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San Diego FBA's

May
26

Three-Part Civil Legal Skills Series Part 1: Investigating & Preserving a Case



Part One of the Series will discuss various aspects of investigating and preserving a case. The panel aims to cover topics, including interviewing clients, the ethical duty to reasonably investigate, pre-filing negotiations, and data retention policies.

Panelists:

- Deborah Dixon - Partner, Dixon Diab & Chambers LLP
- Megan Donohue - Partner, Cooley LLP
- Francis DiGiacco - Partner, Hillier DiGiacco LLP
- Wendy Tucker- Partner, Procopio LLP

Moderator: Jack Burns, Associate, Sheppard Mullin LLP

Date: May 26, 2022 | 12 pm - 1 pm

Location: Jury Assembly Room | Carter Keep U.S. District Courthouse

Cost: Free | 1 hour general MCLE credit

[*Click here to RSVP](#) or visit fbasd.org

Investigating & Preserving a Case – General Outline
5/26/2022 | 12:00 – 1:00 p.m. | Jury Assembly Room

I. Welcome & Introductions (Dylan)

Moderator:

Jack Burns is a healthcare litigator at Sheppard, Mullin, Richter & Hampton. He represents providers and health plans in regulatory, reimbursement, and fraud and abuse matters. Jack previously clerked for Judge Burns on the U.S. District Court and Judge Procter Hug on the Ninth Circuit.

Panelists:

Frankie DiGiaccio represents plaintiffs in employment matters at his firm Hillier DiGiaccio LLP. Before this, Frankie was an Assistant United States Attorney in the Southern District of California and an associate at Robbins Geller Rudman & Dowd LLP.

Deborah Dixon is a founding partner of Dixon Diab & Chambers. Her practice focuses on class and mass actions relating to defective products and representing those injured by utility-caused fires in California. She has been named lead class counsel in several state and federal class actions. In addition to filing claims on behalf of employees for gender discrimination, harassment or assault, Deborah frequently advises employers on best practices to avoid lawsuits and presents on the importance of inclusivity in the workplace.

Megan Donohue is an experienced litigator and partner at Cooley with a focus on complex business litigation, class actions, and advertising and media. She represents clients in many different industries, both small start-ups and industry leaders, including pharmaceuticals, healthcare, nutraceuticals, cosmetics, consumer products and digital media. She has successfully defended numerous advertising challenges, often involving emerging technologies and business models, and has initiated and defended challenges before the National Advertising Division of the Council of Better Business Bureaus.

Wendy Tucker is a partner at Procopio and focuses on providing effective and practical counseling and advice to employers in all areas of employment law including terminations, leaves and accommodations, harassment and discrimination, wage and hour, management training and investigations. Her clients include public entities, charter schools and all types of other businesses. Wendy is experienced in successfully helping employers handle personnel crises and in resolving workforce issues such as toxic workplace or ineffective management and staffing. She advises her clients on solutions and best practices to minimize the risk of litigation or other exposure. Wendy is also experienced in assisting clients with all phases of union activity including recognition, collective bargaining, grievances and unfair practice charges and has represented clients before the Public Employment Relations Board.

II. Brief Program Overview

- a. Interviewing the client and investigating the case:
 - i. Plaintiff's side investigation of case
 - ii. Defendant's side investigation of case
 - iii. Joseph A. Bank case discussion

- b. Prelitigation negotiations:
 - i. Is a demand letter usually the first contact with the defendant?
 - ii. Whether and how to make a pre-litigation demand
 - iii. Pre-filing mediation

- c. Document preservation, litigation holds, and ESI:
 - i. Document and evidence preservation
 - ii. Litigation hold letter from the defense side
 - iii. Litigation hold letter from the plaintiff side

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title III. Pleadings and Motions

Federal Rules of Civil Procedure Rule 11

Rule 11. Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions

Currentness

(a) Signature. Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name--or by a party personally if the party is unrepresented. The paper must state the signer's address, e-mail address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.

(b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper--whether by signing, filing, submitting, or later advocating it--an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

(c) Sanctions.

(1) **In General.** If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

(2) **Motion for Sanctions.** A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under [Rule 5](#), but it must not be filed or be

presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. If warranted, the court may award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion.

(3) *On the Court's Initiative.* On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b).

(4) *Nature of a Sanction.* A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; 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 part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.

(5) *Limitations on Monetary Sanctions.* The court must not impose a monetary sanction:

(A) against a represented party for violating Rule 11(b)(2); or

(B) on its own, unless it issued the show-cause order under Rule 11(c)(3) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

(6) *Requirements for an Order.* An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.

(d) *Inapplicability to Discovery.* This rule does not apply to disclosures and discovery requests, responses, objections, and motions under [Rules 26](#) through [37](#).

