PennState Dickinson Law

DICKINSON LAW REVIEW
PUBLISHED SINCE 1897

Volume 94
Issue 4 *Dickinson Law Review - Volume 94, 1989-1990*

6-1-1990

Court-Ordered Sanctions of Attorneys: A Concept That Duplicates the Role of Attorney Disciplinary Procedures

William I. Weston

Follow this and additional works at: https://ideas.dickinsonlaw.psu.edu/dlra

Recommended Citation

William I. Weston, *Court-Ordered Sanctions of Attorneys: A Concept That Duplicates the Role of Attorney Disciplinary Procedures*, 94 DICK. L. REV. 897 (1990).
Available at: https://ideas.dickinsonlaw.psu.edu/dlra/vol94/iss4/3

This Article is brought to you for free and open access by the Law Reviews at Dickinson Law IDEAS. It has been accepted for inclusion in Dickinson Law Review by an authorized editor of Dickinson Law IDEAS. For more information, please contact lja10@psu.edu.

Court-Ordered Sanctions of Attorneys: A Concept That Duplicates the Role of Attorney Disciplinary Procedures

William I. Weston*

I. Introduction

Recently, some judges have responded to the problem of attorney misconduct by issuing sanctions against offending attorneys.[1] This practice threatens to alter radically the essence of the attorney-client relationship, the practice of law, and the manner in which cases are litigated. In addition, it alters the necessary equilibrium between counsel, the parties, and the judge in the conduct of a trial. Ironically, attorney sanctions were initially imposed in order to reduce litigation; instead, they have produced extensive trial and appellate litigation.[2] Some commentators have suggested that a relatively small number of judges are responsible for a disproportionately large number of sanction cases.[3] This supports the contention that most judges are uncomfortable with the issue.[4]

This Article is not concerned with the sanctions imposed upon an attorney for failure to respond to a motion within a specified time.[5] It does not question the power of a judge to hold an attorney in contempt for specific conduct.[6] This Article addresses whether a judge should have the power to punish the attorney and the litigant for initiating the action. By utilizing this power, granted in the federal system by Rule 11 of the Federal Rules of Civil Procedure,[7] the

*Professor of Law, University of Baltimore, School of Law. ABML, Loyola College of Maryland; J.D., University of Maryland School of Law. Director, Hoffberger Center for Professional Ethics, University of Baltimore.

1. "[A]ttorney sanctions have emerged as an increasingly significant aspect of civil litigation in the United States." Note, *Insuring Rule 11 Sanctions*, 88 MICH. L. REV. 344 (1989).

2. Note, *A Uniform Approach to Rule 11 Sanctions*, 97 YALE L.J. 901, 901-02 (1988). Federal courts issued over 1000 opinions dealing with Rule 11 in the five years following the Rule's promulgation in 1983. *Id.* at 901. In Maryland, appellate courts addressed the application of their analogous sanction rule, MD. R. CIV. P. 1-341, no less than six times in 1988.

3. Note, *supra* note 2, at 903.

4. *Id.*

5. *See, e.g.*, MD. R. CIV. P. 2-432, 2-433; FED. R. CIV. P. 26(c), 27, 30(g), 37. *See also* National Hockey League v. Metropolitan Hockey League, 427 U.S. 639 (1976).

6. *See, e.g.*, MD. R. CIV. P. P1-P5.

7. FED. R. CIV. P. 11. For the text of Rule 11, see *supra* note 35.

judge can alter the result of the case by ordering remedies that are as significant as any jury award.

This relatively unfettered power to sanction attorneys and their clients for conduct prior to the commencement of litigation as well as during the litigation creates a severe obstacle benefiting neither the courts nor the practice of law, and is of little value to the public. In federal courts, attorney sanctions affect plaintiffs four times as often as defendants,[8] and there is every reason to believe that a similar disparity exists in state courts. This disparity suggests that the system is skewed against plaintiffs.

The legal system enjoys credibility in part because the judge is viewed as detached and objective, not only with regard to the subject matter of the litigation, but also with regard to the litigators and parties.[9] Because the power to issue sanctions radically alters the balance of power among the participants in litigation, it may cause all participants to suspect that the process may not be as objective as it seems.[10] The judge is wary of the lawyer and feels obligated to evaluate not only the merits of the matter, but also the attorney's motives for presenting a given motion, argument, or document, to determine whether the attorney's action is "frivolous."[11]

Each lawyer fears opposing counsel, and they approach one another as warriors, not as dignified professionals protecting the inter-

---

8. AMERICAN BAR ASSOCIATION SECTION OF LITIGATION, SANCTIONS: RULE 11 AND OTHER POWERS 1 (2d ed. 1988).

9. The Supreme Court has suggested that the delay of litigation that results from discovery abuse and other systemic faults leads to public "frustration with the federal courts and, ultimately, disrespect for the law." Roadway Express, Inc. v. Piper, 447 U.S. 752, 757 n.4 (1980). *Roadway* dealt with sanctions under 28 U.S.C. § 1927 (1982), which permits federal courts to assess excess costs, expenses, and attorneys' fees to "[a]ny attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously . . . ." *Id.*

10. *See* Legal Aid Bureau v. Bishop's Garth Assocs. Ltd. Partnership, 75 Md. App. 214, 540 A.2d 1175, *cert. denied*, 313 Md. 611, 547 A.2d 188 (1988) (dynamics of the trial process and response of the trial judge to the process can be viewed as bringing into question the objectivity of the process and the fairness of the administration of justice).

11. For example, an attorney may be subject to sanctions under FED. R. CIV. P. 11 for filing a pleading that includes every possible theory of the case. *See, e.g.*, Rodgers v. Lincoln Towing Serv., Inc., 596 F. Supp. 13 (N.D. Ill. 1984), *aff'd*, 771 F.2d 194 (7th Cir. 1985). Sanctions may also be ordered if the judge determines that an attorney's summary judgment motion is unjustified and misleading as to the state of the law. *See, e.g.*, Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531 (9th Cir. 1986), *reh'g denied en banc*, 809 F.2d 584 (9th Cir. 1987).

Although it does not appear in the Federal Rules, the term "frivolous" is frequently used to describe a class of cases that are brought in bad faith, without substantial justification, to harass the defendant or abuse the legal process. Note, *supra*, note 1, at 350-51. *See, e.g., In re* Marriage of Flaherty, 31 Cal. 3d 637, 646 P.2d 179, 183 Cal. Rptr. 508 (1982) (no sanction if appeal not frivolous); Dent v. Simmons, 61 Md. App. 122, 485 A.2d 270 (1988) (no sanction for attempt to seek extension of existing law).

ests of their clients and acting within ethical constraints. Clients may also be sanctioned,[12] and this potential exposure gives the client the right and the need to be involved in all phases of the litigation, including procedural decisions that have traditionally been made by the lawyer.[13]

Even more troublesome is the use of attorney sanctions as a weapon. Judges threaten lawyers to secure desired results, such as settlement, withdrawal, or action on a motion or pleading. Lawyers threaten one another to force or prevent specific conduct. Perhaps the most disturbing result is that clients believe that their legal positions cannot be vindicated for fear of sanction. As a result, all concerned take a combative approach that is detrimental to the practice of law and has a chilling effect on the litigation process.[14] One might suggest that there will be no cause for concern for those who file pleadings and motions that are not sanctionable. However, the sanction rules are so vague and subject to the latitude of judicial discretion that, unless necessity demands otherwise, lawyers must take the conservative approach in order to avoid provoking sanctions.[15]

---

12. Sanctions for litigation brought in bad faith may be applied both to counsel and to litigants. *See* Roadway Express, Inc. v. Piper, 447 U.S. 752, 766 (1980) (dealing with 28 U.S.C. § 1927 sanctions); Needle v. White, Mindel, Clarke & Hill, 81 Md. App. 463, 568 A.2d 856, *cert. denied*, 319 Md. 582, 573 A.2d 1338 (1990) (citing cases in which Maryland's sanction rule, Rule 1-341, has been imposed upon litigants).

13. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) comment (1983) ("[T]he lawyer should assume responsibility for technical and legal tactical issues . . . .").

14. In a recent Florida case, Muckerman v. Burris, 553 So. 2d 1300 (Fla. Dist. Ct. App. 1989), *vacated*, No. 1009 (LEXIS, States library, Fla. file), the attorney filed an action on behalf of his client to set aside certain deeds conveying real property. *Id.* at 1300. The defendant filed a motion to dismiss on the ground that the client lacked standing. *Id.* The trial court granted the motion and dismissed the complaint. *Id.* With the trial court's permission, the lawyer filed several amended complaints. *Id.* After a hearing, the trial court dismissed the amended complaints with prejudice, and the appellate court affirmed the dismissal. 553 So.2d at 1300. The defendant then sought attorney's fees pursuant to FLA. STAT. § 57.105 (1987), and the trial court ordered sanctions against the attorney and the plaintiff. *Id.*

The Florida District Court of Appeal could find no evidence to support the trial court's finding that there were no justiciable issues. *Id.* at 1301. The court held that "when a party engages in a good faith, soundly based, nonfrivolous, but unsuccessful attempt to change an existing rule of law, attorney's fees are inappropriate." *Id.*

15. "Judicial legislation in the area of sanctions creates further confusion and imprecision for the attorney and client. *See* A & M Grocery v. Frank Lopez, No. 89-394 (S.C. Ala. June 8, 1990) (LEXIS, States library, Ala. file) (court used several synonyms, including "groundless in fact or in law," "vexatious," and "frivolous" for the term "substantial justification," none of which are direct synonyms for the phrase).

In a recent case, the Arizona Court of Appeals cited the Arizona statute regarding sanctions, which provides, in part, that " 'without substantial justification' means that the claim or defense is groundless and is not made in good faith." Chavarria v. State Farm Mutual, No. 1 CA-CV 88-392 (Ariz. Ct. App. Feb. 27, 1990) (LEXIS, States library, Ariz. file). This statute indicates that all three requirements are necessary to satisfy the definition of "without substantial justification." The court stated, "Further, we cannot say that this appeal was prosecuted for an improper motive or *that any reasonable attorney would agree that it was totally and*

Some might suggest that this effect is entirely beneficial. These sanctions were created to prevent frivolous litigation,[16] reduce the number of cases in court,[17] and, at least peripherally, to reduce the prevalence of attorney antics occurring prior to and during the conduct of the legal proceeding. Clearly, attorneys do bring frivolous cases having nothing to do with the protections and guarantees of the legal system.[18] It is equally clear that some lawyers abuse the legal system for purposes other than the promotion of justice or vindication of their clients.[19] Although court-ordered sanctions are intended to address each of these issues, it is far from certain that they have had an impact on any of them. Moreover, the use of attorney sanctions clearly carries serious and very troubling harms that diminish the effectiveness and even the validity of the legal system. The language of the sanctions statutes is not the only culprit; the entire mechanism by which sanctions are determined and awarded is also culpable.[20]

---

completely without merit." *Id.* (emphasis added). It is unclear whether the term "totally without merit" is a further clarification of the statutory definition, a new definition, or common law language without any independent meaning.

