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Annual Survey of Virginia Law: Motions for Sanctions

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MOTIONS FOR SANCTIONS

*W. Hamilton Bryson**

I. INTRODUCTION

For centuries, the legal profession has had rules of professional conduct. Although they were unwritten, they were well known. The rules covered honesty in pleading and practice and also required the general politeness expected of decent people. These rules were not always followed, nor were they always enforced when not followed. Sadly, in modern times, these rules are being disregarded more frequently and the costs to others, both within and outside the profession, are increasing dramatically.

This deplorable situation has caught the attention of the organized bar, and codes of professional civility¹ have been issued in recent times. The Virginia State Bar has an elaborate system for prosecuting professional misconduct.² Though the system is operating aggressively, it has been effective in curbing only the most gross and obvious offenses. The traditional remedies—contempt of court proceedings and actions for malicious prosecution—also have their limitations. In order to deal with the unprofessional behavior that was recognized by the bar but not adequately dealt with, the General Assembly, in 1987, enacted Virginia Code section 8.01-271.1, which was closely modeled upon Federal Rule of Civil Procedure No. 11.³

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1. *American College of Trial Lawyers Code of Trial Conduct*, 156 F.R.D. 275-93 (1994); VIRGINIA STATE BAR, *Principles of Professional Courtesy* (June 1988); RICHMOND BAR ASSOCIATION, *Principles of Professionalism, Bar Association of the City of Richmond Handbook*, 8.1 (1994); *Virginia Bar Association Creed*, 22 VA. B. ASS'N J., Spring 1996, at 47.

2. VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY, VA. SUP. CT. R., 6, §§ II, IV, 13.

3. Recent amendments to Federal Rule 11 have not been followed in Virginia state practice.

The purpose of this essay is to describe the application of section 8.01-271.1 in practice.

II. SUBSTANCE

The essence of section 8.01-271.1 is that pleadings, motions, and other papers first should be "well grounded in fact and . . . law" upon a "reasonable inquiry" and, second, should not be made "for any improper purpose."⁴ The Supreme Court of Virginia has declared that the first part of the rule is to be governed by an objective standard of reasonableness.⁵ The second part has not yet been considered by the Supreme Court of Virginia, but the trial courts are applying a subjective test, which appears to this writer to be required by the words "improper purpose"⁶—a purpose or intention to do something that is improper is an act of bad faith.⁷

A. "Reasonable Inquiry"

If a filing or motion is to be judged by an objective standard—that of the reasonable lawyer, rather than the subjective view of the actual person who made the filing or motion—then the appellate court can reconsider the issue on appeal based on the record of the proceedings below. The appellate court can objectively determine the reasonableness of the lawyer just as well as the trial court. And indeed, the Supreme Court of Virginia has felt unconstrained by the findings of the circuit courts

4. Section 8.01-271.1 covers discovery requests and responses. *E.g.* Mickle v. Largent's Great Falls Stables, 34 Va. Cir. 143, 148, 150 (Fairfax County 1994); Thompson v. Adamson, 33 Va. Cir. 275 (Loudoun County 1994); Mayfield v. Southern Ry., 31 Va. Cir. 229, 235 (Richmond City 1993); Athas v. Kolbe Corp., 24 Va. Cir. 313 (Richmond City 1991); Wierzbicki v. Shirley, 17 Va. Cir. 192, 194 (Fairfax County 1989). However, in order to remove any doubt, VA. SUP. CT. R. 4:1(g), which copies the language of § 8.01-271.1, was promulgated in 1991. Rule 4:1(g) sanctions were applied in *Lewis v. Lambert*, 26 Va. Cir. 109 (Richmond City 1991). The sanctions of § 8.01-271.1 can also be applied in situations of bad faith attachments and memoranda of *lis pendens* under VA. CODE ANN. § 8.01-269. *E.g.*, CMF Loudoun, L.P. v. Brown, 39 Va. Cir. 101, 103 (Loudoun County 1996).

5. See *infra* Sect. II.A.

6. See *infra* Sect. II.B.

7. See, *e.g.*, Atlas Mach. & Iron Works Inc. v. Bethlehem Steel Corp., 986 F.2d 709, 716 (4th Cir. 1993).

in reconsidering the state of the law and the pleader's knowledge of the facts in reversing lower court decisions.

In the case of *Tullidge v. Board of Supervisors of Augusta County*,⁸ the standard of objective reasonableness was applied by the circuit court to the plaintiff's motion for judgment.⁹ The plaintiff, an attorney at law suing *pro se* as a private citizen of Augusta County, sued the Board of Supervisors to prevent them from moving the county offices out of the City of Staunton. There were several political and economic considerations on both sides of the issue; there was no impropriety, but the general public was well aware of the issues of civic pride and financial cost of moving the county offices. Hence, public opinion was sharply divided.

