Bloomberg BNA

The United States
Law Week

Case Alert & Legal News™

Attorneys

Malpractice

What's a lawyer supposed to do when an opposing party claims her loss resulted from a conspiracy involving the lawyer? According to SulmeyerKupetz attorney David J. Richardson, some states rely on common law, while others, such as California, have vexatious litigation statutes to help lawyers. Focusing on the California statute, Richardson looks at how lawyers can successfully navigate around these vexatious litigants.

Your Opponent Has Just Sued You: Your Options Vary Widely Depending on the State Where the Litigation Is Filed

DAVID J. RICHARDSON

If you work as a litigator for enough years, you are likely to find yourself a defendant in a lawsuit filed by your opponent's client.

Not your client, alleging malpractice.

But your opponent's client, alleging that his or her litigation loss was a result of your conspiracy with your client, the judge, the jury, and a host of potential defendants.

David Richardson is Senior Counsel at SulmeyerKupetz, a premier business, financial restructuring and litigation firm in California. He has a wide range of experience in corporate restructuring, commercial litigation and appellate practice; he can be reached at drichardson@sulmeyerlaw.com or 213-626-2311.

It is difficult to take such a lawsuit seriously, but courts have a tendency to assume that all plaintiffs are reasonable and sane until proven otherwise.

The time and cost of proving otherwise can be substantial.

Prompt Dismissal. Several options are available to obtain a prompt dismissal of such a lawsuit—at least for attorneys who practice or are sued in the right jurisdiction.

Rather than call a malpractice insurer and ask them to become involved in litigation that isn't actually malpractice, it might be best to consider options that could not only resolve the present litigation in a prompt manner, but also ensure that any future litigation filed by the same plaintiff is resolved far more quickly.

The most obvious option is the vexatious litigant motion, though it is an option that is most readily available in only a handful of states.

In states that have a vexatious litigant statute, a defendant can file a motion that challenges the vexatious nature of the litigant as an initial response to the complaint, and toll the time to answer.

Incomprehensible Complaint. Vexatious litigation is typically filed pro se, the complaint is often incomprehensible, and the text usually informs the court that the vast conspiracy uncovered by the plaintiff is actually an indicator of the plaintiff's vexatious nature.

 ISSN 0148-8139

Such lawsuits are ripe for a vexatious litigant determination before the parties have to engage in the time and expense of discovery.

Only five states have vexatious litigant statutes.

The statute that has served as the example for the others is California's Code of Civil Procedure Section 391, which provides that a motion asking that the plaintiff be designated as a vexatious litigant may be supported where: (i) the plaintiff has a practice of filing repeated pro se litigation that is meritless; (ii) the plaintiff has been deemed a vexatious litigant in another court (including of another state); or (iii) after losing in litigation, the plaintiff has repeatedly attempted to re-litigate the same or related claims against the same or related parties.

Upon the filing of a motion seeking relief under Section 391, the litigation is stayed and the burden then rests with the plaintiff to prove a reasonable probability of prevailing on her claims.

Where the court finds that there is no likelihood of prevailing, and that the plaintiff is ''vexatious,'' the court will require that the plaintiff post an appropriate bond before the litigation may proceed.

If the bond is not paid, the litigation is dismissed against the movants, and no similar litigation may be filed without prior leave of court.

Texas provides a similar statutory framework under Civ. Prac. & Rem. § 11.001 et seq., as does Florida under Florida Civil Practice and Procedure Section 68.093, Ohio under Ohio Rev. Code § 2323.52 and S. Ct. Prac. Rule 4.03(B), and Hawaii under Haw. Rev. Stat. Ann. § § 634J-1 – 634J-7.

The Ohio statute is unique, in that there is no requirement of repeated vexatious behavior.

Common Law. Other states lack a statutory framework for dealing with vexatious litigants, but some recognize the concept under common law, and often apply similar remedies.

For example, under New York law, the issue is addressed more as a matter of an improper filing of frivolous litigation, subject to sanctions.

In common law states like New York, rulings barring vexatious litigation usually arise from proceedings within that litigation, rather than from a pre-answer motion that may end the litigation at the outset.

On a proper showing, New York courts will often deem a litigant to be vexatious, and apply injunctive relief to bar further litigation. *See*, *e.g.*, *Yagan v. Fitzpatrick*, 2010 NY Slip Op 33049(U) (Onandaga County 2010) (enjoining pro se litigant from filing further ''vexatious litigation''); and *Martin-Trigona v. Capital Cities/ABC*, 145 Misc. 2d 405, 546 N.Y.S.2d 910 (N.Y. County 1989) (entering pre-filing injunction against vexatious pro se litigant).

