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THE INHERENT POWER AND DUE PROCESS MODELS IN CONFLICT: SANCTIONS IN THE FIFTH CIRCUIT

by
*Neil H. Cogan**

They shall be construed to secure the just, speedy, and inexpensive determination of every action.¹

We do not sit as a means by which the system can be punished—or to be punished ourselves—by the pursuit of frivolous or malicious appeals by disgruntled state prisoners.²

THE topic of sanctions, particularly sanctions under rule 11 of the Federal Rules of Civil Procedure, has been in recent years a “hot topic” of process. Many dozens of articles, essays, comments, and notes have discussed the issues presented by the recent enhancement of sanctions under rule 11. There are discussions of whether the rule makes process more or less speedy and costly; whether the rule encourages or discourages lawsuits or motion practice; whether the rule favors plaintiffs or defendants. And, of course, the literature has explored whether the rule discourages what has been perceived as unreasonable conduct by parties and attorneys. Such conduct, if allowed, makes the litigation process unfair and causes unjust results.

In this essay, I take a different look at sanctions, one that can be taken with any rule of process or, for that matter, any rule of conduct. I look at the sources of law from which one court, the Court of Appeals for the Fifth Circuit, during the last three years has drawn its decisions on sanctions, under rule 11 and other rules and statutes. In effect, I look at the issue of legitimacy, whether the substance and method of the court of appeals’ imposition of monetary and dignitary penalties has been legitimate. Whether a court acts legitimately in seeking to achieve just, speedy, and inexpensive results is itself an important issue of justice, as well as structure.

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1. FED. R. CIV. P. 1.

2. *Gabel v. Lynaugh*, 835 F.2d 124, 125 (5th Cir. 1988) (per curiam).

In part I, I describe three models that courts have followed in deciding process issues. In part II, I argue that the court of appeals has split as to which model to follow, although in deciding several important issues recently, the court has opted for the model that gives it greatest control over access to the courts. In part III, I make some suggestions for the future decision-making by the Fifth Circuit and other courts.

I. THREE MODELS

Courts follow at least three models in finding sources for their decision of issues connected with process. Not every court follows but one model; certainly large appellate courts do not. These models instead describe points along a continuum. A court's process decisions over a few years can show where along the continuum the court, or a majority of judges on an appellate court, finds its model.

The continuum in the process area, similar to its analogue in the substance area, charts a court's sources for, and its uses of, judicial power. At one end of the continuum is the formalist model. A federal court that follows this model finds its power primarily in the text of statutes and rules and secondarily in the text of article III. This court looks to legislative history and advisory committee notes in order to read text. A formalist court would claim that its sources of power have greater legitimacy than those of any other court because its sources of power are legitimated by legislature or conventions.

The formalist court opens or restricts litigants' access to court according to the provisions of text. This court is, usually, the least activist court, but assuming that the Federal Rules of Civil Procedure, by text and intention, were designed to open access to litigants, the formalist court also opens access.

A little farther along the continuum is the due process model. The court that follows this model is influenced but not captured by the due process clauses of the Constitution. In addition to other sources, this court finds power in the principles and policies of due process, those principles and policies connected primarily with fair notice, a fair hearing, known legal standards, a written articulated decision by a trial court, and full appellate review.

The due process court claims legitimacy for its use of due process principles and policies by reference not simply to the federal and state constitutions, but to traditions of fairness developed and accepted at law and especially in equity. This court opens litigant access to courts more than the Federal Rules of Civil Procedure textually require. This court often is activist.

Farther along the continuum are a number of weak inherent power models, with a strong inherent power model at the very end of the continuum. Some courts that follow a weak inherent power model find power in their special role in the constitutional system; for example, in a special role to protect civil rights. These courts look for legitimacy to the Reconstruction

amendments and jurisdictional statutes, as well as civil rights legislation enacted during and since Reconstruction. These courts are especially sympathetic to access by civil rights plaintiffs. They are still more activist.

Some courts find both power and limitation of power in the principles of separation of powers and federalism. They find legitimacy for these principles not so much in the text of the Constitution as in its structure and relationships, as well as in some jurisdictional statutes. These courts are generally unsympathetic to access, but they too are more activist than the formalist and due process courts.

Finally, at the end of the continuum are the courts that find power inherent in their institution, in the power of courts *qua* courts. The sources are not textual, but are instead historical and political. These courts follow a strong inherent power model.

The inherent power models, especially those at the end of the continuum, are the most boundless. The courts that follow them have the widest range of sources and the widest freedom of choice in using these sources. These courts are the most activist in the process area. They might, for example, emphasize the right of persons to have access to the federal courts for the vindication of federal rights. Or they might emphasize the shrinking resources of the federal courts, the need for the federal courts to be selective in the disputes they decide, or simply their unhappiness with certain kinds of litigation. In deciding several important issues in the last three years, a majority of the Fifth Circuit Court of Appeals has followed a strong inherent power model, using inherent power to restrict access to both the district courts and to the court of appeals itself.

II. SANCTIONS

The Fifth Circuit's decisions about sanctions can be divided into two parts: sanctions imposed initially by a district court and sanctions imposed initially by the court of appeals itself.

A. *Sanctions Imposed by the District Court*

The court of appeals' decisions about sanctions imposed by district courts have come under at least eight headings. Sections 1447(c), 1915(e), and 1927 of title 28; section 1988 of title 42; rules 11, 37, and 68 of the Federal Rules of Civil Procedure; and (quite explicitly) the inherent power of the courts. Under each heading, a careful reading of the decisions shows a conflict between a due process model and a strong inherent power model.

