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Cover Page Footnote
Chief Judge, Souther District of New York

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SYMPOSIUM
QUALITY ADVOCACY AND THE *CODE OF PROFESSIONAL RESPONSIBILITY*

THE ETHICS OF DILATORY MOTION PRACTICE: TIME FOR CHANGE

*THE HONORABLE DAVID N. EDELSTEIN**

One of the goals of the adversary system is to "secure the just, speedy, and inexpensive determination of every action." Chief Judge Edelstein maintains that a restriction on dilatory motion practice is needed to secure this goal. To that end he proposes an amendment to the Code of Professional Responsibility, the United States Judicial Code, and the Federal Rules of Civil Procedure.

I. INTRODUCTION

THE merits of the adversary system have not lost their freshness for debate and continue to be the subject of much spirited discussion. For example, the competence of advocates has been appraised by members of the bench, and recommendations for improving the quality of advocacy have been presented.[1] Additionally, whether the adversary system places too much emphasis on gamesmanship and too little stress on the ascertainment of truth has been debated at length.[2] This Article does not seek to continue either of these important dialogues. Rather, it is the intention of the author to provoke consideration of a different aspect of our litigation process: the problem of delay resulting from motion practice.

That motions can cause delay and can be employed for the purpose of causing delay is no secret to the legal community. Yet despite this

* Chief Judge, Southern District of New York.

1. E.g., Burger, The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?, 42 Fordham L. Rev. 227 (1973); Kaufman, Does the Judge Have a Right to Qualified Counsel?, 61 A.B.A.J. 569 (1975); Kaufman, The Court Needs a Friend in Court, 60 A.B.A.J. 175 (1974). See also Sheran & Harmon, Minnesota Plan: Mandatory Continuing Legal Education for Lawyers and Judges as a Condition for the Maintaining of Professional Licensing, 44 Fordham L. Rev. 1081 (1976); Widgery, The Compleat Advocate, 43 Fordham L. Rev. 909 (1975); Wolkin, A Better Way to Keep Lawyers Competent, 61 A.B.A.J. 574 (1975).

2. E.g., Damaska, Presentation of Evidence and Factfinding Precision, 123 U. Pa. L. Rev. 1083 (1975); Frankel, The Search for Truth: An Umpireal View, id. at 1031; Freedman, Judge Frankel's Search for Truth, id. at 1060; Uviller, The Advocate, The Truth, and Judicial Hackles: A Reaction to Judge Frankel's Idea, id. at 1067.

problem's substantial notoriety, it has received surprisingly little treatment in legal journals or case law. It is in the belief that the problem of delay should receive further consideration from the legal community that this Article is written.

The advocate has at his disposal a broad spectrum of motions which may be employed for a "myriad of uses"[3] during the course of litigation. Motion practice is available as a means of obtaining relief from the court before, during, and after trial. For the advocate practicing in the federal courts, the *Federal Rules of Civil Procedure*[4] specify a great number of distinct motions. Additionally, there are established and recognized motions which are frequently made even though not explicitly authorized by the *Federal Rules*. The motion for reargument is one such motion.[5]

Assuredly, motion practice is vital to our adversary system. It is a mechanism for bringing requests of counsel to the attention of the court, and it facilitates the disposition of meritless cases[6] and cases in which there are no factual disputes.[7] However, motion practice can produce the negative effect of retarding the judicial process. Every motion requires the attention of the court, and if the number of hours required to dispose of the motion exceeds the time available for its consideration the court must postpone disposition of the motion. When the litigation cannot proceed until the motion is resolved, the inevitable result is that the final resolution of the dispute is delayed.[8]

Delay of disposition is detrimental to the adversary system. In criminal litigation, the Constitution demands speedy determinations of guilt or innocence.[9] In civil litigation, there is no constitutional requirement of promptness; however, victimized plaintiffs and innocent defendants frequently have a strong interest in prompt relief or vindication.[10] Moreover, it is in the public interest to expedite litigations of general concern and to maintain a system which stands ready and able to "secure the just, *speedy*, and inexpensive determination of every action."[11]

3. 5 C. Wright & A. Miller, Federal Practice and Procedure § 1190, at 29 (1969).

