Sanctioning Frivolous Litigation in State and Federal Courts

Introduction and Overview

In a recent decision the Supreme Court referred to the "tensions inherent in a system that contemplates parallel judicial processes." The State/Federal Judicial Council of New York seeks not only to relieve some of those tensions, but also to promote the improvement of our parallel processes through cooperative effort. Today's program on sanctioning frivolous litigation in state and federal courts presents the opportunity to examine jointly an important matter of mutual concern.

Despite our best intentions, I suppose that some of the frictions generated by our dual court system always will remain. The Committee on Federal-State Jurisdiction of the Judicial Conference of the United States is charged with the maintenance of good relations between the two jurisdictions, but it is not always successful in that endeavor. The Judicial Conference Committee, on which I am privileged to serve, is composed of state and federal judges from various parts of the nation who are appointed by the Chief Justice of the United States. I am told that some years ago an elderly state judge from one of the western states offered at each meeting of the Committee a
resolution calling for the impeachment of Earl Warren. When the judge finally was informed that Warren was dead, he offered a resolution calling for posthumous impeachment. With that in mind, I dedicate this program to the goal of a more peaceful coexistence between state and federal judges.

After my brief overview of available state and federal sanctions and of some of the problems sanctions have generated and will generate, I shall introduce the four members of our distinguished panel. Each panel member will examine our topic from a different perspective. Following the panel presentation, we will be open to questions and comments from the floor. A period of approximately forty-five minutes of this two-hour program has been reserved for that purpose. All are invited to attend the reception following the program and to continue the discussion there.

On the federal side, there are various statutes and rules providing sanctions for litigation misconduct. Rule 26 of the Federal Rules of Civil Procedure confers authority for the imposition of sanctions upon an attorney or pro se party who signs any impermissible discovery request, response or objection. According to Rule 26, the signature is a certification that the discovery request, response or objection in question is: (1) consistent with the rules of procedure and either warranted by existing law or by a good faith argument for the extension, modification or reversal of existing law; (2) not interposed for any improper purpose such as harassment, delay or increase in the
cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the amount in controversy and the importance of the issues at stake in the litigation. For a violation of this Rule, payment of reasonable expenses, including reasonable attorney's fees, may be ordered.

Rule 30 of the Federal Rules authorizes the imposition of similar sanctions upon one who fails to attend a deposition after giving notice thereof or whose failure to serve a subpoena on a non-party witness renders futile the attendance of other parties. Rule 30 also provides that, where certain factual information is included in a notice of deposition, an attorney's signature on the notice constitutes a certification of belief in the truth of the information. The sanctions of Rule 11, upon which we soon shall focus, are applicable to this type of certification.

Federal Rule 37 is entitled "Failure to Make or Cooperate in Discovery: Sanctions" and allows for the assessment of expenses, including counsel fees, where an order is necessary to compel discovery; where a party fails to comply with a proper request to admit the genuineness of a document or the truth of a matter; where a party fails to appear for a deposition or serve answers to interrogatories or respond to a request for inspection; and where a party of attorney fails to participate in good faith in the framing of a discovery plan. Under certain circumstances, the sanction of dismissal may be imposed under this Rule.

The Federal Rules authorize sanctions for failure to obey a scheduling order and for failure to attend or participate in a
pre-trial conference (Rule 16); for supporting or opposing in bad faith a motion for summary judgment (Rule 56); and for commencing an action after dismissing a previous action based on the same claim (Rule 41).

Two provisions in Title 28 of the U.S. Code deal with sanctions imposable by trial level courts. 28 U.S.C. § 1919 allows a court to order the payment of costs when a suit is dismissed for want of jurisdiction. "Costs," as used here and in other provisions of federal law, means actual expenses incurred. 28 U.S.C. § 1927 provides that an attorney "who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."

