Civil Procedure - Federal District Courts Have Inherent Power to Sanction Attorneys for Abuse of the Judicial Process

Carolyn L. Dessin

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Confronted with the growing problem of docket crowding, courts have enacted and imposed a wide variety of rules and sanctions aimed at members of the bar designed to discourage abuse of the judicial process. Federal courts traditionally have had the power to punish for contempt, however, the contempt sanction is replete with limitations which


2. See 18 U.S.C. § 401 (1982). Section 401 is the legislative statement of the contempt sanction. Section 401 reads:

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

Id.

Prior to the enactment of § 401, the Supreme Court had held that courts possessed the inherent power to punish for contempt. Ex parte Robinson, 86 U.S. (19 Wall.) 505, 510 (1873). See generally R. Goldfarb, The Contempt Power (1963).

Rule 42 of the Federal Rules of Criminal Procedure provides the procedure for dealing with two types of contempt—"direct" contempt and "indirect" contempt. Fed. R. Crim. P. 42. Direct contempt is contempt that is committed in the presence of the court; all other contempt is classified as indirect. Id. Rule 42 states:

(a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe

(1073)
hamper its effectiveness.\(^3\) Additionally, federal courts have the statutory
authority to require an attorney whose conduct "unreasonably and vexa-
tiously" multiplies judicial proceedings "to satisfy personally the excess
costs, expenses, and attorneys' fees reasonably incurred because of such
conduct."\(^4\) Also, federal courts possess inherent powers to promulgate
rules designed to regulate attorney conduct.\(^5\)

it as such. The notice shall be given orally by the judge in open court in
the presence of the defendant or, on application of the United States
attorney or of an attorney appointed by the court for that purpose, by
an order to show cause or an order for arrest. The defendant is enti-
tled to a trial by jury in any case in which an act of Congress so pro-
vides. He is entitled to admission to bail as provided in these rules. If
the contempt charged involves disrespect to or criticism of a judge, that
judge is disqualified from presiding at the trial or hearing except with
the defendant's consent. Upon a verdict or finding of guilt the court
shall enter an order fixing the punishment.

Id. It should be noted that the contempt power is generally regarded as inherent
in courts; thus, statutory provisions regarding contempt are seen as codifications
rather than grants of authority. See generally R. GOLDFARB, supra.

3. See generally Comment, supra note 1. The limitations on the contempt
sanction include the requirement of willful misconduct and judicial regard of the
contempt sanction as a measure of last resort. See Pennsylvania v. Local Union
542, Int'l Union of Operating Eng'rs, 552 F.2d 498, 510 (3d Cir.) ("[W]illful-
ness is an element of criminal contempt which must be proved beyond a reasona-
ble doubt."); cert. denied, 434 U.S. 822 (1977); Comment, Financial Penalties Imposed
Directly Against Attorneys in Litigation Without Resort to the Contempt Power, 26 UCLA
L. Rev. 855, 862 (1979) ("[A] pervasive judicial attitude ... regards employment
of the contempt power, like formal discipline, as a measure of last resort."). For
a further discussion of the contempt sanction, see infra notes 83-87 and accom-
panying text.

and "expenses," see infra notes 26-28 and accompanying text.

5. See, e.g., Fed. R. Civ. P. 37. Rule 37 is one example of a rule promulgated
to regulate attorney conduct. Rule 37 reads in pertinent part:

(a) Motion for Order Compelling Discovery. . . . (4) Award of Ex-
enses of Motion. If the motion [to compel discovery] is granted, the
court shall, after opportunity for hearing, require the party or deponent
whose conduct necessitated the motion or the party or attorney advis-
ing such conduct or both of them to pay to the moving party the rea-
sonable expenses incurred in obtaining the order, including attorney's
fees, unless the court finds that the opposition to the motion was sub-
stantially justified or that other circumstances make an award of ex-
enses unjust.

If the motion is denied, the court shall, after opportunity for hear-
ing, require the moving party or the attorney advising the motion or
both of them to pay to the party or deponent who opposed the motion
the reasonable expenses incurred in opposing the motion, including
attorney's fees, unless the court finds that the making of the motion was
substantially justified or that other circumstances make an award of ex-
enses unjust.

If the motion is granted in part and denied in part, the court may
apportion the reasonable expenses incurred in relation to the motion
among the parties and persons in a just manner. . . .

(b) Failure to Comply with Order. (2) . . . (E) . . . the court shall
require the party failing to obey the [discovery] order or the attorney

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Recently, the United States Court of Appeals for the Third Circuit, sitting in banc, expanded the scope of a court's inherent powers by holding that a federal district court can order an attorney to pay the cost of impanelling a jury for one day as a sanction for alleged abuse of the judicial process. In \textit{Eash v. Riggins Trucking}, the Third Circuit overruled an earlier Third Circuit decision which held that a district court has no power to impose a monetary sanction on an attorney for misconduct absent an adjudication of contempt. Although the \textit{Eash} court held that the district court acted within its inherent power, it vacated the district court's order because the district court had denied the attorney due process.

The issue in \textit{Eash} of whether a district court has the authority to impose a monetary sanction for attorney misconduct arose in a personal advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. \textit{Id.} Thus, rule 37 provides a mechanism for discouraging frivolous discovery motions and unfounded refusals to comply with discovery orders. The potential sanction against an advising attorney should make attorneys particularly sensitive to the merits of possible claims. See generally Flanders, \textit{Local Rules in Federal District Courts: Usurpation, Legislation or Information?}, 14 \textit{Loy. L.A.L. Rev.} 213 (1981). For further discussion of the courts' inherent rulemaking power, see infra notes 117-24 and accompanying text.


It has long been recognized that the courts have a wide range of inherent powers. See, e.g., Link v. Wabash R.R., 370 U.S. 626, 630-31 (1962) (court's authority to dismiss action \textit{sua sponte} for failure to prosecute has generally been considered an inherent power); Michaelson v. United States, 266 U.S. 42, 65 (1924) (power to punish for contempt is inherent in all courts).


For a further discussion of inherent powers, see infra notes 29-36 and accompanying text.

7. 757 F.2d 557 (3d Cir. 1985) (in banc).

8. See Gamble v. Pope & Talbot, Inc., 307 F.2d 729, 731 (3d Cir.) ("[T]he district court has not been given authority and possesses no inherent power to fine an attorney who has not been held in contempt nor given a hearing."), cert. denied, 371 U.S. 888 (1962). For a further discussion of Gamble, see infra notes 37-54 and accompanying text.

9. 757 F.2d at 570-71. The Third Circuit found a denial of due process because the trial judge did not give defendants' counsel prior notice or an opportunity to be heard. \textit{Id.} For a further discussion of this finding, see infra note 63 and accompanying text. For the text of the district court's order, see infra note 15.
injury suit. During the week before the scheduled trial, plaintiffs' counsel unsuccessfully attempted to contact defendants' counsel regarding a possible settlement. On the day of trial, however, defendants' attorney offered a settlement amount that plaintiffs' attorney accepted. Accordingly, the district court dismissed the action by stipulation of the parties.

Eleven days after the dismissal, the district court entered an order directing defendants' counsel to pay the court the cost of impanelling a jury for one day as a sanction for what the court believed to be an abuse of the judicial process by the attorney. The district court, in its order, concluded that under the circumstances "settlement on the eve of trial was not justified." The order was entered without notice to the attorney and without affording him an opportunity to be heard.

ORDER

The above captioned case was set for trial on Monday, May 23, 1983. Plaintiff's attorney made repeated attempts to contact defendant's attorney in regards to settlement possibilities during the week of May 16, 1983. Receiving no response, plaintiff prepared for trial and appeared on May 23rd, ready to present his case.

At this point, defendant's attorney made a proposal of settlement which was accepted by plaintiff. The defendant's attorney was scheduled for trial in state court the same day. The settlement avoided a possibly unfortunate conflict.

The settlement on the eve of trial was not justified. Defendant's attorney was given adequate notice by plaintiff's counsel and by Court personnel to attempt to reach an agreement.

IT IS HEREBY ORDERED that William Tighe, Esquire, is directed to pay to the Clerk of Court for the Western District of Pennsylvania the sum of $900.00, computed as follows: $30.00 (per diem fee for jurors) times 15, the minimum number of jurors necessary to select a jury of seven persons, one being an alternate, to be selected by lot. Said amount is payable by September 2, 1983.

Id. at 571-72.

16. Id. at 571. The district court believed that the settlement allowed defendants' counsel to avoid a scheduling conflict with another trial scheduled in state court for the same day. Id. Defendants' counsel disputed this contention. Id. Believing that the timing of the settlement benefitted defendants' counsel, the district court concluded that the last-minute settlement was unjustified as defendants' counsel had ample prior opportunity for settlement. Id. at 571 app. For the text of the district court's order, see supra note 15.

