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Sanctions—Stepchild or Natural Heir to Trial and Appellate Court Delay Reduction?

I. INTRODUCTION

Fred Woods*

The term "sanction," as used in the nominative case, is defined in *Black's Law Dictionary* as "[t]hat part of a law which is designed to secure enforcement by imposing a penalty for its violation or offering a reward for its observance." ¹

This short and pithy definition of sanction, like any other dictionary definition, is meant to incite the curious to study and delve further into the subject to obtain some appreciation for the full magnitude of the term as employed by the legal community. For a clearer understanding of the term, one must access the realm of the legal community with its attendant lore as derived from statutes, decisions, rules of court, custom and usage.

This article examines selected authorities and seasons the discussion with impressions gained through practical experience on the trial and appellate benches. Its goal is to improve our corporate understanding of the commonly used device of sanctions. The time will be well spent since requests for sanctions now seem to appear in almost every pleading and brief filed in our courts.²

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1. BLACK'S LAW DICTIONARY 1203 (5th ed. 1979).
2. The proliferation of requests for sanctions has been accompanied by the increasing use of the appellate court system to contest the sanctions imposed at the trial.

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Also explored, and indeed promoted, are the permissible and logical inferences that can be drawn concerning the utility of California’s legal concept of sanctions in promoting or detracting from that great crusade which now permeates our legal system from beginning to end—“trial and appellate court delay reduction.”

In order to curtail any myopia that might exist, it is necessary to point out that sanctions come in a variety of packages. Commonly, and perhaps most often, when referring to sanctions, our minds immediately focus on “monetary” sanctions, either as a penalty or as a reward depending on whether one is on the giving or receiving end of the sanction. However, the cautious will be well advised that the use of sanctions by the courts is on the rise in a variety of forms.

court level. L.A. Daily J., Sept. 9, 1987, at 5, col. 1. Justice Lynn Compton has stated that “what is happening is that the trial courts are using sanctions more, which in turn has led to more appeals’…” Id. (quoting Justice Compton of the California Second District Court of Appeal). It also has been noted that “[t]he relative frequency of sanctions awards in recent years suggests not only that courts are more willing to award them, but that respondents are more readily inclined to ask for them.” Meadow, Sanctions for Frivolous Appeals, L.A. LAW., Sept. 1985, at 48, 52.

However, the motion for sanctions itself is often frivolous. Motions for sanctions usually are incorporated into a case as a matter of course. Hinerfeld, The Sanctions Explosion, CAL. LAW., Nov. 1987, at 33, 82. Arthur Miller, a Harvard Law School professor, once illustrated the frivolous nature of sanctions in a “Kafkaesque dream,” or perhaps a nightmare, “in which motions for sanctions would be countered with motions to sanction frivolous motions for sanctions, which would be similarly countered with more motions for sanctions, ad infinitum.” Id.


4. The term “penalty” may be a misnomer. In an interesting article on the possibilities of insuring for monetary sanctions, the authors assert that whether a sanction is a penalty may be predicated on the intent of the sanctioned attorney. See Lynberg, Lin, & Langbord, Monetary Sanctions Under California Law: Are They Insurable?, L.A. LAW., Dec. 1988, at 26. If the court determines that an attorney intentionally acted in a sanctionable manner, the monetary sanctions imposed against the attorney should be considered a penalty and thus uninsurable under an errors and omissions policy. Id. at 28.

However, a different question arises when the sanctioned attorney was merely negligent in evaluating a client’s case or the merits of a particular motion. A monetary sanction for negligently bringing a frivolous motion can be analogized to legal malpractice. Id. Therefore, one could assert that this type of sanction should be covered under a standard errors and omissions insurance policy. Id. “Thus, the damages caused by a negligent attorney who is sanctioned should be insurable because an ‘… insurer intend[s] to insure against liability for losses to others . . . .'” Id. (citation omitted). However, “[t]he losses caused by a negligent attorney who is sanctioned are the additional costs imposed on the opposing party as well as the courts and the judicial process because of the negligent attorney’s conduct.” Id. One could argue, therefore, that the purpose behind sanctions as a deterrent requires that sanctionable actions for frivolity in the judicial system be excluded from coverage regardless of the intent of the attorney.
II. COMMON SOURCES OF AUTHORITY AND THE RANGE OF JUDICIALLY IMPOSED SANCTIONS

The general authority for the imposition of sanctions are many, varied, and sprinkled throughout California's Government Code, the Code of Civil Procedure, the Civil Code, and the Rules of the Court. In section 68609(d) of the California Government Code, judges are given authority to impose sanctions to achieve the purposes of the Trial Court Delay Reduction Act. In section 128 of the Code of Civil Procedure grants general powers to the court to control proceedings before it. Furthermore, section 128.5 of the Code of Civil Procedure gives trial courts and judicial arbitrators the authority to order a party who engages in frivolous actions or delay tactics to pay the expenses and attorneys' fees of the opposing party.

