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### United States v. National Medical Enterprises: What to Do When Government Attorneys Engage in Misconduct

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**UNITED STATES V. NATIONAL MEDICAL ENTERPRISES:  
WHAT TO DO WHEN GOVERNMENT  
ATTORNEYS ENGAGE IN  
MISCONDUCT**

**I. INTRODUCTION**

In recent years, federal judges have been increasingly willing to impose sanctions for a party's violation of a court order,<sup>1</sup> especially during the discovery phase of litigation.<sup>2</sup> These judges view violations of court orders as a direct threat to their authority<sup>3</sup> and recognize the need for sanctions as a deterrent to such abuses.<sup>4</sup> The Ninth Circuit, in particular, has taken the lead in using sanctions as both a specific deterrent against the conduct of a particular litigant, and as a general deterrent against misconduct by other litigants.<sup>5</sup> In addition, the United States

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1. Although state courts have experienced a corresponding increase in the number of sanctions applied, this Note will deal exclusively with the discovery sanctions imposed by the federal courts. See Sherwood, *Curbing Discovery Abuse: Sanctions Under the Federal Rules of Civil Procedure and the California Code of Civil Procedure*, 21 SANTA CLARA L. REV. 567 (1981) for a discussion of the increased use of sanctions in both the federal and state courts.

2. See, e.g., FEDERAL JUDICIAL CENTER, JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: DISCOVERY 21-26 (1978). Courts may rely on several sources of authority for imposing these sanctions including Federal Rules of Civil Procedure 37 & 41 and the inherent power of the courts to protect the orderly administration of justice. See *infra* notes 4, 8 & 79-82.

3. See, e.g., *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764-65 (1980) (violation of court order is affront to inherent power of courts to protect authority and dignity of judiciary); see also *Phoceene Sous-Marine, S.A. v. U.S. Phosmarine, Inc.*, 682 F.2d 802, 806 (9th Cir. 1982) (courts have inherent power to dismiss action to ensure integrity of their orders); *Fendler v. Westgate-California Corp.*, 527 F.2d 1168, 1170 (9th Cir. 1975) (decision whether to dismiss action for failure to comply with court order is within discretion of trial judge under the inherent power).

4. *United States v. Sumitomo Marine & Fire Ins. Co.*, 617 F.2d 1365 (9th Cir. 1980). In *Sumitomo*, the Ninth Circuit identified the three general purposes of Federal Rule of Civil Procedure Rule 37(b) sanctions:

- (1) to prevent the disobedient party from profiting from his own failure to comply with the court order;
- (2) to serve as a specific deterrent to secure compliance with the order at hand;
- and
- (3) to serve as a general deterrent so that the court may consider the impact that sanctions would have on this and other litigation.

*Id.* at 1369; see Comment, *The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions*, 91 HARV. L. REV. 1033 (1978).

5. *Id.*; see also *Wyle v. R.J. Reynolds Indus.*, 709 F.2d 585, 589 (9th Cir. 1983) (in choosing among available sanctions, district court may properly consider deterrent value of dismissal order on future litigants).

Supreme Court has authorized the use of harsh sanctions to ensure that "other parties to other lawsuits [do not] feel freer than we think . . . they should feel to flout other discovery orders of the district courts."<sup>6</sup>

A district court may only impose sanctions, however, within the confines of due process requirements.<sup>7</sup> The Supreme Court has admonished that the harshest sanctions<sup>8</sup> are only to be imposed where the failure to comply with the court order is due to "wilfulness, bad faith or any fault [of the party sanctioned]."<sup>9</sup> Further, the Ninth Circuit has declared that harsh measures may be particularly appropriate where the government is the "disobedient party."<sup>10</sup>

Most cases dealing with sanctions involve private attorneys, representing private litigants, not government attorneys. The standards used to evaluate the propriety of conduct by a civil government attorney have not been clearly set forth. In *United States v. National Medical Enterprises* (NME II),<sup>11</sup> the Ninth Circuit reviewed the decision of a district court to dismiss the government's case for interfering with the fact-finding process and attempting to influence witnesses.<sup>12</sup> The appellate court

6. *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643, *reh'g denied*, 429 U.S. 874 (1976) (per curiam) (dismissal upheld for failure to comply with discovery order to answer interrogatories even though party had complied by time of sanction hearing). Federal Rule of Civil Procedure Rule 37 empowers a court to order a party to provide or permit discovery. The Rule further states that a court may sanction a party for failing to comply with the discovery order. FED. R. CIV. P. 37(b).

7. See *infra* notes 118-35 and accompanying text.

8. A wide range of sanctions is available under Federal Rule of Civil Procedure Rule 37. In ascending order of harshness, a court may:

require the delinquent party or his attorney to pay the reasonable expenses, including attorney's fees, incurred by the innocent party as a result of the failure to obey the order; strike out portions of pleadings; deem certain facts as established for purposes of the action or preclude admission of evidence on designated matters; dismiss all or part of the action; or render a default judgment against the disobedient party.

*Sumitomo*, 617 F.2d at 1369; see also MANUAL FOR COMPLEX LITIGATION § 42.3 (2d ed. 1985) (supplement to C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE (1969-85)). See generally Symposium, *Sanctioning Attorneys for Discovery Abuse—The Recent Amendments to the Federal Rules of Civil Procedure: Views from the Bench and the Bar*, 57 ST. JOHN'S L. REV. 680 (1983), reprinted in PRACTISING LAW INSTITUTE, CURRENT PROBLEMS IN FEDERAL CIVIL PRACTICE 261 (1983); Comment, *Sanctions Imposed by Courts on Attorneys Who Abuse the Judicial Process*, 44 U. CHI. L. REV. 619 (1977).

9. *Societe Internationale Pour Participations Industrielles et Commerciales v. Rogers*, 357 U.S. 197, 212 (1958) (dismissal not proper where inability of party to produce documents due to foreign law protecting those records and not due to party's bad faith).

10. *Sumitomo*, 617 F.2d at 1370. "The effectiveness of and need for harsh measures is particularly evident when the disobedient party is the government." *Id.*

11. 792 F.2d 906 (9th Cir. 1986). In this Note, *NME II* will be used to refer to the Ninth Circuit opinion at 792 F.2d 906 (9th Cir. 1986); *NME I* will refer to the district court opinion at 107 F.R.D. 628 (E.D. Cal. 1985), *aff'd in part, vacated in part*, 792 F.2d 906 (9th Cir. 1986).

12. *NME I*, 107 F.R.D. at 631.

vacated the dismissal, holding that the district court abused its discretion by not applying a three-part test prior to dismissing the action.<sup>13</sup> The test suggested by the Ninth Circuit would require the trial court to consider alternative sanctions, determine the prejudicial impact to the defendants and weigh the public interest.<sup>14</sup> This "public interest" element is not usually present in private actions.<sup>15</sup> By requiring that the district court view the public interest in dismissing an action, the Ninth Circuit holds a civil government attorney to a *lesser* standard of conduct than his private counterpart.

The issues raised in *NME II* suggest the need to clarify the standard of conduct required of government attorneys and to establish a test by which courts can evaluate misconduct when deciding whether to impose sanctions. This Note will first explore the analyses used by courts when confronted with a case in which a private attorney engages in misconduct. It will then examine the various competing interests involved when a government attorney engages in misconduct. Further, this Note will propose a test by which a district court may determine when dismissal is the proper sanction for government misconduct.<sup>16</sup> As set out below, the author believes it is time for the courts to reexamine and clearly articulate the standards applied to civil government attorneys. With a proper analytical framework, courts may formulate guidelines which: (1) will strike a balance between the many competing concerns; and (2) will be truly enforceable against civil government counsel.<sup>17</sup>

## II. EXAMINATION OF THE CASE

In late 1983, the United States Department of Justice (DOJ) filed a complaint in the Eastern District of California alleging that National Medical Enterprises, Inc. (National Medical)<sup>18</sup> had violated the federal

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13. See *infra* note 82 and accompanying text.

14. *NME II*, 792 F.2d at 913.

15. The *NME II* court, however, professed that it was not addressing the issue whether government attorneys should be held to a different standard than private attorneys. *Id.* at 913-14.

16. Dismissal has been held to be a proper sanction where a party willfully violates a court order. See *Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp.*, 602 F.2d 1062 (2d Cir. 1979).

17. This Note will focus on civil government attorneys and will only deal with federal prosecutors for purposes of analogy. See *infra* notes 245-60 and accompanying text. Further, this Note will emphasize the duties and obligations of the attorneys working for the Department of Justice, the largest employer of federal lawyers. See Report of the Civil Service Commission, "The Oliver Report": *Excerpts from the Model Attorney Evaluation System*, 32 FED. B.J. 39 (1973).

18. The complaint filed by the DOJ named both National Medical Enterprises, Inc. and

antitrust laws.<sup>19</sup> National Medical owned one hospital in the Modesto area and had recently acquired a second hospital.<sup>20</sup> The DOJ contended that when National Medical acquired this second hospital, a single owner controlled too many hospital beds in the area thus violating the antitrust laws.<sup>21</sup>

During the discovery phase of the case, government counsel contacted seven prospective third party witnesses.<sup>22</sup> The DOJ attorneys told those witnesses that the government would like to attend any interviews that the witnesses granted to National Medical.<sup>23</sup> In addition, the government asked the witnesses to provide the DOJ with copies of any documents that they gave to National Medical.<sup>24</sup> National Medical moved for a protective order to prohibit the government from making further "requests."<sup>25</sup>

The district court granted National Medical's motion for a protective order<sup>26</sup> to eliminate "unwarranted confusion and misunderstanding" caused by the DOJ counsel.<sup>27</sup> District Judge Robert E. Coyle found that

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National Medical Hospitals, a wholly owned subsidiary, as defendants. This Note will refer to the defendants collectively as "National Medical."

19. The complaint alleged a violation of section 7 of the Clayton Act, 15 U.S.C. § 18 (1982). *United States v. National Medical Enters.*, 792 F.2d 906, 908 (9th Cir. 1986). These antitrust charges arose from recent hospital acquisitions in the Modesto, California area. At the time of the suit, National Medical was the fourth largest health care company in the United States and operated over 450 health care facilities nationwide. *Id.*; Brief for the Appellant at 2, *United States v. National Medical Enters.*, 792 F.2d 906 (9th Cir. 1986) (No. 85-2485) [hereinafter Appellant's Brief]. Since 1969, National Medical had owned Doctor's Medical Center, the largest hospital in Modesto. *NME II*, 792 F.2d at 908. In December 1982, National Medical acquired Modesto City Hospital, the third largest hospital in Modesto. *Id.* By obtaining ownership of this second hospital, DOJ alleged that National Medical's share of the total hospital beds in the area was above the DOJ Merger Guidelines, and thus violated the antitrust laws. *Id.* After seven months of civil investigation by the DOJ, the government filed suit in district court. Appellant's Brief, *supra* at 1.

20. Appellant's Brief, *supra* note 19, at 1.

21. *NME II*, 792 F.2d at 908.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. FED. R. CIV. P. 26(c). A court may make any order "which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden . . ." *Id.*

27. *United States v. National Medical Enters.*, No. CV-F-83-481 REC (E.D. Cal. May 18, 1984) [hereinafter May 18, 1984 Order] (order establishing procedures for witness interviews and for obtaining documents); *see also* *United States v. National Medical Enters.*, 107 F.R.D. 628, 631 (E.D. Cal. 1985). The district judge in *NME I* described the circumstances as "over-reaching by the government." *Id.* Upon reviewing the incidents leading to the May 18, 1984 Order, Judge Coyle stated that it was "incredible" that the government believed no confusion existed or had ever existed. May 18, 1984 Order, *supra*, at 2 n.1. The court then listed several examples of the confusion caused by the DOJ attorney conduct. The custodian of several

the government's statements to prospective witnesses had deprived National Medical of the opportunity to meet privately with individuals previously interviewed by DOJ counsel.<sup>28</sup> The protective order emphasized that each witness was free to choose whether to grant an interview on his own terms to either party.<sup>29</sup> In addition, Judge Coyle sent letters to each of the seven prospective witnesses encouraging them to use their discretion in granting interviews or providing documents to either side in the action.<sup>30</sup>

Both parties conducted extensive discovery over the next several months. In 1985, National Medical moved to dismiss the suit alleging that a DOJ attorney's conduct at two depositions violated the earlier protective order.<sup>31</sup> National Medical alleged that during one deposition, a DOJ attorney discouraged a neutral witness from providing information which he was otherwise inclined to furnish.<sup>32</sup> At another deposition, the same DOJ attorney allegedly attempted to limit a third-party deponent's statements concerning possible additional improprieties by government counsel.<sup>33</sup> The district court accepted National Medical's charges that the government attorney had made comments during the deposition in an attempt to discredit National Medical and to influence neutral witness

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public records said he had been "instructed" by the government not to permit National Medical to review any public documents without first contacting the DOJ. *Id.* In addition, another witness stated that the DOJ had requested that government attorneys be allowed to attend any interviews granted by the witness to National Medical and to receive copies of any documents requested by National Medical. *Id.* at 3 n.2. Although both individuals considered the DOJ requests unusual, they complied because it was the government that made the requests. *Id.*

28. May 18, 1984 Order, *supra* note 27, at 3. Judge Coyle went on to state that even though the DOJ conduct "may not breach the ethical standards of the profession . . . this method of trial preparation . . . smacks of an approach of one-upsmanship which the court finds distasteful and disfavors." *Id.* at 3 n.2.

29. *Id.* at 4-5.

30. *NME II*, 792 F.2d at 909 (quoting May 18, 1984 Order of the District Court). Judge Coyle was concerned that government counsel were not "sensitive to the fact that, whether intended or not, 'requests' to witnesses from government counsel are likely to carry more weight than those from private counsel." May 18, 1984 Order, *supra* note 27, at 3 n.2, 4. The letter sent by the district court to the prospective witnesses provided in relevant part:

In the event counsel for either party to this case request an opportunity to interview you, the decision to grant an interview is entirely at your discretion and you are free to dictate the terms of any such interview. The Court encourages you, however, to speak privately and freely with counsel for both sides and to provide each side with any documents you feel appropriate to disclose.

May 18, 1984 Order, *supra* note 27, at Letter Attachment. Judge Coyle believed that this letter would rectify any misconduct which had already taken place. *NME I*, 107 F.R.D. at 631.

31. Brief for the Appellees at 1, *United States v. National Medical Enters.*, 792 F.2d 906 (9th Cir. 1986) (No. 85-2485) [hereinafter Appellees' Brief].

32. *NME II*, 792 F.2d at 909.

33. *Id.*

testimony.<sup>34</sup>

The district court then issued an order concluding that the statements made by the DOJ attorneys "during the [two] depositions were highly improper and had the potential of influencing these witnesses in their responses to appropriate questions on discovery."<sup>35</sup> The judge further stated that "there ha[d] been a sufficient violation of the spirit and intention of the [protective] order in an attempt to influence witnesses and the outcome of this litigation to warrant dismissal of the action."<sup>36</sup> National Medical, in the view of Judge Coyle, had presented no evidence that the witnesses were in fact influenced or that the defendants were prejudiced. Hence, the district court declined to dismiss the case but instead imposed a \$3000 sanction against the government.<sup>37</sup>

The parties proceeded with the case and trial began in July 1985. After one week of trial, National Medical renewed its previous motion to dismiss for misconduct of government counsel.<sup>38</sup> This time, the DOJ had supposedly made comments to a neutral witness on the eve of her trial testimony.<sup>39</sup> The alleged statements suggested that National Medical had made a series of payoffs to effect the sale of a competitor hospital to National Medical.<sup>40</sup> This acquisition of the competitor hospital by National Medical was the subject of the underlying antitrust suit.<sup>41</sup> In addition, a DOJ attorney supposedly told the witness that National Medical was a disreputable company because it did not have any female corporate executives.<sup>42</sup> After the district court held evidentiary hearings

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34. *Id.*

35. *Id.*; see also *United States v. National Medical Enters.*, No. CV-F-83-481 REC (E.D. Cal. May 21, 1985) at 4 [hereinafter May 21, 1985 Order].

36. *NME II*, 792 F.2d at 910.

37. *NME I*, 107 F.R.D. at 631.

38. *Id.* at 629.

39. *Id.* at 629-30. The witness involved was a neutral third party, Ms. Sheila Yuter. Ms. Yuter was the Director of Planning for a hospital unrelated to the action. *Id.* Prior to testifying at trial, she met with one of the DOJ attorneys to review her proposed testimony. *Id.* Ms. Yuter set out in a declaration that during that meeting the DOJ attorney made several unsolicited and improper remarks which bore no relation to her proposed testimony. *Id.* Ms. Yuter declared that she believed these remarks were made by the government to convince her that National Medical had acted improperly and to persuade her of the strength of the government's position. *Id.* at 631. The declaration of Sheila Yuter is set forth in Judge Coyle's opinion. *Id.* at 629 n.1.

40. *Id.* at 630. The statements made by DOJ counsel included remarks that several principals at Modesto City Hospital had been "paid off" to effect the sale of Modesto City Hospital to National Medical. *Id.* The payments were described by the government as "big" payoffs and that the people involved were "taken care of" by National Medical. *Id.*

41. *NME II*, 792 F.2d at 908.

42. *NME I*, 107 F.R.D. at 631. One evening, before Ms. Yuter's trial testimony, several DOJ attorneys went to Ms. Yuter's hotel room to talk with her. One female government

and heard oral arguments on National Medical's motion,<sup>43</sup> the court ruled from the bench that the government's conduct "constitute[d] yet another attempt by plaintiff's counsel to improperly influence a neutral witness for the plaintiff."<sup>44</sup> The court further stated that

[t]he defendants have been and are faced with repeated attempts to improperly influence witnesses in giving testimony in a matter of great importance. . . . Government's counsel will not be given a free rein to attempt to influence witnesses and if they happen to be caught where the witness has in fact been influenced, only then will the court assure that such activities will not continue.<sup>45</sup>

In response to the DOJ attorney misconduct, the court dismissed the case with prejudice.<sup>46</sup>

On appeal, the Ninth Circuit affirmed the award of monetary sanctions.<sup>47</sup> The court, however, vacated the dismissal of the action and remanded the suit so that the district judge could reconsider the case according to the proper legal standard.<sup>48</sup>

### III. REASONING OF THE COURT

#### A. *Monetary Discovery Sanction*

In reviewing the decision of the district court to impose a \$3000 sanction and to dismiss the government's action, the Ninth Circuit applied an abuse of discretion standard.<sup>49</sup> The government argued that by

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attorney referred to National Medical as a disreputable company for not having any women at the corporate level. *Id.* The female attorney continued that she could not believe that a company would name its health maintenance organization "PMS." *Id.* The attorney intended "PMS" to refer to premenstrual syndrome and Ms. Yuter understood the reference in that context. *Id.* at 631 n.3. While Ms. Yuter believed that the woman attorney was attempting to establish a personal rapport with her, Ms. Yuter found the statements inappropriate. *Id.* at 631.

43. *Id.* at 629.

44. *Id.* at 631.

45. *Id.* at 632.

46. *Id.* Dismissal with prejudice is reserved for the most egregious cases because it operates as an adjudication on the merits. FED. R. CIV. P. 41(b). Under the doctrine of res judicata, such a dismissal bars the refiling of the previously dismissed complaint. See *Phillips v. Arizona Bd. of Regents*, 123 Ariz. 596, 601 P.2d 596 (1979).

47. *NME II*, 792 F.2d at 914.

48. *Id.* The Ninth Circuit found that Judge Coyle should have (1) considered lesser sanctions; (2) determined the prejudicial impact of the government's conduct; and (3) weighed the public interest in the action before dismissing the suit. *Id.* at 913.

