

Opposing Counsel Keep Stalling – What Can I Do?

The Attorney Professionalism Committee invites our readers to send in comments or alternate views to the responses printed below, as well as additional hypothetical fact patterns or scenarios to be considered for future columns. **Send your comments or questions to: NYSBA, One Elk Street, Albany, NY 12207, Attn: Attorney Professionalism Forum, or by email to journal@nysba.org.**

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To the Forum:

I am the defendant's counsel in a federal lawsuit against a New York State trooper being sued for malicious prosecution. This case has been very slow-moving, as plaintiff's attorneys consistently miss deadlines such as serving the summons and complaint, expert witness disclosure and responding to discovery demands. They also failed to appear for several court conferences, at which I have mentioned to the court counsel's frequent missed deadlines. It is beginning to feel like a waste of time and my clients' money to continue defending them in a case the plaintiff has paid no mind to.

Most of the time, plaintiff's counsel has brazenly missed these deadlines without so much as an email, but on several occasions, they requested same-day extensions of deadlines to try to reach settlement. While each of these extensions was granted by the court, counsel never reached out to me with any sort of settlement demand. I have tried to contact their office multiple times, to be told that they are unavailable or receive no response at all.

Several days after missing the final pretrial conference, counsel filed an apologetic letter requesting an adjournment and that no blame be placed on the plaintiff. The letter cited numerous excuses for the missed deadlines and appearances, such as this being the handling associate's first federal case, the supervising partners being busy with other cases and a sudden resignation of several sup-

port staff. The court has yet to take any action against plaintiff's counsel beyond entering an order establishing discovery deadlines (which, predictably, counsel has missed).

I am contemplating filing a motion to dismiss the case and call for sanctions on the grounds that the defendant is now prejudiced by the plaintiff's lack of attention to the case. Would filing a motion to dismiss be ethical and proper in this instance, as it might harm the plaintiff? What kind of sanctions might the plaintiff's attorneys face?

*Sincerely,
Patience Isabel Waning*

Dear Ms. Waning:

The frustrating situations that you describe certainly make it difficult to adequately represent your client. All litigators can appreciate that a caseload and to-do list is in constant flux, as are partners' and clients' priorities.

But lawyers have a higher duty of professional responsibility to give our clients and their legal matters our utmost attention, not opposing counsel. The potentially severe consequences and prejudicial effects for repeatedly and inexcusably missing deadlines are designed (in part) to discourage egregious and recurring behavior like the plaintiff's counsel's and to prevent wasting of judicial resources.

New York Rules of Professional Conduct

The New York Rules of Professional Conduct (RPC) Rule 1.3 states that lawyers must act with “reasonable diligence and promptness in representing a client.” In the words of Rule 1.3(b), “a lawyer shall not neglect a legal matter entrusted to the lawyer.” Comment [1] to Rule 1.3 states that “a lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer.” If the lawyers are unable to carry out their obligations to the client, there are protocols for withdrawal from representation.

Your opposing counsel does not seem to be representing clients with the diligence required by the RPC. The Rule and its comments specifically guide lawyers concerning their workload, advising them to control the amount of work they take on “so that each matter can be handled diligently and promptly.” Further, lawyers “are encouraged to adopt and follow effective office procedures and systems,” and the rule warns that “neglect may occur when such arrangements are not in place or are ineffective.” The situation you describe suggests that opposing counsel does not have effective office procedures and systems, which have led to the failure to handle the case diligently and promptly.

The American Bar Association's Model Rules of Professional Conduct

The American Bar Association’s Model Rules of Professional Conduct¹ aligns with New York’s by requiring effective case load management to avoid neglect. Though slightly less detailed than New York’s version, the ABA rule mandates that “a lawyer shall act with reasonable diligence and promptness in representing a client . . . despite opposition, obstruction or personal inconvenience to the lawyer.” Comment [3] details the importance of promptness throughout representation beyond ensuring that a case is filed within the statute of limitations, stating that “even when the client’s interests are not affected in substance . . . unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer’s trustworthiness.”

These rules suggest that opposing counsel is neglecting the case and that many of the reasons offered by opposing counsel for missing deadlines are meritless excuses. The supervising partners are supposed to bolster opposing counsel’s lack of experience and run interference for the sudden departure of support staff. These are not problems the client, the court or your client should be forced to shoulder. Lawyers must still uphold their responsibility to their clients to tend to the legal matters to which they were assigned. A lawyer’s job should be to ease the anxieties of their clients rather than add to them.

To File or Not To File a Motion To Dismiss

Moving to dismiss may be the best way to protect your client’s rights. Undoubtedly, opposing counsel’s lack of attention to the matter has wasted your client’s time and the court’s resources. It does seem unjust for your client to have to spend the money defending themselves against someone who doesn’t seem to care about the fight he or she started. (If nothing else, you should move to recover attorney’s fees and costs expended to attend those missed hearings.) While plaintiff might be harmed by their case being dismissed, your duty is to protect your clients’ interests, and it is plaintiff’s counsel’s duty to protect their client’s. A violation of rules of professional conduct is only one part of the equation.