5. Trial Court Delay Reduction Act, CAL. GOV'T CODE § 68609(d) (West Supp. 1990). Section 68609(d) provides:

In order to enforce the requirements of an exemplary delay reduction program and orders issued in cases assigned to it, the judges of the program shall have all the powers to impose sanctions authorized by law, including the power to dismiss actions or strike pleadings, if it appears that less severe sanctions would not be effective after taking into account the effect of previous sanctions or previous lack of compliance in the case. Judges are encouraged to impose sanctions to achieve the purposes of this article. Id. (emphasis added).

6. CAL. CIV. PROC. CODE § 128 (West Supp. 1990); see Fairfield v. Superior Court, 246 Cal. App. 2d 113, 120, 54 Cal. Rptr. 721, 725 (1966) (trial court in its discretion may impose appropriate sanctions to a party who refuses to obey an order requiring further responses to interrogatories).


The court in Quinlan reaffirmed that an attorney is entitled to prior notice of the threat of the imposition of sanctions by the trial court, and the grounds thereunder, before being sanctioned under section 128.5 of the Code of Civil Procedure. Quinlan, 209 Cal. App. 3d at 1419, 257 Cal. Rptr. at 851. However, the court disposed of any necessity to hear the matter of sanctions on a “separate” day. Id. It further found that a delay beyond the trial court's two-hour hearing limit, when used for improper purposes, was a substantive basis for sanctions. Id. at 1422, 257 Cal. Rptr. at 852-53.

Bach involved a suit against a justice of the peace and a superior court judge. Sanctions against the plaintiff, an attorney, were imposed and upheld on appeal because "some but not all causes of action" were frivolous under section 128.5 of the Code of Civil Procedure. Bach, 207 Cal. App. 3d at 875, 255 Cal. Rptr. at 851. The court incorporated a threshold test which provides that the line between acceptable and unacceptable conduct is crossed when, among other things, "a significant and material part of the appeal" is frivolous. Id. at 875-76, 255 Cal. Rptr. at 246 (quoting Maple Properties v. Harris, 158 Cal. App. 3d 997, 1010, 205 Cal. Rptr. 532, 541 (1984) (footnote omitted) (emphasis in original), cert. denied, 470 U.S. 1054 (1985)). The court also held that
Section 177.5 of the Code of Civil Procedure permits the court to impose monetary sanctions, payable to the county, for violations of court orders. Section 437c(i) of the Code of Civil Procedure allows the court to sanction parties for the filing of affidavits in bad faith during a summary judgment motion. The court also may impose penalties under section 575.2 of the Code of Civil Procedure for the failure to comply with the requirements of local rules.

One of the rules that allows the court the power to impose alterna-
sanctions on appeal are proper when the appeal is "totally and completely without merit." Id. at 880, 255 Cal. Rptr. at 249; see also Silver v. Gold, 211 Cal. App. 3d 17, 25-26, 259 Cal. Rptr. 185, 189-90 (1989) (frivolous motion to tax costs warranted imposition of sanctions).

In Frank Annino, the appellate court upheld an award of monetary sanctions under section 128.5 despite the fact that the plaintiff had dismissed the action against the awardee, thereby removing the litigant from the "party" classification required by the statute. Frank Annino, 215 Cal. App. 3d at 358, 263 Cal. Rptr. at 595. The court held that "[a]llowing a person no longer a party to obtain sanctions for the bad faith tactics [under which] he suffered while he was a party is clearly consistent with the purposes of section 128.5." Id. at 358, 263 Cal. Rptr. at 596 (emphasis added) (footnote omitted).

In Cook, the trial court imposed sanctions against the Orange County District Attorney for prosecuting a weak cause of action for possession with intent to sell a controlled substance. The court acquitted the defendant of the possession for sale charge, see CAL. PENAL CODE § 1181.1 (West 1985), and referred the defendant to a drug diversion program. Because the defendant had desired this from the beginning, the court imposed sanctions under section 128.5 in the amount of $3000, which represented the costs of holding the jury trial. Cook, 209 Cal. App. 3d at 406, 257 Cal. Rptr. at 226. The matter was reversed on appeal. After considering the legislative history and intent of section 128.5, the court found that it applies only to civil cases. Id. at 407, 257 Cal. Rptr. at 227.

8. CAL. CIV. PROC. CODE § 177.5 (West Supp. 1990); see Laborer's Int'l Union N. Am. Local 89 v. El Dorado Landscape Co., 208 Cal. App. 3d 993, 256 Cal. Rptr. 632 (1989); Moyal v. Lamphere, 208 Cal. App. 3d 491, 256 Cal. Rptr. 296 (1989). In Moyal, an attorney failed to comply with the local "fast track" rules of the court. The court dismissed the case and imposed sanctions against the attorney. Id. at 494, 256 Cal. Rptr. at 298-97. The sanctions against the attorney were upheld on appeal under section 177.5 of the Code of Civil Procedure. Id. at 501, 256 Cal. Rptr. at 301. However, the dismissal was reversed. The court found that the client was blameless and, therefore, the lower court had abused its discretion in dismissing the client's action. Id. at 503, 256 Cal. Rptr. at 302-03. The dismissal was not in the spirit of section 575.2(b) of the Code of Civil Procedure, which provides that the negligence of the attorney is not to be imputed to the client. Id. at 502-03, 256 Cal. Rptr. at 302-03 (citing CAL. CIV. PROC. CODE § 575.2(b) (West Supp. 1990)).

