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NOTE

RULE 11: WHAT PROCESS IS DUE?

The American system of jurisprudence is based on a concept of fundamental fairness for all parties involved.¹ Embodying this concept are the fifth and fourteenth amendments of the United States Constitution, which restrict governmental actions depriving any person of "life, liberty, or property, without due process of law."² Exactly what "process" is required is not a static concept, but is dependent upon various facts and circumstances, including the nature of the deprivation that will take place.³ The United States Supreme Court, charged with ensuring that due process is afforded, has been given the authority by Congress to promulgate rules for the procedure and operation of the courts.⁴ Pursuant to

¹ See J. GORA, *DUE PROCESS OF LAW* 10 (1978). "Fundamental fairness" is the benchmark for the rights and procedures required by due process. See *id.*

² U.S. CONST. amend. V, amend. XIV, § 1. The due process clause guarantees that a person will receive "process" if the government deprives that person of life, liberty, or property. See J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* § 13.1, at 452 (3d ed. 1986) [hereinafter *CONSTITUTIONAL LAW*]. When such an appropriation is to take place, a person is entitled "to a fair procedure to determine the basis for, and legality of, such action." *Id.* It is not sufficient that the government's action is detrimental to a person; it must be a taking of life, liberty, or property before some type of process is required. *Id.* When such interests are at stake, the individual is justified in demanding a fair procedure. *Id.* The form of the procedure to be granted must be determined with regard to "what procedures are both necessary and affordable for proper resolution" of the action. *Id.* If the taking is not within the range of interests protected, a person is not entitled to a procedure to determine his rights. *Id.* § 13.2, at 453; see *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 570-72 (1972). The exact definition of these interests "is not infinite" but property encompasses more than actual ownership of traditional ideas of "property." *Id.*

³ See *Goss v. Lopez*, 419 U.S. 565, 575-76 (1975). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

⁴ See Rules Enabling Act, ch. 651, §§ 1-2, 48 Stat. 1064 (1934) (current version at 28 U.S.C. § 2072 (1982)). The Supreme Court was given the authority to promulgate "by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts . . . of the United States in civil actions Such rules shall not

this grant of authority, in 1938 the Court adopted the Federal Rules of Civil Procedure.⁵ Rule 1 notes that the goal of the Rules is "to secure the just, speedy, and inexpensive determination of every action."⁶ Although the Rules have contributed to our system by increasing accessibility to the courts, this ease of access has also tended to backlog the system.⁷ Realizing this, the Supreme Court amended certain rules in 1983⁸ to grant district court judges the

abridge, enlarge or modify any substantive right[s] . . ." 28 U.S.C. § 2072 (1982).

⁵ FED. R. CIV. P. (codified as amended in 28 U.S.C.A. (1982 & West Supp. 1988)).

⁶ FED. R. CIV. P. 1.

⁷ See Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1, 8 (1984). The Federal Rules of Civil Procedure instituted notice pleading, replacing particularized pleading, "which deterred suits by requiring enough knowledge and preinstitution investigation to enable the plaintiff to make specific allegations regarding the defendant's conduct." *Id.* The "liberal and permissive" rules allow easy access so that everyone can exercise his right to a day in court. *Id.* In *Lepucki v. Van Wormer*, 765 F.2d 86, 87 (7th Cir.), *cert. denied*, 474 U.S. 827 (1985), the court stated:

Our system of jurisprudence is designed to insure that all disputants with colorable claims have access to the courthouse. Relatively low barriers to entry have, however, generated an undesirable result—a deluge of frivolous or vexatious claims filed by the uninformed, the misinformed, and the unscrupulous. These claims clog court dockets and threaten to undermine the ability of the judiciary to efficiently administer the press of cases properly before it.

Id.; see Burger, *Foreword to LAWYERS CONFERENCE TASK FORCE ON REDUCTION OF LITIGATION COST & DELAY, DEFEATING DELAY* at vii (1986). In 1969, there were 112,606 filings in the federal district courts. *Id.* In 1985, there were 307,582 filings while the number of judges during this period increased by only fifty percent. *Id.* Professor Miller attributes this "litigation explosion" to four factors: (1) "the changing demography of the legal profession"; (2) "the growth in substantive rights"; (3) "our egalitarian procedural system"; and (4) "economic incentives to litigate." See Miller, *supra*, at 2-12.

⁸ See Amendments to Rules, 97 F.R.D. 165 (1983). In 1983, the Supreme Court promulgated new rules 26(g), 53(f), and 72 to 76, and amended rules 6(b), 7(b), 11, 16, 26(a)-(b), 52(a)-(c), and 67. *Id.* The power to impose sanctions was expressly made mandatory for violations of rules 11 and 26, and discretionary for violations of rule 16. FED. R. CIV. P. 11, 16 & 26. Rule 16, as amended, states that the court must, with limited exceptions, issue a scheduling order. FED. R. CIV. P. 16(b). The order will limit the time "(1) to join other parties and to amend the pleadings; (2) to file and hear motions; and (3) to complete discovery." *Id.* It also may include the "dates for conference before trial, a final pretrial conference, and trial," and "any other matters appropriate in the circumstances of the case." *Id.* If this order is not obeyed, or a pretrial conference is missed, or an attorney is "substantially unprepared to participate" in the conference, the court may impose upon the party "the reasonable expenses incurred because of any noncompliance . . . , including attorney's fees." FED. R. CIV. P. 16(f).