Such a motion to dismiss falls under New York Civil Practice Law and Rules Section 3216, which states that “where a party unreasonably neglects to proceed generally in an action or otherwise delays in the prosecution thereof against any party who may be liable to a separate judgment, or unreasonably fails to serve and file a note of issue, the court, on its own initiative or upon motion, with notice to the parties, may dismiss the party’s pleading on terms.”² These motions may be granted unless the party failing to prosecute “shows justifiable excuse for the delay and a good and meritorious cause of action.”³

Sanctions Lawyers May Face for Neglectful Representation

Courts have handled sanctioning attorneys in these contexts in different ways. Generally, New York courts have the discretion to “award any party or attorney in any civil action or proceeding before the court . . . costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney’s fees, resulting from frivolous conduct as defined in this Part.” This frivolous conduct includes that which is “undertaken primarily to delay or prolong the resolution of the litigation.”⁴ However, in order for a court to issue sanctions for frivolous conduct, there must have been a “pattern of frivolous behavior.”⁵

In *In re Kraft*,⁶ the court sanctioned a supervising attorney’s neglect in managing a high-volume divorce practice because he failed to adequately supervise his subordinates in their handling of cases. This neglect was found to be a professional responsibility violation even though the court also found that the attorney was “well motivated, never intended to wrong his clients and was himself, to some extent, victimized by the unauthorized actions of one of his employees.”⁷ This lawyer was issued a sanction of public censure by the court.

U.S. District Judge Lewis Liman dismissed a lawsuit earlier this year in the Southern District where the

plaintiff's counsel consistently failed to meet deadlines, appear for court conferences and respond to defendants' counsel, just as your opposing counsel has been doing.⁸ Defense counsel filed a motion to dismiss for failure to prosecute two weeks before the scheduled trial, noting that plaintiff's counsel repeatedly asked for extensions of deadlines to hopefully reach a settlement before trial but never communicated a settlement demand. Defense counsel also filed a motion for sanctions calling for the following relief: "(1) reasonable attorneys' fees for time prepping for trial this month; (2) reasonable attorneys' fees for today's conference and (3) all out-of-pocket expenses incurred by Defendant Wyrick, who is retired from the NYPD and drove back from the West Coast last weekend because this trial was scheduled to begin this coming Monday."

The judge ultimately granted this motion, citing a "a lack of interest in the case's prosecution" on the part of the plaintiff's counsel and as a result of their "consistently flouting deadlines imposed by courts in this district," and ordered that the plaintiff's attorneys each complete four CLE credit hours regarding federal practice and procedures. These CLE credits would not be counted toward the lawyers' standard CLE requirements to maintain their license with the New York bar. In addition, the court awarded attorney's fees and costs borne by the defendants in answering to plaintiff's claims. This ruling came in response to a motion to dismiss filed by the defendant's counsel.

Conclusion

Based on opposing counsel's conduct and the amount of time by which they have delayed litigation, you certainly seem to have a basis to dismiss the action and to request sanctions and reasonable attorney's fees. Though the last thing anyone wants to do is move for sanctions against fellow attorneys when we can all understand the feeling of being overwhelmed by our workload, opposing counsel should have at least tried to provide notice to you that a deadline would be missed and respond to your attempts to contact them.

Sincerely,
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QUESTION FOR THE NEXT FORUM

To the Forum:

Our firm was recently retained to handle a highly complex commercial action. The client is extremely cost-sensitive and asked that we do our best to keep costs lean wherever possible. We have been working on this case for several months, and the client has already asked for several discounts on the bill. I am concerned that we just received our client's document production consisting of over 100,000 documents for review. As cost is a concern for the client, I was discussing the strategy on how to approach the review with my associate, and she suggested we use an AI review tool such as DIALOG DTE to review the documents using an algorithm to pull only highly relevant documents and save time and money. Call me old school, but I have significant concerns about running 100,000 highly sensitive business documents through an unsecure computer program. Further, I am not familiar with DIALOG DTE's intricacies and other issues that may evolve in using this new AI tool as a discovery assistant. How do I know it is accurately pulling relevant documents? Are documents uploaded to DIALOG DTE protected and confidential?

My associate also told me it could even write briefs and create outlines of arguments for our firm. For obvious reasons, this program is extremely appealing to me as it could substantially increase the efficiency of my practice while keeping costs down for the clients.

I asked DIALOG DTE its thoughts and it recommended its use. However, I am interested to hear your thoughts. Is the use of this program permitted under the Rules of Professional Responsibility? What are the applicable rules of the road?

Sincerely,
Ould Skewl

Endnotes

1. https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_3_diligence/comment_on_rule_1_3/.
2. CPLR 3216(a).
3. CPLR 3216(e); *Builtland Partners v. Coordinated Metals, Inc.*, 166 A.D.2d 276 (1st Dep't 1990).
4. <https://www.law.cornell.edu/regulations/new-york/22-NYCRR-130-1.1>.
5. *Sarkar v. Pathak*, 67 A.D.3d 606 (1st Dep't 2009).
6. 148 A.D.2d 149 (1st Dep't 1989).
7. *In re Kraft*, 148 A.D.2d 149 (1st Dep't 1989).
8. *Federal Judge Orders CLE Classes for Lawyers After 'Persistent Failures' to Meet Deadlines*, N.Y.L.J., March 1, 2023, <https://www.law.com/newyorklawjournal/2023/03/01/federal-judge-orders-cle-classes-for-lawyers-after-persistent-failures-to-meet-deadlines>.

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