NOTES

THE INHERENT POWER: AN OBSCURE DOCTRINE CONFRONTS DUE PROCESS

American federal courts asserted inherent judicial power early in their existence.[1] The inherent powers of federal courts derive from Article III of the United States Constitution[2] and from the very existence of the courts[3]. Courts invoke their inherent powers to aid in the exercise of

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1. Ex parte Robinson, 86 U.S. (19 Wall.) 505 (1873) (courts have inherent power to punish for contempt); Heckers v. Fowler, 69 U.S. (2 Wall.) 123 (1864) (courts have inherent powers to establish all necessary rules for orderly conducting of business); U.S. v. Hudson & Goodwin, 11 U.S. (7 Cranch.) 32 (1812) (courts have inherent power to enforce an order and imprison for contempt).

Tyrell Williams attempted to define three senses of "inherent power." Williams, *The Source of Authority for Rules of Court Affecting Procedure*, 22 WASH U. L. Q. 459, 470-78 (1937).

First, "inherent" means implied or complete power, unless superseded or destroyed by statute. *Id.* at 473. Second, "inherent," when applied to a regulatory power of a constitutional court, indicates a power implied by the Constitution. This power cannot be abrogated by legislative enactment. *Id.* at 474. Finally, "inherent" denotes superstatutory power belonging to the courts. *Id.* Williams believed the court's superstatutory power derived from its power to regulate non-procedural matters ancillary to the administration of justice, such as bar qualification. *Id.* at 475-76. The courts have power to promulgate procedural rules that are superstatutory when a legislative enactment frustrates the administration of justice. *Id.* at 478.

2. Article III provides:

> The judicial power of the United States, shall be vested in one supreme court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

U.S. CONST. art. III, § 1.

The United States Constitution established three branches of government. Article I established the legislative branch, and delineated its powers and responsibilities. Article II established the executive branch. Article III established the federal judiciary. Article III prevented the executive and legislative branches from unduly interfering with the judiciary by granting the federal judiciary tenure and protection against reduction in remuneration.

In People v. Little, 89 Misc.2d 742, 392 N.Y.S.2d 831 (1977), the court stated that the Constitution's separation of powers doctrine provided that the three branches of government are separate but equal, with each branch free to govern, manage, and administer business within its own sphere without restrictions by the other branches. *Id.* at 745, 89 N.Y.S.2d at 834-35; *see* Kaufman, *The Essence of Judicial Independence*, 80 COLUM. L. REV. 671, 687 (1980); *see also* Note, *Inherent Judicial Power and Regulation of the Practice of Law*, 23 ARIZ. L. REV. 1313, 1315, 1316 (1981).

Congress may create Article III courts under its Article I, § 8, cl. 9 power "to constitute tribunals inferior to the Supreme Court." 1 J. MOORE, FEDERAL PRACTICE Para. 60[6] at 633 (1968).

3. "The complete independence of the courts of justice is particularly essential in a limited constitution." THE FEDERALIST, No. 78, at 524 (A. Hamilton) (J. Cooke ed. 1961). *See* Note, *Inherent Judicial Power and Regulation, supra* note 6 at 1316; *see generally* Shillitani v. U.S., 384

jurisdiction, to administer justice,[4] and to preserve their independence and integrity.[5]

Courts exercise their inherent power to find contempt independent of any statute.[6] Additionally, under the inherent powers doctrine, courts sanction attorneys for conduct not rising to the level of contempt.[7] The "pure" exercise of the inherent power to sanction attorneys, however, confronts the attorneys' due process rights to notice and an opportunity to be heard.[8]

Part I of this Note examines two applications of the federal courts' inherent powers: the power to sanction attorneys and the power to promulgate local rules. Part II discusses modern cases confirming the existence of those powers[9] and concludes that a court's pure exercise of inherent power to sanction attorneys violates the attorneys' due process rights.[10] Part III proposes two alternative solutions to the inherent power-due process problem: one, promulgation of specific local rules, and two, a new Federal Rule of Civil Procedure. Finally, Part IV concludes that a new Federal Rule is the superior alternative.

I. USES OF THE COURT'S INHERENT POWER: SANCTIONS UPON ATTORNEYS AND LOCAL RULES

Administering justice is the principal objective of all courts.[11] Under the inherent power doctrine courts may fine for contempt,[12] enforce observance of an order,[13] or imprison for contumacy.[14] These powers are

U.S. 364 (1966) (no question that courts have inherent power to enforce compliance with their lawful orders); Frankfurter and Landis, *Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1023 (1924).

4. Williams, *supra* note 1, at 471.

5. Eichelberger v. Eichelberger, 582 S.W.2d 395, 398 (Tex. 1979).

6. *See infra* note 12 and accompanying text.

7. *See infra* note 18 and accompanying text.

8. *See infra* notes 74-76 and accompanying text.

9. Although the first case discussed, Gamble v. Pope Talbot, Inc., 307 F.2d 729 (3d Cir. 1962), refused to allow use of the inherent power to impose penalties against an attorney for non-contemptuous conduct, *id.* at 731-32, the inherent powers doctrine subsequently expanded. *See infra* text accompanying notes 36-72.

10. *See infra* notes 121 and 130 and accompanying text.

11. *See* Williams, *supra* note 1, at 471.