Rule 26 considers the methods, scope, and limits of discovery, and requires that every request for discovery or response thereto be signed. FED. R. CIV. P. 26 (a), (b) & (g). The signature acts as a "certification" that the attorney has read the document, that it is "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law," that it is "not interposed for any improper purpose," and that it is not "unreasonable or unduly burdensome or expensive." FED. R. CIV. P. 26(g). If the rule is violated, sanctions "may include an order to pay the amount of the reasonable expenses in-

power to more efficiently manage the conduct of litigation from the initial filing of pleadings to the actual trial of the matter.⁹

Rule 11, as originally adopted in 1938, was designed to discourage the filing of frivolous or dilatory pleadings.¹⁰ The rule was rarely invoked, however, and did not effectively deter abuses.¹¹

curred because of the violation, including a reasonable attorney's fee." *Id.*

⁹ See Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313, 1313-14 (1986). These particular amendments, see *supra* note 8, were to aid the district courts in managing litigation and also to stem the tide of pretrial abuse. See Nelken, *supra*, at 1313-14. Charles Wiggins, a member of the Advisory Committee, stated that the amendments to the Rules were intended to reduce "unneeded delay and unnecessary expense in litigation." Address by Charles E. Wiggins, Annual Judicial Conference—Second Judicial Circuit of the United States (Sept. 30, 1983), reprinted in 101 F.R.D. 161, 177 (1984). The amended rules were implemented to address these problems in three ways: (1) by encouraging early judicial management to facilitate the early disposition of cases; (2) by heightening the "accountability" and "sharpen[ing] the awareness of the responsibilities of attorneys"; and (3) by deterring noncompliance with the Rules by the consistent application of sanctions. *Id.* at 177. Although the notion of extensive judicial management goes against the traditional concept of a judge being a "neutral and passive arbiter," the changes were deemed necessary because attorneys, on their own, were not efficiently conducting the pretrial phases of litigation. See Miller, *supra* note 7, at 14-15.

¹⁰ See Note, *The Dynamics of Rule 11: Preventing Frivolous Litigation by Demanding Professional Responsibility*, 61 N.Y.U. L. REV. 300, 312 & n.97 (1986) (citing original text of rule).

¹¹ See Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1, 4-5 (1976). The original rule's primary purpose was to "regulat[e] lawyer honesty in pleading." *Id.* Its major deterring factor was that if the rule was violated, the pleading would be stricken and the action would continue as if the pleading had not been served. *Id.* at 14. Additionally, if it was found to be a wilful violation involving an attorney, the attorney was subject to disciplinary proceedings. *Id.* One major problem with the enforcement of the rule was that no clear guidelines emerged for the courts to follow. *Id.* at 5-14. The enforcement procedures of the original rule were ambiguous and judges appeared hesitant to sanction attorneys. See S. KASSIN, AN EMPIRICAL STUDY OF RULE 11 SANCTIONS 3-4 (1985). The most problematic part of the rule, in regard to sanctioning attorneys, was that it required a showing of bad faith on the part of the attorney at the time of his signing of the pleading. *Id.* at 3. The difficulty in proving such a subjective belief sometimes forced the courts to simply accept an attorney's characterization of his intent. See *United States v. Long*, 10 F.R.D. 443, 445 (D. Neb. 1950) ("court is compelled to accept [the attorney's] assurances as being tendered in good faith"); Note, *supra* note 10, at 313. With the subjective standard, "there [was] no position—no matter how absurd—of which an advocate [could] not convince himself." *Wells v. Oppenheimer & Co.*, 101 F.R.D. 358, 359 n.3 (S.D.N.Y. 1984), *vacated*, 106 F.R.D. 258 (S.D.N.Y. 1985). Because of confusion as to the applicable standards and "appropriate disciplinary action," and the courts' reluctance to strike pleadings, the rule was rarely invoked and was not considered effective in deterring abuse. See 1983 Amendments of the Federal Rules of Civil Procedure, Advisory Committee, 97 F.R.D. 165, 198-99 (1983) [hereinafter *Advisory Committee's Note*]. In a study conducted for the Federal Judicial Center, it was found that in the period from 1938 to 1979, there had only been eleven reported cases in which rule 11 motions had been granted. See S. KASSIN, *supra*, at 2.

When amended in 1983, the rule's scope was enlarged to encompass not only pleadings but also "motion[s] or other paper[s]" and called for the mandatory imposition of "appropriate sanction[s]" for its violation, including the awarding of "a reasonable attorney's fee."¹² While these sanctions, which may be levied on an attorney, his client, or both,¹³ have generally been regarded as serving either a punitive¹⁴ or compensatory purpose,¹⁵ they also provide a deterrent to wilful violators¹⁶ and may educate the unwary litigator in

¹² 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 the attorney's individual name A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Id.

¹³ *Id.*

¹⁴ See Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 185 (1985). Judge Schwarzer states that "[t]he rule provides for sanctions, not fee shifting. It is aimed at deterring and, if necessary, punishing improper conduct rather than merely compensating the prevailing party. The key to invoking Rule 11, therefore, is the nature of the conduct of counsel and the parties, not the outcome." *Id.* Judge Schwarzer concedes, however, that monetary sanctions are designed to both penalize the offender and compensate the aggrieved party. *Id.* at 201. He advises that the amount of the sanction should be limited to the "consequential expenses and attorney's fees . . . incurred 'because' of the paper filed in violation." *Id.* at 203. Any amount in excess of this sum must be characterized as a fine, requiring additional due process safeguards before imposition. *Id.* at 202.

