Interlocutory Appeal of Attorney Sanctions: In Search of a Standard

In the last decade, a dramatic increase in the number of monetary sanction orders imposed against an attorney of record for misconduct in the litigation process has occurred.[1] Coupled with this increase is a rise in the number of appeals by attorneys who question the appropriateness of such sanctions.[2] These appeals have generated a sharp split among the circuit courts as to whether the appeal should be heard immediately or whether the attorney must await conclusion of the principal case before the appeal may be heard. Conflicting principles attendant to the resolution of this issue have left the search for a common standard unfulfilled.[3]

In order for federal appellate jurisdiction to exist, the appeal must come from a final order of the trial court or fall within a limited number of legislative and judge-made exceptions. The interlocutory appeal of attorney sanction orders presents a conflict between the principles underlying the final judgment rule and one of the exceptions to the rule, the collateral order doctrine. Furthermore, this conflict is cast in the shadow of the sanction provision's objective. Monetary sanctions can be imposed pursuant to a variety of legislative provisions.[4] However,

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1. For a discussion of the philosophical implications of the necessity for sanctions, their impact on the proliferation of requests for sanctions, and the increasing use of appellate courts to contest such sanctions, see Fred Woods, *Sanctions — Stepchild or Natural Heir to Trial and Appellate Court Delay Reduction*, 17 PEPP. L. REV. 665, 674-78 (1990).

2. *Id.* at 665 & n.2.

3. The sanction orders examined in this Note must be factually distinguished from those orders which award but have yet to quantify attorneys fees, Jensen Elec. v. Moore, Caldwell, Rowland & Dodd, Inc., 873 F.2d 1327 (9th Cir. 1989) (an order imposing monetary sanctions without setting an amount is not a final or appealable order), sanctions imposed jointly against the attorney and his client, Thomas E. Hoar, Inc. v. Sara Lee Corp., 882 F.2d 682 (2d Cir. 1989) (the joint obligations of the sanction will certainly affect attorney-client relations due to the allocation of financial burden, and the order must therefore be permitted an immediate appeal), sanction orders against an attorney who has withdrawn from the case, Markwell v. County of Bexar, 878 F.2d 899 (5th Cir. 1989) (an order assessing sanctions against an attorney who has withdrawn from representation will not impede the progress of the underlying litigation and is therefore immediately appealable), and nonmonetary sanctions.

4. Federal Rules of Civil Procedure 11, 16(f), 26(g), and 37 as well as 28 U.S.C. §§ 1912 and 1927 are aimed at curtailing litigation misconduct. Rules 38 and 46(c) serve as sanction provisions for misconduct at the appellate level. Furthermore, a vast array of federal rules and statutes provide penalties for specific types of violations and proceedings. *See, e.g.*, 26 U.S.C. § 6673 (1988 & Supp. I 1989); FED. R. CIV. P. 30(g)(2), 41(b)-(d), 55; SUP. CT. R. 49.2; TAX CT. RULE 33(b).

the underlying purpose of the sanction provision may differ. Possible purposes for these sanctions include deterrence, compensation, and punishment. Although the procedural safeguards necessary to accomplish the underlying purpose may vary, courts have traditionally made little distinction among the available sanction orders when addressing the issue of appealability.

The central purpose of the finality rule is to avoid piecemeal litigation. Similarly, specific sanction provisions are available to punish an attorney who has delayed litigation proceedings. Alternatively, the collateral order doctrine serves to protect the due process rights of an individual whose access to the judicial system is prejudiced by a delay in appeal. With respect to a sanctioned attorney, this concern is the effective opportunity to be heard. With respect to the client, this concern is the right to fair representation, unbiased by conflicts of interest created by the court. Thus, the issue of appealability must attempt to reconcile these competing considerations.

Attempting to determine the scope of the general finality rule and its exceptions as to the appealability of attorney sanctions, courts have placed considerable emphasis on the attorney's status as a nonparty versus a party to the principal litigation. This distinction has been made predominantly in the context of the attorney's ability to effectively challenge the sanction order without a loss of his due process rights. Although compelling arguments exist pro and con in regard to interlocutory appealability of attorney sanctions, the traditional test of the collateral order doctrine cannot adequately support the development of one standard to be applied under all facts and circumstances.

Procedural devices, either statutory or judge-made, can be developed to assure that the order is effectively reviewable after a final judgment on the principal case. Accordingly, this Note's proposed alternative supports a shift in emphasis from vindication of the attorney's due process rights to the due process rights of the attorney's client. To achieve a workable approach for assuring protection of the client's due process rights, this Note recommends a flexible, balancing approach in which the threat of due process impairment is weighed against the good faith/bad faith objective of counsel underlying the conduct for which he or she was sanctioned.

Part I discusses the statutory rule of finality and exceptions to the rule as possible routes to appellate jurisdiction. In particular, the collateral order doctrine is examined as the dominant theory upon which the interlocutory appeal of attorney sanction orders are decided. Part II analyzes the underlying concerns represented by the rules of appealability and by the various sanction provisions available to serve as a check on attorney conduct. Part III offers alternatives to balance the competing concerns of appealability and the sanction provisions, while striving to achieve a unitary standard in application.

I. The Rule of Appealability

Federal appellate jurisdiction is conferred by 28 U.S.C. § 1291 over all final decisions of the U.S. District Courts.[5] An order is final when it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."[6] However, the requirement of finality is to be given a practical, rather than technical meaning.[7] Accordingly, a number of exceptions to the general finality rule have developed. Statutory exceptions are provided for certification of a partial judgment,[8] certification of a question of law,[9] and writs of mandamus.[10]

In *Cohen v. Beneficial Industrial Loan Corp.*,[11] the Court created the "collateral order" exception to the final decision requirement of section 1291.[12] This exception protects the small class of rights which are "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."[13] To be appealable under the collateral order doctrine, an order "must [1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment."[14]

An attorney sanction is generally held to represent a nonfinal order and is thus not appealable pursuant to section 1291.[15] Accordingly, the interlocutory appeal of a sanction order overcomes the jurisdictional barrier only if it falls within one of the limited exceptions to the finality rule. Because the available statutory exceptions are inapplicable to attorney sanctions,[16] the controversy surrounding the appeal of attorney

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5. 28 U.S.C. § 1291 (1988).

6. Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 373-75 (1981); Coopers & Lybrand v. Livesay, 437 U.S. 463, 467 (1978) (quoting Catlin v. United States, 324 U.S. 229, 233 (1945)).

7. *Firestone*, 449 U.S. at 375.

8. Fed. R. Civ. P. 54(b).

9. 28 U.S.C. § 1292 (1988).

10. *Id.* § 1651.

11. 337 U.S. 541 (1949).

12. *See id.* at 546-47.

13. *Id.* at 546.

14. Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978) (citations omitted).

15. *See, e.g.*, G.J.B. & Assoc., Inc. v. Singleton, 913 F.2d 824, 827 (10th Cir. 1990); DeSisto College, Inc. v. Line, 888 F.2d 755, 761-62 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 2219 (1990); *In re* Licht & Semonoff, 796 F.2d 564, 569-70 (1st Cir. 1986); Frazier v. Cast, 771 F.2d 259, 261 (7th Cir. 1985). *But see* Optyl Eyewear Fashion Int'l v. Style Cos., 760 F.2d 1045, 1047 n.1 (9th Cir. 1985) (the court stated that a sanction order against a nonparty attorney is final and immediately appealable, but contradicted itself by citing the collateral order doctrine, which applies only to nonfinal orders as the basis for appellate jurisdiction).

16. *See G.J.B. & Assoc.*, 913 F.2d at 827 n.4.

sanctions rests in the judge-made exception to the collateral order doctrine.[17]

Application of the doctrine to attorney sanctions has generated a multitude of rationales both supporting and opposing the grant of an interlocutory appeal. Proponents of appealability argue that a sanction assessment is a conclusive determination not to be affected by the outcome of the case,[18] that denial of immediate review would place an attorney in an ethical quandary when considering settlement,[19] and that an order is not reviewable on appeal from a final judgment by a nonparty.[20] Conversely, opponents argue that permitting the appeal would allow attorneys to seek delay through voluntary creation and acceptance of sanctions.[21] Furthermore, the court might respond by refusing to sanction attorneys at all, thereby defeating the very purpose of the sanction itself.[22]

In *Cheng v. GAF Corp.*,[23] the court noted that "[t]he order of attorney's fees in this case is clearly a conclusive determination."[24] Distinguishing factually an earlier Second Circuit decision, the *Cheng* court relied on the fact that the sanction award was not subject to

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17. It has been argued that a writ of mandamus is the only appropriate avenue for the interlocutory appeal of a monetary sanction order against an attorney of record for discovery abuse. Nancy E. Berman, Note, *Monetary Sanctions Against Attorneys for Discovery Abuse in Federal Court: When Can They Be Appealed?*, 9 CARDOZO L. REV. 1021 (1988). However, "mandamus cannot be used to review the district court's exercise of discretion." Hinton v. Department of Justice, 844 F.2d 126, 132 (3d Cir. 1988). The decision to impose sanctions and what sanctions to impose are matters commonly within the discretion of the district court. Coca-Cola Bottling Co. v. Coca-Cola Co., 110 F.R.D. 363, 367 (D. Del. 1986). *Cf.* Eastway Constr. Corp. v. City of N.Y., 762 F.2d 243, 254 n.7 (2d Cir. 1985) (although imposition of Rule 11 sanction may be mandated, the type of sanction to be imposed is committed to the discretion of the district judge). Furthermore, the standard by which mandamus is to be utilized, as enunciated in Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943), is "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." Accordingly, the district court's exercise of its discretionary jurisdiction over sanction orders cannot be checked through the use of mandamus.

18. *See Frazier*, 771 F.2d at 262.

19. *See* Cheng v. GAF Corp., 713 F.2d 886, 889-90 (2d Cir. 1983) ("appellant's lawyer may be placed in an ethical dilemma; his view of any settlement proposal would almost certainly be colored by its handling of the attorneys' fee issue").

20. *See* DeSisto College, Inc. v. Line, 888 F.2d 755, 762 (11th Cir. 1989); Frazier v. Cast, 771 F.2d 258, 262 (7th Cir. 1985); *Cheng*, 713 F.2d at 890.

21. Eastern Maico Distribs. v. Maico-Fahrzeugfabrik, 658 F.2d 944, 949 (3d Cir. 1981).

22. *Id.*

23. 713 F.2d 886 (2d Cir. 1983).

24. *Id.* at 889.

adjustment in establishing its conclusive character.[25] Similarly, in *Ortho Pharmaceutical Corp. v. Sona Distributors*,[26] the court determined that an order conclusively settles the question when a sanction is subject to immediate payment.[27] *Ortho* involved sanctions imposed jointly against the attorney and his client. However, this distinction strengthens the proposition that a sanction imposed solely on an attorney is conclusive, because the attorney, unlike the client, lacks the same closeness in connection to the principal case's merits.

An inference may be drawn from *Cheng* and *Ortho* that an order is not a conclusive determination when the amount is subject to adjustment or when the amount is not immediately payable. Regardless, there has been little discussion or disagreement that a sanction order represents a "conclusive determination."[28]

Similarly, the second prong of the collateral order doctrine, limiting its application to collateral matters completely separate from the merits, has not proven to be an insurmountable obstacle. In *Cheng*, the court noted the lack of connection of the particular sanction order imposed with the merits of the underlying principal case.[29] Furthermore, the court stated that "fee questions are not inherently or necessarily subsumed by a decision on the merits."[30] In contrast, discovery sanctions represent a matter not completely collateral, because the propriety of such orders cannot be ascertained without a determination of the merits in the underlying action.[31]

The Seventh Circuit in *Frazier v. Cast*[32] employed a narrow approach in holding a fee award to be completely separate from the merits. Noting

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25. *Id.* (distinguishing Hastings v. Maine-Endwell Cent. Sch. Dist., 676 F.2d 893 (2d Cir. 1982)).

