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PERMISSION TO PUNISH: SANCTIONS WITHOUT BOUNDARIES

Jaymie L. Roybal*

I. INTRODUCTION

All litigants who appear before the court understand each judge has inherent authority to regulate the litigation in his or her courtroom. Examples of this inherent authority are: the power to set litigation timelines, to implement a dress code within the courtroom, to order discovery, etc. Inherent authority also includes the ability to sanction parties or attorneys for behavior that is contrary to the integrity of the judicial process. However, this inherent authority should not be limitless, and there should be procedural safeguards in place to prevent a trial court judge from imposing excessive sanctions as punishment for behavior he or she finds inexcusable.

Harrison v. Board of Regents of the University of New Mexico is a case where a trial judge's inherent authority to control the litigation on his docket went too far. In *Harrison v. Board of Regents of the University of New Mexico*, the New Mexico Court of Appeals addressed whether a district court's inherent power to impose sanctions includes the power to impose a type of sanction called "non-compensatory monetary sanctions" against a public entity.¹ This type of sanction is significant, as sanctions by this label are new to the State of New Mexico, having never been imposed against a party in the state prior to *Harrison*.²

In *Harrison*, the New Mexico Court of Appeals held that the trial court judge did have the authority to impose non-compensatory monetary sanctions against the University of New Mexico.³ In so holding, the Board of Regents of the University of New Mexico (the "University") was sanctioned \$100,000.⁴ The court ordered this money to be paid to four local charitable organizations.⁵ The underlying basis for imposing these sanctions was "improper witness interference and tampering" by a University official in an ongoing medical malpractice claim.⁶

In its review of the case, the Court of Appeals upheld the sanctions.⁷ The main rationale for doing so was ". . . the need to prevent abusive litigation practice

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1. *Harrison v. Bd. of Regents of the Univ. of New Mexico*, 2013-NMCA-105, ¶ 2, 311 P.3d 1236.

2. This is the first recorded case in New Mexico history that addresses "non-compensatory monetary sanctions."

3. *Harrison*, 2013-NMCA-105, ¶ 2.

4. *Id.* ¶ 10.

5. *Id.*

6. *Id.* ¶ 8.

7. *Id.* ¶ 2.

and preserve the integrity of the judicial process.”⁸ Whether the University official’s conduct was deserving of punishment by the court is not the focus of this note. However, in upholding the imposition of these sanctions, the *Harrison* court left many unanswered questions. First, can punitive assessments be levied against any New Mexico governmental entity for actions a judge finds improper? Second, were these sanctions effectively a form of criminal contempt by another name, simply labeled “non-compensatory monetary sanctions”? Third, it is good policy for a judge to order taxpayers’ money to go to charity because of the conduct of a University official?

This note will explore the answers to these questions by: First, by reviewing the history of non-compensatory monetary sanctions both on the federal level and in New Mexico, and determining the requirements for imposing such sanctions against parties; Second, by analyzing these sanctions as applied in *Harrison* through the lens of civil and criminal contempt; Third, by discussing whether the New Mexico Court of Appeals incorrectly held that punitive assessments could be imposed against a governmental entity and in doing so, expanded a judge’s inherent authority.

II. BACKGROUND

A. Factual Background and Procedural History

The University of New Mexico Hospital (“UNM Hospital”) serves as the primary teaching hospital for the University of New Mexico School of Medicine.⁹ UNM Hospital operates New Mexico’s only Level I Trauma Center.¹⁰ The UNM Hospital system is a large, complex organization with a complex governance structure.¹¹ There are numerous boards and executive officers that oversee the daily functions of the UNM Hospital; however, at the top of this complex governance structure is the University of New Mexico Board of Regents.¹²

Harrison v. Board of Regents of the University of New Mexico began as a medical malpractice claim, in which the Board of Regents of the University of New Mexico was named as a defendant.¹³ The claim resulted from a C-section/tubal ligation surgery.¹⁴ The Plaintiff claimed that Mrs. Harrison’s large bowel had been punctured during surgery, causing her to develop an infection with lifetime consequences.¹⁵

At the time the litigation was taking place, the Plaintiff’s expert witness, Dr. Ian Paul worked for the University of New Mexico Health Sciences Center as an

8. *Id.* ¶ 24.

9. *About UNM Hospital*, UNM HOSPITALS, <http://hospitals.unm.edu/about/about-unmh.shtml> (last visited Nov. 1, 2014).

10. *Id.*

11. *See UNM Hospital Board of Trustees Agenda for August 23, 2013*, UNM HOSPITALS 20, http://hospitals.unm.edu/bot/materials/2013.08.23_ePacket.pdf.

12. *Id.*

13. *Harrison*, 2013-NMCA-105, ¶ 4.

14. *Harrison v. Lovelace, et al.*, CV 2009 09855 (order imposing sanctions on defendant University of New Mexico).

15. *Id.*

Assistant Professor.¹⁶ Dr. Paul, a pathologist was retained to testify about whether the bowel punctures had likely arisen from the surgery in question or from a separate unrelated medical condition.¹⁷

During the course of the litigation, Dr. Paul was strongly encouraged to withdraw his participation by Scot Sauder, an attorney employed by the University.¹⁸ After learning of Dr. Paul's participation in the case, Mr. Sauder communicated his concerns with Dr. Paul Roth, Chancellor of the University of New Mexico Health Sciences Center.¹⁹ Dr. Roth approved of Mr. Sauder's plans to inform Dr. Paul's supervisors of his plans to testify.²⁰

Mr. Sauder proceeded to contact two of Dr. Paul's supervisors, Dr. Ross Zumwalt and Dr. Thomas Williams.²¹ Mr. Sauder suggested that Dr. Paul's involvement with the case created a conflict of interest with the University.²² Dr. Zumwalt responded to Mr. Sauder's initial concern, stating in an email: "I am sure the Regents desire that this case be evaluated by competent, qualified, and unbiased experts. The Regents are fortunate that Dr. Paul fits those criteria."²³ Mr. Sauder contacted both Dr. Zumwalt and Dr. Williams again as the litigation proceeded, insisting Dr. Paul withdraw from testifying in the case.²⁴ Without confirmation that Dr. Paul was going to withdraw, Mr. Sauder informed the University's contract counsel that Dr. Paul would not be testifying.²⁵

Within days of the final communications between Mr. Sauder and Dr. Paul's supervisors, Dr. Paul withdrew from the case.²⁶ Dr. Paul explained in an email to Plaintiff's counsel that he had been under "a lot of pressure from the higher ups at UNM" to withdraw from the case.²⁷ Dr. Paul was under consideration for a significant job promotion at the time this case was happening.²⁸ He testified that he felt intimidated and feared his career was in jeopardy.²⁹ Furthermore, Dr. Paul testified that if not for Mr. Sauder's actions, he would not have stepped down from the case.³⁰ Additionally, Both of Dr. Paul's supervisors testified that they did not believe it was appropriate or necessary for Dr. Paul to withdraw from the case.³¹

As a result of Mr. Sauder's conduct, the trial court judge held that the University should be sanctioned.³² The court issued two different types of sanctions:

16. *Harrison*, 2013-NMCA-105, ¶ 4.

17. *Harrison v. Lovelace, et al.*, CV 2009 09855 (order imposing sanctions on defendant University of New Mexico).