¹⁵ See Miller & Culp, *Litigation Costs, Delay Prompted the New Rules of Civil Procedure*, Nat'l L.J., Nov. 28, 1983, at 34, col. 2. Professor Miller, who served as the Reporter for the Advisory Committee of the 1983 amendments, and his coauthor suggest that even though the rule refers to "sanctions," liability should be considered a "cost-shifting technique," requiring the violator to bear the burden of his adversary's expenses. *Id.* Viewing the sanctions as compensatory in nature acknowledges "the fact that one of the injuries that can occur in this society is the injury that is inflicted by the receipt of one's own lawyers' bill." Address by Judge Charles Sifton, Symposium Sponsored by the Association of the Bar of the City of New York (Apr. 24, 1985), reprinted in *Response to a Practitioner's Commentary on the Actual Use of Amended Rule 11*, 54 FORDHAM L. REV. 28, 29 (1985).

¹⁶ See Nelken, *supra* note 9, at 1325. As a corollary to either compensation or punishment, sanctions will serve as a deterrent from other violations. *Id.* But see COMMITTEE ON

regard to the standard to which he will be held.¹⁷ Although the main purpose of rule 11 is to "streamline the litigation process,"¹⁸ the Advisory Committee on the amendment feared it might encourage satellite litigation, which would undermine this goal.¹⁹ To some extent, this fear has been realized by an increase in rule 11 litigation.²⁰ A separate concern relating to the imposition of sanctions is that due process requirements must be met.²¹ Unfortunately, courts have offered little guidance to help resolve this latter issue.²²

This Note will discuss whether monetary sanctions beyond quantifiable fees, costs, and expenses should be imposed for rule 11

FEDERAL COURTS, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, RULE 11: A PROGRESS REPORT 21 (1986) [hereinafter COMMITTEE ON FEDERAL COURTS] (reporting that judges in the Southern and Eastern Districts of New York believe rule 11 has only minor impact on attorney conduct).

¹⁷ See Schwarzer, *supra* note 14, at 201. Judge Schwarzer argues that many times a small financial penalty or reprimand is appropriate and will serve the purpose of both deterrence and education. See *id.* In the case of a reprimand, publication enhances the deterrent effect of sanctions and will further aid in educating the bar about expected standards under rule 11. *Id.* at 202.

Within the courts themselves, there is no agreement on which view reflects the underlying purpose of the rule. Compare *Westmoreland v. CBS*, 770 F.2d 1168, 1180 (D.C. Cir. 1985) (dual purpose of deterrence and punishment) with *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 254 (2d Cir. 1985) ("to punish . . . those who would manipulate the federal court system for ends inimicable to those for which it was created"), *cert. denied*, 108 S. Ct. 269 (1987).

¹⁸ See Advisory Committee's Note, *supra* note 11, at 198. An increase of sanctions should result in discouraging abusive tactics and consequently lessen frivolous claims and defenses. *Id.*

¹⁹ *Id.* at 201.

²⁰ See *Whittington v. Ohio River Co.*, 115 F.R.D. 201, 205 (E.D. Ky. 1987). Satellite litigation has been harder to limit than expected. *Id.* It was thought that there would be an initial upsurge in the use of the rule and then a leveling off after two or three years. See Address by Arthur Miller, Annual Judicial Conference—Second Judicial Circuit of the United States (Sept. 30, 1983), *reprinted in* 101 F.R.D. 161, 200 (1984). Between the date the amended rule became effective, August 1, 1983, and December 15, 1987, there were 688 rule 11 decisions reported. See Vario, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 199 (1988). The number of reported district court decisions seems to have leveled, but the number of court of appeals decisions is still rising. *Id.*

The explosion in the number of rule 11 sanctioning proceedings is mainly attributed to the use of the objective standard in determining whether there has been a violation of the attorney's duty of reasonable inquiry. *Id.* Unfortunately, the objective standard is prone to uneven application by individual judges with differing views. See *Whittington*, 115 F.R.D. at 208 n.26.

²¹ See *infra* note 32 and accompanying text.

²² In *Donaldson v. Clark*, 819 F.2d 1551 (11th Cir. 1987) (en banc), the Eleventh Circuit provided the most thorough consideration yet undertaken by any of the circuit courts of the "procedures and standards" applicable to rule 11 motions. See *id.* at 1553.

violations. Additionally, the constitutional due process aspects for the imposition of these sanctions will be addressed. Finally, this Note will suggest a procedural solution for the imposition of these sanctions, keeping in mind the spirit and intent behind the rule.

SANCTIONS: PUNITIVE OR COMPENSATORY

Rule 11 states that a court may levy "an appropriate sanction, which may include an order to pay . . . the amount of the reasonable expenses incurred . . . including a reasonable attorney's fee."²³ "Appropriate sanctions" has been interpreted by various courts to include not only quantifiable costs, fees, and expenses, but also a monetary sum in the nature of a fine.²⁴ Although courts have struggled to differentiate between an "appropriate sanction" and a "punitive fine," confusion still exists.²⁵

It is submitted that the amount of a monetary sanction imposed for violating rule 11 should not exceed the opposing party's attorney's fees, costs, and expenses incurred because of the violation. Although the Advisory Committee's Note is silent on this point, it is suggested that the use of the phrase "including a reasonable attorney's fee" is a limiting clause and not merely illustrative.²⁶

A major concern with the imposition of rule 11 fines is that such sanctions may overlap the congressionally created penalty for

²³ FED. R. CIV. P. 11.

