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# LITIGATION SANCTIONS AGAINST LAWYERS AND DUE PROCESS

DOUGLAS R. RICHMOND*



## INTRODUCTION

Lawyers may be variously sanctioned for misconduct in litigation. To offer some federal court examples, a lawyer who signs, files, submits or later advocates a pleading, motion, or other paper that violates Rule 11(b) of the Federal Rules of Civil Procedure may be sanctioned under Rule 11(c).[1] Under Rule 26(g), a court may sanction a lawyer who improperly certifies a discovery response, request, or objection.[2] With respect to depositions, a court may sanction a lawyer who "impedes, delays, or frustrates the fair examination of the deponent" under Rule 30(d)(2).[3] Under Rule 45(d)(1), a court may sanction a lawyer who is responsible for issuing or serving a subpoena and who imposes undue burden and expense on the person being subpoenaed.[4] Under Rule 38 of the Federal Rules of Appellate Procedure, an appellate court may monetarily sanction a lawyer who pursues a frivolous appeal.[5] Under 28 U.S.C. § 1927, a court may sanction a lawyer who "multiplies the proceedings in any case unreasonably and vexatiously."[6] Both federal and state courts may sanction lawyers pursuant to their inherent

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1. FED. R. CIV. P. 11.
2. FED. R. CIV. P. 26(g).
3. FED. R. CIV. P. 30(d)(2).
4. FED. R. CIV. P. 45(d)(1).
5. FED. R. APP. P. 38.
6. 28 U.S.C. § 1927 (2018).

power to regulate the conduct of parties and lawyers who appear before them.[7] In addition, many states have created authority for sanctions by adopting rules of civil procedure that are modeled on their federal counterparts.[8]

Lawyers who are alleged to have committed misconduct in litigation are entitled to due process before a court imposes sanctions.[9] "The precise procedural protections of due process vary, depending upon the circumstances, because due process is a flexible concept unrestricted by any bright-line rules."[10] Where sanctions are concerned, due process minimally requires notice and the opportunity to be heard.[11] The requirements of notice and an opportunity to be heard frequently operate in tandem; that is, if lawyers do not receive adequate notice that they may be sanctioned, they will consequently be denied a meaningful opportunity to be heard.[12] In the same vein, a lawyer's ability to argue against a previously unannounced request for sanctions at a hearing does not mean that the lawyer received due process.[13] The ambushed lawyer could not be expected to sit idly by while the court threatened or imposed sanctions; the lawyer's extemporaneous argument against

7. Chambers v. NASCO, Inc., 501 U.S. 32, 43–44 (1991); LaPeter v. LaPeter, 439 P.3d 247, 261 (Haw. Ct. App. 2019); Wong v. Luu, 34 N.E.3d 35, 45-46 (Mass. 2015); Westview Dr. Invs., LLC v. Landmark Am. Ins. Co., 522 S.W.3d 583, 613 (Tex. App. 2017).

8. Where state rules of civil or appellate procedure are modeled on analogous federal rules of civil or appellate procedure, state courts interpreting their own rules frequently look to federal court decisions interpreting the corresponding federal rules for guidance. *See, e.g.*, Heritage Vill. II Homeowners Ass'n v. Norman, 443 P.3d 964, 969 (Ariz. Ct. App. 2019); McHughes v. Wayland, 572 S.W.3d 861, 863 (Ark. 2019); Ruiz v. Chappell, 461 P.3d 654, 656 (Colo. App. 2020); Buck Blacktop, Inc. v. Gary Contracting & Trucking Co., LLC, 929 N.W.2d 12, 18 (Minn. Ct. App. 2019); Eddy v. Builders Supply Co., 937 N.W.2d 198, 210 (Neb. 2020); Yount v. Criswell Radovan, LLC, 469 P.3d 167, 172 (Nev. 2020); Felix v. Ganley Chevrolet, Inc., 49 N.E.3d 1224, 1230 (Ohio 2015); Meiners v. Meiners, 438 P.3d 1260, 1268 (Wyo. 2019). Although federal court decisions clearly are persuasive authority and state courts often follow them, they do not bind state courts interpreting their own rules. Bank of Am., N.A. v. Reyes-Toledo, 428 P.3d 761, 775 (Haw. 2018).

9. *See, e.g.*, Yaffa v. Weidner, 717 F. App'x 878, 883–84 (11th Cir. 2017) ("[A] district court's broad discretion to impose sanctions or otherwise manage its affairs is subject to . . . due process."); State Pub. Def. v. Iowa Dist. Ct., 886 N.W.2d 595, 599 (Iowa 2016) (rejecting a trial court's taxation of court costs and travel expenses against the state public defender because the trial court "imposed this sanction without prior notice and without giving the state public defender an opportunity to be heard, in violation of due process").

10. Steinert v. Winn Grp., Inc., 440 F.3d 1214, 1222 (10th Cir. 2006).

11. Shepherd v. Annucci, 921 F.3d 89, 97 (2d Cir. 2019) (requiring "adequate notice"); Hernandez v. Acosta Tractors Inc., 898 F.3d 1301, 1306 (11th Cir. 2018) (requiring "fair notice"); J.W. v. Watchtower Bible & Tract Soc'y of N.Y., Inc., 241 Cal. Rptr. 3d 62, 81 (Ct. App. 2018); *State Pub. Def.*, 886 N.W.2d at 599.

12. *See, e.g.*, KCI USA, Inc. v. Healthcare Essentials, Inc., 797 F. App'x 1002, 1007 (6th Cir. 2020) (explaining that a lack of notice denied the sanctioned lawyers an opportunity to be heard).

13. Hutchinson v. Pfeil, 208 F.3d 1180, 1185 (10th Cir. 2000) (quoting 1488, Inc. v. Philsec Inv. Corp., 939 F.2d 1281, 1292 (5th Cir. 1991)); OSI Rest. Partners, LLC v. Oscoda Plastics, Inc., 831 S.E.2d 386, 391 (N.C. Ct. App. 2019).

sanctions evidences only his or her ability to muster a hurried defense in challenging circumstances—not that the court provided adequate notice of possible sanctions.[14]

In some situations, the rule under which sanctions may be imposed expressly requires due process. For instance, under Rule 11(c)(1), a lawyer must be afforded "notice and a reasonable opportunity to respond" before a court may award an appropriate sanction.[15] Similarly, under Rule 38 of the Federal Rules of Appellate Procedure, a lawyer may be assessed damages and costs for pursuing a frivolous appeal only after receiving "a separately filed motion or notice from the court" and being afforded a "reasonable opportunity to respond."[16] In other cases, the lawyer's right to due process is implied or implicit.[17] Regardless of the alleged offense or the grounds for potential sanctions, a court's failure to afford a lawyer due process before imposing sanctions generally is an abuse of discretion.[18]

This article examines the notice and hearing requirements for due process when a lawyer faces potential sanctions in litigation. After doing so, it offers recommendations for lawyers in this uncomfortable and unfortunate situation.

## I. THE NOTICE REQUIRED FOR DUE PROCESS

### *A. General Principles*

To start, notice for due process purposes generally requires that the lawyer to be sanctioned receive specific notice of the alleged misconduct; the authority for the sanctions being considered, such as the rule or statute being invoked, or the court's inherent authority; and the standard by which the lawyer's conduct will be assessed.[19] Or, as the Third Circuit has outlined the notice requirement, a lawyer whose conduct may result in sanctions "is entitled to notice of the reasons for possible sanctions, the rule on which they might be based, and their potential form."[20] Regardless of how a court frames the test for satisfactory notice, the lawyer in the opposing party's or court's crosshairs

14. Griffin v. Griffin, 500 S.E.2d 437, 439 (N.C. 1998).

15. FED. R. CIV. P. 11(c)(1).

16. FED. R. APP. P. 38.

17. *See, e.g.*, Snider v. L-3 Commc'ns Vertex Aerospace, L.L.C., 946 F.3d 660, 678 (5th Cir. 2019) (requiring due process before imposing inherent authority sanctions); Smith v. Banner Health Sys., 621 F. App'x 876, 883 (9th Cir. 2015) (mandating due process for sanctions under 28 U.S.C. § 1927).

18. Mitchell v. Nobles, 873 F.3d 869, 875 (11th Cir. 2017); Morjal v. City of Chi., 774 F.3d 419, 422 (7th Cir. 2014); Liles v. Contreras, 547 S.W.3d 280, 287 (Tex. App. 2018).

19. Wilson v. Citigroup, N.A., 702 F.3d 720, 725 (2d Cir. 2012) (quoting Sakon v. Andreo, 119 F.3d 109, 114 (2d Cir. 1997)).

20. Am. Bd. of Surgery, Inc. v. Lasko, 611 F. App'x 69, 72 (3d Cir. 2015).

needs to know the listed information to prepare a defense.[21] More pointedly, lawyers facing possible sanctions require particularized notice to address the specific factors necessary to excuse their conduct.[22] For these reasons, general notice that a court is considering sanctions is insufficient for due process purposes.[23]

Unless a rule or statute specifies the method for giving notice to a lawyer, another party's motion or supporting brief or memorandum, or a court order, all potentially suffice.[24] A court's comments at a hearing at which the offending lawyer appears also may provide sufficient notice, provided that the court does not impose sanctions at the same time.[25] Presumably, a party's oral motion or request for sanctions at a hearing can satisfy the notice requirement if it meets the controlling test for adequacy and the rule being invoked does not require a written motion.[26] Certainly, an opposing lawyer's oral motion for sanctions at a hearing may prompt a court to issue a show cause order that will then provide a basis for sanctions that satisfies due process.[27] In contrast, the mere existence of a rule or statute allowing or providing for sanctions is not sufficient notice that a court is considering related sanctions.[28]

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21. *See, e.g.*, Wanda I. Rufin, P.A. v. Borga, 294 So. 3d 916, 918 (Fla. Dist. Ct. App. 2020) (reversing sanctions against the lawyer where nothing in the notice of hearing indicated that the court would consider awarding attorney's fees against her personally).

