

CALIFORNIA JUDGES BENCHGUIDES

**Benchguide 3**

**COURTROOM CONTROL:  
CONTEMPT AND SANCTIONS**

[REVISED 2010]



ADMINISTRATIVE OFFICE  
OF THE COURTS

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EDUCATION DIVISION/CENTER FOR  
JUDICIAL EDUCATION AND RESEARCH

- *Continue the matter if a delay is necessary to allow the accused a reasonable opportunity to gather evidence and procure witnesses to establish an excuse. Arthur v Superior Court, supra, 62 C2d at 409.*
- *Consider whether the accused has presented a legitimate excuse for the contempt. For discussion, see §3.37.*
- *Immediately determine whether the accused is guilty. For discussion of burden of proof, see §3.25.*

(7) *Impose punishment, consider a stay of execution, and prepare a written order.*

- *Follow steps (7) to (9) of the direct contempt procedure checklist in §3.7.*
- *Recite in the order that the contemner was afforded a reasonable opportunity to be heard regarding the reasons for his or her act, and either no excuse was offered or the court found the offered excuse to be insufficient. See Inniss v Municipal Court, supra, 62 C2d at 490; for a sample form, see §3.95.*
- *Report final contempt order to the State Bar, as appropriate. See §3.42.*

### III. SANCTIONS PROCEDURE

#### A. [§3.10] Checklist: Sanctions Procedure Under CCP §128.7

Code of Civil Procedure §128.7 states that when an attorney or underrepresented party files a paper in court, he or she is making representations to the court that certain conditions have been met, and it provides for sanctions if there are any violations. The law applicable to CCP §128.7 sanctions is discussed in §3.55.

(1) *Consider a party's request for sanctions or initiate a proceeding for sanctions on the court's own motion (CCP §128.7(c)) if an attorney or party has presented a paper to the court without making reasonable inquiry before certifying that to the best of that person's knowledge, information, and belief, all of the following conditions are true (CCP §128.7(b)):*

- The paper is not being presented primarily for an improper purpose, such as harassment or delay;
- The legal contentions are warranted by existing law or by nonfrivolous argument for modification of existing law;
- Factual allegations are warranted by the evidence or are likely to have evidentiary support after investigation; and

- The denial of factual allegations is warranted by the evidence or is reasonably based on lack of information or belief.

See discussion in §§3.52–3.62.

*Note:* Sanctions must be requested in a separate motion. CCP §128.7(c)(1).

(2) *Determine whether there was adequate notice and an opportunity to withdraw or correct the challenged paper.* CCP §128.7(c). A motion for sanctions under CCP §128.7 cannot generally be filed until 21 days after it has been served. During this 21-day “safe harbor” period, the party being served has the opportunity to correct the violation, and if it does so, the sanctions motion cannot be filed or pursued. CCP §128.7(c)(1) (court may shorten or extend this 21-day period). Because CCP §1005(b) requires motions to be filed at least 16 court days before the hearing, a motion for sanctions must be served at least 43 days before it will be heard (21 days prescribed by CCP §128.7(c)(1), plus 16 court days, plus 6 intervening weekend days). This notice period may be shortened by the court. See CCP §1005(b). This 43-day period is further extended under CCP §1005(b) when the notice of motion is served by mail. *Cromwell v Cummings* (1998) 65 CA4th Supp 10, 13 n3, 76 CR2d 171. Constitutional principles of due process require the notice of motion to identify the persons against whom monetary sanctions are sought. 65 CA4th Supp at 13.

*Note:* The opportunity to withdraw or correct challenged papers is a safe harbor provision that permits an offending party to avoid sanctions by withdrawing or correcting the papers. A party may not bring a motion for sanctions, unless there is some action the offending party may take to withdraw the improper pleading. *Malovec v Hamrell* (1999) 70 CA4th 434, 441, 82 CR2d 712.

(3) *If imposing sanctions on the court’s own motion, enter an order describing the sanctionable conduct and directing the attorneys or parties to show cause why they have not violated CCP §128.7(b), unless, within 21 days of service of the order to show cause, the challenged paper is withdrawn or corrected.* CCP §128.7(c)(2).

