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Jeffrey A. Parness

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THE NEW METHOD OF REGULATING LAWYERS: PUBLIC AND PRIVATE INTEREST SANCTIONS DURING CIVIL LITIGATION FOR ATTORNEY MISCONDUCT

*Jeffrey A. Parness**

The topic of regulating attorney conduct most immediately raises thoughts of disciplinary panels established by court rule or legislative enactment. Such enforcement mechanisms typically are employed to hear alleged violations of the American Bar Association's Model Code of Professional Responsibility or its Model Rules of Professional Conduct. The code and rules now govern the professional conduct of American lawyers, whether they work on civil or criminal matters and whether they work in or out of court. Further reflection on the subject might also prompt consideration of the conduct of attorneys being questioned by their former clients, either in a civil malpractice suit or in a setting in which the legal representation during an earlier criminal case is being challenged. However, the topic would prompt few to reflect upon the regulation of lawyers during litigation for conduct which occurs during that litigation and in which the lawyers are not named as parties, their licenses are not in jeopardy, and their effective legal assistance under the Sixth Amendment is not examined.

This relatively new method of regulating lawyers during the litigation of claims belonging to others merits greater attention. The following paragraphs are intended to prompt such attention and will concern only the regulation of attorney conduct during civil litigation in traditional (and not administrative or other) courts. After reviewing the recent recognition and expansion of judicial power to regulate an attorney's conduct during civil litigation, certain difficulties with the exercise of this new power will be explored. Mainly, these difficulties arise because courts on occasion simultaneously utilize their new-found authority over lawyers during litigation to achieve two distinct ends. The more common goal is to provide redress to opposing parties and others injured by an attorney's litigation misconduct. The other, less common goal is to promote societal interests by providing a remedy to the public at large

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* Associate Professor of Law, Northern Illinois University. B.A., Colby College; J.D., The University of Chicago. This paper is based upon a talk presented on June 14, 1987, at the Annual Meeting of the Law and Society Association.

for the same, or comparable, activity. While addressing such differing objectives in the same breath, courts at times deny procedural protections, defy the limits imposed upon their authority, and fail to accord equal treatment to similarly situated lawyers. This paper will focus on these two objectives by examining the differences in private interest sanctions and public interest sanctions imposed during civil litigation. In doing so, it will also address the relationship between these sanctions and other forms of attorney regulation.

Before reviewing the nature of the new regulatory power and its recent expansion into public interest remedies, the similarities between public interest sanctions during civil litigation and both traditional disciplinary actions and criminal contempt proceedings should first be noted. In each instance, attorney conduct is scrutinized for the primary purpose of protecting the public at large. Should it be found that a relevant standard of conduct has been breached, any resulting remedy would be geared primarily to promote public, rather than private, interests. Possible remedies include disbarment, suspension, reprimand, admonishment, a monetary assessment payable to the government (at times, related to the government's expenses resulting from the breach of conduct) or referral to a disciplinary panel. Notwithstanding these similarities, there are significant distinctions in the procedural safeguards afforded attorneys who stand accused of misconduct in each setting. While some differences are inevitable and necessary, the safeguards attending the imposition of public interest sanctions during civil litigation have generally been inadequate.

Recent recognition and significant expansion of judicial power to regulate attorney conduct during civil litigation is best exemplified by certain of the 1983 amendments to the Federal Rules of Civil Procedure and their progeny. The most noteworthy of the 1983 amendments altered rule 11.¹ This amendment has received significant professional support, including endorsement by the American Bar Association's Stanley Commission on Professionalism,² adoption by a growing number of state trial courts,³ and implementation by a number of appellate

1. Preliminary Draft of Proposed Amendment to the Federal Rules of Civil Procedure, 90 F.R.D. 451, 462-63 (1981) [hereinafter Preliminary Draft] (references to this draft are prompted by its inclusion of a comparison of the old and new rule 11, as well as the relevant Advisory Committee Notes).

2. "... In the Spirit of Public Service:" A Blueprint for the Rekindling of Lawyer Professionalism, Report of the Commission on Professionalism to the Board of Governors and the House of Delegates of the American Bar Association, 112 F.R.D. 243, 291-92 (1986).