One example is the conflict between panels in *Batson v. Neal Spelce Associates, Inc.*³ In *Batson I* the court, per Judge Jolly, followed a due process model in reversing and remanding a judgment of a district court. The district court had under rule 37 both dismissed a case and awarded over \$30,000 in fees and costs as sanctions for a failure to disclose.⁴ In reviewing

3. 765 F.2d 511 (5th Cir. 1985); 805 F.2d 546 (5th Cir. 1986).

4. FED. R. CIV. P. 37(b)(2) ("[T]he court . . . may make such orders in regard to the

the district court's order, the court of appeals panel said that the sanction of dismissal could be imposed first, only if the discovery failure is willful or in bad faith; second, only if deterrence cannot be achieved by a less drastic sanction; and third, only if the aggrieved party's trial preparation is substantially prejudiced. The court added as a fourth consideration that the sanction of dismissal may be inappropriate where the failure is the attorney's and not the client's or where the failure was grounded in confusion or sincere misunderstanding.⁵ In *Batson I* the court vacated the sanction of dismissal because the district court did not make "explicit findings" on the possibility of less drastic sanctions.⁶

The court said also that the sanction of fees and costs must take into account only those actually caused by the discovery failure and that such a sanction must be reasonable.⁷ The court reversed the award of \$30,000 because that sum was not the expense caused by the discovery failure and because the amount "appear[ed] to be unreasonable on its face."⁸ The court rejected arguments that the award could be sustained under section 1988,⁹ section 1927,¹⁰ and under the inherent power of the courts.¹¹

On remand, the district court found that only dismissal served the deterrent purpose of rule 37; further, it found that the plaintiff had acted in bad faith not simply regarding the discovery failure, but regarding the whole conduct of the litigation.¹² The district court, therefore, reaffirmed its sanction of dismissal and its award of \$30,000.¹³

In *Batson II*¹⁴ a second panel of the Fifth Circuit, per Judge Johnson, affirmed both sanctions. Regarding dismissal, the court held, with no explanation, that the district court's finding that dismissal was the only deterrent was not clearly erroneous and the judgment of dismissal was, therefore, not

failure [to comply with a discovery order] as are just, and among others the following: . . . dismissing the action In lieu of any [other sanctions] or in addition thereto, the court shall require the party . . . or the attorney . . . to pay the reasonable expenses, including attorney's fees").

5. 765 F.2d at 514.

6. *Id.* at 516. The court did not find the dismissal sanction erroneous, but instead said it could not determine whether dismissal was appropriate without greater articulation by the district court. Since a remand was necessary on the sanction of fees and costs, the court also remanded the dismissal issue in the interest of "judicial economy." *Id.*

7. *Id.*

8. *Id.*

9. 42 U.S.C. § 1988 (1982) ("In any action or proceeding to enforce a [civil rights] provision . . . , the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee"). The court held that the district court's opinion did not support the award. 765 F.2d at 517.

10. 8 U.S.C. § 1927 (1982) ("Any attorney . . . 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."). The court said a sanction under section 1927 would have to be against the offending party's attorney, while the sanction in this case was against the party. 765 F.2d at 516 n.3.

11. 765 F.2d at 516-17 n.3.

12. *Batson v. Neal Spelce Assocs., Inc.*, 112 F.R.D. 632, 637-44 (W.D. Tex. 1986).

13. *See* 112 F.R.D. 632 (W.D. Tex. 1986).

14. 805 F.2d 546 (5th Cir. 1986).

an abuse of discretion.¹⁵ Regarding the fees and costs, the court in *Batson II* held that the district court had power under judge-made rules, independent of rule 37, to impose an award of \$30,000 for the plaintiff's bad faith litigation.¹⁶ The second panel rejected an argument that, in order to support the award of \$30,000, the district court was required to hold a hearing on the merits of the plaintiff's substantive claim.¹⁷

What happened between *Batson I* and *Batson II* was a switch from a due process model to a strong inherent power model, from a model concerned with the text of rule 37 as tempered by notions of fairness to a model content with the court's inherent power and eager for docket control against seemingly abusive litigants. The first panel favored traditional due process principles, namely, a hearing, written articulated findings, adherence to known legal standards, and full appellate review. The second panel favored district court discretion (read, "inherent power"),¹⁸ including discretion whether to hold a hearing and discretion whether to sanction. Further, the second panel favored both district court and appellate court discretion by opting for reversal only if findings of fact are clearly erroneous and only if applications of law to fact amount to an abuse of discretion. These standards of review not only reject a due process model in favor of a strong inherent power model and not only dissuade the kinds of litigants the second panel found abusive. These standards of review also give no notice to the profession as to what the court of appeals truly deems to be sanctionable conduct.

A second conflict of models arose not between panels of the court of appeals but within a single panel. The conflict appeared in two cases decided within a week of each other, *Brinkmann v. Dallas County Deputy Sheriff Abner*¹⁹ and *News-Texan, Inc. v. Garland*.²⁰ In *Brinkmann*, the issue of sanctions arose from a dismissal of a suit under rule 37. The court, per Judge Garwood, reaffirmed the due process factors described by Judge Jolly in *Batson I*.²¹ Moreover, Judge Garwood added to those four factors²² a fifth, that in order to impose the sanction of dismissal a district court must make a clear record of litigant delay or "contumacious conduct."²³ In contrast with *Batson II*, the *Brinkmann* court said that its review of a district court dismissal "must be 'particularly scrupulous.'"²⁴ In reviewing the dismissal in *Brinkmann* at some length, the court tellingly noted that the plaintiff had received notice that continuing his discovery failure "would result in dismissal."²⁵

By contrast, in *News-Texan*, the same panel of the court of appeals fol-

15. *Id.* at 551.

