CIVILITY IN EVERYDAY LAWYERING — 2014

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The Civility Rules:

Standards of civility in the New York legal community appear primarily in (i) Part 130 of the Rules of the Chief Administrator of the Courts (22 NYCRR §§ 130-1 and 1200, Appendix A), (ii) Part 221 of the Rules of the Chief Administrator of the Courts (22 NYCRR §§ 221.1 *et seq.*), (iii) various provisions of the Rules of Professional Conduct ("RPC") (codified at 22 NYCRR § 1200), and (iv) local rules for the various courts.[1]

The text below discusses judges' treatment of attorneys whose conduct, among other things, ran afoul of the following rules (or, in the case of the Rules of Professional Conduct, predecessor provisions of the former Disciplinary Rules):

1. RPC 8.4(d): prohibiting an attorney from engaging in conduct that is "prejudicial to the administration of justice."

2. RPC 8.4(b): prohibiting a lawyer or law firm from engaging "in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer."

3. RPC 3.3(f): decreeing that in appearing as a lawyer before a tribunal, a lawyer shall not "engage in undignified or discourtesy conduct" (subdivision [2]) or "engage in conduct intended to disrupt the tribunal" (subdivision [4]).

4. 22 NYCRR § 1200, Appendix A: The Standards of Civility, a "set of guidelines intended to encourage lawyers, judges and court personnel to observe principles of civility and decorum, and to confirm the legal

[1] Rules and guidelines discussed in these materials appear in the attached addendum or elsewhere in the course materials.

profession's rightful status as an honorable and respected profession where courtesy and civility are observed as a matter of course."[2]

5. 22 NYCRR § 130-1.1(c)(1) and (2): conduct is sanctionable if "it is completely without merit and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law," or, if "it is undertaken primarily to delay or prolong the resolution of litigation," or, "to harass or maliciously injure another" (mirrored by DR 2-109[a][1] and DR 7-102[a][1], prohibiting a lawyer from bringing an action merely for the purpose of harassing or maliciously injuring any person).[3]

Rule 3.1 of the Rules of Professional Conduct says that a "lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there

[2] Although the Standards of Civility are "not intended to be enforced by sanction or disciplinary action," they are nevertheless devised to "encourage both judges and lawyers to observe principles of civility, and to confirm the legal profession's rightful status as an honorable and respected profession where courtesy and civility are observed as a matter of course." 22 NYCRR § 1200, Appendix A at Preamble. The standards consist of twelve guidelines, many containing one or more subsections, which lend guidance to the conduct expected from the bench, the bar, and courtroom personnel.

[3] Sanctions under 22 NYCRR 130-1.1 may include an order requiring payment directly to the opposing party or counsel for expenses reasonably incurred as a result of the frivolous conduct. In addition, courts may impose financial sanctions payable to the Lawyer's Fund for Client Protection (22 NYCRR § 130-1.3). Before the court levies monetary sanctions, the offending party or lawyer must have a reasonable opportunity to be heard. 22 NYCRR § 130-1.1(d). In assessing whether conduct is frivolous, courts will evaluate:

a) the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct; and

b) whether the conduct was continued when its lack of factual basis was apparent, or should have been apparent.

is a basis in law and fact for doing so that is not frivolous." Rule 3.1(b) continues that a lawyer's conduct is frivolous "for purposes of this Rule" if:

> (1) the lawyer knowingly advances a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law;
>
> (2) the conduct has no reasonable purpose other than to delay or prolong the resolution of litigation, in violation of Rule 3.2, or serves merely to harass or maliciously injure another; or
>
> (3) the lawyer knowingly asserts material factual statements that are false.

Practitioners, especially those who go to court, have to confront differing—and perhaps conflicting—definitions of "frivolous" conduct they are mandated to avoid. Under Rule 3.1(b)(1), a lawyer's conduct is frivolous *for purposes of the Rule* if the lawyer knowingly advances a claim or defense that is unwarranted under existing law (except, of course, that the lawyer can advance the claim or defense if it is supported by a good faith argument for change in existing law). Under 22 NYCRR §130-1.1(c), "for purposes of [Part 130], conduct is frivolous" if it is "*completely* without merit in law," subject to a "*reasonable* argument" for change in the law (emphases added).

Can conduct that is unwarranted under existing law, thus in violation of Rule 3.1 and subjecting the lawyer to disciplinary measures, nonetheless not be *completely* without merit, thus protecting the lawyer from a Part 130 sanction?

Here, the professional disciplinary norm seems stricter than the lawyer's Rule-based responsibilities that can result in court sanctions. On the other hand, conduct "undertaken *primarily* to delay or prolong the resolution of the litigation, or to harass or maliciously injure another," is frivolous, thus sanctionable under Part 130. But in order to breach the Rules of Professional Conduct, the conduct must have "*no* reasonable purpose other than to delay or prolong the resolution of litigation," or serve "merely to harass or maliciously injure another" (emphasis added). Conduct, accordingly, intended primarily to delay, harass, or injure maliciously, but which also has a secondary purpose (for example, to advance the client's cause), will violate Part 130, putting the lawyer at risk of a court-imposed sanction, but will not breach Rule 3.1.

These differences mirror the variations between Part 130 and the now-superseded Code of Professional Responsibility. Course materials for earlier presentations of this program segment asked if, in adopting the Rules of Professional Conduct, the Appellate Divisions intended to continue the suggestion that conduct might breach one set of norms but not the other, and whether the Appellate Divisions even considered the differences between the provisions. No reported case has addressed these issues, so the answers remain unclear.

Individual court rules often follow, or refer to, the rules cited above. For example, as a ground for discipline, Rule 1.5(b) of the Local Rules for the United States District Courts for the Southern and Eastern Districts of New York includes

a finding that an attorney "engaged in conduct violative of the New York State Rules of Professional Conduct." The Local Rules for the Appellate Divisions, First and Second Departments, declare that "[d]ignity, order and decorum are indispensable to the proper administration of justice. Disruptive conduct by any person while in the court is in session is forbidden." 22 NYCRR §§ 604.1(b), 700.2. The rules also require attorneys to "avoid disorder and disruption in the courtroom," and "maintain a respectful attitude toward the court," and refer to every attorney's obligation to adhere to the Rules of Professional Conduct at all times--inside and outside the courtroom.[4] 22 NYCRR 604(1)(d), 700.4.

Hot Topics:

Recent decisions addressing lawyers' uncivil behavior abound. There is increased attention to lawyers' conduct, and now more than ever, clients can suffer the consequences of their lawyers' conduct. In *Arpino v. F.J.F. & Sons Electric Co., Inc.*, 102 A.D. 3d 201 (2d Dep't 2012), the Appellate Division reversed a Supreme Court order denying the plaintiff's motion to strike the defendants' answer or alternatively to preclude the defendants from calling witnesses and presenting evidence, on the ground that the defendants had failed to comply timely with court-ordered discovery mandates, and granted the preclusion. Justice Austin's decision for the court suggests that the Second Department has reached the

[4] The local rules for the Third Department contain a similar provision. *See* Local Rules for the Supreme Court of the State of New York, Appellate Division, Third Department § 806.2 (Attorney Misconduct Defined).

saturation level with attorneys' non-compliance with discovery orders, and that the consequences of lawyers' non-compliance now will be imposed on their clients. He wrote: "The failure to abide by these basic rules governing compliance with disclosure orders cannot and will not be tolerated in our courts." *Id*. at 208. Accordingly, "[a]lthough perhaps an undesirable outcome, parties, where necessary, will be held responsible for the failure of their lawyers to be court-ordered deadlines and provide meaningful responses to discovery demands and preliminary conference orders. *Id.* at 207-08. The decision should serve as a red flag to practitioners in the Second Department.

Whether this and other cases reflect a real increase in questionable behavior or simply increased judicial attention to the subject, the conclusion seems inescapable that uncivil behavior can jeopardize a client's substantive position even as it risks unfavorable mention of the lawyer's name in a prominent place in the *New York Law Journal*. *See, e.g.*, *GMAC Bank v. HTFC Corp.*, 248 F.R.D. 182 (E.D. Pa. 2008) (discussed at length below).

For several years, *GMAC* has stood as hallmark of inappropriate conduct, although the client was the principal malefactor while the lawyer played a supporting role. Now, the Florida Supreme Court has disciplined two lawyers whose conduct seems comparable. The pair exchanged insulting e-mails in which one referred to "bottom feeding/scum sucking/loser lawyers like yourself" and the other wrote that the first displays symptoms of a disability marked by "closely

spaced eyes, dull blank stare, bulbous head, [and] lying" and later, after learning that the first lawyer's son suffers from a birth defect, that "[w]hile I am sorry to hear about your disabled child, that sort of thing is to be expected when a retard reproduces." *See Florida Bar v. Mitchell*, 46 So. 3d 1003 (Fla. 2010) (reciprocal discipline was imposed in the District of Columbia, *see* 21 A.3d 1004 [D.C. Ct. App. 2011] and Pennsylvania [*see* 2011 Pa. Lexis 2308]); *Florida Bar v. Mooney*, 49 So. 3d 748 (Fla. 2010).[5] One lawyer received a public reprimand and was directed to take a course in professionalism; the other won a ten-day suspension and orders to attend an anger management course. (The suspended lawyer also received ten-day suspensions in Pennsylvania and the District of Columbia, where he was also admitted. *See In Re Mitchell*, 2011 Pa. LEXIS 2308 [Sept. 26, 2011]; *In Re Mitchell*, 21 A.3d 1004 [D.C. App. 2011]). How the dispute became public and came before the disciplinary authorities remains unclear.

In an another extraordinary case, the Minnesota Supreme Court barred a lawyer from practicing for 15 months after he admitted having sex with a matrimonial client and billing her for his time. *See In re Lowe*, 824 N.W.2d 634 (Minn. 2013), *see also* www.thelaw.net/minnesota-lawyer-disbarred-for-servicing-client.

[5] The respective complaints and accompanying exhibits are available at http://www.tampabay.com/specials/2010/PDFs/mitchellcomplaint.pdf and http://www.tampabay.com/specials/2010/PDFs/MooneyComplaint.PDF

For other examples of lawyers' incivility that resulted in public mention, *see Laddcap Value Partners, LP v. Lowenstein Sandler P.C.*, 18 Misc. 3d 1130A, 859 N.Y.S.2d 895 (Sup. Ct. N.Y. Co. 2007) (ordering special referee to oversee all future depositions, after male lawyer referred at deposition to female adversary as "hon" and "girl," asked why she was not wearing a wedding ring, and said she had "a cute little thing going on"); "Deposition Remarks Reflect Lack of Civility, Court Finds," N.Y.L.J. (Dec. 12, 2007), *available at* http://www.law.com/jsp/nylj/PubArticleFriendlyNY.jsp?id=900005498197; *Wolters Kluwer Fin. Serv. Inc. v. Scivantage*, 525 F. Supp. 2d 448 (S.D.N.Y. 2007), *aff'd in part, rev'd in part*, 564 F.3d 110 (2d Cir. 2006) (Judge Baer sanctioned partner at major firm for frequent misrepresentations, failures to follow court orders, and other instances of incivility; Second Circuit affirmed sanctions imposed on lawyer, but reversed sanctions imposed on another lawyer and the law firm); *In re Peters*, 543 F. Supp. 2d 326, 335 (S.D.N.Y. 2008) (Judge Rakoff, acting for the Committee on Grievances, suspended the lawyer in the *Wolters Kluwer* case from practice in the Southern District pending further order)[6]; *Stern v. Burkle*, 2007 N.Y. Misc. LEXIS 6402, 238 N.Y.L.J. 51 (Sup. Ct. N.Y. Co. Sept. 6, 2007) (in action against, among others, Bill and Hillary Clinton, denying

[6] The Court of Appeals for the Second Circuit reversed the order of the Southern District Committee on Grievances suspending the lawyer for seven years, holding that the committee should have conducted its own fact-finding hearing, rather than rely on facts found by the District Court. *In Re Peters*, 642 F.3d 381 (2d Cir. 2011). This case offers yet another instance in which a lawyer, although exonerated on appeal from a disciplinary sanction, found her circumstance spread across the front page of the *New York Law Journal*.

application for admission *pro hac vice* of out-of-town lawyer for plaintiffs, on basis of his sanctionable conduct in other jurisdictions, including instances of discovery abuse, conduct degrading to court and prejudicial to administration of justice, and rude and unprofessional behavior directed toward judge and adversary).[7]

A lawyer's failure to pay a judgment may result in discipline. In *Matter of Harrington*, 112 A.D.3d 201 (1st Dep't 2013), the First Department disbarred a lawyer charged with failing to satisfy a Civil Court judgment against him and in favor of a client. The court based its action not only on the lawyer's silence in the face of the proceeding (deemed a failure to cooperate with the committee investigation into his conduct), but also his failure to satisfy the judgment. The lawyer doubtless did not aid his case when, upon having been advised by the committee that he might face a judicial subpoena if he did not respond to its requests, he wrote back, "Wow. A judicial subpoena! Perhaps you expect us to be concerned. Prepare to be disappointed." "Panel Disbars Attorney Who Did Not Pay Judgment," *NYLJ*, Nov. 14, 2013.

