June 1987

Foreword - Tough Love: The Court of Appeals Runs the Seventh Circuit the Old Fashioned Way

Linda R. Hirshman

Follow this and additional works at: https://scholarship.kentlaw.iit.edu/cklawreview

Part of the Law Commons

Recommended Citation
Available at: https://scholarship.kentlaw.iit.edu/cklawreview/vol63/iss2/2
FOREWORD

TOUGH LOVE: THE COURT OF APPEALS RUNS THE SEVENTH CIRCUIT THE OLD FASHIONED WAY

LINDA R. HIRSHMAN*

Every law school class has its Kingsfield. Mine was Geoffrey Hazard. One day, after a particularly intimidating civil procedure class, I asked one of my fellow students why he thought a teacher would act like that. “It’s to get us toughened up for the abuse we’re going to have to take from the judges when we get out,” he replied knowingly. “Aha,” I thought to myself, “So this law school experience is simply art imitating life.” But when I got out and started appearing in courtrooms, the judges were generally rather agreeable. They certainly didn’t act like law professors. So when, many years later, I read that President Ronald Reagan had selected several federal judges from among the faculty of my law school, I figured that things had come full circle. Life would now imitate art.

In fairness, the United States Court of Appeals for the Seventh Circuit, which is the subject of this symposium, includes only two products of the University of Chicago Law School faculty, Judges Richard Posner and Frank Easterbrook; a third professor, Kenneth Ripple, formerly of the Notre Dame Law School, completes the academic complement of the ten active judges. Judge Posner, a Republican appointee (Reagan), is a distinguished academic who pioneered the application of economic analysis to law. Judge Easterbrook, another Reagan appointee, is also of an economic bent. Despite his relative youth, he has published extensively about antitrust, corporate and securities issues. Judge Ripple, a third Reagan appointee, was a Special Assistant to Justice Warren Burger for six years before joining the faculty at Notre Dame. The other members of the court, whose decisions will be the subject of this issue, are: (1) Walter J. Cummings, Democratic appointee (Johnson), who just completed his term as Chief Judge of the circuit, practicing attorney before appointment to the circuit in 1966; (2) William J. Bauer, newly installed as Chief Judge of the Seventh Circuit, a Republican appointee to the court (Ford), former United States Attorney and federal and state

trial judge with a special interest in the criminal law; (3) Harlington Wood, Jr., from Springfield, a Republican appointee (Ford), former federal trial judge and Assistant Attorney General in the United States Justice Department; (4) Richard D. Cudahy, Democratic appointee (Carter), Wisconsin businessman, lawyer and civic activist; (5) John L. Coffey, Republican appointee (Reagan), a Wisconsin state judge since 1954, Justice of the Wisconsin Supreme Court for four years before appointment to the federal court; (6) Joel M. Flaum, Republican appointee (Reagan), former Assistant State’s Attorney, Attorney General and first Assistant U.S. Attorney, federal trial judge when appointed to the appeals court, a judge with a particular interest in criminal law. The newest member of the court, Daniel Manion, a Republican appointee (Reagan), did not take his seat until after the decisions that are the subject of this symposium. In addition, panels on the Seventh Circuit often include one of the senior judges or a visitor; en banc sessions include only judges in active service and any senior judges who were on the original panel.¹

In any case, because the court is heavily weighted toward judges appointed by the conservative Ronald Reagan and because the appointees include very articulate and widely published advocates of somewhat novel approaches to legal matters, there are lots of Seventh Circuit watchers, both in the court’s jurisdiction and nationally. Insofar as the appointees of a conservative administration are likely to dominate the population of the federal courts for some time to come, this Reagan dominated court’s jurisprudence is an interesting harbinger. Moreover, this degree of attention to a court of appeals seems entirely appropriate, since the growth in federal litigation has not been accompanied by a concomitant increase in the output of the Supreme Court, and, accordingly, the courts of appeals are frequently the ultimate arbiters of federal law.

In this first of the faculty symposiums on the work of the Seventh Circuit, which will be published annually by the Chicago-Kent Law Review, each of three prominent scholars addresses an area where the court’s decisions have created a body of law that is substantively significant and also reflective of a more general approach to legal issues that makes the Seventh Circuit particularly worth watching.² They are

¹. During the period in question the senior judges included (1) Jesse E. Eschbach, a Reagan appointee, a U.S. district court judge in Indiana for 19 years; (2) Thomas E. Fairchild, a former Wisconsin Supreme Court Justice, who was appointed by Johnson; (3) Wilbur F. Pell, Jr., a Nixon appointee, who was formerly the director and chairman of a bank; and (4) Luther M. Swygert, a Kennedy appointee, who was a U.S. district court judge in Indiana for 18 years.

². Although the articles in this symposium issue focus somewhat on opinions authored by them, Judges Posner and Easterbrook have not written significantly more opinions than the other
(1) Professor Linda Silberman on the court's efforts to subject to more stringent review the district courts' decisions regarding preliminary injunctive relief; (2) Professor James Holzhauer on the proper standard for the courts to impose upon labor unions in enforcing the duty of fair representation; and (3) Professor Robert Glicksman on the retreat from judicial activism in environmental matters as represented by ten years of unsuccessful efforts to find a federal avenue of enforcement for the cleanup of the polluted Waukegan Harbor. In addition, the student contributors to this issue of the Law Review have selected several Seventh Circuit cases as the focus of their note and comments. Although the articles address very different subjects, the general understanding that emerges is predictable and clear: this conservative court is strongly disinclined to use its authority to rearrange existing social, economic and political distributions. The less predictable result of this symposium is that the court's fresh approach stimulated each of the faculty authors to reconsider the accepted wisdom of his area and, in each instance, to suggest altered ways of looking at the subjects. Thus, Linda Silberman reconsiders the desirability of a larger appellate presence in the preliminary injunction decision, Jim Holzhauer suggests an entirely new set of standards for a duty of fair representation, and Bob Glicksman suggests that the court's retreat from activism in environmental matters is symbolic of a much broader withdrawal, based on fundamental concerns of separation of powers and institutional competency.

