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Sanctions Under Amended Federal Rule 11—Some “Chilling” Problems in the Struggle Between Compensation and Punishment*

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Sanctions came into their own in the 1983 amendments to the Federal Rules of Civil Procedure. Explicit authority to award money sanctions, against lawyers as well as their clients, was written into rules 11, 16, and 26, and sanctions were made mandatory for violating rules 11 and 26. These changes were provoked by a decade of criticism of the spiraling costs, delay, and abuse that have come to characterize the pretrial stage of litigation.1 These problems are rooted not only in the dynamics of the adversary system, but also in the apparent reluctance of judges to use the sanctions already at their disposal to curb abusive and dilatory practices.2

The 1983 amendments call for a significant shift in relations between court and counsel in the litigation process.3 The federal judge is now required not only to be an active case manager, but also to police lawyers who overuse, misuse, or otherwise abuse the litigation process.4 The new sanctions provisions emphasize...
and give teeth to this policing function.

Rule 11, an antiquated and rarely invoked rule that governs all filings in federal court, was substantially redrafted in the 1983 amendments. It became the centerpiece of the new role for sanctions as a powerful case management tool. Rule 11 now requires a lawyer signing a paper filed in federal court to certify that "after reasonable inquiry" the paper has an adequate legal and factual basis and that it is not interposed for "any improper purpose." Under the rule, sanctions for violations are mandatory and bad faith no longer needs to be shown to establish a violation. These two changes alone have greatly increased the number of situations in which sanctions are considered. Between August 1, 1983, when the rule took effect, and August 1, 1985, judges in more than 200 reported cases considered rule 11 sanctions.

Rule 11 sanctions can be imposed on the lawyer, the client, or both. The sanctions are viewed by some as primarily compensatory and by others as primarily punitive; the tension between these two views cannot be completely reconciled. On the one hand, sanctions are a form of cost-shifting, compensating a party for expenses incurred because of an opponent's unnecessary, wasteful, or abusive conduct. On the other hand, they are a form of punishment, imposed only on those who violate the rule. Whatever the rationale for imposing sanctions, their frequent use is likely to be a significant deterrent. An emphasis on punishment, however, heightens the rule's potential for deterring vigorous advocacy—a substantial and uncertain risk foreseen by the rule's drafters.

In this article, I will review briefly the history of rule 11 and the policy concerns that led to its amendment in 1983. I will then discuss the major changes in the rule and survey its use during the first two years following its amendment. I will explore the significance of the compensation-punishment dichotomy in the analysis and implementation of the rule's sanctions provisions and examine how courts have balanced the two objectives in specific cases. Finally, I will evaluate the potential chilling effect of rule 11 sanctions, particularly as exemplified in the punishment oriented interpretation of one the rule's major proponents, Judge William W Schwarzer of the Northern District of California. In conclusion, I will suggest that the purpose of the rule can best be served by nonmandatory sanctions and an interpretation that views the rule in the context of the Federal Rules' overall procedural scheme, and that seeks to minimize the rule's chilling effect on vigorous advocacy.

I. THE REASONS FOR CHANGE

A. THE FORMER RULE

Before its amendment in 1983, rule 11 had remained unchanged since its promulgation in 1938. It provided that, by signing a pleading, a lawyer certified that there was "good ground to support [the pleading]" and that it was "not

Litigation: The Trial Judge's Role, 61 JUDICATURE 400 (1978); S. FLANDERS, CASE MANAGEMENT AND COURT MANAGEMENT IN THE UNITED STATES DISTRICT COURTS (1977).


6. FED. R. CIV. P. 11.
interposed for delay.” Historically, the signature requirement served the purpose of generating clients by insuring that bills in equity did not get filed without assistance from counsel. The signature certified nothing concerning the grounds for the bill. The “good ground” certification included in the former rule stemmed from Justice Story’s gloss on history, which read into the signature requirement a guaranty by counsel that the pleading in question was well-founded. Story’s view was incorporated into rule 24 of the Equity Rules of 1842 and, later, into the 1912 Equity Rules.

Equity Rule 24 was the source of the language used in rule 11 when it was adopted as part of the Federal Rules of Civil Procedure 48 years ago. The “good ground” standard had received no attention in the case law before that time. On its face, the standard required that every pleading have a sound factual and legal basis. Wright and Miller construed the rule also to impose a “moral obligation” on the lawyer not to file baseless pleadings. Similarly, Risinger concluded that the rule was intended “to secure lawyer honesty.”

The former rule focused on the lawyer’s conduct, but its enforcement provisions were directed at the client. If a pleading was signed “with intent to defeat the purpose” of the rule, it could be stricken as sham—a sanction that harshly penalized the client for the lawyer’s misconduct. A “wilful” violation of the rule might also lead to “appropriate disciplinary action” against the lawyer. Such action has been rare even in recent years, because of the predominant interpretation that it could be taken only if the lawyer acted in subjective bad faith.

Described by one commentator as “the most famous and widely applicable binding precept regulating lawyer honesty in pleading,” former rule 11 was nonetheless rarely applied before its amendment in 1983. The former rule’s

8. Risinger, supra note 5, at 10-11.
9. [E]very Bill ... must have the signature of counsel annexed to it. ... The great object of this rule is, to secure regularity, relevancy, and decency in the allegations of the Bill, and the responsibility and guaranty of counsel, that upon the instructions given to them, and the case laid before them, there is good grounds for the suit in the manner, in which it is framed. J. STORY, EQUITY PLEADINGS ch. 11, § 47 (1838) (emphasis added) (quoted in Risinger, supra note 5, at 9-10).
11. Id.
12. Id. at 14.
15. Although the language of the rule was directed primarily at lawyer honesty, the provision for striking as sham historically required both a determination of the dishonesty of the pleader and of the falsity of the pleading. Risinger, supra note 5, at 16; see 5 C. WRIGHT & A. MILLER, supra note 13, § 1334, at 502 (“A motion to dismiss as sham under Rule 11 should not be granted if there is any possibility that the party can prove his case.”).
16. See Buchanan v. Blase, No. 83-C-2932, slip op. at 5 (N.D. Ill. July 30, 1984) (prior to amendment, rule 11 required “clear showing of subjective bad faith or intentional misconduct”); Badillo v. Central Steel & Wire, 717 F.2d 1160, 1166 (7th Cir. 1983) (award of attorney’s fees denied for lack of showing of bad faith); Nemeroff v. Abelson, 620 F.2d 339, 350 (2d Cir. 1980) (per curiam) (attorneys’ fees denied where action “not without foundation and hence not commenced in bad faith”).
17. Risinger, supra note 5, at 4-5.
18. Risinger found only 19 “genuine adversary Rule 11 motions,” the first in 1950. Id. at 35. Wright, Miller, and Kane cite close to 40 cases decided between 1975 and 1983 that deal with rule 11 issues other than failure to sign pleadings. 5 C. WRIGHT & A. MILLER, supra note 13, §§ 1332-34 (1983 Supp.). For an example of conduct that provoked sanctions under the former rule, see Kinee v. Abraham Lincoln Fed.
“meaningless sanctions” and “soft standards” have frequently been cited as reasons for its relative invisibility and disuse. Renewed use of the rule in recent years, however, suggests that it was less the rule’s language than prevalent ideas about the propriety of sanctions against lawyers that caused it to be ignored for so long.

Whatever its limitations, former rule 11 did address a matter of considerable concern to the drafters of the 1983 amendments: the responsibility of lawyers not to file groundless or improperly motivated papers. It thus became a prime candidate for amendment to make it an effective deterrent to tactics that ignore the social costs of litigation.

B. THE GROWING CONCERN WITH LITIGATION ABUSE

The 1983 amendments were adopted after more than a decade of mounting concern about misuse and overuse of the litigation process, and an increasing federal caseload. These concerns were expressed by Chief Justice Burger in his 1976 keynote address to the Pound Conference: “Correct or not, there is also a widespread feeling that the legal profession and judges are overly tolerant of lawyers who exploit the inherently contentious aspects of the adversary system to their own private advantage at public expense.”

Much of the specific criticism of lawyers’ behavior during this period focused on discovery tactics that subvert the spirit, if not the letter, of the rules. There was also a more general concern that lack of effective judicial oversight and tactical considerations in litigation—manipulating the process to gain an advantage for clients—that clogged the courts with frivolous suits and unnecessary pretrial activity. The traditional sources of authority for sanctioning lawyers, although suitable for truly egregious cases, were limited to situations involving subjective bad faith or intentional misconduct. Thus they could not reach much conduct that was both counterproductive and costly to the system.

A case that illustrates the frustration caused by traditional limitations on sanctions is Buchanan v. Blase, which was decided after the 1983 amendments took effect but involved pre-amendment conduct. The plaintiff, Buchanan, was a bartender who had been accused of serving liquor to a minor. He was fired after his employer was warned by the liquor commissioner that she might lose her liquor...
license if Buchanan remained on the payroll. The bartender sued the liquor commissioner, claiming violation of his civil rights under 42 U.S.C. §§ 1983 and 1985. The commissioner's lawyer wrote to the plaintiff's lawyers, who had failed to appear at the initial hearing on the defendant's motion to dismiss, warning that he would seek attorney's fees if the suit was not dismissed voluntarily. The plaintiff's lawyers replied (in the margin of the letter sent to them), "[We] are all quaking in our boots." After the motion to dismiss was granted, one of the plaintiff's lawyers denied that he had had any responsibility for handling the case. Both of the plaintiff's lawyers defended against the motion for fees solely on their own behalf, raising no argument that such an award against the plaintiff himself was unwarranted under 42 U.S.C. § 1988. Although the court reproved the lawyers for their "thoroughly unprofessional" conduct, "abjectly deficient briefing," and repeated "bungling" of the case, it nonetheless concluded that there was no basis for an award of sanctions against them under any of the standards in effect in April, 1983, when the complaint was filed:

The standards for an award of costs and fees against a lawyer under 28 U.S.C. § 1927, Fed. R. Civ. P. 11 (prior to the 1983 amendment), and the court's inherent power to punish bad faith conduct are closely related and exceedingly stringent . . . . [T]hese provisions therefore lack utility in all but the most outrageous cases . . . . They do not punish mediocre lawyering or even the sort of gross blundering exhibited in this case . . . . Nor do they punish behavior that may only be characterized as unprofessional and irresponsible.25

C. THE 1983 AMENDMENTS

The 1983 amendments to rules 7, 11, 16, and 26 have been described as an "integrated package"26 designed to make lawyers more accountable for their actions, increase judicial management of cases, improve the discovery process, and encourage use of sanctions where appropriate.27 They focus on the pretrial process and attempt to remedy the perceived inefficiencies and abuses of the system by increasing judicial oversight of litigation and by diminishing the incentives for certain kinds of litigation behavior through sanctions provisions. Rule 7(b)(3) makes explicit the application of rule 11 to motions as well as pleadings.28 Rule 16, which expands the role of pretrial conferences, is a "blueprint for management,"29 and rule 26 puts the judge in the driver's seat with respect to the scope of discovery.30 Rule 11 is a general provision that supplements the case management tools prescribed in rules 16 and 26. It imposes a revised certification re-

25 Id. at 5-6.
26 A. MILLER, supra note 4, at 2.
27 Id. at 10-11.
28 "The addition of Rule 7(b)(3) makes explicit the applicability of the signing requirement and the sanctions of Rule 11 . . . ." Fed. R. Civ. P. 7 advisory committee's note to 1983 amendment.
29 A. MILLER, supra note 4, at 20.
30 "The amendment . . . is designed to encourage district judges to identify instances of needless discovery and to limit the use of the various discovery devices accordingly." Fed. R. Civ. P. 26 advisory committee's note to 1983 amendment.
requirement on lawyers with respect to all filings;\textsuperscript{31} and it explicitly makes sanctions, including costs and attorney's fees, mandatory when violations of the requirement occur.

II. THE RULE AS AMENDED

The 1983 amendments to rule 11 altered the language of the rule's certification requirements and made several changes to its enforcement provisions.\textsuperscript{32} The impact of the rule, however, stems as much from the drafters' decision to "make the profession aware" of the rule and the obligations it imposes\textsuperscript{33} as it does from the amendments themselves. This part will discuss the rule's certification and enforcement provisions and explore the differing views of two of the rule's leading exponents regarding the purpose of its sanctions provisions.

A. THE SIGNER'S CERTIFICATION

1. Reasonable Inquiry

The rule clarifies the former requirement that there be "good ground to support" a paper by focusing expressly on both the factual and legal elements of that requirement. A lawyer (or party filing pro se) certifies by his signature that "to the best of his knowledge, information, and belief formed after reasonable inquiry" the paper is well-grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.

\textsuperscript{31} The amended rule requires the attorney to sign "[e]very pleading, motion, and other paper." Fed. R. Civ. P. 11.

\textsuperscript{32} The rule now reads:

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper, that to the best of his knowledge, information, and belief (there is good ground to support it; and that it is not interposed for delay) 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, or is signed with the intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.] it shall be stricken unless 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.

FED. R. CIV. P. 11 (new language in italics; deleted language in brackets).

\textsuperscript{33} Miller & Culp, Litigation Costs, supra note 4, at 24 col. 4. ("the revision of Rules 7 and 11 is as much a psychological exercise to get the attention of the bench and the bar as it is to make a significant change in their content").

\textsuperscript{34} Fed. R. CIV. P. 11.
The major change is the requirement of reasonable inquiry; the rule now imposes an affirmative duty to investigate the facts and the law that was not explicit under the former rule or the cases interpreting it. The Advisory Committee commented that the new "standard is more stringent than the original good-faith formula, and thus it is expected that a greater range of circumstances will trigger its violation." A lawyer's failure to make the required inquiry will result in sanctions, regardless of her subjective good faith. The language of the rule no longer restricts sanctions to "wilful" violations. Thus, sanctions have been imposed under the rule for naming the wrong defendant as a result of inadequate prefiling investigation, for bringing an action clearly barred by res judicata, for failing to meet the amount in controversy requirement for diversity jurisdiction, for making a motion to dismiss for improper venue when venue was proper and the factual basis for venue was readily ascertainable, and for bringing claims lacking an adequate factual basis.

In making the required certification, the lawyer cannot rely on the client's word alone, if further investigation of the facts can reasonably be undertaken to confirm or deny the client's story. In addition, some courts and commentators...

35. 2A J. Moore & J. Lucas, Moore's Federal Practice § 11.02[2] n.7 (1986) ("The principal change in the standard, if there is one, lies in the requirement of 'reasonable inquiry.'").
36. C. Wright & A. Miller, supra note 13, § 1333, at 499-500 ("the cases [under the former rule] do not make it clear to what extent an attorney must investigate his client's case prior to signing").

Initially, a number of courts applied the subjective bad faith standard of the pre-amendment rule to post-amendment cases. In the Seventh Circuit, for example, such decisions were apparently due to confusing language in two cases decided after August, 1983, but dealing with pre-amendment conduct. Gieringer v. Silverman, 731 F.2d 1272, 1281-82 (7th Cir. 1984) ("wilful" bad faith necessary to trigger rule 11); Suslick v. Rothschild Sec. Corp., 741 F.2d 1000, 1007 (7th Cir. 1984) (subjective bad faith test applied); see In re Ronco, 105 F.R.D. 493, 497 (N.D. Ill. 1985) (discussing confusion in Seventh Circuit regarding rule 11 standard). The Seventh Circuit has since explicitly adopted an objective test for sanctions under amended rule 11. Rodgers v. Lincoln Towing Serv., 771 F.2d 194, 205 (7th Cir. 1985).

