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Sanctions – To ask or not to ask: That is the question

The award of sanctions has often seemed arbitrary. Two recent decisions should help put the uncertainty to rest

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We have all been denied sanctions in situations where we thought justice required their issuance. An attorney in our office recently sought sanctions for the violation of a settlement agreement. Sanctions were denied and the offending attorney was simply instructed to comply with the agreement. It wasn't until the third motion to enforce the settlement was brought, and nine months had been lost, that the court issued sanctions. Not surprisingly the issuance of sanctions triggered the offending counsel's compliance with the agreement.

Conversely, many of us have been sanctioned or awarded sanctions in circumstances far less deserving than the scenario discussed above. Recently, an attorney in our office was sanctioned for opposing a motion for a protective order when the issue in dispute had a clear split of authority. The practice guide itself directed counsel to present the issue to the court for a ruling. It is hard to envision a more justified opposition than one based on a split in legal authority.

So why are sanctions granted in some scenarios and denied in others?

Surely we don't have a completely arbitrary process in place; a process that punishes attorneys without providing them an opportunity to evaluate the likelihood that their actions are sanctionable. Or do we?

Two key decisions came down this fall which will help put the uncertainty in sanction requests to rest. The Fourth District Court of Appeal issued *Doe v. U.S. Swimming, Inc.* (Nov. 21, 2011) 200 Cal.App.4th 1424, which provides guidance on defining the otherwise vague "substantial justification" standard. The Sixth District Court of Appeal issued *Kim v. Westmoore Partners, Inc.* (Nov. 29, 2011) 201 Cal.App.4th 267, which looks closely at ethical considerations to be examined in a sanction request.

This article analyzes the impact of those two decisions on our everyday practice.

The forgotten analysis

Rarely do we see a discovery motion where only one side requests sanctions. Once a sanction request is aired the opponent necessarily feels compelled to make a counter request. Some attorneys request sanctions in their moving papers for fear that their opponent will seek them in opposition.

We have all been faced with a "difficult" opponent. "Difficult" meaning unreasonable in all aspects. Many attorneys jump at the opportunity to request sanctions against these less-than-preferable opponents. But there are ethical considerations that come into play.

Attorneys have forgotten that there is a legal analysis behind a sanction request. Discovery sanctions are intended "not to provide a weapon for punishment" but rather to "prevent abuse of the discovery process and correct the problem presented." (*Parker v. Wolters Kluwer U.S., Inc.* (2007) 149 Cal.App.4th 285.) Moreover, constitutional due process requires that sanction awards go no further than necessary to accomplish the purpose of discovery. (*Newland v. Superior Court* (1995) 40 Cal.App.4th 608.)

Discovery sanctions are permissible when a discovery motion is brought or opposed unsuccessfully and the party to be sanctioned *acted without substantial justification*. (*Argaman v. Ratan* (1999) 73 Cal.App.4th 1173, 1177 (emphasis added); *Foothill v. Lyon/Copley Corona Associates* (1996) 46 Cal.App.4th 1542, 1557; California Code of Civil Procedure, §§2023.010(a), 2023.030(a), 2025.420(d).)

Uncertainty in the definition of "substantial justification" has led to the inconsistent application of sanctions. Some judges impose sanctions against the losing party as a matter of right. Other judges never impose sanctions.

Given the uncertainty in determining when sanctions will be awarded, attorneys are exposing themselves to sanctions every time they bring or oppose a motion. How can the due process requirement of fair notice be satisfied if attorneys have no advanced warning that their conduct is of the type that should be corrected? Likewise, what ethical considerations should an attorney evaluate before requesting sanctions against an opponent?

Ethical considerations

As the court recently made vividly clear "sanctions should be reserved for serious violations of the standard of practice, not used as a bullying tactic." (*Kim v. Westmoore Partners, Inc.* (2011) 201 Cal.App.4th 267, 293.)

Sanctions are serious business. They deserve more thought than the choice of a salad dressing. "I'll have the sanctions, please. No, on second thought, bring me the balsamic; I'm trying to

> lose a few pounds." A request for sanctions can never be so lightly considered as to be copied word for word from another brief — much less copied in reliance on facts from another case that do not obtain in the present one.

(*Id.* at 291-294.)

In *Kim*, counsel was sanctioned during the appeal for offensive conduct. Counsel lied to the court to obtain a briefing extension and then included a meritless request for sanctions against his opponent. The sanction allegations were "word-for-word identical" to allegations in a brief counsel filed in another appeal in 2009. (*Id.* at 290-291.) The court did not take counsel's cut-and-paste boilerplate sanction request lightly, commenting that "[i]t is difficult for us to express how wrong that is." (*Id.* at 293.) The court imposed sanctions on its own motion for this unethical behavior. (*Ibid.)*

The case reminds us that asking for sanctions against a fellow colleague should be reserved for those instances when they are actually warranted. The request should not be cut-and-paste from a form motion that circulates the office. It was "cut-and-paste" behavior that warranted sanctions against the attorney in *Kim*.