22. Indah v. U.S. S.E.C., 661 F.3d 914, 928 (6th Cir. 2011); *see, e.g.*, Ted Lapidus, S.A. v. Vann, 112 F.3d 91, 97 (2d Cir. 1997) (explaining how the lack of particularized notice deprived the lawyer of the opportunity to defend himself against sanctions).

23. Martinez v. City of Chi., 823 F.3d 1050, 1055 (7th Cir. 2016) (quoting Johnson v. Cherry, 422 F.3d 540, 551–52 (7th Cir. 2005)).

24. *See, e.g.*, Progressive Emu Inc. v. Nutrition & Fitness Inc., 785 F. App'x 622, 631 (11th Cir. 2019) (explaining that a party's statement in its motion to quash a subpoena that it was seeking related sanctions gave the sanctioned law firm adequate notice); Bell v. Vacuforce, LLC, 908 F.3d 1075, 1082 (7th Cir. 2018) (concluding that the opponent's motion and an earlier district court order afforded the lawyer adequate notice of his objectionable conduct); Regions Bank v. Gateway Hous. Found., 732 F. App'x 402, 404 (6th Cir. 2018) (requesting sanctions in reply to sanctioned lawyer's motion, in statement of unresolved issues, and in motion for sanctions provided adequate notice); Taurus IP, LLC v. DaimlerChrysler Corp., 726 F.3d 1306, 1345 (Fed. Cir. 2013) (referring to Seventh Circuit standards and stating that the opponent's brief in support of a motion in limine furnished adequate notice); Schlaifer Nance & Co. v. Est. of Warhol, 194 F.3d 323, 334–35 (2d Cir. 1999) (explaining that the opposing party's motion and the district court's order setting forth its preliminary thoughts both provided fair notice).

25. *See, e.g.*, Armstead v. Allstate Prop. & Cas. Ins. Co., 705 F. App'x 783, 787 (11th Cir. 2017) (finding sufficient notice); Rates Tech., Inc. v. Mediatrix Telecom, Inc., 688 F.3d 742, 748 (Fed. Cir. 2012) (determining that the magistrate judge's admonitions at two hearings afforded the lawyer adequate notice).

26. *See generally In re* Sunshine Jr. Stores, Inc., 456 F.3d 1291, 1307 (11th Cir. 2006) ("[A] party can be given notice from either the court or from the party seeking sanctions.").

27. *See, e.g.*, Methode Elecs., Inc. v. Adams Techs., Inc., 371 F.3d 923, 925-28 (7th Cir. 2004).

28. McLaughlin v. Phelan Hallinan & Schmieg, LLP, 756 F.3d 240, 250 (3d Cir. 2014).

As noted earlier, a court must specify the rule or statute on which sanctions are premised to satisfy the notice requirement for due process.[29] The need for particularized notice is more acute in some cases than others. Where, for example, a court is considering imposing sanctions under its inherent power, notice of that plan is essential to the offending lawyer because such sanctions are not based on a rule or statute that establishes clear standards of conduct for lawyers.[30]

To illustrate, how a lawyer defends against inherent authority sanctions may differ substantially from how he or she might defend against sanctions flowing from some other identified source. Consider *Eastcott v. Hasselblad USA, Inc.*,[31] where the moving party cited Rule 37 as the sole basis for sanctions.[32] Under Rule 37, a lawyer may be sanctioned for unjustifiably advising a party not to comply with a discovery order (Rule 37 (b)(2)(A)), for unjustifiably advising a party not to attend its own deposition or not to respond to written discovery (Rule 37(d)(3)), or for failing to develop and submit a Rule 26 discovery plan in good faith (Rule 37(f)).[33] Those are very limited grounds for sanctions and therefore allow the allegedly offending lawyer to tailor a very narrow defense. Contrast that situation with inherent authority sanctions based on the claim that the lawyer acted in bad faith, which can best be defined as "a broad range of willful improper conduct."[34] Furthermore, defending against Rule 37 sanctions likely will not require expert testimony, while resisting inherent authority sanctions well may.

To use another example, notice of possible sanctions under Rule 11 is not necessarily sufficient to alert a lawyer to potential inherent authority sanctions.[35] This conclusion is understandable when you consider that sanctions sought by a party or initiated by the court under Rules 11(c)(2) or (3), respectively, must rest on conduct detailed in the party's motion or the court's show cause order.[36] Additionally, the standards for imposing sanctions under Rule 11 versus a court's inherent authority differ significantly: sanctions based on Rule 11 merely

29. *See, e.g.*, Mantell v. Chassman, 512 F. App'x 21, 25 (2d Cir. 2013) (finding that the lawyer lacked notice of sanctions under 28 U.S.C. § 1927 where the opponent sought sanctions under Rule 37 and the district court did not warn the lawyer that it was considering § 1927 sanctions); Hutchinson v. Pfeil, 208 F.3d 1180, 1185 (10th Cir. 2000) (stating that because 28 U.S.C. § 1927 differs from Rule 11 in standards, procedure, and punitive scope, the pursuit of sanctions under one does not constitute notice for purposes of the other).

30. *See, e.g.*, Eastcott v. Hasselblad USA, Inc., 564 F. App'x 590, 597–98 (Fed. Cir. 2014) (reasoning that under Second Circuit standards, a request for Rule 37 sanctions did not sufficiently notify the lawyers of possible inherent authority sanctions).

31. *Eastcott*, 564 F. App'x at 590.

32. *Id.* at 597.

33. FED. R. CIV. P. 37.

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

35. Wright v. CompGeeks.com, 429 F. App'x 693, 698 (10th Cir. 2011).

36. StreetEasy, Inc. v. Chertok, 752 F.3d 298, 310 (2d Cir. 2014) (quoting Star Mark Mgmt., Inc. v. Koon Chun Hing Kee Soy & Sauce Factory, Ltd., 682 F.3d 170, 175 (2d Cir. 2012)).

require proof of objectively unreasonable conduct by the lawyer,[37] while inherent authority sanctions require the lawyer to have acted in bad faith.[38]

Looking at things from a different angle, a lawyer needs to know that a court is weighing possible inherent authority sanctions to argue for the application of a rule or statute that better fits the situation (and presumably offers a better chance of avoiding sanctions).[39] In fact, a court ordinarily should not invoke its inherent power to sanction a lawyer where the lawyer's alleged misconduct is sanctionable under a rule or statute.[40]

Finally, a trial court needs to specify the bases for any sanctions so that an appellate court may meaningfully review the related order if called upon to do so.[41] In some cases, a trial court's failure to do so may invalidate a sanctions award in whole or part.[42]

Although the need for particularized notice is well-recognized and is understood to be especially important where inherent authority sanctions are concerned, some courts have upheld inherent authority sanctions even though the lawyer knew only of the possibility of sanctions under some other source.[43] In *Miller v. Cardinale (In re DeVille)*,[44]for example, the court affirmed the entry of inherent authority sanctions against two lawyers even though the bankruptcy court had originally identified only Bankruptcy Rule 9011 as the basis for

37. Tejero v. Portfolio Recovery Assocs., L.L.C., 955 F.3d 453, 460 (5th Cir. 2020); McGreal v. Vill. of Orland Park, 928 F.3d 556, 560 (7th Cir. 2019); Wolfington v. Reconstructive Orthopaedic Assocs. II PC, 935 F.3d 187, 207 (3d Cir. 2019) (quoting Lieb v. Topstone Indus., Inc., 788 F.2d 151, 157 (3d Cir. 1986)).

38. Purchasing Power, LLC v. Bluestem Brands, Inc., 851 F.3d 1218, 1223 (11th Cir. 2017); *In re* Goode, 821 F.3d 553, 559 (5th Cir. 2016); Bredehoft v. Alexander, 686 A.2d 586, 589 (D.C. 1996); Rush v. Burdge, 141 So. 3d 764, 766 (Fla. Dist. Ct. App. 2014); *In re* Partington, 463 P.3d 900, 907 (Haw. 2020); *In re* Est. of Weatherbee, 93 A.3d 248, 253 (Me. 2014); Brewer v. Lennox Hearth Prods., LLC, 601 S.W.3d 704, 716 (Tex. 2020); Lawson v. Brown's Day Care Ctr., Inc., 776 A.2d 390, 393 (Vt. 2001).

39. Metz v. Unizan Bank, 655 F.3d 485, 490 (6th Cir. 2011).

40. Chambers v. NASCO, Inc., 501 U.S. 32, 50 (1991); Moakley v. Smallwood, 826 So. 2d 221, 227 (Fla. 2002) (citing *Chambers*, 501 U.S. at 50); State *ex rel.* Tal v. City of Okla. City, 61 P.3d 234, 248 (Okla. 2002) (citing *Chambers*, 501 U.S. at 50).

41. *See, e.g.*, Arnold v. Fed. Nat'l Mortg. Ass'n, 569 F. App'x 223, 224 (5th Cir. 2014) (lamenting the district court's failure to specify the grounds for sanctions and declining to speculate about the basis for the sanctions); Fuqua Homes, Inc. v. Beattie, 388 F.3d 618, 623 (8th Cir. 2004) (explaining the problems caused by the district court's failure to identify the authority under which it imposed sanctions).

42. *See, e.g.*, Zhou v. Chen, 299 So. 3d 503, 504 (Fla. Dist. Ct. App. 2020) (reversing an award of monetary sanctions where the trial court's order did not specify the facts supporting its determination that the lawyer acted in bad faith, and further noting that the lawyer was denied due process).

43. *See, e.g.*, Fellheimer, Eichen & Braverman, P.C. v. Charter Techs., Inc., 57 F.3d 1215, 1227 (3d Cir. 1995) ("Ideally, there would have been some explicit indication here that the bankruptcy court was acting pursuant to its inherent sanction power. We refuse, however, to go along with [the law firm's] argument and overturn the bankruptcy court's decision merely because that court applied the wrong label to the righteous use of its inherent sanction power.").

