MONTHLY LUNCHTIME SEMINAR SERIES

35th Session:

SANCTIONS: SUPREME COURT RULES 137 & 219(C)

Judge Lynn M. Egan
Judge Moshe Jacobius

June 11, 2015

JUDGE LYNN M. EGAN

Judge Lynn M. Egan became a Cook County Circuit Court judge in 1995 and has served in the Law Division for over 18 years. She has presided over high volume motion calls, an Individual Commercial Calendar, an Individual General Calendar and bench and jury trials. She is currently the only Cook County judge assigned to a General Individual Calendar in the Law Division, which includes every type of case filed in the Division, specifically including personal injury actions such as medical & dental malpractice, product liability, infliction of emotional distress, defamation/slander, premises liability, construction & motor vehicle accidents, as well as commercial disputes such as breach of contract, fraud, conspiracy, breach of fiduciary duty, wrongful termination, employment discrimination and legal & accounting malpractice. She manages these cases from time of filing until final disposition, including all motion practice, case management, settlement conferences and trials. Additionally, Judge Egan is committed to assisting parties with the voluntary resolution of cases. As a result, hundreds of cases pending on other judges' calls in the Law & Chancery Divisions & the Municipal Districts are transferred to Judge Egan each year for settlement conferences and she has helped facilitate settlements totaling over 200 million dollars.

Judge Egan has also served as a member of several Illinois Supreme Court Committees, including the Executive Committee, Discovery Procedures Committee, Civil Justice Committee and Education Committee. She has also been a faculty member at dozens of judicial seminars throughout the state, including the annual New Judges' Seminar, regional conferences and the mandatory Education Conference. She has authored numerous articles on subjects such as discovery, requests to admit, restrictive covenants, Day-In-The-Life films, directed verdicts, jury selection & instructions, Dead Man's Act, Supreme Court Rule 213, expert witnesses, reconstruction testimony, court ordered medical exams, attorney-client/work product privileges, sanctions and damages. She also serves as a mentor for new judges and was recently appointed to the Illinois Courts Commission, a 7 member panel responsible for rendering final decisions on matters of judicial discipline.

Judge Egan has served on Bar Association committees and Boards of Directors and has been a frequent speaker at Bar Association seminars. She has taught law school classes and judged trial & appellate advocacy competitions. In 2012, she became a registered CLE provider through the Illinois MCLE Board and provides free CLE seminars for attorneys and judges every month. Since her monthly seminar series began in August 2012, Judge Egan has awarded over 6,500 hours of CLE credit to Illinois attorneys.

Prior to joining the bench, Judge Egan was an equity partner at Hinshaw & Culbertson, where she focused her practice on medical negligence cases. In addition to trial work, she argued before the Illinois Supreme Court on a matter of first impression in the country in *Cisarik v. Palos Community Hospital*. Similarly, during her earlier career in the Cook County State's Attorney's Office, she worked in the criminal and juvenile divisions and argued before the Illinois Appellate and Supreme Courts on matters of first impression in Illinois.

Judge Moshe Jacobius

Judge Moshe Jacobius is a graduate of DePaul Law School where he graduated *cum laude* in 1975. He earned a B.A. from the University of Illinois and an M.A. in history, also from the University of Illinois.

Judge Moshe Jacobius has a distinguished record of public service. He was formerly a Chicago Public School teacher working in the inner city. He began his legal career in 1974 as a law clerk for the Office of the Illinois Attorney General and worked his way up through the ranks in that office. Judge Jacobius had 16 year career as a litigator in the Office of the Illinois Attorney General handling some of the most difficult and sensitive cases in the office and serving three Illinois Attorneys General. He was formerly the head of the Worker's Compensation Division of the Office as well as the head of the General Law Division. The General Law Division is the civil litigation arm of the office. It handles the vast majority of the civil litigation in the office, including the most sensitive and complex litigation. In his capacity of Chief of General Law, Judge Jacobius supervised 40 attorneys. In 1988, he was named as Counsel to the Illinois Attorney General. He advised the Attorney General on major litigation and legislation in the office, handled special projects and was liaison to the National Association of Attorneys General and to the American Bar Association.

Judge Jacobius was appointed to the bench in January 1991 by the Illinois Supreme Court. In 1994, he was elected to a six-year term as a Circuit Court Judge from the 9th Judicial Sub-circuit. In 2006, the voters retained Judge Jacobius to another six-year term.

When first appointed, Judge Jacobius was assigned to the Domestic Relations Division and he has been in the Division since January 1991, except for a short stint as a Chancery Division judge from February 2000 to July 2000. Handling diverse assignments in the Domestic Relations Division, Judge Jacobius presided over numerous trials dealing with all major issues handled by the Division. In July 2000, Judge Jacobius returned to the Domestic Relations Division as Presiding Judge. He has lectured widely in the area of domestic relations and was appointed by the Illinois Supreme Court to its Commission on Child Custody and Committee on Courtroom Security. In December 2010, Judge Evans appointed Judge Jacobius as the Presiding Judge of the Chancery Division.

Judge Jacobius has consistently received high ratings from bar associations that have reviewed his judicial proficiency as well as the endorsements of Chicago's two major newspapers in his judicial elections. He is married and has two children and seven grandchildren.

SECTION A

- *Sanctions: Supreme Court Rules 137 & 219(c), by Judge Lynn M. Egan, June 2015.*

SANCTIONS:
SUPREME COURT RULES 137 & 219(c)

by

Judge Lynn M. Egan

June 2015

I. Introduction.

Both Supreme Court Rules 137 and 219(c) vest trial judges with broad discretion concerning the imposition of sanctions. Importantly, however, the purpose behind each rule is very different and dictates the type and scope of available sanctions. *Locasto v. City of Chicago, 2014 IL App (1st) 113576, ¶ 33.* Thus, judges and lawyers must understand the fundamental difference between Rules 137 and 219(c) or risk reversal on appeal.

II. Supreme Court Rule 137.

"Rule 137 has a profoundly critical function – to deter abuse of the litigation process." *Euro Parcel Service, LLC v. Sitko, 2014 IL App (1st) 140107-U, ¶ 16.* The most important, and distinguishing, feature of Rule 137 is that it is penal in nature. *Krautsack v. Anderson, 223 Ill.2d 541, 561 (2006).* Its purpose is to prevent the filing of frivolous or false pleadings and to punish those who file suits for improper purposes. *Id.* Because it is penal in nature, it is strictly construed. *CitiMortgage, Inc. v. Johnson, 2013 IL App (2d) 120719, ¶ 41.* Despite the strict construction, however, Rule 137 sanctions can be quite expansive and can be imposed upon the actual party to the litigation, the party's lawyer, or both. *Dowd & Dowd, Ltd. v. Gleason, 181 Ill.2d 460 (1998).*

In order to advance the goal of preventing false or frivolous pleadings, Supreme Court Rule 137(a) includes a signature requirement, which provides as follows:

> *Every pleading, motion and other document of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other document and shall state his address.*

(Ill.S.Ct.Rule 137(a)(West 2014). The significance of the signature requirement is that it serves as a certification by the attorney or party that he has read the pleading or other document and believes it is well grounded in fact and supported by existing law or a good-faith argument for the extension, modification, or reversal of existing law. *Id.* As a certification, it is also the basis upon which courts may impose sanctions when a document is utilized in violation of the rule.

