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PLAYING HARDBALL IN FEDERAL COURT: JUDICIAL ATTEMPTS TO REFEREE UNSPORTSMANLIKE CONDUCT

BRADLEY W. FOSTER

Do you comb through case law looking for technical excuses not to respond to those interrogatories? Do you refuse to stipulate to anything? Fight to the death over every issue? Refuse to back down in the face of overwhelming odds? Is this the lawyer you are? Or aspire to be? Or fear to come up against? This, my friend, is hardball.¹

I. THE PROBLEM

INCREASINGLY, LAWYERS ARE approaching trial advocacy with a Rambo-like attitude, a belief that litigation is a war which must be won at all costs.² This approach has been colorfully dubbed as "hardball" lawyering.³ The term has often been used to describe a course of conduct in which an attorney "is personally antagonistic or insistent on all of the procedural rules being followed."⁴ One commentator has stated that hardball tactics are frequently characterized by the following: a mindset that liti-

¹ Bodine, *In This Issue*, A.B.A. J., July 1, 1987, at 10.

² See Sayler, *Rambo Litigation*, A.B.A. J., Mar. 1, 1988, at 78.

³ See Goldberg, *Playing Hardball*, A.B.A. J., July 1, 1987, at 48. "'Hardball is playing with a baseball, not a softball; it's faster and harder hitting and implies a high level of professionalism and the major leagues.' But . . . it doesn't mean spitball or sleazeball. 'It's a game where winning within the bounds of the rules is the most important thing.'" *Id.* at 49 (quoting Monroe Freedman, a legal ethics professor at Hofstra University).

⁴ *Id.* at 48.

gation is warfare and a concurrent tendency to describe trial advocacy in military terms, a belief that common courtesy and civility ill-befit the true warrior, a willingness to manipulate facts and fire off unnecessary motions and discovery requests in order to intimidate the opposing party, and an overriding urge to put the attorney on center stage, rather than the client or his cause.⁵ While the term "hardball" probably defies a comprehensive definition, most lawyers will agree that, like Justice Stewart with pornography, you know it when you see it.⁶

Most attorneys play hardball occasionally, generally as a last resort, but an alarming number do so routinely, relishing their macho image and the adrenal rush of courtroom battle.⁷ Champions of this form of advocacy argue that hardball tactics are essential for attorneys in fulfilling their duty to act as zealous advocates for their clients.⁸ Opponents counter that hardball tactics needlessly waste both time and resources, delaying the administration of justice and threatening to place litigation beyond the financial reach of most litigants.⁹

⁵ Sayler, *supra* note 2, at 78.

⁶ See *id.* Because of the inherent nature of the adversary system, most hardball is played in the field of litigation. See Goldberg, *supra* note 3, at 49. One lawyer has stated, "When I go into the courtroom, I come in to do battle . . . I'm not there to do a minuet." *Id.*

⁷ See Goldberg, *supra* note 3, at 48.

⁸ See *id.* at 50-51. "The greatest crime . . . is not when the attorney is overzealous but when he isn't zealous enough." *Id.* at 50; cf. AMERICAN COLLEGE OF TRIAL LAWYERS' CODE OF TRIAL CONDUCT Preamble (1987), which provides in part:

To his client, a lawyer owes undivided allegiance, the utmost application of his learning, skill and industry, and the employment of all appropriate legal means within the law to protect and enforce legitimate interests. In the discharge of this duty, a lawyer should not be deterred by any real or fancied fear of judicial disfavor, or public unpopularity.

Id. But see AMERICAN COLLEGE OF TRIAL LAWYERS' CODE OF TRIAL CONDUCT Rule 13(b)(1987) ("A lawyer should avoid disparaging personal remarks or acrimony toward opposing counsel, and should remain wholly uninfluenced by any ill feeling between the respective clients."). See also MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-10 (1980) ("The duty of a lawyer to represent his client with zeal does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm.").

⁹ Dondi Properties Corp. v. Commerce Sav. & Loan Ass'n, 121 F.R.D. 284, 286

Among the primary opponents of hardball litigation are judges. Perceiving a sharp decline in lawyer professionalism,¹⁰ judges are beginning to speak out vigorously against hardball tactics.¹¹ Former Chief Justice Burger recently urged that a small handful of lawyers must not be allowed to abuse the court system and preempt its time and machinery for purposes not intended, thereby denying access to the federal courts to others in need of its limited resources.¹² But judges are by no means alone. One lawyer lamented:

What has happened to the "gentleman" trial lawyer of the past, like Atticus Finch in Harper Lee's *To Kill A Mockingbird*, who walked arm in arm with his opposing attorney after a long day of a very emotional trial? Today it appears that trial lawyers don't even speak civilly to each other. From the time the suit is filed, they often harbor such animosity toward each other that they speak as little

(N.D. Tex. 1988)(en banc). The court stated, "We address today a problem that, though of relatively recent origin, is so pernicious that it threatens to delay the administration of justice and to place litigation beyond the financial reach of litigants." *Id.* For a discussion that insists that hardball litigation is not only detrimental to the system, but is also simply bad advocacy, see Saylor, *supra* note 2. *But see* Committee on Federal Courts, *A Proposed Code of Litigation Conduct*, 43 THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 738, 738-39 (1988) ("[I]t is simply not true that 'hardball' litigation always constitutes bad or ineffective lawyering. Many clients do crumble in the face of an opposing counsel's campaign of harassment, and those lawyers who set out to make life unremittingly unpleasant for their adversaries often do succeed in wearing those adversaries down."). The Committee insists that arguments against hardball tactics should not be merely utilitarian; such arguments are easily countered by examples of situations in which hardball tactics clearly worked. *Id.* at 739.

¹⁰ A 1985 poll of state and federal judges indicated that 55% felt that lawyer professionalism was on the decline. Report of Commission on Professionalism, 112 F.R.D. 243, 254 (1986). Judges are by no means the only ones who question the professionalism of lawyers. *Id.* The same study revealed that only six percent of corporate users of legal services felt that "all or most" lawyers deserved to be called professionals, and 68% of these corporate clients stated that lawyer professionalism was decreasing over time. *Id.*

¹¹ See *supra* note 9 for an example of judicial attacks against hardball tactics; *Eash v. Riggins Trucking Inc.*, 757 F.2d 557, 565 (3d Cir. 1985) ("The dramatic rise in litigation in the last decade has led trial judges to conclude that indulgent toleration of lawyers' misconduct is simply a luxury the federal court system no longer can afford."); see also Saylor, *supra* note 2, at 81.

¹² Burger, *Abuses of Discovery*, TRIAL, Sept. 1984, at 18, 19.

as possible thereafter — even after the case is over.¹³

Exasperated by the damage to the legal system caused by hardball practices, the United States District Court for the Northern District of Texas sat en banc to adopt standards designed to end such practices in *Dondi Properties Corp. v. Commerce Savings and Loan Association*.¹⁴ Using *Dondi Properties* as an example, this comment will examine judicial attempts to establish standards of litigation conduct for attorneys. In doing so, it will specifically address the following: (1) the litigation standards imposed by the *Dondi Properties* court;¹⁵ (2) the power of federal courts to enforce such standards;¹⁶ (3) possible due process road-

¹³ Albright, *Waging Unconditional Warfare*, TEX. LAW., Sept. 5, 1988, at 18.

¹⁴ 121 F.R.D. at 284. This opinion arose from a consolidation of two cases filed in the Northern District of Texas, *Dondi Properties Corp. v. Commerce Sav. & Loan Ass'n* and *Knight v. Protective Life Ins. Co.* [Hereinafter the individual cases will be referred to as *Dondi* and *Knight* respectively. The consolidated opinion will be referred to as *Dondi Properties*].

In discussing possible reasons for the rise in abusive conduct by attorneys, the court stated:

As judges and former practitioners from varied backgrounds and levels of experience, we judicially know that litigation is conducted today in a manner far different from years past. Whether the increased size of the bar has decreased collegiality, or the legal profession has become only a business, or experienced lawyers have ceased to teach new lawyers the standards to be observed, or because of other factors not readily categorized, we observe patterns of behavior that forebode ill for our system of justice.

Id. at 286.

¹⁵ See *infra* notes 19-40 and accompanying text for a discussion of the *Dondi Properties* standards.

¹⁶ See *infra* notes 41-121 and accompanying text for a discussion of the power of federal courts to enforce the *Dondi Properties* standards. An analysis of the power of each state jurisdiction to sanction attorneys for abusive litigation practices is beyond the scope of this comment. For a general discussion of state court sanctioning powers, see Annotation, *Attorney's Liability Under State Law for Opposing Party's Counsel Fees*, 56 A.L.R. 4TH 486 (1987); Annotation, *Award of Damages for Dilatory Tactics in Prosecuting Appeal in State Court*, 91 A.L.R. 3D 661 (1979). In the federal context, this comment does not attempt a comprehensive examination of the sanctioning powers of federal courts under the Federal Rules of Civil Procedure. A number of commentators have more than adequately examined the sanctioning power of federal courts in the aftermath of the 1983 amendments to Rule 11 and the discovery rules. See, e.g., Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189 (1988); Schwarzer, *Sanctions Under the New Federal Rule 11 — A Closer Look*, 104 F.R.D. 181 (1985); SECTION OF LITIGATION, AMERICAN BAR ASSOCIATION, *SANCTIONS: RULE 11 AND OTHER POWERS* (2d ed. 1988); Shaffer, *Rule 11: Bright Light*,

blocks to such enforcement;¹⁷ and (4) advantages and drawbacks to such enforcement.¹⁸

II. ATTEMPTING TO CURB THE PROBLEM — *DONDI PROPERTIES*

In *Dondi Properties Corp. v. Commerce Savings and Loan Association*,¹⁹ the district court sat en banc to adopt standards of litigation conduct for attorneys appearing in civil actions before the court.²⁰ *Dondi Properties* was a consolidation of two cases filed in the Northern District of Texas, *Dondi Properties Corp. v. Commerce Savings and Loan Association*²¹ and *Knight v. Protective Life Insurance Co.*²²

In *Dondi*, sanction motions and motions to compel were filed against the plaintiff for failing to answer interrogatories and comply with discovery orders, for improperly withholding documents, and for misrepresenting facts to the court.²³ The defendants asserted that the plaintiff's failure to comply with the prior orders of the magistrate constituted "bad faith" and warranted dismissal of the ac-

Dim Future, 7 REV. OF LITIGATION 1 (1987); Note, *Rule 11 Sanctions: Toward Judicial Restraint*, 26 WASHBURN L.J. 337 (1987); *Sanctioning Attorneys for Discovery Abuse — The Recent Amendments to the Federal Rules of Civil Procedure: Views from the Bench and Bar*, 57 ST. JOHNS L. REV. 671 (1983); Comment, *Sanctions Under Amended Rule 26 — Scalpel or Meat-ax? The 1983 Amendments to the Federal Rules of Civil Procedure*, 46 OHIO ST. L.J. 183 (1985). Furthermore, these rules probably are not even applicable in a wide variety of situations involving hardball conduct. See *infra* notes 49-79 and accompanying text for a discussion of Rule 11 and its applicability to hardball conduct.

¹⁷ See *infra* notes 122-145 and accompanying text for a discussion of due process constraints on the power of courts to enforce the *Dondi Properties* standards.

¹⁸ See *infra* notes 146-179 and accompanying text for a discussion of the advantages and drawbacks of vigorous enforcement of the *Dondi Properties* standards.

¹⁹ 121 F.R.D. 284 (N.D. Tex. 1988)(en banc).

²⁰ *Id.* at 285.

²¹ *Dondi* was an action for recovery based upon civil RICO, common law fraud, federal regulations prohibiting affiliate transactions, civil conspiracy, negligent misrepresentation, and usury, arising in connection with activities relating to a failed savings and loan association. *Dondi Properties*, 121 F.R.D. at 285.

²² *Knight* was an action for recovery based upon alleged violations of the Texas Insurance Code and the Texas Deceptive Trade Practices — Consumer Protection Act, breach of contract, and breach of duty of good faith, all arising from the refusal of the defendant to pay to the plaintiff the proceeds of a life insurance policy. *Dondi Properties*, 121 F.R.D. at 285.