18. *Harrison*, 2013-NMCA-105, ¶ 5.

19. *Id.*

20. *Id.*

21. *Id.* ¶ 6.

22. *Id.*

23. *Id.* ¶ 5.

24. *Id.* ¶ 6.

25. *Id.*

26. *Id.* ¶ 7.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* ¶ 6.

32. *Id.* ¶ 9.

compensatory sanctions and non-compensatory monetary sanctions.³³ The compensatory sanctions the University was ordered to pay totaled \$32,000, which included the Plaintiff's reasonable attorney fees, as well as reasonable costs incurred in locating and retaining a substitute expert witness.³⁴

In addition to the compensatory sanctions that were ordered, the court ordered the University to pay non-compensatory monetary sanctions totaling \$100,000, which the court instructed to be divided amongst four local Albuquerque charities as follows:

\$30,000 to the Roadrunner Food Bank
\$30,000 to the United Way of New Mexico
\$15,000 to the Animal Humane Society of Albuquerque
\$25,000 to the Healthcare for the Homeless.³⁵

The University was ordered to pay these sanctions, totaling \$132,000 after the underlying medical malpractice claim had been settled.³⁶ Additionally, Mr. Sauder was personally sanctioned by the district court, and was ordered to pay \$1,500 to the Roadrunner Food Bank using his personal funds.³⁷

The New Mexico Court of Appeals reviewed the case, and affirmed the decision of the district court.³⁸ The New Mexico Supreme Court granted a Writ of Certiorari on October 18, 2013³⁹, and later quashed the Writ on Certiorari on May 20, 2014.⁴⁰

B. Legal Background

1. History of Inherent Authority

This section will outline inherent authority in the judicial system generally, as well as inherent authority of courts in New Mexico.

a. Inherent Authority Generally

Article III of the United States Constitution confers the judicial power of the United States in "one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."⁴¹ The Constitution, however, does not explain all powers of the federal courts established by Article III. A court will often

33. *Id.* ¶ 10.

34. *Id.*

35. *Harrison v. Lovelace, et al.*, CV 2009 09855 (order imposing sanctions on defendant University of New Mexico).

36. *Harrison*, 2013-NMCA-105, ¶ 25.

37. *Id.* ¶ 10.

38. *Id.* ¶ 2.

39. *Harrison v. Lovelace*, 2013-NMCA-105 (N.M.), *cert. granted*, (N.M. Oct. 18, 2013) (No. 34,349).

40. *Harrison v. Lovelace*, 2013-NMCA-105 (N.M.), *cert. quashed*, (N.M. May 20, 2014) (No. 34,349).

41. *See* U.S. CONST. art. III, § 1.

use its inherent authority to take action that is not specifically authorized by the Constitution, a written rule, or a statute.⁴²

A court's inherent authority is broad and not well defined.⁴³ However, scholars argue that this authority is critical to the judicial system as a whole.⁴⁴ It is essentially "the authority of a trial court, whether state or federal, to control and direct the conduct of civil litigation without any express authorization in a constitution, statute, or written rule of court."⁴⁵ Inherent authority can best be understood as a subset of implied powers.⁴⁶ This authority stems back to the English common law.⁴⁷ The United States adopted this concept of a court's authority over its processes and procedures from the English courts.⁴⁸

The United States Supreme Court addressed the issue of a court's implied powers in 1812, stating:

Certain implied powers must necessarily result to our courts of justice, from the nature of their institution. . . . To fine for contempt, imprison for contumacy, enforce the observance of order, &c., 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 statute⁴⁹

One facet of a court's inherent authority is the power to sanction.⁵⁰ One of the many reasons behind this power is that "courts must be able to secure obedience to their rules and protect their processes from abuse or misuse."⁵¹ These sanctions can be imposed for "violation of the court's orders and rules, for abuse of process, and for bad faith litigation, including adjudication for contempt, dismissal of the action, entry of default judgment, award of costs and attorneys' fees to opposing parties, [and] imposition of fines"⁵² However, it is unclear to many when and how a court may invoke its inherent authority; this authority has often been described as "nebulous and possessing shadowy bounds."⁵³

One scholar noted, "there is no clear standard establishing when courts may legitimately invoke their inherent powers to take some action that has not been

42. Joseph J. Anclien, *Broader is Better: The Inherent Powers of Federal Courts*, 64 N.Y.U. ANN. SURV. AM. L. 37, 38 (2009).

43. Daniel J. Meador, *Inherent Judicial Authority in the Conduct of Civil Litigation*, 73 TEX. L. REV. 1805 (1995).

44. Anclien, *supra* note 42, at 41.

45. Meador, *supra* note 43.

46. Anclien, *supra* note 42, at 40.

47. Meador, *supra* note 43, at 1805–1806.

48. *Id.* at 1806.

49. *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812).

50. *See generally* Meador, *supra* note 43, at 1811.

51. *Id.*

52. *Id.* at 1820.

53. Anclien, *supra* note 42, at 41.

specifically licensed by rule or statute.”⁵⁴ It is also unclear the role Congress could potentially play in limiting this authority without interfering with Article III. of the Constitution.⁵⁵ Though the boundaries of inherent authority are unknown, it is clear that courts have relied on this inherent authority at all stages of trial.⁵⁶

Chambers v. NASCO, Inc. is one of the most well known cases regarding inherent authority on the federal level. In *Chambers* the United States Supreme Court held the federal district court properly invoked its inherent power in sanctioning one party [Chambers] for bad-faith conduct and ordered the party pay attorney fees and related expenses.⁵⁷ *Chambers* is best understood for the proposition that federal courts have the inherent power to manage their own proceedings and to control the conduct of those who appear before them. In invoking the inherent power to punish conduct which abuses the judicial process, a court must exercise discretion in fashioning an appropriate sanction, which may range from dismissal of a lawsuit to an assessment of attorney’s fees.⁵⁸

Furthermore, the Supreme Court expressed that in cases of bad-faith conduct, courts should generally rely on the Federal Rules of Civil Procedure to sanction parties; however, per the court’s discretion it may impose sanctions under its inherent authority.⁵⁹

b. Inherent Authority in New Mexico

In *State ex rel. N.M. State Highway & Transp. Dep’t v. Baca*, the New Mexico Supreme Court addressed the question of whether a district court may award attorney fees against the State as a sanction for bad-faith litigation.⁶⁰ *Baca* concerned a state employee who was terminated for wrongfully collecting per diem when he didn’t meet the requirements for receiving the money.⁶¹ Mr. Baca appealed his termination to the Personnel Board and was reinstated following a hearing on the merits.⁶² The State proceeded to appeal this reinstatement to the district court, and the district court remanded the decision of the Personnel Board.⁶³ On remand, the Personnel Board again ordered Mr. Baca’s reinstatement.⁶⁴

The State proceeded to appeal this decision again, and the district court affirmed the decision of the Personnel Board.⁶⁵ Additionally, the district court found that the State treated Mr. Baca differently because of his role as a union activist.⁶⁶

54. *Id.* (“The Supreme Court’s jurisprudence is schizophrenic: it sometimes states that inherent powers are available only when they are indispensable to the discharge of the judicial power, yet it often authorizes their use in less pressing situations.”)

55. *Id.* at 42.

56. *Id.* at 44.

57. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 35 (1991).

58. *See generally* *Chambers*.

