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NOTES

CIVIL PROCEDURE — POWER OF FEDERAL COURTS TO DISCIPLINE ATTORNEYS FOR DELAY IN PRE-TRIAL PROCEDURE

I. Introduction

A large question has been presented recently to the federal judiciary. The question is: What is the proper sanction to be imposed by a federal court where pre-trial procedure is delayed by reason of an attorney's failure to observe a local rule or court order relating to pre-trial? Pre-trial procedures long have been recognized in the federal courts as a method for the promotion of the expeditious administration of justice.¹ That goal of the pre-trial procedure is vitiated, however, where violation occurs and needless delay results. The delay is keenly felt especially in federal district courts inundated with litigation, where a steady flow of cases through the docket is a necessity to prevent further delay to litigants already forced to queue up and wait interminably for trial.

Two available deterrents to such delay have recently been considered.² The United States Supreme Court, in *Link v. Wabash Railroad*,³ found no abuse of discretion in a federal trial judge who dismissed with prejudice the oldest civil case on the court's docket after counsel for the plaintiff failed to appear for a scheduled pre-trial conference. The dismissal was rendered despite a telephone message from the attorney that he would be unable to attend because he was 160 miles away and busy preparing papers for filing in a state supreme court. In *Gamble v. Pope & Talbot*,⁴ the United States Court of Appeals for the Third Circuit held that a district court had no authority to impose a fine of \$100, payable to the United States, for the failure of counsel for the defendant to submit a pre-trial memorandum within 30 days of his receipt of plaintiff's pre-trial memorandum, as local rule required. The district court, upon plaintiff's motion to strike the tardy memorandum, had entered an order (1) striking from the memorandum names of certain proposed witnesses, precluding the defendant from calling them at trial, (2) imposing the fine noted above, and (3) permitting the plaintiff to submit within 30 days an appropriate order imposing upon defendant all costs, expenses and reasonable counsel fees caused by defendant's delay in filing the memorandum. The defendant conceded the propriety of the first order and the plaintiff failed to enforce the third.

Stated succinctly, the two cases establish a curious state of the law: a client's entire cause may be lost without a hearing on its merits because of his attorney's negligence but a court may not penalize by fine the individual attorney whose negligence caused the violation of the pre-trial procedure.

Traditionally, it must be pointed out, dismissal has been regarded as an appropriate sanction, not only for violation of pre-trial rules and orders,⁵ but for kindred violations as well.⁶ To the majority of the Court in *Link* dismissal obviously was an appropriate sanction, when invoked "for want of prosecution," a rationale having considerable case law foundation.⁷ Rule 41(b) of the Federal Rules of

1 *Gamble v. Pope & Talbot*, 307 F.2d 729 (3d Cir.), cert. denied, 371 U.S. 888 (1962).

2 *Gamble v. Pope & Talbot*, 307 F.2d 729 (3d Cir.), cert. denied, 371 U.S. 888 (1962) (imposition of a fine); *Link v. Wabash R.R.*, 370 U.S. 626 (1962) (dismissal of case).

3 370 U.S. 626 (1962).

4 307 F.2d 729 (3d Cir.), cert. denied, 371 U.S. 888 (1962).

5 *Dalrymple v. Pittsburgh Consol. Coal Co.*, 24 F.R.D. 260 (W.D. Pa. 1959).

6 See, e.g., *Joseph v. Norton Co.*, 24 F.R.D. 72 (S.D.N.Y. 1959), aff'd 273 F.2d 65 (2d Cir. 1959) (refusal to try case because of illness of associate counsel).

7 *Sandee Mfg. Co. v. Rohm*, 298 F.2d 41 (7th Cir. 1962); *American Nat'l Bank v. U.S.*, 142 F.2d 571 (D.C. Cir. 1944); *Hicks v. Bekins Moving & Storage*, 115 F.2d 406 (9th Cir. 1940). Federal courts have authority under Rule 83 of the Federal Rules of Civil Procedure to make rules for dismissal for want of prosecution. 7 MOORE, FEDERAL PRACTICE ¶ 83.03, at 4705 (2d ed. 1955). The strict enforcement of rules authorizing dismissal for want of prosecution has been strongly advocated as being "consonant with the dignity of the courts and the expedition of justice." CYCLOPEDIA OF FEDERAL PROCEDURE § 29.16, at 106 (3d ed. 1951).

Civil Procedure expressly recognizes that a suit may be dismissed, on motion, "for failure of the plaintiff to prosecute." This Rule has been construed so as not to prohibit a federal court from dismissing for want of prosecution on its own motion.⁸

In addition to dismissal, several other sanctions which cast the penalty more upon client than counsel have been invoked for delay in pre-trial or related matters. In *Syracuse Broadcasting Corp. v. Newhouse*⁹ the Second Circuit sustained the propriety of a district court order precluding a plaintiff from presenting evidence with respect to areas of alleged wrongdoing where the court believed that plaintiff had not properly complied with a pre-trial order to furnish factual information. In *In the Matter of 1208, Inc.*,¹⁰ a bankrupt whose attorney had failed to appear for a pre-trial conference was deprived of the right to a jury trial. The court stated that imposition of the penalty would hasten respect for pre-trial conferences and thus promote speedy disposition of litigation. And in *Borup v. National Airlines*,¹¹ a case was restored to the foot of a crowded trial calendar, as punishment for the delay of plaintiff's counsel in filing an application for return to the trial calendar. At a pre-trial conference defendant had submitted a settlement offer which was accepted by plaintiff's attorney but later rejected by the plaintiff himself. Counsel's failure to make prompt reapplication was held to create unreasonable delay.

The question of the propriety of a sanction directing its harm to the client was put squarely to the Supreme Court in *Link*. On this point, Mr. Justice Harlan said for the majority:

There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have notice of all facts, "notice of which can be charged upon the attorney."¹²

Satisfaction with dismissal as a sanction for violation of pre-trial rules and orders, therefore, is eased by satisfaction with a theory of strict identification of attorney and client. If strict identification is acceptable and does not offend fundamental notions of justice and fair play or proper conceptions of agency jurisprudence, the search for the appropriate sanction may well be concluded. Dismissal of an action for non-observance of pre-trial procedure unquestionably has the desired deterrent effect on attorneys.

Satisfaction with strict identification of attorney and client is not unanimous, however. The Supreme Court divided 4-3 in the *Link* decision, with Chief Justice Warren, Mr. Justice Black and Mr. Justice Douglas dissenting and with Mr. Justice Frankfurter and Mr. Justice White not participating. In dissent, Mr. Justice Black said:

I think Judge Schnackenberg was entirely correct in his dissent to the opinion of the majority on the Court of Appeals for the Seventh Circuit upholding the dismissal when he said:

"The order now affirmed has inflicted a serious injury upon an injured man and his family, who are innocent of any wrongdoing. Plaintiff's cause of action * * * was his property. It has been destroyed. The district court, to punish a lawyer, has confiscated another's property without due process of law, which offends the constitution. A district court does not lack disciplinary authority over an attorney and there is no justification, moral or legal, for its punishment of an innocent litigant for the personal conduct of

8 CYCLOPEDIA OF FEDERAL PROCEDURE § 29.16, at 105 (3d ed. 1951).

9 271 F.2d 910 (2d Cir. 1959). It is interesting to note that the Second Circuit in this case regarded dismissal of plaintiff's action "too drastic" under the circumstances.