16. A court may award attorney's fees as sanctions against a party who has acted in "bad faith, vexatiously, wantonly or for oppressive reasons." Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 258-59 (1975).

17. Judge Cudahy stated the problem succinctly in Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073 (7th Cir. 1987), *cert. dismissed*, 485 U.S. 901 (1988): "Rule 11 [has changed] from a protector against frivolous litigation, a boon to the parties and the courts, into a fomenter of derivative litigation, a mire for unwary parties and overzealous courts." *Id.* at 1085 (Cudahy, J., concurring in part and dissenting in part). He added that our legal system is now "in danger of creating a whole new cottage industry of sanctions." *Id.* at 1086.

18. *See* Wyatt v. Wehmeuller, 163 Ariz. 12, 785 P.2d 581 (1989). In *Wyatt*, the attorney filed a motion for lis pendens that misrepresented the object of the action and the relief demanded. The trial court ruled the motion groundless and stated that it contained a material misstatement of the plaintiffs' actual claims. Interestingly, on appeal the plaintiffs sought to distance themselves from their attorney by alleging that the attorney did not act with their authority. The court dismissed this argument by stating that an attorney operates with both actual and apparent authority. *Id.* at 27, 785 P.2d at 596.

19. "Rule 11 *requires* lawyers to think first and file later, on pain of personal liability." Stewart v. RCA Corp., 790 F.2d 624, 633 (7th Cir. 1986).

20. *See* Maryland State Bar Association, Report of Joint Committee to Study Rules 1-311 and 1-341, at 2 (Sept. 1990), which provides:

> Based on [the] survey and the Joint Committee's other efforts on this project, it is the consensus of the Joint Committee, acting with the approval of the involved Section Councils, that revisions should be made to the non-discovery sanctions process as now defined by Maryland Rules 1-311 and 1-341, as follows:
>
> 1. A hearing should be available for a party and/or their counsel being considered for such sanctions.
> 2. Notice of any pending motion and hearing should, of course, be provided to the involved parties/counsel.
> 3. In the event that an award is sought or being considered against both the parties and the attorney(s), the notice should identify the potential conflict as between the parties and their counsel, to put the recipients on

When the legal system loses the valuable and important balance between the trier of fact and the litigants, the process is diminished. It is further diminished when the trier of fact also judges the conduct of the participants in relation to the substance of the case and in relation to his or her interpretation of the evidence coupled with the conduct of the parties and counsel. The legal system is further diminished when the litigants and counsel, both potentially subject to sanctions, must present their case to a judge who has the authority to order sanctions.

In our legal system, the lawyer is a partisan as well as an officer of the court.[21] Similarly, the mechanics of court-ordered sanctions place the judge in a dual role. In addition to making appropriate decisions regarding the subject matter of the litigation, the judge

---

> notice that the parties and their attorneys may need separate counsel for purposes of the hearing.
> 4. In the event the Court determines it is appropriate to enter sanctions, there should be required findings of one of the four factors as a basis to justify sanctions:
> a. Bad faith; or
> b. Lack of substantial justification; or
> c. Irrational behavior; or
> d. Gross negligence.
> 5. Additionally, in the event of the entry of such sanctions, the Court should be required to make specific findings of fact as to the bases for the sanctions award.
> 6. Provisions should be made for the Court to make a determination of equivalent legal expenses, with particular reference to attorney's fees if no actual fee has been incurred, as would be true in a contingent case.
> 7. Any sanction award entered should be limited to the expenses involved in the specific litigation activity which is the subject of the ruling.
> . . . .

The concern of the Maryland State Bar Association over the meaning of the rule(s) and the specific application of the sanction rule is responsive to the large number of sanction cases that have occurred in Maryland, nearly all of which have resulted in appeals in which the judge was found to have applied the sanction rule incorrectly.

21.

> The first principle of conduct is the principle of neutrality. This principle prescribes that the lawyer remain detached from his client's ends. The lawyer is expected to represent people who seek his help regardless of his opinion of the justice of their ends.
> . . . .
> The second principle of conduct is partisanship. This principle prescribes that the lawyer work aggressively to advance his client's ends. The lawyer will employ means on behalf of his client which he would not consider proper in a non-professional context even to advance his own ends. These means may involve deception, obfuscation, or delay. Unlike the principle of neutrality, the principle of partisanship is qualified. A line separates the methods which a lawyer should be willing to use on behalf of a client from those he should not use. Before the lawyer crosses the line, he calls himself a representative; after he crosses it, he calls himself an officer of the Court. Most debates . . . concern the location of his [sic] line.

Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 30, 36-37 (footnotes omitted).

must also make qualitative decisions concerning the case itself and the conduct of the participants.[22] For the participants, this power looms menacingly, much like the mythical sword of Damocles.[23] For the judge, it represents the power to accomplish by fiat what may or may not be permitted by the appropriate rules.[24]

In addition, because there are no factual or formal due process requirements controlling the award of sanctions,[25] the result is a free-wheeling system of punishment.[26] Judges are using the anvil of sanctions to kill the ant of attorney misconduct. Not only are sanctions directed at the conduct of the trial and the substance of the case, but they have been extended to limit the ability to use discovery to move the plaintiff's case forward.[27]

No qualitative or quantitative evidence exists suggesting a body of frivolous cases that would warrant this cavalier approach. If the chilling effect of sanctions is not enough to cause concern, sanctions also create a separate and parallel system of attorney discipline not

---

22. *See supra* note 11 and accompanying text.

23. Damocles was the 4th Century B.C. Courtier in the retinue of Dionysius, the Elder of Syracus. The sword was suspended by a single hair over the head of Damocles, guest at a banquet that was given by Dionysius c 367 B.C. This was done as a reminder of the insecurity of a tyrant's happiness. WEBSTER THIRD NEW INTERNATIONAL DICTIONARY 2314 (1986).

24. *See supra* note 20 and accompanying text.

25. *See, e.g.*, Caldwell v. Samuels Jewelers, 222 Cal. App. 3d 970, 272 Cal. Rptr. 126 (1990), in which the court was asked to interpret the California sanction statute because the attorney who was sanctioned alleged that the due process requirements of the statute were violated by the trial court's action. The court cited Lavine v. Hospital of the Good Samaritan, 169 Cal. App. 3d 1019, 215 Cal. Rptr. 708 (1985), in which the court stated that "its [statute's] purpose is to fulfill the 'rudiments' of due process both for due process' own, constitutional sake and to ensure that the power conferred by the statute will not be abused." *Caldwell*, 272 Cal. Rptr. at 130.

26. Also illustrative of the lack of a structured sanction system is the failure of trial courts to make specific findings or reasons for the imposition of sanctions. The sanctioned individual neither knows nor understands the bases for the determination. *See, e.g.*, Tidwell v. Waldrop, 554 So. 2d 1009 (Ala. 1990) (Alabama Supreme Court remanded the case to the trial court for a determination of the reasons for the award and for a redetermination of the award). *Contra* Alpine Assocs. v. KP&R, Inc., No. 89CA0412 (Colo. Ct. App. Apr. 19, 1990) (LEXIS, States library, Colo. file) (court determined that the trial court set forth adequate reasons for the award of attorney's fees in accordance with the sanctions statute).

27.

> Rule 11 is designed to insure that allegations made in a complaint drafted by a member of the bar . . . are supported by a sufficient factual predicate *at the time that the claims are asserted*. It is thus no answer to a motion seeking Rule 11 sanctions . . . to suggest that plaintiffs needed discovery to ascertain whether the claim asserted was well founded.

City of Yonkers v. Otis Elevator Co., 106 F.R.D. 524, 525 (S.D.N.Y. 1985), *later proceeding*, 649 F. Supp. 716 (S.D.N.Y. 1986), *aff'd*, 884 F.2d 42 (2d Cir. 1988).

How else is a litigant to obtain sufficient evidence upon which to assert his claim without the benefit of discovery, when the facts, witnesses, and papers are in the control of the other party? Of course, there is no unlimited right to conduct such discovery, but the attorney must be afforded some latitude to obtain the necessary facts through the discovery process. *Cf.* Collins v. Walden, 834 F.2d 961, 965 (11th Cir. 1987).

governed by specific rules of professional conduct or subject to the protections provided by the state grievance procedures.[28]

Attorneys and their clients can be summarily disciplined by the award of economic penalties for conduct found wanting under the amorphous standard of judicial discretion. Not only does the sanction process duplicate the attorney grievance procedure; it parallels the state disciplinary regime because the award of sanctions does not bar the application of the state grievance procedure to the same set of facts. The award of economic sanctions in no way prevents, limits, or diminishes the operation of the state grievance procedure or its potential outcome.[29] Furthermore, no formal rules limit when sanctions may be applied to the offending attorney and the client.[30]

No basis exists to justify the duplication of the grievance procedures and rules of professional conduct that already operate. This dual approach creates problems not only because of its duality, but also because the sanction approach is simply unworkable. The system of attorney sanctions[31] operates on the presumption that the participant is liable for sanctions simply because the judge determines that he is.[32] The result is neither just nor equitable, and has a negative impact upon the practice of law and the relationship between the judge and counsel.[33] The need for parties to have meaningful access to the courts outweighs the limited benefits achieved by reducing the number of allegedly frivolous claims.

This Article addresses the operation of the sanction rules, and discusses due process concerns raised by the sanction procedure. It

---

28. *See, e.g.*, MD. R. CIV. P., BV 1-BV 18.

29. *See supra* notes 136-73 and accompanying text.

30. *But see* Teamsters Local Union No. 430 v. Cement Express, Inc., 841 F.2d 66, 69 (3d Cir. 1988) (sanctions could not be applied to an attorney for failing to produce sufficient evidence to overcome a motion for summary judgment). *See also* Needle v. White, Mindel, Clarke & Hill, 81 Md. App. 463, 568 A.2d 856, *cert. denied*, 319 Md. 582, 573 A.2d 1338 (1990), in which Maryland's intermediate appellate court overturned a post trial award of sanctions against a plaintiff's attorney in a case that survived two summary judgment motions and required a six hour jury deliberation.

