

# CHIPPING AWAY AT THE STONE WALL: ALLOWING FEDERAL COURTS TO IMPOSE NON-COMPENSATORY MONETARY SANCTIONS UPON ERRANT ATTORNEYS WITHOUT A FINDING OF CONTEMPT

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## INTRODUCTION

In today's crowded federal courts, district court judges often battle with attorneys to assure that cases are litigated in a reasonable and timely manner. Mirroring the increase in the number of cases in federal courts, the discovery abuses, including egregious abuses, also increased.<sup>1</sup> These abuses inevitably cause undue delay and impede the efficient administration of justice.

Some discovery abuses are intentional and are part of a well thought out litigation plan. In essence, well-funded litigants can make economic decisions to stonewall discovery and delay a timely result by throwing money at a case in hopes of outlasting their adversary. *Baker v. General Motors Corp.*<sup>2</sup> exemplifies this abuse and typifies what is wrong with litigation today. In *Baker*, the plaintiff sought various documents relating to complaints received by the defendant regarding the vehicle type that was the subject of the suit. Counsel for General Motors ("G.M.") stated, "[w]e cannot produce what we do not have," and explained that many of the complaints had been destroyed under G.M.'s document retention policy.<sup>3</sup> Counsel maintained this position until the eve of trial. After extensive investigation, plaintiffs discovered that G.M. possessed the requested documents, that these documents had been produced in other litigation, and that G.M. had even given some of the documents to the National Highway Transportation Safety Administration.<sup>4</sup> Two days before trial, defense counsel produced five hundred documents they had previously claimed did not exist.<sup>5</sup>

District Court Judge Joseph E. Stevens described the intent of these disrespectful and war-like tactics:

There is no doubt that the discovery in this case has been extraordinarily expensive and we do not have to look very far to explain that fact. Through the long discovery history in this case, the parties have held

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1. See generally *J.M. Clemminshaw Co. v. City of Norwich*, 93 F.R.D. 338, 357-58 (D. Conn. 1981).

2. 159 F.R.D. 519 (W.D. Mo. 1994), *rev'd in part on other grounds*, 86 F.3d 811 (8th Cir. 1996).

3. *Id.* at 522 (quoting letter from David Kelly, Counsel for Defendant, to J. Kent Emison, Counsel for Plaintiffs, July 21, 1993, attached to Plaintiff's Motion for Summary Judgment as Exhibit J).

4. See *id.*

5. See *id.*

numerous conferences in person and by telephone. From the beginning, this Court tried to relate to defense counsel and through them to their client that trial by ambush or by delay is no longer acceptable in federal court, and certainly not in the Western District of Missouri. At the very first discovery conference in 1992, the Court instructed defense counsel to send a photocopy of Rule 37 to the defendant, because this Court will not permit the biggest best-funded party to win solely because they can hold out the longest. It is clear by the proceedings reflected in the entire record of this case that this Court's warning was not heeded. General Motors clearly believed that it should do all in its power to wear the plaintiffs out through a litigation strategy of feast and famine. Plaintiffs were forced to starve on incomplete discovery responses during the early part of the case, and then feast on thousands of documents on the eve of trial. Although it is a strategy that may well assure a defense victory if permitted to go unchecked, this Court will not allow such tactics to tip the scales of justice.<sup>6</sup>

This Note, in accordance with the conclusions of courts with similar viewpoints,<sup>7</sup> suggests imposing non-compensatory monetary sanctions upon attorneys, without requiring a finding of contempt, as an appropriate sanction for the sort of discovery abuse that Judge Stevens found intolerable.<sup>8</sup> Imposing non-compensatory sanctions against the errant attorney attacks discovery abuses at their source, adequately deters similar future abuses, and preserves the judicial preference for trial on the merits. In *Baker*, the district court judge turned to Federal Rule of Civil Procedure 37 to impose sanctions.<sup>9</sup> The district court judge

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6. *Id.* at 526.

7. *See, e.g.,* *Miranda v. Southern Pac. Transp. Co.*, 710 F.2d 516 (9th Cir. 1983); *In Re Sutter*, 543 F.2d 1030 (2d Cir. 1976); *Pereira v. Narragansett Fishing Corp.* 135 F.R.D. 24 (D. Mass. 1991); *J.M. Cleminshaw Co. v. City of Norwich*, 93 F.R.D. 338 (D. Conn. 1981).

8. For the purposes of this Note, the term "non-compensatory monetary sanctions" means any monetary sanctions imposed by a district court in excess of costs and expenses, including attorney's fees and any amount the court deems appropriate as the reasonable fee for its time, which results from the failure to comply with the court's discovery order.

9. The relevant portion of Rule 37, subsection (b), reads in its entirety:

(b) Failure to Comply with Order.

(1) Sanctions by Court in District Where Deposition is Taken. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) Sanctions by Court in Which Action is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

opted for more severe sanctions than non-compensatory monetary sanctions. The court ordered the defendant's affirmative defenses be stricken and that the defective nature of the vehicle be taken as established.<sup>10</sup> Unfortunately, the sanctions imposed by the district court were overturned on appeal, and the attorneys' egregious discovery abuses went unpunished and undeterred.<sup>11</sup>

The Eighth Circuit's review of the sanctions in *Baker* is problematic. First, the Eighth Circuit seems to have performed a de novo review instead of the abuse of discretion standard dictated by the Supreme Court.<sup>12</sup> Furthermore, the Eighth Circuit reversed the district court's order of sanctions because it was not "just" or specifically related to the discovery abuses.<sup>13</sup> The Eighth Circuit also stated that the district court should have looked at less severe sanctions.<sup>14</sup> Had the judge imposed lesser sanctions, his ruling may have been upheld on appeal. Nevertheless, it is troubling that such egregious abuses can occur and go unpunished because of judicial limitations placed upon Rule 37.

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(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any order except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring that party to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that that party is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

FED. R. CIV. P. 37.

10. See *Baker v. General Motors Corp.*, 86 F.3d 811, 814-15 (8th Cir. 1996).

11. See *id.* at 817 (remanding the district court for imposition of less severe sanctions). Further, as of the date of this publication, the sanctions are still being held under advisement by a new district court judge. The original judge, J. Joseph E. Stevens, is now deceased.

12. See *Pierce v. Underwood*, 487 U.S. 552, 552 (1988).

13. *Baker*, 86 F.3d at 817.

14. See *id.*

This Note focuses on the appropriateness of imposing non-compensatory monetary sanctions on attorneys, without a finding of contempt, for discovery abuses. Part I provides background information, including definitions of key terms and the requirements for imposing sanctions. Part II discusses the difference between civil and criminal contempt, as well as the inapplicability of civil contempt to the problem. Part III discusses how various courts have addressed non-compensatory monetary sanctions. Finally, Part IV suggests reasons why non-compensatory monetary sanctions should be allowed when the sanctioned party is an attorney and will discuss how these monetary sanctions differ from a finding of criminal contempt.

## I. BACKGROUND AND DEFINITIONS

### A. General Background Information

The sanctions allowed by Rule 37 are flexible enough to effectively sanction errant attorneys. Attorney discovery abuses range from negligent behavior to intentional or willful disobedience of a court's order as was the case in *Baker*.<sup>15</sup> Correspondingly, the judicial arsenal contains a flexible array of sanctions. To combat discovery abuse, district courts must look to Federal Rule of Civil Procedure 37 as the exclusive remedy for noncompliance with discovery orders.<sup>16</sup> Rule 37 lists a variety of sanctions a court may employ and authorizes any other orders (sanctions) which are "just." The listed sanctions district court judges may order under Rule 37 include: fees and expenses,<sup>17</sup> deeming matters admitted,<sup>18</sup> preclusion orders,<sup>19</sup> striking of pleadings,<sup>20</sup> dismissal or default,<sup>21</sup> contempt,<sup>22</sup> disallowing use of information at trial,<sup>23</sup> and instructing the jury on misconduct.<sup>24</sup> The final paragraph of Rule 37(b)(2) states:

In lieu of any of the foregoing orders or in addition thereto, the court

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15. A substantial number of discovery abuses that face courts today, like attorney misconduct, are the result of negligent behavior rather than intentional or willful disregard. This distinction is significant because the contempt power utilized by federal courts requires willful, or in some instances reckless, disregard for judicial authority. See 18 U.S.C. § 401 (1994). In essence, the contempt power requires the court to actually determine a lawyer's motive for noncompliance with an order. In contrast, a district court may impose sanctions under Rule 37 for negligent noncompliance with an order. See *infra* notes 40-42 and accompanying text.

16. See *Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 207-08 (1958).

17. FED. R. CIV. P. 37(a)(4)(A); 37(c)(1); 37(c)(2); 37(d); 37(g).

18. See *id.* 37(b)(2)(A).

19. See *id.* 37(b)(2)(B).

20. See *id.* 37(b)(2)(C).

21. See *id.*

22. See *id.* 37(b)(2)(D).

23. See *id.* 37(c)(1).

24. See *id.*

shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.<sup>25</sup>

While non-compensatory monetary sanctions are not specifically listed in Rule 37, it cannot be said that they are forbidden by the rule. The listed sanctions of Rule 37 are not exhaustive and the rule gives judges wide discretion to impose other sanctions.<sup>26</sup> As long as the sanction is "appropriate," the Federal Rules of Civil Procedure "place virtually no limits on judicial creativity."<sup>27</sup> Therefore, any sanction that can be classified as "just" is available under Rule 37.<sup>28</sup>

Despite the wide discretion given to district court judges in formulating sanctions under Rule 37, a split in authority has developed within the circuit courts as to whether a district court may impose monetary sanctions in excess of the "reasonable expenses" expressed in Rule 37(b)(2), without requiring a finding of contempt. Two diametrically opposed positions have developed. One position is that the only monetary sanctions authorized by Rule 37(b)(2), absent a finding of contempt, are the compensatory sanctions found in its final paragraph.<sup>29</sup> The opposing view is that non-compensatory monetary sanctions are authorized under the first paragraph of Rule 37(b)(2), which states that the court "may make such orders in regard to the failure [to comply with discovery orders] as are just."<sup>30</sup>

Recently, the Tenth Circuit addressed the issue of whether a district court has the power to impose non-compensatory monetary sanctions against errant lawyers under Rule 37. In *Law v. National Collegiate Athletic Association*,<sup>31</sup> the court equated the imposition of non-compensatory monetary sanctions with criminal contempt.<sup>32</sup> The court assumed that it must resort to its contempt power to impose monetary sanctions beyond reasonable costs and expenses.<sup>33</sup> The Tenth Circuit reasoned that since the non-compensatory sanctions were neither compensatory nor avoidable by compliance with issued orders, the district court could not have been operating under its civil contempt power, and thus, must have been operating under its criminal contempt power.<sup>34</sup> The court went on to

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25. FED. R. CIV. P. 37(b)(2).