12. Ex parte Robinson, 86 U.S. (19 Wall.) 505 (1873). *Accord* Michaelson v. U.S., 266 U.S. 42 (1924); Myers v. U.S., 264 U.S. 95 (1924); *see* Anderson v. Dunn, 19 U.S. (6 Wheat.) 204 (1821).

13. U.S. v. Hudson and Goodwin, 11 U.S. (7 Cranch.) 32, 34 (1812).

14. *Id.* Contumacy includes insubordinate or rebellious conduct.

superstatutory and unabrogable.[15]

Speedy trials aid the administration of justice. Under the inherent powers doctrine courts may promulgate rules and procedures to effectuate speedy trials.[16] However, this exercise of the inherent power is valid only if the rules and procedures accord with the constraints of the Supreme Court and Federal Rules.[17]

The two most frequent exercises of the inherent powers are sanctioning attorneys and promulgating local rules.[18] The Rules Enabling Act gives the Supreme Court procedural rulemaking authority.[19] The Federal

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15. *Id.*

16. Heckers v. Fowler, 69 U.S. (2 Wall.) 123, 128 (1865). The Federal Rules of Civil Procedure also consist of rules and procedures to effectuate speedy trials. *See infra* notes 21-23 and accompanying text.

17. Heckers v. Fowler, 69 U.S. at 123. One commentator argues that other commentators too quickly find assertions of inherent power in judicial opinions. Burbank, *Sanctions in the Proposed Amendments to the Federal Rules of Civil Procedure: Some Questions About Power*, 11 HOFSTRA L. REV. 997, 1004 and n.30. He asserts that courts correctly cite *Heckers* for the proposition that federal courts possess inherent power to make rules. *Id.* at 1014. *See Heckers*, 69 U.S. at 128 ("Circuit Courts, as well as other federal courts, have authority to make and establish all necessary rules for the orderly conducting of business . . . provided such rules are not repugnant to the laws of the United States.")

18. Another exercise of the inherent power is over members of the bar. *See e.g.*, Eash v. Riggins Trucking, Inc., 757 F.2d 557, 575 (1985); *see also* Williams, *supra* note 1 at 476. Kleiner v. First National Bank of Atlanta, 751 F.2d 1193 (11th Cir. 1985) (a trial judge possesses the inherent power to discipline counsel for misconduct, short of behavior giving rise to disbarment or criminal censure, without resort to powers of civil or criminal contempt); Flaska v. Little River Marine Const. Co., 389 F.2d 885 (1980) (the inherent power of a court to manage its affairs necessarily includes the authority to impose sanctions upon errant lawyers); Barnd v. City of Tacoma, 664 F.2d 1339 (1982) (trial court's inherent powers include power to assess attorney's fees, but like other sanctions they should not be assessed without fair notice and opportunity for a hearing on the record).

Generally, courts impose penalties upon attorneys in response to negligently caused inconvenience, delay, intentional obstructions of justice; failure to appear; discovery abuses; default; etc. *See generally* Note, *Financial Penalties Imposed Directly Against Attorneys in Litigation Without Resort to the Contempt Power*, 26 UCLA L. REV. 855 (1979).

19. The Rules Enabling Act provides:

> The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court.

28 U.S.C. § 2071 (1982), and :

> The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeal of the United States in civil actions . . . and appeals therein . . . . Such rules shall not abridge, enlarge or modify any substantive right . . . .

28 U.S.C. § 2072 (1982).

Congress enacted the Rules Enabling Act in 1934. Soon thereafter a number of state legislatures enacted statutes which specifically delegated rulemaking authority to courts. Other states provided for judicial rulemaking authority in their constitutions. *See* Comment, *Exclusive Judicial Power to*

Rules of Civil Procedure set out specific procedural rules. Both the Supreme Court Rules and the Federal Rules of Civil Procedure provide sanctions for violations of their procedural rules. Because of the extensive coverage of the federal rules and Supreme Court Rules, exercises of the inherent power to sanction are usually for minor infractions.[20]

Federal courts also assert their inherent power to promulgate local rules.[21] Federal Rule of Civil Procedure 83 allows each district court to establish local rules that are consistent with the Federal Rules of Civil Procedure.[22]

The sanctioning power and the power to promulgate local rules sometimes overlap. For example, a local rule might authorize imposition of a sanction (such as attorney's fees) against counsel for failing to attend a pretrial conference.[23] Furthermore, exercises of each power may have concurrent support from both inherent and statutory grants of power.[24] Often, courts, under their inherent power, will sanction attorneys for violating a local rule.

In these days of increasing litigation, a narrowly drawn court rule cannot address the court's need to exercise its inherent power in order to impose effective sanctions upon all forms of attorney misconduct. Due process rights limit the court's inherent power to sanction attorneys. Every attorney must receive adequate notice that specific rights of his are being adjudicated. Litigation challenging the sanctions grounded in the

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Regulate Appellate Practice and Procedure—People v. Cox, 30 DEPAUL L. REV. 969, 973 nn.22-24 (1981).

20. *See infra* notes 51, 55, 57, and 61 and accompanying text. One commentator asserts that the court's use of the inherent power has been important in the development of summary assessments against attorneys when other forms of authority are weak, ineffective, or narrow. Note, *supra* note 18, at 876. There is, however, a strong argument that such use of the inherent power has *never* been firmly established.