Several other circuits have also applied an objective standard. Zaldivar v. City of Los Angeles, 780 F.2d 823, 832 (9th Cir. 1986); Eavanson, Auchmuty & Greenwald v. Holtzman, 775 F.2d 535, 540 (3d Cir. 1985); Westmoreland v. Columbia Broadcasting Sys., 770 F.2d 1168, 1177 (D.C. Cir. 1985); Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 253 (2d Cir. 1985); Davis v. Veslan Enters., 765 F.2d 494, 497-98 (5th Cir. 1985).

41. Pallante v. Paine Webber, Jackson & Curtis, No. 84 Civ. 5761 (S.D.N.Y. May 14, 1985); Cannon v. Loyola Univ., 609 F. Supp. 1010 (N.D. Ill. 1985), aff'd, 784 F.2d 777 (7th Cir. 1986); Bookkeepers Tax Servs. v. National Cash Register Co., 598 F. Supp. 336 (E.D. Tex. 1984); Ellingson v. Burlington Northern, 653 F.2d 1327 (9th Cir. 1981), reached a similar result under former rule 11, where the claim was "patently" barred by res judicata. Id. at 1332.
45. Coburn Optical Indus. v. Cilco, Inc., 610 F. Supp. 656, 659 (M.D.N.C. 1985) ("If all the attorney has is his client's assurance that facts exist or do not exist, when a reasonable inquiry would reveal otherwise, he has not satisfied his obligation [under Rule 11]."); Kendrick v. Zanides, 609 F. Supp. 1162, 1172 (N.D. Cal. 1985) (where counsel has document refuting client's allegations, he must investigate); Thompson v. Midland Prods., No. 83-7469, slip op. at 5 (N.D. Ill. Jan 20, 1984) (phone call sufficient to reconcile client's confusion regarding identity of employer against whom he sought to bring action); see also Schwarzer, Sanctions Under the New Rule 11—A Closer Look, 104 F.R.D. 181, 187 (1985) ("What is crucial under the rule is not who makes the inquiry, but whether as a result the attorney has acquired..."
have interpreted the “reasonable inquiry” requirement to vary with the lawyer’s expertise in the field and access to research sources, creating heightened standards of performance for certain segments of the bar.46

2. Improper Purpose

The rule also expands the certification requirement with respect to the purpose of the filing. It now prohibits filing for “any improper purpose,” not just for delay. This change recognizes that there are numerous tactical reasons for filing papers beside causing delay.47 The rule now gives the courts greater freedom to deal with “groundless, bad faith procedural moves.”48

Although courts and commentators have stressed that rule 11 introduces an objective standard to measure a lawyer’s conduct,49 it is more accurate to say that the rule adds an objective layer to the subjective core of traditionally sanctionable bad faith conduct.

No pre-filing inquiry can uncover law that does not yet exist, and a “good faith” standard is expressly retained in connection with arguments for the extension, modification, or reversal of existing law.50 Moreover, the improper purpose standard requires that the court attempt to fathom the motives of the signer. As one court described the test: “What an attorney is deemed to certify is both 1) his or her ‘knowledge, information, and belief formed after reasonable inquiry’—an objective test—and 2) the absence of ‘any improper purpose’—a subjective test that supported the old ‘bad faith’ requirement.”51 Under the new


47. See FED. R. CIV. P. 11 advisory committee’s note (recognizing delay only one of many improper purposes for abusing litigation process).

48. Browning Debenture Holder’s Comm. v. Dasa Corp., 560 F.2d 1078, 1088-89 (2d Cir. 1977). The court in Browning listed a number of procedural maneuvers it felt were impermissible: appeal of mooted issues, frivolous motion for summary judgment, and dragnet subpoenas. Id. at 1088.

49. See supra note 38; Schwarzer, supra note 45, at 185 (“the rule, although derived from precedents resting on bad faith, is not so limited”).

50. The language of the rule comes from disciplinary rule 7-102(A)(2) of the American Bar Association Model Code of Professional Responsibility which provides:

(A) In his representation of a client, a lawyer shall not:

   (2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by a good faith argument for an extension, modification, or reversal of existing law.

See Pudlo v. Director, IRS, 587 F. Supp. 1010, 1011 (N.D. Ill. 1984) (“Rule 11 is objective in its application except to the extent a litigant argues for a change in the law.”).

51. In re Ronco, 105 F.R.D. 493, 495 (N.D. Ill. 1985) (emphasis in original); see McLaughlin v. Western Casualty & Sur. Co., 603 F. Supp. 978, 981 (S.D. Ala. 1985) (“First, the attorney must make a reasonable inquiry into both the facts of the case and the law . . . . Second, the pleading must not be interposed for an improper purpose.”); 2A J. MOORE & J. LUCAS, supra note 35, ¶ 11.02[2] n.7 (“to fall within the ‘improper purpose’ language it will usually be necessary to demonstrate some subjective bad faith”). Judge Schwarzer maintains that the court “need not delve into the attorney’s subjective intent” in deciding whether a paper has been filed for an improper purpose. Schwarzer, supra note 45, at 195. He argues that improper purpose may be objectively determined because it can be based on a finding from the record that the filing “caused delay that was unnecessary . . . caused increase in the cost of litigation that

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rule, then, as under the old, the state of mind of the signer may still play a significant role, either in determining whether sanctions are warranted at all or in deciding the severity of the sanctions to be imposed.  

B. ENCOURAGING THE USE OF SANCTIONS

In addition to broadening the scope of sanctionable activity, rule 11 marks a dramatic shift in attitude toward the use of sanctions. The court's options are no longer limited to the drastic—and therefore rarely imposed—sanction of striking the offending pleading. Instead, the rule makes sanctions mandatory but leaves the specific sanction to the discretion of the judge, allowing it to be tailored to fit the situation. In addition, the rule provides that sanctions may be imposed upon the signer, a represented party, or both, depending on the violation. Thus, what was once a blunt instrument of power is now a flexible and efficient case management tool.

1. Mandatory Sanctions

Once a violation of any of the certification requirements is found, rule 11 makes sanctions mandatory. The court does not have discretion, as it would under rule 37, 28 U.S.C. § 1927, or its inherent powers, to conclude that sanctions are unwarranted and to deny them. This limitation on judicial discretion was imposed to "focus the court's attention" on dealing with abuse and misuse of the litigation process. One comprehensive study of sanctions under the Federal Rules prepared in 1981 concluded that "delay, obfuscation, contumacy, and lame excuses on the part of litigants and their attorneys are tolerated without any measured remedial action until the court is provoked beyond endurance."

The perceived reluctance of judges to impose sanctions has several sources: judges' sympathy, as former practitioners, for the pressures on lawyers in the

was needless, or... lacked any apparent legitimate purpose." Id. at 195 (emphasis added). This attempt to "objectify" the inquiry circumvents the plain language of the rule, which addresses the lawyer's "purpose" in filing a paper, not merely the effect of its filing. The rulemakers, however, in incorporating and expanding the "delay" provision of the old rule, have retained its subjective element. At an earlier point in his article Judge Schwarzer seems to recognize this inherently subjective aspect when he says that "[t]he key to invoking Rule 11, therefore, is the nature of the conduct of counsel and the parties, not the outcome." Id. at 185.

52. See In re Ronco, 105 F.R.D. at 498 ("though 'improper purpose' could well be an aggravating factor under the revised Rule, its absence does not insulate from sanctions the lawyer who fails the alternative objective standard") (emphasis in original); infra notes 113-127 and accompanying text.

53. "The court... retains the necessary flexibility to deal appropriately with violations of the rule. It has discretion to tailor sanctions to the particular facts of the case, with which it should be well acquainted." Fed. R. Civ. P. 11 advisory committee's note.

54. "If a pleading, motion, or other paper is signed in violation of this rule, the court... shall impose... an appropriate sanction... ." Fed. R. Civ. P. 11.

55. See Eastway Constr. Corp. v. City of New York, 762 F.2d 243 (2d Cir. 1985) (reversing trial court's denial of sanctions sought by defendant under rule 11 for plaintiff's baseless antitrust claim). The court stated, "Unlike the statutory provisions that vest the district court with 'discretion' to award fees, Rule 11 is clearly phrased as a directive. Accordingly, where strictures of the rule have been transgressed, it is incumbent upon the district court to fashion proper sanctions." Id. at 254 n.7.

56. "The text of the amended rule seeks to dispel apprehensions that efforts to obtain enforcement will be fruitless by insuring that the rule will be applied when properly invoked... . And the words 'shall impose' in the last sentence focus the court's attention on the need to impose sanctions for pleading and motion abuse." Fed. R. Civ. P. 11 advisory committee's note.

57. R. RODES, K. RIPPLE & C. MOONEY, supra note 2, at 85.

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adversary system; concern that available sanctions often punish the client for the lawyer’s misdeeds; and uncertainty about the court’s power to impose sanctions on its own initiative. 58 Rule 11 deals with each of these obstacles to effective use of sanctions. By making sanctions mandatory, the drafters of rule 11 sought to discourage any collegial inclination to overlook or minimize violations. They also hoped to maximize the deterrent effect of sanctions, a goal expressly approved by the Supreme Court in National Hockey League v. Metropolitan Hockey Club. 59

2. Retained Discretion

Although rule 11 makes sanctions mandatory, flexibility is preserved by expressly leaving to the court the selection of “an appropriate sanction.” 60 The only sanction explicitly provided for is an award of reasonable costs and attorney’s fees “incurred because of” the violation, but the rule gives the court discretion to fashion other sanctions to fit the situation before it. In addition, the court must find that rule 11 has been violated before the issue of sanctions even arises.

Rule 11 gives the court additional discretion, and necessary flexibility, by providing that sanctions may be awarded against the lawyer, the client, or both, depending on the nature of the violation and the relative responsibility of those involved. This change resolves the former dilemma about punishing an innocent client or doing nothing. 61 It also puts lawyers on notice that they will have to take responsibility for conducting litigation in a professional manner or run the risk of personal liability for sanctions.

3. Who Has Responsibility for Enforcing the Rule?

Under rule 11, the court may deal with violations on its own initiative, as well as on a party’s motion. By expressly authorizing sua sponte consideration of sanctions the rule should end any uncertainty in this area. 62 In addition, it reinforces a central theme of the 1983 amendments: the importance of case management and the role of sanctions as a tool for controlling litigation. The judge is urged by the rule and by the accompanying advisory committee’s notes to scrutinize lawyers’ conduct as “part of [her] responsibility for securing the system’s effective operation.” 63

The impact of rule 11’s mandatory sanctions is softened by the elements of

58. “Courts currently appear to believe they may impose sanctions on their own motion. Authority to do so has been made explicit in order to overcome the traditional reluctance of courts to intervene unless requested by one of the parties.” FED. R. CIV. P. 11 advisory committee’s note (citation omitted). On judicial reluctance to impose sanctions and on the usefulness of sanctions to deal with litigation abuse, see generally the articles cited supra note 2. Sofaer, Sanctioning Attorneys for Discovery Abuse Under the New Federal Rules: On the Limited Utility of Punishment, 57 ST. JOHN’S L. REV. 680 (1983) (examining 1983 amendments prior to enactment).

59. 427 U.S. 639, 643 (1976) (per curiam) (sanctions warranted “not merely to penalize... but to deter those who might be tempted to such conduct in the absence of such a deterrent”). The Advisory Committee has emphasized this function. “The word ‘sanctions’ in the caption, for example, stresses a deterrent orientation in dealing with improper... papers.” FED. R. CIV. P. 11 advisory committee’s note.

60. FED. R. CIV. P. 11.

61. See R. RODES, K. RIPPLE & C. MOONEY, supra note 2, at 70 (citing Comment, Recent Innovations to Pretrial Discovery Sanctions: Rule 37 Reinterpreted, 1959 DUKE L.J. 278, 280-82).

62. See supra note 58.

63. FED. R. CIV. P. 11 advisory committee’s note.
continued discretion noted above. Nonetheless, the message is clear. The rule seeks to eliminate whatever reluctance judges may have had to sanction those who misuse the litigation process. It puts lawyers on notice that they can no longer hide behind what has been termed an "empty head, pure heart" defense of their litigation tactics.

C. THE PURPOSE OF SANCTIONS: COMPENSATION, PUNISHMENT AND DETERRENCE

Two divergent views have emerged regarding the function of rule 11 sanctions. One emphasizes the economics of litigation, noting the rule's objective standards and its focus on the costs incurred by the nonviolator as the basic measure of sanctions. The other recognizes that the very word "sanctions" connotes punishment, with its implication of misconduct that requires corrective action by the court. These conflicting conceptions of sanctions—both of which include a deterrence aspect—have found proponents who are outspoken supporters of the rule. Professor Arthur Miller, Reporter to the Civil Rules Advisory Committee that fashioned the 1983 amendments, advocates the economic approach, while Judge William W Schwarz of the Northern District of California has emphasized the punitive aspects of sanctions.

1. Compensation or Punishment?

The language of rule 11, and the accompanying advisory committee's notes, no longer refer to subjective bad faith, willfulness, and the like, standards that have restricted the use of sanctions over the years. The purpose of the expanded certification requirement, according to Professor Miller, is to impose a "stop and think" obligation on lawyers, in order to "skim off the frivolous and improperly motivated lawsuits, motions and discovery that are polluting the federal system." Professor Miller has even asserted that the word "sanctions" in the rule is a misnomer. "Although denominated a sanction provision, in reality it is more appropriately characterized as a cost-shifting technique . . . . To some

64. Schwarz, supra note 45, at 187. As the advisory committee's note suggests, "the new language is intended to reduce the reluctance of courts to impose sanctions by emphasizing the responsibilities of the attorney and reinforcing those obligations by the imposition of sanctions." FED. R. CIV. P. 11 advisory committee's note (citations omitted); cf. Renfrew, supra note 2, at 79-84 (judges need not wait for lawyers to request sanctions; judges hesitate to punish clients for sins of lawyers, fear abuse of sanctions motions); Brazil, supra note 4, at 927-28 (judges, many of whom were litigators, empathize with zealous attorneys and refrain from imposing sanctions).


