Sporting Theory of Justice: Taming Adversary Zeal with Logical Sanctions Doctrine

Judith Maute, University of Oklahoma
SPORTING THEORY OF JUSTICE: TAMING ADVERSARY ZEAL WITH A LOGICAL SANCTIONS DOCTRINE

by Judith L. Maute*

TABLE OF CONTENTS

I. The Adversary System ........................................ 13
   A. The Idealized Conception ............................... 13
   B. The Traditional Ethic of Adversary Zeal ........... 16
II. Taming Traditional Adversary Zeal ...................... 19
   A. Changes in Ethical and Procedural Rules .......... 19
      1. From the Code to the Model Rules: Defining
         Coherent Standards ......................... 19
      2. The 1983 Amendments to the Federal Rules of
         Civil Procedure ........................... 21
   B. Amended Rule 11: The Cornerstone for Enforcing
      Acceptable Standards of Conduct ................. 28
III. Insights of Game Theory on Sanctions ................. 30
   A. Defining Game Theory in the Litigation Context . 30
   B. Competitive Sports: Analogous to Litigation? .... 41
      1. Sanctions in Competitive Sports ............... 41
      2. The Litigation Analogy ...................... 46
   C. Sanctions as Essential Regulators of Game Play . 50
      1. Two Tiers of Sanctions under Preamendment
         Cases ..................................... 51

* Associate Professor of Law, University of Oklahoma, A.B., Indiana University, J.D., University of Pittsburgh, LL.M., Yale University. The author gratefully acknowledges invaluable input from many friends and colleagues around the country, including Jerry Anderson, John Beckerman, Lea Brilmayer, Ray Dacey, Teree Foster, Dan Gibbens, Michael Gibson, David Hall, Michael Hand, Anita Hill, Drew Kershen, Peter Kutner, David Luban, Susan Martyn, William McNichols, and Keven Saunders. Gail Wettstein (J.D., University of Oklahoma) and Teresa Parish (J.D., expected 1988, University of Oklahoma) were devoted and enthusiastic research assistants. The University of Oklahoma College of Law provided some financial support for the project. Any errors or omissions are, of course, those of the author.
2. Proposed Two-Tier System of Sanctions .... 54
   b. Procedural Issues in Exercising Sanction Authority ..................... 59
   c. Substantive Standards for the Exercise of Sanction Authority .......... 64

IV. Post-Amendment Sanctions Activity ................. 76
    A. Second Circuit Activity .................................. 77
    B. Ninth Circuit Activity ................................... 82
    C. Seventh Circuit Activity .................................. 90
SPORTING THEORY OF JUSTICE

It's all a game, but a game with very strict rules. You have to stay meticulously within the law; the least misstep, if caught, involves an instant penalty. But there is no particular moral opprobrium in incurring a penalty, any more than there is being offside in football. [One who violates the rules]. . .is not "looked down on," except by sentimentalists. He's simply been caught, that's all. Even the public understands that. . . . You break the rules, pay the penalty and go back to the game.¹

Auchincloss' "Yuppie Lawyer" Bob Service describes the competitive climate in which the game of securities takeover is played. In competitive sports such as football, basketball, and baseball, rules define infractions occurring on and off the playing field and identify permissible sanctions for the violations. Ordinary violations bear no taint of moral blameworthiness; the infraction is noted and sanction imposed primarily to compensate the other team and to facilitate orderly game play. Moral blameworthiness arises, warranting some measure of punishment, only with persistent or especially harmful infractions.

Litigation also is often regarded as a game, with victory going to the more skilled player and justice, hopefully, on the winning side. While rules exist to govern the litigation game, those governing the conduct of the litigator-player have not been rigorously enforced, so that an infraction rarely results in instant penalty. Until recently, sanctions were reserved for flagrant or morally culpable violations. The 1983 amendments to the Federal Rules of Civil Procedure (the "1983 amendments") signal the end of such tolerance. Aggressive enforcement has begun in some courts. If the rules are rationally interpreted and strictly applied to sanction infractions, we can expect fewer infractions, thus furthering more accurate determinations on the merits.

According to traditional professional ethics, the litigator is to pursue client objectives zealously. The adversary process of civil litigation is sometimes called a "zero-sum game," where one party wins and the other suffers a corresponding loss. Zealous representation requires both lawyers to fight competitively—to win, regardless of whether "victory" is fair in the context of the dispute. Competitive forces operate so strongly within the litigating bar that the adversary culture tolerates,

¹. L. Auchincloss, DIARY OF A YUPPIE 26-27 (1986). An example of one who violated the rules is cartoonist Gary Trudeau's Phil Slackmeyer, an imprisoned investment banker without remorse for his past deeds. He shows the downside risk to an area of legal practice free of moral opprobrium for violating the game rules.
even encourages, excess of zeal. These excesses add to the existing problems of an overloaded judicial system, causing unnecessary delays, expense, and, sometimes, skewed results.

In 1906, Roscoe Pound referred to the “sporting theory of justice” as a fundamental tenent of the adversary system. While often used in a pejorative sense, the phrase has a biting ring of truth, analogizing litigation to competitive sports. Serious comparison can be useful as the legal system considers how to restrain pervasive litigation abuses with sanctions. Rules provide structure for the game and set some limits on permissible conduct.

Sports and litigation differ in their institutional purposes, how the game is played, and the roles served by the various players. Yet we see in competitive sports a rational system of rules, regularly interpreted and applied by the game officials, with the sanction imposed for violating an ordinary rule of the game being both predictable and compensatory in nature. Punitive sanctions are reserved for conduct that threatens the institutional legitimacy of the game or is morally blameworthy. Despite their differences, with the aid of basic game theory principles, the sports analogy facilitates reasoned consideration of the comprehensive sanctions doctrine needed to tame excessive zeal.

Litigation rules governing procedure and ethics recently were the subject of major reform efforts. In August 1983, within one day of each other, comprehensive amendments to the Federal Rules of Civil Procedure (the “Federal Rules”) became effective and the American Bar Association (“ABA”) adopted the Model Rules of Professional Conduct (the “Model Rules”). The traditional ethic of zealous advocacy persuades many litigators to interpret narrowly their obligations under the game rules. The adversary culture treats litigation as a pure zero-sum game, where the lawyer’s only proper objective is to win.

The Model Rules delete most references to “zealous advocacy.”

3. Game theory is a mathematical discipline used to select a logical strategy that will optimize the player’s utility preferences. Mathematical Psychology, An Elementary Introduction 202-227 (C. Coombs ed. 1970) [hereinafter Mathematical Psychology]. See generally S. Brams, Game Theory and Politics (1975); See infra notes 92-100 and accompanying text.
5. The previous ABA-sponsored ethical guide, the Model Code of Professional Responsibility, stated a duty to represent clients zealously. Model Code of Professional Responsibility DR 7-101, EC 7-1, EC 7-8 to 7-10 (1981) [hereinafter CPR]; see infra notes 29-40 and accompany-
Instead, they define a lawyer's duty to screen out contentions that are frivolous or otherwise improper, to expedite litigation, and to participate fairly in discovery. Standing alone, the Model Rules would have little effect in taming excessive zeal. However, they are an important backdrop for interpreting the 1983 amendments consistently with lawyers' ethical obligations. The 1983 amendments create an enforcement mechanism—sanctions—that, if enforced, can be used to regulate fair and orderly game play.

Part I of this article considers the idealized concept of the adversary system, and how the ethic of adversary zeal challenges the legitimacy of litigation. Part II identifies changes in the ethical rules brought about by the Model Rules and sets forth the comprehensive system of civil sanctions, incorporating previously available devices with those created by the 1983 amendments.

Part III describes basic game theory terminology and principles. It finds that the notion of zero-sum game combines with the full adversary zeal envisioned by the sporting theory of justice to result in many excesses that subvert legitimate, accurate, and prompt dispute resolution. After exploring the analogy between sports and litigation, this section develops a comprehensive approach to civil sanctions as essential but subsidiary regulators of game play. The section argues that regulation of orderly game play must largely rest with the trial court, with only a possibility of later appellate review. Sanctions, to deter further incidents in a case, must be accurate, and usually prompt, with no interlocutory appeal to a higher authority. Scope of review should be confined to the question whether the trial judge acted properly as a "game official" making specific factual and legal determinations as to whether a rule was violated that permits the sanction imposed.

The 1983 amendments are based primarily on an objective standard: whether the lawyer or party acted reasonably and in accordance with the specific duties imposed by the rule. Rule 11 of the Federal Rules, which is the cornerstone of amended Rules 7 and 26(g),⁶ reading text.

⁶. Rule 11 provides in full:

Rule 11. Signing of Pleadings, Motions, and Other Papers; Sanctions

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. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be
quires the signer of a pleading or any other paper to certify that after conducting a reasonable prefiling inquiry, the signer concluded the contention had a reasonable basis and was not brought for an improper purpose. If a violation occurs, an appropriate sanction must be imposed.

Post-amendment doctrine can be effectively shaped into a two-tier system of sanctions roughly consistent with those regulating athletic contests. The first tier includes "ordinary" rule violations that might be committed by rational, competitive players because of excessive zeal, inadvertence, or negligence. Conduct gradually moves into the second, punitive tier when it is morally blameworthy because of repeated, bad faith, willful, or reckless violations. Sanctions orders should be carefully drawn, making specific findings of fact tied to a particular sanction authority for the order and any sanction imposed. Future courts need to be more creative at devising sanction orders that reflect punishment goals of compensation, deterrence, retribution, and incapacitation.

Section IV focuses on Rule 11 and post-amendment case law de-
The decisions are evaluated as to whether evolving sanctions doctrine meets standards of rationality necessary for the rules to deter violations and encourage "voluntary" compliance with the new standards of objective reasonableness.

I. THE ADVERSARY SYSTEM

A. The Idealized Conception

Classical definition of the adversary system envisions a sharp clash of proofs and reasoned arguments by the parties' professional advocates before a neutral and passive judge who will decide the dispute fairly on the merits. The results are thought more likely to approximate truth (or fairness or rationality) than competing models of litigation, as long as the participants fulfill their institutionalized roles. Procedure, evidence, ethics, and substantive law determine the rules for the partisan presentations.

Partisan presentation is fundamental in this classical system, not only to facilitate the sharp clash of contentions, but also to insure the parties' participation in furtherance of their autonomy. Yet, while

7. See Frankel, The Search for Truth: An Umpireal View, 123 U. Pa. L. Rev. 1031 (1975) (urging reform of the adversary system, a system in which the judge is nonpartisan, promoting an objective search for truth, while the litigators attempt to further their clients' interests); Fuller & Randall, Professional Responsibility: Report of the Joint Conference, 44 A.B.A. J. 1159, 1160-61 (1958) (arguing that a decision maker can best reach an impartial judgment when the issues have been presented with "intelligent and vigorous advocacy"); Rhode, Ethical Perspectives on Legal Practice, 37 Stan. L. Rev. 589 (1985) (describing formalism as the adversary system's invisible hand). According to classical theory, the judge is passive, remaining in a state of equipoise until both parties have fully presented their cases, and then undertaking to evaluate the merits of the dispute. This characterization is now outmoded, given the level of trial judge involvement in case management. See Resnick, Managerial Judges, 96 Harv. L. Rev. 376 (1982).


9. CPR, supra note 5, EC 7-25.

their participation is institutionally assured, it is representational in that the presentation is made by the lawyer as a professional advocate.11 The client retains the advocate and relinquishes much control over the manner of presentation.12 The lawyer is thus charged with the responsibility of competitively garnering all the facts, evidence, and law necessary to maximize the client's chance of winning.13 Additionally, the lawyer has to represent the client "zealously within the bounds of the law."14 In the idealized conception, the advocate plays this role well when zeal for a "client's cause promotes a wise and informed decision of the case."15 The lawyer plays the role badly when, out of a desire to win, he or she "distorts and obscures its true nature."16 As often understood within the profession, the "duty of zealous advocacy" is translated to mean that the lawyer should play to win, within the rules, if possible.17 Meanwhile, the judge is assigned the role of neutral and passive observer, withholding evaluation until both parties have had a fair opportunity to present their strongest claims and contentions.18 Like the referee or baseball umpire, the judge is expected to make impartial rulings that regulate the process of adjudication; similarly, much discretion is vested in the judge as referee, whose procedural decisions are subject to limited review.19

According to theory, adversarial adjudication resolves disputes authoritatively by determining questions raised by claims of right and accusations of guilt.20 In reality, however, many shortcomings, excesses, and abuses foster widespread dissatisfaction and demands for reform. Judges complain of incompetence, delays, and inaccuracies.21 Scholars


14. CPR, supra note 5, Canon 7.
16. Id.
17. M. Frankel, Partisan Justice 4, 11, 25, 48 (1980); Thode, supra note 13, at 582-85. The ethic of adversary zeal encourages the advocate to construe narrowly the applicable constraints imposed by the rules.
18. Fuller & Randall, supra note 7, at 1161.
20. Id. at 368-69; CPR, supra note 5, EC 7-21.
and philosophers question the moral justifications of the process and lawyers' nonaccountability for abusive conduct taken in a representa-
tional capacity. Lay participants or observers are often enraged by
the costs and delays of litigation, and are emotionally dissatisfied with
the process. The dissatisfaction has kindled interest in exploring a
range of dispute resolution processes instead of adjudication. Only
within the legal profession itself is there much dissent on the need to
restrain overzealous advocacy.

Which is the problem: the adversary system, the adversary ethic,
or how the game is played? The system still has much to commend it.
At a minimum, it does reasonably well as a form of dispute resolution,
and the replacement costs outweigh the anticipated benefits of chang-
ing to a different judicial system. While many of the alternatives now
being developed meet genuine needs for certain types of disputes, they
cannot be expected realistically to eliminate the demand for a govern-
ment-sponsored and -enforced adversary system of dispute resolution.

In its most extreme form, the ethic of zealous advocacy defeats the
ends of justice. Critics fear that the outcome in a particular case may
be determined more by competitive zeal, skill, and resources than the

why delay varies within and between court systems; its effect on outcome). For the full text of
Rule 11, see supra note 6. See generally M. FRANKEL, supra note 17, at 52-58; Burger, Agenda
for 2000 A.D.—A Need for Systematic Anticipation, Keynote Address to National Conference
on the Causes of Popular Dissatisfaction with the Administration of Justice (April 7-9, 1976), re-
printed in 70 F.R.D. 83, 92 (1976) [hereinafter Burger, Agenda]; Burger, Isn't There a Better
Way? (Report on the State of the Judiciary, ABA midyear meeting, January 24, 1986), reprinted

22. Luban, supra note 8, at 83-118; Donagan, Justifying Legal Practice in the Adversary


24. Luban, supra note 8, at 112; S. LANDSMAN, supra note 8, at 44-46 (adversary system is
best means to protect individual autonomy; is individually good, integral part of our social fabric,
and individual autonomy; pragmatically is worth keeping). The movement encouraging use of
additional methods of dispute resolution challenges the idea that the adversary process is appropri-
ate for resolving all disputes, and argues that some forms of cooperation can be appropriate even
in cases that are usually regarded as adversarial.

25. Techniques such as mediation may work best for disputes that either are unlikely to be
litigated (e.g., neighborhood squabbles, where small stakes result in small, though significant, es-
trangement) or where the problems are so complex and multifaceted that the dispute is ill-suited
to formal adjudication. See, e.g., Fuller, supra note 15, at 394-404 (discussing polycentric dis-
putes); see also Henderson, Judicial Review of Manufacturers' Conscientious Design Choices: The
Limits of Adjudication, 73 COLUM. L. REV. 1531 (1973). Professors Edwards and Fiss focus on
those issues of social importance requiring a binding judicial determination on the merits. Ed-
wards, Alternate Dispute Resolution: Panacea or Anathema?, 99 HARV. L. REV. 668 (1986); Fiss,
They argue that the adversary culture must undergo substantial reforms. The zealous advocate is merely a competitive survivor in an aggressive contest played according to normative rules. If formally stated rules do not impose significant restraints on improper conduct, if they are not regularly enforced against violators, and if violations hold the promise of benefits exceeding possible costs of violation, then the rational competitor has strong incentive to test the outer limits of the rules and little disincentive to avoid exceeding these limits.

B. The Traditional Ethic of Adversary Zeal

Traditional ethical precepts impose a duty to represent clients zealously—within legal bounds. Folklore of lawyers' "blind devotion" emphasizes zeal, with minimal focus on the legal boundaries that circumscribe permissible conduct. Lord Brougham's powerful statement concerning his defense of Queen Caroline against King George IV's adultery charge exemplifies this singular loyalty:

To save that client by all means and expedients, and at all hazards and costs to other persons, and amongst them, to himself [the lawyer] is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others.

The zealous advocacy related in folklore gets support from formal regulations. The precursor to the Model Rules, the Code of Professional Responsibility (the "Code"), currently states the disciplinary standards for the majority of states, encouraging full adversary zeal. Canon 7 of the Code states the axiomatic principle that lawyers should zealously represent their clients within legal bounds. The ethical considerations, however, identify inherent difficulties in determining those boundaries, and encourage the advocate both to resolve all doubts in

27. See, e.g., 2 Trial of Queen Caroline 8 (J. Nightingale ed. 1820-21) (quoted in Salzberg, supra note 13, at 647).
28. Id.
29. The Code of Professional Responsibility was adopted by the ABA in 1969; eventually it was adopted by all states except California. C. Wolfram, supra note 8, at 56-57. After several years of intensive study, on August 2, 1983 the ABA House of Delegates approved the Model Rules of Professional Conduct to replace the Code. While the Code is the current standard in most states, the Model Rules are now under consideration, or have already been adopted, in most jurisdictions. As of July 1987, twenty-one states had formally adopted the Model Rules. Law. Man. on Prof. Conduct (ABA/BNA) 01:3 (July 22, 1987).
30. CPR, supra note 5, Canon 7.
the client's favor and to make litigation decisions without regard to professional opinion on the probability of success. Assurance is given that the lawyer's duty to the client and to the legal system are the same: to represent the client zealously but within legal bounds.

The Code's Disciplinary Rule ("DR") 7-101, "Representing a Client Zealously," requires that the lawyer not intentionally fail to seek a client's lawful objectives, but allows for ordinary courtesy and the exercise of professional judgment to forego a contention. This ambiguous directive is followed by rules that state minimal limits on the sporting theory of justice. Disciplinary Rule 7-102, "Representing a Client Within the Bounds of the Law," forbids a lawyer to assert a position or to take action where it is obvious that such action would merely serve to harass or maliciously injure another. Presently unwarranted

31. *Id.; see also* CPR, *supra* note 5, EC 7-2, 7-4, 7-9.
32. CPR, *supra* note 5, EC 7-19.
33. DR 7-101, Representing a Client Zealously, states that:
   (A) A lawyer shall not intentionally:
      (1) Fail to seek the lawful objectives of his client through available means permitted by law and the Disciplinary Rules, except as provided by DR 7-101(B). A lawyer does not violate this Disciplinary Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.
      (2) Fail to carry out a contract of employment entered into with a client for professional services, but he may withdraw as permitted under DR 2-110, DR 5-102, and DR 5-105.
      (3) Prejudice or damage his client during the course of the professional relationship except as required under DR 7-102(B).
   (B) In his representation of a client, a lawyer may:
      (1) Where permissible, exercise his professional judgment to waive or fail to assert a right or position of his client.
      (2) Refuse to aid or participate in conduct that he believes to be unlawful, even though there is some support for an argument that the conduct is legal.

*Id.,* DR 7-101.
34. DR 7-102, Representing a Client Within the Bounds of the Law
   (A) In his representation of a client, a lawyer shall not:
      (1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.
      (2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.
      (3) Conceal or knowingly fail to disclose that which he is required by law to reveal.
      (4) Knowingly use perjured testimony or false evidence.
      (5) Knowingly make a false statement of law or fact.
      (6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.
claims, however, are permitted if they are supportable by a good faith argument for the extension, modification, or reversal of existing law. Given the folklore of zealous advocacy and the admonition to resolve all doubts in the client’s behalf, it is a rare lawyer who could not devise some good faith argument for the flimsiest of claims. Because DR 7-102(A) uses an essentially subjective, good-faith standard, the remote risk of disciplinary action could be countered easily either with a “pure heart, empty head” defense or by arguing that the lawyer made a good faith error of judgment. The Code often refers to a subjective good faith standard, imposing a positive duty only when the lawyer knows some damaging fact or controlling adverse precedent. When this standard is applied to guide essentially private decisions by a lawyer, based upon facts that are not readily observable to others, the rules are largely self-executing. The overzealous lawyer can, with relative impunity, violate a rule or stretch its interpretation so as to justify doubtful conduct.

The Code states limited exceptions to the full adversary zeal envisioned by the competitive sporting theory of justice. Those exceptions require some degree of candor and minimal fair play in the conduct of litigation in order to educate the court about relevant information and to provide both parties with an opportunity to make their presentations. A lawyer may not make, use, or preserve false evidence or make false

(7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.
(8) Knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule.
(B) A lawyer who receives information clearly establishing that:
   (1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication.
   (2) A person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

Id., DR 7-102.
35. Id.
36. Id., EC 7-3 (“While serving as advocate, a lawyer should resolve in favor of his client doubts as to the bounds of the law.”).
37. Schwarzer, Sanctions Under the New Federal Rule 11—A Closer Look, 104 F.R.D. 181, 187 (1985) (explaining that the “pure heart, empty head” defense is only available where the standard is subjective). As written, the standard of DR 7-102(A)(1) is not purely subjective; “a lawyer shall not . . . assert a position . . . when it is obvious that such action would serve merely to harass or maliciously injure another.” CPR, supra note 5, DR 7-102(A)(1).
38. See, e.g., CPR, supra note 5; DR 7-101, 7-102, 7-105 to 7-109.
statements of fact or law. Affirmatively, the advocate must reveal directly adverse, controlling precedent not cited to the court by an opponent and must refrain from certain conduct designed to confuse the factfinder.

II. TAMING TRADITIONAL ADVERSARY ZEAL

A. Changes in Ethical and Procedural Rules

Written game rules for civil litigation are in the process of major change. Effective August 1, 1983, the Supreme Court adopted amendments to the Federal Rules designed to curb the more pervasive excesses of adversary zeal. The very next day, the ABA formally adopted the Model Rules, which substantially revise the Code's regulation of lawyer conduct. Both changes are significant in their own right. As a practical matter, however, widespread change in the adversary culture and the standards for acceptable litigation conduct can result only from rational enforcement of the procedural rules. Nowhere is the self-executing nature of the ethical rules more evident than in the litigation context. The traditional ethic of adversary zeal, when coupled with enforcement difficulties, largely relegates ethical rules to a guidance function. Nevertheless, changes in the ethical standards for advocacy are an important backdrop to support proper implementation of the procedural amendments.

1. From the Code to the Model Rules: Defining Coherent Standards

In using familiar legal terminology, the Model Rules set more objective standards to guide private choices than did the Code. Nevertheless, they remain self-executing, with compliance voluntary, largely depending upon the individual lawyer. In contrast to the Code's encouragement of zealous representation, the term does not appear in Part 3 of the Model Rules. Instead, the duty to screen is increased by Rule 3.1: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a . . . [nonfrivolous basis

---

39. Id., DR 7-102(A)(4-6).
40. Id., DR 7-106(B)(1).
41. In identifying a lawyer's various professional functions, the Preamble describes the advocate as "zealously assert[ing] the client's position under the rules of the adversary system." The substantive rules for the advocate in Part 3 do not state a duty of zealous advocacy. MODEL RULES, supra note 4, Rules 3.1, 3.2, 3.4. Rules 3.1—"Meritorious Claims and Contentions," 3.2—"Expediting Litigation," and 3.4—"Fairness to Opposing Party and Counsel," are the ethical rules that correspond to the civil procedure amendments and civil sanctioning authorities.
for doing so] which includes a good faith argument for an extension, modification or reversal of existing law.” Having a nonfrivolous basis—a basically objective standard—is the primary focus, but the Rule also includes the Code’s subjective focus on actions taken primarily to harass or maliciously injure another.

