Rule 11 and the Court's Inherent Power to Shift Attorney's Fees: An Analysis of Their Competing Objectives and Applications

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RULE 11 AND THE COURT'S INHERENT POWER TO
SHIFT ATTORNEY'S FEES: AN ANALYSIS OF THEIR
COMPETING OBJECTIVES AND APPLICATIONS

I. INTRODUCTION

In an effort to reduce congested court dockets, expensive litigation, and substantial delays in the judicial system, court and court observers are giving increased attention to the practice of sanctioning improper motives and bad-faith courtroom conduct. Arguably, the remedy of choice is awarding attorney's fees to the injured party. Both Federal Rule of Civil Procedure 11 (hereinafter Rule 11) and the federal court's inherent power to control courtroom litigants are vehicles for achieving this purpose. While the scope of Rule 11 is limited to and specifically designed for deterrence, the court's inherent power is broader and is designed to compensate. There are occasions, however, where Rule 11 and the court's inherent power overlap, and the question for the court becomes under which authority the offender should be punished. This comment explores the nature and appropriate use of the court's authority to sanction under Rule 11 and the court's inherent power.

Traditionally the sanctioning tools have worked in tandem. When the conduct at issue is not sanctionable under Rule 11, the court's inherent power fills the gap to punish the offender. The

2. The United States Supreme Court has recently decided several important cases involving the use of sanctioning statutes. See, e.g., Business Guides, Inc. v. Chromatic Communications Enters., 111 S. Ct. 922, 929 (1991) (Rule 11 certification standards apply to all signers, including represented parties); Cooter & Gell v. Hartmarx Corp., 110 S. Ct. 2447, 2461 (1990) (Rule 11 applies only to papers filed in district court); Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120, 127 (1989) (liability under Rule 11 does not extend to signing attorney's law firm). In addition, courtroom observers have written extensively on the subject of sanctioning courtroom misconduct. See, e.g., 5A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1331 (1990); Arthur R. Miller, The Adversary System: Dinosaur or Phoenix?, 69 MINN. L. REV. 1 (1984).
3. One commentator has found that attorney's fees have been imposed as sanctions in 96% of the cases finding a violation of Rule 11. Melissa L. Nelken, Sanctions Under Amended Federal Rule 11 - Some "Chilling" Problems in the Struggle Between Compensation and Punishment, 74 GEO. L.J. 1313, 1333 (1986).
4. See infra notes 86-89 and accompanying text.
5. See infra notes 29-31 and accompanying text.
United States Supreme Court has recently announced in Chambers v. NASCO, Inc. a greatly expanded version of the court’s inherent power, particularly regarding Rule 11. No longer is this resource just a "gap-filler." After the Court’s decision, a district judge can, in certain circumstances, rely solely on the court’s inherent power to sanction, even when Rule 11 also applies.

Using Chambers as a point of reference, this comment begins with an historical sketch of the court’s inherent power to sanction, describing the power's purpose and its application. This comment then discusses the origin and development of Rule 11, its purpose, and its application. The problem of overlap and choosing between the sanctioning tools is then introduced. Consequences of endorsing an expanded version of the inherent power to sanction are analyzed with respect to the purpose of Rule 11, the requirements of due process, and the amount of attorney’s fees awarded. Finally, this comment advances several proposals intended to minimize the harmful effects of the Court's decision and to retain the benefits of the traditional approach to awarding attorney’s fees.

II. BACKGROUND

A. The Court's Inherent Power to Sanction

1. The American Rule

Courts may not award attorney's fees as damages to a prevailing party unless authorized by statute or contractual agreement between the parties. This long-held tradition has become known as

7. The Court also found the bad-faith exception applicable to sanctionable conduct outside the courtroom. Id. at 2132; see also infra notes 40 and 46 and accompanying text. Chambers v. NASCO, Inc. has been limited by a recent district court decision finding that a court's inherent power to assess attorney's fees as sanctions is restricted to litigation before that court. CJC Holdings, Inc. v. Wright & Lato, Inc., 142 F.R.D. 648, 652 (W.D. Tex. 1992). This decision would prevent a court from imposing sanctions that require a finding of misconduct upon a party for acts that occurred entirely before another court in another circuit. Id.
8. See infra notes 13-64 and accompanying text.
9. See infra notes 65-121 and accompanying text.
10. See infra notes 122-42 and accompanying text.
11. See infra notes 143-205 and accompanying text.
12. See infra notes 206-28 and accompanying text.
the American Rule and states that "the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser."\(^{14}\) The rule's historical roots reach as far back as the beginning of the United States federal system.\(^{15}\) In 1853, Congress enacted legislation that embraced the spirit of the American Rule and expressly limited attorney's fees collectible from the losing party to the amounts stated in the statute.\(^{16}\) The 1853 Act remains largely unchanged in the current United States Code.\(^{17}\) The general rule against fee-shifting continues to be reaffirmed by the United States Supreme Court.\(^{18}\)

2. The Common Law Exceptions

In spite of the American Rule, federal courts have crafted common law exceptions to the rule against fee-shifting based on their inherent power to police their judicial proceedings.\(^{19}\) The implied

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15. *See*, e.g., Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306, 306 (1796) ("The general practice of the United States is in opposition [sic] to [the award of attorney's fees as damages]; and even if that practice were not strictly correct in principle, it is entitled to the respect of the court, till it is changed, or modified, by statute.").
   
   *Fees of Attorneys, Solicitors, and Proctors. In a trial before a jury, in civil and criminal causes, or before referees, or on a final hearing in equity or admiralty, a docket fee of twenty dollars . . . .
   
   In cases at law, where judgment is rendered without a jury, ten dollars, and five dollars where a cause is discontinued.
   
   For scire facias and other proceedings on recognizances, five dollars.
   
   For each deposition taken and admitted as evidence in the cause, two dollars and fifty cents.
   
   A compensation of five dollars shall be allowed for the services rendered in cases removed from a district to a circuit court by writ of error or appeal . . . .
   
   Id.
18. "The 1853 Act was carried forward in the Revised Statutes of 1874 and by the Judicial Code of 1911. Its substance, without any apparent intent to change the controlling rules, was also included in the Revised Code of 1948 as 28 U.S.C. §§ 1920 and 1923(a)."
   
19. *See*, e.g., Weinberger v. Romero, 456 U.S. 305, 313 (1982) ("[W]e do not lightly assume that Congress has intended to depart from established principles [such as the scope of a court's inherent power]."); United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812) ("Certain implied powers must necessarily result to our Courts of justice from the nature of their institution[s]." These implied powers "cannot be dispensed with in a Court, because they are necessary to the exercise of all others."); *see also* Chambers v. NASCO, Inc., 111 S. Ct. 2123, 2132 (1991) (affirming the inherent power of federal courts to police the conduct of the parties
supervisory powers are "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs as to achieve the orderly and expeditious disposition of cases." The 1853 Act does not interfere with judicially created exceptions allowing for fees in excess of those allowed by statute.

The three most commonly used exceptions are narrowly tailored and fall into the categories of the common-fund exception, the willful disobedience exception, and the bad-faith exception. The common-fund exception enables courts to award attorney's fees to a party whose litigation efforts "preserv[ed] or recover[ed] a fund for the benefit of others in addition to himself." The common-fund exception is properly derived not from the court's inherent power, but from its historic equity jurisdiction. Under the willful disobedience exception, courts have discretion to shift the entire cost of litigation appearing before them; Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980) ("The inherent powers of federal courts are those which 'are necessary to the exercise of all others.'") (citing United States v. Hudson, 11 (7 Cranch) 32, 34 (1812)); Ex parte Robinson, 86 U.S. (19 Wall.) 505, 510 (1874) ("The power to punish for contempt is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings . . ."); Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 227 (1821) ("[C]ourts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect and decorum in their presence, and submission to their lawful mandates . . .").

20. Link v. Wabash R.R., 370 U.S. 626, 630-31 (1962). The scope of the court's inherent power to control the conduct of litigants who appear before it is far-reaching. See, e.g., Ex parte Robinson, 86 U.S. (19 Wall.) 505, 510 (1874) ("Power to punish for contempt is inherent in all courts."); Ex parte Burr, 22 U.S. (9 Wheat.) 529, 531 (1824) (federal court has the power to control admission to its bar and punish attorneys who appear before it). When court orders are disobeyed, the court's power naturally extends to conduct beyond the confines of the courtroom. See, e.g., Young v. United States, 481 U.S. 787, 798 (1987) ("The underlying concern that gave rise to the contempt power was not . . . merely the disruption of court proceedings. Rather, it was disobedience to the orders of the Judiciary, regardless of whether such disobedience interfered with the conduct at trial."); Illinois v. Allen, 397 U.S. 337 (1970) (court may ban from the courtroom a criminal defendant who disrupts a trial); Link v. Wabash R.R., 370 U.S. 626 (1962) (court may act sua sponte to dismiss a suit for failure to prosecute); Gulf Oil v. Gilbert, 330 U.S. 501 (1947) (court may dismiss an action under its inherent power on grounds of forum non conveniens); Universal Oil Co. v. Root Ref. Co., 328 U.S. 575 (1946) (court has power to set up an independent investigation to determine whether it has been a victim of fraud); Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 245 (1944) (courts have "the historic power of equity to set aside fraudulently begotten judgments").