26. See *Anderson v. Beatrice Foods Co.*, 129 F.R.D. 394 (D. Mass. 1989), *aff'd*, 900 F.2d 388, 394 n.6 (1st Cir. 1990).

27. *Id.*

28. *Jaen v. Coca-Cola Co.*, 157 F.R.D. 146, 149 (D. Puerto Rico 1994).

29. See *Martin v. Brown*, 63 F.3d 1252, 1263 (3d Cir. 1995).

30. FED. R. CIV. P. 37(b)(2).

31. 134 F.3d 1438 (10th Cir. 1998).

32. See *id.* at 1442.

33. See *id.*

34. See *id.* at 1443.

conclude that the sanctioned individual should have been afforded the additional due process concerns associated with criminal contempt proceedings.<sup>35</sup>

In contrast, other circuit and district courts have allowed non-compensatory monetary sanctions against errant attorneys without requiring a finding of criminal contempt and the higher degree of due process associated with criminal proceedings.<sup>36</sup> Unlike the Tenth Circuit, these courts focused on the general purpose of Rule 37 and the plain meaning of Rule 37(b)(2) to conclude that a finding of contempt is permissive, instead of required.<sup>37</sup> In short, these courts concluded that Rule 37(b)(2) and the inherent power of federal courts allow for monetary sanctions in excess of "reasonable expenses" caused by the failure of an attorney to comply with a discovery order without having to resort to the court's contempt power.

### *B. Requirements for Imposing Sanctions*

Before a district court imposes sanctions, it must first satisfy several requirements. First, a district court judge must find a *failure* to comply with a discovery order.<sup>38</sup> Next, the district court judge must find that there is *no substantial justification* for the noncompliance and that the circumstances surrounding the sanctions do not make the imposition of sanctions unjust.<sup>39</sup> Finally, the district court judge must determine the *proper person* to receive the sanctions.

First and foremost, there must be a *failure* to comply with a discovery order. Rule 37(b) is entitled "Failure to comply with order," and a willfulness requirement should not be read into the rule. In 1970, the Rule was amended by substituting the word "failure" for "refusal." This change was made to destroy the willfulness requirement that had been read into the rule by many courts<sup>40</sup> and to harmonize the rule with the interpretation of *Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*,<sup>41</sup> in which the Supreme Court expressly rejected the argument that Rule 37(b) requires a finding of willfulness or bad faith before sanctions can be imposed. The court ruled that a district court may impose sanctions once it determines that the failure to comply with a discovery order has been due to "willfulness, bad faith, or any

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35. See *id.* at 1444.

36. See *Miranda v. Southern Pac. Transp. Co.*, 710 F.2d 516 (9th Cir. 1983); *In Re Sutter*, 543 F.2d 1030 (2d Cir. 1976); *Pereira v. Narragansett Fishing Corp.* 135 F.R.D. 24 (D. Mass. 1991); *J.M. Clemminshaw Co. v. City of Norwich*, 93 F.R.D. 338 (D. Conn. 1981).

37. See, e.g., *Satcorp Int'l Group v. China Nat'l Silk Import & Export Corp.*, 101 F.3d 3 (2d Cir. 1996); *J.M. Clemminshaw Co. v. City of Norwich*, 93 F.R.D. 338, 338 (D. Conn. 1981).

38. See FED. R. CIV. P. 37(b).

39. See *id.*

40. See FED. R. CIV. P. 37 advisory committee's notes (1970).

41. 357 U.S. 197, 207-08 (1958); see also FED. R. CIV. P. 37 advisory committee's notes (1970).

fault of [the person in noncompliance],” but not inability.<sup>42</sup> Under this rule it would appear that noncompliance due to negligent conduct could constitute a failure under Rule 37(b).

Once a district court determines that there has been a failure to comply with a discovery order, it must determine whether the failure was *substantially justified*. Rule 37 (b)(2) states that “the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorneys fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.”<sup>43</sup> Thus, sanctions are inappropriate if there is a substantial justification for the failure to comply with the discovery order or the circumstances are such that imposing sanctions would be unjust. “The burden of establishing substantial justification is on the party being sanctioned.”<sup>44</sup> Consistency in interpreting the language of Rule 37 dictates that the burden of establishing circumstances that cause the imposition of unjust sanctions would also fall upon the non-complying person. The Supreme Court has clarified that an individual’s discovery conduct is likely *substantially justified* under Rule 37 if it arises out of a “genuine dispute, or if reasonable people could differ as to the appropriateness of the contested action.”<sup>45</sup> Unfortunately, the Court has not identified what circumstances make the imposition of sanctions unjust.<sup>46</sup> This factor seems to be one left to the trial judge’s discretion. Nonetheless, the imposition of sanctions is inappropriate if there is a substantial justification or if special circumstances make imposing sanctions unjust.

If a district court determines that there has been a failure to comply with a discovery order, but does not find that the failure was substantially justified or that the circumstances would make the imposition of sanctions unjust, it must next decide who to sanction. Rule 37 subsections (a) and (b) permit the court to impose sanctions upon a party, the party’s attorney or both. The rule establishes no preference between the two. In *Devaney v. Continental American Insurance Co.*,<sup>47</sup> the Eleventh Circuit stated that Rule 37(b) dictates that “when an attorney advises [] client[s] in discovery matters, he assumes a responsibility of professional disposition of that portion of the lawsuit and may be held accountable for positions taken or responses filed during that process.”<sup>48</sup> This

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42. *Societe Internationale*, 357 U.S. at 212.

43. FED. R. CIV. P. 37(6)(2).

44. *Telluride Mgmt. Solutions, Inc. v. Telluride Inv. Group*, 55 F.3d 463, 466 (9th Cir. 1995) (citing *Hyde & Drath v. Baker*, 24 F.3d 1162, 1171 (9th Cir. 1994), *overruled on other grounds by* *Cunningham v. Hamilton County, Ohio*, 527 U.S. 198, 202 (1999) (overruling the finding in *Telluride* that sanctions are immediately appealable).

45. *Pierce v. Underwood*, 487 U.S. 562, 565 (1988) (citations omitted).

46. At least one court has indicated that a party’s financial hardship may be one such circumstance that makes imposition of sanctions unjust. *See Bosworth v. Record Data of Md., Inc.*, 102 F.R.D. 518, 521 (D. Md. 1984).

47. 989 F.2d 1154 (11th Cir. 1993).

48. *Id.* at 1162.

conclusion, combined with the legislative intent to remove any “bad faith” requirement previously read into Rule 37, vests a trial court with broad discretion to impose monetary sanctions upon attorneys subject only to limited due process protection.<sup>49</sup>

*C. Limitations on Sanctions Imposed Under Rule 37(b)*

While it is apparent that district courts are given wide discretion in formulating appropriate sanctions, there are general limitations upon that discretion. First, the district courts must provide the sanctioned party or attorney with adequate due process. Secondly, and in furtherance of the general due process considerations, the sanctions imposed must specifically relate to the claimed discovery abuse. Courts of appeal use an abuse of discretion standard to review the district court’s sanction order. Thus, as long as there are adequate judicial findings supporting the consideration of these limitations, it appears that the district court’s reasonable sanctions will be upheld.<sup>50</sup>

Rule 37(b)(2) embodies two due process standards.<sup>51</sup> These “two standards, one general and one specific, . . . limit a district court’s discretion. First, any sanction must be ‘just’; second, the sanction must be specifically related to the particular ‘claim’ which was at issue in the order to provide discovery.”<sup>52</sup> While the latter requirement reflects the rule in *Hammond Packing Co. v. Arkansas*,<sup>53</sup> “the former represents [a] general [substantive] due process restriction on the court’s discretion.”<sup>54</sup>

The amount of sanctions a court can award is limited under Rule 37 only by that which is “reasonable” under the circumstances.<sup>55</sup> “The requirement that an ordered sanction be ‘just’ imposes a duty on the district court, particularly in the case of severe sanctions, to give adequate consideration to ‘whether lesser sanctions would be more appropriate for the violation.’”<sup>56</sup> Thus, at least in the cases where dismissal is used as a sanction, lesser sanctions should be imposed if they would adequately compensate the aggrieved party and deter future discovery abuses.<sup>57</sup> For the same reasons, the district court should use the same

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49. *See id.*

50. *See id.* at 1160.

51. *See Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 707 (1982).

52. *Id.* at 707; *see also* *General Ins. Co. of Am. v. Eastern Consol. Util., Inc.*, 126 F.3d 215, 220 (3d Cir. 1997) (citing *Insurance Corp. of Ireland*, 456 U.S. at 707).

53. 212 U.S. 322 (1909).

54. *Insurance Corp. of Ireland*, 456 U.S. at 707.

55. *Carlucci v. Piper Aircraft Corp.*, 775 F.2d 1440, 1453 (11th Cir. 1985).

56. *Webb v. District of Columbia*, 146 F.3d 964, 971 (D.C. Cir. 1998) (quoting *Bonds v. District of Columbia*, 93 F.3d 801, 808 (D.C. Cir. 1996)).

57. *See Stars’ Desert Inn Hotel & Country Club, Inc. v. Hwang*, 105 F.3d 521, 524 (9th Cir. 1997) (holding that a court should consider prejudice and availability of lesser sanctions before entering default or dismissal). This is the general rule for when the harshest sanction of dismissal



rationale to formulate all sanctions.

In addition to a substantive due process limitation, Rule 37 imposes a general procedural due process limitation. Procedural due process requires that a sanctioned attorney or party must have adequate notice and a chance to be heard.<sup>58</sup> There are several compelling reasons why notice, an opportunity to prepare a defense, and a hearing are required prior to sanctioning counsel or a litigant. The procedural due process requirement ensures that: (1) attorneys “have an opportunity to prepare a defense and to explain their questionable conduct at a hearing; (2) the judge [has] time to consider the severity and propriety of the proposed sanction in light of the attorney’s explanation for their conduct; and (3) the facts supporting the sanction appear in the record, facilitating appellate review.”<sup>59</sup>

The final due process requirement of Rule 37(b) is the specifically-related-to requirement. Under this requirement, a sanction must be specifically related to a particular “claim” of discovery abuse. This requirement is normally enunciated when a district court deems certain facts as admitted. Then, the admitted facts must be those contained in (specifically related to) the discovery order that was not obeyed.<sup>60</sup> This presumption originated in *Hammond Packing Co. v. Arkansas*.<sup>61</sup> In *Hammond Packing*, the Court dismissed a defense when the defendant failed to produce any evidence in support of a particular defense.<sup>62</sup> The Court reasoned that this failure supports “the presumption that the refusal to produce evidence . . . was but an admission of the want of merit in the asserted defense.”<sup>63</sup> In essence, the sanction takes as established the facts sought to be proven through discovery.<sup>64</sup> The fact that a “legal consequence . . . follows from this, does not in any way affect the appropriateness of the sanction.”<sup>65</sup>

For the purposes of a meaningful review, a district court invoking the sanction power of Rule 37 must “clearly state its reasons so that meaningful

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will be imposed. However, the same theory should hold true for other sanctions, such as striking defenses and barring evidence from use at trial. Courts favor disposition on the merits and adequate deterrence, but must balance these preferences with the prejudice imposed on the aggrieved party. If lesser sanctions can adequately deter the noncomplying party while at the same time minimize the prejudice imposed on the aggrieved party, it makes sense to impose the lesser sanctions so that the matter can be fully and fairly litigated.

