

By MARTIN COLE

Frivolous Litigation

Frivolous litigation is one of those areas in the law where we “know it when we see it,” even if we cannot provide a perfect definition. Everyone has heard anecdotal stories of cases that get labeled as the most *frivolous* lawsuits of all time, some accurate (there was indeed a lawsuit filed against McDonald’s for its too-hot coffee¹) and some, while repeated at length, not accurate. Rule 3.1, Minnesota Rules of Professional Conduct (MRPC), is entitled “Meritorious Claims and Contentions,” and states that 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. (emphasis added.)

While perhaps not a model of “plain English,” the rule provides at least some substance to the term that is relatively easy to grasp. But it still does not attempt to define “frivolous,” instead using the term to help define “meritorious” or nonmeritorious.²

This lack of clarity may not be all that significant except, based upon my

conversations with judges and lawyers around the state, many people seem to perceive that frivolous litigation in Minnesota is on the rise. Several well-publicized cases have generated substantial comment from Minnesota lawyers and regular inquiry as to whether the disciplinary system is going “to



do something” about lawyers who repeatedly have initiated similar, nonmeritorious cases, despite repeated rejection and criticism from the courts. As lawyers, we are familiar with various restrictions on frivolous litigation and we are also familiar with the sanctions that can be imposed by the courts for frivolous litigation. But sanctions presume that findings that a lawsuit, motion or pleading is indeed frivolous already have been made. Is control of this issue thus limited to the courts? Perhaps it is a good time to review the disciplinary standards and assess how the lawyer discipline system also is an appropriate part of the answer.

History and Case Law

Discipline rules prohibiting lawyers from making frivolous claims or commencing frivolous litigation have long been part of professional conduct standards. Over 100 years ago, the 1908 Canons of Ethics contained the following assertion in language typical of the day: “The responsibility for advising questionable transactions, for bringing questionable suits, for urging questionable defenses, is the lawyer’s responsibility. He cannot escape it by urging as an excuse that he is only following his client’s instructions.”³ The former Code of Professional Responsibility DR 7-102(A) carried on such a prohibition, making it a clear basis for professional discipline. Since 1985, Rule 3.1, MRPC, has retained that privilege.

Many lawyers incorrectly assume that Rule 3.1, MRPC, is completely coextensive with other federal or state standards such as Rule 11 of the

Rules of Civil Procedure, Rule 26 discovery standards, or Minn. Stat. §549.211. While there is obviously significant overlap (Minn. R. Civ. P. 11.02(b) and 11.03, for one example, authorize sanctions for claims that are unwarranted by a nonfrivolous argument), there are also technical differences as to verification and opportunities to rectify. Rule 3.1, MRPC, can be applied to situations in any proceeding and covering any issue, which may be beyond the scope of the Rules of Civil Procedure.

It nevertheless is true that a majority of such matters that come before the Director’s Office for possible discipline have already been the subject of some court action and ruling. For example, among the lawyers publicly disciplined for frivolous claims or litigation, an attorney was indefinitely suspended for a minimum of 90 days⁴ following civil and appellate findings in three related cases.⁵ Court action had included summary judgment against the lawyer’s client and sanctions against the lawyer personally. Such a pattern of frivolous matters, with court sanctions imposed, presents the most straightforward basis for discipline. Other situations can result in discipline as well. For example, Rule 3.1, MRPC, can apply to attorneys acting *pro se*, not just at the client’s direction. An attorney was sanctioned by the court for frivolous motions brought in his own marital dissolution matter; this conduct was then part of the disciplinary proceedings against the attorney.⁶



MARTIN COLE
is director of the Office of Lawyers Professional Responsibility. An alumnus of the University of Minnesota and of the University of Minnesota Law School, he has served the lawyer disciplinary system for 25 years.

Not every instance in which a court issues sanctions against an attorney, such as for some delay in responding to discovery requests, automatically will result in discipline—even if complained about to the Director's Office.

