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ALTERNATIVE SANCTIONS IN LITIGATION

Douglas R. Richmond*

I. INTRODUCTION

Assume for a moment that you represent a party in a property dispute and sue the opposing landowner in federal court. The district court determines that it lacks jurisdiction over the matter and dismisses the case, further holding that you should be sanctioned for filing the action.¹ As a sanction, the district court orders you to take and pass a law school class on federal jurisdiction.² You appeal and the appellate court agrees that the sanction was inappropriate. Unfortunately, it disapproves of the sanction largely because it would burden a law school to accept a practicing lawyer as a student.³ The appellate court believes that “it would be more appropriate” for you to attend continuing legal education (CLE) courses on federal court practice and it thus encourages the district court to consider such a sanction on remand.⁴ Your appellate victory is perhaps not Pyrrhic—after all, a law school course would be expensive and impose an inflexible time and examination commitment, so a CLE mandate represents some improvement—but nor is it a win worth celebrating.

Alternatively, consider the consequences of the lawyers’ incivility in *Huggins v. Coatesville Area School District*.⁵ In *Huggins*, the plaintiff’s lawyer, Lewis Hannah, and a defense lawyer, James Ellison, had “heated, personal, rude, and pointless” exchanges during a deposition.⁶ Hannah was the provocateur and “ratcheted the acrimony higher and the standards lower,” but Ellison gave as good as he got.⁷ The defendants thereafter moved for a protective order and for sanctions.⁸ Instead of ordering Hannah to pay the defendants’ costs and fees incurred in bringing the motion—which the court rejected as a sanction based on Ellison’s complicity—the court selected a sanction intended to “have greater long-term substantive effect.”⁹ The court required Hannah to attend a CLE course addressing civility and professionalism, and ordered Hannah and Ellison to join each other for a meal within a few weeks, Dutch treat, in an attempt to repair their professional relationship.¹⁰

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1. *Willhite v. Collins*, 459 F.3d 866, 869–70 (8th Cir. 2006) (discussing the imposition of sanctions based on Rule 11 and the district court’s inherent powers).

2. *Id.* at 870.

3. *Id.*

4. *Id.*

5. *Huggins v. Coatesville Area Sch. Dist.*, Civ. A. No. 07-4917, 2009 WL 2973044 (E.D. Pa. Sept. 16, 2009).

6. *Id.* at *1.

7. *See id.* at *1–2.

8. *See id.* at *2.

9. *Id.* at *4.

10. *Id.*

A Florida federal court also went beyond mandatory CLE attendance as a sanction when a plaintiff's lawyer, Aryn Fuller, missed a pretrial conference, failed to submit a confidential case statement for a settlement conference, was late for the first day of trial, and did not have a witness available at trial as required.¹¹ The court ordered Fuller to join the Federal Bar Association (FBA), attend a FBA webinar on federal civil litigation basics, and arrange for a mentor through the FBA.¹²

Finally, consider Oklahoma lawyer Gerard Pignato's sanction for "unprofessional letters" he sent to opposing counsel.¹³ The court directed him "to submit to the Oklahoma Bar Journal for publication an article pertaining to civility and professionalism as they relate to adversary proceedings."¹⁴ The court further ordered Pignato to state in the article why he wrote it, target as his audience inexperienced lawyers, and provide the court with a copy of the article upon its submission for publication.¹⁵ Pignato wrote a conforming Oklahoma Bar Journal article that was published within the time allotted by the court, although the published version of the article made no mention of why he wrote it.¹⁶ Other courts have likewise required lawyers to write bar journal articles as a sanction.¹⁷

The non-monetary sanctions imposed on these lawyers may fairly be characterized as *alternative sanctions*; they were imposed instead of monetary sanctions or traditional non-monetary sanctions that affect a lawyer's ability to litigate a case, such as revoking the lawyer's pro hac vice admission. Alternative sanctions may further be categorized as *reflective sanctions* where they are intended to cause offending lawyers to reflect on their conduct with a goal of reform, or as *shaming sanctions* where they are intended to shame errant lawyers into improving their behavior and, in addition, to deter other lawyers from engaging in similar misconduct. Ordering a lawyer to attend a CLE program is the most common example of a reflective sanction.¹⁸ This sanction requires no public

11. Order Imposing Sanctions at 1, *Sindicich v. Amica Mut. Ins. Co.*, Case No. 6:14-cv-889-Orl-37KRS, 2016 WL 3563874 (M.D. Fla. July 1, 2016), <https://www.scribd.com/document/287281291/Sindicich-Sanctions-Order-1>.

12. *Id.*

13. Order at 1, *Johnson v. Gov't Emps. Ins. Co.*, Case No. CIV-07-868-M (W.D. Okla. Apr. 14, 2008) (imposing non-monetary sanctions).

14. *Id.* at 2.

15. *Id.*

16. See Gerard F. Pignato, *Professionalism for Attorneys—Young and Old*, 79 OKLA. B.J. 2827 (2008), <http://www.okbar.org/Portals/13/PDF/OBJ/2008/December%2013.pdf>.

17. See, e.g., *St. Paul Reinsurance Co. v. Commercial Fin. Corp.*, 198 F.R.D. 508, 518 (N.D. Iowa 2000) (sparing the lawyer some embarrassment by stating that did not have to say in the article that he was required to write it as a sanction).

18. Judges routinely require lawyers to attend CLE programs as a sanction for litigation-related misconduct. See, e.g., *In re Violet*, 460 F. App'x 30, 40–41 (2d Cir. 2012) (requiring the lawyer to complete 12 hours of CLE in addition to the hours normally required of New York lawyers); *In re Hsu*, 451 F. App'x 37, 39 (2d Cir. 2011) (requiring the lawyer to complete a CLE course on each of three specified subjects); *Edmonds v. Seavey*, 379 F. App'x 62, 64–65 (2d Cir. 2010) (affirming the district court's Rule 11 sanction requiring a lawyer to "attend CLE courses in the relevant area" because he did "not appear to comprehend the civil RICO statute"); *Willhite v. Collins*, 459 F.3d 866, 870 (8th Cir. 2006) (suggesting mandatory CLE courses as a sanction rather than making the lawyer complete a law school class); *Balthazar v. Atl. City Med. Ctr.*, 137 F. App'x 482, 490–91 (5th Cir. 2005) (affirming the district court's order that the lawyer attend two CLE courses, one on federal practice and procedure and one on

acknowledgement of error or wrongdoing by the lawyer. In most cases, no other lawyers will know why the sanctioned lawyer is attending a particular CLE course. At the same time, judges who order lawyers to attend CLE programs do not believe that the lawyers will change their behaviors or improve their practices solely as a result of the content delivered during those seminars. Rather, self-analysis by the lawyer of the need to change her behavior or enhance her professional knowledge or skills is a principal goal of mandatory CLE attendance, even if it is not the only goal.

professional responsibility); *Thomas v. Cooper/T. Smith Stevedoring Co.*, No. 00-30056, 2001 WL 274750, at *1–2 (5th Cir. Feb. 22, 2001) (approving a sanction of five hours of CLE courses in lieu of awarding attorneys’ fees); *In re Marshall*, No. 3:15-MC-88-JWD, 2016 WL 81484, at *8, *12 (M.D. La. Jan. 7, 2016) (ordering the lawyer to complete six hours of CLE on ethics or professionalism in addition to other sanctions for repeatedly failing to meet deadlines, disregarding court rules, and failing to appear for a scheduling conference); *Burrage-Simon v. State Farm Mut. Auto. Ins. Co.*, No. 2:14-cv-00429-GMN-NJK, 2015 WL 5224885, at *1, *6 (D. Nev. Sept. 8, 2015) (ordering the lawyer to attend an ethics-based CLE course in addition to paying a monetary sanction); *Broussard v. Lafayette Consol. Gov’t*, No. 6:13-cv-2872, 2015 WL 5025345, at *6–8 (W.D. La. Aug. 20, 2015) (ordering the lawyers to complete in the next 17 months 21 hours of CLE courses in addition to any CLE credit otherwise required or completed); *Wise v. Wash. Cty.*, No. 10-1677, 2015 WL 1757730, at *37 (W.D. Pa. Apr. 17, 2015) (requiring the plaintiff’s lawyers to attend CLE courses; one of the lawyers had to attend two courses, the other had to attend only one); *Howard v. Offshore Liftboats, LLC*, Nos. 13-4811, 13-6407, 2015 WL 965976, at *11 (E.D. La. Mar. 24, 2015) (relying on FED. R. CIV. P. 30(d)(2) in ordering a lawyer to “attend an additional five (5) hours of continuing legal education over and above what he is required to attend . . . all of which must be in the area of professionalism and/or ethics” as a sanction for his “unprofessional personal insults” directed at opposing counsel during depositions); *Cruz-Aponte v. Caribbean Petroleum Corp.*, 123 F. Supp. 3d 276, 278–81 (D.P.R. 2015) (ordering a lawyer to complete a professionalism course for saying, “You’re not going through menopause, I hope,” to a female lawyer who complained about the heat in the room where depositions were being taken); *Rivas v. Bowling Green Assocs.*, No. 13-cv-7812 (PKC), 2014 WL 3694983, at *5 (S.D.N.Y. July 24, 2014) (ordering the plaintiff’s law firm to “require each partner or member of the firm admitted to practice before this [c]ourt who practices in the field of litigation to attend a continuing education program” on topics specified by the court); *Torres v. City of Houston*, Civ. A. No. H-12-2323, 2013 WL 2408056, at *10 (S.D. Tex. May 31, 2013) (ordering the plaintiff’s attorney “as a remedial and prophylactic measure more than a sanction” to complete 14 hours of CLE courses “in addition to the CLE required of all active attorneys,” and further mandating that the specified courses could not be taken on-line); *Santini v. Cleveland Clinic Fla.*, Case No. 98-6559-CIV-ZLOCH, 1999 U.S. Dist. LEXIS 23667, at *81 (S.D. Fla. Sept. 2, 1999) (ordering the lawyer to obtain five hours of CLE credit on legal ethics within one year in addition to other sanctions); *Bullard v. Chrysler Corp.*, 925 F. Supp. 1180, 1191 (E.D. Tex. 1996) (sanctioning the lawyer under Rule 11 and requiring him to complete 10 hours of CLE on legal ethics in addition to other penalties); *LaVigna v. WABC Television, Inc.*, 159 F.R.D. 432, 437 (S.D.N.Y. 1995) (ordering the lawyer to attend 12 hours of CLE programming in addition to paying a \$250 fine); *Vandeventer v. Wabash Nat’l Corp.*, 893 F. Supp. 827, 833 (N.D. Ind. 1995) (offering the lawyers the alternative of petitioning to vacate monetary sanctions by agreeing to successfully complete specified CLE seminars); *In re Morton*, Case No. 3:15-bk-30892-SHB, 2015 WL 5731859, at *1 (Bankr. E.D. Tenn. Sept. 30, 2015) (requiring two lawyers “to attend ten hours of ethics continuing legal education above what is required for maintaining their Tennessee law licenses,” in addition to imposing significant monetary penalties and requiring the lawyers to report themselves to Tennessee disciplinary authorities); *Goldberg v. Mt. Sinai Med. Ctr. of Greater Miami, LLC (In re S. Beach Cmty. Hosp.)*, Case No. 06-10634-BKC-LMI, 2007 Bankr. LEXIS 2780, at *3, *10 (Bankr. S.D. Fla. July 3, 2007) (requiring the lawyer to attend a full-day professionalism course as a sanction for disagreeing with the court’s reasoning during oral argument by stating: “I suggest with respect, Your Honor, that you’re a few French Fries short of a Happy Meal in terms of what’s likely to take place.”) (internal quotation marks omitted).

Shaming sanctions, as the description suggest, include a demonstration or display of penitence by errant lawyers.¹⁹ Pignato's case offers a good example of a shaming sanction; it would be a perfect example had his Oklahoma Bar Journal article stated the reason for its publication as the court ordered.

Alternative sanctions became a subject of concern and controversy among practicing lawyers when in 2014 the district court in *Security National Bank of Sioux City v. Abbott Laboratories*,²⁰ acting on its own, sanctioned a lawyer from a leading global law firm for misconduct during depositions she defended.²¹ The lawyer's misconduct included (1) making an "astounding number" of improper objections; (2) repeatedly objecting and interjecting in ways that coached witnesses how to answer questions; and (3) excessively interrupting the depositions, thereby delaying and frustrating witnesses' examinations.²² While the court's decision to sanction the lawyer on its own rather than in response to a motion by another party was itself noteworthy, the court's shaming sanction in particular attracted lawyers' attention:

Counsel must write and produce a training video in which Counsel, or another partner in Counsel's firm, appears and explains the holding and rationale of this opinion, and provides specific steps lawyers must take to comply with its rationale in future depositions in any federal and state court. The video must specifically address the impropriety of unspecified "form" objections, witness coaching, and excessive interruptions. The lawyer appearing in the video may mention the few jurisdictions that actually require only unspecified "form" objections and may suggest that such objections are proper in only those jurisdictions. The lawyer in the video must state that the video is being produced and distributed pursuant to a federal court's sanction order regarding a partner in the firm, but the lawyer need not state the name of the partner, the case the sanctions arose under, or the court issuing this order.²³

The court additionally required the lawyer to obtain its approval of the video, and thereafter to make it known and available to each lawyer her global law firm who engaged in federal or state litigation or who worked in any practice group in which at least two of the lawyers had appeared in any federal or state case in the United States.²⁴ The lawyer also had to demonstrate compliance with the order by

19. See, e.g., *DeLuca v. Seare (In re Seare)*, 515 B.R. 599, 621 (B.A.P. 9th Cir. 2014) (affirming a lower court's sanction order requiring the lawyer to provide a copy of that order to certain potential clients for the next two years "as a means of informing the bar that being disciplined for unethical conduct has repercussions beyond just paying a fine and moving on"); *Salmon v. CRST Expedited, Inc.*, Case No. 14-CV-0265-CVE-TLW, 2016 WL 3945362, at *4 (N.D. Okla. July 19, 2016) (requiring a novice lawyer "to speak to students at the University of Tulsa College of Law about the dangers of filing a lawsuit as a licensed legal intern" as a sanction for filing a frivolous lawsuit; also ordering the young lawyer to pay \$3,000 in attorneys' fees).

20. 299 F.R.D. 595, 600 (N.D. Iowa 2014), *rev'd sub nom.* *Sec. Nat'l Bank of Sioux City v. Jones Day*, 800 F.3d 936 (8th Cir. 2015).

21. *Id.* at 610–11.

22. *Id.* at 600.

23. *Id.* at 610 (footnote omitted).