58. “[L]ike other sanctions, attorney’s fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record.” *Miranda v. Southern Pac. Transp. Co.*, 710 F.2d 516, 522 (9th Cir. 1983) (quoting *Roadway Express, Inc. v. Piper Aircraft Corp.*, 447 U.S. 752, 767 (1980)).

59. *Id.* at 522-23 (citing *Weiss v. Burr*, 484 F.2d 973, 985-87 (9th Cir. 1973)).

60. *See Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 707, 709 (1982).

61. 212 U.S. 322 (1909).

62. *See id.* at 357.

63. *Id.*

64. *See Insurance Corp. of Ireland*, 456 U.S. at 709.

65. *Id.*

review may be had on appeal.”<sup>66</sup> As previously mentioned, an appellate court reviews sanctions imposed under Rule 37 under an abuse of discretion standard.<sup>67</sup> “The question, of course, is not whether this Court, or whether the Court of Appeals, would as an original matter have [dismissed the action]; it is whether the District Court abused its discretion in so doing.”<sup>68</sup> Without detailed findings for each specific sanction, the appellate court does not have any basis for determining whether the district court abused its discretion and conformed with due process requirements.<sup>69</sup>

*D. Attorneys May Be Treated Differently than Parties*

An attorney who is delaying, stonewalling, or engaging in other abusive discovery behavior does so at his or her own peril. Specifically, attorneys should be aware that, in some instances, monetary sanctions will be imposed upon them under a much less stringent set of standards. At least one court has concluded that monetary sanctions should be imposed against attorneys before more severe sanctions are utilized.<sup>70</sup> These less stringent standards developed as a matter of fairness.<sup>71</sup> Specifically, abusive attorneys should be sanctioned before the parties themselves, especially when the attorney has knowingly engaged in abusive behavior.<sup>72</sup> It would be unfair to visit the sins of an attorney upon his client, and such a sanction assures the efficient administration of justice.<sup>73</sup>

The last paragraph of Rule 37(b) makes it clear that sanctions may include an assessment of financial penalties directly against those counsel who are

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66. *Wilson v. Volkswagen of Am., Inc.*, 561 F.2d 494, 505 (4th Cir. 1977) (quoting *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 376 (1977)); *see also* *Metrocorps, Inc. v. Eastern Mass. Junior Drum & Bugle Corps Ass’n*, 912 F.2d 1 (1st Cir. 1990) (remanding for failure to state basis for denial of attorneys fees and costs); *Carlucci v. Piper Aircraft Corp.*, 775 F.2d 1440, 1453 (11th Cir. 1985) (imposing \$10,000 sanction for bad faith discovery tactics and remanding for failure to state basis for imposing sanction).

67. *See Insurance Corp. of Ireland*, 456 U.S. at 700.

68. *Id.* at 707 (quoting *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642 (1976)).

69. *See Wilson*, 561 F.2d at 505.

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We believe that imposing a monetary penalty on counsel is an appropriate sanction considerably less severe than holding counsel in contempt, referring the incident to the client or bar association, or dismissing the case. If we were to foreclose the district court from imposing this relatively mild penalty for violation of the local rules, district courts would be forced to resort to more severe sanctions.

*Miranda v. Southern Pac. Transp. Co.*, 710 F.2d 516, 520-21 (9th Cir. 1983) (citing *Chisom v. National Heritage Life Ins. Co.*, 637 F.2d 1328, 1331-32 (9th Cir. 1981)).

71. *See id.* at 521.

72. *See J.M. Cleminshaw Co. v. City of Norwich*, 93 F.R.D. 338, 357 (D. Conn. 1981) (citing *Flaksa v. Little River Marine Constr. Co.*, 389 F.2d 885, 888 (5th Cir. 1968)).

73. *See id.*

responsible for the failure.<sup>74</sup> Because Rule 37 sanctions are intended both to punish and deter, as well as to compensate victimized parties, Rule 37(b) gives a district court the authority to levy monetary fines payable to the court against delinquent counsel.<sup>75</sup> In accordance with the clear language of Rule 37(b), a court has the authority to assess fines against counsel for violations of orders that the court has entered pursuant to Rule 26(f), as well as violations of any orders that the court has entered pursuant to Rule 37(a).<sup>76</sup>

## II. CIVIL CONTEMPT VERSUS CRIMINAL CONTEMPT

The problems surrounding non-compensatory monetary sanctions begin with the distinction between criminal contempt and civil contempt. The confusion surrounding the contempt distinction is so great that one commentator has stated that “[t]he literature on contempt of court is unanimous on only one point: the law is a mess.”<sup>77</sup> Nevertheless, for courts that require a finding of contempt prior to the imposition of non-compensatory monetary sanctions, the distinction is an important one.

The importance of the civil/criminal distinction revolves around general notions of due process, specifically those rights given to a defendant in a criminal action. “The distinction between criminal and civil contempt is important because ‘[c]riminal contempt is a crime in the ordinary sense, and criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings.’”<sup>78</sup>

The distinction between civil and criminal contempt “turns on ‘the character . . .’ of the sanction” imposed.<sup>79</sup> Succinctly, “[c]ivil as distinguished from criminal contempt is a sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of noncompliance.”<sup>80</sup> On the other hand, a contempt sanction is generally considered criminal if it imposes punishment for past conduct, usually imprisonment or a fine in a fixed amount.<sup>81</sup> While these distinctions are general, they provide insight into many

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74. Courts have also relied on their inherent powers to impose monetary sanctions upon attorneys. This power flows from the court’s inherent power to control the cases before it. The inherent power of a court to manage its affairs necessarily includes the authority to impose reasonable and appropriate sanctions upon errant lawyers practicing before it. See *Flaksa*, 389 F.2d at 888; see also *Cleminshaw*, 93 F.R.D. at 357-58.

75. See *Cleminshaw*, 93 F.R.D. at 359.

76. See *id.* at 359 n.16.

77. Earl C. Dudley, Jr., *Getting Beyond the Civil/Criminal Distinction: A New Approach to the Regulation of Indirect Contempts*, 79 VA. L. REV. 1025, 1025 (1993).

78. *Law v. National Collegiate Athletic Ass’n*, 134 F.3d 1438, 1442 (10th Cir. 1998) (quoting *International Union, United Mine Workers v. Bagwell*, 512 U.S. 821, 826 (1994)).

79. *International Union, United Mine Workers*, 512 U.S. at 827 (citation omitted).

80. *Law*, 134 F.3d at 1442 (quoting *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949)).

81. See *Hicks v. Feiock*, 485 U.S. 624, 631-33 (1988).

of the courts rulings that require a finding of contempt prior to the imposition of non-compensatory monetary sanctions.

### III. THE CLASSIFICATION CONFUSION: DISTRICT AND CIRCUIT COURT TREATMENT OF NON-COMPENSATORY MONETARY SANCTIONS

As a result of the confusion and judicial discretion surrounding sanctions under Rule 37(b), a split in the circuit courts has developed. The circuit courts are split as to whether non-compensatory monetary sanctions may be imposed without a finding of contempt.<sup>82</sup> In effect, the split seems to be the result of a classification problem. The courts requiring a finding of contempt classify non-compensatory monetary sanctions as fines with criminal overtones,<sup>83</sup> whereas the courts that do not require the finding classify non-compensatory sanctions as appropriate civil sanctions furthering judicial economy and control.<sup>84</sup>

In the end, a court must choose between additional due process or judicial economy and control. If the court favors additional due process beyond that found in Rule 37, requiring a finding of contempt will ensure more procedural protection to sanctioned parties.<sup>85</sup> However, if the court favors judicial economy and control, relying on the procedural protections Rule 37 provides will allow a speedier trial, a more direct focus on the merits of the case, and more control over the case before it.<sup>86</sup>

#### *A. Courts Requiring a Finding of Contempt*

The circuit and district courts that have required a finding of contempt favor additional procedural protections. These courts have used two rationales to arrive at the contempt requirement for imposing non-compensatory sanctions. First, courts have generally classified non-compensatory monetary sanctions as punitive fines equal to criminal contempt and have ignored the express language of Rule 37.<sup>87</sup> As a result of this classification, the courts have required the additional due process protections afforded to criminal defendants.<sup>88</sup> The second rationale used to arrive at a finding of contempt has focused on a seemingly narrow reading of the last paragraph of Rule 37(b)(2)<sup>89</sup> and has limited any

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82. See *Law*, 134 F.3d at 1442 (citing *Satcorp Int'l Group v. China Nat'l Silk Import & Export Corp.*, 101 F.3d 3, 5 (2d Cir. 1996)).

83. See, e.g., *id.* at 1443.

84. See, e.g., *Cleminshaw Co. v. City of Norwich*, 93 F.R.D. 338, 338 (D. Conn. 1981).

85. See *Law*, 134 F.3d at 1443-44.

86. See *Cleminshaw*, 93 F.R.D. at 351 n.11.

87. See, e.g., *Law*, 134 F.3d at 1442.

88. See *id.* at 1444.

89. The final paragraph of Rule 37(b)(2) states:

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an

monetary sanctions to compensatory fees and expenses.<sup>90</sup> Under this rationale, any amount of monetary sanctions in excess of “reasonable expenses” is an unauthorized fine under Rule 37 unless there has been an associated finding of contempt.<sup>91</sup>

The best example of the typical contempt-requiring case is *Law v. National Collegiate Athletic Ass’n*,<sup>92</sup> which is the most recent case addressing the issue.<sup>93</sup> The dispute in *Law* arose out of an alleged violation of federal antitrust law by the National Collegiate Athletic Association (“NCAA”). The defendant and defense counsel were sanctioned by the district court for failing to provide specific salary and benefit information of various Division I coaches to the plaintiff.<sup>94</sup> As a result of the defense’s failure to provide the ordered information, the district court ordered the NCAA and its counsel to pay the reasonable expenses and attorney’s fees that plaintiff incurred because the failure to permit discovery, plus a twenty-five percent surcharge.<sup>95</sup>

The district court imposed the twenty-five percent surcharge in excess of the reasonable fees and expenses to deter future discovery abuse. The district court stated that no meaningful deterrent effect would result without the surcharge.<sup>96</sup> The district court judge pointed out that the NCAA was already subject to liability for payment of all costs and fees which plaintiff incurred due to the NCAA’s established violation of federal antitrust law and that the surcharge was the least severe penalty that would serve to deter future misconduct.<sup>97</sup>

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award of expenses unjust.

