

## Second Circuit Sends Signals On Civility

BY RICHARD F. ZIEGLER AND KRISTIN COLLINS

Incivility can be costly to an attorney practicing in federal court if the judge determines that the attorney has crossed the line from “zealous advocacy” to sanctionable vitriol. For lawyers and judges alike, the problem is to know when that line has been crossed. Three decisions in the Second Circuit this past summer illustrate that the civility standard is difficult to discern and considerably lower than at least one demanding district court judge had thought.

In a thorough opinion, Judge Denny Chin sanctioned a lawyer for aggressive and offensive treatment of the opposing party — conduct that initially appeared to cost the lawyer \$50,000 in sanctions. *Revson v. Cinque & Cinque, P.C.*, 70 F.Supp.2d 415 (S.D.N.Y. 1999) (*Revson I*). See, R. Ziegler, “The Price of Incivility,” National Law Journal, Feb. 7, 2000. Although Judge Chin sought to track Second Circuit standards for sanctionable conduct closely — indeed, he consciously attempted to comply with a then recent decision that had reversed a sanctions order he had imposed in an unrelated case — the Court of Appeals reversed him again, rejecting his conclusion that the lawyer’s unseemly conduct rose to the level of “bad faith” litigation tactics. *Revson v. Cinque & Cinque, P.C.*, 2000 WL 1071764 (2d Cir. Aug. 9, 2000) (*Revson II*). Unfortunately, while *Revson II* and two other recent sanctions appeals provide some insight into the Second Circuit’s definition of the “bad faith” misconduct that warrants sanctions, the Court’s benchmark of misconduct remains unclear. Arguably, the Court has allowed litigators to reduce their standard of conduct.

*Revson* grew out of a dispute over legal fees between the law firm of Cinque & Cinque and its client, Rommy Revson. Disgruntled with the Cinque firm’s allegedly inflated fees, Ms. Revson retained a new lawyer to help her resolve the dispute. Holding no punches, that lawyer initiated the legal battle with a letter threatening his opponent with the “legal equivalent of a proctology exam,” and continued with various threats and *ad hominem* attacks both in and out of court. *Id.* at 417. After a jury dismissed Revson’s claims against Cinque & Cinque and awarded the law firm \$732,370 on its counterclaim for unpaid fees, Judge Chin slapped Revson’s lawyer with a \$50,000 sanction for his “vexatious” litigation tactics. Judge Chin found the lawyer’s behavior “clearly and unmistakably ‘beyond the pale.’” The Judge followed the Second Circuit’s earlier decision in *Schlaifer Nance & Co. v. Estate of Andy Warhol*, 1999 WL 935355 (2d Cir. Oct. 19, 1999), in which the Court maintained that “bad faith” can be evidenced by attorney misconduct. Judge Chin reasoned that the “manner in which [counsel] litigated the case... multiplied [the] proceedings,” evidenced “bad faith,” and justified sanctions under 28 U.S.C. §1927 and the court’s inherent powers. 70 F.Supp. 2d at 438.

But the appeals court disagreed. After painstakingly analyzing each instance of the lawyer’s offending behavior relied upon by Judge Chin, Judge Amalya Kearse concluded that each incident was acceptable, and, accordingly, that none of the conduct “individually or in the aggregate” warranted sanctions. The fatal flaw of Judge Chin’s opinion may have been his concession that certain of Revson’s claims and

defenses, while not successful, were not “utterly devoid of legal or factual basis.” *Revson II* seems to teach that as long as the offending attorney can show on appeal that his underlying legal claims were not utterly unfounded, he can probably save himself from sanction — even if his conduct during litigation seems “beyond the pale” to the trial judge.

Nonetheless, it is significant that the Second Circuit’s opinion chose to address the factual record of the attorney’s behavior so closely. By doing so the opinion implicitly agreed with Judge Chin’s holding below that the “bad faith” necessary to impose sanctions under Section 1927 can be based exclusively on an attorney’s behavior in the litigation process — even where, as Judge Chin acknowledged below, the claims the attorney is asserting are “colorable.” 70 F. Supp. At 438. *Revson II* would have been a more useful opinion had it squarely answered this purely legal question.

*Revson II*’s analysis of the various acts of misconduct relied on by Judge Chin in imposing sanctions is disheartening for the signal it sends to the litigation bar. The appellate decision seems to pay only lip service to the trial court’s repeatedly-stated position that sanctions were warranted “not for one single incident, but for his entire course of conduct,” 70 F. Supp. 2d at 441. Instead, it treats, and ultimately finds unsanctionable, each individual component of the pattern of offensive conduct. The now well-known letter on the eve of suit, threatening “the legal equivalent of a proctology exam,” is described in *Revson II* as “offensive and distinctly lacking in grace and civility” and even “repugnant,” 2000 WL 1071764 at \*8. But the letter is ultimately tossed off as merely “reflective of a general decline in the decorum level of even polite public discourse,” *id.* Oddly, the appellate court relied for that proposition on a news report of some amusing remarks made by Mayor Giuliani in which he referred to a political event as akin to a “colonoscopy.” The opinion does not explain why officers of the court cannot be expected to adhere to a higher standard than politicians on the stump.