*Note:* Safe harbor limitations also apply to court-initiated sanctions, so that sanctions may not be imposed if the party has no action to take to withdraw or correct the improper pleading or paper. *Malovec v Hamrell, supra*, 70 CA4th at 441.

(4) *Conduct a hearing to consider imposing sanctions.* CCP §128.7(c) (court may impose sanction only after notice and an opportunity to respond).



(5) *Determine the type and amount of sanctions.* CCP §128.7(d) (court must consider whether party seeking sanctions exercised due diligence). Sanctions must be limited to that which is sufficient to deter repetition of this or comparable conduct by others. CCP §128.7(c). Sanctions may include an order to pay (CCP §128.7(d)):

- A penalty into court; and
- Some or all of the reasonable expenses and attorneys' fees incurred by the moving party as a result of the sanctionable conduct if sought on motion and warranted for purpose of deterrence.

Monetary sanctions may not be awarded:

- Against a represented party for unwarranted legal contentions (CCP §128.7(d)(1)); or
- For an award based on the court's own motion unless the court issues its order to show cause before a voluntary dismissal or settlement (CCP §128.7(d)(2)).

(6) *Prepare, or direct counsel to prepare, a written order.* See CCP §128.7(e) (court must describe the sanctionable conduct and explain the basis for the imposition of sanctions; there is no statutory requirement that the order be written or that an order denying sanctions be explained).

- **JUDICIAL TIP:** Best practice is to issue a written order and not to state mere conclusions in the words of the statute. Give a factual recital, with reasonable specificity, of the circumstances leading to the order. If desired, incorporate by reference portions of a party's papers that adequately set forth the conduct, circumstances, and legal arguments providing the bases for the court's conclusions. It may be advisable to attach a transcript of the hearing, if available.

(7) *Notify the State Bar if sanctions against an attorney are \$1000 or greater.* See Bus & P C §6086.7(c) (excludes discovery sanctions).

## **B. Checklists: Other Sanctions Alternatives**

### **1. [§3.11] Checklist: Violation of Lawful Court Order Under CCP §177.5**

(1) *Consider a party's request or initiate sanction proceedings on court's own motion for violation of a lawful court order by a person, done without good cause or substantial justification. This power does not apply to advocacy of counsel before the court.* For the purposes of this section, the term "person" includes a witness, a party, a party's attorney, or both. CCP §177.5.

The law applicable to CCP §177.5 sanctions is discussed in §3.63:

## F. Sanctions Under CCP §128.7

### 1. [§3.52] Bases for Sanctions

The basis for sanctions under CCP §128.7 is a violation of the attorney or party certification requirements. Code of Civil Procedure §128.7 requires that every pleading, petition, written notice of motion, or other similar paper be signed by at least one attorney of record in the attorney's individual name, or if the party is not represented by an attorney, be signed by the party. CCP §128.7(a).

By presenting to the court, whether by signing, filing, submitting, or later advocating, such a pleading, petition, written notice of motion, or other similar paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, all of the following conditions are met (CCP §128.7(b)):

- It is not being presented primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.
- The claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.
- The allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.
- The denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

A violation of these representations may be the basis for the court to impose sanctions on the attorneys, law firms, or parties that committed the violation or are responsible for the violation. CCP §128.7(c).

Under CCP §128.7 there are basically three types of submitted papers that warrant sanctions: (1) papers that are factually frivolous (not well grounded in fact); (2) papers that are legally frivolous (not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law); and (3) papers interposed for an improper purpose. *Guillemín v Stein* (2002) 104 CA4th 156, 167, 128 CR2d 65.

Code of Civil Procedure §128.7 is not applicable to disclosures and discovery requests, responses, objections, and motions. CCP §128.7(g).

*Note:* Because CCP §128.7 so closely tracks Fed R Civ P 11 (as it read in 1994), federal cases interpreting Rule 11 are likely to have some bearing



on interpreting and applying CCP §128.7. See *Guillemin v Stein, supra*, 104 CA4th at 167 (federal case law construing Rule 11 is persuasive authority with regard to meaning of CCP §128.7); *Hart v Avetoom* (2002) 95 CA4th 410, 413, 115 CR2d 511 (in examining provisions of CCP §128.7, California courts may look to federal decisions interpreting federal rule).