17. 757 F.2d at 559.
counsel filed a petition for reconsideration, which the district court
denied.\(^\text{18}\) On appeal, the Third Circuit reviewed the case \textit{in banc}.\(^\text{19}\)

Writing for the majority,\(^\text{20}\) Judge Adams initially considered whether the district court had jurisdiction to issue the order assessing the costs of impanelling a jury eleven days after dismissal of the case.\(^\text{21}\) In upholding the district court's jurisdiction, the Third Circuit focused upon other contexts in which a court retains post-dismissal jurisdiction.\(^\text{22}\)

The Third Circuit next considered whether the district court had
the authority to impose the cost of impanelling a jury as a sanction for
attorney misconduct.\(^\text{23}\) The court recognized two potential sources for
this authority: 28 U.S.C. § 1927\(^\text{24}\) and the inherent powers of the

\(^{18}\) \textit{Id.} Defendant’s counsel, in his petition, disputed the factual basis of the
district court’s order. \textit{Id.} Counsel apparently asserted that he did not settle on
the eve of trial merely to avoid a scheduling conflict.

\(^{19}\) \textit{Id.} Initially, a panel of three Third Circuit judges was to resolve the
case. \textit{Id.} Because of the importance of the issue presented, however, the court
decided to review the case \textit{in banc}. \textit{Id.}

\textit{Rule 35 of the Federal Rules of Appellate Procedure governs when causes
will be determined by the court sitting \textit{in banc}. \textit{Fed. R. App. P. 35.} The rule
reads in pertinent part:}

\textit{(a) When Hearing . . . in Banc Will be Ordered. A majority of the
circuit judges who are in regular active service may order that an appeal
. . . be heard . . . by the court of appeals in banc. Such a hearing . . . is
not favored and ordinarily will not be ordered except (1) when consider-
ation by the full court is necessary to secure or maintain uniformity of
its decisions, or (2) when the proceeding involves a question of exceptional
importance.}

\textit{Id.} (emphasis added).

\(^{20}\) 757 F.2d at 557. Judge Seitz filed a dissenting opinion. \textit{Id.} at 572
(Seitz, J., dissenting). Judge Sloviter, joined by Judges Gibbons and Higginboth-
ham, filed a separate dissent. \textit{Id.} at 573 (Sloviter, J., dissenting).

\(^{21}\) \textit{Id.} at 559. The district court dismissed the case on August 1, 1983, and
the order was entered on August 12, 1983. \textit{Id.}

\(^{22}\) \textit{Id.} at 559-60. The court noted that under the federal rules, a court has
jurisdiction to fix costs even after a judgment has been entered. \textit{Fed. R. Civ. P.
54(d), 58;} see 10 C. \textit{Wright & A. Miller, Federal Practice and Procedure
§ 2668, at 207 (1983)} ("On dismissing an action, the court may retain jurisdic-
tion to fix costs.").

Similarly, pursuant to 28 U.S.C. § 1927, it is generally recognized that
courts retain jurisdiction to assess attorney’s fees after a judgment is entered.
1983) (district court retains jurisdiction to assess attorney’s fees for “reasonable
time” after entry of judgment).

\(^{23}\) 757 F.2d at 559-60. For a discussion of various sanctions for attorney
misconduct, see \textit{supra} notes 1-5 and accompanying text.

\(^{24}\) 757 F.2d at 560 (citing 28 U.S.C. § 1927 (1982)). Section 1927 states:
Any attorney or other person admitted to conduct cases in any court of
the United States or any Territory thereof who so multiplies the pro-
ceedings 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.
courts. Relying on the Supreme Court's decision in *Roadway Express v. Piper*, the Third Circuit stated that "costs" recoverable under section 1927 are limited to "the opposing litigants' costs and expenses incurred by virtue of an attorney's misconduct." The *Eash* court concluded that since the costs of impanelling a jury are borne by the court and not the opposing litigant, the sanction imposed in *Eash* was not recoverable under section 1927. The *Eash* court then discussed a court's inherent powers.

The Third Circuit initially accepted the premise that courts have inherent powers, and that these powers were "vested in the courts upon their creation" and that these powers were "not derived from any state-


25. 757 F.2d at 560-70. For a discussion of inherent powers, see infra notes 29-36 and accompanying text.

26. 447 U.S. 752 (1980). In *Roadway*, the petitioner requested an award of attorney's fees and court costs because the respondent had failed to comply with court orders. Id. at 754.

27. 757 F.2d at 560. The Supreme Court in *Roadway* had held that respondents were not liable for attorney's fees because costs under § 1927 are limited to costs allowed under 28 U.S.C. § 1920. 447 U.S. at 757-58 (citing 28 U.S.C. § 1920 (1982)). Taxable costs under § 1920 are limited to

1. Fees of the clerk and marshal;
2. Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
3. Fees and disbursements for printing and witnesses;
4. Fees for exemplification and copies of papers necessarily obtained for use in the case;
5. Docket fees under section 1923 of this title;
6. Compensation of court appointed experts, compensation of interpreters and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title . . .


Section 1927 was amended subsequent to the *Roadway* decision to include attorney's fees. 757 F.2d at 560 n.3. The *Eash* court did not note the addition of the word "expenses" to the statute. At least one court has followed the holding of *Roadway* notwithstanding the amendment of § 1927. See United States v. Austin, 749 F.2d 1407 (9th Cir. 1984) (cost of summoning jury is not set forth in § 1920 and thus is not taxable under § 1927).

28. 757 F.2d at 560. The court noted that "the costs of impanelling a jury [are] costs which customarily are borne by the government." Id.

29. Id. at 561.

30. Id.; see Michaelson v. United States, 266 U.S. 42, 56-66 (1924); Ex parte Robinson, 86 U.S. (19 Wall.) 505, 510 (1874).

In *Robinson*, an attorney was disbarred for misconduct. Id. at 508. The Court held that "[t]he power to punish for contempts is inherent in all courts . . . The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power." Id. at 510. Furthermore, the Court found that the power to punish for contempt had been and could be "limited and defined by the act of Congress.” *Id.* Thus, congressional action is not a grant of the contempt power, but rather a codification of it.

The Court reaffirmed its *Robinson* holding in *Michaelson*. 266 U.S. at 65-66.
The Third Circuit Review identified three general types of inherent power: 1) "irreducible inherent authority"; 2) "powers implied by law"; 3) "powers inherent in the judges' office or judicial advisory capacity". Michaelson involved an adjudication of contempt without a trial by jury. Noting that Congress could regulate the power of the inferior federal courts to punish for contempt, the Court cautioned that "the attributes which inhere in that power and are inseparable from it can neither be abrogated nor rendered practically inoperative." Id. at 66.


In affirming the Seventh Circuit, the Supreme Court first noted that the power to dismiss for failure to prosecute is expressly recognized in the Federal Rules of Civil Procedure. 370 U.S. at 629 (citing Fed. R. Civ. P. 41(b)). Rule 41(b) states in pertinent part: "(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action . . . ." Fed. R. Civ. P. 41(b). The Court rejected plaintiff's contention that absent a motion by the defendant, a court has no power to dismiss a case for failure to prosecute. 370 U.S. at 630-31. Rather, the Court stated that [t]he authority of a court to dismiss su a sponte for lack of prosecution has generally been considered an inherent power, governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.

Id. (citations omitted); see also National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639 (1976) (per curiam). The National Hockey League Court held that a district court has power to dismiss a case under rule 37 of the Federal Rules of Civil Procedure. Id. Rule 37(b)(2) states in pertinent part:

If a party . . . fails to obey an order to provide or permit discovery . . .
the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following . . .
(C) An order . . . dismissing the action or proceeding or any part thereof . . . .

Fed. R. Civ. P. 37(b)(2). In light of Link, rule 37 may be viewed as a codification of the inherent power of courts to dismiss for failure to prosecute.

The Third Circuit Review identified a variety of uses of a court's inherent powers. 757 F.2d at 561. See, e.g., Link v. Wabash R.R., 370 U.S. 626, 629-30 (1962) (court can rely on inherent power to dismiss case su a sponte for failure to prosecute); Levine v. United States, 362 U.S. 610, 615 (1960) (court's power to sanction for contempt stems from inherent power of judiciary); Ex parte Wall, 107 U.S. 265 (1883) (court has authority to strike attorney from the roll for flagrant misconduct); Island Dev. Co. v. McGeorge, 37 F.2d 345, 345 (3d Cir. 1930) (in absence of statute, taxation of costs in appellate court is matter inherently within courts' general powers). But cf. Spevack v. Klein, 385 U.S. 511 (1967) (court does not have power to disbar attorney for invoking his constitutional privilege against self-incrimination).