[7] Admission *pro hac vice* never can be assumed. In *Southerland v. Woo*, 2014 U.S. Dist. LEXIS 23944 (E.D.N.Y. Feb. 24, 2014), after a mistrial Judge Brian Cogan refused to re-admit *pro hac vice* a lawyer for the second trial. The lawyer was admitted to practice in state court, but not in the Eastern District. Judge Cogan wrote that he had never had before him "in any case [a lawyer] who has demonstrated the defiance, lack of respect, and unawareness of local practice and the Federal Rules of Civil Procedure as [the lawyer] demonstrated during the [first] trial." Judge Cogan cited various examples of the lawyer's tardiness, misrepresentations to the court, refusal to follow procedural directions, and unfamiliarity with federal practice.

The failure to extend courtesies, such as routine extensions, can result in embarrassment beyond the boundaries of a case. *See, e.g., Cushman v. Shinseki*, United States Court of Appeals for Veterans Claims, Case No. 05-3207 in which the Secretary of Veteran's Affairs opposed an appellant's request to extend the time to file his reply brief: "The Secretary's argument can be summarized as 'I oppose this motion because Mr. Cushman opposed mine first.'" (The appellant wished to move quickly to seek withheld benefits to which he claimed entitlement.) The court wrote: "Apart from the schoolyard concept that turnabout is fair play, the Secretary does not provide a basis upon which the Court should not grant the 14-day extension."

The Securities and Exchange Commission reminds us that administrative agencies will police the activities of lawyers who practice before them, even in the absence of disciplinary activity by a court or bar disciplinary body. Thus in *Matter of Altman*, 2010 SEC LEXIS 3762 (Nov. 10, 2010) the Commission imposed a lifetime bar on a lawyer practicing before it, although he was not the subject of other disciplinary proceedings. Finding that he had told an adversary that his client, an ex-employee, would testify falsely to the Commission in exchange for a severance package from the employer, the Commission wrote that the lawyer's status as a commercial litigator "makes future violations" [at *72] and that "[o]ther attorneys, who might be encouraged by a more lenient sanction to act in a similar fashion, must also be deterred" [at *76]. The Commission acted after

an administrative law judge imposed a nine-month suspension and the Commission's General Counsel appealed. The Court of Appeals for the District of Columbia Circuit denied Altman's petition for review, thereby affirming the disciplinary action taken by the Commission. *Altman v. SEC*, 666 F.3d 1322 (D.C. Cir. 2011).

In *Cleary Gottlieb Steen & Hamilton LLP v. Kensington Int'l Ltd.*, 284 Fed. Appx. 826 (2d Cir. 2008), the Court of Appeals for the Second Circuit affirmed Judge Preska's ruling imposing sanctions on the Cleary Gottlieb firm. Based on evidence at two hearings, Judge Preska found that Cleary Gottlieb lawyers had sought to delay or obstruct post-judgment discovery by seeking to dissuade a non-party witness from testifying at a deposition. She also found that the Cleary Gottlieb lawyers failed to establish, through credible testimony or otherwise, a good-faith motive for their actions. Accordingly, she concluded that "Cleary had 'crossed the line' between 'zealous advocacy and improper conduct,'" and imposed sanctions that she found "necessary to remind Cleary that it has obligations beyond representing its client." *Id.* at 828, quoting *Kensington Int'l Ltd. v. Republic of Congo*, 2007 U.S. Dist. LEXIS 63115, at *33, 34 (S.D.N.Y. Aug. 23, 2007).

In *In Re Warburgh*, 644 F.3d 173 (2d Cir. 2011), the Second Circuit ruled that a lawyer who ignores an order to show cause issued by the court's Committee on Admissions and Grievances waives any issue relating to the propriety of

summary disciplinary action. The attorney's default also serves as an independent basis for disciplinary action and an aggravating factor in determining the outcome.

Courtroom conduct that lawyer might defend as zealous advocacy will draw scrutiny if it crosses the line. In *Marx v. The Rosalind and Joseph Gurwin Jewish Geriatric Center,* 2014 N.Y. Misc. LEXIS 283 (Sup. Ct. Suffolk Co., Jan. 14, 2014), Justice Jeffrey Spinner held that a lawyer who persisted in a line of questions after repeatedly sustained objections, resulting in a mistrial, violated Part 130-1.1(a) and 130-1.2. The judge declined to sanction the lawyer, but held that the lawyer and her firm were responsible for the adversary's fees and expenses for jury selection, trial time, and expert witness fees and other disbursements resulting from the mistrial.

In *Erin Serv. Co., LLC. v. Bohnet*, 907 N.Y.S. 2d 100, 2010 N.Y. Misc. LEXIS 412 (Dist. Ct. Nassau Co., February 23, 2010), Judge Michael Ciaffa of the Nassau County District Court, sanctioned plaintiff's counsel for a "veritable 'perfect storm' of mistakes, errors, misdeeds, and improper litigation practices." *Id.* at *1-2.

The plaintiff took a default judgment after the defendant failed to appear. When the defendant moved to open the default, the court signed an order to show cause, explicitly requiring "personal appearance" by all parties. The plaintiff's counsel failed to appear on the return date. After a hearing, the court concluded

that the default judgment had been obtained through a "demonstrably false affidavit of service," which claimed on its face that defendant had been served personally at an address in 2004, although she had not lived there since 1998.

In light of the defendant's sworn averments and the failure of the plaintiff's counsel to appear, the court vacated the judgment and dismissed the complaint. In its order, the court specifically directed counsel for plaintiff to appear for a hearing on sanctions under Part 130. At the hearing date, a per diem lawyer with no personal knowledge appeared for the plaintiff. The defendant also attended, and she complained that after the court had issued its order dismissing the case, representatives of the plaintiff's counsel had continued to "hound" her for payment of the alleged debt, through multiple telephone calls. The court issued another order, further directing counsel to refrain from calling defendant, and again directing counsel to appear for a sanctions hearing.

At the next court date, an inexperienced associate appeared, bringing little from his firm's file. The court was struck by the absence of any proof that the defendant actually owed a debt to the claimed creditor, that she had defaulted, or that the plaintiff had obtained a lawful assignment of any such debt from the creditor. After some testimony, the court directed the plaintiff's counsel to produce its complete file, except for privileged documents, so that the court could determine whether counsel had, at each step, satisfied its ethical obligation to move forward with the claim only if it had a factual and legal basis for doing so.

Instead of producing its file, the attorney submitted a CD-ROM, "containing a jumble of computer entries" that "raised more questions than it answered."

As a result, the court found that the plaintiff's attorneys had committed no less than eighteen separate violations of Part 130. These included their failure to investigate properly in 2004 whether the defendant actually resided at the place where service purportedly was made; filing an affidavit of service that it knew or should have known included a false claim; filing a complaint without investigating the factual bases; filing an affidavit of verification falsely claiming "personal knowledge" of facts relating to the alleged debt; seeking and obtaining a default judgment that it knew or should have known was supported by insufficient proof or false or fraudulent affidavits; attempting to enforce the default judgment it knew or should have known was obtained invalidly; failing to appear in court as ordered; continuing to seek to collect the debt after dismissal of the complaint, in disobeyance of the court's order; harassing or maliciously injuring the defendant through phone calls; failing to send a lawyer with knowledge of the fact to a hearing, requiring that it be rescheduled; and failing to produce its complete file, as directed. Accordingly, the court sanctioned the lawyers $14,800. Although the court's decision does not suggest a referral to the disciplinary authorities, on the basis of the facts found that action might seem reasonable.

Although the lessons of the case seem especially apt for high-volume or collection practices, its implications are broader. As lawyers, we have obligations

to the court, our adversaries, and the system, and they are not diminished by heavy caseloads or small stakes in a particular litigation.

Rule 16(f) of the Federal Rule of Civil Procedure provides that if a party or its attorney "fails to appear at a scheduling or other pretrial conference," a court may impose sanctions. In *Shukla v. Sharma*, 07 Civ. 2972, NYLJ 1202626512793, at *1 (E.D.N.Y., Oct. 31, 2013), Judge Carol Amon imposed a $500 fine on a lawyer who failed to appear for argument, after his earlier failure to come to court for a scheduled oral argument. The fine stood, notwithstanding the lawyer's contention that he was unaware of the calendar in part because his PACER account was disabled as a result of his failure to pay fees, and his promise that he would never again miss an oral argument. Judge Amon wrote that "[f]or the second time, [the lawyer] has wasted the time and flouted the authority of this Court."

Delay itself seems increasingly to form the basis of judicial reaction, with consequences for lawyers and clients. In a divorce action pending in Supreme Court, New York County, Justice Saralee Evans, nearing requirement, accused an attorney of deliberate delay and dilatory conduct that, she wrote, appeared to have been designed to precipitate a mistrial (and thus secure another trial judge). She noted that the lawyer had spent three trial days examining a witness on a theory that the court rejected, then caused further delay by asserting back problems, the dependency of another trial, and his long-standing birthday travel plans. Justice

Evans granted the mistrial and directed a sanctions hearing. "Soon-to-Retire Judge Claims Lawyer's Delay Forced Mistrial," N.Y.L.J., November 28, 2011.

A criminal defense lawyer who missed court appearances and repeatedly arrived late found himself fined $500. The final straw was his appearance 35 minutes late, after a series of arrivals several hours tardy. The court's research disclosed similar issues with other judges. *Matter of Rankin*, 2012 WL 1359795 (Sup. Ct. Kings Co. March 30, 2012). Here again, the story appeared in the New York Law Journal. *See* "Busy Attorney Found Late for Trial is Fined $500 by State Judge," N.Y.L.J. (April 11, 2012).

In *Jamison v. City of New York*, 2009 U.S. Dist. LEXIS 40612 (E.D.N.Y. May 14, 2009), Judge Mauskopf dismissed a complaint and fined plaintiff's counsel $1,000 for contempt, after the lawyer failed repeatedly to comply with orders, stopped appearing at conferences and hearings, and did not respond to communications from court personnel. Another lawyer, who repeatedly missed deadlines and filed substandard briefs, found herself disbarred by the Second Circuit. (The court declined to permit her to withdraw from practice before the circuit, preferring to trigger reciprocal discipline in other jurisdictions.) *In re Jaffe*, 585 F.3d 118, (2d Cir. 2009).[8]

[8] A useful compilation of lawyers' disciplinary cases involving dilatory conduct may be found in Norman B. Arnoff and Sue C. Jacobs, *Professional Liability*, N.Y.L.J. (Feb. 9, 2010), *available at* http://www.law.com/jsp/nylj/PubArticle FriendlyNY.jsp?id= 1202442442483.

A non-lawyer *pro se* party is not insulated from the consequences of incivility. *Bellet v. City of Buffalo*, 2012 U.S. Dist LEXIS 17116 (W.D.N.Y. 2012), while perhaps an extreme example in terms of conduct and result, suggests that courts' tolerance for the idiosyncrasies of *pro se* litigants is not limitless. There, Magistrate Judge Jeremiah J. McCarthy wrote (*id*. at *1):

> Although litigants normally have the right to have their claims decided on their merits, that right is not absolute. In a rare case, it can be forfeited by a party's misconduct. This is such a case.

The decision catalogues a series of extreme statements by the plaintiff. Judge McCarthy relied specifically on a telephone conference with the parties, during which the following exchange occurred:

> "MR. BELLET [the *pro se* plaintiff]: I received an answer from the city on the 21st that's untimely. Mr. Miller did not hire a city attorney.
>
> THE COURT: Well, I think Mr. --
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> MR. GENTILE [defense counsel]: I'd be willing to accept service for Mr. Miller.
>
> MR. BELLET: You can't go out and solicit your client, you know that.
>
> THE COURT: Mr. Bellet --
>
> MR. BELLET: Who do you think you are?
>
> THE COURT: Mr. Bellet --
>
> MR. GENTILE: Mr. Bellet –
>
> THE COURT: Now, Mr. Gentile, let me speak for a minute.