As the title of this foreword reflects, I intend to address briefly a less substantive subject; namely, the court's efforts to impose demanding new standards of litigation conduct in this circuit. There has been a fair amount of talk about this in the popular and trade presses, lawyers describing their mistreatment at the hands of an abusive tribunal, others decrying the lawyers' inability or unwillingness to abide by even minimally demanding professional standards. Since standards of litigation conduct apply to every case before the court, it seems appropriate for this first symposium to include some report from the "front," if there is a front.

Well, exactly what is different about the court's behavior? This foreword is not the appropriate forum to review six years of substantive

members of the court. A WESTLAW search revealed that, while Judge Posner led the field, authoring 122 opinions from June 30, 1985 to January 1, 1987, Judge Flaum also contributed 104 opinions while Judges Easterbrook, Wood and Coffey each wrote over 90 opinions.

3. By "court," at least on the subject of this foreword, I mean all ten of the active members of the court of appeals. The panels in the cases cited here included at one time or another each of the ten active members of the court; of the cases involving litigation management, there are almost no dissents or concurring opinions, and none of the cases elicited en banc reconsideration.
decisions, ranging from interpretations of the Internal Revenue Code\textsuperscript{4} to the first amendment.\textsuperscript{5} A lot of writing on the court's general predilections exists already,\textsuperscript{6} and the articles in this symposium detail the court's development of two very important substantive areas of federal law—environmental protection and labor relations—as well as the quasi-managerial matter of the standards for preliminary injunctions. However, because the court's approach to managerial matters cannot be understood outside the context of its overall substantive approach to the role of the federal courts, I will suggest one overbroad generalization about the relationship between philosophy and management and support my general proposition with one overly narrow example. The general proposition is that, in the six years since the first of Ronald Reagan's appointees took office in this circuit, the court's decisions have reflected a pattern, albeit not unwavering, of reading narrowly the rights-creating provisions of federal law, reducing the role that the federal courts play in the rearrangement of events as they occur in the world outside the courtroom.

My example is \textit{Walker v. Rowe}.\textsuperscript{7} In \textit{Walker}, Judge Easterbrook, writing for himself, then Chief Judge Walter Cummings and Judge James Noland sitting by designation, reversed a jury verdict of almost a million dollars against the Director of the Illinois Department of Corrections and the Assistant Warden of the Pontiac Correctional Center for damages to six prison guards hurt or killed in the 1978 riot at the prison. The guards contended that the defendants were personally responsible for conditions that enabled the prisoners to kill or injure the guards. The question, asked Judge Easterbrook, was "whether acts and omissions [colorably the personal responsibility of the defendants] violate the Constitution."\textsuperscript{8} The answer, according to the court, was no—the Constitution, the court held, is a charter of negative liberties, not obligating the state to protect people, even its prison guards, from danger.\textsuperscript{9}

The most interesting aspect of \textit{Walker v. Rowe} is the court's exegesis of the philosophical reasons justifying its restrictive reading of the constitutional language. According to the court, when it comes to the affirmative provision of goods, governments regularly make choices, including

\begin{itemize}
  \item \textsuperscript{4} Schuster v. Commissioner, 800 F.2d 672 (7th Cir. 1986).
  \item \textsuperscript{5} Menora v. Illinois High School Ass'n, 683 F.2d 1030 (7th Cir. 1982) (Posner, J.), \textit{cert. denied}, 459 U.S. 1156 (1983).
  \item \textsuperscript{7} 791 F.2d 507 (7th Cir. 1986).
  \item \textsuperscript{8} \textit{Id.} at 509.
  \item \textsuperscript{9} \textit{Id.} at 510.
\end{itemize}
sacrificing safety of their employees for other ends, and "[t]he level of safety to be provided . . . is [to be] determined by political and economic forces, not by juries implementing the due process clause."10 At the end of the opinion, the court is even more explicit:

Pontiac is a den of murderers, rapists, and others with no respect for the law—and all too often nothing to lose from further mayhem. If there are few guards, the prisoners will murder each other; if the guards are present in abundance, the guards may become the targets; if the guards lock the prisoners in their cells, all will suffer to prevent violence by a few. There is no solution within the reach of a federal court, no easy recourse in the due process clause of the fourteenth amendment. The state has many choices, all costly, many bound to end in tragedy for someone. It may make these tragic choices for itself.11

The opinion is thus a paradigm of the court’s commitment to reducing the role of the federal judiciary vis-à-vis the federal legislature, the states, and, as Walker so graphically illustrates, the vicissitudes of life itself. This substantive commitment to minimize the reach of the federal courts is the background against which the Seventh Circuit’s procedural directives must be viewed.

