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TINKERING WITH THE AD DAMNUM CLAUSE IN TORT CASES: TORT REFORM OR PROLIFERATION OF NEW TORT CLAIMS?

ADRIENNE MELTZER FOX*

On January 1, 1987, an amendment to the North Carolina Rules of Civil Procedure became effective which prohibits pleading a specific amount of damages or *ad damnum* clause in all negligence actions and in all actions claiming punitive damages.¹ This technical, procedural change to the rules of pleading was not among the changes originally contemplated by the commission charged with proposing solutions to the perceived crisis in the North Carolina tort system.² This commission, the North Carolina Medical Malpractice and Medical Liability Study Commission of 1986, proposed a wide variety of solutions to the problems of escalating liability insurance costs and increasingly high jury verdicts in negligence cases, particularly malpractice cases.³ However, in the short session of the biennial North Carolina legislature, legislators

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1. Act of July 16, 1986, ch. 1027, 1986 N.C. Sess. Laws 617, 639-40.

2. The 1985 North Carolina General Assembly created a "North Carolina Malpractice and Medical Liability Study Commission." Act effective July 18, 1985, ch. 792, 1985 N.C. Sess. Laws 1336, 1357. See Maxwell, *The Crisis Arrives in North Carolina*, 16 TRIAL BRIEFS 10 (1985) (published by the North Carolina Academy of Trial Lawyers, Box 767, Raleigh, N.C. 27602).

3. The formation of the Medical Malpractice Study Commission and the presentation of a significant number of changes to the North Carolina tort system were attempts on the part of insurance companies and professional associations to accomplish tort reform in North Carolina in the 1986 session of the General Assembly. Although the goals of this reform effort were far more grandiose and far-reaching, encompassing limitations on recoveries and contingent fees and a host of other substantive measures, the tort reform "fizzled" and this particular measure, changing the manner of pleading the *ad damnum* clause, was part of a last minute compromise offered by Rep. Joe Hackney. Conversation with then Rep. Paul Pulley (Oct. 1, 1986).

Serious questions remain as to whether North Carolina ever had, or does have, a liability insurance crisis warranting any tinkering with the tort system. A report by the General Accounting Office, [hereinafter GAO], the investigative arm of Congress, reported that in the years 1983 to 1985 doctors in North Carolina paid lower premiums than in most other states. *Durham Morning Herald*, Oct. 6, 1986, at B1, col. 4.

An explanation for the low malpractice insurance rates in North Carolina was offered by state Insurance Commissioner Jim Long: "I think the basic reason you don't see higher rates is our juries are very conservative in their awards. We don't have as many claims or suits being filed and the tort system is more conservative." *Durham Morning Herald*, Oct. 6, 1986, at B1, col. 4.

Similarly, the GAO report concluded that liability insurance is still only a small part of the operation costs of doctors and hospitals. Another report indicates that North Carolina medical malprac-

were unable to agree on any major substantive changes in the tort system.⁴ Only one bill, encompassing several stop-gap measures, was passed.⁵

One part of this omnibus bill, an amendment to Rule 8(a)(2), provides:

[a pleading which sets forth a claim for relief . . . shall contain] a demand for . . . the relief to which he [the pleader] deems himself entitled. Relief in the alternative or of several different types may be demanded. In all negligence actions, and in all claims for punitive damages in any civil action, wherein the matter in controversy exceeds the sum or value of ten thousand dollars (\$10,000), the pleading shall not state the demand for monetary relief but shall state that the relief demanded is for damages incurred or to be incurred in excess of ten thousand dollars (\$10,000). However, at any time after service of the claim for relief, any party may request of the claimant a written statement of the monetary relief sought, and the claimant shall, within 10 days after such service, provide such statement, which shall not be filed with the clerk until the action has been called for trial or entry of default entered. Such statement may be amended in the manner and at times as provided by Rule 15.⁶

The 1986 amendments to Rule 8(a)(2) provide no specific sanction for violation of this rule.⁷ In addition, there is no legislative history available to help interpret the intent behind these amendments or to ascertain the sanctions to be imposed for a violation of the amended rule.⁸

For these reasons, it is helpful to review the history of the North Carolina Rules of Civil Procedure, focusing especially on the 1976 change to

tice insurance rates are the second lowest in the country. News and Observer, Oct. 8, 1986, at 18A, col. 1.

4. See Conversation with Rep. Paul Pulley, *supra* note 3.

5. Act of July 16, 1986, ch. 1027, 1986 N.C. Sess. Laws 617.

6. N.C. Gen. Stat. § 1A-1, R. Civ. P. 8(a)(2) (1983).

7. The uncertainty about what possible sanctions can befall the unwary lawyer who violates Rule 8(a)(2)'s strictures is expressed in a publication by North Carolina's largest legal malpractice carrier. An article in the newsletter of Lawyer's Mutual Liability Insurance Co. of North Carolina refers to the change effective January 1, 1987 and states that this change would create havoc as regards legal malpractice because "depending on the mood of the particular superior court judge, a Rule 8(a)(2) violation could cost you a case on a Rule 41 motion." See *infra* text accompanying notes 48-95. The newsletter continues:

The new Rule 8(a)(2) is pretty clear. However, suppose you are pleading multiple causes of actions against multiple defendants. If you ask for excess of \$10,000 in each claim for relief, have you violated the rule? I don't have the answer. All I suggest is that you play it safe."

Coley, *Malpractice Tips*, LML TODAY Sept. 1986, at 4 (newsletter published by Lawyers Mut. Ins. Co. of North Carolina).

Coley's concern regarding sanctions for violation of the rule as well as the actual scope of the rule is justifiable. See *infra* notes 48-95 and accompanying text.

8. Representative Joe Hackney, the drafter of the amendment which became the new version of Rule 8(a)(2), discussed the fact that there is no legislative history for this rule. He stated that his reasons for introducing the 1986 amendment were the same as the reasons for the 1976 amendment to pleading the *ad damnum* clause — to prevent damage to a defendant's reputation. The Representative went on to say that since the rule was silent as to sanctions, "case law would apply." Telephone conversation with North Carolina Rep. Joseph Hackney (Oct. 1, 1986).

Rule 8(a)(2) which first prohibited the pleading of a specific *ad damnum* clause in "professional malpractice actions."⁹ Furthermore, in order to understand the new amendments it is necessary to analyze those cases which addressed the sanctions appropriate for violation of the prior rule. This writer's position is that neither the sanctions now provided in Rule 11¹⁰ of the Rules of Civil Procedure nor the sanctions that have been previously applied for violations of Rule 8(a)(2) adequately remedy the damage to defendants that is intended to be prevented under the present Rule 8(a)(2) *ad damnum* ban.

HISTORY OF NORTH CAROLINA RULES ON PLEADING DAMAGES

In 1967, the North Carolina General Assembly enacted the North Carolina Rules of Civil Procedure.¹¹ These rules were designed to simplify the process of pleading a valid complaint in all civil actions. They represented a policy of limiting procedural roadblocks to reaching the merits of a lawsuit.¹² The "notice" pleading requirement of these rules applied to every civil case and significantly changed the former "fact pleading" practice which had required that the pleader set forth facts sufficient to state the essential elements of his legal cause of action.¹³ North Carolina adopted a type of pleading similar to the federal

9. Act of May 12, 1976, ch. 977, 1975 N.C. Sess. Laws 3, 6. The 1976 amendment to Rule 8(a)(2) first eliminated any mention of the *ad damnum* clause. See *infra* notes 30-39 and accompanying text.

