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PUBLIC MATTER

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STATE BAR COURT CLERK'S OFFICE
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10 THE STATE BAR COURT
 11 HEARING DEPARTMENT - SAN FRANCISCO

13 In the Matter of) Case No. 04-O-15890
 14 THOMAS EDWARD FRANKOVICH,)
 15 No. 74414,) NOTICE OF DISCIPLINARY CHARGES
 16 A Member of the State Bar.)

NOTICE - FAILURE TO RESPOND!

18 **IF YOU FAIL TO FILE AN ANSWER TO THIS NOTICE WITHIN THE**
 19 **TIME ALLOWED BY STATE BAR RULES, INCLUDING EXTENSIONS, OR**
 20 **IF YOU FAIL TO APPEAR AT THE STATE BAR COURT TRIAL, (1) YOUR**
 21 **DEFAULT SHALL BE ENTERED, (2) YOU SHALL BE ENROLLED AS AN**
 22 **INACTIVE MEMBER OF THE STATE BAR AND WILL NOT BE**
 23 **PERMITTED TO PRACTICE LAW UNLESS THE DEFAULT IS SET ASIDE**
 24 **ON MOTION TIMELY MADE UNDER THE RULES OF PROCEDURE OF**
 25 **THE STATE BAR, (3) YOU SHALL NOT BE PERMITTED TO**
 26 **PARTICIPATE FURTHER IN THESE PROCEEDINGS UNLESS YOUR**
 27 **DEFAULT IS SET ASIDE, AND (4) YOU SHALL BE SUBJECT TO**
 28 **ADDITIONAL DISCIPLINE.**

24 **STATE BAR RULES REQUIRE YOU TO FILE YOUR WRITTEN**
 25 **RESPONSE TO THIS NOTICE WITHIN TWENTY DAYS AFTER SERVICE.**

26 **IF YOUR DEFAULT IS ENTERED AND THE DISCIPLINE IMPOSED BY**
 27 **THE SUPREME COURT IN THIS PROCEEDING INCLUDES A PERIOD OF**
 28 **ACTUAL SUSPENSION, YOU WILL REMAIN SUSPENDED FROM THE**
PRACTICE OF LAW FOR AT LEAST THE PERIOD OF TIME SPECIFIED
BY THE SUPREME COURT. IN ADDITION, THE ACTUAL SUSPENSION
WILL CONTINUE UNTIL YOU HAVE REQUESTED, AND THE STATE

1 **BAR COURT HAS GRANTED, A MOTION FOR TERMINATION OF THE**
2 **ACTUAL SUSPENSION. AS A CONDITION FOR TERMINATING THE**
3 **ACTUAL SUSPENSION, THE STATE BAR COURT MAY PLACE YOU ON**
4 **PROBATION AND REQUIRE YOU TO COMPLY WITH SUCH**
5 **CONDITIONS OF PROBATION AS THE STATE BAR COURT DEEMS**
6 **APPROPRIATE. SEE RULE 205, RULES OF PROCEDURE FOR STATE**
7 **BAR COURT PROCEEDINGS.**

8 The State Bar of California alleges:

9 JURISDICTION

10 1. Thomas Frankovich ("Respondent") was admitted to the practice of law in the
11 State of California on June 28, 1977, was a member at all times pertinent to these charges, and is
12 currently a member of the State Bar of California.

13 GENERAL BACKGROUND

14 2. The Americans with Disabilities Acts ("ADA"), 42 U.S.C. §12101, et seq was
15 signed into law in 1990. Its stated goal is to remedy discrimination against individuals with
16 disabilities.

17 3. Title III of the ADA, 42 U.S.C. §12181 et seq, requires the removal of structural
18 barriers in existing public accommodations "where such removal is readily achievable." Where
19 removal of the barrier is not readily achievable, the facility must provide access through
20 alternative methods if such methods are readily achievable." U.S.C. §12181 (b)(A)(v). To
21 enforce Title III, the ADA contains both a private right of action, 42 U.S.C. §12188(a), and a
22 right of action for the Attorney General, 42 U.S.C. §12188(b). While the Attorney General may
23 seek monetary damages on behalf of an aggrieved party, 42 U.S.C. §12188(a)(B), the only
24 remedies available under the private right of action are injunctive relief and the recovery of
25 attorneys' fees and costs. 42 U.S.C. §12188(a)(1); 42 U.S.C. §2000a-3(a).

26 4. Because violations of the ADA also constitute a violation of California's Unruh
27 Civil Rights Act, Cal. Civ. Code §51(f), and the California Disabled Persons Act ("CDPA"), Cal.
28 Civ. Code §54(c), plaintiffs can sue in federal court for injunctive relief under the ADA, and tack
on state law claims for money damages under the Unruh Act and CDPA.

 5. Jarek Molski ("Molski") is an individual who is paralyzed from the chest down
and uses a wheelchair for mobility.

1 6. Les Jankey ("Jankey") is an individual who relies on a wheelchair for mobility.

2 7. In 2004, respondent filed at least 223 lawsuits in the United States District Courts
3 for the Northern and Central Districts of California alleging violations of the ADA. Of those
4 lawsuits, 156 were filed on behalf of Molski, 40 were filed on behalf of either Jankey or Patrick
5 Connally, a disabled individual and president of Disability Rights Enforcement Education
6 Services ("DREES"). DREES was a co-plaintiff in all of the lawsuits.

7 8. From in or about 2003 through 2007, approximately 400 lawsuits were filed on
8 Molski's behalf in the federal districts in California against various businesses alleging
9 violations of the ADA.

10 COUNT ONE

11 Case No. 04-O-15890
12 Business and Professions Code, section 6106
[Moral Turpitude-Scheme to Extort]

13 9. Respondent wilfully violated Business and Professions Code, section 6106, by
14 committing an act involving moral turpitude, dishonesty or corruption, as follows:

15 10. In or about 2004, respondent filed an action alleging violations of the ADA on
16 behalf of Molski, *Molski v. Evergreen Dynasty Corporation d/b/a Mandarin Touch Restaurant*,
17 et al, United States District Court, Central District of California, case number CV 04-0450 ER.

18 11. On or about December 9, 2004 the District Court issued an order declaring
19 Molski a vexatious litigant and ordered him to obtain leave of court before filing any other
20 lawsuits alleging violations of the ADA.

21 12. In its December 9, 2004 order, the Court issued an order to show cause against
22 respondent to show why he should not be required to obtain leave of court to file any future
23 lawsuits alleging violations of the ADA.

24 13. On or about March 5, 2005, the Court issued a memorandum decision ordering
25 respondent to obtain leave of court before filing any new complaints alleging violations of Title
26 III of the ADA in the United States District Court for the Central District of California.

27 14. Respondent appealed the orders issued against Molski and respondent's firm.
28

1 15. On or about August 31, 2007 the Ninth Circuit Court of Appeals issued an
2 opinion in which it affirmed the orders of the district court declaring Molski a vexatious litigant
3 and requiring him to obtain leave of court before filing any other ADA lawsuits and requiring
4 respondent to obtain leave of court before filing any new ADA complaints. A copy of the
5 opinion is attached hereto as Exhibit "A".

6 16. In its opinion, the Ninth Circuit affirmed the district court findings that many
7 physical injuries alleged in the complaints were contrived and false, that a letter that respondent
8 sent along with the complaints was misleading and intimidating for the purpose of coercing
9 defendants into quick settlements without consulting with counsel, that respondent typically
10 waited one year after the alleged injuries occurred before filing the complaint in order to
11 maximize the damages threatened and to intimidate the small businesses against whom
12 respondent frequently filed suit, and that the high settlement rate (only one case had been tried)
13 showed a desire for a quick settlement.

14 Bodily Injury Claims

15 17. The district court reviewed more than 200 ADA complaints filed by respondent
16 between 2002 and 2004. The district court concluded that many of the claimed physical injuries
17 were contrived. The district court reached this conclusion for two main reasons. 1) Some of the
18 complaints alleged that the plaintiff suffered bodily injury as a result of encountering an
19 architectural barrier even if the facts showed that the plaintiff did not attempt to enter the
20 business. 2) The other reason the court concluded that the claimed physical injuries were
21 contrived was the fact that plaintiffs alleged similar injuries sustained in a similar or exact same
22 fashion at multiple businesses on the same day.

23 18. The district court concluded that a claim for physical injury was made in every
24 complaint filed by respondent in order to invoke the personal injury provisions of the
25 defendant's insurance policy. The Court stated that the "allegations of physical injury, which are
26 not an essential element of a claim of discrimination under the ADA, thus appear to be included
27 in the complaint to improve the chances of invoking insurance coverage as a source for the
28 payment of damages."

1 19. The district court cited *Molski v. Casa Medina*, United States District Court,
2 Northern District of California, case number C04-1947 as a case in which the claim of physical
3 injuries was contrived. The Casa Medina complaint alleged Molski “suffered bodily injury
4 (including, but not limited to, fatigue, stress, strain and pain in wheeling and attempting to and/or
5 transferring)” due to defendants’ failure to provide accessible facilities. However, the facts in
6 the complaint do not allege that Molski ever attempted to negotiate any barrier in the restaurant.
7 The court concluded that the claim of physical injury appeared to be contrived.

8 20. Respondent filed numerous complaints that allege Molski sustained similar or
9 identical injuries at multiple establishments on a single day. For example, respondent filed
10 sixteen lawsuits on Molski’s behalf alleging injuries sustained over a four day period from May
11 20, 2003 to May 23, 2003. All of the injuries were to Molski’s upper extremities as a result of
12 transfers or negotiating barriers.

13 21. Respondent filed numerous complaints which allege that on thirty-seven
14 occasions in 2004, Molski was injured two or more times on the same day.

15 22. Respondent filed numerous complaints which allege that on nineteen occasions in
16 2004, Molski was injured three or more times on the same day.

17 23. Respondent filed numerous complaints which allege that on nine occasions in
18 2004, Molski was injured four or more times on the same day.

19 24. Respondent filed numerous complaints which allege that on thirty-seven
20 occasions in 2004, Molski was injured two or more times on the same day.

21 25. Respondent filed numerous complaints which allege that on nineteen occasions in
22 2004, Molski was injured three or more times on the same day.

23 26. Respondent filed numerous complaints which allege that on nine occasions in
24 2004, Molski was injured four or more times on the same day.

