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IN THE SUPREME COURT
DATE TIME: 7/13/01 4:20
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IN THE SUPREME COURT OF THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

ELIZABETH B. MATSUNAGA,
Plaintiff,

v.

MARIA CYNTHIA MATSUNAGA,
Defendant and Third-Party Plaintiff-Appellee

v.

DOUGLAS F. CUSHNIE and ROBERT W. JONES,
Third-Party Defendants-Appellants

Cite as: Matsunaga v. Matsunaga, 2001 MP 11

Appeal Nos. 99-027 & 99-013 (Consolidated)
Civil Action No. 97-043

ORDER

¶1 The Opinion filed on July 13, 2001 is amended to reflect the correct case citation in footnote 18, as follows:

[18]*Sonoda*, 3 N.M.I. at 541.

SO ORDERED: 7/13/01

MIGUEL S. DEMAPAN, Chief Justice

JOHN A. MANGLONA, Associate Justice

TIMOTHY H. BELLAS, Justice *Pro Tem*

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ELIZABETH B. MATSUNAGA,
Plaintiff

v.

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DOUGLAS F. CUSHNIE and ROBERT W. JONES,
Third Party Defendants-Appellants

Cite as: ***Matsunaga v. Matsunaga, 2001 MP 11***

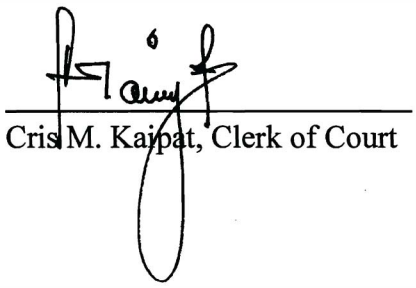
Appeal Nos. 99-027 & 99-013 (Consolidated)
Civil Action No. 97-043

JUDGMENT

¶ 1 Pursuant to Rule 36 of the Rules of Appellate Procedure, judgment is hereby entered. The Appellee's motion for attorney's fees and costs in responding to this appeal is **DENIED**, and

the trial court's imposition of sanctions against Appellant is **AFFIRMED.**

Entered this 13th day of July, 2001.



Cris M. Kaipat, Clerk of Court

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FOR PUBLICATION

IN THE SUPREME COURT OF THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

ELIZABETH B. MATSUNAGA,
Plaintiff

v.

MARIA CYNTHIA MATSUNAGA,
Defendant and Third-Party Plaintiff-Appellee

v.

DOUGLAS F. CUSHNIE and ROBERT W. JONES,
Third-Party Defendants-Appellants

OPINION

Cite as: *Matsunaga v. Matsunaga*, 2001 MP 11

Appeal Nos. 99-028 & 99-013 (Consolidated)
Civil Action No. 97-0043
Argued and Submitted: April 17, 2001

For Maria C. Matsunaga:

Bruce Berline, Esq.
P.O. Box 5682 CHRB
Saipan, MP 96950

For Cushnie and Jones:

Douglas F. Cushnie, Esq.
P.O. Box 949
Saipan, MP 96950

BEFORE: MIGUEL S. DEMAPAN, Chief Justice, JOHN A. MANGLONA, Associate Justice, and TIMOTHY H. BELLAS, Justice *Pro Tempore*

PER CURIAM:

INTRODUCTION

¶1 Appellant Douglas F. Cushnie failed to comply with a clear and unambiguous court order requiring him to pay attorney's fees and costs by a date certain. Appellant chose to ignore the order and now seeks to avoid the consequences of his contempt. We have jurisdiction pursuant to Article I, Section 3 of the Constitution of the Commonwealth of the Northern Mariana Islands, as amended,[1/] and 1 CMC § 3202. We affirm.

ISSUES PRESENTED AND STANDARD OF REVIEW

¶2 I. Whether this Court has jurisdiction to review the April 1, 1997 and October 19, 1997 Orders of the Superior Court, sanctioning Mr. Cushnie for violating rules of professional conduct, barring him from collecting fees earned, and directing him to pay Appellee's attorney's fees. This Court has the authority and duty to determine its own jurisdiction. *See Mafnas v. Superior Court*, 1 N.M.I. 278, 281 (1990).

¶3 II. Whether the Superior Court abused its discretion by sanctioning Mr. Cushnie for failing to comply with its Orders of April 1, 1997 and October 16, 1997. We review the jurisdiction of the trial court to issue sanctions *de novo*. *See Aquino v. Tinian Cockfighting Board*, 3 N.M.I. 284 (1992). We review the imposition of civil contempt and contempt sanctions for an abuse of discretion. *See CNMI v. Borja,* 3 N.M.I. 156, 164 (1992); *Lucky Development Co., Inc. v. Tokai U.S.A., Inc.*, 3 N.M.I. 79, 84 (1992). We review the question of whether the trial court provided an alleged contemnor with due process *de novo*. *See Sonoda v. Villagomez*, 3 N.M.I. 535, 541 (1993).