The importance of the signature requirement is evidenced by the fact that failure to sign a pleading, motion or other document constitutes a violation of Rule 137 and justifies an order striking the document. *Ill.S.Ct.Rule 137(a)(West 2014).*

ETHICS NOTE: Illinois Rule of Professional Conduct 1.2(c) permits attorneys to limit their scope of representation -- if reasonable under the circumstances and the client gives informed consent. *Ill.R.Prof'l Conduct 1.2(c)(West 2014).* This can include

providing advice about drafting pleadings, motions or other documents that are subject to Rule 137. Significantly, Supreme Court Rule 137(e) expressly allows an attorney to assist a self-represented party in drafting pleadings, motions or other documents without filing an appearance and without signing the document as ordinarily required. Instead, the self-represented party must sign the document and the attorney is not required to undertake independent investigation of the facts or representations made by the party – unless the attorney knows the representations to be false. *Ill.S.Ct.Rule 137(e)(West 2014).*

CAUTION: Note, however, that an attorney who files an appearance after being retained to provide limited scope representation must fully comply with Rule 137. *Ill.S.Ct.Rule 137, Committee Comments (West 2014).*

A. What Documents Are Covered by Rule 137?

Essentially, everything proffered by a party during the course of litigation is subject to the requirements of Rule 137. Thus, the scope of the rule is quite broad as it expressly applies to "every pleading, motion and other document" generated or used by a party during the course of litigation. *Ill.S.Ct.Rule 137(a)(West 2014).*

Even though the rule refers to documents that are "filed," attorneys and litigants must ensure that all documents, even those which are not filed, comply with the rule. Further, inclusion of the words, "pleading" and "motion" does not imply that less formal documents are outside the scope of Rule 137. Indeed, the Committee Comments to the rule refer to "papers," not just "pleadings." *Ill.S.Ct.Rule 137, Committee Comments (West 2014).*

Specific examples of items subject to the rule include appearances & jury demands (*Pettigrew v. Thompson, 2014 IL App (1st) 131960-U),* complaints & counterclaims (*Williams v. Pincham-Benton, 2012 IL App (1st) 112645-U),* section 2-622 reports authored by consulting experts in medical negligence cases (*Nissenson v. Bradley, 316 Ill.App.3d 1035 (1st Dist., 2000)),* answers to interrogatories & requests to admit (*American Service Insurance v. Miller, 2014 IL App (5th) 130582),* motions (including Rule 137 motions)(*Iavarone v. Stensrud, 2012 IL App (2d) 110836-U),* responses & affidavits filed in opposition to motions (*Petersen v. Darien Park District, 2012 IL App (2d) 120033-U),* witness statements (*Sanchez v. City of Chicago, 352 Ill.App.3d 1015 (1st Dist., 2004)),* affidavits of heirship signed by non-parties (*In re Estate of Stean, 2012 IL App (1st) 121891-U),* section 2-1401 petitions (*In re Marriage of Spagnoli, 2012 IL App (2d) 100625-U)* & responses in garnishment proceedings (*Rios v. Valenciano, 273 Ill.App.3d 35, 40 (2d Dist., 1995)).*

In fact, the rule even applies to papers not authored by a party or lawyer if they are used by the party or lawyer during the litigation. *See, Petersen v. Darien Park District, 2012 IL App (2d) 120033-U(witness affidavits); Sanchez v. City of Chicago, 352 Ill.App.3d 1015 (1st Dist., 2004)(witness statements); and Nissenson v. Bradley, 316 Ill.App.3d 1035 (1st Dist., 2000)(MD's section 2-622 report).*

B. To Whom Does the Rule Apply?

Although it is clear that the rule permits sanctions to be imposed upon the parties to litigation and their individual attorneys, there has been conflict in the law about whether law firms are subject to Rule 137 sanctions, stemming primarily from the decision in *Brubakken v. Morrison, 240 Ill.App.3d 680 (1st Dist., 1992)* and language within Rule 11 of the Federal Rules of Civil Procedure (Fed. R. Civ. P. 11). In *Brubakken*, the appellate court upheld sanctions imposed upon a law firm for the conduct of its employed lawyer. However, Rule 137 was not at issue and the decision has been consistently distinguished by subsequent cases. *See, Foy v. Safeco Insurance Company of Illinois, 2013 IL App (1st) 121875-U.* Thus, *Brubakken* should not be cited as an accurate reflection of the law on the issue of whether a law firm can be sanctioned for the conduct of its employed lawyers.

Instead, the more accurate reflection of the law is found in cases such as *Medical Alliances, LLC v. Health Care Services Corporation, 371 Ill.App.3d 755, 758-759 (2d Dist., 2007)("a trial court may not sanction a law firm under Rule 137")* and *Levin v. Seigel & Capital, Ltd., 314 Ill.App.3d 1050, 1053-1054 (3d Dist., 2000)("we hold, therefore, that only the individual attorney who signed the pleading, the represented party, or both, may be sanctioned under Rule 137."***An attorney's "personal responsibility is nondelegable and not subject to principles of agency or joint and several liability.").*

ETHICS NOTE: Rule 137 and the appellate decisions interpreting it make clear that lawyers owe a duty "to one's adversary and to the legal system" (*Hernandez v. Williams, 258 Ill.App.3d 318, 323 (3d Dist., 1994))* and that pleadings filed in violation of Rule 137 constitute a breach of this duty "by taking the time of the judge, jury and other officers away from matters more in need of resolution." *Id. Accord, Foy v. Safeco Insurance Company of Illinois, supra.*

CAUTION: Nothing in Rule 137 confers standing upon an attorney acting in his individual capacity to file a motion for sanctions against another attorney to recover attorney fees and expenses. *LaSalle National Trust, N.A. v. Lamet, 2014 IL App (1st) 121730-U, ¶ 20.* Thus, a valid statutory attorney's lien does not give an attorney the right to file a Rule 137 motion for sanctions as a vehicle to recover his fees. *Id.*

C. Does the Rule Only Apply at Time of Filing?

No. The duty imposed under Rule 137 is of a continuing nature so attorneys have an ongoing obligation to dismiss suits or withdraw pleadings & documents as soon as it becomes apparent that they lack merit. *Id. at ¶ 44.("This court long ago determined that an attorney has a continuing duty of inquiry throughout the pendency of litigation.")*

Indeed, a violation of the continuing duty of inquiry is, itself, sanctionable. *American Service Insurance v. Miller, 2014 IL App (5th) 130583, ¶ 13.*

NOTE: An attorney's duty to withdraw false or frivolous documents or even dismiss a baseless complaint takes precedence over Rule 1.2(a) of the Rules of Professional Conduct, which details a lawyer's duty to follow a client's instructions. *Ill.R.Prof'l.*

Conduct 1.2(a)(West 2014). This means that an attorney "has a professional duty to promptly dismiss a baseless lawsuit, even over the objections of the client, when the attorney learns that the client has no case." *Cmarko v. Fisher, 208 Ill.App.3d 440, 446 (1st Dist., 1990).* Why? Even though the attorney owes a fiduciary obligation to the client, "an attorney's first duty is to the administration of justice." *Walsh v. Capital Engineering & Manufacturing Company, 312 Ill.App.3d 910, 916 (1st Dist., 2000).*

ETHICS WARNING: Attorneys cannot hide behind predecessor counsel. *Foy v. Safeco, supra.* This means it is no defense that a prior lawyer filed or advanced the offending document. All lawyers involved in a case, even those who did not sign or file the offending document, have an ethical duty to correct the record once it is apparent that the document is erroneous or lacks a basis in law or fact. *Nissenson v. Bradley, 316 Ill.App.3d 1035, 1041 (1st Dist., 2000)("Though counsel has a duty to make reasonable inquiry before filing a pleading, the duty of reasonable inquiry does not end there. A successor attorney cannot hide behind his predecessor. Just as a party is ultimately responsible for the pleadings filed by his attorney on his behalf, a successor attorney inherits from his predecessor the duty to update.").*