10. Rule 11(a) of the North Carolina Rules of Civil Procedure was amended as part of the same omnibus act. Rule 11(a), as revised effective January 1, 1987, provides:

Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Except when otherwise specifically provided by these rules or by statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served.

According to Rep. Hackney, the sanctions of Rule 11 are not intended to apply to violations of Rule 8(a)(2). Conversation, *supra* note 8. The North Carolina version of Rule 11(a) follows Federal Rule of Civil Procedure 11(a). The federal rule was amended in 1983 in order to stress to attorneys the need for a reasonable pre-filing inquiry into both the facts and the law to satisfy the affirmative duty imposed by the rule. Albright v. Upjohn Co., 788 F.2d 1217 (6th Cir. 1986). According to the advisory committee note to Federal Rule 11, the federal rule was amended in 1983 "to reduce the reluctance of courts to impose sanctions. . . by emphasizing the responsibilities of the attorney and reinforcing those obligations by imposition of sanctions." FED. R. CIV. P. 11 advisory committee's note (1983).

11. Act effective July 1, 1969, ch. 954, 1967 N.C. Sess. Laws 1274.

12. Sizemore, *General Scope and Philosophy of the New Rules*, 5 WAKE FOREST L. REV. 1, 4 (1969); see also Sutton v. Duke, 277 N.C. 94, 176 S.E.2d 161 (1970); Johnson v. Johnson, 14 N.C. App. 40, 187 S.E.2d 420 (1975).

13. N.C. Gen. Stat. § 1A-1, R. Civ. P. 8 official comment (1983).

practice.¹⁴

The 1967 codification adopted a rule of pleading¹⁵ that specifically required the pleader to include a "demand for judgment for the relief to which he deems himself entitled."¹⁶ This *ad damnum* clause was designed to give the defendant notice of those damages sought by the plaintiff that were not specifically pled as special damages.¹⁷ At common law, the *ad damnum* clause was a significant part of the plaintiff's complaint because the plaintiff's recovery was limited by the clause.¹⁸ By continuing the code practice of allowing recovery in excess of the prayer for relief,¹⁹ the 1967 codification of the rules lessened the importance of the *ad damnum* clause.²⁰

The practice of allowing recovery in excess of the prayer for relief is consistent with the guiding principle of the rules of civil procedure to enhance, not hamper, the decision of cases on their merits.²¹ In reality, however, many plaintiffs plead a "claim for damages" in the *ad damnum* clause that bears little or no relation to what they reasonably expect to recover in the litigation.²² This practice blurs the notice function and results in inflated damage claims within the pleading.²³

14. *Id.*; see also *Redevelopment Comm'n v. Grimes*, 277 N.C. 634, 178 S.E.2d 345 (1971); *Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970).

15. This rule of pleading stated that:

A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross claim, or third-party claim shall contain (1) A short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences or series of transactions or occurrences intended to be proved showing that the pleader is entitled to relief, and (2) A demand for judgement for the relief to which he deems himself entitled. N.C. Gen. Stat. § 1A-1, R. Civ. P. 8 (1969).

16. N.C. Gen. Stat. § 1A-1, R. Civ. P. 8(a)(2) (1969).

17. North Carolina Rule of Civil Procedure 9(g) requires that "[w]hen items of special damage are claimed each shall be averred." 5 C. WRIGHT, A. MILLER & M. KANE, *FEDERAL PRACTICE AND PROCEDURE* § 1256, at 254, § 1259 at 261 (1969).

18. E. JAMES & G. HAZZARD, *CIVIL PROCEDURE* 149 (3d ed. 1985).

19. C. CLARK, *HANDBOOK OF THE LAW OF CODE PLEADING* 265-66 (2d ed. 1947) North Carolina Rule of Civil Procedure 54(c) states in part, "every final judgement shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

20. The *ad damnum* clause is thought to have significance in those jurisdictions where the pleadings are read to the jury. In such a jurisdiction there is great likelihood that an artificially inflated prayer for relief could affect the size of the verdict which the jury might ultimately grant. Comment, *An Analysis of State Legislative Responses to the Medical Malpractice Crisis*, 1975 DUKE L. J. 1417, 1452. The fear is that the verdict will be based not on plaintiff's proof at trial, but on the initial *ad damnum*. North Carolina, however, typically does not allow such a reading of the complaint to the jury. N.C. Gen. Stat. § 1A-1, R. Civ. P. 7(d) (1983).

21. A plaintiff who incorrectly pleads the *ad damnum* clause, but who otherwise states a sufficient claim for relief, is not subject to dismissal. *Fremont City Bd. of Educ. v. Wayne County Bd. of Educ.*, 259 N.C. 280, 130 S.E.2d 408 (1963); *North Carolina State Ports Auth. v. Lloyd A. Frye Roofing Co.*, 32 N.C. App. 400, 232 S.E.2d 846 (1977), *aff'd*, 294 N.C. 73, 240 S.E.2d 345 (1978).

22. Many have commented that the *ad damnum* is really just an "asking price." See Comment, *supra* note 20, at 1452.

23. The problem is further compounded because the pleadings which have been filed become public records. Typically, industrious reporters check the clerk of court's office daily to determine if

In adopting the North Carolina Rules of Civil Procedure, the legislature attempted to ensure that the mechanics of procedure did not inhibit the decision of cases on their merits.²⁴ The rule on pleadings specifically states that, "[a]ll pleadings shall be so construed as to do substantial justice."²⁵ The sufficiency of a pleading is tested by a motion to dismiss for failure to state a claim upon which relief can be granted.²⁶ Thus, North Carolina has consistently followed the federal practice of denying the drastic step of dismissal unless such a motion shows affirmatively that the plaintiff has no cause of action or legal claim against the defendant.²⁷ This policy allows cases to proceed to a determination on the merits rather than allowing mechanical dismissals for failing to comply with technical pleading requirements.²⁸ Adopted to implement this laudable policy, these rules were intended to be uniform in their application to all civil cases.²⁹

In 1976, the North Carolina General Assembly appointed a legislative study commission to examine possible ways of curtailing what was viewed as an alarming rise in medical malpractice lawsuits, astronomical recoveries, and most importantly, skyrocketing medical malpractice insurance rates.³⁰ The study commission examined various methods of relief for the "medical malpractice crisis."³¹ These methods included changing the statutes of limitation and repose, revising the standard of care, adopting an arbitration system, placing a limitation on the amount of recoverable damages, and limiting the contingent fees of plaintiffs' attorneys.³²

The recommendations of the commission resulted in the passage of major legislation concerning procedural changes.³³ Most importantly, this legislation created a new article of the North Carolina General Stat-

any large suits, especially those involving well-known litigants, have been filed. Thus, the claim for large damages becomes "news" which is disseminated by the media. Conversation with William Smith, reporter with the Durham Morning Herald (Aug. 1986) [hereinafter Smith].

24. *Johnson v. Johnson*, 14 N.C. App. 40, 187 S.E.2d 420 (1972).

25. N.C. Gen. Stat. § 1A-1, R. Civ. P. 8(f) (1983); see also Sizemore, *supra* note 12, at 5-7.

26. N.C. Gen. Stat. § 1A-1, R. Civ. P. 12(b)(6) (1983); see also *Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970).

27. *Conley v. Gibson*, 355 U.S. 41, 48 (1957); *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944); *Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970); North Carolina Dep't of Human Resources, 58 N.C. App. 748, 294 S.E.2d 377 (1982).