32. 757 F.2d at 561-62. While the court recognized three categories of inherent power, it noted that often a court will not specify the category upon which it is relying to support its decision. Id.

One commentator has noted a similar tripartate division of the range of inherent powers. He states:

The inherent power of the judiciary has been phrased in the following ways: (1) as such powers as result from the very nature of a court's organization and are essential to its existence and protection and to the due administration of justice; (2) as such power as is essential to the
from strict functional necessity”; 34 and 3) powers “necessary only in the practical sense of being useful.” 35 The court concluded that under their inherent powers, courts have developed many tools to promote courtroom efficiency and achieve justice, at least in the absence of legislation

existence, dignity and functions of a court from the very fact that it is a court; and (5) as such powers as are necessary to the orderly and efficient exercise of jurisdiction.


33. 757 F.2d at 562. The Third Circuit noted that this type of judicial power is strictly limited, encompassing only “authority involving activity so fundamental to the essence of a court as a constitutional tribunal that to divest the court of absolute command within this sphere is really to render practically meaningless the terms ‘court’ and ‘judicial power.’” Id. (citing Levin & Amsterdam, Legislative Control Over Judicial Rule-Making: A Problem of Constitutional Revision, 107 U. Pa. L. Rev. 1, 30-32 (1958)). The court noted that even the legislature cannot deprive the courts of this limited domain of fundamental power. Id. at 562; see also United States v. Klein 80 U.S. (13 Wall.) 128 (1872) (discussing separation of legislative and judicial power). The Third Circuit found that this fundamental power was not the source of authority for the district court’s sanction in Eash. 757 F.2d at 562.

In their article, Levin and Amsterdam note that “[t]here are spheres of activity so fundamental and so necessary to a court” that the courts must be deemed to have absolute control with no interference from the legislature. The authors reasoned that legislative interference in those areas would render the notion of “judicial power” meaningless. Levin & Amsterdam, supra, at 30. They further noted that this very fundamental control of the judicial system by the judiciary was necessary to maintain appropriate separation of powers. Id.

34. 757 F.2d at 562. The court noted that this type of inherent power was a power “implied from functional necessity”. Id. (citing Roadway, 447 U.S. at 764). The Supreme Court has held that this species of power can be regulated, though not abrogated. Id. at 762; see, e.g., Michaelson v. United States, 266 U.S. 42, 66 (1924). For a discussion of Michaelson, see supra note 30 and accompanying text.

One commentator suggests that this type of inherent power stems from a court’s need to manage its own affairs. Comment, supra note 3, at 878. The Fifth Circuit has relied on this type of inherent power to uphold a sanction against an attorney. Flaska v. Little River Marine Constr. Co., 389 F.2d 885, 888 (5th Cir. 1968) (“The inherent power of a court to manage its affairs necessarily includes the authority to impose reasonable and appropriate sanctions upon errant lawyers practicing before it.”).

35. 757 F.2d at 562-63. The Third Circuit noted that this type of power can be exercised “only in the absence of contrary legislative direction.” Id. at 563 (citing Alyeska Pipeline Serv. v. Wilderness Soc’y, 421 U.S. 240, 259 (1975) (“These exceptions are unquestionably assertions of inherent power in the courts to allow attorneys’ fees in particular situations, unless forbidden by Congress . . . .”)).

The Supreme Court has recognized this third type of inherent power in Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947). In Gulf Oil, the Court upheld the inherent power of a district court to dismiss a suit pursuant to the doctrine of forum non conveniens. Id. at 512. Noting that courts possess inherent powers to control administrative matters, the Court reasoned that the district court had the power to dismiss the case. Id. at 508-09. The Court found that the venue statute did not remove the district court’s power to dismiss, thus implying that this type of power could be limited by an applicable statute. Id. at 507-09.
precluding such action.\textsuperscript{36}

In order to find that the district court in \textit{Eash} possessed the inherent authority to impose a monetary sanction upon an attorney, the Third Circuit had to overrule its prior decision in \textit{Gamble v. Pope \& Talbot, Inc.}\textsuperscript{37} In \textit{Gamble}, defense counsel filed an untimely pretrial memorandum in violation of the court’s “standing orders.”\textsuperscript{38} The district court rejected plaintiff’s motion to have the untimely memorandum stricken,\textsuperscript{39} however, the court, \textit{inter alia}, imposed a fine of one hundred dollars on defendant’s counsel.\textsuperscript{40} The Third Circuit, in a plurality opinion by Judge McLaughlin, held that a district court did not possess the “inherent power to fine an attorney who has not been held in contempt nor given a hearing” and that the fine carried a criminal connotation.\textsuperscript{41}

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{36} 757 F.2d at 564 (citing Link v. Wabash R.R., 370 U.S. 626, 630-31 (1962)); see Dowling, \textit{The Inherent Power of the Judiciary}, 21 A.B.A. J. 635 (1935) (discussing historical and constitutional bases for exercise of inherent judicial power).
\item\textsuperscript{37} 307 F.2d 729 (3d Cir.) (in banc), \textit{cert. denied}, 371 U.S. 888 (1962). \textit{Gamble} was decided fifteen years before the Supreme Court’s decision in \textit{Roadway}. For a discussion of \textit{Roadway}, see supra notes 26-27 and accompanying text.
\item\textsuperscript{38} 307 F.2d at 730. The filing of the memorandum was required as part of the district court’s pretrial procedure. \textit{Id.}\footnote{\textit{Id.}\footnote{\textit{Id.}}. Defense counsel filed his memorandum ten months late on the eve of trial. \textit{Id.}\footnote{\textit{Id.}\footnote{\textit{Id.}}} The court noted that counsel’s failure to file the memorandum was an unintentional oversight, not willful misconduct. \textit{Id.}}. A standing order, in effect at the time the case was pending, allowed for the imposition of sanctions for violations of pretrial procedures. This standing order provided as follows:

For failure to appear at a pretrial conference, or to participate therein,
or to prepare therefor, the Court, in its discretion, may make such or-
der with respect to the imposition of fines, costs and counsel fees, as is
just and proper; with respect to the continued prosecution of the cause
(complaint, cross-claim or counterclaim), a dismissal may be entered,
or as to the defense, the preclusion of all or any part thereof, as is like-
wise just and proper.

\textit{Id.}\footnote{\textit{Id.}\footnote{\textit{Id.}}}.

\item\textsuperscript{39} \textit{Id.}\footnote{\textit{Id.}\footnote{\textit{Id.}}} The district court concluded that striking defendant’s memorandum would be too drastic considering that the delay was unintentional. \textit{Id.}\footnote{\textit{Id.}}.

\item\textsuperscript{40} \textit{Id.}\footnote{\textit{Id.}} In addition to imposing a fine upon defense counsel, the court “struck the names of certain proposed witnesses appearing on the memorandum thereby precluding the defendant from calling them as witnesses at the trial” and “permitted the plaintiff to ‘submit within thirty days an appropriate order imposing upon defendant all costs, expenses and reasonable counsel fees caused by defendant’s delay in filing its pretrial memorandum.’” \textit{Id.}\footnote{\textit{Id.}}.

The district court viewed the fine as proper “[i]n view of the time of judicial employees of the Government wasted as a result of the late filing of this memo-
randum.” \textit{Id.} at 731. The district court noted that in the future the fine would be greater since lawyers would be put on notice by this case. \textit{Id.}\footnote{\textit{Id.}}.

\item\textsuperscript{41} \textit{Id.}\footnote{\textit{Id.}} On appeal to the Third Circuit, \textit{amicus curiae} on behalf of the trial court asserted that the fine in \textit{Gamble} was simply “an exercise of disciplinary authority, with no necessary criminal connotation.” \textit{Id.}\footnote{\textit{Id.}}. The Third Circuit, however, concluded that “the effect was to punish defendant’s attorney for con-
tempt.” \textit{Id.}\footnote{\textit{Id.}}.

The \textit{Gamble} court also noted that “basic disciplinary innovations” were be-
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In dissent, Chief Judge Biggs concluded that the inherent powers of a court include the power "to impose appropriate and reasonable sanctions upon those admitted to its bar."42 Unlike the plurality, Chief Judge Biggs concluded that the sanction in Gamble did not carry a criminal connotation.43

Judge Adams, in Eash, noted that commentators have criticized the Gamble decision as seemingly contradictory to Link v. Wabash Railroad,44 a Supreme Court decision rendered one year prior to Gamble.45 In Link, yond the scope of local rulemaking power. Id. at 732. The court concluded that the "district court's power to penalize . . . is limited by the contempt statute, 18 U.S.C.A. § 401, and by Rule 42 of the Federal Rules of Criminal Procedure." Id.

