

Dep't of Education v. Brust

OATH Index No. 2280/07, mem. dec. (Sept. 25, 2009)

Attorney suspended indefinitely from practicing before tribunal; sanction of \$2,500 imposed upon him for willfully and persistently violating 48 RCNY §1-13.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF EDUCATION
Petitioner
-against-
CRAIG BRUST
Respondent

MEMORANDUM DECISION

JOAN R. SALZMAN, *Administrative Law Judge*

Pursuant to the rules of the Office of Administrative Trials and Hearings, 48 RCNY §1-13 (Lexis 2008), sanctions are hereby imposed upon respondent's attorney, Raphael F. Scotto, Esq., for his conduct during a hearing on disciplinary charges brought by the Department of Education (the "Department") against his client, a custodian engineer, Craig Brust, for sexual harassment of a subordinate, retaliation for her discrimination complaint, and fraudulent submission of time records that caused the City to pay his staff for time they did not actually work, as well as being intoxicated at work in a public elementary school. The background and procedural history of the case can be found in *Department of Education v. Brust*, OATH Index No. 2280/07 (Sept. 29, 2008), *adopted*, Chancellor's Decision (Oct. 22, 2008) (the "*Brust* Matter").

During the course of the *Brust* hearing, which took 14 days (December 6, 7, and 13, 2007, January 15, 16, and 29, February 12 and 29, March 6, 7, and 27, April 16, and May 2 and 12, 2008), despite numerous orders to desist and warnings to correct his behavior on the 3000-page record, Mr. Scotto engaged in a pattern of willful conduct that included, *inter alia*,

- Yelling or screaming;
- Interrupting and talking over his adversary, the witnesses and the judge;
- Interfering with proper examination by his adversary;

- Violating orders of the tribunal as to proper areas of inquiry by posing questions that had been ruled out;
- Feeding answers to witnesses or interjecting his own answers before witnesses could do so during their testimony;
- Making insulting and rude remarks directed at others in the hearing room, and, in general, engaging in conduct disrespectful to the tribunal and violative of its specific orders concerning decorum and of its rules;
- Repeatedly mocking the physical appearance of his adversary and insulting him personally, calling him, for example, “the idiot”;
- Crumpling up in the presence of the court and throwing into the garbage bin in the hearing room (A) a receipt for monetary sanctions imposed upon Mr. Scotto as well as, on a separate occasion, (B) a lawful subpoena signed (at Mr. Scotto’s request) by the judge for a witness whose attendance Mr. Scotto requested several times, but never called; these were displays of disrespect for the tribunal, a waste of judicial resources and, in the case of the subpoena, part of an effort by Mr. Scotto to inconvenience a witness he admittedly disdained as a matter of record.
- Countermanding an on-the-record order to this same witness to appear at an appointed time by scheduling another witness at the same time;
- Repeatedly questioning court rulings in a prolonged and belligerent manner;
- Audibly using profanity on at least two occasions to express contempt for the adversary and the court; and
- Disregarding repeated instructions and orders to desist from this type of disrespectful, uncivil, unprofessional, and inappropriate conduct.

These were not a few isolated incidents, and cannot be dismissed as the ordinary wear and tear of trial practice. To the contrary, this conduct filled the transcripts of this 14-day hearing and injected a serious, ongoing distraction for all involved, including Mr. Scotto’s client, the respondent. Mr. Scotto’s tone of voice was often very loud, and he was so dismissive of others that he appeared to be attempting to bully the other participants in the proceedings. Such conduct, which fell below that expected of an attorney practicing before this tribunal, I find, was willful and deliberate, and delayed the proceedings substantially. A full review of the record, including Mr. Scotto’s written explanation of his conduct, with the benefit of the passage of time since the trial, and well after the merits have been decided, shows Mr. Scotto’s conduct to have been willful and vexatious; his insults and derision of his opponent, of some of the witnesses, of his own client, and of the tribunal were for purposes of harassment and interference with the progress of the trial. This decision is not issued lightly. Rather, it is the product of reflection, with the benefit of distance from the crucible of trial and its protagonists. This ruling is issued in the interests of promoting civility in the courtroom.

Faced with this extraordinary record, I issued an Order to Show Cause on January 29, 2009,¹ and provided to Mr. Scotto a full opportunity to be heard on the question of whether sanctions should be imposed upon him for his conduct of the disciplinary hearing in this matter. The audio recording of the hearing, which is included in the record, is essential to understanding Mr. Scotto's conduct, the pervasive loudness of his voice, and his sarcastic tone throughout this matter.

I have fully considered Mr. Scotto's response to the Order to Show Cause, filed February 24, 2009, as supplemented on April 15 and 29, 2009 (the "Response"),² before making the findings contained in this decision and order, as has the Chief Judge of OATH, who endorses this order below. Mr. Scotto's response is highly significant and damning in four telling respects: (1) he admits, without accepting responsibility, that he misbehaved in the ways itemized above in virtually every category noted; he does not deny it;³ (2) he tenders defenses of his conduct that are preposterous, and attempts to shift the blame to the other participants in the proceedings, claiming, for example, "I ask forgiveness for forgetting where I was," thereby reducing his defense to the untenable position that a veteran attorney could abandon decorum and basic rules of civility in an administrative tribunal because it is not a court (Response at 5); (3) he shows no genuine contrition; for example, instead of offering a real apology for insulting opposing counsel's physical appearance (referring to his "hulk" and noting pointedly that his adversary had difficulty clearing the space between counsel table and a podium, saying "tough fit, there, huh?"), he attempts most ungraciously to deflect attention and fault to his adversary, Victor E. Muallem, Esq., counsel for the Department of Education, and the tribunal; Mr. Scotto

¹ The Order to Show Cause is incorporated herein in full. References herein and in the Order to Show Cause to "Tr." are to the transcript of the underlying disciplinary proceeding, and time counter references (i.e., "11:00:00") are to specific passages by hours, minutes and seconds, in the audio recording of the hearing from which the transcript was created. The full transcript and audio recording of the disciplinary hearing in this matter, as well as the pre-trial, trial and post-trial correspondence and orders, form the record of this matter.

² Mr. Scotto's Response and subsequent letters dated April 15 and 29, 2009, answering the Order to Show Cause, as well as my letter to him dated February 27, 2009, on the subject of sanctions are included in the record of this proceeding. The entire performance by Mr. Scotto was so undignified and fell so far below the courtesy attorneys owe to one another and to judges and witnesses as to militate toward the imposition of sanctions.

³ For example, Mr. Scotto admits that when he exclaimed "God" on day two of the trial when Mr. Muallem voiced an objection (Tr. 292), "I don't see that as insulting. I see it as frustration not properly curbed" (Response at 9). In the same passage, the witness asked for clarification of a confusing question by Mr. Scotto, who retorted, "Oh, please" (Tr. 292).

compounds the original insults and instead concocts a defense of the snide remarks he directed at Mr. Muallem's person by claiming now, though it is not so, that opposing counsel's stomach "touched the table where Mr. Brust sat" (Response at 7), and that Mr. Muallem's "buttocks literally rubbed itself against the edge of my table inches from my [Mr. Scotto's] face" (Response at 7-8), as Mr. Muallem simply moved from a podium past Mr. Scotto's table⁴ to approach Mr. Brust at the witness stand politely to show him a key document, when the only appropriate defense here would have been for Mr. Scotto to admit he was clearly in the wrong and say he was sorry for the gratuitous affront to Mr. Muallem; a review of the transcript shows, the "tough fit" comments were obviously a calculated interruption of proper cross-examination of Mr. Scotto's client by Mr. Muallem about a key document written by respondent that went to the heart of the case, only two pages into the cross (Apr. 16, 2008: Tr. 2655-58); Mr. Scotto also referred to Mr. Muallem as "the idiot" (May 2, 2008: Tr. 2801); and, perhaps most importantly, (4) the Response itself is a further manifestation of Mr. Scotto's contempt for the lawful process of the tribunal, for the tribunal, for adversary counsel, for certain witnesses and even, remarkably, for his own client.

In short, there is no defense to the offensive conduct Mr. Scotto exhibited here, and his Response amounts to yet another display of sheer "chutzpah," a term recently elucidated by the Second Circuit as "a legal term of art . . . analytically similar to 'unclean hands,' though not necessarily coterminous with that concept as understood in Chancery Courts in this Circuit

⁴ Counsel tables at OATH measure two-and-a-half feet wide. There was nothing disrespectful in opposing counsel's movements and he was not near Mr. Scotto's face. Similarly, there was simply no truth to the notion that opposing counsel's stomach touched the witness's table when Mr. Scotto's client was testifying. It was not so and I asked Mr. Scotto immediately to desist from such *ad hominem* attacks. The defenses proffered of the rude remarks directed at Mr. Muallem are patently ludicrous, utterly inappropriate and malicious fabrications that amount to fresh, mean-spirited insults revealing a total denial of responsibility and rejection of civility and grace. It must be said in the strongest terms that this disgraceful conduct by Mr. Scotto was puerile and intolerable. Adding insult to injury, Mr. Scotto now complains that "Mr. Muallem's conduct was insulting and disgraceful and went unaddressed by the Court" (Response at 8). To the contrary, the tribunal did immediately address these incidents by telling Mr. Scotto to stop this. There was nothing to address on the subject of Mr. Muallem's conduct. He moved around the hearing room appropriately and respectfully at all times. Not only was Mr. Scotto's commentary thoroughly unwarranted, it detracted from the trial and burdened the record with utter nonsense. At the moment of Mr. Scotto's rude interjection, delivered in a nasty tone in no way appropriate at a trial, about Mr. Muallem's body, Mr. Muallem was examining respondent, Mr. Scotto's client, at the very opening of Mr. Muallem's cross-examination of the party-respondent. It is clear that Mr. Muallem was only two pages into the cross, asking incisive questions that went to the heart of the sexual harassment charges against respondent. By persisting in advancing fictional accounts belied by the record, and attempting to cast aspersions on everyone else, Mr. Scotto brings discredit not upon others, but upon himself alone.

have employed the ‘classic definition’ and contemporary variations where a party’s conduct is especially and brazenly faulty. . . . Although ‘chutzpah’ is, in some respects, ‘vastly overused,’ . . . it endures in judicial opinions whenever judges -- who have ‘seen it all’ -- encounter such flagrant abuses that no single word adequately expresses appropriate disgust . . . ” *Motorola Credit Corp. v. Uzan*, 561 F.3d 123, 128 n. 5 (2d Cir. 2009) (citations omitted).

Mr. Scotto persisted in a pattern of misbehavior over a lengthy period of time beginning in the pre-trial stages of what became a protracted, 14-day trial, due in no small part to his habitual disruptions. He carried on this way, despite manifold opportunities provided to him to correct himself, and despite my pleading with him to abandon his offensive course of conduct and my repeated, earnest expressions of my reluctance to sanction him (*e.g.*, Jan. 29, 2008: Tr. 1241-42, citing the sanctions available,⁵ but stating that I was “loath to use them”). But he forced the issue. Because the only conclusion available on this record is that his conduct was willful and contumacious, and that he knowingly broke the most basic requirements of civility and decorum that should be second nature to a seasoned attorney at the bar, he has created a record that cannot be ignored.

Record of Sanctionable Conduct

Following are examples of the specific rules and pre-trial and trial orders of the tribunal that Mr. Scotto violated repeatedly.

In a November 2, 2007, memorandum decision issued before the start of trial, I ordered “that because the tone of counsel’s verbal exchanges in the discovery conference was so discordant and the conference was consequently so needlessly protracted, this tribunal’s sanctions rule [was] to be reviewed by counsel prior to their next appearance at OATH in this matter. *See* 48 RCNY 1-13 (Lexis 2007).” *Dep’t of Education v. Brust*, OATH Index No. 2280/07, mem. dec. at 6 (Nov. 2, 2007). This order reminded both counsel to read and be fully

⁵ Noting that there are sanctions other than monetary fines available under rule 1-13, I said: “For example, formal admonishment or reprimand, in . . . addition to the imposition of a fine Exclusion of the offending person from the proceedings, exclusion or limitation of evidence, adverse evidentiary inference, adverse disposition of the case, or other sanctions. I don’t want to hold this conduct against your client. I don’t want to put you out of the proceedings. . . . I don’t want to put time limits on your case. But you are really interrupting the Department’s case by all these antics that have been [c]ited” (Jan. 29, 2009: Tr. 1241-42).

familiar with and to comply with rule 1-13, entitled “Conduct; Suspension from Practice at OATH.”⁶

On the second day of the trial, December 7, 2007, I ordered Mr. Scotto not to interrupt the witnesses, in the course of a *voir dire*, during which he raised his voice and argued with the judge about the basics of courtroom procedure, and began instructing me as if in a tutorial. In response to his lecturing, I ruled, “you may interrupt the witness when I say you can, and not otherwise” (Tr. 212-15). In the midst of cross-examining a city investigator, Mr. George Nagy, about his difficulty remembering the contents of a letter written by the complainant, Mr. Scotto

⁶ Section 1-13 of OATH’s rules of practice provides:

- (a) Individuals appearing before OATH shall comply with the rules of this chapter and any other applicable rules, and shall comply with the orders and directions of the administrative law judge.
- (b) Individuals appearing before OATH shall conduct themselves at all times in a dignified, orderly and decorous manner. In particular, at the hearing, all parties, their attorneys or representatives, and observers shall address themselves only to the administrative law judge, avoid colloquy and argument among themselves, and cooperate with the orderly conduct of the hearing.
- (c) Attorneys and other representatives appearing before OATH shall be familiar with the rules of this title.
- (d) Attorneys appearing before OATH shall conduct themselves in accordance with the canons, ethical considerations and disciplinary rules set forth in the code of professional responsibility in the their representation of their clients, in their dealings with other parties, attorneys and representatives before OATH, and with OATH’s administrative law judges and staff.
- (e) Willful failure of any person to abide by the standards of conduct stated in paragraphs (a) through (d) of this section, may, in the discretion of the administrative law judge, be cause for the imposition of sanctions. Such sanctions may include formal admonishment or reprimand, assessment of costs or imposition of a fine, exclusion of the offending person from the proceedings, exclusion or limitation of evidence, adverse evidentiary inference, adverse disposition of the case, in whole or in part, or other sanctions as the administrative law judge may determine to be appropriate. The imposition of sanctions may be made after a reasonable opportunity to be heard. The form of the hearing shall depend upon the nature of the conduct and the circumstances of the case.
- (f) In the event that an attorney or other representative of a party persistently fails to abide by the standards of conduct stated in paragraphs (a) through (d) of this section, the chief administrative law judge may, upon notice to the attorney or other representative and a reasonable opportunity to rebut the claims against him or her, suspend that attorney or representative from appearing at OATH, either for a specified period of time or indefinitely until the attorney or representative demonstrates to the satisfaction of the chief administrative law judge that the basis for the suspension no longer exists.

gratuitously accused opposing counsel of coaching the witness, and then engaged in a verbal outburst in response to an objection made by opposing counsel: Mr. Nagy: “I don’t recall what the letter says.” Mr. Scotto: “Well, then look in your notes. You can look in your notes and see if you see it. *Unless Mr. Muallem -- he has coached the witness, your Honor, he knows it’s in there*” (Tr. 248-50) (emphasis added).⁷ Mr. Muallem properly objected that there was no basis for Mr. Scotto to make such a statement on the record. Mr. Scotto had been yelling at the witness (Tr. 242-43), and then began yelling about Mr. Muallem’s objection to the verbal attack on him, and I stated that I did not want to make the proceedings unpleasant, “[b]ut if I have to order you to behave yourself, I order you to do so.” When Mr. Scotto persisted, I ordered him to “[s]top the theatrics” (Tr. 248-50). Within two pages of that ruling, I sustained an objection that Mr. Scotto was approaching the witness and continuing to yell at him (Tr. 252). I informed him that there was a good quality audio record being made of the trial, that there was no need to scream at everyone in the room, and that I did not want to make an issue of his screaming and interrupting everyone. I alerted him that he was arguing with the witness, yelling and talking over me. I informed him that if he had an issue with the witness’s testimony, he should take it up in an appropriate way: “Now, let me suggest to you how to proceed. You can ask your questions without yelling. If you don’t like the answer of the witness, you don’t argue with him. You tell me in closing what you think you excavated here” (Tr. 254-55). Mr. Scotto said he would stop this and lower his voice, but this was to be only the beginning of his outbursts.