66. Miller & Culp, Litigation Costs, supra note 4, at 34, col. 1.

67. A. MILLER, supra note 4, at 18-19; see Zimmerman v. Schweiker, 575 F. Supp. 1436, 1441 (E.D.N.Y. 1983) ("This [reasonable inquiry] language represents an attempt to increase litigators' responsibility to keep ill-founded complaints and defenses out of court."). Such a facially modest view of the drafters' goal in amending rule 11 presupposes a high degree of judicial restraint in exercising the sanction power that goes with it. By and large that expectation has been met. As will be discussed below, however, some of the problems foreseen by the drafters have arisen in cases where judges have taken a more expansive view of the rule's sweep and have interpreted it as a mandate to reform the adversary system. See infra notes 155-249 and accompanying text.
degree this alters the traditional American approach to costs and brings it closer to the British system." 70 Professor Miller's view is supported by the fact that the only sanction explicitly recommended in the rule is "the amount of the reasonable expenses incurred because of the filing . . . including a reasonable attorney's fee." 71

By contrast, Judge Schwarzer espouses the view that the rule is aimed at punishing offenders, as well as deterring those who might be inclined to similar actions: "The rule provides for sanctions, not fee shifting. It is aimed at deterring conduct rather than merely compensating the prevailing party. The key to invoking Rule 11, therefore, is the nature of the conduct of counsel and the parties, not the outcome." 72 His interpretation is at least partially consistent with the very advisory committee's notes formulated by Professor Miller: "The word 'sanctions' in the caption, for example, stresses a deterrent orientation in dealing with improper pleadings, motions, or other papers." 73

In Professor Miller's lexicon, rule 11 sanctions are simply an economically rational method of encouraging lawyers to "stop and think" before they file pleadings or motions. His emphasis on the similarity of rule 11 sanctions to cost shifting is appealing for the very reason it is inaccurate. By downplaying the punishment aspect of sanctions, it seeks to make their imposition more palatable, and thus more likely to occur. Yet sanctions may be imposed only when rule 11 has been violated. The rule does not simply entitle the prevailing party on any motion to an award of fees, as a pure cost-shifting provision would. The cost-shifting characterization glosses over the fact that the rule penalizes for failure to do that which a competent lawyer is required to do—that is, to make a reasonable inquiry into the facts and the law before filing papers and to refrain from invoking court processes to gain a tactical advantage in litigation.

While talk of cost shifting tends to soften the blow of sanctions, it does not change the fact that the rule, which mandates sanctions in the absence of bad faith, fundamentally affects the traditional independence of counsel in the course of litigation. 74 Judge Schwarzer's focus on punishment makes the judge the final arbiter of a wide array of litigation decisions, with a perceived mandate to reform the conduct of lawyers. Aggressive use of rule 11 sanctions to punish lawyers threatens to chill vigorous advocacy and restrict access to the courts in ways that do not appear to have been intended by the drafters. Some of Judge Schwarzer's own opinions illustrate this danger. 75

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70. Miller & Culp, Litigation Costs, supra note 4, at 25, col. 2-3. Such a characterization of rule 11 sanctions ignores serious questions about the limits of the Supreme Court's rulemaking power. See Burbank, Sanctions in the Proposed Amendments to the Federal Rules of Civil Procedure: Some Questions About Power, 11 HOFSTRA L. REV. 997 (1983); Brazil, supra note 4, at 942-44; Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S., 260 (1975) (Congress has not "extended any roving authority to the judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted").
71. FED. R. CIV. P. 11.
72. Schwarzer, supra note 45, at 185.
73. FED. R. CIV. P. 11 advisory committee's note.
74. See Miller, supra note 2, at 34 ("Strong judicial management is a potential threat to the adversary system . . . because it calls for a significant change in the power relationship between judges and lawyers and in their respective functions.").
75. See infra parts III and IV (discussing, inter alia, Judge Schwarzer's expansive use of rule 11).
2. Deterrence

Both these views of sanctions serve a deterrence function. The punishment model makes an example of the party or lawyer sanctioned, and the cost-shifting model imposes the opposing party's costs on the violator. In both, publication of the court's opinion and/or requiring its distribution within the sanctioned firm, as well as the strength of the court's language regarding the particular violation, further the goal of deterrence.

Cost shifting itself, however, is likely to be effective as a deterrent only to the extent that the costs incurred happen to outweigh the benefits derived, for example, from delay. In all other cases, we must assume that sanctions will be accepted as a cost of litigation and that the conduct will continue. The rule's provision for imposing sanctions on the lawyer as well as the client could change the stakes in this cost-benefit analysis. If lawyers are concerned about their obligations as officers of the court, they may find their interests conflicting with their clients' over the desirability of sanctionable conduct. On the other hand, the deterrence aim may backfire; clients may seek out lawyers who have been chastised in a sanctions opinion for obstructive litigation tactics.  

III. Rule 11 IN ACTION

What has happened since rule 11 was amended? In this part I will present some preliminary statistical data about the rule's use during the first two years following its adoption. Rule 11 decisions during this initial period reveal the tension between the rule's "objective" certification provisions and mandatory sanctions, as well as the significance of a finding of improper purpose in the sanctions context. Additionally, the courts have begun to limit recovery of actual fees as sanctions. Finally, from a procedural viewpoint, I will analyze some of the problems that have arisen under the punishment model of rule 11.

A. THE FIRST TWO YEARS: A STATISTICAL SUMMARY

When rule 11 was promulgated, there was some concern that it might lie dormant, much like its predecessor, despite the efforts of the rulemakers to en-
courage the use of sanctions as a case management tool. It is clear that that particular concern was unwarranted: between August 1, 1983, when the rule became effective, and August 1, 1985, there were 233 reported district court cases in which sanctions under the rule were considered. In the 233 cases sanctions were considered 240 times. Of these 100 ordered sanctions, 85 denied them, 42 issued warnings, 9 postponed decision on the sanctions issue, and 4 invited motions for sanctions.

While the number of reported appellate opinions is still small, the number of district court opinions indicates that the availability of sanctions has become a significant factor in litigation. Furthermore, since relatively few district court opinions are published and since publication of a decision imposing sanctions against a lawyer may be viewed as a sanction in itself, the actual number of rule 11 decisions certainly far exceeds those available through computerized legal research systems or in published form.

1. The Geography of Rule 11

One-half of the rule 11 opinions in the first two years came from two large urban districts: the Southern District of New York (Manhattan) and the Northern District of Illinois, Eastern Division (Chicago). Together, these two districts accounted for only 7.8% of the federal court civil filings during the period beginning July 1, 1983 and ending June 30, 1985. Thus, the rule 11 activity in these districts is considerably greater than the volume of cases would warrant. Crowded dockets and the relative anonymity of practice may be contributing factors to the large number of rule 11 cases in these areas. Judges in these districts may be motivated to be more aggressive case managers and, therefore, to encourage the use of rule 11 to curb litigation abuses and increase the efficiency of case handling.

A few other metropolitan areas have had significant rule 11 activity, but 21
states had no reported rule 11 cases before August 1, 1985. The use of rule 11 to date has thus been concentrated in a few large urban centers.

2. The Situations in Which Sanctions are Sought

In one-third of the cases, sanctions were sought in connection with rule 12(b)(6) motions to dismiss for failure to state a claim or rule 56 motions for summary judgment. This is not surprising, since these are the two primary pretrial vehicles for examining the factual and legal merit of a claim, and thus for evaluating the reasonableness of counsel's prefilling inquiry.

The remaining cases cover a wide variety of procedural situations, including other rule 12(b) motions, motions to disqualify counsel, and motions to remand to state court. The most significant finding that emerges from this "other" category is the striking lack of rule 11 motions directed at defendants' pleadings. Rule 11 motions by plaintiffs were far less frequent than those by defendants.

In addition to being concentrated geographically, rule 11 sanctions issues have tended to recur in certain kinds of cases. Although civil rights cases accounted for only 7.6% of the civil filings between 1983 and 1985, 22.3% of the rule 11 cases involve civil rights claims. Securities cases and tax suits (the latter mostly involving pro se plaintiffs) are also disproportionately represented in the sample. By contrast, only 11.2% of the rule 11 cases involved contract claims, which accounted for 35.7% of the filings during the period surveyed. In both civil rights and pro se tax cases, concern has repeatedly been expressed about frivolous suits and their burden on the courts. If the problem is real, rule 11 may be used to cure it. Securities cases, on the other hand, usually involve high stakes; the level of strategic behavior leading to rule 11 motions may be comparably high, in contrast to more routine contract disputes.

3. How is the Sanctions Issue Resolved?

Rule 11 provides that sanctions may be sought by motion or imposed by the
court on its own initiative. Judges have not hesitated to use the power made explicit in the rule. In 30.6% of the cases studied, the court considered sanctions sua sponte, ordering them 34% of the time and issuing warnings 57.5% of the time.95

Where the parties sought sanctions, defendants were most active, as the large number of requests in connection with rule 12(b)(6) motions indicates. Defendants asked for sanctions in 54% of the cases, and they were granted 44% of the time.96 Plaintiffs moved for sanctions in only 15.5% of the cases, and 46% of those motions were granted.97

The infrequency of sanctions motions against defendants indicates that some of the implications of rule 11 may have escaped the plaintiffs’ bar. For example, there were no cases discussing the defendant’s obligation of prefiling inquiry in connection with admissions and denials in an answer.98 The widely assumed right of a defendant to put a plaintiff to his proof is not supported by the Federal Rules.99 Indeed, Rule 8(b) permits a general denial only “subject to the obligations set forth in Rule 11”;100 frivolous answers violate rule 11 no less than frivolous complaints. Can a defense lawyer, any more than a plaintiff’s lawyer, take her client’s word in preparing pleadings? How much investigation into her client’s records must a lawyer do before denying a plaintiff’s allegations? Strict enforcement of rule 11’s prefiling inquiry requirement against defendants could have far reaching consequences for the entire civil litigation process, since proof of liability often lies in the defendant’s files.

Similarly, the common practice of reciting a laundry list of affirmative defenses in the answer should be closely scrutinized under rule 11. A few cases have considered sanctions for raising defenses lacking an adequate factual or legal basis,101 but they are certainly far rarer than the number of unfounded defenses must be. If plaintiffs begin to challenge the factual and legal adequacy of defendants’ pleadings under rule 11, the use of sanctions will profoundly affect the “game” of litigation.

95. Of the 240 times sanctions were considered, they were ordered sua sponte 27 times and warnings were issued 42 times. In two cases, an order to show cause was entered, and on four occasions, the court invited a motion for sanctions.
96. Defendants requested sanctions 128 times, and they were granted 56 times.
97. Plaintiffs requested sanctions 37 times, and they were granted 17 times.
98. In Marine Midland Bank v. Goyak, 84 Civ. 1204, slip op. at 4 (S.D.N.Y. July 12, 1984) (imposing sanctions in Marine Midland Bank v. Goyak, 585 F. Supp. 1358 (1984)), for example, the court concluded that the denials in the answer were “sham” and not deserving of detailed discussion. Despite this conclusion, the court did not discuss the scope of the defendant’s duty of inquiry under rule 11.
99. See Risinger, supra note 5, at 2 n.4 (discussing former rule 11). The current rule, which imposes an affirmative duty of prefiling inquiry on all parties, should remove any lingering doubts about the latitude retained by defendants in answering under the standards of rule 8(b).
100. FED. R. CIV. P. 8(b). The rule also requires that “[d]enials shall fairly meet the substance of the averments denied.” Id.
4. Who Is Sanctioned?

The cases studied indicate that judges have exercised their discretion in deciding who is to pay whatever sanctions are ordered. In 38% of the cases granting sanctions, they were ordered against the lawyer only; in 29%, against the client only; and in 18%, against both. The remaining cases ordered sanctions without specifying who was liable for them.

The cases do not often discuss the rationale underlying these discretionary decisions. Certainly where the violation is a matter of legal judgment, sanctioning the lawyer seems most appropriate. Where a sufficient factual basis is wanting or the filing is made for an improper purpose, the specific facts before the court must guide its decision about whether to sanction the lawyer, the client, or both.

B. THE FIRST TWO YEARS: "OBJECTIVE" UNREASONABLENESS AND IMPROPER PURPOSE

During the first two years under rule 11, courts began to define the duty of prefiling inquiry imposed by the rule. They emphasized the objective nature of the new standard, although the decisions indicate that judges have widely varying views of what is objectively well-grounded advocacy. The courts also used the improper purpose standard to sanction an assortment of conduct that went unpunished under the former rule and to enhance sanctions otherwise available under rule 11.

1. "Objective" Unreasonableness

As the figures above indicate, rule 11 has been used frequently in connection with rule 12(b)(6) motions. In many instances, particularly during the first year after rule 11 was amended, courts warned plaintiffs whose claims were dismissed with leave to amend that they would be subject to sanctions if the amended complaint did not correct the factual or legal deficiencies that led to dismissal.

There is little consistency among judges, however, concerning the characteristics of an "objectively" unacceptable pleading. In Grillo v. Harrington, for example, a judge in the Southern District of New York ordered rule 11 sanctions against plaintiff and its counsel for filing a complaint in which lack of subject matter jurisdiction over a factional dispute within a state political party was plain:

102. See Blake v. National Casualty Co., 607 F. Supp. 189, 193 (C.D. Cal. 1984) ("While an attorney may have to rely upon his client for facts, knowledge and interpretation of the appropriate law is his specialty, and for which he has been specially trained. As a consequence, the attorney and not the client should bear the sanction for filing papers which violate Rule 11 by being unsupported by existing law, or as an attempt to modify the law.").

103. See, e.g., Lancaster v. Thompson, No. 82-5548 (N.D. Ill. Dec. 15, 1985) (complaint dismissed for failure to allege any facts to support claim while calling lawyer's attention to rule 11); Laterza v. American Broadcasting Co., 581 F. Supp. 408 (S.D.N.Y. 1984) (finding complaint utterly insufficient, court warned that if amended complaint did not correct the factual or legal deficiencies that led to dismissal);


It is clear to anyone with a nodding acquaintance with federal jurisdiction that that issue raises no federal question and no issue cognizable under federal law or the federal constitution, the only bases for the parties—all citizens of New York—to have access to this court. The issue posed . . . is [one] of state law to be adjudicated in the state's courts.

Another judge in the same district took a more permissive "boys will be boys" attitude. In *Coast Manufacturing Co. v. Keylon*, the judge denied a motion for rule 11 sanctions against a Delaware corporation that had sought to create diversity jurisdiction against a Michigan defendant. The corporation had sued, in its own name, on a claim that actually belonged to its Michigan subsidiary. After granting defendant's motion to dismiss, the court rejected the motion for sanctions:

> It is understandable that litigants will do a small amount of artful conniving to gain access to the diversity jurisdiction of the federal courts, and for a long time such efforts have been tolerated. It is our duty to protect the diversity jurisdiction from abuses of the sort attempted here. In doing so, we need not become punitive. That branch of the motion is denied as a matter of discretion.

While the *Keylon* case is unusual among the reported opinions for the narrow view it takes of the obligations imposed by rule 11, it is difficult to know, without empirical study, how persistent the tolerant attitude expressed in it remains. Just as we cannot have a full picture of the use of rule 11 without going beyond the reported opinions, we cannot accurately assess, without further study, the degree of resistance to vigorous enforcement of the rule. Decisions such as *Keylon*, however, raise questions about the uniformity with which the requirements of rule 11 are being enforced in the federal system.

