Recent developments in rulings on sanctions

Among the decisions from the past two years, several turn on state of mind—of the offender or the accuser.

BY GREGORY P. JOSEPH

In the realm of sanctions, state of mind matters. Some sanctions require bad faith, and even if negligence is enough, "subjective intent can bear on whether to impose a sanction and what amount to fix....Even a dog, said Holmes, distinguishes between being kicked and being stumbled over." *Ameriquest Mortgage Co. v. Nosek*, 609 F.3d 6, 9 (1st Cir. 2010).

THE PRACTICE

Commentary and advice on developments in the law

This column explores recent sanctions decisions, a number of which turn on state of mind—of the offender or of the accuser.

• *Bad faith*. The court may impose inherent power sanctions if counsel or client act in bad faith. Given that counsel is the agent of the client, one might think that counsel's bad faith is attributable to the client. Ordinarily, it is not. The rule is that bad faith is personal to the offender. See, e.g., *In re Porto*, 2011 U.S. App. Lexis 13941 (11th Cir. July 8, 2011) ("While a client may be made to suffer litigation losses because of her attorney's missteps, [we] reject...the notion that an innocent client must also suffer sanctions because of misconduct by her attorney that is not fairly attributable to her. Without more, the rule that the sins of the lawyer are visited on the client does not apply...and a court must specify conduct of the plaintiff herself that is bad enough to subject her to sanctions").

In particularly egregious situations, however, the court may feel compelled to make an exception, if that is essential to impose a meaningful remedy, which will affect the client. See, e.g., *O2 Micro Int'l Ltd. v. Beyond Innovation Tech. Co.*, 2011 U.S. App. Lexis 23125 (Fed. Cir. Nov. 18, 2011) (imputing bad faith of defense counsel to defendant when counsel violated an in limine order not to refer to the fact that the plaintiff was headquartered in the Cayman Islands by asking on voir dire: "Now, are there any of you who have a problem with a company that puts its headquarters offshore on a Caribbean island in order to avoid paying U.S. taxes?"—expert testimony excluded).

THE REVERSE IS ALSO TRUE

Just as the bad faith of counsel cannot generally be imputed to the client, the reverse is also true—the bad faith of the client is not imputed to counsel. See, e.g., *In re Aston-Nevada L.P.*, 409 F. App'x 107 (9th Cir. 2010) ("It strains reason to find that an attorney who agrees to represent a client, learns within a few days that the client's position lacks merit, and seeks to dismiss the action the next day, acts in bad faith. It...may be perfectly fair to conclude that [the clients] acted in bad faith and with improper purpose when they filed the...case. But, it is entirely different to impute that bad faith and improper purpose to a careless attorney and his entire firm").

• *Unclean-hands defense*. Observing that "all sanctions originate from the realm of equity," the U.S. Court of Appeals for the 3d Circuit recognized something of an unclean-hands defense in *Bull v. UPS Inc.*, 2012 U.S. App. Lexis 54 (3d Cir. Jan. 4, 2012). *Bull* reversed a spoliation sanction of dismissal with prejudice based on the plaintiff's failure to turn over original documents because copies had been produced and the defendant never seriously pursued the originals. Distressed that the defendant's "representations to the District Court, and this Court, were less than candid," the Bull court concluded "that, apart from the merits of the appeal, without the benefit of clean hands here, [the defendant] should not be the beneficiary of a sanction that we are, under most circumstances, already loathe to affirm."

• *Simple mistake*. Federal Rule of Civil Procedure 11 was not intended to punish innocent, inadvertent errors. There must be unreasonable conduct or bad faith. A simple mistake may not fall in either of these categories. See, e.g., *Boone v. JP Morgan Chase Bank N.A.*, 2011 U.S. App. Lexis 23813 (11th Cir. Nov. 30, 2011) (defense counsel filed a document without redacting the plaintiff's Social Security number, as required by law, but promptly did so once counsel realized the error; held, no sanctions because "there is no evidence that [counsel] acted unreasonably or for an improper purpose"); *In re Bees*, 562 F.3d 584 (4th Cir. 2009) (when misstatement in one part of brief was contradicted a few pages later, court could "only conclude that [the] error...was an inadvertent mistake, not a deliberate attempt to mislead or a failure to conduct a reasonable inquiry" and did "not justify Rule 11 sanctions"); *McCreary v. Wertanen*, 2010 U.S. App. Lexis 27404 (6th Cir. Dec. 8, 2010) (no sanctions for a "mistake [that] was the result of a simple misunderstanding" and not made in bad faith).