26. 847 F.2d 1512 (11th Cir. 1988).

27. *Id.* at 1515.

28. *See* DeSisto College, Inc. v. Line, 888 F.2d 756, 763 (11th Cir. 1989) (recognizing that a sanction order represents a final disposition regarding the propriety of the attorney's conduct); Frazier v. Cast, 771 F.2d 259, 262 (7th Cir. 1985) ("The assessment of $400 for plaintiff's attorney's fees was a conclusive determination."). *See also* G.J.B. & Assoc., Inc. v. Singleton, 913 F.2d 824 (10th Cir. 1990) (the court never addressed the conclusive character of the ruling); *In re* Licht & Semonoff, 796 F.2d 564, 573 (1st Cir. 1986) (after finding that the order failed the third prong of the collateral order doctrine, the court noted that it need not inquire into whether it represented a conclusive determination).

29. Cheng v. GAF Corp., 713 F.2d 886, 889 (2d Cir. 1983). The *Cheng* court further argued that the sanction could be appealed without delaying the underlying litigation. *Id.* at 890. However, in practice, such appeals have an "inevitable delaying effect." Eastern Maico Distribs. v. Maico-Fahrzeugfabrik, 658 F.2d 944, 949 (3d. Cir. 1981).

30. *Cheng*, 713 F.2d at 889 (quoting White v. New Hampshire Dept. of Employment Sec., 455 U.S. 445, 451 n.13 (1982)).

31. *Eastern Maico Distribs.*, 658 F.2d at 947.

32. 771 F.2d 259 (7th Cir. 1985).

that the standard for imposing Rule 11 sanctions is based upon the facts known to the attorney at the point in time at which he acted, the *Frazier* court concluded that the success of an appeal cannot be affected by the outcome of the principal case, whether favorable or not to the client.[33] In essence, the sanction is thus collateral to and separate from the merits not only because the principal case cannot be affected by the outcome of the sanction appeal, but also because the sanction appeal cannot be affected by the outcome of the principal case. These cases demonstrate the importance of the specific sanction provision utilized as well as the particular facts involved when addressing the issue of appealability. Unfortunately, many courts fail to make this distinction.[34]

The third prong of the collateral order doctrine, that the order must be effectively unreviewable on appeal from a final judgment, commands considerable attention among the circuit courts. The First Circuit emphasized the third factor as the "central focus" and possibly even the "dispositive criterion" in deciding the interlocutory appeal issue.[35] Even when a court denies the interlocutory appeal of an attorney sanction order on the policies underlying procedural rules, the holding is usually phrased in terms of the case's inability to satisfy the "effective unreviewability" prong of the collateral order doctrine.[36] As will be seen, the arguments surrounding the appealability issue focus on the rights which this prong of the test seek to protect.

In deciding the issue of appealability, the circuit court decisions fall into the framework of two predominant considerations. First, the objective of the finality rule, to avoid piecemeal litigation[37] and the objective of the particular sanction employed is frustrated.[38] For purposes of analyzing the appealability of attorney sanctions, this will be termed the good faith/bad faith consideration. Second, a sanctioned attorney has the right to be heard and his client has the right to fair representation,

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33. *Id.* at 262. *See also* Cooter & Gell v. Hartmarx Corp., 110 S. Ct. 2447, 2456 (1990) (although not decided in the context of an interlocutory appeal, the Court noted that "a Rule 11 sanction is not a judgment on the merits of an action. Rather, it requires a determination of a collateral issue").

34. *See infra* notes 84-85 and accompanying text.

35. *In re* Licht & Semonoff, 796 F.2d 564, 571 (1st Cir. 1986).

36. *See, e.g.*, G.J.B. & Assoc., Inc. v. Singleton, 913 F.2d 824, 829 (10th Cir. 1990).

37. *See Licht*, 796 F.2d at 569 ("The purpose of the § 1291 requirement limiting appellate review to final decisions is to avoid piecemeal litigation, promote judicial efficiency, reduce the cost of litigation, and eliminate the delays caused by interlocutory appeal.").

38. *See, e.g.*, Eastern Maico Distribs., Inc. v. Maico-Fahrzeugfabrik, 658 F.2d 944, 948-49 (3rd Cir. 1981) (immediate appeal would undermine the purpose of Rule 37(a)(4) to deter litigation delay).

free of unfavorable prejudice imposed by actions of the court. This will be termed the due process consideration.

The cases demonstrate that the three-pronged test of the collateral order doctrine cannot adequately rationalize the conflicting considerations under all facts and circumstances. However, the search for a standard by which to administer precedent has led the majority of federal circuit courts to adopt a stance either allowing or denying the immediate appeal of sanctions imposed on the current attorney of record.[39] A danger is created by applying a set standard to circumstances which do not support the rationale used to establish that standard.

In an attempt to establish the standard, courts consistently draw upon the party versus nonparty distinction to aid in their determination.[40] Such a distinction does not, however, prove conclusive. This is illustrated by decisions which hold that a nonparty cannot effectively obtain review after final judgment as well as decisions which adhere to the rule that only a party can appeal from a final judgment.[41] Additionally, attempts to overcome compelling party/nonparty arguments highlight the struggle between stances which the appealability issue presents. For example, one court found that an attorney's interests are so closely tied to those of the client's that he or she should not be termed a nonparty.[42]

In an effort to establish some certainty, the emphasis placed on the party/nonparty distinction often leads to adoption of a rule which may, when applied as precedent, prove inequitable under certain circumstances. The search for a standard which demonstrates consistency in application among the circuits continues.

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39. *See infra* notes 43-44 and accompanying text.