24. *Id.*

filing an affidavit along with a copy of the notice about the video that was circulated within the firm.²⁵

The Eighth Circuit reversed the district court, but in doing so it did not criticize the choice of sanction.²⁶ Rather, it reversed because “[s]o unusual a sanction required the district court to give particularized notice of the nature of the sanction it had in mind so that counsel would have a meaningful opportunity to respond,” and the district court did not provide such notice.²⁷ Indeed, the nature of the district court’s sanction became known only when it issued its opinion.²⁸ As a result, the alternative sanction could not stand.²⁹

The district court and Eighth Circuit decisions in *National Bank of Sioux City* require courts and lawyers to focus attention on alternative sanctions against lawyers. This Article is intended to help guide them in that process. It begins in Part II with an overview of the sources of courts’ authority or power to sanction lawyers, focusing on bases for imposing alternative sanctions and highlighting illustrative cases as appropriate. In discussing sanctions premised on procedural rules, Part II focuses on the Federal Rules of Civil Procedure rather than state rules simply because the federal case law is well-developed. Finally, Part III focuses on the richly illustrative decision in *Security National Bank of Sioux City* and the broader lessons to be learned from that case.

II. COURTS’ AUTHORITY TO SANCTION LAWYERS

Depending on the case, courts may impose alternative sanctions on lawyers (a) under Federal Rule of Civil Procedure 11 and state equivalents; (b) under several rules of civil procedure beyond Rule 11; and (c) pursuant to their inherent power to regulate the conduct of those who appear before them. Other common bases for sanctioning lawyers, such as Federal Rule of Civil Procedure 37, 28 U.S.C. § 1927, and Federal Rule of Appellate Procedure 38 do not permit alternative sanctions.

A. Federal Rule of Civil Procedure 11

Federal Rule of Civil Procedure 11 is perhaps the best-known basis for imposing sanctions. Rule 11 governs lawyers’ misconduct in presenting pleadings, written motions, and other papers to courts.³⁰ Rule 11 does not apply to disclosures under Rule 26 or to discovery requests, responses, objections, and motions.³¹ Regarding documents and related conduct within its scope, Rule 11(b) provides:

(b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or

25. *Id.*

26. *Sec. Nat’l Bank of Sioux City v. Jones Day*, 800 F.3d 936 (8th Cir. 2015).

27. *Id.* at 945.

28. *Id.*

29. *Id.*

30. GREGORY P. JOSEPH, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE § 5(C)(1), at 89–90 (5th ed. 2013).

31. FED. R. CIV. P. 11(d).

unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

- (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
- (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
- (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
- (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.³²

Rule 11(c) governs sanctions for violations of Rule 11(b):

(c) Sanctions.

- (1) In General. If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.
- (2) Motion for Sanctions. A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. . . .
- (3) On the Court's Initiative. On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b).

32. FED. R. CIV. P. 11(b).

(4) Nature of a Sanction. A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.

* * *

(6) Requirements for an Order. An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.³³

States have adopted their own versions of Rule 11.³⁴

Under Rule 1 of the Federal Rules of Civil Procedure, Rule 11 applies “in all civil actions and proceedings in the United States district courts, except as stated in Rule 81.”³⁵ Rule 11 therefore applies in actions and proceedings based on both diversity and federal question jurisdiction.³⁶ The limitation in Rule 1 that the Federal Rules of Civil Procedure apply to civil matters in district courts clarifies that Rule 11 does not apply to appellate proceedings,³⁷ with the possible exception of certain securities actions.³⁸ Likewise, Rule 11 does not apply in criminal cases or in bankruptcy cases; lawyers' misconduct in those cases is punished or remedied under other authorities.³⁹

The standard for determining whether Rule 11 sanctions are appropriate depends on how the question is raised. When weighing the appropriateness of Rule 11 sanctions based on a party's motion, courts employ an objective standard of reasonableness.⁴⁰ When imposing sanctions on their own initiative under Rule

33. FED. R. CIV. P. 11(c).

34. *See, e.g.*, KAN. STAT. ANN. § 60-211 (2012); MO. SUP. CT. R. 55.03.

35. FED. R. CIV. P. 1. Rule 81 identifies the federal proceedings to which the Federal Rules of Civil Procedure do and do not apply. *See* FED. R. CIV. P. 81.

36. *See Pavelic & LeFlore v. Marvel Entm't Grp.*, 493 U.S. 120, 123 (1989) (“We give the Federal Rules of Civil Procedure their plain meaning.”).

37. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 406 (1990).

38. *See Gurary v. Nu-Tech Bio-Med, Inc.*, 303 F.3d 212, 225–26 (2d Cir. 2002) (discussing the PSLRA and stating that “[o]nce the presumption [against plaintiffs in unfounded and abusive securities fraud cases] is triggered and is not rebutted, however, it seems most likely that Congress meant for the defendant to receive fees and costs incurred in seeking sanctions . . . including all reasonable expenses related to appellate proceedings.”).

39. JOSEPH, *supra* note 30, § 5(B)(1), at 87 (“While misbehavior in criminal cases may be punishable under other authorities, such as 28 U.S.C. § 1927 and the inherent power of the court[,] . . . it is not sanctionable under Rule 11.”); 11 U.S.C. § 105(a) (2012) (governing bankruptcy cases and stating that “[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.”); FED. R. BANKR. P. 9011 (providing a Rule 11 equivalent in bankruptcy proceedings).

40. *See Hourani v. Mirtchev*, 796 F.3d 1, 17 (D.C. Cir. 2015); *Montell v. Diversified Clinical Servs., Inc.*, 757 F.3d 497, 510 (6th Cir. 2014).

11(c)(3), on the other hand, courts should apply a standard similar to that used to support sanctions for contempt.⁴¹ The contempt standard is stricter or more stringent, although the precise standard may vary by jurisdiction.⁴² Regardless, requiring a higher standard for sanctions imposed by a court sua sponte under Rule 11(c)(3) reduces the risk that by sanctioning a lawyer, a district court will “inadvertently dampen attorneys’ legitimate, zealous advocacy on behalf of clients.”⁴³ A stricter standard may further be justified on the basis that lawyers tempting sanctions under Rule 11(c)(3) do not enjoy the safe harbor provision of Rule 11(c)(2) that would otherwise allow them to correct or withdraw the offending papers.⁴⁴

Rule 11 grants courts a great deal of flexibility in fashioning sanctions, as long as the sanction a court selects is “appropriate” and is “limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated.”⁴⁵ This means that a court should impose the least severe sanction required to accomplish Rule 11’s purposes.⁴⁶ Rule 11(c)(4) expressly provides for alternative sanctions, which it refers to as “nonmonetary directives.”⁴⁷ Courts may, for example, order lawyers to participate in CLE programs,⁴⁸ as they often do, but their creativity in crafting appropriate sanctions certainly does not stop there.⁴⁹ In *Curran v. Price*,⁵⁰ for example, the court was looking to fashion a non-monetary sanction against a lawyer, Timothy Umbreit, who tried to remove a case to federal court “that was not

41. See *Muhammad v. Walmart Stores E.*, 732 F.3d 104, 108 (2d Cir. 2013); *McDonald v. Emory Healthcare Eye Ctr.*, 391 F. App’x 851, 853 (11th Cir. 2010); *Stone v. Wolff Props. LLC*, 135 F. App’x 56, 59 (9th Cir. 2005) (quoting *United Nat’l Ins. Co. v. R&D Latex Corp.*, 242 F.3d 1102, 1116 (9th Cir. 2001)).

42. Compare *Muhammad*, 732 F.3d at 108 (requiring “a finding of subjective bad faith” for contempt), with *Pousson v. Shinseki*, 22 Vet. App. 432, 437 (2009) (concluding that the defendant’s “gross negligence and a gross lack of diligence” met the standard for civil contempt).

43. *Rankin v. City of Niagara Falls*, 293 F.R.D. 375, 387 (W.D.N.Y. 2013).

44. *McDonald*, 391 F. App’x at 853; see also *In re Nakhuda*, 544 B.R. 886, 899–902 (B.A.P. 9th Cir. 2016) (taking the same approach under FED. R. BANKR. P. 9011, the bankruptcy counterpart to FED. R. CIV. P. 11).

45. FED. R. CIV. P. 11(e)(1), (4).

46. *Jenkins v. Methodist Hosps. of Dallas, Inc.*, 478 F.3d 255, 265 (5th Cir. 2007) (quoting *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 877–78 (5th Cir. 1988)).

47. FED. R. CIV. P. 11(c)(4).

48. See, e.g., *Edmonds v. Seavey*, 379 F. App’x 62, 65 (2d Cir. 2010) (calling the Rule 11 sanction requiring the offending lawyer to attend CLE courses “particularly apropos”); *Carlino v. Gloucester City High Sch.*, 44 F. App’x 599, 601–602 (3d Cir. 2002) (affirming order under Rule 11 requiring lawyer to attend two CLE courses within 18 months in addition to other sanctions); *Broussard v. Lafayette Consol. Gov’t*, Civ. A. No. 6:13-cv-2872, 2015 WL 5025345, at *6–8 (W.D. La. Aug. 20, 2015) (relying on Rule 11 in ordering the lawyers to complete 21 hours of extra CLE courses); *Thomason v. Norman E. Lehrer, P.C.*, 182 F.R.D. 121, 131–32 (D.N.J. 1998) (relying on Rule 11 in ordering the lawyer to complete two CLE courses within 18 months); *Bullard v. Chrysler Corp.*, 925 F. Supp. 1180, 1191 (E.D. Tex. 1996) (sanctioning the lawyer under Rule 11 and ordering him to take 10 hours of CLE on legal ethics in addition to other penalties).

49. See JOSEPH, *supra* note 30, § 16(B)(1), at 270 (“There are few limits placed on judicial creativity in fashioning an appropriate sanction.”); see, e.g., *Reinhardt v. Gulf Ins. Co.*, 489 F.3d 405, 417 (1st Cir. 2007) (affirming the district court’s order that the lawyer perform ten hours of pro bono service as a sanction for violating Rule 11).

50. 150 F.R.D. 85 (D. Md. 1993).

removable under any conceivable notion of federal removal jurisdiction.”⁵¹ While noting that non-monetary sanctions are intended to be educational,⁵² the court declined to make Umbreit attend a CLE course principally because it doubted that a CLE course would fill this gap in his knowledge of federal law.⁵³ Rather:

[A] more laser-like approach [was] warranted, consisting of remedial education in federal removal law, to be gained and reinforced through the mnemonic device of copying appropriate materials out in longhand. . . .

Specifically . . . Umbreit . . . [was] . . . directed to copy out, legibly, in his own handwriting, and within 30 days . . . the text (i.e., without footnotes) of section 3722 in 14A C. Wright, A. Miller, and E. Cooper, *Federal Practice and Procedure: Civil* (1985), together with the text of that section’s update. . . . Mr. Umbreit [was required to] turn in the resulting product to the Clerk of this Court, with a certification that it was made solely by himself and in his own handwriting. This sanction [was] . . . the least drastic—and likely a very effective—way of impressing the appropriate principles of federal removal jurisdiction upon counsel’s long-term memory.⁵⁴

In another Rule 11 alternative sanctions case, *Fields v. Gates*,⁵⁵ the plaintiffs’ lawyer filed false civil cover sheets in several cases and dismissed another case in an attempt to draw a particular judge, which the court and the defendants characterized either as forum-shopping or judge-shopping.⁵⁶ The defendants moved for sanctions under Rule 11 and sought to have the case dismissed.⁵⁷ The court instead ordered the plaintiffs’ lawyer to “enroll and attend at an accredited law school a full course in ethics and professional responsibility.”⁵⁸

B. Federal Rules of Civil Procedure Beyond Rule 11

While Rule 11 and courts’ inherent power are perhaps the most frequently cited bases for imposing alternative sanctions, federal courts may also impose alternative sanctions on lawyers under various Federal Rules of Civil Procedure.

51. *Id.* at 85.

52. *Id.* at 86.

53. *Id.* at 87.

54. *Id.*

55. 184 F.R.D. 342 (C.D. Cal. 1999).

56. *Id.* at 344–45.

57. *Id.* at 345.

58. *Id.*

I. *Rule 16*

The first of these rules is Rule 16, which governs pretrial conferences.⁵⁹ Rule 16(f) provides:

(1) *In General.* On motion or on its own, the court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)–(vii), if a party or its attorney:

(A) fails to appear at a scheduling or other pretrial conference;

(B) is substantially unprepared to participate—or does not participate in good faith—in the conference; or

(C) fails to obey a scheduling or other pretrial order.

(2) *Imposing Fees and Costs.* Instead of or in addition to any other sanction, the court must order the party, its attorney, or both to pay the reasonable expenses—including attorney’s fees—incurred because of any noncompliance with this rule, unless the noncompliance was substantially justified or other circumstances make an award of expenses unjust.⁶⁰

A Rule 16(f) violation does not require a finding of bad faith, although a court may consider a lawyer or litigant’s bad faith in settling on an appropriate sanction.⁶¹

Rule 16(f) permits courts to impose alternative sanctions on lawyers,⁶² and they freely do so using the rule as authority.⁶³ *Petrisch v. JP Morgan Chase*⁶⁴ is an illustrative case. In *Petrisch*, the court relied on Rule 16(f) to sanction the plaintiff’s lawyer, Stephen Jackson, for failing to appear for a pretrial conference and for violating various scheduling and pretrial orders.⁶⁵ “To remedy the injury to the [c]ourt” for wasting its time, the court ordered Jackson to attend four hours of CLE courses on federal practice and procedure within the next year.⁶⁶ The courses had to be approved by state CLE authorities and conducted in a live classroom format, and

59. FED. R. CIV. P. 16.

60. FED. R. CIV. P. 16(f).

61. *Hogan v. Raymond Corp.*, 536 F. App’x 207, 211 (3d Cir. 2013).

62. See FED. R. CIV. P. 16(f)(1) (empowering courts to “issue any just orders” when a party or lawyer commits a listed offense); FED. R. CIV. P. 16(f)(2) (providing for the payment of reasonable expenses “[i]nstead of or in addition to any other sanction”).

63. See, e.g., *Burrage-Simon v. State Farm Mut. Auto. Ins. Co.*, No. 2:14-cv-00429-GMN-NJK, 2015 WL 5224885, at *1, *6 (D. Nev. Sept. 8, 2015) (ordering the lawyer to attend an ethics-based CLE course in addition to imposing a monetary sanction for violating Rule 16(f) by willfully missing a settlement conference).

64. 789 F. Supp. 2d 437 (S.D.N.Y. 2011).

65. *Id.* at 455.

