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**AND THE CHILL GOES ON—FEDERAL CIVIL
RIGHTS PLAINTIFFS BEWARE:
RULE 11 VIS-À-VIS 28 U.S.C. § 1927 AND THE
COURT’S INHERENT POWER**

*Danielle Kie Hart**

I. Introduction

Consider the following story:¹ An employee contacts an attorney after she is fired from her job; the employee believes that she has been terminated because of her gender and race. After conducting a preliminary investigation, her attorney files a complaint alleging wrongful discharge against the client’s former employer in federal district court. The district court warns plaintiff’s counsel that several of the statements made in the complaint are inflammatory. Defendant’s counsel sends a warning letter demanding that plaintiff dismiss the complaint and threatening to seek sanctions.

After initial discovery fails to reveal sufficient facts to sustain plaintiff’s claim, plaintiff dismisses her complaint. Following dismissal, defendant immediately files a motion for sanctions alleging that plaintiff’s claims were frivolous. But defendant only seeks sanctions pursuant to 28 U.S.C. § 1927 and the court’s inherent power. In a separate letter to the court that is copied to plaintiff’s

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1. This story is a hypothetical composite of various cases collected for this article. It does not recount the actual conduct of any particular parties.

counsel, however, defendant suggests that the district court should sua sponte sanction plaintiff under Rule 11 of the Federal Rules of Civil Procedure.

The district court declines defendant's invitation to sanction plaintiff's counsel under Rule 11. The court specifically notes that defendant failed to comply with Rule 11's procedural requirements; it also notes that this may be the reason prompting defendant's § 1927 and inherent power motion. Because the court also cannot find bad faith by plaintiff's counsel in filing the complaint, it declines to impose sanctions under either § 1927 or its inherent power.

The foregoing story illustrates both a positive and negative effect created by the 1993 amendments to Rule 11. The positive effect—the court denies Rule 11 sanctions against plaintiff for failure of defense counsel to comply with the procedural amendments added to the Rule in 1993. One could therefore argue that the amendments appear to be doing their job. But the negative effect—defendant now requests 28 U.S.C. § 1927 and inherent power sanctions specifically *because* defendant either cannot, or simply did not, satisfy those very same procedural amendments added to Rule 11 in 1993.² In addition, the defendant sometimes still requests Rule 11 sanctions, notwithstanding the failure of compliance.³ Are the amendments still working when sanctions other than Rule 11 are requested, *because* of the 1993 amendments? Are they working when Rule 11 sanctions are still threatened? Unfortunately, the story recounted above, though just a hypothetical, is a scenario that is currently being played out in the federal district courts.

This article examines the interaction of Rule 11 vis-a-vis 28 U.S.C. § 1927 and the court's inherent power to sanction. Incidentally, this paper was prompted by research uncovered for another article,⁴ indicating that: (a) while Rule 11 use appears to be

2. This is a negative effect because rather than avoiding sanctions entirely for failure to comply with Rule 11's procedural requirements, sanctions under alternative bases of sanctioning authority are still threatened.

3. Significantly, Rule 11 sanctions, even in the face of noncompliance with the procedural amendments, are not always denied. See Danielle Kie Hart, *Still Chilling After All These Years: Rule 11 of the Federal Rules of Civil Procedure and Its Impact on Federal Civil Rights Plaintiffs After the 1993 Amendments*, 37 VAL. U. L. REV. 1 (2002) [hereinafter Hart, *Still Chilling*].

4. See *Id.*

declining in the federal courts after the 1993 amendments to the Rule, imposition of sanctions under § 1927 and the court's inherent power may be increasing;⁵ and (b) the federal courts and the litigants appearing before them seem to be using 28 U.S.C. § 1927 and/or the court's inherent power to sanction to circumvent the procedural requirements of Rule 11 when those procedural requirements have not been or could not be met.⁶

Since then, subsequent research on this subject appears to support both of these observations. The purpose of this paper, therefore, is to tie these two observations together and to explore the implication(s) they pose for civil rights plaintiffs in the federal courts. Very briefly, the fear is that: (1) unlike the judge in the hypothetical recounted above, the federal district courts will misapply Rule 11 but will nevertheless use their sanctioning authority broadly to improperly impose sanctions when such sanctions could not be imposed under Rule 11; or (2) even if the federal district courts do not make these mistakes, civil rights plaintiffs will not file meritorious lawsuits in the federal courts because of the *potential* that the courts will use their sanctioning authority broadly.

Part II examines the federal district court's sanctioning authority. Part II.A briefly examines the history, scope and purpose of Rule 11, 28 U.S.C. § 1927 and the court's inherent power to sanction, taking care to note the significant overlap between the three sanctioning provisions. Part II.B then explores *why* Rule 11 was amended in 1993, focusing mainly on the Rule's chilling effects. According to many commentators, the mere threat of Rule 11 sanctions, coupled with the knowledge that large Rule 11 sanctions are sometimes imposed, chilled creative advocacy by discouraging civil rights plaintiffs and their attorneys from filing meritorious claims in the federal courts. Studies also showed that Rule 11 was used disproportionately against civil rights plaintiffs.⁷ Part II.B

5. Georgene Vairo, *Rule 11 and the Profession*, 67 *FORDHAM L. REV.* 589, 643 (1998) [hereinafter Vairo, *Profession*].

6. See *infra* Part III.

7. See *infra* Part II.B; see also Hart, *Still Chilling*, *supra* note 3, at 12–17 (discussing the findings of numerous studies, most of which concluded that civil rights plaintiffs were sanctioned at a substantially higher rate than other plaintiffs).

discusses some of the specific amendments designed to help reduce these effects. Part II.B underscores the inherent difficulty that exists in trying to reduce one sanctioning rule's adverse effects when the federal courts have other, somewhat overlapping, sanctioning authority available to them. That problem, more specifically, is that the federal courts and the litigants appearing before them may well start to rely more heavily on other bases of sanctioning authority if it has become more difficult to obtain sanctions under Rule 11.

Part III lays out the research collected for this article, which tends to confirm, at least very preliminarily, that the sanctions problem identified in Part II actually seems to exist in the federal courts. Part IV discusses in greater detail the general and particular implications of this preliminary conclusion. Briefly, using alternative bases of sanctions to circumvent the procedural requirements of Rule 11 eviscerates the 1993 amendments and creates a zero sum sanctions game for federal court litigants. The more particular result is that the 1993 amendments are not reducing Rule 11's chilling effects. Instead, they are arguably spreading to include 28 U.S.C. § 1927 and the court's inherent power to sanction. Even though all federal court litigants may be adversely affected by what appears to be a sanctioning trend in the federal courts, the category of litigants most likely to be *chilled* are civil rights plaintiffs.

Part V poses other relevant considerations that are significant to this discussion. Specifically, Part V.A explores the propriety of circumventing the procedural requirements of Rule 11 by using 28 U.S.C. § 1927 or the court's inherent power to sanction. This question is especially cogent in light of the United States Supreme Court's decision in *Chambers v. NASCO, Inc.*,⁸ which is briefly discussed. Part V.A ultimately concludes that it is improper to use § 1927 or the court's inherent power to sanction to displace Rule 11 simply *because* the Rule's procedural requirements are not satisfied: (a) where the specific mechanisms for triggering sanctions under § 1927 or the court's inherent power are not independently met; and (b) as a matter of policy. The *Chambers* case should not be interpreted as compelling a different result. Finally, Part V.B discusses what is at stake when 28 U.S.C. § 1927 and the court's

8. 501 U.S. 32 (1991).

inherent power to sanction are used as Rule 11 substitutes. In a nutshell, using these alternative bases of sanctions as Rule 11 substitutes will increase the chilling effects experienced by civil rights plaintiffs in the federal courts. The result is to threaten access to the federal courts for these types of litigants bringing these types of claims.

II. THE FEDERAL COURT'S SANCTIONING AUTHORITY

A. *Rule 11, 28 U.S.C. § 1927 and the Court's Inherent Power to Sanction*

Rule 11 of the Federal Rules of Civil Procedure has existed since 1938; it has generated hundreds of cases and countless law review articles. Since it was originally enacted in 1938, the Rule has been substantially amended twice. The original version was designed to "promote honesty in pleading"⁹ but was seldom used, because the Rule's bad faith requirement was too difficult to prove.¹⁰ The second version, as amended in 1983, was designed to give the federal district courts greater authority to control litigation.¹¹ Its

9. Karen Kessler Cain, *Frivolous Litigation, Discretionary Sanctioning and a Safe Harbor: The 1993 Revision of Rule 11*, 43 U. KAN. L. REV. 207, 207-09 (1994).

10. *Id.* at 209; see also Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 191 (1988) (noting that the 1938 version of Rule 11 was largely ignored.); James R. Simpson, *Why Change Rule 11? Ramifications of the 1992 Amendment Proposal*, 29 CAL. W. L. REV. 495, 496 (1993) (The reason "the rule was rarely invoked during its first 45 years prior to the 1983 amendment" was "[d]ue to the difficulty in proving subjective bad faith"); Howard A. Cutler, *A Practitioner's Guide to the 1993 Amendment to Federal Rule of Civil Procedure 11*, 67 TEMP. L. REV. 265, 273 (1994) (noting that Rule 11 was "rarely invoked" because the showing of subjective bad faith was "very difficult and time-consuming"); FED. R. CIV. P. 11 advisory committee's note to 1983 amendment (acknowledging that "in practice Rule 11 has not been effective in deterring abuses") (citation omitted); Lawrence C. Marshall et al., *The Use and Impact of Rule 11*, 86 NW. U. L. REV. 943, 947 (1992) (concluding that the practical effect of the bad faith requirement "was to place only 'a moral obligation on attorneys to satisfy themselves that good grounds existed for the action or defense'") (footnote omitted).

11. Eric K. Yamamoto, *Case Management and the Hawaii Courts: The Evolving Role of the Managerial Judge in Civil Litigation*, 9 U. HAW. L. REV. 395, 430 (1987); Stephen B. Burbank & Linda J. Silberman, *Civil Procedure Reform in Comparative Context: The United States of America*, 45 AM. J. COMP. L. 675, 679 (1997).

primary purpose was to deter frivolous lawsuits,¹² and it was, and continues to be, very successful in getting attorneys to “stop, look and inquire” before filing.¹³ The result is that parties assert or litigate fewer meritless positions, and they bring less groundless litigation in the federal district courts.¹⁴ But the 1983 version of the Rule was probably invoked too often and created several significant problems, including excessive Rule 11 litigation and diminished access to the federal courts by litigants asserting non-mainstream claims.¹⁵ The current version of Rule 11, as amended in 1993, was specifically designed to address those problems.¹⁶

The primary purpose of Rule 11, however, remains deterrence, not compensation.¹⁷ Consequently, if a Rule 11 violation is found, the federal district courts are admonished to impose the least severe sanction “sufficient to deter repetition of such conduct or comparable conduct by others similarly situated.”¹⁸

12. Cutler, *supra* note 10 at 273; Cain, *supra* note 9 at 207; FED. R. CIV. P. 11 advisory committee’s note to 1983 amendment.

13. Eric K. Yamamoto & Danielle K. Hart, *Rule 11 and State Courts: Panacea or Pandora’s Box?*, 13 U. HAW. L. REV. 57, 60–61 (1991) (quoting Erik K. Yamamoto, *Efficiency’s Threat to the Value of Accessible Courts for Minorities*, 25 HARV. C.R. –C.L. L. REV. 341, 362 (1990)).

14. *Id.*; *c.f.* Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFF. L. REV. 485, 513–14 (1988/1989) (noting that the 1983 version of Rule 11 increased the federal bench and bar’s awareness of Rule 11 and, significantly, caused attorneys to stop and think before filing, deterred some frivolous litigation, and, as a result, helped ameliorate the primary problem that prompted the 1983 amendment, namely, the deterrence of abuse.) (footnotes omitted) [hereinafter Tobias, *Litigation*]; Marshall, *supra* note 10, at 964 (Lawyers practicing in the Fifth, Seventh, and Ninth Circuits were asked in a study conducted by the American Judicature Society, “what is the biggest impact, if any, of the sanctioning provisions of Rule 11 on your practice?” The leading response, which was quite consistent with the intent of the framers of Rule 11, was that Rule 11 has generated increased factual investigation before the filing of cases and pleadings.”) (footnote omitted).

15. Yamamoto & Hart, *supra* note 13, at 60–61; Georgene M. Vairo, *Rule 11: Where We Are and Where We Are Going*, 60 FORDHAM L. REV. 475, 480 (1991) [hereinafter, Vairo, *Where We Are*]; Hart, *Still Chilling*, *supra* note 3, at 10.

16. *See infra* Part II.B.

17. FED. R. CIV. P. 11 advisory committee’s note to 1993 amendment (“[T]he purpose of Rule 11 sanctions is to deter rather than to compensate . . .”).

18. FED. R. CIV. P. 11(c)(2); *see also* GREGORY P. JOSEPH, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE §§ 16(C)(1)–(2) at 287 (3d ed.