40. *See* G.J.B. & Assoc., Inc. v. Singleton, 913 F.2d 824, 828 (10th Cir. 1990) (holding that "a district court's sanction order defaulting some but not all the parties to the lawsuit was not appealable until termination of the entire matter. 'Attorneys and parties . . . must bear the burden of sanctions to the conclusion of the case and appeal on the merits of the fully adjudicated case. . . .'"); DeSisto College, Inc. v. Line, 888 F.2d 755, 762 (11th Cir. 1989) ("sanction orders are immediately appealable when the sanction was against 'a non-party'"); *In re* Licht & Semonoff, 796 F.2d at 568, 572 (1st Cir. 1986) (stating that "appellate jurisdiction . . . turns on whether the appellant is a party, nonparty, or attorney and expressly disclaiming an opinion regarding appealability of sanctions against a nonparty or an attorney no longer litigating the case, indicating that counsel of record maintains a position between a party and nonparty which is significant to determination of appellate jurisdiction); Frazier v. Cast, 771 F.2d 259, 262 (7th Cir. 1985) (sanctions imposed against a nonparty must be appealable when entered because the order is not reviewable on appeal from a final judgment); Cheng v. GAF Corp., 713 F.2d 886, 890 (2d Cir. 1983) (citing lawyer's position as a nonparty as a reason for permitting immediate appeal); *Eastern Maico Distribs.*, 658 F.2d at 950 (holding that the sanction order was not immediately appealable, the court noted that "the congruence of interests here is so great that [the attorney's] status as a non-party is arguable").

41. *See infra* notes 43-44 and accompanying text.

42. *See Eastern Maico Distribs.*, 658 F.2d at 950.

II. The Circuit Court Considerations

Eight federal circuit courts of appeal have addressed whether current counsel of record may immediately appeal a monetary sanction order for misconduct. Four of these courts held that such orders are immediately appealable, although one circuit did so on the grounds that an attorney sanction is a final order.[43] The remaining four circuits held that an appeal cannot be heard until final judgment on the principal case.[44] The controversy represented by this split of authority is best exemplified by the effects which result from the opposite stances regarding appeal.

A. Due Process Considerations

Due process concerns influence whether to grant or deny the interlocutory appeal of a sanction order in two ways. A sanctioned attorney has the right to have his appeal heard in an effective and timely manner. Because only a party to that litigation has standing to appeal from a final judgment, the nonparty attorney must seek procedural alternatives for which definitive guidelines do not exist. Furthermore, even if the nonparty obstacle is overcome, the financial burdens which the attorney must bear may render a later appeal effectively unreviewable. It is the contention of this Note that any due process concerns of the sanctioned attorney are nearly eliminated through the use of procedural alternatives.

The client's right to have his case fairly presented raises a second due process concern. It is possible that the client's representation may be compromised due to the decision to deny counsel's immediate appeal of a sanction order. Such a situation exists where the attorney elects to shift the personal financial burden of the sanction at the expense of the client's representation.

When the circumstances of a particular case raise due process concerns of the client, the analysis of whether to grant or deny an interlocutory appeal of the sanction order must be taken further to examine

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43. DeSisto College, Inc. v. Line, 888 F.2d 755 (11th Cir. 1989); Frazier v. Cast, 771 F.2d 259 (7th Cir. 1985); Opty Eyewear Fashion Int'l, Co. v. Style Cos., 760 F.2d 1045 (9th Cir. 1985) (stating that a sanction order against a nonparty attorney is final and immediately appealable, but contradicted itself by citing the collateral order doctrine, which applies only to nonfinal orders); Cheng v. GAF Corp., 713 F.2d 886 (2d Cir. 1983). In addition to the foregoing, the Eighth Circuit stated, without discussion, that "Rule 11 sanctions against present counsel to a party are immediately appealable as a final decision under § 1291 and under the *Cohen* collateral order doctrine." Crookham v. Crookham, 914 F.2d 1027, 1029 n.4 (8th Cir. 1990) (citations omitted).

44. G.J.B. & Assoc., Inc. v. Singleton, 913 F.2d 824 (10th Cir. 1990); Click v. Abilene Nat'l Bank, 822 F.2d 544 (5th Cir. 1987); *In re* Licht & Semonoff, 796 F.2d 564 (1st Cir. 1986); Eastern Maico Distribs., Inc. v. Maico-Fahrzeugfabrik, 658 F.2d 944 (3d Cir. 1981).

the good faith/bad faith objective of the attorney's sanctioned conduct. However, if this due process concern is not presented, analysis should stop, because there is no further reason for granting an immediate appeal of the sanction.

1. *Attorney's Right To Have Sanction Appeal Heard.*—The statutory right to appeal from a judgment or order of a district court may ordinarily be exercised only by an aggrieved party losing below.[45] However, the procedural avenues available to one termed a nonparty are not so readily apparent. In *Frazier*, the court stated plainly that sanctions against a nonparty are not reviewable on appeal from a final judgment.[46] If the parties settle or the client decides not to appeal the final judgment, the attorney is precluded from appealing the sanction order.[47] Thus, in terms of the collateral order doctrine, the attorney's appeal is "effectively unreviewable" if delayed until conclusion of the principal litigation.

Preservation of the attorney's appeal, however, presents a procedural obstacle which can be avoided by a statutory or judge-made right of appeal. Indeed, other courts have recognized that there is "no reason why an attorney should not be allowed to appeal a sanction order when the main case is terminated without an appeal."[48] The judicial power to assure this equitable right of appeal was demonstrated in *G.J.B. & Assoc., Inc. v. Singleton*.[49] The *G.J.B.* court held that an attorney sanction is not immediately appealable under the collateral order doctrine.[50] Accordingly, an appeal prior to final judgment on the principal case must be dismissed as prematurely filed. However, the court recognized that a retroactive application would leave counsel remediless as the time for filing a new notice of appeal following the final judgment had passed.[51] The court concluded that the attorney's appeal must be heard in this case.[52]

A more realistic approach to the effective unreviewability prong of the collateral order doctrine requires that the "denial of an immediate appeal would make any effective review 'impossible', or would 'destroy'

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45. 2 RICHARD A. GIVENS, MANUAL OF FEDERAL PRACTICE § 8.1 (3d ed. 1987).

