

Lawyer Faces Sanctions For Assertions in Brief

BY LAZAR EMANUEL

Lawyers who insert intemperate or incendiary language about the opposing client in the briefs they submit to the Appellate Division, Second Department, can expect to be hauled before the court to show cause why sanctions and/or costs should not be imposed against them for frivolous conduct. *Matter of Wecker v. D'Ambrosio*, 2002-09753, NYLJ Apr. 9, 2004, page 29.

In a battle over custody, the Family Court awarded custody to the father. The mother appealed. In her brief to the Appellate Division, the mother and her counsel: (1) described the father as "a misfit" and "a miscreant"; (2) alleged that the father was a criminal engaged in the fencing of stolen property because he did not maintain a checking account for his business; (3) suggested that the father "paid [the forensic psychologist] for [a] biased report; (4) asserted with respect to the Family Court judge: "no judge in her right mind" would have awarded custody to the father; and (5) "opined" that the Family Court's decision was "laughable" and "irrational" and may have "resulted from corruption."

Court Acts On Its Own Motion

The court reminded the wife and her attorney that

"Conduct during a litigation, including on an appeal, is frivolous and subject to sanction and/or the award of costs when it is completely without merit in law or fact and cannot be supported by a reasonable argument for the extension, modification, or reversal of existing law; it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or it asserts material factual statements that are false."

The Court cited 22 NYCRR 130-1.1. [Editor's Note: See, also, DR 7-102(A), 22 NYCRR 1200.33].

The Appellate Court ordered the wife and her attorney to substantiate the statements in their brief:

Here, we direct the parties and their respective counsel to submit papers to this Court addressing whether the content of and the manner in which this appeal was prosecuted by the mother and/or her counsel should be found frivolous within the meaning of NYCRR 130-1.1, and if so, whether sanctions should be imposed and/or costs awarded to the father, including legal fees incurred in defending this appeal...

If a good faith basis is claimed for any or all of these [statements], or any other statements and arguments advanced on appeal, it should be set forth in the submission to this court.