While the Code inferred that delay serving a client’s interest is permissible, Rule 3.2 states an affirmative duty to “make reasonable efforts to expedite litigation consistent with” the client’s legitimate interests. As defined by the comment to the Rule, realizing financial or other benefits from an otherwise improper delay are not legitimate client interests. Rule 3.4 is the ethical counterpart to litigation rules requiring fair competition regarding access to evidence, discovery conduct, and obedience to the rules of a tribunal. Subsection (a), concerning access to evidence, is more explicit than its Code predecessor: A lawyer shall not “unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal” material of potential evidentiary value. Rule 3.4(c) narrows the ethical duty to obey court rules, prohibiting only knowing disobedience of an obligation under a tribunal’s rules (except for open refusal or denial that there is a valid obligation). Within Rule 3.4, subsection (d) is the most significant change from the Code in that it attempts to strike at abusive discovery conduct.

These changes are consistent with an underlying philosophy of the Model Rules to define coherent standards of conduct both for purposes of discipline and of guidance. The heightened standards, while laudable, remain practically unenforceable so long as the ethic of zealous advocacy is the stated and accepted professional norm. Beyond questions of enforcement resources, most ethical violations in litigation are beyond the reach of disciplinary authorities. The offensive conduct probably occurred in private, hidden from scrutiny by the opponent and

42. CPR, supra note 5, DR 7-102(A)(1); C. WOLFRAM, supra note 8, at 600.
43. MODEL RULES, supra note 4, Rule 3.2 comment.
44. Compare CPR, supra note 5, DR 7-109(A) (shall not suppress evidence that lawyer or client has “legal obligation” to reveal).
45. MODEL RULES, supra note 4, Rule 3.4(c).
46. Rule 3.4 provides:
A lawyer shall not:
. . . (d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party.
Id., Rule 3.4(d). This has no counterpart in the Code.
47. Id., Preamble, Scope, and Terminology.
judge. Even if it were observed, most abusive litigation conduct is not sufficiently egregious to attract attention for possible discipline.

Although still not realistically enforceable on a large scale, these changes to the ethical standards are significant. Perhaps most important is the very change in the ethical rules to exclude authoritative reference to a duty of adversary zeal. If the Code had continued unchanged in the face of the 1983 amendments, zealous advocacy would continue as the prevailing ethical standard. Revisions to both sets of game rules increase the probability that the procedural amendments will be effective. As a practical matter, the primary impact of the Model Rules must rest on their moral persuasiveness in guiding the litigator as to what conduct is ethically permissible. Discipline—for violating the duties to screen, to expedite, or to participate fairly in discovery—is highly unlikely.

2. The 1983 Amendments to the Federal Rules of Civil Procedure

Because it is extremely difficult for the bar to enforce ethical rules in the litigation context, efforts to restrain abuse must take place in the courts, through the exercise of supervisory authority over the litigation process. While the problem of deficient information concerning hidden activity remains, the trial court has at its disposal far more information than could be obtained later by disciplinary authorities. Of greater significance is the potential normative impact of enforcement threats by the court responsible for presiding over the litigation and, perhaps, evaluating the merits of a dispute. The 1983 amendments set the framework for a comprehensive system of sanctions to reach a wide array of litigation misconduct.

Orderly litigation focused on the merits of a dispute is best achieved when the participants have advance, specific notice of the particular types of conduct likely to be deemed a violation and the kind of sanction likely to result. This level of information requires that court-imposed sanctions bear the same level of rationality as that expected of referees in competitive sports. That is, a violation should be called as soon as reasonably practicable, with the order identifying the precise rule violated by particular acts or omissions. The sanction imposed should be fashioned narrowly, only as permitted by the sanction authority, and should be responsive to the harm caused by the

Violations can be classified into two general categories. Within the first, or compensatory, tier are a wide range of “ordinary” violations—conduct that falls beneath objectively reasonable practice standards, whether resulting from discrete and rational strategic choices encouraged by an excess of adversary zeal or from ordinary negligence. The second, or punitive, tier encompasses intentional, bad faith, reckless, or morally blameworthy misconduct, and conduct which, if left unchecked, challenges the institutional validity of the adversary system.

Most of the recent post-amendment sanction cases fall within the first tier. Whenever it is determined that the conduct is unreasonable, according to standards of professional competence and good faith, an appropriate sanction is imposed against lawyer or client. A typical first-tier sanction is based on what it will take to compensate for the resulting harm: a monetary assessment or other relief aimed at the evidence or contentions. Besides compensation, this sanctions order serves to remove unfair advantage secured by the violation. Deterrence, compensation, and restitution are the principal goals in sanctioning first-tier violations. Before the amendments, the conduct either would have violated no rule or would have resulted in no sanction. Conduct was typi-

49. Rule 11 uses objectively reasonable standards:

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. . . .

FED. R. CIV. P. 11 (quoted in full, supra note 6 and accompanying text). See infra text accompanying notes 246-52.

50. See, e.g., Zaldivar v. City of Los Angeles, 780 F.2d 823 (9th Cir. 1986); National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639 (1976). The second prong of Rule 11 addresses moral blameworthiness, requiring that “[the pleadings] not be interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.” FED. R. CIV. P. 11. See also id., Advisory Committee Notes, 1983 Amendments (“The references in the former text to willfulness as a prerequisite to disciplinary action has been deleted. However, in considering the nature and severity of the sanctions to be imposed, the court should take account of the state of the attorney's . . . actual or presumed knowledge. . . .”); infra notes 252-55 and accompanying text. As characterized by the Seventh Circuit, the Rule incorporates the torts of abuse of process (filing an objectively frivolous suit) and malicious prosecution (filing a colorable suit for the purpose of imposing expense on the defendant rather than for the purpose of winning). Szabo Food Serv. v. Canteen Corp., 823 F.2d 1073, 1083 (7th Cir. 1987).

51. See infra note 225, where evidence and issue preclusion are used as discovery sanctions under Rule 37; see also Eastway Constr. Corp. v. City of New York, 821 F.2d 121, 126 (2d Cir. 1987) (Pratt, J., dissenting) [Eastway II], cert. denied, 108 S. Ct. 269 (1987).
cally egregious to warrant even a minimal compensatory sanction. Under the post-amendment decisions, the punitive tier encompasses both egregious conduct sanctioned under the preamendment rules and conduct that threatens institutional legitimacy. Now, however, sanction orders are beginning to make gradations among violations according to the severity of the misconduct. Deterrence and retribution are the main goals of punitive sanctions. The post-amendment punitive tier encompasses most preamendment sanctionable conduct. As such, the preamendment "death penalty" sanctions of dismissal or default are now rare.

These rule changes portend a change in "the law" in the broadest sense of the word: rules of conduct that are established and enforced by authority. "Sanctions" secure obedience and give binding effect to that law. Their purpose is not just to penalize wrongdoers, or to deter those tempted to misbehave, but also to make restitution for the unfair advantage obtained by the conduct. If the amended procedural standards are diligently enforced as part of a comprehensive system of sanction authority, substantial changes in the ethic of zealous advocacy can be expected. The amendments must also be considered against the backdrop of the sources of sanction power previously available to curb misconduct.

Conduct under Rule 11 and its related rules is evaluated under two prongs: an objective test of diligence—whether the attorney conducted a reasonable pre-filing inquiry—and a subjective standard of good faith—whether a litigation move was made for an improper purpose such as to harass, delay, or cause unnecessary expense to an opponent. Rule 11, the cornerstone to the 1983 amendments, has, in some courts, already proven a forceful weapon to punish and deter abusive litigation conduct. Applied to "every pleading, motion and other paper," it requires the lawyer (or pro se litigant) to certify that, after reasonable inquiry, the signer believes the filing is well grounded in fact and law, and is not made for improper purpose. Appropriate sanctions shall be imposed for violations, which may include expenses and attor-
neys' fees. Rule 16(f) of the Federal Rules applies to compliance with pretrial orders. It gives the judge immense power to control and manage the pretrial process, and allows for the imposition of a wide range of sanctions, such as dismissal, default, claim preclusion, attorneys' fees, and expenses, and failure to obey an order or to prepare to participate in good faith. Neither “contumacious attitude,” chronic failure, nor actual violation by the party or party's lawyer is required as a “necessary threshold” for the imposition of sanctions. Amended Federal Rule 26(g), which applies to every request for discovery, imposes a comparable standard for enforcement and contains a parallel sanctions provision.

These amendments supplement the pre-existing sanction devices permitting assessed costs for bad-faith conduct of litigation. Thus, Rule 37 contains provisions to award expenses for a motion to compel discovery and more serious sanctions for failure to comply with a discovery order. Rule 41, concerning the dismissal of actions, does not invoke monetary sanctions, but provides only for the sanction of dismissal. Rule 56(g) authorizes the court to assess expenses against a party filing summary judgment affidavits in bad faith or solely for the purpose of delay. Federal Rule of Appellate Procedure (“Appellate Rule”) 38 permits assessment of costs and attorneys' fees for frivolous appeals. They are awarded as a matter of justice to the appellee and as a pen-

56. Id.
57. Id.
59. FED. R. CIV. P. 26(g). For the relevant text of the Rule, see supra note 6. Amended Rule 7 expands the duty to certify pleadings to all motions and other papers. It has not yet been used as a meaningful sanction authority. See infra notes 234-38 and accompanying text.
60. FED. R. CIV. P. 37(a)(4) (“Award of Expenses of Motion”), 37(b) (“Failure to Comply with Order”), 16(f) (Rule 16 itself provides for attorneys' fees and expenses, and incorporates by reference the other sanctions from Rule 37).
61. According to Rule 41(b), defendant may move for dismissal if plaintiff fails to prosecute or “to comply with these rules or any order of court”; id., Rule 41(b). But see J.M. Cleminshaw Co. v. City of Norwich, 93 F.R.D. 338, 355 (D. Conn. 1981) (interpreting Rule 41 to allow monetary penalties, even though not specifically provided for in Rule).
62. FED. R. CIV. P. 56(g).
63. FED. R. APP. P. 38 (“If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee”); see also Bartel Dental Books Co. v. Schultz, 786 F.2d 486, 490 (2d Cir.), cert. denied, 106 S. Ct. 3298 (1986) (damages include attorneys' fees).
ality against the appellant. Its purpose is to allow the courts to protect the public from attorneys who "abuse the process of the courts." Inherent power and section 1927 are fall-back authorities available to control trial behavior and generally vexatious litigation conduct. These inexact sanctioning powers authorize liability for excessive costs against one who unreasonably and vexatiously multiplies proceedings. Inherent power is properly exercised when counsel willfully abuses the judicial process or otherwise conducts litigation in bad faith. Bad faith consists of knowingly or recklessly making a frivolous claim, making a meritorious argument for the purpose of harassment, or willfully abusing the judicial process. Unreasonable litigation conduct may also incur section 1927 liability. The purpose of section 1927 is to deter unnecessary delay by both plaintiffs and defendants. Although

---

64. See 786 F.2d at 490.
65. Id. at 491.
66. Even absent express legislative authorization, American courts have asserted inherent power to regulate the legal profession. Federal courts sometimes rely on this general power to discipline lawyers for willful or bad faith abuse of the judicial process. See generally Oliveri v. Thompson, 803 F.2d 1265, 1272 (2d Cir. 1986), cert. denied, 107 S.Ct 1373 (1987); C. Wolf ram, supra note 8, at 31-32, 142-43.
67. 28 U.S.C. § 1927 authorizes assessing excess costs, expenses, and attorneys' fees against a lawyer who multiplies proceedings unreasonably and vexatiously. It provides:

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 and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. § 1927 (1980). See also infra notes 71-73 and accompanying text; see generally the discussion of costs in Oliveri, 803 F.2d 1265.
69. Oliveri, 803 F.2d 1265.
70. Id. at 1272; see also United States v. Associated Convalescent Enters., 766 F.2d 1342 (9th Cir. 1985) (defense counsel unreasonably delayed trial with delayed motion; calculated nondisclosure of conflict violated duty of candor).
71. See Haynie v. Ross Gear Div. of TRW, Inc., 799 F.2d 237, 243 (6th Cir. 1986) (section 1927 sanctions for pursuing claims lawyer should have known were frivolous), vacated, 107 S. Ct. 2475 (1987). Since section 1927 was amended in 1980 to include award of attorney fees, its use has greatly increased. 803 F.2d at 1273.
72. 803 F.2d at 1273. 42 U.S.C. § 1988 is also a cost-shifting device that can be used by prevailing civil rights defendants forced to defend a frivolous, unreasonable, or groundless claim. Attorneys' fees are ordinarily allowed the prevailing plaintiff absent special circumstances making an award unjust. Newman v. Piggie Park Enter., Inc., 390 U.S. 400, 402 (1968). A prevailing defendant is awarded attorneys' fees under section 1988 only if the court finds the plaintiff's claim was "frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." Hughes v. Roe, 449 U.S. 5, 15 (1980) (quoting Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 422 (1978)). Unlike sanctions under the inherent power doctrine, section
the ultimate reach of this section is still unknown,73 it might authorize sanctions for accumulated small fouls that unreasonably and vexatiously multiply the proceedings but do not independently violate a more precise sanction authority.

Although federal courts had authority to sanction misconduct before the 1983 amendments, they typically exercised this power sparingly, and only to punish serious misconduct.74 The procedural rules that authorized sanctions focused on bad faith or violations of court orders.75 Courts tended to reserve sanctions for morally culpable conduct.76 Philosophically, however, the procedural rules assumed cooperation among parties during discovery and pre-trial stages, with the sharp partisan clash reserved for trial. Even where lawyers failed miserably to cooperate—employing dilatory tactics and frivolous games—sanctions resulted only where the conduct was repeated or flagrant. While Rule 37 authorized reasonable control over discovery misconduct, judicial reluctance to impose sanctions encouraged lax and informal enforcement standards, which in turn promoted an adversary culture of “aggressive gamesmanship.”77

To bring about positive change in the competitive adversary culture, trial courts must overcome their reluctance to impose sanctions, and must issue rationally supported orders that tie sanctions for specific misconduct to the most precise sanction authority available. Orders denying sanctions should be similarly precise in concluding the questioned conduct is not a violation. If there is wide-spread and reasoned enforce-

1988 requires no detailed finding of bad faith. 803 F.2d at 1272-73. Section 1988 shifts attorneys' fees from one party to the other, whereas section 1927 holds the attorney personally liable. Id. at 1273.

73. An expected clarification on whether unreasonable conduct was sanctionable under section 1927 is no longer forthcoming. Pursuant to a stipulated dismissal and the suggestion of mootness, the United States Supreme Court vacated and remanded with directions to dismiss a judgment of the Sixth Circuit imposing sanctions for negligent conduct. Haynie, 107 S. Ct. 2475.


75. See, e.g., FED. R. CIV. P. 11 & 37.


ment of the sanction provisions, lawyers will have sufficient notice of sanctionable conduct.78

Rational litigators should be able to evaluate more carefully whether their proposed conduct complies with reasonable standards of the profession and whether their clients are behaving unreasonably. Since the 1983 amendments, there has been a virtual explosion of reported cases addressing sanctions for attorney or litigant misconduct.79 Only if there is logical, predictable and system-wide enforcement can we hope for any significant change in the present “adversary culture.”80

Some lawyers complain about the time and energy consumed by sanctions proceedings, about the chilling effect on innovative claims, and that sanctions infect litigation with unnecessary hostility between lawyers.81 The current level of activity is likely to be temporary, lasting only as long as necessary for the courts of appeals to formulate standards and for the legal profession to understand the new level of responsibility. When fully incorporated into the litigation process and adversary ethic, the sanction provisions can recede into the background as law that affects lawyers’ conduct, but does not dominate litigation activity.82 In time, the higher standards of reasonableness and good faith

78. Schwarzer, supra note 37, at 197-99. Not surprisingly, metropolitan litigation centers have had the most sanction activity; anecdotal reports indicate sanctions or the threat of sanctions are affecting conduct in cities such as New York, Los Angeles, San Francisco, Washington, D.C., and Chicago. In other regions, the rules have varying impact. See infra notes 240-42 and accompanying text, for how this might be done to minimize risks of bias from extensive managerial judging; see also Resnick, supra note 7, at 432-42.


80. Compare Landon, Clients, Colleagues, and Community: The Shaping of Zealous Advocacy in Country Law Practice, 1985 Am. B. Found. Res. J. 81 (describing a cooperative litigation environment where informal sanctions related to reputation in the legal community have a normative effect) with Brazil, Improving Judicial Controls over the Pretrial Development of Civil Actions: Model Rules for Case Management and Sanctions, 1981 Am. B. Found. Res. J. 875 (aggressive gamesmanship as unwritten rules of adversary culture, especially during discovery process). The “culture of professionalism” is a mainstay to both the original Canons of Professional Ethics and the Code. While the Model Rules do not eschew the importance of voluntary self-restraint, the rule texts are drafted to enhance enforceability. Diversity within the profession and the near-anonymity of large cities deprive notions of professionalism of much normative impact. Id.


82. Miller, supra note 58, at 40-41.
enforced by court rules, like other areas of law, will be largely self-executing, in that most risk-averse rational players will comply voluntarily on a regular basis.

The following section examines Rule 11, the cornerstone of the 1983 amendments. By comparison to the former version, the amended rule has had an immense impact, if measured only by the amount of sanctions activity taking place around the country.

B. Amended Rule 11: The Cornerstone for Enforcing Acceptable Standards of Conduct

The Federal Rules state the basic game rules for the conduct of civil litigation. As drafted, the rules largely presuppose voluntary compliance with professional norms. Litigators, as professional advocates with dual responsibilities to their clients and the legal system, are expected to urge their clients' contentions zealously while also protecting institutional values of accurate and legitimate dispute resolution. Significant cooperation among disputing parties is expected, particularly during the discovery process. All the procedural rules are to be interpreted consistently with their overall purpose, to provide for the just, speedy, and efficient resolution of disputes.83

By contrast, the game is actually played by aggressive competitors who gauge the restraints on their conduct through a romanticized ethic of adversary zeal. It is this overriding professional norm that guides many litigators' private decisions, not the various, oftentimes vague or ambivalent rules that purport to set the legal bounds of representation. While the procedural game rules were written to promote fair contests and accurate, rational outcomes, their precise terms left too much discretion for the zealous advocate to violate that spirit. Particularly because so much litigation activity is private, rational aggressive players took advantage of that opportunity, narrowly construing their professional obligations to play within the written game rules. Given the plentiful opportunities to cheat (i.e., technically violate the game rules) and the potential benefits or unfair advantages obtainable from violations, the widespread complaints of abusive conduct are not all surprising.

The 1983 amendments are a serious effort to reform the adversary culture, taming excessive adversary zeal that secures illegal advantage from an opponent and that threatens institutional values in efficient and acceptable outcomes. To effect such a massive change in the way lit-
gators play the game, courts must implement the rules rationally, so that players have reasonably clear notice of the applicable standards and costs of violations. Once there is some consensus as to the proper standards and procedures for implementing sanctions doctrine, primary responsibility for enforcement must remain with the trial judge who—much like a referee—has first-hand opportunity to observe the conduct and should have effective power to regulate orderly game play.

Before the 1983 amendments, Rule 11 merely required that each pleading of a party represented by counsel be signed by the attorney. The signature would certify that the lawyer had read the pleading, and that to the best of "his knowledge, information and belief there was good ground to support it; and that it was not interposed for delay."84 Pleadings that were unsigned or signed with intent to defeat the Rule could be stricken, and the attorney could be subjected to "appropriate disciplinary action" for willful violations. As understood, the Rule required little pre-filing inquiry, merely imposing on the lawyer a "moral obligation" to be satisfied that there were good grounds for the pleading.85 Questions of a lawyer's good faith arose infrequently. Rule 11 was criticized as having little impact on a lawyer's actual conduct.86 Section 1927 and inherent authority87 gave courts discretion to impose costs and attorneys' fees as a form of discipline. However, the bad faith

84. Former Fed. R. Civ. P. 11 (1960), provided in full:
   Rule 11. Signing of Pleadings
   Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or on one witness sustained by corroborating circumstances is abolished. The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a willful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.


86. See, e.g., Risinger, Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11, 61 MINN. L. REV. 1, 35-37 (1976) (between 1938 and 1976 only eleven cases resulted in a trial court finding of violation, with only one case striking the pleading sustained on appeal using Rule 11); C. WRIGHT & A. MILLER, supra note 85, § 1333.

87. See supra notes 66-68 and accompanying text.
standard of these authorities meant that sanctions were rarely imposed. Judicial aversion to sanctions did not induce lawyers to fulfill their professional obligation to screen out frivolous, harassing, or otherwise abusive litigation conduct. Dr Dr

Since the 1983 amendments took effect, sanctions have come into their own as a viable option in litigation. Some trial judges have acquired a "no nonsense" reputation whose implicit threat of sanctions is likely to deter overzealous advocacy while encouraging more competent representation by lawyers tempted to cut corners. Nationwide, however, there is substantial disagreement among federal judges as to what constitutes a violation, whether the standard requires bad faith or merely willfulness, and, considering the purpose of sanctions, whether or not they will be imposed. Moreover, available evidence suggests that judges tend to underestimate the frequency with which other judges grant sanctions requests, indicating systematic misperceptions of the norms. Logical, reasoned analysis of sanctions doctrine is needed to bring some order to the current chaos. An examination of game theory and an analogy to sports provide useful observations for courts to consider in establishing standards for imposition of sanctions.

III. INSIGHTS OF GAME THEORY ON SANCTIONS

A. Defining Game Theory in the Litigation Context

In many respects, litigation is a classic game. Many lawyers and laypersons regard it as a competitive contest in which the outcome is determined as much by the comparative skill and strategy of the players as by the merits of the underlying dispute. Legal literature is replete with references to the litigation process as a sporting event. Litigation can also be regarded as a game, as defined by that branch of mathematics known as game theory.
It is beyond the scope of this article to address the precise application of game theory. That task is better left to the expertise of mathematicians who are trained in its intricacies. Nevertheless, some useful insights can be had from considering game theory's terminology and basic principles. The sports analogue and how it deals with rule infractions then facilitates reasoned analysis of how sanctions doctrine might effectively curb excessive zeal and enforce a standard of competence.

According to game theory, players are rational actors who make deliberate choices among potential moves based on their relative preferences for outcome. As applied in the sanctions context, a comprehensive, logical and internally consistent doctrine is needed to provide players with better information for determining the payoff from certain strategic choices. Where players have this level of advance information that certain conduct is likely to be sanctioned and to what extent, the hope of obtaining a strategic advantage from a rule violation is diminished. The rational player is deterred from violations because the probable sanction will remove that advantage, compensating the opponent for harm caused by the violation.

Litigation is often called a zero-sum game by mathematicians, legal scholars, judges, and authors of literary works. In a zero-sum game there is a winner and a loser, with the loser's payout precisely the same as the winner's gain. The game is played in a strictly competitive fashion.

