

RESOLUTION 10-08-06

DIGEST

Attorneys Fees: Costs in Frivolous Litigation

Adds Code of Civil Procedure section 1037 to provide protection from frivolous litigation including relief from costs and fees.

RESOLUTIONS COMMITTEE RECOMMENDATION DISAPPROVE

History:

Similar to Resolution 11-07-05, which was disapproved.

Reasons:

This resolution adds Code of Civil Procedure section 1037 to provide protection from frivolous litigation including relief from costs and fees. This resolution should be disapproved because appropriate safeguards already exist to sanction inappropriate litigation conduct, and this resolution would operate to chill constitutional rights to file actions.

California Code of Civil Procedure section 128.7 sanctions frivolous litigation conduct. There are detailed procedures delineated in order for a party to be able to avail itself of those provisions. Further, the various discovery statutes afford litigants the opportunity to seek sanctions if there is a proven belief that discovery abuse has occurred.

This resolution does nothing to assist with these issues and, in fact, causes confusion where little exists. The term “unreasonably expands or delays the proceeding” is undefined in the resolution and will cause unnecessary confusion. It is unclear what conduct would fall within this definition, and how it would differ from discovery abuses or other frivolous conduct that would already subject a party to sanctions under existing law.

The resolution also seeks to have a party deemed a “prevailing party” simply by successfully opposing a party who was found to have “unreasonably expanded or delayed the proceeding” or by engaging in “abuse of discovery.” While that conduct is inappropriate and should warrant sanctions, deeming opponents of parties who engage in that type of conduct as “prevailing parties” is wholly inappropriate. The inappropriate conduct, likely, is being engaged in by the attorney, not the party. However, deeming the opposing party as the “prevailing party” would operate to hold the party liable for his or her attorney’s inappropriate conduct. This resolution would most likely increase the number of sanction motions brought before the trial courts.

TEXT OF RESOLUTION

RESOLVED that the Conference of Delegates recommends that legislation be sponsored to add Code of Civil Procedure section 1037 as follows:

1 §1037

10-08-1

2 In any civil proceeding where the court determines that a party is engaging in frivolous
3 litigation, the opposing party shall be declared the prevailing party, and the court shall award
4 attorney’s fees and costs to that prevailing party either upon motion or sua sponte
5 (a) In any civil proceeding the court, upon motion or sua sponte, shall determine
6 whether or not a party brings or defends a claim without substantial justification, brings or
7 defends a claim solely or primarily for delay or harassment, unreasonably expands or delays
8 the proceeding, or engages in abuse of discovery. In any of the foregoing situations, the
9 Court shall find that the party is thus engaging in frivolous litigation.
10 (b) “Prevailing party” as used in this section shall be defined as follows: The
11 opposing party shall be declared the “prevailing party” for purposes of this code section.
12 (c) If the court should determine that a party did not act in good faith and with
13 reasonable cause and is therefore engaging in frivolous litigation, an additional issue shall be
14 decided as to the attorneys’ fees and costs reasonably and necessarily incurred by the party
15 or parties opposing the proceeding, and the court shall render judgment in favor of that
16 prevailing party in the amount of all reasonable and necessary attorney’s fees and costs.
17 Reasonable fees and costs as used in this section shall include reasonable attorneys’ fees,
18 expert witness fees, the expense of services of experts, advisers, and consultants in defense
19 of the proceeding, and where reasonably and necessarily incurred in defending the
20 proceeding.

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

PROPONENT: Santa Barbara County Bar Association

STATEMENT OF REASONS

Existing Law: Existing law does not provide sufficient protection for frivolous litigation.

This Resolution: This Resolution would provide justifiable protection from frivolous litigation and provide ethical relief from costs incurred. This is not the same as a malicious prosecution action since “malice” is not required, but this code section change would force a would-be litigant to seriously consider whether this is a proper action taken before a court. And, it would allow the court not to be burdened with matters which should not take up court time. Thus, it would create a “civil” equivalent of the protection afforded by Penal Code Sections 1447 and 1448.

