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Public Hearing on Sanctions Against Attorneys and Parties For Frivolous and Bad Faith Actions or Tactics

Assembly Committee on Judiciary

ASSEMBLY COMMITTEE ON JUDICIARY

Public Hearing

on

SANCTIONS AGAINST ATTORNEYS AND PARTIES FOR FRIVOLOUS AND BAD FAITH ACTIONS OR TACTICS

September 18, 1987
The Beverly Hilton Hotel
The Royal Suite
9876 Wilshire Boulevard
Beverly Hills, California

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Legislative Coordinator, Family Law Section
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Hearing on
SANCTIONS AGAINST ATTORNEYS AND PARTIES
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CHAIRMAN ELIHU HARRIS: This hearing is on the issue of sanctions against attorneys and parties. There's been a great deal of concern in the legal community, and I think in the public at large, about the whole system of justice, the administration of justice, and what makes it work; how we speed up the process; how we discipline lawyers and others for misconduct or for conduct that is not in the interest of justice. Sanctions are certainly one of those weapons that has been created to get a handle on misconduct.

Several pieces of legislation have been introduced on the subject in the 1987-88 Legislative Session, and those proposals are still pending. What we would like to do at this hearing is solicit comments on those pieces of legislation, and more importantly, the issue of sanctions against attorneys and parties. We want to make sure that any sanctions that are exercised are appropriate and that they are effective.

So, in that regard, we would like to have comments and would like to ask our first witness, Mr. Howard Dickstein, who is with Kanter, Merin, Dickstein and Kirk of Sacramento and also General Counsel for the Little Hoover Commission, if you would come forward and give us some perspective on sanctions.

Mr. Leslie, do you have any opening comments that you would like to make? Okay.

MR. HOWARD DICKSTEIN: Thank you, Mr. Chairman. Good morning to you and to Mr. Leslie. I'm General Counsel for the Little Hoover Commission, and the Little Hoover Commission, of course, is the sponsor of AB 1252 introduced by Assemblyman Zeltner which is included in your packet. This bill was recently amended on September 11 to more accurately reflect the intent of the Commission, when it made a recommendation for attorney sanctions in its report on the insurance liability crisis in May of 1986. And, initially, you should be aware that the Commission did a study of the insurance liability crisis and the impact of the court system on that crisis. The only facts really before the Commission, and the only justification for any changes in the law, were based on preliminary research done in the course of that study. It is for that reason that the bill is limited to the tort actions: personal injury and wrongful death actions. It is not because the Commission feels that any other actions shouldn't be sanctioned, but it is simply a result of the fact that we didn't have any real knowledge one way or the other -- unlike this Committee -- on other kinds of actions. We felt that it would be inappropriate to make any recommendations outside the circle of study.

Within the court system, certainly, there is evidence of abuse of the system. The fact alone, that 52 cents on every dollar paid out goes to attorneys, speaks for itself. It is interesting to note, in that regard, that it's not just the plaintiffs' attorneys or is it the defendants' attorneys. Most of the issues the Commission looked at were contentious in that those interests that support the plaintiff were on one side, and those interests that support defendants on another. In this area -- and I think this is what sets it apart -- it impacts both sides. Because, certainly, in the testimony and research that the Commission conducted, it is clear that there are both frivolous claims filed and equally clear that frivolous motions and defenses were and are put forward by defense attorneys.

Finally, the injured and their attorneys can make any kind of claim, and they can do so without any economic penalties because of the contingency fee system. And similarly, the defense attorneys have an interest in prolonging, perhaps delaying and making motions because of the kind of system they work within, which, as you know, is an hourly rate system -- the more hours an attorney puts in, the higher the attorneys fees. To the best of our knowledge, that 52 cents on the dollar we split very evenly.

This is an area of concern to the Commission where (inaudible) and it is a difficult area to draw a line in. On the one hand, obviously, it's a matter of policy that use of the judicial system encourages a peaceful, orderly settlement of these suits. We discourage self-help. It is an adjunct, the mainstay of our system. There are constitutional underpinnings of the rights plaintiffs have to seek redress. There's constitutional underpinnings in the litigation as a form of speech. The professional responsibility of attorneys and to their clients is to pursue every avenue, in fact every possible meritorious cause. It's not clear to plaintiffs' attorneys in the first instance what may turn out to be meritorious and what may not turn out to be meritorious. It's the discovery system, an elaborate and developed system, that helps the attorneys make that determination, so in some ways the plaintiff's attorney gets caught in the middle between the ethical obligations to the client and the ethical obligations as an officer of the court to ensure that the courts time is not wasted.

CHAIRMAN HARRIS: Yes, but let me interrupt one second. Is your opposition basically to the law as it's been amended regarding sanctions for these types of actions, or is it against its application?

MR. DICKSTEIN: Well, I think the opposition to the law as it stands is that it has not operated as a deterrent. I think that AB 1252, as amended, would free up the sanctions from the monetary costs to the parties, which is unlike other bills that I'm aware of at least. The bill, as amended, very clearly would provide a penalty as well as the costs and attorney fees against the offending party, so that you have something like a civil

penalty and it would be something that the judge would have to exercise with discretion. I know, in discussions with the Judges' Association -- which opposed, and I think you can look in your packets for their letter of opposition on AB 1252 -- their reasoning was that we repealed existing CCP 128.5. Well, in its present form, it doesn't do that and it's never been the intention that it should do that. It would leave 128.5 just as it is but add, at least in the case of tort actions, a greater penalty and more discretion. We learned in our discussions with judges, at least at the trial court level, that it's rare, particularly in Sacramento County, for there ever to be a sanction of more than $1,000 or $1,500. So it was with that in mind that the bill comes in to give judges more discretion.

It's my understanding, after talking to representatives of the Judges' Association about their opposition to the bill in its current form, that they would not oppose the bill in its current form.

CHAIRMAN HARRIS: Ms. DeBow, if you don't mind, could you give us a summary of the legislation in this area as well as the current status of either support or opposition?

MS. DEBORAH DeBOW: Yes, to the extent that I know what the support or opposition is. There are currently three bills pending before our committee. Probably one or any of them will be heard in January. One of them is AB 245, by Mr. Harris. All it does is delete the "solely intended to cause delay" in 128.5. Then there is Assembly Bill 1252, Mr. Zeltner's bill which Mr. Dickstein is speaking to, which adds a special penalty in personal injury or wrongful death actions when a frivolous motion or a frivolous claim or defense is asserted, or a party causes unnecessary delay, and that penalty is up to $10,000. There is a third bill, AB 1914, which would enact Federal Rule 11 into California law, which requires that an attorney do reasonable inquiry and provide a certification when the attorney files a pleading with the court that it is well grounded in fact and lost.

Now Senate Bill 379, by Mr. Presley, was passed last week, and it adopts Rule 11 for two counties in a pilot project in Riverside and San Bernardino, which is substantially similar to Assembly Bill 1914, Mr. Harris' bill adopting Rule 11.

In 1985, there was Senate Bill 379, by Mr. Ellis, which recast 128.5 provisions. There has been some concern that, perhaps, in the recasting and new definitions that we opened up some problems in using 128.5 that, perhaps, we should look at and remedy. It is also pointed out there were major concerns that we didn't have time to address in 1985 and that we should be looking at over the next few years. So, that's another reason for having this hearing. The reason why we introduced Assembly Bill 245 is to open up the discussion and see if, perhaps, something else ought to be done.

The other bills that also address sanctions -- well not like 128.5 does -- is the Discovery Act for abuses in discovery, which went into effect July 1st, 1987, and then there's some belief that the pilot projects -- what is it? Assembly Bill 3300?

CHAIRMAN HARRIS: Yes, the Trial Court Delay Reduction Act.

MS. DeBOW: Yes, that some other needs for sanctions under 128.5 may be reduced because of AB 3300.

CHAIRMAN HARRIS: Thank you very much. All right, I want to recognize my colleagues, Tim Leslie, who's been here, and Mr. Friedman, who just joined us. Mr. Friedman, we have just begun by having testimony by Mr. Dickstein, who is General Counsel for the Little Hoover Commission, on the subject of Mr. Zeltner's bill relative to sanctions. And, Mr. Dickstein, I hope I didn't interrupt your train of thought with that interruption. But if you could continue, I think we have a background for the bills that are under consideration.

MR. DICKSTEIN: Thank you, Mr. Chairman. I really have few opening remarks to make. I think this bill is pretty self-explanatory and I don't want to go on too much. I note that there are witnesses that are going to testify, that appear to have a depth and background in this area, and I'm anxious to hear from them.

CHAIRMAN HARRIS: The Little Hoover Commission, basically, isolated and focused its concerns on that narrow issue ....

MR. DICKSTEIN: This was one of eight or nine legislative recommendations, all of which are making their way, successfully or unsuccessfully, through the Legislature.

I would note only a couple of more things: One, as Ms. DeBow indicated, the new Discovery Act does have a pretty detailed sanction provision that we haven't really had an opportunity to see the impact of. There is CCP 2023, and a lot of care was taken in its drafting and I think it will be interesting for the Committee and the Commission to note what its impact in operation is. It is limited to discovery abuses, and it defines discovery abuses in a fairly narrow way, so it certainly wouldn't apply to complaints or claims or summary judgment motions or certain kinds of defenses, but I think the fact that it does provide for a number of alternative types of sanction that don't exist at the present time may well be of interest, because it's not just monetary sanctions that are going to do the trick, but actual impact on the outcome of the litigation, the termination of it, or the admission of certain issues, or the evidentiary implications of frivolous motions.

Another point is that in Assembly Bill 1252, as it now stands, and as 128.5 also provides, there's a hearing. That, I think, is an important provision, -- certainly for the Commission in its study -- in striking an adequate balance between the rights of both attorneys to bring motions and claims, and also the rights of society in general and of the defendants not to be harassed. It's important, the Commission thought, to provide for a hearing so that these civil penalties, particularly when they can go up to $10,000 in addition to the actual costs in attorney's fees, shouldn't be made or done lightly but that all the facts come out prior to the imposition of any such penalty. And there is a California Supreme Court case that appears to me to indicate that such a hearing is a necessary element prior to the imposition of a sanction. That case was for appellate sanctions. It didn't apply to trial court sanctions, but the reasoning, I would think, is equally applicable.

In conclusion, Mr. Chairman and members of the Committee, AB 1252 in its present form attacks a specific problem, a problem the Commission had information about. It contains, we feel, adequate safeguards to protect the profession, and to the extent that it separates the penalty amount from the actual cost to the parties, its purpose is to provide a greater deterrent than any of the existing bills now in force to accomplish that objective. Thank you.

CHAIRMAN HARRIS: Thank you. Any questions? We have a couple of questions. Ms. DeBow would like to...

MS. DeBOW: In your personal role as an attorney, do you feel that there is any public policy reason to limit this $10,000 sanction to personal injury or wrongful death actions?

MR. DICKSTEIN: No. No, and it's my understanding that the Commission has no opposition to changes in the law outside of it; it's just that it had no knowledge on its own to support such legislation. It's as simple as that.

MS. DeBOW: But in your personal experience...

MR. DICKSTEIN: In my personal experience, I think that it is broader. I don't think there's any question in my mind. I have both experience as a defense attorney in litigation and I do plaintiffs' work -- about half and half. There's no question in my mind that the sanctions should apply to cases other than tort actions. In my experience, again -- in response to your question -- a lot of the so-called frivolous claims really come out of what I would consider ego battles among the attorneys (getting one up on each other or getting angry at each other or having personality conflicts that are being worked out through the courts) that have little or nothing -- and I think nothing is the more appropriate description -- to do with the merits of the case or the ultimate outcome of the case, as much as they do to the relationship between counsel.

Now, I find that when you have a good relationship with counsel and there's mature counsel, the problems are worked out in a more civilized way without involving the entire judicial system. But it's very difficult, I think, under present law, and the judges appear to me to be very -- it has to be a very extreme abuse the way the law is now written, before a judge will step in, and it's usually only after the second, third, or fourth time that that abuse occurs.

In federal court, I find, again in my personal experience, that attorneys are a little bit less willing to go out and fight those kinds of battles before a federal judge, because a federal judge will be more likely, at least in the Eastern District in Sacramento, to sanction the attorney. The kinds of battles that occur in the superior and municipal courts are more likely to occur before the magistrates in federal court, which is another way of going that none of the bills address: to actually take discovery and put it at some other level so that it doesn't impact the court system as such. You have another kind of system that may be something that will be worthwhile looking into, the magistrates system and its application to the state courts.

MS. DeBOW: Did you intend for this bill to apply to complaints and cross-complaints, also?

MR. DICKSTEIN: Yes.

MS. DeBOW: Okay. Now, the standards that you've set up in terms of defining frivolous motion, claim, or defense are slightly different than those already provided in 128.5. Do you have a reason for this?

MR. DICKSTEIN: Well, I think the difference is really a similar difference to Mr. Harris' bill about "solely for the purpose of delay." I think that's the only significant difference that I can determine. It's almost impossible, I think, in my experience -- and the Commission's investigation bore this out -- to say that the sole cause of something is a delay. There's always some justification on some other level. But if the primary thrust of it is that it causes unnecessary delay, that, I think, implies that there was no other justification, no other real justification in terms of furthering the claim or furthering a defense to the claim or getting at information; so by eliminating that word, at least in the tort context, I think it makes a more realistic deterrent.

MS. DeBOW: Okay. One of the standards under AB 1252 is that "it must have been made in bad faith, either for prolonging or delaying litigation, and to harass another party." The first test is a two-pronged test, and the second test is "without any reasonable basis in law or fact and lacking any good faith argument for extension, modification, or reversal of existing law." Was one concern to limit the chilling effect on a party or do you have another purpose?

MR. DICKSTEIN: No, no. There was really no other purpose in that. I understand the distinction you're making and I think that those things should be carefully looked at and drafted for consistency. At the same time, as a practical matter, you rarely if ever see a case where the purpose was delay that didn't have the impact of harassing the other party. They're really two sides of the same coin, and I can't really think offhand of an example of one without the other. One way of harassing a party is delaying the course of the litigation.

ASSEMBLYMAN TIM LESLIE: As the non-attorney member of this panel, at least today, you can enlighten me on some things that everybody else in the room will already know about. You indicated that sometimes personalities between counsels can give rise to some of the delaying tactics that would be involved in the legislation. Could you give me one hypothetical situation or scenario as to how this might arise and what kind of delaying tactic might be used?

CHAIRMAN HARRIS: The one that you used.

MR. DICKSTEIN: That was the first thing that came to mind, (laughter) but I was going to put it as, "A colleague of mine once did ..."

I guess what we'll sometimes see is where the attorneys really differ sharply on the merit of the case, and the defense attorney feels that the plaintiff is really a gold-digger and really has no business bringing the action, and the defense attorney has a good relationship with his or her client. The defense attorney will do things, probably, that would not otherwise be done.

For example, I know of a situation in which the defense attorney came to know that the plaintiff was on an extended trip to Europe, and after a year and a half or so of litigation, the defense attorney decided that it was time to initiate a discovery device that would result in a psychiatric examination of the plaintiff which would require the plaintiff to come back within a certain period of time. Then the plaintiff's attorney would make motions for protective orders and the defense attorney would argue that it was absolutely necessary that the plaintiff be produced at a certain time for this psychiatric examination, and the relevance of the psychiatric examination was kind of tangential in the case.

The case I'm thinking of was a sex harassment case. The director of an organization was accused of harassing a plaintiff. And the defense attorney wanted to see if the plaintiff was normal, what her background was like, whether she was unusually sensitive, and arguably that was relevant. At the same time, there were motions up and back and up and back as to when it was going to be scheduled and whether the person was going to have to come back from this trip, and whether the -- what we call the at-issue memo in which the lawyers agree that the case was ready

to be tried -- should be pulled because the plaintiff wasn't being made available for discovery. Then there was a motion to make it no longer at issue. And it just can go on and develop into tremendous struggles.

ASSEMBLYMAN LESLIE: Given this scenario, then -- that's a good example. Thank you -- if AB 1252 were in fact law, how would it deal with this? It would take the judge to determine that there was frivolous activity going on and then he could impose a $10,000 fine?

MR. DICKSTEIN: In addition to the costs. This is probably not an insurable item; this is not insured under a malpractice policy, for a number of reasons which I think other witnesses will address. But I think it would provide a real deterrent if it meant that the attorneys had to dig into their own pockets. Sometimes the costs are not that great. They're usually $1000 or less, so they're not that much of a deterrent, but if an attorney's going to have to dig into his own pocket for $8,000 or $9,000 plus the attorney's fees, I think he'd swallow before doing something like that.

CHAIRMAN HARRIS: Let me ask a question. Mr. Leslie's question is on point, although I think your answer is more responsive to the sanctions that are just limited to the Discovery Act reform. What about a trial? Why can't the judge, when he has got the party in court on the existing sanctions, exercise the appropriate disciplinary function to maintain control of the case and the process by which the case is being resolved?

MR. DICKSTEIN: You say, "in court". Do you mean during the trial of the case?

CHAIRMAN HARRIS: Yes, during the trial.

MR. DICKSTEIN: I think the judge could but, first of all, very few of the cases ever get to trial, so you've already ruled out 98% of the cases. If you talk about sanctions during a trial, it's just going to apply to a few cases. Once you get into trial...

CHAIRMAN HARRIS: You don't see the problem of sanctions, basically, as being problems that visit the case at trial?

MR. DICKSTEIN: No.

CHAIRMAN HARRIS: But during discovery and during motions preceding the actual trial, settlement conferences and other kinds of things...

MR. DICKSTEIN: Once you are in trial, particularly if there is a jury there, then the attorneys are going to be conscious about not wanting to come off as harassing and

delaying. The jurors have things to do, everyone has things to do.

My experience, and the testimony of the Commission, was it was mostly in the bringing of the claim, the motions for summary judgment, the demurrers. Another good example is attorneys who were sued for malpractice almost always feel that the case is without merit against them.

I've seen attorneys who won't report it to their carrier but want to defend themselves and will demurrer -- which is to make a motion to dismiss the case because it doesn't state a claim -- might lose it and then keep bringing other motions again, and again, and again, sometimes just because a certain portion of one cause of action wasn't clearly incorporated into another cause of action. Very technical reasons.