16. *Id.* at 550-51.

17. *Id.* at 551.

18. *Id.*

19. 813 F.2d 744 (5th Cir. 1987).

20. 814 F.2d 216 (5th Cir. 1987).

21. 765 F.2d 511 (5th Cir. 1985).

22. See *supra* text accompanying note 5.

23. 813 F.2d at 749.

24. *Id.* (quoting *Emerick v. Fenick Indus., Inc.*, 539 F.2d 1379, 1381 (5th Cir. 1976)).

25. *Id.* at 750 (emphasis in original).

lowed an inherent power model where the issue of sanctions arose not under rule 37 but under rule 11²⁶ and under section 1447(c)²⁷ of the removal provisions. The district court had held that the removal of a case from state to federal court by the city of Garland, Texas, was improvident.²⁸ The district court had declined to award costs, however, because it did not find that the city of Garland had acted in "bad faith."²⁹ The court of appeals, again per Judge Garwood, held that neither rule 11 nor section 1447(c) textually requires "bad faith,"³⁰ and impliedly refused to do what it did under rule 37 in *Brinkmann*, namely, read the text in light of due process principles and policies.

While the city of Garland maintained that it had filed its removal petition on a theory of law that was at the "frontier of the law,"³¹ the court of appeals said that Garland's frontier was a "far frontier,"³² unwarranted by an objective view of existing law or a good faith extension thereof. The court made no mention of such due process factors as notice, confusion, misunderstanding, or contumaciousness, although it hinted that there was prejudice as a result of the delay caused by removal. The absence of such factors is troublesome, of course, because not just costs but attorney's fees are available under rule 11.³³

It might be argued that the distinction between *Brinkmann* and *News-Texan* is a distinction between the sanction of dismissal and the sanction of costs and fees. When the sanction includes attorney's fees that may quickly reach tens of thousands of dollars, however, the distinction breaks down. Tens of thousands of dollars in many cases overwhelms the amount at stake in a plaintiff's case and becomes in effect a dismissal. Moreover, the mere possibility of such an award is so onerous for some plaintiffs that it becomes the *potential* case's death-knell just as assuredly as is a dismissal of a filed case.

A final example of district court sanctions is *Thomas v. Capital Security Services, Inc.*³⁴ *Thomas* is a rule 11 case in which the court of appeals en banc, per Judge Johnson, in part followed a due process model, but in important respects followed an inherent power model. To the observer, these conflicting models in *Thomas* are a sign of compromise in writing the en banc opinion.

In *Thomas*, the due process model is apparent in a holding that an attorney's duties under rule 11 arise at fixed times rather than at all times; that is,

26. FED. R. CIV. P. 11 ("[i]f a pleading, motion, or other paper is signed in violation of this rule, the court . . . shall impose . . . an appropriate sanction").

27. 28 U.S.C. § 1447(c) (1982) ("[i]f . . . it appears that the case was removed improvidently and without jurisdiction, the district court . . . may order the payment of just costs").

28. 814 F.2d at 217.

29. *Id.* at 220.

30. *Id.*

31. *Id.* at 217.

32. *Id.*

33. FED. R. CIV. P. 11 ("sanction . . . may include . . . expenses incurred . . . , including a reasonable attorney's fee").

34. 836 F.2d 866 (5th Cir. 1988).

the court held that it is fair to require a reasonable investigation when an attorney signs a paper, but that it is not fair to require that an attorney constantly re-evaluate his or her case with each new fact or decision brought to the attorney's attention.³⁵ The due process model is apparent also in a holding that it is incumbent upon an aggrieved party to notify an adversary of a possible rule 11 violation at a time close to the offending conduct; it is not fair to wait and run up exorbitant fees and costs.³⁶ A district court too is required to notify a party that the court may impose rule 11 sanctions at the end of the case.³⁷ The due process model is apparent in the court of appeals' holding that a district court is required to impose the least drastic sanction adequate to deter future violations.³⁸

The inherent power model is also apparent in important respects. The court of appeals held that it would not require that district courts make findings of fact and conclusions of law in each case of a violation; rather, it held that the rigor of the district court's explication would depend upon "the amount, type, and effect of the sanction applied."³⁹ A due process model would recognize that every sanction, even the least burdensome, affects the reputation of a practitioner. Were due process the guide, a court would make detailed findings and conclusions before a reputation could be tarnished. Absent compulsion by statute or rule, however, an inherent power court considers that it has the inherent authority to ameliorate the burden that would be imposed on a district court were it required in each case to write a page or two of explication.

The inherent power model is apparent too in *Thomas's* overruling⁴⁰ of *Robinson v. National Cash Register Co.*⁴¹ In *Robinson*, the court held that a district court's findings of fact to support a rule 11 sanction are reviewed under the clearly erroneous standard; a district court's legal conclusion that a particular set of facts constitutes a rule 11 violation is reviewed de novo; and a district court's sanction, its amount and type, are reviewed under an abuse of discretion standard.⁴² Although the court's three-part holding was in accord with traditional standards of review, the *Thomas* court held that findings of fact, conclusions of law, and applications of law to fact would each be reviewed under an abuse of discretion standard.⁴³ Exercising its inherent authority, the *Thomas* court believed that the traditional division of responsibility imposed too much work upon the court of appeals itself.⁴⁴

In addition to relieving district courts of work, these holdings also give much discretion (read, "power") to the district courts. A district court that need not explain its decisions in detailed findings of fact and conclusions of

35. *Id.* at 873-76.