59. *Id.*

60. 1995-NMSC-033, ¶ 1, 896 P.2d 1148.

61. *Id.* ¶ 4.

62. *Id.* ¶ 6.

63. *Id.*

64. *Id.* ¶ 7.

65. *Id.*

66. *Id.*

Therefore, the court held these actions constituted bad faith on behalf of the State and it was ordered to pay attorney fees.⁶⁷ This ruling was appealed to the New Mexico Court of Appeals, which held that “a New Mexico court may invoke its inherent power and award attorney fees for bad faith litigation.”⁶⁸ The court noted:

A court may award attorney’s fees in order to vindicate its judicial authority and compensate the prevailing party for expenses incurred as a result of frivolous or vexatious litigation.⁶⁹

The Supreme Court of New Mexico reviewed the case, and acknowledged a district court’s inherent power as discussed in *U.S. v. Hudson*.⁷⁰ To determine whether these attorney fees were appropriate to award against a governmental entity, the Court applied a balancing test.⁷¹ The interests being weighed were policy interests favoring punitive damages against those favoring immunity.⁷² The Court held that awarding attorney fees against a governmental party was permitted, but noted “. . . there is a compensatory aspect to attorney fee awards that distinguishes them from awards for punitive damages.”⁷³

In its analysis, the New Mexico Supreme Court discussed *Torrance County Mental Health Program v. New Mexico Health & Environmental Department*. *Torrance County* held that when punitive damages are assessed against the State, taxpayers are punished rather than those who committed the punishable acts in the first place.⁷⁴ The *Baca* Court noted that *Torrance County* held that this consequence undermines the purposes of the punitive sanctions.⁷⁵ However, the Court in *Baca* distinguished attorney fees from punitive sanctions stating:

While it is certainly true that attorney’s fee awards are a punitive sanction, they also have a compensatory aspect, and whereas the punitive effect might be lost when an award is made against the State, the compensatory effect will not.⁷⁶

In regards to a court issuing these awards through its inherent authority, the Supreme Court held that “a court’s power only extends to conduct occurring before the court or in direct defiance of the court’s authority.”⁷⁷

67. *Id.*

68. *Id.* ¶ 8

69. *Id.* ¶ 12.

70. *Baca*, ¶ 11; *See* United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812).

71. *Baca*, 1995-NMSC-033, ¶¶ 19–20.

72. *Id.* ¶ 19 (quoting *Torrance Cnty. Mental Health Program, Inc. v. New Mexico Health & Env’t Dep’t*, 1992-NMSC-026, 830 P.2d 145).

73. *Baca*, 1995-NMSC-033, ¶ 22.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* ¶ 17.

2. *Non-Compensatory Monetary Sanctions*

This section will outline how non-compensatory monetary sanctions are imposed on parties on the federal level and in New Mexico.

a. *Federal Circuit Split*

On the federal level, non-compensatory monetary sanctions are allowed under Rule 37.⁷⁸ This type of sanction is not directly named in Rule 37, but the rule allows for any sanction that is appropriate, thus giving great deference to a judge.⁷⁹ Non-compensatory monetary sanctions are typically imposed when a discovery violation has occurred.⁸⁰ Rule 37(b)(2)(C) states:

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's 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.⁸¹

Built into Rule 37 are requirements that ensure a party's rights to due process are protected.⁸² Substantive due process requires that a sanction must be just under the circumstances and that the sanction must be related to the specific claim at issue in the discovery process.⁸³ Procedural due process requires that a party or a practitioner must have adequate notice and the opportunity to be heard before the sanctions can be imposed.⁸⁴

The issue of whether a finding of contempt is required prior to imposing non-compensatory monetary sanctions has caused a split in the federal courts.⁸⁵ The United States Court of Appeals for the Second Circuit has held that a federal court has the inherent power to "manage its affairs," and thus there is no need to have a finding of contempt in order to impose non-compensatory monetary sanctions.⁸⁶ Conversely, the United States Court of Appeals for the Tenth Circuit held in *Law v. National Collegiate Athletic Ass'n* that imposing a non-compensatory monetary sanction on a party first requires a finding of criminal contempt.⁸⁷ Holding a party's conduct as criminal contempt adds another layer of due process to the case.⁸⁸

78. Greg Neibarger, *Chipping Away at the Stone Wall: Allowing Federal Courts to Impose Non-Compensatory Monetary Sanctions Upon Errant Attorneys Without A Finding of Contempt*, 33 IND. L. REV. 1045, 1049 (2000). See also FED. R. CIV. P. 37(b).

79. Neibarger, *supra* note 78, at 1049.

80. *Id.* at 1050.

81. FED. R. CIV. P. 37(b)(2)(C). Other sanctions allowable under Rule 37(b)(2)(A) include striking pleadings in whole or in part, staying proceedings until an order is obeyed, dismissing an action in whole or in part, or rendering a default judgment. See FED. R. CIV. P. 37(b)(2)(A).

82. Neibarger, *supra* note 78, at 1052.

83. *Id.*

84. *Id.* at 1053.

85. *Id.* at 1049.

86. *Id.* at 1064.

87. *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1438, 1444 (10th Cir. 1998).

88. *Id.*

In *Law v. National Collegiate Athletic Ass'n*, the Tenth Circuit equated non-compensatory monetary sanctions with criminal contempt, and held:

... defendants in criminal contempt proceedings must be presumed innocent, proved guilty beyond a reasonable doubt, and accorded the right to refuse to testify against themselves; must be advised of charges, have a reasonable opportunity to respond to them, and be permitted the assistance of counsel and the right to call witnesses; must be given a public trial before an unbiased judge; and must be afforded a jury trial for serious contempts.⁸⁹

The court in this case was concerned that the party being sanctioned [NCAA] didn't have adequate notice it might be held in criminal contempt and liable for non-compensatory monetary sanctions, and also didn't receive adequate due process that is required for criminal contempt.⁹⁰ Therefore, "once a court decides the sanction was non-compensatory, it must ensure that all of the procedural safeguards for criminal proceedings have been satisfied before it will uphold the sanctions."⁹¹

b. History of Non-Compensatory Monetary Sanctions in New Mexico

As previously stated, *Harrison v. Board of Regents of University of New Mexico* is the first case of record in New Mexico that addresses "non-compensatory monetary sanctions." The New Mexico Court of Appeals did not provide an explanation of non-compensatory monetary sanctions, nor did it detail the procedure for imposing the sanctions. However, it did distinguish them from punitive sanctions.⁹² The court explained:

(1) [t]he award of punitive damages is based on a party's misconduct toward [] the individual [,]" whereas "[a]n award of sanctions is based on a party's misconduct toward [] the court."

(2) punitive damage awards are entrusted to a fact finder, while the assessment of sanction falls solely within the ambit of the court's constitutional power; and (3) "[p]unitive damages . . . are not intended to compensate the injured party," while sanctions imposed under the court's inherent authority can be both compensatory and punitive in nature.⁹³

However, this was not the first case in which New Mexico courts have addressed punitive awards against a governmental entity. *Torrance Cnty. Mental Health Program, Inc. v. New Mexico Health & Env't Dep't* addressed the question of whether punitive damages may be recovered from a governmental entity in a breach of contract action.⁹⁴ The Supreme Court of New Mexico held that the state's

89. *Id.* at 1443.