28. *Foman v. Davis*, 371 U.S. 178, 181 (1962); *Johnson v. Johnson*, 14 N.C. App. 40, 187 S.E.2d 420 (1972).

29. N.C. Gen. Stat. § 1A-1, R. Civ. P. 1 (1983). The rules remained constant with regard to pleading until 1976.

30. Act of June 16, 1975, ch. 623, 1975 N.C. Sess. Laws 749.

31. REPORT OF THE NORTH CAROLINA PROFESSIONAL LIABILITY INSURANCE STUDY COMMISSION, at 4-5 (March 12, 1976).

32. *Id.* at 26-38.

33. Act of May 12, 1976, ch. 977, 1975 N.C. Sess. Laws 3, 6. The act was entitled "An Act to Revise and Provide for Procedural and Substantive Laws Governing Claims for Professional Malpractice: To revise the Statute of Limitations for Adults and Minors; to Provide for a Standard of

utes entitled "Medical Malpractice Actions,"³⁴ and it also addressed the standard of health care, the necessary informed consent to health care treatment, and liability limitation for first aid or emergency treatment.³⁵ This act also amended Rule 8(a)(2) of the North Carolina Rules of Civil Procedure to eliminate from a complaint the "demand for monetary relief" in all professional malpractice actions.³⁶ This amendment applied only to professional malpractice cases, changing the former practice of pleading a "demand for judgment to which he deems himself entitled." Such modification of the general rule was stated:

Provided, however, in all professional malpractice actions, including actions against health care providers, wherein the matter in controversy exceeds the sum or value of ten thousand dollars (\$10,000), the pleading shall not state the demand for relief, but shall state that the relief demanded is for damages incurred or to be incurred in excess of ten thousand dollars (\$10,000). . .³⁷

Expressing concern for the stigmatizing effect of media publication of the filing of huge malpractice suits, the legislative study commission recommended that an attempt be made to limit such damage to the reputation of health care providers named as defendants in medical malpractice lawsuits.³⁸ Therefore, the apparent legislative policy behind the initial amendment to Rule 8(a)(2) was to help alleviate the harm to the reputation of the professional malpractice defendant.

With this as the underlying policy, the legislature's action is curious. The commission's charge was to address a perceived crisis in the area of medical malpractice believed to be caused by escalating jury verdicts and

Care, a Doctrine of Informed Consent, an Extension of the Good Samaritan Law, and the Elimination of the Ad Damnum Clause."

34. This section was codified at North Carolina General Statute Sections 90-21.11 to .14 (1975).

35. *Id.*

36. N.C. Gen. Stat. § 1A-1, R. Civ. P. 8(a)(2) (1977).

37. *Id.*

38. Report, *supra* note 31. This concern for the stigma to professionals' reputations is appropriate, because a professional has, as his product, only his good name. The situation is markedly different with a business which despite its own poor reputation, still has a product which may be demanded by the public.

In considering the elimination of the *ad damnum* clause, the legislative study commission noted that in jurisdictions where the pleadings are typically read to the jury, large demands for monetary damages often resulted in juries awarding higher amounts. Report, *supra*, note 31, at 32.

North Carolina, however, does not typically allow the reading of the pleadings to the jury, so the study commission was aware that elimination of the *ad damnum* in this state could not be expected to lower jury verdicts. Report, *supra*, note 31, at 33.

It is also curious to note that some research suggests that doctors may be immune from negative effects on their reputation of a malpractice suit because high occupational status tends to insulate the doctor from imputation of incompetence. Schwartz & Skolnick, *Two Studies of Legal Stigma*, 10 SOC. PROBS. 133, at 141 (1962).

A more recent recount of a physician's own experience of being named a defendant in a malpractice suit that resulted in an award of \$813,000 to the plaintiff includes the physician's candid admission that in the weeks following newspaper reports of the verdict, "patients didn't stop coming." Eisenburg, *A Doctor on Trial*, N.Y. Times, July 20, 1986, § 26 (Magazine), at 42.

malpractice insurance rates.³⁹ The commission's goal of assuring the availability of health care by controlling rising insurance rates and high jury verdicts was an important one. However, the efficacy of the legislature's amending the *ad damnum* rule as a means of reaching this goal is questionable. The commission's own acknowledgement that the purpose of the amendment was to protect the reputation of health care providers is the primary example of the inappropriateness of this legislative action.

One other change preceded the current version of Rule 8(a)(2). In 1979 the specialized ban on pleading the *ad damnum* clause was extended to "actions against product manufacturers, wholesalers or retailers for recovery of damages for personal injury, death or damage to property based upon or arising out of any alleged defect or any failure in relation to a product."⁴⁰ This extension of the *ad damnum* ban to products liability cases arose from a comprehensive amendment to North Carolina's products liability law.⁴¹ Neither the 1979 nor the 1986 amendment provide any legislative history. Thus, it may be assumed that the policy of preventing pre-judgment harm to defendants' reputations is behind all proscriptions of the *ad damnum* clause.⁴²

While Rule 8(a)(2) has been amended three times in less than twenty years to prohibit mentioning a prayer for relief in various types of cases, no sanction is included in any version of Rule 8(a)(2). What then are the consequences of violating Rule 8(a)(2)? Substantial problems are confronted in reaching an answer to this question.⁴³

39. Report, *supra*, note 31, at 3.

40. Act effective Oct. 1, 1979, ch. 654, 1979 N.C. Sess. Laws 687, 689.

41. N.C. Gen. Stat. § 1A-1, R. Civ. P. § 99B (1979).

42. Hackney, *supra* note 8.

43. In addition to problems of the appropriateness of a sanction for violations of Rule 8(a)(2), the rule has spawned several other problem areas. One near and dear to the heart of any civil procedure professor is the *Erie* implication of Rule 8(a)(2). *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). While there is a federal rule of civil procedure which addresses pleading in federal courts, specifically Federal Rule 8(a), two federal district courts sitting in North Carolina have reached contrary results as to whether North Carolina Rule 8(a)(2) applies to cases brought in federal court under diversity jurisdiction, 28 U.S.C. § 1332 (1948). See generally, *Hanna v. Plumer*, 380 U.S. 460 (1965) (holding that the federal rules of civil procedure apply in diversity cases). Holding that the North Carolina rule is merely procedural and not intimately bound up with a state right or obligation and, therefore, not mandatory in federal courts is *Dean v. Litton Industrial Prods., Inc.*, No. 85-82-CIV-5 (E.D.N.C. June 17, 1985). In a case decided just prior to *Dean*, *Richards & Assocs., Inc. v. Boney*, 604 F. Supp. 1214 (E.D.N.C. 1985), another judge in the same federal district held that North Carolina Rule 8(a)(2) would apply to a pleading in federal court and added, in *dicta*, that "failure to follow Rule 8(a)(2) would be a separate basis upon which this court could dismiss the complaint." *Id.* at 1218. The conflict within the Eastern District of North Carolina has not been resolved by the Fourth Circuit Court of Appeals.

An additional problem area arises when a plaintiff files a multi-claim complaint against a defendant with negligence claims subject to the strictures of Rule 8(a)(2), and other claims such as breach of fiduciary duty free from the Rule 8(a)(2) prohibitions. In such a case, there is nothing to prevent the news media from producing stories that "Defendant Doe has been sued for \$xx Million." How is the purpose behind Rule 8(a)(2) effectuated in this situation?

