# 44-2083. Sanctions for abusive litigation

A. In any private action arising under this chapter, on final adjudication of the action, unless the parties stipulate otherwise, the court shall include in the record specific findings regarding compliance by each party and each attorney representing any party with each requirement of rule 11(b) of the Arizona rules of civil procedure or any applicable federal or other jurisdictional counterpart to the rules as to any complaint, responsive pleading or dispositive motion. If the federal or other jurisdictional rules of civil procedure do not have a counterpart to rule 11(b) of the Arizona rules of civil procedure, rule 11(b) of the Arizona rules of civil procedure applies.

B. If the court makes a finding under subsection A that a party or attorney violated any requirement of rule 11(b) of the Arizona rules of civil procedure or any federal or other jurisdictional counterpart to the rules as to any complaint, responsive pleading or dispositive motion, the court shall impose sanctions on that party or attorney in accordance with rule 11 of the Arizona rules of civil procedure or any federal or other jurisdictional counterpart to the rules. Before making a finding that any party or attorney has violated the applicable rules, the court shall give that party or attorney notice and an opportunity to respond.

C. Subject to subsections D and E, for the purposes of subsection B, the court shall adopt a presumption that the appropriate sanctions for:

1. Failure of any responsive pleading or dispositive motion to comply with any requirement of rule 11(b) of the Arizona rules of civil procedure or any applicable federal or other jurisdictional counterpart to the rules is an award to the opposing party of reasonable attorney fees and other expenses incurred as a direct result of the violation.

2. Substantial failure of any complaint to comply with any requirement of rule 11(b) of the Arizona rules of civil procedure or any federal or other jurisdictional counterpart to the rules is an award to the opposing party of reasonable attorney fees and other expenses incurred in the action.

D. The presumption prescribed in subsection C may be rebutted only on proof by the party or attorney against whom sanctions are to be imposed that either of the following applies:

1. The award of attorney fees and other expenses will impose an unreasonable burden on that party or attorney and would be unjust, and the failure to make an award would not impose a greater burden on the party in whose favor sanctions are to be imposed.

2. The violation of rule 11(b) of the Arizona rules of civil procedure or federal or other jurisdictional counterpart to the rules was de minimis.

E. If the party or attorney against whom sanctions are to be imposed meets the burden prescribed by subsection D, the court shall award the sanctions that the court deems appropriate pursuant to rule 11 of the Arizona rules of civil procedure or any applicable federal or other jurisdictional counterpart to the rules.

# Here's a little-known way to get money back from a bad lawyer

**Rebekah L. Sanders**
The Republic | azcentral.com

Ray Bedell, a retired Phoenix electrician, had borrowed and scraped together more than $5,000 to hire an attorney in a family court case so he could spend more time with his daughter.

The lawyer seemed smart, aggressive and talented in the courtroom, Bedell remembered.

But a year into the case, Kristi Michelle Morley seemed to disappear, he said. An important court date was just six days away, and the attorney wouldn't answer his calls.

"Out of nowhere, she falls off the face of the Earth," Bedell, 56, said. "I'm trying to reach out to her, and I can't get a response."

Bedell wasn't the only client whom Morley ghosted.

The lawyer left other cases up in the air, causing disastrous legal and financial consequences for clients, a State Bar of Arizona investigation found. The attorney blamed medical issues, but appeared well enough to go on motorcycle rides, the Bar found.

*The Republic* could not find contact information to ask Morley for comment.

Bedell figured his money had disappeared along with her.

**But then he learned of a State Bar program that refunds clients of dishonest lawyers up to $100,000 per victim**. The average payment per person was about $7,000 last year.

**Examples of Client Protection Fund cases include:**

- An attorney fails to perform work a client paid for and refuses to issue a refund.
- An attorney improperly keeps part or all of a lawsuit settlement or award.
- An attorney lies, which causes a client financial harm.
- An attorney dies in the middle of a case and doesn't leave money to reimburse clients.

- Lawyers accused of these actions don't always have bad intentions, Bar officials said. Some may experience mental health issues, addictions or

other life turns that could happen to anybody. But the behavior still does damage.
- Bedell couldn't believe the program existed, he said.
- "Thank God it's there," he said.

**Bedell submitted a claim. In September the Client Protection Fund sent him a $5,500 check.**

It even included refunding fees to a hypnotist Bedell's attorney puzzlingly had required him to see.

"I got it all back to the penny," Bedell said. "It's like Santa Claus times 10."