36. *Id.* at 879-81.

37. *Id.* at 881.

38. *Id.* at 878.

39. *Id.* at 883.

40. *Id.* at 872.

41. 808 F.2d 1119 (5th Cir. 1987).

42. *Id.* at 1126.

43. 836 F.2d at 871-73.

44. *Id.* at 883.

law, and a district court that is reviewed under an abuse of discretion standard only, is powerful indeed. Furthermore, these holdings deter litigants from bringing novel claims to district courts. Fewer lawsuits mean, of course, less work for district courts and the court of appeals.

B. Sanctions Imposed by the Court of Appeals

The conflict between the due process and inherent power models is apparent also in the sanctions imposed by the court of appeals under sections 1915⁴⁵ and 1927⁴⁶ of title 28 and rule 38⁴⁷ of the Federal Rules of Appellate Procedure, especially the sanctions imposed upon *pro se* litigants.

In *Gabel v. Lynaugh*,⁴⁸ a panel of Judges Gee, Garwood, and Jones said, per curiam, that the court of appeals is concerned with the large number of frivolous *pro se* appeals, especially by prisoners.⁴⁹ According to *Gabel*, prisoners obtain complete or partial reversals in 7.62% of appeals, more than half the rate of all appeals, 14.3%.⁵⁰ With all due respect to the court, 7.62% is not a particularly poor reversal rate for litigants without counsel. Nonetheless, the perception that prisoners bring a large number of frivolous appeals is causing some conflict about how to sanction such appellants.

An appellate court following a due process model would, among other concerns, be concerned with notice—notice to a litigant that an appeal or other filing might be frivolous, notice that persistence may be sanctioned, and notice that the sanction may be of a certain range and consequence. In many cases, the court of appeals has indeed issued notices to *pro se* litigants that future frivolous filings will subject them to sanctions. Some of these have been lyrical, such as the warning to Tom Bush that he “has had his day in court, and night has fallen,”⁵¹ and to Lavoyd “Bill” Hardin that “[t]he appellate sponge is saturated.”⁵² But it is far from clear, such lyrics notwithstanding, that the court’s notices have made litigants understand which of their filings might be frivolous and what sanctions may follow.

In *Lay v. Anderson*,⁵³ for example, a panel of Judges Gee, Garwood, and Jones, per curiam, taxed costs on appeal of \$105 against a *pro se* prisoner under section 1915.⁵⁴ In so doing, the court emphasized that the prisoner had “filed at least a half dozen petitions for habeas corpus relief and several prisoner civil rights cases”⁵⁵ and that the merits of the current appeal were

45. 28 U.S.C. §§ 1915(d), (e) (1977) (“(d) The court . . . may dismiss the case . . . if satisfied that the action is frivolous or malicious. (e) Judgment may be rendered for costs at the conclusion of the suit or action . . .”).

46. 28 U.S.C. § 1927 (1982); see *supra* note 10.

47. FED. R. APP. P. 38 (“If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.”).

48. 835 F.2d 124 (5th Cir. 1988).

49. *Id.* at 125 & n.1.

50. *Id.* at 125 n.1.

51. *Bush v. United States*, No. 87-6168, slip op. at 2 (5th Cir. Mar. 10, 1988) (per curiam).

52. *Hardin v. McMaster*, No. 86-1914, slip op. at 3 (5th Cir. Apr. 1, 1987) (per curiam).

53. 837 F.2d 231 (5th Cir. 1988) (per curiam).

54. *Id.* at 232.

55. *Id.*

frivolous.⁵⁶ The court added that it had “expressly warned [the litigant] that his litigiousness must be controlled.”⁵⁷ Indeed, the same panel had previously warned Mr. Lay,⁵⁸ but that warning did not specify the rules and statutes under which sanctions may be issued and did not explain the range and consequence of the possible sanctions.⁵⁹

The court of appeals has been deferential with some litigants, as illustrated by *Mills v. Criminal District Court*.⁶⁰ In *Mills*, the court, per Judge Jolly, reversed a district court dismissal of a *pro se* section 1983⁶¹ complaint, and held that the complaint should have been dismissed without prejudice.⁶² The plaintiff had made conclusory allegations of a conspiracy, but the court of appeals held that he should have the chance to re-file with proper factual allegations.⁶³ The court notified the prisoner that if he simply re-filed, without giving additional facts, he might subject himself to rule 11 sanctions.⁶⁴ In another case on the same day and involving the same litigant, the court issued to Mr. Mills a similar decision with similar warnings.⁶⁵ It is doubtful, however, from a reading of the decisions that the litigant can understand the warnings, that, for example, he can understand the difference between conclusory and nonconclusory allegations.

In other cases, however, neither the court of appeals nor the district court appear to have given a *pro se* litigant any notice at all of the possibility of sanctions, and yet the court of appeals has imposed sanctions.⁶⁶ Moreover, the court of appeals has not been concerned with notice where a litigant is represented by counsel.⁶⁷ The best example of the latter is the court's imposition of attorney's fees upon the city of Garland in *News-Texan, Inc.*, despite the fact that the district court itself refused to enter such a sanction.⁶⁸

Perhaps the clearest examples of an inherent power model are not the cases imposing sanctions without notice, but the development by the court of new remedies against unwanted litigants. For example, in some cases of sanctions imposed upon a prisoner, prison officials have been ordered to

56. *Id.*

57. *Id.* at 233.