MR. GENTILE: Buffalo police officer.

THE COURT: Mr. Bellet, I'm the judge in this case.

MR. BELLET: Not anymore.

THE COURT: Mr. Bellet --

MR. BELLET: The guy hasn't been an officer in ten years.

THE COURT: Mr. Bellet, I'm the judge in this case. If --

MR. BELLET: City charter doesn't let this guy solicit private clients.

THE COURT: Mr. Bellet, if Mr. Gentile is willing to represent Mr. Miller, then he may do so. I'm not going to allow any default to be taken on this time as long as --

MR. BELLET: I want to see a retainer.

THE COURT: That's none of your business, Mr. Bellet.

MR. BELLET: Oh yes it is my business. It's very much my business. And who the hell are you to talk to me like that?

THE COURT: Mr. Bellet, if you --

MR. BELLET: I don't give a damn what title you have.

THE COURT: Mr. Bellet, if you continue, I will dismiss this case, and I will hold you in contempt. Now back off.

MR. BELLET: Oh yeah? Goodbye."

At that point plaintiff hung up the telephone. (*Id*. at *5-6.)

Judge McCarthy noted (2012 U.S. Dist. LEXIS 17116, at *7-8) that "[a]lthough outright dismissal of a lawsuit . . . is a particularly severe sanction, [it] is within the court's discretion," quoting *Chambers v. NASCO*, 501 U.S. 32, 43 (1991). "'For . . . abusive tactics that do not directly relate to discovery, this Court

must rely on is inherent power to sanction bad-faith conduct,' *Blum v. Schlegel*, 1996 WL 925921, *5 (W.D.N.Y. 1996) (Skretny, J.), *aff'd on other grounds*, 108 F.3d 1369 (wd Cir. 1997) (unpublished opinion)." He continued: "If plaintiff's outburst on December 9, 2011 were an isolated occurrence, I might be inclined to impose a less drastic sanction than outright dismissal."

But he considered the full record in the case: "Plaintiff's demonstrated history of disrespect for this court's authority, coupled with his disregard of my express warnings on June 23, 2011 and December 9, 2011, leaves me convinced that if a lesser sanction were imposed, his 'obstructionist and abusive tactics would continue undeterred.'" 2012 U.S. Dist. LEXIS 17116 at *10, *quoting Blum*, 1996 WL 925921 at *12. Judge McCarthy dismissed the case with prejudice.

How do Courts Address Issues of Civility?

Cases demonstrate the sometimes varying ways in which courts will deal with uncivil conduct, whether in litigation between parties or attorney disciplinary proceedings. The cases also set baselines for our conduct, although they suggest that those who might benefit the most from the decisions are least likely to study them.

The Court of Appeals has given new vitality to an old remedy for lawyers' incivility. In *Amalfitano v. Rosenberg*, 12 N.Y.3d 8 (2009), the court held that to win triple damages from a lawyer under Judiciary Law Section 487, a wronged

plaintiff need show only that the lawyer defendant *intended* to deceive, not that the attorney's scheme succeeded.[9] Plaintiffs' efforts to rely on the statute have expanded. The reach of Section 487 is limited. To sustain a claim requires evidence of a "chronic and extreme pattern of legal delinquency." *Cosmetics Plus Group, Ltd. v. Traub*, 2013 N.Y. App. Div. LEXIS 1271 (1st Dep't Feb. 28, 2013), *quoting Solow Mgt. Corp. v. Seltzer,* 18 A.D.3d 399 (1st Dep't 2005). *See also Straumwasser v. Zeiderman*, 102 A.D. 3d 630 (1st Dep't 2013), (a single alleged act of deceit is insufficiently egregious to support a claim under Section 487); *Dupree v. Voorhees*, 102 A.D.3d 912, 959 N.Y.S.2d 235 (2d Dep't 2013) (disclaiming earlier Second Department decisions sustaining claims under Section 487 based on lawyer's chronic, extreme pattern of legal delinquency, since *Amalfitano v. Rosenberg* limited liability under Section 487 to instances involving intent to deceive); *Melcher v. Greenberg Traurig, LLP*, 102 A.D.3d 497 (1st Dep't 2013) (Section 487 subject to a three-year statute of limitations; the First Department decided the case by a three-to-two margin, so there may be further appellate review).[10]

Gagstetter v. Gagstetter, 2002 N.Y. Slip. Op. 40037U, 2002 N.Y. Misc. LEXIS 184 (Sup. Ct. Nassau Co. 2002), decided the plaintiff's motion for

[9] Section 487 says that "an attorney or counselor who . . . is guilty of any deceit or any collusion, or consents to any deceit or collusion, with intent to deceive the court or any party . . . forfeits to the party injured treble damages . . . ."

[10] The underlying behavior of the lawyer in *Amalfitano v. Rosenberg* brought him a one-year suspension from practice. *See Matter of Rosenberg*, 97 A.D. 3d 189 (1st Dep't 2012).

sanctions alleging violation of former 22 NYCRR § 130-1.1(c)(1) and (2), which prohibits conduct that is "completely without merit and cannot be supported by a reasonable argument," "undertaken primarily to delay or prolong the litigation," or "to harass or maliciously injure another." *Id.* at *3. In addition to finding that defense counsel's improper conduct "prevented the facilitation" of the underlying real estate closing, which led to lengthy litigation, the court noted that her numerous applications "caused hours of time and expenditure of funds for plaintiff to constantly respond and defend each motion, some of which were subsequently withdrawn." *Id.* Despite defense counsel's actions, the court declined to impose sanctions, noting that they should be only "considered in particularly egregious situations." *Id.* at *4. Instead, utilizing "civility and courtesy," the court strongly reminded the lawyer that she has the same obligations. *Id.*[11]

In *Matter of Ajah*, 110 A.D.3d 68 (2d Dep't 2013), the Appellate Division suspended for five years a lawyer who had "failed on numerous occasions to safeguard the interests of her client" and was not candid with the Grievance Committee. The Second Department pointed to the lawyer's misrepresentations and lack of candor in dealing with her associate, whom the lawyer instructed to misrepresent herself to clients in order to collect fees due to the lawyer.

[11] Given the "contentiousness and hostilities" involved (*id.* at *1), *Gagstetter* reminds attorneys of their duty to "act in a civil manner regardless of the ill feelings that their clients may have towards others." 22 NYCRR § 1200, Appendix A (¶ I-A).

In appropriate cases, courts will cite lawyers for contempt, even criminal contempt. *In re Pollack*, 2008 U.S. Dist. LEXIS 73047 (E.D.N.Y. Sept. 19, 2008), imposed a criminal contempt conviction upon a lawyer who failed to appear timely for trial on repeated instances; violated the court's specific order by asking certain questions of a witness, then claimed that she did not consider the order to be "lawful"; failed to end a direct examination of a witness as ordered, then reargued the ruling in front of the jury in violation of the court's specific direction not to do so; and asserted that she need not follow what she characterized as an "illegal" ruling that precluded her from questioning witnesses about a specified topic. The contempt proceeding took place before a different judge, who noted that the trial judge was convinced that the respondent's misbehavior was an attempt to provoke a mistrial. Nevertheless, the judge hearing the contempt proceeding declined to visit the respondent's motives, declaring that her misbehavior "made it impossible to conduct an orderly trial of this case," eventually forcing the trial judge to dismiss the action. *Id.* at *34. The district judge subsequently sentenced the lawyer to two years' probation, and suspended her from practicing law in the Eastern District of New York for 45 days. *See* Mark Fass, *Attorney Gets Probation, Suspended for Contempt*, N.Y.L.J. (Sept. 29, 2008), *available at* www.law.com/jsp/nylj/PubArticleNY.jsp?id =1202424841675.

Last year, the Second Department disbarred the lawyer, finding that she had "engaged in a pattern of behavior that goes to the heart of the Judicial system."

Instead of testing "the viability of procedures and rulings of the Courts," she "arbitrarily declared them 'illegal' or otherwise decided simply not to comply, repeatedly demonstrating a willingness to violate any rules or procedures which she finds unsuitable." Her background included a finding of criminal contempt and a "substantial disciplinary history." The court found that under the totality of the circumstances, the lawyer "has demonstrated a flagrant disregard for the authority of the Courts." *Matter of Pollack*, 110 A.D.3d119 (2013).

Professional misconduct can underlie a criminal conviction. An upstate lawyer who pleaded guilty to obstruction of justice got a federal sentence of a year and a day. The lawyer took payment to file a criminal appeal, but never filed the appeal. Instead, the lawyer provided a bogus brief and a phony decision, purportedly handed down by the Second Circuit. The lawyer also gave a client a forged divorce document, supposedly signed by a Supreme Court justice on a day when the judge was away. The lawyer had been disbarred in 2011. "Ex-lawyer Gets Prison Term for Obstructing Justice," *NYLJ,* Aug. 16, 2013.

In *Ransmeir v. Mariani,* 718 F.3d 64 (2d Cir. 2013), the Second Circuit sanctioned a lawyer who argued that the district judge could not be impartial because he was Jewish. The lawyer moved in the trial court to have Judge Alvin Hellerstein recuse himself because the judge's son worked for an Israeli law firm that represented an Israeli defense company that had a contract with Boeing, a defendant in the Southern District case, and because the son's law firm

represented an Israeli company that allegedly was connected to another defendant through convoluted relationships. The motion also argued that Judge Hellerstein is a supporter of Israeli causes.

The Second Circuit held that the motion warranted sanctions because it was frivolous and also because it was anti-Semetic. The court wrote that the motion "consisted of little more than a series of offensive insinuations, unmistakably anti-Semetic, about Judge Hellerstein, his family members, their professional work and some of their personal charitable activities." The court continued, "on closer observation, [the lawyer's] real argument is that Judge Hellerstein cannot be impartial because he is Jewish." The court added that it could not bar the lawyer from holding his views, but it imposed sanctions "because he allowed those views to prompt him to submit frivolous and grossly insulting arguments" to the court.

Recent decisions highlight the increasing willingness of courts to sanction lawyers for frivolous challenges to arbitration awards. *See, e.g., Digitelcom, Ltd. v. Tele2 Sverige AB,* 12 Civ. 3082 (S.D.N.Y. Aug. 1, 2012; *Prospect Capital v. Emon,* 2010 WL 907956 (S.D.N.Y. Mar. 9, 2010; *Merrill Lynch, Pierce, Fenner & Smith v. Whitney,* 419 Fed. Appx. 826 (10th Cir. 2011).

The Repeat Offender

Repeated instances of conduct taken separately may not give rise to sanctions, but if committed persistently may be problematic. The Third

Department suspended an attorney for "undignified and discourteous conduct degrading to the court," primarily in cases in which the lawyer represented plaintiffs claiming sexual abuse by priests. *In re Aretakis*, 57 A.D.3d 1160, 1161, 869 N.Y.S.2d 638, 639 (3d Dep't 2008). In suspending the lawyer for one year, the Appellate Division sustained two charges against him. On the first, the court found that he engaged in frivolous conduct by "making false accusations against judges," that he engaged in conduct that reflects adversely on his fitness as a lawyer, that he knowingly made false statements of law and fact, and that he "asserted positions which served to harass and maliciously injure." *Id.* Significantly, the Appellate Division relied on the actions of four other courts that had sanctioned the attorney since 2005. The second charge asserted that in court papers, he made an "unwarranted, unprofessional and demeaning personal attack" against an upstate town Justice. *Id.* at 1162, 869 N.Y.S.2d 640.

This represents yet another instance of cumulative disciplinary action, suggesting that isolated instances of misbehavior, while perhaps subjecting the offending attorney to sanction by individual courts, will not get the attention of the Appellate Division until the miscreant boasts a significant record of repeated violations.

In *Lavin v. Melloul*, 7 Misc. 3d 1027A, 2005 N.Y. Misc. LEXIS 1026 (Sup. Ct. Kings Co. 2005), in addition to referring the plaintiff's counsel to the Departmental Disciplinary Committee, the court sanctioned him in the amounts of

$1,500 payable to the Lawyer's Fund for Client Protection and $750 to the defendant's counsel for attorneys' fees -- due to his persistent misconduct at trial. Throughout the trial, the sanctioned attorney exhibited uncivil conduct. For example, he arrived late to court without explanation, repeatedly demeaned his adversary, refused to obey the court's instructions to refrain from making certain statements in the jury's presence, made groundless objections, breached the court's direction to stop personal "testimony," professed ignorance of the judge's individual part rules, and generally made life miserable for the court and his adversary. The court apparently admonished the lawyer throughout the trial, ultimately relying on the cumulative nature of the lawyer's conduct when it imposed sanctions and made the disciplinary committee referral. The sanctioned lawyer surely missed the point. Just as an apology that can go a long way to ameliorating uncivil conduct (see cases discussed below), a lawyer's recognition of his misbehavior, and later effort to get off the figurative train before it is too late, may forestall sanctions.