25 Respondent’s litigation strategy

26 27. Many of the complaints were filed one year after the alleged injuries occurred.
27 The court concluded respondent waited a year after the injury occurred to file the complaints in
28

1 order to maximize the amount of damages he could demand which would serve to intimidate the
2 small businesses against who were frequently the defendants.

3 28. Each of the 223 complaints respondent filed alleged the same five causes of
4 action: a federal ADA claim, violation of California Civil Code 54, et seq, violation of California
5 Health and Safety Code §19955, violation of California Civil Code 51, et seq, and violation of
6 California Business and Professions Code §17200, unfair business practices.

7 29. All of the complaints reviewed by the Court sought damages of \$4,000 per day
8 from the date of the plaintiff's visit to the business to the date when repairs are completed. The
9 Court found that it was respondent's regular practice to wait up to one year before filing a
10 lawsuit, during which time the requested daily damages continued to accrue.

11 30. The Court concluded that respondent's practice of requesting \$4,000 per day in
12 damages coupled with the substantial passage of time served the purpose of intimidation by
13 implying that defendants could be liable for a large amount in damages.

14 31. For example, in the *Mandarin Touch* case, the Court noted that damages could
15 total \$1,452,000 based on damages of \$4,000 per day.

16 32. After filing the lawsuit, respondent sent a copy of the complaint directly to each
17 defendant, along with a letter. The letter contained information that could be viewed as
18 intimidating as well as misleading and inaccurate.

19 33. In the letter respondent advised the defendant against hiring an attorney because
20 defense attorneys simply embark upon billing expeditions. The letter also states that the
21 defendant's insurance policy may cover the claim, and that the defendants do not have any bona
22 fide defense to the ADA action. This statement is misleading because the ADA requires the
23 removal of barriers in certain structures only when "such removal is readily achievable."
24 Respondent further recommends that the defendant quickly settle the matter rather than waste
25 their money on needless litigation.

26 34. The court also cited the high rate of settlement of Molski's cases, (only one out
27 of 400 has gone to trial) as an indication of an extortion scheme.

28

1 did not seek any type of medical treatment or evaluation for any individual incidence of injury.
2 Respondent did not require that Molski seek any type of medical treatment or evaluation for each
3 incident. However, all of the settlement discussions included claims for injury.

4 43. Respondent did not inform any individual defendant that Molski had also
5 suffered bodily injury at hundreds of other establishments. Respondent did not apportion the
6 amount of damages that any individual business could be responsible for in relation to the entire
7 amount of damages Molski allegedly suffered from hundreds of encounters with architectural
8 barriers.

9 44. By making settlement demands and settling with defendants without
10 appropriately apportioning each defendant's responsibility for the repetitive, continuous, and
11 cumulative trauma Molski allegedly suffered, thereby making defendants responsible for more
12 than their share, respondent committed an act involving moral turpitude, dishonesty or
13 corruption.

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NOTICE - INACTIVE ENROLLMENT!

YOU ARE HEREBY FURTHER NOTIFIED THAT IF THE STATE BAR COURT FINDS, PURSUANT TO BUSINESS AND PROFESSIONS CODE SECTION 6007(c), THAT YOUR CONDUCT POSES A SUBSTANTIAL THREAT OF HARM TO THE INTERESTS OF YOUR CLIENTS OR TO THE PUBLIC, YOU MAY BE INVOLUNTARILY ENROLLED AS AN INACTIVE MEMBER OF THE STATE BAR. YOUR INACTIVE ENROLLMENT WOULD BE IN ADDITION TO ANY DISCIPLINE RECOMMENDED BY THE COURT. SEE RULE 101(c), RULES OF PROCEDURE OF THE STATE BAR OF CALIFORNIA.

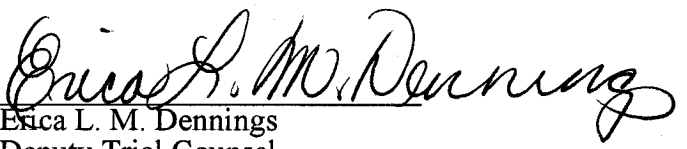
NOTICE - COST ASSESSMENT!

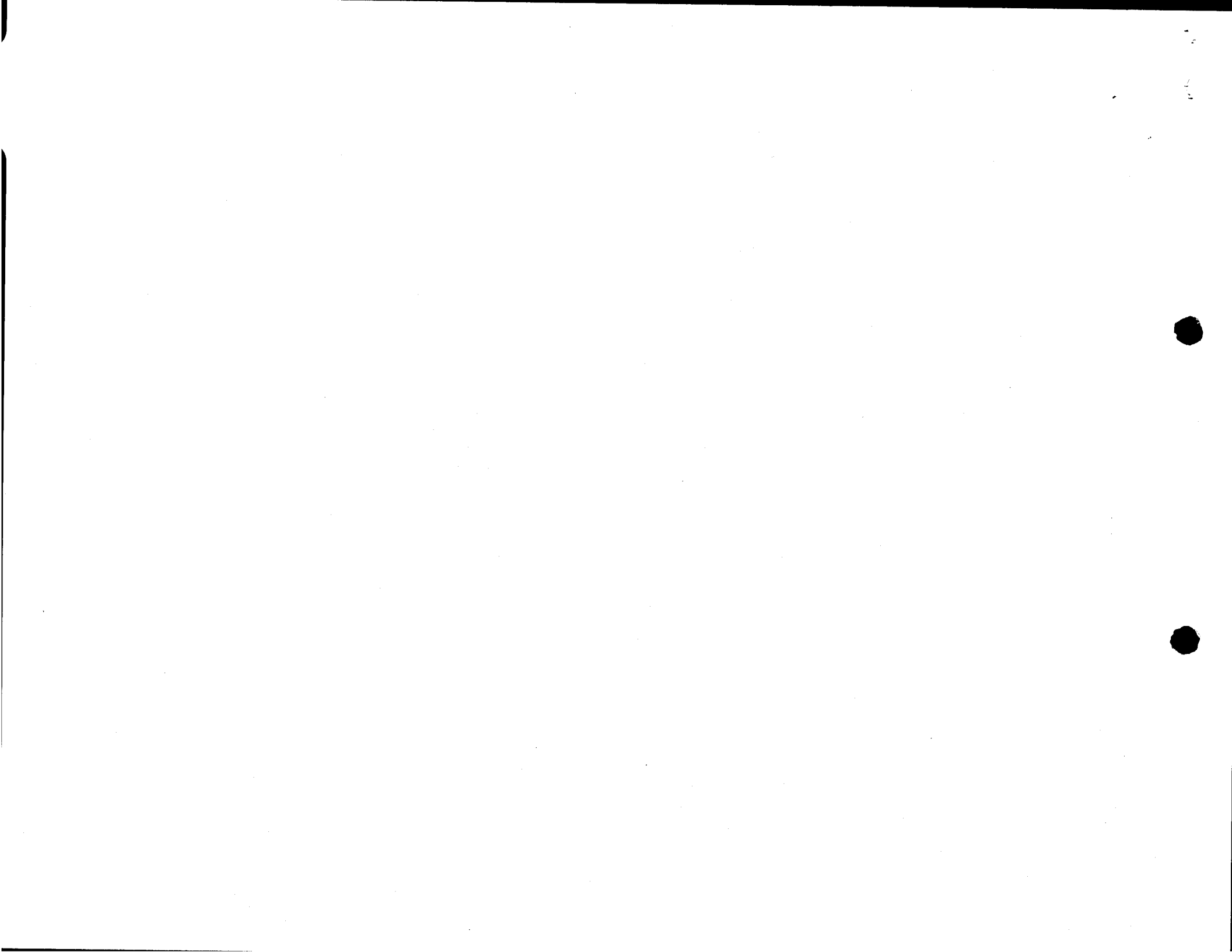
IN THE EVENT THESE PROCEDURES RESULT IN PUBLIC DISCIPLINE, YOU MAY BE SUBJECT TO THE PAYMENT OF COSTS INCURRED BY THE STATE BAR IN THE INVESTIGATION, HEARING AND REVIEW OF THIS MATTER PURSUANT TO BUSINESS AND PROFESSIONS CODE SECTION 6086.10. SEE RULE 280, RULES OF PROCEDURE OF THE STATE BAR OF CALIFORNIA.

Respectfully submitted,

THE STATE BAR OF CALIFORNIA
OFFICE OF THE CHIEF TRIAL COUNSEL

Dated: February 4, 2008

By: 
Erica L. M. Dennings
Deputy Trial Counsel



500 F.3d 1047, 19 A.D. Cases 1165, 35 NDLR P 144, 2007 Daily Journal D.A.R. 13,582
(Cite as: 500 F.3d 1047)

H

Molski v. Evergreen Dynasty Corp.
C.A.9 (Cal.),2007.

United States Court of Appeals,Ninth Circuit.
JarekMOLSKI; Disability Rights Enforcement
Education Services: Helping You Help Others, a
California public benefit corporation,
Plaintiffs-Appellants,

v.

EVERGREEN DYNASTY CORP., d/b/a Mandarin
Touch Restaurant; Brian McInerney; Kathy S.
McInerney, as joint tenants, Defendants-Appellees.
No. 05-56452.

Argued and Submitted April 17, 2007.
Filed Aug. 31, 2007.

Background: Disabled restaurant patron sued restaurant's owner alleging accessibility violations of Americans with Disabilities Act (ADA) and state law. The United States District Court for the Central District of California, 347 F.Supp.2d 860,Edward Rafeedie, J., granted owner's motion for order declaring plaintiff a vexatious litigant, and requiring plaintiff to obtain leave of court before filing additional suits under Title III of ADA. Subsequently, the District Court, 359 F.Supp.2d 924, imposed sanction against law firm that represented patron by requiring it to obtain leave of court before filing any claims under Title III of ADA. Finally, the District Court, 385 F.Supp.2d 1042, granted summary judgment for owner. Patron and law firm appealed pre-filing orders.

Holdings: The Court of Appeals held that:

- (1) District Court's pre-filing orders were not immediately appealable and did not trigger running of 30-day limitations period for notice of appeal;
- (2) pre-filing order against patron comported with due process;

(3) District Court's substantive findings supported pre-filing order against patron;

(4) pre-filing order against patron was sufficiently narrowly tailored;

(5) pre-filing order against firm comported with due process;

(6) District Court's substantive findings supported pre-filing order against firm; and

(7) pre-filing order against firm was sufficiently narrowly tailored.

