
Stephen B. Burbank
University of Pennsylvania Carey Law School

Follow this and additional works at: https://scholarship.law.upenn.edu/faculty_scholarship

Part of the Civil Law Commons, Civil Procedure Commons, Courts Commons, Jurisprudence Commons, Legal Profession Commons, and the Legal Studies Commons

Repository Citation
https://scholarship.law.upenn.edu/faculty_scholarship/1200

This Article is brought to you for free and open access by Penn Law: Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship at Penn Law by an authorized administrator of Penn Law: Legal Scholarship Repository. For more information, please contact PennlawIR@law.upenn.edu.
SANCTIONS IN THE PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: SOME QUESTIONS ABOUT POWER

Stephen B. Burbank*

The most recent proposed amendments to the Federal Rules of Civil Procedure1 present interesting questions from the perspective of


On April 28, 1983, the Court adopted the proposed amendments, effective August 1, 1983, and authorized the Chief Justice to transmit them to Congress. 51 U.S.L.W. 4501 (U.S. May 3, 1983). See Amendments to the Rules of Civil Procedure for the U.S. District Courts, H.R. Doc. No. 54, 98th Cong., 1st Sess. 3-25 (1983) [hereinafter cited as Supreme Court Report]. The proposed Rules as approved by the Judicial Conference, together with the Advisory Committee's Notes and forms are printed in id. at 35-84; see also 97 F.R.D. 165-244 (1983).

the jurisprudence of court rulemaking. That is a perspective which, except as to matters of rulemaking process and structure, has been largely neglected, and it has not informed the discussion of the most controversial of the proposed amendments, those dealing with sanctions.

The 1980 amendments, we well remember, were criticized in high places as a “compromise” and as “tinkering changes.”


2. See Burbank, The Rules Enabling Act of 1934, 130 U. Pa. L. Rev. 1015, 1018-23, 1193-97 (1982). For suggested changes in the court rulemaking process, see W. Brown, Federal Rulemaking: Problems and Possibilities 41-63, 118-34 (1981). For proposals as to structural alternatives, see id. at 64-86, 108-17. In February, 1982, the House of Delegates of the American Bar Association approved principles to “promote openness in the rule-making process” that included publishing rulemaking procedures, publishing and distributing draft rules and major changes therein, holding public hearings on draft rules and major changes, maintaining publicly available minutes of proceedings, and taking action on final reports on proposed rules at open meetings. See Summary of Action Taken by the House of Delegates of the American Bar Association 9-10 (1982). The House of Delegates also approved changes in the relevant statutes and procedures so as to delegate rulemaking authority to the Judicial Conference and to make the Conference’s Advisory Committees “broadly representative of all segments of the legal profession . . . .” Id. at 9. The long-ago promised formal statement of rulemaking procedures from the Judicial Conference’s Standing Committee on Rules of Practice and Procedure, see Burbank, supra, at 1021 n.17, has yet to appear. The chairman of that committee, Judge Gignoux, has, however, testified at a hearing on the federal court rulemaking process held by the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Committee on April 21, 1983. Copies of Judge Gignoux’s statement and of the statements of James F. Holderman (on behalf of the ABA) and Alan B. Morrison (Director, Public Citizen Litigation Group) are on file with the Hofstra Law Review.