49. *United States v. National Medical Enters.*, 792 F.2d 906, 910 (9th Cir. 1986). The abuse of discretion standard is often seen as a necessary deference by the appellate courts to the power required by the trial courts to conduct trials. See *Rosenberg, Judicial Discretion of the*



imposing the monetary sanction, the district court had abused its discretion because the conduct of the DOJ attorneys at the two depositions did not violate the protective order.<sup>50</sup> The government acknowledged that under Federal Rule of Civil Procedure 37(b),<sup>51</sup> a district court is authorized to impose a wide range of sanctions where a party failed to comply with a discovery order.<sup>52</sup> However, the DOJ argued that a monetary sanction in this case was not proper.<sup>53</sup> The government contended that the protective order dealt only with interviewing witnesses and requesting documents, while the conduct in question involved attorney behavior at depositions.<sup>54</sup> Thus, the government believed that even if the conduct at the depositions was improper, it did not violate the protective order.<sup>55</sup>

The Ninth Circuit instead viewed the district court's protective order as prohibiting the DOJ attorneys from dissuading a witness from referring to discoverable documents.<sup>56</sup> Consequently, the circuit court held that the DOJ lawyer's comments during the deposition could be interpreted as violating the protective order.<sup>57</sup> In upholding the monetary sanction imposed by the district court, the Ninth Circuit deferred to the district judge's finding that his order had been violated.<sup>58</sup> The appellate court noted that the district judge is best able to assess whether a

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*Trial Court, Viewed From Above*, 22 SYRACUSE L. REV. 635, 637 (1971). The proper inquiry by the appellate court is not whether it would have ruled differently on the original matter, but whether the district court abused its discretion in its actions. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 761 (1982). In fact, such matters as discovery or the conduct of counsel are seen as particularly deserving of appellate court deference because they involve a "feel" for the case which can only be obtained by the trial court. *Id.* at 760-61. Judge Friendly has also admonished that "[t]he district judge must be master of how to get cases to trial, and has had opportunities for frequent observation of the offending counsel which would not emerge from a cold record." *Id.* at 761. Thus, in *NME II*, because attorney conduct was involved, it was proper for the Ninth Circuit to apply the abuse of discretion standard. For a further discussion of the abuse of discretion standard, see *infra* note 109.

50. *NME II*, 792 F.2d at 911.

51. FED. R. CIV. P. 37(b). Rule 37(b) empowers a court to impose sanctions for failure to comply with a court order.

52. *United States v. Sumitomo Marine & Fire Ins. Co.*, 617 F.2d 1365, 1369 (1980); see *supra* notes 4 & 8.

53. The Ninth Circuit did point out that the district court's authority is limited to sanctions (1) which are just, and (2) which specifically relate to the particular claim at issue in the order. *NME II*, 792 F.2d at 910.

54. *Id.* at 911.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* Judge Coyle made express findings that he believed both his first and second orders had been violated. May 21, 1985 Order, *supra* note 35, at 4. "[T]here has been a sufficient violation of the spirit and intention of the [May 18, 1984 Order] in an attempt to influence witnesses and the outcome of this litigation to warrant dismissal of the action." *Id.*; see also *United States v. National Medical Enters.*, 107 F.R.D. 628, 631-32 (E.D. Cal. 1985), *aff'd in*

party had complied with one of his or her own orders.<sup>59</sup> The circuit court concluded that the district court had not erred in imposing the \$3000 sanction.<sup>60</sup>

### B. Dismissal Sanction

The government next argued that even if the monetary sanction was not an abuse of the trial court's discretion, the district judge improperly dismissed the action.<sup>61</sup> The Ninth Circuit noted that Judge Coyle had relied on government counsel's two previous violations of his orders as the basis for dismissing the government's suit.<sup>62</sup> The appellate court, however, distinguished between the types of conduct proscribed by the district court's first two orders and the type of conduct in question here.<sup>63</sup> The circuit court characterized the first two orders as dealing with "roadblocks to information during discovery."<sup>64</sup> In contrast, the court viewed the dismissal order as involving an entirely different type of misconduct—an attempt to improperly influence a trial witness.<sup>65</sup> As such, the Ninth Circuit found the conduct in question to be different from that proscribed by the previous two orders.<sup>66</sup> The only possible link between the three incidents, according to the appellate court, was that the district judge had found all three to be improper.<sup>67</sup>

As a result, the Ninth Circuit did not frame the issue as whether the government's conduct was improper.<sup>68</sup> Instead, the circuit court examined whether the first two orders provided clear warning to the government that the district court would dismiss the case if the DOJ attempted to influence a witness before trial.<sup>69</sup> In support of this concept

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part, vacated in part, 792 F.2d 906 (9th Cir. 1986) (stating that the government's statements to neutral witnesses were clearly misconduct and violated the court's two previous orders).

59. *NME II*, 792 F.2d at 911; see also *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 947 (9th Cir. 1976).

60. *NME II*, 792 F.2d at 911.

61. *United States v. National Medical Enters.*, 792 F.2d 906, 911 (9th Cir. 1986).

62. *Id.* The government initially argued that Judge Coyle had clearly erred in finding that a DOJ attorney had made comments that National Medical "paid off" individuals in order to complete the acquisition. The Ninth Circuit, however, after reviewing the record, declined to hold that the district court's finding was clearly erroneous. *Id.*

63. *Id.* at 911-12.

64. *Id.* at 912.

65. *Id.* The court of appeals viewed these most recent government improprieties as an entirely new type of misconduct because National Medical had not claimed an inability to conduct discovery as a result. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

of required notice, the court cited *In re Rubin*.<sup>70</sup> In *Rubin*, the bankruptcy court struck an answer to a petition for involuntary bankruptcy as a sanction for the debtor's failure to comply with discovery orders.<sup>71</sup> Reviewing the order to strike the answer, the *Rubin* court stated that a party must be given notice by the trial court that continued noncompliance will result in a severe sanction.<sup>72</sup> The Ninth Circuit reversed the order striking the answer because no warning had been afforded the debtor in *Rubin*.<sup>73</sup>

The *NME II* court analogized to the *Rubin* case and found there had been insufficient warning to the government that their conduct regarding the trial witness would violate the protective orders.<sup>74</sup> Therefore, the Ninth Circuit concluded that without adequate notice to the government, the misconduct underlying the third order did not violate the first two orders.<sup>75</sup>

### 1. Power of the court to dismiss

By analyzing the dismissal order separately from the first two orders, the *NME II* court refused to allow the district court to rely on Federal Rules of Civil Procedure 37(b)<sup>76</sup> or 41(b).<sup>77</sup> These Rules allow a court to dismiss an action where a party has violated a court order.<sup>78</sup> The circuit court recognized, however, that a district court has the inherent power to dismiss an action "to ensure the orderly administration of justice and the integrity of [its] orders."<sup>79</sup> The appellate court cau-

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70. 769 F.2d 611 (9th Cir. 1985).

71. *Id.* at 613.

72. *Id.* at 616-17.

73. *Id.* at 619.

74. *NME II*, 792 F.2d at 912.

75. *Id.* The appellate court found unpersuasive National Medical's argument that the district court could rely on Federal Rules of Civil Procedure 37(b) or 41(b) to uphold the dismissal and instead ruled that the third order must be treated separately from the first two orders. *Id.*

76. *Id.* Federal Rule of Civil Procedure 37(b) contains language empowering district courts to impose sanctions, including dismissal, against a party who fails to comply with a court discovery order. FED. R. CIV. P. 37(b)(2)(C); see also FED. R. CIV. P. 37 advisory committee's note.

77. *NME II*, 792 F.2d at 912. Federal Rule of Civil Procedure 41(b) provides that a court may dismiss a case for failure to comply with a court order. FED. R. CIV. P. 41(b); see also FED. R. CIV. P. 41 advisory committee's notes.

78. *NME II*, 792 F.2d at 912.

79. *Id.* (quoting *Phoceene Sous-Marine S.A. v. U.S. Phosmarine, Inc.*, 682 F.2d 802, 806 (9th Cir. 1982)); see also *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980); *Link v. Wabash R.R.*, 370 U.S. 626, *reh'g denied*, 371 U.S. 873 (1962).

In *Fjelstad v. American Honda Motor Co.*, 762 F.2d 1334 (9th Cir. 1985), the district court relied on its inherent power to sanction conduct which did not violate either the Federal

tioned that dismissal is an extreme sanction and will only be upheld if the deceptive conduct was willful, in bad faith, or if it threatened to interfere with the rightful decision in the case.<sup>80</sup> In addition, the Ninth Circuit stated that a district court must consider the prejudice or irreparable harm done to the innocent party, in this case National Medical.<sup>81</sup>

The appellate court held that the district court had abused its discretion in dismissing the action by: (1) failing to consider lesser, alternative sanctions; (2) failing to determine the prejudicial impact of the government's conduct on National Medical; and (3) failing to weigh the public interest in the antitrust action.<sup>82</sup>

*a. alternative sanctions*

In holding that the district court had failed to consider alternative sanctions, the appellate court rejected the argument put forth by National Medical that the two prior protective orders were attempts by the district court to apply lesser sanctions. The Ninth Circuit reiterated that the district judge erred in considering the "third incident of misconduct as a continuation of the first two."<sup>83</sup> The *NME II* court cited other

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Rules of Civil Procedure or the court's discovery orders. *Id.* at 1338. The district judge imposed a judgment of liability against Honda for refusing to provide information during discovery. *Id.* The Ninth Circuit found the penalty too harsh for conduct which it viewed as not "utterly inconsistent with the orderly administration of justice." *Id.*

80. *NME II*, 792 F.2d at 912. In a case cited by the Ninth Circuit, *North Am. Watch v. Princess Ermine Jewels*, 786 F.2d 1447 (9th Cir. 1986), the appellants had initially represented that they did not have the documents requested in discovery, then later the appellants produced the documents in court. The district court determined that the appellants deliberately misled the court and dismissed the suit. The Ninth Circuit upheld the dismissal sanction because of the appellants' willful violation of the discovery order and its attempt to deceive the court and prejudice the other side. *Id.* at 1451.

The Ninth Circuit had stated in an earlier decision that willful deception to the court must relate to a matter that would interfere with a rightful decision in the case to support a sanction of dismissal. *Phoceene Sous-Marine, S.A. v. U.S. Phosmarine, Inc.*, 682 F.2d 802 (9th Cir. 1982). In *Phosmarine*, in order to delay their trial, the appellants submitted false statements, purportedly from a physician. While clearly a willful deception of the court, the Ninth Circuit ruled that the conduct was unrelated to the merits of the patent infringement suit and held that dismissal was improper. *Id.* at 806.

81. *NME II*, 792 F.2d at 913.

82. *Id.* at 914. The Ninth Circuit found that Judge Coyle applied the incorrect legal standard in relying on the first two orders as notice of the possible dismissal of the action. The court was quick to point out, however, that it did not condone the behavior of government counsel. *Id.* The *NME II* court stated that the first two incidents of misconduct could only be considered on the question of deceptive intent. *Id.* at 913.

83. *Id.* The court stated that government counsel's improper remarks to the neutral third party witness, Ms. Yuter, were different in kind from the improper discovery tactics involved in the first two orders. *Id.* Therefore, the first two incidents could not be considered as attempts at imposing lesser sanctions. *Id.*

Ninth Circuit cases for the proposition that the district court had abused its discretion by failing to consider lesser sanctions before granting dismissal.<sup>84</sup>

Following this precedent, the Ninth Circuit stated that the two prior incidents of DOJ misconduct were relevant only to the issues of deceptive intent on the part of the government and whether such conduct was inconsistent with the orderly administration of justice.<sup>85</sup> The circuit court determined that the two prior incidents of misconduct could have been used by the district court in determining the severity of the sanction to impose. However, the Ninth Circuit would not allow the two prior orders to be considered as an attempt by the district court to impose lesser sanctions.<sup>86</sup> Therefore, Judge Coyle could not rely on these incidents "alone as a fulcrum to elevate the final incident of misconduct to a level that would allow dismissal of the action with prejudice."<sup>87</sup>

*b. prejudice to National Medical*

The circuit court also found that Judge Coyle had erred in not adequately considering whether National Medical had been prejudiced as a result of the government's conduct. While acknowledging that a showing of actual harm or prejudice was not a prerequisite to dismissal,<sup>88</sup> the appellate court stated that Judge Coyle should have examined the possible prejudice to National Medical before dismissing the suit.<sup>89</sup>

The *NME II* court again cited Ninth Circuit precedent to support

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84. *Id.* at 913-14. In *In re Hill*, 775 F.2d 1385 (9th Cir. 1985), the bankruptcy court dismissed an action because the bankruptcy trustee failed to timely file his brief with the court. Reversing the district court, the Ninth Circuit determined that when the deficiency is in the management of the litigation, the court must view alternative sanctions which achieve a penalty in conformity with fault. *Id.* at 1387.

The Ninth Circuit undertook a similar analysis in *United Artists Corp. v. La Cage Aux Folles, Inc.*, 771 F.2d 1265 (9th Cir. 1985). There the district court was faced with a litigant who continually refused to comply with discovery orders, even after the court imposed monetary sanctions. *Id.* at 1267. The Ninth Circuit held that because the trial court had tried to impose a lesser, monetary sanction, the lower court had not abused its discretion in dismissing the action. *Id.* at 1271.

*Raiford v. Pounds*, 640 F.2d 944 (9th Cir. 1981), the last case relied on by the Ninth Circuit in *NME II* for this rule, involved a dismissal for failure to prosecute. The trial court in *Raiford* dismissed the action when the plaintiff failed to file a timely pretrial order. The Ninth Circuit reversed, stating that because this case was "still young," the trial court had abused its discretion by not considering lesser sanctions. *Id.* at 945.

85. *NME II*, 792 F.2d at 913. See *supra* notes 79-80 for a discussion of the inherent power of the courts.

86. *NME II*, 792 F.2d at 913.

87. *Id.*

88. *Id.*

89. *Id.*

its requirement that the district court consider prejudice to National Medical.<sup>90</sup> The court stressed, however, that the district judge erred in failing to consider this factor prior to ordering dismissal.<sup>91</sup>

*c. public interest*

In addition, the court of appeals concluded that the district court should also have weighed public interest concerns before dismissing the case.<sup>92</sup> The Ninth Circuit required that the district court consider the effect of dismissal for government counsel's misconduct, where the goal of the lawsuit was to enforce laws which benefit society as a whole.<sup>93</sup> National Medical argued that the district court had been aware of and had considered the public interest involved in the case.<sup>94</sup> National Medical also contended that Judge Coyle had recognized the public interest by describing the *NME II* case as one of "great importance."<sup>95</sup> The appellate court rejected this argument.<sup>96</sup>

The *NME II* court stated that some of the factors enumerated by the court in *Henderson v. Duncan*<sup>97</sup> should have been weighed by the district court before it dismissed the *NME II* case.<sup>98</sup> These public interest con-

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90. One case cited by the *NME II* court, *Henderson v. Duncan*, 779 F.2d 1421 (9th Cir. 1986), involved a dismissal for failure to comply with a court-imposed discovery schedule. In *Henderson*, the Ninth Circuit held that where the integrity of the district court was involved, and where the party had clear warnings of the consequences of his behavior, lack of actual prejudice to the defendant was not determinative. *Id.* at 1425. There the district court was correct in dismissing the case even without an express finding of prejudice.

In another case cited by the Ninth Circuit, *Schmidt v. Herrmann*, 614 F.2d 1221 (9th Cir. 1980), the district court twice struck the plaintiffs' complaint because it was unintelligible. *Id.* at 1224. Affirming the dismissal in *Schmidt*, the Ninth Circuit stated that a showing of prejudice was not necessary as long as the court had considered the possible harm to the other party. *Id.* In fact, in *Schmidt*, the Ninth Circuit *inferred* prejudice to the defendant because of the confusing pleadings. *Id.* The *NME II* court also cited *North American Watch* where the court found that the party's willful violations of the court's orders prejudiced North American's ability to prepare for trial. *Id.* at 1451. Having found actual prejudice, the Ninth Circuit in *North American Watch* ruled that dismissal was proper. *Id.* For a further discussion of Ninth Circuit precedent regarding prejudice, see *infra* note 160 and accompanying text.

91. *NME II*, 792 F.2d at 913.

92. *Id.*

93. *Id.*

94. *Id.*

95. *United States v. National Medical Enters.*, 107 F.R.D. 628, 632 (E.D. Cal. 1985). National Medical stressed that implicit in this language was the court's recognition that the substantive rights involved in this case were not those of an ordinary lawsuit. Appellees' Petition for Rehearing and Suggestion for Rehearing En Banc at 11, *United States v. National Medical Enters.*, 792 F.2d 906 (9th Cir. 1986) (No. 85-2485) [hereinafter Appellees' Rehearing Brief].

96. *NME II*, 792 F.2d at 913.

97. 779 F.2d 1421, 1423 (9th Cir. 1986).

98. *NME II*, 792 F.2d at 913.

cerns include the interest in quickly resolving litigation and the interest in deciding a case on its merits.<sup>99</sup> The Ninth Circuit stated that the district court in *NME II* erred by failing to consider any of these public interest concerns.<sup>100</sup>

*d. government attorney*

Finally, the Ninth Circuit refused to accept National Medical's contention that government attorneys should be held to a more demanding standard of conduct than private attorneys. The circuit court, while acknowledging that the "status of the government attorney is unique," refused to extend that observation to mean that "government attorneys should be held to a different standard of compliance or care for dismissal purposes."<sup>101</sup>

In support of this conclusion, the court of appeals distinguished its earlier decision in *United States v. Sumitomo Marine & Fire Insurance Co.*<sup>102</sup> In *Sumitomo*, the court had emphasized that harsh sanctions were more appropriate where the disobedient party was the government because those charged with enforcing the law should also set an example by obeying the law.<sup>103</sup> National Medical stressed that the reasoning used in *Sumitomo* also applied to the *NME II* case. The circuit court, however, stated that *Sumitomo* did not support the proposition that a government attorney should be held to a different standard than that required of a private attorney.<sup>104</sup> The Ninth Circuit declared that because the district judge had not relied on such a special standard as the basis of his ruling, the court need not address the issue on review.<sup>105</sup>

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99. *Id.*

100. *Id.*

101. *Id.*

102. 617 F.2d 1365 (9th Cir. 1980). The *Sumitomo* case arose out of a collision at sea in which the government brought a suit for damages. During discovery, the government failed to answer interrogatories, even after ordered to do so by the court. *Id.* at 1367. The government attorneys exhibited, in the words of the court, a "callous disregard" for their court-ordered discovery obligations, thereby justifying an order imposing monetary sanctions personally against the government counsel. *Id.* The government did subsequently answer some interrogatories, but refused to provide any information regarding damages. *Id.* at 1368. When the district court ordered that the government supply the documents relevant to damages, the government failed to comply. *Id.* Finally, the district court ordered that the government be precluded from introducing any evidence at trial regarding its damages. *Id.*

The Ninth Circuit recognized that such a preclusion order was tantamount to dismissal. *Id.* The court pointed out that one purpose of imposing sanctions was to deter flagrant disregard for court discovery orders. *Id.* at 1370. Further, the court stated that harsh measures were particularly appropriate when the disobedient party was the government. *Id.*

103. *Id.*

104. See *infra* notes 181-86 and accompanying text.

105. *NME II*, 792 F.2d at 913-14.

The appellate court concluded its opinion by holding that the district court had abused its discretion in dismissing the action.<sup>106</sup> The Ninth Circuit vacated the dismissal and remanded the case to the district judge to consider alternative sanctions, to examine the prejudice to National Medical and to weigh the public interest involved.<sup>107</sup>

#### IV. ANALYSIS

##### A. *Basis of the Decision*

The *NME II* opinion evidences the lengths to which a court will often go to uphold the conduct of government attorneys. Unfortunately, because this is such a result-oriented decision, one may only speculate as to the actual rationale used by the court.

##### 1. The pre/post trial distinction.

In reviewing the propriety of the dismissal order, the Ninth Circuit emphasized an arbitrary distinction between discovery misconduct and the same type of conduct recurring once trial had begun.<sup>108</sup> The *NME II* opinion notably lacks any precedent supporting the proposition that attempting to influence witnesses during discovery should be analyzed separately from attempting to influence witnesses during trial. This fortuitous event—that the DOJ acted one week after trial began—is the pivotal, although camouflaged, component of the court's decision. The result of such a forced distinction is unsound. Government attorneys are virtually encouraged to engage in misconduct during discovery, confident that the slate will be wiped clean once trial begins. The Ninth Circuit's use of such artificial pre/post trial categories served as a means to obscure the acts of the government counsel.<sup>109</sup>

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106. *Id.* at 914.

107. *Id.* Another issue involved in the *NME II* case that will not be discussed in this Note concerns the following: The government had requested that on remand the case be assigned to a different judge. The Ninth Circuit concluded that the appearance of justice would not be injured by remanding the case to the same judge. *Id.* Pointing out the substantial duplication of efforts which would be involved, the court denied the government's request and ruled that Judge Coyle could preside in a fair manner. *Id.*

108. *United States v. National Medical Enters.*, 792 F.2d 906, 912 (9th Cir. 1986).

109. An abuse of discretion standard, like that used in *NME II*, affords a great deal of deference to the observations of the district judge. *See supra* note 49. Using the abuse of discretion standard, the Ninth Circuit noted that it would not reverse the district court's ruling unless it had a "definite and firm conviction that the district court made a clear error of judgment." *NME II*, 792 F.2d at 910.