58. *Lay v. Butler*, No. 86-3587, slip op. at 2 (5th Cir. Dec. 31, 1987) (per curiam): “[R]ules and statutes authorizing sanction for frivolous and unmeritorious actions in the federal courts will be brought to bear on this unjustified litigiousness if it does not cease promptly.”

59. No. 86-3587 (Dec. 31, 1987).

60. 837 F.2d 677 (5th Cir. 1988).

61. 42 U.S.C. § 1983 (1982).

62. 837 F.2d at 679-80.

63. *Id.*

64. *Id.* n.2.

65. *Mills v. Vinh*, No. 87-2873, slip op. at 4 n.2 (5th Cir. Feb. 2, 1988) (per curiam).

66. *See, e.g., Simmons v. Poppell*, 837 F.2d 1243 (5th Cir. 1988); *Gabel v. Lynaugh*, 835 F.2d 124 (5th Cir. 1988). In these cases, the court impliedly held that the district court's finding of frivolousness provided ample warning.

67. *See, e.g., Coane v. West Houston Medical Center*, No. 87-2717, slip op. (5th Cir. Nov. 2, 1987); *News-Texan, Inc. v. Garland*, 814 F.2d 216 (5th Cir. 1987).

68. 814 F.2d at 221.

withdraw moneys from prisoners' trust accounts.⁶⁹ In other cases, prisoners have been warned that the courthouse doors will be shut;⁷⁰ and those doors have been shut.⁷¹ In *Lay v. Anderson*,⁷² for example, the court ordered that Lay may not appeal *in forma pauperis* until he pays \$105 in costs, unless the district court certifies that the appeal is in good faith.⁷³ In *Gill v. Texas*,⁷⁴ the court ordered the clerk not to accept any additional filings in an appeal.⁷⁵ The court of appeals has not relied upon any rule or statute for these sanctions, but has instead used its inherent power as a court.

Using its inherent power, the court of appeals has opted not to publish several dozen decisions imposing sanctions.⁷⁶ The court is sanctioning many litigants without letting the public know what it is doing. At times the sanctioning decision is published, but the prior notice or warning is neither published nor attached as an appendix. Regardless of whether nonpublication is within the court's inherent powers, the court of appeals should not, and cannot long, avoid public scrutiny of its imposition of sanctions. It should publish these decisions.⁷⁷

III. A MODEST PROPOSAL

Sanctions should be imposed for abusive conduct; I do not mean to suggest to the contrary. The perception in this country⁷⁸ and in others⁷⁹ is that abusive conduct is increasing and that appropriate remedies must be forthcoming. In this country, it is clear that the courts are resorting to their inherent power to develop new and appropriate remedies.⁸⁰ And I do not mean to suggest that the courts are without power.

But what I do suggest is that the imposition of a sanction often is a serious deprivation of property and liberty. For litigant and counsel alike, it might be a loss of money or of reputation. Legislatures should participate in deciding the general rules that govern the kind of sanctions imposed and the methods by which they are imposed upon litigants and counsel; and until legislatures act, courts should employ due process principles in developing

69. See, e.g., *Simmons v. Poppell*, 837 F.2d 1243, 1244 (5th Cir. 1988); *Gabel v. Lynaugh*, 835 F.2d 124, 125-26 (5th Cir. 1988).

70. See *Patterson v. Patterson*, 808 F.2d 357, 358 (5th Cir. 1986).

71. See *Stelly v. Commissioner*, 804 F.2d 871 (5th Cir. 1986); *Lonsdale v. Cagle*, No. 86-1592, slip op. at 8-9 (5th Cir. Apr. 21, 1987).

72. 837 F.2d 231 (5th Cir. 1988).

73. *Id.* at 232.

74. *Gill v. Texas*, No. 86-2834, slip op. (5th Cir. Dec. 22, 1987).

75. *Id.*, slip op. at 15.

76. See FIFTH CIR. R. 47.5.1 ("opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law").

77. For a synopsis of a number of these opinions, see the attached Appendix.

78. See Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013 (1988).

79. See Goldstein, *Reflections on the Possibilities and Problems of Accelerating the Civil Litigation Process*, 7 TEL AVIV U. STUDIES IN LAW 50 (1985-86).

80. See *Dondi Properties Corp. v. Commerce Sav. & Loan Ass'n*, 121 F.R.D. 284 (N.D. Tex. 1988) (en banc) (adopting Dallas Bar Association's "Guidelines of Professional Conduct").

sanctions. Due process principles are principles of fundamental fairness; they are principles of long acceptance and wide acceptability.

I would suggest the following modifications of practice in the Fifth Circuit to accord with due process principles.

A. *Aggrieved Party's Role*

An aggrieved party should in writing and with precision inform the other party of its asserted violation of a statute or rule within ten days of the asserted violation. If the violation is not cured within ten days after notice, the aggrieved party should move for a remedy, including a sanction, within another ten days. Failure to move for a remedy within this last ten-day period would waive sanctions.

B. *District Court's Role*

A district court should hold a hearing on the request for sanctions. In the case of complaints against lawyers, such defenses as inadvertence, confusion, and the need for expedition should be allowed despite the shift from a subjective to an objective standard under rule 11. In the case of complaints against nonlawyers under other provisions, additional defenses, such as lack of knowledge and lack of competence, should be allowed. Following the hearing the court should issue detailed findings of fact and conclusions of law.