3. Ariz. Rule Civ. Proc. 16(11a) (West Supp. 1986); Mont. Rule Civ. Proc. 11 (1985); N.C. Rule Civ. Proc. 11 (West 1959); Ill. Rev. Stat. ch. 110, § 2-611 (West Supp.

courts.⁴ It has even been suggested for use by the United States Supreme Court.⁵ While the former as well as the current provisions of rule 11 address judicial regulation of attorney conduct, the new rule greatly expands not only the conduct regulated, but also the nature of judicial regulation.

Under the earlier version of rule 11, an attorney signing a document filed in a district court was deemed to have certified that the paper was supported by "good ground" and was "not interposed for delay."⁶ A willful violation of this signature requirement, as well as the insertion of scandalous or indecent matter, permitted the court to subject the responsible attorney "to appropriate disciplinary action."⁷

Under present rule 11, an attorney signing a document filed in a district court is deemed to have certified that the paper was founded on "reasonable inquiry," "well grounded in fact," "warranted by existing law," and "not interposed primarily for any improper purpose."⁸ Any violation of the rule, whether willful or not, now requires rather than permits the court to subject the responsible attorney to "an appropriate sanction."⁹ Such a sanction may include an order to pay the opposing party's reasonable attorney's fees,¹⁰ thus encompassing non-disciplinary remedies.¹¹

In amending the signature requirement in 1983, the federal rule-makers expressly recognized the judicial power to employ sanctions against attorneys during civil litigation to punish, compensate or deter.

1987); Mo. Rules of Court 55.03 (West 1987); Ky. Rule Civ. Proc. 11 (Baldwin 1986); Mich. Rules of Court 2.114(D) and (E) (West 1987); Minn. Rule Civ. Proc. 11 (West Supp. 1987); Tenn. Rule Civ. Proc. 11 (Michie 1987).

4. See, e.g., Utah Court Rules 40 (Michie 1987); Rule 3.1 of the Rules of Court of the United States Court of Appeals for the Tenth Circuit; *In re Disciplinary Action Curl*, 803 F.2d 1004, 1007 (9th Cir. 1986).

5. S. Estreicher & J. Sexton, *Redefining the Supreme Court's Role*, 119-120 (Yale Univ. Press 1986).

6. Preliminary Draft, *supra* note 1, at 462.

7. *Id.* at 463.

8. *Id.* at 462.

9. *Id.* at 463.

10. *Id.* Whether attorney's fees may be awarded against an attorney absent bad faith or intentional misconduct is uncertain. Burbank, *Sanctions in the Proposed Amendments to the Federal Rules of Civil Procedure: Some Questions of Power*, 11 Hofstra L. Rev. 997 (1983) (suggesting that rule 11 must be read in conjunction with 28 U.S.C. § 1927, which also permits attorney's fees awards against lawyers engaging in litigation misconduct).

11. Prior to the 1983 amendments, confusion and mischief surrounded the issue of disciplinary action. Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 Minn. L. Rev. 1, 42-47, 62 (1976). Frequently, discipline under rule 11 was read not to permit an award of attorney fees. *United States v. Standard Oil Co. of California*, 603 F.2d 100, 103 n.2 (9th Cir. 1979).

They indicated that the amended rule would encourage the "detection and punishment" of a violation of the signing requirement.¹² They further declared that the amendments incorporated "the equitable doctrine permitting the court to award expenses, including attorney's fees, to a litigant whose opponent acts in bad faith in instituting or conducting litigation,"¹³ and that the new requirements stressed "a deterrent orientation in dealing with improper pleading."¹⁴ Such judicial authority to punish, compensate or deter has been recognized by many trial and appellate courts.¹⁵

With the present authority to impose a sanction designed to punish an attorney for litigation misconduct, to compensate those incurring injuries resulting from such misconduct, or to deter instances of similar attorney misconduct, trial and appellate courts can now assess both private interest and public interest sanctions. Recent experience indicates most courts initially focus only on the private interest sanction of compensation for individual losses, particularly for attorney's fees,¹⁶ and this is how the sanctioning authority should be used.¹⁷ Nevertheless, in certain cases courts go beyond this private remedy by awarding compensation for the public's losses or by pursuing discipline against errant lawyers. In these multi-sanction settings, particularly egregious attorney conduct is usually involved.¹⁸ Such egregious acts often fall within the zone of

12. Preliminary Draft, *supra* note 1, at 461 (Advisory Committee Note on Fed. R. Civ. P. 7(b)(3)), recognized in *id.* at 465.

13. *Id.* at 463.