Throughout the day, I repeatedly ordered Mr. Scotto not to interrupt the witnesses. Nonetheless, he continued to do so. After the third such interruption, I ordered him to behave “in a professional manner” (Tr. 290-94; 12:24:00-12:27:00). Mr. Scotto acknowledged that he was loud, but announced that he would not change: “Your Honor, I’m going to say this in a real low tone. I know I’m loud, Judge. I know I yell when I shouldn’t. I admit it. I’ve been told this, your Honor, from my first days, 37 years ago, okay? And I can’t change, Judge, it’s hard” (Tr. 257-60). Throughout the colloquy about obtaining a “yes” or “no” answer from the witness, Mr. Scotto interrupted and talked over both the witness and the judge. He indicated that he would not make an effort to change his loud and interruptive style of advocacy, and added gratuitous

⁷ Mr. Scotto’s claim in his Response that he meant by “coached the witness” only that Mr. Muallem had legitimately “prepared” the witness (Response at 8) is unpersuasive. I find that the remark was a snide one and was so intended.

insults of his adversary: “Mr. Muallem is so totally unprofessional, he has no idea what he’s doing” (Tr. 258).

As Mr. Scotto continued to talk over others in the hearing room, make comments on the testimony, and belittle his adversary, I was compelled to repeat my orders concerning courtesy and decorum following another interruption of the witness that same day: “I want you to know that I’m making a reminder now. I don’t know if I’m going to do it, but you should be aware that in my Discovery Order of November I asked you to read the sanction rules. It talks about decorous behavior . . . and abiding by the orders of the tribunal” (Tr. 329-30).

On the next trial date, December 13, 2007, I reiterated my order for the attorneys as a result of Mr. Scotto’s conduct the previous two days:

ALJ SALZMAN: [O]n November 2, 2007, I issued a Memorandum Decision, the last paragraph of which said [--] [it] was a discovery order [--] because we had a very [con]tentious conference, and it ended with, on page 6, “[F]inally, I note that because the tone of counsel’s verbal exchanges in the discovery conference was so discordant and the conference was consequently so needlessly protracted, this tribunal’s sanctions rule is to be reviewed by counsel prior to their next appearance at OATH in this matter. [See] 48 RCNY § 1[-]13 (Lexis 2007).”

Did both of you have an opportunity to read rule 1[-]13 after that?

MR. MUALLEM: Your Honor, I did.

MR. SCOTTO: I did. Carefully, Your Honor.

ALJ SALZMAN: You read it carefully? So, the question is, how can we proceed with all of this going on, where you say you can’t change, but you will change today, say it, Mr. Scotto. I put this out for you to consider for the balance of the trial that 1[-]13(a) says individuals appearing before OATH shall comply with the rules of this Chapter, and any other applicable rules, and shall comply with the orders and directives of the Administrative Law Judge.

And it goes on in [(b)] to talk about you must conduct yourself at all times in a dignified and orderly and decorous manner, avoid colloquy and argument amongst yourselves. Cooperate with the orderly conduct of the hearing.

In [(e)] we have, you have a right to be heard before any sanction is imposed. I’m not holding a hearing now, but I’m telling you, that if it continues, I cannot tolerate 23 violations of my Orders with this interrupting. So, the next time it happens, in January, I’m going to give you a hearing in the middle of everything. I’ll excuse the witness, you’ll have a hearing, and you’ll tell me why I should not impose, to start [a] \$25 penalty on you, personally, as the attorney, for

interrupting the witness, interrupting me, making . . . comments on the testimony. All the stuff that's been happening. I don't want to do it. I hate to do it. It's very unpleasant for me, as well, and so, I just put that out there, but I do want to go back to where we left off, which is that you agreed on something, and I wish you all a very pleasant Holiday and a Happy New Year.

(Tr. 636-38).

Mr. Scotto's conduct at the trial did not improve, however, and often degenerated into yelling, personal attacks on opposing counsel, and disrespect for the tribunal. For example, on the third day of trial, he derided his adversary and argued with a witness based on her answer to a question. I notified him that he was facing sanctions: "We're going to have to deal with this issue at the end of the day, the question of how you're conducting this. I don't know what's going to happen with it, but I have a choice of either letting it go or doing something about it. This is the eighth violation of my Order today" (Tr. 512, Tr. 569-70).

On January 15, 2008, I held a sanctions hearing, which did not result in a sanction at that juncture. I did, however, instruct Mr. Scotto again as to the proper behavior required of him, instructions which he disregarded as the day progressed:

At the end of the last session, we went over the sanction rule, everybody read it. I read it again, and I said that I was going to give you a hearing if this happened again, with interrupting the witness and screaming. You did raise your voice, just then. You did interrupt the witness. . . . And I said I'd stop the witness at that point -- excuse the witness and you would have a hearing, and you would tell me why I should not impose [a] \$25 penalty on you personally, as the attorney for the respondent, for interrupting the witness, interrupting me, making comments on the testimony, all that had been happening. . . . I'm not sanctioning you for that, but please, please, let her finish her breath. If you want to tell me when she's done talking, if you want to say, excuse me, Your Honor."

(Tr. 763-64).

Shortly thereafter, Mr. Scotto insulted Mr. Muallem, saying, "He doesn't know what he's talking about." I told Mr. Scotto that I took issue with his tone: "You can say that you disagree with your opponent without saying he doesn't know what he's talking about It's a tonal problem" (Tr. 782-85). Mr. Scotto had been screaming for three days and admitted he had been yelling. After excusing the witness and allowing Mr. Scotto to be heard fully on the record a second time that day, I sanctioned Mr. Scotto \$25 for yelling during the hearing, in violation of my previous order and the rules of the tribunal. At the start of the sanctions hearing, I stated the ground rules again: "[W]e weren't going to have arguments, all dating back to the discovery

conference, when I have to say the lawyers were[] sniping at each other. When we came to the trial, I believe it was on day two of the trial, I had to order Mr. Scotto to stop interrupting, commenting on the evidence, and to stop screaming. From that point, in days two and three, I recorded 23 violation[s] of that order” (Tr. 809). I made it clear that this sanction was for Mr. Scotto’s ongoing yelling: “And to be very clear, it’s because of inordinate raising your voice without provocation because there was a late-starting objection, and I wanted to hear what Mr. Muallem had to say. And that’s totally inappropriate. The orders were clear. You were warned and warned” (Tr. 807-13; 2:49:00-2:56:55). I reconsidered, as Mr. Scotto requested, but found no reason to lift the sanction. Mr. Scotto paid the \$25 fine on January 16, 2008 (Tr. 835-37; ALJ Ex. 2).

Again, at the start of trial on January 16th, Mr. Scotto was notified that his conduct up to that point had often failed to conform to the requirements of my order and OATH rules:

There were at a minimum 24 warnings and I don’t know of any place where you get 24 chances in any context, so I don’t see a reason to lift it.

And just to reiterate and reformulate what the order is, I’m going to say it now one more time that there’s to be no interrupting anyone in the room, Mr. Scotto. No comments on the testimony except in closing arguments. No yelling or screaming and no *ad hominem* or insulting or rude remarks to anyone in the room. . . .

(Tr. 835-36) (emphasis supplied). Mr. Scotto asked for the definition of “*ad hominem*,” and I explained that it meant “against the person,” no insulting others in the room (Tr. 836). Although this apparently was the first time Mr. Scotto had appeared in a matter at OATH, he indicated that he has been practicing law in the courts for 37 years. He is not a neophyte. Such an order should not have been necessary, but it was in this case. I instructed him that the next violation of my orders or OATH rules would result in a \$50 sanction, with the amount increasing for continuing violations (Tr. 836).

Nonetheless, Mr. Scotto continued throughout the day to violate my orders and OATH rules. While hearing from both sides as to whether a document offered by petitioner should have been admitted as evidence during redirect, Mr. Scotto engaged in a repeated pattern of yelling, interrupting both opposing counsel and me, hectoring the court, and generally rude behavior (Tr. 898-906; 1020-42). At a full sanctions hearing on January 16, 2008, Mr. Scotto argued repeatedly only that he was correct about the legal point then at issue (“I am 100 percent right,”

Tr. 1088-89), all the while interrupting me, and missing the point entirely. He failed to address the rude manner in which he was acting. He simply would not give others, including the judge, a chance to speak, not even during the sanctions hearing, which, unfortunately, itself offered additional grounds for sanctions. Therefore, I found that he had violated rule 1-13 and imposed a \$50 sanction on Mr. Scotto for continuing to violate my orders and OATH rules of practice (Tr. 1042). In the course of the hearing, I noted that Mr. Scotto had said himself that he did not have an “on/off switch” (Tr. 1037). Mr. Scotto later sought reconsideration of the sanction under the erroneous belief that it had been imposed based upon a substantive argument he had made rather than his behavior during the hearing (Tr. 1083-96). In scheduling future trial dates, Mr. Muallem offered to show Mr. Scotto his calendar because Mr. Scotto did not have his with him. Rejecting that courtesy, Mr. Scotto retorted, “Oh, leave me alone, Mr. Muallem” (Tr. 1083), and called him “a wise guy” (Tr. 1084). After giving Mr. Scotto a full hearing on the record, I replayed the colloquy on our audio system in chambers after hours, reconsidered, as I promised to do, and found no reason to lift the \$50 sanction, which Mr. Scotto paid on January 29, 2008 (Tr. 1100, 1173; ALJ Ex. 3).

In sum, in the early days of the trial, I twice imposed small monetary sanctions upon Mr. Scotto, after issuing no fewer than 23 warnings on the record, and affording him a full opportunity to be heard on the record, and reheard, in hopes that he would modify his behavior and comply with the orders and rules of OATH and observe basic rules of civility in the hearing room. The monetary sanctions imposed during the hearing were to prove utterly insufficient to correct Mr. Scotto’s conduct as the hearing continued. Instead, his rude and disruptive conduct continued through much of the remaining nine days of trial. While I did not conduct further sanctions hearings during the remainder of the trial because I wanted to keep the focus of the work on the merits of the case, I notified Mr. Scotto that his actions would be addressed once the trial on the merits had been concluded.

On January 29th, 2008, after Mr. Scotto engaged in an argumentative exchange with a witness and fell back into a belligerent tone with the court, I again informed him that he had “not conformed [his] behavior to the orders of the tribunal” (Tr. 1237-38). He was notified, “We are going to have a sanctions hearing at the end of this when we’re done with the witness. And you’re up for multiple hundreds now because you have been absolutely out of control all day. Worse than ever. . . . You have been insulting to almost everyone in the room, you’ve

interrupted, you've made rude comments, you've made faces" (Tr. 1238-39). As a result of Mr. Scotto's conduct, a sanctions hearing was initially scheduled for February 12, 2008. Mr. Scotto was advised that he could obtain the services of an attorney and that he was exposed to fines at that point "in the range of \$1,000" (Tr. 1343-45).

After issuing a limited written apology in writing on February 7, 2008, with a request to adjourn any sanctions hearing (ALJ Ex. 4), he remained unwilling to alter his conduct during the balance of the trial. In substantial part because he was loudly talking over other speakers in the hearing room, the transcript was delayed because the transcriber was having difficulty getting everything down -- "because of all the interruptions and the problems I have noted on the record with Mr. Scotto talking or yelling over others who were speaking" (ALJ Ex. 5). In six days, we had heard from only three witnesses and expected many other witnesses to be called (ALJ Exs. 4-6).⁸ In response to Mr. Scotto's request for the transcript, therefore, I had a set of CD's of the audio record made for each side, pending the completion of the transcription work.

In an email to both counsel dated February 8, 2008, I reiterated that I was "concerned first and foremost with completing the hearing on the merits expeditiously" (ALJ Ex. 4). I wrote that Mr. Scotto already had my "standing orders as to attorney conduct in the hearing room, the OATH rules, the lawyers' code of professional responsibility," and that "I expect[ed] that there will be no further problems as we complete[d] the hearing and that the witnesses and all others in the hearing room will be treated appropriately" (ALJ Ex. 4). I put Mr. Scotto on notice that "[t]he audio recording is the underlying official record of the proceedings from which the transcripts are printed and the compact audio disks of the proceedings will be incorporated into the record of any sanctions proceeding even after the transcripts are completed" (ALJ Ex. 4). I granted Mr. Scotto's request for an adjournment of a further hearing on sanctions that had been set for February 12, 2008, so that he could consult counsel and review the record for purposes of defending himself in a sanctions hearing. After reissuing my standing orders concerning civility and decorum on numerous occasions during the trial, and seeing the rude and interruptive conduct continue nonetheless, I reiterated that I would make an effort to notify Mr. Scotto when I believed he was engaging in conduct that could subject him to further sanctions, and did so on the record. I announced that I would not charge his conduct in any way to his client, whom I did

⁸ Ultimately, we heard from 15 witnesses in 14 trial days.

not hold responsible for Mr. Scotto's conduct of the trial, nor would I delay or burden the trial record with additional sanctions hearings before deciding the matter on the merits (Feb. 12, 2008: Tr. 1349-50: "You [Mr. Brust] are not to be billed for it. It has nothing to do with your case. I've said in the emails that we've only heard from three out of many, many witnesses. I've not made up my mind, and nothing that's [gone] on heretofore with your attorney has any impact on my view of your case. I want to hear all the witnesses, and my mind is completely open in the case"). I indicated that I would reach the merits, that any sanctions imposed should not be billed back to Mr. Scotto's client or paid by the client, and that after issuing my report and recommendation, I would then evaluate the record and return to the issue of attorney sanctions "at a date and time to be set" (Tr. 1349; ALJ Ex. 4).

Following multiple additional interruptions of witnesses and opposing counsel on the part of Mr. Scotto on February 29, 2008, I again advised him that his continuing conduct appeared to constitute multiple violations of my order:

All right. The problem I'm having today is again, you know, I don't want to deal with sanctions now. I want to finish the trial on the merits. There were a number of events today that I mentioned. . . . I just tell you that because it's not gone into the ether. I'm going to have to deal with that -- or, I may -- you know, I have to decide what to do with it all.

(Tr. 1774).

Similarly, following a series of speaking objections on the part of Mr. Scotto on March 7, 2008, and his statement interrupting cross-examination of a witness, Ms. Nieves, a teacher, with his comment on the testimony of another witness ("If I may, Your Honor, these allegations have been totally refuted by the only witness --"), I was compelled to reiterate my order that there be no speaking objections or interruptions:

I would like it quiet. I didn't get a chance yesterday to tell you, just so that you're both on notice that I regard that yesterday was a day where I will go through -- as to which I will go through the record because of the interruptions and the violation of my Order, not to have speaking objection[s], and I said we're going to deal with any sanction issues at the end. And we will. We're going to rule on the merits first, sanctions will come later.

(Tr. 2035-37). Mr. Scotto was further advised, "I've told you that I make notes about the testimony and I've told you that I put notations on the days when I'm giving you notification that there might be sanction problems." (Tr. 2140).

When it came to the witnesses he presented, Mr. Scotto repeatedly telegraphed answers to respondent's witness, both by asking leading questions on direct examination and by objecting to opposing counsel's questions with speaking objections containing answers to those questions. He was warned that he was telegraphing answers to witnesses and that such "interruption may make the post-decision [sanctions proceeding], because there was no occasion to do that The post-decision review that I have to make of the record for the purposes of sanctions." For example, Mr. Scotto interjected that the witness Anthony Harris had "Specifically denied Specifically denied" telling the complainant that Mr. Brust was in love with her, before Mr. Khadaroo, a subsequent witness, could answer with his own knowledge on that point (Mar. 27, 2008: 2304-05, 2249, 2255, 2263-65, 2274-75, 2365, 2405).

On April 16, 2008, I noted that Mr. Scotto was engaging in interrupting opposing counsel's cross-examination, with Mr. Scotto calling his cross-examination questions "absurd": "The questions are absurd, Mr. Muallem. Your questions are absurd" (Tr. 2516). I ordered "No commentary" (Tr. 2516). The questions were perfectly appropriate ones about the witness's present recollection. I addressed the improper attempt to interrupt the cross-examination of the respondent:

The rulings have been made in this case how many times? You know, I made rulings on how this is to be conducted and then at the end of the day, the question of sanctions will come up after we do the merits. You know, I think it is an interruption at this point. . . . I tried a lot of stuff. I tried money sanctions. That didn't have much effect, so we're going to have to deal with that later. . . . And just for the record, I regarded that as an interruption and I ask you not to do it again.