90. *Id.* at 1444.

91. Neibarger, *supra* note 78, at 1059.

92. *Harrison v. Bd. of Regents of the Univ. of New Mexico*, 2013-NMCA-105, ¶ 19, 311 P.3d 1236.

93. *Id.*

94. *Torrance Cnty. Mental Health Program, Inc. v. New Mexico Health & Env't Dep't* 1992-NMSC-026, ¶ 1, 830 P.2d 145.

policy of not permitting punitive damage awards against a governmental entity in tort claims, as reflected in the Tort Claims Act, applied to breach of contract cases also.⁹⁵ In holding that punitive damages were not recoverable against the government in breach of contract cases, the court acknowledged the Legislature's silence on the issue.⁹⁶

The Court considered two important policy considerations in reaching its decision in *Torrance County*.⁹⁷ The two policy considerations were: (1) the strong disincentive punitive damages provide against abuse of governmental power and (2) the corresponding positive incentive they create for accountability by government officials in the conduct and management of the programs they are entrusted to administer.⁹⁸ Ultimately the Court ultimately held that the necessity to protect public revenues was the policy that must prevail, unless a statute specifically authorizes that the monies can be diverted to payment of punitive assessments.⁹⁹

3. Contempt

Contempt of court is generally divided into two categories: civil contempt and criminal contempt.¹⁰⁰ Generally speaking, if a court imposes sanctions that are punitive in nature, i.e. to "vindicate the court's authority," the contempt is criminal.¹⁰¹ The United State Supreme Court has held that in cases of criminal contempt, the defendant has the right to a jury trial and the right to a neutral and objective fact finder.¹⁰² In *Bloom v. Illinois*, the Supreme Court stated:

Indeed, in contempt cases an even more compelling argument can be made for providing a right to jury trial as a protection against the arbitrary exercise of official power. Contemptuous conduct, though a public wrong, often strikes at the most vulnerable and human qualities of a judge's temperament. Even when the contempt is not a direct insult to the court or the judge, it frequently represents a rejection of judicial authority, or an interference with the judicial process or with the duties of officers of the court.¹⁰³

In New Mexico, the power to punish for contempt is inherent in the courts.¹⁰⁴ The exercise of such power is to preserve authority and respect for the courts.¹⁰⁵ The Trial Handbook for New Mexico Lawyers defines criminal contempt as "the power of the court to punish for the purpose of vindicating its public

95. *Id.* ¶ 2.

96. *Id.* ¶ 19.

97. *Id.* ¶ 25.

98. *Id.*

99. *Id.* ¶ 27.

100. Margaret Meriwether Cordray, *Contempt Sanctions and the Excessive Fines Clause*, 76 N.C. L. REV. 407, 410 (1998).

101. *Id.* at 411.

102. *Id.* at 415. *See also* *Bloom v. Illinois*, 391 U.S. 194, 202 (1968).

103. *Bloom v. Illinois*, 391 U.S. 194, 202 (1968).

104. J. DUKE THORNTON, TRIAL HANDBOOK FOR NEW MEXICO LAWYERS § 5: (citing *Case v. State*, 1985-NMSC-103, 709 P.2d 670).

105. THORNTON, *supra* note 104, § 5:1 (citing *Purpura v. Purpura*, 1983-NMCA-001, 847 P.2d 314).

authority.”¹⁰⁶ Civil contempt is remedial and aids the court in furthering the cause of justice between litigants.¹⁰⁷

The Supreme Court of the Territory of New Mexico distinguished between criminal and civil contempt as follows:

Proceedings for contempt are of two classes - those prosecuted to preserve the power and vindicate the dignity of the courts, and to punish for disobedience of their orders, and those instituted to preserve and enforce the rights of private parties to suits, and to compel obedience to orders and decrees made to enforce the rights and administer the remedies to which the court has found them to be entitled. The former are criminal and punitive in their nature, and the government, the courts, and the people are interested in their prosecution. The latter are civil, remedial, and coercive in their nature, and the parties chiefly in interest in their conduct and prosecution are the individuals whose private rights and remedies they were instituted to protect or enforce.¹⁰⁸

Furthermore, in *State v. Magee Pub. Co.*, the New Mexico Supreme Court held that criminal contempt:

. . . embraces all acts committed against the majesty of the law, or, to clothe the thought in other language, it may be said to include those acts done in disrespect of the court, or which obstruct the due and proper administration of justice, or which tend to bring the court into disrepute in the form of public opinion.¹⁰⁹

In addition to the distinction between civil and criminal contempt, there is an important distinction between direct and indirect contempt. Direct contempt is committed in the court’s presence, while indirect contempt is committed outside of the court’s presence.¹¹⁰ Examples of direct contempt include: an attorney failing to follow criminal appeal rules or refusal of a witness to testify.¹¹¹ Examples of indirect contempt include: disobedience of a court order or the intimidation or unlawful coercion of a witness.¹¹²

III. RATIONALE

A. New Mexico Court of Appeals: Majority Opinion

On appeal, the New Mexico Court of Appeals addressed the question of whether a district court’s inherent power to impose sanctions for a party’s misconduct during litigation includes the authority to issue a non-compensatory

106. THORNTON, *supra* note 104, § 5:2.

107. *Id.*

108. *Costilla Land & Inv. Co. v. Allen*, 1910-NMSC-044, 110 P. 847, 848.

109. *State v. Magee Pub. Co.*, 1924-NMSC-023, 224 P. 1028, 1029.

110. THORNTON, *supra* note 104, § 5:3.

111. *Id.*

112. *Id.*

monetary sanction against a public entity.¹¹³ The court affirmed the district court's ruling, upholding the non-compensatory monetary sanctions imposed against the University.¹¹⁴

Judge Vanzi, writing for the majority began the court's analysis by first acknowledging a district court's inherent authority.¹¹⁵ The court rejected the University's argument that non-compensatory monetary sanctions could not be levied against it because of its status as a governmental entity.¹¹⁶ Relying on *State Highway and Transp. Dept. v. Baca*, the court stated:

A fundamental aspect of a court's exercise of its inherent power is the principle that a court's inherent authority extends to all conduct before the court and to all parties appearing before the court, regardless of the party's status as a private litigant or as a governmental/public entity.¹¹⁷

The University did not challenge the district court's inherent authority to impose the sanctions, but it did challenge the nature of the sanctions themselves.¹¹⁸ The University's main argument was that the sanctions could not be imposed because they were not compensatory in nature.¹¹⁹ The purpose ". . . instead, was solely a punitive sanction designed to punish the Regents for their conduct and to act as deterrence."¹²⁰ The University also challenged the sanctions on public policy grounds.¹²¹

Responding to the nature of the sanctions, the New Mexico Court of Appeals distinguished non-compensatory monetary sanctions from punitive damages.¹²² The court relied heavily on two cases to make its decision: *State Highway and Trans. Dept. v. Baca* and *Torrance Cnty. Mental Health Program, Inc. v. New Mexico Health & Env't Dep't*. The issue in *Baca* was whether a district court had the authority to award attorney fees against the State as a sanction for bad-faith litigation.¹²³ The New Mexico Supreme Court held that a district court could award attorney fees against a governmental entity for bad-faith litigation.¹²⁴ The University contended that *Baca* stood for the proposition that attorney fees were appropriate

113. *Harrison v. Bd. of Regents of the Univ. of New Mexico*, 2013-NMCA-105, ¶ 12, 311 P.3d 1236.