10 188 F. Supp. 664 (E.D. Pa. 1960).

11 159 F. Supp. 807 (S.D.N.Y. 1956).

12 370 U.S. 626, 633-34 (1962).

his counsel. Because it was neither necessary nor proper to visit the sin of the lawyer upon his client, I would reverse."¹³

* * * *

One may readily accept the statement that there are circumstances under which a client is responsible for the acts or omissions of his attorney. But it stretches this generalized statement too far to say that he must always do that. This case is a good illustration of the deplorable kind of injustice that can come from the acceptance of any such mechanical rule.¹⁴

* * * *

Surely it cannot be said that there was a duty resting upon Link, a layman plaintiff, to try to supervise the daily professional services of the lawyer he had chosen to represent him.¹⁵

* * * *

If a general rule is to be adopted, I think it would be far better in the interest of the administration of justice, and far more realistic in the light of what the relationship between a lawyer and his client actually is, to adopt the rule that no client is ever to be penalized, as this plaintiff has been, because of the conduct of his lawyer unless notice is given to the client himself that such a threat hangs over his head.¹⁶

In this and other contexts courts have refused to dismiss actions with injury to the client where counsel has violated a court rule or court order. Thus, in *Padovani v. Bruchhausen*,¹⁷ the Second Circuit held improper an order of a federal district court precluding a plaintiff from entering the bulk of his evidence, and thus in effect dismissing the plaintiff's claim, because the plaintiff's attorney had failed to submit an adequate pre-trial statement. The order was handed down after the trial court for the third time had adjudged plaintiff's statement insufficient on the defendant's motion. On appeal the court granted plaintiff's petition for vacation of the preclusion order. Among its reasons was the following:

Second is the drastic nature of the penalty inflicted upon a litigant for what at most is an error or dereliction of his lawyer. . . . [T]he decision which in practical effect ends the case is explicitly placed upon the lawyer's failure to comply with the court's requirements as to pre-trial. . . . It would seem hardly likely under these circumstances that the lay plaintiff could know or comprehend the doom about to be visited upon him, not his counsel, in time to avert it if, indeed, that were in any way possible.¹⁸

In *Bardin v. Mondon*,¹⁹ the same court remanded a case which a district court had dismissed with prejudice because of the refusal of plaintiff's counsel to proceed with trial, when, after three years, it reached the Ready Day calendar. The appellate court directed that the suit to be dismissed *without prejudice* provided that plaintiff's counsel pay all trial and appellate court costs taxed to the plaintiff and an additional \$100 for having so multiplied proceedings as to increase costs unreasonably. The court stated:

Appellants have suffered from the sins of their counsel, sins of which they probably knew nothing at all. Although a litigant is ordinarily bound by the mistakes of his counsel, in this instance, we think it would serve a better purpose to require counsel himself to pay for the inconvenience caused by his own dilatory conduct.²⁰

Similarly, in *Leong v. Railroad Transfer Service*,²¹ the Seventh Circuit considered it abuse of discretion where a trial court refused to vacate a judgment of dismissal rendered when attorneys of both plaintiff and defendant failed to appear when case was called to trial. The appellate court recognized that to dismiss was to penalize the plaintiff and not his counsel. And, in *Manekofsky v. Baker*,²² dismissal of an action for refusal of the plaintiff's counsel to proceed to trial because

13 *Id.* at 637.

14 *Id.* at 644-45.

15 *Id.* at 647.

16 *Id.* at 648.

17 293 F.2d 546 (2d Cir. 1961).

18 *Id.* at 548.

19 298 F.2d 235 (2d Cir. 1961).

20 *Id.* at 238.

21 302 F.2d 555 (7th Cir. 1962).

22 169 A.2d 376 (R.I. 1961).

of conflict with other trial engagements was held an abuse of discretion. The court said that a trial justice should dismiss only "with a scrupulous regard for the rights of the parties to the action."²³ On motion for reargument it made this statement:

It is a further contention of the defendant that the decision of the court as set out in the opinion may substantially erode the rule of law that the actions of counsel bind the client. With this we do not agree. That there are limitations upon the power of counsel to bind his client is well known.²⁴

Dismissal has been denied as inappropriate also where counsel for plaintiff failed to observe a court rule requiring that out-of-state counsel associate with local counsel when instituting an action in the court, or gain admittance to the court *pro hac vice*.²⁵ In *Stevens v. Gertz*,²⁶ where, instead of ordering dismissal of an action for failure of attorneys to gain admittance to practice before the court, the court refused to permit the attorneys in question to represent the plaintiff unless within 20 days they comply with the appropriate court rules, the court said:

From the allegations of the complaint it appears that if the complaint were dismissed, the State statute of limitations would bar a new suit by the plaintiff for the same cause of action. In this situation it is obvious that granting the defendant's motion to dismiss would penalize the innocent plaintiff litigant rather than his attorneys, who failed to qualify under the local rules of this court, which were promulgated to enable the court to exercise supervision over attorneys and not for the purpose of penalizing innocent litigants.²⁷

Indeed, Congress itself by statute has created an exception to the general rule of attorney-client identification. By means of an enactment whose origin dates to 1813²⁸ it has conferred power on a court to tax an attorney any excess costs incurred by reason of the attorney's unreasonable and vexatious increase of costs resulting from the multiplication of proceedings.²⁹

These authorities indicate, therefore, sympathy toward the client and leave doubt as to the universal acceptance of the doctrine of absolute identification of principal and agent in the attorney-client context. It cannot be doubted that the principal-client *may* be held bound by the acts of the attorney-agent done with authority. The question is, however, whether or not he *should* be so bound in all circumstances. If it is found that a court has no authority under which to levy the penalty upon the attorney, it may be questioned whether greater harm results from a penalty expending its force on the client than would result if no penalty were levied at all. But that question is not reached here since it will be demonstrated that penalty is available to the courts which would achieve the salutary purpose of deterring disrespect for pre-trial rules and orders and at the same time save the client from injury through no fault of his own.

II. Inherent Powers of Courts Over Attorneys

The Third Circuit in the *Gamble* decision was convinced that, unless a fine was imposed according to procedures required in a contempt proceeding, a federal district court possessed no inherent power to levy it. Both dissenting opinions, on the other hand, were equally convinced that a fine was an appropriate and reasonable sanction and that disciplinary sanctions were not only familiar but also within the inherent power of any court of record.

No case bearing on either the inherent power, or the lack of same, of a court to levy a fine was cited in the opinions. This attests to the absence of case law on the point. Nevertheless, a general inherent power over attorneys is widely recognized.³⁰

²³ *Id.* at 379.

²⁴ *Id.* at 380.

²⁵ *MacNeil v. Hearst Corp.*, 160 F. Supp. 157 (D. Del. 1958).

²⁶ 103 F. Supp. 760 (W.D. Mich. 1952). *Cf.* *Schiffrin v. Chenille Mfg. Co.*, 117 F.2d 92 (2d Cir. 1941).

²⁷ *Stevens v. Gertz*, 103 F. Supp. 760, 762 (W.D. Mich. 1952).

²⁸ REV. STAT. § 982 (1875).

²⁹ 28 U.S.C. § 1927 (1959).

³⁰ *DeKrasner v. Boykin*, 54 Ga. App. 29, 186 S.E. 401 (1936).

