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The Inherent Power to Impose Sanctions: How a Federal Judge is Like an 800-pound Gorilla

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Barrels of ink have been spilled over Federal Rule of Civil Procedure 11, the sanctions rule. It has been panned and praised by seemingly equal numbers of experts and insiders in countless law journals and judicial opinions.[1] Polarizing in the abstract, the Rule often surfaces in closely contested and highly visible litigation; it seems that every trial lawyer has a Rule 11 horror story to tell. Perhaps no other Rule has been more frequently the object of intense study and debate.

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1. The Advisory Committee on Civil Rules described the body of recent literature in passing:

> For empirical examination of experience under the 1983 rule, see, e.g., New York State Bar Committee on Federal Courts, *Sanctions and Attorneys' Fees* (1987); T. Willging, *The Rule 11 Sanctioning Process* (1989); American Judicature Society, *Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11* (S. Burbank ed., 1989); E. Wiggins, T. Willging, and D. Stienstra, *Report on Rule 11* (Federal Judicial Center 1991). For book-length analyses of the case law, see G. Joseph, *Sanctions: The Federal Law of Litigation Abuse* (1989); J. Solovy, *The Federal Law of Sanctions* (1991); G. Vairo, *Rule 11 Sanctions: Case Law Perspectives and Preventive Measures* (1991).

FED. R. CIV. P. 11 Advisory Committee's Notes.

Debate over sanctions has captured the attention of the legal profession following each Rule 11 amendment.[2] Curiously, there are no Goldilocks who find the Rule "just right"; everyone complains that it is either too strong or too weak.

But in a significant sense, all the debate and controversy is beside the point. Suppose that someone said that a federal judge has the power to impose sanctions without the authority of Rule 11 and would have the power even if Rule 11 were abolished? In fact, the highest authority has said so. In a 1991 decision, *Chambers v. NASCO, Inc.*,[3] the Supreme Court held, in essence, that a federal

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2. Rule 11 was amended in 1983 and 1993. The 1983 amendments were intended to "put teeth" into the sanctioning provisions, and that is how the federal courts have understood them. *See, e.g.*, Willy v. Coastal Corp., 112 S. Ct. 1076 (1992) (upholding the imposition of Rule 11 sanctions even after a subsequent determination that the court lacked subject matter jurisdiction); Business Guides Inc. v. Chromatic Enters. Inc., 498 U.S. 533, 547 (1991) (holding that "a represented party who signs his or her name bears a personal, nondelegable responsibility to certify the truth and reasonableness of the document"); Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 395 (1990) (holding that a district court may impose Rule 11 sanctions after a plaintiff voluntarily dismisses the action); Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120 (1989) (deciding that Rule 11 sanctions may be imposed on an attorney who signs papers but not on the attorney's law firm); Estate of Calloway v. Marvel Entertainment Group, 9 F.3d 237, 239 (2d Cir. 1993) (holding counsel jointly and severally liable for the client's Rule 11 violation).

In dissent, Justice Scalia complained that the 1993 amendments rendered the sanction rule "toothless." COMMUNICATION FROM THE CHIEF JUSTICE OF THE UNITED STATES TRANSMITTING AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND FORMS PURSUANT TO 28 U.S.C. 2072, H.R. DOC. NO. 74, 103d Cong., 1st Sess. (1993), *reprinted in* Supreme Court of the United States, *Amendments to the Federal Rules of Civil Procedure*, 146 F.R.D. 402, 507 (1993) [hereinafter *Amendments to the Federal Rules*] (Scalia, J., dissenting, joined by Thomas and Souter, JJ.). *See generally Developments in the Law, Lawyers' Responsibilities and Lawyers' Responses*, 107 HARV. L. REV. 1547, 1629-51 (1994); Note, *Sanctions Under Rule 11*, 19 T. MARSHALL L. REV. 1 (1993) (noting a current trend among courts away from a rigorous application of Rule 11 and toward applying the Rule only in the most egregious of cases); Linda S. Mullenix, *Should Congress Decide Civil Rules? No: Not a Subject to Wheel 'n Deal*, NAT'L L.J., Nov. 22, 1993, at 15 (arguing that the new Rules represent a partisan struggle between the legislative and judicial branches).

