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Report of the Special Committee to Consider Sanctions for Frivolous Litigation in New York State Courts

New York State Bar Association

REPORT OF THE SPECIAL COMMITTEE TO CONSIDER SANCTIONS FOR FRIVOLOUS LITIGATION IN NEW YORK STATE COURTS

I. Introduction

In October, 1989, the New York State Bar Association (NYSBA or the Association) created a Special Committee to Consider Sanctions for Frivolous Litigation in New York State Courts (the Committee). The chair of the Committee is former Court of Appeals Judge Hugh R. Jones. A list of the Committee's members is set forth in Appendix A.

The members of the Committee have brought varied backgrounds and experiences to the Committee's work. It was the Association's intent to constitute a Committee representative of lawyers in New York State.

The Committee was formed in response to a request by the Commercial and Federal Litigation Section of the Association. That Section had studied the use of sanctions in the New York State courts. The primary focus of that study was Part 130 of the Uniform Rules for the New York State Trial Courts (Part 130), implemented on January 1, 1989, which permits the award of costs and the imposition of financial sanctions for frivolous conduct in civil litigation.

Part 130 was the subject of legislative attention during 1989. At the 1989 legislative session which ended on July 1, 1989, the Assembly passed a bill in the closing days which would have suspended the operation of Part 130 (A. 3521). The Senate failed to act on the companion bill (S. 3887) before the session ended, reportedly because "[s]enate leaders blocked a vote in the upper house," N.Y.L.J., July 5, 1989, at 2, col. 3.

The bills provided that during the period of suspension the subject of frivolous litigation would be studied by a temporary state commission. Further efforts to create such a commission and to suspend the court rules during the period of the study were expected in the current session of the Legislature.

The Commercial and Federal Litigation Section recognized the desirability of further study in this area and proposed that the Association constitute a representative committee to review the operation of the rules providing for sanctions against frivolous litigation and to consider proposals for improvement. In response to that proposal, Association President John J. Yanas appointed the Special Committee. The general objective of the Committee was to study and recom-

mend appropriate means for addressing problems caused by abusive conduct in the courts of New York State. The text of the Committee's charge is set forth in Appendix B.

II. The Committee's Activities

The Committee first met on November 30, 1989. Thereafter, the Committee sent a letter to county and local bar association presidents in New York State inviting written comments by their associations on the topic of addressing problems caused by frivolous conduct, including the question of when sanctions should be imposed as well as the substantive and procedural form they should take. The Committee also sent letters to all New York State judges, inviting written comments on the same issues. In addition, the Committee invited written comments from members of interested NYSBA sections (Insurance, Negligence and Compensation Law; Commercial and Federal Litigation; and Trial Lawyers) and committees (Civil Practice Law and Rules; County Courts; Judicial Administration; Medical Malpractice; Supreme Courts; and Tort Reparations).

The Committee mailed a hearing notice relating to public hearings to be conducted by the Committee. Recipients of the hearing notice included members of the NYSBA House of Delegates, NYSBA section and committee chairs, county and local bar associations (including women's, specialty and ethnic bars), as well as selected newspapers in all regions of the State.

Thus, the Committee mailed letters directly to more than 12,000 lawyers and judges expressing its interest in their views on these matters. Many additional lawyers and others were afforded an opportunity to comment through local and county bar associations and at public hearings.

To obtain data regarding similar statutes and rules in other states, the Committee sent letters to the Law Digest Revisers for Martindale-Hubbell in the other 49 states and arranged for the mailing of a memorandum to executive directors of other state bar associations throughout the United States. In response to its solicitations, the Committee received written comments from 147 organizations and individuals. The Committee also conducted a public hearing in New York City on February 9, 1990. An acknowledgement and listing of those who either responded to the Committee's survey or testified at the public hearing is set forth in Appendix C.

The Committee received and considered voluminous materials from the Law Digest Revisers for Martindale-Hubbell. A chart setting forth data on sanctions furnished by other jurisdictions is set

forth in Appendix D. The Committee also considered numerous judicial decisions regarding sanctions.

Finally, the Committee considered an extensive study by the Committee on Federal Courts of the New York State Bar Association on *Sanctions and Attorneys' Fees*, issued in June 1987. That report surveyed the experiences and attitudes, regarding the provision for sanctions in Rule 11 of the Federal Rules of Civil Procedure (Rule 11), of a broad spectrum of the practitioners, as well as the judges, in the federal courts in New York. Detailed questionnaires were mailed to approximately 8,000 lawyers and to every federal judicial officer in New York State. As part of that study, the responses of 1,414 lawyers and 43 judges to the questionnaires were obtained and analyzed by computer.

The Committee met over the weekend of February 24-25, 1990 and on March 12, 1990. The Committee now respectfully submits its Report.

III. Recommendations

The Committee believes that in adopting Part 130, the New York State courts acted appropriately and took a significant step in the right direction. Nevertheless, the Committee recommends that Part 130 be modified in several significant ways. The major changes proposed are set forth in Section A of this part of the Report.

Most of the proposed revisions stem from the Committee's view that the focus of Part 130 should be on abusive conduct rather than on frivolous pleadings. The other major changes stem from the Committee's belief that the purpose of Part 130 should be deterrence, with fee-shifting the appropriate deterrent mechanism, rather than punitive sanctions.

Section B of this part of the Report contains the text of revised Part 130. The text of current Part 130 indicating the Committee's revisions thereto is set forth in Appendix E. An analysis of the proposed changes and an exposition of the reasons for the changes is set forth in Section C of this part of the Report.

A. Summary of Recommendations

1. The caption for Part 130, "Costs: Sanctions," should be replaced with "Costs for Abusive Conduct."

2. The second sentence of current § 130-1.1(a), which provides that financial sanctions may be imposed in lieu of awarding costs, should be deleted.

3. Current § 130-1.1(c), which defines frivolous conduct, should be amended in two respects:

a. Subpart (i), which was patterned on Federal Rule of Civil Procedure 11, should be deleted.

b. Subpart (ii) should be revised to incorporate omissions, as well as abusive acts.

4. § 130-1.2, which details the requirements for orders awarding costs, should be amended in two respects:

a. The section should require courts to set forth in writing the particulars of the conduct undertaken which violated Part 130, and the particulars justifying the amount of costs awarded.

b. The cap of $10,000 should be eliminated.