The inherent power of the judiciary has been phrased in the following ways: (1) as such powers as result from the very nature of a court's organization and are essential to its existence and protection and to the due administration of justice;³¹ (2) as such power as is essential to the existence, dignity and functions of a court from the very fact that it is a court;³² and (3) as such powers as are necessary to the orderly and efficient exercise of jurisdiction.³³

Inherent powers differ from jurisdiction in that jurisdiction is conferred by Constitutions or by statutes enacted in the exercise of legislative authority.³⁴ Such powers as are necessary to the orderly and efficient exercise of jurisdiction are regarded both from their nature and ancient exercise, as inherent.³⁵ The inherent powers do not depend upon express constitutional grant or the legislative will.³⁶ A court has inherent power to control the order of disposition of causes on its docket³⁷ and to establish rules for regulating its proceedings.³⁸

Among the inherent powers is the power to supervise and discipline the conduct of attorneys as officers of the court.³⁹ This particular inherent power was described in the case *DeKrasner v. Boykin*.⁴⁰

Courts, to carry out their undoubted right to function as an independent department of government, as ordained by the various Constitutions, have many times declared unto themselves certain inherent powers independent of legislative grant. . . . Expressed in general terms, "every court has inherent power to do all things which are reasonably necessary for the administration of justice within the scope of its jurisdiction. . . . Research reveals that under this theory of inherent or necessary incidental powers, courts have unanimously assumed powers of wide and far-reaching extent over the conduct of members of the legal profession, which include the power to admit, suspend, discipline, or disbar an attorney. . . . This inherent power over the legal profession is independent of legislative grant. While all courts recognize the right of the Legislature to pass laws to aid them in their visitatorial power in this respect, they further assert their right to disregard unreasonable statutory regulations. . . . This visitatorial power over members of the bar is without question a necessary incident to a court's proper administration of justice of causes coming within its jurisdiction."⁴¹

Attorneys are singled out as especially amenable to judicial regulation because of their positions as officers of the court.⁴² The court is regarded as their superior not on the theory that they are its agents in the ordinary sense but because of their close intimate relationship to the bench.⁴³ This visitatorial power is as old as courts themselves and the admission of attorneys to practice therein.⁴⁴

Examples of the exercise by courts of inherent power over attorneys are manifold. A court has inherent power to determine the qualifications for admission

31 *Fuller v. State*, 100 Miss. 811, 57 So. 806 (1912).

32 *In re Integration of Nebraska Bar*, 133 Neb. 283, 275 N.W. 265 (1937).

33 *Hale v. State*, 55 Ohio St. 210, 45 N.E. 199 (1896). Some definitions of inherent powers combine elements of each of these definitions. *Hopkins v. Barnhardt*, 223 N.C. 617, 27 S.E.2d 644 (1943); 14 AM. JUR. COURTS § 171 (1938).

34 14 AM. JUR. COURTS § 171 (1938).

35 *Ibid.*

36 *Ibid.* The rationale behind this statement was given in *In re Cate*, 273 Pac. 617 (Cal. App. 1928), as follows: A court's inherent power over admissions to the bar is derived from the Constitution and hence is exclusive of the legislature's authority under the police power to invade the field in the guise of regulation. The reason is that inherent powers of a state court are ultimately derived from the state constitution, to which the courts themselves owe their existence. Since the legislature did not give that inherent power, it cannot take it away.

37 *Landis v. North Am. Co.*, 299 U.S. 248 (1936).

38 *Meyer v. Brinsky*, 129 Ohio St. 371, 195 N.E. 702 (1935).

39 *DeKrasner v. Boykin*, 54 Ga. App. 29, 186 S.E. 701 (1936).

40 54 Ga. App. 29, 186 S.E. 701 (1936).

41 *Id.* at 703-05.

42 *Phipps v. Wilson*, 186 F.2d 748 (7th Cir. 1951); *Corum v. Hartford Acc. & Indem.*, 67 Cal. App. 2d 780, 155 P.2d 710 (1945); 2 Am. St. Rep. 847 (1888); WEEKS, ATTORNEYS AT LAW 145 (2d ed. 1892).

43 *In re Integration of Nebraska Bar*, 133 Neb. 283, 275 N.W. 265 (1937).

44 *Ex parte Bradley*, 74 U.S. (7 Wall.) 364 (1868).

to practice before it.⁴⁵ It has inherent power of withholding from attorneys the privilege under the rule of comity of appearing as counsel and participating in the trial of a case.⁴⁶ If a state supreme court, it has inherent power to promulgate rules to create, control, regulate and integrate a state bar.⁴⁷ Such a court has power to admit an individual to the practice of law despite an adverse recommendation of a bar admissions committee established by statute.⁴⁸ A court possesses inherent power to purge champertous cases from its docket⁴⁹ and thus may order investigations into alleged practices of "ambulance-chasing."⁵⁰ Courts have inherent power to suspend⁵¹ and disbar⁵² attorneys from practice and may readmit an attorney who has been disbarred.⁵³

A court may order an attorney to fulfill his undertaking to represent a client.⁵⁴ A court has inherent power to appoint an attorney to conduct the prosecution of a crime⁵⁵ or to defend a person charged with a crime.⁵⁶ An attorney who retains out of money collected by him for his client an amount so far exceeding the attorney's just compensation as to raise a presumption of bad faith may be ordered by a court to pay over to the client any amount in excess of just compensation.⁵⁷ Courts may order an attorney to pay over money to his clients which he has received in his official capacity and withholds from them.⁵⁸ A court has power, where a controversy exists over attorneys' fees, to determine the reasonable amount of such fees in a case before it and to determine the division of such fees between particular attorneys.⁵⁹

As officers of the court, attorneys may be summarily ordered to fulfill their personal undertakings⁶⁰ and to pay costs occasioned by their conduct in proceedings before the court.⁶¹ They may be compelled, in proper cases, to disclose the client's abode or occupation,⁶² to produce the client,⁶³ and to disclose certain communications.⁶⁴ Attorneys may be ordered to answer affidavits⁶⁵ and to deliver up documents.⁶⁶ Where evidence obtained by unconstitutional search and seizure is in the hands of a prosecutor, a court in the exercise of its inherent power to discipline its officers may order a return of the papers or property seized and the suppression of it as evidence.⁶⁷ Finally, it is within the inherent power of a court to punish

45 *In re* Integration of State Bar, 185 Okla. 505, 95 P.2d 113 (1939).

46 *Atchison, T. & S.F. Ry. v. Jackson*, 235 F.2d 390 (10th Cir. 1956).

47 *In re* Integration of State Bar, 185 Okla. 505, 95 P.2d 113 (1939).

48 *Brydonjack v. State Bar*, 208 Cal. 439, 281 Pac. 1018 (1929).

49 *Rubin v. State*, 194 Wis. 207, 216 N.W. 513 (1927).

50 *In re* Association of Bar, 222 App. Div. 580, 227 N.Y. Supp. 1 (1928).

51 *United States v. Stump*, 112 F. Supp. 237 (D. Alaska 1953); *People v. Harris*, 273 Ill. 413, 112 N.E. 978 (1916).

52 *State v. Cannon*, 199 Wis. 401, 226 N.W. 385 (1929).

53 *In re* Cate, 273 Pac. 617 (Cal. App. 1928).

54 *Wigg v. Rook*, 6 Mod. 86, 87 Eng. Rep. 843 (1794).

55 *Dukes v. State*, 11 Ind. 557 (1858).