In Laborer's International, the court found that local "fast track" rules, implemented to carry out the Trial Court Delay Reduction Act, were constitutionally sound. Laborer's Int'l, 208 Cal. App. 3d at 1002-05, 256 Cal. Rptr. 633-38. The court specifically held that sanctions imposed under section 177.5 for an attorney's failure to file the required at-issue memorandum per local "fast track" rules did not violate the due process clause of the fourteenth amendment of the United States Constitution. Id. at 1008-09, 256 Cal. Rptr. 639-40. The court's order to show cause (OSC) as to why sanctions should not be imposed gave the attorney the required notice and opportunity to be heard. Id. at 1008-09, 256 Cal. Rptr. at 640-41.


10. Id. § 575.2; see California ex rel Public Works Bd. v. Bragg, 183 Cal. App. 3d 1018, 1028-29, 228 Cal. Rptr. 576, 582-83 (1986) (noting that court must impose penalties sua sponte upon counsel who fail to comply with local rules).
tives to monetary penalties is section 583.150 of the Code of Civil Procedure, which preserves dismissal and sanction power under court-adopted rules and under the inherent power of the court. In tandem with section 583.150 is section 583.360 of the Code of Civil Procedure, which mandates dismissal for a failure to bring an action to trial within certain time periods. Section 583.430 of the Code of Civil Procedure sets forth the conditions for granting or denying a discretionary dismissal.

Section 907 of the Code of Civil Procedure allows additional damages on appeal for costs resulting from frivolous or delaying tactics. Sections 2016 through 2036 of the Code of Civil Procedure provide the basis for controlling the method and scope of discovery in California and also the permissible sanctions for failing to comply with the discovery act without substantial justification.

12. Id. § 583.360; see Varwig v. Leider, 171 Cal. App. 3d 312, 316, 217 Cal. Rptr. 208, 211 (1985) (plaintiff’s failure to enforce settlement or bring suit to trial within five years of the filing, void of acceptable reasons, requires dismissal); see also Berry v. Weitzman, 203 Cal. App. 3d 351, 357-58, 249 Cal. Rptr. 816, 820 (1988) (plaintiff’s failure to take purposeful action to bring suit to trial within final six months of a tolled statute of limitations with an overall time frame of five years requires dismissal).
13. CAL. CIV. PROC. CODE § 583.430 (West Supp. 1990). This provision basically allows the court to set conditions upon which the granting or denial of the dismissal will be based. Id. The court also can require the parties to comply with those terms it finds necessary. Id.
14. Id. § 907 (West 1980); see Young v. Rosenthal, 212 Cal. App. 3d 96, 130-35, 260 Cal. Rptr. 369, 390-94 (1989) (appeals sanctionable because they were prosecuted for no other reason than to harass and delay); infra note 15; see also National Secretarial Serv., Inc. v. Froelich, 210 Cal. App. 3d 510, 526, 258 Cal. Rptr. 506, modified, 210 Cal. App. 3d 1145h (1989). In Froelich, the court held that the delay tactics incorporated by the appellants were sanctionable in order to discourage similar future behavior. Id. at 526, 258 Cal. Rptr. at 515. The court imposed sanctions of $3500 to cover the appellee’s costs and attorney’s fees. Id. at 526-27, 258 Cal. Rptr. at 516. The court contemplated imposing sanctions to reimburse the state for the expense of the frivolous appeal. Because the appellants had not been given notice of the court’s consideration of such additional sanctions, the court declined to impose them. Id.; see infra note 51 and accompanying text.
15. CAL. CIV. PROC. CODE §§ 2016-2036 (West Supp. 1990). Section 2023 is the primary section under which sanctions may be imposed. The most recent extensive case involving sanctions under the discovery requirements is Young v. Rosenthal, 212 Cal. App. 3d 96, 260 Cal. Rptr. 369 (1989). The decision pertains exclusively to issues concerning sanctions imposed at both the trial and appellate levels. The suit involved a disbarred attorney and his former counsel, who was seeking to collect attorneys’ fees for services rendered. Successive law firms were involved. The disbarred lawyer was represented by counsel at trial and on appeal.

The case is also noteworthy because it involves an extensive review of the general law of sanctions. For example, the appellate court held that the imposition of monetary sanctions for abuse of the discovery process was justified. Id. at 118-19, 260 Cal.
Under section 4370.5 of the California Civil Code, just and reasonable awards for costs and attorneys' fees in a pending dissolution proceeding may be based upon the conduct of the parties or the attorneys involved.16