Regardless of whether it is mathematically correct, this characteri-
zation has two unfortunate consequences for the adversary process of litigation. It overlooks the fact that transaction costs associated with litigation distort the symmetry of a zero-sum solution. For lawyers who are paid a fee regardless of outcome, litigation is a win-win game. Lawyers' self-interest may compel them to pursue litigation as though it were a strictly competitive, zero-sum game although it may be in the client's best interest to handle the dispute by less costly and contentious means. Second, the legitimacy of the adversary process is cast in doubt where collective competitive zeal (encouraged by simplistic notions of a zero-sum contest) unreasonably extends proceedings, many of which should not have been brought in the first place. This problem applies generally, but may be more acute when fees are contingent on outcome. Plaintiffs' lawyers' only hope of compensation is to secure a favorable outcome in as many cases as possible. Here, self-interest acts as a disincentive to studied voluntary compliance with professional duties requiring counsel to screen out frivolous contentions and encourages litigation conduct designed more for strategic advantage than arriving at the merits. Complaints about delay, costs, inaccurate results, and overburdened courts have spurred development of alternative forms of dispute resolution.

Behind the trusted mantle of self-regulation and against the backdrop of adversary zeal, lawyers have had immense room to stretch, ignore, or be ignorant of the rules. Most litigation choices are made in private, after assessing the relative advantages and risks based on hidden information. Even when an opponent claims a rule infraction, courts have been very reluctant to sanction. Minimal risk of being detected and sanctioned for rule violations encourages many fine, zealous lawyers to stretch their interpretation of the game rules to the outer limits.

Revisions to the game rules, spurred by complaints about abuse, delay, and excessive costs, are now in place. The various sanction authorities collectively create an integrated system for dealing with game infractions. Courts are charged with the task of implementing these changes. To reduce the payoff available from doubtful moves, the qual-

96. Market forces undoubtedly impose some restraint, for many clients are now becoming consumers who will shop for successor counsel when the fees previously charged are consistently excessive in view of the value obtained.

97. See Wall St. J., Nov. 12, 1987, at 1, col. 2 (one third of responding corporations used dispute resolution systems other than litigation, disposing of 6.8% of their disputes).
ity of officiating must improve. Game theory terminology and principles and the sports analogue are offered in hopes of achieving a system that can effectively deter infractions, detect when one has occurred, and impose an appropriate sanction.

Play between two or more players is structured by successive moves, ending at a defined point of termination. The word "game" is reserved for the aggregate of the rules which define it. Rules define a set of successive choices, or moves. Each move results in an outcome for which the players have relative preferences, and which determines who is to make the next choice from the available options. Players rationally decide between alternatives after evaluating the probability of various outcomes, their associated risks and benefits, and their relative order of preference.

Players try to design game strategy after a reasoned, probability-based analysis. Game strategy varies according to the number of players, whether or not the maximum outcome is limited (affecting incentives to cooperate), and whether or not it is a game of perfect information. A game is strictly competitive where the players have opposing preferences of outcomes. This concept of strict opposition of outcomes is quite restrictive, limiting zero-sum games to those situations where the numerical utility of one player equals the negative utility to the opponent. A game is nonzero-sum when the players have at least one pair of outcome preferences that are not in strict opposition.

The adversary system has been characterized as the most highly developed method through which conflict is resolved within a zero-sum structure. Where the outcome results in a gain to one party, the other suffers a corresponding loss. The win-lose adversary game creates a dilemma: Justice is presumably on one side only, but each player must fight hard, "using all the tricks of the trade, as long as the rules are obeyed." Ambiguities about facts and law challenge the fundamental assumption that "justice" is a certain determinable outcome. Sometimes justice may be on neither side, with neither party at fault. Nevertheless, the system engages in this fiction to support the outcome of cases that must be finally determined after trial on the mer-

99. R. Luce & H. Raiffa, Games and Decisions 59 (1957); Marshall, supra, note 95, at 922.
100. Mathematical Psychology, supra note 3, at 206.
101. A. Rapoport, Fights, Games and Debates 262-63 (1960).
102. Id. at 263-64.
103. Marshall, supra note 95, at 922.
its. In those cases, litigation is properly characterized as a zero-sum game because both plaintiff and defendant seek identical goals—judgment in their favor—and the process “customarily culminates in an all-or-nothing, or zero-sum result.”

The traditional ethic of zealous advocacy, which is premised on game play culminating in trial on the merits before a judge, incorporates the notion of litigation as a zero-sum game. As applied to professional norms of conduct, this simplistic characterization overlooks a conflict of interest between lawyer and client because of transaction costs. Take a simple case resulting in judgment for plaintiff of $100. Defendant loses $100 and plaintiff wins $100, seemingly a classic zero-sum outcome. However, where each party must spend $40 in attorneys’ fees and expenses, then we find that defendant is out $140, while plaintiff nets only $60. When viewed solely from the perspective of the parties, the net recovery to plaintiff is less than defendant’s outlay—a non-zero-sum solution. Asymmetry results largely because of legal fees. It may be in both parties’ best interest to pursue another, less adversarial form of dispute resolution if that would reduce the legal fees, increasing the net gain by plaintiff and lowering the net payoff by defendant. Other forms of dispute resolution, by short-circuiting litigation, thus reducing transaction costs, help push toward the symmetry of a zero-sum solution.

Lawyers’ perception of litigation as a zero-sum game overlooks this conflict of interest. Psychologically, this misperception encourages excesses of zeal where the adversary system is used as a “technique for victory” and not a “means to equal justice.” It gives free reign to those litigators with personalities already predisposed to aggressive competition. The spirit of zero-sum dominates the process and outcome of litigation. Even cases that are finally settled are done so partly out of the fear of losing.

While there is intrinsic benefit to ending a dispute by calling a winner, the adversary system aspires to higher purposes: achieving a fair, just, or at least acceptable result. The game rules are intended to further those higher purposes, and not merely to determine which side played better. Simplistic characterization of litigation as a zero-sum game diminishes the spirit to play to further an appropriate result. Lawyers play the game in a dual capacity, both as professional repre-

104. Id. at 919.
105. Id. at 921.
106. Id. at 922.
sentatives of their clients (the "real players in interest") and as players in their own right.

Lawyers' professional training, typically focused on making rational distinctions, also encourages rationalization to absolve us of moral accountability when—because of competitive skill and resources—we achieve an unjustified outcome for a client. Ethical duties are generally understood to prescribe a "special moral code which governs ... [one] who is acting for another," yet a litigator's professional interest in a reputation as a "hard-ball player," a high ratio of wins to losses, or a competitive personality may result in a game being played as zero-sum, even when it is in the client's interest to have it played as a nonzero-sum, or negotiated, game. That is, for many real life disputes it is in the parties' joint interest to have the game played with a win-win philosophy. Cynical litigators perceive their ethical duty as playing to win, despite the merits of the dispute.

Mathematical treatment of game theory begins after assigning utility values to possible outcomes, and does not question the rationality of contending parties' goals. Care must be taken not to automatically treat as strictly competitive all games the outcomes of which require monetary exchanges. Even in lawsuits with money-exchange outcomes, litigants have many other concerns that affect their desire for a particular outcome. For example, an injured plaintiff who has present need for medical and living expenses may place a higher utility on reaching a prompt settlement for less money than an insured defendant whose carrier prefers delay for economic reasons or a favorable legal determination with future precedential value. Characterizing a game as zero-sum or nonzero-sum is a choice that has normative value, because game theory is a decision-making tool to help people identify "how they behave if they wish to achieve certain ends."  

The current rash of sanctions orders has grabbed the bar's attention. A rare opportunity exists to redefine standards of professional conduct while educating lawyers and the bench about the changes in the game rules. Lawyers debate what is happening with interest akin to that of a sports fan or participant. While the immediate impact of a

110. R. LUCE & H. RAFFA, supra note 99, at 60.
111. Id. at 63.
112. See, e.g., Fear and Loathing in Oklahoma: Local Attorneys Battle the FDIC, Nat'l L.J., Oct. 26, 1987, p. 6 (describing District Judge Wayne Alley's Oklahoma City courtroom, packed
sanction affects only the players involved, the debate truly involves the entire legal community. Trial judges are now invested with an unprecedented level of responsibility to officiate over litigation conduct. Appellate courts are responsible for training the trial judges to fulfill this expanded role. Both trial and appeals courts must carefully focus upon the proper application of each sanction authority. Whenever a sanctions issue arises, the trial judge should make specific findings and conclusions. This will serve multiple purposes. The trial judge will gain experience at officiating over litigation fouls, with reasoned review on appeal articulating standards of conduct and punishment goals relevant to the type of rule infraction. As appeals courts reach a consensus on sanctions doctrine, they can train trial judges to better officiate, with better refereeing ultimately reducing the number of fouls committed.113

Game theorists caution that there are some games, such as labor management or trade between foreign countries, that should not be treated as zero-sum games to avoid misleading and erroneous conclusions.114 Most economic, political, and military conflicts are fit into classical game theory by acknowledging their strictly competitive nature.115 The shortcomings of applying game theory to real life situa-

113. See McCormick & Tollison, supra note 98, for a statistical study of rules violations in basketball that analyzed the impact of increasing the number of referees from two to three on the incidence of fouls. The authors concluded that increasing the number of law enforcers raises the probability of arrest, thus inducing fewer criminal acts. Referee competency rose with the number of officials, and the number of fouls decreased.

In basketball terms . . . fouling but not being caught in the act will induce players to foul and to practice avoiding fouls or techniques to draw the attention of officials when they are fouled, and may lead to the addition of more referees. Such behavior reduces scoring because spending time in this way decreases a player's ability to perform other basketball feats such as scoring.

. . . .

. . . . More experienced officials are associated with higher scores, presumably because they call a better game. More referee learning means better refereeing, better refereeing means fewer fouls committed, and fewer fouls committed means more real output. This is additional evidence that more basketball officials reduces the number of fouls committed and the number of bad calls.

Id. at 232-33. Applying this analysis to litigation, an increase in social welfare would result from better, more, and experienced officiating over litigation conduct. This would reduce incentives for violations, thus freeing the players to devote their energy to "scoring" on the merits of an action.

114. R. LUCE & H. RAIFFA, supra note 99, at 60.

115. Id. at 88. Consider this excerpt from a jurisprudential piece on the dynamics of the common law:

As baseball grew, so did the influence of values that saw winning, rather than exercise, as the purpose of the game. Victory was to be pursued by any means possible within the language of the rules, regardless of whether the tactic violated the spirit of the rules. The
tions are recognized: it cannot take into account participants’ psychological make-up, and thus logical application of pure zero-sum strategy can lead to absurd results.\textsuperscript{116} Even more basic, the fundamental assumption that players will act rationally is subject to considerable doubt.

Regardless of whether the zero-sum label is mathematically defensible, it has unfortunate consequences on how the game is actually played. It encourages excessive adversary zeal that sometimes loses sight of the institutional purposes underlying the game of litigation. It ignores the multiple variables that bear upon each parties’ utility value for the final outcome, which in turn enables trade-offs and cooperation to negotiate a mutually favorable result. Moreover, it overlooks the many situations in which litigation is a necessary, albeit sometimes unpleasant, process for resolving disputes so that relationships can proceed, perhaps with guidance for future conduct. Many business and domestic disputes fit this category, where multiple issues affect the parties’ preferences for different outcomes.\textsuperscript{117} In those cases, the possibility of trade-offs or cooperation should mean the game is not played in strictly competitive fashion.

By definition, cooperation is impossible in zero-sum games, whereas mutual gain through cooperation is always a possibility in nonzero-sum games.\textsuperscript{118} Litigation players lack complete freedom to make binding agreements on all aspects of the game. The rules expect cooperation in certain areas. Players have the power to negotiate settlement of most substantive disputes, subject to approval by clients, and perhaps the judge. Depending on the procedural rules, and how they are enforced in general and by the specific judge, the players may also effectively control the entire case and how it moves (or fails to move) through the court process.\textsuperscript{119} The Code advises that “proper function-
ing of the adversary system depends upon cooperation between lawyers and tribunals. . . .”\textsuperscript{120} Taken with the Federal Rules mandate that all the procedural rules “shall be construed to secure the just, speedy and inexpensive determination of every action,”\textsuperscript{121} it becomes apparent that cooperation is essential during discovery to give both parties fair access to evidence relevant to an accurate determination on the merits. Pre-trial activity designed to streamline the trial is crucial for prompt resolution of individual disputes and efficient use of judicial resources. The institutional goal of accurate, legitimate dispute resolution could not be pursued without cooperation between lawyers, as players with professional limitations on how the game is played.

The fact that almost ninety percent of all litigation is settled\textsuperscript{122} challenges the common supposition that parties’ utilities are in strict opposition. The theory of a negotiated game reveals a multiordinal meaning of equity, where the parties can make trade-offs and cooperate in reaching a negotiated outcome that benefits each player to a greater extent than what is possible under a zero-sum solution. For example, a structured settlement may provide for periodic payment into a trust fund for the plaintiff by a defendant-investor with the defendant able to invest the money at a higher rate of return than possible for plaintiff, and to receive a commission for its investment services. Both parties are better off than if the defendant were required to make an immediate lump sum payment. Negotiation scholarship—empirical, practical, and theoretical—argues that a cooperative problem solving generally may be more effective and can creatively fashion a win-win outcome.\textsuperscript{123} Thus, in the negotiation context, adversary zero-sum play unnecessarily limits the available options by assuming that the parties’ utilities are in strict opposition.\textsuperscript{124}

According to game theory, a rational player formulates a strategy in an effort to maximize one’s outcome. In nonzero-sum games, various methods of cooperation and information sharing are possible, including advance disclosure of strategy (combined with a reputation for inflexibility), preplay jockeying for position, and mixed cooperative strategies within the same game or over a series of repeat games. Parties’ choices

\textsuperscript{120} CPR, supra note 5, EC 7-39.

\textsuperscript{121} FED. R. CIV. P. 1.


\textsuperscript{123} See generally W. FISHER & M. URY, GETTING TO YES (1981); G. WILLIAMS, EFFECTIVE LEGAL NEGOTIATION (1978); Menkel-Meadow, supra note 117.

\textsuperscript{124} Menkel-Meadow, supra note 117, at 788-89.
of actions are defined by the procedural rules, although the consequences of these choices are not predictable because of ambiguities in the substantive law, available evidence, and uncertainties about the opponent's strategy. The lawyer (as player-representative for a party) moves—or chooses between possible alternatives—after calculating the advantages to be gained and risks to be taken. Many subtle, nonquantifiable factors enter into the lawyer's calculations. Competent and riskaverse litigators move after assessing options in light of reasonably available alternatives under the law and less rational—but often accurate—hunches about what moves and game strategy are likely to win the game. Those "hunches" are based on imperfect information about the opponent's skill, resources, commitment, and adversariness; about the judge's temperament and managerial style; and about any risk of sanctions for violating the procedural game rules.¹²⁵ Yet, all these factors are irrelevant to the equities of a disputed claim.

Procedural and substantive legal rules exist to provide a system for resolving disputes, whether on the merits or in some other socially acceptable manner. The rules of procedure identify possible moves and purport to set standards for determining whether, under a given set of facts, a particular move should be successful at obtaining a strategic advantage in the overall game play. However, the procedural rules fre-

¹²⁵ Technically, a game of perfect information is when each player knows all past moves taken by the opponent. Information is imperfect when such knowledge is lacking. The effect is to make rational strategic decision making more difficult. If one were to regard moves in litigation as clearly stated, formal contentions raised in papers filed with the court, litigation would be a game of perfect information. Diversity within the big metropolitan areas, however, results in wide differences in competence, commitment to a client's cause, and the level of adversariness lawyers are willing to use. Information, then, is not perfect. I would argue that "moves" in litigation cannot be limited to such discrete actions as filing in court. While the fact of filing is easily discernible, what is in contention and what is subterfuge is often clouded. Rather, litigation might be broken down into stages, some characterized by filings with the court, but others that are a dynamic, interactive process. Before suit is filed, the parties may jockey for favorable strategic positions or attempt to resolve the matter without litigation. After commencement of the action, the parties might skirmish with preliminary motions. Discovery itself might constitute a subsidiary game related to the primary dispute. As time for trial approaches, parties are expected to reach stipulations as to the remaining issues in dispute and most questions of evidence or procedure. If settlement negotiations (which can take place any time) are not successful, then the case must be tried in court before a judge or jury. The battle can continue through appeals and enforcement efforts. Whether or not litigation is technically a game of imperfect information about the players' moves, a significant amount of litigation activity takes place in private, where voluntary self-restraint is the primary limit on one's adversary zeal. In a practical sense, the hidden nature of litigation activity deprives players of much information. See, e.g., Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531 (9th Cir. 1986) (reversing sanctions order thought to require too exacting a judgment call by lawyer), reh'g en banc denied, 809 F.2d 584 (1987).
quently are not used to further legitimate, rational outcomes. A player imbued with the ethic of zealous advocacy can obtain unjustified strategic advantages by misusing available procedural options. For example, a player may deliberately take a move that is destined to fail because it is not rationally supported by law or facts. The move is taken precisely because it may secure an unrelated (and perhaps unjustified) advantage—to divert attention from the merits, conceal harmful evidence, or delay for financial or other improper advantage. This misuse of the procedural game rules is made possible when the rules are ambiguous, inconsistently enforced, or generally ignored. By manipulating the procedural rules to obtain tactical and strategic advantages unrelated to the merits of a dispute, an adroit competitor can win a game, i.e., maximize an outcome, that in fairness should have been lost.\(^{120}\)

If litigation game rules are to facilitate acceptable resolution of disputes, they must be regularly enforced so that players can rationally calculate the probable costs of possible violations. This, of course, presupposes lawyers’ ability to make such judgments. Sanctions under the 1983 amendments change the game rules, increasing the professional obligation to screen, expedite, and conduct the litigation in a reasonable manner. Their proper use as necessary, rationally implemented devices is critical to changing the adversary culture that encourages excessive adversary zeal. If trial courts, as supported by appellate courts, create a predictable and regularly enforced sanction doctrine, this will eventually change the payoffs of engaging in certain types of misconduct. Lawyers, as self-interested, often rational economic actors, will adjust their conduct to comply with the articulated game rules. By specifying the standard of conduct expected of lawyers, sanctions may deter both willful or conscious violations and nonwillful violations resulting from lack of competence or preparation.

Game theory purports to be normative.\(^{127}\) The simplistic characterization of litigation as a zero-sum game has strongly influenced many litigators’ perceptions of their ethical obligations to clients. Regardless of whether the characterization is mathematically correct, the zero-sum label influences lawyers’ strategic decision making, support-

---

126. There are inherent difficulties with construing a normative theory to advise “rational players” what the outcome should be. That involves assumptions about what we mean by “rationality.” A. Rapoport, supra note 92, at 34-36. Given the vast range of opinion among national players, there is no consensus what the outcome “should be” across the litigation spectrum.

127. Id. at 32-38.
ing excessive adversary zeal in the spirit of competition.\textsuperscript{128}

B. \textit{Competitive Sports: Analogous to Litigation?}

1. Sanctions in Competitive Sports

Competitive sports are a more accessible way to think about game theory and the contributions it could make to controlling litigation abuse.\textsuperscript{129} Sports such as basketball and football are strictly competitive, or zero-sum games. The maximum outcome is limited; only one team can win, and ties are given low preference even when legally possible. By definition, team preferences for outcome are in strict competition. The games are played in a strictly competitive fashion. Cooperative game play is an impossibility. Far beyond issues of game theory, vastly different social purposes are fulfilled by litigation and competitive sports. For our purposes, these differences should fundamentally affect how the game is played. Nevertheless, some useful comparisons can be made between the rules that regulate the two types of games and how sanctions are imposed when the rules are violated.

Rational players (both athletes and coaches) make calculated judgments about the conduct permitted and prohibited under the rules. Interpretive questions abound, with strong incentives to seek narrow, imposed limits. For many rules, the system depends on voluntary compliance, requiring that the rules have normative value in the athletic community. Players comply because they regard the rule as stating an accepted or enforced standard of conduct. Ability to enforce depends on whether there is available proof of infraction, what inferences can be made, and how the rules are interpreted and applied. Enforcement capability also depends on the quality of refereeing.\textsuperscript{130} When conduct is

\begin{itemize}
  \item \textsuperscript{128} See, e.g., materials prepared by Litigation Risk Analysis which promote using logical, decision-free analysis in formulating litigation strategy. Paper presented Nov. 4, 1982, ABA Litigation Section meeting (copy on file with the author). As one commentator has observed, "to train lawyers to be fighters, when their work and the world require far more of them—that they be problem solvers and mediators—is anachronistic. Positing law as a zero-sum game is not only unrealistic today, it also reduces the chance to attain equal justice on the merits." Marshall, \textit{supra} note 95, at 926.
  
  \item \textsuperscript{129} This analysis is focused on the level of collegiate athletics. Similar comparisons could be made to professional athletics, although the system of private ownership and explicit profit motivation may vary the analysis somewhat. The author gratefully acknowledges insights shared by Oklahoma University basketball coach Billy Tubbs, \textit{Interview with Billy Tubbs, Head Basketball Coach at the University of Oklahoma (July 15, 1984) \[hereinafter Tubbs Interview\]} and the insights of friends and colleagues who understand sports far better than I.
  
  \item \textsuperscript{130} See McCormick and Tollison, \textit{supra} note 98, at 226-33. Power to enforce the rules is split between the national body that drafts them and acts as watchdog for the entire system, and
\end{itemize}
hidden from view, enforcement is difficult unless (sometimes literally) there is a litmus test for whether a violation has occurred.

Both litigation and competitive sports serve important functions which, in turn, affect the rules defining how the games are played. On a grand, societal level both games are a socially acceptable form of tension release, a ritual art form whereby players, fans, litigants, and litigators can act out their aggressions within defined limits.¹³¹ Players and coaches can also be viewed as performing artists engaged in a form of self-expression, with stature in the community accorded to participants who have creatively refined their technical skills. The sports team is an object of loyalty and cohesiveness that draws together an otherwise diverse community. Competitive sports provide entertainment for fans and hopefully profit for the team sponsors and related industries. For many athletes, the teamwork experience provides important lessons on the value of joint cooperation to achieve a common goal; it may also prepare them to cope with the successes and failures of normal living.¹³²

In competitive sports, therefore, the rules must promote a sharp clash of athletic skill, teamwork, and strategy, with victory in a given contest going to the team that plays the better game. The outcome is intended to be a valid comparison of the teams’ pure competitive skills. Game rules are designed and interpreted so that one opponent cannot take illegal advantage of another; the outcome should fairly reflect which team is more skilled and played better.¹³³ Nationally, competitive sports have extremely high stakes. The outcome of a game between two specified opponents can vary in utility: Some games will be much more important than others. Where the stakes are high, players will play more aggressively—as a strictly competitive choice.¹³⁴

Specific game rules are designed to regulate a fair contest, attempting to exclude outside influences that could give unjustified advantage to either side. Thus, on the collegiate level, restrictions on recruiting and pregame scouting are intended to prevent unfair advantage to academic institutions with generous supporters and lavish sports

---

¹³¹ C. Wolfram, supra note 8, at 568; Marshall, supra note 95, at 920.
¹³² Tubbs Interview, supra note 129.
¹³³ Id.
¹³⁴ Id.
budgets. Such a financial advantage could prevent less affluent teams from effectively competing—both in individual games and in the ranking system. Similarly, prohibitions on use of steroids and other substances reflect a concern that individual player performance reflects skill and ability unaltered by performance-enhancing drugs. Fan loyalty is critical to the financial success of the athletic enterprise: Thus, a certain entertainment level must be maintained throughout the season. Specific game rules are designed to avoid unnecessary delays, with penalties imposed for stalling, but also provisions for commercial timeouts.