Affirmed in part and dismissed in part.
West Headnotes

[1] Federal Courts 170B ↔579

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(C) Decisions Reviewable
170BVIII(C)2 Finality of Determination
170Bk576 Particular Actions,
Interlocutory Orders Appealable
170Bk579 k. Civil Rights Cases.
Most Cited Cases

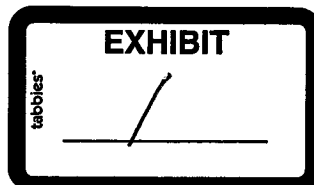
Federal Courts 170B ↔597

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(C) Decisions Reviewable
170BVIII(C)2 Finality of Determination
170Bk585 Particular Judgments,
Decrees or Orders, Finality
170Bk597 k. Costs and Security for
Costs. Most Cited Cases

Federal Courts 170B ↔669

170B Federal Courts

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170BVIII Courts of Appeals
170BVIII(E) Proceedings for Transfer of
Case
170Bk665 Notice, Writ of Error or
Citation

170Bk669 k. Commencement and
Running of Time for Filing; Extension of Time.
Most Cited Cases

District court's order imposing sanction against law
firm that represented plaintiff, pursuant to district
court's inherent power to levy sanctions, requiring
firm to obtain leave of court before filing any
further disability discrimination claims in district,
was not immediately appealable either as final
decision or as interlocutory order, and did not
commence 30-day period for filing notice of appeal;
30-day period was triggered upon district court's
subsequent grant of summary judgment for
defendant. 28 U.S.C.A. §§ 1291, 2107(a);
F.R.A.P. Rule 4(a)(1)(A), 28 U.S.C.A.

[2] Federal Courts 170B ↪579

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(C) Decisions Reviewable
170BVIII(C)2 Finality of Determination
170Bk576 Particular Actions,
Interlocutory Orders Appealable
170Bk579 k. Civil Rights Cases.

Most Cited Cases
District court's pre-filing order in disability
discrimination action, declaring plaintiff vexatious
litigant and requiring him to obtain leave of court
before filing additional suits under Title III of
ADA, was not immediately appealable final
decision; order was not conclusive, and could be
reviewed and corrected, if necessary, after final
judgment, and thus was outside scope of collateral
order doctrine. 28 U.S.C.A. § 1291; Americans
with Disabilities Act of 1990, § 2 et seq., 42
U.S.C.A. § 12101 et seq.

[3] Federal Courts 170B ↪574

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(C) Decisions Reviewable
170BVIII(C)2 Finality of Determination

170Bk572 Interlocutory Orders
Appealable

170Bk574 k. Other Particular
Orders. Most Cited Cases
In general, district court order imposing sanctions
on party is not appealable before entry of final
judgment. 28 U.S.C.A. § 1291.

[4] Federal Courts 170B ↪813

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk813 k. Allowance of Remedy
and Matters of Procedure in General. Most Cited
Cases

(Formerly 170Bk814.1)
Pre-filing order entered against vexatious litigant,
requiring litigant to obtain leave of court before
filing additional suits, is reviewed for abuse of
discretion.

[5] Injunction 212 ↪26(4)

212 Injunction
212II Subjects of Protection and Relief
212II(A) Actions and Other Legal
Proceedings
212k26 Commencement and Prosecution
of Civil Actions

212k26(4) k. Prevention of Multiplicity
of Suits or Circuity of Action. Most Cited Cases
All Writs Act provides federal district courts with
inherent power to enter pre-filing orders against
vexatious litigants. 28 U.S.C.A. § 1651(a).

[6] Constitutional Law 92 ↪3960

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3956 Access to Courts; Right to Seek
Remedy
92k3960 k. Vexatious or Frequent
Litigants. Most Cited Cases

Injunction 212 ↪26(4)

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212 Injunction

212II Subjects of Protection and Relief

212II(A) Actions and Other Legal Proceedings

212k26 Commencement and Prosecution of Civil Actions

212k26(4) k. Prevention of Multiplicity of Suits or Circuity of Action. Most Cited Cases
Pre-filing order against vexatious litigant is extreme remedy to be used only rarely, since such sanction can infringe litigant's due process right of access to courts. U.S.C.A. Const.Amend. 5.

[7] Constitutional Law 92 ↪3960

92 Constitutional Law

92XXVII Due Process

92XXVII(E) Civil Actions and Proceedings

92k3956 Access to Courts; Right to Seek Remedy

92k3960 k. Vexatious or Frequent Litigants. Most Cited Cases

Injunction 212 ↪115

212 Injunction

212III Actions for Injunctions

212k115 k. Process and Appearance. Most Cited Cases

Injunction 212 ↪130

212 Injunction

212III Actions for Injunctions

212k130 k. Trial or Hearing. Most Cited Cases

Injunction 212 ↪189

212 Injunction

212V Permanent Injunction and Other Relief

212k189 k. Nature and Scope of Relief. Most Cited Cases

In order for federal district court to enter pre-filing order against vexatious litigant: (1) litigant must be given notice and chance to be heard before order is entered, as required by Due Process Clause; (2) district court must compile adequate record for review; (3) district court must make substantive

findings about frivolous or harassing nature of plaintiff's litigation; and (4) vexatious litigant order must be narrowly tailored to closely fit specific vice encountered. U.S.C.A. Const.Amend. 5.

[8] Constitutional Law 92 ↪3960

92 Constitutional Law

92XXVII Due Process

92XXVII(E) Civil Actions and Proceedings

92k3956 Access to Courts; Right to Seek Remedy

92k3960 k. Vexatious or Frequent Litigants. Most Cited Cases

Injunction 212 ↪115

212 Injunction

212III Actions for Injunctions

212k115 k. Process and Appearance. Most Cited Cases

ADA plaintiff had fair notice of possibility that he might be declared vexatious litigant by federal district court and have pre-filing order entered against him, requiring him to obtain leave of court before filing further such claims, and thus declaration and order comported with Due Process Clause; district court's order was prompted by motion filed by defendants and served on plaintiff's counsel. U.S.C.A. Const.Amend. 5; Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.

[9] Injunction 212 ↪130

212 Injunction

212III Actions for Injunctions

212k130 k. Trial or Hearing. Most Cited Cases

Federal district court compiled adequate record of review prior to issuing pre-filing order declaring ADA plaintiff vexatious litigant and requiring him to obtain leave of court before filing further such claims; record contained complete list of cases filed by plaintiff in district, along with complaints from many of those cases, and pre-filing order outlined and discussed many of those cases. Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.

500 F.3d 1047, 19 A.D. Cases 1165, 35 NDLR P 144, 2007 Daily Journal D.A.R. 13,582
(Cite as: 500 F.3d 1047)

[10] Injunction 212 ↪130

212 Injunction

212III Actions for Injunctions

212k130 k. Trial or Hearing. Most Cited Cases

Federal district court made substantive findings about frivolous or harassing nature of ADA plaintiff's litigation, as required to support issuance of pre-filing order against him, requiring him to obtain leave of court before filing further such claims; court made fact findings that plaintiff had made false and exaggerated allegations of injury and had pursued litigation strategy to maximize damages and coerce settlements. Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.

[11] Injunction 212 ↪189

212 Injunction

212V Permanent Injunction and Other Relief

212k189 k. Nature and Scope of Relief. Most Cited Cases

Federal district court's pre-filing order declaring ADA plaintiff vexatious litigant, and requiring him to obtain leave of court before filing further such claims, was sufficiently narrowly tailored; order covered only type of claims plaintiff had been filing vexatiously, namely ADA Title III claims, did not prevent plaintiff from filing any ADA complaints but rather subjected his complaints to initial screening review by district judge, and was restricted to single venue. Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.

[12] Injunction 212 ↪26(4)

212 Injunction

212II Subjects of Protection and Relief

212II(A) Actions and Other Legal Proceedings

212k26 Commencement and Prosecution of Civil Actions

212k26(4) k. Prevention of Multiplicity of Suits or Circuity of Action. Most Cited Cases
Mere fact that federal plaintiff has filed large number of complaints, by itself, is not basis for

designating litigant as "vexatious" and imposing pre-filing order.

[13] Injunction 212 ↪26(4)

212 Injunction

212II Subjects of Protection and Relief

212II(A) Actions and Other Legal Proceedings

212k26 Commencement and Prosecution of Civil Actions

212k26(4) k. Prevention of Multiplicity of Suits or Circuity of Action. Most Cited Cases
Textual and factual similarity of federal plaintiff's multiple complaints, by itself, is not basis for finding plaintiff to be "vexatious litigant" and imposing pre-filing order.

[14] Federal Courts 170B ↪813

170B Federal Courts

170BVIII Courts of Appeals

170BVIII(K) Scope, Standards, and Extent

170BVIII(K)4 Discretion of Lower Court

170Bk813 k. Allowance of Remedy and Matters of Procedure in General. Most Cited Cases

Court of Appeals reviews for abuse of discretion district court's imposition of sanctions against attorney.

[15] Federal Civil Procedure 170A ↪2828

170A Federal Civil Procedure

170AXX Sanctions

170AXX(E) Proceedings

170Ak2828 k. Notice and Hearing. Most Cited Cases

Before imposing sanctions on attorney, district court must afford attorney notice and opportunity to be heard.

[16] Federal Civil Procedure 170A ↪2768

170A Federal Civil Procedure

170AXX Sanctions

170AXX(B) Grounds for Imposition

170Ak2767 Unwarranted, Groundless or Frivolous Papers or Claims

500 F.3d 1047, 19 A.D. Cases 1165, 35 NDLR P 144, 2007 Daily Journal D.A.R. 13,582
(Cite as: 500 F.3d 1047)

170Ak2768 k. In General. Most Cited Cases

Federal Civil Procedure 170A ⇨2769

170A Federal Civil Procedure
170AXX Sanctions
170AXX(B) Grounds for Imposition
170Ak2767 Unwarranted, Groundless or Frivolous Papers or Claims
170Ak2769 k. Reasonableness or Bad Faith in General; Objective or Subjective Standard. Most Cited Cases

Injunction 212 ⇨26(4)

212 Injunction
212II Subjects of Protection and Relief
212II(A) Actions and Other Legal Proceedings
212k26 Commencement and Prosecution of Civil Actions
212k26(4) k. Prevention of Multiplicity of Suits or Circuity of Action. Most Cited Cases
Justifications for imposing pre-filing sanction on attorney include attorney's willful abuse of judicial process, bad faith conduct during litigation, or filing frivolous papers.