22. Id. at 257-59.

23. Id. at 257. See generally John P. Dawson, Lawyers and Involuntary Clients in Public Interest Litigation, 88 HARV. L. REV. 849, 850-51 (1975) (prevailing plaintiff should be awarded fees from the common fund based on restitution principles); John P. Dawson, Lawyers and Involuntary Clients' Attorney's Fees From Funds, 87 HARV. L. REV. 1597 (1974) (discussing the historical development of the common-fund exception from its roots in restitution principles).

to a party who intentionally disobeys a court order.\textsuperscript{25} The third exception and the one on which this comment focuses is the inherent power to assess attorney's fees when a losing party has "acted in bad faith, vexatiously, wantonly; or for oppressive reasons."\textsuperscript{26} While Congress has the authority to pass legislation prohibiting use of these exceptions,\textsuperscript{27} the legislative branch "has not repudiated the judicially fashioned exceptions to the general rule against allowing substantial attorneys' fees."\textsuperscript{28} As long as Congress' acquiescence continues, the courts will use their judicially created exceptions to sanction abuse of the judicial process.

3. \textit{The Purpose of the Bad-Faith Exception}

The purpose of sanctions generally is the improvement of the judicial process. This improvement can be achieved through punishment, compensation, and deterrence.\textsuperscript{29} However, the court's inherent power under the bad-faith exception is arguably geared toward pun-

\begin{itemize}
\item \textsuperscript{25} Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967) (citing Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 426-28 (1923)), cited with approval in Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 258 (1975)).
\item \textsuperscript{26} Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 258-59 (1975) (quoting F.D. Rich v. United States, 417 U.S. 116, 129 (1974)). While Alyeska involved bad-faith conduct on the part of the losing party, sanctions have been extended equally to prevailing parties who misuse the judicial process. See, e.g., \textit{In re TCI, Ltd.}, 769 F.2d 441, 445 (7th Cir. 1985); Wright v. Jackson, 522 F.2d 955, 958 (4th Cir. 1975). Technically, the bad-faith exception to the American Rule against fee-shifting does not contradict the rule at all. The American rule prohibits fee-shifting on a substantive basis. That is, the prevailing party does not also get his or her fees and costs paid by the loser.
\item The bad-faith exception providing for fee-shifting is procedural, not substantive. Fees are awarded not based on who wins, but on who abuses the judicial process. This distinction becomes very important when a federal court sits in diversity and must choose between a state law that allows for fee-shifting and the federal rule allowing fee-shifting only upon a finding of bad faith. Under the \textit{Erie} Doctrine, federal courts defer to state law only when there is conflict between substantive federal law and substantive state law. See generally Jeffrey A. Parness, \textit{Choices About Attorney Fee-Shifting Laws: Further Substance/Procedure Problems Under Erie and Elsewhere}, 49 U. Pitt. L. REV 393 (1988). This point was made in \textit{Chambers v. NASCO, Inc.} when the United States Supreme Court allowed application of the bad-faith exception to shift fees despite substantive state law to the contrary. 111 S. Ct. 2123, 2137 (1991).
\end{itemize}
ishment and compensation, with deterrence being a helpful by-product. The Supreme Court in 1973 indicated that "the underlying rationale of 'fee shifting' is, of course, punitive, and the essential element in triggering the award of fees is therefore the existence of 'bad faith.'" In a later opinion, the Court elaborated further, stating that the dual purpose of the court's inherent powers is "vindicating judicial authority without resort to the more drastic sanctions available for contempt of court and making the prevailing party whole for expenses caused by his opponent's obstinacy." Because of this emphasis on "vindication" and making the party "whole," litigants are subject to greater possible sanctions, monetary or otherwise, than if deterrence alone were the motivating factor.

4. Chambers v. NASCO and the Bad-Faith Exception

Under the bad-faith exception of *Alyeska Pipeline,* the Supreme Court recently affirmed in *Chambers v. NASCO* an assessment of nearly one million dollars in attorney fees, along with disbarment of the lawyers involved. Sanctions were imposed based on the court's inherent powers, not on Rule 11 or other applicable mechanisms. The Court readily found bad faith based on Chambers' and his lawyers' conduct.

Chambers was sued for specific performance of a contract in which he agreed to sell his Louisiana television and radio communications business. Under the contractual obligations, Chambers was required to file the necessary documents requesting a transfer of interest with the Federal Communications Commission (hereinafter FCC). Having changed his mind about the deal, Chambers refused to file the documents with the FCC and attempted to convince NASCO that the deal was off. NASCO responded by taking legal

33. *Chambers v. NASCO,* Inc., 111 S. Ct. 2123, 2130 n.5 (1991). Chambers was required to pay his opponent's entire litigation expense, including fees and costs totaling $996,644.65. His attorneys were disbarred or suspended for periods ranging from six months to five years. *Id.*
34. *Id.* at 2146-47 (Kennedy, J., dissenting). In his dissent, Justice Kennedy listed a number of rules and statutes which the district court could have relied to reach all of the sanctionable conduct. *Id.* These sanctioning tools included Federal Rules of Civil Procedure 11, 16(f), 26(g), 56(g), and 18 U.S.C. § 401 (1988), and 28 U.S.C. § 1927 (1988). *Id.*
36. *Id.*
37. *Id.*
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action, suing Chambers in the United States District Court for the Western District of Louisiana. NASCO prayed for specific performance and a temporary restraining order (hereinafter TRO) to prevent the sale or encumbrance of the property. Before the TRO hearing, Chambers attempted to place the property beyond the jurisdiction of the court by selling the property to a trust he created with his sister as trustee and his children as beneficiaries. Chambers thought he was able to do this because he had discovered that the NASCO purchase agreement had not been recorded, thereby allowing him to sell the business to a third party.

After Chambers recorded the purported transfer of his business to his sister, a skeptical judge called Chambers’ attorney to make sure that the property would remain unencumbered until the hearing. The attorney withheld information about the third-party sale and recordation. At the hearing, a perturbed judge warned Chambers that his conduct was sanctionable and enjoined him from entering into a lease-back agreement with the trustee, wherein Chambers would be able to continue running the business.

Despite this warning, Chambers continued with “a series of meritless motions and pleadings and delaying actions.” The following facts are a sampling of Chambers’ conduct: He refused to allow NASCO to inspect the business records pursuant to an injunction; he subsequently appealed twice but was denied each time for lack of final judgment; he filed a series of meritless motions and was warned on each occasion; and he attempted to relocate the equipment and begin a new business with FCC approval so as to render the contract meaningless while the court was writing its opinion.

In the final analysis, the district court held for NASCO, finding that the deeds conveying the business into a trust were void and inoperative. Chambers unsuccessfully appealed the decision to the Fifth Circuit, and the case was remanded to fix the amount of appellate sanctions for frivolous appeal and to determine whether further

38. Id. at 2128.
39. Id.
40. Id.
41. Id.
42. Id. at 2129.
43. Id.
44. Id.
45. Id. (quoting NASCO, Inc. v. Calcasieu Television & Radio, Inc., 124 F.R.D. 120, 127 (W.D. La. 1989)).
46. Id. at 2129-30.
47. Id. at 2130.
sanctions were appropriate for conduct during the litigation below.\textsuperscript{48} On remand, the district court found the conduct during the entire litigation process sanctionable.\textsuperscript{49} While the court noted that Rule 11 and other sanctioning tools were applicable, the judge decided that they were unable to reach all of the bad-faith conduct perpetrated on the court.\textsuperscript{50} NASCO’s entire litigation costs were awarded on the basis of the court’s inherent power.\textsuperscript{51} This finding was upheld by the Fifth Circuit,\textsuperscript{52} and the Supreme Court affirmed, in a five-to-four decision, finding that the district court did not abuse its discretion when it relied solely on its inherent power to sanction Chambers’ bad-faith conduct.\textsuperscript{53} The Court held that whenever conduct sanctionable under Rule 11 is intertwined with conduct that only the inherent power could address, a court in its discretion may safely rely on its inherent power alone.\textsuperscript{54}

5. \textit{The Subjective Standard}

The standard for imposing sanctions is a narrow, subjective one. The sanctioned litigant must in fact have entertained improper motives and acted in "bad faith, vexatiously, [or] wantonly."\textsuperscript{55} The district court in \textit{Chambers} found three specific categories of bad faith conduct that combined to perpetrate fraud on the proceedings: (1) attempts to deprive the court of jurisdiction; (2) filing of false and frivolous pleadings; and (3) dilatory tactics designed to oppress, harass, and force the opposing party into compliance.\textsuperscript{56} Based on this finding of bad faith and the fact that the misconduct continued from the genesis of the litigation to its completion, the lower court justified sanctions of attorney’s fees against Chambers in the sum of the expenses paid by NASCO to its attorneys.\textsuperscript{57}

6. \textit{Due Process Requirements}

The Court in \textit{Chambers} warned judges that they must "exercise caution in invoking [the court’s] inherent power, and it must comply

