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The Court of Appeals Deals with the Issue of Monetary Costs and Sanctions for Frivolous Litigation Practices

Joyce Onorato Abamont

DEVELOPMENTS IN THE LAW

The Court of Appeals deals with the issue of monetary costs and sanctions for frivolous litigation practices

Frivolous lawsuits employed as instruments of harassment and delay present expanding problems for already overburdened courts.[1] Striving to maintain the efficaciousness of the judicial system in an increasingly litigious society,[2] courts have sought to reduce frivolous litigation by shifting attorneys' fees and costs, a more stringent penalty than customary sanctions and contempt proceedings.[3] Federal courts have accomplished fee-shifting by ex-

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[1] *See* Asberry v. United States Postal Serv., 692 F.2d 1378, 1382 (D.C. Cir. 1982). Filing clearly frivolous suits constitutes an unnecessary and unjustifiable burden on already overcrowded courts, diminishes the opportunity for careful consideration, and delays access to the courts by persons with truly deserving causes. *Id.*

"Lawsuits are expensive and time consuming to courts and litigants alike." Limerick v. Greenwald, 749 F.2d 97, 101 (1st Cir. 1984). When an attorney fails to look at his case objectively and appeals because the rules allow it, he commits a wrong against the parties and the courts. *Id.*

Between 1940 and 1981, the number of civil cases in federal courts increased approximately six times as fast as the population of the United States. *See* Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 275 (1982). In state courts for the period 1967-1976, appellate filings increased at double the rate of population growth. *Id.*

[2] *See* Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531, 1540 (9th Cir. 1986); *see also* Zaldivar v. City of Los Angeles, 780 F.2d 823, 829 (9th Cir. 1986) (to remedy attorney misconduct look to Fed. R. Civ. P. 11); Gabrelian v. Gabrelian, 108 App. Div. 2d 445, 452, 489 N.Y.S.2d 914, 921 (2d Dep't 1985) (attorneys and parties who engage in "dilatory or frivolous conduct during litigation . . . impede . . . orderly administration of justice" and impose undue burdens on system) (quoting Karutz v. Chicago Title Ins. Co., 112 Misc. 2d 815, 820, 451 N.Y.S.2d 1001, 1004-05 (Sup. Ct. App. T. 2d Dep't 1981)), *appeal dismissed*, 66 N.Y.2d 741, 488 N.E.2d 211, 497 N.Y.S.2d 365 (1985).

A major problem facing today's courts is to preserve the judicial system's effectiveness in the wake of increasing litigation. While reallocation of attorneys' fees is one way to discourage wasting judicial resources, the author cautions that courts must maintain the proper balance between discouraging abuse and allowing free access to the courts. *See* Mallor, *Punitive Attorneys' Fees for Abuses of the Judicial System*, 61 N.C.L. REV. 613, 615 (1983); *see generally* Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636, 653 (1974) (current practice breeds abuse, fails to discourage unfounded and vexatious claims).

[3] *See, e.g.*, Roadway Express, Inc. v. Piper, 447 U.S. 752, 764-65 (1980) (although most prominent inherent power of federal courts is contempt sanction, in "narrowly defined circumstances" courts may force counsel to pay attorneys' fees). The United States Supreme Court has held that federal courts have the power to assess attorneys' fees against parties who litigate in bad faith and against counsel who wilfully abuse judicial processes. *See id.* at 766; Mallor, *supra* note 2, at 615; Comment, *supra* note 2, at 652-53.

Existing remedies for abusive conduct include disciplinary proceedings, *see* N.Y. JUD. LAW § 90 (McKinney 1983 & Supp. 1988), contempt proceedings, *see* N.Y. PENAL LAW §§

ercising inherent judicial powers,[4] by statutory exception,[5] and by invoking Rule 11 of the Federal Rules of Civil Procedure.[6] In au-

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210.05-.15 (McKinney 1986), and malicious prosecution suits. *See* Note, *Groundless Litigation and the Malicious Prosecution Debate: A Historical Analysis*, 88 YALE L.J. 1218, 1218 (1979) [hereinafter Note, *Groundless Litigation*].