CREDIT(S)

(Amended April 28, 1983, effective August 1, 1983; March 2, 1987, effective August 1, 1987; April 22, 1993, effective December 1, 1993; April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1937 Adoption

This is substantially the content of [former] Equity Rules 24 (Signature of Counsel) and 21 (Scandal and Impertinence) consolidated and unified. Compare former Equity Rule 36 (Officers Before Whom Pleadings Verified). Compare to similar purposes, *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 19, r. 4, and *Great Australian Gold Mining Co. v. Martin*, L.R. 5 Ch.Div. 1, 10 (1877). Subscription of pleadings is required in many codes. 2 Minn.Stat. (Mason, 1927) § 9265; N.Y.R.C.P. (1937) Rule 91; 2 N.D.Comp.Laws Ann. (1913) § 7455.

This rule expressly continues any statute which requires a pleading to be verified or accompanied by an affidavit, such as: U.S.C., Title 28:

§ 381 [former] (Preliminary injunctions and temporary restraining orders)

Exemplar - Pre-Litigation Checklist

	Initial Contact & Retention
1.	Identify Clients – Adverse Parties – Related Parties: entity / individual; locations / jurisdictions
2.	Run Conflicts and resolve
3.	Obtain billing guidelines or limitations
4.	Engagement Letters and Waivers
	Assessment of Status
5.	Insurance <ul style="list-style-type: none"> • Request policies • Identify if claims made
6.	Identify ADR obligations [arbitration or mediation]
	Assessment of Client
7.	Identify the client's goals
8.	Explore the client's risk tolerance
9.	Determine need and scope of budgets
	Assessment of Adverse Party
10.	Conduct litigation search of party and counsel
	Assessment of Venue
11.	Identify the venue and removal options
	Initial Assessment
12.	Identify Claims, Defenses, Statutory or Contractual Deadlines
13.	Request Relevant Documents
14.	Identify primary witnesses <ul style="list-style-type: none"> • Schedule interviews
15.	Prepare Litigation Hold letters <ul style="list-style-type: none"> • Identify custodians
16.	Identify ESI issues and prepare plan for retention and collection

SAMPLE LITIGATION HOLD LETTER

In addition, please accept this letter as official notice to management and employees that CLIENT is requesting DEFENDANT and its related entities not destroy, conceal or alter any paper or electronic files, or other data generated by and/or stored on DEFENDANT's or its employees' computer systems and storage media (e.g., hard disks, floppy disks, backup tapes), or any other electronic data, such as voicemail, video tape, surveillance or emails relating to CLIENT.

Through discovery we expect to obtain from DEFENDANT and its related entities, a number of documents and electronic media, emails, work product and other data, stored on your computers and storage media. In particular, we will seek the following type of information:

- All complaints relating to [the product/person/issue];
- All investigations relating to employee or his/her conduct, work performance or complaints lodged by or against _____, including the results of the investigations, consideration of alternative remedies, and evidentiary support for the investigations, and participating individuals and their roles in the investigation;
- All writings relating to or memorializing the decision to terminate [or not] employee;
- All information relating to complaints to, or investigations made by any governmental entity to DEFENDANT and its related entities;
- All information related to audits _____; and
- Any electronic recordings, including voice mails or electronic data stored on DEFENDANT's system relating to CLIENT.

The above list is by no means inclusive of the documents in possession, custody or control which is included in the duty to preserve under California and Federal laws. Accordingly, we request that DEFENDANT and its related entities take all appropriate steps to implement preservation and legal hold procedures, and immediately make reasonable efforts to preserve all discoverable electronic data.

In anticipation of a later, more formal, request for production of electronic data resident on DEFENDANT and its related entities' computer systems, we request DEFENDANT and its related entities immediately freeze all document retention or destruction procedures, as well as any deletion, overwriting, backup or archival storage of electronic data including, without limitation, any backup tape, disk, hard-drive or server. We likewise request you instruct your employees to:

- Discontinue all data destruction and backup tape recycling policies;

SAMPLE LITIGATION HOLD LETTER

- Preserve and not dispose of relevant hardware unless an exact replica of the file (a mirror image copy)¹ is made;
- Preserve and not destroy passwords, decryption procedures (and accompanying software); network access codes, ID names, manuals, tutorials, written instructions, compression or reconstruction software; and
- Maintain all other pertinent information and tools needed to access, review, and reconstruct all requested or potentially relevant electronic data.

The authority prohibiting destruction of evidence apply to electronically-stored information in the same manner that they apply to other evidence. Due to its format, electronic information is easily deleted, modified or corrupted. Accordingly, DEFENDANT is obligated to take every reasonable step to preserve this information until the final resolution of this matter.