46. *Frazier*, 771 F.2d at 262.

47. *See id.*. *See also DeSisto*, 888 F.2d at 763; *Cheng*, 713 F.2d at 890.

48. *Licht*, 796 F.2d at 572. *See also* G.J.B. & Assoc., Inc. v. Singleton, 913 F.2d 824, 828 (10th Cir. 1990) (third party's interest in a fee determination makes him an aggrieved party whose property interest can only be protected by allowing appeal); *Click*, 822 F.2d at 545 (noting that Rule 11 sanctions are routinely appealed when merged in final judgment without addressing settlement situation or when sanctioned attorney represents successful litigant).

49. 913 F.2d 824.

50. *Id.* at 829.

51. *Id.* at 830.

52. *Id.*

the 'legal and practical value' of appellant's right to appeal."[53] Such circumstances have been used to grant an immediate appeal asserted on grounds that a serious liquidity problem may cause harm which is irreparable despite ultimate vindication with return of the funds at a later time.[54] Additionally, the precarious financial position of the sanctioned party may jeopardize recovery.[55] Several courts recognize the financial burden placed upon counsel as a factor impacting the effectiveness of a later appeal.[56] Once again, procedural tools may eliminate or lessen the effect of such circumstances.

The court could safeguard an attorney's financial stability by ordering the delay of payment until final judgment on the sanction order, the holding of funds in trust by the court, or the posting of a payment bond. Inevitably, risk of financial loss to one party must be weighed against the prejudice inflicted on the other. For example, although immediate payment of the sanction may pose a risk of loss to the attorney, prejudice may result by withholding funds from the awarded party. The awarded party must still meet the costs of defending against the litigation for which the sanction was awarded. Accordingly, the appropriateness of procedural tools to balance these conflicting interests should be left to the discretion of the trial judge. In exercising this discretion, factors such as the size of the monetary sanction and the financial condition of the litigants must be considered.

In summary, regardless of the particular tool utilized by the court, procedural alternatives to immediate appeal may be employed to assure the attorney's right to an effective review of a sanction order.

2. *Client's Right To Fair Representation.*—In contrast to the attorney, greater concern accompanies the due process implications flowing to the attorney's client. As noted, one argument supporting the immediate

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53. *In re* Licht & Semonoff, 796 F.2d 564, 571 (1st Cir. 1986) (citing Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 376-77 (1981)).

54. Ortho Pharmaceutical Corp. v. Sona Distribs., 847 F.2d 1512, 1517 (11th Cir. 1988) (sanctions imposed against attorney and client jointly are immediately appealable).

55. *Id.*

56. *See id.* ("the considerable size of the sanction and its immediate payability — also serve to bring the order in this case under the practical finality exception"). *See also* Riverhead Sav. Bank v. National Mortg. Equity Corp., 893 F.2d 1109 (9th Cir. 1990) (sanction order is effectively unreviewable if delayed until after final judgment when party receiving the award is in receivership); Rosenfeld v. United States, 859 F.2d 717 (9th Cir. 1988) (third prong of the collateral order doctrine is satisfied when there is a strong likelihood of insolvency); Palmer v. City of Chicago, 806 F.2d 1316, 1319 (7th Cir. 1986) ("the fees would disappear into insolvent hands" upon enforcement of the sanction award), *cert. denied*, 481 U.S. 1049 (1987); Diaz v. Southern Drilling Corp., 427 F.2d 1118 (5th Cir.) (immediate review necessary to protect funds which are jeopardized by the claims of an intervening party), *cert. denied*, 400 U.S. 878 (1970).

appeal is that the attorney would otherwise be placed in an ethical dilemma when considering settlement.[57] However, opponents argue that "the [attorney's] self interest in making the sanction part of the settlement is not a matter about which we should speculate. The [attorney's] ethical obligation is to [his] client's best interests."[58] Regardless of the attorney's ethical obligation, one must observe that he may not fulfill that obligation. Therefore, the court must examine the client's right to fair representation. The due process clause guarantees an aggrieved party the opportunity to present a case and have its merits fairly judged.[59] "The most basic consideration is whether the person . . . has been given an opportunity to be heard at a meaningful time and in a meaningful manner."[60] In essence, it is contended that by denying the appeal of an attorney sanction the court interferes with the attorney-client relationship by creating a conflict of interest.

Allocation between counsel and client of the financial burden accompanying a sanction order creates an "obvious" conflict of interest.[61] Though the specific prejudice may not be so clearly identifiable, a conflict of interest likewise exists when an attorney has the power to affect the personal financial burden which he must bear based upon the representation afforded his client. The Second Circuit in *Cheng v. GAF Corp.* stated that "[i]f the fee issue is linked to settlement negotiations . . . [the attorney's] view of any settlement proposal would almost certainly be colored by its handling of the attorney's fee issue."[62]

One response to such an allegation is to omit the sanction from the settlement and permit its appeal afterwards.[63] This response fails to recognize that the attorney's view of settlement could just as easily be colored by the mere fact that it *is* omitted from settlement. Another response offered to nullify any possible ethical dilemma is for the district court to exercise its discretionary power by revoking the sanction order so as to promote settlement.[64] How can this not be said to color counsel's view toward settlement? The attorney may advocate settlement in order

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57. *See supra* note 19.

58. *In re* Licht & Semonoff, 796 F.2d 564, 572 (1st Cir. 1986).

59. Logan v. Zimmerman Brush Co., 455 U.S. 422, 433 (1982).

60. Fleming v. U.S. Dep't of Agric., 713 F.2d 179, 183 (6th Cir. 1983) (citing Mathews v. Eldridge, 424 U.S. 319, 333 (1976)).

61. *See* White v. General Motors Corp., 908 F.2d 675, 685 (10th Cir. 1990). *See also* Calloway v. Marvel Entertainment Group, 854 F.2d 1452, 1473-74 (2d Cir. 1988) (client must be separately represented when both the lawyer and client are the subject of a sanction order due to the conflict of interest such a situation creates), *rev'd in part on other grounds*, 110 S. Ct. 456 (1989).