Additionally, merely because an attorney withdraws from a case does not deprive the court of power to sanction him, even if the Rule 137 motion is filed after withdrawal. *LaSalle National Trust, N.A. v. Lamet, 2014 IL App (1st) 121730-U, ¶ 21, citing Western Auto Supply v. Hornback, 188 Ill.App.3d 273, 276 (5th Dist., 1989).*

D. What Constitutes a False or Frivolous Pleading?

A false or frivolous pleading is one which lacks a factual or legal foundation (*Baker v. Berger, 323 Ill.App.3d 956, 966 (1st Dist., 2001)*), or is interposed for an improper purpose, such as harassment, causing unnecessary delay or increasing the cost of litigation. *Rios v. Valenciano, 273 Ill.App.3d 35, 40 (2d Dist., 1995).* In order to satisfy the requirements of Rule 137, and avoid the conclusion that the pleading or other document was false or frivolous, lawyers and litigants must conduct a reasonable inquiry prior to filing. *Bank of New York Mellon v. Maslowski, 2013 IL App (2d) 130373-U.* Importantly, the inquiry must be objectively reasonable and the attorney must follow-up with further investigation if there are any discrepancies, inconsistencies or gaps in information. *Id. at ¶ 21.*

CAUTION: Typically, the reasonable inquiry requirement cannot be satisfied through exclusive reliance on the client's verbal representations, particularly when the client has additional information in his possession or such information can be obtained from third parties. *Foy v. Safeco, supra; In re Estate of Stean, 2012 IL App (1st) 121891-U, ¶ 25. (An attorney cannot ignore "warning signs.").* This means that attorneys cannot simply accept a client's representations at face value, particularly when faced with inconsistencies or incomplete information. Instead, attorneys must be "diligent in verifying the truth of the facts" provided by clients. *Id. at ¶ 26. See also, Bank of New York Mellon v. Maslowski, 2013 IL App (3d) 130373-U, ¶ 21. ("Attorneys are admonished that Illinois law is well settled that licensed attorneys have "'an obligation to objectively review all information and if any discrepancies, inconsistencies, or gaps appear, he [or she] must investigate further before filing.'").*

E. Standard.

The standard utilized to assess whether a document violates Rule 137 is objective and focuses on what was reasonable under the circumstances that existed at the time the document was signed or filed. *City of Virginia v. Mitchell, 2015 IL App (4th) 140252-U, ¶ 17.* Importantly, "an attorney's honest belief that his or her case is well grounded in fact or law is insufficient." *State Farm Mutual Insurance Co. v. Ocampo, 2014 IL App (1st) 133925-U, ¶ 14.*

Appellate decisions interpreting Rule 137 frequently include the oft-cited language that the rule is not intended to penalize litigants or their attorneys simply because they were zealous, but unsuccessful. *See, Casablanca Lofts, LLC v. Blauvise, 2014 IL App (1st) 132236-U, ¶ 22.* While such language is an accurate statement of law, attorneys should not place undue emphasis on it, particularly to the exclusion of the repetitive warnings about the need to undertake a reasonable inquiry as to the facts and law prior to filing documents. Importantly, what is reasonable is judged by an objective standard so an attorney's good faith or honest belief is irrelevant in the context of a Rule 137 motion. *Sterdjevich v. RMK Management Corporation, 343 Ill.App.3d 1, 19 (1st Dist., 2003).*

NOTE: Although an objective standard is utilized to assess the reasonableness of the inquiry undertaken prior to filing or presenting papers during litigation, subjective bad faith must be demonstrated if the Rule 137 movant seeks sanctions "for a needless increase in the cost of litigation." *Morgan Place of Chicago v. City of Chicago, 2012 IL App (1st) 091240, ¶ 59; accord, Cook v. AAA Life Insurance Company, 2014 IL App (1st) 123700, ¶ 63.*

ALERT: It is within the trial court's discretion to resolve a Rule 137 motion for sanctions without an evidentiary hearing, particularly if the opposing party fails to request such a hearing and the factual basis for the sanction request is contained in the record. *Williams v. Pincham-Benton, 2012 IL App (1st) 112645-U, ¶ 18.*

F. Appropriate Sanctions.

When a pleading, motion or other document is signed in violation of Rule 137, the court may impose "an appropriate sanction," which can include reasonable attorney's fees and expenses incurred as a result of the false or frivolous filing. *Ill.S.Ct.Rule 137(a)(West 2014). See also, American Service Insurance v. Miller, supra.*

Importantly, however, a court is not limited to imposition of fees or expenses in response to a Rule 137 violation. Instead, "a court has several options, including 'a warm friendly discussion on the record, a hard-nosed reprimand in open court, compulsory legal education, monetary sanctions, or other measures appropriate to the circumstances.'" *J.F. Heckinger v. Welsh, 339 Ill.App.3d 189, 192 (2d Dist., 2003).*

As with all sanctions, fees and expenses under Rule 137 must be reasonable. In determining whether attorney fees are reasonable, the following factors are relevant: 1) the skill and standing of the attorney seeking fees, the nature of the case, the novelty and difficulty of the issues, the degree of responsibility required, the usual and customary charge for similar services in the community and whether there is a

reasonable connection between the fees and the litigation. *In re Marriage of Spagnoli, 2012 IL App (2d) 100625-U, ¶ 42.*

Additionally, the record must clearly reflect that the fees or expenses were incurred as a result of the offending pleading or document. *Cook v. AAA Life Insurance Company, 2014 IL App (1st) 123700, ¶ 64 ("A court will only award those fees or costs that are caused by the improper filing.").*

NOTE: If no sanction is entered after the court finds a Rule 137 violation, the issue is not appealable. *Youngblood v. McGinty, 2015 IL App (4th) 140264-U, ¶ 22.*

G. Can a Rule 137 Violation Be Purged?

Even though all lawyers and litigants have an ongoing obligation to correct the record when it becomes apparent that a document has been advanced in violation of Rule 137, doing so does not purge the violation. As noted by the court in *Edward Yavitz Eye Center, Ltd. v. Allen, 241 Ill.App.3d 562, 571 (2d Dist., 1993),* "a litigant who violates the rule should be held to account for the damage done by that violation even if the litigant later withdraws the offending pleading." Why? Sanctions are still appropriate in such a situation in order "to avoid saddling the judiciary and nonoffending litigants with the needless expenditure of time and money." *Id. Accord, J.F. Heckinger v. Welsh, 339 Ill.App.3d 189, 193 (2d Dist., 2003).*

Thus, subsequently filing a well-founded, amended pleading or voluntarily dismissing the case will not shield the offending lawyer or litigant from sanctions under Rule 137. *In re Marriage of Streur, 2014 IL App (1st) 131721-U, ¶ 37. ("*If a litigant could purge his violation...merely by taking a dismissal, he would lose all incentive to 'stop, think and investigate more carefully before serving and filing papers.'"