The circuit court found that the plaintiff was motivated by "sincerity," but his legal conclusions were "unreasonable."¹⁰ The law requires a referendum before moving the county court house but not before moving the county administrative offices. The argument to the contrary based on a seat of government theory was found to be objectively unreasonable. The circuit court judge then held that "subjective notions of good faith are significant . . . [but] not relevant . . ." as to whether there should be sanctions under section 8.01-271.1, and held that he was required to impose a sanction.¹¹ However, the good faith of the plaintiff was relevant to what the sanction should be, and the plaintiff was given a "private reprimand."¹² Presumably, it was such a "private reprimand" as might be imposed by a disciplinary committee of the Virginia State Bar upon a member of the bar. A private scolding of a member of the general public in a judge's chambers would be less severe than the scowls meted out in public daily by many a general district court judge for a person's having been arrested though acquitted.

8. 15 Va. Cir. 134 (Augusta County 1988), *rev'd on other grounds*, 239 Va. 611, 391 S.E.2d 288 (1990).

9. *Id.* at 138.

10. *Id.*

11. *Id.*

12. *Id.* at 139.

The Supreme Court of Virginia reversed this ruling on the grounds that as a matter of law the plaintiff's position was reasonable though erroneous.¹³ In fact, the supreme court had recently refused to hear an appeal of Tullidge's case in chief and thus in effect affirmed the dismissal of his case by the circuit court.¹⁴ Whether a legal argument is reasonable though erroneous is as much a question of law for review on appeal as the correctness of the argument. The effect of this position upon the well established principle *ignorantia legis neminem excusat* is unclear.

Decided on the same day as *Tullidge* was *County of Prince William v. Rau*.¹⁵ In this case, Rau sued for a declaratory judgment against Prince William County to have a rezoning ordinance declared invalid for the failure to follow correct parliamentary procedures.¹⁶ The final rezoning vote came after a series of substitute motions, tie votes, deferments, and reconsiderations.¹⁷ The circuit court ruled that technically the rezoning was invalid, and imposed sanctions under section 8.01-271.1 against Prince William County in the amount of the plaintiff's attorney's fees incurred in prosecuting the suit.¹⁸ The case involved a complicated interplay of the laws and rules of municipal corporations and parliamentary procedure. The Supreme Court of Virginia, following *Tullidge*, reversed the award of sanctions against the County because its defense to the litigation was reasonable, though ultimately unsuccessful.¹⁹ Applying *Tullidge*, the supreme court said that "[w]e . . . resolve any doubts in favor of the [person sought to be sanctioned] and eschew the wisdom of hindsight."²⁰

In *Montecalvo v. Johnson*,²¹ an arrest warrant was issued against Montecalvo, but the criminal charges against him were dismissed. Montecalvo then sued Johnson and others for mali-

13. *Tullidge v. Board of Supervisors of Augusta County*, 239 Va. 611, 391 S.E.2d 288 (1990).

14. *Id.* at 614, 391 S.E.2d at 289.

15. 239 Va. 616, 391 S.E.2d 290 (1990).

16. *Id.* at 618, 391 S.E.2d at 291.

17. *Id.* at 618-20, 391 S.E.2d at 291-92.

18. *Id.* at 618, 391 S.E.2d at 291.

19. *Id.* at 620-21, 391 S.E.2d at 292-93.

20. *Id.* at 620, 391 S.E.2d at 292.

21. 17 Va. Cir. 382 (Richmond City 1989).

cious prosecution. Johnson's attorney gave detailed information to Montecalvo's attorney showing that Johnson had nothing whatsoever to do with the issuance of the warrant and that the claim was thus completely groundless. Neither the plaintiff nor his attorney took any steps to dismiss the claim or even investigate the merits of the action. In *Montecalvo*, the filing was done "without any investigation" of the facts except for the information found in the arrest warrant. Afterwards, having been informed of the truth of the matter by defense counsel, no investigation or discovery whatsoever was conducted as to the facts.

Applying an objective standard of reasonableness, the trial court judge granted a motion for sanctions against the plaintiff's lawyer and ordered him to reimburse the defendant for her own attorney's reasonable fees.²² The trial court ruled that though such sanctions are not favored, they were necessary "to prevent frivolous lawsuits."²³ In this case, the trial court found that the filing of this lawsuit without any investigation of the facts was done with the intent to harass.²⁴ The trial court further held that the purposes of section 8.01-271.1 are to deter improper litigation and to give compensation for it.²⁵

In a four to three decision, the Supreme Court of Virginia, in the case of *Oxenham v. Johnson*,²⁶ reversed the trial court's order for sanctions. The supreme court stated, as a standard of review, that an award or denial of sanctions would be reversed only for an abuse of judicial discretion on the part of the trial judge.²⁷ The supreme court substantially agreed with the objective principles applied by the circuit court. The purposes of section 8.01-271.1 are to "protect litigants from the mental anguish and expense of frivolous assertions of unfounded factual and legal claims and against the assertion of valid claims for improper purposes. And, sanctions can be used to protect courts against those who would abuse the judicial process."²⁸

22. *Id.* at 384, 386.