4. 28 U.S.C. app., at 7729 (1970).

5. Fed. R. Civ. P. 83 authorizes the establishment of local court rules, which may authorize additional motions. The motion for reargument, for example, is impliedly authorized by a local rule of the Southern and Eastern Districts. S.D.N.Y. & E.D.N.Y. Gen. R. 9(m).

6. Fed. R. Civ. P. 12(b)(6), (c).

7. Fed. R. Civ. P. 56.

8. Steckler, Motions Prior to Trial, in Proceedings of the Seminar on Procedures for Effective Judicial Administration, 29 F.R.D. 191, 299 (1961).

9. U.S. Const. amend. VI.

10. But see text accompanying notes 34-35 infra.

11. Fed. R. Civ. P. 1 (emphasis added); see 5 C. Wright & A. Miller, supra note 3, § 1182, at 11.

Given that delay is undesirable within the framework of the adversary system, this Article will address two areas of concern regarding the problem of delay, and then propose some methods of mitigating that problem. The two areas are (1) the extent to which the adversary system does limit motion-caused delay and (2) whether the adversary system should further limit motion-caused delay.

II. The Extent To Which The Adversary System Does Limit Motion-Caused Delay

Before making any particular motion counsel typically might consider various strategic factors: Is this particular motion the best means of persuading the court to grant the desired relief? Should the motion be made at this particular time? Is the benefit to the client worth the time and expense involved in the motion? Will this motion, even if granted by the court, have a negative impact on the litigation as a whole, for example, by disclosing too much to opposing counsel?

In addition to weighing the above factors which relate directly to the impact of the motion upon the client's interests, counsel must comply with a variety of provisions which regulate the submission of dilatory motions: the *Judicial Code's* provision allowing the taxation of excessive costs upon counsel;[12] the *ABA Code of Professional Responsibility's* sections relating to vexatious delay and prejudice to the administration of justice;[13] and the *Federal Rules of Civil Procedure's* provisions relating to motions interposed for delay.[14]

The *Judicial Code* supplies a deterrent to motion practice which produces delay. Section 1927 of title 28 of the *United States Code* provides that:

> Any attorney or other person . . . who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs.

According to the language of section 1927, the court can tax costs only upon an attorney whose motion practice increases costs unreasonably and vexatiously; delay or intent to cause delay is not necessarily sufficient. Because of the narrowness of the section and the problems of proving vexatiousness, there have been no cases, to the author's knowledge, where this statute has been used to tax costs against an attorney solely for submitting dilatory motions.[15]

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12. 28 U.S.C. § 1927 (1970).

13. ABA Code of Professional Responsibility DR 1-102(A)(5), 7-102(A)(1) (1975).

14. Fed. R. Civ. P. 7(b)(2), 11.

15. But cf. Gullo v. Hirst, 332 F.2d 178, 179 (4th Cir. 1964) (per curiam) (Where there were "serious questions of abuse of process," the court remanded with instructions "to tax the plaintiff with reasonable counsel fees for the defendants' attorneys" and to "visit a proper sanction upon the plaintiff's counsel.").

The *ABA Code of Professional Responsibility* contains provisions which address dilatory motion practice.[16] DR 1-102, entitled "Misconduct," provides that "[a] lawyer shall not . . . [e]ngage in conduct that is prejudicial to the administration of justice."[17] This provision certainly is applicable to *any* conduct prejudicial to the administration of justice. In fact, it is the breadth of the rule's prohibition which appears to limit the provision's utility. It contains no standard for the determination of "prejudicial" conduct and hence is dependent upon other ethical sources or upon ad hoc judicial determinations to supply a standard.