14. *Id.* at 465. Courts utilizing rule 11 and its counterparts have recognized that deterrence can be pursued even though punishment and compensation may not be involved. For example, individualized warnings have been issued to lawyers involved in misconduct, and generalized warnings have been issued to all who practice before the court. See, e.g., *Dreis & Krump Mfg. v. Int'l Ass'n of Machinists*, 802 F.2d 247, 256 (7th Cir. 1986) ("Lawyers practicing in the Seventh Circuit, take heed!") and *National Ass'n of Radiation Survivors v. Walters*, 111 F.R.D. 595, 603 (N.D. Cal. 1986) (future submissions by a certain lawyer to be treated with due skepticism).

15. But see Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 *Geo. L.J.* 1313, 1338 (1986) (arguing rule 11 permits only an award of reasonable costs and attorney's fees to an opposing party and other "less stringent sanctions," and thus does not permit sanctions which serve as punishment).

16. *Id.* at 1333 ("In 96 percent of the cases studied in which sanctions were imposed for violation of rule 11, the courts awarded 'reasonable' costs and attorney fees to the party opposing the sanctioned paper.").

17. Parness, *Groundless Pleadings and Certifying Attorneys in the Federal Courts*, 1985 *Utah L. Rev.* 325, 355.

18. See, e.g., *Itel Containers Int'l v. Puerto Rico Marine Mgt.*, 108 F.R.D. 96, 104 (D.N.J. 1985) (knowing the court lacked jurisdiction, defendant's counsel litigated the matter as if jurisdiction existed and went out of his way to induce the plaintiff and the court to believe jurisdiction was proper); *Zerman v. Jacobs*, 113 F.R.D. 13, 14 (S.D.N.Y. 1986) (plaintiff "persisted in a personal vendetta against the defendants aimed at wearing them down and clogging the courts, despite repeated warnings. . .").

activity prohibited by the code or rules of professional conduct administered through bar disciplinary panels,¹⁹ or within the zone of conduct proscribed by the statutes on criminal contempt.²⁰

During civil litigation in which both private and public interest sanctions are imposed for attorney misconduct, significant differences between the two remedies are frequently unappreciated. Similarly unrecognized on occasion are important differences between the varying types of public interest sanctions. Finally, in some instances there remain undiscussed and thus unexplained the differences in the mechanisms attending sanctions, disciplinary actions, and contempt, all of which may be available for addressing the same attorney misconduct during civil litigation. Failure to distinguish properly the distinct remedies and mechanisms available for attorney misconduct during civil litigation prompts criticism and undermines the sincere and necessary regulatory efforts under rule 11 and its counterparts. Criticism is appropriate as there have been troubling instances in which private and public interest sanctions for litigation misconduct were imposed during civil litigation.

An examination of recent sanction cases is disturbing because there is often found an inappropriate consolidation of the prosecution, hearing, and resolution of the two distinct types of sanctions—private interest remedies and public interest remedies. For example, the pursuit of a public interest sanction, such as a monetary assessment payable to the court, is often first noted and then resolved by a court during its ruling on a motion for a private interest sanction, such as an award of attorney's fees to an aggrieved private party. In such cases, the court effectively serves as a policeman, a prosecutor, and an adjudicator before the accused learns that any public interest sanctions are even being contemplated. Occasionally, the court also serves as a witness when, for example, it recalls earlier cases in which the same lawyer engaged in

19. While rule 11 mandates sanctions on attorneys who sign papers formulated without reasonable inquiry, not well grounded in fact or not warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, Model Rules of Professional Conduct Rule 3.1 (1983) 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 good faith argument for an extension, modification or reversal of existing law."

20. 18 U.S.C. § 401 (1966) ("A court of the United States shall have power to punish . . . such contempt of its authority, . . . as . . . disobedience or resistance to its lawful . . . rule. . . ."); 18 U.S.C. § 402 (1966) ("Any person . . . willfully disobeying any lawful . . . rule of any district court of the United States . . . by doing any act or thing therein, or thereby forbidden, if the act or thing so done be of such character as to constitute also a criminal offense under any statute of the United States or under the laws of any State in which the act was committed, shall be prosecuted for such contempt as provided in section 3691 of this title. . . ."). See, e.g., *Zerman*, 113 F.R.D. at 15.

other acts of misconduct.²¹ While a court's assumption of a variety of roles during the imposition of a public interest sanction certainly serves worthwhile objectives such as economy, efficiency and speed, such should not come at the expense of fundamental fairness.

