That Dog Won't Hunt

Lawyers, Clients, and Frivolous Litigation.

In our litigious world, where attorneys are rewarded handsomely for aggressively pursuing and defending legal assaults, and where novel, creative legal arguments are hallmarks of superior advocacy, the defining edge between good lawyering and abuse of process is not always clear. As a result, the filing of untrue, unnecessary, dilatory and spurious claims or defenses is not uncommon. Attorneys are well-advised to understand the boundaries of ethical pleading.

A few years ago, a client of mine, who was about to sue his employer, warned me to be wary of the "boss's bull----." He explained that the employer, who was frequently sued, typically defends cases by filing meritless counterclaims against the plaintiffs or by raising unprovable defenses. The employer and his attorney were also known to engage in costly and time-consuming motion practice in order to discourage and weaken adversaries. According to my client, the employer was also not above making unfounded accusations of employee theft and of other criminal and civil wrongdoing against his litigation adversaries. My client warned me to expect such a response.

We expected edgy litigation. We needed to locate the line between strident advocacy and vexatious lawyering. Of course, tortious allegations in pleadings may expose the offending party to liability for defamation, but for most cases, a small constellation of statutes, Rules of Court and Rules of Professional Conduct creates a guideline for practitioners. A few words about these rules follow.

Of the Rules and statutes which pertain, N.J.S. 2A:15-59.1 – Frivolous Causes of Action, is central. It provides that a party in a civil action who prevails, either as plaintiff or defendant against another party, may be awarded costs and attorney fees, "*if the judge finds, at any time during the proceedings or upon judgment that a complaint, counterclaim, cross-claim or defense of the non-prevailing person was frivolous.*" Such a finding may be based on the pleadings, discovery and/or evidence that the complaint, counterclaim, cross-claim or defense was used in "*bad faith, solely for the purpose of harassment, delay or malicious injury,*" or that the non-prevailing party knew or should have known that the pleading or defense was "*without any reasonable basis in law or equity, and could not be supported by a good faith argument for an extension, modification or reversal of existing law.*"

The Frivolous Causes of Action statute does not pertain to lawyers, but to litigants only. This interpretation was deemed necessary, since the Rules of Court and the RPCs alone control attorney behavior, and the award of fees and costs against a lawyer is disciplinary in nature. Thus, any such award against an attorney would encroach upon an exclusive domain of the OAE – attorney discipline. Moreover, the Rules of Professional Conduct and the Rules of Court also have provisions that are directly on point. Nevertheless, the language of NJS 2A:15-59.1 is helpful in defining the boundary between permissible and impermissible filings by attorneys, and the Courts have used that language frequently in applying the RPCs and Rules of Court.

Counsel are often surprised to learn that the Frivolous Causes of Action statute does not apply to appeals or to motion practice, although special rules apply to Motions for Summary Judgment. In Motions for Summary Judgment, R.4:46-5(b) (Affidavits Made in Bad Faith) applies. It provides unambiguously, that, "[i]*f the court is satisfied, at any time, that any of the affidavits submitted pursuant to this rul*

e are (sic) presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them (sic) to pay to the reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt."

Even in cases where a Summary Judgment motion is denied, the Court may review the matter following adjudication, and then impose sanctions. *"In an action tried to conclusion in which the prevailing party had made a pretrial motion for summary judgment or partial summary judgment that was denied, the court may, on motion, award counsel fees to the prevailing party if it finds that the denial of the motion was based on a factual contention raised in bad faith by the party opposing the motion with knowledge that it was a palpable sham or predicated on facts known or which should have been known to be false. The motion shall be made to the trial court and shall be decided on the basis of the record made in the summary judgment motion and the trial of the cause. The award of counsel fees shall be* limited *to those legal services rendered on the motion for summary judgment and for such subsequent services as were compelled by its denial."* R. 4:46-6. The Court may make the motion *sua sponte*.

It is important to note that a litigant who relies in good faith on the advice of counsel cannot be found to have known that the claim was baseless or defenseless under the statute. Furthermore, and with good reason, the misconduct of an attorney in initiating or pursuing a frivolous claim cannot be imputed to the client. Accordingly, relatively few litigants are ever charged with violations of the statute.

On the other hand, an attorney may not hide behind the client's representations or assurances concerning the facts of the matter, but is ultimately responsible for the content of his or her pleadings. Due diligence is imposed upon us by the Rules before we affix our names to any "pleading, written motion, or other paper." Rule 1:4-8 (Frivolous Litigation) specifies that,

> *"The signature of an attorney or pro se party constitutes a certificate that the signatory has read the pleading, written motion or other paper. By signing, filing or advocating a pleading, written motion, or other paper, an attorney or pro se party certifies that, to the best of his or her knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:*
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> *(1) the paper is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;*
> *(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;*
> *(3) the factual allegations have evidentiary support or, as to specifically identified allegations, they are either likely to have evidentiary support or they will be withdrawn or corrected if reasonable opportunity for further investigation or discovery indicates insufficient evidentiary support; and*
> *(4) the denials of factual allegations are warranted on the evidence or, as to specifically identified denials, they are reasonably based on a lack of information or belief or they will be withdrawn or corrected if a reasonable opportunity for further investigation or discovery indicates insufficient evidentiary support.*

Most of us are familiar enough with RPC 3.1. - Meritorious Claims and Contentions. It dictates that: "*A lawyer shall not bring or defend a proceeding, nor assert or controvert an issue therein unless*

the lawyer knows or reasonably believes that there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law, or the establishment of new law."

Honoring the broader swing of the criminal defense lawyer's axe, but limiting that, as well, RPC 3.1 continues: "*A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established*."

RPC 3.1 and the Rules of Court apply to all papers and oral presentations in which an attorney advocates on behalf of a client; they are not limited to trials and motions. Almost any communication from an attorney can fall within its scope. Moreover, additional RPCs address other, more nuanced aspects of frivolity, further discouraging attorneys from foul play. Specifically, RPC 4.4 prohibits the use of any "means that have no substantial purpose other than to embarrass, delay or burden a third person," and RPC 3.4(d) prohibits attorneys from making pretrial discovery requests with similar purposes. They are very easy rules to follow.

Every lawyer, or at least every litigator, has had a client who has instructed: "I want you to make them miserable," or "I want this to cost them plenty," or, "Drag this out as long as you can." While we wish to please our clients and do their bidding when we can, remember that we are our client's sword and shield; we are not Angels of Death or the Great Avenger.

We have rules that we must follow and whose violation can bring misery upon us. They are easy to follow. Advocate aggressively, defend passionately but remain above your client's emotion. When you try so hard to win cases, why put yourself in jeopardy for the sake of a worthless argument or an ill—spirited measure? Life is too short.

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