66. See *id.* at 456.

were to be in addition to those hours required for members of the New York State Bar or any other state bar to which Jackson belonged.⁶⁷

2. *Rule 26*

Next there is Rule 26(g), which governs the signature of Rule 26(a) disclosures, and discovery requests, responses, and objections. Rule 26(g) states in pertinent part:

(1) *Signature Required; Effect of Signature.* Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name—or by the party personally, if unrepresented—and must state the signer's address, e-mail address, and telephone number. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

(A) with respect to a disclosure, it is complete and correct as of the time it is made; and

(B) with respect to a discovery request, response, or objection, it is:

(i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

(ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

(iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

* * *

(3) *Sanction for Improper Certification.* If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.⁶⁸

67. *Id.*

68. FED. R. CIV. P. 26(g).

A lawyer's certification is tested as of the time the disclosure or discovery document was signed.⁶⁹ Whether a reasonable inquiry has been made is evaluated under a standard of objective reasonableness.⁷⁰ In deciding whether to impose sanctions for violating Rule 26(g)(1), "the court must avoid hindsight and resolve all doubts in favor of the signer."⁷¹

Because the imposition of sanctions under Rule 26(g)(3) depends on the signature of a disclosure or discovery document in violation of Rule 26(g)(1), courts' ability to invoke the rule to remedy litigation misconduct is severely circumscribed.⁷² That said, where a lawyer violates Rule 26(g)(1) without substantial justification, the court *must* sanction the lawyer, the party the lawyer represents, or both.⁷³ "Rule 26(g)(3) gives the judge discretion over the nature of the sanction but not whether to impose one."⁷⁴ Courts may impose reflective or shaming sanctions on lawyers under the rule, as *St. Paul Reinsurance Co. v. Commercial Financial Corp.*⁷⁵ illustrates.

In *St. Paul* the defendant, CFC, moved for an expedited trial setting under Rule 57 and, in the process, cited a discovery objection by the plaintiffs that allegedly evidenced their plan to make the litigation as burdensome as possible for CFC.⁷⁶ This caused the district court to scrutinize the plaintiffs' discovery objections and it did not like what it saw: "In almost every respect . . . each objection asserted by the plaintiffs [was] boilerplate, obstructionist, frivolous, overbroad, and, significantly, contrary to well-established and long standing federal law."⁷⁷ Unwilling to tolerate the plaintiffs' "egregious" discovery abuse, the district court raised the issue of Rule 26(g) sanctions on its own initiative.⁷⁸

After examining several representative improper objections, the court turned to Rule 26(g).⁷⁹ The court determined that the principal signer and exclusive draftsman of the plaintiffs' discovery responses was their out-of-state counsel, and concluded that his certification of the objections fell far below any objective standard of reasonableness.⁸⁰ In selecting a sanction, the court noted that while Rule 26(g) permitted it to make the lawyer pay CFC's attorneys' fees and costs, other sanctions were available.⁸¹ The court also noted that while the objections were "obstructionist,

69. FED. R. CIV. P. 26 advisory committee's note to 1983 amendment ("The certification speaks as of the time it is made."); JOSEPH, *supra* note 30, § 42(C)(2), at 641.

70. *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, Nos. 96-16770, 96-16869, 1999 WL 362836, at *1 (9th Cir. June 4, 1999).

71. *Bergeson v. Dilworth*, 749 F. Supp. 1555, 1566 (D. Kan. 1990).

72. *See* *McGuire v. Metro. Life Ins. Co.*, No. 12-cv-10797, 2015 WL 1757312, at *6 (E.D. Mich. Apr. 17, 2015) ("A necessary prerequisite to imposing sanctions under Rule 26(g)(3), per the text of the rule, is a certification that violates Rule 26(g)(1).").

73. FED. R. CIV. P. 26(g)(3).

74. *Rojas v. Town of Cicero*, 75 F.3d 906, 909 (7th Cir. 2015); *see also* *McHugh v. Olympia Entm't, Inc.*, 37 F. App'x 730, 741 (6th Cir. 2002) ("Sanctions under Rule 26(g)(3) are not discretionary if the district court finds that a discovery filing was signed in violation of the rule.").

75. 198 F.R.D. 508 (N.D. Iowa 2000).

76. *Id.* at 510-11.

77. *Id.* at 511.

78. *Id.*

79. *Id.* at 515.

80. *Id.* at 516-17.

81. *Id.* at 516.

frivolous and deplorable,” the lawyer’s explanation for them—that he was exasperated by the scope of the discovery requests and was surprised by the bitterness of the litigation—was “believable, but not justifiable.”⁸² Thus, rather than fining him, the *St. Paul* court fashioned what it considered to be a lesser sanction:

[C]ounsel shall . . . write an article explaining why it [was] improper to assert the objections that he asserted in this case. Counsel shall submit the article to both a New York and Iowa bar journal . . . , however, he is not required to mention in the article that it was written pursuant to a sanction order. Counsel shall have 120 days from December 1, 2000, in which to comply with this order. In addition, counsel shall submit an affidavit stating that he alone researched, wrote, and submitted the article for publication, indicating which journals he submitted the article to, as well as submitting a copy of the article to this court.⁸³

Concluding, the court warned the lawyer that failing to prepare the article as instructed could result in additional sanctions.⁸⁴

3. Rule 30

Rule 30, which governs depositions by oral examination,⁸⁵ also provides a basis for sanctioning lawyers. Under Rule 30(d)(2), a court “may impose an appropriate sanction—including the reasonable expenses and attorney’s fees incurred by any party—on a person who impedes, delays, or frustrates the fair examination of the deponent.”⁸⁶ By referring to “a person” when identifying who a court may sanction for a violation, Rule 30(d)(2) plainly permits courts to sanction lawyers.⁸⁷

Unlike sanctions under Rule 26(g)(3), sanctions imposed under Rule 30(d)(2) are not mandatory; the decision to sanction a violator is entrusted to the district court’s discretion.⁸⁸ A lawyer need not act in bad faith to be sanctioned under Rule 30(d)(2).⁸⁹ Rather, the question for a court considering sanctions under the rule

82. *Id.* at 517.

83. *Id.* at 518.

84. *Id.*

85. FED. R. CIV. P. 30.

86. FED. R. CIV. P. 30(d)(2).

87. *See Zottola v. Anesthesia Consultants of Savannah, P.C.*, No. CV411-154, 2012 WL 6824150, at *6 (S.D. Ga. June 7, 2012) (stating that Rule 30(d)(2) allows for sanctions against lawyers).

88. *See, e.g., Pain Ctr. of SE Ind., LLC v. Origin Healthcare Sols., LLC*, No. 1:13-cv-00133-RLY-DKL, 2015 WL 5775455, at *2 (S.D. Ind. Sept. 30, 2015) (concluding that Rule 30(d)(2) sanctions were not warranted); *Brady v. Grendene USA, Inc.*, No. 12cv604-GPC (KSC), 2015 WL 5177760, at *3 (S.D. Cal. Sept. 4, 2015) (declining to impose Rule 30(d)(2) sanctions).

89. *Hylton v. Anytime Towing*, No. 11CV1039 JLS (WMc), 2012 WL 3562398, at *2 (S.D. Cal. Aug. 17, 2012); *Layne Christensen Co. v. Bro-Tech Corp.*, Civil Action No. 09-2381-JWL-GLR, 2011 WL 6934112, at *2 (D. Kan. Dec. 30, 2011) (distinguishing Rule 30(d)(2) sanctions from 28 U.S.C. § 1927 sanctions); *Applebaum v. Nat’l Westminster Bank*, No. CV 2007-0916(DLI)(MDG), 2011 WL 8771843, at *6 (E.D.N.Y. Oct. 5, 2011) (differentiating Rule 30(d)(2) from 28 U.S.C. § 1927); *GMAC Bank v. HTFC Corp.*, 248 F.R.D. 182, 196 (E.D. Pa. 2008).

is whether the lawyer's conduct delayed, frustrated, or impeded the fair examination of the deponent.⁹⁰ Courts may impose Rule 30(d)(2) sanctions sua sponte.⁹¹

While Rule 30(d)(2) permits a court to award an aggrieved party its reasonable expenses and attorneys' fees as a sanction for a person's obstructionist behavior in connection with a deposition, that is not the only permissible sanction.⁹² This flexibility is apparent from the rule's (1) reference to "an appropriate sanction,"⁹³ and (2) use of the illustrative term "including" to introduce the types of sanctions available to courts.⁹⁴ In short, the rule allows courts to impose reflective and shaming sanctions on lawyers for deposition misconduct.⁹⁵

4. Rule 37

Rule 37 permits courts to sanction parties and lawyers for various forms of discovery abuse.⁹⁶ In addition to penalizing misconduct in discovery, sanctions imposed under Rule 37 are intended to deter similar misconduct by others, compensate the court and affected parties for any expenses attributable to the

90. See e.g., *Applebaum*, 2011 WL 8771843, at *6 (quoting the rule and the 1993 advisory committee notes); *Dunn v. Wal-Mart Stores, Inc.*, No. 2:12-cv-01660-GMN-VCF, 2013 WL 5940099, at *1 (D. Nev. Nov. 1, 2013) ("First, the court must determine whether a person's behavior has impeded, delayed, or frustrated the fair examination of the deponent."); *Sicurelli v. Jeneric/Pentron, Inc.*, No. 03CV4934(SLT)(KAM), 2005 WL 3591701, at *8 (E.D.N.Y. Dec. 30, 2005) ("[F]or purposes of Rule [30(d)(2)], a clear showing of bad faith on the part of the attorney against whom sanctions are sought is not required. Instead, the imposition of sanctions under Rule [30(d)(2)] requires only that the attorney's conduct frustrated the fair examination of the deponent.").

91. *Sec. Nat'l Bank of Sioux City v. Jones Day*, 800 F.3d 936, 942 (8th Cir. 2015); *Tajonera v. Black Elk Energy Offshore Operations, L.L.C.*, Civ. A. Nos. 13-0366 et al., 2015 WL 5178418, at *7 (E.D. La. Sept. 3, 2015).

92. See e.g., *Claypole v. Cty. of Monterey*, Case No. 14-cv-02730-BLF, 2016 WL 145557, at *5 (N.D. Cal. Jan. 12, 2016) (requiring a lawyer to donate \$250 to the Women Lawyers Association of Los Angeles as a sanction for a sexist remark directed at opposing counsel during a deposition, as well as imposing fees and costs); *Carroll v. Allstate Fire & Cas. Ins. Co.*, Civ. A. No. 12-cv-00007-WJM-KLM, 2014 WL 859238, at *11 (D. Colo. Mar. 4, 2014) (striking an expert witness's testimony and excluding him as a Rule 30(d)(2) sanction); *Mazzeo v. Gibbons*, No. 2:08-cv-01387-RLH-PAL, 2010 WL 3020021, at *2 (D. Nev. July 27, 2010) (admonishing two lawyers for deposition misconduct and sanctioning them by "memorializing their misconduct in this order").

93. FED. R. CIV. P. 30(d)(2).

94. See *Ala. Educ. Ass'n v. State Superintendent of Educ.*, 746 F.3d 1145, 1150 n.13 (11th Cir. 2014) (explaining that the term "include" when used to introduce a category, group, or list is intended to be illustrative rather than exhaustive or exclusive); *Paxson v. Bd. of Educ. of Sch. Dist. No. 87*, 658 N.E.2d 1309, 1314 (Ill. App. Ct. 1995) ("We, too, find the word 'including', in its most commonly understood meaning, to be a term of enlargement, not of limitation."); *Md. Cas. Co. v. NSTAR Elec. Co.*, 30 N.E.3d 105, 110 (Mass. 2015) (quoting *P.R. Mar. Shipping Auth. v. Interstate Commerce Comm'n*, 645 F.2d 1102, 1112 n.26 (D.C. Cir. 1981)); *Beaver Dam Cmty. Hosps., Inc. v. City of Beaver Dam*, 2012 WI App 102, ¶ 14, 344 Wis.2d 278, 822 N.W.2d 491 (adhering to the general rule that "'include' is a term of illustration or inclusion, not one of limitation or exclusion").

95. See e.g., *Howard v. Offshore Liftboats, LLC*, Civ. A. Nos. 13-4811, 13-6407, 2015 WL 965976, at *11 (E.D. La. Mar. 4, 2015) (relying on Rule 30(d)(2) in ordering a lawyer to "attend an additional five (5) hours of continuing legal education over and above what he is required to attend in Texas, all of which must be in the area of professionalism and/or ethics" as a sanction for his "unprofessional personal insults" directed at opposing counsel during depositions).

96. JOSEPH, *supra* note 30, § 47(A), at 674.

offending party's abuses, and compel compliance with discovery rules.⁹⁷ Although parties are generally the focus of sanctions under Rule 37, lawyers may be sanctioned under Rule 37(b)(2)(C) for unjustifiably advising a party not to comply with a discovery order,⁹⁸ under Rule 37(d)(3) for unjustifiably advising a party not to attend its own deposition or not to respond to written discovery,⁹⁹ or under Rule 37(f) for failing to participate in good faith in developing and submitting a Rule 26 discovery plan.¹⁰⁰ Sanctions, however, are limited to the payment of reasonable expenses, including attorneys' fees, attributable to the abuses.¹⁰¹ Alternative sanctions are not an option for courts using Rule 37 to remedy misconduct in discovery.¹⁰²

C. 28 U.S.C. § 1927

Rules of civil procedure furnish but one source of authority for sanctioning lawyers for misconduct in litigation. In federal courts, lawyers may also be sanctioned under 28 U.S.C. § 1927, which states:

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.¹⁰³

Unlike Rule 11, § 1927 applies to cases in federal appellate courts as well as to district court cases.¹⁰⁴ Section 1927, again unlike Rule 11, applies to criminal cases as well as to civil matters.¹⁰⁵

A lawyer's conduct "multiplies proceedings" when it results in proceedings that would not have occurred otherwise.¹⁰⁶ To be sanctionable under § 1927, a lawyer's conduct must multiply the proceedings "unreasonably and vexatiously."¹⁰⁷ Courts uniformly reason that bad faith conduct satisfies the vexatiousness requirement.¹⁰⁸ Reckless conduct will also satisfy the vexatiousness requirement in

97. *Id.*

98. FED. R. CIV. P. 37(b)(2)(C).

99. FED. R. CIV. P. 37(d)(3).

100. FED. R. CIV. P. 37(f).

101. FED. R. CIV. P. 37(b)(2)(C); FED. R. CIV. P. 37(d)(3); FED. R. CIV. P. 37(f).

102. *See, e.g.,* Gowan v. Mid Century Ins. Co., No. 5:14-CV-05025-LLP, 2015 WL 7274448, at *4 (D.S.D. Nov. 16, 2015) (declining the plaintiff's request to require the defendant to produce a discovery video as an alternative sanction in part because sanctions were being sought under Rule 37 rather than Rule 30).

103. 28 U.S.C. § 1927 (2012).

104. JOSEPH, *supra* note 30, § 21(A)(1), at 427.

105. *Id.* § 21(B), at 431.

106. Daniels v. Sodexo, Inc., No. 8:10-cv-00375-T-27AEP, 2013 WL 4008744, at *7 (M.D. Fla. Aug. 5, 2013).

107. 28 U.S.C. § 1927 (2012).