In applying an abuse of discretion standard to review the decision of the district court, the appellate court acknowledged that a trial judge's finding of noncompliance with one of its orders is given considerable weight on appeal. *Id.* at 912. Also, a district court's ruling on the



Judge Coyle, however, chose to examine the government's conduct

conduct of counsel is an area regarded as an exclusive specialty of the district judge. Friendly, *supra* note 49, at 760; *see also* Skogen v. Dow Chem. Co., 375 F.2d 692, 704-05 (8th Cir. 1967). Therefore, determinations by a district court involving the conduct of counsel appearing before it are afforded great deference on appeal. *See, e.g.,* United Artists Corp. v. La Cage Aux Folles, Inc., 771 F.2d 1265 (9th Cir. 1985).

The Ninth Circuit had stated in an earlier case that "[a] rule of thumb as to the meaning of the abuse of discretion standard is that the trial court's order should not be disturbed unless there is 'a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.'" Schmidt v. Herrmann, 614 F.2d 1221, 1224 (9th Cir. 1980) (citations omitted) (within court's discretion to dismiss complaint for failure to comply with court order requiring an amended complaint be filed in accordance with Federal Rules of Civil Procedure).

The Supreme Court has stated that whether the appellate court would have imposed the sanction in the first place is irrelevant. National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 642, *reh'g denied*, 429 U.S. 874 (1976) (per curiam). Rather, the proper inquiry is whether the trial court's decision was clearly erroneous and whether the trial court abused its discretion by its acts. Chism v. National Heritage Life Ins. Co., 637 F.2d 1328, 1331 (9th Cir. 1981) (affirming district court's dismissal with prejudice for failure to comply with discovery orders because trial court is in much better position to supervise conduct of litigants and to determine appropriate sanctions for abusive conduct); *see also* La Cage Aux Folles, 771 F.2d at 1271. "We may have been inclined to impose an additional fine or other sanction rather than granting dismissal following [plaintiff's] continuing noncompliance with the discovery orders, but we conclude that the district court did not abuse its discretion in granting dismissal." *Id.*

In applying an abuse of discretion standard to a trial court's exercise of discretion in dismissing an action, the Ninth Circuit had cautioned, in an earlier case, that

we must remember that the district court, not this court, exercises the discretion. As the Supreme Court has stated, [t]he question . . . is not whether . . . the Court of Appeals, would as an original matter have dismissed the action,' . . . . The rule is a sound one because the district court before which a case is litigated is in a far better position than a court of appeals to supervise the conduct of the litigants and to determine appropriate sanctions for abusive conduct.

*Chism*, 637 F.2d at 1331 (citations omitted). Thus, much deference is afforded the trial court by the appellate court before an abuse of discretion is found. In *NME I*, Judge Coyle was so convinced that his determination was correct that he dismissed the case from the bench after the evidentiary hearing, rather than taking the matter under submission for additional review. United States v. National Medical Enters., 107 F.R.D. 628, 629 (E.D. Cal. 1985), *aff'd in part, vacated in part*, 792 F.2d 906 (9th Cir. 1986).

The *NME II* court relied on *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943 (9th Cir. 1976), to support this idea of appellate deference. In *Van Bronkhorst*, the Equal Employment Opportunity Commission's suit for sex discrimination was dismissed with prejudice. The Ninth Circuit found no abuse of discretion and affirmed the trial court's dismissal with prejudice where the government litigant had failed to comply with court order. *Id.* at 952. In so holding, the court recognized that "[t]here is no question that a District Court has the power to dismiss a claim of a plaintiff with prejudice for failure to comply with an order of the court. . . . It is equally clear that the district judge's determination that his order was not complied with is entitled to considerable weight on appeal since he is in the best position to assess the circumstances." *Id.* at 947 (citations and footnotes omitted).

Furthermore, this appellate court deference to decisions of a trial court regarding the conduct of counsel is considered especially appropriate because

the [individual case] decision depends on first-hand observation or direct contact with the litigation. Only the trial judge has seen the witness or observed the jury's

by type, rather than by its time of occurrence. He found that the actions of the government attorneys implicated the integrity of the fact-finding process. As overseer of the pretrial phases of the case, he was concerned with attempts by the government to influence witnesses.<sup>110</sup>

There is little support in analogous areas of law for the circuit court's distinction of trial and discovery misconduct. For example, federal criminal statutes are applied to attempts to influence or intimidate a prospective witness without regard to whether the misconduct occurred before or after trial began.<sup>111</sup> Similarly, an unavailable witness' improperly influenced deposition testimony automatically becomes improperly influenced trial testimony despite the fact that the misconduct occurred during discovery rather than during trial.<sup>112</sup> These two situations are analogous to the *NME II* case because all involve attempts to influence witnesses during the fact-finding process. The possibility of tainting the entire trial is always present where witnesses have been influenced or intimidated.<sup>113</sup> Thus, little support appears for the court's discovery/trial

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reaction to evidence. Only the trial judge has supervised the course of litigation through discovery and pretrial, and can evaluate the diligence or procrastination of the attorneys. In those circumstances the trial court has a superior vantage point which an appellate court cannot replicate. The trial court's decision therefore merits a high degree of insulation from appellate revision.

*United States v. Criden*, 648 F.2d 814, 817-18 (3rd Cir. 1981) (abuse of discretion standard not appropriate where trial court's decision not based on first hand observation, but merely weighing of factors). However, if the reviewing court was not examining the first hand observations of the trial judge, the appellate court need not defer to the findings of the trial court. *Rosenberg*, *supra* note 49, at 646. *See, e.g., La Cage Aux Folles*, 771 F.2d at 1271; *Wyle v. R.J. Reynolds Indus.*, 709 F.2d 585 (9th Cir. 1983); *Baker v. Limber*, 647 F.2d 912 (9th Cir. 1981); *Chism*, 637 F.2d at 1331; *G-K Properties v. Redevelopment Agency*, 577 F.2d 645 (9th Cir. 1978); *Baker v. F & F Inv.*, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); *Napolitano v. Compania Sud Americana de Vapores*, 421 F.2d 382 (2d Cir. 1970).

The *NME II* court correctly described the appellate deference given the trial court's observations of conduct of counsel. The circuit court strained to not afford Judge Coyle this deference in a case involving government counsel. The Ninth Circuit in *NME II*, instead characterized the trial court's error as the inappropriate weighing of factors, thus avoiding the typical appellate deference afforded the conduct of counsel.

110. *NME I*, 107 F.R.D. at 631.

111. *E.g.*, 18 U.S.C. §§ 1503-1512 (1982); *see also United States v. Griffin*, 463 F.2d 177 (10th Cir.), *cert. denied*, 409 U.S. 988 (1972) (construing 18 U.S.C. § 1503, which proscribes "endeavors to influence, intimidate, or impede any [witness], in any court of the United States," as fully applicable to prospective witnesses in matters pending in any federal court); *United States v. Wilson*, 796 F.2d 55 (4th Cir. 1986), *cert. denied*, 107 S. Ct. 896 (1987) (attempted witness tampering could be prosecuted even if the actions were not successful); *United States v. Risken*, 788 F.2d 1361 (8th Cir.), *cert. denied*, 107 S. Ct. 329 (1986) (finding that § 1512 could apply to improper influence towards any person even if proceeding is not pending).

112. FED. R. CIV. P. 32(a)(3) (Rule provides for use of depositions at trial if deponent becomes unavailable).

113. J. TANFORD, *THE TRIAL PROCESS* 20-21 (1976).

misconduct distinction.<sup>114</sup>

The Ninth Circuit characterized the first two instances of government misconduct in *NME II* as involving "roadblocks to information during *discovery*"<sup>115</sup> while the charge underlying the dismissal order was "improper influence of a *trial* witness during an interview just before she testified."<sup>116</sup> The only link between the first two orders and the third order, according to the court, was that the district judge found the conduct underlying all of them to be improper.<sup>117</sup> In so characterizing the misconduct, the Ninth Circuit recast the issue presented as improper balancing of the relevant factors by the trial court. Thus, the court could avoid the deference usually afforded the first hand observations of the trial judge and could instead apply an objective test. Here again, the Ninth Circuit hid behind its arbitrary pre/post trial distinctions as to the precise type of government misconduct.

## 2. Due process

The *NME II* court stated that the trial court's first two orders did not give the government fair warning that further misconduct would result in dismissal.<sup>118</sup> Thus, the court concluded that due process had not been satisfied in this case. Courts have viewed due process as a flexible concept which requires "such procedural protections as the particular situation demands."<sup>119</sup> The requirements of due process are generally met if the court, before it imposes a sanction, provides the party with an opportunity to explain its actions.<sup>120</sup> The Ninth Circuit suggested that the real issue in *NME II* was not whether the conduct underlying the orders was improper, but whether the first two orders gave the government "clear notice" that the conduct found in the third order would result in dismissal of the action.<sup>121</sup>

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114. Additionally, in this situation it is appropriate for the court to examine the type of misconduct giving rise to the court orders. Attempts to influence witnesses have been viewed by other courts as particularly dangerous to the judicial process and the type of conduct which should be dealt with in the harshest of terms. See *infra* notes 382-83 and accompanying text.

115. *NME II*, 792 F.2d at 912 (emphasis added).

116. *Id.* (emphasis added).

117. *Id.* To support its holding, the Ninth Circuit stated that the district court in *NME I* could not rely on FED. R. CIV. P. 37(b) or FED. R. CIV. P. 41(b) to authorize the dismissal of the action. See *infra* note 137 and accompanying text.

118. *NME II*, 792 F.2d at 912.

119. *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

120. *Al Barnett & Son, Inc. v. Outboard Marine Corp.*, 611 F.2d 32, 36 (3d Cir. 1979).

121. *NME II*, 792 F.2d at 912; see also *Professional Seminar Consultants, Inc. v. Sino Am. Technology Exch. Council, Inc.*, 727 F.2d 1470, 1474 (9th Cir. 1984) (trial court entered order to produce particular documents or risk having certain facts established); *Rainbow Pioneer v.*

The *NME II* court cited *In re Rubin*<sup>122</sup> in support of this notice requirement.<sup>123</sup> The *Rubin* court distinguished *Fjelstad v. American Honda Motor Co.*,<sup>124</sup> a case surprisingly analogous to the *NME II* case. The *Fjelstad* trial court expressly warned the defendant that the court was considering severe sanctions for defendant's failure to file interrogatory answers.<sup>125</sup> The Ninth Circuit found the district court's entry of default judgment proper in *Fjelstad*, because the prior order of the court was not unconstitutionally vague and consequently provided sufficient notice to the parties.<sup>126</sup> The court in *Rubin* emphasized that a party must be given some indication of how it failed to comply with the court's order.<sup>127</sup>

Contrary to the opinion of the Ninth Circuit in *NME II*, Judge Coyle had threatened to dismiss the case if the DOJ misconduct continued.<sup>128</sup> Additionally, the DOJ attorneys were afforded an opportunity for a full evidentiary hearing on the misconduct in question before the case was dismissed.<sup>129</sup> Thus, under the *Fjelstad* rationale, the DOJ had been given adequate notice and a full opportunity to be heard.

Recently, the Ninth Circuit stated that in order to satisfy due process, a court imposed sanction must (1) be just; and (2) specifically relate to the particular claim at issue in the discovery order.<sup>130</sup> Further, when a court imposes sanctions that interfere with a party's claim (e.g., dismissal) due process concerns are not met if the sanctions are imposed merely for punishment and not because the misconduct threatens to interfere with the rightful decision in the case.<sup>131</sup> This control requirement can be satisfied by any act within the control of the party.<sup>132</sup>

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Hawaii-Nevada Inv. Corp., 711 F.2d 902, 904 (9th Cir. 1983) (order to respond to interrogatories and to produce documents contained warning that failure to comply would result in default); *United States v. Sumitomo Marine & Fire Ins. Co.*, 617 F.2d 1365, 1367 (9th Cir. 1980) (court warned that unless interrogatories were answered by certain date, complaint would be dismissed).

122. 769 F.2d 611 (9th Cir. 1985). See *supra* notes 70-73 and accompanying text for a discussion of the facts of *Rubin*.

123. *Id.* at 619; see *supra* notes 70-73 and accompanying text.

124. 762 F.2d 1334 (9th Cir. 1985).

125. *Id.* at 1340.

126. *Id.*

127. *Rubin*, 769 F.2d at 616.

128. *NME I*, 107 F.R.D. at 631.

129. *Id.* Generally some form of notice and hearing, whether formal or informal, is required before imposing a sanction. *Fuentes v. Shevin*, 407 U.S. 67, 90 (1972); see also *Fruin, When Lawyers Bend the Court Out of Shape*, JUDGES' J., Fall 1982, at 14, 18-19.

130. *Professional Seminar*, 727 F.2d at 1474.

131. *Wyle*, 709 F.2d at 591; see also *Fjelstad*, 762 F.2d at 1340; *Munoz-Santana v. I.N.S.*, 742 F.2d 561, 564 (9th Cir. 1984).

132. *Societe Internationale Pour Participations Indus. et Commerciales v. Rogers*, 357 U.S.

In *NME II*, the misconduct of the government attorneys was within their control because it consisted of comments made by the attorneys. In fact, the conduct of the DOJ is a perfect example of the willful noncompliance discussed by the Ninth Circuit in other cases.<sup>133</sup> A court need not find that the failure to comply with one of its orders was motivated by a desire to impede the administration of justice.<sup>134</sup>

The repeated attempts by the DOJ to block discovery or to influence witnesses threatened to interfere with the proper decision in the *NME II* case. Moreover, Judge Coyle afforded the government notice of the possibility of dismissal and a full opportunity to explain their actions.<sup>135</sup> All the requirements of due process were complied with by the district court in *NME II*.

### 3. Authority for dismissal

Deciding that the first two orders did not give sufficient warning of dismissal, the *NME II* court held that Federal Rules of Civil Procedure 37 and 41 were not authority for dismissal of the suit.<sup>136</sup> The court of appeals recognized that a district court has an inherent power to dismiss an action to ensure the integrity of its orders and the orderly administration of justice.<sup>137</sup> The Ninth Circuit, however, found that the trial

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197 (1958). In *Rogers*, the plaintiff was unable to produce discovery documents because its compliance would violate Swiss banking laws. *Id.* at 211. The Court distinguished between a party's conscious decision not to produce documents and a party's inability to comply because of circumstances beyond his control. *Id.* The Court found dismissal improper where noncompliance was not willful. *Id.* at 212. Even noncompliance with a court order alone may be sufficient to establish "fault." *Cf. Munoz-Santana*, 742 F.2d at 564.

133. *E.g., Rogers*, 357 U.S. at 211-12; *see supra* note 132 and accompanying text.

134. *Damiani v. Rhode Island Hosp.*, 93 F.R.D. 848, 851 (D.R.I. 1982), *aff'd*, 704 F.2d 12 (1st Cir. 1983).

135. *NME II* also satisfies some additional factors of the due process analysis, not discussed by the appellate court. The United States Supreme Court has declared that due process considerations limit the use of sanctions as a punishment. In *Hammond Packing Co. v. Arkansas*, 212 U.S. 322 (1909), the Court found that due process rights were protected where a default judgment was entered against a defendant who refused to produce documents pursuant to a court order. *Id.* at 351. Reasoning that the default was not "mere punishment," the *Hammond* Court stated that Hammond had not shown the reasons for its failure to comply with the court order. *Id.* at 350-51. Under this fairness rationale set forth by the Court, a party who had failed to comply with a court order is treated as if he had chosen to abandon his claim or defense. Comment, *supra* note 4, at 1041-42. Similarly, in *NME II*, the dismissal was not mere punishment, but related to government counsel's violations of the district court's orders.

136. *NME II*, 792 F.2d at 912.

137. *Id.* (quoting *Phoceene Sous-Marine S.A. v. U.S. Phosmarine, Inc.*, 682 F.2d 802, 806 (9th Cir. 1982)). The United States Supreme Court recognized that the inherent power of a court is "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link v. Wabash R.R.*, 370 U.S. 626, 630-31, *reh'g denied*, 371 U.S. 873 (1962). In *Link*, the

court's dismissal in this case constituted an abuse of discretion.<sup>138</sup>

The inherent powers of the federal courts have been described as those powers "necessary to the exercise of all others."<sup>139</sup> Before relying on their inherent power to dismiss a case, courts generally undergo a two-prong analysis.<sup>140</sup> First, the court must decide if any sanction at all is appropriate. That is, whether the alleged misconduct involved actions undertaken in bad faith or conduct inconsistent with the orderly administration of justice.<sup>141</sup> Second, the court must examine whether the misconduct related to the matters in controversy in a way that interfered with the rightful decision in the case.<sup>142</sup> This second prong incorporates the due process concerns that dismissal be used only in extreme circumstances.<sup>143</sup>

In setting forth the test in *NME II*, the Ninth Circuit ignored both prongs. The court not only overlooked whether a sanction was appropriate in the case, but also failed to examine whether the DOJ conduct would have interfered with the rightful decision in the case. The court instead found that the district court had erred by not considering a three-part test.<sup>144</sup>

#### 4. Test proposed by the court

The court of appeals found that the district court abused its discretion by not considering lesser sanctions, by not determining the prejudicial effect of the government's conduct prior to dismissal and by not weighing the public interest in an antitrust action.<sup>145</sup> However, each of

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Court upheld the use of the inherent power of the lower court to dismiss an action sua sponte for failure to prosecute. *Id.* at 633. Some years later, in *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980), the Court again affirmed that the Federal Rules of Civil Procedure do not limit a court's inherent power "to levy sanctions in response to abusive litigation practices." *Id.* at 765. The Ninth Circuit has adopted the rationale of *Link* and *Piper* and has found that "[i]t is firmly established that the courts have inherent power to dismiss an action or enter a default judgment to ensure the orderly administration of justice and the integrity of their orders." *Phosmarine*, 682 F.2d at 806 (citations omitted); accord *Landis v. North Am. Co.*, 299 U.S. 248 (1936); *Fendler v. Westgate-California Corp.*, 527 F.2d 1168 (9th Cir. 1975); *O'Brien v. Sinatra*, 315 F.2d 637 (9th Cir. 1963).

138. See *supra* notes 49 & 109 and accompanying text for a discussion of the standard of review.

139. *Roadway Express*, 447 U.S. at 764-65 (citations omitted).

140. *Fjelstad*, 762 F.2d at 1338.

141. *Id.*

142. See *Wyle*, 709 F.2d at 589.

143. *Id.*; see *North Am. Watch Corp. v. Princess Ermine Jewels*, 786 F.2d 1447, 1451 (9th Cir. 1986); *Henderson v. Duncan*, 779 F.2d 1421, 1423 (9th Cir. 1986); *Fjelstad*, 762 F.2d at 1338; *Wyle*, 709 F.2d at 589; see also *supra* note 80 and accompanying text.

144. *NME II*, 792 F.2d at 913.

145. *Id.*

these required factors were present in the trial court record. This result in *NME II* indicates the apparent lengths to which a court will go to uphold the actions of government counsel.

*a. alternative sanctions*

The Ninth Circuit first stated that Judge Coyle had erred by failing to consider alternatives to dismissing the case.<sup>146</sup> The requirement that a trial court consider alternative sanctions prior to dismissal ensures that the sanction selected by the court will be the most effective in bringing about the desired result.<sup>147</sup> National Medical argued that the two earlier orders were attempts by the district court to impose sanctions less drastic than dismissal.<sup>148</sup> Responding that the case was dismissed for a different kind of misconduct, the circuit court held that the two earlier orders were not attempts to impose lesser sanctions.<sup>149</sup>

National Medical stressed that the record below indicated that the district judge had considered and rejected other lesser sanctions at the evidentiary hearing prior to dismissal.<sup>150</sup> In fact, at that hearing, the district judge asked government counsel what sanctions they would recommend if the court granted the defendants' motion.<sup>151</sup> None of the sanctions suggested by the government, in light of its repeated pattern of misconduct, provided Judge Coyle with a suitable alternative to dismissal.<sup>152</sup>

Having raised the issue of alternative sanctions sua sponte, a district court need not exhaust all possible sanctions before dismissing the case.<sup>153</sup> A district judge is only required to explore meaningful alterna-

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146. *Id.*

147. *United States v. United Mine Workers of Am.*, 330 U.S. 258, 303-04 (1947).

148. *NME II*, 792 F.2d at 913.

