IN THE SUPREME COURT OF FLORIDA
CASE NO. 95,534

Third District Court of Appeal Case no. 97-334

DIOSDADO C. DIAZ and DENNIS HABER, ESQ.,
Petitioners,

vs.

RINA COHAN DIAZ and LEINOFF & SILVERS, P.A.,
Respondents

PETITIONER HABER'S INITIAL BRIEF ON THE MERITS

Respectfully submitted,

Helen Ann Hauser
Fla. bar no. 353906
DITTMAR & HAUSER
Counsel for Petitioner Haber
3250 Mary Street, Suite 400
Coconut Grove, Fl 33133
(305) 442-4333

INTRODUCTION

The Third District opinion from which appeal is taken, case no. 97-334, reported at Diaz v. Diaz, 727 So. 2d 954 (Fla. 3d DCA 1999), dealt with a post-judgment award of attorneys' fees. There was also an appeal from the final judgment of dissolution of marriage, Third District case no. 96-515, affirmed without opinion. The Third District consolidated the records in its two cases, so that for case no. 97-334, the parties ordered only post-judgment pleadings and three transcripts of post-judgment proceedings dated March 14, 1996; May 23, 1996; and December 10, 1996. References to pleadings in the appellate record will include the two Third District case numbers so that these documents can be readily located. References to transcripts will include the dates of the transcripts and page numbers. Any transcripts dated prior to March, 1996, will be found in the record from case no. 96-515. The parties will generally be referred to by name, or by their status in the original trial court proceedings–i.e., as "husband," "wife," "husband's counsel," and so on.

There are two petitioners, Diosdado C. Diaz and Dennis Haber, Esq., who were, respectively, the husband and one of the husband's attorneys in the trial court. The respondents are Rina Cohan Diaz (former wife) and her counsel Leinoff and Silvers, P.A. Both Dennis Haber, P.A. and Leinoff and Silvers, P.A. have withdrawn as counsel for their respective clients; all parties now have separate representation.

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES:

STATUTES AND RULES:

OTHER AUTHORITIES:

STATEMENT OF THE CASE AND FACTS

This case, of vital importance to the Bar and the public of this State, asks this Court to settle a conflict among the District Courts of Appeal as to whether a Florida trial court has "inherent power" to impose sanctions upon a litigant's counsel for conduct which is not prohibited by any rule or statute, and is not contemptuous. If any such power is recognized in Florida, this Court must then delineate its limitations–-what

type of conduct could justify the exercise of such extraordinary power, what procedural safeguards must be afforded to the attorney, and how can the attorney-client relationship be protected? The Third District affirmed a trial court's order in this divorce case, directly assessing $40,000 of the wife's attorney fees against the husband and his counsel, jointly and severally, for failing to settle the proceeding at an earlier stage. There was no evidentiary hearing as to the specific issue of whether the attorney acted in "bad faith." There was no specific finding of "bad faith" by counsel, nor of any improper conduct by the husband except for his mere prosecution of the action.

As recited in the final order dissolving the marriage [R 96-515, pp. 431-444], the husband and wife, during an eleven-year marriage with one child, maintained entirely separate finances. The wife, an attorney, voluntarily left her employment [Id., at 431-32]. The wife had a trust consisting of stock in her father's closely-held businesses, which generated income from dividends and distributions. Thus, the wife did not have to work in order to enjoy a very comfortable lifestyle, Id.

The husband stipulated that the wife's trust assets were non-marital, but attempted throughout the litigation to ascertain her net worth, the amount of income generated from the trust, whether any potential income from the stock had been withheld, whether any assets had been invested in such a way that their appreciation could have

become marital property, and whether any income had lost its separate character by becoming commingled with marital funds. The wife never fully disclosed her assets and income. She wrote large checks for "cash," and had no receipts showing whether the money was spent on joint items or personal luxuries [Tr 7/28/95, pp. 224-25]. Her original financial affidavit was highly inaccurate, and an amended one was filed only at the child support hearing [R 96-515, pp. 49-55, 71-67]. She could not explain why, in the prior year, the sum of $240,000 had flowed into her bank account [Tr 3/14/96, p. 19-20]. The trial court denied the husband's multiple attempts to get income information directly from the trust or the father's businesses.

The husband, although his own income had not diminished during the marriage, sought some form of alimony based upon the parties' established lifestyle [Tr 7/28/95, p. 219; Tr 8/31/95, p. 282; Tr 9/1/95, p. 583]. The parties had a home with expensive china and crystal and original art; they took trips out of the country, and enjoyed dining out [Tr 7/28/95, pp. 40-41, 47-48, 125-26, 214-15]. The wife admitted that she had paid most household bills [Tr 7/28/95, p. 113]. Based on evidence of lifestyle, the husband requested a lump-sum payment to help him purchase a residence [Tr 7/28/95, pp. 22-24]. Even the wife's expert accountant was retained to testify regarding lifestyle [Tr 8/31/95, p. 291], deemed a relevant issue by both parties. It was ultimately shown that the wife was deeply indebted on credit cards [Tr 8/31/95,

p. 276], so that her prosperity was artificial. The large monthly payments she made were interest on "maxed out" accounts [Tr 8/31/95, p. 273]. However, these facts did not come out until late in the case [Tr 3/14/96, p. 20]. Ultimately, the court denied alimony to the husband [R 96-515, p. 437].

The court did, however, recognize that the wife should not receive one-half of the husband's employment benefits. "Had the wife not received what amounted to an annuity she, too, would have been working and earning a benefit and/or pension which could have been offset against the husband's pension benefits," Id., p. 439. Thus, the judge awarded the wife only 25% of such benefits, which was the basis of the wife's unsuccessful appeal. The court also awarded $600 per month child support, and medical benefits for the child, Id.,at 441-43.

Subsequently, on March 14, 1996, the trial court held a hearing on both parties' requests for fees and costs, at which each party presented its legal bills. The wife's counsel asserted entitlement to fees pursuant to sections 61.16 and 57.105, Florida Statutes. Both legal argument and testimony was presented on the issues framed. The wife asserted that before commencing litigation, she had offered to stipulate to a divorce decree without asking for any of the husband's benefits, and she sought only $50 per week in child support. This offer, and later offers with different terms, were rejected [Tr 3/14/96, p. 9]. The wife asserted that refusal to settle constituted

vindictiveness [Tr 3/14/96, p. 10] .

The husband, however, testified that the original offer was mailed to him just as the wife left the country, accompanied by no financial disclosure. When the divorce commenced, he did not know what the wife earned or what she spent, except that she spent "a lot." After suit was filed in November of 1994, the husband sought the assistance of attorney Dennis Haber. Obviously, therefore, Haber had no input into the rejection of the original offer. The husband told his attorney that he had "no idea" what the wife's financial position was [Tr 3/14/96, pp. 89-91]. The wife's counsel accused attorney Haber of needlessly trying a meritless case-- but oddly enough, asserted that the husband's co-counsel Charlotte Karlan, a family law specialist who conducted the entire trial [See Transcripts of 7/28/95, 8/31/95, 9/1/95, 12/26/95] was not blameworthy because "she came in late" [Tr 3/14/96, p. 12].

The wife's counsel even accused the husband of deliberately engineering the recusal of a prior judge, thereby delaying the proceedings, by hiring a particular expert who had previously been involved in a case with that judge [Tr 3/14/96, pp. 10, 46]. However, the successor judge made no finding of misconduct as to this recusal. Rather, the judge repeatedly opined that the wife's original offer should have been accepted, since the husband's pension would be at risk if he litigated [Tr 3/14/96, p. 21]. Attorney Haber responded that it was impossible to achieve a fair settlement

without having complete disclosure [Tr 3/14/96, pp. 26, 29]. When the wife made a second, less advantageous pretrial offer, the full picture was still not known, although some discovery had been done [Id., p. 47]. The wife's counsel admitted that there were many matters his client professed not to know at her deposition, and that her first financial affidavit was inaccurate [Tr 3/14/96, pp. 60-62]. The second offer was less than a month after this unsatisfactory and uninformative deposition [Id.]

Attorney Karlan, trial counsel for the husband, testified that good-faith settlement discussions continued during the proceedings, but the original offer from the wife was no longer "on the table," [Tr 12/10/97, p. 72]. She, too, stated that although the wife's stock was not a marital asset, it had to be valued so that the financial issues could be addressed. Without knowing debts and current income, it was impossible to determine whether alimony would be payable [Tr 3/14/96, pp. 104-111].