FACTS AND PROCEDURAL BACKGROUND

¶4 In January of 1997, Douglas F. Cushnie and Robert W. Jones filed a complaint and request for a temporary restraining order on behalf of Elizabeth B. Matsunaga against her daughter-in-law,

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[1/] N.M.I. Const. art. IV, § 3 was amended by the passage of Legislative Initiative 10-3, ratified by the voters on November 1, 1997 and certified by the Board of Elections on December 13, 1997.

Appellee Maria C. Matsunaga, to recover funds advanced to Maria for her husband's medical expenses. According to Elizabeth, Maria promised to earmark the funds for certain expenses, and, although Maria repeatedly promised to repay the money, she neither did so nor provided any receipts or explanation as to how the money was spent. Elizabeth also requested an injunction to prevent Maria from expending any additional funds allegedly remaining in her possession.

¶5 On January 10, 1997, the trial court granted Elizabeth's request for a temporary restraining order, and set the hearing for preliminary injunction for January 16, 1997. Prior to the commencement of the hearing, however, counsel for both parties met in chambers to discuss Maria's concerns about a conflict of interest arising out of Cushnie's representation of Elizabeth against Maria. When Cushnie declined to withdraw voluntarily, Maria subsequently filed a motion to disqualify counsel.

¶6 The court, by Special Judge Alberto C. Lamorena, III, granted the motion for disqualification. *See Matsunaga v. Matsunaga*, Civil Action No. 97-43 (N.M.I. Sup. Ct. March 27, 1997) (Order Disqualifying Counsel). In so doing, the court found that Cushnie had violated Model Rule of Professional Conduct 3.7[2/] by acting as an advocate at a trial where he was likely to be a necessary witness. Although Cushnie denied ever representing a particular member of the Matsunaga Family, following the hearing, the court inadvertently discovered and took judicial notice of a motion filed in an entirely separate proceeding, in which Cushnie had acknowledged an ongoing attorney-client relationship with George Matsunaga and the Matsunaga family.[3/] The court thus determined that

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[2/] In material part, Model Rule 3.7 prohibits a lawyer from acting as an advocate at a trial in which the lawyer is likely to be a necessary witness, except where: (1) the testimony relates to an uncontested issue; (2) the testimony relates to the nature and value of legal services rendered in the case; or (3) disqualification of the lawyer would work substantial hardship on the client. *See* Model Rules of Prof'l Conduct ("MODEL RULES"), R. 3.12 (1983).

[3/] The court claimed to have discovered and taken judicial notice of a Motion to Withdraw as Counsel in *CNMI v. Sablan*, Crim. Case No. 96-258 (filed Jan. 16, 1997), in which the Cushnie Office raised its ongoing attorney-client relationship with George Matsunaga and the Matsunaga family as a basis for withdrawal.

Cushnie and Jones had also violated Model Rules 1.7[4/] and 3.3[5/] by representing one client (Elizabeth) with interests directly adverse to another current client (Maria) without first obtaining the consent of each client after consultation, and by knowingly offering evidence to the court which it knew to be false. On all three grounds, the court granted the motion to disqualify.

¶7 In its April 1, 1997 Order, the trial court also assessed various sanctions against Cushnie and Jones for their violations of professional rules of conduct. First, the court ordered Cushnie to pay the attorney's fees incurred by Elizabeth in prosecuting the motion for disqualification. Second, the court precluded Cushnie from charging Maria for any costs or time associated with the defense of the disqualification motion. Pursuant to Canon 3(B)(3) of the Code of Judicial Conduct for the Commonwealth Judiciary, moreover, the court also referred the matter to the Disciplinary Committee of the Northern Marianas Bar Association.

¶8 Following its review of the attorney's fees and costs incurred in the prosecution of the disqualification motion, on October 17, 1997, the court entered a subsequent order directing Cushnie to pay $3,230 in fees and costs on or before October 31, 1997. Cushnie neither paid the sanctions nor sought a stay in enforcement. Nor did Cushnie seek review of the October 17 Order.

¶9 In March of 1999, Maria sought an order to show cause as to why Cushnie should not be held in contempt for refusing to comply with the court's October 17 Order. Following the denial of Cushnie's subsequent motion to disqualify the trial judge, Maria renewed the motion to show cause in September of 1999.

[4/] Model Rule 1.7(a) prohibits a lawyer from representing a client when the representation of that client would be adverse to another client unless: (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and (2) each client consents after consultation.

[5/] Model Rule 3.3 addresses candor toward the tribunal. In material part, it prohibits a lawyer from knowingly: (1) making a false statement of material fact or law to a tribunal; (2) failing to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent statement by the client; (3) failing to disclose adverse legal authority in controlling jurisdiction; and (4) offering evidence that the lawyer knows to be false.