²³ *Id.*

tion or the award of other relief to the defendants.²⁴ The defendants also moved for sanctions against the plaintiff's attorney for failing to identify himself and his client in a discussion with a prospective witness.²⁵

In *Knight*, the plaintiff filed a motion to strike a reply brief filed by the defendant without leave of the court.²⁶ The plaintiff asserted that the reply should be stricken because the defendant failed to obtain leave to file the reply, a violation of a local rule,²⁷ and because the defendant filed his reply more than twenty days after the plaintiff's response was filed.²⁸ In the alternative, the plaintiff sought permission to file an additional response.²⁹

The en banc court set the tone for its admonitory opinion by suggesting that hardball litigation tactics, while of relatively recent origin, have become so pernicious that they threaten to impede the effective administration of justice and place litigation beyond the financial reach of most litigants.³⁰ The court stated:

With alarming frequency, we find that valuable judicial and attorney time is consumed in resolving the unnecessary contention and sharp practices between lawyers. Judges and magistrates of this court are required to devote substantial attention to refereeing abusive litigation tactics that range from benign incivility to outright

²⁴ *Id.* Noting the defendant's assertion that the plaintiff acted in bad faith, the court stated:

Such characterization of a party opponent's conduct should be sparingly employed by counsel and should be reserved for only those instances in which there is sound basis in fact demonstrating a party's deliberate and intentional disregard of an order of the court or of obligations imposed under applicable Federal Rules of Civil Procedure. Such allegations, when inappropriately made, add much heat but little light to the court's task of deciding discovery disputes.

Id. at 289.

²⁵ *Id.* at 290.

²⁶ *Id.* at 285.

²⁷ The rule provides, "In the discretion of the Presiding Judge, the movant may be permitted to file a reply brief if permission is sought immediately upon the receipt of the response to the motion." N.D. TEX. R. 5.1(f).

²⁸ *Dondi Properties*, 121 F.R.D. at 286.

²⁹ *Id.*

³⁰ *Id.*

obstruction. Our system of justice can ill-afford to devote scarce resources to supervising matters that do not advance the resolution of the merits of a case; nor can justice long remain available to deserving litigants if the costs of litigation are fueled unnecessarily to the point of being prohibitive.³¹

The court thus determined that it should adopt standards of litigation conduct without awaiting action by the circuit court.³² It concluded that district courts are in the best position to evaluate what are acceptable trial-level practices by litigating attorneys.³³ Accordingly, the court adopted the following standards of practice to be observed by attorneys appearing in civil actions in the Northern District of Texas:

(A) In fulfilling his or her primary duty to the client, a lawyer must be ever conscious of the broader duty to the judicial system that serves both attorney and client.

(B) A lawyer owes, to the judiciary, candor, diligence and utmost respect.

(C) A lawyer owes, to opposing counsel, a duty of courtesy and cooperation, the observance of which is necessary for the efficient administration of our system of justice and the respect of the public it serves.

(D) A lawyer unquestionably owes, to the administration of justice, the fundamental duties of personal dignity and professional integrity.

(E) Lawyers should treat each other, the opposing party, the court, and members of the court staff with courtesy and civility and conduct themselves in a professional manner at all times.

(F) A client has no right to demand that counsel abuse the opposite party or indulge in offensive conduct. A lawyer

³¹ *Id.*

³² *Id.* at 287.

³³ *Id.* The court analogized to *Thomas v. Capital Sec. Serv., Inc.*, 836 F.2d 866, 873 (5th Cir. 1988) (en banc) (Fifth Circuit concluded that in Rule 11 cases, "the district court will have a better grasp of what is acceptable trial-level practice among litigating members of the bar than will appellate judges"); see *Dondi Properties*, 121 F.R.D. at 287.

shall always treat adverse witnesses and suitors with fairness and due consideration.

(G) In adversary proceedings, clients are litigants and though ill feeling may exist between clients, such ill feeling should not influence a lawyer's conduct, attitude, or demeanor towards opposing lawyers.

(H) A lawyer should not use any form of discovery, or the scheduling of discovery, as a means of harassing opposing counsel or counsel's client.

(I) Lawyers will be punctual in communications with others and in honoring scheduled appearances, and will recognize that neglect and tardiness are demeaning to the lawyer and to the judicial system.

(J) If a fellow member of the Bar makes a just request for cooperation, or seeks scheduling accommodation, a lawyer will not arbitrarily or unreasonably withhold consent.

(K) Effective advocacy does not require antagonistic or obnoxious behavior and members of the Bar will adhere to the higher standard of conduct which judges, lawyers, clients, and the public may rightfully expect.³⁴

³⁴ *Dondi Properties*, 121 F.R.D. at 287-88. The court borrowed these standards from the DALLAS BAR ASSOCIATION GUIDELINES OF PROFESSIONAL COURTESY and THE DALLAS BAR ASSOCIATION LAWYER'S CREED. *Dondi Properties*, 121 F.R.D. at 287. The court noted that the new standards are consistent with the American Bar Association's Model Code of Professional Responsibility. *Id.* at 288 n.9. EC 7-36 of the Model Code provides:

Judicial hearings ought to be conducted through dignified and orderly procedures designed to protect the rights of all parties. Although a lawyer has the duty to represent his client zealously, he should not engage in any conduct that offends the dignity and decorum of proceedings. While maintaining his independence, a lawyer should be respectful, courteous, and above-board in his relations with a judge or hearing officer before whom he appears. He should avoid undue solicitude for the comfort or convenience of judge or jury and should avoid any other conduct calculated to gain special consideration.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-36 (1980). EC 7-37 provides:

In adversary proceedings, clients are litigants and though ill feeling may exist between clients, such ill feeling should not influence a lawyer in his conduct, attitude, and demeanor towards opposing lawyers. A lawyer should not make unfair or derogatory personal reference to opposing counsel. Haranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system.

The court further indicated that it will simply no longer tolerate abusive hardball practices.³⁵ It stated that litigants who persistently played hardball could expect their conduct to prompt an appropriate response from the court.³⁶ The court stated that its response to improper litigation tactics might include "a warm friendly discussion on the record, a hard-nosed reprimand in open court, compulsory legal education, monetary sanctions, or other measures appropriate to the circumstances."³⁷ The *Dondi Properties* court apparently suggests that if pushed too far, it too can play hardball.

One commentator has suggested that the *Dondi Properties* opinion came as a "breath of fresh air" to the majority of trial lawyers who are concerned about the tension and delay caused by hardball lawyers.³⁸ It remains to be seen, however, whether these standards will accomplish their objective. The standards will be difficult to enforce be-

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-37 (1980). EC 7-38 provides:

A lawyer should be courteous to opposing counsel and should accede to reasonable requests regarding court proceedings, settings, continuances, waiver of procedural formalities, and similar matters which do not prejudice the rights of his client. He should follow local customs of courtesy or practice, unless he gives timely notice to opposing counsel of his intention not to do so. A lawyer should be punctual in fulfilling all professional commitments.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-38 (1980); see also MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-10 (1980), *supra* note 8.

³⁵ *Dondi Properties*, 121 F.R.D. at 288. The court stated:

We think the standards we now adopt are . . . appropriately established to signal our strong disapproval of practices that have no place in our system of justice and to emphasize that a lawyer's conduct, both with respect to the court and to other lawyers, should at all times be characterized by honesty and fair play.

Id. at 288-89.

³⁶ *Id.* at 288. The court stated, "Those litigators who persist in viewing themselves solely as combatants, or who perceive that they are retained to win at all costs without regard to fundamental principles of justice . . . can expect instead that their conduct will prompt an appropriate response from the court . . ." *Id.*

³⁷ *Id.* (quoting *Thomas*, 836 F.2d at 878). The *Dondi Properties* court stated that appropriate sanctions include the full range of sanctions available in the Rule 11 context, but noted that it was not intending to adopt Rule 11 jurisprudence in the context of the case at bar. *Id.* at 288 & n.10.

³⁸ Albright, *supra* note 13, at 19.

cause they are both quite broad and rather nebulous. Words like "courtesy", "cooperation", and "civility" are not easily defined.³⁹ On the other hand, perhaps the mere articulation of the standards, rather than their enforcement, may serve to signal the litigating bar that it is still appropriate for lawyers to behave like "gentlemen."⁴⁰ Even if this is the case, the impact of *Dondi Properties* will be far more significant if the standards of conduct can be effectively and efficiently enforced.

III. ENFORCING THE *DONDI PROPERTIES* STANDARDS OF CONDUCT

The questions necessarily arise whether federal courts have the power to enforce standards of practice such as those promulgated in *Dondi Properties*,⁴¹ and whether an opinion such as *Dondi Properties* adds anything to the existing powers of federal courts to sanction hardball conduct. Enforcement powers could conceivably emanate from a number of different sources, including the Federal Rules of Civil Procedure,⁴² 28 U.S.C. § 1927, which gives district courts the power to tax costs and attorneys' fees against attorneys who unreasonably and vexatiously multiply the proceedings in a case,⁴³ and the vague "inherent powers"⁴⁴ of the courts. Each of these sources will be ex-

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ The *Dondi Properties* court did not indicate whether it was promulgating these standards under the authority of any particular rule or statute. Instead, prior to listing the new standards of conduct, the court simply cited a laundry list of rules and statutes which give district courts the power to control trial practices. *Dondi Properties*, 121 F.R.D. at 287.

⁴² See *infra* notes 49-79 and accompanying text for a discussion of Federal Rule of Civil Procedure 11.

⁴³ See *infra* notes 80-97 and accompanying text for a discussion of section 1927. Section 1927 provides, "Any attorney . . . who so multiplies the proceedings in any case unreasonably or vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. § 1927 (1982).

⁴⁴ See *infra* notes 98-121 and accompanying text for a discussion of the inherent power of federal courts; cf. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 258-59 (1975) (a court may assess attorneys' fees when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons); *Thomas*,

amined in turn.

In analyzing the power of federal courts to enforce the *Dondi Properties* standards, the following hypothetical, loosely borrowed from *Knight v. Protective Life Insurance Co.*,⁴⁵ will be utilized: Defendant files a motion to join an additional party. Plaintiff files a response to this motion. Without obtaining leave of the court as required by a local rule, defendant files a reply brief to plaintiff's response. Thereafter, in an attempt to harass and intimidate the other side, the plaintiff files a motion to strike the reply brief because the rule was violated, despite the fact that the reply does little to harm the plaintiff's case. The plaintiff clearly is being "personally antagonistic or insistent on all of the procedural rules being followed."⁴⁶ In short, he is playing hardball. By failing to cooperate with opposing counsel, he also has violated the standards promulgated in *Dondi Properties*.⁴⁷ But can he be sanctioned for such conduct? Do federal courts currently have the power to enforce these guidelines, especially with respect to intangibles like a cooperative attitude?⁴⁸ This section will explore the possible answers to these questions.

836 F.2d at 875 (district court has inherent power to award attorneys' fees when losing party has acted in bad faith during the course of the litigation).

⁴⁵ See *Dondi Properties*, 121 F.R.D. at 285-86.

⁴⁶ See *supra* notes 3-5 and accompanying discussion for a definition of hardball conduct.

⁴⁷ See *Dondi Properties*, 121 F.R.D. at 287-88.

⁴⁸ In *Knight*, the court never reached this question. The court stated that the attorneys violated the standards promulgated by the en banc court by failing to cooperate with one another. *Dondi Properties*, 121 F.R.D. at 291. The court noted that the attorneys' lack of cooperation was a waste of both time and judicial resources. *Id.* Nevertheless, the court not only failed to discuss the possible imposition of sanctions, it did not even warn the attorneys to change their conduct. It simply held that the defendant's reply brief should not be stricken and that the plaintiff could not file a further response. *Id.* at 292. Note that *Knight* was not decided by the en banc court which promulgated the standards of litigation conduct, but only by the judge before whom the case was originally brought. *Id.* at 286 n.4.