56 *Powell v. Alabama*, 287 U.S. 45 (1932).

57 *Burns v. Allen*, 15 R.I. 32, 2 Am. St. Rep. 844 (1885).

58 *Jeffries v. Laurie*, 27 Fed. 198 (E.D. Mo. 1886). It has been said on this point: "The law is not guilty of the absurdity of holding that after a client has spent years in collecting through his attorney a lawful demand, he shall be put to spending as many more to collect it from his attorney, and if that attorney should not pay, then try the same track again." *Bowling Green v. Todd*, 52 N.Y. 489, 493 (1873).

59 *American Fed. of Tobacco Growers v. Allen*, 186 F.2d 590 (4th Cir. 1951).

60 *Weeks, op. cit. supra* note 42, at 144-45; *CORDERY, LAW RELATING TO SOLICITORS* 183 (4th ed. 1935).

61 14 AM. JUR. COSTS § 32 (1938); *CORDERY, op. cit. supra* note 60, at 183; 7 C.J.S. *Attorney and Client* § 50 (1937); *Weeks, op. cit. supra* note 42, at 269-70.

62 *Weeks, op. cit. supra* note 42, at 144-45.

63 *Ibid.*

64 *Ibid.*

65 *Ibid.*

66 *Ibid.*; 2 Am. St. Rep. 854 (1888).

67 *Centrachio v. Garrity*, 198 F.2d 382 (1st Cir. 1952).

an attorney for contempt.⁶⁸

Many of these examples of the inherent power of courts over attorneys could be lodged under a general heading of the power of courts to discipline attorneys. The most common exercises of this power to discipline are the suspension or disbarment of an attorney "whenever it is satisfactorily established that he is an unfit or unsafe person to enjoy the privileges of an attorney at law, or to manage the business of others in that capacity."⁶⁹ Disbarment or suspension is imposed for grievous misconduct. Indeed, nearly every ground for disbarment is in itself a contempt of court.⁷⁰ But it is clear that a contempt of court may frequently occur and be punishable as such, although the character thereof is not of sufficient gravity to constitute ground for disbarment.⁷¹ Thus, the power to disbar an attorney for cause shown is distinct from the power to punish him for contempt.⁷²

Disbarment or suspension of an attorney is employed only when courts have become persuaded that an attorney has lost the mental and moral qualifications requisite to his office.⁷³ The office is one having an intimate and vital relation to the administration of justice.⁷⁴ When an attorney has lost the requisite qualifications, the courts must deprive him of his means and destroy his opportunities for action detrimental to the proper administration of justice.⁷⁵ The power to punish an attorney for contempt, on the other hand, is generally invoked for serious misconduct which does not merit an attorney's removal from practice. Such contempt may lie in the attorney's refusal to obey a lawful order of court, in an offense or insult offered to the court or its judges, or in any improper interference with the due administration of justice.⁷⁶ The violation being less serious than in cases meriting disbarment or suspension, the penalty is less harsh, usually being fine, imprisonment or payment of costs.⁷⁷

In circumstances, however, where the attorney's conduct is less grievous than that which normally would merit the sanctions of disbarment or suspension, and less serious than would deserve infliction of the "criminal taint" of contempt, but where it nonetheless impedes the due administration of justice, the *Gamble* court would question the power of a court to discipline. On the face of it, it would seem to follow that the existence in a court of the power to discipline for more serious offenses and to inflict more serious penalties would prove the existence of a power to discipline for less serious offenses which merit discipline and to inflict less serious penalties. Proof of the power to perform the greater act would be proof of the power to perform the lesser act.

The one significant disciplinary sanction, outside of verbal reprimand, said to be within the inherent power of courts and imposed for minor infractions by attorneys, has been the assessment of costs.⁷⁸ According to one authority:

[A] court has inherent power in the exercise of its discretion to impose costs on an attorney in order to punish him, and where an attorney has been guilty of unauthorized or negligent acts or of general professional misconduct, he is often held liable for costs by the court as a punishment for such acts or misconduct.⁷⁹

Another example of the imposition of a penalty for an infraction not warranting punishment for contempt has been the practice of the federal district court for

68 CORDERY, *op. cit. supra* note 60, at 207-08; WEEKS, *op. cit. supra* note 60, at 145.

69 THORNTON, ATTORNEYS AT LAW 1166 (1914).

70 *Id.* at 1206.

71 *Ibid.*

72 *Ex parte Robinson*, 86 U.S. (19 Wall.) 505 (1873); *Ex parte Bradley*, 74 U.S. (7 Wall.) 364 (1868); WEEKS, ATTORNEYS AT LAW 156 (2d ed. 1892).

73 THORNTON, ATTORNEYS AT LAW 1173-74 (1914).

74 *Ibid.*

75 *Ibid.*

76 *Id.* at 1205.

77 CORDERY, LAW RELATING TO SOLICITORS 208 (4th ed. 1935).

78 Authorities cited note 61 *supra*.

79 7 C.J.S. *Attorney and Client* § 50 (1937).

the Western District of Pennsylvania in the enforcement of pre-trial rules and orders.⁸⁰ There, an attorney who has failed to appear for pre-trial has been required to pay as a penalty a proper attorney fee to the other party who had appeared.⁸¹ Where it has seemed that the other party appearing would refuse to accept the fee since it had been obtained by levy upon an attorney, the offending attorney has been ordered to pay the fee to the library fund.⁸²

Perhaps a reason for the dearth of case law on the imposition of fines, as opposed to costs and fees, upon attorneys for minor disciplinary infractions is the accepted connotation of the word "fine." Generally, a fine is understood to mean a sum of money exacted of a person guilty of a misdemeanor or a crime, the amount of which may be fixed by law or left to the discretion of the court.⁸³ In the area of court discipline of attorneys, a fine apparently has taken on this criminal connotation for its frequent use as a punishment for contempt. The word "fine" often is used in distinction to the word "penalty."⁸⁴ A "penalty" is a sum of money exacted by way of punishment for doing some act which is prohibited or omitting to do something which is required.⁸⁵ A "penalty" can be imposed where no crime is committed.⁸⁶ Since this distinction between the use of the word "fine" and the word "penalty" is not always maintained, and since at times the word "fine" may be used synonymously with "penalty" and does not always mean a pecuniary punishment for an offense inflicted by a court in the exercise of criminal jurisdiction,⁸⁷ it is possible that the trial court in the *Gamble* case was using the word "fine" in the sense of "penalty." "Fine" in the sense of "penalty" does not convey the connotation of a criminal proceeding and hence would not have been so readily associated by the Third Circuit with contempt of court.⁸⁸ It is submitted that the assessing of costs and fees against attorneys as a means of discipline is an example of the imposition of a "penalty."