CAUTION: To the extent *Couri v. Korn, 202 Ill.App.3d 848 (3d Dist., 1990)* holds to the contrary, it is a minority view that has been rejected by later decision. *Edward Yavitz Eye Center, Ltd., supra. ("We cannot endorse this holding.").*

H. Timing is Everything.

A motion for sanctions pursuant to Rule 137 "can be filed at any time during the litigation." *Commonwealth Edison Company v. Munizzo, 2013 IL App (3d) 120153, ¶ 25.* Thus, the aggrieved party need not answer or move to dismiss the false or frivolous pleading before seeking relief under Rule 137. *Youngblood v. McGinty, 2015 IL App (4th) 140264-U, ¶ 34-35. (To preclude a sanction motion until after termination of the frivolous proceeding would frustrate the purpose of Rule 137, "which is to ensure the prompt disposition of frivolous matters" and "would unnecessarily increase the cost of litigation and constitute an inefficient use of judicial resources.").*

Importantly, however, a Rule 137 motion must be brought "during the litigation," which means while the trial court still retains jurisdiction. Indeed, Rule 137 expressly dictates that any alleged violations must be raised "within the civil action in which the pleading, motion or other document...has been filed." *Ill.S.Ct.Rule 137(b)(West 2014).* Thus, the alleged violation must be raised while the trial court retains jurisdiction of the original

action, which extends up to 30 days after entry of final judgment or within 30 days of ruling on a post-trial motion. Id. *See also,* LaSalle National Trust, N.A. v. Lamet, *2014 IL App (1st) 121730-U, ¶ 23 ("'In this regard, filing a Rule 137 motion is the functional equivalent of adding an additional count to a complaint, or counterclaim, depending on which party files the motion.'").*

Under no circumstances can a motion alleging a Rule 137 violation give rise to a separate civil suit. *Ill.S.Ct.Rule 137(b)(West 2014).*

ALERT: In Commonwealth Edison Co. v. Munizzo, *2013 IL App (3d) 120153,* the Appellate Court decided an issue of first impression in connection with Rule 137. Specifically, the court considered the timeliness of a Rule 137 motion in a small claims case, to which Supreme Court Rule 287 applies and requires advance leave of court to file any motion. After considering the purpose behind the rules, the court concluded that the filing of a motion for leave to file a Rule 137 petition 29 days after entry of final judgment was timely and sufficient to toll the 30-day period for filing a notice of appeal. Id. *at ¶ 27.*

I. Written Explanation of Sanction.

Whenever a sanction is imposed under Rule 137, subsection (d) requires the court to provide a written explanation, specifically delineating the reasons and bases of any sanction. The explanation can be included in the judgment order or a separate order. *Ill.S.Ct.Rule 137(d)(West 2014).*

J. Standard of Review

Because the imposition of sanctions is a discretionary matter, the standard on review is abuse of discretion, which is the most deferential standard. Morgan Place of Chicago v. City of Chicago, *2012 IL App (1st) 091240, ¶ 60.*

When employing this standard, reviewing courts look specifically to determine whether the trial court decision was 1) informed, 2) based on valid reasoning, and 3) follows logically from the facts. City of Virginia v. Mitchell, *2015 IL App (4th) 140252-U, ¶ 18.*

If the trial court conducted an evidentiary hearing before imposing sanctions and provided a detailed ruling, its decision will typically be considered "informed." As for the reasoning supporting the imposition of sanctions, an appellate court will limit its review to the actual reasons articulated by the trial court. Unlike certain evidentiary rulings, the appellate court will not search the record and affirm sanctions if the record as a whole supports them. Instead, sanctions will only be affirmed "on the grounds specified by the trial court." State Farm Mutual Insurance Company v. Ocampo, *2014 IL App (1st) 133925-U, ¶ 15.*

CAUTION: Although most appellate decisions agree that the standard of review is abuse of discretion, even when the trial court does not conduct an evidentiary hearing (Williams v. Pincham-Benton, *2012 IL App (1st) 112645-U, ¶ 12),* at least one decision reached a contrary conclusion and held that a *de novo* standard is appropriate if the trial

court did not hold an evidentiary hearing. Casablanca Lofts, LLC v. Blauvise, *2014 IL App (1st) 132236-U, ¶ 18.*

III. Supreme Court Rule 219(c).

Sanctions under Rule 219(c) are quite different from those available under Rule 137. Unlike Rule 137, the purpose behind Rule 219(c) is not punishment; instead, its purpose is to compel discovery and encourage a trial on the merits. Kubicheck v. Traina, *2013 IL App (3d) 110157, ¶ 43.* As a result, an appropriate order under Rule 219(c) is one which, "to the degree possible, insures both the accomplishment of discovery and a trial on the merits." Id. *at ¶ 75.* Importantly, the rule is also intended to assist the court enforce its procedural rules. Sander v. Dow Chemical Company, *166 Ill.2d 48 (1995);* VC&M, Ltd. v. Andrews, *2013 IL 114445.* Thus, sanctions under Rule 219 have been described as "a needed tool for the trial court for case management." Ibrahim v. Reproductive Genetic Institute, *2013 IL App (1st) 120113-U, ¶ 56.*

A. Effect of Sander v. Dow Chemical Company.

Until the Supreme Court decision in Sander v. Dow Chemical Company, *166 Ill.2d 48 (1995),* sanctions under Rule 219(c) were perceived to be limited to those situations where there was a violation of a discovery order. Thus, conduct that was unrelated to a discovery order was not considered sanctionable under Rule 219(c). Id. *at 63.*

Although the Supreme Court in Sander noted that this conclusion was "a correct statement of the law," it greatly expanded the traditional interpretation of what constitutes a "discovery" order. Id. Specifically, the Court held that any order concerned with discovery or the pretrial procedures detailed in Supreme Court Rule 218 can trigger application of Rule 219(c). Id. *at 12-13.* This expansive definition was a dramatic development in the context of Rule 219 sanctions because Rule 218 charges the trial court with responsibility for "ongoing differential case management," which specifically includes facilitating the prosecution of cases by simplifying and narrowing the issues, amending pleadings and "any other matters which may aid in the disposition of the action." *Ill.S.Ct. Rule 218(a)(1)-(5) & Committee Comments(West 2014).* Consequently, trial courts can impose sanctions for violation of "discovery" orders, "pretrial" orders or "procedural rules." VC&M, Ltd. v. Andrews, *2013 IL App 114445, ¶ 26.* Thus, the Sander interpretation of what constitutes a "discovery" order vastly broadened the scope of a trial court's discretion under Rule 219(c).

As a result, a trial court's authority to enter Rule 219 sanctions is no longer limited to violations of traditional discovery orders, such as those concerned with interrogatories, production requests or depositions. Instead, trial courts can also impose sanctions for violations of any "pretrial orders." Such violations can include failure to comply with local court rules, such as those concerning e-filing (VC&M, Ltd. v. Andrews, *2013 IL 114445),* filing suit under a fictitious name without leave of court (Santiago v. E.W. Bliss Company, *2012 IL 111792),* failure to strike or amend pleadings consistent with court rulings or failure to respond to a motion for a protective order. Sander, *supra at 23.*

Why? Because court rules, even local rules, help prevent undue delays and disruptions, and pleadings and protective orders determine the appropriate scope of relevant discovery, all of which support the ultimate aim of Rule 218 case management conferences. Id.

Significantly, trial courts can also consider an attorney's repeated failure to attend case management conferences or status hearings. South Suburban Industrial, L.L.C. v. Village of Alsip, 2015 IL App (1st) 133328-U, ¶ 31. Indeed, a case can be dismissed with prejudice as a sanction for failure to appear on the day of trial. Mayes v. Netco, Inc., 2013 IL App (1st) 130235-U, ¶ 34. Additionally, sanctions can be imposed for "misconduct during proceedings," such as a party's failure to answer questions in the manner directed by the trial court. In re Marriage of Bloom, 2014 IL App (2d) 130163-U, ¶ 13. ("Respondent continued to disregard the trial court's directions and interject nonresponsive material into her answers to such questions. Since respondent refused to comply with the basic rules regarding how a hearing is conducted, the trial court closed proofs. This course was within the trial court's discretion."). Similarly, sanctions can be imposed for failure to answer appropriate questions at a deposition. Dolan v. O'Callaghan, 2012 IL App (1st) 111505.