23. *Id.* at 385.

24. *Id.* at 384.

25. *Id.* at 385.

26. 241 Va. 281, 402 S.E.2d 1 (1991).

27. *Id.* at 287, 402 S.E.2d at 4.

28. *Id.* at 286, 402 S.E.2d at 3.

However, based on the facts of *Montecalvo v. Johnson*, the majority of the supreme court ruled that the plaintiff's claim for compensatory damages was clearly not frivolous and that it clearly was not an attempt to improperly harass the defendant.²⁹ Therefore, the trial court judge abused his discretion in ordering sanctions, and he was reversed.³⁰ The majority acknowledged that Montecalvo's claim for punitive damages was indeed frivolous, and this would have appeared to the plaintiff's counsel had he made a reasonable inquiry into the facts.³¹ However, the trial court had not separated the expense of defending against the frivolous claim for punitive damages from the legitimate claim for compensatory damages.³² Thus, the improper calculation of damages was an abuse of discretion by the trial court.³³ Since the supreme court could not make the correct calculation without hearing further evidence—which, of course, is not proper upon an appeal—the lower court order was reversed. Rather than remand the case for this to be done in the lower court, the supreme court entered final judgment of dismissal in favor of the appellant.

A strong dissenting opinion filed by three of the justices of the Supreme Court of Virginia followed.³⁴ The essence of the dissent was that the trial court did not abuse its discretion in finding that the entire claim in the circuit court was filed improperly.³⁵ Thus, the sanctions were fully appropriate.

The minority opinion also volunteered some useful and instructive dictum. Weak legal claims that are filed in anticipation of small out-of-court settlements are liable to receive sanctions.³⁶ This suggests that the willingness to settle for the "nuisance value," (i.e., a sum less than the defendant's anticipated litigation expenses) is an invitation to a claim for sanc-

29. *Id.* at 287-89, 402 S.E.2d at 4-5.

30. *Id.* at 290, 402 S.E.2d at 6.

31. *Id.* at 289, 402 S.E.2d at 5-6.

32. *Id.*

33. *Id.* at 290, 402 S.E.2d at 6.

34. *Id.* at 290-99, 402 S.E.2d at 6-11 (Poff, S.J. joined by Russell, J., and Hassell, J., dissenting).

35. *See id.* at 297-99, 402 S.E.2d at 9-11 (Poff, S.J., joined by Russell, J. and Hassell, J. dissenting).

36. *Id.* at 297, 402 S.E.2d at 10 (Poff, S.J., joined by Russell, J. and Hassell, J. dissenting).

tions under section 8.01-271.1.³⁷ The minority opinion of the court also declared that one purpose of the statute is to compensate for damage, (i.e., expenses) caused by improper litigation.³⁸

Another case in which the Supreme Court of Virginia addressed substantive issues raised pursuant to section 8.01-271.1 is *Nedrich v. Jones*.³⁹ The trial court found in favor of the sixteen defendants, sustained their demurrers, and awarded sanctions against the plaintiff's attorney.⁴⁰ On appeal, the supreme court held that some of the plaintiff's claims were plausible and objectively reasonable but that others were not, and therefore, the awards of sanctions were affirmed in part and reversed in part.⁴¹

In the case of *Concerned Taxpayers of Brunswick County v. County of Brunswick*,⁴² the Supreme Court of Virginia affirmed an award of sanctions by the Circuit Court of Brunswick County. One of the counts of the plaintiffs' suit was to have certain individual members of the Board of Supervisors held personally liable for certain official acts for which they voted.⁴³ The trial court held that there was no law that could be reasonably construed to allow such a claim, and imposed sanctions.⁴⁴ The supreme court affirmed this award of sanctions.⁴⁵

Little can be inferred from the statistical observation that in most of the cases involving section 8.01-271.1, the supreme court has reversed the award of sanctions. First, an appellate court is more likely to write an opinion when it reverses rather

37. *Id.* (Poff, S.J., joined by Russell, J. and Hassel, J., dissenting). Whether a clause in a settlement agreement not to pursue remedies under § 8.01-271.1 would be void as against public policy depends upon whether this statute is penal or quasi-penal. This writer believes that it is quasi-penal since one of its purposes is "to protect courts against those who would abuse the judicial process." *Id.* at 286, 402 S.E.2d at 3. A statute that protects the public is at least quasi-penal. In *Mayfield v. Southern Ry.*, 31 Va. Cir. 229, 237 (Richmond City 1993), the court granted sanctions to "punish the plaintiff for his dishonesty."

38. *Oxenham*, 241 Va. at 298, 402 S.E.2d at 10.

39. 245 Va. 465, 429 S.E.2d 201 (1993).

40. *Id.* at 470, 429 S.E.2d at 203.