\textsuperscript{48} Id.
\textsuperscript{49} Id.
\textsuperscript{50} Id.
\textsuperscript{51} Id.
\textsuperscript{52} NASCO, Inc. v. Calcasieu Television & Radio, Inc., 894 F.2d 696 (5th Cir. 1990).
\textsuperscript{53} Id.
\textsuperscript{56} \textit{Chambers}, 111 S. Ct. at 2131.
\textsuperscript{57} Id. at 2130.
with the mandates of due process, both in determining that the requisite bad faith exists and in assessing fees.\textsuperscript{58} This means that attorney's fees will generally not be assessed absent "fair notice and an opportunity for a hearing on the record."\textsuperscript{59} Due process under the court's inherent power is not dictated by rule or statute,\textsuperscript{60} and therefore requirements will vary depending upon the fact pattern\textsuperscript{61} and jurisprudential model used.\textsuperscript{62} In Chambers, the Court found that the district judge had complied with defendant's right to procedural due process.\textsuperscript{63} The fact that the sanctions were not assessed until the end of litigation did not defeat due process requirements because "Chambers received repeated timely warnings both from NASCO and the court that his conduct was sanctionable."\textsuperscript{64}

\textsuperscript{58. Id. at 2136.}
\textsuperscript{59. Roadway Express, Inc. v. Piper, 447 U.S. 752, 767 (1980).}
\textsuperscript{60. Eash v. Riggins Trucking, Inc., 757 F.2d 557, 563 (3d Cir. 1985).}
\textsuperscript{61. Hearing and notice requirements are subject to varied interpretations. Compare, e.g., Ray A. Scharer & Co. v. Plabell Rubber Prods., Inc., 858 F.2d 317, 321 (6th Cir. 1988) (due process at a minimum requires notice and a reasonable opportunity to be heard) with United States v. Nesglo, Inc., 744 F.2d 887, 890 (1st Cir. 1984) (hearing not required if sanctioned party fails to ask for one) and Miles v. Sampson, 675 F.2d 5, 9-10 (1st Cir. 1982) (hearing not required if court is intimately familiar with the case). The standard of specific findings of bad faith will also vary. Compare, for example, Batson v. Neal Speloe Assocs., 112 F.R.D. 632, 639 (W.D. Tex. 1986) (account of plaintiff's bad faith litigation in the record), aff'd, 805 F.2d 546 (5th Cir. 1986) with Baker Indus. v. Cerberus Ltd., 764 F.2d 204, 209 (3d Cir. 1985) (sanctions upheld under 28 U.S.C. § 1927 despite the absence of specific findings of bad faith in the record).}

\textsuperscript{62. One commentator has offered three models to explain how courts approach due process decisions under their inherent power: The formalist model, the due process model, and the inherent power model. Each model describes points along a continuum representing a court's willingness to actively participate in the proceedings. Courts following the formalist model find their power primarily in the text of statutes and rules. The formalist approach looks only secondarily to the text of Article III of the U.S. Constitution. Next along the continuum is the Due Process model, which also looks to the text of rules and statutes but which is also open to the policies and traditions of the Due Process Clause. Farther down the continuum are a number of inherent power models ranging from weak to strong. The weak inherent power models are more activist and find their source of power in various constitutional amendments, statutes, and in the principles of separation of powers and federalism. The strong inherent power model is the most activist and finds its power inherent in the institution of the courts. Courts using the strong inherent power model exercise the greatest freedom and expand or shrink Due Process requirements according to their temperament and situation. Neil H. Cogan, The Inherent Power and Due Process Models in Conflict: Sanctions in the Fifth Circuit, 42 Sw. L.J. 1011, 1012-13 (1989).}

\textsuperscript{63. Chambers v. NASCO, Inc., 111 S. Ct. 2123, 2138 (1991).}
\textsuperscript{64. Id. at 2139.}
B. Federal Rule of Civil Procedure 11

1. The History of Rule 11

The power of the courts to impose sanctions for bad-faith conduct is set forth in various provisions of the Federal Rules. Sanctions under Rule 11 are one example of a codified attempt to address concern over abusive tactics and frivolous litigation. Rule 11 was first adopted in 1937 and represented the unification of Equity Rule 24 relating to signature of counsel and Rule 21 relating to scandalous matters. Application of the rule was designed to strike pleadings not signed by an attorney of record or signed with an improper purpose. The signature of the attorney certified "that to the best of [the attorney's] knowledge, information, and belief there is good ground to support [the pleading]; and that it is not interposed for delay." A "wilful violation" of the rule subjects the attorney to "appropriate disciplinary action."

2. The 1983 Amendment

Rule 11 was amended in 1983 in response to the need for more effective deterrence of litigant abuse and misuse of judicial proceedings. During the years following the rule's amendment, widespread confusion arose over the application of the rule, the standard required of attorneys, and the available sanctions. Some people feared that imposition of Rule 11 sanctions might chill creative lawyering. The Advisory Committee Note to the amendment stated that "[the] new language is intended to reduce the reluctance of courts to impose sanctions by emphasizing the responsibilities of the attorney and reenforcing those obligations by the imposition of sanctions."

The 1983 amendment to Rule 11 made substantial modifica-

67. Schwarzer, supra note 65, at 182-83.
69. Id.
70. Id.
72. Id.
73. Schwarzer, supra note 65, at 184.
74. Committee Note, supra note 71, at 198 (citations omitted).
tions:76 (1) the rule's certification requirement extended to every paper filed in court, not just pleadings; (2) the attorney's signature certified that a reasonable pre-filing inquiry had been conducted; (3) the claim was well-grounded in fact and warranted by existing law, or by a good-faith argument for the modification of existing law; (4) papers could not be submitted for an improper purpose, such as to harass or needlessly increase litigation costs; and (5) upon violation, the court was under a mandatory obligation to impose sanctions, which could include reasonable attorney's fees.76

3. The Objective Standard

While Rule 11 was historically rooted in the courts' equitable and inherent powers to sanction bad-faith conduct, the amended ver-

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75. The full text of Federal Rule of Civil Procedure 11 [hereinafter Rule 11] after the 1983 amendment is as follows (new matter is in italics; deleted matter is in strike-out):

Rule 11. Signing of Pleadings, Motions, and Other Papers; Sanctions.

Every pleading, motion, and other paper 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, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief it is not interposed for delay formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.


76. For a general discussion of the 1983 amendments to Rule 11 see Schwarzer, supra note 65, at 184-97.
sion of the rule is not so limited. The Advisory Committee Note specifically states that “[t]he reference in the former text to wilfulness as a prerequisite to disciplinary action has been deleted.” Thus, subjective bad faith is no longer the standard for Rule 11 as it is under the inherent power doctrine. To determine whether a party has violated Rule 11 by submitting a paper for improper motives, the court does not look at subjective intent alone. A broader objective standard applies, resulting in increased use of sanctions. The court will infer improper purpose from the record and surrounding circumstances. At least one judge does not lament the change in standards applicable to litigant conduct:

Were a court to entertain inquiries into subjective bad faith, it would invite a number of potentially harmful consequences, such as generating satellite litigation, inhibiting speech and chilling advocacy. At the same time, some offenders might escape for lack of sufficient evidence of bad faith. Finally, a bad faith test would make courts more reluctant to impose sanctions for fear of stigmatizing a lawyer by a bad faith finding.

Sanctions for a violation of the Rule 11 certification requirements extend to conduct by the client as well. But the standard applied to litigants under Rule 11 is “one of reasonableness under the circum-

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77. Committee Note, supra note 71, at 198.
78. Id. at 200.
79. See supra note 55.
80. “[I]n considering the nature and severity of the sanctions to be imposed, the court should take account of the state of the attorney's or party's actual or presumed knowledge when the pleading or other paper was signed.” Committee Note, supra note 71, at 200 (emphasis added).
82. Schwarzer, supra note 65, at 196.
83. The 1983 Advisory Committee Note states that “it may be appropriate under the circumstances of the case to impose a sanction on the client.” Committee Note, supra note 71, at 200. Liability, however, does not extend to the firm of which the attorney is a member. Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120, 124 (1989). The new 1991 proposed Rule 11 amendments take a more liberal position on law firm liability. Fed. R. Civ. P. 11 advisory committee's note, Proposed Rules, 137 F.R.D. 53, 80 (1991) [hereinafter Proposed Rules]. Under the proposed amendments “it may be appropriate to impose a sanction on the attorney's firm, another member of the firm, or co-counsel, either in addition to or instead of the person actually making the presentation to the court.” (emphasis added).
stances." Accordingly, a client can be held to a reasonable standard that takes into account a reduced level of skill and responsibility relative to that of the attorney.

4. **Purpose of Rule 11**

In contrast to the bad-faith exception to the American Rule, the primary focus of Rule 11 is deterrence and punishment rather than compensation. The 1983 Advisory Committee Note expressly states that "[t]he word 'sanction' . . . stresses a deterrent orientation in dealing with improper pleadings, motions or other papers." The Supreme Court has recently endorsed this position, finding that "the central purpose of Rule 11 is to deter baseless filings in District Court and thus . . . streamline the administration and procedure of the federal courts." Therefore, "punishment of a violation of the signing requirement [is] encouraged by the amended rule."