FED. R. CIV. P. 37(b)(2).

90. See, e.g., *Martin v. Brown*, 63 F.3d 1252 (3d Cir. 1995); *Buffington v. Baltimore County, Md.*, 913 F.2d 113 (4th Cir. 1990).

91. It is significant that none of these contempt-requiring courts have addressed the constitutionality of Rule 37. Instead of addressing the clear language of Rule 37, courts have narrowly read Rule 37 to avoid questioning the constitutionality of the Rule. It would seem logical that if the plain language of Rule 37 allowed non-compensatory monetary sanctions, but non-compensatory monetary sanctions are unconstitutional because of the procedure provided by Rule 37, then Rule 37 is unconstitutional. This is a tough conclusion for any court to accept.

92. 134 F.3d 1438 (10th Cir. 1998).

93. Other cases which discuss a finding of contempt are: *Satcorp International Group v. China National Silk Import & Export Corp.*, 101 F.3d 3 (2d Cir. 1996) (did not answer whether a finding of contempt is necessary before imposing non-compensatory sanctions, but held that, at the least, due process requires that the delinquent party be provided with notice of possible sanctions and an opportunity to present evidence or arguments against their imposition); *Martin v. Brown*, 63 F.3d 1252 (3d Cir. 1995) (any amount of monetary sanctions in excess of compensatory damages requires a finding of contempt); *Hathcock v. Navistar International Transportation Corp.*, 53 F.3d 36 (4th Cir. 1995) (a fine under Rule 37 is effectively a criminal contempt sanction, requiring notice and the opportunity to be heard).

94. See *Law*, 134 F.3d at 1439-40.

95. See *id.* at 1440.

96. See *id.* at 1441.

97. See *id.* The district court apparently saw a potential problem with a narrow reading of

The Tenth Circuit disagreed with the district court and overturned the district court's surcharge sanction. The court ignored the plaintiff's argument that the "may make such orders in regard to the failure as are just" language of Rule 37(b)(2) allows sanctions in excess of reasonable attorney's fees and expenses. Instead, the Tenth Circuit focused on the civil and criminal contempt distinction. The Tenth Circuit equated the twenty-five percent surcharge to a finding of criminal contempt and held that the sanctioned parties, client, and attorneys, did not receive adequate due process.<sup>98</sup>

In making the civil and criminal contempt distinction, the Tenth Circuit relied on general notions of civil and criminal contempt set forth by the Supreme Court.<sup>99</sup> The court did not equate the non-compensatory sanction (the surcharge) to a finding of civil contempt because it was not meant to compensate the aggrieved party and because the defendant and its counsel could not have avoided the sanction by complying with the order.<sup>100</sup>

Once the Tenth Circuit equated the surcharge to a finding of criminal contempt, the court had to determine whether the procedural safeguards for criminal contempt orders were satisfied. These procedural safeguards are:

[D]efendants in criminal contempt proceedings must be presumed innocent, proved guilty beyond a reasonable doubt, and accorded the right to refuse to testify against themselves; must be advised of charges,

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Rule 37 limiting monetary sanctions to compensatory damages. If a remedy for a cause of action provides for attorney's fees upon successful completion, then limiting the Rule 37 sanctions to those expenses and fees only resulting from the discovery abuse does not serve any deterrent effect because the defendant will have to pay those fees whether the case is won or lost. *See id.* Due to the resulting lack of specific punishment, others will be more likely inclined to engage in similar abusive behavior. *See id.*

The *Law* court responded to this argument by stating that this outcome is not inevitable because, if the defendant won on appeal, the defendant would only have to pay those expenses and fees associated with the discovery abuse rather than all of the attorney's fees and expenses incurred by plaintiff over the course of the antitrust case. *See id.* at 1441 n.7.

However, in cases like antitrust, a defendant is left in a position where compensatory discovery sanctions are very small compared to the large amounts of money at stake in the overall case (which already includes the adversary's attorney's fees and expenses). In effect, the cost of doing wrong is reduced and may even become profitable. The worst possible position for the defendant is losing and having to pay the judgment and all plaintiff incurred expenses and fees. However, should the discovery abuse provide a winning edge for the defendant, it must only pay those expenses and fees incurred as a result of the discovery abuse (which is almost nothing compared to the potential payout had the defendant lost).

98. *See id.* at 1443.

99. *See id.* at 1442 (citing *McComb v. Jacksonville Paper Co.*, 336 U.S. 187 (1949) (civil contempt is a sanction to enforce compliance with an order of the court or to compensate for losses sustained); *United States v. United Mine Workers*, 330 U.S. 258 (1947) (civil contempt is a fine payable to the complainant to compensate her for losses sustained)).

100. *See id.*

have a reasonable opportunity to respond to them, and be permitted the assistance of counsel and the right to call witnesses; must be given a public trial before an unbiased judge; and must be afforded a jury trial for serious contempts.<sup>101</sup>

Furthermore, Federal Rule of Criminal Procedure 42(b) provides that “[a] criminal contempt . . . shall be prosecuted on notice . . . [which shall] state . . . the essential facts constituting the criminal contempt charged and describe it as such.”<sup>102</sup>

In *Law*, the court found that the additional due process concerns and safeguards associated with criminal contempt were not met. Specifically, the court found that the defendant and its defense counsel did not receive adequate notice of the possibility that they might be held in criminal contempt, because: (1) the request for sanctions did not request monetary sanctions in excess of attorney’s fees and expenses; and (2) the district court’s show cause order did not specifically name two of defendant’s counsel.<sup>103</sup> Accordingly, the district court’s sanctions were vacated.

The *Law* case is typical of the cases that require a finding of contempt prior to the imposition of non-compensatory monetary sanctions. This line of cases typically classifies non-compensatory monetary sanctions as criminal fines which are subsequently equated to findings of criminal contempt.<sup>104</sup> Once a court decides the sanction was non-compensatory, it must ensure that all of the procedural safeguards for criminal proceedings have been satisfied before it will uphold the sanctions. Normally, courts in this position will find that the desired procedural safeguards were not satisfied during the course of regular litigation, and the abusive discovery goes unpunished.<sup>105</sup>

While the court in *Law* focused on the civil versus criminal contempt distinction to overturn the sanctions, a narrow reading of Rule 37 is implicit in the court’s holding. By equating sanctions in excess of fees and expenses to a punitive fine, the court ignored the “may make such orders in regard to the failure as are just” language of Rule 37(b)(2), which grants it broad discretionary power to formulate appropriate sanctions. The same implicit narrow reading of Rule 37

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101. *Id.* at 1443-44.

102. *Id.* at 1444 (quoting FED. R. CRIM. P. 42(b)).

103. *See id.*

104. *See generally* Satcorp Int’l Group v. China Nat’l Silk Import & Export Corp., 101 F.3d 3 (2d Cir. 1996) (did not answer whether a finding of contempt is necessary before imposing non-compensatory sanctions, but held that, at the least, due process requires that the delinquent party be provided with notice of possible sanctions and an opportunity to present evidence or arguments against their imposition); *Martin v. Brown*, 63 F.3d 1252 (3d Cir. 1995) (any amount of monetary sanctions in excess of compensatory damages requires a finding of contempt); *Hathcock v. Navistar Int’l Transp. Corp.*, 53 F.3d 36 (4th Cir. 1995) (a fine under Rule 37 is effectively a criminal contempt sanction, requiring notice and the opportunity to be heard).

105. *See, e.g., id.*; *Hathcock v. Navistar Int’l Transp. Corp.*, 53 F.3d 36 (4th Cir. 1995); *Buffington v. Baltimore County, Md.*, 913 F.2d 113 (4th Cir. 1990).

holds true in other courts' holdings that require a finding of contempt prior to imposing non-compensatory monetary sanctions.

Another case that required a finding of contempt prior to imposing non-compensatory sanctions is *Martin v. Brown*.<sup>106</sup> Unlike the court in *Law*, the court in *Martin* found adequate due process. However, the court did require a finding of contempt.

In *Martin*, the Third Circuit overturned a five hundred dollar sanction imposed by the district court upon the defense counsel because the basis for the sanction was not specifically set forth by the district court. Unlike most courts that require a finding of contempt prior to the imposition of non-compensatory monetary sanctions, the court in *Martin* found adequate due process without the additional proceedings associated with criminal contempt.<sup>107</sup> In *Martin*, the plaintiff sought to inspect the defendant's real property involved in the litigation. The court issued an order allowing the inspection, but the defendant continually refused to allow plaintiff to inspect the property. In response to the refusal, the plaintiff filed a Motion for Sanctions, and the court issued an order directing the parties to comply with the previous discovery order and even warned them that sanctions would be imposed for future noncompliance. Despite this warning, the defendant refused to allow inspection of the real property and the plaintiff filed yet another Motion for Sanctions. The court, once again in a later pretrial hearing, "echoed its warning to the parties . . . that sanctions [w]ould be imposed for conduct . . . 'in violation of the Rules of Civil Procedure and/or the Rules of Professional Conduct.'"<sup>108</sup>

Defense counsel claimed that she did not receive adequate due process. Specifically, defense counsel claimed that she did not receive sufficient notice that specific Rule 37 sanctions would be imposed.<sup>109</sup> The court disagreed. The court recognized that "[n]o precise all encompassing rule captures the requirements of procedural due process. The process that is due varies with the nature of particular disputes, and evaluation of its requirements should balance

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106. 63 F.3d 1252 (3d Cir. 1995).

107. While the court did find adequate due process, it appears that it did so under the wrong standard of review. In *Martin*, the Third Circuit recognized that the sanction involved issues of due process and substituted plenary review for the abuse of discretion standard. *See id.* at 1262. The court stated that "[w]hen the procedure the district court uses in imposing sanctions raises due process issues of fair notice and the right to be heard, however, our review is plenary." *Id.* However, it is evident that imposing any sanctions under Rule 37 deals in some degree with issues of notice and opportunity to be heard. This alone should not be the basis for establishing the standard of review. Furthermore, it is well-settled law that appellate courts are required to review Rule 37 sanctions under an abuse of discretion standard. *See Insurance Corp. of Ireland, Ltd. v. Compagnie Des Bauxites de Guinee*, 456 U.S. 694, 707 (1982); *General Ins. v. Eastern Consol. Util.*, 126 F.3d 215, 219 (1997). Thus, the Third Circuit should have provided a more detailed explanation supporting its deviation from the established standard of review set forth by the Supreme Court.