Game rules identify sanctions for violations, which vary according to the severity of infraction. They can be divided into two categories. Some rules, which articulate shared moral norms, demand widespread, voluntary compliance. Infractions of these rules affect the sport’s institutional legitimacy. These rules regulate conduct off the playing field, which is typically hidden from public view. Infractions of such rules are determined on a national level, with strong sanctions imposed both for punishment and deterrence of infractions such as drug use, recruiting violations, and nonapproved financial support. Repeated infractions of rules can result in harsh punishment, including the “death penalty” in which an individual player or a team is banned from competition for morally culpable conduct.

135. Repeat games are played within the national professional leagues so that all teams can be ranked according to competitive ability. As a systemic goal, specific outcomes and the overall team rankings should fairly reflect the teams' relative competitive abilities. Stakes are largely determined by ranking done within a conference or on a national level and playoffs among the top contenders.

136. See, e.g., National Collegiate Athletic Ass'n, NCAA Manual 1987-88 art. 3 §§ 6(c), 9(1) (1986) (prohibiting involvement in gambling activities related to intercollegiate athletics); id. art. 3 § 9(d) (rendering ineligible for competition student guilty of fraud in entrance exam or other dishonest conduct evading NCAA regulations); id. By-Law 5-2 (prohibiting use of dangerous drugs by student athletes competing in NCAA championships). See generally id. art. 3 § 6 (Principles of Ethical Conduct).

Undoubtedly, significant disparities of enforcement exist within this category of rules. Besides the usual difficulty in securing proof of hidden activities, some rules are drafted with such precision that technical evasion is a possibility. For example, private supporters reportedly give athletes preferential treatment on such matters as clothing purchases and car loans. Where it can be shown that the booster acted solely in a private capacity, without any support, encouragement, or knowledge of the university personnel, it appears that a university may escape penalties for such illegal financial support.

137. The “death penalty,” suspension from all NCAA activities, was imposed against Southern Methodist University (SMU) for continuing illegal financial support of players even after the NCAA put the school on probation and ordered the payments stopped. Additional sanctions may result, whether from possible lawsuits, the Methodist church, or politics. As a church-related insti-
Other rules are procedural, designed merely to regulate the orderly and fair conduct of the game on the playing field. Midgame infractions are more readily observable than outside infractions, and when called, are regularly sanctioned within the limits of the rule. These procedural game rules are also designed so that one side does not secure an illegal advantage, but they lack the moral force of those rules protecting institutional legitimacy. Competitors are expected to challenge the limits of these procedural conduct rules, and sometimes to commit intentional violations for strategic reasons. The "penalty" imposed usually is measured in terms of the probable harm caused the opponent by the infraction.

Two critical points must be made. First, competitors are expected to break some rules. Indeed, some rules are expected to be broken as part of rational game strategy. Even though a foul is called and a sanction imposed, the cost of that sanction is less than the benefit sought to be gained. In basketball, for example, a team with a two-point lead prefers risking having a foul called if the conduct prevents the opponent from making a two- or three-point basket. Such violations are not morally culpable; they are merely part of a rational game strategy designed by a player after conscious calculation. The resulting sanction bears no hint of moral disapproval. It is a predictable consequence of an ordinary violation as called by the official responsible for insuring orderly game play.

Second, the sanction reflects the presumed harm caused one's opponent, another purpose served by a rule. Certain expected violations, such as those regarding game delays, protect important institutional values, but the sanction is a hand slap intended to impose some cost so
that teams do not destroy the entertainment value of a game with unnecessary delays. In these cases, "sanctions" have no retributive value; they are merely part of ordinary game management by the referees. Other violations are also intentional tactical choices designed to gain a competitive advantage over one's opponent. For example, the basketball rules prohibit interfering with a player in the act of shooting. If the referee observes and calls a violation, a two-shot penalty free-throw is given. By preventing an opponent from completing a shot that could have resulted in a two-point basket, the sanction is measured by the probable (or possible) harm to the opponent. A competitive player may rationally decide to risk committing a foul in hopes that the fouled player will miss the free-throws. By consciously violating this type of game rule, the player hopes to secure a strategic advantage that will strengthen the chance of winning. When the referee calls the foul, there is again no negative moral value to the sanction imposed; compensation is the ordinary consequence when an opponent secures an illegal advantage and a foul is called.

To some extent, the fact of compensation deters persistent violation, because a rational player knows the payoff is limited if a foul is called. Deterrence is a primary rationale for the whole range of game rules. For ordinary rules that regulate orderly game play, the cumulative effect of multiple fouls on a player deters the individual player from excesses of competitive zeal. Litmus tests for drugs are to deter drug usage, which tarnishes the image of a sport in the public eye. Even technical fouls, which are largely retributive, serve both special and general deterrence goals. Retribution, or moral culpability, only enters into the procedural, in-game sanctions when a team member exceeds the number of permissible fouls or when there is a technical foul. Violations may result in benching a player for the balance of a game; this deters individuals from overzealous competition. Technical fouls, which are called against flagrant violations, may also result in punitive sanctions of varying degrees. In some cases, allowing multiple free-throws or ejecting a player is regarded as sufficient punishment to indicate strong disapproval for the conduct and to deter future incidents. Other times, the conduct could result in forfeiture of the game or sus-

141. The retributive element is often slight when a player fouls out of the game; the fouls may be intentional strategic choices altruistically made to benefit the team. Nevertheless, the foul-out rule is necessary to enable the game to proceed without too many interruptions. Deterrence is the primary remedial goal.
pension from all games for a period of time.\textsuperscript{142}

2. The Litigation Analogy

For purposes of comparing the process of civil litigation with athletic contests, we are concerned primarily with the referees, who are charged with regulating game play, enforcing standards of conduct, and declaring the victor at the end of a game. The litigation analogue is the trial judge, who has primary responsibility for supervising the manner in which a case is litigated.

Although analogues, judges and referees fulfill divergent roles. Where the referee's responsibilities are limited to officiating game conduct, the trial judge must also evaluate the dispute on the merits. Professor Fuller distinguished judges and umpires by the fact that an umpire's decisions are not made in a framework assuring the opportunity to present proofs and reasoned arguments.\textsuperscript{143} While that may be true, it is true because the respective contests differ fundamentally in how they are conducted and their defined objectives. In sports, the parties play a game whose objective is unrelated to presentation of facts and arguments. Game rules further entertainment and acceptable competition, with the institutional goal served in individual contests by declaring a winner. The socially-defined, institutional objective is consistent with the player's objective to be declared the winner. There is limited opportunity for arguments on the validity of a call because it would not further the institutional objectives.

Accordingly, referees have broad discretion to call a foul and impose a penalty. Whether rulebreaking conduct occurred is often a judgment call, depending on what is observed and how it is interpreted under the rules by a particular referee. As judgment calls, officiating decisions are virtually nonreviewable by later appeal to higher author-

\textsuperscript{142} In collegiate sports, conduct in violation of NCAA rules by players or participants can result in forfeiture of one or more games. Misconduct that warrants harsh sanctions includes grade fixing; ineligible players, see \textit{N.Y. Times}, Feb. 15, 1987, at 2E, col. 2 (University of Nevada at Las Vegas), \textit{N.Y. Times}, Feb. 28, 1986, at 24, col. 4 (Kansas State); recruiting violations, see \textit{N.Y. Times}, Jan. 22, 1982, at 26, col. 4 (South Florida University); drug use, see \textit{N.Y. Times}, Jan. 7, 1987, at 10B, col. 1 (University of Maryland imposed its own sanctions for illegal drug use). If several team members are suspended, the team may have to forfeit because it lacks the required number of players. See \textit{N.Y. Times}, April 5, 1985, at 1, col. 5 (Tulane). In professional sports, persistent fan disruption after proper warnings can result in forfeiture. In sports such as baseball, where the umpire enjoys virtually total discretion, a team may be required to forfeit a game for unsportsmanlike conduct directed at game officials.

\textsuperscript{143} Fuller, \textit{supra} note 15, at 365.
Midgame appeals would prolong the game interminably and create institutional nightmares. Nevertheless, referees are expected to have rational support for their decisions. Coaches and fans watch closely, holding referees accountable for bad calls. Coaches can attempt to reason with the referee on disputed calls, although if limits of decorum are exceeded, a technical foul may be called on the coach. Fan protest, instant replays, and public commentary hold the referees accountable to minimal levels of rationality. Consistently bad officiating raises questions about the institutional legitimacy of the sport, so public pressure (and desire for continued employment) curb officials' arbitrary abuse of discretion.

The trial judge has dual responsibilities: regulating orderly conduct of litigation much as is done by a referee, and evaluating the merits of a dispute. Litigation rules provide a structure for partisan presentation of proofs and arguments so that disputes can be resolved according to the merits. Institutional objectives relate to the need for a legitimate, socially acceptable process for peaceful resolution of disputes. The socially desired outcome relates to a search for truth, and not merely determining the contestants' relative skill. Because litigation serves a higher purpose than athletic contests, the judges are more accountable for correct rulings in both areas of responsibility. In contrast to referees' final authority over decisions, many trial court decisions are reviewable to protect accuracy of resolutions and to further consistent interpretation of procedural rules. The extent and standard of review, however, depends upon whether the appealed issues relate to the merits, or to the orderly conduct of litigation. With regard to sanctions, the judge reasonably can be expected to issue specific factual findings and legal conclusions as to the existence of a violation, and whether a sanction is appropriate under the stated authority for regulating litigation conduct. The referee's call should identify the rule infraction and impose a sanction within the limits of discussion allowable by the stated

144. Although review may be technically available by filing a protest with the national supervisory body, as a practical matter, a referee's decision is hardly ever reversed.

145. Midgame review has been done on a trial basis in professional football. An additional referee is located in the press box who has authority to reverse a disputed call upon "indisputable visual evidence" that it was incorrect (i.e., independent review of the "instant replay" tape).

146. For example, Indiana University head basketball coach Bobby Knight threw a chair onto the court to protest a ruling in a 1984 game with traditional rival, Purdue. Knight was ejected from the game and later suspended from one game for this technical foul. N.Y. Times, Feb. 24, 1985, at 4E, col. 1; N.Y. Times, Mar. 3, 1985, at 7E, col. 1.

147. See supra notes 2-3 and accompanying text. Systemic objectives are to be distinguished from the parties' objectives.
rule. Written findings by the judge serve a parallel function. Players in both contexts thereby receive rational information about standards of conduct and how they are being enforced. Accurate, consistent calls in litigation are, however, more important. The stated rules have yet to be interpreted into a workable set of standards. For this to occur, specific findings are needed so that appeals courts can address the interpretive questions and correct erroneous calls.  

Significant distinctions exist among the roles of players. In sports, the coach has distinct relationships on several different levels: with the national athletic organization, the owner or institutional employer, the players, and the public. Loyalty is owed primarily to the institution, while effective team play requires loyalty from the players to the coach. Team members, while essential for game play, combine their athletic abilities using skills and strategies developed by them and the coach.

By contrast, the advocate’s loyalties are divided. Although primary loyalty in a given case is to the employing client, lawyers typically have multiple clients. Conflicting demands may arise from the multiple clients. Lawyers are simultaneously agents employed by the client and principals in their own right. As licensed professionals, lawyers owe allegiance to the legal system.

In every case, the system vests the advocate with plenary authority to decide what litigation conduct is legally permissible and tactically appropriate. Player objectives are the same in both litigation and sports: to win. Players in both contexts pursue their objectives with a combination of technical skill, personal style, and preparation. In litigation, however, an individual lawyer-player’s interest in developing a professional reputation as a successful, skilled representative is probably consistent with the institutional objectives of litigation. Absent a significant threat of enforcement, the desire to win for oneself and one’s client is likely to influence strategic choices about what moves to take and whether to risk rule infractions. Lawyers will not adequately screen out implausible contentions or refrain from unreasonably contentious behavior unless a system exists for enforcing articulated standards.

The litigator usually is both the primary strategist and responsible

148. See Thomas v. Capital Sec. Servs., 812 F.2d 984 (sanctions summarily denied; vacated and remanded for trial court to make specific findings), reh’g granted, 822 F.2d 511 (5th Cir. 1987); In re Yagman, 796 F.2d 1165 (9th Cir.) (remand for specific findings of misconduct keyed to sanctioning authority), modified, 803 F.2d 1085 (1986), mandamus granted sub nom., Brown v. Baden, 815 F.2d 575, cert. denied, 56 U.S.L.W. 3383 (U.S. Nov. 30, 1987) (No. 87-250).

149. Maute, supra note 12, at 1090.
for technical execution of game moves. Other litigation "team members," although essential to play, are in less active roles that are defined by presentation of the dispute according to the lawyer's strategic plans.\textsuperscript{150} As in sports, the identity of witness-players and their methods of play may be critical to the outcome of a case.\textsuperscript{151}

Litigation and sports differ markedly in how the respective games are played. While both are games involving hidden activity, litigation opponents practically must play with far less information than sports competitors. In sports, a game takes place within defined time limits. It consists of physical activity by a group of individuals acting together as a team. The actual game rules—restrictions on acceptable behavior—relate to physical conduct of the players. The sports competitor has access to information about the opponent's previous game strategies, and can examine game tapes to search for weak spots. Although opportunities to cheat exist during game play, they consist of physical conduct that frequently can be observed or factual inferences drawn from and hence punished.

Depending upon the control asserted by the trial judge, the course of litigation could be determined largely by the players. Litigation has no definite duration, and is seldom played out to its culmination: full trial on the merits in open court.\textsuperscript{152} Even for those cases that are tried, most time in litigation involves activities hidden from the observation of the court and the opponent.\textsuperscript{153} Given litigators' competitive instincts, encouraged further by the traditional adversary ethic, the opportunities and incentives to cheat are enormous. These opportunities to cheat exist when a lawyer confers with a client, conducts factual investigation in or out of discovery, researches the law, or participates in settlement negotiations.\textsuperscript{154} Incentive to use that opportunity exists whenever the player predicts that a strategic benefit can be obtained by a violation


\textsuperscript{151} Consider, for example, the Pennzoil-Texaco dispute, where Texaco's defense witnesses had a damning effect with the jury. Pennzoil successfully portrayed Texaco's New York negotiators as "too slick, somehow lacking in the ethics and honor that governed dealings in Texas." Wall St. J., May 8, 1987, at 7, col. 1. Jury foreperson Rick Lawler envisioned them as takeover professionals conducting midnight deals in plush hotel rooms, playing both ends against the middle. Their flashy dress and elitist demeanor reportedly alienated the jurors.

\textsuperscript{152} In one sample, less than 8% of the disputes went to trial. Trubek, \textit{supra} note 122, at 89.

\textsuperscript{153} \textit{Id.} at 91. Lawyers devoted an average of 8.6% of their time in a case to trials or hearings. Another 14.3% was spent on pleadings for presentation to the court. The balance—about 75% of time spent in litigation activity—does not take place out in the open.

\textsuperscript{154} An average of 78% of time is devoted to these litigation activities. \textit{Id.}
that will escape sanction. In an adversary culture where some forms of cheating are unwritten rules of the game, even observed violations are often greeted with fraternal tolerance by opposing counsel and trial judges. Sanctions doctrine must account for the limited opportunity to observe private litigation conduct and the conscious choices made by strategic players. Legal standards should be defined to allow the judge to make factfindings and draw inferences from information available without invading confidentiality.

C. Sanctions as Essential Regulators of Game Play

Notwithstanding these marked differences in purpose, roles, and type of game play, competitive sports still offer some useful insights about how game rules can be drafted and enforced to enhance institutional purposes. Rational players consciously assess whether they can obtain a competitive advantage by intentionally risking a rule violation; where the probable sanction is less than the expected gain, competitive logic encourages the violation. Occasional "penalties" for intended, strategic violations are merely a cost of doing business. The rare, truly punitive sanctions are reserved for violations that threaten the institutional legitimacy of the entire sport. If rulemakers deem that certain types of violations are getting out of hand, they can revise the rule and permissible sanction in order to encourage voluntary (but self-interested) compliance.

Lawyers' "adversary culture" loosely defines permissible standards of conduct according to the standards stated in the rules, as interpreted by lawyers and enforced by courts. The preamendment game rules were characterized by lax enforcement that tolerated, and even encouraged, excessive competitive zeal. Cases dragged on for years, often with satellite litigation on peripheral issues raised primarily for tactical advantage. Litigation costs skyrocketed, and increasing doubts were raised as to whether the outcome was largely determined by resources

156. Kritzer, Sarat, Trubek, Bumiller & McNichol, Understanding the Costs of Litigation: The Case of the Hourly-Fee Lawyer, 1984 Am. B. Found. Res. J. 559, 594-95 [hereinafter Litigation Costs] (arguing that we can expect no reduction of litigation costs unless something is done to modify what Brazil called the adversary culture); see also Roadway Express, Inc. v. Piper, 447 U.S. 752, 757 n.4 (1980) ("Due to sloth, inattention, or desire to seize tactical advantage, lawyers have long indulged in dilatory practices."); Fuller & Randall, supra note 7, at 1161 ("[W]hen [the lawyer's] desire to win leads him to muddy the headwaters of decision, . . . instead of lending a needed perspective to the controversy, he distorts and obscures its true nature.").
and competitive zeal, or by the merits of a case. Whether the fault was the rules or their implementation, spiraling concerns of litigation abuse threatened the legitimacy of the adversary process.

1. Two Tiers of Sanctions Under Preamendment Cases

Preamendment judicial response to litigation misconduct can be separated into three groups. One group reflected a high tolerance of abuse resulting from an ordinary excess of competitive zeal; such conduct was not sanctionable under a forgiving standard of "boys will be boys." The second group consisted of first-tier sanctions, which were imposed only when abusive conduct was repeated, intentional, or in bad faith. Despite this high standard for finding a rule violation, the resulting sanctions were essentially compensatory. The third group was the second, or punitive, tier, which included cases where the violations were egregious, flagrant, or morally blameworthy. With such levels of culpability rarely found, the resulting sanctions were severe: retribution and incapacitation influenced courts to impose the "death penalty"—dismissal, default, or denial of otherwise proper attorneys' fees.

Courts tolerated a lot of frivolous suits, motions practice, and evasive or harassing discovery. After all, most trial judges were former litigators who saw what was going on, and found it hard to blame the lawyers for trying. Concern for access to the courts resulted in the most minimal standards for screening out frivolous claims or appeals. Rule 11, requiring what was supposedly a lawyer's certificate of compliance with the screening function, was virtually unenforceable.

The lawsuit or appeal was rare that reached the first level of sanctions, where the conduct was in bad faith or vexatious. Preamendment Rules 11 and

157. *See, e.g.*, Roadway Express, 447 U.S. at 757 n.4 (“A number of factors legitimately may lengthen a lawsuit, and the parties themselves may cause some of the delays. Nevertheless, many actions are extended unnecessarily by lawyers who exploit or abuse judicial procedures, especially the liberal rules for pretrial discovery.”); *see also* C. DICKENS, BLEAK HOUSE 2-5 (1948) (describing chancery abuses of the nineteenth century).


159. *See infra* notes 171-75 and accompanying text.


161. Nemeroff v. Abelson, 620 F.2d 339 (2d Cir. 1980) (fee award vacated; remanded for determination of the propriety of appellants' conduct of the litigation). Appeals courts were perhaps less tolerant when their own time was wasted with frivolous appeals; preamendment sanctions of double costs and attorneys' fees were not uncommon. *See, e.g.*, Overmyer v. Fidelity & Deposit Co., 554 F.2d 539 (2d Cir. 1977) (frivolous appeal to delay time of payment warranted sanction of double costs plus attorneys' fees).
37 set minimal limits, which generally encouraged excessive adversary zeal in other aspects of litigation. Many complained of rampant discovery abuse. Here, it was not that the rules were the problem, but how the system worked. As designed, the discovery rules expected cooperation among parties; judges frequently would rebuff motions to compel production and for sanctions, still expecting the parties to cooperate. Many lawyers regarded discovery as a game, with tactical delay, harassment, and evasion part of the unwritten rules. The rules allowed healthy growth of the adversary culture, which in turn encouraged competitors to test the limits in pursuit of some perceived advantage. Violations were easy to get away with, particularly when they consisted of passivity or non-responsiveness. Enforcement required the opponent to seek help from a typically reluctant trial judge.

Ordinary competitive zeal was allowed free reign. Lawyers made rational, calculated choices about the most effective strategy to secure a favorable result for the client. By playing games with dilatory motions practice, discovery, appeals, and generally vexatious litigation conduct, lawyers could effectively divert attention from the merits of a case, causing such expense and delay that the outcome often reflected more the competitive zeal, skill, or economic resources of the lawyers and parties than the merits of a dispute. Only when the conduct was found to be in bad faith, vexatious, or an intentional disregard of court orders did some sanction become likely. However, in this first tier, the ordinary sanction was merely compensation for the probable

164. Id. at 235-45.
165. Id. at 230-35.
168. See, e.g., David v. Hooker, Ltd., 560 F.2d 412 (9th Cir. 1977) (finding appeal not frivolous). While pending, all or most other activity ceases, thus diverting attention from the merits. Regardless of whether the appeal is found to be frivolous, it achieves the strategic advantage of delay.
harm caused an opponent—usually attorneys' fees, and perhaps costs, assessed against the offending player. By comparison to the possible strategic or economic advantages to be gained from the violating conduct, the risk of sanctions apparently was only a slight deterrent.

Harsh second-tier sanctions were imposed both to punish responsible persons and to deter others from similar conduct. Cases warranting these punitive sanctions involved flagrant disregard of the rules, often coupled with intentional flouting of court orders. When a party was found at fault for such violations, the punishment was severe—dismissal or default. Such flagrant abuse threatened the legitimacy of the adversary process. The sanction fell mostly on the client, although the conduct was initiated and directed by the attorney.

This lax two-tier system tolerated much abuse. Complaints about overzealous advocacy increased dramatically after 1906 when Pound first challenged the "sporting theory of justice." Things became worse—much worse. Former Chief Justice Burger openly advocated reform. The Supreme Court sustained judicial power to sanction lawyers and litigants who abuse the judicial process, appointed an advisory committee to reexamine the rules of procedure, and adopted their recommendations to take effect August 1, 1983.

171. See, e.g., cases cited supra notes 166-69.


176. See 35 F.R.D. at 282; Pound, supra note 2, at 406.

177. See generally Burger, Agenda, supra note 21.


179. See supra note 21 and accompanying text.
2. Proposed Two-Tier System of Sanctions

Under the new rules, overzealous advocacy fostered by the adversary ethic is no longer acceptable. Now the lawyer or signer must stop, look into the factual and legal basis for an assertion, and only proceed after reasonably concluding the assertion is plausible.\(^{180}\) Formal adoption of a comprehensive sanctions system should force courts and lawyers to re-evaluate permissible limits of adversary zeal. Presently, these rules and their enforcement are controversial.\(^{181}\) This is precisely because they are demanding a drastic change in the adversary culture.\(^{183}\)

Despite the controversy and frenzy of activity, eventually the risk of sanctions will give normative effect to the affirmative requirements for evaluating whether a course of conduct meets reasonable professional standards. Sanctions activity is at an all-time high, raising concern about satellite litigation.\(^{183}\) It will take a few more years for appellate courts to work out some relatively uniform interpretations of the applicable standards and procedure. Until those standards develop, activity will continue to be high. On a temporary basis, the professional community needs to talk a lot about sanctions and acceptable standards of conduct. This talk, accompanied by regular judicial enforcement, will eventually bring about changes in the conduct regarded as acceptable for lawyers. Meanwhile, we must also recognize that sanctions activity itself may occur because of overzealous advocacy. An implausible or unwarranted strategic request for sanctions is itself a sanctionable infraction. Concern for satellite litigation must be considered in the larger context. Once courts have had the opportunity to develop a comprehensive sanctions doctrine, some standards will exist to guide lawyers' private choices about their own conduct and to be used as enforcement tools against occasional offenders. In the long-term, sanctions may exist as a small, but necessary component of the procedural rules.\(^{184}\)

\(^{180}\) Miller, supra note 58, at 15; see also Note, Plausible Pleadings: Developing Standards for Rule 11 Sanctions, 100 HARV. L. REV. 630, 635-42 (1987).