In *In re Heller*, 9 A.D.3d 221, 780 N.Y.S.2d 314 (1st Dep't 2004), the court cited the cumulative effect of the lawyer's conduct during the course of his career and levied the ultimate sanction -- disbarment. The Departmental Disciplinary Committee brought eleven counts of professional misconduct against the attorney, which arose from three separate matters. The allegations included, among other things, refusing to abide by the trial court's instruction to remain seated during

trial, shouting during trial, and behaving in a "disruptive, offensive, obstructionist and intimidating manner" during referee-supervised pre-trial examinations. *Id.* at 222, 780 N.Y.S.2d at 315. Each action violated former DR 1-102(A)(5). Based on "the totality of his conduct" in the ten previous charges, the eleventh, and final, charge against the attorney alleged conduct adversely reflecting on his fitness to practice law (breaching former DR 1-102[A][7]). *Id.*

After an evidentiary hearing, a special referee sustained most of the charges, either in whole or in part (including the charge based on the cumulative effect of the respondent's conduct), and recommended suspending the respondent for at least two years. The Committee sought to confirm the referee's recommendation, and the respondent moved to dismiss the petition, or in the alternative, to reject the sanction (recommended by the referee) as excessive.

Denying the respondent's motion, the First Department concluded that "[i]n light of the cumulative evidence of respondent's 24-year history of sanctions [noting five instances since 1984] . . . his consistent, reprehensible, unprofessional behavior, which has included . . . disrupting and thwarting proper legal process through both physical and verbal aggression . . . the appropriate sanction here is disbarment." 9 A.D.3d at 228, 780 N.Y.S.2d at 319. In reaching this conclusion, the court agreed with the referee's finding that "the spectacle of a lawyer roaming the courtroom despite orders to be seated degrades the administration of justice." *Id.* at 225, 780 N.Y.S.2d at 317. The court also noted the respondent's shouting

tirade, where he compared the trial judge unfavorably to other allegedly abusive Supreme Court justices, and, ironically, threatened to report the judge to the Commission on Judicial Conduct.

The court emphasized one particularly offensive display. During a pretrial psychiatric examination, the respondent interrupted the examination "at least 49 times, sometimes using foul language, and . . . repeatedly call[ing] the [examining physician] a 'charlatan' and referr[ing] to him as 'Abdul Gamal.'" 9 A.D.3d at 227, 780 N.Y.S.2d at 318. Reporting the respondent to the judge, the doctor wrote that he "had never encountered such inappropriate, unprofessional, disrespectful, and outrageous behavior from an attorney." *Id.* The doctor testified that the respondent stated:

> [L]isten, I could take you, I've taken bigger guys than you, and you don't scare me . . . . Don't think you can push me around.

Id. The physician could not complete the evaluation, causing the trial judge to order a referee's supervision of the remaining sessions. The referee's presence failed to curb the respondent. In fact, the referee stated that the "respondent was so vehement and violent that [the referee] feared for his safety, and instructed a court officer to attend." *Id.*, 780 N.Y.S.2d at 319. He also testified that at one point the "respondent had lifted a chair over his head in a threatening manner." *Id.* Given the respondent's cumulative behavior, the court disbarred him.

Heat of Battle v. Time for Reflection

Misbehavior in correspondence or court papers, preparation of which allows for thought and withdrawal of offensive words, may carry a bigger burden than spontaneous courthouse or deposition miscreants. *In re Delio*, 290 A.D.2d 61, 731 N.Y.S.2d 171 (1st Dep't 2001), involved disciplinary proceedings brought by the Departmental Disciplinary Committee for the First Judicial Department against an attorney for his conduct before the Bronx County Housing Court, where the following colloquy took place after the court issued a default against the respondent's client:

> THE COURT: Counselor, I don't have to explain why I have defaults.
>
> RESPONDENT: This is [inaudible] other than your own self interest --
> THE COURT: I've had enough, Counselor. Step back. Counselor --
>
> RESPONDENT: You're so pompous on the bench. It's ridiculous. You should remember what your jobs are.
>
> THE COURT: Counselor --
>
> RESPONDENT: I don't have to respect you if you're not --
>
> THE COURT: Have a seat, Counselor. Have a seat.
>
> RESPONDENT: You're wrong.
>
> THE COURT: Counselor, have a seat. I'm going to have a contempt hearing.
>
> RESPONDENT: It's wrong. She can't hold a contempt hearing. You have to call for one.

THE COURT: Well, I will call for one.

Id. at 62-63, 731 N.Y.S.2d at 171-72.

Three days later, in an attempt to restore the case to the calendar, the respondent said the following in an affirmation:

> In fact there is not one reason that I can think of that the Court was restrained to dismiss the proceeding at 10:30 A.M. other then [sic] its own self interest in keeping the docket clear . . . However if the resolution part [sic] only concern is the following of arbitrary rules they impose and then the Court defends these rules with pomposity and arrogance rather than logic or substantive meaning then there is no way to actually resolve anything. Bulling [sic] litigants with treats [sic] of irrational behavior is not justice or jurisprudence. The Court, when it suits its political temperament is quick to create standards that are unsupported in the law and are thereafter defended with it costs to [sic] much to appeal.
>
> . . .
>
> The reason why someone is not where he should be is not the issue. Considering the large volume of cases most offices must maintain to make a living in this business it is amazing more cases are not missed. There will always be events such as this one for one reason or many. The point is how the Court will deal with these events. Like an ostrich sticking its head in the sand the option is always available to punt and dismiss the case. That is the easy part. What is hard sometimes is to do the right thing and remember facts like the person seeking relief is not the one who made the mistake and it is wrong to punish the petitioner for a procedural mistake. That is what the Court does here in these circumstances. Being so focused on the time of day the Court does not seem to have the time to provide any type of justice other than dismissal.

290 A.D.2d at 63, 731 N.Y.S.2d at 172.

The judge made no statement on the record regarding the incident, nor did she initiate a contempt proceeding. The Committee charged the respondent with violating former DR 1-102 (a)(5), alleging conduct prejudicial to the administration of justice by challenging the authority of the court; violating former DR 7-106(c)(6) for engaging in undignified and discourteous conduct that was degrading to a tribunal; and violating former DR 1-102 (a)(7) by engaging in conduct that adversely reflected on the respondent's fitness to practice law. The respondent testified that he apologized to the judge and expressed remorse for his conduct. Nevertheless, the referee sustained all three charges and recommended a three-month suspension.

A hearing panel conducted an oral argument, and then recommended that the charges be sustained, with a sanction of public censure. The Committee then sought an order from the Appellate Division, confirming the referee's report and the hearing panel's determination and imposing whatever sanction the court deemed appropriate. 290 A.D.2d at 64, 731 N.Y.S. 2d at 173. The First Department held that the record fully supported the findings of misconduct in violation of former DR 1-102(a)(5) and (7) and 7-106(c)(6). Due to the respondent's remorse, however, combined with his apology to the judge, cooperation with the disciplinary proceedings, and previously unblemished

disciplinary record, the court publicly censured him, rather than suspending him for three months, as the referee recommended.[12]

In *Revson v. Cinque & Cinque, P.C.*, 70 F. Supp. 2d 415 (S.D.N.Y. 1999), the District Court sanctioned plaintiff's counsel, *sua sponte*, under 28 U.S.C.S. § 1927[13] for conduct throughout the litigation. The action arose from a dispute over attorneys' fees between the plaintiff and her former lawyer. After a jury verdict in favor of the defendant former attorney, Judge Chin ordered the plaintiff's attorney to show cause why sanctions should not be levied for his conduct. Stressing its disapproval of the tactics employed by the plaintiff's attorney (*id.* at 418), the

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[12] *Delio* illustrates the important, if obvious, lesson that if the conduct is not truly outrageous, a first-time offender may get a break in the form of a lesser sanction. *See also In re Schiff*, 190 A.D.2d 293, 599 N.Y.S.2d 242 (1st Dep't 1993), discussed below. In contrast, a lawyer with a disciplinary "rap sheet" who strays far outside the basepath cannot expect leniency. *See, e.g., In re Heller*, 9 A.D.3d 221, 780 N.Y.S.2d 314. *In re Pollack*, 238 A.D.2d 1, 664 N.Y.S.2d 772 (1st Dep't 1997), offers another useful example. The charges included violation of DR 1-106(c)(6) for characterizing opposing counsel as a "pimp" and expressing desire to "beat the living daylights" out of him. *Id.* at 5, 664 N.Y.S.2d at 774. The mitigating factors cited in *Delio* and *Schiff* were absent. The court noted that the respondent failed to cooperate with the Committee's investigation and had a history of disciplinary incidents from which he did not appear to have been rehabilitated. The First Department ultimately disbarred the respondent, although due only partially to the disciplinary violation noted above. (The respondent was found guilty of numerous other violations, including federal criminal charges for conspiracy under 18 U.S.C. § 371 and accessory after the fact under 18 U.S.C. § 3. Although it is doubtful that the violation of former DR 106(c)(6) alone would have warranted disbarment, the court's emphasis is instructive of the often cumulative effect of disciplinary violations.)

[13] Federal courts may also levy sanctions for incivility under FRCP 11, and pursuant to their inherent power '"to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'" *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44, 111 S. Ct. 2123, 2132 (1991), *quoting Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-31, 82 S. Ct. 1386, 1388 (1962).

court found that his "offensive, demeaning, abusive, haranguing, and discourteous conduct" warranted a $50,000 sanction. *Id.* at 439.

The court was particularly troubled by a letter from the plaintiff's counsel to the defendant (who was the plaintiff's former attorney), which threatened to subject him to the "legal equivalent of a proctology exam," by looking into his finances and billing practices if the dispute proceeded to litigation. 70 F. Supp. 2d at 421. The court also noted that plaintiff's attorney repeatedly attacked the defendant in an "offensive and demeaning fashion," (*id.* at 417) and threatened to "tarnish" his reputation. *Id.*

The District Court's opinion included a lengthy lament on the unfortunate trend in civil litigation toward "Rambo tactics" and the increased lack of civility among trial lawyers. 70 F. Supp. 2d at 434-36. The court expressed its opinion regarding the adverse consequences (other than sanctions) resulting from such conduct:

> The bar should take note, as this case well shows, that Rambo tactics do not work. Judges and juries do not like them. The tactics employed by [plaintiff's attorney] here did not prevent the jury from returning a substantial verdict against [the plaintiff] and they undoubtedly contributed to the result. There is a lesson to be learned.

Id. at 435. The court also quoted Justice Sandra Day O'Connor on the costliness of incivility:

> Incivility disserves the client because it wastes time and energy – time that is billed to the client at hundreds of dollars an hour, and energy that is better spent working on the case than working over the opponent. According to an English proverb, "the robes of lawyers are lined with the obstinacy of clients." In our experience, the obstinacy of one lawyer lines the pockets of another; and the escalating fees are matched by escalating tensions. I suspect that, if opposing lawyers were to calculate for their clients how much they could save by foregoing what has been called 'Rambo-style' litigation (in money and frustration), many clients, although not all, would pass in the pyrotechnics and happily pocket the difference.

Id. at 436 (quoting Sandra Day O'Connor, *Professionalism*, 76 WASH U.L.Q. 5 [1998]).

The Court of Appeals reversed the sanction, holding that the conduct on the record did not warrant a $50,000 fine. *Revson v. Cinque & Cinque, P.C.*, 221 F.3d 71 (2d Cir. 2000). While the Second Circuit found the "proctology letter" offensive and "distinctly lacking in grace or civility," it held that the inappropriate reference did not amount to sanctionable conduct.[14] *Id.* at 79. In reversing the sanction, the court also emphasized the attorney's apologies both to the court and to the defendant. *Id.* at 76. Despite the successful appeal, the victory came at some expense to the lawyer -- both the District Court and Second Circuit opinions became front-page stories in the *New York Law Journal*, featuring the lawyer's

[14] The Second Circuit focused on the defendant's status as a *party* to the litigation. Thus, plaintiff's counsel was permitted to "warn the opposing party of his intention to assert colorable claims, as well as to speculate about the likely effect of those claims being brought." *Id.* at 80.

name.[15] The reported decisions included lengthy discussions of the lawyer's inappropriate conduct and whether sanctions were warranted.