3. 501 U.S. 32 (1991).

judge is like the proverbial 800-pound gorilla.[4] The majority held that federal judges have all of the judicial power necessary to manage their own proceedings and to control the conduct of those who appear before them, including the inherent power to punish abuses of the judicial process.[5] Thus, federal judges have a license to sanction lawyers and litigants virtually at will and without regard to any limitations in the Rules and statutes.[6]

Presumably, nearly every litigator is aware that Rule 11 is not the exclusive source of sanctioning authority. For example, other rules of procedure authorize sanctions at the trial level as well as on

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4. *Id.* at 43-44 (providing an overview of a court's inherent powers); *see also* S.D. Shuler, *Recent Development,* Chambers v. NASCO, Inc.*: Moving Beyond Rule 11 into the Unchartered Territory of Courts' Inherent Power to Sanction*, 66 TUL. L. REV. 591, 593 (1991) (warning that *Chambers* may have disturbing implications); *The Supreme Court, 1990 Term—Courts' Inherent Authority to Sanction in Diversity Cases:* Chambers v. NASCO, Inc., 105 HARV. L. REV. 349, 355-60 (1991) [hereinafter *The Supreme Court, 1990 Term*] (arguing that fee shifting should be left to the states and that federal courts should not invoke their inherent powers to sanction prelitigation conduct); Stephen K. Christiansen, Note, *Inherent Sanctioning Power in the Federal Courts After* Chambers v. NASCO, Inc., 1992 B.Y.U. L. REV. 1209, 1216-28 (arguing that the *Chambers* holding created a new inherent power); Hugh M. Favor, Jr., Comment, *Federal Courts Sanctioning Represented Parties Using Rule 11 and Their Inherent Power: You Can Run But You Cannot Hide*, 21 CAP. U. L. REV. 225, 249-54 (1992) (arguing that the *Chambers* opinion insufficiently defines the bad-faith standard for invoking inherent powers); John Papachristos, Note, *Inherent Power Found, Rule 11 Lost: Taking A Shortcut to Impose Sanctions in* Chambers v. NASCO, 59 BROOK. L. REV. 1225, 1245-50 (1993) (criticizing the *Chambers* holding as inconsistent with Rule 11, prior judicial interpretations of the rule, and the *Erie* doctrine); Goodloe Partee, Note, *Federal Procedural Rules Do Not Displace Inherent Powers of Court to Award Attorney's Fees for Bad Faith Conduct*, 14 U. ARK. LITTLE ROCK L.J. 107, 107 (1991) (arguing that *Chambers* is consistent with the *Erie* doctrine).

5. *Chambers*, 501 U.S. at 42-43. Justice White wrote for a majority that included Justices Marshall, Blackmun, Stevens, and O'Connor; Justice Scalia wrote a dissent; Justice Kennedy wrote a dissent joined by Chief Justice Rehnquist and Justice Souter.

6. *Id.* at 46; *see* Linda S. Mullenix, *Rule 11 Decisions Targeted Clients, Not Just Lawyers*, NAT'L L.J., Aug. 19, 1991, at S9 (stating that recent Supreme Court decisions hold that federal courts may sanction lawyers under Federal Rule of Civil Procedure 11 and may sanction clients using a court's inherent power).

appeal.[7] Several federal statutes also authorize the award of attorney's fees to prevailing parties in specified kinds of cases.[8]

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7. *See* FED. R. CIV. P. 16(f) (providing that if, in relation to a scheduling conference, a party or attorney fails to obey an order, fails to appear, is substantially unprepared, or fails to participate in good faith, the court may (1) refuse to allow the party to support or oppose designated claims or defenses, (2) prohibit the party from introducing designated matters in evidence, (3) strike pleadings in whole or in part, (4) stay proceedings, (5) dismiss the action, (6) render a default judgment, or (7) issue a contempt order); *id.* 26(g)(3) (providing a court with the authority to impose reasonable cost, including attorney's fees, for an improper certification of disclosure); *id.* 37 (authorizing sanctions for a failure to properly disclose or cooperate in discovery); *id.* 41(b) (providing for the imposition of costs for a previously dismissed action if the same plaintiff commences an action based upon or including the same claim asserted against the same defendant); *id.* 55 (authorizing entry of default judgment); FED. R. APP. P. 38 (authorizing the imposition of damages and costs upon a party who asserts a frivolous appeal or delays the proceedings). *See generally* ROBERT E. RODES, JR., ET AL., SANCTIONS IMPOSABLE FOR VIOLATIONS OF THE FEDERAL RULES OF CIVIL PROCEDURE: A REPORT TO THE FEDERAL JUDICIAL CENTER (1981) (discussing sanctions that can be imposed pursuant to Federal Rules of Civil Procedure 11, 16, 36, 37, 41(b), and 55).