41. *Id.* at 471-77, 429 S.E.2d at 204-07.

42. 249 Va. 320, 455 S.E.2d 712 (1995).

43. *Id.* at 329, 455 S.E.2d at 717.

44. *Id.* at 333, 455 S.E.2d at 719.

45. *Id.* at 334, 455 S.E.2d at 720.

than affirms a lower court's award of sanctions; there is a greater psychological need to explain the reasons for disagreeing than agreeing with something. Secondly, the supreme court is less likely to grant an appeal in the first place where the trial court has, by means of a letter opinion or otherwise, justified its action and the appellate court sees the correctness of it. On the other hand, a trial court would be more likely to write an opinion when it sustains a motion for sanctions. In fact, most such motions are dismissed peremptorily.⁴⁶

In *Bandas v. Bandas*,⁴⁷ the divorcing parties contracted to submit their differences to arbitration. After the arbitrator made an award that was favorable to the plaintiff-wife, she moved for the court to confirm the award and make it an order of the court.⁴⁸ The defendant-husband opposed the motion on the grounds that the contract for arbitration of support, child visitation, and equitable distribution was against public policy and was erroneous in various respects.⁴⁹ "[T]he court found there was no basis whatever to question the arbitrator's decisions. . . . There was no plausible view of the law available to defendant. . . ."⁵⁰ The objections of the defendant were found to be "frivolous causing consequent unnecessary delay and expense to plaintiff," and sanctions were imposed.⁵¹

In 1993, the Court of Appeals of Virginia heard the husband's appeal from the circuit court decision.⁵² Applying the "abuse of discretion" standard, the court of appeals found that the trial court ruled correctly in awarding sanctions based on allegations by the husband as to the propriety of the arbitration award.⁵³ Nevertheless, the court of appeals remanded the award to the trial court to reconsider the question of "how

46. *E.g.*, *Chavez v. Metaxatos*, 28 Va. Cir. 239, 239 (Alexandria City 1992); *Continental Fed. Sav. Bank v. Centennial Dev. Corp.*, 23 Va. Cir. 275, 277 (Fairfax County 1991) ("the filing was objectively reasonable"); *Sterrett v. Loudoun County Supervisors*, 23 Va. Cir. 153, 161 (Loudoun County 1991); *Sovran Bank, N.A. v. Jacob*, 15 Va. Cir. 110, 123 (Loudoun County 1988); *Vaughn v. McGrew*, 12 Va. Cir. 125, 126 (Chesapeake City 1988).

47. 25 Va. Cir. 492 (Richmond City 1991).

48. *Id.* at 492.

49. *Id.* at 492-96.

50. *Id.* at 510.

51. *Id.*

52. *Bandas v. Bandas*, 16 Va. App. 427, 430 S.E.2d 706 (1993).

53. *Id.* at 438, 430 S.E.2d at 712.

an arbitration award should be treated by a trial court in domestic relations cases.⁵⁴ Therefore, the court of appeals remanded the case ordering the amount of the sanctions to be recalculated.⁵⁵

Numerous reported circuit court cases granted sanctions for filings and motions that were not reasonably grounded on law or facts.⁵⁶ Additionally, there are numerous cases in which motions for sanctions have been denied.⁵⁷

B. "Improper Purpose"

Turning now to the second general prohibition, that of filing pleadings and making motions "for any improper purpose," we see that section 8.01-271.1 deals with actions that may be legally correct, but that are abusive under the circumstances.⁵⁸ Improper actions within the context of litigation are prohibited. The Statute gives three examples of improper purposes, "to harass or to cause unnecessary delay or needlessly increase . . . the cost of litigation."⁵⁹ This goes considerably beyond the elements of the torts of malicious prosecution and abuse of process. Although the appellate courts in Virginia have not yet had

54. *Id.*

55. *Id.*

56. *E.g.*, Mickle v. Largent's Great Falls Stables, Inc., 34 Va. Cir. 143 (Fairfax County 1994); Murphy v. Chadwyck-Healey, Inc., 31 Va. Cir. 163 (Alexandria City 1993); Griffith v. Smith, 30 Va. Cir. 250 (Richmond City 1993), *rev'd on other grounds sub nom.* Roberts v. Clarke, 34 Va. Cir. 61 (Va. 1994) (per curiam); Miller v. Moore, 29 Va. Cir. 339 (Fauquier County 1992); Friedman v. Fairfax Plaza Office Park, 29 Va. Cir. 239 (Fairfax County 1992); Parten Paint and Drywall Co. v. Wells/Ashburn Venture, 29 Va. Cir. 117 (Loudoun County 1992); Coronis v. Flowers, 23 Va. Cir. 1 (Fairfax County 1990); Wierzbicki v. Shirley, 17 Va. Cir. 192 (Fairfax County 1989); Sullivan v. Reliable Realty, 16 Va. Cir. 118 (Clarke County 1989).