Various sanctions are available for abuse of the federal appellate process. The Rules of Appellate Procedure (Rule 38) allow the award of "double costs" as well as "just damages" as sanctions for a frivolous appeal. The same sanctions are available by statute (28 U.S.C. § 1912) for causing delay in the appellate proceedings. Another rule of Appellate Procedure provides for the imposition of sanctions against attorneys "who unreasonably and vexatiously increase the costs of litigation through the inclusion of unnecessary material in the appendix." (Rule 30). Courts of appeals have adopted local rules to sanction non-compliance with scheduling and other local requirements (e.g., CAMP Rule 7), and it is the general consensus
that the courts of appeals have inherent power to sanction those
who conduct appellate litigation in bad faith.

The sanction rule that has generated the most controversy in
federal practice, and the one upon which our discussion will
focus, is, of course, Rule 11 of the Federal Rules of Civil
Procedure. Rule 11 has existed in its present form for over five
years and has been applied in more than 700 reported cases. The
Rule simply provides that every pleading, motion or other paper
of a party represented by an attorney shall be signed by at least
one attorney of record; that a party who is not represented must
sign his or her own name; and that the signature certifies the
following: (1) the paper signed is "to the best of the signer's
knowledge, information, and belief formed after reasonable
inquiry . . . well grounded in fact;" (2) that the paper "is
warranted by existing law or a good faith argument for the
extension, modification, or reversal of existing law;" and (3)
that the paper "is not interposed for any improper purpose, such
as to harass or to cause unnecessary delay or needless increase
in the cost of litigation."

According to Rule 11, the court shall, upon motion or sua
sponte, impose an appropriate sanction upon the signer, the
represented party or both, whenever a paper is signed in
violation of the Rule. An appropriate sanction "may include an
order to pay to 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."

Whether or not sanctions have cured litigation abuse or contributed to more careful lawyering is a matter of dispute. A recent survey by the State Bar Association Committee on Federal Courts reveals that a great majority of the judges and lawyers surveyed believe that sanction provisions are necessary to discourage attorneys from bringing frivolous cases, although some important qualifications were registered in the survey. One thing, however, is certain. Sanction applications in the federal system continue to rise, and now is the time to identify and address some of the problems engendered by this increased activity of the courts in the sanctioning of litigation misconduct.

Sanctions for litigation misconduct have not played a very large part in New York practice heretofore. Sanctions have been imposed under a CPLR provision allowing several remedies for discovery abuse, but they frequently have been conditional in nature. Sanctions are available in connection with requests for admission and for failure to comply with special calendar rules in malpractice cases. There are provisions in the Civil Practice Law & Rules authorizing the court to assess costs and reasonable attorneys fees not to exceed $10,000 for a frivolous personal injury or malpractice action or for a frivolous defense, counterclaim or crossclaim in such an action. The assessment may be made against an attorney, a party or both.
The focus of our attention on the state side, however, is the new Civil Sanction Rule promulgated by Order of the Chief Administrative Judge on October 25, 1988, effective January 1, 1989. A rule of the Chief Judge of the State, adopted in consultation with the Administrative Board of the Courts and with the approval of the State Court of Appeals, authorizes the sanctions. The new rule comes in response to a Court of Appeals decision in 1986, Matter of A.G. Ship Maintenance v. Lezak, holding that the imposition of sanctions for a frivolous action was unauthorized in the absence of a statute or court rule. The statement given by the Chief Judge on the issuance of the new rule is instructive. He said that the sanctions made available by the rule "give our judges additional tools for dealing with unnecessary delays."

In any event the new rule proscribes frivolous conduct in civil litigation. It defines conduct as frivolous 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 primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another."

The new state rule makes a distinction between costs and financial sanctions, although both may be said to fall under the general heading of Sanctions. Costs are defined as actual expenses reasonably incurred and reasonable attorneys fees resulting from the frivolous conduct, and may be assessed against
a party, an attorney or both. The award of costs is made to a party or attorney. Financial sanctions for frivolous conduct, which may be awarded in addition to or in lieu of costs, are paid to the Clients' Security Fund if assessed against an attorney and to the State Commissioner of Taxation and Finance if assessed against a party not an attorney. Total costs and sanctions cannot exceed $10,000 in any one action or proceeding. The rule is much different from federal practice in this respect, since there is no cap either in Rule 11 or in most of the other federal sanction rules. An award against an attorney may be made against him personally, his partnership or the office or firm by which he is employed.