In each case, however, the lack of a statutory framework means that such rulings arise from proceedings within the vexatious litigation, such as motions for sanctions or attorney's fees, rather than from a pre-answer motion that might end the litigation at the outset.

Federal Court. Where the frivolous litigation is filed in federal court, the Circuits offer slightly differing standards for determining whether the litigant is ''vexatious,'' and for determining whether to enter a pre-filing order barring future litigation. *See*, *e.g.*, *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1057-58 (9th Cir. 2007) (reconciling similar Second and Ninth Circuit standards for entry of a pre-filing order).

Federal courts usually find that they have the jurisdiction to enter pre-filing orders under the All Writs Act, 28 U.S.C. § 1651(a), though some courts will enter such orders based upon their inherent power to guard against abuses of the judicial system. *See*, *e.g.*, *Farguson v. MBank Houston, N.A.*, 808 F.2d 358, 360 (5th Cir. 1986).

In general, however, each Circuit has shown a willingness to grant post-answer motions and enter pre-filing orders barring future, repetitive litigation against related parties, based upon claims that have been resolved in prior litigation, or barring litigation aimed at harassment.

Something Less Than Vexatious. California provides a further remedy that might apply in situations where the litigant is something less than vexatious—such as a first-time filer of frivolous litigation—and where the litigation asserts that the attorney defendants are part of a conspiracy that was carried out against the plaintiff in earlier litigation.

California Civil Code § 1714.10 provides that, where a plaintiff wishes to file a complaint that includes a cause of action alleging a claim against an attorney ''for a civil conspiracy with his or her client arising from any attempt to contest or compromise a claim or dispute, and which is based upon the attorney's representation of the client,'' the plaintiff must file a petition with the Court seeking leave to file the complaint, and must establish that there is ''a reasonable probability'' that the plaintiff will prevail.

Where the plaintiff instead files the complaint without prior leave of court, the failure to obtain prior leave of court is grounds for dismissal by demurrer.

Section 1714.10 essentially provides attorneys with statutory pre-filing protection that is similar to the vexatious litigant statute, without the need for prior vexatious conduct or rulings.

Courts apply Section 1714.10 in a manner that is similar to California's vexatious litigant statute, relying on a ''reasonable probability'' of success analysis to determine if the claims are frivolous. *See Evans v. Pillsbury, Madison & Sutro* (1998) 65 Cal. App. 4th 599, 604 (''Section 1714.10 was intended to weed out the harassing claim of conspiracy that is so lacking in reasonable foundation as to verge on the frivolous.'').

Union of Conduct. There is no requirement that the term ''conspiracy'' be used by the plaintiff.

Rather, courts look to whether the allegations show a ''union of conduct between attorney and client arising out of the legal representation.'' *Berg & Berg Enterprises, LLC v. Sherwood Partners, Inc.* (2005) 131 Cal. App. 4th 802, 824.

  LW ISSN 0148-8139

The primary difference between the two statutes is one of procedure.

A motion under Section 1714.10 is brought in a demurrer or motion to strike, and does not stay the litigation, though a successful motion will lead to dismissal of the complaint.

California is the only state that has enacted such a statute, but courts in some other states recognize that an attorney cannot be held liable for a civil conspiracy with his client, and provide that a complaint that asserts such a claim is subject to dismissal. *See*, *e.g. Astarte, Inc. v. Pacific Indus. Sys.*, 865 F. Supp. 693, 708 (D. Colo. 1994) (holding that an attorney cannot engage in a civil conspiracy with his client in the course of acting in the scope of his authority, and dismissing complaint); *Born v. Hosto & Buchan, PLLC*, 2010 Ark. 292 (2010) (dismissing claim alleging civil conspiracy with attorney's client, on grounds that ''there can be no civil conspiracy between an attorney and his client for actions undertaken in the furtherance of the legal representation.'').

Dismissal of Frivolous Litigation. Obtaining the dismissal of frivolous litigation asserted against attorneys can be expensive in any jurisdiction.

But the procedures available in California, and other states that have followed California's lead, can substantially reduce the expense involved and the time required to obtain a dismissal of litigation and an order against future filings.