How to handle a motion for sanctions

DENTONS

December 22, 2015

In recent years, litigation has become, for lack of a better word, litigious, such that motions for sanctions are more commonplace than ever before. Some litigators routinely use such motions to pressure the opposing party and increase the stakes. Other motions are merited by the unprofessional or improper conduct of counsel.

Most courts recognize when a motion for sanctions is employed as a litigation tactic and treat such a motion accordingly. Still, some conduct merits potential sanctions against a party and/or its counsel. Various legal news publications have noted the ingenuity of judges in crafting monetary and nonmonetary sanctions for inappropriate conduct. The bottom line is that the risk of a motion for sanctions—and the actual imposition of sanctions—has neve been greater.

The most common predicates for a motion for sanctions are discovery disputes and frivolous litigation. *See* Cal. Civ. Proc. Code §§ 128.5, 128.7 (outlining grounds and procedure for filing motion for sanctions based on bad faith or frivolous tactics). The impact on attorneys and their law practices can be significant.

When an attorney receives a motion for sanctions (whether solely against the client or against both the attorney and the client), various obligations attach that many attorneys overlook.

After the initial—and often angry—response by an attorney receiving such a motion, the safest and best course is t follow established protocols designed to assure compliance with all ethical, legal and contractual obligations.

Appoint someone in charge

The first and most important step is designate a risk management partner to decide the appropriate actions that follow. Motions for sanctions implicate a variety of issues, and rather than have a fool for a client, most attorneys are well-advised to trust someone detached from the situation to address them.

How to tell the client

In dealing with a motions for sanctions, a potential conflict may arise between the attorney and the client. For example, if opposing counsel seeks sanctions against the client for actions of the attorney, an issue could arise regarding whether the client might have a claim against the attorney should sanctions be imposed. Likewise, if opposing counsel seeks sanctions against both the attorney and the client, an issue may arise as to whether the conduct at issue is the client's, the attorney's, or both.

These issues implicate duties of disclosure and, possibly, the recommendation for the client to seek independent advice regarding the next steps.

Most often, the attorney may continue to act on behalf of the client (and the law practice, if the plaintiffs seek

sanctions against both). However, to do so, the attorney and law practice should follow these three steps:

1. Tell the client

No matter how frivolous, every motion, demand, or action seeking a recovery from a client must be reported to the client. See Cal. R. Prof'l Conduct 3-500 (noting counsel's obligation to keep clients informed); Cal. Bus. & Prof. Code § 6068(m) (same). This notice alerts the client to the request for sanctions, affords them the opportunity to get advice, and allows them to decide what, if anything, should be done.

2. Explain the practical consequences

The State Bar of California's Standing Committee on Professional Responsibility and Conduct has provided the following guidance: "[A]t a minimum, the lawyer must inform the client of the existence of the motion, the fact that sanctions are being sought against the client and the lawyer, the amount of the sanctions being sought and the practical consequences of the motion if it is granted or it is denied. The lawyer also has a duty to supply the client with additional information necessary to permit the client to make informed decisions with respect to the motion." Cal. Standing Comm. on Prof'l Responsibility & Conduct, Formal Opinion No. 1997-151.

If the motion appears to be a routine litigation tactic by opposing counsel, then tell the client. If there is any risk that the motion might be granted, explain the basis of the motion and why there is risk.

In addition, advise the client of the options. For example, if the motion seeks sanctions for a discovery issue, advise the client of the options to simply provide the discovery, fight the motion or use other counsel to address the sanctions issue. Give the client a candid assessment of the advantages and disadvantages of each option.

3. Document the client's decision

In most cases, especially those involving opposing attorneys known for seeking sanctions as a routine matter, clients likely will decide to treat it as part of the litigation and instruct the attorney to go forward. In other cases, such as those involving allegations of frivolous claims, obstruction or destruction of evidence, the conversation, and the disclosure to the client, will be much more involved.

Regardless of the decision, the best course is for the client's decision to be confirmed in writing. In the absence of such written confirmation, clients may mistakenly believe that it is the attorney's responsibility to pay any sanctions imposed. This written confirmation can even include an agreement allocating any potential sanction: "The attorney and client may agree in advance how to allocate their respective responsibility for paying any such award, provided there is adequate disclosure to the client and the agreement is ethical under the circumstances in which the sanctions are imposed." Cal. Standing Comm. on Prof'l Responsibility & Conduct, Formal Opinion No. 1997-151.

Determine whether there are coverage issues

A request for sanctions is a demand for money. As such, it may qualify as a "claim" against an attorney or a law practice. If the motion for sanctions is directed against the attorney, it may implicate a notice requirement under the law practice's legal malpractice insurance policy.

Even if the motion is only against the client, it may implicate coverage issues if the client acted on the advice of the attorney. Further, if during the client communications, the client indicates that it intends to hold the law practice responsible for any sanctions imposed, then again a claim may exist.

In any event, the law practice may have notice of a circumstance that might give rise to a claim. The practice therefore should consider and evaluate its obligation to report the incident under its legal malpractice policy.

Tell the legal malpractice insurer

The safest course in these situations is to provide notice to the law practice's legal malpractice insurance company. By providing such notice, the law practice takes an important step in assuring that any coverage that might exist will be available in the event that the motion results in an actual obligation to pay.

Conduct an internal review

In addition, the designated risk management partner should open a separate file within the firm and evaluate the risks to the law practice. If additional steps need to be taken (such as those cases where the client's conduct could give rise to sanctions), then the law practice may need to take more aggressive steps to protect itself. These steps can range from requesting client action to correct a situation to withdrawal.

All actions in this regard must be segregated from client files. These actions are squarely focused on protecting the law practice.

A fool for a client

If appropriate, the risk management partner may want to retain independent counsel to represent the law practice in connection with the motion for sanctions. This is especially true if the law practice's conduct is at issue.

Attorneys representing both the client and the law practice are subject to restrictions that do not apply to separate counsel for both the client and the law practice.

For one thing, the attorneys are not appearing as both witnesses of what happened as well as appearing as advocates for the propriety of the conduct. And, importantly, attorneys representing both cannot assert positions adverse to their client even if the actual facts and evidence would support such a position. See Cal. R. Prof'l Conduct 3-310 (rules on avoiding the representation of adverse interests).

Should a law practice decide it needs separate counsel, the decision should be disclosed to the client. This disclosure should include a recommendation, in writing, for the client to seek independent legal advice regarding whether the client should also use other counsel to defend the motion.

As published in *The Recorder*

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