Rule 11 scrutiny is triggered when a party or its attorney signs¹⁹ and *presents* to the court²⁰ “a pleading, written motion, or other paper.”²¹ By signing and presenting the pleading, motion or other paper to the court, the party or attorney certifies:

(1) that the paper is not interposed for any improper purpose; (2) that the presenter has conducted a reasonable inquiry into the law and that the paper embodies existing legal principles or a nonfrivolous argument for the extension, modification, or reversal of existing law; and (3) that the presenter has conducted a reasonable inquiry into the allegations, contentions and denials of fact contained in the pleading, written motion or other paper.²²

Hence, Rule 11 is expressly limited to misconduct involving pleadings, written motions and other papers. It does not extend to any other kind of litigation misconduct.²³ In contrast, the district court’s authority to sanction under either 28 U.S.C. § 1927 or its inherent power is not so limited.²⁴

Section 1927 has been in existence since 1813.²⁵ It was originally enacted “to prevent multiplicity of suits or processes, where a single suit or process might suffice.”²⁶ The statute was amended in 1980 to specifically provide for an award of attorneys’ fees; it now provides:

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who

2000) [hereinafter JOSEPH, SANCTIONS]; *see also* FED. R. CIV. P. 11(b)(1)–(4).

19. Rule 11 requires that each pleading, motion or other paper be signed by at least one attorney of record or the party. FED. R. CIV. P. 11(a).

20. Presenting includes “signing, filing, submitting, or later advocating.” *Id.* 11(b).

21. *Id.*

22. JOSEPH, SANCTIONS, *supra* note 18, § 6(D), at 119; *see also* FED. R. CIV. P. 11(b)(1)–(4).

23. Gregory P. Joseph, *Sanctions: Rules 11, 26(g), 30(d), and 37, § 1927, Inherent Power, Appellate Rule 38, and § 1912*, in CIVIL PRACTICE AND LITIGATION TECHNIQUES IN FEDERAL AND STATE COURTS 79, 91 (ALI-ABA Course of Study, Dec. 9, 1999), WL SE63 ALI-ABA 79 [hereinafter Joseph, *Rules*].

24. *Id.*

25. *See generally*, JOSEPH, SANCTIONS, *supra* note 18, § 20, at 374 (discussing § 1927’s legislative history in more detail).

26. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 759 (1980) (citation omitted).

so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.²⁷

Section 1927 is a penal statute, the primary purpose of which is to deter unnecessary delay in litigation by requiring attorneys in violation of the statute to personally satisfy the excess costs, including attorneys' fees, attributable to their litigation misconduct.²⁸ The statute "penalizes the wrongful proliferation and prolongation of litigation."²⁹ Section 1927, therefore, is a specific attempt to address the problem of controlling abuses of judicial processes.³⁰ The statute "imposes an obligation on attorneys throughout the entire litigation to avoid dilatory tactics."³¹ Thus, unlike Rule 11 sanctions, which focus on pleadings, written motions and other papers, "the inquiry under § 1927 is on a course of conduct."³²

To trigger sanctions under § 1927, the lawyer's conduct "must multiply the proceedings *both* 'unreasonably and vexatiously.'"³³ That is, a federal district court may only impose sanctions pursuant to § 1927 "if[:] (1) the actions of the attorney multiply the proceedings *and* (2) the attorney's actions are [both] vexatious and unreasonable."³⁴ The power granted to the federal district courts to sanction pursuant to § 1927 is one that must be strictly construed.³⁵ It is also one which should be utilized only in situations "evidencing a 'serious and standard disregard for the orderly process of justice.'"³⁶

27. 28 U.S.C. § 1927 (2000).

28. JOSEPH, SANCTIONS, *supra* note 18, § 20, at 374-75.

29. *Id.*, § 23(A)(1), at 384.

30. *Roadway Express, Inc.*, 447 U.S. at 761-62.

31. *Bowler v. U.S. Immigration & Naturalization Serv.*, 901 F. Supp. 597, 604 (S.D.N.Y. 1995) (quoting *United States v. Int'l Bhd. of Teamsters, AFL-CIO*, 948 F.2d 1338, 1345 (2d Cir. 1991)).

32. *Id.* at 605 (citation omitted).

33. JOSEPH, SANCTIONS, *supra* note 18, § 23(B)(1), at 395 (emphasis added); *see also id.* § 23(B), at 395 (for a general discussion of "unreasonably and vexatiously").

34. *Dreiling v. Peugeot Motors of Am., Inc.*, 768 F.2d 1159, 1165 (10th Cir. 1985) (emphasis added) (citations omitted).

35. *Id.*

36. *Id.* (quoting *Kietel v. Las Vegas Hacienda, Inc.*, 404 F.2d 1163, 1167 (7th Cir. 1968)).

The federal circuits are split as to whether § 1927 requires a showing of subjective bad faith or whether mere recklessness is sufficient.³⁷ Nevertheless, given the standard triggering liability under § 1927, the scope of sanctionable misconduct under the statute is broader than Rule 11. In other words, more types of misconduct are sanctionable under § 1927 than Rule 11.³⁸ Indeed:

It is important to bear in mind . . . that “unreasonably” modifies “multiplies the proceedings”—that is, the issue is not necessarily the reasonableness of the position asserted but rather whether the assertion itself is, in the circumstances, reasonable. Therefore, *the fact that Rule 11 sanctions may be denied with respect to a court filing does not necessarily mean that the filing does not contravene § 1927.*³⁹

Importantly, the scope of sanctionable conduct under Rule 11 and § 1927 also overlaps. For example, both Rule 11 and § 1927 would apply to the following situations occurring within a pending case: “[f]iling a baseless or deceptive pleading[;] [f]iling a baseless motion[;] [filing] baseless opposition papers in response to a motion[;] [p]ursuing [or later advocating] a litigation position after it becomes apparent that the asserted position is devoid of merit[; and] [t]aking frivolous legal positions[.]”⁴⁰

The federal district court’s sanctioning power, however, is not limited to what is enumerated in statutes or in the rules of civil procedure.⁴¹ The federal courts have the inherent power to punish

37. Gregory P. Joseph, *Recent Sanctions Decisions: Rule 11, Inherent Power, 28 U.S.C. § 1927*, in CIVIL PRACTICE AND LITIGATION TECHNIQUES IN FEDERAL AND STATES COURTS 23, 33 (ALI-ABA Course of Study, Jan. 15–17, 2003), WL SH063 ALI-ABA 23.

38. See generally JOSEPH, SANCTIONS, *supra* note 18, § 21, at 375, § 23, at 384.

39. *Id.* § 23(B)(1), at 395 (emphasis added).

40. *Id.* § 23(A)(1), at 384–85 (discussing § 1927) “There is no question that the wrongful multiplication of proceedings within a pending case is sanctionable under § 1927.” (citations omitted); see also *supra* text accompanying notes 19–23 (discussing when Rule 11 applies and what triggers Rule 11 scrutiny).

41. *C.f.* JOSEPH, SANCTIONS, *supra* note 18, § 26(A)(1), at 427. Indeed, Rule 11 and 28 U.S.C. § 1927 simply “represent partial codifications of a courts’ [sic] inherent power to sanction.” S.D. Shuler, *Chambers v. NASCO, Inc.: Moving Beyond Rule 11 Into the Uncharted Territory of Courts Inherent*

attorneys or parties who abuse the judicial process,⁴² including the power to sanction.⁴³ The court's general inherent power is one that the federal courts have long upheld; indeed its existence has been recognized since the early Nineteenth Century.⁴⁴

The inherent power to impose sanctions is generally included amongst "those powers necessary to the exercise of all others."⁴⁵ This power is not governed by specific rules or statutes, "but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases."⁴⁶ The inherent power to impose sanctions, therefore, is generally acknowledged as being necessary "to protect against the disruption or abuse of judicial processes and to ensure obedience to a court's orders, thereby preserving [the court's] authority and dignity."⁴⁷

Although it has been said that the court's inherent power to sanction serves the three purposes of deterrence, compensation and punishment, with an emphasis on the latter two,⁴⁸ the *primary* purpose of this power appears to be "the improvement of the judicial process."⁴⁹ Consequently, inherent power sanctions may only be imposed for abusive litigation practices undertaken in bad faith.⁵⁰ Unlike § 1927, therefore, where there is a split in the circuits,⁵¹ bad

Power to Sanction, 66 TUL. L. REV. 591, 596 (1991).

42. Vairo, *Profession*, *supra* note 5, at 594.

43. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-46 (1991); Shuler, *supra* note 41, at 596.

44. Shuler, *supra* note 41, at 596; *see also* *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 227 (1821) (Implicit in Article III of the federal constitution, which creates the Supreme Court and confers power on Congress to establish a federal judiciary, is the power of courts to "impose silence, respect, and decorum, in their presence, and submission to their lawful mandates.").

45. Joseph, *Rules*, *supra* note 23, at 174; *see* Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 742 (2001).

46. *Chambers*, 501 U.S. at 43 (citation omitted).

47. Pushaw, *supra* note 45, at 764-65 (footnote omitted).

48. Thomas E. Baker, *The Inherent Power to Impose Sanctions: How a Federal Judge Is Like an 800-Pound Gorilla*, 14 REV. LITIG. 195, 201 (1994); Daniel H. Fehderau, *Rule 11 and the Court's Inherent Power to Shift Attorney's Fees: An Analysis of Their Competing Objectives and Applications*, 33 SANTA CLARA L. REV. 701, 705-06 (1993).

49. Fehderau, *supra* note 48, at 705.

50. JOSEPH, SANCTIONS, *supra* note 18, § 26(A)(1), at 427 (citation omitted).

51. *See supra* text accompanying note 37.

faith is an absolute requirement to trigger sanctions under the court's inherent power.⁵²

The court's inherent power to sanction is therefore narrower than Rule 11 because of the bad faith requirement.⁵³ It is also much broader than the Rule (and § 1927 for that matter) because of the scope of the court's inherent power,⁵⁴ which has been described as "unlimited,"⁵⁵ and "staggeringly broad."⁵⁶ The court's inherent power to sanction covers the full range of litigation abuse,⁵⁷ not just misconduct associated with pleadings, written motions and other papers (Rule 11),⁵⁸ or litigation misconduct that unreasonably and vexatiously multiplies the proceedings (§ 1927).⁵⁹ In fact, the court's inherent power to sanction is broad enough to reach misconduct that does not even occur before the court.⁶⁰ But, "[b]ecause inherent powers are shielded from direct democratic controls,"⁶¹ the federal courts are admonished to exercise their inherent powers "with restraint and discretion."⁶²

Like § 1927, there is also considerable overlap between Rule 11 and the court's inherent power to sanction, especially with respect to litigation misconduct failing Rule 11's improper purpose certification.⁶³ More specifically, the "improper motive and harassment prohibited by Rule 11 are similar to the kind of [bad

52. See generally JOSEPH, SANCTIONS, *supra* note 18, § 27(A), at 446 ("A finding of bad faith on the part of the offender is a prerequisite to the imposition of an inherent power sanction."); *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45–46 (1991) (A court's inherent power to sanction is limited to when a party acted fraudulently or in bad faith.).

53. Fehderau, *supra* note 48, at 718; Baker, *supra* note 48, at 199.

54. Baker, *supra* note 48, at 199–200.

55. *Chambers*, 501 U.S. at 68 (Kennedy, J., dissenting).

56. JOSEPH, SANCTIONS, *supra* note 18, § 2(E), at 44.

57. Fehderau, *supra* note 48, at 718.

58. See *supra* text accompanying notes 19–23.

59. See *supra* text accompanying notes 28–36.

60. JOSEPH, SANCTIONS, *supra* note 18, § 26(E)(1), at 437 ("The sanction, however, is limited to bad faith related to the litigation process, and it does not extend to unrelated misconduct, such as prelitigation bad faith misbehavior that is encompassed within the cause of action.").

61. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980); *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991).

62. *Roadway Express*, 447 U.S. at 764.

63. See *supra* text accompanying note 22.

faith] conduct addressed by” the court’s inherent power.⁶⁴

B. *The 1993 Amendments to Rule 11*

Notwithstanding that the federal courts have a plethora of sanctioning provisions at their disposal,⁶⁵ Rule 11 is probably one of the most well-known and one of the most controversial.⁶⁶ It was substantially amended in 1993 to address the problems created by the 1983 version of the Rule,⁶⁷ the most problematic of which was its chilling effects on civil rights plaintiffs and other litigants asserting non-mainstream claims in the federal courts.⁶⁸ Very briefly:

[Rule 11’s] chilling effects essentially took two distinct but related forms. First, Rule 11 stifled the development of the common law by “inhibit[ing] vigorous and creative lawyering,” thereby chilling creative advocacy. More specifically, because of the threat of Rule 11 sanctions, lawyers were much less likely to file some novel but meritorious claims that they might otherwise have pursued and/or to make novel legal arguments that may well have prevailed in court. Second, Rule 11 had a disproportionate impact on certain types of litigants and their attorneys; the threat of sanctions “pose[d] special threats to small plaintiffs’ attorneys and to public interest and pro bono attorneys, thereby inhibiting court access for certain social groups, especially those asserting novel legal theories or

64. Fehderau, *supra* note 48, at 718.

65. *See, e.g., Chambers*, 501 U.S. at 61–62 (Kennedy, J., dissenting) (citing a non-exhaustive list).

66. *See, e.g., Carl Tobias, Reconsidering Rule 11*, 46 U. MIAMI L. REV. 855, 857 (1992); *Developments in the Law-Lawyers’ Responsibilities to the Courts: The 1993 Amendments to Federal Rule of Civil Procedure 11*, 107 HARV. L. REV. 1629, 1630 (1994) [hereinafter *Developments in the Law*].