²⁴ See, e.g., *Naked City, Inc. v. Aregood*, 117 F.R.D. 634, 636 (N.D. Ind. 1987) (fine of \$5,000 imposed for failure to comply with court order); *Olga's Kitchen of Hayward, Inc. v. Papo*, 108 F.R.D. 695, 700 (E.D. Mich. 1985) (in addition to paying attorneys' fees, costs, and expenses, party and his counsel "also directed to pay the Clerk of the Court \$1,000 because of the efforts required by [the judge] in response to their actions in this case"), modified, 815 F.2d 79 (6th Cir. 1987); *Itel Containers Int'l v. Puerto Rico Marine Management, Inc.*, 108 F.R.D. 96, 106 (D.N.J. 1985) ("modest" or "reasonable" fine of \$5,000 "to vindicate the dignity of the judicial process"); see also *Mercury Serv., Inc. v. Allied Bank*, 117 F.R.D. 147, 156 (C.D. Cal. 1987). In *Mercury*, the court held that "[i]n appropriate circumstances, a district court may impose a punitive sanction for the filing of a paper that lacks factual foundation and is intended to mislead the Court and opposing parties, even if the paper does not significantly delay proceedings, because of the disrespect shown to judicial process." *Id.*

²⁵ See, e.g., *Miranda v. Southern Pac. Transp. Co.*, 710 F.2d 516, 521 (9th Cir. 1983) ("[b]ecause the term 'fine' is generally associated in common parlance with criminal offenses we utilize the term 'monetary sanction' to avoid this connotation").

²⁶ See Advisory Committee's Note, *supra* note 11, at 198. The Committee simply stated that the rule is "expanding the equitable doctrine permitting the court to award expenses, including attorney's fees, to a litigant whose opponent acts in bad faith in instituting or conducting litigation." *Id.*

criminal contempt.²⁷ Before a fine exceeding \$500 may be imposed for criminal contempt, a party has a right to a trial by jury.²⁸ Both legal commentators²⁹ and courts³⁰ have recognized that in some instances a "sanction" under rule 11 may constitute a latent criminal fine. Furthermore, since rule 11 was not promulgated by legislative enactment, sanctions should be imposed with "restraint and discretion," rather than for punitive purposes.³¹

THE DUE PROCESS DILEMMA

It is undisputed that before a court can impose monetary sanctions, due process must be afforded to the sanctioned party.³²

²⁷ See 18 U.S.C. § 401 (1982). Criminal contempt involves the doing of an act prohibited by the court while civil contempt is the refusal to do something that has been ordered by the court. See *Shillitani v. United States*, 384 U.S. 364, 368 (1966). A criminal contempt fine is usually payable to the United States. See *Parker v. United States*, 153 F.2d 66, 70 (1st Cir. 1946).

²⁸ See FED. R. CRIM. P. 42(b).

²⁹ See Schwarzer, *supra* note 14, at 202-03.

The criminal character of a fine brings into play additional due process safeguards. . . . To impose a fine under Rule 11 without extending the procedural protections of criminal contempt proceedings risks reversal on appeal and is inadvisable.

The safer course, therefore, is to limit sanctions to consequential expenses and attorney's fees, i.e., those incurred "because" of the paper filed in violation.

Id. (footnotes omitted).

There is also the possibility that when a court wishes to punish a party, rule 11 will be invoked "to circumvent the due process safeguards to which a party is entitled before criminal sanctions are imposed." See *Nelken*, *supra* note 9, at 1338.

³⁰ See *In re Yagman*, 796 F.2d 1165, 1180-81 (9th Cir. 1986), *cert. denied*, 108 S. Ct. 450 (1987). A monetary sanction may indirectly constitute a criminal fine if, for example, the amount imposed is grossly disproportionate to the attorney's actions. *Id.* at 1180. Additionally, if during the time while the action was pending it became evident that the attorney and the judge were personal adversaries, the nature of the sanction must come under closer scrutiny. *Id.* at 1181. If it is found that the sanction constitutes a criminal fine, "additional due process safeguards are called into play." *Id.* "[T]his point bears special emphasis lest the specter of satellite litigation trample the due process rights that the targets of judicial sanctions undeniably possess." *Donaldson v. Clark*, 819 F.2d 1551, 1563 (11th Cir. 1987) (en banc) (Johnson, J., concurring).

³¹ See *Eash v. Riggins Trucking, Inc.*, 757 F.2d 557, 573-74 (3rd Cir. 1985) (en banc) (Sloviter, J., dissenting). In *Eash*, the dissent argued "that it is Congress . . . and not the judiciary that has the power to establish crimes and penalties A monetary sanction unrelated to the other parties' costs is a fine, and a fine can be imposed only to punish conduct that has been prohibited by the legislature." *Id.* (Sloviter, J., dissenting).

³² See, e.g., Advisory Committee's Note, *supra* note 11, at 201 ("procedure obviously must comport with due process requirements"); see also *Sanko S.S. Co. v. Galin*, 835 F.2d 51, 53 (2d Cir. 1987) (procedure for imposing sanctions "must comport with due process requirements"); *Donaldson*, 819 F.2d at 1558 (sanctions under rule 11 are interests qualifying for due process protection).