A judge may not base an award of sanctions under CCP §128.7 on misconduct by an attorney or party in the proceeding that does not involve a pleading, motion, or other filing. See *Christian v Mattel, Inc.* (9th Cir 2002) 286 F3d 1118, 1129 (in imposing sanctions under Fed R Civ P 11, judge may not consider attorney's discovery abuses or misstatements made during hearing, but only whether complaint was baseless). See also *Truesdell v Southern Cal. Permanente Med. Group* (9th Cir 2002) 293 F3d 1146, 1155 (judge may not consider *other* cases in which plaintiff's counsel had filed frivolous complaints against defendant).

## 2. [§3.53] Person Against Whom Sanctions Award May Be Made

Sanctions under CCP §128.7 cannot be awarded in favor of a party against its own attorney. See *Mark Indus., Ltd. v Sea Captain's Choice, Inc.* (9th Cir 1995) 50 F3d 730, 732 (interpreting Fed R Civ P 11). Monetary sanctions may not be awarded against a party whose attorney asserts frivolous legal contentions in violation of CCP §128.7(b)(2). CCP §128.7(d)(1); *Banks v Hathaway, Perrett, Webster, Powers & Chrisman* (2002) 97 CA4th 949, 952, 118 CR2d 803. Monetary responsibility for such a violation is more properly placed solely on the party's attorney. *Cromwell v Cummings* (1998) 65 CA4th Supp 10, 14 n3, 76 CR2d 171.

However, monetary sanctions may be imposed against a represented party for violating other provisions of CCP §128.7(b), *e.g.*, for presenting a document for an improper purpose, to harass, cause unnecessary delay, or needless increase in the cost of litigation in violation of CCP §128.7(b)(1), for making allegations or other factual contentions lacking evidentiary support in violation of CCP §128.7(b)(3), or for making denials of factual allegations not warranted by the evidence in violation of CCP §128.7(b)(4). *Laborde v Aronson* (2001) 92 CA4th 459, 466-467, 112 CR2d 119 (judge could impose sanctions against both attorney and client under CCP §128.7(b)(1)).

## 3. [§3.54] Duty To Investigate Required by CCP §128.7

*Duty imposed on attorney.* Similar language in Fed R Civ P 11 has been interpreted to impose an affirmative obligation on the part of the attorney (or unrepresented party) to investigate the validity of the legal and factual contentions made in the papers filed by the attorney (or party).

See *Business Guides, Inc. v Chromatic Communications Enters., Inc.* (1991) 498 US 533, 550, 111 S Ct 922, 112 L Ed 2d 1140; *Christian v Mattel, Inc.* (9th Cir 2002) 286 F3d 1118, 1127. The test is an objective one. 286 F3d at 1127. The reasonable person against whom an attorney's conduct is measured is a competent attorney admitted to practice before the court. See *Zaldivar v City of Los Angeles* (9th Cir 1986) 780 F2d 823, 830.

When the complaint is the primary focus of rule 11 proceedings, the court must conduct a two-part inquiry to determine (1) whether the complaint is legally or factually baseless from an objective perspective, and (2) if the attorney has conducted a reasonable and competent inquiry before signing and filing it. *Holgate v Baldwin* (9th Cir 2005) 425 F3d 671, 676; *Christian v Mattel, Inc.*, *supra*, 286 F3d at 1127. The attorney's (or party's) duty to make reasonable inquiry increases in direct proportion to the information available as the litigation proceeds. See *Townsend v Holman Consulting Corp.* (9th Cir 1990) 929 F2d 1358, 1364. Sanctions may not be imposed against an attorney who fails to make a reasonable inquiry about the facts before filing the complaint if after-acquired evidence establishes that the complaint was well-founded. *In re Keegan Mgt. Co.* (9th Cir 1996) 78 F3d 431, 434. When a complaint alleges multiple causes of action, the fact that at least one claim is found not to be frivolous does not preclude the court from awarding sanctions based on other claims in the complaint that are found to be frivolous. *Holgate v Baldwin*, *supra*, 425 F3d at 677. In addition, the fact that an attorney withdraws as counsel due to a conflict of interest does not preclude the court from imposing sanctions against the attorney based on a filing the attorney made before withdrawing. 425 F3d at 677.