Although these sanction awards were overturned on appeal, the mere fact that these attorneys had to litigate over their conduct is bound to create a chilling effect on future zealous advocacy.

31. *See, e.g.*, FED. R. CIV. P. 11; IOWA R. CIV. P. 80(a); MD. R. CIV. P. 1-341.

32. The judge determines what is frivolous and may impose sanctions upon determining that the case is "spiteful." Cavallary v. Lakewood Sky Diving Center, 623 F. Supp. 242, 246 (S.D.N.Y. 1985).

33. "[The judge's] discretion is not arbitrary and uncontrolled, but judicial, to be exercised in conformity with the standards governing the judicial office." Quercia v. United States, 289 U.S. 466, 470 (1932). Although this case discussed the danger that a judge's comments on the facts during the trial could influence the jury, this observation could also be applied to the imposition of attorney sanctions, a situation in which the judge must also remain neutral and impartial.

considers the parallel approach of the Model Rules of Professional Conduct, concluding that the Model Rules' approach is appropriate and sufficient to weed out attorney misconduct while protecting the public and permitting meaningful access to the courts.

II. The Rules and Their Application

A. The Purposes of Sanction Rules

Attorneys and their clients are governed by state sanction rules[34] and by Federal Rule of Civil Procedure 11.[35] Both the state

34. For example, the applicable Maryland rule states:

> In any civil action, if the court finds that the conduct of any party in maintaining or defending any proceeding was in bad faith or without substantial justification the court may require the offending party or the attorney advising the conduct or both of them to pay to the adverse party the costs of the proceeding and the reasonable expenses, including reasonable attorney's fees, incurred by the adverse party in opposing it.

MD. R. CIV. P. 1-341.

The applicable Illinois statute states:

> The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper, that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in act and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

ILL. ANN. STAT. ch. 110, para. 2-611 (Smith-Hurd 1986). *See also* IOWA R. CIV. P. 80(a); PA. R. CIV. P. 4019.

35. Rule 11, as amended in 1983, states:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address . . . . The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation . . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

FED. R. CIV. P. 11.

Prior to the 1983 amendment to Rule 11, sanctions were based on a subjective standard and evaluated on the basis of good faith. The amendment replaced the good faith standard with one based on "reasonable inquiry." *See* Notes of Advisory Committee on Rules, 1983 Amendment, 97 F.R.D. 165, 198-99 (1983). The result is a change from a subjective standard to an objective one. *See, e.g.*, Eastway Constr. Corp. v. City of N.Y., 762 F.2d 243, 253 (2d Cir. 1985), *modified*, 821 F.2d 121 (2d Cir. 1987), *cert. denied*, 484 U.S. 918 (1987).

The application of the reasonable inquiry standard has generated a significant amount of

and federal rules exist to prevent suits that are frivolous or brought in bad faith.[36] In addition, cases brought to harass are also subject to sanctions under Rule 11.[37] Although the interpretative literature surrounding these state and federal rules suggest that they were not designed to create a chilling effect upon legitimate causes of action,[38] the sanction rules have produced such an effect. In *In re Marriage of Laherty*,[39] the court observed that:

> Counsel and their clients have a right to present issues that are arguably correct, even if it is extremely unlikely that they will win on appeal. An appeal that is simply without merit is *not* by definition frivolous and should not incur sanctions. Counsel should not be deterred from filing such appeals out of a fear of reprisals. Justice Kaus stated it well. In reviewing the dangers inherent in any attempt to define frivolous appeals, he said the

---

litigation exploring the parameters of the term. Each factual situation will require a different level of "reasonable inquiry." Mohammed v. Union Carbide Corp., 606 F. Supp. 252, 261 (E.D. Mich. 1985).

Courts consider a number of issues under the reasonable inquiry standard: the experience of the attorneys who have filed the pleading, Unioil, Inc. v. E.F. Hutton & Co., 809 F.2d 548, 557 (9th Cir. 1986), *cert. denied*, 484 U.S. 822 (1987); whether the attorneys personally interviewed the parties and witnesses, Wold v. Minerals Eng'g Co., 575 F. Supp. 166, 167 (D. Colo. 1983); the documents and physical evidence reviewed by the attorneys prior to filing the pleading, Florida Monument Builders v. All Faiths Memorial Gardens, 605 F. Supp. 1324, 1326 (S.D. Fla. 1984); and whether counsel blindly followed the views of other attorneys rather than conducting individual research and analysis, Home-Pack Transp., Inc. v. Donovan, 39 Fed. R. Serv. 2d (Callaghan) 1063, 1066 (D. Md. 1984).

Counsel are also expected to make a reasonable inquiry into the law prior to filing a pleading. When that inquiry is deemed not to be reasonable, the attorney is subject to sanctions. *See, e.g.*, Kuzmins v. Employee Transfer Corp., 587 F. Supp. 536, 538 (N.D. Ohio 1984) (counsel failed to determine whether a right to a jury trial exists in sexual discrimination cases). Suits whose purpose is determined to be improper are also the subject of sanctions. *See, e.g.*, Steinle v. Warren, 765 F.2d 95, 101 (7th Cir. 1985) (frivolous claim brought in bad faith). For factors in defining what is a "reasonable inquiry," *see* Thomas v. Capital Sec. Servs., Inc., 812 F.2d 984, 988-90 (5th Cir. 1987), *reh'g en banc*, 822 F.2d 511 (5th Cir. 1987), *reh'g en banc*, 836 F.2d 866 (5th Cir. 1988).

36. "The terms of Rule 11 state that the signature of an attorney acts as a certificate that the motion 'is warranted by existing law or a good faith argument for the extension . . . of existing law *and* that it is not interposed for any improper purpose.' " Robinson v. National Cash Register Co., 808 F.2d 1119, 1130 (5th Cir. 1987) (quoting FED. R. CIV. P. 11).

37. *Id.* at 1130.

38. "Rule 11 is 'not intended to chill an attorney's enthusiasm or creativity.' " *Id.* at 1131. As the Maryland Court of Special Appeals recently noted,

> The objective of the Rule [Maryland Rule 1-341] is to fine-tune the judicial process by eliminating the abuses arising from the tendency of a few litigants and their counsel initiating or continuing litigation that is clearly without merit. The inherent danger in the process is that over zealous [sic] pursuit of the objective may result in what the Court, in *Eastway Construction Corp. v. City of New York*, 762 F.2d 243, 254 (2nd Cir. 1985), described as "stifling the enthusiasm or chilling the creativity that is the very lifeblood of the law."

Needle v. White, Mindel, Clarke & Hill, 81 Md. App. 463, 470, 568 A.2d 856, 860, *cert. denied*, 319 Md. 582, 573 A.2d 1338 (1990).

39. 31 Cal. 3d 637, 646 P.2d 179, 183 Cal. Rptr. 508 (1982).

> courts cannot be "blind to the obvious: the borderline between a frivolous appeal and one which has no merit is vague indeed . . . ." Vague definitions of what constitutes a frivolous appeal raise the danger that attorneys will be deterred from asserting valid claims out of a fear that they will incur court sanctions.[40]

Although sanctions may be awarded against both the attorney and the client,[41] or to each separately,[42] the ultimate purpose of the sanction rule is to punish attorneys for failure to exercise control over the litigation process. Sanctions are punitive,[43] and are severe so that the court's intent will be perceived clearly and future conduct will be deterred.[44] The court generally scrutinizes the attorney's conduct, considering whether the lawyer acted "beyond the limits of reason or the bounds of the law."[45] The court also determines whether the attorney should have inquired into possible limitations before filing the action.[46]

B. Sanctions and Judicial Hindsight

Even the most egregious attorney conduct does not warrant the use of judicial hindsight to apply sanctions at the termination of the proceeding.[47] This is overly burdensome to the attorney, and is not the most effective means of addressing the attorney's conduct. Judicial hindsight, like any post mortem review, is likely to find questionable conduct. Moreover, if the case did not proceed in accordance with the judge's views, judicial hindsight affords the judge one last

---

40. *Id.* at 650-51, 646 P.2d at 187-88, 183 Cal. Rptr. at 516-17.

41. *See, e.g.*, Quaker Alloy Casting Co. v. Gulfco Indus., 686 F. Supp. 1319 (N.D. Ill. 1988) (client liable for sanctions for alleging fraud and perjury without good faith basis).

42. Robinson v. National Cash Register Co., 808 F.2d 1119 (5th Cir. 1987).

43. *See* Oliveri v. Thompson, 803 F.2d 1265 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987). "Courts should be sensitive to the impact of sanctions on attorneys. They can be economically punishing, as well as professionally harmful; due process must be afforded." *Id.* at 1280.

44. "The rule [Rule 11] reflects a dual purpose: [compensation and] penalizing the offender to achieve special and general deterrents." Schwartzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 201 (1985). *See, e.g.*, Fox v. Boucher, 794 F.2d 34 (2d Cir. 1986) (court imposed double costs and attorney's fees as a sanction); Hale v. Harney, 786 F.2d 688 (5th Cir. 1986).

45. Friedman v. Dozorc, 412 Mich. 1, 54, 312 N.W.2d 585, 606 (1981) (footnote omitted).

46. Wren v. Feeney, 176 Ill. App. 3d 364, 531 N.E.2d 155 (1988). *See also* Wymer v. Lesslin, 109 F.R.D. 114 (D.D.C. 1985), in which the court sanctioned the attorney for failure to inquire into his client's citizenship with regard to diversity in a federal case. The client revealed her true citizenship on the morning of trial and her revelation destroyed diversity. *Id.* at 116.

47. *Cf.* Needle v. White, Mindel, Clarke & Hill, 81 Md. App. 463, 478, 568 A.2d 856, 865, *cert. denied*, 319 Md. 582, 573 A.2d 1338 (1990).

chance to correct what he or she believes to be an erroneous result.[48] This correction process is generally directed against the attorney and may be undertaken sua sponte by the judge or in response to a motion from opposing counsel.