¶10 In response, Cushnie took the position that the October 17 Order was interlocutory, not immediately appealable, and thus subject to change by the court at any time. On this basis, and because the order imposing sanctions issued as part of the disqualification order, Cushnie argued that the order awarding fees was not enforceable until a final judgment entered, and thus a contempt proceeding could not be maintained. The trial court disagreed, and on October 28, 1999, orally entered its order directing Cushnie to pay the $3,230 in fees previously awarded as well as interest from October 17, 1997, the date the order awarding fees was executed. In addition to sanctioning Cushnie an additional $525.00 for attorney's fees incurred in filing the motion for order to show cause, the court ruled that unless all amounts were paid within ten days, additional sanctions of $2500 would be awarded. Cushnie seeks review of the October 28, 1999 Order and challenges the jurisdiction of the Superior Court to bar the collection of attorney's fees from a client and award attorney's fees on the facts of this case.

DISCUSSION

I. This Court Lacks Jurisdiction to Review the Orders Imposing and Awarding Sanctions.

¶11 Com. R. App. P. 4(a)(1) requires a notice of appeal from a particular judgment or order to be filed within thirty days of the entry of judgment or order. We have interpreted this requirement to be both "mandatory and jurisdictional." *See Tudela v. Marianas Public Land Corp.*, 1 N.M.I. 181, 185 (1990). In this case, the order imposing the sanction of attorney's fees and ordering forfeiture of fees incurred was filed on November 1, 1997 (the "Order Imposing Sanctions"), and the order setting the amount of fees and requiring compliance on or before October 31, 1997 was filed on October 17, 1997 (the "Order Awarding Sanctions"). Since Appellant did not file a notice of appeal until November 3, 1999, the first and obvious question presented in this appeal is whether we have jurisdiction to review the Orders Imposing and Awarding Sanctions.

¶12 Appellee takes the position that the Orders Imposing and Awarding Sanctions were final and appealable and thus this Court lacks jurisdiction to review the initial award of sanctions. *See, e.g., Lucky Development Co., Ltd. v. Tokai, U.S.A., Inc.*, 3 N.M.I.79, 85-86 (1992) (order imposing Rule 11 sanctions against plaintiff's attorney was final and immediately appealable); *Zombrano v. City of Tustin*, 885 F.2d 1473, 1476 (9th Cir. 1989) (order requiring counsel to submit final, nonrefundable payment of sanctions within thirty days for failure to comply with local rules was final). Appellee thus maintains that Appellant's failure to seek timely review of the sanctions bars this Court from considering their validity on appeal. Appellant, on the other hand, contends that because the Orders Imposing and Awarding Sanctions were interlocutory,[6/] he was left with no choice but to refuse to pay the sanctions and attack the legal basis underlying the trial court's orders through this contempt proceeding. *Cf. Cobbledick v. United States,* 309 U.S. 323, 60 S.Ct. 540, 84 L.Ed. 783 (1940) (when a motion to quash a subpoena is denied, the movant may either obey its commands or violate them, and, if cited for contempt, properly contest its validity in the contempt proceeding); *Cacaique v. Robert Reiser & Co.*, 169 F.3d 629, 622 (9th Cir. 1999) (contempt proceeding is an appropriate method for testing the correctness of a discovery order). Appellant essentially maintains that when an individual appeals a contempt judgment imposed for violating an order imposing sanctions, the underlying order is thus itself subject to review. *See Cacique, Inc.,* 169 F.3d at 622.

¶13 This Court's appellate jurisdiction over Superior Court proceedings, set forth in 1 CMC § 3102(a), permits us to hear appeals only from judgments, orders or decrees which are final, except

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[6/] *See Olopai v. Hillblom*, 3 N.M.I. 529, 533-534 (1993) (order disqualifying counsel in civil proceedings is not appealable either as a final order or under the collateral order doctrine); *CNMI v. Guerrero*, 3 N.M.I. 479, 482 (1993) (order disqualifying counsel in criminal proceeding not appealable as either a final order or under the collateral order doctrine). *See also Cunningham v. Hamilton County, Ohio,* 527 U.S. 198, 119 S.Ct. 1915, 144 L.Ed.2d 184 (1999) (order imposing monetary sanctions against an attorney pursuant to Fed. R. Civ. P. 37 is not an appealable final order under 18 U.S.C. §1291).

as otherwise provided by law. *See Commonwealth v. Hasinto*, 1 N.M.I. 377, 384-385 & n.6 (1990). Generally, a decision is not "final" unless it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *See Catlin v. United States*, 324 U.S. 229, 233 (1945). We have, however, interpreted the term "final judgment, orders, and decrees" to permit jurisdiction over appeals from a small category of orders that do not terminate the litigation. *See Hasinto*, 1 N.M.I at 384, n.6. This small category includes only decisions that conclusively determine a disputed question, resolve an important issue completely separate from the merits of the action, and are effectively unreviewable on appeal from the final judgment in the underlying action. *Id.*