Judge McLaughlin also discussed, at length, the ordinary procedural status of the case, and the cooperation between the judiciary and the bar which is necessary for the "smooth, satisfactory operation of the [judicial] system." Id. at 732. Judge McLaughlin stressed the balance between the bar and the judiciary when he stated that "[t]he effort to concentrate all that frightening power in the bench is too dangerous a potential to let slip by clothed in such disarming language as 'simply . . . an exercise in disciplinary authority, with no necessary criminal connotation.'." Id. at 733 (quoting the amicus curiae). The Third Circuit concluded that the district court had no authority to fine an attorney for conduct not rising to the level of contempt. Id. at 731.

Judge Hastie concurred in the result, finding that the district court had exceeded its power in imposing the sanction. Id. at 733 (Hastie, J., concurring).

The Gamble plurality did not consider the inherent powers of courts as a possible source of authority for the sanction. The Eash majority noted this in overruling Gamble. 757 F.2d at 564.

42. 307 F.2d at 735 (Biggs, C.J., dissenting). Chief Judge Biggs reasoned that the authority for the fine was grounded in the inherent powers of the court. Id. at 733-34 (Biggs, C.J., dissenting). The Chief Judge focused on the absence of willfulness to distinguish the fine from criminal contempt. Id. at 736 (Biggs, C.J., dissenting). After noting the problem of overcrowded dockets and the overly harsh nature of other sanctions such as dismissal, Chief Judge Biggs concluded that the district court acted within its power to "impose appropriate and reasonable sanctions upon those admitted to its bar." Id. at 734-36 (Biggs, C.J., dissenting). In a brief concurrence in dissent, Judge Goodrich advocated the authority of judges "to impose reasonable sanctions for the breach of reasonable rules." Id. at 737 (Goodrich, J., dissenting).

43. Id. at 734 (Biggs, C.J., dissenting). Chief Judge Biggs agreed with the amicus curiae in the case that "the action of the court below was—simply . . . an exercise of disciplinary authority, with no necessary criminal connotation.'." Id. The view of the Gamble dissenters regarding the lack of criminal connotation of attorney sanctions was adopted by the Eash majority. 757 F.2d at 566.

The Gamble majority, on the other hand, viewed the fine as carrying a criminal connotation. 307 F.2d at 733. The majority went so far as to label the principle underlying the dissenters' position "an ominous doctrine that should be buried deep and forgotten." Id.


45. 757 F.2d at 565; see, e.g., Comment, supra note 3, at 877 (noting strange juxtaposition of Gamble and Link); Note, supra note 32 (noting inconsistency of Gamble holding with both Link decision and the concept of inherent powers of courts); Comment, Dismissal for Failure to Attend a Pretrial Conference and the Use of Sanctions at Preparatory Stages of Litigation, 72 YALE L.J. 819, 830 (1963) (questioning Gamble holding as suggesting that sanctioning attorney for misconduct is more sensible than sanctioning client for attorney’s misconduct).
the Court held that a district court had the inherent power to dismiss an action "sua sponte" for lack of prosecution. Judge Adams also commented that several courts have rejected "the result and reasoning of Gamble as unduly narrow."

Judge Adams addressed the contention that the order in Eash, like the order in Gamble, improperly and informally inflicted a criminal punishment upon a member of the bar without resort to the contempt statute. Judge Adams noted that the costs imposed in Eash were logically related to counsel's alleged misconduct while in Gamble the fine was unrelated to the misconduct. Judge Adams concluded that the "nexus" and "limit" thus created by the sanction in Eash made it "significantly different" from the sanction in Gamble.

The Eash court next considered whether the inherent powers of a court encompass the authority to impose the costs of impanelling a jury upon an attorney. The court examined the sanction against its background discussion of inherent powers. The Eash court found that a court has the inherent authority to punish attorney misconduct apart from the contempt power. Additionally, the court found that the holding in Gamble inappropriately restricted "the judicial use of sanctions" which, the court concluded, "is a practical necessity in the management of caseloads."

46. Link, like Eash, arose as a personal injury suit. 370 U.S. at 627. When plaintiff's counsel failed to appear at a scheduled pretrial conference, the district court dismissed the case. Id. at 628-29. The Link Court upheld the lower court's dismissal based on the lower court's inherent power, stating that the power to dismiss "is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the District Courts." Id. at 629-30. The Court further reasoned that rule 41(b) did not deprive the lower court of its inherent power to dismiss "sua sponte." Id. (citing Fed. R. Civ. P. 41(b)). For the text of rule 41(b), see supra note 31.

47. 757 F.2d at 565; see, e.g., Miranda v. Southern Pac. Transp. Co., 710 F.2d 516 (9th Cir. 1983) (agreeing with arguments stated by Chief Judge Biggs in his dissent in Gamble); Martinez v. Thrifty Drug & Discount Co., 593 F.2d 992 (10th Cir. 1979) (finding of contempt is not necessary for imposition of monetary sanction against an attorney).

48. 757 F.2d at 565.

49. Id. Judge Adams reasoned:

In Gamble, [the Third Circuit] essentially was concerned with the imposition of a fine unrelated to any actual consequence of counsel's conduct and that knew no bounds other than each individual judge's notion of an appropriate penalty warranted by a counsel's misdeeds. The present case is significantly different in that the district court tied its sanction to specific costs that bore a direct relationship to the alleged misconduct and thus offered a nexus and a limit. Id. (emphasis added).

50. Id.

51. Id. at 566. The court stated that unlike a contempt sanction, the sanction in Eash "is based simply on an unjustified failure to discharge an administrative responsibility as an officer of the court." Id.

52. Id. (citing Comment, supra note 3). Judge Adams commented that "the
sanctions in regulating attorney behavior.\textsuperscript{58} Based on the foregoing, the \textit{Eash} court expressly overruled \textit{Gamble} and held that a court has the inherent power to impose the costs of impanelling a jury upon an attorney.\textsuperscript{54}

After finding that the order was within a court's inherent powers, the \textit{Eash} court addressed the fact that the district court did not base its sanction on a local rule.\textsuperscript{55} While the court did not deem this fatal to the imposition of the sanction,\textsuperscript{56} it suggested that "if the district courts believe that there are occasions in which the imposition of such a sanction would be just, wise and efficacious, a local rule on the imposition of such a sanction might well be salutary."\textsuperscript{57} Judge Adams commented that local rules serve an informational purpose and supply an empirical basis for making changes in national rules.\textsuperscript{58}

more traditional penalties . . . are at times inadequate to regulate the wide range of attorney misconduct." \textit{Id.}

\textsuperscript{53} \textit{Id.} at 567. The court noted that "the imposition of financial penalties is the only sanction both mild enough and flexible enough to use in day-to-day enforcement of orderly and expeditious litigation." \textit{Id.} (citing R. Rodes & K. Ripple, \textit{supra} note 1, at 86). The court also noted that such sanctions were a useful deterrent to abuse of the judicial process. \textit{Id.} For a discussion of Judge Sloviter's criticism in her dissenting opinion in \textit{Eash} of a "usefulness" rationale, see infra note 74.

\textsuperscript{54} 757 F.2d at 568. The court reasoned that its "fresh evaluation of the importance and necessity of some kind of sanction as one of the reasonable and flexible instruments for curbing abuse of the judicial process suggests that \textit{Gamble} should no longer control this conceptual area." \textit{Id.}

It is interesting to note what the \textit{Eash} court did \textit{not} decide:

\begin{quote}
We do not imply . . . that the imposition of a sanction was proper in the present case . . . nor do we express any view on what forms of attorney misconduct would justify the imposition of the sanction . . . . Nor is anything in this opinion meant to suggest that settlement on the eve of trial is in and of itself improper.
\end{quote}

\textit{Id.} It is submitted that these statements give district courts great leeway and little guidance in determining what conduct will be deemed sanctionable.

\textsuperscript{55} \textit{Id.} at 568-70.

\textsuperscript{56} \textit{Id.} at 568-69. The Third Circuit noted that in \textit{Link}, the Supreme Court held:

\begin{quote}
Petitioner's contention that the District Court could not act in the conceded absence of any local rule covering the situation here is obviously unsound. Federal Rule of Civil Procedure 83 expressly provides that "in all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules."
\end{quote}

\textit{Id.} at 569 (quoting \textit{Link}, 370 U.S. at 633 n.8).

\textsuperscript{57} \textit{Id.} at 569. The Third Circuit agreed with the Second, Ninth, and Tenth Circuits that in the absence of a statute or rule to the contrary, district courts have the power to make local rules that impose reasonable sanctions on attorneys who conduct themselves in a manner unbecoming a member of the bar, who fail to comply with any rule of court, including local rules, or who take actions in bad faith. \textit{Id.} (citing Miranda v. Southern Pac. Transp. Co., 710 F.2d 516, 521-22 (9th Cir. 1983); Martinez v. Thrifty Drug & Discount Co., 593 F.2d 992, 994 (10th Cir. 1979); \textit{In re Sutter}, 543 F.2d 1030, 1037-38 (2d Cir. 1976)).