In *Curtis & Associates v. Callaghan*, 11831/10, NYLJ 12-025656545161 at *1 (Sup. Ct. Westchester Co. July 24, 2012), Justice Alan Scheinkman of the Supreme Court, Westchester County, sanctioned a lawyer who made allegations of corruption by court personnel (the lawyer claimed that someone in the court's Law Department was "corrupt" and working for the plaintiff rather than the courts, filed frivolous motions, and suborned his client's non-compliance with discovery that the Court had ordered). After the lawyer made allegations in his papers, at oral argument the judge asked the lawyer to address what the judge called "troublesome aspects" of the lawyer's papers, but that "[i]n each instance [the lawyer] declined this Court's exhortation to step back from the brink." Once again, the lawyer who passes up the last clear chance to avoid trouble suffers the consequences.

[15] *See also* Daniel Wise, *Judge Blasts Lawyer-Turned-Author on Ethics, Intellectual Honesty Over Defense of Ex-Client*, N.Y.L.J. (Jan. 29, 2010), *available at* http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1202439607347: Bronx Supreme Court Justice Richard Lee Price castigated a lawyer for urging his own mistakes to support reversal of a client's conviction for ineffective assistance of counsel. In an earlier book, the lawyer had called judges "belligerent" and "spoiled divas." While Justice Price did not refer the lawyer for disciplinary action, the *Law Journal* story mentioned his name prominently. Similarly, in *Keach v. County of Schenectady*, 593 F.3d 218 (2d Cir. 2010), a district judge criticized a lawyer's "candor and honesty" for leaking details of settlement negotiations to a newspaper. The judge did not impose sanctions or pursue further discipline. That case also yielded a *Law Journal* story, with the lawyer identified. Vesselin Mitev, *Work in Similar Cases Justifies Cut in Fee Request, 2nd Circuit Finds*, N.Y.L.J. (Feb.18, 2010), *available at* http://www.law.com/jsp/article. jsp?id =1202443779600.

Sometimes an apology will not avoid disciplinary consequence, even in a case where the lawyer's conduct, although wholly inappropriate, appears isolated. *In re Dinhofer*, 257 A.D.2d 326, 690 N.Y.S.2d 245 (1st Dep't 1999), involved a lawyer who, during a telephone status conference, told a Southern District judge, among other things:

- "This is rampant corruption. I don't know what else to say. This is a sham."
- "This is blatantly corrupt. You are sticking it to me every way you can."
- "I'm not rude to [the court's staff], I'm rude to you, because I think you deserve it. You are corrupt and you stink. That's my honest opinion, and I will tell you to your face."

Id. at 327-28, 690 N.Y.S.2d at 246.

After a public censure imposed by the Southern District disciplinary process, state court disciplinary proceedings began. Despite the respondent's apology to the district judge and his previously clean disciplinary record, the First Department imposed a three-month suspension.

Some lawyers do get the message. In *Astrada v. Archer*, 21 Misc. 3d 1134A; 2008 N.Y. Misc. LEXIS 6878 (Sup. Ct. Kings Co. 2008), the court found a lawyer's conduct frivolous under Part 130, and directed payment of a $10,000 sanction. When the lawyer failed to make the payment, and the Appellate Division denied the lawyer's application for a stay of enforcement, the Supreme Court s*ua sponte* issued an order requiring the lawyer to show cause why she

should not be held in criminal contempt. A news item appearing in the *New York Law Journal*, on December 8, 2008, reported that the lawyer later paid the sanction. Mark Fass, *Brooklyn Lawyer Avoids Jail, Pays $10,000 Sanction*, N.Y.L.J. (Dec. 8, 2008), *available at* http://www.law.com/jsp/nylj/PubArticle FriendlyNY.jsp?id=1202426544441.

Honesty

Honesty is a fundamental component of an attorney's obligation of civil conduct, even beyond its obvious ethical necessity. *See* Standards of Civility ¶ IX. Intentionally misleading a court or adversary is not only discourteous, but harmful to the litigation process. In *Fryer v. Omnicom Group, Inc.*, 09 Civ. 9514 (S.D.N.Y.), Judge William Pauley sanctioned a law firm for allowing its client, the plaintiff in an employment discrimination suit, to conceal that she had obtained a new job for "substantially more money." In her deposition, the plaintiff testified that she had not heard from her prospective new employer or that she did not get the job, whereas in fact she had been hired. Judge Pauley criticized the inaccuracy in the plaintiff's expert's report, as well as the plaintiff's false deposition testimony. He noted expressly that the plaintiff's lawyer should have recognized that her deposition testimony would mislead the defendant's counsel, and that the plaintiff's lawyer could have disclosed the inaccuracy before, during, or after the deposition, but did not, apparently in an effort to extract a favorable settlement although the judge declined to grant the defendant's motion to dismiss the case, he

directed the plaintiff's lawyers to pay $15,000 directly to defense counsel, with the plaintiff herself ordered to pay an additional $2,500 to the defense lawyers. "Law Firm Is Sanctioned Over Client's Concealment in Bias Suit," N.Y.L.J. May 27, 2011.[16]

That case hardly stands alone. In *Klein v. Seenauth*, 180 Misc. 2d 213, 687 N.Y.S.2d 889, 895 (Civ. Ct. Queens Co. 1999), the court *sua sponte* ordered a hearing to determine whether plaintiff's counsel committed frivolous conduct under 22 NYCRR 130-1.1(c)(3) by "[asserting] material factual statements that [were] false." The plaintiff failed to produce for inspection a bicycle involved in a 1995 accident. In 1997, the plaintiff's attorney affirmed under penalty of perjury that the defendant could inspect the bicycle "at any time." *Id.* at 221, 687 N.Y.S.2d at 895. After ignoring several requests to turn over the bicycle, plaintiff's attorney revealed, in a January 1999 affirmation, that the bicycle had been discarded long ago.

The court ordered a hearing to give the plaintiff's attorney the opportunity to explain the apparent frivolous conduct (*i.e.*, conflicting affirmations and unexplained delay) and to enable the court to determine what penalty, if any,

[16] The law firm's conduct resulted in disciplinary proceedings against the lawyers involved. In *In re Gilly*, 2013 U.S. Dist. LEXIS 35457 (S.D.N.Y. Feb. 5, 2013), the Committee on Grievances suspended the firm's partner from practice in the Southern District for a year, and in *In re Filosa*, 2013 U.S. Dist. LEXIS 35450 (S.D.N.Y. Feb. 5, 2013), the Committee imposed the same suspension on the associate involved.

would be imposed. As a further admonition, the court emphasized numerous other ethical standards embodied in the Code of Professional Responsibility, including an attorney's "high duty to maintain the dignity of the legal system," and to refrain from making any statements that "reasonably could have the effect of deceiving or misleading the court." 180 Misc. 2d at 221, 687 N.Y.S. 2d at 895. The court also referred to the then-recently promulgated New York Standards of Civility (22 NYCRR § 1200, Appendix A). *Id.* at 222, 687 N.Y.S.2d at 896. [17]

In *Matter of Weisel*, 108 A.D. 3d 39 (1st Dep't 2013) a lawyer retained to commence a civil action created a fraudulent stipulation of settlement, bearing a fictional caption, index number, and settlement amount; randomly selected the name of his purported opposing counsel; and forged the other lawyer's signature on the document, which he gave to his client, misrepresenting that he had settled the matter. Before the client discovered the fraud, the lawyer filed an appropriate complaint in court. After the lawyer whose name had been forged discovered what had happened, the lawyer wrote letters to his client and the other lawyer, asserting that he suffered from an addiction to lying. In addition to a nine-month suspension, the Appellate Division required the lawyer to pass the ethics component of the Bar examination and to "appropriately address his pathological behavior."

[17] The results of the hearing are not reported.

In *Matter of Tanella*, 104 A.D.3d 94 (2d Dep't 2013), the Appellate Division disbarred a lawyer who, among other things, submitted false and/or misleading written answers to the grievance committee and deceived his clients into believing that he settled claims when he had not even commenced actions on their behalves. The Appellate Division agreed with the Special Referee that the respondent was "morally corrupt and intellectual bankrupt." 957 N.Y.S.2d at 406.

Behavior When Not Representing a Client

Attorneys are held to the rules of ethics and civility whether they appear for clients, are parties to litigation, or simply go about their lives, For example, in *1050 Tenants Corp. v. Lapidus*, 13 Misc. 3d 1220A, 831 N.Y.S.2d 348 (N.Y.C. Civ. Ct. N.Y. Co. 2006), *aff'd*, 2007 N.Y. Slip. Op. 52049U, 17 Misc. 3d 133A (1st Dep't 2007), the court held a sanctions hearing and determined that Lapidus, a litigant who was an experienced real estate litigator represented by counsel, engaged in frivolous conduct under 22 NYCRR 130-1.1(c)(3), and testified falsely about material matters during trial. The court sanctioned the respondent in the amount of $10,000 (the maximum allowed under 22 NYCRR 130-1.2 for a single occurrence of frivolous litigation), and referred him to the Departmental Disciplinary Committee.

The respondent engaged in twenty-year litigation with the cooperative corporation where he held a proprietary lease. To settle a prior litigation with the cooperative corporation, the respondent entered into a stipulation outlining several

pre-conditions that had to have been met before he could withhold maintenance payments. He failed to meet the conditions in the stipulation, withheld maintenance, and ultimately defended another non-payment trial where he claimed he did not see the prior stipulation until several days before the trial began.

During the sanctions hearing, the attorneys for both sides in the first litigation testified that the respondent knew of, and approved, the stipulation. Thereafter, he failed to give honest and direct answers regarding three previous contempt findings against him. Initially claiming that he could not remember how many times, or when, he was held in contempt, the respondent later admitted knowing of one contempt finding, but denied receiving the decision or making any effort to obtain a copy of it. Moreover, he could not recall whether he appealed any of the contempt decisions, or whether they were affirmed on appeal (one had been; *see Handler v. 1050 Tenants Corp.*, 24 A.D.3d 231, 806 N.Y.S.2d 487 [1st Dep't 2005]).

The court held that respondent made material false statements at the nonpayment trial and further compounded the problem by lying at the sanctions hearing, despite abandoning the statements in his post-trial brief. Noting that one factor to consider in determining whether conduct is frivolous is "whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party"

(22 NYCRR 130-1.1[c][3]), the court imposed the $10,000 sanction and referred the respondent to the disciplinary committee.[18]

In *Matter of Davey*, 111 A.D.3d 207 (1st Dep't 2013), the First Department imposed a two-year suspension on a lawyer who, the Appellate Division wrote, engaged in a ten-year pattern of frivolous litigation and disregard of court orders, lack of remorse, denial of wrongdoing, and failure to pay sanctions, all in the connection with a dispute with his former wife.

The Committee on Grievances of the Southern District holds that a lawyer's status as pro se litigant will not bar disciplinary action. In *Matter of Morisseau*, 2011 U.S. Dist. LEXIS 12095 (Feb 7, 2011) the court barred a lawyer from appearing before it, although she was not admitted to practice in the Southern District, after dismissal of her two *pro se* actions.

Behavior outside a lawyer's professional activities can result in professional discipline. A series of First Department cases underscores this point,

[18] In *Source Vagabond Systems, Ltd. v. Hydrapak*, 2013 U.S. Dist. LEXIS 25669 (Feb. 21, 2012), Judge Colleen McMahon of the Southern District of New York, sanctioned the plaintiff's law firm and two of its partners for more than $200,000, finding the plaintiff's case to have been frivolous. Judge McMahon included in her award the defendant's legal fees opposing the plaintiff's motion for partial reconsideration of the sanctions, holding that a motion for reconsideration of a decision awarding sanctions is part of the motion for sanctions and falls under FRCP 11. She wrote that the plaintiff's "decision to seek reconsideration of the court's decision on the sanctions motion caused this court to waste even more time, and [the defendant] to waste even more money, than had already been wasted in supervising and defending against this lawsuit." *Id.* at *5.

although there is no reason to expect the other departments to react differently. *Matter of Dear*, 91 A.D.3d 111, 934 N.Y.S.2d 141 (1st Dep't 2011), presents a paradigm. The lawyer, an Orthodox Jew, received a speeding ticket from a New Jersey State Trooper. On the letterhead of the law firm at which he was an associate, he wrote to the traffic court, requesting dismissal because, among other reasons, the officer "called me a 'jew kike'" and "this prejudice obviously was the cause for the ticket." *Id*. at 112. The New Jersey State Police conducted an Internal Affairs investigation, in which the lawyer expanded on his claim of prejudice. The State Police filed a grievance with the Departmental Disciplinary Committee, revealing that the traffic stop had been recorded and that there was no evidence that the trooper had made any of the statements that the lawyer claimed. In the disciplinary proceeding, the lawyer admitted that his charges were false. Notwithstanding his admission, his psychiatrist's testimony of the lawyer's emotional disorders, and the referee's articulated belief that the lawyer was sincerely remorseful and that his apology to the trooper was genuine, the First Department imposed a six-month suspension. In *Matter of Leonov,* 92 A.D.3d 50, 936 N.Y.S.2d 137 (1st Dep't 2011), a lawyer who pleaded guilty to a misdemeanor assault of a cab driver was censured publicly.