16. CAL. CIV. CODE § 4370.5 (West Supp. 1990). This issue was addressed in a suit decided by Division 7 of the Second Appellate District. See In re Marriage of Norton, 206 Cal. App. 3d 270, 253 Cal. Rptr. 354 (1988). In a dissolution suit involving child custody, the wife, who at the appellate level was the petitioner, filed a petition to regain custody due to changed circumstances. The trial court found the petition to be unreasonable. Id. at 56, 253 Cal. Rptr. at 356. Based upon that fact, and the fact that the wife had instigated numerous claims just to harass her estranged husband, the appellate court found that the trial court did not abuse its discretion in awarding sanctions, and it upheld the sanction award of $2500. Id. at 56-59, 253 Cal. Rptr. at 356-57; see also In re Marriage of Melone, 193 Cal. App. 3d 757, 765-66, 238 Cal. Rptr. 510, 515 (1987) (award of wife's attorney's fees was proper when husband failed to sign a stipulation offered by his wife postponing spousal support; failed to appear at the scheduled hearing; and subsequently sought to have the resulting order for support set aside).
Turning to the California Rules of Court, under rule 26 the court may impose penalties for frivolous appeals or unreasonable infractions of the rules on appeal.\textsuperscript{17} Finally, rule 227 of the California Rules of Court addresses sanctions for failure to comply with the rules, the local rules, and court orders.\textsuperscript{18}

As is readily discernible from the most cursory reading of the above statutory and rule references and annotations, the range of sanctions clearly exceeds that of merely imposing monetary penalties. The range of sanctions may include any of the following in descending order of severity: dismissal (civil death penalty); entry of default; striking of pleadings; evidence, witness, and issue limitation; vacation of motion or trial date; and monetary sanctions. The uninitiated should be cognizant of the variety of sanctions available under existing California law.\textsuperscript{19}

III. A BRIEF LOOK AT THE DEVELOPMENT OF SANCTIONS

Sanctions can be traced back almost indefinitely. In ancient times

\textsuperscript{17} CAL. SUP. CT. & CT. APP. R. 26; see Otworth v. Southern Pac. Transp. Co., 166 Cal. App. 3d 452, 212 Cal. Rptr. 743 (1985). The determination of the frivolity of an appeal in support of sanctions is a two-part test:

The subjective standard looks both to the motives and good faith of the appellant, imposing a penalty where the only purpose of the appeal was to harass the respondent or to delay the effect of an adverse judgment. The objective standard looks at the merits of the appeal from a reasonable person's perspective, imposing sanctions where any reasonable person would agree that the point is totally and completely devoid of merit.

\textit{Id.} at 461, 212 Cal. Rptr. at 748 (citing \textit{Flaherty}, 31 Cal. 3d at 649, 646 P.2d at 186-87, 183 Cal. Rptr. at 515-16). \textit{But see Flaherty}, 31 Cal. 3d at 649-51, 646 P.2d at 187-88, 183 Cal. Rptr. at 16-17 (in applying the subjective and objective standard, "punishment should be used most sparingly to deter only the most egregious conduct"). \textit{See also infra} note 53 and accompanying text.

In M.E. Gray Co. v. Gray, 163 Cal. App. 3d, 1025, 210 Cal. Rptr. 285 (1985), the court, bearing in mind the limitation of sanctions to egregious conduct as stated in \textit{Flaherty}, chose only to employ the objective standard. \textit{Id.} at 1039-40, 210 Cal. Rptr. at 293-94. The \textit{Gray} court, in a strongly worded opinion, held that a law firm's appeal from an order imposing sanctions for the filing of a frivolous motion was in and of itself without merit and, therefore, frivolous. \textit{Id.} The "firm's decision to pursue an appeal not only exacerbated an already appalling situation, but also, it exhibited a flagrant disregard for the law firm's obligation 'to respect the legitimate interests of fellow members of the bar, the judiciary, and the administration of justice.'" \textit{Id.} at 1040, 210 Cal. Rptr. at 294 (quoting \textit{Flaherty}, 31 Cal. 3d at 647, 646 P.2d at 185, 183 Cal. Rptr. at 514 (citation omitted)).

\textsuperscript{18} CAL. SUP. CT. R. 227; see City of El Monte v. Takei, 158 Cal. App. 3d 244, 249-50, 204 Cal. Rptr. 559, 562-63 (1984) (court "may order the person at fault 'to pay the opposing party's reasonable expenses and counsel fees'" limited to actual costs).

\textsuperscript{19} "There is no doubt that courts have adopted a whole new attitude toward using sanctions to accomplish 'calendar management.' " Hinerfeld, \textit{supra} note 2, at 33.
sanctions took the form of amercements. This was a penalty paid to
the crown upon a finding of misconduct in a criminal or civil proceed-
ing.20 “A plaintiff in any civil action would be amerced as a result of
nonsuit, bar, adverse verdict, or abatement of the action due to some
irregularity of pleading or procedure.”21 The same was true for the
defendant should he lose the suit.22 As in the present, these sanc-
tions were appealable only on the issue of the amount, not on the
sanction itself.23

By the thirteenth century, statutes actually were enacted allowing
the award of damages to be in the form of land.24 During the seven-
teenth and eighteenth centuries, amercement met its demise, and the
awarding of costs to the prevailing party began to appear in English
common law.25 By the eighteenth and nineteenth centuries, English
courts allowed case delay, so long as the attorney paid for the costs.26
Later, the courts actually began to hold clients responsible for their
attorneys’ conduct. Although early American courts imposed sanc-
tions, they did not address whether the client was responsible for the
sanction.27

Most of California’s sanctions statutes are fairly young. However,
“California appellate courts have been statutorily authorized to im-
pose sanctions for the prosecution of frivolous civil appeals” since
1851.28 The statute’s current version is section 907 of the California
Code of Civil Procedure.29

Interpretation of the statutes via case law has been the focus of
much attention. In Bauguess v. Paine,30 the California Supreme
Court became concerned with the trial court’s power to impose sanc-
tions. The court noted that the case “illustrates the dangers which
the exercise of such power, ‘without appropriate safeguards and
guidelines’ would pose.”31 Thus, in 1981, the California legislature
enacted section 128.5 of the Code of Civil Procedure.

