

CURRENT PERSPECTIVES IN PROFESSIONALISM

INTRODUCTION

The latest edition of *Black's Law Dictionary* defines professionalism as “[t]he practice of a learned art in a characteristically methodical, courteous, and ethical manner.” The ABA has noted in a report on professionalism that “professionalism is an elastic concept the meaning and application of which are hard to pin down.” Most people who study the subject consider professionalism to be related to ethics but somehow broader in the way lawyers should act in their conduct toward fellow lawyers, clients, and the courts. Some commentators have written that as a profession lawyers have sought a cure for the disease of incivility or lack of professionalism before agreeing on its nature, symptoms, and causes.

For many years federal, state, and local bar associations have addressed professionalism or civility problems with numerous codes of conduct. About one half of our states require more than an hour of CLE each year in ethics and/or professionalism. Abundant studies document that many lawyers are unhappy in their work, so much so that lawyers experience levels of depression, anxiety, and other mental illnesses at a higher rate than any other profession. Commentators have identified several reasons for lawyers’ despair--heightened competitiveness, a quest for money, a general decline in values, dissatisfaction with work, and the diminished view in which the public holds the profession.

A recent survey finds that over 60% of attorneys want less stress and fewer hours on the job as opposed to just 2% who want more compensation. The legal consulting firm who conducted the study reports that “[j]ob-related stress and work/life balance issues can lead to employee dissatisfaction and staff turnover which may decrease a firm’s productivity and directly impact its ability to remain competitive.” To counter these trends, the consulting firm recommends that employers offer flexible and part-time scheduling, job sharing, telecommuting, and compressed work weeks to keep its work force. Legal employment should also include mentoring, continuing legal education, and cross-training in a variety of practice areas.

Further complicating matters, renowned psychologist Martin Seligman studied over 100 professions and pursuits and found that law is the only one where pessimists outperform optimists. Seligman is the founder of Positive Psychology which basically looks at psychological wellness as opposed to dysfunction. Seligman writes that a “pessimist views bad events as pervasive, permanent and uncontrollable, while the optimist sees them as local, temporary and changeable.” In all other endeavors pessimism is a bad trait and pessimists tend to perform more poorly than their optimistic cohorts. Except for one profession. Writes Seligman:

Pessimism is seen as a plus among lawyers, because seeing troubles as pervasive and permanent is a component of what the law profession deems prudent. A prudent perspective enables a good lawyer to see every conceivable snare and catastrophe that might occur in any transaction. The ability to anticipate the whole range of problems and betrayals that non-lawyers are blind to is highly adaptive for the practicing lawyer who can, by so doing, help his clients defend

against these far-fetched eventualities. If you don't have this prudence to begin with, law school will seek to teach it to you. Unfortunately, though, a trait that makes you good at your profession does not always make you a happy human being.

I. The law has long sought to control more than just the unethical acts of attorneys. Courts have always had the inherent power to discipline attorneys who cross the line of acceptable behavior in the practice of law. *Chambers v. Nasco*, 501 U.S. 32, 111 S.Ct. 2123 (1991).

It has long been understood that “[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution,” powers “which cannot be dispensed with in a Court, because they are necessary to the exercise of all others.” *United States v. Hudson*, 7 Cranch 32, 34, 3 L.Ed. 259 (1812); see also *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764, 100 S.Ct. 2455, 2463, 65 L.Ed.2d 488 (1980) (citing *Hudson*). For this reason, “Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates.” *Anderson v. Dunn*, 6 Wheat, 204, 227, 5 L.Ed. 242 (1821); see also *Ex parte Robinson*, 19 Wall, 505, 510, 22 L.Ed. 205 (1874). These powers are “governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.” *Link v. Wabash R. Co.*, 370 U.S. 626, 630-631, 82 S.Ct. 1386, 1388-1389, 8 L.Ed.2d 734 (1962).

Prior cases have outlined the scope of the inherent power of the federal courts. For example, the Court has held that a federal court has the power to control admission to its bar and to discipline attorneys who appear before it. See *Ex parte Burr*, 9 Wheat, 529, 531, 6 L.Ed. 152 (1824). While this power “ought to be exercised with great caution,” it is nevertheless “incidental to all Courts.” *Ibid*.