A recent Maryland case illustrates the problems associated with judicial sanctions. In *Needle v. White, Mindel, Clarke & Hill*,[49] the trial judge ordered the payment of $143,117.14 in attorney's fees. The judge ordered the client to pay $121,369.14, and her attorneys to pay $21,748.00.[50] The case arose when the client was accused of embezzling funds from a law firm.[51] Large sums of money were found to be missing, and the firm's insurance carrier required the filing of a police report. Shortly after the police report was filed, the client was indicted.[52] The client was represented by a public defender and was acquitted. She then retained Mr. Needle and sued the law firm for malicious prosecution and intentional infliction of emotional distress.[53] The firm refused to comply with discovery requests and repeatedly delayed the process, believing that the acquittal had been incorrect and that the client had at least participated in the theft even if she had not stolen the money herself.[54]

The law firm moved for summary judgment, and an extensive hearing on this motion preceded the trial. Both litigants presented memoranda, exhibits, and excerpts from the testimony at the criminal trial.[55] The law firm contended that it had probable cause to justify accusing the client, that its conduct was not so outrageous as to constitute intentional infliction of emotional distress, and that the client's action was really nothing more than a retaliation for the

48. Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531 (9th Cir. 1986). The court observed that "Rule 11 should not impose the risk of sanctions in the event that the court later decides that the lawyer was wrong." *Id.* at 1542. The court also suggested that the judge should not be required to review the accuracy of every document filed, because it would be a substantial waste of the litigants' time and money. *Id.*

Similarly, in Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073 (7th Cir. 1987), *cert. dismissed*, 485 U.S. 901 (1988), one judge concluded that the trial judge should not be forced to grade briefs, especially when the award of a "c" means not only that the party loses the case, but also that the attorney loses his shirt. 823 F.2d at 1085 (Cudahy, J., concurring in part and dissenting in part).

49. 81 Md. App. 463, 568 A.2d 856, *cert. denied*, 319 Md. 582, 573 A.2d 1338 (1990).

50. *Id.* at 465, 568 A.2d at 857.

51. *Id.*

52. *Id.* at 465, 568 A.2d at 857.

53. *Id.* at 466, 568 A.2d at 857.

54. Needle v. White, Mindel, Clarke & Hill, 81 Md. App. 463, 466, 568 A.2d 856, 857, *cert. denied*, 319 Md. 582, 573 A.2d 1338 (1990). The author interviewed the sanctioned attorney who explained the case and the process. The sanctioned attorney also showed me the discovery motions, opposing counsel's failure to respond, and the court orders requiring compliance, some of which were not followed.

55. *Id.* at 466, 568 A.2d at 857.

criminal charges.[56] The trial judge denied the firm's summary judgment motion, and the matter proceeded to trial. At the close of the client's case, the law firm again moved for judgment.[57] After a thorough hearing, the court denied the motion, concluding that there were genuine issues of material fact. The court reasoned that the jury could reasonably find that the firm lacked probable cause to accuse the client; in addition, the client had presented evidence that she had suffered emotional distress.[58] The judge restated for the record the testimony of the client's psychiatrist concerning the impact of the events on the client.

The law firm presented its case and then renewed the motion for judgment.[59] The court reserved its ruling, and submitted the matter to the jury. The jury concluded that the law firm had a reasonable belief that the client took the money and that the firm did not report the matter to the police maliciously or with reckless disregard for the truth.[60] At the request of the law firm, and over the objection of the client, the jury was also instructed to indicate whether it believed that the client had stolen the money. The jury concluded that she had not.[61] Finally, the jury found that although the client suffered emotional distress, it was not severe enough to rise to the level necessary for a finding of intentional infliction of emotional distress.[62]

After the jury rendered its verdict, the court scheduled a sanctions hearing sua sponte.[63] Mr. Needle and his associate requested a postponement to establish the specifics of the charges facing them and to seek separate counsel, but the judge denied the postponement.[64] The judge then filed an extensive memorandum imposing sanctions and establishing post-trial findings of fact which, according to the Maryland Court of Special Appeals, "adopted the version of a particular witness or witnesses over the testimony of others, or . . . [was] contrary to the responses of the jury on the issues or . . . adopt[ed] a conclusion where more than one inference is presented by the testimony."[65] The appellate court reversed the award of sanc-

56. *Id.* at 466, 568 A.2d at 857-58.
57. *Id.* at 467, 568 A.2d at 858.
58. *Id.* at 467, 568 A.2d at 858.
59. Needle v. White, Mindel, Clarke & Hill, 81 Md. App. 463, 468, 568 A.2d 856, 858, *cert. denied*, 319 Md. 582, 573 A.2d 1338 (1990).
60. *Id.* at 468, 568 A.2d at 858.
61. *Id.*
62. *Id.*
63. *Id.*
64. Needle v. White, Mindel, Clarke & Hill, 81 Md. App. 463, 468 n.1, 568 A.2d 856, 859 n.1, *cert. denied*, 319 Md. 582, 573 A.2d 1338 (1990).
65. *Id.* at 470, 568 A.2d at 859. The court added:

tions and directed that the law firm pay its own costs.[66]

Even when the language of the sanction rule is clear, as in Federal Rule 11, its application can reflect a lack of clarity or consistency. The 1983 amendment clearly changed the applicable standard from one of good faith to "reasonable inquiry."[67] Courts are still unclear, however, as to how the new standard should be applied, or whether to accept the modifications at all. In *Estate of Blas v. Winkler*,[68] the court considered application of 28 U.S.C. section 1927[69] and Federal Rules 11 and 37. Without applying a specific rule, the court noted: "Plaintiff's arguments to the district court were not frivolous. Even if plaintiff's arguments to the district court were frivolous, the requisite bad faith is absent."[70]

Even if the attorney operates in good faith,[71] or is responding to the demands of the client[72] or exercising the client's right to a fair trial,[73] the attorney may be attacked with sanctions. This may occur if the judge decides, based on judicial hindsight,[74] personal animosity, ego, disbelief of the witnesses or evidence, or for any other reason, to take the law into his or her own hands. This may seem a harsh indictment of the sanction system, but an award of sanctions

---

> We note that the court allegedly talked to the jury off the record after the case ended. Appellants obtained affidavits of several jurors relating to the testimony of various witnesses who participated in the trial. Arguably, the role of the jury ought to tend with its verdict. Satellite litigation is a matter that the court and counsel should resolve without seeking the thought processes of the trier of fact.

Id. at 470 n.2, 568 A.2d at 859 n.2.

66. *Id.* at 474, 568 A.2d at 864.

67. *See supra* note 35.

68. 792 F.2d 858 (11th Cir. 1986).

69. *See supra* note 9.

70. *Winkler*, 792 F.2d at 861.

71. Weisman v. Rivlin, 598 F. Supp. 724 (D.D.C. 1984) (mistaken failure to realize diversity jurisdiction warranted sanctions).

72. Blair v. Shenandoah Women's Center, Inc., 757 F.2d 1435, 1438 (4th Cir. 1985) (sanctions assessed for bad faith, dilatory tactics, and frivolous, scandalous accusations).

73. *In re* Custody of Caruso, 185 Ill. App. 3d 739, 542 N.E.2d 375 *appeal denied*, 545 N.E.2d 135 (Ill. 1989) (attorney relied on client's oral assurances that facts existed and undertook no inquiry).

74. "We think it erroneous to determine a lack of substantial justification [for initiating an action] from the vantage point of judicial hindsight because hindsight, judicial or otherwise, is always 20/20, irrespective of any astigmatism, foresight may suffer." Kelley v. Dowell, 81 Md. App. 338, 342, 567 A.2d 521, 523 (1990) (citing Legal Aid Bureau, Inc. v. Bishop's Garth Assocs. Ltd. Partnership, 75 Md. App. 214, 540 A.2d 1175 (1988)). The court added:

> According to the standard set forth in that case [*Bishop's Garth*], the trial court was required to take evidence on the circumstances surrounding Judge Burns' grant of the ex parte motion, and to determine whether the motion was substantially justified at the time it was filed. The trial judge clearly did not limit his inquiry to the point in time when [the attorney] filed the motion for ex parte relief. Rather, he determined the lack of substantial justification for *filing* the action *in light of all of the evidence adduced at the trial on the merits.*

Kelley, 81 Md. App. at 343, 567 A.2d at 523.

may be equally harsh. The *Needle* court stated, "In short, there are no winners, which underscores the necessity that counsel seek sanctions only where a claim is clearly meritless and trial judges accept the premise that Rule 1-341 'is an extraordinary remedy intended to reach only intentional misconduct.' "[75]

C. *Sanctions and the Attorney*

Clients may be and often are the subject of sanctions. Courts rarely impose sanctions, however, upon a client without also sanctioning the attorney. The focus of sanctions is on the attorney, but the attorney often cannot avoid them and still pursue zealous and effective representation.[76] Once the attorney is engaged and the case is filed, the matter is before the court. At that point, the attorney cannot refuse to move the matter forward simply because the attorney has doubts about the client's sincerity. The time of filing is the crucial point in sanctions cases.[77] Absent actual knowledge that the client is committing perjury, bringing an action without any basis, or abusing the system, the attorney cannot judge the client or the client's motives in the case. To do so would be to risk malpractice, a grievance, or both.

Because the sanction rules require the attorney to *judge* the credibility of the client, evidence, and witnesses in advance of the litigation (and in the case of Federal Rule 11, in advance of the pleadings), the attorney must play three roles: zealous advocate, officer of the court, and unwilling trier of fact and credibility. If the attorney fails to measure up to the applicable standards in any of these areas, the result may be a malpractice suit, disbarment, sanctions, or a combination thereof. Although the *Needle* court suggested that sanctions would be warranted only when the attorney's conduct is intentional, courts award sanctions for conduct that is less than purely intentional.

Very few cases satisfy the real intent of the sanction rules, but the attempt to control these cases has radically altered the way attorneys approach the practice, the client, and the court. The consequences are severe. In *Needle*, for example, the cost of appealing the

75. Needle v. White, Mindel, Clarke & Hill, 81 Md. App. 463, 481, 568 A.2d 856, 865, *cert. denied*, 319 Md. 582, 573 A.2d 1338 (1990) (quoting Talley v. Talley, 317 Md. 428, 564 A.2d 777 (1989)).

76. "[The] adversary system intends, and expects, lawyers to probe the outer limits of the bounds of the law, ever searching for a more efficacious remedy . . . ." State Bar Grievance Adm'r v. Corace, 390 Mich. 419, 434-35, 213 N.W.2d 124, 132 (1973).

77. Kelley v. Dowell, 81 Md. App. 338, 342, 567 A.2d 521, 523 (1990).

trial court's imposition of sanctions matched the cost of the sanctions that were ordered.[78] Mr. Needle and his associate were vindicated, but they paid the price nevertheless. The harm to practitioners and to the practice of law will continue unabated until the rules are supplemented by written, specific, and narrow guidelines.

