

Routine Evidence Code Violations Overburden Family Court

By Fred Silberberg

The policy of the law of the state of California is to promote settlement of litigation between parties. In order to facilitate that policy, and to allow parties to speak openly and enter into settlement negotiations in good faith, settlement communications are supposed to be privileged, pursuant to Evidence Code Section 1152. However, in family law cases, it appears that such communications are no longer protected. A review of a good percentage of litigated family law case files will reveal numerous violations of this section of the Evidence Code, for which there is no penalty assessed on the party or lawyer, and which

results in the judicial officer who is handling the file being exposed to all sorts of communications that any other bench officer would not be privy to.

To be sure, most of these exposures of privileged communications are done intentionally by counsel. The hope is that if the court gets a flavor of what has transpired, it may somehow be swayed to ultimately make a ruling in the favor of one party, knowing what positions were taken in settlement discussions.

Under Family Code Section 271, the court is permitted to award attorney fees as sanctions to the extent that the actions of a party to a proceeding have frustrated the policy of the law to promote settlement. These attorney fees awards can be

made at any time in the course of a case, so long as there is notice and an opportunity to be heard given to the adverse party.

The enactment of the section, rather than resulting in promoting settlement, has done the opposite. Prior to the enactment of the code section, attorney fees were generally reserved to specific types of proceedings in family law cases. Now, it seems that they are raised in regard to almost every proceeding that takes place before a court. Even a routine motion is now typically accompanied by a request for attorney fees under Family Code Section 271.

This is the manner in which the policy of keeping settlement communications confidential is abrogated. Counsel now will disclose their version of settlement communications on a routine basis, under the guise of seeking attorney fees under Family Code Section 271. So, when the objection is raised that the communication is privileged and should not have been divulged, the response from the lawyer who proffered the statement is that it was offered in support of the request for sanctions under Section 271 and is therefore not privileged.

In most California courts, family law proceedings are assigned to one trial court for the life of the case, the theory being that that judicial officer can become familiar with the matter, and not have to learn the facts each time a particular aspect of the case comes back before him or her. In the context of an ongoing litigated divorce case then, the judicial officer is exposed to repeated violations of communications that would otherwise be privileged. Certainly, these types of communications would almost never be divulged to a judge presiding over a civil non-family law case. It is the exposure of these communications that can, at times, sway a judicial officer one way or the other, or give the impression that one of the parties is more unreasonable than the other. While most family law judges and commissioners will tell you that they are not influenced by such actions, and that they do not form an opinion as to one of the parties, human nature makes it nearly impossible for a judge not to formulate such an opinion.

In practice, most of the requests for sanctions under Section 271 are

not granted. However, the damage is done once the communications are exposed. The import of the section then has the opposite effect of what was intended. A settlement communication is sent, it is not accepted, it is then divulged to the court in the course of ongoing litigation and becomes a basis for sanctions, or it puts the litigant in an unfavorable light in front of the court. Clearly this is yet another example of statutory enactment by our Legislature gone awry in the course of a family law proceedings.

Because the practice of family law in most courts in California is one that is relegated to submission of written pleadings, as opposed to live testimony, the problem arising from this practice is compounded. There is no basis to object to a communication before the answer is elicited, as one would in the course of an evidentiary hearing or a trial. It is virtually impossible to "un-ring" the proverbial bell because the statement is made in a written