In light of the philosophy expressed in Walker, it is not surprising to find, on the procedural or managerial side, a line of decisions raising jurisdictional barriers to the federal courthouse.12 This development has two forms: first, the court examines, sua sponte, questions of the subject matter jurisdiction of the trial court; then in deciding the questions, the court construed strictly the jurisdictional rules. The court signalled its intent to scrutinize on its own the jurisdictional credentials of the cases on its docket in its 1983 decision in Gaunce v. deVincentis, dismissing for lack of subject matter jurisdiction a case that erroneously challenged agency action in district court, rather than following the proper channels of administrative review. In its opinion, the court reminded the bar that it had just amended the Circuit Rules to require all appellants to file with their briefs a summary of the bases for both the district court and appellate jurisdiction.13

10. Id.
11. Id. at 512 (citation omitted).
12. Wisconsin Knife Works v. National Metal Crafters, 781 F.2d 1280 (7th Cir. 1986); Goldstick v. ICM Realty, 788 F.2d 456 (7th Cir. 1986); Stockman v. LaCroix, 790 F.2d 589 (7th Cir. 1986); Kanzelberger v. Kanzelberger, 782 F.2d 774 (7th Cir. 1986); Christianson v. Colt Indus., 798 F.2d 1051 (7th Cir. 1986); Cote v. Wadel, 796 F.2d 981 (7th Cir. 1986); Federal Deposit Ins. Corp. v. Elefant, 790 F.2d 661 (7th Cir. 1986); Wilsey v. Eddingfield, 780 F.2d 614 (7th Cir. 1985), cert. denied, 106 S. Ct. 1660 (1986); Casio, Inc. v. S.M. & R. Co., 755 F.2d 528 (7th Cir. 1985); Bernstein v. Lind-Waldock, 767 F.2d 179 (7th Cir. 1984); Buethe v. Britt Airlines, Inc., 749 F.2d 1235 (7th Cir. 1984); Gaunce v. deVincentis, 708 F.2d 1290 (7th Cir.), cert. denied, 464 U.S. 978 (1983).
Inevitably, when jurisdictional issues first surface at the appellate level, bizarre consequences ensue. Probably my favorite example from the Seventh Circuit is *Federal Deposit Insurance Corp. v. Elefant*, a case resembling nothing so much as a law school examination that all parties below failed miserably. As the author of the opinion, Judge Easterbrook, described the case, "[a] simple action to collect a debt has produced a host of problems, all jurisdictional." The case began when United of America Bank, an Illinois citizen, made a loan to the ITRI Torah Institute, allegedly a New York corporation, with two Illinois residents as guarantors. The bank got into trouble, and the FDIC, which guaranteed some of the deposits, sued the Torah Institute and its guarantors in Illinois state court. The New York defendant removed the whole case, asserting diversity of citizenship. The alert civil procedure student will by now have spotted at least two jurisdictional problems, but, as the court of appeals pointed out, "everyone acted as if the whole action had been moved to district court, and the district judge never noticed the jurisdictional problems (of which there are more to come)." The district court granted summary judgment against ITRI and one of the two guarantors, deflecting consideration of other claims in the case.

Having removed and lost, defendants appealed, contending that the district court should not have exercised diversity jurisdiction over the FDIC at all. The FDIC, having won on the merits in federal district court, agreed nonetheless that the removal was improper and sought a remand for the district court to explore another possible ground for jurisdiction. After having been silent throughout the trial on the jurisdictional problems, including those in its own unique statute, the FDIC also asked for $16,000 in attorneys' fees against the defendants for improper removal!
The substance of the jurisdictional argument was as follows. If the FDIC took the citizenship of the bank, the case obviously did not qualify for diversity jurisdiction, because several of the defendants were also Illinois citizens. By the time the case got to the court of appeals, the parties had shifted their positions to treat the FDIC as a citizen of the District of Columbia. The removing defendants contended on appeal that the FDIC's statute\(^{18}\) nonetheless precludes federal diversity jurisdiction where the FDIC is acting as a receiver for a state bank. This is a tough argument, because the FDIC statute, drafted in 1935, said nothing about diversity jurisdiction but merely precluded the use of federal question jurisdiction in that circumstance. (As the court of appeals explained, this limitation in the jurisdictional preclusion was understandable, because a government agency was not qualified for diversity citizenship until 1958, when the diversity statute was amended to provide for corporate citizenship for diversity purposes.)

The court of appeals was thus confronted with a neat problem in statutory interpretation. Congress' purpose in 1935 was clearly to avoid transferring whole bodies of garden variety state collection suits to the federal courts just because the FDIC was involved. But the statute is silent about diversity. Judge Easterbrook is the author of many scholarly articles and opinions exhorting the courts to respect strictly statutory language, however confining.\(^{19}\) Nonetheless, in this case, he stretched the statutory language to prohibit the assertion of jurisdiction, explaining his decision on the grounds that this was that rare case where the legislative record was clear enough for the court to infer Congress' intent.\(^{20}\) The case, having proceeded to summary judgment in the federal court, would now be sent back to state court to begin again.

A final word: the court did not give the FDIC its attorneys' fees. The FDIC should have noted the obvious defects of nondiversity in the defendants' original removal, said the court. Moreover, the court found it difficult to tag defendants with foreseeing the court's expansive interpretation of the FDIC statute, which does not even mention diversity, when the FDIC did not even realize its potential application. In passing, ingly, the court, which is very tight-fisted about the trial court jurisdiction, usually finds in favor of its own jurisdiction to review, even where the right to appeal is far from clear. \(\text{E.g., Palmer v. Chicago, }806\ F.2d\ 1316\ (7\text{th Cir. }1986);\text{ In re Wagner, }808\ F.2d\ 542\ (7\text{th Cir. }1986);\text{ McMunn v. Hertz Equip. Rental Corp., }791\ F.2d\ 88\ (7\text{th Cir. }1986);\text{ FDIC v. Elefant, }790\ F.2d\ 661\ (7\text{th Cir. }1986);\text{ Charles v. Daley, }799\ F.2d\ 343\ (7\text{th Cir. }1986).\)

20. \text{Elefant, }790\ F.2d\ at 666.
the court of appeals reminded the district court that it, too, should at least have picked up the easy points.

