CALIFORNIA ACADEMY OF APPELLATE LAWYERS

President
Charity Kenyon
Kenyon Yeates LLP
2001 N Street, Suite 100
Sacramento, CA 95811
(916) 609-5000

First Vice-President
Jonathan B. Steiner
California Appellate Project
520 S. Grand Avenue, #400
Los Angeles, CA 90017
(213) 243-0333

Second Vice-President
Kevin M. Fong
Pillsbury Winthrop Shaw
Pittman LLP
50 Fremont Street
San Francisco, CA 94105
(415) 983-1270

Secretary-Treasurer
David S. Ettinger
Horvitz & Levy LLP
15760 Ventura Blvd., 18th Flr.
Encino, CA 94136

Former Presidents
Gideon Kanner
Edward L. Lascher
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Richard Sherman
Robin Meadow
Paul D. Fogel
Charles A. Bird

May 19, 2009

SUPREME COURT OF CALIFORNIA
350 McAllister Street
San Francisco, California 94102

Re: *Valerie Ross* v. *Appellate Division*, No. S172472 (E044602)
AMICUS CURIAE LETTER OF CALIFORNIA ACADEMY OF APPELLATE LAWYERS IN SUPPORT OF PETITION FOR REVIEW

Honorable Ronald M. George, Chief Justice of California, and the Associate Justices of the California Supreme Court:

The California Academy of Appellate Lawyers ("the Academy") submits this letter as amicus curiae in support of the petition for review pending before this court, as authorized by rule 8.500(g) of the California Rules of Court. The decision of the Court of Appeal for the Fourth District, Division Two, upholding the imposition of $500 in monetary sanctions and reimbursement to the City of Hesperia including its attorney's fees for defending the appeal, to be paid by retained appellate counsel, for the filing of a frivolous appeal in the Appellate Division of the Superior Court of San Bernardino County, deserves further attention because of the fundamental issues of law and policy at stake.

This court's previous order dated February 27, 2008 (S159307), granting review, directed the Court of Appeal to issue an alternative writ and determine the following questions: "(1) Whether a court has authority to impose monetary sanctions for the filing of a frivolous appeal in a criminal case; and (2) if so, whether the appeal in question was frivolous as to warrant the imposition of monetary sanctions." The Court of Appeal's March 19, 2009 decision concluded "that the appellate court did have the jurisdiction to order sanctions" (Petition for Review, Exh. A, p. 6), that the appellate division properly found the appeal frivolous (id. at pp. 6-8), and that it "acted well within its discretion in sanctioning petitioner." (Id. at p. 8.)

The Academy respectfully submits the Court of Appeal's response to this court's transfer order cries out for further review. Reasonable appellate courts and appellate attorneys may differ on how they would approach the

problem, but there is no doubt that the Court of Appeal's analysis fails to address the effect of a criminal defendant's constitutional right to effective assistance of appellate counsel on an appellate court's power to impose sanctions. The correct answers to the questions this court posed to the Court of Appeal are important not only to appellate lawyers who handle criminal cases, but to the defendants they represent and to appellate practitioners generally. The Academy strongly urges that this court grant the petition for review and provide the necessary guidance for future cases that are now certain to arise.

Interest of the Amicus Curiae

The members of the California Academy of Appellate Lawyers are experienced appellate lawyers who regularly handle appeals for clients in both civil and criminal cases. Among our members are attorneys who regularly or occasionally are counsel of record in state criminal appeals, both on a privately retained basis and under appointment by the California appellate courts. As with attorneys in civil cases, criminal appellate attorneys are bound by state-prescribed rules of conduct and ethical requirements, but in criminal appeals counsel must also perform with reasonable competence and provide effective assistance of counsel on appeal under the dictates of the Sixth Amendment of the United States Constitution, as well as article I, section 15 of the California Constitution.