5. Current § 130-1.3, which pertains to payment of sanctions, should be deleted.

6. Additional Recommendations:

a. The Office of Court Administration should monitor the operation of Part 130 to determine its effectiveness and to identify problems.

b. An appropriate unit within the New York State Bar Association should be designated to receive comments of practicing attorneys and to monitor the operation of Part 130 to determine its effectiveness and to identify problems.

c. The Legislature should consider repealing N.Y. Civ. Prac. L & R. § 8303-a (McKinney 1981 & Supp. 1990) (CPLR) as ineffective and inconsistent with the thrust of amended Part 130.

B. Text of Proposed Revision of Part 130

UNIFORM RULES - TRIAL COURTS

§ 130-1.1 — Costs for Abusive Conduct.

(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 attorneys' fees, resulting from abusive conduct as defined in 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, 8 or 10 of the Family Court Act.

(b) The court, as appropriate, may make such award of costs, against either an attorney or a party to the litigation or against both. Where the award 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 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 abusive if it is undertaken or omitted primarily to delay or prolong unreasonably the resolution of the litigation or to harass or maliciously injure another, and may include the making of a motion for costs under this section. In determining whether the conduct in question is abusive, the court shall consider whether the conduct was continued after its impropriety was apparent or should have been apparent to counsel.

(d) An award of costs 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.

§ 130-1.2 — ORDER AWARDING COSTS.

The court may make an award of costs only upon a written decision setting forth the particulars of the conduct on which the award is based, the reasons why the court found the conduct to be abusive, and the reasons why the court found the amount awarded to be appropriate. An award of costs shall be entered as a judgment of the court.

§ 130-1.3 — APPLICATION TO OFFICERS OTHER THAN JUDGES OF THE COURTS OF THE UNIFIED COURT SYSTEM.

The powers of a court set forth in this Part shall apply to judges of the Housing Part of the New York City Civil Court and to hearing examiners appointed pursuant to section 439 of the Family Court Act, except that the powers of Family Court hearing examiners shall be limited to a determination that a party or attorney has engaged in abusive conduct, which shall be subject to confirmation by a judge of the Family Court who may impose any costs authorized by this Part.

§ 130-1.4 — EXCEPTION.

This rule shall not apply to requests for costs or attorneys fees subject to the provisions of CPLR 8303-a.

C. Analysis of Recommendations and Proposed Revisions

Two overriding concerns support the Committee's recommendations. First, the Committee believes that the current formulation may

unnecessarily chill access to the New York State courts without preventing the conduct that actually causes needless expense and delay. Accordingly, the Committee's recommendations for change are designed to avoid the chilling of access problems presented by sanctions rules.

Second, the Committee is concerned with insuring that the revised rule serve to deter the type of conduct that causes such expense and delay, without creating the risk of arbitrary punishment. The Committee therefore recommends that the persons harmed by such conduct be compensated for their incurred expenses, including attorneys fees. Such cost shifting is not subject to arbitrary application as the provision for payment of sanctions may be.

Before analyzing the text of the revised Part 130, it is important to place the Committee's recommendations in a larger context. The Committee found no empirical or other data to suggest that the problems confronting the New York State courts are caused by the bringing of frivolous complaints or other pleadings.[1] Rather, almost all indications are that excessive costs and delay are caused by abusive litigation practices. Accordingly, the focus of revised Part 130 is on abusive conduct, and not on the merits of pleadings filed.

Commentators critical of Part 130 and of Federal Rule of Civil Procedure 11, which became the model for Part 130, speak eloquently of the need to prevent the chilling of access to courts. Indeed, every empirical study of Rule 11 undertaken to date suggests that Rule 11 may have a chilling effect on the bringing of novel claims and theories.[2]

Access to the court system is a basic tenet of the American legal and historical tradition. A sanctions provision which exerts a chilling influence on creative counsel does violence to this tradition. The sanction of dismissal or the denial of relief by the court is a sufficient safeguard. Indeed, in our common law tradition, it is bad public policy to provide judges with a tool that would permit them not only to

1. The fact that CPLR 8303-a has only been invoked twice in the reported cases suggests that problems other than frivolous filings were the cause of the medical malpractice crisis. Similarly, only a handful of the cases applying Part 130 that the Committee collected involved sanctions for a frivolous pleading.

2. Nelken, *Has the Chancellor Shot Himself In the Foot Looking for a Middle Ground on Rule 11 Sanctions*, 41 HASTINGS L.J. 383 (1990); Burbank, *Rule 11 in Transition: The Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11*, AM. JUDICATURE SOC'Y (1989); Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFFALO L.R. 485 (1989); La France, *Federal Rule 11 and Public Interest Litigation*, 22 VAL. U.L. REV. 331 (1988); Vairo, *Rule 11, A Critical Analysis*, 118 F.R.D. 189 (1988); Nelken, *Sanctions Under Amended Federal Rule 11 - Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313 (1986).

dismiss an action, but also to sanction the losers when in their view the claims or theories were frivolous. At the very least, a rule that may chill access to courts should be adopted, if at all, by the legislature, not the courts themselves.

By deleting § 130-1.1(c)(i), which raises the access questions, from the rule, any question of the Office of Court Administration's (OCA's) jurisdiction to adopt the rule is eliminated. The access to courts question is for the New York State Legislature to decide. On the other hand, the daily operation and administration of the New York courts, including the control of abusive conduct, is properly a function of the OCA. The proposed rule, which focuses only on conduct, is therefore properly within the OCA's jurisdiction. Indeed, it is preferable for a rule aimed at preventing abusive conduct to be adopted by the OCA, which can monitor the rule and has the flexibility to make appropriate revisions.

The following commentary describes and explains the proposed revisions to the text of Part 130.

§ 130-1.1 — Costs for Abusive Conduct

The words in the caption for Part 130, "Costs: Sanctions," have been replaced with "Costs for Abusive Conduct." The caption would then reflect the scope and underlying purpose of the rule, to combat abusive conduct. The word "Sanctions" is eliminated and the word "Costs" is maintained, because, as will be explained below, the Committee recommends that only costs in the form of reasonably incurred expenses and attorney's fees may be awarded under the rule.

§ 130-1.1(a)

The Committee proposes that § 130-1.1(a) be revised to provide:

> (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 attorneys' fees, resulting from abusive conduct as defined in 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, 8 or 10 of the Family Court Act.

There are no changes in the first sentence except for replacing the phrase "frivolous conduct" with "abusive conduct" in accord with the overall change in the emphasis of the rule.