In addition, everyone (and if not everyone, then at least *pro se* litigants) should get one free bite. The one free bite is the first notice, as imprecise as that notice might be. One free bite or not, however, a district court should give notice with precision to a sanctioned party or attorney whether an appeal or other finding may provoke further sanctions and what the range of penalties might be under such sanctions.

C. *Appellate Court's Role*

The court of appeals' review should follow the three-part structure of *Robinson v. National Cash Register Co.*⁸¹ Moreover, the court should *fully* explicate why the clearly erroneous and abuse of discretion standards are or are not satisfied. If the court believes that the appeal is sanctionable, it should then remand for a determination of whether the appellant had received precise notice of the frivolousness of an appeal, whether the appellant understood the notice, and what penalty is appropriate within the range previously indicated by the district court.

* * *

A due process model would fairly and accurately distinguish sanctionable conduct from nonsanctionable conduct. Moreover, such a fair and adequate process might well deter some of the satellite sanctions litigation that is unwarranted. In short, if the court of appeals continues to rely upon its inher-

81. 808 F.2d 1119 (5th Cir. 1987). For additional discussion of *Robinson's* structure for review, see *supra* text accompanying note 42.

ent power, it should temper the exercise of that power with due process fairness.

This is the fiftieth year of the Federal Rules of Civil Procedure. The rules were inspired by jurists and lawyers who wanted to open access to the federal courts in order to build confidence in the system of justice. By and large, these jurists and lawyers adopted principles and rules that modeled fairness. It would be an inapt celebration of the rules for the court of appeals to abandon the premise and promise of the rules by using its inherent power to limit access to the courts.

APPENDIX

1. *Johnson v. University of Houston*, No. 85-2812 (5th Cir. Jan. 6, 1987) (per curiam) (panel of Judges Clark, Garwood, and Hill) (sanction of \$500 against *pro se* appellant for frivolous appeal).
2. *United States v. Wooster*, No. 86-2292 (5th Cir. Jan. 27, 1987) (per curiam) (panel of Judges Politz, Williams, and Jones) (sanction of \$1,500 under rule 38).
3. *Johnson v. Stephens Buick-Opel, Inc.*, No. 86-1547 (5th Cir. Mar. 9, 1987) (per curiam) (panel of Judges Rubin, Randall, and Higginbotham) (sanction of attorney's fees, costs and expenses assessed "jointly and severally" against appellant party and counsel under 28 U.S.C. § 1927 and rule 38).
4. *Jackson v. Strauss Systems, Inc.*, No. 86-3671 (5th Cir. Mar. 27, 1987) (Garwood, J., opinion) (Judges Clark and Hill also on panel) (sanction of attorney's fees and costs assessed against counsel under 28 U.S.C. §§ 1912 & 1927, rule 11 and rule 38).
5. *Hardin v. McMaster*, No. 86-1914 (5th Cir. Apr. 1, 1987) (per curiam) (panel of Judges Politz, Williams, and Jones) (warning of possible sanctions for filing of further frivolous appeals).
6. *Anderson v. Baylor Medical Center*, No. 86-1580 (5th Cir. Apr. 8, 1987) (Higginbotham, J., opinion) (Judges Rubin and Randall also on panel) (affirming district court sanction of \$700 under 42 U.S.C. § 1988; assessment of double costs of appeal against counsel under rule 38).
7. *Chitta v. Nueces County*, No. 86-2856 (5th Cir. Apr. 10, 1987) (per curiam) (panel of Judges Clark, Politz, and Higginbotham) (refusing to impose sanctions against *pro se* appellant).
8. *Lonsdale v. Cagle*, No. 86-1592 (5th Cir. Apr. 21, 1987) (per curiam) (panel of Judges Clark, Garwood, and Hill) (sanctions of \$2,000 assessed against each of two appellants plus double costs of appeal and prohibition of any tax-related appeals until sanctions paid and prior judgments satisfied).
9. *Benoit v. City Police Dep't*, No. 87-403 (5th Cir. July 24, 1987) (per curiam) (panel of Judges Politz, Johnson, and Higginbotham) (admonishing counsel, but declining to impose sanctions for frivolous appeal).
10. *Lyons v. Town of Chatham*, No. 86-4844 (5th Cir. Aug. 14, 1987) (per curiam) (panel of Judges Gee, Rubin, and Hill) (affirming district court sanctions imposed under rule 11; assessing double costs of appeal under rule 38).
11. *Butler v. Abilene Veterinary Clinic*, No. 87-1389 (5th Cir. Sept. 2, 1987) (per curiam) (panel of Judges Williams, Jolly, and Higginbotham) (assessing double costs for frivolous appeal).
12. *McDonald v. Delta Air Lines, Inc.*, No. 87-3240 (5th Cir. Sept. 11, 1987) (Reavley, J., opinion) (Judges Randall and Jolly also on panel) (affirming district court sanctions under rule 11; assessing double costs of appeal under rule 38).