\textsuperscript{58} \textit{Id.} at 570.
The *Eash* court concluded that a rule covering the imposition of the costs of impanelling a jury for late settlement is within the "local rulemaking power."59 Relying on the Supreme Court's decision in *Colgrove v. Battin*,60 the *Eash* court concluded that "[a] reasonable monetary sanction on an errant attorney is not a procedural innovation beyond the reach of a local rule."61 The court observed that at the present time a local rule covering monetary sanctions would be more efficacious than a uniform national rule given the divergent disciplinary needs of the various district courts.62

Finally, the Third Circuit considered the manner in which the sanction had been imposed upon the attorney in *Eash*.63 Finding that the entry of a monetary sanction without affording the attorney prior notice or an opportunity to be heard violated procedural due process,64 the court vacated the district court's order.65

Judge Seitz dissented from the majority's holding.66 While he agreed with the majority that courts have the authority to impose monetary sanctions based on their inherent powers67 or on rights bestowed

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59. *Id.* at 569 (citing *Gamble*). The *Gamble* court had found that a rule regarding this type of sanction was beyond the courts' rulemaking power. 307 F.2d at 732.


60. 413 U.S. 149 (1973).

61. 757 F.2d at 569. The Court in *Colgrove* defined basic procedural innovations as those which "bear upon the ultimate outcome of the litigation." 413 U.S. at 164 n.23. The *Eash* court concluded that since a monetary sanction is not "outcome determinative," it is not beyond the reach of local rules. 757 F.2d at 569.

62. 757 F.2d at 569-70. The *Eash* court noted that the widely varying characteristics of the district courts, e.g., size, congestion and attorney practices, make the situation amenable to local rather than national rules. *Id.*

63. 757 F.2d at 570. Defense counsel had been given neither notice nor an opportunity to be heard. *Id.*

64. *Id.*; see, e.g., *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) ("an individual [must] be given an opportunity for a hearing before he is deprived of any significant property interest") (emphasis in original); *see also Goss v. Lopez*, 419 U.S. 565 (1975) (where prior hearing is not feasible, person deprived should be given opportunity for hearing as soon as practicable).

The *Eash* court noted that the procedural safeguards required by due process—notice and an opportunity to be heard—would "ensure that the attorney has an adequate opportunity to explain the conduct deemed deficient." 757 F.2d at 571. The court further found that fundamental fairness may require some notice to the attorney that the attorney's conduct is sanctionable. *Id.*

65. 757 F.2d at 571.

66. *Id.* at 572 (Seitz, J., dissenting).

67. *Id.*
on them by Federal Rule of Civil Procedure 83, he opined that such sanctions cannot fairly be imposed without providing the bar with some type of advance notice.

In a separate dissent, Judge Sloviter reasoned that allowing the judiciary to impose such sanctions would impinge upon the legislative "power to establish crimes and penalties and define costs," in violation of the separation of powers doctrine. She also commented that the sanction invoked in Eash contravened "the express and hard-won limitations" of the contempt statute. Furthermore, she posited that the imposition of the costs of impanelling a jury was an improper sanction.

68. Id. Rule 83 provides, in part, that "[i]n all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules." FED. R. CIV. P. 83.

69. 757 F.2d at 572-73 (Seitz, J., dissenting). Judge Seitz took judicial notice that last minute settlements of the type at issue in Eash are frequently "a way of life" and not considered reprehensible by the bar. Id. at 572 (Seitz, J., dissenting). Thus, Judge Seitz posited that fundamental fairness required prior notice before the imposition of a sanction like that in the instant case. Id. at 572-73 (Seitz, J., dissenting). Judge Seitz concluded that a local rule would satisfy the fundamental fairness requirement. Id. Judge Seitz stressed, however, that the rulemaking power should not be used on an ad hoc basis. Id.

70. Id. at 573 (Sloviter, J., dissenting). Judges Gibbons and Higginbotham joined in Judge Sloviter's dissent. Id. Judge Sloviter viewed the sanction imposed in Eash as having a criminal connotation because it was unrelated to the opposing parties' costs. Id. at 573-74 (Sloviter, J., dissenting). She stressed the fact that only Congress has the constitutional authority to "define offenses and establish penalties." Id. at 575 (Sloviter, J., dissenting) (citing U.S. CONST. art. I, § 1). Therefore, she reasoned that the majority holding "arrogate[d] unto the federal judicial Congress' power to establish penalties and define assessable costs, and encroaches upon the limits to the contempt power established by Congress and the courts." Id. at 573 (Sloviter, J., dissenting); see also United States v. Hudson and Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812) ("The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offence."). Judge Sloviter noted that only contempt has diverged from the principle that criminal offenses are established by Congress. 757 F.2d at 573-74 (Sloviter, J., dissenting).

In the majority opinion, Judge Adams rejected the dissent's contention that the sanction imposed in Eash violated the separation of powers doctrine. 757 F.2d at 566. Judge Adams based this conclusion on his finding that the sanction carried no criminal connotation. Id. (citing Miranda v. Southern Pac. Transp. Co., 710 F.2d 516, 521 (9th Cir. 1983)). Thus, he reasoned that the lack of legislative imprimatur for the sanction was not fatal to its imposition. Id. Judge Adams also noted that the Third Circuit had imposed other financial sanctions in the absence of congressional action. Id.

71. 757 F.2d at 579 (Sloviter, J., dissenting). Discussing the history of the contempt statute, Judge Sloviter noted that the power to punish contempt summarily was virtually untethered in the late eighteenth century. Id. at 578 (Sloviter, J., dissenting). This broad, inherent contempt power was codified in § 17 of the Judiciary Act of 1789. Id. Judge Sloviter noted that the power to punish contempt summarily was limited by the Act of 1831, which is similar to 18 U.S.C. § 401. Id. Thus, Judge Sloviter stressed that the inherent power of courts to punish summarily for contempt has been limited solely to the conduct proscribed in 18 U.S.C. § 401. Id. at 579 (Sloviter, J., dissenting).
because it had “no historical antecedent and no statutory or Rule authorization.”

Judge Sloviter also disagreed with the majority’s holding that a court could impose such a sanction pursuant to a local rule. Judge Sloviter concluded that it was improper to extend a court’s inherent powers to include the power to fine an attorney absent a finding of contempt.

In Eash, the Third Circuit concluded that a court has the inherent power to impose a monetary sanction related to the waste of judicial resources upon the attorney whose misconduct caused the waste. In light of the ever-increasing caseload facing the federal courts, this type of sanction is necessary for courts to control abuse of the judicial process. Courts are faced with a wide variety of attorney misconduct and a correspondingly wide array of judicial sanctions for dealing with such misconduct. It is submitted that the Eash decision provides the framework.

72. Id. at 576 (Sloviter, J., dissenting). Judge Sloviter questioned the majority’s reliance on Link and Roadway Express. Id. Judge Sloviter reasoned that the sanctions imposed in both Link and Roadway were authorized by “traditional inherent powers” unlike the sanctions imposed in Eash. Id. Additionally, she asserted that the majority decision “circumvents the procedure that has been established for drafting and promulgating the Federal Rules.” Id.

The majority answered Judge Sloviter’s argument regarding the lack of historical antecedent for the district court’s sanction in Eash by positing that no sanction imposed pursuant to a court’s inherent powers needs the undergirding of a long-standing tradition. Id. at 567. The majority noted that the particular sanction in Roadway was upheld by the Supreme Court despite its lack of “long legal ancestry.” Id.

73. Id. at 576-77 (Sloviter, J., dissenting). The sanction, in Judge Sloviter’s opinion, was a “basic procedural innovation” that cannot be effectuated by a local rule. Id. at 577 (Sloviter, J., dissenting). Judge Sloviter noted that the district court had established a procedure requiring notice of settlements two days prior to trial. Id. Judge Sloviter characterized this as a “procedural innovation.” See also Miner v. Atlass, 363 U.S. 641 (1960) (where district court has no power to promulgate rule ordering taking of deposition, district court lacks authority to order taking of deposition).

74. 757 F.2d at 580 (Sloviter, J., dissenting). Judge Sloviter rejected the majority’s “usefulness” rationale, noting that [in light of the ample sanctions otherwise available, the need to curb attorney abuse of trial and pretrial procedures is not so great as to countenance the extension of the courts’ “inherent” powers to include the power to fine attorneys for conduct that does not rise to the level of contempt.

Id. For a discussion of the majority’s usefulness rationale, see supra note 53 and accompanying text.

75. 757 F.2d at 566-67.