Consider the decision in *Lyle v. Charlie Brown Flying Club, Inc.*²² The defendant had on at least two occasions requested sanctions, presumably attorney's fees and costs, against the plaintiff's lawyers pursuant to rule 11. In response, the court scheduled an evidentiary hearing, indicating that the hearing would be confined to three issues. The issues all concerned the activities of the plaintiff's three lawyers prior to and during the lawsuit.²³ After the hearing, the court granted the defendant an award of attorney's fees. Its decision was founded, in part, on a determination that two of the plaintiff's lawyers had engaged in a "flagrant misrepresentation" to the court.²⁴ Without further hearing (and in the apparent absence of much, if any, warning), the court concluded that an additional sanction against the two lawyers was warranted. It ordered a "public reprimand" of the lawyers, consisting of a notice, not less than one eighth of a page, in a major Atlanta daily legal newspaper.²⁵ The notice declared that the two lawyers were reprimanded for having "intentionally misrepresented to the court facts contained in the record in the case."²⁶

This public interest sanction, arising from a motion for a private interest sanction, is particularly troubling if the first notice of possible dual sanctions comes in the decision on the private party's motion. Such a lack of notice was recognized in another multiple sanctions case, *Advo System, Inc. v. Walters*.²⁷ After granting a rule 11 motion requesting that the plaintiff's lawyer pay for the defendant's attorney's fees, the court further declared that the plaintiff's lawyer would also be held accountable for "the waste of judicial resources" caused by the pursuit

21. See, e.g., *Cheek v. Doe*, 110 F.R.D. 420, 422 (N.D. Ill. 1986), *aff'd in part and rev'd in part*, No. 86-2155, slip op. at nn.3 & 4 (7th Cir. June 5, 1987); *Becker v. Adams Drug Co.*, 819 F.2d 32, 33 (2d Cir. 1987) (pro se plaintiff's numerous frivolous appeals recalled); *United States v. Dominguez*, 810 F.2d 128, 129 (7th Cir. 1987).

22. 112 F.R.D. 392 (N.D. Ga. 1986).

23. *Id.* at 394.

24. *Id.* at 403.

25. *Id.* at 403-04.

26. *Id.* at 404.

27. 110 F.R.D. 426 (E.D. Mich. 1986). See also *Dore v. Schultz*, 582 F. Supp. 154 (S.D.N.Y. 1984). Lack of notice can also occur in a dual sanctions case involving misconduct of a party. See e.g., *Dominguez v. Figel*, 626 F. Supp. 368, 372 and 374 (N.D. Ind. 1986). Cf. *Eash v. Riggins Trucking Inc.*, 757 F.2d 557, 570 (3d Cir. 1985) ("as a general practice a monetary detriment should not be imposed by a court without prior notice and some occasion to respond").

of "baseless litigation."²⁸ It thereupon assessed \$900 against the plaintiff's lawyer (as well as \$900 against the plaintiff) to cover a portion of the \$3600 cost incurred by the court in holding the unnecessary trial.²⁹ Because it found that the plaintiff and his lawyer "were likely unaware that such a sanction might be imposed,"³⁰ the remainder of the \$3600 cost was not assessed. The court concluded by giving notice to all future litigants that the pursuit to trial of meritless cases would not be tolerated and that "the cost of such conduct to the public will not be ignored."³¹ Apparently, in future decisions on rule 11 requests for private interest sanctions, the total governmental cost of holding trial will be assessed because sufficient notice of this possibility has been given in an earlier published opinion, albeit in a different case.

Concerns about judicial regulation of attorney conduct during civil cases also arise when the varying types of public interest sanctions are not themselves adequately distinguished. For example, courts sometimes consider simultaneously several such sanctions under the apparent assumption that their pursuit, hearing and resolution are governed by similar legal constraints. A monetary assessment payable to the court and related to the court's expenses in incurring an attorney's misconduct seems very different from an assessment which is unrelated to such expenses. Orders of compensation typically require differing procedural safeguards than orders of punishment.³² Further, trouble develops when a court fails to explain the basis of a public interest sanction. For example, courts often order attorneys, as a result of their misconduct, to make a monetary payment to the clerk of the court without articulating how the amount was determined.³³ Judicial review is impossible and