Please forward a copy of this letter to all persons and entities with custodial responsibility for the items referred to in this letter. Failure to abide by this request could result in penalties. (*New Albertsons, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1403, 1424-1426; *Do It Urself Moving & Storage, Inc. v. Brown, Leifer, Slatkin & Berns* (1992) 7 Cal.App.4th 27, 36; *Williams v. Russ* (2008) 167 Cal.App.4th 1215, 1218-1219, 1224; *Vallbona v. Springer* (1996) 43 Cal.App.4th 1525, 1548.)

We appreciate your compliance with the demands referenced herein and obtaining the personnel file requested.

¹ A mirror image copy is a bit-by-bit copy of a hard drive that ensures the computer system is not altered during the imaging process. The mirror image should include active files, deleted files, deleted file fragments, hidden files, directories, and any other data contained on the computer.

217 F.Supp.3d 1200
United States District Court, S.D. California.

David M. LUCAS, et al., Plaintiffs,
v.
JOS. A. BANK CLOTHIERS, INC., Defendant.

CASE NO. 14cv1631-LAB (JLB)

|
Signed 11/15/2016

Synopsis

Background: Alleged purchaser of suits brought putative class action against seller, alleging that seller had inflated suit prices before offerings “buy one, get one free” sales. After it became clear that alleged purchaser, who had been designated lead plaintiff, had lied about ever buying suits from seller, and after plaintiffs moved to dismiss case with prejudice, seller moved to sanction allege purchaser and his attorneys.

Holdings: The District Court, [Larry Alan Burns, J.](#), held that:

counsel did not act recklessly, but

alleged purchaser acted in bad faith.

Motion granted in part and denied in part.

Procedural Posture(s): Motion to Dismiss.

Attorneys and Law Firms

***1201** [Daniel Frech](#), [Stuart Edward Scott](#), Spangenberg Shibley & Liber LLP, Cleveland, OH, [Hassan Ali Zavareei](#), [Jeffrey Douglas Kaliel](#), [Sophia Goren](#), Tycko & Zavareei LLP, Washington, DC, for Plaintiffs.

David M. Lucas, FPO, AP, pro se.

[E. Alex Beroukhim](#), [James F. Speyer](#), Arnold & Porter LLP, Los Angeles, CA, for Defendant.

ORDER RE: SANCTIONS

Honorable [Larry Alan Burns](#), United States District Judge

David Lucas sued Joseph A. Bank for allegedly inflating suit prices before offering supposed “buy one, get one free” sales. Hassan Zavareei of Tycko & Zavareei and Stuart Scott of Spangenberg Shibley & Liber represented David M. Lucas in this putative class action. Without rehearsing the entire procedural history of the case, suffice it to say that the allegations against Joseph A. Bank fell apart when it became clear to all that Lucas, who had been designated lead plaintiff, had lied about ever buying suits from Joseph A. Bank. Plaintiffs eventually moved to dismiss the case with prejudice, and Joseph A. Bank filed a motion to sanction Lucas and his attorneys for not dismissing the case sooner.

***1202** The Court agrees that Lucas's attorneys should have been more diligent and skeptical of Lucas's story much earlier in the litigation. But they didn't act recklessly. And the Court won't stain their reputations for dishonest acts committed by their client. With that said, the Court recognizes that significant time, effort, and money was spent by everyone involved because Lucas attempted to perpetrate a fraud on Joseph A. Bank, this Court, and the public. The Court has determined that Lucas's conduct is sanctionable.

I. Background

A. Lucas becomes the class representative.

Lucas learned of the proposed lawsuit against Joseph A. Bank through an online advertisement. He responded to the ad and eventually spoke with an employee at the Spangenberg law firm. The conversation was memorialized in a May 2014 memo. Lucas told a firm representative with whom he first spoke that he remembered buying three suits for about \$1,000. He went on to relate that the suits “incurred wear” “within a year.” When the Spangenberg associate asked Lucas if he'd be interested in serving as a class representative in a contemplated class action suit against Joseph A. Bank, he enthusiastically responded “YES!” (Ex. A, Tab 1.)

About a month later, Lucas sent Spangenberg an email containing a different account. He now claimed that he had purchased a total of 12 suits from Joseph A. Bank—three suits on four separate occasions. Spangenberg asked for proof, and Lucas emailed them back a document that he described as “the bank statements for the four purchases made with my debit card.” What Lucas provided looked like an online banking print-out that had been redacted with black marker. The document showed four debit transactions at Joseph A. Bank occurring in December 2012, June 2013, December 2013, and a fourth transaction with the date redacted. (Ex. A, Tab 2.)

