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Sanctions Under California Code Of Civil Procedure

Section 128.5: How To Avoid Eating A Piece Of Humble Pie

I. INTRODUCTION

The newly amended California Code of Civil Procedure, section 128.5¹ clarifies and expands those instances when attorney's fees and other costs will be authorized by a court against an attorney, his client, or both. This legislative action reflects the broadening judicial interpretation of section 128.5 since the statute's enactment in 1982. The increasing use of sanctions by state courts parallels a similar trend in the federal system.² This article reviews the reported state decisions granting or denying sanctions under 128.5. The article provides supportive case law for an attorney requesting such sanctions and guidelines for those wishing to avoid "eating a piece of humble

1. (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.

CAL. CIV. PROC. CODE § 128.5 (West Supp. 1986).

2. The federal counterpart to California's section 128.5 is FED. R. CIV. P. 11 (amended April 28, 1983). For some interesting cases interpreting Rule 11, see *Van Berkel v. Fox Farm and Road Mach.*, 581 F. Supp. 1248 (D. Minn. 1984) (costs granted against plaintiff's counsel who did not make reasonable inquiry before signing complaint and unjustifiably failed to dismiss on learning that suit was time-barred); *Wells v. Oppenheimer & Co., Inc.*, 101 F.R.D. 358 (S.D.N.Y. 1984) (no need for subjective finding of bad faith before awards granted).

pie.”³

The changes that the amended section makes to the original statute are significant.⁴ Under the old section, bad faith tactics included

3. The statement “eating a piece of humble pie” originates with the trial judge in *Bauguess v. Paine*, 22 Cal. 3d 626, 586 P.2d 942, 150 Cal. Rptr. 461 (1978). The supreme court’s ruling in *Bauguess* initiated the passage of section 128.5. In that case, a plaintiff’s attorney, in a personal injury trial, examined a trial exhibit after the court had recessed for the day. Some of the jurors’ own notes appeared on the exhibit. The following day, the trial judge learned of the incident from his court clerk and reprimanded the attorney for his conduct. The court also suggested the possibility of mistrial.

Plaintiff’s counsel defended his action by stating he had done nothing wrong. In fact, he argued that not only was he entitled to review the exhibit (since it had been admitted into evidence), but that he was under a *duty* to examine the exhibit.

The trial judge found counsel in contempt of court and awarded defendant’s motion for mistrial. At a later hearing, plaintiff’s counsel was ordered to pay defendant \$700 in attorney’s fees. The judge commented, “[What] would make me happier than anything else in the world is to have you [plaintiff’s counsel] just maybe eat a little humble pie and admit that you made a mistake in judgment and it’s not going to happen again” *Bauguess*, 22 Cal. 3d at 633, 586 P.2d at 946, 150 Cal. Rptr. at 465.

Upon appeal, the California Supreme Court held that the trial court had no equitable, supervisory or *statutory* authority to award the attorney fees. In an often quoted passage, the court remarked,

The use of the courts’ inherent power to punish misconduct by awarding attorney’s fees may imperil the independence of the bar and thereby undermine the adversary system. In cautioning trial courts to use their contempt powers with care, this court has repeatedly stressed the importance of permitting counsel to be a vigorous advocate: “He has a right to press a legitimate argument and to protest an erroneous ruling.” Indeed, so essential is this “fundamental interest of the public in maintaining an independent bar” . . . that “a mere mistaken act by counsel cannot render him in contempt of court. Even if a legal proposition is untenable, counsel may properly urge it in good faith; he may do so even though he may not expect to be successful, provided of course, that he does not resort to deceit or to wilful obstruction of the orderly process.”

Id. at 638, 586 P.2d at 949, 150 Cal. Rptr. at 468 (quoting *Smith v. Superior Court*, 68 Cal. 2d 547, 560, 440 P.2d 65, 73, 68 Cal. Rptr. 1, 9 (1968)).

As a lone dissenter Justice Clark argued that it was within the courts’ supervisory role to control counsel. He was also “distressed that the majority appear[ed] to condone both [the attorney’s] astonishing imposition upon the orderly procedures of the court and the disingenuous explanation to which he continue[d] to adhere.” 22 Cal. 3d at 641-42, 586 P.2d at 951, 150 Cal. Rptr. at 470 (Clark, J., dissenting). Apparently, the California Legislature was also distressed by the decision, and passed section 128.5 shortly thereafter.

4. The original section 128.5 reads as follows:

(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.

Act of Sept. 24, 1981, ch. 762, § 1, 1981 Cal. Stat. 2968.

See also *id.*, § 2 (“It is the intent of this legislation to broaden the powers of trial

those actions which were frivolous and/or which caused unnecessary delay.⁵ Bad faith tactics under the revised section also include actions "employed solely to harass an opposing party or are totally and completely without merit"⁶ Furthermore, the words "action" and "tactic" now are *not limited* to "the making or opposing of motions and the filing and service of a complaint or cross-complaint."⁷ As will be illustrated below, these current changes reflect the courts' expanding interpretation of 128.5.⁸

II. WHAT CONSTITUTES "FRIVOLOUS" AND "IN BAD FAITH"?

The current definition of "frivolous" incorporates a two-part standard which has its origins in California cases that discuss the meaning of "frivolous appeals."⁹ The first "subjective" standard requires a review of the motives of both the party and his counsel.¹⁰ Under the second, "objective" standard, the court analyzes the merits of the action from the perspective of the reasonable person. The test is "whether any reasonable person would agree that the point is totally and completely devoid of merit, and, therefore, frivolous."¹¹ When used together, the two standards lend support for each other. For instance, an action that appears to be totally meritless may indicate that the action was intended solely for delay. Prior to the new revision, the courts often used this two-part standard to determine what was frivolous under 128.5.¹²

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 *Bauguess v. Paine*").