In *Matter of Rosenzweig*, 2013 N.Y. App. Div. LEXIS 1173 (Feb. 26, 2013), a married lawyer traveled to Jamaica with his paramour, falsely told a Jamaican government official that he was a bachelor, executed marriage

documents indicating that he was then unmarried, and participated in a ceremony by which he and his girlfriend were "officially married" under Jamaican law. According to the lawyer, his new "wife" understood that their purported marriage was not a legal union, and they had no plans to cohabitate after the ceremony. The lawyer's activities violated Jamaican law.

A referee recommended censure, but the hearing panel called for a six-month suspension and the court agreed. "That respondent's misconduct involves his personal life only, does not necessarily warrant a sanction less severe than suspension." *Id.*at *7. In assessing the sanction to be imposed, the court referred to cases "involving willful misrepresentation to government officials or court." The extraterritorial venue of the respondent's misrepresentations apparently was irrelevant.

Emotional or medical ailments do not insulate lawyers from their conduct. *In re Supino*, 23 A.D.3d 11, 806 N.Y.S.2d 178 (1st Dep't 2005), involved reciprocal disciplinary proceedings against an attorney admitted in New York and New Jersey. New Jersey authorities suspended the lawyer for three months based on his conduct during his personal New Jersey matrimonial case against his former wife. Among other things, the attorney filed nine criminal complaints against his former wife (eight were dismissed); filed at least 30 criminal complaints against police officers who responded to his former wife's calls; left telephone messages with police officers declaring that he would violate a restraining order and

"knock" a police captain "on his butt;" informed various New Jersey judges of his intent to file complaints against them, at least eight times; and left threatening messages for a New Jersey court administrator, accusing her of being an idiot and doctoring evidence. *Id.* at 12, 806 N.Y.S.2d at 179.

Although the Appellate Division noted that the lawyer had been diagnosed with bipolar disorder and had an alcohol problem, it adopted the three-month suspension imposed by New Jersey. The court observed that the sanction "is in keeping with First Department precedent for similar levels of misconduct," 23 A.D.3d at 14, 806 N.Y.S.2d at 180, citing *In re Delio*, 290 A.D.2d 61, 731 N.Y.S.2d 171 and *In re Dinhofer*, 257 A.D.2d 326, 690 N.Y.S.2d 245.

Conduct at Depositions

Depositions can be challenging. "[A] deposition is a court proceeding and a witness and counsel are responsible for how they behave at deposition." *State Farm Mut. Auto. Inc. Co. v. Lincow*, 715 F. Supp. 2d 617, 642 (E.D. Pa. 2010). Doubtless because they almost always take place outside the presence of judges or other court personnel, depositions offer special opportunities for lawyer misbehavior.[19]

For example, in *Corsini v. U-Haul Int'l, Inc.*, 212 A.D.2d 288, 630 N.Y.S.2d 45 (1st Dep't 1995), the plaintiff, an attorney, represented himself. The

[19] Deposition misbehavior has attracted academic interest. *See, e.g.*, Note, "Lawyers Gone Wild: Are Depositions still a 'Civil' Procedure?," 42 Conn. L. Rev. 152 (2010).

plaintiff began exhibiting uncivil and abusive behavior before depositions; the plaintiff followed the defendant's counsel around the courthouse while he was on trial in an unrelated case. Thereafter, at his deposition, the plaintiff repeatedly refused to answer, evaded, and improperly responded to defense counsel's questions. The plaintiff also personally attacked defense counsel and his firm, making comments including:

> You practiced at the lowest level of the profession and, unfortunately, that is not even professional. Where that is, is in the sewer, in the basement. You're a hired gun, you're a paid person to do what the bidding of your client [sic], who has already been established to be unethical.
>
> You're so scummy and so slimy and such a perversion of ethics or decency because you're such a scared little man, you're so insecure and so frightened and the only way you can impress your client is by being nasty, mean-spirited and ugly little man, and that's what you are. That's the kind of prostitution you are in.

Id. at 289, 630 N.Y.S.2d at 46. When defendant's counsel questioned the plaintiff at his deposition, he further frustrated the deposition by responding:

> I'm not answering your question, [n]one of your business, [and] [j]ust assume I have been around and I have practiced with the best and the brightest which is irrelevant to anything about the way which is why you are not going to get an answer [to] any of those questions.… [They are] so poorly framed, so redundant, so irrelevant.

212 A.D.2d at 290, 630 N.Y.S.2d at 46. Defense counsel ultimately suspended the deposition after the plaintiff responded "Oh, God, what a slime bag." *Id.* at 290,

630 N.Y.S.2d at 46. Following the suspended deposition, the defendants moved to dismiss the complaint pursuant to CPLR 3126.

In dismissing the action, the court noted that it was "difficult to find one among the 217 pages of deposition [testimony] which d[id] not contain willful evasion, gratuitous insult, argumentative response, or patent rudeness from the plaintiff." 212 A.D.2d at 290, 630 N.Y.S.2d at 46. The court noted that a lawyer's duty to refrain from uncivil and abusive behavior is not diminished because the site of the proceeding is a deposition room, or law office, rather than a courtroom. Acknowledging that CPLR 3126 provides various sanctions for attorney incivility, the most drastic of which is dismissal, the court distinguished this case from others where dismissal was not granted. In this case, unlike other cases prosecuted by *pro se* litigants, the plaintiff, an attorney and officer of the court, had a duty to comply with the then-applicable New York Code of Professional Responsibility.

In *Principe v. Assay Partners*, 154 Misc. 2d 702, 586 N.Y.S.2d 182 (Sup. Ct. N.Y. Co. 1992), an attorney was sanctioned under 22 NYCRR § 130-1 for abusive conduct that "degrade[d] a colleague upon the basis that she is female." *Id.* at 704, 585 N.Y.S.2d at 184. Over the course of a deposition, a male attorney made the following comments to a female adversary: "I don't have to talk to you, little lady;" "Tell that little mouse over there to pipe down;" "What do you know, young girl[?];" "Be quiet, little girl;" and "Go away, little girl." *Id.*, 585 N.Y.S.2d

at 184. The transcript reflected the comments, and an attorney for another party confirmed that they were accompanied by disparaging gestures.

The court focused on the seriousness of gender bias and the importance that this conduct not "be permitted to find a safe haven in the practice of law or in the workings of the courts and the judiciary," seemingly applauding the movant for "expos[ing] the behavior to light and refus[ing] to let it stand as another hidden dirty little secret, which, while undoubtedly occurring on a daily basis, no one speaks about in public." 154 Misc. 2d at 705-06, 586 N.Y.S.2d at 185. The court also noted that the pervasive nature of the remarks precluded any "excuse that [the] objectionable behavior was a single comment which could have been uttered spontaneously without reflection." *Id.* at 707, 586 N.Y.S.2d at 186. The court ultimately levied sanctions of $1,000; $500 payable directly to the movant's attorney and $500 payable to the Client's Security Fund. *Id.* at 714, 586 N.Y.S. 2d at 190-91. *See also In re Monaghan*, 295 A.D.2d 38, 39, 743 N.Y.S.2d 519, 520 (2d Dep't 2002) (publicly censuring respondent for engaging in a "continuing harangue of [opposing counsel] for her alleged mispronunciation of [certain] words"); *Levine v. Goldstein*, 173 A.D.2d 346, 569 N.Y.S.2d 715 (1st Dep't 1991) (sanctioning lawyer for improperly directing a client not to respond to questions and continually objecting to matters other than form).

In *O'Neill v. Ho*, 28 A.D.3d 626, 814 N.Y.S.2d 202 (2d Dep't 2006), rather than imposing the drastic sanction of striking the defendant's answer, the court

imposed a $1,500 monetary sanction to compensate the plaintiff's counsel for the time and costs incurred in connection with a frustrated deposition session. After the plaintiff moved to compel answers to nine deposition questions and the court ordered a second deposition, counsel made extensive "speaking objections," which were not based on "constitutional rights, privilege, or palpable irrelevance," and the defendant repeatedly refused to answer "clear questions" before ultimately leaving the deposition. *Id.* at 627, 814 N.Y.S.2d at 203.

In re Schiff, 190 A.D.2d 293, 599 N.Y.S.2d 242 (1st Dep't 1993), involved misconduct that resulted in an attorney disciplinary proceeding. The respondent represented a plaintiff at a deposition in a personal injury action. During the deposition, the respondent was "unduly intimidating and abusive toward the defendant's counsel, and [ ] directed vulgar, obscene and sexist epithets toward her anatomy and gender." *Id.* at 294, 599 N.Y.S.2d at 242. In affirming the Departmental Disciplinary Hearing Panel recommendation of public censure, the court noted that respondent's actions were "inexcusable and intolerable, and violate[d] DR 1-102(A)(7) of the Code of Professional Responsibility in that it reflects adversely on his fitness to practice law." *Id.* Nevertheless, the court declined to impose a more severe sanction, since the respondent apologized by letter and in person to the attorney who bore his insults, was only 28 years old and inexperienced, had been sanctioned monetarily by the hearing judge, and shortly after the incident was fired by his law firm.

Where the record reflects an attorney's lack of civility or professionalism, courts may condemn the behavior without a disciplinary proceeding. For example, in *Orner v. Mount Sinai Hosp.*, 305 A.D.2d 307, 761 N.Y.S.2d 603 (1st Dep't 2003), the court addressed the plaintiff's motion to take further depositions after the discovery process broke down. The court noted that the defendant's counsel exhibited a "sardonic and unprofessional" attitude toward plaintiff's counsel during the previous depositions, "which, in turn, fostered an uncooperative attitude from defendants' witnesses." *Id.* at 309, 761 N.Y.S.2d at 606. The court reproached defendant's counsel: "[w]e take this opportunity to express our regret that we are placed in the position of having to refer to these and other such fundamental principles of procedure and professional civility to an experienced defense lawyer." *Id.* at 310, 761 N.Y.S. 2d at 606.

Cadlerock Joint Venture, L.P. v. Sol Greenberg & Sons Int'l, 94 A.D. 3d 580, 942 N.Y.S.2d 497 (1st Dep't 2012), presents another instance (and another that made the *New York Law Journal; see* "Lawyer's 'Outrageous' Conduct Leads to $10,000 Sanction," N.Y. L.J. [April 23, 2012]). The First Department ordered that a deposition continue under court supervision, sanctioned a lawyer $10,000, and directed an assessment of costs and attorneys' fees incurred by the other party. The court noted that the lawyer repeatedly interrupted the examination; made improper objections and meritless lengthy speeches; conferred with his client mid-answer; and insulted his adversary, the judge, the clerk and the

court reporter, who eventually left the deposition because of the abuse. The Appellate Division found that the conduct violated Part 130-1.1, imposed the sanctions, and noted that the Supreme Court had referred the lawyer's "frivolous, outrageous, and unprofessional behavior" to the Disciplinary Committee.[20] The *New York Law Journal* reported that the Supreme Court later awarded the lawyer's adversary an additional $36,274 in attorneys' fees and costs. "Sanctioned Lawyer Now Ordered to Pay Legal Fees," N.Y.L.J. (Oct. 30, 2012).

GMAC Bank v. HTFC Corp., 248 F.R.D. 182, 2008 U.S. Dist. LEXIS 15878 (E.D. Pa. 2008), presented extraordinary circumstances that tested the court as well as the miscreant's adversary. The court offered a handful of examples of the witness's "hostile, uncivil, and vulgar conduct," which continued throughout nearly twelve hours of deposition testimony. *Id.* at 186, 2008 U.S. Dist. LEXIS 15878 at *9. According to the judge, counsel "used the word 'fuck' and variants thereof no less than 73 times." *Id.* at 187, 2008 U.S. Dist. LEXIS 15878 at *12. Noting that the malefactor's "profuse vulgarity had no constructive purpose," the judge concluded that "[t]he Court is left with the impression that such abusive language was chosen solely to intimidate and demean opposing counsel." *Id.* The judge concluded that the witness willfully exploited the discovery process by

[20] The Appellate Division for the Second Department reminded us recently that a court imposing sanctions under Part 130 must specify the reasons why it found the subject matter frivolous or why the sanction imposed was appropriate. *Matter of Nathan F.T.*,110. A.D.3d 820 (2d Dep't 2013).

impeding the deposition, delaying the proceedings, interrupting counsel, failing to answer questions, and giving intentionally evasive responses. The court responded by sanctioning the witness under FRCP 37(a)(3)(B)(i), awarding fees and expenses incurred by the adversary's motion to compel further deposition testimony, and FRCP 30(d)(2), by awarding counsel fees and costs.