(Tr. 2515-17). Later that day, Mr. Scotto engaged in an *ad hominem* attack on opposing counsel by gratuitously disparaging his appearance. I immediately stated that such behavior was inappropriate and would be addressed after the hearing was concluded (Tr. 2657-61). In addition, Mr. Scotto continued to engage in cueing his witnesses during petitioner's cross-examination. Mr. Muallem asked Mr. Brust, "What time did Mr. Harris come into work on August 22, 2006?" Mr. Scotto answered the question, "6:20, Your Honor" (Tr. 2503-04, 2696-97).

This behavior persisted on the next trial date, May 2, 2008, where Mr. Scotto was again instructed to stop signaling to his witnesses: "it's all in the record and it's all going to be dealt with at another time because we're going to finish this case" (Tr. 2795, 2788-89). Mr. Scotto's

continued failure to abide by OATH's rules and my orders was noted in response to repeated violations of the rules and orders by Mr. Scotto. I noted as late as May 2, 2008, the 13th day of trial, Mr. Scotto's interruptions, talking over me, and his "sneering, contemptuous tone," adding that I had "made orders in this case that no judge should ever have to make about civility, about tone" (Tr. 2850-57, 2864-68, 2892-93, 2910-12).

The Sanctions Process and the Reasonable Opportunity to be Heard

On January 29, 2009, well after a decision was rendered on the merits, I issued to Mr. Scotto the Order to Show Cause why additional sanctions should not be issued against him. He was warned in the Order that such sanctions could take the form not only of monetary sanctions pursuant to 48 RCNY section 1-13(e), but also of a ban by the Chief Administrative Law Judge of OATH, pursuant to section 1-13(f) of the same rule, of an indefinite duration from practicing before OATH for persistent failure to abide by the standards of conduct stated in paragraphs (a) through (d) of rule 1-13. In the Order to Show Cause, Mr. Scotto was urged, in preparing his response, to review the full, transcribed record, as well as the audio recording of the *Brust* hearing, in particular, as the audio version constitutes a recorded indicator of his tone and attitude during the trial that amplifies the typescript (Order at 2 and 19).⁹

The Order to Show Cause provided Mr. Scotto more than a month, until March 2, 2009, to be heard in response to the order in writing. On February 24, 2009, Mr. Scotto responded in writing, without counsel, claiming that imposing sanctions without giving him the opportunity to be heard in person, "with or without the assistance of counsel," "would deprive [him] of a 'reasonable opportunity to be heard,'" as required by section 1-13(e) of OATH's rules of practice. In my letter of February 27, 2009, I noted that Mr. Scotto had stated on the record

⁹ The tribunal supplied the record to both counsel in this case in electronic form, both in typescript format and in audio form. The audio recording was delivered to Mr. Scotto twice by this tribunal (*see* ALJ Ex. 7 as to the first set of CD's). On Mr. Scotto's request during a trial continuance, this tribunal provided its own trial exhibits, in the presence of his adversary, in a conference room at OATH, so that he could ensure that he had a complete set of exhibits during the trial. Mr. Scotto and Mr. Muallem were allowed to make copies of any exhibits they needed. After the Report and Recommendation was issued on the merits on September 29, 2008, Mr. Scotto wrote on October 8, 2008, requesting additional copies of the record and stating that in an office move and destruction of files, he could not find Mr. Brust's file. He requested additional copies of the audio CD's already given to him by the tribunal and copies of all the trial exhibits in this matter. The tribunal then had its staff make a copy for him of the nearly 400 pages of trial exhibits, and created a second copy of the audio record on CD's, and forwarded those duplicates to him on or about November 18, 2008, at the customary cost for such copies.

during the trial of his client, on January 29, 2008, that Mr. Scotto was going to retain counsel to represent him in the sanctions proceeding, and that I had notified him that he could do so (Tr. 1344-45). I also wrote that he had indicated a year before the February 2009 correspondence concerning sanctions, in a letter of February 7, 2008, that he wanted to consult an attorney with respect to attorney sanctions in this matter, and that I then granted, via email dated February 9, 2008, his request to adjourn the sanctions hearing then scheduled in February 2008, for the express purpose of enabling him to secure legal representation of his choice with regard to sanctions, and deferred the sanctions proceeding until after the trial (Pet. Exs. 4, 6). I added that I had “made it clear on the record of the trial herein that I would indeed take up the issue of attorney sanctions after issuing my decision in the underlying matter, as noted in the Order to Show Cause of January 29, 2009.” I wrote that although Mr. Scotto had had ample time to find legal representation since last year and since I issued the Order to Show Cause a month before my February 27, 2009 letter, Mr. Scotto indicated that he wished to be heard further, possibly with counsel. Therefore, I granted him a full opportunity to make a further written submission, either himself or through counsel of his choice, should he wish to do so. I wrote that further submissions were not required, but that he would be heard further as to all matters raised in the Order to show Cause, should he wish to submit supplemental papers. I indicated that I would accept papers in letter form, or in the form of affirmations or affidavits. Given the size of the underlying record of almost 3,000 pages, I gave Mr. Scotto an additional seven weeks, until April 17, 2009, to find counsel and make any further submission he wished, with or without benefit of counsel, as he chose. I wrote: “I will consider your points and arguments in full.” Addressing his complaint that he must be heard in person, I denied the application for oral argument:

Rule 1-13 of this tribunal provides for a “reasonable opportunity to be heard” on sanctions, and adds *that “[t]he form of the hearing shall depend upon the nature of the conduct and the circumstances of the case.”* Reading your letter as a request for oral argument, I hereby adhere to my Order, in which I indicated, on page 20, that you will be heard only on papers. All matters you wish to call to my attention can be conveyed in writing and I will consider them.

(Letter of Feb. 27, 2009) (emphasis supplied).

Despite being given many months to retain counsel to assist him in this sanctions proceeding, including nearly three months following the formal Order to Show Cause, Mr.

Scotto reversed course and chose not to secure the services of an attorney. He submitted no further papers except for his two brief transmittal letters, of April 15 and 29, enclosing two articles, about two sanctions decisions, one in state court and one in federal court, that arose in circumstances very different from the facts at issue here, and pleaded for leniency. The judges in the two reported cases decided not to impose sanctions upon attorneys for reasons that have no relevance here. Despite being given ample opportunity to do so, he offered no new factual material and no valid excuse for his actions.

As Mr. Scotto himself noted, the rules require “a reasonable opportunity to be heard,” but “[t]he form of the hearing shall depend upon the nature of the conduct and the circumstances of the case.” 48 RCNY § 1-13(e). See generally *RCN Construction Corp. v. Fleet Bank, N.A.*, 34 A.D.3d 776, 777 (2nd Dep’t 2006) (a hearing on sanctions was not required where parties who were sanctioned in the amount of \$3,000 were offered an opportunity to be heard and to oppose motion for sanctions); *Martino v. Martino*, 194 A.D.2d 591, 592 (2nd Dep’t 1993) (court order and plaintiff’s oral and written applications for sanctions afforded defendant notice and a reasonable opportunity to be heard on the question of sanctions). There was no need for a new evidentiary hearing here because there already was a full, written record and an audio recording of the underlying *Brust* hearing, which are fully incorporated herein as the record of this sanctions proceeding, along with the Report and Recommendation in the *Brust* Matter and the full set of pre-trial, trial and post-trial orders and correspondence. Mr. Scotto had every opportunity to, and was able to, convey any new factual matter (though he cited none) that might justify his behavior, as well as legal arguments to the tribunal in his defense through written submissions.

In his Response to the Order to Show Cause, rather than showing contrition for his conduct, Mr. Scotto instead sought to justify his conduct as an appropriate set of responses to the rulings of the tribunal, with which he disagreed, as well as purportedly impermissible behavior on the part of opposing counsel. The Response is without merit and will be addressed further below, along with examples of the conduct that compel the outcome here. The obstreperous conduct by Mr. Scotto at the trial was so pervasive that it is impracticable to list each incident in a nearly 3,000-page record. Accordingly, the examples listed herein are illustrative examples only, without limitation.

Further Examples of Sanctionable Conduct

Over the course of 14 trial dates in this matter, Mr. Scotto repeatedly violated the pre-trial and trial orders, OATH rules of practice and basic rules of civility required of attorneys in all courts. His conduct fell into multiple categories noted above, and including, but not limited to the following, with specific, additional references to both the written transcript and the audio record.

Among the violations of evidentiary rulings at the trial was questioning by Mr. Scotto of the complainant (who was found later to have been the victim of sexual harassment by Mr. Scotto's client), and of other witnesses, about the complainant's supposed sexual relationships with co-workers other than respondent. Mr. Scotto wanted to prove that the complainant had had sexual relationships with a number of male workers, other than respondent, at the public school where she worked. Given the sensitivity of the issue, and my concern that the complainant not be harassed at the trial, I heard from both counsel outside the presence of the witnesses, on the record, on the question of whether Mr. Scotto should be able to ask questions of the witnesses about this subject. Mr. Muallem argued that even if it were true that the complainant had any such relationships (which were never established at the trial, as it turned out), such relationships would be utterly irrelevant and would not constitute a defense to sexual harassment by respondent. After weighing the arguments of both sides, I ruled on January 15, 2008, that I would allow Mr. Scotto to ask only the nature of the complainant's relationships with two co-workers who were expected to testify, and to use a leading form, but not repeated, follow-up questions, on the basis that establishing a sexual relationship with those witnesses might go to their credibility and that of the complainant and to any personal interest or bias they might have, but would not be relevant to respondent's liability. I based this ruling on an offer of proof by Mr. Scotto about two of the named co-workers (a teacher and a cleaner, Mr. Rivera, who were expected as witnesses); as to the third co-worker, Mr. McDonald, who was not going to be called as a witness by either side, Mr. Scotto offered no good faith basis to inquire, and I ruled that he could not ask questions about whether Mr. McDonald had a sexual relationship with the complainant. Nonetheless, on the very next day, January 16, 2008, Mr. Scotto asked the complainant questions about whether she had a sexual relationship with Mr. McDonald, in violation of my order. When Mr. Muallem objected, Mr. Scotto quibbled that he was not violating the evidentiary ruling, by attempting to draw a distinction between the phrase he used,

“making out” (“Well, were you making out with Mr. McDonald” “down in the boiler room?”), and “sexual relations,” citing for authority former President Clinton. I reminded him that “I had already ruled on that and you know I did” (Tr. 919). I had to instruct the witness not to answer, and Mr. Scotto only thereafter withdrew the question (Jan. 15, 2008: Tr. 720-32; Jan. 16, 2008: Tr. 919; 11:50:20-11:51:05; Tr. 958-60; 01:58:50-2:00:20).

Mr. Scotto persisted, however. I issued further orders on January 29, 2008, that he stop asking gratuitous questions about the complainant’s supposed sexual relationships that went beyond the original ruling, but he did it anyway, despite reminders that he was violating the rulings. He asked Mr. Rivera, who appeared as a witness, numerous questions about whether he had a sexual relationship with complainant, until Mr. Muallem objected that Mr. Scotto was going beyond the permitted questioning. I had to remind Mr. Scotto of the limits that were set. Immediately thereafter, he asked Mr. Rivera about whether complainant had a sexual relationship with Mr. McDonald, as to whom I had ordered Mr. Scotto not to inquire. I reminded him during this very examination not to inquire because he had shown no basis to ask those questions (Jan. 15, 2008: Tr. 720-32; Jan. 16, 2008: Tr. 919; 11:50:20-11:51:05; Tr. 958-60; 01:58:50-2:00:20; Jan. 29, 2008: Tr. 1202-05; 03:45:00-03:47:20). I alerted Mr. Scotto, even as he began to ask about Mr. McDonald’s sexual history, that the question was off-limits, and that he could not keep asking such questions “again and again” (Tr. 1203). But within seconds, he went right ahead and asked Mr. Rivera whether the complainant had a sexual relationship with Mr. McDonald, despite my clear ruling in the prior, very specific on-the-record session with both counsel that this was not permitted because it was irrelevant and without basis. I informed Mr. Scotto that he had violated that order. He claimed he forgot. He immediately asked Mr. Rivera yet again if he himself had any sexual contact with the complainant (Tr. 1204). There is no way he could have forgotten the ruling repeated seconds earlier. He denied that this was willful; I stated on the record, “Yes it is, sir” (Tr. 1205). In this sexual harassment case, in which Mr. Scotto tried mightily to blame his client’s conduct on the victim,¹⁰ it is simply not plausible that he “forgot” the rulings about sex. I find that Mr. Scotto violated my rulings willfully, to harass and embarrass the complainant when she was on the witness stand, and to smear her when asking

¹⁰ For example, after asking about the complainant’s work habits, he commented to her at the hearing, “You walked around in your high heels and your breasts hanging out” (Tr. 958; 1:58:50-2:00:20). When Mr. Muallem objected, Mr. Scotto withdrew the question.

questions of the co-worker who testified, not only about his own relationship with the complainant, but also about whether complainant had a sexual relationship with yet another co-worker. No such relationships were established, Mr. Scotto could not even make an offer of proof as to Mr. McDonald to justify such questions, and it became clear that this was nothing but innuendo intended to degrade the complainant in the eyes of the tribunal.

In fact, Mr. Scotto began his attacks on the complainant and Mr. Muallem from the very start of the trial. In his opening statement, before any evidentiary rulings were made, he argued: “You will see that she is pregnant, she is unwed, she is pregnant” (Tr. 21-22). Mr. Muallem objected. When I asked what the relevance was at the time of trial, more than one year after the events alleged had ended, that the complainant was pregnant, Mr. Scotto withdrew the comment. He then argued that his comment was relevant and incorporated an attack on Mr. Muallem, “we are going to show that she has had relations with all of the people who they are relying on -- not all of the people, some of the people that the Department is relying on. . . .¹¹ We are going to show, your Honor, a motive, which I am not going to discuss, your Honor, because I think Mr. Muallem will tell it to his witnesses” (Tr. 22). I sustained Mr. Muallem’s objection that there was no basis to say that Mr. Muallem would do such a thing. (Tr. 22-23). A review of the record shows that Mr. Scotto’s strategy from the inception of the trial was to harass other participants in the proceeding.

In the Response, Mr. Scotto continues to disparage the tribunal and mischaracterize its actions and decisions. In his principal defense, for example, Mr. Scotto asks the tribunal to excuse his conduct because, he says, it was his natural response at the time based upon his objection to the admission of hearsay in this administrative, employee disciplinary hearing of his client. He began this line of objection during the testimony of a City investigator, Mr. Nagy, of the Office of the Special Commissioner of Investigation for the New York City School District (an arm of the New York City Department of Investigation), who was permitted to testify about his investigation of the underlying complaint against Mr. Scotto’s client for sexual harassment of a subordinate, female employee. Apparently unfamiliar with the tribunal, Mr. Scotto refused to accept that hearsay is admissible in accordance with the rules governing the tribunal, and could

¹¹ These comments and questions regarding the sexual history of the complainant seemed intended to impress a jury, but this was a non-jury trial.

not let this go, even though City investigative reports are routinely accepted in such hearings, where there are indicia of the reliability of a contemporaneous, independent investigation, including memoranda of witness statements taken during a lawful investigation.

Moreover, the investigative memoranda and testimony were not all hearsay, and the contemporaneous memoranda of some of the witness statements were used to impeach witnesses whose testimony contradicted their earlier statements to the investigators closer in time to the events. The investigator testified to, for example, party admissions by Mr. Scotto's client, an exception to the hearsay exclusionary rule or non-hearsay under federal rules. *See Prince, Richardson on Evidence* §§ 8-201, 8-202 (Lexis 2008 ed.) Mr. Brust admitted to Investigator Nagy that he had feelings for the complainant and bought gifts for her. Thus, Mr. Nagy testified on direct questioning:

- Q. What questions did you ask Mr. Brust, and what were his answers?
A. I had asked him if he ever told [the complainant] his feelings towards her and he said he did. . . . Mr. Brust also acknowledged giving her gifts for Christmases and birthdays, such as necklaces and earrings and he mentioned glasses, he mentioned a pair of Yankee tickets for one of her birthdays. I had asked him if he had sent her roses and he acknowledged that he did. And I asked him why, and he said because her boyfriend beat the shit out of her, so he sent her roses.