77. Comment, supra note 3, at 855 (discussing various sanctions). For a
work for a more effective method of dealing with abuse of the judicial process while, at the same time, placing the onus of the sanction on the culpable person—the attorney.

The sanctions available to courts can be divided into two categories: sanctions punishing the client78 and sanctions punishing the attorney.79 Sanctions such as dismissal, which punish the client for attorney misconduct, are premised on the theory that the attorney is the agent of the client even though, in a practical sense, a client has little control over his attorney’s misconduct.80 Courts and commentators have suggested that punishing clients for their attorney’s misconduct is an unfair and ineffective method of punishing and deterring attorney misconduct.81 It is submitted that a fairer, more effective method of punishing and deterring attorney misconduct is through the imposition of sanctions directly on the errant attorney.82

further discussion of sanctions available to courts, see supra notes 1-5 and accompanying text.

78. See Link v. Wabash R.R., 370 U.S. 626 (1962) (case dismissed because attorney failed to appear at pretrial conference); Gamble v. Pope & Talbot, Inc., 307 F.2d 729 (3d Cir. 1962) (defendant precluded from calling witnesses named in pretrial memorandum that was filed ten months late), cert. denied, 371 U.S. 888 (1962); In re 1208, Inc., 188 F. Supp. 664 (E.D. Pa. 1960) (client deprived of jury trial because attorney failed to appear or give reasonable excuse for not appearing at pretrial conference); See also Comment, supra note 3, at 855-58, 864-68 (discussing wide variety of sanctions imposed on clients for attorney misconduct). Sanctions punishing a client for his attorney’s misconduct include assessing costs against the client and prejudicing the client’s case. Id.

79. See Comment, supra note 3, at 855-56. Sanctions punishing the attorney for misconduct include invoking the contempt power, initiating formal disciplinary proceedings, and assessing costs against the attorney. Id.

80. See, e.g., Link v. Wabash R.R., 370 U.S. 626 (1962). In Link, plaintiff contended on appeal that it was unfair for the district court to dismiss his case because of his attorney’s failure to appear at a pretrial conference. The Supreme Court rejected his contention and affirmed the dismissal, holding that [p]laintiff voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representational litigation, in which each party is deemed bound by the acts of his lawyer-agent . . . . Id. at 635-34 (emphasis added). See also Comment, supra note 3, at 866-67. The Comment author suggests that the agency theory is gradually being eroded in favor of a theory that imposes sanctions on the culpable person. Id. (citing 28 U.S.C. § 1927 (1976)).

81. See, e.g., Flaska v. Little River Marine Constr. Co., 389 F.2d 885 (5th Cir.), cert. denied, 392 U.S. 928 (1968). In Flaska, the district court dismissed plaintiff’s case when his counsel failed to appear at a pretrial conference. 389 F.2d at 886. The Fifth Circuit reversed, holding that the district court “erred in imposing the drastic sanctions [of dismissal] upon the innocent litigant.” Id. at 889. Moreover, the Fifth Circuit suggested that on remand the district court should consider assessing a penalty against plaintiff’s attorney. Id. See also Comment, supra note 3, at 856 (“Recognizing the harsh results of visiting the sins of attorneys upon their clients, some courts recently have turned instead to summarily assessing financial sanctions directly against errant counsel.”).

82. See Comment, supra note 3, at 892.
The most traditional sanction punishing the attorney rather than the client is the contempt sanction, which is a potent weapon against attorney misconduct. To be liable for contempt, however, the attorney must willfully disregarded the authority of the court. Thus, the contempt sanction is only available to police egregious conduct; it is not available to punish negligent misconduct by attorneys. Because of the mens rea requirement for contempt and the general reluctance of courts to invoke the contempt power for any but the most serious misconduct, the contempt sanction is not adequate to deter or deal with all attorney misconduct. Accordingly, it is submitted that Judge Adams correctly overruled Gamble to expand a court's inherent powers to include the power to sanction an attorney for less than willful misconduct.

It is submitted that in the interests of just and efficient operation of the federal court system, the federal district courts should be deemed to possess the broadest range of inherent powers constitutionally permissible. Such a view would encourage the district courts to work creatively toward the management of their caseloads.

While the Third Circuit in *Eash* criticized other courts for not specifying the type of inherent power on which they were relying, the Third Circuit did not expressly state which type of inherent power it considered the appropriate source of authority for the sanction imposed in *Eash*. In light of the court's discussion of inherent powers, it is most likely that the power for the monetary sanction in *Eash* was derived not

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83. For further discussion of the contempt sanction, see *supra* notes 2-3 and accompanying text.
84. See, e.g., *Sykes v. United States*, 444 F.2d 928 (D.C. Cir. 1971). In *Sykes*, the District of Columbia Circuit stated that "[a]n essential element of . . . [the] offense [of contempt] is an intent . . . to commit it. . . . By definition, contempt is a willful disregard or disobedience of a public authority." *Id.* at 930 (quoting *BOUVIER'S LAW DICTIONARY* (1914)) (emphasis in original); see also Comment, *supra* note 1, at 620-22 ("The primary limit on a court's power to punish attorneys for contempt is the well established principle that a contemnor must have 'willfully disregarded' the authority of the court.").
86. See Comment, *supra* note 3, at 862 ("[A] pervasive judicial attitude . . . regards employment of the contempt power, like formal discipline, as a measure of last resort.").
88. For a further discussion of inherent powers, see *supra* notes 29-36 and accompanying text.
90. 757 F.2d at 561-62. The *Eash* court noted that the amicus curiae in *Eash* had not pointed to the type of irreducible inherent powers fundamentally necessary to a court's existence to support the sanction. *Id.* at 562. Thus, presumably, the *Eash* court was not relying on that type of inherent power. For a
from irreducible inherent authority, but rather from either the powers arising from the nature of the court or the powers necessary in the practical sense of being useful.

The line between these two types of inherent power is far from clear. For example, the power to control a docket might seem a necessary power only in the sense of being highly useful until one considers that excessive docketing delays could result in great injustice to potential litigants. Thus, the power to control the docket arguably is included in the type of inherent power arising from the nature of the court and necessary to the exercise of all judicial powers. The Third Circuit may have intentionally failed to indicate which type of inherent power controlled in Eash because of the interrelationship of these two powers.

Courts and commentators seem increasingly willing to rely on the concept of inherent powers to support sanctions which will deter abuse of the judicial process. Both case law and commentary support the proposition that the sanction in Eash is supported by the power necessary for a court to manage its own affairs or the power arising from the nature of the court. In Link, for example, the Court noted that the power of a court to dismiss a case sua sponte for lack of prosecution was an inherent power governed "by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." Relying in part on Link, the Court in Roadway posited that "the inherent powers of federal courts are those which are necessary to the exercise of all others." It is submitted that the reasoning in Link and Roadway support the Third Circuit's decision in Eash since, in both cases, the district court was presumably acting for the purpose of deterring abusive attorney conduct that could result in injustice to litigants.

Furthermore, the rationale set forth in Link and Roadway supports Eash even though the sanction in Link was imposed on a client while the sanction in Eash was imposed on a member of the bar. In Roadway, the discussion of a court's fundamentally necessary inherent power, see supra note 33 and accompanying text.

91. For a discussion of this limited type of inherent power, see supra note 33 and accompanying text.
92. For a discussion of this type of inherent power, see supra note 34 and accompanying text.
93. For a discussion of this type of inherent power, see supra note 35 and accompanying text.
94. See, e.g., Roadway, 447 U.S. at 765; Comment, supra note 3, at 875-78 (citing supporting cases).
95. For further discussion of these bases for imposing sanctions, see supra notes 29-36 and infra notes 96-100.
96. 370 U.S. at 630-31 (footnote omitted).
97. 447 U.S. at 764 (quoting United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812)).
98. See Link, 370 U.S. at 630; see also Roadway, 447 U.S. at 765.
Court cited *Link* for the proposition that assessment of counsel fees is a less severe sanction than outright dismissal and, therefore, the inherent powers of courts included the power to assess attorneys' fees in the proper circumstances. Arguably, the inherent powers of courts over members of the bar should extend at least as far as the inherent powers of courts over litigants.

While recognizing a court's inherent powers, the *Roadway* Court noted inherent powers must be exercised with restraint and discretion because their exercise is shielded from direct democratic controls. It is submitted that the Third Circuit, by requiring a causal relationship between the harm caused and the sanction imposed, exercised an appropriate level of restraint and discretion.

Other cases have recognized the imposition of financial sanctions on attorneys as the most appropriate sanction for abuse of the judicial process. In upholding such sanctions, courts have stressed the ineffectiveness and unfairness of sanctions that punish the client. For example, the Ninth Circuit in *Miranda v. Southern Pacific Transportation Co.* noted that reasonable sanctions against attorneys might be more appropriate in many instances than penalizing litigants. The *Miranda* court reasoned that this was the case when the attorney was the culpable party and the litigant was innocent.