62. *Cheng v. GAF Corp.*, 713 F.2d 886, 889-90 (2d Cir. 1983).

63. *In re* Licht & Semonoff, 796 F.2d 564, 572 (1st Cir. 1986).

64. *Id.* at 573.

to relieve his own financial burden when settlement is not truly in the best interests of his or her client.

Finally, opponents of immediate appeal argue that the possible effect on the attorney-client relationship alone is not enough to make the order effectively unreviewable at a later time.[65] This argument squarely presents the problem against which a shift in the focus of due process considerations is recommended. It is the client's right to vigorous advocacy which should be emphasized and not the attorney's right to effective review. As previously discussed, the attorney's right to effective review is achievable by procedural alternatives.

If the client is unsuccessful in the principal litigation and feels slighted by counsel's inadequate representation, as induced by a sanction order, she may appeal her judgment. However, this may necessitate delay until her attorney's appeal is complete. For instance, if the sanction was imposed for a frivolous claim or defense under Federal Rule of Civil Procedure 11, dismissal of the claim or defense must necessarily precede or accompany the order because such a sanction represents a ruling on the merits.[66] The client must wait until her attorney is exonerated before appealing her case on the grounds of that claim or defense. In this respect, the goal to avoid piecemeal litigation is no better accomplished than if the sanction appeal was heard during the principal case. Furthermore, the client faces time constraints in which to appeal the judgment. Failure to appeal within that period renders her appeal unreviewable. Alternatively, if the principal litigation ends in settlement, the client lacks a remedy if it later appears that counsel provided inadequate representation due to the sanction. Although malpractice is a possibility, it may not represent a realistic one.[67]

Similar to the conflict of interest posed to the attorney pursuing settlement, the denial of immediate appeal of a sanction order may create a "chilling" effect with a resulting denial of the vigorous rep-

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65. G.J.B. & Assoc., Inc. v. Singleton, 913 F.2d 824, 829 (10th Cir. 1990).

66. Because "[t]he time when sanctions are to be imposed rests in the discretion of the trial judge," FED. R. CIV. P. 11 note (1983), a frivolous claim need not be sanctioned until the completion of the litigation. However, the attorney must be given notice that sanctions are contemplated. *In re* Yagman, 796 F.2d 1165, 1183-84 (9th Cir. 1986). Such notice alone may cause counsel to abandon an asserted claim. Alternatively, sanctions imposed at the end of the litigation do not confront the problem of finality which interlocutory orders face.

67. For a discussion concerning proof of damages in a malpractice action, see John H. Bauman, *Proving Damages for Legal Malpractice*, 25 TRIAL, July 1989, at 45. In order to prevail on the malpractice claim, the client may be required to prove through the use of a trial-within-a-trial the validity of such lost claim or defense. Furthermore, even if it can be shown that the attorney is guilty of a conflict of interest, there remains the difficulty of proving damages in excess of the settlement amount. *Id.*

resentation to which the client is entitled. Although the imposition of a sanction will always have a chilling effect to some degree, the totality of circumstances and the impact of the sanction proceedings on the attorney-client relationship are factors which the court should consider when fashioning a procedure to insure due process.

B. Good Faith/Bad Faith Considerations

Many courts recognize the importance of the good or bad faith of the offender in determining the appropriateness or type of a sanction to be imposed.[68] When addressing the issue of appealability, courts may be more willing to overcome the general rule against piecemeal litigation where the sanctioned attorney appears to have acted in good faith. Although, by definition, the imposition of sanctions under certain provisions indicate bad faith, the facts may truly represent otherwise. The good faith/bad faith of the attorney must be examined for purpose of evaluating the weight to be given the effects which delay in the appeal may cause. Furthermore, distinctions among the sanctions imposed reveal varying standards of good faith upon which the sanctioned attorney's conduct is judged. For example, under Rule 11, whether a signer acts with an improper purpose is judged under an objective standard.[69] Although the imposition of section 1927 sanctions has moved toward the rejection of a subjective bad faith standard, at least three circuits have held that bad faith is necessary to sustain such a sanction.[70]

The relevance of the good faith/bad faith state of mind of the sanctioned attorney is shown by considering various grounds for the

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68. *See, e.g.*, Cabell v. Petty, 810 F.2d 463, 466 (4th Cir. 1987) ("the absence of deliberate 'harassment' may be a consideration in choosing an appropriate sanction"); *In re* Kelly, 808 F.2d 549, 552 (7th Cir. 1986) ("Because of . . . the possibility that the affidavit was clumsily rather than dishonestly drafted . . . we have decided that formal discipline is not appropriate."); Lieb v. Topstone Indus., Inc., 788 F.2d 151, 157 (3rd Cir. 1986) (subjective bad faith "may be relevant in determining the form and amount of punishment or compensation").

69. Flip Side Prods., Inc. v. JAM Prods., Ltd., 843 F.2d 1024, 1035 (7th Cir. 1986); Stevens v. Lawyers Mut. Liab. Ins. Co., 789 F.2d 1056, 1060 (4th Cir. 1986); *Lieb*, 788 F.2d at 157; Zaldivar v. City of Los Angeles, 780 F.2d 823, 831 (9th Cir. 1986); Oliveri v. Thompson, 803 F.2d 1265, 1275 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987).