One matter of court rulemaking jurisprudence that, in light of the proposed amendments, can no longer be neglected concerns the relationship between supervisory court rules and local court rules. The proposed amendments explicitly permit local rulemaking on some matters, see proposed Fed. R. Civ. P. 16(b), Supreme Court Report, supra note 1, at 5 (categories of cases may be exempted from scheduling order requirement), id. at 5-6 (magistrate may be authorized to enter (and modify) scheduling order), and the Advisory Committee Notes elsewhere state that local experimentation is permitted. See proposed Fed. R. Civ. P. 16 advisory committee note, Supreme Court Report, supra note 1, at 52 (responsibility for drafting pretrial order). The rulemakers’ criteria in making these judgments are not clear; nor are the implications of this greater specificity about local court rulemaking for other areas where it is lacking. How, for instance, can a local rule limiting the number of interrogatories be upheld under 28 U.S.C. § 2071 (1976) (I pretermit Fed. R. Civ. P. 83, which in my view is invalid, see Burbank, supra, at 1193 n.763), given the Committee’s 1980 decision to withdraw an amendment to Fed. R. Civ. P. 33(a) that would have blessed such rules, a decision supported by reference to “[t]he constantly-echoed criticism . . . that a limitation on the number of questions was arbitrary, unreasonable and unnecessary”? H.R. Doc. No. 306, 96th Cong., 2d Sess. 18 (1980).

3. 446 U.S. 995, 998, 1000 (1980) (dissenting statement of Powell, J.). We may not remember that “tinkering” by state legislatures was one of the rallying cries in the campaign
though compromise also appears to have played a part in the proposed amendments,\(^4\) their emphasis on sanctions represents no mere tinkering. To be sure, sanctions for a willful violation of Rule 11 and for various defaults in connection with discovery were part of the original Federal Rules of Civil Procedure.\(^5\) Moreover, at least since Professor Rosenberg’s influential 1958 article,\(^6\) sanctions have been an important item on the agenda of those concerned about discovery abuse. Sanctions received attention in the 1970 Amendments\(^7\) and again in the 1980 Amendments.\(^8\) But, with these proposed amendments, they have moved center-stage. The rulemakers propose: sanctions for violation of the certification requirement imposed by proposed Rule 11 for pleadings, motions and other papers,\(^9\) sanctions for

---

\(^{4}\) Thus, the preliminary draft of proposed Fed. R. Civ. P. 16(b) required “the judge” to enter a scheduling order, Preliminary Draft, supra note 1, at 466, and the Advisory Committee Note made clear that the choice of language was deliberate, reflecting the Committee’s “judgment that it is preferable that this task be handled by a district judge rather than a magistrate, except when the magistrate is acting under 28 U.S.C. § 636.” Id. at 472. In response to objections by federal magistrates, the Advisory Committee changed the language in its final draft to permit entry of a scheduling order by a magistrate “only when specifically authorized by district court rule.” See e.g., Comments of the National Association of United States Magistrates (Oct. 10, 1981) (copy on file with the Hofstra Law Review); Final Draft, supra note 1, at 9. The Standing Committee added language to enable a magistrate to modify a schedule “when specifically authorized by district court rule.” See letter from Hon. Walter R. Mansfield to Joseph F. Spaniol, supra note 1. The words “only” and “specifically” in proposed Fed. R. Civ. P. 16(b) were deleted by the Judicial Conference. See Proceedings, supra note 1, at 37; see also id. at 3-5.

\(^{5}\) See 308 U.S. 645, 676 (1937) (Rule 11); id. at 704 (Rule 30(g)); id. at 710-13 (Rule 37) see also id. at 736 (Rule 56(g)).

\(^{6}\) Rosenberg, Sanctions to Effectuate Pretrial Discovery, 58 Colum. L. Rev. 480 (1958).


\(^{8}\) See 446 U.S. 995 (1980).

\(^{9}\) Proposed Fed. R. Civ. P. 11 provides in pertinent part: The signature of an attorney or party constitutes a certificate by him that he has
failure to obey a scheduling or pretrial order, for failure to appear at, to be prepared to participate in, or to participate in good faith in, a conference, under proposed Rule 16,\(^{10}\) and sanctions for violation of the certification requirement imposed by proposed Rule 26 for discovery requests, responses and objections.\(^{11}\)