As the *Kim* court eloquently stated: "Lawyers and judges of our generation spend a great deal of time lamenting the loss of a golden age when lawyers treated each other with respect and courtesy. It's time to stop talking about the problem and act on it." (*Ibid*.)

Substantial justification

Unethical conduct is easy to identify and undoubtedly grounds for sanctions. But many attorneys struggle with the appropriateness of sanctions in situations where their opponent is not acting "unethical" but is acting without "substantial justification." Articulating the confines of substantial justification has presented a challenge.

For years attorneys have relied on the *Foothill v. Lyon/Copley Corona Associates* (1996) 46 Cal.App.4th 1542 decision when requesting or opposing sanctions. The trial court in *Foothill* imposed sanctions against a defendant who withheld documents during discovery and then unsuccessfully opposed a motion to compel. The appellate court overturned the sanction order finding that defendant acted with "substantial justification" in withholding documents and opposing the motion. (*Id.* at 1556.)

The court's analysis in *Foothill* focused on the reasonableness of the defendant's conduct in formulating its discovery position. (*Id.* at 1556-1558.) The court emphasized that the defendant did not withhold documents without reason or explanation. Defendant first offered to produce the documents subject to confidentiality and then suggested the court set the parameters by way of a protective order. In response, plaintiff filed a motion to compel, which defendant opposed. (*Ibid*.) In opposing the motion, the court found that the defendant's actions were "substantially justified" because defendant believed a dispute existed and took reasonable steps to try to resolve the dispute. (*Ibid.*)

Foothill clarified that losing a discovery motion does not mean a party acted without substantial justification. Even so, *Foothill* simply provided attorneys with an unambiguous example of facts demonstrating "substantial justification." The decision did little in terms of actually defining "substantial justification." The only guidance provided by *Foothill* is similar to the famous quote by Justice Potter Stewart on pornography, "I know it when I see it." (*Jacobellis v. State of Ohio* (1964) 378 U.S. 184, 197 (Justice Stewart concurring).)

What about situations where there is a split of authority and one party refuses to make concessions on its position. Is the refusal to make concessions evidence of unreasonableness?

Well-grounded in law and fact

On November 21, 2011, the Sixth Appellate District published *Doe v. U.S. Swimming, Inc.* (2011) 200 Cal.App.4th 1424, which directly addresses the definition of "substantial justification" in the context of discovery sanctions.

U.S. Swimming was a case involving allegations of sexual molestation. Plaintiff sought all documents related to past complaints against swim coaches. Defendant filed a motion for protective order seeking to redact certain information from the documents. Plaintiff countered with a motion to compel. (*Id.* at 1427-1428.) Both motions were granted and no sanctions were ordered as all parties were found to be substantially justified in their positions. (*Ibid.*)

When the production date arrived defendant produced over redacted documents in an incomprehensible order. (*Id.* at 1428-1429.) Plaintiff filed a motion to compel and sought sanctions arguing that defendant failed to comply with the court's prior discovery order. (*Ibid).* In response, defendant admitted that it interpreted the court's protective order conservatively, but argued that its interpretation was substantially justified. (*Id.* at 1429-1431.) This argument was seemingly in line with the *Foothill* decision, which noted that a difference of interpretation would not support a finding of sanctions. (*Foothill*, *supra*, 46 Cal.App.4th at 1558.) Nevertheless, the court would not accept at face value defendant's conclusionary statement that there was a difference of interpretation. The court embarked on an analysis to determine whether the interpretation was reasonable and thus "substantially justified." In doing so, the court delineated additional verbiage to define substantial justification. The court stated that the phrase "substantial justification" means conduct that is clearly reasonable because it is well-grounded in both law and fact. (*U.S. Swimming*, *supra,* 200 Cal.App.4th at 1434-1435.)

After hearing argument, the court found that defendant's interpretation was not well-grounded in law and instead "unreasonably pushed the envelope." (*Id.* at 1437-1438.)

Defendant was unilaterally expanding definitions, interpreting words "contrary to the usual and ordinary dictionary meaning" and redacting topics that "by

no stretch of language" could be encompassed in the protective order. (*Ibid.*)

The new language defining substantial justification shows that the term is not an off-the-cuff argument that will shield an attorney from sanctions. An attorney cannot simply conclude that his position is in fact substantially justified. The analysis requires thoughtful articulation of both the law and facts in support of the position presented. This new language should assist us all in our pursuit of sanctions as well as our defense.

Take Away Tips

- Don't cut-and-paste sanction requests in all your discovery motions. You lose credibility and your opponent may use the *Kim* case to reveal your bad behavior.
- If your opponent has articulated a position that appears grounded in law and fact, you should not seek sanctions.
- Don't be compelled to seek sanctions when your opponent is notorious for seeking them. Point to the *Kim* decision and highlight your opponent's incivility, the court may award you sanctions on its own.
- When arguing an issue that involves a split of authority, use *U.S. Swimming* to shield yourself from sanctions if the court ultimately adopts the opposing view.

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