¶14 Appellant does not dispute that the Orders Imposing and Awarding Sanctions are based upon the violation of rules governing professional conduct and involve questions entirely separate from the merits. Since the trial court imposed the sanctions against Appellant personally for conduct unrelated to the merits, moreover, should the parties elect to settle or not appeal the matter, Appellant's right to appeal the order imposing sanctions could be irretrievably lost. Unlike a discovery situation, where an attorney and his client have a congruence of interests, an attorney who has been sanctioned for misconduct entirely unrelated to the merits of a proceeding may well have a personal interest in pursuing an immediate appeal that is separate from the interests of his client. Accordingly, and with respect to sanctions imposed for what amounts to professional misconduct, we see no basis for departing from a long line of cases treating these orders as final for purposes of an appeal. *See, e.g., Pacific Harbor Capital, Inc. v. Carnival Air Lines*, 219 F.3d 1112 (9th Cir. 2000) (order permanently and prospectively barring counsel from appearing before court is immediately appealable); *Primus Automotive Financial Services, Inc. v. Batarse*, 115 F.3d 644 (9th Cir. 1997) (order sanctioning counsel under inherent power is immediately appealable under 28 U.S.C. § 1291); *Optyl Eyewear Fashion Intern. Corp. v. Style Companies, Ltd.*, 760 F.2d 1045, 1047 & n.1 (9th Cir. 1985) (order

imposing sanctions upon counsel, a nonparty in the underlying action, is final and appealable by the person sanctioned, when the sanction is imposed).

¶15 Regardless of whether the Orders Imposing and Awarding Sanctions qualify as final orders, however, "'[a] contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy.'" *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. E.E.O.C.*, 478 U.S. 421, 441 n. 21, 106 S.Ct. 3019, 3032 n.21, 92 L.Ed.2d 344 (1986) (quoting *Maggio v. Zeitz*, 333 U.S. 56, 69, 68 S.Ct. 401, 408, 92 L.Ed.2d 476 (1948). Where, as here, the Orders Imposing and Awarding Sanctions were not invalid on their face and immediate review was readily available, our review of a finding of civil contempt is technically limited to questions of jurisdiction, such as whether the trial court had the authority to impose the punishment inflicted, and whether the acts for which the punishment was imposed constitute a contempt. *See United States v. Rylander*, 460 U.S. 752, 756-57, 103 S.Ct. 1548, 1552-53, 75 L.Ed.2d 521 (1982);[7] *In re Establishment Inspection of Hern Iron Works, Inc.*, 881 F.2d 722, 725-26 (9th Cir. 1989) (contemnor cannot ordinarily raise the invalidity of a judicial order as a defense to a contempt charge). Accordingly, our review in this case is strictly confined to whether the trial court had jurisdiction to issue the Orders Imposing and Awarding Sanctions, and whether the trial court abused its discretion in sanctioning Appellant for failing to comply with their terms. While we have jurisdiction to review the trial court's Order of October 28, 1999,[8] we do not consider the validity of the sanctions themselves.

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[7] "It would be a disservice to the law if we were to depart from the long-standing rule that a contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy. The procedure to enforce a court's order commanding or forbidding an act should not be so inconclusive as to foster experimentation with disobedience." *Rylander*, 460 U.S. at 756-757, 103 S.Ct. at 1552.

[8] A contempt order that imposes sanctions is final and appealable when entered. *See Commonwealth v. Borja*, 3 N.M.I. 156 (1992).

II. The Trial Court Had Jurisdiction to Award Attorney's Fees and Bar the Collection of Fees Earned

¶16 Civil contempt occurs when a party fails to comply with a court order. *See Commonwealth v. Borja*, 3 N.M.I. 156, 162-163 (1992). Appellant argues, however, that because the trial court lacked jurisdiction to issue the order imposing sanctions and forfeiting fees, disobedience of or resistance to a void order cannot be punishable as civil contempt. *See Borja*, 3 N.M.I. at 162 ("Civil contempt... flows from the court's inherent powers and may be used by the court to enforce compliance with its lawful orders"); *Western Fruit Growers v. Gottfried*, 136 F.2d 98, 100 (9th Cir. 1943)[9].