57. Smith v. Smith, 37 Va. Cir. 267 (Loudoun County 1995); Saliba v. Duff, 35 Va. Cir. 141 (Fairfax County 1994); Lazarus v. Thomas, 33 Va. Cir. 457 (Loudoun County 1994); Lewis v. Dean, 28 Va. Cir. 319 (Fairfax County 1992); Continental F.S.B. v. Centennial Dev. Corp., 23 Va. Cir. 275 (Fairfax County 1991); Lankford v. Moore's Marine, Inc., 22 Va. Cir. 295 (Richmond City 1990); Frantz's Auto. Services, Inc. v. Crabtree, 21 Va. Cir. 443 (Fairfax County 1990); Ashmont Co. v. Welton, 20 Va. Cir. 181 (Chesterfield County 1990); Bragg v. Bragg, 20 Va. Cir. 26 (Loudoun County 1989); Investors Real Estate Inv. Co. v. Foster, 19 Va. Cir. 111 (Richmond City 1990); Socorso v. Remuzzi, 17 Va. Cir. 94 (Loudoun County 1989).

58. VA. CODE ANN. § 8.01-271.1 (Repl. Vol. 1992 & Cum. Supp. 1996).

59. *Id.*

an occasion to express an opinion on what is an "improper purpose" under the Statute,⁶⁰ there are numerous circuit court opinions.

To begin with, sanctions do not lie against a plaintiff merely for exercising the right to suffer a voluntary nonsuit,⁶¹ nor can sanctions be imposed under section 8.01-271.1 for the improper questioning of a witness at a deposition.⁶² Furthermore, "[s]anctions are not appropriate merely because a party loses a motion or a case. Nor are sanctions appropriate because a defense is ultimately unsuccessful."⁶³

However, filing a suit for the purpose of tactical posturing is prohibited by section 8.01-271.1.⁶⁴ Pursuing a frivolous claim against a person in the hopes of settling it out of court for the "nuisance value" of it is sanctionable.⁶⁵ False and groundless responses to discovery requests that needlessly increase the cost of litigation are subject to sanctions under this Statute,⁶⁶ as are actions "undertaken in bad faith with the intent to harass and obstruct."⁶⁷

A fortiori, actions taken in bad faith with actual malice and deceit are covered. In *Dominion Leasing Corp. v. Thompson*,⁶⁸

60. There are a few appellate court opinions which consider what is not an "improper purpose." See *Oxenham v. Johnson*, 241 Va. 281, 289, 402 S.E.2d 1, 5 (1991); *Wetstein v. Araujo-Wetstein*, 11 Va. App. 331, 398 S.E.2d 96 (1990). However, this type of case is somewhat fact specific, and not much can be argued from a statement of a negative.

61. *Breckner v. Hallen*, 36 Va. Cir. 79, 81 (Spotsylvania County 1995); *Warf v. Fields*, 33 Va. Cir. 1, 4 (Loudoun County 1993); *Becon Services Corp. v. Hazel Indus., Inc.*, 33 Va. Cir. 554, 558 (Loudoun County 1992).

62. *Timchak v. Ogden Allied Services Corp.*, 24 Va. Cir. 70, 73-74 (Loudoun County 1991).

63. *Winchester Homes, Inc. v. Hoover Universal, Inc.*, 30 Va. Cir. 22, 34 (Fairfax County 1992).

64. *Griffith v. Smith*, 30 Va. Cir. 250, 266-68 (Richmond City 1993) *rev'd on other grounds sub nom. Roberts v. Clarke*, 34 Va. Cir. 61 (Va. 1994); *Dolan v. Barnes*, 19 Va. Cir. 76, 77 (Alexandria City 1989).

65. *Oxenham v. Johnson*, 241 Va. 281, 297, 402 S.E.2d 1, 10 (1991) (Poff, S.J., dissenting).

66. *Mickle v. Largent's Great Falls Stables, Inc.*, 34 Va. Cir. 143, 148 (Fairfax County 1994); *Thompson v. Adamson*, 33 Va. Cir. 275 (Loudoun County 1994); see also Va. Sup. Ct. R. 4:1(g); *Mayfield v. Southern Ry.*, 31 Va. Cir. 229 (Richmond City 1993).

67. *Liberty Sav. Bank v. Ben J. Powers Const., Inc.*, 34 Va. Cir. 527, 528 (Fauquier County 1992).

68. 15 Va. Cir. 446 (Roanoke City 1989) ("deceitful" and "outrageous and egre-

a claim was filed which was barred by the doctrine of res judicata and a contract to arbitrate. Also, the filing of the same claim in a federal court had resulted in sanctions under Federal Rule 11 (the model for section 8.01-271.1), and the same claim had been dismissed by a judge of the Superior Court for the District of Columbia.⁶⁹

In *Melka Marine, Inc. v. Town of Colonial Beach*,⁷⁰ the circuit court found that the plaintiff and his counsel deliberately and needlessly increased the cost of the litigation, and substantial sanctions were awarded against the plaintiff and his counsel for oppressive litigation tactics.