67. Another major problem created by the 1983 version of Rule 11 included excessive satellite litigation. Carl Tobias, *The 1993 Revision of Federal Rule 11*, 70 IND. L.J. 171, 172 (1994) [hereinafter Tobias, *Revision*]; *see generally*, Hart, *Still Chilling*, *supra* note 3, at 10–17 (discussing various problems that the 1983 version created, including: excessive Rule 11 litigation, increased adversariness, disproportionate impact on certain parties and plaintiffs, and stifling of creative lawyering).

68. *See generally* Hart, *Still Chilling*, *supra* note 3, at 6–17 (discussing the chilling effects on civil rights claims and asserting that it is the most troubling problem caused by the 1983 version of the Rule).

reordered social understandings in the form of legal rights.”⁶⁹

Several, sometimes related, causes appear to have been responsible for the Rule’s chilling effects. These causes included, among other things, a lack of uniform sanctioning procedures, use of Rule 11 by the federal district courts as a fee-shifting device and, many commentators believed, a substantive bias in the federal courts against civil rights plaintiffs.⁷⁰

To reduce Rule 11’s chilling effects, the Advisory Committee incorporated a couple of major substantive changes into the Rule.⁷¹ While these substantive changes are significant, “the Advisory Committee appears . . . to have relied [mainly] on procedure to mitigate the Rule’s chilling effects.”⁷² Only the procedural changes most relevant to this paper are discussed below.⁷³

69. *Id.* at 11 (footnotes omitted).

70. *Id.* at 18.

71. First, to reduce the Rule’s negative impact on the assertion of novel claims, Rule 11’s “good faith” standard was replaced by a “nonfrivolous” standard. See FED. R. CIV. P. 11(b)(2) (1993); Hart, *Still Chilling*, *supra* note 3, at 25; Cain, *supra* note 9, at 219; Simpson, *supra* note 10, at 505. Second, to reduce the Rule’s disproportionate impact on plaintiffs asserting claims in federal court, Rule 11 was amended to allow plaintiffs to make factual allegations “likely to have evidentiary support” without being in violation of the Rule. See FED. R. CIV. P. 11(b)(3). Plaintiffs, in other words, may now file their claims in federal court with less factual information, especially in situations where relevant information is possessed by the defendant or third parties. See Hart, *Still Chilling*, *supra* note 3, at 26; Leslie M. Kelleher, *The December 1993 Amendments to the Federal Rules of Civil Procedure – A Critical Analysis*, 12 *TOURO L. REV.* 7, 64 (1995); *Developments in the Law*, *supra* note 66, at 1646; Scott Nehrbass, *The Proposed Amendment to Federal Rule of Civil Procedure 11: Balancing the Goal of Deterrence with Considerations of Due Process and Fairness*, 41 *U. KAN. L. REV.* 199, 222–23 (1992).

72. Hart, *Still Chilling*, *supra* note 3, at 26–27; *c.f.*, Sam D. Johnson et al., *The Proposed Amendments to Rule 11: Urgent Problems and Suggested Solutions*, 43 *BAYLOR L. REV.* 647, 663–64 (1991) (asserting that “[t]he most salient change . . . is a thorough reorganization of Rule 11 . . . designed to improve the procedures by which sanctions are imposed” but conceding that the changes are insufficient to combat the potential abuse of the Rule); William W. Schwarzer, *Rule 11: Entering A New Era*, 28 *LOY. L.A. L. REV.* 7, 19 (1994) (characterizing the new procedure for Rule 11 as the “most drastic” of the 1993 amendments to the Rule).

73. For a more complete discussion of the procedural changes made to Rule 11 in 1993, see Hart, *Still Chilling*, *supra* note 3, at 27–34.

To begin with, the federal district courts are no longer required to impose sanctions if a violation of Rule 11 is found. Instead, the decision to impose sanctions is now discretionary.⁷⁴ If the court decides to impose a sanction, however, it is specifically encouraged to impose non-monetary sanctions.⁷⁵ Indeed, attorneys' fees are *not* available at all if sanctions are imposed pursuant to a court's order to show cause.⁷⁶ A federal district court may only impose monetary sanctions in the form of attorneys' fees where a party initiated a motion for Rule 11 sanctions.⁷⁷

The 1993 amendments also dramatically changed Rule 11 motion practice by making it procedurally more difficult to obtain. For example, there is now a separate motion requirement, meaning that any request for Rule 11 sanctions cannot simply be included in another motion, like a motion to dismiss, but rather must be made independently.⁷⁸ In addition, a party moving for sanctions must *serve* its Rule 11 motion on the opposing party twenty-one days, or such other time as the court may prescribe, *prior to* filing it with the court.⁷⁹ Procedurally, therefore, Rule 11 sanctions can only be awarded pursuant to a party's motion if *both* the separate motion requirement *and* safe harbor provision have been complied with.⁸⁰ Stated alternatively, a party's Rule 11 motion *must be denied* by the

74. FED. R. CIV. P. 11(c).

75. FED. R. CIV. P. 11(c)(2); *see also* FED. R. CIV. P. 11 advisory committee's note to 1993 amendment (noting that a sanction may be nonmonetary as well as monetary and the various limits on monetary sanctions).

76. FED. R. CIV. P. 11(c)(2) ("Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, *or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.*") (emphasis added).

77. *Id.*

78. FED. R. CIV. P. 11(c)(1)(A).

79. *Id.* My colleague, Franklin Ferguson, Jr., points out that Local Rules of Court often address filing deadlines and, consequently, could impact significantly on Rule 11 practice and analysis in a given jurisdiction. While certainly important, the impact that such Local Rules may have on the 1993 amendments and Rule 11 interpretation are beyond the scope of this article.

80. Whether Rule 11 sanctions are imposed assumes that a Rule 11 violation is found and that the offending pleading, written motion or other paper was not withdrawn or amended appropriately within the safe harbor period.

federal district court if that party either fails to make a separate Rule 11 motion or fails to serve the motion on the opposing party twenty-one days prior to filing it in court. If the federal district court decides to impose Rule 11 sanctions, however, the court is now explicitly required to issue an order that describes the conduct violating the Rule and explains the basis for the Rule 11 sanction imposed.⁸¹

The procedural changes made to Rule 11 in 1993, therefore, were an attempt by the Advisory Committee to: (1) provide uniform sanctioning procedures, thereby providing uniformity to the federal district courts' sanctioning decisions;⁸² (2) prevent Rule 11 from being used as a fee-shifting device by explicitly limiting the use of attorneys' fees as the most widely used "appropriate" sanction for a Rule 11 violation;⁸³ and (3) limit the arbitrary imposition of Rule 11 sanctions, i.e., because of any substantive bias, by requiring the federal district courts to explain the bases of their Rule 11 decisions.⁸⁴

As previously discussed, however, Rule 11 is certainly not the only provision in the federal court's sanctioning arsenal.⁸⁵ The court's inherent power to sanction and 28 U.S.C. § 1927 have been around for a long time.⁸⁶ Indeed, whether or not Rule 11 was amended in 1993 to help reduce some of the Rule's chilling effects, these other sanctioning authorities were available and were used by the federal courts. They would be available even if Rule 11 were to be repealed tomorrow.⁸⁷

So, what is the problem? The problem is not so much that the

81. FED. R. CIV. P. 11(c)(3).

82. See Hart, *Still Chilling*, *supra* note 3, at 35.

83. *Id.* at 35–36.

84. *Id.* at 37.

85. See *supra* text accompanying notes 25–64 (discussing 28 U.S.C. § 1927 and the court's inherent power) and *supra* note 65 and accompanying text (discussing other sanctioning authority).

86. See *supra* text accompanying notes 25, 44.

87. See FED. R. CIV. P. 11 advisory committee's note to 1993 amendment ("Rule 11 is not the exclusive source for control of improper presentations of claims, defenses, or contentions. It does not supplant statutes permitting awards of attorney's fees to prevailing parties or alter the principles governing such awards. It does not inhibit the court in punishing for contempt, in exercising its inherent powers, or in imposing sanctions, awarding expenses, or directing remedial action authorized under other rules or under 28 U.S.C. § 1927.") (citation omitted).

federal courts have sanctioning authority other than Rule 11. Rather, the fear is that the federal district courts and attorneys will resort to other sanctioning tools, including 28 U.S.C.A. § 1927 and the court's inherent power, to sidestep Rule 11 because the procedural requirements added by the 1993 amendments make it harder to obtain Rule 11 sanctions. Whether this problem actually exists in the federal district courts is examined in the next part.

III. SANCTIONS PRACTICE IN THE FEDERAL COURTS

If the federal district courts and federal litigators are using 28 U.S.C. § 1927 and the court's inherent power to sanction to get around amended Rule 11, then one should expect to find two things in the case law: first, raw data that Rule 11 use is declining subsequent to the 1993 amendments, while reliance on 28 U.S.C. § 1927 and the court's inherent power is increasing over the same time period,⁸⁸ and second, evidence in the cases themselves demonstrating that these alternative bases of sanctions are actually being relied upon for the specific purpose of sidestepping the procedural requirements of the amended Rule. There seems to be preliminary support for both propositions in the cases.

In 1998, Professor Georgene Vairo observed anecdotally that: Rule 11 has been replaced by an increased emphasis on other sanctions tools, such as 28 U.S.C. § 1927 and the court's inherent power. Now that the consciousness of the bench and bar regarding the need for sanctions in egregious cases has been raised, these tools appear to be used with much greater frequency than before Rule 11 was amended in 1983.⁸⁹

This comment prompted me to test the accuracy of the claim. To

88. It is very important to distinguish between increased *reliance* on these alternative bases of sanctions and an increase in *sanctions imposed* pursuant to them. The research conducted here only tracked the former. That is, no attempt was made to determine whether more sanctions are actually being imposed under 28 U.S.C. § 1927 and the court's inherent power after the 1993 amendments to Rule 11. Instead, my only concern was to determine whether 28 U.S.C. § 1927 and the court's inherent power to sanction were being *invoked* in the federal district courts at a greater rate since the 1993 amendments.

89. Vairo, *Profession*, *supra* note 5, at 643.

do so, it was necessary to compare numbers for all three sanctioning provisions both before and after the 1993 amendments to Rule 11. Two five year periods were thus selected⁹⁰ and searches were run on Lexis-Nexis⁹¹ in the following four federal district courts: the Southern District of New York, the District of New Jersey, the Eastern District of Louisiana, and the Northern District of California.⁹² The numerical results are set forth in Table 1 below.⁹³

TABLE 1: FREQUENCY OF USE TABLE

	1/1/86-12/31/91		1/1/96-12/31/01	
	RULE 11	§ 1927/IP	Rule 11	§ 1927/IP
SDNY	731	121	389	199
DNJ	81	4	48	32
EDLa	89	9	83	33
NDCal	68	12	65	20

90. The two five-year periods are: January 1, 1986 – December 31, 1991 (covering the 1983 version of Rule 11), and January 1, 1996 – December 31, 2001 (covering the 1993 version of the Rule).

91. The following searches were run in each of the four federal district courts selected for the two five year time periods selected: (1) Southern District of New York (“federal rule of civil procedure 11” or “frcp 11” or “fed. r. civ. p. 11” or “rule 11” /p sanction AND COURT (southern); “28 USC 1927” or “28 U.S.C. § 1927” or “inherent power” /p sanction AND COURT (southern)); (2) District of New Jersey (“federal rule of civil procedure 11” or “frcp 11” or “fed. r. civ. p. 11” or “rule 11” /p sanction; “28 USC 1927” or “28 U.S.C. § 1927” or “inherent power” /p sanction) (3) Eastern District of Louisiana (federal rule of civil procedure 11” or “frcp 11” or “fed. r. civ. p. 11” or “rule 11” /p sanction AND COURT (eastern); “28 USC 1927” or “28 U.S.C. § 1927” or “inherent power” /p sanction AND COURT (eastern)); and (4) Northern District of California (“federal rule of civil procedure 11” or “frcp 11” or “fed. r. civ. p. 11” or “rule 11” /p sanction AND COURT (northern); “28 USC 1927” or “28 U.S.C. § 1927” or “inherent power” /p sanction AND COURT (northern)).

92. Each of these district courts was selected for the following reason: these were the district courts in which I uncovered cases indicating that 28 U.S.C. § 1927 and the court’s inherent power to sanction were being used to sidestep Rule 11’s procedural requirements. I therefore wanted to check the frequency of sanctions in these districts.

93. The size of the case law sample collected for this article is not large enough to generate statistically significant results. The numbers are included nevertheless because they *suggest* certain trends in the sanctioning practices of the federal district courts selected.

Professor Vairo's anecdotal observation turned out to be quite accurate. The raw numbers available on Lexis-Nexis⁹⁴ revealed that Rule 11 use in every district examined had in fact declined *and* that 28 U.S.C. § 1927 and the court's inherent power were invoked more frequently since the 1993 amendments to Rule 11 went into effect.⁹⁵

Preliminary research, therefore, suggests that the first part of the sanctions problem identified in Part II *may* exist in the federal district courts. The next step, of course, is to determine *why* Rule 11 use in the federal district courts is declining while use of § 1927 and the court's inherent power is increasing.