read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

**Supreme Court Report, supra note 1, at 4-5.**

10. Proposed Fed. R. Civ. P. 16(f) provides:

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

**Supreme Court Report, supra note 1, at 8.**

11. Proposed Fed. R. Civ. P. 26(g) provides:

(g) SIGNING OF DISCOVERY REQUESTS, RESPONSES, AND OBJECTIONS. Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the request, response, or objection and state his address. The signature of the attorney or party constitutes a certification that he has read the request, response, or objection, and that to the best of his knowledge, information, and belief formed after a reasonable inquiry it is: (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response or objection and a party shall not be obligated to take any action with respect to it until it is signed.
I will not rehearse—although I will touch on some of—the pruden­
tial arguments of those who favor and those who oppose en­
hanced emphasis on sanctions as a means to meet and deter per­
ceived abuses in the conduct of civil litigation. My concern, rather,
has to do with questions of power. The analysis is offered with no
pretensions to definitiveness. It may, however, stimulate further
thought about questions that, it seems to me, have received inade­
quate attention in the past.

In the Note to proposed Rule 11, the Advisory Committee, after
observing that “in practice Rule 11 has not been effective in deter­
rning abuses” and that the courts have been reluctant to impose sanc­
tions, states:

The amended rule attempts to deal with the problem by build­
ing upon and expanding the equitable doctrine permitting the court
to award expenses, including attorney’s fees, to a litigant whose op­
opponent acts in bad faith in instituting or conducting litigation. See,
e.g., Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980); Hall v.

In the Note to proposed Rule 26, the Committee states:

Because of the asserted reluctance to impose sanctions on at­
torneys who abuse the discovery rules, . . . Rule 26(g) makes explicit the authority judges now have to impose appropriate sanc­
tions and requires them to use it. This authority derives from Rule
37, 28 U.S.C. § 1927, and the court’s inherent power. See Road­
Col. 1980); Note, Sanctions Imposed by Courts on Attorneys Who

In one Note, the Committee acknowledges that the proposed
amendment represents an expansion of existing authority. In the
other, it asserts that the proposed amendment merely codifies ex­
isting authority and requires the courts to exercise it. The apparent

---

inconsistency suggests a need to examine the extent to which the Committee’s proposed sanction provisions are, in fact, restatements of existing authority, and to the extent they are not, whether they pose any serious questions of power.

I am uneasy whenever, as in the Advisory Committee Note to proposed Rule 26, I encounter a defense of an assertion of power predicated on multiple sources of authority. My uneasiness is conditioned generally in the context of supervisory court rulemaking by an awareness, based on historical research, that the Advisory Committee has not often been overly troubled by questions of power.14 Indeed, the Reporter of the 1938 Civil Rules, then Dean Clark, once wrote an article, based on a memorandum he had prepared for the Advisory Committee, in which he traced the authority to deal with matters of procedure affecting appeals to a variety of sources.15 He later noted to a correspondent that Professor Moore had “always laughed slyly at [that] article on the basis that there I did much rewriting of the Act. I have answered that some one must do it and that I was affording a logical basis therefor.”16

Proposed Rule 26(g) requires every attorney or unrepresented party to sign every discovery request, response or objection and provides that the signature constitutes an elaborate certification calling for, among other things, an exercise of judgment about such matters as the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. The proposed Rule also provides that if a certification is made in violation of the Rule, the court shall impose an appropriate sanction that may include reasonable expenses incurred because of the violation, including a reasonable attorney’s fee.17 To what extent does this provision regarding sanctions “make explicit the authority judges now have”?