The Problem: Currently, a defendant can be brought into court on the filing of a frivolous lawsuit without recourse. The defendant may lose simply due to lack of funds. Unless the action specifically falls under “malicious prosecution” under Government Code section 821.6 for liability of public employees, Penal Code sections 1447 and 1448 for criminal actions brought wherein the defendant is subsequently exonerated, or Penal Code section 374.2 with respect to discharge or release by sewers or sewer systems, there is no protection. Other frivolous action may be taken without sufficient consequences.

Both Arizona in its ARS 12-341.10(a) for contract actions and ARS 12-349 for all other civil

actions as well as Ireland have provided for attorney's fees and costs in frivolous litigation cases. Federal Rules of Civil Procedure, rule 11, also provides for such attorney's fees and costs.

In Europe, the filing of personal injury cases has boomed in the last few years—its nickname in some circles is “the American disease.” The Republic of Ireland has gone the furthest in its reform by imposing sentences for false evidence of up to 10 years in prison or a 100,000 euro (\$130,000) fine resulting in a 20% drop in such cases, according to the Wall Street Journal January 26, 2005. Other European countries have also taken steps. The U.K.'s Chief Justice Lord Woolf has introduced reforms aimed at the cost of litigation in civil claims courts. The French government has sought to slow the runaway costs of medical malpractice insurance by setting up a state office to settle certain cases out of court. Europe is closely watching the success of the Irish reforms to determine further restrictions. In Ireland, one American style company had so many claims filed against it for personal injury (120 by the year 2000) that the filers of such claims became known as “have-a-go-Charlies.” It is time that California joins the effort to curb frivolous litigation and preserve the sanctity of our judicial system for the legitimate cases.

Adding California Code of Civil Procedure section 1037 will further public policy by affording all parties protection from frivolous litigation, saving huge amounts of taxpayer funds by keeping frivolous litigants out of the courts by having a deterring effect upon those who would otherwise bring frivolous lawsuits or engage in other types of frivolous litigation, and would thus have a beneficial effect upon the legal process.

IMPACT STATEMENT

This proposed resolution will affect California Code of Civil Procedure section 1717.

AUTHOR AND/OR PERMANENT CONTACT: Betty L. Jeppesen, 800 Garden Street, Suite K, Santa Barbara, CA 93101; 805/963-8621; FAX 805/962-9981, btjpps@aol.com, islay@impulse.net

RESPONSIBLE FLOOR DELEGATE: Betty L. Jeppesen

COUNTERARGUMENTS

ORANGE COUNTY BAR ASSOCIATION

The Resolution is based on incorrect premises, is unneeded and is ultimately counterproductive. The premises are that “[e]xisting law does not provide sufficient protection for frivolous litigation,” that “a defendant can be brought into court on the filing of a frivolous lawsuit without recourse,” and that there is no analog to Federal Rule of Civil Procedure 11 in California. However, California law already authorizes the award of sanctions for frivolous actions or motions, *see* Code Civ. Proc. § 128.7, and discovery motions brought or opposed without substantial justification. *See, e.g.*, Code Civ. Proc. § 2030.300(d). Section 128.7 is largely based on, although not identical to, Federal Rule of Civil Procedure 11. *See, e.g., Cromwell v. Cummings*, 65 Cal. App. 4th Supp. 10, 14 (1998) (stating Section 128.7 was modeled after

F.R.C.P. 11); *id.* at 14 n.6 (cases interpreting F.R.C.P. 11 are persuasive authority with regard to Section 128.7). Under Section 128.7, any attorney, or unrepresented party, who presents a pleading, motion or similar paper to the court makes an implied certification that:

- (1) it is not being presented primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
- (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extensions, modification or reversal of existing law or the establishment of new case law;
- (3) the allegations and other factual contentions have evidentiary support, or if so specifically identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
- (4) the denials of factual contentions are warranted by the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Like F.R.C.P. 11, Section 128.7 authorizes the imposition of non monetary and monetary sanctions, including all or some of the reasonable attorneys' fees incurred as a direct result of the violation. Code Civ. Proc. § 128.7(d). Similarly, the Discovery Act provides for the award of sanctions in connection with discovery motions brought or opposed without substantial justification. *See, e.g.*, Code Civ. Proc. § 2030.300(d). Thus, California law already contains mechanisms to allow for the award of attorneys' fees for frivolous litigation. To the extent that a problem with frivolous litigations continuing to exist, it does so notwithstanding the Court's ability to award sanctions for frivolous litigation, and this redundant Resolution will not solve the problem.