I should disclose up front that I did not analyze each and every case cited in the empirical research compiled in Table 1. Nor do all of the cases discussed actually impose sanctions pursuant to 28 U.S.C. § 1927 and/or the court's inherent power.⁹⁶ All of the cases that I discuss below, however, strongly suggest that these alternative bases of sanctions were requested and/or are at issue *because* of a failure to comply, either as a tactical decision or inadvertently, with

94. It is very important to note that the raw numbers reflected in Table 1 most likely do not represent *all* of the sanctions activity in *any* of the federal district courts examined. Experience with Rule 11 has shown that a majority of Rule 11 cases are not reported, either in the form of published opinions or even on the electronic databases, like Lexis-Nexis and Westlaw. See Mark Spiegel, *The Rule 11 Studies and Civil Rights Cases: An Inquiry into the Neutrality of Procedural Rules*, 32 CONN. L. REV. 155, 169 n.62 (1999) (identifying a study done in the Third Circuit finding "only 9.1% of the Rule 11 cases that were disposed of resulted in opinions published in the reporter system and only 39.1% of the total dispositions were on Lexis or Westlaw" (citation omitted)); Theodore C. Hirt, *A Second Look At Amended Rule 11*, 48 AM. U. L. REV. 1007, 1042-43 (1999) (noting that reported Rule 11 court cases are not necessarily an accurate reflection of the Rule's operation because, for a variety of reasons, many cases don't appear in published services). Therefore, it seems safe to assume that a majority of the § 1927 and inherent power activity would similarly go unreported.

95. My colleague, Franklin Ferguson, Jr., first notes that sanctions *overall* decreased in both the Southern District of New York and the District of New Jersey, while sanctions *overall* rose slightly in both the Eastern District of Louisiana and the Northern District of California; he then asks whether these numbers are important. Unfortunately, determining the significance of these "trends," assuming that they continued to hold up over time and in a statistically significant sample of cases, is beyond the scope of this paper.

96. See *supra* note 88.

Rule 11's procedural requirements.⁹⁷

In *Farris v. County of Camden*,⁹⁸ for example, plaintiff, the lessor of office space to the county, sued the county, its employees and the chairman of the local political committee, alleging, among other things, that the defendants conspired to punish him for failing to make political contributions.⁹⁹ Approximately fourteen months later, defendant chairman and defendant political committee moved for sanctions in the form of attorneys' fees against plaintiff's counsel.¹⁰⁰

The bases of defendants' motion for sanctions were that plaintiff's counsel: "asserted claims against them which counsel knew or should have known lacked an arguable basis in law and fact"¹⁰¹ and "intentionally advance[d] . . . baseless contention[s] . . . for an ulterior purpose, such as harassment or delay[.]"¹⁰² Defendants, however, only requested sanctions pursuant to 28 U.S.C. § 1927 and the court's inherent power, not Rule 11, a fact that the district court found "curious,"¹⁰³ since the crux of the alleged misconduct fell within the scope of the Rule.¹⁰⁴

While there is some suggestion in the opinion that the defendants put plaintiff's counsel on "notice" that they planned to seek sanctions of some kind, defense counsel made no attempt to comply with Rule 11's procedural requirements,¹⁰⁵ as defendants'

97. The subsequent history for the cases compiled in Table 1 was not checked, because the purpose of collecting these data was simply to test a hypothesis—namely, to determine whether Rule 11 use decreased in the federal courts over the same time period in which reliance on 28 U.S.C. § 1927 and the court's inherent power increased. Consequently, I was merely interested in the raw numbers. Whether any of the cases were ultimately modified or even reversed on appeal, therefore, really has no impact on the hypothesis being tested.

98. 61 F. Supp. 2d 307 (D.N.J. 1999).

99. *Id.* at 318–19.

100. *Id.* at 319.

101. *Id.* at 331.

102. *Id.* at 332 (quoting Defendant's Brief in Support of Motion for Sanctions (filed Dec. 8 1998) at 17).

103. *Id.* at 331.

104. *Id.* at 334.

105. Defendants alleged that they put plaintiff's counsel on notice that they would be seeking sanctions several months prior to filing their motion. While the exact type of "notice" provided is not specified, it was clearly insufficient to satisfy Rule 11's motion requirements. The court addressed the issue at

motion was filed directly with the court.¹⁰⁶ Defense counsel, however, requested in a letter to the district court that the court sua sponte sanction plaintiff's counsel, pursuant to Rule 11(c)(1)(B).¹⁰⁷

The federal district court in *Farris* ultimately denied defendants' motion for § 1927 and inherent power sanctions, because defense counsel failed to establish that plaintiff's counsel acted in bad faith.¹⁰⁸ The court also declined to impose sua sponte Rule 11 sanctions, because doing so "would allow [defense counsel] to circumvent the 'safe harbor' requirement of the Rule."¹⁰⁹

Similarly, in *Malbrough v. Kilpatrick & Stocktown, LLC*,¹¹⁰ plaintiffs' filed a complaint against several defendants alleging various Racketeer Influenced and Corrupt Organizations (RICO) claims.¹¹¹ Plaintiffs' counsel was twice warned by the federal district court that certain allegations made in the complaint exposed her to sanctions if they turned out to be frivolous.¹¹² Shortly after the court's initial warning, plaintiffs dismissed their RICO complaint. Defendants then moved for sanctions.¹¹³

length in a footnote. See *id.* at 332 n.15.

106. *Id.* at 332. Recall that Rule 11 requires that a motion requesting sanctions be served on the opposing party twenty-one days prior to being filed with the court. See FED. R. CIV. P. 11(c)(1)(B); see also *supra* text accompanying notes 79–80.

107. *Farris v. County of Camden*, 61 F. Supp. 2d 307, 332 (D.N.J. 1999). Two brief points should be made concerning defense counsel's request for sua sponte Rule 11 sanctions. First, defendants were seeking attorneys' fees as a sanction, which, pursuant to the plain language of Rule 11, cannot be awarded if Rule 11 sanctions are imposed sua sponte by the district court. FED. R. CIV. P. 11(c)(2); see also *supra* text accompanying notes 76–77. Second, and unfortunately, it is not uncommon for federal court litigants and/or the federal district court itself to use Rule 11's order to show cause procedure to sidestep Rule 11's motion requirements. See Hart, *Still Chilling*, *supra* note 3, Parts III.A.2.c & III.B.4.a.

108. *Farris*, 61 F. Supp. 2d at 335.

109. *Id.* at 334. For another case out of the New Jersey district court, see *In re Prudential Insurance Co. of America Sales Practices Litigation*, 63 F. Supp. 2d 516, 523 (D.N.J. 1999) (A magistrate judge explicitly found that attorney for class members who objected to a class settlement filed a 28 U.S.C. § 1927 motion against lead class counsel in an "attempt[] to sidestep the 21-day safe harbor provision under Rule 11;" the district court judge concluded, among other things, that counsel's § 1927 motion was itself filed in bad faith.).

110. No. CIV.A. 99-1683, 1999 WL 643663 (E.D. La. Aug. 23, 1999).

111. *Id.* at *1.

112. *Id.*

113. *Id.*

Significantly, the defendants moved for sanctions pursuant to 28 U.S.C. § 1927, rather than Rule 11, a fact that the district court specifically noted.¹¹⁴ The district court found, moreover, that “plaintiffs conduct in [the] case was more akin to a Rule 11 type violation than § 1927” because the alleged misconduct involved a pleading.¹¹⁵ The court speculated that defendants may have sought sanctions pursuant to § 1927, specifically because they failed to comply with the procedural requirements of amended Rule 11. The court stated:

A motion for Rule 11 sanctions . . . may not be filed with the court unless it is first served on the allegedly offending party and twenty-one days have passed without the pleading or motion being withdrawn No such notice/safe harbor is required under § 1927. The defendants do not purport to have complied with the notice procedures of Rule 11; hence, perhaps, their resort to [28 U.S.C. § 1927].¹¹⁶

The district court denied defendants’ motion, because plaintiffs had withdrawn their complaint after being warned by the court, which, coincidentally, was within twenty-one days after it was filed.¹¹⁷

In *Chatham Partners, Inc. v. Fidelity & Deposit Co. of Maryland*,¹¹⁸ plaintiff filed an order to show cause seeking an order requiring defendant to pay approximately \$4.5 million allegedly due

114. *Id.*

115. *Id.* at *2.

116. *Id.* at *1.

117. *Id.* at *2.

118. No. 99 Civ. 12308, 2001 WL 1262960 (S.D.N.Y. Oct. 19, 2001). See also *Suarez v. Gallo Wine Distributors LLC*, No. 02 Civ. 4273, 2003 WL 716548 (S.D.N.Y. Mar. 3, 2003); *Tommy Hilfiger Licensing, Inc. v. Bradlees, Inc.*, No. 99 Civ. 4677, 2002 WL 1967032 (S.D.N.Y. June 4, 2002); *Duferco Int’l Steel Trading v. T. Klaveness Shipping A/S*, 184 F. Supp. 2d 271 (S.D.N.Y. 2002); *Patsy’s Brand, Inc. v. I.O.B. Realty, Inc.*, No. 99 Civ. 10175, 2001 WL 1154669 (S.D.N.Y. Oct. 1, 2001); *Yrityspankki Skop Oyj v. Delta Funding Corp.*, No. 98 Civ. 7888, 2001 WL 477009 (S.D.N.Y. May 7, 2001); *Gamla Enters. N. Am. v. Lunor-Brillen Design U. Vertriebs GmbH*, No. 98 Civ. 992, 2000 WL 193120 (S.D.N.Y. Feb. 17, 2000); *Schlaifer Nance & Co. v. Warhol*, 7 F. Supp. 2d 364 (S.D.N.Y. 1998). Some of the cases listed here are clearly more recent than the cases compiled in Table 1. They are included, however, because they: (a) tend to demonstrate that the practice of circumventing Rule 11 is occurring in the Southern District of New York; and (b) show that this practice is still ongoing.

and owing on a surety bond.¹¹⁹ The district court determined that plaintiff's claims with respect to the surety bond were meritless and its order to show cause was frivolous.¹²⁰ The court therefore concluded that "some sanction [was] appropriate and the only question [was] the amount." Defendant moved for sanctions, but only pursuant to 28 U.S.C. § 1927.¹²¹ The district court explained the defendant's strategy as follows: "Apparently recognizing that its failure to serve a Rule 11 notice would preclude the court from awarding it attorneys' fees under that Rule, defendant has not sought them under Rule 11 but rather asks for such relief under 28 U.S.C. § 1927."¹²² The district court agreed that plaintiff's counsel violated § 1927 by filing the unwarranted order to show cause and awarded defendant \$9,017.00 in attorneys' fees.¹²³

These apparent attempts to sidestep the procedural requirements of amended Rule 11 are not limited to the attorneys litigating in federal court. The federal district courts themselves sometimes initiate the practice.

For example, in *Galonsky v. Williams*,¹²⁴ defendant moved for Rule 11 sanctions against plaintiff's counsel for filing frivolous

119. *Chatham Partners, Inc.*, 2001 WL 1262960, at *1.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at *2. The district court apparently believed that both Rule 11 and § 1927 were implicated by plaintiff's filing the complaint *and* its order to show cause. Rule 11 sanctions were not available with respect to any of the alleged misconduct, however, because of defendant's failure to comply with the Rule's procedural requirements. The district court also declined to impose § 1927 sanctions against plaintiff's counsel for filing the complaint in the case, because "given the policy considerations that gave rise to the adoption of Rule 11's safe harbor provision, it seems inappropriate to use 28 U.S.C. § 1927 to do what the Court cannot do under Rule 11." *Id.* (citation omitted). But because the district court concluded that Rule 11's safe harbor provision could not have been satisfied with respect to plaintiff's order to show cause—there was only a five-day response time for defendant—§ 1927 sanctions were appropriate with respect to that order. *Id.* The district court's interpretation of Rule 11's safe harbor provision and plaintiff's order to show cause is very problematic because such an interpretation effectively writes the safe harbor provision out of the Rule anytime there is less than twenty-one days to respond to a pleading, written motion or other paper. *See Hart, Still Chilling, supra* note 3; Part IV.B.2.a (rejecting such an interpretation of the safe harbor provision and discussing solutions).

124. No. 96 Civ. 6207, 1997 WL 759445 (S.D.N.Y. Dec. 10, 1997).

pleadings and a motion to amend the complaint.¹²⁵ The district court concluded that plaintiff's pleadings and motion "were baseless and unfounded in law" and "filed for an improper purpose," thereby violating Rule 11.¹²⁶ Defendant, however, failed to satisfy Rule 11's motion requirements, a fact that plaintiff's counsel specifically pointed out.¹²⁷ The district court was reluctantly forced to conclude that defendant's motion "appeared technically barred for failure to follow the safe harbor provision of Rule 11."¹²⁸ But because the court was convinced that plaintiff's argument based on Rule 11's procedural requirements "exalt[ed] form over function[.]"¹²⁹ the district court gave plaintiff's counsel notice that it was considering imposing sanctions on its own initiative, pursuant to both Rule 11 and 28 U.S.C. § 1927, where a safe harbor period was not required.¹³⁰

The district court ultimately determined that both Rule 11 and § 1927 were violated by plaintiff's counsel.¹³¹ Sanctions in the form of attorneys' fees, however, were only awarded pursuant to § 1927. By way of explanation, the district court stated:

Due to the defendant's technical failure to comply with the safe harbor provision of Rule 11, the Court may not, under Rule 11, order [plaintiff's counsel] to reimburse the defendant for attorney fees or other expenses attribut[able] to his sanctionable conduct. *See* Rule 11(c)(2). Under § 1927, however, the Court may properly order such compensation.¹³²

Similarly, in *Bowler v. U.S. Immigration & Naturalization Service*,¹³³ the government moved for Rule 11 sanctions against petitioner's counsel for filing an order to show cause to stay a deportation order, arguing that the action was filed without a

125. *Id.* at *3.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at *3-*7.