21. *See infra* notes 34, 56, and 59. Local rules are rules issued "in view of local physical conditions in the state, the character of the people, their peculiar customs, usages and beliefs." BLACK'S LAW DICTIONARY 847 (5th ed. 1979). *See infra* note 52. *See also* Heckers v. Fowler, 69 U.S. at 128 ("Circuit Courts, as well as all other federal courts, have authority to make and establish all necessary rules for the orderly conducting of business . . . provided such rules are not repugnant to the laws of the United States."); Comment, *Sanctions Imposed by Courts on Attorneys Who Abuse the Judicial Process*, 44 U. CHI. L. REV. 619, 633 (1977).

22. Federal Rule of Civil Procedure (hereinafter referred to as "Rule") 83 states:

> Each district court . . . may from time to time make and amend rules governing its practice not inconsistent with these rules. . . . In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules.

FED. R. CIV. P. 83.

23. *See infra* note 52.

24. *See supra* notes 18-20, 21-22 and accompanying text.

court's inherent power is a cumbersome way of meeting the court's and attorneys' due process requirements.

II. CASE LAW

In *Gamble v. Pope Talbot, Inc.*, the district court fined the defendant's attorney for failure to file trial memoranda pursuant to a local standing order.[25] The Third Circuit Court of Appeals held that without a contempt proceeding, the district's court's fine was unauthorized and void.[26] The court reasoned that imposing basic "disciplinary innovations," such as penalizing attorneys, required a uniform approach.[27] Thus, courts may not discipline attorneys using their Rule 83 local rulemaking authority.[28] Rather, imposition of penalties for attorney misconduct required contempt proceedings.[29] The majority expressed concern over the courts becoming dictatorial powers.[30]

On the other hand, the dissent argued that the district court had the

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25. 307 F.2d 729, 731-32 (3d Cir. 1962). The local standing order provided:

> 1. . . . The filing of a pre-trial memorandum by all counsel is mandatory . . . .
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> 3. . . . Not later than 30 days after the publishing of [the civil pre-trial] list, counsel for plaintiff shall file a written pre-trial memorandum with the Clerk of the Court and serve two copies on all other counsel of record.
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> Within 30 days of receipt of such pre-trial memorandum, all counsel served with plaintiff's memorandum shall file a written pre-trial memorandum with the Clerk of the Court and serve two copies on all other counsel of record. . . .
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> For failure to appear at a pre-trial conference, or to participate therein, or to prepare therefore, the Court, in its discretion, may make such order with respect to the imposition of fines, costs and counsel fees, as is just and proper; with respect to the continued prosecution of the cause . . ., a dismissal may be entered.

Id. at 729-30.

26. The court equated the fine to a penalty. *Id.* at 731. The court argued that a district court could only impose a penalty pursuant to the contempt statute which provides:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
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> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
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> (2) Misbehavior of any of its officers in their official transactions;
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> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

18 U.S.C. § 401 (1982).

27. 307 F.2d at 732.

28. *Id.* at 731-32.

29. *Id.* at 732.

30. *Id.* at 732-33. The court stated that dictatorial powers could not be used to further the cause of reducing lawyers to "puppets, completely subject to the whim and warp of the courts." *Id.*

authority under Rule 83 to sanction the attorney.[31] Noting that the procedural mishap occurred during a pretrial proceeding, the dissent found dismissal improper because it penalized the client for his attorney's mistakes.[32]

According to the dissent, Rule 83 authorized and validated the standing order.[33] Even if the standing order was unauthorized by Rule 83 the dissent argued that the court possessed inherent power to promulgate the standing order, as well as to sanction the attorney.[34] He asserted that the power to discipline springs from a different source than the power to punish for criminal contempt.[35]

Prior to the *Gamble* decision, the United States Supreme Court decided *Link v. Wabash Railroad*.[36] In *Link*, the district court *sua sponte* dismissed the case due to an attorney's failure to attend a pretrial conference.[37] The court dismissed the case without a standing order, without notifying the attorney or client,[38] and without a hearing on the dismissal.[39] The United States Supreme Court affirmed the dismissal as an exercise of the court's inherent power to manage its own affairs.[40]

The Court declared that the district court possessed inherent power to dismiss as a means to relieve court congestion, prevent undue delays, and

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31. *Id.* at 735-36 (Biggs, C.J., dissenting).

32. *Id.* at 734-35.

33. *Id.* at 735-36. Chief Judge Biggs stated that the standing order was a reasonable exercise of authority given district courts by the Supreme Court in accordance with the Court's rulemaking power under the Rules Enabling Act. *See supra* note 19 (28 U.S.C. § 2072).

34. 307 F.2d at 736.

35. *Id. Cf.* Roadway Express v. Piper, 447 U.S. 752, 764 (1980) (the most prominent inherent power is the contempt sanction). Chief Judge Biggs believed that giving the proceedings a criminal cast would require a contempt finding. But failure to file a pre-trial memorandum without willfulness, was a "peccadillo" not a sin. 307 F.2d at 736. *See supra* note 26 (18 U.S.C. § 401).

36. 370 U.S. 626 (1962).