• *Reliance on client*. Counsel may not generally rely exclusively on representations of fact made by the client, if corroboration is available, not only because the client has a stake in the outcome but also because, if the client were to appear pro se, the client would have to undertake a reasonable inquiry. Gregory P. Joseph Sanctions: The Federal Law of Litigation Abuse § 8(A)(6) (Supp. 2012). At the same time, however, a "lawyer need not routinely assume the duplicity or gross incompetence of her client....It is...usually reasonable for a lawyer to rely on information provided by a client, especially where that information is superficially plausible and the client provides its own records which appear to confirm the information." *In re Taylor*, 655 F.3d 274 (3d Cir. 2011).

RULE 11 AND AIDING PRO SE LITIGANTS

• *Ghostwriting*. Because standards are relaxed when judges review the papers of pro se litigants, several lower courts have held that ghostwriting by an attorney of a pro se filing is both unethical and a deliberate evasion of the responsibilities imposed by Rule 11. The 2d Circuit rejected this view in *In re Liu*, 2011 U.S. App. Lexis 23326 (2d Cir. Nov. 22, 2011). Finding no ethical violation, the court held that assisting a pro se litigant with drafting constitutes a permissible form of limited representation. *Liu* also declared in a footnote that Rule 11 is inapplicable "since that rule...*requires the signature of the 'attorney of record,'*...*not a drafting attorney*. See also Fed. R. Civ. P. 11(b) (specifying the representations that are made by an attorney when 'presenting' a pleading to the court 'whether by signing, filing, submitting, or later advocating it')" (emphasis in original).

• *Proportionality and imprisonment*. In reversing as too harsh a dismissal with prejudice imposed under Rule 16(f), the 7th Circuit in *Williams v. Adams*, 660 F.3d 263 (7th Cir. 2011), emphasized that "Court-ordered punishments (as distinct from punishments specified in legislation) are required to be proportioned to the wrong." The court reversed because, inter alia, dismissal had been imposed due to the plaintiff's failure to pay a $9,000 sanction, which the plaintiff was unable to pay; the sanction had been imposed solely because of his lawyer's misconduct; and the lawyer ultimately had paid the sanction. *Williams* held: "Inability to pay a fine has been held not to justify the alternative of imprisonment,...and a plaintiff's inability to pay a monetary sanction imposed in a civil lawsuit should not automatically justify the alternative sanction of dismissal."

Inability to pay a fine and refusal to do so, however, are two distinct concepts. Incarceration for civil contempt for refusing to pay a $24,000 sanction that the offender was capable of paying—but refused to pay—was affirmed by the 4th Circuit in *Young Again Prods. Inc. v. Ortega*, 2011 U.S. App. Lexis 25713 (4th Cir. Dec. 23, 2011) ("In light of [multiple] flagrant violations [of court orders], we hold that the district court did not abuse its discretion when it held [the defendant] in civil contempt").

• *Reputation and appealability*. The general rule is that mere judicial criticism of a lawyer's conduct, standing alone, does not constitute a sanction and is not appealable. In contrast, a formal reprimand is an appealable sanction. The middle ground is murky. The 5th Circuit held in *Omega Claims Solutions Inc. v. N'Site Solutions Inc.*, 2011 U.S. App. Lexis 23282 (5th Cir. Nov. 18, 2011), that the conclusion in a district court order that counsel's actions were "sufficient to warrant the sua sponte imposition of Rule 11 sanctions" was unappealable because the district court also, expressly, declined to impose a sanction. In contrast, the 3d Circuit ruled in *Adams v. Ford Motor Co.*, 653 F.3d 299 (3d Cir. 2011), that a factual finding that a lawyer had violated an ethical rule was appealable—even though the district court had explicitly declined to impose a reprimand—in light of " 'the importance of an attorney's professional reputation, and the imperative to defend it when necessary.' "

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