132. *Id.* at *7; *see also supra* Part II.B (discussing the 1993 amendments to Rule 11).

133. 901 F. Supp. 597 (S.D.N.Y. 1995).

reasonable inquiry into the facts and for an improper purpose.¹³⁴ The district court “agree[d] with the government that [petitioner’s counsel’s] misconduct [fell] within the ambit of Rule 11[,]” but the court declined to impose Rule 11 sanctions “because of the ambiguity of whether [the Rule’s] procedural requirements ha[d] been met”¹³⁵ On its own initiative, the court then raised the propriety of sanctions under 28 U.S.C. § 1927 and the court’s inherent power, despite the fact that neither party had filed briefs addressing such sanctions.¹³⁶ Petitioner’s counsel was ultimately sanctioned \$2,500 in attorneys’ fees, pursuant to § 1927.¹³⁷

Significantly, but not surprisingly, this practice of sidestepping amended Rule 11’s procedural requirements is also making its way into federal appellate court opinions. At best, the practice may be going unnoticed at the appellate level,¹³⁸ at worst, the appellate courts may be encouraging it.¹³⁹

134. *Id.* at 603–04.

135. *Id.* at 604 (discussing several potential procedural problems).

136. *Id.* at 605 n.3.

137. *Id.* at 606. The district court also found that sanctions were appropriate under the court’s inherent power, but the court declined to impose such sanctions because “the inherent power doctrine should be used with restraint.” *Id.* at 606 n.5. See *Schlaifer Nance & Co. v. Warhol*, 7 F. Supp. 2d 364 (S.D.N.Y. 1998).

138. See *Ted Lapidus, S.A. v. Vann*, 112 F.3d 91, 92, 94, 97 (2d Cir. 1997) (Plaintiff filed a motion for Rule 11 sanctions against defendant for filing an allegedly improper third party complaint. The Federal District Court for the Southern District of New York denied Rule 11 sanctions because plaintiff failed to comply with Rule 11’s procedural requirements. Nevertheless, the court awarded sua sponte sanctions against defendant (who was an attorney), pursuant to 28 U.S.C. § 1927 in the amount of \$10,000. The Second Circuit reversed the sanctions order after concluding that defendant did not receive sufficient notice that sanctions might be based on § 1927. No mention was made of the apparent use of 28 U.S.C. § 1927 to sidestep Rule 11’s procedural requirements.).

139. *Flanagan v. Arnaiz*, No. 97-15517, 1999 WL 1128641, at *2 (9th Cir. Dec. 7, 1999) (the Federal District Court for the Northern District of California imposed Rule 11 sanctions against plaintiff pursuant to defendant’s motion, notwithstanding the fact that Rule 11’s safe harbor provision had not been complied with; the court—not the defendant—apparently gave plaintiff twenty-one days to withdraw the meritless arguments asserted in plaintiff’s Opposition Memorandum. The Ninth Circuit affirmed the district court’s order imposing Rule 11 sanctions and then, citing the United States Supreme Court’s decision in *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991), stated that, “any technical mistake by the district court was harmless, because it could easily

It would, of course, be a gross oversimplification to suggest that the practice of sidestepping Rule 11's procedural requirements is the *only*—or even the main—reason for the decreased reliance on Rule 11 and the increased emphasis on 28 U.S.C. § 1927 and the court's inherent power to sanction reflected in Table 1. That claim is not being made here. The pervasiveness of the practice is also unclear from the preliminary research conducted for this article. Further research would need to be done before definitive answers could be reached. At the same time, the cases discussed above do provide one possible and plausible explanation for at least part of the shifting reliance on Rule 11 vis-a-vis 28 U.S.C. § 1927 and the court's inherent power *suggested* by the empirical research.¹⁴⁰ More specifically, Rule 11 use in the federal district courts appears to be declining at the same time that use of 28 U.S.C. § 1927 and the court's inherent power to sanction is increasing *at least in part because* the procedural requirements of Rule 11 could no longer be, or simply were not, met.

IV. AND THE CHILL GOES ON

The research for this article seems to support the hypothesis articulated in Part II, namely, that the federal district courts and the attorneys practicing before them may be resorting more frequently to other sanctioning tools, like 28 U.S.C. § 1927 and the court's inherent power, *because* it is harder to obtain Rule 11 sanctions after the 1993 amendments to the Rule. As a result, it appears that Rule 11's procedural requirements are being *sidestepped* in some percentage of the cases. Significantly, if this conclusion is correct, then the practice of sidestepping these requirements raises several troubling implications for federal court litigants in general and federal civil rights plaintiffs in particular.

Before discussing the implications that "sidestepping" poses, it

have awarded the same sanctions under 28 U.S.C. § 1927 or its inherent power.") The *Chambers* case is discussed further in Part V.A1, *infra*.

140. Again, the number of cases collected for this article is not large enough to generate a statistically significant sample. The research conducted and conclusions reached here, therefore, are merely preliminary. *But* the numbers reflected in Table 1, together with the cases discussed above, do provide enough information to raise certain issues and discuss their potential implications.

is important to understand that this practice describes a couple of rather specific situations. That is, sidestepping occurs when: (1) the same litigation misconduct is being used as the factual basis for all three sanctions provisions,¹⁴¹ (2) Rule 11's procedural requirements have not been satisfied, and (a) Rule 11 sanctions are threatened anyway, possibly in conjunction with a threat of alternative bases of sanctions, and/or (b) *because* Rule 11 is not satisfied, sanctions are only sought pursuant to 28 U.S.C. § 1927 and the court's inherent power.¹⁴²

When understood in this fashion, "sidestepping" Rule 11's procedural requirements is problematic, in the first instance, because it suggests that the safe harbor provision, which was the centerpiece of the 1993 amendments to Rule 11,¹⁴³ is not being well-received by the federal bench and bar.¹⁴⁴ If this suggestion turns out to be correct—for example, if the safe harbor provision is not being well-received—this would only provide added incentive to circumvent it.

In addition, or perhaps more specifically, what makes sidestepping particularly problematic is that such a practice essentially renders the 1993 amendments to the Rule meaningless. The district court in *Malbrough*¹⁴⁵ aptly summed up the problem as

141. See *infra* notes 175, 215.

142. See *supra* text accompanying notes 124–137, 98–137, respectively.

143. Charles M. Yablon, *The Good, The Bad, and the Frivolous Case: An Essay on Probability and Rule 11*, 44 UCLA L. REV. 65, 98 (1996); Carl Tobias, *Civil Rights Plaintiffs and the Proposed Revision of Rule 11*, 77 IOWA L. REV. 1775, 1785 n.63 (1992); Sidney Powell & S. Ann Saucer, *Revised Rule 11: Is It Safer?*, 15 MISS. C. L. REV. 271, 275 (1995); Vairo, *Where We Are*, *supra* note 15, at 498; Georgene M. Vairo, *The New Rule 11: Past as Prologue*, 28 LOY. L.A. L. REV. 39, 64 (1994).

144. Perhaps Justice Scalia, in dissenting from the Supreme Court's adoption of the 1993 amendments to the Federal Rules of Civil Procedure, including Rule 11, summed up the opposition to the safe harbor best when he wrote:

In my view, those who file frivolous suits and pleadings should have no "safe harbor" . . . Under the revised Rule, parties will be able to file thoughtless, reckless, and harassing pleadings, secure in the knowledge that they have nothing to lose: If objection is raised, they can retreat without penalty . . . Even if the careless litigant quickly dismisses the action, the harm triggering Rule 11's concerns has already occurred.

61 U.S.L.W. 4365, 4392 (Scalia, J., dissenting).

145. *Malbrough v. Kilpatrick & Stocktown*, No. CIV.A. 99-1683, 1999 WL 643663 (E.D. La. Aug. 23, 1999).

follows:

At first blush, both 18 [sic] U.S.C. § 1927 and Rule 11 appear to sanction the same sort of conduct. If so, then arguably a party can circumvent the safe harbor requirements of Rule 11 by simply filing under § 1927. *Such a rule, however, “would undermine the safe harbor provision of Rule 11 by essentially reading it out of the Rule.”*¹⁴⁶

Such an evisceration of Rule 11’s procedural requirements, in turn, creates two different but related problems. The first problem concerns Rule 11 itself.

The Rule’s procedural requirements were added in 1993 to help accomplish very specific purposes, including reducing the Rule’s chilling effects on civil rights plaintiffs.¹⁴⁷ If these requirements are being sidestepped in practice (meaning that the requirements are unfulfilled *and* Rule 11 sanctions are being requested and perhaps imposed anyway), the 1993 amendments cannot be accomplishing their stated objectives. Consequently, Rule 11’s chilling effects must still be continuing in the federal district courts.¹⁴⁸

In a related and important vein, if Rule 11’s procedural requirements are being sidestepped (meaning that they are not being complied with *and* sanctions are denied under Rule 11, *but* are being requested and perhaps imposed pursuant to 28 U.S.C. § 1927 or the court’s inherent power *because Rule 11 has not been satisfied*), then the chilling effects that prompted the Advisory Committee to amend Rule 11 in 1993 are arguably spreading to include these alternative bases of sanctions. The reason for this conclusion, of course, is that these alternative bases of sanctions are, in effect and to a certain extent, simply being used as substitutes for Rule 11 requests or sanctions.

The net effect of sidestepping the procedural requirements of Rule 11, therefore, appears to be the creation of a potential “zero sum sanctions game” for all persons appearing in the federal courts. That is, a federal litigant or her attorney may no longer be sanctioned

146. *Id.* at *1 (citation omitted) (emphasis added).

147. *See supra* text accompanying notes 67–84.

148. *See generally* Hart, *Still Chilling*, *supra* note 3, Part IV (arguing that Rule 11’s chilling effects continue to exist in the federal courts even after the 1993 amendments).

under Rule 11 because the 1993 amendments make it harder for courts to award Rule 11 sanctions. But that very litigant or her attorney may end up being sanctioned under either 28 U.S.C. § 1927 or the court's inherent power, *because the 1993 amendments make it harder for courts to impose Rule 11 sanctions*. In either case, however, sanctions are still threatened and they may still be imposed.

While the zero sum sanctions game may adversely *affect all* federal court litigants and attorneys, it is most likely to *chill* federal civil rights plaintiffs and the attorneys representing them.¹⁴⁹ Federal court experience with Rule 11 provides ample evidence explaining why.

We know, for example, that the impact of Rule 11 on the legal community is spread in two ways—via Rule 11 decisions handed down by the federal courts and in the informal Rule 11 activity that takes place outside of the courts' opinions.¹⁵⁰ A decision to impose Rule 11 sanctions will have a greater impact on the legal community than a decision not to sanction. Professor Maureen Armour explains:

[I]n a Rule 11 context, consider two similar cases decided by different judges with different outcomes; one results in sanctions, the other doesn't, and both are affirmed on appeal under the abuse of discretion standard. Neither case should be treated as anything other than affirming the court's discretion to act as they [sic] did, and a third judge facing the problem is free to decide either way. *However, the deterrent impact of the sanction case poses a serious threat, since in the sanction case law, it will be the adverse sanctions cases that begin to define the boundaries of Rule 11 and guide a litigant's behavior. Thus, the two cases are*

149. See *supra* text accompanying note 69 (discussing Rule 11's chilling effects).

150. See Marshall, *supra* note 10, at 960 ("One of the most significant questions that needs to be asked about Rule 11 . . . is how it has affected lawyers' practice. *For the impact of a sanctions order or threat can extend far beyond the case in which it is carried out or the lawyers who are directly affected by it. Lawyers who hear and read about these sanctions must, to some extent, process the information and shape their own conduct based on their assessment of the risk that various kinds of conduct they are contemplating creates.* This kind of general deterrence is reflected in litigators' statements that they have modified their behavior in response to Rule 11.") (emphasis added).

*not treated equally in the real world of practice . . .*¹⁵¹

It therefore seems fairly obvious that sizeable Rule 11 sanctions, in even a few cases,¹⁵² would discourage civil rights plaintiffs and their attorneys from filing lawsuits “because their lack of resources makes them unusually vulnerable.”¹⁵³ Indeed, when the federal district courts decide to impose Rule 11 sanctions, it is not uncommon for them to award *all* litigation costs, including attorneys’ fees, as the “appropriate” Rule 11 sanction. In an article that I recently wrote,¹⁵⁴ for example, I collected ninety-two district court cases.¹⁵⁵ In twenty-eight of those cases, Rule 11 sanctions were imposed, either via motion or order to show cause. Monetary sanctions in the form of attorneys’ fees were imposed in twenty-five of those twenty-eight cases, or 89% of the time.¹⁵⁶ But, more importantly for present purposes:

[O]ut of the twenty-five cases awarding monetary sanctions in the form of attorneys’ fees, fourteen of them, or 56%, made just such an award [i.e., awarded all of the litigation

151. Maureen Armour, *Rethinking Judicial Discretion: Sanctions and the Conundrum of the Close Case*, 50 SMU L. REV. 493, 566 (1997) (emphasis added).