One final problem area apparent to this writer—and there may be others—is created by the con-

Generally, when a plaintiff's lawyer violates Rule 8(a)(2), he and his client are subject to the consequences provided by the rules of civil procedure.⁴⁴ These remedies are designed to punish violations and make whole those damaged in their role as participants in the civil litigation process. The remedies available are internal to the civil litigation process and do not provide for redress of consequential harms such as damage to reputation. For purposes of violation of the rules of civil procedure, the only denomination of a person that is important is the "party to a lawsuit." When a plaintiff violates a pleading rule, the rules of civil procedure can only make the defendant whole in his role as the defendant. Who the party is and what he does for a living makes no difference. Therefore, no adequate or appropriate remedies are available to redress a harm to the reputation of a party in his role as the defendant.

The interplay of the special *ad damnum* clause for tort defendants and the remedy for violation of its strictures is the focus of this article. The future of this issue will be guided by an understanding and a synthesis of the holdings in the three cases, *Jones v. Boyce*,⁴⁵ *Schell v. Coleman*⁴⁶ and *Harris v. Maready*,⁴⁷ that have dealt with this difficult problem and form the case law upon which the trial courts must base their Rule 8(a)(2) rulings. These cases, curiously, involve lawyers as defendants in professional malpractice cases. Their analysis, however, extends to any tort defendant whose reputation is protected by the current stricture on the pleading of a prayer for relief.

Jones v. Boyce⁴⁸

Jones v. Boyce was the first reported case to raise the issue of an appropriate remedy for violating the ban on *ad damnum* clauses in profes-

sion in Rule 8(a)(2) and Rule 9(g) which requires: "When items of special damages are claimed, each shall be averred." This rule has been interpreted to require particularity of pleading special damages under Rule 9(g), going so far in some cases as requiring allegation of specific sums sought. *Rodd v. W.H. King Drug Co.*, 30 N.C. App. 564, 228 S.E.2d 35 (1976); *Windfield Corp., v. McCallum Inspection Co.*, 18 N.C. App. 168, 196 S.E.2d 607 (1973). Is it adequate compliance with North Carolina Rule 9(g) for the plaintiff in a medical malpractice action to plead for "special damages for loss of earnings in an amount in excess of \$10,000?" This attempt at complying with Rule 8(a)(2) may violate Rule 9(g).

44. These consequences include the granting of a motion to strike under Rule 12(f), sanctions under Rule 11, and involuntary dismissal under Rule 41(b).

If the purpose of Rule 8(a)(2) were to prevent dissemination of the plaintiff's demand for judgment, and thus to ensure the defendant's right to an impartial unbiased jury, other devices are available to resolve the problem. *Voir dire* questioning of potential jurors, change of venue motions, or continuances until the dissemination of the demand for relief is forgotten, are alternatives that would help provide the defendant an impartial and unbiased jury. But, it seems that such was not the intent behind North Carolina's Rule 8(a)(2). See Hackney, *supra* note 8.

45. 60 N.C. App. 585, 299 S.E.2d 298 (1983).

46. 65 N.C. 91, 308 S.E.2d 662 (1983), *disc. rev. denied*, 311 N.C. 763, 321 S.E.2d 145 (1984).

47. 64 N.C. App. 1, 306 S.E.2d 799 (1983), *rev'd*, 311 N.C. 536, 319 S.E.2d 912 (1984).

48. 60 N.C. App. 585, 299 S.E.2d 298 (1983).

sional malpractice cases. *Jones* involved a legal malpractice action brought *pro se* by a Central Prison inmate against his former attorney.⁴⁹ The *ad damnum* clause of the plaintiff's complaint specifically demanded one million dollars for compensatory damages and two million dollars for punitive damages.⁵⁰ Two days after the filing of the suit, newspapers reported the filing of the suit and the specific amount of damages demanded.⁵¹

In *Jones*, the defendant responded to the complaint of the unrepresented plaintiff by filing a motion, pursuant to Rule 41(b), for dismissal of the action.⁵² The ground for the motion was the plaintiff's failure to comply with Rule 8(a)(2).⁵³ The plaintiff then moved to amend his complaint in order to delete the portions of the *ad damnum* clause that violated Rule 8(a)(2).⁵⁴ The trial court denied plaintiff's motion to amend and dismissed the plaintiff's cause of action, with prejudice, pursuant to Rule 41(b).⁵⁵

The North Carolina Court of Appeals was asked to find that the trial court abused its discretion in dismissing plaintiff's action for failure to comply with Rule 8(a)(2).⁵⁶ The court of appeals found no such abuse.⁵⁷

In reaching the decision in *Jones*, the court of appeals considered whether the plaintiff should have been granted leave to amend.⁵⁸ While noting that leave to amend was necessary because a responsive pleading had been filed, and furthermore, that such leave shall be "freely given when justice so requires," the court of appeals determined that the legislative intent behind Rule 8(a)(2) outweighed the countervailing interest of allowing liberal amendment to a *pro se* plaintiff who had violated a technical rule of pleading.⁵⁹ As evidence of a readily discernible legislative intent, the court cited the Report of the North Carolina Professional Liability Study Commission.⁶⁰

The court next sought to determine whether the power of dismissal

49. *Id.* at 586, 299 S.E.2d at 300.

50. *Id.*

51. Raleigh News & Observer, Aug. 15, 1981, at 23, col. 1; Raleigh Times, Aug. 15, 1981, at B5, col. 6.

52. *Jones*, 60 N.C. App. at 586, 299 S.E.2d at 360. Rule 41(b) of the North Carolina Rules of Civil Procedure states, in part, that "[f]or failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim therein against him."

53. *Id.* at 586, 299 S.E.2d at 298.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* It is curious that the court here chose not to imply the remedy of allowing the striking of the offending portions of the complaint or any other possible alternative. The court's opinion seems constricted by the defendant's response to the complaint.

58. *Jones*, 60 N.C. App. at 586, 299 S.E.2d at 300.

59. *Id.* at 587, 299 S.E.2d at 300 (quoting N.C. Gen. Stat. § 1A-1, R. Civ. P. 15(a) (1983)).

60. *Id.* (quoting the Report, *supra* note 31).

under Rule 41(b) is a permissible sanction for violation of Rule 8(a)(2).⁶¹ The court noted that the power in Rule 41(b) must be implied as an appropriate remedy where Rule 8(a)(2) omits any penalty for its violation.⁶² "Absent application of the Rule 41(b) provision for dismissal for violation of the rules, litigants could ignore the proscription with impunity, thereby nullifying the express legislative purpose for its enactment."⁶³ The court of appeals did not discuss whether the violation of Rule 8(a)(2) by the plaintiff was a case of ignoring the proscription of the rule, or merely a case of ignorance on the part of the *pro se* plaintiff.

Schell v. Coleman⁶⁴

In *Schell v. Coleman*, suit was filed against James C. Coleman for attorney malpractice and mismanagement of a receivership.⁶⁵ The complaint included a demand for a judgment of \$1,950,000.⁶⁶ The defendant moved to dismiss the complaint for its violation of Rule 8(a)(2).⁶⁷ The trial judge denied the defendant's motion to dismiss on these grounds and, *ex mero motu*, ordered that the prayer for relief be amended to allege damages "in excess of \$10,000."⁶⁸ According to the opinion, the plaintiff never filed the corrected page of the complaint and thus the offensive prayer for relief was never eliminated.⁶⁹ Subsequently, the defendant was granted a summary judgment.⁷⁰ Thereafter, the plaintiff appealed that action and the defendant cross-appealed the failure to dismiss on the grounds of violation of Rule 8(a)(2).⁷¹ The court of appeals held that the trial court abused its discretion by denying defendant's motion to dismiss for pleading violations.⁷² In reaching this result, the court reiterated the propriety of a Rule 41(b) dismissal as a sanction for this pleading violation.⁷³

The court of appeals recounted the facts of the case and concluded

61. *Id.* See also Note, *The Involuntary Dismissal Sanction for Rule 8(a)(2) Violations in Malpractice Complaints — A Reversion to Code Pleadings?*, 62 N.C.L. REV. 1107 (1984).