\(^{181}\) This can be seen from the intracircuit fights about Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531 (9th Cir. 1986), reh'g en banc denied, 809 F.2d 584 (1987), in which the Kirkland & Ellis firm aggressively defended against a $3,000 sanction; see infra notes 353-64 and accompanying text, and the fact that William Kuntsler and Ramsay Clark represented the civil rights lawyer in Oliveri v. Thompson, 803 F.2d 1265 (2d Cir. 1986), cert. denied, 107 S. Ct. 1373 (1987). Lawyers place high value on the stakes in these sanctions disputes.

\(^{182}\) Litigation Costs, supra note 156, at 594-95.

\(^{183}\) See, e.g., Golden Eagle, 801 F.2d 1531.

\(^{184}\) See Oliveri, 803 F.2d at 1271.
It is naive and unrealistic to believe that lawyers’ ethical standards for litigation conduct could be effectively enforced by the disciplinary authorities of local bar associations. Courts are the only feasible forum. When the lawyers are the ones attacked in litigation, they fight back even more competitively. This type of hyperactivity was apparent in the 1970’s, when courts thrashed over the meaning of the conflict-of-interest provisions of the Code of Professional Responsibility. Ironically, these “ethics battles” were often tactical skirmishes. Eventually some common understandings were reached about the substantial relationship test, vicarious disqualification, and procedural matters. Legitimate disqualification activity subsided after lawyers had reasonable notice about the kind of conflicts screening they should do before accepting a new case. The Supreme Court, in a series of decisions, then held that the grant or denial of a disqualification motion was a nonappealable, interlocutory order. These skirmishes now take place mainly in the trial court—where they belong—with the judge who has examined the factual claims first hand and determined whether disqualification is legally warranted.

The legal community should be patient about the current level of sanctions activity. Courts eventually will reach some consensus on the proper use of sanctions. At present, appellate review of district court sanctions orders is critical. Without it, enforcement would be impossibly erratic, depriving the rules of much deterrent force. Circuit-level activity has brought about some doctrinal refinement—at least in defining the outer parameters: identifying the various sanctions authorities, and determining when they should be used.

a. Reviewability of Sanctions Orders and Standards for Review

After courts have had some opportunity to strive for a consensus about acceptable standards of conduct and measures of control, the Supreme Court should follow its own lead in disqualification cases to find that interlocutory sanction orders are also nonappealable. Although sanctions often are against the lawyer as a nonparty, immediate appeal diverts attention from the merits of a dispute to the peripheral

185. Many of the standards developed by the courts have been codified in Model Rules, Rules 1.7-1.12 (1983).


187. See supra note 186 & infra note 188.
issue. The client bears most of the cost of sanctions—if not in legal fees, at least in delay. Lawyers’ built-in conflict of interest when defending their own conduct speaks against treating them like ordinary nonparties.\footnote{Richardson-Merrell, 472 U.S. at 435 (MODEL RULES, Rules 1.7(b) & 1.2 (1985) require, as a matter of professional ethics, that the decision to appeal turn "entirely on the client's interest"). Sanctions create great potential for lawyer-client conflicts of interest. The risk of sanctions on the lawyer tempers zeal for the client with self-interested caution. Moreover, the lawyer’s zeal in defending against personal accusations is likely to be more intense than for the client. See Letter from Michael Salem, Esq., July 25, 1987 (copy on file with author); see also In re Lawrence, No. 86-428, slip op. (D.C. Cir. June 5, 1987) (reported in Nat’l L.J., Nov. 2, 1987, at 13) (duty to comply with Rule 11 does not establish defense for failing to carry out contract of employment).}

For the long term, nonappealability of interlocutory sanction orders will enhance enforcement of the rules. As officers of the legal system, lawyers will have to convince the judge before whom they are appearing that they behaved in accordance with professional standards. True, some sanctions orders may be effectively unreviewable. Most pretrial orders are affirmed on appeal,\footnote{Richardson-Merrell, 472 U.S. at 434, citing 15 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3907 (1976).} so limited reviewability is not critical to outcome. To the extent that judges are like referees—responsible for keeping the competitive process on track so that it can reach an acceptable conclusion—they must be able to make binding judgment calls about rule violations and appropriate sanctions. This requires that due deference be given to the trial court’s factual findings, and factually-based inferences about whether a violation has occurred. Ultimate responsibility for implementing the new rules lies with the trial judges. Appeals courts should respect trial judges’ efforts to restrain excesses that plague the trial process. If legitimate, reasonable efforts to control abuse are reversed on appeal, exasperated trial judges are likely to quit trying.\footnote{See, e.g., Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531 (9th Cir. 1986), reh’g en banc denied, 809 F.2d 584 (1987), a very controversial case in which the Ninth Circuit reversed sanctions imposed by Judge Schwarzer, a noted authority on Rule 11. 801 F.2d at 1538-42. Schwarzer assessed Kirkland & Ellis three thousand dollars in attorneys’ fees for what he deemed misrepresentation of the law by failure to cite directly controlling, adverse authority. In what must be a very unusual move, a member of the appeals court requested *sua sponte* an en banc hearing. Although this request was denied, five judges filed a scathing dissent which supported Judge Schwarzer’s attempt to enforce the ethical duty of candor with the parallel language of Rule 11, and alternatively argued for remand to consider whether the sanction could be otherwise supported. 809 F.2d 584, 584 (dissenting opinion); see infra notes 361-63 and accompanying text.}“Like any referee, the district judge will occasionally make mis-
But the possibility that a ruling may be erroneous and may impose additional litigation expense is not sufficient to set aside the finality requirement. . . ." But the possibility that a ruling may be erroneous and may impose additional litigation expense is not sufficient to set aside the finality requirement. . . ."

The Supreme Court in Richardson-Merrill denied appealability of disqualification orders despite concerns about a dangerous game—the tactical use of disqualification motions to harass opposing counsel. In so holding, the Court said that: "[i]mplicit in § 1291 is Congress's judgment that the district judge has primary responsibility to police the prejudgment tactics of litigants, and that the district judge can better exercise that responsibility if the appellate courts do not repeatedly intervene to second guess prejudgment rulings.”

Repetitive intervention with trial courts' officiating decisions is to be avoided. Nevertheless, appeals courts have significant review authority to determine that the sanctions rules are being applied properly. A system of error correction must be devised so that trial courts can fulfill their officiating responsibility according to some articulated standards. While the issues will evolve continually at the edges, general deterrence goals require some uniformity. Appeals courts need to create guidelines for sanctioning, thus training trial judges how to officiate under the new rules.

Rational, predictable application of sanctions doctrine demands reviewability in two situations: where a violation has occurred but the trial court imposed no sanction; and where there is no violation but the trial court did sanction. More limited review is proper where a viola-

191. Richardson-Merrill, 472 U.S. at 436.
192. Id. Observers feared the decision would result in increased tactical use of disqualification motions by defendants wanting to delay trial. Nat'l L. J., July 1, 1985, at 5. Permitting interlocutory appeal is not the proper way to address this concern. Rather, the concern supports the need for clearly stated standards that can be applied consistently by trial courts. As the law of conflicts has evolved in the disqualification context, trial courts have received sufficient guidance as to the proper standards to apply; whether disqualification is appropriate in a particular case is a decision properly vested in the trial court. Disqualification motions that are frivolous or brought for improper tactical reasons such as delay are sanctionable under Rule 7. See, e.g., Hillcrest Memorial Park, Inc. v. First Fed. Sav. & Loan, No. 84-C2224, slip op. (N.D. Ill. 1985) (sanctioned under Rule 11).
193. Richardson-Merrill, 472 U.S. at 436.
194. Special problems exist in the first category, where there was no sanction for a violation. Unless the player harmed by the violation also loses on the merits, it has little incentive to appeal the denial of sanctions. Similarly, cases that are settled can get no correction of erroneous sanction decisions. Until there is a consensus about the new standards, trial judges should be especially aware of the confusing information disseminated by wrong decisions. Whether other mechanisms could be devised to insure correction of gross errors is an important question that exceeds the scope of this article.
tion is found but the sanction imposed is claimed to be an abuse of discretion. In each instance where the trial court did not properly apply sanctions doctrine, the erroneous decision will leave an opponent with an unfair advantage. The error, if allowed to stand, conveys inaccurate and unpredictable information to the practicing bar as to the expected standards of conduct.

The standard of review should be tailored carefully, giving due regard for the trial judge to have the final say upon fact determinations, and substantial authority to draw inferences therefrom. That is to say, whether a violation has occurred is a mixed question of law and fact. While factual determinations are sustained unless clearly erroneous, a determination that those facts did or did not violate a rule is reviewed de novo. Deference should be given the trial judge’s superior opportunity to observe and draw factual inferences from the perspective of seeing how the litigation has been conducted. Trial court findings that conduct resulted from a willful or conscious choice should be sustained unless clearly erroneous.

195. See Eastway Constr. Corp. v. City of New York, 821 F.2d 121 (2d Cir. 1987) ($1,000 sanction fell below the bottom range of appropriate discretion; remanded with direction to order award of $10,000 payable by plaintiffs and their counsel) [Eastway II], cert. denied, 108 S. Ct. 269 (1987).

196. Now under consideration by the Fifth Circuit is whether a dual standard of review is proper, depending on whether the sanctions were granted or denied. See Thomas v. Capital Sec. Servs., 812 F.2d 984, reh'g en banc granted, 822 F.2d 511 (5th Cir. 1987); see also 3 Civil Trial Manual (BNA) 450, 454-56 (Oct. 21, 1987) (discussing Thomas). Appellant contends that the Zaldivar standard of review, see infra notes 320-31 and accompanying text, should only apply if sanctions are imposed, with trial court denials accorded “substantial deference.” 3 Civil Trial Manual (BNA) at 455. This standard, if adopted, would only encourage further chaos, and deter judges from attempting to exercise their sanction authority. Significant confusion as to the proper standard of review exists among and within the circuits. See generally id. at 450-56. As evidenced by Golden Eagle, see supra note 181 and accompanying text, the Ninth Circuit erred in this regard, and the Supreme Court should ultimately decide. No doubt order is needed on this issue; the problem lies with finding a correct solution.

197. Special deference must be given the trial judge in drawing inferences from facts pertaining to the conduct of litigation. The judge has superior opportunity to observe the behavior, and should be permitted to make legal inferences from the entire context of litigation. In this respect, trial judges and referees are entitled to the same deference as in other factual matters in gauging whether sanctions are warranted. See, e.g., Hudson v. Moore Business Forms, Inc., 827 F.2d 450, 454 (9th Cir. 1987). For precisely this reason the Ninth Circuit decision in Golden Eagle erroneously invaded the judgment of the trial court. See supra text accompanying notes 189-93.

198. This is where the Ninth Circuit panel in Golden Eagle erred. See supra note 190 and accompanying text. Judge Schwarzer factually concluded that Kirkland & Ellis deliberately formulated its arguments for the purpose of misleading the court on the current state of the law. I agree with Judge Schwarzer that the lawyer’s signature certifies that each of the stated assertions contained in the paper is legally plausible and factually supportable. Partisan presentation is based on each side educating and trying to persuade the court as to the correct determination. A trial
By contrast to sports officials, the de novo standard permits extensive intervention with trial court judgment calls. This power is appropriate, if carefully exercised by appellate courts, to require principled application of sanctions doctrine so that clear standards of conduct can evolve. Where the trial court issues specific findings of fact analyzed to determine whether a violation has occurred, the de novo review should identify the legal standards for application, and then examine the facts against that standard. If the trial court correctly identified a violation, then the resulting sanction should be sustained if it was within the discretionary limits set by the sanction authority. These different standards of review reflect the kinds of judgments that must satisfy a higher level of rationality (i.e., identifying the kinds of conduct sanctionable under each authority) and the factually based judgment calls that must finally rest with the referee.

b. Procedural Issues in Exercising Sanction Authority

Enough sanctions cases have now been decided on appeal that some circuits have begun to develop their own sanctions jurisprudence. Post-amendment cases also suggest a two-tier system, but one vastly different from before. The lines are no longer clear between tolerable and sanctionable conduct, whether the sanction is a mere hand slap for deterrence or outright punishment. The post-amendment cases progress gradually from one tier to the next, with courts refining standards of acceptable litigation conduct. Rather than the lax "boys will be boys" standard, cases denying sanctions seriously evaluate conduct before finding that it complied with reasonable standards of practice. Nev-
Nevertheless, a warning is sometimes given about future conduct. The first tier of sanctionable conduct presently consumes most of the literature that addresses standards of conduct and the sanctioning process. When the conduct is found unreasonable and in violation of a rule, the sanctions should be tailored either to compensate the opponent for harm caused or to counteract for the illegal advantage. The second, or punitive tier is expanded in scope to include a wider range of blameworthy conduct. Instead of the "death penalty" for reprehensible conduct, some courts are fashioning narrower sanctions that reflect degrees of fault (hence, the need for punishment), harm to the litigation process (hence, the need for systemwide deterrence), and harm to the opponent (hence, the need for compensation).

Ironically, sanctions orders in many of the compensatory tier cases are being reversed because of trial courts' failure to evaluate properly the sanction rules and conduct. Some sanctions have been reversed for procedural errors, and not because the behavior conformed to professional standards. Thus, reversal and remand may be ordered because the trial court did not give proper notice, specifically identify the conduct found to violate a particular sanction authority, or impose permitted sanctions. This must outrage frustrated trial judges trying to curb abuse. Wherever possible, the reviewing court should consider a remand to allow the trial judge an opportunity to correct the errors with proper findings. Remand could further deterrence by focusing inquiry on rational distinctions among the various rules, thus educating

203. See, e.g., In re Snyder, 472 U.S. at 646-47.
204. Some judges are beginning to consider sanctions in light of the punishment goals served by various kinds of orders. See Eastway II, 821 F.2d at 124 (Pratt, J., dissenting). Judge Schwarzer suggests three tiers, where a first violation may result in reprimand; compensatory sanctions for a second violation; and discipline considered for further violations. There are strong due process problems with sanctions such as disbarment and suspension; Judge Schwarzer prefers referring such matters to state bar authorities. 104 F.R.D. at 201-4.
205. See, e.g., In re Yagman, 796 F.2d 1165 (9th Cir. 1986) (no notice, quantification, or itemization), modified, 803 F.2d 1265 (2d Cir. 1986), cert. denied, 107 S. Ct. 1373 (1987); Lacina v. G-K Trucking, 802 F.2d 1190 (9th Cir. 1986) (reasonableness judged on law at time of initial filing; factual confusion remedied without increase in costs), vacated on other grounds, 107 S. Ct. 3224 (1987).
both the bar and trial judges. While it is only fair to give the trial judge a second shot to uphold the sanction, the appeals courts are correct to demand carefully reasoned sanctions decisions from the trial courts. For the comprehensive system of sanctions to work as intended, the players and referees must know the acceptable standards of conduct and what conduct violates specific rules. When the trial judge—acting as referee over the competitive adversary process—calls a foul on a player, that call must be supported by a specific violation for which the player had advance notice of potential penalties.207

The call should also be timely. Whenever possible, the trial judge should give prompt and clear notice of potential sanctions liability so the responsible persons can reform their future conduct. Sanctions may be imposed sua sponte or in response to motion by an opponent.208 Courts retain authority to award sanctions after a case is dismissed; voluntary dismissal does not absolve one of the obligation to answer for one’s act.209 Pretrial or discovery misconduct should be handled at the time of offending conduct, with prompt payment of any costs a condition of proceeding further.210 This will expedite the case, and deter abuse in a wide range of activities hidden from observation. For misconduct during trial or a hearing, the judge should give prompt notice and conduct a separate sanctions proceeding at the conclusion of the matter.211 Sanctions for frivolous appeals can be handled ancillary to the appellate judgment.212 Fashioning an appropriate sanction is com-

---

207. See also Thomas v. Capital Sec. Servs., Inc., 812 F.2d 984, 989 (5th Cir. 1985), requiring that all Rule 11 motions be supported by findings of fact and conclusions of law on the following points: "(1) whether reasonable inquiry into the facts was made; (2) whether reasonable inquiry into the law was made; (3) whether the action was taken to harass, delay or increase unnecessarily costs of litigation; and (4) whether an attorney has met his continuing obligation to reevaluate his litigation position." Hudson v. Moore Business Forms, Inc., 827 F.2d 450 (9th Cir. 1987) is an example of how appeals courts should focus their review of a sanctions order.

208. See, e.g., Schwarzer, supra note 37, at 197.

209. See Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073, 1079 (7th Cir. 1987) (voluntary dismissal); Greensberg v. Sala, 822 F.2d 882 (9th Cir. 1987) (sanctions request after complaint dismissed; affirmed trial court denial finding no violation).


211. In re Yagman, 796 F.2d 1165 (9th Cir. 1986). This process permits the judge to accumulate isolated instances of misconduct not otherwise sanctionable under a precise rule. Inherent power and section 1927 should properly allow sanctions for an accumulation of minor infractions that unreasonably prolong litigation.

mitted to the sound discretion of the court. Yet it, too, bears a burden of rationality under the law. The sanctions award must be “quantifiable with some precision and properly itemized in terms of the perceived misconduct and the sanctioning authority.”

Amended Rules 7, 11, and 26 use the same model for fashioning an appropriate sanction. If the court finds a violation, it must impose an appropriate sanction, which may include an order to pay the other party’s expenses. In most instances, the harm caused an opponent is measured by the attorneys’ fees and costs reasonably necessary to respond to the misconduct. If a sanctions award includes legal costs, the trial judge should determine that the fees are reasonable in amount and are in relation to the harm caused by the offending conduct.

---

213. See National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639, reh’g denied, 429 U.S. 874 (1976). District courts must have discretion to fashion an appropriate remedy; if appeals courts reverse trial court sanctions, the trial bar would get the message that it can get away with even flagrant abuse. This concern calls for a narrow standard of review regarding the appropriate sanction. Union Oil, Inc. v. E. F. Hutton & Co., 809 F.2d 548 (9th Cir. 1986) (trial court’s $294,141.10 sanction upheld against attorney for violating federal civil rule); Zaldivar v. City of Los Angeles, 780 F.2d 823 (9th Cir. 1986) (propriety of sanction reviewed for abuse of discretion).

214. In re Yagman, 796 F.2d at 1184.

215. Equitable principles of cost-shifting have been described as one basic result of sanction litigation. Miller, supra note 58, at 16-17. A cogent sanctions doctrine does not abrogate the “American Rule”, which deals with ordinary litigation costs. Amounts recoverable as sanctions are costs which would not have arisen except for a violation of duty to conduct the litigation within the rules.

In Britain, litigation costs are routinely assessed against the losing party. Under the American rule, litigation costs are borne by the respective parties absent a specific statute authorizing fee-shifting. Many such statutes authorize granting fees to prevailing plaintiffs under the private attorney general theory or to prevailing defendants for a plaintiff’s bad faith assertion of meritless claims. The bad faith exception to the American rule allowed very limited cost-shifting for a certain class of cases. Recovery of attorneys’ fees was rarely imposed because of the high standard of culpability; the party had to have acted with bad faith, initiated vexatious litigation, or unreasonably continued litigation after learning that the claim was frivolous. See Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978). This high standard was necessary to prevent an undue chilling effect that deters novel, untried claims. The amendments to the Federal Rules of Civil Procedure generally extend the option for cost-shifting. They now may be assessed against a lawyer who violates the duty to screen out improper litigation conduct. Moving toward the British view, costs may also be shifted to a party. In Britain, cost-shifting is total, and is assessed against the losing party as an ordinary consequence of defeat. By contrast, cost-shifting is partial under the American rule, results only upon the finding of some objectively culpable conduct, and can be ordered against either a party or a lawyer.

216. See, e.g., MGIC Indem. Co. v. Weisman, 803 F.2d 500 (9th Cir. 1986) (sanctioned party granted opportunity to challenge opponent’s time sheets).

the opponent could have mitigated harm by raising early objections, payment of all resulting fees and costs is not required by the compensation principle.  

Moreover, the "punishment should fit the crime." The trial court should fashion sanctions according to the harm caused and should assess them against the player who bears primary responsibility for the conduct—whether initiated and directed by the attorney or client. Sanctions against the lawyer may not be passed on to the client. Compensation, including partial cost shifting to the opponent, should be the presumptive sanction for first-tier violations. For obvious violations that cause a significant drain on judicial resources, compensation to the court system may be in order. Because of enormous business incentives to use litigation as economic leverage, the disproportionate consumption of judicial resources is just one part of a much larger form of economic combat. The presumption for compensatory damages can be rebutted by proof that the full harm was not proximately caused by the violation, but rather by the claimant's un-

218. In re Yagman, 796 F.2d at 1185. Disagreement exists as to whether the sanctions award should be determined using the lodestar method, which identifies an amount presumptively recoverable and then is adjusted upward or downward depending on certain variables, including mitigating factors. Instead, the sanction could be fashioned consistent with the punishment goals of the authority relied upon. See generally Eastway II, 821 F.2d 121.


221. These sanctions are described as tacit fee-shifting mechanisms. Miller, supra note 58, at 37-39.

222. Sloan v. United States, 621 F. Supp. 1072 (N.D. Ind. 1985) (Rule 11 sanction; fine of $250 to opponent and $250 to court), aff'd in part and appeal dismissed in part, 812 F.2d 1410 (7th Cir. 1987). Magistrate Wayne Brazil has suggested that different standards be used for public policy cases (e.g., civil rights) and economic power cases (e.g., intellectual property, antitrust). Lecture by Wayne Brazil, AALS Annual Meeting, Section on Civil Procedure (January 5, 1987) [hereinafter Brazil Lecture].

223. See, e.g., Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073, 1083 (7th Cir. 1987) (sanctions appropriate response to predatory litigation between business competitors) (Easterbrook, J.); MGIC Indem. v. Weisman, 803 F.2d 500 (9th Cir. 1986) (sanctions imposed upon corporation for making claims that they knew were not well grounded in fact; instead, company acted only upon a "vague suspicion"). But see Zaldivar, 780 F.2d at 834 (Rule 11 sanction denied although law deployed in purely political dispute for which it was ill-suited; colorable claim stated, and standard for harassment not met). Brazil suggests consideration of a user-paid system so that regular economic combatants absorb the costs imposed on the legal system. Brazil Lecture, supra note 222. But cf. Nelken, Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment, 74 Geo. L.J. 1313, 1352-53 (1986) (compensation for harm to opposing party should serve as cap to Rule 11 sanctions; other sanctions in excess of costs should be clearly proscribed in rule).
reasonable failure to mitigate. It might also be rebutted by mitigating factors such as motivation, inability to pay, the opponent's complicity or lack of need for compensation, and dangers of chilling particular kinds of litigation.  

224 Under Rule 37 courts are imposing non-monetary "merit" sanctions that are compensatory in effect. If misconduct denies an opponent fair access to relevant information, a sanctions order precluding the evidence or claims may restore balance to the merits of a dispute, as compensation for obtaining an illegal advantage.  