5. **Crafting Appropriate Sanctions**

Rule 11 states that the court "shall" impose . . . an appropriate

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84. Committee Note, supra note 71, at 198.
86. Courts, however, recognize that all three aspects of sanctions under Rule 11 play a role: "Rule 11 sanctions are meant to serve several purposes, including (1) deterring future litigation abuse, (2) punishing present litigation abuse, (3) compensating victims of litigation abuse, and (4) streamlining court dockets and facilitating case management." White v. General Motors Corp., 908 F.2d 675, 683 (10th Cir. 1990); see American Bar Association, Standards and Guidelines for Practice Under Rule 11 of the Federal Rules of Civil Procedure (1988), reprinted in 5 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE 212, 235-36 (Supp. 1989).
87. Committee Note, supra note 71, at 199-200. The new 1991 proposed Rule 11 continues to endorse this overarching goal of deterrence: "[T]he court should select sanctions that are not more severe than are needed to deter such improper conduct by similarly situated persons." Proposed Rules, supra note 83, at 80. Before the amendments can be incorporated into the Federal Rules of Civil Procedure, they must be approved by the Committee on Rules of Practice and Procedure, the Judicial Conference, the United States Supreme Court, and Congress. If the changes are approved, they will go into effect in December 1993. Henry J. Reske, A Kinder, Gentler Rule 11, A.B.A. J., Aug. 1991, at 25.
88. Cooter & Gell v. Hartmarx Corp., 110 S. Ct. 2447, 2454 (1990). The American Bar Association Journal reports that a "recent survey of 800 trial lawyers by Litigation News showed that 53 percent believed the rule was doing what it was supposed to - make attorneys stop and think before signing pleadings." Reske, supra note 87 at 25.
89. Committee Note, supra note 71, at 200.
90. The term "shall" is "used in law, regulations, or directives to express what is mandatory." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2085 (3d ed. 1986). Courts do not have discretion as to whether or not to apply sanctions. Chambers v. NASCO,
sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee."\textsuperscript{91} Rule 11 is not simply a fee-shifting mechanism.\textsuperscript{92} While the rule provides for attorney's fees, there is no "entitlement to full compensation on the part of the opposing party."\textsuperscript{93} Nevertheless, sanctions could include expenses directly resulting from the filing of the lawsuit.\textsuperscript{94} Lower federal courts generally recognize that determinations regarding Rule 11 monetary damages should not be made in a vacuum.\textsuperscript{95} Several important variables must be factored into the equation to meet the reasonableness and deterrence objectives.

Inc., 111 S. Ct. 2123, 2136 (1991). \textit{See also} Committee Notes, \textit{supra} note 71, at 200 ("[T]he words 'shall impose' . . . focus the court's attention on the need to impose sanctions for pleading and motion abuses."). Underscoring this duty imposed on the court, the Rule gives the court the power to sanction on its own motion. \textit{See} FED. R. CIV. P. 11.

91. FED. R. CIV. P. 11. While the focus of this comment is on attorney's fees, Rule 11 leaves the trial judge with discretion to impose "appropriate" sanctions. These may include "oral or written reprimands and disciplinary proceedings." Untereiner, \textit{supra} note 65 at 920 n.124. While suspension and disbarment under Rule 11 are theoretically within the discretion of the trial judge, Schwarzer, \textit{supra} note 65, at 204, use of these sanctions in this context is generally disfavored because of heightened due process requirements. \textit{See} White v. General Motors Corp., 908 F.2d 675, 684 (10th Cir. 1990) ("Such decisions are properly made by those charged with handling attorney disbarment and are generally accompanied by specific due process provisions to protect the rights of the attorney in question.").

92. It is not surprising that courts have consistently chosen this remedy over others available, since Rule 11 expressly provides for monetary sanctions. One commentator has found that 96% of Rule 11 applications result in sanctions of attorney's fees. Melissa L. Nelken, \textit{Sanctions Under Amended Federal Rule 11 - Some "Chilling" Problems in the Struggle Between Compensation and Punishment}, 74 GEO. L.J. 1313, 1333 (1986). It is still important to make the distinction that Rule 11 is not a fee-shifting mechanism driven solely by goals of compensation.

93. White v. General Motors Corp., 908 F.2d 675, 683 (10th Cir. 1990). In \textit{White}, the district court on remand adjusted its initial award of $172,382.19, based on the prevailing party's attorney's fees, down to $50,000. White v. General Motors Corp., 139 F.R.D. 178, 183 (D. Kan. 1991). See also Thomas v. Capital Sec. Servs., 836 F.2d 866, 879 (5th Cir. 1988) (reasonable attorney's fees "does not necessarily mean actual expenses").

94. \textit{See}, e.g., Cooter & Gell v. Hartmarx Corp., 110 S. Ct. 2447, 2461 (1990). In Brandt v. Schal Ass'n, Inc., the appellate court upheld an award of sanctions totalling $351,664.96 and equalling the amount of defendant's attorneys' fees and expenses. Brandt v. Schal Ass'n, Inc., 960 F.2d 640, 644 (7th Cir. 1992). But the court may have been influenced by the fact that there was a finding of bad faith in addition to a Rule 11 violation. \textit{Id.} at 647. The rule that compensation and deterrence are not mutually exclusive may be limited to occasions where the court either finds bad faith or suspects bad faith to be present. However, in such situations, the court should expressly invoke the bad-faith exception to the American Rule and invoke its inherent power to shift attorney's fees onto the offending party.

In *White v. General Motors Corp.*, the Tenth Circuit stated that courts should consider the following four factors that serve as limitations on the amount of Rule 11 monetary sanctions: (1) the reasonableness of the opposing party’s attorney fees; (2) the minimum amount needed to deter; (3) the sanctioned party’s ability to pay; and (4) other factors related to the seriousness of the violation.

A full explanation of these factors was given by the Fourth Circuit in *Kunstler v. Britt*. The lower court’s award of attorney’s fees under Rule 11 was ruled inappropriate because “the district court used the Rule to shift fees and compensate the defendants, rather than to deter improper litigation.” Relying on *White*, the court of appeals expounded on the four factors a district court should consider.

First, the court must calculate what in fact constitutes reasonable attorney fees in a particular instance. Only time spent “which is in response to that which has been sanctioned should be evaluated.” Costs that could have been avoided should not be included in the calculations: “The injured party has a duty to mitigate costs by not over[-]staffing, over[-]researching or over[-]discovering clearly meritless claims.”

Second, the sanction should represent the minimum dollar amount necessary to deter. In other words, “It is particularly inappropriate to use sanctions as a means of driving certain attorneys out of practice.” At the same time, sanctions should not be so great as to chill creative lawyering and the filing of valid lawsuits. At some point the risk of sanctions can become so great that lawyers will be less willing to test the boundaries of existing law for fear that

96. *White v. General Motors Corp.*, 908 F.2d 675 (10th Cir. 1990).
97. *Id.* at 684-85. Other tests or factors have been suggested. See, e.g., Page & Sigel, *supra* note 29, at 75-77; Untereiner, *supra* note 65, at 917-19. The Supreme Court recently settled a controversy concerning the standard of review for Rule 11 decisions when it announced an abuse of discretion standard for both factual and legal conclusions. Cooter & Gell v. Hartmarx Corp., 110 S. Ct. 2447, 2461 (1990).
99. *Id.* at 522.
100. *Id.* at 522-25. The Eighth Circuit has also adopted the *White* standard. *Pope v. Federal Express Corp.*, 974 F.2d 982 (8th Cir. 1992).
101. *Id.* at 523.
102. *Kunstler*, 914 F.2d at 523.
103. *Id.* (quoting *White v. General Motors Corp.*, 908 F.2d 675, 684 (10th Cir. 1990)).
104. *Id.* at 524.
105. *Id.* (quoting *White v. General Motors Corp.*, 908 F.2d 675, 684-85 (10th Cir. 1990)).
106. *Id.*
such testing will be found improper and sanctionable.