152. See, e.g., *Avirgan v. Hull*, 705 F. Supp. 1544, 1551 (S.D. Fla. 1989) (\$1 million); *Mercury Air Group, Inc. v. Mansour*, 267 F.3d 542, 545 (5th Cir. 2001) (\$203,641); *Harter v. Iowa Grain Co.*, Nos. 96-3907, 97-2671, 96-4074, 97-2041, 1999 WL 754333, at *2 (7th Cir. July 15, 1998) (\$92,000); *Cox v. Preferred Technical Group, Inc.*, 110 F. Supp. 2d 786, 791 (N.D. Ind. 2000) (\$80,917); *Kramer v. Tribe*, 156 F.R.D. 96, 111 (D.N.J. 1994) (\$70,289); *Cooper v. Chicago Transit Auth.*, No. 95 C 2616, 1997 U.S. Dist. LEXIS 5299, at *20 (N.D. Ill. Apr. 14, 1997) (\$105,149.78—significantly, the fact that plaintiffs’ attorney belonged to a small firm was held to be insufficient reason to reduce the size of the award. *Id.* at *7–8.).

153. Tobias, *Litigation*, *supra* note 14, at 501; Hart, *Still Chilling*, *supra* note 3, Part IV.A (discussing Rule 11’s chilling effects on civil rights cases after the 1993 amendments). It is therefore critical, in looking at Rule 11 vis-a-vis 28 U.S.C. § 1927 or the court’s inherent power, to track the number of times sanctions were actually awarded, the types of cases involved, the relationship between the type of case and whether sanctions were awarded, and the types of sanctions that were awarded. This specific research, however, is beyond the scope of this article.

154. See Hart, *Still Chilling*, *supra* note 3.

155. While the sample of ninety-two district court cases is not large enough to generate statistically significant results, the numbers are still important, and therefore included, because they *suggest* certain troubling sanctioning trends in the federal district courts.

156. Hart, *Still Chilling*, *supra* note 3, at 98–100.

costs, including attorneys' fees]. Perhaps more significantly . . . of the fourteen district court cases that awarded *all* litigation costs as an "appropriate" Rule 11 sanction, all fourteen were imposed against plaintiffs or their counsel, and eight of the fourteen involved civil rights claims.¹⁵⁷

Rule 11's impact on the legal community, however, is not limited to the federal courts' decided cases, because: (a) most Rule 11 activity is not reported;¹⁵⁸ and (b) a lot of Rule 11 activity is informal, taking the form of threats or warnings by opposing counsel and the federal district courts.¹⁵⁹ Given that Rule 11 sanctions are *not* imposed in the majority of cases in which Rule 11 is raised,¹⁶⁰ one can only conclude that the *threat* of Rule 11 sanctions has had the biggest impact on litigant behavior in the federal courts. Indeed, Judge Sam Johnson has warned that "[t]he *threat* of the imposition of large awards of attorneys' fees . . . effectively closes the courts" to people who advance "novel or controversial positions[,] and "good faith arguments to change existing law."¹⁶¹

We also know that prior exposure to some kind of Rule 11 activity will actually cause lawyers to change the way they counsel their clients. According to the study conducted by the American Judicature Society (AJS) of federal litigators in the Fifth, Seventh

157. *Id.* at 100-02 (footnotes omitted).

158. *See supra* note 94.

159. For example, Professor Vairo writes:

[A] great deal of anecdotal evidence exists that a large number of judges, including those who previously were less zealous in prodding the parties before them, cite Rule 11 in pretrial conferences and other proceedings on and off the record to remind litigants of their obligations under Rule 11, and that monetary consequences could follow violations of the rule.

Vairo, *Profession, supra* note 5, at 624 (footnote omitted); *see also*, Elizabeth C. Wiggins, et al., *The Federal Judicial Center's Study of Rule 11*, 2 F.J.C. DIRECTIONS 3, 36, Nov. 19, 1991 (discussing the Federal Judicial Center's ["FJC"] study) (Two federal district court judges responding to the FJC survey said, "I think the existence of Rule 11, not its use, has helped[,] and "I have found the rule most useful as a threat and have not, therefore, had to impose sanctions very frequently.") (emphasis added).

160. *See, e.g.*, Marshall, *supra* note 10, at 952; *see also* Hart, *Still Chilling, supra* note 3, at 102-03 (Author's research revealed that sanctions were awarded in 49% of the 135 cases collected.).

161. Johnson, *supra* note 72, at 650 (emphasis added).

and Ninth Circuits:¹⁶²

[L]awyers who had previously been exposed to some degree of Rule 11 activity—ranging from having been involved in a case in which sanctions were imposed to cases involving out-of-court threats—were more likely to report having changed their behavior in counselling [sic] clients and litigating federal lawsuits primarily because of Rule 11 Specific deterrence appears to be occurring, as lawyers who are directly exposed to a Rule 11 sanctions experience seem to be more likely to change their behavior than those [who] do not have personal experience with the Rule.¹⁶³

If the AJS study is correct, and prior exposure to Rule 11 has the greatest impact on lawyer behavior, the obvious question is: *which* lawyers have the highest exposure rate to some kind of Rule 11 activity, whether it be in decided cases or merely through threats? The answer is that Rule 11 statistics and studies show that civil rights plaintiffs filing lawsuits in the federal courts are targeted (which includes being threatened with) *and* sanctioned under Rule 11 more frequently than any other litigant in any other category of case.¹⁶⁴ Consequently, because: (a) this category of litigant is exposed to the highest level of Rule 11 activity; and (b) we know that any prior exposure to Rule 11 is most likely to result in changes in behavior, *this* category of litigant and claim is much more likely to be chilled by Rule 11.¹⁶⁵ That is, civil rights plaintiffs and their attorneys, more than any other category of litigant, are less likely to: assert claims or defenses that they believe have merit; file papers that they would like

162. Marshall, *supra* note 10, at 949–50.

163. *Id.* at 980–81.

164. Plaintiffs will be targeted for Rule 11 sanctions more frequently than defendants. See Wiggins, *supra* note 159, at 19 (discussing the FJC study); Marshall, *supra* note 10, at 952–53 (discussing the AJS study). Plaintiffs will be sanctioned much more frequently than defendants. Wiggins, *supra* note 159, at 19 (the FJC study). And Rule 11 sanctions will actually be imposed against civil rights plaintiffs and their attorneys at a rate significantly higher than other litigants, plaintiff or defendant, in other cases. Tobias, *Litigation*, *supra* note 14, at 490–91 (citing early studies conducted by Professor Nelken and Professor Vairo); Marshall, *supra* note 10, at 965–66, 971 (the AJS study); Hart, *Still Chilling*, *supra* note 3, at 109–10.

165. See generally Hart, *Still Chilling*, *supra* note 3, Part IV.A (discussing Rule 11's chilling effects on civil rights plaintiffs after the 1993 amendments).

to file in a given case; and file lawsuits in the federal courts.¹⁶⁶ The result, of course, is that development of the common law is stifled and access to the federal courts for civil rights plaintiffs asserting claims that challenge the existing status quo is discouraged.¹⁶⁷

The research conducted for this paper suggests that the practice of "sidestepping" Rule 11 described above¹⁶⁸ sometimes results in 28 U.S.C. § 1927 and the court's inherent power to sanction being used as Rule 11 *substitutes*.¹⁶⁹ Under *these* circumstances, therefore, the federal court experience and conclusions regarding federal civil rights plaintiffs and Rule 11 arguably still apply to sanctions requests and awards imposed pursuant to 28 U.S.C. § 1927 and/or the court's inherent power.¹⁷⁰

166. More specifically, the authors of the AJS study found that:

[R]espondents who identified themselves as spending more than 50% of their time doing civil rights plaintiffs' work were far more likely to be affected by Rule 11 than other lawyers in virtually every response category that was measured. For example, 44% of the self-identified civil rights plaintiffs' lawyers reported that they had advised a client not to pursue a lawsuit that had little or no merit, compared to 13.2% of those who spend most of their time on civil rights defense work. That this disparity is not attributable purely to the plaintiff orientation of this specific question can be seen by looking at the response rates to the question of whether the lawyer decided not to assert a claim or defense that the lawyer felt had potential merit. This question is not particularly plaintiff-oriented, yet 31% of civil rights plaintiffs' lawyers reported having taken this action, compared to 17.9% of those who do civil rights work on the defense side. Similarly, 24% of civil rights plaintiffs' lawyers reported that they had not filed particular papers in a given case that they would have liked to file, compared to 10% of those doing civil rights defense work.

Marshall, *supra* note 10, at 971 (footnotes omitted).

167. See, e.g., Cutler, *supra* note 10, at 282-83; Eric K. Yamamoto, *Efficiency's Threat to the Value of Accessible Courts for Minorities*, 25 HARV. C.R.-C.L. L. REV. 341, 345 (1990) [hereinafter Yamamoto, *Efficiency's Threat*]. To the extent that Rule 11 prevents *meritless* claims from being filed in the federal district courts, it is achieving salutary results. The objection being levied here is that Rule 11 also chills civil rights plaintiffs and their attorneys from filing *meritorious* claims.

168. See *supra* text accompanying notes 141-42.

169. See *supra* text accompanying notes 147-49.

170. Again, the claim being made here is not that *all* of the increased reliance on alternative bases of sanctions, like 28 U.S.C. § 1927 and the court's inherent power, is a result of the practice of sidestepping Rule 11's procedural requirements. The claim *is* being made, however, that *some* of the shifting emphasis under Rule 11 vis-a-vis 28 U.S.C. § 1927 and the court's inherent

Consequently, for all of the reasons discussed above,¹⁷¹ plaintiffs and their attorneys who bring civil rights claims in the federal district courts are more likely than any other category of litigant in any other type of case to be *chilled* by the zero sum sanctions game that appears to be taking place in the federal district courts.¹⁷² This conclusion would hold true even if, as it turns out, § 1927 and/or inherent power sanctions are denied by the federal district courts a majority of the time.¹⁷³ This is true because Rule 11 experience makes clear that the mere threat that § 1927 or inherent power sanctions may be imposed, whether raised by the opposing party or the federal district court, can produce profound chilling effects.¹⁷⁴

power is a result of sidestepping. Consequently, to the extent that sidestepping results in § 1927 or the court's inherent power being used as Rule 11 *substitutes*, it seems safe to conclude that these alternative bases of sanctions would be subject to the same problems and criticisms plaguing Rule 11.

171. *See supra* text accompanying notes 150–67.

172. Figuring out the number of times sanctions are actually awarded pursuant to either 28 U.S.C. § 1927 and/or the court's inherent power is important because of the impact that decisions to impose sanctions have on the legal community. *See supra* text accompanying notes 150–57. But the significance of the fact that sanctions pursuant to these alternative bases of authority are being *threatened* cannot be overlooked given the impact that informal sanctioning activity, like threats to sanction, has on litigant behavior. *See supra* text accompanying notes 158–64. In other words, the mere threat that § 1927 or inherent power sanctions may be imposed, whether raised by the opposing party or the court, can produce profound chilling effects.

173. Of course, sanctions pursuant to § 1927 and/or the court's inherent power are sometimes awarded. *See, e.g.,* *Chambers v. NASCO, Inc.*, 501 U.S. 32, 35, 40 (1991) (affirming federal district court's order imposing \$996,644.65 [representing *all* of the prevailing party's litigation expenses] as inherent power sanctions); *Ridder v. City of Springfield*, 109 F.3d 288, 297–99 (6th Cir. 1997) (reversing a federal magistrate's order imposing \$32,546.02 as Rule 11 sanctions, but affirming the magistrate's order imposing \$32,546.02 as § 1927 sanctions). But determining the number of times sanctions are actually awarded pursuant to either 28 U.S.C. § 1927 and/or the court's inherent power is beyond the scope of this article.

174. *See supra* text accompanying notes 158–64 (discussing impact of informal sanctioning activity).

V. SOME THINGS TO THINK ABOUT

A. *Is Sidestepping Improper?*

Given that the same set of facts could trigger sanctions under Rule 11, 28 U.S.C. § 1927, and the court's inherent power,¹⁷⁵ the question must be asked whether using § 1927 and/or the court's inherent power to circumvent Rule 11's procedural requirements is actually improper? Both § 1927 and the court's inherent power to sanction predate the enactment of Rule 11.¹⁷⁶ Indeed, Rule 11 was amended in 1993 *after* the United States Supreme Court decided the *Chambers v. NASCO, Inc.*¹⁷⁷ case (discussed below), which appears to give the federal district courts extremely broad discretion to invoke their inherent power to sanction. In fact, the Advisory Committee was not only aware that *Chambers* and § 1927 existed when it amended Rule 11, but also made a point to state explicitly that Rule 11 did not displace other sanctioning authority of the federal district courts.¹⁷⁸ So is sidestepping improper? The *Chambers* case suggests that the answer is no.