44. Miller v. Cardinale (*In re* DeVille), 361 F.3d 539 (9th Cir. 2004).

sanctions and did not invoke its inherent authority until it issued a supplemental decision.[45] The *In re DeVille* court reasoned that the lawyers "were fully advised of the conduct charged against them and of the fact that the bankruptcy court deemed the charged conduct to have been pursued in bad faith."[46] The bankruptcy court's determination that the lawyers had acted in bad faith as required for inherent authority sanctions was key, as sanctions based on Rule 11 merely require proof of objectively unreasonable conduct.[47] Furthermore, and without straying too far into the weeds of the case, the lawyers' misconduct was such that Rule 11 was an inadequate basis for sanctions.[48] Accordingly, the bankruptcy court's invocation of its inherent authority to sanction the lawyers was appropriate.[49]

The *In re DeVille* court essentially employed a harmless error analysis.[50] In fact, a court's failure to give particularized notice of the basis for contemplated sanctions, like other errors, can be harmless.[51] A lawyer's inability to show prejudice attributable to a lack of particularized notice could therefore expose the lawyer to sanctions based on unforeseen authority, with any hope of appellate relief lost to the harmless error doctrine in effect if not in name.[52] The resulting lesson for lawyers defending against misconduct allegations is simple: when possible, be prepared to demonstrate prejudice attributable to a court's failure to specifically identify ahead of time the basis for contemplated

45. *Id.* at 548.

46. *Id.* at 550.

47. *See supra* note 37 and accompanying text.

48. *In re DeVille*, 361 F.3d at 551.

49. *See also* Methode Elecs., Inc. v. Adams Techs., Inc., 371 F.3d 923, 927–28 (7th Cir. 2004) (affirming inherent authority sanctions where "blind adherence" to Rule 11 procedures was impossible); Fellheimer, Eichen & Braverman, P.C. v. Charter Techs., Inc., 57 F.3d 1215, 1225–27 (3d Cir. 1995) (holding to the same effect as the court in *In re DeVille*).

50. A court's error also may be harmless where it applies the wrong burden of proof or standard of conduct when sanctioning a lawyer, but the lawyer's misconduct also would have been sanctionable had the court applied the correct burden or standard. *See, e.g.*, Six v. Generations Fed. Credit Union, 891 F.3d 508, 518 n.9 (4th Cir. 2018) ("Here, even if the district court's application of an unnecessarily high standard of proof to its bad-faith analysis were legal error, it would be harmless because the district court's conclusions would nevertheless stand under a lower standard.").

51. Ayoubi v. Dart, 640 F. App'x 524, 528 (7th Cir. 2016).

52. *See, e.g.*, Boyer v. BNSF Ry. Co., 832 F.3d 699, 702 (7th Cir. 2016) ("We note that [plaintiff's counsel] has long had notice of the conduct on which BNSF sought sanctions, and he has had multiple opportunities . . . to make his case against the award of sanctions. He is in no material way prejudiced, consequently, by a change in the source of authority we rely on to justify our decision."); RDLG, LLC v. Leonard, 649 F. App'x 343, 347–48 (4th Cir. 2016) (involving Rule 16(f) sanctions and stating that because the defendant could not show prejudice, his already tenuous notice argument failed); McLaughlin v. Phelan Hallinan & Schmieg, LLP, 756 F.3d 240, 250 (3d Cir. 2014) ("It is true that PHS did not receive notice that sanctions were being considered before the District Court initially imposed them and hence did not immediately have an opportunity to argue that its failure was substantially justified. PHS, however, eventually provided arguments why it believed its conduct was not sanctionable."); Tate v. Ancell, 551 F. App'x 877, 896 (7th Cir. 2014) ("As with any procedural error, counsel must demonstrate that he was harmed by the error in order to establish a basis for reversal; the failure to grant notice and an opportunity to be heard, like any other error, can be harmless.").

sanctions. Of course, in some cases, a lawyer may have no valid defense to sanctions. In that situation, a claimed lack of notice will almost certainly be deemed harmless.

In the end, wayward lawyers generally receive adequate notice of potential sanctions. This is to be expected given that a lawyer may receive notice from the party seeking sanctions, the court, or both, and adequate notice from any source may come in various forms. But cases and facts differ, and lawyers do not always receive the notice they are owed.[53] *KCI USA, Inc. v. Healthcare Essentials, Inc.*[54] is a case in point.

In 2014, KCI sued Healthcare Essentials on a variety of theories related to the theft of KCI's intellectual property orchestrated by Healthcare Essentials' owner, Ryan Tennebar.[55] Healthcare Essentials was represented by the Cleveland law firm of Cavitch, Familo & Durkin (Cavitch) and three of its lawyers: Komlavi Atsou, Michael Rasor, and Eric Weiss (referred to in the opinion as "the individual attorneys").[56] The case was marred by Healthcare Essentials' serious discovery abuses, which spurred KCI to twice seek sanctions against Healthcare Essentials and Cavitch.[57] In April 2016, Cavitch learned that Healthcare Essentials apparently had, in fact, engaged in the fraud and theft it was accused of, and moved to withdraw from the company's representation.[58] In so moving, Cavitch informed the court that it had developed an "irreconcilable conflict" with its client but revealed nothing more.[59] In granting the motion, the district court warned Cavitch that the firm might later be required "to clarify, explain, or justify its prior actions as counsel" in the case.[60] Thus, despite its withdrawal, "Cavitch was on notice that its conduct could still be at issue."[61]

KCI forged ahead and ultimately won a preliminary injunction against Healthcare Essentials.[62] Regrettably, Healthcare Essentials (represented by new counsel) still did not comply with discovery and ignored the injunction.[63] "This led KCI to file a motion to show cause

53. *See, e.g.*, O.R. v. Hutner, 515 F. App'x 85, 89 (3d Cir. 2013) (rejecting Rule 11 sanctions where the court did not state that it was considering Rule 11 sanctions or identify the type of sanctions under consideration and did not style the related order as a show cause order); Strems L. Firm, P.A. v. Avatar Prop. & Cas. Ins. Co., 297 So. 3d 592, 594 (Fla. Dist. Ct. App. 2020) (finding a due process violation with respect to an award of monetary sanctions where the insurer's motion to dismiss did not seek sanctions, the clients did not seek sanctions, and the trial court did not provide any notice that it intended to invoke its inherent authority to sanction).

54. KCI USA, Inc. v. Healthcare Essentials, Inc., 797 F. App'x 1002 (6th Cir. 2020).

55. *Id.* at 1004.

56. *Id.* at 1003.

57. *Id.* at 1004.

58. *Id.*

59. *KCI*, 797 F. App'x at 1004.

60. *Id.* (internal quotation marks omitted).

61. *Id.*

62. *Id.*

63. *Id.*

on July 21, 2016."[64] The next day, the district court held a status conference.[65] Because Cavitch was out of the case, no one from the firm attended.[66] During the status conference, Tennebar's lawyer attempted to blame Cavitch for any discovery misconduct.[67] The judge advised the lawyers present that Cavitch should appear at the next status conference if Healthcare Essentials' new lawyers thought that the firm's presence was necessary.[68]

At the next status conference in early August, the court considered Healthcare Essentials' discovery mischief, including Cavitch's alleged involvement.[69] The individual attorneys attended the conference.[70] The court questioned Weiss regarding one of the discovery violations.[71] Soon thereafter, KCI filed a motion seeking discovery concerning Cavitch's involvement in Healthcare Essentials' obstructionist discovery tactics. After Cavitch submitted ex parte briefs that revealed Tennebar's fraud and thefts, the district court held a telephonic status conference to discuss Healthcare Essentials' continuing violation of a restraining order and other discovery abuses.[72] During the conference, Atsou testified regarding Cavitch's alleged participation in Healthcare Essentials' falsification of some spreadsheets.[73]

Cavitch's involvement in the case "was largely an afterthought" until November 2017, when the district court heard one of KCI's motions to show cause.[74] By then, KCI had fully unraveled Healthcare Essentials' fraud and theft of KCI's intellectual property, but Healthcare Essentials still obstructed discovery, disobeyed discovery orders, and disregarded the injunction.[75] Importantly, KCI's motion did not mention Cavitch or its conduct, or any of the individual attorneys.[76]

Hours before the scheduled hearing on KCI's latest motion, KCI filed a "bench brief" that assailed "the Cavitch attorneys."[77] In its brief, KCI rehashed old grievances and asserted for the first time that Cavitch lawyers had made misrepresentations to the court.[78] "KCI's brief, however, neither sought sanctions from the individual attorneys nor mentioned the individual attorneys by name (apart from including

64. *KCI*, 797 F. App'x at 1004.
65. *Id.*
66. *Id.*
67. *Id.*
68. *KCI*, 797 F. App'x at 1004.
69. *Id.* at 1004–05.
70. *Id.* at 1005.
71. *Id.*
72. *Id.*
73. *KCI*, 797 F. App'x at 1005.
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *KCI*, 797 F. App'x at 1005.

testimony as an exhibit)."[79] In response, Cavitch filed a short brief and supporting affidavit stating that it was prepared to defend itself.[80]

At the hearing—which no one from Cavitch attended—KCI thoroughly discussed the firm's conduct.[81]

> On the one hand, the district judge acknowledged that the sanctions against Cavitch were "[n]ot an issue, as far as I'm concerned, certainly not at this hearing." On the other, KCI stated it would be "directly critical of some of the actions taken by counsel" and it was "referring to the Cavitch law firm" (not the new lawyers).[82]

After the show cause hearing, KCI filed an "omnibus motion for sanctions" against Cavitch but not against the individual attorneys.[83] Cavitch opposed the motion and requested an evidentiary hearing.[84] Then, in a footnote in its reply brief, KCI for the first time indicated that it was also seeking sanctions against the individual attorneys in accordance with 28 U.S.C. § 1927.[85] The footnote read:

> The Opposition contends that Cavitch cannot be sanctioned under 28 U.S.C. § 1927. . . . For the removal of any doubt . . . the Court should sanction Michael Rasor, Komlavi Atsou, and Eric Weiss of the Cavitch firm—the same individuals who submitted affidavits with the Opposition (and, in fact attested to the statements made in the Opposition)—under 28 U.S.C. § 1927 for multiplying these proceedings unreasonably and vexatiously.[86]

KCI apparently had to change course and seek sanctions against the individual attorneys, because, as Cavitch highlighted in its briefing, Sixth Circuit precedent established that § 1927 sanctions are not available against law firms.[87]

Without holding a hearing, the district court issued a sanctions order in which it held Cavitch and the individual attorneys responsible for the discovery violations recited in KCI's omnibus sanctions motion.[88] The court found that KCI was entitled to fees and costs from Cavitch and the individual attorneys.[89] To determine the proper

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79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *KCI*, 797 F. App'x at 1005.
84. *Id.*
85. *Id.*
86. *Id.* at 1005–06 (citation to the record omitted).
87. *See, e.g.*, BDT Prods., Inc. v. Lexmark Int'l, Inc., 602 F.3d 742, 750–51 (6th Cir. 2010) ("We therefore confirm . . . that 28 U.S.C. § 1927 does not authorize the imposition of sanctions on law firms."). There is a split of authority among federal appellate courts as to whether a law firm—as compared to an individual lawyer—may be sanctioned under 28 U.S.C. § 1927. Douglas R. Richmond, *Alternative Sanctions in Litigation*, 47 N.M. L. REV. 209, 224 (2017).
88. *KCI*, 797 F. App'x at 1006.
89. *Id.*

amount, the district court conducted a damages hearing.[90] After Cavitch unsuccessfully moved for reconsideration, the district court awarded KCI just over $365,000 in fees and costs against Cavitch, Rasor, and Atsou, and more than $ 290,000 against Weiss, "all joint and several."[91] Cavitch and the individual attorneys separately appealed to the Sixth Circuit.[92]

On appeal, the individual attorneys contended that they were denied due process because they lacked notice and a meaningful opportunity to be heard.[93] The Sixth Circuit agreed.[94] While Cavitch may have received adequate notice that it might be sanctioned, notice to the firm was not enough; either KCI or the district court had to fairly inform the individual attorneys that sanctions were also being sought against them.[95] The district court could have fulfilled its notice obligation through a show cause order, but it never issued one.[96] As for KCI's failure to put the individual attorneys on notice:

> KCI could have specifically moved for sanctions against the individual attorneys in its original omnibus sanctions motion, making it clear that it was seeking sanctions against the individual attorneys in addition to seeking sanctions against the firm. But KCI did not. Mentioning the individual attorneys in a *footnote* of a reply brief—when previous filings and allegations had been directed at the "Cavitch Firm"—is not sufficient notice. Telling is KCI's reason for flagging the individual attorneys in that footnote: "For the removal of any doubt . . . the Court should sanction Michael Rasor, Komlavi Atsou, and Eric Weiss of the Cavitch firm." Doubt there was. And doubt [was] not enough to provide sufficient notice to the individual attorneys.[97]

Continuing, the court reasoned that KCI's earlier sanctions motions did not put the individual attorneys on notice, either, because those motions were directed solely at the "Defendant" and "Defendant's Counsel."[98] They never mentioned the individual attorneys.[99] The court's warning when granting Cavitch's motion to withdraw that the firm's conduct could come back to haunt it—which, by the time of the sanctions order, was growing mold—was not specific enough to put the individual attorneys on notice.[100] After all, these remarks were not notice of sanctions—they simply notified Cavitch that it might have to explain its conduct at some later time.[101] KCI's bench brief addressed

90. *Id.*
91. *Id.*
92. *Id.*
93. *KCI*, 797 F. App'x at 1006.
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *KCI*, 797 F. App'x at 1007.
99. *Id.*
100. *Id.*
101. *Id.* at n.1.

Healthcare Essentials' serial discovery abuses, but it did not mention the individual attorneys; rather, it referred to the "Cavitch Firm."[102] Furthermore, "KCI titled its omnibus sanctions motion 'Plaintiff KCI, USA, Inc.'s Omnibus Motion for Sanctions Against Cavitch, Familo & Durkin Co., LPA' and explained that the 'Motion for Sanctions against counsel [was] directed *only* at Cavitch, Familo & Durkin Co., LPA.'"[103] In the motion, KCI asked the court to sanction Cavitch and require Cavitch to reimburse KCI's reasonable attorney's fees and costs.[104] As the *KCI* court noted, it "is one thing to believe your firm is going to be sanctioned and required to pay attorney's fees and costs. It is quite another to be informed that you—individually—could be on the hook for the sanctions."[105]

Because they never received notice that they might be sanctioned, the individual attorneys were denied due process.[106] Furthermore, while it is not immediately relevant, they were also denied an opportunity to be heard, further robbing them of due process.[107] Although they were not necessarily entitled to an evidentiary hearing, they never even had a chance to file briefs opposing KCI's omnibus motion for sanctions.[108] Cavitch's opportunities to defend itself could not be imputed to the individual attorneys because, as the *KCI* court observed, parties' interests can differ.[109]

The Sixth Circuit vacated the sanctions order and remanded the case to the district court to afford the individual attorneys an opportunity to be heard.[110] The court also vacated the order and remanded the case with respect to the sanctions against the firm.[111] The court had to remand Cavitch's appeal because the firm's liability pivoted largely on the individual attorneys' conduct.[112]

The *KCI* court reached the correct result. If a court plans to sanction an individual lawyer as opposed to the lawyer's firm, the lawyer must receive notice and an opportunity to be heard before he or she may be sanctioned; notice to the law firm does not constitute notice to the lawyer.[113] Similarly, if a court indicates that it is contemplating sanctions against a party, it may not sanction the party's lawyer without first

102. *Id.* at 1007.
103. *KCI*, 797 F. App'x at 1007.
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.* (observing that the individual attorneys did not have a meaningful opportunity to respond to the allegations against them).
108. *KCI*, 797 F. App'x at 1007–08.
109. *Id.* at 1008.
110. *Id.*
111. *Id.*
112. *Id.*
113. *KCI*, 797 F. App'x at 1006.

giving the lawyer notice of that possibility.[114] Just as a law firm's and individual lawyers' interests may differ when sanctions are in play, so may a party's and its lawyer's interests vary.

*Kornhauser v. Commissioner of Social Security*[115] is another interesting case in which notice to the lawyer was held to be inadequate. In that case, Valinda Kornhauser sued the Commissioner of Social Security in the U.S. District Court for the Middle District of Florida over the denial of her claim for disability benefits.[116] The magistrate judge assigned to the case opted to decide Kornhauser's claims based on the administrative record and directed both sides to submit legal memoranda supporting their respective positions.[117]

After reviewing the parties' memoranda, the magistrate judge issued a report and recommendation (R&R) indicating that the district court should vacate the administrative decision adverse to Kornhauser and remand the case to the Commissioner for further proceedings.[118] In the R&R, the magistrate judge noted that the legal memorandum Kornhauser's lawyer had filed on her behalf violated Middle District of Florida Local Rule 1.05(a), which governed the formatting, font size, line spacing, margins, and paper quality of documents filed with the court.[119] Specifically, the margins of Kornhauser's memorandum were too narrow and the footnotes used smaller than ten-point type.[120] In a footnote accompanying these criticisms, the magistrate judge wrote: "These intentional violations would justify striking the memorandum. However, this sanction would unfairly punish the plaintiff. Consequently, I propose that, when plaintiff's counsel seeks attorney's fees, that the typical request for a cost-of-living increase be denied."'[121]

The district judge adopted the magistrate's R&R and instructed the court clerk to enter judgment for Kornhauser.[122] Subsequently, Kornhauser petitioned the district court to recover her attorney's fees under the Equal Access to Justice Act (EAJA).[123] The parties stipulated to a $5,000 fee award.[124] The district court referred the stipulated fee award to the magistrate judge for a reasonableness recommendation.[125] The magistrate judge concluded that the district court should

114. Valley Health Sys., LLC v. Est. of Doe, 427 P.3d 1021, 1032 (Nev. 2018).
115. Kornhauser v. Comm'r of Soc. Sec., 685 F.3d 1254 (11th Cir. 2012).
116. *Id.* at 1255.
117. *Id.*
118. *Id.*
119. *Id.*
120. *Kornhauser*, 685 F.3d at 1255.
121. *Id.* (quoting the footnote to the R&R).
122. *Id.* at 1255–56.
123. *Id.* at 1256.
124. *Id.*
125. *Kornhauser*, 685 F.3d at 1256.

reduce Kornhauser's fee award by nearly $1,000 for her lawyer's violation of the local rule in preparing her legal memorandum.[126] Kornhauser objected to the recommendation, arguing that she did not deliberately violate the local rule and that the typical penalty for offenses such as hers was the allowance of the opportunity to correct the errors, but the district court overruled her objection and reduced her fee award as a sanction.[127] Kornhauser appealed the district court's decision to the Eleventh Circuit, which concluded that it was "not sustainable."[128]

In sanctioning Kornhauser's lawyer by reducing the fee award, the district court had relied on its "inherent power to manage the orderly and efficient disposition of the cases before it."[129] In invoking its inherent authority, however, the district court was obligated to afford Kornhauser's lawyer fair notice that sanctions were possible and an opportunity to defend her conduct orally or in writing.[130] Unfortunately, the district court failed to do so and thereby robbed the lawyer of due process:

> The only notice Kornhauser's attorney received, which informed her that she might be sanctioned for failing to comply with Local Rule 1.05(a), came in the form of a footnote to the Magistrate Judge's R&R . . . addressing the merits of Kornhauser's challenge to the Commissioner's decision. The Magistrate Judge never asked Kornhauser's attorney for a response; he didn't need a response because he had already decided *sua sponte* to recommend, when the attorney applied for an award for attorney's fees, that the District Court sanction the attorney for violating Local Rule 1.05(a). Thus, in the [later] R&R he sent to the District Court on the EAJA fees issue, he did not recommend that the District Court issue an order requiring the attorney to show cause why she should not be sanctioned. The Magistrate Judge did not recommend the issuance of an order to show cause because he had already branded counsel's violation of the local rule "intentional" and worthy of sanction—no explanation could suffice to excuse the violation. [131]

Had the district court issued a show cause order and thereafter granted the lawyer a hearing rather than simply branding her conduct intentional in line with the magistrate judge's view, "the [district] court might have concluded that striking the memorandum would have been the simplest, and more appropriate, sanction for failing to

126. *Id.*
127. *Id.* at 1256-57.
128. *Id.* at 1257.
129. *Id.* (citing Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991)).
130. *Kornhauser*, 685 F.3d at 1257 (quoting *In re* Mroz, 65 F.3d 1567, 1575–76 (11th Cir. 1995)).
131. *Id.* at 1258.

comply with Local Rule 1.05(a)."[132] Instead, the district court denied the lawyer due process and consequently abused its discretion in sanctioning her through the reduction of her fees.[133]

The *Kornhauser* court vacated the reduced EAJA fee award and instructed the district court to grant Kornhauser attorney's fees in the stipulated amount of $5,000.[134]

It is perhaps worth considering whether the *Kornhauser* court might have affirmed the fee reduction on harmless error grounds; after all, the lawyer had the opportunity to object in writing to the R&R and, in doing so, asserted that she had not intentionally violated the local rule.[135] But this was not a good case for harmless error analysis because the magistrate judge simply assumed the lawyer's bad faith rather than exploring the reasons for her violation of the local rule before recommending the fee reduction.[136] Plus, the *Kornhauser* court was plainly bothered by the magistrate judge's picayune basis for sanctions and the district judge's decision to essentially rubber stamp the magistrate's R&R,[137] such that it had no incentive to find harmless error.

### *B. Notice Where Monetary Sanctions are Punitive*

The concept of notice that the *KCI* and *Kornhauser* courts addressed represents basic due process analysis. As *KCI* and *Kornhauser* also illustrate, courts often sanction lawyers monetarily. In *KCI*, the district court awarded KCI its attorney's fees and costs as a sanction, but courts may also fine lawyers.[138] If, rather than assessing attorney's fees and costs, a court fines a lawyer for misconduct and makes the fine payable to the court as compensation for costs arising out of the sanctioned behavior, the fine is civil in nature and the sanctioned lawyer is entitled to notice and an opportunity to be heard.[139] Where a fine is not compensatory, it is considered criminal in nature and the due process requirements change.[140] In such cases, the court must afford

132. *Id.* (footnote omitted).

133. *Id.* (quoting *In re Mroz*, 65 F.3d at 1575–76).

134. *Id.* at 1258–59.

135. *Kornhauser*, 685 F.3d at 1256–57.

136. *Id.* at 1258.

137. *See id.* (discussing the procedure by which the court sanctioned the lawyer).

138. In *Kornhauser*, the district court did not fine the lawyer; it simply reduced her fee award to be paid by the Commissioner. *Id.* at 1257.

139. Gibson v. Credit Suisse Grp. Secs. (USA) LLC, 733 F. App'x 342, 345 (9th Cir. 2018); *see also* Fed. Trade Comm'n v. Rensin, 687 F. App'x 3, 7 (2d Cir. 2017) (explaining that when compensatory sanctions are being considered, providing notice and an opportunity to be heard satisfies due process); Ingenuity13 LLC v. Doe, 651 F. App'x 716, 719–20 (9th Cir. 2016) (explaining that an award of attorney's fees and costs is compensatory and thus civil in nature even if the court multiplies the aggrieved party's requested fees).

140. *See Gibson*, 733 F. App'x at 345 (discussing due process in criminal contempt proceedings).

the lawyers the same due process they would receive in a criminal contempt proceeding, including proof of their guilt beyond a reasonable doubt.[141] Obviously, lawyers must have notice that all or some portion of a fine is punitive rather than compensatory to avail themselves of the procedural protections that accompany a criminal contempt charge.[142]

In *Gibson v. Credit Suisse Group Securities (USA) LLC*,[143] for example, the district court sanctioned the plaintiffs' lawyers under 28 U.S.C. § 1927 and its inherent authority for mishandling a key witness statement.[144] The court awarded the defendants their attorney's fees associated with the pursuit of their sanctions motion, and additionally fined each of the plaintiffs' lawyers $6,000.[145] The plaintiffs' lawyers appealed to the Ninth Circuit.[146]

The *Gibson* court concluded that the plaintiffs' lawyers had received adequate notice and an opportunity to be heard in connection with the award of fees to the defendants, and that their right to due process regarding that portion of the sanction had been satisfied.[147] With respect to their $6,000 fines, however, the lawyers argued that those sanctions were punitive rather than compensatory, and that they were therefore entitled to additional due process safeguards.[148] This was not a straightforward issue from the Ninth Circuit's perspective, because the district court had stated that the fines "were 'designed in part to account for the cost of judicial resources unnecessarily expended as a result of Plaintiffs' counsel's actions.'"[149] Unfortunately, the district court had not stated what portions of the fines were intended to compensate the court as compared to being assessed purely as penalties.[150]

To the extent the fines were intended to compensate the district court, the *Gibson* court concluded that the lawyers had received due process in conjunction with the award of the defendants' attorney's fees.[151] The Ninth Circuit therefore vacated the district court's sanctions order as to the $6,000 fines and remanded the case so that the district court could determine whether any portion of the fines was

141. *Id.*

142. *See, e.g.*, Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1438, 1444 (10th Cir. 1998) (reversing the district court's sanctions order because the lawyers did not adequate notice that they might be held in criminal contempt and suffer non-compensatory monetary sanctions, and they were not afforded the due process that criminal contempt charges require).

143. *Gibson*, 733 F. App'x at 342.

144. *Id.* at 344–45.

145. *Id.* at 344.

146. *Id.*

147. *Id.* at 345–46.

148. *Gibson*, 733 F. App'x at 345.

149. *Id.* at 346.

150. *Id.*

151. *Id.* at 345–46.

non-compensatory.[152] "If any portion of the fines [was] non-compensatory, then that portion would be criminal in nature and would be subject to the additional due process protection of proof beyond a reasonable doubt."[153]

## II. THE OPPORTUNITY TO BE HEARD

Once a lawyer receives adequate notice that he or she may be sanctioned, due process further requires that the court afford the lawyer an opportunity to be heard before any sanctions are imposed. At the outset, it is important to understand that due process generally does not require a court to hold an evidentiary hearing before sanctioning a lawyer.[154] Indeed, despite framing the second prong of the due process test as requiring an "opportunity to be heard," a court generally need not hold *any* hearing before imposing sanctions.[155] An opportunity to respond in writing to a motion for sanctions or to an order to show cause usually suffices for due process.[156] If lawyers believe that they need testimony or other evidence to effectively oppose a motion for sanctions or to respond to a show cause order, they should submit affidavits or other evidence as exhibits to their written responses.[157] Courts tend to reason that sanctions motions, like most other matters that come before them, "can adequately be heard on the papers."[158]

Here it is worth pausing to note that an evidentiary hearing and a hearing at which a lawyer simply presents oral argument are not equivalent proceedings,[159] and that courts are often wise to entertain oral argument before sanctioning a lawyer even where an evidentiary hearing is unnecessary. As the Second Circuit once explained:

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152. *Id.* at 346.

153. *Gibson*, 733 F. App'x at 346.

154. Collins v. Daniels, 916 F.3d 1302, 1320 n.15 (10th Cir. 2019); *In re* Rembrandt Techs. LP Patent Litig., 899 F.3d 1254, 1276 (Fed. Cir. 2018) (involving a patent law exceptional case determination); *In re* USA Com. Mortg. Co., 462 F. App'x 677, 680 (9th Cir. 2011); *In re* 60 E. 80th St. Equities, Inc., 218 F.3d 109, 117 (2d Cir. 2000); Wilson-Simmons v. Lake Cnty. Sheriff's Dep't, 207 F.3d 818, 822 (6th Cir. 2000); Johns v. Johns, 672 S.E.2d 34, 38–40 (N.C. Ct. App. 2009).

155. Gamage v. Nev. *ex rel.* Bd. of Regents of Higher Educ., 647 F. App'x 787, 789 (9th Cir. 2016); Porter Bridge Loan Co. v. Northrop, 566 F. App'x 753, 756 (10th Cir. 2014) (quoting Resol. Tr. Corp. v. Dabney, 73 F.3d 262, 268 (10th Cir. 1995)).

156. *See, e.g.*, *In re* Deepwater Horizon, 643 F. App'x 377, 383 (5th Cir. 2016) (explaining that the opportunity to respond in writing to a motion for sanctions satisfied due process); Ford v. Strange, 580 F. App'x 701, 715 (11th Cir. 2014) (stating that the lawyer's written response to a motion for Rule 11 sanctions satisfied due process); *Porter Bridge Loan Co.*, 566 F. App'x at 756 (quoting *Dabney*, 73 F.3d at 258); Storli v. Holliday, 37 F. App'x 874, 876 (9th Cir. 2002) (concluding that the lawyer's opportunity to respond in writing to the sanctions motions lodged against him satisfied due process); *In re* Sunshine Jr. Stores, Inc., 456 F.3d 1291, 1307 (11th Cir. 2006) ("The party subject to sanctions must be afforded the opportunity to justify its actions either orally *or in writing*." (emphasis added)).

