Vexatious Litigation: When a Lawsuit Leads to Sanctions

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Litigation is, by its very nature, adversarial. Lawyers may bluff, cajole or appear unyielding as tactics to try to achieve a positive result for their clients. But there can be risk if lawyers engage in usually aggressive conduct that unreasonably drives up the costs of litigation.

Unreasonably driving up the costs of litigation is often referred to as “vexatious litigation,” and can result in a party or lawyer being compelled to pay the other side’s legal fees and costs. Although the “American Rule” typically does not recognize fee-shifting as a standard consequence to litigation, the impact of **federal statute 28 USC § 1927** can result in fee-shifting in cases involving serious patterns of misconduct.

This article provides a brief overview of misconduct that generally qualifies as vexatious litigation and provides some pointers for lawyers both in preventing such an outcome and in protecting a client's interests when other litigants are being needlessly vexatious.

What is the Rule?

Section 1927 authorizes sanctions if a lawyer "unreasonably and vexatiously" "multiplies the proceedings" in any case. In most jurisdictions, this generally requires the movant to show bad faith, recklessness, or improper motive on the part of the vexatious lawyer.

Section 1927 sanctions are most often imposed in cases of serious, repetitive or intentional conduct. This is because merely violating a rule of procedure or filing a lawsuit later found to be frivolous, alone, may not be enough to warrant sanctions under the statute.

There are other mechanisms that also provide for sanctions for bad-faith litigation. ***Rule 11 of the Federal Rule of Civil Procedure*** authorizes sanctions for making representations that are "legally frivolous" or "factually misleading."

Rule 11, in contrast to Section 1927, affords a period of time in which litigants may "cure" their violations. In addition, courts are empowered with inherent authority to sanction litigants and counsel for engaging in bad faith or willfully improper conduct.

Lawyers who engage in bad-faith litigation tactics may face sanctions under a combination of these authorities that can vary in severity. In some of the most egregious cases, courts have referred attorneys to the local bar in conjunction with imposing other monetary sanctions.

Common misconduct that can get lawyers and litigants in hot water for unreasonably multiplying the proceedings in any case include: filing a frivolous claim, repeatedly violating the rules of procedures or local rule or filing multiple briefs with baseless arguments.

Be Aware of the Duty to Investigate Claims

In one recent case, a court affirmed a sanctions order finding that class-action claims were vexatious where the plaintiff filed a tenuous class-action complaint and then pursued the action for over 18 months with extensive discovery and motion practice, before dropping the class allegations without explanation (after seeking several extensions to certify the class).

In another example, a court affirmed sanctions against both the attorneys and the client for initially filing a complaint with an affidavit unsupported by any factual evidence, which resulted in two years of discovery and litigation. The court found this unreasonably and vexatiously multiplied the proceedings and sanctioned the attorneys and the law firm, as well as the clients for being willful participants, under Section 1927, and awarding the other side their attorney's fees.

These cases illustrate the importance of properly investigating and vetting claims prior to litigation. That is not to say that a plaintiff has violated Section 1927 simply by bringing a case that is ultimately defeated on its merits. Rather, courts look for evidence that the litigant (or their lawyers) did not engage in any review of the facts or law in support of a lawsuit, or that once the lawyers learned the case lacked merit, they continued to pursue it aggressively (and at great expense for the other parties).

Conducting a neutral and honest evaluation of the merits of one's position at the outset, and as the facts develop, may aid in preventing Section 1927 sanctions.

Document Vexatious Litigation

For litigants who are on the receiving end of vexatious litigation, it can be helpful to document what is happening. Section 1927 sanctions may be appropriate for a pattern of misconduct during discovery or maintaining baseless and excessive claims for years when counsel should have known the claims had no merit.

Thus, alerting the other side to concerns and deficiencies can help satisfy a showing later on that the party's decision to continue with aggressive litigation was done intentionally.

It can also be helpful for litigants to specifically track those expenses that are increased as a result of vexatious litigation (such as costs for certain depositions or fees for opposing frivolous briefing). Having such information readily available can help support a future application under Section 1927.

Is the Client Aware of the Risk?

Lawyers can get in trouble for blindly pursuing a client's litigation goals, ignorant of the merits of the case or the rules of the jurisdiction. And if a client does not appreciate the risks in such an aggressive approach, the lawyers may be facing criticism from not only the court but also from their client.

Lawyers can try to educate their clients that being aggressive for the sake of being aggressive (and in the absence of support on the merits of the claim) can create risks of sanctions against the firm or client-or even dismissal of the case.

Advising clients of such risks may even help steer the client away from an otherwise problematic litigation strategy. And if lawyers engage in such conduct and do not explain the risks to their clients, the clients may threaten a legal malpractice claim against their lawyers if the lawyers' misconduct leads to dismissal or sanctions.

By being aware of the risk of sanctions for vexatious litigation, lawyers can be zealous advocates without crossing the line.

Shari L. Klevens is a partner at Dentons and serves on the firm's U.S. board of directors. She represents and advises lawyers and insurers on complex claims, is co-chair of Dentons' global insurance sector team and is co-author of "California Legal Malpractice Law" (2014).

Alanna Clair is a partner at the firm and focuses on professional liability defense.

Klevens and Clair are co-authors of "The Lawyer's Handbook: Ethics Compliance and Claim Avoidance."

Your Key Contacts

Shari L. Klevens
Partner, Washington, DC
D +1 202 496 7612
shari.klevens@dentons.com

Alanna Clair
Partner, Washington, DC
D +1 202 496 7668
alanna.clair@dentons.com