A. Federal Rule of Civil Procedure 11

Any discussion of sanctions almost invariably begins with Rule 11,⁴⁹ and not without good reason.⁵⁰ Since its amendment in 1983, Rule 11 has been both highly touted and vigorously applied.⁵¹ Nevertheless, it is generally an inappropriate means for sanctioning hardball conduct, at least the type of conduct evident in our hypothetical. One court noted, "Rule 11 is not a panacea intended to remedy all manner of attorney misconduct."⁵² The *Dondi Properties* court apparently agreed. That court specifically stated that it was not adopting Rule 11 jurisprudence in the context of the standards of litigation which it promulgated.⁵³ This part will examine the potential applicability of Rule 11 to hardball conduct in general, and our hypothetical situation in particular.⁵⁴

Rule 11 requires every pleading, motion, and other paper of a party represented by an attorney to be signed by the attorney.⁵⁵ This signature constitutes a certification by the attorney that (1) "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 good faith argument for the extension, modification, or reversal of existing law,"⁵⁶ and (2) "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."⁵⁷

On its face, Rule 11 seems to apply to our hypothetical situation because the plaintiff's motion to strike was inter-

⁴⁹ See FED. R. CIV. P. 11.

⁵⁰ See Joseph, *Rule 11 Is Only the Beginning*, A.B.A. J., May 1, 1988, at 62.

⁵¹ *Id.* For a general discussion of Rule 11 sanctions, see Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189 (1988); Schwarzer, *Sanctions Under the New Federal Rule 11 — A Closer Look*, 104 F.R.D. 181 (1985); SECTION OF LITIGATION, AMERICAN BAR ASSOCIATION, *SANCTIONS: RULE 11 AND OTHER POWERS* (2d ed. 1988).

⁵² *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 829-30 (9th Cir. 1986).

⁵³ *Dondi Properties*, 121 F.R.D. at 288 n.10.

⁵⁴ See *supra* notes 45-48 and accompanying text for a discussion of the hypothetical situation.

⁵⁵ FED. R. CIV. P. 11.

⁵⁶ *Id.*

⁵⁷ *Id.* (emphasis added).

posed for an improper purpose. Nevertheless, judicial interpretation of this rule has generally limited sanctions to situations in which the signed paper is not well-grounded in fact and law.⁵⁸ In most circuits, if a motion has objective merit,⁵⁹ it will not be sanctioned even if filed in bad faith.⁶⁰ An example of the unwillingness of courts to

⁵⁸ See *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531 (9th Cir. 1986) (court reversed an award of sanctions under Rule 11 against an attorney who failed to cite contrary authority in a brief to the court). The *Golden Eagle* court held, "A complaint which complies with the 'well-grounded in fact and warranted by . . . law' clause cannot be sanctioned as harassment under Rule 11, regardless of the subjective intent of the attorney or litigant." *Id.* at 1538. The court further stated:

Rule 11 is intended to reduce the burden on district courts by sanctioning, and hence deterring, attorneys who submit motions or pleadings which cannot reasonably be supported in law or in fact. We therefore reverse the district court's imposition of sanctions for conduct which it felt fell short of the ethical responsibilities of the attorney.

Id. at 1542; see also *National Ass'n of Gov't Employees v. National Fed'n of Fed. Employees*, 844 F.2d 216, 223 (5th Cir. 1988) ("if an initial complaint passes the test of non-frivolousness, its filing does not constitute harassment for the purpose of Rule 11"); *Rachel v. Banana Republic, Inc.*, 831 F.2d 1503, 1508 (9th Cir. 1981) ("Because of the objective standard applicable to Rule 11, a complaint that is well-grounded in fact and law cannot be sanctioned regardless of counsel's subjective intent.").

⁵⁹ See *Thomas v. Capital Sec. Serv., Inc.*, 836 F.2d 866, 873 (5th Cir. 1988) (en banc) (objective standard used to examine attorney's conduct under Rule 11); see also *Donaldson v. Clark*, 819 F.2d 1551, 1556 (11th Cir. 1987) (en banc); *Stevens v. Lawyers Mut. Liab. Ins. Co.*, 789 F.2d 1056, 1060 (4th Cir. 1986); *Rodgers v. Lincoln Towing Serv., Inc.*, 771 F.2d 194, 205 (9th Cir. 1985).

⁶⁰ See *City of Yonkers v. Otis Elevator Co.*, 649 F. Supp. 716, 736 (S.D.N.Y. 1986), *aff'd*, 844 F.2d 42 (2d Cir. 1988) ("Even a bad faith motion does not justify Rule 11 sanctions where . . . the court has concluded that the arguments advanced are not lacking in colorable legal support."); see also *Oliveri v. Thompson*, 803 F.2d 1265, 1275 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987) ("Although *Eastway* might be read as leaving open the possibility of imposing rule 11 sanctions where the attorney is guilty of a violation of the rule, we hold today that there is no necessary subjective component to a proper rule 11 analysis.") (referring to *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243 (2d Cir. 1985)); *Zaldivar*, 780 F.2d at 832 (after questioning whether an attorney may be sanctioned for doing what the law allows, if the attorney's motive for doing so is improper, the court held that, at least with respect to the filing of the original complaint, a lawyer may not be sanctioned if the claim has objective merit); *Schwarzer*, *supra* note 51, at 195 ("If a reasonably clear legal justification can be shown for the filing of the paper in question, no improper purpose can be found and sanctions are inappropriate."). Note, however, that not all courts are willing to rule out completely the possibility of imposing sanctions on attorneys who improperly file papers that are well grounded in fact and law. See, e.g., *National Ass'n*

sanction bad faith motions which are well-grounded in fact and law is found in *National Association of Government Employees, Inc. v. National Federation of Federal Employees*.⁶¹

In *National Association*, an incumbent labor union (N.A.G.E.) filed a defamation suit against a challenger union (N.F.F.E.) during the course of an election to determine which union would represent the civilian employees at Fort Hood, Texas.⁶² N.A.G.E. filed suit after N.F.F.E. published a pamphlet containing allegedly false statements regarding N.A.G.E.'s poor treatment of its union members.⁶³ After concluding that N.A.G.E. had brought suit not because it had a meritorious claim, but rather for the purpose of harassing N.F.F.E. and to serve as a campaign tactic, the trial court imposed sanctions against N.A.G.E. under Rule 11.⁶⁴ The Fifth Circuit vacated the

of *Gov't Employees*, 844 F.2d at 224; *Zaldivar*, 780 F.2d at 832 n.10. The *National Association* court stated:

Like the *Zaldivar* court, we do not hold that the filing of a paper for an improper purpose is immunized from Rule 11 sanctions simply because it is well grounded in fact and law. The case can be made, for example, as *Zaldivar* noted, that the filing of excessive motions, even if each is "well grounded," may under some circumstances constitute "harassment" sanctionable under the Rule.

National Ass'n of Gov't Employees, 844 F.2d at 224; accord *Zaldivar*, 780 F.2d at 832 n.10; see *infra* notes 69-74 and accompanying text for a discussion of the possibility of sanctioning excessive or repetitious motions, even if each is warranted by fact and law.

⁶¹ 844 F.2d 216 (5th Cir. 1988).

⁶² *Id.* at 217.

⁶³ *Id.* at 218.

⁶⁴ *Id.* at 219. The trial court had summarized the plaintiff's conduct as follows: (1) the court suggested a possible settlement agreement at a pretrial conference, but the parties would not accept it; (2) the evidence showed that the lawsuit had been brought "for the purpose of harassing the defendant and to serve as a campaign tactic"; (3) in order for the plaintiff to have prevailed, the jury would have had to conduct "extensive extrapolating and bootstrapping"; (4) at the close of the plaintiff's case, the trial court told the parties that the case should be settled, that it was inclined to direct a verdict for the defendants but it was not willing to do so at that time, and that it was considering imposing sanctions; and (5) at the close of the evidence, the court had again suggested settlement and warned that it might take away any verdict rendered for the plaintiff, but the plaintiff still refused to settle the case. *Id.* After concluding that N.A.G.E.'s suit "was lacking in its factual and legal basis" and "was brought for the improper purpose of harassing defendants," it imposed sanctions on N.A.G.E. under Rule 11. *Id.*

portion of the judgment awarding sanctions.⁶⁵

The appellate court held that the Rule 11 sanctions were inappropriate because the complaint was not "totally lacking in merit."⁶⁶ The court held that the filing of a complaint which is well-grounded in fact and law cannot, as a matter of law, "harass" the defendant in violation of the rule, regardless of the plaintiff's subjective intent.⁶⁷ The court determined that subjective bad faith was not an element of Rule 11 inquiries.⁶⁸ Thus, at least with respect to the filing of *initial* complaints, Rule 11 will not curb bad faith conduct which has objective merit. Rule 11 simply loses its teeth in this context.

The *National Association* court indicated, however, that every paper filed for an improper purpose is not immunized from Rule 11 sanctions simply because it is well-grounded in fact and law.⁶⁹ The court stated while initial complaints were so immunized, the bad faith filing of ex-

⁶⁵ *Id.* at 217.

⁶⁶ *Id.* at 223.

⁶⁷ *Id.* The court stated:

We do not condone litigation instituted for ulterior purposes rather than to secure judgment on a well-grounded complaint in which the plaintiff sincerely believes. Yet the Rule 11 injunction against harassment does not exact of those who file pleadings an undiluted desire for just deserts. In *Zaldivar v. City of Los Angeles* [780 F.2d 823, 832 (9th Cir. 1986)], the Ninth Circuit held that the filing of a complaint that complies with the "well grounded in fact and warranted by existing law" prong of Rule 11 cannot, as a matter of law, "harass" the defendant as Rule 11 forbids, regardless of the plaintiff's subjective intent. . . . [We agree] with *Zaldivar* that if an initial complaint passes the test of non-frivolousness, its filing does not constitute harassment for the purposes of Rule 11.

National Association, 844 F.2d at 223 (footnotes omitted).

⁶⁸ *Id.* at 224. "The history of the Rule . . . indicates that 'subjective bad faith' is no longer an element of Rule 11 inquiries. Instead, the court must focus on objectively ascertainable circumstances that support an inference that a filing harassed the defendant or caused unnecessary delay." *Id.* (footnotes omitted).

⁶⁹ *Id.* The court stated in dicta:

[W]e do not hold that the filing of a paper for an improper purpose is immunized from Rule 11 sanctions simply because it is well grounded in fact and law. The case can be made, for example, . . . that the filing of excessive motions, even if each is "well grounded," may under some circumstances constitute "harassment" sanctionable under the Rule.

Id. (footnotes omitted); accord *Zaldivar*, 780 F.2d at 832 n.10.

cessive motions, even if well grounded, could constitute harassment sanctionable under the Rule.⁷⁰ Other circuits, however, have expressly rejected the contention that arguments which have colorable legal support may be sanctioned if filed in bad faith.⁷¹

By applying the *National Association* dicta on excessive motions to our hypothetical situation, a court could conceivably sanction the plaintiff for filing the motion to strike in bad faith.⁷² On the other hand, the plaintiff's conduct in filing the single bad faith motion does not involve the type of "repetitious or excessive filings" the court was willing to sanction in *National Association*.⁷³ In addition, the *National Association* court seems to indicate the plaintiff's improper purpose would still have to be de-

⁷⁰ *National Ass'n*, 844 F.2d at 224; see also *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1083 (7th Cir. 1987), cert. dismissed, 108 S.Ct. 1101 (1988) (in holding that Rule 11 has both objective and subjective components, the court stated that "[t]he Rule effectively picks up the torts of abuse of process (filing an objectively frivolous suit) and malicious prosecution (filing a colorable suit for the purpose of imposing expense on the defendant rather than for the purpose of winning)"); *Whittington v. Ohio River Co.*, 115 F.R.D. 201, 208 (E.D. Ky. 1987) ("even meritorious litigation positions, if taken for purposes of harassment or other improper reason can violate Rule 11").

⁷¹ See *supra* note 60 for a discussion of cases which have held that even bad faith motions may not be sanctionable if they are warranted by fact and law.

⁷² See *supra* notes 69-70 and accompanying text for a discussion of sanctioning the filing of well grounded excessive motions.