Members of the Academy have an interest in proper application of the legal principles that guide appellate counsel in the performance of their duties, but also are concerned that the constitutional principles which govern appellate counsel in their representation of defendants in criminal appeals are properly and consistently applied by the appellate courts. Our concerns reach beyond the hundreds of attorneys in this state whose practices primarily emphasize or solely entail the handling of criminal appeals in state court cases; in some appeals appellate counsel also may have been trial counsel, or have a general practice, and this may be especially true in many appellate division cases particularly in counties whose courts sit many miles away from metropolitan regions.[1] The Academy also maintains a continuing interest in the standards

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[1]It is necessary to add how uncommon it is for members of the Academy, or even experienced appellate practitioners in criminal cases, to take on cases in the superior court appellate divisions. By and large these cases are handled by members of the local bar with less expertise in appellate practice. These and other sui generis aspects of appellate division

(continued...)

for imposing sanctions for frivolous appeals.

The issues that arise in this case implicate the Academy's strong interest in ensuring that the rules and procedures in this area are properly defined and understood, by courts as well as practitioners, and that the constitutional principles which uniquely govern criminal appeals are recognized and correctly applied. For these reasons, we support the grant of review.

Necessity for Grant of Review

1. **Whether a Court Has Authority to Impose Monetary Sanctions for the Filing of a Frivolous Appeal in a Criminal Case**

The Court of Appeal acknowledges, but finds not dispositive, two aspects of the California Rules of Court ("rule(s)") that call into question the propriety of the sanctions ordered by the Appellate Division of the San Bernardino County Superior Court based on petitioner's filing of a frivolous criminal appeal. First, as the Court of Appeal notes, the provisions of rule 8.276(e)(1)(A) that authorize the imposition of sanctions on a party or an attorney for taking a frivolous appeal, pertain to appeals taken to the Courts of Appeal (and this court as well), but not to appeals in the superior court appellate divisions which are governed instead by rule 8.366(a). (Petition for Review, Exh. A, pp. 3-4.) Indeed, there is no authority for sanctions as to misdemeanor and infraction appeals in the appellate division. (See rules 8.880, 8.891, 8.925.) Second, former rule 8.366 — which explicitly stated that rule 8.276 applied in criminal cases as well — no longer does; effective January 1, 2008, rule 8.366 "now specifically excludes the sanctions provisions of rule 8.276(a)(1) from application in criminal appeals." (Petition, Exh. A, p. 4, fn. 3.)

Despite these potential obstacles, to use a football metaphor the Court of Appeal punts on this point: because the amendment to rule 8.366 postdated the appellate division appeal, the court believes it unnecessary to decide the effect of that subsequent amendment on the present

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[1](...continued)
appeals may increase the likelihood of recurrence of sanctions after the Court of Appeal's decision here, if left undisturbed.

case. (Petition, Exh. A, p. 4, fn. 3.)[2] But the Academy believes the Rules of Court cannot be so readily dismissed from consideration, nor does the Court of Appeal adequately explain from what source it finds "the authority of an appellate court, including the appellate division, is not so narrowly derived." (Id. at p. 4.)

The Court of Appeal cites language from a passing remark in People v. Superior Court (Laff) (2001) 25 Cal.4th 703, 739, footnote 16, and from opinions in three appellate court writ proceedings, all predating the renumbering of the rules — Gottlieb v. Superior Court (1991) 232 Cal.App.3d 804, 813-815; Jones v. Superior Court (1994) 26 Cal.App.4th 92, 96-97; and In re White (2004) 121 Cal.App.4th 1453, 1479 — which relied on Code of Civil Procedure sections 1109 and 907, as well as former rule 26, to justify sanctions in the contexts of criminal pretrial writ proceedings (Gottlieb and Jones) and habeas corpus proceedings (White). It thus concludes that "despite the lack of an express rule of court governing appellate divisions, case authority as it existed in 2007, as summarized by the Supreme Court's pronouncement's in *Laff*, acknowledged an appellate court's power, derived from statute, to sanction for frivolous appeals in criminal cases." (Pet., Exh. A, p. 6.)

This *ipse dixit* reasoning drawn from a repealed rule of court, passing language in the Laff footnote, and a series of writ decisions, provides a shaky foundation from which to derive authority for imposition of sanctions. There may be better reasons than these for reaching the unsettling conclusion that the Appellate Division did have jurisdiction to order sanctions, and to further require appellate counsel to reimburse the municipality which prosecuted the underlying case and defended the appeal, but if so that justification should have this court's imprimatur, after careful consideration of the continuing viability of earlier authority predating the rule changes of recent years. In particular, this court should address the effect of the Judicial Council's deletion of criminal appeals from the authority it conferred on appellate courts other than appellate divisions to impose sanctions, while omitting to adopt such a rule as to misdemeanor and infraction appeals.