5. *See id.* § 1.

6. Act of July 26, 1985, ch. 296, 1985 Cal. Adv. Legis. Serv. 694 (Deering).

7. *Id.*

8. At the recent annual meeting of Women Lawyers of Ventura County, Judge Klein (author of the decision in *Lesser v. Huntington Harbor Corp.*, 173 Cal. App. 3d 922, 219 Cal. Rptr. 562 (1985) (discussed below)) indicated that the reported decisions regarding section 128.5 complemented the current amendment. She also stated that her decision in *Lesser* did not conflict with the revised statute. Address by J. Klein, Women Lawyers of Ventura County Annual Banquet (Jan. 14, 1986).

9. *See In re Marriage of Flaherty*, 31 Cal. 3d 637, 646 P.2d 179, 183 Cal. Rptr. 508 (1982) (in-depth discussion of the objective and subjective standards in examining frivolous appeals).

10. *Id.* at 649, 646 P.2d at 186-87, 183 Cal. Rptr. at 515-16.

11. *Id.*

12. *See, e.g., Karwasky v. Zachay*, 146 Cal. App. 3d 679, 194 Cal. Rptr. 292 (1983); *Garcia v. Sterling*, 176 Cal. App. 3d 17, 221 Cal. Rptr. 349 (1985).

III. THE CASE LAW:

A. *The Case of the Motion That Had No Logic: A Motion To Disqualify Counsel:*

In *Karwasky v. Zachay*,¹³ the plaintiff's attorney was sanctioned \$250.00 for bringing a motion to disqualify opposing counsel from representing both defendants in a personal injury action.¹⁴ Although the plaintiff alleged a conflict of interest between the two defendants, he failed to allege any conflict between the defendants and their attorney. Furthermore, the plaintiff was unable to present any evidence that such a conflict existed between defense counsel and her clients.

The trial court found that "good faith has to include the concept that motions are brought based upon at least some statutory . . . or . . . case law, or at least . . . upon some kind of a concept that has a logic or coherency to it" ¹⁵ Since the plaintiff's motions had none of these traits, sanctions were appropriate. In fact, the plaintiff's counsel *admitted* to the trial court the absence of any statutory or case law to support his motion!¹⁶

Despite this admission by counsel, the plaintiff appealed the sanction award. She claimed that mistaken legal judgment should not constitute bad faith. The court of appeal disagreed, and ruled that "a motion is frivolous and in bad faith where, as here, any reasonable attorney would agree such motion is totally devoid of merit."¹⁷ The court affirmed the sanction award.

The *Karwasky* case is a classic example of a court employing the objective/reasonable person standard to determine whether a motion is frivolous. It also represents the proposition that mistaken legal judgment is not a valid defense against 128.5 motions.

B. *The Case of the Moribund Motion: A Motion to Change Venue:*

In *Fegles v. Kraft*,¹⁸ the court required the plaintiffs to pay \$450 in attorneys' fees for bringing a bad faith motion to change venue.¹⁹ A

13. *Karwasky*, 146 Cal. App. 3d 679, 194 Cal. Rptr. 292 (1983).

14. This was a slip-and-fall case brought against both the owner and manager of a trailer park. Each defendant was represented by the same attorney. Plaintiff's counsel moved to disqualify defense counsel from representing the park manager. Plaintiff alleged the relationship between the employer/park owner and the employed park manager created a conflict of interest for the defense attorney. The defense attorney responded to this motion with her own motion for sanctions under section 128.5. *Id.*

15. *Id.* at 681, 194 Cal. Rptr. at 294.

16. *Id.*

17. *Id.* at 681, 194 Cal. Rptr. at 293.

18. 168 Cal. App. 3d 812, 214 Cal. Rptr. 380 (1985).

19. The \$450 represented reasonable expenses incurred by the defendants in opposing the change of venue motion.

review of the proceedings is necessary to understand the ruling. The defendants initially filed a motion to change venue from Oakland, in Alameda County, to San Luis Obispo, where the defendants' resided. The plaintiffs then filed a counter motion to keep the case in Oakland. They claimed the move to San Luis Obispo would inconvenience twenty-seven witnesses. However, the trial court granted the defendants' motion. It also denied the plaintiffs' later petition for writ of mandate.

One year later, the plaintiffs again moved to return the case to Oakland. This time they claimed thirty witnesses would be inconvenienced and that one treating physician lived closer to Oakland than to San Luis Obispo. For a third time, the court denied plaintiffs' motion to transfer and imposed sanctions against them.²⁰

On appeal, the plaintiffs attempted to distinguish their case from *Karwasky v. Zachay*²¹ by arguing that their motion was not "totally devoid of merit."²² The appellate court acknowledged that "a reasonable attorney"²³ might have opposed the *initial* motion to change venue. But, such a view "might be subject to a reappraisal after one trial judge, and presumably a panel of at least two or three appellate justices, decided the motion lacked sufficient merit to be granted."²⁴

The court of appeal was apparently disturbed by the plaintiffs' actions in this case. They wondered "when this moribund motion [could be] laid to rest and no longer resurrected to haunt the courts of either Alameda or San Luis Obispo Counties."²⁵ The appellate court also stressed that the plaintiffs' lack of good faith was supported by their failure to comply with Code of Civil Procedure, section 1008(b).²⁶ The case was then remanded to the lower court upon

20. At the third hearing to once again determine if the case should be returned to Oakland, the presiding judge in disbelief remarked to the moving attorney: "[Y]ou are renewing a motion and requiring the defendant to meet that motion when the motion was made in Alameda County. The motion to change venue was granted. It was taken up to the Court of Appeal. The Court of Appeal rejected the opportunity to change the ruling of the trial court." *Fegles*, 168 Cal. App. 3d at 815, 214 Cal. Rptr. at 381.