In summary, a court's inherent disciplinary power over attorneys is well established. The sanctions imposed have included disbarment and suspension for abuses most seriously impairing the administration of justice, punishment for contempt in cases of serious abuses not meriting removal from the bar, and the imposition of costs and fees for minor infractions of court rules and orders above the realm of triviality. Fines rarely, if at all, have been imposed for punishment outside of the exercise of the contempt power. It may be argued that "it is a just inference that an alleged power of the court which has lain dormant during the whole period of English jurisprudence and which no court in America has ever attempted to exercise until within a very recent period never in fact had any existence."⁸⁹ The answer would seem to be that courts have exercised vastly similar powers of penalization, that one of these penalties, the imposition of costs, has been employed for centuries, and that the mere failure of courts to use this particular penalty does not prove the absence of the power to levy it. It may be argued that the inherent power to levy costs on attorneys has rarely been employed by American courts during the 20th century. But, to that argument, it may be answered that

80 McILVAINE, COMPLIANCE BY COUNSEL — A DISTRICT JUDGE'S VIEWS AS TO THE MEANS OF INSURING COMPLIANCE BY COUNSEL WITH THE PRETRIAL PROCEDURES, IN SEMINAR ON PROCEDURES FOR EFFECTIVE JUDICIAL ADMINISTRATION, PROCEEDINGS, 29 F.R.D. 408 (1962).

81 *Id.* at 411.

82 *Ibid.*

83 *State v. Rumfelt*, 241 N.C. 375, 85 S.E.2d 398 (1955).

84 *Ibid.*

85 *Ibid.*

86 *State v. Liggett & Meyers Tobacco Co.*, 171 S.C. 511, 172 S.E. 857 (1933).

87 *Holliman v. Cole*, 168 Okla. 473, 34 P.2d 597 (1934).

88 Indeed, we are enjoined, when discussing the meaning of the word "fine," to look through the label to discover what lies beneath it. *Department of Health v. Roselle*, 34 N.J. 331, 169 A.2d 153 (1961).

89 21 C.J.S. *Courts* § 31 (1940).

substantial use was made of the power by 19th-century American courts,⁹⁰ proof enough of the existence of the power, and that the use of costs as a disciplinary device has achieved substantial popularity in Great Britain.⁹¹

If, therefore, a court in the exercise of its supervisory power over attorneys as officers of the court deems it necessary in promotion of due administration of justice to subject attorneys to fines for their failure to observe pre-trial procedures established by the court, the fine should stand as a proper use of the court's inherent power unless it is unreasonable and excessive.

III. *The Imposition of Costs as a Sanction*

As indicated in the preceding section, courts are said to have inherent power to assess costs against an attorney, as opposed to his client, in order to punish the attorney.⁹² The question discussed in this section will be whether or not the trial court in the *Gamble* decision could have imposed costs upon an attorney, either through the exercise of an inherent power of supervision over attorneys or in pursuit of a statutory authorization, for violation of a pre-trial rule or order.

The imposition of costs upon an attorney has an ancient heritage. As early as 1719, in the case *Fawkes v. Pratt*,⁹³ a court ordered costs to be paid by a solicitor because of his gross negligence in filing improper pleadings. After once filing a defective complaint for an imprisoned bankrupt suing his debtors, counsel amended the complaint but failed to include a prayer for process against the parties defendant added by the amendment. Later, in *Cook v. Broomhead*,⁹⁴ a solicitor for a defendant was ordered by a court to pay to the plaintiffs, because of his refusal to appear when the cause was called to trial, not only costs to the plaintiffs in making the motion for costs but also plaintiff's costs resulting from solicitor's failure to appear at the hearing of the cause.

The imposition of costs upon an attorney who is not a party to an action is in its nature a disciplinary or punitive act.⁹⁵ It is generally stated that costs may be visited upon an attorney where he has misconducted himself in his profession,⁹⁶ acted without authority,⁹⁷ or has been guilty of ordinary negligence.⁹⁸ It even is said that "costs have been imposed on attorneys for . . . in any way causing expense clearly unnecessary."⁹⁹ Other authorities restrict the summary infliction of costs to instances of nothing less than "gross carelessness"¹⁰⁰ or "gross negligence."¹⁰¹ The authorities are in seeming agreement, however, that an attorney may not be held liable for costs merely because of inadvertence, inexperience, or slight or excusable error.¹⁰² Thus, while an attorney may not be disciplined for trivial causes, the power to discipline in this manner is not limited to cases where he would be subject to indictment or civil liability.¹⁰³

Cases involving the imposition by American courts of costs upon an attorney, as an exercise of the court's inherent powers, seem to have arisen primarily in the

90 1917B Am. Ann. Cas. 43; 21 Am. Ann. Cas. 882 (1911).

91 36 HALSBURY, LAWS OF ENGLAND *Solicitors* §§ 270-72 (3d ed. 1961).

92 14 AM. JUR. *Costs* § 32 (1938); CORDERY, *op. cit. supra* note 60, at 183; 7 C.J.S. *Attorney and Client* § 50 (1937); WEEKS, *op. cit. supra* note 42, at 269-70.

93 1 P.Wms. 593, 24 Eng. Rep. 531.

94 16 Ves. Jun. 132, 33 Eng. Rep. 934 (1809).

95 *Allen v. Fink*, 211 App. Div. 411, 207 N.Y. Supp. 428 (1925).

96 1917B Am. Ann. Cas. 43; 14 AM. JUR. *Costs* § 32 (1938); CORDERY, *op. cit. supra* note 60, at 189; 7 C.J.S. *Attorney and Client* § 50 (1937).

97 7 C.J.S. *Attorney and Client* § 50 (1937); 1917B Am. Ann. Cas. 44.

98 21 Am. Ann. Cas. 882 (1911); 1917B Am. Ann. Cas. 43; 14 AM. JUR. *Costs* § 32 (1938); CORDERY, *op. cit. supra* note 60, at 166.

99 WEEKS, ATTORNEYS AT LAW 203 (2d ed. 1892).

100 *Ibid.*

101 2 Am. St. Rep. 856 (1888); WEEKS, *op. cit. supra* note 99, at 269-70.

102 1917B Am. Ann. Cas. 44; 14 AM. JUR. *Costs* § 32 (1938).

103 *Wilbur v. Howard*, 70 F.Supp. 930 (E.D. Ky. 1947).

19th century.¹⁰⁴ For example, a New York chancery court in 1835 in *Kane v. Van Vranken*¹⁰⁵ held that a solicitor may be personally liable for the costs of correcting an irregular proceeding, where he had failed to make a timely reply to an answer, through negligence or gross ignorance, and thereby had prejudiced the rights of the adverse party. And in *Brown v. Brown*¹⁰⁶ an Indiana court held in 1853 that a court may properly tax the costs of a divorce proceeding dismissed for the defendant against the plaintiff's attorney where his petition is unnecessarily "gross" and his deportment in reading it "indelicate."

The existence of the inherent power of American courts to tax costs to attorneys seldom has been questioned in 20th-century case law. In *U.S. Savings Bk. v. Pittman*,¹⁰⁷ however, the Florida Supreme Court held that where an attorney, after there has developed an interest adverse to that of his client, proceeds with the cause and obtains decrees adverse to his client's interests, a court of equity may tax the attorney with the costs of an appeal and any other costs made necessary by the attorney's action, including reasonable attorney's fees. And in *Joslyn v. Joslyn*¹⁰⁸ an Illinois appellate court taxed one-half of a sum of unpaid costs of divorce litigation to counsel for the defendant because of the attorney's false statements and general conduct unbecoming to a lawyer.