"The use of a motion for contempt as a negotiating tool, or to threaten and intimidate . . . constitutes an abuse of the process of this court . . . ." Photosound, Inc. v. Gourdine, 126 Misc. 2d 495, 498, 482 N.Y.S.2d 993, 996 (Sup. Ct. N.Y. County 1984), *modified*, 118 App. Div. 2d 472, 479 N.Y.S.2d 751 (1st Dep't 1986). The *Photosound* court concluded that "more drastic measures should be taken to discourage this type of frivolous motion practice," *id.* at 495, 482 N.Y.S.2d at 994, and recognized that the best method to make the respondent whole was to award attorneys' fees. *Id.* at 499, 482 N.Y.S.2d at 996.

Perjury proceedings often present evidentiary problems, *see* N.Y. PENAL LAW § 210.50 (McKinney 1975), as proof of perjury may not be established by the uncorroborated testimony of sole witness. *See id.* Guilt must be established beyond a reasonable doubt in such proceedings. *See id.*, commentary at 497.

Malicious prosecution also has been criticized as a useless remedy. *See* Note, *Groundless Litigation*, *supra*, at 1218. Noting that only America "places a subsequent tort action at the core of its machinery for dealing with groundless litigation," *id.* at 1221, the author suggests that a preferred solution would promote primary reliance on controls available within the groundless suits themselves. *See id.*

[4] *See, e.g.*, Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 259 (1975) (unless forbidden by Congress, courts have inherent powers to allow attorney fees); Hall v. Cole, 412 U.S. 1, 4-5 (1973) (federal courts, exercising "equitable powers" may award attorney fees if justice will be served); *see also* 6 J. MOORE, W. TAGGART & J. WICKER, MOORE'S FEDERAL PRACTICE ¶ 54.78[3] (2d ed. 1987) (discussing equitable powers of courts to award fees); Comment, *Sanctions Imposed by Courts on Attorneys Who Abuse the Judicial Process*, 44 U. CHI. L. REV. 619, 633 (1977) (courts have inherent power to establish rules governing proceedings).

Under the inherent powers doctrine, federal courts have allowed exceptions to the general American rule which denies recovery of legal fees to successful litigants. *See, e.g.*, Roadway Express, Inc. v. Piper, 447 U.S. 752, 765 (1980) ("in narrowly defined circumstances federal courts have inherent power to assess attorney's fees"); Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 164 (1939) ("[a]llowance of such costs in appropriate situations is part of the historic equity jurisdiction of the federal courts"). One of the most common exceptions under the American rule has been the bad faith exception, in which fees are awarded for wanton, oppressive or vexatious violations. *See Roadway Express*, 447 U.S. at 766. *See generally* Mallor, *supra* note 2, at 630-32 (bad faith exceptions).

[5] *See, e.g.*, Civil Rights Attorneys' Fees Award Act of 1976, Pub. L. No. 94-559, § 2, 90 Stat. 2641 (codified as amended at 42 U.S.C. § 1988 (1982)) (provisions awarding attorneys' fees in actions under Civil Rights Act); Lanham Act, Pub. L. No. 93-600, § 3, 88 Stat. 1955 (1946) (codified as amended at 15 U.S.C. § 1117 (1982)) (in trademark violation actions courts, in exceptional cases, may award reasonable attorneys' fees); Clayton Act, ch. 323, § 4, 38 Stat. 731 (1914) (codified as amended at 15 U.S.C. § 15(a) (1982)) (successful plaintiff in antitrust litigation may recover cost of suit and attorneys' fees). *See also* Note, *Awards of Attorney's Fees in the Federal Courts*, 56 ST. JOHN'S L. REV. 277, 320-23 (1982) (most statutory fee-shifting provisions employ permissive terms).

[6] *See* FED. R. CIV. P. 11. Rule 11 provides in pertinent part:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated . . . . The signature of an attorney or party constitutes a

thorizing monetary sanctions against attorneys and individual parties for frivolous litigation practices, New York State courts have relied on the inherent judicial power of the courts[7] and the very narrow statutory authority under amended CPLR 8303-a.[8] How-

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

Id. Rule 11, as amended in 1983, was intended to reduce the reluctance of courts to impose sanctions when abuses in trial practice are apparent. *See* FED. R. CIV. P. 11, advisory committee's note on 1983 Amendment, *reprinted in* 2A J. MOORE, W. TAGGART & J. WICKER, *supra* note 4, ¶ 11.04[4].