B. Sander Bonus: A Court's "Inherent Authority."

Even though the Supreme Court affirmed the trial court's decision to dismiss plaintiff's complaint with prejudice based on Rule 219(c), it went beyond the rule in discussing the scope of a trial court's authority to enter such a drastic sanction.

Specifically, the Court noted that a trial court has the "inherent authority," independent of any rule or statute, to dismiss a case with prejudice in order "to prevent undue delays in the disposition of cases caused by abuse of procedural rules, and also to empower courts to control their dockets." Sander, supra at 65-66. Although the Court had previously expressed this sentiment in Bejda v. SGL Industries, Inc., 82 Ill.2d 322 (1980), the Sander Appellate Court regarded it as mere *dicta* and suggested that a "more clear direction" from the Supreme Court was necessary.

Thus, the Supreme Court provided such direction in Sander, expressly noting that judicial authority to dismiss a case with prejudice is "'the most effective sanction'" against the disregard of court orders. Sander, supra at 67. Importantly, the Court continues to adhere to this perspective. See, VC&M, Ltd. v. Andrews, 2013 IL 114445, ¶26; Santiago v. E.W. Bliss Company, 2012 IL 111792, ¶ 16.

The "inherent authority" principle is particularly significant in the context of case management because it does not limit a court to any rule, statute or articulated list of offenses. Instead, it is regarded as an essential tool that enables courts to reach goals which provide extremely broad bases for exercise of judicial discretion: control of judicial dockets and maintaining the integrity of the court system.

C. Effect of Shimanovsky v. General Motors Corp.

Three years after the *Sander* decision, the Supreme Court furthered extended the reach of Rule 219(c) in *Shimanovsky v. General Motors Corporation, 181 Ill.2d 112 (1998)* when it determined that Rule 219(c) vests trial courts with the authority to impose sanctions even in the absence of *any* court order or violation of a procedural rule. Specifically, the Court determined that destructive testing of an allegedly defective product eight months prior to suit being filed "interfered with" the opposing party's subsequent right to discovery, thereby warranting sanctions. *Id. at 122.*

Although the Supreme Court in *Shimanovsky* concluded that dismissal with prejudice was not the appropriate sanction under the circumstances, it unequivocally rejected the idea that potential litigants do not owe a duty "to preserve the integrity of relevant and material evidence." *Id. at 121-122.* Instead, the Court expressly agreed with prior Appellate decisions[1] which found that a duty regarding preservation of evidence was appropriately imposed because a court's inability to sanction a party for presuit destruction of evidence would enable potential litigants to "circumvent discovery rules or escape liability simply by destroying the proof prior to the filing of a complaint." *Id.* Because the rules make clear that both parties are entitled to full disclosure of any relevant matter, and presuit destruction of evidence interferes with such disclosure, Rule 219(c) sanctions can be imposed for conduct that occurs *before* any court orders are entered.

NOTE: Sanctions are not automatically warranted whenever evidence is destroyed or altered. "Rather, a court must consider the unique factual situation that each case presents and then apply the appropriate criteria to these facts in order to determine what particular sanction, if any, should be imposed." *Shimanovsky, supra at 127.*

CAUTION: The duty to take reasonable measures to preserve relevant evidence so as to avoid Rule 219(c) sanctions should not be confused with the duty to preserve evidence in a spoliation of evidence claim. The Illinois Supreme Court expressly held that the analysis for purposes of establishing a cause of action for spoliation of evidence is entirely different from the *Shiminovsky* analysis applicable to sanctions. *Martin v. Keeley & Sons, Inc., 2012 IL 113270, ¶ 51. ("Shiminovsky was inapposite to the issue of whether a defendant owes a duty to preserve evidence in a spoliation of evidence claim.***The test applied by this court in Shimanovsky is not relevant to spoliation."). See also, Dardeen v. Kuehling, 213 Ill.2d 329 (2004).*

D. What Sanctions Are Included Under Rule 219(c)?

Rule 219(c) expressly states that courts may enter sanction orders that are "just," specifically including the following, non-exhaustive list:

- Stay of proceedings until the offending party complies with the order or rule;

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[1] *See, Graves v. Daley, 172 Ill.App.3d 35 (1988), American Family Insurance Company v. Village Pontiac-GMC, Inc., 223 Ill.App.3d 624 (1992); and Miller v. Gupta, 275 Ill.App.3d 539 (1995).*

- Bar the offending party from filing any other pleading related to any issue related to the discovery refusal or failure;
- Bar the offending party from maintaining any claim, counterclaim, 3rd party complaint or defense related to that issue;
- Bar witnesses from testifying about the issue;
- Default judgment as to claims or defenses in any pleading to which the issue is material OR dismiss the offending party's action with or without prejudice;
- Strike any portion of the offending party's pleadings related to that issue and, if appropriate, enter judgment on that issue;
- If a money judgment is ultimately entered, order the offending party to pay interest at the rate applicable to judgments for any period of pretrial delay attributable to the discovery violations.
- Alternatively, or in addition to the above, the court may order the offending party to pay the other party or parties "reasonable expenses incurred as a result of the misconduct, including a reasonable attorney fee, and when the misconduct is willful, a monetary penalty."
- Institute contempt proceedings.

Ill.Sup.Ct. Rule 219(c)(i)-(vii)(West 2014).

In determining which sanction is "just" under the circumstances, "the trial court must weigh the competing interests of the parties' rights to maintain a lawsuit against the necessity to accomplish the objectives of discovery and promote the unimpeded flow of litigation." Sander, *supra at 68.* Although the ultimate goal is always to achieve a trial on the merits, the Supreme Court has acknowledged that this interest "must bow to the interests of the opposing party" when it becomes apparent that non-compliance will continue. *Id. at 69.*

NOTE: Although subsections (a), (b) & (d) of Rule 219 expressly address noncompliance in the context of written discovery, requests to admit and abuse of discovery procedures, respectively, all of the sanctions listed in subsection (c) also apply to these situations.

CAUTION: Dismissing a case with prejudice as a Rule 219(c) sanction is not interchangeable with dismissal for want of prosecution. Although both types of orders may be warranted when a party fails to follow court orders or rules, they are different in nature and produce distinctly different consequences. Specifically, dismissal with prejudice is an adjudication on the merits and is *res judicata.* By contrast, a DWP is without prejudice and cannot override a litigant's right to refile under section 13-217 of the Code of Civil Procedure. Mayes v. Netco, Inc., *2013 IL App (1st) 130235-U, ¶ 17-18. See also,* Sander v. Dow Chemical Company, *166 Ill.2d 48, 68 (1995).*

E. When Are Rule 219(c) Sanctions Appropriate?

Rule 219(c) sanctions are appropriate whenever a party "unreasonably refuses" to comply with court orders or rules. Shimanovsky, *supra at 120.*

What type of behavior constitutes an "unreasonable" refusal? This determination is "circumstance-specific." *People v. Road America Automotive, Inc., 2014 IL App (1st) 120825-U, ¶ 31.* However, attorneys should understand that courts will consider the nature of the discovery, number of court orders violated, the efforts to comply, whether a pattern of noncompliance or recalcitrance is evident and the offending party's attitude during a sanctions proceeding. *See generally, American Service Insurance v. Miller, 2014 IL App (5th) 130582. (Trial court's comment upon the party's "cavalier attitude" was appropriate.).*

CAUTION: While the imposition of any sanction must be driven by the specific facts of the case, dismissal with prejudice and entry of a default judgment are considered the most "drastic," "lethal" type of sanctions and may only be utilized when the offending party "has shown a deliberate and contumacious disregard for the court's authority." *Sander, supra at 68.* Thus, the record must reveal that the party has "willfully disregarded the authority of the court, and such disregard is likely to continue." *Id. at 69.*

F. To Whom Does Rule 219 Apply?

As is true of Rule 137 sanctions, Rule 219(c) sanctions can be imposed upon parties, their individual attorneys or both. *Ill.Sup.Ct. Rule 219(c)(West 2014).* Further, just as Rule 137 permits the imposition of sanctions for a party's use of false or meritless documents authored or signed by a non-party, Rule 219(c) also imposes responsibility upon the parties and lawyers for the lack of discovery compliance by non-parties.