By contrast, the taxation of attorneys has gained wider popularity in England.¹⁰⁹ The practice there is described in Halsbury's Laws of England:¹¹⁰

Consideration is given in this section to the liability of a solicitor to be ordered to pay costs only as an officer of the court or under particular rules of court. Where in any proceedings before the Supreme Court costs are incurred improperly or without reasonable cause or are wasted by undue delay or by any other misconduct or default, the court may make against any solicitor whom it considers to be responsible, whether personally or through a servant or agent, an order disallowing the costs as between the solicitor and his client and directing the solicitor to repay to his client costs which the client has been ordered to pay to other parties, or directing the solicitor personally to indemnify the other parties against all costs payable by them. A solicitor must first be given a reasonable opportunity to appear before the court and show cause why the order should not be made (and the court may refer the matter to a taxing officer for inquiry and report), except where the proceedings have been stultified by the solicitor's failure to attend or be represented, or to deliver a necessary document, or to be prepared with any proper evidence or account, or otherwise to proceed.

This source subsequently states that:¹¹¹

A solicitor may also be ordered to pay costs direct to the opposite party where . . . the trial of the action cannot proceed owing to his neglect to attend or send a representative, or to deliver any papers necessary for the use of the court which according to the practice ought to be delivered.

Thus it would seem that in England courts have taxed attorneys for negligence both in a situation similar to that in the *Link* case (failure of the attorney to

104 1917B Am. Ann. Cas. 43; 21 Am. Ann. Cas. 882 (1911). In *Ex parte Robins*, 63 N.C. 310 (1868), an American court recognized an inherent power to levy costs but asserted that this was not a distinct power but rather a branch of the power to punish for contempt. None of the English authorities cited in the opinion stand for this proposition; they stand merely for the proposition that a court may assess attorneys costs who have been grossly negligent. Perhaps, the court was wrongly assuming that because costs could be imposed as a punishment for contempt they could only be imposed for that reason. Another interesting case is *Bogart v. Electrical Supply Co.*, 27 Fed. 722 (C.C.S.D.N.Y. 1886), where a federal court assessed costs to an attorney under its contempt power for what normally would be only gross negligence at most. This forced the court to examine Rev. Stat. 725 (the predecessor of the modern federal contempt statute, 28 U.S.C. § 401) and determine that the statute's reference to punishment by fine and imprisonment did not exclude punishment for contempt by imposing costs.

105 5 Paige 62 (N.Y. 1835).

106 4 Ind. 627 (1853).

107 80 Fla. 423, 86 So. 567 (1920).

108 337 Ill. App. 443, 86 N.E.2d 367 (1949).

109 36 HALSBURY, LAWS OF ENGLAND *Solicitors* §§ 270-72 (3d ed. 1961).

110 *Id.* at § 270.

111 *Id.* at § 272.

attend a proceeding) and in a situation similar to that in *Gamble* (failure of the attorney to deliver papers for the use of the court). In this respect it is noteworthy that the English cost system has been hailed as "a powerful weapon which diminishes to the zero point, the so-called nuisance suits, and is an effective weapon on dilatory or burdensome interlocutory tactics."¹¹²

The imposition of costs on attorneys has been made the subject of legislation in some American states.¹¹³ In the federal system one statute and two of the federal rules may be noted which allow the imposition of costs on attorneys.¹¹⁴ Two of these are of specific and one of more general application. Under Rule 37(a) of the Federal Rules of Civil Procedure a court if it chooses may impose directly on an attorney, rather than on the party he represents, costs incurred where the attorney, without justification, has advised his client to refuse to answer a question asked on a deposition, or has moved to compel a deponent to answer an unjustified question. And under Rule 75(e) of the Federal Rules costs may be imposed upon attorneys who bring before a federal appellate tribunal matter not essential to the decision of the questions presented by the appeal.¹¹⁵

A federal costs statute of more general application to attorneys, however, is 28 U.S.C. § 1927, which states:

Any attorney . . . who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs.

This statute is based on a very similar Congressional enactment of 1813.¹¹⁶ Yet, despite its age, the statute has rarely been employed.¹¹⁷ In an early 20th-century case of the statute, the word "costs" was broadly construed so as to include any "expenses" capable of being multiplied.¹¹⁸ The purpose of the statute has been stated to be "to punish the pettifogger, or at least, to make him pay the expenses occasioned by his misconduct. . . ."¹¹⁹ It is said to recognize "that such costs should not have been incurred and places their payment on the person who is responsible for them."¹²⁰

The statute has been strictly construed so as to permit the taxation of an attorney only when "excess costs" are created.¹²¹ Where there is nothing in the record to indicate the amount of costs incurred, and thus the existence of any excess costs, taxation of an attorney under the statute is improper.¹²² There is, therefore, no authority in the statute for allowing an arbitrary sum to be inserted in a judgment to be paid by an attorney to the opposing party.¹²³ And, a motion for costs under the statute, made before trial, cannot be granted on a mere presumption that excess costs will be incurred.¹²⁴

The statute has been employed where an attorney unreasonably and vexatiously prolonged the taking of depositions by excessive cross-examination or has unwarrantably obstructed the examination of his client by instructing him not to answer proper questions.¹²⁵ Costs have been assessed under the act where a plaintiff in a patent infringement suit continued the suit and the taking of testimony after

¹¹² McILVAINE, *supra* note 80, at 413.

¹¹³ THORNTON, ATTORNEYS AT LAW 536 (1914).

¹¹⁴ 28 U.S.C. § 1927 (1959); FED. R. CIV. P. 37(a); FED. R. CIV. P. 75(e).

¹¹⁵ Pursuant to court rule costs have been imposed on attorneys for failing to condense the transcript of the record on appeal. *Trust Co. v. Gault*, 69 F.2d 133 (5th Cir. 1934). *Cf. United States v. Howard*, 64 F.2d 533 (5th Cir. 1933), and *Hughes v. United States*, 83 F.2d 76 (10th Cir. 1936).

¹¹⁶ REV. STAT. § 982 (1875).

¹¹⁷ 74 HARV. L. REV. 1466 (1961).

¹¹⁸ *Motion Picture Patents v. Yankee Film Co.*, 192 Fed. 134 (S.D.N.Y. 1912).

¹¹⁹ *Motion Picture Patents v. Steiner*, 201 Fed. 63, 64 (2d Cir. 1912).

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

¹²² *Ibid.*

¹²³ *Ibid.*

¹²⁴ *Coyne & Delany v. G. W. Onthank*, 10 F.R.D. 435 (S.D. Iowa 1950).

¹²⁵ *Toledo Metal Wheel Co. v. Foyer Bros.*, 223 Fed. 350 (6th Cir. 1915).

it had filed a petition for reissue of the patent with the Patent Office on the ground of the invalidity of the patent in suit.¹²⁶ Costs have been assessed also where counsel for plaintiff have refused to proceed with trial after the case, after three years, was moved to the Ready Day calendar to the knowledge of all concerned.¹²⁷ The imposition of costs under the statute has been threatened where counsel for a plaintiff-beneficiary already had instituted four unsuccessful litigatory attempts to collect on a life insurance policy.¹²⁸ And it has been said in a dictum that if a witness is examined and the record clearly shows that his testimony should have been completed in an hour and that by the unreasonable conduct of the attorney it has drawn out for days, the court may compel the offending attorney to pay the excess occasioned by this unnecessary prolongation of the examination.¹²⁹

The only regrettable aspect of this statute, and its judicial interpretation, would seem to be its infrequent use.¹³⁰ The statute is a ready tool for use by courts in the enforcement of pre-trial procedures. Not only would it, if used frequently enough, serve as a deterrent to dilatory tactics but it would provide a means of compensation to an opponent who has been put to expense by such tactics. No suggestion is made that Congress intended the application of the statute specifically to pre-trial situations but the words are broad enough to allow that. The only word of the statute which arguably could impede an application of the statute to pre-trial is the word "vexatiously." While there is some authority in other contexts for the interpretation of "vexatious" to mean wilful, malicious or in bad faith, "another reasonable interpretation appears to be merely 'annoying inconvenience.'"¹³¹ To reiterate a salient point, the statute stands as a tool awaiting use by the federal courts for whom it was designed. The statute is especially commendable because it breaks through the fiction of attorney-client identification and imposes the penalty on the erring attorney. Federal courts cannot mourn the absence of a sanction for pre-trial delays when one such as this stands ready and waiting.