108. *See, e.g.,* Boyer v. BNSF Ry. Co., 824 F.3d 694, 708 (7th Cir. 2016) (explaining that both objective and subjective bad faith will support § 1927 sanctions); Blixseth v. Yellowstone Mountain Club, LLC, 796 F.3d 1004, 1007 (9th Cir. 2015) (requiring subjective bad faith for sanctions under § 1927); *In re Prosser*, 777 F.3d 154, 162 (3d Cir. 2015) ("A court imposing § 1927 sanctions must find bad faith, but

many jurisdictions,¹⁰⁹ regardless of whether it is assessed independently or is considered to fall within the definition of “bad faith” in this context.¹¹⁰ Negligent conduct, however, will not support sanctions under § 1927.¹¹¹

There is a split of authority regarding the reach of § 1927 and, more particularly, whether a law firm as compared to an individual lawyer may be sanctioned under the statute.¹¹² The statute’s reference to “[a]ny attorney or other person admitted to conduct cases in any court” would seem to clearly indicate that law firms are not subject to sanctions under § 1927.¹¹³ This is the conclusion reached by the Sixth,¹¹⁴ Seventh,¹¹⁵ and Ninth Circuits.¹¹⁶ The Fourth Circuit has expressed doubt that § 1927 permits sanctions against law firms, but has not decided the issue.¹¹⁷ In contrast, the Second,¹¹⁸ Third,¹¹⁹ Eleventh,¹²⁰ and District of Columbia¹²¹ Circuits allow law firms to be sanctioned under § 1927. The reasoning of the courts

that finding need not be made explicitly.”); *EEOC v. Great Steaks, Inc.*, 667 F.3d 510, 522 (4th Cir. 2012) (“Bad faith on the part of the attorney is a precondition to imposing fees under § 1927.”); *Star Mark Mgmt., Inc. v. Koon Chun Hing Kee Soy & Sauce Factory, Ltd.*, 682 F.3d 170, 178–79 (2d Cir. 2012) (requiring bad faith or conduct akin to bad faith for sanctions).

109. *See, e.g.*, *Lawyers Title Ins. Corp. v. Doubletree Partners, L.P.*, 739 F.3d 848, 871–72 (5th Cir. 2014) (requiring evidence of bad faith, improper motive, or reckless disregard of the lawyer’s duties to the court for sanctions); *Grochocinski v. Mayer Brown Rowe & Maw, LLP*, 719 F.3d 785, 799 (7th Cir. 2013) (quoting *Kotsilieris v. Chalmers*, 966 F.2d 1181, 1184–85 (7th Cir. 1992)); *Braunstein v. Ariz. Dep’t of Transp.*, 683 F.3d 1177, 1189 (9th Cir. 2012) (quoting *Lahiri v. Universal Music & Video Distrib. Corp.*, 606 F.3d 1216, 1219 (9th Cir. 2010)); *Hamilton v. Boise Cascade Express*, 519 F.3d 1197, 1202 (10th Cir. 2008) (explaining that any conduct, viewed objectively, that manifests intentional or reckless disregard of a lawyer’s duties to the court, is sanctionable under § 1927).

110. *See, e.g.*, *Young Apts., Inc. v. Town of Jupiter*, 503 F. App’x 711, 725 (11th Cir. 2013) (“Bad faith is an objective standard that is satisfied when an attorney ‘knowingly or recklessly pursues a frivolous claim or engages in litigation tactics that needlessly obstruct the litigation of non-frivolous claims.’”) (quoting *Amlong & Amlong, P.A. v. Denny’s, Inc.*, 500 F.3d 1230, 1242 (11th Cir. 2007)); *Peer v. Lewis*, 606 F.3d 1306, 1314 (11th Cir. 2010) (“Bad faith is an objective standard that is satisfied when an attorney knowingly or recklessly pursues a frivolous claim.”).

111. *Boyer*, 824 F.3d at 708; *Salkil v. Mount Sterling Twp. Police Dep’t*, 458 F.3d 520, 532 (6th Cir. 2006).

112. It appears that the Tenth Circuit has yet to address this issue. *See Medtronic Navigation, Inc. v. BrainLab Medizinische Computersysteme GmbH, Civ. A. No. 98-cv-01072-RPM*, 2008 WL 410413, at *10 (D. Colo. Feb. 12, 2008) (noting the split of authority on whether § 1927 authorizes fee awards against law firms and stating that the Tenth Circuit has not addressed this issue). At least one district court in the Tenth Circuit has concluded that law firms may be sanctioned under § 1927, but other district courts in the circuit have held that only individual lawyers may be sanctioned. *Compare id.* (“Liability should be borne by the firm. If section 1927 does not support an award of fees against [the law firm] as an entity, then such an award is appropriate under the court’s inherent authority.”), *with Sangui Biotech Int’l, Inc. v. Kappes*, 179 F. Supp. 2d 1240, 1245 (D. Colo. 2002) (concluding that sanctions under § 1927 may not be imposed on law firms).

113. 28 U.S.C. § 1927 (2012).

114. *BDT Prods., Inc. v. Lexmark Int’l, Inc.*, 602 F.3d 742, 750–51 (6th Cir. 2010).

115. *Claiborne v. Wisdom*, 414 F.3d 715, 723 (7th Cir. 2005).

116. *Kaass Law v. Wells Fargo Bank, N.A.*, 799 F.3d 1290, 1293 (9th Cir. 2015).

117. *Blue v. U.S. Dep’t of the Army*, 914 F.2d 525, 549 (4th Cir. 1990).

118. *Enmon v. Prospect Capital Corp.*, 675 F.3d 138, 147–48 (2d Cir. 2012).

119. *Baker Indus., Inc. v. Cerberus Ltd.*, 764 F.2d 204, 208–212 (3d Cir. 1985).

120. *Avirgan v. Hull*, 932 F.2d 1572, 1582 (11th Cir. 1991).

121. *LaPrade v. Kidder Peabody & Co.*, 146 F.3d 899, 907 (D.C. Cir. 1998).

permitting sanctions against law firms under the statute, however, is either suspect or non-existent.¹²² For example, the Second Circuit coarsely reasoned that “[t]here is no serious dispute that a court may sanction a law firm pursuant to its inherent power. We see no reason that a different rule should apply to § 1927 sanctions, and, in any event, we have previously upheld the award of § 1927 sanctions against a law firm.”¹²³ But with all due respect to the judges of the Second Circuit, courts’ inherent power to sanction is not granted or enforced pursuant to a clear and unambiguous statute.¹²⁴ Different rules may indeed support different approaches,¹²⁵ and while *stare decisis* is a preferred judicial approach, it “is not an inexorable command.”¹²⁶ Nor, for that matter, is there any need to extend § 1927 to law firms when a court may invoke its inherent power to sanction a law firm for the same type of conduct that is punishable under the statute.¹²⁷

The plain text of § 1927 indicates that it provides no basis for alternative sanctions; only monetary penalties are available under the statute and even those are limited to the *excess* costs, expenses, and fees incurred by virtue of the lawyer’s wrongful multiplication of the proceedings.¹²⁸ At least one court, however, arguably appears to have relied on § 1927 in imposing alternative sanctions. In *Moser v. Bret Harte Union High School District*,¹²⁹ the court sanctioned a lawyer defending the school district in an education law case for multiple misstatements, mischaracterizations and misrepresentations in summary judgment briefing, many frivolous objections in summary judgment briefing, and personal attacks on the plaintiff and his lawyer.¹³⁰ The “only reasonable inference” to be drawn, the court concluded, was that the lawyer, Elaine Yama, and her law firm “intended to obstruct at every step and stand education law on its head.”¹³¹ As for the sanction:

Under FRCP Rule 11, 28 U.S.C. § 1927, *and* the Court’s inherent powers, Ms. Yama is ordered to personally pay Plaintiff and his counsel \$5,000 for the increased costs and expenses related to causing Plaintiff’s need to repeatedly respond to Defendant’s blatant misrepresentations, throughout the four year history of this litigation; Ms. Yama is PUBLICALLY REPROVED and ordered to attend 20 hours of CLE ethics training in programs approved by

122. See, e.g., *id.* at 904–907 (failing even to discuss the effect of the limiting “[a]ny attorney or other person admitted to conduct cases in any court” language).

123. *Enmon*, 675 F.3d at 147.

124. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (quoting *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630–31 (1962)).

125. Compare FED. R. CIV. P. 11(c)(1) (authorizing courts to impose appropriate sanctions on law firms), with *cf.* 28 U.S.C. § 1927 (2012) (authorizing monetary sanctions against “[a]ny attorney or other person admitted to conduct cases in any court of the United States or any Territory”).

126. *Payne v. Tennessee*, 501 U.S. 808, 828 (1991).

127. JOSEPH, *supra* note 30, § 21(C)(2), at 435–36.

128. 28 U.S.C. § 1927 (2012).

129. 366 F. Supp. 2d 944 (E.D. Cal. 2005).

130. *Id.* at 953–76.

131. *Id.* at 976.

the California State Bar Association . . . and must submit proof of such training to the Court. . . .¹³²

Unfortunately, the opinion is unclear. One possible interpretation of this language is that the court imposed all three sanctions on Yama (excess costs and expenses, public reproof, and mandatory CLE) under each of the three sources of authority it cited: Rule 11, § 1927, and its inherent powers. Another possible reading is that the court publicly reproofed Yama and ordered her to attend CLE courses under either Rule 11 or its inherent powers or both, and assessed excess costs and expenses against her under § 1927. The second alternative is preferable because the court would then be properly applying the statute, but that interpretation is by no means certain. In any event, the opinion's ambiguity coupled with the plain statutory language robs *Moser* of any persuasive value in advocating for alternative sanctions under § 1927. *Moser* certainly has no precedential value.¹³³

D. Federal Rule of Appellate Procedure 38

Although most lawyers think of sanctions as a trial court peril, appellate courts may also impose sanctions, as we saw in the discussion of 28 U.S.C. § 1927.¹³⁴ Federal Rule of Appellate Procedure 38 provides another basis for appellate sanctions. Rule 38 states that “[i]f a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.”¹³⁵ Sanctions for pursuing a frivolous appeal are discretionary with the appellate court—not mandatory.¹³⁶ An appeal is frivolous for purposes of the rule when “the result is obvious or when the appellant’s argument is wholly without merit.”¹³⁷ Sanctions may also lie where an appeal is filed for improper purposes or the appellant makes only cursory arguments.¹³⁸

Rule 38 is silent as to the possible targets of sanctions, but it is clear that courts may rely on it to sanction lawyers.¹³⁹ It is equally clear from the language of the rule that any sanctions must be monetary—alternative sanctions are not an option for courts.

132. *Id.* at 988.

133. See *Vertex Surgical, Inc. v. Paradigm Biodevices, Inc.*, 648 F. Supp. 2d 226, 231 (D. Mass. 2009) (“As Judges Posner and Easterbrook have repeatedly and accurately observed, with characteristic bluntness, district court decisions are neither authoritative nor precedential.”).

134. See *supra* note 103 and accompanying text.

135. FED. R. APP. P. 38.

136. *Blixseth v. Yellowstone Mountain Club, LLC*, 796 F.3d 1004, 1008 (9th Cir. 2015).

137. *Duff v. Cent. Sleep Diagnostics, LLC*, 801 F.3d 833, 844 (7th Cir. 2015) (quoting *McCoy v. Iberdrola Renewables, Inc.*, 769 F.3d 535, 538 (7th Cir. 2014)).

138. *Id.*

139. *Salata v. Weyerhaeuser Co.*, 757 F.3d 695, 700–701 (7th Cir. 2014) (“Rule 38 allows us to impose sanctions against an appellant or an appellant’s attorney.”); *Ransmeier v. Mariani*, 718 F.3d 64, 69 (2d Cir. 2013) (“It is well settled that an attorney’s conduct on appeal as well as the arguments he makes may expose him to sanctions both under our inherent power and under the proscriptions of 28 U.S.C. § 1927 and Federal Rule of Appellate Procedure 38.”).

E. Courts' Inherent Power to Sanction

Courts' ability to sanction lawyers and parties for misconduct in litigation extends beyond the authority granted by procedural rules and statutes.¹⁴⁰ Courts may also sanction lawyers and parties pursuant to their inherent power to regulate the conduct of those who appear before them.¹⁴¹ This is true of federal¹⁴² and state¹⁴³ courts alike. Courts' inherent power to sanction lawyers and parties to vindicate their authority exists separate and apart from their power of contempt.¹⁴⁴

Courts must exercise caution and restraint when exercising their inherent powers.¹⁴⁵ At a minimum, a court considering sanctions under its inherent power must ensure that it understands the facts and law underpinning its decision.¹⁴⁶ Inherent power sanctions are generally justified only where the offender (1) willfully disobeys a court order;¹⁴⁷ or (2) acts in bad faith.¹⁴⁸ But while the willful

140. See *Parsi v. Daiouleslam*, 778 F.3d 116, 130 (D.C. Cir. 2015) (observing that “[i]n addition to sanctions contemplated by the Federal Rules of Civil Procedure,” courts possess “an inherent power at common law” to impose sanctions).

141. See *Sciarretta v. Lincoln Nat'l Life Ins. Co.*, 778 F.3d 1205, 1212 (11th Cir. 2015) (“Courts have the inherent power to police themselves and those appearing before them.”); *Ransmeier*, 718 F.3d at 68 (“Our authority to impose sanctions is grounded, first and foremost, in our inherent power to control the proceedings that take place before this [c]ourt.”); *Shepherd v. Am. Broad. Cos.*, 62 F.3d 1469, 1475 (D.C. Cir. 1995) (stating that a court may sanction both lawyers and parties pursuant to its inherent powers); *Nat. Gas Pipeline Co. of Am. v. Energy Gathering, Inc.*, 2 F.3d 1397, 1411 (5th Cir. 1993) (saying “there is no doubt” that courts may sanction lawyers under their inherent powers); *Tom v. S.B., Inc.*, 280 F.R.D. 603, 610 (D.N.M. 2012) (observing that “courts have an inherent power to sanction attorneys and parties”).

142. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43–44 (1991).

143. *Rush v. Burdge*, 141 So. 3d 764, 766 (Fla. Dist. Ct. App. 2014); *In re Estate of Weatherbee*, 2014 ME 73, ¶ 9, 93 A.3d 248, 253; *Wong v. Luu*, 34 N.E.3d 35, 44–45 (Mass. 2015); *Maldonado v. Ford Motor Co.*, 719 N.W.2d 809, 810 (Mich. 2006); *A.J.H. ex rel. M.J.H. v. M.A.H.S.*, 364 S.W.3d 680, 682 (Mo. Ct. App. 2012); *Brundage v. Estate of Carambio*, 951 A.2d 947, 967 (N.J. 2008); *State ex rel. King v. Advantageous Cmty. Servs., LLC*, 2014-NMCA-076, ¶ 12, 329 P.3d 738, 741; *Supplee v. Miller-Motte Bus. Coll., Inc.*, 768 S.E.2d 582, 600 (N.C. Ct. App. 2015) (quoting *In re Small*, 689 S.E.2d 482, 485 (N.C. Ct. App. 2009)); *Utz v. McKenzie*, 397 S.W.3d 273, 281 (Tex. App. 2013); *Maxwell v. Woodall*, 2014 UT App 125, ¶ 5–11, 328 P.3d 869, 871–74; *Env't Specialist, Inc. v. Wells Fargo Bank Nw., N.A.*, 782 S.E.2d 147, 149 (Va. 2016) (citing and discussing *Nusbaum v. Berlin*, 641 S.E.2d 494, 501–502 (Va. 2007)); *State v. Merrill*, 335 P.3d 444, 447 (Wash. Ct. App. 2014).