**Client Protection Fund payments don't come quickly**, the Bar acknowledges. Bedell's case took two and a half years, when counting the time it took for his attorney to be investigated and disciplined.

**The process requires clients to submit documentation**, a chance for accused attorneys to provide responses, and Client Protection Fund employees to conduct an independent investigation.

The process can be delayed further if the attorney has not yet been disciplined by the Bar. **The fund requires disciplinary action, such as license suspension or disbarment, to occur before approving any refunds.**

**The final step is a vote by a board of volunteer attorneys** that meets once a quarter on whether and how much money to award. The board didn't vote on Bedell's case for six months because of a case backlog, he said.

**But Bedell commended the thoroughness of the process.**

"They checked every receipt," he said. "You have to have your ducks in a row. They're not giving away free money, nor should they."

**Bedell also praised the legal profession for serving as its own watchdog.**

The money doled out to victims comes from yearly dues paid by Arizona's more than 24,000 licensed lawyers.

"It gives consumers some recourse when there is a bad apple in the bunch," Client Protection Fund board member Jim Penny said. "It's all the lawyers in the state who are pooling the resources together to help them."

**Even if the process isn't speedy, Bedell encouraged other victims to apply for compensation.**

"If you have been wronged like that, absolutely reach out and see what they can do for you," he said.

Bedell's own case ended up going his way.

His former attorney was disbarred. And Bedell was able to increase time spent with his daughter.

"God is good," he said.

## How can I get money if a lawyer stole from me?

1. Call the State Bar of Arizona to explain your case and ask if you may be eligible to apply to the Client Protection Fund. Call 602-340-7280 within Maricopa County or 800-319-0514, extension 7280, everywhere else.
2. Fill out an application on the State Bar of Arizona website. Forms are available in English and in Spanish.
3. Cooperate as necessary with the fund investigator, staff and board.
4. Wait for the fund board to vote on your claim.

## Who can receive money from the Client Protection Fund?

- Individuals who have hired the lawyer or have a fiduciary relationship with the lawyer, such as guardianship.
- Small businesses that have hired the lawyer or have a fiduciary relationship with the lawyer, such as guardianship.

## Who is not eligible to receive money?

- The current or former spouse, child, parent, grandchild, grandparent or sibling of the lawyer.
- Partners, associates, co-shareholders or employees of the lawyer.
- Governments.
- Most businesses, such as corporations, bonding agencies, medical providers, companies controlled by the lawyer or other third parties with claims against the lawyer.

## What are the requirements of the lawyer?

- The lawyer must have been licensed or authorized to practice law in Arizona.
- The lawyer must have been disciplined with a suspension for longer than six months, interim suspension, disbarment or a felony conviction

related to the claim. If none of these apply, the lawyer must have been transferred to disability inactive status or have died.
- The client's financial loss must have been caused by the lawyer's dishonest conduct.

## How soon must I file a claim?

- Your claim must be filed within five years from the time you knew, or should have known, of the lawyer's dishonest conduct.

## How long will it take to receive a check?

- The process can take a year or longer.

## How much money can I get?

- The limit per person is $100,000.
- The limit of total claims against one lawyer is $250,000.

## What types of behavior by the lawyer qualify?

- Wrongful acts such as theft or embezzlement of money.
- The wrongful taking or conversion of money, property or other things of value.
- Refusal to refund fees when the lawyer performed little to no work.
- A lawyer's intentional dishonest or deceitful conduct that leads to the loss of money or property.

## What types of claims are not eligible?

- Claims based on a lawyer's negligence, incompetence, or malpractice.
- Disputes about fees if the lawyer performed a significant amount of work.
- Money you gave to a lawyer for an investment, loan or any other purpose that did not arise from a lawyer-client relationship.
- Requests for reimbursement for interest, legal fees paid to other lawyers, damages, or other expenses.

## What if my claim is denied?

- You will be notified in writing and can request reconsideration. A second denial is final.

## How can I get more information?

- Call the State Bar of Arizona at 602-340-7280 within Maricopa County or 800-319-0514, extension 7280, everywhere else.
- Visit the State Bar of Arizona website.