The rule's objective standard of reasonable inquiry has resulted in widespread use of sanctions, but several courts have balked when urged to award sanctions automatically to a prevailing party. For example, the current test for deciding a rule 12(b)(6) motion is generous to plaintiffs. Dismissal is appropriate only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." A complaint that fails to meet even this minimal standard is one, by definition, that a competent lawyer would not have brought after reasonable inquiry into the facts and law, thus triggering the objective standard for sanctions under rule 11. This logical outcome has not

106. Id. at 698.
107. Id. at 3.
108. I plan to undertake such a study, based on interviews with lawyers and judges and review of court files. The result will be an empirical assessment of the impact of rule 11 on federal practice, as well as judges' and lawyers' views about its implementation and proper scope.
109. See Ring v. R.J. Reynolds Indus., Inc., 597 F. Supp. 1277, 1281 (N.D. Ill. 1984) (granting motions to dismiss and for sanctions, but stating that "mere fact a complaint is dismissed does not make the attorney who files the complaint liable for sanctions"); Robinson v. C.R. Laurence Co., 105 F.R.D. 567, 568 (D. Colo. 1985) ("A defendant is not entitled to attorney fees as an automatic consequence of success on a motion to dismiss for failure to state a claim.").
been readily accepted, however, perhaps in part because of the potential chilling effect of such automatic consequences of dismissal.

2. Certification Imposes a Continuing Duty

Although rule 11 by its terms speaks to the certification made upon filing a given paper, the courts have interpreted it as imposing a continuing duty on counsel to revise pleadings that may have been well-grounded when filed. Thus, in In re Continental Securities Litigation,11 the court denied a defendant's motion to dismiss for failure to state a claim on the grounds that the complaint was adequate on its face. The court noted that a motion for summary judgment after discovery would be appropriate, given defendant's claim that there was no basis for joining him in the suit. It also noted that sanctions under rule 11 might be sought "[i]f it develops that [defendant] was included in the complaint without reasonable basis, or has been kept in this case beyond the point where his improper joinder should have been evidence [sic]."112

Imposing such a continuing duty properly requires the parties to use information gained in discovery to refine and narrow the issues and claims on which they intend to go forward. In addition, it discourages the use of litigation to coerce settlement for purely economic reasons.

3. Improper Purpose

The requirement that a paper not be filed for "any improper purpose" applies regardless of the objective factual or legal basis for the paper. As a separate element of the rule's mandated certification, it requires assessing the state of mind of the filing party.113 As applied by some courts that have construed rule 11, the improper purpose standard—connoting bad faith on the part of the filing party—has served primarily to enhance sanctions for conduct that also failed to meet the objective standard of having a reasonable basis in fact and law.114 Improper purpose has been inferred from a violation of the objective standard.115

This inferential approach to the determination of improper purpose was used in two cases from the Northern District of California, both involving the same law firm, which specializes in management labor law. In Huettig & Schromm v. Landscape Contractors Council,116 the court sanctioned the firm for bringing suit against the union when

111. No. 82-4112 (N.D. Ill. April 9, 1984).
112. Id. at 2. Accord Woodfork v. Gavin, 105 F.R.D. 100, 104 (N.D. Miss. 1985) ("this rule as amended obligates an attorney . . . to continually review, examine, and reevaluate his position as the facts of the case come to light"); Schwarz, supra note 45, at 200 ("A position that might be reasonable in a paper filed early in the action may become unreasonable or frivolous in the light of subsequent discovery.").
113. See supra part II.A.2 (interpreting "improper purpose" language as retaining subjective core to objective certification requirement of amended rule 11).
115. See United States ex rel U.S.-Namibia (S.W. Africa) Trade & Cultural Council v. Africa Fund, 588 F. Supp. 1350 (S.D.N.Y. 1984) (repeated groundless suits established improper purpose); Felix v. Arizona Dept of Health Servs., 606 F. Supp. 634, 636 (D. Ariz. 1985) (allegations so groundless that improper purpose established); Schwarz, supra note 45, at 196 ("Improper purpose may be manifested by excessive persistence in pursuing a claim or defense in the face of repeated adverse rulings . . . ").
116. 582 F. Supp. 1519 (N.D. Cal. 1984), aff'd, 790 F.2d 1421 (9th Cir. 1986).
counsel knew or should have known that . . . their client had neither a cause of action nor any claim to invoke this Court’s jurisdiction. . . . Given the claimed expertise and experience of these attorneys, a strong inference arises that their bringing of an action such as this was for an improper purpose.\footnote{117}

In \textit{Hudson v. Moore Business Forms},\footnote{118} the same firm represented the defendants in a suit alleging wage discrimination and breach of an employment contract. The firm was sanctioned, by a different judge, for filing “spurious” counterclaims with an “unconscionable” request for $200,000 in compensatory damages and $4,000,000 in punitive damages against the plaintiff, an unemployed 50-year-old woman whose husband was retired.\footnote{119} The court found the defendant’s legal arguments, which sought to impose liability on the plaintiff for breach of the conveant of good faith and fair dealing, “directly contrary to the developing body of law in the employment field.”\footnote{120} The lack of plausible justification for either the compensatory or punitive damages claims, the court said, “raises a strong inference that the defendant’s motive in bringing the counterclaim was to harass the plaintiff and to deter similar actions from being brought.”\footnote{121}

In \textit{Huettig & Schromm} the court awarded $5,625 in attorney’s fees to the defendant union. In addition to this fairly routine sanction, the court ordered the firm to certify that no part of the sanction was paid by the client and that a copy of the opinion was given to every lawyer in the firm.\footnote{122} The court also chose to publish its strongly worded opinion, in which it reminded counsel that “the heaviest sanction they will suffer is one they have inflicted on themselves—loss of the courts’ [sic] confidence in their probity.”\footnote{123} Given the court’s condemning language, publication of the opinion must be considered a severe sanction in itself.\footnote{124}

In \textit{Hudson} the court awarded plaintiff over $14,000 in costs and attorney’s fees for defending against the baseless counterclaim and litigating the sanctions motion. The award was made not only against the law firm representing defendant, but also against the individual lawyers who signed the counterclaim. In ordering the sanctions, the judge referred to \textit{Huettig & Schromm}:

\begin{quote}
This is not the first time that a judge of this District has imposed sanctions on this firm . . . . If these counsel persist in stepping over the line of permissible advocacy, more severe sanctions must be considered. Opposing parties and their counsel, the firm’s own clients and
\end{quote}

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\begin{footnotes}
117. \textit{Id.} at 1522.
119. \textit{Id.} at 480-81.
120. \textit{Id.} at 483.
121. \textit{Id.}
122. 582 F. Supp. at 1522-23 (Schwarzer, J.). Judge Schwarzer has required dissemination of a rule 11 sanctions order in other cases, presumably for its deterrent effect. See \textit{Golden Eagle Distrib. Corp v. Burroughs Corp.}, 103 F.R.D. 124, 129 (N.D. Cal. 1984) (decision must be shown to all attorneys in firm), \textit{rev’d}, No. 84-2602 (9th Cir. Oct. 9, 1986); \textit{Larkin v. Heckler}, 584 F. Supp. 512, 514 (N.D. Cal. 1984) (decision must be shown to all Assistant United States Attorneys in district).
123. 582 F. Supp. at 1522.
124. See Schwarzer, \textit{supra} note 45, at 201 ("Judges are prone to forget the sting of public criticism delivered from the bench. Such criticism, while potentially constructive, can also damage a lawyer’s reputation and career . . . . There is a distinction between bad practice and lack of integrity."); \textit{cf. supra} note 82.
\end{footnotes}
the court should not be forced to expend time and money on these lawyers' reckless adventures.\textsuperscript{125}

These opinions illustrate the new attitude toward sanctions that has been fostered by rule 11. Although judges often felt their hands were tied by the "exceedingly stringent" test of bad faith under former rule 11,\textsuperscript{126} they now impose sanctions frequently for failure to meet the objective test of reasonable inquiry and do not hesitate to punish misuse of the litigation process for tactical ends.\textsuperscript{127}

The sheer number of cases in which attorney's fees have been awarded for violation of rule 11 cannot fail to have a generalized deterrent effect on lawyers. While everyone might agree that such a result is salutary if it deters frivolous pleadings and motions, agreement about what exactly is frivolous would be harder to reach. One of the greatest concerns about rule 11 was that its liberalized sanction provisions would have a chilling effect on vigorous advocacy.\textsuperscript{128} As I will argue in part IV of this article, that concern is well-founded and has not been dispelled by experience under the rule.

C. "REASONABLE" ATTORNEY'S FEES AS COMPENSATION: THE LIMITS ON KEEPING THE METER RUNNING

In 96\% of the cases studied in which sanctions were imposed for violation of rule 11, the courts awarded "reasonable" costs and attorney fees to the party opposing the sanctioned paper.\textsuperscript{129} Only a handful of courts have imposed sanctions other than, or in addition to, fees and expenses.\textsuperscript{130}

What standards have evolved in the interpretation of "reasonable" fees and

\begin{itemize}
  \item \textsuperscript{125} 609 F. Supp. 467, 485 (citation omitted); see also Lepucki v. Van Wormer, 765 F.2d 86, 89 (7th Cir. 1985) (per curiam) ("We will no longer tolerate abuse of the judicial process by irresponsible counsel."); cert. denied, 106 S. Ct. 86 (1985).
  \item \textsuperscript{126} See supra part I.B.
  \item \textsuperscript{127} See e.g., Chevron v. Hand, No. 84-1954 (10th Cir. June 7, 1985) (sanctions against plaintiff for filing rule 60(b) motion "solely for purposes of delay"); Lepucki v. Van Wormer, 765 F.2d at 89 (sanctioning attorney for repeatedly bringing suits "as a device for asserting certain philosophical beliefs about the tax laws of the United States"); WSB Elec. Co. v. Rank & File Comm. to Stop the 2-Gate Sys., 103 F.R.D. 417, 421 (N.D. Cal. 1984) (litigation used to pursue "economic or political objectives which have no place in the courts").
  \item \textsuperscript{128} Miller & Culp, Litigation Costs, supra note 4, at 34.
  \item \textsuperscript{129} The largest single award in the sample is $37,365, granted by Judge Schwarzer in Kendrick v. Zanides, No. 84-6295 (N.D. Cal. Aug. 28, 1985). The materials collected by the A.B.A. Litigation Section, supra note 77, include one unreported $50,000 sanction in Alaska, Orange Prod. Credit Ass'n v. O/S Frontline, No. A84-063, Order at 13 (D. Alaska Mar. 19, 1985). The National Law Journal of Nov. 11, 1985, reported a case, Glaser v. Cincinnati Milacron, No. 82-64 (W.D. Pa. 1985), now on appeal to the Third Circuit (No. 85-3483), in which sanctions of almost $160,000 were granted to 89 wrongly named defendants in a product liability case.
  \item \textsuperscript{130} See supra note 122. Five cases ordered sanctions in addition to attorney's fees: court fines were awarded in Kirksey v. Danks, 608 F. Supp. 1448 (S.D. Miss. 1985); Donaldson v. Clark, 105 F.R.D. 526 (M.D. Ga. 1985), rev'd, 786 F.2d 1570, reh'g granted and opinion vacated, 794 F.2d 572 (11th Cir. 1986); Snyder v. IRS, 596 F. Supp. 240 (N.D. Ind. 1984); Young v. Williams, 596 F. Supp. 141 (N.D. Ill. 1984); and payment of interest was ordered on a judgment that was delayed by a rule 11 violation in Davis v. Veslan Enters., 765 F.2d 494 (5th Cir. 1985). In only five cases were sanctions other than attorney's fees ordered. These included paying money into court, Barton v. Williams, 38 Fed. R. Serv. 2d (Callaghan) 966 (N.D. Ohio 1983); Dore v. Schultz, 582 F. Supp. 154 (S.D.N.Y. 1984); dismissal, Valle v. Taylor, 587 F. Supp. 514 (D.D.C. 1984); deeming certain allegations of the complaint admitted, Johnson v. Department of Health, 587 F. Supp. 1117 (D.D.C. 1984); and placing a reprimand in the court's file on the sanctioned lawyer, Allen v. Faragasso, 585 F. Supp. 1114 (N.D. Cal. 1984). This unusual sanction (what is "the court's file" on a lawyer?) was imposed by Judge Schwarzer. The A.B.A. has considered implementing a version of this sanction. See infra note 249.
\end{itemize}
costs under the rule? The courts begin their calculation with the actual expenses incurred because of the sanctioned filing, but they have awarded substantially less than claimed in some cases. Although these courts recognize the compensatory purpose of sanctions, they emphasize that rule 11 was not designed to give the party seeking sanctions a free ride. Courts have adopted a number of criteria for determining the reasonableness of actual expenses that discourage the party seeking sanctions from needlessly incurring fees and costs. Similarly, where the perceived goal is punishment, courts have both decreased and increased the fee award sought to make it commensurate with the violation punished.

1. The Duty to Mitigate: Avoiding Unnecessary Motions

Chief Judge Robert F. Peckham of the Northern District of California has articulated a “duty of mitigation” owed by the party seeking rule 11 sanctions, to deter counsel from unnecessarily escalating costs. In United Food & Commercial Workers Union Local No. 115 v. Armour & Co.,131 he ordered plaintiff to pay only $7,500 of the approximately $22,000 claimed by defendant as fees and costs attributable to its defense against a claim alleging wrongful refusal to arbitrate. While the partial award of fees did not “in any way reflect a decision that the actions of the union’s counsel were excusable,”133 the court concluded that a lawyer faced with a violation of rule 11 has a duty to use the “least expensive alternative” to bring the matter to the court’s attention early in the litigation. In this case, the court concluded, the suit was so patently frivolous that defendants, rather than going through the formality and expense of a summary judgment proceeding, should first have sought to raise the lack of factual basis for plaintiff’s complaint in a telephone status conference with the judge.134 Although the purpose of rule 11 is to ensure that “the victims of frivolous lawsuits do not pay the expensive legal fees associated with defending such lawsuits,”135 the court also noted that the rule “only authorizes ‘reasonable’ fees, not necessarily actual fees.”136

Courts have also denied actual fees when the party entitled to fees has “overlawyered” the case, either by assigning too many attorneys to it or by doing too much work in light of the simplicity of the issues. In Marine Midland Bank v. Goyak,137 the court, in ruling on a request for fees and costs in excess of $7,000, awarded just over half that amount, noting that on this comparatively simple matter there was an excess of professional services. Just why two senior partners, one associate, and a paralegal were required to work on this matter is not clear . . . . As this Court has stated on another occasion: “undoubtedly, parties to a litigation may

131. 106 F.R.D. 345 (N.D. Cal. 1985); see also Schwarzer, supra note 45, at 198 (“mitigation principle should apply in the imposition of sanctions”).
133. Id. at 350.
134. Id. at 349. This approach is supported by amended rule 16(c)(1), which explicitly contemplates the elimination of “frivolous claims or defenses” without resort to formal summary judgment motions. Fed. R. Civ. P. 16(c)(1) advisory committee’s note.
136. Id.
137. No. 84 Civ. 1204 (S.D.N.Y. July 12, 1984).
What fees are reasonable will vary with the complexity of the case and the court's certainty that a rule 11 violation has occurred. Some judges will undoubtedly insist on the use of the formal motion machinery whenever dismissal may result. Nonetheless, the recognition of a duty of mitigation when attorney's fees are sought under rule 11 will avoid an excessive burden on the sanctioned party and diminish the tactical value of orchestrating rule 11 motions to increase the cost of litigation for the other side. It will also underscore the proposition that the "just, speedy, and inexpensive determination of every action" is a joint responsibility of the court and of counsel for both sides.