¶17 We may reverse a contempt if the underlying order that it attempts to enforce was entered by a court that lacked the authority or jurisdiction to do so. *See. e.g., Thomas, Head and Griesen Employees Trust v. Buster*, 95 F.3d at 1456. What Appellant fails to grasp, however, is the distinction between an order that is void because the court lacked jurisdiction to issue it and an order that may be merely erroneous, irregular, or improvidently rendered. *See, e.g., Dike v. Dike*, 75 Wash.2d 1, 18, 448 P.2d 490, 494 (1968). A judgment, decree or order entered by a court that lacks jurisdiction over the parties or of the subject matter, or that lacks the inherent power to make or enter the particular order involved, is void. *See* RESTATEMENT, JUDGMENTS (SECOND) §1 (1983).[10] In contrast, an order

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[9] *See also Washington ex rel. Superior Court of Snohomish County v. Sperry,* 79 Wash.2d 69, 483 P.2d 608, 611, *cert. denied sub nom. McCrea v. Sperry,* 404 U.S. 939, 92 S.Ct. 272, 30 L.Ed.2d 252 (1971) (void order or decree, as distinguished from one that is simply erroneous, cannot produce a valid judgment of contempt); *In re Berry*, 68 Cal.2d 137, 65 Cal.Rptr.273, 280 (1966) (only the violation of a lawfully issued order is punishable as contempt).

[10] Section 1 of the RESTATEMENT (SECOND) OF JUDGMENTS sets forth the requisites of a valid judgment or order. In material part, it provides that a court has the authority to render judgment in an action when the court has jurisdiction of the subject matter of the action, and either the party against whom judgment is to be rendered has submitted to the jurisdiction of the court, or the party has been afforded adequate notice and the court has territorial jurisdiction of the action. Section 11, which defines subject matter jurisdiction, in turn provides: "A judgment may properly be rendered against a party only if the court has authority to adjudicate the type of controversy involved in the action." If the type of controversy is within the subject matter jurisdiction, then all other defects or errors go to something other than subject matter jurisdiction. *See Marley v. Dept. of Labor and Indus.*, 886 P.2d 189, 193 (1994); Martineau, *Subject Matter Jurisdiction as a New Issue on Appeal: Reining in an Unruly Horse,* 1988 B.Y.U.L.Rev.

based on a mistaken view of the law or on an erroneous application of legal principles, but which has been issued by a court with the power to make the order and which has jurisdiction over the parties and of the subject matter, is erroneous or voidable. *Dike*, 448 P.2d at 494. While disobedience of, or resistance to, a void order is not contempt, where a court has jurisdiction over the person and the subject matter, "no error in the exercise of such jurisdiction can make the judgment void." *Dike,* 75 Wash.2d at 8, 448 P.2d at 494 (quoting *Robertson v. Commonwealth,* 181 Va. 520, 536, 25 S.E.2d 352 (1943)); *see also Bresolin v. Morris,* 86 Wash.2d 241, 245, 543 P.2d 325 (1975) ("[a] judgment is void only where the court lacks jurisdiction of the parties or the subject matter or lacks the inherent power to enter the particular order involved").

¶18 When the court has jurisdiction over the parties and of the subject matter of the suit, and the legal authority to make the order, a party refusing to obey the order, however erroneously made, will be liable for contempt. *See Wilmot v. Doyl,* 403 F.2d 811, 814 n.16 (9th Cir. 1968); *Dike,* 75 Wash.2d at 8, 448 P.2d 490. Since a court maintains inherent subject matter jurisdiction to enter orders of contempt, even if premised on an erroneous prior order,[11/] we now turn to whether the trial court had jurisdiction to sanction Appellant and bar the collection of fees on the facts of this case.

¶19 Appellant argues that in the absence of a statute or rule authorizing the sanctions in question, the trial court lacked jurisdiction to impose and award sanctions in this case. Contrary to Appellant's reading of the law, however, we have repeatedly recognized the inherent power and duty of Commonwealth courts to regulate the practice of law, both in and out of court. *See, e.g., Saipan Lau Lau Development, Inc. v. San Nicolas*, Orig. Action No. 00-001 (N.M.I. Sup. Ct. March 8, 2001) (Opinion and Order re: Order to Show Cause) at 22 (recognizing the authority of this Court to

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1, 28.

[11/] *E.g., Dike,* 75 Wash.2d at 8, 448 P.2d 490.

discipline attorneys, for, among other things, the violation of disciplinary rules); *Borja*, 3 N.M.I at 171 (addressing the court's inherent power to sanction for contempt and the violation of court rules); *Sonoda v. Villagomez*, 3 N.M.I. 535, 541 (1993) (recognizing this Court's inherent judicial power to impose sanctions upon attorneys who violate court rules). A court may rely upon its inherent power to regulate the conduct of lawyers appearing before it, moreover, even when specific statutes and rules regulating the conduct are in place. *See F.J. Hanshaw Enterp., Inc. v. Emerald River Development, Inc.*, 244 F.3d 1128, 1136-37 (9th Cir. 2001). The court's inherent power has been invoked, when necessary, to impose sanctions on those lawyers who violate the Rules of Professional Conduct.[12/] The range of sanctions which may be imposed encompasses the assessment of attorney's fees as well the forfeiture of fees incurred. *See, e.g.,* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49 (Proposed Final Draft No. 1, 1996)[13/]; *Image Technical Service, Inc. v. Eastman Kodak Co.*, 136