28. *Advo System, Inc.*, 110 F.R.D. at 433.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Eash v. Riggins Trucking Inc.*, 757 F.2d 557, 568 (3d Cir. 1985) (while affirming a trial judge's inherent authority to assess against an attorney the cost of impanelling a jury, the court reserved the issue of monetary sanctions wholly unrelated to any costs incurred). Compare *Doyle v. United States*, 817 F.2d 1235, 1237 (5th Cir. 1987) (failing to distinguish compensatory and other money sanctions). In comparable settings, compensatory contempt proceedings differ in procedure from criminal contempt proceedings, *In re Grand Jury Proceedings*, 795 F.2d 226, 234 (1st Cir. 1986), and compensatory and disciplinary remedies are handled differently by appellate courts, *Toepfer v. Dep't. of Transp.*, 792 F.2d 1102 (Fed. Cir. 1986).

33. *Dore v. Schultz*, 582 F. Supp. 154, 158 (S.D.N.Y. 1984); *Pravic v. United States Industries-Clearing*, 109 F.R.D. 620, 524 (E.D. Mich. 1986); *Young v. I.R.S.*, 596 F. Supp. 141, 152 (N.D. Ind. 1984); *Home-Pack Transport, Inc. v. Donovan*, 102 F.R.D. 163, 166 (D. Md. 1984); *Ferguson v. MBank Houston, N.A.*, 808 F.2d 358, 360 (5th Cir. 1986); *McDougal v. C.I.R.*, 818 F.2d 453, 455 (5th Cir. 1987); *United States v. Stillwell*, 810 F.2d 135, 136 (7th Cir. 1987). But see *Cheek v. Doe*, No. 86-2155 (7th

appellate court deference to lower court determinations invites lower court action without standards or in derogation of any standards.

Finally, difficulty has arisen regarding the overlap of the regulatory mechanisms designed to address similar attorney misconduct. For example, federal courts occasionally rule that the procedures for assessing monetary awards payable to the court should be similar whether assessment occurs under rule 11 or pursuant to a prosecution for criminal contempt.³⁴ While the quest for equal treatment is commendable, such rulings are flawed in that they fail to appreciate that some public interest sanctions under rule 11 serve to compensate or to deter, but not to punish,³⁵ while sanctions for criminal contempt are typically solely penal in nature.³⁶ The procedures attending punishment need to be far more stringent. Similarly, courts appear to differ on whether provisions like rule 11 permit, as a form of "appropriate sanction," restrictions on the attorney's continuing ability to practice law or whether separate disciplinary proceedings are needed.³⁷

Besides the display of insensitivity to the differences in remedies and regulatory mechanisms, the imposition on attorneys of public interest

Cir. June 5, 1987) (in reducing the assessment payable to the court, concern was expressed for "lack of reasons"); *Eash*, 757 F.2d at 571 (written findings are appropriate). See also *Hyde v. Van Wormer*, 106 S. Ct. 403 (1985) (while six justices awarded \$500 in damages to party opposing frivolous petition for certiorari, three dissenting justices note lack of explanation); *Yagman v. Baden*, 796 F.2d 1165, 1184 (9th Cir. 1986) ("round-figure" approach to sanctions is inadequate, as award must be undertaken with some precision and properly itemized in terms of perceived misconduct and the sanctioning authority), modified, 803 F.2d 1085 (9th Cir. 1986); *Raymond Lloyd Co. v. Dist. Ct. 20th Jud. Dist.*, 732 P.2d 612, 616 (Colo. 1987) (inflexible, mandatory fine under court rule is void).

34. *Donaldson v. Clark*, 786 F.2d 1570, 1577 (11th Cir. 1986) and *Cotner v. Hopkins*, 795 F.2d 900, 903 (10th Cir. 1986) (both courts assumed monetary payments to the court constitute punishment). Cf. *Eash*, 757 F.2d at 568; *Donaldson v. Clark*, 819 F.2d 1551 (en banc court reverses three judge panel's decision and finds criminal contempt procedures are not always needed for monetary sanctions payable to the court). While I have distinguished compensatory and other monetary awards payable to the court for due process purposes, the Eleventh Circuit Court of Appeals apparently distinguishes monetary awards to the court by whether or not they are related to the misconduct, that is, commensurate with the willfulness and gravity of the misconduct. *Donaldson*, 819 F.2d at 1558, relying on *Kleiner v. First Nat'l Bank of Atlanta*, 751 F.2d 1193, 1210 (11th Cir. 1985).