Costs are taxed against an attorney only in extreme cases. Miles v. Dickson, 387 F.2d 716, 717 (5th Cir. 1967) (per curiam); see Weiss v. United States, 227 F.2d 72, 73 (2d Cir. 1955), cert. denied, 350 U.S. 936 (1956). Such action requires a finding by the court that the attorney has acted in bad faith. West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079, 1092 (2d Cir.), cert. denied, 404 U.S. 871 (1971); Coyne & Delany Co. v. G.W. Onthank Co., 10 F.R.D. 435, 436 (S.D. Iowa 1950); see Miles v. Dickson, supra, at 717. It is presumed that the attorney has acted in good faith. Coyne & Delany Co. v. G.W. Onthank Co., supra, at 436. The imposition of costs is within the trial judge's discretion, Brislin v. Killanna Holding Corp., 85 F.2d 667, 671 (2d Cir. 1936), and judges may be reluctant to find that members of the bar have acted in bad faith. Perhaps another reason for judicial reluctance to assess these costs is that the assessment might require notice and a separate hearing resulting in more wasted time and money. See Hanley v. Condrey, 467 F.2d 697, 700 (2d Cir. 1972) (per curiam).

In two cases in which costs were taxed against an attorney, the assessment was not based upon the attorney's dilatory tactics. In one case, repeated serious breaches of the Canons of Ethics by an attorney with a long history of such conduct led the court to assess costs against the attorney. Kiefel v. Las Vegas Hacienda, Inc., 404 F.2d 1163, 1165-71 (7th Cir. 1968), cert. denied, 395 U.S. 908 (1969). In an earlier case, costs were taxed against an attorney who obstructed the taking of a deposition; the attorney's acts were of such a nature that the trial court initiated contempt proceedings against him. Toledo Metal Wheel Co. v. Foyer Bros. & Co., 223 F. 350, 357-58 (6th Cir. 1915).

16. In the federal courts, the local court rules often provide that attorneys admitted to practice before these courts are subject to the disciplinary provisions of the ABA Code of Professional Responsibility. E.g., D.C. Conn. R. 2; S.D.N.Y. & E.D.N.Y. Gen. R. 5(f). But see W.D.N.Y. R. 4. These rules provide that disciplinary proceedings are to be instituted by complaint to the Chief Judge of the district court. See also Standing Comm. on Ethics and Professional Responsibility, R. of Proc. 10, in ABA Code of Professional Responsibility 65C (1975).

The ABA Code is also applicable to state court proceedings. E.g., N.Y. Judiciary L., app. at 351 (McKinney 1975). Presently, disciplinary proceedings in New York are instituted by complaint to a local bar association. Serious charges are brought before the bar group's committee on grievances. This committee may then file formal charges with the appellate division of the Supreme Court of New York. See N.Y. Judiciary L. § 90 (McKinney 1968); N.Y. Court Rules, 1st Dep't, § 603.4 (McKinney 1975); 2d Dep't, id. § 691.4; 3d Dep't, id. § 800.28; 4th Dep't, id. § 1022.19, .20. The Association of the Bar of the City of New York recently proposed substantial changes to this grievance procedure. Association of the Bar of the City of New York, Ad Hoc Comm. on Grievance Procedures, Report on the Grievance System (1976); see N.Y. Times, Feb. 4, 1976, at 1, col. 1; 175 N.Y.L.J., Feb. 4, 1976, at 1, col. 2.

17. ABA Code of Professional Responsibility DR 1-102(A)(5) (1975).

Another *Code* provision presents a more useful standard for determining when dilatory motions may not be submitted. DR 7-102 provides in part:

> (A) In his representation of a client, a lawyer shall not:
> (1) File a suit, assert a position, conduct a defense, *delay a trial,* or take other action on behalf of his client when he knows or when it is obvious that such action would serve *merely* to harass or maliciously injure another.[18]

Assuming that delay of any portion of the litigation process and not just of the trial can be considered a form of harassment,[19] counsel is required by the *Code* to insure that no motion is made merely to harass through delay. However, counsel apparently is not prohibited from submitting a motion which has multiple purposes; so long as at least one of those purposes is not to harass through delay, such a motion would not be designed "merely" to harass. Furthermore, the rule does not restrict motions which are not intentionally dilatory, or even motions that are intentionally dilatory but are not aimed at harassment.

