DailyNews

Restraining Order Against an Attorney Must Be Based on Multiple Instances of Non-Litigation Conduct

Tim Kowal *January 22, 2024*

A restraining order is available under Code of Civil Procedure section 527.6 if you have suffered harassment through a "knowing and willful course of conduct" resulting in harassment. And what type of people are more likely to cause a feeling of harassment more than lawyers? So attorney Jacquelynn Hansen got a restraining order against her opposing counsel in a family law case, Oleg Volkov. But the Court of Appeal in *Hansen v. Volkov* (D2d7 Sep. 18, 2023) No. B311524 (cert. for pub.) reversed because some of the conducted was protected litigation activity, and the only unprotected conduct was a single act, insufficient to establish a pattern of conduct.

Basically, Volkov had shown up at a deposition at Hansen's office even though it had been cancelled (but counsel did have difficulty communicating clearly). Volkov kept insisting on written confirmation of the cancellation. He finally left the office, albeit very slowly, and filmed Hansen without her consent, purportedly to confirm he had attended the deposition at the noticed time. The trial court found that Volkov's emails leading up to the deposition were "argumentative and self-serving," and after Hansen's "clear and unequivocal cancellation" of the deposition, also "entirely unnecessary." The court also ruled Volkov had "no legitimate purpose" to personally appear at Hansen's office. The court issued the statutory-maximum three-year restraining order.

Reversing, the Court of Appeal said Volkov's emails about a deposition, even if "argumentative and self-serving and entirely unnecessary"—and maybe even "seriously annoying" to boot, the court volunteered—did not threaten violence, and so they were constitutionally protected litigation activity. So it was error for the trial court to consider them as part of a course of conduct of harassment.

Aside from the emails, the only other conduct that could support a restraining order was Volkov's attendance at the deposition. (I don't understand why this was not likewise protected litigation conduct. -tk) But he was only there 30 minutes and complained of a hurt foot with the door hit him on the way out. But however offensive or annoying Volkov may have been, "[t]his evidence was insufficient" to support "substantial emotional distress." Besides, it was only a single incident, and as a matter of law that is "insufficient to meet the statutory requirement of a course of conduct."

Comment

As the court notes, the incivility by counsel was mutual. I am sure there are cases where a restraining order against opposing counsel may be called for. But as examples of incivility go, this was banal stuff: a few passive-aggressive emails, and an unpleasant but rather short interaction at a deposition. Yawn. I am glad the Court of Appeal reversed, but the fact that the trial court so readily granted the restraining order is chilling. The standard, after all, is supposed to be "clear and convincing evidence."

This article was originally published on the website of Kowal Law Group.

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