In *Bremner, Baber and Janus v. Morrissey*,⁷¹ the defendant Michael J. Morrissey, a member of the bar, made "a blatant misrepresentation to the court,"⁷² sanctions were granted against him, and the matter was referred to the disciplinary committee of the Virginia State Bar. Ultimately his license to practice law was revoked.⁷³

Although *pro se* litigants are usually treated with tenderness by the courts,⁷⁴ in *Parr Excellence, Inc. v. Anderson*,⁷⁵ the *pro se* defendant's "egregious behavior" in attempting to have opposing counsel removed from the lawsuit resulted in an award of sanctions under section 8.01-271.1. The circuit court held that "[a] review of the record of this case, incidental litigation stemming from this case, and prior practices of defendant in other cases reveals that the motion was interposed for the purposes of delay, harassment, frustration and escalation of costs of the opposition."⁷⁶ This case, in fact, was part of an incredible campaign of harassment by means of bad faith litigation which led

gious violations").

69. *Id.* at 447.

70. 37 Va. Cir. 108 (Westmoreland County 1995).

71. 19 Va. Cir. 324 (Richmond City 1990).

72. *Id.* at 329. In *Mayfield v. Southern Ry.*, 31 Va. Cir. 229 (Richmond City 1993), sanctions were imposed to "punish this plaintiff for his dishonesty." *Id.* at 237.

73. *In re Morrissey*, No. 90-031-1002, VA. LAW. REG., Apr. 1991, at 28-30, *aff'd sub nom.* *Morrissey v. Virginia State Bar*, No. 910738, VA. LAW. REG., Feb. 1993, at 36.

74. *E.g.*, *Socorso v. Remuzzi*, 17 Va. Cir. 94, 96 (Loudoun County 1989); *Berger v. Simsarian*, 14 Va. Cir. 261 (Arlington County 1989).

75. 14 Va. Cir. 10 (Fairfax County 1987).

76. *Id.* at 14.

to Anderson's being denied access to the courts without prior judicial approval.⁷⁷

This writer has heard it said often that section 8.01-271.1 is not needed because the bar of Virginia behaves with honesty and decency. This is for the most part true, and may it continue so. However, we have seen some sad cases to the contrary, and occasionally sanctions under this statute are needed and appropriate.

C. "Appropriate Sanction"

Virginia Code section 8.01-271.1⁷⁸ states that "an appropriate sanction" can be imposed against an offending attorney⁷⁹ or party⁸⁰ or both of them.⁸¹ The Statute does not limit the judge as to the scope of "an appropriate sanction" where one is found to be warranted.⁸² However, it does suggest an order to pay "reasonable expenses" and "reasonable attorney's fee[s]."⁸³ Indeed, these are the most obvious means of compensating for damage caused by improper litigation, and they are certainly the most frequent types of sanction.⁸⁴ However, one circuit

77. *Anderson v. Sharma*, 33 Va. Cir. 543, 549 (Fairfax County 1992).

78. VA. CODE ANN. § 8.01-271.1 (Repl. Vol. 1992 & Cum. Supp. 1996).

79. *E.g.*, *Athas v. Kolbe Corp.*, 24 Va. Cir. 313, 319 (Richmond City 1991).

80. *E.g.*, *Mayfield v. Southern Ry.*, 31 Va. Cir. 229, 237 (Richmond City 1993).

81. *E.g.*, *Melka Marine, Inc. v. Town of Colonial Beach*, 37 Va. Cir. 108 (Westmoreland County 1995); *Wierzbicki v. Shirley*, 17 Va. Cir. 192, 194 (Fairfax County 1989).

82. *See* cases cited *supra* note 81.

83. *Id.*

84. *E.g.*, *O'Brien v. Wren*, 39 Va. Cir. 222, 223 (Charlottesville City 1996) (\$6,000.00); *Dove v. Dayton Town Council*, 39 Va. Cir. 159, 171-72 (Rockingham County 1996) (\$49,641.98); *CMF Loudoun, L.P. v. Brown*, 39 Va. Cir. 101, 104 (Loudoun County 1996) (\$2,000.00); *Sozio v. Thorpe*, 38 Va. Cir. 280 (Fairfax County 1995) (\$1,400.00); *Pisner v. Wilson Tree Co.*, 38 Va. Cir. 74, 76-77 (Fairfax County 1995) (\$2,500.00); *Melka Marine, Inc. v. Town of Colonial Beach*, 37 Va. Cir. 108 (Westmoreland County 1995) (\$30,000.00 for attorney's fees); *Mickle v. Largent's Great Falls Stables, Inc.*, 34 Va. Cir. 143, 148 (Fairfax County 1994) (\$4,082.20 for attorney's fees); *Thompson v. Adamson*, 33 Va. Cir. 275 (Loudoun County 1994) (\$3,196.99 for expenses for an unnecessary study); *Liberty Sav. Bank v. Ben J. Powers Constr., Inc.*, 34 Va. Cir. 527, 528 (Fauquier County 1992) (\$6,500.00 for attorney's and expert witness fees); *Athas v. Kolbe Corp.*, 24 Va. Cir. 313, 319 (Richmond City 1991) (\$300.00 for attorney's fees); *Coronis v. Flowers*, 23 Va. Cir. 1, 3 (Fairfax County 1990) (\$300.00 for attorney's fees); *Bremner, Baber and Janus v. Morrissey*, 19 Va. Cir. 324, 331 (Richmond City 1990) (\$973.70 for attorney's fees,