In *Chambers*, the court of appeals had imposed sanctions under Federal Rule of Appellate Procedure 38 for attorney's fees and double costs as a penalty for frivolously appealing a decision. *Chambers*, 501 U.S. at 40; *see also* THOMAS E. BAKER, A PRIMER ON THE JURISDICTION OF THE U.S. COURTS OF APPEALS § 5.04 (1989) (discussing appellate sanctions).

8. *See, e.g.*, Susan G. Mezey & Susan M. Olson, *Fee Shifting and Public Policy: The Equal Access to Justice Act*, 77 JUDICATURE 13, 13 (1993) (explaining that the Equal Access to Justice Act, 28 U.S.C. § 2412 (1988 & Supp. IV 1992), provides for the federal government to pay the legal expenses of private parties prevailing against it in nontort civil and administrative litigation); J.D. Page & Doug Sigel, *The Inherent and Express Powers of Courts to Sanction*, 31 S. TEX. L.J. 43, 73-82 (1990) (discussing which sanctions should be imposed, including attorney's fees, and which parties should be sanctioned under various federal statutes); David Shub, *Private Attorney's Fees Awards for Civil Rights*, 42 DUKE L.J. 706, 706-08 (1992) (discussing the Supreme Court's interpretation of the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1988 & Supp. III 1991)); Charles Silver, *Incoherence and Irrationality in the Law of Attorneys' Fees*, 12 REV. LITIG. 301 (1993) (discussing unsuccessful efforts to develop a body of fee-award law that regulates incentives in responsible ways); Carl Tobias, *Civil Rights and the Proposed Revision of Rule 11*, 77 IOWA L. REV. 1775, 1783 (1992) (reviewing proposed modifications to Rule 11 and their effect on civil rights plaintiffs); Carl Tobias, *Civil Rights Procedural Problems*, 70 WASH. U. L.Q. 801, 801 (1992) (analyzing procedural developments that have hindered civil rights plaintiffs); *The Supreme Court, 1991 Term—Fee Enhancement*, 106 HARV. L. REV. 338, 339 (1992) (commenting on the Supreme Court's definition of what constitutes a reasonable fee for cases taken on contingency); Stanford L. Cameron, Comment, *Civil Rights Plaintiffs' Recovery of Expenses for*

There are also general statutes that authorize trial and appellate sanctions.[9] Finally, litigants may initiate an independent action for malicious prosecution or abuse of process.[10] But the *Chambers* Court recognized an inherent power that exists in federal courts *qua* courts,[11] although this somewhat curious power, analogous to the contempt power,[12] may not be familiar to litigators and perhaps some judges. The plaintiff in *Chambers* certainly learned an expensive lesson when the Supreme Court approved the district court's order that the plaintiff pay the defendant's expenses and attorney's fees, which totaled nearly one million dollars.[13]

The inherent power is at once broader and narrower than the Rule 11 power.[14] Rule 11 focuses on specific abuses and is not limited to willful conduct; in contrast, the inherent power reaches the full range of litigation misconduct, but authorizes fee shifting only for bad-faith conduct or willful disobedience of a court's orders.[15] To exercise its inherent sanctioning authority, a federal court may

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Experts as Litigation Costs Under 42 U.S.C. § 1988, 66 TEMP. L. REV. 857, 857 (1993) (commenting on ramifications of Supreme Court decisions that have limited the ability of plaintiffs in civil rights cases to recover expert fees as litigation costs).

9. *See* 28 U.S.C. § 1912 (1994) (authorizing the award to a prevailing party of just damages for delay); *id.* § 1927 (1994) (authorizing the imposition of personal liability for excess costs, expenses, and attorney's fees on those litigators guilty of unreasonable conduct before a federal court).