The second sentence of current § 130-1.1(a), which provides that financial sanctions may be imposed in lieu of awarding costs, is deleted. The provision for allowing "costs in the form of reimbursement

for actual expenses reasonably incurred and reasonable attorney's fees, resulting from abusive conduct" is a sufficient deterrent and also has the benefit of reimbursing the party victimized by the abusive conduct.

Abusive conduct also may harm the court system and other litigants needing judicial intervention because of the delay engendered. The Committee considered whether punitive sanctions or monetary fines beyond or in lieu of reimbursement for costs were desirable or needed to deter abusive conduct. For several reasons, the Committee decided that such sanctions were neither desirable nor necessary.

Punitive fines raise several problems. It is difficult to measure or quantify what an appropriate sanction should be. First, the value of a court's time is hard to measure. Given the difficulties in quantification, some judges may resort to subjective factors and assert their authority by imposing unjustifiably large fines. Moreover, as a matter of public policy, it is the function of judges to rule on the legitimacy of actions or motions, and fines should not attach to using the system.

Second, litigants "waiting in line" also may be damaged by abusive conduct. However, it is difficult to measure what their damages would be. Moreover, the payment of a fine to the Clients' Security Fund does not speed up the line nor compensate the litigants. In addition, more effective remedies, such as the power to enjoin repetitive abuses, exist to combat abuses such as the refiling of meritless claims.[3]

Reimbursement in the form of actual and reasonable expenses will provide a sufficient deterrent to abusive conduct so that punitive sanctions should be unnecessary. The Committee also proposes that the $10,000 cap on costs be eliminated. The prospect of full cost-shifting should make lawyers think twice about engaging in abusive conduct.

No changes are proposed to the third sentence. Thus, the applicability of Part 130 remains the same.

§ 130-1.1(b)

The Committee proposes that § 130-1.1(b) be revised to read:

> (b) The court, as appropriate, may make such award of costs, against either an attorney or a party to the litigation or against both. Where the award 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

3. Muka v. NYS Bar Ass'n, 120 Misc. 2d 897, 466 N.Y.S.2d 891 (Sup. Ct. Tompkins County 1983); Muka v. Hancock, Estabrook, Ryan, Shove & Hust, 120 Misc. 2d 146, 465 N.Y.S.2d 416 (Sup. Ct. Onondaga County 1983); Muka and Deubler v. Pollack (Sup. Ct. Otsego County December 29, 1989) (op. unavailable); N.Y. CITY CIV. CT. ACT § 1810 (McKinney 1963).

> defender's office with which the attorney is associated and that has appeared as attorney of record. The award may be imposed upon any attorney appearing in the action or upon a partnership, firm or corporation with which the attorney is associated.

The only changes made to this subsection are to conform the language. Accordingly, the phrases referring to the imposition of sanctions are deleted.

The Committee recommends that Part 130 awards of costs continue to be made against either the attorney, the party or both. It is contemplated that most awards will be imposed against the attorney. Most decisions as to tactics and motions are made by lawyers, and clients often will have no basis for determining whether the attorney's tactic is improper.

The Committee believes, however, that the option of making an award against the client, or the attorney and client, should be preserved. In some cases, a client knowingly will instruct the attorney to go forward with improper conduct, such as filing a motion to delay or harass an adversary.

The revised subsection preserves the option of making the award against an attorney, or upon the attorney's partnership, firm, corporation, government agency, prosecutor's office, legal aid society or public defender's office with which the attorney is associated.[4] Especially with the elimination of the $10,000 cap, allowing the award to be against the entity as well as the attorney will insure maximum deterrence. The rule will encourage the entity to monitor more carefully the practices of the attorneys associated with the entity.

Part 130 awards are not dependent on the signing of a paper as is the case with Federal Rule of Civil Procedure 11.[5] Under the Civil Practice Law and Rules (CPLR), papers may be signed by the party or signed in the name of a firm, rather than the individual attorney who caused the paper to be prepared. In addition, because Part 130 is aimed at conduct, and more than one attorney may be involved in the litigation, it is appropriate to allow the award to be made against the entity. Permitting the award to be against the entity may also avoid the sometimes difficult task of determining exactly which attorney was responsible for the abusive conduct or course of conduct.

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4. In contrast, under Fed. R. Civ. P. 11, only a party signing a pleading may be sanctioned. *See* Pavelic & Leflore v. Marvel Entertainment Group, 110 S. Ct. 456 (1989).

5. Because the focus of Part 130 is on abusive conduct rather than on the frivolousness or merits of a paper filed or served, the Committee decided that importing the signing requirement of Federal Rule of Civil Procedure 11 is inappropriate.

§ 130-1.1(c)

The Committee proposes that § 130-1.1(c) be revised to provide:

> (c) For purposes of this Part, conduct is abusive if it is undertaken or omitted primarily to delay or prolong unreasonably the resolution of the litigation or to harass or maliciously injure another, and may include the making of a motion for costs under this section. In determining whether the conduct in question is abusive, the court shall consider whether the conduct was continued after its impropriety was apparent or should have been apparent to counsel.

This is the heart of Part 130. This subsection, which defines frivolous conduct, has been completely rewritten. First, the subpart now defines "abusive conduct" rather than "frivolous conduct." The word "abusive" more clearly defines the type of objectionable conduct that ought to be deterred. While the word "abusive" may have some subjective content, the word generally connotes wrongdoing. The word "frivolous" merely connotes wrongheaded. Wrongdoing should be deterred. The process of winning and losing takes ample care of the wrongheaded.

Subpart (i), which was patterned on Federal Rule of Civil Procedure 11, is deleted. The subpart was designed to incorporate an objective test by defining "frivolous" with phrases such as "completely without merit" and "reasonable argument." The circularity of the definition, however, inevitably leads to and invites subjective decision-making. Any rule that employs the word "frivolous" necessarily raises the problem of chilling because that word is inherently subjective and ultimately is dependent on one's view of the merits of the pleading or motion. While Part 130-1.1(c)(i) expressly[6] and Rule 11 implicitly[7] both sought to cloak the concept of frivolous in objective dress, by immunizing from sanctions all papers supported by a reasonable argument, such attempts may ultimately fail to prevent the problem of chilling because of disputes about whether such arguments are reasonable or not.[8]

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6. (c) For purposes of this Part, conduct is frivolous if:
(i) it is completely without merit in law or fact and cannot be supported by reasonable argument for an extension, modification or reversal of existing law.

