THE TERMINATOR

By Matthew King

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Terminating sanctions, the most extreme punishment in civil litigation, are so unusual that some attorneys practice their entire careers without encountering them.

Art Shartsis, of Shartsis, Friese & Ginsburg in San Francisco, is one of the rare ones. He and co-counsel Frank Cialone recently persuaded a judge to grant their termination motion in a consumer fraud suit filed by a group of former students against a South Bay vocational training college.

"Every case that is terminated usually has something unique that caused it," said who secured the rarely imposed sanction. "This case managed to have almost all of them."

Unlike the typical dismissals for failing to state a valid claim or violating the statute of limitations, terminating sanctions are imposed as a penalty for abuse of the litigation process, particularly for discovery abuses. But the net effect in both situations is the same: The plaintiffs' suit is thrown out of court and dies without reaching the merits.

On April 12, Santa Clara County Superior Court Judge Conrad F. Rushing handed down just that sanction in Alexander v. Masters Design & Technical Center Inc., CV 770932, against the advice of the referee he had appointed to handle hearings and motions during discovery, retired appellate Justice Harry F. Brauer.

"It's just so extreme, you see," Brauer said during one hearing. "It just isn't done."

Both sides agree this was a perfect example of how not to conduct a case.

In throwing out the matter last month, Rushing criticized the plaintiffs for their "willful" refusal to provide the defense with meaningful discovery responses and declared the case was "tantamount to a fraud on the court."

The assertion is hotly denied by Sharon Kinsey and Derek Albertsen of Santa Cruz, the most recent in a series of plaintiffs counsel in the matter. They argue that they were the victims of dilatory defense tactics and that Rushing was biased and didn't give them a fair hearing.

Rushing did not respond to requests for an interview.

The Masters Institute in San Jose is a vocational school specializing in electronics and graphic design. Its students are primarily recent high school graduates who don't want to attend college and adults planning a career change.

Students generally spend around $15,000 for an 18-month program. Masters relies heavily on advertising, even using disc jockey Howard Stern as a pitch man.

Some graduates didn't do as well on the job market as they felt they had been led to believe they would. Not surprisingly, considering their field of study, one of these graduates, Keith DeJarnet, created a Web site to complain and solicit complaints by other Masters students and graduates.

Masters then sued DeJarnet for defamation. The school also sent letters to 11 other graduates threatening similar suits for allegedly bad-mouthing Masters in letters to the state's Council for Private Postsecondary and Vocational Education, Albertsen said.

One of the graduates contacted Albertsen in 1997, and he agreed to represent the group.

Albertsen filed an anti-SLAPP (strategic lawsuit against public participation) motion against Masters. Santa Clara County Superior Court Judge Richard C. Turrone agreed and dismissed the case against DeJarnet.

According to Shartsis, that win started Albertsen on a "holy war."

"Absolutely, it is a holy war," Albertsen said, a war against what he considers a greedy company.

He began by creating a Web site to solicit more plaintiffs, and then filed suit in February 1998 on behalf of 101 former students alleging that Masters had engaged in fraudulent recruiting practices, failed to provide promised cutting-edge technological equipment and retained unprofessional and unqualified instructors.

However, he soon realized the job was too big for him, and he held off serving the suit on Masters. Instead, he persuaded Craig Needham and Wes Wagnon, of San Jose's Liccardo, Rossi, Sturges & McNeil, to join him. In April 1998 they filed a 273-page lawsuit on behalf of 135 former students, repeating the allegations in the first suit.

The Liccardo attorneys initially took on the bulk of the work, but, according to Albertsen, they soon wilted in the face of a determined defense. "Liccardo pursued it half-heartedly for about six months and they threw in the towel," he said.

Attempts to reach Needham and Wagnon were unsuccessful, but in a declaration made in February, Needham said the significant reason for his firm's withdrawal was the huge financial outlay weighed against the "relatively modest potential reward."

At that point, Albertsen was joined by Sharon Kinsey, who had practiced law for just three years after a long career in marketing. The pair admits their legal briefs lacked focus.

"I inherited a bag of worms," Kinsey said. "I inherited an order issued by Justice Brauer as to what had to be done, and I had to redo everything."

For one thing, the discovery referee forwarded thousands of interrogatory questions from the defendants that had to be answered in short order. The resulting responses were a mess, as even the plaintiffs counsel concede.

The most egregious problems, in the eyes of defense attorneys, were contradictory sets of responses turned in for the same student.

Some responses contained so much garbled syntax and so many inaccuracies that Cialone doubted the clients had ever read what they were swearing to. Indeed, he said, almost all of the answers appeared to come from the same boilerplate.