⁷³ See *National Ass'n*, 844 F.2d at 224. The *National Ass'n* court cited three cases in which sanctions had been imposed on plaintiffs for excessive filings. See *William Passalacqua Builders v. Resnick Developers South, Inc.*, 611 F. Supp. 281, 285 (S.D.N.Y. 1985) (court awarded sanctions for the filing of two motions, the second of which raised no issues not already raised in the first); *Day v. Amoco Chem. Corp.*, 595 F. Supp. 1120, 1121-22 (S.D. Tex.), appeal dismissed, 747 F.2d 1462 (5th Cir. 1984), cert. denied, 470 U.S. 1086 (1985) (court imposed sanctions under § 1927 and Rule 11 on a plaintiff who, after his complaint has been judged frivolous and malicious and had been dismissed with prejudice, filed a motion to correct an alleged misstatement in the record, a motion to vacate the judgment, and a motion to disqualify the judge); *Taylor v. Prudential-Bache Sec., Inc.*, 594 F. Supp. 226, 227 (N.D.N.Y.), aff'd, 751 F.2d 371 (2d Cir. 1984) (court imposed sanctions on a plaintiff who filed six consolidated suits, all frivolous, against various defendants and had engaged in "particularly egregious and unjustified litigiousness"). Yet, it should be noted that in each of these cases, the sanctioned motions were frivolous, not merely interposed to harass the defendant. *National Ass'n*, 844 F.2d at 224.

terminated under an objective test.⁷⁴ A court may be unwilling to find that the plaintiff's well-grounded motion, which was perhaps uncooperative but not excessive and repetitious, was objectively filed for an improper purpose. Accordingly, even in a jurisdiction following the dicta in *National Association*, our hypothetical plaintiff arguably will not be sanctionable under Rule 11.

Keeping in mind our hypothetical, it becomes obvious that Rule 11 is not being utilized to curb this type of hardball conduct. Rule 11 is limited to situations in which a claim or motion is not well grounded in fact or law.⁷⁵ While hardball tactics will occasionally fall into this category, they also often involve forcing the other side to rigidly adhere to the technicalities of procedural rules.⁷⁶ Thus, their position often has merit under the rules, even if it subjectively may be considered unreasonable or vexatious. If courts approach Rule 11 from a purely objective viewpoint, then it will be virtually impossible to sanction a litigant who files a motion requiring the other side to *comply* with the procedural rules.⁷⁷ Another means is thus

⁷⁴ See *National Ass'n*, 844 F.2d at 224 ("Amended Rule 11 mandates the court to focus on objective circumstances in determining whether an attorney has conducted 'reasonable inquiry' and a paper is 'well grounded' in fact and law, and purely subjective elements should not be reintroduced into the determination concerning 'improper purpose.'") (footnote omitted); *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 831-32 (9th Cir. 1986). The *Zaldivar* court stated:

We believe the conduct forming the basis of the charge of harassment must do more than in fact bother, annoy or vex the complaining party. Harassment under Rule 11 focuses upon the improper purpose of the signer, objectively tested, rather than the consequences of the signer's act, subjectively viewed by the signer's opponent.

780 F.2d at 831-32.

⁷⁵ See *supra* note 58 for a discussion of cases holding that Rule 11 is designed to curb the filing of claims or motions which are not well grounded in fact and law.

⁷⁶ Consider our hypothetical, in which the plaintiff filed a motion to strike the defendant's reply because the defendant had failed to comply with a procedural rule.

⁷⁷ While it is theoretically possible to impose sanctions in some circuits on an attorney who files a paper well grounded in fact and law, it is difficult to imagine many situations in which the paper would objectively be deemed to have been filed for an improper purpose. Realistically, if a hardball litigator tempers his zeal with a little common sense, he can avoid sanctions under Rule 11. Only by filing "excessive motions" can he be subjected to potential sanctions. Even then, he

needed to control this type of misconduct.⁷⁸ Furthermore,

probably is protected if there is legal justification for his motion. See *supra* notes 69-74 and accompanying text for a discussion of sanctions for the filing of excessive motions.

⁷⁸ While district courts possess the power to sanction attorneys under other Federal Rules of Civil Procedure as well, particularly under Rules 26(g) and 37, these rules, like Rule 11, are not well-suited to curbing the type of conduct exemplified by our hypothetical. Rule 26(g) provides:

Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney The signature of the attorney . . . constitutes a certification that the signer has read the request, response, or objection, and that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is: (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

FED. R. CIV. P. 26(g). In the advisory committee note, the committee states that "[t]he rule simply requires that the attorney make a reasonable inquiry into the factual basis of his response, request, or objection." FED. R. CIV. P. 26(g) advisory committee's note. The committee states that the attorney's conduct should be judged under "an objective standard similar to the one imposed by Rule 11." *Id.* Accordingly, like Rule 11, Rule 26(g) may not be an effective sanctioning tool against an attorney whose motion is objectively warranted by fact and law, but is filed in bad faith. See *supra* notes 49-79 and accompanying text for a discussion of this problem in the Rule 11 context.

Rule 37 provides, in part, that "[i]f a party . . . fails to obey an order to provide or permit discovery, . . . the court in which the action is pending may make such orders in regard to the failure as are just" FED. R. CIV. P. 37(b)(2). Among other possible sanctions, including the treatment of the failure to obey the order as contempt of court, the rule provides that the court may "require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorneys' fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust." *Id.* However, Rule 37 is limited in its applicability by the qualification that an attorney may not be sanctioned unless he violates a court order. See *Petroleum Ins. Agency, Inc. v. Hartford Accident & Indem. Co.*, 106 F.R.D. 59, 65 (D. Mass. 1985) (sanctions cannot be imposed under Rule 37(b) for failure to comply with a discovery request where no court order had been entered compelling discovery). Finally, note that both Rules 26(b) and 37 relate only to discovery, admittedly an area in which a large amount of hardball takes place, but certainly not broad enough to cover all areas of hardball, including our hypothetical situation. For a further discussion of sanctioning discovery abuse, see *Sanctioning Attorneys for Discovery Abuse — The Recent Amendments to the Federal Rules of Civil Procedure: Views from the Bench and Bar*, 57 ST. JOHN'S L. REV. 671

because it only applies to signed papers, Rule 11 is wholly inappropriate to curb a wide range of other hardball tactics prohibited by *Dondi Properties*, particularly those dealing with the attorney's attitude and behavior toward his adversaries and the court.⁷⁹ Federal courts that find Rule 11 or another Federal Rule of Civil Procedure lacking may turn to 28 U.S.C. § 1927 or the inherent powers of the court to find the authority to impose sanctions on attorneys who persistently play hardball.

B. 28 U.S.C. § 1927

Section 1927 provides that any attorney who "multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."⁸⁰ This provision is designed to "curb dilatory practices and the abuse of court processes by attorneys."⁸¹ The virtue, and danger, of section 1927 lies in its scope.⁸² Unlike Rule 11, section 1927 embraces everything done in federal court.⁸³ It is not limited to acts or omissions involving the signing of papers not well grounded in fact or law, but encompasses all types of multiplicative conduct by attorneys in federal court.⁸⁴ Courts have held that sanctions are appropriate under section 1927 even in cases in which an attorney has

(1983); Comment, *Sanctions under Amended Rule 26 — Scalpel or Meat-ax? The 1983 Amendments to the Federal Rules of Civil Procedure*, 46 OHIO ST. L.J. 183 (1985).

⁷⁹ See *supra* note 34 and accompanying text for a discussion of the *Dondi Properties* standards.

⁸⁰ 28 U.S.C. § 1927 (1982). Until 1980, section 1927 imposed a burden only for excess costs, which rarely amounted to a significant sum. *Oliveri v. Thompson*, 803 F.2d 1265, 1273 (2d Cir. 1986). Accordingly, it produced very little litigation. *Id.* However, since the 1983 amendments to the Federal Rules of Civil Procedure ushered in a new awareness of the sanctioning powers of the federal courts, section 1927 has been utilized with a vengeance. See Joseph, *supra* note 50, at 62.

⁸¹ *Colucci v. New York Times Co.*, 533 F. Supp. 1011, 1013 (S.D.N.Y. 1982).

⁸² See Joseph, *supra* note 50, at 62. For a discussion of the dangers of overzealous use of sanctioning power, see *infra* notes 146-176 and accompanying text.

⁸³ See Joseph, *supra* note 50, at 62.

⁸⁴ *Id.* For a discussion of the applicability of Rule 11 to hardball conduct, see notes 49-79 and accompanying text.

not obviously violated any technical rules if, acting within the rules, the attorney has proceeded in bad faith for the purpose of delay or increasing the costs of litigation.⁸⁵

The circuits are split on the question of whether an award under section 1927 requires bad faith or merely objectively unreasonable conduct. The majority of courts have held that standards for the imposition of sanctions on an attorney under section 1927 must necessarily be quite stringent, requiring a clear showing of bad faith, in order to ensure that the prospect of sanctions does not "chill the ardor of proper and forceful advocacy on behalf of his client."⁸⁶ An attorney should not be penalized simply for zealously pressing his client's interests.⁸⁷ Other

⁸⁵ *In re Yagman*, 796 F.2d 1165, 1187 (9th Cir. 1986), *cert. denied*, 108 S.Ct. 450 (1987). Note, however, that the *Yagman* court held that if a technical rule is applicable, sanctions under section 1927 are not appropriate. *Id.* The court held that section 1927 could not be used to sanction attorneys for abuses of discovery, governed primarily by Rules 26 and 37. *Id.*; *but see* *Unique Concepts, Inc. v. Brown*, 115 F.R.D. 292 (S.D.N.Y. 1987) (court used section 1927 and the inherent power of the court to sanction an attorney for discovery abuse, generally governed by Rules 26 and 37, after the attorney made repeated personal attacks on the opposing counsel during a deposition, calling him, among others, a "very rude and impertinent young man" and an "obnoxious little twit").

⁸⁶ *Colucci v. New York Times Co.*, 533 F. Supp. 1011, 1014 (S.D.N.Y. 1982). The *Colucci* court stated:

The thrust of [section 1927] is to curb dilatory practices and the abuse of court processes by attorneys. The sanctions authorized under section 1927 are not to be lightly imposed; nor are they to be triggered because a lawyer vigorously and zealously pressed his client's interests. The power to assess the fees against an attorney should be exercised with restraint lest the prospect thereof chill the ardor of proper and forceful advocacy on behalf of his client. To justify the imposition of excess costs of litigation upon an attorney his conduct must be of an egregious nature, stamped by bad faith that is violative of recognized standards in the conduct of litigation. This section is directed against attorneys who willfully abuse judicial processes.

Id. at 1013-14 (footnote omitted); *see also Oliveri*, 803 F.2d at 1273 ("Imposition of a sanction under § 1927 requires a 'clear showing of bad faith'"); *Ford v. Temple Hosp.*, 790 F.2d 342, 347 (3d Cir. 1986) (there must be a finding of willful bad faith on the part of the offending attorney before sanctions may be imposed under section 1927); *Dreiling v. Peugeot Motors of Am., Inc.*, 768 F.2d 1159 (10th Cir. 1985) (power to assess costs under section 1927 is power that must be strictly construed and utilized only in instances evidencing serious and standard disregard for orderly process of justice).