The court may make the award on a motion or on its own initiative and must afford the parties a reasonable opportunity to be heard. A written decision is required "setting forth the conduct on which the award or imposition is based, the reasons why the court found the conduct to be frivolous, and the reasons why the court found the amount awarded or imposed to be appropriate." Notable is the permissive language of the new state rule -- "The Court, in its discretion, may award . . . .," in contrast to the mandatory language of Federal Rule 11 -- "[T]he court . . . shall impose . . . ."

There you have the principal sanction rules adopted in the federal and state jurisdictions. I suggest that these rules have presented and will continue to present some difficult issues: whether sanctions serve to stifle lawyer creativity; whether they
generate excessive satellite litigation; whether they promote bad (or worse) relations between opposing counsel; whether they lead to conflicts of interest between attorney and client; whether they deter public interest litigation; whether fee shifting and money sanctions may be replaced by other alternatives; whether there is a lack of predictability in the standards applied; whether sanctions are imposed arbitrarily; and whether it really is a form of tail-chasing to do what the state and federal rules now both allow: to impose sanctions for frivolous applications for sanctions. I think that the questions boil down to these: What purposes are we trying to accomplish with sanctions? Do the sanctions we have developed serve those purposes? And can we achieve those purposes in some different way? For the answers to all these questions, I turn to our distinguished panel.

The first panel member to speak will be the redoubtable Charles L. Brieant, Jr., Chief Judge of the United States District Court for the Southern District of New York since October, 1986. His undergraduate and law degrees are from Columbia, and he had a most distinguished career at the bar and in public service prior to his appointment to the District Court in 1971. He is a raconteur, gourmet and bon-vivant as well as a good friend. I thank him for taking time from his busy schedule to share his thoughts and experiences on sanctioning frivolous litigation. He will present "The Federal Experience."

Next we will hear from Lawrence M. Grosberg, Associate Professor of Law at New York Law School. Professor Grosberg
teaches in the areas of civil procedure and discrimination law. He is a graduate of the University of Southern California and the Columbia University Law School. He was Director of the Fair Housing Clinic at Columbia from 1979 to 1983 and now directs a similar clinic at New York Law School. Professor Grosberg recently published an article on our topic. It is entitled "Illusion and Reality in Regulating Lawyer Performance: Rethinking Rule 11." This interesting and challenging piece appears in Volume 32 of the Villanova Law Review. Larry will present "Alternatives to Sanctions."

Our third panel member is Shira A. Scheindlin, a partner in the law firm Budd Larner Gross and others. She served as United States Magistrate in the Eastern District from 1982 to 1986 following service as an Assistant United State Attorney and as General Counsel to the New York City Department of Investigation. She holds an undergraduate degree from the University of Michigan, an M.A. from Columbia and a J.D. from the Cornell Law School. She has lectured extensively on federal practice and chaired the State Bar Association Subcommittee on Sanctions that produced the excellent report and survey to which I referred earlier. She served as a law clerk to Judge Brieant from 1976 to 1977, a good year for his opinions. She will present "A Lawyer's Perspective."

Our final panelist is Michael Colodner, Counsel to the New York State Office of Court Administration since 1983. He is a graduate of Hamilton College and Columbia Law School. From 1967
to 1974, Michael served as an Assistant State Attorney General in the Litigation Bureau and has been with the Office of Court Administration since 1974. He has held the titles of Assistant Counsel, Deputy Counsel, First Deputy Counsel and now Counsel. I understand that he had the major responsibility for drafting the new New York Rule, and, strangely enough, he will present "The New York Rule."
I. FEDERAL SANCTIONS

A. FEDERAL RULES OF CIVIL PROCEDURE

1. Rule 11. Signing of Pleadings, Motions, and Other Papers; Sanctions

This Rule provides that, as to any "pleading, motion, or other paper" signed by an attorney or an unrepresented party in violation of this rule, the court, upon motion or sua sponte, "shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred" because of the violation, "including a reasonable attorney's fee."

"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."