Third, since the purpose of a sanction is deterrence, the court should consider the ability of the offender to pay.\textsuperscript{107} This consideration is analogous to a punitive damages situation, in which "the financial condition of the offender is an appropriate consideration."\textsuperscript{108} When the sanction amount is large, the parties should be given an opportunity to demonstrate their financial status by submitting affidavits.\textsuperscript{109}

Finally, the court may consider other miscellaneous factors.\textsuperscript{110} These factors may include the offender's "history, experience, and ability, the severity of the violation, the degree to which malice or bad faith contributed to the violation, the risk of chilling the type of litigation involved, and other factors as deemed appropriate in individual circumstances."\textsuperscript{111}

6. Due Process Requirements

Due process generally requires that a litigant be afforded notice and a fair hearing.\textsuperscript{112} Currently, there are no mandatory procedures for meeting due process requirements under Rule 11.\textsuperscript{113} The Rule 11 motion itself constitutes notice.\textsuperscript{114} If the issue is whether an attorney made a good-faith argument under existing law, however, the court may give more specific notice.\textsuperscript{115} The timing of the notice requirement is not left entirely to the court's discretion. The Advisory Committee Notes state that "[a] party seeking sanctions should give

\begin{enumerate}
\item[107.] Id.
\item[108.] Id. (quoting White v. General Motors Corp., 908 F.2d at 685).
\item[109.] Id.
\item[110.] Id.
\item[111.] Id. at 524-25 (quoting White v. General Motors Corp., 908 F.2d at 685).
\item[112.] Mullane v. Central Hanover Trust Co., 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.").
\item[113.] Donaldson v. Clark, 819 F.2d 1551, 1558 (11th Cir. 1987) ("No set rule can be stated to govern all Rule 11 cases; the standard is necessarily flexible to cover varying situations."). For a good discussion on notice and hearing requirements under Rule 11, see Donaldson, 819 F.2d at 1558-61 and Braley v. Campbell, 832 F.2d 1504, 1514 (10th Cir. 1987).
\item[114.] Donaldson, 819 F.2d at 1560. But see Tom Growney Equip. v. Shelley Irrigation Dev., 834 F.2d 833, 836 n.5 (9th Cir. 1987) ("[W]e distinguish ourselves from other courts that have found the 'notice' requirement satisfied by the mere presence of the rule.").
\item[115.] Donaldson, 819 F.2d at 1560. If the 1991 proposed amendments to Rule 11 are approved, a more specific notice requirement will be mandatory, regardless of the circumstances. The amendment reads: "A motion for sanctions under this rule shall be served separately from other motions or requests, and shall describe the specific conduct alleged to violate [the section]." Proposed Rules, supra note 83, at 76 (emphasis added).
\end{enumerate}
notice to the court and the offending party promptly upon discovering a basis for doing so."\textsuperscript{116} However, "in the case of pleadings the sanctions issue . . . normally will be determined at the end of the litigation, and in the case of motions at the time when the motion is decided or shortly thereafter."\textsuperscript{117}

The Advisory Committee warns that satellite litigation\textsuperscript{118} over sanctions and separate hearings should be reduced to a bare minimum.\textsuperscript{119} Whether or not a hearing is granted depends on several factors: (1) the circumstances in general; (2) the severity of the sanction; (3) the judge's participation in the proceeding, and his knowledge of the facts; and (4) whether further inquiry is needed.\textsuperscript{120} California District Court Judge Schwarzer counsels:

Due process requires that the offending party be given notice and an opportunity to oppose the imposition of sanctions. Because ordinarily the opposition will consist of an explanation and justification, it can be adequately presented by memorandum and declarations. Oral argument may be helpful, even if not required by due process. An evidentiary hearing would not seem to be necessary and should be avoided, unless the court must find disputed facts or resolve issues of credibility. This should rarely be true if, as this article argues the sanctions decision is based on the face of the record, not on extraneous matters such as state of mind.\textsuperscript{121}

C. Choosing Between the Bad-Faith Exception and Rule 11

1. The Problem of Overlap

Courts recognize that there is overlap between their inherent

\begin{itemize}
  \item 116. Committee Note, supra note 71, at 200.
  \item 117. Id. at 200-201.
  \item 118. "Satellite litigation results when additional hearings and discovery requests are needed to determine what level of inquiry to expect of a client, to decide whether a client or attorney is responsible for the violation, and to apportion sanctions." Note, Factual Frivolity: Sanctioning Clients Under Rule 11, 65 WASH. L. REV. 939, 955-56 (1990) (author argues that a combination of judicial discretion and the objective standard poses a small risk of increased satellite litigation as compared to pre-1983 subjective bad faith determinations).
  \item 119. Committee Note, supra note 71, at 201. The 1991 proposed amendments to Rule 11 would give more specificity to the hearing requirement: "[T]he court shall impose an appropriate sanction . . . after notice and a reasonable opportunity to respond . . . ." Proposed Rules, supra note 83, at 76 (emphasis added).
  \item 120. Donaldson v. Clark, 819 F.2d 1551, 1561 (11th Cir. 1987) (weighs the factors suggested by the Advisory Committee Note); see also Committee Note, supra note 71, at 201. As a general rule, due process considerations are greater as the severity of sanctions increases. Kunstler v. Britt, 914 F.2d 505, 521-22 (4th Cir. 1990).
  \item 121. Schwarzer, supra note 65, at 198.
\end{itemize}
power to supervise judicial proceedings and statutory authority found in the rules.\textsuperscript{122} Chambers recognizes this overlap by stating: "The Court's prior cases have indicated that the inherent power of a court can be invoked even if procedural rules exist which sanction the same conduct."\textsuperscript{123} The Advisory Committee Notes find that the rule "build[s] upon and expand[s] the equitable doctrine permitting the court to award expenses, including attorney's fees, to a litigant whose opponent acts in bad faith in instituting or conducting litigation."\textsuperscript{124}

The question that arises is under what authority the court should apply sanctions when the misconduct falls under both the court's inherent power and the Rule. This overlap can arise frequently with regard to the issues discussed in this comment. The improper motive and harassment prohibited by Rule 11 are similar to the kind of conduct addressed by the bad-faith exception.\textsuperscript{125} Conceivably, the court could find improper motive under the Rule 11 objective standard and at the same time find elements of bad faith under the inherent power's subjective test. The inherent power is "both broader and narrower than other means of imposing sanctions."\textsuperscript{126} It is broader than Rule 11 in that it covers the full range of litigation abuse. It is narrower than Rule 11 in that it is triggered by a finding of subjective bad faith.\textsuperscript{127}

2. The Traditional Approach

Traditionally, courts have viewed their inherent power to sanction misconduct as displaced by legislation in the form of sanctioning rules and statutes.\textsuperscript{128} This view finds support from at least two sources. First, the Supreme Court in Alyeska Pipeline reemphasized that the American Rule prohibits federal courts from awarding attorney's fees in the absence of a statute or contract providing an

\textsuperscript{122} Blue v. Department of the Army, 914 F.2d 525, 534 (4th Cir. 1990) ("In a proper case, several of the theories can be invoked to justify punishment of the same conduct."). Blue poses, but does not answer, the question of what standard to apply when attorney's fees are awarded based on both Rule 11 and the bad-faith exception to the American Rule against fee-shifting. \textit{Id.}

\textsuperscript{124} Committee Note, supra note 71, at 198.
\textsuperscript{125} \textit{Chambers}, 111 S. Ct. at 2133 n.10.
\textsuperscript{126} \textit{Id.} at 2134.
\textsuperscript{128} \textit{See supra} note 62 and accompanying text; \textit{see also Chambers}, 111 S. Ct. at 2142 (Kennedy, J., dissenting) (allowing courts to ignore applicable statutory provisions and exercise instead inherent power to shift fees "as illegitimate as it is unprecedented").
Second, the American Rule itself recognizes that Congress has constitutional responsibility to define the procedural and remedial powers of federal courts. It is the legislative branch that regulates the available costs, sanctions, and fines. Reiterating the traditional approach, a dissenting Justice Kennedy in Chambers stated that the "proper exercise of inherent powers requires exhaustion of express sanctioning provisions." The court must first look to sanctions imposed under rules and statutes before resorting to their inherent power to sanction bad faith. Under the traditional approach, inherent power is limited in its application to behavior not addressed by the rules and therefore found outside of and between the rules. The court's inherent power acts as a gap-filler and "[a]t the very least, . . . must continue to exist to fill in the interstices."

3. The Emerging Modern Approach

Some modern courts have expanded the traditional approach by applying their inherent power to behavior not covered by the rules and statutes, as well as to behavior covered by those rules. These courts first apply the rules, but where the rules are silent on details regarding behavior they purport to cover, the courts then use their inherent power to impose additional sanctions. Thus, the rules are still applied, but in contrast with the strict traditional approach, they are viewed as supplementary to the court's inherent power. This development is best illustrated by an example.

The Seventh Circuit used this expanded approach when it affirmed a district court order requiring a represented party to attend a pre-trial conference. The district court was unable to use Federal Rule of Civil Procedure 16(a) (hereinafter Rule 16) because

130. See supra note 27; see also Sibbach v. Wilson & Co., 312 U.S. 1, 9-10 (1941); McIntire v. Wood, 11 U.S. (7 Cranch) 317, 318 (1813).
131. See, e.g., Kaiser Aluminum & Chem. Corp. v. Bonjorno, 110 S. Ct. 1570, 1576 (1990); Alyeska Pipeline, 421 U.S. at 262. For a comprehensive list of rules and statutes available to the federal courts see Chambers, 111 S. Ct. at 2142 (Kennedy, J., dissenting).
132. Chambers, 111 S. Ct. at 2141 (Kennedy, J., dissenting).
133. Id.
134. See supra notes 128-33 and accompanying text.
137. Rule 16(a) states: "Pretrial Conferences; Objectives. In any action, the court may
this rule only reached attorneys and unrepresented parties. Instead, the court invoked its inherent power to “fill the gap” left by the rule. Affirmed on appeal after a rehearing, the court of appeals justified its decision by arguing that as long as federal courts do not contradict the rules, they may exercise procedural authority outside of the rules based on their inherent power.