Federal courts have applied Rule 11 in an effort to deter dilatory claims and motions. *See* Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 254 (2d Cir. 1985); Rodgers v. Lincoln Towing Serv. Inc., 596 F. Supp. 13, 22 (N.D. Ill. 1984), *aff'd*, 771 F.2d 194 (7th Cir. 1985); Tedeschi v. Smith Barney, Harris Upham & Co., 579 F. Supp. 657, 660 (S.D.N.Y. 1984), *aff'd*, 757 F.2d 465 (2d Cir.), *cert. denied*, 474 U.S. 850 (1985). For a discussion of the problems involved in the application and interpretation of Rule 11, see Cavanagh, *Developing Standards Under Amended Rule 11 of the Federal Rules of Civil Procedure*, 14 HOFSTRA L. REV. 499, *passim* (1986); *infra* notes 38-40 and accompanying text.

[7] *See, e.g.*, Gabrelian v. Gabrelian, 108 App. Div. 2d 445, 445, 439 N.Y.S.2d 914, 916 (2d Dep't), *appeal dismissed*, 66 N.Y.2d 741, 488 N.E.2d 111, 497 N.Y.S.2d 365 (1985). In *Gabrelian*, which involved an underlying matrimonial action, the husband brought contempt charges against his ex-wife contending that she failed to abide by a judgment ordering division of personal property after the sale of the marital residence. *Id.* at 446, 489 N.Y.S.2d at 916. The lower court, ruling that there had been no showing of contumacious conduct by the wife and that the husband had raised issues already decided or dismissed, imposed a fine on the husband for harassing his ex-wife. *Id.* While disallowing the fine because of the circumstances in the case, the Appellate Division, Second Department, recognized the inherent power of the courts to impose a financial assessment on a litigant or his attorney for repeated filings of frivolous motions. *See id.* at 448, 489 N.Y.S.2d at 918. "It is our view that courts of record . . . are vested with inherent powers, which are neither derived from nor dependent upon express statutory authority . . . ." *Id. See also* Karutz v. Chicago Title Ins. Co., 112 Misc. 2d 815, 451 N.Y.S.2d 1001 (Sup. Ct. App. T. 2d Dep't 1981) (assessment of counsel fees within inherent power of court).

In New York, courts using their inherent powers have imposed monetary sanctions against attorneys and parties for delaying tactics which frustrate the objectives and procedures of the independent assignment system, *see* McLoughlin v. Henke, 130 Misc. 2d 1091, 1092, 499 N.Y.S.2d 332, 333 (Sup. Ct. Queens County 1986), in foreclosure and sale actions, *see* Beacon Fed. Sav. & Loan Ass'n v. Marks, 97 App. Div. 2d 451, 451, 467 N.Y.S.2d 662, 663 (2d Dep't), *appeal dismissed*, 60 N.Y.2d 560, 459 N.E.2d 863 (1983), for lawyer procrastination in serving and filing notes of issue, *see* Moran v. Rynar, 39 App. Div. 2d 718, 719, 332 N.Y.S.2d 138, 141 (2d Dep't 1972), and for failure to serve interrogatories during discovery. *See* Kahn v. Stamp, 52 App. Div. 2d 748, 749, 382 N.Y.S.2d 199, 201 (4th Dep't 1976).