In its barest form, procedural due process requires both notice and an opportunity to be heard.³³ It is only under extraordinary circumstances that these protections need not be afforded.³⁴ The extent of the due process that must be given is not rigid and depends

The fact that the party or attorney is generally sanctioned for acts done in a judicial proceeding is irrelevant in determining whether due process notice must be afforded. See *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 354-55 (1871). As the Supreme Court stated in *Bradley*, a case concerning the disbarment of an attorney:

[E]xcept where matters occurring in open court, in presence of the judges, constitute the grounds of its action, the power of the court should never be exercised without notice to the offending party of the grounds of complaint against him, and affording him ample opportunity of explanation and defence. This is a rule of natural justice, and is as applicable to cases where a proceeding is taken to reach the right of an attorney to practice his profession as it is when the proceeding is taken to reach his real or personal property.

Id.

These due process considerations are only applicable in instances where monetary sanctions are imposed, not where the attorney is merely reprimanded, since a reprimand is merely an injury to reputation, not a deprivation deserving due process protection. See CONSTITUTIONAL LAW, *supra* note 2, § 13.4, at 470. Injury to reputation alone is not considered a protected interest; however, when the injury is of such magnitude that it will prevent a person from pursuing a significant range of employment opportunities, due process rights are applicable. See *Paul v. Davis*, 424 U.S. 693, 701 (1976).

³³ See *Miranda v. Southern Pac. Transp. Co.*, 710 F.2d 516, 522-23 (9th Cir. 1983). Affording attorneys procedural protections such as notice, an opportunity to be heard, or a hearing will safeguard constitutional due process rights by guaranteeing that:

(1) the attorneys will have an opportunity to prepare a defense and to explain their questionable conduct at a hearing; (2) the judge will have time to consider the severity and propriety of the proposed sanction in light of the attorneys' explanation for their conduct; and (3) the facts supporting the sanction will appear in the record, facilitating appellate review.

Id.

³⁴ See *Miranda*, 710 F.2d at 522. A common "extraordinary circumstance" is a criminal contempt action. *Id.* Such a summary proceeding is necessary only when there is a need to defend the judicial system itself. *Id.* Even if it would be appropriate to disbar an attorney for his contemptuous act, the disbarment would be subject to full due process protection. *Id.*; see *Cooke v. United States*, 267 U.S. 517, 537 (1925). The Supreme Court has stated that even contempt, "except of that committed in open court," requires that the person be given notice of the charge against him, afforded the opportunity to present defenses, have access to counsel, and be entitled to call witnesses. *Id.* The Court has stated that the need for summary contempt proceedings arises when:

To preserve order in the court room for the proper conduct of business, the court must act instantly to suppress disturbance or violence or physical obstruction or disrespect to the court when occurring in open court. There is no need of evidence or assistance of counsel before punishment, because the court has seen the offense.

Such summary vindication of the court's dignity and authority is necessary.

Id. at 534. The circumstances which allow a court to exercise its power for contempt are now codified, see 18 U.S.C. § 401 (1982), as is the procedure required for contempt actions. See FED. R. CRIM. P. 42(b).

on the circumstances as they are presented.³⁵

Due process requires that the party against whom sanctions are being considered receives notice of the contemplated action in a form that apprises him of the reasons for the action.³⁶ Since a motion for sanctions can be raised by either opposing counsel or by the court itself,³⁷ the procedure for affording notice may vary.³⁸

The Committee on Federal Courts of the New York City Bar Association surveyed judges from the Southern and Eastern Districts of New York to ascertain which notice procedures were most commonly used.³⁹ The Committee concluded that lawyers commonly request the imposition of sanctions by adding them to other motions that are presented to the court.⁴⁰ Rarely were the motions for sanctions made by separate motion or fully briefed.⁴¹ The Committee, in its recommendations, has suggested that all motions for the imposition of sanctions "be made in writing, on notice, and supported by separate factual and legal arguments."⁴² Furthermore, the Committee has recommended that if such motions are not in this form, they should not be considered.⁴³ In its response to the Committee's recommendations, the Standing Committee, though discouraging the appending of rule 11 sanctioning motions

³⁵ See *Szabo Food Serv. v. Canteen Corp.*, 823 F.2d 1073, 1084 (7th Cir. 1987), cert. dismissed, 108 S. Ct. 1101 (1988). In *Szabo*, under a rule 11 motion, counsel requested over \$10,000 in attorneys' fees. *Id.* The court recognized the importance of differentiating between foolish or obvious motions, and more significant and serious motions for rule 11 sanctions. *Id.* "A serious Rule 11 motion is not a gnat to be brushed off with the back of the hand. This motion was serious; it should have received serious attention." *Id.*; see also *Donaldson v. Clark*, 819 F.2d 1551, 1561 (11th Cir. 1987) (en banc) ("more serious the possible sanction . . . the more process that will be due"). See generally *supra* note 3 and accompanying text (discussing "process" requirements).

³⁶ See *infra* notes 37-53 and accompanying text.

³⁷ See *supra* note 12 (text of FED. R. CIV. P. 11). Before rule 11 was amended in 1983, courts believed they had the implied right to raise the issue of sanctions *sua sponte*. See Advisory Committee's Note, *supra* note 11, at 200. The rule, as amended, makes this explicit. *Id.* Courts have not been hesitant to raise the issue. See Nelken, *supra* note 9, at 1328. For example, from August 1, 1983 to August 1, 1985, out of 233 cases in which sanctions were considered, the court raised the issue *sua sponte* 30.6% of the time. *Id.*

³⁸ See Advisory Committee's Note, *supra* note 11, at 200. The Advisory Committee did not explicitly state that notice should be in writing, only that the court and the offending party should be notified. See *id.* It is suggested that a writing would prevent any confusion or misunderstanding. See *infra* notes 46-48 and accompanying text.