A Spangenberg paralegal followed up with Lucas asking him for the date of the redacted purchase. Lucas told her it was July 1, 2012. The paralegal annotated the alleged bank statement with that date and attempted to otherwise “clean[] up the document” by removing the black marker redactions. Attorney Scott later produced this cleaned-up document to Joseph A. Bank in July 2015, but didn't provide the original that Lucas had sent until August 2016. (Ex. A, Tab 34.)

Scott testified that in his opinion, Lucas seemed like a good fit to be a class representative. Lucas held a Master's degree in accounting, worked for Qualcomm, and was married to a service member in the U.S. Navy. Scott had no reason to suspect that Lucas was lying about buying suits. Scott and Zavareei decided to move forward with Lucas as their class representative. They filed the lawsuit in July 2014.

B. Problems with Lucas's story emerge.

The parties litigated the action over the next year. In January 2016, Joseph A. Bank deposed Lucas. Lucas testified that he purchased the first three suits in July 2012 from a Joseph A. Bank store in San Diego. He said the suits frayed after he wore them once or twice. Rather than return them to Joseph A. Bank, he donated them to Goodwill. Yet, he testified that a few months later he bought three more suits from Joseph A. Bank. When these suits also frayed after a single wearing, he donated them too. He testified that the next summer (2013), he bought three more suits from Joseph A. Bank. And a few months later, he bought the final three suits. According to Lucas, all of the suits frayed after he wore them once or twice. He testified that he didn't complain or return the suits because returning things ***1203** made him anxious. He maintained that he purchased all of the suits with his Navy Federal Credit Union debit card. (Dkt. 151–1, Ex. B.)

On May 24, 2016, pursuant to a subpoena, Navy Federal Credit Union produced Lucas's original bank statements. The records established that Lucas had made no purchases from any Joseph A. Bank store. Faced with the glaring inconsistency between Lucas's testimony and what the records revealed, plaintiffs' counsel told Joseph A. Bank's lawyers that they were “conferring with Mr. Lucas to figure this out,” and surmised that Lucas may have “misremembered the debit card he used.” (Ex. A, Tab 16.)

A week later, Daniel Frech, a Spangenberg attorney who had most of the communication with Lucas, alerted Scott and Zavareei to another issue: If the prices Lucas supplied on his alleged bank statement were correct, then he was taxed at 8.75%, which “should mean that he bought [the suits] in the Bay area.” (Ex. A, Tab 21.) Frech emailed Lucas: “The tax rate looks like it was 8.75%, which suggest[s] that it was in San Francisco or Santa Clara county. Maybe Marin. Not a lot of places around San Diego have a sales tax rate that high.” (Ex. A, Tab 20.)

C. The parties file summary judgment motions.

On June 22, 2016, Lucas and Joseph A. Bank filed motions for summary judgment. (Dkt. 103 and 106.) Joseph A. Bank argued that Lucas wasn't entitled to restitution, and also maintained that his story was so implausible that no reasonable juror could believe it. Joseph A. Bank identified five problems with Lucas's story: (i) His claim to have purchased twelve-suits didn't make sense; (ii) his Navy Federal records showed no suit purchases; (iii) the Navy Federal records showed that Lucas made purchases in Virginia at the same times in 2012 that he claimed he bought suits in San Diego; (iv) Lucas said he had alterations performed at the stores, but the prices on the statement Lucas produced didn't reflect those additional costs; and (v) the suit prices on the statement Lucas produced reflected an 8.75% sales tax, yet no Joseph A. Bank store in San Diego had a tax rate that high in 2012 or 2013. (Dkt. 106–1.)

Zavareei testified that when he read Joseph A. Bank's summary judgment motion “alarm bells went off.” A few days later, Tycko attorneys spoke with Lucas by telephone and although they “still kind of believe[d]” Lucas, stated they didn't feel comfortable going forward with him as class representative. (Ex. A, Tab 28.) Plaintiffs' counsel withdrew their motion for summary judgment, asked for a continuance on Joseph A. Bank's pending summary judgment motion, and moved to substitute a new class representative “to protect the putative class” and because of the “vagaries around the specifics of [Lucas's] purchases.” (Dkt. 108–1.) Discovery was closed by then, and the Court denied the request. (Dkt. 113.)

Three days later, plaintiffs' counsel moved to voluntarily dismiss their claims with prejudice and to withdraw from representing Lucas owing to ethical concerns. (Dkt. 116, 117.) At this point, Joseph A. Bank moved for sanctions against Lucas and his attorneys. (Dkt. 132.) They also obtained an order from the magistrate judge compelling plaintiffs' counsel to produce their communications with Lucas. (Dkt. 147.) The Court granted the motion to withdraw and ordered Lucas to: (i) answer some key questions about the alleged bank statement; and (ii) appear at a hearing on October 18, 2016. (Dkt. 123, 128, 150.)