By the time Haber himself began testifying at the initial fees hearing, the judge had already made up her mind. Instead of allowing him to testify uninterrupted as the wife's counsel had done, the judge peppered Haber with hostile questions such as, "What on earth gave you an indication that this man could be entitled to alimony even if she had an income of $200,000 a year?" [Tr 3/14/96, pp. 117-18], "How much more did you know when you went to trial?" and "Did you ever figure out what your client had at risk?" Id., p.118. The fees hearing concluded with the judge stating, "I'm going

to award the wife some attorney's fees...I'm considering awarding a part of these fees against counsel because I think this litigation was totally uncalled for and totally unnecessary, and I don't know who exactly was responsible for carrying it on to this extreme...I am just utterly appalled and very upset at what has happened in this litigation... it is what gives lawyers a bad name..." [Id., pp. 156-57]. Haber answered, "As much as I would like to respond to your position, I am constrained by attorney/client privilege in not doing so," [Id., p. 158].

On May 23, 1996, another hearing was held at which only attorney Karlan appeared for the husband. The parties discussed a modification of the final order [Tr 5/23/96, pp. 1-7]. The wife's counsel also inquired whether there had been a determination on the fees amount in accordance with the oral ruling at the end of the March hearing [Id., pp. 3,8]. The judge stated, "The problem that I had in coming up with the figure is I don't know who was responsible for this litigation in the sense I don't know whether the husband got bad advise [sic] or whether the husband got advise [sic] and didn't want to follow it," Id., p. 10. She then stated that $40,000 would be a fair amount to assess, out of a gross amount of roughly $67,000 in fees and $6,000 in costs claimed by the wife [Id., at 10-11]. She continued, "I'm going to make it a joint and several responsibility of the husband's and... Mr. Haber. The reason is that I can't do it other than that, and I am not entitled to the nature of the

relationship between the two. I don't know what passed between them I don't know how they made this decision to proceed. I know that Mr. Haber has got to assume some of the responsibility because it is so obvious to me that this is a case that never should have been," Id., at 13. Thereafter, at the request of the wife's counsel, the court made a finding that the case had been litigated in "bad faith," but without deciding whether the husband or the attorney was culpable, Id., at 22-23. Haber had not been placed on notice that the Court was about to make this finding and had no opportunity to address it before the oral ruling.

When he learned that fees had been assessed against him personally, without proper notice to him and without his presence, attorney Haber promptly moved for rehearing. At this time, an order drafted by the wife's counsel had been presented to the Court but not executed. On December 10, 1996, Haber appeared, represented by his own separate counsel. Because of the conflict created by the court's ruling, the husband was represented by attorney Karlan. Only legal argument was presented at the December hearing, for two reasons-–time constraints, and concerns about attorney-client privilege [Tr 12/10/96, pp. 88, 75-91]. The Court accepted a limited proffer by Haber that his client had already testified or would testify that when these early offers were made, he knew almost nothing about his wife's finances [Tr 12/10/96, pp. 39-40], but Haber felt unable to proffer anything else without violating

his duty to his client. At the outset, the judge stated, "I was disturbed with the way this case was tried...I couldn't figure out why this case took as much time or money or why it was so allegedly complicated," [Id., p. 3]. Because the first offer by the wife was very advantageous, the judge opined, "there is no way that anyone with a knowledge of family law could not have figured out that he couldn't do better accepting the settlement," [Id., p. 4]. She continued, "I don't know who is responsible. I don't know if it was the lawyer. I don't know if it was the client. I don't know whether the lawyer had a responsibility under Sanchez versus Sanchez to come and say to his client, 'No, I am not going to take this position because I don't think it is warranted in the law...' " [Id., p. 6]. The court remarked that the husband's claim for alimony was "a long shot," whereas, if he litigated, the wife would have a claim to the husband's substantial pension that would likely be much greater than any possible alimony [Id., p. 8]. (Ultimately, the wife was awarded only 25% of the pension, and did not succeed in her appeal from that order.)

Attorney Haber's counsel explained, once again, that the husband and his original counsel initially had no idea of the extent of the wife's income or assets, nor their form; and further, that the wife was not forthcoming in discovery [Id., p. 9]. The husband's counsel, Ms. Karlan, explained that lump sum alimony was appropriate because of the disparity in the ability of the two parties to keep up the marital lifestyle,

and that after some discovery was finally obtained, the husband asked for only $25,000 [Id., pp. 23-24]. The judge responded, "I am looking at this in a global situation. I am looking at it as a lawyer who evaluates it. I am looking...through the eyes of somebody who practices a long time. And one of the questions that...I have to deal with is when you think you know and you're offered a reasonable settlement, do you put it on the line for what you might find out." [Id., p. 30].

Haber's counsel explained that pursuant to Fla. Stat. sec. 57.105, the judge would have to find a complete absence of justiciable issues in order to award fees against an attorney. Even then, the fees assessed could not be joint and several, but at most could be 50/50 against attorney and client [Id., pp. 32-35]. The judge agreed that "No divorce action could ever be a 57.105 because there is always a judiciable [sic] issue ...On its face it is totally not frivolous... that is the way Chapter 61 works..." [Id., pp. 36, 50]. "I realize this isn't a 57.105 case," Id., p. 52. Haber's counsel further argued that there is no right to fees for rejection of a "reasonable" settlement offer, and that section 61.16 contains no provision for an award against counsel.

For the first time, the trial judge explained that her rationale for awarding fees was based upon the inherent power of the court [Id., p. 32], and repeated that the liability should be joint and several because she did not know whom to blame, even though such a ruling meant that Haber and his (now former) client were thereby placed in

such conflict that Haber was obliged to withdraw. Haber's counsel protested that it would be improper "to try to assess the motives of counsel or have counsel and their clients testifying after the case is over why they did what they did. It strikes at the heart of a litigant's right to vigorous representation," Id., p. 84.

The judge and the parties extensively discussed how they could have this "inherent power" award reviewed on appeal, without committing an invasion of the attorney-client privilege that would prove improper in the event of a reversal. If only entitlement were determined and no final judgment entered, the order would not be reviewable. Haber's counsel explained, "Due to our quandary of attorney/client privilege problems, we can't present testimony on the issue unless there is a complete waiver plus a limitation that opposing counsel cannot use it for any other purposes..." Id., pp. 86-87. The judge considered entering an order leaving the apportionment to be determined in the future, but feared that it would not constitute a final reviewable order, Id., pp. 88-89. Haber's counsel asked, "Can we reserve our right if the DCA determines that the Court has power to do that to present the testimony as to who did what?" The Court replied, "Yes," [Id., p. 87], and suggested asking the appellate Court to remand the matter for allocation (Id., p. 91). Ultimately, the trial judge entered an order [R 97-334, pp. 20-23] awarding $40,000 in fees, plus interest, to be paid to the wife's counsel jointly and severally by the husband and attorney Haber.

The order, essentially unchanged from the one drafted by the wife's counsel prior to this last hearing, recites the terms of the wife's original offer and states that the husband's alimony claim was "dwarfed by the litigation expenses incurred by the parties," had "no basis in law," and "bordered on a 57.105 action." It finds that the Respondent acted in bad faith, but explains, "The court is unaware as to whether Respondent or Respondent's counsel, Dennis Haber, or they jointly caused this senseless and bad faith litigation. There is no way for the Court to make such a determination at this time," Id.

In addition to supporting his former client's argument that no fees could be awarded for a perceived failure to accept a reasonable settlement, attorney Haber contended on appeal that there was no authority whatsoever for an assessment against counsel under these circumstances and, further, that he had been unable to properly defend himself without violating the attorney-client privilege. The Third District's affirmance, at 727 So. 2d 954, recites, "The trial court concluded that at the outset of this case, it should have been obvious that (1)the wife had made a generous and desirable settlement offer, (2) there was no realistic possibility to do better in litigation, and (3) there was a high probability that the husband in litigation would do much worse," even though the court also acknowledges that the alimony claim by the husband was in the "gray area" and that the trial court called it "at best a longshot"

rather than wholly frivolous, Id., at 956. The Third District then held, "Courts have the inherent power to assess attorneys' fees against counsel for litigating in bad faith," Id. at 958, rejected the attorney's claim that attorney-client privilege prevented him from defending himself , and declined even to remand the matter for hearing. The former husband and attorney Haber filed timely motions for rehearing, certification, and rehearing en banc, supported by an amicus brief from the Family Law Section of the Florida Bar. Specifically, Haber pointed to portions of the transcript which clearly indicated that the trial court and all parties contemplated a full evidentiary hearing in the event of an affirmance. The Third District denied all of these motions, and this petition for further review was timely filed thereafter.

SUMMARY OF THE ARGUMENT

In this case, Florida must decide whether to allow its trial courts to impose sanctions, including an opposing party's fees, upon counsel and litigants for conduct which is neither unlawful nor contemptuous, but offends some unpublished guideline in a trial judge's mind. While Federal courts have experimented with using "inherent power" of the courts to sanction conduct which Congress has not seen fit to condemn, they recognize that this extraordinary power, if unchecked, threatens our adversarial

system of justice. Thus, Federal courts generally allow the use of "inherent power" sanctions only for outrageous conduct which threatens the integrity of the justice system. They require adequate notice, a hearing, and a finding of actual "bad faith." When disciplining counsel, Federal courts cite their power to control the admission and conduct of the bar practicing before them. Still, there is no evidence that "inherent power" sanctions accomplish anything not available through the rules of civil procedure, Federal fee-shifting statutes, or the contempt power.