37. *Id.* at 627. The action grew out of a collision between plaintiff's automobile and defendant's train. *Id.* at 627. The pre-trial conference was held some six years after the action commenced. Plaintiff's counsel, however, failed to attend, and the judge dismissed the case. *Id.* at 629.

38. Absence of notice regarding the possibility of dismissal or failure to hold a hearing does not necessarily render the dismissal void. *Id.* at 632.

39. *Id.* at 629. *See id.* at 632-33. *See also id.* at 633 n.8 for authorization under Rule 83. *Link* is an unusual case because the due process problems were overcome. The Court stated that the adequacy of a notice and a hearing proceeding depends largely upon the party's knowledge of the consequences of his conduct. *Id.* at 632.

40. *Id.* at 633. The Court stated that the district court derives its authority to dismiss *sua sponte* for lack of prosecution from its inherent power. *Id.* at 630. A court will use its inherent power to dismiss an action that is collusive, frivolous, fraudulent, harassing, vexatious, etc. *See* MOORE, *supra* note 2 at 635.

aid in the administration of justice.[41] Not only was the power ancient and firmly established, but Federal Rule of Civil Procedure 41 recognized the power.[42] Rule 41 authorizes dismissal for failure to prosecute, comply with the rules, or comply with any order of the court.[43] Rule 41, however, does not limit the inherent power to dismiss to only those three situations.[44]

Nearly twenty years later, a district court, in *Roadway Express Inc. v. Piper* assessed attorneys fees against the plaintiffs in a civil rights class action for failure to comply with discovery orders and to file timely briefs.[45] The district court justified its ruling upon several federal statutes.[46] The Supreme Court held that a district court may tax attorneys fees upon such plaintiffs by invoking Rule 37(b)[47] and, in appropriate circumstances, its inherent powers,[48] not by invoking the federal attorney fees statutes.[49] The Court noted, however, that the district court could not use its inherent power to impose attorneys fees without complying

41. *Id.* at 629.

42. *Id.* at 630.

43. Rule 41(b) provides in pertinent part:

> (b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him . . . .

FED. R. CIV. P. 41(b).

44. 370 U.S. at 630. The Court stated that the authority of a court to dismiss *sua sponte* for lack of prosecution has generally been considered an inherent power. *Id.*

45. 447 U.S. 752, 755-56 (1980). The court required plaintiffs to pay Roadway's costs and attorney's fees for the entire lawsuit, an assessment amounting to $17,000. *Id.* at 756.

46. *Id.* at 752. 42 U.S.C. §§ 1988, 2003-5(k) provide for prevailing party to recover attorney's fees "as part of the costs" of litigation. 28 U.S.C. § 1927 allows a court to tax the excess "costs" of litigation against an attorney "who so multiplies the proceedings . . . as to increase the costs unreasonably and vexatiously . . . ." *Id.*

47. 447 U.S. at 763-64. Rule 37(b) provides in pertinent part:

> In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

FED. R. CIV. P. 37(b).

48. 447 U.S. at 765-66. Generally, under the court's inherent power, a party cannot recover his counsel fees. When the opposing party has acted in bad faith, however, a party may recover his attorney's fees. *Id.* The requirement for bad faith in order to exercise the inherent power has been lightened. *Roadway*'s assertion may be strictly limited to its facts. *See* Burbank, *supra* note 17, at 1005 and n.35, (asserting the *Roadway* court was preoccupied with the specific context of attorneys fees, and that greater attention should have been given to the articulation of the inherent powers doctrine).

49. 447 U.S. at 756-63.

with due process.[50]

Later cases also have rejected *Gamble*. Relying on *Link, Roadway,* and the *Gamble* dissent, the courts have upheld the district courts' inherent power to sanction attorneys for a variety of non-contemptuous misconduct. In most cases, a local rule supported the court's professed power, obviating due process concerns.

In *In Re Sutter*, the Second Circuit Court of Appeals held that district courts have the power, absent a contrary statute or Supreme Court Rule, to establish local court rules sanctioning attorneys for conduct falling short of contempt.[51] In *Sutter*, the district court assessed $1,500 upon an attorney for failing to defend diligently, a violation of a local rule.[52] Dismissing the attorney's *Gamble*-based argument that imposition of costs required a finding of contempt, the court stated that the local rule merely required recklessness.[53] The court found that Rule 83, the Rules Enabling Act, and the doctrine of inherent powers supported the local rule.[54]

Similarly, in *Martinez v. Thrifty Drug & Discount Co.*, the district court, as authorized by local rule, imposed jury costs upon attorneys who had failed to notify the court on the day before the trial that jury assem-

50. 447 U.S. at 767. The court stated that "attorneys fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record." *Id.* The Court, recognizing that a court's power over the bar is as great as that over litigants, also stated that if a court may assess attorney's fees against bad faith litigants the court may certainly assess attorney's fees against attorneys who willfully abuse the judicial process. *Id.* at 766.

51. 543 F.2d 1030, 1037-38 (2d Cir. 1976).