In Roadway Express, Inc. v. Piper,18 the Court considered three

14. See Burbank, supra note 2, at 1132-37, 1194.
15. For the article, see Clark, Power of the Supreme Court to Make Rules of Appellate Procedure, 49 Harvard Law Review 1303 (1936). The memorandum, dated February 2, 1936, can be found in 2 Communications of the Advisory Committee on Rules for Civil Procedure for the District Courts of the United States (Harvard Law School Library). See also Burbank, supra note 2, at 1138 n.345.
16. Letter from Charles E. Clark to Edgar B. Tolman (Oct. 15, 1938) (extract with letter from Charles E. Clark to Monte M. Lemann (Nov. 1, 1938) (Charles E. Clark Papers, Yale University Library, box 113, folder 65)).
17. See supra note 11.
possible sources of authority for the district court's order that counsel for the plaintiffs pay more than $17,000 in costs and attorney's fees to the defendant. 28 U.S.C. § 1927 was found not to authorize an award of attorney's fees. The Court upheld the "inherent power" of a trial court to award attorney's fees in certain circumstances but defined those circumstances as necessarily including conduct that constitutes or is tantamount to bad faith, as to which there was no specific finding. Finally, the Court invited the district court on remand to consider whether to award costs and attorney's fees for failure to answer Roadway Express' interrogatories under Rule 37(b).

Now, since the Court's decision in Roadway Express, 28 U.S.C. § 1927 has been amended to include the sanction of attorney's fees. The statutory amendment should not, however, provide comfort to—indeed, it should discomfort—the rulemakers. The proposed amendment to Rule 26 (as with proposed Rule 11) provides sanctions that may include a reasonable attorney's fee without requiring conduct that was willful, in bad faith, or the like. In amending section 1927, on the other hand, Congress specifically declined to alter the standard under existing law, described by Representative Mazzoli as requiring "the attorney conduct, if sanctionable, to be solely for the purpose of delay . . . ." As he explained: "The managers on the part of the House were firm in their resolve to maintain the tough standard of current law so that the legislation in no way would dampen the legitimate zeal of an attorney in representing his client." Representative McClory observed that the House conferees

19. "Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs." 28 U.S.C. § 1927 (1976). The statute has since been amended. See infra text accompanying note 23.
20. 447 U.S. at 757-63.
21. Id. at 764-67.
22. Id. at 764.
23. The current version reads:
   "Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who 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.
24. See supra notes 9, 11.
26. Id.
were unable to accept the Senate standard (which required a finding that the attorney “intentionally engage[d] in conduct unreasonably and primarily for the purpose of delaying or increasing the cost of the litigation”)27 because it “would have lowered the standard of dilatory conduct necessary to make out a violation and would have done so to such an extent that . . . the legitimate zeal of attorneys representing their clients would have been chilled.”28 In other words, the amendment to section 1927 changed the extent of liability of an attorney found in violation. Query, however, whether in light of the policy judgments made by Congress, that is all it did,29 a question to which I shall return. In any event, the amended statute by itself hardly provides authority for the expansive approach to sanctions taken in the proposed amendments.

What of the “court’s inherent power”? Here, we immediately encounter a problem of definition that has eluded or bedeviled many courts and commentators for years.30 The Advisory Committee may

29. [W]e chose not to alter the standard of conduct required by present law. What we did change was the extent of liability to be imposed on attorneys who engage in clearly dilatory tactics . . . The extent of this liability cannot, in justice, be limited merely to filing fees and other nominal court costs as it is today. But it should extend to out-of-pocket costs that the opposition had to incur for legal fees and witness expenses because of the attorney’s misconduct. This is what our compromise does—this is all it does, and I believe that it should be accepted by this body.