³⁹ See COMMITTEE ON FEDERAL COURTS, *supra* note 16, at 24.

⁴⁰ See *id.*

⁴¹ *Id.*

⁴² *Id.* at 34.

⁴³ *Id.*

onto other substantive motions, has contended that a rule requiring all rule 11 motions to be in writing and fully briefed is too rigid.⁴⁴ The Standing Committee suggests that the decision to file a separate rule 11 motion should be left initially to the moving party; however, if the judge determines that more information is required, he or she should have the discretion to request briefing of the issue.⁴⁵

It is submitted that the courts should require the party who moves pursuant to rule 11 to file a written notice with the court and to serve it on the alleged violator, noting the specific documents that are believed to contravene the rule, the basis for the motion, and the requested expenses, fees, or sanctions.⁴⁶ Besides satisfying the due process notice requirement, this procedure would supply the sanctioned attorney with the particulars upon which to base his defense⁴⁷ and would facilitate any subsequent appeal.⁴⁸

⁴⁴ See COMMENTS OF THE STANDING COMMITTEE ON THE IMPROVEMENT OF CIVIL LITIGATION ON A REPORT BY THE FEDERAL COURTS COMMITTEE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK CONCERNING AMENDED RULE 11, at 13 (1987) [hereinafter STANDING COMMITTEE COMMENTS].

⁴⁵ *Id.* at 13-14. The Standing Committee has asserted that when a motion for imposition of sanctions is raised, it can often be settled by a telephone conference, thereby eliminating the time and expense required to brief and argue the matter. *Id.*

⁴⁶ See A.B.A., Trial Evidence Committee, *Initial Draft—Rule 11 Standards*, § m(5), at 52 (1988). Any party against whom sanctions are being considered must receive notice of the sanction and the reasons for its imposition in order that due process be satisfied. See *Donaldson v. Clark*, 819 F.2d 1551, 1559-60 (11th Cir. 1987) (en banc). It must be "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Contained within the notice should be the amount of the attorney's fees requested, broken down into hours spent and rate per hour for the personnel supplying the services. See *Pravic v. U.S. Indus.-Clearing*, 109 F.R.D. 620, 623 (E.D. Mich. 1986). Rough estimates of the time and money expended should not be accepted. See *National Ass'n of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1327 (D.C. Cir. 1982); cf. *Shrock v. Altru Nurses Registry*, 810 F.2d 658, 661-62 (7th Cir. 1987). In *Shrock*, the defendant moved for attorney's fees under a civil rights statute, but the motion was denied by the district court. *Id.* at 661. On appeal, the circuit court stated that the defendant would probably be entitled to attorney's fees under rule 11 because the standard for awarding them is different than under the civil rights statute. *Id.* at 661-62. However, the court ruled that the plaintiff had not received adequate notice to defend against a rule 11 motion and the action was remanded. *Id.* at 662.

⁴⁷ See *Donaldson*, 819 F.2d at 1559-60. The notice aspect of due process requires that the party be forewarned of the reasons why the imposition of sanctions is being considered. *Id.* The notice need not be in the form of a complaint, *id.* at 1560, but it is suggested that requiring a writing would have the beneficial effect of narrowing the issues to be argued and decided at the subsequent hearing without further burdening the court.

⁴⁸ *Id.*

It is suggested that when the imposition of sanctions is raised *sua sponte* by the court, care must be exercised in assuring that sufficient notice is received by the party. One view is that the existence of the rule itself gives adequate warning of what is expected from a party, thereby satisfying the requirement of notice for due process purposes.⁴⁹ The opposing viewpoint reasons that while the rule sets forth the minimum standards that must be met for any document filed, it fails to satisfy due process requirements because it does not give the party notice of the specific reasons for which rule 11 has been invoked.⁵⁰

It is suggested that the view adopted by the Tenth Circuit, in the context of sanctions for frivolous appeals, is the most efficient means of affording notice to all parties involved. The Tenth Circuit requires the trial court to issue an order to show cause for not imposing sanctions.⁵¹ The degree of specificity of notice depends on the type of violation and the party to be sanctioned.⁵² As the Supreme Court has declared, "[t]he adequacy of notice . . . respecting proceedings that may affect a party's rights turns, to a considerable extent, on the knowledge which the circumstances show such party . . . to have of the consequences of his own conduct."⁵³

The second major component of due process is an opportunity to be heard "at a meaningful time and in a meaningful manner."⁵⁴

⁴⁹ See *id.*; *Rowland v. Fayed*, 115 F.R.D. 605, 608 (D.D.C. 1987); see also *Lepucki v. Van Wormer*, 765 F.2d 86, 88 (7th Cir.) (while attorney may not know court will impose sanctions, knowledge that court can impose them is sufficient notice), *cert. denied*, 474 U.S. 827 (1985).

⁵⁰ See *Tom Growney Equip., Inc. v. Shelley Irrigation Dev., Inc.*, 834 F.2d 833, 836 n.5 (9th Cir. 1987) (distinguishing "between the general notice about sanctions [from rule 11] and notice that sanctions are being considered").