2. Attempts to Mitigate: Informal Contact with Opposing Counsel

A corollary of the duty to mitigate the expense of bringing a rule 11 violation to the court's attention is seen in cases in which sanctions were sought only after attempting to bring the defects of the pleading to the attention of opposing counsel. In Brownlow v. General Services Employees Union, the court awarded attorney's fees against the plaintiff's lawyer in a title VII case for pursuing a claim even after the defendant's lawyer advised him by letter of cases clearly establishing that the claim had no legal basis because of the plaintiff's failure to file first with the Equal Employment Opportunity Commission. The court was willing to excuse the original filing of the complaint on the grounds that the plaintiff's lawyer might have "failed to locate authority on the issue," but it held that continuing to assert its baseless legal position after being put on notice of the law by the defendant was a violation of rule 11.

The frivolousness of the plaintiff's position was demonstrated by the fact that in its opposition to the defendant's motion for summary judgment the plaintiff never mentioned the cases cited in the defendant's letter urging dismissal. Since the plaintiff's lawyer simply ignored existing law, the court concluded, his position could not be construed as a good faith argument for a change in the law.

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138. Id. at 10; see also Weissman v. Rivlin, 598 F. Supp. 724, 726 (D.D.C. 1984) ("the hours claimed far exceed the amount of time that should have been necessary . . . to dispose of the diversity issue").
139. Obviously, for such a duty to be meaningful, the judge must be willing to get involved in the case at an early stage, as amended rule 16 envisions.
140. FED. R. CIV. P. 1.
142. Id. at 35,897-98.
143. Id. at 35,898. The court also noted that when he filed suit, plaintiff's lawyer might reasonably have believed that Guardsmark "would waive the defense that plaintiff failed to comply with filing requirements." Id. at 35,897.
144. Id. at 35,898. The court concluded fees were justified under title VII and 28 U.S.C. § 1927, as well as under rule 11. It made the award only under the latter two, since fault in the matter lay with the attorney, not the client, and plaintiff would have been liable for an award under title VII. See Smith v. United Trans. Union Local No. 81, 594 F. Supp. 90, 100-01 (S.D. Cal. 1984) (awarding rule 11 sanctions against defendant for repleading affirmative defenses previously stricken, although plaintiff provided to defendant a copy of a case that "laid to rest" the legal argument on which defendant relied).
145. Brownlow, 35 Empl. Prac. Dec. at 35,898. The attempt to avoid sanctions under rule 11 by belatedly arguing that a legal position unsupported by existing law is actually one for the "extension, modification or reversal" of existing law has been given short shift by at least one court, SFM Corp. v. Sundstrand, 102 F.R.D. 555, 559 (N.D. Ill. 1984) ("SFM has never until now made any such argument..."
Given the possible justifications for filing the complaint in the first place, the court limited the award to fees incurred by the defendant after the plaintiff's lawyer had filed papers indicating his intent to pursue the claim despite the defendant's letter.

In *Pudlo v. Director, IRS*, the court denied rule 11 sanctions in a case in which a petition to quash an Internal Revenue Service summons was filed one day late. The court found that Pudlo's inquiry into the applicable law was reasonable under the circumstances and thus no sanctions were warranted. It also noted that Pudlo's counsel's prompt voluntary dismissal of the suit when the applicable law was called to his attention militated against sanctions. The court felt "less inclined to grant awards of attorney's fees when litigants are that forthcoming and non-obstructionist." Under the duty to mitigate recognized in *United Food & Commercial Workers Union*, such informal methods of dealing with frivolous complaints—common enough already among practicing attorneys—should be encouraged. When such efforts fail and the court ultimately finds dismissal to be warranted, the fact that the party seeking sanctions sought to resolve the dispute informally should bolster the claim for attorney's fees under rule 11.

D. "REASONABLE" FEES AS PUNISHMENT: MAKING THE PUNISHMENT FIT THE OFFENSE

When the court's purpose in awarding sanctions is to punish, the determination of reasonable fees does not depend on the steps taken to mitigate expenses by the party seeking sanctions. Instead, the court assesses the conduct and the resources of the party against whom sanctions are being sought to determine an appropriate sanction. Thus, where the actual fees are high, though not viewed as excessive, the award may be reduced to avoid imposing too great a burden on the sanctioned party, in light of the severity of the violation or the financial means of that party.

For example, in *Heimbaugh v. City & County of San Francisco*, Judge Schwarzer, "taking into consideration plaintiff's economic situation and inexperience," ordered him to pay $50 toward defendants' expenses in obtaining summary judgment on a claim that the judge found to be "frivolous on its face." Similarly, in *In re Itel Securities Litigation*, the court reduced a fee request of almost $95,000 to $15,000, stating that the amount sought "far exceeds the proper amount of sanctions for [the improper] conduct," even though the

147. Id. at 1014.
148. Id. at 1012.
151. 596 F. Supp. 226 (N.D. Cal. 1984), *aff'd*, 791 F.2d 672 (9th Cir. 1986).
152. Id. at 235.
court considered referring the offending lawyer to the New York Bar Association for disciplinary action.\textsuperscript{153} This punishment oriented limitation acts as a discretionary cap on fee awards under rule 11 and is an example of how the cost-shifting rationale may yield to concern that the sanction imposed be appropriate to the violation. The court in \textit{Itel} explicitly found the original fee request to be "realistic and reasonable" but concluded that compensation would be excessive punishment.\textsuperscript{154}

There is only one case in which the fees awarded clearly exceeded the expenses incurred as a result of the rule 11 violation. In \textit{Kendrick v. Zanides},\textsuperscript{155} Judge Schwarzer awarded over $37,000 in fees to the four lawyers representing the various defendants,\textsuperscript{156} to be paid by the lawyer who brought the action. The suit was a federal civil rights action, originally brought in state court and removed to federal court by the defendants. Although Judge Schwarzer acknowledged that the complaint was not governed by rule 11 when it was filed, he awarded fees from the time of filing in state court on the ground that rule 11 "is not limited to compensatory remedies but may include punitive sanctions."\textsuperscript{157} He reasoned that if he imposed sanctions only for fees incurred after an amended complaint was filed in federal court, the sanctions would be "insignificant" and the lawyer's "egregious misuse of the processes of the courts, the evil at which Rule 11 is aimed,"\textsuperscript{158} would go largely unpunished. Judge Schwarzer further defended the punitive sanctions award on the grounds that when the plaintiff's lawyer filed the state court action, he "must be assumed as an experienced attorney to have known that the federal government removes all actions against it to federal court . . . and that he would be subject to the Federal Rules of Civil Procedure."\textsuperscript{159}

The court's rationalization about the inevitability of removal scarcely supports sanctions authorized by a rule that applies only to papers filed in federal court. The result in \textit{Kendrick} may be justified, if at all, by reference to Judge Schwarzer's interpretation of the punitive purpose of rule 11\textsuperscript{160} and the aggravated nature of the lawyer's conduct, which almost led to his suspension from

\begin{footnotes}
\item[153] Id.
\item[154] Id.; see also Taylor v. Prudential-Bache Sec. Inc., No. 83-1103, 83-1161, 83-1537, 84-150, slip op. at 7 (N.D.N.Y. Aug. 3, 1984) ("potentially devastating effect" on pro se litigant of award sought); McQueen v. United Paperworkers Int'l Union Local 1967, C-1-84-1196, slip op. at 9 (S.D. Ohio Feb. 26, 1985) (award reduced because, in part, counsel's actions "negligent" as opposed to willful).
\item[157] \textit{Kendrick}, No. 84-6295 slip op. at 16 (N.D. Cal. Aug. 28, 1985). In assessing the fee request of the four federal defendants, Judge Schwarzer did deny more than $5,000 in fees and $700 in costs sought by the SEC attorneys, on the grounds that they had overlawyered the case and that some of the travel for which they sought compensation was unnecessary. \textit{Id.} at 14.
\item[158] Id. at 12.
\item[159] Id.
\item[160] See Schwarzer, supra note 45, at 185 ("rule [11 is . . . aimed at deterring and, if necessary, punishing improper conduct"). In \textit{Kendrick} Judge Schwarzer based his fee award not only on rule 11, but also on 28 U.S.C. § 1927 and the inherent powers of the court, both of which require a finding of bad faith conduct. Although neither of these other sources of authority would justify awarding fees for conduct in state court prior to removal, their applicability does not depend on the signing "trigger" of rule 11. Since virtually every act except the filing of the original complaint (including motions to dismiss and for summary judgment by the defendants) did take place in federal court, the attorney's fees awarded were in fact primarily for work done after removal.
\end{footnotes}
practice before the district court. As Judge Schwarzer himself has recognized, however, imposing monetary sanctions that exceed the expenses incurred because of a rule 11 violation raises serious problems; "courts need to be wary about imposing fines, which are criminal in nature." When the desire to punish causes the court to abandon the cost-shifting policy set forth in rule 11, there is a danger that the rule will be used to circumvent the due process safeguards to which a party is entitled before criminal sanctions are imposed. Judge Schwarzer's interpretation of the discretion accorded the trial court by rule 11 allows an award of sanctions that would otherwise be permissible only after resort to the contempt power, with all its procedural protections. 163 The fact that sanctions are now mandatory under rule 11 gives the rule enormous scope. Nevertheless, there is no indication that the drafters, in giving judges discretion to fashion "an appropriate sanction," meant to encourage the frankly punitive approach taken by Judge Schwarzer in Kendrick and several other cases. Instead, the rule should be read to grant discretion to award less stringent sanctions than reasonable costs and attorney's fees, where appropriate, but not to condone imposing fines or other penalties solely to punish violators. 164

IV. SOME CHILLING ASPECTS OF SANCTIONS

It is too early to know what the long term effect of rule 11 will be—whether it will serve the salutary purpose of curbing the excesses of adversarial zeal or stifle

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161. In his first order on the sanctions issue in Kendrick Judge Schwarzer wrote that the "only reasonable conclusion is that Kendrick and his attorneys filed the amended complaint ... not to prevail in the action, which they knew they could not, but to serve their vindictive purpose to damage the defendants' reputations and subject them to personal harassment," 609 F. Supp. at 1173, and he ordered the attorneys to show cause why they should not be suspended from practice in the Northern District of California. Id.

162. Schwarzer, supra note 45, at 202; see W. SCHWARZER, MANAGING ANTITRUST AND OTHER COMPLEX LITIGATION 156 (1982) ("Fines, on the other hand, because of the stigma which attaches to them, should not be imposed except by way of criminal contempt proceedings.").

163. See Miranda v. Southern Pac. Trans. Co., 710 F.2d 516, 522 (9th Cir. 1983) (procedural safeguards must be observed except in exigent circumstances such as those in which summary criminal contempt is pursued). Although sanctions like those in Kendrick are unlikely to be imposed under rule 11 absent a finding of improper purpose, the uncertainty in the cases about whether such a finding requires subjective bad faith raises the possibility that sanctions could be ordered without any inquiry into intent. Although the lawyer in Kendrick was granted a full opportunity to brief and argue the sanctions issue, the question arises whether he should not also have been afforded a jury trial, in light of the serious nature of the fine imposed, see Bloom v. Illinois, 391 U.S. 194 (1968) (constitutional right to jury trial in criminal contempt case because penalty potentially serious), and a hearing in front of a different judge, given Judge Schwarzer's strong condemnation of his conduct in the original order to show cause, Kendrick, 609 F. Supp. at 1173. See Mayberry v. Pennsylvania, 400 U.S. 455 (1971) (defendant tried for criminal contempt after slandering judge should get trial before another judge); Textor v. Board of Regents, 711 F.2d 1387, 1396 (7th Cir. 1983) (on remand case should be heard by judge "who has not already expressed his displeasure with plaintiff's counsel"); cf. W. SCHWARZER, supra note 162, at 166-69 (punitive or remedial nature of sanction determines character of contempt proceeding and necessary procedural safeguards).

164. 28 U.S.C. § 1927 (1982) permits only an award of "excess costs, expenses, and attorneys' fees incurred because of" the sanctioned conduct (emphasis added). See United States v. Blodgett, 709 F.2d 608 (9th Cir. 1983) (remanding for determination that sanctions award, justified under either 28 U.S.C. § 1927 or inherent power of court, represented only actual costs and expenses incurred by government).

165. Prof. Miller, for example, views the court's discretion in determining the sanction as a "safety valve" that relieves the pressure of the mandatory sanctions language. "In some cases, an 'appropriate' sanction will be nothing more than an oral reprimand by the court or an expression of disagreement with the lawyer's decision." Miller & Culp, Litigation Costs, supra note 4, at 34, col. 4. Judge Schwarzer's approach, by contrast, often evidences the tendency to "overkill" that the drafters hoped to avoid. Id.
legitimate advocacy in the name of efficient judicial management of "objectively unreasonable" claims and defenses. This second possibility was raised by representatives of the bar during the advisory committee hearings on the 1983 proposed amendments.166 Mandatory sanctions, they claimed, were not necessary to deal with the perceived reluctance of judges to impose sanctions under existing rules.167 They argued that the threat of sanctions created a potential conflict between lawyer and client and that the rule would have a chilling effect on a lawyer's willingness to bring difficult cases.168

The Committee was sensitive to these concerns. In response to comments about the dangers of mandatory sanctions, Judge Mansfield, the Advisory Committee Chair, noted that a judge would have discretion to impose "a de minimis sanction."169 In its advisory note, the Committee explicitly disclaimed any intent "to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories."170 Indeed, as discussed above in part II, Committee Reporter Miller has repeatedly emphasized the "cost-shifting" purpose of the sanctions provision. In his view, rule 11 is a modest, value-neutral, and economically sensible way of allocating the costs of marginal litigation. He has firmly assured the legal community that "the advisory committee did not intend to dampen the enthusiasm or the adversarial spirit of lawyers."171

Unfortunately, these official and semiofficial disclaimers cannot, standing alone, remove the danger they address. Whatever the drafters' intentions, the inherently punitive impact of a sanctions provision, as we have seen, may cause such an unintended result. As I will discuss below, the concerns expressed before the rule was adopted were well-founded, and the chilling aspects of sanctions need to be carefully analyzed in assessing the rule's overall effectiveness. I will first examine the rule's effect on the filing of pleadings, particularly in the civil rights context, and its relation to the pleading requirements of rule 8. A discussion of the rule's impact on the lawyer-client relationship will follow. Finally, I will discuss Judge Schwarzer's use of rule 11 to define the limits of acceptable advocacy.

A. CHILLING THE ASSERTION OF CLAIMS AND DEFENSES

1. A Cautionary Note

It should be noted at the outset that there is a difficulty in evaluating the chilling effect of rule 11 by reading case reports. Without access to the pleadings, or to the parties' supporting papers, the court's opinion is the only source from which to discern the issues. A judge awarding sanctions is often advocating the correctness of his decision and is likely to do so by shaping the presenta-

167. See id. at 135-36 (testimony of John Arness on behalf of the American College of Trial Lawyers) (mandatory sanctions are overreaction to judicial reluctance to impose sanctions).
168. Id. at 137 (testimony of John Arness on behalf of the American College of Trial Lawyers).
169. Id. at 138 (remark of Judge Mansfield).
171. Miller & Culp, Litigation Costs, supra note 4, at 34, col. 3.
tion of facts convincingly. Furthermore, while many judges are confident that they can identify baseless pleadings, rule 11’s potential threat to novel or unpopular causes of action—and to ones that are difficult to prove without access to information in the hands of the defendants—must be carefully evaluated.