52. Sutter, a New York attorney, initially represented a defendant indicted on racketeering charges, but became involved in another case. *Id.* at 1032. The second case ran longer than he expected. Consequently, Sutter missed his first trial date, delaying it for more than three days. *Id.* at 1034. The judge invoked court rule 8 to impose the $1500 fine. *Id.* at 1032. Rule 8 provides:

> (a) Failure of counsel for any party to appear before the court at a conference, or to complete the necessary preparations, or to be prepared to proceed to trial at the time set, may be considered an abandonment of the case . . . and an appropriate order may be entered against the defaulting party.
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> (b) *Imposition of costs on attorneys.*
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> If counsel fails to comply with Rule (f) or a judge finds that the sanctions in subdivision (a) are either inadequate or unjust to the parties, he may assess reasonable costs directly against counsel whose action has obstructed the effective administration of the court's business.

Id. at 1034.

53. *Id.* at 1035.

54. *Id.* at 1036-37.

blage was unnecessary.[55] The parties had settled on the morning of the trial. The Tenth Circuit Court of Appeals rejected *Gamble*'s reasoning and upheld the district court's imposition of jury costs as a proper exercise of its power under Rule 83.[56]

In *Miranda v. Southern Pacific Transportation Co.*, the district court assessed a fine upon counsel for failing to qualify an expert witness, according to the local rules.[57] Upon appeal, the Ninth Circuit Court of Appeals specifically rejected *Gamble*'s reasoning that imposition of a monetary assessment required contempt proceedings.[58] The court, relying on *Roadway*, asserted that the doctrine of inherent powers authorized imposition of a sanction on counsel.[59] Remand was necessary, however, to give the attorneys their due process rights to request a hearing and contest the imposition of sanctions.[60]

Finally, in *Eash v. Riggins Trucking, Inc.*, the Third Circuit Court of Appeals held that district courts have inherent power to impose jury costs upon an attorney for failure to inform his client of the opponent's settlement offer until the day of trial.[61] *Eash* expanded the scope of the

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55. 593 F.2d 992, 993 (10th Cir. 1979).

The Rule authorized the Court to impose costs of impanelling a jury when parties and counsel failed to notify the court clerk before 12:00 noon of the last business day before trial. *Id.*

The action was filed on August 22, 1977. On May 15, 1978, a jury was chosen and trial date set for May 22, 1978. *Id.* On the morning of trial the action was dismissed by joint stipulation of the parties. *Id.*

56. *Id.* at 994. The court asserted a rule is valid if it falls within the object and purpose of administering the court in an efficient manner. *Id.*

57. 710 F.2d 516, 518 (9th Cir. 1983). Here, the district court imposed a $250 fine upon each attorney for failure to comply with a local pre-trial conference Rule 9, respecting qualifications of expert witnesses. *Id.* at 518-19.

58. *Id.* at 521. Counsel implored the *Miranda* court to follow *Gamble*. *Id.* at 520. The court, however, followed the *Gamble* dissent. *Id.* at 520-21. The court asserted that a monetary sanction for failing to carry out the responsibilities of an attorney differs from criminal contempt. *Id.* at 521. The former is an inexcusable failure to perform an administrative responsibility, while the latter affronts the authority of a judge. *Id.*

59. *Id.* at 520-21. *See* Barnd v. City of Tacoma, 664 F.2d 1339 (9th Cir. 1982) (district court's inherent powers include power to assess attorney's fees directly against counsel who litigate in bad faith litigation, so long as the court gives notice and affords a hearing).

The *Miranda* court argued that sanctioning an attorney was better than sanctioning his client. 710 F.2d at 520. *Cf. Link*, 370 U.S. at 633 (stating that "[t]here is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client.").

60. 710 F.2d at 523.

61. 757 F.2d 557, 568 (3d Cir. 1985). In *Eash*, during the week before a personal injury suit was set for trial, plaintiff's attorney repeatedly attempted to communicate with defendant's attorney in regard to settlement. *Id.* at 559. As plaintiff's attorney failed to receive a response to his at-

inherent powers doctrine beyond that asserted by the Supreme Court in *Link* and *Roadway*.[62] First, the *Eash* court asserted its pure inherent power.[63] In other words, neither local rule nor a federal rule supported the court's exercise of its inherent power. Second, the *Eash* court stated that contrary legislation could not abrogate the power asserted.[64]

Third, *Eash* overruled *Gamble* as anachronistic in light of present court needs.[65] An overwhelming weight of opinion, expressed by the earlier cases[66] and by legal commentators, demonstrated the flaws in the *Gamble* approach. Moreover, the increase in litigation and subsequent necessity to control the docket required that district courts use their inherent power to control attorneys' litigation behavior.[67] The court's assertion of its pure inherent power, however, deprived the attorney of his due process rights of constructive notice.[68] Thus, the court remanded for

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tempted communications, he prepared for trial. *Id.* The parties settled the morning of the trial. *Id.* The district court ordered defendant's attorney to pay the costs of impanelling an unnecessary jury. The sanction imposed was $390, representing $30 per diem fee for each juror, multiplied by 13, the minimum number of persons necessary to select a jury. *Id.*

62. According to the court, its inherent powers vested in its creation. *Id.* at 561. The court discussed three types of inherent power. First is the "irreducible inherent authority" which emanates from the congressional establishment of lower federal courts and the demarcation of their jurisdiction. *Id.* at 562. This power encompasses a narrow range of fundamental activity, divestiture of which would render meaningless the terms "court" and "judicial power." *Id.* at 562. In this context, courts may act regardless of contrary legislation. *Id.*

Second, the court stated that inherent powers include powers arising from the nature of the court. *Id.* These powers are necessary for the exercise of all others and are implied from strict functional necessity. *Id.*

Finally, the third type of inherent power embraces powers necessary only in the practical sense of being useful. *Id.* at 563. Such power is exercised by the court in supplying itself with an auditor, or janitor, or the like. Courts may exercise this type of inherent power only in the absence of contrary legislation. *Id.*

The court concluded the district court's power derived from strict functional necessity. *Id.*

63. *Id.* at 560-65.