Now that has nothing to do with discovery, and it wouldn't be covered by the new Discovery Act. But it would be covered by 1252 and by all the bills, really, that the Committee is considering.

CHAIRMAN HARRIS: Okay. Any other questions? Thank you very much.

MR. DICKSTEIN: Thank you.

CHAIRMAN HARRIS: I would like to next call Mr. Richard Fruin of Lawler, Felix & Hall, Los Angeles, who is the author of articles related to sanctions. Thank you. I appreciate your joining us.

MR. RICHARD FRUIN: My name is Richard Fruin, F-R-U-I-N. By way of background, I graduated from law school at the University of California, Berkeley, in 1965. I've been with my present firm since that date. I do commercial litigation. I don't do any personal injury or wrongful death litigation. I represent both plaintiffs and defendants, both big and small plaintiffs and defendants.

I have written several articles in obscure journals and Ms. DeBow found one of them, and I have been active in several bar association committees on sanctions.

I would like to address just two problems, but perhaps before I do that, I could remark upon Mr. Dickstein's comments. I would agree with him that there is no problem with attorney abuse at trial. Once you are in front of the judge, the judge can control it and can understand what is going on.

One of the reasons there is less ...

CHAIRMAN HARRIS: In your experience they do?

MR. FRUIN: Yes, they do. Sometimes you get weak judges that do not, but that's not common.

CHAIRMAN HARRIS: Thank you.

MR. FRUIN: One of the reasons there is less litigation abuse in federal courts is because matters are assigned to a federal judge, a single judge at the filing window, and therefore the judge can supervise the calendar throughout the course of the litigation. That is not the practice in state court and, for that reason alone, you have more litigation abuse in state court.

I disagree, I think, with Mr. Dickstein's view that providing the ability to obtain sanctions is going to lessen the friction that sometime occurs in lawsuits. The ability to seek sanctions is merely another weapon. It is a way to exacerbate rather than to minimize friction between counsel, because counsel can dig at each other by filing motions for sanctions.

I have a whole list of situations in which fractious counsel cause problems for each other. To respond to your question, for instance: motions to disqualify opposing counsel; arguments over the right to discovery or discovery of certain items; refusal to stipulate to matters that can be obtained as a matter of right if you make a motion to the court; making up motions without probable success either because you don't have a law or you don't have the facts; failure to comply with the litigation rules either because you don't understand the rules or because the rules are ambiguous, or because you didn't know about the rules.

Litigation, these days, is very complex. You are litigating in many different courts: municipal and superior in different counties, federal, appellate, arbitrations, administrative tribunals. Each of these courts has their own rules, and the rules are constantly changing. The most important rules are generally the unwritten rules, which is the custom and practice of that particular judge of that particular court.

Let me turn to what I was going to talk about...

CHAIRMAN HARRIS: Before you do that -- the examples you raised. Talking about sanctions, those seem to be very difficult sometimes to pin down in terms of the intent of the moving party. It may be an error, but should we have sanctions where there is no mal-intent simply because of the fact that there was delay as a result of that action, -- by trying to disqualify the opposing counsel for example? Is that a legitimate tool in certain circumstances? Tell me a little bit about the sanctions as they might apply to those motions, whether they're made for frivolous purposes or otherwise.

MR. FRUIN: Well let me say, at the outset, that I think intent to cause or actually causing delay is the wrong standard. In Los Angeles County, it takes five years to get to trial in the

superior court. Nothing that you do in the course of litigation is going to delay your day in court.

The proper standard is unnecessary expense. Sometimes litigation becomes a war of attrition. I think that unnecessary delay is an irrelevant standard and that really you should be focusing upon unnecessary expense. It seems to me, if that were the standard it would clarify some of these problems. For instance, refusal to stipulate to matters that can be obtained as a matter of right.

You can make the motion. Having to make the motion is not going to delay the proceeding at all. But the fact that the other side wouldn't stipulate has caused you unnecessary expense. Now, it wasn't frivolous, either, because the other side did not have to stipulate. There is no obligation that a party stipulate to things which you can get as a matter of right, but they should have done that. They should not have cluttered the court's calendar with a motion that should be granted.

ASSEMBLYMAN LESLIE: On that question, I assume that for every one of the various types of motions that can be made there has to be a reason that they are there and there must be times when they are appropriate.

MR. FRUIN: Yes, that's right.

ASSEMBLYMAN LESLIE: How do you know, or how can you demonstrate or prove when it was appropriate and when it wasn't?

MR. FRUIN: Well, I think an experienced litigation counsel would know when the motion, although ostensibly a discretionary motion, was a motion which the judge had no actual discretion to deny.

There are many statutes which give courts' discretion. They have been on the books for many years. Many of the rulings of judges have been taken on appeal on those particular statutes and the appellate courts have defined the standard by which the court can deny or the standard by which a court, or under which a court, must grant such a motion. So that if you look in the annotations to the statute, you can determine in the clear cases what the result is going to be. Of course there are borderline cases too. That is why the statute is there. And if you have a good relationship with the other counsel normally you can work this matter out. But litigation, by definition, is adversarial; it's fractious. You know when you are playing football, when you are playing basketball, did anyone ever give you an elbow? Do they ever bump you? Do they ever trip you? All of those things are violations of rules, but it is done all the time. I think that litigation, since it has these rules which you must follow, provides innumerable opportunities for essentially bumping your opponent. That is why you try to develop a good relationship with the other attorney so that you keep your cost down. Sometimes the other attorney is not motivated to keep your cost down.

One of the great stimulators of litigation in the past ten years was the market rate of interest shooting above 7%. That meant that every debtor could make money by refusing to pay his debt and waiting for the other side to sue and then get to trial. Why, if the market rate of interest were 15% and the delay of the trial was five years, and then when you were found liable at trial you only had to pay 7%, you've more than covered your attorney's fee by refusing to pay during the interim period of time.

CHAIRMAN HARRIS: Yes, Mr. Friedman?

ASSEMBLYMAN TERRY FRIEDMAN: Mr. Fruin, what motivates your concern in this area? Is it more to protect innocent other parties from harassment and incurring unnecessary additional expenses or is it to try to protect the court from being weighted down in taking its time on matters that are frivolous, compounding its problems with delay?

MR. FRUIN: I think the source of my concern is that I hate waste. I think that resolving disputes through litigation is extremely expensive. You must be an extraordinarily wealthy country to do it the way we do it. I hate to see money wasted.

CHAIRMAN HARRIS: Do you have an article on that? I might like to read it.

MR. FRUIN: No, I don't have an article on my philosophy. My article is on a specific aspect. But that's the origin. You know, I grew up in a penny-pinching family and I don't like to see unnecessary expense incurred for matters that should be resolved by acknowledgement of what the rules are.

ASSEMBLYMAN FRIEDMAN: So your concern is more protecting parties than protecting the court and the system?

MR. FRUIN: Protecting clients, yes. But it's also protecting the system and protecting the judges' time for important matters.

ASSEMBLYMAN FRIEDMAN: Have you given thought, in addition to the whole area of sanctions, to giving further authority or power to judges to manage litigation in our state courts? More broadly, to what extent do you think it's feasible to try to move our state courts in accordance with the federal court system, where you have a single judge in control?.

MR. FRUIN: I think that would be desirable. There are countervailing considerations. I would think it would be desirable to have panels of judges who are specialists in particular areas. You would have judges who are personal injury judges. You would have judges who are commercial non-personal injury judges. You would have criminal judges. At the present time we have a de facto distinction between criminal law judges and civil law judges. But I think that if you could develop

judges who are specialists and experienced in particular areas of the law, that they could quickly evaluate a case and they could also better control a case. I think it might work in some counties that have a smaller case load and fewer lawyers and fewer claims. But I'm not sure it would work in Los Angeles.

I'm not sure that I answered the question that you asked, Mr. Harris. Maybe I should go into what I was going to say. I haven't really done any recent research or considered my comments or prepared any papers at great length. I did want to talk about sanctions as a substitute for malicious prosecution. And then I want to talk about sanctions as an interference with the attorney-client relationship.

First, let me say that 128.5, as it was originally drafted, I do not believe intended to authorize sanctions because a claim was made in bad faith. If you look in the legislative history, particularly the statement made by the legislative assistant to the Governor, it says that the statute that became 128.5 was not intended to be a substitute for malicious prosecution.

Malicious prosecution is a tort by which the winner in a civil law suit can file an action against the person who brought the action or maintained the defense and established that the claim was brought in bad faith with malice. It requires another lawsuit. However, there are some attributes of that second lawsuit which are not present when sanctions are used to censure and penalize for the filing of an action. To begin with, the defendant has a right to a jury trial, but you don't have the right to a jury trial when you have a sanctions hearing after the trial. The defendant has a right to discovery to see what the costs actually incurred by the plaintiff were, but you don't have that right when you have a sanctions hearing on a motion.

The defendant, if a client in a malicious prosecution action, has a defense that he or she has relied upon advice of counsel after making full disclosure of the facts, and that is a defense against malicious prosecution, but that's the very subject which can give rise to sanctions in a sanctions hearing.

If you've finished a trial and you've lost, and the other side hits you with a sanctions motion, you are in a very difficult position both professionally and morally. You may have lost the trial, but your client might want to take an appeal. Yet the attorney and your opponent, your adversary, is now seeking to impose sanctions upon both you as counsel for the client and the client. Now there are various things that can be said, obviously, in your and your client's defense. However, you are the attorney for the client. You are the shaper and the presenter of the client's story. Now if the assertion is that the claim should not have been filed, what should the lawyer do. Should the lawyer say, "I didn't think it should be filed either but my client wanted me to file it," or "I didn't think it was a valid defense but I told my client they had a 10% chance of

prevailing on this defense," or "I told him, 'I don't think you have a defense at all but you have a right to make the plaintiff prove it.'" Can the lawyer say that about the client in order to remove the possibility that the lawyer himself is going to be subject to sanctions?

He obviously can't do that. He has to tell his client, "You go find yourself another lawyer who will represent you at this sanctions hearing because I am now an adversary to you." And the client may say, "I want you to take an appeal. You know the case. You know the rights and wrongs of it. How can I hire a lawyer to represent me against you at the same time I want to hire you to take an appeal?" I think it's an insoluble problem, and I don't think any of the bills that you have address it.

CHAIRMAN HARRIS: Well if it is insoluble then probably you don't want to try it.

MR. FRUIN: But it is permitted.

CHAIRMAN HARRIS: Now I see what you're saying.

MR. FRUIN: You created a problem.

CHAIRMAN HARRIS: I understand. Now, I see what you're saying. I'm sorry. I misunderstood. I've got it.

MR. FRUIN: 128.5, as it was amended, has created that problem.

ASSEMBLYMAN LESLIE: Does this happen now?

MR. FRUIN: Yes, it does.

ASSEMBLYMAN LESLIE: This problem?

MR. FRUIN: Yes, it does.

ASSEMBLYMAN LESLIE: So it's either with or without any new bill we have that problem.

MR. FRUIN: Well, the right to seek sanctions, that is the statutory right, has created the problem. If you didn't have that statute then the remedy of the prevailing party at trial would be to file an action for malicious prosecution. Indeed, you still have the problem, it's greatly minimized because they have to make the decision that they are going to instigate another litigation. They probably wouldn't do it while the first litigation is on appeal if it is still on appeal. But, after you've prevailed at the trial, it is very easy for the prevailing counsel to move in with a sanctions motion and say, "Judge, you have already decided this case. You know that they don't have any real merit in this claim. You've decided so yourself." And that's another problem that this statute creates; and that is ...

ASSEMBLYMAN FRIEDMAN: Excuse me, before we get to that I just have a point on your last comment, Mr. Fruin. Couldn't the same dilemma be provoked by an action for malicious prosecution following trial?

MR. FRUIN: Yes, it could be, but it's not going to occur immediately. The day after trial...

ASSEMBLYMAN FRIEDMAN: Well, the action could be filed immediately and the dilemma for the party's discovery could begin very soon thereafter, and motion for summary judgment could be made quite soon. That could be heard in virtually the same time period as the sanctions hearing.

MR. FRUIN: No, I don't believe that is true. To begin with, you can't hear a motion within 45 days from the filing and service of the complaint and ...

ASSEMBLYMAN FRIEDMAN: Is it 60 or is it 90? I'm not sure. It's not that much different, even if it isn't exactly the same.

MR. FRUIN: Well, what I am saying is there are a number of procedural protections that would prevent the immediate hearing on a malicious prosecution action of the summary judgment. But, you know, deciding to go forward with the malicious prosecution action is a decision in itself. Client and lawyer have to get together on it; it's going to cost more money. Once the action is filed you have procedural protections and then the moving, that is the resisting, party could always seek a delay which will probably be granted if the matter is still up on appeal.

As a matter of fact, I'm not sure that you can file a malicious prosecution action. You have to have a favorable determination, and I don't know whether the trial court decision is a favorable determination if you still have the right to appeal. But, I don't want to unduly take your time. I've prepared an outline for a talk which I gave -- actually it was a number of particular episodes that could occur -- and there's a recorded California case called Lesser vs. Huntington Harbor Corporation, in which a sanctions hearing proceeded immediately after trial and the judge said at trial, "I don't think this case had any merit. Come back tomorrow and I'll determine how much I'm going to impose sanctions on the losing party." I mean, you are hit with a thunderbolt at a point in time when the relations between you and your client are very critical.

While I'm still on the subject of malicious prosecution, there are some problems with all these bills. Section (d) of 128.5 says "The liability imposed by this section is in addition to any other liability imposed by law, or act or omissions within the purview of this section."

The question arises, if the prevailing party does obtain sanctions against the losing party, is that it? Or does the prevailing party have a right, in addition, to sue for malicious prosecution? And if the prevailing party in addition to getting sanctions sues for malicious prosecution, is the determination of the judge at the sanctions hearing collateral estoppel so that the losing party has no defense in a malicious prosecution proceeding?

In a malicious prosecution proceeding the plaintiff says, "One judge has already decided that this claim had no merit, was frivolous, was done for the purpose of delay, and now I want you simply to rubber stamp that decision."

You have another question. What if you're hit with a sanction and it is $10,000, and you pay $10,000, and then the prevailing party sues you for malicious prosecution? Do you get an offset for the $10,000 that you paid?

CHAIRMAN HARRIS: In that regard, do you think there should be a choice of one or the other or do you feel that both are appropriate?

MR. FRUIN: Yes, yes, there should be a choice. As a matter of fact there is a statute -- I don't have it in mind right now, but it was adopted before 128.5 -- that says, when you sue a governmental entity and you lose, and it's determined that the action was filed in bad faith or was frivolous or something like that, you can seek sanctions but that is determinative of your right to sue for malicious prosecution.

CHAIRMAN HARRIS: You elect one or the other?

MR. FRUIN: You elect one or the other. But I think that the biggest problem is the wedge that the sanctions motion after trial drives between the attorney and his client. However, that wedge occurs not only if a sanctions motion is brought to trial but really anytime a sanctions motion is brought. It's always nibbling away at the attorney-client relationship because the lawyer is always tempted to explain away his responsibility by saying, "It was my client's decision to bring this matter."

In Great Britain, the barristers follow what is known as the "cab rule" -- I think it's called the "cab rule" -- which means to say that any barrister is for hire; that the worst person, the scummiest person in Great Britain, can go to the best barrister and if he can pay his fees, he can hire that barrister. The barrister is there as a public utility.

Well, you know, we have vestiges of the British system and it pops up in odd ways throughout our litigation system. But at least that's an ideal, that anyone can go to a good lawyer and if they can persuade the lawyer that they have a case, they can get that lawyer to represent them.

But this right of sanctions, you see, is making the lawyer personally responsible for the sort of investigation that the lawyer has done in trying to find out whether the client has a good case or not. You have professional questions like, "should you advise your client in writing that should this motion be brought, that there is a possibility of sanctions?" If you have to advise your client in writing, it's a substantial additional expense.

Sanctions can be used to make the other side jittery. As an example, for instance, I have an associate who is appearing on a demurrer today in the Santa Monica Court. He filed this demurrer in July, but in the Santa Monica Court you have to get a reservation in order to have a hearing. So the hearing was today, although this was filed some two months ago.

The opposition need not be filed until five days before the hearing. So the opposition was filed and mailed on Monday, or we received it on Monday, I forget which. But the opposition asked for sanctions for a hearing set this Friday. And why did they ask for sanctions? Well there were a variety of reasons. One reason was that the demurrer wasn't set for hearing within 30 days, which is required by the statute.

The Santa Monica court won't hear any demurrer within 30 days. And there were a number of other little things like that. They said that the demurrer was not set out in a separate piece of paper. Well, we got the opposition on Monday, and it sought sanctions for a hearing on Friday. You have to file any reply two days before the hearing, so the reply had to be filed on Wednesday.

Then it asked for sanctions. Well sanctions were inappropriate, but what do you do?

ASSEMBLYMAN FRIEDMAN: Are you familiar, Mr. Fruin, with sanctions on sanctions motion? It would seem that your description and my experience bears out that often times sanctions are used as part of one party's strategy to do all the things that sanctions motions are intended to minimize. How frequently does it occur that a party and counsel in the position of your associate today would respond by seeking sanctions for the opposing party's attempt to get sanctions against you so late?

MR. FRUIN: Well, in this particular episode it is not possible. You have due process requirements for the hearing of a sanctions motion. The present law and the present bill say that a sanctions motion may be contained in a party's responding papers. So, this sanctions motion was properly included in the responding motions, despite the fact that the responding motions were received five days before the hearing.

ASSEMBLYMAN FRIEDMAN: I guess what I'm saying is, there's two bases for seeking sanctions on sanctions: you could

bring it not only because the motion gives you too little time to respond but also because it's frivolous, it's meant to harass, or whatever other standard is applied to as a basis for sanction motion in the first instance, and it certainly could be said about the motion itself.

MR. FRUIN: It could be brought, but I wouldn't bring it because the cost of bringing it is more than you're going to get. You're going to lose it anyway. But, when you start entangling a sanctions motion into the merits of the matter, you run the risk of the merits of the matter being overlooked because the parties are concerned about the sanctions motion. That's the part of the motion in which the lawyer has a personal financial interest; it's not the merits of the matter which gave rise to the claim for sanctions.