7. The full text of Rule 11 is set forth in Appendix F. Although the word "frivolous" does not appear in Rule 11, many courts applying the rule use a frivolous test in determining whether sanctions must be imposed. Hudson v. Moore Business Forms, Inc., 836 F.2d 1156 (9th Cir. 1987), *reh'g denied*, 898 F.2d 684 (9th Cir. 1990); Kramer, Levin, Nessen, Kamin & Frankel v. Aronoff, 638 F. Supp. 714 (S.D.N.Y. 1986).

8. For example, if Brown v. Board of Education, 347 U.S. 483 (1954), were filed in

Indeed, the Committee considered and rejected several reformulations of such standards and found all of them unacceptable in light of the problem of chilling of access.

Moreover, it is unnecessary to focus on the merits of pleadings in Part 130. As Part 130, even as currently formulated, suggests, the problem is conduct. However, as currently drafted, Part 130 raises the same chilling effect problem as Rule 11 because it uses the word "frivolous," rather than the word "abusive," to define objectionable conduct. More important than the question of meritless claims and theories is the problem of lawyers misbehaving in the conduct of depositions, motion practice, and in the courtroom; and the filing or serving of repetitive motions or pleadings. Equally of concern is the failure of lawyers to respond to court orders, discovery requests, or conferences.

Accordingly, the provision currently incorporated in subpart (c)(ii) has been revised to apply to omissions, as well as abusive acts. The first sentence of subpart (c) now provides that "conduct is abusive if it is *undertaken or omitted* primarily to delay or prolong unreasonably the resolution of the litigation or to harass or maliciously injure another, and may include the making of a motion for costs under this section."

The word "primarily" is retained. The Committee believed that using the word "solely," which is used in CPLR § 8303-a, would undermine the effectiveness of the rule because it would be too difficult to prove or find sufficient evidence. In addition, the word "solely" may provide an avenue of escape for the unscrupulous lawyer seeking to cloak misconduct with a minimal element of propriety. Retaining the word "primarily" is more workable, and has the advantage of allowing the court to deal leniently with an inadvertent offender while being able to take effective action against the deliberate or repeat violator. Using the word "primarily" allows the court to infer that the conduct was abusive under the circumstances.

Under the proposed rule, the mere filing of a frivolous pleading would not ordinarily constitute the basis for an award. However, if it becomes apparent after the filing that there is no factual basis whatsoever for the pleading, the expense of the litigation attributable to that

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the wake of Plessy v. Ferguson, 163 U.S. 537 (1896), and the amended version of Rule 11 were in existence, there would be a great risk that a federal judge would be required to sanction the plaintiff filing the action. In some cases, sanctions have been reversed because an appellate court has found that the lower court not only should not have imposed sanctions, but also wrongly decided the issue on the merits against the party sanctioned. Goldman v. Belden, 754 F.2d 1059 (2d Cir. 1985).

pleading may be shifted from that point on. Under these circumstances, the lack of any factual basis for the pleading would permit the court to find that the party filing the pleading had persisted in pursuing it for one of the purposes identified in § 130-1.1(c) of the proposed rule.

The subsection makes clear that abusive motions for costs are also subject to the rule. It is necessary to make this clear to avoid the problem of satellite and abusive sanctions motions that are endemic in the federal courts under Rule 11.

§ 130-1.1(d)

The Committee proposes that § 130-1.1(d) be changed to read:

> (d) An award of costs 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.

Only one conforming change is made to this subsection. The phrase referring to the imposition of sanctions is deleted. The Committee retained the provision of an opportunity for parties to move for costs under the rule. Because the rule would permit only awards of costs, rather than sanctions, it is necessary and desirable to allow the victimized party to move for relief. That party should not be required to rely on a judge who may be loath to raise such issues. Similarly, a judge may wish to raise the abusive conduct question *sua sponte* to protect a victimized party who may be loath to move for an award because of concerns about damaging relations with an adversary or the court and the climate for settling a dispute.

The problems of satellite litigation and abusive sanctions motions encountered in the federal courts under Rule 11 should not arise under revised Part 130. First, because the rule no longer covers frivolous pleadings, allowing for Monday-morning quarterbacking exercises, relatively fewer motions will be made. Second, the Committee expects courts to aggressively monitor the making of motions under Part 130, and to impose awards against attorneys who bring abusive motions for costs.

The Committee recommends no changes in the language pertaining to the opportunity to be heard. Because § 130-1.2 will be revised to require judges making awards to be more specific as to what the abusive conduct is, it is unnecessary to be specific about the type of notice and hearing. Awards will be reversed if the trial court fails to conduct a hearing or to take affidavits that permit an accused attorney to re-

spond to the required detailed recitation of wrongdoing. Affidavits will be sufficient, so long as they are on personal knowledge. However, the court should hold oral hearings when necessary, especially if a credibility issue is presented.

§ 130-1.2 — Order Awarding Costs

The Committee proposes that § 130-1.2 be revised to provide:

> The court may make an award of costs only upon a written decision setting forth the particulars of the conduct on which the award is based, the reasons why the court found the conduct to be abusive, and the reasons why the court found the amount awarded to be appropriate. An award of costs shall be entered as a judgment of the court.

The caption of the subsection deletes the words "or Imposing Sanctions" to conform to the major revisions of Part 130. In addition to the conforming changes to the text which substitute "abusive" for "frivolous," and which delete the phrases pertaining to sanctions, the text of this subsection is amended in two important respects.

First, the section requires courts to set forth in their written order the particulars of the conduct undertaken which violated Part 130 and which justified the amount of costs awarded. The addition of the phrase "particulars of the" conduct is necessary to prevent litigants and the courts from imposing an award based on subjective factors alone. Requiring the court to set forth the particulars should insure that awards are not unfairly made, and will insure that a satisfactory record for appellate review is maintained.

The case law under Federal Rule of Civil Procedure 11 has evolved to require findings by the district court as to the specifics of the violation and the sanction awarded. The findings requirement has provided the federal appellate courts with a tool for preventing abusive use of Rule 11, and the concept should be expressly incorporated into Part 130.

Particularity also complements the due process requirements contained in § 130-1.1(d). Requiring specificity in the order will result in proper notice to the attorney and will minimize the chances of the court making an improvident ruling.

The particularity requirement also applies to the court's award. Part 130 permits an award of "actual expenses reasonably incurred and reasonable attorney's fees, resulting from abusive conduct." Thus, the court must demonstrate that the award is for the victimized party's actual expenses resulting from the abusive conduct. The rule

is not an all-purpose fee-shifting device, rather it provides only for reimbursement for the expenses caused by the abusive conduct.