149. *Id.*

150. *Id.*

151. Appellees' Rehearing Brief, *supra* note 95, at 8 (quoting Record at 1065).

152. *Id.* at 9 (quoting Record at 1075-76). Government counsel suggested that instead of dismissing the case, the court should impose formal guidelines on DOJ contact with witnesses, exclude particular government attorneys from participating in the trial or require that the senior government attorneys more closely supervise the junior attorneys. *Id.* National Medical analogized this last DOJ suggestion to "putting the wolves in to guard the chickens." Appellees' Brief, *supra* note 31, at 45 (quoting Record at 1081).

153. *Von Poppenheim v. Portland Boxing & Wrestling Comm'n*, 442 F.2d 1047, 1053-54 (9th Cir. 1971), *cert. denied*, 404 U.S. 1039 (1972), *reh'g. denied*, 405 U.S. 999 (1973). The court in *Von Poppenheim* stated that:

There are of course a wide variety of other sanctions short of dismissal that are available. The district judge, however, need not exhaust them all before finally dismissing a case. The exercise of his discretion to dismiss requires only that possible and meaningful alternatives be reasonably explored, bearing in mind the drastic foreclosure of rights that dismissal effects.

tives.<sup>154</sup> The record in *NME II* contained evidence that the district court had considered lesser sanctions prior to dismissal. The district court had thus acted properly in examining and rejecting alternative sanctions before dismissing the government's case.

*b. prejudicial impact*

The Ninth Circuit also stated that "the district court refused to consider if National Medical had suffered any prejudice as a result of the government's conduct."<sup>155</sup> Although the district court made no findings of prejudice to National Medical, it is evident from the dismissal order that the district court had considered the possible prejudice to National Medical resulting from the government's misconduct.<sup>156</sup> The order stated:

The defendants have and are faced with repeated attempts to improperly influence witnesses in giving testimony in a matter of great importance. While the government argues that there has been no showing that the attempts were successful, *such is no longer the issue*. Government's counsel will not be given free rein to attempt to influence witnesses and if they happen to be caught where the witness has in fact been influenced, only then will the court assure that such activities will not continue.<sup>157</sup>

The language of the order indicates that the district court was aware of sufficient government misconduct so that a showing of prejudice was no longer required.<sup>158</sup> Judge Coyle's reluctance to dismiss the action at the time he issued the second protective order, because "there ha[d] been no

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*Id.* at 1053-54 (footnote omitted); see also *Anderson v. Air West, Inc.*, 542 F.2d 522 (9th Cir. 1976).

154. See *Nevijel v. North Coast Life Ins. Co.*, 651 F.2d 671 (9th Cir. 1981) (where district court explored reasonable alternative sanctions, dismissal with prejudice for failure to comply with Federal Rules of Civil Procedure held not an abuse of discretion). But see *Tolbert v. Leighton*, 623 F.2d 585 (9th Cir. 1980) (where only evidence of dilatoriness was party's failure to attend pretrial conference, abuse of discretion to dismiss case for failure to prosecute without first considering less drastic sanctions).

155. *NME II*, 792 F.2d at 913.

156. The district court's findings are generally to be liberally construed to "uphold, rather than defeat [the] judgment." *Wells Benz, Inc. v. United States*, 333 F.2d 89, 92 (9th Cir. 1964) (quoting *Clyde Equip. Co. v. Fiorito*, 16 F.2d 106, 109 (9th Cir. 1926)). Furthermore, there is no requirement that the trial court commit its consideration of alternative, lesser sanctions to writing. See *Ash v. Cvetkov*, 739 F.2d 493, 496 (9th Cir. 1984). Thus, the oral examination of alternative sanctions by Judge Coyle in *NME I* was proper and satisfied the Ninth Circuit's requirement.

157. *NME I*, 107 F.R.D. at 632 (emphasis added).

158. In fact, Judge Coyle believed, when he issued his second order, there had been a sufficient violation of the intent of the first protective order to warrant dismissal. May 21, 1985 Order, *supra* note 35, at 4.



showing . . . of any actual influence of any of the witnesses," further supports this conclusion.<sup>159</sup> By ultimately dismissing the case, the district court was satisfied that the government's misconduct had exceeded the level that the district court would tolerate.

Moreover, the Ninth Circuit itself recognized in *NME II* that "a showing of prejudice or irreparable harm" was not required prior to dismissal. The relevant factor on review, instead, was whether the court had *considered* the issue of prejudice prior to dismissal.<sup>160</sup> The district court in *NME II* considered the prejudice to National Medical before

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159. *Id.* at 4-5. The court requested that National Medical "bring conduct of the type set forth [in the second order] to the court's attention." *Id.*

160. The cases cited by the Ninth Circuit in *NME II* support the requirement that prejudice need not actually be proven. For example, in *Henderson v. Duncan*, 779 F.2d 1421 (9th Cir. 1986), the Ninth Circuit declared that lack of prejudice to defendants was not determinative where the integrity of court orders was involved. *Id.* at 1425. The court in *Henderson* noted that "although no specific showing of prejudice to defendants is made, the integrity of the district court is involved . . . [and] we cannot find that a lack of prejudice to defendants is determinative." *Id.* In *Henderson*, the district court warned the plaintiff four times that his dilatory preparation would not be tolerated. The court examined: (1) the policy favoring litigation on the merits; (2) whether prejudice was shown; and (3) whether less severe sanctions were considered. *Id.* at 1423. Because the *Henderson* case was a dismissal for failure to prosecute, the circuit court also analyzed the district court's need to manage its docket, and the court's interest in expeditiously resolving litigation. *Id.* The *Henderson* court emphasized that the appellate court should not view the conduct in a vacuum. Thus, the Ninth Circuit held in *Henderson* that a showing of prejudice was not necessary prior to dismissal. *Id.* at 1424.

The *Henderson* court distinguished *Mir v. Fosburg*, 706 F.2d 916 (9th Cir. 1983), where the plaintiff had failed to file any documents with the court even though they had been served on defendants. The Ninth Circuit ruled that it was error to dismiss the case without evidence of the trial court considering lesser sanctions or a showing of prejudice to defendants. *Id.* at 918-19. The *Henderson* court noted, however, that the *Mir* case was actually reversed on due process grounds because the plaintiff in *Mir* had received no warnings prior to dismissal of his case. *Henderson*, 779 F.2d at 1425.

The *Henderson* court approvingly cited *Ash v. Cvetkov*, 739 F.2d 493 (9th Cir. 1984). In *Ash*, the Ninth Circuit clarified that a party need not show actual prejudice, but rather must show that the trial court balanced the various factors. *Id.* at 496. The court in *Henderson* relied on *Ash* in stating that the district judge was in the best position to determine the effects of the party's misconduct and to sanction accordingly. *Henderson*, 779 F.2d at 1424.

The court in *Raiford v. Pounds* used a similar analysis. 640 F.2d 944 (9th Cir. 1981) (*per curiam*). In *Raiford*, the court determined that the trial court abused its discretion when it dismissed an action where neither prejudice had been shown nor alternative sanctions had been considered. *Id.* at 945. Similarly, the Ninth Circuit was prepared to infer prejudice, in several other cases, to uphold a harsh sanction. *See, e.g., Rubin*, 769 F.2d at 619 (although finding of prejudice not determinative where party affirmatively stated that it was ready for trial in spite of the misconduct, dismissal was improper because party had no warning that court would dismiss); *Wyle*, 709 F.2d at 589 (irreparable harm to adverse party merely one factor that should be weighed by trial court in determining proper sanction); *Sumitomo*, 617 F.2d at 1370 (party's delay for eighteen months in providing court ordered discovery caused "unmistakable" prejudice); *Schmidt v. Herrmann*, 614 F.2d 1221, 1224 (9th Cir. 1980) (court inferred that defendants were prejudiced by plaintiff's inability to file intelligible complaint); *States Steamship Co. v. Philippine Air Lines*, 426 F.2d 803, 804 (9th Cir. 1970) (dismissal for failure to

issuing the second order and again before issuing the dismissal order. The district court had satisfied this second factor imposed by the Ninth Circuit.

*c. public interest*

The last requirement set forth by the *NME II* court was that the district court weigh the public interest concerns in a case "benefiting the citizenry as a whole."<sup>161</sup> While focusing on the rights of society, the court did not clearly define "public interest." The court did discuss the policy favoring trial on the merits of a case and the policy against depriving a party of his day in court.<sup>162</sup> However, the court's view of what constitutes the "public interest" is much too limited. The appellate court's analysis neglected to consider the other interests of the public, in addition to litigation on the merits, that must be considered before a court may dismiss an action.

In discussing the public interest, the Ninth Circuit referred to the obvious interest of the citizenry to have the benefit of the laws.<sup>163</sup> When Congress passes laws to accomplish certain goals, a case brought to enforce those goals should not be thrown out merely because of government attorney misconduct.<sup>164</sup> The rationale set forth by the Ninth Circuit in *NME II* overlooked language from an earlier opinion that "the public interest requires not only that Court orders be obeyed but further that Governmental agencies which are charged with the enforcement of laws should set the example of compliance with Court orders."<sup>165</sup> Thus, the *NME II* court should have been concerned not just with enforcing the laws to benefit society, but also with ensuring that

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prosecute does not require specific findings regarding prejudice to defendants because law will presume injury from unreasonable delay).

161. *NME II*, 792 F.2d at 913.

162. *Id.*; see also *Fox v. Studebaker-Worthington, Inc.*, 516 F.2d 989 (8th Cir. 1975).

163. *NME II*, 792 F.2d at 913.

164. *Id.* This public interest requirement set out by the *NME II* court creates a nebulous and unworkable standard. Commentators have already criticized "public interest" as having no meaning to guide government action. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1683 (1975). However, some have recognized a public interest to have government lawyers providently manage a litigation and not waste the public's funds or time. H. SHRIVER, *THE GOVERNMENT LAWYER* 127 (1975). The "public interest" standard, in fact, may be little more than a term used to disguise the process of allocating valuable benefits. See Reich, *The Law of the Planned Society*, 75 YALE L.J. 1227, 1235-36 (1966).

165. *NME II*, 792 F.2d at 913; *Sumitomo*, 617 F.2d at 1370 (quoting *Perry v. Golub*, 74 F.R.D. 360, 366 (N.D. Ala. 1976)).

government officials obey the laws that they enforce.<sup>166</sup>

Further, the Ninth Circuit stated that there is a "public interest" in allowing a case to proceed to a trial on the merits whenever possible.<sup>167</sup> While this view is reflected in a number of decisions,<sup>168</sup> many courts have begun to recognize its flaws.<sup>169</sup> When a court overlooks misconduct and allows a lawsuit to proceed to trial on the merits, the court protects the wrongdoer at the expense of the innocent party.<sup>170</sup> Public interest includes the idea that a party not profit by his noncompliance with a court order.<sup>171</sup> Consequently, a public interest also exists in protecting the innocent defendant from harassing litigation and the misconduct of others.<sup>172</sup> In *NME II*, the government's misconduct, if left unpenalized, would have punished National Medical in its preparation of the case.<sup>173</sup> Attempts to influence witnesses and block the fact-finding process can taint the entire proceeding and prevent a fair trial.

Maintaining the court's right to preserve the integrity of its orders is an equally important public policy.<sup>174</sup> The public perception of the judi-

166. The laws that a government attorney must follow may originate from congressional enactments, professional ethical canons or court orders.

167. Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 58 COLUM. L. REV. 480 (1958).

168. See, e.g., *Ash*, 739 F.2d at 496; *Mir*, 706 F.2d at 918; *Ace Novelty Co. v. Gooding Amusement Co.*, 664 F.2d 761, 763 (9th Cir. 1981); *Raiford*, 640 F.2d at 945.

169. E.g., *Henderson*, 779 F.2d at 1423; *Mir*, 706 F.2d at 918; *Van Bronkhorst*, 529 F.2d at 950; *Von Poppenheim*, 442 F.2d at 1051.

170. *Von Poppenheim*, 442 F.2d at 1053-54 (court must consider defendant's right to be free from costly and harrassing litigation).

171. *Sumitomo*, 617 F.2d at 1370.

172. *Al Barnett & Son*, 611 F.2d at 36. In *Von Poppenheim*, the court stated that:

Here the district judge made such reasonable opportunities and alternatives available to plaintiff that the dismissal was not an abuse of discretion. Somewhere along the line, the rights of the defendants to be free from costly and harrassing litigation must be considered. So too must the time and energies of our courts and the rights of would-be litigants awaiting their turns to have other matters resolved. The exact point on that line is incapable of exact definition, but we are satisfied that the present case went beyond it.

442 F.2d at 1053-54.

173. See *supra* notes 153-54 and accompanying text. This "litigation on the merits" philosophy, as adopted by the *NME II* court, has been criticized as "dull[ing] the cutting edge of sanctions intended to enforce compliance with procedural rules." Rosenberg, *supra* note 167, at 480. The judicial preoccupation with reaching the merits of every lawsuit weakens judges' ability to require that parties appearing before them play fairly or lose. *Id.* This view also ignores the numerous temptations to bend or evade the rules when preparing for and conducting a trial. *Id.* The effect of this philosophy is often to tolerate misconduct for the sake of proceeding to trial.

174. *Professional Seminar*, 727 F.2d at 1470 (balance of competing public and private interests in dismissing a case should be struck in favor of court's interest in efficiency, compliance with its orders and deterrence); see also Renfrew, *Discovery Sanctions: A Judicial Perspective*, 97 CALIF. L. REV. 264, 268 (1979).

cial system is always at issue when attorneys ignore court orders.<sup>175</sup> To protect the integrity of court orders, the Supreme Court has recognized the deterrence value of sanctions.<sup>176</sup> Thus, the public benefits when the courts are able to maintain the flow of cases and protect their own sanctity.

As structured by the appellate court, the public interest requirement would seldom be surmounted if the government were a party to the lawsuit. Ostensibly, all acts of the government are in the public interest.<sup>177</sup> When dealing with federally employed lawyers, commentators often state that "the client is the public interest."<sup>178</sup> The activities of the government almost always benefit a large number of citizens. In essence, the court has created a standard that does not easily transfer to a private litigant because this public interest element is generally not present in private litigation.<sup>179</sup>

As stated, many public interests exist beyond those identified by the court in *NME II*. The "public interest" test constructed by the Ninth Circuit is too narrow and neglects important policy concerns. However, even if the circuit court's test is applied, the district court in *NME II* complied with the requirement that it consider the public interest.<sup>180</sup>

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175. *Chism*, 637 F.2d at 1332.

176. See *supra* note 137 and accompanying text. The United States Supreme Court in *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, *reh'g denied*, 429 U.S. 874 (1976) (per curiam), first condoned this general/specific deterrent distinction. In that case, the Court stated that the purpose of sanctions was "not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent . . . [so that] other parties to other lawsuits would . . . [not] flout other . . . orders of other district courts." 427 U.S. at 643.

177. J. Fleishman, *Keynote Address: The Pursuit of Self-Interest for the Public Good: An Ethical Paradox of Representative Democracy* (June 16-19, 1982), reprinted in THE ROSCOE POUND-AMERICAN TRIAL LAWYERS FOUNDATION, FINAL REPORT: ETHICS AND GOVERNMENT 27 (1982). Professor Fleishman analogized the role of a public official to that of a trustee of the public trust. Relying on basic trust law, he maintained that the government official is to always conduct himself for the benefit of the beneficiary, the public.

178. See, e.g., Lawry, *Who is the Client of the Federal Government Lawyer? An Analysis of the Wrong Question*, FED. B.J. Fall 1978, at 61, 64 [hereinafter Lawry I].

179. Some examples of "public interest" being a factor in a case other than a suit with the government include: private antitrust, class action and public interest cases. Several commentators, however, advocate injecting a public interest element into the conduct of all attorneys, whether public or private. See, e.g., Rauh, *The Lawyer's Obligation to the Public Interest*, reprinted in THE LAWYER'S PROFESSIONAL INDEPENDENCE (1985).

180. In *NME I*, Judge Coyle noted that the case before him was a "matter of great importance." 107 F.R.D. at 632. Implicit in that phrase is the court's recognition that the substantive issues at stake in the lawsuit were not those found in an ordinary lawsuit. *Id.*

The public interest analysis, however, as applicable to this case, raises some interesting issues. First, the government never raised this issue of "great public concern" at the district court level. See *G-K Properties v. Redevelopment Agency*, 577 F.2d 645, 648 (9th Cir. 1978)

### 5. Glaring omissions

The most remarkable feature of the *NME II* case is the cursory treatment the court gave to the fact that the misconduct was undertaken by government attorneys.<sup>181</sup> National Medical cited *United States v. Sumitomo Marine & Fire Insurance Co.*<sup>182</sup> to support its argument that a more demanding standard of conduct was warranted when misconduct was undertaken by government attorneys.<sup>183</sup> The Ninth Circuit acknowledged that the "status of the government attorney is unique," but summarily rejected any other similarity between *NME II* and *Sumitomo*.<sup>184</sup>

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("Since this objection to the dismissal was not asserted below, it may not be raised for the first time on this appeal.")

Second, and more importantly, the government had failed to take the steps necessary to preserve the trial court's ability to award the relief requested by the government. In an antitrust action, where the acquisition has already been consummated, the government typically obtains a "hold separate order." J. VON KALINOWSKI, ANTITRUST LAWS AND THE TRADE REGULATION § 15.02[2] (1987). Before issuing this type of order, the trial court requires that the government establish the prima facie merits of its case. *Id.* After accepting that proof, the court orders the defendant to take no further steps regarding the acquisition that is the subject of the antitrust suit. In so doing, the hold separate order preserves the individual identities of the various assets in question. This also allows the court to order a divestiture if it ultimately finds a violation of the antitrust laws. See *FTC v. Exxon Corp.*, 636 F.2d 1336 (D.C. Cir. 1980); *United States v. United Technologies Corp.*, 466 F. Supp. 196 (N.D.N.Y. 1979); *United States v. Acorn Engineering Co.*, Trade Cas. (CCH) ¶ 64,197 (N.D. Cal. 1981).

In this case, however, the government did not seek a "hold separate order" even though National Medical had already acquired the second hospital. Appellees' Rehearing Brief, *supra* note 95, at 12. Believing the government could not meet its burden of proof to obtain the order, National Medical refused to voluntarily hold the two hospitals separately. *Id.* Thus, the government's inaction resulted in a consummated acquisition and an irrevocable combination of services between the two hospitals. *Id.* Little harm has been done to the public interest by dismissing the *NME II* case since there is now no ultimate remedy in the case. The actions and statements of the district court indicated that it was aware of the public interests involved in the case.

181. Yet another anomaly in the *NME II* case was the Ninth Circuit's refusal to rely on any precedent from outside the circuit for the standard of government attorney conduct. In stating that "National Medical cites no precedent in this circuit that would support such a proposition," the court ignored language of other courts which have addressed the special role of the government attorney. See, e.g., *infra* note 214, and accompanying text. This statement by the circuit court is odd, not only because other jurisdictions freely rely on each other for persuasive authority, but because the Ninth Circuit, in its *Sumitomo* opinion, approvingly adopted the reasoning and language of an opinion from a district court in the First Circuit. In fact, the language quoted by the court in *Sumitomo* was: "[T]he public interest requires not only that Court orders be obeyed but further that Governmental agencies which are charged with the enforcement of laws should set the example of compliance with Court orders." *Sumitomo*, 617 F.2d at 1370 (quoting *Perry v. Golub*, 74 F.R.D. 360, 366 (N.D. Ala. 1976)).

182. 617 F.2d 1365 (9th Cir. 1980). For a discussion of the facts of *Sumitomo*, see *supra* note 102.

183. *NME II*, 792 F.2d at 913.

184. *Id.* Interestingly, Judge Wallace authored both the *Sumitomo* and *NME II* opinions.