Unlike Section 128.7, the Resolution also fails to respect due process rights by allowing the Court to award sanction *sua sponte*, without any provision for the sanctioned party to have notice and a reasonable opportunity to respond. *Cf.* Code Civ. Proc. § 128.7 (requiring notice and a reasonable opportunity to respond, including a 21 day period in which the offending party may correct the violation and withdraw the offending pleading).

SACRAMENTO COUNTY BAR ASSOCIATION

Access to the courts is a constitutional right, an aspect of the right to petition the government for redress of grievances. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510, 92 S.Ct. 609, 612 (1972). Grounds to impose sanctions for frivolous litigation must be carefully defined to avoid seriously chilling litigants' constitutional rights, and due process requires notice and opportunity for a hearing before sanctions may be imposed. *In re Marriage of Flaherty*, 31 Cal.3d 637, 651-653 (1982).

This resolution violates these constitutional requirements. It would base sanctions on vague and undefined standards, such as "unreasonably expand[ing] or delay[ing]" litigation. The remedy it proposes for discovery abuses—declaring the opposing party the prevailing party in the

litigation, regardless of the nature of the abuse or the actual merits of the case—is overkill. And, it would allow a court to impose sanctions without the prior notice and opportunity for a hearing that due process demands.

Code of Civil Procedure § 128.7 already provides attorney fee sanctions for frivolous litigation. It is modeled directly on Federal Rules of Civil Procedure, rule 11, which the resolution’s proponent cites as an effective sanctions provision. The Discovery Act provides sanctions for discovery abuses, which can include evidentiary and terminating sanctions that prevent a party who seriously abuses discovery from presenting critical evidence, pursuing a cause of action or defending against one.

The proponent offers no reason why these existing remedies for frivolous litigation tactics and discovery abuses, remedies that are tailored to avoid impairing fundamental constitutional rights and to satisfy due process, are inadequate.

SAN DIEGO COUNTY BAR ASSOCIATION

The proposal is based on the assumption that the legal system is too often misused to harass, and far too tolerant of abusive litigation tactics. It is possible this proposal is a response to a problem that derives from the lawyers’ inevitably subjective view that their cases are overwhelming while the opposition is meritless. It has both procedural and substantive defects.

The proposal is so broadly written that it invites both lawyers and judges to assess the relative merit of every case and award fees whenever a very strong case appears to prevail over a very weak one. The proposal, if adopted, could inadvertently provide the nutrients for a proliferation of motions, fee awards and appeals that consumes far more resources than are presently squandered on meritless suits and tactics.

The purpose is to discourage although it has the appearance of setting out a defined procedure, it is far from clear how, when, or what triggers this mechanism. The consequence is the assessment of fees and costs, and the route to that end is a determination that the victim is the prevailing party. In all cases that already contain either contractual or statutory provisions allowing the prevailing party to recover fees and the itemized costs, this provision would have no prophylactic effect on frivolous behavior unless the proposal could be used to “short circuit” the litigation.

The language suggests that a prevailing party can be designated at any point in the proceedings at which the trial court decides that one side is “engaging in”, as opposed to “engaged in” frivolous litigation. “Prevailing party” is a word of art referring to the party who achieves all or a substantial part of its litigation objectives. Thus, the proposal seems to allow the Court to terminate proceedings, enter a judgment, and designate a prevailing party.

It is perhaps to facile to say “frivolous” litigation is easily and universally recognized on sight. What may at first seem frivolous may turn out to be genius, and vice versa. Nor is it necessarily true that trial judges should be invested with the power to scrutinize how attorneys prepare or try

their cases. Not only does this dangerously confuse the role of arbiter and advocate, but it may call for a level of expertise not generally found on the bench. Not all judges were trial attorneys, and relatively few regularly tried civil cases.