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PERSPECTIVE

Can they do that? Sanctions and disciplinary actions against lawyers for frivolous litigation

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A lawyer's duty not to pursue frivolous claims has entered the public discourse, thanks to the 50-plus lawsuits that the Trump campaign and its proxies have filed — and lost or withdrawn — since the 2020 presidential election. In particular, the suits alleging unsubstantiated claims of massive vote fraud are generating calls for sanctions and disciplinary actions against the lawyers who filed these suits, making this an opportune moment to review some of the federal and California rules, statutes and legal principles that seek to reign in lawyers from pursuing claims or taking positions that lack factual or legal merit.

California State Bar Disciplinary Actions

Most lawyers are aware that, as officers of the court, they are bound by certain rules limiting the right or duty to promote a client's cause. For instance, every lawyer has the duty to counsel or maintain only those claims, defenses, actions and proceedings that appear to the lawyer to be "legal or just," except the defense of a person charged with a public offense, and the duty not to encourage the commencement or the continuation of an action from any "corrupt motive of passion or interest." Cal. Bus. & Prof. Section 6068(c), (g). California lawyers are subject to rule 3.1 of the California Rules of Professional Conduct prohibiting lawyers from presenting any claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification or reversal of the existing law. Cal. R. Prof. Cond. 3.1(a)(1)-(2).

Lawyers who egregiously violate these duties by, for example, using the legal process for some personal and improper end or fabricating a claim, may be subject to serious discipline, including the suspension from the practice of law and disbarment. *See, e.g.*, *In re Scott*, 4 Cal. State Bar Ct. Rptr. 446 (Cal. State Bar Ct. 2002) (suspension for a lawyer who filed four related lawsuits, one after another, to harass and be vindictive toward those the lawyer considered responsible for judgment and sanctions in the initial suit); *Sorensen v. State Bar*, 52 Cal. 3d 1036 (1991) (suspension for a lawyer who responded to a small claims action with a municipal court action out of spite and utilized financially taxing means of redress out of proportion to the sum at stake); *Matter of Wyshak*, 4 Cal. State Bar Ct. Rept. 70, 78, 81 (Rev. Dept. 1999) (disbarment for a lawyer who encouraged a false sexual harassment claim to induce the opposing party to drop an unlawful detainer action against the lawyer's client).

Even where the filing or other conduct does not rise to the level that warrants discipline, counsel may find themselves facing a sanctions order from a district or superior court judge if they pursue a legally or factually baseless claim or engage in bad faith tactics. Below we review the legal standards and a few recent developments in the principal non-discovery sanctions provisions.

Sanctions under FRCP 11

Rule 11 of the Federal Rules of Civil Procedure imposes upon lawyers a duty to certify that they have read any pleadings or motions they file with the court and that such pleadings and motions are well-grounded in fact and have a colorable basis in law. Fed. R. Civ. Proc. 11, subd. (a), (b). The rule includes a safe harbor provision, and no sanctions may issue if the challenged filing is withdrawn within 21 days of the service of the motion for sanctions. *Id.*, subd. (c).

In determining whether to impose sanctions for a violation of Rule 11, courts consider (1) whether the filing at issue is legally or factually baseless from an *objective* perspective (i.e., a reasonable lawyer standard) and (2) if the lawyer conducted a "reasonable and competent inquiry" before signing and filing it. *Christian v. Mattel, Inc.*, 286 F.3d 1118, 1127 (9th Cir. 2002) (citation omitted). Sanctions are warranted only in "the rare and exceptional case where the action is clearly frivolous," *Operating Eng'rs Pension Tr. v. A–C Co.*, 859 F.2d 1336, 1345 (9th Cir. 1988), and the 9th U.S. Circuit Court of Appeals is generally reluctant to impose sanctions for factual errors in papers filed before an opportunity to conduct discovery. *Greenberg v. Sala*, 822 F.2d 882, 887 (9th Cir. 1987). The rule is not intended to chill a lawyer's enthusiasm or creativity in pursuing factual or legal theories. Thus, arguments for extensions, modifications, or reversals of existing law or for creation of new law do not warrant sanctions, provided they are nonfrivolous. Fed. R. Civ. Proc. 11 advisory committee's note.