2. Rule 16. Pretrial Conferences; Scheduling; Management

This Rule states that the district court, upon motion or sua sponte, "may make such orders . . . as are just" or "any of the orders provided in [Fed. R. Civ. P.] 37(b)(2)(B), (C), (D)" whenever:

(a) a party or party's attorney fails to obey a scheduling or pretrial order; or

(b) no appearance is made on behalf of a party at a scheduling or pretrial conference; or

(c) a party or party's attorney is substantially unprepared to participate in a conference; or

(d) a party or party's attorney fails to participate in pretrial conferences and scheduling and planning in good faith.

The Rule also provides that, "[i]n lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing the party or both to pay the reasonable expenses incurred because of any noncompliance
until this rule, including attorney's fees," unless noncompliance was justified or "other circumstances make an award of expenses unjust."


Rule 26(g), entitled "Signing of Discovery Requests, Responses, and Objections," empowers the court, upon motion or sua sponte, to impose sanctions whenever an attorney or unrepresented party certifies a request, response, or objection in violation of the rule. To this end, the court "shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee."

4. Rule 30. Depositions Upon Oral Examination

Rule 30(b)(1) requires a party to provide written notice to "every other party to the action" prior to taking the deposition of any person upon oral examination. Subsection (b)(2) provides that "[t]he plaintiff's attorney shall sign the notice, and the attorney's signature constitutes a certification by the attorney that to the best of the attorney's knowledge, information, and belief the statement and supporting facts are true. The sanctions provided by Rule 11 are applicable to the certification." (emphasis added).

Rule 30(g)(1) provides that, if a party who has given notice of the taking of a deposition fails to attend and another party attends in person or by attorney pursuant to the notice, "the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by that party and that party's attorney in attending, including reasonable attorney's fees." Subsection (g)(2) provides for the same sanctions under similar circumstances: where the party giving notice of the deposition of a "witness" fails to serve a subpoena upon the witness and the witness because of such failure does not attend, but another party attends in person or by attorney in anticipation of the deposition.

5. Rule 36. Requests for Admission

Rule 36(a) provides that, where a party serves upon any other party a written request for the admission of "the truth of any matters within the scope of Rule 26(b) [discovery]" and as set forth in this Rule, and the former party subsequently moves "to determine the sufficiency of the answers or objections," the court:
(a) "shall order that an answer be served," unless it determines that an objection is verified; or

(b) "may order either that the matter is admitted or that an amended answer be served," if it determines that an answer does not comply with the requirements of this Rule.

The Rule also states that the provisions of Rule 37(a)(4), see infra, "apply to the award of expenses incurred in relation to the motion."

6. Rule 37. Failure to Make or Cooperate in Discovery: Sanctions

Rule 37(a) permits a party to move for an order compelling discovery under certain circumstances. Subsection (a)(4) provides that, when such a motion is granted, "the court shall, after opportunity for hearings, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees." The court has discretion in imposing such sanctions, however, where "the opposition to the motion was substantially justified or . . . other circumstances make an award of expenses unjust."

Rule 37(b), entitled "Failure to Comply with Order," provides for sanctions (i.e., contempt) by the court in the district where the deposition is taken, Rule 37(b)(1), and sanctions (i.e., "such orders in regard to the failure as are just") by the court in which the action is pending, Rule 37(b)(2). The latter subsection sets forth a nonexhaustive list of possible sanctions (see paragraphs (A)-(E)), and gives the court the discretion to impose "reasonable expenses, including attorney's fees," in lieu of or in addition to the enumerated sanctions.

Paragraphs (A), (B), and (C) of Rule 37(b)(2) permit resolving orders; preclusion orders; and orders striking out pleadings, staying further proceedings, dismissing the action, or rendering a judgment by default, respectively. Paragraph (D) provides that, in lieu of or an addition to any of these enumerated orders, the court may hold a party in contempt for "the failure to obey any orders except an order to submit to a physical or mental examination." Lastly, paragraph (E) provides that, "[w]here a party has failed to comply with an order under Rule 35(a) requiring that party to produce another for examination," the court may issue any of the orders listed in paragraphs (A)-(C), unless "the party failing to comply
shows that that party is unable to produce such person for examination."