225 Courts have not yet addressed whether merit sanctions are "appropriate sanctions" for violating Rules 11 or 26.  

226 Courts should be authorized to fashion nonmonetary sanctions creatively, both to compensate and to deter. Especially in litigation that is part of a larger economic war, a sanctions order that merely assesses attorneys' fees and costs may do little to deter continued strategic misconduct. Sanctions that effectively remove the strategic advantage gained by the misconduct should have greater deterrent effect than simply a monetary order.  

c. Substantive Standards for the Exercise of Sanction Authority

The substantive standard for determining if a violation occurred varies with the specific sanctioning authority. That is, whether a given set of facts warrants a particular sanction depends upon the authority relied upon by the trial judge. In deciding whether a sports violation has occurred, the referee must identify the violation and fashion the sanction within the boundaries set by that rule. The referee is immediately accountable to the spectators for the rational justification of the call. Although a call will never be reversed because of fan pressure, occasionally consultation with the other referees may change a call. Moreover, a referee's concern for future employment encourages rationality. By contrast, in litigation there is no such immediate accountability after sanctions are imposed. Instead, the parties have advance opportunity to present their opposing characterizations of the facts, whether a violation has occurred, and the appropriateness of sanction. Partisan presentation of sanctions disputes is a natural corollary of an adversary process that is premised on a claim of rationality.  

227 To that end, some review authority must exist to reverse improper judgment

---

225. Smith v. Rowe, 761 F.2d 360 (7th Cir. 1985).
226. Brazil Lecture, supra note 222 and accompanying text.
calls. Trial court findings of fact and conclusions of law tied to specific sanction authorities enable the appeals court to evaluate whether that standard has been met.\textsuperscript{228} The trial court findings should be based on the record whenever possible, and focus precisely upon the contentions or other specific conduct claimed to violate a rule. While a written record may not give the reviewer the same accuracy as instant replays, deference to a trial court judgment argues against the need for such accuracy.

Currently, most sanctions cases fall within the first tier, concerning conduct that warrants compensatory sanctions to remove an unfair advantage secured by illegal conduct. Under the amended rules, the vast majority of cases apply the primarily objective standard codified in Rule 11. However, also included in the compensatory tier are some cases under section 1927 and the inherent power doctrine, which are the primary vestiges of the preamendment, bad faith standard.\text{229}\textsuperscript{229}\textsuperscript{230} Each is available as a fall-back sanction authority to reach inappropriate conduct that does not violate another more specific rule. While the underlying conduct may support a finding of some violation, undifferentiated use of fall-back authorities lacks sufficient rationality. The deterrent value of a comprehensive sanctions system can only be realized if each of the rules is applied to the specific type of conduct it was designed to regulate. In time, courts can refine the standards under particular rules so that lawyers understand the specific types of conduct that are prohibited.

Rule 11, which mandates sanctions for violations of objectively reasonable standards, is the cornerstone for Rules 7 and 26. Frivolous pleadings (including complaints, answers, and third-party claims) are best handled under Rule 11. The vast bulk of sanctions cases apply Rule 11 to sanction frivolous complaints. Standards are needed to promote consistent treatment among offenders.\textsuperscript{230} Clearly, plaintiffs have no monopoly on pleading for harassment value. Nevertheless, a plausible complaint or counterclaim would rarely be found in violation of the second prong of Rule 11.\textsuperscript{231} This slightly greater protection is needed so as not to chill innovative claims. Focused application of Rule 11 would make it evident that pro forma affirmative defenses or unsupportable

\textsuperscript{228} See Thomas v. Capital Sec. Servs., Inc., 812 F.2d 984 (5th Cir. 1987).
\textsuperscript{229} See supra note 53 & infra notes 336-37 and accompanying text.
prayers for damages are also prohibited. Thus, Rule 11 sanctions are warranted against defendants who file broad answers to gain entry into broad discovery of marginally relevant issues—not because the issues are really disputed, but to gain economic leverage by overdiscovery.

Rule 7 has been virtually unused as a sanctions device. It applies the objective Rule 11 standard to all motions and other papers. Rule 7 would be the rational authority for sanctioning frivolous Rule 12 or 56 motions, motions to disqualify, and other pretrial and post-trial motions. Discovery requests and responses are properly evaluated under Rule 26(g), which is designed to curb harassing or redundant discovery, and discovery disproportionate to the stakes of a dispute. Rule 37 would continue regulating failures to participate in discovery. If there were such refinement, Rule 11 primarily would regulate pleadings, with Rule 7 focused on motions practice and briefs outside of the discovery area. Rule 16(f) grants the trial judge vast authority to sanction failures in the pretrial process.

Carefully focused application of the various sanctioning authorities is critical for them to have the desired deterrent effect. When courts focus attention on the specific types of conduct at different stages of litigation that violate particular rules, lawyers will eventually understand what is expected of them and begin to conform their behavior to those standards. The amended rules present an integrated package; if judges take care to apply each rule at the appropriate stage of litigation, early case-management efforts should deter subsequent misconduct.

232. See Hudson v. Moore Business Forms, Inc., 827 F.2d 450 (9th Cir. 1987) ($4.2 million damage claim lacked reasonable support, warranted conclusion that counterclaim filed to harass unemployed plaintiff).

233. Brazil Lecture, supra note 222.

234. FED. R. CIV. P. 7(b)(3). The relevant section provides that “all motions shall be signed in accordance with Rule 11.” Id. The notes to Rule 7 state that “[t]he addition of Rule 7(b)(3) makes explicit the applicability of the signing requirement and the sanctions of Rule 11, which have been amplified.” FED. R. CIV. P. 7 Advisory Committee Note (1983 Amendment).

235. Miller, supra note 58, at 32-33.

236. FED. R. CIV. P. 37. A party who fails to comply with a discovery order may be held in contempt, or ordered to pay the opposing party's expenses and attorney's fees, and most drastically, may have the case dismissed or a default judgment entered against him. Id.

237. Kassin describes a split among judges as to the purpose of sanctions, whether they are used for deterrence, punishment, or compensation. The majority tend to favor deterrence, but seemingly have doubt as to the effectiveness of sanctions—doubt that is justified so long as they hold to a mixed objective and subjective standard to determine when sanctions are appropriate. S. KASSIN, supra note 89, at 19-28. Those judges who think that the purpose of sanctions is compensatory also focus more on the objective standard and are more likely to grant sanctions. My
"no nonsense" judge, they would be foolish to risk the judge's wrath by testing the limits of zealous advocacy. As the bar learns about the new standards of conduct, fewer nonwillful violations will occur because of intensified efforts at prefiling investigation. Timely warnings, coupled with reasonably warranted sanctions, will encourage orderly case processing by the parties. Professor Resnick is properly concerned that judges actively engaged in pretrial case management will develop biases that impede impartial evaluation on the merits. Because impartial judgment is the very reason for the judicial role, active case management could subvert healthy adversary process.

To some extent, judicial responsibility for orderly case management can be delegated to magistrates or special masters. Bifurcation of case management issues from the merits would help insulate the trial judge from developing biases. Sometimes it will not be possible for the trial judge to delegate sanctioning responsibilities because the conduct occurred in her presence, or because evaluation relates to complex issues closely related to the case. Bias concerns are strongest where the rules for case management are largely discretionary. For example, Rule 16(f) confers upon the judge broad authority to determine whether certain conduct is sanctionable and to make "such orders . . . as are just." The 1983 amendments limit judicial discretion in finding a violation and mandate sanctions when one is found. Trial court discretion is further limited by procedural requirements for proper exercise of sanction authority. These limits on discretion do not eliminate the risk

238. Sometimes, however, judges may take a "no-nonsense" stand on certain unpopular types of claims where the lawyer, who is not being overzealous, is forced to take courageous stands in court. Again, an effective system of error correction is critical so as not to chill assertion of important, albeit unpopular, claims.

239. Initial evidence indicates Rule 11 is having a deterrent effect; one-third of responding New York attorneys have intensified their prefiling factual and legal investigations. REPORT, supra note 231, at 3.

240. See generally Miller, supra note 58.


242. Resnick approves of appointing court personnel as case managers. Id. at 436-38.

243. FED. R. CIV. P. 16(f).

244. Resnick, supra note 7, at 433-35, suggests the need for clearly articulated rules for judicial management to guard against bias. In Abney v. Patten, CIV-84-44A, slip op. (W.D. Okla. Oct. 2, 1987), had the Federal Deposit Insurance Corp. made this argument after researching the limits of Rule 16 authority before filing a response to an order, no sanction would have been imposed. Instead, the FDIC challenged the authority first, and later could not justify the contention with timely, prefiling research. See also Nat'l L. J., Oct. 26, 1987, at 6.
of trial court bias but do impose a higher burden of rationality than that borne by sporting referees responsible for orderly game play.

Although Rule 11 is currently overused, the present level of attention is warranted. As the cornerstone of sanctions doctrine, Rule 11 sets the basic standard for determining whether a certificate violates a rule. Most of the inquiry is based on an objective standard of reasonableness, although it includes some subjective inquiry into what was actually done and why the lawyer thought it proper. If a filing violates either prong of the rule, a sanction is mandatory.

Under the first prong, three questions are relevant: what inquiry was done to determine whether the filing was factually and legally plausible; under existing circumstances, whether the factual investigation and legal research complied with reasonably competent practice standards; and whether the signer’s evaluation that the contention was plausible is one that could have been made by a reasonably competent lawyer. One might argue from the text of Rule 11 that an objective level of inquiry applies only to reasonableness of inquiry, and that the judicial gloss requiring a reasonable evaluation is unwarranted. Given the inherent difficulties in after-the-fact evaluation, reasonable inquiry may be the best we can expect. This interpretation should not cause significant problems. At least for now, the quality of litigation conduct would improve dramatically if lawyers conducted reasonable prefiling inquiry on the facts and law to support their contentions. Where there is doubt as to the plausibility of the contention, whether or not such inquiry was actually done before the filing, is the proper focus of Rule 11 and related proceedings.

An exclusively objective focus is flawed. The amendment was intended to impose on lawyers a duty to stop and think; it no longer is proper to file now and analyze the specific claims and contentions later. For many advocates, this is a radical departure from their current style of practice. The rule tries to reach behind observable conduct—the particular filing—and to regulate the signer’s private conduct before the filing. It is the proper focus of Rule 11 and related proceedings.

---

245. See supra notes 53 & infra notes 252-55 and accompanying text.
247. Compare Kamen v. American Tel. & Tel. Co., 791 F.2d 1006, 1011-13 (2d Cir. 1986) (court said prefiling inquiry must be reasonable, but did not address whether it was actually done) with Thomas v. Capital Sec. Servs. Inc., 812 F.2d 984, rehe’g granted, 822 F.2d 511 (5th Cir. 1987) (explicit findings required on reasonableness of actual prefiling inquiry).
248. Miller, supra note 58, at 15.
filing. The required signature is a certificate that the signer has read the paper, has conducted a reasonable inquiry, and has concluded that it raises plausible contentions. Signing without having inquired constitutes false certification. Focus on the actual inquiry will provide easier proof of compliance, will more effectively reach the hidden activity, and will encourage more competent prefiling screening. Focus on actual inquiry would also permit good faith honesty-in-fact as a possible defense to sanctions. Magistrate Wayne Brazil said that in assessing sanctions, he would consider a lawyer's candid explanation of the legal and factual reasoning done to fashion a responsible, but creative, theory. This subjective aspect could help guard against the feared chilling effect from a purely objective standard.

The second and third inquiries, concerning whether the investigation and evaluation were reasonable, focus courts' attention on defining acceptable standards of litigation conduct. Disciplinary and malpractice cases address limits on zealous advocacy only when the facts are outrageous. For courts to define now what falls within and without the bounds of reasonably permissible filings can fill that gap. Clear, advance notice of these standards, accompanied by sanctions that risk lawyers' economic self-interest, is the only way to secure compliance with rules that regulate essentially hidden activity. Focus on the objective reasonableness of the contention asserted should address violations resulting both from competence failures and from rational player decisions to test the limits of zealous advocacy.

A filing that satisfies the first prong may still violate the second prong of Rule 11 if it was interposed for an improper purpose. Under former Rule 11, this was the critical language for those few cases where sanctions were imposed. Because the primary focus of the

249. See, e.g., McCabe v. General Foods Corp., 811 F.2d 1336 (9th Cir. 1987) (insufficient inquiry before filing amended complaint). But see Kamen, 791 F.2d at 1012-14 (lawyer could have made plausible assumptions from limited facts supporting jurisdiction). This must be distinguished from the preamendment certification that said the lawyer had read the pleading and had good faith belief that went to inherently non-observable conduct.

250. Brazil Lecture, supra note 222.

251. See, e.g., Hewitt v. City of Stanton, 798 F.2d 1230 (9th Cir. 1986) (removal petition legally frivolous according to case law of which a competent attorney would have been aware); Huettig & Schromm, Inc. v. Landscape Contractors Council, 790 F.2d 1421 (9th Cir. 1986) (labor law specialists knew or should have known that claimed jurisdiction was totally baseless; inferred action brought for improper purpose).

252. See infra notes 305-312 and accompanying text (discussing Oliveri).

253. Zaldivar, 780 F.2d at 832 (dictum limited to this theoretical possibility).

254. Risinger, supra note 86, at 37 n.125.
amendment is on the first prong, the second prong remains primarily a
fall-back, where a paper may have some legal or factual plausibility,
but the court can infer improper motive from the circumstances of the
filing. As examples of improper purpose, the rule includes contentions
interposed to harass, to cause unnecessary delay, or to cause needless
increase in cost of litigation. The second prong is an important tool to
deter moves designed as tactical warfare, to divert attention from the
merits, or to gain economic advantage by wearing down an opponent in
peripheral skirmishes. Improper purpose does not focus on subjective
motives, but rather is determined by an objective standard as inferred
from the circumstances. Thus, filing of excessive motions could be
sanctionable harassment.

An initial pleading theoretically is sanctionable under the second
prong even though it is factually and legally plausible. This could
have an enormous and unwarranted chilling effect if applied to sanction
an otherwise plausible complaint. Courts should narrowly construe the
second prong to be violated by a complaint only when there are clear
objective circumstances from which the court can soundly infer that
the complaint was filed for an improper purpose. Whether a paper
satisfies the certification requirement should be determined according
to the information available at the time the paper was filed. Courts
should not append to the Rule a continuing duty to evaluate the litiga-
tion position. Such expansion is not supported by the Rule text, and
should be the subject of separate consideration by those responsible for
drafting future amendments.

Appeals courts should clearly articulate the standards for evaluat-

---

255. FED. R. CIV. P. 11.
256. Zaldivar, 780 F.2d at 832. Eastway, 4 Fed. R. Serv. 3d (Callaghan) at 784-85.
257. Zaldivar, 780 F.2d at 832 n.10.
258. For example, Judge Schwarzer notes that “[t]he record in the case and all the surround-
ing circumstances should afford an adequate basis for determining whether particular papers or
proceedings caused delay that was unnecessary, whether they caused increase in the cost of litiga-
tion that was needless, or whether they lacked any apparent legitimate purpose. Findings on these
points would suffice to support an inference of an improper purpose. 104 F.R.D. at 195. But see
Zaldivar, 780 F.2d at 832 (initial filing of complaint does not harass opposing party if it is “well
grounded in fact and warranted by existing law”).
259. For example, claims may be purely repetitive of prior litigation between the same parties,
or a party's clear admission could defeat an essential factual element. See, e.g., Eastway Constr.
Corp. v. City of New York, 762 F.2d 243 (2d Cir. 1985) [Eastway I]; Greenberg v. Sala, 822
F.2d 882, 887-89 (9th Cir. 1987).
260. Compare Thomas v. Capital Sec. Servs., Inc., 812 F.2d 984 (5th Cir.), reh’g granted,
822 F.2d 511 (5th Cir. 1987) with Oliveri v. Thompson, 803 F.2d 1265 (2d Cir. 1986), cert.
ing whether or not a violation has occurred. This is critical in order to achieve some consistency in application. At present there are wide variances among judges, even within the same circuit, as to whether they would find sanctions warranted on a hypothetical set of facts.\textsuperscript{261} Sanctions tend to recur in certain types of claims: civil rights, securities, and tax suits (with pro se plaintiffs) are disproportionately represented.\textsuperscript{262} Manageable standards for trial court determination of whether a violation has occurred, plus appellate review on the proper application of those standards is needed to protect against hostility to the underlying claim that might partly account for this disparity.

Although most post-amendment sanction activity falls within the first, compensatory, tier, the level of activity has overcome some trial judges' reluctance to sanction a wider range of activity using varying levels of severity. By contrast to the few cases and harsh sanctions previously imposed, the post-amendment cases begin to make gradations based on blameworthiness and proportionality. Because of such gradations, there is now gradual progression from the first to the second tier, and within the second tier from lower to higher degrees of punishment.

While difficult to identify a definite boundary between the two tiers of sanctionable conduct, the first tier primarily includes "ordinary" rule violations that might be committed by rational competitive players out of excessive zeal, inadvertence, or negligence. Where the violation is blameworthy—because of repeat, bad faith, willful, or reckless violations—retributive punishment becomes an avowed objective of the resulting sanction. The violations become blameworthy precisely because they threaten the institutional legitimacy of the adversary process for resolving civil disputes. Among the punitive-tier cases decided after the 1983 amendments, the sanctionable activity ranges from negligence,\textsuperscript{263} to evasion of a court order,\textsuperscript{264} to willful or deliberate malfeasance.\textsuperscript{265}

Not surprisingly, discovery abuses continue to predominate; discovery is the one category of litigation conduct where intentional violations were almost accepted as unwritten rules of the game. Now an

\begin{itemize}
\item \textsuperscript{261} S. Kassin, \textit{supra} note 89 at 17-43.
\item \textsuperscript{262} Id. at 39. In fact, 21% of all sanction motions litigated since August 1983 were filed in civil rights cases. \textit{Id. See also,} Nelken, \textit{supra} note 79, at 1327, who reports that 22.3\% of all sanction cases involve civil rights claims.
\item \textsuperscript{263} \textit{In re Curl}, 803 F.2d 1004 (9th Cir. 1986) (negligent misrepresentation); \textit{Fjelstad v. American Honda Motor Co.}, 762 F.2d 1334 (9th Cir. 1985) (willful delay).
\item \textsuperscript{264} \textit{United States v. National Medical Enters.}, 792 F.2d 906 (9th Cir. 1986).
\item \textsuperscript{265} \textit{Fjelstad}, 762 F.2d at 1340-41.
\end{itemize}
increasing number of cases impose sanctions on conduct that in subtler, but more pervasive ways, threatens institutional legitimacy. These courts are beginning to enforce lawyers' ethical responsibilities as officers of the court: to maintain decorum and respect for the tribunal so it can resolve disputes in an orderly and accurate way.266

As courts experiment with fashioning sanctions appropriate for certain conduct, they should consider the possible goals sought to be attained. Explicit consideration of punishment goals is focused most naturally on criminal law. Possible goals of criminal punishment include retribution, deterrence, incapacitation, and rehabilitation. Retribution is premised on the notion that each individual is a responsible moral agent capable of making choices between right and wrong. It is normative and not empirically verifiable; punishment is imposed because the actor is deemed morally responsible for making a wrong choice. Deterrence has two components: special deterrence, to discourage this actor from repeat violations; and general deterrence, a utilitarian means of social control that seeks to reduce future incidence of similar misconduct by others.267 Incapacitation literally removes the actor from opportunities for repeat violations; the argument for such extreme punishment is strongest where the actor is least able to control him or herself, and thus is undeserving of retributive punishment. Rehabilitation is regarded not in utilitarian terms, but as a humanitarian effort to make the actor a more productive member of society.268

In 1976, the Supreme Court acknowledged retribution and deterrence as appropriate sanctions goals for cases in the punitive tier.269 Although incapacitation and rehabilitation have not yet been embraced, they would also seem to be legitimate goals of courts with power to discipline lawyers for violating court rules or conduct un-

266. In re Kelly, 808 F.2d 549 (8th Cir. 1986) (censure for inaccurate statements under oath concerning conduct of a judge); United States v. Stoneberger (In re Buchanan), 805 F.2d 1391 (9th Cir. 1986) (repeated tardiness for court appearances; remanded for assessment of fine and costs); 225 Broadway Co. v. Sheridan, 807 F.2d 24 (2d Cir. 1986) (frivolous appeal); In re Curl, 803 F.2d 1004 (9th Cir. 1986) (negligent misrepresentation); Fox v. Boucher, 794 F.2d 34 (2d Cir. 1986) (lawyer-plaintiff brought frivolous claim for improper purpose); see also In re Snyder, 472 U.S. 634, on remand, 770 F.2d 743 (8th Cir. 1985) (though letter was disrespectful, it did not rise to level of rudeness required before suspension warranted as conduct unbecoming to a lawyer).


becoming a member of the bar.\textsuperscript{270}

An appropriate second-tier sanction should be fashioned in light of all sanctioning goals, including the compensatory goal embodied by the first tier. Criminal law provides for grading of offenses at two stages: The statute measures relative severity of offenses and the court evaluates the proportionality of a particular sentence according to the facts and circumstances related to the offense. So too, sanctions doctrine grades severity of offenses, with the specific rules or sources of power defining the specific sanctions authorized. Artificial segregation of sanctions goals unnecessarily confuses the analysis. A punitive sanction could simultaneously serve several aims. A warning, for example, can serve the goals of special deterrence, retribution, and rehabilitation. Dismissal or default is primarily for purposes of retribution and general deterrence.\textsuperscript{271}

In deciding among the possible sanctions available under a specific sanctioning power, a court should consider whether the lawyer or the client is primarily responsible for the misconduct. If it can be inferred that the misconduct occurred at the direction of the client, second-tier aims are largely retribution, compensation, and deterrence. The client fairly can be held responsible where there is direct involvement or knowing acquiescence and acceptance of benefits obtained by the misconduct. Awards of attorneys' fees and expenses against the client,\textsuperscript{272} and preclusion of evidence or claims\textsuperscript{273} are lesser forms of client-directed sanctions that both remove unfair advantage and serve the aims of general and special deterrence. The severe sanctions of dismissal or default are retributive, reserved for infractions that threaten to interfere with rightful decision of the case, and are the result of deliberate malfeasance, efforts to deceive the court, or other conduct that is "utterly inconsistent with the orderly administration of justice."\textsuperscript{274} Civil contempt seems to be a special deterrent, designed to coerce compliance in the immediate case, while criminal contempt is largely retributive.\textsuperscript{275}

\begin{thebibliography}{9}
\bibitem{270} Fed. R. App. P. 46.
\bibitem{271} National Hockey League, 427 U.S. at 642-43; William T. Thompson Co. v. General Nutrition Co., 593 F. Supp. 1443 (D. Cal. 1984) (sanction less than dismissal would only reward GNC for its misconduct).
\bibitem{272} Fed. R. Civ. P. 37(b)(2).
\bibitem{273} Id.
\bibitem{274} Wyle v. R. J. Reynolds Indus., Inc., 709 F.2d 585, 589 (9th Cir. 1983), cited in Fjelstad, 762 F.2d at 1338; see also General Nutrition Co., 593 F. Supp. at 1454.
\bibitem{275} Both of these sanctions can be imposed against the client or the lawyer. Fed. R. Civ. P.
\end{thebibliography}
Lawyer-directed sanctions could serve any of these four aims, although deterrence and retribution will be most common. Informal discipline, such as a warning or admonition, is likely to deter that lawyer from similar misconduct in the future; if it is contained in a published opinion, it also serves a retributive function. Monetary assessments against the lawyer, including attorneys' fees, costs, or fines, serve both general and special deterrence aims, as well as compensation and restitution. When a lawyer is made to pay an opponent or the court system the costs of lawyer-instigated violations, both that lawyer and the practicing bar will be deterred economically from similar future misconduct. Shifting to the responsible party costs caused by a violation compensates the harmed opponent and also removes the unfair advantage secured by the infraction. Although sanctions designed for special deterrence also could achieve some rehabilitation, that goal is typically better suited for disciplinary authorities than for courts seeking to regulate the orderly conduct of litigation. However, when the court acts pursuant to its disciplinary powers, rehabilitation and incapacitation may enter into the evaluation.