144. See *In re Charbono*, 790 F.3d 80, 86 (1st Cir. 2015) (“The courts of appeals, too, have recognized the authority of federal courts to impose inherent-power sanctions without a finding of contempt.”).

145. *Chambers*, 501 U.S. at 50; *Tucker v. Williams*, 682 F.3d 654, 662 (7th Cir. 2012); *Wong*, 34 N.E.3d at 45.

146. *Trade Well Int'l v. United Cent. Bank*, 778 F.3d 620, 626 (7th Cir. 2015).

147. *Id.* at 627 (stating that “sanctions under the court’s inherent power should not be imposed unless there is bad-faith conduct or willful disobedience of an order”); *Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1035 (9th Cir. 2012) (“[A] district court has the inherent power to sanction for: (1) willful violation of a court order; or (2) bad faith. A determination that a party was willfully disobedient is different from a finding that a party acted in bad faith. Either supports the imposition of sanctions.”).

148. *In re Goode*, 821 F.3d 553, 559 (5th Cir. 2016); *Williamson v. Recovery Ltd.*, 826 F.3d 297, 302 (6th Cir. 2016); *Haeger v. Goodyear Tire & Rubber Co.*, 793 F.3d 1122, 1132–34 (9th Cir. 2015), *amended by* 813 F.3d 1233 (9th Cir. 2016); *Sciarretta v. Lincoln Nat'l Life Ins. Co.*, 778 F.3d 1205, 1212 (11th Cir. 2015); *Sun River Energy, Inc. v. Nelson*, 800 F.3d 1219, 1227 (10th Cir. 2015) (quoting *Farmer v. Banco Popular of N. Am.*, 791 F.3d 1246, 1256 (10th Cir. 2015)); *Trade Well Int'l*, 778 F.3d at 627; *Ali v. Tolbert*, 636 F.3d 622, 627 (D.C. Cir. 2011); *Rush*, 141 So. 3d at 766; *Gap v. Puna Geothermal*

disobedience of a court order is easily evaluated, there is no precise litmus test for determining what sort of conduct by lawyers or litigants constitutes bad faith.¹⁴⁹ Rather, “bad faith” describes “a broad range of willful improper conduct.”¹⁵⁰ It is clear, however, that mere negligence will not suffice.¹⁵¹

In some jurisdictions, a lawyer may face inherent power sanctions absent a finding of bad faith.¹⁵² As the Second Circuit explained in *United States v. Seltzer*,¹⁵³ courts’ inherent power “includes the power to police the conduct of attorneys as officers of the court, and to sanction attorneys for conduct not inherent to client representation, such as, violations of court orders or other conduct which interferes with the court’s power to manage its calendar and the courtroom without a finding of bad faith.”¹⁵⁴

Courts may impose inherent power sanctions *sua sponte*.¹⁵⁵ A court may invoke its inherent power to sanction a lawyer or party even where the misconduct is sanctionable under a rule or statute.¹⁵⁶ Where a lawyer’s or party’s misconduct is sanctionable under a rule or statute, however, a court ordinarily should rely on that authority instead of resorting to its inherent power.¹⁵⁷ When a court relies on its inherent power to sanction a lawyer or party rather than leaning on an applicable rule or statute, it should explain why the rule or statute was inadequate under the circumstances.¹⁵⁸

Courts’ inherent power certainly includes the power to craft alternative sanctions.¹⁵⁹ In fact, courts regularly employ their inherent powers to fashion

Venture, 104 P.3d 912, 921 (Haw. 2004) (quoting *Bank of Haw. v. Kunimoto*, 984 P.2d 1198, 1215 (Haw. 1999)); *In re Estate of Weatherbee*, 2014 ME 73, ¶ 17; *A.J.H. ex rel. M.J.H.*, 364 S.W.3d at 682; *Merrill*, 335 P.3d at 447. *But see Wong*, 34 N.E.3d at 44 (reasoning that “‘bad faith’ alone is too vague a standard to establish the scope of a judge’s inherent power to assess attorney’s fees against an attorney who is not in violation of a court order, statute, or rule of procedure”).

149. *Grochocinski v. Mayer Brown Rowe & Maw, LLP*, 719 F.3d 785, 799 (7th Cir. 2013).

150. *Fink v. Gomez*, 239 F.3d 989, 992 (9th Cir. 2001).

151. *Trade Well Int’l*, 778 F.3d at 627; *Grochocinski*, 719 F.3d at 799.

152. *See, e.g., In re Charbono*, 790 F.3d 80, 88 (1st Cir. 2015) (asserting that “where an inherent-power sanction does not take the form of an award of attorneys’ fees (and thus does not involve a departure from the American Rule), a finding of bad faith is not ordinarily required”); *Stevenson v. Union Pac. R.R. Co.*, 354 F.3d 739, 745 (8th Cir. 2004) (explaining that “a finding of bad faith is not always necessary to the court’s exercise of its inherent power to impose sanctions”).

153. 227 F.3d 36 (2d Cir. 2000).

154. *Id.* at 42.

155. *Projects Mgmt. Co. v. Dyncorp Int’l LLC*, 734 F.3d 366, 375 (4th Cir. 2013).

156. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 49 (1991).

157. *Id.* at 50.

158. *See United States v. Rogers Cartage Co.*, 794 F.3d 854, 863 (7th Cir. 2015) (discussing the district court’s reliance on its inherent power rather than on Rule 11).

159. *See Haeger v. Goodyear Tire & Rubber Co.*, 793 F.3d 1122, 1141 (9th Cir. 2015), *amended by* 813 F.3d 1233 (9th Cir. 2016) (“Courts have the inherent power to impose various non-monetary sanctions.”).

reflective and shaming sanctions against lawyers.¹⁶⁰ In *Hardy v. Asture*,¹⁶¹ for example, the court determined that the lawyer's repeated refusal to comply with procedural requirements and serial failures to exercise legal judgment in a social security case were clearly willful and demonstrated bad faith, and accordingly warranted inherent power sanctions.¹⁶² The court therefore ordered the lawyer to attend eight hours of CLE courses on social security litigation in federal court conducted in a live classroom format in the next six months.¹⁶³ In *Davis v. West Los Angeles Travelodge*,¹⁶⁴ the court invoked its inherent power to sanction a defense lawyer who repeatedly behaved disrespectfully and unprofessionally toward the plaintiff's lawyer, who required a service dog.¹⁶⁵ The court ordered the lawyer to complete 20 hours of continuing legal education on civility and professionalism, and to perform 30 hours of volunteer work with a disability rights organization.¹⁶⁶ In *Glucksberg v. Polan*,¹⁶⁷ Scott Andrews, a lawyer representing the defendants, did not promptly reveal that one of his clients had died.¹⁶⁸ Relying on its inherent power, the West Virginia federal court hearing the matter sanctioned Andrews by ordering him to:

[R]esearch, write, and submit to the court an article explaining: (1) the proper course for a lawyer to follow, under West Virginia and federal law, in the event that the lawyer's client dies during the course of representation, including the necessary notification of the court and of other parties to the proceeding, investigation of the status and proper representation of the estate, and any possible notices or motions to be filed in court; (2) the possible adverse consequences that can flow from failing to scrupulously follow these procedures; and (3) the general rules in West Virginia for the appointment of an administrator or executor to an estate and the

160. See, e.g., *Armstead v. Allstate Prop. & Cas. Ins. Co.*, 1:14-cv-586-WSD, 2016 WL 7093903, at *6 (N.D. Ga. Dec. 6, 2016) (ordering the lawyer to write a 5,000 word or longer article for two state bar journals "discussing the practical and legal consequences of failing to be candid with the court and failing to comply with court rules and orders"); *In re Parker*, Civ. A. No. 3:14cv241, 2014 WL 4809844, at *6 (E.D. Va. Sept. 26, 2014) (upholding a bankruptcy court's use of its inherent power to sanction a lawyer by requiring him to attend 12 hours of CLE courses on bankruptcy law and ethics in addition to other penalties); *In re Aleman*, Case No. 14-00606-TLM, 2015 WL 1956271, at *2 (Bankr. D. Idaho Apr. 29, 2015) (relying on its inherent authority to order the lawyer to obtain six CLE credits within the next six months); *In re Varan*, No. 11 B 44072, 2014 WL 2881162, at *14-15 (Bankr. N.D. Ill. June 24, 2014) (reasoning that because the offending lawyers' experience as practitioners and apparent participation in Illinois mandatory CLE did not deter their serious misconduct, completion of a law school course on professional responsibility was required).

161. Civ. No. 1:11cv299, 2013 WL 566020 (W.D.N.C. Feb. 13, 2013).

162. *Id.* at *7.

163. *Id.* at *8.

164. No. CV 08-8279 CBM (CTx), 2010 WL 623657 (C.D. Cal. Feb. 3, 2010).

165. *Id.* at *1-2.

166. *Id.* at *1.

167. No. Civ.A. 3:99-0129, 2003 WL 24221184 (S.D. W. Va. June 12, 2003).

168. *Id.* at *1.

capacity or incapacity of estate representatives to sue or be sued in West Virginia.¹⁶⁹

Interestingly, this sanction was proposed by the lawyer representing Andrews at the show cause hearing in the case—presumably in an effort to avoid monetary sanctions or some other possible penalty believed to be more serious.¹⁷⁰ Andrews’s lawyer also told the court at the final show cause hearing that he had required Andrews to do all of the legal research required to prepare for the hearing,¹⁷¹ surely again with mitigation in mind.

F. Summary

Depending on the case and jurisdiction, courts may sanction lawyers under rules of civil procedure, rules of appellate procedure, 28 U.S.C. § 1927, and their inherent powers. A court contemplating sanctions must afford the targeted lawyer due process, meaning notice that sanctions are a possibility and an opportunity to be heard on the issue.¹⁷² This is true in state courts as well as federal courts.¹⁷³ More particularly, “notice” in this context requires the court to inform the lawyer of the source of authority for the possible sanctions and the specific conduct under scrutiny so that the lawyer can mount a defense.¹⁷⁴ If especially severe sanctions are being contemplated, particularized notice of the nature of the sanction may be required.¹⁷⁵ What constitutes an opportunity to be heard will vary by case.¹⁷⁶ A court is not necessarily required to hold an evidentiary hearing or hear oral argument; in some situations, briefing may be sufficient for the court to rule.¹⁷⁷

Lawyers who are threatened with possible sanctions are wise to devote significant effort to defeating them in the trial court. Losing at the trial court level substantially lessens a lawyer’s chances for vindication because appellate courts generally review trial courts’ sanctions orders for abuse of discretion.¹⁷⁸ Although this is not an insurmountable hurdle for a sanctioned lawyer to overcome, it certainly is an unfavorable standard of review, as any experienced appellate advocate will

169. *Id.* at *11.

170. *Id.*

171. *Id.*

172. *In re Charbono*, 790 F.3d 80, 88 (1st Cir. 2015); *Sec. Nat’l Bank of Sioux City v. Jones Day*, 800 F.3d 936, 944 (8th Cir. 2015) (quoting Plaintiffs’ Baycol Steering Comm. v. Bayer Corp., 419 F.3d 794, 802 (8th Cir. 2005)); *Collins v. Boyd*, 541 F. App’x 197, 204 (3d Cir. 2013).

173. *See, e.g.*, *Griffin v. Griffin*, 500 S.E.2d 437, 438–39 (N.C. 1998) (reversing sanctions award against the lawyer based on the violation of the lawyer’s due process rights).

174. *Martin v. Giordano*, 11-CV-4507 (ARR) (JO), 2016 WL 4411401, at *4 (E.D.N.Y. Aug. 18, 2016) (quoting *Schlaifer Nance & Co. v. Estate of Warhol*, 194 F.3d 323, 334 (2d Cir. 1999)).

175. *Sec. Nat’l Bank of Sioux City*, 800 F.3d at 944.

176. *Martin*, 2016 WL 4411401, at *4.

177. *Id.* at *6 (citing *Schlaifer Nance & Co.*, 194 F.3d at 335–36).

178. *CBS Broad. Inc. v. FilmOn.com, Inc.*, 814 F.3d 91, 100 (2d Cir. 2016); *Sun River Energy, Inc. v. Nelson*, 800 F.3d 1219, 1222 (10th Cir. 2015); *United States v. Rogers Cartage Co.*, 794 F.3d 854, 862 (7th Cir. 2015); *Ek v. Boggs*, 75 P.3d 1180, 1190 (Haw. 2003); *Bahena v. Goodyear Tire & Rubber Co.*, 235 P.3d 592, 596 (Nev. 2010); *Nath v. Tex. Children’s Hosp.*, 446 S.W.3d 355, 361 (Tex. 2014); *Ragland v. Soggin*, 784 S.E.2d 698, 701 (Va. 2016).

attest.¹⁷⁹ Even assuming that a trial court's discretion narrows as the severity of a possible sanction increases or where the court entertains the possibility of sanctions on its own,¹⁸⁰ the abuse of discretion standard still requires the appellate court to affirm the trial court unless it (1) acted arbitrarily; (2) made an error of law; or (3) relied on clearly erroneous factual findings.¹⁸¹ Plus, where a trial court sanctions a lawyer based on more than one source of authority—such as a rule of civil procedure and 28 U.S.C. § 1987, or a rule and the court's inherent power—the lawyer must prevail across the board on appeal; if an appellate court can affirm a sanction on any basis it generally will do so.¹⁸² This is true even where the trial court cites incorrect authority as the sole basis for imposing sanctions.¹⁸³

III. ALTERNATIVE SANCTIONS IN THE SPOTLIGHT

Now with an essential understanding of the sanctions framework, we return to what must be considered the leading alternative sanctions case, styled as *Security National Bank of Sioux City v. Abbott Laboratories*¹⁸⁴ at the district court level and as *Security Nat'l Bank of Sioux City v. Jones Day*¹⁸⁵ on appeal. This Part will examine the district and appellate court decisions, and then analyze the case and alternative sanctions from a broader perspective. In doing so, it refers to both the district court and Eighth Circuit decisions by the shorthand title *Security National Bank of Sioux City*.

179. See *Escribano-Reyes v. Prof'l Hepa Certificate Corp.*, 817 F.3d 380, 391 (1st Cir. 2016) (stating that the abuse of discretion standard of review is “not appellant-friendly”) (quoting *Jensen v. Phillips Screw Co.*, 546 F.3d 59, 64 (1st Cir. 2011)); *Gallego v. Northland Grp. Inc.*, 814 F.3d 123, 129 (2d Cir. 2016) (noting that the abuse of discretion standard is “deferential”); *United States v. One 1987 BMW 325*, 985 F.2d 655, 657 (1st Cir. 1993) (“All in all, a party protesting an order in respect to sanctions bears a formidable burden in attempting to convince the court of appeals that the lower court erred.”).