Reasonable discretion is applied. But also note that a matter in which there is no civil sanction, even where such sanctions were sought, can still result in discipline in appropriate circumstances.⁷

Finally, in some limited instances, what may seem to be frivolous, even harassing, litigation *tactics* may result in discipline even when no violation of Rule 3.1, MRPC, has been charged. Recently, an attorney was suspended for what the court labeled as frivolous litigation tactics (unduly voluminous pleadings, motions and discovery requests), but since the underlying claim had sufficient merit, the violation was limited to Rule 8.4(d), MRPC, as conduct prejudicial to the administration of justice.⁸

Disciplinary Role

As may be discerned from the discussion above, just as courts sometimes struggle to determine whether a particular matter is indeed frivolous and worthy of sanctions, the disciplinary system has a similar difficulty. Even though the standard applicable to Rule 3.1, MRPC, is an objective one, as opposed to a subjective one, application of the rule involves an inherent degree of “we know it when we see it” as was noted above. That is one reason why disciplinary authorities may hesitate to charge a violation of Rule 3.1, MRPC, absent court findings in all but the most obvious and egregious situations. The rule allows exceptions (as do other similar standards) for instances of “a good faith argument for an extension, modification, or reversal of existing law,” so where there is some degree of reasonable disagreement, caution usually is applied. For the most part, the disciplinary system allows the court to make that type of judgment call in the first instance.

One way in which the disciplinary system can play a significant role is in dealing with individuals who bring frivolous claims or lawsuits in multiple

matters before multiple courts or even in multiple jurisdictions: situations where any one court may not be aware of the magnitude of the problem, or limited in its ability to hold the lawyer accountable for actions taken outside the presence of the particular judge or court. In such situations, if the Director's Office becomes aware of such a pattern of conduct, it can seek appropriate sanction (discipline) against the attorney. That can be a lengthy process, however, and sometimes requires several disciplinary actions before the ultimate resolution is achieved (an admonition for a first instance, private probation for a second or third, then public discipline if continued).

Frivolous litigation harms the courts and litigants forced to respond to such claims. Dealing with the few attorneys who repeatedly bring such matters is time consuming and frustrating. The courts may have a primary role in policing such conduct, but the disciplinary system can play an equally important role where appropriate. ▲

Notes

- ¹ Many writers (well, several) have stated that the McDonald's coffee lawsuit was far from frivolous. Using it as an example is not intended to resolve this debate.
- ² Dictionaries most commonly include words like “trivial,” “inappropriate,” or even “silly” in their definition of frivolous.
- ³ Canon 31, ABA Canons of Professional Ethics (1908).
- ⁴ An indefinite suspension requires a petition for reinstatement and a reinstatement hearing pursuant to Rule 18, Rules on Lawyers Professional Responsibility (RLPR), whereas a fixed suspension of 90 days or less would not. Rule 18(e) (3), RLPR.
- ⁵ *In re Pinotti*, 585 N.W.2d 55 (Minn. 1998).
- ⁶ *In re Ulanowski*, 800 N.W.2d 785 (Minn. 2011).
- ⁷ *In re Panel Case No. 17289*, 669 N.W.2d 898 (Minn. 2003).
- ⁸ *In re Murrin*, 821 N.W.2d 195 (Minn. 2012); *petition for cert. pending*.



Regular Bench & Bar columnist Tony Zeuli is an intellectual property trial lawyer with Merchant & Gould. Prior to becoming a registered patent attorney, Tony worked in the field of nuclear physics for the University of Chicago and Department of Energy at Argonne National Laboratory. Tony is a frequent speaker and writer on patent litigation issues at national intellectual property law conferences such as those sponsored by the American Intellectual Property Law Association and the Association of Patent Law Firms, and his articles have appeared in national publications such as the *Federal Lawyer*. Tony can be reached at 612.371.5208 or at tzeuli@merchantgould.com or by visiting merchantgould.com/zeuli.

Merchant & Gould
An Intellectual Property Law Firm

TRADEMARK Copyright & Patent Searches

*“Experienced Washington office
for attorneys worldwide”*

FEDERAL SERVICES & RESEARCH:

Attorney directed projects at all Federal agencies in Washington, DC, including: USDA, TTB, EPA, Customs, FDA, INS, FCC, ICC, SEC, USPTO, and many others. Face-to-face meetings with Gov't officials, Freedom of Information Act requests, copyright deposits, document legalization @ State Dept. & Embassies, complete trademark, copyright, patent and TTAB files.

COMPREHENSIVE: U.S. Federal, State, Common Law and Design searches,
INTERNATIONAL SEARCHING EXPERTS: Our professionals average over 25 years experience each
FAST: Normal 2-day turnaround with 24-hour and 4-hour service available

GOVERNMENT LIAISON SERVICES, INC.
200 N. Glebe Rd., Suite 321
Arlington, VA 22203

Ph: 703-524-8200, Fax: 703-525-8451

Minutes from USPTO & Washington, DC

TOLL FREE: 1-800-642-6564

www.GovernmentLiaison.com
info@GovernmentLiaison.com