⁸⁷ *Colucci*, 533 F. Supp. at 1014.

courts have held that section 1927 may be imposed on any attorney who unreasonably multiplies the proceedings in a case, regardless of whether he has acted in bad faith.⁸⁸ While this is a significant issue in many cases, where subjective good faith might act as a "safe harbor" against sanctions even though the attorney has proceeded unreasonably,⁸⁹ it is not of similar significance in discussing many types of hardball conduct, in which the attorney is almost invariably proceeding in bad faith.⁹⁰ Accordingly, section 1927 may be particularly appropriate to our hypothetical situation, in which the plaintiff violated no technical rules, other than the nebulous *Dondi Properties* standards, but proceeded in bad faith.⁹¹

⁸⁸ See *Jones v. Continental Corp.*, 789 F.2d 1225, 1230 (6th Cir. 1986) (where attorney knows or reasonably should know that the claim pursued is frivolous or that litigation tactics will needlessly obstruct litigation of nonfrivolous claims, trial court may assess fees attributable to such action against attorney under section 1927). The *Jones* court indicated that the standard for the imposition of sanctions under section 1927 was less stringent than the bad faith standard used to shift attorneys' fees under a court's inherent powers. *Id.* "To hold that subjective 'bad faith' remains as necessary under amended § 1927 as under *Roadway Express* would be to assume that the [statute adds] nothing to the 'inherent powers' recognized in that case." *Id.*; see *infra* notes 98-121 for a discussion of *Roadway Express*, Inc. v. Piper, 447 U.S. 752, 764 (1980), and the inherent powers of federal courts.

⁸⁹ See, e.g., *Sherman Treators Ltd. v. Ahlbrandt*, 115 F.R.D. 519, 525 (D.D.C. 1987) (although counsel for plaintiff in patent infringement action failed to meet standard of reasonableness required by Rule 11 in pursuing action without apprehending reasonably whether the defendant authorized infringing party to act as its licensee, such conduct was not vexatious or unreasonable for purposes of section 1927).

⁹⁰ Note that proving bad faith on the part of a hardball attorney may not always be easy, especially in situations like our hypothetical, in which his position has objective merit. See *supra* notes 45-48 and accompanying text for a discussion of the hypothetical situation; see *infra* notes 122-145 and accompanying text for a discussion of an attorney's right to a hearing before the imposition of sanctions.

⁹¹ Subjective bad faith means more than "vigorously and zealously" asserting a client's interest. *Colucci*, 553 F. Supp. at 1014. An attorney's conduct must be of "an egregious nature, stamped by bad faith that is violative of recognized standards in the conduct of litigation." *Id.* On the other hand, assuming that the *Dondi Properties* standards would qualify as "recognized standards in the conduct of litigation," at least in the Northern District of Texas, a violation of these standards might be evidence of subjective bad faith on the part of the attorney. One potential problem arises from the suggestion in *Yagman* that section 1927 does not apply to a situation which should be governed by a Federal Rule of Civil Procedure. See *Yagman*, 796 F.2d at 1187. Accordingly, a court could possibly hold that Rule 11 exclusively applies to our hypothetical. If Rule 11 sanctions are not appropri-

In some circuits, however, even bad faith may not be sufficient to impose sanctions under section 1927. Some courts have imposed the additional requirement that the attorney's claim must lack a colorable basis in fact or law before sanctions are appropriate under this provision.⁹² For example, in *Indianapolis Colts v. Mayor & City Council of Baltimore*,⁹³ the Seventh Circuit held that sanctions against an attorney under section 1927 were inappropriate.⁹⁴ Because the claim was not so frivolous or unreasonable as to justify sanctions under Rule 11, the court held that an award of sanctions under section 1927 was also "clearly unwarranted."⁹⁵ This approach emasculates the sanctioning power of section 1927. By tying section 1927 sanctions to the merits of an attorney's complaint, this provision simply parallels the authority of federal courts to sanction attorneys under Rule 11.⁹⁶ Section 1927 becomes nothing more than a redundancy. Moreover, this section becomes useless to deter the type of conduct evident in our hypothetical situation, in which the plaintiff's motion was well-grounded in fact and law, but filed in bad faith.⁹⁷ Clearly, in circuits adhering to this restrictive view

ate, then section 1927 sanctions are similarly inappropriate. For a discussion of this issue raised by *Yagman*, see *supra* note 85.

⁹² See *Indianapolis Colts v. Mayor & City Council of Baltimore*, 775 F.2d 177, 182 (7th Cir. 1985) ("Before a court may assess fees under section 1927, the attorney must intentionally file or prosecute a claim that lacks a plausible legal or factual basis"); *Day v. Amoco Chem. Corp.*, 595 F. Supp. 1120, 1123 (S.D. Tex.), *appeal dismissed*, 747 F.2d 1462 (5th Cir. 1984), *cert. denied*, 470 U.S. 1086 (1985) (In discussing section 1927 sanctions, the court stated, "Moreover, while lack of merit of the action is evidence of bad faith, the claim must also lack a colorable basis in law to justify an award of fees.").

⁹³ 775 F.2d at 177.

⁹⁴ *Id.* at 180. This case arose out of the continuing litigation between the Colts football franchise, which moved from Baltimore to Indianapolis, and the city of Baltimore, which attempted to prevent the move by exercising its eminent domain powers over the team. *Id.* at 179. The instant case concerned the validity of an interpleader claim filed by the Colts to bring into the suit the Indiana corporation owning the Hoosier Dome, where the Colts had agreed to play their games. *Id.*

⁹⁵ *Id.* at 180.

⁹⁶ See *supra* notes 49-79 and accompanying text for a general discussion of the sanctioning power of federal courts under Rule 11.

⁹⁷ See *supra* notes 45-48 and accompanying text for a discussion of the hypothetical situation.

of section 1927, a court will need to look elsewhere to find appropriate sanctioning power in our hypothetical.

C. *Inherent Powers*

If a court finds that Rule 11 and section 1927 do not provide appropriate sanctioning power in our hypothetical situation, it might turn to its inherent powers.⁹⁸ The inherent powers of federal courts are those which are necessary to the exercise of all others.⁹⁹ They are derived from the "control necessarily vested in the courts to manage their own affairs."¹⁰⁰ They also are extraordinarily broad.¹⁰¹ For example, the contempt power is rooted in the inherent power of the judiciary,¹⁰² as are the powers of a court to dismiss an action for failure to prosecute,¹⁰³

⁹⁸ See, e.g., *Petroleum Ins. Agency, Inc. v. Hartford Accident & Indem. Co.*, 106 F.R.D. 59 (D. Mass. 1985) (although neither Rule 26, Rule 37, nor section 1927 authorizes imposition of sanctions for plaintiff's failure to produce certain documents to answer fully certain interrogatories where no order compelling discovery was issued and where plaintiff's conduct was negligent but not intentional, court has inherent power to order continuance and to require plaintiff and his counsel to pay reasonable expenses, including attorneys' fees, which will be incurred by defendants in re-preparing their case during continuance).

⁹⁹ *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980); see also *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812). In *Hudson*, the Supreme Court stated:

Certain implied powers must necessarily result to our Courts of justice from the nature of their institution. . . . To fine for contempt — imprison for contumacy — [e]nforce the observance of order, . . . are powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others: and so far our Courts no doubt possess powers not immediately derived from statute. . . .

Id.

¹⁰⁰ *Link v. Wabash R.R.*, 370 U.S. 626, 630 (1962).

¹⁰¹ Joseph, *supra* note 50, at 64.

¹⁰² *Levine v. United States*, 362 U.S. 610, 615 (1960) ("From the very beginning of this Nation and throughout its history the power to convict for criminal contempt has been deemed an essential and inherent aspect of the very existence of our courts.").

¹⁰³ *Link v. Wabash R.R.*, 370 U.S. at 630.

The authority of a court to dismiss *sua sponte* for lack of prosecution has generally been considered an "inherent power," governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.

Id.

to disqualify counsel,¹⁰⁴ to vacate a final judgment for fraud on the court,¹⁰⁵ or to disbar, suspend, or reprimand counsel.¹⁰⁶

The inherent power has also been used to award attorneys' fees and litigation costs where the losing party has "acted in bad faith, vexatiously, wantonly or for oppressive reasons."¹⁰⁷ Awards under this inherent power may be made either against the losing party or against the losing party's attorney.¹⁰⁸ The bad faith exception permitting the award of attorney's fees is not limited to situations in which an action is *filed* in bad faith.¹⁰⁹ In *Lip-*

¹⁰⁴ *Kleiner v. First Nat'l Bank of Atlanta*, 751 F.2d 1193, 1209 (11th Cir. 1985) ("A trial judge possesses the inherent power to discipline counsel for misconduct, short of behavior giving rise to disbarment or criminal censure, without resort to the powers of civil or criminal contempt."). The court stated that "[c]ourts possess the inherent power to protect the orderly administration of justice and to preserve the dignity of the tribunal." *Id.*

¹⁰⁵ *Universal Oil Prod. Co. v. Root Refining Co.*, 328 U.S. 575, 580 (1946) ("The inherent power of a federal court to investigate whether a judgment was obtained by fraud, is beyond question.").

¹⁰⁶ *Eash v. Riggins Trucking Inc.*, 757 F.2d 557, 561 (3d Cir. 1985).

Inherent power has been frequently invoked by the courts to regulate the conduct of members of the bar as well as to provide tools for docket management. Courts have thus relied on the concept of inherent power to impose several species of sanctions on those who abuse the judicial process.

Id.; see also *Penthouse Int'l Ltd. v. Playboy Enter., Inc.*, 663 F.2d 371, 386 (2d Cir. 1981) (A federal district court must be able "to protect the administration of justice by levying sanctions in response to abusive litigation practices."). For an excellent overview of the inherent powers of federal courts, see *Eash*, 757 F.2d at 560-65.

¹⁰⁷ *F.D. Rich Co. v. United States ex rel. Indus. Lumber*, 417 U.S. 116, 129 (1974); accord *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975); see also *Jones v. Continental Corp.*, 789 F.2d 1225, 1228 (6th Cir. 1986) ("There is no doubt that a federal district court, in the sound exercise of its discretion, may assess attorneys' fees against losing counsel as well as against a losing party.") (emphasis original). The "American Rule" ordinarily requires parties to bear their own counsel fees and other litigation expenses. See *Alyeska*, 421 U.S. at 247.

¹⁰⁸ *Oliveri v. Thompson*, 803 F.2d 1265, 1272 (2d Cir. 1986), cert. denied, 480 U.S. 918 (1987); see, e.g., *Dow Chem. Pac. Ltd. v. Rascator Maritime S.A.*, 782 F.2d 329, 344 (2d Cir. 1986) (award made against party); *Weinberger v. Kendrick*, 698 F.2d 61, 80-81 (2d Cir. 1982), cert. denied, 464 U.S. 818 (1983) (award made against attorney).

¹⁰⁹ *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1980); see *Hall v. Cole*, 412 U.S. 1, 15 (1973) (" '[B]ad faith' may be found, not only in the actions that led to the lawsuit, but also in the conduct of the litigation."); *Oliveri*, 803 F.2d at 1272

sig v. National Student Marketing Corp.,¹¹⁰ the D.C. Circuit stated that "even assuming good faith in the filing of the counterclaim, other dilatory tactics during the litigation would justify the award of attorney's fees."¹¹¹

The *Lipsig* court further stated that attorneys' fees may be awarded even against a winning party or his attorneys.¹¹² The assertion of a colorable claim by an attorney will not bar the assessment of attorneys' fees against him if his claim was filed in bad faith.¹¹³ Thus, under the *Lipsig* view, the plaintiff in our hypothetical could be sanctioned for filing the motion to strike in bad faith, even though it was well grounded in fact and law.¹¹⁴

The inherent power also enables district courts to make

("An inherent power award may be imposed either for commencing or continuing an action in bad faith, vexatiously, wantonly, or for oppressive reasons.").

¹¹⁰ 663 F.2d 178 (D.C. Cir. 1980)(if a litigant is substantially motivated by vindictiveness, the assertion of a colorable claim by him will not bar assessment of attorneys' fees against him).

¹¹¹ *Id.* at 182. The court further stated, "While the presence of merit in a claim or defense may well negate any motion of bad faith in its *filing*, it certainly cannot justify abuse of the judicial process in the *methodology* of its *prosecution*. *Id.* (emphasis original).