21. Id. (footnote omitted).
22. Id.
23. Id. at 1259-60.
24. Id. at 1260-61.
25. Id. at 1264.
Justification for Holding Clients Responsible for Their Attorneys’ Procedural Errors,
1988 DUKE L.J. 733, 735.
27. Id. at 735-36.
28. Eisenberg, Sanctions on Appeal: A Survey and a Proposal for Computation
29. Id.; see CAL. CIV. PROC. CODE § 907 (West 1980).
3d 349, 251 Cal. Rptr. 75 (1988).
31. Id. at 639, 586 P.2d at 949, 150 Cal. Rptr. at 468.
Almost immediately, courts began to apply section 128.5 to issues pertaining to a requirement of good faith in the filing of motions, as well as to motions involving harassment or delay. As use of section 128.5 developed, due process concerns emerged, and the courts began to require that attorney's receive adequate notice before sanctions could be imposed.

Notwithstanding the growing pains California has experienced with the increasing use of sanctions, the courts in recent years have imposed and upheld sizeable sanctions. In an extreme case, Hersch v. Citizens Savings & Loan Association, the Second Appellate District not only upheld a ruling for the plaintiffs, but also imposed a sanction of $125,000 after determining that the appeal was taken for the purpose of delay. That same year, the Second Appellate District imposed a $10,000 sanction in Comora v. Comprehensive Care Corp. This imposition came after the court of appeal took notice of sanctions totaling over $14,000, the result of some fourteen years of litigation. In 1984, the court of appeal in Maple Properties v. Harris imposed a $20,000 sanction upon an appellant for using the judicial system to reargue a resolved matter. More recently, in Dwyer v. Crocker National Bank, the court of appeal held that the trial court did not abuse its discretion in imposing sanctions prohibiting the introduction of certain evidence at trial or by motion, or in awarding $73,258 to cover the defendant's attorney's fees and expenses. Additionally, the court also found that under rule 26 of the California Rules of Court, the appeal itself was frivolous and thus imposed an

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32. See Karwasky v. Zachay, 146 Cal. App. 3d 679, 194 Cal. Rptr. 292 (1983). "[T]he concept of good faith has to include the concept that motions are brought, based upon at least some statutory law, or based upon case law, or at least is based upon some kind of a concept that has a logic or coherency to it . . . ." Id. at 681, 194 Cal. Rptr. at 294 (quoting the trial court); see also Ellis v. Roshei Corp., 143 Cal. App. 3d 642, 649-50, 192 Cal. Rptr. 57, 61-62 (1983) (delay tactics seen as an unnecessary expenditure of time and thereby sanctionable).

33. See O'Brien v. Cseh, 148 Cal. App. 3d 957, 961, 196 Cal. Rptr. 409, 411 (1983) (ex parte notification of the opposing counsel against whom sanctions are sought does not constitute adequate notice); see also Corralejo v. Quiroga, 152 Cal. App. 3d 871, 872-74, 199 Cal. Rptr. 733, 734-35 (1984) (reversing sanctions because defendant's counsel did not have adequate notice "of the need to prove his or her own blamelessness in the complained of actions").

36. Id. at 377-78, 199 Cal. Rptr. at 542-43.
additional $10,000 sanction upon appellants.\textsuperscript{39}

What this should tell attorneys is that the imposition of sanctions is definitely on the rise. More importantly, the courts are not reluctant to award appropriate sanctions, even if they appear extreme.\textsuperscript{40} Some attorneys complain that the increase in the number of sanctions imposed, as well as the amounts, has not provided a stable basis upon which history or precedent can be built; and, therefore, those practicing law have no appreciable level of expectation.\textsuperscript{41} However, well focused lawyers who concentrate their energies on acting responsibly as officers of the court have no reason to fear the sanctioning power of any court. It is only those attorneys who constantly walk on the edge of impropriety, waiting for the courts to punish them, who must be concerned with the question of expectation, and rightly so.