108. *Martin*, 63 F.3d at 1256.

109. *See id.* at 1262.



fairly the competing interests of the sanctioned person against the judicial system's need for efficient judicial administration."<sup>110</sup> The court held that plaintiff's motion requesting Rule 37 sanctions for noncompliance with the court's discovery order placed defense counsel on notice that sanctions would be imposed under Rule 37.<sup>111</sup> That the specific sanctions requested were not those given was immaterial in the court's eyes.<sup>112</sup> As further evidence that defense counsel was on notice of potential Rule 37 sanctions, the court pointed out that defense counsel even filed a response to plaintiff's Rule 37 sanctions motion.<sup>113</sup>

The court similarly disagreed with defense counsel's assertion that she did not receive an adequate opportunity to be heard. Defense counsel claimed that she did not receive an adequate opportunity to be heard because she was not able to attend the hearing for unresolved issues, where the sanctions were discussed, due to a prior commitment. The court held that defense counsel's election to rely on local counsel to state her position was immaterial.<sup>114</sup>

While the Third Circuit in *Martin* did not overturn the sanction imposed upon the attorney for procedural reasons, it did overturn the imposed sanctions on grounds that the sanction imposed was overly broad (i.e., the district court did not explain the specific basis for the sanction). Specifically, the court held that "[a]bsent contempt, the only monetary sanctions Rule 37 authorizes are 'reasonable expenses' resulting from the failure to comply with discovery."<sup>115</sup> Because the five hundred dollar sanction was in excess of the "reasonable expenses" set forth in Rule 37 and there was not any associated finding of contempt to justify the sanction, the court deemed the sanction to be a fine, which was not authorized by Rule 37.<sup>116</sup> Because the sanction was not considered authorized under Rule 37 and the district court did not provide any other specific basis for the sanction, the Third Circuit overturned the sanction.<sup>117</sup>

Like *Law*, a narrow reading of Rule 37 is implicit in the *Martin* court's holding. In *Martin*, the court also ignored the "may make such orders in regard to the failure as are just" language of Rule 37(b)(2). It did, however, rely on the last paragraph of Rule 37(b)(2) to conclude that Rule 37 limits monetary sanctions to reasonable expenses.<sup>118</sup> This paragraph states: "In lieu of any of the

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110. *Id.*

111. *See id.* at 1263.

112. *See id.*

113. *See id.*

114. *See id.*

115. *Id.* (citing FED. R. CIV. P. 37 (1995); *Newton v. A.C. & S., Inc.*, 918 F.2d 1121, 1126 (3d Cir. 1990)).

116. *Id.*

117. *See id.* at 1264. Significantly, the court recognized that Rule 37 authorizes punitive and compensatory damages, but limited the amount of those damages by relying on case law that requires the amount of monetary damages be *specifically related to* those expenses, not *equal to* those expenses. *See id.* at 1263 n.15 (citing *Roadway Express, Inc. v. Piper Aircraft Corp.*, 447 U.S. 752, 763-64 (1980)).

118. *See id.* at 1263.

foregoing orders or in addition thereto, the court shall require the party failing to obey . . . to pay the reasonable expenses.”<sup>119</sup> By concluding that Rule 37 only allows reasonable expenses, the court seemingly transformed the last paragraph of Rule 37(b)(2) into an impenetrable ceiling or cap on monetary sanctions.

*Law* and *Martin* are examples of cases that use different means to come to the same end. Both of these courts classified non-compensatory monetary sanctions as fines. The court in *Law*, however, went even further and classified non-compensatory monetary sanctions as a criminal fine. Under the rationale used by this court, any non-compensatory sanctions intended to punish are equated to criminal contempt, and the sanctioned party must be afforded the additional due process safeguards associated with criminal proceedings. Under the reading of Rule 37 in *Martin*, even if there is adequate due process, a finding of contempt is still required to justify any monetary sanctions in excess of the “reasonable expenses” mentioned in of Rule 37(b)(2). Regardless of the rationale used, a finding of contempt is ultimately required by both courts before non-compensatory monetary sanctions are allowed.

### *B. Courts Not Requiring a Finding of Contempt*

On the opposite side of the spectrum from *Law* and *Martin* are courts that do not require a finding of contempt before allowing non-compensatory monetary sanctions. These courts have placed a premium on judicial economy and control while still recognizing the importance of adequate due process.<sup>120</sup> Courts that allow non-compensatory monetary sanctions have had a much broader reading of Rule 37 than those that require a finding of contempt and have pointed to the federal court’s inherent power to control the proceedings before them as additional support for imposing those sanctions. By allowing non-compensatory monetary sanctions these courts hope to punish those who perform egregious discovery abuses and deter others from engaging in similar conduct. As a result, the judicial process will become smoother and speedier without endless mini-

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119. FED. R. CIV. P. 37(b)(2).

120. See, e.g., *J.M. Cleminshaw Co. v. City of Norwich*, 93 F.R.D. 338, 360 (D. Conn. 1981). The court held that:

[L]itigants, the public, and the courts share an interest in the prompt and efficient administration of justice; that failures of counsel to comply with applicable discovery rules and court orders threaten that common interest; and that reasonable sanctions, carefully and consistently applied, are an appropriate means of deterring further violations and vindicating the public interest.

*Id.* See also *Pereira v. Narragansett Fishing Corp.*, 135 F.R.D. 24, 27 (D. Mass. 1991). The court stated:

In my opinion, the Court’s ability to manage civil litigation in even the most elementary fashion requires that the conduct forming the basis of the violations in this case be dealt with in a manner which will deter counsel for the plaintiff in this case and other counsel in other cases from behaving similarly in the future.

*Id.*

trials, which cause unwarranted delay to and distraction from the cases before the federal courts.<sup>121</sup>

The leading case allowing non-compensatory monetary sanctions without a finding of contempt is *J.M. Cleminshaw Co. v. City of Norwich*.<sup>122</sup> In *Cleminshaw*, the court approached the problem using a broad reading of Rule 37 and relied upon the inherent power of the federal courts to ultimately conclude that non-compensatory monetary sanctions are permissible.<sup>123</sup> The court also concluded that the process set forth in Rule 37 adequately addressed any due process considerations.<sup>124</sup>

In *Cleminshaw*, the court sanctioned an attorney for failing to answer discovery requests. The court opined that the failure to answer was the fault of counsel and, as a consequence, counsel should compensate for the reasonable expenses incurred by the opposing party, including paying a fine to punish counsel for his abusive conduct.<sup>125</sup> Accordingly, the court assessed a fine upon counsel in the amount of \$150.

The court first relied on Rule 37 as an adequate basis for imposing the \$150 sanction upon counsel. The district court judge applied a “broad” interpretation of Rule 37, which focused on the “may make such orders . . . as are just” language of subparagraph (b)(2).<sup>126</sup> The court recognized that the sanctions listed in Rule 37 were not intended to be exhaustive and that the “as are just” language suggested that a court possesses discretionary authority to fashion any appropriate order to enforce compliance with pre-trial discovery.<sup>127</sup> The court later supported its position that these sanctions could be punitive, and in excess of compensating the other party, by relying on the language used in the last paragraph of Rule 37(b) and on the goals of the rule.

[T]he last paragraph of Rule 37(b) makes clear that such sanctions may include an assessment of financial penalties directly against those counsel who are responsible for the failure of compliance. Because Rule 37 sanctions are intended to serve punitive and deterrent functions, as well as the goal of compensating victimized parties, the court has found that under Rule 37(b), it possesses the authority to levy against

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121. See *Cleminshaw*, 93 F.R.D. at 359 (“The judiciary’s use of case and court management techniques can help speed the termination of civil actions without impairing the quality of justice.”).

122. *Id.* at 338.

123. See *id.* at 351-54.

124. See *id.* at 351 n.11.

125. See *id.* at 356-57.

126. *Id.* at 355.

127. *Id.* (citing *Flaks v. Koegel*, 504 F.2d 702, 707 (2d Cir. 1974)). One could argue that the “enforce compliance with pre-trial discovery” language cited by the court could be equated to the coercive function of civil contempt. However, a full reading of the court’s opinion regarding the general and specific deterrence goals of Rule 37 seems to suggest that the court meant compliance with the federal discovery process in general, by the parties currently before the court and those who would come before it in the future.

delinquent counsel monetary fines which are payable to the court. In accordance with the clear language of Rule 37(b), the court finds that its authority to assess fines against counsel extends to violations of orders which the court has entered pursuant to Rule 26(f), as well as to violations of any orders which the court has entered pursuant to Rule 37(a).<sup>128</sup>

In addition to Rule 37, the court found additional support for non-compensatory monetary sanctions under the federal court's inherent power. The court recognized that a federal court has the inherent power to "manage its affairs."<sup>129</sup> This power includes the ability of a trial court to impose "reasonable and appropriate sanctions upon errant lawyers practicing before it."<sup>130</sup> These statements indicate that, "in an era of rapidly expanding dockets, district courts must be permitted to draw on the full range of their inherent powers, and on the sanctions authorized by [the Federal Rules of Civil Procedure], to avoid undue delays in the disposition of cases."<sup>131</sup>

The *Cleminshaw* court also gave several other reasons non-compensatory sanctions are permissible. The court recognized the unfairness of visiting the sins of an attorney upon his/her client and the need for such a sanction to assure the efficient administration of justice.<sup>132</sup> It also recognized that non-compensatory sanctions were consistent with the intent of the 1970 Amendments to Rule 37, which strove to create greater flexibility of the rules to handle the increase in discovery abuses.<sup>133</sup> Finally, the court held that the imposition of non-compensatory monetary sanctions furthers the punishment and deterrence goals of Rule 37.<sup>134</sup>

Not only did the court find authorization for non-compensatory monetary sanctions, it also distinguished them from a criminal fine.<sup>135</sup> While other courts have equated fines to criminal contempt because they carry the criminal hallmark of punishment,<sup>136</sup> the *Cleminshaw* court did not find the argument convincing. The court stated that there is a punitive and deterrent element in all discovery sanctions.<sup>137</sup> The court concluded that additional due process associated with a

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128. *Id.* at 358 n.16.

129. *Id.* at 357 (citing *In re Sutter*, 543 F.2d 1030, 1037 (2d Cir. 1976)).

130. *Id.* at 353 (quoting *Flaska v. Little River Marine Constr. Co.*, 389 F.2d 885, 888 (5th Cir. 1968)).

131. *Id.* at 358.

132. *See id.* at 357.

133. *See id.* at 356.

134. *See id.* at 360.

135. *See id.* at 351 n.11.

136. *See supra* Part III.A.