114. *Id.* ¶ 2.

115. *Id.* ¶ 15.

116. *Id.* ¶ 20.

117. *Id.* ¶ 16.

118. *Id.* ¶ 17.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* ¶ 19 ("(1) '[t]he award of punitive damages is based on a party's misconduct toward[] the individual[.]' whereas 'a]n award of sanctions is based on a party's misconduct toward[] the court,' . . . (2) punitive damage awards are entrusted to a fact finder, while the assessment of sanction falls solely within the ambit of the court's constitutional power; and (3) '[p]unitive damages . . . are not intended to compensate the injured party,' while sanctions imposed under the court's inherent authority can be both compensatory and punitive in nature") (citations omitted).

123. *State ex rel. New Mexico State Highway & Transp. Dep't v. Baca*, 1995-NMSC-033, ¶ 1, 896 P.2d 1148.

124. *Id.* ¶ 12.

because the fees have a compensatory aspect and a punitive aspect; therefore, the court could not uphold sanctions that only have a punitive effect.¹²⁵ The New Mexico Court of Appeals rejected this argument, stating that this proposition was only one aspect of the *Baca* court's holding, and was not the sole basis for the decision.¹²⁶

In *Torrance County* the issue was whether punitive damages could be issued against a governmental entity for a breach of contract action.¹²⁷ The Supreme Court of New Mexico held that the Tort Claims Act applied and therefore, the government was shielded from paying punitive damages in tort cases.¹²⁸ The Court also extended this premise to cases involving breach of contract issues.¹²⁹ In *Harrison*, the New Mexico Court of Appeals rejected *Torrance County* as controlling because *Torrance County* did not concern the district court's "inherent power to sanction conduct that abuses the judicial process."¹³⁰ The court also used supporting authority to further illustrate these points.¹³¹

The University argued that imposing these sanctions was against public policy because the sanctions would punish innocent taxpayers who took no part in the wrongful conduct.¹³² The court rejected this argument, stating "these concerns are 'subordinate to a court's authority to control the parties and the litigation before it.'"¹³³ The court explained that the University's argument was not persuasive because in effect, any sanction results in punishing the public through expenditure of public funds.¹³⁴ Additionally, the court stated, "In our view, sanctions are punitive by their very nature."¹³⁵

Disregarding the public policy concerns set forward by the University, the court reiterated that the district court has the inherent authority to impose non-compensatory monetary sanctions.¹³⁶ It emphasized "The policy behind a district court's inherent authority is the need to prevent abusive litigation practice and preserve the integrity of the judicial process."¹³⁷

Lastly, the court acknowledged the unique procedural posture of the case.¹³⁸ It defended the actions of the district court judge in imposing the sanctions after the

125. *Harrison*, 2013-NMCA-105, ¶ 21.

126. *Id.*

127. *Torrance Cnty. Mental Health Program, Inc. v. New Mexico Health & Env't Dep't* 1992-NMSC-026, ¶ 1, 830 P.2d 145.

128. *Id.* ¶ 2.

129. *Id.*

130. *Harrison*, 2013-NMCA-105, ¶ 19.

131. *See id.* (citing *Restaurant Mgmt. Co. v. Kidde-Fenwal, Inc.*, 1999-NMCA-101, ¶ 11, 986 P.2d 504. *See also* *State v. Candelaria*, 2008-NMCA-120, ¶ 22, 192 P.2d 792; *Fernandez v. Farmers Ins. Co. of Ariz.*, 1993-NMSC-035, ¶ 15, 857 P.2d 22; *Gonzales v. Surgidev Corp.*, 1995-NMSC-047, ¶¶ 12-13, 899 P.2d 594).

132. *Harrison*, 2013-NMCA-105, ¶ 24.

133. *Id.* ¶ 22.

134. *Id.* ¶ 23.

135. *Id.* ¶ 24.

136. *Id.*

137. *Id.*

138. *Id.* ¶ 25.

litigation ended, stating “the options for sanctions available in the case were severely limited.”¹³⁹

B. New Mexico Court of Appeals: Dissenting Opinion

Judge Garcia, writing in dissent opined that he disagreed with the majority that a court has a right to exercise its inherent legal authority to impose a purely punitive sanction against a governmental entity for improper conduct during a legal proceeding.¹⁴⁰ The dissenting opinion criticized the “non-compensatory monetary sanction” label used by the majority, arguing it was purely a punitive sanction.¹⁴¹ Judge Garcia wrote:

Where a sanction has no compensatory component and is issued exclusively for the purpose of punishment and deterrence, the sanction is the equivalent of a punitive damages award.¹⁴²

The majority and the dissent agree on the competing public policy interests regarding awarding punitive damages against a governmental entity.¹⁴³ Judge Garcia characterized these competing policy interests as a balancing of interests, writing:

The need to protect public revenues and to prevent the injustice of punishing innocent taxpayers rather than the officials at fault must be balanced against the need to deter abuse of governmental power and to promote accountability among government officials.¹⁴⁴

His dissent criticized the majority for failing to address the competing policy concerns in depth in its analysis.¹⁴⁵ He also attacked the notion that courts need more authority to impose punitive awards in order to “deter an abuse of power and promote accountability among governmental officials.”¹⁴⁶

In doing so, he noted the inherent differences between the powers a district court has in controlling the litigation before it compared with the power a jury has.¹⁴⁷ A court has greater power than a jury to deter such abuse.¹⁴⁸ He argued that the \$1,500 sanction imposed on Mr. Sauder personally is one example of a power the court has that the jury does not.¹⁴⁹ However, he argued that the \$100,000 sanction imposed on the University has no effect on Mr. Sauder professionally, nor does it further deter the conduct.¹⁵⁰ Furthermore, this sanction brings no other value to the

139. *Id.*

140. *Id.* ¶ 30 (Garcia, J., dissenting opinion).

141. *Id.* ¶ 31.

142. *Id.*

143. *Id.* ¶ 33.

144. *Id.*

145. *Id.*

146. *Id.* ¶ 35.

147. *Id.* ¶ 34.

148. *Id.* ¶ 35.

149. *Id.*

150. *Id.*

public policy being implemented because the innocent taxpayers are the ones paying the cost of the public official's punishable conduct.¹⁵¹

Judge Garcia argues that this is already well within the court's broad power to deter conduct through issuing effective compensatory sanctions.¹⁵² He explained the court incorrectly justified its decision because the district court can already achieve the desired end without additional means in terms of adding power to judicial authority.¹⁵³ He argues that juries, rather than the district courts might be the body that needs additional authority in order to deter this type of conduct.¹⁵⁴ In presuming that the jury process is incapable of appropriately punishing a governmental entity, Judge Garcia argues that the jury component of our legal system is undermined.¹⁵⁵ He stated:

It is an unfortunate mistake to presume that judges and not juries possess the exclusive knowledge and ability to determine when a purely punitive award must be imposed on a governmental entity and then paid by innocent taxpayers from public revenues.¹⁵⁶

IV. ANALYSIS

The New Mexico Court of Appeals arrived at the incorrect result in *Harrison*. In its analysis, the court relied almost exclusively on the inherent authority of the district court judge to control the litigation in his or her courtroom as justification to uphold the non-compensatory monetary sanctions, thereby punishing the University for the inappropriate conduct of its employee. In this section, I argue that the court effectively disregarded New Mexico precedent governing, as well as legislative intent that concerns governmental immunity. Additionally, the decision left many questions unanswered. Perhaps most importantly for parties and practitioners alike: what are "non-compensatory monetary sanctions" and under what parameters are governmental entities subject to being punished by said sanctions?