70. *See* New Alaska Dev. Corp. v. Guetschow, 869 F.2d 1298, 1306 (9th Cir. 1989) (subjective bad faith is a requirement of § 1927 sanctions); *Oliveri*, 803 F.2d at 1277; Baker Indus. v. Cerberus, Ltd., 764 F.2d 204 (3d Cir. 1985). *Cf.* Walter v. Fiorenzo, 840 F.2d 427 (7th Cir. 1988) (objective standard for imposition of § 1927 sanctions adopted); Braley v. Campbell, 832 F.2d 1504 (10th. Cir. 1987) (subjective good faith cannot serve as an infinitely expansive safe harbor from sanctions); Ordower v. Feldman, 826 F.2d 1569, 1574 (7th Cir. 1987) (although intent is a factor in assessing § 1927 liability, it may be demonstrated through reckless conduct).

denial of appeal. One such ground is that allowing immediate appeal would chart a course to any attorney seeking delay by voluntarily inducing and accepting a sanction.[71] By definition, subjective good faith of the attorney would render such grounds meaningless. A second reason for denying appeal is that the court's response might be to refuse to sanction attorneys at all, thereby defeating the very purpose of the sanction.[72] For example, one purpose of Rule 37(a) is to sanction attorneys who have unnecessarily delayed the proceedings.[73] If an appeal of the sanction is allowed, the attorney may obtain an extension of the very delay for which their conduct was sanctioned. In response to this argument, the court may just as easily impose the sanction and then deny the appeal. Indeed, if the purpose was to create delay it would be said that counsel acted in bad faith and should not generally be permitted immediate appeal. Although the distinction between good and bad faith is not easily ascertainable, it is apparent that some courts have placed a degree of importance on the good faith/bad faith objective of the attorney when addressing appealability.

In *Cheng*, the court stated, "there is no indication in this case that Cheng and his attorney are in collusion to create delay or are in any other way so closely tied that Cheng's lawyer should not be considered a bona fide third party for purposes of this appeal."[74] The court held that the attorney, as a nonparty, could immediately appeal the sanction imposed.[75] *Cheng* involved sanctions imposed against the attorney under 28 U.S.C. § 1927 for the frivolous application of mandamus and writ of certiorari. Seeking disqualification of opposing counsel, the attorney sought review of the district court's denial for a second time based upon an intervening Supreme Court decision which held that denial of motions to disqualify could only be reviewed on appeal prior to completion of the principal case under special circumstances warranting a writ of mandamus.[76] On appeal in the first instance, the circuit court reversed the lower court and granted the motion to disqualify. When addressing the merits of the sanction order, the court noted that Cheng's attorney may have been ethically obliged to once again pursue his disqualification efforts in light of the circuit court's previous ruling. Thus the court acknowledged for a second time the good faith nature of the attorney's conduct.

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71. *See* Eastern Maico Distribs. v. Maico-Fahrzeugfabrik, 658 F.2d 944, 949 (3rd Cir. 1981).

72. *See, id.* at 948-49.

73. *Id.* at 949.

74. Cheng v. GAF Corp., 713 F.2d 886, 890 (2d Cir. 1983).

75. *Id.*

76. *Id.* at 887-88 (citing Firestone Tire and Rubber Co. v. Risjord, 449 U.S. 368 (1981)).

In contrast, the court in *Eastern Maico Distribs. v. Maico-Fahrzeugfabrik*[77] relied upon the fact that the sanction order imposed fell under the provisions of Rule 37(a) in denying immediate appeal.[78] An inference of bad faith appeared when the court noted that the nonparty's interest in resisting discovery, which is protected against by Rule 37(b) sanctions, differs from objectives of harassment and delay which are sanctioned under Rule 37(a).[79] Furthermore, the court stated that appellate jurisdiction might be appropriate for other types of interlocutory discovery sanctions against a nonparty.[80] Thus, this seldom observed distinction among sanction provisions placed importance on the bad faith motives of counsel's conduct in denying immediate appeal.

A further distinguishing factor among the various sanction provisions resides in the mandatory versus discretionary nature of their imposition. For example, Federal Rules of Civil Procedure 26(g) and 37 both strive to prevent discovery abuse by way of sanction provisions. However, Rule 37 authorizes broad discretionary powers in the imposition of sanctions while Rule 26(g) mandates the imposition of sanctions for conducting discovery irresponsibly.[81] Thus, while an empty head — pure heart defense may satisfy the court under Rule 37, subjective bad faith cannot be considered before invoking a Rule 26(g) sanction.[82]

The cases demonstrate a distinction between good faith and bad faith conduct in the grant or denial of an immediate appeal. The significance of this distinction is that a standard of appealability applied to one set of circumstances may prove inequitable under differing circumstances. Once the issue of appealability is addressed, the same court or other courts are likely to rely upon the holding without differentiating between the facts and circumstances. In *Click v. Abilene National Bank*[83] the court stated that there is "no obvious reason to differentiate sanctions imposed under Rule 11 from the sanctions that the district court may enter pursuant to Fed. R. Civ. P. 37 or 28 U.S.C. § 1927."[84] Other courts have similarly cited decisions in support or opposition of interlocutory sanction order appeals without recognizing the mandatory versus discretionary or good

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77. 658 F.2d 944 (3d Cir. 1981).

78. *Id.* at 949-51.

79. *Id.* at 949.

80. *Id.*

81. FED. R. CIV. P. 26(g) note (1983). The mandatory nature of Rule 26(g) was imposed due to the reluctance shown to sanction attorneys under Rule 37, one of the sources from which Rule 26(g) derives its authority. *Id.*

82. National Ass'n of Radiation Survivors v. Turnage, 115 F.R.D. 543, 555 (N.D. Cal. 1987).

83. 822 F.2d 544 (5th Cir. 1987).

84. *Id.* at 545.

faith/bad faith character of the sanction.[85] Failure to draw a distinction in such situations is to misapply precedent. Accordingly, it is proposed that a distinction between the type of sanction imposed and the underlying facts of the case be factored into the appealability decision.

III. The Alternative

Initially it should be reiterated that the appeal of an interlocutory order can be heard only if it falls within one of the limited exceptions to the statutory finality rule. The collateral order doctrine generally serves as an effective device in evaluating the need for an immediate appeal of a sanction order. However, the traditional application of the doctrine should extend beyond the scope in which it is often utilized.

First, the doctrine's applicability should not be determined solely on the basis of the attorney's status as a nonparty of the principal case. Rather the nonparty designation should be merely one factor in addressing its application. Because procedural alternatives can eliminate most due process concerns impacting upon the attorney as a nonparty, only in the most extreme situations must the collateral order doctrine be invoked to permit immediate appeal for purposes of the attorney's protection.