137. "[A]lthough the most drastic sanctions may not be imposed as "mere penalties," courts are free to consider the general deterrent effect their orders have on the instant case and on other litigation, provided that the party on whom they are imposed is, in some sense, at fault." *Cleminshaw*, 93 F.R.D. at 351 n.11 (quoting *Cine Forty-Second St. Theater Corp. v. Allied Artists*

finding of criminal contempt was not necessary. The court opined that:

The recognition of this punitive element has not, in general, led to the requirement that courts establish additional procedures before imposing discovery sanctions. To the contrary, recent cases and commentary suggest the wisdom of the district courts' drawing even more promptly and diligently on their authority to sanction for discovery abuses.<sup>138</sup>

The court went on to analogize non-compensatory monetary sanctions to other instances where punitive sanctions have been imposed "directly upon counsel without procedural protections beyond those of notice and an opportunity to be heard."<sup>139</sup> For instance, Federal Rule of Appellate Procedure 38 provides that an appellate court may, in its discretion, impose "just damages" for delay and "single or double costs to the appellee."<sup>140</sup> Similarly, 28 U.S.C. § 1912 provides, "[w]here a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs."<sup>141</sup>

Double costs, by definition, exceed [any] amount of [damages that would] compensate appellees for [their] expenses in opposing a frivolous appeal. To the extent that the court awards double costs, therefore, the sanction imposed on the appellants, or their counsel, is necessarily punitive and thus designed to serve as a deterrent.<sup>142</sup>

Additionally, the court also analogized non-compensatory monetary sanctions to sanctions imposed under 28 U.S.C. § 1927.<sup>143</sup> The court observed that, under § 1927, the Second Circuit Court of Appeals has, with some frequency, imposed substantial sanctions directly against counsel without first conducting special hearings on the propriety of the sanctions.<sup>144</sup>

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Pictures Corp., 602 F.2d 1062, 1066 (2d Cir. 1979)).

138. *Id.* at 351 n.11 (citing *Roadway Express, Inc. v. Piper Aircraft Corp.*, 447 U.S. 752, 763-64 (1980)).

139. *Id.*

140. The full text of Rule 38 states: "If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee." FED. R. APP. P. 38.

141. 18 U.S.C. § 1912 (1994).

142. *Cleminshaw*, 93 F.R.D. at 351 n.11.

143. *See id.* "Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. § 1927.

144. *See Bankers Trust Co. v. Publicker Indus., Inc.*, 641 F.2d 1361, 1368 (2d Cir. 1981) (allowing double costs and either damages of \$10,000 or attorneys' fees and expenses, whichever sum was less, assessed jointly against appellant and its counsel); *Browning Debenture Holders' Comm. v. DASA Corp.*, 605 F.2d 35, 40-41 (2d Cir. 1978) (allowing double costs and damages of \$2500 assessed against appellants' counsel); *Acevedo v. Immigration and Naturalization Serv.*, 538

Other cases in various circuits and districts have also found non-compensatory monetary sanctions to be appropriate.<sup>145</sup> Like *Cleminshaw*, these cases have focused on the express language of Rule 37 and the court's inherent power to manage its affairs as appropriate bases for their conclusions. One of the most transparent analyses of Rule 37 as authority for non-compensatory monetary sanctions was set forth in *Pereira v. Narragansett Fishing Corp.*<sup>146</sup> In *Pereira*, the court relied on the clear language of Rule 37.

The clear import of this language is that the phrase 'may make such orders as are just' as used in both Rules 16(f) and 37(b)(2), Fed. R. Civ. P., permit the imposition of a sanction in the form of a monetary fine which is paid to the court and not to an opposing party as reimbursement for costs and attorney's fees. The language also seems to make clear that this sanction can be imposed without proceeding to a finding of contempt as per Rule 37(b)(2)(D), Fed. R. Civ. P. The power to proceed by way of contempt is explicit; if this were the only route, there would have been no need for the First Circuit to construe the phrase "such orders as are just" to include the imposition of a monetary sanction. That a finding of contempt is not a prerequisite to the imposition of such a monetary sanction is made clear also by the First Circuit's notation in the *Media Duplication* case that "[t]he relevant portions of Rule 37 do not pertain to monetary sanctions (except to the extent that 37(b)(2)(D) permits an order treating the failure to obey the court as a form of contempt)."<sup>147</sup>

Due process is another important aspect of non-compensatory monetary sanctions examined by courts that do not require a finding of contempt. The court in *Cleminshaw* was not the only court to conclude that the process set forth by Rule 37 adequately addresses any due process problems. For example, the

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F.2d 918, 921 (2d Cir. 1976) (allowing double costs assessed against petitioner's counsel); *Cleminshaw*, 93 F.R.D. at 351 n.11 (citing *Shuffman v. Hartford Textile Corp.*, 659 F.2d 299, 305 (2d Cir. 1981) (allowing double costs and damages of \$5000 assessed against counsel)).

145. See *Roadway Express v. Piper Aircraft Corp.*, 447 U.S. 752, 765 (1980) (concluding that the inherent power of federal courts includes the authority to "levy sanctions in response to abusive litigation practices"); *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-31 (1962) (federal trial court possesses inherent power to control the disposition of the cases before it); *Carlucci v. Piper Aircraft Corp.*, 775 F.2d 1440 (11th Cir. 1985) (Rule 37(b) and the inherent power of the court authorize such sanctions); *Miranda v. Southern Pac. Transp. Co.*, 710 F.2d 516, 520 (9th Cir. 1983) (district court has the inherent power to impose reasonable and appropriate sanctions upon those admitted to the bar); *Flaksa v. Little River Marine Const. Co.*, 389 F.2d 885, 888 (5th Cir. 1968) (stating that "[t]he inherent power of the court to manage its affairs necessarily includes the authority to impose reasonable and appropriate sanctions upon errant lawyers practicing before it.").

146. 135 F.R.D. 24 (D. Mass. 1991).

147. *Id.* at 27 (quoting *Media Duplication Serv., Ltd. v. HDG Software, Inc.*, 928 F.2d 1228, 1241 n.11 (1st Cir. 1991)).

court in *Carlucci v. Piper Aircraft Corp.*,<sup>148</sup> interpreted Supreme Court cases to stand for the proposition that “the power of federal courts to curb [discovery] abuses . . . not to be hamstrung by the additional procedural burdens [if those burdens] would have the effect of limiting the force and effect of Federal Rule 37.”<sup>149</sup> The court recognized that if Rule 37 was not enforced diligently, its punishment and deterrence goals would be eroded.<sup>150</sup> In concluding that Rule 37 itself provides adequate due process, the court stated: “It is neither necessary nor appropriate for an inferior federal court to engraft upon Rule 37 a procedural mechanism more demanding than that which the Supreme Court has deemed adequate to both guarantee due process and vindicate the policy underlying that rule.”<sup>151</sup>

While several cases have concluded that Rule 37 authorizes non-compensatory monetary sanctions and that the process provided for in the rule is adequate, it should be noted that in most of these cases, the sanctioned individuals have been attorneys. This distinction played an important role in *Miranda v. Southern Pacific Transportation Co.*,<sup>152</sup> where the court actually differentiated between contempt and the power of the court to sanction attorneys. It recognized that the bar bears a special administrative responsibility in the judicial process independent from the public at large.<sup>153</sup> “A monetary sanction imposed for failure to carry out this special responsibility . . . differs from the more severe infractions of criminal contempt for which attorneys and . . . the general public can become liable. The former is an unjustified failure to carry out an administrative responsibility as an officer of the court; the latter is an affront to the authority of the judge.”<sup>154</sup>

Whether a court ultimately requires a finding of contempt depends on its classification of non-compensatory monetary sanctions. Courts that classify non-compensatory monetary sanctions as fines with criminal overtones will most likely require a finding of contempt, whereas courts that classify non-compensatory sanctions as appropriate civil sanctions allowed under Rule 37 or

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148. 775 F.2d 1440 (11th Cir. 1985).

149. *Id.* at 1450 (citing *Roadway Express*, 447 U.S. at 763-64; *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 643 (1976); *Link*, 370 U.S. at 632)).

150. *See id.*

151. *Id.*

152. 710 F.2d 516 (9th Cir. 1983).

153. The court also made a distinction between the word “fine” and “monetary sanction.”

Because the term “fine” is generally associated in common parlance with criminal offenses we utilize the term “monetary sanction” to avoid this connotation. Numerous sanctions can be imposed against the parties and attorneys for violation of court rules. We see no reason to preclude the use of reasonable monetary sanctions against attorneys for violations of local rules when they are the offending parties. This may well be more appropriate on many occasions rather than penalizing the parties for the failures of their counsel.

*Id.* at 521.

154. *Id.*

the courts' inherent powers will most likely not require the finding. The current state of confusion surrounding these sanctions and the resulting split among the circuits demonstrate that this classification is not an easy one.

#### IV. MAKING SENSE OF THE CONFUSION: WHY NON-COMPENSATORY SANCTIONS ARE AUTHORIZED BY RULE 37

While the classification of non-compensatory monetary sanctions is not easy, there are several reasons why federal courts ought to conclude that these sanctions are allowable, especially when the party being sanctioned is an attorney. First, the express language of Rule 37 allows for sanctions not specifically enumerated in the rule. Second, the rationale behind non-compensatory monetary sanctions is fundamentally different from that of criminal contempt. Third, attorneys operate under different obligations than the public in general. Fourth, the process set forth by Rule 37 meets general due process requirements. Finally, such a finding is not only consistent with the general spirit of the Federal Rules of Civil Procedure, but it furthers the specific goals of Rule 37 more effectively than requiring a finding of contempt.

##### *A. The Express Language of Rule 37*

The express language of Rule 37 authorizes district courts to impose non-compensatory monetary sanctions. While some courts have limited monetary sanctions to reasonable costs and fees incurred by the aggrieved party,<sup>155</sup> the express language of Rule 37 gives wide discretion to a district court judge to impose any sanction it deems "just."

The plain language of Rule 37 makes it clear that as long as the imposed sanction is "just," the Federal Rules of Civil Procedure "place virtually no limits on judicial creativity."<sup>156</sup> Courts have made it clear that the sanctions listed in Rule 37(b) are not exhaustive of the sanctions available to district courts to punish discovery abuses.<sup>157</sup> Accordingly, the use of the word "just" would only limit the magnitude of any monetary sanctions to an amount which is "reasonable" under the circumstances.<sup>158</sup> "[While] the most drastic sanctions may not be imposed as 'mere penalties,' courts are free to consider the general deterrent effect their orders may have on the instant case and on other litigation, provided that the party on whom [the sanctions] are imposed is, in some sense, at fault."<sup>159</sup> Thus, Rule 37 authorizes judges to impose non-compensatory

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155. See *supra* Part III.A.

156. *Anderson v. Beatrice Foods Co.*, 900 F.2d 388, 394 (1st Cir. 1990).