2. The Extent of Reasonable Inquiry

Inquiry into the Facts. The reasonable inquiry standard of rule 11 is designed to reduce the number of frivolous lawsuits and motions, by requiring the lawyer to refrain from taking positions that reasonable investigation would have shown to be unfounded. The goal appears modest enough, and laudable. Yet the threat of sanctions may deter not only frivolous cases, but also potentially meritorious cases from being filed and pursued. To reduce the potential chilling effect of rule 11’s sanctions provisions, the reasonable inquiry standard must be read in light of rule 8 and the underlying policies of the Federal Rules of Civil Procedure.

For example, the judicial climate has grown increasingly inhospitable to civil rights claims in recent years. The disproportionate number of civil rights cases in which rule 11 sanctions have been considered since August 1, 1983, must give pause to the civil rights bar. Even with a good faith belief in the merit of a claim, lawyers may be deterred from pursuing civil rights cases when they contemplate the possibility of being sanctioned for what a judge concludes is a frivolous suit.

In Rodgers v. Lincoln Towing Services, the Seventh Circuit affirmed the dismissal of a civil rights claim and the award of rule 11 sanctions against plaintiff’s lawyers for filing what the district court had termed a “ponderous, extravagant, and overblown complaint.” In his amended complaint, Rodgers alleged that the police and a towing company had conspired to bring a false vandalism charge against him and that the city of Chicago maintained unconstitutional

172. See Vairo, supra note 77, at 88. (opinion “has the power to make an attorney’s argument seem frivolous”).

173. See Risinger, supra note 5, at 52-58 (voicing similar concerns about aggressive enforcement of the former rule, even with its bad faith requirement).

174. “Greater attention . . . to pleading and motion abuses and the imposition of sanctions when appropriate, should . . . help to streamline the litigation process by lessening frivolous claims or defenses.” FED. R. CIV. P. 11 advisory committee’s note.

175. MODEL CODE OF PROFessional RESPONSIBILITY EC 7-3 (1979). While rule 11 may tend to chill advocacy, ethical canons encourage a lawyer to “resolve in favor of his client doubts as to the bounds of the law.” See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3-1 comment (1983) (a “filing . . . is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery . . . [or] believes that the client’s position ultimately will not prevail”). The advocate thus has a professional duty to err on the side of the client. This duty is sorely tested by a rule which, in close cases, may lead to sanctions against the lawyer who fulfills it.


177. See supra note 92 (52 of 233 rule 11 cases involved civil rights claims).

178. 771 F.2d 194 (7th Cir. 1985).

policies. The Seventh Circuit affirmed despite its disagreement with the district court's characterization of the case "as a ‘relatively minor incident’":

[H]ad plaintiff introduced some fact that would have indicated that [the defendant police officer] indeed believed Rodgers was innocent but was in league with [the towing company] to intimidate plaintiff, or some fact to prove that the City maintained the policies that Rodgers alleges, then he would have stated an actionable claim that could have at least survived the motion to dismiss."

Given the difficulty of “proving” the policies or beliefs of the defendants without access to discovery, the award of rule 11 sanctions for inadequate factual inquiry in a case like Rodgers is questionable and may well have a chilling effect.

The advisory committee's notes warn against “using the wisdom of hindsight” to determine the reasonableness of a lawyer's prefiling inquiry and suggest that the standard must be a flexible one.181 In Mohammed v. Union Carbide,182 the court awarded the defendant rule 11 sanctions on the plaintiff’s defamation claim, on the grounds that “charges of defamation . . . by definition are notorious, public acts.” Sanctions were appropriate because the plaintiff had failed “to conduct any investigation whatsoever into [the] claims.”183 The defendant’s request for sanctions on the plaintiff’s Sherman Act conspiracy and monopolization claims was denied because “the difficulty of investigating [such] . . . claims prior to the initiation of the lawsuit lessens the extent of investigative efforts that an attorney must undertake to satisfy the ‘reasonable inquiry’ standard.”184

The distinction drawn by the court in Mohammed is essential if rule 11’s requirement of reasonable inquiry into the factual basis for papers is to be read in accordance with the policies underlying the Federal Rules of Civil Procedure. The Rules as a whole, with their broadened discovery and relaxed pleading provisions, encourage parties to seek redress through the courts both for clearly defined wrongs and for reasonably suspected ones that can only be developed through discovery.185 In cases that fall into the latter category, the reasonable inquiry standard of rule 11 should be liberally construed so that plaintiffs are not precluded from establishing the merits of a claim.

**Inquiry into the Law.** When the issue is the reasonableness of inquiry into the law, even greater caution is warranted before a violation of rule 11 is found. As one commentator has noted, “today’s frivolity may be tomorrow’s law.”186 A good faith argument to change existing law is not subject to sanctions under rule 11. If a lawyer simply fails to research the law or ignores the existing law in

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180. Rodgers, 771 F.2d at 205 n.8. But see Snyder, supra note 77, at 16.
181. Thus, what constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available to the signer; whether he had to rely on a client for information as to the facts underlying the pleading, motion, or other paper; whether the pleading, motion, or other paper was based on a plausible view of the law; or whether he depended on forwarding counsel or other member of the bar.

183. Id. at 262.
184. Id.
185. Risinger, supra note 5, at 56.
186. Id. at 57.
making legal arguments, sanctions are appropriate.187 A lawyer must know the existing law to seek to change it in good faith. When a legal position is asserted repeatedly in a series of suits and is soundly rejected each time, however, the propriety of sanctions becomes more difficult to decide. While sanctions may be warranted to shield defendant from a barrage of suits,188 the development of the law is threatened if rule 11 is read "to penalize litigants because they choose to fight uphill battles."189

Thus, in weighing the merits of a legal argument, the courts must keep in mind that "[r]ule 11 does not require a litigant to forego recovery on a particular theory merely because [his] lawyers may believe there is a good chance of losing."190 The possibility of chilling proper advocacy must be carefully weighed before finding a violation of rule 11 based on a legal argument advanced by counsel.191

**Specificity in Pleadings.** Although at least one court has explicitly stated that rule 11 does not change the notice pleading requirements of rule 8,192 as a practical matter lawyers may perceive that greater specificity in pleading is required, if for no other reason than to ward off a motion for sanctions.193 Such an outcome would increase the potential chilling effect of the rule's reasonable inquiry standard by introducing the threat of sanctions for pleadings that otherwise meet the rule 8(a)(2) requirement of a "short and plain statement of the claim."194 It would also be at odds with the policy of permitting less-than-certain claims to proceed to discovery—a policy that has survived numerous attacks in the years since the federal rules were adopted.195

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188. See, e.g., Lepucki v. Van Wormer, 765 F.2d 86 (7th Cir. 1985) (per curiam) (affirming award of fees against the plaintiff's attorney, who repeatedly brought suits challenging validity of federal notes as legal tender).


190. Id. at 519.

191. See Blake v. National Casualty Co., 607 F. Supp. 189, 192 (C.D. Cal. 1984) (determination whether rule 11 has been violated "requires sensitivity on the part of the court. Relevant factors to consider include the amount of time the attorney had to prepare the motion, the expertise of the attorney, the complexity of the law involved, and the extent to which the attorney supports the motion.").

192. Computer-Place v. Hewlett-Packard Co., 607 F. Supp. 822, 832 n.11 (N.D. Cal. 1984) (plaintiff not "bound to its pleading" by rule 11, which "does not increase the requirements of Rule 8"), aff'd, 779 F.2d 56 (9th Cir. 1985).

193. This may prove to be a particular problem in civil rights cases, where greater specificity in pleading is sometimes required, completely apart from rule 11. See Elliot v. Perez, 751 F.2d 1472, 1479 (5th Cir. 1985) (courts "consistently require the claimant to state specific facts, not merely conclusory allegations" in 42 U.S.C. § 1983 cases). See generally Wingate, A Special Pleading Rule for Civil Rights Complaints: A Step Forward or a Step Back?, 49 Mo. L. Rev. 677 (1984).

194. Id. at 816-17.


> From a theoretical point of view, the current practice of allowing general pleadings and extensive discovery cannot seriously be challenged. There seems to be little reason why litigants should be prevented from establishing legitimate claims in actions in which the admissible facts are to be found only in the files and minds of opposing parties.

*Id.* at 816-17.
The 1983 amendments to rules 16 and 26 have greatly increased the court's oversight of the entire litigation process and of discovery in particular. The heightened obligations of counsel under both rules are added safeguards against burdening the system with frivolous suits and unnecessary discovery. The courts should, therefore, construe rule 11's "reasonable inquiry" standard liberally, particularly when the lawyer must proceed, if at all, based on a good faith belief in the merit of a claim.196

B. THE LAWYER-CLIENT RELATIONSHIP

The provision of rule 11 for awarding sanctions against a lawyer, her client, or both, will certainly have subtle and far-ranging effects on the relationship between lawyer and client. Traditionally, the relationship has enjoyed a highly protected status in our adversary system.197

1. Playing it Safe

Rule 11 is designed to reinforce lawyers' obligations as officers of the court. It encourages them to be responsible to the system and to be more candid with clients whose cases are weak. The threat of sanctions, however, may lead lawyers simply to "play it safe" when evaluating novel or disfavored claims.

If the general trend toward restrictive civil rights rulings198 threatens the viability of many potential claims, it does so without altering the alliance between lawyer and client as proponents of a claim. The liability for sanctions to which the lawyer is exposed under rule 11, however, undermines this alliance because it creates a potential conflict of interest between the lawyer and her client. This conflict is not, of course, limited to civil rights cases or to the initial filing of pleadings. Indeed, it is likely to affect a lawyer's perspective on litigation in subtle ways. She might decide to reject a case or position because it is too risky, or forgo plausible arguments that might vex a managerial judge before whom she must practice.199

Because sanctions for errors in legal judgment will generally

196. See Taylor v. Belger Cartage Serv., 102 F.R.D. 172, 180-81 (W.D. Mo. 1984) ("attorneys must be free to assert less than perfect claims on behalf of clients ... to assert claims where the facts and law are less than certain ... to utilize discovery processes ... to explore and develop facts to support established or reasonable extensions of established legal theories"); see also Friedgood v. Axelrod, 593 F. Supp. 395, 397-98 (S.D.N.Y. 1984) (sanctions awarded against plaintiff under 42 U.S.C. § 1988, but denied against court-appointed lawyer under 28 U.S.C. § 1927 and rule 11 on grounds lawyer "was not required to disbelieve his own client" and acted "reasonably" in going forward with evidentiary hearing despite information provided by defendants' lawyer that cast doubt on plaintiff's claims).

197. The attorney-client privilege "is the oldest of the privileges for confidential communications known to the common law ... Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

198. See supra note 176.

199. See Miller, supra note 2, at 34-35:

Strong judicial management is a potential threat to the adversary system as it has existed for hundreds of years because it calls for a significant change in the power relationship between judges and lawyers and in their respective functions. Indeed, there are risks in imposing a meaningful duty on attorneys to act in the interests of the judicial system, rather than exclusively in that of their clients, and in placing enforcement of that duty in the hands of judges, whose primary concern could well become efficiency rather than justice itself.

This shift creates the risk that clients will be left without meaningful representation in difficult cases and that the growth and development of the law will be correspondingly stifled.
fall—as they should—on the lawyer,200 self-interest may lead to an overly conservative view of the merits of a client's case. While Professor Miller has expressed confidence that "those who self-select themselves into law and then into litigation are not likely to lose their advocate's instincts out of a fear of sanctions,"201 their self-interest may lead them in that direction, to the detriment of their clients and the system as a whole.

2. The Paper Trail

Judge Schwarzer has suggested that one step toward fulfilling the lawyer's parallel discovery certification obligation under amended rule 26(g) would be to provide the client with written instructions about how to gather the information necessary to prepare accurate and complete discovery responses.202 While encouraging clients to be forthright and thorough in responding to discovery is certainly desirable, the creation of such paper trails may well come to be viewed as necessary to insulate the lawyer from personal liability for any ensuing sanctions, under rule 26(g) or rule 11.203 Practices designed to protect the lawyer at the client's expense are likely to spread as the size and number of sanctions awards increases. While many lawyers will refuse to be drawn into open conflict with their clients over liability for sanctions, the potential for conflict is inherent in the rule and will lead to subtle changes in lawyer-client relations, even where the sanctions issue is never actually raised.

3. Privilege and Work Product

A related problem, which has not yet been addressed directly in the cases, concerns the preservation of the attorney-client and work product privileges in the context of sanctions hearings. Judge Schwarzer has argued that the assertion of privilege is not a barrier to resolving sanctions issues, since the information needed to support a claim that a paper is well-founded is likely to come out in discovery anyway.204 Nonetheless, the potential for revealing otherwise protected information increases when the question arises whether to sanction the lawyer or the client.

The American Bar Association Code of Professional Responsibility provides that a lawyer may reveal "confidences or secrets necessary . . . to defend himself

200. See supra note 102.
201. A. MILLER, supra note 4, at 18.
203. Former District Judge Abraham Sofaer, of the Southern District of New York, addressed this problem at the 54th Fourth Circuit Judicial Conference:

Lawyers are going to defend themselves against sanctions. They are already writing articles advising other lawyers to keep memos in their files about discussions with clients, so they can defend the position they take in litigation, when and if they are accused of having done something improper. The memos would show that the client told the attorney to do what he or she had done, or that the client provided a basis for the attorney's allegations. This sort of behavior and state of mind potentially drives a wedge between lawyers and their clients.

204. Schwarzer, supra note 45, at 199.
against an accusation of wrongful conduct."

Thus, if a lawyer advised against pursuing what she considered a losing, albeit colorable, claim, she would be entitled to use otherwise confidential communications to shift sanctions to her client in the event the court found that the claim was not well-founded. Conflicts between out-of-state counsel and local counsel, whose signatures appear on papers, may also risk exposing privileged or work product information as the court seeks to apportion responsibility for a rule 11 violation.

Although the provisions of rule 26(c) regarding protective orders are available to reduce the disclosure of such material, clients will certainly become less forthright as they learn of the varied circumstances in which rule 11 can drive a wedge between them and their lawyers. The long-term effect of rule 11 on lawyer-client relations cannot be assessed without further inquiry into the practices that lawyers have established in response to the increased likelihood of sanctions. With or without the actual disclosure of privileged or work product information, however, there is justifiable concern that lawyer-client relations will undergo significant, and not altogether desirable, changes as lawyers seek to protect themselves from sanctions.

C. DEFINING THE LIMITS OF ACCEPTABLE ADVOCACY

How does rule 11 affect a lawyer’s duty to her client? To what extent does it incorporate broad ethical obligations based on her concurrent duties as an officer of the court? In this final part, I will discuss the relationship between rule 11 and the ethics of advocacy by examining Judge Schwarzer’s application of the rule to punish conduct found to exceed the limits of acceptable advocacy.