(Dec. 7, 2008: Tr. 198-200). Mr. Brust independently admitted at the hearing that he gave his subordinate gifts and that he had feelings for her, though he tried to give his own interpretation of these matters at trial. Report and Recommendation at 5-6, 22. Mr. Brust also admitted sending a message to the complainant that she was fired (Apr. 16, 2008: Tr. 2695-96), upon learning, the record showed, that she complained to the school principal about sexual harassment by Mr. Brust. Report and Recommendation at 58-68. The decision shows that it was based on credible, first-hand, eyewitness accounts of respondent's behavior, including his intoxication at school, and his falsification of time sheets. It was undisputed that he sent his staff home early one day because he was upset with the complainant and then had the city pay them all for a full day's work. His testimony that he was going to pay them from his own pocket was belied by his own admission that he never did so. Report and Recommendation at 74-76. Thus, the record contained ample non-hearsay evidence that supports the Report and Recommendation in the *Brust* Matter. But Mr. Scotto refused to accept this tribunal's rule, which is not unusual in New York administrative hearings, that strict adherence to the technical rules of evidence is not

necessarily required here. *See* 48 RCNY § 1-46(a) (Lexis 2008); NYC Admin. Procedure Act (“CAPA”), NYC Charter § 1046(c)(1) (“Adherence to formal rules of evidence is not required”) (Lexis 2008); *see also Health & Hospitals Corp. (Lincoln Medical & Mental Health Center) v. Huling*, OATH Index No. 1359/05, at 5 n.1 (July 22, 2005). These quasi-judicial administrative proceedings are not strictly governed by the CPLR, though we may look to the CPLR for guidance. CPLR § 101 (CPLR applies to “civil judicial proceedings in all courts of the state”); *Dep’t of Buildings v. Gelb*, OATH Index No. 1298/97, at 3 (Nov. 12, 1997), *aff’d*, Comm’r Dec. (Apr. 21, 1998) (citing *Infante v. Donohue*, 42 Misc. 2d 727, 731 (Sup. Ct. Albany Co. 1964) (holding that a civil administrative disciplinary hearing is not a “civil judicial proceeding” within section 101 of the CPLR)); *Human Resources Admin. v. Ben-Siyon Man-of-Jerusalem*, OATH Index No. 790/91, mem. dec. at 8 (Nov. 12, 1991).

Despite Mr. Scotto’s many objections to the contrary, both during trial and in his response to my Order to Show Cause, hearsay, with few limitations, is admissible in administrative proceedings, *see* N.Y. Civ. Serv. Law § 75(2) (Lexis 2009) (in civil service disciplinary hearings “[c]ompliance with technical rules of evidence shall not be required”), and may form the sole basis for an administrative adjudication if sufficiently probative, relevant and reliable. *Matter of S & S Pub, Inc. v. New York State Liq. Auth.*, 49 A.D.3d 654 (2d Dep’t 2008); *Matter of Café, La China Corp. v. New York State Liq. Auth.*, 43 A.D.3d 280, 281 (1st Dep’t 2007); *Dep’t of Correction v. Graham*, OATH Index No. 1380/03, at 25 (Feb. 25, 2004), *modified on penalty*, Comm’r Dec. (Aug. 6, 2004), *modified on penalty*, NYC Civ. Serv. Comm’n Item No. CD07-83-M (July 27, 2007). Indeed, in the Report and Recommendation in the *Brust* Matter, I cited precedent from this tribunal that shows that an administrative law judge may credit contemporaneous hearsay statements in a City investigative report over less reliable trial testimony where the investigator was unbiased. Report and Recommendation at 7 (citing, *inter alia*, *Bd. of Education v. Roman*, OATH Index No. 1555/97 at 10-13 (Sept. 30, 1997)).

Nonetheless, as noted in my Report and Recommendation, to the extent that I referred to hearsay, including the SCI investigation report, I did so in a limited way, using the report as a record of contemporaneously recorded statements of witnesses by a neutral investigator, who displayed no personal bias and no reason to fabricate or embellish the evidence. I did not rely on such hearsay heavily or exclusively in reaching my decision. Non-hearsay evidence of witnesses directly involved in the events independently supported my findings. I held as follows: “I found

Investigator Nagy's report to be sufficiently probative and reliable to provide a contemporaneous record of his investigation, which captured the recollections of the witnesses closer to the time of the relevant events than the time of trial, beginning about a year and-a-half-later. Nagy's investigation, while not perfect, was impartial and fairly accurate in the essential points material to this matter." Report and Recommendation at 5-6. The record reflects that contrary to Mr. Scotto's assertions, the investigation was not deeply flawed, the rules of evidence applicable in administrative tribunals were followed, and it can be said that the Report and Recommendation is independently supported by evidence that meets the requirements of the strict rules of evidence.

But even assuming, for the sake of argument, that the judge's rulings here were not correct in whole or in part, Mr. Scotto had no valid reason for acting as he did. Irrespective of his view of the quality or soundness of the tribunal's legal rulings, Mr. Scotto's conduct during the hearing was improper and unacceptable. Once the rulings were made, even though he disagreed with them and made that plain, it was improper for him to express his displeasure at every turn by yelling, whining, commenting sarcastically, having tantrums or fits of temper, and insulting the other participants at length. While this tribunal can appreciate passionate advocacy, Mr. Scotto repeatedly crossed the line into disruptive and disorderly behavior that benefited no one and served only to delay the proceedings, to insult his opposing counsel, and to disrespect this tribunal. It would seriously demean the lawful administrative process and system of justice to condone or excuse Mr. Scotto's behavior as spirited advocacy, as Mr. Scotto would have it. There was no disguising his disrespect for the tribunal, his opponent and some of the witnesses, even, remarkably, at times, his own client. As one federal court put it: "Vigorous representation is one thing, lack of civility is quite another. This court will not tolerate the latter." *See generally Leiching v. CONRAIL*, Report and Recommendation, 1996 U.S. Dist. LEXIS 20796, at *4 (N.D.N.Y. 1996), *adopted*, 1997 U.S. Dist. LEXIS 3561 (N.D.N.Y. 1997).

Mr. Scotto freely disparaged the tribunal when he disagreed with its rulings. When I asked him not to interrupt proper direct examination by Mr. Muallem, stating that I wanted to hear the evidence, not arguments and colloquy, Mr. Scotto uttered the word, "Evidence," in a mocking tone, an allusion to his displeasure with the rulings admitting the investigative proof. I noted that this was "another snide comment directed at the tribunal" (Jan. 29, 2008: Tr. 1143-44). Later in the hearing, in another example of his disdain for the tribunal, after being told it

was impermissible to include in his questions of his client the answers, he said, “Oh, are you serious, Judge?” and then yelled at the judge about objections to the leading form of his questions. Asked if he was yelling at me, Mr. Scotto showed his pique: “Ah, please.” When I declared that he was yelling at me, he admitted it, then offered a perfunctory apology, then, remarkably, reversed course and denied he had been yelling. He then withdrew his question. When I pointed out that “[t]here is no court in this land or this country, no administrative tribunal and no social context in which what you do in this court is permitted. It’s not permitted,” he argued, and blamed his conduct on the tribunal, with the retort: “I’ve never been in a court, Judge, where what went on here ever in my life. So I think you’re wrong on that, I’m sorry to say.” Instead of relenting, he complained of having to apologize (“How many times am I going to say, I’m sorry all the time, Judge”), yelling yet again, and asked to put the matter of his conduct aside and simply continue his questioning. Impatient with the tribunal for faulting him, he admitted that he did not have to behave this way: “And I know, Judge. Just let me ask the next question.” Told he was not getting the point at all, he answered preemptively, as if to dismiss entirely the question of his conduct, “Okay. Are we continuing or not, Your Honor?” Mr. Scotto’s unrelenting discourtesies disrupted the proceedings. At this point, I rejected his refusal to correct himself and called a brief recess: “No, we’re taking a break because I don’t have to put up with this any longer.” Still in denial, he said: “I’m not making you put up with anything, Your Honor.” Trying to impress upon him the importance of changing his tone to a more polite one, I responded, “I can’t do much, but I’m going to take a break now for five minutes” (May 2, 2008: Tr. 2819-22; 11:26:30-11:29:22).

In an open display of contempt for the tribunal and of his brazen refusal to accept the sanction, Mr. Scotto threw the receipt for his cash payment of the \$50 sanctions fine in the garbage (Jan. 29, 2008: Tr. 1173; 03:09:33-03:10:12). This dramatic use of the trash bin to signify his scorn for the tribunal and others, even a witness, would become a signature move for him. As discussed in detail below, he repeated this flourish when he later destroyed a valid subpoena I had signed at his request for a witness for whom he expressed his deep disdain; Mr. Scotto did his utmost to have this witness alter his work schedule repeatedly, only to be told he was not needed at all.

In rearguing against the \$50 sanction and seeking reconsideration, Mr. Scotto refused to accept that he had been sanctioned for yelling and violating my clear orders about decorum, not

for making an argument about the scope of cross-examination. He would not concede he did anything wrong, harping instead on the notion that he was “100 percent right” about his objection that led to his yelling episode (Jan. 16, 2008: Tr. 1089). Still defending his objection to cross-examination, which was moot and not the basis for the sanction, he resorted to belittling the tribunal: “I mean, I’m arguing a point, Judge, that’s basic law. This is -- this is, as they say, which I hate to say it, this is legal cross-examination 101” (Tr. 1092). In fact, there was a complicated question about the scope of cross-examination and redirect (Jan. 16, 2008: Tr. 900-01, 1020-42), and I told him: “It’s not about whether you’re right on the merits or not. It’s about a record of . . . 30 violations of an order for decorum” (Tr. 1090). Unwilling to accept this, his answer was a dismissive, “Oh, please” (Tr. 1090). Impervious to criticism of his comportment, Mr. Scotto simply reiterated, “And I know I’m right on the merits, Judge” (Tr. 1093).

Mr. Scotto instructed the tribunal about the rudiments of conducting a trial, would not accept the tribunal’s ruling as to the proper scope of redirect examination, and interfered with my effort to conduct a colloquy with counsel about whether the matter Mr. Muallem sought to inquire about on redirect had been opened by Mr. Scotto’s cross-examination. Mr. Scotto took the position that if he did not introduce a particular document on cross-examination, Mr. Muallem could not introduce any document on re-direct, even if that document covered a subject that Mr. Scotto had raised on cross-examination and had been produced in discovery by Mr. Scotto on behalf of his client (Tr. 1021). Wholly apart from failing to appreciate that I was considering both sides’ positions, Mr. Scotto would not accept any other view of the proof than his own, and felt compelled to interject his challenge to the ruling by belittling the judge. This was not an isolated incident. After the testimony of the complainant had been completed on January 16, 2008, Mr. Scotto lashed out at both Mr. Muallem and me, refusing even to estimate how many witnesses he intended to call or how much trial time would be needed to complete the proceedings. He refused Mr. Muallem’s courtesy of offering to let Mr. Scotto look at Mr. Muallem’s calendar because Mr. Scotto did not have his with him, saying, “Oh, leave me alone, Mr. Muallem,” calling him a “wise guy” (Tr. 1083-84). Mr. Scotto yelled at his client for suggesting a trial date that would resolve the matter expeditiously, even though Mr. Scotto himself was pleading for conclusion of the trial because his client was reportedly suffering psychologically from being removed from his regular duties and assigned a desk pending the outcome of the case. Mr. Scotto interrupted and yelled at the judge and repeated that he was

“100 percent right” about the evidentiary ruling, interrupting Mr. Muallem during the discussion of sanctions (Tr. 1082-96). I told Mr. Scotto at this juncture: “We’re not really making any progress at all in terms of just the basic getting through the day together” (Tr. 1084-96).

Mr. Scotto was instructed numerous times not to telegraph answers to his own witnesses and not lead to them (*e.g.*, Mar. 7, 2008: Tr. 2029, 2068; Mar. 27, 2008: Tr. 2249), but he kept doing it anyway. For example, he interfered with a question about what Mr. Brust knew of a subordinate’s involvement in Mr. Brust’s decision to terminate the employment of the complainant. Mr. Scotto interjected, signaling to his client to claim ignorance: “He didn’t even talk to Mr. Harris. How would he know?” (Apr. 16, 2008: Tr. at 2696). Mr. Scotto talked over the judge and yelled when his objection was overruled during cross-examination of respondent when Mr. Muallem stated that Mr. Scotto was feeding information to his client. Mr. Scotto denied that he was feeding answers to the witness. I told him: “That is not right. Don’t do that, please. It’s not the first time.” Mr. Scotto objected and argued with the ruling, yelling again (Tr. 2696-97). Indeed, when Mr. Muallem objected that Mr. Scotto was hindering his cross-examination of Mr. Brust, Mr. Scotto retorted: “*Ah, bull.* The Department has had three weeks to prepare like unbelievable cross-examination, Your Honor, at a pace I’ve never seen. No one would ever permit this,” referring in a scoffing and sarcastic tone to Mr. Muallem as “*The Department*” (Apr. 16, 2008: Tr. 2697, 2696-99; 04:38:00-04:42:25) (emphasis supplied). In this way, Mr. Scotto attempted to belittle Mr. Muallem and his cross-examination. Reminded at a subsequent session for the umpteenth time to desist from interfering with the cross-examination of his client, Mr. Scotto chose to besmirch Mr. Muallem, calling him an “idiot”: “*Ah, the idiot,* he asked five thousand of them [leading questions] through his witnesses, Judge” (May 2, 2008: Tr. 2801, and surrounding pages) (emphasis supplied). Not content to accept the instruction, Mr. Scotto, insisted that the fault lay with his adversary, and argued with me when I said it was not so that Mr. Muallem had done the same.

When Mr. Muallem said he “strenuously” disagreed with Mr. Scotto about the merits of his objection, Mr. Scotto exclaimed, directing his ire again at Mr. Muallem: “*Oh, strenuously, my ass*” (Jan. 16, 2008: Tr. 1093, 1087-96; 05:33:35-05:44:40) (emphasis supplied). His verbal attacks on Mr. Muallem intensified and were relentless. Mr. Scotto also hurled the insult, “idiotic,” at Mr. Muallem for his argument about an evidentiary point (Jan. 29, 2008: Tr. 1141-42).

As noted, Mr. Scotto engaged repeatedly in *ad hominem* personal attacks on his opposing counsel. On March 7th, 2008, Mr. Scotto stated in a mocking tone that he did not want his opposing counsel's "hulk" to "hover" over a witness, and, when questioned about his insult concerning his adversary's morphology, stated caustically that he was "going to say his stomach but [he] didn't want to be insulting" (Mar. 7, 2008: Tr. 2204; 04:00:05-04:01:34). Later, on April 16th, 2008, despite my earlier notice to him that the "hulk" insult was inappropriate, Mr. Scotto screamed about the judge's comment for the record that Mr. Scotto had insulted Mr. Muallem's physical form or morphology. Mr. Scotto commented, "Tough, huh?," and then "Tough fit, there, huh?," as Mr. Muallem passed between Mr. Scotto's counsel table and the podium in the middle of the hearing room. I told Mr. Scotto that he should have withheld his comment. Mr. Scotto's response was audible. He said: "*Fuck*," to show disrespect to the tribunal for having made the point about civility. I told him that his remarks were "insulting. Don't do it" (Tr. 2658), and that he had already been told not to insult opposing counsel's person. I notified Mr. Scotto at the hearing that this was a sanctionable event. Instead of retreating from the insult, Mr. Scotto compounded it by saying, "Then we're going to have to measure," referring to opposing counsel's body and the space between the table and the podium. Mr. Scotto also began yelling and talking over me again, arguing in defense of his insult (Apr. 16, 2008; Tr. 2657-61; 03:33:42-03:39:45) (emphasis supplied).

Remarkably, Mr. Scotto says he finds "puzzling" the fact that his use of profanities was raised here (Response at 19). His apology is tepid at best: "I do admit that I was totally frustrated and said things I *probably* should not have" (*Id.*) (emphasis supplied). Remarkably, he does not believe he definitely was in the wrong for cursing repeatedly in mid-trial.

Besides these two attacks aimed at opposing counsel's person, Mr. Scotto repeatedly insulted opposing counsel's character -- baseless attacks he notably continues to defend in response to the Order to Show Cause. On one occasion, Mr. Scotto mockingly accused opposing counsel of lying about his next intended question (Mar. 27, 2008: Tr. 2478-79; 05:13:57-05:14:49), and on another Mr. Scotto used an analogy, in a most insulting way, comparing his adversary to a criminal in claiming Mr. Muallem was misleading a witness on cross-examination (Apr. 16, 2008: Tr. 2722): "Well, Judge, you know what? If we asked all the criminals in the world did you commit the crime, know what they would all say? No, I didn't do it." (Tr. Apr. 16, 2008: Tr. 2722). Mr. Muallem properly objected to this comparison.