21. 146 Cal. App. 3d 679, 194 Cal. Rptr. 292 (1983).

22. *Fegles*, 168 Cal. App. 3d at 814, 214 Cal. Rptr. at 381.

23. *Id.*

24. *Id.*

25. *Id.* at 815, 214 Cal. Rptr. at 381.

26. *Id.* at 814, 214 Cal. Rptr. at 381. Code of Civil Procedure section 1008(b) provides:

When the party who originally made an application for an order which was refused in whole or part . . . makes a subsequent application for the same order upon an alleged different state of facts, it shall be shown by affidavit what application was made before, when and to what judge, what order or decision

different grounds.²⁷

C. *The Case Of The Motion That Failed To Leave Well Enough Alone: A Motion To Dismiss:*

Sanctions were awarded against a defense firm for filing a bad faith motion to dismiss in *M.E. Gray Co. v. Gray*.²⁸ Shortly before trial, the defendants moved the court to continue trial for several months so they could depose expert witnesses. Over the plaintiff's objections, the motion to continue trial was granted. However, the trial court recognized that a continuance might subject the case to dismissal under Code of Civil Procedure Section 583(b).²⁹ To avoid this problem, the court ordered that all parties to the action sign a waiver to the so-called "five year rule."³⁰

Unfortunately, no waiver was ever filed with the court. Once the five year time period passed, the defendants moved to dismiss the action.³¹ The motions were denied and sanctions were awarded in the

was made thereon, and what new facts are claimed to be shown. For failure to comply with this requirement, any order made on such subsequent application may be revoked or set aside on ex parte motion.

CAL. CIV. PROC. CODE § 1008(b)(West 1980).

The plaintiffs claimed their motion was "different" within the meaning of section 1008(b) from their earlier motion on the grounds that the defendants were the ones who actually initiated the first motion, whereas now the plaintiffs were the instigators. The plaintiffs also alleged that the "new fact" in support of their motion was that the treating physician lived closer to Alameda than to San Luis Obispo. The trial court decided both grounds were insufficient. *Fegles*, 168 Cal. App. 3d at 816, 214 Cal. Rptr. at 381-82.

27. 168 Cal. App. 3d at 817, 214 Cal. Rptr. at 383. See *infra* notes 94-97 and accompanying text, regarding the sufficiency of orders granting sanctions.

28. 163 Cal. App. 3d 1025, 210 Cal. Rptr. 285 (1985).

29. Civil Procedure section 583(b) provided:

Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of the defendant, after due notice to plaintiff or by the court upon its own motion, unless such action is brought to trial within five years after the plaintiff has filed his action, except where the parties have filed a stipulation in writing that the time may be extended.

CAL. CIV. PROC. CODE § 583(b)(West 1976). Section 583 was repealed in 1984. Portions of the repealed statute have been recodified at CAL. CIV. PROC. CODE § 583.310 (West Supp. 1986).

30. *Gray*, 163 Cal. App. 3d at 1030, 210 Cal. Rptr. at 297. The defendant/appellant law firm did prepare a written stipulation to the waiver several months after the continuance had been granted. It was forwarded to plaintiff's counsel with instructions that plaintiff was to circulate the stipulation among all the other parties for their signatures. The original, once signed by all, was to be returned to the originating law firm for later filing with the court. *Id.*

31. The defendant/appellant law firm claimed its interpretation of the order to obtain the written waiver was made in good faith and that "it reasonably believed an advantage had been afforded to its clients by plaintiff's failure to execute and file the written waiver prior to the expiration of the 5 year period." *Id.* at 1034, 210 Cal. Rptr. at 290.

amount of \$2,950.00 against one law firm.³²

The court of appeal affirmed the award and cited several factors supporting its finding that defense counsel had acted in bad faith. First, all defendants were obligated to comply with the order to sign and file with the court the written waiver. Appellant had waited more than three months to prepare and forward to plaintiff's counsel the stipulation of waiver. Defense counsel then failed to follow up as to the stipulation's status or location. Perhaps more significantly, appellant "made no effort to follow up on the status of the stipulation during the 27 days which elapsed before it filed the motion to dismiss."³³

The appellate court also rejected the appellant's claim that it was the *plaintiff's* duty to obtain the waiver: "[a] *plaintiff* whose trial date has been continued on a *defendant's* motion beyond the five-year period, should not suffer mandatory dismissal because the *defendant* failed to comply with an order requiring the filing of a stipulation."³⁴ And although the trial court could have awarded sanctions against some of the other defendants, its failure to do so was not incorrect.³⁵

However, the story does not end here. The court of appeal also

32. At the hearing on the motions, the following dialogue took place between the court and appellant defense counsel:

[Court:] Mr. Dewberry, I read your moving papers. I was truly amazed at what I read, and so I reread them. I read everything else and then I read everything else again. But, you know, the orders are incredible . . . What the hell are you doing? This is truly incredible. Everybody knows that waiver doesn't have to be filed within the five years . . . What are you doing?

[Mr. Dewberry:] Basically, it's our belief or my belief alone that the plaintiff's inadvertence in filing [the stipulation] and returning it . . . for filing has in effect given my client a windfall on a substantive right.

Id. at 1034-35, 210 Cal. Rptr. at 290.

Note that the plaintiff had requested sanctions against all the moving parties and their attorneys, jointly and severally. However, the trial court granted sanctions only against the appellant law firm.

