ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I represent the plaintiff in a breach of fiduciary duty suit. My client has a very good claim, but the defense counsel is stalling the case at every turn. For example, on a motion to dismiss boilerplate affirmative defenses and counterclaims, which were completely unsupported by facts, defendant's counsel e-filed opposition just before midnight the day before oral argument. Due to the late filing, I didn't even realize there was opposition to the motion until I got to court. I did not have a chance to read the opposition or the cases cited before the argument and defendant's counsel handed up a copy of the opposition to the judge at the oral argument. Even though I objected to the late submission of opposition, the court was reluctant to decide the motion without considering the opposition. The matter was adjourned for yet another appearance.

After my successful motion to dismiss, defense counsel was not responding to routine discovery demands. When I tried to address it at a court conference, a *per diem* attorney appeared for the defendant with no knowledge of the case. He said he would pass the message on to counsel and the conference was a complete waste of time. At another conference, I waited for over two hours before the defense counsel appeared, told the law clerk that he would respond to my demands, and then didn't produce anything.

Eventually I had to make a discovery motion. At oral argument for the motion, defendant's counsel handed me a large box of documents that were purportedly responsive to my demands. Since I didn't have a chance to review all of the documents before the argument, when the judge asked if the motion was being withdrawn in light of the production, I had to request an adjournment and make another court appearance when I discovered that the response was still not complete.

My client is getting increasingly frustrated with the rising cost of litigation because of my multiple court appearances that were adjourned without progress and my motion to obtain routine discovery. The client is especially angry because they know the defendant isn't incurring the same legal costs. Is there any recourse against a party or attorney that delays a case, and forces my client to incur legal fees, by submitting last-minute filings that delay the resolution of a motion? Is there any recourse for sending *per diem* attorneys to a conference, with no knowledge of the case, or showing up two hours late?

Sincerely,

G. U. Areslow

Dear G. U. Areslow:

Unfortunately, you are not alone in dealing with counsel whose main legal strategy is "justice delayed is justice denied." The New York Rules of Professional Conduct (NYRPC), the Rules of the Chief Administrative Judge, and the New York Civil Practice Law and Rules (CPLR) give judges the power to address such conduct. The Commercial Division of the Supreme Court of New York (Commercial Division) has additional rules to expedite litigation, including a number of new significant rule changes that specifically address attorney conduct that delays litigation. While it may be too late for this case, it may be advisable to consider requesting appointment to the Commercial Division in the future to take advantage of these rules.

Rule 3.2 of the NYRPC addresses delays and the prolonging of litigation: "In representing a client, a lawyer shall not use means that have no substantial purpose other than to delay or prolong the proceeding or to cause needless expense." This rule does not have an equivalent precursor in New York's former Disciplinary Rules and its application has not been cited in many published decisions. In *In re Gluck*, the Eastern District of New York referenced a Rule 3.2 violation for an attorney's failure to prosecute multiple actions. (*See In re Gluck*, 114 F. Supp. 3d 57 (E.D.N.Y. 2015)). However, this was one of a number of violations in an attorney disciplinary action including the disregard of 25 court orders in 11 separate actions (*id.*). Rule 3.2 is also cross-referenced in the definition of "frivolous" conduct found in Rule 3.1(b)(2) of the NYRPC: "A lawyer's conduct is 'frivolous' for purposes of this Rule if . . . the conduct has no reasonable purpose other than to delay the resolution of litigation in violation of Rule 3.2, or serves merely to harass or maliciously injure another."

Rule 130 of the Chief Administrative Judge similarly addresses frivolous conduct taken primarily to delay the resolution of litigation. Under 22 N.Y.C.R.R. § 130-1.1(c)(2), "conduct is frivolous if . . . it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another." But the rub is that getting sanctions is not an easy matter. An earlier *Forum* discussed the limitations of § 130-1 in a case where an adversary did not inform counsel of information that resulted in additional litigation costs. (*See* Vincent J. Syracuse

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 email to journal@nysba.org.**

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& Matthew R. Maron, *Attorney Professionalism Forum*, N.Y. St. B.J., July/August 2013, p. 47–49).

We believe that there is a strong argument under Rules 3.1(b)(2), 3.2, and 130-1.1(c)(2) that a late night e-filing opposition on the eve of oral argument, and a document dump at the return date for oral argument, without warning, were done for no other purpose than to delay resolution of the motions. While this is frivolous conduct, the paucity of cases involving Rule 3.2 suggests that courts are generally loathe to grant sanctions except when faced with egregious circumstances. Therefore, whether you are able to obtain relief for your adversary's conduct here will depend to a certain degree on the judge's discretion and the record you have established before the court.