In addition, it is firmly established that “[t]he power to punish for contempt is inherent in all courts.” *Robinson, supra*, at 510. This power reaches both conduct before the court and that beyond the court’s confines, for “[t]he underlying concern that gave rise to the contempt power was not . . . merely the disruption of court proceedings. Rather, it was disobedience to the orders of the Judiciary, regardless of whether such disobedience interfered with the conduct of trial.” *Young v. United States ex rel. Vultton et Fils S.A.*, 481 U.S. 787, 798, 107 S.Ct. 2124, 2132, 95 La Ed. 2d 740 (1987) (citations omitted.)

Counsel may be liable for causing excessive litigation costs. *Traveler’s Insurance Co. v. St. Judge Hospital of Kenner, La. Inc.*, 38 F.3d 1414 (5th Cir. 1994).

Because §1927 sanctions are penal in nature, *Monk v. Roadway Express, Inc.*, 599 F.3d 1378, 1383 (5th Cir. 1979), *aff’d in relevant part sub nom. Roadway Express, Inc. v. Piper*, 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed. 2d 488 (1980), and in order not to dampen the legitimate zeal of an attorney in representing his client § 1927, the offending attorney’s multiplication of the proceedings was both “unreasonable” and “vexatious”,

Federal Deposit Ins. Corp. v. Conner, 20 F.3d 1376, 1384 (5th Cir. 1994) evidence of recklessness, bad faith, or improper motive must be present. *Hogue v. Royse City, Tex.*, 939 F.2d 1249, 1256 (5th Cir. 1991).

Despite the strict limitations for imposing § 1927 sanctions, their imposition and quantification are committed to the sound discretion of the court imposing them; we review only for abuse of that discretion. *E.g.*, *Topalian v. Ehrman*, 3 F.3d 931 934 (5th Cir. 1993); *Trevino v. Holly Sugar Corp.*, 811 F.2d 896, 907-08 (5th Cir. 1987). In sum, in reviewing the imposition of sanctions, we do not substitute our judgment for that of the district court in enforcing acceptable sanctions of conduct. *Topalian*, 3 F.3d at 935.

Rule 11 of the Federal Rules of Civil Procedure allows sanctions even after the case is dismissed. *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 110 S.Ct.2447, (1990).

As the “violation of Rule 11 is complete when the paper is filed,” *Szabo Food Service, Inc.*, *supra*, at 1077, a voluntary dismissal does not expunge the Rule 11 violation. In order to comply with Rule 11's requirement that a court “shall” impose sanctions “[i]f a pleading, motion, or other paper is signed in violation of this rule,” a court must have the authority to consider whether there has been a violation of the signing requirement regardless of the dismissal of the underlying action. In our view, nothing in the language of Rule 41(a)(1)(I), Rule 11, or other statute or Federal Rule terminates a district court's authority to impose sanctions after such a dismissal.

It is well established that a federal court may consider collateral issues after an action is no longer pending. For example, district courts may award costs after an action is dismissed for want of jurisdiction. See 28 U.S.C. § 1919. This Court has indicated that motions for costs or attorney's fees are “independent proceeding[s] supplemental to the original proceeding and not a request for a modification of the original decree.” *Sprague v. Ticonic National Bank*, 307 U.S. 161, 170, 59 S.Ct. 777, 781, 83 L.Ed. 1184 (1939). Thus, even “years after the entry of a judgment on the merits” a federal court could consider an award of counsel fees. *White v. New Hampshire Dept. of Employment Security*, 455 U.S. 445, 451, n.13, 102 S.Ct. 1162, 1166, n. 13, 71 L.Ed.2d 325 (1982). A criminal contempt charge is likewise “ ‘ a separate and independent proceeding at law’ “ that is not part of the original action. *Bray v. United States*, 423 U.S. 73, 75, 96 S.Ct. 307, 309, 46 L.Ed.2d 215 (1975), quoting *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 445, 31 S.Ct. 492, 499, 55 L.Ed. 797 (1911). A court may make an adjudication of contempt and impose a contempt sanction even after the action in which the contempt arose has been terminated. See *United States v. Mine Workers*, 330 U.S. 258, 294, 67 S.Ct. 677, 696, 91 L.Ed. 884 (1947). (“Violations of an order are punishable as criminal contempt even though . . . the basic action has become moot”); *Gompers v. Buck's Stove & Range Co.*, *supra*, 221 U.S., at 451, 31 S.Ct. at 502 (when main case was settled, action became moot, “of course without prejudice to the power and right of the court to punish for contempt by proper proceedings”). Like the imposition of costs, attorney's fees, and contempt sanctions, the imposition of a Rule 11 sanction is not a judgment on the merits of an action. Rather, it requires the determination of a collateral issue: whether the attorney has abused the judicial process, and, if so, what sanction

would be appropriate. Such a determination may be made after the principal suit has been terminated.

