ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I am always conscious about running up unnecessary legal fees in litigation matters and I am acutely aware that, in this current economic climate, clients scrutinize legal bills more than ever. I recently succeeded in winning summary judgment on liability for my client in a breach of contract matter and the trial court subsequently directed a hearing on damages in which my adversary, David Delayer (Delayer), moved for a stay in the appellate court. The stay was granted, however, on the condition that Delayer's client post an undertaking. The day after the stay was granted, I emailed Delayer asking if his client would be posting the undertaking directed by the appellate court. His response was, "We have not made that determination as of yet." A few days later, at a conference before the trial court, Delayer said that his clients "were not seeking to obtain an undertaking." Since Delayer represented that he was not going to seek an undertaking, the trial court scheduled a damages hearing at the conference to occur in 30 days. The day after the conference and in preparation for the hearing, I served a document subpoena upon Delayer, which he moved to quash. That motion was argued a few days before the damages hearing and was granted in part by the trial court. The following morning, I was informed by Delayer that his client had posted the undertaking directed by the appellate court which it had required in order to stay the damages hearing. That afternoon, counsel for the insurance company (which issued the undertaking) informed me that Delayer had applied for the bond "weeks earlier." This is the first I had heard about the timing of the application for the bond, and from past experience I know that a bond is usually issued in a matter of days (if not the same day). Had I known that Delayer had applied for the bond weeks ago (and assuming it was issued shortly after he applied for it), then I would not have been forced to spend unnecessary time opposing his motion to quash since he likely knew weeks prior that the bond was issued, thereby staying the damages hearing.

I believe that Delayer's actions are unprofessional. At a minimum, Delayer's behavior is a clear example of uncivil (perhaps unethical) conduct motivated solely for the purpose of increasing my client's litigation expenses.

My questions for the Forum: Did my adversary act unprofessionally? Is Delayer's conduct sanctionable?

Sincerely,

A. Barrister

Dear A. Barrister:

What constitutes sanctionable conduct is one of the most hotly debated matters faced by the bench and the bar. Section 130-1 of the Rules of the Chief Administrator of the Courts, 22 N.Y.C.R.R. 130-1 (Rule 130-1 or Part 130) sets forth the provisions governing how costs and sanctions may be awarded by a court when it finds that a party or its attorney has acted in a manner warranting the imposition of costs or sanctions. Specifically, Rule 130-1.1 states:

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

The Attorney Professionalism Committee invites our readers to send in comments or alternate views to the responses printed below, as well as additional hypothetical fact patterns or scenarios to be considered for future columns. **Send your comments or questions to: NYSBA, One Elk Street, Albany, NY 12207, Attn: Attorney Professionalism Forum, or by e-mail to journal@nysba.org.**

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> (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.

Although a full discussion of what constitutes sanctionable conduct could take up volumes of this *Journal*, it appears that the situation which you have described focuses primarily on the question of whether a potentially expensive delay caused by an adversary rises to the level of frivolous conduct and should be sanctioned. Rule 130-1.1(c)(2) notes that frivolous conduct includes actions which are "undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another." Rule 130-1.1(c)(2). One example of sanctionable delay involved a law firm which had hindered the resolution of a litigation by twice moving for additional time to submit an appeal brief while withholding for many months information regarding a related settlement in another state that mooted the appeal and of the firm's intention to move to dismiss the appeal on that ground. *See Naposki v. First National Bank of Atlanta*, 18 A.D.3d 835 (2d Dep't 2005).

Of course, an analysis as to what constitutes sanctionable conduct would be incomplete without mentioning Rule 11 of the Federal Rules of Civil Procedure. Although the federal courts are often hesitant to order sanctions when faced with the allegation that a party or its counsel engaged in conduct intended to "cause unnecessary delay, or needlessly increase the cost of litigation . . ." (*see* Fed R. Civ. P. 11(b)(1)), Rule 11 is not by itself the only weapon to combat delay tactics by an attorney. 28 U.S.C.A. § 1927 states that

> [a]ny attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

In *Wechsler v. Hunt Health Systems, Ltd.*, 216 F. Supp. 2d 347 (S.D.N.Y. 2002), the District Court granted sanctions pursuant to both Rule 11 and 28 U.S.C. § 1927 against a defense counsel who "on the eve of [a] . . . pre-trial conference to set a trial date . . . sought [a] procedurally unsound motion for summary judgment." *Id.* at 357. The court in *Wechsler* noted that such conduct by defense counsel "sought to needlessly delay th[e] action." *Id.* at 358.

Naposki and *Wechsler* show just two examples of how courts view delay tactics – they are not taken lightly. While we all know that delay and expense are often inevitable in litigation, smart lawyers recognize that they only create problems for themselves when they engage in delay tactics that include unnecessary motion practice (as seen in *Wechsler*) or discovery "undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another." *See* Rule 130-1.1(c)(2).

We are sure that there are many members of our profession who would consider completely unprofessional Delayer's failure to inform you about the status of the bond in a timely manner. Certainly, many would view Delayer's conduct as violations of multiple provisions of the Standards of Civility (the Standards) (*see* 22 N.Y.C.R.R. § 1200, App. A). Part VI of the Standards provides that "[a] lawyer should not use any aspect of the litigation process . . . for the purpose of unnecessarily prolonging litigation or increasing litigation expenses." Furthermore, Part IX of the Standards states that "[l]awyers should not mislead other persons involved in the litigation process" and Part IX(b) provides that "[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."