In Florida, we have an integrated Bar; individual courts control neither admission nor discipline of counsel. Further, this Court has recognized that entitlement to fees is a substantive matter for the legislature to determine. There are already several rules and statutes which assess fees against a party or attorney who has acted improperly or pursued a frivolous claim. But the Third District in this case held that a trial court could assess the opponent's fees, *jointly and severally,* against a litigant and one of his attorneys, although the claim was not frivolous, no offer-of-judgment statute applied, and there was no finding of misconduct during the litigation. The trial court simply felt that the case should have been settled because it was a "long shot." Thus, the trial court attempted to create a new penalty, punishing litigants and their counsel for daring to exercise their right of access to the courts. While recognizing that attorney-client privilege and his duty of loyalty barred the lawyer from testifying as to what

advice he gave his client, the trial judge sanctioned him simply because she could not tell whether attorney or client was responsible for the decision to proceed with the case. Although the case at bar was a divorce, the Third District's ruling applies to trial courts in general. It authorizes a Draconian remedy without limitation, without due process, and without a meaningful right of review, bypassing The Florida Bar entirely. Worse, if failure to settle a colorable claim is deemed improper, attorneys and their clients will be placed in hopeless conflict by every settlement overture, and no attorney will dare to pursue a novel claim.

If there is "inherent power" in Florida trial courts to sanction counsel for conduct which violates no statute, rule, or order and is not contemptuous, the power must be reserved for outrageous conduct, and full due process must be provided. An attorney's failure to force his client to settle a colorable claim is not misconduct at all.

ARGUMENT:

I. THIS COURT SHOULD RESOLVE THE CONFLICT AMONG THE DISTRICT COURTS OF APPEAL BY DETERMINING THAT FLORIDA TRIAL COURTS DO NOT POSSESS INHERENT POWER TO DISCIPLINE AN ATTORNEY FOR CONDUCT WHICH VIOLATES NO RULE, STATUTE, OR COURT ORDER, AND IS NOT CONTEMPTUOUS

The appearance of this issue on the docket of this Court is, without question, another sign of the serious crisis in our legal profession which continues to be addressed by The Florida Bar under this Court's leadership. But in our zeal to stamp

out the much-publicized egregious misconduct of a few attorneys, we must not weaken the pillars which support the adversarial system, a citizen's right of access to the courts, and a citizen's right to counsel. If Florida should grant amorphous, unlimited, "inherent" sanctioning power to our trial courts, without due regard to the profound consequences of such a ruling, our system of justice will be shaken to the core, rendering its meaningful survival by no means certain. Two of Florida's five intermediate appellate courts have already attempted to recognize just such undefined and unlimited "inherent power," while two others have declined to do so. One has equivocated. It is now up to this tribunal to bring calm rationality to the issue. A brief historical perspective will be presented, followed by analysis of the concerns that relate specifically to Florida.

A. "Inherent Power" of Federal Courts to Assess Fees Against Counsel is Derived from the Federal Court's Control Over the Attorneys Who Comprise Its Bar , and Requires Notice, Hearing, and Factual Findings Meeting a Stringent Standard; Its History, However, is Checkered, and Its Efficacy Questionable

To understand the present controversy over a court's "inherent powers" to assess sanctions against counsel, we must go back to the much-cited case of Roadway Express, Inc., v. Piper, 447 U.S. 752 (1980). By failing to timely file pleadings pursuant to court orders, the plaintiffs' counsel in a civil rights class action precipitated the dismissal of their clients' claims, and the defendants sought an award

of their not-inconsiderable fees and costs for defense of the class action. At that time, there was no Federal statutory authorization for an award of fees against counsel in that context; 28 U.S.C. sec. 1927 provided only for an award of "costs" against an attorney who "so multiplies the proceedings...as to increase costs unreasonably and vexatiously," 447 U.S. at 752. Rule 37(b) of the Federal Rules of Civil Procedure would apply only to those matters related to discovery abuses, although it did provide for fees against opposing counsel. The Supreme Court held,

> In narrowly defined circumstances federal courts have inherent power to assess attorney's fees against counsel. The general rule is that a litigant cannot recover his counsel fees, but that rule does not apply when the opposing party has acted in bad faith, including bad faith in the conduct of the litigation. In view of a court's power over members of its bar, if it may tax counsel fees against a party who has litigated in bad faith, it certainly may assess those expenses against counsel who willfully abuse judicial processes, Roadway Express, supra, 447 U.S. at 753.

The Supreme Court provided no real guidance as to the nature of the "narrowly defined circumstances" except to note that "the trial court did not make a specific finding as to whether counsel's conduct constituted or was tantamount to bad faith, a finding that should precede any sanction under the court's inherent powers," Id., at 767; it then remanded the case for a hearing on this issue. "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," Id., at 766. "Because inherent powers are shielded from direct democratic controls, they must be exercised with restraint and

discretion," the opinion warned, Id., at 764. Notably, in the year this case was published, Congress amended 28 U.S.C. sec. 1927 so that it now permits an assessment of fees against counsel, not merely costs (see *"Historical and Statutory Notes"* to 28 U.S.C.A. sec. 1927 (West, 1994, and 1999 supp.). There is, accordingly, no longer any need to resort to the doctrine of "inherent powers" in order to remedy an abuse of the type addressed in Roadway Express.

Roadway Express gave impetus to a line of cases in the Federal trial and appellate courts including In Re Sutter, 543 F. 2d 1030 (2d Cir. 1976) and Eash v. Riggins Trucking, Inc., 757 F. 2d 557 (3d Cir. 1985), which deduced the existence of "inherent power" to sanction attorneys from the fact that each judicial circuit has power to promulgate its own rules regulating the admission and conduct of counsel. These cases describe a need to use sanctions in order to control case loads or preserve the integrity of the judicial process. They impose sanctions for acts which delay the case or impede justice, not decisions to initiate or continue litigation. In the case of Kleiner v. First Nat. Bank, 751 F. 2d 1193 (11th Cir. 1985), the court expressly stated that its $50,000 fine against counsel was in the nature of a disciplinary proceeding, as counsel had told his client that it was permissible to disregard a court order prohibiting direct contact with members of the plaintiff class. Similarly, in In re Tutu Wells Contamination Litigation, 162 F.R.D. 46 (D. V.I. 1995) and Tedesco v. Mishkin, 629

F. Supp. 1474 (S.D.N.Y. 1986), each Court explained that it had responsibility to supervise the attorneys appearing before it, and therefore could impose monetary sanctions upon them for conduct not amounting to contempt.

Another significant U.S. Supreme Court case relevant to the instant controversy is Chambers v. NASCO, Inc., 501 U.S. 32 (1991), wherein a litigant actually attempted to fraudulently remove property from the court's reach, misrepresented facts to the Court, and filed meritless motions calculated to delay the proceedings . The Court imposed the opposing party's fees upon the miscreant. The Supreme Court rejected the sanctioned party's contention that, by enacting 28 U.S.C. sec. 1927 and the various provisions of the Federal Rules of Civil Procedure, Congress had intended to limit the power of the lower Federal courts in regard to sanctions. Instead, the Supreme Court held that "inherent power" could be exercised by Federal courts even where existing rules and statutes may also apply, in order to vindicate judicial authority, Chambers, supra, 501 U.S. at 46. "Inherent power" sanctions as delineated in Chambers are both broader and narrower than sanctions under Federal rules and statutes: on one hand, they reach conduct not prohibited by rules or statutes; but on the other hand, they require a specific finding of subjective bad faith, Daniel H. Fehderau, *Rule 11 and the Court's Inherent Power to Shift Attorney's Fees: An Analysis of Their Competing Objectives and Applications,* 33 SANTA CLARA L.

REV. 701, 718 (1993), citing Chambers, supra, and Business Guides, Inc. v. Chromatic Communications Enterprises, Inc., 111 S. Ct. 922 (1991).

Chambers was decided by a bare 5-4 majority. Justice Scalia dissented to the extent that the sanctions purported to punish out-of-court misconduct. Justices Kennedy and Souter, joined by Chief Justice Rehnquist, wrote a ringing dissent, reasoning that "inherent powers" should never be used to impose sanctions where rules and statutes exist. "By inviting district courts to rely on inherent authority as a substitute for attention to the careful distinctions contained in the Rules and statutes, today's decision will render these sources of authority superfluous in many instances. A number of pernicious practical effects will follow," Id., at 67 (dissenting opinion). Because of the absence of limitations on "inherent power," it "can be applied to chill the advocacy of litigants..." Id., at 69.