Censure, among the mildest of disciplinary actions, serves the ends of punishment and special deterrence. To suspend or hold a lawyer to civil contempt is clearly punitive, but these sanctions include an opportunity for redemption in either an immediate or future sense. Suspension, while retributive, also temporarily incapacitates a culpable lawyer from engaging in any litigation activity, insuring more time to reflect about future conduct. Suspension is to be distinguished from disbarment by its rehabilitative aspect. To warrant the severe sanction of suspension, the lawyer's conduct must be morally blameworthy, such as

37 (b)(1).

276. See, e.g., In re Kelly, 808 F.2d at 552; 225 Broadway, 807 F.2d at 26; Carlucci v. Piper Aircraft Corp., 775 F.2d 1440, 1453-54 (11th Cir. 1985).

277. Carlucci, 775 F.2d at 1453; 225 Broadway, 807 F.2d at 26.

278. Roadway Express, Inc. v. Piper, 447 U.S. 766 (1980) (inherent power to assess attorneys' fees against lawyers as penalty for deliberate strategy of inaction). See generally second-tier cases assessing costs against lawyer only, e.g., Hewitt v. City of Stanton, 798 F.2d 1230, 1233 (9th Cir. 1986); Huettig & Schromm, Inc. v. Landscape Contractors Council, 790 F.2d 1421, 1427 (9th Cir. 1986).

279. See, e.g., Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073, 1079 (7th Cir. 1987) ("An award under Rule 11 is a 'sanction' for violating a rule of court. The obligation to answer for one's act accompanies the act. . . . If . . . [a party] imposed costs on its adversary and the judicial system by violating [the rule], it must expect to pay.").

280. A court has inherent authority to suspend or disbar lawyers, as officers of the court. See In re Snyder, 472 U.S. at 643-47 (dictum; authority specifically limited by Fed. R. App. P. 46).
repeated or willful disobedience of a valid court order.281 Criminal contempt, punishable by fine or imprisonment, is primarily retributive. For litigation conduct to subject a lawyer to disbarment, it must be egregious. Either the conduct demands harsh punishment because of its moral culpability, such as a flagrant disregard for accurate determinations,282 or because the lawyer is apparently incapable of controlling the outrageous conduct.283

The parallel to competitive sports continues throughout the punitive tier. In sports, conduct is measured on a graduated scale starting with ordinary or predictable violations—the first tier—and ending with conduct demanding the harshest of punishment. Most of the time, primary and general deterrence are the underlying rationale for sanctions; retribution is aimed primarily at blameworthy conduct. The harshest sanctions are reserved for hidden conduct where there are possibly rich rewards from undiscovered violations, and flagrant violations that threaten the legitimate ordering of game play.284 Where special deterrence does not work, courts can move to harsh incapacitation that also has strong, general deterrent value.285 When activity is hidden and especially egregious because it threatens the legitimacy of the competitive process, harsher sanctions are needed to warn others that such conduct bears high costs when discovered. Punitive measures may be needed to deter others in the relevant community from following their most aggressive competitive instincts.

An important institutional goal in collegiate sports is to maintain some balance between athletics and academics. Hidden violations that

281. See, e.g., In re Snyder, 472 U.S. at 645-47 (inherent authority does not support suspension for single incident or rudeness or lack or professional courtesy); United States v. Stoneberger, 805 F.2d 1391, 1393 (9th Cir. 1986) (absent bad faith for inherent authority, no power to suspend for repeated tardiness for court appearances).


283. See, e.g., In re Crumpacker, 269 Ind. 630, 383 N.E.2d 36 (disbarred for undignified, discourteous conduct, including repeated outbursts in court), cert. denied, 444 U.S. 979 (1978).

284. See N.Y. Times, Aug. 18, 1985, § 5, at 9 (discussing NCAA imposition of "death penalty" (one year suspension) on Southern Methodist University for continuing illegal financial support after authorities ordered it stopped).

285. For a client, incapacitation is dismissal or default; for the lawyer, it is denial of all attorneys' fees, and possibly suspension or disbarment. The choice of sanction may depend on whether a deliberate violation was an intentional choice made by an aggressive strategic player. Compensatory economics is a good first effort at deterrence with retribution and incapacitation relevant to fashioning sanctions for more serious misconduct.
directly challenge this goal threaten the legitimacy of the overall athletic system. For example, serious violations of rules against illegal financial support threaten to bring outcomes that are determined by which team has more resources that it is willing to commit to winning, rather than which team has played better within the constraints of a balanced program. The litigation system must protect its institutional interest in legitimacy so that economic resources or excessive zeal do not alter appropriate outcomes. Although some economic warfare is endemic to a capitalistic society, we should strive to insulate some forms of competition from outcomes that are unduly swayed by economic power.

IV. POST-AMENDMENT SANCTIONS ACTIVITY

Significant differences among the Ninth, Second, and Seventh Circuit Courts of Appeals are suggested by a review of their approaches to sanctions. The Second Circuit has issued opinions in two key cases, but otherwise has adopted a reactive posture, deciding several cases on an ad hoc basis. This may signal that it is taking a "wait and see" attitude, preferring to observe how trial courts are handling sanctions before it assumes a leadership role.

Of the three, the Ninth Circuit has developed the most reasoned, comprehensive approach consistent with the type of infraction system proposed here. With one important exception, its decisions fit generally within that framework, and provide some examples on the kind of rational factfinding and legal analysis appropriate for sanctions. Recently, the Seventh Circuit took a definite stand by articulating sanctioning guidelines.

286. Anecdotal reports indicate dramatic differences in the impact of the amendments on local litigation practice, even within the same federal circuit. Differences among circuits might be expected, although one empirical study showed no statistically significant difference among the responses of federal district judges by circuit. See S. Kassin, supra note 89, at 25. Nevertheless, the collection of appellate sanctions opinions within a circuit allows more focused evaluation of what is happening under the new rules.

These circuits were selected because they include jurisdiction over the major litigation centers of Chicago, New York, Los Angeles, and San Francisco and thus are assumed to be more experienced with abusive conduct and to have a more deliberate approach toward sanctions doctrine. As indicated by the following discussion, the cases do not fully support that assumption.
A. Second Circuit Activity

The Second Circuit first addressed amended Rule 11 in *Eastway Construction Corp. v. City of New York*287 ("Eastway I"). City Hall banned Eastway from participating directly or indirectly in rehabilitation contracts because of past defaults. Eastway unsuccessfully challenged this action in state court, and then raised constitutional and antitrust claims in federal court. Chief Judge Weinstein of the district court dismissed the action on defendants' motion for summary judgment, but denied their request for attorneys' fees and costs under Rule 11 because he thought the claims were not frivolous.288 The Second Circuit reversed the denial of sanctions.

*Eastway I* sets an objective standard mandating some sanction if Rule 11 is violated.289 The Rule is violated "where it is patently clear that a claim has absolutely no chance of success under the existing precedents, and where no reasonable [legal] argument can be [made]."289 Sanctions are required when a pleading is interposed for "any improper purpose, or where, after reasonable inquiry, a competent attorney could not form a reasonable belief that the pleading 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."290 Because a competent attorney, using reasonable diligence, would have concluded that the antitrust claim was "destined to fail," the case was remanded with instructions to the district court to impose appropriate monetary sanctions for the defendants' reasonable expenses.291

---

288. Id. at 249-50.
289. Id. at 253, 254 n.7 (subjective bad faith no longer required; imperative "shall" is directive).
290. Id. at 254.
291. Id. at 254 (emphasis added).
292. Id. On remand Judge Weinstein balked, issuing a lengthy opinion on the proper standards for imposing Rule 11 sanctions and disagreeing with the Second Circuit standard, but proceeding to set forth a formula for calculating a monetary Rule 11 sanction. The formula begins with attorneys' fees and costs as the basic compensatory focus, or lodestar figure. This amount is then subject to adjustment as warranted by certain mitigating or aggravating circumstances, such as the marginal frivolousness of the claim, the unexpectedness of applying the *Eastway I* objective standard, and the fact that it was a first offense. He felt bound by the court of appeals to impose some monetary sanctions, which he set at $1,000.00, but he added that this figure was about 10 times higher than that imposed by "other courts under similar circumstances." 637 F. Supp. 558, 584 (E.D.N.Y. 1986). The initial compensatory, lodestar figure was for $53,000, the maximum allowable fee. His warning to courts not to use their extensive powers under Rule 11 to "punish in a vindictive and excessively harsh manner" indicates that he hesitated to impose any monetary sanctions. Id. at 584. This action on remand powerfully indicates the resistance of some lower
Eastway I correctly interprets the amended Rule 11 as "explicitly and unambiguously imposing] an affirmative duty on each attorney to conduct a reasonable inquiry into the viability of a pleading before it is signed." Notwithstanding this strong language requiring district court evaluation of the actual prefiling inquiry, later Second Circuit decisions vacillate on this standard. Since Eastway I, the court has moved back to an essentially reactive posture, deciding whether trial courts have properly applied the standard. The decisions do not clearly address the extent of prefiling investigation that actually must take place to support the signer's reasonable evaluation that the claim was plausible. Instead, later cases focus on the judicial gloss given to Rule 11's text; compliance is determined by an objective standard—whether a reasonably competent lawyer could form a reasonable belief that the claims were warranted. While significant advantages could be had
courts to use of sanction authority. In Eastway II, the circuit again reversed Judge Weinstein, and set the amount payable by all concerned at $10,000 total, one-half from lawyers and the balance from plaintiffs. See infra text accompanying notes 300-304.

293. 762 F.2d at 243, 253 (2d Cir. 1985).

294. Only months after Eastway I, a different panel of the court claimed that Rule 11 is similar to the bad faith exception to the American rule on attorneys' fees. Puritan Ins. Co. v. Eagle S.S. Co., 779 F.2d 866, 873 (2d Cir. 1985); see supra note 215 and accompanying text. Hansen v. Prentice-Hall, Inc., 788 F.2d 892 (2d. Cir. 1986) affirmed a denial of attorneys' fees on the bare conclusion that the pro se plaintiff-lawyer "could form a reasonable belief that his complaint was well grounded in fact and warranted by existing law." Id. at 894 (emphasis added) (quoting Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 252 (2d Cir. 1985)). Viewed in hindsight, this conclusion could be factually supportable, although the plaintiff did not prove this. Id. Nevertheless, the district court's conclusion on reasonableness should not overlook the lawyer's affirmative duty at the time of filing to conduct the legal research and factual investigation necessary to evaluate whether the claim was frivolous.

The Second Circuit has had some occasion to affirm post-amendment sanctions. See, e.g., Fox v. Boucher, 794 F.2d 34 (2d Cir. 1986) (attorney-plaintiff's suit deemed a conscious effort to harass the defendant with an "entirely frivolous" claim; sanctions supported by both tiers of the amended rule). The conduct should have been sanctionable before the amendments. Bartel Dental Books Co. v. Schultz, 786 F.2d 486 (2d Cir. 1986), upholds sanctions that would not be appropriate under preamendment standards. Plaintiff's equal protection claim was "not supported by any legally relevant facts." Id. at 490. The award was affirmed without considering whether any prefiling inquiry took place, because "a competent attorney could not form a reasonable belief that any of these claims were warranted." Id. Bartel follows Eastway in focusing on a purely objective standard of reasonableness to determine whether a violation has occurred, and to find that a sanction is the necessary result.

Kamen v. American Tel. & Tel. Co., 791 F.2d 1006 (2d Cir. 1986), also addresses the issue of prefiling inquiry as crucial to finding a violation. Kamen sued under section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1981), with jurisdiction premised on the defendant's receipt of "federal financial assistance." The district court dismissed the action and awarded sanctions because plaintiff did not voluntarily dismiss after being advised that defendant received no federal assistance. To impose sanctions, the district court must consider the reasonableness of any prefiling inquiry, including situational factors such as the need to rely on the client for certain informa-
from articulating standards for what constitutes a basis for a reasonable belief from one's "information, knowledge and belief. . . .," this primarily objective focus might work against the type of inquiry best suited to creating some standards. Hypothesizing about what a reasonable person might conclude, Rule 11 addresses what information was available to a particular lawyer before a paper was filed. The lawyer certifies to the fact of reasonable prefiling inquiry; if that did not occur, the certificate is a misrepresentation. Increased focus on actual prefiling inquiry is appropriate to consider what kind of legal and factual investigation would have been reasonable under the circumstances. Absent explicit consideration of the actual prefiling inquiry, lawyers will continue to believe it is all right to file before thinking through what they are doing, and deciding whether the particular contention is "well grounded in fact and is warranted by existing law or a good faith argument for [a change in the law.]"\(^{205}\) Refined attention to this factual matter is needed before attempting meaningful standards for the lawyer's screening obligation.

Although the court in *Oliveri v. Thompson* disclaimed use of different standards depending on the type of claim involved,\(^{206}\) the pattern of Second Circuit decisions suggests otherwise. Of the several cases imposing sanctions, none involves a civil rights plaintiff: all are basically economic disputes. At least two cases reverse sanction orders imposed against civil rights plaintiffs who asserted colorable but innovative claims.\(^{207}\) The decisions reflect an implicit sensitivity protecting good faith assertions of creative or untested claims that have little support in the case law.\(^{208}\) While this concern has general application, it is especially appropriate for civil rights cases where the economic disincentive, the time available for investigation, and whether the filing was based on a "plausible" view of the law. *Id.* at 1011-12. The court again side-stepped whether any prefiling inquiry actually took place, instead asking whether the signer reasonably could assume the jurisdictional facts. *Id.* at 1013.

\(^{295}\) *Fed. R. Civ. P.* 11, quoted in full *supra* note 6. For related developments under the tort of malicious prosecution, see *Williams v. Coombs*, 179 Cal. App. 3d 626, 224 Cal. Rptr. 865 (1986) (whether probable cause available as defense depends on facts known to lawyer at time the action is filed, measured by objective standard of whether a reasonable lawyer would have considered action tenable on theory advanced).

\(^{296}\) 803 F.2d 1265, 1280-81 (2d Cir. 1986).

\(^{297}\) *Kamen*, 791 F.2d 1006; *Oliveri*, 803 F.2d at 1280.

\(^{298}\) This observation is counterintuitive to statistics compiled by other scholars. See *Nelken, supra* note 79, at 1327, indicating that civil rights, securities, and pro se tax claimants have received a disproportionate share of attention under Rule 11. Further study is warranted to evaluate the reasons for any disparity.
atives to filing a claim are already great.\textsuperscript{299} Heavy-handed use of sanctions against the lawyers would reduce the number of lawyers willing to press such claims. Furthermore, disproportionate focus of sanctions on the initial filing of a complaint diverts needed attention from a much wider range of litigation misconduct.

In \textit{Eastway Construction Corp. v. City of New York}\textsuperscript{300} ("Eastway II"), the Second Circuit begins to address the limits of allowable discretion. On appeal from Judge Weinstein's order on remand, the Second Circuit held that the amount awarded fell outside the outer limits of permissible discretion in fashioning a sanction. The severity of sanctions must be "carefully calibrated by those entrusted with the responsibility for imposing them."\textsuperscript{301} While an amount equal to the lodestar figure need not be awarded routinely, the district court must exercise discretion within reasonable limits. To be finally done with the matter, the court determined the minimum appropriate sanctions award.\textsuperscript{302} In dissent, Judge Pratt insisted that the Rule 11 sanction of a "'reasonable attorney's fee' . . . be calculated with reference to the actual cost burden on defendant that was inflicted by . . . [the] misconduct."\textsuperscript{303} In refusing to recognize such a sanction as a punitive fine, he claimed the court missed a unique opportunity to fashion "a logical, consistent rationale for the new 'Era of Sanctions' by refusing to address the punishment goals that could be served by a sanction order."\textsuperscript{304}

Judge Pratt, in \textit{Oliveri},\textsuperscript{305} had already helped the court develop "an integrated code of sanctions to supply coherent guidance."\textsuperscript{306} It reversed an order of attorneys' fees and costs; Rule 11 was not violated when the complaint was filed, and there was no clear finding of bad faith required under section 1927.\textsuperscript{307} Plaintiff, an indigent, sued police officers and the county for unconstitutional arrest, excessive force, and other claims. The district court sanctioned both plaintiff and his counsel for "instituting and continuing prosecution of meritless and frivo-

\begin{footnotes}
299. Although attorneys' fees are available to prevailing civil rights plaintiffs, increasing barriers to recovery render these cases less attractive to experienced practitioners in the area. See generally 42 U.S.C. § 1988, Title VII (1982); 42 U.S.C. § 2000e (1982).
300. 821 F.2d 121 (2d Cir. 1987).
301. \textit{id.} at 122.
302. \textit{id.} at 122, 124 (quoting Reeve v. Denneh, 145 Mass. 23, 28, 11 N.E. 938, 944 (1887)).
303. \textit{id.} at 126.
304. \textit{id.} at 124.
306. \textit{id.} at 1271.
307. Remand to allow such a determination is appropriate. The Second Circuit avoided remand by finding there was no bad faith.
\end{footnotes}
Viewed in retrospect, the lawyer’s prefiling inquiry appears reasonable in light of the factual information available. He interviewed his client at length before filing a complaint, and obtained copies of police and court records relating to Oliveri’s arrest, incarceration, and release. For economic reasons, plaintiff did not depose the defendants, having to rely on interrogatories, with critical questions remaining unanswered until right before trial. The defendant’s delayed answers appeared to negate plaintiff’s claim; sanctions were imposed for continuing a now-frivolous claim. The Second Circuit reversed the district court’s award of sanctions. The key to Rule 11 is the certification made by signing a pleading or paper. Here, no Rule 11 violation occurred because the attorney’s actual prefiling investigation led him to the reasonable conclusion that the facts established a colorable claim. While disapproving the “boilerplate” civil rights allegations, continuing litigation after obtaining evidence indicating an action lacked merit was not sanctionable under Rule 11. By its terms, Rule 11 applies only to a lawyer’s conduct at the time pleadings and papers are signed. While continuing a lawsuit after discovering that it lacks merit might be sanctionable conduct, that conduct must be evaluated under section 1927 or inherent authority.

---

308. 803 F.2d at 1286.
309. Id. at 1269.
310. Id. at 1274-75.
311. The advisory committee’s notes state that the “signer’s conduct is to be judged as of the time the pleading or other paper is signed.” Id. at 1274. This statement would not have been made if the rule “were meant to impose a continuing obligation on the attorney.” Disagreement exists on the correct time frame for applying Rule 11. See Thomas v. Capital Sec. Servs., 812 F.2d 984, 989, reh’g granted, 822 F.2d 511 (5th Cir. 1987). Before the written rules can function as an effective rule book for infractions, they must be enforced as written, paying careful attention to the subtle distinctions among rules. Cf. Crawford Fitting Co. v. J. T. Gibbons, Inc., 55 U.S.L.W. 4820 (U.S. June 15, 1987) (strictly enforcing statutory limit on recoverable witness fees). If the written rules are inadequate to handle a significant problem of abuse, and the conduct is not properly sanctionable under section 1927 or inherent authority, see supra discussion in text accompanying notes 66-73, further amendment to the rules may be in order. A continuing duty to evaluate one’s position in litigation is ethically sound, but is not correctly enforced with a rule regulating certification when a paper is filed.
312. Because the trial judge relied on Rule 11 and section 1927, the Second Circuit did not address whether they might otherwise be appropriate under 42 U.S.C. § 1988. In dicta, the court noted that the lawyer was not in possession of facts that would negate the claim, and that “the county’s recalcitrance delayed the relevant discovery to the eve of trial.” 803 F.2d at 1279. Because there was no evidence of clear finding of bad faith, section 1927 could not sustain this sanction. “Bad faith” here is similar to that under the inherent power doctrine, which approximates bad faith with vexatious, wanton, or oppressive reasons. Id. at 1273. Note, however, that a lawyer may withdraw from representation after discovering information which causes the lawyer
Because the Second Circuit has decided few significant post-amendment cases, clear projections of its future developments in sanctions doctrine are difficult. Nevertheless, the Oliveri opinion's compendium of sanction authorities, suggests the court is moving in the same direction as the Ninth Circuit, where Rule 11 serves a distinct but limited role among the various authorities. This direction is consistent with game theory principles. Players with reliable information about the probable sanctions of acts that violate rules will be deterred from misconduct because sanctions reduce the payoff from the act. Simply put, rational and specific application of sanctions doctrine can effectively deter willful choices to indulge in excesses of adversary zeal.

B. Ninth Circuit Activity

The Ninth Circuit was active in sanctions doctrine well before the 1983 amendments, and thus the court is not fixated on Rule 11 as a new, cure-all sanctions device. Two and a half years after the amendments, the court decided its first case under the rule. By then, many courts and some scholars had already suggested its proper inter-
It entered the fray aggressively, outlining a comprehensive framework for sanctions, later filling in the details and demonstrating proper application. With one critical exception, the Ninth Circuit decisions generally fit within a comprehensive framework that serves reasonably well as a system for error correction. Within defined standards of review, the court has announced standards for determining Rule 11 violations, the interrelationship with other sanction authorities, and the specificity required to support a sanctions order.

Under the Ninth Circuit's approach, the trial judge bears a high burden of rationality: The sanctions order must be carefully framed, identifying the specific authority relied upon to sanction particular categories of misconduct; the award must be just, as authorized by the Rule; and it must be in relation to the harm reasonably caused by the violation. The procedure for calling a violation and ordering sanctions is defined. Timely calls are expected unless they would disrupt the trial process. Rule 11 is only one sanctions device, which should not be used where another provision more directly applies.317

Doctrinally, Zaldivar v. City of Los Angeles316 and In re Yagman319 develop the framework for implementing a comprehensive approach to sanctions. The first Rule 11 case, Zaldivar,320 involved a "purely political dispute" in which plaintiffs sought to prevent a recall vote by claiming a violation of the Voting Rights Act.321 The district court dismissed the action and imposed sanctions, characterizing the complaint as "totally frivolous" and as a "last ditch effort" after failed attempts "to derail the recall process" in state courts.322 Interim events mooted all issues on appeal but the sanctions awards. The Ninth Circuit reversed, holding that a competent attorney who had conducted a reasonable inquiry could have argued in good faith that the Voting Rights Act applied to these facts. Whatever the litigant's "true purpose", a factually and legally plausible complaint seeking to vindicate voting rights under the fourteenth amendment "cannot be deemed im-

---

317. See infra notes 318-64 and accompanying text.
318. 780 F.2d 823 (9th Cir. 1986).
319. 803 F.2d 1085 (9th Cir. 1986).
320. 780 F.2d 823 (9th Cir. 1986).
321. Id. at 825.
322. Id. at 830 (citing 590 F. Supp. at 857).
permissible harassment.” In an extensive opinion by Judge Wiggins, the court prescribed the standard for reviewing Rule 11 sanctions orders, the scope of the rule, and how it is to be interpreted. On appeal of an order imposing sanctions, disputed factual determinations should be sustained unless clearly erroneous, the determination that a violation had occurred is reviewed de novo; appropriateness of a sanction imposed is reversed only for abuse of discretion. Rule 11 is not a panacea intended to remedy all litigation misconduct and does not affect other sanctioning authorities that should be used where they directly apply. Rule 16(g) applies to improper discovery filings and Rule 56(g) to improper summary judgment affidavits. Narrow application of Rule 11 preserves the protections of more specialized rules and avoids uncertainties resulting from its use as a catch-all device.