IV. PHILOSOPHICAL IMPLICATIONS OF THE NECESSITY FOR SANCTIONS

Every judge who has presided in any department of a busy trial court, particularly in a civil law and motion department, is immediately faced with motions of merit, marginally meritorious motions, and motions which are clearly devoid of any merit. Fortunately, the latter type of motion is in the minority, but the minority is indeed becoming well represented. When faced with a motion that is devoid of any legal merit, the general judicial “staff” conversation invariably centers around the reason for bringing such a motion. The staff attorneys assigned to the judge or other hearing officers frequently will comment at the completion of their analysis: “Must be the end of the month and billable hours have to be generated to pay the overhead,” or, “just another paper war,” or, “the paralegal was unsupervised again.”\textsuperscript{42} The analysis and recommendation by the judicial staff to the judge may be persuasive and even reflected in the judge’s pre-
hearing tentative ruling or opinion, written or unwritten. A prudent lawyer should never underestimate the weight that judicial staff analysis and recommendations may carry with a judge in a busy court environment.43

After being confronted with nonmeritorious contentions, is such a suspecting judicial frame of mind reasonable, or is it the result of an unwarranted quantum leap in logic by one who has possibly forgotten that he or she was once also engaged in the practice of law? It is submitted that the growing evidence in the legal community supports the former conclusion. Three factors lend credence to this conclusion: (1) the increasing abundance of attorney services, (2) the establishment of “mega-law firms” and “mega-salaries,” and (3) the drift toward establishing mercantilism in the practice of law.

Initially, it is interesting to note the statistics concerning the availability of lawyers in California and their resultant impact on the courts. One is constantly bombarded with bar admission statistics. As of the date of the last administration of oaths to practice law, there were 122,300 lawyers admitted to practice law in California.44 According to statistics compiled by the American Bar Foundation in Chicago, California could boast one lawyer for every 247 persons in 1989, a substantial increase over the one lawyer for every 367 persons in 1980. These statistics readily demonstrate the rapid increase in the availability of attorney services in California. Does this fact alone

the attorney’s professional responsibility precludes him or her from pursuing such an appeal, and to withdraw from the representation of the client.


An attorney should remember that “[a] lawyer who has been sanctioned may face a long and expensive fight to save his name and career . . . .” Hinerfeld, supra note 2, at 82.

43. Courts have long been empowered to impose sanctions in order to control their dockets. Attorneys should be aware that the judicial staff may become frustrated with analyzing frivolous motions. “If, over the life of a lawsuit, the lawyer and his client have built up a pattern of poor conduct, they should not be surprised if an appellate court finds that the appeal itself is merely one more step in the process” and thereby sanctionable. Meadow, supra note 2, at 52. “In evaluating the appellant’s motives, the courts have consistently gone beyond the confines of the appeal itself.” Id. at 50; see Comora v. Comprehensive Care Corp., 140 Cal. App. 3d 369, 377, 189 Cal. Rptr. 538, 542 (1983) ($10,000 sanction upheld for harassment through groundless litigation over 14 years); see also Beckstead v. International Indus., Inc., 127 Cal. App. 3d 927, 935, 179 Cal. Rptr. 767, 771 (1982) ($6000 sanction imposed based upon appellants’ long history of unmeritorious and frivolous appeals).

44. In July 1989, 59.1% of those who took the California bar examination, considered one the most rigorous in the nation, passed, bringing the number of California attorneys to the listed number. San Francisco Chron., Nov. 28, 1989, at A7 (final ed.).
support the conclusion that when frivolous positions are taken in court documents and briefs, the blame must be placed on the increased abundance of attorney services in California? The question is rhetorical and needs only a short and quick response: "No!" Nor does the availability of attorneys support an inference that there are too many lawyers in California. History is replete with many instances of honorable services performed by the California bar and the contribution that attorneys have made to the improvement of the body politic. No small credit should be given to our California lawyers for their contribution to the prosperity of our state. However, it is an indisputable fact that with the increase in bar population must come an increase in the opportunity for urging untenable legal positions in court.45

A second factor which appears to give rise to frivolous pleadings and the concomitant necessity for sanctions is the drift toward the establishment of the “mega-law firm” and the payment of “mega-salaries” to beginning lawyers.46 The current tendency toward an inordinate conglomeration of attorneys into the mega-law firm is without question. State bar journals, legal newspapers, and other periodicals constantly bombard us with information concerning the “top” law firms in California in terms of population and salaries. What once would have been labeled “a managing partner’s nightmare” only a few years ago has suddenly taken on the aura of the ordinary. It is not uncommon to see a study comparison which reveals that the top law firms in California, in some instances, have affiliated attorneys exceeding one hundred in number. Added to this is an oft-quoted statistic that often “jars” experienced bench officers to the quick, since historically the majority have abandoned lucrative positions in the private sector to accept service on the bench with less remuneration. Of course, that statistic pertains to the salaries paid to many beginning lawyers in the top firms. A figure approaching $75,000 per year is not uncommon.47 Where do the funds come from

45. Some individuals believe that the increase in the number of attorneys is the cause of the increasing use of sanctions. Associate Justice Jack Goertzen of the Court of Appeal, Second Appellate District, Division Four, formerly the presiding judge of the Los Angeles County Superior Court, believes that “there are simply more lawyers litigating more cases.” L.A. Daily J., Sept. 9, 1987, at 5, col. 1. However, others share the belief that the problem lies within the legal profession itself and that more attorneys are doing anything and everything in order to win their cases. Id. No actual statistics are available, but judges and lawyers agree that the use of section 128.5 of the California Code of Civil Procedure, which addresses frivolous actions or delaying tactics, has increased significantly. See Hinerfeld, supra note 2, at 35. For a discussion of section 128.5, see supra note 7 and accompanying text.