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[2]There may well be reasons why the court's treatment of the rule change is incomplete, such as the applicability of the so-called "abatement" rule which holds that "absent a saving clause, a criminal defendant is entitled to the benefit of a change in the law during the pendency of his appeal (*People* v. *Rossi* (1976) 18 Cal.3d 295; *In re Estrada* (1965) 36 Cal.2d 740) . . . ." (People v. Babylon (1985) 39 Cal.3d 719, 722, parallel citations omitted.)

Moreover, the result in this case appears to conflict with this court's admonition that "the power to punish attorneys for prosecuting frivolous appeals . . . should be used most sparingly to deter only the most egregious conduct." (In re Marriage of Flaherty (1982) 31 Cal.3d 637, 650-651.) Resolution of that conflict consistent with Flaherty is necessary to secure uniformity of decision concerning the proper application of that fundamental principle.

In urging this court to review the Court of Appeal's determination, the Academy suggests one overarching consideration (among several left unaddressed) that may control the outcome — criminal appeals may differ from civil appeals for purpose of imposing sanctions. Civil and criminal cases share many general attributes, of course, but there are important differences as well, and they may matter in the present context. (See Shinseki v. Sanders (2009) 556 U.S. __, __ (filed Apr. 21, 2009; No. 07-1209), citing Chapman v. California (1967) 386 U.S. 18, 23-24.) To put it bluntly, usually in a criminal proceeding "someone's custody, rather than mere civil liability, is at stake." (O'Neal v. McAninch (1995) 513 U.S. 432, 440.) That may not be so when an infraction is involved, as here, but the constitutional principles that guide the disposition of this case should be the same for all criminal appeals. And clearly those constitutional principles must trump the authority the Court of Appeal here "derive[s] from statute."

At the very least, the Court of Appeal's answer to this court's first question is incomplete. Quite possibly it is wrong. So that no uncertainty remains, review is necessary to answer it for this case and those certain to follow.

2. **Whether the Appeal in Question Was Frivolous As To Warrant the Imposition of Monetary Sanctions**

In answer to this court's second question posed by its February 27, 2008 order (S159307), the Court of Appeal cites civil cases "in which an appeal has been found frivolous if it involves claims previously rejected by the same court" (Petition for Review, Exh. A, p. 7, citations omitted), and complains that "[r]esurrecting the same arguments that were previously raised and rejected in the same factual context simply delayed matters and caused an unnecessary expenditure of time and effort by the court and litigants — including the defendant himself" (id. at pp. 7-8), but ultimately concludes that "even if we believe that the appellate division was wrong, . . . it acted well within its discretion in sanctioning petitioner." (Id. at p. 8.) A standard that allows appellate sanctions merely for "resurrecting" previously rejected arguments raises the specter of chilling appropriate albeit vigorous appellate advocacy

across a broad swath of cases, advocacy that allows for the change and evolution of the law.

Examination of the Court of Appeal's reasoning reinforces the necessity for review. First, as discussed in the petition for review, neither the Court of Appeal's cited cases approving sanctions for frivolous civil appeals (City of Bell Gardens v. County of Los Angeles (1991) 231 Cal.App.3d 1563; Hummel v. First National Bank (1987) 191 Cal.App.3d 489) nor those that involve frivolous writ proceedings (Gottlieb v. Superior Court, supra, 232 Cal.App.3d 804; see also Jones v. Superior Court (1994) 26 Cal.App.4th 92) supply compelling precedent for the propriety of sanctions in a criminal appeal. But whatever support they suggest, it seems obvious that the Judicial Council's actions postdating those cases which excluded criminal appeals from the sanctions provisions of the rules, call into question the viability of those earlier decisions as applied to this context. Nonetheless, the Academy recognizes this court's observation in Laff, citing Gottlieb, that "an appellate court properly may impose sanctions in a criminal appeal, including sums necessary to reimburse the court for the cost of resources devoted to a frivolous appeal." (People v. Superior Court (Laff), supra, 25 Cal.4th at p. 738, fn. 16.) This raises an apparent conflict between current rule 8.366 (even assuming its applicability here) and this court's 2001 footnoted observation in Laff, so review on that basis alone seems necessary.