The Chief Administrative Judge's Rules include provisions regarding the failure to comply with discovery orders and the failure of counsel with knowledge of the case to appear. Under 22 N.Y.C.R.R. § 130-2.1(a),

> the court, in its discretion, may impose financial sanctions or, in addition to or in lieu of imposing sanctions, may award costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, upon any attorney who, without good cause, fails to appear at a time and place scheduled for an action or proceeding to be heard before a designated court.

One of the criteria that judges are to consider in determining whether the failure to appear is without good cause, and whether sanctions should be applied, is "whether substitute counsel appeared in court at the time previously scheduled to proffer an explanation of the attorney's nonappearance and whether such substitute counsel was prepared to go forward with the case" (22 N.Y.C.R.R. § 130-2.1(b)(4)). In *Alveranga-Duran v. New Whitehall Apartments, LLC*, 40 A.D.3d 287 (1st Dep't 2007), although the Appellate Division, First Department, reversed the lower court's dismissal of the action, it held that sanctions, to be determined by the lower court, were appropriate pursuant to 22 N.Y.C.R.R. § 130-2 where, among other violations, a *per diem* attorney, with no connection to the plaintiff's counsel's firm, appeared at a conference for the plaintiff without authority to act on behalf of the firm.

While certain actions over a short period may be egregious enough to warrant severe monetary sanctions (*see, e.g.*, *Freidman v. Fayenson*, 41 Misc. 3d 1236(A) (Sup. Ct., N.Y. Co. 2013), *aff'd*, 2016 N.Y. Slip Op. 02944 (1st Dep't 2016)), as a practical matter it is our experience that courts typically follow a "one bite" rule and will not award sanctions for a first time dilatory offense. Courts tend to look at the "broad pattern" of conduct by counsel in determining whether sanctions are appropriate (*see Levy v. Carol Mgt. Corp.*, 260 A.D.2d 27, 33 (1st Dep't 1999); 4A N.Y. Prac. Com. Litig. in New York State Courts § 55:3 (4th ed.)). So our advice is to be smart. Experience teaches that a court may be more inclined to consider sanctioning opposing counsel's dilatory tactics if you can establish a record of a repeated pattern of such tactics. Therefore, if defendant's counsel appears by *per diem* counsel, who has no knowledge of the case or the authority to act, and the court is not inclined to sanction your adversary at that point, you may consider requesting that the judge order defendant's counsel of record to appear at future appearances with the failure to do so resulting in the striking of the answer (*see* 22 N.Y.C.R.R. § 202.27) or monetary sanctions (*see* 22 N.Y.C.R.R. § 130-2.1). At that point if your adversary fails to comply, he has not only violated the Rules of Professional Conduct but a court order and has notice about the consequences of his behavior.

Unless good cause is shown, CPLR 2214(c) prohibits a court from considering motion papers that are not timely filed. However, judges are often reluctant to hold a party in default on a motion where counsel makes last minute submissions and provides explanations along the lines of, "the discovery was voluminous," "my client just got me the documents," or "we had a hard time finding some of the requested documents." However, if you expect a last-minute document dump at oral argument based on your prior experience with counsel's dilatory behavior, you may consider emailing opposing counsel a few days in advance of the oral argument noting that opposition is past due, offer a very brief adjournment if there is a reasonable explanation for the delay, and indicate that you will request sanctions if there is a last-minute submission resulting in an adjournment. In other words, create a record to demonstrate the extent of the problem to the court. If there is no response, this email at oral argument would certainly support your argument that the court should award sanctions under Rule 130-1.1.

Commercial litigation often requires extensive discovery from an opposing party and dealing with non-responsive or tardy counsel can bring a case to a standstill. In breach of fiduciary actions such as yours, this is especially true as the allegations frequently involve concealed actions taken by the other party and you need discovery in order to establish what was hidden from your client. One of the purposes of New York's Commercial Division is to expedite the resolution of commercial matters including breach of fiduciary cases. Although the Commercial Division has had an extensive set of rules that facilitate the expedition of business actions (22 N.Y.C.R.R. § 202.70), many new rules, and changes to existing rules, were recently implemented. In 2012, former Chief Judge Jonathan Lippman created a Task Force on Commercial Litigation in the 21st Century. The Task Force issued a report with proposals to ensure that New York retains its role as the preeminent financial and commercial center of the world. As a result of the Task Force's proposals, a number of Commercial Division Rules were modified or added in order to reduce delay and eliminate unnecessary litigation costs. Some of the Commercial Division rules, includ-

ing recently enacted rules, and a rule still under consideration for approval, are applicable to your situation.