[8] CPLR 8303-a (McKinney Supp. 1987). CPLR 8303-a authorizes costs and attorney fees up to $10,000 against any party advancing a frivolous claim or defense. *Id.* Originally limited to medical malpractice actions, it was amended in 1986 to extend to personal injury, property damage and wrongful death suits. *Id.* Thus, CPLR 8303-a operates only in tort claims, and is not applicable to contract, matrimonial, corporate, property, commercial or

ever, in *A.G. Ship Maintenance Corp. v. Lezak*,[9] the Court of Appeals held that absent a statute or court rule, courts cannot impose sanctions for frivolous litigation conduct.[10]

In *Lezak*, the respondent was an attorney employed by the Waterfront Commission of New York Harbor.[11] The Commission, which accused the petitioner, a stevedoring corporation, of billing customers for services never performed, instituted proceedings against the corporation.[12] The petitioner later charged that during the course of these proceedings, the respondent falsely represented his lack of any exculpatory *Brady* material[13] and that he wrongfully withheld such material from the petitioner.[14] Additionally, petitioner demanded that the respondent be barred from any further involvement with proceedings concerning the petitioner or its affiliates.[15] Although the Commission denied this request, it offered to reopen the hearings on the *Brady* issue.[16] The corporation rejected this offer and subsequently filed disciplinary charges against the respondent, which were later dismissed.[17]

Several years later, the respondent, again acting as attorney for the Commission, investigated companies closely related to the petitioner.[18] As a result of these investigations, the corporation instituted contempt proceedings and Article 78 proceedings against the respondent.[19] In response, the respondent sought sanctions against the petitioner for counsel fees and disbursements, claiming the petitioner acted in bad faith by attempting to harass and in-

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any other actions. *See id.*

[9] 69 N.Y.2d 1, 503 N.E.2d 681, 511 N.Y.S.2d 216 (1986).

[10] *Id.* at 6, 503 N.E.2d at 684, 511 N.Y.S.2d at 219.

[11] *Id.* at 3, 503 N.E.2d at 684, 511 N.Y.S.2d at 216. The Waterfront Commission polices activities on the New York/New Jersey harbor fronts in an attempt to eliminate racketeering, corruption and criminal activities. *Id.*

[12] *Id.* at 3, 503 N.E.2d at 682, 511 N.Y.S.2d at 217. Eventually, the corporation admitted certain charges and paid a fine. *Id.*

[13] *Id. See* Brady v. Maryland, 373 U.S. 83 (1963). The exculpatory material derives its name from a case in which the Supreme Court ruled that suppression of evidence favorable to the defendant, when requested by the defendant, violates due process when the evidence is material to either guilt or punishment. *Id.* at 87-88.

[14] *Lezak*, 69 N.Y.2d at 3, 503 N.E.2d at 682, 511 N.Y.S.2d at 217.

[15] *See id.*

[16] *Id.*

[17] *Id.*

[18] *Id.* The Commission investigated a joint venture partner of the corporation and a related company in an effort to determine whether there had been federal tax violations. *Id.*

[19] *Id.* at 3-4, 503 N.E.2d at 682, 511 N.Y.S.2d at 217.

timidate him.[20] The Supreme Court, Special Term, Kings County, denied respondent's requested relief,[21] and the decision was affirmed by the Appellate Division, Second Department.[22]

The Court of Appeals, in a per curiam opinion, affirmed the dismissal of the sanctions claim.[23] The court recognized "that frivolous court proceedings present a growing problem which must be deterred" and that "[s]uch practices not only injure and debilitate the honest litigant, but they also waste judicial resources."[24] Noting that other deterrents such as disciplinary proceedings for attorneys, contempt proceedings, or actions to recover damages based on theories of malicious prosecution or abuse of process had proved ineffective, the court concluded that fee-shifting is frequently used to deter abusive practices.[25] The court held, however, that sanctions against attorneys and parties are best authorized by plenary rule rather than by ad hoc judicial determination.[26] Avoiding the question of whether a court has the inherent authority to impose sanctions, the Court of Appeals reasoned that such a system of sanctions would be best effectuated by the legislature's power to prescribe rules of practice governing court proceedings.[27] Under the exercise of rule-making powers delegated by the legislature, and in the absence of legislation to the contrary, the courts may develop rules to enforce sanctions for frivolous practices.[28] Until such standards are formulated, concluded the court, monetary sanctions for frivolous litigation practices should be imposed

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[20] *Id.*

[21] *Id.*

[22] A.G. Ship Maintenance Corp. v. Lezak, 120 App. Div. 2d 662, 502 N.Y.S.2d 257 (2d Dep't 1986). In denying the recovery of counsel fees, neither court indicated whether the court lacked power to grant such relief or whether the defendant's request simply was not meritorious. *See id.*

[23] *Lezak*, 69 N.Y.2d 1, 6, 503 N.E.2d 681, 684, 511 N.Y.S.2d 216, 219 (1986).