Then, the other thing I would say, another problem is that you have to wonder how impartial a judge can be such that he can decide the merits of the motion and independently decide whether or not the motion is frivolously brought, and in this outline I...

ASSEMBLYMAN HARRIS: Wouldn't he be the best person to make that judgment, given the fact that he would have the chance to witness the entire episode?

MR. FRUIN: He's the best person, however judges have their own concerns. They're concerned about a heavy calendar. When you're in the federal system, some judges are very heavy-handed in telling you that a litigation should not be there. And if it has to go to trial, I'm going to impose sanctions on the loser. So, yes, the judge is the best person to know whether or not it's frivolous, but he or she may have their own bias.

I have an example of that in this little summary I have here.

I would suggest a couple of thoughts by way of solution. I think sanctions really fall under two categories. I think that there's one category that you might call "process" sanctions, and the other category would be "substantive" sanctions. The "process" sanction is where there's been a process failure. You can generally identify the lawyer as being the person who filed the papers late. He didn't follow the rules, or some other situation like that. That's a professional responsibility of the lawyer to comply with the rules. It has nothing to do with the substance or the merits of the client's position. I think that a judge perhaps could be given the power to routinely impose sanctions for "process" failures. It would be like a traffic violation, like an infraction. It's there to get your attention. It's there to make you a better lawyer.

However, sanctions which are imposed for a substantive deficiency in the position of the client gives rise to other

considerations, such as the attorney-client relationship, more substantive due process, that sort of thing. So I think you might make a distinction between those two areas in your thinking.

Secondly, I would suggest that maybe a sanctions motion should be separately noticed, rather than being tacked on to the main motion or being tacked on to the opposition. That would lessen the likelihood that it's going to be routinely thrown on and is going to make a cleaner record with respect to the responsibility of the parties in making a sanctions motion. Also, it would limit the possibility that the merits of the motion are going to become entangled with the personalities and the conduct of the clients and the attorneys before the judge.

I have nothing further to say. It's a very interesting topic, and in many aspects of it the literature is inadequate in describing the actual problems with the sanctions movement. I would say that, you know, in Great Britain and British Commonwealth countries, the loser pays the costs of the winner. And, in many ways, sanctions are kind of an evolutionary development in American law moving in that direction. Because, in actual practice, this standard of frivolousness or bad faith gets watered down a great deal, particularly if it's a motion which is filed just after the conclusion of a trial. You don't have time to tell the court whether or not you have good faith or bad faith, or what the frivolousness of the claim or the defense was. So that gets blurred. The judge says, "You lost. You were wrong. You pay sanctions." And sanctions become a way of fee-shifting. It's consistent with the fact that more and more statutes which are passed now at both the state and federal level have fee shifting provisions in them. And I don't think that the standards that you have put in the proposed statutes or in the present statute, really in practice are much of a barrier to the imposition of sanctions when a judge really wants to impose them.

CHAIRMAN HARRIS: Thank you, Mr. Fruin. You were very helpful and insightful. This is an important topic. We have a lot of pressure on us, as you are aware, both in the area of disciplining lawyers for misconduct and for not being professional in their demeanor. There is also a lot of pressure on us because of the five-year average trial time it takes to resolve a matter in Los Angeles. Sanctions are one of the tools available and we want to make sure it is used appropriately. The complexities, I think, of sanctions and malicious prosecution, and the side issues that emerge therefrom, are very important and you pointed them out to us. In trying to draft some legislation, I think, we'll be a little more creative as well as a little more conscious of the complexities in this area.

ASSEMBLYMAN LESLIE: At this point, I have a question. The conflict that can be created between the attorney and the client, when it gets down to, not the process kind of things but the substantive kinds of issues, I guess the attorney could always argue that the client had to make the decision because I

would hope that, at least technically speaking, the buck would have to stop with the client. Isn't the client theoretically in control? And yet in practice, at least in the situations I've been in, when you're the client you feel that you're almost totally -- unless you're pretty sophisticated in this -- that you're pretty well dependent upon your attorney's advice and you're going to go with your attorney's advice.

MR. FRUIN: I think that's true. I think that most clients, and almost all individual clients, must rely totally upon the attorney to tell them whether they have a good case or a good defense.

ASSEMBLYMAN LESLIE: So it's a Catch-22, in terms of that one aspect of your remarks. I mean the attorney's trying to defend himself against sanctions. He can always say, "Well, I explained it to my client..."

CHAIRMAN HARRIS: You're talking about tracing down responsibility?

ASSEMBLYMAN LESLIE: Yes. "... the client made a bad decision. I told him that he only had a 10% chance. He made the call." But on the other hand, you've got to know that if they went ahead and did that, the attorney was encouraging it.

MR. FRUIN: Of course the defense or the obstacle that has to be overcome is the finding of frivolousness, and in the state statute also so-called "bad faith". And if you make that standard high, then you have a very small risk that sanctions are going to be imposed improperly on anybody, either lawyer or client.

One point I want to make is that, yes, it's true that 98% of cases are settled, but every case is a problem. Every sanctions motion is a problem. It's true that sanctions may be imposed only one out of a hundred times, but there were 99 times that sanctions had to be defended against, and all of the problems that you have to think about, whether it's your fault, your client's fault, what you have to tell your client, whether the client has to get separate counsel, digging through the file to find out what the facts were, looking up the law to see how strong you were. In those 99 cases in which sanctions were not granted, you have to go through all the work in order to defend yourself. And your professional judgment is being questioned and challenged by someone that you might not like very much and someone that you might think is very unprofessional.

CHAIRMAN HARRIS: Well, in part, my difficulty is that motions and the various tools that are available to counsel in the litigation process, some of them by their nature are available to be misused at least from the other side's standpoint. In other words, it's an adversarial process and you use every tactic you can. You indicated, in reality, that if you get away with kicking somebody, then they'll think about it next

time there's a play run, so sometimes you do that. So, obviously, we want to make sure that we understand that sometimes those things serve, if not appropriate purposes, certainly the purposes of those people that are utilizing those tools. Maybe we want to make sure that if they use them they don't get caught when they're using them in an inappropriate way, because there's going to be a penalty. But that's all we can do.

MR. FRUIN: That's true. Thank you.

CHAIRMAN HARRIS: Thank you.

Okay. I'd like to next ask Ms. Lynne Yates-Carter, who is the Legislative Chair of the Executive Committee of the Family Law Section of the State Bar of California to come forward. How are you today?

MS. LYNNE YATES-CARTER: The Family Law Section has reviewed the Assembly Bills that are before you today. I think you have in front of you our position paper on one of the bills that we had a great of concern about, which was AB 1252.

Attorneys' fees, costs, and...

ASSEMBLYMAN LESLIE: Your letter on that bill doesn't relate to the bill as it is now before us, I don't think.

CHAIRMAN HARRIS: The bill's been amended. I don't know if you were here.

MS. CARTER: That's right. It was my understanding that it was being amended on that date.

ASSEMBLYMAN LESLIE: Does that change your position on that bill?

MS. CARTER: As far as our concerns on the bill, and if you let me grab that bill very quickly, the AB 1252 copy...

ASSEMBLYMAN LESLIE: Yes, all the points in your letter, which were well taken, aren't relevant. So you'll either be needing to come up with some new points or I guess we'll need your opposition or, of course, you can do whatever you want.

MS. CARTER: Okay. If the sanctions that are imposable in an action generally are limited to $10,000, we would have an ongoing objection because we have an ongoing concern where the ever-increasing cost of family law litigation is often exacerbated by the opposition between the parties and the desires of the parties (the emotional questions that come into family law situations) that increase the amount of costs overall. As presently drafted, AB 1252 does talk about sanctions, a legislative intent to limit the sanctions in personal injury and death cases to a cap of $10,000. If that is the only cap, then we wouldn't be as concerned about the impact on family law and the cap that might be raised on the family law action.

What we still have an ongoing concern about is the standard that's being used in drafting the legislation on the imposition of attorneys' fees and costs and where there is a delineation between the motive, and I'm looking at Section 3 in the amended version of 1252, talking about what a frivolous motion claim or defense is, either for the purposes of prolonging or delaying the resolution of a litigation and to harass the other party. I think we'd have an ongoing concern with that language, because we see that as being an "or" proposition. In family law, very often you have a party who may want to prolong the case. They may want to harass the case, and the tactics they use may have either effect. We want to leave the general ability of the court to impose sanctions as open as possible.

I don't know if the Committee's aware of the use of attorneys' fees, costs, and sanctions in family law. Generally, at the present time, I'd like to address that very briefly. In many counties, including the county that I practice in -- Santa Clara County -- the family law filings in superior court presently constitute 40% of the total filings. We have local rules. We have special guidelines that cover the area of attorneys' fees, costs, and sanctions, and even with that we've always looked at CCP 128.5 as being a very valuable tool in an attorney's arsenal to try to stop nonmeritorious litigation and abuses of the process.

One issue that has come up in the past is whether or not there ought to be any limitations on a party's ability to get attorneys' fees, costs, and sanctions under 128.5 and whether or not the recent revisions in the Discovery Act would eliminate the value of 128.5. We still see that as being a backup and needed piece of legislation to help us meet the often very skillful tactics employed in family law actions to delay the litigation, to increase the cost of litigation, and to try to force one party out of being able to fund ongoing litigation in family law, which results in a very serious loss of personal rights. We would urge you, in considering this question, to leave as open as possible the availability of sanctions, attorneys' fees, and costs, especially keeping them open in family law actions.

I'd be glad to answer any questions that the committee might have specifically.

CHAIRMAN HARRIS: Talk to me very briefly, if you would, about the $10,000 limit that you object to as an inappropriate level.

MS. CARTER: Absolutely.

CHAIRMAN HARRIS: I'm not sure I quite understand. I know that it's a lot of money. Is that the only reason? One of the traditional attitudes is if the punishment measures up to the crime or the misdeed, then why is $10,000 or could not $10,000 be appropriate if it is discretionary with the judge? Look at the particular case, look at the amount of delay, look at the

particular cost, look at how egregious it was. Might it not be worth $10,000? What if it was a Joan Collins' divorce? There's plenty of money involved, and this guy makes these comments that turn out to be totally in error. He made some assertions, made some motions, and the motions were made on these assertions, and we found out that it was all fantasy, and caused her a lot of embarrassment, caused a lot of problems, caused a lot of delays, and held her up to more ridicule in those magazine pulp pieces. Tell me about it. Might not just $10,000 be appropriate?

MS. CARTER: We're saying $10,000 may not be enough.

CHAIRMAN HARRIS: Right.

MS. CARTER: Unfortunately, in many civil cases there can't be a finite end to the litigation. One of the common tenets of family law attorneys is if there are children and if there is support being paid, that litigation isn't going to end until the support terminates or until the children are age 18, or possibly beyond depending upon what happens with pending legislation. The problem is that the in-court battles can extend over a period of years. During those in-court battles, because of delays on the civil calendar, because of the lesser availability of courtrooms for family law cases -- somehow a family law case with $200,000 in assets is seen as less serious than a P.I. case involving $75,000 in a demand -- because of those problems we have extended family law litigation, with ever-increasing costs of that family law litigation, and if you put a $10,000 cap on it that's not enough. That's not enough to compensate for the nonmeritorious motions that may be brought in the intervening years.

We're saying no cap, absolutely no cap.

CHAIRMAN HARRIS: Oh, I see. Now I understand. I thought you were saying that $10,000 was too much.

MS. CARTER: Oh, no. By no means. I have a case pending now where my fees are close to $80,000.

ASSEMBLYMAN LESLIE: What is the sanction fee based upon today?

MS. CARTER: Attorneys' fees and costs. Some counties have adopted local rules as well that impose for specific sanctions being assessed for violation of local rules as a policy.

ASSEMBLYMAN LESLIE: If today it's attorneys' fees and costs, and this bill makes it attorneys' fees, costs, plus -- don't you think that this bill makes progress then? You're opposing it because it doesn't go far enough, but it's taking a step that's never been taken before.

MS. CARTER: In the initial draft we did oppose it because it didn't go far enough and because it set a specific cap, and we opposed the specific cap because we thought it wasn't enough.

ASSEMBLYMAN LESLIE: So, what amount do you think it should be increased to?

MS. CARTER: Whatever amount the court deems appropriate under the circumstances.

ASSEMBLYMAN LESLIE: In other words, you'd say court costs, expenses, and penalties as determined by the court?

MS. CARTER: Attorneys' fees, costs, and appropriate sanctions -- I'm not trying to draft the legislation -- various elements would include attorneys' fees, costs, and also provide the court with the opportunity to award sanctions. Now, again, I can't speak for the Committee on the amended bill because we didn't even consider the amended bill, but we will be addressing that issue, I'm sure.

ASSEMBLYMAN LESLIE: But from what I can gather now, the only problem that you have with the bill -- or one of the problems you have with the bill -- is that it just doesn't go far enough, and you'd like to see the cap off and leave it totally to the discretion of the judge in terms of the sanction amount.

MS. CARTER: That's right, again because..., I'm not saying every case in family law is a marathon, by any means. But we do have cases where one side, at the very outset of the litigation, is determined to "get" the other side.

ASSEMBLYMAN LESLIE: Would you rather have no bill, or would you rather have a bill that provided for $10,000? I mean, if it came down to that.

MS. CARTER: If I had my "druthers" -- and I speak as an individual and not for the Committee, because I can't speak for the Committee on this -- I would like to have a bill that expressly makes sanctions, over and above reasonable attorneys' fees or attorneys' fees, costs, and expenses actually incurred, available. Under this process I would like to see, individually, the legislation drafted to incorporate the possibility of getting it not only for tactics that are harassment, but also as a separate issue those that cause unnecessary delay.

ASSEMBLYMAN LESLIE: Well, I think I agree with you, but I just was wondering, if it came down to a point of negotiation and you had to decide if there was going to be no sanction amounts, as is the current practice, or there was going to be a cap put into the law, would you rather have none or would you rather have it with a cap?

MS. CARTER: I think that I'd rather have a cap, if I had to choose between the two, but my preference by far is having an open-ended amount for those very egregious cases.

CHAIRMAN HARRIS: All right. Any questions? Thank you very much. We appreciate it very much. Are there any other witnesses? Anyone else who has heard the testimony who would like to make a comment on the question of sanctions? I think we've gotten, at least from my perspective, some varying viewpoints on the question that are going to help us formulate either one or a number of pieces of legislation on the question, because we are obviously looking for tools to expedite the trial process and the civil litigation process in general. I think the ideas that have been elicited and the comments that have been made are going to help us to draft appropriate parameters in this area.

I don't have any other questions. Is there anything else, Ms. DeBow?

ASSEMBLYMAN LESLIE: Could we have just a moment for a little internal discussion? I assume that what we've been talking about this morning would come under the category, generally, of tort reform?

CHAIRMAN HARRIS: No, not really. Perhaps litigation reform or trial delay reform.

ASSEMBLYMAN LESLIE: One of our witnesses was talking about this as being a tort reform kind of thing.

MS. DeBOW: Specifically, what he was addressing was what they did their study on and what the final results were. He was with the Little Hoover Commission, right?

ASSEMBLYMAN LESLIE: Right. They were concerned about this as it related to tort reform.

MS. DeBOW: As it related to personal injury and wrongful death.

ASSEMBLYMAN LESLIE: Well, you know what I'm kind of wondering about is that last Friday, we had quite a discussion about...

CHAIRMAN HARRIS: It was on the table in terms of...

ASSEMBLYMAN LESLIE: Yes, and you know, if someone would consider this tort reform, would we have to postpone this hearing for five years?

CHAIRMAN HARRIS: We don't have to postpone it. The trial lawyers and the insurance industry and the manufacturers and doctors and 90% of the people of California would not care about it. No, I don't think it would specifically fall under that at all. I think it is much more about the process.

Mr. Friedman, do you have any more to add?

ASSEMBLYMAN FRIEDMAN: A point that didn't come up that I've become increasingly aware of is the use and abuse of sanctions and malicious prosecution actions by parties who are being sued by the various public interest entities, especially when the public interest board was performed by pro bono...

CHAIRMAN HARRIS: You have some experience in that.

ASSEMBLYMAN FRIEDMAN: Yes, I do. In fact, just yesterday, I was talking to people in my L.A. office who had involved some pro bono counsel from a major Los Angeles law firm. It was a terribly egregious case. It was in the paper this week. It was an eviction of a woman. It seems that the party in that case, who was trying to evict her -- the landlord -- is infamous. When he is involved in litigation with pro bono counsel on the other side, he invariably brings sanctions actions against them or malicious prosecution actions if they try to block whatever he's trying to do that's typically illegal. And that intimidates, and sometimes successfully, pro bono counsel because in the major law firms it creates such enormous malpractice premiums that the simple threat of being sued for malicious prosecution or sanctions chills their participation. And the fact that it could be filed would increase their premiums by tens of thousands of dollars just because they're involved in a case. A lot of these matters involve creating new law, trying to find new ways to protect innocent victims. I don't necessarily see that this is directly on point.

CHAIRMAN HARRIS: What about your sanctions point, though?

ASSEMBLYMAN FRIEDMAN: I think it's a reasonable fear. I'm not sure exactly what to do about it, but the professional bad actors can use and abuse sanctions as well as use malicious prosecution actions to intimidate pro bono counsel from acting or representing parties who otherwise would be unrepresented.

CHAIRMAN HARRIS: Ms. DeBow, have you looked at the sanctions on sanctions in terms of whether or not they've been effective in derailing or at least addressing those kinds of abuse that Mr. Friedman described?

MS. DeBOW: No, only from the comments today and having talked to a number of attorneys in this area who have mentioned that it's a problem. It's a procedural problem. It does not remedy the malpractice insurance premium problem.

CHAIRMAN HARRIS: I think we ought to address that problem because, obviously, sanctions can be misused. Okay.

Any other matter to come before the committee?

Thank you.

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October 2, 1987

The Honorable Elihu M. Harris
Assembly Committee on Judiciary
California Legislature
State Capitol
P. O. Box 942849
Sacramento, California 94249-0001

Dear Chairman Harris:

Thank you for the opportunity to appear before the Committee on September 18, 1987 to comment on the bills currently under consideration to amend Code of Civil Procedure Section 128.5. This letter will summarize my specific suggestions to the Committee to clarify Section 128.5.