D. Vagueness of the Sanction Rules

Further problems arise from the language of the sanction rules; the language is often so vague as to make interpretation nearly impossible when the situation involves unintentional misconduct. The interpretation of the rules often adds more confusion than clarity.[79] This leads to other confusion. In *Robinson v. National Cash Register*,[80] the Court of Appeals for the Fifth Circuit attempted to construe the language of Rule 11. The court suggested that there should be a difference in the treatment of an attorney who signs pleadings as opposed to one who does not.[81] Therefore, the inquiry is not based on the actions or conduct of the offending attorney or on the attorney's degree of involvement. Instead, the sanction decision hinges on whether the attorney's name appears on the dotted line. In *Robinson*, the court concluded that the absence of the attorney's signature was determinative, even though evidence was presented to the court that the attorney in question had been mentioned in the pleadings and had participated in settlement negotiations.[82] The court cited public policy reasons for failing to sanction the attorney, but never discussed the measure of conduct.[83] The court seemed to measure the attorney's conduct by whether the attorney's signature was on a pleading. This approach is not applied in malpractice cases or in discipline cases, in which the attorney's conduct would be decisive.

Unfortunately, the continued confusion regarding the function, direction, and application of court-ordered sanctions makes it more difficult to justify their existence. Whether the standard is bad faith

78. *See supra* notes 50-66 and accompanying text.

79. For example, in McLaughlin v. Bralee, 803 F.2d 1197 (D.C. Cir. 1986), the court suggested that the amended Rule 11 requires the imposition of sanctions when "warranted by groundless or abusive practices." *Id.* at 1205 (quoting Westmoreland v. CBS, 770 F.2d 1168, 1174 (D.C. Cir. 1985)). It is not clear how this concept relates to the standards specifically set out in Rule 11. This illustrates the difficulty faced by courts in attempting to apply the rules and to interpret them. Some troublesome areas are difficult to resolve but easy to recognize; sanctionable conduct is neither.

80. 808 F.2d 1119 (5th Cir. 1987).

81. *Id.* at 1128-29.

82. *Id.* at 1131-32. The court rejected the proposition that the attorney in question was mentioned in the pleadings. *Id.* at 1132.

83. *Id.* at 1132.

or reasonable inquiry, the clear purpose of the sanction process is to measure and punish offending conduct. This becomes clear when courts suggest, as the court did in *Napier v. Thirty or More Unidentified Federal Agents, Employes or Officers*[84] that Rule 11 imposes a duty that requires an attorney to inquire into the facts and law before filing papers with the court.[85]

Moreover, the rules fail to indicate when the lawyer is supposed to make this crucial decision upon which the sanction process hinges. The crucial point appears to be the moment when the attorney agrees to file the case on behalf of the client. Once the case is filed, however, the attorney must follow the matter through discovery, unless there is evidence that would lead the reasonable attorney to believe that the case is being brought "vexatiously, wantonly or for oppressive reasons."[86] Once discovery is complete, appropriate motions are filed, and the case is set for trial, the attorney may still judge the client's case and determine whether the case will go forward.[87] A lawyer may also refuse to take a case because the fee will be inadequate, the case will create a conflict of interest, the client is unwilling to be truthful, or the evidence fails to justify the claim. Under the sanction rules, however, an attorney must decide whether to accept the case based almost entirely on his or her personal evaluation of whether the case is frivolous and that decision is made without the benefit of evidence, testimony, or response from the opposing counsel. The judgment of the judge is thereby replaced with the judgment of the attorney.

These rules are nebulous and unclear, and do not adequately allow the attorney to zealously and effectively represent the client. The client must confront another hurdle in the process of obtaining a legal remedy. Unlike other hurdles that are the subject of clear rules of procedure, this hurdle is based on the subject judgment of the attorney or, ultimately, the judge. For example, the level of the demand for damages formulated by the attorney may be the subject of sanctions.[88]

---

84. 855 F.2d 1080 (3d Cir. 1988).

85. *Id.* at 1091.

86. Roadway Express, Inc. v. Piper, 447 U.S. 752, 766 (1980).

87. Many courts take the view that the attorney has the obligation to dismiss a lawsuit that he or she believes to be baseless, irrespective of the potential outcome, simply because lawyers are officers of the court and their primary duty is to help administer justice. Consequently, the attorney's duty to the court takes precedence over the duty to the client. *In re* Custody of Caruso, 185 Ill. App. 3d 739, ___, 542 N.E.2d 375, 379, *appeal denied*, 545 N.E.2d 135 (Ill. 1989) (quoting Van Berkel v. Fox Farm & Road Mach., 581 F. Supp. 1248, 1251 (D. Minn. 1984)).

88. *See, e.g.*, Hudson v. Moore Business Forms, 827 F.2d 450 (9th Cir. 1987) (frivolous

This becomes particularly troublesome when the client is attempting to assert a fundamental right. In *Legal Aid Bureau, Inc. v. Bishop's Garth Associates Limited Partnership*,[89] the court suggested that when a fundamental right is involved, the court must exercise care, particularly when the attorney's conduct is based on justifiable grounds.[90] This implies a different level of review when a fundamental right is involved than in ordinary litigation situations.[91] Nevertheless, the client must be aware that the jury is not the only arbiter of the case. The client must satisfy the attorney in order to obtain legal vindication, and may even have to confront the judge's personal view of the case.[92]

E. Other Problems

The penalties for violating the vague sanction rules are extensive and costly.[93] One frequently applied remedy is the award of attorney's fees to the opposing side.[94] Courts may utilize other remedies, however, such as awarding the costs of litigation,[95] or issuing warnings, oral reprimands, or written admonitions. The court may even order the offending attorney to take continuing education courses.[96] One court ordered the sanctioned attorney to circulate the court's opinion criticizing his conduct throughout his firm.[97] Nevertheless, the selection of an appropriate remedy is the very least of the problems associated with the sanction rules, paling into insignificance when compared to the interpretational problems.

Finally, perhaps the most disturbing problem with the rules is

---

damage claim warranted sanctions).

89. 75 Md. App. 214, 540 A.2d 1175, *cert. denied*, 313 Md. 611, 547 A.2d 188 (1988).

90. *Id.* at 221, 540 A.2d at 1178.

91. *Id.*

92. In Mohammed v. Union Carbide Corp., 606 F. Supp. 252 (E.D. Mich. 1985), the court suggested that the attorney had two duties: "to counsel the client against bringing meritless claims, and to conduct reasonable inquiry before instituting suit . . . ." *Id.* at 261. In most sanctions cases, however, even if the attorney carries out both duties, counsel and client might still be subject to sanctions because there is no accurate and clear way of determining when a claim is meritless and what level of inquiry is reasonable.

93. This is despite cases suggesting that the sanction to be chosen should be the "least severe sanction adequate to serve the purpose." Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 878 (5th Cir. 1988).

94. Needle v. White, Mindel, Clarke & Hill, 81 Md. App. 463, 568 A.2d 856, *cert. denied*, 319 Md. 582, 573 A.2d 1338 (1990). *See also* Larouche v. National Broadcasting Co., 780 F.2d 1134 (4th Cir.), *cert. denied*, 479 U.S. 818 (1986).

95. *In re* Custody of Caruso, 185 Ill. App. 3d 739, 542 N.E.2d 375, *appeal denied*, 545 N.E.2d 135 (Ill. 1989).

96. Stevens v. City of Brookton, 676 F. Supp. 26 (D. Mass. 1987).

97. Heuttig & Schromm, Inc. v. Landscape Contractors Council, 582 F. Supp. 1519 (N.D. Cal. 1984), *aff'd*, 790 F.2d 1421 (9th Cir. 1986).

the difference between their philosophical focus and their real focus. Philosophically, the rules seek to attack cases that do not deserve to be in court because they do not warrant judicial attention. In reality, however, every case is affected by the sanction rules, because the sanctions sword hangs over the head of both counsel and client[98] and because the judge is given a power so enormous that it destroys the natural balance of the legal system.[99]

The state and federal sanction rules are unclear, and produce more litigation, not less.[100] The deterrent effect is offset by the number of appeals generated by the application or misapplication of the sanctions rules caused by the lack of clarity in the rules. In short, if the judge simply dismissed the frivolous case on the merits, the net result would probably be a significant reduction in the number of cases and appeals. Even a reduction in the number of appeals would be welcome and would significantly benefit those litigants whose cases languish on appellate court dockets.

---

98. Concern that partners in a sanctioned attorney's law firm might be liable along with the offender was recently assuaged by the Supreme Court in Pavelic & LeFlore v. Marvel Entertainment Group, 110 S. Ct. 456 (1989). The Court reversed a Second Circuit decision that upheld an award of $50,000 against a New York attorney and $50,000 against his former firm for the attorney's filings in a copyright infringement action. *Id.* at 457-58. The Court of Appeals for the Second Circuit concluded that an award of sanctions against the lawyer and his firm would serve as a deterrent. *Id.* at 459-60. Writing for the Supreme Court, Justice Scalia noted that the text of the rule referred to the person who signed the paper; this meant an individual signer, not the firm. *Id.* at 458-59. In dissent, Justice Marshall suggested that the majority opinion would give a blanket immunity to law firms for the misconduct of their individual partners. *Id.* at 461-62 (Marshall, J., dissenting).

99. In Cabell v. Petty, 810 F.2d 463 (4th Cir. 1987), the plaintiff filed an action to assert certain constitutional rights. *Id.* at 464. The plaintiff filed suit to prevent the running of the statute of limitations, and voluntarily dismissed the case after a brief oral argument on a motion to dismiss. *Id.* at 465. The court found that the conduct of the plaintiff's counsel bordered on violating Rule 11, but denied a motion for sanctions. *Id.* The Court of Appeals for the Fourth Circuit reversed and remanded, concluding that counsel had clearly violated Rule 11 because there was no indication that counsel ever intended to seek a modification of existing law. *Id.* at 466. However, the dissent noted that the plaintiff's attorney reasonably believed that facts existed which supported a claim that constitutional rights had been violated. *Cabell*, 810 F.2d at 467-68.

This case highlights the argument that ethical codes are remiss in obligating the lawyer to direct his or her efforts to satisfying the desires of the client, without indicating clear obligations to other institutions. Patterson, *An Inquiry Into the Nature of Legal Ethics: The Relevance and Role of the Client*, 1 GEO. J. LEGAL ETHICS 43, 50-52, 60-63 (1987). Regardless of the accuracy of Patterson's thesis, court-ordered sanctions clearly raise difficult issues concerning the attorney's exercise of totally independent judgment about the forward movement of a case that may be on the edge of the law. Some might suggest that the sanction rules have succeeded if they have done nothing more than require attorneys to think about their obligations to the judicial system.