On March 27, 2008, without prior notice, Mr. Scotto suddenly asked, after 5:00 p.m., to continue late into the night. When Mr. Muallem indicated that he could not stay past 5:30 p.m., Mr. Scotto mocked him, yelling and interrupting on matters that should have been uncontroversial, such as the trial day's schedule, eleven days into the trial. Mr. Scotto gratuitously attacked Mr. Muallem's veracity about his evening commitments: "I don't believe Mr. Muallem in a million years" (Mar. 27, 2008: Tr. 2483, 2481-86; 5:17:00-5:24:00). After Mr. Muallem stated that he would need additional dates to complete the cross-examination of the respondent, Mr. Scotto then reversed course and asked for a recess to cut off the remaining ten minutes Mr. Muallem had for cross-examination that evening. Mr. Muallem objected to the interruption of his cross (Mar. 27, 2008: Tr. 2484-86; 05:21:35-05:23:49). On prior dates when we stayed late, we did so by agreement in advance, in consultation with the witnesses (Tr. 2481). Mr. Scotto then suddenly decided to retrieve his cell phone messages in the middle of cross-examination and told Mr. Muallem to ask questions while Mr. Scotto was on his phone. Mr. Muallem correctly refused to proceed in such fashion (Mar. 27, 2008: Tr. 2481-86; 5:17:00-5:24:00). There are signs posted prominently at the entrances to the hearing rooms at OATH that say "CELLULAR PHONES PROHIBITED," with a graphic depiction of a cell phone inside a red circle with a line through the phone. Commenting on Mr. Muallem's cross-examination of Mr. Scotto's client later in the trial, Mr. Scotto could not resist abusing Mr. Muallem again: "The most boring. This is unbelievable, Judge Judge, I can't take it too much more. I'm sorry. This is laborious. Glacial pace, whatever the words are" (Apr. 16, 2008: Tr. 2716, 2720). This running commentary was uncalled for and extremely rude.

Despite the monetary sanction he paid on January 29, 2008, Mr. Scotto continued to misbehave that very day, by making faces during a colloquy as I was trying to make a determination about the production by Mr. Muallem of notes, which I ultimately required of Mr. Muallem, ruling in favor of Mr. Scotto, notwithstanding Mr. Scotto's rudeness (Jan. 29, 2006: Tr. 1237-42), loudly interrupting the tribunal, making snide remarks about the tribunal and the evidence, repeatedly and belligerently calling a relevant question from Mr. Muallem about a witness's observations of intoxication on the part of respondent "idiotic," and exclaiming, "Aww, God," when Mr. Muallem asked that the record reflect that Mr. Scotto was interrupting

him, making it impossible to hear others in the room (Jan. 29, 2006: Tr. 1141-42 and *passim*; 12:33:30-12:35:50).¹²

Mr. Scotto is not contrite. Although he was urged to listen to the audio version of the hearing, he still says he does “not know” if he spoke scoffingly of his opponent or not, but rather claims, “I have never heard of a person refer to himself as an entity as opposed to a human being. At least when the federal prosecutors call themselves the government you can call them “the government” in sarcastic tone without threat of sanction. I am sorry if the same was not true at OATH” (Response at 19). This is in no way an apology. On the contrary, Mr. Scotto is saying the opposite, and touting courtroom sarcasm for the purpose belittling an adversary as perfectly laudable attorney conduct. This kind of response invites sanctions and is an aggravating factor in the consideration of appropriate penalty.

In a bizarre turn, Mr. Scotto even blew up at his own client during a discussion of scheduling (Tr. Jan. 29, 2008: 1239; 1238-43). He simply lost patience and the outburst was most undignified. Mr. Scotto’s client wanted to participate in scheduling additional trial days at the soonest possible time because he had been reassigned without duties and very much wanted a resolution of this matter. During a discussion with the judge about particular trial dates, Mr. Brust asked innocently, and clearly, based on his statements throughout the hearing, in hopes of getting his serious disciplinary charges resolved, “What about January 30th?” At that point, Mr. Scotto interrupted Mr. Brust and, in a very loud voice, said “Excuse me” to his client in an overtly dismissive, condescending, and nasty tone that conveyed that he did not want his client’s input on the schedule; the clear import of the outburst was that Mr. Scotto wanted his client to keep silent. I said that Mr. Scotto’s outburst was directed at his own client. Mr. Scotto answered, “Exactly.” I said to Mr. Scotto, “I don’t understand that either” (Jan. 16, 2008: Tr. 1086-1087; 05:32:19-05:32:47). In his Response, Mr. Scotto offers that “Frankly, it is not the Court’s business how I treat my client. . . . I know of no OATH rule regarding treatment of one’s client” (Response at 17). In arguing this outrageous point, Mr. Scotto not only admits that he was rude to his client, but claims he was justified in yelling at his client in open court because

¹² Mr. Scotto interrupted and talked over the witnesses habitually. *E.g.*, Dec. 6, 2008: Tr. 91-92; 12:46:30-12:47:55; Dec. 13, 2007: Tr. 568-70; 03:15:40-03:17:52. He interrupted by commenting on the cross-examination questions of a union official, Mr. Matthew Wile, injecting negative comments about the City investigator, an earlier witness in the case, despite repeated rulings against speaking objections and comments on the testimony (March 6, 2008: Tr. 1899; 3:04:58-3:05:12).

Mr. Brust did not understand that it was in his own best interest to delay the trial: “The fact that he wanted to get the trial over with was not in his best interest whether he knew it or not” (*Id.*). Mr. Scotto even supplies the reasoning that Mr. Brust was being paid during the trial by the Department of Education (*id.*), even though he was not permitted to serve in his regular duties and was assigned to a room where he did nothing. Here, Mr. Scotto reveals that his repeated representations to the court that his client needed a speedy resolution of this matter were not forthright.

Contrary to this frivolous defense, it is indeed a court’s business when an attorney not only: (A) represents solemnly to the court in writing and on the record¹³ that his client needs to have a trial expedited because he is suffering “debilitating,” “severe distress” psychologically from his reassignment with no duties, yet the attorney knows all the while that he is disingenuously and purposely delaying the matter (as, for example, by taking on a new legal matter in the middle of this ongoing trial, in conflict with a speedy resolution here, for the same time this trial was previously scheduled to continue); but also (B) is extremely rude to any person sitting in the courtroom. The OATH rules do require that all “individuals appearing before OATH shall conduct themselves at all times in a dignified, orderly and decorous manner.” 48 RCNY section 1-13(b). They do not say that a lawyer may berate his client, or deceive the court, so long as the lawyer perceives that he is looking out for his client’s interests.

Indeed, Mr. Scotto’s admission in the Response that delay was in his client’s interest all along provides an overarching explanation for his misconduct -- that Mr. Scotto’s behavior was entirely deliberate on his part and calculated specifically to delay the proceedings and defer the possibility that his client’s employment might be terminated.

Uncivil conduct by attorneys has been criticized as “grossly disrespectful . . . and a violation of accepted, proper courtroom decorum.” *Matter of Castellano*, 46 A.D.2d 792 (2d Dep’t 1974). In *Castellano*, an attorney was cited for contempt for making “insulting and disrespectful remarks to the court” and “interject[ing] improper and sarcastic comments during the proceedings.” Some of the conduct discussed by the court included the attorney asking the court, within the hearing of the jury, “Are you permitting the nonsense that is going on in this

¹³ Jan. 11, 2008 email from Mr. Scotto; Jan. 16, 2008: Tr. 1085-86.

courtroom?"; interrupting the prosecutor's examination of a witness to declare that the proceedings were a "farce";¹⁴ engaging in improper examination of a witness; characterizing another witness who had a criminal record as "the scum of the earth," saying that the prosecutor was "as bad as he is," and concluding the examination by saying, "I think I have to throw up."¹⁵ The Appellate Division explained that the attorney's conduct was "grossly disrespectful to the court and a violation of accepted and proper courtroom decorum . . . [and] intolerable, for it destroys confidence in the fairness of judicial rulings and judgments and perverts the trial procedure as a serious search for truth." *See also Matter of Heller*, 9 A.D.3d 221 (1st Dep't 2004) (finding that attorney who refused to abide by court's instruction to remain seated during trial, shouted at the judge, referred to a matter previously ruled inadmissible, was disruptive, offensive, and intimidating during pretrial examinations, used foul language, showed "seething anger" in disagreeing with and defying the court's rulings, engaged in undignified and discourteous conduct degrading to a tribunal, failed to adhere to repeated rulings regarding his conduct, used harassing tactics against a *pro se* party, among other conduct, and conducted a defense and delayed trial merely to harass another, was guilty of professional misconduct).

In *Heller*, an attorney was faulted for engaging in "an 'ingrained pattern of angry, offensive and obstructionist behavior.'" *Id.* at 226 (citing the disciplinary hearing panel). The court noted the attorney's "perverse and persistent refusal to accept adverse rulings," his "persistent rationalizations in denial of his misconduct," and "the lack of remorse or acknowledgment by [the attorney] that his conduct was harmful and inappropriate." *Id.* at 226, 228. The court also noted his "utter contempt for the judicial system," "consistent, reprehensible, unprofessional behavior, which has included screaming at . . . and disparaging judges [and] adversaries . . . , intentionally defying court rulings, and disrupting and thwarting proper legal process through . . . verbal aggression." *Id.* at 228.

¹⁴ Arguing against sanctions on January 16, 2008, Mr. Scotto stated, "I think this whole case is an injustice" (Tr. 1092).

¹⁵ Mr. Scotto complained that I should not ask questions of Mr. Muallem about what topics he had left to prove, because, in Mr. Scotto's view, Mr. Muallem would then mold his questions to replicate those I might pose (though I had not identified any), and claim them as his own. Said Mr. Scotto: If I may, Judge, please don't say it because you know what he's going to say? That's exactly my next question and I get, like, nauseous" (Apr. 16, 2008: Tr. 2740).

The principal excuse Mr. Scotto tenders now -- “I would submit, most respectfully, that the reason for some of my actions was that *I just forgot it is Court*” (Response at 4, emphasis supplied) -- not only contradicts the irrefutable record, wherein he was repeatedly warned to control his behavior and conform his conduct to that required by OATH’s rules of practice and generally accepted rules of civility, but is also in and of itself disrespectful to the tribunal. It is yet another manifestation, the hollow protestations of “respect” notwithstanding, of Mr. Scotto’s contempt for this tribunal. Mr. Scotto wrote that every act of his that was cited in the Order to Show Cause was a “reflex,” and “perhaps negligent never intentional,” and that he “forgot” where he was because there was no jury and the rules were unfamiliar to him (Response at 4-5).¹⁶ OATH trials follow traditional trial sequence: opening statements, each party’s direct case with cross-examination by the other party, and closing arguments. 48 RCNY § 1-46. Its administrative law judges wear judicial robes while presiding over the trials with the same decorum as is found in the courts. There was no occasion for confusion about where Mr. Scotto

¹⁶ In addition, Mr. Scotto complains that he acted as he did because he found the tribunal unusual. He writes in his Response that I found it “contemptuous” that he asked that a record be made of the pre-trial discovery conference held November 1, 2007 (Response at 2). There is no basis for this assertion. There was an extensive history of calls and email and other correspondence among counsel and the judge that led to the set-up of the pre-trial conference. OATH discovery conferences are not necessarily conducted on the record. In fact, I asked Mr. Scotto to draft the pre-trial order that I would sign setting forth the orders that I made in the conference. He refused to do so, and I made a comprehensive record of the conference when I issued my order of November 2, 2007. Having refused to draft such an order, Mr. Scotto then sent to Mr. Muallem and me a competing proposed order three days after my order had been signed and issued, because he took issue with my rulings. I issued another pre-trial order on November 7, 2007, specifically finding the competing proposed order duplicative and unnecessary and addressing the rulings as to which Mr. Scotto sought reconsideration. OATH practice in holding informal pre-trial conferences is not unusual. Our rules provide that the decision whether to transcribe matters other than the hearing, which must be transcribed, rests in the discretion of the administrative law judge. 48 RCNY § 1-51 (Lexis 2008). The practice of holding informal conferences to resolve pre-trial discovery issues without requiring a formal record, to obviate wasteful motion practice, is not uncommon in the courts in civil cases. Moreover, Mr. Scotto defends himself on the frivolous basis that I did not settle the case, stating that he has “never been in a Courtroom where the judge actually hearing testimony could not make some attempt to settle the case” (Response at 2). In fact, Judge Tynia D. Richard conducted two settlement conferences in this matter, first on August 8, 2007, and again on November 20, 2007, and put in additional effort beyond those meetings at OATH by considering written submissions from counsel concerning settlement and speaking with them by telephone. There are no jury trials at OATH. Under OATH rules, the functions of trial judge and settlement judge are separate, to encourage settlements, such that the settlement conference judge, who may hear the candid positions of both sides and be privy to settlement offers that are not admissible at trial, does not, by rule, serve as the trial judge. 48 RCNY § 1-31. Neither is this practice unusual. There is certainly nothing in this argument that excuses Mr. Scotto’s rudeness throughout the proceedings or that justifies his “forgetting” that he was in a tribunal. That Mr. Scotto sometimes found the hearing rooms too hot or too cold or too small, or that OATH has microphones for electronic recording and transcription of hearings that memorialized his rude, intemperate, and profane remarks (Response at 5-6) -- although the facility is rather pleasant and modern, with hearing rooms specifically designed and more than adequate to accommodate the trial work in this and other matters referred here by numerous City agencies for hearings -- provides no justification for Mr. Scotto’s misbehavior of record.

believed he was appearing for fourteen trial days, or what behavior was required of him. The repeated warnings and admonitions that he invited during the trial should have been unnecessary, but are a matter of record. That Mr. Scotto expresses no real remorse, and instead offers, in essence, that “he forgot where he was,” is tantamount to saying that he was fully justified in treating these proceedings as a free-for-all, because, he says, OATH is not a court. Under Mr. Scotto’s reasoning, attorneys could be as rude and unruly as they pleased in administrative trials, with impunity, so long as they felt they were right on the merits and the judge was wrong. This defense is itself demeaning and must be rejected entirely.

In addition, Mr. Scotto defends his conduct as simply the outward manifestation of his frustration that “hours [were] spent on ministerial details that really ha[d] no relevance to the testimony in the case including: subpoenas, witnesses, picking dates” and “every administrative task became a project” (Response at 4-5). Contrary to Mr. Scotto’s unsupportable claim that administrative tasks took inordinate amounts of time for reasons beyond his control, time lost during the trial was more often than not a direct result of Mr. Scotto’s deliberate misbehavior and abuse of process. For example, on March 6, 2008, I signed a subpoena, at Mr. Scotto’s request, for the principal of the respondent’s school, Mr. Fred Tudda, to appear at the trial as a witness the following day, March 7th at 10:00 a.m.¹⁷ Mr. Scotto, in my presence, changed the time on the subpoena after I had signed it, to 2:00 p.m., and Mr. Muallem gave him the fax number on the record so that Mr. Scotto could fax that subpoena to the principal during the lunch break on March 6th. Mr. Tudda had a problem with 2:00 p.m. due to his childcare needs, and counsel agreed to go back to 10:00 a.m. In accordance with my pre-trial orders that counsel cooperate to keep witnesses on telephone notice to minimize unnecessary waiting time for them, Mr. Muallem kept Mr. Tudda on alert to be ready to appear at that time. Mr. Scotto’s office had also called the principal on the phone on March 5th and told him to appear at 10:00 a.m. on March 7th, and Mr. Tudda had to make arrangements at work for that appearance. But Mr. Scotto never served this second subpoena, then decided that he no longer wanted Mr. Tudda for the appointed date and time on March 7th, and announced that he would call Mr. Tudda to testify another day. Extended colloquy with counsel on the record revealed that Mr. Scotto was having an unusual

¹⁷ I wrote on the subpoena that the time was subject to a confirmation by phone from “Victor Muallem, Esq.,” because Mr. Scotto had complained that Mr. Tudda had been discourteous to him and would not take his calls.

problem scheduling the testimony of Principal Tudda. Although he should have been able to follow my pre-trial orders to make the necessary arrangements with his witnesses between court appearances without judicial intervention, I deemed it necessary to hold a conference call from the tribunal, during the hearing, with both counsel present on the record, to Mr. Tudda to arrange for his scheduled appearance at trial on March 27, 2008, which was at that time the last scheduled trial date. Mr. Scotto said on March 6th that he would be “very shocked” if the trial were not completed on March 27th (Tr. 1925). I released the principal from appearing on March 7th and directed him to make arrangements at work to appear at the trial on March 27, 2008, at 9:30 a.m. My scheduling order was specific and clear. I directed Mr. Tudda’s appearance at the request of Mr. Scotto, for what was then the only other date to complete the hearing, as there was not much leeway in the schedule. The whole purpose of the exercise was to supervise the problem counsel were having agreeing about this witness’ schedule, particularly because Mr. Scotto had made it clear on the record that he did not care at all about Mr. Tudda’s convenience.