1. Sanctions As A Substitution For Malicious Prosecution.

Under present wording, Section 128.5 may be employed to impose sanctions on a party, his counsel or both at the trial court conclusion if the claim, or presumably the defense, is deemed to be in bad faith and pursued frivolously or to cause unnecessary delay. Section 128.5 in this usage is a substitute for an independent action for malicious prosecution, however, the inter-relationship between Section 128.5 and malicious prosecution is not addressed by the statute. Left open by the statute and case law are the issues of whether a litigant may proceed both with a claim under Section 128.5 and a malicious prosecution action; whether a determination on the 128.5 motion is collateral estoppel with respect to a subsequent malicious prosecution action; and whether any award paid as a sanction is an offset against a subsequent successful malicious prosecution judgment.

At the hearing, Chairman Harris suggested that perhaps a litigant should be allowed to pursue either a sanctions award under Section 128.5 or malicious prosecution action but not both. That approach, in which I would concur, is already embodied in Code of Civil Procedure Section 1038. (Section 1038 was adopted in 1980, one year before the original Section 128.5.) Section 1038 applies to actions filed against the State or its political

subdivisions and provides that if the action is concluded in the State's favor by summary judgment or nonsuit, the State may make application for an award of its legal fees by showing that the action was brought without "reasonable cause" and without a "good faith belief that there was a justiciable controversy under the facts and law . . ." Section 1038(c) specifically provides as follows:

> ". . . and any party requesting the relief pursuant to this section waives any right to seek damages for malicious prosecution. Failure to make such motion shall not be deemed a waiver of the right to pursue a malicious prosecution action."

I would urge that Section 128.5 be amended consistently with Section 1038, to preclude a party who moves for sanctions under Section 128.5 for his opponent's bringing of the action from subsequently seeking recovery for the tort of malicious prosecution on the same matter.

2. The Entanglement Of Sanctions With The Merits Of The Motion.

Our discussion at the hearing also covered the fact that an application for sanctions filed in a pre-trial proceeding may divert attention away from the merits of the motion and cause the attorney resisting such an application to spend time to the detriment of the presentation on the merits of the motion. This is particularly so because Section 128.5(b)(1) as presently written provides that an application for sanctions may be noticed "in a party's moving or responding papers." The section appears to contemplate that the application for sanctions may be an "add-on" to a motion or the opposition to a motion, and, in actual practice, most sanction applications are an "add-on" to the motion or the opposition. The coupling of a substantive motion with an application for sanctions makes the opposing party not only defend on the merits but also defend his motives with the risk that merits and motives may become entangled. The filing of sanctions application, as I expressed at the hearing, also raises the specter of a conflict between the attorney and his or her client just at the time when the attorney is attempting to present the client's position.

I would suggest that Section 128.5 be amended to provide that any application for sanctions must be noticed as a separate motion and must be accompanied and supported by a statement of proposed findings justifying the requested sanctions. The requirement of a separate motion, to my mind, will reduce the number of frivolous sanctions applications filed and by requiring the enumeration of the alleged grounds for the imposition of sanctions will separate the merits of the pending motion from the attempt to censure counsel and/or client by imposing sanctions. Such a rule will also prevent the "add-on" of a sanctions application to a motion opposition, a practice which may not give the opposing party adequate opportunity to prepare and present a rebuttal to the Section 128.5 claim. California Rules of Court 317(a) provides that any opposition to a motion shall be filed not later than five days before the noticed hearing, and any reply not later than two days before. If a sanctions application is first noticed in an opposition then the party addressed by that application may not have sufficient time to present an adequate rebuttal. The rebuttal, furthermore, necessarily will be embedded in the reply memorandum submitted on the substantive motion.

Thank you again for the invitation to appear before the Committee.

Very truly yours,

Richard L. Fruin, Jr.

RLF:mg

SEI 4

The Superior Court
LOS ANGELES, CALIFORNIA 90012
CHAMBERS OF
NORMAN L. EPSTEIN, JUDGE

TELEPHONE
(213) 974-1234

September 9, 1987

Honorable Elihu M. Harris
Chairman, California Legislature
Assembly Committee on Judiciary
State Capitol
P. O. Box 942849
Sacramento, California 94249-0001

Dear Assemblyman Harris:

Thank you for inviting my review and response to the AB 493, AB 1252 and AB 1914 regarding sanctions for bad faith and frivolous actions and tactics. I respond, of course, only for myself; I do not speak for the Superior Court or any of its committees, nor of the Los Angeles County Bar Association or any of its committees or constituent groups.

That disclaimer over, let me turn to the merits.

AB 245: I think the change in Code of Civil Procedure section 128.5 proposed in this bill is well merited. If an action is taken in bad faith, it should be sufficient that it does cause unnecessary delay; it should not be necessary to establish that such delay was the only purpose of the actions or tactics.

AB 1252: I see serious problems in this bill, as now written. It would appear to restrict the present broad scope of Code of Civil Procedure section 128.5 to personal injury and wrongful death litigation. I can see no reason for excepting sanctions for frivolous motions, etc. in other cases.

I'm not sure that a restatement of "frivolous" is needed; present section 128.5 (especially if modified as proposed in AB 245) seems to be entirely adequate, and has now received a considerable case law gloss.

Finally, I note the change that deletes "reasonable expenses" as the principle measure for fees. In its place, the bill appears to authorize a kind of fine--i.e., a penalty that would more than make the moving party whole. On the other hand, a $10,000 cap would be enacted, preventing a court from making a party whole in the rare case in which expenses caused by a bad faith tactic exceed $10,000. (Such matters are rare, but I have seen them.) And it is not clear if the $10,000 is an aggregate amount for all frivolous actions by all respondents.

AB 1914: This measure appears to adopt the federal practice for state court proceedings. I think that is a good idea, although I would like to know more about how the federal rule was worked out.

I hope this is useful.

Sincerely yours,

Norman L. Epstein

NLE:pp

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Refer to file number

Writer's direct dial nur

September 18, 1987

Ms. Deborah M. DeBow
Senior Consultant
Assembly Committee on Judiciary
State Capitol
P. O. Box 942849
Sacramento, CA 94249-0001

In Re: AB 1252, AB 1914

Dear Ms. DeBow:

I write in response to the letter to me from Elihu M. Harris, Esq., Chair, Assembly Committee on the Judiciary.

I cannot be available to provide testimony on these bills. However I have a few comments that you may wish to draw to the attention of the Committee.

Although I am sympathetic to the concerns that clearly prompted these measures, I do not agree that these bills will have the positive effects that their sponsors hope to achieve. The purpose is to do something about court congestion and delay in the judicial system. As you know, provisions for sanctions for bad faith activities already exist in both the state and the federal systems. The results of the imposition of such sanctions has been almost uniformly discouraging.

I commend to the attention of the Committee the sophisticated study by the Rand Institute for Civil Justice, "Managing the Unmanageable: A History of Civil Delay in the Los Angeles Superior Court," especially at pages 73-89 (1984). The documented conclusion of that study is as follows:

> "Yet despite the Court's determined efforts in this regard in its faith that some of these procedures will result in a long-term reduction in delay, we have found no such long-term effect on the time-to-trial figures as a result of their imposition. As with the addition of judicial manpower, the imposition of these procedures could well have prevented or tempered subsequent increases in delay... but overall, the wait-to-trial continued upward in the Los Angeles Superior Court, particularly since the mid-1930's."

The underlying assumption of sanction rules and statutes is that congestion and delay are at least partially caused by dilatory lawyers and by the filing of frivolous lawsuits. Some lawyers are dilatory and some lawsuits are frivolous, but the amount of litigation engendered by such practices is a trivial part of the caseload. As the Rand Institute study makes indelibly clear the basic problem is that as the population has escalated in the major urban centers of California, the demand for judicial services has exceeded the supply. When the problem is traffic jams on a freeway, it does not speed up the traffic to make cars move up faster on the on-ramp. No matter how well intentioned proposals for sanctions have been (and they have always been well intentioned), the end product is to increase the amount of judicial time that must be spent per case to administer a sanctions program and since judicial time is the scarcest resource, the results are usually contrary to the draftmen's intent. Moreover, it is undeniable that imposing sanctions on lawyers increases the cost of delivery of legal services.

I am opposed to these bills because, in my opinion, the result will be to increase, rather than decrease, congestion and delay in the California courts.

Sincerely,

Shirley M. Hufstedler

SMH:sh

JOHN B HOOK
RONALD E MALLEN*
HOWARD M GARFIELD
JOSEPH P McMONIGLE
DONALD W CARLSON
DAVID W EVANS
MARSHA L MORROW
BARRY D BROWN
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LOS ANGELES, CA 90024

September 9, 1987

Ms. Deborah M. DeBow
Senior Consultant
Assembly Committee on Judiciary
State Capitol
Post Office Box 942849
Sacramento, California 94249-0001

Dear Ms. DeBow:

Chairman Harris, by his letter of 1 September, requested my comments on Assembly Bills Numbers 245, 1252 and 1914. I write in my capacity as an individual lawyer, not as a member of my firm. My background is as a lawyer who specializes in the field of legal malpractice and professional responsibility. I am the author of a treatise, Legal Malpractice, which will be published in the third edition by West Publishing within the next few months. I have also been Chairman of the ABA Standing Committee on Laywers' Professional Liability and am a present member of the Standing Committee on Lawyer Competence. Thus, in my practice and professional activities, I have become very familiar with the subject of attorney sanctions. I will not be available, however, for the interim hearing on the 18th of September.

I enclose as a research source, and not for republication because of the restricted copyright, draft materials of Sections 69.1-69.5, which will appear as part of the third edition of Legal Malpractice. The principal focus of the materials concerns the rapidly developing and confused application of Federal Rule 11. The federal court experience in the sanctions area proceeds upon the premise that the sanction power is salutory by eliminating unmeritorious and unreasonable claims, procedures and tactics. There has been a literal flood of litigation concerning the interpretation of Rule 11. For the lawyers, the uncertainty has created concern and risk since difference rules have been applied in different circuits.

There are many unanswered questions, such as the degree to which lawyers can continue to rely upon their clients for facts and whether they can trust what clients say.

A major justification for Rule 11 is the perception that the poor quality of claims and tactical activities can be controlled by imposing sanctions upon lawyers. Those sanctions have been very substantial and are typically not covered by lawyers' professional liability insurance. The countervailing concerns are twofold. First is the cost of sanctions to the legal profession. Second is the concern that lawyers' reaction to the threat of sanctions will be not to pursue otherwise meritorious claims or approaches out of personal concern. Unfortunately, we are still years away in terms of experience from being able to evaluate the impact of the countervailing justifications and concerns. A reality, however, is that whatever litigation or tactics have been deterred by sanctions, there has been a substantial replacement with litigation over the propriety and meaning of those sanctions.

The California experience has been relatively minimal. Code of Civil Procedure Section 128.5 has focused upon a subjective standard which requires the presence of bad faith or a total lack of merit. Thus, as a deterrent, Section 128.5 has dealt essentially with the most blatant abuses. If the purpose of Section 128.5 is to improve the quality of claims and litigation, then it has failed. If the sole purpose is to deal with extreme abuses, then Code of Civil Procedure Section 128.5 has served that purpose.

In reviewing the three proposed pieces of legislation, I comment as follows. I address first Assembly Bill Number 1252 because, in my opinion, it is the most inappropriate piece of legislation. First, for reasons not explained, the legislation is limited to "personal injury or death" actions. There is much litigation involving contracts and economic issues which seem meaningless to exclude from the ambit of the proposal. The $10,000 limit is arbitrary and does not appear to have a counterpart in any other legislation I have seen in the

United States. Subdivision (c) is illogical. Although Subdivision (a) talks about "frivolous claims or defenses," Subdivision (c) requires a finding that "the entire case or defense" was frivolous. Thus, while the statute purports to provide sanctions for a frivolous claim, sanctions cannot lie unless the entire case was frivolous. The provisions are not only inconsistent but illogical. Injury caused by a frivolous, coercive claim or a singular defense exists regardless of whether the entire proceeding is or is not meritorious. In my opinion, Assembly Bill Number 1252 is inappropriate and so inartfully drafted as to likely engender significant litigation regarding its meaning.

Assembly Bill Number 245 is an evolutionary refinement of Section 128.5. It appears to sharpen the statute's application by no longer requiring that the wrongful actions be solely intended to cause delay but merely cause delay. I see the change as minor both in legal effect and practical impact.

Assembly Bill Number 1914 adds Code of Civil Procedure Section 447, which brings into play a California counterpart of Rule 11. If AB 1914 were adopted, then Code of Civil Procedure Section 128.5 would be redundant, perhaps inconsistent, and create confusion which would warrant the repeal of that section. On the positive side, the construction of Section 447 would be aided by a huge body of federal law on Rule 11. The California experience would then follow the federal courts, with the first consequence being the frequent application of the sanction rules, followed by a great increase in appellate review.

In summary, my opinion is that Code of Civil Procedure Section 128.5 has had minimal impact upon the practice of law or the nature of litigation in California since it is designed to deal only with blatant abuses. In contrast, Rule 11 and the proposed comparable legislation in California is likely to have significant impact upon the quality of litigation and the style and cost of the practice of law. The unresolved issue remains whether the benefits of a Rule 11 approach outweigh the adverse

consequences. As a short-term solution, Rule 11 does appear to achieve salutory objectives. I remain uncertain about the long-term effects.

I will be out of the country until the 28th of September. If I can be of further assistance, please advise.

Sincerely,

Ronald E. Mallen

REM/dap
Enclosures
cc: Elihu M., Harris

Superior Court of the State of California

COUNTY OF SACRAMENTO
SACRAMENTO, CALIFORNIA 95814
Roger K. Warren, Judge

September 15, 1987

Honorable Elihu M. Harris
Chairman, Assembly Committee on Judiciary
State Capitol
Post Office Box 942849
Sacramento, California 94249-0001

Attention: Ms. Deborah M. DeBow, Senior Consultant

Re: Interim Hearing on Attorney Sanctions;
AB 245 (Harris), AB 1252 (Zeltner), and
AB 1914 (Harris)

Dear Assemblyman Harris:

The California Judges Association (CJA) supports the changes in the law of sanctions proposed in Assembly Bill 245 (Harris) and Assembly Bill 1914 (Harris). CJA believes that such legislation will enhance the ability of the courts to regulate improper conduct of parties and counsel.

CJA opposes Assembly Bill 1252 (Zeltner). The bill repeals the existing provisions of Code of Civil Procedure section 128.5, which is the principal statutory basis for attorney sanctions in non-discovery matters. Inexplicably, the proposed Section 128.5 would apply only in actions for personal injury or death.

CJA's Civil Law and Procedure Committee will be meeting in Los Angeles on September 22. Noting your solicitation from us of written legislative proposals consistent with the intent of the three pending bills, I will communicate any further comments or proposals on the subject to the Assembly Committee as shortly thereafter as possible.

Thank you very much for soliciting our views on this subject.

Very truly yours,

ROGER K. WARREN, Chair
California Judges Association
Committee on Civil Law and Procedure

RKW/nsv

CALIFORNIA LEGISLATURE
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SUBCOMMITTEE ON
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1100 J STREET, FIFTH FLO
SACRAMENTO, CA 9581
LLOYD CONNELLY
CHAIRMAN

STAFF
GENE ERBIN
COUNSEL
ROSEMARY SANCHEZ
SECRETARY

Agenda

Public Hearing
on
Sanctions Against Attorneys and Parties
for Frivolous and Bad Faith
Actions or Tactics

Friday, September 18, 1987
9:15 a.m. to 1:00 p.m
The Beverly Hilton Hotel
The Royal Suite
9876 Wilshire Boulevard
Beverly Hills, CA

9:15 Opening Comments by the Chair and Committee Members

9:30 Howard Dickstein
Kanter, Merin, Dickstein, & Kirk
Sacramento, CA
General Counsel for "Little Hoover" Commission

10:00 Richard L. Fruin, Jr.
Lawler, Felix & Hall
Los Angeles, CA
Author of articles relating to sanctions.

10:30 Lynne Yates-Carter
Attorney at Law
San Jose, CA
Legislative Coordinator, Family Law Section
State Bar of California

CALIFORNIA LEGISLATURE
Assembly Committee
on
Judiciary
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1100 J STREET, FIFTH FLC
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CHAIRMAN

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SECRETARY

MEMORANDUM

TO: INTERESTED PERSONS

FROM: Elihu M. Harris, Chair
Assembly Committee on Judiciary

DATE: September 15, 1987

RE: Interim Hearing on Attorney Sanctions
State Bar Convention

Friday, September 18, 1987
9:15 a.m. to 1:00 p.m.
The Beverly Hilton Hotel
The Royal Suite
9876 Wilshire Boulevard
Beverly Hills, CA

Enclosed is the informational packet for the Interim Hearing on September 18, 1987.

We will be addressing issues presented in AB 245 (Harris), AB 1252 (Zeltner), and AB 1914 (Harris) pertaining to sanctions against attorneys and parties for frivolous and bad faith actions or tactics.

Included in the packet for purposes of comparison are SB 379 (Presley), which limits the provisions also contained in AB 1914 to a 5-year pilot project to commence in Riverside and San Bernardino Counties, and SB 379 (Ellis), chaptered in 1985, which amended the sanction provisions contained in the Code of Civil Procedure Section 128.5 (see AB 245). The packet also contains correspondence and other relevant information to facilitate discussion at the hearing.

We have solicited for the purposes of discussion at this hearing (a) written legislative proposals consistent with the intent of

the pending bills; (b) persons with expertise in the area of attorney sanctions who are interested in responding critically to the pending bills and/or any written legislative proposals; and (c) other written materials, articles, or comments with regards to the pending legislation or general area of attorney sanctions.

Please direct questions to: Deborah M. DeBow, Senior Consultant, Assembly Committee on Judiciary, State Capitol, P.O. Box 942849, Sacramento, California, 94249-0001, (916) 445-4560.

EMH:mea

§ 128.5. [Payment of expenses attributable to bad faith actions or frivolous or delaying tactics] (a) Every trial court may order a party, the party's attorney, or both to pay any reasonable expenses, including attorney's fees, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay. This section also applies to judicial arbitration proceedings under Chapter 2.5 (commencing with Section 1141.10) of Title 3 of Part 3.