On the other hand, where counsel is alerted to factual or legal deficiencies and persists in pursuing the defective claims counsel will not be heard to plead ignorance or good faith alone to escape sanction. *See Nguyen v. Simpson Strong-Tie Company, Inc.*, 19-cv-07901 (N.D. Cal. Sept. 2, 2020). In *Nyguen*, a putative class action product liability case, plaintiffs alleged that defendant failed to warn of cer-

tain problems with defendant's product. Defendants alerted plaintiffs in at least two Rule 11 letters that defendant's website and guide expressly warned consumers about the very issue the complaint alleged were undisclosed. The court found the complaint legally and factually baseless, either because the lawyers failed to conduct a competent inquiry into the facts necessary to support their clients' claims, or did not bother to include facts that contradicted the claims asserted. Either way, even if the lawyers were operating in good faith, the court noted, "that wouldn't act as a shield, for Rule 11 does not carry a bad faith requirement and 'Counsel [cannot] avoid the sting of Rule 11 sanctions by operating under the guise of a pure heart and empty head.'" (Citations omitted). While some counsel use the threat of sanctions tactically, *Nyguen* stands as a reminder that Rule 11 letters that raise legitimate issues should not be ignored. In the event the court finds a filing to be baseless, the fact that the lawyer who filed the target paper ignored prior warnings may be a factor that leads a court to award sanctions.

Sanctions under California State Law

California Code of Civil Procedure Section 128.7, modeled after Rule 11, authorizes sanctions against a lawyer for presenting to the court a frivolous paper (i.e., without legal or factual merit) or a paper for an improper purpose (i.e., to harass or to cause unnecessary delay or expense). Like Rule 11, whether the challenged paper is frivolous is tested under an objective standard. *Bockrath v. Aldrich Chem. Co., Inc.*, 21 Cal. 4th 71, 82, 86 (1999). Thus, a showing of subjective bad faith is not required, although the fact that a party (or counsel) does not actually believe in the merits of the challenged claim is relevant to whether sanctions are warranted in the particular case. *Peake v. Underwood*, 227 Cal. App. 4th 428, 449 (2014). A claim will be deemed objectively unreasonable "if any reasonable attorney would agree that [it] is totally and completely without merit." *Id.* at 440 (brackets in original, internal quotes omitted).

Under Section 128.5, the court may order a party or counsel, or both, to pay "the reasonable expenses, including attorney's fees, incurred by another party as a result of actions or tactics, made in bad faith, that are frivolous or solely intended to cause unnecessary delay." CCP Section 128.5. Section 128.5 is broader in reach than Section 128.7 since it is not limited to court filings. Both sections include a 21-day safe harbor provision. CCP Sections 128.5(f)(1) (B), (D), 128.7(c)(1), (2).

An interesting legal difference between the two statutes is that sanctions are warranted under Section 128.5 only where there is a showing of an improper purpose, i.e., *subjective* bad faith. *In re Marriage of Sahafzadeh-Taeb & Taeb*, 39 Cal. App. 5th 124, 135 (2019) (citation omitted). Bad faith, however, may be inferred from lack of merit, for example, where the lawyer takes a position that is "wholly incredible and without any merit whatsoever," i.e., a frivolous position taken without "honest belief in the propriety or reasonableness thereof." *Id.* (internal citations and marks omitted).

A disorganized or overly subscribed lawyer should pay heed. Disregard for the court and the opposing party's schedule and time, even due to a significant other obligation like another trial, may be grounds for a finding of bad faith and sanctions against the lawyer. *In re Marriage of Sahafzadeh-Taeb & Taeb*, 39 Cal. App. 5th at 128.

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*These standards for imposing sanctions are high and for a good reason. "Forceful representation often requires that an attorney attempt to read a case or an agreement in an innovative though sensible way. Our law is constantly evolving, and effective representation sometimes compels attorneys to take the lead in that evolution." *Operating Engineers Pension Trust v. A-C Co.*, 859 F.2d 1336, 1344 (9th Cir. 1988) (reversing an award of Rule 11 sanctions). On the other hand, a lawyer does not have license to persist in filings based on factual allegations whose inaccuracy have been brought to the lawyer's attention nor claims based on legal theories that no objectively reasonable lawyer would conclude have merit. A lawyer must know when to stop. ■

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