33. *Id.* at 1035, 210 Cal. Rptr. at 290 (emphasis added). In fact, there were two specific instances in which appellant could have determined the stipulation's status. Four days prior to bringing its motion to dismiss, the appellant attended the deposition of one of the plaintiff's experts. Then, three days before bringing the motion, the appellant discussed the case with plaintiff's counsel by telephone. At neither time did defense counsel inquire as to the stipulation. Nor did he advise plaintiff's counsel that the five year period had expired and that the defendant would file a motion to dismiss.

34. *Id.* at 1036, 210 Cal. Rptr. at 291 (emphasis in original).

35. *Id.* at 1039, 210 Cal. Rptr. at 293. Interestingly enough, at the hearing on the motion, the appellant "did not object to the court's unwillingness to apportion the sanctions nor did he attempt to refute the court's finding the [appellant] firm alone was responsible." *Id.* at 1038, 210 Cal. Rptr. at 293.

found the appeal to be frivolous.³⁶ The sanctions were then increased to \$8,850, which represented three times the amount of the original award. In short, the court found the conduct of defense counsel reprehensible.³⁷ By pursuing the appeal, the appellant "exacerbated an already appalling situation . . . [and] exhibited a flagrant disregard for the law firm's obligation" to the bar, the courts and the interests of justice.³⁸ The moral of this case may be to think twice before making the same argument twice. It may be less costly to "leave well enough alone."³⁹

*D. The Case Where Blame Could Not be Found:
A Motion to Quash:*

The case of *Luke v. Baldwin-United Corp.*⁴⁰ illustrates the limitation of section 128.5. The plaintiff in that case brought a wrongful termination action against Baldwin and several of its subsidiaries. Based upon a seemingly reasonable investigation,⁴¹ attorneys for Baldwin filed a motion to quash, claiming California had no personal jurisdiction over the company. Later, during discovery on the jurisdictional issue, several jurisdictional contacts were established with the State of California. Defense counsel then acknowledged jurisdiction and withdrew his motion before the plaintiff had prepared any opposition papers. Yet later, the trial court granted the plaintiff's motion for \$8,373.75 in sanctions.⁴²

Faced with such a heavy fine, defense counsel appealed. First, he argued his conduct was not egregious within the meaning of 128.5. Second, he alleged he was prevented from exonerating himself due to the attorney-client privilege. The appellant's arguments convinced the court to reverse the sanction order. The court distinguished the

36. The ruling on the frivolous appeal was made under Rule 26(a) which states, in relevant part:

Where the appeal is frivolous or taken solely for the purpose of delay . . . the reviewing court may impose upon offending attorneys or parties such penalties, including the withholding or imposing of costs, as the circumstances of the case and the discouragement of like conduct in the future may require.

CAL. CIV. & CRIM. RULES § 26(a)(West 1981).

37. *Gray*, 163 Cal. App. 3d at 1040, 210 Cal. Rptr. at 294.

38. *Id.*

39. *Id.*

40. 167 Cal. App. 3d 664, 213 Cal. Rptr. 654 (1985).

41. Defense counsel questioned a company director, who was also a financial officer, and researched the law on personal jurisdiction of a foreign corporation. *Id.* at 667, 213 Cal. Rptr. at 655.

42. The trial court sanctioned the attorney since it appeared inconceivable that an attorney of the avowed experience of defendant's counsel could not or would not have elicited those same facts [establishing jurisdiction] prior to the filing of the motion to quash At the very least, counsel had an obligation to pursue those facts further to determine, based on the complex corporate scheme described, if all bases of jurisdiction were negated.

Id. at 669, 213 Cal. Rptr. at 657.

attorney's conduct here from other cases where counsel had been personally punished.⁴³ In other cases, the conduct of the sanctioned attorneys was "blatant; they personally misused the judicial system."⁴⁴ But here, the sanction "was based upon impermissible speculation and conjecture as to facts [the attorney] *could* have or *should* have discovered."⁴⁵

The appellate court realized that it was impossible for the trial court to determine whether the attorney or the client was to blame for filing the motion to quash. The only way to determine which party was at fault would require an inquiry into facts protected by the attorney-client privilege. This the court was unwilling to do. Since the lower court could not allocate responsibility,⁴⁶ the award as against the attorney could not stand.⁴⁷

E. The Case of Misplaced Reliance: A Motion to Strike:

A motion will not be considered frivolous or in bad faith where the moving party relies upon case law later determined to be incorrect. In *Garcia v. Sterling*,⁴⁸ the plaintiff's counsel noticed a motion to strike portions of a defendant's verified answer that conflicted with the defendant's earlier sworn deposition testimony.⁴⁹ The defendant's responding papers requested sanctions under section 128.5 "on the ground that the motion . . . was . . . 'totally devoid of merit, frivolous, and not brought in good faith.'"⁵⁰ The lower court agreed and granted sanctions of \$150.

The court of appeal reversed. It found that the cases upon which the plaintiff relied in bringing his motion constituted "prime examples of the widespread misunderstanding of the scope of judicial notice of court records."⁵¹ The plaintiff's incorrect reliance upon the

43. The comparison cases to which the *Luke* court cited include *In re Marriage of Gumabao*, 150 Cal. App. 3d 572, 198 Cal. Rptr. 90 (1984); *Cosenza v. Kramer*, 152 Cal. App. 3d 1100, 200 Cal. Rptr. 18 (1984); *Ellis v. Roshei Corp.*, 143 Cal. App. 3d 642, 192 Cal. Rptr. 57 (1983).

44. *Luke*, 167 Cal. App. 3d at 669, 213 Cal. Rptr. at 657.

45. *Id.* (emphasis in original).

46. *Id.*

47. The issue of sanctions against the client, Baldwin, was not before the court of appeal. *Id.* at 670, 213 Cal. Rptr. at 658.

