

Lawmakers Eye Sanctions on Frivolous Suits

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SACRAMENTO — Legislation to impose stiffer sanctions against lawyers who pursue frivolous actions is under consideration in the state Legislature.

The exact terms of the possible legislation, which is expected to be amended into AB 245 by Judiciary Committee Chairman Elihu Harris, D-Oakland, have not been defined, but the issue is clear.

The frequency of sanctions motions has increased appreciably in recent years, and some worry that new sanctions might worsen court congestion.

"The sanctions are symptomatic of something else," said Howard Dickstein, general counsel for the Commission on California State Government Organization and Economy, better known as the Little Hoover Commission.

"Ultimately you'll have to deal with more basic issues. It's really the litigation explosion that is causing the sanctions explosion. I don't oppose dealing with symptoms, but it's kind of like taking an aspirin," he said.

Sacramento Superior Court Judge Roger Warren said he sees the "sanctions explosion" as a positive, but perhaps temporary, trend.

"It's having an effect, Warren said. "Lawyers are improving their conduct. The standards of practice in the bar are slowly changing. It used to be anything went, and that's not true anymore. Now it's anything reasonable goes."

The 1987 Harris bill and another, harsher measure by Assemblyman Paul Zeltner, R-Lakewood, have been exhaustively discussed in meetings involving lawyers and judges around the state.

The Zeltner bill, AB 1252, would have imposed — in addition to payment of expenses incurred by another party as a result of bad-faith actions — a maximum \$10,000 penalty "for making frivolous motions, asserting frivolous claims, or defenses, or causing unnecessary delays" in personal injury cases.

Carrie Harper, an aide to Zeltner, said elements of AB 1252, which was sponsored by the Little Hoover Commission, are expected to be incorporated within the Harris measure.

The Zeltner measure prompted strong criticism in the legal community last year.

Harper said Harris "didn't want the severity of our bill, and it was quite clear which bill would get out of committee."

AB 1252 was opposed by the California Judges Association, the Los Angeles County Municipal Court Judges Association

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ation and the Family Law Section of the State Bar of California.

The less controversial Harris bill last year attempted to revise Code of Civil Procedure Section 128.5 by deleting the term "solely" from the section, which authorizes a trial court to require a party and/or attorney to pay "reasonable expenses" incurred by another party as a result of "tactics or actions not based on good faith, which are frivolous or solely intended to cause unnecessary delay."

Harris said he was concerned that the term "solely" in the statute limits the court's ability to impose sanctions in appropriate cases because the court "cannot determine whether unreasonable delay was the 'sole' intent of the counsel or party."

The measure was supported in its original form by the Los Angeles Superior Court, the Independent Trustees Association and the Los Angeles County Bar Association. The California Trial Lawyers Association supports the concept of tougher sanctions and has said it will work with Harris in drafting amendments.

The bill was not acted upon during the 1987 session (which is actually the first year of the two-year legislative session), but it was set to be reconsidered when the Legislature resumed this year.

An interim hearing on the general subject of sanctions against attorneys was held in Beverly Hills Sept. 18, and Harris said he might amend the bill to incorporate ideas endorsed at that hearing.

"There is a lot of pressure on us, both in the area of disciplining lawyers for misconduct and for not being professional in their demeanor," Harris said at the hearing. "There is also a lot of pressure because of the five-year average trial time it takes to resolve a matter in Los Angeles."

"Sanctions are one of the tools available, and we want to make sure it is used appropriately," Harris added. "In trying to draft some legislation, I think we'll be a little more creative as well as a little more conscious of the complexities."

Legislators considering tougher sanctions statewide are also watching the progress of a pilot project to reduce trial court delay in Riverside and San Bernardino County Superior Courts, enacted with legislation, SB 379, by Sen. Robert Presley, D-Riverside.

Designed to discourage the filing of frivolous or nuisance suits and encourage early settlement of legitimate claims, the measure permits a judge to impose disciplinary sanctions and monetary penalties on attorneys. The pilot project begins July 1 and will be administered by the state Judicial Council.

Dickstein said proposed amendments to AB 245 would permit judges to award court costs against the offending party. In addition, Dickstein and others said, Zeltner's bill applied only to personal injury actions — a limitation that might be expanded in future amendments to the Harris bill.

"Zeltner and the Little Hoover Commission want something more than just costs to attorneys," Dickstein said. "It takes a lot of time for the courts to deal with this avalanche."

"The problem with sanctions is that everyone makes sanction motions, so the result is even more court action. If there were a little more punch [in the law], it would reimburse the judicial system and the taxpayer," he said.

Dickstein told the interim hearing that a substantial monetary penalty "is probably



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not an insurable item [under] a malpractice policy.

"If an attorney's going to have to dig into his own pocket for \$8,000 or \$9,000 plus the attorney's fees, I think he'd swallow before doing something like that," he told the committee.

Dickstein and others familiar with various sanction proposals say the issue raises thorny practical questions for legislators and the courts.

"Ever since the deal was struck between the trial lawyers and the [insurance] industry on insurance and tort liability, some political energy for these kinds of bills was dissipated," Dickstein added.

Deborah Debow, the Assembly Judiciary Committee counsel researching amendments to AB 245, said she could not discuss details of the possible amendments yet.

Since since the September hearing Dickstein has met with Harris' staff and Warren, chairman of the Civil Law and Procedure Committee of the California Judges Association, in an attempt to work out acceptable language for the sanctions bill.

Dickstein says it may include an amendment to assess court costs as well as a provision that any such payment would be "an offset against [an action for] malicious prosecution."

A malicious prosecution action could still be filed under that proposal, but the amount of an award would be offset by the amount of the sanctions penalty.

Warren emphasized that he participated in the Dec. 23 meeting with Dickstein and Harris' staff merely as an interested party and that the judges association does not take positions on bills until they are in print. But Warren said further action on the various sanctions proposals is up to Harris.

"I think it will be significantly changed," Warren said.

"One of the ideas I put on the table was to broaden the provisions of Section 177.5, which allows a judicial officer to impose reasonable monetary sanctions, payable to the county for violation of a court order," Warren added.

"When a party acts unreasonably, costs are imposed on the court and the public to deal with all this nonsense. Why should taxpayers have to pay for frivolous actions?"

Warren suggested incorporating provisions of sections 128.5 and 177.5, so that "where a party or lawyer acts unreasonably, a judge could order reimbursement of costs and expenses and order money paid into the county treasury. . . . It would up the ante a little bit on deterrence."