***1204 D. The sanctions hearing.**

A few days before the hearing, Lucas sent the Court an email explaining that the bank statement he produced had been “faxed” to him. He didn't offer any information about when, where, how, or from whom he obtained this document. He also tried to blame his former counsel for any misunderstanding that may have arisen.

The Court held the hearing on October 18, 2016. Lucas appeared telephonically from Japan, and advised the Court that he was proceeding without an attorney. The Court placed Lucas under oath and attorneys from both sides, as well as the Court, questioned him. Lucas maintained that the bank statement he provided was legitimate and that his twelve-suit story was true. He admitted that he must have mistakenly purchased the 2012 suits in Virginia, but insisted that he bought the suits in 2013 in California.

While questioning Lucas, Zavareei submitted into evidence an email that he sent to Lucas on July 12, 2016. The letter stated: “We have been doing research on how to proceed based on our conclusion that you have not been honest with us and have been dishonest in your deposition. Despite our numerous calls and requests for clarification, you have not been able to provide any sort of explanation for the facts that indicate you were being untruthful.” (Ex. 1.)

Joseph A. Bank called attorneys Scott and Zavareei as witnesses. Scott testified that after May 24, when he became aware of the real Navy Federal records, lawyers with his firm spoke with Lucas and emailed him 13 times. Zavareei said he didn't realize

how serious the problem was until he read Joseph A. Bank's summary judgment motion. Both Scott and Zavareei admitted they knew about the tax rate issue before the summary judgment motion. Zavareei also acknowledged that he didn't read Lucas's deposition until months after it was taken.

II. Standard of Review

A. Burden of proof.

The Ninth Circuit hasn't addressed the standard of proof for sanctions. *Lahiri v. Universal Music & Video Distribution Corp.*, 606 F.3d 1216, 1219 (9th Cir. 2010). But most courts that have considered the issue apply the clear and convincing evidence standard. See, e.g., *Shepherd v. Am. Broad. Companies, Inc.*, 62 F.3d 1469, 1478 (D.C. Cir. 1995). The clear and convincing standard is a way to protect against “the consequences of grave decisions too lightly reached.” *Eastwood v. Nat'l Enquirer, Inc.*, 123 F.3d 1249, 1252 n.5 (9th Cir. 1997). Sanctioning an attorney is a grave decision with serious consequences for his or her reputation. A sanctions motion alone is an accusation with the power to stigmatize. For these reasons, the Court finds that when a lawyer's good name and professional honor are on the line, the party moving for sanctions must provide clear and convincing evidence.

B. Section 1927 sanctions.

Under section 1927, “Any attorney...who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.” 28 U.S.C. § 1927. The law of the Ninth Circuit isn't quite clear if “recklessness suffices for § 1927 sanctions,” *Fink v. Gomez*, 239 F.3d 989, 993 (9th Cir. 2001), or if sanctions under “section 1927 must be supported by a finding of subjective bad faith.” *Blixseth v. Yellowstone Mountain Club, LLC*, 796 F.3d 1004, 1007 (9th Cir. 2015) (bad faith includes when an attorney “recklessly raises a frivolous argument or argues a meritorious *1205 claim for the purpose of harassing an opponent”). The Court need not resolve the issue because even under the lesser standard of recklessness, there is not clear and convincing evidence that Lucas's former attorneys acted recklessly.

C. Inherent power sanctions.

The Court may also sanction parties or counsel under its' inherent powers when they act in bad faith. *Fink*, 239 F.3d at 994. Here, the Court finds by clear and convincing evidence that Lucas acted in bad faith, and also that he acted intentionally and willfully.

III. Findings of Fact

A. Lucas's counsel didn't act recklessly.

Recklessness is “a departure from ordinary standards of care that disregards a known or obvious risk of material misrepresentation.” *In re Girardi*, 611 F.3d 1027, 1038 n.4 (9th Cir. 2010). Attorneys Scott and Zavareei testified that they weren't aware of Lucas's obvious lack of credibility until they read Joseph A. Bank's motion for summary judgment. The Court credits their testimony, and finds that they acted promptly and reasonably after that point. Within three weeks of determining that Lucas lacked credibility, they moved to substitute a new class representative. When the Court denied that motion, they moved to dismiss Lucas's claims with prejudice, and withdraw from representing him.

1. Counsel filed suit in good faith and didn't alter the statement to deceive.

Having considered all of the evidence, the Court finds that plaintiff's counsel initially had no reason to suspect that Lucas—a professional accountant with advanced degrees, a job at Qualcomm, and a wife serving in the U.S. Navy—was lying to them about buying suits. This finding is buttressed by evidence that Lucas produced a phony document to his lawyers to

corroborate his account of the purchases. Lucas's counsel were entitled to rely on his representations and the corroborating record he produced.