A. Inherent Authority of the District Court

The fact that the district court has inherent authority is unquestioned. The limits of a court's inherent authority are unknown, but it should be used sparingly. The New Mexico Supreme Court has recognized that district court judges have the inherent authority to "impose a variety of sanctions on both litigants and attorneys in order to regulate their docket, promote judicial efficiency, and deter frivolous filings."¹⁵⁷ This authority is critical to judicial efficiency and ensuring that both parties and practitioners act in accordance with the rules and the law. This authority

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* ¶ 36.

155. *Id.*

156. *Id.* ¶ 37.

157. *State ex rel. New Mexico State Highway & Transp. Dep't v. Baca*, 1995-NMSC-033, ¶ 11, 896 P.2d 1148.

extends to all courts, as was recognized by The United States Supreme Court in 1812.¹⁵⁸

Inherent authority touches all aspects of litigation, i.e. it can allow a judge to regulate dress, filings procedures, conduct, etc. However, the court's inherent authority, though not well defined, must have boundaries. It should not be treated as a limitless power. In the case of *Harrison*, the court went too far.

The New Mexico Court of Appeals relied on the district court's inherent authority in upholding this specific type of sanctions against a governmental entity, The University of New Mexico.¹⁵⁹ It did not punish the University pursuant to a rule or statute; instead, it effectively created a black hole type of sanction that was not well defined or well explained.

For these reasons, if courts to exercise this inherent authority in imposing non-compensatory monetary sanctions against a party, it would be most appropriate to do so with a finding of criminal contempt first. This would ensure that a party's due process rights are protected, and guarantees that a party has the opportunity to be heard by a neutral fact finder and/or a jury of his or her peers.

It is important to recognize that *Harrison* is the first case of record that addresses "non-compensatory monetary sanctions" by name in New Mexico. Because of this, the court should have honored a more honest approach in imposing these sanctions against the University. The court went through great lengths in describing what these sanctions are not, even attempting to distinguish them from punitive damages.¹⁶⁰ In doing so, it unveiled what they are, which are punitive sanctions.¹⁶¹ The very name "non-compensatory monetary sanctions" illustrates the punitive nature of the penalty. If the sanction is not compensatory, logic would follow that the sanction is therefore punitive. Furthermore, the court used the wide reach of the judge's inherent authority to impose the penalties¹⁶², thus creating a situation where challenging the penalties on appeal would be difficult.

It is important to note that the court did not address whether the uniqueness of the non-compensatory monetary sanctions requires a different analysis from compensatory sanctions.¹⁶³ It offered no framework under which this type of sanction can be imposed in the future. Because there was no discussion of this new type of sanction and how or if it fit under the umbrella of inherent authority, the court effectively expanded its inherent authority without justification.

The court offered no guidance as to where future monies resulting from non-compensatory monetary sanctions could be directed to. In the *Harrison* case, Judge Malott directed the \$100,000 to four local charitable organizations, including Roadrunner Food Bank, United Way of New Mexico, Animal Humane Society of Albuquerque and Healthcare for the Homeless. Based on the silence of the Court of Appeals as to whether this was an appropriate action, it can be inferred future

158. *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812).

159. *Harrison*, 2013-NMCA-105, ¶ 27.

160. *Id.* ¶ 19.

161. *Id.* ¶ 24.

162. *Id.* ¶ 27.

163. *See generally Harrison*, 2013-NMCA-105.

sanction monies can be directed to the charity or organization of the district court judge's choice.

B. Incorrect Application of Precedent

To begin its analysis, the court immediately rejected both holdings of *Torrance Cnty. Mental Health Program, Inc. v. New Mexico Health & Env't Dep't* and *State Highway and Trans. Dept. v. Baca*, stating neither decision was controlling because neither dealt with a district court's inherent power.¹⁶⁴ However, in doing so the court effectively disregarded New Mexico precedent governing, as well as legislative intent that concerns governmental immunity. The court drew narrow lines between the issue in *Harrison* and the issues presented in both *Baca* and *Torrance County* in order to achieve a different result.

The New Mexico Supreme Court weighed "policy interests favoring the recovery of punitive damages against those favoring immunity for governmental entities" in *Torrance County*.¹⁶⁵ The Court concluded that the policy interests behind governmental immunity outweighed policy interests of recovering punitive damages for breach of contract actions.¹⁶⁶

In *Harrison*, the New Mexico Court of Appeals rejected *Torrance County* because it did not directly address a court's inherent power to sanction conduct that abuses the judicial process.¹⁶⁷ However, in doing so the court disregarded the legislative intent clearly expressed in the New Mexico Tort Claims Act, which prohibits punitive damages to be assessed against governmental entities.¹⁶⁸ It is important to note that the case which gave rise to the sanctions in the first place was a medical malpractice claim, a tort under New Mexico law.

Judge Timothy Garcia, writing for the dissent stated that the majority "asserts that misconduct toward the court must be given greater weight than misconduct toward a party when punitive punishment of a governmental entity is a consideration."¹⁶⁹ This creates an unfair standard for parties who are governmental entities compared to parties who are not.

The analysis applied in *Torrance County* should have been applied in *Harrison*. At the core of each case was the issue of punitive assessments against a governmental entity.¹⁷⁰ *Torrance County* held that "the state's policy of not permitting assessment of punitive damages in tort cases, as reflected in our Tort Claims Act, applies also, despite legislative silence on the issue, to breach-of-contract cases."¹⁷¹ Though damages and sanctions are distinct as they serve different purposes, it is reasonable to infer that the protections of immunity in the Tort Claims Act regarding punitive awards were intended by the Legislature to extend to the

164. *Harrison*, 2013-NMCA-105, ¶ 18.

165. *Id.*

166. *Id.*

167. *Id.* ¶ 19.

168. NMSA 1978, § 41-4-19(D) (2008).

169. *Harrison*, 2013-NMCA-105, ¶ 32.

170. See generally *Torrance Cnty. Mental Health Program, Inc. v. New Mexico Health & Env't Dep't* 1992-NMSC-026, 830 P.2d 145, and *Harrison*, 2013-NMCA-105.