For instance, under Commercial Division Rule 12, "[t]he failure of counsel to appear for a conference may result in a sanction authorized by section 130.2.1 of the Rules of the Chief Administrator or section 202.27, including dismissal, the striking of an answer, an inquest or direction for judgment, or other appropriate sanction" (22 N.Y.C.R.R. § 202.70(g) (Rule 12)). Commercial Division Rule 1(a) requires all counsel that appear be fully familiar with the case and authorized to enter into substantive and procedural agreements on behalf of their clients. (*See* 22 N.Y.C.R.R. § 202.70(g) (Rule 1)(a)). Rule 1(a) also cross-references Rule 12 noting that the failure to appear by counsel with knowledge may be regarded as a default and therefore subject to sanction, dismissal, or striking of answer (*id.*). These rules prevent the appearance of *per diem* attorneys that do not know anything about a case and are unable to act on behalf of the party for which they are appearing. However, in the event a *per diem* attorney does appear without knowledge of the case, the Rule 1(a) violation could result in sanctions.

With respect to discovery disputes, Commercial Division Rule 14 requires counsel to submit letter applications and delineates the procedure for addressing discovery issues through a telephone conference with the court. (*See* 22 N.Y.C.R.R. § 202.70(g) (Rule 14)). This rule permits attorneys who are not satisfied with discovery to address the issue with the court without having to incur the costs of a formal motion or an additional appearance. Often the submission of the discovery letter alone, with notice to the court, will motivate opposing counsel to speed up the production or make them reconsider their reasons for withholding discovery. If the issue is not resolved through the submission of letters alone, a telephone conference with a law clerk or the judge may resolve the issue and possibly result in the judge issuing a discovery order. This can often be an opportunity to convey the dilatory tactics an opponent is using without the burden or expense of a full motion.

One of the recent changes to the Commercial Division Rules was the addition of a preamble that acknowledges the problems caused by dilatory tactics. (*See* Unified Court System Memorandum by the Commercial Division Advisory Counsel, June 27, 2014). Although this amendment did not expand the scope of sanctions already available, it does directly address many of the issues you are facing with your adversary:

> The Commercial Division understands that the businesses, individuals and attorneys who use this Court have expressed their frustration with adversaries who engage in dilatory tactics, fail to appear for hearings or depositions, unduly delay in producing relevant documents, or otherwise cause the other parties in a case to incur unnecessary costs. The Commercial Division will not tolerate such practices. The Commercial Division is mindful of the need to conserve client resources, encourage proportionality in discovery, promote efficient resolution of matters, and increase respect for the integrity of the judicial process (22 N.Y.C.R.R. § 202.70(g) (Preamble)).

The Preamble also refers to Rule 12, and Rule 13(a), regarding adherence to discovery schedules, and notes that "[t]he judges in the Commercial Division will impose appropriate sanctions and other remedies and orders as is warranted by the circumstances" (*id.*). This Preamble is a clear message to practitioners with cases assigned to the Commercial Division that its justices will not condone practices meant to impair the prompt resolution of commercial litigation.

Another recent Commercial Division rule change implemented staggered court appearances as a "mechanism to increase efficiency in the courts and to decrease lawyers' time waiting for a matter to be called by the courts" (22 N.Y.C.R.R. § 202.70(g) (Rule 24)). Pursuant to Rule 24, each oral argument for a motion will be assigned a time slot thereby preventing attorneys from having to wait for a multi-hour calendar call (*see id.*). As this is a new rule which will require the coordination of the schedules of busy judges, attorneys and part clerks, this process will likely take some time to be fully implemented. While the staggered appearances in this rule are only applicable to motions, it is possible that such a procedure could also be applied to compliance conferences in the future in order to similarly decrease waiting time for a conference calendar call and thereby increase attorney efficiency.

Finally, although it is only a proposed rule change, the Commercial Division Advisory Council has proposed a new rule that would permit parties to obtain a written memorialization of resolutions reached at compliance conferences to be presented to the judge to be so-ordered. (*See* Unified Court System Memorandum by the Commercial Division Advisory Counsel, January 14, 2016). The purpose of this proposed rule change is to increase the efficiency of resolving discovery disputes in a more informal setting, such as with a judge's law clerk (*see id.*). Such a rule would provide you with a court order at the conclusion of each compliance conference that the opposing counsel could not ignore. This should result in every appearance being more productive.

Your client's frustration with opposing counsel's dilatory tactics is regrettably all too common. While it may be difficult to convince a judge that any one of your adversaries' transgressions may be sufficient enough to warrant sanctions, the repeated conduct taken to delay the proceedings is a violation of NYRPC Rule 3.2, and may be sanctionable for frivolous conduct pursuant to 22 N.Y.C.R.R. §§ 130, *et seq*. If this case was assigned to the Commercial Division, the additional rules discussed above may further support your argument for sanctions. In the event this case is not before the Commercial Division, in future litigations that meet the criteria for admission,