157. Jensen v. Phillips Screw Co., 546 F.3d 59, 65 (1st Cir. 2008).

158. *Id.*

159. *In re* Jacobs, 44 F.3d 84, 90 (2d Cir. 1994).

> An evidentiary hearing serves as a forum for finding facts; as such, its need can be obviated when there is no disputed question of fact or when sanctions are based entirely on an established record. In contrast, a hearing at which the subject of a sanctions motion speaks and argues vindicates a purpose that is *sui generis*. It is this latter purpose to which the phrase "opportunity to be heard" aspires in our context. Sanctions carry much more than a pecuniary impact: Reputations are at stake and licenses to practice are in danger. Thus, irrespective of the state of the factual record, a district court will often exercise its discretion to provide someone facing this jeopardy the opportunity to speak to the very court that is about to pronounce judgment.[160]

The arguable need for an evidentiary hearing is weakest where the presiding judge has supervised the litigation from its inception or for some reasonable time and is familiar with the accused lawyer's conduct, or where the judge witnessed the conduct that forms the basis for the possible sanctions.[161] Either way, the court is unlikely to benefit from an evidentiary hearing and will probably be either reluctant or unwilling to hold one.[162] It follows that a court may similarly decline to hear oral argument in such situations.

Although a court generally does not have to hold a hearing before it sanctions a lawyer, in some jurisdictions a hearing may be required in certain circumstances.[163] It is a rare general rule, after all, that does not have some exceptions.[164] For example, in some jurisdictions, a

160. Schlaifer Nance & Co. v. Est. of Warhol, 194 F.3d 323, 335 (2d Cir. 1999).

161. *See, e.g.*, Gonzalez v. Fresenius Med. Care N. Am., 689 F.3d 470, 481 (5th Cir. 2012) (rejecting the plaintiff's due process argument where the judge who awarded sanctions had presided over the plaintiff's consolidated cases and was fully familiar with the litigation); Lamboy-Ortiz v. Ortiz-Velez, 630 F.3d 228, 246 (1st Cir. 2010) ("The sanctions were imposed largely on the basis of conduct that occurred within the court's presence (and in relation to which the plaintiffs' counsel had received numerous warnings), and thus there were few issues, if any, that could have been clarified by the presentation of additional evidence or testimony." (footnote omitted)); Ace Am. Ins. Co. v. Underwriters at Lloyd's & Cos., 939 A.2d 935, 946 (Pa. Super. Ct. 2006) (concluding that the trial court acted within its discretion when it sanctioned a lawyer without a hearing where the court had observed the lawyer's offending conduct firsthand).

162. *See* Cook-Benjamin v. MHM Corr. Servs., Inc., 571 F. App'x 944, 949 (11th Cir. 2014) (explaining that the district court was not required to hold a hearing before imposing sanctions where the lawyer had an opportunity to respond to the Rule 11 allegations, the district court was versed in the facts of the case and the sanctionable conduct, and any hearing would only have squandered judicial resources).

163. *See, e.g.*, Crumplar v. Super. Ct. *ex rel* New Castle Cnty., 56 A.3d 1000, 1011–12 (Del. 2012) (mandating oral argument when a court imposes Rule 11 sanctions sua sponte); Moakley v. Smallwood, 826 So. 2d 221, 227 (Fla. 2002) (requiring an evidentiary hearing where a court is considering an award of attorney's fees against a lawyer for bad faith conduct based on the court's inherent authority); *In re* Marriage of Adugna, 95 P.3d 646, 648 (Kan. Ct. App. 2004) (stating that before it may impose inherent authority sanctions, a trial court must give a lawyer the opportunity for a hearing on the record).

164. *See, e.g.*, Smith v. Banner Health Sys., 621 F. App'x 876, 883 (9th Cir. 2015) ("In light of the significant sanction imposed, the different judges that presided in this matter, and the particulars of this action and related actions known to the district court, we hold that the district court abused its discretion when it failed to grant the [lawyer's] request for oral argument prior to imposing 28 U.S.C. § 1927 sanctions."); Adams v. Ford Motor Co., 653

hearing may be warranted where the lawyer's alleged misconduct rises to the level of bad faith required for inherent authority sanctions or where the lawyer is threatened with sanctions under 28 U.S.C. § 1927 and the lawyer's conduct is so egregious that it is tantamount to bad faith.[165] At least where inherent authority sanctions are concerned, it is better practice for the court to conduct an evidentiary hearing.[166]

If a lawyer is sanctioned without a hearing or following an inadequate hearing and thereafter successfully moves for reconsideration, either a hearing on reconsideration or the opportunity to then fully brief the issues ordinarily satisfies the lawyer's right to due process.[167] If, however, the court considers a different form of sanction or a new basis for sanctions after a lawyer has advocated for reconsideration of the original sanction, the court must afford the lawyer notice and an opportunity to be heard with respect to the new sanction.[168]

Even where a hearing is not required, a court has the discretion to hold an evidentiary hearing or entertain oral argument before imposing sanctions.[169] In exercising its discretion to conduct an evidentiary hearing, a court may wish to consider (1) the nature and severity of the sanctions in play; (2) whether the imposition of sanctions requires a finding of bad faith or misconduct nearing that level on the part of the lawyer; (3) the risk that sanctions might be erroneously imposed absent a hearing; (4) the court's level of familiarity with the case and knowledge of the conduct in question; (5) whether the party moving for sanctions may be doing so to gain a tactical advantage in the litigation;

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F.3d 299, 309 (3d Cir. 2011) (holding that a lawyer who was ambushed by the court at a hearing was denied due process because he did not have a chance to present witness testimony to support his position and the judge did not examine his accuser).

165. *See, e.g.*, Amlong & Amlong, P.A. v. Denny's, Inc., 500 F.3d 1230, 1239–42 (11th Cir. 2007) (imposing a high standard for § 1927 sanctions and stating that a lawyer facing such sanctions is entitled to a hearing).

166. U.S. v. Agosto-Vega, 731 F.3d 62, 66 (1st Cir. 2013) (quoting U.S. v. Romero–López (*In re* Armenteros-Chervoni), 661 F.3d 106, 108-09 (1st Cir. 2011)).

167. *See, e.g.*, Snider v. L-3 Commc'ns Vertex Aerospace, L.L.C., 946 F.3d 660, 678 (5th Cir. 2019) (discussing a hearing on reconsideration); Sun River Energy, Inc. v. Nelson, 800 F.3d 1219, 1230 (10th Cir. 2015) ("[A]lthough the initial order imposing the sanction on [the lawyer] was procedurally defective, the subsequent proceedings on counsel's motion for reconsideration cured the deficiency."); *In re* Hancock, 192 F.3d 1083, 1086 (7th Cir. 1999) ("Without notice that sanctions were in the offing and with no opportunity to be heard, Taylor was in fact deprived of his due process rights at the April 14 hearing. However, the bankruptcy court . . . scheduled another proceeding. So it was essentially a no-harm, no-foul situation because, generally speaking, 'procedural errors are cured by holding a new hearing in compliance with due process requirements.'" (quoting Batanic v. I.N.S., 12 F.3d 662, 667 (7th Cir. 1993))); Valley Health Sys., LLC v. Est. of Doe, 427 P.3d 1021, 1033 (Nev. 2018) (concluding that "a subsequent opportunity to fully brief the issue of imposition of attorney sanctions is sufficient to cure any initial due process violation").

168. Smyth v. Cha (*In re* Cha), No. CC-07-1027-MoDMc, 2007 WL 7535049, at *5-6 (B.A.P. 9th Cir. Aug. 16, 2007).

169. *See* Lambright v. Ryan, 698 F.3d 808, 826 (9th Cir. 2012) (referring to an evidentiary hearing); Jones v. Pittsburgh Nat'l Corp., 899 F.2d 1350, 1358–59 (3d Cir. 1990) (stating that the need for oral argument, a written response, or an evidentiary hearing before sanctions issue should be committed to the district court's discretion).

(6) whether there is a question of responsibility for the misconduct as between the lawyer and the party the lawyer represents, or between multiple lawyers; (7) the harm to the lawyer's reputation that the sanctions under consideration may cause; and (8) whether a hearing may facilitate anticipated appellate review.[170] This list is not exclusive and other case-specific factors may influence a court's decision to conduct or deny an evidentiary hearing.[171]

*In re Pimentel-Soto*[172] is a recent case in which the district court's failure to conduct an evidentiary hearing, on top of inadequate notice of possible sanctions, required reversal of the lawyer's modest monetary penalty. In *In re Pimentel-Soto*, the district court appointed Kendys Pimentel-Soto to represent a criminal defendant.[173] Two weeks later, Pimentel-Soto failed to appear at a September 16, 2015 status conference.[174] The district court began the conference by fining Pimentel-Soto $100 for failing to appear.[175] The government lawyers were there, however, so the conference proceeded in her absence.[176]

Pimentel-Soto moved for reconsideration within hours of being sanctioned.[177] She wrote that she missed the conference because she mistakenly calendared it for September 17 instead of September 16.[178] She explained that at the time of the conference, she was meeting with her client to prepare for the conference that she wrongly believed would be held the following day.[179] In an effort to convince the court of her diligence generally, she highlighted her many activities in the case since her recent appointment.[180]

The district court denied her motion for reconsideration later that day and ordered her to pay the sanction within two days.[181] Pimentel-Soto was equally expedient and filed a second motion for reconsideration the same day.[182] "This time, she insisted that the district court grant her a hearing so that she might show cause for why her failure to appear '[did] not merit this type of sanction,' in light of the 'punitive character of such sanction and its stigma on [her] professional reputation and record.'"[183] In support of her motion, she attached a copy of

170. *See* GREGORY P. JOSEPH, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE 412, 612 (6th ed. 2020) (discussing due process generally and listing some of these factors).

