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The Serious Business of Appealing a Sanctions Order

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No question about it: A sanctions order is serious business. When directed at an attorney, it calls into question the lawyer's professional and ethical standing and—at a bare minimum—his or her judgment. When a sanctions order is directed at a client, counsel cannot avoid being cast in its negative shadow, appearing unable to run the case properly. In either situation, the outcome of the litigation will likely suffer.

Courts, acting as the chief guardians of our profession, are duty-bound to impose sanctions where warranted. However, being human, judges sometimes overreact, misunderstand the facts, or simply make mistakes.

An appeal may be the only way to correct such errors. Appealing a sanctions order presents unique considerations that make the exercise different from an appeal on the merits. The following are some strategic suggestions for sanctioned parties seeking to cleanse their wounds on appeal.

Enter Appellate Counsel

The first suggestion for challenging a sanctions order is basic, yet often overlooked: Retain new counsel for the appeal, and certainly do not appeal sanctions pro se. This applies even where trial counsel represented the client excellently, and can legitimately claim to have received a raw deal from the trial court.

Appellate courts may be skeptical of trial counsel whose professionalism and integrity have already been called into question. In contrast, new appellate counsel can provide the Appellate Division or the Second Circuit with a credible, dispassionate view of the record and concede error where necessary.

The least productive sort of oral argument on appeal is one in which trial counsel becomes defensive when the panel tries to focus on what went wrong below. A sanctions case that was handled flawlessly at the trial level is a rare bird indeed. For that reason, lawyers who refuse to admit any mistakes may lose credibility at the appellate level.

The better strategy is often for new appellate counsel to acknowledge that trial counsel could have handled matters differently. After that acknowledgement, appellate counsel can then regain the offensive position by arguing (for example) that:

- the trial court misunderstood the facts;
- the disputed conduct was inadvertent;
- the disputed conduct did not warrant sanctions;
- the trial judge did not allow a sufficient opportunity to remedy the problem;
- the problem was ultimately fixed;
- the sanctions were disproportionate to the gravity of the offense; or

- the trial court did not afford counsel an appropriate hearing.

Conflicts of Interest

In a sanctions case, new counsel may also be necessary because an award of sanctions may give rise to a conflict of interest between the attorney and the client. For instance, if both counsel and the client have been sanctioned for a discovery violation, counsel's defense may end up being that the misconduct was perpetrated by the client. Similarly, the Second Circuit has observed that a sanctions motion attacking the factual basis for a claim will "almost inevitably" lead to a conflict between lawyer and client. The sanctions motion "plac[es] in question the attorney's right to rely on his client's representations and the client's right to rely on his lawyer's advice."[1]

When to Appeal?

Once appellate counsel are retained, the appeal must be commenced in a timely manner. Typically, the best course will be to appeal the sanctions order as soon as an appeal is permitted. The overhang of pending sanctions against one side or its lawyers can complicate litigation of the merits in trial court. And, if the sanctions incorporate a preclusion order, the party's ability to mount a case at trial could be significantly impaired.

Taking an immediate appeal from a sanctions order in New York state court typically poses no problem. New York procedure allows an appeal from any order deciding a motion made upon notice, where the order "affects a substantial right."[2] Most sanctions orders fall within that category. Those that do not (for example, sanctions orders issued by a trial judge sua sponte) can be the subject of an application for permission to appeal.[3]

If the sanction is to take effect imminently, appellate counsel will need to seek a stay of enforcement. A stay pending appeal can be obtained from the Appellate Division on an emergency basis,[4] or (in the case of a monetary sanction) by posting a bond or other undertaking.[5]

In the federal system, things run differently. According to the latest authority from the Second Circuit, sanctions orders generally are not appealable in advance of a final judgment, regardless of whether the sanction is for frivolous conduct, addresses discovery violations, or was meted out under the trial court's inherent power.[6] (The Second Circuit acknowledged an exception for sanctions orders that are "inextricably intertwined" with an interlocutory injunction, which itself is immediately appealable.[7])

Due Process

Trial judges, being human, are not always perfect. In very rare cases, they have been known to lose their tempers and hand down sanctions like lightning bolts from Zeus. Recall, for example, the extreme case of the Niagara Falls City Court judge who, in 2005, jailed 46 defendants because a cell phone rang during proceedings in his courtroom.[8]

The appellate bench—which is composed primarily of former trial judges—knows this. For appellate judges, to err is human and to correct is their job. In sanctions cases, appellate panels frequently find themselves reviewing judicial actions taken in the heat of the moment, perhaps provoked by counsel's conduct that—although annoying to the bench—falls within the accepted bounds of legal advocacy.

The appellate court's task in these cases is to consider the record objectively, in a thoughtful and even-tempered manner, and to correct those trial judges who have "fired from the hip." When the appellate court determines that the sanctioned party should have been afforded a hearing or other additional procedure, the result is often a remand.