(b) For purposes of this section:

(1) "Actions or tactics" include, but are not limited to, the making or opposing of motions or the filing and service of a complaint or cross-complaint. The mere filing of a complaint without service thereof on an opposing party does not constitute "actions or tactics" for purposes of this section.

(2) "Frivolous" means (A) totally and completely without merit or (B) for the sole purpose of harassing an opposing party.

(c) Expenses pursuant to this section shall not be imposed except on notice contained in a party's moving or responding papers; or the court's own motion, after notice and opportunity to be heard. An order imposing expenses shall be in writing and shall recite in detail the conduct or circumstances justifying the order.

(d) The liability imposed by this section is in addition to any other liability imposed by law for acts or omissions within the purview of this section. Amended Stats 1985 ch 296

§ 177. Powers of judicial officers as to conduct of proceedings. Every judicial officer shall have power:

1. To preserve and enforce order in his immediate presence, and in proceedings before him, when he is engaged in the performance of official duty;

2. To compel obedience to his lawful orders as provided in this code;

3. To compel the attendance of persons to testify in a proceeding before him, in the cases and manner provided in this code;

4. To administer oaths to persons in a proceeding pending before him, and in all other cases where it may be necessary in the exercise of his powers and duties. [1872; 1880 ch 35 § 1.] *Cal Jur 3d Affidavits and Declarations Under Penalty of Perjury § 10, Evidence § 405; Witkin Procedure (3d) Courts §§ 137, 138.*

§ 177.5. [Power to impose sanctions for violations of lawful orders] A judicial officer shall have the power to impose reasonable money sanctions, not to exceed fifteen hundred dollars ($1,500), notwithstanding any other provision of law, payable to the county in which the judicial officer is located, for any violation of a lawful court order by a person, done without good cause or substantial justification. This power shall not apply to advocacy of counsel before the court. For the purposes of this section, the term "person" includes a witness, a party, a party's attorney, or both.

Sanctions pursuant to this section shall not be imposed except on notice contained in a party's moving or responding papers; or on the court's own motion, after notice and opportunity to be heard. An order imposing sanctions shall be in writing and shall recite in detail the conduct or circumstances justifying the order. [1982 ch 1564 § 1.] *Witkin Procedure (3d) Courts § 141; Trial § 67.*

§ 178. [Power] to punish for contempt. For the effectual exercise of the powers conferred by the last section, a judicial officer may punish for contempt in the cases provided in this code. [1872; 1880 ch 35 § 1.] *14 Cal Jur 3d Contempt § 4.*

§ 907. [Costs on frivolous or delaying appeal.] When it appears to the reviewing court that the appeal was frivolous or taken solely for delay, it may add to the costs on appeal such damages as may be just. [1968 ch 385 § 2; former § 907 repealed 1933 ch 744 § 198.] *Cal Jur 3d Appellate Review §§ 581, 601, 680, 705; Cal Practice Rev Ch 53 Planning After Trial; Cal Practice § 61:2; Witkin Procedure (3d) Appeal §§ 18, 532, 533, 535.*

DESCRIPTORS	Existing CCP 128.5 and AB 245 (Harris)	ISSUES	AB 1252 (Zeltner)	ISSUES	AB 1914 (Harris) and *SB 379 (Presley)	ISSUES
1) Code section impacted:	CCP 128.5 amended.		CCP 128.5 amended to add:		CCP 447 added.	
2) Civil penalty:	Unspecified.		Up to $10,000 penalty.		"Appropriate sanction" Penalty unspecified.	
3) Civil sanction:	Reasonable expenses including attorney fees.	Should there be a penalty in excess of expenses?	Attorney fees & costs.		Reasonable expenses, including attorney fees.	
4) Sanction imposed against:	Party, attorney or both.		Attorney or party.		Attorney or party.	
5) Types of cases sanction is applicable:	All actions including arbitration.		Personal injury/wrongful death		All actions.	
6) Conditions for applying sanction:	Bad faith actions or tactics that are frivolous or that are solely intended to cause unnecessary delay. AB 245 deletes "solely intended" so as to permit sanctions to be imposed when an action or tactic causes unnecessary delay.	Should this provision read "not done in good faith"? Are "delay" provisions too broad? Should statute need "intent"? Should statute retain "solely intended" to cause delay?	Frivolous motions or asserting frivolous claims or defenses or causing unnecessary delay.	Unclear if complaints are included.	Pleading, motions or other paper signed certified after reasonable inquiry, that it is well-grounded in fact and warranted by existing law or a good faith argument for extension/modification or reversal of existing law and not interposed for improper purpose.	

DESCRIPTORS	Existing CCP 128.5 and AB 245 (Harris)	ISSUES	AB 1252 (Zeltner)	ISSUES	AB 1914 (Harris) and *SB 379 (Presley)	ISSUES
7) Definitions for application of sanctions:	Actions/tactics defined as making/opposing motions or filing & service of complaint & cross-complaint. Frivolous defined as totally & completely without merit or for sole purpose of harass.		Defines frivolous motion, claim or defense as: a) made in bad faith either for prolonging or delaying litigation and to harass another party, or, b) made without any reasonable basis in law or fact and lacking any good faith argument for an extension, modification or reversal of existing law.	Should not "and" be "or"?	Specifies improper purpose as: to harass or cause unnecessary delay or needless increase in cost. Failure to certify requires striking of the motion or other paper. Certified in violation subjects party or attorney to sanctions.	
8) When sanction may be imposed:	Specifies hearing upon notice. Requires order to specify conduct.		Court may assess sanctions at the time it rules on motion, claim or defense or at time of judgment, if it finds entire case or defense was frivolous.		No indication as to when court assesses sanction.	Should not the requirement of notice and hearing on the motion be specified in the statute.
9) Other:						

Comments: When a party could have set a motion in 21 days but sets it in six weeks, should sanctions be available?

If both parties act together to delay a case, should the court have the power to impose sanctions on both parties? Who is to receive the proceeds from the sanction in this situation?

*1987 - to enrollment.

LEGISLATIVE HISTORY

The Legislature added Code of Civil Procedure Section 128.5 (CCP 128.5) in 1981 to give trial court judges the power to impose sanctions against attorneys who pursue bad faith tactics or actions which are frivolous or which cause unnecessary delay.

The courts [Baugess v. Paine (1978) 22 3d 626] determined that the power to assess sanctions was not an inherent power of the court.

Proponents of the original bill (SB 947) asserted that frivolous motions consumed court time and increased litigation costs. Opponents feared that such ability to sanction would inhibit the proper advocacy by counsel.

In 1984, CCP 128.5 was amended to apply to arbitration proceedings. (AB 2752)

The 1985 amendments (SB 379) to CCP 128.5 recast the basis for imposing sanctions and defined "actions or tactics" and "frivolous." The application of CCP 128.5 to the filing and service of a complaint or cross-complaint was specified.

Senate Bill No. 947

CHAPTER 762

An act to add Section 128.5 to the Code of Civil Procedure, relating to courts.

[Approved by Governor September 24, 1981. Filed with Secretary of State September 25, 1981.]

LEGISLATIVE COUNSEL'S DIGEST

SB 947, Davis. Courts.

Existing law does not authorize a trial court, except in limited, expressly authorized situations, to award expenses, including attorney's fees, as a sanction.

This bill would authorize a trial court to require a party or the party's attorney, or both, to pay any reasonable expenses incurred by another party as a result of tactics or actions not based on good faith which are frivolous or cause unnecessary delay, as specified.

The people of the State of California do enact as follows:

SECTION 1. Section 128.5 is added to the Code of Civil Procedure, to read:

128.5. (a) Every trial court shall have the power to order a party or the party's attorney, or both, to pay any reasonable expenses, including attorney's fees, incurred by another party as a result of tactics or actions not based on good faith which are frivolous or which cause unnecessary delay. Frivolous actions or delaying tactics include, but are not limited to, making or opposing motions without good faith.

(b) Expenses pursuant to this section shall not be imposed except on notice contained in a party's moving or responding papers; or the court's own motion, after notice and opportunity to be heard. An order imposing expenses shall be in writing and shall recite in detail the conduct or circumstances justifying the order.

SEC. 2. It is the intent of this legislation to broaden the powers of trial courts to manage their calendars and provide for the expeditious processing of civil actions by authorizing monetary sanctions now not presently authorized by the interpretation of the law in Baugess v. Paine (1978), 22 Cal. 3d 626.

O

ASSEMBLY COMMITTEE ON JUDICIARY
ELIHU M. HARRIS, Chairman

Prepared by
R. LeBov

BILL: SB 947
(As amended 8/18/81)

HEARING DATE: 8/26/81
SEN. JUD. COMM. VOTE: (5-0)
SENATE FLOOR VOTE: (31-0)

AUTHOR: Davis

SUBJECT:

This bill is intended to give trial courts the statutory authority to award attorneys' fees as sanctions.

ANALYSIS:

The California Supreme Court has held that, pursuant to its supervisory power, a trial court may "take appropriate action to secure compliance with its orders, to punish contempt, and to control its proceedings" but that, absent statutory authority, a court may not award attorneys' fees as a sanction under its supervisory power. [Baugess v Paine, 22 Cal. 3d 626 (1978)]

This bill would authorize a trial court to require a party or the party's attorney, or both, to pay any reasonable expenses, including attorneys' fees, incurred by another party as a result of tactics or actions not based on good faith which are frivolous or which cause unnecessary delay.

STAFF COMMENTARY:

1. In Bauguess, the Supreme Court held that if trial courts had "the inherent power to impose sanctions in the form of attorney's fees for alleged misconduct, trial courts would be given a power without procedural limits and potentially subject to abuse." The court cited Young v Redman (55 Cal. App. 3d 827) in which the Court of Appeal observed that "such power in the trial court, unfettered and unbridled, without appropriate safeguards and guidelines could cancel

(CONTINUED)

any benefits derived to the judicial process by generating a proliferation of appeals" and that therefore "[Any] power of the trial court to impose such sanctions should be created by the legislative branch of government with appropriate safeguards and guidelines developed following a thorough indepth investigation." Does this bill contain such appropriate safeguards and guidelines or is it potentially subject to abuse?

2. Judge Weil of the Los Angeles Superior Court states that his court's "law and motion departments are cluttered up with (frivolous) motions that consume vasts amounts of judicial time and require unnecessary and espensive appearances to be made by lawyers resisting these motions." He therefore urges enactment of this bill in order to "empower the trial court judge to impose sanctions in the form of attorneys' fees in favor of parties who must resist frivolous motions brought solely for the purpose of delay.

3. Opponents of this bill fear that authorizing trial courts to award attorneys' fees as a sanction could imperil the independence of the bar and inhibit zealous advocacy by counsel. In this regard the American Civil Liberties Union points out that raising all possible motions is part of an attorney's responsibility of serving his or her client. The ACLU further states that "Determination as to whether a motion is frivolous is subject to abuse of judicial discretion. If a motion has been denied, a judge might be more susceptible to a determination that such a motion was frivolous. Furthermore, some attorneys might be inclined to use motions for sanctions as a delaying tactic.

"In many instances, judges already have the discretion to grant or deny hearings on motions. Where it is determined that a motion is frivolous, the judge is free to deny the hearing. Attorneys also may bring motions for sanctions now. If the motions have merit, sanctions can be awarded."

ASSEMBLY BILL No. 2752

Introduced by Assembly Member Harris

February 7, 1984

An act to amend Section 128.5 of the Code of Civil Procedure, relating to judicial arbitration.

LEGISLATIVE COUNSEL'S DIGEST

AB 2752, as introduced, Harris. Judicial arbitration.

Existing law authorizes a trial court to require a party or the party's attorney, or both, to pay any reasonable expenses incurred by another party as a result of tactics or actions not based on good faith which are frivolous or cause unnecessary delay, as specified.

This bill would make those provisions also applicable in judicial arbitration proceedings.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Section 128.5 of the Code of Civil Procedure is amended to read:

128.5. (a) Every trial court shall have the power to order a party or the party's attorney, or both, to pay any reasonable expenses, including attorney's fees, incurred by another party as a result of tactics or actions not based on good faith which are frivolous or which cause unnecessary delay. Frivolous actions or delaying tactics include, but are not limited to, making or opposing motions without good faith. *This section also applies to judicial arbitration proceedings under Chapter 2.5 (commencing with Section 1141.10) of Title 3 of Part 3.*

(b) Expenses pursuant to this section shall not be imposed except on notice contained in a party's moving or responding papers; or the court's own motion, after notice and opportunity to be heard. An order imposing expenses shall be in writing and shall recite in detail the conduct or circumstances justifying the order.

O

AB 2752 (Harris) As introduced 02/07/84

SUBJECT

This bill is intended to permit the imposition of costs and attorneys' fees when frivolous actions or delaying tactics are used in judicial arbitration.

DIGEST

Existing law authorizes a trial court to require a party or the party's attorney or both to pay reasonable expenses, including attorneys' fees, incurred by another party as a result of tactics or actions, not based on good faith, which are frivolous or which cause unnecessary delay.

This bill would specifically provide that the provisions authorizing imposition of reasonable expenses and attorneys' fees for frivolous acts or delaying would apply to judicial arbitration proceedings.

STAFF COMMENTS

1. The State Bar and the Judicial Council are joint sponsors of this bill. It is their position that some parties are abusing the judicial arbitration process by either failing to participate in the hearings or by utilizing delaying tactics during the arbitration proceedings. The sources suggest that such conduct defeats the purpose of judicial arbitration (i.e. expeditious resolution of the case).

   While the sources suggest that a court currently may have the power to impose the sanctions authorized by Code of Civil Procedure Section 128.5 for dilatory tactics used in judicial arbitration, they believe that this bill is necessary to remove all doubt.

3. This bill would specifically authorize a court to impose costs, including an opponent's attorneys' fees, against a party or the party's attorney, for tactics or actions used in arbitration proceedings which are not based on good faith and are frivolous or cause unnecessary delay. However, these sections may not be imposed unless the affected party has been given notice and an opportunity to be heard. Further, the order imposing the sanction must be in writing and recite in detail the conduct or circumstances justifying the order.

(CONTINUED)

2. The courts have held that despite a party's wilful refusal to appear at an arbitration proceeding, that party has an established right to a trial de novo (or court trial) after the arbitration award has been filed. (See Herbert v Hain, 153 Ca.App.3d 465 (1982). This bill, contends the sources, may "ameliorate the unfairness" that results when a party requests a trial de novo after failing to appear and participate in a judicial arbitration hearing. The bill, argue the sources, would permit a court to force the party who fails to appear at arbitration hearings to bear the burden of costs and attorneys' fees incurred by the party who attended and prevailed at the hearing.

SOURCE

State Bar of California
Judicial Council

SUPPORT

Cal-Tax

OPPOSITION

Unknown

Senate Bill No. 379

CHAPTER 296

An act to amend Section 128.5 of the Code of Civil Procedure, relating to civil actions.

[Approved by Governor July 26, 1985. Filed with Secretary of State July 29, 1985.]

LEGISLATIVE COUNSEL'S DIGEST

SB 379, Ellis. Sanctions for bad-faith judicial actions.

Existing law authorizes a trial court to require a party, the party's attorney, or both to pay any reasonable expenses incurred by another party as a result of tactics or actions not based on good faith which are frivolous or cause unnecessary delay, as specified. Existing law also provides separate actions for abuse of judicial process and malicious prosecution.

This bill would revise the above provisions for award of expenses by making these provisions applicable to bad-faith tactics or actions which are intended to cause unnecessary delay or are employed solely to harass an opposing party or are totally and completely without merit, rather than tactics or actions which cause unnecessary delay. The bill would define "actions and tactics" to include, but not be limited to, the making or opposing of motions and the filing and service of a complaint or cross-complaint. "Actions and tactics" would not include the mere filing of a complaint without service upon an opposing party.

The people of the State of California do enact as follows:

SECTION 1. Section 128.5 of the Code of Civil Procedure is amended to read:

128.5. (a) Every trial court may order a party, the party's attorney, or both to pay any reasonable expenses, including attorney's fees, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay. This section also applies to judicial arbitration proceedings under Chapter 2.5 (commencing with Section 1141.10) of Title 3 of Part 3.

(b) For purposes of this section:

(1) "Actions or tactics" include, but are not limited to, the making or opposing of motions or the filing and service of a complaint or cross-complaint. The mere filing of a complaint without service thereof on an opposing party does not constitute "actions or tactics" for purposes of this section.

(2) "Frivolous" means (A) totally and completely without merit or (B) for the sole purpose of harassing an opposing party.

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(c) Expenses pursuant to this section shall not be imposed except on notice contained in a party's moving or responding papers; or the court's own motion, after notice and opportunity to be heard. An order imposing expenses shall be in writing and shall recite in detail the conduct or circumstances justifying the order.

(d) The liability imposed by this section is in addition to any other liability imposed by law for acts or omissions within the purview of this section.

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ASSEMBLY COMMITTEE ON JUDICIARY
ELIHU M. HARRIS, Chairman

SB 379 (Ellis) - As Amended: June 20, 1985

PRIOR ACTION

Sen. Jud. Com. 7-0 Sen. Floor 38-0

SUBJECT: This bill revises the authority of a court to impose sanctions for tactics or actions which are not done in good faith and are frivolous or cause delay.

DIGEST

Existing law authorizes a trial court to require a party, the party's attorney, or both to pay reasonable expenses incurred by another party as a result of tactics or actions not based on good faith, which are frivolous or cause unnecessary delay.

Existing law also provides separate actions for abuse of judicial process and malicious prosecution, and grants courts the power to impose contempt sanctions for the misconduct of attorneys or parties.

This bill:

1) Deletes the statutory language which permits an award of expenses resulting from tactics or actions not based on good faith which cause unnecessary delay;

2) Authorizes an award of expenses resulting from tactics or actions brought in bad faith which are solely intended to cause unnecessary delay;

3) Defines actions and tactics as including the filing and serving of a complaint or cross-complaint, but excludes a complaint or cross-complaint filed but not served;

4) Defines a frivolous action or tactic as one brought solely to harass or which is totally and completely without merit.

FISCAL EFFECT

None

- continued -

COMMENTS

1. The existing statute, Code of Civil Procedure (CCP) Section 128.5, does:

   (a) Not specify that sanctions may be imposed by the trial court for filing of a frivolous complaint or cross-complaint or for filing a complaint or cross-complaint which causes unnecessary delay.