As a result, a party may suffer sanctions for the lack of compliance by a retained expert witness. *Kubichek v. Traina, 2013 IL App (3d) 110157, ¶ 39. ("The discovery rules impose enforceable obligations upon the parties, including a duty to disclose relevant and discoverable information relating to their controlled expert witnesses. The failure to make such disclosures in a timely and complete fashion justifies sanctions against the parties, even if the failure is the result of actions taken or not taken by the controlled witnesses themselves.").* The rationale for sanctioning a party for the conduct of a controlled expert witness is based on the conclusion that allowing a party to avoid discovery obligations by blaming an expert would "encourage gamesmanship and contravene the spirit of the discovery rules." *Kubichek, supra.*

Importantly, however, Rule 219 also allows a court to sanction a non-party. Specifically, subsection (a) permits the court to sanction a non-party deponent who fails to answer appropriate questions, "without substantial justification," and subsection (c) permits the court to sanction a non-party who unreasonably fails to comply "at the instance of or in collusion with a party." *Ill.Sup.Ct. Rule 219(a) & (c)(West 2014). See also, Dolan v. O'Callaghan, 2012 IL App (1st) 111505.*

G. Must a Party Suffer the Consequences of Attorney Conduct?

Maybe. "Although the fact that the conduct leading to a discovery violation is attributable to the attorney is not a bar to sanctions,...[it] is a factor the court should have

considered." *Ibrahim v. Reproductive Genetic Institute, 2013 IL App (1st) 120113-U, ¶ 74. See also, Stevens v. International Farm Systems, Inc.*, 56 Ill.App.3d 717, 720-721 (1978).

H. Relevant Factors Prior to Imposing Rule 219 Sanctions.

Sanctions under Rule 219(c) must be "just and proportionate to the offense." *South Suburban Industrial, L.L.C. v. Village of Alsip, 2015 IL App (1st) 133328-U, ¶ 26.* What does this mean? It means that sanctions must be designed to coerce compliance, rather than punishing the dilatory party, and insures both discovery and a trial on the merits. *Id.* Obviously, this definition mandates a case-specific approach and requires that the focus be upon "the particular behavior of the offending party...and the effects that behavior had upon the adverse party." *Id. at ¶ 27.*

In making such an assessment, the trial court (and attorneys) must consider the following factors when contemplating the imposition of sanctions under this rule: 1) surprise to the adverse party, 2) the prejudicial effect of the proffered testimony or evidence, 3) the nature of the testimony or evidence, 4) the diligence of the adverse party in seeking discovery, 5) the timeliness of the adverse party's objection to the testimony or evidence, and 6) the good faith of the party offering the testimony or evidence. *Shimanovsky v. General Motors Corporation, 181 Ill.2d 112, 124 (1988).*

Significantly, no single factor is dispositive. *American Service Insurance v. Miller, 2014 IL App (5th) 130582, ¶ 20.*

CAUTION: When determining whether to impose Rule 219(c) sanctions, it is inappropriate to consider prior Rule 137 sanctions that may have been imposed in the same case. *Locasto v. City of Chicago, 2014 IL App (1st) 113576, ¶ 33-34. ("Nothing in either rule or committee comments suggests that sanctions under one rule should be taken into account in determining sanctions under the other rule.").*

I. Progressive Sanctions

Rule 219 includes a non-exhaustive list of possible sanctions, which means that a trial court is not limited to the sanctions expressly listed in the rule. Instead, trial courts have broad discretion to fashion a wide variety of responses in an effort to correct offending conduct and compel compliance. Nevertheless, reviewing courts are clear that dismissal and default judgment should be reserved "for the most recalcitrant and unyielding parties" (*Locasto, supra at ¶ 35)* because these are drastic sanctions which preclude a trial on the merits. As a result, they are only appropriate as a last resort when "all other enforcement efforts...have failed to advance the litigation." *Sander, supra at 67-68.*

Importantly, even if ultimately warranted, several Appellate decisions suggest that a progressive approach to sanctions must be employed. Thus, lesser sanctions and warnings about what will occur if non-compliance continues should be utilized before dismissal or default judgment. In fact, the First District stated that trial courts should

consider the following additional factors before resorting to dismissal or default judgment:

- The degree of the party's personal responsibility for the noncompliance,
- The level of cooperation and compliance with previous discovery and sanction orders,
- Whether less coercive measures remain available or, based on the record, would be futile; and
- Whether the recalcitrant party had been warned, orally or in writing, about the possibility of entry of an order of default or dismissal.

Locasto, supra at ¶ 35.[2] If the record fails to demonstrate that lesser sanctions were ineffective, that dismissal or default were entered only as a last resort and that a trial on the merits was no longer possible, the Appellate Court is more likely to conclude that the sanction was overly harsh and an abuse of discretion. *Ibrahim v. Reproductive Genetic Institute, 2013 IL App (1st) 120113-U, ¶ 74-75.*

J. Standard of Review.

The decision to impose sanctions under Rule 219(c) is a discretionary matter that is subject to an abuse of discretion standard on appeal. *Shimanovsky, supra at 120.* Given the important goals served by Rule 219(c), the Supreme Court has held that "only a clear abuse of discretion justifies reversal." *Id.*

[2] *Contrary to Locasto, supra, the Illinois Supreme Court held that only the following two additional factors need be considered when determining whether to dismiss or enter a default judgment: "1) there is a clear record of willful conduct showing deliberate and continuing disregard for the court's authority; and 2) a finding that lesser sanctions are inadequate to remedy both the harm to the judiciary and the prejudice to the opposing party." Santiago v. E.W. Bliss Company, 2012 IL 111792, ¶ 20.*

SANCTIONS:
SUPREME COURT RULES
137 & 219(c)

Judge Lynn M. Egan

Judge Moshe Jacobius

June 11, 2015

POLICY OBJECTIVES

- Deter abuse of the litigation process
- Punish wrongdoers
- Compel discovery
- Encourage trial on the merits
- Assist Courts in enforcing procedural rules
- Facilitate case management
- Preserve the integrity of the court system

KEY DIFFERENCES

RULE 137

- Penal in nature.
- Purpose is to prevent false or frivolous pleadings or claims interposed for improper purposes.
- Only applies to documents utilized after suit filed.

RULE 219(c)

- Compulsory in nature.
- Purpose is to compel discovery & encourage trial on the merits.
- May apply to conduct that occurs BEFORE suit filed.

RULE 137

SIGNATURE REQUIREMENT

Subsection (a):

"Every pleading, motion *and other document* of a party represented by an attorney shall be signed by at least one attorney of record in his individual name."

- Constitutes a certification by the attorney or party that he has read the document & believes it is well grounded in fact & supported by existing case law or a good-faith argument for extension, modification, or reversal of existing law.

ETHICS NOTE

- Under Ill.R.Prof'l Conduct 1.2(c), attorneys can limit the scope of representation -- if reasonable under the circumstances & client gives informed consent.
- Includes providing advice about documents that are subject to Rule 137.
- **Rule 137(e)** allows attorneys to assist self-represented parties with pleadings, motions or other documents without filing an appearance or signing the document. Instead, party must sign.
- Attorney is NOT required to undertake investigation of the facts or representations made by the party – UNLESS attorney knows the representations to be false.