13. *Evans v. Hathaway*, No. 87-4517 (5th Cir. Oct. 2, 1987) (per curiam) (panel of Judges Politz, Johnson, and Higginbotham) (assessing double costs of appeals against *pro se* appellant under rule 38; warning of further sanctions if frivolous appeals continue).
14. *Hickson v. Crawford*, No. 87-2874 (5th Cir. Oct. 22, 1987) (per curiam) (panel of Judges Gee, Garwood, and Jones) (assessment of \$10 in costs under 28 U.S.C. § 1927 to be taken from prisoner's trust fund).
15. *Nichols v. Wright*, No. 87-1436 (5th Cir. Oct. 26, 1987) (per curiam) (panel of Judges Gee, Garwood, and Jones) (assessing double costs and \$1,000 (\$250 to be paid to each of four appellees) under rule 38).
16. *Hardin v. United States*, No. 87-1571 (5th Cir. Oct. 30, 1987) (per curiam) (panel of Judges Gee, Garwood, and Jones) (sanction of double costs).
17. *Coane v. West Houston Medical Center*, No. 87-2717 (5th Cir. Nov. 2, 1987) (Reavley, J., opinion) (Judges Garwood and Jolly also on panel) (affirming district court's denial of rule 11 sanctions against plaintiff-appellant).
18. *Gill v. Texas*, No. 86-2834 (5th Cir. Dec. 22, 1987) (Garwood, J., opinion) (Judges Gee and Jones also on panel) (assessing costs, expenses, and attorney's fees for frivolous appeal and unreasonable and vexatious multiplying of proceedings; prohibiting further motions in matter including motions or rehearing).
19. *Lay v. Butler*, No. 86-3587 (5th Cir. Dec. 31, 1987) (per curiam) (panel of Judges Gee, Garwood, and Jones) (warning of sanctions for future frivolous actions).
20. *Easley v. Speers*, No. 87-6076 (5th Cir. Jan. 28, 1988) (per curiam) (panel of Judges Gee, Garwood, and Jones) (warning of possible sanctions if litigation continues).
21. *Mills v. Vinn*, No. 87-2873 (5th Cir. Feb. 2, 1988) (per curiam) (panel of Judges Reavley, King, and Jolly) (reversing rule 11 sanction of \$25, but warning of possible sanctions for future "useless motions and civil claims").
22. *Johnson v. Moore*, No. 87-2810 (5th Cir. Feb. 4, 1988) (per curiam) (panel of Judges Clark, Williams, and Davis) (warning of possible future sanctions).
23. *Eversley v. MBank Dallas*, No. 87-1796 (5th Cir. Mar. 3, 1988) (Garwood, J., opinion) (Judges Gee and Jones also on panel) (declining to impose rule 38 sanctions because appeal not frivolous, but assessing ordinary costs against appellant and losing party).
24. *Lemons v. Myers*, No. 87-2689 (5th Cir. Mar. 3, 1988) (per curiam) (panel of Judges Gee, Garwood, and Jones) (warning of possible monetary sanctions or revocation of pauper status for future frivolous appeals).
25. *Stephenson & Thompson, P.C. v. Dayton Indep. School Dist.*, No. 87-2756 (5th Cir. Mar. 3, 1988) (per curiam) (panel of Circuit Judges Rubin and Politz and District Judge Lee) (affirming district court's as-

assessment of rule 11 sanctions; assessing double costs of appeal under rule 38).

26. *Hot Boudin Co. v. Harrison Price Co.*, No. 87-3753 (5th Cir. Mar. 8, 1988) (per curiam) (panel of Judges Clark, Williams, and Davis) (declining to assess sanctions despite prior warning to appellant).
27. *Jones v. Jones*, No. 87-6150 (5th Cir. Mar. 8, 1988) (per curiam) (panel of Judges Clark, Williams, and Davis) (declining to assess sanctions because appellant was *pro se* prisoner).
28. *Bush v. United States*, No. 86-6168 (5th Cir. Mar. 10, 1988) (per curiam) (panel of Judges Gee, Garwood, and Jones) (warning of financial sanctions if appellant continues to pursue case).
29. *Taylor v. Bunge Corp.*, No. 87-3768 (5th Cir. Mar. 23, 1988) (per curiam) (panel of Judges Reavley, King, and Jolly) (affirming district court's sanctions of attorney's fees and costs under rule 11; assessing sanction of attorney's fees and costs under 28 U.S.C. § 1927).
30. *Chandler v. Brister*, No. 88-1134 (5th Cir. June 1, 1988) (per curiam) (panel of Judges Clark, Williams, and Davis) (warning of rule 11 and rule 38 sanctions if appellant continues "to pursue groundless federal claims"; declining to assess sanctions upon *pro se* appellant).
31. *Thomas v. Woods*, No. 88-2227 (5th Cir. June 1, 1988) (per curiam) (panel of Clark, Williams, and Davis) (warning against further frivolous suits and appeals).
32. *Thomas v. Riley*, No. 88-2431 (5th Cir. June 29, 1988) (Politz, J., opinion) (Judges Johnson and Higginbotham also on panel) (affirming rule 11 sanctions imposed by district court; holding that no warning necessary before imposing sanctions in case because of large number of frivolous filings of same type) ("In such a setting . . . warning has no meaning and is not a requisite to the imposition of sanctions.")
33. *Corbit v. Clade*, No. 88-1458 (5th Cir. Aug. 10, 1988) (per curiam) (panel of Judges Gee, Rubin, and Politz) (consolidating and dismissing four cases brought by plaintiff; warning of rule 38 sanctions if plaintiff continues to prosecute suits).
34. *United States v. Landes*, No. 87-5619 (5th Cir. Aug. 1, 1988) (per curiam) (panel of Judges Reavley, Johnson, and Jones) (warning of rule 11 and rule 38 sanctions if appellant continues to press rejected theory of law).
35. *Cargill, Inc. v. M/V Bedford*, No. 87-3907 (5th Cir. Aug. 31, 1988) (Rubin, J., opinion) (Judges Garwood and Davis also on panel) (rule 38 sanction of attorney fees and costs for frivolous portion of appeal).
36. *Williams v. Lynaugh*, No. 88-1469 (5th Cir. Sept. 8, 1988) (per curiam) (panel of Judges Williams, Garwood, and Higginbotham) (warning of rule 38 sanctions for future appeals and suits).
37. *Warren v. Bergeron*, No. 88-4033 (5th Cir. Sept. 7, 1988) (per curiam) (panel of Judges Gee, Williams, and Higginbotham) (assessing sanction of \$500 against counsel under rule 39 and § 1927 for appealing magistrate's order "to comply with existing rules of courtroom decorum").
38. *Hamilton v. Stovall*, No. 87-6152 (5th Cir. Oct. 3, 1988) (per curiam)