47. An alarming article in the Los Angeles Times reported that some of Los Angeles’ largest firms purportedly were paying as much as $1100 a week for first- and sec-
to pay such salaries in these well-populated law firms that are constantly developing and appearing? The answer, of course, predominantly lies in the fees paid by clients, necessarily generated to pay these sums which were unheard of a few short years ago. The essential ingredient to the concoction necessary to meet the monthly overhead is, for the most part, "billable hours." The quandary then becomes whether a decision to file a marginal pleading is dictated more out of the necessity for billable hours than the client's best interest. The more marginal the motion, the stronger the inference to be drawn by judicial staff and bench officers that the client's interests have become ancillary.

A third factor affecting the conduct of litigation is an encroaching and illegitimate legal philosophy concerning the status of the activity we legal insiders commonly refer to as "practicing law." There was a time when the prevailing language in the community at large, and most certainly within the legal community when contemplating the role of lawyers, was that of "professionalism." In earlier times, any reference to an attorney being involved in a "job" or "vocation" was met with a quick retort: "Professional." Now we see an acceptance of a term in the legal profession which once was relegated to the business community. The "law merchant" seems to have gotten within the city walls. Periodicals now refer to "the merchanting" of legal services. It has even been suggested that we are only a prospector away from selling shares to investors as a means of financing lawsuits. Such terms, which originate within the "law merchant,"

...
degrade and cheapen our proud heritage as professionals. Indeed, they create confusion within the legal community concerning the role and duties of lawyers as officers of the court and representatives of their clients. Could it be that the merchanting of legal services in courts has led to the marginal or nonmeritorious motion, action, or appeal? While some may disagree, the answer is plausibly in the affirmative.

V. SANCTIONS AND COURT DELAY REDUCTIONS

California courts at all levels and in all departments are under applied stress to reduce calendar backlogs. Patience with marginal pleadings, and most certainly with nonmeritorious pleadings, is at its nadir. Of necessity, the courts are more inclined to impose sanctions in order to preserve valuable time to resolve meritorious and deserving controversies. Although the Court of Appeal for the Second Appellate District articulated the proposition more poignantly, the

50. See supra note 7; see also Consenza v. Kramer, 152 Cal. App. 3d 1100, 200 Cal. Rptr. 18 (1984). "[T]he attorney's professional responsibility precludes him or her from pursuing . . . [frivolous] appeal[s], and . . . [requires] withdraw[al] from the representation of the client." Id. at 1103, 200 Cal. Rptr. at 20 (emphasis added).

51. See Sheldon Appel Co. v. Albert & Oliker, 47 Cal. 3d 863, 765 P.2d 498, 254 Cal. Rptr. 336 (1989). Former California Supreme Court Associate Justice John Arguelles, writing for a unanimous court, suggested that an alternative way to curb excessive litigation is through the application of measures authorizing sanctions for frivolous or delaying conduct. He specifically wrote:

After reviewing the competing policy considerations, we agree with those decisions and commentaries which have concluded that the most promising remedy for excessive litigation does not lie in an expansion of malicious prosecution liability. As the Supreme Court of Michigan has recently noted, "In seeking a remedy for the excessive litigiousness of our society, we would do well to cast off the limitations of a perspective which ascribes curative power only to lawsuits." While the filing of frivolous lawsuits is certainly improper and cannot in any way be condoned, in our view the better means of addressing the problem of unjustified litigation is through the adoption of measures facilitating the speedy resolution of the initial lawsuit and authorizing the imposition of sanctions for frivolous or delaying conduct within the first action itself, rather than through an expansion of the opportunities for initiating one or more additional rounds of malicious prosecution litigation after the first action has been concluded. In recent years, the Legislature has taken several steps in this direction, enacting legislation to facilitate the early weeding out of patently meritless claims and to permit the imposition of sanctions in the initial lawsuit—against both litigants and attorneys—for frivolous or delaying conduct. Because these avenues appear to provide the most promising remedies for the general problem of frivolous litigation, we do not believe it advisable to abandon or relax the traditional limitations on malicious prosecution recovery.

Id. at 872-74, 765 P.2d at 509, 254 Cal. Rptr. at 341 (citations omitted) (quoting Friedman v. Dorzorc, 412 Mich. 1, 312 N.W.2d 585, 600 (1981)).


It is perhaps time that the courts, both trial and appellate, begin to speak and react more forcefully with respect to cases such as this one. Such an abuse of the legal system for no other purpose than to avoid paying a legitimate claim
“chilling effect” admonition as to litigants’ rights given by a unanimous California Supreme Court decision in In re Marriage of Flaherty—3 is a phrase that is given great deference by bench officers. The concern is that “[t]he lawyer who hears the footsteps of sanctions may be less willing to pursue an aggressive course or to advance a novel legal theory.”—4 However, the chilling effect of court congestion is also paramount in the mind of our judicial officers. Witness the mutative trend toward “rent-a-judging” occasioned by trial court congestion and the rapidly developing dichotomy between monied litigants simply can no longer be tolerated. It is not fair to the opposing litigant who is victimized by such tactics and it is not fair to the greatly overworked judicial system itself or those citizens with legitimate disputes waiting patiently to use it. In those cases where such abuse is present, an award of substantial sanctions is proper.