Even more distressing is the appellate court’s treatment of Judge Chin’s expressed concern that a failure to impose sanctions in the circumstances before him would be sending a “signal” to the bar that it is appropriate to write offensive, threatening letters to a party, that it is permissible to call adversaries “snakes” and “slimy,” and that lawyers can engage in vexatious, unfair tactics with impunity. “I will not send that signal.” 2000 WL 1071764 at \*11.

Certainly the Second Circuit could have reversed Judge Chin’s sanctions order without commenting specifically on the Judge’s desire to avoid a signal that uncivil behavior is acceptable in the federal court in Manhattan. By choosing to quote that very portion of Judge Chin’s opinion, the Second Circuit necessarily sends its own signal. Indeed, far from instructing the bar not to misinterpret the reversal to conclude that the conduct at issue is acceptable, the Second Circuit’s opinion does precisely the opposite. The opinion quotes Judge Chin’s criticism of counsel’s reference to the opposing party as a “slimy” “snake,” and then follows with another quotation in which the Judge observed that “an attorney should not be ‘an attack dog whose sole purpose is to destroy.’” Remarkably, the Second Circuit’s decision explicitly places the trial judge and the lawyer he sanctioned on the same essential plane, noting light-heartedly that both of them had engaged in “colorful tropes” involving “likening an attorney to a member of the animal kingdom ....” *Id.*

Of course, abusive conduct is one thing if it targets the opposing party. It is quite another if it is directed at the judge. If the Court of Appeals was forgiving of the conduct described in *Revson*, it showed no such mercy a month earlier, when another attorney accused two federal judges of colluding with a trustee in a

bankruptcy action. *In re 60 East 80th Street Equities v. Sapir*, 2000 WL 942931 (S.D.N.Y. July 10, 2000). When the Bankruptcy Court dismissed the debtor's motion to vacate the trustee's sale of judgments, counsel retaliated by alleging on appeal to the district court that the sale was "judicially sanctioned grand larceny," and that the trustee was an "idiot," a "thie[f]" and a "liar[]" who committed "defalcation and malfeasance".... "under the approving nod of a sympathetic court." Perhaps not surprisingly, Judge Charles Briant of the Southern District was unconvinced by these vituperative charges. He dismissed the appeal as frivolous and, *sua sponte*, levied a \$5,000 sanction against the lawyer under Section 1927. Multiplying his woes, the lawyer appealed his sanction to the 2d Circuit, rehashing his conspiracy theories, and condemning Judge Briant as part of the "judicial fraud designed to whitewash the actions of the Trustee and the Bankruptcy Court." *Id.* The lawyer's allegations of a grand judicial conspiracy won him censure and additional sanction by the appeals court: "Such comments cross the line from passionate advocacy and disagreement with a court's decision into sanctionable conduct evincing bad faith." For his behavior, the Court doubled his sanction to \$10,000.

*The Sapir* case was an easy one. The underlying legal claims were clearly meritless and the lawyer repeatedly maligned members of the federal judiciary. But cases that are on the margin — those that involve weak claims and unusually aggressive litigation tactics — pose a problem under the Second Circuit's current case law. *Revson II* makes fairly clear that attack-dog litigation tactics by themselves are unlikely to constitute evidence of "bad faith" and that "meritlessness" is the touchstone of sanctionable misconduct. Significantly, "meritlessness" is a very high standard, as is illustrated by a third recent sanctions decision by the Second Circuit in *Salovaara v. Eckert*, 2000 WL 1134356 (2d Cir. Aug. 9, 2000).

In *Salovaara*, Judge Kimba Wood levied Section 1927 sanctions against the plaintiff and his attorney for asserting baseless claims after a judicial warning, and for presenting conflicting testimony. When counsel relied on the baseless arguments on appeal, Judge Wood took the meritlessness of the claims and counsel's disregard for her warnings as evidence of "bad faith." The Judge imposed sanctions equal to the costs the unfounded claims had created for his adversaries — a stiff \$92,000.

On appeal, the Second Circuit closely scrutinized Judge Wood's decision and held that the plaintiff's legal theories — albeit weak — were sufficient to rebut the label of "meritlessness," thereby avoiding sanctions under Section 1927. *Id.* at \*13. (The plaintiff was not entirely scot-free, however. Judge Wood's separate Rule 11 sanction for submitting conflicting testimony — an affidavit that was apparently contradicted by deposition testimony in a different case — was remanded for further fact finding.) The summer's decisions reinforce the trend of the Second Circuit to reverse decisions by district court judges attacking what they perceive to be unacceptable behavior by attorneys. While it may have been wise to reconsider the size of the sanctions imposed by Judges Chin and Wood, one wonders whether the Court's recent decisions haven't licensed untoward litigation tactics that will ultimately prove costly to clients, the courts and the legal profession's sense of itself.

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