The court must also demonstrate that the award is for expenses and attorney's fees that are "reasonably incurred." The use of this phrase makes it unnecessary to add an express duty of mitigation to the rule. Only a victimized party who has mitigated will be able to recover its total fees and expenses.

The subsection will continue to require an award to be entered as a judgment of the court which will permit the offending party to take an immediate appeal. Thus, the rule provides ample protection during the course of the action or proceeding to seek review of an award.

The second major change to this subsection is to eliminate the cap of $10,000. There are several significant problems with the cap, and there is no real need for the cap because of other changes made to Part 130.

The requirement that the court set forth with particularity the basis for an award protects against arbitrary awards. The victim of an unfair award is unlikely to be appeased by the fact that there is some limit on the Court's unfairness. In addition, the elimination of sanctions, which are difficult to quantify, removes one of the remaining justifications for a cap. As a corollary, requiring the court to set forth the particulars of an award, limited by the reasonableness requirement, prevents unfair awards.

The basic problem with the cap is that it permits unscrupulous lawyers or litigants to buy a license for abuse. Once the magic $10,000 threshold is met, the court will lose Part 130 as a tool to control abusive conduct. A well-financed party, for example, would be in a position to overwhelm a less well-off or impecunious adversary. Part 130's new emphasis on abusive conduct, instead of frivolous conduct, also reduces the need to protect smaller firms from large awards. If solo practitioners or others with lesser resources engage in abusive conduct, they should not be able to hide behind inability to pay as an excuse for continuing to harass their opponents.

§ 130-1.3 — Application to Officers Other than Judges of the Courts of the Unified Court System

The Committee proposes that § 130-1.3 should now read:

> The powers of a court set forth in this Part shall apply to judges of the Housing Part of the New York City Civil Court and to hearing examiners appointed pursuant to section 439 of the Family Court Act, except that the powers of Family Court hearing examiners shall be limited to a determination that a party or attorney has engaged in abusive conduct, which shall be subject to confir-

mation by a judge of the Family Court who may impose any costs authorized by this Part.

The current text of this section is deleted. As discussed in the analysis of § 130-1.1, the Committee decided that sanctions were neither necessary nor desirable. Compensatory awards provide a sufficient deterrent to the abusive conduct proscribed by the rule.

In its place is the revised text of current § 130-1.4. Only conforming changes are made to new § 130-1.3. The word "frivolous" is replaced with the word "abusive," and the phrase "or sanctions" is deleted.

§ 130-1.4 — Exception

The revised text of this subsection has been moved to § 130-1.3. If the legislature declines to repeal CPLR § 8303-a, the text of current § 130-1.5 will become § 130-1.4.

§ 130-1.5

Deleted.

IV. Examples Illustrating the Operation of the Revised Rule

Examples illustrating the operation of the revised rule are set forth in Appendix G.

V. Potential Vehicles for Imposing Other Forms of Costs and Sanctions

In making its recommendations, the Committee has recognized and considered other forms of costs and sanctions which are currently available in New York State. The Committee does not believe that any of these costs and sanctions are viable alternatives to the measures the Committee now recommends. The Committee has listed these costs and sanctions in this section of its Report and has summarized the reasons they are not useful in curtailing abusive conduct.

A. CPLR Provisions

The CPLR contains various provisions for fees (Article 80), costs (Articles 81 and 82), and disbursements and additional allowances (Article 83). With the possible exception of CPLR 8303-a (discussed hereinafter), the maximum amounts which may be awarded under these provisions are not sufficient to address in a meaningful way the problems of abusive conduct discussed in this Report. In addition, statutory costs and disbursements are usually awarded automatically

to the successful party in a lawsuit and may not be used to attempt to control abusive conduct.

The CPLR section which might be expected to be most useful in addressing abusive litigation conduct is CPLR Section 3126 which provides "[p]enalties for refusal to comply with order or to disclose." In particular, Section 3126 provides:

> § 3126. PENALTIES FOR REFUSAL TO COMPLY WITH ORDER OR TO DISCLOSE.
>
> If any party, or a person who at the time a deposition is taken or an examination or inspection is made, is an officer, director, member, employee or agent of a party or otherwise under a party's control, refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed, pursuant to notice duly served, the court may make such orders with regard to the failure or refusal as are just, among them:
>
> 1. an order that issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or
> 2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or
> 3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

Judges are reluctant to apply the penalties provided in CPLR 3126 because they are thought to result in prejudice to the client, not to the lawyer, who is more likely to have been responsible for the improper conduct. If judges will not use the section, it is obviously not a meaningful deterrent. In addition, even if the section was used, it would often be inappropriately applied because it frequently would punish the client for the sins of its lawyer.

B. Attorney Disciplinary Procedures

The Committee considered the availability of attorney grievance or disciplinary procedures pursuant to DR 7-102 (A)(1) and (2) as a possible alternative response to abusive conduct. The Committee concludes that such proceedings are not a viable alternative. There is a distinct advantage to having an application relating to abusive litiga-

tion conduct promptly adjudicated by the judge before whom the conduct occurred, rather than by a grievance or disciplinary committee months or years later. In addition, attorney disciplinary proceedings have not been an effective way to control abusive litigation conduct. Much abusive conduct is arguably not violative of the disciplinary rules but still should be curtailed.

C. Civil Contempt Proceedings Under the Judiciary Law

The Committee considered the availability of proceedings for civil contempt under Section 751(1) of the Judiciary Law as a possible alternative response to abusive conduct. The Committee concluded that such proceedings are rarely used in the context of abusive conduct and are inadequate for dealing with the abuses intended to be covered by the Committee's recommendations.

VI. CPLR 8303-a

The Committee recommends that the New York Legislature consider whether CPLR Section 8303-a should be continued in view of the revised thrust of Part 130. Certain of the conduct described in Section 8303-a may be the subject of an award pursuant to revised Part 130. In addition, Section 8303-a as drafted is applicable to a limited class of cases. An abusive conduct standard should encompass all forms of cases. Finally, Section 8303-a inevitably results in limitations on access to the courts. As set forth above, the Committee believes that the Legislature should consider whether such limitations are appropriate.

Respectfully submitted,
SPECIAL COMMITTEE TO CONSIDER
SANCTIONS FOR FRIVOLOUS LITIGATION
IN NEW YORK STATE COURTS

Separate Statement of Stanley Futterman

I agree with all but one of the recommendations of the Committee, including its endorsement of the appropriateness and importance of court rules prohibiting abusive conduct in litigation. I disagree only with the Committee's recommendation that the "objective" standard for determining abusive conduct be deleted.