A second group of litigation management decisions involves the strict enforcement in cases otherwise within the jurisdiction of the district court of door closing provisions like statutes of limitations, issue and claim preclusion and the narrow reading of relief provisions like the reopeners and transfer rules. One such decision, *Marrese v. American Academy of Orthopaedic Surgeons*, in which the court, *en banc*, applied the doctrine of claim preclusion to preclude litigation of federal antitrust claims after state claims have been resolved against the plaintiff, has been the subject not only of reversal but of much criticism. Nonetheless, looking at the general pattern of litigation over the last year, I do not see significant numbers of cases in which the court enforced such rules with exceptional harshness; usually in this second group of cases, the court of appeals is simply affirming the district court's rulings.

One such case, *Cote v. Wadel*, is interesting as a possible harbinger of a harsher future, although I tend to think that decision is more understandable as a reflection of the court's interest in strict enforcement of the personal jurisdiction rules, as a subset of its tight-fisted jurisdiction rulings generally. In *Cote*, the plaintiff, who had very bad luck with her professional relationships, was suing her former lawyers for malpractice in failing to prosecute her original, medical malpractice action against her doctor. Her second set of lawyers sued the lawyer defendants in Wisconsin, where the plaintiff lived, although the defendants apparently resided in Michigan, where the original malpractice action had been litigated. The Wisconsin federal district court dismissed the Michigan lawyer defendants for lack of personal jurisdiction, and, in a rather unexceptional opinion by Judge Posner, the court of appeals affirmed. The harder issue was the court's affirmance of the district court decision to dismiss, rather than transferring the case, under section 1404(a) of Title 28, resulting in plaintiff's total exclusion from any courthouse, because,

21. *Cote v. Wadel*, 796 F.2d 981 (7th Cir. 1986); *Kagan v. Caterpillar Tractor*, 795 F.2d 601 (7th Cir. 1986); *Video Views, Inc. v. Studio 21, Ltd.*, 797 F.2d 538 (7th Cir. 1986); *Rudell v. Comprehensive Accounting*, 802 F.2d 926 (7th Cir. 1986); *cf. Grosvenor v. Brienen*, 801 F.2d 944 (7th Cir. 1986); *Bieganek v. Taylor*, 801 F.2d 879 (7th Cir. 1986).

22. 692 F.2d 1083 (7th Cir. 1982), modified, 706 F.2d 1488 (7th Cir. 1983), modified on reh'g *en banc*, 726 F.2d 1150 (7th Cir. 1984), rev'd, 470 U.S. 373 (1985).


24. 796 F.2d 981 (7th Cir. 1986).
in the meanwhile, the statute of limitations had run. Although the court of appeals agreed with the plaintiff that the transfer provisions of the United States Code would have allowed the trial court to transfer and save the plaintiff's action, it refused to find a clear abuse of discretion, concluding that the harsh result was "elementary" and "litigants and the public will benefit substantially in the long run from better compliance with the rules limiting personal jurisdiction." 25

In the third and largest group of management matters, the court has been visibly wielding the stick, imposing fees and other sanctions against both parties and their attorneys with an unprecedentedly heavy hand for frivolous litigation and for failure to meet the court's performance expectations. Many statutes and rules of procedure authorize the federal courts to impose attorneys' fees and other sanctions like costs, 26 but four provisions encompass most of the courts' authority to punish just general bad actors. They are Rule 11 of the Federal Rules of Civil Procedure, Rule 38 of the Federal Rules of Appellate Procedure, and sections 1912 and 1927 of Title 28.

Rule 11, newly drafted in 1983 as part of an effort to give trial judges more authority over the litigation process, requires attorneys to sign pleadings, certificating thereby that the pleading is well grounded in fact and existing law or a good faith argument for changing the law. Violation of Rule 11 can result in fees and sanctions either to the party or the attorney. Rule 38 of the Federal Rules of Appellate Procedure authorizes the court of appeals to impose sanctions for frivolous appeals. Section 1912 provides for damages and costs to the prevailing party on appeal for his delay, and section 1927 authorizes any federal court to charge costs to attorneys personally for multiplying the proceedings vexatiously. Thus, both the district courts and the courts of appeals have the authority to sanction a party or a lawyer or both, in proper cases under the rules.