180. See *Nat'l Bank of Sioux City*, 800 F.3d at 941; see also *Universitas Educ., LLC v. Nova Grp., Inc.*, 784 F.3d 99, 103 (2d Cir. 2015) (asserting that appellate review for abuse of discretion is more exacting where a district court initiates sanctions on its own).

181. See *Farmer v. Banco Popular of N. Am.*, 791 F.3d 1246, 1256 (10th Cir. 2015) (explaining when a district court abuses its discretion); see also *Loyd v. St. Joseph Mercy Oakland*, 766 F.3d 580, 588 (6th Cir. 2014) (“An abuse of discretion will not be found unless (1) the district court's decision is predicated on an erroneous conclusion of law, (2) the district court's factual findings are clearly in error, or (3) the district court's decision is, when taken as a whole, ‘clearly unreasonable, arbitrary or fanciful.’”) (quoting *Toth v. Grand Trunk R.R.*, 306 F.3d 335, 343 (6th Cir.2002)).

182. See, e.g., *Jones v. Ill. Cent. R.R. Co.*, 617 F.3d 843, 857 (6th Cir. 2010) (stating that “although the district court erred in invoking Rule 11, we uphold its entry of sanctions against defense counsel under Federal Rule of Civil Procedure 26, 28 U.S.C. § 1927, and the district court's inherent power”); see also *Balerna v. Gilberti*, 708 F.3d 319, 323 (1st Cir. 2013) (explaining that while Rule 11(b) sanctions were improper, it would not have been an abuse of discretion for the district court to invoke its inherent power to discipline the lawyer, so the lawyer was not prejudiced by the district court's reliance on Rule 11(b)).

183. See *Isaacson v. Manty*, 721 F.3d 533, 539 (8th Cir. 2013) (“Even where a court cites incorrect authority as the basis for contempt sanctions, we may consider alternative grounds for the imposition of those sanctions, so long as the court could have sanctioned the same conduct under another source of authority, the court's findings are adequate to meet the applicable standard, and the contemnor's due process rights are protected.”).

184. 299 F.R.D. 595, 600 (N.D. Iowa 2014), *rev'd sub nom.* *Sec. Nat'l Bank of Sioux City v. Jones Day*, 800 F.3d 936 (8th Cir. 2015).

185. 800 F.3d 936 (8th Cir. 2015).

A. The District Court Decision in Security National Bank of Sioux City

Security National Bank of Sioux City began as a product liability action. Security National Bank, as conservator for a child, J.M.K., sued Abbott Laboratories, the maker of baby formula that was allegedly contaminated by dangerous bacteria.¹⁸⁶ J.M.K. allegedly suffered brain damage from consuming the tainted formula.¹⁸⁷ Abbott ultimately won the case at trial.¹⁸⁸ In preparing for trial, however, the parties filed deposition designations and objections to designations, and thus the district court read deposition transcripts of several witnesses.¹⁸⁹ On the third day of trial, District Judge Mark W. Bennett, acting sua sponte, entered an order directing one of Abbott's counsel from the respected global law firm of Jones Day to show cause why she should not be sanctioned for a pattern of obstructionist behavior during depositions.¹⁹⁰ Retreating a bit out of the concern that he should not burden the Jones Day lawyers with the distraction of a sanctions hearing mid-trial, Judge Bennett decided to table any sanctions debate until the trial concluded.¹⁹¹ Thus, the same day he entered judgment in Abbott's favor, he entered a supplemental show cause order directing the Jones Day lawyer to address three classes of deposition conduct that potentially warranted sanctions: (1) excessive use of "form" objections when defending depositions; (2) numerous attempts to coach witnesses when defending depositions; and (3) frequent interruptions and purported attempts to clarify questions by the plaintiff's counsel during depositions.¹⁹² Although he did not name her in the opinion, Judge Bennett focused his ire on the conduct of Jones Day partner June Ghezzi, an accomplished trial lawyer with an unblemished professional record.¹⁹³

I. "Form" Objections

With respect to "form" objections, the district court focused on two depositions in which Ghezzi posed "form" objections at least 115 times.¹⁹⁴ In other words, rather than objecting to questions on specific bases related to their form, such as being leading or compound, or assuming facts not in evidence,¹⁹⁵ Ghezzi "simply objected to 'form,'" requiring the plaintiff's lawyer and anyone reading the deposition transcript to guess the basis for the objection.¹⁹⁶ As the court saw it, Ghezzi also used "form" objections to nitpick the examiner's word choices in what the court characterized as efforts to influence the witness's answer, to "voice absurdly hyper-technical truths," and to invent "novel objections" devoid of legal

186. *Sec. Nat'l Bank of Sioux City*, 299 F.R.D. at 598.

187. *Id.*

188. *Id.*

189. *Sec. Nat'l Bank of Sioux City*, 800 F.3d at 939.

190. *Sec. Nat'l Bank of Sioux City*, 299 F.R.D. at 598.

191. *Id.*

192. *Id.*

193. *See Sec. Nat'l Bank of Sioux City*, 800 F.3d at 938 (identifying Ghezzi).

194. *See Sec. Nat'l Bank of Sioux City*, 299 F.R.D. at 600.

195. *See Cincinnati Ins. Co. v. Serrano*, No. 11-2075-JAR, 2012 WL 28071, at *5 (D. Kan. Jan. 5, 2012) (offering examples of form objections).

196. *Sec. Nat'l Bank of Sioux City*, 299 F.R.D. at 600.

basis.¹⁹⁷ In any event, the court observed, her “form” objections “rarely, if ever, followed a truly objectionable question.”¹⁹⁸

Judge Bennett explained his reasons for believing that “form” objections to questions are impermissible:

[O]bjecting to “form” is like objecting to “improper”—it does no more than vaguely suggest that the objector takes issue with the question. It is not itself a ground for objection, nor does it preserve any objection. Instead, “form” objections refer to a *category* of objections, which includes objections to “leading questions, lack of foundation, assuming facts not in evidence, mischaracterization or misleading question, non-responsive answer, lack of personal knowledge, testimony by counsel, speculation, asked and answered, argumentative question, and witness’ answers that were beyond the scope of the question.”¹⁹⁹

In addition to being useless because they obliquely refer to any number of possible bases for objection, “form” objections are inefficient and frustrate the goals underlying the Federal Rules of Civil Procedure.²⁰⁰

The Rules contemplate that objections should be concise and afford the examiner the opportunity to cure the objection. . . . While unspecified “form” objections are certainly concise, they do nothing to alert the examiner to a question’s alleged defect. Because they lack specificity, “form” objections do not allow the examiner to immediately cure the objection. Instead, the examiner must ask the objector to clarify, which takes *more* time and *increases* the amount of objection banter between the lawyers. Briefly stating the particular ground for the objection, on the other hand, is no less concise and allows the examiner to ask a remedial question without further clarification.²⁰¹

Finally, it is difficult for courts to evaluate the validity of “form” objections.²⁰² A court asked to rule on “form” objections must speculate about the bases for them.²⁰³ That is reason enough to require lawyers to specify the grounds for their objections.²⁰⁴

Interestingly, after explaining at length why “form” objections are improper, Judge Bennett noted that not all courts share his dislike for them and some courts even require lawyers to assert only unspecified “form” objections in depositions.²⁰⁵ Consequently, Judge Bennett declined to sanction Ghezzi merely for

197. *Id.* at 600–601.

198. *Id.* at 601.

199. *Id.* (quoting *NGM Ins. Co. v. Walker Constr. & Dev., LLC*, No. 1:11-CV-146, 2012 WL 6553272, at *2 (E.D. Tenn. Dec. 13, 2012)).

200. *Id.* at 602.

201. *Id.* at 602–603.

202. *Id.* at 603 (quoting *Mayor of Baltimore v. Theiss*, 729 A.2d 965, 976 (Md. 1999)).

203. *Id.*

204. *Id.*

205. *Id.*

asserting “form” objections.²⁰⁶ But Ghezzi’s use of “form” objections highlighted two other concerns: witness coaching and excessive deposition interruptions.²⁰⁷ Judge Bennett was willing to sanction Ghezzi for using form objections as a means of coaching witnesses and as a tactic to interrupt depositions.²⁰⁸

2. *Witness Coaching*

Moving on to the problem of witness coaching, Judge Bennett observed that while some courts approve of “form” objections, they consistently prohibit lawyers from coaching witnesses during depositions.²⁰⁹ Lawyers may not comment on questions in ways that might influence witnesses’ answers.²¹⁰ In this case, Ghezzi made numerous “‘clarification-inducing’ objections—objections that prompted the witnesses to request that the examiner clarify otherwise cogent questions.”²¹¹ After listening to Ghezzi’s objection, the witness would ask the plaintiff’s lawyer to clarify an easily understandable question or even refuse to answer the question.²¹² Judge Bennett recited several examples from the transcripts he read.²¹³ Here was one:

Q. Well, if there were high numbers of OAL, Eb samples in the factory, wouldn’t that be a cause for concern about the microbiological quality of the finished product?

COUNSEL: Object to the form of the question. It’s a hypothetical; lacks facts.

A. Yeah, those are hypotheticals.

...

Q. Would that be a concern of yours?

COUNSEL: Same objection.

A. Not going to answer.

Q. You’re not going to answer?

A. Yeah, I mean, it’s speculation. It would be guessing.

COUNSEL: You don’t have to guess.²¹⁴

206. *Id.*

207. *Id.* at 603–604.

208. *Id.* at 604.

209. *Id.*

210. *Id.* (quoting FED. R. CIV. P. 30(c)(2) and citing the FED. R. CIV. P. 30 advisory committee notes to 1993 amendments).

211. *Id.*

212. *Id.*

213. *See id.* at 604–608.

214. *Id.* at 604.

Judge Bennett was also upset by Ghezzi's practice of concluding objections in ways that suggested to witnesses that they should claim to be incapable of answering the question.²¹⁵ Predictably, the witnesses took the hints.²¹⁶ For example:

Q. If it's high enough to kill bacteria, why does Abbott prior to that go through a process of pasteurization?

COUNSEL: If you know, and you're not a production person so don't feel like you have to guess.

A. I don't know.

Q. Does it describe the heat treatment that you referred to a few moments ago, the heat treatment that occurs in the dryer phase?

...

COUNSEL: Okay. Do you know his question? He's asking you if this is what you're describing.

A. Yeah, I don't know.

Q. . . . Is there any particular reason that that language is stated with respect to powdered infant formula?

COUNSEL: If you know. Don't—if you know.

A. No, I—no, not to my knowledge.

COUNSEL: If you know. I mean, do you know or not know?

A. I don't know.²¹⁷

In other instances, the court faulted Ghezzi for coaching witnesses to give particular answers, reinterpreting or rephrasing the plaintiff's lawyer's questions, or providing witnesses with additional information to consider when answering questions.²¹⁸ Consider this exchange as an example of conduct the court found to be improper:

Plaintiff's Counsel: [I]s there something that they . . . just chose not to put—

215. *See id.* at 606.

216. *Id.*

217. *Id.* at 607 (internal citations omitted); *see also* *Cincinnati Ins. Co. v. Serrano*, No. 11-2075-JAR, 2012 WL 28071, at *5 (D. Kan. Jan. 5, 2012) (“Instructions to a witness that they may answer a question ‘if they know’ or ‘if they understand the question’ are raw, unmitigated coaching, and are *never* appropriate. This conduct, if it persists after the deposing attorney requests that it stop, is misconduct and sanctionable.”).

218. *Sec. Nat'l Bank of Sioux City*, 299 F.R.D. at 607–08.

Defense Counsel: [S]he didn't write this.

[Witness]: Yes, I didn't write this.

Plaintiff's Counsel: [D]o you know if that test was performed in . . . Columbus?

[Witness]: I don't.

Defense Counsel: Yes, you do. Read it.²¹⁹

Ghezzi defended her conduct by arguing that she was simply steering the plaintiff's lawyer "to the correct ground" when he was "on the wrong track factually" when deposing Abbott witnesses.²²⁰ When examinations of Abbott witnesses "bogged down," she merely "attempted to speed up the process by helping to clarify or facilitate things."²²¹ These arguments did not persuade the court. A lawyer defending a deposition is not empowered to decide whether another lawyer is going astray or to redirect that lawyer's questioning to fit the defending lawyer's view of the case.²²² Furthermore, the court thought that it was nonsensical to suggest that Ghezzi's running commentary hastened the depositions.²²³ Her comments were framed as objections—they were not well-intentioned efforts to clarify questions.²²⁴ In summary, Ghezzi's perceived witness coaching was sanctionable.²²⁵

3. *Excessive Interruptions*

Beyond Ghezzi's use of objections to coach Abbott witnesses, the court believed that she excessively interrupted the depositions she defended.²²⁶ In discussing her "grossly excessive" interruptions, the court noted that (a) in one deposition, her name appeared in the transcript 92 times, or roughly once per page; (b) in another deposition, her name appeared in the transcript 381 times, or approximately three times per page; and (c) her name appeared with similar frequency in the transcripts of the other depositions she defended.²²⁷ And, as noted earlier, the court considered almost all of her objections and interruptions to be improper.²²⁸ Because Ghezzi's objections and interruptions delayed, frustrated, and impeded the fair examinations of the witnesses being deposed, they provided an independent basis for sanctions.²²⁹

219. *Sec. Nat'l Bank of Sioux City v. Jones Day*, 800 F.3d 936, 940 n.3 (8th Cir. 2015).

220. *See Sec. Nat'l Bank of Sioux City*, 299 F.R.D. at 608–09.

221. *Id.* at 609.

222. *See id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

4. *The Show Cause Hearing and Sanctions*

After receiving two responses from Jones Day to his supplemental show cause order, Judge Bennett conducted a telephonic hearing.²³⁰ During that hearing, he asked Ghezzi to “follow up with an e-mail message suggesting an appropriate sanction” should he decide to sanction her.²³¹ Judge Bennett did not indicate the types of sanctions he was considering.²³² A few days later, another Jones Day partner responded with an e-mail message urging the court not to impose sanctions and declining to suggest a possible sanction.²³³

Judge Bennett entered his sanctions order one week later. He explained that while he had the discretion to impose substantial monetary sanctions on Ghezzi, he was more interested in reforming her deposition practices.²³⁴ He was also deeply committed to deterring similar behavior by other lawyers because “so many litigators are *trained* to make obstructionist objections.”²³⁵ He therefore settled on an “outside-the-box” sanction designed for deterrent and reformative effect.²³⁶

Counsel must write and produce a training video in which Counsel, or another partner in Counsel’s firm, appears and explains the holding and rationale of this opinion, and provides specific steps lawyers must take to comply with its rationale in future depositions in any federal and state court. The video must specifically address the impropriety of unspecified “form” objections, witness coaching, and excessive interruptions. The lawyer appearing in the video may mention the few jurisdictions that actually require only unspecified “form” objections and may suggest that such objections are proper in only those jurisdictions. The lawyer in the video must state that the video is being produced and distributed pursuant to a federal court’s sanction order regarding a partner in the firm, but the lawyer need not state the name of the partner, the case the sanctions arose under, or the court issuing this order. Upon completing the video, Counsel must file it with this court, under seal, for my review and approval. If and when I approve the video, Counsel must (1) notify certain lawyers at Counsel’s firm about the video via e-mail and (2) provide those lawyers with access to the video. The lawyers who must receive this notice and access include each lawyer at Counsel’s firm . . . who engages in federal or state litigation or who works in any practice group in which at least two of the lawyers have filed an appearance in any state or federal case in the United States.²³⁷

230. *Id.* at 598.