48. 176 Cal. App. 3d 17, 221 Cal. Rptr. 349 (1985).

49. The motion to strike was brought pursuant to CAL. CIV. PROC. CODE §§ 436, 437 (West Supp. 1986).

50. 176 Cal. App. 3d at 20, 221 Cal. Rptr. at 350-51 (quoting defendant's responding papers).

51. *Id.* at 22, 221 Cal. Rptr. at 352.

case law, however, did not indicate that the motion was frivolous or in bad faith.⁵²

The *Garcia* decision is an example of a case where the first subjective standard (under which the party's motive is reviewed) outweighed any mistaken legal judgment made by the attorney. There was "no evidence of subjective bad faith or improper motive."⁵³ Furthermore, under the second, objective test, "it was not unreasonable for [the] attorney to think the issues were arguable."⁵⁴

Both the objective and subjective standards have been employed by the courts to determine if a motion was frivolous or presented in bad faith. If an attorney fails to support a motion with *any* evidence or case law, his action may be found lacking in good faith. A mistaken legal judgment usually will not be a valid defense unless the mistake can be attributed to a misunderstanding of a legal principle common within the legal community. However, if there is other evidence to support an improper motive, such a defense would most certainly fail. Also, noncompliance with other code procedures and with court orders, and the failure to communicate with opposing counsel when there is opportunity to do so, may be further indicators that counsel is acting improperly.

On the other hand, a court may be reluctant to order sanctions when it can only speculate as to which party was at fault. Sanctions are a serious matter and should not be granted upon mere conjecture as to what an attorney or his client could or should have done. Thus, in at least one case, the use of the attorney-client privilege helped to shield an attorney from sanctions.⁵⁵

Finally, if an attorney or his client has been sanctioned, he should think carefully before appealing such an order. Unless he can raise valid due process issues,⁵⁶ a party who appeals a sanction order may end up incurring the wrath of the appellate court and paying additional sanctions for filing a frivolous appeal.

IV. WHAT CONSTITUTES "DELAY"?

A. *The Failure to Appear at Trial*

There are few reported cases which consider the meaning of "delay" under section 128.5. To a certain extent, one could argue that

52. *Id.*

53. *Id.*

54. *Id.* at 22-23, 221 Cal. Rptr. at 352. The court here actually incorporated into its opinion the two part test followed in the case of *In re Marriage of Flaherty*, 31 Cal. 3d 637, 646 P.2d 179, 183 Cal. Rptr. 508 (1982).

55. See *Luke v. Baldwin-United Corp.*, 167 Cal. App. 3d 664, 213 Cal. Rptr. 654 (1985).

56. See *infra* notes 80-97 and accompanying text.

any motion that is frivolous or made in bad faith ultimately amounts to a delay in the resolution of the action. Thus, the terms "frivolous," "bad faith," and "delay" should not be considered autonomously. However, in the case of *In re Marriage of Gumabao*,⁵⁷ sanctions of \$450 were granted against an attorney primarily for his delay tactics.

Specifically, the sanctioned attorney in *Gumabao* failed to appear at a marriage dissolution trial. What apparently infuriated the trial court was that throughout the day the trial was to begin, the attorney's office continually called the court and informed it that counsel would be there within a certain time. However, counsel never did appear, and the trial had to be continued.⁵⁸

The punished attorney appealed upon two grounds. First, he contended that section 128.5 should be construed in conjunction with appellate decisions involving contempt of court. He argued that these decisions "do not authorize sanctions for an absent or tardy attorney if there is a valid excuse" ⁵⁹ The attorney claimed his presence at court in another matter that same day constituted such a valid excuse. His second claim on appeal was simply that his actions were not willful.

The court of appeal summarily disregarded the attorney's first claim by ruling the contempt cases were "simply inapposite" to section 128.5 cases.⁶⁰ As to the attorney's second argument, the court was quite forward in its response:

Because of [the appellant's] failure to take the courteous step of notifying [opposing counsel] of his predicament, [opposing counsel] and his client were required to sit or be available for court the better part of a day. Whether [the appellant] had a valid excuse . . . is of no consequence to us. His discourteous act towards opposing counsel was not in good faith, was frivolous and caused unnecessary delay⁶¹

Furthermore, willfulness, or lack thereof, played no part in granting or denying the sanctions under section 128.5. With "ample justifica-

57. 150 Cal. App. 3d 572, 198 Cal. Rptr. 90 (1984).

58. The attorney in fact did not call the court. Instead, his secretary called the court at 9:45 a.m., leaving word for opposing counsel, and indicated that the attorney would be in court by 11:00 a.m. At 11:00 a.m., she informed the court he would be there by 1:30 p.m. At 1:30 p.m., she called and said he would be there by 2:30 p.m. At 5:10 p.m., the attorney finally was through with the other matter, but, by that time, he thought "it was too late to notify [opposing counsel] that this difficulty [with the other matter] had been encountered." *Id.* at 575, 198 Cal. Rptr. at 93.

59. *Id.* at 576, 198 Cal. Rptr. at 93.

60. *Id.* at 577, 198 Cal. Rptr. at 94.

61. *Id.*

tion”⁶² the appellate court had little difficulty in affirming the sanction order.⁶³

B. *The Failure to Stipulate*

A second example of bad faith delay tactics can be found in *Ellis v. Roshei Corp.*⁶⁴ In that case, plaintiff’s counsel would not agree to allow the defendant to amend his cross-complaint to correct a technical error.⁶⁵ Instead, plaintiff’s counsel filed a demurrer to the cross-complaint. In an unusual twist, the trial court granted the plaintiff’s demurrer, but also sanctioned him for filing it.⁶⁶

At oral argument before the court of appeal, plaintiff’s counsel stated that he refused to stipulate because “his client was suspicious of defendants.”⁶⁷ The appellate court found such rationale itself to be “unacceptable”⁶⁸ and that the attorney should not have “blindly follow[ed] his client’s instructions.”⁶⁹ The attorney’s act caused delay and harassment and sanctions were appropriate.