Rule 37(c) empowers the court to impose sanctions for violations of Rule 36, where "a party fails to admit the genuineness of any document or the truth of any matter" so requested, and "the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter." The court has discretion to issue an order, upon application by the requesting party, requiring the other party "to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees," unless it finds:

(1) "the request was held objectionable pursuant to Rule 36(a);"

(2) "the admission sought was of no substantial importance;"

(3) "the party failing to admit had reasonable ground to believe that the party might prevail on the matter;" or

(4) "there was other good reason for the failure to admit."

Rule 37(d) further provides for the imposition of sanctions where a party fails to attend his own deposition, serve answers to interrogatories, or respond to a request for inspection. Upon motion, the court "may make such orders in regard to the failure as are just," including, but not limited to, the orders listed in paragraphs (A)-(C) of subsection (b)(2) of this Rule. The court also "shall" require, in lieu of any order or in addition thereto, the party failing to act or the attorney advising the party or both "to pay the reasonable expenses, including attorney's fees, caused by the failure," unless it finds that the failure "was substantially justified or that other circumstances make an award of expenses unjust."

Finally, Rule 37(g) states that the court, after opportunity for a hearing, "may" require a party or a party's attorney "to pay any other party the reasonable expenses, including attorney's fees," caused by the former party's (or his attorney's) failure "to participate in good faith in the framing of a discovery plan by agreement," as required by Rule 26(f).

7. Rule 41. Dismissal of Actions
Rule 41(d) provides for sanctions against a plaintiff who, after dismissing an action in "any court," thereafter commences an action "based upon or including the same claim against the same defendant." In this event, "the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay proceedings in the action until the plaintiff has complied with the order."

8. Rule 56. Summary Judgment

Subsection (g) provides that, when "it appears to the satisfaction of the court at any time" that an affidavit supporting or opposing a motion for summary judgment was "presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees." In addition, the court may hold in contempt "any offending party or attorney."

B. FEDERAL RULES OF CRIMINAL PROCEDURE

1. None

C. FEDERAL RULES OF EVIDENCE

1. None

D. FEDERAL RULES OF APPELLATE PROCEDURE

1. Rule 30. Appendix to the Briefs

Rule 30(b) provides that the cost of producing the appendix ordinarily "shall be taxed as costs in the case," but where either party causes "matters" to be unnecessarily included, "the court may impose the cost of producing such parts on the party." The subsection further provides, "each circuit shall provide by local rule for the imposition of sanctions against attorneys who unreasonably and vexatiously increase the costs of litigation through the inclusion of unnecessary material in the appendix."

The 1986 Amendment to the Advisory Committee Note observes that subdivision (b) of this Rule requires the circuit, by local rule, to establish a procedural mechanism for the imposition of sanctions against attorneys who conduct appellate litigation in bad faith," and that both 28 U.S.C. § 1927, entitled "Counsel's liability for excessive costs," and "the inherent power of the court" authorize such sanctions.
2. Rule 38. **Damages for Delay**

This Rule reads, in its entirety, "If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee."

3. Rule 39. **Costs**

Rule 39(a) assesses the costs of appeals upon the appellant, "unless otherwise agreed by the parties or ordered by the court," when an appeal is dismissed; upon the appellant, "unless otherwise ordered," when a judgment is affirmed; upon the appellee, "unless otherwise ordered," when a judgment is reversed; and "as ordered by the court" when a judgment is affirmed in part, reversed in part or vacated.

4. Rule 46. **Attorneys**

Rule 46(b) provides for suspension or disbarment "[w]hen it is shown to the court that any member of its bar has been suspended or disbarred from practice in any other court of record, or has been guilty of conduct unbecoming a member of the bar of the court." ** Accord Sup. Ct. R. 8.**

Rule 46(c) empowers a court of appeals, "after reasonable notice and an opportunity to show cause to the contrary, and after a hearing, if requested," to "take any appropriate disciplinary action against any attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with [the Rules of Appellate Procedure] or any rule of the court."

E. **STATUTES**

1. 28 U.S.C. § 1912. **Damages and Costs on Affirmance**

This section provides, in its entirety, that "[w]here a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs."