Through the general language of rule 1 of the *Federal Rules of Civil Procedure*[20] and various more particularized provisions,[21] the *Federal Rules* attempt to regulate dilatory litigation tactics. Rule 56 speaks to summary judgment affidavits presented "solely for the purpose of delay."[22] Rule 11 speaks to pleadings "interposed for delay."[23] Other provisions restrict delay less directly.[24]

Rule 7(b)(2) speaks indirectly to the submission of dilatory motions.

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18. Id. DR 7-102(A)(1) (emphasis added); see American College of Trial Lawyers, Code of Trial Conduct (rev. 1972): "Every effort consistent with the legitimate interests of the client should be made to expedite litigation and to avoid unnecessary delays, and no dilatory tactics should be employed for the purpose of harassing an adversary or of exerting economic pressure on him." Id. rule 21(a). "A lawyer should never employ dilatory tactics of any kind to procure more fees." Id. rule 23(g).

19. This assumption is made because the Code rule directly addresses only delay of the trial itself.

20. Fed. R. Civ. P. 1 provides: "These rules govern the procedure in the United States district courts . . . . They shall be construed to secure the just, speedy, and inexpensive determination of every action."

21. See notes 22-25 infra and accompanying text.

22. Fed. R. Civ. P. 56(g). This rule provides for the imposition of costs on the party responsible for the delay. E.g., Clark v. Hancock, 45 F.R.D. 512, 514-15 (S.D. Ga. 1968); Munson Line, Inc. v. Green, 6 F.R.D. 470, 474-75 (S.D.N.Y. 1947). With respect to the attorney at fault, the rule provides only for contempt proceedings.

23. Fed. R. Civ. P. 11.

24. See also Fed. R. App. P. 46(c), under which an attorney may be disciplined for filing an appeal solely for the purpose of delay, or for failing to prosecute the appeal with due diligence. See United States v. Eng, 527 F.2d 611 (9th Cir. 1976); United States v. Alexander, 521 F.2d 794 (9th Cir. 1975); In re Bithoney, 486 F.2d 319 (1st Cir. 1973).

It provides that "[t]he rules applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by these rules."[25]

On its face this provision appears to be concerned only with matters of form. In fact, however, rule 7(b)(2) incorporates what is potentially a potent sanction against delay. One of the "rules applicable to captions, signing, and other matters of form of pleadings" is rule 11. That rule provides in pertinent part:

> SIGNING OF PLEADINGS
>
> Every pleading 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. . . . The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that *it is not interposed for delay.* If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action.[26]

Under rule 7(b)(2), then, motions are subject to the same certification requirements as are pleadings under rule 11. If a motion is not signed or is signed in order to circumvent the purpose of the rule, the court may summarily strike or reject the motion. In either case, if the attorney acted intentionally the court may impose disciplinary sanctions.

Although rule 7(b)(2)'s incorporation of rule 11 does provide the federal adversary system with a mechanism for restricting dilatory motions, several limitations on this mechanism should be recognized. First, rule 7(b)(2) does not reach motions which are not *purposefully* dilatory, but affects only motions "interposed for delay."[27]

Second, even if the motion were purposely dilatory, there is a reasonable possibility that the rule 11 standard would not prohibit it unless it were interposed *solely* for delay.[28] Rule 7(b)(2) would then reach only slightly further than DR 7-102,[29] although the additional remedy of striking or rejecting the motion would be available. Finally, rule 7(b)(2) apparently has never been utilized to restrict intentional delay; the author has not found a single judicial decision considering rule 7(b)(2) as it relates to delay.