- (panel of Judges Politz, King, and Smith) (assessing double costs under rule 38).
39. *United States v. Ortloff*, No. 88-1645 (5th Cir. Oct. 5, 1988) (per curiam) (panel of Judges King, Garwood, and Smith) (warning of possible future sanctions under rule 11 and rule 38).
 40. *Gulf Water Benefaction Co. v. Public Util. Comm'n*, No. 87-6059 (5th Cir. Nov. 2, 1988) (Garwood, J., opinion) (Judges Rubin and Davis also on panel) (affirming dismissal of suit under rule 41(b) as within "court's inherent powers"; assessing sanction of costs, expenses, and attorney fees against appellant under rule 38; holding appellant's attorney jointly and severally liable for sanctions under § 1927 for "malice, stupidity, or gross negligence").
 41. *Minton v. Key Serve Group*, No. 88-2936 (5th Cir. Nov. 2, 1988) (per curiam) (panel of Judges Johnson, Davis, and Jones) (warning of future rule 11 and rule 38 sanctions).
 42. *Benson v. Ally*, No. 88-4672 (5th Cir. Nov. 2, 1988) (per curiam) (panel of Judges Johnson and Jones) (warning of future rule 11 and rule 38 sanctions).
 43. *Szumigal v. Nationwide Mut. Ins. Co.*, No. 88-4313 (5th Cir. Nov. 4, 1988) (per curiam) (panel of Judges Rubin, Garwood, and Davis) (admonishing counsel, but declining to assess sanctions).
 44. *Fagone v. Parish of W. Carroll*, No. 88-4139 (5th Cir. Nov. 14, 1988) (Rubin, J., opinion) (Judges Garwood and Davis also on panel) (assessing sanction of double costs for "unrelenting desire to pursue a claim without arguable merit").
 45. *Corbit v. Crow*, No. 88-1451 (5th Cir. Nov. 17, 1988) (per curiam) (panel of Judges Rubin, Garwood, and Davis) (dismissing six appeals and noting prior warning of future sanctions (see item 33 above); vacating authorization to proceed *in forma pauperis* and directing payment of appellate costs; imposing filing restraint against new appeals until sanctions paid and prior judgments satisfied).
 46. *Pringle v. Bournias*, No. 87-1834 (5th Cir. Nov. 18, 1988) (Smith, J., opinion) (Judges Politz and King also on panel) (affirming district court's rule 16(f) sanctions of \$250 and attorney's fees assessed against one defendant; remanding rule 11 sanctions totalling \$40,000 assessed, jointly and severally, against eight defendants and two attorneys (two defendants and one attorney did not appeal; the appealing attorney was also assessed the rule 16(f) sanctions, but appealed only the rule 11 sanctions)). The panel found rule 11 sanctions were appropriate, but remanded "for a statement of reasons justifying the large amount of sanctions imposed." The panel then imposed a sanction of attorney fees under rule 38 and § 1927 against appellants.
 47. *Waters v. Commissioner*, No. 88-4434 (5th Cir. Nov. 22, 1988) (per curiam) (panel of Judges Politz, King, and Smith) (affirming sanction of \$5,000 assessed by Tax Court under Internal Revenue Code § 6673 for frivolous arguments; assessing sanction of \$1,500 under rule 38 and Internal Revenue Code § 7482(c)(4) for frivolous appeal).

48. *Adams, Kleemier, Hagan, Hannah & Fouts v. Namr*, No. 88-3379 (5th Cir. Nov. 28, 1988) (Gee, J., opinion) (Judges Williams and Higginbotham also on panel) (assessing sanction of attorney fees and double costs under rule 38 against defendant-appellant).
49. *United Mkts. Int'l, Inc. v. O'Baid*, No. 88-2721 (5th Cir. Dec. 2, 1988) (per curiam) (panel of Judges Rubin, Reavley, and Jones) (warning of future rule 38 and § 1927 sanctions).
50. *Landry v. McClanahan*, No. 88-4599 (5th Cir. Dec. 7, 1988) (order of Rubin, J.) (denying "garbled and confusing" motion related to appeal of rule 11 sanctions; warning that appellant should consider voluntarily dismissing appeal to avoid rule 38 sanctions).
51. *Thomas v. Wilson*, No. 88-2709 (5th Cir. Dec. 23, 1988) (Davis, J., opinion) (Judges Rubin and Garwood also on panel) (affirming district court sanction of \$50; warning of future rule 38 sanctions; declining to impose sanctions "[t]o avoid heaping coals on Thomas' head.")

