

It Just Got Easier To Get Sanctions Under California Code of Civil Procedure Section

128.5 - *San Diegans for Open Government v. City of San Diego.*

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In *San Diegans for Open Government v. City of San Diego*, 2016 WL 3162818, 16 Cal. Daily Op. Serv. 5941, the Fourth District Court of Appeal in California addressed 2014 revisions to California Code of Civil Procedure Section 128.5. Principal amongst the Fourth District's holdings in the *San Diegans for Open Government* case is that under revised C.C.P. §128.5 an objective standard alone is to be applied to determine whether the actions or tactics at issue were frivolous or solely intended to cause unnecessary delay. This holding in *San Diegans for Open Government* will make it demonstrably easier to get C.C.P. §128.5 sanctions.

The Case

The case arose from a dispute between San Diegans for Open Government ("SDOG"), a non-profit organization acting as a "government watchdog" and the San Diego City Attorney's Office ("City Attorney"). SDOG submitted a public records request to the City Attorney seeking certain emails. The City Attorney refused to produce the requested emails claiming they were not public records.

SDOG sued the City of San Diego and the City Attorney for violation of the California Public Records Act (the "Act") and sought a declaratory judgment compelling disclosure of the emails. SDOG also included a cause of action for waste. SDOG ultimately dismissed the waste claim, but secured a judgment against the City of San Diego and the City Attorney for violation of the Act and declaratory relief. The trial court awarded SDOG prevailing party attorney fees

under the Act. The trial court also denied a request by the City for C.C.P. §128.5 sanctions from SDOG for filing the dismissed waste claim.

The City appealed claiming, in part, that the trial court erred by concluding the lack of evidence of subjective bad faith by SDOG required denial of the sanctions motion.

The Opinion

In its *San Diegans for Open Government* opinion, the Fourth District considered the legislative history of the 2014 revisions to section 128.5 and concluded that one purpose of the revisions was to eliminate the subjective standard and impose an objective standard.

Former section 128.5 is silent on whether an objective or subjective standard applies to determine whether actions or tactics are frivolous or solely intended to cause unnecessary delay. The subjective standard evaluates the motives of a party or counsel and the objective standard looks at the merits from a reasonable person's perspective. (In re Marriage of Flaherty (1982) 31 Cal.3d 637, 649, 183 Cal.Rptr. 508, 646 P.2d 179.) Many courts interpreting former section 128.5 required a showing of subjective bad faith in addition to frivolousness. (Shelton v. Rancho Mortgage & Investment Corp. (2002) 94 Cal.App.4th 1337, 1346, 115 Cal.Rptr.2d 82 [listing cases].)

Section 128.5 is similarly silent on whether an objective or subjective standard applies. The question presented is whether the Legislature intended section 128.5 to be interpreted similar to former section 128.5. Our review of the legislative history shows one purpose of section 128.5 was to eliminate the subjective standard and impose an objective standard.

The court remanded to the trial court to reevaluate the sanctions motion under the legal standard of "objective unreasonableness".

The Fourth District in *San Diegans for Open Government* also held that current C.C.P. §128.5 applies to all cases pending as of January 1, 2015 and that the safe harbor waiting period in C.C.P. §128.7 does not apply to C.C.P. §128.5 sanction motions. The court also addressed the respective burdens on the parties to a C.C.P. §128.5 sanction motion, holding that the party seeking sanctions must first tender "some evidence showing potentially sanctionable conduct" which shifts the burden to the opposing party to refute the moving party's prima facie showing. The court noted that the moving party may rely upon "factually devoid discovery responses" by the party opposing the motion to raise a reasonable inference the opposing party lacks facts supporting its claim and thereby shift the burden.

Takeaways

First, it is now much easier to California to apply for and obtain section 128.5 sanctions. No longer will the moving party be required to present evidence of the subjective intent or motive of the opposing party or counsel. The court will only look at the merits of the alleged bad faith actions or tactics from a reasonable person's perspective. This will make C.C.P. §128.5 sanction motions a more effective tool for litigators to address frivolous actions and tactics and for the court to police such actions and tactics.

Second, California litigators have to more closely scrutinize their claims, answers, actions and tactics to ensure adequate factual support. While, even under an objective standard, the burden is high on the moving party bringing a C.C.P. §128.5 sanctions motion, counsel can no longer save themselves by arguing their objectively frivolous actions were not prompted by

subjective bad faith. Conversely, the court can no longer save counsel from a sanctions order by finding there was no evidence of subjective bad faith.

Third, I foresee future uncertainty about application of the *San Diegans for Open Government* "objectively unreasonable" standard to the parts of C.C.P. §128.5. The statute contains two separate grounds for an award of sanction - bad faith actions/tactics that are frivolous or "solely intended to cause unnecessary delay". Further, the definition of "frivolous" in the statute is "totally and completely without merit" or "for the sole purpose of harassing an opposing party". The objective standard enunciated in *San Diegans for Open Government* works well with the merit, or absence of merit, determination in consideration of a C.C.P. §128.5 motion. But, how does an objective standard apply to determining whether a party or counsel "solely intended to cause unnecessary delay" or acted "for the sole purpose of harassing an opposing party"? These determinations seem, on their face, to require some inquiry into the intent of the party or counsel to be sanctioned. Can the court properly conclude solely from an objective finding that an action was completely without merit that the party or counsel taking that action "solely intended to cause unnecessary delay" or acted "for the sole purpose of harassing an opposing party"? If that were the case, wouldn't that render the "solely intended to cause unnecessary delay" and "for the sole purpose of harassing an opposing party" language in the statute meaningless and superfluous? The statute, even after the 2014 revisions, seems to require, by its express language, some consideration of the bad actor's intent to cause delay or harass. It remains to be seen from future cases how a solely objective standard for consideration of C.C.P. §128.5 motions can be applied to determine the intent of the party or counsel to be sanctioned for taking the bad faith action.