100. Sanctions are applied equally to appeals that a court determines to be frivolous. *See, e.g., In re* Marriage of Economou, No. C006703 (Cal. Ct. App. Aug. 23, 1990) (LEXIS, States library, Cal. file) (court determined that appeal was frivolous and a misuse of an appellate court's resources).

III. Due Process Concerns

Even if the rules were more clearly drafted and their terms more clearly defined, a critical problem would still remain: the lack of concern for procedural due process that frequently appears in attorney sanction cases. Neither the state rules nor Federal Rule 11 provide any procedural safeguards.[101] Both the state and federal courts treat the sanction rules as nothing more than extensions of the judge's general power to rule on motions. This treatment is not justified. These sanctions have the same impact as those associated with the state attorney discipline procedures, and are qualitatively no different. The lawyer who is the subject of court-ordered sanctions is often scrutinized and ridiculed by members of the profession, the public, and the press. Many people, attorneys and laymen alike, believe that many frivolous cases are brought and that the sanction rules will somehow reduce this number. Accordingly, the sanctioned attorney is tried and sentenced in the court of public opinion, suffering the further stigma of being judged as unprofessional by the press, the public, and the bar.

A. Due Process and the Judge

In most situations, sanction awards violate even the most rudimentary definition of the concept of due process.[102] Neither state nor federal sanction rules require the holding of a hearing, gathering of facts, rendering of a formal opinion, presentation of evidence or witnesses, or confrontation of witnesses.[103] The judge, by raising the sanction issue sua sponte or by recognizing a motion from opposing counsel, assumes the simultaneous roles of prosecutor and judge. The

---

101. *See supra* notes 34-35.

102.

> Due process of law. Law in its regular course of administration through courts of justice. Due process of law in each particular case means such an exercise of the powers of the government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs . . . . To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject matter of the suit . . . . Due process of law implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty or property, in its most comprehensive sense; to be heard, by testimony or otherwise, and to have the right of controverting, by proof, every material fact which bears on the question of right in the matter involved. If any question of fact or liability be conclusively presumed against him, this is not due process of law.

BLACK'S LAW DICTIONARY 449 (5th ed. 1979).

103. *See supra* notes 34-35 for sanction rules.

judge's rulings narrow the options available to the accused lawyer, and the judge will make the sanction decision without affording any guarantees or protection to the accused attorney.

The role of the judge is even more troublesome because it is inextricably linked to the lack of clarity in the rules themselves. To allow one person to decide in each case what is a "reasonable inquiry"[104] or what is "bad faith"[105] returns the litigation process to a subjective level. A judge, who is far removed from the practice of law and may not see the larger context, may find perfectly sound legal tactics to be frivolous or unreasonable. The judge may also view creative tactics as a threat to the court and the litigation process. Sanction rules allow the judge to punish the lawyer when legitimate differences of opinion exist, and the only remedy for the lawyer is a costly and time-consuming appeal.

A scenario drawn from actual practice illustrates this problem. Near the end of the discovery period, an attorney filed interrogatories. Opposing counsel complained that the purpose was purely to harass; the lawyer responded that he had a right under local rules to file the interrogatories and to have them answered within thirty days. He stated that he wanted the record complete and that there might be information to which he was entitled. The judge believed discovery had been quite thorough and lengthy. Should the judge be allowed to sanction the lawyer who filed the interrogatories by substituting his judgment as to their value for that of the lawyer?[106]

Some motions may appear frivolous, but may in fact be appropriately filed in an effort to obtain a favorable response on behalf of the client. No justification exists for permitting the judge, who must consider the merits of the case, to simultaneously evaluate the validity of an attorney's tactics. In order to avoid sanctions, the attorney may be required to reveal the litigation strategy in court, thereby giving a significant advantage to opposing counsel. This process benefits nobody, and deprives the legal system of the opportunity to evaluate and experiment with creative solutions to legal issues.

---

104. FED. R. CIV. P. 11.

105. MD. R. CIV. P. 1-341.

106. This occurred in a case arising under Maryland's Health Claims Arbitration Statute, MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-05 (1989). The author served as Panel Chair in the case, and was therefore responsible for ruling on all motions and questions of evidence and procedure. Although extensive discovery had taken place, I denied the motion for sanctions on the ground that the lawyer had a right to file the interrogatories and was exercising the right in a timely fashion. Although bad feelings clearly existed between this attorney and his adversary, I felt it inappropriate to substitute my judgment and to conclude that the attorney had acted in bad faith or without substantial justification.

B. *The Need for Due Process*

The failure of the sanction rules to provide for due process is particularly striking in light of the requirements of due process imposed upon the attorney disciplinary system. In *In re Ruffalo*,[107] the United States Supreme Court held that attorneys charged with unethical conduct are entitled to procedural due process including fair notice of the charge.[108] State courts have extended the requirements of due process to administrative hearings before bar grievance commissions.[109] Due process requirements should also be extended to the sanction process because sanctions are designed to punish the attorney for conduct that the court finds to be violative of appropriate standards of conduct.[110] When a judge sanctions an attorney, the economic, personal, and professional consequences are substantially similar to those arising when sanctions are imposed through the grievance process. These consequences may limit or even end the attorney's ability to practice law. Court-ordered sanctions may deprive the attorney of the privilege of practice, which should not occur without due process of law.[111]

In *Braley v. Campbell*,[112] the Court of Appeals for the Tenth Circuit confronted the due process question in a sanctions case.[113] Alexander, the plaintiff's attorney, filed a civil rights action against a municipal hospital and other defendants.[114] At trial, the court granted summary judgment in favor of all defendants.[115] Alexander appealed, but his arguments, like those he raised during the trial,

---

107. 390 U.S. 544 (1975).

108. *Id.* at 550. The Court concluded that a disciplinary proceeding is an adversary proceeding of a quasi-criminal nature; therefore, the attorney is entitled to due process. *Id.* at 551-52.

109. Sexton v. Arkansas Supreme Court Comm. on Professional Conduct, 299 Ark. 439, 774 S.W.2d 114 (1989).

110. "The recognized purposes to be achieved by lawyer discipline are to protect the public, ensure the administration of justice, and maintain the integrity of the [legal] profession." *In re* Bowen, 160 Ariz. 558, ____, 774 P.2d 1348, 1351 (1989). *See also In re* Hoover, 161 Ariz. 529, 779 P.2d 1268 (1989).

111. Sexton v. Arkansas Supreme Court Comm. on Professional Conduct, 299 Ark. 439, ____, 774 S.W.2d 114, 118 (1989) ("Certainly, we could never tolerate the denial of the right to practice law without fully affording due process to the practicing attorney.").

112. 832 F.2d 1504 (10th Cir. 1987).

113. The court imposed sanctions under 28 U.S.C. § 1927 (1982), which states:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably or vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

Under Rule 11, the trial court alone is empowered to impose sanctions. *See* FED. R. CIV. P. 11.

114. *Braley*, 832 F.2d at 1508.

115. *Id.*

were so convoluted that the defendants had great difficulty understanding the plaintiff's basic contentions.[116] The Court of Appeals for the Tenth Circuit affirmed the summary judgment and awarded the defendants attorney's fees and costs for the appeal, on the grounds that it was "patently frivolous, multiplicious and vexatious."[117] The court affirmed the judgment en banc, and addressed what process is due in court-ordered sanction cases:

> [T]he court must identify the extent of the multiplicity resulting from the attorney's behavior and the costs arising therefrom. Second, because the person sanctioned is entitled to notice and opportunity to be heard, the objectionable conduct must be identified sufficiently to make the opportunity to respond meaningful. Finally, the reasons for the decision must be in a form reviewable by the appellate courts.[118]

Fundamental due process must be provided in any attorney sanction procedure. Although the *Braley* court set forth some procedural requirements, it failed to explain how these requirements are to be satisfied.

C. *Due Process and Judicial Discretion*

A Minnesota appellate case, *Anderson v. Lindgren*,[119] illustrates the essential due process problem raised by court-ordered sanctions: the broad, unbridled discretion of the trial judge to impose harsh sanctions. The plaintiff had opened a resort motel as a retirement project.[120] She fell behind in mortgage payments, however, and was forced to close the motel after less than three years of operation.[121] Anderson filed suit against several defendants, claiming $85,000 in losses from the operation.[122] The trial court concluded that Anderson's claims were frivolous and brought in bad faith, and directed a verdict in favor of all defendants.[123] The court ordered Anderson to pay more than $20,000 in attorney's fees.[124]

Anderson appealed to the Minnesota Court of Appeals, which held that she lost her investment because the motel was unsuccessful,

116. *Id.*
117. *Id.* at 1507.
118. *Id.* at 1513.
119. 360 N.W.2d 348 (Minn. Ct. App. 1984).
120. *Id.* at 350.
121. *Id.*
122. *Id.*
123. *Id.* at 352.
124. Anderson v. Lindgren, 360 N.W.2d 348, 352 (Minn. Ct. App. 1984).

and not due to any conduct attributable to the defendants.[125] The court also held that the inappropriate behavior of the plaintiff and her attorney justified the trial court's finding of bad faith and its award of sanctions.[126] The court agreed with the trial court's characterization of this judicial function as "frankly, distasteful."[127] Since the trial court did not act capriciously or abuse its broad discretion, however, the appellate court did not overturn the award.[128] The court unequivocally noted its disapproval of the sanctions: "[w]e do not endorse the award as the only, or even as the most appropriate, method by which to deal with recalcitrant parties or counsel. Courts have at their disposal less intrusive sanctions and cautions which should be explored and exhausted before resorting to an award of attorneys fees."[129]

This case suggests that it is very difficult for the trial judge to make the sanction decision objectively. After hearing the evidence, judging the credibility of the witnesses, and directing a verdict in favor of the defendants, the trial judge could never have been objective and fair in imposing sanctions. The court never held a hearing to determine whether the plaintiff and her attorney acted in bad faith. This issue was left entirely to the discretion of the trial judge. Whether the plaintiff and her attorney acted in bad faith or not, they were clearly entitled to fundamental due process and fairness. Parties facing court-ordered sanctions are entitled to have their actions evaluated by an impartial judge. This protection is absolutely crucial because the sanction determination will be reversed only if the judge is guilty of abuse of discretion.[130]

It is far from clear that justice was served by imposing sanctions on Anderson and her attorney, particularly when these sanctions led to extensive satellite litigation. The court could have resolved the matter by simply dismissing the case and filing a grievance with the office of bar counsel. Perhaps justice was served by assuring the innocent victims of a frivolous lawsuit that they would be compensated for their attorneys fees. This positive result is mitigated, however, by

125. *Id.*
126. *Id.* at 353.
127. *Id.*
128. *Id.*
129. Anderson v. Lindgren, 360 N.W.2d 348, 353 (Minn. Ct. App. 1984).
130. *Id. But see In re* Lasky, 54, Wash. App. 841, 776 P.2d 695 (1989), in which the court noted that some courts have adopted a three-tier approach for review of sanction determinations: findings of fact are reviewed for clear error; conclusions of law are reviewed de novo; and the appropriateness of the sanction is reviewed for abuse of discretion. *Id.* at 551, 776 P.2d at 700. The *Lasky* court chose to use the normal abuse of discretion standard. *Id.* at 551-52, 776 P.2d at 700.

the high cost of answering to the appeal. In light of the overall damage to the judicial system, fee awards seem counterproductive. The judicial system is diminished when the system allows an attorney to be punished for bringing a losing case. Furthermore, fundamental principles of due process are violated when sanctions are imposed by the judge who heard the underlying case[131] and without an appropriate factfinding hearing. The judicial system cannot justify a procedure that denies due process,[132] objectivity, and fundamental fairness, and which stifles the creativity that has traditionally been the hallmark of our legal system.