Chambers was influenced by, and further influenced, a line of cases in the lower Federal courts which had begun to delineate a "bad faith" exception to the "American Rule" against fee-shifting, relying upon the earlier Supreme Court case of Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975) . These courts, however, have moved with caution, particularly in relation to attorney sanctions. As Adams v. Carlson, 521 F. 2d 168 (7th Cir. 1975) explains, such fee-shifting is indeed "punitive." Thus, "[t]he standards for bad faith are necessarily stringent." Further,

in an area of unsettled law, vigorous litigation "should not be equated with obduracy, wantonness, vexatiousness, or oppression," Carlson, 521 F. 2d at 170. In Barndt v. City of Tacoma, 664 F. 2d 1339, 1342 (9th Cir. 1981), the appellate court explained that sanctions could not be imposed without a specific finding, pursuant to a hearing, that counsel "willfully abused judicial process or otherwise acted in bad faith."

Federal courts sanction only "serious and studied disregard for the orderly processes of justice," Kiefel v. Las Vegas Hacienda, Inc., 404 F. 2d 1163, 1167 (7th Cir. 1967). "[I]t is not sufficient that the claim be found meritless; the claim must be without a plausible legal or factual basis and lacking in justification," Knorr Brake Corp. v. Harbil, Inc., 738 F. 2d 223, 226-27 (7th Cir. 1984). Thus, in McKenna v. Champion International Corp., 1986 WL 15549 (D. Minn. 1986), the trial court declined to sanction plaintiffs whose claims proved time-barred; "their actions were not pressed in bad faith, though plaintiffs' counsel must have appreciated that the probability of successfully litigating these claims was extremely remote....Although the prosecution of these claims may evince bad judgment on the part of plaintiffs' counsel, who erroneously believed these claims had merit, this case does not present the compelling circumstances that warrant the imposition of attorneys' fees."

A finding that an attorney became aware of adverse authority after filing the case, but continued to prosecute the matter, does not warrant the imposition of fees against

counsel, Jones v. Gilman Paper Co., 1984 WL 2571 (S.D. Ga. 1984). Similarly, a finding that an attorney has taken a frivolous appeal does not establish bad faith; the Court must specifically determine whether the appeal was taken solely for purposes of delay, United States v. Blodgett, 709 F. 2d 608 (9th Cir. 1983).

In Public Interest Bounty Hunters v. Board of Governors of the Federal Reserve Board, 548 F. Supp. 157 (N.D. Ga. 1982), the court determined that fees could not be assessed even though the attorney's briefs "simply made no sense." The court pointed out that counsel had not conducted the litigation in an abusive manner; the problem with the case was simply "that it was filed at all," which was not sanctionable. "[F]ees should not be assessed against counsel except in those rare instances where the attorney's misconduct is so egregious and willful that the judicial system ceases to function properly," Daniels v. Motel Properties, Inc., 1984 WL 2575 (S.D. Ga. 1984). Even in cases of egregious conduct such as abetting a fraud on the court, Federal courts have held that monetary sanctions against counsel may not exceed the harm actually occasioned by the improper conduct, which also requires findings by the trial court, Ostano Commerzanstalt v. Telewide Systems, Inc., 880 F. 2d 642 (2d Cir. 1989); Lipsig v. National Student Marketing Corp., 663 F. 2d 178 (D.C. Cir. 1980).

It does not appear that the recognition of "inherent" sanctioning authority against litigants and attorneys in the Federal courts, throughout the last twenty-five years, has

either diminished frivolous litigation or improved the conduct of the Federal bar. "Although court-ordered sanctions are intended to address each of these issues, it is far from certain that they have had an impact on any of them. Moreover, the use of attorney sanctions clearly carries serious and very troubling harms that diminish the effectiveness and even the validity of the legal system," William I. Weston, *Court-Ordered Sanctions of Attorneys: A Concept that Duplicates the Role of Attorney Disciplinary Procedures,* 94 DICKINSON L. REV. 897, 898 (1990). Obviously, many judges attempting to apply "inherent authority" have been troubled by due process and public policy concerns, as well as the undefined scope of the power, resulting in a hodgepodge of *ad hoc* rulings. Indeed, in Eash v. Riggins Trucking, Inc., 757 F. 2d 557 (3d Cir. 1985), one of the seminal decisions upholding "inherent power" to sanction attorneys, four judges dissented from the majority opinion and would have held that attorneys cannot be fined for conduct that violates no rule or legislation and does not constitute contempt. The dissenters stated that although "[t]here is no more difficult task before judges than to voluntarily decline to expand their own powers,....the principle that underlies the majority's affirmation of the district court's power has no built-in limitation.....We cannot be blind to the lesson of history that unchecked power may lead to abuse," Eash, supra, 757 F. 2d at 580.

In sum, although the Federal circuit and district courts have spilled a good deal of

ink over the issue of "inherent power," they have probably accomplished nothing which could not likewise have been done through the use of 28 U.S.C. sec. 1927 and Rules 11 and 37 of the Federal Rules of Civil Procedure, in their current forms. As previously noted, 28 U.S.C. sec. 1927 was amended in 1980 to allow for the imposition of fees against counsel. Rule 11 was amended in 1983 to do likewise, *see Advisory Committee Notes to Rule 11,* Federal Civil Judicial Procedure and Rules (West, 1999), p. 86. Thus, attorney misconduct in Federal courts today can be addressed via legislative enactments which have passed through the democratic process of debate, and have some standards, definitions, and legislative history to guide the bench and bar.

B. "Inherent Powers" to Sanction Attorneys in State Courts Have Been Rejected by Some State Courts, and Closely Circumscribed by Others; Where Permitted, Such Attorney Sanctions Require Notice, Hearing, and an Express Finding of Improper Purpose

Not surprisingly, several states have followed the lead of the Federal courts in recognizing an "inherent power" to sanction parties or their counsel for bad-faith litigation conduct, although most have placed significant limits on such power if recognized. However, the Supreme Court of California flatly refused to "jump on the bandwagon," and the highest courts of some other states have expressed grave reservations. In addition to concerns about the vague and unrestrained nature of

"inherent power," courts have pointed out significant differences between state and Federal courts, particularly in regard to attorney discipline.

In Bauguess v. Webster Paine, 22 Cal. 3d 626, 586 P. 2d 942, 150 Cal. Rptr. 461(Cal. 1978), the Supreme Court of California reviewed a trial court order imposing an opponent's fees upon an attorney for causing a mistrial. Although the California legislature had enacted several statutes authorizing the award of attorneys' fees to advance certain public policies, none of them applied. Nevertheless, the party benefiting from the award contended that the trial court had "inherent power" to enter the sanction. The reviewing Court declined to recognize the principle, explaining,

> It would be both unnecessary and unwise to permit trial courts to use fee awards as sanctions apart from those situations authorized by statute. If an attorney's conduct is disruptive of court processes or disrespectful of the court itself, there is ample power to punish the misconduct as contempt. Moreover, unlike the power advocated by respondent, a court's inherent power to punish contempt has been tempered by legislative enactment to provide procedural safeguards....Absent such safeguards, serious due process problems would result were trial courts to use their inherent power, in lieu of the contempt power, to punish misconduct by awarding attorney's fees to an opposing party or counsel. The use of courts' inherent power to punish misconduct by awarding attorneys' fees may imperil the independence of the bar and thereby undermine the adversary system...The power advocated by respondents is potentially more sweeping in scope than even the power of contempt. If this court were to hold that trial courts have the inherent power to impose sanctions in the form of attorney's fees for alleged misconduct, trial courts would be given a power without procedural limits and potentially subject to abuse.
>
> Baughess, supra, 22 Cal. 3d 626 at 638.

The California Supreme Court then cited with approval a section from Young v. Redman, 55 Cal. App. 3d 827, 838-39, 128 Cal. Rptr. 86 (Cal. App., 2d Dist., 1976):

> "[A]bsent legislative action, for us to declare that the trial court has inherent power to impose such sanctions takes a giant step in expanding the power of the court with sweeping ramifications. Such power in the trial court, unfettered and unbridled, without appropriate safeguards and guidelines, could cancel out any benefits derived to the judicial process by generating a proliferation of appeals...[A]ny power of the trial court to impose such sanctions should be created by the legislative branch of government with the appropriate safeguards and guidelines developed following a thorough in-depth investigation. Id., at 638-39

In response to Baughess, the California legislature enacted a statute authorizing a court to order a party or the party's attorney to pay "any reasonable expenses, including attorney's fees, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay," but even that enactment did not authorize the imposition of "consequential damages" upon the offending party, merely fees and costs, Brewster v. Southern Pacific Transportation Co., 235 Cal. App. 3d 701, 1 Cal. Rptr. 2d 89, 94 (Cal. App., 4th Dist., 1992).