[17] Attorney and Client 45 ⇨37.1

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k37 Grounds for Discipline
45k37.1 k. In General. Most Cited Cases
Violations of ethics rules can serve as ground for imposing sanctions against attorney.

[18] Federal Civil Procedure 170A ⇨2810

170A Federal Civil Procedure
170AXX Sanctions
170AXX(D) Type and Amount
170Ak2810 k. In General. Most Cited Cases
Sanction imposed against attorney must be tailored to curtail attorney's particular misconduct.

[19] Constitutional Law 92 ⇨3960

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3956 Access to Courts; Right to Seek Remedy
92k3960 k. Vexatious or Frequent Litigants. Most Cited Cases

Injunction 212 ⇨115

212 Injunction
212III Actions for Injunctions
212k115 k. Process and Appearance. Most Cited Cases
Law firm that had represented plaintiff in numerous ADA Title III cases had fair notice of possibility that it might be sanctioned by order requiring it to obtain leave of court before filing more such claims in district, and thus order comported with Due Process Clause; court first issued order to show cause why court should not impose pre-filing order against firm for its role in facilitating plaintiff's litigation, firm responded in writing to order to show cause, and court conducted hearing. U.S.C.A. Const.Amend. 5; Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.

[20] Injunction 212 ⇨130

212 Injunction
212III Actions for Injunctions
212k130 k. Trial or Hearing. Most Cited Cases
Following finding that frequent ADA Title III plaintiff was vexatious litigant, federal district court made sufficient substantive findings to support sanction, consisting of pre-filing order, against law firm that represented plaintiff in numerous actions, requiring firm to obtain leave of court before filing more such claims in district; complaints at issue repeatedly alleged injuries that court found to be contrived and untrue, and claims of injuries often were inconsistent with access barriers alleged. Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.

[21] Injunction 212 ⇨189

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212 Injunction

212V Permanent Injunction and Other Relief

212k189 k. Nature and Scope of Relief. Most Cited Cases

Federal district court's sanction, consisting of pre-filing order, against law firm that had represented vexatious ADA Title III litigant in numerous actions, was sufficiently narrowly tailored; sanction required firm to seek leave of court before filing any more ADA Title III complaints in district, thus ensuring that judge would initially determine whether factual allegations in future complaints were colorable, but did not make it impossible for firm to pursue meritorious ADA litigation in district court. Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.

*1050 Thomas E. Frankovich and Jennifer L. Steneberg, Thomas E. Frankovich, A Professional Law Corporation, San Francisco, CA, for plaintiff-appellant **Jarek Molski** and appellant Thomas E. Frankovich, A Professional Law Corporation.

Robert H. Appert, San Gabriel, CA, for defendants-appellees Mandarin Touch Restaurant and Evergreen Dynasty Corporation.

Alan H. Boon and David B. Ezra, Berger Kahn, Irvine, CA, for defendants-appellees Brian McInerney and Kathy McInerney.

Lizabeth V. West, Charles L. Post, and Thadd A. Blizzard, Weintraub Genshlea Chediak, Sacramento, CA, for amici curiae California Restaurant Association, National Federation of Independent Businesses Legal Foundation, California Retailers Association, California Grocers Association, and California Farm Bureau.

Appeal from the United States District Court for the Central District of California; Edward Rafeedie, District Judge, Presiding. D.C. No. CV-04-00450-ER.

Before: JEROME FARRIS and RONALD M. GOULD, Circuit Judges, and KEVIN THOMAS DUFFY,^{FN*} District Judge.

FN* The Honorable Kevin Thomas Duffy,

Senior United States District Judge for the Southern District of New York, sitting by designation.

PER CURIAM:

This appeal presents two orders of the district court for our review. The first order declared **Jarek Molski** a vexatious litigant and ordered that **Molski** obtain leave of the court before filing any claims under Title III of the Americans With Disabilities Act ("ADA") in the United States District Court for the Central District of California. The second order sanctioned the law firm representing Molski, Thomas E. Frankovich, a Professional Law Corporation ("the Frankovich Group"), by requiring it to obtain leave of the court before filing any claims under Title III of the ADA in the Central District of California. We dismiss two of the defendants-appellees from this appeal for lack of jurisdiction. As to the remaining parties, we hold that the district court acted within its sound discretion in entering the pre-filing orders against Molski and against the Frankovich Group, and we affirm the orders of the district court.

I

Molski, who is paralyzed from the chest down, needs a wheelchair to get around. He has filed about 400 lawsuits in the federal courts within the districts in California. Molski lives in Woodland Hills, California, but frequently travels. According to Molski's amended complaint in this case, during his travels, he stopped at the Mandarin Touch Restaurant in Solvang, California on January 25, 2003. After finishing his meal, Molski decided to use the restroom. Molski was able to pass *1051 through the narrow restroom door, but there was not enough clear space to permit him to access the toilet from his wheelchair. Molski then exited the restroom, and in the course of doing so, got his hand caught in the restroom door, "causing trauma" to his hand. Molski's amended complaint also alleged that Mandarin Touch contained other accessibility barriers "too numerous to list."

Asserting claims under the ADA and California law, Molski, along with co-plaintiff Disability Rights

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Enforcement, Education Services: Helping You Help Others ("DREES"), a non-profit corporation, sought injunctive relief, attorneys' fees and costs, and damages. Specifically, the complaint sought "daily damages of not less than \$4,000/day ... for each day after [Molski's] visit until such time as the restaurant is made fully accessible" as well as punitive damages and pre-judgment interest. The amended complaint named as defendants Mandarin Touch Restaurant, Evergreen Dynasty Corp., and Brian and Kathy McInerney.

Shortly after the defendants answered the complaint, Mandarin Touch and Evergreen Dynasty filed a motion for an order (1) declaring Molski a vexatious litigant; (2) requiring Molski to obtain the court's permission before filing any more complaints under the ADA; and (3) imposing monetary sanctions against Molski and his counsel, Thomas E. Frankovich. Defendants Brian and Kathy McInerney did not join the motion. In a published order, the district court granted the motion in part, declaring Molski a vexatious litigant and granting the defendants' request for a pre-filing order. *Molski v. Mandarin Touch Rest.*, 347 F.Supp.2d 860, 868 (C.D.Cal.2004) [hereinafter *Mandarin Touch I*].

In determining that Molski was a vexatious litigant, the district court applied the five factors set forth in the opinion of the United States Court of Appeals for the Second Circuit in *Safir v. United States Lines, Inc.*, 792 F.2d 19, 24 (2d Cir.1986). Those factors are: (1) the litigant's history of litigation and in particular whether it entailed vexatious, harassing, or duplicative suits; (2) the litigant's motive in pursuing the litigation, for example, whether the litigant had a good faith expectation of prevailing; (3) whether the litigant is represented by counsel; (4) whether the litigant has caused unnecessary expense to the parties or placed a needless burden on the courts; and (5) whether other sanctions would be adequate to protect the courts and other parties. *Id.*

The district court first noted that Molski had an extensive history of litigation. *Mandarin Touch I*, 347 F.Supp.2d at 864. While acknowledging that the fact that a plaintiff has filed a large number of suits,

standing alone, does not warrant a pre-filing order, the district court noted that a large volume of suits might indicate an intent to harass defendants into agreeing to cash settlements. *Id.* The district court also noted that Molski's complaints were all textually and factually similar. *Id.* While again not entirely dispositive, the district court surmised that boilerplate complaints might indicate an intent to harass defendants. *Id.*

Against this background, the district court's reasoning made clear that the most important consideration was its specific finding that the allegations in Molski's numerous and similar complaints were "contrived and not credible." *See id.* The court stressed that Molski often filed multiple complaints against separate establishments asserting that Molski had suffered identical injuries at each establishment on the same day. *Id.* at 865. The district court pointed out that Molski had filed thirteen separate complaints for essentially identical injuries allegedly sustained during one five-day period in May 2003. *1052 *Id.* In particular, Molski had alleged that, at each establishment, he injured his "upper extremities" while transferring himself to a non-ADA-compliant toilet. *See id.* at 864-65. The district court explicitly found that, in making these duplicitous injury claims, Molski had "plainly lied" in his filings to the court because the district court "simply [did] not believe that Molski suffered 13 nearly identical injuries, generally to the same part of his body, in the course of performing the same activity, over a five-day period." *Id.* at 865, 867.

Applying the second *Safir* factor, the district court concluded that Molski's motivation in bringing numerous suits alleging both violations of the ADA and California state civil rights laws was to extract cash settlements from defendants. *Id.* at 866-67. Although the ADA grants private plaintiffs like Molski only the rights to seek injunctive relief, attorneys' fees, and costs, the California state civil rights laws amplify the scope of relief available under federal law by also permitting the recovery of money damages. Compare 42 U.S.C. §§ 2000a-3(a), 12188(a)(1), with Cal. Civ.Code §§ 51(f), 52(a), 54(c), 54.3(a); see also *Moeller v. Taco Bell Corp.*, 220 F.R.D. 604, 606-07 (N.D.Cal.2004) (discussing

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the remedies available under California law). The district court acknowledged that raising multiple claims in one suit is, in and of itself, not vexatious. *Mandarin Touch I*, 347 F.Supp.2d at 866. However, because Molski had tried on the merits only one of his approximately 400 suits and had settled all the others, the district court concluded that Molski's consistent approach was to use the threat of money damages under California law to extract cash settlements and move on to his next case. *Id.*

Applying the third factor from *Safir*, the district court found that Molski had been represented by counsel in every suit he filed. *Id.* The court wrote that "courts are generally protective of *pro se* litigants," but reasoned that "this same protection does not apply to litigants represented by counsel," and concluded that this factor also weighed in favor of issuing a pre-filing order. *Id.*

Under the fourth *Safir* factor, the district court determined that the large number of vexatious claims Molski had filed had placed an undue burden on the courts. *Id.*

Finally, applying the fifth factor from *Safir*, the district court found that the only effective way to protect the courts and other parties from future vexatious litigation by Molski was by entering a pre-filing order. *Id.* Accordingly, the district court held that, "[b]efore filing any new litigation alleging violations of Title III of the ADA in the United States District Court for the Central District of California, Molski[must] file a motion for leave to file a complaint." *Id.* at 868. The court required that Molski "submit a copy of this order and a copy of the proposed filing with every motion for leave." *Id.*

In the same order, the district court denied the motion of Evergreen Dynasty and Mandarin Touch for sanctions as pre-mature. *Id.* Finally, the district court issued an order to show cause why it should not impose a pre-filing sanction on Molski's attorneys, the Frankovich Group. *Id.* at 867.

