CALIFORNIA COURT OF APPEAL CLARIFIES ITS AUTHORITY AND WILLINGNESS TO IMPOSE SANCTIONS FOR LATE NOTICE OF SETTLEMENT

The California Court of Appeal in Huschke v. Slater, Case No. A117114 (1st Dist., 2d Div., December 2, 2008), has clarified that it is authorized and willing to impose sanctions payable to the Court under California Rule of Court 8.276(a) for an unreasonable delay in notifying the Court that a case has settled.

Rule 8.276(a) authorizes the Court of Appeal to impose sanctions "on a party or an attorney" for: (1) "[t]aking a frivolous appeal or appealing solely to cause delay;" (2) "[i]ncluding in the record any matter not reasonably material to the appeal's determination;" (3) "[f]iling a frivolous motion;" or (4) "[c]ommitting any other unreasonable violation of these rules." Cal. R. Ct. 8.276(a)(1)-(4).

After the appellant in Huschke had filed his opening brief and the respondent had notified the Court of Appeal that she did not intend to file a responsive brief, the Court issued a standard oral argument waiver notice in October 2007. That notice emphasized: "Counsel are directed to advise the Court immediately if settlement discussions are underway or are being considered or if there is any other basis for an early dismissal of the appeal." Huschke, Slip Op. at 2. Shortly after receiving the notice, the appellant's counsel filed a request for oral argument. Id. In August 2008, the Court sent the parties an order scheduling oral argument for a date in September 2008. Id. However, the day before the scheduled oral argument, the appellant's counsel faxed the Presiding Justice a letter stating that the case "was settled in December 2007 and dismissed" in the trial court "in January 2008" and requesting that the oral argument be taken off calendar. Id.

The Court took the matter off calendar, but also ordered the parties' counsel to file a joint declaration "under penalty of perjury" explaining: (1) "why counsel did not inform this court that settlement discussions were underway pursuant to the court's [October 2007] notice to the parties;" (2) "why a request for dismissal was not filed with this court once settlement had culminated;" and (3) "why this court should not impose sanctions on counsel for their failure to timely inform this court of the above actions." Huschke, Slip Op. at 3.

The parties' counsel responded with a joint declaration stating that a letter had been sent by an unspecified person on an unspecified date to the Deputy Clerk informing the Court of the settlement. Huschke, Slip Op. at 3. But, because the declaration was not under penalty of perjury, as the Court had directed, the Court ordered "the parties to file a new joint declaration" addressing the Court's three questions and "complying with that directive." Id. The parties "never complied with that order." Id. Instead, the parties' counsel filed separate letters and declarations addressing the Court's questions.

The respondent's counsel's declaration stated that, in compliance with their client's instruction to keep costs down, they had "insisted and [the appellant's counsel had] agreed to take the necessary steps to dismiss the appeal." Huschke, Slip Op. at 3. The appellant's counsel's declaration stated that, although he did "not recall ever" agreeing with the respondent's counsel that he would take the necessary steps to dismiss the appeal, "he or an

associate" nevertheless had: (1) informed the Deputy Clerk by telephone promptly after the settlement had been reached; and (2) in response to the Deputy Clerk's instruction, sent a letter advising the Court "that the underlying case had settled" and promising to "dismiss [the] appeal" after "the settlement agreement is fully and properly executed." Id. at 4-5. However, the Court had "no record of receiving the letter," there was no indication that the respondent's counsel received a copy of the letter, and the appellant's counsel was "unable to produce a signed copy of the letter on his firm's letterhead." Id. at 5.

Based on these submissions, the Court ordered the appellant's counsel to pay sanctions under Rule 8.276(a)(4). It began by emphasizing Rule of Court 8.244 's requirements that, "[i]f a civil case settles after a notice of appeal has been filed . . . the appellant must immediately serve and file a notice of settlement in the Court of Appeal," and "[w]ithin 45 days after filing" that notice "must file either an abandonment" or "a request to dismiss." Huschke, Slip Op. at 5 (quoting Cal. R. Ct. 8.244(a)(1),(3)). It then concluded that, "even indulging the dubitable assumption that the letter" referred to by the appellant's counsel "was actually sent," the letter was neither a "notice of settlement" nor a "request to dismiss" sufficient to comply with Rule 2.44(a). Id. at 6-7. The Court also emphasized that the appellant's counsel could not "shift to respondent's counsel the responsibility" for his delay in complying with Rule 2.44(a). Id. at 6. That delay, the Court concluded, was "'unreasonable' and therefore sanctionable under [R]ule 8.276(a)(4)." Id. at 7.

The Court then explained that, "[a]lthough [R]ule 8.276 does not explicitly provide that such sanctions may be made payable to the court, there is no doubt that they may be":

> California courts have had no difficulty concluding that [Code of Civil Procedure] section 907 authorizes sanctions payable to the court . . . with respect to frivolous appeals. . . and writs. It would be anomalous to think that the principle that a party may be sanctioned for conduct that unnecessarily burdens a court and the taxpayers and prejudices parties to other appeals should apply to frivolous appeals and writs but not to any other conduct that has precisely the same adverse effects on the same institutions and persons. Counsel's failure to timely inform the court that a settlement had been finally reached and then promptly move to dismiss his client's appeal, as required by the rules of court, has caused a waste of judicial resources that cannot be countenanced by judicial officers responsible for the efficient administration of the appellate process.

Huschke, Slip Op. at 9.

Finally, the Court addressed the amount of sanctions. It observed that "a number of appellate courts in other appellate districts have used $5,900-$6,000 based on a calculation made in 1992 as a conservative estimate for processing the average civil appeal." Huschke, Slip Op. at 10. It also noted that, according to one study conducted by the Second District clerk's office, the cost of an appeal that results in an opinion by the Court could be even higher – approximately $8,500. Id. Because the Court already had completed its "review of the record

and research of the legal issues presented and drafted a tentative opinion addressing the merits of the appeal" when it first learned of the settlement, the Court ordered the appellant's counsel to pay $6,000 in sanctions. Id. at 10-11. The Court also ordered the respondent's counsel to bear all costs of responding to the Court's order to file a joint declaration because, although "primary responsibility to comply with [R]ule 8.244" rested with the appellant's counsel, the respondent's counsel also "had a responsibility to their client to ensure that [the appellant's counsel] complied and they failed to do so." Id. at 8 n.1.

Huschke is a strong reminder that, by invoking the jurisdiction of the Court of Appeal to resolve a dispute, private litigants accept certain responsibilities to the Court in addition to the responsibilities they already have to their clients, their opponents, and the trial court. And those responsibilities include promptly notifying the Court of Appeal when a settlement or other event eliminates the need for the Court of Appeal to adjudicate the disputed issues on the merits.