court gave a private reprimand as a sanction,⁸⁵ and another thought that an early dismissal of a non-meritorious claim was sufficient.⁸⁶

Section 8.01-271.1 of the Virginia Code was not intended to routinely shift the attorney's fees of the prevailing party to the losing party. However, where a party is forced to pay an attorney as a result of improper actions covered by this section, these additional attorney's fees are expenses that are properly compensable under the section. If an attorney is required to do work that was caused by a violation of this section, he or she should move for sanctions against the opposing party or counsel rather than pass the costs on to the client.

The most frequent use of sanctions under section 8.01-271.1 is to compensate for damages, i.e., additional expenses incurred as a result of violations of the standards of litigation imposed by this section.⁸⁷ However, sanctions are also available to "punish" for dishonesty and to "send a clear message" of deterrence to others.⁸⁸

III. PROCEDURE

A. Which Court

Motions for sanctions under section 8.01-271.1 do not lie for improper actions taken in other courts or in other lawsuits.⁸⁹ While a circuit court cannot award sanctions for papers filed in a general district court,⁹⁰ sanctions imposed by a district court

court costs, and court reporter's fees).

85. *Tullidge v. Augusta County Supervisors*, 15 Va. Cir. 134, 139 (Augusta County 1988), *rev'd on other grounds*, 239 Va. 611, 391 S.E.2d 288 (1990). The circuit court agreed that "the appropriate sanction is the least severe that will serve the purpose." 15 Va. Cir. at 138.

86. *Berger v. Simsarian*, 14 Va. Cir. 261 (Arlington County 1989).

87. See *supra* footnote 84.

88. *Mayfield v. Southern Ry.*, 31 Va. Cir. 229, 237 (Richmond City 1993) (\$10,000 sanction imposed on the plaintiff).

89. *Liberty Sav. Bank v. Ben J. Powers Constr., Inc.*, 34 Va. Cir. 527 (Fauquier County 1992).

90. *Walker v. Government Employees Ins. Co.*, 26 Va. Cir. 95 (Richmond City 1991) (motion was made in circuit court after case was removed from general district court).

can be appealed to the circuit court for a hearing *de novo* on the issue of sanctions.⁹¹ And, of course, sanctions imposed by a circuit court are appealable to the Court of Appeals of Virginia or to the Supreme Court of Virginia.

B. *Timeliness*

Section 8.01-271.1 cannot be applied retroactively to conduct that occurred before July 1, 1987, the date on which it went into effect.⁹²

This Statute does not create a new cause of action nor a claim or right separate from the substantive claims asserted by the parties, nor can an action for negligence be based upon it.⁹³ Therefore, motions under section 8.01-271.1 must be made while the lawsuit is still under the jurisdiction of the trial court as defined by Rule 1:1⁹⁴ unless the court "expressly reserve[s] jurisdiction over the . . . motion for sanctions . . ."⁹⁵ in an order. When this statute was first enacted, the circuit courts compared motions for sanctions to proceedings for contempt of court and held that the twenty-one day period of Rule 1:1 was not applicable.⁹⁶ However, the Supreme Court of Virginia quickly ruled to the contrary.⁹⁷

91. *Revell v. National Carpet & Rug, Inc.*, 35 Va. Cir. 129 (Fredericksburg City 1994).

92. *Lannon v. Lee Conner Realty Corp.*, 238 Va. 590, 594, 385 S.E.2d 380, 382-83 (1989), *rev'g sub nom. Lee Conner Realty Corp. v. Lannon*, 9 Va. Cir. 97 (Henrico County 1987); *Arcola Indus. Park Joint Venture v. Bryant*, 17 Va. Cir. 243 (Fairfax County 1989).

93. *Citizens for Fauquier County v. SPR Corp.*, 37 Va. Cir. 44 (Fauquier County 1995) (nor can § 8.01-271.1 be the foundation for a claim of civil conspiracy); *Remuzzi v. Giunta*, 32 Va. Cir. 90 (Loudoun County 1993); *Covington v. Haboush*, 28 Va. Cir. 360 (Richmond City 1992).