The California Supreme Court has held that these provisions apply with respect to the imposition of sanctions under CCP §128.7. It specifically held that both attorneys and their clients have a duty to make a reasonable inquiry before filing papers with the court, and must have an actual belief that the allegations set forth in these papers are true. *Bockrath v Aldrich Chem. Co., Inc.* (1999) 21 C4th 71, 82, 86 CR2d 846. A plaintiff should not file a complaint against a specific named defendant unless, after reasonable inquiry, the plaintiff actually believes that the defendant is liable for the plaintiff's damages. 21 C4th at 82. If the plaintiff lacks sufficient evidence to support particular allegations against a defendant, but believes such evidence is likely to be obtained through further investigation or discovery, the complaint must specifically identify these allegations. 21 C4th at 82.

*Duty imposed on client.* Federal courts interpreting Rule 11 have also held that when the client, rather than the attorney, is in the better position to investigate the facts, the client must make a reasonable inquiry before



providing the facts to the attorney. *Pan-Pacific & Low Ball Cable Television Co. v Pacific Union Co.* (9th Cir 1993) 987 F2d 594, 597.

*Duty to corroborate hearsay information.* Attorneys or unrepresented parties should normally corroborate hearsay information. *Unioil, Inc. v E.F. Hutton & Co.* (9th Cir 1986) 809 F2d 548, 558 (amended, rehearing denied). In that regard, it may not be reasonable for an attorney to rely on newspaper articles. *Garr v U.S. Healthcare, Inc.* (3d Cir 1994) 22 F3d 1274, 1279. If the facts seem unlikely, the attorney must make a reasonable attempt to corroborate them. See *Childs v State Farm Mut. Auto. Ins. Co.* (5th Cir 1994) 29 F3d 1018, 1025.

*Factors in determining whether inquiry was reasonable.* Interpreting Rule 11, the court in *Brown v Federation of State Med. Bds. of the U.S.* (7th Cir 1987) 830 F2d 1429, 1435, noted these factors for the judge to consider in deciding whether the inquiry was reasonable:

- Complexity of the facts.
- Time available for investigating the facts before presenting the pleading or other paper. *Cooter & Gell v Hartmarx Corp.* (1990) 496 US 384, 401-402, 110 S Ct 2447, 110 L Ed 2d 359 (inquiry that is reasonable a few months before complaint must be filed may not be reasonable when there is only a short time before statute of limitations expires).
- Whether another attorney initiated the case.
- Whether and to what extent the attorney was required to rely on the client's statement of the facts.

There are different considerations when the soundness of a legal argument is at issue, although the distinction between law and facts is not always an easy one to find. See *Cooter & Gell v Hartmarx Corp.*, *supra*, 496 US at 401. In determining whether a legal argument is frivolous, the judge should consider these factors (*Brown v Federation of State Med. Bds. of the U.S.*, *supra*, 830 F2d at 1435):

- Complexity of the legal issues.
- Whether an attorney (rather than an unrepresented party) is presenting the legal theory.
- Whether the legal theory is reasonable. In this regard, an attorney must research the law and not merely accept the client's position concerning a legal question. *Hendrix v Naphtal* (9th Cir 1992) 971 F2d 398, 400. See *Guillemin v Stein* (2002) 104 CA4th 156, 167-168, 128 CR2d 65 (sanctions were not warranted when legal contention advanced by party was "arguable"; even though it lacked persuasive force, motion was not frivolous, and party was entitled to zealously argue the point).



- Time available for researching the law.

Under CCP §128.7, an attorney or unrepresented party may be able to show that a legal contention is warranted by either providing current valid authority or by providing support for a contention that existing law should be changed. See CCP §128.7(b)(2).

#### 4. [§3.55] Examples of Conduct That May Warrant Sanctions Under CCP §128.7

A judge may impose sanctions under CCP §128.7 for the following types of conduct:

- Against a plaintiff for filing a complaint to which the defendant has a complete defense. See *Laborde v Aronson* (2001) 92 CA4th 459, 463-465, 112 CR2d 119 (litigation privilege of CC §47 established complete defense to all causes of action); *Liberty Mut. Fire Ins. Co. v McKenzie* (2001) 88 CA4th 681, 689-692, 105 CR2d 910 (in insurer's declaratory relief action to determine coverage, judge properly ordered insured to pay sanctions to insurer for naming claims adjuster employed by insurer as cross-defendant in his cross-complaint against insurer for breach of contract and breach of implied covenant of good faith, in contravention of well-settled law).
- Against a plaintiff after sustaining the defendant's demurrer without leave to amend. See *Banks v Hathaway, Perrett, Webster, Powers & Chrisman* (2002) 97 CA4th 949, 953-954, 118 CR2d 803 (judge loses jurisdiction to award sanctions only when order sustaining demurrer is reduced to judgment before defendant serves and files sanctions motion).
- Against a plaintiff for filing an amended complaint that is not in accordance with the judge's order sustaining the defendant's demurrer with leave to amend. See *Eichenbaum v Alon* (2003) 106 CA4th 967, 971, 131 CR2d 296.
- Against a party for filing a motion for reconsideration that does not comply with the statutory requirements for such a motion. CCP §1008(d); *Deauville Restaurant, Inc. v Superior Court* (2001) 90 CA4th 843, 852, 108 CR2d 863; *Marriage of Drake* (1997) 53 CA4th 1139, 1168-1169, 62 CR2d 466.
- Against an unrepresented plaintiff or a represented plaintiff's attorney when the defendant is granted summary judgment in an action under the California Fair Employment and Housing Act (FEHA) (Govt C §12900) based on the plaintiff's failure to exhaust administrative remedies. *Hon v Marshall* (1997) 53 CA4th 470, 478-479, 62 CR2d 11.

- Against a wife for filing a separate action based on claims that were within the jurisdiction of the family court when the dissolution proceeding had been filed before the separate action. *Burkle v Burkle* (2006) 144 CA4th 387, 400, 50 CR3d 436.

Although CCP §128.7(a) states that any unsigned paper “shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party,” this does not compel a dismissal, nor does it rule out granting leave to amend. *Vaccaro v Kaiman* (1998) 63 CA4th 761, 767-768, 73 CR2d 829; see *Board of Trustees of Leland Stanford Jr. Univ. v Superior Court* (2007) 149 CA4th 1154, 1167-1170, 57 CR3d 755 (complaint not signed by party may be amended to add signature even after limitations period has run). As long as the omission of counsel’s signature is capable of cure, it is an abuse of discretion for a judge to strike the plaintiff’s complaint without affording leave to amend. *Vaccaro v Kaiman* (1998) 63 CA4th 761, 768-769, 73 CR2d 829. In enacting CCP §128.7, the Legislature did not intend that a judge must dismiss an action when counsel fails to “promptly” sign the complaint, if counsel is willing to do so belatedly. 63 CA4th at 769. There are other alternatives short of dismissal of the plaintiff’s action that are sufficient to enforce the legislative policy of CCP §128.7. For example, a judge has authority under CCP §436 to require, as a condition of leave to amend, that the plaintiff pay the defendant’s expenses of the motion to strike the complaint. 63 CA4th at 769.

Examples of conduct that gave rise to Rule 11 sanctions as interpreted in federal case law (which may have some bearing on interpreting and applying CCP §128.7) include:

- Pursuing lawsuit for copyright infringement against a one-person company operating out of a garage when simple checking would have shown that no infringement had occurred. *Business Guides, Inc. v Chromatic Communications Enters., Inc.* (1991) 498 US 533, 550, 111 S Ct 922, 112 L Ed 2d 1140.
- Causing delay as a result of repeated unjustified procedural moves. *Coastal Transfer Co. v Toyota Motor Sales, U.S.A.* (9th Cir 1987) 833 F2d 208, 212.
- Seeking excessive amount of damages. *Hudson v Moore Bus. Forms, Inc.* (9th Cir 1987) 836 F2d 1156, 1162.
- Naming party as a defendant only to establish venue. *Stewart v American Int’l Oil & Gas Co.* (9th Cir 1988) 845 F2d 196, 201.

## 5. [§3.56] Procedural Requirements

A motion for sanctions must be made separately from other motions or requests and must describe the specific conduct alleged to violate



subdivision. CCP §128.7(c)(1); *Barnes v Department of Corrections* (1999) 74 CA4th 126, 135-136, 87 CR2d 594. The moving party must strictly comply with this requirement. 74 CA4th at 135-136 (doctrine of substantial compliance does not apply). Informal notice of an intention to seek sanctions in the future does not serve as a substitute for a formal noticed motion. 74 CA4th at 135-136.