New York likewise approached the "inherent power" movement with suspicion. The Appellate Division of the Supreme Court of New York stated that courts do have inherent power to impose financial sanctions upon a party or an attorney who has engaged in abusive litigation practices, but that it was improper to exercise such power where the defendant had not violated any statute, rule, or court order, Gabrelian

v. Gabrelian, 108 A.D. 2d 445, 489 N.Y.S. 2d 914 (N.Y.A.D., 2d Dept., 1985). Justice Lazer, concurring in the result only, wrote, "I believe that the threat of unspecified sanctions may well impede the exercise of the right of access to the courts and may have a damaging impact on that continuing development which lies at the heart of the common law by discouraging the assertion of new and novel claims for recovery," Id., 108 A.D. at 456, 489 N.Y.S. 2d at 924.

Subsequently, the Court of Appeals of New York in A.G. Ship Maintenance Corp. v. Lezak, 69 N.Y. 2d 1, 503 N.E. 2d 681, 511 N.Y.S. 2d 216 (N.Y. 1986), was asked "to approve such awards either as a sanction authorized under the exercise of the court's inherent powers or to create a new remedy or cause of action which may be asserted within the action itself to provide a prompt remedy to an aggrieved party," Id., 69 N.Y.2d at 5, 503 N.E. 2d at 683, 511 N.Y.S. 2d at 218. The Court explained that under New York's Constitution, the legislature had power to regulate practice and procedure in the courts, and it could address the problem of frivolous litigation. Thus, the Court would not venture into this quagmire:

> It is not necessary to determine whether the power of the courts to impose sanctions for frivolous proceedings is inherent to the judicial function or is merely delegable by the Legislature under our Constitution. The fact is that the most practicable means for establishing appropriate standards and procedures which will provide an effective tool for dealing with this problem is by plenary rule rather than by ad hoc judicial decisions....Thus in the case now before us sanctions cannot be imposed because at the time the petitioner instituted the proceeding, there was neither a statute nor a court rule

authorizing the imposition of sanctions for frivolous actions.
Id., 69 N.Y.2d at 6, 503 N.E. 2d at 684, 511 N.Y.S. 2d at 219.

New Jersey likewise opted to tread cautiously. Asked to affirm sanctions against a law firm employing counsel who failed to fully inform his client of the terms of a settlement, resulting in litigation, the Court remarked that it found no basis to depart from the "firmly settled policy" that fees can be awarded only pursuant to statute, court rule, or contract. The court declined to decide whether New Jersey courts have inherent power to assess counsel fees as a sanction for an attorney's improper conduct, but held that even if such power did exist, the conduct at issue in this case was merely negligent and could not reach the necessary threshold, Dziubek v. Schumann, 275 N.J. Super. 428, 646 A. 2d 492 (N.J. Super., A.D.,1994).

A Wyoming court, asked to validate "inherent power" sanctions against an attorney based on Federal precedent, responded, "What is necessary in one jurisdiction or in certain circumstances might be only useful in others," Bi-Rite Package, Inc. v. District Court of the Ninth Judicial District of Fremont County, 735 P. 2d 709, 714 (Wyo. 1987). Whereas crowded dockets might be so severe a problem in other courts as to necessitate extraordinary measures, Wyoming courts had no real backlog. The Court thus declined to uphold sanctions imposed by the trial court upon an attorney who settled "late," thus inconveniencing the trial court and disrupting its calendar.

The Supreme Court of Oklahoma split evenly when confronted with an "inherent

power" award against an attorney. Four justices voted to affirm an award of attorneys' fees in favor of Oklahoma City, imposed upon an attorney who attempted for the fourth time to file the same type of meritless claim, relying upon Roadway Express, supra. Three dissented without opinion. Justice Opala wrote a thoughtful dissent, pointing out, "In the federal judicial structure, unlike in the Oklahoma court system, each United States district court is authorized to establish and to control its own local bar. In contrast, the lawyers of this state are all licensed and supervised by a single body organized centrally under the inherent power of the Oklahoma Supreme Court," Winters v. City of Oklahoma City, 740 P. 2d 724, 728 (Okla. 1987). While this sanction was clearly a disciplinary action, Justice Opala noted that a licensed attorney could be disciplined only by the state bar pursuant to the Oklahoma Supreme Court's authority; the disciplinary function could not be delegated to trial courts.

Connecticut recognizes an "inherent power" in courts to sanction an attorney, but requires a specific finding of bad faith on the part of counsel, CFM of Connecticut, Inc. v. Chowdhury, 239 Conn. 375, 685 A. 2d 1108 (Conn. 1996). The District of Columbia, likewise, will allow such sanctions only after a hearing resulting in a specific finding of bad faith by counsel, Charles v. Charles, 505 A. 2d 462 (D.C. Ct. App. 1986). Washington agrees, State v. Harris, 95 Wash. App. 741, 977 P. 2d 621 (Wash. App., Div. 1, 1999). The Supreme Court of Hawaii has addressed the

question three times, holding that the imposition of "inherent power" sanctions upon an attorney can be upheld only if there is a full hearing with a specific finding of bad faith conduct by counsel, supported by a clear record which can be reviewed by a superior court, Lester v. Rapp, 85 Hawaii 238, 942 P. 2d 502 (Hawaii 1997); Enos v. Pacific Transfer & Warehouse, Inc., 79 Hawaii 452, 903 P. 2d 1273 (Hawaii 1995). The power must be exercised with restraint and discretion, Bank of Hawaii v. Kunimoto, 91 Hawaii 372, 984 P. 2d 1198 (Hawaii 1999). Likewise, the Supreme Judicial Court of Maine explained that such power can be used "only in the most extraordinary circumstances," Linscott v. Foy, 716 A. 2d 1017 (Maine 1998). The Supreme Court of New Mexico adopted the rationale of Chambers as to parties and their attorneys, but expressly limited its application to "conduct occurring before the court or in direct defiance of the court's authority," State ex rel. New Mexico State Highway and Transportation Dept. v. Baca, 120 N.M. 1, 6 896 P. 2d 1148, 1153 (N.M. 1995). In Vermont, counsel must be told the nature of the alleged misconduct, with fair notice and an opportunity to be heard, before "inherent power" sanctions may be imposed, Van Eps v. Johnston, 150 V7. 324, 553 A. 2d 1089 (Vt. 1988).

A number of state courts have also determined that counsel's undesirable conduct does not meet the extraordinary level necessary to justify "inherent power" sanctions, even if there is authority to impose them. Simply bringing a frivolous claim is not

sufficient; there must be a finding that an intentionally frivolous claim was brought for purposes of harassment, and it is an abuse of discretion to impose "inherent power" sanctions upon a litigant without that finding, Rogerson Hiller Corp. v. Port of Port Angeles, 96 Wash. App. 918, 982 P. 2d 131 (Ct. App. Wash. 1999). Negligence in supervising a subordinate attorney is insufficient, Dziubek v. Schumann, 275 N.J. Super. 428, 646 A. 2d 492 (N.J. Super., A.D., 1994). Failing to control the excessive fee demands of a retained expert witness will not suffice, either, Pontidis v. Shavelli, 296 N.J. Super. 420, 686 A. 2d 1275 (N.J. Super., A.D., 1997). Where counsel apparently circumvented the spirit, though not the letter, of an order limiting discovery, but did not "interfere with the administration of justice or detract from the trial court's dignity and integrity," it was an abuse of discretion to impose "inherent power" sanctions upon the law firm, Phillips & Akers v. Cornwell, 927 S.W. 2d 276, 280 (Tx. App., 1st Dist., 1996). Only egregious behavior will support an "inherent power" sanction; there must be clear evidence that the action was entirely without color and taken for other improper purposes amounting to bad faith, Optic Graphics, Inc. v. Agee, 87 Md. App. 770, 591 A. 2d 578 (Ct. Spec. App. Md. 1991).

Clearly, our sister states have been cautious in finding an "inherent power" to sanction attorneys. Where such power is upheld, it is used only for egregious misconduct not addressed by existing rules or statutes, never to punish the mere

prosecution of even a frivolous claim. Adequate notice, a hearing, and an express finding of improper purpose are all necessary before any sanction can be upheld.

C. Historically, Florida Courts Have Allowed Sanctions Against Counsel Only When Authorized by Rule, Statute, or Contract, or for Contemptuous Conduct , But the Two Districts that Have Recently Discussed "Inherent Power" Have Simply Adopted Federal Precedent Without Regard to the Limits or the Rationale of the Federal Doctrine

In Florida, as in other U.S. jurisdictions, we begin with the "American Rule" that each party in litigation should bear its own fees unless the litigants have agreed to the contrary, with certain very limited exceptions enacted by the legislature, e.g., Dade County v. Pena, 664 So. 2d 959 (Fla. 1995). In 1982, the Fourth District recognized that Florida had not adopted the developing Federal doctrine of "inherent power" to sanction litigants or attorneys for "bad faith" conduct, Department of Revenue v. Arga Co., 420 So. 2d 323 (Fla. 4th DCA 1982), citing Perkins State Bank v. Connolly, 632 F. 2d 1306 (5th Cir. 1980)[1]. In Arga, the trial court awarded fees to the successful party on the basis of "bad faith." The appellate court explained that in Florida, one must meet the more stringent standard of section 57.105, a "complete absence of a justiciable issue of law or fact," Arga, supra, 420 So. 2d at 324.