[12/] *See, e.g. Chambers v. NASCO, Inc.,* 501 U.S. 32, 43, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991) (citing *Ex parte Burr,* 9 Wheat. 529, 531, 6 L.Ed. 152 (1824) (recognizing the power of the courts to control admission to the bar and to discipline attorneys); *Eash v. Riggins Trucking, Inc.,* 757 F.2d 557, 561 (3d Cir. 1985); *Cannon v. Cherry Hill Toyota, Inc.*, 190 F.R.D. 147, 161 (D.N.J. 1999) (relying on inherent power to sanction an attorney who violated a "myriad of professional rules of conduct and rules of procedure"); *United States ex rel. O'Keefe v. McDonnell Douglas Corp.*, 961 F.Supp. 1288, 1291 (E.D.Mo. 1997) (court has inherent authority to impose sanctions for conduct abusing the judicial process including violation of rules of professional conduct); *United States v. Ortiz-Miranda*, 931 F.Supp. 85, 89 & n. 4 (D.P.R. 1996) (sanctionable conduct includes violations of the Model Rules of Professional Conduct); *In re Smyth*, 242 B.R. 352, 362 (W.D.Tex. 1999) (sanctionable conduct includes violations of the Model Rules of Professional Conduct). *But see McCarthy v. Southeastern Penn. Transp. Auth.,* 772 A.2d 987 (Pa. Super. 2001) (while it may be appropriate under certain circumstances for trial courts to enforce the Code of Professional Responsibility by disqualifying counsel or otherwise restraining his participation or conduct in litigation to protect the rights of litigants to a fair trial, trial courts should not use the Canons to alter substantive law or to punish attorney misconduct); *Commonwealth v. Lambert*, 765 A.2d 306 (Pa. Super. 2000) (trial court may sanction, warn or recommend disciplinary action against an attorney who has violated a Rule of Professional Conduct);

[13/] Under the RESTATEMENT, a lawyer is not entitled to be paid for services rendered in violation of the lawyer's duty to a client, or for services needed to alleviate the consequences of the lawyer's misconduct. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 49 (Proposed Final Draft No.1) (March 29, 1996) ("A lawyer engaging in clear and serious violation of duty to a client may be required to forfeit some or all of the lawyer's compensation for the matter. In determining whether and to what extent forfeiture is appropriate, relevant considerations include the gravity and timing of the violation, its wilfulness, its effect on the value of the lawyer's work for the client, any other threatened or actual harm to the client, and the adequacy of other remedies"); RESTATEMENT (SECOND) AGENCY § 469 (1958) (agent entitled to no compensation for conduct which is disobedient or breach of duty of loyalty to principal).

F.3d 1354, 1357-1358 (9th Cir. 1998) (disallowing attorney's fees for representation of clients with conflicting interests); *Chambers v. Kay,* 88 Cal.App.4th 903, 106 Cal.Rptr.2d 702, 714 (2001) (when an attorney violates his ethical duties to a client, he is not entitled to a fee for his or her services); *Burrow v. Arce*, 997 S.W.2d 229 (Tex.1999)(discussing cases).

¶20 Appellant contends, however, that under the case law of the Commonwealth, a trial court imposing sanctions under its inherent powers is only empowered to do so if the party subject to the sanctions acted in "bad faith." Since neither the Order Imposing Sanctions nor the Order Awarding Fees contained any allegations or findings of bad faith, Appellant contends that the Orders were invalid. *See Borja*, 3 N.M.I. at 172 (before imposing sanctions under its inherent authority, the trial court must provide counsel with the opportunity to demonstrate that his or her questionable conduct was not undertaken recklessly or willfully or in bad faith); *Sonoda*, 3 N.M.I. at 541 (sanctions vacated and remanded to trial court for determination of whether counsel acted recklessly or wilfully, or in bad faith). While the broad language of these cases at first glance provides Appellant with rhetorical support, a close analysis of their holdings in context fails to support Appellant's position.

¶21 In every case in which this Court has required a finding of bad faith as a prerequisite for the imposition of sanctions under the court's exercise of its inherent authority, the conduct at issue was related to the attorney's role as an advocate for his or her client. *E,g,, Sonoda*, 3 N.M.I. at 538-539 (failure to prepare for trial and request continuance); *Borja*, 3 N.M.I. at 172 (transfer of funds to federal agency with request to initiate forfeiture proceedings). In this case, however, the trial court imposed sanctions because Cushnie allegedly lied to the court and violated his responsibilities to his client. There is no allegation that either of these actions was undertaken as part of Cushnie's role in representing his client. Rather, both of these charges involve Cushnie's failure to perform his responsibility as an officer of the court. Under circumstances such as these, where the conduct at issue

is unrelated to an attorney's legitimate efforts at zealous advocacy for the client, sanctions may be justified even absent a finding of bad faith, given the court's inherent power to regulate the practice of law for the protection of the public and "'to manage [its] own affairs so as to achieve the orderly and expeditious disposition of cases.'" *Chambers*, 501 U.S. at 43, 111 S.Ct. at 2123 (quoting *Link v. Wabash R. Co.*, 370 U.S. 626, 630-31, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962); *Saipan Lau Lau Development, Inc.,* Slip Op. at 22.