171. *See generally* Steinert v. Winn Grp., Inc., 440 F.3d 1214, 1222 (10th Cir. 2006) ("The precise procedural protections of due process vary, depending upon the circumstances, because due process is a flexible concept unrestricted by any bright-line rules.").

172. *In re* Pimentel-Soto, 957 F.3d 82 (1st Cir. 2020).

173. *Id.* at 84.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Pimentel-Soto*, 957 F.3d at 84.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Pimentel-Soto*, 957 F.3d at 84.

183. *Id.*

her calendar, which showed her scheduling error.[184] She further explained that her prior court appearances reflected a history of punctuality.[185] Pimentel-Soto's second motion for reconsideration was equally futile; the district court denied it without a hearing.[186]

Hanging tough, Pimentel-Soto asked the district court to stay payment of her $100 fine so that she could appeal the sanction.[187] The district court refused.[188] Pimentel-Soto paid the fine under protest and appealed to the First Circuit to rectify the "continuing harm to her reputation as a result of the sanction."[189]

The *In re Pimentel-Soto* court was troubled by the sanction for three combined reasons.[190] First, the district judge did not sanction all lawyers who failed to appear at conferences or hearings; rather, his standard scheduling order recited that "sanctions for failure to appear 'may' be issued."[191] In that vein, the district judge acknowledged that he rarely imposed sanctions and only then on a case-specific basis.[192] There was also evidence in the record that in many cases in the district, lawyers who failed to appear were not sanctioned.[193]

Second, the court could not ascertain the criteria used to determine when and why lawyers should be sanctioned for failing to appear.[194] Neither the local rules, nor any judge's standing order in the district, nor case law gave any hint of the standard used to sanction lawyers for failing to appear at conferences or hearings.[195] The court suspected that the criteria might "be something like good cause. But then it [was] difficult to see how there could be many failures to appear that are more innocent than this one," where the lawyer's neglect was an innocent error in calendaring the conference date.[196] In short, Pimentel-Soto lacked notice of the basis for her sanction.[197]

Third, the district court sanctioned Pimentel-Soto without first allowing her the opportunity to show cause for missing the conference or to explain her absence.[198] The *In re Pimentel-Soto* court noted that it

184. *Id.*
185. *Id.*
186. *Id.*
187. *Pimentel-Soto*, 957 F.3d at 83–84.
188. *Id.* at 84.
189. *Id.*
190. *Id.* at 86.
191. *Id.*
192. *Pimentel-Soto*, 957 F.3d at 86.
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.*
197. *See Pimentel-Soto*, 957 F.3d at 86. ("The lack of notice . . . here is partial and implicit: The specter of a fine is disclosed, but no hint is provided as to why it is imposed sometimes and often not others. Clarity about a rule requires clarity about available excuses or exceptions to it.").
198. *Id.*

had "repeatedly urged district courts to listen before sanctioning."[199] Such prudence is especially wise where the district court invokes its inherent authority to sanction the lawyer.[200] Certainly, the need for a hearing is lessened when the sanctionable conduct occurs in the judge's presence, and, here, Pimentel-Soto's failure to appear indeed occurred in the district judge's presence.[201] But the district judge did not know the reason for her failure to appear when he sanctioned her, which made the sanction appear all the more arbitrary and confusing.[202]

The *In re Pimentel-Soto* court assumed that the district court considered equitable criteria when deciding whether to sanction lawyers who missed hearings or conferences.[203] Unfortunately, "without notice of these criteria, the bar and public [might] think otherwise. Unequal treatment without an opportunity to be heard before a sanction is imposed and the absence of any explanation for that inequality" could foster suspicion that the district court's decision was at the very least irrational.[204]

In summary, the court reaffirmed district courts' inherent authority to sanction lawyers but reminded judges to be cautious when they invoke that authority.[205] A district court's denial of a hearing before sanctioning a lawyer amplifies the appearance of unfairness and increases the probability of error where, as here, the court needs to know the factual foundation for the sanctions.[206] In accordance with that observation, the First Circuit reversed Pimentel-Soto's sanction.[207]

Although the *In re Pimentel-Soto* court was careful not to be overly critical of the district court, the First Circuit was plainly perplexed by the district court's arbitrariness in sanctioning Pimentel-Soto and seeming disregard of her motions for reconsideration.[208] In fact, the district court's denial of her motions for reconsideration illustrates a possibly under-appreciated aspect of the case. That is, the First Circuit did not appear to analyze whether Pimentel-Soto's motions to reconsider afforded her the opportunity to be heard that she was previously denied. But even if the court had entertained that possibility, it still should have determined that the district court denied Pimentel-Soto due process. That conclusion was required because for a motion for re-

199. *Id.*
200. *Id.* (quoting U.S. v. Agosto-Vega, 731 F.3d 62, 66 (1st Cir. 2013)).
201. *Id.* at 87.
202. *Pimentel-Soto*, 957 F.3d at 87.
203. *Id.*
204. *Id.* (noting that the court's "own confidence that such suspicions [were] unwarranted serve[d] as too pat a reassurance").
205. *Id.* (quoting U.S. v. Horn, 29 F.3d 754, 760 (1st Cir. 1994)).
206. *Id.* (quoting U.S. v. Agosto-Vega, 731 F.3d 62, 66 (1st Cir. 2013)).
207. *Pimentel-Soto*, 957 F.3d at 87.
208. See *supra* notes 190–202 and accompanying text.

consideration to substitute for a hearing, the court must give the lawyer's arguments "full and adequate consideration."[209] Regrettably, the district court apparently did not give Pimentel-Soto's motions *any* consideration, let alone perform the dutiful review that due process requires.[210]

If a court grants a hearing, it must allow the lawyer or law firm facing sanctions to reasonably present his, her, or its defense.[211] Consider, for example, the plight of the law firm facing sanctions in *Kirshner v. Uniden Corp. of America*.[212]

In *Kirshner*, the Missouri law firm of Schumaier, Roberts & McKinsey (Schumaier), together with its Los Angeles local counsel, Michael Weinstock, represented the plaintiff, Don Kirshner, in a product liability lawsuit against Uniden in a Los Angeles federal court.[213] Approximately one year into the litigation, Uniden filed a motion for a protective order to compel Schumaier to return some allegedly privileged Uniden documents that the firm had obtained in another case.[214] When Schumaier did not respond to Uniden's motion—Weinstock received a copy of the motion but Schumaier reportedly did not—Uniden served a supplemental memorandum in which it sought sanctions against both Schumaier and Weinstock under two local court rules, 28 U.S.C. § 1927, and the district court's inherent powers.[215]

Timing is sometimes critical in litigation and so it was here: Schumaier received Uniden's supplemental memorandum on Saturday, June 14, 1986, and the district court set the hearing on Uniden's sanction request for Monday, June 16.[216] The district court conducted the hearing as planned on that Monday.[217] Weinstock and Uniden's lawyers attended the hearing, but Schumaier did not appear.[218] The district court granted Uniden's motion for a protective order and additionally assessed sanctions of just under $6,000 against Schumaier and Weinstock jointly and severally to compensate Uniden for its costs

209. Snider v. L-3 Commc'ns Vertex Aerospace, L.L.C., 946 F.3d 660, 678 (5th Cir. 2019).

210. *See In re Pimentel-Soto*, 957 F.3d at 84 (discussing the district court's treatment of Pimentel-Soto's motions for reconsideration).

211. *See, e.g.*, Haynes v. Home Depot USA, Inc., 800 F. App'x 480, 487 (9th Cir. 2020) (reasoning that a law firm's due process rights were violated where the district court conducted a sanctions hearing without the lawyer responsible for the misconduct); Nuwesra v. Merrill Lynch, Fenner & Smith, Inc., 174 F.3d 87, 93–94 (2d Cir. 1999) (explaining that the lawyer was denied a reasonable opportunity to be heard because the court did not discuss at the hearing all the specific instances of misconduct for which it sanctioned him and thus denied him the chance to defend against those charges).

212. Kirshner v. Uniden Corp. of Am., 842 F.2d 1074 (9th Cir. 1988).

213. *Id.* at 1076.

214. *Id.*

215. *Id.* at 1076–77.

216. *Id.* at 1077.

217. *Kirshner*, 842 F.2d at 1077.

218. *Id.*

in seeking the protective order.[219] Schumaier appealed to the Ninth Circuit on the ground that it was sanctioned without the benefit of due process.[220]

In the Ninth Circuit, Schumaier argued that the district court sanctioned it without affording it adequate notice and an opportunity to be heard.[221] The law firm's argument resonated with the *Kirshner* court:

> Schumaier first received notice of Uniden's intent to seek sanctions on Saturday, June 14, 1986, just two days before the hearing at which sanctions were imposed. This short notice, arriving during the weekend before the Monday hearing, undoubtedly left Schumaier inadequate time to prepare a defense and to travel from its offices in Missouri to Los Angeles to attend the hearing.[222]

Weinstock's presence at the sanctions hearing was no substitute for Schumaier's participation.[223] Although Weinstock asked the district court to defer the imposition of any sanctions until Schumaier had the opportunity to present a defense,[224] his appearance "was insufficient to protect Schumaier's interest. Indeed, Weinstock resisted Uniden's request for sanctions by arguing that Schumaier, not he, bore responsibility for the violation of the local court rules."[225]

The *Kirshner* court concluded that "the district court had no power to impose sanctions without granting at least a short continuance of the hearing to enable Schumaier to attend."[226] Consequently, in assessing sanctions against Schumaier, the district court abused its discretion.[227]

## III. RECOMMENDATIONS FOR LAWYERS

Now, with an understanding of the notice and hearing requirements for sanctions, it is worth examining the process from the perspective of a lawyer who is threatened with sanctions. In a law firm of any size, a lawyer who receives notice of possible sanctions—whether by way of an adversary's motion or letter, a court's comments at a hearing, or a show cause order—should promptly inform the firm's general counsel or other lawyer responsible for such matters.[228] This is the first