Id. at 526, 258 Cal. Rptr. at 515 (footnote omitted); see supra note 14.

53. 31 Cal. 3d 637, 646 P.2d 179, 183 Cal. Rptr. 508 (1982). The court specifically noted:

Both strands of this definition are relevant to the determination that an appeal is frivolous. An appeal taken for an improper motive represents a time-consuming and disruptive use of the judicial process. Similarly, an appeal taken despite the fact that no reasonable attorney could have thought it meritorious ties up judicial resources and diverts attention from the already burdensome volume of work at the appellate courts. Thus, 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—when any reasonable attorney would agree that the appeal is totally and completely without merit.

However, any definition must be read so as to avoid a serious chilling effect on the assertion of litigants’ rights on appeal. Counsel and their clients have a right to present issues that are arguably correct, even if it is extremely unlikely that they will win on appeal. An appeal that is simply without merit is not by definition frivolous and should not incur sanctions. Counsel should not be deterred from filing such appeals out of a fear of reprisals. Justice Kaus stated it well. In reviewing the dangers inherent in any attempt to define frivolous appeals, he said the courts cannot be “blind to the obvious: the borderline between a frivolous appeal and one which simply has no merit is vague indeed . . . . The difficulty of drawing the line simply points up an essential corollary to the power to dismiss frivolous appeals: that in all but the clearest cases it should not be used.”

Id. at 650, 646 P.2d at 187-88, 183 Cal. Rptr. at 516-17 (emphasis in original) (citation omitted) (quoting People v. Sumner, 262 Cal. App. 2d 409, 415, 69 Cal. Rptr. 15, 20 (1968)); see supra note 17; see also Weston, The Threat of Sanctions for Frivolous Suits, COMPLEAT LAW., Winter 1989, at 44. “The sanctions rule becomes a restraint preventing the lawyer from bringing a case for fear of the economic consequences rather than the more legitimate and significant concern for vindicating his client’s position and broadening the law.”

Id.

54. Hinerfeld, supra note 2, at 33.

55. Judge Eli Chernow of the Los Angeles Superior Court says [that] courts have long been mindful of warnings about the undesirable consequences of sanctioning attorneys, but he welcomes the judicial control of the courtroom that the threat of sanctions brings. “We as a society were so concerned about ‘chilling effects,’” says Chernow, “that we gave insufficient
Witness the loss of talented bench officers to the various “rent-a-judge” systems, and the concomitant decrease in public confidence in our judicial systems as administered. The applied concept of sanctions definitely has a legitimate part to play in relieving our apprehensions over court congestion. However, “[l]awyers by [virtue of their legal professionalism] also have a responsibility to avoid . . . [frivolous actions] by bringing objectivity and common sense to bear on their recommendations to clients.”

However, this judicial tool of sanctions as an aid in reducing court congestion does come with a price, which must be paid in terms of additional judicial time requirements. Sanctions, whether cast as a monetary fine or other punitive form, must be imposed with a great deal of care since they are penal in nature. Because of the penalty aspect of a sanction order, an additional care requirement is thrust upon the bench officer to expend additional judicial time to insure that the sanctions imposed are infused with due process, as a matter of right in the first instance, and to avoid vulnerability on appellate review in the second. A tendency exists on the part of many judges to adopt, as a path of least resistance, the chilling effect admonition of In re Marriage of Flaherty when considering sanctions, thereby avoiding the additional time required to fine tune a sanction hearing and subsequent order so that they will pass appellate muster. Such an approach is self-defeating and of no benefit to court delay reduction. Meritorious motions for sanctions should be granted despite the additional time constraints placed upon the busy bench officer. The concomitant results will be salutary and visible in the form of decreased court congestion.

There is agreement on this point from the federal bench. “Some people say it’s chilled advocacy,” says Judge Schwarzer. “I don’t see any evidence of that whatsoever. Anyone who wants to conduct himself as an effective advocate and to bring forth a novel argument is not precluded from doing so.”

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Id. at 82 (emphasis added) (quoting Judge Eli Chernow of the Los Angeles Superior Court and Judge William Schwarzer of the Northern District of California, respectively).


58. See supra note 2 (increased use of sanctions has created an increase in appellate court review of sanctions).

59. But see supra note 4 (insurability of sanctions may depend upon the label ascribed to them).
VI. CONCLUSION

It remains to be seen whether the process of imposing sanctions will effectively reduce trial and appellate court backlogs, or whether the mechanics for imposing sanctions will elongate proceedings, thereby increasing the number of cases on our trial and appellate court calendars. However, if sanctions are consistently and properly imposed, in keeping with constitutional requirements of due process, the inevitable result will be a marked improvement in our backlog-ed calendars, thus enabling better access to our courts by deserving litigants.