Although counsel weren't reckless, the Court believes that they should have done more to vet Lucas before selecting him as their class representative. For example, it was sloppy not to nail down Lucas's complete story early on. Basic questions about where Lucas bought the suits and what he did with them should have been asked long before Joseph A. Bank deposed him a year after the case was filed. Plaintiffs' counsel were also somewhat careless in ignoring Lucas's changing story (*e.g.*, first three suits, then twelve), even though they didn't disregard an obvious risk that their client was deceiving them before filing suit.

Joseph A. Bank argues alternatively that counsel should be sanctioned for altering the bank statement and failing to disclose the changes. At the hearing, Scott acknowledged that was a mistake. And it was. But the changes to the phony record were cosmetic, not substantive. The paralegal supplied a missing date by typing it into the document in a noticeably different font. The Court agrees that counsel should have notified Joseph A. Bank about the alteration, but the conduct is not cause for sanctions.

2. Counsel acted carelessly, but not recklessly, after Lucas's deposition.

Lucas told a far-fetched story at his deposition. The Court finds that former counsel acted negligently, but not recklessly, in failing to follow-up with their client immediately after his deposition. That's especially true for attorney Zavareei, who admitted that he was embarrassed that he may not have read the deposition testimony until as late as June 2016. Because an ***1206** attorney is entitled to rely on his client's sworn testimony, as outlandish as the twelve-suit story sounded, plaintiffs' counsel still had no hard evidence that their client was lying to them and that he had forged the corroborating bank statement until the true and correct bank records were obtained.

But the revelation of the official Navy Federal records four months later should have alerted plaintiffs' counsel that Lucas's account was either mistaken or false. The Court finds it troubling that former counsel filed their summary judgment motion on June 22, 2016—a month after discovering the problems with the bank records that were the linchpin for Lucas's standing.

The Court acknowledges that the missing purchases, standing alone, didn't necessarily mean that Lucas was lying or that he created a false document. The more likely explanation was that he misremembered which account he used. And that's what plaintiffs' counsel initially thought. Frech wrote Scott and Zavareei: “Meaning, unless Lucas is a pathological liar with a penchant for forgery, that he misremembered which account he used to purchase the suits. Or something else is amiss.” (Ex. A, Tab 12.)

But Lucas's counsel had also discovered other problems. For example, Frech emailed Lucas on May 31, 2016, that the 8.75% tax rate didn't look right. A month later, counsel told the Court in their substitution motion that, “Plaintiff did not know prior to the filing of” Joseph A. Bank's summary judgment motion on June 22, 2016, “that JAB has no stores in metropolitan San Diego with an 8.75% sales tax rate.” (Dkt. 108–1.)

At the hearing, Scott admitted he was aware of the tax issue by June 1, 2016, but said he didn't know exactly where the Joseph A. Bank stores in San Diego County were located during the relevant time frame. He acknowledged on cross examination that he should have taken the time to research the store locations but didn't. Zavareei testified that he probably had some knowledge about the tax issue. Plaintiffs' counsel knew that the City of La Mesa had an 8.75% tax rate during the relevant time, but acknowledged that they didn't follow up to find out if Joseph A. Bank had a store in La Mesa in 2012 or 2013.

These weren't great explanations—particularly after Frech emailed lawyers at Tycko and Spangenberg on June 28 relating, “I looked again just now and can't find any plausible 8.75% taxing jurisdictions in which Lucas could have bought all four of his suits.” (Ex. A, Tab 28.) But what that email does suggest is that when counsel filed their substitution motion two days later—claiming they didn't know about the tax problem before June 22—they made the motion in good faith. Briefs often pass through many word processors. Based on the internal email, and Zavareei and Scott's credible testimony at the hearing, the Court finds the tax rate problem was something that got missed rather than something that was intentionally concealed to mislead. Still, Lucas's counsel should have alerted the Court to the problems with the bank statement.

The Court credits Zavareei and Scott's testimony, which is supported by confidential internal emails, that tends to establish the lawyers didn't appreciate how serious the problems with Lucas's account were until Joseph A. Bank pointed them out. Lucas's counsel didn't act recklessly.

B. Lucas should be sanctioned \$40,000.

In contrast to his counsel, the Court finds that Lucas did act recklessly and with the intent to deceive by making up a story that he had purchased suits from Joseph A. Bank, and creating a phony *1207 document purporting to prove the purchases that he never made. He compounded these deceitful actions by lying under oath at deposition and during the sanctions hearing before this Court. Lucas defrauded Joseph A. Bank, his own counsel, and the Court from the inception of this lawsuit.