[24] *Id.* at 4, 503 N.E.2d at 682, 511 N.Y.S.2d at 217.

[25] *Id.* at 4, 503 N.E.2d at 682-83, 511 N.Y.S.2d at 217-18.

[26] *Id.* at 6, 503 N.E.2d at 684, 511 N.Y.S.2d at 219.

[27] *See id.* at 5-6, 503 N.E.2d at 683-84, 511 N.Y.S.2d at 218-19. As sources for this power, the court pointed to the New York Constitution, and the New York Judiciary Law. *See id.*

The New York Constitution confers power on the legislature to alter and regulate jurisdiction and proceedings in law and equity. *See* N.Y. CONST. art. 6, § 30. This authority to regulate practice and procedure may be delegated to the courts. *See id.*

[28] *Lezak*, 69 N.Y.2d at 6, 503 N.E.2d at 684, 511 N.Y.S.2d at 219. In accordance with the Judiciary Law, the Chief Judge of the Court of Appeals has the power to establish standards and administrative policies relating to "implementation of rules and orders regulating practice and procedure in the courts, subject to the reserved power of the legislature . . . ." N.Y. JUD. LAW § 211(1)(b) (McKinney 1983).

only under circumstances authorized by CPLR 8303-a.[29]

By refusing to impose sanctions, it is submitted that the Court of Appeals properly insisted on the promulgation of a uniform rule to penalize parties bringing frivolous suits rather than allowing the question to be determined on a case-by-case basis. While the court has not denied an inherent judicial power to enforce such sanctions,[30] neither has it affirmatively recognized that the power is in-

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[29] *See supra* note 8 and accompanying text (discussing CPLR 8303-a and its sanction provisions).

[30] *See Lezak*, 69 N.Y.2d at 6, 503 N.E.2d at 684, 511 N.Y.S.2d at 219. Indeed, the court specifically stated that "[i]t is not necessary to determine whether the power of the courts to impose sanctions for frivolous proceedings is inherent to the judicial function or is merely delegable by the Legislature under our Constitution." *Id.* Apparently, the court reasoned that for the present, it was not essential to identify the source of the court's power; more importantly, the court believed steps must be taken to end abuses of the judicial system.

It is suggested, however, that New York supports the federal courts' recognition that inherent power to assess monetary sanctions does reside in the courts when claims are pursued merely for purposes of delay, harassment, and intimidation. *See* Roadway Express, Inc. v. Piper, 447 U.S. 752, 767 (1980) ("in a proper case, such sanctions are within a court's powers"). *Accord* Ltown Ltd. Partnership v. Sire Plan, Inc., 108 App. Div. 2d 435, 440-41, 489 N.Y.S.2d 567, 572 (2d Dep't 1985) (inherent power "plainly resides in New York State courts as well").

In Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975), environmental groups brought suit to prevent the Secretary of the Interior from issuing permits necessary for the construction of a trans-Alaska pipeline. *See id.* at 241-45. The circuit court of appeals awarded attorneys' fees on the grounds that respondents had acted to vindicate the rights of all citizens to a clean environment. *Id.* at 245-46. The Supreme Court acknowledged inherent judicial power to allow attorneys' fees in some situations. *Id.* at 259. *See also* F.D. Rich Co. v. United States *ex rel.* Indus. Lumber Co., 417 U.S. 116, 129 (1974) (recognizing inherent equitable power to award attorneys' fees if losing party acted in bad faith, oppressively, wantonly or vexatiously); Day v. Amoco Chem. Corp., 595 F. Supp. 1120, 1122 (S.D. Tex. 1984) (malicious frivolous claim allows court to impose monetary sanctions), *cert. denied*, 470 U.S. 1086 (1985); *supra* note 4 and accompanying text (discussing inherent powers doctrine).