1. The Advocate’s Role and Duty to the System

The adversary system has encountered increasing criticism in recent years as an underlying cause of many of the seemingly intractable problems of litigation, particularly at the pretrial stage. Meaningful reform, it has been argued, cannot occur until lawyers shift their priorities from zealous representation of their clients toward a greater recognition of their obligations as officers of the court.

For example, Magistrate Wayne Brazil, in an article discussing the adversary system, wrote:

205. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1979). See Vairo, supra note 77, at 66 (lawyer may disclose confidential information necessary to defend against charge of wrongful conduct).

206. In Golden Eagle Distributing Corp. v. Burroughs Corp., 103 F.R.D. 124 (N.D. Cal. 1984), rev’d, No. 84-2602 (9th Cir. Oct. 9, 1986), Judge Schwarzer imposed monetary sanctions only on the law firm responsible for the brief in question, but he required that the sanctions order be distributed to all lawyers in both that firm and the firm acting as local counsel in the case. Id. at 129; see also Schwarzer, supra note 45, at 199-200 (where allocation of sanctions among lawyers requires disclosure of work product, allocation should be deferred); Vairo, supra note 77, at 66; Coburn Optical Indus. v. Cilco, Inc., 610 F. Supp. 656, 660 (M.D.N.C. 1985) (“It is difficult for a lawyer to disclaim all responsibility for a paper bearing his name.... The court expects local counsel... to ensure that Local Rules and the Federal Rules of Civil Procedure are followed even when the pleading or motion is not prepared by them.”). The implications of rule 11 for lawyers appearing as local counsel have only begun to take shape. The few courts that have considered the issue have implied that the role of local counsel can no longer safely be viewed as perfunctory.

207. FED. R. CIV. P. 11 advisory committee’s note (“The rule does not require a party or an attorney to disclose privileged communications or work product in order to show that the signing of the pleading, motion, or other paper is substantially justified. The provisions of Rule 26(c), including appropriate orders after in camera inspection by the court, remain available to protect a party claiming privilege or work product protection.”).
nature of civil discovery, has called for sweeping changes in the rules of professional responsibility and the rules of civil procedure to promote sharing of information and a joint search for truth at the pretrial stage of litigation. The alternative dispute resolution movement and the current interest in problemsolving approaches to legal negotiations are, in part, reactions to litigation as a war of attrition in which the advocate seeks to maximize the advantage to her client regardless of the social cost or the harm done to the truth in the process.

It was in this climate that the 1983 amendments to the Federal Rules of Civil Procedure were adopted. Rule 11, as we have seen, was designed to take a "modest step" in the direction of increasing lawyers' responsibility to the court system by requiring them to file papers only after making a reasonable inquiry into the facts and the law.

Some courts have stressed that the certification provisions of rule 11 impose a duty to the system that limits a lawyer's freedom to promote the client's interest above all else. A lawyer has an obligation, reinforced by the reasonable inquiry standard of rule 11, to counsel her client, "to dissuade the client from pursuing specious claims," and if she learns that a pending claim is without legal merit, "to dismiss [it], even over the objection of [the] client." These cases emphasize that a lawyer's ethical duties as an officer of the court and her obligations under rule 11 may overlap and reinforce each other. Nevertheless, courts must proceed with care given the rule's "potential for chilling legitimate advocacy." Reasonable lawyers may differ about whether a claim warrants litiga-

208. Brazil, Civil Discovery, supra note 1, at 1349-50. But see Sofaer, supra note 55, at 703 ("The will to win—so essential to effective advocacy—cannot be limited to the courtroom; it does and to an extent should permeate the discharge of all the attorney's services to the client.").

209. See generally Riskin, Resolution, and Lawyer, 43 Ohio St. L.J. 29 (1982) (lawyers must develop ability and willingness to mediate variety of matters currently forced through adversary system); Dispute Resolution, 88 Yale L.J. 905-1091 (1979) (symposium devoted to analysis of goals motivating alternative dispute resolution mechanisms, practical and theoretical barriers preventing achievement of goals, and costs and risks of the mechanisms); Sander, Varieties of Dispute Processing, 70 F.R.D. 111 (1976) (exploring ways to reduce court caseloads through nonjudicial dispute resolution alternatives); Fuller, Mediation—Its Forms and Functions, 44 S. Cal. L. Rev. 305 (1971) (general discussion of characteristics, forms, and functions of mediation).


212. Miller, supra note 2, at 19.


215. Id. at 1251; Mohammed, 606 F. Supp. at 261; see Weir v. Lehman Newspapers, 105 F.R.D. 574, 575 (D. Colo. 1985) (rule 11 sanction standard "is similar to the ethical requirement that an attorney present only those arguments which are supported by existing law or a good faith argument to extend, modify, or reverse existing law"); Taylor v. Belger Cartage Serv., 102 F.R.D. 172, 181 (W.D. Mo. 1984) 'under both rule 11 and ethical canons, attorneys "owe their clients, the judicial system and the public a duty to analyze problems brought to them in light of easily ascertainable legal standards and to render detached, unemotional, rational advice on whether a wrong recognized by law has been done"' (emphasis in original), aff'd per curiam, 762 F.2d 665 (8th Cir. 1985); Glover v. Libman, 578 F. Supp. 748, 769 (N.D. Ga. 1983) (attorney's motion for disqualification brought to delay suit for tactical reasons violates rule 11 and ethical canons).

tion, and rule 11 was designed only to curb, not to destroy, the advocate’s zeal.

2. The All-Purpose Approach to Rule 11: Golden Eagle v. Burroughs

As discussed earlier, Judge Schwarzer has interpreted rule 11 as a mechanism to punish, not merely to compensate. In Golden Eagle Distributing Corp. v. Burroughs Corp., he expanded his reading of rule 11 to incorporate the ethical obligations of a lawyer propounded in the various codes of ethical conduct. Judge Schwarzer sanctioned a lawyer who had made a meritorious summary judgment argument that the judge found to exceed the bounds of acceptable advocacy—and to violate rule 11—because of the way the argument was made.

The Basis for Sanctions. Golden Eagle involved a summary judgment motion in which the defendant argued that plaintiff’s claim, which had been transferred to the Northern District of California from the District of Minnesota under 28 U.S.C. § 1404(a), was barred by the California statute of limitations. The argument was based on a sophisticated analysis of the interaction of federal law on transfers for convenience with the Erie doctrine and the Minnesota law on dismissals on forum non conveniens grounds. The motion also urged

City of New York, 762 F.2d 243, 254 (2d Cir. 1985) (“Vital changes have been wrought by those members of the bar who have dared to challenge the received wisdom, and a rule that penalized such innovation and industry would run counter to our notions of the common law itself.”).

217. 103 F.R.D. 124 (N.D. Cal. 1984). As this article was going to press, the Ninth Circuit reversed Judge Schwarzer’s sanctions decision in Golden Eagle. Golden Eagle Distrib. Corp. v. Burroughs Corp., No. 84-2602 (9th Cir. Oct. 9, 1986). The court found that rule 11 “does not require that counsel differentiate between a position which is supported by existing law and one that would extend it,” slip op. at 16, and that such a “requirement ... tends to create a conflict between the lawyer’s duty zealously to represent his client ... and the lawyer’s own interest in avoiding rebuke.” Id. at 17-18. Judge Schwarzer also erred on the adverse authority issue: his view would lead to sanctions depending “on close decisions concerning whether or not one case is or is not the same as another.” Id. at 21. Judge Schwarzer’s use of rule 11, the court concluded, “far from avoiding excess litigation, increases it. We must not interpret Rule 11 to create two ladders for after-the-fact review of asserted unethical conduct: one consisting of sanction procedures, the other consisting of the well-established bar and court ethical procedures. Utilizing Rule 11 to sanction motions or pleadings not well-grounded in fact or law, or papers filed for improper purposes, gives full and ample play to the 1983 amendments.” Id. at 22.

218. 28 U.S.C. § 1404(a) permits, with certain restrictions not relevant here, a transfer of venue for the convenience of the parties and witnesses.


220. The central issue in Burroughs’ summary judgment motion was whether the California or Minnesota statute of limitations should be applied to Golden Eagle’s claim. The California statute would have barred the claim, while the Minnesota statute would have permitted it. Golden Eagle, 103 F.R.D. at 125. Burroughs tendered both a state and federal law basis for its assertion that the California statute ought to be applied. As a matter of Minnesota law, Burroughs argued, the Minnesota courts would not have applied that state’s statute of limitations because they would have dismissed the suit on the ground of forum non conveniens. Burroughs added that to apply Minnesota’s statute, and thereby permit Golden Eagle to assert its claim, “would violate the Erie doctrine of uniformity between state and federal rules of decision in diversity cases.” Burroughs’ Opening Memorandum on Minnesota Law, reprinted in Golden Eagle, 103 F.R.D. at 126.

Burroughs also argued that federal law does not necessarily require application of the transferor state’s law when the venue of an action is transferred under 28 U.S.C. § 1404(a). In Van Dusen v. Barrack, 376 U.S. 612 (1964), the Supreme Court interpreted § 1404(a) to require that “where the defendants seek transfer, the transferee district court [must] apply the state law that would have been applied if there had been no change of venue.” Id. at 639. However, the Court explicitly reserved the question of whether § 1404(a) would operate similarly if the defendants had argued that the transferor state would have dismissed the suit on forum non conveniens grounds. Id. at 640. Burroughs asserted that Golden Eagle’s claim fell “squarely within the forum non conveniens exception” enunciated in Van Dusen. Burroughs’ Opening Memorandum on Federal Law, reprinted in Golden Eagle, 103 F.R.D. at 127.
dismissal of a negligence claim for purely economic loss on grounds of failure to state a claim under California law.\footnote{Golden Eagle, 103 F.R.D. at 128-29.}

At the hearing on the summary judgment motion, Judge Schwarzer questioned Burroughs' lawyer closely. He focused on the legal basis for the contentions made in the papers supporting the motion and expressed particular displeasure at the way the statute of limitations argument had been made. In that context, he observed:

So here we have a motion which is presented as though it is supported by authority when in fact there is no authority. And all of the authority appears to be against it without telling the court candidly that that is the case and without any kind of an effort to make a good faith argument in favor of extending or modifying existing law as contemplated by Rule 11.\footnote{Reporter's Transcript at 2, Golden Eagle.}

He also noted Burroughs' failure to cite two lower California appellate court cases that questioned the viability of the California Supreme Court case on which Burroughs relied in its economic loss argument.\footnote{Burroughs omitted Pisano v. American Leasing, 146 Cal. App. 3d 194, 194 Cal. Rptr. 77 (1983) and Huang v. Garner, 157 Cal. App. 3d 404, 203 Cal. Rptr. 800 (1984). The case on which Burroughs relied, Seely v. White Motor Co., 65 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965), denied tort recovery for economic loss when the parties were in privity of contract, as they were in Golden Eagle. \textit{Id.} at 18, 403 P.2d at 151-52, 45 Cal. Rptr. at 23. A later case, J'Aire Corp. v. Gregory, 24 Cal. 3d 799, 598 P.2d 60, 157 Cal. Rptr. 407 (1979), permitted recovery in negligence for purely economic loss where the parties were not in privity of contract, without discussing \textit{Seely}. \textit{Id.} at 804-05, 598 P.2d at 63-64, 157 Cal. Rptr. at 410-11. The two cases cited by Judge Schwarzer questioned the validity of \textit{Seely} in light of \textit{J'Aire}. \textit{Pisano}, 146 Cal. App. 3d at 196-97, 194 Cal. Rptr. at 79; \textit{Huang}, 157 Cal. App. 3d at 420-23, 203 Cal. Rptr. at 810-11.}

After denying the summary judgment motion, the court on its own motion gave Burroughs' lawyer two weeks to submit a memorandum "why Rule 11 sanctions should not be imposed"\footnote{Defendant's Memorandum in Opposition to Rule 11 Sanctions at 2-3, Golden Eagle.} on him or his firm.

In its memorandum in response to the show cause order, Burroughs addressed the issues raised by the court and argued that its original brief met the requirements of rule 11:

Each [argument] rested on existing precedent, argued for the logical extension of precedent to an unresolved issue, or offered reasons why the Court should disregard contrary decisions from other circuits.

Each argument for extension or modification of the law rested on legal principles in decided cases and on considerations of policy.\footnote{Id. at 9-10.}

After reiterating its legal arguments in detail, Burroughs "urg[ed] the Court to consider that counsel's obligation to his client often requires advancement of theories for which there is no direct precedential support."\footnote{Golden Eagle, 103 F.R.D. 124.}

\textbf{Rule 11 and the Duty of Candor.} In his opinion granting sanctions,\footnote{Golden Eagle, 103 F.R.D. 124.} Judge Schwarzer focused on rule 3.3 of the American Bar Association's Model Rules of Professional Conduct and quoted at length from the comments to that

\begin{itemize}
  \item[221.] Golden Eagle, 103 F.R.D. at 128-29.
  \item[222.] Reporter's Transcript at 2, Golden Eagle.
  \item[224.] Reporter's Transcript at 2, Golden Eagle.
  \item[225.] Defendant's Memorandum in Opposition to Rule 11 Sanctions at 2-3, Golden Eagle.
  \item[226.] \textit{Id.} at 9-10.
  \item[227.] \textit{Golden Eagle}, 103 F.R.D. 124.
\end{itemize}
rule. He also examined ethical consideration 7-23 of the former Model Code. Both versions of the code explain the lawyer’s duty of candor to the tribunal. Judge Schwarzer stated:

There would be little point to Rule 11 if it tolerated counsel making an argument for the extension of existing law disguised as one based on existing law. The certification made by counsel signing the motion is not intended to leave the court guessing as to which argument is being made, let alone to permit counsel to lead the court to believe that an argument is supported by existing law when it is not.

The duty of candor is a necessary corollary of the certification required by Rule 11.

Based on this assessment of the intended reach of rule 11, Judge Schwarzer held that Burroughs’ lawyer had violated the rule because his statute of limitations argument was “not warranted by existing law, contrary to the representations made... by counsel.”

The most elemental rationale of this branch of Rule 11 is that fair decisions cannot be expected if the deciding tribunal is not fully informed, let alone if it is misled. It is as badly misled by an argument purporting to reflect existing law when such law does not exist as by a failure to disclose adverse authority. That is a sufficient basis for finding a violation of Rule 11, regardless of their purpose and whether they may have acted in good faith.

On the economic loss issue, the lawyer was held to have violated rule 11 by

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228. Golden Eagle, 103 F.R.D. at 127-8. The portion of rule 3.3 applied by Judge Schwarzer states that “[a] lawyer shall not knowingly... make a false statement of material fact or law to a tribunal.” MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (1983).

The accompanying comment states in part:

[1] The advocate's task is to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client is qualified by the advocate's duty of candor to the tribunal.

... Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(3), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction which has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 comment (1983).

