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## Litigation 101: Moving for Sanctions

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Given the nature of litigation, there is a distinct chance your client will not be happy to have been sued and may be eager to explore the most aggressive means to challenge the lawsuit.

A motion for sanctions under Code of Civil Procedure section 128.7 may be an alluring prospect since it opens up the other side to punitive sanctions, both monetary and non-monetary, sufficient to discourage similar conduct in the future.

However, as with demurrers, it is important to counsel restraint when the potential downsides of a motion for sanctions outweigh the chances of success.

Unlike demurrers, motions for sanctions under section 128.7 are not limited to the initial pleading stage. The motion permitted by 128.7(c) is simply the enforcement mechanism for the obligation imposed on all attorneys by 128.7(b) that every pleading signed and filed with the court is not presented with the primary purpose to harass, based on frivolous or outdated legal support, or lacking basic evidentiary support.

Nonetheless, the motion for sanctions under 128.7 is often most effectively used at the outset of litigation to challenge a glaring procedural or jurisdictional flaw in a complaint. In an example from my practice, an opposing counsel once filed a new complaint with the same parties and alleging similar claims as a prior case that was about to be dismissed by the court. The new complaint was simply a procedural end-around aimed at avoiding the preclusive effect of the pending dismissal and the court granted sanctions as a result.

In a similar manner, but in a jurisdictional context, the defendant in an arbitration I initiated filed a complaint in superior court seeking to obtain the court's decision on the enforceability of the arbitration provision. A motion for sanctions filed in the superior court, while not ultimately ruled on, was effective in encouraging opposing counsel to defer the arbitrability determination to the private arbitrator, as required by the purchase agreement.

The arbitration context is one that will come into play more often now given recent federal decisions. If an enforceable arbitration provision contains a class-action waiver, for instance, which the plaintiffs ignore in filing a class-action complaint, then a motion for sanctions may be appropriate. That particular area of law is rapidly developing, however, so a complaint would likely need to be relatively identical to prior case authority—for instance, the cell phone adhesion contract at issue in *AT&T Mobility v. Concepcion*—in order to preclude a non-frivolous

argument for extension of prior case law.

These are just a few examples of good substantive contexts for a motion for sanctions. In general, these types of challenges are better than more nebulous challenges to factual contradictions or untruths. After all, the statute gives a court power to award fees and costs to the opposing party as well.

These motions are also procedurally challenging. The most unusual feature—and the one often dominating coverage in the practice guides—is the so-called "safe harbor" requirement. The motion for sanctions is designed to not catch its recipient off guard in a "gotcha" moment. Instead, counsel seeking relief must present the motion to opposing counsel at least 21 days before ultimately filing it with the court. Opposing counsel then has the option of withdrawing the offending pleadings before the motion is filed.

One of the perils of the safe harbor period is it requires the moving party to serve a fully drafted version of the motion for sanctions 21 days before actually filing it. To put this in context, consider the situation where you are filing the motion in response to a newly served complaint. Motions for sanctions are not allowed after a case has already been terminated. Therefore, you will want the motion to be heard on or before any hearing on a demurrer. This means, barring an extension to respond, your motion for sanctions will be due, in unchangeably final form, less than 10 days from service of the complaint on your client.

This can present additional problems when your motion is based on challenges to the factual basis of a complaint, which will require you to corral client declarations and other outside support. The best advice in this context is simply to get started early.

Aside from these substantive realities and procedural hurdles, motions for sanctions under section 128.7 can simply be a way to get things done. Responding to an informal request for dismissal, for instance, is not usually at the top of a plaintiff attorney's to-do list. A motion for sanctions to support your request is, if all else fails, one way to put it there.

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