10. *See, e.g.*, 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1226, 1254 (1990) (discussing the nature and limitations of actions for malicious prosecution and abuse of process).

11. *Chambers*, 501 U.S. at 46; *see also* Missouri v. Jenkins, 495 U.S. 33, 73 (1990) (exploring the limits of the federal equitable power); *cf.* Kevin F. Risley, *Why Texas Courts Should Not Retain the Inherent Power to Impose Sanctions*, 44 BAYLOR L. REV. 253 (1992) (exploring the use of judicial sanctions in Texas courts as a litigation tool).

12. *See* Spallone v. United States, 493 U.S. 265, 275 (1990) (discussing the limits of the contempt and equitable powers of a federal court); *see generally* Thomas E. Baker, *Contempt Power of the Courts*, *in* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 193 (Kermit L. Hall ed., 1992) (describing the derivation of the contempt power from the Judiciary Act of 1789, Ch. 20, § 14, 1 Stat. 73, 81 (1789), and explaining that the power is necessary because the federal courts must be able to enforce their judgments and orders).

13. *Chambers*, 501 U.S. 32, 58 (1991) (Scalia, J., dissenting).

14. *Id.* at 46 (White, J.); Partee, *supra* note 4, at 118-19.

15. *Chambers*, 501 U.S. at 46-47. Justice Scalia, dissenting, agreed that the inherent power would reach "situations involving less than bad faith." *Id.* at 58 (Scalia, J., dissenting).

act—sua sponte or upon a motion to conduct an independent investigation—as long as its actions are consonant with the basic procedural due process guarantees of reasonable notice, a meaningful opportunity to be heard, and particularized findings.[16] Appropriate sanctions can be as extreme as dismissing the lawsuit or vacating a previously entered judgment upon the demonstration of fraud upon the court.[17] Lesser sanctions, including the award of attorney's fees and costs and various forms of attorney discipline, are also within the district court's informed discretion. Presumably, any sanction contemplated under federal statutes and rules can be imposed incident to the inherent power as well.[18]

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16. FED. R. CIV. P. 11 Advisory Committee's Notes; *see also* Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1279-95 (1975) (discussing the elements of a fair hearing, including (1) an unbiased tribunal, (2) notice of the proposed action and the alleged grounds, (3) an opportunity to argue against the action, (4) an opportunity to present witnesses, (5) an open presentation of the evidence alleged to support the proposed action, (6) a decision based solely upon the evidence presented, (7) the assistance of counsel, (8) public attendance, (9) the establishment of a record, (10) a statement of the reasons justifying the outcome, and (11) judicial review).

17. Statutes of limitations do not exist in this context: "[E]ven under Rule 11, sanctions may be imposed years after a judgment on the merits." *Chambers*, 501 U.S. at 56.

18. As the Advisory Committee has explained,

> The court has available a variety of possible sanctions to impose for violations, such as striking the offending paper; issuing an admonition, reprimand, or censure; requiring participation in seminars or other educational programs; ordering a fine payable to the court; referring the matter to disciplinary authorities (or, in the case of government attorneys, to the Attorney General, Inspector General, or agency head), etc.

FED. R. CIV. P. 11 Advisory Committee's Notes.

An objection might be raised to a sanction imposed under the inherent power that might not be raised, in theory, under the rules. For example, Federal Rule of Appellate Procedure 38 provides that if a court of appeals determines that an appeal is frivolous, it may award "just damages and single or double costs" against the appellant. FED. R. APP. P. 38. Suppose a court, after affording procedural due process, imposes the sanction of double costs under its inherent power. The award could be challenged as intrinsically arbitrary because, first, the definition of costs is idiosyncratic, and second, doubling the costs is purely retributive. One way for the court to avoid the issue altogether, of course, is to invoke the authority of the inherent power and to invoke Rule 38 in the alternative.

The statement in the text accompanying this footnote, however, is more right than wrong for several reasons. First, the matter is given over to the informed

Inherent sanctions, like Rule 11 sanctions, may be imposed against any person responsible for wrongdoing, regardless of whether that person is a litigant or an attorney.[19] Sanctionable wrongdoing includes prelitigation misconduct[20] as well as abuses of process that occur beyond the courtroom, such as the willful disobedience of an otherwise valid court order, so long as the court affords a violator due process before imposing sanctions.[21] In addition to Rule 11's function as a deterrent, inherent sanctions further the goals of compensation and punishment.