Part 130 of the Uniform Rules of the New York State Trial Courts now prohibits attorney conduct in civil litigation when:

> (i) it is completely without merit in law or fact and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; or
>
> (ii) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another.

The first of these standards, which the Committee would eliminate, looks at whether there is any "merit" to or "reasonable argument" for a position taken in litigation. It holds lawyers as objective a standard of conduct as has been devised, taken from the Code of Professional Responsibility, and avoids the need to judge an attorney's motives.

I do not think the standard is too high. I believe it is one that those who consider themselves members of a learned profession should welcome, both for themselves and for the responsible clients they serve.

The objective standard is intended to, and hopefully will, "chill" conduct that is "completely without merit in law or fact and cannot be supported by a reasonable argument . . . ." The Committee objects that the standard may unintentionally freeze out imaginative claims and theories. No one has identified for us, however, a single novel claim or theory that has not been advanced because of Part 130 or any of its federal or state counterparts.

The Committee's Report argues that a *Brown v. Board of Education* claim filed in the wake of *Plessy v. Ferguson* might have been sanctioned by a federal judge under the objective standard. The argument is an unpersuasive one for several reasons. First, it does an injustice to the lawyering which went into the *Brown* challenge; while the merits of the Supreme Court's decision have been subjected to microscopic analysis, no responsible jurist, to my knowledge, has ever suggested that the *Brown* proponents, or the first Mr. Justice Harlan, who dissented in *Plessy*, did not present a "reasonable argument for an extension, modification or reversal of existing law;" that much is specifically protected by the existing wording of Part 130. If we cannot trust our judges to recognize a reasonable argument when they see it, we cannot trust them to do anything.

Second, references to federal constitutional rights can have only a tangential relation to civil litigation in the state courts. The scope of application of Part 130 embraces the humbler stuff of contracts, torts and matrimonial litigation. There is less consequence to what may be deterred and more justification for the shifting of costs.

Third, under the Committee's proposal to eliminate punitive sanctions, which I strongly support, no one can be *punished* for a theory that may be judged too imaginative. All that may be involved is the shifting of some of the huge expense of modern litigation — the real chiller of resort to the courts — from the innocent and victorious litigant to the losing party and/or attorney who has imposed additional expense through the assertion of a position "completely without merit in law or fact . . . ." Anything less seems to me to be unjust.

Fourth, there is the collective judgment of other jurisdictions. Our survey shows that of thirty-three jurisdictions (including the federal) as to which we were able to acquire first-hand information, 29 employ an objective standard akin to that in Part 130. One state, Idaho, goes further and by statute authorizes its courts to award attorney fees in any action that merits it, approaching the "English" rule which customarily shifts attorneys' fees from the winner to the loser. There are good reasons to refrain from shifting costs automatically from winner to loser, but not when the loser has been irresponsible.

Fifth, Part 130 is barely a year old. I do not believe we have accumulated the experience which would justify amputating one of its two standards. I am concerned that to do so would send the wrong message to New York's attorneys. For the good of their clients and themselves, they should be asked how they can be more responsible, not encouraged to think that next year they may be able to get away with more than they think they can this year.

I recognize that the Committee has attempted to be responsive to these concerns by noting that persistence in asserting a position after its lack of merit has become obvious may be found to constitute "harassment." That approach seems to me inadequate, however. First, judgments about a lawyer's or party's motives may be far more difficult to make than judgments about the objective basis for a position taken in litigation. Courts will be reluctant, and properly so, to make judgments of the former type. Moreover, I believe that the root problem is not so much harassment as irresponsibility. I do not think many lawyers act out of malice; I do think many lawyers have diffi-

culty confessing to their clients that a position they have asserted has been shown to be baseless and should be abandoned.

Stanley Futterman

Appendix A

Members of the Special Committee to Consider Sanctions For Frivolous Litigation in New York State Courts

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Edward N. Costikyan
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Appendix B

Charge to Special Committee to Consider Sanctions For Frivolous Litigation in New York State Courts

The Special Committee to Consider Sanctions for Frivolous Litigation in New York State Courts shall:

1. Study appropriate means for addressing problems caused by frivolous litigation in the courts of New York State, including the question of when sanctions should be imposed and the substantive and procedural form they should take. As part of this study, the Committee shall evaluate the appropriateness and effectiveness of those measures already in place designed to control frivolous litigation, especially those procedures for the imposition of sanctions established by the Uniform Rules for the New York State Trial Courts.

2. Prepare appropriate recommendations based on its study for consideration by the House of Delegates. Such recommendations may include, but are not limited to, amendment or expansion of the existing court rules, or the formulation of such further rules, regulations or legislation as the Committee may deem appropriate.

3. To the extent practicable, conduct its deliberations in close coordination with other interested committees and sections of the Association.

4. Make timely progress reports to the officers of the Association and to the Executive Director and to submit its report and recommendations to the Executive Committee and the House of Delegates as requested by the President.

Appendix C

Acknowledgment of Contributors

The sincere appreciation of the Committee is extended to the following attorneys, law firms and judges who responded to our request for comments and suggestions with respect to sanctions rules, as their views have been of considerable assistance to our study.

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Appendix D

Summary of U.S. Jurisdictions' Approaches to the Problem of Abusive Conduct in Litigation

Jurisdiction	Stat.	Court Rule	Subj. Stand.	Object. Stand.	Applic. to Party	Applic. to Atty.	Punitive Sancts.	Cost Shift.
Alabama	X	-	X	X	X	X	-	X
Alaska	-	X	X	X	X	X	to $500	X
Arizona	X	X	X	X	X	X	-	to $5000
Arkansas	-	-	-	-	-	-	-	-
California								
Colorado								
Connecticut								
Delaware	-	X	X	X		X	-	X
Dist. of Col.								
Florida	X	-	-	X	X	X	-	X
Georgia	X	-	X	-	X	X	-	X
Hawaii								
Idaho	gen'l auth.	X	X(rule)	X(rule)	X	X(rule)	-	X
Illinois								
Indiana								
Iowa	-	X	X	X	X	X	-	X
Kansas	X	-	X	X	X	X	-	X
Kentucky								
Louisiana	X	-	X	X	X	X	X(atty)	X
Maine	-	X	X	X	X	X	-	X
Maryland	-	X	X	X	X	X	X(atty)	X
Massachusetts	X	X	X	-	X	X	X(atty)	X(party)
Michigan	X	X	X	X	X	X	-	X
Minnesota	X	X	X	X	X	X	?	X
Mississippi	X	X	X	X	X	X	X(atty)	X
Missouri	X	X	X	X	X	X(rule)	-	X
Montana								
Nebraska	X	-	X	X	X	X	-	X
Nevada								
New Hampshire								
New Jersey								
New Mexico	X	-	X	X	X	X	X	-
New York	X	X	X	X	X	X	to $10,000	total
N. Carolina	X	X	X	X	X	X	-	X
N. Dakota								
Ohio	?	X	X	X	-	X	X(atty)	X(atty)