   (b) Not specifically permit imposition of a penalty for tactics, actions, or the filing of a complaint/cross-complaint which may be intended to cause delay but, in fact, causes no delay.

   (c) Permit imposition of a penalty for tactics or actions, not based on good faith, which cause unnecessary delay.

   (d) Specify that reimbursement may be ordered by the trial court for reasonable expenses incurred in defending against tactics or actions which are frivolous and not based on good faith.

2. According to the sponsor, this bill is needed to deter a party and/or attorney from filing frivolous complaints or cross-complaints. It is argued that when such conduct is in bad faith, the party and/or attorney perpetrating the conduct should be liable for any reasonable expenses (e.g., attorneys' fees) incurred by the other party.

   Proponents state that there are limited remedies for bogus complaints. The pursuit of a malicious prosecution action, although an available remedy, is costly, time-consuming, subject to a difficult standard of proof for damages, and emotionally traumatic to the plaintiff. Further, it may be difficult to locate an attorney willing to pursue a malicious prosecution action. Usually the plaintiff merely desires to be reimbursed his/her expenses incurred in defending against the underlying unmeritorious complaint, which this bill would permit.

3. Current provisions of law provide both courts and parties alternative methods of redress in instances of deliberate malfeasance. Causes of action are available, such as malicious prosecution and abuse of process, which have evolved standards to preserve and protect a person's right to access to the courts, while permitting another to collect damages for abuse and misuse of the litigation process. Alternatively, courts have discretion to impose contempt sanctions for misconduct of an attorney or party.

5. The statute currently uses the standard of "not based on good faith" in determining the appropriateness for awarding expenses. This standard is undefined, broad and vague. Thus, this bill requires that such tactics or

- continued -

actions must be found to be done in bad faith prior to the imposition of sanctions. Such amendment would likely reduce the chilling effect on parties who wish to exercise appropriate litigation rights.

This bill also defines frivolous actions or tactics to be those which are brought solely to harass the opposing party or which are totally and completely without merit.

The "bad faith" standard and definition of frivolous are consistent with case law interpreting Code of Civil Procedure Section 907, which assesses sanctions for frivolous appeals. In In re Marriage of Flaherty (1982) 31 Cal.3d 637, the California Supreme Court disallowed the sanctions that the court of appeal had imposed on an attorney under Code of Civil Procedure Section 907 and Rule 26(a) for pursuing a frivolous appeal. The Supreme Court pointed out that there was no clear definition of the concept "frivolous." The court suggested that a carefully framed definition, "surrounded by procedural protections and sparingly applied...can serve the important purpose of penalizing the most egregious conduct without deterring valid appellate claims." The court further stated that "an appeal should be held to be frivolous only when it is prosecuted for an improper motive-to harass the respondent or delay the effect of an adverse judgment or when it indisputably has no merit..."

The court in Atchison, Topeka and Santa Fe Ry. Co. v. Stockton Port Dist. (1983) 140 Cal.App.3d 111, 116, stated: "The fact that an action is determined to be 'without merit' does not, a fortiori, place it in the category of frivolous...Obviously, where an action is initiated for an improper motive, or a party knows or should know the facts or law or both preclude the action or any recovery, yet prosecutes the action in any event, the question of a frivolous action is raised...The Legislature did not intend, however, to chill the valid assertion of a litigant's rights against a public entity or any other defendant. For this reason, it is clear sanctions should not be imposed except in the clearest of cases." (Citing Flaherty)

6. This bill also authorizes the court to impose sanctions upon the filing and serving of a complaint or cross-complaint which was solely intended to cause delay. The mere filing of a complaint or cross-complaint (e.g., to protect the statute of limitations), without service of the complaint or cross-complaint, will not subject such party to sanctions under Civil Procedure Code Section 128.5.

However, the discovery statutes restrict commencement of discovery (e.g., interrogatories, depositions, subpoenas) until after service of the complaint, thus limiting plaintiff's ability to investigate and to determine the merit of a claim.

- continued -

7. Although taking no position on this bill, the Attorney General notes that:

> The potential effect of these changes is not clear. Current law allows sanctions for actions and tactics which either cause unnecessary delay or are frivolous: the bill would apparently delete the possibility of sanctions where unnecessary delay was in fact caused, and allow them only if delay was intended. As phrased, a court thus would apparently have no power to order sanctions where unintentional unnecessary delay was in fact caused.
>
> Moreover, the bill would require a judge to determine the subjective purpose of a party, rather than determining only the effect of the action or tactic; it thus may in practice lessen the possibility of sanctions, since subjective intent is difficult to prove. Actual delay is at least objectively recognizable. In addition, any action or tactic which is intended to cause unnecessary delay probably is already subject to sanction as "frivolous," and it is difficult to see what the new language adds.

Support	Opposition
County Supervisors Association of California	American Civil Liberties Union

ACLU
AMERICAN CIVIL LIBERTIES UNION
CALIFORNIA LEGISLATIVE OFFICE
1127 11th Street, Suite 602 □
Sacramento, California 95814
Telephone (916) 442-1036 □

June 10, 1985

Members
Assembly Judiciary Committee
State Capitol Building
Sacramento, California 95814

Re: SB 379 (Amended) -
Oppose

Dear Members:

Please be advised that the ACLU opposes SB 379 which seeks to expand the grounds upon which an attorney or party may be sanctioned for bad faith in civil proceedings.

The current provisions of law provide both courts and parties adequate methods of redress in instances of deliberate malfeasance. However, the additional authority proposed in SB 379 would authorize the levying of what are essentially punitive damages against a party or counsel for the filing of a civil complaint or cross-complaint. Such action by counsel may be appropriate and to act otherwise may constitute actionable malpractice. Particularly in cases of police abuse, both civil and criminal defense counsel may be dissuaded from fully representing a client's interests.

In its present form, SB 379 allows for an award of punitive damages where tactics or actions "are intended to cause unnecessary delay". This standard is vague and may include through its overbreadth actions which lead to postponements that are entirely justified on the basis of the facts and circumstances of a particular case. The proposed rule would also allow opposing counsel to 'second guess' the moving party. It is not clear whether this bill would allow opposing counsel to challenge a delay that had been granted or that had been denied before or after the actual trial proceeding. We are also concerned that because of the intent standard, an attorney may be required to divulge information and strategy that could not otherwise be required for disclosure because of work-product rules.

We feel that such precedent is both dangerous and unnecessary. The proposed rule may discourage attorneys from accepting cases that may require the filing of complaints and cross-complaints. And, it would also penalize those who acted at the direction of a client with a bona fide belief that the filing of such an action was appropriate and necessary to gain legal redress.

Daphne L. Macklin, Legislative Advocate • Marjorie C. Swartz, Legislative Advocate • Rita M. Egri, Legislative Assistant
ACLU of Northern California • Dorothy M. Ehrlich, Executive Director
1663 Mission Street, Suite 460•San Francisco, 94103•(415)621-2493
ACLU of Southern California • Ramona Ripston, Executive Director
633 South Shatto Place • Los Angeles, 90005 • (213) 487-1720

Given these concerns, we see no basis for amending the current law and urge that you vote against this proposal.

Respectfully,

DAPHNE L. MACKLIN
Legislative Advocate

MARJORIE C. SWARTZ
Legislative Advocate

cc: Consultant, Assembly Judiciary Committee
Senator Jim Ellis

BILL NO.: SB 379 ANALYST: Richard C. Jacobs

AUTHOR: Ellis DATE: April 18, 1985

DATE LAST AMENDED: April 10, 1985 PHONE: (8) 597-0285

Re: SB 379

1. Analysis

Code of Civil Procedure section 128.5 now provides that trial courts have the power to order a party or the party's attorney to pay the opposing party's reasonable expenses, including attorney's fees, incurred as a result of tactics or actions, not taken in good faith, which are frivolous or which cause unnecessary delay.

This bill would amend section 128.5 in two ways. It first would allow a court to make the specified award not for tactics or actions which caused unnecessary delay, but for those which were "intended" to cause unnecessary delay; second, the bill would specifically include the filing of a civil complaint or cross-complaint in bad faith as a possible ground for an award of expenses.

The potential effect of these changes is not clear. Current law allows sanctions for actions and tactics which either cause unnecessary delay or are frivolous: the bill would apparently delete the possibility of sanctions where unnecessary delay was in-fact caused, and allow them only if delay was intended. As phrased, a court thus would apparently have no power to order sanctions where unintentional unnecessary delay was in fact caused.

Moreover, the bill would require a judge to determine the subjective purpose of a party, rather than determining only the effect of the action or tactic; it thus may in practice lessen the possibility of sanctions, since subjective intent is difficult to prove. Actual delay is at least objectively recognizable. In addition, any action or tactic which is intended to cause unnecessary delay probably is already subject to sanction as "frivolous," and it is difficult to see what the new language adds.

The portion of the bill including complaints and cross-complaints as possible examples of frivolous actions or delaying tactics appears to be unnecessary. In City of Long Beach v. Bozek (1982) 31 Cal.3d 527, the Court concluded that a City could not pursue a malicious prosecution action against a defendant who had previously unsuccessfully sued the City, but cited section 128.5 as a possible means by which the City could recover its expenses.

II. Recommendation

The law allowing sanctions for frivolous actions or tactics or those which cause unnecessary delay in litigation ought to be clear so that the trial courts can use it effectively. This bill introduces confusing language, and may in fact be counterproductive.

DP.

DIGEST

Appeals: Sanctions

Amends Code of Civil Procedure section 907 to require notice and a written recitation of judicial justification when sanctions for a frivolous or dilatory appeal are imposed.

RESOLUTIONS COMMITTEE REPORT
Recommend APPROVE IN PRINCIPLE

Reasons:
This resolution would require that the imposition of sanctions for a frivolous or dilatory appeal must be with notice and that the court must issue a detailed written order reciting the basis for the sanctions. The resolution would protect against abuses of the sanctions power without changing the substantive basis for awarding sanctions.

The proponent cites two major reasons for the proposed amendment: (1) under current law, courts may impose sanctions without any ascertainable basis; and (2) under current law, sanctions may be imposed for an appeal taken as a delaying tactic even though the appeal is not frivolous.

The proposed amendment is desirable in that it would require the appellate court to recite in detail the circumstances justifying the award and the basis on which the court arrived at the amount of the award. Such a requirement would aid the Supreme Court, in those instances in which a petition for hearing is granted, in determining whether an award of sanctions under Code of Civil Procedure section 907 was appropriate.

However, the proposed amendment would not, as the proponent suggests, affect the appellate courts' present ability to award sanctions where an appeal is taken solely for purposes of delay, but is not frivolous. The proposed amendment, patterned after Code of Civil Procedure section 128.5, specifically provides that sanctions may be awarded as a result of actions not based on good faith which are frivolous or which cause unnecessary delay. Thus, the basis for imposing sanctions remains the same under present Code of Civil Procedure section 907 and the proposed amendment.

* *

SECTION/COMMITTEE REPORTS

COMMITTEE ON ADMINISTRATION OF JUSTICE
Recommend APPROVE IN PRINCIPLE
Reasons:
Present law allows an appellate court to impose sanctions for frivolous appeals or delays. This proposal clarifies the procedures to be used by appellate courts in imposing such sanctions, by adopting the procedures applicable to trial courts under Code of Civil Procedure section 128.5. The same result could be achieved by repealing Code of Civil Procedure section 907 and amending section 128.5 to make it applicable to "trial or appellate courts."

TEXT OF RESOLUTION

RESOLVED that the Conference of Delegates recommends that Legislation be sponsored to amend Section 907 of the Code of Civil Procedure to read as follows:

~~§907~~

~~(a) When it appears to the reviewing court that the appeal was frivolous or taken solely for delay, it may add to the costs on appeal such damages as may be just.~~

§907

(a) The reviewing court shall have the power to order a party to pay reasonable expenses or damages, or both, including attorney's fees, incurred by another party as a result of tactics or actions not based on good faith which are frivolous or which cause unnecessary delay. Frivolous actions or delaying tactics include, but are not limited to, taking or opposing an appeal without good faith.

(b) No award pursuant to this section shall be imposed except on notice contained in a party's moving or responding papers; or the court's own motion, after notice and opportunity to be heard. An award pursuant to this section shall be in writing and shall recite in detail the conduct or circumstances justifying the award and the basis on which the court arrived at the amount of the award.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT Beverly Hills Bar Association

STATEMENT OF REASONS

In Hersch v. Citizens Savings & Loan Assn., 146 Cal.App.3d 1002 (1983), the court imposed $125,000 in "damages pursuant to Code of Civil Procedure §907," even though the court said that the amount of such damages could not be ascertained:

> "Having determined that the appeal in this case was taken for the purpose of delay, we must address the subject (sic) appropriate remedy. The statute itself provides that damages may be added to the costs on appeal. Although the actual damages sustained by plaintiffs in the form of lost interest might be appropriately assessed, there is nothing in the record here from which calculation of such an amount can be made. No inquiry was made into the subject . . . nor were counsel placed on notice that any such inquiry might be made. Absent any basis for direct measurement of damages, we are left to assess such an amount as will bear some rational relationship to the circumstances of the parties and to the purpose of Code of Civil Procedure §907.

"We find to be just, and add to plaintiff's costs on appeal, damages in the sum of $125,000. Attorney's fees on appeal are awarded to plaintiffs in an amount to be determined by the trial court." (146 Cal.App.3d at 1013).

We believe that a statute which authorizes a court to make an award of $125,000 in sanctions without any ascertainable basis is just too vulnerable to abuse.

Another problem with the statute as presently written is the statement in the Hersch opinion that such sanctions could be imposed for an appeal taken for purposes of delay even though that appeal was not frivolous. We do not believe that a party should be penalized for taking action which has potential merit.

The amended statute tracks California Code of Civil Procedure §128.5 added in 1981, applicable to trial courts, which expresses the Legislature's latest thoughts in this area.

This proposed amendment does not affect any other law, statute or rule.

AUTHOR/PERMANENT CONTACT Peter Appleton (213) 553-6822

COUNTER-ARGUMENT TO RESOLUTION 2-29-84

San Diego County Bar Association

Recent case law at the appellate and supreme court level has set forth the circumstances and procedure for sanctions at the appellate level. The appeal process is unlike the process in the trial court in that the case has already been litigated and resulted in an award which is presumed correct. The appellate court has the full record of trial court proceedings before it and should have the authority to fashion sanctions which fit the facts of an individual case. There is some question as to whether existing Code of Civil Procedure §128.5 allows an award of sanctions over and above actual expenses incurred by the opposing litigant. The present proposal would inject that same uncertainty at the appellate level.

COUNTER-ARGUMENT TO RESOLUTION 2-29-84

Santa Clara County Bar Association

This Resolution attempts to limit the authority of appellate courts to impose sanctions for "frivolous" appeals. While the goal is good, the attempt is both deficient and results in a broadening of the sanction power. The Resolution appears to permit sanctions where the Court finds an appeal was taken for delay, even though the case was not "frivolous." The Resolution allows sanctions to be imposed on the party who won in the trial court, for "opposing an appeal without good faith."

The matter of sanctions in appellate matters should be set in an overall scheme established by statute or rule. The Resolution should be disapproved.

DELEGATION
POSITION: _____

ASSIGNED
TO: _____

CALLED UP FOR: Limited Debate _____ Full Debate _____

ACTION OF THE
CONFERENCE: _____

ASSEMBLY BILL No. 245

Introduced by Assembly Member Harris

January 12, 1987

An act to amend Section 128.5 of the Code of Civil Procedure, relating to civil actions.

LEGISLATIVE COUNSEL'S DIGEST

AB 245, as introduced, Harris. Civil actions: sanctions.

Existing law authorizes a trial court to require a party, the party's attorney, or both to pay any reasonable expenses incurred by another party as a result of tactics or actions not based on good faith that are frivolous or solely intended to cause unnecessary delay, as specified.

This bill would revise those provisions by making those provisions applicable to tactics or actions not based on good faith that are frivolous or that cause unnecessary delay, rather than which are solely intended to cause unnecessary delay.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Section 128.5 of the Code of Civil Procedure is amended to read:

128.5. (a) Every trial court may order a party, the party's attorney, or both to pay any reasonable expenses, including attorney's fees, incurred by another party as a result of bad-faith actions or tactics that are frivolous or ~~solely intended to~~ *that* cause unnecessary delay. This section also applies to judicial arbitration proceedings under Chapter 2.5 (commencing with Section 1141.10) of Title 3 of Part 3.

(b) For purposes of this section:

(1) "Actions or tactics" include, but are not limited to, the making or opposing of motions or the filing and service of a complaint or cross-complaint. The mere filing of a complaint without service thereof on an opposing party does not constitute "actions or tactics" for purposes of this section.

(2) "Frivolous" means (A) totally and completely without merit or (B) for the sole purpose of harassing an opposing party.

(c) Expenses pursuant to this section shall not be imposed except on notice contained in a party's moving or responding papers; or the court's own motion, after notice and opportunity to be heard. An order imposing expenses shall be in writing and shall recite in detail the conduct or circumstances justifying the order.

(d) The liability imposed by this section is in addition to any other liability imposed by law for acts or omissions within the purview of this section.

O

AMENDED IN ASSEMBLY SEPTEMBER 11, 1987

CALIFORNIA LEGISLATURE—1987–88 REGULAR SESSION

ASSEMBLY BILL No. 1252

Introduced by Assembly Member Zeltner

March 3, 1987

An act to ~~repeal and add~~ *amend* Section 128.5 of the Code of Civil Procedure, relating to sanctions for frivolous litigation.

LEGISLATIVE COUNSEL'S DIGEST

AB 1252, as amended, Zeltner. Sanctions for frivolous actions.

Under existing law, a trial court may order a party, the party's attorney, or both to pay expenses incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay.

This bill would, ~~instead~~ *in addition*, provide that in an action for personal injury or death a trial court may assess against either party or its attorneys sanctions, ~~including attorney's fees and costs~~ *in addition to expenses*, up to a maximum of $10,000, for making frivolous motions, ~~assisting~~ *asserting* frivolous claims, or defenses, or causing unnecessary delays, as specified.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. It is the intent of the Legislature, in enacting this act, to impose penalties against plaintiffs and defendants for making frivolous motions or asserting frivolous claims or defenses by awarding sanctions; ~~including costs and attorney's fees,~~ *in personal injury or death actions, in addition to expenses,* if a claim or defense is made in bad faith or without any reasonable basis in law or fact.

