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ACTED WITH SUBSTANTIAL JUSTIFICATION

By Katherine Gallo



A fellow Bay Area attorney contacted me about being sanctioned in excess of \$5,000. He was mortified; as it was the first time he had ever been sanctioned and couldn't believe the amount he was sanctioned under the circumstances. After I had spoken to him about his remedies, one being, a Writ, he wrote me the following e-mail.

*Just wondering, but what does the phrase "**acted with substantial justification**" mean in the sanctions statute for motion to compel depo testimony, CCP 2025.480?*

Does it mean the conduct that led the moving party to make the motion has to be substantially justified? Or does it mean the decision to make or oppose the motion to compel has to be substantially justified? [The Judge] said at the hearing that "The rule on sanctions is that the prevailing party is entitled to reasonable sanctions, unless the non-prevailing party's position has been shown to be substantially justified. That is not a punishment.

I think my conduct at the depo (agreeing to withdraw all my instructions not to answer and to deal with the questions right there on the spot) was substantially justified in opposing the motion too (because at least some of his points were at least arguably wrong as a matter of law, and also because of his complete failure to try to meet and confer before filing the motion, in violation of sec 2023.010(I), sec 2025.480(b), among other reasons.

In reading the various discovery treaties I realized that there were no examples on what "**acted with substantial justification**" was. It appeared to be one of those undefined terms thus giving the trial judge a lot of leeway to "know it when he sees it."

On August 20, 2012, the First District Court of Appeal came to the rescue, publishing *Diepenbrock v. Superior Court* 2012Cal.App. LEXIS 896. Justice Pollak, writing for the majority, stated:

In Doe v. U.S. Swimming, Inc. (2011) 200 Cal.App.4th 1424, 1434 [133 Cal. Rptr. 3d 465], the court held that "substantial justification" as used in the above statutes

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means a justification that is "well grounded in both law and fact." (See *Union Mut. Life Ins. Co. v. Superior Court* (1978) 80 Cal.App.3d 1, 15 [145 Cal. Rptr. 316] [Party seeking discovery sanctions "must demonstrate that the opposing party's objections were insubstantial, were interposed for purposes of delay or harassment, or were otherwise unreasonable."]; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial, supra, ¶ 8:846, p. 8E-152 (rev. # 1, 20012) ["to avoid sanctions the deponent must show 'substantial justification' for his or her refusal to answer the deposition question; e.g., reasonable grounds to believe the objection was valid when made and that opposition to the motion to compel therefore was justified"].)

Justice Pollak concluded that:

...While the court may properly have rejected plaintiff's contention...the conflicting legal authority on an unsettled issue provided substantial justification for appellants' position, negating the basis for the sanction order.

I am a big advocate for the court to impose sanctions when there are garbage objections to proper discovery requests or deposition questions. However, an attorney is ethically bound to stand up and protect their client's privileges. It is also the attorney's responsibility to educate the court with the law and the facts to substantiate their position in invoking the privilege. When there is a real legal dispute regarding privilege the court needs to sit up and take notice and it should not be a sanctionable offense if is grounded in law and fact.

If you find yourself in this dilemma, I recommend that you read *Doe v. U.S. Swimming, Inc.* (2011) 200 Cal.App.4th 1424 for an in depth analysis on what is "**acted with substantial justification.**"

End of Story: As for my fellow Bay Area attorney, when he realized that the objection on privilege was going to be overruled and that the sanction was going to be over \$5000, he made sure he made a record for a Writ to the Court of Appeal. The case settled prior to filing of the prepared Writ and before Diepenbrock came down. I never asked whether the trial court's decision forced him to settle in order to protect his client.

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