New York has recognized that courts have inherent power to control their own business and to conduct that business to safeguard the rights of all litigants. *See* Riglander v. Star Co., 98 App. Div. 101, 104, 90 N.Y.S. 772, 774 (1st Dep't 1904), *aff'd*, 181 N.Y. 531, 73 N.E. 1131 (1905). Drawing on the federal courts' assertion of inherent judicial authority to justify the imposition of monetary sanctions for frivolous litigation, a New York court has noted that "[t]his inherent power . . . plainly resides in New York State courts as well." *Ltown*, 108 App. Div. 2d at 441, 489 N.Y.S.2d at 572. In *Ltown*, one of the parties continually opposed and delayed a mortgage foreclosure action at every stage of the proceedings. *See id.* at 436, 489 N.Y.S.2d at 569. The *Ltown* court found suspect the motives for the delays and the opposition to the proceedings, and *sua sponte* raised the issue of whether the party and his counsel should be penalized for pursuing frivolous litigation. *Id.* at 438, 489 N.Y.S.2d at 570-71. Noting that New York courts have inherent power to control their calendars and keep their houses in order, the *Ltown* court reasoned there was "no difficulty in concluding that a New York appellate court may impose appropriate sanctions against an attorney, a client, or both for the pursuit of frivolous litigation." *Id.* at 441, 489 N.Y.S.2d at 573. It is submitted that although the *Ltown* court order awarding attorneys' fees was modified by

herent.[31] Rather, the court relied on the existence of its delegated powers under the New York State Constitution and statutes to adopt a sanctions rule, thereby avoiding the inherent power question.[32] The Court of Appeals decided on a course of court-initiated rules[33] apparently because use of the inherent power doctrine has not resulted in the uniformity which the court has ascertained necessary for the effective control of frivolous practices.[34] A promulgated rule provides uniformity in administration, whereas ad hoc rulings, presumably based on a court's inherent powers, potentially preclude uniformity because of the amorphous nature of inherent power[35] and judges' varying viewpoints concerning the utilization

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the Court of Appeals in *Lezak*, this action was indicative of the Court of Appeals' desire to develop a uniform sanctions rule rather than its denial of inherent power. *See* Oppenheim & Macnow, P.C. v. Worth, 109 App. Div. 2d 602, 602, 486 N.Y.S.2d 997, 997 (1st Dep't 1985) (sanctions sustained, though reduced); *see also supra* note 7 and accompanying text (sanctions in New York); *cf.* Aslanis v. Southwest Sewer Dist., 92 App. Div. 2d 855, 855, 459 N.Y.S.2d 631, 632 (2d Dep't 1983) (disallowing monetary sanctions payable to the court rather than movant imposed under inherent power doctrine).

[31] *Lezak*, 69 N.Y.2d at 6, 503 N.E.2d at 684, 511 N.Y.S.2d at 219.

[32] *See id.*

[33] *See* N.Y.L.J., Jan. 8, 1987, at 1, col. 2. Following the *Lezak* decision, the Chief Administrative Judge asked for comments from judges, lawyers and the public concerning the scope of a rule authorizing courts to impose sanctions against attorneys. *See id.* Numerous comments were received by the Office of Court Administration and the comment deadline of September 18, 1987 was extended. *See Rule Changes (Including Sanctions Rule), Scheduled To Take Effect January 1st, Put Off Indefinitely*, 336 N.Y. ST. LAW DIG. 5 (Dec. 1987). The consideration of comments and the integration of suggestions are among the factors that have delayed the effective date of the rules, which was to have been January 1, 1988. *See id.* Professor Siegel notes that some legislators have cast "a jaundiced eye" at the proposed sanctions rule—Part 130 of the Uniform Rules. *Id.* "[L]egislative committee hearings have been held to see whether the legislature should pick up all the reins on sanctions. . . . Prompt action by the legislature . . . purporting with a general sanctions statute to preempt the field, would put Part 130 on a back burner for a while, or incinerate it altogether." *Id.*