Apart from failing to distinguish between judicial power to act in the absence of contrary legislative direction and power to act notwithstanding such direction, the problem discussed in the text, commentators are too quick to find assertions of inherent power in judicial opinions. Take, for instance, Hecker v. Fowler, 69 U.S. (2 Wall.) 123 (1865) (The date of decision and the proper case caption can be found in 17 Law. Ed. 759. The error in the official report was confirmed by the Court’s Reporter of Decisions on March 25, 1983.), where the Court stated: “Circuit courts, as well as all other Federal courts, have authority to make and establish all necessary rules for the orderly conducting business in the said courts, provided such rules are not repugnant to the laws of the United States.” Id. at 128 (emphasis added). The case is cited for the proposition that the federal courts possess inherent power to make rules. See, e.g., R. Rodes, K. Ripple & C. Mooney, Sanctions Imposable for Violations of the Fed-
be no exception, if the serial citation of *Roadway Express* and *Hall v. Cole*\(^3^1\) in the Note to proposed Rule 11 was intended to suggest that these cases stand for the same proposition.\(^3^2\) In *Hall*, the Court was discussing an equitable doctrine that, as the opinion itself pointed out, is within the power of Congress to reverse.\(^3^3\) In *Roadway Express*, on the other hand, the Court was discussing a power that is inherent in the sense that it trumps a contrary determination by Congress. It is for that reason that the Court observed: “Because inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion.”\(^3^4\) Indeed, apparently preoccupied with the specific context (attorney’s fees), the Court opined that “a specific finding as to whether counsel’s conduct . . . constituted or was tantamount to bad faith . . . would have to precede any sanction under the court’s inherent powers.”\(^3^5\)

It may not be fair to tax the Advisory Committee with perpetuating confusion about the concept of inherent power, both because its citation to *Hall* occurs in the Note to proposed Rule 11 and the specific reference to “the court’s inherent power” occurs in the Note to proposed Rule 26, and because the Court itself was confused in *Roadway Express*, relying on cases such as *Hall* and *Alyeska Pipeline Service v. Wilderness Society*,\(^3^6\) cases involving judicial power indisputably subject to congressional override,\(^3^7\) for the content of a judicial power “shielded from direct democratic controls.” Again, however, the inherent power concept, at least as blessed by the Su-

---

\(^3^1\) 412 U.S. 1 (1973).

\(^3^2\) See supra text accompanying note 12.

\(^3^3\) “This does not end our inquiry, however, for even where ‘fee-shifting’ would be appropriate as a matter of equity, Congress has the power to circumscribe such relief.” 412 U.S. at 9.

\(^3^4\) 447 U.S. at 764.

\(^3^5\) Id. at 767 (emphasis added). Although this dictum may be defensible, its origins, see infra text accompanying notes 36-37, provide grounds for skepticism. One might have hoped for greater “restraint and discretion” in the articulation of the doctrine of inherent power.

\(^3^6\) 421 U.S. 240 (1975).

\(^3^7\) See supra text accompanying note 33; see also 421 U.S. at 259 (“These exceptions are unquestionably assertions of inherent power in the courts to allow attorneys’ fees in particular situations, unless forbidden by Congress . . . ”).
We are remitted then to the Advisory Committee's reliance on Rule 37 and can now better understand its citation, in the Note to proposed Rule 26, of a student piece in the *University of Chicago Law Review*, where the author concludes: "[T]he great advantage of sanctions entered pursuant to the courts' rulemaking power is that negligent or reckless conduct can clearly be sufficient for liability." There is no question that provisions of Rule 37 in its present form authorize the imposition of sanctions, including attorney's fees, for conduct that does not rise to the level of bad faith and that is not as egregious as conduct triggering 28 U.S.C. § 1927. The inquiry then is whether such provisions are a valid exercise of the rulemaking power, an inquiry that requires us to consider the Rules Enabling Act of 1934.

For purposes of simplicity, it may be useful to phrase two questions: (1) Does the Supreme Court have the power under the Rules Enabling Act to promulgate rules that authorize the imposition of sanctions, including reasonable attorney's fees, on parties or their attorneys for conduct that is negligent (or, if you like, non-willful, not in bad faith, or whatever similar formulation is necessary to remove the proposed amendments from any protective umbrella of section 1927 and inherent power as defined in *Roadway Express*)? (2) Does the Supreme Court have the power under the Act to promulgate rules that require the imposition of sanctions in those circumstances? I believe the answer to the first question is affirmative, although that answer is not reached without difficulty. An affirmative answer to the second question requires the surmounting of even greater difficulties.