¶22 In reaching this conclusion, we note the split among the circuits and even within some circuits evidencing confusion about a trial court's power to impose sanctions under the inherent powers doctrine.[14/] While the Ninth Circuit has required a finding of bad faith to justify sanctions imposed under the court's inherent powers for conduct related to an attorney's role as an advocate,[15/] it has also upheld the award of sanctions, even absent a finding of bad faith. *See, e.g., People of the Territory of Guam v. Palomo*, 35 F.3d 368, 376 (9th Cir. 1994) (upholding sanctions under inherent powers doctrine even without bad faith); *Unigard Sec. Ins. Co. v. Lakewood Engineering Mfg. Corp.*, 982 F.2d 363, 368 n.2 (9th Cir. 1992) ("This court has, since *Roadway*, confirmed the power of the district court to sanction under its inherent powers not only for bad faith, but also for willfulness or fault by

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[14/] *Compare, e.g., United States v. Mottweiler*, 82 F.3d 769, 772 (7th Cir. 1996) (negligent failure to be present when the jury returns could support a civil order requiring counsel to reimburse one's adversary, and the judicial system, for expenses) *with Elliott v. Tilton,* 64 F.3d 213, 217 & n.3 (5th Cir. 1995) (rejecting notion that finding of misconduct short of bad faith can support imposition of sanctions); *Republic of Philippines v. Westinghouse Elec. Corp.*, 43 F.3d 65, 74 n.11 (3d Cir. 1994) ("'[a] court need not always find bad faith before sanctioning under its inherent powers'"); *Harlan v. Lewis*, 982 F.2d 1255, 1260 (8th Cir. 1993) (rejecting argument that sanctions under inherent authority of courts always requires finding of bad faith); *Kleiner v. First National Bank*, 751 F.2d 1193, 1207-08 (11th Cir. 1985) (holding that sanctions can be justified under inherent authority of court, even when sanctioned party acted in good faith) *and In re Baker*, 744 F.2d 1438, 1441 (10th Cir. 1984) (en banc) (upholding sanction based on "record [that] reflects not contumaciousness, but a pattern of negligence").

[15/] See *Primus Automotive Financial Services, Inc. v. Batarse*, 115 F.3d 644, 649 (9th Cir. 1997) (bad faith is a prerequisite to the imposition of sanctions for raising frivolous arguments and/or harassing an opponent under the court's inherent powers "because it ensures that restraint is properly exercised ... and it preserves a balance between protecting the court's integrity and encouraging meritorious arguments "); *Moore v. Keegan Management Co.*, 78 F.3d 431, 436 (9th Cir. 1996) (reversing sanctions because district court found only "recklessness"); *Zambrano v. City of Tustin*, 885 F.2d 1473, 1478 (9th Cir. 1989) (requiring a finding of bad faith).

the offending party"). *See also Fink v. Gomez,* 239 F.3d 989, 993-994 (9th Cir. 2001) (sanctions under court's inherent authority require bad faith or "a variety of types of willful actions including recklessness when combined with an additional factor such as frivolousness, harassment, or an improper purpose"). Our review of these cases suggests a distinction between sanctions imposed to punish behavior by an attorney in the "actions that led to the lawsuit...[or] the conduct of the litigation,"[16/] and those involving the violation of a court order or other misconduct that is not undertaken for the client's benefit. *See, e.g., United States v. Seltzer*, 227 F.3d 36, 41-42 (2d Cir. 2000) (court need not find bad faith before imposing a sanction under its inherent power for attorney misconduct not undertaken for the client's benefit).

¶23 We recognize that there are "factual and legal prerequisites" to the trial court's exercise of its broad powers to sanction attorneys under its inherent powers. *Zambrano*, 115 F.3d at 1478. When a sanction is imposed for conduct that is normally part of the attorney's legitimate efforts at zealous advocacy of his or her client, we therefore require a finding of bad faith to strike a balance between the vigorous pursuit of litigation and the right to be free of litigation that is undertaken "in bad faith, vexatiously, wantonly, or for oppressive reasons." *Batarse,* 115 F.3d at 650. Thus, we insist upon bad faith as a prerequisite to the award of sanctions for conduct normally related to the pursuit of litigation because it ensures that "restraint is properly exercised," *id.,* and it preserves the balance between protecting the court's integrity and encouraging meritorious arguments. *See Roadway Express,* 447 U.S. at 764, 100 S.Ct. at 2463 (noting that because "inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion").