Even when the attorney files a suit with no basis in fact, due process demands that sanctions be imposed only after an appropriate hearing in which all facts and issues are explored. Unless this opportunity to be heard is provided, the attorney's only remedy is to file an appeal that can succeed only if the reviewing court finds that the lower court abused its discretion.[133]

If a trial judge may impose sanctions without conducting a separate hearing,[134] without appointing a separate judge to hear the

---

131. *See In re* Kennedy, 472 A.2d 1317 (Del. Super. Ct.), *cert. denied*, 467 U.S. 1205 (1984). When a member of the grievance board acts in an adjudicative or investigative role in one proceeding and in a judicial role in another involving different facts, there is no violation of due process. 472 A.2d at 1327-28 (citing Withrow v. Larkin, 421 U.S. 35 (1975)). This case, however, involved no additional evidence of unfairness in the grievance process, and the underlying cases involved different facts. 472 A.2d at 1328.

132. *See* Beit v. Probate & Family Court Dep't, 385 Mass. 854, 434 N.E.2d 642 (1982), in which the Massachusetts Supreme Judicial Court held that fair notice and an opportunity for a hearing must be provided before a judge can impose costs on an attorney for failure to appear. *Id.* at ____, 434 N.E.2d at 647. The judge relied on his inherent power, and not on any statutory authority. *Id.* at ____, 434 N.E.2d at 643-44. The Supreme Judicial Court concluded that the judge did possess the power to sanction the attorney, but added that

> if the judge requires an attorney to pay court costs, he must afford him fair notice and a reasonable opportunity to be heard. Without procedural safeguards, "serious due process problems would result were trial courts to use their inherent power in lieu of the contempt power." . . . Further, we believe that a judge who exercises his or her inherent power to impose costs on an attorney must articulate the reasons for the sanction. The requirement of articulation of reasons ensures that the judge will act with restraint. We also believe that it ensures judicial recognition of the seriousness of imposing sanctions.

Id. at ____, 434 N.E.2d at 646-47 (quoting Bauguess v. Paine, 22 Cal. 3d 626, 638, 150 Cal. Rtpr. 461, 468 (1978)).

The court added two interesting observations. First, the court noted the suggestion made by one commentator that the attorney be required to notify the client of the sanction so the client may guard against being billed by the attorney for the cost of the sanction. *Id.* at ____ n.4, 434 N.E.2d 643 n.4 (citing Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CAL. L. REV. 770, 802 (1981)).

Second, the court suggested that the judge might refer the case to the appropriate grievance authority, rather than impose sanctions. 385 Mass. at ____ n.13, 434 N.E.2d at 647 n.13.

133. Kilton v. Nadler & Assocs., 447 N.W.2d 468 (Minn. Ct. App. 1989). *But see* discussion of *In re* Lasky, 54 Wash. App. 841, 776 P.2d 695 (1989), *supra* note 130.

134. *See, e.g.*, Van Eps v. Johnson, 150 Vt. 324, ____, 553 A.2d 1089, 1092 (1988)

case, and without following final and meaningful guidelines, fundamental notions of due process and fairness will be violated. Neither the lofty rationale behind court-ordered sanctions nor the reprehensible conduct of some attorneys and their clients can justify the abrogation of fundamental rights[135] and abandonment of due process. If courts cannot be just and fair in imposing sanctions, they will inevitably shatter the image of integrity that gives public legitimacy to the judicial process.

IV. Advantages of Traditional Disciplinary Procedures

A. The Attorney Disciplinary Procedure

The attorney disciplinary procedure exists to protect the public, ensure that justice will be administered, and maintain the integrity of the profession.[136] When a violation of ethical standards occurs, the state bar has the power to disbar the errant attorney.[137] This power stems from the court's general authority to define, regulate, and control the practice of law.[138] This includes the power to develop standards by which attorney conduct shall be measured.[139]

This disciplinary process is utilized and is effective. Between 1984 and 1988, more than 11,000 attorneys were subjected to some degree of discipline.[140] Of that number, more than 1200 were disbarred and more than 3500 were suspended from the practice of law.[141] During the same period, more than 3200 attorneys were disciplined by federal agencies.[142] Of that number, 250 were disbarred and more than 340 were suspended.[143] Significantly, these disciplinary procedures are separate from the litigation arena, take their inspiration from established codes of conduct, and operate according to procedural standards designed to provide fundamental due process while simultaneously protecting the interests of the profession and

(absence of notice and an appropriate and fair hearing was improper, especially when such a hearing might shed light on the measure of damages to be imposed as a sanction).

135. *See, e.g.*, Gagliardi v. McWilliams, 834 F.2d 81 (3d Cir. 1987); Sanko Steamship Co., Ltd v. Galin, 835 F.2d 51 (2d Cir. 1987).

136. *See supra* note 110 and accompanying text.

137. *See* Louisiana State Bar Ass'n v. Williams, 549 So. 2d 275, 280 (La. 1989).

138. Committee on Legal Ethics v. Douglas, 370 S.E.2d 325, 334 (W. Va. 1988).

139. *Id.*

140. AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON PROFESSIONAL DISCIPLINE AND CENTER FOR PROFESSIONAL RESPONSIBILITY, STATISTICAL REPORT, SANCTIONS IMPOSED IN PUBLIC DISCIPLINE OF LAWYERS 1984-1988 25 (1989).

141. *Id.*

142. *Id.* at 26.

143. *Id.*

the public.[144] The process of determining sanctions and attorney discipline under the grievance procedure can run in a parallel fashion against the same attorney.[145]

If the court-ordered sanction process conformed to the requirements of due process and fundamental fairness, the sanction system would be nothing more than a carbon copy of the attorney disciplinary system already in place. No perceptible differences would exist to justify its separate operation. Administrative agencies, such as state bar grievance committees, already exist, operating under established rules designed to protect attorneys from premature public attack and to provide appropriate factfinding procedures consistent with due process of law.[146]

B. Model Rule 3.1

Some criticize the ethical codes as not aspiring high enough. Some complain that the code is preoccupied with the attorney-client relationship, and not sufficiently concerned with the attorney's duties to others. Some contend that the emphasis on zealous representation leads to a low standard of attorney conduct.[147] Professor Patterson suggests that the Model Rules of Professional Conduct[148] represent a positive change in approach from a "loyalty code" to an "integrity code."[149] He argues that the Rules set more objective and extrinsic requirements regarding appropriate conduct by members of the bar.[150]

The Model Rules clearly address the same problems that Rule 11 is designed to prevent. Model Rule 3.1 provides:

> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless

144. AMERICAN BAR ASSOCIATION CENTER FOR PROFESSIONAL RESPONSIBILITY, STANDARDS FOR IMPOSING LAWYER SANCTIONS 5-6 (1986).

145. *In re* Solerwitz, 575 A.2d 287, 292 (D.C. App. 1990).

146. *In re* Petition of Colorado Bar Ass'n, 137 Colo. 357, ____, 325 P.2d 932, 937 (1958).

147. Patterson, *supra* note 99, at 46-47.

148. The Model Rules of Professional Conduct were adopted by the American Bar Association House of Delegates on August 2, 1983, following extensive research, review, and study by the American Bar Association Commission on Evaluation of Professional Standards, chaired by the late Robert J. Kutak. *Id.* at 43.

149. *Id.* at 48-49.

150. *Id.*

> so defend the proceeding as to require that every element of the case be established.[151]

The Comment to Rule 3.1 indicates that a lawyer has a duty "to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure."[152] This Comment emphasizes the law's flexibility and the potential for change,[153] whereas sanction rules seek to restrict innovation and creativity.

The Comment also recognizes that the law is often unclear and is never static.[154] The lawyer does not always have full information at hand when the time comes to sign the pleading or commence the suit.[155] Gaining that information is a principle goal of the liberal discovery process.[156] The Model Rules recognize that the system must allow the attorney some latitude to pursue the vindication of the client's position, even if the lawyer reasonably believes that the client will lose the case.[157] Critically, Model Rule 3.1 differs from Rule 11 on the issue of intent. Under the Model Rules, the attorney may be disciplined only if the client brings the action primarily for the purpose of harassing or maliciously injuring another, or if the attorney cannot make a good faith argument for extending, modifying, or reversing the law.[158]

C. *Advantages of the Traditional Approach*

Model Rule 3.1 clearly emanates from a different philosophical approach than the approach that produced Rule 11 and its various state counterparts. The sanction rules impose unrealistic and burdensome standards, and have a chilling effect on litigation. Sanction rules create a two-step process that first inquires into the minds of the client and lawyer, and then examines the merits of the case. Although the court handles both stages simultaneously, the attorney must act as both judge and advocate, and must assume these roles before any meaningful discovery occurs.

Some state sanction rules parallel the language and intent of Model Rule 3.1.[159] In *Kahn v. Cundiff*,[160] the lawyer attempted to

---

151. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1989).
152. *Id.* comment.
153. *Id.* comment.
154. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 comment (1989).
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. *See, e.g.*, IND. CODE ANN. § 34-1-32-1 (Burns 1986), which provides:
(b) In any civil action, the court may award attorney's fees as part of the

utilize Model Rule 3.1 to explain the meaning of the term frivolous, which appears in the Indiana sanction rule.[161] The court concluded that the statute established an objective standard of reasonableness, which considered the opportunity the attorney had to investigate the facts and conduct discovery prior to making the decision to move forward with the case.[162]

Model Rule 3.1 provides a more thoughtful and viable method of dealing with frivolous cases than either Federal Rule 11 or the state sanction rules. Model Rule 3.1 is coordinated with the attorney's other ethical obligations, including those to the client, the profession, and the court, allowing these obligations to be considered in context. For example, issues of confidentiality or conflict of interest may exist that must be considered in evaluating the conduct of an attorney. Because administrative grievance proceedings are confidential, a court may not be aware of an attorney's previous ethical lapses when evaluating the attorney's conduct under Rule 11. Most significantly, the sanctioned attorney is not subject to the whim of the judge but is afforded specific due process protection.