As long as *Sibbach v. Wilson & Co.* remains law and the Court that promulgates Federal Rules and amendments has the final word on their validity, disputations regarding validity and invalid-
ity are likely to be of purely academic interest, and the remedy, if any, to overreaching will come by way of congressional action. As one who has recently penned many pages of academic disputation on the subject, I will hardly shirk an opportunity for a brief refrain particularly because, for reasons not unrelated to those germane in a doctrinal analysis, there is some basis for prediction that Congress, given its willingness since 1973 to intercept proposed Federal Rules and amendments, will show an interest in these.

Historical research suggests that Congress’ purpose in the famous first two sentences of the 1934 Act was to allocate lawmaking power between federal institutions, the Supreme Court (as rulemaker) and Congress, and that the protection of state law was deemed a likely effect, rather than the primary purpose, of the procedure/substance dichotomy. Moreover, the history tells us that Congress intended significantly greater limitations on rulemaking than the Court has acknowledged—either implicitly in promulgating Federal Rules and amendments or explicitly in cases adjudicating their validity. Briefly, Congress’ concerns seem to have been rulemaking in areas where choices would have a predictable and identifiable impact on rights claimed under the substantive law or on interests claimed under the Constitution, and rulemaking in areas where choices would create rights substantially similar to rights under the substantive law in their effect on persons or property.

Of course, a sanction—the sanction of arrest for contempt in failing to obey an order to submit to a physical examination—was central to the Court’s decision, although not to the parties’ arguments, in the Sibbach case. Moreover, in the pre-1934 legislative materials that inform the interpretation of the Rules Enabling Act, there is evidence of particular concern about arrest, probably be-

disengage the Court from rule promulgation. See id. at 1021 n.16, 1195-96. The principles approved by the ABA’s House of Delegates in 1982 call for transfer of the Court’s functions to the Judicial Conference. See supra note 2.
43. Burbank, supra note 2.
44. See id. at 1018-20.
45. “[T]he Supreme Court of the United States shall have the power to prescribe, by general rules . . . the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant.” Act of June 19, 1934, Pub. L. No. 73-415, § 1, 48 Stat. 1064, 1064. For the subsequent history of the Act, see Burbank, supra note 2, at 1101-04.
46. See Burbank, supra note 2, at 1106-12.
47. See id. at 1121-31.
48. See Sibbach v. Wilson, 312 U.S. 1, 14, 16 (1941); Burbank, supra note 2, at 1181-84.
cause of its equivalence in the bill's sponsors' minds with a rule of substantive law.\textsuperscript{49} In any event, the Court's convoluted reasoning about Rule 37 in \textit{Sibbach} aside,\textsuperscript{50} that rule is valid even with respect to the sanction of arrest for contempt precisely because it makes no choices.\textsuperscript{51}

We need not be concerned about the sanction of arrest (for contempt) in connection with the proposed amendments to Rules 11 and 26, because the trial judge retains discretion to choose from a range of available sanctions.\textsuperscript{52} What then is the problem? As I see it, the problem is this: In the legislative history of the amendments to \textit{28 U.S.C.} § 1927, Congress itself identified as a concern the effect of alternative choices among standards for imposing sanctions on the "legitimate zeal" of attorneys in representing their clients.\textsuperscript{53} In other words, it was not the sanction to be imposed—Congress agreed that the range of sanctions should be augmented—but the conduct triggering the imposition that was of concern. Moreover, Congress apparently believed that judgments about the effect of alternative sanctioning standards on lawyers' conduct (and, implicitly, on their clients' cases) could be made with some confidence.

Even with the gloss provided by this legislative history, I do not maintain that the proposed amendments are invalid under the standards emerging from the Rules Enabling Act's pre-1934 history. For accepting, as I do not, Congress' judgment about the predictability of impact of choices among different sanctioning standards, that impact is not identifiable in any particular class of cases.\textsuperscript{54} The rulemakers have not, however, aided their case by supplementing one rulemaking choice with another, that is, by making the imposition of sanctions mandatory upon a finding of violation.