C. *Other Acts of “Bad Faith”*

As noted in the case of *In re Marriage of Gumabao*,⁷⁰ lack of willfulness was not a valid defense to sanctions under section 128.5. In *Mungo v. UTA French Airlines*,⁷¹ there was no question that the sanctioned attorney acted with intentional bad faith. Six days prior to trial, plaintiff’s counsel asked the court for a continuance. When

62. *Id.*

63. *Id.* In another dissolution proceeding, *In re Marriage of Bergman*, 168 Cal. App. 3d 742, 214 Cal. Rptr. 661 (1985), the court of appeal indicated that section 128.5 was fully applicable to family law matters:

In adopting Code of Civil Procedure section 128.5 the Legislature has given trial judges a valuable tool to curb actions of litigants which are not in good faith. In family law cases, because of the emotional atmosphere surrounding the breakup of the marriage, judicious use should be made of this tool. Aggressive advocacy should not be stifled, but bad faith and repetitive courses of conduct should not be tolerated. This tool, at the very least, places the victim of conduct not carried on in good faith in the position of being made financially whole in opposing it.

168 Cal. App. 3d at 764 n.20, 214 Cal. Rptr. at 675 n.20.

64. 143 Cal. App. 3d 642, 192 Cal. Rptr. 57 (1983).

65. The technical error was that the cross-complaint failed to specify the statutes under which the breach of duty was alleged. Defense counsel, upon discovery of the omission, informed plaintiff’s counsel of the particular statutes at which time plaintiff’s counsel agreed that those statutes were correct. Plaintiff’s attorney, however, would not stipulate to an amended cross-complaint, for to do so would eliminate the sole basis of his demurrer. *Id.* at 646, 192 Cal. Rptr. at 59.

66. The attorney fees amounted to \$250. *Id.* at 647, 192 Cal. Rptr. at 60.

67. *Id.* at 649, 192 Cal. Rptr. at 61.

68. *Id.*

69. *Id.* at 650, 192 Cal. Rptr. at 62.

70. 150 Cal. App. 3d 572, 198 Cal. Rptr. 90 (1984).

71. 166 Cal. App. 3d 327, 212 Cal. Rptr. 369 (1985). The appellants here were clients, who challenged the sanction award directed against their attorney.

the trial court refused, plaintiff's counsel announced his readiness for trial. By so doing, he knew that defense counsel would incur substantial preparatory trial costs.⁷²

On the day of trial, plaintiff's counsel claimed his key witness was both out of the country and unavailable. His request to continue the case was again denied. Instead, plaintiff's counsel was granted one hour to reach his key witness. When he failed to contact the witness, plaintiff's counsel dismissed the remaining causes of action against the defendant. Sanctions were then granted against plaintiff's counsel for \$500.

The court of appeal found that plaintiff's counsel had "the responsibility not to lead the court and opposing counsel to believe that there would be a trial . . . knowing that the key witness was not even in the country and had not been contacted even up to the hour of trial."⁷³ Such actions showed bad faith. Based upon the findings of the court of appeal, one wonders why the sanctions were not greater, especially in light of the costs incurred by the defense.

The courts have harsh words for those they find delaying the resolution of cases. As a minimum precaution, an attorney should not "trick" or otherwise mislead the court or his opponent into believing there will be a trial when there simply will not be one. If an attorney says he will be in court, he had better appear or be prepared to make a trip to the bank.

V. THE LATEST EXPANSION OF 128.5: ITS APPLICATION TO AN ENTIRE LAWSUIT

Neither the old nor the newly amended section 128.5 specifically states that the section pertains to an *entirely* frivolous lawsuit. However, one court of appeal has recently held that section 128.5 does apply to "entire actions not based on good faith which are frivolous or cause unnecessary delay in the resolution of a dispute."⁷⁴ In *Lesser v. Huntington Harbor Corp.*,⁷⁵ a trial court awarded defendants \$59,148.10 in attorney's fees and costs spent on a six-year defense of a multi-million dollar fraud claim.⁷⁶ Curiously, the plaintiff did not

72. Defense counsel was forced to spend about \$12,758 in six days on trial preparation. *Id.* at 332, 212 Cal. Rptr. at 373.

73. *Id.* at 333, 212 Cal. Rptr. at 373.

74. *Lesser v. Huntington Harbor Corp.*, 173 Cal. App. 3d 922, 219 Cal. Rptr. 562 (1985).

75. *Id.*

76. Approximately six years after the action was initially filed, it was brought to

contest the trial court's authority to grant such sanctions as against the complete lawsuit. This issue was raised for the first time by the court of appeal.

Although no court had previously addressed the question, the *Lesser* court was able to cite supporting language. For instance, a prior court had remarked, "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."⁷⁷ The absence of any *restrictive* language in section 128.5 also convinced the court that sanctions can apply to an entire case.

VI. DISCOVERY AND SECTION 128.5

When a party or his attorney fails to cooperate with opposing counsel in civil discovery, he may become liable for attorney's fees and other expenses under Code of Civil Procedure section 2034.⁷⁸ But, the courts have also held that such bad faith discovery tactics are sanctionable under section 128.5.⁷⁹ To determine if sanctions should fall under section 2034 or section 128.5, one court has suggested that "[c]ourts [should be] understandably suspicious of a party's belated claim of mistaken admission of facts where the party has had un-

trial. Plaintiff presented his case in one and one-half days. The defendant then moved for a nonsuit. The trial court, after a hearing on the motion, granted the defendant's request for attorney fees and costs. *Id.* at 927, 219 Cal. Rptr. at 564.