231. *Id.*

232. *Sec. Nat’l Bank of Sioux City v. Jones Day*, 800 F.3d 936, 945 (8th Cir. 2015).

233. *Sec. Nat’l Bank of Sioux City*, 299 F.R.D. at 598.

234. *Id.* at 609.

235. *Id.*

236. *Id.* at 609–10.

237. *Id.* at 610.

Judge Bennett explained that he would never have acted *sua sponte* had Ghezzi's conduct generally been appropriate.²³⁸ Depositions can be brutal, and even good lawyers occasionally object improperly.²³⁹ Ghezzi unquestionably was a fine lawyer; indeed, the judge praised her superior performance at trial.²⁴⁰ But her excellent trial work did not excuse her deposition conduct.²⁴¹ Because her improper deposition tactics "went far beyond what judges should tolerate of any lawyer," sanctions were required.²⁴²

In conclusion, Judge Bennett indicated that he would automatically stay the order pending any appeal.²⁴³ As expected, Ghezzi and Jones Day appealed.²⁴⁴ Security National Bank chose not to submit a brief on appeal, but five amici submitted briefs in support of the district court.²⁴⁵

B. The Eighth Circuit Decision in Security National Bank of Sioux City

The Eighth Circuit began its analysis by noting that the district court had sanctioned Ghezzi under Rule 30(d)(2) and stating that it reviews orders imposing sanctions under Rule 30(d)(2) for abuse of discretion.²⁴⁶ A district court's discretion constricts as the severity of the chosen sanction increases or when it imposes sanctions on its own.²⁴⁷ When a district court imposes sanctions *sua sponte* or when the sanction it selects is harsher than most, a reviewing court applies the abuse of discretion standard with special rigor.²⁴⁸

Ghezzi and Jones Day contended that Rule 30(d)(2) did not empower the district court to impose sanctions on its own, but the Eighth Circuit succinctly declined to so limit the court's power.²⁴⁹ Even if the lawyers in a case choose to ignore discovery violations, courts may still impose Rule 30(d)(2) sanctions on their own to deter ongoing and future misconduct.²⁵⁰ "Both the plain language and purpose of Rule 30(d)(2) authorize courts to impose sanctions *sua sponte*."²⁵¹

The Eighth Circuit was bothered by the timing of the sanctions order, however. Judge Bennett did not assume responsibility for the *Security National Bank of Sioux City* case until 16 months after the depositions in which Ghezzi's most offensive conduct took place and one year after discovery closed.²⁵² He did not impose sanctions until some seven months later, meaning that Ghezzi was sanctioned

238. *Id.*

239. *Id.*

240. *Id.* at 610–11.

241. *Id.* at 611.

242. *Id.* at 610.

243. *Id.* at 611.

244. *Sec. Nat'l Bank of Sioux City v. Jones Day*, 800 F.3d 936, 941 (8th Cir. 2015).

245. *Id.*

246. *Id.* (citing *Craig v. St. Anthony's Med. Ctr.*, 384 Fed. App'x. 531, 532 (8th Cir. 2010)).

247. *Id.* (citing *Jones v. United Parcel Serv., Inc.*, 460 F.3d 1004, 1010 (8th Cir. 2006)).

248. *Id.* (citing *Norsyn, Inc. v. Desai*, 351 F.3d 825, 831 (8th Cir. 2003)).

249. *Id.* at 942.

250. *See id.*

251. *Id.*

252. *See id.* at 943.

almost two years after she had defended the subject depositions without a peep from the plaintiff's lawyer.²⁵³ As the court explained:

With few exceptions, sanctions should be imposed “within a time frame that has a nexus to the behavior sought to be deterred.” . . . Rule 30(d)(2) sanctions assessed near the time of violation deter both ongoing and subsequent abuses. . . . Prompt action “helps enhance the credibility of the rule,” and by deterring further discovery abuse, “achieve its therapeutic purpose.” . . . This is especially true when sanctions are imposed sua sponte after the fact, for delay allows potential violations to pass unchecked and undeterred. . . . The primary purpose of Rule 30(d)(2) was not well served by the post hoc procedures here.²⁵⁴

Moreover, Judge Bennett gave Ghezzi no advance notice of the type of sanction he was considering.²⁵⁵ Neither the original show cause order nor the supplemental show cause order signaled the court's intent to impose the unusual sanction selected.²⁵⁶

The Eighth Circuit reasoned that before “imposing the ‘most severe sanctions,’” a district court should give the target lawyer “‘clear notice’ as to the form of the sanction.”²⁵⁷ Particularized notice of the sanction being considered may be especially important where a lawyer's reputation may be affected by the sanction given the symbolic statement that sanctions may make about a lawyer's integrity or the quality of her work.²⁵⁸ A lawyer's opportunity to be heard is of diminished value without notice of the nature of a potential sanction, because the lawyer needs that information to thoughtfully respond.²⁵⁹

In this case, Ghezzi had no appreciable notice of the sanction the district court was contemplating.²⁶⁰ Although Judge Bennett gave Ghezzi and Jones Day advance notice of his reasons for considering Rule 30(d)(2) sanctions, he never indicated in his show cause orders or during the hearing that producing and distributing an instructional video on deposition misconduct was in the cards.²⁶¹ The unusual shaming sanction was revealed for the first time in the district court's published opinion.²⁶²

The Eighth Circuit explained that once information about an extraordinary litigation sanction is publicized, damage to the lawyer's career, reputation, and future professional opportunities may be hard to repair and might even be irreparable.²⁶³

253. See *id.* (citing MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.42 (2004)).

254. *Id.* (citations omitted).

255. *Id.* at 944.

256. *Id.*

257. *Id.* (quoting *Harlan v. Lewis*, 982 F.2d 1255, 1262 (8th Cir. 1993)).

258. *Id.* (quoting *In re Prudential Ins. Co. of Am. Sales Practice Litig. Actions*, 278 F.3d 175, 191 (3d Cir. 2002)).

259. See *id.*

260. See *id.* at 945.

261. *Id.*

262. *Id.* (citing *In re Tutu Wells*, 120 F.3d 368, 380 (3d Cir. 1997)).

263. *Id.* (citing *Adams v. Ford Motor Co.*, 653 F.3d 299, 308–09 (3d Cir. 2011)).

Recognizing the importance to Ghezzi of her professional reputation, the court considered the possibility that Judge Bennett's shaming sanction could indelibly stain her career.²⁶⁴ Given the professional stakes, she was entitled to particularized notice of the nature of the sanction Judge Bennett was considering so that she could meaningfully respond to the show cause orders.²⁶⁵

In coming to a decision, the Eighth Circuit noted that it could vacate the sanctions order and remand the case to the district court for further proceedings.²⁶⁶ But it saw little value in that approach because Ghezzi had already been significantly punished by virtue of having endure the sanctions process and litigation, and additional sanctions proceedings so long after the challenged conduct took place would not serve the deterrent purpose of Rule 30(d)(2).²⁶⁷ The court therefore reversed the district court's sanctions order.²⁶⁸

C. Analysis: Security National Bank of Sioux City and Beyond

Although Jones Day and Ghezzi were surely gratified by the Eighth Circuit's decision in *Security National Bank of Sioux City*, lawyers should not read the case too expansively. The Eighth Circuit did not endorse Ghezzi's conduct.²⁶⁹ More to the immediate point, the court did not condemn or invalidate reflective or shaming sanctions. To the contrary, the opinion can be read to suggest that the Eighth Circuit would have upheld the district court's shaming sanction had the district court acted sooner and given Ghezzi particularized notice of the sanction it was considering. The sanction might also have been affirmed had the plaintiff timely moved for sanctions rather than the district court raising the possibility of sanctions on its own at trial.²⁷⁰

Additionally, the Eighth Circuit's decision is incompletely reasoned. First, the court seemingly faulted the district court for not holding a Rule 16 conference in the discovery phase of the case which supposedly would have allowed Judge Bennett (or the magistrate judge or senior district judge on the case earlier) to learn whether there were problems to address.²⁷¹ Of course, the district court could have learned of Ghezzi's offending conduct at a Rule 16 conference only if the plaintiff's lawyer raised it and the plaintiff's lawyer never complained about her conduct at any point in the case.²⁷² There is no reason to believe based on the facts in the opinion that the plaintiff's lawyer would have complained had he been forced to appear for a status

264. *Id.*

265. *Id.* (citing *In re Tutu Wells*, 120 F.3d at 380–81)).

266. *Id.*

267. *Id.*

268. *Id.*

269. *See id.* (“[a]ssuming without deciding that there was sanctionable conduct” in the case). For another case in which a court sanctioned a lawyer for conduct similar to Ghezzi's, see *AKH Co. v. Universal Underwriters Insurance Co.*, Case No. 13-2003-JAR-KGG, 2016 WL 141629, at *3–4 (D. Kan. Jan. 12, 2016).

270. *See Sec. Nat'l Bank of Sioux City*, 800 F.3d at 938, 942–43 (reiterating three times that the plaintiff's lawyer never complained to the court about Ghezzi's deposition practices).

271. *See id.* at 943.

272. *See id.* at 942–43 (noting that the plaintiff's lawyer never sought judicial intervention in discovery).

conference at some point during discovery. The lack of a Rule 16 conference was therefore irrelevant.

Second, the Eighth Circuit's criticism of the delay between Ghezzi's deposition conduct and Judge Bennett's expression of concern about it was exaggerated. Although it is preferable for deterrence purposes for sanctions to be "imposed within a time frame that has a nexus to the behavior sought to be deterred,"²⁷³ a court's failure to sanction a lawyer at the earliest possible time does not operate to pardon the lawyer's misbehavior.²⁷⁴ Indeed, district courts may consider collateral issues such as sanctions even after a case has been voluntarily dismissed.²⁷⁵

This was not a case like *In re Yagman*,²⁷⁶ where the district court waited until the conclusion of the case to suggest Rule 11 sanctions against the plaintiff's lawyer for filing the lawsuit.²⁷⁷ In *Security National Bank of Sioux City*, the parties filed their deposition designations and objections in preparation for a January 6, 2014 trial, thus presenting Judge Bennett with a record of Ghezzi's behavior very late in the game; Judge Bennett overruled Abbott's objections to the plaintiff's deposition designations on December 30, 2013, in the process expressing his unhappiness with them; he issued his first show cause order on January 9, 2014; and he issued his supplemental show cause order on January 21, 2014, the day he entered judgment for Abbott.²⁷⁸ That is a relatively compressed time frame. The fact that the district court did not hold a sanctions hearing until July 17, 2014, was due in substantial part to Jones Day obtaining extensions of time to respond to the supplemental show cause order and later obtaining a continuance of the hearing.²⁷⁹ In fact, reserving a decision on sanctions until the end of trial is sometimes appropriate because, "[i]n some situations, liability under proper sanctioning authority will not be immediately apparent or may not be precisely and accurately discernible until a later time."²⁸⁰

Third, while Judge Bennett should have given Ghezzi notice of the sanctions he was considering, it is questionable whether his failure to do so was consequential. When he asked Ghezzi to suggest an appropriate sanction should he decide to go that route, Jones Day declined to propose a sanction.²⁸¹ Jones Day took that approach even though the firm must have known that Judge Bennett might be

273. *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 881 (5th Cir. 1988).

274. It bears repeating that Judge Bennett acted on Ghezzi's misconduct when he learned of it. He likely would have acted on it sooner had it been brought to his attention by the plaintiff's lawyer, but, as the Eighth Circuit noted, (1) the plaintiff's lawyer kept silent; and (2) sanctions against a lawyer may be appropriate even where opposing counsel does not complain about the lawyer's behavior or move for sanctions himself. *Sec. Nat'l Bank of Sioux City*, 800 F.3d at 942–43.

275. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395–96 (1990).

276. 796 F.2d 1165 (9th Cir. 1986). In *Security National Bank of Sioux City*, the Eighth Circuit cited *In re Yagman* as support for its statement that "[t]he primary purpose of Rule 30(d)(2) was not well served by the post hoc procedures here." *Sec. Nat'l Bank of Sioux City*, 800 F.3d at 943–44.

277. *In re Yagman*, 796 F.2d at 1180.

278. *Sec. Nat'l Bank of Sioux City*, 800 F.3d at 938–40; *Sec. Nat'l Bank of Sioux City v. Abbott Labs.*, 299 F.R.D. 595, 598 (N.D. Iowa 2014), *rev'd sub nom. Sec. Nat'l Bank of Sioux City v. Jones Day*, 800 F.3d 936 (8th Cir. 2015).

279. *See Sec. Nat'l Bank of Sioux City*, 299 F.R.D. at 598.

280. *In re Yagman*, 796 F.2d at 1183.

281. *Sec. Nat'l Bank of Sioux City*, 299 F.R.D. at 598.

weighing a shaming sanction. Assuming that the excellent Jones Day lawyers representing the firm and Ghezzi in the district court did the research one would expect of them, they surely found the decision in *St. Paul Reinsurance Co., Ltd. v. Commercial Financial Corp.*,²⁸² discussed earlier,²⁸³ where Judge Bennett criticized a lawyer's discovery objections as "boilerplate, obstructionist, frivolous, overbroad, and, significantly, contrary to well-established and long standing federal law."²⁸⁴ In *St. Paul*, he ordered the lawyer to write a bar journal article explaining why it was improper to object as he did.²⁸⁵ Yet, even with published authority indicating the possibility of an alternative sanction, Ghezzi and Jones Day never inquired whether one might be on the judge's mind. None of this is to say that Jones Day should have conceded that Ghezzi deserved to be sanctioned. It is to say, however, that notice of the possibility of an alternative sanction should perhaps not have been given the weight in this case that it was.

Fourth, the court's embrace of the principle that before "imposing the 'most severe sanctions,' a district court should provide 'clear notice' as to the form of the sanction,"²⁸⁶ arguably was a reach. That principle typically applies where the potential sanction will substantively affect the party's case, as where, for example, the court might submit an adverse inference instruction, strike the party's pleadings, or dismiss the case.²⁸⁷ The same is true with respect to the court's observation that a district court's discretion narrows as the severity of the sanction increases.²⁸⁸ Either way, in *Security National Bank of Sioux City* the sanction had no effect on the case.