[34] *See Lezak*, 69 N.Y.2d at 6, 503 N.E.2d at 684, 511 N.Y.S.2d at 219. Refusing to employ its inherent powers, a counsel fees award was denied by the Court of Appeals because "these expenses are merely incidents of litigation and thus are not compensable in the absence of statutory authority providing for such." City of Buffalo v. J.W. Clement Co., 28 N.Y.2d 241, 262-63, 269 N.E.2d 895, 908, 321 N.Y.S.2d 345, 364 (1971). For a somewhat analogous situation in the federal courts, see Dow Chemical Pacific Ltd. v. Rascator Maritime S.A., 782 F.2d 329 (2d Cir. 1986), which found that one defendant acting in bad faith does not justify an award of fees against co-defendant. *See id.* at 344. *See also* Weinberger v. Kendrick, 698 F.2d 61, 80 (2d Cir. 1982) ("high degree of specificity" required when attorneys' fees awarded on bad faith basis), *cert. denied*, 464 U.S. 818 (1983); Browning Debenture Holders' Comm. v. DASA Corp., 560 F.2d 1078, 1088 (2d Cir. 1977) (claims not entirely without color).

[35] *See, e.g.*, Deancey v. Pipegras, 141 N.Y. 88, 96, 35 N.E. 1089, 1091 (1894) (difficult to define inherent judicial power); Gabrelian v. Gabrelian, 108 App. Div. 2d 445, 451, 489 N.Y.S.2d 914, 920 (2d Dep't 1985) (inherent judicial power not susceptible to exact defini-

of these powers.[36]

The effectiveness of a promulgated rule, however, may be achieved only through judicial discretion in the application of the rule to differing factual situations.[37] Thus, it is asserted, any sanctions imposed are necessarily ad hoc. Therefore, the court should have formally embraced the inherent powers doctrine to supplement the forthcoming rule. By failing to do so, the court may have prematurely obviated the effectiveness of the rule.

Furthermore, the court's decision in *Lezak* to proceed deliberately in imposing a general sanction rule may have been affected by the example of the federal courts in interpreting Rule 11. Since Rule 11 was amended in 1983, its interpretation and application has been unsettled.[38] Questions have arisen regarding the determination of an objective standard of bad faith,[39] the parameters of

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tion). The definition is often tautological. *See* United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812) ("[c]ertain implied powers must necessarily result to our Courts of justice . . . because they are necessary . . . .").

[36] *See, e.g., Gabrelian*, 108 App. Div. 2d at 456-58, 489 N.Y.S.2d at 924-26 (Lazar, J., concurring) (disagreeing strongly over sanctions issue); Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 204-05 (1985) (supporting deterrent effect of sanctions). Judge Schwarzer's view is in sharp contrast to Chief Judge Weinstein of the United States District Court for the Eastern District of New York, who views Rule 11 as having "increased the tension in litigation, and increased the amount of extra motions and extra appeals." Lewin, *A Legal Curb Raises Hackles*, N.Y. Times, Oct. 2, 1986, at D8, col. 6.

[37] *See* Schwarzer, *supra* note 36, at 201; *see also Gabrelian*, 108 App. Div. 2d at 455, 489 N.Y.S.2d at 923 (pro se litigant's conduct should not be measured against same standard as member of bar). *But see* Taylor v. Prudential-Bache Sec., Inc., 594 F. Supp. 226, 227-28 (N.D.N.Y.) ($35,000 in attorneys' fees imposed on pro se litigant for "irresponsible and inexcusable approach to the law"), *aff'd without opinion*, 751 F.2d 371 (2d Cir. 1984). Whether an attorney has made a "reasonable inquiry" into the underlying facts of a claim is a factual determination. *See* Mohammed v. Union Carbide Corp., 606 F. Supp. 252, 261 (E.D. Mich. 1985); *see also* Zaldivar v. City of Los Angeles, 780 F.2d 823, 831 (9th Cir. 1986) ("reasonable inquiry" within circumstances of the case).