On its own motion, the court may enter an order that describes the specific conduct that appears to violate subdivision and that directs an attorney, law firm, or party to show cause why it is not liable for sanctions, unless, within 21 days of service of the order to show cause, the challenged paper, claim, defense, contention, allegation, or denial is withdrawn or appropriately corrected. CCP §128.7(c)(2).

When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this section and explain the basis for the sanction imposed. CCP §128.7(e).

The required notice of motion and safe harbor provisions are discussed in §3.57.

For a checklist of the CCP §128.7 procedure, see §3.10.

## 6. [§3.57] Safe Harbor Limitations

A party seeking sanctions under CCP §128.7 must serve, but not file, a notice of motion describing the specific conduct that allegedly violated CCP §128.7(b); the motion may not be coupled with any other motion or request. CCP §128.7(c)(1). A party served with the notice of motion seeking sanctions has a safe harbor period of 21 days from that service to withdraw or appropriately correct the challenged paper, claim, defense, contention, allegation or denial; such a withdrawal or correction will render the motion moot. CCP §128.7(c)(1). Thus, the offending party may avoid sanctions altogether by withdrawing or correcting the challenged document. *Hart v Avetoom* (2002) 95 CA4th 410, 413, 115 CR2d 511.

A judge may prescribe a safe harbor period that is shorter or longer than 21 days. CCP §128.7(c)(1).

In addition to withdrawing or correcting the challenged pleading, the offending party must also give notice to the moving party that it has taken that step. *Liberty Mut. Fire Ins. Co. v McKenzie* (2001) 88 CA4th 681, 692, 105 CR2d 910. Absent notice, the moving party has no knowledge that the problem has been resolved and consequently will proceed (as it warned the offending party it would do) with filing the sanctions motion with the court. This requires the unnecessary expenditure of time by the court and the moving party's attorney that could have been avoided if notice had been given. When the offending party fails to give notice (and offers no explanation for that omission), the court has the authority to impose the sanctions requested. 88 CA4th at 692.

If a withdrawal or correction is not made within the 21-day period, the moving party may file the motion. See CCP §128.7(c)(1). The moving papers that are filed must be the same papers that were served on the opposing party. *Hart v Avetoom, supra*, 95 CA4th at 414–415.

The 21-day safe harbor limitation also applies to sanctions initiated by the judge. CCP §128.7(c)(2); *Levy v Blum* (2001) 92 CA4th 625, 637, 112 CR2d 144; *Barnes v Department of Corrections* (1999) 74 CA4th 126, 131, 87 CR2d 594. Thus, when a judge issues an order to show cause as to why sanctions should not be imposed, the judge must set the matter for hearing at least 21 days after service of the order. *Levy v Blum, supra*, 92 CA4th at 637.

*Time for Service.* Because CCP §1005(b) requires motions to be filed at least 16 court days before the hearing, CCP §128.7(c)(1) effectively requires a motion for sanctions to be served at least 43 days before it will be heard (21 days required by CCP §128.7(c)(1), plus 16 court days, plus 6 intervening weekend days), unless an order shortening time is obtained. *Cromwell v Cummings* (1998) 65 CA4th Supp 10, 13 n3, 76 CR2d 171; see CCP §1005(b) (court or judge may prescribe shorter time). This 43-day period is further extended under CCP §1005(b) when the notice of motion is served by mail.