62. *Jones*, 60 N.C. App. at 586, 299 S.E.2d at 300.

63. *Id.*

64. 65 N.C. App. 91, 308 S.E.2d 662 (1983), *disc. rev. denied*, 311 N.C. 763, 321 S.E.2d 145 (1984). Plaintiff's notice of appeal and petition for discretionary review under North Carolina General Statute Section 7A-31 was denied. Defendant's motion to dismiss the appeal for lack of substantial constitutional question was allowed.

65. *Id.* Because two claims for relief were pled by the plaintiff it is unclear whether the prayer for relief relating to the claim for mismanagement of a receivership, as distinct from legal malpractice, was subject to the strictures of Rule 8(a)(2).

66. *Id.*

67. *Id.*

68. *Id.* at 92, 308 S.E.2d at 663.

69. *Id.*

70. *Id.* at 91, 308 S.E.2d at 663.

71. *Id.*

72. *Id.* at 94, 308 S.E.2d at 664.

73. *Id.*

that the plaintiff's violation of Rule 8(a)(2) was "flagrant." First, the plaintiff had been allowed the opportunity to cure his violation by amending the complaint but had failed to do so.⁷⁴ Additionally, the court found that plaintiff had caused adverse media publicity, served the defendant in open court and informed the state Department of Insurance that the defendant attorney had been sued for two million dollars for misappropriation.⁷⁵ Noting that the local newspaper and a local radio station ran news items reporting the plaintiff's two million dollar lawsuit against Coleman, the court of appeals concluded that, "Plaintiff's violation of Rule 8(a)(2) may have caused irreparable harm to Coleman's professional reputation and to his ability to be afforded a fair trial. Such are the evils to be avoided by the rule."⁷⁶ The court found that in light of the determination of the "flagrant and aggravated nature of plaintiff's violation of the rule, we are compelled to hold the trial court abused its discretion in denying defendant's motion to dismiss."⁷⁷

Harris v. Maready⁷⁸

In the third reported case, plaintiff Harris sued the law firm that had represented her in a domestic matter and, as individual defendants, two attorneys of the law firm, for professional legal malpractice arising from an alleged conflict of interest.⁷⁹ The alleged conflict arose from a business relationship between the plaintiff's husband and one of the defendants.⁸⁰ The complaint contained a demand in the prayer for relief for five million dollars from the law firm and five million dollars from defendants jointly and severally as compensatory damages for the legal malpractice claims.⁸¹ In the body of the complaint, the plaintiff included a section labeled "Damages" in which she alleged that she was entitled to recover damages from defendants "which may exceed five million dollars" and a like amount was specifically mentioned as punitive damages.⁸²

74. *Id.*

75. *Id.* The court's reliance on Rule 8(a)(2) to handle impropriety in service of process and adverse publicity was erroneous by established law. Rule 4 of the North Carolina Rules of Civil Procedure addresses the manner of service of process and the Code of Professional Responsibility addresses the propriety of attorneys engaging in publicity. The court's conclusion of "causing" adverse publicity is also ambiguous absent any fact in the record that the plaintiff initiated contact with the media. It is certainly possible that the news reporters routinely check the public court file each day to see if anything interesting has happened. *See* Smith, *supra* note 23. One returns, however, to the problem of a valid complaint, validly "discovered" by the media, but containing some proscribed language — here a demand for almost two million dollars.

76. *Schell*, 65 N.C. App. at 94, 308 S.E.2d at 665.

77. *Id.*

78. 311 N.C. 536, 319 S.E.2d 912 (1984).

79. *Id.* at 538, 319 S.E.2d at 914.

80. *Id.*

81. *Id.* at 549, 319 S.E.2d at 920.

82. *Id.*

Headline news stories featuring the multi-million dollar demand for monetary damages immediately followed the filing of the complaint.⁸³ One of the news stories featured the headline "Shirley Harris Sues Ex-Husband, and Lawyer's Firm for \$5 million."⁸⁴

Prior to the filing of any responsive pleading by the defendants, the plaintiff filed an amendment to her complaint, without leave of court, maintaining that such amendment was made as a matter of right under Rule 15(a) of the rules of civil procedure.⁸⁵ This amendment by the plaintiff eliminated all specific monetary damages in the prayer for relief, substituting the offending language with a request simply for "a sum in excess of \$10,000."⁸⁶

Plaintiff's amended complaint did not change the "Damages" section in the body of the original complaint with its request for five million dollars.⁸⁷ While the trial court refused to dismiss plaintiff's complaint for failure to comply with Rule 8(a)(2), the case was dismissed on other grounds.⁸⁸ The plaintiff appealed the dismissal on these other grounds and the defendant cross-appealed, raising the issue of abuse of discretion by the trial court in refusing to dismiss for violation of Rule 8(a)(2).⁸⁹

The court of appeals noted that despite the plaintiff's amendment, the legal malpractice complaint continued to violate Rule 8(a)(2).⁹⁰ In accordance with *Jones v. Boyce*, the court of appeals held that the trial court had abused its discretion when denying the defendant's motion to dismiss "because the complaint remains a pleading based upon professional malpractice demanding monetary relief of five million dollars against each defendant."⁹¹ After reviewing the holding in *Jones v. Boyce*, the court of appeals held that the trial judge abused his discretion by failing to allow the defendant's motion to dismiss for violation of Rule 8(a)(2).⁹²

The North Carolina Supreme Court reversed the court of appeals and found that, under the facts of this case, the trial court did not err in

83. Record at 29-30, *Harris v. Maready*, 311 N.C. 536, 319 S.E.2d 912 (1984) (518A83). Curiously, the *Harris* opinion makes no mention of this adverse publicity to the defendants' reputations, even though that same fact featured prominently in *Schell*. See *supra* note 75 and accompanying text.

84. *Id.* at 50.

85. *Harris*, 311 N.C. at 549, 319 S.E.2d at 920.

86. *Id.* at 549-50, 319 S.E.2d at 920.

87. *Id.* at 550, 319 S.E.2d at 920.

88. *Id.* at 537, 319 S.E.2d at 913. The trial judge dismissed the complaint and summonses against the defendants for lack of jurisdiction and insufficiency of process and service of process.

89. *Id.*

90. *Harris*, 63 N.C. App. 1, 15, 306 S.E.2d 799, 808 (1983), *rev'd*, 311 N.C. 536, 319 S.E.2d 912 (1984).