⁵¹ See *Braley v. Campbell*, 832 F.2d 1504, 1515 (10th Cir. 1987) (en banc). *Braley* involved a "patently frivolous, multiplicitious and vexatious" appeal, and consequently, the circuit court sanctioned the attorney under 28 U.S.C. § 1927 and FED. R. APP. P. 38. See 832 F.2d at 1507. The court stated that when a court considers the imposition of sanctions *sua sponte*, due process is satisfied by the issuance of an order to show cause why they should not be imposed and by giving the party an opportunity to respond. *Id.* at 1515.

⁵² See *Donaldson v. Clark*, 819 F.2d 1551, 1560 (11th Cir. 1987) (en banc). Notice should be more specific for violations of the rule grounded in an alleged lack of legal foundation, as opposed to a document without a factual basis. *Id.* Furthermore, if sanctions are being considered to be levied on the client alone, notice would also need to be more specific. *Id.*

⁵³ *Link v. Wabash R.R.*, 370 U.S. 626, 632 (1962).

⁵⁴ *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); see *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring). Every person is entitled to a hearing prior to an adjudication that will result in a deprivation of property. *Id.*; see also *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1980) (sanctions should not be im-

The type of hearing that must be afforded is not "a technical conception with a fixed content"⁵⁶ but depends on a balancing of factors as identified by the Supreme Court in *Mathews v. Eldridge*:⁵⁶

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.⁵⁷

It is submitted that, in the sphere of sanction hearings, there has been neither a consistent application of procedure, nor development of any objective standards for the types of penalties imposed. To date, the schemes followed by the courts have ranged from a full contempt-like hearing⁵⁸ to no hearing at all.⁵⁹

posed "without fair notice and an opportunity for a hearing on the record"); *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) (right to notice and hearing).

⁵⁶ *McGrath*, 341 U.S. at 162 (Frankfurter, J., concurring); see *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 895 (1961). "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Id.*

⁵⁷ 424 U.S. 319 (1976).

⁵⁷ *Id.* at 335. The Court stated that when evaluating these factors, the cost of the substitute or additional protections may outweigh the benefits received by the individual and society. *Id.* at 348. In the final analysis, the procedure should be designed with regard to "the decision to be made, [and] to 'the capacities and circumstances of those who are to be heard' to insure that they are given a meaningful opportunity to present their case." *Id.* at 349 (quoting *Goldberg v. Kelly*, 397 U.S. 254, 268-69 (1970)).

⁵⁸ See *Cotner v. Hopkins*, 795 F.2d 900, 903 (10th Cir. 1986). The Eleventh Circuit, however, has distinguished rule 11 sanctions from criminal contempt as follows: "The former is an unjustified failure to carry out an administrative responsibility as an officer of the court; the latter is an affront to the authority of the judge." *Donaldson v. Clark*, 819 F.2d 1551, 1559 (11th Cir. 1987) (en banc) (quoting *Miranda v. Southern Pac. Transp. Co.*, 710 F.2d 516, 519 (9th Cir. 1983)).

⁵⁹ See, e.g., *Oliveri v. Thompson*, 803 F.2d 1265, 1280 (2d Cir. 1986) (where judge awarding sanctions has full knowledge of relevant facts, no hearing needed), *cert. denied*, 107 S. Ct. 1373 (1987); *McLaughlin v. Bradlee*, 803 F.2d 1197, 1205 (D.C. Cir. 1986) (plaintiff not entitled to hearing on whether sanctions should be levied or on their amount); *Brown v. National Bd. of Medical Examiners*, 800 F.2d 168, 173 (7th Cir. 1986) (where attorney's incompetence led to sanctions, no hearing needed).

Courts that have refused to grant a subsequent hearing have often asserted that it would be of no value or that there was a violation of the rule as a matter of law. See, e.g., *Donaldson*, 819 F.2d at 1560 (no additional notice beyond very existence of rule 11); *Rodgers v. Lincoln Towing Serv.*, 771 F.2d 194, 205-06 (7th Cir. 1985) (no hearing required where it would serve "no useful purpose"); *Lepucki v. Van Wormer*, 765 F.2d 86, 88 (7th Cir.) (rule 11 constitutes sufficient notice), *cert. denied*, 474 U.S. 827 (1985).

However, even if a court subscribes to the proposition that the mere presence of rule 11

In denying a right to a hearing, some courts have relied on the dictates of the Advisory Committee's Note.⁶⁰ It is submitted that denial of a hearing is both a violation of the due process clause and contrary to the intent of the Advisory Committee. While the Advisory Committee suggests that, when possible, the sanction proceedings should be limited "to the record,"⁶¹ this language must be read in light of the principle that "discovery should be conducted . . . only in extraordinary circumstances."⁶² The various factors bearing on what constitutes "reasonable inquiry" before a violation has occurred should also be considered.⁶³ It is submitted that "on the record" should not be read so narrowly as to encompass only the record as it stands when a motion for rule 11 sanctions is made; rather, it should be read to include the record after arguments for and against their imposition are heard.⁶⁴

The Committee on Federal Courts has stated that in certain situations a "strong presumption" should exist in favor of granting an evidentiary hearing.⁶⁵ It has asserted that the party to be sanctioned should be given the opportunity to provide any type of evi-

constitutes notice, the court still should not totally dispense with a hearing. See *Tom Growney Equip. v. Shelley Irrigation Dev.*, 834 F.2d 833, 835 (9th Cir. 1987); *Hill v. Norfolk & W. Ry.*, 814 F.2d 1192, 1206 (7th Cir. 1987) (Parsons, J., dissenting). The ultimate decision to impose sanctions rests with the court, but by not granting a hearing, "an assessed sanction necessarily appears to be based on caprice or emotion, and not on a monitored exercise of judicial discretion." *Id.*

⁶⁰ See, e.g., *Donaldson*, 819 F.2d at 1560 (noting that Advisory Committee's Note does not contemplate hearing); *McLaughlin*, 803 F.2d at 1205 (limit sanction proceedings to record; party not entitled to hearing); *Doering v. Union County Bd. of Chosen Freeholders*, No. 86-1238 (D.N.J. Sept. 28, 1987) (LEXIS, Genfed library, Dist file) (must be "extraordinary circumstances" to grant hearing); *Rowland v. Fayed*, 115 F.R.D. 605, 608 (D.D.C. 1987) (limit to record to ensure that efficient operation of pleadings not offset by satellite hearings).