64. *Id.* at 563.

65. *Id.* at 568. According to the court, functional necessity required that federal district courts possess suitable instruments for curbing litigation abuses by trial attorneys. *Id.*

66. *Id.* at 565-68.

67. *Id.* at 565. Two problems remained. First, only approximately tailored costs were allowed. But unlike the monetary assessment imposed in *Gamble* (*see supra* notes 25-36 and accompanying text) the cost of impanelling a jury was directly related to the attorney's misconduct. 757 F.2d at 565. Second, absence of a local rule meant the court imposed a sanction for undefined conduct. Supreme Court support, *see Link*, *supra* note 40, and the last sentence of Rule 83, *see supra* note 22, alleviated this problem. The *Eash* court stated the court's inherent authority was not limited to specific categories of conduct defined by local rules. 757 F.2d at 565. Furthermore, a reasonable monetary sanction upon an errant attorney was within the court's power to make procedural (local) rules because it is not outcome-determinative. *Id.* at 569.

68. 757 F.2d at 570-71.

an evidentiary hearing and an occasion for the attorney to respond.[69]

The dissent contended that the power to punish for contempt did not include the power to punish conduct not rising to the level of contempt.[70] Labelling the sanction a fine,[71] the dissent argued that the district court encroached upon Congress' power to define penalties and costs. Thus, according to the dissent, the majority's holding violated the separation of powers principle.[72]

As indicated by the aforementioned cases, the due process constraints of prior notice and a hearing place a significant and pervasive control upon exercises of inherent power.[73] The cases show that imposition of an inherent power sanction upon an attorney for non-contemptuous misconduct is valid when due process requirements are met. When a sanction is imposed in the presence of a local rule, a subsequent hearing affords due process.[74] A pure exercise of the inherent power mandates greater proce-

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69. *Id.* at 571.

70. *Id.* at 575 (Sloviter, J., dissenting). *Compare* Note, *supra* note 18, at 881, 878-79.

71. 757 F.2d at 574. *See* Note, *supra* note 18, at 871 ("Court's have described these summary financial assessments in various terms including 'penalty,' 'fine,' 'financial reprisal,' and 'costs.' "). (citations omitted).

72. 757 F.2d at 573. The dissent warned against oppressive judicial activism infringing upon the boundaries of constitutionally granted federal court jurisdiction. *Id.* at 575. The dissent suggested alternative methods by which the majority could accomplish its objective. For example, the court could formulate an appropriate rule pursuant to the Rules Enabling Act, 28 U.S.C. § 2071. 757 F.2d at 576. Furthermore, the Federal Rules of Civil Procedure granted courts authority to sanction attorneys for a variety of abuses. *Id.*

Judge Seitz wrote a separate dissent, asserting that neither the inherent power nor the last sentence of Rule 83 could be used on an *ad hoc* basis. *Id.* at 572.

73. In addition to due process, other limitations upon the inherent power exist. For example, arbitrary local rules face the caveat of Rule 83 that district court rules cannot be inconsistent with the federal rules. *See supra* note 22. Rule 83, however, may grant courts power they already possess. If there were a confrontation between the local rules and federal rules, the inherent power, according to *Eash*, would override the specific rule or statutory grant of power. 757 F.2d at 563. *See also* Michaelson v. U.S., 266 U.S. 42 (1924).

Another limitation upon the inherent powers is the Rules Enabling Act and the Supreme Court Rules enacted pursuant to the Act. *See supra* note 19.

A third limitation is that superior court rules take precedent over local rules. *See e.g.*, Los Angeles Brush Corp. v. James, 272 U.S. 701 (1927). *See also* Comment, *supra* note 19, at 976 (court rules arising from common law, a constitution, or a statute must further substantive law; a contravening rule is thus void). *See also* Williams, *supra* note 1, at 486.

The final limitation is that the Supreme Court has reserved the power to examine and invalidate local court rules. Sibbach v. Wilson & Co., Inc., 312 U.S. 1, 15 (1941). Some individuals find that constitutional rights constrain exercises of the inherent power. The court may enact a rule characterizing it as procedural while, in fact, the rule may affect a substantive right. *See* Comment, *supra* note 19 at 984.

74. *See e.g., Miranda*, 710 F.2d at 522-23 (opportunity to prepare a defense and a hearing are

dural protections: both prior notice and a hearing.[75] Precise procedural requirements, however, remain vaguely defined by the courts,[76] resulting in needless confusion.

The violations of attorneys' due process rights ensuing from courts' exercises of their inherent power are too dangerous to justify the *status quo* of imposing sanctions and subsequently remanding to eliminate procedural errors. Such a system hardly administers judicial efficiency. Express provisions for sanctions should govern areas previously covered by the inherent powers.