91. *Id.*

92. *Id.* at 16, 306 S.E.2d at 808.

denying the motion to dismiss for violation of Rule 8(a)(2).⁹³ The court briefly reviewed sanctions available for violation of similar *ad damnum* proscriptions in other states, and specifically disagreed with the statement of the court of appeals in *Jones* that "absent the strong sanction of dismissal for violation of Rule 8(a)(2) litigants may ignore the rule's proscription with impunity."⁹⁴ The court held that, "[a]lthough an action may be dismissed under Rule 41(b) for a plaintiff's failure to comply with Rule 8(a)(2), this extreme sanction is to be applied only when the trial court determines that less drastic sanctions will not suffice."⁹⁵

Analysis of Jones, Schell and Harris

After *Harris* the law of North Carolina, with regard to a Rule 41(b) dismissal for violation of Rule 8(a)(2), can only be understood by synthesizing the holdings of *Jones*, *Schell*, and *Harris*.

The *Harris* and *Jones* cases are similar in all respects except in result. In both cases, the only violation of the legislative intent of Rule 8(a)(2) to protect the reputation of professional malpractice defendants was the filing of a pleading that contained a specific request for monetary damages as opposed to the required "in excess of \$10,000" demand.⁹⁶ In neither case did the deciding court find that any aggravating conduct on the part of the plaintiff led to the further detriment of the policy behind Rule 8(a)(2). Undoubtedly, publicity in both cases resulted from the mere filing of the lawsuit with the offending specific claim for damages. However, no finding was made that the plaintiffs in either case had caused publicity of their professional malpractice claims or that they had violated an order of the trial judge to amend their pleadings.

There was publicity in both cases that resulted from the mere filing of the lawsuit with the offending specific claim for damages.⁹⁷ The only factual distinction between the two cases is that the plaintiff in *Harris* was represented by counsel and the plaintiff in *Jones* was not.⁹⁸ Presum-

93. *Harris*, 311 N.C. at 552, 319 S.E.2d at 922.

94. *Id.* at 551, 319 S.E.2d at 921.

95. *Id.* at 551, 319 S.E.2d at 922. North Carolina is the only jurisdiction which allows this drastic sanction of Rule 41(b) for violation of the ban on pleading damages. See, e.g., *Keese v. Brown*, 250 Ga. 383, 297 S.E.2d 487 (1982) (dismissal beyond authority of trial court); *Pizzigrilli v. Von Kessel*, 100 Misc. 2d 1062, 420 N.Y.S.2d 540 (1979) (defendant entitled to order striking offending portions of prayer for relief and plaintiff required to serve amended complaint; dismissal for violation deemed improper); *Franz v. Bednarek*, 678 P.2d 217 (Mont. 1984) (dismissal improper, motion to strike or leave to amend should be allowed); see also *White v. Fisher*, 689 P.2d 102 (Wyo. 1984) (holding statute eliminating *ad damnum* in only certain types of civil actions to be an unconstitutional invasion of the judicial branch of the government); *McCoy v. Western Baptist Hosp.*, 628 S.W.2d 634 (Ky. Ct. App. 1981); *Simon v. St. Elizabeth Medical Center*, 3 Ohio Op. 3d 164, 355 N.E.2d 903 (1976).

96. See *supra* text accompanying notes 50 and 81-82.

97. See *supra* text accompanying notes 51 and 83-84.

98. See *supra* note 49 and accompanying text.

ably then, if *Jones* were decided by the *Harris* court the result would have been different.

A comparison of *Harris* and *Schell* is more revealing. Both cases involved pleadings that violated Rule 8(a)(2) in that they contained claims for damages rather than the Rule 8(a)(2) prescribed claim for damages "in excess of \$10,000."⁹⁹ Both cases resulted in publicity of the specified dollar claims against the legal professional malpractice defendants.¹⁰⁰

In *Schell*, the dismissal with prejudice of plaintiff's case was held to be an appropriate remedy for violation of Rule 8(a)(2).¹⁰¹ In *Harris*, such dismissal was not appropriate.¹⁰² These different results are best understood by examining the facts of both cases as they evidence the intent of the plaintiff's lawyer involved.

In *Schell* the trial court ordered the plaintiff to amend his pleadings to delete the specific dollar demand proscribed by Rule 8(a)(2).¹⁰³ The plaintiff's counsel either refused or failed to do so.¹⁰⁴ By way of contrast, the plaintiff's counsel in *Harris* amended the pleadings to delete the demand for specific dollar recovery in the *ad damnum* clause entitled "Prayer for Relief," while leaving a request for specific dollar damages in the section of the complaint entitled "Damages."¹⁰⁵ However, the court held that the complaint in *Harris* still violated Rule 8(a)(2).¹⁰⁶ This suggests that Rule 8(a)(2) applies to all sections of the complaint for compensatory and punitive damages. With regard to amendment, what distinguishes *Harris* and *Schell* is that Schell's counsel showed his bad faith with regard to the proscriptions of Rule 8(a)(2) while Harris's counsel made a good faith, but erroneous, attempt to comply with the rule.¹⁰⁷ Schell's lawyer, even when faced with a court order, continued in open and notorious violation of Rule 8(a)(2). At worst, such activity evidences a specific intent to violate not only Rule 8(a)(2), but also an order of the court. At best such actions manifest gross negligence.¹⁰⁸ The activity of Harris evidences an error in judgment, based on ignorance of the

99. It is interesting to note that the decision by the North Carolina Supreme Court in *Harris* was issued in August 1984. In September, 1984 the supreme court refused to review the decision of the court of appeals in *Schell*, letting stand the intermediate court's opinion upholding dismissal with prejudice. While *Peaseley v. Virginia Iron, Coal & Coke Co.*, 282 N.C. 585, 194 S.E.2d 133 (1973) makes clear that a denial of *certiorari* or discretionary review by the supreme court is in no way an approval of the intermediate court's decision, nonetheless, *Schell* must be read in conjunction with *Harris*.

100. See *supra* text accompanying notes 83-84 and notes 75-76.

101. See *supra* text accompanying note 77.

102. See *supra* text accompanying note 93.

103. See *supra* text accompanying note 68.

104. See *supra* text accompanying note 69.

105. See *supra* text accompanying notes 85-87.

106. See *supra* text accompanying note 90.

107. See *supra* text accompanying notes 85-87 and note 69.

108. Violation of a court order can in itself give rise to dismissal. See Note, *supra* note 61.

rule.¹⁰⁹ The other major distinction between *Harris* and *Schell* concerns the publicity afforded the pleading. As noted earlier, publicity of the dollar amount of the plaintiff's claim occurred in both cases.¹¹⁰ In *Harris*, the fact of publicity was not mentioned by the North Carolina Supreme Court. In *Schell*, however, the court of appeals specifically found that the plaintiff's lawyer "caused the publicity."¹¹¹

The distinction between the two cases is further understood by focusing on the intent of the lawyer with regard to publicity. The supreme court's decision in *Harris* would seem to suggest, by omission of any discussion concerning publicity, that the fact of publicity is not important. What is important is how such publicity is caused. In *Harris* the publicity concerning the amount claimed by the plaintiff was certainly a result of the filing of pleadings in violation of Rule 8(a)(2).¹¹² Once filing had occurred, counsel for *Harris* could not control what use the media would make of the public record of the complaint and apparently did nothing to further the publicity.¹¹³ In *Schell*, however, counsel evidenced an intent to violate Rule 8(a)(2) by "causing" publicity and thereby further amplifying the damage to the professional malpractice defendant sought to be protected by the rule.¹¹⁴

In applying *Harris* and *Schell*, the trial courts apparently should focus on whether evidence exists of the intent of plaintiff's counsel when determining the appropriate remedy for violation of Rule 8(a)(2). The holding of *Harris* suggests that a mere violation of the rule will not give rise to an appropriate use of the extraordinary sanction of dismissal with prejudice. What is necessary then is not only a showing of a mistake by the plaintiff's counsel, but a showing of mistake plus some evidence of bad faith or intent to thwart the legislative intent behind Rule 8(a)(2) before dismissal with prejudice will be an appropriate sanction. After *Harris*, the trial court must, except in flagrant cases such as *Schell*, "determine that less drastic sanctions will not suffice."¹¹⁵

What then remains of the importance of legislative intent that provides the foundation to Rule 8(a)(2)?¹¹⁶ The legislature sought to protect the reputation of tort defendants by preventing plaintiffs from naming a dol-

109. In the brief for the court, plaintiff's lawyer in *Harris* admitted ignorance of the rule's application to legal malpractice. Appellant's New Brief at 30, *Harris v. Maready*, 311 N.C. 536, 319 S.E.2d 912 (518A83).