175. For example, defendant files a motion for summary judgment, which is denied by the federal district court. Defendant files a motion for reconsideration of the court's denial of its motion, even though the defendant does not have any new evidence to present or arguments to make. Defendant filed its motion to draw out the litigation in terms of time and expense, hoping that plaintiff would then be forced to drop the lawsuit. Under these facts, defendant's motion for reconsideration would trigger all three sanctioning provisions. Rule 11 would be triggered because there was no reasonable basis in fact or law for the filing and the motion was filed for an improper purpose. § 1927 would be triggered because the motion multiplied the litigation both unreasonably and vexatiously. The court's inherent power would be triggered, because the motion appeared to be filed in bad faith. *See also supra* note 141.

176. *See supra* text accompanying notes 9, 25, 44.

177. 501 U.S. 32 (1991).

178. The Advisory Committee stated:

Rule 11 is not the exclusive source for control of improper presentations of claims, defenses, or contentions. It does not supplant statutes permitting awards of attorney's fees to prevailing parties or alter the principles governing such awards. It does not inhibit the court in punishing for contempt, in exercising its inherent powers, or in imposing sanctions, awarding expenses, or directing remedial action authorized under other rules or under 28 U.S.C. § 1927.

FED. R. CIV. P. 11 advisory committee's notes to 1993 amendment (citation omitted).

1. Express authority—*Chambers v. NASCO, Inc.*¹⁷⁹

*Chambers v. NASCO, Inc.*¹⁸⁰ involved an \$18 million contract for the sale of G. Russell Chambers' Louisiana-based television and radio communication business.¹⁸¹ Soon after the contract was executed, Chambers decided that he no longer wanted to sell his company.¹⁸² NASCO, Inc. ("NASCO") filed suit in federal court in the Western District of Louisiana seeking specific performance of the contract and a temporary restraining order to prevent the alienation or encumbrance of the properties at issue.¹⁸³ Chambers and his attorneys then engaged in a wide variety of litigation misconduct, including: refusing to allow NASCO to inspect business documents pursuant to an injunction; trying to fraudulently deprive the district court of jurisdiction by transferring the property to a third party and then seeking refuge in the public records doctrine;¹⁸⁴ filing two appeals for relief of a contempt order, both of which were dismissed for lack of a final judgment;¹⁸⁵ filing frivolous motions and pleadings;¹⁸⁶ and engaging in tactics of delay, oppression, and harassment, including attempting to start a new communications company in Louisiana with FCC approval using the same equipment purportedly sold to NASCO, pursuant to the parties' contract.¹⁸⁷

The district court ultimately determined that NASCO was entitled to specific performance of the contract.¹⁸⁸ After the Fifth Circuit affirmed the district court's decision on the merits in favor of NASCO, it sanctioned Chambers for filing a frivolous appeal, and remanded the case to the district court to fix the amount of appellate sanctions and determine whether further sanctions were warranted for conduct that occurred during the litigation below.¹⁸⁹

On remand to the district court, NASCO moved for sanctions against Chambers and his attorneys pursuant to Rule 11, 28 U.S.C.

179. 501 U.S. 32 (1991).

180. *Id.*

181. *Id.* at 35–36.

182. *Id.* at 36.

183. *Id.*

184. *Id.* at 36–37.

185. *Id.* at 38.

186. *Id.*

187. *Id.* at 39–40.

188. *Id.* at 39.

189. *Id.* at 40.

§ 1927, and the court's inherent power.¹⁹⁰ "After full briefing and a hearing," the district court imposed sanctions against Chambers in the form of attorneys' fees and costs totaling \$996,644.64, which represented all of NASCO's fees and costs incurred in the litigation.¹⁹¹ Several of Chambers' attorneys were also disbarred or suspended from practice.¹⁹² Despite the fact that Rule 11 and 28 U.S.C. § 1927 were available, at least with respect to portions of the litigation misconduct, the district court imposed all of the sanctions pursuant to its inherent power. The district court relied solely on its inherent power to sanction, after concluding that neither Rule 11 nor § 1927 were broad enough to encompass *all* of the litigation misconduct at issue.¹⁹³ The Fifth Circuit affirmed.¹⁹⁴

In a five-to-four decision written by Justice White, the United States Supreme Court also affirmed, finding no abuse of discretion by the federal district court in relying solely on its inherent power to sanction.¹⁹⁵ In affirming, the Supreme Court stated:

[A] federal court [is not] forbidden to sanction bad-faith conduct by means of the inherent power simply because that conduct could also be sanctioned under the statute [i.e., § 1927] or the Rules [of Civil Procedure] . . . [I]f in the informed discretion of the [district] court, neither the statute nor the Rules are up to the task, the court may safely rely on its inherent power.¹⁹⁶

In other words, the Supreme Court essentially held:

When express Rules and statutes provided by Congress do not reach the entirety of a litigant's bad-faith conduct, including conduct occurring before litigation commenced, a district court may disregard the requirements of otherwise applicable Rules and statutes and instead exercise inherent power to impose sanctions.¹⁹⁷

190. *Id.*

191. *Id.*

192. *Id.* at 41 n.5.

193. *Id.* at 41-42.

194. *Id.* at 42.

195. *Id.* at 50.

196. *Id.*

197. *Id.* at 63 (Kennedy, J., dissenting); see also Fehderau, *supra* note 48, at 708 ("[W]henver conduct sanctionable under Rule 11 is intertwined with conduct that only the inherent power could address, a court in its discretion

Unfortunately, *Chambers* has been interpreted by some commentators and courts as essentially encouraging, if not explicitly authorizing, federal district courts to *sidestep* Rule 11 (and other express sanctioning provisions) in favor of its inherent power.¹⁹⁸

2. It is improper to use § 1927 or the court's inherent power to sanction to *sidestep* Rule 11

An extremely pertinent question, *Chambers* notwithstanding, is *why* are all three sanctioning provisions even necessary, if 28 U.S.C. § 1927 or the court's inherent power to sanction can simply be used to circumvent Rule 11's procedural requirements anytime those requirements are not satisfied? The existence of all three sanctioning provisions must mean one of two things: either the sanctioning authorities are different, in which case sidestepping *is* improper, or one or more of the sanctioning provisions is superfluous. Since I am not prepared at this point to think the latter, I have to conclude that the provisions are at least different enough to be distinguishable on a given set of facts. If I am wrong on this score, and I am perfectly willing to be convinced, then further discussions should probably take place about the future of Rule 11.¹⁹⁹

a. it is improper to use § 1927 and the court's inherent power to sidestep Rule 11 where the specific requirements for triggering these other sanctioning provisions are not met

The fact of the matter is, even though Rule 11, 28 U.S.C. § 1927 and the court's inherent power do overlap,²⁰⁰ the three sanctioning provisions also differ in many important respects. For example,²⁰¹ Rule 11 only applies to pleadings, written motions, and other papers

may safely rely on its inherent power alone.”); Baker, *supra* note 48, at 196–97.

198. See, e.g., Baker, *supra* note 48, at 196–97; Jerold S. Solovy, *Sanctions Under Rule 11*, in CURRENT DEVELOPMENTS IN FEDERAL CIVIL PRACTICE 2003 235, 242 (PLI Litig. & Admin. Practice Course Handbook Series No. H00KT, 2003), WL 691 PLI/Lit 235. Professor Baker also notes that “[t]en of the thirteen federal appellate courts have applied the *Chambers* rationale to affirm or uphold sanctions” *Id.* at 203. See also *supra*, text accompanying note 139 (discussing the *Flanagan* case out of the Ninth Circuit).

199. These discussions could include asking whether Rule 11 needs to be amended further, or even repealed.

200. See *supra* text accompanying notes 40, 63–64.

201. The examples provided in the text are by no means exhaustive.

filed in civil actions in the federal district courts.²⁰² Both § 1927 and the court's inherent power, however, may be imposed for a wide range of litigation misconduct occurring in any civil or criminal proceeding in either the federal district or appellate courts.²⁰³

Who can be sanctioned also depends on the sanctioning provision being used. Sanctions under 28 U.S.C. § 1927, for example, may only be imposed on attorneys; it does not apply to clients or pro se litigants.²⁰⁴ Sanctions under both Rule 11 and the court's inherent power, in contrast, can be imposed against attorneys and their law firms, the parties, and pro se litigants.²⁰⁵ Rule 11 sanctions against a represented party, however, are limited in one significant way. Specifically, monetary sanctions may not be imposed on a represented party for violations regarding existing law or "nonfrivolous argument[s] for the extension, modification, or reversal of existing law or the establishment of new law[.]"²⁰⁶

While due process must be satisfied before sanctions can be imposed under Rule 11, § 1927, or the court's inherent power,²⁰⁷ that is probably where the procedural similarity ends. The three sanctioning provisions vary greatly in the procedural limits applicable to each. For example, under Rule 11:

[A] district court [may] impose reasonable sanctions, including attorney's fees, when a party or attorney violates the certification standards that attach to the signing of certain legal papers. A district court [may] issue sanctions under Rule 11 when particular individuals (signers) file certain types (groundless, unwarranted, vexatious) of documents (pleadings, [written] motions and papers). Rule 11's certification requirements apply to all signers of documents, including represented parties . . . , and the Rule

202. See JOSEPH, SANCTIONS, *supra* note 18, § 5(A) at 69.

203. See *id.*, § 21(A)(1), at 375, § 21(B), at 378 (§ 1927), § 26(B), at 431, § 26(D), at 435 (inherent power).

204. See 28 U.S.C. § 1927 (1980) (title of section is: "Counsel's liability for excessive costs."); JOSEPH, SANCTIONS, *supra* note 18, § 21(C)(1), at 379.

205. See FED. R. CIV. P. 11(c); JOSEPH, SANCTIONS, *supra* note 18, § 26(C)(1), at 431-32 (discussing the court's inherent power).

206. See FED. R. CIV. P. 11(b)(2) & (c)(2)(A).

207. See FED. R. CIV. P. 11(c) and advisory committee's note to 1993 amendment; JOSEPH, SANCTIONS, *supra* note 18, § 25(B), at 417 (§ 1927) § 29(A), at 462 (inherent power).

does not apply to papers filed in fora other than district courts²⁰⁸

In contrast, “courts [may] apply inherent powers without specific definitional or procedural limits.”²⁰⁹

Perhaps even more significant than the technical differences between the sanctioning provisions, and as previously discussed, Rule 11, 28 U.S.C. § 1927 and the court’s inherent power to sanction serve different purposes;²¹⁰ they exist to address different problems faced by the federal courts;²¹¹ the scope of § 1927 and the court’s inherent power are much broader than that of Rule 11;²¹² and the type of misconduct necessary to trigger sanctions under each of these provisions differ.²¹³

So, yes, the same litigation misconduct *could* trigger all three sanctioning provisions.²¹⁴ But, assuming the same litigation misconduct is being used as a basis for seeking sanctions pursuant to all three sanctioning authorities,²¹⁵ the bottom line remains the same. If the misconduct at issue fails to satisfy the specific triggering mechanism for § 1927 or the court’s inherent power²¹⁶ and imposing sanctions would not address the specific problem that § 1927 or the

208. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 67–68 (1991) (Kennedy, J., dissenting) (citation omitted); *see also supra* text accompanying notes 72–81 (discussing the 1993 procedural amendments to Rule 11).

209. *Id.* at 68.

210. *See supra* text accompanying notes 12, 17, 26, 28–29, 48–49.

211. *See supra* text accompanying notes 11, 28–31, 46–47, 49–50.

212. *See supra* text accompanying notes 19–23, 38–39, 54–60.

213. *See supra* text accompanying notes 23, 32–34, 52.

214. *See supra* note 175.

215. *See supra* text accompanying notes 98–137 (discussing cases where the same alleged misconduct was used to trigger sanctions under Rule 11, § 1927 or the court’s inherent power). It also seems clear that different conduct in the same case could trigger different sanctioning provisions. This scenario, however, is not the one implicated when § 1927 and the court’s inherent power are invoked to *sidestep* Rule 11’s procedural requirements.

216. Specifically, to trigger: (a) Rule 11 sanctions, a pleading, written or other paper must be filed or presented to the court in violation of the Rule’s certification requirements; *see supra* text accompanying notes 19–22; (b) § 1927 sanctions, the misconduct at issue must multiply the proceedings *both* vexatiously and unreasonably; the federal district court should be looking for a dilatory *course of conduct*, rather than a single defective paper. *See supra* text accompanying notes 26, 32–34; and (c) inherent power sanctions, the misconduct at issue must have been undertaken in bad faith. *See supra* text accompanying note 52.

court's inherent power is intended to address,²¹⁷ then it would seem that the federal district courts simply cannot impose sanctions pursuant to those provisions. In other words, under the circumstances just described, *it would be improper*, based on the language and purpose of the sanctioning authorities themselves, to invoke 28 U.S.C. § 1927 or the court's inherent power to sanction to sidestep Rule 11's procedural requirements.

b. sidestepping should be improper as a matter of policy

Separate and apart from whether the three sanctioning provisions can be interpreted in a way that prevents any of them from being redundant, or worse, superfluous, there are strong policy arguments that using 28 U.S.C. § 1927 or the court's inherent power to sanction to sidestep Rule 11's procedural requirements *should be improper*. It should be improper because any other interpretation will likely produce several pernicious effects, some of which have already been discussed in some detail.²¹⁸

To begin with, allowing § 1927 and the court's inherent power to be used as Rule 11 substitutes runs the risk of eviscerating the 1993 amendments to Rule 11 by essentially reading them out of the Rule.²¹⁹ Such an interpretation will also promote a lack of uniformity in Rule 11 decisions because the same litigation misconduct may or may not trigger Rule 11, depending on whether the Rule's procedural requirements have been met. Lack of uniformity, in turn, will only serve to increase Rule 11's chilling effects²²⁰ because federal court litigants and their attorneys will once

217. Rule 11 is designed to deter frivolous litigation, *see supra* text accompanying note 12; § 1927 is designed to deter unnecessary delay in litigation and control abuses of the judicial process, *see supra* text accompanying notes 28–30; and the court's inherent power is designed to preserve the authority and dignity of the federal courts by preventing disruption or abuse of judicial processes and ensuring obedience to a court's orders. *See supra* text accompanying note 47.

