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Frivolous Lawsuits and Motions: What Do We Do with Them, and What Should We Do with Them?

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Nearly everyone would likely agree that a truly frivolous lawsuit or court motion is a bad thing – except the person filing it. In other words, for most people frivolous tactics are a nightmare, while for a few they are a business model. Quantifying the number and impact of frivolous pleadings filed in California is problematic, in part because, irrespective of objective standards, whether or not a suit is frivolous is ultimately in the eye of the beholder.

At issue are competing public policies, including the need for zealous advocacy, the orderly and efficient management of the courts and ensuring that everyone has unfettered access to the courts. While the policies compete in one sense, they can also be complimentary. On the one hand, altering any standard for frivolity might chill potentially-meritorious litigation or motions, but it might also increase the access for meritorious pleadings because judicial resources will be more efficiently utilized.

California has several mechanisms for dealing with frivolous lawsuits and tactics. This article focuses on and suggests alternatives as to two of them: (1) motion practice under Code of Civil Procedure §§128.5 and 128.7; and (2) vexatious litigant proceedings under CCP §391.

Motions For Bad Faith

California has statutory provisions designed to curb the use of bad-faith tactics. The success of this scheme is hard to quantify. Several obstacles are apparent. The Legislature enacted Code Civ. Proc. §128.5 in 1991, and replaced it with Code Civ. Proc. §128.7 in 1995. Section 128.7 addressed only bad-faith tactics contained in pleadings and papers. Section 128.5 was revived in 2015 to address bad-faith tactics outside those contained in pleadings and papers, and now the statutes operate in tandem, at least in theory.

According to the California Bureau of Research, which was tasked with tracking utilization of the revived Section 128.5 as well as Section 128.7, neither is used very often, and success rates are low when they are utilized. The Bureau acknowledges difficulty in determining whether the statutes have been effective in deterring frivolous lawsuits, because there are potentially other explanations for their low rate of use (such motions are filed in roughly one-half of one percent of the roughly 500,000 cases filed in California annually).[1]

While the statutes may indeed curtail frivolous tactics, there appear to be obvious limitations. There is an inherent difficulty in attempting to curb the filing of bad-faith motions through the filing of yet more motions, which may themselves be used in bad faith. The standards and procedures for the two statutes are somewhat confusing and conflicting. Under the current scheme, judges must review moving papers, opposition papers, reply papers, and potentially an accompanying motion for bad faith, thereby doubling the Court's workload. Given that the success of the statutes in deterring bad-faith tactics cannot be quantified, the statutes may ultimately cause the Courts more work than they are designed to discourage. A different approach might be more effective and more efficient.

Rather than having a separate motion to attack an unmeritorious motion, a better solution might be to increase judicial authority by allowing courts the discretion to determine that a given motion does not require an opposition to merit denial. Under this approach, which would theoretically involve little to no extra work for the Court, since the Court would read the moving papers in any case, the Court could dramatically reduce its workload by eliminating the need for the Court to review opposition and reply papers, or to conduct a hearing.

If a judge were to determine that a given motion was insufficient on its face to require an opposition – for example where a judge determines that he or she would decline to exercise his or her discretion to grant a motion irrespective of any opposition, or that a motion was procedurally defective – the only party wasting resources would be the party who filed the motion. Presumably, this would reduce meritless motions, because: (1) attorneys who would otherwise to use litigation as a club to force the opposing side to capitulate through the sheer cost of litigation would be at least somewhat thwarted, since only the moving party would incur fees; and (2) attorneys might more carefully consider motions to avoid having to explain to their clients incurring fees that accomplished nothing.

Clearly, not every judge would take advantage of the procedure because it would require early review of the moving papers, instead of a comprehensive review of all of the papers at once. Further, the approach might be more effective as to some motions than others (particularly as to motions requiring the exercise of judicial discretion or motions which might be denied on procedural grounds). The authority to employ this method might still discourage the filing of meritless motions, however, since an attorney could not be certain if a judge would summarily dispose of such motion.

Vexatious Litigation

This mechanism targets those propria persona plaintiffs who utilize frivolous litigation as a business model (defining a "vexatious litigant" as one who lost at least five lawsuits in the previous seven years), rather than targeting any particular lawsuits. "The vexatious litigant statutes (§§ 391–391.7) are designed to curb misuse of the court system by those persistent and obsessive litigants who, repeatedly litigating the same issues through groundless actions, waste the time and resources of the court system and other litigants."[2] In its current form, the statute has no effect on attorneys, but it may be possible to expand the scope of the concept to include attorneys against whom findings of bad-faith or frivolous tactics are made multiple times in a given period.

Clearly, no attorney could or should be declared "vexatious" simply by virtue of the number of verdicts rendered against his or her clients. Equally clear is that other remedies, such as State Bar discipline, may be sufficient to deter bad-faith tactics, and the State Bar is the appropriate arbiter of determining whether and on what terms an attorney could or should be allowed to practice. On the other hand, there would seem to be some advantage in allowing judges within a particular venue the discretion to impose reasonable restrictions and other remedial measures on a "vexatious" attorney who repeatedly employs bad-faith or frivolous tactics.

[1] Tang, *Frivolous Action Filings In California*, (2017) California Bureau of Research

[2] *Shalant v. Girardi* (2011) 51 Cal. 4th 1164, 1169

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