There are at least four plausible explanations for the absence of case law considering rule 7(b)(2) as a sanction against delay. First, lawyers

25. Fed. R. Civ. P. 7(b)(2).
26. Fed. R. Civ. P. 11 (emphasis added).
27. Id.
28. See 5 C. Wright & A. Miller, supra note 3, § 1334, at 501-03 (discussing rule 11).
29. See text accompanying notes 18-20 supra.

may be reluctant to challenge their adversaries' use of dilatory tactics. Second, when the motion can be disposed of on the merits, courts may be reluctant to base their decisions on the motivations of a party or his counsel. Third, difficulty in proving an attorney's purpose in submitting a motion may have led the bench and bar to abandon the rule rather than cope with this hard question of fact. Finally, and most likely, the provision itself is presented too obscurely. The rule's heading does not even suggest that the provision is addressed to delay, and the provision on its face appears concerned only with requirements of form. Perhaps a more obvious sanction would be employed more frequently.

None of these explanations is wholly satisfactory; but although it may be unclear why the courts have not considered rule 7(b)(2), it is clear that the rule has had no force or effect as a delay-controlling provision.

In sum, the provisions in the *Judicial Code*,[30] the *ABA Code of Professional Responsibility*,[31] and the *Federal Rules of Civil Procedure*,[32] apparently have not been invoked. The existing scheme of procedural and ethical rules does not significantly restrict the submission of delay-producing motions.[33]

III. WHETHER THE ADVERSARY SYSTEM SHOULD FURTHER LIMIT MOTION-CAUSED DELAY

The next inquiry is whether the adversary system should attempt to place further limits on motion-caused delay. The resolution of this inquiry depends upon a balancing of the public's interest in the prompt

30. 28 U.S.C. § 1927 (1970); see text accompanying note 15 supra.

31. ABA Code of Professional Responsibility DR 7-102(A)(1) (1975); see text accompanying notes 18-20 supra. See also DR 1-102, quoted at text accompanying note 17 supra.

32. Fed. R. Civ. P. 7(b)(2), 11; see text accompanying notes 25-28 supra. See also notes 20-24 supra and accompanying text.

33. It appears that federal judges have inherent power to discipline attorneys. In re Abrams, 521 F.2d 1094, 1101 (3d Cir.), cert. denied, 96 S. Ct. 574 (1975) (There is "an absolute and unfettered power of the district court to admit and to discipline members of its bar independently of and separately from admission and disciplinary procedures of (a) the state courts and (b) this court."); see, e.g., Ex parte Robinson, 86 U.S. (19 Wall.) 505, 512 (1873); Ex parte Burr, 22 U.S. (9 Wheat.) 529 (1824); Hull v. Celanese Corp., 513 F.2d 568, 571 (2d Cir. 1975); Cord v. Smith, 338 F.2d 516, 524 (9th Cir. 1964); Cannon v. U.S. Acoustics Corp., 398 F. Supp. 209, 214-15 (N.D. Ill. 1975). Chief Justice Burger recently stated that "the federal courts have plenary power over the admission, disbarment, or discipline of attorneys who practice before them." United States Dist. Ct. v. Abrams, 96 S. Ct. 574, 575 (1975), denying cert. to In re Abrams, supra (Burger, C.J., dissenting). See also Schlesinger v. Teitelbaum, 475 F.2d 137, 141-42 (3d Cir.), cert. denied, 414 U.S. 1111 (1973) ("[T]he Supreme Court of the United States has recognized the inherent power of [district] courts to take appropriate action to secure the just and prompt disposition of cases."). It is unclear whether this inherent judicial power is any broader than the judiciary's power under current statutes and rules.

resolution of disputes against the public's interest in less restricted advocacy. It should be observed that this balancing process may not be cast in terms of the interest of the client versus that of the public: apples cannot be compared with oranges.

The argument against the institution of more restrictive measures cannot be simply that the adversary system should not limit the ability of counsel to protect their clients in every way possible. As has been discussed, the status quo already imposes guidelines with respect to when and how motions may be brought, and with respect to certain aspects of professional conduct. A similar argument against such measures is that any restriction on counsel's ability to submit certain motions would alter counsel's long-established apportionment of duties to the client on one hand and to the public on the other. Without considering the logic of such a contention, it may simply be observed that no such argument is sufficient unless it includes a justification of the present apportionment of duties.