New Jersey Law Journal
STATEWIDE LEGAL AUTHORITY SINCE 1878
An ALM Publication
FEBRUARY 17, 2021
NJLJ.COM

# Dealing With Lying Lawyers

**Occasionally lawyers step so far over the line as to be abusive to the other party or dangerous to the public. The judicial system, judges and professional ethics watchdogs must decide where the bumpers on acceptable conduct lie and then act to preserve the boundaries on attorney conduct.**

**By Ellen L. Koblitz and Kim D. Ringler**

In light of widely debunked contentions by lawyers on behalf of former president Donald Trump, the question has arisen as to what the New Jersey legal system could do or should do when lawyers make unsupportable arguments outside the courtroom, inside the courtroom, and in legal filings. Both courts and the disciplinary system have tools to deal with lawyers' lies. Some options overlap, some are exclusive to one process or the other, and all of them come fraught with challenges.

The New Jersey courts are intentionally extraordinarily open and welcoming to all litigants. The official New Jersey Court website declaims: "The NJ Courts are using new technology and creative solutions to ensure an open door to justice." And, indeed, the website gives self-represented litigants and lawyers significant help in prosecuting and defending law suits. https://www.njcourts.gov/selfhelp/index.html; https://www.njcourts.gov/attorneys/index.html

The court system is also an excellent escape-valve for lawyers and litigants with extreme views. Rather than engage in possibly dangerous self-help remedies including physical violence, extremists can safely litigate with vitriol, exaggeration and even occasional misrepresentations. But in our age of high-tech virtual dispersal of extreme ideas, where individuals may spread dangerous disinformation with no safeguards, the traditional approach of the courts and disciplinary authorities merit reexamination.

Judges generally show great understanding and empathy in allowing parties and even lawyers of parties to engage in heated rhetoric, given the high emotions often present, and the desire of the judge to conclude the case expeditiously without allegations of prejudice in favor of one side, or the need to recuse. Judges are reported to the Advisory Committee on Judicial Conduct and sued with some regularity, especially judges in Family Court, where the issues generate high emotions. Both judicial attacks are generally side-lined pending the end of the underlying case, and ultimately dismissed as meritless.

If a judge sanctions counsel or refers an attorney for discipline, the question arises whether the judge should then recuse from that attorney's other matters. The judiciary prizes fairness above all, and the prompt resolution of disputes is a big component of fairness. Recusal of the judge, or reversal by the Appellate Division based on an appearance of partiality if the judge does not recuse, is not an efficient way to resolve cases. When lawyers or litigants have a reputation for challenging court procedures, speaking out as a representative of a threatening fringe group, clearly misrepresenting the facts and the law, or otherwise behaving


Ellen L. Koblitz


Kim D. Ringler

in a way that threatens a fair resolution, and when jury prejudice is not a concern, judges are encouraged by the court system to deal with the recalcitrant attorney by maintaining a thick skin, dodging the delays inherent in confronting the lawyer or litigant head-on. This is especially true in Family Court, where the matter, involving custody, child support, divorce or domestic violence, cannot reasonably be dismissed or a party not heard as a sanction. The court's long history of promoting free speech also motivates forgiving treatment of these attorneys.

But occasionally lawyers step so far over the line as to be abusive to the other party or dangerous to the public, and the judge must take action. One of Trump's impeachment defense lawyers complained about the presenters' charge that the defense was frivolous, explaining that if found frivolous, he would lose his law license. That explanation is far from actual practice. If the litigation itself is wholly frivolous, the Court Rules may be invoked to seek sanctions against the attorney. R. 1:4-8(b); *LoBiondo v. Schwartz,* 199 N.J. 62, 98 (2009). First, the opposing party must put the advocate of the frivolous position on notice and give that counsel the ability to seek a safe harbor by dismissing the offending claim. R. 1:4-8(b)(1). When the matter is ultimately concluded, the frivolous litigator may be required to pay the other party's counsel fees and litigation costs as well as a sanction to the court. R. 1:4-8(d).

If a lawyer signs an affirmation of the validity of a claim knowing it to be false, the lawyer could also be prosecuted for the fourth-degree crime of false swearing. N.J.S.A. 2C:28-2. Such a prosecution is extraordinarily rare, if not nonexistent, unless the attorney personally benefits financially from the misrepresentation. I.e., *State v. Clawans*, 38 N.J. 162 (1962), and *State v. Kushner*, 192 N.J. Super. 583 (1984). A judge could also find the lawyer in contempt and sanction counsel if the contempt was in the presence of the judge. R. 1:10-1. If not in the face of the court, the judge may file an order to show cause to be heard by another judge, with prosecuting counsel appointed. R. 1:10-2. And finally, the judge could refer counsel to the disciplinary authorities, knowing that the start of the lengthy disciplinary investigation will likely abide the conclusion of litigation.