77. *Atchison, Topeka & Santa Fe Ry. v. Stockton Port Dist.*, 140 Cal. App. 3d 111, 116, 189 Cal. Rptr. 208, 211 (1983) (emphasis added). The *Lesser* court also referred to *City of Long Beach v. Bozek*, 31 Cal. 3d 527, 645 P.2d 137, 183 Cal. Rptr. 86 (1982), *cert. granted, vacated, and remanded*, 459 U.S. 1095 (1983), *reaff'd, and reissued*, 33 Cal. 3d 727, 661 P.2d 1072, 190 Cal. Rptr. 918 (1983). The purpose of section 128.5 is to "discourage 'frivolous litigation'" *Lesser*, 173 Cal. App. 3d at 929, 219 Cal. Rptr. at 565 (quoting *Bozek*, 31 Cal. 3d at 537, 645 P.2d at 142, 183 Cal. Rptr. at 91).

78. Code of Civil Procedure section 2034 states in relevant part, "If the court finds that the refusal or failure or objection was without substantial justification . . . the court may require the refusing or failing or objecting party or . . . attorney . . . to pay to the examining party the amount of the reasonable expenses incurred in obtaining the order, including reasonable attorney's fees. CAL. CIV. PROC. CODE § 2034 (West 1983).

79. *See, e.g., Swickard v. Crecelius Ranches, Inc.*, 164 Cal. App. 3d 1251, 211 Cal. Rptr. 187 (1985); *Lavine v. Hospital of the Good Samaritan*, 169 Cal. App. 3d 1019, 215 Cal. Rptr. 708 (1985); *Guzman v. General Motors Corp.*, 154 Cal. App. 3d 438, 201 Cal. Rptr. 246 (1984).

In *Swickard*, an attorney was ordered by the trial court to produce and educate his experts. Instead of complying, the attorney withdrew the experts. However, he failed to communicate this withdrawal to defense counsel until defense counsel had expended substantial sums in subpoenaing the experts. A sanction of \$1,000 was imposed against the attorney under Code of Civil Procedure sections 2034 and 128.5.

In *Lavine*, a defendant hospital was granted section 128.5 sanctions for expenses incurred in responding to a frivolous and harassing motion. The motion was deemed to have been brought in bad faith since it requested the production of medical records previously produced by the defendant. The award was reversed on other grounds.

restricted access to the facts, presumptive knowledge of what occurred, and several opportunities to present the correct facts."⁸⁰ Such acts might suggest bad faith within the meaning of section 128.5 as well as noncompliance "without justification" under section 2034. The reported decisions have not announced any definite rules with regard to the use of section 128.5 sanctions in discovery. However, it is clear that if certain due process procedures are not followed, no award under section 128.5 will be granted.

VII. DUE PROCESS CONSIDERATIONS

Although various courts of appeal have admonished an attorney or party for their frivolous, bad faith conduct, the sanction awards have often been reversed upon due process grounds.⁸¹ Under section 128.5, due process requires notice, an opportunity to be heard, and a written order reciting in detail the conduct or circumstances justifying the order.

One important, if not obvious, rationale for such due process guidelines is that sanctions can have a devastating effect, especially upon an attorney. It may undermine his credibility and his opportunity for finding future employment. A public attack upon an attorney's integrity and motives compels the use of due process guidelines by which an attorney can defend himself.

A second rationale is that such guidelines may prevent an "unbridled"⁸² use of sanctions that might encourage punishment not for misconduct, "but for forceful advocacy."⁸³

A. *The Adequacy of Notice*

Adequate notice is not specifically defined in section 128.5. However, the statute does provide that notice can be contained in a

80. *Guzman v. General Motors Corp.*, 154 Cal. App. 3d 438, 446 n.16, 201 Cal. Rptr. 246, 252 n.16 (1984).

81. *See, e.g., Garcia v. Sterling*, 176 Cal. App. 3d 17, 221 Cal. Rptr. 349 (1985) (inadequate order); *Lavine v. Hospital of the Good Samaritan*, 169 Cal. App. 3d 1019, 215 Cal. Rptr. 708 (1985) (case remanded for court to correct insufficient order); *Lesser v. Huntington Harbor Corp.*, 173 Cal. App. 3d 922, 219 Cal. Rptr. 562 (1985) (inadequate notice and opportunity to be heard); *Fegles v. Kraft*, 168 Cal. App. 3d 812, 214 Cal. Rptr. 380 (1985) (remanded for court to correct insufficient order or to reverse); *Corralejo v. Quiroga*, 152 Cal. App. 3d 871, 199 Cal. Rptr. 733 (1984) (notice and order inadequate); *O'Brien v. Cseh*, 148 Cal. App. 3d 957, 196 Cal. Rptr. 409 (1983) (notice and order inadequate).

82. *In re Marriage of Flaherty*, 31 Cal. 3d 637, 653, 646 P.2d 179, 189, 183 Cal. Rptr. 508, 518 (1982).

83. *Id.*

party's moving or responding papers. In *Ellis v. Roshei Corp.*,⁸⁴ the court held that a request for sanctions in a party's opposition papers to a demurrer, served five days prior to the hearing, was sufficient notice. However, it was noted that the standard five day response time under Code of Civil Procedure section 1005 would not always necessarily apply.⁸⁵

The *Ellis* interpretation of adequate notice was refined in *M.E. Gray Co. v. Gray*.⁸⁶ There the court ruled that a one day notice was adequate where the trial court had allowed plaintiff up to one day before the hearing to file its opposition. By so ruling, the court rejected the idea that a five day notice in all cases was required.