157. See *Miltope Corp. v. Hartford Cas. Ins. Co.*, 163 F.R.D. 191, 194 (S.D.N.Y. 1995); *Jaen v. Coca-Cola Co.*, 157 F.R.D. 146, 149 (D.P.R. 1994); *Anderson v. Beatrice Foods Co.*, 129 F.R.D. 394 (D. Mass. 1989), *aff'd*, 900 F.2d 388, 394 (1st Cir. 1990).

158. "The magnitude of sanctions awarded is bounded under Rule 37 only by that which is 'reasonable' in light of the circumstances." *Carlucci v. Piper Aircraft Corp.*, 775 F.2d 1440, 1453 (11th Cir. 1985).

159. *Cine Forty-Second St. Theater Corp. v. Allied Artists Pictures Corp.*, 602 F.2d 1062,



monetary sanctions as long as they are “reasonable” under the circumstances.

The clear language of Rule 37 empowers district court judges to impose any reasonable sanction. If the judge decides to impose non-compensatory monetary sanctions, it is not required to limit the amount of those sanctions to the reasonable expenses and fees incurred by the aggrieved party.

*B. Fundamental Difference Between Civil and Criminal Contempt*

While non-compensatory monetary sanctions do punish, they should not be confused with a finding of criminal contempt. Non-compensatory monetary sanctions and criminal contempt are fundamentally different in several ways. These sanctions differ in requirements, alternative purposes, and consequences.

First, non-compensatory monetary sanctions have different requirements than a finding of criminal contempt. “Under the contempt statute, [a court must] find a willful disregard or disobedience of the court’s authority.”<sup>160</sup> In contrast, sanctions under Rule 37 are imposed when the court determines that the failure to comply with a discovery order was due to willfulness, bad faith or *any fault* of the person in noncompliance, but not inability.<sup>161</sup> Thus, non-compensatory monetary sanctions under Rule 37 differ from a finding of criminal contempt because a willfulness requirement is not required to impose Rule 37 sanctions.<sup>162</sup>

Furthermore, non-compensatory monetary sanctions under Rule 37 differ from a finding of criminal contempt because non-compensatory monetary sanctions serve purposes apart from mere punishment. To determine whether a court’s imposition of sanctions constitutes impermissible punishment or permissible regulation, an appellate court must examine intent of the sanction and the statutory predicate.

Unless Congress in the statute and the court by its action expressly intended to impose punitive restrictions, the punitive/regulatory distinction turns on “whether an alternative purpose to which [the action] may rationally be connected is assignable first, and whether it appears excessive in relation to the alternative purpose assigned.”<sup>163</sup>

In addition to punishment, non-compensatory monetary sanctions seek to deter future abusive conduct and to achieve judicial control and economy. One of the stated goals of Rule 37 is deterrence—both general and specific.<sup>164</sup> The punishment aspect of non-compensatory monetary sanctions accomplishes this

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1066 (2d Cir. 1979) (citing *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 351 (1909); *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 640) (1976)).

160. *In re Sutter*, 543 F.2d 1030, 1035 (2d Cir. 1976) (referring to 18 U.S.C. § 401).

161. *See Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 212 (1958).

162. *See supra* Part I.B.

163. *Harrell v. United States*, 117 F.R.D. 86, 88 (E.D.N.C. 1987) (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963)).

164. *See Roadway Express, Inc. v. Piper Aircraft Corp.*, 447 U.S. 752, 763-64 (1980).

goal.<sup>165</sup> Imposing non-compensatory monetary sanctions also furthers the goals of judicial economy and control. Imposing these sanctions helps achieve judicial economy by ridding cases of additional and unwarranted delays and distractions caused by conducting endless mini-trials.<sup>166</sup> Non-compensatory monetary sanctions also help achieve judicial control by curbing the number of abuses of conduct falling just short of criminal contempt.<sup>167</sup> Since non-compensatory monetary sanctions serve alternative goals such as deterrence, judicial economy, and judicial control, the fact that they punish does not make them impermissible as long as the punishment is not excessive.

The punishment achieved by non-compensatory monetary sanctions is seemingly not excessive in relation to its alternative purposes. Judicial economy, judicial control, and deterrence of discovery abuse are important goals.<sup>168</sup> In regards to judicial economy, it has even been said that courts have a positive duty to restrict needless relitigation of issues.<sup>169</sup> Imposing monetary sanctions in excess of reasonable fees and expenses furthers this important goal. Imposing additional sanctions in excess of compensatory expenses is, in some cases, the only way to accomplish these goals.<sup>170</sup> Should parties and attorneys not be adequately deterred, cases will not be effectively litigated and the already overcrowded federal dockets will become even more overcrowded.<sup>171</sup>

Furthermore, if parties attempt to stonewall discovery, requiring additional proceedings and a finding of contempt would only further the misguided cause.<sup>172</sup> Should a sanctioned party feel that a particular sanction was excessive, he or she may appeal the sanction. However, the question on appeal would be whether the district court abused its discretion in formulating the amount of the sanction.<sup>173</sup> Considering the goals of Rule 37 and their importance, the incidental punishment factor associated with non-compensatory monetary sanctions does not seem excessive.

Another important difference between non-compensatory monetary sanctions and criminal contempt is the consequences imposed. "The person found guilty of criminal contempt, unlike a person on whom sanctions have been imposed, now carries a criminal conviction on his record. Furthermore, possible

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165. *See id.*

166. *See J.M. Cleminshaw Co. v. City of Norwich*, 93 F.R.D. 338, 359 (D. Conn 1981).

167. *See Kleiner v. First Nat'l Bank*, 751 F.2d 1193, 1209 (11th Cir. 1985).

168. *See Tyus v. Schoemehl*, 93 F.3d 449, 454 (8th Cir. 1996).

169. "In this era of overcrowded dockets the courts have a positive duty to restrict needless relitigation of issues." *Id.* at 453 (quoting *Gerrard v. Larsen*, 517 F.2d 1127, 1134 (8th Cir. 1975)).

170. *See supra* note 97.

171. *See generally Tyus*, 93 F.3d at 454-55.

172. *See supra* text accompanying note 91.

173. Appellate courts review "sanctions imposed by a district court for abuse of discretion and will not reverse absent a definite and firm conviction that the district court made a clear error of judgment." *In re the Exxon Valdez*, 102 F.3d 429, 432 (9th Cir. 1996) (quoting *Halaco Eng'g Co. v. Costle*, 843 F.2d 376, 379 (9th Cir.1988)).

punishments for contempt, unlike sanctions, include imprisonment.”<sup>174</sup>

Finally, at least in the cases of attorneys, non-compensatory sanctions carry an additional distinction from a finding of criminal contempt. Attorneys are frequently referred to as officers of the court.<sup>175</sup> A monetary sanction for failure to carry out this special responsibility as an attorney differs from the more severe infractions of criminal contempt (which may be imposed on attorneys and members of the general public).<sup>176</sup> The former is an unjustified failure to carry out an administrative responsibility as an officer of the court; the latter is an affront to the authority of the judge.<sup>177</sup>

### *C. Sanctioning Counsel Before the Parties*

In the case of attorneys, imposing non-compensatory monetary sanctions is more easily justified than imposing those sanctions against parties. The most significant justification for imposing non-compensatory monetary sanctions upon attorneys is a difference in obligations. Attorneys have special obligations which differ from those of the public in general.<sup>178</sup> Courts possess the inherent power to protect the orderly administration of justice and to preserve the dignity of the tribunal.<sup>179</sup> To accomplish this protection “[the] trial judge possesses the inherent power to discipline counsel for misconduct, short of behavior giving rise to disbarment or criminal censure, without [having to] resort to the powers of civil or criminal contempt.”<sup>180</sup>

Yet another justification for treating attorneys different from the general public is the general notion of fairness. First, imposing a non-compensatory monetary sanction upon counsel may be the least severe, but most effective, available sanction. If district court judges were precluded “from imposing this relatively mild penalty for violation of the local rules, district courts would be forced to resort to more severe sanctions.”<sup>181</sup> Also “imposing a monetary penalty on counsel is an appropriate sanction considerably less severe than holding counsel in contempt, referring the incident to the client or bar association, or dismissing the case.”<sup>182</sup>

Non-compensatory monetary sanctions also result in fairer treatment of the

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174. *Mackler Productions, Inc. v. Cohen*, 146 F.3d 126, 129 (2d Cir. 1998).

175. *See Miranda v. Southern Pac. Transp. Co.*, 710 F.2d 516, 521 (9th Cir. 1983).

176. *See id.*; *see also Carlucci v. Piper Aircraft Corp.*, 775 F.2d 1440, 1450 (11th Cir. 1985) (citing *Roadway Express, Inc. v. Piper Aircraft Corp.*, 447 U.S. 752, 763-64 (1980); *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 643 (1976); *Link v. Wabash R.R. Co.*, 370 U.S. 626, 632 (1962)).

177. *See Miranda*, 710 F.2d at 521.

178. *See id.* (“The bar bears a special administrative responsibility in the judicial process independent from the public at large.”).

179. *See Roadway Express*, 447 U.S. at 764-65.

180. *Kleiner v. First Nat’l Bank*, 751 F.2d 1193, 1209 (11th Cir. 1985).

181. *Miranda*, 710 F.2d at 521.

182. *Id.*

parties. Courts have recognized the “‘unfairness of visiting the sins of an attorney upon his client,’ and thus ‘the need for a sanction in the nature of (an assessment against counsel).’”<sup>183</sup>

In doing so, faultless parties rightfully remain unsanctioned and the individual committing the abuse is specifically punished.<sup>184</sup>

#### *D. Rule 37 Provides Adequate Due Process*

A significant problem surrounding non-compensatory monetary sanctions is due process. Some appellate courts have overturned these sanctions by concluding that the sanctioned individuals were not provided adequate due process.<sup>185</sup> However, at least in the case of attorneys, the due process provided for in Rule 37 seems to be adequate.

Rule 37 makes clear that if a party fails to obey a discovery order, the court may impose liability for incurred expenses unless failure is substantially justified.<sup>186</sup> Whatever amount of notice and opportunity to be heard this section affords may depend upon who is being sanctioned.<sup>187</sup> Every order entered by the court does not require notice and a preliminary hearing to avoid offending notions of due process.<sup>188</sup> “The adequacy of notice and hearing respecting proceedings that may affect a party’s rights turns, to a considerable extent, on the knowledge which the circumstances show such party may be taken to have of the consequences of his own conduct.”<sup>189</sup> Rule 37 makes clear that the court is at least *required* to award the opposing party reasonable fees and expenses in the event of a failure to obey a court order that is not substantially justified.<sup>190</sup> Rule 37 also makes clear that the district court may impose any order it deems just, including, but not limited to, those specifically listed in 37(b).<sup>191</sup>

“In view of the plain language . . . of Rule 37, any attorney who fails to comply with the requirements of Rule 37 may be deemed to understand the consequences of his [or her] conduct.”<sup>192</sup> The Supreme Court has also

183. J.M. Cleminshaw Co. v. City of Norwich, 93 F.R.D. 338, 357 (D. Conn. 1981) (quoting *In re Sutter*, 543 F.2d 1030, 1037 (2d Cir. 1976)).