¶24 Where, as here, the court imposes sanctions because an attorney allegedly lies to the court and engages in unprofessional and unethical conduct that is not undertaken for the client's benefit, the

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[16/] *Hall v. Cole,* 412 U.S. 1, 15, 93 S.Ct. 1943, 36 L.Ed.2d 702 (1973).

court need not make an explicit finding of bad faith before imposing a sanction under its inherent power. *E.g., Saipan Lau Lau*, Slip Op. at 22.[17/] Accordingly, we reject Appellant's argument that the Orders Imposing and Awarding Sanctions are void or otherwise defective because they do not include a specific finding of bad faith.

III. Because Appellant Deliberately Ignored the Orders Imposing and Awarding Sanctions, the Finding of Contempt was Appropriate

¶25 In its Order Awarding Fees, the Superior Court ordered Appellant to pay $3,230.00 in attorney's fees to Appellee on or before October 17, 1997. Appellant neither requested reconsideration of that order, nor did he file an appeal. In response to Appellee's subsequent motion for an order to show cause why Appellant should not be held in contempt for failing to comply with the court's order, however, Appellant filed two separate memoranda. In both responses, Appellant challenged the Orders Imposing Sanctions and Awarding Fees as interlocutory and not enforceable. Appellant gave no other reason for failing to comply with the court's order. On October 28, 1999, the Superior Court held a hearing on its order to show cause at which Appellant was afforded yet another chance to show cause why he should not be held in contempt for failure to comply with the Order Awarding Fees. Again, Appellant argued that the order was not enforceable.

¶26 We conclude that the opportunities to respond in writing, along with the opportunity to explain his actions at a hearing on the subsequent contempt proceeding provided Appellant with ample opportunity "to demonstrate that his... questionable conduct was not undertaken recklessly or willfully

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[17/] Of course, when bad faith is patent from the record and specific findings are unnecessary to understand the misconduct giving rise to the sanction, the necessary finding of "bad faith" may be inferred. *See Optyl Eyewear Fashion Intern. Corp.*, 760 F.2d at 1051.

or in bad faith,"[18] and occasion for the trial court to evaluate the legitimacy of Appellant's continued noncompliance with the orders. Accordingly we find no due process violation.

¶27 Nor did the trial court clearly err or abuse its discretion in finding that Appellant's conduct warranted sanctions. A court order – even an arguably incorrect court order – demands respect. *Saipan Lau Lau*, Slip Op. at 22. An order issued by a court with jurisdiction over the parties and the subject matter of an action must be obeyed unless and until it has been vacated or stayed, or until it expires by its own terms. *See Maness v. Myers*, 419 U.S. 449, 458-59, 95 S.Ct. 584, 590-591, 42 L.Ed.2d 574 (1975); *Western Fruit Growers v. Gottfried*, 136 F.2d 98, 100 (9th Cir. 1943). The trial court had the inherent authority and jurisdiction to regulate the conduct of the attorneys practicing before it, and Appellant, as a member of the bar, was subject to the court's jurisdiction. Therefore Appellant was obligated to abide by the court's orders. The appropriate avenue for relief, in the event that Appellant truly believed that the Orders Imposing and Awarding Sanctions were improperly issued, was to seek to have the orders vacated or amended. Thus, if Appellant believed in good faith that the trial court erred in imposing sanctions, he should have either (1) paid the attorney's fees, litigated the case, and then appealed the sanction, or (2) demonstrated his inability to comply and his good faith disagreement with the court, and asked the court to stay the sanction pending an appeal. *See e.g., Maness*, 419 U.S. at 459, 95 S.Ct. at 591; *United States v. United Mine Workers of America*, 330 U.S. 258, 293, 67 S.Ct. 677, 696, 91 L.Ed. 884 (1947). He did neither and chose instead to flout the court's orders. Thus, whether or not the Orders Imposing Sanctions and Awarding Fees were correct, the October 1999 Order of Contempt was appropriate.

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[18] *See Sonoma*, 3 N.M.I. at 541.

IV. Fees and Costs on Appeal

¶28 Appellee moves for attorney's fees and costs in responding to this appeal pursuant to Com. R. App. P. 38(a) on grounds that the appeal is neither well grounded in fact nor warranted by existing law. The motion for fees is **DENIED**.

CONCLUSION

¶29 For the reasons set forth above, we find no abuse of discretion and **AFFIRM** the trial court's imposition of sanctions against Appellant.

DATED this 13th day of July, 2001.

MIGUEL S. DEMAPAN, Chief Justice

JOHN A. MANGLONA, Associate Justice

TIMOTHY H. BELLAS, Justice *Pro Tem*