I told Mr. Tudda that he should expect to appear on March 27th at 9:30 a.m. unless he heard from Mr. Muallem by phone that there was a change, not Mr. Scotto, who claimed that he could not get Mr. Tudda to return his calls, even though it was clear that someone from Mr. Scotto’s office had indeed spoken by phone with Mr. Tudda on March 5th about the schedule for March 7th. I would not have taken the time and trouble to set the schedule on the record if Mr. Scotto were then free to decide unilaterally that he would not call Mr. Tudda at the time the tribunal had set, and instead call a different witness, at the *same time* previously given by the judge on the record to the principal. Nonetheless, Mr. Scotto either disregarded or countermanded my order. It appears from the record that Mr. Scotto already knew during the scheduling conference call that he had already made arrangements with another witness for that time, and while he should have spoken up about the impending scheduling conflict, he did not. The reason for this was to become clear on the record: Mr. Scotto was incensed about the way he felt the principal had treated him when he visited the school to interview witnesses in the fall of 2007;¹⁸ thus, he had no regard for Mr. Tudda’s convenience when it came to scheduling Mr.

¹⁸ Upon Mr. Scotto’s request in a conference call held September 25, 2007, to have an opportunity to interview school employees who might be witnesses should they agree to speak to him, I ordered in the pre-trial phase of this matter that the Department schedule times for Mr. Scotto to visit the school in the fall of 2007, so that employees who wished to cooperate with him had an opportunity to do so. *See* Memorandum Decision Nov. 2, 2007. Mr.

footnote continued. . .

Tudda's testimony. It appeared that Mr. Scotto, despite his subsequent denials (once I articulated my concern that his last-minute scheduling change might have been spiteful), was purposely trying to inconvenience Mr. Tudda and waste the tribunal's time. Indeed, Mr. Scotto ultimately did not even call Mr. Tudda as a witness, confirming the import of Mr. Scotto's own statements on the record, as detailed below, which tended to show that his requests to have Mr. Tudda rearrange his schedule in answer to subpoenae multiple times were a sham and an abuse of the lawful subpoena process.

On March 6, 2008, Mr. Scotto argued on the record that Mr. Tudda had not given him any consideration and was discourteous to him when Mr. Scotto had visited the school, and, therefore, declared: "I don't really care . . . Who cares what Mr. T[udda] thinks. Who cares?" about Mr. Tudda's convenience . . . "I don't care" about Mr. Tudda (Tr. 1830, 1834, 1839). This tirade raised a serious concern, given that Mr. Scotto, contemptuously, in my presence, crumpled up and threw into the garbage this second subpoena I had signed at his request to compel Mr. Tudda's attendance at the trial, that Mr. Scotto was seeking to inconvenience Mr. Tudda in retaliation for the way Mr. Scotto said Mr. Tudda had inconvenienced him when scheduling Mr. Scotto's visits to the school during pre-trial discovery.¹⁹

Mr. Scotto's disdain for the lawful process issued by the court, its subpoena, and its orders, emerged dramatically when he treated the subpoena I signed at his request as garbage and threw it in the trash bin in the hearing room in my presence, with a flourish. This episode unfolded as follows. On March 6th, 2008, Mr. Scotto handed the subpoena I had signed for Mr. Tudda's attendance to Mr. Muallem, saying "Yeah, send this to your boyfriend He's your

Scotto had complained during discovery that he was having trouble making arrangements with the school where Mr. Tudda is the principal to appear there to interview school personnel as potential witnesses in preparation for trial, and was not getting the reception he desired. He reported resistance by Mr. Tudda to his visit. The matter was resolved by my pretrial orders of September 25, October 9 and November 2, 2007, on a number of subjects, including a requirement that counsel exchange letters setting forth the names of the school employees Mr. Scotto wished to see, and that the plans and arrangements for Mr. Scotto's visit be set forth in writing by counsel to Mr. Tudda. I adjourned the start of the trial by email order of October 9, 2007, on Mr. Scotto's request, without objection from Mr. Muallem, to accommodate Mr. Scotto's stated need to return to the school to complete his pre-trial work, Mr. Scotto's vacation plans, and his engagement in other matters in court October 2007.

¹⁹ I make no finding that Mr. Tudda was in fact discourteous to Mr. Scotto. I have before me only Mr. Scotto's assertions about his treatment at the school.

boy,²⁰ you call him” (Tr. 1847; 4:36:12-4:36:49). Mr. Muallem took exception and insisted that Mr. Scotto himself fax the subpoena to Mr. Tudda. Mr. Scotto then contemptuously, in my presence, crumpled up and threw this second subpoena, which I had signed at his request to compel the principal’s attendance at the trial, into the garbage. I notified counsel on March 7th that I regarded the whole business of Mr. Scotto’s handling of the subpoena I had signed to compel Mr. Tudda’s attendance at trial and Mr. Scotto’s crumpling it up and throwing it in the trash in open court as a sanctionable event, an “outrageous interchange” (Mar. 7, 2008: Tr. 2035-38; Mar. 6, 2008: Tr. 1829-47; 1923-27; 1996;²¹ 2017-18; 10:15:28-10:19:17;12:10:00-12:10:30; 4:15:43-4:36:49; Mar. 7, 2008: Tr. 2235-2245-A; 4:42:15-4:59:53). Mr. Scotto now only half admits that this reference to Mr. Tudda as Mr. Muallem’s “boyfriend,” “his boy” “*probably* was not proper” (Response at 13) (emphasis supplied). Even now, he will not apologize -- he speaks only in terms of probabilities, and grudgingly, about his rudeness. In his Response, Mr. Scotto seems to find fault with the fact that the subpoena was not served upon Mr. Tudda (Response at 13), but it was his responsibility to have it served upon the witness. Contrary to Mr. Scotto’s claim that the subpoena was “changed and voided,” it was he who wrote on it and changed the times. Mr. Tudda was waiting for the subpoena to be served and wanted it to regulate his time at work (Mar. 6, 2008: Tr. 1829-32). Having put the tribunal to the trouble of preparing multiple subpoenas of this witness during trial time, Mr. Scotto knew this subpoena was to be served, as revised by my scheduling order in open court, and that is why he attempted to hand it to Mr. Muallem, referring sarcastically to Mr. Tudda as Mr. Muallem’s “boyfriend.” The subpoena was in full force and Mr. Scotto destroyed it in a show of scorn for both Mr. Muallem and Mr. Tudda, and disrespect directed to the judge in her presence. This was contemptuous.

At the end of the day on March 7, 2008, when I asked for confirmation of the final witnesses he would call for March 27, 2008, Mr. Scotto recited the names of a number of witnesses, but he did not mention Mr. Tudda. Mr. Scotto stated that he would not call Mr. Tudda on March 27th at 9:30 a.m., despite my directions to Mr. Tudda on the record in open court, and

²⁰ The typed record has the word “client” here. The audio record has the word “boy,” the actual statement made by Mr. Scotto.

²¹ The transcription for March 6, 2008, is out of order; the morning’s testimony begins at page 1923, and picks up after the lunch break at the starting page, 1829.

instead intended to call another witness at that time, Mr. Stephen Khadaroo. Asked why he had failed to raise any conflict in the schedule between Mr. Tudda and any other witness at the relevant time during the on-the-record phone call with the principal the day before (March 6th), when Mr. Scotto had participated in this scheduling call in open court and on the record, during a discussion of the principal's need to make arrangements for coverage at the school during his absence, Mr. Scotto declined or refused to answer my questions. I asked why he wanted to change the date and time I had given to the principal and when exactly Mr. Scotto had made his arrangements with this other witness in comparison to the time of the conference call with the principal. After more questioning, Mr. Scotto stated vaguely that he knew about Mr. Khadaroo's schedule "this week" (Mar. 7, 2008: Tr. 2239), implying some time between the preceding Monday, March 3rd, and March 6th, which was a Thursday, although he did not or would not give the actual date and refused to answer my question specifically. The conference call with Mr. Tudda was held in the latter part of the week, yet Mr. Scotto was mum about the impending scheduling conflict while I gave Mr. Tudda a time Mr. Scotto apparently had promised to Mr. Khadaroo. Mr. Scotto was duty-bound to explain why he had sat silent during the conference call if he planned to alter the time I had given to the principal. Even assuming that the schedule was subject to change, on notice to Mr. Tudda by Mr. Muallem and under my supervision, such a change was not in the discretion of Mr. Scotto, who had repeatedly made statements that he did not care about Mr. Tudda's convenience. Mr. Scotto was not free simply to change the line-up of witnesses on his own, after my formal directive to the principal had been made. I noted the tribunal's obligation to consider the convenience of all witnesses, be they school principal or school cook (who, as a matter of fact, testified here). Based upon Mr. Scotto's own declarations on the record, I find that Mr. Scotto's late-starting change in the witness line-up was not unexpected, but rather was planned, deliberately or spitefully, expressly to cause maximum inconvenience to Mr. Tudda, and without appropriate regard for the tribunal, its efforts to bring order to this trial, its rules of practice and its lawful process.

During this colloquy, Mr. Scotto engaged in a nearly 20-minute, loud and antagonistic challenge to the tribunal's authority to set the trial sequence and order a particular witness to be taken in the order and at the time previously given to that witness by the court in consultation with both counsel, on the record and pursuant to subpoena. Mr. Scotto had theatrically destroyed the subpoena I signed at his request and asked for another one indicating a different time from

the one that had been set on the record for Mr. Tudda's testimony. I stated that I could order the enforcement of my directive to Mr. Tudda to appear at 9:30 a.m. on March 27th. Mr. Scotto replied: "I object. I'm not doing that, Your Honor . . . I don't think you have that power -- Where does it say you have that power? . . . I'm not accommodating Mr. Tudda No, I'm not doing it" (Tr. 2235-45). I did not, however, preclude Mr. Scotto from calling Mr. Tudda or any other witness, despite Mr. Scotto's repeated requests that I say he was precluded. He was never precluded from calling the witnesses of his choice. Rather, I asked Mr. Scotto to explain why he wanted a change in the time I had taken the trouble to set for that witness on the record with the witness on the phone. Asked why he had not mentioned that he had arranged for another witness, Mr. Khadaroo, to come at the same time I had given to Mr. Tudda while Mr. Scotto was on the conference call in open court with Mr. Muallem and me on the record, Mr. Scotto replied, glibly, "You didn't ask me" (Tr. 2242). I cited 48 RCNY section 1-46(a), which gives OATH judges the authority to alter the trial sequence and consider the convenience of the witnesses, the parties, the attorneys or OATH, "where substantial prejudice will not result." After weighing the convenience of all concerned, I ultimately granted Mr. Scotto's new request to change the roster, due to the newly raised child care needs of a different witness, Mr. Khadaroo.

In the end, the trial was to take three additional days after March 27th. After it became clear that the trial was not going to be completed on March 27, 2008, I signed yet a third subpoena for Mr. Tudda to appear on April 16, 2008. Mr. Scotto, however, never called the school principal as a witness and the whole series of issues he raised about scheduling the principal's testimony and requesting multiple subpoenas appeared to be less related to a genuine need to call Mr. Tudda as a trial witness than to Mr. Scotto's admission that he did not care about Mr. Tudda's convenience ("I'm not accommodating Mr. Tudda," Tr. 2237; 2245-A) because the principal had been, in his view, "totally disrespectful, hostile and indignant" to him; Mr. Scotto said he would change his schedule only for those witnesses he deemed to "have been respectful" to him (Tr. 2245-A).

Another example of delay attributable to Mr. Scotto revolved around an outburst by him about the form of his opponent's questions on recross-examination of Mr. Brust, leading to a belligerent, continuing 10-page, contemptuous episode of yelling at the tribunal about basic examination, arguing about civility, and even scheduling the day (May 2, 2008: Tr. 2848-58;

12:27:49-12:38:22). During this disruption, Mr. Scotto objected repeatedly to Mr. Muallem's prefacing a cross-examination question with the phrase "It's a simple question" (Tr. 2851-52). But Mr. Scotto himself had used that very same locution in questioning a different witness, Mr. Nagy, on *voir dire* earlier in the trial (Dec. 6, 2007: Tr. 91). Mr. Scotto also spent a great deal of the tribunal's time complaining that Mr. Muallem used the word "demand," after Mr. Muallem had said he was demanding an answer from respondent, Mr. Brust, who was evading a question. Although I permitted Mr. Muallem's terminology, on the basis that the word "demand" can be used properly in a formalistic, legal sense in court to mean that an attorney was calling for and insisting upon having an answer to which he is entitled and there was nothing impolite about the usage, Mr. Scotto, nonetheless, carried on at length and argued with the ruling, interrupted the examination and talked over me, adding the exclamation "God," in response to my telling him to subside. He used that expression to show his contempt for the tribunal and others more than once during the hearing. I stated: "I made orders in this case that no judge should ever have to make about civility, about tone. Do not say a word. You just dig yourself in deeper. Just stop it. It's willful conduct and you'll have a chance to --." Mr. Scotto then interrupted me to say: "You're wrong." He interrupted again to repeat the remark, cutting me off from saying that he would have a chance to be heard on whether sanctions should be imposed upon him and to address the issue of willfulness (May 2, 2008: Tr. 2800, 2855, 2852-58).

In addition to these delays that Mr. Scotto injected repeatedly into the proceedings during the course of this trial, Mr. Scotto took on a new and unrelated criminal matter in Supreme Court. On January 29, 2008, on short notice, Mr. Scotto alerted the tribunal that a court date had been set for this newly accepted child pornography matter (Tr. 1321), which interfered with this previously scheduled, continuing trial then set to resume expeditiously on February 1, 2008 -- this, after Mr. Scotto complained at length that the instant case was very upsetting, emotionally, to his client, who needed a resolution (January 11, 2008 email from Mr. Scotto). The new criminal matter was not a prior engagement of his. He simply announced that he would not subordinate his new court matter to this, prior one. I adjourned the scheduled February 1, 2008 trial date until February 12, 2008, because Mr. Scotto had acted in such a way that he came under intervening orders of an Acting Supreme Court Justice to conduct his newly accepted criminal matter. The consequent delay of his client's trial here was chargeable to Mr. Scotto alone (Jan. 29, 2008: Tr. 1320-28; ALJ Ex. 6). Mr. Scotto's defense that "he delayed the Court

that one day” is simply a denial of the facts (Response at 11). His delay put the trial back 11 days. I noted on the record the “burdens on people and every time we do this the witnesses who have been on standby are sent away, and it’s part of the delay problem that we’ve [had]” (Jan. 29, 2009: Tr. 1326).

Sanctions are warranted here. “Offensive or abusive language by attorneys is not proper professional conduct. . . . An attorney who exhibits a lack of civility, good manners and common courtesy tarnishes the image of the legal profession. . . .” *Principe v. Assay Partners*, 154 Misc. 2d 702, 704 (Sup. Ct. N.Y. Co. 1992) (sanctioning attorney for using rude, condescending, and degrading language directed at a female colleague) (male attorney repeatedly belittled opposing counsel as a “little girl,” “that little mouse over there,” who should “pipe down,” with comments like “What do you know, young girl,” “Be quiet, little girl,” and “Go away, little girl”). The objectionable conduct here “falls within well-established categories of sanctionable misconduct,” and viewed in context, cannot be excused as “a single comment which could have been uttered spontaneously without reflection,” *id.* at 707, because the conduct was repeated in the face of numerous warnings on the record to stop. In *Principe*, the court identified categories of behavior that have warranted sanctions, and these recognized types of misconduct are manifest on the record of the instant case, but in a more relentless display, “a paradigm of rudeness”: condescension to another attorney; disparaging an opponent; offensive and abusive language or conduct; obstructionist tactics, and conduct “well outside the norms of accepted practice” or conduct. The courts consider the circumstances of the behavior under an “objectively reasonable” standard measuring the conduct against that of a “reasonable attorney.” The court stated that sanctions sought by the law firm whose associate took the brunt of the insults did not “display . . . an inability to overlook obnoxious conduct, but,” rather, showed “a commitment to basic concepts of justice and respect for the mores of the profession of law.” *Id.* at 704-710. It is clear that the persistent conduct of Mr. Scotto was not reasonable and fell below the norms of the profession. The federal courts have frowned upon such abusive tactics and have imposed sanctions for them. *See generally Leiching v. CONRAIL*, 1997 U.S. Dist. LEXIS 3561 (N.D.N.Y. 1997), *adopting Report and Recommendation of Magistrate Judge*, 1996 U.S. Dist. LEXIS 20796 (N.D.N.Y. 1996) (\$2,500 sanction assessed against counsel for “improper,” “petty,” “abusive,” “vexatious,” “unreasonable,” “intransigent,” conduct lacking in “good faith” and “civility,” excessive and frivolous objections and improper instructions to witnesses during

depositions done for purposes of delay or harassment; and baseless accusations of unethical conduct directed at opposing counsel; Magistrate Judge, who had warned counsel to desist and that sanctions could result, noted the court's inherent power to sanction counsel for acting "in bad faith, vexatiously, wantonly, or for oppressive reasons") (citation omitted). I find that "the atmosphere of incivility" generated by Mr. Scotto "consumed not only excessive amounts of the Court's time but also worked to the disadvantage of both plaintiff and defendant by imposing unnecessary costs and delay," and "is totally attributable to defense counsel." *Id.* at *6-7 (referring to the \$2,500 sanction as a "relatively minimal" one imposed in service to the cause of civility among members of the Bar).