99. 447 U.S. at 765-66. Echoing the *Link* Court, the *Roadway* Court noted that "[t]he power of a court over members of its bar is at least as great as its authority over litigants." *Id.* at 766.

The *Roadway* Court suggested that the attorney sanctioned acted in bad faith. *Id.* at 767. This finding of bad faith did not seem to be a prerequisite to the exercise of inherent powers, however, as the Court cited *Link* with approval and there was no finding of bad faith in *Link*. *Id.* The *Link* Court merely found that the sanctionable conduct—absence from a pretrial conference—was "unexplained". 370 U.S. at 634.

100. *Roadway*, 447 U.S. at 765. In his dissent in *Eash*, Judge Seitz noted with approval this portion of *Roadway*. 757 F.2d at 572 (Seitz, J., dissenting). Such powers can, of course, be indirectly controlled by the democratic process, as when a legislative pronouncement limits the courts' inherent power by precluding its future exercise. *See*, e.g., *Michaelson*, 266 U.S. at 66 (This type of power can "be regulated within limits not precisely defined" although it cannot be "abrogated [or] rendered practically inoperative").

101. *See*, e.g., *Miranda v. Southern Pac. Transp. Co.*, 710 F.2d 516, 521-22 (9th Cir. 1983); cf. *Gabrelian v. Gabrelian*, 108 A.D.2d 445, 489 N.Y.S. 2d 914 (1985). The *Gabrelian* court noted that a court's inherent powers could support the imposition of financial sanctions against attorneys for abuse of the judicial process. *Id.* at 452, 489 N.Y.S.2d at 921 (citing *Aslanis v. Southwest Sewer Dist.*, 92 A.D.2d 855, 459 N.Y.S.2d 631 (1983)). In the opinion of the *Gabrelian* court, however, the inherent powers doctrine would only support a sanction payable to the adverse party, not one payable to the court. *Id.*


103. 710 F.2d 516 (9th Cir. 1983).

104. *Id.*

105. *Id.*
Judge Sloviter, in her dissent, asserted that the monetary sanction imposed by the district court was a criminal penalty beyond the scope of a court's inherent powers. Judge Sloviter contended that the power to proscribe criminal conduct and to establish penalties lies exclusively with Congress. The Eash majority responded by noting the direct nexus between the sanction and the unnecessary costs borne by the judicial system as a consequence of the attorney's misconduct which, it concluded, distinguished the sanction from a fine. Thus, the majority distinguished the sanction imposed in Gamble as analogous to a fine because it was "unrelated to any actual consequence of counsel's conduct and . . . knew no bounds other than each individual judge's notion of an appropriate penalty warranted by counsel's misdeeds." It is submitted that a payment's relation to actual costs distinguishes it from a fine, the amount of which is largely a matter of judicial discretion. An attorney's payment of costs in the form of a judicial sanction for waste of judicial resources pursuant to the inherent authority of the court is analogous to the payment of the opposing litigant's costs under 28 U.S.C. § 1927. The nexus between the costs incurred and the sanction imposed ensures the fairness of this use of inherent power. Furthermore, the Eash court found no authority requiring that financial sanctions on attorneys must be related to the costs of opposing litigants. Thus, the Third Circuit reasoned that a sanction tied to wasted judicial resources was appropriate. It is submitted that the sanction imposed in Eash was more analogous to costs under section 1927 than to a fine, and, as a consequence, the district court had the inherent power to impose the monetary sanction against the attorney. A finding that a court has the inherent power to impose a monetary

106. 757 F.2d at 573 (Sloviter, J., dissenting). For a discussion of Judge Sloviter's dissent, see supra notes 70-74 and accompanying text.
107. 757 F.2d at 573 (Sloviter, J., dissenting).
108. Id. at 565.
109. Id.
110. The terms "fine" and "sanction" are defined by somewhat conclusory language in the cases. When a court seeks to uphold a monetary payment imposed on an attorney, it tends to call the payment a "sanction." See, e.g., Miranda, 710 F.2d at 521 ("Because the term 'fine' is generally associated in common parlance with criminal offenses we utilize the term 'monetary sanction' to avoid this connotation."). When a judge seeks to disallow a payment, the payment is called a "fine." See, e.g., Eash, 757 F.2d at 573 (Sloviter, J., dissenting). The distinguishing factor appears to be the relation or lack thereof to actual costs related to the misconduct in question. The distinction between the payment of costs and a fine has been recognized by many courts. See, e.g., Olds v. Forrester, 126 Iowa 456, 458, 102 N.W. 419, 420 (1905) ("[C]osts accruing in the prosecution [of a case] are no part of the penalty."); State v. Wade, 88 N.E.2d 311, 312 (Ohio App. 1949) ("costs in a trial do not constitute a part of the fine"); City of Cincinnati v. Wright, 67 N.E.2d 358 (Ohio App. 1945) (same).
112. 757 F.2d at 566.
113. Id.
sanction related to wasted judicial resources still leaves open the question of the proper manner for administering the sanction. Judge Adams recommended that district courts regulate monetary sanctions through local rules, while Judge Seitz thought that principles of fundamental fairness required the existence of a local rule before the imposition of such sanctions. In contrast, Judge Sloviter concluded that such a sanction was beyond the scope of the local rulemaking power.

Assuming that the sanction fell within the inherent authority of the district court, one must next consider whether such a sanction would be an appropriate subject for a local rule and whether a local rule is a prerequisite to the imposition of such a sanction. Rule 83 of the Federal Rules of Civil Procedure provides that “[e]ach district court by action of a majority of the judges thereof may from time to time . . . make and amend rules governing its practice not inconsistent with these rules.” Moreover, a local rule cannot be a “basic procedural innovation.”

114. Id. at 569.
115. Id. at 572 (Seitz, J., dissenting).
116. Id. at 576 (Sloviter, J., dissenting).
117. Fed. R. Civ. P. 83. The rulemaking power of the district courts is authorized by statute, 28 U.S.C. § 2071 (1982). The notes of the Advisory Committee on rule 83 point out that commentators have questioned both the process for promulgating local rules and the validity of some local rules. Fed. R. Civ. P. 83 advisory committee note. See generally Note, Rule 83 and the Local Federal Rules, 67 COLUM. L. REV. 1251 (1967). That commentator traced the purposes of the rule and its background, and noted with some dismay the large number of local rules promulgated under rule 83—over two thousand—before 1967. Id. at 1259. After suggesting that the framers of rule 83 envisioned only a limited rulemaking power in the district courts, the author concluded that this power was grossly overused by district courts. Id. at 1259-63, 1275-76.

By contrast, one recent case has suggested that rule 83 should be construed liberally to promote efficiency within a district. Martinez v. Thrifty Drug & Discount Co., 593 F.2d 992, 994 (10th Cir. 1979) (citing Lance, Inc. v. Dewco Servs., 422 F.2d 778 (9th Cir. 1970)).

Rule 83 also states that “[i]n all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules.” Fed. R. Civ. P. 83.

118. The Supreme Court, in Miner v. Atlas, noted that basic procedural innovations should be introduced only after consideration of opinions “from all relevant quarters.” 363 U.S. 641, 650 (1959). Miner involved the General Admiralty Rules rather than the Federal Rules of Civil Procedure. Id. Specifically, the Miner Court considered the extent of the grant of authority contained in admiralty rule 44, which reads:

In suits in admiralty in all cases not provided for by these rules or by statute, the district courts are to regulate their practice in such a manner as they deem most expedient for the due administration of justice, provided the same are not inconsistent with these rules.

General Admiralty Rule 44. The Court held that the local rule of admiralty in question was a basic procedural innovation and thus not authorized by rule 44. 363 U.S. at 652. In a strong dissent, Justice Brennan posited that the majority’s reading of rule 44 was too narrow, noting that there was “nothing in General Rule 44 confining the local rulemaking power to exercises in the trivial.” Id. at 655 (Brennan, J., dissenting). Justice Brennan compared admiralty rule 44 to Federal Rule of Civil Procedure 83, noting with approval the broad interpr eta-
The Supreme Court has defined basic procedural innovations as those aspects of the litigation that bear on its ultimate outcome.\textsuperscript{119} The \textit{Eash} court noted that the \textit{Gamble} court regarded the fine in that case as a "basic procedural innovation" not amenable to local rule.\textsuperscript{120} Judge Sloviter took a similar view in \textit{Eash} that the sanction was a basic procedural innovation.\textsuperscript{121} The \textit{Eash} majority found, to the contrary, that judicial action to regulate attorney conduct is not a basic procedural innovation because it is not outcome-determinative.\textsuperscript{122} When a monetary sanction is imposed on an attorney, it is difficult to conceive of a situation where the sanction would affect the outcome of the litigation. Thus, it is submitted, Judge Adams' conclusion that a monetary sanction is within a district court's local rulemaking power is correct.