[38] *See* Oliveri v. Thompson, 803 F.2d 1265 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 1373 (1987). Recognizing that courts must be sensitive to the impact of sanctions on attorneys, *see id.* at 1280, the *Oliveri* court reversed a decision imposing sanctions on the plaintiff's attorney, reasoning that Rule 11 was limited to an attorney's conduct at the time papers are signed, and not meant to demand a continuing obligation from counsel. *See id.* at 1274. *But see* Eastway Constr. Corp. v. City of New York, 762 F.2d 243 (2d Cir. 1985). In *Eastway*, the court interpreted Rule 11 as expanding the inherent equitable powers of the court to levy sanctions, *see id.* at 253, and viewed sanctions under Rule 11 as mandatory because the rule is "clearly phrased as a directive." *Id.* at 254 n.7; *see also* Rodgers v. Lincoln Towing Serv. Inc., 596 F. Supp. 13, 27 (N.D. Ill. 1984) (court concluded lawyers cannot be free to "plead now and think about the legal validity of their pleadings later"), *aff'd*, 771 F.2d 194 (7th Cir. 1984); *see generally* S. KASSIN, AN EMPIRICAL STUDY OF RULE 11 SANCTIONS 18-45 (1985) (Rule 11 applied with limited clarity and uniformity).

[39] *See* Zaldivar v. City of Los Angeles, 780 F.2d 823 (9th Cir. 1986). Ruling that sanctions were improperly assessed, the *Zaldivar* court concluded that a finding of subjective

reasonable inquiry,[40] and the meaning of a frivolous claim or motion.[41] Thus, *Lezak* may represent New York's effort to solve the problem of frivolous litigation practices while attempting to avoid the difficulties observed in the federal experience.

By refusing to direct sanctions, the Court of Appeals delivered a clear message to the legislature and the courts that unless a statute or court rule is promulgated to deal with the issue of sanctions, aggrieved parties will have no remedy. It is submitted that New York would do well to promulgate a sanctions rule that will work in conjunction with the recognized inherent power of the courts. Without such recognition of inherent court powers, any statute or rule may create additional problems in this controversial area.

Joyce Onorato Abamont

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bad faith was not necessary to impose Rule 11 sanctions. *See id.* at 829. It should be noted that prior to the 1983 amendment to Rule 11, it was construed as speaking in "plainly subjective terms." *See* Nemeroff v. Abelson, 620 F.2d 339, 350 (2d Cir. 1980). "A claim is colorable," reasoned the *Nemeroff* court, "when it has some legal and factual support, considered in light of the reasonable beliefs of the individual making the claim. The question is whether a reasonable attorney could have concluded that facts supporting the claim *might be established*, not whether such facts actually *had been established*." *Id.* at 348 (footnote omitted).

[40] *See* Golden Eagle Distrib. Corp. v. Burroughs Corp., 103 F.R.D. 124 (N.D. Cal. 1984), *rev'd*, 801 F.2d 1531 (9th Cir. 1986). In *Golden Eagle*, the district court, *sua sponte*, levied sanctions on a party's legal counsel, determining that the law firm had engaged in misleading conduct in filing motion papers because it had failed to cite contrary authority and implied that its position was warranted by existing law, not by an extension of existing law. *See id.* at 128-29. The sanctions were imposed despite the district court's holding that the positions on the papers were supportable, both legally and factually. *See id.* at 129. The Court of Appeals for the Ninth Circuit reversed, however, because sanctions cannot be imposed where "a plausible good faith argument can be made." *Golden Eagle*, 801 F.2d 1531, 1541 (9th Cir. 1986) (quoting *Zaldivar*, 780 F.2d at 832); *see also* Van Berkel v. Fox Farm & Road Mach., 581 F. Supp. 1248, 1251 (D. Minn. 1984) (attorney did not make reasonable inquiry upon which to base belief).

[41] *See, e.g.*, Gattuso v. Pecorella, 733 F.2d 709, 710 (9th Cir. 1984) (frivolous means "result is obvious and the arguments of error are wholly without merit"); *In re* Marriage of Flaherty, 31 Cal. 3d 637, 650, 646 P.2d 179, 187-88, 183 Cal. Rptr. 508, 516-17 (appeal without merit not by definition frivolous); Risinger, *Honesty in Pleading and its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1, 61 (1976) (today's frivolity "may become tomorrow's law"); *see generally* Oberman, *Coping with Rising Caseload II: Defining the Frivolous Civil Appeal*, 47 BROOKLYN L. REV. 1057, 1058 (1981) (challenge to eliminate frivolous cases without unfairly discharging claims of potential substance).