Rule 38 and section 1927 are more pertinent to an examination of the appeals court's decisions than is Rule 11, because the decision to levy sanctions under Rule 11 is within the discretion of the trial court. 27 Since the revision of Rule 11 in 1983, the court of appeals has generally affirmed the district courts' Rule 11 decisions, although I should note

25. Id. at 985.
27. See Indianapolis Colts v. Mayor of Baltimore, 775 F.2d 177 (7th Cir. 1985); Suslick v. Rothschild Sec. Corp., 741 F.2d 1000 (7th Cir. 1984).
that affirming the district courts in this circuit has led to some pretty aggressive fee decisions. For example, in *Wang v. Gordon*,\(^{28}\) the court of appeals approved the district court's *sua sponte* entry of a fee award it had levied. Another example is *Analytica, Inc. v. NPD Research, Inc.*,\(^{29}\) a decision predating Rule 11, where the court affirmed the imposition of attorneys' fees against lawyers fighting a motion to disqualify them, penalizing the lawyers for making contentions sufficiently meritorious to elicit one dissent in support of the disfavored contentions and at least one more vote for a rehearing *en banc.*\(^{30}\)

In a couple of recent cases, *Thornton v. Wahl*,\(^{31}\) and *Dreis & Krump Manufacturing v. IAM*,\(^{32}\) the appeals court went even further and disagreed with the lower court's refusals to impose fees under Rule 11. Procedurally, *Dreis & Krump* is a relatively straightforward remand requiring a fee award, but *Thornton* is a bit murkier. In *Thornton*, the district court had denied the fee request. Finding the plaintiff's same contentions on appeal to be "without support," the court of appeals on its own motion awarded defendants double costs and attorneys' fees for the appellate proceedings.\(^{33}\) The only authority the court mentioned for this fee award was Rule 11, although technically, the Federal Rules of Civil Procedure, including Rule 11, do not apply in the courts of appeals.\(^{34}\)

Both *Dreis & Krump* and *Thornton* involve fact situations of a particularly provoking sort. *Thornton* was a failed civil rights action that was the most recent salvo in an eight year divorce battle, and *Dreis & Krump* was an employer's suit to set aside an arbitration award under a collective bargaining agreement. In each case, the issuance of sanctions was obviously driven by the court's conviction that the appellant was litigating for reasons unrelated to its confidence in the soundness of its legal position: "This suit is Mrs. Thornton's revenge"\(^{35}\) and "[a] company dissatisfied with the decisions of labor arbitrators need not include an arbitration clause in its collective bargaining contracts, but having agreed to include such a clause it will not be permitted to nullify the advantages to the union by spinning out the arbitral process unconscion-

---

28. 715 F.2d 1187 (7th Cir. 1983).
29. 708 F.2d 1263 (7th Cir. 1983).
30. *Id.* at 1265.
31. 787 F.2d 1151 (7th Cir.), *cert. denied*, 107 S. Ct. 93 (1986).
32. 802 F.2d 247 (7th Cir. 1986).
33. *Thornton*, 787 F.2d at 1154.
34. *See* Fed. R. Civ. P. 1. The lawyer in a recent disciplinary case, *In re Kelley*, 808 F.2d 549 (7th Cir. 1986), tagged the court with a similar misappropriation of Rule 11.
35. *Thornton*, 787 F.2d at 1152.
ably through the filing of meritless suits and appeals."

Normally when the court acts on its own behalf, it levies a sanction for frivolous appeal under Rule 38 or uses section 1927 to direct the sanction to the offending attorney for conduct on appeal. Current Seventh Circuit Rule 38 jurisprudence began with *Ruderer v. Fines*, where the court imposed double costs and fees on a *pro se* plaintiff, who had been the enfant terrible of the United States courts since his dismissal from government employment in 1965. At the time of the Seventh Circuit decision, the plaintiff had filed sixty-eight different lawsuits to vindicate his contentions regarding his discharge, resulting ultimately in six federal courts issuing injunctions against him approaching the federal building. The court used *Ruderer* to set out the tests for Rule 38: first, the appeal must be frivolous, meaning something more than just unsuccessful, and, second, it must be appropriate to impose sanctions, meaning that they would serve to deter a vexatious litigant or compensate his victim for his trouble.

*Ruderer* was an easy case, as are most of them. A big part of the court's Rule 38 decisions fall into two categories: public fanatics and private fanatics. The public fanatics include such crusaders as tax protesters and a group that concocts bogus land titles. The court has been resorting to fixed fines for such litigation, in order to save the government the trouble of calculating its attorneys fees for opposing them.

The category of private crusaders includes a mixed bag of individuals, whose cases are characterized by a Dickensian persistence coupled with representation by a family member. Perhaps the most graphic example from this group is *Margoles v. Johns*, a 1986 decision in a case begun in 1972 as a slander action. The plaintiff, who had challenged the

36. *Dreis & Krump*, 802 F.2d at 255.
37. 614 F.2d 1128 (7th Cir. 1980).
38. Id. at 1130.
39. See, e.g., *Granado v. Commissioner*, 792 F.2d 91 (7th Cir. 1986); *Coleman v. Commissioner*, 791 F.2d 68 (7th Cir. 1986); *Lepucki v. Van Wormer*, 765 F.2d 86 (7th Cir.), *cert. denied*, 106 S. Ct. 86 (1985); *Granzow v. Commissioner*, 739 F.2d 265 (7th Cir. 1984). Judge Easterbrook described tax protest in his usual felicitous style: "Some people believe with great fervor preposterous things that just happen to coincide with their self-interest. 'Tax protestors' have convinced themselves that wages are not income, that only gold is money, that the Sixteenth Amendment is unconstitutional, and so on." *Coleman*, 791 F.2d at 69.
40. See, e.g., *Wisconsin v. Glick*, 782 F.2d 670 (7th Cir. 1986); *Glick v. Gutbrod*, 782 F.2d 754 (7th Cir. 1986); *Hilgendorf v. Peoples Bank*, 776 F.2d 176 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1644 (1986). The land title litigants apparently contend that original federal land patents preclude the formation of any other interests in land under state law. They file their homemade land patents with the appropriate title system and proceed to litigate about encumbrances, like mortgages, to their land.
41. See, e.g., *Margoles v. Johns*, 798 F.2d 1069 (7th Cir. 1986); *Cannon v. Loyola Univ.*, 784 F.2d 777 (7th Cir. 1986); *Spiegel v. Continental Ill. Nat'l Bank*, 790 F.2d 638 (7th Cir. 1986).
neutrality of the first judge in his case, had been dismissed by the second judge (to whom the case was transferred in an unrelated administrative move) for failure to comply with defendants' discovery requests. Plaintiff's motion to reopen under Rule 60 and his appeal were unsuccessful. Four years later, he moved again under Rule 60 to reopen the dismissal on the grounds that the second judge was biased, too. A third district judge, to whom the Rule 60 motion was assigned, denied it, and the denial was affirmed on appeal. The 1986 appeal was from denial of a third Rule 60 motion, this time to vacate the dismissal of his action on the grounds that he had new evidence to show that the second district judge was biased. The court of appeals assessed the plaintiff $2500.00 in fees for a frivolous appeal.42