[1]Both Arga and Perkins were subsequently cited in an Eleventh Circuit case holding that Florida does not accept the Federal "bad faith" exception to the American Rule, Amey, Inc. v. Gulf Abstract & Title, Inc., 758 F. 2d 1486, 1508 (11th Cir. 1985).

Nevertheless, in Patsy v. Patsy, 666 So. 2d 1045 (Fla. 4th DCA 1996), the same court determined that fees could be assessed against an attorney who filed a motion falsely alleging that his opposing counsel had perpetrated a fraud upon the court. The opinion simply recited that courts "have the inherent power to assess fees against counsel for litigating in bad faith," Patsy, supra, 666 So. 2d at 1047. It distinguished Arga only on the half-hearted basis that the prior case did not directly address fees against counsel. Relying upon Patsy, and again without any exploration of the rationale or limitations upon the doctrine, the same Court approved sanctions against an attorney who had deliberately failed to attend court-ordered mediation and told his client not to attend, based upon "inherent power," even though the same result could apparently have been obtained through contempt, David S. Nunes, P.A. v. Ferguson Enterprises, Inc., 703 So. 2d 491 (Fla. 4th DCA 1997).

The Third District has foreshadowed its ruling in the instant case several times, but until now has never sanctioned attorneys for allegedly pursuing frivolous litigation. In Sanchez v. Sanchez, 435 So. 2d 347 (Fla. 3d DCA 1983), an attorney refused to stipulate to the correction of a scrivener's error. His refusal to cooperate constituted so serious a violation of his ethical duties that his client could not have directed him to act in this fashion. Thus, the court concluded, "he was acting upon his own interests," Sanchez, 435 So. 2d at 350. Accordingly, the trial court's assessment of

$50 against him was proper under the "inherent power possessed by the courts." In Goldfarb v. Daitch, 696 So. 2d 1199 (Fla. 3d DCA 1997), the court determined that the attorney receiving certain proceeds never actually had authority to represent the property owner, and required him to pay the owner for moneys he had disbursed to others. Further, because this attorney was acting in his own interest and not legitimately on behalf of a client, the court could impose an attorneys' fee upon him. Subsequently, the Third District stated in dictum that a trial court had inherent authority to assess fees against counsel for litigating in bad faith, but held that the motion for fees had not been timely filed, Smallwood v. Perez, 735 So. 2d 490 (Fla. 3d DCA 1998). Finally, in Moakley v. Smallwood, 730 So. 2d 286 (Fla. 3d DCA 1999), the Third District affirmed an award of fees against counsel for discovery misconduct on the basis of "inherent power," even though the parties did not rely upon that doctrine and there were other, firmly established, legal theories by which an award could be upheld if justified by the facts. Moakley v. Smallwood is now pending before this Court as case no. 95,471.

The Fifth District has vacillated. In Emerson Realty Group, Inc. v. Schanze, 572 So. 2d 942 (Fla. 5th DCA 1991), the defendant's counsel used a subterfuge to obtain dismissal of the plaintiff's claim. The responsible attorneys were held personally liable for the reasonable attorneys' fees and costs incurred by the plaintiff for

correcting the wrongful dismissal. But the Court did not delineate the authority for the sanctions, nor did it distinguish its own prior case arising from a criminal proceeding. In that case, the trial court had assessed the State Attorney $225 in legal fees incurred by the defendant, for harm occasioned by counsel's tardiness. The appellate court determined that there was absolutely no authority permitting such assessment. It suggested that if counsel's conduct amounted to contempt, sanctions might be imposed, but "any sanctions imposed would not be for the benefit of the defendant," State v. Harwood, 488 So. 2d 901, 902 (Fla. 5th DCA 1986).

The First District has one case on this issue; in Miller v. Colonial Baking Co. of Alabama, 402 So. 2d 1365 (Fla. 1st DCA 1981), an attorney was personally assessed with fees for causing a mistrial by having lunch with two of the jurors. The appellate court reversed on the basis that attorneys' fees can only be awarded by agreement or statute, or when the attorney creates a fund or other property, or for contempt. The Second District, with two cases, has been consistent with the First. In Israel v. Lee, 470 So. 2d 861 (Fla. 2d DCA 1985), an attorney who had repeatedly and wrongfully invoked the attorney-client privilege, to the extent that he was held in contempt and actually jailed, still could not be assessed for the other party's fees in the absence of a specific statute or rule. In American Bank of Lakeland v. Hooven, 471 So. 2d 657 (Fla. 2d DCA 1985), an attorney caused a mistrial by violating a court order not to

mention certain inadmissible evidence. His client was assessed for attorneys' fees and costs, as a sanction. The appellate court reversed, holding that the fees had not been awarded as a sanction for contempt of court and were not otherwise justified by any statute. "Unless accorded as a fine or sanction for indirect contempt of court, attorney's fees are to be awarded only when provided for by agreement, by statute, or when the attorney creates a fund," Hooven, supra, 471 So. 2d at 658.[2]

The very recent Third and Fourth District cases discussed above represent a radical departure from the limits heretofore recognized by Florida courts. Without considering the dangers of such a course or the differences between the Florida and Federal arenas, these two Districts have simply parroted Federal holdings. They have set no limits upon this awesome power, and suggested no means of preserving the due process rights of litigants or counsel. The Third District's holding in the case at bar is even more radical, for there is no precedent in Florida, nor has undersigned counsel

---

[2] Appellate courts, likewise, have on some occasions imposed fees upon counsel for obvious misconduct in appellate proceedings, e.g., Ginder v. Ginder, 531 So. 2d 226 (Fla. 1st DCA 1988); Hutchins v. Hutchins, 501 So. 2d 722 (Fla. 5th DCA 1987); Addison v. Brown, 413 So. 2d 1240 (Fla. 5th DCA 1982). The rationale stated in Hutchins and Addison was that the attorneys were penalized for violating their duty of candor to the appellate tribunal; in Ginder, for violation of the Rules of Appellate Procedure. The space limitations of this Brief do not permit a discussion of the scope of appellate courts' power to sanction counsel, which does appear to differ from the power of trial courts. The issue regarding "inherent power" arising in this case specifically applies to trial courts.

found any in other U.S. jurisdictions, imposing "inherent power" sanctions against counsel for what the judge merely ***speculated*** may have been "bad advice." The one case from this Court which was cited in the Third District's opinion fails to support the Third District's result. In Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. United States Fire Insurance Co., 639 So. 2d 606 (Fla. 1994), this Court extended the doctrine of absolute judicial immunity to bar a claim by a law firm against its opposing counsel for tortious interference with a business relationship. The plaintiff law firm asserted that its opposing counsel had falsely vouched that one member of the plaintiff firm would be called as a witness, unfairly requiring disqualification of the entire firm. This Court held that the civil claim could not proceed, thus *refusing* an invitation to invent creative new, and potentially dangerous, remedies for attorney misconduct. Instead, this Court remarked that a court has "inherent power" to protect itself "from acts obstructing the administration of justice... In particular, a trial court would have the ability to use its contempt powers to vindicate its authority and protect its integrity by imposing a compensatory fine *as punishment for contempt*, Mabie, supra, 639 So. 2d at 608-09 (emphasis added). The quoted language is simply a recognition that contempt power "inheres" in every court; the case by no means suggests that trial courts may institute some undefined *ad hoc* sanction against attorneys for acts not amounting to contempt.