On the other hand, the client's due process concern of vigorous and fair representation requires case by case analysis. For this purpose, an ad hoc approach must define the level of concern presented by the particular facts of the subject case. Once defined, this due process concern is balanced against conflicting policy considerations concerning the purpose of the attorney's sanctioned conduct.

The cases demonstrate that the technical requirements of the collateral order doctrine are arguably satisfied in all sanction appeal situations. Because an ad hoc approach strives to accomplish the doctrine's underlying purpose of due process, the approach rests on the premise that the technical requirements of the doctrine are met when immediate appeal is deemed appropriate. Accordingly, application of the balancing approach will not violate the principled doctrine on which the interlocutory appeal exception is based.

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85. *See, e.g.*, Frazier v. Cast, 771 F.2d 259, 263 (7th Cir. 1985). In holding that a Rule 11 sanction order was immediately appealable, the court cited Knorr Brake Corp. v. Harbil, Inc., 738 F.2d 223 (7th Cir. 1984) (§ 1927 sanction was immediately appealable) and Tamari v. Bache & Co. (Lebanon) S.A.L., 729 F.2d 469 (7th Cir. 1984) (Rule 37 sanction immediately appealable). Other courts have similarly cited § 1927 cases as authority for the immediate appeal of a Rule 11 sanction. *See, e.g.*, Crookham v. Crookham, 914 F.2d 1027, 1029 n.4 (8th Cir. 1990); Sanko S.S. Co., Ltd. v. Galin, 835 F.2d 51 (2d Cir. 1987). *But cf.* Cheng v. GAF Corp., 713 F.2d 886, 890 (2d Cir. 1983) (after citing to a case involving Rule 37(a)(4) sanctions the court stated, "[W]e express no opinion on the appealability of sanctions under that section against the attorney rather than the party he represents").

The desire for a standard rule to be applied in all cases must necessarily be addressed when promoting a case by case approach. However, establishing a rule for purposes of certainty in application is inappropriate regarding the appeal of a sanction order. Certainty is a necessary element for planning. Yet, the only planning which certainty adds for appeals would be whether or not to invoke or induce a sanction to obtain delay. Unquestionably, this represents an improper purpose for which certainty need not provide. The critical certainty which must be provided is that an appeal will be allowed if not at the present time, then later. Furthermore, certainty must provide for protection of the due process considerations. To this end, a balancing approach furthers certainty while upholding the integrity of the finality rule.

As an aid in implementing an ad hoc approach to the appealability of sanction orders against a counsel of record, a classification system is proposed. Against the relevant considerations of due process and the good faith/bad faith objective of counsel's conduct lay four possible situations which the court may confront when addressing the issue of appealability: (1) Good faith objective underlying counsel's conduct accompanied by a low due process concern; (2) bad faith objective — low due process concern; (3) good faith objective — high due process concern; and (4) bad faith objective — high due process concern. By first classifying the particular facts of the subject case within one of the four situations, the decision to grant or deny appeal will achieve greater consistency and equitable results for the parties involved. Furthermore, the scope of situations presenting a true issue regarding the right to appeal is significantly narrowed as three of the four factual situations can be easily resolved.

Whether the attorney was acting in good or bad faith when sanctioned for his conduct, the presence of a low due process concern presents a clear case for denying appeal. Furthermore, it is irrelevant whether any existing due process concern relates solely to the client as distinguished from the attorney. As long as the due process consideration is minimal as it bears on either party, there is no reason for departing from the finality rule to allow appealability.

In contrast, immediate appeal should be granted where the sanction order was imposed on good faith conduct and there exists a high due process concern. Although judicial efficiency or some other sanction purpose may be frustrated by allowing the interlocutory appeal, a convincing rationale is lacking to uphold such objectives at the expense of a fair vindication of the individual party's rights.

The final situation which presents the real focal point of the appealability issue is where the attorney has acted in bad faith but where there also exists a high degree of due process concern should immediate appeal be denied. It is within this category that a balancing approach

is proposed whereby the good faith/bad faith conduct of the attorney is weighed against the due process concerns falling upon the attorney and his client. Although it has been asserted that the attorney is afforded procedural alternatives to assure his due process rights, any remaining concerns which bear on the attorney should carry a great deal less weight than those which apply to the client. Moreover, there is a point at which the client's due process concerns demand the grant of an interlocutory appeal despite the bad faith intent of counsel.

To achieve a balance between the competing considerations of the finality rule and protection of due process concerns, a judicial weighing of the relevant prevailing factors must be employed. Specifically, the relevant factors include: (1) whether counsel is attempting to circumvent the purpose of statutory procedures through improper conduct; and (2) whether the financial burdens which accompany the sanction rise to a level creating a conflict of interest, thereby impairing a litigant's due process rights. Only after these factors have been assessed may the decision to grant or deny an immediate appeal be made.

IV. Conclusion

The opposite stances maintained by the Federal Circuit Courts exemplify the competing considerations on whether the interlocutory appeal of a sanction order against an attorney of record should be allowed. However, the decisions attempt to define one standard by which the appeal process of all monetary attorney sanctions can be guided. This cannot be accomplished while providing consistent equitable results. It is for this very fact that opposite conclusions have been reached by the circuit courts in independent circumstances. Furthermore, the heavy reliance on the nonparty designation of the attorney is misguided. Although significant in addressing the issue of appealability, this factor alone does not alleviate the financial burdens which could render a delayed appeal effectively unreviewable or the conflict of interest which adversely affects the client's representation.

The search for a standard to guide the procedural process of the appeal of an attorney sanction cannot be fulfilled by one standard. Rather, the standard is a system, a classification based upon the facts, which charts the procedural avenue appropriate to the specific circumstances of each case. Only when the circumstances are classified as a bad faith/high due process concern situation should the grant or denial of an interlocutory appeal be in issue. Then the relevant factors must be weighed on a case by case basis. Through this use of an ad hoc, but structured, balancing approach, greater consistency and fairness in application will become the standard.

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