SEC. 2. Section 128.5 of the Code of Civil Procedure ~~is repealed.~~

~~SEC. 3. Section 128.5 is added to the Code of Civil Procedure, to read:~~

~~128.5. (a) In any action for personal injury or death, a trial court may, as it deems just, assess against either party or its attorneys sanctions, including attorney's fees and costs, up to a maximum of ten thousand dollars ($10,000), for making frivolous motions, asserting frivolous claims or defenses, or causing unnecessary delays.~~

~~(b) A frivolous motion, claim or defense, for the purpose of this section, is one made in bad faith, either for the purpose of prolonging or delaying the resolution of the litigation and to harass another party, or (2) made without any reasonable basis in law or in fact and lacking any good faith argument for an extension, modification, or reversal of existing law.~~

~~(c) The court may assess the sanctions referred to in this section either at the time it rules on a particular motion, claim, or defense, or at the time of judgment, if it finds that the entire case or defense thereof was frivolous.~~

is amended to read:

128.5. (a) Every trial court may order a party, the party's attorney, or both to pay any reasonable expenses, including attorney's fees, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay. This section also applies to judicial arbitration proceedings under

Chapter 2.5 (commencing with Section 1141.10) of Title 3 of Part 3.

(b) *In any action for personal injury or death, a trial court may, as it deems just, assess against either party or its attorneys sanctions, up to a maximum of ten thousand dollars ($10,000), in addition to expenses specified in subdivision (a) and apart from any actual monetary losses sustained, for making frivolous motions, asserting frivolous claims or defenses, or causing unnecessary delays.*

(c) For purposes of this section:

(1) "Actions or tactics" include, but are not limited to, the making or opposing of motions or the filing and service of a complaint or cross-complaint. The mere filing of a complaint without service thereof on an opposing party does not constitute "actions or tactics" for purposes of this section.

(2) "Frivolous" means (A) totally and completely without merit or (B) for the sole purpose of harassing an opposing party.

(3) A frivolous motion, claim, or defense, for the purpose of subdivision (b) is one made in bad faith, either for the purpose of prolonging or delaying the resolution of the litigation and to harass another party or made without any reasonable basis in law or in fact and lacking any good faith argument for an extension, modification, or reversal of existing law.

(d) The court may assess the sanctions referred to in subdivision (b) either at the time it rules on a particular motion, claim, or defense, or at the time of judgment, if it finds that the entire case or defense thereof was frivolous. However, sanctions may be assessed only upon notice contained in a party's moving papers or on the court's own motion after notice and an opportunity to be heard. An order imposing sanctions shall be in writing and shall recite in detail the conduct or circumstances justifying the order.

~~(c)~~

(e) Expenses pursuant to this section shall not be imposed except on notice contained in a party's moving

or responding papers; or the court's own motion, after notice and opportunity to be heard. An order imposing expenses shall be in writing and shall recite in detail the conduct or circumstances justifying the order.

~~(d)~~

(f) The liability imposed by this section is in addition to any other liability imposed by law for acts or omissions within the purview of this section.

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ASSEMBLY BILL No. 1252

Introduced by Assembly Member Zeltner

March 3, 1987

An act to repeal and add Section 128.5 of the Code of Civil Procedure, relating to sanctions for frivolous litigation.

LEGISLATIVE COUNSEL'S DIGEST

AB 1252, as introduced, Zeltner. Sanctions for frivolous actions.

Under existing law, a trial court may order a party, the party's attorney, or both to pay expenses incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay.

This bill would, instead, provide that in an action for personal injury or death a trial court may assess against either party or its attorneys sanctions, including attorney's fees and costs, up to a maximum of $10,000, for making frivolous motions, assisting frivolous claims, or defenses, or causing unnecessary delays, as specified.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. It is the intent of the Legislature, in enacting this act, to impose penalties against plaintiffs and defendants for making frivolous motions or asserting frivolous claims or defenses by awarding sanctions, including costs and attorney's fees, if a claim or defense is made in bad faith or without any reasonable basis in law or fact.

SEC. 2. Section 128.5 of the Code of Civil Procedure

is repealed.

~~128.5. (a) Every trial court may order a party, the party's attorney, or both to pay any reasonable expenses, including attorney's fees, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay. This section also applies to judicial arbitration proceedings under Chapter 2.5 (commencing with Section 1141.10) of Title 3 of Part 3.~~

~~(b) For purposes of this section:~~

~~(1) "Actions or tactics" include, but are not limited to, the making or opposing of motions or the filing and service of a complaint or cross-complaint. The mere filing of a complaint without service thereof on an opposing party does not constitute "actions or tactics" for purposes of this section.~~

~~(2) "Frivolous" means (A) totally and completely without merit or (B) for the sole purpose of harassing an opposing party.~~

~~(c) Expenses pursuant to this section shall not be imposed except on notice contained in a party's moving or responding papers, or the court's own motion, after notice and opportunity to be heard. An order imposing expenses shall be in writing and shall recite in detail the conduct or circumstances justifying the order.~~

~~(d) The liability imposed by this section is in addition to any other liability imposed by law for acts or omissions within the purview of this section.~~

SEC. 3. Section 128.5 is added to the Code of Civil Procedure, to read:

128.5. (a) In any action for personal injury or death, a trial court may, as it deems just, assess against either party or its attorneys sanctions, including attorney's fees and costs, up to a maximum of ten thousand dollars ($10,000), for making frivolous motions, asserting frivolous claims or defenses, or causing unnecessary delays.

(b) A frivolous motion, claim or defense, for the purpose of this section, is one made in bad faith, either for the purpose of prolonging or delaying the resolution of

the litigation and to harass another party, or (2) made without any reasonable basis in law or in fact and lacking any good faith argument for an extension, modification, or reversal of existing law.

(c) The court may assess the sanctions referred to in this section either at the time it rules on a particular motion, claim, or defense, or at the time of judgment, if it finds that the entire case or defense thereof was frivolous.

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CALIFORNIA JUDGES ASSOCIATION

Fox Plaza, Suite 208 • 1390 Market Street • San Francisco, California 94102 (415) 552-7660

April 20, 1987

Hon. Elihu Harris, Chairman
Assembly Judiciary Committee
State Capitol, Room 6005
Sacramento, CA 95814

RE: AB 1252 (Zeltner)

Dear Assemblyman Harris:

I am writing on behalf of the California Judges Association to express our opposition to AB 1252, which authorizes sanctions for frivolous motions, but only in wrongful death and personal injury cases. It is unfortunate that this bill repeals CCP §128.5 which the judges find to be a sound and useful provision for control of delaying tactics.

If we can be of assistance with the problems addressed by this bill, please feel free to consult with our Civil Law and Procedure Committee Chairman, Judge Roger K. Warren, Sacramento Superior Court, (916) 440-7848.

Thank you for the opportunity to express our concerns.

Sincerely,

Constance E. Dove
Executive Director

c: Hon. Roger K. Warren
Hon. Elwood Lui
Loren V. Smith (O-II)

LOS ANGELES COUNTY MUNICIPAL COURT JUDGES' ASSOCIATION

Legislation Committee

BRIAN D. CRAHAN
Chairman

110 North Grand Avenue
Los Angeles, California 90012
(213) 974-6209

April 6, 1987

Honorable Elihu Harris, Chair
Assembly Judiciary Committee
State Capitol
Sacramento, CA 95814

Re: AB 1252 (Zeltner)

Dear Assembly Member Harris:

The Los Angeles County Municipal Court Judges' Association opposes AB 1252, which would authorize the imposition of up to $10,000 in attorneys' fees and costs upon a party or attorney making a frivolous motion or causing an unnecessary delay in an action for personal injury or wrongful death.

We object to the deletion of the present provisions of Code of Civil Procedure §128.5 which we believe to be a useful and adequate safeguard against frivolous tactics, and we further oppose the limitation of sanctions to certain categories of actions in this bill.

Sincerely,

BRIAN D. CRAHAN
Judge, Municipal Court

BDC:AMS/jw

cc: Honorable Paul Zeltner
Ruben Lopez
Committee Consultant

THE STATE BAR
OF CALIFORNIA

OFFICE OF GOVERNMENTAL AFFAIRS
Director, MARK T. HARRIS

1100 ELEVENTH STREET, SUITE 315, SACRAMENTO, CALIFORNIA 95814 (916) 444-2762

June 25, 1987

The Honorable Paul E. Zeltner
Assembly Member, 54th District
State Capitol, Room 5130
Sacramento, CA 95814

RE: AB 1252 Position: Oppose Unless Amended

Dear Assembly Member Zeltner:

The State Bar Family Law Section, composed of experts in the field of family law, has reviewed your measure and taken the position noted above. Their comments are detailed in the enclosed report.

THIS POSITION IS BEING PRESENTED ONLY ON BEHALF OF THE FAMILY LAW SECTION OF THE STATE BAR AND HAS NOT BEEN CONSIDERED BY THE BOARD OF GOVERNORS OR THE MEMBERS OF THE STATE BAR OF CALIFORNIA, AND SHOULD NOT BE CONSTRUED AS REPRESENTING THE POSITION OF THE STATE BAR OF CALIFORNIA. MEMBERSHIP IN THE FAMILY LAW SECTION OF THE STATE BAR IS VOLUNTARY. THE SECTION IS COMPOSED OF 2,300 MEMBERS FROM AMONG THE MEMBERS OF THE STATE BAR OF CALIFORNIA.

It is the policy of the State Bar to refer legislative proposals affecting specific legal questions or the practice of law to the appropriate State Bar Committee or Section for review and comment. Our legislative activity is aimed at bringing the expertise of California's lawyers to the assistance of the people of the state through the legislative process. Legislative efforts are focused upon the advancement and improvement of law, the legal system, and the administration of justice.

Please do not hesitate to contact me for further information on this position. We would welcome the opportunity to meet with you or your staff on this issue.

Sincerely,

Judith A. Harper
Legislative Representative

JAH:jel
Enclosure
cc: Deborah DeBow, Consultant
Assembly Judiciary Committee

FAMILY LAW SECTION
THE STATE BAR OF CALIFORNIA

555 FRANKLIN STREET
SAN FRANCISCO, CA 94102-4498
(415) 561-8200

JUN 19 1987

TO: Judith Harper, Office of the Legislative Representative

FROM: Lynne Yates-Carter, Legislative Coordinator

DATE: June 15, 1987

RE: AB 1252 (Zeltner) as introduced 3/3/87.

COMMITTEE RECOMMENDATION: Oppose unless amended. Priority II.

ANALYSIS :

This bill would amend California Code of Civil Procedure Section 128.5, which deals with the court's ability to impose attorneys fees and costs for non-meritorious actions in several important respects.

The bill would:

1) Provide that CCP 128.5 sanctions only apply to personal injury and wrongful death actions;

2) Set a cap on the award of $10,000;

3) Redefine what constitutes frivolous or bad faith actions;

4) Specifically provide that the court could assess sanctions at the time it rules on a partciular motion, claim or defense or at the end of the entire proceedings.

The Family Law Section Executive Committee opposes this bill unless it is amended to remove the limitation to personal injury and wrongful death actions and the $10,000 cap on the award. Code of Civil Procedure Section 128.5 has been used in family law cases as an additional remedy for parties in family law litigation who have been faced with bad faith, non-meritorious actions. The appellate court has upheld an award in a family law case in excess of $10,000. The committee felt that the arbitrary $10,000 cap was inappropriate. However, the committee did approve of the re-drafting of the provisions on what would constitute a basis for a motion under this section. Since AB 245 (Harris) also would modify this section, the committee felt it would be helpful if the changes contemplated by both bills were incorporated in one measure.

PURVIEW :

The Family Law Section has been charged with promoting the efficient administration of justice. This bill, which would eliminate one tool presently available to family law practitioners in limiting frivolous actions and tactics in family law proceedings, would directly impact on the efficient administration of family law matters and thus falls within the committee's purview.

JUDITH HARPER

AB 1252

PUBLIC POLICY :

The public policy of this state supports the efficient administration of the courts and promoting the use, but not abuse, of the courtroom. In limiting the use of Code of Civil Procedure Section 128.5 to personal injury and wrongful death actions and setting a ceiling on the allowable fees and costs, this bill would limit the availability of a potent weapon against frivolous proceedings and claims. The Family Law Section Executive Committee believes that in its present form, this bill is against the best interests of the public and would therefore oppose the bill unless it is amended.

LYNNE YATES-CARTER
Legislative Coordinator

cc: Ira Lurvey
David Long
Dennis Cornell
Don Breer

ASSEMBLY BILL No. 1914

Introduced by Assembly Member Harris

March 5, 1987

An act to add Section 447 to the Code of Civil Procedure, relating to civil actions.

LEGISLATIVE COUNSEL'S DIGEST

AB 1914, as introduced, Harris. Civil law: frivolous actions.

Existing law requires every pleading to be subscribed by the party or the party's attorney. Existing law authorizes a trial court to impose sanctions for bad faith actions or tactics.

This bill would provide that the signature of an attorney or party is a certificate that he or she has read the pleading, motion, or other paper, that it is well grounded in fact and warranted by law, as specified, and not made for an improper purpose. The bill would require an unsigned pleading, motion, or other paper to be signed, and to be stricken if not signed promptly. The bill would authorize the imposition of sanctions if a pleading, motion, or other paper is signed in violation of the requirements of the bill.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Section 447 is added to the Code of Civil Procedure, to read:

447. The signature of an attorney or party constitutes a certificate by him or her that he or she has read the pleading, motion, or other paper, that to the best of his or her knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is

warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or cause unnecessay delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this section, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

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AMENDED IN ASSEMBLY SEPTEMBER 2, 1987

AMENDED IN ASSEMBLY AUGUST 17, 1987

AMENDED IN SENATE MAY 28, 1987

AMENDED IN SENATE MAY 14, 1987

AMENDED IN SENATE APRIL 23, 1987

AMENDED IN SENATE MARCH 16, 1987

SENATE BILL No. 379

Introduced by Senator Presley

February 12, 1987

An act to add and repeal Sections 447 and 1021.1 of the Code of Civil Procedure, relating to civil actions.

LEGISLATIVE COUNSEL'S DIGEST

SB 379, as amended, Presley. Civil actions.

(1) Existing law authorizes the court to order a party, the party's attorney, or both, to pay reasonable expenses, including attorney's fees, incurred by another party as the result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay.

This bill would provide that the signature of an attorney or party constitutes a certificate that the person has read the pleading, motion, or paper, and that it is well grounded and not interposed for an improper purpose. It would provide that if the paper is not signed it shall be stricken if not promptly signed. If a pleading is signed in violation of the above provisions, the court would, upon motion or its own initiative *and after an opportunity to be heard*, impose sanctions.

(2) Under existing law, in the absence of some special circumstance, such as a contractual agreement or specific statutory provision to the contrary, each party to a legal

dispute is to bear the burden of his or her own attorney's fees. There are numerous statutes regarding lawsuits on specific substantive issues which require or authorize a court to award attorney's fees to one party at the expense of another party.

This bill would provide that if a party makes a specified settlement offer that is not accepted and the party not accepting the offer fails to obtain a more favorable offer, the party making the offer could, in the court's discretion, be awarded reasonable attorney's fees for services after the date of the offer, as specified.

(3) The bill would apply only in Riverside and San Bernardino Counties ~~; and would authorize the boards of supervisors of those counties to require the presiding judge of the superior court to report to the Legislature, as specified~~. *It would require the Judicial Council to assess the impact of the bill upon court congestion, as specified, and to report to the Legislature on or before January 1, 1991.*

(4) The *provisions of the* bill *other than those relating to the Judicial Council* would remain in effect until January 1, ~~1993~~ *1991*, when ~~it~~ *they* would be repealed.

Vote: majority. Appropriation: no. Fiscal committee: ~~no~~ *yes*. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Section 447 is added to the Code of Civil Procedure, to read:

447. (a) The signature of an attorney or party constitutes a certificate by him or her that he or she has read the pleading, motion, or other paper; that to the best of his or her knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion,

or other paper is signed in violation of this section, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee. *Sanctions may be imposed only after notice and opportunity to be heard. An order imposing sanctions shall be in writing, and shall recite in detail the circumstances justifying sanctions.*

(b) This section shall apply only in Riverside County and San Bernardino County. The Legislature finds and declares that, in order to assess the impact of this section on a limited basis before making it applicable on a statewide basis, it is necessary for this section to be applicable for a limited period of time in those counties.

(c) This section shall remain in effect until January 1, ~~1993~~ *1991*, and on that date is repealed, unless a later enacted statute, which becomes effective on or before January 1, ~~1993~~ *1991*, deletes or extends that date.

SEC. 2. Section 1021.1 is added to the Code of Civil Procedure, to read:

1021.1. (a) Reasonable attorney's fees, may be awarded in an amount to be determined in the court's discretion, to a party to any civil action as provided by this section, and that award shall be made upon notice and motion by a party and shall be an element of the costs of suit.

(b) A party may be entitled, in the discretion of the court, to an award of attorney's fees under this section if all of the following conditions are met:

(1) The party has made an offer for judgment under Section 998.

(2) That offer was not accepted within the time provided in Section 998.

(3) The party to whom the offer was made thereafter failed to obtain a more favorable judgment.

The party making the offer shall be entitled to attorney's fees only for legal services rendered after the

date of the offer.

(c) In exercising its discretion to award attorney's fees the court shall consider the following factors:

(1) The reasonableness or lack thereof, of a party's failure to accept an offer for judgment under Section 998 in light of the facts known to the party at the time, of which, in light of all of the circumstances, should have been known to the party. Reasonableness shall be determined by a consideration of at least the following matters:

(A) The then apparent merit or lack of merit in the claim that was the subject of the action.

(B) The closeness of the questions of fact and law at issue.

(C) Whether the offeror has unreasonably refused to furnish information necessary to evaluate the reasonableness of the offer.

(D) Whether the action was in the nature of a "test case," presenting questions of far-reaching importance affecting nonparties.

(E) The relief that might reasonably have been expected if the claimant should prevail.

(F) The amount of the additional delay, cost, and expense that the offeror reasonably would be expected to incur if the litigation should be prolonged.