35. See *supra* notes 12-14.

36. But see 18 U.S.C. § 402 (1966) (criminal contempt proceedings may result in a "fine" paid to the complainant or other party injured by the act constituting the contempt).

37. Compare *Kendrick v. Zanides*, 609 F. Supp. 1162, 1173 (N.D. Cal. 1985) (after granting fees and costs under rule 11, the court ordered attorneys to show cause why they should not be suspended from practice in the court) with *Piazza v. Carson City*, 652 F. Supp. 1394, 1395 (D. Nev. 1987) (rule 11 does not contemplate disbarment from practice as an "appropriate sanction").

sanctions during civil litigation also frequently raises serious equal treatment, delegation of powers, and jury trial questions. These issues must soon be addressed so that public interest sanctions during civil litigation can continue to develop as an effective means of regulating attorney conduct.

The equal treatment issue is well demonstrated by review of a few recent cases involving compensatory assessments payable to the court. These cases demonstrate that, besides the inequality caused by differences about the availability of such sanctions,³⁸ inequality also exists where courts agree that some form of sanction is available. In two recent cases, an attorney was ordered to pay money to the court to help defray some, but not all, of the operational costs resulting from the misconduct.³⁹ Each court calculated its total costs on the basis of the rate of \$600 per single hour spent by the federal judge.⁴⁰ In one case, the court discounted the total cost by one-half⁴¹ and in another case, the court ordered the attorney to pay only \$500, although the total cost was "in the neighborhood of \$15,000.00."⁴² Finally, one case, although involving a sanction against a misconducting party rather than a lawyer, resulted in a \$10,000 assessment where the total cost to the taxpayers was \$24,000.⁴³ In none of the cases was there an adequate explanation of the factors guiding the court in determining the amount.

This absence of an explanation is not so surprising given that most rules and statutes which authorize public interest sanctions are themselves without standards. For example, rule 11 states only that "an appropriate sanction" must be imposed and provides for reasonable expenses of other parties as the sole illustration of such a sanction. The rule thus delegates very significant executive and legislative responsibilities to federal judges. They must decide how to uncover additional information relevant to public interest sanctions⁴⁴ and when to pursue such sanctions.

38. Kassin, *An Empirical Study of Rule 11 Sanctions* 39-41 (Federal Judicial Center 1985) (survey of judges reveals differences regarding availability of sanctions other than attorney's fees); Nelken, *supra* note 15, at 1338 (disagreement on availability of punitive sanctions).

39. *Advo System, Inc. v. Walters*, 110 F.R.D. 426, 533 (E.D. Mich. 1986), and *Edwards v. Marsh*, 644 F. Supp. 1564, 1573 (E.D. Mich. 1986).

40. *Advo System, Inc.*, 110 F.R.D. at 433, and *Edwards*, 644 F. Supp. at 1573 n.5.

41. *Advo System, Inc.*, 110 F.R.D. at 433.

42. *Edwards*, 644 F. Supp. at 1573.

43. *Kearns v. Ford Motor Co.*, 114 F.R.D. 57, 67 (E.D. Mich. 1987). See also *Dominguez v. Figel*, 626 F. Supp. 368, 374 (N.D. Ind. 1986) (\$1500 assessment when cost was \$3400).

44. Under rule 11, a court is obligated "upon its own initiative" to impose "an appropriate sanction." Often, the sanction of an opposing party's expenses, by itself, is inappropriate as the amount may be quite small in comparison to the misconduct. The

Also, they must decide what sanctions are permitted under the rule as well as the requirements for each. These significant delegations of non-adjudicatory functions raise troubling separation of powers concerns⁴⁵ and heighten the opportunity for unequal treatment and abuse of discretion.

The jury trial issue is both legally perplexing and very important. In April, 1987, the United States Supreme Court recognized a jury trial right, on the liability issue, in instances where the government seeks to impose a non-compensatory civil remedy of up to \$10,000 a day upon anyone violating legislative and regulatory guidelines on water pollution.⁴⁶ The ramifications of this decision on the processes for imposing public interest sanctions during civil litigation are uncertain. Jury trials must now be considered at least for orders commanding monetary payments to the court which are unrelated to the court's expenses. Of course, recognition of a jury trial right would severely burden a court's authority regarding certain public interest sanctions. The federal rulemakers who proposed rule 11 were quite concerned with such burdens and declared that any gains achieved under the new rule must not be allowed to be "offset by the cost of satellite litigation over the imposition of sanctions."⁴⁷

factual inquiry for any private interest sanction, typically an opposing party's expenses, may not itself prompt a full understanding of all attorney misconduct. The inquiry initiated by a private party may end once sufficient misconduct is established to warrant the private remedy, although further inquiry could reveal more reprehensible conduct warranting additional public interest sanctions.