RULE 137: WHAT'S COVERED?

- **EVERY** pleading, motion and other document.
- Includes filed and unfiled documents.
- Includes all "papers," not just pleadings.

EXAMPLES:

- Appearances/jury demands
- Complaints & counterclaims
- Section 2-622 reports of consulting expert
- Answers to interrogatories & requests to admit
- Non-party, witness statement/affidavits

RULE 137: WHO'S COVERED?

- The individual attorney who signed the document.
- The party.
- Both the attorney & the party.

NOTE: A law firm cannot be sanctioned under Rule 137. *Brubakken v. Morrison, 240 Ill.App.3d 680 (1st Dist., 1992)* is unpersuasive on this principle.

An attorney's "personal responsibility is nondelegable & not subject to principles of agency or joint & several liability." *Levin v. Seigel & Capital, Ltd., 314 Ill.App.3d 1050 (3d Dist., 2000).*

RULE 137: HOW LONG?

FOR THE ENTIRE DURATION OF LITIGATION

- Attorneys have an ongoing obligation to dismiss suits, withdraw pleadings/documents or otherwise correct the record as soon as it becomes apparent that they lack merit.
- This duty overrides Ill.R.Prof'l Conduct 1.2(a) – must dismiss/correct the record even over the client's objection.

Despite a fiduciary obligation to client, "an attorney's first duty is to the administration of justice." *Walsh v. Capital Engineering & Manufacturing Company, 312 Ill.App.3d 910 (1st Dist., 2000).*

RULE 137: SCENARIO #1

Attorney Bob filed a medical malpractice action on behalf of his client, which included his section 2-622 affidavit attesting to his consultation with Dr. Schmidt, who attested to the meritorious basis for filing the suit. An unsigned statement, attributed to Dr. Schmidt, was attached to the complaint. Defendant answered the complaint without challenging the unsigned report.

Attorney Bob later withdrew and a new lawyer, Steve, contacted Dr. Schmidt 2 yrs. later, asking him to review M.D. reports/depositions. After review, Dr. Schmidt replied by stating, "I cannot find a basis for declaring that defendant did or failed to do anything negligent." He also contacted defense counsel & told him that he had previously told the same thing to attorney Bob & that "if Bob has listed me as his expert, he is mistaken."

Defense counsel immediately moves to withdraw his answer to the complaint & to dismiss. Attorney Steve resists the motion by insisting that Dr. Schmidt was previously critical of defendant, forcing defendant to incur the cost of Dr. Schmidt's deposition.

WHAT IS A REASONABLE INQUIRY?

- What was **OBJECTIVELY** reasonable under the circumstances that existed at the time the document was signed or filed.
- Attorney's good faith or honest belief is irrelevant & insufficient to shield from sanctions.
- Not always reasonable to rely solely on representations of client. Attorneys must be "diligent in verifying the truth of the facts" supplied by clients. *In re Estate of Stean, 2012 IL App (1st) 121891-U, ¶ 26.*

RULE 137 – SCENARIO #2

In an explosive family trust case, defendants agreed to allow plaintiff's attorneys & their accountants access to certain financial records. After review, plaintiffs filed a 4th Amended Complaint & disclosed a forensic CPA as a trial witness to support the allegations of the complaint.

However, during the expert's deposition, he testified that several of the complaint allegations were no longer at issue as his review of documents had "cleared up" his concerns. Defendants then moved for SJ as to those specific allegations. Plaintiffs resisted the motion, arguing that other witnesses & evidence would substantiate the allegations at trial.

The court took the motion under advisement & the matter proceeded to trial on all 25 issues raised in the 4th Amended Complaint. After 11 days of trial, evidence supporting only 6 of the 25 allegations was presented & the parties settled. Defendants then filed a Rule 137 motion for sanctions.

RULE 137 – SCENARIO #2

Questions:

- Was the inquiry made by plaintiffs' attorney reasonable prior to filing the 4th Amended Complaint?
- Was the attorney subject to Rule 137 sanctions for not withdrawing the allegations after CPA expert was deposed? Is it a defense that the clients did not authorize withdrawal?

Answers:

- Yes. Under the circumstances, attorney was entitled to rely on initial report of CPA.
- Yes. Attorney "is obligated to dismiss a claim which is ultimately revealed to be unfounded***[and] may not shield a breach of his Rule 137 obligations [by] the simplistic plea that he was merely following his client's directions. Additionally, a litigant cannot avoid sanctions merely because the pleading was only partially frivolous.

Walsh v. Capital Engineering, 312 Ill.App.3d 910 (1st Dist., 2000)

RULE 137: TYPES OF SANCTIONS

- Courts may impose an "**appropriate sanction**," which can include litigation fees/expenses and attorney fees.
- Any fees/expenses must be reasonable & incurred as a result of the offending document.
- Reasonableness is determined by looking at the following factors: skill & standing of attorney seeking fees, nature of the case, novelty/difficulty of issues, degree of responsibility required, usual & customary charge for similar services in community.

CAN THE VIOLATION BE PURGED?

NO!

"A litigant who violates the rule should be held to account for the damage done by that violation even if the litigant later withdraws the offending pleading."

Yavitz Eye Center, Ltd. v. Allen, 241 Ill.App.3d 562 (2d Dist., 1993).

RULE 137 – SCENARIO #3

A doctor sued a medical practice to recover money allegedly due pursuant to a loan. Plaintiff's original complaint alleged a written "Physician Services Agreement" as the basis for the loan.

Defendant filed a section 2-619 motion to dismiss the complaint based on the fact that the written Agreement contained an arbitration provision. Plaintiff responded by filing an amended complaint that alleged an oral agreement.

Defendant sought Rule 137 sanctions because the factual basis of the amended complaint contradicted allegations in the original complaint.

RULE 137 – SCENARIO #3

Questions:

- Did plaintiff violate Rule 137? If so, when? Original complaint or amended complaint?
- If original complaint was sanctionable, did amended complaint remedy the problem?

ANSWERS:

- Yes, plaintiff violated Rule 137 by filing the original complaint because he was on notice that the written agreement contained an arbitration provision, which "obviously preempted" the cause of action.
- No. Must make "prefiling inquiries that are reasonable under the circumstances existing at the time the pleading is signed.***Even a cursory examination of the agreement itself would have revealed that the unambiguous language of the arbitration clause barred a suit based on the agreement itself."
- A valid amended complaint does not insulate a plaintiff from sanctions for an original frivolous filing.

Yavitz Eye Center, Ltd. v. Allen, 241 Ill.App.3d 562 (2d Dist., 1993)

RULE 137: WRITTEN EXPLANATION

- When a sanction is imposed for a Rule 137 violation, subsection (d) requires the Court to provide a written explanation.
- The written explanation can be included in the judgment order or a separate order.
- Attorneys should insist upon this!

RULE 137 – SCENARIO #4

Plaintiff filed a Rule 137 motion for sanctions following dismissal of an unfounded complaint. In denying the motion, the trial court merely stated, "Rule 137, that's within the discretion of the trial court. I'm exercising that discretion & will not award sanctions."

Question:

- Because Rule 137 states that a judge shall set forth its reasons & bases "where a sanction is imposed," does the judge need to provide an explanation when sanctions are NOT imposed?

ANSWER:

- To be determined. Conflict of authority among Appellate Districts & Supreme Court just accepted PLA in *Lake Environmental, Inc. v. Arnold, 2014 IL App (5th) 130109.*

STANDARD OF REVIEW

Abuse of discretion. Reviewing courts look at these factors:

1) Whether decision was "informed"
2) Whether decision was based on valid reasoning
3) Whether decision follows logically from the facts.