In *Chambers*, the Court explicitly distinguished the inherent power from other authorizations to sanction.[22] The general scheme of authorizations under statutes and rules does not displace the inherent power that predates it.[23] Ordinarily, bad-faith misconduct should be dealt with under the Rules, but the Court added that "if in the informed discretion of the court, neither the statute nor the rules are up to the task, the court may safely rely on its inherent power."[24] Even when the misconduct could properly be sanctioned under Rule 11, however, a court may rely on its inherent power.[25] The power is inherent in a court, not a case, and the power applies even in a diversity case in which the controlling state law would not

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discretion of the sanctioning court. Second, inherent sanctions are subject to review only under the abuse-of-discretion standard. Third, in addition to the deterrence goal of rules-based sanctions, the exercise of the inherent power can also be based on the goals of compensation and punishment. Fourth, while theoretically possible, it seems unlikely that a reviewing court would find a sanction specifically authorized by the federal rules to be invalid under some substantive due process theory when the sanction was imposed as an exercise of the inherent power.

19. FED. R. CIV. P. 11 Advisory Committee's Notes ("The sanction should be imposed on the persons—whether attorneys, law firms, or parties—who have violated the rule or who may be determined to be responsible for the violation.").

20. *Chambers*, 501 U.S. at 60 (Scalia, J., dissenting); *id.* at 70-71 (Kennedy, J., dissenting).

21. *Id.* at 50 (White, J.).

22. *Id.* at 46.

23. *Id.* at 46-48.

24. *Id.* at 50.

25. *Chambers*, 501 U.S. at 49-50; *id.* at 60-61 (Kennedy, J., dissenting); *The Supreme Court, 1990 Term*, *supra* note 4, at 356 (recognizing the breadth of the inherent powers, which are those necessary to further the exercise of all of a court's other powers, but suggesting that the inherent powers are nonetheless limited).

allow a sanction.[26] Moreover, the Court held that the decision to impose sanctions under the inherent power was subject to review only under the rather deferential abuse-of-discretion standard applicable under Rule 11.[27]

While the Supreme Court itself has not revisited the issue since 1991, the lower federal courts have internalized the inherent power to sanction. Twenty-one different district courts have invoked the inherent power recognized in *Chambers*.[28] Furthermore, all of the

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26. *Chambers*, 501 U.S. at 51-55; *see also The Supreme Court, 1990 Term*, *supra* note 4, at 359 (arguing that the use of inherent power is invalid if it is not supported by a legitimate basis).

27. *Chambers*, 501 U.S. at 55.