Finally, in *Lesser v. Huntington Harbor Corp.*,⁸⁷ the court announced a rule that the "adequacy of notice should be determined on a case-by-case basis to satisfy basic due process requirements."⁸⁸ The court also gave a formula to determine adequate notice: "[T]he act or circumstances giving rise to the imposition of expenses must be considered together with the potential dollar amount."⁸⁹

The plaintiff in *Lesser* received notice of the defendant's request for expenses via the defendant's trial brief. The brief was "served on the day of the trial, and the demand for expenses was buried on page 17 . . . without any special heading or notice language."⁹⁰ Furthermore, plaintiff's counsel was afforded only two days to prepare a defense to the claim that the suit was initiated in bad faith. The court found both the manner in which notice was given and the time in which the opposition could respond to the sanction request inadequate by due process standards.

As a further qualification of adequate notice, an attorney cannot circumvent the adequate notice rule by combining an ex parte application with a request for section 128.5 sanctions. One attorney who

84. 143 Cal. App. 3d 642, 192 Cal. Rptr. 57 (1983).

85. The court stated:

It would appear that for purposes of requesting sanctions under section 128.5 the five day response time of section 1005 would be jurisdictional to the due process requirements discussed in *Bauguess*. Further, we do not mean to say that five days will be, in all instances, sufficient time to allow the party, against whom sanctions are requested, to answer . . .

Id. at 647 n.5, 192 Cal. Rptr. at 60 n.5.

86. 163 Cal. App. 3d 1025, 210 Cal. Rptr. 285 (1985).

87. 173 Cal. App. 3d 922, 219 Cal. Rptr. 562 (1985).

88. *Id.* at 932, 219 Cal. Rptr. at 567.

89. *Id.*

90. *Id.* A second example of insufficient notice can be found in *Corralejo v. Quiroga*, 152 Cal. App. 3d 871, 199 Cal. Rptr. 733 (1984), where the insufficient notice stated, "Notice is hereby given that . . . Plaintiffs . . . will move for an Order for Payment of Expenses, including attorney's fees in the above-entitled action pursuant to Section 128.5 of the Code of Civil Procedure." *Id.* at 873-74, 199 Cal. Rptr. at 735. The notice was inadequate since it did not put the attorney "on notice of the need to prove his or her own blamelessness." *Id.* at 874, 199 Cal. Rptr. at 735.

tried this tactic was found in "flagrant violation of due process principles."⁹¹

Lastly, section 128.5 permits notice on the court's own motion. No cases to date have determined what would constitute adequate notice under these circumstances. However, in dicta, the *Lesser* court suggested that "the rationale of the notice cases generally would apply."⁹²

B. Opportunity To Be Heard

A party or his attorney is entitled to an evidentiary hearing where he can subpoena or produce evidence or witnesses.⁹³ As with other motions, it is within the discretion of the trial court to set the scope of the hearing. The trial judge must be objective and also give the party subject to sanctions the opportunity to be heard. The trial court cannot decide the sanction issue prior to the hearing and then use the hearing simply as a measuring stick for the amount of the sanction.⁹⁴

C. The Sufficiency of Sanction Orders

A sanction order cannot use conclusory language. It must recite, in detail, the reasons for the ruling.⁹⁵ A simple, two-part rule has been given regarding such orders. First, the order "must state specific circumstances giving rise to the award of attorneys' fees."⁹⁶ Second, the order must "state with particularity the basis for finding those circumstances amount to 'tactics or actions not based on good faith which are frivolous or which cause unnecessary delay.'"⁹⁷ However, an order that is inadequate under section 128.5 might still be valid if the trial court can rely upon another section for the award, such as Code of Civil Procedure section 2034, and if such error is technical

91. *O'Brien*, 147 Cal. App. 3d 957, 962, 196 Cal. Rptr. 409, 412.

92. *Lesser*, 173 Cal. App. 3d at 932, 219 Cal. Rptr. at 567.

93. *Id.* at 934, 219 Cal. Rptr. at 568.

94. *Id.* at 934, 219 Cal. Rptr. at 569.

95. An example of an insufficient order is as follows: "Court determines that motion under Evidence Code § 1158 was not made in good faith, was frivolous and caused unnecessary delay. Court imposes sanctions on counsel for moving party in the amount of \$364, payable to counsel for responding party." *Lavine v. Hospital of the Good Samaritan*, 169 Cal. App. 3d 1019, 1028, 215 Cal. Rptr. 708, 715 (1985).

96. *Fegles v. Kraft*, 168 Cal. App. 3d 812, 816, 214 Cal. Rptr. 380, 382 (1985).

97. *Id.*

and harmless.⁹⁸

The consequence of an inadequate order is that the case will be either remanded to the lower court (with instructions to correct the order) or reversed.

The appellate courts will closely scrutinize an appellant's claim that a sanction award under section 128.5 improperly violated his due process rights. If one or more due process requirements has been improperly handled by the lower court, the sanction order may be reversed. Thus, a party who is *awarded* attorney's fees should carefully review the order granting his fees. A party facing possible sanctions should make his due process objections clearly known to the trial court, as well as preserve his objections in the record. By so doing, he may avoid the later argument that he waived any such objections.

VIII. CONCLUSION

The revised section 128.5 codifies the findings of the courts over the last three years. It can be predicted that use of the statute will continue to increase, as will its scope. Its present purpose is to make an attorney pause and think before he acts. Its long term goal is to expedite the judicial process. Yet, along with these admirable goals, the courts must remain sensitive to equally important due process concerns.

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98. See *Swickard v. Crecelius Ranches, Inc.*, 164 Cal. App. 3d 1251, 211 Cal. Rptr. 187 (1985).