Jurisdiction	Stat.	Court Rule	Subj. Stand.	Object. Stand.	Applic. to Party	Applic. to Atty.	Punitive Sancts.	Cost Shift.
Oklahoma	X	-	X	X	X	X	-	X
Oregon	X	-	X	X	X	X	-	X
Pennsylvania	-	X	X	X	X	X	X(atty)	-
Puerto Rico	-	X	X	X	X	X	X(atty)	X
Rhode Island								
S. Carolina	-	X	X	X	X	X	X(atty)	-
S. Dakota								
Tennessee	X	-	X	X	X	X	X(atty)	X
Texas	X	-	X	-	X	X	-	X
Utah								
Vermont								
Virginia								
Washington	X	X	X(rule)	X	X	X(rule)	-	X
West Virginia								
Wisconsin	X	-	X	X	X	X	-	X
Wyoming								
Federal	-	X	X	X	X	X	-	X
TOTALS (33)	28	20	31	29	27	32	12	29

Special Committee to Consider Sanctions
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ALABAMA

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ME. R. CIV. P. 31 — Depositions upon written questions.
ME. R. CIV. P. 33(a) — Availability [of interrogatories]; procedures for use.
ME. R. CIV. P. 34 — Production of documents and things.
ME. R. CIV. P. 36(a) — Request for admission.
ME. R. CIV. P. 37 — Failure to make discovery; sanctions.
ME. R. CIV. P. 41(d) — Costs of previously-dismissed action.
ME. R. CIV. P. 56(g) — Summary judgment; affidavits made in bad faith.
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(Revised 3/15/90)

Appendix E

Part 130 Costs and Sanctions*

SUBPART 130-1. AWARDS OF COSTS [AND IMPOSITION OF FINANCIAL SANCTIONS] FOR [FRIVOLOUS] *ABUSIVE* CONDUCT IN CIVIL LITIGATION

§ 130-1.1 — COSTS [; SANCTIONS] *for Abusive Conduct.*

(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] ***abusive*** 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 130.3 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, 8 or 10 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 the attorney of record. The award [or sanctions] may be imposed upon any attorney appearing in the action or 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] ***abusive*** if [:]

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

[(ii)] it is undertaken ***or omitted*** primarily to delay or prolong unreasonably the resolution of the litigation[,] or to harass or maliciously injure another[.]

[Frivolous conduct shall] ***and may*** include the making of a [frivolous] motion for costs [or sanctions] under this section. In determining whether the conduct [undertaken was frivolous] ***in question is***

* For ease of reference, a legislative format has been used with deletions denoted by brackets and additions by italics.

abusive, 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 it lacks legal or factual basis] ***after its impropriety*** was apparent or should have been apparent to counsel.

(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 reasonable opportunity to be heard. The form of the hearing shall depend upon the nature of the conduct and the circumstances of the case.

§ 130-1.2 — ORDER AWARDING COSTS [OR IMPOSING SANCTIONS].

The court may make an award of costs [or impose sanctions or both] only upon a written decision setting forth ***the particulars of*** the conduct on which the award [or imposition] is based, the reasons why the court found the conduct to be [frivolous] ***abusive***, and the reasons why the court found the amount awarded [or imposed] to be appropriate. An award of costs [or the imposition of sanctions or both] shall be entered as a judgment of the court. [In no event shall the total amount of costs awarded and sanctions imposed exceed $10,000 in any action or proceeding.]

[§ 130-1.3 — PAYMENT OF SANCTIONS.

Payments of sanctions by an attorney shall be deposited with the Clients' Security Fund established pursuant to section 97-t of the State Finance Law. Payments of sanctions by a party who is not an attorney shall be deposited with the clerk of the court for transmittal to the State Commissioner of Taxation and Finance.]

§ 130-1[.4].*3* — APPLICATION TO OFFICERS OTHER THAN JUDGES OF THE COURTS OF THE UNIFIED COURT SYSTEM.

The powers of a court set forth in this Part shall apply to judges of the Housing Part of the New York City Civil Court and to hearing examiners appointed pursuant to section 439 of the Family Court Act, except that the powers of Family Court hearing examiners shall be limited to a determination that a party or attorney has engaged in [frivolous] ***abusive*** conduct, which shall be subject to confirmation by a judge of the Family Court who may impose any costs [or sanctions] authorized by this Part.

§ 130-1.[5].*4* — EXCEPTION.

This rule shall not apply to requests for costs or attorneys' fees subject to the provisions of CPLR 8303-a.

Appendix F

Rule 11 of the Federal Rules of Civil Procedure (Amended August 1, 1987)

RULE 11. SIGNING OF PLEADINGS, MOTIONS, AND OTHER PAPERS: SANCTIONS. Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Appendix G

Illustrations of Expense Awards for Abusive Conduct

The following are examples of how the Committee's proposed revision would work in a number of diverse situations based both on hypotheticals and on the reexamination of cases decided under the original Part 130. "Award" and "expenses" are used to mean the actual expenses, including attorneys' fees, to which abusive conduct has put an opposing party. Neither term includes a punitive sanction.

* * * * *

1. In a suit by R against former employee E, R deposes E. The deposition consists solely of marking the documents found in E's office. These are marked one by one and R's attorney announces his intention so to proceed with the marking of 4000 documents. There is no issue as to which of the documents or their contents are relevant. E and his lawyer leave the deposition. R moves to make E attend a new deposition, just to continue the marking of the papers. The court denies the motion. Some six weeks of delay results.

Expenses should be made against R for the time spent on the deposition and on the motion and for any other costs demonstrably suffered by E's side because of the delay.

* * * * *

2. A case with some dozen claims is on the ready trial calendar. P then moves for leave to file a supplemental complaint to add four more claims and to take further depositions in Europe. Based on P's factual assertions, which prove untrue, the motion is granted. The ensuing depositions delay the trial another six months.

The depositions show the falsity of P's allegations. Even so, P presses the four claims, withdrawing them only at the close of his case, in the face of D's motion to dismiss.