28. *See, e.g.*, Daisy Sys. Corp. v. Bear Stearns & Co., No. C-92-1845-DLJ, 1994 WL 456879, at *11 (N.D. Cal. Aug. 12, 1994) (finding sanctionable conduct based on the defense counsel's failure to supply omitted discovery in a timely fashion); Horner v. Rowan Cos., 153 F.R.D. 597, 599 (S.D. Tex. 1994) (finding sanctionable conduct based upon the defense counsel's actions in purposely misleading the opposing counsel); Christian v. John, No. 1991-0184, 1993 U.S. Dist. LEXIS 19317, at *8-9 (D.V.I. Dec. 17, 1993) (upholding the lower court's finding that the appellant made an unauthorized sale as his own collection agent); Sierra Foods, Inc. v. Haddon House Food Prods., Inc., No. CIV.A.90-6841, 1992 U.S. Dist. LEXIS 16667, at *55 (E.D. Pa. Sept. 22, 1992) (imposing sanctions based on the inherently unreasonable beliefs expressed in an attorney's affidavit), *dismissed*, 1993 U.S. Dist. LEXIS 10303 (E.D. Pa. July 29, 1993); Kissel v. DiMartino, No. CV-92-5660(CPS), 1993 U.S. Dist. LEXIS 10313, at *24 (E.D.N.Y. July 14, 1993) (imposing sanctions against a plaintiff who filed motions that were based on alleged facts that the plaintiff knew were false); Richardson v. D.L. Food Stores, Inc., No. CIV.A.93-0476-AH-C, 1993 U.S. Dist. LEXIS 12492, at *2 (S.D. Ala. July 13, 1993) (emphasizing the court's inherent authority to deny the plaintiff's in forma pauperis motion), *dismissed*, 1993 U.S. Dist. LEXIS 12500 (S.D. Ala. Aug. 30, 1993); Jane L. v. Bangerter, 828 F. Supp. 1544, 1554 (D. Utah 1993) (finding sanctionable conduct based on frivolous or meritless claims); Nabkey v. Hoffius, 827 F. Supp. 450, 456-57 (W.D. Mich. 1993) (imposing sanctions for consistent patterns of abusive conduct); Hemlac Prods. Corp. v. Roth (Plastics) Corp., 150 F.R.D. 563, 568 (E.D. Mich. 1993) (stating that the district court has the power to impose sanctions on an officer of a corporate defendant who destroyed documents necessary for trial); RTC v. Bright, No. 3:92-CV-0995-D, 1993 U.S. Dist. Lexis 9274, at *11 (N.D. Tex. Mar. 31, 1993) (denying the defendant's motion to dismiss, which was grounded on a statute of limitations and on Federal Rules of Civil Procedure 9(b) and 12(b)(6)), *rev'd*, 6 F.3d 336 (5th Cir. 1993); Scotch Game Call Co. v. Lucky Strike Bait Works, Ltd., 148 F.R.D. 65, 67 (W.D.N.Y. 1993) (imposing sanctions based on unreasonable multiplication of proceedings); Alexander v. Primerica Holdings, Inc., 819 F. Supp. 1296, 1311 (D.N.J. 1993) (imposing sanctions for unreasonable multiplication of lawsuits and bad-faith conduct), *mandamus granted on other grounds*, 10 F.3d 155 (3d Cir. 1993); qad., Inc., v. ALN

federal courts of appeals have had occasion to apply *Chambers*. Ten of the thirteen federal appellate courts have applied the *Chambers* rationale to affirm or uphold sanctions such as

1. fee shifting for misconduct that included the plaintiff's repeated failure to attend hearings;[29]
2. fee shifting under both the inherent power of the court and Section 1927 of Title 27 of the United States Code;[30]
3. requiring counsel to serve, without compensation, as standby counsel for a criminal defendant;[31]
4. sanctioning a lack of candor with the court;[32]

Assoc., No. 88-C-2246, 1992 U.S. Dist. LEXIS 17896, at *3 (N.D. Ill. Nov. 18, 1992) (finding sanctionable conduct when a litigator received an injunction through misrepresentation); Reed v. Iowa Marine & Repair Corp., 143 F.R.D. 648, 654 (E.D. La. 1992) (imposing sanctions because of a breach of Federal Rules of Civil Procedure 26(e)(2) and (3)); Word of Faith Outreach Ctr. Church, Inc. v. Morales, 143 F.R.D. 109, 118 (W.D. Tex. 1992) (granting sanctions because of a deliberate and intentional breach of an express agreement); United States v. Shaffer Equip. Co., 796 F. Supp. 938, 953 (S.D. W. Va. 1992) (dismissing the case with prejudice because of a breach of the attorney's duty of candor), *aff'd in part and vacated in part*, 11 F.3d 450 (4th Cir. 1993); Schwartz v. Capital Liquidators, Inc., No. 87-CIV-3418(MBM), 1992 U.S. Dist. LEXIS 3945, at *11 (S.D.N.Y. Apr. 2, 1992) (sanctioning appellant $3000 for improper questioning before and during the trial); General Envtl. Science Corp. v. Horspall, 141 F.R.D. 443, 444-45 (N.D. Ohio 1992) (finding that the defendants' obstruction of discovery justified the imposition of sanctions); Harlan v. Lewis, 141 F.R.D. 107, 113 (E.D. Ark.) (imposing monetary sanctions against the defense counsel for impermissible *ex parte* contacts), *aff'd*, 982 F.2d 1255, 1261 (8th Cir. 1992), *cert. denied sub nom* Hall v. Harlan, 114 S. Ct. 94 (1993); Barnhill v. United States, No. S89-286(RLM), 1991 U.S. Dist. LEXIS 19360, *3 (N.D. Ind. Dec. 31, 1991) (entering judgment for the private party as a sanction for the conduct of the government counsel), *rev'd*, 11 F.3d 1360, 1371 (7th Cir. 1993); Malautea v. Suzuki Motor Co., 148 F.R.D. 362, 377 (S.D. Ga. 1991) (fining defendants $5000 and counsel $500 for repeated discovery abuse).