The proposed amendments to Rules 11 and 26 differ from the

\begin{footnotes}
\item[49] See Burbank, supra note 2, at 1121-22, 1124, 1128.
\item[50] See \textit{id.} at 1181-82.
\item[51] See \textit{id.} at 1184. More generally, "[t]o the extent that a Federal Rule makes no choices or makes a choice the consequences of which are defeasible by operation of another Federal Rule, the argument for invalidity under [the standards derived from the Act's pre-1934 history] appears to be weakened considerably." \textit{id.} at 1193 (footnote omitted).
\item[52] Of course, \textit{Fed. R. Civ. P. 37}(b) does not permit the trial court to treat failure to obey an order to submit to a physical or mental examination as a contempt of court. The counterpart involved in \textit{Sibbach}, see \textit{312 U.S.} at 9, \textit{authorized, except in such cases, "an order directing the arrest of any party or agent of a party for disobeying any of such orders . . ." See Burbank, supra note 2, at 1181 n.718.}
\item[53] See \textit{supra} notes 9, 11.
\item[54] See \textit{supra} text accompanying notes 25-28.
\item[55] \textit{Cf. Burbank, supra note 2, at 1129-30 (evidence), 1183 (discovery).}
\end{footnotes}
provisions of Rule 37 in at least one significant respect: The proposed amendments require the court to impose sanctions upon violation of the respective certification requirements, whereas Rule 37 affords discretion, even though at first blush there does not appear to be any.\(^{56}\) In this aspect, the proposed amendments do not, and do not purport to, find any support in Rule 37 or in the other sources of authority relied on: (1) An inflexible requirement to impose sanctions is the antithesis of the equitable doctrine referred to in the Advisory Committee Note to proposed Rule 11. "The essence of the equity jurisdiction," the Court has reminded us, "has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it."\(^{56}\) (2) A rule affording no discretion cannot, I believe, be justified as an exercise of "inherent power" of the sort to which the Court was referring in Roadway Express. Such a rule hardly bespeaks the "restraint and discretion" to which the Court in that case referred.\(^{57}\) (3) Finally, in this aspect, section 1927 clearly contemplates the exercise of discretion by the trial judge.\(^{58}\)

The Advisory Committee's ambivalence on this score is obvious in the Notes, which, in speaking of "explicitly encouraging the imposition of sanctions,"\(^{59}\) seem to me to toll the thirteenth hour. And, again, I recognize that discretion is preserved as to the sanction that will be imposed (as well as, inevitably, in the application of the standard to any given set of facts). But a lawyer concerned about adhering to the Code of Professional Responsibility and to the Federal Rules of Civil Procedure is unlikely to assume that, after so much effort, the rulemakers have created a paper tiger. Moreover, my hypothetical lawyer cannot take much comfort from the picture of due process in sanctioning painted by the Advisory Committee,\(^{60}\) which,

55. Thus, putatively mandatory language in Fed. R. Civ. P. 37(a)(4), (b) & (d) is qualified by the identical clause, "unless the court finds that the [relevant behavior] was substantially justified or that other circumstances make an award of expenses unjust." See also Fed. R. Civ. P. 37(c). Imposition of sanctions under Fed. R. Civ. P. 37(g) is explicitly discretionary ("the court may, after opportunity for hearing, require . . . ."). But see Fed. R. Civ. P. 56(g).


57. Supra text accompanying note 34.


60. See proposed Fed. R. Civ. P. 11 advisory committee note:
The procedure obviously must comport with due process requirements. The particular format to be followed should depend on the circumstances of the situation and
although consistent with the austere landscape of *Link v. Wabash Railroad*, does not seem of one piece with the Court’s more recent expression on the subject in *Roadway Express*, or with Congress’ purpose in amending section 1927. We have apparently returned to the view that "[t]o say that a law does not violate the due process clause, is to say the least possible good about it." That is hardly the view the House and Senate managers took when, as reported by one of them, they

strongly agreed that judges who utilize section 1927 sanctions must make every effort to safeguard the rights of an attorney who may be held in violation of that section. In so doing, it is imperative that the court afford the attorney *all appropriate protections of due process available under the law*.