184. *See id.*

185. *See supra* Part III.A.

186. *See* FED. R. CIV. P. 37(b); *supra* text accompanying notes 42-44.

187. *See* Roadway Express, Inc. v. Piper Aircraft Corp., 447 U.S. 752, 767 n.14 (1980).

188. *See* Link v. Wabash R.R. Co., 370 U.S. 626, 632 (1962).

189. *Id.*

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The court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney’s fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

FED. R. CIV. P. 37(b).

191. “[T]he court . . . may make such orders . . . as are just.” FED. R. CIV. P. 37(b)(2).

192. J.M. Cleminshaw Co. v. City of Norwich, 93 F.R.D. 338, 351 n.11 (D. Conn. 1981).

recognized that the assessment of a financial sanction against an attorney causes fewer due process concerns than does a sanction against his/her client.<sup>193</sup> Thus, the amount of notice and opportunity to be heard required for attorneys should be considerably less than that required for the parties to the litigation.

The amount of notice and opportunity to be heard also depends upon the severity of the imposed sanction. As with other sanctions, the nature of due process which is due before a sanction may be levied depends on the facts and the severity of the sanction.<sup>194</sup> An evidentiary hearing is required when a relatively substantial sanction is being considered or when there is a material issue of fact in dispute.<sup>195</sup> On the other hand, when the sanction being considered is relatively mild and there is no material issue of fact in dispute, due process only requires that the delinquent party be provided with notice that the possibility of sanctions will be imposed and an opportunity to present evidence or arguments against their imposition.<sup>196</sup> Thus, relatively mild monetary sanctions would only require that the attorney be provided with notice of the possibility of sanctions and an opportunity to argue against them.

The attention drawn to the due process concerns surrounding non-compensatory monetary sanctions should not discourage district courts from imposing these sanctions upon attorneys. Instead, district court judges should rely on the plain language of Rule 37 to adequately address these due process concerns. This position was best described by Judge Johnson in *Carlucci v. Piper Aircraft Corp.*<sup>197</sup> “It is neither necessary nor appropriate for an inferior federal court to engraft upon Rule 37 a procedural mechanism more demanding than that which the Supreme Court has deemed adequate to both guarantee due process and vindicate the policy underlying that rule.”<sup>198</sup>

#### *E. Furthering the Goals of Rule 37*

Finally, non-compensatory monetary sanctions are consistent with and effectively further the main goals of Rule 37 without a finding of contempt. Non-compensatory monetary sanctions punish those who abuse the discovery process and, depending on the size of the sanction, deter others from conducting abusive discovery behavior.<sup>199</sup>

The Supreme Court has recognized the dual goals of Rule 37 to be

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193. See *Roadway Express, Inc. v. Piper Aircraft Corp.*, 447 U.S. 752, 767 n.14 (1980).

194. See *Devaney v. Continental Am. Ins. Co.*, 989 F.2d 1154, 1159 (11th Cir.1993) (“Assessment of costs and attorneys fees is . . . one of the lesser sanctions contemplated by the Federal Rules and it presents a lesser due process concern than, for example, outright dismissal of the action.”); *Medical Billing, Inc., v. Medical Mgmt. Sciences, Inc.*, 169 F.R.D. 325 (N.D. Ohio 1996).

195. See *Flaks v. Koegel*, 504 F.2d 702, 712 (2d Cir. 1974).

196. See *id.*

197. 775 F.2d 1440 (11th Cir. 1985).

198. *Id.* at 1450.

199. See *Miranda v. Southern Pac. Transp. Co.*, 710 F.2d 516, 521 (9th Cir. 1983).

punishment and deterrence.<sup>200</sup> “Rule 37 sanctions must be applied diligently both ‘to penalize those whose conduct may be deemed to warrant such a sanction, [and] to deter those who might be tempted to such conduct in the absence of such a deterrent.’”<sup>201</sup> However, the Supreme Court has held that the primary purpose of Rule 37 sanctions is deterrence of future discovery abuses.<sup>202</sup>

Courts are free to consider the general deterrent effect their orders may have.<sup>203</sup> Under Rule 37, the abusive individual is sanctioned to deter abuses by other parties or attorneys. This was made evident by the Supreme Court in *National Hockey League v. Metropolitan Hockey Club*, where the court stated:

If the decision of the Court of Appeals remained undisturbed in this case, it might well be that [t]hese respondents would faithfully comply with all future discovery orders entered by the District Court in this case. But other parties to other lawsuits would feel freer than we think Rule 37 contemplates they should feel to flout other discovery orders of other district courts.<sup>204</sup>

When parties or attorneys abuse the discovery process, Rule 37 sanctions are intended to punish the abusing party and to deter others from conducting similar discovery abuses.<sup>205</sup> Rule 37 sanctions achieve these goals simultaneously. In doing so, the abusive party serves as an example for others of sanctions that may be applied should parties or attorneys disobey a discovery order.

Requiring a finding of contempt prior to imposition of non-compensatory monetary sanctions does not punish or deter abusive behavior. Instead, the contempt requirement effectively rewards and promotes abusive behavior. A contempt requirement allows attorneys and parties to continually abuse the discovery process with conduct falling just short of contempt. This is of special concern when the abusing party has such large financial resources that “costs and expenses” are trivial, and where the abusing party has already accounted for these costs as a regular business expense. Furthermore, when a party seeks to stonewall the discovery process, the additional proceedings required for contempt proceedings may aid the abusive attorney or party in delaying the proceedings. Thus, requiring a finding of contempt may aid the abuser, rather than punish the abuser and deter similar abusive behavior.<sup>206</sup>

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200. See, e.g., *Roadway Express, Inc. v. Piper Aircraft Corp.*, 447 U.S. 752, 763-64 (1980).

201. *Id.* (quoting *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 643 (1976)).

202. See *Adolph Coors Co. v. Movement Against Racism and the Klan*, 777 F.2d 1538, 1542 (11th Cir. 1985) (citing *National Hockey League*, 427 U.S. at 643).

203. See *Miltope Corp. v. Hartford Cas. Ins. Co.*, 163 F.R.D. 191, 194 (S.D.N.Y. 1995); *Jaen v. Coca-Cola Co.*, 157 F.R.D. 146, 149 (D.P.R. 1994); *Anderson v. Beatrice Foods Co.*, 129 F.R.D. 394 (D. Mass. 1989), *aff'd*, 900 F.2d 388, 394 (1st Cir. 1990).

204. *National Hockey League*, 427 U.S. at 643.

205. See *id.*

206. See *Eash v. Riggins Trucking, Inc.*, 757 F.2d 557, 567 (3d Cir. 1985) (holding that a court must be able to sanction conduct by lawyers that falls just short of contempt in order to

The additional proceedings associated with the contempt requirement are also inconsistent with notions of judicial economy. The contempt requirement obliges courts to conduct endless mini-trials which will inevitably delay proceedings and circumvent the efficient administration of justice.<sup>207</sup> Thus, judges will be less likely to impose the sanction because the course of litigation will be delayed and their already overcrowded dockets will most likely become even more overcrowded.<sup>208</sup>

#### CONCLUSION

Much confusion surrounds non-compensatory monetary sanctions. Courts have differed in the classification of the sanctions, authorization for the sanctions, and the amount of due process required before imposing the sanctions. As a result of this confusion, a split has developed in the circuit courts of appeal. On one side, courts equate non-compensatory monetary sanctions to a finding of criminal contempt. These courts focus on the punitive aspect of non-compensatory monetary sanctions and conclude that it is criminal in nature and thus, the sanctioned individual should be afforded the additional due process considerations afforded to defendants in criminal proceedings. On the other hand, other courts have concluded that non-compensatory monetary sanctions are appropriate sanctions authorized by Rule 37. These courts focus on the plain

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adequately carry on the court's business of deciding cases).

207. See *Carlucci v. Piper Aircraft Corp.*, 775 F.2d 1440, 1451 (11th Cir. 1985) (stating the general proposition that additional proceedings cause unneeded delay).

By making the status of the underlying action controlling over who may adjudicate allegations of discovery misconduct (that is, by the federal judge hearing the case or by the special three judge panel) and what standards will inform their deliberations (Federal Rule 37 or some local provision) the effect is to bind the hands of the trial court in an area where the Supreme Court has ruled we should promote *maximum flexibility*. It would deprive the district judge of the option to defer a ruling on sanctions so as to allow the errant attorney an opportunity to "purge" himself of the wrongdoing, or at least to mitigate his penalty, by henceforth cooperating in discovery. [Petitioner's] argument would force a court to choose between imposing an appropriate sanction for each instance of bad faith discovery conduct at the time it occurred, certifying each episode to a grievance panel, or waiting until the underlying litigation has been completed and then forwarding the entire matter to the grievance committee or appointed counsel for investigation and a hearing before judges not previously involved, with the expense and delay concomitant. Were we so to hold we would be transforming most citations of misconduct during discovery into full-fledged disciplinary proceedings. This would mire trial courts in endless delays while panels were constituted to consider potential violations of Rule 37 with the attendant result, contrary to the clear holding of the Supreme Court, of discouraging trial courts from imposing sanctions in the first place.

*Id.* (emphasis added).

208. See *id.*

language of Rule 37 and on general notions of due process to conclude that these non-compensatory monetary sanctions are authorized and do not present due process problems.

Despite the split in the circuit court opinions, this Note has provided an analysis of non-compensatory sanctions and their appropriateness. District courts should not be discouraged from imposing these sanctions on the basis of authority or due process. The plain language of Rule 37 makes it clear that the district courts are free to fashion any sanction they deem reasonable in light of the circumstances. This wide discretion may include sanctions in excess of the costs and fees incurred by the aggrieved party. Furthermore, Rule 37 provides for adequate due process to impose these sanctions. While the degree of notice and opportunity to be heard may differ depending on the severity of the sanction, courts can provide for such due process without unwarranted delays and distractions to the litigation that would most likely occur if there was a requirement of criminal contempt.

Finally, when a finding of contempt is not required, non-compensatory monetary sanctions act as tool to combat the ever-increasing problem of stonewalling. By foregoing the contempt requirement, judges can sanction, and thus deter, more discovery abuses. In so doing, the district courts are imposing the least severe and most effective available sanctions and regaining control of the discovery process.