29. Jones v. Winnepesaukee Realty, 990 F.2d 1, 6 (1st Cir. 1993).

30. Sassower v. Field, 973 F.2d 75, 80-81 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 1879 (1993).

31. United States v. Bertoli, 994 F.2d 1002, 1018 (3d Cir. 1993); *cf.* Spain v. Gallegos, 26 F.3d 439, 455-56 (3d Cir. 1994) (recognizing the inherent power to sanction but finding that the district court's imposition of jury costs was an abuse of discretion because there was no record of bad-faith conduct or abuse of the judicial process).

32. United States v. Shaffer Equip. Co., 11 F.3d 450, 463 (4th Cir. 1993) (vacating the district court's dismissal sanction and remanding for consideration of a lesser sanction), *aff'g in part and vacating in part* 796 F. Supp. 938 (S.D. W. Va. 1992).

5. awarding a defendant $2.4 million in attorney's fees for the plaintiff's failure to comply with a court order to submit attorney fee information;[33]
6. dismissing a lawsuit because of a plaintiff's destruction of evidence in violation of a protective order;[34]
7. imposing monetary sanctions against defense counsel for *ex parte* contacts that violated ethical rules;[35]
8. excluding expert-witness testimony and allowing an adverse inference to be drawn from a party's spoliation of evidence despite the absence of a showing of bad faith;[36]
9. dismissing a *pro se* Section 1983 action for failure to obey a court order;[37]
10. excluding a party's evidence because of spoliation;[38]
11. ordering a party to show cause why double-cost sanctions should not be imposed for intentionally misleading the court;[39]
12. and fining defendant $5000 and defendant's counsel $500 for repeated discovery abuses.[40]

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33. Lubrizol v. Exxon Corp., 957 F.2d 1302, 1308 (5th Cir.), *cert. denied*, 113 S. Ct. 186 (1992).

34. Marrocco v. General Motors Corp., 966 F.2d 220, 223-24 (7th Cir. 1992) (upholding the sanction without reference to *Chambers* as an appropriate response to "contumacious conduct").

35. Harlan v. Lewis, 982 F.2d 1255, 1261 (8th Cir. 1993).

36. Dillon v. Nissan Motor Co., 986 F.2d 263, 269 (8th Cir. 1993).

37. Rhones v. Rowland, 1 F.3d 1249 (9th Cir. 1993) (reported in table without opinion). While the court released no official opinion, an unofficial opinion can be found on LEXIS. Rhones v. Rowland, No. 92-15774, 1993 U.S. App. LEXIS 30130, at *1 (9th Cir. Nov. 8, 1993).

38. Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp., 982 F.2d 363, 369 (9th Cir. 1992).

39. Ruoti v. Mercier, 1 F.3d 1249 (10th Cir. 1993) (reported in table without opinion). While the court released no official opinion, an unofficial opinion can be found on LEXIS. Ruoti v. Mercier, No. 92-4147, 1993 U.S. App. LEXIS 18765, at *3 (10th Cir. July 21, 1993).

40. Malautea v. Suzuki Motor Co., 987 F.2d 1536, 1546 (11th Cir.), *cert. denied*, 114 S. Ct. 181 (1993).

While the three remaining courts of appeals have formally recognized the inherent power described in *Chambers*, they have thus far reversed all sanctions imposed by district courts.[41]

Caveat Litigator![42] Vigorous and widespread imposition of sanctions does not depend on the construction—or the deconstruction—of the Rule 11 language. The drafters of the 1993 amendments intended to make Rule 11 "kinder and gentler"; generally, they hoped to decrease the likelihood and the severity of sanctions. Indeed, Justice Scalia dissented from the approval of the amendments because he worried that the changes would "render the Rule toothless."[43] Those amendments, however, took nothing away from the inherent power to impose sanctions, a power that courts may now apply more frequently.