Both prongs of Rule 11 are governed by an objective standard. The first prong, directed at frivolous filing, requires that sanctions be assessed whenever a filing is “frivolous, legally unreasonable, or without factual foundation.” Besides requiring a sufficient factual foundation, the pleader must have a good faith belief that the claim has legal merit. This belief is an objective condition, “which a competent attorney attains” only after reasonable inquiry into the facts and law. Frivolous claims under Rule 11 are evaluated by the familiar standard for awarding fees to prevailing civil rights defendants. The second prong, aimed at misuse of judicial procedures for personal or economic harassment, expands section 1927 to permit sanctions on both parties and their lawyers, to include initial pleadings (not just multiplication of proceedings), and to reach the signer’s improper purposes, as objectively tested.

Because the certificate applies to both clauses, compliance with each must be evaluated independently. In theory at least, a lawyer can be sanctioned for “doing what the law allows, if the attorney’s motive for doing so is improper.” Zaldivar and its progeny reject the possi-

323. Id. at 833-34.
324. Id. at 828-30.
325. Id.
326. Id. at 831.
328. 780 F.2d at 831-32.
329. Id. at 832. Dicta recognized that a factually and legally supportable paper could be sanctionable if, as viewed objectively, it was filed as a weapon for personal or economic harassment. Id. at 830, 832.
330. Id. at 825, 832-34. The voting rights claims influenced the court’s decision that the politi-
bility that a complaint satisfying the first prong could be sanctionable harassment under the second. This sets reasonable limits on satellite litigation over sanctions. If a claim is factually and legally plausible, and not repetitive of prior unsuccessful claims, it should be heard without the chill of a sanctions threat. Proper zeal in pursuing innovative claims to advance the law might otherwise be dampened if there were a risk of sanctions for improper purpose in every case.

In re Yagman develops the earlier themes of authority to sanction and causation of harm, and identifies appropriate sanctions procedure. Yagman represented the plaintiffs in a defamation action dismissed on a directed verdict after three days of trial. The trial judge suggested defendants seek sanctions and, after a separate hearing, found Yagman pursued the litigation vexatiously and in bad faith. On the authority of Rule 11, section 1927, and a local rule, Yagman was ordered to pay almost $300,000 in costs incurred by the defendants. The Ninth Circuit reversed, finding the sanctioning procedure defective. The district court had accumulated all perceived misconduct, "with a reevaluated determination that it was far more serious than . . . [it originally appeared]." The result of this procedure "is a single post-judgment retribution in the form of a massive sanctions award."

In re Yagman establishes procedural requirements for a sanctions

---

331. 796 F.2d 1165, modified, 803 F.2d 1085 (9th Cir. 1986).
332. Id.
333. Id. at 1182-88.
334. Id. at 1183. The court remanded for a different judge to reconsider whether any of Yagman's conduct was sanctionable under a proper exercise of authority. Id. at 1188. The change in judge was based only on the appearance of fairness, not a finding that the trial judge was biased. "[T]he massive sanction award and numerous allegations of bias and overreaching have combined with this poor lawyering to produce an entirely unfortunate result: the fragile appearance of justice has taken a beating. It is time to conclude the matter as quickly and as painlessly as possible." Id. at 1188. The district court's procedure violated the primary purpose of sanctions—to deter subsequent abuse. By allowing the abuses to occur unchecked and undeterred, attorneys' fees accumulated further; the efficiency of levying two years' worth of sanctions in one post-trial lump was paid for in wasted judicial resources and money. Id. at 1183. The subsequent certiorari petition challenged the remand to a different judge.
335. See, e.g., Mossman v. Roadway Express, Inc., 789 F.2d 804 (9th Cir. 1986). Mossman applied Rule 11 to a motion for summary judgment unsupported by the required affidavit, and thus not "well grounded in fact." FED. R. CIV. P. 11. Although the opinion does not explicitly address whether another rule more directly applies, by its terms Rule 56(g) sanctions are inapplicable, for they extend only to affidavits made in bad faith.
order: Particular instances of misconduct must be identified and properly held to violate the specific provisions of the most directly applicable sanctioning authority. A district court may not lump together all the perceived abuses to find that a general provision has been violated. Rather, it must evaluate separately the various categories of misconduct under the Rule. Upon finding a violation, the sanctions ordered must be permitted by the applicable sanctioning authority. The particular conduct "must in fact be sanctionable under the authority relied upon . . . [and] the manner in which they [the sanctions] are imposed cannot be inconsistent with the purpose and directive of the authority on which the sanctions are based," The timing and procedure for any sanction must correspond to the underlying purpose of the sanctioning authority—typically deterrence. When sanctionable misconduct is observable and includes some vexatious pretrial behavior and discovery abuses, sanctions should be assessed soon after observation. If misconduct occurs during a hearing or trial, however, the lawyer should be given clear and fair notice of possible sanctions close in time to the offensive behavior, reserving final judgment on the sanctions amount until the end of the trial. Only where liability for sanctions under a proper sanctioning authority is not "immediately apparent or may not be precisely and accurately discernible until a later time" is it proper to defer the sanctioning decision.

Sanctions must also be fixed in a reasonable amount. To withstand review under the limited abuse of discretion standard, the district court must itemize and quantify the sanctions, so that the appeals court can evaluate whether the sanction is reasonable. Written findings must demonstrate that the evaluation took place, and afford a sufficient basis for reviewing the legal or factual conclusions on which the sanctions

336. 796 F.2d at 1183.
337. Id. at 1183-84. Trial courts can consider lawyers' subsequent conduct and lawyers will thus be deterred from continued misconduct. This early warning of potential sanctions liability should encourage abandonment of meritless claims and motions, thus administering the deterrence goal and eliminating "the danger of an unsuspected punitive award." Id.
338. For example, in some Rule 11 scenarios, the requisite findings on whether a claim is well grounded in fact or law cannot be made until after claimant's evidence is presented. In these cases, the deterrent effect of the sanctions will at best preserve judicial resources in future cases. Id.
339. Id. at 1185.
340. The court stated: "For example, section 1927 authorizes only excess fees and expenses caused by misconduct that prolongs or multiplies court proceedings." Id. at 1184; the sanctions award must therefore itemize what conduct violates this provision and the amount of harm caused by that conduct.
are based.\textsuperscript{341} Moreover, any sanction based on an opponent's fees and expenses is limited to that "reasonably necessary to resist the offending action."\textsuperscript{342} Thus, the district court must consider whether the claimant mitigated the harm by responding to the misconduct reasonably, and not incurring self-inflicted harm with additional misconduct, unnecessary activity, or unreasonable expenses.\textsuperscript{343}

Most of the other Ninth Circuit sanctions opinions fit generally within the framework created by Zaldivar and Yagman. In fashioning sanctions doctrine to operate "as a scalpel," and not "as a meat ax,"\textsuperscript{344} the appeals court has not relied unnecessarily on Rule 11 as a sanction authority.\textsuperscript{345} Nevertheless, recent opinions focus more on factual application of the new standards than defining precisely which sanction authority is best suited for what conduct.\textsuperscript{346} De novo review for whether the facts as found constitute a violation affords an opportunity for the factual and legal analysis appropriate for sanctions. The court's application of an objective standard for determining Rule 11 violations pays little attention to the reasonableness of the actual pre-filing inquiry. As a practical matter, this evaluation occurs when, in hindsight, the contention appeared unwarranted.\textsuperscript{347} Instead, the relevant inquiry relates to what reasonably competent counsel should have known or must have believed.\textsuperscript{348} Rule 11 has been applied to diverse papers other than sim-

\begin{itemize}
\item \textsuperscript{341} Id. at 1185. The opinion says nothing about other sanctions, such as compensating the judicial system for wasted time and resources.
\item \textsuperscript{342} Id.
\item \textsuperscript{343} See generally Zaldivar, 780 F.2d 823.
\item \textsuperscript{344} See, e.g., Mossman v. Roadway Express, Inc., 789 F.2d 804 (9th Cir. 1986) (summary judgment motion unsupported by required affidavit sanctionable under Rule 11 but remanded to determine whether a nonsanctioned party's conduct was also unreasonable).
\item \textsuperscript{345} Id.
\item \textsuperscript{346} See, e.g., Greenberg v. Sala, 822 F.2d 882, 887-89 (9th Cir. 1987) (Rule 11 compliance evaluated at time of filing; "complaint based on reasonable inquiry should not be found to be factually frivolous unless some clear authority or a litigant's own clear admission erases the factual underpinning from some essential element of the litigant's pleading"); Hudson v. Moore Business Forms, 827 F.2d 450, 454-58 (9th Cir. 1987) (counterclaim not frivolous, but attempt to expand the law; however, absence of reasonable support for damage claim warrants conclusion that damage claim filed to harass the plaintiff; Rule 11 violated); Garrett v. City and County of San Francisco, 818 F.2d 1515 (9th Cir. 1987) (vacating sanctions; filing of nonfrivolous complaint cannot amount to harassment); Zuniga v. United Can Co., 812 F.2d 443, 453 (9th Cir. 1987) (initial deficiency in fee petition not legally unreasonable failure so as to require Rule 11 sanctions).
\item \textsuperscript{347} See, e.g., Greenberg, 822 F.2d at 887-89 (complaint based on reasonable inquiry not factually frivolous absent fatal admission defeating essential element).
\item \textsuperscript{348} See, e.g., Hewitt v. Yagman, 798 F.2d 1230 (9th Cir. 1986) (frivolous removal petition filed for improper purpose of delay; precedent, of which competent attorney should have known, defeated claim); Huettig & Schromm, Inc. v. Landscape Contractors, 790 F.2d 1421 (9th Cir.
Most of the Ninth Circuit decisions make sense, and fit within a logical framework enhancing the deterrence value of sanctions. *Golden Eagle Distributing Corp. v. Burroughs Corp.* is the most notable exception. Judge Schwarzer, a noted authority on Rule 11, sanctioned the law firm of Kirkland & Ellis $3,000 for filing a memorandum in support of a motion for summary judgment. Judge Schwarzer apparently concluded that the firm’s conscious litigation strategy was to obtain dismissal on California’s shorter limitations period, avoiding both the longer statutory limitation in Minnesota and the risk of liability for economic loss under California law. His sanction order reprints portions of the brief for summary judgment juxtaposed against that opposing sanctions. Although the arguments raised in the sanctions proceeding were plausible, the summary judgment arguments were calculated to mislead the court into believing that the argument for dismissal under Minnesota’s choice of law was supported by existing law when it was not.

In the sanctions proceeding, counsel conceded Minnesota law was unsettled, and then constructed what Judge Schwarzer found to be a plausible argument. He concluded that the memorandum was not warranted by existing law, contrary to counsel’s representations, and that the firm did not make reasonable inquiry to determine whether dismissal of the economic loss claim was warranted by existing law.

Pending on appeal for two years, the Ninth Circuit reversed, demonstrating a considered reluctance to extend further the line defining permissible zealous advocacy. The opinion, since challenged for distorting and obscuring the trial court’s findings, embraces a tolerant ethic of adversary zeal. The district court’s application of Rule 11 was

1986) (labor law specialists sanctioned, knew or should have known there was no claim; action brought for tactical or strategic reasons) (Schwarzer, J).

349. See, e.g., Mossman, 789 F.2d 804 (summary judgment motion); *Hudson*, 827 F.2d 450 (counterclaim, damage prayer); *Huettig*, 740 F.2d 1421 (removal petition).

350. 801 F.2d 1531 (9th Cir. 1986), reh’g en banc denied, 809 F.2d 584 (9th Cir. 1987).


352. *Id.* at 126-27. Had that been the argument made originally, no sanction would have been ordered for asserting a right to dismissal on the limitations question. Moreover, the district court found that the argument to dismiss the economic loss claim violated counsel’s limited duty of candor, to disclose directly adverse legal authority. Schwarzer found that either Kirkland & Ellis failed to Shepardize their principal authority, a requirement to satisfy the prefiling inquiry duty, or it carefully formulated its argument to avoid citation to a leading California decision allowing economic loss for negligence absent physical harm. *Id.* at 126-29.

characterized as enforcing an ethical duty of candor against a nonfrivolous motion.\textsuperscript{354} Rule 11 is not a second avenue for enforcing ethical violations beyond its own terms.\textsuperscript{355} Nothing in the Rule requires a lawyer to differentiate between an argument warranted by existing law, and one for the extension, modification, or reversal of existing law.\textsuperscript{356} Such an exacting standard would chill aggressive advocacy.\textsuperscript{357} There was no finding of knowing misstatement, which itself would be inappropriate under the objective standard.\textsuperscript{358} Sanctions are permissible only when the paper filed “itself is frivolous” and not the “mere making of a frivolous argument.”\textsuperscript{359} The district court unnecessarily complicated the sanctions procedure by assuming a burden to evaluate under general ethical standards the accuracy of all arguments.\textsuperscript{360}

Upon denial of rehearing en banc, five judges filed a scathing dissent.\textsuperscript{361} The panel’s opinion “substantially recasts” the case, obscuring the trial court’s basis for imposing sanctions.\textsuperscript{362} Judge Schwarzer is “a pioneer authority on the Rule”; when he attempted to deal with misrepresentations that plague trial courts, the circuit “should at least have responded to what he has actually done.”\textsuperscript{363}

Golden Eagle improperly interferes with the trial court’s authority to make factual determinations. The arguments made in the summary judgment memorandum were not innocent errors of judgment, but a willful misstatement of law made to deceive the court and enhance the party’s adversarial position. At a minimum, Judge Schwarzer should have been given an opportunity to make additional findings to support the sanction on remand. A finding of willfulness is an inference of fact that should be sustained unless clearly erroneous. It could reasonably be inferred from the circumstances that Kirkland & Ellis was fully aware of how it characterized the argument made, for the improper purpose of misleading the court to obtain an unjustified dismissal. As so characterized, the willful misrepresentations contained in the memorandum could violate the second prong of Rule 11. In reversing without

\begin{thebibliography}{363}
\bibitem{354} 801 F.2d at 1530.
\bibitem{355} Id. at 1539, 1542.
\bibitem{356} Id. at 1539.
\bibitem{357} Id. at 1540.
\bibitem{358} Id.
\bibitem{359} Id.
\bibitem{360} Id. at 1542.
\bibitem{361} 809 F.2d 584 (Noonan, J., dissenting) (dissent from denial of sua sponte request for en banc hearing, joined by Sneed, Anderson, Hall, and Kozinski, JJ.).
\bibitem{362} Id. at 585.
\bibitem{363} Id. at 584-5.
\end{thebibliography}
remand, the appeals panel infringed upon the trial court's responsible effort to officiate litigation misconduct.

Moreover, *Golden Eagle* misperceives the correct objective standard to evaluate compliance. By mischaracterizing the trial court order as based on "argument identification," it then focused on whether a reasonable basis for the argument existed at the time of filing. The question is not whether a plausible argument might have been made, but whether, at the time of filing, the lawyer had a reasonable basis for a particular argument. The certification states that reasonable inquiry has been done, that the filing is factually and legally warranted, and was not for an improper purpose. Allowing post hoc justification with an argument that might have been made ignores the factual assertions made in the certificate. Just because a lawyer later develops a plausible argument does not satisfy the Rule. There was a factual basis for Judge Schwarzer to have concluded that the certificate was false, in violation of the limited duty of candor set forth by the terms of Rule 11, and that the filing was supported by existing law.

Reversal of sanctions in *Golden Eagle* was most unfortunate. The trial judge was in the best position to observe the manner in which the litigation was conducted, and to draw inferences about whether Kirkland & Ellis was consciously trying to mislead the court. At a minimum, the matter should have been remanded for the trial court to attempt such findings as needed to sustain the order.

The court's opinion tenaciously embraces the classical concept of the adversary system and the zealous ethic unbothered by the realities of litigation. It stressed that sanctions should not be used to review alleged unethical conduct, which is already covered by "well-established bar and court ethical procedures." This assumes that established procedures are working, and that "ethical" duties are necessarily different from legal duties under the rules of procedure and substantive law. Characterizing the lawyer's professional obligations to the court under the procedural rules as "questions of ethics" protects the zealous advocate's ability to stretch the limits with little downside risk.

C. *Seventh Circuit Activity*

Early decisions of the Seventh Circuit were confused and inconsistent. Cases were decided on an ad hoc basis, with little effort to develop
SPORTING THEORY OF JUSTICE

a coherent sanctions doctrine. Finally, four years after the amendments went into effect, the court announced sanctioning guidelines in Brown v. Federation of State Medical Boards. For the most part, the announced standards are consistent with what has evolved in the Ninth and Second Circuits. Now that district judges have some clear

365. Different Seventh Circuit panels vacillated on the proper standard for determining whether a violation has occurred, the consequences that follow from finding a violation, and the standard of review. S. Kassin, supra note 89, at 6-7. Compare Suslick v. Rothschild Sec. Corp., 741 F.2d 1000, 1007 (7th Cir. 1984) (dicta, subjective bad faith applies to postamendment filings) with Rodgers v. Lincoln Towing Serv., 771 F.2d 194, 204-06 (7th Cir. 1985) (Rule 11 sanction based on objective standard of reasonableness; where counsel sanctioned for incompetence, rather than bad faith, no hearing required on whether conduct sanctionable); Indianapolis Colts v. Mayor and City Council of Baltimore, 775 F.2d 177, 181 (7th Cir. 1985) (objective standard to determine whether frivolous) and In re TCI, Ltd., 769 F.2d 441, 445-47 (7th Cir. 1985) (bad faith, which has objective and subjective meaning, still relevant under both section 1927 and Rule 11; if suit is objectively colorable, subjective bad faith relevant to whether filed for improper purpose). Accord Zaldivar v. City of Los Angeles, 780 F.2d 823 (9th Cir. 1986); see supra notes 318-30 and accompanying text. Contrary to the approach taken by the Second and Ninth Circuits, after a violation is found, earlier cases suggested the trial judge might have discretion as to whether a sanction will be imposed. Compare Tarkowski v. County of Lake, 775 F.2d 173, 176 (7th Cir. 1985) (Rule 11 requires sanctions imposed for filings intended to harass; defendants having established "prima facie entitlement" to attorneys' fees for harm caused by harassment campaign, trial judge has burden of explaining refusal to grant motion) with Baranski v. Serhant, 106 F.R.D. 247 (N.D. Ill. 1985) (inadvertent drafting mistake included eight time-barred claims; mistake allowed as defense to Rule 11 violation, with sanctions not mandatory for every violation).

It has been held that sanctions against the lawyer, as a nonparty, are an appealable collateral order. Frazier v. Cast, 771 F.2d 259 (7th Cir. 1985); see Eastway Constr. Corp. v. City of New York, 762 F.2d 243 (2d Cir. 1985); supra notes 187-99 and accompanying text (discussing the proper approach to reviewability). For more recent, essentially ad hoc decisions, see Cheek v. Doe, 828 F.2d 395 (7th Cir.), petition for cert. filed, 56 U.S.L.W. 3322 (U.S. Oct. 14, 1987) (No. 87-596); Skycom Corp. v. Telstar Corp., 813 F.2d 810 (7th Cir. 1987) (Fed. R. App. P. 38; dicta, usually Rule 11 does not require separating frivolous from nonfrivolous claims); Schrock v. Altru Nurses Registry, 810 F.2d 658 (7th Cir. 1987); Brown v. National Bd. of Medical Examiners, 800 F.2d 168 (7th Cir. 1986).

366. 830 F.2d 1429 (7th Cir. 1987).

367. Compliance with the first, objective, prong regarding reasonableness of prefiling factual inquiry includes consideration of "whether the signer . . . had sufficient time for investigation; the extent to which the attorney had to rely on . . . the client for the factual foundation underlying the pleading, motion, or other paper; whether the case was accepted from another attorney; the complexity of the facts and the attorney's ability to do a sufficient prefiling investigation; and whether discovery would have been beneficial to the development of the underlying facts." Id. at 1435. In determining whether there was reasonable inquiry into the law, "the district court should consider the amount of time the attorney had to prepare the document and research the relevant law." Id. Appearance pro se may be relevant to the adequacy of prefiling inquiry. Id. The court evaluated second-prong violations under an objective standard as well, "although subjective bad faith or malice may be important when a claim is objectively colorable." Id. at 1436.

If a violation is found, sanctions are mandatory. Id. at 1433. To create a record for review as to whether the sanction imposed fails within allowable discretion, district judges should prepare specific findings, particularly when awarding substantial compensatory sanctions. In fashioning the
direction on how to fulfill their heightened responsibilities under Rule 11, the goal of efficient judicial administration can be better served.\footnote{Connecticut Law Review (Vol. 20:7) 92} Hopefully Brown signals that the Seventh Circuit is now willing to join its sister courts, and to consider sanctions with a more deliberate approach.

**CONCLUSION**

The present lack of consensus about the proper scope and application of sanctions doctrine is a passing concern. The amended sanctions rules are a major effort to reform the adversary culture. Undoubtedly lawyers and judges differ vastly in their views and on specific applications. The debate should be welcomed, not avoided, as necessary to changing accepted norms of professional conduct. Rule 11 should not, as a matter of course, subsume compliance with the full range of ethical rules. But, where an ethical rule directly corresponds with a legal duty imposed by Rule 11 or another sanctions authority, courts should not shrink from their duty to enforce the rule.\footnote{Connecticut Law Review (Vol. 20:7) 92}

Judicial reluctance to impose sanctions may be reinforced by threat of reversal for improper exercise of the sanctioning authority. To minimize this possibility, courts of appeals should exercise their review authority with care, rationality, and deference. They should not thwart trial judges' well-reasoned, deliberate efforts to control pervasive types of misconduct that infect the litigation process. In the short term, the required precision of a sanctions order may work directly against regular enforcement of the various sanctions provisions. In the long term, this exacting standard may facilitate regular enforcement. Eventually, a system of error correction must be devised to minimize irrational results that challenge the rule's normative value. The articulated standards by which the Ninth Circuit now strikes down improper sanctions can be used to scrutinize trial court refusals to sanction, which presum-
ably should also be supported by precise findings of fact and conclusions of law. As future cases further define the parameters of what constitutes a rule violation, with legal conclusions reviewed de novo, sanction-reluctant trial judges will be reeducated about their new officiating responsibilities. District courts should develop satisfactory procedures for handling sanctions disputes. If specific findings are required, aversion to sanctions issues cannot be avoided by simple denial. Once trial judges are required to make such findings, which are carefully evaluated on appeal, trial courts' aversion to reversal may overcome their reluctance to impose sanctions. This process, in turn, will notify lawyers of their professional obligations.

Much activity in civil litigation is only a form of economic warfare. Institutional legitimacy requires that competitive players be restrained so that the outcome in a given case is not determined by which party is best able to survive an expensive or drawn-out battle. In each case where a legitimate outcome—one fairly approximating an acceptable result—is subverted by disparate resources or competitive zeal, harm occurs at two levels. Not only is justice denied in the specific case, but the imbalance also has a cumulative effect. To the extent that uncontrolled zeal skews a fair, accurate, and expedient outcome of individual disputes, the legitimacy of the adversary process for dispute resolution is called into question. Lawyers define the applicable rules and monopolize their implementation. If the adversary system is to withstand legitimate public scrutiny, the legal profession must reexamine the limits of permissible advocacy. As individual lawyers are forced to reconsider the limits of permissible adversary zeal in defending against threatened sanctions, the message will be heard by the practicing community. If courts will officiate, carefully fulfilling their special duties to regulate fair and orderly game play, a reformed adversary ethic may restore confidence in the adversary system of dispute resolution.