(G) Those other matters that the court may deem relevant in the interest of justice.

(2) The amount of damages and other relief sought and the results obtained for the client.

(3) The efforts made by the parties or the attorneys to settle the controversy.

(4) The existence of any bad faith or abuse of legal procedure by the parties or the attorneys.

(d) In exercising its discretion to determine the amount of attorney's fees to be awarded, the court shall consider the following factors, except that in no event shall the amount awarded exceed a reasonable fee for the services actually rendered.

(1) Customary fees in the community in which the action or proceeding is pending charged by attorneys

with similar experience or expertise.

(2) The time and labor reasonably required to be spent by the attorney or attorneys.

(3) The experience and ability of the attorneys generally within the profession and also with respect to the action or proceeding.

(4) The novelty and difficulty of the questions involved and the skill required to perform the services properly.

(5) The extent to which the acceptance of the particular matter imposes extraordinary burdens on the attorney or attorneys (A) by way of precluding other employment, (B) by the time limitations imposed by the client, or (C) by the circumstances.

(6) Whether the fee is fixed or contingent.

(7) Those other factors that the court may deem relevant in the interest of justice, including any of the factors described in subdivision (c).

(e) Nothing in this section shall be construed to repeal or modify any other statutory provision for the award of attorney's fees or to diminish any express or implied contractual right which a party to a civil action may otherwise have to obtain an award of attorney's fees for the prosecution or defense of an action.

(f) No attorney's fees shall be awarded pursuant to this section in any of the following instances:

(1) Against a party who is proceeding in forma pauperis or a party whom the court has found not to have the financial ability to pay fees or who would suffer an unreasonable financial hardship if ordered to pay fees.

(2) For or against any party with respect to any cause of action under which an award for reasonable attorney's fees is authorized or required by any other federal or California statute.

(3) For or against any party with respect to any cause of action or proceeding commenced or prosecuted under the provisions of Title 7 (commencing with Section 1230.010) of Part 3.

(4) For or against any party in any action in which one or more of plaintiffs seek to proceed as a class under

Section 382.

(5) For or against any party as to any cause of action the gravamen of which is personal injury ~~or wrongful death~~, *wrongful death, or injunctive relief.*

(g) The determination under this section shall be made after the final disposition of the action.

(h) This section shall apply only in Riverside County and San Bernardino County. The Legislature finds and declares that, in order to assess the impact of this section on a limited basis before making it applicable on a statewide basis, it is necessary for this section to be applicable for a limited period of time in those counties.

~~(i) The Board of Supervisors of Riverside County or San Bernardino County, respectively, may require the presiding judge of the superior court to periodically report to the Judiciary Committees of the Assembly and to the Senate and to the Speaker of the Assembly and to the President pro Tempore of the Senate as to the impact, if any, of this section on any or all of the following:~~

~~(1) Case filings.~~

~~(2) Reduction of delay from time of filing to settlement or trial.~~

~~(3) Use of offers for judgment under Section 998.~~

~~(4) The number of dispositions by settlement.~~

~~(j)~~

(i) This section shall remain in effect until January 1, ~~1993~~ *1991*, and on that date is repealed, unless a later enacted statute, which becomes effective on or before January 1, ~~1993~~ *1991*, deletes or extends that date.

SEC. 3. (a) It is the purpose of this act to reduce court congestion. It is the further purpose of adding Section 447 to the Code of Civil Procedure to determine whether that section will result in pleadings that are accurate, based upon a reasonable investigation, and are not frivolous. For courts in Riverside County and San Bernardino County the effectiveness of this act shall be determined by whether, and to what extent, this act accomplishes the following goals:

(1) Reduces caseload by 20 percent.

(2) Reduces frivolous actions by 20 percent.

(3) Increases the early settlement of cases by 20 percent.

(b) The Judicial Council shall assess the impact of this act upon the courts to which it applies, and shall report its findings to the Legislature on or before January 1, 1991. The assessment and report shall include a determination of the number of filings in affected courts, the number of issues involving verification of pleadings that were raised, whether those issues required a court hearing, the number of cases in which sanctions were requested under Section 447 of the Code of Civil Procedure, and whether the judges believe that Section 447 of the Code of Civil Procedure contributes to a reduction of unfounded civil litigation. The report shall particularly address whether this act has accomplished the goals set forth in subdivision (a).

(c) The presiding judges of the courts in which this act applies shall cooperate with the Judicial Council in the assessment and report required by this section.

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ASSEMBLY COMMITTEE ON JUDICIARY
ELIHU M. HARRIS, Chairman

SB 379 (Presley) - As Amended: August 17, 1987

PRIOR ACTION

Sen. Com. on JUD. 6-4 Sen. Floor 23-3

SUBJECT: This bill establishes a pilot project in two counties which will require (1) certification of pleadings and other papers as well grounded and (2) provide for attorneys' fee shifting under specified circumstances.

DIGEST

This bill provides for a limited duration pilot project in Riverside and San Bernardino Counties. Specifically it provides that, in those counties, until January 1, 1993:

1) The signature of an attorney or party on a pleading, motion or other paper certifies that:

   a) The person has read the paper.

   b) He or she knows or believes it is well grounded in fact and warranted either by existing law or a good faith argument for the extension, modification or reversal thereof and that it is not interposed for any improper purpose such as delay, harassment or needlessly increasing litigation costs. If the paper is not signed, it shall be stricken unless promptly signed after the omission is called to the pleader or movant's attention. If the paper is signed in violation of the requirements of the bill, the court shall impose an appropriate sanction upon the party and/or the signer. The sanction may include an order to pay expenses, including attorneys' fees, incurred by other parties because of the filing of the paper.

2) Reasonable attorneys' fees may be awarded to a party in a civil action if he or she has made an offer of compromise under Civil Procedure Code Section 998 which was not timely accepted and the rejecting party fails to obtain a more favorable judgment. Fees may be awarded only for legal services rendered after the date of the offer. In relation to this provision, the bill further provides that:

   a) In deciding whether to award fees, the court shall consider:

- continued -

i) The reasonableness of the failure to accept the Section 998 offer.

ii) The amount of damages sought and the results contained.

iii) The efforts made by the parties or the attorneys to settle the controversy.

iv) The existence of any bad faith or abuse of legal procedure by the parties or the attorneys.

b) The amount of the award shall be in the court's discretion, subject to considerations of the following factors:

i) Customary fees charged by similarly experienced attorneys in the community.

ii) The time and labor reasonably required as well as the novelty and difficulty of the questions involved and the skill required.

iii) The experience and ability of the attorneys as well as the extent to which acceptance of the particular matter imposes extraordinary burdens on the attorneys.

iv) Whether the fee is fixed or contingent.

c) A fee award is excluded:

i) Against an indigent party or a party who does not have the ability to pay.

ii) For or against a party if an award is authorized by any other statute.

iii) In eminent domain actions.

iv) In class actions.

v) In personal injury or wrongful death actions.

d) It shall not be construed to repeal or modify any other statutory attorneys' fee award provision or to diminish any contractual right which a party may otherwise have to obtain an award of attorney's fees.

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e) The respective County Boards of Supervisors may require the presiding judges to report to the Legislature as to the impact on case filings, delay reduction, Section 998 offers, and settlements.

FISCAL EFFECT

None

COMMENTS

1) The California Council of Land Surveyors and Engineers (Council) is the source of this bill's requirement that an attorney or party must certify that a pleading, motion or paper is well grounded and not interposed for a improper purpose. According to the Council, that provision is substantially similar to Federal Rule 11, except it has been modified to conform to existing California requirements for verification of pleadings.

The Council further states that the purpose and intent of the rule is "to insure that allegations are supported by sufficient factual information such that the claims asserted are not frivolous."

2) The California Supreme Court held in In re Marriage of Flaherty (1982) 31 Cal.3d 637 that "Fundamental constitutional mandates require that the basic protections of due process be followed before an attorney is fined for prosecuting a frivolous appeal." The court further stated that "Penalties for prosecuting frivolous appeals should not be imposed without giving fair warning, affording the attorney an opportunity to respond to the charge, and holding a hearing. Further, when imposing sanctions, the court should provide the attorney with a written statement of the reasons for the penalty."

Code of Civil Procedure Section 128.5 which authorizes the imposition of sanctions for frivolous or delaying bad-faith actions or tactics provides that "Expenses pursuant to this section shall not be imposed except on notice contained in a party's moving or responding papers; or the court's own motion, after notice and opportunity to be heard. An order imposing expenses shall be in writing and shall recite in detail the conduct or circumstances justifying the order."

In order to conform to the requirements of Flaherty, should not this bill be amended to provide due process protections similar to those contained in Section 128.5?

3) The California Legal Reform Project (CLRP) is the source of this bill's fee shifting provisions. CLRP states that those provisions have been

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carefully crafted to "confine judicial discretion through criteria of reasonableness of the offer and of the fees and (to) prohibit an award of fees against a person as to whom such an award would represent a financial hardship." CLRP further states its belief that the bill "will produce meaningful data to guide us in future actions to improve the civil justice system."

In support of this measure, the Attorney General's office states that "Because frivolous or weak claims are becoming a substantial problem in our courts, we believe that SB 379 is a reasonable approach to at least assuring that settlement offers made under Code of Civil Procedure section 998 are seriously made and seriously considered by the parties in civil actions. Hopefully, this bill will help mitigate the court congestion that most California counties are now experiencing."

4) The Alliance of American Insurers and the California State Automobile Association (CSAA) oppose this bill. CSAA states that the bill would allow plaintiffs an unfair "leverage" in many cases because a defendant often does not know litigation is pending "until he is served and thus, may need to conduct extensive and often lengthy investigation and discovery before he can respond to, or make an offer." CSAA therefore states its concern that this bill would enable a plaintiff to force the defendant to pay plaintiff's attorney's fees simply by making an offer to settle before the defendant has had a chance to evaluate the case. CSAA also argues that the bill places insurance carriers "in a virtual no-win situation because a losing plaintiff is often judgment proof or has no assets with which to pay defendant's attorney's fees."

5) The Access to Justice Foundation (AJF) opposes this bill. Along with Common Cause (CC), AJF has suggested that the bill be amended to provide that its fee shifting provisions apply only to cases "that seek money damages at law only." CC points out that various provisions of law allow for injunctive relief and other equitable remedies and that in some cases the plaintiff may be "acting as a kind of class representative. He/she may file an action and may be seeking restitution (or) collaterally minor money damages in order to right a larger wrong."

CC further states that it is in society's interest, once such an action is brought, to allow the litigants to pursue it, particularly where others forego action awaiting injunctive result. CC argues that if a small restitution amount may also be involved, it is possible for an egregious defendant to "buy out the case" by offering that restitutionary amount of money to the plaintiff. It is argued that vulnerability to a large fee award may effectively "require" a plaintiff to accept the offer and end the case, thereby "forfeiting the injunctive benefits for... society as a whole."

- continued -

6) The American Civil Liberties Union opposes this bill. The ACLU argues that the fee-shifting provisions "may force a party to accept a settlement offer rather than exercise his or her rights to seek a full trial and award of damages based on the merits of the case." The ACLU further questions "the propriety of limiting the right to access courts for the residents of (the two specified counties). We also question whether a study of the effectiveness of this proposal would be of any significance if the areas to which it applies are not representative of the varieties of civil court jurisdictions throughout the state."

7) This bill is a two-county, five-year pilot project which authorizes the Boards of Supervisors of the affected counties to require the presiding judges to report to the Legislature regarding the impact of the fee-shifting provisions. Is not the Judicial Council the most appropriate entity to survey and report on any such impact? Should not the bill provide for a report on both of the projects which it establishes (i.e., the sanctions for improper certification as well as the fee shifting provisions)?

SUPPORT

California Judges Association
Attorney General, State of California
County Supervisors Association of California
Association of California Water Agencies
Los Angles County Superior Court

OPPOSITION

American Civil Liberties Union
Access to Justice Foundation
California State Automobile Association
Alliance of American Insurers

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445-4560
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RESOLUTION 4-11-87

DIGEST

Signatures on Pleadings: Certification of Compliance

Amends Code of Civil Procedure section 128.5 to state that the signature on a pleading certifies that the pleading satisfies the requirements of Code of Civil Procedure section 128.5.

RESOLUTIONS COMMITTEE REPORT

Recommend DISAPPROVE

History:

Similar to 1986 Resolution 4-10, which was disapproved. Identical to AB 1984 (Harris) and SB 379 (Presley), except that these bills would add section 447 to the Code of Civil Procedure instead of amending Code of Civil Procedure section 128.5.

Reasons:

This resolution makes the signature on a pleading a certification that the signing party has read the pleading, that it is not interposed as a bad faith action, that it is not frivolous, and that it is not intended to cause unnecessary delay. The resolution adopts a requirement for California consistent with Federal Rules of Civil Procedure, rule 11, ignoring the fact that section 128.5, subdivision (a) already accomplishes this end. The resolution is, therefore, redundant. Additionally, insofar as this resolution is directed at attorneys, its purpose is served by Rule 6-101(A) of the rules of Professional Conduct and is thus unnecessary.

* *

SECTION/COMMITTEE REPORTS

COMMITTEE ON THE ADMINISTRATION OF JUSTICE

Recommend DISAPPROVE

Reasons:

The Committee on the Administration of Justice does not condone bad faith or frivilous pleadings. However, this proposal will not add to already existing California law designed to discourage such pleading practices. If such a change were enacted, it should be placed in Code of Civil Procedure section 446, which obligates a party to sign pleadings, not in section 128.5 which does not directly deal with pleadings.

TEXT OF RESOLUTION

RESOLVED that the Conference of Delegates recommends that legislation be sponsored to amend California Code of Civil Procedure Section 128.5 to read as follows:

Section 128.5
(a) Every trial court may order a party, the party's attorney, or both to pay any reasonable expenses, including attorney's fees, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay. This section also applies to judicial arbitration proceedings under Chapter 2.5 (commencing with Section 1141.10) of Title 3 of Part 3. ¶(b) The signature of an attorney or party on a complaint, motion or any other pleading constitutes a certificate that he or she has read the pleading and that, to the best of his or her knowledge,

information and belief formed after reasonable inquiry, it is not interposed as a bad faith action or tactic and that it is not frivolous or solely intended to cause unnecessary delay. ~~(b)~~ (c) For purposes of this section: ¶(1) "Actions or tactics" include, but are not limited to, the making or opposing of motions or the filing and service of a complaint or cross-complaint. The mere filing of a complaint without service thereof on an opposing party does not constitute "actions or tactics" for purposes of this section. ¶(2) "Frivolous" means (A) totally and completely without merit or (B) for the sole purpose of harassing an opposing party. ¶~~(c)~~ (d) Expenses pursuant to this section shall not be imposed except on notice contained in a party's moving or responding papers; or the court's own motion, after notice and opportunity to be heard. An order imposing expenses shall be in writing and shall recite in detail the conduct or circumstances justifying the order. ~~(d)~~ (e) The liability imposed by this section is in addition to any other liability imposed by law for acts or omissions within the purview of this section.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: The Bar Association of San Francisco

STATEMENT OF REASONS:

Section 128.5 of the Code of Civil Procedure was amended by the Legislature during its 1985-86 Regular Session (Ch. 297, 5B 296) to provide that "bad faith actions" and tactics which are "solely intended to cause unnecessary delay" can be the basis for sanctions at the discretion of the Court. This resolution would add a new subsection (b) to Section 128.5 to clarify that the signature of an attorney or party on a complaint, motion or other pleading is a certification that a reasonable inquiry into the facts and law on which the pleading is based has been made, and that it is neither frivolous nor interposed for any of the improper purposes outlined in Section 128.5. While the resolution would emphasize to attorneys and parties that the signing of a complaint, motion or other pleading is a serious and meaningful act requiring some forethought, it does not expand the scope of conduct which is sanctionable under Section 128.5.

This proposed change in Section 128.5 would not affect any other statute, law, or court rule.

AUTHOR AND/OR PERMANENT CONTACT: James W. Morando (415) 954-4457 and Betsy Jolley (415) 392-6320.

RESPONSIBLE FLOOR DELEGATES: James W. Morando (415) 954-4457 and Betsy Jolley (415) 392-6320.

COUNTER-ARGUMENT TO RESOLUTION 4-11-87

Alameda County Bar Association

The Alameda County Bar Association urges disapproval of Resolution 4-11-87 because it feels that the present law adequately takes care of situations involving bad faith actions or tactics and therefore feels the resolution is unnecessary.

This resolution seeks to have language inserted in Code of Civil Procedures Section 128.5 that, in substance, an attorney or party who signs a complaint, motion or other pleading verifies that in fact he or she has read the pleading, and that "after reasonable inquiry" the pleading is not "interposed as a bad faith action or tactic," nor is it "frivolous" or "solely intended to cause unnecessary delay." The proposal does not seek to expand the current law, but is intended to emphasize to attorneys and parties that signature "is a serious and meaningful act requiring some forethought . . . ." Although not indicated in the Statement of Reasons, this proposal is patterned after Federal Rule of Civil Procedure 11.

It is not believed that this proposal would accomplish anything of any significance, and in fact, would be a detriment. If the proposed language is passed, the focus of inquiry on any hearing would, in part, become the nature of the investigation done in order to meet the requirement of "after reasonable inquiry." Particularly in actions where one side has a great economic power over the other side, it is likely to cause greater litigation, with the focal point of the litigation being what an attorney has done to investigate the facts underlying the pleading. The current law provides sufficient guidance for trial courts regarding this issue, and no further delineation of the statute is necessary.

COUNTERARGUMENT TO RESOLUTION 4-11-87

ANTELOPE VALLEY BAR ASSOCIATION

This resolution would require an attorney to attest to the merit of any complaint, motion, etc., that he or she signs. This is clearly unnecessary because Code of Civil Procedure Section 128.5 already covers the area sufficiently.

COUNTER-ARGUMENT TO RESOLUTION 4-11-87

San Diego County Bar Association

The language is surplusage. Parties generally only sign verifications or declarations which are under penalty of perjury. Attorneys are officers of the Court and are bound by the Code of Professional Responsibility.

DELEGATION
POSITION: _____

ASSIGNED
TO: _____

CALLED UP FOR: Limited Debate _____ Full Debate _____

ACTION OF THE
CONFERENCE: _____