About three months later, the district court issued a published memorandum decision regarding that

order to show cause. *See Molski v. Mandarin Touch Rest.*, 359 F.Supp.2d 924 (C.D.Cal.2005) [hereinafter *Mandarin Touch II*]. The district court imposed a pre-filing order on the Frankovich Group similar to the order that it had imposed on Molski. *Id.* at 926. In its decision, the district court first observed that in 2004 the Frankovich Group filed at least 223 nearly identical lawsuits in the Northern and Central Districts of California,*1053 that the complaints all stated an ADA claim and the same four claims under California state law, that the damages requested in each case were identical and that, other than superficial alteration of the names and facts, the complaints were textually identical down to the typos. *Id.* The district court also noted that plaintiffs represented by the Frankovich Group would often file multiple complaints regarding similar or identical injuries sustained at multiple establishments on a single day. *See id.* at 926-27. The district court noted that one-third of the suits were against ethnic restaurants and commented that "such establishments are seen as easy prey for coercive claims." *Id.* at 926.

Supplementing its findings from its decision accompanying the pre-filing order entered against Molski, the district court found that the Frankovich Group had filed sixteen lawsuits on Molski's behalf alleging injuries sustained over a four-day period from May 20, 2003 to May 23, 2003, all alleging that Molski suffered injuries to his upper extremities as a result of transfers or negotiating barriers. *Id.* at 928. The district court also noted that, on thirty-seven occasions in 2004 alone, Molski alleged that he had been injured two or more times on the same day. *Id.* On nineteen occasions, Molski alleged that he had been injured three or more times in one day. *Id.* And, on nine occasions in 2004, Molski alleged that he suffered four or more injuries in one day. *Id.*

Additionally, the district court discussed what it characterized as an "astonishing" letter the Frankovich Group had sent to defendants in at least two cases after suing them. *See id.* at 928. The letter described itself as "friendly advice" and counseled the unrepresented defendant against hiring a lawyer. *Id.* The letter warned that a defense attorney would embark on a "billing expedition"

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and that the defendant's money would be best spent on settlement and remediation of the ADA violations, rather than hiring a defense attorney. *Id.* The letter also advised the defendant that its insurance policy might cover the claim. *Id.* Finally, the letter advised the defendant that it had no bona fide defense to the lawsuit. *Id.*

Relying on its inherent power to levy sanctions, the district court ordered that The Frankovich Group, as presently constituted, and as it may hereafter be constituted, including shareholders, associates and employees, is required to file a motion requesting leave of court before filing any new complaints alleging violations of Title III of the Americans with Disabilities Act in the United States District Court for the Central District of California. Such a motion must include a copy of this order.

Id. at 926.

As the basis for its sanction, the court first emphasized the ethics rules violations contained in the letter discussed above. *Id.* at 929. For example, the letter offered legal advice to an unrepresented party whose interests conflicted with the interests of the Frankovich Group's clients. *Id.* (citing Model Rules of Prof'l Conduct R. 4.3).

Next, the district court found that many of the claims of bodily injury in complaints filed by the Frankovich Group were "contrived." *Id.* at 930. The court found in particular that "the rate of physical injury defies common sense," noting that the plaintiffs alleged similar injuries sustained in a similar fashion at different businesses on the same day. *Id.* The court noted that the similar injuries did not excuse the existence of accessibility barriers, but that its finding that the injury claims were contrived was "merely a recognition of the fact that reasonable people, once injured, tend to take affirmative steps to avoid similar physical injuries, rather than repeat*1054 that same activity 400 times (or five times in the same day)." *Id.* at 931.

The district court also criticized the practice of the Frankovich Group of waiting one year before filing their complaints, in order to maximize the damages

threatened and to intimidate the small businesses against whom the Frankovich Group frequently filed its suits. *Id.* at 932.

Finally, the district court found that the high settlement rate in cases brought by the Frankovich Group, coupled with the volume of cases filed, showed a pattern of extortion. *Id.* at 933-34.

In addition to imposing a pre-filing order on the Frankovich Group, the district court requested that the California state bar investigate the Frankovich Group's practices and consider disciplinary action. *Id.* In the same order, the district court dismissed the plaintiffs' state law claims, declining to exercise supplemental jurisdiction over them. *Id.* at 937.

On August 31, 2005, the district court, in a third published order, granted the defendants summary judgment on Molski's ADA claim for lack of standing. *Molski v. Mandarin Touch Rest.*, 385 F.Supp.2d 1042, 1044 (C.D.Cal.2005). Because Molski's ADA claim was the final claim remaining in the case, the district court also entered an order dismissing with prejudice the plaintiffs' case in its entirety. *Id.* at 1048. (The district court had already dismissed DREES's ADA claim for lack of standing in an unpublished order filed on February 9, 2005.)

On September 13, 2005, Molski and DREES filed their notice of appeal. The notice provided that the plaintiffs were appealing four rulings of the district court: (1) the December 2004 order declaring Molski a vexatious litigant; (2) the February 2005 order dismissing DREES's ADA claim for lack of standing; (3) the March 2005 order sanctioning the Frankovich Group; ^{FN1} and (4) the August 2005 order granting the defendants summary judgment on Molski's ADA claim for lack of standing and dismissing the case.

FN1. In the notice of appeal and in their brief to this court, the Frankovich Group characterizes the order entered against it as an order declaring it a "vexatious litigant."

The Frankovich Group characterizes the order in this fashion likely because we

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have held that “an attorney appearing on behalf of a client cannot be sanctioned as a vexatious litigant; by definition, he or she is acting as an attorney and not as a litigant.” *Weissman v. Quail Lodge, Inc.*, 179 F.3d 1194, 1197 (9th Cir.1999). However, the district court's order is an order imposing sanctions. In its order, the district court repeatedly refers to its inherent power to levy sanctions against attorneys who abuse the litigation process. See *Mandarin Touch II*, 359 F.Supp.2d at 928-29.

II

We first address whether the appeal of the pre-filing orders is timely. 28 U.S.C. § 2107(a) and Federal Rule of Appellate Procedure 4(a)(1)(A) provide that the notice of appeal in a civil case must be filed with the district court clerk within thirty days after the judgment or order appealed from is entered. If a party does not file a notice of appeal within the prescribed time limits, we have no jurisdiction to hear the case. *Bowles v. Russell*, --- U.S. ---, 127 S.Ct. 2360, 2363-64, 168 L.Ed.2d 96 (2007).

[1] Under 28 U.S.C. § 1291, parties may appeal to this court only “final decisions” of the district courts. A final decision is one that “ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.” *Cunningham v. Hamilton County*, 527 U.S. 198, 204, 119 S.Ct. 1915, 144 L.Ed.2d 184 (1999) (internal quotation marks omitted); *1055 *Catlin v. United States*, 324 U.S. 229, 233, 65 S.Ct. 631, 89 L.Ed. 911 (1945). Neither party disputes that the August 31, 2005 order dismissing the case was an appealable final decision. However, the McInerneys argue that the December 2004 pre-filing order entered against Molski and the March 2005 pre-filing order entered against the Frankovich Group were also final decisions and therefore immediately appealable. They maintain we must dismiss the appeal because the notice of appeal, filed on September 13, 2005, was filed more than thirty days after the entry of the pre-filing orders. Conversely, Molski and the Frankovich Group argue that the only final decision in this case

is the district court's August 31, 2005 order dismissing the plaintiffs' case in its entirety and that, because they filed a notice of appeal within thirty days of the entry of that order, their appeal is timely.

The appeal of the Frankovich Group is timely under the Supreme Court's decision in *Cunningham* and our subsequent decision in *Stanley v. Woodford*, 449 F.3d 1060 (9th Cir.2006). In *Cunningham*, the Supreme Court held that an order imposing sanctions on an attorney pursuant to Federal Rule of Civil Procedure 37(a)(4) was not an immediately-appealable “final decision.” 527 U.S. at 200, 119 S.Ct. 1915. In *Stanley*, we extended *Cunningham* and held that we do not have jurisdiction to entertain interlocutory appeals of district court orders sanctioning attorneys pursuant to the district court's inherent power to levy sanctions.^{FN2} *Stanley*, 449 F.3d at 1065. In this case, the district court entered the pre-filing order against the Frankovich Group under its inherent sanctioning power. *Mandarin Touch II*, 359 F.Supp.2d at 928. Because the Frankovich Group could not immediately appeal the pre-filing order entered against it, and because it filed its notice of appeal within thirty days of the district court's August 31, 2005 order dismissing the entire case, its appeal is timely.

FN2. Prior to *Cunningham*, we had permitted interlocutory appeals of sanctions orders entered against attorneys. See, e.g., *Telluride Mgmt. Solutions, Inc. v. Telluride Inv. Group*, 55 F.3d 463, 465 (9th Cir.1995); *Reygo Pac. Corp. v. Johnston Pump Co.*, 680 F.2d 647, 648 (9th Cir.1982); see also *Stanley*, 449 F.3d at 1063 (noting that “*Cunningham* effectively overruled earlier Ninth Circuit decisions allowing immediate appeal by attorneys from orders imposing sanctions”).

[2][3] Molski's appeal is also timely. As a general matter, a district court order imposing sanctions on a party is not appealable before the entry of a final judgment. See *Riverhead Sav. Bank v. Nat'l Mortg. Equity Corp.*, 893 F.2d 1109, 1113 (9th Cir.1990); *Johnny Pflocks, Inc. v. Firestone Tire &*

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Rubber Co., 634 F.2d 1215, 1216 (9th Cir.1980). However, we have not previously and specifically addressed whether pre-filing orders entered against vexatious litigants are immediately-appealable final decisions. As far as we can tell, no other circuit has considered this question either. We begin with the general presumption that "an appeal ordinarily will not lie until after final judgment has been entered in a case." *Cunningham*, 527 U.S. at 203, 119 S.Ct. 1915. For vexatious litigant orders to be appealable immediately, then, those orders would have to fall within the small category of decisions in which appeal is grounded on the collateral order doctrine which permits immediate appeal of orders that are conclusive and that cannot be effectively reviewed on the appeal of the final judgment. *Swint v. Chambers County Comm'n*, 514 U.S. 35, 42, 115 S.Ct. 1203, 131 L.Ed.2d 60 (1995).