⁶¹ See Advisory Committee's Note, *supra* note 11, at 201.

⁶² *Id.*

⁶³ *Id.* at 199. "Reasonable inquiry" depends on a consideration of the following: (1) the time the signer had available for investigation; (2) whether the facts contained in the document were provided by the client; (3) was the legal argument asserted based on "a plausible view of the law;" and (4) did he rely on information provided by another attorney. *Id.*

⁶⁴ See *Miller & Culp, The New Rules of Civil Procedure: Managing Cases, Limiting Discovery*, Nat'l L.J., Dec. 5, 1983, at 23, col. 1. Professor Miller and his coauthor state that the satellite litigation feared by the Advisory Committee was that which entailed discovery. *Id.* at 34, col. 3. They suggest that normally, "only a short hearing . . . should be necessary." *Id.* It is submitted that what the Advisory Committee sought to avoid was a full evidentiary hearing.

⁶⁵ See COMMITTEE ON FEDERAL COURTS, *supra* note 16, at 34. An example of such a situation is when there is an issue of whether an attorney's pre-filing factual investigation was sufficient. *Id.* at 34-35.

dence that it feels is appropriate to aid the court in coming to a decision.⁶⁶ In contrast, the Standing Committee has opposed the idea that a presumption should exist in certain situations, preferring that each case be decided individually by taking into consideration whether there are underlying facts that should be brought out and whether the sanctioned party has been given a chance to explain his actions.⁶⁷

To achieve the goals of rule 11, it is suggested that while there should be a presumption against an evidentiary hearing, a party should at least be allowed to submit briefs and affidavits, and present oral arguments against the imposition of sanctions.⁶⁸ This will allow the court to make a reasoned judgment, preserve an adequate record for appeal, and ensure that the sanctioned party will be afforded his due process guarantees.⁶⁹

CONCLUSION

When amendments focusing on the pretrial activities of the parties involved were made to the Federal Rules of Civil Procedure in 1983, it was felt that the action would streamline the litigation process. Unfortunately, in the five ensuing years, this goal has not been realized; indeed, in some ways the amended rule 11 has had a detrimental effect on the efficiency of the litigation process. Moreover, in trying to attain this goal, due process safeguards have sometimes been sacrificed through inconsistent application.

This Note has attempted to explore some of these inconsistencies and to put forth proposals for the uniform application of sanctioning procedures. Although this Note has concerned itself with sanctions under rule 11, these proposals should be equally applica-

⁶⁶ *Id.* at 34. This would include "briefs, affidavits, live testimony, or any other form of evidence." *Id.*

⁶⁷ See STANDING COMMITTEE COMMENTS, *supra* note 44, at 14.

⁶⁸ See *Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983). The Supreme Court's admonition in *Hensley* that a "request for attorney's fees should not result in a second major litigation" seems to favor a presumption against an evidentiary hearing. *Id.* at 437; see also Schwarzer, *supra* note 14, at 198. Judge Schwarzer states:

[O]rdinarily the opposition will consist of an explanation and justification . . . [and] can be adequately presented by memorandum and declarations. Oral argument may be helpful, even if not required by due process. An evidentiary hearing would not seem to be necessary and should be avoided, unless the court must find disputed facts or resolve issues of credibility.

Id.; see also *Braley v. Campbell*, 832 F.2d 1504, 1515 (10th Cir. 1987) (party to be sanctioned should be allowed to file briefs or otherwise be heard).

⁶⁹ See *Miranda v. Southern Pac. Transp. Co.*, 710 F.2d 516, 522-23 (9th Cir. 1983).

ble to other sanctioning authority granted by the rules. It is suggested that a new rule to the Federal Rules of Civil Procedure, similar to Federal Rule of Appellate Procedure 46(c),⁷⁰ setting forth the notice and hearing requirements to be followed for any violation of the rules, be promulgated for all sanctionable acts.⁷¹

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⁷⁰ See FED. R. APP. P. 46(c). The rule states in pertinent part that "[a] court of appeals may, after reasonable notice and an opportunity to show cause to the contrary, and after a hearing, if requested, take any appropriate disciplinary action against any attorney who practices before it for . . . failure to comply with these rules or any rule of the court." *Id.*

⁷¹ See Address by Judge Abraham D. Sofaer, Annual Judicial Conference—Second Judicial Circuit of the United States (Sept. 30, 1983), *reprinted in* 101 F.R.D. 194, 196 (1984). Judge Sofaer foresaw this problem shortly after the amendments were promulgated and stated that "sanctioning authority should be provided in a clear way, not scattered all over the Federal Rules, and we should be informed what procedures we have to use before we may impose those sanctions." *Id.*