Superficially distinguishing *Sumitomo*, the Ninth Circuit case most closely on point, the court implicitly addressed the exact issue it hoped to avoid—the proper standard by which to judge government attorney conduct. The *NME II* court stated that *Sumitomo* stood for the need for harsh sanctions against the government to punish misconduct.<sup>185</sup> Yet, the court declared that a government attorney was not to be held to a different standard for dismissal purposes.<sup>186</sup>

In *NME II*, the court deliberately distinguished between harsh sanctions for *disobeying a court order*, as in *Sumitomo*, and the standard of compliance for *dismissal purposes*, as in *NME II*. This distinction is specious at best. In *Sumitomo*, the Ninth Circuit acknowledged that precluding a party from introducing evidence could be tantamount to dismissal.<sup>187</sup>

Contradictory language in the *NME II* opinion leaves district courts with little guidance regarding the appropriate test to apply in future cases. On one hand, the Ninth Circuit held that a trial court may properly impose harsh sanctions when the government misbehaves. On the other hand, the court also stated that the trial court must not apply a different standard for compliance or dismissal purposes. This may mean that all litigants are now held to a higher standard. More likely, the court is actually holding government attorneys to a *less* demanding standard than required of private attorneys. The court accomplished this in part by requiring district courts to consider the public interest involved in a case, a concern rarely found in private litigation.<sup>188</sup>

The question regarding the proper standard to be applied to a government attorney was given little consideration by the *NME II* court. While this issue should have been dispositive of the case, the court instead formulated an artificial distinction between discovery and trial misconduct. Part of the problem faced by the *NME II* court in dealing with government attorney misconduct was that no formalized standards for civil government attorney behavior exist.<sup>189</sup> A clearly articulated stan-

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Therefore, this is not a situation where there are differing results due to different judges' understanding of the precedent.

185. *Id.*

186. *Id.*

187. *Sumitomo*, 617 F.2d at 1369.

188. See *supra* note 179.

189. Several commentators in this area have noted the special position of the government attorney and the need for increased vigilance. The government attorney is not only an officer of the court but, more importantly, a representative of the public and possesses a high public responsibility. H. SHRIVER, *supra* note 164, at 144. Our system will not tolerate the exercise of governmental power without proper procedural safeguards. L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 18 (1965). The general purpose of sanctions is to deter miscon-

dard that will be applied to the conduct of government attorneys should be formulated now.

*B. Why There Should be a Special Standard  
for a Government Attorney*

1. Historical status of the government attorney

The special position of an attorney representing the sovereign has been acknowledged throughout history.<sup>190</sup> Traditionally, both the law and the government grew out of the monarchy and the class system.<sup>191</sup> Hence, the sovereign had discretion, while his ministers had to do strictly as they were told.<sup>192</sup>

During the colonial period in this country, the colonies had their crown counsel, their solicitors and their attorneys general.<sup>193</sup> The attorneys general appeared in court on behalf of the crown, advised colonial officials, instituted suits and handled criminal cases. When the federal government was established, Congress provided in the Judiciary Act of 1789<sup>194</sup> for an attorney general to prosecute and conduct suits and to

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duct. Greater sanctions work as a greater deterrent and put attorneys on notice that they are being held to a higher standard.

190. English common law recognized a series of prerogatives, or doctrines of public policy, one of which stated the general rule that "where an act of Parliament is made for the public good, . . . the public interest should not be prejudiced by the negligence of public officers, to whose care they are confided." *See, e.g., CHITTY, LAW OF PREROGATIVES* 379 (1789).

The United States Supreme Court adopted the English common law prerogatives. *United States v. Thompson*, 98 U.S. 486, 489 (1878) (holding that public interest must be protected even "[i]n a representative government, where the people do not and cannot act in a body, where their power is delegated to others, and must of necessity be exercised by them, if exercised at all . . ."); *see also* *Guaranty Trust Co. v. United States*, 304 U.S. 126, 132 (1938); *United States v. Buford*, 28 U.S. (3 Pet.) 12 (1830). The *Thompson* Court found that when the colonies achieved independence, they had adopted the English prerogatives including the one dealing with the negligence of public officers. *Thompson*, 98 U.S. at 489; *see also* *United States v. Knight*, 39 U.S. (14 Pet.) 301, 315 (1840).

Merely because a rule was once part of the common law, however, does not prevent the courts from changing or retracting it. For instance, as Justice Holmes recognized, the common law is not static, but reflects the necessities of the time as well as the prevalent moral and political theories and public policy. O. HOLMES, *THE COMMON LAW* 32-33 (1963). Justice Holmes also pointed out that while the law reflects its past, the substance of the law corresponds to present convenience. *Id.* Similarly, Justice Cardozo noted that judges may not make and unmake laws at will. B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 66-67 (1949). Instead, he believed that a court should consider logic, history and custom in shaping the law because the welfare of society must be a court's paramount concern. *Id.* at 67. Justice Cardozo believed the most important social value was to insure that the laws were uniform and impartial. *Id.* at 112-13.

191. M. DIMOCK, *LAW AND DYNAMIC ADMINISTRATION* 129-30 (1980).

192. *Id.*

193. H. SHRIVER, *supra* note 164, at 127.

194. Act of Sept. 24, 1789, 1 Stat. 73.

advise the President and the executive branch.<sup>195</sup> The further development of the government attorney positions was slow. The first full-time Attorney General was not appointed until 1853;<sup>196</sup> the DOJ was not established until 1870.<sup>197</sup>

Even from these early times, the government attorney's role was viewed as one that balanced discretion and control.<sup>198</sup> One Attorney General described his position as "not properly *political*, but strictly *legal*; and it is my duty . . . to uphold the law, and resist all encroachments from whatever quarter of mere will or power."<sup>199</sup> In fact, in 1904, Teddy Roosevelt wrote to his Attorney General that "[o]f all the officers of the government, those in the Department of Justice should be kept most free from suspicion of improper action . . . ."<sup>200</sup>

Additionally, from the beginnings of the nation, the people have been recognized as the "sovereign."<sup>201</sup> This ideal gave rise to the basic tenets of American democracy. The people were given the power over the political branch of government through the ballot.<sup>202</sup> In the United States, the people must exert control over the activities of government. In the same way, the government must exercise restraint and discretion in its use of power, especially where the public officers are not under direct democratic control.<sup>203</sup>

## 2. Current trends

Congress and the courts have reconsidered the position of the government as a litigant in the American judicial system. Until recently, statutes specifically prohibited courts from awarding either fees or costs

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195. H. SHRIVER, *supra* note 164, at 127.

196. *Id.* at 128. Until this time, Attorneys General were expected to devote some of their time to their public duties and the rest of their time to the private practice of law. *Id.*

197. *Id.* When the DOJ was created in 1870, its purpose was to (1) ensure uniformity of opinion, to prevent conflicts from office to office, and (2) prevent parochialism in departments so that advice would not be given to bolster decisions already made. D. HOROWITZ, *THE JUROCRACY* 13 (1977).

198. H. SHRIVER, *supra* note 164, at 134-35. The Department of Justice has been described as the "barrister" of the United States government. *See, e.g.,* D. HOROWITZ, *supra* note 197, at 6.

199. H. SHRIVER, *supra* note 164, at 136 (quoting Edward Bates, Attorney General to Abraham Lincoln) (emphasis in original).

200. *Id.* at 136.

201. A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 57 (P. Bradley ed., H. Reeves trans. 1945) (in America, fact that people are sovereign is recognized by both law and custom); *THE FEDERALIST* No. 78 (A. Hamilton); *see also* Johnson, *John A. Sibley Lecture: The Role of the Judiciary with Respect to the Other Branches of Government*, 11 GA. L. REV. 455, 465 (1977).

202. W. LECKY, *DEMOCRACY AND LIBERTY* 76-77 (1896). In contrast, the English version relied on the existence of an identifiable unitary sovereign. L. JAFFE, *supra* note 189, at 197.

203. *Cf. Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 439 (1911).



against the government. In 1966, Congress repealed Federal Rule of Civil Procedure 37(f) so that the costs of litigation could be awarded against the United States under the same standards that apply to a private party.<sup>204</sup> Congress also passed a statute in 1980 to allow courts to award attorney's fees against the government.<sup>205</sup>

Similarly, Congress has increasingly eroded the sovereign immunity of the United States.<sup>206</sup> The passage of the Federal Tort Claims Act (FTCA) exemplifies this trend.<sup>207</sup> The FTCA holds the government liable for the negligence of its employees. Traditional reasons for maintaining sovereign immunity, such as protecting the stability of the government, have yielded to demands to treat citizens fairly vis-à-vis the government.<sup>208</sup>

Another step in Congress' attempts to make public bureaucracies more accountable to the American people occurred in 1976 when Congress passed the Government in the Sunshine Act (Act).<sup>209</sup> The Act declared that "the public is entitled to the fullest practicable information regarding the decision-making processes of the Federal Government."<sup>210</sup>

Judges have used these new statutes to equalize the position of the government in relation to other parties.<sup>211</sup> While commentators do not agree on the reasons for this change in the treatment of the government,<sup>212</sup> they recognize a trend to subject governmental acts to increased

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204. FED. R. CIV. P. 37(f), *repealed by* 28 U.S.C. § 2412 (1966).

205. *See* H.R. REP. NO. 96-1418, 96th Cong., 1st Sess. (Sept. 26, 1980) at 8-9, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 4953, 4986-87 [hereinafter H.R. REP.]. The Equal Access to Justice Act, 28 U.S.C. § 2412(b) (1982), allows for attorney's fees to be awarded against the federal government. Part of the express intent of this legislation was to place the federal government on "completely equal footing" with private litigants who manifest bad faith or willful disregard of court orders. H.R. REP., *supra*, at 8-9, 1980 U.S. CODE CONG. & ADMIN. NEWS at 4986-87; *see also* S.E.R., *Jobs for Progress, Inc. v. United States*, 759 F.2d 1, 7 (Fed. Cir. 1985) (clear intent of Congress will undo any traditional royal privilege that had been adopted).

206. The doctrine of sovereign immunity provides that the government may not be sued unless it has consented to be sued by waiving its immunity from suit.

207. 28 U.S.C. § 1346(b) (1982).

208. W. ZIEGLER, JR., *THE LEGAL AND POLITICAL THEORIES OF OLIVER WENDALL HOLMES* 204, 216 (1969).

209. 5 U.S.C. § 552(b)(c) (1982).

210. *Id.* at Declaration of Policy and Statement of Purpose. *See generally* Thomas, *The Courts and the Implementation of the Government in the Sunshine Act*, 37 ADMIN. L. REV. 259 (1985); GOVERNMENT IN THE SUNSHINE ACT, SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS, AND OTHER DOCUMENTS, 94th Cong., 2d Sess. (1976).

211. *See, e.g.*, H.R. REP., *supra* note 205, at 9, 1980 U.S. CODE CONG. & ADMIN. NEWS at 4987 (courts impose costs and fees against the government).

212. Many commentators believe this change in attitude mirrors the disillusionment shared by the country in discovering the criminal conduct undertaken or condoned by government officials during the Watergate incident. *See* Comment, *Removing Politics From the Justice*

scrutiny.<sup>213</sup>

### 3. Public view of government attorneys

#### *a. power wielded*

Courts have noted that the public gives special weight to the comments and actions of government counsel.<sup>214</sup> In fact, Judge Coyle, in *NME II*, expressed concern that the DOJ attorneys were not sufficiently sensitive to the fact that "requests" from government counsel carried more weight than similar requests from private lawyers.<sup>215</sup> A government attorney wields a great deal of power; more than that of an attorney in the private sector.

First, the average citizen is more likely to comply with a govern-

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*Department: Constitutional Problems with Institutional Reform*, 50 N.Y.U. L. REV. 366 (1975).

213. *Cf.* Frankfurter, *The Government Lawyer*, 19 FED. B.J. 24 (1958). Frankfurter argued that there are fundamental differences between the private practitioner and the government attorney. One such difference is that the government lawyer represents the people of the United States, not the narrow view of a particular client. *Id.* at 27. As a result, Frankfurter believed that the federal attorney had a duty to insure that "justice" was being done. *Id.* at 28. This difference between private and public attorneys requires greater vigilance on the part of the government attorney in carrying out his or her responsibilities. *Id.* at 27.

214. *See, e.g.,* Gray Panthers v. Schweiker, 716 F.2d 23, 33 (D.C. Cir. 1983) ("[t]here is, indeed, much to suggest that government counsel have a higher duty to uphold because their client is not only the agency they represent but also the public at large"); Douglas v. Donovan, 704 F.2d 1276, 1279 (D.C. Cir. 1983) (counsel's "obligation to ensure that the tribunal is aware of significant events that may bear directly on the outcome of litigation . . . is especially true for government attorneys, who have special responsibilities to both this court and the public at large"); Perry v. Golub, 74 F.R.D. 360, 366 (N.D. Ala. 1976) ("the public interest requires not only that Court orders be obeyed but further that Governmental agencies which are charged with the enforcement of laws should set the example of compliance with Court orders"); Jones v. Heckler, 583 F. Supp. 1250, 1256 n.7 (N.D. Ill. 1984) ("counsel for the United States has a special responsibility to the justice system"); Equal Employment Opportunity Comm'n v. Datapoint Corp., 457 F. Supp. 62, 65 n.10 (W.D. Tex. 1978) ("[b]ecause of the peculiar power of the government litigator, he is subject to ethical considerations beyond the ordinary litigator"); *cf.* Joseph v. Brierton, 739 F.2d 1244, 1247-48 (7th Cir. 1984) (highly prejudicial remarks by state attorney during closing argument "would not have been proper if he had been a private attorney representing private clients; but it was even worse for a state officer to act in this way. The ethics of the public's lawyers should be above reproach."). In addition, the Code of Professional Responsibility recognizes the inherent power of government attorneys and admonishes against civil government attorneys using their position or the economic power of the government to bring about unjust results. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-14 (1982).

215. May 18, 1984 Order, *supra* note 27, at 3 n.2. The court's opinion goes on to quote the declaration of a witness in the case which stated: "I agreed to cooperate with Mr. Boote's request because he was a DOJ lawyer. . . . [I]t is extremely doubtful that I would have cooperated with identical requests made by a private party. . . ." *Id.*; *see supra* note 30.

ment attorney's demands.<sup>216</sup> Judge Coyle determined that many of the DOJ requests were complied with because, according to one witness, the directives were made by the government and he assumed that these demands were "proper."<sup>217</sup> Therefore, a government attorney's power arises partly because citizens expect the government to act properly.

Second, the federally employed lawyer has tremendous resources at his command.<sup>218</sup> Congress recognized that the federal government with its "greater resources and expertise" could often coerce a party into submitting to the government's position.<sup>219</sup> When these forces are focused against a private litigant, the effects can be devastating both financially and psychologically.<sup>220</sup>

Third, a government attorney, as a public official, is a keeper of the public trust.<sup>221</sup> This concept is based on society's belief that a public official will devote himself solely to the public good.<sup>222</sup> This public trust and public reliance demands a higher level of conduct from government attorneys.<sup>223</sup> Taken together, the power, resources and public trust compel increased scrutiny with respect to the activities of government attorneys.

#### *b. conflict of interest*

Increased scrutiny of government attorneys is required not only because of the power wielded by these lawyers, but also because no mechanism is available to ensure that the interests of the "client" are being protected. Attempting to identify a government attorney's client gives rise to several problems, including conflicts of interest.<sup>224</sup> Many com-

216. See *supra* note 30; see also Schwartz & Jacoby, *Litigation with the Federal Government*, AMERICAN LAW INSTITUTE § 1.124 (1975).

217. May 18, 1984 Order, *supra* note 27, at 3 n.2. Judge Coyle found that four witnesses had refused to grant interviews to National Medical because of the government's conduct and influence. *Id.* at 4.

218. Congress has recognized the resources and expertise that the federal government may draw upon. See, e.g., H.R. REP., *supra* note 205, at 8, 1980 U.S. CODE CONG. & ADMIN. NEWS at 4986.

219. *Id.*

220. In passing 28 U.S.C. § 2412(d), Congress recognized the severe costs to an individual of litigating with the federal government. *Id.* at 8, 1980 U.S. CODE CONG. & ADMIN. NEWS at 4988.

221. Frankfurter, *supra* note 213, at 31-32; see *supra* note 177.

222. Frankfurter, *supra* note 213, at 31-32.

223. Cf. *id.* at 28.

224. This Note will focus on the problems identifying the client of an attorney working for the Department of Justice. There are, however, many situations in which the client of a government attorney is easily identified. For example, a military attorney defending a serviceman during a court-martial could easily identify whose legal interest he or she represents and a typical attorney-client relationship would exist. Lawry I, *supra* note 178, at 63.

mentators have reached differing conclusions as to whom the government attorney actually represents.<sup>225</sup> At least four different possibilities exist. The government attorney may represent: (1) society or the public at large; (2) the government itself, as a self-contained bureaucracy; (3) the agency or department where the attorney works; or (4) the supervisors of the attorney.<sup>226</sup>

If one subscribes to the position that the government attorney represents the agency where he or she works, in some instances an inherent conflict will be present between the goals of the department and the goals of the public at large.<sup>227</sup> In these cases, the federally employed lawyer would be torn between his obligations to do "justice and fairness"<sup>228</sup> and his duty to pursue the specific goals of the agency.<sup>229</sup> The same inherent conflict is present when a federally employed attorney is viewed as representing the government as a whole.<sup>230</sup> The government attorney must recognize the "larger interest at stake . . . which may . . . ultimately distort or retard the achievement of a greater goal."<sup>231</sup>

The generally accepted premise is that the client is the person whose legal problem the attorney represents.<sup>232</sup> Consequently, a typical attorney-client relationship has mechanisms to ensure that the client's interests are being represented. One such mechanism is the ability of the client to hire or fire the private attorney. A client is free to fire the private attorney for misconduct.

Even when attorney misconduct has occurred, courts have been reluctant to "visit the sins of the attorney on the innocent client."<sup>233</sup> Gen-

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225. See, e.g., Lawry, *Confidences and the Government Lawyer*, 57 N.C.L. REV. 625, 632 (1979) [hereinafter Lawry II]. Most observers define the client of a government attorney as being either the public as a whole or as the government agency where the attorney works. Compare Frankfurter, *supra* note 213, at 27 (stating that client of government attorney is "the people of the United States"); with Schnapper, *Legal Ethics and the Government Lawyer*, 32 REC. A.B. CITY N.Y. 649, 650 (1977) (government attorney has duty to represent agency where he works) and Professional Ethics Committee, Federal Bar Association, *The Government Client and Confidentiality: Opinion 73-1*, 32 FED. B.J. 71, 72 (1973) (attorney's professional obligations are to agency where he is employed) [hereinafter Professional Ethics Committee].

226. Lawry II, *supra* note 225, at 632.

227. *Id.*

228. *Id.* at 634.

229. *Id.* at 634-35.

230. See Kleindienst, *The Federal Attorney's Position Within the Government*, 32 FED. B.J. 1, 8-9 (1973). Similar to a private attorney, the government attorney also has the tension between representing the interests of his client and serving as an officer of the court. *Id.*

231. Griswold, *The Office of the Solicitor General—Representing the Interests of the United States Before the Supreme Court*, 34 MO. L. REV. 527, 527 (1969).

232. MODEL RULES OF PROFESSIONAL CONDUCT Scope (1983).

233. *Link v. Wabash R.R.*, 370 U.S. 626, 634, *reh'g denied*, 371 U.S. 873 (1962); see also

erally, when a private party is involved, the trial judge must believe that a reasonable client would have known that the attorney was not doing his or her job before it will impose sanctions on a private litigant.<sup>234</sup> The client has selected a private attorney of his or her own free will and thus, must bear the consequences.<sup>235</sup> When a government attorney is involved, however, the public did not select the lawyer, and cannot fire the attorney for misconduct.<sup>236</sup> Thus, this aspect of client control is not present for a government attorney.

The fact that the public cannot hire or fire a government attorney presents a potential conflict in the motivations of government attorneys. While a private attorney has goals of monetary rewards<sup>237</sup> or at least client retention, the government attorney has neither. A government lawyer does not worry about losing a client or decreasing his or her compensation due to the outcome of the case.<sup>238</sup> Government attorneys must be motivated by other factors. Quite often, the goal of doing justice becomes tarnished and the government attorneys are encouraged to merely win.<sup>239</sup>

The government attorney has two roles which are complementary of each other: advocate for the public and officer of the court.<sup>240</sup> The federal attorney must be especially conscious of these two roles and responsive to each.<sup>241</sup> Both the government lawyer and the court have the same employer—the public.<sup>242</sup> As such, the government attorney must be sen-

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FEDERAL JUDICIAL CENTER, SANCTIONS IMPOSABLE FOR VIOLATIONS OF THE FEDERAL RULES OF CIVIL PROCEDURE 70-79 (1981).

234. See *Link*, 370 U.S. at 633-34; *Damiani v. Rhode Island Hosp.*, 704 F.2d 12, 16 (1st Cir. 1983).

235. *Link*, 370 U.S. at 633-34; *United Artists Corp. v. La Cage Aux Folles, Inc.*, 771 F.2d 1265, 1271 (9th Cir. 1985); *Chism v. National Heritage Life Ins. Co.*, 637 F.2d 1328, 1332 (9th Cir. 1981).