These are the easy cases. A handful of cases fall into a more troublesome third category: where the court finds the substantive contentions insupportable in reason or precedent, although the cases bear none of the warning signs that the legal system is deliberately being misused in service of an external agenda. For example, in Analytica, after affirming the district court's decision to disqualify on the merits, the court, in an opinion by Judge Posner, then affirmed the imposition of costs on the lawyers fighting disqualification, finding that the lawyers' position was "without at least a colorable basis in law."43 But one of the three panel members—Judge Coffey—had dissented vigorously on the merits, agreeing with the unsuccessful lawyers that the law on disqualification had changed. Although a dissent does not make the penalized lawyers correct, it certainly casts doubt on the conclusion that their position was "without colorable basis."

Judges Posner and Coffey were together again on the panel in Indianapolis Colts v. Mayor of Baltimore,44 which ultimately involved the question of fee awards for litigation over fee awards. In the underlying litigation, the court of appeals had reversed the Colts' efforts to maintain an interpleader action against Baltimore. Judge Coffey dissented. On remand from its successful appeal on the merits, Baltimore tried to get the district judge to sock the Colts with attorneys' fees for having filed a frivolous interpleader. The district judge refused. Baltimore appealed the denial of fees, no doubt hoping that if Judge Coffey's dissent couldn't protect the lawyers from charges of frivolity in Analytica, it wouldn't shield the Colts, either. The court of appeals, in an opinion by Judge

42. 798 F.2d at 1075.
43. 708 F.2d at 1269.
44. 775 F.2d 177 (7th Cir. 1985).
Coffey, ruled, not surprisingly, that the support of a member of the appellate court (himself) buttressed the reasonableness of the Colts' action, despite its ultimate lack of success. The court thus affirmed the denial of fees. Indeed, the court continued, so groundless was Baltimore's effort to collect fees for its victory on the merits that its appeal would be characterized as frivolous, and the Colts, losers on the merits in the overall litigation, could collect attorneys' fees for defending the appeal on fees!45

As set forth above, Judge Coffey, dissenting in Analytica, did not vote for the fee award against the disqualified lawyers, and the third panel member in Analytica and Colts was different.46 Judge Posner, however, sat on both panels and voted for fees both times, thus supporting fees in face of a Coffey dissent in Analytica and supporting fees for the effrontery of trying to collect fees in face of a Coffey dissent in Indianapolis Colts. The decisions in Colts and Analytica are disturbing, because, in addition to a general preference for neatness of result, levying fees for debatable positions absent clear signs of abuse of the system, "would 'chill an attorney's enthusiasm or creativity in pursuing factual or legal theories.'"47

Recent decisions include some other examples of sanctions where the signs of abuse are far from clear. For example, in Wang v. Gordon, also discussed above, the court affirmed the district court fee award on a bad faith theory, although the plaintiff's contentions were drawn from a Second Circuit decision not totally out of the ball park, and the worst thing the appeals court could say about plaintiff's position was that it was "strained."48 In another example, Rodgers v. Lincoln Towing Service, Inc.,49 the plaintiff was called to the police station, questioned by a policeman and two complaining witnesses who were personal friends of the policeman, arrested for vandalism at the insistence of the complainers, jailed for over ten hours despite his informing the police that he could make bail, tried on the vandalism charges, and acquitted. Affirming the dismissal of his civil rights complaint against his accusers, the court of appeals also affirmed the imposition of fees under Rule 11 for complaining that defendants had violated his rights to counsel and not to incriminate himself, contentions the court called "far-fetched" and

45. Id. at 184.
46. The third panel member in Analytica was William Campbell, a senior district judge of the Northern District of Illinois, 708 F.2d at 1265; and the third panel member in Colts was Edward Dumbauld, a senior district judge of the Western District of Pennsylvania, 775 F.2d at 178.
47. 775 F.2d at 182 (quoting FED. R. CIV. P. 11 advisory committee's note).
48. 715 F.2d 1187, 1193 (7th Cir. 1983).
49. 771 F.2d 194 (7th Cir. 1985).
“hav[ing] no basis in law.” In a third case of questionable sanctions, the court very recently laid fees equally on an employer-client and its law firm for appealing enforcement of a labor arbitration award, on the grounds that the appellant should have known it could not successfully attack the trial court’s credibility findings. All this being said, however, although the litigation conduct that triggered the sanctions in these three cases is not appalling, neither are the cases clear cut examples of abusive discipline of blameless litigants.