In *Matter of Hayes*, 7 A.D.3d 108 (1st Dep't 2004), the Departmental Disciplinary Committee for the First Department sanctioned an attorney for making insolent and disrespectful remarks to a court and its clerk, after receiving an unfavorable ruling. Likewise, comments that are intended to disparage opposing counsel also degrade the tribunal. *See In re Kavanagh*, 189 A.D.2d 521, 523 (1st Dep't 1993) (censuring attorney who made insulting and unsupported allegations in court papers that his opposing counsel had ties to organized crime, because the statements "constituted insulting slurs of the most fundamental sort and were clearly degrading to the court to which they were presented in the guise of proper argument"). Mr. Scotto's attacks on opposing counsel were improper the first time they occurred. His refusal to conform his behavior to the basic norms of civility and to the tribunal's orders, and his continued attacks in the face of repeated admonitions to stop were not only insults against Mr. Muallem; they were also directed at the tribunal. Mr. Scotto repeatedly debased the proceedings with contempt for the administrative process and the authority of the tribunal. Mr. Scotto's Response contains the most perfunctory apology, one that cannot be accepted as sincere.

Rather than acknowledging that his comments were deeply inappropriate, Mr. Scotto seeks to shift blame to one of the victims of his attacks (opposing counsel) and to the tribunal. The Response is plainly insufficient to convince the tribunal that he should not be sanctioned. *See Hester v. Sendlebach*, 2005 N.Y. Misc. Lexis 3370, at *1-*3 (Sup. Ct. Nassau Co. 2005) (awarding a monetary sanction against an attorney who was "unprofessional, condescending, rude, insulting, and obstructive" during deposition, and rejecting the attorney's attempt to excuse his behavior by criticizing his opponent's ability to pose a question as "no excuse at all"; his "rude and sarcastic tone was unprofessional;" his complaint that deposition dragged on was

“largely due to his constant interruption, harangues and gratuitous comments circumventing and obstructing the proceeding”). Like the attorney in *Hester*, Mr. Scotto criticized his opponent’s questions, mocked his adversary, took over the questioning, suggested answers to his client and other witnesses, and made improper objections during the adversary’s examination of witnesses. *Id.* at *2-3. The court in *Hester* found that the attorney’s zeal in protecting his client “crossed the line into obstructionism and unprofessional behavior.” *Id.* at *3.

Sanctions have been awarded for conduct similar to Mr. Scotto’s here. See *Candolfi v. NYC Transit Auth.*, 156 Misc. 2d 964 (Civ. Ct. Kings Co. 1992) (steady stream of sarcastic, belligerent, defiant and overbearing words and actions at the court and opposing counsel were an accumulation of abuses despite court’s repeated efforts to subdue them and despite a warning addressed to counsel; counsel made extended, obstreperous argument about the court’s rulings, despite standing objection granted;²² hectorated the court with sarcastic and didactic comments challenging its rulings; and made rude remarks to opposing counsel during trial calling her stupid). The court in *Candolfi* aptly held: “The conclusion is inescapable that such actions by counsel have no place in an American trial. The search for truth based on evidence simply cannot proceed when the court’s authority is challenged and defied at every turn, abuse is heaped on the court and opposing counsel, adverse rulings are never accepted (even with objections

²² When Mr. Scotto complained about the admission of certain evidence, early on, I gave him a standing objection regarding hearsay on the first day of trial (Dec. 6, 2007: Tr. at 59), but this did not dissuade him from challenging the tribunal’s rulings habitually. For example, on the sixth day of trial, I was discussing scheduling the balance of the trial and asking both counsel for an estimate of how many more days they believed they needed to complete the trial, which was going very slowly with all the disruptions by Mr. Scotto. Mr. Scotto expressed reluctance to provide an estimate, and took the opportunity to blame Mr. Muallem and the evidentiary rulings for the delay, but took no responsibility for his own misconduct. Instead, he belligerently challenged the rulings again (Jan. 29, 2008: 06:47:38 to 06:51:31; Tr. 1331-36 and surrounding pages), and yet again in his Response to the Order to Show Cause concerning sanctions. Similarly, Mr. Scotto’s assertion that I adjourned the matter “anytime” Mr. Muallem said he had a hearing “without any introspection or questioning by the Court” (Response at 11) is demonstrably untrue. For example, after considering Mr. Scotto’s written opposition, I denied Mr. Muallem’s application via email January 10, 2008, when Mr. Muallem wrote, citing his discovery obligations in another matter, to adjourn the continued trial dates of January 15 and 16, 2008. Mr. Scotto wrote on January 11, 2008, that his client had “been precluded from doing the job he loves and his current placement and the protracted nature of these proceedings are causing him severe distress.” I denied Mr. Muallem’s adjournment request by email on January 12, 2008, as follows: “Adjournments may be granted only for good cause under rule 1-32 of OATH’s rules. We are in the midst of trial in this matter, which has been continued already for several weeks due to the intervening holidays and attorneys’ schedules, and the reason offered for an adjournment at this juncture does not constitute good cause. I cannot adjourn this trial over the objection of the respondent, because of expedited, pre-trial discovery obligations of the Department in another matter. Accordingly, the application must be, and is, denied.” Thus, Mr. Scotto’s claim that “[d]ates were stricken in deference to Mr. Muallem at anytime for any reason that he gave. There was no questioning by the Court,” (Response at 11), is patently false.

preserved) and the court's dignity and decorum are continually undercut. Such behavior can have no purpose except to harass and maliciously injure the court and opposing counsel. They aim at nothing less than a victory of unbridled egotism and arrogance over the judicial process and the rule of law." 156 Misc. 2d at 969.²³

Mr. Scotto's Response is also remarkable in that he defends his conduct as typical courtroom colloquy that he did "not think would violate any Court rules" (Response at 12). He contends, in effect, that "Everybody does it" -- that what he did is supposedly in keeping with what he describes as rampant incivility he observes among attorneys practicing in the courts: "I must say that in my experience, in both State and Federal Court, I have seen during breaks and after Court during discussions about subpoenas and other things, lawyers use profanities, lawyers almost come to blows unless separated and say things which are totally uncivil. If the Court thinks I did things that were uncivil or discourteous, I do not think that most of them revolved around Courtroom conduct. Those things were objections that I did by reflex" (*Id.*). Mr. Scotto's is a dim view of the legal profession: "Lawyers argue and fight, and, yes, even yell in every Courtroom" (Response at 7). And further: "I have seen Court's [*sic*] ridicule attorney's [*sic*] in front of clients in a most uncivil fashion. I have seen the reverse with attorney's [*sic*] demeaning Courts in response" (Response at 18). For Mr. Scotto, this apparently is business as usual, but it is not the kind of attorney conduct that ought to be enshrined as the exemplar for the legal profession. Nor are Mr. Scotto's anecdotal observations elsewhere any defense to what he did here.

This astonishing defense is unacceptable and untenable. It does call to mind, however, a notorious comment and misbehavior by an attorney whose conduct was the subject of criticism by the New York State Supreme Court in *Laddcap Value Partners, LP v. Lowenstein Sandler*

²³ Even a *pro se* prisoner who brought suit and opposed discovery requests of the government and who sent a letter to an Assistant Corporation Counsel that contained "highly offensive language, threats and vulgarity," directed to the city attorney, was ordered by a federal Magistrate Judge to adhere to a high standard of civility, whether the prisoner secured counsel or not: "Plaintiff must proceed with civility and respect throughout the course of this litigation. Plaintiff must not direct any threatening or vulgar language toward [the Assistant Corporation Counsel] or any other person involved in this lawsuit." *Munoz v. Martinez*, Slip Op., 03 Civ. 828 (LAK) (DFE), 2004 U.S. Dist. Lexis 3291. at *3, *5 (S.D.N.Y. 2004). *A fortiori*, here, Mr. Scotto, an attorney practicing law for 37 years in the courts is held to an even higher standard of civility in dealing with opposing counsel. As noted in *Principe*, "Given the rules applicable to professional conduct, any reasonable attorney must be held to be well aware of the need for civility, to avoid abusive and discriminatory conduct, to conduct proper depositions, to eschew obstructionist tactics, and to generally abide by the norms of accepted practice." 154 Misc. 2d at 708.

P.C., 18 Misc. 3d 1130A., 2007 NY Slip Op. 52538U (Sup. Ct. N.Y. Co. 2007). In that case an attorney was contumacious, abusive and strident during a deposition and the court ordered that further depositions be held in the courthouse under the supervision of a Court-appointed referee. The court's opinion began with a quote from the attorney who had been abusive to opposing counsel in a pre-trial deposition. This attorney made numerous speaking objections, interjecting and suggesting answers before his client could answer some of the questions, followed by inappropriate, insulting and derogatory remarks against opposing counsel concerning, *inter alia*, her competence, as did Mr. Scotto here towards Mr. Muallem. In the instant case, the speaking objections were so disruptive that I ordered both counsel to stop making them. The attorney in *Laddcap*, in defense of his conduct on the motion to appoint a referee to supervise the depositions, told the court that he was "not aware of any rule or law which requires civility between counsel." *Id.* at *1-*2. Mr. Scotto's Response is along the same breathstopping lines when he argues that this incivility by attorneys is to be expected and goes unregulated in our courts. This flimsy excuse is unacceptable and I decline to endorse an approach that glorifies uncivil behavior and sinks the practice of law in the trial courts to the lowest conceivable level. Objections are not supposed to cause constant interruption and delay, *id.* at *6, and Mr. Scotto often used speaking objections to interfere with Mr. Muallem's legitimate questions. "Offensive and abusive language by attorneys in the guise of zealous advocacy is plainly improper, unprofessional, and unacceptable." *Id.* at *7. "An attorney who demonstrates a lack of civility, good manners and common courtesy taint[s] the image of the legal profession, and, consequently, the legal system, which was created and designed to resolve differences and disputes in a civil manner. . . ." *Id.* at *8. The court found that the attorney's objectionable conduct merited sanctions, and granted the only relief sought, court supervision of further proceedings.

There is ample precedent for sanctions in this case. *See, e.g., Sholes v. Meagher*, N.Y. Slip Op., Index No. 6016/96 (Sup. Ct. Suffolk Co. July 27, 2001), *appeal dismissed*, 295 A.D.2d 593 (2d Dep't 2002), *aff'd on procedural grounds*, 100 N.Y.2d 333 (2003) (noting the importance of civility and decorum in court, and that an attorney is not relieved of obligations to avoid disorder and disruption in the courtroom in reaction to what the attorney may regard as a deficiency in an evidentiary or other ruling or in the judicial system; attorney must not express displeasure with rulings by various facial expressions, particularly after being admonished by the

judge to stop this; court refused to accept counsel's defense that her displays were "spontaneous" and unintentional and rejected as "revisionist history" counsel's repeated apologies followed by the same, repeated misbehavior; court noted seemingly continual and deliberate effort to divert attention from the issues to be determined; form of hearing on sanctions was affidavits from attorneys after court raised the issue of sanctions *sua sponte*); *Corsini v. U-Haul Int'l, Inc.*, 212 A.D.2d 288 (1st Dep't 1995), *leave to appeal denied*, 87 N.Y.2d 964 (1996) (sanction of dismissal imposed against attorney plaintiff representing himself for obstreperous and antagonistic behavior, including gratuitous verbal attacks on opposing counsel, at deposition; extreme incivility by an attorney to an adversary warrants severe sanction; no excuse found for seasoned practitioner whose behavior was outrageous); *Mink v. Conifer Park, Inc.*, 142 A.D.2d 899 (3d Dep't 1988) (attorney sanctioned for ignoring court rulings, disruptive tactics, use of coarse "gutter language" and insults in addressing opposing counsel, and constant, meritless interruptions); *Carpenter v. Browning-Ferris Industries, Inc.*, 262 A.D.2d 999 (4th Dep't 1999) (total breakdown in civility and professional decorum between attorneys is grounds for sanctions); *Mierek v. New York State Div. of Human Rights*, Slip Op., Index No. 96-CV-296 (FJS/DRH), 1996 U.S. Dist. LEXIS 17266 at *7 (N.D.N.Y. May 28, 1996) ("appalling lack of civility by counsel" during litigation is grounds for sanctions on the court's own initiative).

Moreover, Mr. Scotto's conduct went beyond disruption and disrespect for the tribunal and for his adversary. Mr. Scotto engaged in improper trial tactics throughout the 14-day trial, although he was repeatedly warned that, if he continued, sanctions could be the result. Despite being admonished by the tribunal, he time and again asked leading questions on direct in order to telegraph responses to his witness (Mar. 27, 2008: Tr. 2249; May 2, 2008: 2799-2802). Additionally, Mr. Scotto at times answered questions opposing counsel asked of witnesses before the witnesses could themselves answer (Apr. 16, 2008: Tr. 2696-98; 04:40:09-04:42:29). On one occasion during redirect of his client, Mr. Scotto told respondent that he had previously testified on cross-examination that he saw a community leader twice a week in school, although this factual point was very much in controversy, as it related to that particular witness's ability to observe whether respondent was ever intoxicated at school. This point was not, as announced in Mr. Scotto's question, part of respondent's testimony on cross. Mr. Scotto began yelling at the court, disagreeing with the ruling sustaining the objection to these questions (May 2, 2008: Tr. 2819-22; 11:26:31-11:29:23).

In a similar vein, Mr. Scotto made a habit of interrupting Mr. Muallem's examination of witnesses. On one occasion, in order to interrupt opposing counsel's cross-examination, Mr. Scotto rose from his chair, walked over to the witness stand, and poured an obviously unnecessary second cup of water for a witness, who already had a cup of water (Mar. 7, 2008: Tr. 2164-66; 2190-96; 03:46:57-03:49:19).

On April 16, 2008, while Mr. Muallem was cross-examining the respondent, Mr. Scotto asked that Mr. Muallem show respondent a certain document showing the hours his subordinates worked, even though Mr. Muallem's question called for respondent's present recollection of the hours, a key issue concerning the claim that respondent submitted fraudulent time records and overpaid his employees during a particular period of time. It was in the province of the cross-examiner, Mr. Muallem, not Mr. Scotto, to decide when he would or would not show the witness a document. Mr. Scotto's interference was blatant. Mr. Scotto also interjected, "The questions are absurd." This commentary further interfered with the cross-examination, and came after numerous rulings on the record that Mr. Scotto stop interrupting the examination. Mr. Scotto was asked not to do it again. In the course of the colloquy, Mr. Scotto displayed his contempt again, saying, "Oh, Jesus" (Apr. 16, 2008: Tr. 2515-17; 10:28:44-10:31:38). Soon thereafter, Mr. Scotto interrupted cross-examination and screamed about objections during a line of cross-examination about his client's present recollection of whether he had signed a key document related to the fraud claim in the case. Mr. Scotto yelled when asking the court to admonish his client to answer "yes" or "no." I was compelled to say in response to these outbursts, "No yelling There is no occasion for yelling [N]o more histrionics." Mr. Scotto belittled the questions as "ridiculous," even though they went to heart of the matter. (Apr. 16, 2008: Tr. 2530-35; 11:00:00-11:07:15). On the same date, Mr. Scotto yelled and interrupted cross-examination of his client concerning the charge that his client was intoxicated at work and the follow-up about his client's medications, which Mr. Scotto himself brought out on direct testimony (Apr. 16, 2008: Tr. 2585-97; 12:41:58-12:48:27; 12:53:36-1:00:10).