The court did not stop at sanctioning the witness. It also sanctioned his counsel of record, noting that the lawyer persistently failed to intercede and correct his client's violations of the rules. Accordingly, the court directed that the lawyer share, jointly and severally, the sanctions liability with his client.

In the penalty determination, the judge sanctioned the lawyer and client more than $29,000, and refused to reconsider the decision. 252 F.R.D. 253, 2008 U.S. Dist. LEXIS 62106 (E.D. Pa. 2008). The judge sustained the sanction although he did not find that the lawyer himself engaged in offensive conduct. The judge noted the lawyer's "persistent inaction in the face of [the client's] gross misconduct," (*id.* at 258, 2008 U.S. Dist. LEXIS 62106 at *15) and that the decision to sanction the lawyer "was based on his inaction, not his actions." *Id.* at 265, 2008 U.S. Dist. LEXIS 62106 at *38. The judge assumed that the lawyer truthfully had reported his off-the-record attempts to control the client's conduct. Although it is not a New York case, the decision is useful because it suggests the lengths to which a responsible court will go in requiring a lawyer to take affirmative steps to make a difficult client behave.

In *Bobby D. Assoc. v. Ohlson*, 24 Misc. 3d 1239A, 2009 N.Y. Misc LEXIS 2195 (N.Y.C. Civ. Ct. June 16, 2009), a New York court sanctioned both a lawyer and his client for misbehavior at a deposition. After the client disobeyed earlier discovery orders, the lawyer made speaking objections and disrupted the deposition, and the client and the lawyer walked out before the examination was concluded. The judge found the client in continued contempt, and ordered the lawyer to pay costs under Rule 130.1.

Since October 1, 2006, the Rules of the Chief Administrator of the Courts have governed appropriate deposition conduct. 22 NYCRR §§ 221.1 *et seq*. (a copy appears in the addendum). For example, the rules require that all objections at a deposition must be noted and the answers given, that all objections are made succinctly and ensure they do not suggest an answer. 22 NYCRR § 221.1(a) and (b). Deponents must answer all questions, except those relating to privilege or confidentiality, enforcing a limitation set forth in a court order or plainly improper ones, which would prejudice a person. 22 NYCRR § 221.2. Moreover, the rules prohibit attorneys from interrupting depositions to communicate with the deponent, unless all parties consent. 22 NYCRR § 221.3.

Courts invoke the Uniform Rules for Conduct of Depositions. In *Cioffi v. Habberstad Motorsport, Inc.*, 22 Misc. 3d 839, 869 N.Y.S.2d 321 (Sup. Ct. Nassau Co. 2008), the court sanctioned both sides, plaintiff's attorney $1,000 and defendant's lawyer $250, after a series of deposition interchanges in which, among

other things, the principal malefactor consistently interrupted the witness, refused to allow the witness to finish his answer, told his adversary "I direct you to shut up and get out of here," and otherwise misbehaved. *Id.* at 845, 869 N.Y.S.2d at 325. On motion of the adversary, the court accordingly awarded sanctions. But the moving lawyer did not escape unscathed. After the court noted that he told the first lawyer "[y]ou're obviously in over your head" and to "[s]top whining," the court sanctioned the movant, although for the lesser amount. *Id.* The lesson, of course, is clear - - litigators live in glass houses, and those who ask judges to sanction their adversaries had better be sure that they have behaved acceptably.

Remedying Your Own Discourteous Conduct

More often than not, after an attorney acts discourteously there is still opportunity to ameliorate (if not completely avoid) unpleasant consequences. The most important step is early recognition that one's conduct may have crossed the line of acceptable behavior under one of the applicable rules or guidelines.[21] This may be easier stated than done, since most instances of incivility arise from heated conflicts, often involving an overwhelming belief that one is in the right regarding a particular issue (*see, e.g.*, *In re Delio*, 290 A.D.2d 61, 731 N.Y.S.2d 171). The key is recognizing that one can be both correct with respect to the underlying

[21] Even if you do not believe you violated a prescribed rule, it makes sense to rectify the situation, especially when it appears that another attorney, a judge, or someone else believes you have.

dispute, yet in breach of one's civility and courtesy obligations. Acts of incivility are not justified by ultimate success on the underlying conflict.

After recognizing the potential problem, you should step back and counsel yourself. As most incidents of incivility result from a real or perceived personal attack, a quick recess is often in order. A five-minute "cool down" period to gather one's thoughts usually proves very constructive.

Next, be practical. If you are in a deposition, ask your adversary calmly to step outside. If you are in a conference and others are present, do the same thing. If you are in court, ask the judge for a sidebar discussion with your adversary. Apologize for behavior that others may have found inappropriate.[22] Explain exactly why you acted the way you did, and emphasize how *you* perceived the attendant circumstances (*e.g.*, a comment from your adversary or by the court) that elicited your actions. Express recognition that, regardless of whether you can eventually agree on the underlying issue, you wish to proceed within the boundaries of professionalism and mean no disrespect toward your adversary or the court. Express remorse for your conduct up to this point, perhaps again noting

[22] For additional commentary on this subject, *see* Joel Cohen, *Wearisome Adversaries*, 237 N.Y.L.J. 21 (January 31, 2007), which addresses attorney conduct when dealing with prosecutors, regulatory attorneys (*e.g.*, SEC, IRS) or lawyers for disciplinary committees, who by virtue of their position, possesses the power to punish your client. Presenting several conduct options when dealing with these difficult lawyers, the article gives the "best advice," which "is to resist being confrontational and taking any issues up straight on -- even though, sometimes, strangely, that may work by breaking the ice. All of this, of course, after you've looked in the mirror and concluded that you're not the problem."

that you wish to proceed in a professional manner. In most instances, the judge or adversary will be pleased at your change in attitude, and will be more than willing to forgive any previous misbehavior. Moreover, your adversary (or the court) will be much more likely to entertain your point of view regarding the underlying conflict than if you continued proceeding in an uncivil manner.

Finally, if proceedings are brought against you for incivility (as in any discipline-related proceeding), the courts often consider one's degree of cooperation with the ensuing investigation when determining the proper sanction. *Contrast Revson*, 70 F. Supp.2d 415 (overturning the District Court's $50,000 sanction, noting respondent's apologies) *with In re Pollack*, 238 A.D.2d 1, 664 N.Y.S.2d 772 (citing lack of cooperation with investigation and ultimately disbarring respondent). In addition, there is still opportunity for an apology to the aggrieved party and to show remorse to the hearing panel or referee. [23]

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[23] In *Delio*, 290 A.D.2d 61, 731 N.Y.S.2d 171, although the record clearly inculpated counsel for three violations of the former Code of Professional Responsibility, the court cited the respondent's remorse and subsequent apology, limiting the sanction to public censure rather than the recommended suspension.

ADDENDUM

March 2014

22 NYCRR § 1200, Appendix A

PREAMBLE

The New York State Standards of Civility for the legal profession set forth principles of behavior to which the bar, the bench and court employees should aspire. They are not intended as rules to be enforced by sanction or disciplinary action, nor are they intended to supplement or modify the Rules Governing Judicial Conduct, the Code of Professional Responsibility and its Disciplinary Rules, or any other applicable rule or requirement governing conduct. Instead they are a set of guidelines intended to encourage lawyers, judges and court personnel to observe principles of civility and decorum, and to confirm the legal profession's rightful status as an honorable and respected profession where courtesy and civility are observed as a matter of course. The Standards are divided into four parts: lawyers' duties to other lawyers, litigants and witnesses; lawyers' duties to the court and court personnel; judges' duties to lawyers, parties and witnesses; and court personnel's duties to lawyers and litigants.

As lawyers, judges and court employees, we are all essential participants in the judicial process. That process cannot work effectively to serve the public unless we first treat each other with courtesy, respect and civility.

Lawyers' Duties to Other Lawyers, Litigants and Witnesses

I. Lawyers should be courteous and civil in all professional dealings with other persons.

A. Lawyers should act in a civil manner regardless of the ill feelings that their clients may have toward others.

B. Lawyers can disagree without being disagreeable. Effective representation does not require antagonistic or acrimonious behavior. Whether orally or in writing, lawyers should avoid vulgar language, disparaging personal remarks or acrimony toward other counsel, parties or witnesses.

C. Lawyers should require that persons under their supervision conduct themselves with courtesy and civility.

II. When consistent with their clients' interests, lawyers should cooperate with opposing counsel in an effort to avoid litigation and to resolve litigation that has already commenced.

A. Lawyers should avoid unnecessary motion practice or other judicial intervention by negotiating and agreeing with other counsel whenever it is practicable to do so.

B. Lawyers should allow themselves sufficient time to resolve any dispute or disagreement by communicating with one another and imposing reasonable and meaningful deadlines in light of the nature and status of the case.

III. A lawyer should respect the schedule and commitments of opposing counsel, consistent with protection of the client's interests.

A. In the absence of a court order, a lawyer should agree to reasonable requests for extensions of time or for waiver of procedural formalities when the legitimate interests of the client will not be adversely affected.

B. Upon request coupled with the simple representation by counsel that more time is required, the first request for an extension to respond to pleadings ordinarily should be granted as a matter of courtesy.

C. A lawyer should not attach unfair or extraneous conditions to extensions of time. A lawyer is entitled to impose conditions appropriate to preserve rights that an extension might otherwise jeopardize, and may request, but should not unreasonably insist on, reciprocal scheduling concessions.

D. A lawyer should endeavor to consult with other counsel regarding scheduling matters in a good faith effort to avoid scheduling conflicts. A lawyer should likewise cooperate with opposing counsel when scheduling changes are requested, provided the interests of his or her client will not be jeopardized.

E. A lawyer should notify other counsel and, if appropriate, the court or other persons at the earliest possible time when hearings, depositions, meetings or conferences are to be canceled or postponed.

IV. A lawyer should promptly return telephone calls and answer correspondence reasonably requiring a response.

V. The timing and manner of service of papers should not be designed to cause disadvantage to the party receiving the papers.

A. Papers should not be served in a manner designed to take advantage of an opponent's known absence from the office.

B. Papers should not be served at a time or in a manner designed to inconvenience an adversary.

C. Unless specifically authorized by law or rule, a lawyer should not submit papers to the court without serving copies of all such papers upon opposing counsel in such a manner that opposing counsel will receive them before or contemporaneously with the submission to the court.

VI. A lawyer should not use any aspect of the litigation process, including discovery and motion practice, as a means of harassment or for the purpose of unnecessarily prolonging litigation or increasing litigation expenses.

A. A lawyer should avoid discovery that is not necessary to obtain facts or perpetuate testimony or that is designed to place an undue burden or expense on a party.

B. A lawyer should respond to discovery requests reasonably and not strain to interpret the request so as to avoid disclosure of relevant and non-privileged information.

VII. In depositions and other proceedings, and in negotiations, lawyers should conduct themselves with dignity and refrain from engaging in acts of rudeness and disrespect.

A. Lawyers should not engage in any conduct during a deposition that would not be appropriate in the presence of a judge.

B. Lawyers should advise their clients and witnesses of the proper conduct expected of them in court, at depositions and at conferences, and, to the best of their ability, prevent clients and witnesses from causing disorder or disruption.

C. A lawyer should not obstruct questioning during a deposition or object to deposition questions unless necessary.

D. Lawyers should ask only those questions they reasonably believe are necessary for the prosecution or defense of an action. Lawyers should

refrain from asking repetitive or argumentative questions and from making self-serving statements.

VIII. A lawyer should adhere to all express promises and agreements with other counsel, whether oral or in writing, and to agreements implied by the circumstances or by local customs.

IX. Lawyers should not mislead other persons involved in the litigation process.

A. A lawyer should not falsely hold out the possibility of settlement as a means for adjourning discovery or delaying trial.

B. A lawyer should not ascribe a position to another counsel that counsel has not taken or otherwise seek to create an unjustified inference based on counsel's statements or conduct.

C. In preparing written versions of agreements and court orders, a lawyer should attempt to correctly reflect the agreement of the parties or the direction of the court.