NOTE: Sanctions will only be affirmed "on the grounds specified by the court." *State Farm Mutual Insurance Co. v. Ocampo, 2014 IL App (1st) 133925-U, ¶ 15.*

SANDER -- EXAMPLES

Rule 219(c) sanctions can now be imposed for the following conduct:

- Failure to comply with local court rules, i.e., e-filing;
- Filing suit under fictitious name without leave of court;
- Failure to strike/amend pleadings consistent with court ruling;
- Failure to respond to motion for protective order.

SANDER – EXAMPLES

Sanctions can also be imposed for:

- An attorney's repeated failure to attend case management conferences/status hearings;
- Failure to appear on day of trial;
- "Misconduct during proceedings," i.e., failing to answer questions per Court direction during trial or deposition.

SANDER – THERE'S MORE!

- In addition to broadening the definition of what constitutes a "discovery" order, the Supreme Court also held that a trial court has "**inherent authority**" that is expansive.

- This inherent authority permits a trial court to dismiss a case with prejudice in order "to prevent undue delays in the disposition of cases caused by abuse of procedural rules, & to empower courts to control their dockets." *Sander v. Dow Chemical, 166 Ill.2d 48, 65-66.*

- Thus, courts are not limited to a rule, statute or particular list of offenses!!

SHIMANOVSKY V. GMC

Supreme Court held that Rule 219(c) allows trial courts to impose sanctions **even in the absence of any court order or violation of a procedural rule**.

- Basis: Potential litigants have a duty not to interfere with an opposing party's right to full discovery & pre-suit destructive testing may cause such interference.
- Rationale: Precluding a court from sanctioning a party for pre-suit conduct would allow litigants to "circumvent discovery rules or escape liability simply by destroying the proof prior to the filing of a complaint."

WARNING: Do not confuse with spoliation claim. Completely different analysis.

RULE 219(c) SANCTIONS

All sanctions under this Rule must be "just," which can include:

- Stay of proceedings until compliance
- Bar other pleadings related to noncompliance
- Bar witness testimony related to issue
- Default judgment as to claims/defenses related to issue
- Strike or dismiss pleadings related to issue
- Interest if money judgment ultimately entered
- Reasonable expenses/attorney fees incurred as a result
- Monetary penalty
- Contempt

WHAT IS A "JUST" SANCTION?

- This is a case specific determination – so remain mindful of the record you create!!
- Court must weigh competing interests of a party's right to maintain a lawsuit against the goal of accomplishing discovery objectives & promoting the unimpeded flow of litigation.

TIP: If you seek dismissal, do not request DWP as a sanction. It is not an adjudication on the merits, does not have *res judicata* effect & cannot override right to refile under section 13-217 of the Code.

WHEN ARE SANCTIONS APPROPRIATE?

Rule 219(c) sanctions are appropriate whenever a party "**unreasonably refuses**" to comply with court orders or rules. Things that will be considered include:

- Nature of the discovery
- Number of court orders violated
- Efforts to comply
- Existence of pattern of noncompliance or recalcitrance
- Attitude of offending party

WHO CAN BE SANCTIONED?

Party, lawyer or both. Maybe even a nonparty.

- Rule 219(c) imposes responsibility upon parties & lawyers for their own conduct, as well as certain non-parties, such as retained experts. *Kubichek v. Traina, 2013 IL App (3d) 110157.* It also permits a court to directly sanction a non-party who unreasonably fails to comply "at the instance of or in collusion with a party." *See, Dolan v. O'Callaghan, 2012 IL App (1st) 111505.*

- Rule 219(a) also permits sanctions against non-party deponent who fails to answer appropriate questions.

RULE 219(c) – SCENARIO #1

Plaintiff sued doctor for medical malpractice. Doctor disclosed a well-known expert witness, who had prior experience testifying as a retained expert.

Plaintiff propounded a production request seeking records from defendant about the frequency with which defendant's expert acted as an expert. Defendant responded by stating no such records existed, but promising to seasonably supplement. Trial court twice ordered defendant to supplement the answer, but defendant failed to do so.

Plaintiff's deposition notice for the expert requested a list of all cases in which the witness had testified & the names of lawyers/law firms that had retained him as an expert or consultant during the prior 5 years. Defendant responded by stating there were no such records.

At deposition, the expert admitted a list existed, but insisted on producing the list rather than answer questions on the subject. Plaintiff sent 2 follow-up letters seeking the list, but never received it prior to trial. A motion to bar filed 1 week prior to trial generated a list of 18 cases.

RULE 219(c) – SCENARIO #1

QUESTIONS:

- Plaintiff's Rule 219(c) motion for a new trial argued that defendant's incomplete & tardy compliance precluded adequate cross-examination. Can the trial judge sanction defendant because the expert did not produce the requested information?
- Can a new trial be granted without a definitive showing of how plaintiff was prejudiced?

ANSWERS:

- Yes. Parties cannot evade discovery obligations by blaming a controlled expert.
- Yes. Unfair to require plaintiff to identify what was important or prejudicial in documents that were never produced.

Kubicheck v. Traina, 2013 IL App (1st) 110157

RELEVANT FACTORS

Sanctions under Rule 219(c) must be "**just & proportionate to the offense**." Factors relevant to this determination include the following:

- Surprise to the adverse party
- Prejudicial effect of the proffered evidence
- Nature of the evidence
- Diligence of the adverse party in seeking discovery
- Timeliness of objection by adverse party
- Good faith of party offering the evidence.

PROGRESSIVE SANCTIONS

- While the determination about what is a "just" sanction will always require a case-specific analysis, attorneys/courts should utilize a progressive approach that begins with lesser sanctions and reserves drastic measures such as dismissal or default for "the most recalcitrant & unyielding parties" & only after all other enforcement efforts have failed to compel compliance. *Locasto v. City of Chicago, 2014 IL App (1st) 113576.*

- Additionally, best practice suggests that lesser sanctions should be coupled with warnings about what will occur if non-compliance continues. *Id.*

RULE 219(c) – SCENARIO #2

A couple residing in Saudi Arabia filed suit in Cook County following a botched in vitro fertilization procedure. The trial court ordered the wife's deposition on 3 occasions, but her attorney insisted the deposition be deferred until after mediation, arguing the wife did not have any specialized knowledge about the case.

Over a 14 month period of time, the Court continued to state the need for the wife's deposition. After the Court entered an order specifying a date certain for the deposition, plaintiffs' attorney stated for the first time that the couple were divorcing & that Saudi law precluded the wife from traveling without the husband's permission.

Defendants filed a Rule 219(c) motion to dismiss, which was granted with prejudice.

RULE 219(c) – SCENARIO #2

QUESTIONS:

- Was plaintiffs' assertion of Saudi law properly disregarded by the trial court as untimely?
- Did the trial court properly dismiss with prejudice given the fact that plaintiff never agreed to appear for deposition & nothing in the record suggested this would ever change?

ANSWERS:

- No. Although not raised until the final day for compliance, defendants were not surprised or prejudiced by it.
- No. Plaintiff was unable to comply, not unwilling, due to circumstances beyond her control. As a result, trial court should have tried other enforcement tools more proportionate to the gravity of the violation.

Ibrahim v. Reproductive Genetic Institute, 2013 IL App (1st) 120113-U.

THE "ULTIMATE" SANCTION

When dismissal with prejudice is requested or considered, the Supreme Court suggested that 2 additional elements should be considered & demonstrated by the record:

1. A clear record of willful conduct showing deliberate & continuing disregard for the court's authority; and
2. A finding that lesser sanctions are inadequate to remedy both the harm to the judiciary & the prejudice to the aggrieved party.

Santiago v. E.W. Bliss Company, 2012 IL 111792, ¶ 20.