The Supreme Court’s decision in Chambers announces a new and controversial twist to this emerging approach to the inherent power of the courts. Even though Rule 11 and other statutes addressed the very same offensive conduct, the Court affirmed the district court’s order awarding the injured party its attorney’s fees based solely on the bad-faith exception to the American Rule. This holding greatly expands the reach of a court’s inherent power to control courtroom litigants. Not only does the inherent power work to sanction conduct found in gaps in and between the rules, but it can displace the rules themselves in certain circumstances. The Court ruled:

There is, therefore, nothing in [Rule 11] that warrants a conclusion that a federal court may not, as a matter of law, resort to its inherent power to impose attorney’s fees as a sanction for bad-faith conduct. This is plainly the case where the conduct at issue is not covered by [Rule 11]. But neither is a federal court forbidden to sanction bad-faith conduct by means of the inherent power simply because that conduct could also be sanctioned under [Rule 11].

III. STATEMENT OF THE PROBLEM

The Chambers Court’s interpretation of the relationship between Rule 11 and inherent power establishes a dangerous precedent that can have at least three detrimental effects. Where Rule 11 is ignored, it (1) threatens to frustrate the purposes underlying the rule; (2) arguably leaves litigants exposed to less specific notice and

in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial . . . .” Fed. R. Civ. P. 16(a).

138. G. Heileman Brewing Co. v. Joseph Oat Corp., 848 F.2d 1415, 1421-22 (7th Cir. 1989), reh’g granted, 871 F.2d 648 (7th Cir. 1989) (en banc).

139. Heileman, 871 F.2d at 651.

140. Id. See also HMG Property Investors v. Parque Indus. Rio Canas, Inc., 847 F.2d 908, 915 (1st Cir. 1988).


142. Id. at 2135-36. The Court appears to have adopted the inherent power model of due process in Chambers. See Cogan, supra note 62 (this article does not address Chambers specifically, but does give the theoretical basis for the Court’s position).
hearing requirements, potentially leading to costly surprises at the end of their suit; and (3) leaves an offender without the ability he or she would have had under Rule 11 to argue that a court must fashion an award based on deterrence and not on automatic compensation by shifting fees.

IV. Analysis

A. Determining Legislative Intent

The Rules Enabling Act authorizes the Court to "prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts . . . and courts of appeals." Under this authority the Court promulgated the Federal Rules of Civil Procedure to "govern the procedure in the United States district courts in all suits of a civil nature." The Court is without authority to enact rules that "abridge, enlarge or modify any substantive right." The Court has stated that it is to "interpret Rule 11 according to its plain meaning . . . in light of the scope of the congressional authorization." The rules are "as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard the Rule[s'] mandate than they do to disregard constitutional or statutory provisions."

The mandate of Rule 11 is not discretionary by its terms. Where there is a violation of the rule's requirements, the court "shall impose . . . an appropriate sanction." The mandatory language was added in 1983 and underscores the fact that the intent of the rulemakers was not discretionary imposition of sanctions. Dissenting in the Chambers decision, Justice Kennedy wrote, "The Rules themselves thus reject the contention that they may be discarded in a court's discretion."

The majority in Chambers posed a textual argument of their
own, arguing that in fact the language of Rule 11 did not indicate a legislative intent to displace the inherent power. The majority was not willing to find legislative intent to abrogate a well established supervisory power without a clear intention to do so. The mandate of Rule 11 was limited “only to whether a court must impose sanctions, not to which sanction it must impose.” The only requirement the majority recognized was the imposition of “an appropriate sanction.” In support of its position the majority cited the Advisory Committee Notes, which declared that the rule “build[s] upon and expand[s] the equitable doctrine permitting the court to award expenses, including attorney’s fees, to a litigant whose opponent acts in bad faith in instituting or conducting litigation.”

The 1991 Advisory Committee Notes on Proposed Amendments to Rule 11 reaffirm the court's inherent power when they state that the proposed amendments “[d]o not inhibit the court in exercising its contempt powers.” However, this statement should not be interpreted to permit the substitution of inherent power for Rule 11 sanctions under the circumstances outlined in Chambers. Rule 11 directs the court to achieve the effects of punishment and deterrence by requiring imposition of an appropriate remedy. It does not authorize the court to select its weapon of choice. The effect of allowing such unguided selection runs counter to legislative intent. Since the effect of the court’s inherent power is largely compensatory and is not deterrence-oriented, use of the court’s supervisory power to sanction Rule 11 misconduct arguably does not result in “an appropriate sanction.” A court therefore cannot exercise its inherent powers in order to impose sanctions of greater or lesser magnitude than what is appropriate. This interpretation would be consistent with the committee’s mandate for courts to “select sanctions that are not more severe than are needed to deter such improper conduct by similarly situated persons.”

151. Id. at 2131-32. Several lower courts have already cited Chambers' reasoning that Rule 11 does not displace inherent power to sanction. See, e.g., Gillette Foods, Inc. v. Bayernwald-Fruchteverwertung, 977 F.2d 809, 813 (3d Cir. 1992); Lockary v. Kayfetz, 974 F.2d 1166, 1170 (9th Cir. 1992).

152. Chambers, 111 S. Ct. at 2134.

153. Id. at 2136.

154. Id.

155. Id. at 2134-35 (quoting Committee Note, supra note 71, at 198).

156. Proposed Rules, supra note 83, at 82.

157. See supra notes 86-89 and accompanying text.

158. See supra notes 29-31, 86-89 and accompanying text.

159. Proposed Rules, supra note 83, at 80.
B. Problems with the New Approach

The opinion in Chambers states that whenever conduct sanctionable under Rule 11 is intertwined within conduct that only the inherent power could address, the court in its discretion may safely rely on its inherent power alone.160 The Court was motivated by administrative concerns: "[R]equiring a court first to apply rules and statutes containing sanctioning provisions to discrete occurrences before invoking inherent power to address remaining instances of sanctionable conduct would serve only to foster extensive and needless satellite litigation, which is contrary to the aim of the rules themselves."161 This aim is set forth in Federal Rule of Civil Procedure 1 (hereinafter Rule 1) which states that the rules "shall be construed to secure the just, speedy, and inexpensive determination of every action."162

Construing Rule 11 so as to avoid its limitations is appealing since the Rule could arguably increase a judge’s ability to manage her docket. The harmful consequences to federal civil procedure, however, would exceed any benefits. The Chambers approach would encourage the rebirth of at least two dangers the committee sought to avoid by promulgating the rules: (1) the lack of uniformity; and (2) the chilling effect on creative lawyering. A fundamental goal of the rules was to foster uniformity in federal civil procedure.163 Prior to 1937, the Conformity Act164 required federal courts to defer to the procedures of the state in which they sat.165 Since most states had their own unique sets of rules, litigants in federal courts would be subjected to a variety of procedures.166 After the adoption of the Federal Rules of Civil Procedure in 1937,167 federal courts were subject to a single set of rules.

Chambers undermines this basic objective of uniform application of the rules because litigants will once again be uncertain when and if Rule 11 will be applied to their conduct. The Court attempts

161. Id. at 2136.
162. FED. R. CIV. P. 1.
166. See generally id.
to mitigate this concern by warning that judges "ordinarily should rely on the rules rather than the inherent power."\textsuperscript{168} However, the court still has discretion and if "neither the statute nor the rules are up to the task,"\textsuperscript{169} the court may overlook the rule and apply its inherent power to sanction. As the pressure for more administrative efficiency increases, Rule 11 may even fall into disuse. This would only compound the deleterious consequences by ensuring "the uncertain development of the meaning and scope of these express sanctioning provisions."\textsuperscript{170} One commentator predicts that "if judges turn from Rule 11 and let it fall into disuse, the message to those inclined to abuse or misuse the litigation process is clear. Misconduct, once tolerated, will breed more misconduct and those who might seek relief against abuse will instead resort to it in self-defense."\textsuperscript{171}

Disuse of Rule 11 after its initial promulgation partially motivated its amendment in 1983.\textsuperscript{172} Prior to the amendment, judges were reluctant to impose sanctions because of the subjective nature of the inquiry and because they did not want to be "perceived as imposing [the judges'] personal standards of professionalism on others."\textsuperscript{173} This, the judges feared, would have a chilling effect on creative lawyering.\textsuperscript{174} In 1983, these problems were addressed by amending the rule, making its application mandatory, and substituting an objective standard.\textsuperscript{175} A litigant is arguably more confident about the consequences of advancing a particular claim in court when sanctions are based on an objective standard rather than on the uncertainties and surprises of a subjective test.

C. Distorting the Purpose of Rule 11

The effect of the 1983 Amendments to Rule 11 is significantly altered after Chambers. Instead of an objective standard under Rule 11, the court will apply in specific situations a subjective bad-faith


\textsuperscript{169} Chambers, 111 S. Ct. at 2136. Rule 11 is not "up to the task" when the sanctionable conduct lies largely outside the scope of the rule. \textit{Id.} at 2131.

\textsuperscript{170} \textit{Id.} at 2145 (Kennedy, J., dissenting).

