

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

NOV 12 2015

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

BARBARA HUBBARD,

Plaintiff - Appellant,

v.

PLAZA BONITA, LP,

Defendant,

and

FLAVA ENTERPRISES, INC., DBA
House of Flava and HOT TOPIC, INC.,
DBA Torrid #5056,

Defendants - Appellees.

No. 13-56571

D.C. No. 3:09-cv-01581-JLS-
WVG

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Janis L. Sammartino, District Judge, Presiding

Submitted November 5, 2015**
Pasadena, California

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: SCHROEDER and FRIEDLAND, Circuit Judges and CHHABRIA,^{***}
District Judge.

The Appellant, Lynn Hubbard III, represented his mother in a lawsuit against a shopping mall and its tenants, alleging they denied her equal access to their facilities in violation of the Americans with Disabilities Act of 1990 (“ADA”), 42 U.S.C. §§12101 *et seq.* Hubbard's mother died during the litigation, but after her death he sent at least one of the defendants a settlement agreement purportedly signed by her, without informing the defendant that she had died. The district court sanctioned Hubbard for this conduct, and he appeals. We review for abuse of discretion, and must affirm the district court's ruling unless it was based on legal error or clearly erroneous findings of fact. *Haeger v. Goodyear Tire & Rubber Co.*, 793 F.3d 1122, 1131 (9th Cir. 2015); *Lahiri v. Universal Music & Video Distrib. Corp.*, 606 F.3d 1216, 1218 (9th Cir. 2010). We affirm.

The district court sanctioned Hubbard under 28 U.S.C. § 1927 and pursuant to its inherent powers. Under § 1927, a district court may sanction an attorney who “multiplies the proceedings in any case unreasonably and vexatiously,” if the attorney's conduct was reckless or in bad faith. *Lahiri*, 606 F.3d at 1219. Before imposing sanctions pursuant to its inherent powers, the district court must find “bad faith or conduct tantamount to bad faith.” *B.K.B. v. Maui Police Dep’t*, 276

^{***} The Honorable Vince G. Chhabria, District Judge for the U.S. District Court for the Northern District of California, sitting by designation.

F.3d 1091, 1108 (9th Cir. 2002) (quoting *Fink v. Gomez*, 239 F.3d 989, 994 (9th Cir. 2001)).

On this record, the district court's finding that Hubbard acted recklessly and in bad faith was not clearly erroneous. Any rational attorney representing a plaintiff in an ADA access case would know that if his client died, the defendants would want to know about it, especially before signing a settlement agreement that promised prospective relief. And by sending the defendant an agreement after his mother's death that purported to contain her signature when it was not in fact her signature, Hubbard created the impression that she was still alive. Hubbard provides no coherent innocent explanation for this conduct, and the most logical conclusion to be drawn is that he intended to deceive the defendant. Such conduct rises to the level of recklessness and bad faith. Accordingly, the district court did not clearly err in making that finding, and did not abuse its discretion in sanctioning Hubbard.

Hubbard also contends the amount of the sanction was an abuse of discretion. The district court required Hubbard to pay the defendant \$49,056.05 in attorneys' fees. This reflected the fees incurred by the defendant in the wake of its discovery of the problem with the settlement agreement. For example, the defendant incurred fees investigating the authenticity of the signature, researching the legal impact of the plaintiff's death on the lawsuit, participating in a settlement

conference with the magistrate judge after learning about the deception, and moving for sanctions. The defendant's counsel sought fees for work that was arguably tangential to the conduct for which Hubbard was sanctioned, and the district court conscientiously refused to include that work. Overall, the amount of the fee award was reasonable, and was the product of a discerning review by the district court. *See, e.g., Haeger*, 793 F.3d at 1138; *Lahiri*, 606 F.3d at 1222–23.¹

Finally, Hubbard contends he did not receive adequate notice that he could be sanctioned for his misleading conduct. Before sanctioning an attorney, a district court must provide notice of the “particular alleged misconduct” that could warrant sanctions. *Price v. Lehtinen (In re Lehtinen)*, 564 F.3d 1052, 1060 (9th Cir. 2009) (quoting *Miller v. Cardinale (In re Deville)*, 361 F.3d 539, 548 (9th Cir. 2004)). Hubbard received such notice. The order to show cause issued by the magistrate judge asked “why sanctions should not be imposed on [Hubbard] for allegedly placing Plaintiff's signature on settlement documents prior to and after her death.” The order also asked why Hubbard should not be sanctioned for pursuing a settlement agreement that would give prospective relief to the plaintiff notwithstanding her death, and for “failing to timely disclose to the Court Plaintiff's death.” This adequately encompasses the conduct for which the district

¹ The appellee argues that the district court erred in refusing to include certain billings in the fee award, but the appellee neither preserved this issue below nor cross-appealed on it, so it is waived. *See Simpson v. Lear Astronics Corp.*, 77 F.3d 1170, 1174 (9th Cir. 1996).

court ultimately sanctioned Hubbard.

Hubbard's motion to strike the answering brief and supplemental excerpts of record is denied as moot because we do not rely upon the materials to which Hubbard objects. Hubbard's request for judicial notice is denied for the same reason. Finally, Hubbard's motion for monetary sanctions is denied. *See Nicholson v. Hyannis Air Serv., Inc.*, 580 F.3d 1116, 1128 (9th Cir. 2009) (“The consequences of [counsel]’s violation are too minimal to justify monetary sanctions.”).

The district court’s judgment is **AFFIRMED**.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; St. Paul, MN 55164-0526 (Attn: Jean Green, Senior Publications Coordinator);
 - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

This form is available as a fillable version at:

<http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf>.

Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

v. 9th Cir. No.

The Clerk is requested to tax the following costs against:

| Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1 | REQUESTED <i>(Each Column Must Be Completed)</i> | | | | ALLOWED <i>(To Be Completed by the Clerk)</i> | | | |
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| Excerpt of Record | <input type="text"/> | <input type="text"/> | \$ <input type="text"/> | \$ <input type="text"/> | <input type="text"/> | <input type="text"/> | \$ <input type="text"/> | \$ <input type="text"/> |
| Opening Brief | <input type="text"/> | <input type="text"/> | \$ <input type="text"/> | \$ <input type="text"/> | <input type="text"/> | <input type="text"/> | \$ <input type="text"/> | \$ <input type="text"/> |
| Answering Brief | <input type="text"/> | <input type="text"/> | \$ <input type="text"/> | \$ <input type="text"/> | <input type="text"/> | <input type="text"/> | \$ <input type="text"/> | \$ <input type="text"/> |
| Reply Brief | <input type="text"/> | <input type="text"/> | \$ <input type="text"/> | \$ <input type="text"/> | <input type="text"/> | <input type="text"/> | \$ <input type="text"/> | \$ <input type="text"/> |
| Other** | <input type="text"/> | <input type="text"/> | \$ <input type="text"/> | \$ <input type="text"/> | <input type="text"/> | <input type="text"/> | \$ <input type="text"/> | \$ <input type="text"/> |
| TOTAL: | | | | \$ <input type="text"/> | TOTAL: \$ <input type="text"/> | | | |

* *Costs per page:* May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** *Other:* Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

Continue to next page

Form 10. Bill of Costs - Continued

I, , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature

("s/" plus attorney's name if submitted electronically)

Date

Name of Counsel:

Attorney for:

(To Be Completed by the Clerk)

Date

Costs are taxed in the amount of \$

Clerk of Court

By: , Deputy Clerk