III. PROPOSED SOLUTIONS TO THE INHERENT POWERS- DUE PROCESS PROBLEM

There are essentially two alternative means to guarantee a court's right to impose sanctions for conduct not amounting to contempt without violating due process. First, the court can establish a local rule.[77] Advan-

required before imposing a monetary sanction on counsel); *Martinez*, 593 F.2d at 994 (imposition of a sanction authorized by local rule failed to give rise to a due process issue). *See also Eash*, 757 F.2d at 571 (citing *Miranda* for the proposition that a post-sanction hearing affords due process). In some cases, a previous warning and opportunity to explain may be enough. *See* White v. Raymark Industries, Inc., 783 F.2d 1175, 1176 (4th Cir. 1986) (court warning on day prior to settlement that jury costs would be assessed for unjustified delay in settling case in combination with constructive notice of local rule constituted sufficient notice).

75. *Eash*, 757 F.2d at 570. *Cf. Link*, 370 U.S. at 632, where the court stated that adequacy of notice depended on knowledge of the circumstances. The Court also stated:

> Accordingly, when circumstances make such action appropriate, a District Court may dismiss a complaint for failure to prosecute even without affording notice of its intention to do so or providing an adversary hearing before acting. Whether such an order can stand on appeal depends not on power but on whether it was within the permissible range of the court's discretion.

See also Roadway, 447 U.S. at 767 n.14 ("[t]he due process concerns posed by an outright dismissal are plainly greater than those presented by assessing counsel fees against lawyers"); Boddie v. Connecticut, 401 U.S. 371, 379 (1971) (except in extraordinary circumstances due process requires notice and opportunity to be heard before any government deprivation of a property interest). *See generally* Goldberg v. Kelly, 397 U.S. 254 (1970).

76. *Miranda*, 710 F.2d 516 (9th Cir. 1983), is a typical example. The court stated that due process requires the opportunity to prepare a defense and a hearing in response to a sanction. *Id.* at 522. Later, the court stated that sanctions should not be imposed without procedural protections of notice, opportunity to respond, and a hearing. Note that in *Miranda* the district court had a local rule giving constructive notice.

77. Under Federal Rule of Civil Procedure 83, courts may establish local rules if not inconsistent with Federal or Supreme Court rules. *See supra* note 22 and accompanying text. Most jurisdictions lack court rules imposing sanctions. *See* Comment, *supra* note 21, at 635-36 (author explains that the advantage of sanctions entered pursuant to the court's rulemaking power is that negligent or reckless conduct can be sufficient for liability, in contrast to contempt, which requires a finding of bad faith).

tages of a local rule are docket control,[78] adequate notice, and a mandatory hearing, thus satisfying due process.[79]

On the other hand, disadvantages lie in establishing restrictive rules and their strict enforcement, possibly stifling attorneys in the court room.[80] Satellite litigation would increase. Furthermore, a myriad of local rules will destroy the uniformity and predictability of procedural law. Clients would bear the increased costs.[81]

The second remedial alternative is a new Federal Rule of Civil Procedure.[82] National in scope, the new Rule would solidify due process requirements, by providing uniformity and notice.[83] The new Rule should

78. *See Sutter, Martinez* and *Eash*, as well as the Supreme Court in *Link* and *Roadway* which state that docket control is the primary reason for local rules.

79. *See Eash*, 757 F.2d at 570.

80. The National Law Journal recently stated: "In the absence of clear appellate guidance [referring to *Eash*] . . . judges may have too much discretion, allowing sanctions to reduce effectively a litigant's access to courts." National L. J., Nov. 11, 1985, at 32, col. 2. One commentator suggests that fear of sanctions would chill an attorney's "zeal" in bringing creative legal or factual theories. Comment, *Recent Changes in the Federal Rules of Civil Procedure: Prescriptions to Ease the Pain?*, 15 TEX. TECH. L. REV. 887, 892 (1984); *see* Burbank, *supra* note 17 at 1004.

81. As districts vary in caseload, local rules will naturally differ. Attorneys may be forced to localize their practice to a jurisdiction where they are familiar with the courts. If not, the attorney will devote time learning the procedural rules of foreign jurisdictions. It is currently estimated that district courts have promulgated nearly 3,000 local rules. Roberts, *The Myth of Uniformity in Federal Civil Procedure: Federal Civil Rule 83 and District Court Local Rulemaking Powers*, 8 U. PUGET SOUND L. REV. 537, 538 (1985).

82. It is a conundrum. Through 28 U.S.C. § 2071, the Rules Enabling Act, the legislature has granted the courts power to establish rules of procedure, a power they already possessed. *See supra* note 19 and accompanying text.

83. A new Federal Rule would not be innovative. The Federal Rules of Civil Procedure already cover a host of procedural matters. Under Rule 16(f), a court may impose sanctions for failure to comply with pretrial conference and order provisions. Rule 16(f) provides:

> Sanctions. If a party or party's attorney fails to obey a scheduling a pretrial order, or if no appearance is made on behalf of a party scheduling a pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the judge, upon motion or his own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), (D). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing him or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

FED. R. CIV. P. 16(f). Moreover, under Rule 11, a court may impose sanctions for burdening the court with unwarranted motions, pleadings and other papers. *Id.* at 633.