Then, in depositions, Shartsis said, the few clients they interviewed often didn't know which allegations they had made, and, when pressed, sometimes disavowed them.

Albertsen said the problem stemmed from the Liccardo attorneys' original, overly broad cause of action.

His plan, he said, was to buy time and secure leave to amend the action. "I would narrow it down and bring no more than six or eight claims for each person," he said.

"That's another example [of the problems]," Cialone countered in an interview. "Every time we disprove a claim, they want to make up another one."

Moreover, he said, standard defense tactics were portrayed by the plaintiffs' side as "perjury and heinous plots to subvert justice."

"It's interesting to hear the things [Albertsen] is talking about," Shartsis said of such accusations. "He's trying to put a business out of business, and we've spent hundreds of thousands of dollars and we can't get answers. These [defense tactics] are routine. He focuses on the routine and describes them as heinous acts."

It was, Cialone and Shartsis contend, the plaintiffs' lack of a case that led to the terminating sanctions, not judicial prejudice or unethical defense tactics.

"I don't think anyone would feel that Rushing was not judicious. He spent the better part of a year trying to get the plaintiffs to state what their case was," Shartsis said.

Albertsen, however, maintained that Rushing didn't read plaintiffs' motions or examine exhibits attached to motions.

"Rushing has no place as a judge, based on his behavior in this case. He doesn't follow the law. ... He doesn't give a fair hearing," Albertsen said. "Any judge that hears only one side is not deemed fit to be a judge."

Brauer, meanwhile, issued a few minor financial sanctions against the plaintiffs, but seemed more sympathetic to their case.

In a discovery hearing on Oct. 7, 1999, Brauer told Cialone that he was "going to be looking over your shoulder very carefully" lest the college use its considerable financial resources to drag out the case and financially exhaust the plaintiffs.

Brauer also indicated that he thought the repeated problems in discovery were not intentional, but rather were the products of attorneys in over their heads. He expressed concern in one hearing that the clients would be punished for what was viewed as incompetent lawyering.

"I just don't see that the client deserves any kind of penalty or disadvantage because ... she didn't do anything wrong," Brauer said.

Brauer rejected a motion for terminating sanctions against some of the plaintiffs in late 1999 as a punishment disproportionate to the plaintiffs counsel's transgressions. When he learned that the defense had brought a similar termination motion before Rushing, he advised the judge that the "case was not one of egregious misconduct" and that "plaintiffs counsel [were] making an effort to comply with their obligations." He also wondered in the letter why a matter usually left for the referee was before Rushing. To Albertsen and Kinsey, Cialone and Shartsis were clearly judge- shopping.

"Judge Rushing is not the appellate judge for the discovery referee," Albertsen said.

Cialone said his firm was acting entirely within the law by bringing the motion before

Rushing. Terminating sanctions are so rare, he said, "It's hard to know who to bring the motion to."

"We thought Brauer was incorrect on the law," Shartsis said, on matters including whether giving flawed discovery responses constitutes discovery abuse.

Rushing also had more evidence of the alleged abuse before him than did Brauer, the defense said.

Plaintiffs counsel plan an appeal in which they will argue they did their best to comply with Brauer's discovery orders.

According to John Steele, a partner with Fenwick & West in Palo Alto and a professor of legal ethics at Boalt Hall, terminating sanctions are usually imposed not for incompetence by counsel, but for refusal to comply with court orders.

Terminating sanctions are so unusual, Steele said, because there are many other options available to provide the aggrieved party with relief. For example, he said, Rushing could have dismissed particular plaintiffs or claims to save time and force plaintiffs counsel to focus their case.

Steele cautioned that counsel in consumer fraud cases should be careful not to use the Internet to cast a broader net for plaintiffs than they can manage.

"When a broad complaint is made and the court looks upon it as a bushel of chaff, a few kernels of wheat are going to get thrown out along with it," he said.

"The Internet is fantastic for generating an emotional snowball effect," Steele said. "But often, a plaintiffs lawyer's best strategy is to dispassionately pick a small group of very similar plaintiffs. I know an attorney who interviews 30 people and picks three."

Shartsis argued that the problem was more basic than that.

"Cases are organic," he said. "If you've really got something, you can present it one way or another. There was a complete lack of proof that led [the plaintiffs attorneys] to make stuff up."

Albertsen said he wants to get the focus back on the students and graduates.

"The underlying case is for justice and is very strong," he said.

"We've lost a lot of battles. I feel like I'm in the middle of some Hollywood thriller, but [Masters] is a den of evil. We're not giving up and we're going to win."

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