II. AAJ Code of Conduct and Professionalism

In November, 2007 the Board of Governors of The American Association for Justice rewrote a code of conduct originally adopted in 1988 regarding professionalism. In the representation of clients and otherwise in the practice of the profession as trial attorneys, AAJ members shall abide by the following principles:

- ⌞ Zealously represent the best interests of their clients within the framework of all applicable Rules of Professional Responsibility and with the highest ethical standards of the profession.
- ⌞ Not prosecute or counsel any action, or assert any claim or defense, which is false, frivolous, or wholly insubstantial.
- ⌞ Engage only in advertising that fully complies with the rules of the jurisdictions in which the member is admitted or where the advertising is placed, and not engage in any form of false, misleading, or deceptive advertising.
- ⌞ Not initiate personal contact with any injured party or aggrieved survivor, either personally or through a representative, without a specific request or for the sole purpose of attracting cases.
- ⌞ Not initiate press contact following a disaster or incident that resulted in or death for the sole purpose of attracting cases.
- ⌞ Not knowingly accept referral of a case that has been the subject of conduct that violates the provisions of this Code or other applicable rule.
- ⌞ Disclose and explain the fee to be charged to the client and how it is calculated; the handling of costs while the case is pending and on resolution; and, if contingent upon recovery, memorialize the fee clearly in a written fee agreement.
- ⌞ To the extent consistent with state law or Rules of Professional Conduct, ensure that all decisions to arbitrate disputes arising from contracts with clients are voluntary and that a client's judicial rights and remedies are not waived under coercion; include no predispute mandatory binding arbitration clauses in agreements with clients.
- ⌞ Accept only cases and legal matters for which the attorney or cocounsel possesses the requisite knowledge, skill, time, and resources to prosecute diligently and competently.
- ⌞ Disclose to clients the intention to refer their case to another attorney or to engage

the services of another attorney to represent their interests.

- ↯ Communicate promptly, frankly, and fully with clients when they inquire about their cases and at other times as appropriate to keep them informed about the progress and status of their case

III. Louisiana is one of the states to require professionalism each year as part of attorney continuing legal education. Following approval by the Louisiana State Bar Association House of Delegates and Board of Governors at the Mid-Year Meeting, and approval by the Supreme Court of Louisiana on January 10, 1992, the Code of Professionalism was adopted for the membership. The Code originated out of the Professionalism and Quality of Life Committee.

The Louisiana Code of Professionalism, approved by the LSBA House of Delegates and the Louisiana Supreme Court, reads as follows:

- ↯ My word is my bond. I will never intentionally mislead the court or other counsel. I will not knowingly make statements of fact or law that are untrue.
- ↯ I will clearly identify for other counsel changes I have made in documents submitted to me
- ↯ I will conduct myself with dignity, civility, courtesy and a sense of fair play.
- ↯ I will not abuse or misuse the law, its procedures or the participants in the judicial process.
- ↯ I will consult with other counsel whenever scheduling procedures are required and will be cooperative in scheduling discovery, hearings, the testimony of witnesses and in the handling of the entire course of any legal matter.
- ↯ I will not file or oppose pleadings, conduct discovery or utilize any course of conduct for the purpose of undue delay or harassment of any other counsel or party. I will allow counsel fair opportunity to respond and will grant reasonable requests for extensions of time.
- ↯ I will not engage in personal attacks on other counsel or the court. I will support my profession's efforts to enforce its disciplinary rules and will not make unfounded allegations of unethical conduct about other counsel.
- ↯ I will not use the threat of sanctions as a litigation tactic.
- ↯ I will cooperate with counsel and the court to reduce the cost of litigation and will readily stipulate to all matters not in dispute.
- ↯ I will be punctual in my communication with clients, other counsel and the court, and in honoring scheduled appearances.