It is instructive to note that rules providing for sanctions for abuse of the judicial process exist in a number of jurisdictions and have not been declared inappropriate by any appellate court.\textsuperscript{123} Moreover,

\begin{itemize}
\item Miner v. Atlass, 363 U.S. 641 (1960).
\item 757 F.2d at 569. For a discussion of \textit{Gamble}, see supra notes 37-54 and accompanying text.
\item 121. 757 F.2d at 577 (Sloviter, J., dissenting).
\item 122. \textit{Id.} at 569. The \textit{Eash} court relied on the standard set forth by the Supreme Court in Miner v. Atlass, 363 U.S. 641 (1960) (defining basic procedural innovation as those aspects of the litigation which bear upon its ultimate outcome).
\item 123. The \textit{Eash} Court noted some of the districts which have promulgated such rules. 757 F.2d at 570. Local rule 20(G) for the United States District Court for the District of New Jersey provides:
\begin{quote}
All counsel in civil cases must seriously discuss the possibility of settlement a reasonable time prior to trial. The trial Judge may, in his or her discretion, assess any party or attorney with the costs of jury attendance if a case is settled after the jury has been summoned or during the trial, the amount to be paid to the Clerk. For the purpose of interpreting this paragraph, a jury is considered summoned for trial as of noon of the business day prior to the designated date of the trial.
\end{quote}
D.N.J. GEN. R. 20(G). Local rule 502 of the United States District Court of the District of Colorado reads:
\begin{quote}
\textbf{Jury Cost Assessment}
Whenever any civil action scheduled for jury trial is settled or otherwise disposed of in advance of the actual trial, then, except for good cause shown, jury costs, including marshal's fees, mileage, and per diem, shall be assessed against the parties and their counsel, or otherwise assessed
\end{quote}
Judge Adams noted that because of the varying practices and workloads of the federal district courts, sanctions for attorney misconduct are particularly amenable to local rules.124

While not demanding the presence of a local rule as a condition precedent to the imposition of a sanction of the type in Eash, the Third Circuit seemed to stress the importance of such local rules.125 Presumably, when a local rule is not a condition precedent for a monetary sanction, trial courts have broad discretion as to what conduct to sanction and what sanction to impose. Thus, substantially similar conduct before two different district court judges—or perhaps before the same judge on two different occasions—could be met with a sanction in one case and not the other.

Judge Seitz, in his dissenting opinion, asserted that it is a violation of fundamental fairness to permit a trial court to sanction an attorney for conduct when the attorney has no notice that the conduct is sanctionable.126 It is submitted that Judge Seitz states a valid concern that attorneys should be informed as fully as possible concerning exactly as directed by the court unless the clerk is notified of the settlement before twelve noon of the last business day preceding the time when the action is scheduled for trial, in time to advise the jurors that it will not be necessary for them to attend. Likewise, when any civil action, proceeding as a jury trial, is settled at trial in advance of the verdict, then, except for good cause shown, jury costs, including marshal’s fees, mileage, and per diem, may be assessed against the parties and their counsel, or otherwise assessed as directed by the court.

D. Colo. R. 502. Local rule 5.5(D) of the United States District Court for the District of Delaware states:

Whenever any civil action scheduled for jury trial is settled or otherwise disposed of in advance of the actual trial, then, except for good cause shown, juror costs, including Marshal’s fees, mileage and per diem, shall be assessed equally against the parties and their counsel and otherwise assessed as directed by the Court, unless the Clerk’s Office is notified at least three full days prior to the day on which the action is scheduled for trial.

D. Del. R. 5.5(D); cf. Note, supra note 117, at 1263-64. The Note’s author suggests that “[i]t is peculiarly difficult to bring the issue of a rule’s validity before an appellate court.” Id. at 1263. One reason for this is the discretion given to the district court judge by some local rules. Id. at 1264. Thus, the author notes that appellate review of a decision made under the local rule may focus on the judge’s exercise of discretion when in fact, the judge may have believed his ruling to have been mandated by the local rule. Id.

124. 757 F.2d at 569-70.
125. Id. at 570. The Eash court noted that other districts had promulgated rules covering the imposition of jury costs on attorneys for last minute settlements. Id. For the texts of several of the rules cited by the Eash court, see supra note 123. The Third Circuit went on to cite with approval a commentator’s view that “[s]uch local rules occupy a vital role in the district courts’ efforts to manage themselves and their dockets’ and are essential tools in implementing court policy.” Id. (citing Flanders, supra note 5, at 218, 263).
126. 757 F.2d at 572-73 (Seitz, J., dissenting). For a further discussion of Judge Seitz’s dissent, see supra notes 66-69 and accompanying text.
what conduct is deemed sanctionable.\textsuperscript{127} Not only are concerns of fundamental fairness implicated, but the absence of a local rule could damage the spirit of cooperation between the bar and the judiciary which is necessary to effective case administration. Under the majority holding, an attorney who is successful in negotiating a settlement on the eve of trial cannot be certain whether he will be met with a “thank you” or a sanction from the trial court.\textsuperscript{128}

Thus, while it is submitted that trial courts should be deemed to possess the inherent power to impose sanctions on attorneys who abuse the judicial process, it is further submitted that fundamental fairness requires notice to the bar as to what constitutes abuse of the judicial process. It is submitted that the promulgation of local rules dealing with sanctionable conduct is the best way to resolve the notice problem.\textsuperscript{129}

In conclusion, it is submitted that the Third Circuit’s decision in \textit{Eash} has a potentially profound impact on Third Circuit practitioners. If one interprets \textit{Eash} as holding that a district court can order an attorney to pay the cost of resources wasted because of the attorney’s misconduct, then a district court can assess costs for a myriad of judicial resources—everything from the cost of impaneling a jury to the cost of heating or cooling the courtroom.\textsuperscript{130} The thought that a trial court has the inherent power to impose any or all forum costs on errant attorneys

\textsuperscript{127} 757 F.2d at 572-73 (Seitz, J., dissenting). Judge Seitz suggested that imposing a sanction on an attorney for a last-minute settlement is unfair when the attorney has no actual or constructive notice that such conduct is sanctionable. \textit{Id.} Judge Seitz reached this conclusion after taking judicial notice that “settling on the eve of trial has frequently been a ‘way of life’ in the practice of law in this country for innumerable years.” \textit{Id.} at 572 (Seitz, J., dissenting). Presumably, Judge Seitz was not suggesting that frequency or longevity of conduct shields that conduct from sanction, but rather that “[n]otice of changes in the rules of the game should be conveyed to the players before the game is played.” \textit{Id.} at 573.

\textsuperscript{128} The \textit{Eash} majority did note that “fundamental fairness may require some measure of prior notice to an attorney that the conduct . . . is subject to . . . sanction by a court.” 757 F.2d at 571 (emphasis added). It is submitted that fundamental fairness does require such notice.

\textsuperscript{129} See, e.g., D. COLO. R. 502; D. DEL. R. 5.5(D); D.N.J. GEN. R. 20(G). For the text of these rules, see supra note 123. While a standing order or court admonition might also serve the notice purpose, a local rule seems more likely to be carefully considered before promulgation and thus the preferable method.

\textsuperscript{130} The idea that an errant attorney might be ordered to pay any or all forum costs has attracted the attention of courts and commentators alike. For example, the Sixth Circuit considered this issue in United States v. Ross, 535 F.2d 346 (6th Cir. 1976). In Ross, the district court imposed the cost of impaneling a jury on an attorney, purportedly under the authority of 28 U.S.C. § 1927. The Sixth Circuit overturned the sanction, holding that § 1927 did not authorize the imposition of such a sanction. \textit{Id.} at 350. The court expressed concern that errant attorneys “could be required to pay the pro rata salaries of the judge, his staff, the U.S. Attorney and marshals, in addition to the expenses for any witnesses called.” \textit{Id.} at 351 n.3.

On the other hand, one commentator asserts that “[i]f the attorney’s actions unnecessarily consume the time of a judge, jury, United States attorney, or other
will undoubtedly trouble most practitioners, however, procedural safeguards and appropriate court rules can minimize the possibility of hardships and abuses.

The Third Circuit recognized a potentially useful tool for district courts to use in controlling attorney misconduct without punishing innocent clients. The courts must continue to balance the quest for judicial efficiency and the need for fundamental fairness. Only by so doing can efficient docket management serve the ends of justice.

Carolyn L. Dessin

judicial personnel, the attorney can reasonably be held responsible for the pro rata salaries of these individuals.” Comment, supra note 1, at 628-29.