1. Lucas wasn't credible.

The Court finds Lucas's account of the background facts to be incredible. First, his story that he successively purchased defective suits doesn't ring true. The chances of one suit falling apart after a single wearing is slim; to have it happen eleven more times is fantastic. Lucas's story also doesn't match the account he provided during his initial intake conversation, namely, that he bought three suits that incurred wear after a *year*. Ask yourself, after buying three suits from a store and determining they were poorly made, would anyone return to the same clothing store three more times and spend thousands of dollars to purchase nine more disintegrating suits? At the hearing, Lucas testified that he couldn't recall where he bought these suits in San Diego. He couldn't remember, in particular, if he purchased the suits at the same location all four times, if it was in a shopping center, or if the store was located somewhere along his commuting route between Escondido and his job in San Diego at Qualcomm. The Court finds that Lucas's testimony was false. He didn't buy suits at any Joseph A. Bank store in San Diego at any time.

Lucas also couldn't answer basic questions about the alleged bank statement. For example, he couldn't explain why the prices reflected an 8.75% tax rate, or why his record didn't reflect the alteration costs he said he incurred. At the hearing, he testified that he couldn't recall how he obtained the bank statement. Yet, in the email he sent the Court just three days before the hearing, he stated that someone had “faxed” it to him. He also said other things that weren't true. For example, he testified that when he emailed the alleged bank statement to his attorneys, he included a cover page identifying the financial institution it was from. The lawyers denied that, and the Court finds that Lucas's testimony that he identified the name of the bank isn't true. (*See Ex. 3.*)

Nor did Lucas provide any credible explanation for his failure to figure out where the alleged bank statement came from. The Court questioned Lucas—an experienced accountant—about whether he had taken the basic step of ordering a credit report to identify all possible financial institutions where he may have had accounts. He initially said no, then yes, before finally settling on a story that he discovered three extra cards (Amazon, Best Buy, and Synchronicity). He said that although he tried to obtain records of those accounts, the companies wouldn't produce them for reasons amounting to the dog-ate-my-homework. Lucas's answers at the hearing were hesitant and punctuated with deep sighs. Like his former counsel, the Court concludes his account is dishonest.

The Court finds that the likely motivation for Lucas's false account was money. As the intake memorandum reveals, Lucas seemed extremely interested in becoming a class representative (“YES!”) in the lawsuit against Joseph A. Bank. To assure his selection, he multiplied the number of suits he allegedly purchased, saying initially that he bought three suits for \$1,000, then changing the story to claim that he bought twelve suits for \$5,000. At one point, he even suggested that he had purchased more than twelve suits—using a credit card that he was “unable to get credit card statements for” because he no longer had access to “that credit card account.” (Ex. A, Tab. 2.) Lucas must have assumed that *1208 claiming he purchased more suits meant he would receive more money if he prevailed in the lawsuit.

The Court finds by clear and convincing evidence that Lucas acted in bad faith by intentionally deceiving his lawyers and—initially—opposing counsel about the suit purchases. He also acted in bad faith and with the intent to deceive when he created

a fake bank record, and lied under oath at his deposition and during the sanctions hearing. The effect of his deceitful conduct was to sabotage two years of expensive litigation to the detriment of all involved.

2. Sanctioning Lucas \$40,000 is appropriate.

Faced with the kind of litigation misconduct established here, a court is duty bound to take action to redress it, and to try to deter future misconduct. To do nothing, or to simply dismiss a case under aggravated circumstances like these, creates a risk that courts will be viewed by unscrupulous litigants as an organ for committing fraud. With that said, the Court is also aware that when it exercises its “inherent sanctioning power” it must do so in a way that “tailor[s] the sanction to the particular wrong.” *Chambers v. NASCO, Inc.*, 501 U.S. 32, 56, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991). “Hence, a court can properly consider plaintiff’s ability to pay monetary sanctions as one factor in assessing sanctions. It cannot, however, decline to impose any sanction, where a violation has arguably occurred, simply because plaintiff is proceeding *pro se*.” *Warren v. Guelker*, 29 F.3d 1386, 1390 (9th Cir. 1994).

At the hearing, Lucas testified that he didn't know his net worth. He said he earned income from a home he owned in Virginia, and that he had about \$25,000 equity in the house. He also testified that he owns a car and he has about \$30,000 in savings. Based on this accounting, incomplete as it may be, the Court finds that Lucas can afford a monetary sanction of \$40,000. That's a fraction of what Joseph A. Bank spent, but it's an amount that is proportionate to what Lucas can pay and to the reprehensibility of his conduct.