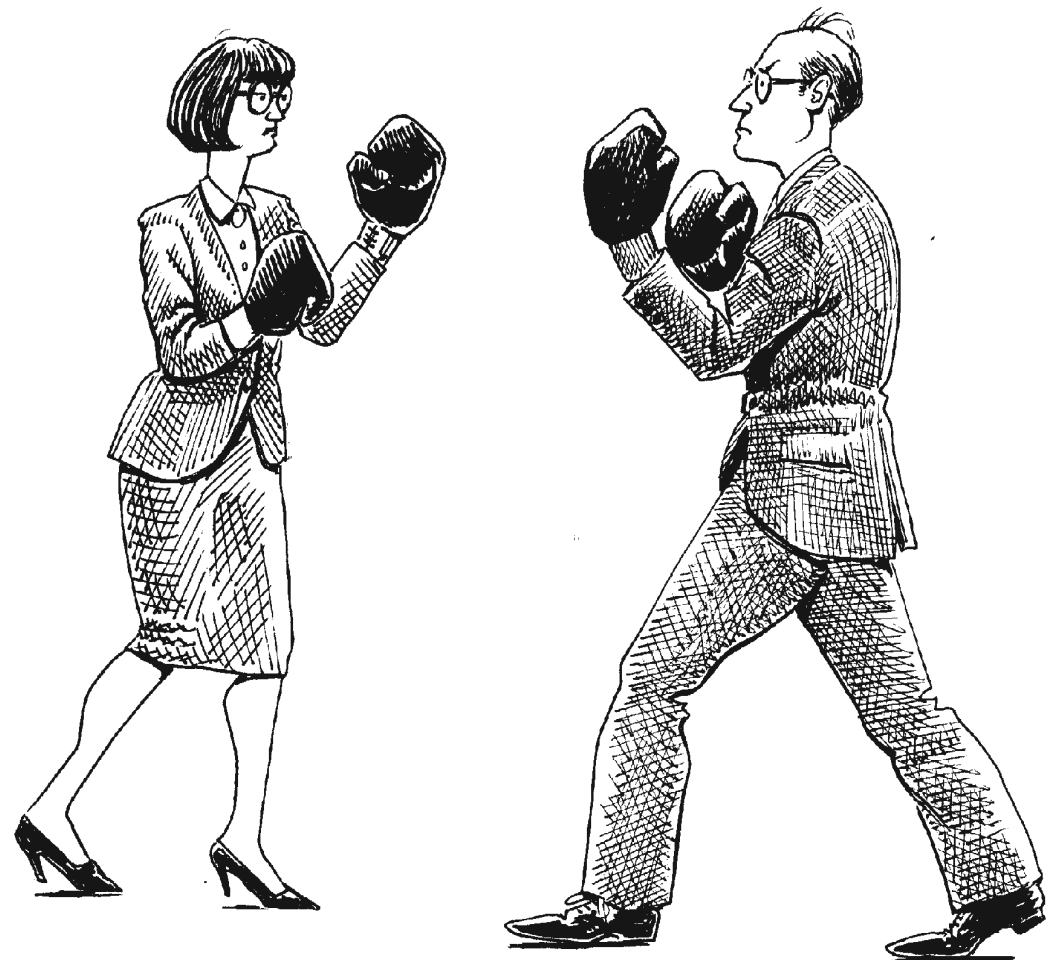
document on file with the court. If there is time for opposing counsel to file written objections to the declaration, the statement has already been read by the court before it rules on the objection, if it does so at all. Again, human nature is such that the damage has been done and the taint is present regardless of what the ruling is on the motion to strike the statement.

In practical terms, most family law judges, who do not have time to handle their case loads because of court congestion, take no action against the party that offers the impermissible statement. That party is now on the offensive, having thrown the statement into the ring in order to justify a request for sanctions under Section 271 that the lawyer knows he or she has little hope of getting. The only way to deter the conduct is for the court to sanction the lawyer that offered the statement, but court's almost never take that action.

If the policy of the law is to pro-

mote the settlement of litigation, then it should be adhered to, without exception. The current practice of routinely divulging such communications results in an impermissible violation of the Evidence Code that is condoned by our sitting judicial officers. Over time, this loophole in the law causes litigation to expand and compounds the burdens that already exist on our courts. Section 271 of the Family Code should be amended to defer such issues until the end of a case after the substantive issues have been decided. If the Legislature does not take such action in its own, then it is the judiciary's burden to uphold Evidence Code Section 1152 so that parties do feel free to engage in good faith settlement negotiations without fear of being painted in a negative light.

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