Should for some reason the statute be considered inappropriate for use in pre-trial, a federal court has ample common law authority under which to assert an inherent power to assess costs upon an attorney for negligence. Indeed, the United States Court of Appeals for the Sixth Circuit said in *Toledo Metal Wheel Co. v. Foyer Bros.*,¹³² where an attorney had created needless delay in deposition taking:

The power of a court to protect a litigant against costs so created by his counsel would exist independently of the [federal costs] statute, inasmuch as the rule at common law is broad enough to redress such a matter through summary proceedings.¹³³

IV. The Rule-Making Power of Courts

Generally, a court has inherent power to establish rules for regulating its proceedings.¹³⁴ In the federal system, however, it is unnecessary to rely on a court's inherent power to fashion rules; there is sufficient statutory and quasi-statutory authorization.¹³⁵ Rule 83 of the Federal Rules of Civil Procedure states:

Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. . . . In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules.

126 *Motion Picture Patents v. Yankee Film Co.*, 192 Fed. 134 (S.D.N.Y. 1912).

127 *Bardin v. Mondon*, 298 F.2d 235 (2d Cir. 1961).

128 *Weiss v. United States*, 227 F.2d 72 (2d Cir. 1955), *cert. denied*, 350 U.S. 936 (1956).

129 *Motion Picture Patents v. Steiner*, 201 Fed. 63 (2d Cir. 1912).

130 74 HARV. L. REV. 1466 (1961).

131 37 N.Y.U.L. REV. 947-48 (1962).

132 223 Fed. 350 (6th Cir. 1915).

133 *Id.* at 358. A federal circuit court has stated that it has inherent power to make and enforce its own rules as to costs in litigation before it. *Island Development Co. v. McGeorge*, 37 F.2d 345 (3d Cir. 1930).

134 *Meyer v. Brinsky*, 129 Ohio St. 371, 195 N.E. 702 (1935).

135 28 U.S.C. § 2071 (1958); FED. R. CIV. P. 83.

Congressional statute 28 U.S.C. 2071 serves a similar purpose. It states:

The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court.

It was the contention of the *Gamble* court that nothing in these enactments gave a federal district court authority to prescribe a rule providing for the imposition of a fine on an attorney for his failure to submit a pre-trial memorandum within the allotted time. The Third Circuit said in that decision:

Although they are an "affirmative grant of authority," . . . still the local rule making power while not limited to the trivial, cannot extend to basic disciplinary innovations requiring a uniform approach. Whether an attorney should be himself fined when, because of office oversight or neglect, he is late in complying with an order of the court is a substantial independent question which calls for mature consideration by the body charged with making Rule recommendations, the Supreme Court's advisory committee.¹³⁶

In his dissent in the *Gamble* case Chief Judge Biggs questioned a pressing need for uniformity in respect to pre-trial conferences. "Some courts," he said, "are not troubled with congested dockets; others are."¹³⁷ He questioned also whether Rule 83 has a written-in prohibition against local rules made in an area where uniformity would be desirable.¹³⁸ Rule 83 would serve no purpose, he indicated, if uniformity were one of its goals, since the Rule itself gives district courts the power to go their separate ways with respect to proceedings before them.¹³⁹

Rule 83's only explicit limitation on the rule-making power is that local rules be consistent with other Federal Rules. Federal statute 28 U.S.C. 2071 adds the limitation that no local rule conflict with any other federal statute. There is also a well-recognized implied limitation that a rule be reasonable in order to be valid.¹⁴⁰ The only uniformity requirement read into Rule 83 is that a rule apply to all suitors in an established and fixed manner and be known to all litigants and attorneys.¹⁴¹ Simply stated, a local rule must have indiscriminate application.

In stating the proposition that a local rule cannot extend to basic disciplinary innovations requiring a uniform approach, the *Gamble* court placed great reliance on the 1960 United States Supreme Court case *Miner v. Atchison*.¹⁴² That case held invalid a local rule authorizing oral depositions in admiralty as inconsistent with the General Admiralty Rules, even though the general rules were silent about such depositions. The case is readily distinguishable from the *Gamble* situation. Rule 16 of the Federal Rules of Civil Procedure explicitly authorizes the making of local rules regarding pre-trial.¹⁴³ The local rule regarding discipline questioned in *Gamble* was made in pursuit of that authorization as well as that of Rule 83. In *Miner*, not only was there an absence of a provision granting district courts in admiralty the power to make rules regarding deposition taking, there was no Rule providing for deposition taking in admiralty procedure. The only authority on which the local rule could be posited was Rule 44 of the General Admiralty Rules — a provision analogous to Rule 83 of the Federal Rules of Civil Procedure. Secondly, and perhaps more importantly, Mr. Justice Harlan, speaking for the Court in the *Miner* decision, said: "We deal here only with the procedure before us, and our decision is based on its particular nature and history."¹⁴⁴ We do not hold, he said, "that whenever the General Admiralty Rules deal with part, but not all, of a subject, those prac-

136 *Gamble v. Pope & Talbot*, 307 F.2d 729, 731-32 (3d Cir.), *cert. denied*, 371 U.S. 888 (1962).

137 *Id.* at 735.

138 *Ibid.*

139 *Ibid.*

140 3A BARRON AND HOLTZOFF, *FEDERAL PRACTICE AND PROCEDURE* 179 (1958).

141 *Spangler v. Atchison*, T. & S.F. Ry., 42 Fed. 305 (W.D. Mo. 1890).

142 363 U.S. 641 (1960).

143 3A BARRON AND HOLTZOFF, *op. cit. supra* note 140 (Supp. 1961, at 28) states: "Detailed procedure for pre-trial conferences is commonly provided by local rule."

144 363 U.S. 641, 649 (1960).

tices left unprovided for by the General Rules may not in any circumstances be dealt with by the District Courts under General Rule 44.¹⁴⁵

In the light of this approach to *Miner*, then, a local rule having as its source of authority Federal Rule 83 would be valid as long as the rule was not inconsistent with other Federal Rules or Congressional enactments, not unreasonable and not discriminatory. The authorization in Federal Rule 16 to district courts to make local rules regarding pre-trial would seem to encourage, rather than discourage, a district court to make rules necessary to the enforcement of pre-trial rules made under the direct authority of Federal Rule 16.

And, yet, there is still another approach to the problem. A federal statute, 28 U.S.C. 1654, states:

In all courts of the United States the parties may plead and conduct their own cases personally or by counsel, as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.