*Purpose of Safe Harbor Provisions.* The purpose of the safe harbor provision is to permit an offending party to avoid sanctions by withdrawing the improper pleading during the safe harbor period. *Hart v Avetoom, supra*, 95 CA4th at 413. This permits a party to withdraw questionable pleadings without penalty, thus saving the court and the parties time and money litigating the pleading as well as the sanctions request. Code of Civil Procedure §128.7 sanctions are designed to promote compliance with statutory standards of conduct rather than to be punitive. *Malovec v Hamrell* (1999) 70 CA4th 434, 441, 82 CR2d 712. A judge must deny the motion if the moving party fails to comply with the safe harbor provision of CCP §128.7(c)(1). *Marriage of Reese & Guy* (1999) 73 CA4th 1214, 1220 n3, 87 CR2d 339 (safe harbor provision is mandatory); *Goodstone v Southwest Airlines Co.* (1998) 63 CA4th 406, 423–424, 73 CR2d 655 (judge has no authority to disregard the safe harbor requirement); *Cromwell v Cummings* (1998) 65 CA4th Supp 10, 13–14, 76 CR2d 171. See *Holgate v Baldwin* (9th Cir 2005) 425 F3d 671 (sanctions award under Rule 11 must be reversed for failure to comply with safe harbor provision, even if challenged filing is frivolous); *Retail Flooring Dealers of Am., Inc. v Beaulieu of Am., LLC* (9th Cir 2003) 339 F3d 1146, 1151 (allowing party to serve sanctions motion under Rule 11 after time has expired for opposing party to correct or withdraw challenged pleading defeats purpose of safe harbor provision).

*Effect of dismissal.* A judge may not order a plaintiff to pay sanctions to a defendant under CCP §128.7 for bringing an improper action against



the defendant after the plaintiff has dismissed the action. *Hart v Avetoom, supra*, 95 CA4th at 413–415. Allowing a defendant to move for sanctions after the conclusion of the case would defeat the purpose of the safe harbor provision, *i.e.*, to allow the offending party to take remedial action. 95 CA4th at 414–415.

However, a judge may award sanctions under CCP §128.7 against a plaintiff that voluntarily dismisses the action (with or without prejudice) *after* the defendant has filed a motion for sanctions. *Eichenbaum v Alon* (2003) 106 CA4th 967, 975, 131 CR2d 296. In such a case, the defendant moves for sanctions only after the plaintiff has been allowed the 21-day safe harbor period to correct its sanctionable conduct, but has not done so. In these circumstances, the plaintiff's belated abandonment of the case does not fulfill the deterrent purposes of CCP §128.7, and the policies favoring allowance of sanctions remain notwithstanding the dismissal. 106 CA4th at 975–976. This construction is consistent with CCP §128.7(d)(2), which provides that the court may not award monetary sanctions on its own motion unless it has issued an order to show cause before a voluntary dismissal. The plain implication of this language is that a judge may award sanctions if a voluntary dismissal comes *after* a sanctions motion is filed. 106 CA4th at 975–976.

### 7. [§3.58] Sanctions

A sanction imposed is limited to what is sufficient to deter repetition of this conduct or comparable conduct by others similarly situated. The sanction may consist of or include directives of a nonmonetary nature, an order to pay a penalty into court, or if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorney's fees and other expenses incurred as a direct result of the violation. CCP §128.7(d). However monetary sanctions may not be awarded against a represented party for a violation of CCP §128.7(b)(2) (claims not warranted by existing law). CCP §128.7(d)(1).

Monetary sanctions may also not be awarded on the court's motion unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned. CCP §128.7(d)(2). See CALIFORNIA JUDGES BENCHBOOK: CIVIL PROCEEDINGS—BEFORE TRIAL, SECOND EDITION §§17.40–17.45 (Cal CJER 2008).

In addition, the court may assess punitive damages against the plaintiff upon a determination by the court that the plaintiff's action was an action maintained by a person convicted of a felony against the person's victim, or the victim's heirs, relatives, estate, or personal representative, for injuries arising from the acts for which the person was convicted of a felony, and that the plaintiff is guilty of fraud, oppression, or malice in maintaining the action. CCP §128.7(f).

### 8. [§3.59] Sanctions Based on Motion for Sanctions

A motion for sanctions brought by a party or a party's attorney primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation, is itself subject to a motion for sanctions. The intent of the Legislature is for courts to vigorously use its sanctions authority to deter that improper conduct or comparable conduct by others similarly situated. CCP §128.7(h).

### 9. [§3.60] Attorney's Fees

The award of sanctions may include attorney's fees to the movant. CCP §128.7(d). However, a self-represented attorney who responds to a filing abuse may not recover sanctions under CCP §128.7 in the form of attorney's fees. *Musaelian v Adams* (2009) 45 C4th 512, 516-520, 87 CR3d 475 (expressly disapproves *Laborde v Aronson* (2001) 92 CA4th 459, 112 CR2d 119 and *Abandonato v Coldren* (1995) 41 CA4th 264, 48 CR2d 429, to the extent that they are inconsistent).