As we see it, pre-filing orders entered against vexatious litigants are not conclusive and can be reviewed and corrected (if necessary) after final judgment. Though *1056 during the pendency of the appeal, the order might delay or prohibit a litigant from filing claims without leave of court, we have the authority to vacate the order entirely if we conclude the order was unjustified on the merits. *Johnny Pflocks*, 634 F.2d at 1216. Moreover, allowing immediate appeals of pre-filing orders would permit piecemeal appeals and result in a costly succession of appeals from the district court's rulings before entry of final judgment. *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374, 101 S.Ct. 669, 66 L.Ed.2d 571 (1981). We see no good reason to part ways from our case law holding that sanctions orders entered against a party are not immediately appealable, and we hold that pre-filing orders entered against vexatious litigants are also not immediately appealable. Because Molski filed his notice of appeal within thirty days of the district court's August 31, 2005 order dismissing the plaintiffs' entire case, Molski's appeal is timely.

III

Before we address the merits of the pre-filing orders, we must address a second jurisdictional issue. Brian and Kathy McInerney ask us to

dismiss them from this appeal because they were not parties to the motion that led to the pre-filing orders entered against Molski and the Frankovich Group. Because Article III limits our jurisdiction to "cases" and "controversies," we dismiss appeals as moot when "the parties lack a cognizable interest in the outcome of the suit." *H.C. v. Koppel*, 203 F.3d 610, 612 (9th Cir.2000); see *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000); *Powell v. McCormack*, 395 U.S. 486, 496, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969). As noted above, the plaintiffs initially appealed four rulings of the district court: the two pre-filing orders and the two orders dismissing Molski and DREES's claims for lack of standing. However, in their briefs, Molski and the Frankovich Group limit their arguments to the two pre-filing orders entered against them.^{FN3} The McInerneys were not a party to the motion that led to the pre-filing orders that now form the sole basis of the appeal in this case. See *Mandarin Touch I*, 347 F.Supp.2d at 861. The McInerneys thus have no cognizable interest in whether we affirm or vacate the pre-filing orders, and there is no justiciable dispute between the McInerneys and Molski and the Frankovich Group. We dismiss Brian and Kathy McInerney from this appeal for lack of jurisdiction.

FN3. In their reply brief, Molski and the Frankovich Group state:

Since the filing of their Notice of Appeal, appellants have narrowed the issues for appeal, and through their opening brief seek this Court's review of two of the lower court's orders-the order deeming appellant **Jarek Molski** a vexatious litigant and the order imposing a pre-filing petition sanction on appellant Thomas E. Frankovich, A Professional Law Corporation.

IV

[4] We next address whether the district court erred in declaring **Molski** a vexatious litigant and in entering a pre-filing order against him. Two district courts in our circuit disagree about whether **Molski's** frequent litigation is vexatious. In this

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case, the Central District of California deemed *Molski* a vexatious litigant. See *Mandarin Touch I*, 347 F.Supp.2d at 868. However, the Northern District of California has denied a motion to declare *Molski* a vexatious litigant in that district. See *Molski v. Rapazzini Winery*, 400 F.Supp.2d 1208, 1212 (N.D.Cal.2005). We review a pre-filing order entered against a vexatious litigant for abuse of discretion. *De Long v. Hennessey*, 912 F.2d 1144, 1146 (9th Cir.1990). A district court abuses *1057 its discretion when it bases its decision on an incorrect view of the law or a clearly erroneous finding of fact. *United States v. Finley*, 301 F.3d 1000, 1007 (9th Cir.2002); *Does 1-5 v. Chandler*, 83 F.3d 1150, 1152 (9th Cir.1996).

[5][6] The All Writs Act, 28 U.S.C. § 1651(a), provides district courts with the inherent power to enter pre-filing orders against vexatious litigants. *Weissman v. Quail Lodge Inc.*, 179 F.3d 1194, 1197 (9th Cir.1999). However, such pre-filing orders are an extreme remedy that should rarely be used. *De Long*, 912 F.2d at 1147. Courts should not enter pre-filing orders with undue haste because such sanctions can tread on a litigant's due process right of access to the courts. *Cromer v. Kraft Foods N. Am., Inc.*, 390 F.3d 812, 817 (4th Cir.2004); *Moy v. United States*, 906 F.2d 467, 470 (9th Cir.1990); see also *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982) (noting that the Supreme Court "traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances"); 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1336.3, at 698 (3d ed.2004). A court should enter a pre-filing order constraining a litigant's scope of actions in future cases only after a cautious review of the pertinent circumstances.

[7] Nevertheless, "[f]lagrant abuse of the judicial process cannot be tolerated because it enables one person to preempt the use of judicial time that properly could be used to consider the meritorious claims of other litigants." *De Long*, 912 F.2d at 1148; see *O'Loughlin v. Doe*, 920 F.2d 614, 618 (9th Cir.1990). Thus, in *De Long*, we outlined four

factors for district courts to examine before entering pre-filing orders. First, the litigant must be given notice and a chance to be heard before the order is entered. *De Long*, 912 F.2d at 1147. Second, the district court must compile "an adequate record for review." *Id.* at 1148. Third, the district court must make substantive findings about the frivolous or harassing nature of the plaintiff's litigation. *Id.* Finally, the vexatious litigant order "must be narrowly tailored to closely fit the specific vice encountered." *Id.*

The district court in this case did not apply the factors we outlined in *De Long*. Instead, the district court looked to Second Circuit case law for guidance, applying that circuit's vexatious litigant standard as outlined in *Safir*. See *Mandarin Touch I*, 347 F.Supp.2d at 863-64. *Molski* argues that the district court erred by structuring its analysis around the *Safir* factors rather than the factors we have identified.

One district court in our circuit has correctly observed that the *Safir* factors "have never been adopted by the Ninth Circuit." *Doran v. Vicorp Rests., Inc.*, 407 F.Supp.2d 1115, 1117 n. 3 (C.D.Cal.2005); see also *Wilson v. Pier 1 Imports (US), Inc.*, 411 F.Supp.2d 1196, 1198 (E.D.Cal.2006) (noting that the Ninth Circuit has developed a vexatious litigant standard separate from *Safir*). However, the Second Circuit's standard is not irreconcilable with our standard, but rather can be viewed as a tool for analyzing some of the factors we set forth in *De Long*, insofar as *Safir* and *De Long* in substance cover much of the same ground. As we noted above, we held in *De Long* that district courts considering imposing a pre-filing order on a vexatious litigant should consider four factors. The first two requirements, (1) notice and an opportunity to be heard and (2) the creation of an adequate record, are procedural considerations—that is, the factors define "[a] specific method or course of action" that district courts should use to assess whether to *1058 declare a party a vexatious litigant and enter a pre-filing order. *Black's Law Dictionary* 1241 (8th ed.2004). The latter two factors, requiring (3) findings of frivolousness or harassment and (4) that the order be narrowly tailored to prevent the litigant's abusive behavior,

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are substantive considerations—that is, the factors help the district court define who is, in fact, a “vexatious litigant” and construct a remedy that will stop the litigant’s abusive behavior while not unduly infringing the litigant’s right to access the courts.

The Second Circuit, by contrast, has instructed district courts, in determining whether to enter a pre-filing order, to look at five factors:

(1) the litigant’s history of litigation and in particular whether it entailed vexatious, harassing or duplicative lawsuits; (2) the litigant’s motive in pursuing the litigation, e.g., does the litigant have an objective good faith expectation of prevailing?; (3) whether the litigant is represented by counsel; (4) whether the litigant has caused needless expense to other parties or has posed an unnecessary burden on the courts and their personnel; and (5) whether other sanctions would be adequate to protect the courts and other parties.

Safir, 792 F.2d at 24. These five factors are substantive in that they all address whether a party is a vexatious litigant and whether a pre-filing order will stop the vexatious litigation or if other sanctions are adequate. The Second Circuit has held that district courts should use the five *Safir* factors to answer the ultimate substantive issue in resolving a motion for a pre-filing order: “whether a litigant who has a history of vexatious litigation is likely to continue to abuse the judicial process and harass other parties.” *Id.*; see also *Cromer*, 390 F.3d at 818 (using the *Safir* factors to “determin[e] whether a pre-filing injunction is substantively warranted”).

Thus, the Second Circuit’s five-factor standard provides a helpful framework for applying the two substantive factors (factors three and four) of our own four-factor standard. See *Rapazzini Winery*, 400 F.Supp.2d at 1210 (“The *Safir* test[']s examination of history of litigation, motive, and needless burden [is] useful in determining whether the current filings are frivolous and the question of whether other sanctions are adequate [is] similar to the Ninth Circuit’s requirement that any pre-filing order be narrowly tailored.”). While we structure our analysis here around the four factors we outlined in *De Long*, it was not reversible error for

the district court to structure its analysis around the similar factors identified by the Second Circuit.^{FN4}

FN4. Because the facts underlying the district court’s imposition of the pre-filing order on Molski are undisputed, we could decide the merits of this appeal even if the district court had applied an incorrect legal standard. See *Pullman-Standard v. Swint*, 456 U.S. 273, 292, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982); *Kelley v. S. Pac. Co.*, 419 U.S. 318, 331-332, 95 S.Ct. 472, 42 L.Ed.2d 498 (1974).

[8] The first factor under *De Long* is whether Molski was given notice and an opportunity to be heard before the district court entered the pre-filing order. This is a core requirement of due process. *De Long*, 912 F.2d at 1147. In this case, Molski had fair notice of the possibility that he might be declared a vexatious litigant and have a pre-filing order entered against him because the district court’s order was prompted by a motion filed by the defendants and served on Molski’s counsel. Also, Molski had the opportunity to oppose the motion, both in writing and at a hearing. Cf. *Pac. Harbor Capital, Inc. v. Carnival Air Lines, Inc.*, 210 F.3d 1112, 1118 (9th Cir.2000) (holding, in a case involving sanctions levied against an attorney, *1059 that “an opportunity to be heard does not require an oral or evidentiary hearing on the issue,” but instead that “[t]he opportunity to brief the issue fully satisfies due process requirements”).

[9] The second factor of the *De Long* standard is whether the district court created an adequate record for review. “An adequate record for review should include a listing of all the cases and motions that led the district court to conclude that a vexatious litigant order was needed.” *De Long*, 912 F.2d at 1147. The record before the district court contained a complete list of the cases filed by Molski in the Central District of California, along with the complaints from many of those cases. Although the district court’s decision entering the pre-filing order did not list every case filed by Molski, it did outline and discuss many of them. See *Mandarin Touch I*, 347 F.Supp.2d at 864-65.