\textsuperscript{171} Schwarzer, supra note 65, at 205.

\textsuperscript{172} \textit{Id.} at 183.

\textsuperscript{173} \textit{Id.} at 184.

\textsuperscript{174} \textit{Id.} at 184.

\textsuperscript{175} See supra notes 71-76 and accompanying text.
standard to shift attorney's fees.\textsuperscript{176} This application will reverse the
gains of the 1983 amendments and reintroduce the possibility of chill-
ing creative lawyering. The Advisory Committee Notes specifically
state that "[t]he rule is not intended to chill an attorney's enthusiasm
or creativity in pursuing factual or legal theories."\textsuperscript{177} Not only will
the standard for finding misconduct change under \textit{Chambers}, but re-
quirements of due process can assume different and amorphous
contours.

The majority in \textit{Chambers} offers a general warning that courts
must be careful in administering their inherent power, and they
must adhere to the mandates of due process, both in determining that
bad faith exists and in calculating fees.\textsuperscript{178} The Court does not define
the parameters of due process in this particular situation. Appar-
ently, that task is left to the lower courts to determine on a case-by-
case basis. This deference gives courts much flexibility in any given
situation, since they will "apply inherent power without specific def-
initional or procedural limits."\textsuperscript{179} Such an approach is part of the
very nature of the application of the court's inherent power.\textsuperscript{180}

In sharp contrast, "The Federal Rules establish explicit stan-
dards for, and explicit checks against, the exercise of judicial author-
ity."\textsuperscript{181} By passing over Rule 11 and invoking the court's inherent
power, judges fundamentally alter norms against which litigants are
measured. Chambers discovered that this unexpected alteration can
occur as late as the end of all litigation.\textsuperscript{182} Parties facing sanctions
are suddenly left without the force of due process arguments based
on the specific provisions of Rule 11.

\textbf{D. Due Process and Determining Sanctionable Misconduct}

Rule 11 puts litigants on specific notice that if parties engage in
certain conduct they will be exposed to appropriate sanctions. The
proscribed activity is limited to the filing of groundless, unwarranted,
and vexatious pleadings, motions, and papers.\textsuperscript{183} Only signers of the
documents are held responsible, and signers include both represented

\textsuperscript{176} See \textit{supra} note 61 and accompanying text.
\textsuperscript{177} Committee Note, \textit{supra} note 71, at 199.
\textsuperscript{179} \textit{Id.} at 2145.
\textsuperscript{180} See \textit{supra} notes 58-64, 112-21 and accompanying text.
\textsuperscript{181} Chambers, 111 S. Ct. at 2145 (Kennedy, J., dissenting).
\textsuperscript{182} \textit{Id.} at 2138.
\textsuperscript{183} See \textit{supra} notes 75, 76 and text accompanying notes 69-70.
parties and their attorneys. If the proposed amendments are accepted, Rule 11 will carry even more specific notice and hearing requirements than the current version. According to proposed Rule 11(c), "[T]he court shall impose an appropriate sanction ... after notice and a reasonable opportunity to respond." Furthermore, under proposed Rule 11(c)(1)(A), requests for sanctions "shall be served separately from other motions ... and shall describe the specific conduct alleged to violate [the Rule]." On its own initiative, the court may invoke Rule 11, "but with the conditions that this be done through a show cause order, thereby providing the person with notice and an opportunity to respond."

Today, a litigant who knows he or she may have engaged in improper filing of court papers will prepare a defense against sanctions based on the due process requirements of Rule 11. If Rule 11 is amended as proposed, the litigant's arguments take on added force, since the operation of the rule is more clearly defined. However, contrary to the litigant's expectations, the court may avoid his or her defense based on Rule 11 due process requirements if the court finds certification violations intertwined with bad-faith conduct beyond the scope of the Rule. In this situation, according to Chambers, the court can safely invoke its inherent powers to punish the litigant. The litigant now finds himself or herself in a fundamentally different scenario in which the court has much more discretion to assess whether the requirements of due process have been met. As a matter of fact, a judge may require nothing more than what the Court in Chambers deemed necessary to satisfy due process requirements; that is, repeated verbal warnings from the judge and opposing counsel that the litigant's behavior is sanctionable, and a hearing at the end of litigation to assess fees.

184. See supra note 83.
185. See supra notes 112-21 and accompanying text.
186. Proposed Rules, supra note 83, at 76 (emphasis added).
187. Id. at 76.
188. Id. at 81.
189. See supra notes 112-21 and accompanying text.
191. See supra notes 58-64 and accompanying text.
192. Chambers, 111 S. Ct. at 2129, 2139. Federal courts are beginning to tackle the question left open by Chambers concerning the requirements of due process under the court's inherent power to assess attorney's fees. See, e.g., Landon v. Hunt, 938 F.2d 450, 451, 454 (3d Cir. 1991) (remanded for district court to consider inherent powers and define due process requirements). The extent to which state courts may use their inherent powers to assess attorney's fees after Chambers is an open issue as well. See, e.g., Schneider v. Friedman, Collard,
E. Due Process and Assessing Fees

Other fundamental changes under Chambers occur in assessing fees to be awarded the injured party. Under Rule 11, attorney's fees are assessed with the goals of punishment and deterrence in mind.\textsuperscript{193} There is generally no entitlement to full compensation.\textsuperscript{194} Therefore, Rule 11 is not an automatic fee-shifting mechanism by nature. \textit{White v. General Motors}\textsuperscript{195} and \textit{Kunstler v. Britt}\textsuperscript{196} demonstrate that circuit courts sensitive to the proper use of Rule 11 have developed specific criteria that district judges should consider in fashioning an appropriate and reasonable remedy.\textsuperscript{197} These factors include: (1) the reasonableness of the opposing party's attorney fees; (2) the minimum amount needed to deter; (3) the sanctioned party's ability to pay; and (4) other factors related to the seriousness of the violation.\textsuperscript{198} Complete fee-shifting without deterrence analysis like that in \textit{White} and \textit{Kunstler} is now unlikely.\textsuperscript{199}

While Rule 11 is designed to deter, the court's inherent power to punish serves to compensate the injured party.\textsuperscript{200} Absent are the specific restraints and procedures found in Rule 11 analysis. Accordingly, the lower court in \textit{Chambers} did not leave a record of any consideration regarding questions about reasonableness of NASCO's expenses or NASCO's efforts to mitigate costs. Along with other sanctions, Chambers was ordered to pay NASCO's entire litigation expenses, totaling nearly one million dollars.\textsuperscript{201}

Despite the fact that sanctions were based upon the district court's inherent power, Chambers argued to the Supreme Court that the lower court acted improperly in assessing attorney's fees, basing his argument solely on cases imposing sanctions under Rule 11.\textsuperscript{202} Chambers' argument, based on a \textit{White-Kunstler} analysis, was curious, of course, since the basis of the sanction was the court's supervisory power. For some unexplained reason, the Court, instead of dis-

\textsuperscript{193} Poswall & Virga, 283 Cal. Rptr. 882, 884 n.5 (Ct. App. 1991) (the question regarding the extent to which \textit{Chambers} applies to California courts is raised but not addressed).
\textsuperscript{194} See supra notes 90-111 and accompanying text.
\textsuperscript{195} See supra notes 90-111 and accompanying text.
\textsuperscript{196} White v. General Motors Corp., 908 F.2d 675 (10th Cir. 1990).
\textsuperscript{197} Kunstler v. Britt, 914 F.2d 505 (4th Cir. 1990).
\textsuperscript{198} See supra notes 97-111 and accompanying text.
\textsuperscript{199} See supra notes 97-111 and accompanying text.
\textsuperscript{200} See supra notes 97-111 and accompanying text.
missing Chambers’ arguments as inappropriate, answered each of his arguments and held that the lower court had acted well within its discretion in fashioning the award. The Court was apparently flexible and understood that it was confronted with a situation in which the conduct could have been punished under Rule 11. Since there was no record of the lower court’s deliberations on this particular matter, the Court substituted its own rationale for justifying the reasonableness of the award.

Because the Court did not remand the case to give the lower court the opportunity to reconsider the appropriateness of the sanction in light of the White-Kunstler factors, there is no clear directive from the Supreme Court that, in cases similar to Chambers, judges must tailor sanctions under their inherent power in accordance with Rule 11 analysis. Unfortunately, this means that litigants are exposed to potentially much greater sanctions for misconduct than ordinarily would be dealt with under Rule 11 analysis.

V. Proposal

A. Course of Action for Parties Facing Sanctions

After Chambers, an important question becomes what a litigant should argue when the court finds both improper filing and bad-faith conduct but awards sanctions based on its inherent power to shift fees rather than its alternative authority to punish derived from Rule 11. There are several courses of action available to a party facing sanctions.