### 10. [§3.61] Postjudgment Motion for Sanctions

A judge lacks authority to grant a party's postjudgment motion for sanctions. Such a motion does not comply with the safe harbor provision of CCP §128.7(c)(1). *Barnes v Department of Corrections* (1999) 74 CA4th 126, 129-135, 87 CR2d 594. A sanctions motion that is served and filed after the action has been dismissed is also untimely. *Hart v Avetoom* (2002) 95 CA4th 410, 413-415, 115 CR2d 511.

A party must serve any motion for sanctions before the final disposition of the claimed sanctionable conduct in order to give the opposing party an opportunity to correct the allegedly offending conduct and avoid sanctions. 74 CA4th at 130, 132-133, 135. For example, an order sustaining a demurrer without leave to amend does not bar a motion for CCP §128.7 sanctions unless the order is reduced to a judgment before the sanctions motion is served and filed. *Banks v Hathaway, Perrett, Webster, Powers & Chrisman* (2002) 97 CA4th 949, 954, 118 CR2d 803.

If the motion is served before the entry of judgment, and the safe harbor time expires before judgment is entered, the motion can be filed after the judgment is entered. *Day v Collingwood* (2006) 144 CA4th 1116, 1124, 50 CR3d 903.

### 11. [§3.62] Appellate Review

An appeal may be taken from an order or interlocutory judgment directing payment of monetary sanctions by a party or an attorney for a party if the amount exceeds \$5000, other than in a limited civil case. CCP §904.1(a)(11), (12). But multiple orders for monetary sanctions against different defendants, each under the appealable limit, cannot be



aggregated to reach the threshold level for appeal. *Calhoun v Vallejo City Unified Sch. Dist.* (1993) 20 CA4th 39, 41, 24 CR2d 337.

In a limited civil case, any order directing payment of monetary sanctions is directly appealable. CCP §905.2; *Drum v Superior Court* (2006) 139 CA4th 845, 850–852, 43 CR3d 279; but see *Lim v Silverton* (1997) 61 CA4th Supp 1, 3–4, 72 CR2d 408 (found to be wrongfully decided by *Drum*).

Other than in a limited civil case, an order or judgment awarding sanctions of \$5000 or less may be reviewed after entry of final judgment in the main action or, in the appellate court's discretion, on petition for an extraordinary writ. CCP §904.1(b).

Appellate courts also routinely review orders *denying* sanctions, even though most cases do not specifically address the issue of whether these orders are appealable. See *Shelton v Rancho Mortgage & Inv. Corp.* (2002) 94 CA4th 1337, 1343, 115 CR2d 82. A postjudgment order denying a request for sanctions is appealable under CCP §904.1(a)(2). 94 CA4th at 1343–1345.

In general, an appeal from a sanctions order may normally only be filed by the attorney who was sanctioned. *20th Century Ins. Co. v Choong* (2000) 79 CA4th 1274, 1276–1277, 94 CR2d 753. However, an attorney's employer has standing to appeal from a sanctions order imposed on the attorney, while acting in the course and scope of his or her employment, because the employer is required by Lab C §2802 to reimburse its attorney-employee for the amount of the sanctions. 79 CA4th at 1276–1277.

An award of monetary sanctions will only be reversed on a finding that the award was a clear abuse of the judge's discretion. *Gemini Aluminum Corp. v California Custom Shapes, Inc.* (2002) 95 CA4th 1249, 1262–1263, 116 CR2d 358; *Shelton v Rancho Mortgage & Inv. Corp.*, *supra*, 94 CA4th at 1345–1346.

A consideration of whether imposing sanctions is a violation of due process is inherent in the appellate review of a judge's exercise of discretion in imposing sanctions. *Winikow v Superior Court* (2000) 82 CA4th 719, 727, 98 CR2d 413.

## H. Other Sanctions

### 1. Violation of Lawful Court Order Under CCP §177.5

#### a. [§3.63] Court's Authority To Impose Sanctions Payable to Court

*Scope of authority.* A judicial officer may impose reasonable monetary sanctions for any violation of a lawful court order without good cause or substantial justification by a witness, a party, a party's attorney, or both a party and a party's attorney. CCP §177.5. See *In re Woodham*