¹¹² *Id.* The court stated, "[I]ndeed, even a winner may have to pay obstinacy fees." *Id.*

¹¹³ *Id.* The trial court had held, "[W]here a litigant is substantially motivated by vindictiveness, obduracy or mala fides, the assertion of a colorable claim will not bar the assessment of attorneys' fees against him." *Id.* The D.C. Circuit stated that the trial court "was eminently correct in its reasoning." *Id.*

¹¹⁴ Some circuits, however, have not accepted the views of the *Lipsig* court. In *Oliveri*, 803 F.2d at 1265, the Second Circuit enacted a far more restrictive standard for awarding attorneys' fees under the bad faith exception. In order to ensure that persons with colorable claims would not be deterred from pressing those claims, the court stated that the bad faith exception requires clear evidence that the challenged actions are entirely without color and are taken for the purpose of harassment or delay. *Id.* at 1272. The court stated:

To ensure, however, that fear of an award of attorneys' fees against them will not deter persons with colorable claims from pursuing those claims, we have declined to uphold awards under the bad-faith exception absent both "clear evidence" that the challenged actions "are entirely without color, and [are taken] for reasons of harassment or delay or for other improper purposes" and "a high degree of specificity in the factual findings of [the] lower courts."

Id. (quoting *Dow Chem.*, 782 F.2d at 344). Under this restrictive view, the plaintiff could not be sanctioned in our hypothetical because the motion to strike was warranted by fact and law. See *supra* notes 45-48 and accompanying text for a discussion of the hypothetical situation.

local rules governing the conduct of court business, provided that the rules promulgated are consistent with acts of Congress and rules promulgated by the Supreme Court.¹¹⁵ District courts may make local rules that impose reasonable sanctions when "an attorney conducts himself in a manner unbecoming a member of the bar, fails to comply with any rule of the court, including local rules, or takes actions in bad faith."¹¹⁶ Furthermore, the Supreme Court has stated that a district court's inherent authority over members of the bar is not limited to regulating conduct covered by a local rule,¹¹⁷ and Federal Rule of Civil Procedure 83 expressly provides that district courts may regulate their practice in any manner not inconsistent with the Federal Rules of Civil Procedure.¹¹⁸ Accordingly, it seems clear that the Northern District of Texas has the power to promulgate and enforce the standards contained in *Dondi Properties* as part of its inherent powers.¹¹⁹

The principal limitation on federal courts in imposing inherent power sanctions is the general rule that sanctions may be imposed only upon a finding of bad faith.¹²⁰ Note,

¹¹⁵ *Eash*, 757 F.2d at 569; see 28 U.S.C. § 2071 (1982).

¹¹⁶ *Eash*, 757 F.2d at 569; see also *Miranda v. Southern Pac. Transp. Co.*, 710 F.2d 516, 521 (9th Cir. 1983); *Martinez v. Thrifty Drug & Discount Co.*, 593 F.2d 992, 994 (10th Cir. 1979); *In re Sutter*, 543 F.2d 1030, 1037-38 (2d Cir. 1976).

¹¹⁷ *Eash*, 757 F.2d at 568.

¹¹⁸ FED. R. CIV. P. 83. Rule 83 provides:

Each district court by action of a majority of the judges thereof may from time to time . . . make and amend rules governing its practice not inconsistent with these rules . . . [Moreover], [i]n all cases not provided for by rule, the district judges and magistrates may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act.

Id.

¹¹⁹ Note that because it satisfies the notice requirements of the due process clause, *Dondi Properties* may actually add to the inherent power of courts to sanction hardball conduct. See *infra* notes 127-132 for a discussion of the requirement of notice before sanctions can be imposed.

¹²⁰ Joseph, *supra* note 50, at 64; see also *supra* notes 107-117 and accompanying text for a discussion of the requirement of finding bad faith before an award of attorneys' fees can be made under a court's inherent powers. Note that one circuit suggested that a lesser standard might be applicable when counsel, rather than a party, is the offender; see *McCandless v. Great A & P Tea Co.*, 697 F.2d 198 (7th Cir. 1983).

however, that courts may not necessarily need to make a finding of subjective bad faith in cases in which the court is imposing sanctions for violating a local rule of the court, rather than simply relying on its general inherent powers.¹²¹ Either way, our hypothetical attorney, who filed a bad-faith motion in violation of the local standard which required him to cooperate with opposing counsel, may be sanctioned by the court for his actions. Of course, in sanctioning an attorney, a district court must comply with all procedural due process requirements.

IV. DUE PROCESS REQUIREMENTS

Attorneys facing possible sanctions have interests which qualify for protection under the Due Process Clause of the Fifth Amendment.¹²² Procedural due process requires

¹²¹ See *In re Sutter*, 543 F.2d at 1035 (unnecessary to find a willful disregard or disobedience of court's authority to impose sanctions under a local rule; recklessness is sufficient, but not mere inadvertence). Because the plaintiff in our hypothetical was violating a written standard of the court, a proof of bad faith may not be necessary. Note, however, that the *Dondi Properties* standards have not been formally adopted as local rules. This may or may not be significant. At least one court, in the due process context, see *infra* notes 122-145 and accompanying discussion, has suggested that adequate prior notice of sanctionable conduct could come not only from local and federal rules and statutes, but also from local custom, an ethical canon, a court order, or a court admonition. See *Eash*, 757 F.2d at 571. Arguably, the same logic should apply to the present context as well. It should not matter whether the *Dondi Properties* standards can technically be characterized as local rules. On the other hand, because *Dondi Properties* involves inherently subjective standards, such as the attorney's failure to cooperate, bad faith may be required merely to prove that the standard was violated in the first place. In that case, the distinction between local rules and inherent power sanctions would be irrelevant.

¹²² *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1980) ("Like other sanctions, attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record"); see, e.g., *Donaldson v. Clark*, 819 F.2d 1551, 1558 (11th Cir. 1987) (due process required for Rule 11 sanctions); *Eash v. Riggins Trucking Inc.*, 757 F.2d 557, 570 (3d Cir. 1985) (due process required for sanctions under inherent power of the court); see also FED. R. CIV. P. 11 advisory committee's note ("The procedure [for sanctions] obviously must comport with due process requirements."); H.R. Conf. Rep. No. 1234, 96th Cong., 2d Sess. 8, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 2781, 2782-83 ("Before sanctioning an attorney under Section 1927, the court is to afford the attorney all appropriate protection of due process available under the law.") (quoted in Committee on Federal Courts, *Procedural Rights of Attorneys Facing Sanctions*, 40 THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 313, 319

that an individual be given both notice and an opportunity to be heard before the government may deprive him of any property interest.¹²³ The form which these procedural protections must take in a particular situation is determined by "an evaluation of all the circumstances and an accommodation of competing interests."¹²⁴ The specific dictates of due process in a given situation will be determined by the interaction of several competing factors.¹²⁵ Principally, these factors include the attorney's interest in having a sanction imposed only if it is justified, the risk of an erroneous imposition of sanctions and the probable value of additional notice and hearing in reducing the chances for error, and the interests of judicial efficiency and the administrative burdens that additional procedural requirements would entail.¹²⁶ In short, the at-

(1985)); see generally Schwarzer, *supra* note 51, at 202-05; Committee on Federal Courts, *supra*, at 313; Note, *Rule 11 Sanctions: Toward Judicial Restraint*, 36 WASHBURN L.J. 337, 361-65 (1987).

¹²³ *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971). The property interest involved is, of course, the monetary sanction imposed on the attorney. An attorney also has a property interest in his license to practice law; cf. *Barry v. Barchi*, 443 U.S. 55, 64 (1979) (property interest in a horse-training license sufficient to invoke protection of the Due Process Clause); *Mackey v. Montrym*, 443 U.S. 1, 10 n.7 (1979) (Due Process Clause applies to state's suspension of a driver's license), for cases supporting the proposition that the holder of a state-issued license has a property right in that license. Note that more is at stake in sanction hearings than simply a property interest. A lawyer's professional reputation is also stigmatized by the imposition of sanctions for violating recognized litigation standards. See *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1540 (9th Cir. 1986) ("What is at stake is often not merely the monetary sanction but the lawyer's reputation."); *Tedeschi v. Smith Barney, Harris Upham & Co.*, 579 F. Supp. 657, 661 (S.D.N.Y. 1984), *aff'd*, 757 F.2d 465 (2d Cir.), *cert. denied*, 474 U.S. 850 (1985) (imposition of sanctions condemns an attorney's professional conduct and reputation).

¹²⁴ *Eash*, 757 F.2d at 570; see *Cafeteria & Restaurant Workers Union 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.").

¹²⁵ See *Donaldson*, 819 F.2d at 1558.

¹²⁶ *Id.* The *Donaldson* court stated that "[p]roviding due process will ensure that Rule 11 will not be applied arbitrarily, that erroneous application of the rule will be minimized, and that creative legal arguments and vigorous advocacy will not be stifled." *Id.* The Supreme Court, in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), laid down the following principles:

[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an

torney's right to fairness and accuracy must be weighed against the court's need to act quickly and decisively.

Due process first requires that an attorney have fair notice of the possible imposition of sanctions and the reason for their imposition.¹²⁷ The adequacy of a particular form of notice turns, to a large extent, on the knowledge that the attorney has of the consequences of his own conduct.¹²⁸ Thus, fundamental fairness may require some form of prior notice to an attorney that his conduct may be subject to discipline or sanction by a court.¹²⁹ It is here that *Dondi Properties* comes into play. Some courts have suggested that adequate prior notice of sanctionable conduct could come from local and federal rules and statutes, local custom, an ethical canon, a court order, or a court admonition.¹³⁰ Under this view, the existence of the *Dondi Properties* opinion in itself constitutes notice that violations of the standards contained therein will be sanctionable.¹³¹ An attorney can hardly assert that he did not know what was expected of him if a well-publicized opinion of the court spells out in detail the expected standards of con-

erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and . . . the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id.

¹²⁷ *Donaldson*, 819 F.2d at 1560. In *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950), the Supreme Court held, "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections." *Id.*

¹²⁸ See *Link v. Wabash R.R.*, 370 U.S. 626, 632 (1962) ("The adequacy of notice and hearing respecting proceedings that may affect a party's rights turns, to a large extent, on the knowledge which the circumstances show such party to have of the consequences of his own conduct.").

¹²⁹ See *Eash*, 757 F.2d at 571.

¹³⁰ *Id.*

¹³¹ *Cf. Donaldson*, 819 F.2d at 1560. The court indicated:

The existence of Rule 11 itself constitutes a form of notice since the rule imposes an affirmative duty on an attorney to conduct a reasonable inquiry into the viability of a pleading before it is signed; an attorney could not assert that he or she had no notice or knowledge of the standards of conduct that the rule itself provides.

Id.

duct for all attorneys appearing before it. The only remaining due process question is whether an oral hearing is required before sanctions can be imposed on the attorney.¹³²

In Rule 11 cases, while a formal hearing may or may not be required by the particular circumstances,¹³³ the attorney must at least be given an opportunity to respond, orally or in writing, to the imposition of sanctions and to justify his action.¹³⁴ The advisory committee notes to Rule 11 state that the particular format to be followed "should depend on the circumstances of the situation and the severity of the sanction under consideration."¹³⁵ In

¹³² One possible problem is that the *Dondi Properties* standards are rather nebulous. An attorney has no precise knowledge of what type of conduct will activate its sanctions. However, a warning by the court at the first sign of abusive conduct might satisfy any notice requirements not met by the standards themselves.

¹³³ Cf. *Roadway Express*, 447 U.S. at 767 (hearing required before imposition of sanctions under inherent power) and *Eash*, 757 F.2d at 570 ("we believe that as a general practice a monetary detriment should not be imposed by a court without prior notice and some occasion to respond") with *Oliveri v. Thompson*, 803 F.2d 1265, 1280 (2d Cir. 1986), cert. denied, 480 U.S. 918 (1987) (due process does not necessarily require that an evidentiary hearing be held in all Rule 11 cases; here the judge's participation in the proceedings provided him with full knowledge of the relevant facts and therefore the procedures followed by the district court did not violate due process) and *Rodgers v. Lincoln Towing Serv.*, 596 F. Supp. 13, 27-28 (N.D. Ill. 1984) ("It would be of no value to hold a hearing at which plaintiff's attorneys could explain to me why they felt it necessary to festoon their complaint with frivolous claims. . . .").