2. 28 U.S.C. § 1918. **District Courts; Fines, Forfeitures and Criminal Proceedings**

Subsection (a) states that costs "shall be included in any judgment, order, or decree rendered against any person" for the violation of any federal statute that provides for a civil fine or forfeiture of property. Subsection (b) permits the court to order the defendant in a criminal matter to pay the
costs of prosecution whenever "any conviction for any offense not capital is obtained in the district court."

3. 28 U.S.C. § 1919. District Courts; Dismissal for Lack of Jurisdiction

Section 1919, in its entirety, states as follows: "Whenever any action or suit is dismissed in any district court or the Court of International Trade for want of jurisdiction, such court may order the payment of costs."


Section 1927 provides that an attorney "who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct."

F. RULES OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

1. Rule § 38. Other Sanctions for Delay

Supplementing Fed. R. App. P. 38, this Rule permits the court, upon motion or sua sponte, to impose, upon a party who has failed to file the record, a brief, or the appendix in a timely manner or his attorney, "other sanctions, including amounts to reimburse an opposing party for the expense of making motions."

2. Rule § 40. Petition for Rehearing

This Rule provides that, where a petition for rehearing is found to be "wholly without merit, vexatious and for delay, the court may tax a sum not exceeding $250 against petitioner in favor of his adversary, to be collected with the costs in the case."

3. Rule § 46. Attorneys

Subparagraph (f), entitled "Suspension or Disbarment," states that such matters "shall be governed by" Fed. R. App. P. 46, but also sets forth the procedures by which an attorney is disbarred or suspended from practice in the Second Circuit, and those by which he may move to modify or revoke an order disbarring him or suspending him from practice.

Subparagraph (g)(1) empowers the Clerk of this Court to enter an order suspending an attorney, "unless the court orders otherwise," immediately after the court receives proper
notice that the attorney has been convicted of a "serious crime," as defined in subsection (g)(2). If no disbarment or suspension order has been entered pursuant to subparagraph (f), the Court, in addition to suspending the attorney in accordance with the provisions of subparagraph (g)(1), may "direct the institution of a formal presentment," before the Committee on Admissions and Grievances, solely to determine "the extent of the final discipline to be imposed," Rule § 46(g)(4). Finally, if the attorney has been convicted of a crime that does not constitute a "serious crime" for purposes of this Rule, "the court shall, refer the matter to the said Committee for whatever action the Committee may deem warranted," Rule § 46(g)(5).

G. CIVIL APPEALS MANAGEMENT PLAN (CAMP)

1. Paragraph 7. Non-Compliance Sanctions

Paragraph 7(a) empowers the Clerk of this Court to dismiss any appeal where the appellant has not adhered to the requirements of paragraph 3 (i.e., docketing the appeal, filing a pre-argument statement, ordering and arranging for payment of a transcript of the proceedings, and paying to docket fee) of the CAMP in a timely fashion.

Paragraph 7(b) orders the Clerk to dismiss an appeal "upon default of the appellant regarding any provision of the schedule calling for action on his part, unless extended by the Court." It further provides for sanctions "as the Court may deem appropriate, including those provided in [Fed. R. App. P. 31(c) or 39(a)] or Rule 38 of the Local Rules of this Court ... or the imposition of a fine," where the appellee has failed to file his brief in a timely manner.

Finally, subparagraph (c) provides that, "[i]n the event of default in any action required by a pre-argument conference order [see paragraph 5] not the subject of the scheduling order," the Clerk shall issue a notice to the appellant that the appeal will be dismissed unless the appellant files, in a timely fashion, "an affidavit showing good cause for the default and indicating when the required action will be taken." The Chief Judge or "any other judge of this Court designated by him" shall then, upon the recommendation of the staff counsel, take "appropriate action."

II. STATE SANCTIONS: CIVIL PRACTICE LAW & RULES (CPLR)

A. ARTICLE 31 -- DISCLOSURE

1. Rule 3126. Penalties for refusal to comply with order or to disclose
Rule 3126 provides that, where a party or "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, the court may make such orders with regard to the failure or refusal as are just . . . ." (emphasis added). The Rule also lists three non-inclusive types of orders that a court may issue in imposing sanctions. These include: (1) resolving orders (Rule 3126(1)); (2) preclusion orders (Rule 3126(2)); and (3) orders striking out pleadings, staying further proceedings, dismissing the action, or rendering a judgment by default (Rule 3126(3)).