Second, referring to the specific circumstances of the sanctions order, the Court of Appeal focuses on the Appellate Division's previous rejection of the same claims, albeit brought on behalf of a different defendant. That reasoning skims the tip of a massive metaphorical iceberg. To the extent the appellate division's rationale for imposing sanctions (which the Court of Appeal accepted) was its previous rejection of the same legal arguments on behalf of another party, that has never been a reason to justify sanctions. How else does the second defendant exercise his right to appellate review? Preserve issues for higher court review? Seek to change the law?

At least as to indigent defendants, this court has recognized that the Sixth and Fourteenth Amendments entitle each defendant to "(1) a competent attorney on appeal, acting as an advocate on behalf of the indigent; and (2) an appellate record that will permit a meaningful, effective presentation of the indigent's claims." (People v. Barton (1978) 21 Cal.3d 513, 518, citations omitted.) Reiterating "some of the specific duties which appointed appellate counsel must fulfill to meet his or her obligations as a competent advocate" (id. at p. 519), the Barton court indicated that these "include 'the duty to prepare a legal brief containing citations to the [appellate record] and appropriate authority, and setting forth all

arguable issues, and the further duty not to argue the case against his client.'" (Ibid., quoting People v. Lang (1974) 11 Cal.3d 134, 139 (other citations omitted), and omitting internal footnote.)

For these propositions, the Barton court cited the seminal United States Supreme Court decisions in Douglas v. California (1963) 372 U.S. 353 and Anders v. California (1967) 386 U.S. 738, as well as this court's opinion in People v. Feggans (1967) 67 Cal.2d 444, and several of its progeny. (See gen. Barton, at pp. 518-519.) This authority has never been called into question, and indeed this court subsequently expanded the rights of indigent defendants in criminal appeals when it adopted a procedure that ensures independent review by the Court of Appeal, in People v. Wende (1979) 25 Cal.3d 436. (See also People v. Kelly (2006) 40 Cal.4th 106, 117-119.) Although the applicability to privately retained counsel of the duties and responsibilities imposed by the federal and state Constitutions on court-appointed counsel in criminal appeals has not been squarely addressed by a California appellate court thus far, this court long ago held that the contours of a defendant's constitutional right to effective assistance of counsel are the same whether defense counsel is appointed or retained. (See People v. Frierson (1979) 25 Cal.3d 142, 161-162.) It seems likely that a similar rule (or modification of it) will be recognized when the issue arises in a criminal appeal; at least it needs to be considered here.

The Court of Appeal says nothing in acknowledgment of these significant constitutional interests, but the Academy thinks they lie at the heart of how any court should approach the question of whether a criminal appeal was frivolous. How is an attorney to comply with his or her "duty" imposed by this court's decisions such as Lang and Barton to prepare a legal brief with appropriate citations, "setting forth all arguable issues," without risking sanctions because an appellate court later determines that the appeal not only lacks merit, but was "frivolous"? What standards are appropriate and necessary to make such a determination? How should an attorney weigh the risk of sanctions in performing these responsibilities? (If one appellate attorney concludes a client's appeal may be found frivolous, and makes a motion to be relieved on that basis without violating her duty not to argue the case against the client, won't any attorney who is substituted face the same dilemma?) If an attorney files a Wende brief, does he still face possible sanctions? If not, does that means of avoiding sanctions put unnecessary (and constitutionally intolerable) pressure on counsel to do so? And, to reiterate, does it make a difference if counsel is court-appointed rather than retained? And what was counsel in *this* case supposed to do — tell the second client that she does not have a right to her own individual appeal because the appellate court rejected a codefendant's arguments? All

of these concerns beg for an answer, but none is to be found in the Court of Appeal's summary treatment of the problem.