In re Belue[163] illustrates how administrative disciplinary proceedings can effectively redress grievances without compromising an attorney's due process rights. Belue was charged with thirteen counts of unethical behavior, including violations of Model Rule 3.1.[164] Belue contended that he was merely an aggressive advocate and that the charges against him represented vigilanteeism.[165] Despite Belue's contention, the case demonstrates the existence of an established procedure that allowed the grievance committee to act with propriety and dignity in dealing with what was a difficult and emotional case. The grievance committee held a two and one-half day hearing, after which the committee made detailed findings of fact and recommendations.[166] The Montana Supreme Court unanimously accepted

---

cost to the prevailing party, if it finds that either party:

(1) Brought the action or defense on a claim or defense that is frivolous, unreasonable or groundless;

(2) Continued to litigate the action or defense after the party's claim or defense clearly became frivolous, unreasonable or groundless; or

(3) Litigated the action in bad faith.

See also PA. R. CIV. P. 4019.

160. 533 N.E.2d 164 (Ind. Ct. App. 1989), *aff'd*, 543 N.E.2d 627 (Ind. 1989).

161. 553 N.E.2d at 170.

162. *Id.*

163. 232 Mont. 365, 766 P.2d 206 (1988).

164. *Id.* at ____, 766 P.2d at 208. Ironically, Belue was charged with violating Rule 3.1 because he filed frivolous and unfounded ethical claims against opposing counsel. *Id.*

165. *Id.* at ____, 766 P.2d at 212.

166. *Id.* at ____, 766 P.2d at 206.

those recommendations and suspended Belue from the practice of law for three months.[167] Both the public and the legal community benefit from the calm approach of such a bar grievance procedure.[168]

In re Plunkett[169] further illustrates the point. Minnesota's Director of Lawyers Professional Responsibility petitioned the Supreme Court of Minnesota, alleging unethical conduct by Plunkett, including a violation of Rule 3.1.[170] The Minnesota Supreme Court viewed Plunkett's conduct in light of his other ethical obligations,[171] and disciplined Plunkett by publicly reprimanding him and ordering him to pay the costs of the frivolous proceeding.[172] Court-ordered sanctions would not have better served the interests of the public, the legal system, or the opposing party. The sanctions process would have resolved the matter more quickly and the opposing party would have received attorneys fees. The grievance process provided a more complete resolution, however, by considering all aspects of Plunkett's conduct and establishing clear guidelines for attorneys to follow in the future.

Moreover, use of the established grievance procedure enhances the profession and maintains the balance between the attorney and the court. Model Rule 3.1 respects the needs of the legal system, but also acknowledges that citizens need to seek judicial resolution of their legal problems.[173] The Model Rules respect the needs and obligations of all participants in the legal system.[174] Sua sponte discipline by judges tips the balance in favor of the judge and, while it accomplishes the immediate goal of punishment, subjects the system to further satellite litigation.[175]

---

167. *Id.* at ____, 766 P.2d at 212.

168. *See* Board of Overseers of the Bar v. Nisbet, No. Bar-88-18 (Me. June 29, 1989) (LEXIS, States library, Me. file).

169. 432 N.W.2d 454 (Minn. 1988).

170. *Id.* at 455. Plunkett was charged with initiating a lawsuit in retaliation for a human rights claim against his clients. *Id.*

171. *Id.* For example, the court considered Plunkett's obligation to supervise his associate, *see* MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.1 (1989), and his duty to respect the rights of others, *see* MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.4 (1989).

172. *Plunkett*, 432 N.W.2d at 455.

173. Quoting the comment to Model Rule 3.1, Chief Judge Richard Gilbert of the Maryland Court of Special Appeals recently pointed out that an action is "not frivolous even though the lawyer believes that the client's position ultimately will not prevail." Legal Aid Bureau, Inc. v. Bishop's Garth Assocs. Ltd. Partnership, 75 Md. App. 214, 222, 540 A.2d 1175, 1179, *cert. denied*, 313 Md. 611, 547 A.2d 188 (1988).

174. *See* Committee on Legal Ethics v. Douglas, 370 S.E.2d 325, 326 (W. Va. 1988) (when faced with the choice between proceeding under the grievance procedure and imposing sanctions, courts should recognize that fairness, due process, and justice demand application of the grievance procedure).

175. In Hauswald Baker v. Pantry Pride, 78 Md. App. 495, 552 A.2d 1308 (1989) the Maryland Court of Special Appeals stated:

The concept of balance is crucial to our legal system, and it provides the final and most important reason for application of state grievance procedures. The Preamble to the Model Rules outlines the various duties and obligations of the attorney,[176] and is animated by a spirit of balance among the various actors in the legal system.[177]

The legal profession essentially governs itself,[178] writing its own rules of conduct, determining its own disciplinary standards, issuing ethics opinions, and maintaining its own grievance process. This protects the systemic balance and gives the lawyer the power and authority to challenge institutions when the challenge is justified. This power should not be abrogated merely because some would abuse the legal system.

The judge possesses enormous power to control the course of litigation, in spite of claims that this power has diminished in recent years. The legal profession has lost power, as evidenced by the move in some jurisdictions to an elective judiciary. Although the sanction rules are well-motivated, allowing judges and lawyers[179] to threaten sanctions further diminishes the power of the legal profession. The judge recognizes the power to impose sanctions and acts accordingly. Attorneys recognize that they may be sanctioned, and they also act accordingly.

V. Conclusion

Cases are brought in bad faith, without substantial justification, and without appropriate and reasonable investigation. This reality cannot be denied or ignored. Some lawyers lack integrity. Lawyers and clients abuse the judicial system by filing motions and pleadings that have no purpose other than vexation and harassment. Perhaps there are too many lawyers chasing after too few cases in an overly crowded judical system. Perhaps our society is overly litigious. Perhaps lawyers overstep the ethical boundaries because they fear that failure to get results for the client will lead to a malpractice action.

> We find equally distressing a growing tendency on the part of some lawyers to file a motion under Rule 1-341 [Maryland's sanction rule] almost routinely, as a Pavlovian response to whatever the other side does. We would caution those heading in that direction that the frivolous and unjustified filing of any motion, including one under Md. Rule 1-341, may not only be grounds for sanctions under that Rule but may also constitute a violation of Rule 3.1 of the Rules of Professional Conduct.

Id. at 507-08 n.3, 553 A.2d at 1314 n.3.

176. MODEL RULES OF PROFESSIONAL CONDUCT preamble (1989).

177. *See id.*

178. MODEL RULES OF PROFESSIONAL CONDUCT preamble (1989).

179. *See* Hauswald Bakery v. Pantry Pride, 78 Md. App. 495, 553 A.2d 1308 (1989).

The problem demands reasonable and appropriate solutions.

Unfortunately, court-ordered sanctions represent a poor approach, providing a quick fix while trampling the rights of attorneys and clients. Court-ordered sanctions have created more problems than they have solved. The sanction rules are complex, and their meanings are often unclear. They ignore due process, create tension between attorneys and judges, and have a chilling effect on litigation. Finally, the sanctions rules create a new and unnecessary disciplinary process that is vastly inferior to the traditionally established procedure.

Designed to stem the flow of litigation, sanction rules have become the focus of a new flood.[180] Appeal is the only remedy to a sanctioned attorney or client; thus, sanction rules create an entirely new class of appellate litigation.[181] This further congests appellate dockets, and imposes extreme costs on those who seek appellate vindication. The attorney faces a Hobson's choice: accept the sanction and the consequent loss of professional standing and reputation, or challenge the sanction and pay the cost of that challenge, knowing that vindication may not result.

More important, the sanction process is fundamentally unfair, unjust, and abusive. The rules do not require a hearing. They do not establish the most basic due process protections. Moreover, the person who hears the case, rules on the evidence, judges the credibility of witnesses, instructs the jury, and rules on motions also determines whether sanctions should be imposed. Some might argue that this is a sensible approach, because the judge knows a great deal about the case. This knowledge of the proceedings, litigants, and counsel, however, creates a real and present risk that the sanction process would not be objective. Additionally, the sanctions process invests the judge with the powers of the grand jury, trier of fact, and trier of the law. The judge plays so many roles in this process that it is difficult to determine which role is being played at any given moment.

The sanction rules unnecessary duplicate the traditional attorney discipline procedures. These procedures take into account the interests of all participants in the legal system.[182] The grievance pro-

180. *See* Szabo v. Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073, 1086 (7th Cir. 1987) (Cudahy, J., concurring in part and dissenting in part) (suggesting that sanction rules have created their own "cottage industry").

181. The standard of review of a trial court decision varies from state to state; determining the standard and overcoming the burden further exacerbates the problem faced by the sanctioned attorney. *See* Kelley v. Dowell, 81 Md. App. 338, 567 A.2d 521 (1990).

182. *Compare* MODEL RULES OF PROFESSIONAL CONDUCT preamble (1989) with FED. R. CIV. P. 11.

cess takes time, and does not satisfy the urge for quick justice, but it works. The speed of the sanction system does not justify the failure to afford due process to sanctioned parties. Quick justice does not justify judges or attorneys who use the threat of sanctions to obtain desired results. The grievance process rests on a foundation of decisional law, ethical codes, and advisory opinions. The sanction process rests on a few vague statutes and vast judicial discretion.

Utilization of court-ordered sanctions diminishes the value and credibility of the grievance process. If courts can sanction attorneys for bringing frivolous cases, perhaps the sanction rules should be modified to allow judicial sanctions for other ethical violations, such as romantic liaisons with clients, conflicts of interest, inappropriate trial publicity, or unreasonable fees. This would certainly provide for more efficient discipline. It would also devastate the legal system.

The time has come to return the function of attorney discipline to the appropriate agencies. Otherwise, courts will soon be required to sanction attorneys for filing sanction motions. If this issue is not immediately considered, the profession, the courts, and the public will face an ever-increasing spiral of sanctions and appeals. Such a result would not benefit anyone. It certainly would not fulfill the hopes of those who created the sanction rules.