The strongest argument against the institution of further restrictions upon the submission of dilatory motions appears to be that society's interest in independent and unhindered representation—which might be impaired by restrictions on dilatory motions—outweighs any benefit to be gained from curtailing delay. It remains to be seen whether the balance struck by this argument is convincing.

Two distinct situations in which a motion submitted results in delay warrant consideration. In the first, the client stands to benefit directly from delay. For example, a plaintiff who has obtained a preliminary injunction,[34] and thus has already demonstrated a likelihood of prevailing on the merits,[35] might nonetheless decide that it is to his benefit to prolong the protection of the provisional remedy by postponing a decision on the merits. Similarly, a defendant may stand to gain directly from prolongation of the litigation where the relief sought is prospective only, or where the relief sought would include interest on a damages judgment and the judgment rate of interest is lower than the rate of return the defendant can obtain, for example, on an investment.[36] The motion in this scenario is made primarily to delay, but will, if granted, garner a non-delay benefit to the client. Thus, the motion purposefully retards the legal process, but still is not proscribed by the existing provisions of the *Code of Professional Responsibility.*[37] Counsel probably need not be concerned with other regulatory provisions either.[38]

34. See Fed. R. Civ. P. 65(a).
35. See 7 J. Moore, Federal Practice ¶ 65.04[1], at 65-39 (2d ed. 1975).
36. For other objectives of dilatory tactics see Steckler, supra note 8, at 311.
37. See text accompanying notes 17-20 supra.
38. See text accompanying notes 15, 22-28 supra.

In the second situation, delay is not the primary goal of the motion, but counsel has reason to believe, or perhaps is even certain, that bringing the motion will result in unintentional delay of the litigation.

In the first situation—where the motion is made primarily to delay—the opponent of restrictions on dilatory motions first is logically compelled to argue that delay itself is legitimate. In so arguing, he may not contend that because dilatory motions are subject only to minimal restrictions, delay itself is *pro tanto* a legitimate objective. Rather, he must contend that it is desirable and appropriate to sacrifice the public's interest in prompt resolution of disputes in favor of the public's interest in less restricted representation of clients. The author rejects this contention, however, in the belief that it is an indisputable abuse of the judicial process, and injurious to the public and sometimes to the innocent party as well, to employ devices purposefully directed at hampering the judicial process.

The second situation—where the motion is not primarily for delay—is somewhat more difficult to analyze. As stated previously, the opponent of a more restrictive system may not argue, without more, that the present procedural and ethical rules permit certain procedural devices, and that therefore any further delay-curtailing restrictions are undesirable simply because they limit access to those devices. Rather, he must argue that the effect of the limitation would be to inappropriately restrict advocacy, and that this effect would be philosophically inconsistent with his view of an optimal adversary system.

I suggest, and I believe that many of those who intuitively disapprove of further restrictions would agree, that there could be a situation where the unintentional delay would be so great and the *non-delay* gain to the client so minimal that the submission of the motion should be deterred.[39] It is not difficult to imagine, for example, a discovery motion whose disposition would require extensive responsive argumentation by the respondent, consideration by the court of large numbers of legal arguments and great amounts of documentation, and perhaps an evidentiary hearing. Further, the movant in this hypothetical situation might know or reasonably expect that the information to be obtained if the motion is granted will be of almost no use to his client's case. Finally, the movant might know or reasonably expect that the submission of the motion will result in substantial delay to the litigation. If such an extreme case can be imagined, and if reasonable men can agree upon the proper resolution of such a case, then some further restriction upon the submission of such motions which unintentionally result in delay is appropriate.

39. Although for convenience reference is made to the client's gain, it must be remembered that the issue is the public's interest in less restricted advocacy. It should also be noted that the client's delay gain, in contrast to his non-delay gain, is never considered.