X. Lawyers should be mindful of the need to protect the standing of the legal profession in the eyes of the public. Accordingly, lawyers should bring the New York Standards of Civility to the attention of other lawyers when appropriate.

Lawyers' Duties to the Court and Court Personnel

I. A lawyer is both an officer of the court and an advocate. As such, the lawyer should always strive to uphold the honor and dignity of the profession, avoid disorder and disruption in the courtroom, and maintain a respectful attitude toward the court.

A. Lawyers should speak and write civilly and respectfully in all communications with the court and court personnel.

B. Lawyers should use their best efforts to dissuade clients and witnesses from causing disorder or disruption in the courtroom.

C. Lawyers should not engage in conduct intended primarily to harass or humiliate witnesses.

D. Lawyers should be punctual and prepared for all court appearances; if delayed, the lawyer should notify the court and counsel whenever possible.

II. Court personnel are an integral part of the justice system and should be treated with courtesy and respect at all times.

Judges' Duties to Lawyers, Parties and Witnesses

A judge should be patient, courteous and civil to lawyers, parties and witnesses.

A. A judge should maintain control over the proceedings and insure that they are conducted in a civil manner.

B. Judges should not employ hostile, demeaning or humiliating words in opinions or in written or oral communications with lawyers, parties or witnesses.

C. Judges should, to the extent consistent with the efficient conduct of litigation and other demands on the court, be considerate of the schedules of lawyers, parties and witnesses when scheduling hearings, meetings or conferences.

D. Judges should be punctual in convening all trials, hearings, meetings and conferences; if delayed, they should notify counsel when possible.

E. Judges should make all reasonable efforts to decide promptly all matters presented to them for decision.

F. Judges should use their best efforts to insure that court personnel under their direction act civilly toward lawyers, parties and witnesses.

Duties of Court Personnel to the Court, Lawyers and Litigants

Court personnel should be courteous, patient and respectful while providing prompt, efficient and helpful service to all persons having business with the courts.

A. Court employees should respond promptly and helpfully to requests for assistance or information.

B. Court employees should respect the judge's directions concerning the procedures and atmosphere that the judge wishes to maintain in his or her courtroom.

22 NYCRR § 130-1.1 Costs; Sanctions

(a) The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part, which shall be payable as provided in Section 130-1.3 of this Part. This Part shall not apply to town or village courts, to proceedings in a small claims part of any court, or to proceedings in the Family Court commenced under Article 3, 7 or 8 of the Family Court Act.

(b) The court, as appropriate, may make such award of costs or impose such financial sanctions against either an attorney or a party to the litigation or against both. Where the award or sanction is against an attorney, it may be against the attorney personally or upon a partnership, firm, corporation, government agency, prosecutor's office, legal aid society or public defender's office with which the attorney is associated and that has appeared as attorney of record. The award or sanctions may be imposed upon any attorney appearing in the action or upon a partnership, firm or corporation with which the attorney is associated.

(c) For purposes of this Part, conduct is frivolous if:

(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;

(2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or

(3) it asserts material factual statements that are false.

Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues, (1) the circumstances under which the conduct took place, including the time available for

investigating the legal or factual basis of the conduct; and (2) whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.

(d) An award of costs or the imposition of sanctions may be made either upon motion in compliance with CPLR 2214 or 2215 or upon the court's own initiative, after a reasonable opportunity to be heard. The form of the hearing shall depend upon the nature of the conduct and the circumstances of the case.

22 NYCRR § 221.1 Objections at depositions

(a) Objections in general. No objections shall be made at a deposition except those which, pursuant to subdivision (b), (c) or (d) of Rule 3115 of the Civil Practice Law and Rules, would be waived if not interposed, and except in compliance with subdivision (e) of such rule. All objections made at a deposition shall be noted by the officer before whom the deposition is taken, and the answer shall be given and the deposition shall proceed subject to the objections and to the right of a person to apply for appropriate relief pursuant to Article 31 of the CPLR.

(b) Speaking objections restricted. Every objection raised during a deposition shall be stated succinctly and framed so as not to suggest an answer to the deponent and, at the request of the questioning attorney, shall include a clear statement as to any defect in form or other basis of error or irregularity. Except to the extent permitted by CPLR Rule 3115 or by this rule, during the course of the examination persons in attendance shall not make statements or comments that interfere with the questioning.

22 NYCRR § 221.2 Refusal to answer when objection is made

A deponent shall answer all questions at a deposition, except (i) to preserve a privilege or right of confidentiality, (ii) to enforce a limitation set forth in an order of a court, or (iii) when the question is plainly improper and would, if answered, cause significant prejudice to any person. An attorney shall not direct a deponent not to answer except as provided in CPLR Rule 3115 or this subdivision. Any refusal to answer or direction not to answer shall be accompanied by a succinct and clear statement of the basis therefor. If the deponent does not answer a question, the examining party shall have the right to complete the remainder of the deposition.

22 NYCRR § 221.3 Communication with the deponent

An attorney shall not interrupt the deposition for the purpose of communicating with the deponent unless all parties consent or the communication is made for the purpose of determining whether the question should not be answered on the grounds set forth in section 221.2 of these rules and, in such event, the reason for the communication shall be stated for the record succinctly and clearly.

Court Rules for the Supreme Court, Appellate Division (First Department)

§ 604.1 Obligation of Attorneys and Judges

(a) Application of Rules. This Part shall apply to all actions and proceedings, civil and criminal, in courts subject to the jurisdiction of the Appellate Division of the Supreme Court in this Judicial Department. It is intended to supplement but not to supersede the Rules of Professional Conduct (Part 1200 of this Title) and the rules governing judicial conduct as promulgated by the Administrative Board of the Judicial Conference. In the event of any conflict between the provisions of this Part and the Rules of Professional Conduct or the rules governing judicial conduct, the Rules of Professional Conduct and the rules governing judicial conduct shall prevail.

(b) Importance of Decorum in Court. The courtroom, as the place where justice is dispensed, must at all times satisfy the appearance as well as the reality of fairness and equal treatment. Dignity, order and decorum are indispensable to the proper administration of justice. Disruptive conduct by any person while the court is in session is forbidden.

(c) Disruptive Conduct Defined. Disruptive conduct is any intentional conduct by any person in the courtroom that substantially interferes with the dignity, order and decorum of judicial proceedings.

(d) Obligation of the Attorney.

(1) The attorney is both an officer of the court and an advocate. It is his professional obligation to conduct his case courageously, vigorously, and with all the skill and knowledge he possesses. It is also his obligation to uphold the honor and maintain the dignity of the profession. He must avoid disorder or disruption in the courtroom, and he must maintain a respectful attitude toward the court. In all respects the attorney is bound, in court

and out, by the provisions of the Rules of Professional Conduct (Part 1200 of this Title).

(2) The attorney shall use his best efforts to dissuade his client and witnesses from causing disorder or disruption in the courtroom.

(3) The attorney shall not engage in any examination which is intended merely to harass, annoy or humiliate the witness.

(4)(i) No attorney shall argue in support of or against an objection without permission from the court; nor shall any attorney argue with respect to a ruling of the court on an objection without such permission.

(ii) However, an attorney may make a concise statement of the particular grounds for an objection or exception, not otherwise apparent, where it is necessary to do so in order to call the court's attention thereto, or to preserve an issue for appellate review. If an attorney believes in good faith that the court has wrongly made an adverse ruling, he may respectfully request reconsideration thereof.

(5) The attorney has neither the right nor duty to execute any directive of a client which is not consistent with professional standards of conduct. Nor may he advise another to do any act or to engage in any conduct which is in any manner contrary to this Part.

(6) Once a client has employed an attorney who has entered an appearance, the attorney shall not withdraw or abandon the case without (i) justifiable cause, (ii) reasonable notice to the client, and (iii) permission of the court.

(7) The attorney is not relieved of these obligations by what he may regard as a deficiency in the conduct or ruling of a judge or in the system of justice; nor is he relieved of these obligations by what he believes to be the moral, political, social, or ideological merits of the cause of any client.

Court Rules for the Supreme Court, Appellate Division (Second Department)

§ 700.1 Application of Rules

These rules shall apply in all actions and proceedings, civil and criminal, in courts subject to the jurisdiction of the Appellate Division of the Supreme Court in the Second Judicial Department. They are intended to

supplement, but not to supersede, the Rules of Professional Conduct set forth in part 1200 of this Title and the Rules of Judicial Conduct set forth in part 100 of this Title. In the event of any conflict between the provisions of these rules and the Rules of Professional Conduct and/or the Rules of Judicial Conduct, the Rules of Professional Conduct and/or the Rules of Judicial Conduct shall prevail.

§ 700.2 Importance of Decorum in Court

The courtroom, as the place where justice is dispensed, must at all times satisfy the appearance as well as the reality of fairness and equal treatment. Dignity, order and decorum are indispensable to the proper administration of justice. Disruptive conduct by any person while the court is in session is forbidden.

§ 700.3 Disruptive Conduct Defined

Disruptive conduct is any intentional conduct by any person in the courtroom that substantially interferes with the dignity, order and decorum of judicial proceedings.

§ 700.4 Obligations of the Attorney

(a) The attorney is both an officer of the court and an advocate. It is his professional obligation to conduct his case courageously, vigorously, and with all the skill and knowledge he possesses. It is also his obligation to uphold the honor and maintain the dignity of the profession. He must avoid disorder or disruption in the courtroom and he must maintain a respectful attitude toward the court. In all respects the attorney is bound, in court and out, by the provisions of the Rules of Professional Conduct.

(b) The attorney shall use his best efforts to dissuade his client and witnesses from causing disorder or disruption in the courtroom.

(c) The attorney shall not engage in any examination which is intended merely to harass, annoy or humiliate the witness.

(d) No attorney shall argue in support of or against an objection without permission from the court; nor shall any attorney argue with respect to a ruling of the court on any objection without such permission. However, an attorney may make a concise statement of the particular grounds for an objection or exception, not otherwise apparent, where it is necessary to do so in order to call the court's attention thereto, or to preserve an issue for appellate review. If an

attorney believes in good faith that the court has wrongly made an adverse ruling, he may respectfully request reconsideration thereof.

(e) Attorneys have neither the right nor duty to execute any directive of a client which is not consistent with the Rules of Professional Conduct set forth in part 1200 of this Title. Nor may the attorney advise another to do any act or to engage in any conduct in any manner contrary to these rules.

(f) Once a client has employed an attorney who has entered an appearance, the attorney shall not withdraw or abandon the case without

(1) justifiable cause,

(2) reasonable notice to the client, and

(3) permission of the court.

(g) Attorneys are not relieved of these obligations by what they may regard as a deficiency in the conduct or ruling of a judge or in the system of justice; nor are they relieved of these obligations by what they believe to be the moral, political, social, or ideological merits of the cause of any client.

Local Civil Rules for the Southern and Eastern Districts of New York

Rule 1.5 Discipline of Attorneys

(a) Committee on Grievances. The chief judge shall appoint a committee of the board of judges known as the Committee on Grievances, which under the direction of the chief judge shall have charge of all matters relating to the discipline of attorneys. The chief judge shall appoint a panel of attorneys who are members of the bar of this court to advise or assist the Committee on Grievances. At the direction of the Committee on Grievances or its chair, members of this panel of attorneys may investigate complaints, may prepare and support statements of charges, or may serve as members of hearing panels.

(b) Grounds for Discipline or Other Relief. Discipline or other relief, of the types set forth in paragraph (c) below, may be imposed, by the Committee on Grievances, after notice and opportunity to respond as set forth in paragraph (d) below, if any of the following grounds is found by clear and convincing evidence:

(1) Any member of the bar of this court has been convicted of a felony or misdemeanor in any federal court, or in a court of any state or territory.

(2) Any member of the bar of this court has been disciplined by any federal court or by a court of any state or territory.

(3) Any member of the bar of this court has resigned from the bar of any federal court or of a court of any state or territory while an investigation into allegations of misconduct by the attorney was pending.

(4) Any member of the bar of this court has an infirmity which prevents the attorney from engaging in the practice of law.

(5) In connection with activities in this court, any attorney is found to have engaged in conduct violative of the New York State Rules of Professional Conduct as adopted from time to time by the Appellate Divisions of the State of New York. In interpreting the Code, in the absence of binding authority from the United States Supreme Court or the United States Court of Appeals for the Second Circuit, this court, in the interests of comity and predictability, will give due regard to decisions of the New York Court of Appeals and other New York State courts, absent significant federal interests.

(6) Any attorney not a member of the bar of this court has appeared at the bar of this court without permission to do so.

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