110. See *supra* text accompanying notes 83-84 and notes 75-76.

111. See *supra* note 75.

112. See *supra* text accompanying notes 83-84. The fact that the publicity followed the filing of the complaint by just one day and that the language of the complaint is reflected in the news stories leads inescapably to this conclusion.

113. See, *Smith supra* note 23.

114. See *supra* note 75. See also the legislative history of the rule at note 38.

115. See cases cited *supra* note 95.

116. See *supra* note 38 and accompanying text.

lar amount for compensatory and punitive damages other than "in excess of \$10,000."¹¹⁷ After *Harris*, apparently only in the most egregious situations will dismissal with prejudice be an appropriate sanction.¹¹⁸ What follows is a discussion of how the available sanctions address the harm sought to be prevented by Rule 8(a)(2).

MAKING THE PUNISHMENT FIT THE HARM

Can an effective remedy ever be granted to the tort defendant for a plaintiff's violation of Rule 8(a)(2)? The rules of civil procedure do not contemplate rectifying damage to reputation of a party, but rather focus on making a party whole when he is forced, by improper conduct on the part of his opponent, to incur costs related to the litigation of a lawsuit. If indeed a tort defendant suffers damage to his reputation by the filing of a complaint that demands specifically enumerated damages, no remedy is available within the rules of civil procedure that will repair damaged reputations.¹¹⁹ The remedies that are available include the awarding of costs, including attorneys' fees for a motion to strike the offending pleading, contempt, and dismissal with prejudice.¹²⁰

Because the filing of a complaint in violation of Rule 8(a)(2) is a lawyer-controlled activity, the sanction obviously must be applied against the lawyer, not his client. The mere granting of costs and expenses will not be sufficient to deter conduct in violation of Rule 8(a)(2). The lawyer who seeks to gain some real or imagined advantage by violating the rule will not be deterred by such nominal costs.

However, a court may impose sufficiently heavy costs by levying of fines for contempt against the offending lawyer, thus providing a deterrent to such future conduct. The court has such power which may be used to maximize the desired deterrent effect.¹²¹ If such costs are suffi-

117. N.C. Gen. Stat. § 1A-1, R. Civ. P. 8(a)(2) (1983); see also *supra* note 8.

118. See cases cited *supra* note 95.

119. In some jurisdiction medical malpractice defendants have tried to assert defamation claims against plaintiffs who violate prescriptions on pleading a specific *ad damnum*. In each instance, these claims have been dismissed because of the privilege accorded to a party within the context of a law suit. See *Sullivan v. Birmingham*, 11 Mass. App. Ct. 359, 416 N.E.2d 528 (1981); *McNeal v. Allen*, 95 Wash. 2d 215, 621 P.2d 1285 (1980).

120. Even the newly amended Rule 11 does not apply in this situation. See *supra* note 10.

121. Although no cases have yet been decided under the newly revised Rule 11 of the North Carolina Rules of Civil Procedure, federal courts have imposed stiff sanctions on attorneys who have violated the mandate of federal Rule 11. See *Albright v. Upjohn Co.*, 788 F.2d 1217 (6th Cir. 1986); *Shea v. Donohoe Const. Co.*, 795 F.2d 1071 (D.C. Cir. 1986); *Unioil Inc. v. E.F. Hutton & Co.*, 802 F.2d 1080 (9th Cir. 1986), *pending petition for reh'g*, (imposed a sanction of \$291,141.10 for a Rule 11 violation).

In addition, North Carolina courts have the inherent power to impose fines and sanctions against an attorney for disobeying a court order. *In re Robinson*, 37 N.C. App. 671, 247 S.E.2d 241 (1978). This inherent power is necessary for the court "to manage its affairs, to see that justice is done, and to see that the administration of justice is accomplished as expeditiously as possible." *Id.* at 676, 247 S.E.2d at 244. This power extends to citations for contempt, censure, informing the North Carolina

ciently publicized and meted out with sufficient regularity and consistency, the conduct of other lawyers tempted to commit a knowing violation of Rule 8(a)(2) may be deterred also. However, even this desirable end does nothing to remedy the damaged reputation of tort defendants.

The ultimate sanction of dismissal with prejudice results in punishing the offending lawyer by making him the insurer of the original tort defendant. The plaintiff who has had his claim dismissed because of the activity of his lawyer will have a new cause of action for professional malpractice against his own attorney.¹²² The original plaintiff's lawyer thus becomes liable for whatever damages would have been properly awarded to the plaintiff against the original tort defendant.¹²³ Such a result seems absurd for a number of reasons.

Surely the offended tort defendant receives a benefit in not having to defend a lawsuit or pay damages. This benefit apparently has no sound policy underpinning. If in fact a defendant has committed a tort against a member of the public, he should be made to answer by paying appropriate damages for that tort.¹²⁴ This basic premise underlies the entirety of tort law. A tortfeasor who escapes responsibility for his actions receives a windfall.¹²⁵ If the original tort claim was, in fact, baseless then the tort defendant has no forum to vindicate himself.¹²⁶ Moreover, any damage to the defendant's reputation caused by the filing of the pleading remains unvindicated.

Also, when the plaintiff's lawyer who knowingly violates Rule 8(a)(2) becomes the insurer of the original tort defendant and in turn is sued for professional malpractice, how can that claim be fairly and effectively prosecuted or defended? Because the original tort claim will form the basis for damages, the plaintiff will necessarily have to prove that case. In litigating the claim, discovery will be necessary against the original tort defendant who is no longer a party.¹²⁷ As such, all discovery devices

State Bar of the misconduct, imposition of costs, suspension for a limited time of the right to practice in the state or in that particular court, or disbarment. *Id.*; see also *Daniels v. Montgomery Mut. Ins. Co.*, 81 N.C. App. 600, 344 S.E.2d 847 (1986).

122. Unfamiliarity with the rules of pleading and failure to follow them certainly amounts to legal malpractice when the client's claim is dismissed as the proximate result of the lawyer's action. See discussion *supra* note 7.

123. P. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 32, at 185 (5th ed. 1984) [hereinafter PROSSER AND KEETON].

124. *Id.* § 1, at 5-6.

125. *Id.* § 1, at 6.

126. The tort defendant's reputation will actually be in worse condition because the fact that he has been sued is a matter of public record, yet he has no forum to vindicate himself "on the merits." If the original tort defendant "wins" at all, it is only on a technicality.