Grievances alleging unprofessional conduct come from many sources including judges, and the Office of Attorney Ethics (OAE) may also open investigations on its own initiative. When the court matter is still pending, and the ethical issues raised are part the controversy, the OAE or a District Ethics Committee may determine to put its investigation on hold pending the conclusion of the litigation. R. 1:20-3(f). On occasion, a lawyer sanctioned by a court, or prosecuted criminally, then faces the music in the professional conduct setting based upon the same actions or failures. *Matter of Kushner*, 101 N.J. 397 (1986). In a recent example in Florida, attorneys were first sanctioned for withholding discovery documents and then received 90-day suspensions of their law licenses. *Florida Bar v. Daley*, case number SC17-142, and *Florida Bar v. Amlong*, case number SC 17-150.

Should a disciplinary investigation of a lawyer's conduct involving lies or unfounded statements in litigation move forward, the Rules of Professional Conduct (RPCs) provide a wide platform for assessing whether actionable misconduct has taken place. Practicing law is a privilege, not a right, and both self-regulation and the esteem of the profession depend on conscientious examination of outright lying on the part of a lawyer in the course of representing a client.

The RPCs most often invoked are 3.1, Meritorious Claims and Contentions; 3.3 Candor Toward the Tribunal; 3.4, Fairness to Opposing Party and Counsel; 4.1, Truthfulness in Statements to Others; and the catch-all RPC 8.4, Misconduct, which bars conduct prejudicial to the administration of justice or conduct involving dishonesty or misrepresentation. This arsenal enables disciplinary investigations against Trump campaign lawyers and any lawyers using falsehoods as the basis for litigation.

For example, in Michigan, the Attorney General, the Governor and the Secretary of State have filed a grievance asking for an investigation into attorney Sidney Powell and three others for violation of the RPCs. In New York, over 200 lawyers signed a grievance demanding an investigation of the professional misconduct allegedly committed by attorney Rudy Giuliani. Around the country, lawyers are susceptible to disciplinary investigations in any jurisdiction in which they are admitted in addition to the jurisdiction where the allegedly unprofessional actions took place.

Credit: igorstevanovic / Shutterstock.com

To find sufficient proof of misconduct in New Jersey, the evidence must meet the clear and convincing test. Findings must also overcome protest that the investigation was not impartial, stemmed from partisan politics, or improperly limited free speech. These challenges are considerable but not overwhelming when the proof is present that a lawyer knowingly brought groundless litigation predicated on non-existent or false—as distinct from eventually discoverable—facts. When proven, violations of the RPCs may result in sanctions ranging from an admonishment to suspension from practice.

Another control on baseless lawsuits and false statements is civil litigation. Newly filed cases by Smartmatic USA Corp. against Fox News, individual newscasters, and others rest on defamation and pack a practical punch because the resultant damages are potentially formidable. Similarly, Dominion Voting Systems Corp. has sued both Powell and Giuliani alleging they made groundless allegations and statements in the course of representing clients challenging the presidential election results.

Acting independently or synchronously, the judicial system, judges and professional ethics watchdogs must decide where the bumpers on acceptable conduct lie and then act to preserve the boundaries on attorney conduct.

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# Lawyer fingerprinting in this state turns up over 2,200 convictions unknown to bar

By Debra Cassens Weiss

April 1, 2019, 7:30 am CDT

A California court rule requiring lawyers to be fingerprinted has turned up more than 6,000 criminal history reports, including more than 2,200 convictions previously unknown to the state bar.

The 2,200 unknown convictions include 20 unreported felonies, Above the Law reports.

The number of convictions likely will increase as more lawyers get fingerprinted ahead of an April 30 deadline. In its latest update, the State Bar of California said about one-third of the state's active lawyers had yet to be fingerprinted.

The bar is focusing first on convictions for crimes more serious than infractions committed by active lawyers, obtained after their admission to the bar.

The bar wants the fingerprints to comply with a law that requires the state bar to receive notifications of lawyer arrests and convictions from the California Department of Justice. The bar was out of compliance with the mandate until last year, according to the state bar website.

Although lawyers were required to submit fingerprints when they were admitted to the bar, those fingerprints were not retained for future notifications.

Lawyers who miss the deadline will be fined, and those who ignore the mandate will be placed on inactive status as of Dec. 1.