Professor Siegel notes that "the court's tendency . . . is to stay away from the listed sanctions, especially when it is the attorney rather than the client who is responsible for the nondisclosure," D. Siegel, New York Practice § 367, at 464 (1978), and that the "favored device" is the "conditional order," whereby "a designated sanction is invoked 'unless' the party makes the requisite disclosure within a stated time," id. at 464-65. Such orders also often provide for costs and attorneys' fees, and, "if the court finds that the resistance is the fault of the resisting party's attorney, it may order him to pay the fee out of his pocket," id. at 465.

Finally, Prof. Siegel notes that "[a]ll of the disclosure devices" set forth in the CPLR are enforced by the sanctions of Rule 3126 "with the exception of the request to admit [see CPLR 3123], which carries its own set of consequences," id. at 463.

2. Rule 3123. Admission as to matters of fact, papers, documents and photographs

This Rule provides that when a party, after being served with "a written request for admission" pursuant to subdivision (a), "does not admit and if the party requesting the admission thereafter proves the genuineness of" a paper or document at issue, the correctness or fairness of representation of any such photograph, or the truth of any such matter of fact, "he may more at or immediately following the trial for an order requiring the other party to pay him the reasonable expenses incurred in making such proof, including reasonable attorney's fees," Rule 3123(c). Such an order "shall be made" by the court, "outside the presence of the jury," unless "the court finds that there were good reasons for the denial or the refusal otherwise to admit or that the admissions sought were of no substantial importance," id.

B. ARTICLE 34 -- CALENDAR PRACTICE; TRIAL PREFERENCES
1. **Rule 3406. Mandatory filing and pre-calendar conference in dental and malpractice actions**

Rule 3406(b) provides that, in actions to recover damages for dental, medical or podiatric malpractice, the chief administrator of the courts "shall provide for the imposition of costs or other sanctions, including imposition of reasonable attorney's fees, dismissal of an action, claim, cross-claim, counterclaim or defense, or rendering a judgment by default for failure of a party or a party's attorney to comply with [the] special calendar control rules" set forth in this section "or any order of a court made thereunder."

C. **ARTICLE 55 -- APPEALS GENERALLY**

1. **Rule 5528. Content of briefs and appendixes**

Rule 5528(e) states that an appellate court "may withhold or impose costs" for "any failure" to comply with the Rule's requirements concerning the (a) appellant's brief and appendix, (b) respondent's brief and appendix, and (c) appellant's reply brief and appendix.

D. **ARTICLE 75-A -- HEALTH CARE ARBITRATION**

1. **Section 7564. Form of decision; costs upon frivolous claims and counterclaims**

If the panel of arbitrators in a proceeding under this article determines that "the action, claim, counterclaim, defense or cross claim of an unsuccessful party is frivolous," it is "empowered to award costs and reasonable attorney's fees" to the successful party.

E. **ARTICLE 83 -- DISBURSEMENTS AND ALLOWANCES**

1. **Section 8303-a. Costs upon frivolous claims and counterclaims in actions to recover damages for personal injury, injury to property or wrongful death**

Subdivision (a) provides that the court "shall award to the successful party costs and reasonable attorney's fees not exceeding ten thousand dollars," if the court finds "at any time during the proceedings or upon judgment," the action or a claim, counterclaim, defense or cross claim in an action brought under this section to be frivolous.

Subdivision (b) provides that the costs and fees awarded under subdivision (a) "shall be assessed either against the party bringing the action, claim, cross claim, defense or
counterclaim," or against his attorney, or against both, "as may be determined by the court, based upon the circumstances of the case." Costs and fees are to be awarded in addition to any other judgment awarded to the successful party.

Subdivision (c) sets forth the requirements for a court to determine frivolousness.

2. Section 8303-a. **Costs upon frivolous claims and counterclaims in podiatric, dental and medical malpractice actions**

This section is separate and distinct from the previous section relating to actions to recover damages for personal injury, injury to property or wrongful death, although its section number and requirements are identical.