127. Distinctions are made in the North Carolina Rules of Civil Procedure as to discovery available against parties in a lawsuit, as opposed to witnesses. The use of "requests for production" under Rule 34, "requests to admit" under Rule 36, "requests for mental and physical examinations" under

and enforcement procedures available only against parties will be unavailable to the plaintiff with regard to the original tort defendant.¹²⁸

Even more problematic is that the plaintiff's former lawyer, the new defendant, most certainly will have received confidential information regarding the original tort claim from his former client.¹²⁹ Such information of the former client may not be used by his former lawyer to the lawyer's advantage.¹³⁰ In addition, counsel for the former lawyer, now defendant, will not be able to consult with the original tort defendant whose conduct is at the heart of the lawsuit. This twist makes an adequate defense and a fair result unlikely.

Finally, should the plaintiff prevail against his former lawyer and receive damages predicated on the tortious conduct of the original defendant, what is the impact on the original defendant? Because of the odd posture of the lawsuit, the original defendant will have little or no control over the outcome, and his reputation may be further damaged by a negotiated settlement or verdict in which he had little voice.¹³¹ The former lawyer, now defendant, will have little interest, for example, in preventing publicity of a negotiated award predicated on the tort of the original defendant which can lead to headlines such as "Former Patient Received \$1,000,000 for Doctor's Mistake".¹³² Such headlines certainly might further damage the reputation of the original tort defendant. Also, if the plaintiff receives an award predicated on the original tort defendant's actions, what is the effect on his liability insurance rates? Because he could not control the second lawsuit, he would have no power to further effect disposition, and his liability insurance carrier pays no money; he could argue that the award should have no effect on his rates. But if he did commit an act of negligence or one subjecting him to punitive damages and such an act can now be documented, is he not a poorer risk and should not his carrier be entitled to higher premiums to reflect that risk?¹³³

Rule 35, and the economical interrogatory practices under Rule 33 are limited to parties, not witnesses in a lawsuit.

128. For failure to comply with discovery a court has much broader authority to sanction a party than is available against a witness. *See, e.g.*, N.C. Gen. Stat. § 1A-1, R. Civ. P. 37(b)(2) (1983).

129. N.C. RULES OF PROFESSIONAL CONDUCT Canon IV, Rule 4(A) (N.C. State Bar 1985).

130. Rules 4(C)(3) and 4(C)(5) of Canon IV of the N.C. RULES OF PROFESSIONAL CONDUCT logically do not apply to this situation.

131. Perhaps intervention under Rule 24 of the North Carolina Rules of Civil Procedure would be allowed because the former defendant would be able to meet the requirements of the rule.

132. Typically, settlements in professional malpractice cases are conditioned on confidentiality.

133. Ironically, the original thrust behind amending the rule on pleading the *ad damnum* came in 1976 and 1986 from a legislature concerned about a liability insurance crisis and the high cost of providing such insurance. *See supra* text accompanying notes 2-3 and 30-31. The effect of granting this most severe penalty available for a violation of Rule 8(a)(2) is to thwart the natural effect of liability on the cost of insurance.

What then is left of the policy behind Rule 8(a)(2) to protect the reputation of tort defendants? After *Harris*, dismissal with prejudice is a most unlikely result and, as has been argued, a most undesirable one.¹³⁴ The granting of the costs for the legal activity of the defendant to strike the pleading is ineffective. Further, the use of contempt against the offending plaintiff's lawyer does nothing to remedy the harm sought to be protected by Rule 8(a)(2).

One suggested answer lies in the availability of the common law tort of abuse of process.¹³⁵ Perhaps the only effective remedy is to allow a cause of action by the original tort defendant against the original plaintiff's lawyer for abuse of process. This remedy accomplishes the original intent of the drafters of Rule 8(a)(2) by protecting, or at least vindicating, the reputation of tort defendants. The two elements of an action for abuse of process are 1) an ulterior motive and 2) an act in the use of legal process not proper in the regular prosecution of the proceeding.¹³⁶ Abuse of process arises in a situation where process is at first validly issued, for example, in a valid negligence or punitive damage claim. After the issuance of the process, however, the plaintiff uses the valid legal process for a purpose for which it was not intended. The cases involving violation of Rule 8(a)(2) fit this mold perfectly. The plaintiff files a valid complaint for negligence or punitive damages. Plaintiff's lawyer, however, violates the strictures of Rule 8(a)(2) which are known to him and which, as an attorney, must be followed. This constitutes the ulterior motive to use the judicial system for an improper use, the improper use being the deliberate harm to the tort defendants' reputation.¹³⁷

Allowing the remedy of abuse of process to the tort defendant is the only way to effectuate the out-of-court policy of Rule 8(a)(2), the protection of defendants' reputations. All of the other procedural sanctions available for Rule 8(a)(2) violations have only the systemic or in-court

134. In *Stokes v. Wilson & Redding Law Firm*, 72 N.C. App. 107, 323 S.E.2d 470 (1984), cert. denied, 313 N.C. 612, 332 S.E.2d 83 (1985), the trial court's dismissal of a *pro se* plaintiff's complaint violating Rule 8(a)(2) and seeking three million dollars in a legal malpractice claim was reversed.

In *Wilder v. Amatex Corp.*, 314 N.C. 550, 336 S.E.2d 66 (1985), a products liability case, the original complaint was dismissed because the plaintiff's prayer for damages violated Rule 8(a)(2). However, the order of dismissal permitted the plaintiff to file a new action within a year based on the same claim.

In *Miller v. Ferree*, 84 N.C. App. 135, 351 S.E.2d 845, 847 (1987), the North Carolina Court of Appeals stated: "It is clear that a dismissal with prejudice, pursuant to Rule 41(b) is an available sanction for a plaintiff's violation of Rule 8(a)(2)." However, the appellate court affirmed the trial court's determination that dismissal without prejudice was an appropriate sanction in a legal malpractice case where the plaintiff's violations of Rule 8(a)(2) resulted in at least three newspaper articles concerning the lawsuit.

135. PROSSER AND KEETON, *supra* note 123, § 85, at 608, § 32, at 185.

136. Byrd, *Malicious Prosecution in North Carolina*, 47 N.C.L. REV. 285, 288 (1968).

137. *Id.*; see also *Ledford v. Smith*, 212 N.C. 447, 193 S.E.2d 722 (1937); *Abernathy v. Burns*, 210 N.C. 636, 188 S.E.2d 97 (1936); *Ludwick v. Penny*, 158 N.C. 104, 73 S.E. 228 (1911).

purpose of thwarting the offending behavior and ensuring the intended operation of the civil justice system. These sanctions under the rules of civil procedure can do no more than enforce the obligation of attorneys to follow rules whose purpose is exclusively and primarily to make the judicial system function fairly and efficiently.¹³⁸ The only vindication for the out-of-court policy interest of protecting defendants' reputations is to apply the remedy of abuse of process, which is of a substantive, rather than procedural nature.

CONCLUSION

If the wish of the legislature is to continue with this practice of prohibiting the mention of specific dollar amounts in negligence and punitive damage actions, the rule should be amended to provide a sanction or remedy for its violation. This author would propose the following:

Dismissal with prejudice is not an available remedy for violation of Rule 8(a)(2). In cases of knowing and willful violation of Rule 8(a)(2), such proof will be *prima facie* evidence for a claim of abuse of process against the plaintiff's attorney.

These suggested changes in Rule 8(a)(2) would provide fair notice to litigants and their attorneys, encourage consistency, and establish a sanction that is reasonably related to the harm which this rule was intended to remedy.

138. See N.C. Gen. Stat. § 1A-1, R. Civ. P. 1 (1983); Sizemore, *supra* note 12.