The court's focus on the severity of the sanction, however, raises another question: short of issuing an adverse inference instruction, dismissing a party's case, striking a party's pleadings, or revoking a lawyer's pro hac vice admission, what makes a sanction among the "most severe"? Does any shaming sanction require clear notice to the lawyer of its intended form? What if the shaming sanction is embarrassing, but, when viewed objectively, cannot reasonably be said to indelibly stain the lawyer's reputation or career, or impair her ability to practice?²⁸⁹ In the same vein, the court's statement that "[s]o unusual a sanction"—that is, the production of an intra-firm instructional video—required "particularized notice of the nature of the sanction" being contemplated,²⁹⁰ raises the question of what makes a sanction sufficiently unusual to trigger the particularized notice requirement. A

282. 198 F.R.D. 508 (N.D. Iowa 2000).

283. See *supra* notes 75–84 and accompanying text.

284. *St. Paul*, 198 F.R.D. at 511.

285. *Id.* at 518.

286. *Sec. Nat'l Bank of Sioux City v. Jones Day*, 800 F.3d 936, 944 (8th Cir. 2015) (quoting *Harlan v. Lewis*, 982 F.2d 1255, 1262 (8th Cir.1993)).

287. See *Harlan v. Lewis*, 982 F.2d 1255, 1260–62 (8th Cir. 1993) (imposing monetary sanctions and referring the defense lawyer to state disciplinary authorities rather than striking the defendant's answer or precluding witnesses from testifying, as the plaintiff requested).

288. See *Sentis Grp., Inc. v. Shell Oil Co.*, 559 F.3d 888, 898–99 (8th Cir. 2009) (discussing dismissal as a discovery sanction).

289. See *Sec. Nat'l Bank of Sioux City*, 800 F.3d at 944–45 (quoting *In re Prudential Ins. Co. Am. Sales Practice Litig. Actions*, 278 F.3d 175, 191–93 (3d Cir. 2002); *In re Tutu Wells Contamination Litig.*, 120 F.3d 368, 381 n.10 (3d Cir.1997)).

290. *Sec. Nat'l Bank of Sioux City*, 800 F.3d at 945.

reflective sanction such as mandatory CLE attendance certainly does not rise to that level.²⁹¹

Whatever its flaws, the Eighth Circuit's opinion in *Security National Bank of Sioux City* is in several respects a positive decision for lawyers and courts alike. Again, from courts' perspective, the Eighth Circuit did not hold that alternative sanctions are flatly inappropriate, meaning that district courts in that judicial circuit retain the discretion to fashion case- and situation-specific alternative sanctions, and that other courts cannot seize on the opinion to forbid the use of alternative sanctions. It is important for trial courts to have flexibility when regulating the conduct of lawyers appearing before them.²⁹² It is also important for trial courts to have sanctioning options apart from monetary sanctions and non-monetary sanctions that go to the merits or substance of the case, or to the offending lawyer's ability to practice. The availability of alternative sanctions may be especially important where an errant lawyer's practice is so thin that she cannot afford to pay reasonable monetary sanctions,²⁹³ or at the other extreme, where the misbehaving lawyer's wealth makes a monetary sanction proportionate to the misconduct at issue the equivalent of pocket change.²⁹⁴

If the court's elevated scrutiny of the district court's sanctions order prompts trial courts to think carefully when fashioning extraordinary alternative sanctions,²⁹⁵ that caution is good for all concerned. Trial courts will satisfy themselves that they are focusing on significant misconduct that truly requires extraordinary sanctions rather than imposing sanctions out of accumulated

291. See JOSEPH, *supra* note 30, § 16(B)(5), at 280 ("An order requiring lawyers to participate in mandatory continuing legal education is another *lesser* sanction.") (emphasis added).

292. See *generally* Young v. Gordon, 330 F.3d 76, 81 (1st Cir. 2003) (stating that "the choice of an appropriate sanction must be handled on a case-by-case basis").

293. A lawyer's ability to pay is a factor for a court to consider in imposing monetary sanctions under Rule 11. JOSEPH, *supra* note 30, § 16(D)(10), at 322. A lawyer claiming the inability to pay monetary sanctions bears the burden of producing evidence of her inability to pay. Fed. Election Comm'n v. Toledano, 317 F.3d 939, 948–49 (9th Cir. 2002) (quoting Gaskell v. Weir, 10 F.3d 626, 629 (9th Cir. 1993)). Whether courts should consider offenders' ability to pay when imposing sanctions under 28 U.S.C. § 1927 depends on the jurisdiction. The Seventh and Tenth Circuits have concluded that courts should not consider offenders' ability to pay when awarding fees and expenses under § 1927. Hamilton v. Boise Cascade Express, 519 F.3d 1197, 1206 (10th Cir. 2008); Shales v. Gen. Chauffeurs, Sales Drivers & Helpers Local Union No. 330, 557 F.3d 746, 749 (7th Cir. 2009). The Second and Ninth Circuits, on the other hand, have concluded that courts may do so. Haynes v. City of San Francisco, 688 F.3d 984, 987 (9th Cir. 2012); Oliveri v. Thompson, 803 F.2d 1265, 1281 (2d Cir. 1986).

294. Any sanction that a court imposes should be proportionate to the gravity of the offense. Montano v. City of Chi., 535 F.3d 558, 563 (7th Cir. 2008) (discussing inherent power sanctions); Goya Foods, Inc. v. Wallack Mgmt. Co., 344 F.3d 16, 20 (1st Cir. 2003) (stating that so long as a trial court's monetary sanction is reasonably proportionate to the offending conduct, its quantification will not be disturbed on appeal).

295. See Nat. Gas Pipeline Co. of Am. v. Energy Gathering, Inc., 2 F.3d 1397, 1411 (5th Cir. 1993) ("Although novel sanctions are not objectionable per se, they are subject to close examination on review simply because their reasonableness has not been demonstrated.").

frustration with a lawyer or a case.²⁹⁶ Lawyers are more likely to receive the benefit of the doubt in close cases, which is consistent with sanctions doctrine generally.²⁹⁷

Similarly, if the opinion pushes trial courts to provide particularized notice of the nature and severity of the sanctions they are weighing in more cases,²⁹⁸ it increases the likelihood that targeted lawyers will provide more detailed and focused responses to courts' show cause orders or to opponents' motions.²⁹⁹ That, in turn, should lead courts to make better sanctions decisions in general.

At the same time, any benefits that might flow from courts providing lawyers with particularized notice of possible alternative sanctions are arguably speculative. Competent lawyers who believe they have done nothing wrong are guaranteed to vigorously oppose any possible sanctions. In the process, they will advise the court of applicable law and material facts justifying their conduct. Thus, a particularized notice requirement seems of little benefit either to the court or to the offending lawyer. If a lawyer who is threatened with possible shaming sanctions can easily afford proportionate monetary sanctions or her firm or client will pay any monetary sanction on her behalf, she is sure to argue that if any sanction is imposed, it should be monetary. That would seem to defeat the deterrent purpose of the sanction, unless the court recognizes the argument for what it is and sticks with the shaming sanction—but then the parties have come full circle, because the court presumably was considering a shaming sanction in the first place precisely because it saw no value in a monetary sanction. In short, particularized notice of possible alternative sanctions mostly serves to signal lawyers who lack confidence in their own defense that they may wish as a fallback position to urge an alternative sanction less severe than the one the court is holding out.

Finally, in most jurisdictions, a trial court that is seriously disturbed by a lawyer's conduct but concerned that it cannot or should not levy sanctions, may condemn the lawyer's conduct in a published opinion without exposing its decision to appellate review provided that it does not (a) expressly denominate its criticism as a reprimand; or (b) make specific findings of misconduct.³⁰⁰ Appellate courts refuse

296. See, e.g., *Gowan v. Mid Century Ins. Co.*, No. 5:14-cv-05025-LLP, 2015 WL 7274448, at *5 (D.S.D. Nov. 16, 2015) (concluding that the defendant's repeated assertion of baseless discovery objections even after the court held such objections to be invalid, "while unjustified under the Federal Rules," were "not severe enough to warrant the kind of sanctions imposed [by the district court] in *Security Nat'l*").

297. See, e.g., *K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co.*, 61 F.3d 123, 131 (2d Cir. 1995) (stating that "all doubts should be resolved in favor of the signing attorney" when considering Rule 11 sanctions); *Mustapha v. HSBC Bank, USA*, Civ. A. No. 4:12-cv-01924, 2013 WL 632856, at *7 (S.D. Tex. Feb. 20, 2013) (giving the plaintiffs "the benefit of doubt" in declining to impose sanctions while cautioning them that their good faith would not be presumed in the future).

298. See, e.g., *Adams v. United Servs. Auto. Ass'n*, No. 2:14-CV-02013, 2016 WL 1465433, at *9–11 (W.D. Ark. Apr. 14, 2016) (citing *Sec. Nat'l Bank of Sioux City v. Jones Day*, 800 F.3d 936, 945 (8th Cir. 2015) (giving lawyers notice of sanctions being considered)).

299. JOSEPH, *supra* note 30, § 17(D)(1), at 388.

300. See Douglas R. Richmond, *Appealing from Judicial Scoldings*, 62 BAYLOR L. REV. 741, 760 (2010) (noting the majority approach to lawyers' appeals from judicial criticism). *But cf.* *Adams v. Ford Motor Co.*, 653 F.3d 299, 305 (3d Cir. 2011) (concluding that the district court's finding of lawyer misconduct unaccompanied by a formal reprimand or monetary penalty was a sanction for appellate purposes because it "directly undermine[d] [the lawyer's] professional reputation and standing in the community").

to entertain lawyers' appeals of routine judicial commentary on their conduct.³⁰¹ Thus, in *Security National Bank of Sioux City*, had the district court declined to sanction Ghezzi and instead simply criticized her conduct as obstructionist and unjustified in a pretrial ruling on the parties' deposition designations and objections, she would not have had standing to appeal.³⁰² In many cases, judicial criticism of lawyers' conduct in published opinions may deter future misconduct as effectively as shaming sanctions. From courts' perspective, this approach has the advantage of avoiding time-consuming ancillary litigation.

IV. CONCLUSION

Courts may impose non-monetary sanctions on lawyers in litigation. These include what we have called alternative sanctions because they differ from traditional non-monetary sanctions that affect a lawyer's ability to litigate a case, such as revoking the lawyer's pro hac vice admission. Alternative sanctions may further be categorized as reflective sanctions where they are intended to cause the offending lawyers to reflect on their conduct with a goal of reform, or as shaming sanctions where they are intended to shame errant lawyers into improving their behavior and, in addition, to deter other lawyers from engaging in similar misconduct. The sanction imposed by the district court in *Security National Bank of Sioux City* is now the leading example of a shaming sanction, notwithstanding the Eighth Circuit's reversal on appeal.

Courts considering alternative sanctions should be sure to give lawyers particularized notice of the sanctions they are considering and afford the targeted lawyers an opportunity to be heard on the issue. They should also act promptly upon learning of misconduct by lawyers. Assuming they do these things, any alternative sanctions they impose are likely to be upheld on appeal in light of the deferential abuse of discretion standard of review that appellate courts apply in sanctions cases.

From lawyers' perspective, it is obviously desirable to avoid engaging in conduct that may draw a motion for sanctions or that may prompt a trial court to raise the possibility of sanctions sua sponte. When lawyers are handling litigation in jurisdictions in which they do not regularly practice, a first step toward avoiding potential misconduct is to retain knowledgeable local counsel who can advise them on customary practice in the jurisdiction. Depending on the case, reasonable research of local practices may be a wise investment. Returning to *Security National Bank of Sioux City*, Ghezzi might have avoided the deposition conduct that upset the district judge. With the exercise of some diligence or the guidance of capable local counsel, she would have known of *Van Pilsum v. Iowa State University of Science & Technology*,³⁰³ in which the court sanctioned the plaintiff's lawyer for repeatedly restating the defense lawyer's questions to "clarify" them for the plaintiff, and for consistently interrupting defense counsel to interpose "objections which were thinly veiled instructions to the [plaintiff], who would then incorporate" her lawyer's comments in her answers.³⁰⁴ She might also have learned from research locating the

301. Richmond, *supra* note 300, at 759.

302. See *Williams v. United States (In re Williams)*, 156 F.3d 86, 92 (1st Cir. 1998).

303. 152 F.R.D. 179 (S.D. Iowa 1993).

304. *Id.* at 180.

opinion in *Rakes v. Life Investors Insurance Co. of America*,³⁰⁵ if not from local counsel, that “the general practice in Iowa permits an objector to state in a few words the manner in which the question is defective as to form. . . . Care must be taken by the objector, however, to not attempt to suggest an answer, or to influence or ‘coach’ the witness.”³⁰⁶ A glance at either case—or the advice of local counsel versed in Iowa federal court practice—surely would have caused an excellent lawyer such as Ghezzi to rethink her regular deposition practices and style honed in other jurisdictions.

To be sure, if Ghezzi had never handled cases in Iowa federal courts or had done so previously without her deposition practices being challenged, and if her deposition practices were the norm in the jurisdictions in which she regularly appeared, she would have had no reason to anticipate the possibility of sanctions. But that returns us to the importance of capable local counsel who can provide the sort of advice and nuts-and-bolts guidance that visiting lawyers may require, and to the gathering of intelligence through reasonable legal research in appropriate cases.

Lawyers who are threatened with sanctions should not respond on their own. Rather, they should seek the assistance of other lawyers in their firm or retain separate counsel, or both, in defending against any allegations of misconduct. This does not mean that targeted lawyers should be excluded from their own defenses; after all, they have valuable knowledge to contribute and their interests are at stake. Rather, separate counsel are likely to provide a level of objectivity when analyzing the situation and formulating a response that a lawyer who is in another party’s or a court’s crosshairs cannot.

In some cases, it may be necessary for lawyers who are facing possible sanctions to consider whether they should propose an alternative sanction as a means of escaping more serious penalties. This recommendation may gall the affected lawyers, but, depending on the facts and the court, it may be a prudent choice. Attending a CLE course or writing a bar journal article probably is preferable to a more serious monetary or shaming sanction, or to a case-altering non-monetary sanction such as revocation of the culpable lawyer’s pro hac vice admission.

In summary, alternative sanctions are a regular feature on the litigation landscape. For lawyers, the keys are first to avoid misconduct supporting sanctions of any kind; second to defeat any attempts to impose sanctions, including alternative sanctions, at the trial court level; and, third, to minimize or mitigate any sanctions that may be imposed. If it is necessary to appeal a sanction, a lawyer must strive to build a case in the trial court that is strong enough to overcome the deferential abuse of discretion standard that the appellate court will apply.

305. No. C06-0099, 2008 WL 429060 (N.D. Iowa Feb. 14, 2008).

306. *Id.* at *5.