Rule 11 provides:

> 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 . . . . The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or

require a post-sanction hearing. To allow for jurisdictional differences, however, the new Rule must be broadly based, leaving some discretion with the judge. A new rule would be effectuated by deleting the last sentence of Federal Rule of Civil Procedure 83 and inserting the following sentences:

In all cases not provided for by rule, district courts shall have the power to

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other paper; that to the best of his knowledge, information, and belief 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 signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it . . . an appropriate sanction . . . .

FED. R. CIV. P. 11.

Lastly under Rule 26(g), a court may impose sanctions for abuses during discovery. Rule 26(g) provides:

Signing of Discovery Requests, Responses, and Objections. Every request for discovery or response or objection thereto made by 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 . . . . The signature of the attorney or party constitutes a certification that he has read the request, response, or objection, and that to the best of his knowledge, information, and belief formed after a reasonable inquiry it is: (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation . . . .

If a certificate is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification . . . an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

FED. R. CIV. P. 26(g).

For a discussion of these rules and the effect of the amendments thereto, see Comment, *supra* note 80. These sanctions are in addition to sanctions found in other Federal Rules of Civil Procedure, covering depositions, discovery, dismissals, and default. *See generally* FED. R. CIV. P. 37, 60(g), 41(b), 45 and 55.

Note that Rule 16(f), 11, and 26(g) provide for mandatory imposition of sanctions. For an excellent discussion on the courts' power to amend the Federal Rules of Civil Procedure, see Burbank, *supra*, note 17. One commentator suggests that in the federal system it is unnecessary to rely upon the court's inherent power to fashion rules, as sufficient statutory and quasi-statutory authorization already exists. *See* Note, *Civil Procedure—Power of Federal Courts to Discipline Attorneys for Delay in Pre-Trial Procedure*, 38 NOTRE DAME L. REV. 158, 169 (1963). On the other hand, Burbank assures that Rule 11 and 26(g) are out of bounds. He states "the inherent power concept, at least as blessed by the Supreme Court in *Roadway Express*, hardly supports, by itself, the breadth of the sanction provisions in these proposed amendments." Burbank, *supra* note 17, at 1005-06. But he concludes the power exists under the Rules Enabling Act to promulgate rules that authorize sanctions for attorney conduct that is negligent. *Id. See generally* Comment, *supra* note 80, at 889 (suggesting that the new amendments demonstrate the Advisory Committee's preoccupation with sanctions).

sanction sufficiently defined attorney misconduct. Prior to the imposition of a sanction the court shall provide a hearing on said matter.

A new Federal Rule has some of the same disadvantages as a local rule: constrained attorneys and satellite litigation. Whether a local rule or a new federal rule is used, court procedures will naturally vary in each jurisdiction.[84] Both alternatives seek to accomplish what courts currently do under the inherent powers doctrine. In contrast to the inherent powers doctrine, however, the chief advantage of each proposed alternative is prior notice.[85]

IV. EVALUATION OF THE ALTERNATIVE SOLUTIONS

Since their inception, federal courts have asserted inherent powers to effectuate the administration of justice. In many instances the Supreme Court and lower federal courts have affirmed this power. No court, however, has adequately defined the inherent power.

Sanctioning attorneys and promulgating local rules are the most frequent exercise of the inherent power. They are interrelated: local rules enacted under inherent powers provide district courts with authority to sanction attorneys. A pure exercise of the inherent power must meet due process requirements of prior notice and a hearing. A pure exercise will not overcome lack of prior notice. In effect, this particular exercise of the inherent power is interstitial and a dead letter. Efficient administration of justice and attorney due process rights are ignored when courts sanction pursuant to the inherent power because remand is necessary to eliminate the procedural due process problems.

Establishing local rules, or a new Federal Rule of Civil Procedure will help alleviate the due process problem. A new Federal Rule is the better alternative. A new Federal Rule would nationalize due process requirements for inherent power sanctions, and simply add to the already pervasive Federal Rules of Civil Procedure. Furthermore, a new Rule would

84. Local rules will vary in each jurisdiction because of caseload, dockets set by judges and tradition. One commentator states: "Rather than uniformity, a high degree of local diversity has been introduced into almost every phase of federal pretrial procedure . . . . Other local rules are unwise, confusing, or poorly drafted." Roberts, *The Myth of Uniformity, supra* note 81, at 540.

85. *See supra* notes 69, 76-77 and accompanying text. Notice can be afforded prior to the exercise of an inherent power, however, by oral or written warning. *See* Nesco Design Group, Inc. v. Grace, 577 F. Supp. 414 (1983) (oral notice to attorneys at pretrial conference that jury costs would be assessed for failure to notify court two days prior to jury selection upheld). Moreover, regularity in imposition of sanctions has been said to afford notice consistent with due process. *See* Note, *supra* note 18 at 892.

not displace the inherent power, but coexist with it.[86] Courts should not summarily sanction attorneys based upon the illusive and unpredictable inherent power doctrine when a new federal rule can inject notice and procedural equity into court proceedings.

Joseph J. Janatka

86. This suggestion is like the contempt sanction which co-exists with the federal court's inherent power to find contempt.