Under federal precedent, a party should receive "a proper opportunity to oppose the motion for sanctions and to augment the record with appropriate countervailing evidence."[9] That opportunity may involve an evidentiary hearing where appropriate. In state court, motion practice may be required so that a party is afforded "a full and fair opportunity" to present evidence against sanctions, as well as adequate notice that sanctions may be imminent.[10] Failure to afford due process to the sanctioned party is a well-recognized ground for vacating sanctions awards on appeal.

Abuse of Discretion

The standard of review presents a hurdle for sanctions appeals, but the hurdle is surmountable. In federal court, sanctions for frivolous conduct are authorized by Rule 11, while the source of law for discovery sanctions is Rule 37. Sanctions can also be issued under the trial court's inherent power. In any case, the standard of review is "abuse of discretion." The same standard applies in New York state court, regardless of whether the sanctions have been imposed for frivolous conduct under Part 130 of the Chief Administrator's rules, for

discovery violations under CPLR 3126, or through inherent judicial power.

"Abuse of discretion," however, does not mean "the sanction is always affirmed." To the contrary, the appellate courts frequently reverse, vacate or modify sanctions orders. The abuse-of-discretion standard is flexible enough to permit this. The Second Circuit has explained that a district court abuses its discretion when "(1) its decision rests on an error of law (such as application of the wrong legal principle) or a clearly erroneous factual finding, or (2) its decision—though not necessarily the product of a legal error or a clearly erroneous factual finding—cannot be located within the range of permissible decisions."[11]

That description sounds much like ordinary appellate review: If the trial judge made a legal error, that's an abuse of discretion according to the Second Circuit. If the trial judge misapprehended the facts, that is likewise an abuse of discretion. If the appellant's counsel can persuade the appellate court that the trial judge's order was just plain wrong—that's a ground for reversal also.

Sanctions Must Be Condign

Parties appealing sanctions have often achieved success by focusing on proportionality. Sanctions must be condign and fit the offense. Under Rule 11, a sanction "must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated."[12] In the words of the First Department, a sanction should be "appropriately tailored to achieve a fair result."[13] The sanction should "restore balance to the matter,"[14] not provide a windfall to the other side.

The First Department's treatment of the extreme sanction of striking a party's pleading furnishes a good example. On Jan. 29, 2013, that court issued three separate decisions, all reversing orders that had stricken pleadings due to spoliation or destruction of evidence.[15] Together, those cases confirm that pleadings should be stricken only when the sanctioned conduct prejudices the adverse party so substantially that it is unable to present evidence to support its claims or defenses.

Federal and state rules offer trial judges a wide menu of sanctions from which to choose. These include:

- monetary awards (often paying the other party's costs and fees);
- striking all or a portion of a party's pleading;
- instructing the jury that the sanctioned conduct supports an adverse inference; and
- an order precluding the sanctioned party from making a particular argument.

A skillful advocate often can persuade an appellate court that the sanction imposed below was too severe, and that the order should be softened or modified as a result.

Remand: A New Beginning

Successful sanctions appeals result in grateful clients. A stain on their reputation has been removed. They have proven the trial judge wrong.

Where the appeal results in remand, however, the client typically will end up before the same trial judge. That is the time for trial counsel to rebuild burned bridges and rehabilitate the client's image, with the hope that a second sanctions appeal will be unnecessary. And, on remand, a little humility does not hurt.

Endnotes

1. *Healey v. Chelsea Resources*, 947 F.2d 611, 623 (2d Cir. 1991).
2. CPLR §5701(a)(2)(v).
3. CPLR §5701(c).
4. CPLR §5519(c).
5. CPLR §5519(a)(2).
6. *SEC v. Smith*, 710 F.3d 87, 96 (2d Cir. 2013).
7. 28 U.S.C. §1292(a)(1); see *Smith*, 710 F.3d at 96.
8. See *In re Restaino*, 10 N.Y.3d 577 (2008) (removing said judge from office).
9. *Healey*, 947 F.2d at 622.
10. *Postel v. New York Univ. Hosp.*, 262 A.D.2d 40, 42 (1st Dept. 1999).
11. *Zervos v. Verizon N.Y.*, 252 F.3d 163, 168-69 (2d Cir. 2001); accord *Smith*, 710 F.3d at 97.
12. Fed. R. Civ. P. 11(c)(4).
13. *Gogos v. Modell's Sporting Goods*, 87 A.D.3d 248, 255 (1st Dept. 2011) (citation omitted).
14. *Baldwin v. Gerard Ave.*, 58 A.D.3d 484, 485 (1st Dept. 2009).
15. See *Melcher v. Apollo Med. Fund Mgt.*, 105 A.D.3d 15 (1st Dept. 2013); *Alleva v. United Parcel Serv.*, 102 A.D.3d 573 (1st Dept. 2013); *Suazo v. Linden Plaza Assoc.*, 102 A.D.3d 570 (1st Dept. 2013).

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