171. *Torrance Cnty.*, 1992-NMSC-026, ¶ 2.

government in all cases. Applying this framework would mean that all punitive assessments against a governmental entity are barred. The *Harrison* court ignored this fundamental similarity between the two cases and instead distinguished them narrowly for the purposes of punishing the University.¹⁷²

The New Mexico Supreme Court in *Baca* articulated the balancing test from *Torrance County* in determining whether attorney fees could be assessed against a governmental entity.¹⁷³ In doing so, the Court held that attorney fees could be assessed against a governmental entity.¹⁷⁴ However, the Court noted that “there are certain checks upon an attorney’s fees award that are absent from a punitive damages award.”¹⁷⁵ One significant difference between the two is that attorney fees have a compensatory aspect and are not punitive in nature.¹⁷⁶

Like the *Harrison* court rejected *Torrance County* as controlling, it also rejected the principles of *Baca* as controlling.¹⁷⁷ The University contended the *Baca* stood for the proposition that “the inherent power of a court to sanction a party before it – even a governmental entity – would be honored, but only on the condition that the sanction have a direct compensatory effect for the benefit of the other party to actually remedy the wrongdoing.”¹⁷⁸ The New Mexico Court of Appeals in *Harrison* declined to accept this as the holding of *Baca*.¹⁷⁹

The Supreme Court in *Baca* did go to great lengths to distinguish compensatory awards from punitive awards.¹⁸⁰ It is arguably clear from *Baca* that the Court was concerned with imposing punitive damages against a governmental entity.¹⁸¹ The court in *Harrison* incorrectly interpreted *Baca* and instead the principles articulated were applied to disadvantage the University.

If *Baca* had been interpreted in the light most favorable to the University, the only sanctions that would have been upheld are those that were compensatory in nature. The New Mexico Court of Appeals could have upheld the district court’s awards of both attorney fees and the cost to the Plaintiff in retaining a new expert witness. However, in its interpretation of *Baca* the court extended the case’s holding and used it to support the punitive nature of the non-compensatory monetary sanctions imposed against the University.¹⁸²

The New Mexico Court of Appeals, however, did articulate the balancing test used both in *Torrance County* and *Baca*.¹⁸³ The court in *Harrison* characterized the competing policy concerns as follows:

172. See *Harrison* 2013-NMCA-105, ¶¶ 18–19.

173. *State ex rel. New Mexico State Highway & Transp. Dep’t v. Baca*, 1995-NMSC-033, ¶ 20, 896 P.2d 1148.

174. *Id.*

175. *Id.* ¶ 21.

176. *Id.* ¶ 22.

177. *Harrison*, 2013-NMCA-105, ¶ 18.

178. Brief for Appellant at 13, *Harrison v. Bd. of Regents of the Univ. of New Mexico*, No. 34,349.

179. *Harrison*, 2013-NMCA-105, ¶ 21.

180. See *State ex rel. New Mexico State Highway & Transp. Dep’t v. Baca*, 1995-NMSC-033, ¶ 21–22, 896 P.2d 1148.

181. *Id.*

182. *Harrison*, 2013-NMCA-105, ¶ 21.

183. *Id.* ¶ 18.

The need to protect public revenues and to prevent the injustice of punishing innocent taxpayers rather than the officials at fault must be balanced against the need to deter abuse of governmental power and to promote accountability among governmental officials.¹⁸⁴

Nonetheless, the court found the policy concern of punishing innocent taxpayers for the actions of a government official unconvincing and upheld the non-compensatory monetary sanctions.¹⁸⁵ The court stated that these concerns were “subordinate to a court’s authority to control the parties and the litigation before it.”¹⁸⁶

The University of New Mexico, as a public institution is funded primarily by the State of New Mexico, and therefore New Mexico’s taxpayers. Therefore, an award of punitive sanctions against the University punishes only the taxpayers, who took no part in the punishable action. The University serves a public good – when it is forced to pay punitive awards, its student consumers are the ones who are ultimately hurt.

C. Unanswered Questions about “Non-Compensatory Monetary Sanctions”?

The New Mexico Court of Appeals did not point to any rule or statutory authority that addressed “non-compensatory monetary sanctions.” The court also did not offer any guidance or framework as to how these sanctions would be analyzed. Instead, it emphasized the differences between punitive damage awards and non-compensatory monetary sanctions, including:

(1) “[t]he award of punitive damages is based on a party’s misconduct toward [] the individual [,]” whereas “[a]n award of sanctions is based on a party’s misconduct toward the court”; (2) punitive damages are entrusted to a fact finder, while the assessment of sanctions falls solely within the ambit of the court’s constitutional power; and (3) “[p]unitive damages . . . are not intended to compensate the injured party,” while sanctions imposed under the court’s inherent authority can be both compensatory and punitive in nature.¹⁸⁷

While the court clarified these few differences, many ambiguities surrounding non-compensatory monetary sanctions still exist. The court in Harrison did not discuss whether non-compensatory monetary sanctions in New Mexico would be regarded in the same manner as the federal courts regard these sanctions. The court failed to acknowledge the purposes for which non-compensatory monetary sanctions are used on the federal level.

As previously stated, there is a split in the federal circuit regarding non-compensatory monetary sanctions.¹⁸⁸ Generally, in federal court non-compensatory

184. *Id.*

185. *Id.* ¶ 22.

186. *Id.* ¶ 22. (quoting *Baca*, 1995-NMSC-033, ¶ 25.)

187. *Id.* ¶ 19.

188. *See supra* Part II(1)(a).

monetary sanctions are allowed under Rule 37.¹⁸⁹ The sanctions are typically imposed when a discovery violation has occurred.¹⁹⁰

The Tenth Circuit has held that imposing a non-compensatory monetary sanction on a party requires a finding of criminal contempt.¹⁹¹ Holding a party's conduct as criminal contempt adds another layer of due process to the case.¹⁹² Contrary to federal procedures, the sanctions in *Harrison* were not imposed against the University for a discovery violation, but rather for misconduct during the litigation process.¹⁹³

The New Mexico Court of Appeals did not reference this analytical framework in its decision in *Harrison*. Furthermore, it did not reference any of the Tenth Circuit's decisions in its analysis. As a result, it remains unclear what the guidelines are for assessing these sanctions against a party in New Mexico. However, it is clear that the sanctions are a good tool to prevent misconduct from litigants in the future. One might even argue the New Mexico Court of Appeals intentionally did not detail an analytical framework for these sanctions, as not knowing the limits of the sanctions might be the deterrent altogether.

Because of this confusion, New Mexico should follow the precedent set in the Tenth Circuit regarding imposing non-compensatory monetary sanctions against a party. Following this approach would ensure that parties and practitioners understand the purposes of the sanctions and furthermore, understand the process of how the penalties may be imposed.

If the Court of Appeals had followed the approach adopted by the Tenth Circuit, it would have required the district court to first hold a hearing as to whether the University was guilty of criminal contempt. This hearing would have been before a neutral fact finder.

However, the sanctions were imposed against the University after the underlying medical malpractice action had ended.¹⁹⁴ The University filed a Motion for Reconsideration of Sanctions Award on January 11, 2012.¹⁹⁵ Because of the filing of this motion, a hearing was held and the parties had the opportunity to be heard. However, if not for this motion it is likely that there would have been no hearing and the University would not have received adequate due process.

Adopting the Tenth Circuit approach in New Mexico would ensure that all parties have the opportunity to be heard before a large sanction is imposed against it. Furthermore, adding this additional layer of due process would ensure that a district court judge cannot misuse his or her power in imposing excessive amounts of sanctions for conduct that he or she finds inexcusable.

189. Neibarger, *supra* note 78, at 1049.

190. *Id.* at 1050.

191. *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1438 (10th Cir. 1998).

192. *Id.*

193. *See generally* *Harrison v. Bd. of Regents of the Univ. of New Mexico*, 2013-NMCA-105, 311 P.3d 1236.

194. *Harrison*, 2013-NMCA-105, ¶ 25.

195. *Harrison v. Lovelace, et al.*, CV 2009 09855 (order on motion for reconsideration of sanctions award on defendant University of New Mexico).