Although Mr. Scotto attributes the protraction of the hearing to Mr. Muallem's cross-examination (Response at 16: "Mr. Muallem examined witnesses for 9 hours on direct and 8 hours on redirect"), it was these habitual, gratuitous interruptions by Mr. Scotto, which continued essentially unabated through 14 days of hearings that resulted in delaying the hearing. Courts have noted that sanctions are useful in "preventing the waste of judicial resources, and deterring

vexatious litigation and dilatory or malicious litigation tactics.” *100 East 21st Street Equities v. Cummings-Sharpe*, 15 Misc. 3d 1132A, 2007 NY Slip Op. 50948U (Civ. Ct. Kings Co. 2007) (sanctioning an attorney and his firm \$2,500, where the attorney, among other things, failed to follow procedural orders issued by the court, and indicated to the court that the court was overreacting to the attorney’s failure to follow the orders, issuing decisions impulsively, and unfairly singling him out). Imposing sanctions would serve a deterrent purpose here.

Again, the examples of Mr. Scotto’s conduct cited previously are only that -- examples. For 14 days, he willfully disobeyed the tribunal’s rules and orders. The tribunal rejects Mr. Scotto’s claim that “almost everything [at issue]. . . was a reflex action” and not planned nor intentional (Response at 22). The sheer volume of the 14-day record proves the contrary. Mr. Scotto was given a multitude of opportunities to modify his conduct but willfully refused. He chose to behave in a way that hampered the proceedings, brought discredit upon himself and mocked the lawful administrative process. For these reasons, I find that sanctions are warranted.

Sanctions Imposed

In determining appropriate sanctions, this tribunal should consider: the retributive and deterrent purposes of sanctions, to prevent future frivolous conduct by an individual attorney and the Bar “at large,” to serve goals including preventing the waste of judicial resources, and deterring vexatious litigation, and dilatory or malicious litigation tactics; Mr. Scotto’s actions in violating rulings despite court-issued warnings to stop; his lack of contrition and concern about the consequences of his conduct; and the fact that Mr. Scotto has a small firm -- when this matter began he used letterhead as a solo practitioner, later adding the name of his sister, an attorney who assisted him throughout the trial. *See Pacheco v. Zenobio*, 23 Misc. 3d 1121A, 2009 NY Slip Op. 50882U, at *5 (Sup. Ct. Kings Co. 2009); *Jones v. Camar Realty Corp.*, 167 A.D.2d 285 (1st Dep’t 1990), *appeal dismissed*, 77 N.Y.2d 939 (1991), *reconsideration denied*, 78 N.Y.2d 909 (1991), *cert. denied sub nom. Hanft v. Camar Realty Corp.*, 502 U.S. 940 (1991); *100 East 21st Street Equities LLC v. Cummings-Sharpe*, 15 Misc. 3d 1132A, 2007 NY Slip Op. 50948U (Civ. Ct. Kings Co. 2007). I note that the tribunal has considered Mr. Scotto’s proposal that in lieu of sanctions he take future OATH cases only after notice to the tribunal, but finds that Mr. Scotto has already demonstrated that his conduct cannot be regulated in the courtroom because he has been unwilling after a multitude of opportunities to conform his conduct to norms

of civility for lawyers. For the reasons stated herein, after full review of the record of this matter, Mr. Scotto's proposal is rejected and, by order of the Chief Administrative Law Judge Roberto Velez, pursuant to 48 RCNY section 1-13(f), Raphael F. Scotto, Esq., is hereby indefinitely suspended from appearing at OATH, until such time as he demonstrates to the satisfaction of the Chief Administrative Law Judge that the basis for such suspension no longer exists.

A sanction is "especially warranted" where, as in this case, the court "clearly advises a vexatious litigant of the baseless nature of the conduct," and where the attorney offers "'no mitigating circumstances or persuasive reasons for forbearance,'" and "apparently . . . has no regrets regarding his handling of th[e] litigation," *Pacheco*, 2009 NY Slip Op. 50882U, at *5-*6 (citing, *inter alia*, *Levy v. Carol Management Corp.*, 260 A.D.2d 27, 34-35 (1st Dep't 1999), and *Jones*, 167 A.D.2d at 286-87)). Mr. Scotto's unacceptable conduct continued essentially unabated over the course of the 14 trial days, after initially being warned during pretrial proceedings that he was required to conform his behavior to the OATH rules and my orders. Initial attempts to deter abusive and improper actions by Mr. Scotto, in the form of relatively small \$25 and \$50 sanctions, proved ineffective. Considering the extraordinary nature of Mr. Scotto's misconduct, his persistence, which I find to have been willful, in treating the tribunal, his adversary and other participants in the proceeding so disrespectfully, and his demonstrable lack of genuine remorse for his conduct as he continues to seek to shift the blame by citing external factors purportedly beyond his control, such as the size of the hearing rooms (Response at 5), which he found too small to contain his aggressive style of advocacy, I find that pursuant to 48 RCNY 1-13(e), a sanction of \$2,500 is appropriate and within the range of relevant precedents. *See Intercontinental Credit Corp. Div. of Pan American Trade Development Corp. v. Roth*, 78 N.Y.2d 306, 308 (1991) (sanction in the amount of \$ 2,500 imposed on attorney whose frivolous conduct delayed proceeding); *Pinto v. Pinto*, 286 A.D.2d 377 (2d Dep't 2001) (imposing \$2,500 sanction for frivolous conduct); *100 East 21st Street Equities LLC v. Cummings-Sharpe*, 15 Misc. 3d 1132A, 2007 NY Slip Op. 50948U (Civ. Ct. Kings Co. 2007) (imposing \$2,500 against firm for engaging in frivolous conduct after failing to rectify the conduct despite being warned by the court and provided with an opportunity to take steps to relent); *Pacheco*, 23 Misc. 3d 1121A, 2009 NY Slip Op. 50882U, at *5-6 (\$2,500 sanctions for attorney's deliberate, frivolous conduct).

The conduct here is more in line with sanctions of \$2,500 than with cases in which lesser amounts were imposed for a single type of incivility in a deposition outside the presence of the court, because here the conduct persisted despite numerous requests by the judge at trial to stop insulting others and there was so much more here, such as deliberate efforts to inconvenience a witness, profanity, delay, obstruction and overt contempt for the tribunal and its lawful process. *Cf. Cioffi v. Habberstad*, 22 Misc. 3d 839 (Sup. Ct. Nassau Co. 2008) (\$1,000 sanction for offensive and unprofessional interruption of deposition witness and rude remarks to adversary; and lesser amount for retort in kind by adversary). In *Dawe v. 20 Beaver Street, LLC*, OATH Index Nos. 237/06 and 335/06, mem. dec. (Oct. 20, 2006),²⁴ this tribunal imposed a \$1,000 sanction against an attorney found to have willfully disobeyed this tribunal's orders setting a trial date, and requiring repleading and production of trial exhibits. It was noted in *Dawe* that monetary sanctions for willful misbehavior by counsel "may well be higher in the future, as the public is now on notice that such conduct will not be tolerated. Those who treat this tribunal as an afterthought whose orders can simply be disregarded with impunity will be subject to appropriate sanctions considered on a case-by-case basis." *Id.* at 21. It was held in *Dawe* that if the attorney who was sanctioned failed timely to pay the fine in full, he would not be permitted to appear at OATH in the matter unless and until he paid it, and he was placed on notice that failure to pay the fine in full would constitute a basis upon which the Chief Administrative Law Judge could suspend him for a specified period of time or indefinitely from appearing at OATH in any matter under section 1-13(f) of our rules. *Id.*

An attorney who, throughout a trial, "conducted himself in a highly unprofessional manner" by belittling the court and who, despite admonitions from the bench, ignored these rulings repeatedly, was sanctioned in the amount of \$3,500 in *Delgaizo v. Campisi*, Index No. 04265/1998, Slip Op. (Sup. Ct. Suffolk Co. Feb. 1, 2001). The court cited the Code of Professional Responsibility, Disciplinary Rule ("DR") 7-106(C)(6), in effect during most of the relevant time here, and restated in the new Rules of Professional Conduct, effective April 1, 2009, 22 NYCRR § 1200.25 [Rule 3.3(f)] (Lexis Apr. 1, 2009), and applicable to the April 15 and 29, 2009 Response letters in this matter. As an attorney appearing before OATH, Mr. Scotto

²⁴ The memorandum decision in *Dawe* was a final decision of this tribunal and not subject to review by the Loft Board, which reversed in part and remanded a related Report and Recommendation on other grounds, in Loft Bd. Order No. 3161 (Feb. 15, 2007). The related litigations settled, obviating any such further proceedings.

was expressly bound by the “canons, ethical considerations and disciplinary rules set forth in the code of professional responsibility” for attorneys “in [his] representation[] of his client[], in [his] dealings with other parties, attorneys and representatives before OATH, and with OATH’s administrative law judges and staff.” 48 RCNY § 1-13(d).

DR 7-106(C)(6) provides: “In appearing as a lawyer before a tribunal,²⁵ a lawyer shall not . . . [e]ngage in undignified or discourteous conduct which is degrading to a tribunal.” 22 NYCRR § 1200.37 (pre-April 2009). The revised rules contain similar provisions: “In appearing as a lawyer before a tribunal, a lawyer shall not: engage in undignified or discourteous conduct . . . ; or engage in conduct intended to disrupt the tribunal.” 22 NYCRR § 1200.25(f) [Rule 3.3(f)(2) and (4)] (Apr. 1, 2009).²⁶ The applicable Ethical Considerations (“EC”) provide in pertinent part:

EC 7-36. Judicial hearings ought to be conducted through dignified and orderly procedures designed to protect the rights of all parties. Although a lawyer has the duty to represent the client zealously,²⁷ the lawyer should not engage in any conduct that offends the dignity and decorum of proceedings. While maintaining independence, a lawyer should be respectful, courteous, and above-board in relations with a judge or hearing officer before whom the lawyer appears.

EC 7-37. In adversary proceedings, clients are litigants and though ill feeling may exist between clients, such ill feeling should not influence a lawyer’s conduct, attitude, and demeanor towards opposing lawyers. A lawyer should not make unfair or derogatory personal reference to opposing counsel. Haranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system.

Mr. Scotto acted in contravention of this rule and the ethical considerations, as well as DR 7-106(A), which states that an attorney shall not “disregard . . . a standing rule of a tribunal

²⁵ A “tribunal” is defined in the pre-April 2009 Code to include “all courts, arbitrators and all other adjudicatory bodies.” 22 NYCRR § 1200.1(6) (pre-April 2009). The new Code provides that “tribunal” “denotes a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity.” 22 NYCRR § 1200.0(w) [Rule 1.0] (Lexis 2009). Thus, Mr. Scotto’s rationalization that he “forgot” where he was and, therefore, that he should be excused for his rudeness and disruption, is not plausible.

²⁶ *See also* 22 NYCRR § 1200.24 [Rule 3.2]; § 1200.23 [Rule 3.1]; 1200.26 [Rule 3.4] (Apr. 1, 2009).

²⁷ The term “zealously” has been deleted from the new rules. *See* A.E. Davis, “Professional Responsibility: Zealously – Within the Bounds of the Law,” NYLJ, November 3, 2008. While even the former code’s recognition in Canon 7 of zealous representation “within the bounds of the law,” DR 7-101, 7-102, 22 NYCRR §§ 1200.32, 1200.33, provided no excuse for Mr. Scotto’s conduct at trial, there is certainly no excuse after the advent of the new rules of professional responsibility for the continued defense by Mr. Scotto of the indefensible.

or a ruling of a tribunal made in the course of a proceeding. . . .” 22 NYCRR § 1200.37 (pre-April 2009), and DR 7-102(A)(1), 22 NYCRR § 1200.33, which prohibits “conduct[ing] a defense, delay[ing] a trial, or tak[ing] other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.” These provisions were found to have been violated by the attorney in *Candolfi v. NYC Transit Auth.*, 156 Misc. 2d 964 (Civ. Ct. Kings Co. 1992), where an attorney repeatedly made personal attacks on the court and on opposing counsel. Also implicated here is DR 7-106(C)(2), which prohibits an attorney from asking “any question that he or she has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person.” 22 NYCRR § 1200.37; *see also* EC 7-25 (“a lawyer should not ask a witness a question solely for the purpose of harassment or embarrassment”) (pre-April 2009). Mr. Scotto’s conduct raised questions under that Disciplinary Rule in that: he asked questions of the complainant about a sexual relationship with a particular co-worker for which no basis was even offered, where the tribunal’s ruling clearly prohibited that particular question *in limine*; and by asking additional questions on this sensitive subject despite the ruling during the questioning that he could make a limited inquiry as to two other co-workers, but must not ask such questions repeatedly. He did so anyway, even though the questions were irrelevant in any event to whether her supervisor had sexually harassed the complainant.

Mr. Scotto’s conduct toward Mr. Muallem, some of the witnesses, including his client and the complainant, and the tribunal ran afoul of the applicable rules and ethical considerations for attorneys, rules which bind him in practicing law under OATH’s rules of practice.

The record of this proceeding will show, not that I have “looked for each and every hair in the egg” (Response at 20), as Mr. Scotto puts it, but that his conduct so violated the norms of civility expected in a judicial proceeding as to make it impossible to ignore. Even in his Response, Mr. Scotto continues to say he was “100 percent correct”; “I admit I forgot where I was on occasions”; “sometimes my adversarial urgency *may have* outweighed proper conduct”; “I would say that most of the conduct was not directed to Court room proceedings but collateral issues that normally don’t come into play during the course of a trial” (Response at 21-23) (emphasis supplied). Mr. Scotto is in denial. These offerings reflect a deep and continuing refusal to accept responsibility. They are not valid or even particularly plausible excuses for the horrendous pattern of Mr. Scotto’s deliberate and willful misbehavior that permeates this record.

The court in *Delgaizo* found “that the actions and total disregard of civility and courtroom decorum on [the attorney’s] part warrant the imposition of sanctions, noting that “Unfortunately there is no mathematical formula with which to compute the amount. All that a court can do in such a case is to estimate what amount will sting sufficiently to communicate its demand for improved professional conduct without imposing excessive hardship.” *Delgaizo v. Campisi*, Index No. 04265/1998, Slip Op. at 2 (Sup. Ct. Suffolk Co. Feb. 1, 2001)2 (citing *Candolfi v. New York City Transit Auth.*, 156 Misc. 2d 964, 970 (Civ. Ct. Kings Co. 1992)) (court considered imposing \$2,500-\$3,000 fine against attorney, but ultimately imposed \$1,800 because he was a “relatively young lawyer who may not yet have attained great financial success”). Here, Mr. Scotto has been in practice for more than 30 years, and a fine in the amount of \$2,500 takes into account both his small firm practice and the importance of setting a fine that will communicate the need for improvement in his treatment of others in the courtroom.

Mr. Scotto is to remit payment by check in the amount of \$2,500, payable to the City of New York, in good funds, by October 15, 2009. His client shall not be billed for or reimburse or pay this fine. Pursuant to 48 RCNY section 1-13(f), Mr. Scotto shall not be permitted otherwise to appear as counsel in any matter at this tribunal until further notice from the Chief Administrative Law Judge of OATH. Although Mr. Scotto’s application to avoid sanctions entirely is denied, the terms and mechanism of the suspension hereby imposed upon him are exactly those proposed by Mr. Scotto himself in his Response: Mr. Scotto must notify the Chief Judge of OATH if he intends to accept a case that would be heard here. He has agreed to “do anything that the Court or the Chief [Judge] requires of [him] to be able to accept that matter. If the Court finds that [he] should not, [he] will abide by the ruling. If [he] do[es] not report the possibility of the new matter, [he] will be open to any sanction that the Court sets for [his] not telling them about [his] intention to be retained.” Mr. Scotto describes this mechanism as a way to “avoid any problems in the future and provide a self-inflicted regulation consistent with a possible sanction that could be imposed [OATH 1-13].” He also states: “It is also my promise to change in certain fashions, if I wish to practice before the Court.” Response at 22.

It is so ordered.

Joan R. Salzman
Administrative Law Judge

September 25, 2009

APPEARANCES:

VICTOR E. MUALLEM, ESQ.
Attorney for Petitioner

RAPHAEL F. SCOTTO, ESQ.
Attorney for Respondent

SO ORDERED:

Roberto Velez
Chief Judge of the Office of
Administrative Trials and Hearings