D. Imposition of Fees for Pursuing Frivolous Litigation is a Matter of Substantive Law, Properly Reserved for the Florida Legislature

The development of new mechanisms to punish litigants and counsel who either pursue frivolous claims or do not settle, in furtherance of public policy concerns, is not a subject for judicial activism in Florida; it is a province of the legislature. When Fla. Stat. sec. 57.105 was first adopted, its Constitutionality was challenged on the basis that the statute infringed upon the procedural and rulemaking authority of the courts. This Court responded, "To the contrary, an award of attorneys' fees is a matter of substantive law properly under the aegis of the legislature," Whitten v. Progressive Casualty Insurance Co., 410 So. 2d 501, at 504-05 (Fla. 1982). Subsequently, of course, our legislature has amended section 57.105 to include cases which become untenable after commencement, and permit a court to invoke the statute sua sponte, Ch. 99-225, sec. 4, at 1671, Laws of Florida. Whether or not this revision survives constitutional challenges, it indicates that the Legislature certainly considers fee-shifting based upon frivolousness to be within its own realm. [3]

---

[3]Of course, both Haber and his client assert that the alimony claim so berated by the trial court was far from frivolous. This was a "gray area" marriage, where alimony is unpredictable, Victoria M. Ho & Janeice T. Martin, *Appellate Court Trends in Permanent Alimony for "Gray-Area" Divorces,* 51 FLA. B. J. 60 (1997). In these cases, income disparity and the marital standard of living are very important. In Young v. Young, 677 So. 2d 1301 (Fla. 5th DCA 1996), permanent alimony was awarded where the needier spouse, an engineer earning $54,000

Similarly, in reviewing the legislative enactment of sanctions for refusing offers of judgment, this Court determined that entitlement to such fees was a substantive matter for the legislature to determine, but the procedures for implementation of the award were within the purview of the Court, Timmons v. Combs, 608 So. 2d 1 (Fla. 1992); David L. Kian, *The 1966 Amendments to Florida Rule of Civil Procedure 1.442; Reconciling a Decade of Confusion,* 71FLA. BAR. J. 32 (1997). Notably, in adopting the offer-of-judgment statutes, our legislature declined to extend the sanctions to family law cases. The First District reversed a trial court decision which denied an otherwise eligible spouse's claim for attorneys' fees "based solely on the trial court's finding that she unreasonably rejected her former husband's offer of child support," Aue v. Aue, 685 So. 2d 1388 (Fla. 1st DCA 1997). The Third District itself has held, in the case of E & A Restaurants of the Keys, Inc. v. Bernreuter, 589 So. 2d 436, 437 (Fla. 3d DCA 1991), "We completely reject the view that there was or is any free-form substantive right to attorneys' fees upon a generalized 'unreasonable' rejection of a 'reasonable' offer which is or was subject to enforcement by the court." In that case, the plaintiffs had made a demand for judgment that did not comply with the procedural requirements of the applicable statute. The court nevertheless awarded

---

annually, had lost no earning capacity during the marriage but could not maintain the same living standard that the couple had enjoyed. Based upon these authorities, there was a good-faith basis for seeking reasonable alimony in this case.

them fees, and the Third District reversed. But in the case at bar, the Third District has contradicted itself. The trial judge, as shown by her own comments, imposed fees upon attorney Haber as punishment for the only wrong she found--failure to settle at an early stage, as viewed from the perspective of hindsight. Our legislature has defined the parameters within which parties can be sanctioned for failure to settle and/or for continuing to litigate claims which may be frivolous; courts may not invent a new "inherent power" to sanction attorneys whose conduct neither the legislature nor this Court, in its rulemaking function, has deemed wrongful.

E. Discipline of Attorneys is a Matter Reserved to this Court and to the Florida Bar, Requiring Due Process and a Neutral Fact-Finder; Further, in Formal Bar Proceedings, Counsel May Defend by Disclosing Otherwise Confidential Communications with Clients

As explained in the preceding portions of this Brief, Federal courts have exercised sanctioning authority in part because they each must control the admission and conduct of their own bars. However, in a state having an integrated bar, the various trial courts no longer have that responsibility because the discipline and qualifications of the bar are overseen by a single central authority, see, Winters v. City of Oklahoma City, 740 P. 2d 724, 728 (Okla. 1987)[Opala, J., dissenting]. As this Court has held, in July, 1957, Florida amended its Constitution so as to divest the district courts of their inherent disciplinary authority over counsel, and placed such disciplinary power

exclusively in this Supreme Court, State ex rel. Arnold v. Revels, 109 So. 2d 1 (Fla. 1959). This Court has subsequently delegated disciplinary functions to the Florida Bar, see R. Regulating Fla. Bar 3-3.1. Florida trial courts may have power to *investigate* an attorney's misconduct in a case, and such investigation will not constitute "double jeopardy" even if the offender is subsequently referred to The Florida Bar for formal proceedings, The Florida Bar v. Massfeller, 170 So. 2d 834 (Fla. 1964). And, of course, the contempt power was unimpeded by the creation of an integrated Bar. Still, it appears plain that for suspected professional misconduct not amounting to contempt, trial courts in Florida should not be conducting *ad hoc* disciplinary proceedings, even if they have jurisdiction, which is questionable.

Under a special procedure delineated in Rule 3-7.8, a circuit court is authorized to conduct a Bar disciplinary hearing, but only by involving the state attorney and having a separate judge, not the one complaining about the attorney, conduct the hearing. Review is available before this Court, just as in regular Bar proceedings. The procedures set forth in the Rules Regulating the Florida Bar are designed to give the accused attorney fair notice of the charges, a full hearing, an impartial fact-finder, and a proper avenue for review. Similarly, in a contempt proceeding, it is well established that full procedural safeguards are required. But in the instant case, an attorney has been convicted and punished without any of the due process guaranteed to him, and

he was judged by the person who had already ruled–-repeatedly and emphatically--that his client's claims were unfounded.

Worse, to the limited extent that a hearing was afforded to him, the attorney was prevented from defending himself by his duty not to disclose confidential communications from his client, particularly in the presence of the hostile party . The Third District opinion declined to address the issue of privilege, cavalierly noting that section 57.105 proceedings create the same sort of dilemma. Section 57.105 proceedings normally require the attorney to withdraw, e.g., Khoury v. Estate of Kashey, 533 So. 2d 908 (Fla. 3d DCA 1988). However, such proceedings are normally conducted by motion at the end of the case, with proper notice. Further, where the only matter remaining in a 57.105 hearing is to apportion the fees between attorney and client, there should be no need for the presence of the opposing party, and some type of protection (i.e., a sealed record) can be afforded to prevent hostile use of the confidential information.[4]

An "inherent power" sanction as envisioned by the Third District can apparently

---

[4]In a dissolution of marriage involving a minor child, the need to protect attorney-client confidences from the opposing party is particularly critical, since the court retains jurisdiction until the child's majority. In common experience, divorce cases which begin in acrimony continue to generate litigation for years. Thus, even though counsel in the instant case had been obliged to withdraw, the client still had a real need to protect confidential information from his spouse.

be imposed at any time, at the whim of the judge. It is doubtful whether a judge's *sua sponte* threat to sanction counsel, with no pending motion or pleading charging any violation of a statute, rule, or court order, constitutes the sort of "proceeding concerning the lawyer's representation of the client" which will relieve the lawyer of his duty to preserve client confidences under Rule 4-1.6. Certainly, in this case of first impression, without any authority on the subject, and without a waiver by his client, attorney Haber was relegated to silence. A Bar disciplinary proceeding clearly does relieve counsel of his silence, and defense is possible. For all of these reasons, this Court should prohibit the *ad hoc* use of "inherent power" sanctions against counsel, and explain that if a trial judge is concerned about perceived improper conduct which is not contemptuous and violates no Court rule or order, the matter should be referred to The Florida Bar.

William I. Weston, in his thoughtful article entitled *Court-Ordered Sanctions of Attorneys: A Concept that Duplicates the Role of Attorney Disciplinary Procedures,* 94 DICKINSON L. REV. 897 (1990), finds the "inherent power" movement entirely counterproductive. "This relatively unfettered power to sanction attorneys and their clients for conduct prior to the commencement of litigation as well as during the litigation creates a severe obstacle benefiting neither the courts nor the practice of law," Id., p. 927. In this process, the impartiality of the judge is imperiled. Judges

threaten litigants' counsel, and counsel threaten one another, in order to achieve settlements, withdrawals, or other results. "Perhaps the most disturbing result is that clients believe that their legal positions cannot be vindicated for fear of sanction," and "[t]he sanction rules are so vague and subject to the latitude of judicial discretion that, unless necessity demands otherwise, lawyers must take the conservative approach in order to avoid provoking sanctions," Id., p. 899. Since there are no formal due process requirements (often no due process at all), the results are unpredictable, yet are generally reviewed only for "abuse of discretion." "Not only does the sanction duplicate the attorney grievance procedure; it parallels the state disciplinary regime because the award of sanctions does not bar the application of the state grievance procedure to the same set of facts," Id., p. 903. Wrongful conduct is determined by "judicial hindsight," which is unduly "likely to find questionable conduct," Id., p. 905. Further, "[n]o qualitative or quantitative evidence exists suggesting a body of frivolous cases that would warrant this cavalier approach," Id., p. 902.