We are not, in any event, confined to the evidence of history in interpreting the Rules Enabling Act. The standards of rulemaking

the severity of the sanction under consideration. In many situations the judge’s participation in the proceedings provides him with full knowledge of the relevant facts and little further inquiry will be necessary. To assure that the efficiencies achieved through more effective operation of the pleading regimen will not be offset by the cost of satellite litigation over the imposition of sanctions, the court must to the extent possible limit the scope of sanction proceedings to the record. Thus, discovery should be conducted only by leave of the court, and then only in extraordinary circumstances.

*Supreme Court Report*, *supra* note 1, at 41. *See also* proposed *Fed. R. Civ. P.* 26(g) advisory committee note:

The sanctioning process must comport with due process requirements. The kind of notice and hearing required will depend on the facts of the case and the severity of the sanction being considered. To prevent the proliferation of the sanction procedure and to avoid multiple hearings, discovery in any sanction proceeding normally should be permitted only when it is clearly required by the interests of justice. In most cases the court will be aware of the circumstances and only a brief hearing should be necessary.

*Supreme Court Report*, *supra* note 1, at 60. Thus does fairness yield to the demands, as well as the jargon, of efficiency, convincing even one who is skeptical about the accuracy of the picture drawn by Resnik, *supra* note 30, that the author has a point. This is "managerial judging" with a vengeance. Note, moreover, that as recently as 1980, the rulemakers saw fit to provide in the text of *Fed. R. Civ. P.* 37(g) that a sanction might be imposed "after opportunity for hearing."

62. "Like other sanctions, attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record." 447 U.S. at 767 (footnote omitted).
allocation suggested by the pre-1934 history were formulated for another age and may not be adequate for the needs of the nation today. Whereas much of the debate about these sanctioning provisions has concerned—and the Advisory Committee appears to have painted a picture of due process with an eye to—the possible effect of "satellite litigation" on judicial administration, a procedural concern, the concern identified by Congress in the legislative history of the amendment of section 1927 is much more difficult to characterize. Consider the brouhaha about the privilege provisions in the proposed Federal Rules of Evidence.

The Rules Enabling Act allocates lawmaking power. Where our elected representatives have concluded that choices among standards for imposing sanctions on attorneys implicate the effectiveness of representation of clients, it seems to me a fair question whether those choices should be made by the rulemakers or by Congress. The question is more insistent when the trial judge's discretion is, even if only formally, constrained. It should be obvious that I do not regard the "laying before" provision of the Rules Enabling Act as a substitute for, or as equivalent to, congressional action. In light of Congress' unhappiness with that mechanism in recent years, and of the concerns expressed in connection with section 1927, the point may again become a moot one. If so, the blame lies with all of us for continuing to fail to confront "the admittedly difficult business of defining institutional limits in a federal democracy."

65. See Burbank, supra note 2, at 1104-06, 1186-97.
66. See supra note 60.
68. Compare proposed FED. R. CIV. P. 11 advisory committee note, SUPREME COURT REPORT, supra note 1, at 39 ("The rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories.") with supra text accompanying notes 25-28. The point, of course, is not that Congress' conclusion about the effect of sanctions on the "legitimate zeal" of attorneys is correct or, indeed, that against the background of the proposed amendments, the concern should dominate in the lawmaking calculus. It is rather that articulated public policy should not be ignored by the rulemakers.
69. "Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported." 28 U.S.C. § 2072 (1976).
70. See Burbank, supra note 2, at 1102, 1196.
71. See id. at 1018-20, 1196 n.779.
72. Id. at 1197.