218. *See* Part IV, *supra*.

219. *See supra* text accompanying notes 145–49; *see also* *Chambers v. NASCO, Inc.*, 501 U.S. 32, 67 (1991) (Kennedy, J., dissenting) (“By inviting district courts to rely on inherent authority as a substitute for attention to the careful distinctions contained in the Rules . . . , today’s decision will render these sources of authority superfluous in many instances.”).

220. Recall that lack of uniformity is cited as one of the causes of Rule 11's chilling effects. *See supra* text accompanying note 70.

again be unsure as to when and if Rule 11, as opposed to § 1927 or the court's inherent power, will be invoked against them.²²¹ And because they will not be able to adequately predict what might trigger Rule 11,²²² federal court litigants, especially civil rights plaintiffs who are typically resource poor,²²³ may decide that they cannot afford to file unpopular but meritorious claims in federal court.²²⁴ Surely this cannot be the result intended by the Advisory Committee,²²⁵ Congress²²⁶ or the federal courts.

c. but what about Chambers?

The *Chambers*²²⁷ case can be interpreted as holding that Rule 11 can be "sidestepped" in favor of the court's inherent power.²²⁸ But *Chambers* does not compel such a result, nor should it be so interpreted.²²⁹

221. As Justice Kennedy wrote in his dissenting opinion in *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991), Rule 11's "definite standards give litigants notice of the proscribed conduct and make possible meaningful review for misuse of discretion . . ." *Id.* at 68 (Kennedy, J., dissenting); *c.f.* Fehderau, *supra* note 48, at 725 ("By passing over Rule 11 and invoking the court's inherent power, judges fundamentally alter norms against which litigants are measured.").

222. For that matter, federal court litigants, including civil rights plaintiffs, will probably not be able to accurately predict when and if sanctions will be triggered under 28 U.S.C. § 1927 and the court's inherent power, either.

223. *See* Tobias, *Revision*, *supra* note 67 at 192 (arguing that, "the intrinsic nature of considerable civil rights litigation and the restraints which impede many civil rights plaintiffs and practitioners may make their efforts to comply with Rule 11's strictures covering prefiling inquiries and legal and factual certification seem inadequate. These inherent characteristics, particularly the parties' and attorneys' lack of money, time, power, and access to information involving their cases, also explain why these litigants and their counsel may be risk averse and why Rule 11's invocation might chill their efforts.") (footnotes omitted).

224. *See* Hart, *Still Chilling*, *supra* note 3, at 35.

225. *See supra* Part II.B (discussing reasons why the Advisory Committee decided to substantially amend Rule 11 for the second time in 1993).

226. Congress is implicated here for the simple reason that it was responsible for enacting 28 U.S.C. § 1927. Congress, therefore, would have an interest in how § 1927 is being interpreted by the federal courts.

227. 501 U.S. 32 (1991).

228. *See supra* Part V.A.1.

229. For very good critiques of the majority opinion in *Chambers*, see generally, Pushaw, *supra* note 47; *see also Chambers*, 501 U.S. at 60 (Kennedy, J., dissenting).

First, *Chambers* can and should be interpreted as requiring the federal district courts to invoke rules-based (or statutory) sanctions powers, if those rules are adequate to cover the misconduct at issue.²³⁰ The case can be interpreted in this fashion, because the *Chambers*' majority itself expressly stated that, "when there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the Rules, the court ordinarily should rely on the Rules rather than the inherent power."²³¹ In these circumstances, that is, where there is a rule or statute that is adequate to the task, there is simply no need to resort to the court's inherent power, and *Chambers*, therefore, should be so construed.²³² In fact, several federal circuit courts have already done so.

For example, in *United States v. One 1987 BMW 325*,²³³ the First Circuit reversed a district court order striking a claim for failure to make discovery where the opposing party failed to make a motion to compel discovery, as required by Rule 37, before seeking dismissal.²³⁴ The First Circuit stated:

[T]here are limits to a court's inherent powers, particularly in instances where the Civil Rules are on all fours. When, as in this case, the Civil Rules limit the nature of the sanction that can be imposed, a court may not use its inherent powers to circumvent the Rules' specific provisions.²³⁵

In another example, the Seventh Circuit reversed a district court order that reversed a decision of the bankruptcy court and awarded judgment in favor of one of the parties for failure of the opposing party's counsel to file an appearance form, pursuant to a local rule of court.²³⁶ The district court relied on Rule 11 and another local rule as authority for its action.²³⁷ In reversing the district court, the Seventh Circuit stated:

230. See JOSEPH, SANCTIONS, *supra* note 18, § 26(A)(1), at 428; Fehderau, *supra* note 48, at 718-19.

231. *Chambers*, 501 U.S. at 50.

232. JOSEPH, SANCTIONS, *supra* note 18, § 26(A)(1), at 428; Fehderau, *supra* note 48, at 719.

233. 985 F.2d 655 (1st Cir. 1993).

234. *Id.* at 661.

235. *Id.* (citations omitted).

236. *Kovilic Constr. Co. v. Missbrenner*, 106 F.3d 768, 771 (7th Cir. 1997).

237. *Id.*

[The inherent power] exists even where procedural rules govern the same conduct. Nevertheless, “[b]ecause of their very potency, inherent powers must be exercised with restraint and discretion.” Furthermore, courts may not exercise their inherent powers in a way that actually conflicts with constitutional or statutory provisions. The ‘supersession’ clause of the Rules Enabling Act... suggests that exercises of inherent powers may also not directly conflict with the national procedural rules. This Court has recognized the need to be cautious when resorting to inherent powers to justify an action, particularly when the matter is governed by other procedural rules, lest (even in the absence of a direct conflict) the restrictions in those rules become meaningless.²³⁸

In addition, *Chambers* should not dictate the result in a case where *Chambers* can be distinguished factually.²³⁹ Recall that in *Chambers*, the sanctioned litigant and his attorneys engaged in “extraordinary, persistent abusive behavior, not all of which was sanctionable under existing statutes and rules.”²⁴⁰ Under *these* circumstances, where “the conduct sanctionable under the Rules [is] intertwined within conduct that only the inherent power [can] address[.]”²⁴¹ the *Chambers* majority held that the federal district courts have discretion to invoke their inherent power to sanction.²⁴² Stated alternatively, if the litigation misconduct at issue does fall squarely within the scope of a Rule (or statute), then *Chambers* is distinguishable and the federal district courts: (a) should not rely on their inherent powers to impose a sanction; *and* instead (b) *should* rely on the Rule implicated on the facts to govern their sanctions

238. *Id.* at 772–73 (alteration in original) (citations omitted); *see also* Runfola & Assoc., Inc. v. Spectrum Reporting II, Inc., 88 F.3d 368, 375 (6th Cir. 1996); *but see supra* note 198 (noting that several federal circuit courts have relied on *Chambers* to uphold inherent power sanctions).

239. *See generally* Fehderau, *supra* note 48, at 728–30 (noting that litigants facing sanctions have several courses of action available after *Chambers*). A “Keycite” of the *Chambers* case on Westlaw reveals all of the negative indirect history for the case, including cases in which *Chambers* was distinguished.

240. JOSEPH, SANCTIONS, *supra* note 18, at § 26(A)(1) at 428; Johnson, *supra* note 72, at 653; *see also Chambers v. NASCO, Inc.*, 501 U.S. 32, 50–51 (1991).

241. *Chambers*, 501 U.S. at 51.

242. *Id.* at 50.

decision.²⁴³

B. *What's at Stake?*

This article has essentially assumed that civil rights litigation is important and that the federal courts are an important forum for these kinds of "conversations" to take place. Are these assumptions correct? Is access to the federal courts important for civil rights plaintiffs? My unqualified answer is yes. Elsewhere I have written:

Access to court is critical for litigants asserting non-mainstream claims that challenge the existing socio-political order. It is critical for two very related reasons: first, because minority groups are typically outside of the political decision making process and, as a result, subject to the will of the majority, and, second, because of the integral part courts play in our constitutional system and democratic form of government. More specifically, under a separation of powers ideal, courts operate to prevent oppression of minorities by the majority; they function, at least in part, to hold government accountable by constitutional standards; and they are an important forum in which *public values* and *group rights* can be discussed, renegotiated, and vindicated.²⁴⁴

Civil rights litigation, in turn, is extremely important because it serves to build our communities;²⁴⁵ it educates and informs the

243. My colleague, Michael Dorff, suggests that rather than trying to distinguish *Chambers*, the wiser course, strategically, might be to advocate that *Chambers* be overruled, either by the Supreme Court or by statute. In other words, if one of the reasons Rule 11 was amended in 1993 was to reduce its chilling effects, thereby helping to preserve access to the federal courts for civil rights plaintiffs, then either the Supreme Court or Congress should act to prevent that purpose from being thwarted by the federal courts' interpretation and application of § 1927 and/or the court's inherent power to sanction. I certainly have no objections to the strategy suggested by Professor Dorff; but, like him, I am also under no illusions about whether such action will be taken anytime soon by our current Supreme Court and Congress.

244. Hart, *Still Chilling*, *supra* note 3, at 139-41 (footnotes omitted).

245. There are different ways to define the "community" being built. Compare Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860, 1874-75 (1987) [hereinafter Minow, *Interpreting Rights*] ("Although the language of rights, on its surface, speaks little of community or convention, those who exercise rights signal and strengthen their relation to a

public²⁴⁶ about non-mainstream claims and perspectives²⁴⁷ and the differences among us.²⁴⁸ Importantly, civil rights litigation also conveys a powerful political message about the kind of society in which we want to be a part.²⁴⁹ For all of these reasons, then, access to our courts is absolutely essential, and the federal district court's sanctioning powers, whether under Rule 11, 28 U.S.C. § 1927 or the court's inherent powers, should not be used to impede it.

VI. CONCLUDING THOUGHTS

Rule 11 was significantly amended in 1993 to help reduce, among other things, the Rule's chilling effects on federal civil rights plaintiffs. The 1993 amendments have been in effect for ten years now, more than enough time to draw at least some preliminary conclusions regarding whether those amendments have been successful.

Preliminary research seems to suggest that the federal district courts and the litigants practicing before them appear to be invoking 28 U.S.C. § 1927 and the court's inherent power to sanction specifically to circumvent the procedural requirements added to Rule 11 in 1993. This suggestion is troubling because it means that §

community . . . Stating a claim in a form devised by those who are powerful in the community expresses a willingness to take part in the community, as well as a tactical decision to play by the rules of the only game recognized by those in charge.”), with Yamamoto, *Efficiency's Threat*, *supra* note 167, at 405 (“A developing view of minority litigation is that the process of asserting rights . . . creates context for sharing common struggles. It links ‘the individual to a broader social group,’ providing strength from a collective identity.”); and Elizabeth M. Schneider, *The Dialectic Of Rights And Politics: Perspectives From The Women's Movement*, 61 N.Y.U. L. REV. 589, 612–13 (1986). These different conceptions of community are not mutually exclusive; they are both very much at work when a minority group asserts a rights claim.

246. See generally, Yamamoto, *Efficiency's Threat*, *supra* note 167 at 408 n.312 (describing ways in which minority perspectives are communicated to the public through the legal process).

247. *Id.* at 407–08.

248. MARTHA MINOW, MAKING ALL THE DIFFERENCE 22, 50 (1990) (arguing persuasively that “difference” is a comparative term, that is, different as to whom? Significantly, this point of comparison often goes unstated).

249. Schneider, *supra* note 245 at 624–25; Yamamoto, *Efficiency's Threat*, *supra* note 167 at 420–21; Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1089 (1984); Minow, *Interpreting Rights*, *supra* note 245 at 1867; Danielle Kie Hart, *Same-Sex Marriage Revisited: Taking A Critical Look At Baehr v. Lewin*, 9 GEO. MASON U. CIV. RTS. L.J. 1, 110–11 (1998).

1927 and the court's inherent power are essentially being used as Rule 11 *substitutes*. If these alternative bases of sanctions are indeed being used as Rule 11 substitutes, then, it seems inescapable that many, if not all, of the criticisms that prompted the 1993 revisions to Rule 11 would apply now to § 1927 and the court's inherent power to sanction as well. Such a result would not bode well for any federal court litigant; it would be particularly chilling, however, for federal civil rights plaintiffs.

So, are the amendments working? Are they accomplishing the purposes envisioned for them by the Advisory Committee? To answer these questions definitively, more than the anecdotal research conducted here needs to be done. My hope, though, is that this article will prompt further discussions about the sanctioning power of the federal courts in general and Rule 11 in particular. In the end, I remain confident that the problems suggested here can be remedied if the federal bench and bar adopt a careful and cautious approach to sanctions.