As set forth above, Rule 38 is directed at parties; although the federal courts also have inherent unwritten equitable powers to award fees personally against lawyers, the standards for equitable awards and section 1927, which addresses lawyers, are worded somewhat differently from Rule 38. Nonetheless, the court of appeals has basically run all of its sources of authority together, turning its attention to lawyers not based on the differences between Rule 38 and section 1927, but for unarticulated policy reasons. Basically, the cases reveal that the court has been tagging lawyers, rather than clients, with fees, sanctions, and, as discussed below, rhetoric, in three circumstances: (1) where the court sees “front” plaintiffs for a crusade in which it is the lawyer who is the constant; (2) where the party itself is perceived as unsophisticated; or (3) where the erroneous contention is obvious, but so technical that only a lawyer could be expected to know it.

Where fees and sanctions are directed to the lawyers, the court has, not infrequently, taken the opportunity to administer a public scolding, too. At present, the court seems to be concentrating its verbal ire on lawyers who make claims unacceptably beyond the margins of existing law, lend themselves to their clients’ blood feuds, or commit breaches of etiquette.

In re TCI, Ltd., a bankruptcy matter, involved all three provocations. Where fees and sanctions are directed to the clients, the court has, not infrequently, taken the opportunity to administer a public scolding, too. At present, the court seems to be concentrating its verbal ire on lawyers who make claims unacceptably beyond the margins of existing law, lend themselves to their clients’ blood feuds, or commit breaches of etiquette.

---

50. Id. at 205.
51. District No. 8, IAM v. Clearing, 807 F.2d 618 (7th Cir. 1986).
53. Reid v. United States, 715 F.2d 1148 (7th Cir. 1983).
54. Thornton v. Wahl, 787 F.2d 1151 (7th Cir. 1986); McCandless v. Great Atl. & Pac. Tea Co., 697 F.2d 198 (7th Cir. 1983).
55. Maneikis v. Jordan, 678 F.2d 720 (7th Cir. 1982). But cf. District No. 8, 807 F.2d 618, where none of these factors are apparent from the opinion.
56. Thornton v. Wahl, 787 F.2d 1151 (7th Cir. 1986); In re TCI, Ltd., 769 F.2d 441 (7th Cir. 1985).
57. Thornton, 787 F.2d 1151 (7th Cir. 1986); In re TCI, Ltd., 769 F.2d 441 (7th Cir. 1985); McCandless, 697 F.2d 198 (7th Cir. 1983).
58. United States v. Devine, 768 F.2d 210 (7th Cir. 1986) (district court order allowing oversize brief affirmed); United States v. Devine, 787 F.2d 1086 (7th Cir. 1986); In re TCI Ltd., 769 F.2d 441 (7th Cir. 1985).
tions. There, the debtor’s lawyer filed three successive complaints against its creditors to try to reverse the sale of property, a sale that had been the subject of an earlier agreed order in the bankruptcy. The bankruptcy judge dismissed all three complaints and, eventually, levied fees against the debtor’s law firm to compensate the creditors for their efforts in defending the last two complaints. The district judge affirmed, and all parties appealed—the losing lawyer from the fee award and the creditors because they didn’t get fees for opposing the first complaint.

The court of appeals characterized the debtor’s claims as follows:

The complaint relies upon a supposed promise . . . that is neither required by law . . . nor established by judicial order . . . . The amended and second amended complaints assert that the building itself is personal property, an argument whose only footing is George Orwell’s Newspeak. The claim with the best pedigree . . . had nothing to do with [the defendants].

Interestingly, the law firm would not back down. The lawyer acted only at his clients’ insistence, the firm contended, adding that the low margins of profit in a bankruptcy practice did not permit lawyers to do extensive legal research before filing and that a strict penalty for such unsupported assertions would stifle their adversarial vigor. The firm concluded by refusing to admit it had been wrong and vowing to continue its conduct. Not surprisingly, the brief on appeal thus contained few citations to authority or substantive defenses other than a cursory attack on the constitutionality of section 1927. It even contained that bete noire of the Seventh Circuit, a typo.

The court rebuked the lawyers roundly on all three scores. “When lawyers yield to the temptation to file baseless pleadings to appease clients, however, they must understand that their adversary’s fees become a cost of their business.” Regarding the dampening of zeal in a low cost practice, the court said:

An attorney who wants to strike off on a new path in the law must make an effort to determine the nature of the principles he is applying (or challenging); he may not impose the expense of doing this on his adversaries—who are likely to be just as busy and will not be amused by a claim that the rigors of daily practice excuse legal research . . . . We are . . . not worried about “chilling” the sort of “creativity” demonstrated by these pleadings. Chilling this sort of “creativity” is the central function of Section 1927.

Affirming the fee award below, the court toyed with the idea of adding

59. 769 F.2d at 447.
60. Id. at 446.
61. Id. at 446 (emphasis in original).
62. Id. at 447-48.
fees for the first complaint but declined, reasoning that the creditors' lawyers probably spent too much time on the matter anyway. Finally, in response to the debtors' lawyers' attempt to justify themselves on appeal, the court reviewed in detail the inadequacies it saw in the brief and concluded that the debtors' lawyers should pay the creditors' attorneys' fees on appeal as well as $1,000 interest on the $8,000 fee award below for delay.