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The district court supplemented its findings in *Mandarin Touch I* with a further discussion of Molski's litigation history in *Mandarin Touch II*. See *Mandarin Touch II*, 359 F.Supp.2d at 927-28. The district court compiled a record adequate for review of its order.

[10] The third factor set forth by *De Long* gets to the heart of the vexatious litigant analysis, inquiring whether the district court made " 'substantive findings as to the frivolous or harassing nature of the litigant's actions.' " *De Long*, 912 F.2d at 1148 (quoting *In re Powell*, 851 F.2d 427, 431 (D.C.Cir.1988)). To decide whether the litigant's actions are frivolous or harassing, the district court must "look at 'both the number and content of the filings as indicia' of the frivolousness of the litigant's claims." *Id.* (quoting *Powell*, 851 F.2d at 431). "An injunction cannot issue merely upon a showing of litigiousness. The plaintiff's claims must not only be numerous, but also be patently without merit." *Moy*, 906 F.2d at 470.

Molski concedes that he has filed numerous claims. However, **Molski** contends that his suits were not vexatious because they had merit. As the district court observed, it is likely that many of the businesses **Molski** sued were not in compliance with the ADA. *Mandarin Touch I*, 347 F.Supp.2d at 865. However, while **Molski's** complaints may have stated a legitimate claim for relief, it was not clearly erroneous for the district court to find that the claims of injury contained in those complaints were patently without merit. Because many of the violations **Molski** challenged were similar, it would have been reasonable for **Molski's** complaints to contain similar allegations of barriers to entry, inadequate signage, and so on. However, it is very unlikely that **Molski** suffered the same injuries, often multiple times in one day, performing the same activities—transferring himself from his wheelchair to the toilet or negotiating accessibility obstacles. Common sense dictates that **Molski** would have figured out some way to avoid repetitive injury-causing activity; even a young child who touches a hot stove quickly learns to avoid pain by not repeating the conduct. The district court's conclusion that **Molski** "plainly lied" in making his injury allegations was not clearly

erroneous.

In light of the district court's finding that **Molski** did not suffer the injuries he claimed, it was not clearly erroneous for the district court to conclude that the large number of complaints filed by **Molski** containing false or exaggerated allegations of injury were vexatious.

The district court's determination that **Molski** harassed defendants into cash settlements was justified by its findings regarding **Molski's** litigation strategy. California law provides that a plaintiff who suffers discrimination based on his or her disability may recover up to three times *1060 the amount of actual damages for each offense, and that, at a minimum, the plaintiff must recover damages of not less than \$4000. Cal. Civ.Code § 52(a). Thus, **Molski** usually sought damages of not less than \$4000 for each day that a facility did not comply with the ADA. Because **Molski** would often wait to file suit until a full year elapsed since his visit to the defendants' establishments, defendants often faced claims for statutory damages of over one million dollars. While **Molski's** claim for daily damages might have been legally justified,^{FN5} it was not clearly erroneous for the district court to find that **Molski's** litigation strategy evidenced an intent to harass businesses into cash settlements.^{FN6}

FN5. District courts in our circuit disagree about whether a plaintiff may seek daily damages under California Civil Code sections 52(a) and 54.3(a). Compare *Rapazzini Winery*, 400 F.Supp.2d at 1211 (holding that daily damages are not available under section 52(a)), and *Doran v. Embassy Suites Hotel*, No. C-02-1961, 2002 WL 1968166, at *6 (N.D.Cal. Aug.26, 2002) (holding that daily damages are not available under either section 52(a) or 54.3(a)), with *Botosan v. Fitzhugh*, 13 F.Supp.2d 1047, 1051-52 (S.D.Cal.1998) (holding that an allegation that a plaintiff "is being subjected to a discrimination" meant that the plaintiff had been deterred from visiting a public accommodation on a daily basis, and supported a claim for daily

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damages under sections 52(a) and 54.3(a)); see also *Arnold v. United Artists Theatre Circuit, Inc.*, 866 F.Supp. 433, 439 (N.D.Cal.1994) (suggesting that a plaintiff can claim damages under sections 52(a) and 54.3(a) for each particular occasion of deterrence). We could not find any California court that has spoken on this issue.

FN6. We note that there was a substantial disconnect between the magnitude of injuries Molski suffered and the amount of damages he sought to recover. For example, in this case, in a declaration submitted to the district court, Molski admitted that the injury he suffered at Mandarin Touch-scraping his hand on the door frame was "not a big injury." Nonetheless, Molski claimed damages of "not less than \$4,000" for each of the 363 days that elapsed between when he visited Mandarin Touch on January 25, 2003, and when he filed his complaint on January 23, 2004. Molski thus made a damage claim of no less than \$1,452,000 on the day he filed his complaint, with that amount growing by the day. Even if Molski could claim statutory minimum damages in an amount far greater than any actual injury he suffered, see *Continental Cablevision, Inc. v. Poll*, 124 F.3d 1044, 1049 (9th Cir.1997) (suggesting that statutory damages do not require proof of injury); *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1306 (9th Cir.1990) (same), Molski's claims of damages far in excess of the injuries he suffered are not entirely irrelevant to determining whether his litigation was vexatious.

By seeking damages of *not less than* \$4000 per day, Molski would claim actual damages beyond those to which he was arguably entitled under the California statutes. See Cal. Civ.Code §§ 52(a), 54.3(a) (permitting the recovery of actual damages). Also, there existed a possibility that the district court would

reject the notion that Molski could recover daily damages, see *supra* note 5, and that Molski would be forced to seek, for the most part, actual damages. Additionally, Molski's complaints usually sought punitive damages. In all of those situations, to recover actual or punitive damages, Molski would need to prove a corresponding injury. Cf. *Continental Cablevision, Inc.*, 124 F.3d at 1049; *Six (6) Mexican Workers*, 904 F.2d at 1306. Because he claimed damages far in excess of his actual injuries, his exaggerated claims of damages support a pre-filing order to the extent that he sought to recover more than the statutory minimum of damages.

The district court also did not err when it inferred an intent to harass defendants into settlement from the fact that Molski had tried on the merits only one of his roughly 400 ADA cases and the fact that Molski and the Frankovich Group targeted ethnic restaurants viewed as easy prey for coercive claims.

Frivolous litigation is not limited to cases in which a legal claim is entirely without merit. It is also frivolous for a claimant who has some measure of a legitimate claim to make false factual assertions. *1061 Just as bringing a completely baseless claim is frivolous, so too a person with a measured legitimate claim may cross the line into frivolous litigation by asserting facts that are grossly exaggerated or totally false. In an adversary system, we do not fault counsel or client for putting their best arguments forward, and it is likely the unusual case in which a finding of frivolous litigation follows in the train of a legitimate legal claim. It is a question of degree where the line falls between aggressive advocacy of legitimate claims and the frivolous assertion of false allegations. In this case, the district court, looking at the allegations of hundreds of lawsuits, made a decision that Molski's baseless and exaggerated claims of injuries exceeded any legitimacy and were made for the purpose of coercing settlement. We cannot on this record conclude that the district court's factual determinations were clearly erroneous or that the district court erroneously reached the legal

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conclusion that Molski's litigation was vexatious.

[11] The fourth and final factor in the *De Long* standard is that the pre-filing order must be narrowly tailored to the vexatious litigant's wrongful behavior. In *De Long*, we held overbroad an order preventing the plaintiff from filing any suit in a particular district court. *De Long*, 912 F.2d at 1148. Likewise, in *O'Loughlin*, we held that an order requiring a plaintiff to show good cause before making any request to proceed in forma pauperis was not narrowly tailored. *O'Loughlin*, 920 F.2d at 618. Also, in *Moy* we held that an order requiring a plaintiff to obtain leave of court to file any suit was overly broad when the plaintiff had only been highly litigious with one group of defendants. *Moy*, 906 F.2d at 470. Here, by contrast, the district court's order is much narrower-it only prevents Molski from filing actions under Title III of the ADA in the Central District of California. The order thus appropriately covers only the type of claims Molski had been filing vexatiously-ADA claims. Cf. *Cromer*, 390 F.3d at 818-19 (vacating a pre-filing order that prevented the plaintiff from making "any and all filings" in the present case and also enjoined him from making any future filings in any unrelated case in the district court without obtaining permission from the magistrate judge who issued the order); *In re Packer Ave. Assocs.*, 884 F.2d 745, 748 (3d Cir.1989) (vacating as not narrowly tailored a pre-filing order "prohibiting a litigant from ever again filing a document in federal court"). The order also does not prevent Molski from filing any ADA complaints, it merely subjects Molski's complaints to an initial screening review by a district judge. The order is narrowly tailored because it will not deny Molski access to courts on any ADA claim that is not frivolous, yet it adds a valuable layer of protection, which we think was warranted, for the courts and those targeted by Molski's claims. See *Franklin v. Murphy*, 745 F.2d 1221, 1232 (9th Cir.1984).

[12][13] In summary, we reemphasize that the simple fact that a plaintiff has filed a large number of complaints, standing alone, is not a basis for designating a litigant as "vexatious." *De Long*, 912 F.2d at 1147; *In re Oliver*, 682 F.2d 443, 446 (3d

Cir.1982). We also emphasize that the textual and factual similarity of a plaintiff's complaints, standing alone, is not a basis for finding a party to be a vexatious litigant. Accessibility barriers can be, and often are, similar in different places of public accommodation, and there is nothing inherently vexatious about using prior complaints as a template. See *Wilson*, 411 F.Supp.2d at 1196 (stating that uniform instances of misconduct can justify uniform pleadings).

As we discussed above, the ADA does not permit private plaintiffs to seek damages,*1062 and limits the relief they may seek to injunctions and attorneys' fees. We recognize that the unavailability of damages reduces or removes the incentive for most disabled persons who are injured by inaccessible places of public accommodation to bring suit under the ADA. See Samuel R. Bagenstos, *The Perversity of Limited Civil Rights Remedies: The Case of "Abusive" ADA Litigation*, 54 U.C.L.A. L.Rev. 1, 5 (2006). As a result, most ADA suits are brought by a small number of private plaintiffs who view themselves as champions of the disabled. District courts should not condemn such serial litigation as vexatious as a matter of course. See *De Long*, 912 F.2d at 1148 n. 3. For the ADA to yield its promise of equal access for the disabled, it may indeed be necessary and desirable for committed individuals to bring serial litigation advancing the time when public accommodations will be compliant with the ADA. But as important as this goal is to disabled individuals and to the public, serial litigation can become vexatious when, as here, a large number of nearly-identical complaints contain factual allegations that are contrived, exaggerated, and defy common sense. False or grossly exaggerated claims of injury, especially when made with the intent to coerce settlement, are at odds with our system of justice, and Molski's history of litigation warrants the need for a pre-filing review of his claims.