You mentioned that you had emailed Delayer the day after the stay was granted by the appellate court asking if his client would be posting the undertaking directed by the appellate court and that Delayer claimed he had not made that determination. As you noted above, Delayer thereafter made a representation before the trial court that his clients "were not seeking to obtain an undertaking." It is entirely possible that Delayer misrepresented his position concerning the undertaking in his exchange with you (a potential violation of Rule 4.1 of the New York Rules of Professional Conduct (the RPC) which requires that "[i]n the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person"). Of greater concern is that Delayer may have misrepresented himself before the trial court concerning the status of the undertaking. Such misstatement could amount to a violation of Rule 3.3(a)(1) of the RPC which states that "[a] lawyer shall not knowingly make a false statement of fact or law to a tribunal . . ."

If you had known that Delayer had actually received the undertaking earlier in time than he later told you, then you would not have had to operate under the assumption that the damages hearing was going forward as previously scheduled by the trial court and you would not have been forced to engage in an unnecessary discovery dispute in advance of the previously scheduled hearing date. By keeping you in the dark as to the status of the undertaking,

Delayer's conduct likely caused you to incur unnecessary litigation expenses (a violation of Part VI of the Standards) and the position he took as to the undertaking may have been both misleading and contrary to what he represented to you in prior conversations (a violation of Part IX of the Standards).

Now, was Delayer's conduct sanctionable? Perhaps wanting to go in the other direction, one court recently answered this question in the negative. *Conason v. Megan Holding, LLC*, N.Y.L.J., May 7, 2013, at 22 (Sup. Ct., N.Y. Co. Apr. 18, 2013), was an action for alleged rent overcharges. The plaintiffs won summary judgment on liability. The court directed an assessment of damages by way of a hearing and ordered an award of attorney fees for the plaintiffs. The defendants sought a stay of the damages hearing in the Appellate Division and further perfected their appeal. The Appellate Division stayed the damages hearing on the condition that the defendants post an undertaking. The plaintiffs thereafter moved for costs in the form of attorney fees, claiming that the defendants failed to inform them they were applying for a bond, thus causing the plaintiffs unnecessary work in litigating a subpoena, among other motion practice. The court addressed the issue of whether a party could be sanctioned for failing to save its adversary money, noting doing so would cause no prejudice to itself. In the end, the court denied the plaintiffs' motion for costs and found that the conduct at issue was not sanctionable. The court stated that while Part 130 could expressly provide that failing to save an adversary money was sanctionable, it did not, and questioned where "to draw the line between mere discourtesy and sanctionable misconduct." In addition, the court found that a code of conduct prohibiting causing an adversary to waste money would be difficult to interpret and enforce.

The court in *Conason* apparently felt constrained by the fact that (unlike in Rule 11) there is no express language in Part 130 permitting an award of costs and sanctions when attorneys engage in conduct that unnecessarily adds to the cost of a case. Nevertheless the court expressed the view that attorneys potentially have both a moral duty and a heightened ethical duty not to engage in conduct that could result in one's adversary being forced to incur unnecessary litigation expenses. In the words of the court, "the day may come when the law takes a more moralistic, one might say 'holistic,' approach," adding that "we all gain when nobody is allowed gratuitously to cause another's loss." *Id.* Furthermore, the court embraced the idea that "[i]n normal civil society, the failure to save someone else money is bad form" and that "[w]hat in normal civil society is common courtesy may some day in law become ethical obligation." *Id.*

While counsel's tactics in *Conason* may not have risen to the level of sanctionable conduct, we can think of situations that might warrant a different result. Consider, for example, the adversary who insists that a deposition must be scheduled in a distant location on a holiday week, claiming that is the only place and time the witness will be available for the next six months. The fact, as discovered when the deposition is taken, is that the attorney knew full well that the witness was available in the adversary's home city for much of that time and there was no reason for the out-of-town deposition. Was the concealment of this fact frivolous conduct within the meaning of Part 130? We are sure that many of us would view it as such.

Although Delayer's conduct (which bears a striking resemblance to the conduct at issue in *Conason*) may not, at least in the view of one judge, have been sanctionable, it should be a cautionary tale for attorneys in their dealings with opposing counsel. The lesson to be learned is that the case law may not always keep pace with the conduct. Lawyers take a great risk when they engage in practices which delay cases and cause unnecessary litigation expense.

Sincerely,
The Forum by
Vincent J. Syracuse, Esq., and
Matthew R. Maron, Esq.,
Tannenbaum Helpern Syracuse
& Hirschtritt LLP

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I have been trying to develop an appellate practice and decided a few years ago to write a quarterly electronic newsletter discussing recent appellate decisions on issues that are of interest to my colleagues and potential clients. My thought was that the newsletter would give me an opportunity to demonstrate my writing and analytical abilities, and attract clients.

The newsletter (known as "The Able Law Firm Letter") targets attorneys and members of the business community who might refer business to my firm, and it includes my biographical and contact information. When I write about a case, I give the citation. I discuss the decision, its implications to the particular practice area and whether the decision is in my opinion correct. I never mention the names of the attorneys who handled the case. My plan is working, and I have gotten several clients who tell me they decided to hire me because of the newsletter. Recently, I had a case in the Court of Appeals which resulted in a major victory for me. I have decided to write about the case in my newsletter and plan on identifying the name of my client and highlighting the fact that I was the attorney who successfully handled the case.

A number of colleagues have suggested that my newsletter is attorney advertising, and that it is unprofessional for me to tout my victory by writing about it. Frankly, I do not think my colleagues are correct, but I am wondering whether it is possible that I am doing something wrong. I have also been told that even though my Court of Appeals decision is a reported case, I need the permission of my client to write about the case and identify its name.

Sincerely,
I.A.M. Able, Esq.