1. Distinguishing Chambers

The first argument is to distinguish Chambers and urge that that case is limited to its facts and bears no resemblance to the current litigation. The party facing sanctions should stress that “the court ordinarily should rely on the rules rather than the inherent power.” This means that passing over an applicable rule in favor of the court’s inherent power should only be done in unusual circumstances such as those presented in Chambers. The litigant should

203. Id. at 2138.

204. After the Chambers decision, one lower court attempted to explain the Court’s flexibility, suggesting that the Court’s rationale was the lack of “extensive authority on the scope of a court’s inherent power to punish a party’s disruptive and vexatious litigation activities . . . .” Brandt v. Schal Ass’n, Inc., 960 F.2d 640, 646 (7th Cir. 1992).


206. Id. at 2136.
point out that according to the U.S. Supreme Court, a judge only has discretion when "conduct sanctionable under the rules [is] intertwined within conduct that only the inherent power could address . . . and all of the litigant's conduct is deemed sanctionable." The qualified and limited language of the Court seems to provide an opportunity in most situations to at least argue that Chambers is not applicable. That is, the litigant's misconduct is not "intertwined" in the Court's use of the term, and not all of the litigant's conduct is sanctionable.

The Court's use of the term "intertwined" in Chambers needs further analysis, as the meaning of the term is not clear from the opinion. There are no descriptive adverbs qualifying the meaning of the verb. The dictionary definition of the word "intertwined" gives the sense of being twisted together: "[T]o unite by twining one with another." But neither the dictionary nor the Court indicates how much "twining" is sufficient to satisfy the definition. Does the conduct sanctionable under the rules need to be so intertwined within conduct that only the inherent powers can address that the two are impossible to separate? Alternatively, must the two types of sanctionable conduct only be closely, but not permanently, intertwined? If the Court intends the former definition, then the application of Chambers will be narrowed even further.

Prior use by the Court of the verb "to intertwine" can shed some light on this inquiry. In some of the Court's most recent decisions, the term has generally been qualified by an adverb indicating the degree of "twining" required. In several of those recent cases, the Court has found something to be "inextricably intertwined," "inseparably intertwined," and "intricately intertwined." After reciting cases such as these, a litigant can argue that the Court usually uses the verb in its most restrictive meaning. That is, the use of the verb "intertwined" in Chambers refers only to situations where the different kinds of sanctionable conduct are so interlaced as to be indistinguishable. Only then is the use of the inherent power to sanction justified, because any attempt by courts to disentangle the

207. *Id.*
211. *Stewart,* 110 S. Ct. at 1761.
212. *Port Authority Trans-Hudson Corp.*, 110 S. Ct. at 1876.
strands of conduct "would serve only to foster extensive and needless satellite litigation."  

Of course, the strongest argument for a restrictive interpretation of "intertwined" is made by looking to see how Justice White, the author of the majority opinion in *Chambers*, uses the verb. The best case is made by citing *Connecticut v. Doehr*, an opinion that he wrote and handed down on the same day as *Chambers*. In both opinions, Justice White uses "intertwined" without any qualifying adverbs.

In *Chambers*, Justice White writes that "conduct sanctionable under the rules was intertwined within conduct that only the inherent power could address." Similarly, in *Doehr*, Justice White writes in dicta that "the notice and hearing question, and the bond question are intertwined and can fairly be considered facets of the same general issue." But in *Doehr*, Justice White provides a clue to the meaning of "intertwined." In the very next sentence, an important qualifier reveals the meaning of his use of the verb "intertwined." He writes, "[A] discussion of notice and a hearing cannot be divorced from consideration of a bond." Justice White uses "intertwined" in its most restrictive sense. The litigant would draw the inference that Justice White likely uses the verb in its most restrictive sense when appearing without a qualifying adverb. This would be true particularly when he uses the verb twice in two different opinions on the same day. Successfully advancing this argument would further narrow the applicability of *Chambers* to any fact pattern, because the misconduct must be inseparable in order for the inherent power to apply.

2. *White-Kunstler Still Appropriate*

The second argument to make concedes that, if the court does have discretion to use its inherent powers to shift fees, it still must consider the *White-Kunstler* analysis developed for Rule 11 sanctions. The litigant should argue that the Court implicitly adopted and endorsed this approach when it heard and addressed Chambers' arguments based on Rule 11 analysis. The Court must have done

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215. *Doehr* and *Chambers* were decided on June 6, 1991.
218. *Id.*
so in response to the unusual circumstances presented. That is, both Rule 11 and inherent power were applicable. Since complete and automatic fee-shifting is not appropriate for conduct sanctionable under Rule 11, it should be equally inappropriate and make no difference when the basis of authority is the court's inherent power.

3. The Court's Membership

Another point of which litigators should always be aware is the impact on Supreme Court decisions when there is a personnel change. The confirmation of Justice Thomas to replace Justice Marshall could change how the Court majority views the use of inherent power to sanction. Since Justice Marshall joined the majority in *Chambers,* Justice Thomas becomes a swing vote. As a political conservative and a President Bush appointee, Justice Thomas could very likely join the conservative block that dissented in *Chambers.* With a majority of the Court's members critical of the decision in *Chambers,* the Court may be willing to scale back *Chambers'* application and influence.

B. Courts Invoking Their Supervisory Power

Traditionally, courts have looked to statutory authority before invoking sanctions consisting of attorney's fees. The American Rule against fee-shifting has only a few judicially created exceptions based on the court's supervisory power. The bad-faith exception should be invoked only after exhausting all of the possible statutory provisions.

There are at least two reasons for courts to follow this procedure. First, the intent of Rule 11 was not to allow courts to derive their authority to sanction from their inherent power. Second, the intent of Rule 11 is to deter specific abuse while encouraging creative lawyering. This goal will be frustrated by use of the inherent power, which aims primarily to compensate injured parties. If a court disagrees and follows *Chambers,* a judge ought to at least minimize the disruption of the parties' expectations and allow the litigant to offer a White-Kunstler analysis in his or her defense. This rea-

220. *Id.* at 2127.
221. See supra text accompanying notes 128-35.
222. See supra notes 19-28 and accompanying text.
223. See generally Committee Note, supra note 71.
224. Schwarz, supra note 65, at 184.
225. See supra text accompanying notes 97-111.
Sonable compromise would both simplify the judge’s assessment of sanctions and honor the litigant’s expectations.

C. Proposal for Amendment to Rule 11

The Court in Chambers argued that the mandatory language in Rule 11 referred only to whether a sanction should be given. In the Court’s view, Rule 11 did not dictate which sanction applies and under what basis it should be given. This argument is based purely on legislative intent. Therefore, the legislature can overrule the Court’s decision by amending Rule 11 and making its intent more clear. By amending Rule 11, Congress can remove any doubt that the rule is intended to displace the court’s inherent power over the matters it addresses. With the proposed amended portion in italics, Rule 11 would read in pertinent part:

If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney’s fee. Sanctions imposed for misconduct in violation of this rule will be based solely on the statutory authority and objectives derived from this rule, and shall not exceed what is necessary to deter comparable conduct by parties similarly situated.

With the proposed modification, courts will clearly be unable to maintain the position that under Rule 11 they have discretion to look outside of the authority delegated by the rule to sanction conduct that falls within the rule. This will reaffirm the boundaries set up in the U.S. Constitution, which dictates that the function of Congress is to legislate rules of procedure, and the function of the Judiciary is to adjudicate within the guidelines set by the rules. The courts will have to take reasonable time to specifically identify the types of sanctionable conduct and apply the applicable sanction.

VI. Conclusion

This comment has explored the interrelated use of Federal Rule of Civil Procedure 11 and the court’s inherent power to assess attor-

226. See supra text accompanying notes 151-55.
227. See supra text accompanying notes 151-55.
228. Author’s proposed modifications are emphasized in italics.
ney's fees to punish improper certification and court paper filings. As background for this discussion, the historical development of the two sources of authority were outlined. The two sanctioning tools were contrasted to show their differences in application and effect. To summarize, Rule 11 is primarily designed to deter specific misconduct, while the court's supervisory power seeks to generally compensate the injured party. This comment argued that the court's choice of authority to impose sanctions would make a significant difference in the amount of liability imposed.

Traditionally, courts would first exhaust statutory authority to shift fees before using their supervisory power to sanction behavior outside the reach of the rules.229 The impact on this tradition by a recent United States Supreme Court decision was analyzed as it affirmed and expanded the modern trend toward relying more heavily on the court's inherent power to sanction.230 In certain instances where both Rule 11 and the supervisory power are applicable, the court may, in its discretion, choose to shift attorney's fees based solely on its inherent power. Several problems were discussed that arguably follow from this new tack. Rule 11 could eventually fall into disuse, thereby frustrating the goal of uniformity that inspired the rule's inception. In addition, the offending party is exposed to greater liability under inherent-power sanctions, since these sanctions leave the litigant without the ability to argue for the specific restraints and procedures provided by Rule 11.

This comment proposed several responses to the Court's recent decision. Possible arguments that a party facing sanctions could advance to reduce sanctions under the court's supervisory power were suggested. In addition, an amendment to Rule 11 was proposed in order to forbid discretion in the court's choice of authority to impose sanctions. While concerns over judicial administrative efficiency are important, they cannot be an excuse for a court circumventing the specific requirements and goals of statutory provisions.

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229. See supra text accompanying notes 128-35.
230. See supra text accompanying notes 141, 142.