D. Was Harrison an Issue of Contempt?

The New Mexico Court of Appeals stated that a primary reason for imposing non-compensatory monetary sanctions against the University was to deter this type of abusive conduct by litigants in the future.¹⁹⁶ In imposing the sanctions, the district court stated: “[t]hat any public entity, let alone the flagship University of this State, believes it has such power to stifle comment is both terrifying and in violation of public policy[.]”¹⁹⁷ It is clear from the language of the court that these sanctions were intended to punish the University for conduct that the court found intolerable.

The court did not classify the non-compensatory monetary sanctions as either criminal or civil contempt, it merely classifies them as a deterrent.¹⁹⁸ Though the court did not expressly label the sanctions as an act of criminal contempt, it falls under this classification by definition.¹⁹⁹ New Mexico precedent states that criminal contempt:

embraces all acts committed against the majesty of the law, or, to clothe the thought in other language, it may be said to include those acts done in disrespect of the court, or which obstruct the due and proper administration of justice, or which tend to bring the court into disrepute in the form of public opinion.²⁰⁰

Because the non-compensatory monetary sanctions imposed against the University meet the requirements for criminal contempt in New Mexico, the Court of Appeals violated the University’s due process rights in upholding the sanctions without providing the additional procedural safeguards necessary in cases of contempt.

To reiterate, the sanctions were imposed on the University after the underlying medical malpractice claims had been settled.²⁰¹ The court stated that because of the unique procedural posture of the case, the options available for the sanctions were limited.²⁰² But the procedural posture of the case raises interesting questions regarding the imposition of the sanctions, including: (1) Should non-compensatory monetary sanctions have been imposed at all, since the underlying claims had been settled? (2) Should there have been a separate action regarding the sanctions? (3) Did Scot Sauder receive adequate due process given that he was sanctioned separately but was not a named party to the lawsuit?

Because of the striking similarities regarding the reasoning for imposing the sanctions against the University and the definition for criminal contempt in New Mexico, the sanctions should not have been imposed without a finding of criminal contempt. The University was not afforded a separate trial regarding the sanctions, nor were the issues ever presented before a jury. These procedural safeguards were

196. *Harrison*, 2013-NMCA-105, ¶ 25.

197. *Id.* ¶ 9.

198. *Id.* ¶ 25.

199. See THORNTON, *supra* note 104, § 5:2.

200. *State v. Magee Pub. Co.*, 1924-NMSC-023, 224 P. 1028, 1029.

201. *Harrison*, 2013-NMCA-105, ¶ 25.

202. *Id.*

sidestepped. These opportunities should have been afforded to the University before these penalties were imposed. Moreover, these opportunities should be afforded to parties subject to non-compensatory monetary sanctions in the future.

V. IMPLICATIONS

The New Mexico Court of Appeals ultimately set new precedent in holding that a district court's inherent power to impose sanctions includes the authority to impose non-compensatory monetary sanctions against a public entity.²⁰³ In so holding, the court set a dangerous precedent: When a party that is a governmental entity conducts litigation in a manner intolerable to the court and the integrity to the judicial system, the court may punish that party at the taxpayers' expense. Furthermore, a district court judge has the power to direct those taxpayer monies to any cause of his or her choosing as a result of *Harrison*.

A. Normative Argument / Proposal

I propose that imposing non-compensatory monetary sanctions upon a party that is a governmental entity requires a finding of criminal contempt before a party can be penalized. A party should receive a trial by jury and an opportunity to be heard before a neutral fact finder.

Furthermore, I propose that if there has been a finding of criminal contempt and non-compensatory monetary sanctions are imposed against a party, the monies be paid into a new fund. This new fund should be established to take the monies from the punitive sanctions and allocate it to fund legal aid services in NM. This will prevent the arbitrary nature of where the sanctions should be paid and it removes a judge's bias and favor towards any one group or cause. Allowing a judge to direct funds to any cause or his or her choosing could lead to the imposition of non-compensatory monetary sanctions on parties for the wrong reasons.

Lastly, if New Mexico courts continue to uphold the imposition of non-compensatory monetary sanctions against governmental entities, I propose the courts create explicit guidelines for such a punishment. These guidelines should be established to protect taxpayers and public monies alike, and should reflect the Legislature's intent to safeguard public funds.

B. Counter Arguments

The most apparent counterargument to this approach is that requiring courts to find criminal contempt before imposing these sanctions complicates a process that is already complex. Furthermore, adding this step to the process restricts a judge's inherent authority to control the litigation in his or her courtroom.

One could also argue the court should not define the boundaries of non-compensatory monetary sanctions because they are such an extreme remedy that will be used sparingly. One reason why parties will be deterred from behaving in such a way that the sanctions will be imposed on them is because they don't know the limits so they will be less inclined to test them.

203. *Id.* ¶ 27.

Lastly, one could argue that the \$100,000 sanction had no real impact on the University because of the sheer size of the institution. If the judge's goal was to deter future misconduct, he should have imposed an amount that would have affected the University's budget in a more significant way.

C. Test Suites

1. If the sanction to be imposed was less than \$100,000, the judge should have held a criminal contempt hearing before imposing the sanctions on the University. If the University was found to not be in contempt of court, the sanctions should not have been imposed at all. Any non-compensatory monetary sanction that is going to be imposed upon a party should require a finding of criminal contempt.

2. In *Harrison* the sanctions were ordered to be paid to four local charities. If a case with the same facts were to be presented today, a criminal contempt hearing should first take place. If it is found that the party is guilty of criminal contempt, the punitive sanctions should instead be paid into a new fund established to assist in funding legal aid services in New Mexico.

VI. CONCLUSION

This note aimed to explore the uniqueness of non-compensatory monetary sanctions in the New Mexico jurisprudence. Specifically, this note aimed to explore: (1) if punitive assessments can be levied against a governmental entity under a court's inherent authority, (2) what exactly "non-compensatory monetary sanctions" are, and if at their core they are a form of criminal contempt, and (3) if it is good policy to force taxpayers' money to go to charity because of the conduct of a government official. Furthermore, this note has attempted to provide an alternative foundation for imposing this new type of sanction against a party that is a governmental entity in New Mexico.

This proposal, imposing non-compensatory monetary sanctions upon a party would require a finding of criminal contempt before the sanctions can be imposed, seeks to ensure that taxpayer money is safeguarded and that the government receives adequate due process. Furthermore, this suggestion ensures that any imposition of these sanctions is fair. This extra procedural safeguard would prevent a misuse of judicial power. This proposal does not seek to strip courts of the inherent authority they possess, yet to suggest a more honest approach in terms of process.

What is clear about imposing non-compensatory monetary sanctions against a party that is a governmental entity is that a court must find a harmonious balance between immunity and punishment. Furthermore, these sanctions are an extreme remedy and if New Mexico courts continue to impose them under a judge's inherent authority, this power should be used sparingly and the boundaries should be better defined.

This note has hopefully assisted legal practitioners, the courts and parties in understanding non-compensatory monetary sanctions in New Mexico. As the boundaries of both a court's inherent authority and non-compensatory monetary sanctions continue to be defined in New Mexico, parties and practitioners alike should be cautioned to not cross the line between zealous advocacy and acting in a manner contrary to the integrity of the judicial process.