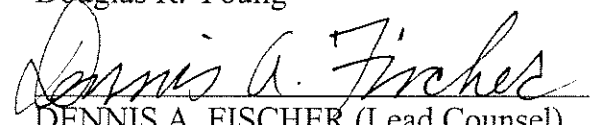
Lastly, the Academy agrees with the distinction petitioner draws between cases such as Dvorin v. Appellate Dept. (1975) 15 Cal.3d 648, 651, and Brown Co. v. Appellate Department (1983) 148 Cal.App.3d 891, 904, where it is a lower court judgment under review, and this case where the Court of Appeal reviews the appellate division's own sanctions order. While the Academy usually does not weigh in on ordinary questions involving the exercise of discretion, here we are concerned with the Court of Appeal's self-proclaimed limitation on its review of a ruling it concedes may have been "wrong," refusing to look beyond whether the appellate division "either exceeded its jurisdiction" or denied "a fair hearing" (Petition, Exh. A, p. 8). That unprecedented departure from the usual standard of review may leave a criminal defendant and his or her attorney without any meaningful ability to correct an erroneous ruling. The Court of Appeal's questionable approach in limiting writ review is also worthy of the court's attention.

Conclusion

In the past, the Academy as amicus curiae before this court has expressed concerns about Court of Appeal procedures that improperly discouraged appellate counsel from exercising the right to request and present oral argument. (See People v. Pena (2004) 32 Cal.4th 389, 397-403.) The Pena decision, at one point, noted in passing "the Hobson's choice" the former oral argument notice of the Fourth Appellate District, Division Two, posed for counsel in its reference to imposition of sanctions if appellate counsel chose to orally argue a point made in the briefing. (Id. at pp. 402-403.) The Ross case poses related concerns; the threat of sanctions that looms over every criminal appeal in that same court after the decision cannot lightly be dismissed, and other courts may follow. We therefore urge this court to grant review here, to restate the limitations on the imposition of sanctions it emphasized in Marriage of Flaherty, supra, and to settle the important questions of law presented by the Court of Appeal's opinion.

Respectfully submitted,

CALIFORNIA ACADEMY OF APPELLATE LAWYERS
Jonathan B. Steiner
Dennis A. Fischer
Jay-Allen Eisen
Jon B. Eisenberg
Steven Mayer
Robin Meadow
Robert A. Olson
Douglas R. Young



DENNIS A. FISCHER (Lead Counsel)
Law Offices of Dennis A. Fischer
A Professional Corporation
1448 Fifteenth Street, Suite 206
Santa Monica, California 90404
Phone: (310) 451-4815 Fax (310) 451-4639
Email: dennisafischer@earthlink.net

Attorneys for Amicus Curiae

PROOF OF SERVICE BY MAIL
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the aforesaid County, State of California; I am over the age of eighteen years and not a party to the within action; my business address is 1448 Fifteenth Street, Suite 206, Santa Monica, California 90404.

On May 19, 2009, I served the foregoing

AMICUS CURIAE LETTER OF CALIFORNIA ACADEMY OF APPELLATE LAWYERS IN SUPPORT OF PETITION FOR REVIEW
Re: *Valerie Ross* v. *Appellate Division*, No. S172472 (E044602)

on the Interested Parties in this action by placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail in Santa Monica, California, addressed as follows:

STEVEN GRAFF LEVINE, ESQ.
1112 Montana Avenue #309
Santa Monica, California 90403

CITY OF HESPERIA
ATTN: Tanya Hehir, Esq.
Covington & Crowe, LLP
1131 West Sixth Street, Suite 330
Ontario, California 91762

CLERK, SAN BERNARDINO COUNTY
SUPERIOR COURT
14455 Civic Drive
Victorville, California 92392

COURT OF APPEAL
Fourth District, Division Two
3389 Twelfth Street
Riverside, California 92501

SAN BERNARDINO SUPERIOR COURT,
APPELLATE DIVISION
401 North Arrowhead Avenue
San Bernardino, California 92415

OFFICE OF THE ATTORNEY GENERAL
P.O. BOX 85266
San Diego, California 92186-5266

This document is filed and served on paper purchased as recycled. I declare under penalty of perjury under the laws of the State of California, that the foregoing is true and correct.

DATED: May 19, 2009

_____
DONNA K. BENTON