236. Lawry I, *supra* note 178, at 69. Some government attorneys, such as district attorneys, are often elected positions which offer the opportunity for public feedback through the ballot box. This Note, however, is limited to the federal government attorney who is not elected, such as those employed by the Department of Justice. For a discussion of the structure of the Department of Justice, see D. SCHWARTZ & S. JACOBY, *GOVERNMENT LITIGATION* 10 (1963).

237. "Monetary rewards" is used here to include contingent fee arrangements.

238. Cf. vom Baur, *Care and Feeding of Government Lawyers*, 56 A.B.A. J. 668, 671 (1970).

239. Frankfurter, *supra* note 213, at 24, 27. In fact, the motto of the Department of Justice declares that "the United States wins its point whenever Justice is done its citizen in the courts." *Id.*; cf. Comment, *supra* note 212, at 367-68.

240. Lee, *Lawyering for the Government: Politics, Polemics & Principle*, 47 OHIO ST. L.J. 595, 595 (1986).

241. *Id.*

242. *Id.* at 596.

sitive to the values embodied in the opponent's side of the lawsuit.<sup>243</sup> In fact, every time the federal lawyer files suit, he or she is obligated to take into account the public resources that will be consumed by the case.<sup>244</sup>

Without clear controls on government attorneys' conduct, misdirected public servants can neglect their public duties and focus on immediate agency goals. The actions of government attorneys must be held to higher scrutiny since there is no effective mechanism to ensure that the interests of the people are being represented.

#### 4. Analogies to the criminal justice system

##### *a. prosecutorial misconduct*

Similar conflicts of interest are present for federal prosecutors. While courts have not focused on federal civil attorneys' behavior, many courts have examined the effects of prosecutorial misconduct.

Prosecutorial misconduct and overreaching, which many commentators consider rampant in the American criminal justice system, have long been a cause of concern.<sup>245</sup> In 1935, the United States Supreme Court addressed the issue of prosecutorial misconduct in the landmark case of *Berger v. United States*.<sup>246</sup> In *Berger*, the prosecutor made inappropriate remarks during cross-examination and closing arguments.<sup>247</sup> The Court emphasized that the prosecutor was not the representative of an ordinary party to the controversy, but was a representative of the sovereign and had a duty to look beyond the confines of the particular case to make sure that justice was done.<sup>248</sup> The *Berger* requirement that the prosecutor seek a higher goal has become a common theme in analyzing prosecutorial misconduct cases. The responsibility of representing the sovereign means that the prosecutor is held to unique standards of behavior.<sup>249</sup>

Prosecutors have virtually unbridled discretion in the exercise of their duties.<sup>250</sup> Prosecutors have discretion whether to investigate, indict

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243. *Id.*

244. *Id.* This also means weighing the good that will be achieved as a result of the action against the costs or other disadvantages. *Id.*

245. See, e.g., Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629 (1972).

246. 295 U.S. 78 (1935).

247. *Id.* at 85.

248. *Id.* at 88; cf. Lawry II, *supra* note 225, at 634.

249. Adlerstein, *Ethics, Federal Prosecutors, and Federal Courts: Some Recent Problems*, 6 HOFSTRA L. REV. 755, 755 (1978).

250. NATIONAL DISTRICT ATTORNEYS ASSOCIATION, *THE PROSECUTOR'S DESKBOOK* 3 (P. Healy, ed. 1971).

or prosecute a suspect.<sup>251</sup> Courts demand more from the prosecutors than mere diligence in the performance of their public duties because of this power; the virtuous and honorable exercise of power is required.<sup>252</sup>

The most common types of prosecutorial misconduct involve attempts to influence the factfinder with inadmissible evidence.<sup>253</sup> These include: referring to the defendant's failure to testify, expressing personal opinion on the defendant's guilt, arguing facts not in evidence, making inflammatory arguments and appealing to bias or prejudice.<sup>254</sup> Surprisingly, courts have developed few standards to deal with such prosecutorial misconduct and proceed on a virtually ad hoc basis.<sup>255</sup>

Commentators place some of the blame for prosecutorial misconduct on the fact that courts seldom sufficiently reprimand prosecutors for misconduct.<sup>256</sup> In fact, courts often require a substantial showing of reversible error before overturning a conviction.<sup>257</sup> Thus, courts will often examine the conduct complained of, yet find the prosecutor's behavior is harmless error and impose no sanction. Observers have become increasingly concerned that the prosecutor may in this way actually be re-

251. J. LAWLESS, JR., PROSECUTORIAL MISCONDUCT 11 (1985).

252. Uviller, *The Virtuous Prosecutor in Quest of an Ethical Standard: Guidance from the ABA*, 71 MICH. L. REV. 1145, 1145, 1159-60 (1973).

253. Alschuler, *supra* note 245, at 633.

254. *Id.* at 633-34. The problem of over-zealous prosecutors litigating cases is analogous to that of over-zealous police officers seizing evidence. As a result of police misconduct in seizing evidence, the exclusionary rule was developed by the courts to protect the rights secured by the fourth amendment against unreasonable searches and seizures. C. WHITEBREAD & C. SLOBOGIN, CRIMINAL PROCEDURE 16-44 (2d ed. 1986). The exclusionary rule arguably deters police misconduct by making illegally seized evidence, and fruits of that evidence, inadmissible at trial. *Id.*

A common concern shared by courts in exclusionary rule cases, and equally applicable in the *NME II* case, is whether a litigant should receive a windfall merely because the government did not follow the "rules." In both situations, when the court imposes a sanction, the government "loses." While both the exclusionary rule and court sanctions serve to deter misconduct and promote judicial integrity, the courts are very cognizant of the equities of one person reaping such a reward when the court imposes such a sanction.

255. Alschuler, *supra* note 245, at 638.

256. Note, *Legal Ethics: The Second Circuit Reacts to Prosecutorial Misconduct*, 49 BROOKLYN L. REV. 1245-47 (1983); see also Alschuler, *supra* note 245, at 668; AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON PROFESSIONAL DISCIPLINE, THE JUDICIAL RESPONSE TO LAWYER MISCONDUCT I.10-I.14 (May 1984) [hereinafter STANDING COMMITTEE]; cf. M. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 96 (1975) (rare that prosecutor was disciplined for gross misconduct short of serious criminal offenses).

257. Note, *supra* note 256, at 1247. This raises the dilemma whether a convicted defendant should go free because of the prosecutor's conduct. Conversely, the conviction may be partially due to the prosecutor's misconduct. In *NME II*, DOJ attorneys' attempts to alter the fact-finding process so polluted the litigation as to leave the trial court no alternative but to dismiss the case because it could not ensure a fair trial to both sides.

warded for his misconduct.<sup>258</sup> In the quest for convictions, a prosecutor may be willing to engage in misconduct and risk a verbal reprimand since reversible error is rarely found.<sup>259</sup>

Like prosecutors, civil government attorneys also represent the sovereign and have a duty to look beyond the confines of the case at hand to ensure that justice is done.<sup>260</sup> As was seen in *NME II*, civil government attorneys will endure minor sanctions for their misconduct, confident that the court will not impose a harsh sanction against them. Recognizing the power and influence of the federally employed lawyer, we must establish guidelines of conduct to deter civil attorneys from engaging in misconduct.

### C. Mechanisms to Control Government Attorney Conduct

Several possible mechanisms exist to oversee the federally employed lawyer and to achieve increased accountability including: professional censure by the bar under the rules of professional conduct; civil actions brought by members of the public; self-regulation within each governmental agency; congressional enactments; and judicial control.<sup>261</sup> The discussion that follows explores judicial control as the best method to

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258. Alschuler, *supra* note 245, at 647. Alschuler describes the typical sequence at trial as follows:

When prosecutorial misconduct occurs at trial, the defense attorney has, of course, only two choices. He may object or he may remain silent. If he objects, he then gives the trial judge two choices—to overrule the objection or to sustain it. If the trial judge sustains the objection, the usual remedy will be an instruction to the jury to disregard the prosecutor's improper comments. As simple and basic as it seems, this procedure leaves the defense attorney effectively boxed in when it comes to an appeal, whatever the prosecutor's conduct. The purpose of many rules of appellate practice is, of course, to confine appellate review to exceptional situations. If the defense attorney has failed to object, the appellate court will ordinarily conclude that the error was "waived." If an objection was made but overruled, the misconduct will rarely be so serious that the appellate court will find more than "harmless error." Finally, if an objection was made and sustained, the appellate court will ordinarily conclude that the trial judge's instructions effectively "cured" the error.

*Id.*

259. See J. LAWLESS, JR., *supra* note 251, at 8. Many prosecutors engage in misconduct and feel uninhibited in acting aggressively because of the slight risk the court may impose sanctions. *Id.* at 576. The solution to prosecutorial misconduct may be to establish standards that require a prosecutor to be an impartial officer of the court in addition to an advocate. Alschuler, *supra* note 245, at 644. Inherent in the combative nature of the adversary system, however, is that both sides solely want to win. J. LAWLESS, JR., *supra* note 251, at 8. Another possible method to curb zealous prosecutors is to target sanctions at the abusive attorney personally, not at overturning the conviction. For a discussion of creative sanctions in a civil context, see *infra* notes 390-97 and accompanying text.

260. See *supra* note 239.

261. These methods of controlling government attorney conduct are basically the same ones that serve to regulate private counsel behavior.



control abusive conduct by government attorneys.<sup>262</sup>

### 1. Control by professional censure

The Code of Professional Responsibility (Code)<sup>263</sup> and the Model Rules of Professional Conduct (Model Rules)<sup>264</sup> set forth the standard of conduct for all attorneys, whether private or public.<sup>265</sup> Federal attorneys are bound by the version of the Code or Model Rules adopted in the jurisdiction where they are admitted to practice law.<sup>266</sup> While the majority of the ethical rules apply with equal force to private and government attorneys, commentators have expressed concern that many Code and Model Rules provisions do not readily apply to government attorneys.<sup>267</sup>

#### a. ethical rules

These ethical rules of conduct emphasize the attorney-client relationship. Consequently, they are difficult to apply to the conduct of gov-

262. Many states already have statutes providing the supreme court of the state with the ultimate power to disbar or suspend all attorneys admitted to the state bar. *See, e.g.*, CAL. BUS. & PROF. CODE § 6100 (West 1982 & Supp. 1987); ILL. ANN. STAT. ch. 110A, para. 771 (Smith-Hurd 1985); N.Y. JUD. LAW § 90(2) (McKinney 1983); OKLA. STAT. ANN. tit. 5, § 13 (West 1984); TEX. REV. CIV. STAT. ANN. art. 320a-1 (Vernon Supp. 1987); VA. CODE ANN. § 54-48 (1982).

263. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1982).

264. MODEL RULES OF PROFESSIONAL CONDUCT (1983).

265. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preliminary Statement (1982); MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1983). *Cf.* W. DURANT & A. DURANT, THE LESSONS OF HISTORY 37 (1968) ("Morals are the rules by which a society exhorts . . . its members and associations to behavior consistent with its order, security, and growth.").

The Model Code of Professional Responsibility (Code) was developed by the American Bar Association (ABA) in 1969 and has been adopted in a majority of the states. Many states, however, are now considering whether to adopt the entirely restructured set of rules approved by the ABA in 1983 as the Model Rules of Professional Conduct (Model Rules). This Note will use "ethical rules" and "ethical provisions" to refer to the general rules regulating the conduct of lawyers.

Commentators have identified several other sources from which an attorney's professional and ethical conduct may be derived. *See, e.g.*, Hill, *Ethics for the Unelected*, 68 A.B.A. J. 950 (1982) (attorney's ethical conduct derived from: the law, the code of professional responsibility, the attorney's peers, and personal conscience); H. DRINKER, LEGAL ETHICS 22 (1961) (attorney duties and obligations created by four sources: statutes, common law, Canons of Ethics and usage, customs, practice of the bar).

266. Lawry I, *supra* note 178, at 61. Many federal agencies have adopted the Code of Professional Conduct either by administrative directive or by regulation. Poirier, *The Federal Government Lawyer and Professional Ethics*, 60 A.B.A. J. 1541 (1974). A recent proposal to establish a separate set of admission standards for federal practice has been abandoned. Moore, *Licensing of Attorneys for Federal Practice*, LITIGATION NEWS, Winter 1987, at 8.

267. Lawry I, *supra* note 178, at 61.

ernment counsel.<sup>268</sup> The identity of "the client" of a government lawyer is harder to ascertain than for a private attorney and often depends on the function performed by the federal lawyer.<sup>269</sup>

The Code stresses the duties required of an attorney toward his or her client. The Code, however, is silent on the issue of whom the government attorney represents<sup>270</sup> and commentators have posited a variety of conflicting views.<sup>271</sup> Under the Code, the government attorney is seen as representing the agency for whom he or she works.<sup>272</sup>

The general focus of the Model Rules is broader than that of the Code and encompasses the attorney's responsibilities to those other than

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268. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY canon 4 (1982) (prohibiting disclosure of client confidences); *id.* canon 7 (zealously represent client).

269. Lawry II, *supra* note 225, at 631-32.

270. While no Code provision directly addresses the issue of the government attorney's client, the discussion of "entity" representation in EC 5-18 is somewhat analogous. That section provides:

[a] lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests and his professional judgment should not be influenced by the personal desires of any person or organization.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-18 (1982); see also MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 comment (1983). Similarly, the government attorney is protecting the interests of his "client," and not the persons employed by it. EC 5-18 provides at least a basis to apply the Code to government attorneys.

Some commentators, in fact, suggest that the Code and the Model Rules be rewritten to specifically cover the conduct of a government attorney. See, e.g., The Committee of the Federal Courts, *An Examination of the Proposed Uniform Federal Rules of Disciplinary Enforcement*, 32 REC. A.B. CITY N.Y. 666 (1977) [hereinafter Committee Report].

271. See, e.g., Lawry II, *supra* note 225, at 632 (identifying four possibilities for the client of a government lawyer: "(1) society or the public interest; (2) the government itself, viewed as a self-contained bureaucracy (the 'state' as opposed to 'society'); (3) the agency or department of the government, considered as a self-contained unit or entity; and (4) one or more officials of the agency or department, considered in their official capacities"). Lawry points out that the identity of the client may be deduced from a series of questions such as: who does the attorney take direction from in matters to be decided by the "client," whose "interests" is the lawyer trying to foster or protect and whose "confidences" is the lawyer obligated to respect. *Id.* at 631-32. This "client" analysis, however, must also take into account the duties to be performed. For example, a government attorney representing a person in a disciplinary proceeding obviously has "a client." A more complex analysis involves a federally employed lawyer who is the member of the legal staff of a government agency.

272. The generally accepted view is that when the Code refers to "client," it refers to the agency for which the government attorney works. Professional Ethics Committee, Federal Bar Association, *Opinion 73-1*, FED. B.J., Fall 1973, at 71 (the "client" of a federal lawyer is the agency where the lawyer is employed); FEDERAL ETHICAL CONSIDERATION 5-1 ("immediate professional responsibility of the federal lawyer is to the department or agency in which he is employed, to be performed in light of the particular public interest function of the department or agency"); see also *Government Lawyer's "Client,"* 91 Law. Man. on Prof. Conduct (ABA/BNA) No. 32, at 4106-07 (Apr. 30, 1986).

the client.<sup>273</sup> While the comments to the Model Rules contain a discussion of the government attorney's duty to the agency for which he or she works,<sup>274</sup> the Model Rules state that the client of the government attorney "is generally the government as a whole."<sup>275</sup>

These conclusions as to the government attorney's client fail to comport with discussions by various courts that the client of a government attorney is the public at large.<sup>276</sup> Applying the Code and the Model Rules to federal lawyers has only added to the confusion in this area. As a result, these ethical rules hardly suffice as a mechanism to control government attorney misconduct.<sup>277</sup>

Regardless of the identity of the client, both the Code and the Model Rules contain ethical provisions that impose special duties exclusively on public counsel.<sup>278</sup> For example, a government attorney in a civil action has a duty to seek justice.<sup>279</sup> While neither the Code nor the Model Rules advocates winning at all costs, the ethical rules themselves recog-

273. MODEL RULES OF PROFESSIONAL CONDUCT preamble (1983).

274. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 comment (1983). The Model Rules have deleted the specific provisions dealing with government attorneys which were contained in the Code. The situation of government attorneys is addressed in the comment to the rule involving representation of organizations. *Id.*

275. *Id.* The Model Rules analogize between the role of a lawyer for an entity and a lawyer for the government, stating that the client of the government attorney is the "government at large." *Id.* The Model Rules, however, fail to clarify whether the client is actually the governmental bureaucracy or the people. *Id.*

276. *See, e.g.,* Gray Panthers v. Schweiker, 716 F.2d 23, 33 (D.C. Cir. 1983) (There is much to "suggest that government counsel have a higher duty to uphold because their client is not only the agency they represent but also the public at large"). For a further discussion, see *supra* note 214.

277. The application of these ethical rules has yet to be clearly set forth. Interestingly, the ethical guide of the DOJ itself sheds no light on this topic, but merely contains a compilation of the various provisions. *See* OFFICE OF LEGAL EDUCATION, UNITED STATES DEPARTMENT OF JUSTICE, ETHICS AND PROFESSIONAL CONDUCT FOR THE FEDERAL ATTORNEY (1984) (this book contains inter alia Exec. Order No. 11,222, 3 C.F.R. 306 (1964-1965) (Standards of Ethical Conduct); 5 C.F.R. § 735 (Employee Responsibilities and Conduct); 18 U.S.C. §§ 201-10 (1982) (Crimes and Criminal Conduct); MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1982)).

278. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (1982) (restraints on prosecutors); *id.* EC 7-14 (duty of government attorney to fairness); *id.* EC 9-3 (avoid appearance of professional impropriety); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.11 (1983) (limiting successive government and private employment); *id.* Rule 1.13 comment (maintaining confidences as a government attorney).

279. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-14 (1982). In fact, the inscription around the rotunda of the Department of Justice reads: "The United States wins its point whenever Justice is done its citizens in the courts." Frankfurter, *supra* note 213, at 27; *see also* D. SCHWARTZ & S. JACOBY, *supra* note 236, at 38. In contrast, the private attorney has a duty to zealously represent his client. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1982); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.2 (1983).

nize that the government attorney is not comparable to his private counterpart and require the government attorney to consider more than merely the case at hand.<sup>280</sup>

Recognizing these specific ethical rules limiting a government attorney's conduct, however, is not sufficient.<sup>281</sup> In fact, in *NME II*, Judge Coyle found the DOJ attorneys' conduct was sanctionable, although he believed the conduct did not violate any professional ethical code.<sup>282</sup> The DOJ attorneys' behavior in *NME II* was actually proscribed by several ethical provisions: attorneys may not disobey a court order;<sup>283</sup> attorneys may not interfere with access to witnesses or evidence;<sup>284</sup> attorneys shall avoid the appearance of impropriety;<sup>285</sup> attorneys may not encourage a third-party witness to withhold information from the other side;<sup>286</sup> and attorneys may not undertake conduct which is prejudicial to the administration of justice.<sup>287</sup> Thus, even courts are confused as to whether conduct of government attorneys violates either the Code or the Model Rules.

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280. See *supra* note 278.

281. The ethical rules themselves have often been viewed as merely a "minimalist code." Cf. D. Callahan, *Minimalist Ethics*, in *ETHICS IN HARD TIMES* (1981) (defining "minimalist ethics" as that standard of behavior that merely avoids that which is prohibited and does not strive for any higher moral obligation).

282. May 18, 1984 Order, *supra* note 27, at 3 n.2. Judge Coyle further characterized the government's acts as an "approach of one-upsmanship which the Court [found] distasteful and disfavor[ed]." *Id.*

283. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-106(A) (1982) ("A lawyer shall not disregard or advise his client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding . . ."); MODEL RULES OF PROFESSIONAL CONDUCT 3.4(c) (1983) ("A lawyer shall not: . . . knowingly disobey an obligation under the rules of a tribunal . . .").

284. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-109(A) (1982) ("A lawyer shall not suppress any evidence that he or his client has a legal obligation to reveal or produce."); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(a) & (b) (1983) ("A lawyer shall not: . . . unlawfully obstruct another party's access to evidence . . . or counsel or assist a witness to testify falsely . . .").

285. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 9-101 (1982) (attorney shall avoid even appearance of impropriety).

286. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-109(A) (1982) ("A lawyer shall not suppress any evidence that he or his client has a legal obligation to reveal or produce."); MODEL RULES OF PROFESSIONAL CONDUCT 3.4(a) & (f) (1983) ("A lawyer shall not: . . . unlawfully obstruct another party's access to evidence . . . or request a person . . . to refrain from voluntarily giving relevant information to another party . . .").

287. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(5) (1982) ("A lawyer shall not: . . . [e]ngage in conduct that is prejudicial to the administration of justice."); MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4(d) (1983) ("It is professional misconduct for a lawyer to: . . . engage in conduct that is prejudicial to the administration of justice."). Improper communications with persons involved in the litigation, such as took place in the *NME II* case, are prohibited under either code. See *supra* notes 283-85.

*b. enforcement*

The method of enforcing the ethical rules of conduct raises additional problems when these codes are used as the mechanism to prevent government attorney misconduct. Generally, these ethical rules are enforced by the state supreme court through the state bar association.<sup>288</sup> The typical chronology of an enforcement proceeding is as follows: A complaint is filed with the state bar; the complaint is investigated by the grievance committee; the committee holds a preliminary hearing; formal charges are filed against the attorney; the bar holds a formal hearing; a review committee recommends discipline; the state supreme court holds a hearing, and discipline is enforced.<sup>289</sup>

However, enforcing these rules against a federally employed attorney raises federalism issues.<sup>290</sup> The state bar association is charged with disciplining attorneys who are licensed to practice within the state.<sup>291</sup> In many jurisdictions, a federal lawyer must be admitted to practice within the state before he may practice in the federal courts within the state's boundaries.<sup>292</sup> Consequently, a state often exercises power over federal officials. While a state cannot outrightly regulate the federal government,<sup>293</sup> the state can regulate the individual actors of the federal government.<sup>294</sup>

Under the supremacy clause, however, a state may not limit the exercise of the federal license to practice law.<sup>295</sup> As a result, any state bar power to discipline federal attorneys is purely illusory. The federal courts need not recognize the disbarment of one of its members by the

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288. See, e.g., Alschuler, *supra* note 245, at 670.

289. See H. DRINKER, *supra* note 265, at 34-35; Alschuler, *supra* note 245, at 670; see also *Lester v. State Bar*, 17 Cal. 3d 547, 551 P.2d 841, 131 Cal. Rptr. 225 (1976).

290. Federalism involves the allocation of powers between the state and federal governments. This doctrine recognizes the concern of states over undue intrusion by the federal government. See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 2-1-2-4, 15-19, § 3-37, 139-40 (1978); Friendly, *Federalism: A Forward*, 86 YALE L.J. 1019 (1977).

291. Generally, the state supreme court has delegated to the state bar disciplinary power over the attorneys licensed to practice within the state. The ultimate responsibility for attorney conduct, however, remains with the court. See, e.g., *In re Ellis*, 12 Cal. 3d 442, 525 P.2d 699, 115 Cal. Rptr. 795 (1974).

292. Cf. Simonelli, *State Regulation of a Federal License to Practice Law*, CASE & COM., Sept.-Oct. 1984, at 30, 32.

293. See *Johnson v. Maryland*, 254 U.S. 51, 56-57 (1920).

294. L. TRIBE, *supra* note 290, § 6-28 at 393.

295. See *Sperry v. Florida*, 373 U.S. 379 (1963) (federal regulations take precedence over state law regarding practice of law before Patent office); *Ex parte McCue*, 211 Cal. 57, 293 P. 47 (1930) (beyond jurisdiction of state courts to attempt to regulate practice of attorneys appearing before federal courts within the state). But see *In re Kearney*, 63 So. 2d 630 (Fla. 1953) (rule requiring person who practices law within state to be member of state bar equally applicable to attorney with only federal tax practice).

state bar.<sup>296</sup> The Supreme Court has unequivocally stated that "disbarment by federal courts does not automatically flow from disbarment by state courts."<sup>297</sup> Thus, while a lawyer is often admitted to practice in a federal court by way of a state court, he is not automatically kept out of federal court when banished from state court.<sup>298</sup> Such a policy leads to the anomalous result that an attorney may be prohibited from practicing in the state courthouse and yet be allowed to walk across the street and practice in the federal courthouse.<sup>299</sup>

Ethical rules and state bar associations do not sufficiently control government attorney conduct. Neither the Code nor the Model Rules specifically addresses the government attorney's situation. Moreover, because federal courts need not adopt the disciplinary determinations of the state bar associations, the ethical provisions that bind the profession do not prevent government attorney misconduct.<sup>300</sup>

## 2. Private civil remedies

In addition to the rules of professional conduct, the client's role is important in controlling the conduct of a private attorney.<sup>301</sup> For example, the private client determines the objectives of the representation.<sup>302</sup> A client must also be consulted by the attorney regarding any settlement or plea.<sup>303</sup> If the client feels the representation is inadequate, he or she may fire the attorney and seek other counsel.<sup>304</sup> Unfortunately, a government attorney does not have the benefit of a client to guide his or her behavior. First, the public is likely unaware of the misconduct. Second,

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296. Simonelli, *supra* note 292, at 33.

297. *Theard v. United States*, 354 U.S. 278, 282 (1956). In *Theard*, the Court refused to uphold the automatic acceptance of the state court's disbarment of an attorney. The court stated that "[w]hile a lawyer is admitted into a federal court by way of a state court, he is not automatically sent out of the federal court by the same route." *Id.* at 281.

298. *Id.* Committee Report, *supra* note 270, at 666 (citations omitted).

299. Committee Report, *supra* note 270, at 666 (citations omitted). Recognizing this anomaly, many commentators have proposed that a set of federal disciplinary rules be established. *Id.* at 673. Recent movements to establish a set of uniform federal rules for disciplining federal attorneys and a system for licensing those in federal practice have been abandoned. Moore, *supra* note 266, at 8.

300. "When dealing with ethical principles . . . we cannot paint with broad strokes. The lines are fine and must be so marked. Guide-posts can be established . . . and the conclusion in a particular case can be reached only after painstaking analysis of the facts and precise application of precedent." *United States v. Standard Oil Co.*, 136 F. Supp. 345, 367 (S.D.N.Y. 1955).

301. Lawry II, *supra* note 225, at 633.

302. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 (1982); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1983).

303. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 (1982); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1983).

304. *Cf.* Lawry II, *supra* note 225, at 633.

the public as a whole cannot exert adequate pressure on its public servants to prevent misconduct.<sup>305</sup>

The major obstacle to a member of the public bringing a civil action against a federal attorney is lack of standing.<sup>306</sup> The party seeking to have his claim adjudicated by a federal court must have a "sufficient stake" in the controversy so that it may be resolved by the federal court.<sup>307</sup> The Supreme Court has stated that to satisfy the standing requirement, a litigant must demonstrate (1) injury in fact, (2) that the injury was caused by the challenged conduct, and (3) that the injury is redressable by a favorable decision of the court.<sup>308</sup> Thus, if a member of the public were to challenge alleged misconduct by government attorneys, he must plead sufficient injury to meet the standing requirement.

Assuming that a member of the public becomes aware of some federal lawyer misbehavior and is able to bring an action that meets the standing test, several different types of suits are available for him or her to bring. For example, a citizen may file a civil suit against an individual government attorney alleging a deprivation of constitutional rights. The Supreme Court, in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,<sup>309</sup> established that a person may bring an action directly against federal officers for a denial of constitutional rights.<sup>310</sup> Although a *Bivens* action is more commonly used against police misconduct, the Court stated that this type of suit should be used where constitutional rights are being deprived. The use of such actions in the criminal justice system for police officer misconduct, however, has proven an ineffective remedy to deter misconduct in that arena.<sup>311</sup>

A person may also file a suit against the government as a whole under the Federal Tort Claims Act (FTCA).<sup>312</sup> The FTCA provides a cause of action for damage to property due to a negligently caused wrong committed by a federal employee acting within the scope of his or her

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305. See *supra* notes 224-30 and accompanying text.

306. See L. TRIBE, *supra* note 290, §§ 3-17-3-29, at 79-114.

307. *Sierra Club v. Morton*, 405 U.S. 727, 731 (1972).

308. *Valley Forge Christian College v. Americans United*, 454 U.S. 464, 472 (1982); see also *Barlow v. Collins*, 397 U.S. 159 (1970); *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 152-53 (1970).

309. 403 U.S. 388 (1971), *on remand*, 456 F.2d 1339 (2d Cir. 1972).

310. *Id.*

311. C. WHITEBREAD & C. SLOBOGIN, *supra* note 254, at 46-47; see also Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955). See generally I. SILVER, *POLICE CIVIL LIABILITY* § 1.04 (1986).

312. 28 U.S.C. § 1346(b) (1982).

employment.<sup>313</sup> The inherent problem with this type of suit is that the person must experience damage to property.<sup>314</sup> This is very unlikely when examining the misconduct of attorneys.

A further civil remedy for government attorney misconduct is an injunction. This action would be brought against the offending lawyer based on unconstitutional acts or actions beyond the scope of his or her duties.<sup>315</sup> As an action at equity, the citizen would have to show repeated, persistent misconduct and no adequate remedy at law.<sup>316</sup> Thus far, injunctions have not proven to be a widely utilized method of controlling the behavior of the government.<sup>317</sup>

Another civil remedy that may be brought against a private attorney and not against the government is a suit for malpractice. Unlike his or her public counterpart, a private attorney is constantly aware that his or her client may bring a malpractice action against the attorney. Malpractice suits for negligent representation against private attorneys have become increasingly prevalent.<sup>318</sup> Conversely, while the potential for malpractice liability has proven an effective method to control the private attorney, the same is not true for government attorneys, since a government attorney is immune from malpractice suits.<sup>319</sup>

While several possible civil remedies can be brought by a member of the public, none can effectively control misconduct by government attorneys. Relying on actions brought by the public will not adequately curb federal lawyer abuses.

### 3. Self-regulation within the agency

Another method to control government attorney misconduct is to allow the employer-governmental agency<sup>320</sup> to set up procedures to mon-

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313. *Id.* For a discussion of how the FTCA further abrogated sovereign immunity, see *supra* notes 207-08 and accompanying text.

314. 28 U.S.C. § 1346(b) (1982).

315. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 695, *reh'g denied*, 338 U.S. 840 (1949).

316. *Id.*

317. *Cf.* C. WHITEBREAD & C. SLOBOGIN, *supra* note 254, at 57.

318. See Gates, *Charting the Shoals of Malpractice*, A.B.A. J., July 1987, at 62; Gates, *Lawyers' Malpractice: Some Recent Data About a Growing Problem*, 37 MERCER L. REV. 559 (1986).

319. See *Butz v. Economou*, 438 U.S. 478 (1978); *Barr v. Mateo*, 360 U.S. 564, *reh'g denied*, 361 U.S. 855 (1959); see also Faure & Strong, *The Model Rules of Professional Conduct: No Standard for Malpractice*, 47 MONT. L. REV. 363 (1986); Edmondson, *Legal Ethics*, 37 MERCER L. REV. 297 (1985).

320. The Administrative Procedure Act (APA) governs the conduct of all federal administrative agencies. 5 U.S.C. §§ 101-912 (1982). The APA defines "agency" to mean each authority of the government except the courts and the Congress. *Id.* § 105.



itor the actions of its lawyers.<sup>321</sup> An agency, such as the DOJ,<sup>322</sup> is entirely a creature of statute and has only the power given it by Congress through its enacting legislation.<sup>323</sup> An agency may promulgate both substantive rules that create new law and interpretative rules that dictate internal operations.<sup>324</sup> Thus, the DOJ could promulgate and enforce regulations to prevent misconduct. Similar types of honor systems, however, have been rejected by commentators in the field of administrative law as unworkable means to control agency abuses.<sup>325</sup>

Courts and commentators have recognized the amount of power vested in agencies.<sup>326</sup> To allow an agency to exercise control by self-promulgated rules, bureaucratic tradition or popular opinion has been considered by some to be overly optimistic.<sup>327</sup> An agency is not allowed to exercise even its interpretative rulemaking function without proper checks.<sup>328</sup> Further, discretionary acts of an agency are subject to judicial review because of the potential for institutional abuse.<sup>329</sup> The failure of some agencies to carry out their mandate has created further demands for methods to ensure that agencies serve the interests they were created to protect.<sup>330</sup>

Establishing general rules which could be applied consistently within the agency would eliminate ad hoc decision making.<sup>331</sup> To formulate such meaningful rules, however, may require that the agency expend

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321. Typically, Congress creates an agency by enacting legislation that specifies the agency's mandate. B. SCHWARTZ, *ADMINISTRATIVE LAW* 35-36 (2d ed. 1984).

322. The DOJ is specifically listed in the APA as an agency and is treated as any other agency of the executive branch. 5 U.S.C. § 101 (1982). All executive departments are agencies within the meaning of the APA because they are the organizations through which the president exercises his executive powers. See 1 STEIN, MITCHELL & MEZINES, *ADMINISTRATIVE LAW* § 4.02 (1987).

323. 1 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 3.1, 149-53 (2d ed. 1978); see also B. SCHWARTZ, *supra* note 321, at 10.

324. 1 K. DAVIS, *supra* note 323, § 2.7, at 82-87. See generally J. O'REILLY, *ADMINISTRATIVE RULEMAKING: STRUCTURING, OPPOSING AND DEFENDING FEDERAL AGENCY REGULATIONS* (1983).

325. 2 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 8.3, 163-67 (2d ed. 1978). Administrative law deals with that body of law which governs administrative agencies. See 1 K. DAVIS, *supra* note 323, §§ 1.1-1.3, at 1-25 for a discussion of the general parameters of administrative law.

326. M. DIMOCK, *supra* note 191, at 12.

327. Stewart, *supra* note 164, at 1675. In fact, some believe that because of a government official's intense commitment to his mission, such agency generated directives may be disobeyed. P. SCHUCK, *SUING GOVERNMENT* 8-9 (1983).

328. 2 K. DAVIS, *supra* note 325, § 8.9, at 196-97.

329. *Id.*

330. Stewart, *supra* note 164, at 1682. The attorney in such a situation becomes the servant of the vested special interests, rather than a servant to society as a whole. *Id.*

331. *Id.* at 1698.

a considerable amount of resources which may be better spent elsewhere.<sup>332</sup> Commentators have conceded that if an agency implemented a series of self-regulating policies, the problem of abuse within an agency still would not be controlled.<sup>333</sup> Agency zeal simply cannot be expected to result in curbed agency power.<sup>334</sup>

The role of the courts in monitoring agencies has varied considerably with time.<sup>335</sup> The judiciary has recently assumed the primary duty to scrutinize the actions of agencies. The fear of unbridled discretion has given rise to a court's right to review virtually any act of an agency.<sup>336</sup> This problem of controlling agency actions is seen by some commentators as the most pressing problem facing administrative law.<sup>337</sup> The court's part in reviewing agency actions has been described as "one of containment," to ensure that the agency has acted within its mandate.<sup>338</sup> Courts, not the agencies themselves, have a vital role in realizing the public purposes and overseeing agencies.<sup>339</sup>

The *NME II* facts dictate against allowing agencies to regulate themselves. In *NME II*, the government suggested that instead of dismissing the case, Judge Coyle could impose formal guidelines requiring a senior government attorney to directly supervise each junior attorney.<sup>340</sup> The district court rejected this proposal in light of the pattern of misconduct by the senior government counsel.<sup>341</sup> The *NME II* district judge did not believe that the DOJ was capable of monitoring its own conduct. While an agency is free to promulgate operating and procedural rules

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332. *Id.* at 1700.

333. *Id.* at 1702. In an analogous area, police departments have attempted to institute policies to stop misconduct and abuses by officers. C. WHITEBREAD & C. SLOBOGIN, *supra* note 254, at 63. In the abstract, this method would appear to be the most efficient way to regulate police conduct; supervisors would control the substance and procedure and the officers would be more likely to accept punishment from an insider. *Id.* In practice, however, self-regulation is not effective because departments withhold allegations of misconduct, and procedures are often ineffective. *Id.*; see also Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974).

334. Stewart, *supra* note 164, at 1698. This is true because often "excessive agency independence serves to defeat accountability in government." Meese, *Towards Increased Government Accountability*, 32 FED. B. NEWS & J. 406, 407 (1985).

335. Rabin, *Federal Regulation in Historical Perspective*, 58 STAN. L. REV. 1189 (1986).

336. *Abbott Labs. v. Gardner*, 387 U.S. 136, 140-41 (1967).

337. K. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1969).

338. Stewart, *supra* note 164, at 1675. Traditionally, courts ensured that an agency's actions were not "arbitrary and capricious." *Dunlop v. Bachowski*, 421 U.S. 560, 568 (1975). This served to bridge the gap between separation of powers and the combination of functions present in an agency. Stewart, *supra* note 164, at 1676.

339. B. SCHWARTZ, *supra* note 321, at 436-37.

340. Appellees' Rehearing Brief, *supra* note 95, at 8-9; see *supra* note 152.

341. Appellees' Rehearing Brief, *supra* note 95, at 8-9.

within its legislative mandate, such interpretative rules alone are not sufficient to control the behavior of government attorneys.

#### 4. Control by Congress

An effective regulator of government attorneys, as employees of the executive branch, is either of the two other branches of the federal government: Congress or the courts.<sup>342</sup> Congress can control the actions of government attorneys in numerous ways. Congress could pass new statutes, slash funding, institute investigations, not approve presidential nominees, supervise through standing committees, require formal congressional clearance of particular administrative decisions or change the mandate of the agency.<sup>343</sup> Most of these methods, however, would require a number of years to produce results.

As our society has grown increasingly complex, Congress' energies have been spread thin with the result being much inaction and political stalemate.<sup>344</sup> However, Congress has begun to take affirmative measures to hold the government more accountable for its actions by abrogating sovereign immunity.<sup>345</sup> Through the passage of a series of statutes, Congress has attempted to place the government on equal footing with other litigants.<sup>346</sup>

Additionally, Congress performs a basic supervisory function over

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342. 1 K. DAVIS, *supra* note 323, §§ 2.7-2.8, at 82-91. Inherent in the framework of our system of government is the idea of checks and balances. THE FEDERALIST No. 51 (J. Madison). The founders were worried that one branch of the government would have unlimited power. THE FEDERALIST No. 10 (J. Madison). The founders were particularly suspicious that the executive branch would become too powerful and establish a tyranny. *Id.* To guard against one branch of government obtaining too much power, the federal system was designed with three co-equal branches to monitor the activities of the other branches. THE FEDERALIST No. 9 (A. Hamilton). The founding fathers believed that the powers of government should be separate and that each branch should be distinct. Johnson, *supra* note 201, at 463; *see also* L. FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 3-19 (1985).

343. L. FISHER, *supra* note 342, at 119.

344. L. JAFFE, *supra* note 189, at 45. This is especially true when Congress deals with an executive agency, like the Department of Justice. L. HUSTON, A.S. MILLER, S. KRISLOW & R. DIXON, JR., ROLES OF THE ATTORNEY GENERAL OF THE UNITED STATES 51 (1968). To remove an employee of the executive branch, Congress could pass a concurrent resolution expressing the sentiment that the president remove the executive official. L. FISHER, *supra* note 342, at 96. Congress could also use its investigative power to precipitate resignation. *Id.* Such actions are unlikely when the individual is a lower level federal lawyer in the DOJ, such as were involved in *NME II*.

345. K. WARREN, ADMINISTRATIVE LAW IN THE AMERICAN POLITICAL SYSTEM 39 (1982); *see also* S. BARBER, THE CONSTITUTION AND THE DELEGATION OF CONGRESSIONAL POWER 108-09 (1975).

346. *See supra* notes 204-12 and accompanying text.

the agencies employing government attorneys. When Congress delegates power to an agency, such as the DOJ, Congress must stand ready to oversee the functioning of that agency.<sup>347</sup> A single plan devised by Congress to monitor government attorney conduct would resolve differences between the ethical rules of the various state bar associations and establish a uniform set of standards.<sup>348</sup> Congress can also exert control to ensure that the agency's actions conform to the specific legislative directives for the agency.<sup>349</sup>

Congress could also oversee the conduct of government attorneys by developing precise legislative policies for the agencies to follow. A major drawback to such a congressional remedy is that it paints with very broad strokes. If Congress chose to tailor separate remedies for the specific demands of each type of government attorney, Congress would create a patchwork of rules. A statute that encompassed all possible situations and circumstances would be almost impossible to draft. When Congress drafts a statute, it cannot be sure of all the specifics to include. When judgments or predictions are wrong, the statute must be re-written.<sup>350</sup> Such an all-encompassing scheme seems inappropriate when juxtaposed with the recent deregulation statutes enacted by Congress.<sup>351</sup> An across the board effort to legislate would also decentralize responsibility and further erode political accountability for decisions.<sup>352</sup>

Furthermore, any congressional plan would require a great amount of time to develop. Such a task would require resources that Congress is often unable or unwilling to allocate.<sup>353</sup> This is due primarily to the logistics of a democratic system of government. Modifications to the statutes might not meet the contingencies of the situation because of this time lag. In addition, Congress has also been criticized as weak and unable to pass legislation except under threat of calamity or force of overwhelming public opinion.<sup>354</sup> Relying on Congress to remedy the problem of government attorney misconduct seems doomed to failure.