An award should be made to D for the expenses incurred after it became clear that the facts on which P's motion was granted were untrue. The award would include the cost of trying those four claims. And if P cannot show good faith in initially believing true the facts on which the motion was predicated, D's expenses in conducting the depositions would be another element included in the award.

* * * * *

3. Depositions are scheduled. D asks P to agree to adjourn the depositions, but P declines. D then moves for summary judgment (CPLR 3212) or to dismiss (CPLR 3211), just to get the automatic

stay of discovery that CPLR 3214 works on such a motion. When the motion is denied as wholly meritless, P's expenses incurred in the delay and in resisting the motion would be imposed on D.

* * * * *

4. X's attorney, A, objects to every other question at a deposition, refusing to let the client answer despite rulings by the judge requiring answers and instructing the attorney to save all objections (except those as to mere form) for the trial.

Expenses should be imposed on A.

* * * * *

5. X's attorney, A, has been told by the judge not to mention anything about Y's alleged drunkeness at the time of the event in issue. After a four-week trial, A asks a witness if it isn't a fact that Y was drunk at the time in question. A mistrial is declared.

An award should be made against A. But it would be compensatory only. No punitive damages could be imposed. Contrast *Deacon's Bench, Inc. v. Hoffman*, No. 87-0647 (Sup. Ct., Schenectady County May 2, 1989) (Doran, J.).

* * * * *

6. P, groundlessly refusing to pay rent, has compelled several landlords to bring a series of summary proceedings. P has also brought several supreme court proceedings to stay the summary proceedings in the lower courts. In the latest supreme court proceeding, all of this comes to the fore.

An award should be made against P, but for expenses only, and only for expenses incurred by the adverse party in the present proceeding. A punitive sanction would be precluded. Contrast *Winters v. Gould*, 143 Misc. 2d 44, 539 N.Y.S.2d 686 (Sup. Ct., New York County 1989).

* * * * *

7. P, with litigious history, lost a certificate for two shares of stock and asked the corporation to replace it. As was their right, the corporate officials demanded a bond of P. Vindictively, P sued to remove them as officers.

If the court finds that the action was brought with malice, to injure the defendants, it should impose an award of expenses against P. But the costs of other similar suits brought by P earlier could not be part of the award, even though the court could consider such other suits in deciding whether P's bringing the present suit was malicious. Con-

trast *Martin-Trigona v. Capital Cities/ABC, Inc.*, 145 Misc. 2d 405, 546 N.Y.S.2d 910 (Sup. Ct., New York County 1989).

* * * * *

8. On an ordinary and clear money claim, D interposes a groundless denial and defense, unreasonably delays a deposition, and makes numerous groundless motions, all of which fail. An award can be made against D for the delays and for the groundless motions, but not merely for the interposition of the denial or defense. Compare *Superior Merchandise Electronics Co. v. Kent Import Export Co.*, N.Y.L.J., July 11, 1989, at 21, col. 2 (Davis, J.).

* * * * *

9. D moves to strike various paragraphs from an extended complaint because the complaint is too detailed. The court learns that in another action the same firm objected to another plaintiff's complaint as too inadequate. Upon a finding that the motion is intended to harass or delay, an award can be made against D. Here, too, D's conduct in the other case can be considered, but the award can cover only the expenses P incurs in the present action.

* * * * *

10. By "audible comments, facial expressions and gestures," P's lawyer, A, manifests "a persistent pattern . . . of attempted intimidation and disrespect," wasting the time of D and of a physician that D has subpoenaed. An award made to D can include a sum for the physician's wasted time, but no punitive sanction may be imposed. Compare *Weltz v. Urban Raiff & Sons, Inc.*, No. H-42259 (Sup. Ct., Erie County Dec. 5, 1989) (Joslin, J.).

* * * * *

11. In a matrimonial action in which the judge has made a full equitable distribution and instructed the parties that they would therefore be required to sustain their own attorney's fees, W nevertheless moves against H for attorney's fees. A compensatory award can be made against W, payable to H's side for its expenses in opposing the motion, but no punitive sanction may be imposed. Compare *Smerling v. Smerling*, N.Y.L.J., Nov. 21, 1989, at 22, col. 3 (Glen, J.).

* * * * *

12. F, respondent in a paternity proceeding, denies paternity, asks for a DNA test, and, when the court allows it, himself moves to stop it, citing to the court a superseded statute favorable to F's position after having cited the proper updated statute in earlier papers in the

proceeding. F can be required to pay such expenses as the other side has sustained, but not punitive sanctions. Contrast *Van Norden v. Schindler*, 144 Misc. 2d 771, 545 N.Y.S.2d 462 (Sup. Ct., Queens County 1989).

* * * * *

13. Lawyer L, the friend of lawyer F in the paternity proceeding set forth in Example 12, lets F put L's name on all the papers in the case. No punitive sanction can be imposed on L, but if L was aware of F's dilatory purpose, the award of expenses could of course run against L as well as F. Contrast, again, the *Van Norden* case cited in Example 12.

* * * * *

14. After venue in an action brought in New York County is changed to Schenectady, and the order changing venue is affirmed by the appellate division, the change is made and P's lawyer, L, saying nothing about the previous proceedings, moves in the same action, now in Schenectady, to change the venue back to New York County. L can be made to pay the expenses of the opposing parties in resisting the latest motion. But a punitive sanction would not be allowed. Contrast *Bossone v. General Electric Co.*, No. 87-1462 (Sup. Ct., Schenectady County Feb. 21, 1990) (Doran, J.).

* * * * *

15. P, a bank, mistakenly pays D twice for the same thing and sues to recover the second payment. D puts in a denial. P sends copies of the cancelled checks showing D's lawyer the double payment and evidencing that there is no issue of fact. If D now persists in contesting, and P moves for summary judgment, D can be made to pay the expenses of the motion. Here the award is being made not for the mere interposition of the denial, but for D's pressing it in the face of evidence manifesting its groundlessness.*

If P did not so move, instead taking unnecessary pretrial steps, a later resolution of the case in P's favor would justify an award of expenses only for the cost of summary judgment motion but not for the later steps, which would not have been reasonably incurred. The use of "reasonably" in the rule requires also a reasonable effort by a party to mitigate its own expenses in the face of abusive conduct by the other side.

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* See and compare Ulster Savings Bank v. Wolf (Sup. Ct., Ulster Co. Oct. 18, 1989) (Votg, J.) [citation and opinion unavailable].