By implication, federal courts have authority to provide by rule the qualifications upon which it will admit members to its bar.¹⁴⁶ It has been said that the last clause of the above-quoted statute "is clear recognition of that large measure of control the various courts have over the counsel permitted to manage and conduct causes before it."¹⁴⁷

A local rule requiring as a condition for admission to the bar of a district court membership in the state bar of the state in which the district court sits has been held within the rule-making power of a court as conferred by Congress in 28 U.S.C. 1654.¹⁴⁸ A far-reaching local rule in the United States District Court for the Southern District of Iowa, whose validity has never been passed on,¹⁴⁹ provides that nonresident attorneys representing plaintiffs in certain cases are required to prove under oath that they have never violated any of the canons of ethics, if the court, in its uncontrolled discretion, determines to require such a showing.¹⁵⁰

Thus, since by statute federal courts have been vested with a power to frame rules stating who may or who may not practice before those courts, it would seem that impliedly the courts would have power to establish rules for the conduct of attorneys during their tenure before the court.¹⁵¹ It would seem that such a court could establish rules determining when an attorney admitted to practice before it has forfeited those rights,¹⁵² and that the presence of the power to rule as to when an attorney should be banished from practice before it would prove the power to establish by rule lesser sanctions for lesser infractions. In the light of an express statutory power to make rules regarding admission of attorneys before a court, a power to make rules to discipline an attorney by fine would seem obvious.

V. Punishment for Contempt

Because it saw no other basis for the imposition of a fine, the Third Circuit in the *Gamble* decision determined that the levy was in effect an attempt at punishment for contempt. But, it said, since the conduct was not found to be contemptuous and was penalized without the procedural safeguards given by Rule 42 of the

145 *Id.* at 648. One authority is of the opinion that in light of this decision it is possible that some of the more far-reaching local rules recently adopted may not be valid. 3A BARRON AND HOLTZOFF, *op. cit. supra* note 140 (Supp. 1961, at 27).

146 *Cf.* In the Matter of Crow, 283 F.2d 685 (6th Cir. 1960), holding that a district court may provide by rule the qualifications upon which it will admit members to its bar.

147 *MacNeil v. Hearst Corp.*, 160 F. Supp. 157 (D. Del. 1958).

148 *Matter of Wasserman*, 240 F.2d 213 (9th Cir. 1956).

149 3A BARRON AND HOLTZOFF, *op. cit. supra* note 140, at 185.

150 S.D. Iowa R. 3 *Cf.* *Lark v. West*, 182 F. Supp. 794 (D.D.C. 1960), *aff'd* 289 F.2d 898 (D.C. Cir. 1961), holding that a federal district court may require, with respect to comity for admission of applicants, independent examinations into character fitness.

151 *Cf.* *Straley v. Universal Uranium*, 182 F. Supp. 940 (S.D. Cal. 1960).

152 *Cf. In re Claiborne*, 119 F.2d 647 (1st Cir. 1941).

Federal Rules of Criminal Procedure, the court's action was violative of the Fifth Amendment.

However, while not conclusive, the fact that the trial judge in imposing the fine did not consider himself to be punishing for contempt is persuasive. There is no evidence in his opinion that the trial judge intended to punish for contempt. Indeed, that an attempt to punish the failure of counsel to supply a timely pre-trial memorandum is not contemptuous conduct was acknowledged by the dissenting opinion in *Gamble* as well as by the majority. Lacking the necessary element of wilfulness, the conduct obviously was without the proscriptions of the federal contempt statute.¹⁵³

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, *and none other*, as —

- (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
- (2) Misbehavior of any of its officers in their official transactions;
- (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

If conduct does not fall within this statute, a federal court cannot punish it as contemptuous.¹⁵⁴ This rule was laid down with great emphasis by the Supreme Court in the 1962 case, *In re McConnell*.¹⁵⁵

[The present federal contempt statute] is based on an Act passed in 1831 in order to correct serious abuses of the summary contempt power that had grown up and was intended as a "drastic delimitation . . . of the broad undefined power of the inferior federal courts under the Act of 1789," revealing "a Congressional intent to safeguard Constitutional procedures by limiting courts, as Congress is limited in contempt cases, to 'the least possible power adequate to the end proposed.'" "The exercise by federal courts of any broader contempt power than this," we have said, "would permit too great inroads on the procedural safeguards of the Bill of Rights, since contempts are summary in their nature, and leave determination of guilt to a judge rather than a jury."

Both the majority and the minority in the *Gamble* case agreed, therefore, that the attorney's conduct was not such as fell within the federal contempt statute. They also agreed that only conduct which fell within the statute was punishable for contempt. The majority, however, considered the imposition of the fine outside the scope of the court's authority and concluded that the action could only be an unlawful attempt to punish for contempt. The minority considered the contempt question irrelevant, since the court had inherent power to discipline. This appears to be the better approach.

One final question remains to be considered, that is, whether or not by the enactment of a contempt statute Congress intended to exclude all other forms of discipline from the inherent power of federal courts. On this point, the Fifth Circuit in *United States v. Green*¹⁵⁶ held in 1898 that the federal contempt statute, while it limited the punishment of contempts to fine and imprisonment, did not prohibit courts from disbaring attorneys. The court explained that in a proceeding to disbar, courts do not consider the question of contempt but simply the question as to whether the offense of which the party is guilty renders him unfit to remain any longer a member of the court. The same might be said of a court's inherent power to discipline for minor offenses, such as violation of pre-trial. The mere presence of a codification of the power to punish for contempt does not mean the removal of a court's power to punish for offenses where wilfulness is not an element.

VI. Conclusion

Some method is needed in the federal courts to secure compliance with pre-

153 18 U.S.C. 401 (1958). (Emphasis added.)

154 *Ex parte Robinson*, 86 U.S. (19 Wall.) 505 (1873).

155 370 U.S. 230, 233 (1962).

156 85 Fed. 856 (5th Cir. 1898).

trial procedures. Delay in pre-trial defeats an important purpose of the procedures themselves. That a federal court in 1962 should resort to dismissal of actions where pre-trial procedures are not strictly observed is in gross contradiction to the sophistication federal courts are considered to have attained. Federal courts using streamlined discovery and pre-trial procedures should be employing nothing less than streamlined sanctions to enforce those procedures. Dismissal as a sanction is not to be justified by reliance upon the ancient maxim *qui facit per alienum, qui facit per se*, a maxim which merely describes the relationship of principal-agent but does not reach the reasons for it. If there is a reason for holding the client for all his attorney's actions, let the courts state it. The everyday realities of the lawyer-client relationship, however, are reason enough for dismissing strict identification in this context, if one is not convinced of the gross injustice which results to an innocent litigant whose cause is lost by reason of his attorney's negligence.

Dismissal is an extreme and unwarranted sanction. It would be better for federal courts to revive the use of their inherent power to assess the delinquent attorney costs for his dilatory tactics. The imposition of a nominal fine upon attorneys, a sanction hastily rejected by the Third Circuit in *Gamble*, would be an excellent solution. Federal courts, besides their inherent powers, have a power to assess costs authorized by statute. Further authority for the use of a reasonable sanction for violations of pre-trial may be found in Federal Rule 83. None of the limitations of Rule 83 would appear to deprive a court of its rule-making power where attorney-directed sanctions for pre-trial are concerned, notwithstanding the *Gamble* decision.

Certainly, in the absence of clear-cut authority denying a federal court any power to impose an attorney-directed sanction for violation of pre-trial rules or orders, a court should at least *attempt* to employ a sanction which penalizes the offending party. If dismissal is the only available sanction, the law has performed the unenviable feat of rejecting progress and justice for time-worn maxims.

Edmund J. Adams