Even if a uniform system were developed to regulate the conduct of federal attorneys, implementing detailed legislative policies would not be

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347. L. JAFFE, *supra* note 189, at 41; *see supra* notes 321-22 and accompanying text.

348. *See supra* notes 265-66 and accompanying text.

349. Stewart, *supra* note 164, at 1673.

350. L. FISHER, *supra* note 342, at 119.

351. Rabin, *supra* note 335, at 1317-19.

352. Stewart, *supra* note 164, at 1695.

353. *Id.*

354. K. WARREN, *supra* note 345, at 38-39. Worse still, Congress has been accused of "political sleight of hand" by ducking hard issues and drafting ambiguous legislation. *See* Meese, *supra* note 334, at 407.

feasible.<sup>355</sup> Congress lacks any real mechanism to enforce a series of statutes and must ultimately rely on the judiciary to see that the provisions are being carried out.<sup>356</sup> While Congress has the potential to play a significant role in curbing government attorney misconduct, the major responsibility to oversee this area should reside with the judicial system.

### 5. Judicial control

The judiciary boasts the best mechanism to control government attorney misconduct. The courts have long been recognized as having the power and duty to monitor the acts of counsel appearing before it.<sup>357</sup> Courts have taken an active role in disciplining attorneys for misconduct.<sup>358</sup> In addition, the judicial system has the primary responsibility for enforcing the ethical standards of behavior.<sup>359</sup>

The founding fathers recognized the need for a strong judiciary to monitor the exercise of power by the other two branches of government.<sup>360</sup> The framers of the constitution felt that the survival of the country depended on maintaining a strong and independent judiciary.<sup>361</sup> They believed that the courts must have the power to resolve disputes between individuals and governmental institutions.<sup>362</sup> The grant of power to the judiciary was a mandate for federal courts to check and restrain any overstepping by the legislative or executive branches on the rights of the people.<sup>363</sup> While the founding fathers also realized that any exercise of judicial power would create tensions between the federal courts and the other branches,<sup>364</sup> the judiciary has been viewed as the branch of government least dangerous to political rights.<sup>365</sup> The courts

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355. Stewart, *supra* note 164, at 1695.

356. L. TRIBE, *supra* note 290, §§ 3-1-3-4, at 20-32. Compare R. DWORKIN, TAKING RIGHTS SERIOUSLY 84 (1977) (community should be governed by people elected by and responsible to majority) with C. WOLFE, THE RISE OF MODERN JUDICIAL REVIEW 330 (1986) (courts must review actions of political branch in protecting rights).

357. See Comment, *supra* note 4, at 1036. Appellate courts often admonish trial courts not to minimize the extent of their responsibilities to correct misconduct. Alschuler, *supra* note 245, at 654-55.

358. Comment, *supra* note 4, at 1063.

359. See *supra* note 262 and accompanying text; see also 11 Law. Man. on Prof. Conduct (ABA/BNA) No. 201, at 101-07 (Nov. 14, 1984).

360. Johnson, *supra* note 201, at 464. Chief Justice Marshall believed that the judges were separated from the people by tenure of office and by the nature of their duties. *Id.*

361. *Id.* The federal courts secured for themselves the power of judicial review in *Marbury v. Madison*, 1 Cranch 137 (1803).

362. Johnson, *supra* note 201, at 464.

363. *Id.*

364. *Id.* at 465.

365. THE FEDERALIST No. 78 (A. Hamilton).

have the least capacity to annoy or injure these rights because courts have no influence over "the sword or the purse."<sup>366</sup> From early times, a judge was regarded as guaranteeing the rights of citizens against the assaults of the other branches.<sup>367</sup> Thus, the actions of the DOJ, as an executive agency, come under the purview of the courts.<sup>368</sup>

Judicial review is often seen as a means to curb unjust agency action.<sup>369</sup> The courts must see that the interests of the public are promoted and the interests of the minorities are protected.<sup>370</sup> Recently, federal judges have more actively stepped in to resolve a larger variety of disputes.<sup>371</sup> As a result, the courts have helped shape many procedures and substantive policies.<sup>372</sup> This current trend of judicial activism also has the potential to become a powerful force to protect interests of litigants from the abuses of government misconduct.<sup>373</sup>

Controlling the misconduct of government attorneys is something for which judges are especially well-equipped.<sup>374</sup> A district judge has the opportunity to observe the misconduct of lawyers firsthand. The *NME II* case demonstrates that the judiciary is the proper body to protect par-

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366. *Id.*

367. A. DE TOCQUEVILLE, *supra* note 201, at 156-57; *see also* Johnson, *supra* note 201, at 466; K. WARREN, *supra* note 345, at 41.

368. K. WARREN, *supra* note 345, at 41.

369. B. SCHWARTZ, *supra* note 321, at 429; K. WARREN, *supra* note 345, at 42. Any argument favoring Congress over the courts as the body to control government attorney misconduct seems unfounded because of the grant of power to the courts. K. WARREN, *supra* note 345, at 378. In addition, the interests and decisions of the democratic branches may be reviewed by the courts. *Id.* at 331. At least one commentator has posited that the decisions of the judiciary are superior to actions by the legislature because they are more principled. *Id.* Further, this view has been heralded as better protecting the rights of the minority. *See* C. WOLFE, *supra* note 356, at 330-31; Stewart, *supra* note 164, at 1694; *see also supra* notes 320-40 and accompanying text.

Responsible government must be ready to justify anything it does. R. DWORKIN, *supra* note 356, at 191. Government must demonstrate that its acts were calculated to generate more over-all benefit than harm. *Id.* The judiciary must then engage in this balancing of interests. *Id.* The government lawyer, as an attorney and a bureaucrat, must look to the courts to resolve the conflict between what the agency wants him to do and what the courts say he should do. D. HOROWITZ, *supra* note 197, at 1.

370. K. WARREN, *supra* note 345, at 370; C. WOLFE, *supra* note 356, at 330. The role of the federal judge has been described as to dispose of cases by trial or settlement with fairness and an optimum blend of prompt decision and rightness of result. R. POSNER, *THE FEDERAL COURTS* 224 (1985).

371. *Id.* at 367.

372. *Id.*

373. Stewart, *Self-conscious Interest and the Democratic Process: The Case of Citizens Regulating Agencies and Federal Courts*, LAW & POL'Y Q., Oct. 1979, at 1, 417.

374. *See supra* notes 49 & 109.

ties from the abusive conduct of an executive agency, such as the DOJ.<sup>375</sup> The federal courts are empowered to promulgate and enforce sanctions against litigants and their counsel.<sup>376</sup> Further, any solution devised by Congress could be prospective only and would not deal with the misconduct as it occurred. Congress must also rely upon the courts to review and enforce any laws it passes. Therefore, the courts are best suited to assume responsibility for control of government attorney conduct.<sup>377</sup>

#### *D. Guidelines for Imposing Sanctions Against Government Attorneys*

Acknowledging that government attorneys should be held to a higher standard of conduct, and that the judiciary is the most qualified entity to impose any sanctions for substandard conduct, the question becomes: what should be the standard of conduct for government attorneys? The standard must be flexible so courts are not reluctant to enforce it, and broad enough to cover all types of misconduct. The guidelines for imposing sanctions must also meet the demands of a particular situation as well as be strict enough to deter future misconduct. Most importantly, the standards must give the district judge discretion in assessing the conduct of attorneys occurring within the courtroom.<sup>378</sup>

In order to satisfy these various requirements, courts must establish a standard that accounts for the type of misconduct involved, considers the need to maintain public faith in the judicial system and then examines the severity of sanction to impose. Only after weighing these factors should a court decide whether to impose an effective sanction against a government attorney.

##### *1. Type of misconduct*

###### *a. character of misconduct*

When assessing attorney misconduct, a court must consider the "character" of the conduct.<sup>379</sup> Thus, a court must look not only at the

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375. The courts must clear their calendars of misbehaving lawyers so that innocent parties may have speedier access to the justice system. M. DIMOCK, *supra* note 191, at 135.

376. Cf. 28 U.S.C. § 2072 (1982) (providing that Supreme Court may prescribe rules of civil procedure). Federal Rule of Civil Procedure 83 allows the district courts to make local rules governing its practice.

377. M. RHEINSTEIN, WHO WATCHES THE WATCHMEN? INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES 590 (P. Sayre ed. 1947).

378. Without clear standards that judges are willing to enforce, civil government attorneys, like prosecutors, will be encouraged to engage in misconduct. See *supra* notes 258-59 and accompanying text.

379. A distinction based on the type of misconduct is analogous to a distinction recognized in the criminal justice system. A prosecutor's misconduct involving threats or improper argu-

fact that a court order was violated but must also determine exactly what actions took place. The court's analysis should examine both objective and non-objective misconduct. The differentiating feature between objective and non-objective misconduct is the ease with which the court may identify it. Actions that are easy to detect are objective behavior. Objective behavior would include failing to answer interrogatories or failing to meet court-imposed deadlines. On the other hand, non-objective conduct is more difficult to detect and lies within the discretion of the court. This type of conduct would include whether the interrogatory answers provided actually satisfy the request.

While the court relies on the parties to bring both types of misconduct to its attention, objective misconduct exists in a binary world. In examining interrogatories, the court would determine if the questions have or have not been answered. Whether the answers are acceptable and in good faith is not always obvious and is more typical of a non-objective problem. The court must distinguish between these types of misconduct because non-objective misconduct has far more insidious and damaging effects.

The *NME II* case presents an example of the effect of failing to examine the type of misconduct involved.<sup>380</sup> The DOJ had interfered with National Medical's ability to secure information by attempting to influence witnesses.<sup>381</sup> This type of non-objective misconduct goes to the heart of the fact-finding process, potentially tainting the entire proceeding.<sup>382</sup> When witnesses are involved, this potential damage to the entire litigation is much greater than a mere inability to obtain information; rather, trial testimony itself may be influenced.<sup>383</sup> The cases cited by the

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ment is evaluated differently than conduct involving concealment or destruction of evidence. J. LAWLESS, JR., *supra* note 251, at 586-94.

380. *United States v. National Medical Enters.*, 792 F.2d 906 (9th Cir. 1986).

381. *NME II*, 792 F.2d at 911-12.

382. J. TANFORD, *supra* note 113, at 20-21. Tanford stated that if attorneys were prevented from talking to witnesses, as was the case in *NME II*, the judicial system could not work. *Id.* at 20. He goes on to say that the attorney's right to interview witnesses is so essential that only the court, in limited circumstances, should be able to restrict that right. *Id.* at 21.

Psychological studies have shown that interviews and interrogations can have a great impact on people. E. BERGLER & J. MEERLOO, *JUSTICE AND INJUSTICE* 71-73 (1963) (discussing psychological impact on witnesses of various types of interviews and interrogations); Landsman, *Reforming Adversary Procedure: A Proposal Concerning the Psychology of Memory and the Testimony of Disinterested Witnesses*, 45 U. PITT. L. REV. 547 (1984) (explores various ways witness testimony may be distorted). For a discussion of instances where attorneys tried to improperly influence witnesses, see *STANDING COMMITTEE*, *supra* note 256, at III.11-III.12.

383. *Doe v. Eli Lilly & Co.*, 99 F.R.D. 126 (D.D.C. 1983) (recognizing potential for influ-



Ninth Circuit in *NME II* exclusively involved objective misconduct.<sup>384</sup> Applying precedent involving objective misconduct to a situation involving non-objective misconduct is unsound. This is because of the increased difficulty in detecting the non-objective abuses and the undermining effects of such misconduct.

Again, because of the special weight given by the public to government actions, attempts by government counsel to improperly influence witnesses or engage in any type of non-objective conduct are of great concern.<sup>385</sup> Consequently, any effort by government counsel to restrict a potential witness from freely revealing facts and opinions must be subject to heightened scrutiny.

Related to the ease of detection of misconduct is the severity of the potential impact. This analysis should center on the damage done in the case.<sup>386</sup> The fine line between developing all the facts and coaching a witness is a question of good faith.<sup>387</sup> Attempts to interfere with the fact-finding process should be afforded different treatment than mere failures to answer interrogatories. Non-objective misconduct precludes a genuine trial on the merits because the whole case has been polluted by the inability to gather untainted information. By reviewing the non-objective misconduct of government attorneys, a court will be able to isolate and sanction the most damaging misconduct.

## 2. Public policy

In addition to categorizing misconduct, the court should consider the policy reasons behind imposing sanctions. This analysis must be broader than the public interest test mandated by the Ninth Circuit in

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encing trial testimony is inherent in every contact between prospective witness and an adversary).

384. See *supra* notes 79-107 and accompanying text.

385. *International Business Machs. v. Edelstein*, 526 F.2d 37 (2d Cir. 1975). In *Edelstein*, government counsel ordered two witnesses to cancel their interviews with IBM. The Second Circuit emphasized the right of an attorney to unhampered access to witnesses as an important part of his or her trial preparation and stated that the government actions were inappropriate. *Id.* at 42-44; see also *United States v. Gregory*, 369 F.2d 185, 188-89 (D.C. Cir. 1966), *cert. denied*, 396 U.S. 865 (1969) (In reviewing prosecutor's refusal to allow defense counsel to interview witnesses without prosecutor present, court made no distinction between suppression of evidence and suppression of means to obtain evidence); *Coppolino v. Helpern*, 266 F. Supp. 930, 935-36 (S.D.N.Y. 1967) (court described trial as search for truth and stated that constitutional notions of fair play and due process would not allow attorney to obstruct opponent from interviewing witnesses).

386. This requirement resembles the Ninth Circuit test for prejudicial impact in *NME II*. As already noted, however, the precedent does not require a showing of actual prejudice. See *supra* notes 90-91 and accompanying text.

387. H. DRINKER, *supra* note 265, at 86.

*NME II*.<sup>388</sup> The court should review the deterrent effect of sanctions in the instant case as well as how sanctions affect public faith in the bar and further the interests of judicial integrity.

An important consideration in this area, as demonstrated by *NME II*, is to discourage the public from refusing the requests of public officials. The public should not bear the burden of determining whether a government request is proper or constitutes over-reaching. Thus, the government must be prohibited from relying on law-abiding citizens to carry out improper requests. The possible deterrent effect of a sanction on other federal lawyers is also a proper consideration for the court.

The courts are responsible for maintaining their own integrity. A court is in the best position to assess the full content of its order and to determine whether a party has complied with an order.<sup>389</sup> Thus, before imposing a sanction, the court should consider not only the litigants and attorneys before it, but the entire judicial system.

### 3. Types of sanctions

The most difficult part of this analysis is selecting a penalty that will be effective. The solution may be for courts to use more creative approaches to achieve the desired results. The courts must concern themselves with formulating the appropriate decree for a particular situation.<sup>390</sup> The remedy must correct past abuses and prevent future ones. Depending on the misconduct, the court may want to maintain ongoing authority over the misbehaving attorneys.<sup>391</sup>

This may mean imposing a sanction not against the United States, but rather imposing a monetary sanction personally against the offending government attorney.<sup>392</sup> An even more effective sanction for a government attorney may be to bar him or her from practicing in federal court for a period of time. The court could also write a public letter to the United States Attorney General indicating that some of his attorneys had failed to follow an order of the court or had otherwise abused the administration of justice.<sup>393</sup> Public pressure on the Attorney General may help

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388. See *supra* note 95.

389. *Von Poppenheim v. Portland Boxing & Wrestling Comm'n*, 442 F.2d 1047 (9th Cir. 1971), *cert. denied*, 404 U.S. 1039 (1972), *reh'g denied*, 405 U.S. 999 (1973).

390. *Johnson*, *supra* note 201, at 469.

391. *Id.* at 470-71. While these proposals focus on creative disciplinary measures, this Note recognizes that other, more typical, sanctions are still available to the district judge. See, e.g., *supra* note 8.

392. 28 U.S.C. § 1927 (1982).

393. D. SEGAL, SURVEY OF THE LITERATURE ON DISCOVERY FROM 1970 TO THE PRESENT: EXPRESSED DISSATISFACTIONS AND PROPOSED REFORMS 62 (1978).

him to better monitor his subordinates.<sup>394</sup> Another method used against the government in other contexts is a structural injunction.<sup>395</sup> Using this method, a federal court would set forth a detailed order attempting to restructure an entire bureaucratic agency to eliminate the potential for further abusive practices.<sup>396</sup>

Judges are often reluctant to dismiss a case for attorney misconduct where the government is involved. As was shown in *NME II*, where government misconduct has occurred, the judge must be vigilant to ensure that all parties will receive a fair trial. Federal courts must utilize new and creative sanctions against government attorneys, in addition to their traditional arsenal, to control the behavior of these federal lawyers.<sup>397</sup>

## V. CONCLUSION

The proper standards of conduct for civil federal government attorneys have not been clearly set forth by either the courts or Congress. In *United States v. National Medical Enterprises*,<sup>398</sup> the court recognized the unique position of a federally employed attorney. Society has a right, according to the court, to have its public servants obey the laws they seek to enforce. However, the court stopped short of creating a separate set of standards to assess government misconduct.

The power and influence of government attorneys mandate that the standard used to measure government attorney conduct be higher than that for their private counterparts.<sup>399</sup> Moreover, recent statutes enacted by Congress hold the government more accountable for its acts. This

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394. *Id.* at 63.

395. P. SCHUCK, *supra* note 327, at 15-16. Schuck also lists less intrusive ways for a court to control misconduct. *Id.* A prohibitory injunction identifies certain conduct as wrongful and forbids the government from engaging in such conduct. *Id.* By excluding choices, the party is free to select others. In contrast, a mandatory injunction requires the government to take affirmative acts. *Id.* In this situation, the court displaces the party's judgment and substitutes its own. *Id.* Again, the most judicially intrusive measure is the structural injunction. *Id.*

396. *Id.*

397. For a partial list of sanctions available to a district judge, see *supra* note 8. Part of the means to effectively sanction, is to make truth our paramount objective of the adversary system. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1055 (1975). Such a goal would mean that trial judges could control litigation excesses by direct intervention and by better training and regulation of counsel. *Id.* at 1041.

398. 792 F.2d 906 (9th Cir. 1986).

399. This resulting rule satisfies equal protection requirements, since different standards are being applied to individuals who are not similarly situated. The equal protection clause applicable to federally employed lawyers is contained in U.S. CONST. amend. V. For a general discussion of equal protection cases, see L. TRIBE, *supra* note 290, §§ 16-1-16-57 at 991-1136.

trend gives rise to a need to more closely scrutinize the actions of federally employed attorneys.

The conduct of government lawyers cannot effectively be controlled by professional censure or through civil remedies. The mechanism to control abusive conduct is through the other two branches of government. While Congress can play a significant role in deterring such conduct, the primary responsibility for monitoring and enforcing government attorney conduct lies with the judiciary.

Any guidelines applied by the courts must take into account the type of misconduct, the ease of detection and the possible damage to the other party's case.<sup>400</sup> Before the court can properly weigh the deterrent value of any possible sanction, the courts should examine any harm done to the integrity of the judicial system. By using such an analysis, the level of conduct expected of a civil federal attorney will be more clearly defined and readily exhibited.

*Marian Wolff Easton\**

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400. Applying this proposed guideline to the *NME II* case, Judge Coyle would have been justified in his concern over the DOJ attorneys' attempts to influence witnesses and interfere with the fact-finding process. Further, Judge Coyle recognized that for every instance of misconduct brought to his attention, there were likely other instances of misconduct of which he was not aware. Even under these proposed guidelines, the pervasive nature of the misconduct involved in *NME II* may have left Judge Coyle no alternative but to dismiss the suit. However, if he were convinced that National Medical could receive a fair trial, he may have sanctioned government counsel by barring the offending attorney from practicing in federal court for a period of time. Judge Coyle may also have enjoined the DOJ and required a restructuring of the department to ensure that the agency was adequately monitoring its attorneys.

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