¹³⁴ See *Donaldson v. Clark*, 819 F.2d 1551, 1560 (11th Cir. 1987). The *Donaldson* court stated:

The accused must be given an opportunity to respond, orally or in writing as may be appropriate, to the invocation of Rule 11 and to justify his or her actions. Rule 11 does not require that a hearing separate from trial or other pretrial hearings be held on Rule 11 charges before sanctions can be imposed; indeed the Advisory Committee Note indicates that the contrary is preferable Whether and to what extent additional hearing is required will vary depending upon the nature of the case. The Advisory Committee note indicates some of the matters to be considered: (1) the circumstances in general; (2) the type and severity of the sanction under consideration; and (3) the judge's participation in the proceedings, the judge's knowledge of the facts, and whether there is need for further inquiry.

Id. at 1560-61; see FED. R. CIV. P. 11 advisory committee's note.

¹³⁵ FED. R. CIV. P. 11 advisory committee's note. The note further indicates: To assure that the efficiencies achieved through more effective operation of the pleading regimen will not be offset by the cost of satel-

many situations, the judge's participation in the proceedings will provide him with full knowledge of the relevant facts and little further inquiry will be necessary.¹³⁶ On the other hand, when a court must resolve an issue of credibility or determine whether a good faith argument can be made for a particular legal position, the risk of error and the probable value of additional procedural safeguards are likely to be greater.¹³⁷ In that case, a separate hearing on the imposition of sanctions may be required.¹³⁸

It should be noted that Rule 11 employs an objective standard of reasonableness.¹³⁹ A hearing will be far more essential in the context of sanction motions made under the *Dondi Properties* standards, which to a large extent are concerned with the subjective bad faith of attorneys. Under the inherent powers of the court and section 1927, which employ subjective bad faith standards,¹⁴⁰ courts have held that sanctions must be predicated on a hearing concerning the issue of an attorney's bad faith.¹⁴¹ Thus,

lite litigation over the imposition of sanctions, the court must to the extent possible limit the scope of the sanction proceedings to the record. Thus, discovery should be conducted only by leave of court, and then only in extraordinary circumstances.

Id.

¹³⁶ *Id.*

¹³⁷ *Donaldson*, 819 F.2d at 1561.

¹³⁸ *Id.*; see *infra* notes 132-142 and accompanying text for a discussion of the requirement of a hearing before the imposition of sanctions for bad faith conduct.

¹³⁹ See *supra* notes 58-59 and accompanying text for a discussion of the objective standard in Rule 11 cases.

¹⁴⁰ See *supra* notes 86-87 and accompanying text for a discussion of the bad faith standard under section 1927; see *supra* notes 111-121 and accompanying text for a discussion of the bad faith standard under the inherent powers of the court.

¹⁴¹ See *Roadway Express*, 447 U.S. at 767 (sanctions under the inherent power of the federal courts "should not be assessed lightly or without fair notice and an opportunity for a hearing on the record"); *United States v. Blodgett*, 709 F.2d 608, 610 (9th Cir. 1983). The *Blodgett* court stated:

While on the facts we cannot conclude that the district court erred in finding that the appeal was frivolous, the mere fact that an appeal is frivolous does not of itself establish bad faith. To establish bad faith [under section 1927] on this record, a hearing was required to determine if the appeal was taken solely for purposes of delay.

Id.; *Knorr Brake Corp. v. Harbil, Inc.*, 738 F.2d 223, 227 (7th Cir. 1984) (before assessing attorney's fees under section 1927, "a court should provide counsel with some opportunity to be heard"); *Miles v. Dickson*, 387 F.2d 716, 717 (5th Cir.

before sanctions may be imposed under *Dondi Properties*, a hearing will almost invariably be necessary to allow counsel to justify their actions.¹⁴²

This conclusion necessarily raises the concern that excessive satellite litigation will clog the federal courts. Litigation over sanctions under *Dondi Properties*-type standards could easily take as much or more time than hardball tactics currently cost the system. The *Dondi Properties* court expressed a desire to avoid this problem.¹⁴³ But is this a realistic goal? The court also stated that it intended "to take the steps necessary to ensure that justice is not removed from the reach of litigants either because improper litigation tactics interpose unnecessary delay or because such actions increase the cost of litigation beyond the litigant's financial grasp."¹⁴⁴ Clearly, these conflicting goals must be carefully balanced against one another in order for *Dondi Properties* to effectively curb hardball conduct.¹⁴⁵ If such a balance cannot be achieved, perhaps the *Dondi Properties* standards should not, or cannot, be enforced.

V. SHOULD *DONDI PROPERTIES* BE ENFORCED?

A. *Cooperation v. Zealous Advocacy*

This comment has already noted that a handful of hardball lawyers are abusing the court system through the use

1967) ("To assess the costs against the attorneys [under section 1927] without notice and a hearing was, of course, wrong."); see also *Rothenberg v. Security Management Co.*, 736 F.2d 1470, 1472-73 (11th Cir. 1984) (where sanctions were supported only by conclusory statements concerning bad faith, imposition of sanctions was vacated and remanded to district court to indicate the factual basis for its findings to facilitate appellate review); see generally Committee on Federal Courts, *supra* note 122, at 319, 326.

¹⁴² See *supra* note 141 and accompanying text for a discussion of the requirement of a hearing before the imposition of sanctions for bad faith conduct.

¹⁴³ *Dondi Properties*, 121 F.R.D. at 288 ("We do not, by adopting these standards, invite satellite litigation of the kind we now see in the context of Fed. R. Civ. P. 11 motions. To do so would defeat the fundamental premise which motivates our action.").

¹⁴⁴ *Id.*

¹⁴⁵ See *infra* notes 163-176 for further discussion of the satellite litigation problem.

of dilatory tactics which waste both the time and the resources of attorneys and judges.¹⁴⁶ Most attorneys will not dispute the fact that such abusive conduct should be curtailed in the interests of justice.¹⁴⁷ But if "hardball" is not simply a description of abusive practices, but is really a description of a pervasive mind-set towards litigation possessed by a number of attorneys,¹⁴⁸ can the courts effectively govern an attorney's general attitude and behav-

¹⁴⁶ See *supra* notes 9-13 and accompanying text for a discussion of the detrimental effect of hardball tactics on the court system.

¹⁴⁷ See *supra* note 9 and accompanying text for a discussion of the views of the opponents of hardball litigation tactics; but see *supra* note 8 and accompanying text for a discussion of the views of hardball's advocates.

¹⁴⁸ See *supra* notes 2-6 and accompanying text for a discussion of the hardball mentality. Some have suggested that the underlying problem behind hardball tactics is that certain young law firms are unable to, or simply do not want to, break into the "good old boy" network, in which technical rules are often ignored for the convenience of attorneys, regardless of whether this is effective client advocacy. See Goldberg, *supra* note 3, at 51. Others have attacked this idea as ludicrous. See Sayler, *supra* note 2, at 80. "The notion is that civilized conduct is for the monied, the boring, the timid, the conservative — but not for the creative and the free-spirited. This is bonkers." *Id.* Whatever the merit of these respective arguments, it must be acknowledged that a certain tension exists between "mainstream" firms and "hardball" firms. This tension creates mistrust and prevents judicial processes from running smoothly. Accordingly, it is a problem which must be addressed, although perhaps more appropriately by the bar than by the judiciary. Bar associations may be in a better position to encourage these groups to meet and work out their differences than are judges, who, as outsiders, are somewhat insulated from conflicts within the bar.

At least one bar association has apparently agreed. The Bar of the City of New York recently published a proposed code of litigation conduct. Committee on Federal Courts, *A Proposed Code of Litigation Conduct*, 43 THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 738 (1988). Like *Dondi Properties*, the proposed code focuses on intangibles like civility and cooperation between attorneys. The Committee states:

The kind of conduct that is the subject of this report is not the sort that is proscribed, for the most part, by the canons of ethics or even by judicial interpretations of Rule 11. We are interested more in conduct that is legal, ethical, and usually beyond the reach of sanctions, but is nevertheless, in our view, improper. Such conduct, although both legal and ethical, tends to violate the appropriate relationships among lawyers. It is the kind of conduct that makes life at the bar more difficult for lawyers and clients, and unnecessarily so. We hope that by suggesting rules of conduct, we will provide some guidance to the bar and initiate a debate about where proper lines should be drawn.

Id. at 738.

ior? If so, should they attempt to do so? This section will examine the possible responses to these questions.

The *Dondi Properties* court stated that attorneys have a duty not to unreasonably or arbitrarily refuse to cooperate with the opposing counsel.¹⁴⁹ However, it may be difficult to determine whether an attorney is refusing to cooperate because he is complying with his duty to zealously pursue the interests of his client,¹⁵⁰ or whether he is simply acting in bad faith. The boundary between sanctionable and legitimate conduct is unquestionably vague in this context.¹⁵¹ Just how cooperative an attorney is required to be will probably depend upon the particular situation. The problem lies in deciding where to draw the line.

¹⁴⁹ *Dondi Properties*, 121 F.R.D. at 287-88. At least in part, the *Dondi Properties* court may have promulgated its litigation standards with an eye toward certain hardball firms which were not actually involved in either the *Dondi* or the *Knight* cases. In Dallas, there is a growing tension between mainstream and hardball firms. See *supra* note 148 for a general discussion of such tension. Referring to one of the "hardball firms" in town, an attorney from an old-guard Dallas firm stated, "The reputation they're developing, whether deserved or not, is that they're behaving in a fashion that is not the Dallas way. Dallas lawyers are gentlemen to each other. These two act like New York lawyers." *Quotes*, A.B.A. J., Feb. 1, 1989, at 35. The *Dondi Properties* standards may have been promulgated in order to help to preserve the "Dallas way." The assumption underlying this quotation may also help to explain why a case such as *Dondi Properties* arose in the Northern District of Texas rather than another federal district, such as the Southern District of New York. But see Committee on Federal Courts, *supra* note 148, at 738 (indicating that lawyers in New York are also dissatisfied with hardball tactics).

¹⁵⁰ See AMERICAN COLLEGE OF TRIAL LAWYERS' CODE OF TRIAL CONDUCT Preamble (1987) ("To his client, a lawyer owes undivided allegiance, the utmost application of his learning, skill and industry, and the employment of all appropriate legal means within the law to protect and enforce legitimate interests.").

¹⁵¹ Consider the special problems inherent in regulating some types of hardball tactics. If the problem is an attorney's arguably unreasonable insistence on compliance with obscure technical rules, it is difficult to justify the imposition of sanctions for zealously insisting that the opposing party comply with those rules, even if such insistence may be detrimental to the system. It may be that the problem is not with the attorney, but with the rules themselves. If the rules are so complicated that an attorney who insists on compliance with them is considered to be acting in bad faith, then the rules should be simplified. This rather simplistic conclusion of course raises a host of additional issues. Fundamental changes in the rules are not likely to occur overnight. On the other hand, such changes should perhaps at least be considered.

In *Cheng v. GAF Corp.*,¹⁵² the Second Circuit reversed an award of attorneys' fees and expenses to appellee GAF Corporation (GAF) for the costs of defending against appellant Cheng's allegedly unreasonable and vexatious attempts to disqualify GAF's counsel.¹⁵³ The court found that Cheng's motion not only was not frivolous or unreasonable, but in light of a prior decision of the Second Circuit supporting disqualification, his attorney "may have been ethically obliged to pursue his disqualification efforts."¹⁵⁴ Had Cheng been faced with the duty to cooperate under *Dondi Properties*, he might have failed to seek disqualification even if it had been in the best interests of his client.

Accordingly, courts must be careful that the threat of sanctions does not become oppressive, creating a chilling effect on legitimate advocacy.¹⁵⁵ Consider our hypothetical.¹⁵⁶ The plaintiff's attorney has a duty to employ "all appropriate legal means within the law to protect and enforce legitimate interests."¹⁵⁷ While he should not vexatiously make unwarranted motions which do not significantly affect the interests of his client, if the motion has even a chance of success, he may have an ethical duty to file it.¹⁵⁸ The fact that he did so with a Rambo-like

¹⁵² 713 F.2d 886 (2d Cir. 1983).