45. Regarding delegation of executive authority to individual courts, consider the following statement in *Young v. United States ex rel. Vuitton et Fils, S.A.*, 55 U.S.L.W. 4676, 4685 (U.S. May 26, 1987) (Scalia, J., concurring):

The judicial power is the power to decide, in accordance with law, who should prevail in a case or controversy. . . . That includes the power to serve as a neutral adjudicator in a criminal case, but does not include the power to seek out law violators in order to punish them which would be quite incompatible with the task of neutral adjudication. It is accordingly well established that the judicial power does not generally include the power to prosecute crimes. . . . Rather, since the prosecution of law violators is part of the implementation of the laws, it is—at least to the extent that it is publicly exercised—executive power, vested by the Constitution in the President. (citations omitted).

Regarding delegation of legislative authority to individual courts, relevant factors in considering the propriety of permitting ad hoc judgments about "appropriate" sanctions include the lawmakers' declarations of policy (for the federal rules they are found in the Advisory Committee Notes), their declarations of standards to guide judicial action, and whether the lawmakers required any judicial findings during the exercise of legislative authority. *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

46. *Tull v. United States*, 107 S. Ct. 1831 (1987). See also *Rife v. Godbehere*, 814 F.2d 563 (9th Cir. 1987) (possible fine of \$500 for an individual triggers a jury trial right in a misdemeanor case).

47. Preliminary Draft, *supra* note 1, at 466.

Given the significant difficulties encountered with the judicial imposition of public interest sanctions on attorneys during civil litigation, can the continued exercise of such power be justified? Notwithstanding reasonable concerns, support can be justified by the compelling need for occasional public interest sanctions and by the opportunity to minimize future difficulties.

In the absence of public interest sanctions against attorneys during civil litigation, regulatory enforcement tools would include only private interest sanctions during litigation, proceedings before disciplinary panels, criminal contempt actions, and attorney malpractice suits. These other devices, while useful in the regulation of attorney conduct during litigation, are by themselves inadequate. Although private interest sanctions related to attorney's fees and other litigation costs can be handled quickly and cheaply, alone they often constitute an incomplete remedy. Many losses will go unrecovered;⁴⁸ more importantly, these sanctions are at times an ineffective deterrent in that the expenses are low relative to the benefits derived from the sanctioned behavior.⁴⁹

Similarly, private interest sanctions cannot truly serve to punish, though they may be viewed by those sanctioned as punishment. While traditional disciplinary and criminal contempt proceedings may involve punishment, as well as forms of deterrence and compensation not now available through private interest sanctions, such actions are slow, pertain to more limited kinds of attorney misconduct than are encompassed within rule 11-type provisions, and require independent case filings such that the attorney misconduct is distanced from the litigation in which it occurred. Requirements such as privity,⁵⁰ as well as many of the problems attending disciplinary actions and criminal contempt prosecutions, serve to limit the utility of attorney malpractice suits.

By contrast, public interest sanctions are quick, in that they can be imposed summarily, are efficient, in that they are considered by the

48. Not only are the public's losses uncompensated, but also certain private losses go uncompensated with private interest sanctions. For the view that recoveries under private interest sanctions should be broadened to encompass all pecuniary losses, see *Roberts v. Auto-Owners Ins. Co.*, 422 Mich. 594, 374 N.W.2d 905, 924 (1985) (Levin, J., separate opinion).

49. See, e.g., Nelken, *supra* note 15, at 1325 (noting that sanctioned lawyers can benefit from the imposition of sanctions, as they may become known as certified hard-nosed litigators); *Nat'l Union Fire Ins. Co. v. Continental Illinois*, 113 F.R.D. 637, 644 n.16 (N.D. Ill. 1987) ("With deep-pocket litigants . . . there is a serious question whether adding some deductible expenses to their total cost-and only when they are caught-provides enough of a disincentive to such improper conduct.").