94. "All final judgments . . . shall remain under the control of the trial court . . . for twenty-one days after the date of entry, and no longer." VA. SUP. CT. R. 1:1.

95. *Concerned Taxpayers of Brunswick County v. Brunswick County*, 249 Va. 320, 332, 455 S.E.2d 712, 719 (1995); *see also Mickle v. Largent's Great Falls Stables, Inc.*, 34 Va. Cir. 143, 150 (Fairfax County 1994) ("Where the court officially separates the motion for sanctions from the case in chief. . .").

96. *Anderson v. Busman*, 22 Va. Cir. 93 (Fairfax County 1990), *rev'd*, 26 Va. Cir. 26 (Va. 1991); *see also Community Bank & Trust v. Turk*, 20 Va. Cir. 378 (Loudoun County 1990); *Surovell, Jackson, Colten & Dugan, P.C. v. Dawson*, 18 Va. Cir. 392 (Fairfax County 1990).

97. *Anderson v. Busman*, 26 Va. Cir. 26 (Va. 1991), *rev'g* 22 Va. Cir. 93 (Fairfax County 1990); *see also Roberts v. Clarke*, 34 Va. Cir. 61 (Va. 1994), *rev'g Griffith v.*

C. *Preserving the Motion*

In order to avoid the limitation of Rule 1:1, the cautious and safe method of proceeding is simply to postpone entry of the final judgment in the case until after all motions for sanctions have been heard and determined. This is the *modus operandi* of most circuit court judges. The disadvantage to this is postponing the resolution of the parties' controversy while matters involving counsel, not the parties, are being decided. For example, in the case of *Griffith v. Smith*,⁹⁸ a demurrer and motion for sanctions were filed on March 15, 1991, a hearing was held on April 22, 1991, and the demurrer was sustained on May 13, 1991; however, the issue of sanctions against the plaintiff's attorney was not decided until March 4, 1993, after extensive and careful research and further hearings. In order to accommodate the parties, the trial court judge took the motion for sanctions "under advisement" in order to avoid the operation of Rule 1:1 and then dismissed the defendant.⁹⁹

Taking the motion for sanctions under advisement was insufficient to avoid being reversed upon appeal.¹⁰⁰ The trial court should have "officially separate[d] the motion for sanctions from the case in chief. . . [by means of a] judgment order which expressly reserved determination of the motion."¹⁰¹ To put it another way, the trial court judge should have "expressly reserved jurisdiction over the . . . motion for sanctions in the . . . order[] that preceded the final order. . . ."¹⁰²

IV. CONCLUSION

The imposition of sanctions under section 8.01-271.1 for misuse of the legal process ultimately requires a balancing of con-

Smith, 30 Va. Cir. 250 (Richmond City 1993); Covington v. Haboush, 28 Va. Cir. 360 (Richmond City 1992).

98. 30 Va. Cir. 250 (Richmond City 1993).

99. *Id.* at 251 n.1.

100. Roberts v. Clarke, 34 Va. Cir. 61 (Va. 1994) (per curiam).

101. Mickle v. Largent's Great Falls Stables, Inc., 34 Va. Cir. 143, 150 (Fairfax County 1994).

102. Concerned Taxpayers of Brunswick County v. Brunswick County, 249 Va. 320, 332, 455 S.E. 2d 712, 719 (1995).

flicting general principles; this must be done by the trial court in its sound judicial discretion. In describing this balance, this writer cannot do better than to quote the scholarly Judge Robert K. Woltz:

In the court's opinion, sanctions of this nature should be applied very cautiously. The right of litigants to seek redress in the courts and the responsibility of counsel to seek redress for their clients by the joinder of multiple parties and by advancing legal theories of recovery, even at times novel theories, should not be stifled. On the other hand, such liberty granted to litigants and their lawyers should not be construed as open season to sue anyone and everyone within sight or sound nor to give them license to assert legal theories with insubstantial factual underpinnings. Clearly, sanctions are not appropriate in every case merely because a demurrer has been sustained.¹⁰³

In Virginia state courts, many trial judges do not grant motions for sanctions as a matter of policy, and those that do proceed reluctantly and cautiously so as not to discourage the good faith resort to the courts. However, bad faith and negligent litigation practices which cause harm are destructive to the system of justice as administered by the courts. Offenses against the principles of section 8.01-271.1 increase the costs of litigation and thus, adversely affect the accessibility of the courts to poor people and those who have small claims. This Statute has had the beneficial effect of causing lawyers to think through their claims, defenses, motions, and discovery methods before putting them into action. Certainly, thoughtful planning and legal research at the beginning of the process will result in more efficient and less expensive litigation. As it is currently being applied in the Virginia state courts today, this Statute has been a success.

103. *Sullivan v. Reliable Realty*, 16 Va. Cir. 118, 128 (Clarke County 1989) (awarding sanctions for indiscriminate claims against various defendants).