IV. Proposals

It is the author's conclusion that, first, delay is not a legitimate objective of motion practice, and, second, in certain circumstances it is appropriate to disallow the submission of a motion even where delay is not the object. The procedural and ethical rules which govern motion practice in our adversary system can be amended to implement these two conclusions.

The current statutory provision taxing an attorney for excessive costs can easily be amended to incorporate these conclusions. To incorporate the first conclusion—that delay is not a legitimate objective—language may simply be appended to the present section. The new section 1927 of the *Judicial Code*[40] would then provide:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs. *Costs resulting from the submission of a motion intended primarily for delay are such costs.*

The author recognizes that under this amended version of section 1927, as in the other proposed provisions which follow, proving intent will not be easy and might consume substantial court time and may even cause delay. In response to the criticism that it would be unwise to institute a scheme which would increase delay, it is submitted that, first, there will be many cases where the determinations of fact will be less time-consuming than the disposition of the motion on the merits, and, second, and perhaps more important, the existence of the proscription may have a substantial deterrent effect.

Implementing the second conclusion—that dilatory motions should be disallowed in certain circumstances even when delay is not the object of the motion—requires first that a standard be articulated. The standard should require actual or constructive knowledge on the part of counsel that the motion will result in substantial delay and that, even if granted, the motion will secure very insubstantial relief for the client. Adding this standard, the *Judicial Code* provision would then read:

> Any attorney or other person admitted to conduct cases in any court . . . may be required by the court to satisfy personally such excess costs. *Costs resulting from the submission of a motion (1) intended primarily for delay, or (2) where the attorney knew or should have known that substantial delay would result and that if granted the motion would secure very insubstantial relief are such costs.*

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40. 28 U.S.C. § 1927 (1970).

The *Code of Professional Responsibility* DR 7-102 similarly may be modified to implement the two conclusions previously enunciated. With the addition of language like that employed to revise section 1927 of the *Judicial Code,* DR 7-102 would provide:

DR 7-102 Representing a Client Within the Bounds of the Law.
(A) In his representation of a client, a lawyer shall not:
(1) File a suit, assert a position, conduct a defense, delay a trial, or take other action . . . .
(1.5) Submit a motion intended primarily for delay or where the lawyer knows or should know that substantial delay will result and that if granted the motion will secure very insubstantial relief.
(2) Knowingly advance a claim . . . .

The dilatory motion provision contained in the *Federal Rules*[41] has not been utilized, but even if it had been, it does not go far enough. The problem of disuse hopefully can be mitigated by adopting a self-contained rule identified as dealing with delay, in contrast to current rule 7(b)(2), entitled "Motions and Other Papers," which cryptically incorporates rule 11, entitled "Signing of Pleadings." The very fact that such an explicit provision would be included in the *Federal Rules* should diminish any reluctance on the part of the bench or bar to utilize the provision. The problem of scope can be obviated by incorporating into the rule the above-enumerated standards proposed to be added to the provisions of the *Judicial Code* and the *Code of Professional Responsibility.*

Current rule 7(b)(2), through rule 11, includes both procedural and disciplinary sanctions. Although retention of the disciplinary sanction is somewhat superfluous in light of the proposed modification of DR 7-102, it emphasizes the seriousness of the conduct proscribed by the rule.

With these points in mind, the proposed rule of procedure might provide as follows:

RULE 7.5
DILATORY MOTIONS

The court may treat as a nullity any motion which is (1) submitted primarily for delay, or (2) submitted by an attorney who knows or should know that substantial delay will result and that the motion if granted will secure very insubstantial relief. The court may impose disciplinary sanctions in an appropriate case.

I have no doubt that other minds may disagree with the analysis employed in this Article and may disapprove of the precise method of implementation which has been suggested. Nevertheless, the analysis

41. Fed. R. Civ. P. 7(b)(2).

is presented to stimulate consideration of a problem within our adversary system. The proposals are presented as an illustration of how the results of the analysis, or of a similar analysis, might be implemented.

The problem of delay deserves attention. If this Article illumines that problem or raises questions about the problem in the minds of some of the legal community, then it and I will have served our purpose.