50. See, e.g., *Friedman v. Dozorc*, 412 Mich. 1, 312 N.W.2d 585 (1981). See also *Bob Godfrey Pontiac, Inc. v. Roloff*, 291 Or. 318, 630 P.2d 840 (1981) (an intentional violation of the Code of Professional Responsibility does not trigger attorney civil liability for all injuries).

very same court in which the relevant attorney conduct occurred, are flexible, in that they can serve to compensate, punish, or deter, and are gapfilling, in that they address misconduct which demands more than an award of a private interest sanction, less than a designation as a crime, and something other than a full-scale hearing at which a professional license may be removed or restricted.

The issue, then, is how to impose public interest sanctions without the resulting aforementioned difficulties. One answer is that over time, as solutions are found to problems on a case-by-case basis, the difficulties will diminish. Such a response is unsatisfactory, however, as it fails to take into account the ways in which public interest sanctions against lawyers during civil litigation can be made more effective without awaiting the arrival of new cases.

In conclusion, several additional suggestions on improving the processes for public interest sanctions will be offered. First, the availability of public interest sanctions under rule 11-type provisions should be generally recognized. Reasonable arguments are heard against such a recognition,⁵¹ but should be found unpersuasive given the important void in attorney regulation which is filled by this form of sanctioning authority. In the absence of express authorization within a rule 11-type provision, public interest sanctions should be explicitly recognized in local court rules and judicial opinions. Local court rules are especially important, as they can address not only the availability of, but also the procedures and standards for public interest sanctions. In speaking about local court rules which provide for assessments against attorneys of certain expenses incurred by a court, the U.S. Court of Appeals for the Third Circuit recently said:

The local rule device fulfills important informational purposes, placing the bar on notice of a court's policies . . . Similarly a local rule may well be the most effective means of ensuring that all members of the bar are aware that a particular practice is deemed improper, and thus subject to a sanction. Local rules may also alert rulemakers to the need for changes in national rules and supply an empirical basis for making such changes. Furthermore, a local rule may be a powerful implement for rationalizing diverse court practices and imposing uniformity within a given district.⁵²

51. Nelken, *supra* note 15 (concern for the chilling effect on vigorous advocacy); Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 *Harv. L. Rev.* 630 (1987) (concern for deterring undeveloped and nonstandard claims).

52. *Eash v. Riggins Trucking Inc.*, 757 F.2d 557, 570 (3d Cir. 1985). The court proceeded to declare that "fundamental fairness may require some measure of prior notice to an attorney that the conduct . . . is subject to discipline or sanction. . . ." *Id.* at 571.

A second suggestion is that the relationship between private and public interest sanctions should be clarified. The differences in the two forms of sanctions must be recognized, as should the distinctions between the varying types of public interest sanctions. Such differences and distinctions demand varying procedural safeguards, depending upon which sanction is being considered. For example, judges do not undertake the varying executive, legislative and judicial roles when considering private interest sanctions as they do when public interest sanctions are being considered. In addition, all monetary assessments made payable to the court should not be considered the same, for there exist valid distinctions, such as between punitive and compensatory orders. As between private and public interest sanctions, priority should be given to compensating private persons.⁵³ Thus, money orders which serve the public interest in deterrence are generally appropriate only when compensation to injured private persons constitutes an insufficient monetary award because the attorney's misconduct is especially reprehensible.

Third, further examination is needed as to the relationship between public interest sanctions against lawyers under rule 11-type provisions and other actions against lawyers such as traditional disciplinary proceedings, criminal contempt prosecutions and civil suits. Warranting review are questions such as: Under what circumstances should a civil court refer the record in a rule 11-type proceeding to the inquiry board or officer within the bar disciplinary mechanism? Under what circumstances (per double jeopardy and otherwise) might a rule 11-type proceeding bar a later criminal contempt prosecution? To what extent should courts considering public interest sanctions take into account the possibility that certain private losses, unrecoverable as part of a private interest sanction, may be pursued in a later civil suit? Finally, what role should the record in a rule 11-type proceeding play in any later disciplinary or criminal contempt action?

Public interest sanctions under provisions like rule 11 of the Federal Rules of Civil Procedure are fast becoming an important component of the attorney regulatory system. Although difficulties inhere in their use, their employment should be continued. While doing so, courts should explicitly differentiate between public and private interest sanctions, provide fairer procedures during the consideration of public interest sanctions, and coordinate any public interest sanctions with disciplinary, criminal contempt, and other civil remedies.

53. Parness, *supra* note 17, at 355-56. The extent of any such compensation is, however, debatable. See *supra* note 48.

