

Stiffer Sanctions For Frivolous Litigation Conduct

Amended Part 130 Now in Effect

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Tougher sanctions for frivolous litigation conduct in New York State courts are in place as of March 1, 1998, when amendments to 22 NYCRR Part 130 took effect. The amendments, which build on recommendations by the Craco Committee in 1995, raise the stakes for litigators in four ways.

Summary of Amendments

Dollar ceiling raised

The dollar ceiling on sanctions has been raised significantly. The old rule set a maximum of \$10,000 in sanctions per case, whereas the amended rule sets maximum sanctions at \$10,000 "for any single occurrence of frivolous conduct." See 130-1.2. In effect, the sky is now the limit.

Signature requirement

The amended rule requires an attorney to sign "every pleading, written motion, and other paper, served on another party or filed or submitted to the court..." Unless "good cause" is shown, "the court shall strike any unsigned paper if the omission of the signature is not corrected promptly after being called to the attention of the attorney or party." The attorney's signature certifies that to the best of the attorney's "knowledge, information and belief, formed after an inquiry reasonable under the circumstances, the presentation of the paper or the contentions therein are not frivolous..." See 130-1.1a(a)-(b). The old rule did not contain any certification requirement.

Wider definition of frivolous"

The amended rule widens the scope of frivolous conduct by providing that conduct is "frivolous" if it "asserts material factual statements that are false." See C130-1.1(c)(3). The old rule had provided that conduct was frivolous only if it was "completely without merit in law or fact..."

Greater sanctions for failure to appear

If an attorney fails without good cause to appear for a scheduled court hearing, the amended rule allows a court to impose financial sanctions on him personally "in addition to" requiring the attorney to pay attorney fees and other expenses incurred by other parties. See C 130-2.1(a). The old rule allowed either personal sanctions or fees and expenses, but not both.

Amendments Raise Questions

The amendments raise many questions. Here are some commonly asked questions:

Must an attorney sign every exhibit to a motion, or just the motion itself? The rule requires a signature on every "pleading, written motion, and other paper served on another party or filed or submitted to the court..."

However, an attorney's signature on the motion or pleading ought to be sufficient. If the court had intended to require attorneys to sign exhibits, it would have said so. But the attorney remains responsible

for the exhibits, because the attorney's signature certifies that the papers and the contentions therein are "not frivolous" and that the attorney has conducted "an inquiry reasonable under the circumstances." Therefore, if exhibits assert "material statements that are false," the attorney may be responsible for the falsity.

May paralegals or secretaries sign court papers? No. The rule expressly requires the signature of an attorney. However, non-lawyers may sign letters as long as they do not conceal or misrepresent their status as non-lawyers.

What is "an inquiry reasonable under the circumstances"? Only time will tell. However, federal court opinions construing Rule 11 of the Federal Rules of Civil Procedure, which uses the identical phrase, should prove helpful. See, e.g., *Business Guides v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533 (1991); *Eastway Construction Corp. v. City of New York*, 762 F.2d 243 (2d Cir, 1985); *Nassau-Suffolk Ice Cream, Inc. v. Integrated Resources, Inc.*, 114 F.R.D. 684 (S.D.N.Y. 1987).

Each case will be judged on its own, looking to such factors as the time available for investigation, whether crucial facts were in the control of the opposing party, and whether a reasonable lawyer would have relied on the information at hand without investigating further.

What is a "single occurrence"? This phrase will also take time to sort out. However, if an attorney files a memorandum that includes two false statements of material fact - and cites a case that has been reversed on appeal, the chances are that a court will consider this to be a "single occurrence of frivolous conduct" rather than three separate occurrences.

Applying Sanctions

If an attorney fails without good cause to sign a pleading, motion, or other paper, will there be a sanction? Not right away. The rule does not provide any automatic penalty for failing to sign a paper covered by the rule. Rather, the rule provides: "Absent good cause shown, the court shall strike any unsigned paper if the omission of the signature is not corrected promptly after being called to the attention of the attorney or party." The "absence of good cause" applies to the failure to correct the error promptly, not to the initial failure to sign. Once she is put on notice, there-ettfioii-y-hotflll1i1ake every effort to sign the paper immediately or to notify the court and opposing counsel why she cannot do so (e.g., a sole practitioner on vacation in Europe or in the hospital).

The amended rule will at first make law practice more difficult, especially for sole practitioners. But in the long run, if courts really enforce the new rule, it should cut down on frivolous litigation and frivolous litigation tactics. That should reduce the costs of litigation for clients and leave lawyers and judges more time to think about the merits of cases rather than the methods by which they are litigated.