II. IF ANY "INHERENT POWER" EXISTS IN FLORIDA TRIAL COURTS TO PUNISH COUNSEL FOR ACTS THAT VIOLATE NO STATUTE, RULE, OR COURT ORDER AND DO NOT AMOUNT TO CONTEMPT, IT MUST BE RESERVED FOR EGREGIOUS CONDUCT, WITH PROPER NOTICE, A HEARING, AND A RIGHT OF MEANINGFUL REVIEW

As seen in the historical discussion regarding precedent in other states and in the Federal system, supra, the awesome power exercised by a trial judge through

"inherent power" sanctions against counsel is so dangerous to our entire system of justice that many jurists believe it should not be recognized at all. But if this Court believes there can ever be a situation justifying "inherent power" sanctions against counsel for conduct which is not contemptuous and is not punishable by use of any existing statute or rule, it must provide guidance to the bench and bar, placing limits upon the power. The following restrictions are suggested:

The standard for imposing sanctions must be truly "stringent," Adams v. Carlson, 521 F. 2d 168 (7th Cir. 1975); misconduct under this doctrine should be so severe as to threaten the very function of the Court itself. Pre-litigation conduct should not be considered, unless it consists of an act (i.e., counsel's knowing destruction of relevant evidence) directly hampering the administration of justice. A specific finding that the attorney committed serious misconduct with actual wrongful intent amounting to subjective "bad faith" should be required. Mere negligence or even incompetence should not evoke this extraordinary remedy, nor should the pursuit of "long shot" claims, e.g., Optic Graphics, Inc. v. Agee, 87 Md. App. 770, 591 A. 2d 578 (Ct. Spec. App. Md. 1991). Even in the context of section 57.105, courts hold that "[t]he attorney is not an insurer to his client's adversary that his client will win in litigation. Rather, he has a duty "to represent his client zealously...(in presenting) for adjudication any lawful claim, issue or defense," Fee, Parker & Lloyd. P.A. v.

Sullivan, 379 So. 2d 412 (Fla. 4th DCA 1980), *citing* ABA Code of Professional Responsibility, EC 7-1, DR 7-101. A client who suffers an adverse result due to his attorney's error can bring a claim for malpractice, wherein the attorney will have full procedural rights; thus, it is both unfair and unnecessary to decide issues of negligent representation by summary procedure.

The necessary finding of "bad faith" can be reached only after the attorney has been given adequate notice that the court intends to impose sanctions under this theory, and has been provided a full hearing wherein witnesses and evidence can be presented, e.g., Barndt v. City of Tacoma, 664 F. 2d 1339 (9th Cir. 1981). If the judge is the accuser and/or if the judge has made preliminary rulings in favor of the opposing party which directly bear upon the claim of sanctions, his or her impartiality is questionable; in such a situation, the attorney should be entitled to have the issue referred to a neutral judge. If proper defense would require divulging attorney-client confidences, the matter should definitely be referred to another judge unless the entire litigation with the opposing party has been fully and finally ended, including appeals. Further, in that situation, the accused attorney should be specifically relieved from the duty of confidentiality; and, of course, the opposing party should be excluded from hearing any testimony regarding confidential attorney-client communications. There should be an immediate right of appeal from any final order imposing sanctions upon

an attorney.

III. THE ATTORNEY'S CONDUCT IN THIS CASE WOULD NOT BE CONSIDERED SANCTIONABLE EVEN BY JURISDICTIONS WHICH RECOGNIZE SUCH POWER, NOR WAS HE AFFORDED DUE PROCESS

The only "misconduct" found by the trial judge in this case was the litigation itself. In her opinion, the case should have been settled in light of the risks and potential benefits of litigating. Even the Third District opinion stops short of finding the case wholly frivolous; it was not. The trial judge termed it a "long shot," but even she did not find a total absence of justiciable issues [Tr 12/10/96, p.8] No precedent exists holding that the pursuit of a "long shot" by counsel is so extraordinarily outrageous that the court must invoke its "inherent powers" to protect itself. If "long shots" were improper, we would never have recognized a right to counsel for indigent criminal defendants because Justice Abe Fortas could not have argued Gideon v. Wainwright, 372 U.S. 335 (1963); and our children would still attend segregated schools because Justice Thurgood Marshall could not have agreed to take on Brown v. Board of Education of Topeka, Shawnee County, Kansas, 347 U.S. 483 (1954).

Indeed, "long shots" are explicitly sanctioned. R. Regulating Fla. Bar 4-3.1 prohibits an attorney from participating in litigation "unless there is a basis for doing

so that is not frivolous, *which includes a good faith argument for an extension, modification, or reversal of existing case law.*" This rule is broad enough to permit even innovative or imaginative claims, and is intended simply to prohibit "an obsessive attempt to relitigate an issue that has failed decisively numerous times," The Florida Bar v. Richardson, 591 So. 2d 908, 910 (Fla. 1992). A contention that the husband was entitled to a reasonable amount of alimony in this unusual situation, where the wife was not only capable of earning a large salary but had trust income that during one year approached $240,000, and where for eleven years she had provided a more luxurious lifestyle for him than he could now provide for himself, was a claim fairly entitled to be heard in the courts of this state.

In addition, because attorney Haber did not receive advance warning that the Court was considering an "inherent power" sanction, did not have reason to believe–-from *any* prior precedent–that his conduct was sanctionable, and could not present his defense without violating his duty to his client, he clearly did not receive the due process required by all of the above-cited cases. A cursory review of the transcripts from the March, May, and December, 1996, hearings, leaves any reader with the clear impression that this judge was determined to sanction someone, and did not even wish to know whether the client or the attorney was the culpable party.

STANDARD OF REVIEW

As to the issue of whether the trial court had jurisdiction to impose this sanction upon attorney Haber, the standard of review is *de novo,* "right or wrong," Lester v. Rapp, 85 Hawaii 238, 942 P. 2d 502 (Hawaii 1997). The issue of whether Petitioner Haber was afforded due process is reviewed by the same standard, Bank of Hawaii v. Kunimoto, 91 Hawaii 372, 984 P. 2d 1198 (Hawaii 1999). To the extent that there were factual findings relevant to this issue, they are reviewable under a "clearly erroneous" standard, Optic Graphics, Inc. v. Agee, 87 Md. App. 770, 591 A. 2d 578 (Ct. Spec. App. Md. 1991), but Petitioner's contention is that there were really no significant factual findings because he was unable to present a defense. Finally, if the prerequisites for sanctions have been met, a decision regarding whether to impose sanctions, and in what amount, is reviewed according to an "abuse of discretion" standard, Id. Once again, Petitioner contends that the trial court never reached this point because it did not have jurisdiction, failed to afford him due process, and failed to make essential factual findings.

CONCLUSION

In this case of first impression in Florida, this Court should hold that Florida trial courts have no power to impose sanctions upon counsel for conduct which violates no statute, rule, or court order, and does not amount to contempt. The dangers of recognizing such vast, amorphous power far outweigh its highly speculative benefits. If, however, this Court chooses to grant some degree of "inherent power" sanctions to trial courts, it must place strict limitations upon the power, in accordance with the jurisprudence of other state and Federal courts. Under those standards, it is clear from the record in this case that the conduct of the Petitioner, Dennis Haber, Esq., was in no way improper, and the trial court's award against him should be reversed. Justice would surely be ill served if attorneys could be punished merely for pursuing "long shots," or for failing to force their clients to settle colorable claims. It is likewise clear that the Petitioner was not afforded due process, so that at minimum, remand for a fair hearing would be necessary if this Court considered his conduct even questionable.

NOTE ON TYPEFACE

The typeface used herein is Times New Roman, , proportionately spaced, fourteen point.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed this __ day of December, 1999 to: All parties on the attached mailing list.

By: _____

Helen Ann Hauser
Fla. bar no. 353906
DITTMAR & HAUSER
Counsel for Petitioner Haber
3250 Mary Street, Suite 400
Coconut Grove, Fl 33133
(305) 442-4333

MAILING LIST–DIAZ V. DIAZ, SUPREME CT. CASE NO. 99,534

Mark A. Gatica, Esq.
Markowitz, Davis, Ringel & Trusty, P.A.
9130 S. Dadeland Blvd., Ste. 1225
Miami, Fl 33156-7849
(counsel for Respondent Leinoff & Silvers)

Andrew M. Leinoff, Esq.
1500 San Remo Ave., Ste. 206
Coral Gables, Fl 33146
(Respondent)

Robert I. Barrar, Esq.,
Rubin and Barrar
333 N.E. 23rd St.
Miami, Fl 33137
(counsel for Respondent Rina Cohan Diaz)

Deborah Marks, Esq.
Abrams, Etter and Marks, P.A.
800 Brickell Avenue, Ste. 1115
Miami, Fl 33131
(counsel for co-Petitioner D.C. Diaz)

David Pakula, Esq.
Fazio, Dawson, DiSalvo, Cannon, Abers, Podrecca & Fazio
P. O. Box 14519
633 S. Andrews Avenue
Ft. Lauderdale, Fl 33302

(counsel for the Florida Defense Lawyers Assn, as amicus)

Ky M. Koch, Esq.
200 N. Garden Avenue, Suite A
Clearwater, Fl 33756
(co-counsel for Florida Bar Family Law Section, as amicus)

M. Katherine Ramers, Esq.
1112 Pinehurst Road
Dunedin, Fl 34698
(co-counsel for Florida Bar Family Law Section, as amicus)

Roy D. Wasson, Esq.
1320 S. Dixie Hwy., Ste. 450
Coral Gables, Fl 33146-2911
(counsel for Academy of Florida Trial Lawyers, as amicus)