¹⁵³ *Id.* at 887. Cheng filed an employment discrimination suit against GAF. Cheng was represented by Legal Services for the Elderly Poor (LSEP). GAF was represented by the law firm of Epstein, Becker, Borsody & Green, P.C. (the Epstein firm). During the course of litigation, an attorney from LSEP left that firm for the Epstein firm. Cheng then moved to disqualify the Epstein firm, alleging that the attorney who had left LSEP had been privy to confidential information regarding Cheng's suit. *Id.*

¹⁵⁴ *Id.* at 891. The court noted that under the Canons of the American Bar Association Code of Professional Responsibility, there exists at least the appearance of impropriety. *Id.* at 887-88.

¹⁵⁵ See *Colucci v. New York Times Co.*, 533 F. Supp. 1011, 1014 (S.D.N.Y. 1982) ("The power to assess the fees against an attorney should be exercised with restraint lest the prospect thereof chill the ardor of proper and forceful advocacy on behalf of his client.").

¹⁵⁶ See *supra* notes 45-48 and accompanying text for a discussion of the hypothetical situation.

¹⁵⁷ AMERICAN COLLEGE OF TRIAL LAWYER'S CODE OF TRIAL CONDUCT Preamble (1987).

¹⁵⁸ Cf. *id.*; *Cheng*, 713 F.2d at 891.

mentality may be morally reprehensible, but it may not be validly sanctionable.

In order to maintain the proper balance between cooperation with opposing parties on the one hand, and zealous client advocacy on the other hand, courts must apply the *Dondi Properties* standards with wisdom and restraint.¹⁵⁹ Perhaps the most appropriate way to achieve this balance is to apply the standards only to "clearly unthinkable" actions,¹⁶⁰ rather than to borderline cases such as the one in our hypothetical. This solution will serve two functions. First, because sanctions will be appropriate only in the most egregious cases, the *Dondi Properties* standards will not chill legitimate advocacy. Second, the higher standard of "clearly unthinkable" will reduce the likelihood that a party opposing a motion will routinely claim that his opponent has failed to cooperate and file a motion for sanctions under *Dondi Properties* as a hardball tactic of his own.¹⁶¹ If *Dondi Properties* applies only in extraordinary circumstances, it is less likely to be wrongfully invoked every time an attorney is displeased with his adversary's conduct or demeanor.

On the other hand, if the courts do not limit the applicability of these standards to egregious cases, the threat of sanctions under *Dondi Properties* "will cast an ominous shadow over federal courts" which will chill legitimate advocacy and perhaps prevent parties from asserting meritorious claims or defenses.¹⁶² The *Dondi Properties* standards are designed to increase the efficiency of federal courts. However, efficiency should not be achieved at the expense of fairness. A higher standard for the imposition of sanc-

¹⁵⁹ Cf. *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1086 (7th Cir. 1987) ("I continue to believe that the 1983 amendment of Rule 11 was sound in concept, but it will surely defeat its own purpose if not applied with wisdom and restraint.").

¹⁶⁰ Cf. Shaffer, *Rule 11: Bright Light, Dim Future*, 7 REV. OF LITIGATION 1, 32 (1987) ("unless Rule 11 is put on the shelf and applied only to 'unthinkable' claims, it will cast an ominous shadow over federal courts").

¹⁶¹ See *infra* notes 168-171 and accompanying text for a discussion of the willingness of courts to sanction frivolous motions for sanctions.

¹⁶² Shaffer, *supra* note 160, at 32.

tions under *Dondi Properties* should provide a proper balance between efficiency and accuracy. As long as they act reasonably, attorneys will be free to pursue zealously the interests of their clients. Only when they engage in clearly unthinkable conduct that delays the administration of justice will they be sanctioned for their conduct. While it is admittedly not flawless, particularly because of the difficulty of determining whether particular conduct is or is not clearly unthinkable, this standard should adequately serve the interests of clients, as well as the court system.

B. *Satellite Litigation*

Satellite litigation poses another serious problem. An example of the magnitude of this problem in the Rule 11 context is found in *Eastway Construction Corp. v. City of New York*,¹⁶³ in which the Second Circuit ruled on a Rule 11 dispute for the second time. The court had earlier reversed the trial court's refusal to award sanctions against a plaintiff who filed a frivolous civil rights action and remanded the case for proper sanctions to be imposed.¹⁶⁴ On remand, the trial court imposed a sanction of \$1,000 on the plaintiff.¹⁶⁵ This did not satisfy the Second Circuit, which modified the sanction award to \$10,000.¹⁶⁶ Thus, sanctions were awarded for a violation of Rule 11 only after two trips to the Second Circuit and denial of a petition for certiorari by the Supreme Court.¹⁶⁷ It is not difficult

¹⁶³ 821 F.2d 121 (2d Cir.), *cert. denied*, 108 S. Ct. 269 (1987) [hereinafter *Eastway II*].

¹⁶⁴ *Eastway Constr. Corp. v. City of New York*, 762 F.2d 242 (2d Cir. 1985) [hereinafter *Eastway I*].

¹⁶⁵ *Eastway Constr. Corp. v. City of New York*, 637 F. Supp. 558 (E.D.N.Y. 1986), *modified*, 821 F.2d 121 (2d Cir.), *cert. denied*, 108 S. Ct. 269 (1987).

¹⁶⁶ *Eastway II*, 821 F.2d at 122.

¹⁶⁷ This situation led one commentator to conclude, "*Eastway I* and *Eastway II* are prime examples that the use and application of Rule 11 are frustrating the Rule's purposes." Shaffer, *supra* note 160, at 26. Shaffer further stated, "If nothing else, [there is] a marked disagreement among judges on how Rule 11 is to be used, and this disagreement is spawning litigation and judicial nuances that undermine the laudable purposes of the Rule." *Id.* at 31.

to imagine district and appellate court dockets filled with similar cases under *Dondi Properties*.

The satellite litigation problem may be magnified further if courts are willing to impose sanctions under *Dondi Properties* against attorneys who file frivolous motions for sanctions. In *Aircraft Trading & Services, Inc. v. Braniff, Inc.*,¹⁶⁸ Aircraft Trading moved for sanctions against Braniff for bringing a frivolous appeal.¹⁶⁹ After concluding that Braniff's appeal was well-supported in fact and law, the court stated that Aircraft Trading's motion for sanctions itself bordered on the frivolous.¹⁷⁰ While the court did not sanction Aircraft Trading in this case, it did indicate a willingness to sanction in the future attorneys who bring frivolous requests for sanctions.¹⁷¹

Accordingly, consider this nightmare based on our hypothetical: The defendant files a motion in violation of a local rule. The plaintiff, acting possibly in bad faith, moves to strike the motion. The defendant then moves for sanctions against the plaintiff for failure to comply with the *Dondi Properties* standards. The plaintiff then moves for sanctions because the defendant also violated the duty to cooperate imposed by *Dondi Properties*.¹⁷² The court must now hold a hearing¹⁷³ and attempt to determine who is to blame and whether anyone has acted in bad faith.¹⁷⁴ The courts could conceivably be clogged with hundreds of variations of this scenario. *Dondi Properties* expressed an intention to avoid excessive satellite liti-

¹⁶⁸ 819 F.2d 1227 (2d Cir.), cert. denied, 108 S. Ct. 163 (1987).

¹⁶⁹ *Id.* at 1236. Aircraft Trading characterized Braniff's appeal as "totally lacking in merit, framed with no relevant supporting law, conclusory in nature, and utterly unsupported by the evidence." *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* "Appellees' request for sanctions therefore borders on the frivolous, and we caution that we will not hesitate to impose appropriate penalties in the future for frivolous requests for sanctions." *Id.*

¹⁷² See *Dondi Properties*, 121 F.R.D. at 287.

¹⁷³ See *supra* notes 122-145 and accompanying text for a discussion of the possible requirement of a hearing before sanctions can be imposed on an attorney.

¹⁷⁴ For a discussion of bad faith in the context of section 1927, see *supra* notes 86-92 and accompanying discussion. For a discussion of bad faith in the context of the inherent power of the courts, see *supra* notes 111-121.

gation.¹⁷⁵ If it cannot effectively do so, problems with satellite litigation may defeat the fundamental purpose behind the *Dondi Properties* standards.

Once again, this problem could be minimized if a "clearly unthinkable" standard were applied to sanctions under *Dondi Properties*.¹⁷⁶ If only egregious conduct is sanctionable, then attorneys will be less likely to fire off unnecessary sanction motions, especially if judges sternly warn them that frivolous sanction motions will not be tolerated. This hands-off approach, however, may leave hardball attorneys free to disrupt the court system. But if judges also warn attorneys who are playing hardball that they will be slapped with sanctions if they continue to abuse judicial resources, hardball lawyers may become much more cooperative, especially if judges are willing to impose stiff penalties on attorneys whose conduct does rise to a level which violates the "clearly unthinkable" standard. If *Dondi Properties* is used sparingly, but forcefully, judges may be able to curb hardball conduct without defeating the *Dondi Properties* court's goal of improving the efficiency of the federal court system.

VI. CONCLUSION

Hardball tactics pose a significant problem to our system of justice, wasting valuable judicial and attorney time and resources. Clearly, some judicial response is necessary, especially considering the inconsistent treatment among the circuit courts of sanctioning powers under Rule 11 and section 1927.¹⁷⁷

Judicial interpretations of Rule 11 and section 1927

¹⁷⁵ See *Dondi Properties*, 121 F.R.D. at 288 ("We do not, by adopting these standards, invite satellite litigation of the kind we now see in the context of Fed. R. Civ. P. 11 motions. To do so would defeat the fundamental premise which motivates our actions.").

¹⁷⁶ See *supra* notes 159-162 and accompanying text for a discussion of the proposed standard.

¹⁷⁷ See *supra* notes 49-79 and accompanying text for a discussion of a court's sanctioning powers under Rule 11; see *supra* notes 80-97 and accompanying text for a discussion of a court's sanctioning powers under section 1927.

have rendered these provisions ineffective to curb many types of hardball conduct. Accordingly, this comment has addressed conduct that is generally legal, ethical, and beyond the reach of traditional sanctions.¹⁷⁸ Nevertheless, such conduct is making life unnecessarily difficult for anyone associated with litigation in federal court.

Dondi Properties is a landmark case attempting to establish standards of conduct for attorneys in order to curb abusive hardball tactics. These standards, enacted under the court's inherent powers, focus on the dignity and integrity that should be expected of a member of the legal profession. The standards encourage lawyers to be both cooperative and courteous to each other, to clients, and to judges.

This comment has examined a number of possible roadblocks to the imposition of sanctions under *Dondi Properties*, noting particularly the possible chilling effect on legitimate advocacy and the problem of excessive satellite litigation. However, the *Dondi Properties* standards, although rather nebulous, should more than adequately serve their purpose in most situations. If the presence of the standards does nothing more than cause lawyers to stop and think before engaging in questionable conduct, they will have achieved an important goal. Perhaps lawyers will attempt to cooperate with one another before racing to the courthouse to settle their often petty differences.

It is too early to tell whether *Dondi Properties* will achieve its goal of effectively and efficiently curbing hardball conduct. But if *Dondi Properties* achieves this goal in the Northern District of Texas, other courts may soon follow suit, ushering in a new era of sanctions against abusive litigators. Lawyers who attempt to play hardball in federal court may discover that, all too often, they strike out.

¹⁷⁸ See Committee on Federal Courts, *supra* note 148, at 739 ("We are interested more in conduct that is legal, ethical, and usually beyond the reach of sanctions, but is nevertheless, in our view, improper.").

If nothing else, *Dondi Properties* sends out a strong signal to the litigating bar:

The standard tells us what we already should know in conducting our professional lives. They should instruct the inexperienced lawyer. They should prick the conscience of those experienced lawyers who either have lost or never had respect for their profession. The publication of these standards is the first punch in the long fight against the decline in professionalism. Other courts, both state and federal, should follow suit and join the fight. The courts and the bar will wrestle with the problem for a long time to come. At least the fight has begun.¹⁷⁹

¹⁷⁹ Albright, *supra* note 13, at 19.