219. *Id.*
220. *Id.* at 1076.
221. *Id.* at 1082.
222. *Kirshner,* 842 F.2d at 1082.
223. *Id.* at 1083.
224. *Id.* at 1082.
225. *Id.* at 1083.
226. *Id.* (citing Miranda v. S. Pac. Transp. Co., 710 F.2d 516, 522–23 (9th Cir. 1983)).
227. *Kirshner,* 842 F.2d at 1083.
228. In the most comprehensive law firm general counsel survey conducted to date, seventy-six percent of the 255 law firms surveyed assigned the title "General Counsel" to the lawyer filling the general counsel role within the firm, "with risk management partner, ethics partner, firm counsel and loss prevention partner" the next most common titles conferred

step toward formulating an appropriate strategy for responding to the motion or order, or for planning for the motion or order that is expected to follow. Naturally, any plan or strategy may be affected by various factors, including, for example, whether sanctions are also being sought against the client and whether the firm has a conflict of interest as a result.[229]

When it comes to responding to a motion or order, a targeted lawyer may in many cases be entrusted with preparing the response—or at least a draft that is subject to approval by the general counsel or another specified lawyer in the firm. In other cases, different lawyers in the firm should be tasked with preparing the response. In yet other cases, it may be advisable to retain outside counsel for the lawyer who then prepares the response and represents the lawyer for the entirety of the sanctions controversy. The latter two approaches are not meant to suggest that lawyers threatened with sanctions should be excluded from their own defenses; after all, they have valuable knowledge to contribute and their interests are at stake. It is to suggest, however, that in some cases, separate counsel is likely to provide a level of objectivity when analyzing the situation and formulating a response that allegedly errant lawyers or their colleagues cannot.

Lawyers who are threatened with sanctions should remember that they have a right to specific notice of (1) the alleged misconduct to be sanctioned; (2) the authority for the sanctions being considered, such as the rule or statute being invoked, or the court's inherent authority; and (3) the standard by which their conduct will be assessed.[230] If all three elements are not clear from the adversary's motion or supporting papers or from the court's show cause order, the lawyer should seek a more definite statement from the adversary, or request that the court clarify its order. Different rules or statutes may penalize very different types of conduct, hold lawyers to varying standards of conduct, or permit only certain types of sanctions.[231] Lawyers need the particularized

upon the lawyer functioning as general counsel. Matthew K. Corbin, *The Aon General Counsel Survey*, QUALITY ASSURANCE REV. (Aon plc, Chicago, IL), Summer 2016, at 1, 8 (on file with the author); *see also* Anthony E. Davis, *The Emergence of Law Firm General Counsel and the Challenges Ahead*, PRO. LAW., No. 20(2), 2010, at 1 (reporting that in a 2008 survey of AmLaw 200 firms, eighty-five percent reported having a general counsel, and stating that for firms outside the AmLaw 200, "anecdotally, the existence of the position of general counsel is now almost as commonplace in law firms with over 200 lawyers, and is becoming common in firms of over 100 lawyers").

229. *See generally* MODEL RULES OF PRO. CONDUCT r. 1.7(a)(2) (AM. BAR ASS'N 2020) ("A concurrent conflict of interest exists if: . . . there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.").

230. Wilson v. Citigroup, N.A., 702 F.3d 720, 725 (2d Cir. 2012) (quoting Sakon v. Andreo, 119 F.3d 109, 114 (2d Cir. 1997)).

231. For example, and as outlined earlier, sanctions imposed under Rule 11 merely require proof of objectively unreasonable conduct by the lawyer, while sanctions imposed pursuant to a court's inherent authority require that the lawyer acted in bad faith. See *supra* notes 37–38 and accompanying text.

notice outlined above to prepare a meaningful defense. If, in the process of seeking clarification, the lawyer can guide the opposing party or the court toward a rule, statute, or standard that is favorable to the lawyer's defense, all the better.

When planning a response to a sanctions motion or show cause order, lawyers should assume that there will be no evidentiary hearing. A lawyer who wants a hearing should request one in accordance with applicable local rules.[232] Indeed, the failure to request a hearing usually defeats any later claim that a hearing was required to satisfy due process.[233] But assuming the court will not hold a hearing, it is important to marshal the exculpatory evidence necessary to submit with a brief or memorandum in opposition. For instance, a lawyer should obtain affidavits from supportive witnesses to append as exhibits to the brief or memorandum. The lawyer facing sanctions may need to submit an affidavit explaining her conduct. If documents are to be attached as exhibits to the brief or memorandum, it may be necessary to authenticate those in some fashion. In some cases, it may be desirable to obtain a report from an expert witness that can be submitted as an exhibit. In summary, if the court will decide whether to award sanctions "on the papers,"[234] the lawyer should ensure that the court has the best possible record to inform its decision. Moreover, a thorough response is necessary to build a record on appeal should the trial court

232. *See, e.g.*, Smith v. Banner Health Sys., 621 F. App'x 676, 683 (9th Cir. 2015) ("In light of the significant sanction imposed, the different judges that presided in this matter, and the particulars of this action and related actions known to the district court, we hold that the district court abused its discretion when it failed to grant the [lawyer's] request for oral argument [in conformity with local rules] prior to imposing 28 U.S.C. § 1927 sanctions.").

233. *See, e.g.*, Margo v. Weiss, 213 F.3d 55, 64 (2d Cir. 2000) ("Plaintiffs' counsel . . . could have requested an evidentiary hearing but did not ask for one; 'the district court had no reason to exercise its discretion to hold an evidentiary hearing that had not been requested.'" (quoting Int'l Ore & Fertilizer Corp. v. SGS Control Servs., Inc., 38 F.3d 1279, 1286–87 (2d Cir. 1994))).

234. Jensen v. Phillips Screw Co., 546 F.3d 59, 65 (1st Cir. 2008).

impose sanctions over the lawyer's opposition.[235] An appellate court typically will not allow a lawyer to make an argument against sanctions for the first time on appeal.[236]

If lawyers are surprised with possible sanctions at hearings or court conferences, they should explain that they were not adequately notified that they would have to defend their conduct, clarify the notice elements listed above, and request a continuance so that they may fairly respond to the allegations against them. Lawyers who are unable to postpone the discussion of possible sanctions must then defend themselves as best they can under the circumstances. If the court imposes sanctions, the lawyer may choose to seek reconsideration of the court's order. If the sanctions are recommended by a federal magistrate judge, the lawyer should object to the magistrate judge's recommendations under Rule 72(a) of the Federal Rules of Civil Procedure.[237] In seeking reconsideration or review, the lawyer is likely curing the initial due process violation,[238] but the point, of course, is that meritless sanctions should not survive judicial review that comports with due process. In any event, the lawyer's compelled participation in a surprise sanctions hearing does not satisfy the requirements for due process.[239]

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235. A lawyer who hopes to appeal a sanctions order must timely appeal from a *final* sanctions order. The lawyer's failure to do so was fatal in Feldman v. Olin Corp., 692 F.3d 748 (7th Cir. 2012), even though the court was sympathetic to the lawyer's argument that he was improperly sanctioned through an award of attorney's fees under Rule 11 because the district court did not provide adequate notice of the sanctions. *Id.* at 758. For that matter, the opposing party's "argument on the merits for sanctions was flimsy." *Id.* But, the *Feldman* court explained, it lacked jurisdiction to address the challenged Rule 11 sanctions because Feldman's lawyer "failed to file a timely notice of appeal from the district court's final decision on sanctions." *Id.* Although Feldman's lawyer filed a notice of appeal from the order granting the motion for sanctions, "that order was nonfinal, because it explicitly reserved the calculation of fees." *Id.* When the court assessed the calculated fees against Feldman in a subsequent order, his lawyer failed to file a notice of appeal premised upon that order. *Id.* (noting that the court had dismissed a prior appeal of the sanctions as untimely).

236. *See, e.g.*, Cook-Benjamin v. MHM Corr. Servs., Inc., 571 F. App'x 944, 949 (11th Cir. 2014) ("We will not consider Hardwick's argument, raised for the first time on appeal, that the court should have considered his inability to pay [the monetary sanctions awarded]."); *see generally* Singleton v. Wulff, 428 U.S. 106, 120 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below."); Stevo v. Frasor, 662 F.3d 880, 884 (7th Cir. 2011) ("Arguments raised for the first time... [on appeal] are waived, unless of course they question appellate or subject matter jurisdiction.").

237. *See* FED. R. CIV. P. 72(a) (governing objections to a magistrate judge's non-dispositive order).

238. Snider v. L-3 Commc'ns Vertex Aerospace, L.L.C., 946 F.3d 660, 678 (5th Cir. 2019); Sun River Energy, Inc. v. Nelson, 800 F.3d 1219, 1230 (10th Cir. 2015); Lightspeed Media Corp. v. Smith, 761 F.3d 699, 704 (7th Cir. 2014); *In re* Schmidt, 114 P.3d 816, 825 (Alaska 2005).

239. *See* Griffin v. Griffin, 500 S.E.2d 437, 439 (N.C. 1998) ("The fact that [the lawyer] participated in the hearing and did the best he could do without knowing in advance the sanctions which might be imposed does not show a proper notice was given.").

Finally, a lawyer must be prepared to argue that if the court awards sanctions, any proposed or requested sanctions are too harsh. Again, the failure to make an argument against sanctions in the trial court will likely waive that argument on appeal.

## CONCLUSION

Lawyers who are threatened with sanctions in litigation are entitled to due process. Due process is a flexible concept, but, at a minimum, the presiding court must afford the lawyer notice of the contemplated sanctions and a meaningful opportunity to be heard. These simple concepts have numerous aspects that lawyers must recognize and carefully navigate if they are ever required to defend their conduct on due process grounds. This article provides a basic analytical and tactical framework for lawyers who unfortunately find themselves facing potential sanctions in litigation.