We acknowledge that Molski's numerous suits were probably meritorious in part-many of the establishments he sued were likely not in compliance with the ADA. On the other hand, the district court had ample basis to conclude that Molski trumped up his claims of injury. The

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district court could permissibly conclude that Molski used these lawsuits and their false and exaggerated allegations as a harassing device to extract cash settlements from the targeted defendants because of their noncompliance with the ADA. In light of these conflicting considerations and the relevant standard of review, we cannot say that the district court abused its discretion in declaring Molski a vexatious litigant and in imposing a pre-filing order against him.

V

[14] The final issue in this case is whether the district court erred in imposing a pre-filing order against the Frankovich Group. We review the district court's imposition of sanctions against an attorney for abuse of discretion. *Weissman*, 179 F.3d at 1197; *Yagman v. Republic Ins.*, 987 F.2d 622, 628 (9th Cir.1993). "A district court abuses its discretion in imposing sanctions when it bases its decision 'on an erroneous view of the law or on a clearly erroneous assessment of the evidence.' " *Mark Indus., Ltd. v. Sea Captain's Choice, Inc.*, 50 F.3d 730, 732 (9th Cir.1995) (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990)).

The district court in this case sanctioned the Frankovich Group with a pre-filing order pursuant to its inherent power to regulate abusive or bad-faith litigation. *Mandarin Touch II*, 359 F.Supp.2d at 928; see *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-44, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991); *Link v. Wabash R.R. Co.*, 370 U.S. 626, 632, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962). "This inherent power derives from the lawyer's role as an officer of the court which granted admission." *In re Snyder*, 472 U.S. 634, 643, 105 S.Ct. 2874, 86 L.Ed.2d 504 (1985) (citations omitted). The Supreme Court has cautioned that, because of the potency of attorney sanction orders, courts must exercise their inherent sanctioning authority with restraint and sound discretion. *Chambers*, 501 U.S. at 45, 111 S.Ct. 2123; *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980).

*1063 [15][16][17][18] As a procedural matter, before imposing sanctions on an attorney, the district court must afford the attorney notice and an opportunity to be heard. *Weissman*, 179 F.3d at 1198. As a substantive matter, justifications for imposing a pre-filing sanction on an attorney "include the attorney's willful abuse of the judicial process, bad faith conduct during litigation, or filing frivolous papers." *Id.* (citations and internal quotation marks omitted). Violations of ethics rules can also serve as a ground for imposing sanctions. See, e.g., *Gomez v. Vernon*, 255 F.3d 1118, 1134 (9th Cir.2001); *Erickson v. Newmar Corp.*, 87 F.3d 298, 303 (9th Cir.1996); see also C.D. Cal. Local R. 83-3.1.2 (providing that attorneys practicing in the district court must comply with the Rules of Professional Conduct of the State Bar of California, that any violation of those rules "may be the basis for the imposition of discipline," and that the Model Rules of Professional Conduct of the American Bar Association may also be considered as guidance when disciplining attorneys). Additionally, the sanction imposed must be tailored to curtail the attorney's particular misconduct. *Chambers*, 501 U.S. at 57, 111 S.Ct. 2123; *Support Sys. Int'l, Inc. v. Mack*, 45 F.3d 185, 186 (7th Cir.1995) (per curiam); *Orlett v. Cincinnati Microwave, Inc.*, 954 F.2d 414, 420 (6th Cir.1992).

[19] In this case, the district court afforded the Frankovich Group notice and an opportunity to be heard before imposing its sanction. On December 10, 2004, the district court issued an order to show cause why the court should not impose a pre-filing order on the Frankovich Group for its role in facilitating Molski's litigation. *Mandarin Touch I*, 347 F.Supp.2d at 867. The Frankovich Group responded to the order in writing, and on February 7, 2005, the district court conducted a hearing on the order. These proceedings provided the Frankovich Group the notice and opportunity to be heard that due process requires. See *Pac. Harbor Capital*, 210 F.3d at 1118; *Weissman*, 179 F.3d at 1198.

[20] The district court also did not abuse its discretion in making the substantive determination that a pre-filing order was justified based on the

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conduct of the Frankovich Group. As discussed above, Molski's complaints repeatedly alleged injuries that the district court found to be contrived and untrue. Also, the claims of injuries often were inconsistent with the barriers alleged. For example, complaints filed by the Frankovich Group would allege bodily injury suffered as a result of inadequate signage or the lack of an accessible parking space.

In light of the similarity and exaggerated nature of the frequent injuries Molski alleged, we concluded above that the district court's findings regarding the lack of veracity in Molski's complaints were not clearly erroneous and that the district court was within its discretion in imposing a pre-filing order on Molski. When a client stumbles so far off the trail, we naturally should wonder whether the attorney for the client gave inadequate or improper advice. That the Frankovich Group filed numerous complaints containing false factual allegations, thereby enabling Molski's vexatious litigation, provided the district court with sufficient grounds on which to base its discretionary imposition of sanctions. *Weissman*, 179 F.3d at 1198.

The district court also emphasized that the letter that the Frankovich Group sent to the defendants in at least two cases may have violated multiple ethics rules. While we do not rely on the possible ethical violations as a ground for affirming the sanction imposed on the Frankovich Group, we note that Frankovich Group's decision to send letters that many might view as intimidating to unrepresented defendants was, at best, a questionable exercise *1064 of professional judgment. The letters gave legal advice to unrepresented parties whose interests conflicted with the interests of the Frankovich Group, and this advice quite possibly ran afoul of relevant ethical rules. See Model Rules of Prof'l Conduct R. 4.3 ("The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client."); Model Code of Prof'l Responsibility DR 7-104(A)(2) (providing that "a lawyer shall not ... [g]ive advice to a person who is not represented

by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client").

Additionally, the letters advised the defendant that it had no bona fide defense to the ADA action, when in fact this might not be true in a particular case. For example, the ADA requires the removal of barriers in certain structures only when "such removal is readily achievable." 42 U.S.C. § 12182(b)(2)(A)(iv). This possibly false statement of law may have violated ethics provisions regarding a lawyer's candor to third parties. See Model Rules of Prof'l Conduct R. 4.1(a) (providing that "[i]n the course of representing a client a lawyer shall not knowingly ... make a false statement of material fact or law to a third person"); Model Code of Prof'l Responsibility DR 7-102(A)(5).

The advice that the defendant might have insurance covering the alleged ADA violation might also have violated Model Rule 4.1(a) and Disciplinary Rule 7-102(A)(5) because California courts have held that an insurance company has no contractual duty to defend in an ADA suit alleging that a defendant's facilities were inaccessible. See *Modern Dev. Co. v. Navigators Ins. Co.*, 111 Cal.App.4th 932, 943, 4 Cal.Rptr.3d 528 (2003). But because the district court was within its discretion in sanctioning the Frankovich Group based on the questionable allegations of physical injury in the complaints they filed, we need not rely on the possible ethics rules violations as a ground for affirming the district court's sanction.^{FN7}

FN7. Because we do not need to rely on the possibility of ethical rule violations to sustain the district court's pre-filing order against the Frankovich Group, and we decline to do so, we also do not make an ultimate determination whether or not any ethical rule violations occurred. As a general matter, decisions on whether lawyers have violated their ethical obligations are best made in the context of formal bar association proceedings where

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procedural due process protects the lawyer's rights while assessing any harm to the public.

[21] Finally, we hold that the district court's pre-filing sanction is sufficiently tailored to combat the Frankovich Group's practice of repetitive litigation based on false allegations of injury. The sanction requires the Frankovich Group to seek leave of the court before filing any more ADA complaints in the Central District of California, and requires that the district court's order in this case accompany the Frankovich Group's motion for leave. Functionally, the sanction ensures that a judge will initially determine whether the factual allegations in future complaints are colorable. The order will protect against the extracting of possibly unjustified settlements from uncounseled small-business defendants intimidated by the spectre of a federal complaint coupled with a coercive and misleading communication from a law firm. However, the order does not make it impossible for the Frankovich Group to pursue meritorious ADA litigation in the district court. See *Franklin*, 745 F.2d at 1232. Moreover, as far as the evidence before the district court showed, the Frankovich*1065 Group only used abusive litigation tactics in connection with litigation under the ADA. The pre-filing order rightly applies only to complaints asserting claims for relief under the ADA. See *De Long*, 912 F.2d at 1148; *O'Loughlin*, 920 F.2d at 618. For these reasons, we hold that the pre-filing order imposed in this case is adequately tailored to punish the past sanctionable conduct of the Frankovich Group, and, more importantly, to protect the courts and the public from any future misconduct by that law firm.^{FN8} Lawyers are required to give their clients' interests zealous advocacy, and while the pre-filing order in this case will not stand in the way of advocacy for legitimate claims, it will help to ensure that the services of the Frankovich Group are used in support of valid claims and not as a device to encourage settlement of unwarranted or exaggerated claims. We affirm the district court's order imposing sanctions on the Frankovich Group.

FN8. District courts have broad discretion

in fashioning sanctions. *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 961 (9th Cir.2006); *Ritchie v. United States*, 451 F.3d 1019, 1026 (9th Cir.2006); *Falstaff Brewing Corp. v. Miller Brewing Co.*, 702 F.2d 770, 786 (9th Cir.1983) (Wallace, J., dissenting in part). Permissible sanctions when vexatious litigation is encountered may include not only a pre-filing order, but also monetary sanctions or even the ultimate sanction of dismissal of claims. We do not here hold that, if a court encounters vexatious litigation, a pre-filing order is the only permissible form of sanction. Rather, the district court may exercise its sound discretion under the facts presented to choose any appropriate sanction that will punish the past misconduct and prevent the future misconduct of the lawyer or party at issue.

VI

In summary, we dismiss defendants Brian and Kathy McInerney from this appeal for lack of jurisdiction. We affirm the district court's order declaring Molski a vexatious litigant and requiring him to obtain leave of the court before filing another ADA complaint in the Central District of California. We also affirm the district court's order sanctioning the Frankovich Group and imposing a similar pre-filing order on it. Costs are awarded to the appellees.

AFFIRMED IN PART, DISMISSED IN PART.

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