In conclusion, I submit the following Madisonian postscript: We should always look askance upon any assertion of an inherent power by any branch of the federal government.[44] The danger is more

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41. An example of the Sixth Circuit's reasoning can be found in Grossman v. Garratt & Evans, P.C., 992 F.2d 1216 (6th Cir. 1993) (reported in table without opinion). While the court released no official opinion, an unofficial opinion can be found on LEXIS. Grossman v. Garratt & Evans, P.C., No. 92-1407, 1993 U.S. App. LEXIS 10533, at *9 (6th Cir. Apr. 30, 1993) (reversing costs and attorney's fees sanctions because of a lack of justification under Rule 11 and inherent power). *See also* Sun-Tek Indus., Inc. v. Kennedy Sky Lites, Inc., No. 92-1162, 1993 U.S. App. LEXIS 1605, at *6 (Fed. Cir. Jan. 29, 1993) (reversing a fee-shifting sanction because no evidence of misconduct appeared in the record); United States v. Wallace, 964 F.2d 1214 (D.C. Cir. 1992) (reversing a monetary sanction because a bad-faith finding was clearly erroneous).

42. "[T]o allow punishment to take the form of such a generic, all-encompassing, massive, post-trial retribution . . . would send shivers through the bar." *In re* Yagman, 796 F.2d 1165, 1185 (9th Cir. 1986), *cert. denied sub nom.* Real v. Yagman, 484 U.S. 963 (1987).

43. *Amendments to the Federal Rules*, *supra* note 2, at 507 (Scalia, J., dissenting); *see also* Karen N. Moor, *The Supreme Court's Role in Interpreting the Federal Rules of Civil Procedure*, 44 HASTINGS L.J. 1039, 1040 (1993) (discussing the Supreme Court's application of the "plain meaning" rationale to rule interpretation and arguing for the Court to use a more activist interpretation to achieve the Rules' underlying purpose).

44. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty is this: you must

obvious when inherent powers are asserted by the political branches, but it is also implicated here, since the Article III judicial power[45] is, likewise, merely an enumerated power. Under the Constitution, federal tribunals are the limited courts of the same limited sovereign.[46] Furthermore, the principle of separation of powers cautions federal judges from acting contrary to or inconsistent with federal statutes; federal courts are likewise obliged to follow the rules of procedure promulgated under the Rules Enabling Act.[47]

Nevertheless, federal courts do possess an inherent power to impose sanctions, separately and independently of any rule or statute—so says the highest Court of 800-pound gorillas.

> first enable the government to control the governed; and in the next place to oblige it to control itself.

THE FEDERALIST No. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961); *see also* Chambers v. NASCO, Inc., 501 U.S. 32, 58-60 (1991) (Scalia, J., dissenting) (stating that Congress may specify how the inherent powers of the President will be exercised so long as the specifications do not impair that power).

45. U.S. CONST. art. III, § 1.

46. *Id.*; *see also, e.g.*, Kokkonen v. Guardian Life Ins. Co., 114 S. Ct. 1673, 1676-77 (1994) (holding that a district court does not have the inherent power under the doctrine of ancillary jurisdiction to enforce the terms of a settlement agreement).

As an incident of federal action, any decision to impose sanctions would have to afford procedural due process in accord with the Fifth Amendment. *See* Neil H. Cogan, *The Inherent Power and Due Process Models in Conflict: Sanctions in the Fifth Circuit*, 42 SW. L.J. 1011, 1013, 1022 (1989) (examining the due process implications of Rule 11 sanctions imposed by the Fifth Circuit and arguing that the court overemphasizes its inherent power at the expense of due process protections); Charlene Cullen, Comment, *Rule 11: Due Process Reconsidered*, 22 CUMB. L. REV. 729, 729 (1992) (discussing Rule 11 sanctions and due process concerns); Joseph J. Janatka, Note, *The Inherent Power: An Obscure Doctrine Confronts Due Process*, 65 WASH. U. L.Q. 429, 439-40 (1987) (discussing the potential for violation of due process concerns when courts invoke their inherent sanctioning power).

47. 28 U.S.C.A. §§ 2071-2075, 2077 (1988); *see Chambers*, 501 U.S. 60-67 (Kennedy, J., dissenting) (arguing that the legislature, not the judiciary, possesses constitutional responsibility for defining sanctions and fees).