IV. Conclusion

Ben Franklin said it takes many good deeds to acquire a good reputation and only one bad deed to lose it. That's especially true in the legal profession. The Court is reluctant to sanction attorneys who were intentionally deceived by their client—although, as recounted here, that doesn't absolve them completely. As experienced class action litigators, counsel should have more thoroughly vetted Lucas's account, and should have promptly investigated his changing stories. But ultimately, the Court finds there isn't clear and convincing evidence that the attorneys multiplied the proceedings “unreasonably and vexatiously.” In other words, plaintiffs' counsel didn't act in bad faith or recklessly by failing to dismiss the case sooner. Lawyers must give their clients the benefit of the doubt and act circumspectly before abandoning them or their cases. That's especially true in situations like this one, where the interests of a putative class were also at stake.

David Lucas caused Joseph A. Bank to needlessly expend a substantial amount of money. He's done a disservice to many other citizens who faithfully and with good intentions turn to the Court to help them reliably and honestly resolve their disputes. His conduct is sanctionable. The Court orders Lucas to pay Joseph A. Bank \$40,000.

IT IS SO ORDERED.

All Citations

217 F.Supp.3d 1200

RULES OF PROFESSIONAL CONDUCT

Comment

[1] This rule is intended to permit the State Bar to discipline lawyers who violate applicable portions of the California Code of Judicial Ethics while acting in a judicial capacity pursuant to an order or appointment by a court.

[2] This rule is not intended to apply to a lawyer serving as a third-party neutral in a mediation or a settlement conference, or as a neutral arbitrator pursuant to an arbitration agreement. (See rule 2.4.)

CHAPTER 3. ADVOCATE

Rule 3.1 Meritorious Claims and Contentions

(a) A lawyer shall not:

(1) bring or continue an action, conduct a defense, assert a position in litigation, or take an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person;* or

(2) present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of the existing law.

(b) A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, or involuntary commitment or confinement, may nevertheless defend the proceeding by requiring that every element of the case be established.

Rule 3.2 Delay of Litigation

In representing a client, a lawyer shall not use means that have no substantial* purpose other than to delay or prolong the proceeding or to cause needless expense.

Comment

See rule 1.3 with respect to a lawyer's duty to act with reasonable* diligence and rule 3.1(b) with respect to a lawyer's representation of a defendant in a criminal

proceeding. See also Business and Professions Code section 6128, subdivision (b).

Rule 3.3 Candor Toward the Tribunal*

(a) A lawyer shall not:

(1) knowingly* make a false statement of fact or law to a tribunal* or fail to correct a false statement of material fact or law previously made to the tribunal* by the lawyer;

(2) fail to disclose to the tribunal* legal authority in the controlling jurisdiction known* to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel, or knowingly* misquote to a tribunal* the language of a book, statute, decision or other authority; or

(3) offer evidence that the lawyer knows* to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence, and the lawyer comes to know* of its falsity, the lawyer shall take reasonable* remedial measures, including, if necessary, disclosure to the tribunal,* unless disclosure is prohibited by Business and Professions Code section 6068, subdivision (e) and rule 1.6. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes* is false.

(b) A lawyer who represents a client in a proceeding before a tribunal* and who knows* that a person* intends to engage, is engaging or has engaged in criminal or fraudulent* conduct related to the proceeding shall take reasonable* remedial measures to the extent permitted by Business and Professions Code section 6068, subdivision (e) and rule 1.6.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding.

(d) In an ex parte proceeding where notice to the opposing party in the proceeding is not required or given and the opposing party is not present, a lawyer shall inform the tribunal* of all material facts known* to the lawyer that will enable the tribunal* to make an informed decision, whether or not the facts are adverse to the position of the client.

Rule 3.1: Meritorious Claims & Contentions

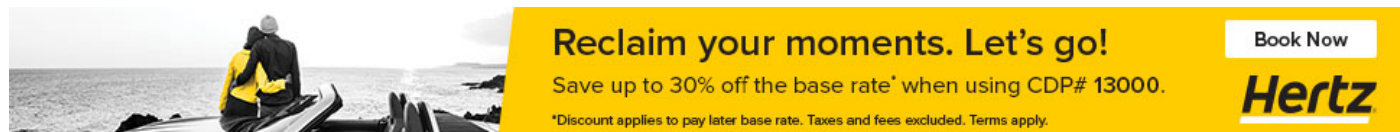
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Advocate

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless 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. 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.

[Comment](#) | [Table of Contents](#) | [Next Rule](#)

A promotional banner for Hertz. On the left, a person in a yellow jacket is seen from behind, sitting in a small boat on a body of water. The right side of the banner has a yellow background with white text. The text reads: "Reclaim your moments. Let's go!" followed by "Save up to 30% off the base rate* when using CDP# 13000." Below this is a small asterisked note: "*Discount applies to pay later base rate. Taxes and fees excluded. Terms apply." In the top right corner of the yellow area is a white button that says "Book Now". The Hertz logo is in the bottom right corner of the yellow area.

Reclaim your moments. Let's go!
Save up to 30% off the base rate* when using CDP# 13000.
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