Well, what's going on? I think both less and more than one would have guessed. The court's opinions and the nominal changes in the local rules of appellate procedure seem to be grounded in two principles, each unassailable. First, frivolous litigation wastes the resources of the judicial system and also unjustly wastes the resources of the other side. There is a certain percentage of crazies in any society, and it is difficult to quibble with the court's efforts to resist being drawn into matters more appropriate for the opera house than the courthouse. Second, sloppy litigation is also wasteful. Some of the sloppiness is attributable to the same cause that makes the pediatrician keep you waiting—lawyers are greedy and overextended. Some is for the related reason that the amounts in dispute don't justify the expense involved in doing a careful job. By raising the standard of performance, the court inevitably raises the expense of litigation and thus should reduce the flow of business into the judicial system. In this way, pedagogical habits and political philosophy mesh. But that does make either wrong.

Some of the picture is a little more disturbing. Lawyers are justifiably troubled by the deterioration in the relationship between the bench and the bar. As for life imitating art, the tone of some of the opinions resembles more a review of the lawyers' performance in a moot court exercise than a resolution of real disputes. This phenomenon is most

63. Id. at 448-49.
64. For instance, nothing decided to date in the Seventh Circuit remotely approaches the significance of supervisory matters that confronted in the Court of Appeals for the Ninth Circuit this year. In UniOil, Inc. v. E.F. Hutton, 809 F.2d 548 (9th Cir. 1986), the court affirmed a judgment of close to $500,000 against a prominent San Francisco plaintiffs' law firm, for failing to make an adequate factual investigation into their named plaintiff before filing a securities class action. In the same week, a different panel reversed a district court ruling imposing sanctions against a prominent Chicago law firm for what the trial court characterized as representing as existing law what was at best an argument for extension of existing law into an undecided area and for failing to cite contrary authority. Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531 (9th Cir. 1986), rev'g 103 F.R.D. 124 (N.D. Cal. 1984). The trial court ruling in Golden Eagle had elicited some substantial concern over the "chilling effect."
65. The court has not flinched at applying its scrutiny to cases in which the litigants appear pro se. See, e.g., Reis v. Morrison, 807 F.2d 112 (7th Cir. 1986); Ruderer, 614 F.2d 1128 (7th Cir. 1980).
66. See, e.g., Cote v. Wabel, 796 F.2d 981 (7th Cir. 1986) (see supra notes 24-25 and accompanying text); FDIC v. Elefant, 790 F.2d 661 (7th Cir. 1986) (see supra notes 14-16 and accompanying text); Bonds v. Coca-Cola, 806 F.2d 1324 (7th Cir. 1986).
disturbingly reflected in the increase in *sua sponte* decisions. This Foreword noted two groups of such decisions—the *sua sponte* raising of jurisdictional defects and the *sua sponte* imposition of sanctions for procedural misconduct. Granted that both of these areas involve system-related issues that entitle the court to greater leeway, still, the increase of *sua sponte* decisions is inevitably accompanied by a loss in effective advocacy and in the dialogue between bench and bar. Moreover, it is often difficult to tell from the opinions whether the substantive issues discussed were briefed and argued or emerged from the fertile minds of the able jurists. The court’s recent opinion in *Bonds v. Coca-Cola*, raising, *sua sponte*, a tolling argument for the plaintiff, rebuking his lawyer for failing to see it, and then refusing to consider the argument for lack of assistance of counsel, raises the disturbing suspicion that the court’s willingness to think up positions on its own may lead litigants out of the courthouse more often than it admits them.

The escalation of rhetoric from the bench has also contributed to the deterioration. The briefs and the opinion discussed above in *TCI* exemplify this phenomenon. Another example appears in the exchange over the matter of a rehearing in *Olympia Equipment Leasing Co. v. Western Union Telegraph*. In that antitrust suit, Judge Posner, writing for himself, Judges Bauer and Flaum, had reversed a large jury verdict for the plaintiff. The petition for rehearing *en banc* characterized the panel decision as “seizing this opportunity to preempt the application of the [recent Supreme Court decision in *Aspen Skiing*]’s antitrust principles in this Circuit” and “to emasculate its principles and announce contrary rules for this Circuit . . . consistent with [Judge Posner’s] long held personal view” and engaging in unwarranted “*de novo* review of the facts,” a review that “changes dramatically when Judge Posner is on the panel.” In addition to denying the petition (with nary a vote for rehearing) the two panel members not the subject of the petitioner’s verbal ire concurred specially to rebuke the petitioning lawyers for their tone.

I think that part of the reason for the escalated rhetoric from the bench is frustration. The statistics set forth above about the percentage of nonconforming briefs three years after amendment of local Rule 9 are discouraging, and the descriptions of the quality of the papers

67. 806 F.2d 1324 (7th Cir. 1986).
68. 802 F.2d 217 (7th Cir. 1986) (denying rehearing of 797 F.2d 370 (7th Cir. 1986)), cert. denied, 107 S. Ct. 1574 (1987).
69. Petition for Rehearing with Suggestion for Rehearing *En Banc* at 1-5 n.5, 18 n.24, *Olympia*, 802 F.2d 217.
70. *Olympia*, 802 F.2d at 219-20.
71. See supra note 13 and accompanying text.
presented to the courts do not arouse sympathy for their creators. Still, one is unaccustomed to hearing grown men and women addressed in such admonitory tones ("Lawyers practicing in the Seventh Circuit, take heed!")\(^7\), and the temptation to answer back, as the *Olympia* lawyers did, must be very great.

But, in the end, the real developments of significance in this court so substantially reconstituted and including judges of such great abilities and commitment, are substantive. And it is to those substantive developments that this symposium is addressed.

\(^7\) *Dreis & Krump*, 802 F.2d 247, 256 (7th Cir. 1986).