229. Golden Eagle, 103 F.R.D. at 128. Ethical consideration 7-23 states:

The complexity of law often makes it difficult for a tribunal to be fully informed unless the pertinent law is presented by the lawyers in the cause. A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it. The adversary system contemplated that each lawyer will present and argue the existing law in the light most favorable to his client. Where a lawyer knows of legal authority in the controlling jurisdiction directly adverse to the position of his client, he should inform the tribunal of its existence unless his adversary has done so; but, having made such disclosure, he may challenge its soundness in whole or in part.


231. Id. at 129.

232. Id. at 128.
failing to cite in his opening brief the two appellate court cases cited by Judge Schwarzer at the summary judgment hearing and *J'Aire Corp. v. Gregory*,233 a later California Supreme Court opinion that Burroughs had distinguished in its reply brief in support of its summary judgment motion.234

Thus, Judge Schwarzer equated the failure to denominate an argument for the extension of law as such with "knowingly" making a "false statement of law."235 He treated Burroughs' failure to cite authority that was not controlling, not known to Burroughs,236 not directly adverse to Burroughs' defense, and already cited by Golden Eagle as "knowingly" failing "to disclose ... legal authority ... known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel."237 The reasoning by which Judge Schwarzer found a violation of these "corollary" ethical principles is difficult to fathom, given that he expressly put aside any consideration of counsel's purpose and good faith in the matter and that he focused only on Burroughs' opening brief in deciding the adverse authority issue.238 Furthermore, it is not at all clear that the actions for which Burroughs' lawyer was punished violate the governing standards of practice in the Northern District of California.239

Most importantly, Golden Eagle addresses difficult questions about the nature of law and the limits of acceptable advocacy. Is a legal position "warranted by existing law" if it follows from the rationale but not the precise holding of previous decisions? Can anyone determine with precision when a position has become an argument for the "extension" or "modification" of existing law? Or is the line a fluid one, depending in part on the perspective of the observer? Must the advocate, in the name of candor, cite every case that questions the continued authority of precedent on which he relies? The answers to these questions are not within the scope of this article, nor are they properly within the scope of rule 11.

*Is the Duty of Candor Part of Rule 11?* Neither the text of rule 11 nor the accompanying advisory committee's note deal with the issues addressed in Golden Eagle. The rule itself states only that the lawyer's signature certifies that based upon "reasonable inquiry [the paper] . . . is warranted by existing law or a

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234. Ironically, Golden Eagle's memorandum opposing Burroughs' summary judgment motion did not cite *Pisano or Huang* either, citing only *J'Aire*. Thus, under Judge Schwarzer's expansive view of rule 11, Golden Eagle also failed to insure that the court was "fully informed" when making its decision.
236. Both at the summary judgment hearing and in a later affidavit, Burroughs' lawyer stated that he was not aware before the hearing of either *Pisano or Huang*. See Golden Eagle, 103 F.R.D. at 129 (noting lawyer's claim of ignorance).
239. Local Rule 110-3 for the Northern District of California requires lawyers to comply with the standards of professional conduct of the State Bar of California. Rule 7-105 of the California Rules of Professional Conduct (1985) states that a member of the bar "shall not seek to mislead the judge . . . by an artifice or false statement of fact or law." There is no provision in the State Rules requiring a lawyer to disclose controlling adverse authority. Indeed, a proposal that such a rule be adopted by the State Bar Board of Governors was defeated by the Conference of Delegates at the 1984 State Bar Annual Meeting. Transcript of Conference of Delegates' Debate on 1984 Special Ethics Issue 3 at 184-85 (Sept. 24, 1984). One of the major arguments against the proposal was that it interfered with the lawyer's duty as an advocate and undermined the attorney-client relationship. Id. at 181-82 (statement of Darrel Horsted, Lawyer's Club of San Francisco).
good faith argument for the extension, modification, or reversal of existing law." By its terms, rule 11 does not impose any obligation to differentiate between arguments clearly supported by existing law and those that seek to extend or modify the law. The rule demands only that the attorney certify that one or the other of these propositions applies to the paper in question. Judge Schwarzer expressly recognized the merit of Burroughs' argument in Golden Eagle. He imposed sanctions because he deemed the structure of the argument to be an attempt to mislead the court. Yet nothing in the rule requires a lawyer to frame arguments in any particular way; its focus is on the existence of a legal basis for the argument.

Even if arguendo Burroughs' counsel did violate the ethical rules cited by Judge Schwarzer, there is no indication that rule 11 was intended to incorporate as "necessary corollary" the ethical obligations created by the codes of professional behavior. The new language in rule 11 was chosen to provide "a standard of conduct that is more focused," requiring the existence of "some pre filing inquiry into both the facts and the law." The purpose of the rule is to deter the filing of baseless pleadings and motions, not to punish lawyers for making meritorious arguments in a way that the court deems to exceed the bounds of acceptable advocacy.

As already discussed, rule 11 casts a far wider net for sanctions than did the former rule because sanctions are now mandatory and are not triggered solely by bad faith conduct. To read the rule as broadly as the court did in Golden Eagle leaves the bar subject to ill-defined standards and increases the risk that judges will be merely "imposing their personal standards of professionalism on others" in making sanctions decisions. Rule 11, along with the other 1983 amendments to the Federal Rules of Civil Procedure, represents a significant shift toward increased judicial control of the litigation process. The change is fraught with dangers, however, if it gives judges "too much power . . . and too much of an emotional stake in the outcome." Unless scrupulously controlled, the rule's broad sanctions provisions empower judges to deal with concerns about the adversary system that go far beyond the intended scope of the rule.
V. CONCLUSION

Rule 11 has been widely used since its amendment to sanction lawyers and their clients for violating its certification requirement. The decisions indicate that courts have taken seriously the rule’s broadened standards for sanctionable conduct and its mandatory language. There is still considerable disagreement, however, about the primary rationale for the rule’s sanctions provisions and its intended scope.

The cost-shifting view espoused by Professor Miller emphasizes the economic realities of litigation and seeks to have costs fall on the party whose wasteful or abusive conduct caused expense to the other side. This view likens sanctions to the English practice of awarding attorneys’ fees to the prevailing party. The analogy is not really apt, since rule 11 sanctions are not automatically available to a prevailing party, yet it comes closest in spirit to the goal implicit in a sanctioning standard aimed at deterring frivolous filings. By contrast, Judge Schwarzer views the purpose of rule 11 as primarily punitive. He focuses on the nature of the conduct giving rise to sanctions—a secondary factor in Professor Miller’s economic analysis. Judge Schwarzer believes that the imposition of sanctions is a duty that judges must discharge to encourage lawyers to take their ethical responsibilities to the court seriously. He has not only imposed costs and fees upon lawyers who have violated the rule, but has published and ordered wide dissemination of his often highly critical opinions, a sanction that may have far more serious consequences for the offending lawyers than an order to pay fees.

In addition, Judge Schwarzer’s view of the rule’s scope goes well beyond its language, incorporating broad ethical principles related to the lawyer’s duty as an officer of the court. Although grounded in the fact that the rule does, after all, provide for sanctions, Judge Schwarzer’s application of rule 11, which goes beyond the limits discussed in his own commentary on the rule, poses a serious threat to lawyers’ independent judgment and professional reputation. The punitive approach to rule 11 sanctions, if applied frequently, threatens to chill vigorous advocacy, especially since sanctions are mandatory and no longer require a finding of bad faith. A broad interpretation of the rule’s “penumbra,” as exemplified in the Golden Eagle case, heightens the chilling effect that the drafters sought to avoid.

Rule 11 was not designed as a cure-all for the ills of the adversary system, but as a modest step toward reducing the number of frivolous filings in federal court. To lessen its potentially chilling effect, while accomplishing the valid goals of deterring baseless and tactically motivated filings, several aspects of the rule

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249. The American Bar Association has considered including published rule 11 sanctions decisions in its disciplinary data bank, which currently contains reports of public state bar disciplinary rulings. Conversation with Chief Judge Robert F. Peckham of the Northern District of California (Aug. 20, 1985). This step would certainly increase the chilling effect of rule 11 sanctions, particularly if broad interpretations of its scope are upheld.

250. Compare supra notes 149-61, 217-49 and accompanying text (discussing sanction opinions by Schwarzer) with Schwarzer, supra note 45, at 202 (fines must be imposed cautiously) and Schwarzer, supra note 162 (fines should be limited to criminal contempt proceedings).
should be changed or clarified. First, the sanctions provisions, rather than being mandatory, should be amended to track the language of rule 37(b)(2), requiring the judge to impose sanctions unless the conduct for which sanctions are sought is substantially justified. This change would bring the letter of the rule in line with the spirit of the advisory committee’s note, which emphasizes the variety of circumstances that can affect the “reasonableness” of a lawyer’s prefiling inquiry. Without such a change, sanctions decisions are more likely to be made without careful weighing of the factors enumerated by the advisory committee, and the rule’s chilling effect will be increased. Second, the rule must be read in light of rule 8 and the general policies underlying the Federal Rules of Civil Procedure. Courts should be cautious about imposing rule 11 sanctions at the pleadings stage, particularly in view of the protections against prolonging frivolous cases found in rules 16 and 26. Finally, the punitive approach to sanctions must be carefully circumscribed, given its potential for circumventing established due process protections recognized in the law of contempt. The language of the rule should clearly proscribe monetary sanctions in excess of the costs and fees incurred by the opposing party and should not permit incorporation by reference of ethical duties to the court not explicitly set forth there.

Accomplishment of rule 11’s stated goals will only be hindered by attempts to make it a wide-ranging vehicle for punishment. The rule was amended to give judges a more focused standard for imposing sanctions, not carte blanche to reform the adversary system. If it is applied with discretion and respect for vigorous advocacy, it can be an effective tool to “skim off” frivolous claims and defenses and improper “procedural moves” in litigation, without chilling the sources of change and development in the law.
Sanctions Denied


Warnings


Other


SECOND CIRCUIT

Sanctions Granted Against Client


Mead Corp. v. Mark A. Assoc., No. 85 Civ. 192 (S.D.N.Y. July 11, 1985) (contract; against defendant)

Allen v. Colgate-Palmolive, No. 79 Civ. 1076 (S.D.N.Y. Mar. 21, 1985) (civil rights; against defendant)

Taylor v. Prudential-Bache Sec., 594 F. Supp. 226 (N.D.N.Y.) (securities; against plaintiff), aff’d, 751 F.2d 371 (2d Cir. 1984)


Against Attorney


Pallante v. Paine Webber, No. 84 Civ. 5761 (S.D.N.Y. May 14, 1985) (securities; rule 12(b)(6) motion; against defendant)


Silverman v. Center, 603 F. Supp. 430 (E.D.N.Y. 1985) (against plaintiff)


251. Civil rights, tax, securities, and contracts cases are indicated parenthetically; these cases are discussed supra notes 92-94.
Feder Trading v. Hoffman, No. 80 Civ. 3413 (S.D.N.Y. May 24, 1984) (contract; against plaintiff)

Against Both
Grillo v. Harrington, No. 85 Civ. 3538 (S.D.N.Y. July 15, 1985) (civil rights; against plaintiff)
In re Liberty Music & Video, 50 Bankr. 379 (S.D.N.Y. 1985) (against plaintiff)
People v. Overton, No. 83 Civ. 7581 (S.D.N.Y. Jan. 12, 1984) (civil rights; against defendant)

Unspecified
Sea Land Serv. v. H. Bros. Corp., No. 84 Civ. 0628 (S.D.N.Y. July 17, 1985) (against defendant)
Hecht v. United States, 609 F. Supp. 264 (S.D.N.Y. 1985) (tax; against plaintiff)
Anschultz Petroleum v. E.W. Saybolt & Co., No. 82 Civ. 4498 (S.D.N.Y. May 6, 1985) (contract; rule 56 motion; against defendant by plaintiff and third party defendant)
Fox v. Boucher, 603 F. Supp. 216 (S.D.N.Y. 1985) (sua sponte; against plaintiff)
Villalva v. Boulevard Hosp., No. 83 Civ. 5107 (S.D.N.Y. Nov. 4, 1983) (sua sponte; against defendant)

Sanctions Denied

Law v. Cullen, 613 F. Supp. 259 (S.D.N.Y. 1985) (civil rights; rule 56 motion; sanction against plaintiff denied)

Church v. McClure, No. 81 Civ. 7875 (S.D.N.Y. June 28, 1985) (sanction against plaintiff denied)

Helander v. Patrick, No. 77 Civ. 2401 (S.D.N.Y. June 25, 1985) (civil rights; rule 56 motion; sanction against plaintiff denied)


In re AM Int’l Inc. Sec. Litig., 606 F. Supp. 600 (S.D.N.Y. 1985) (securities; rule 12(b)(6) motion; sanction against plaintiff denied)

McKay v. Capital Cities Communications, 605 F. Supp. 1489 (S.D.N.Y. 1985) (contract; rule 56 motion; sanction against plaintiff denied)

Wohl v. Westheimer, 610 F. Supp. 52 (S.D.N.Y. 1985) (securities; sanction against plaintiff denied)


Connel v. Weiss, No. 84 Civ. 2660 (S.D.N.Y. Mar. 19, 1985) (contract; sanction against defendant denied)


Johnson v. Orr, No. 84 Civ. 779 (S.D.N.Y. Feb. 4, 1985) (rule 56 motion; sanction against plaintiff denied)

Totalplan Corp. of Am. v. Lure Camera Ltd., 613 F. Supp. 451 (W.D.N.Y. 1985) (contract; rule 12(b)(6) motion; sanction against plaintiff denied)


Kommel Prods. v. Lettergraphics Int’l, No. 84 Civ. 582 (S.D.N.Y. Oct. 10, 1984) (contract; rule 12(b)(6) motion; sanction against plaintiff denied)
“CHILLING” PROBLEMS IN RULE 11 SANCTIONS


Meistrich v. Executive Monetary Management, No. 83 Civ. 1636 (S.D.N.Y. Sept. 27, 1984) (sanction against plaintiff denied)


Taylor v. Weissman, No. 84 Civ. 357 (N.D.N.Y. June 14, 1984) (rule 56 motion; sanction against plaintiff denied)


Williams v. Birzon, 576 F. Supp. 577 (N.D.N.Y. 1983) (civil rights; rule 12(b)(6) motion; sanction against plaintiff denied)


Collorafi v. United States, 84-1 U.S. Tax. Cas. (CCH) ¶ 9107 (E.D.N.Y. 1983) (tax; rule 12(b)(6) motion; sanction against plaintiff denied)

Stewart Data v. Baruch Hertz & Track Data Corp., No. 83 Civ. 1565 (S.D.N.Y. Dec. 2, 1983) (rule 56 motion; sanction against plaintiff denied)

Warnings

Drake v. Miller, No. 85 Civ. 0190 (S.D.N.Y. June 18, 1985)


Zola v. Merrill Lynch, Pierce, Fenner & Smith, No. 84 Civ. 8522 (S.D.N.Y. May 28, 1985) (securities)

Merrill Lynch Futures v. Morici, No. 84 Civ. 2485 (S.D.N.Y. Apr. 3, 1985) (securities)

Smith v. City of New York, No. 82 Civ. 4457 (S.D.N.Y. Apr. 3, 1985) (civil rights)


HeinOnline -- 74 Geo. L. J. 1357 1985-1986
Bourdages v. Metals Refining Ltd., No. 84 Civ. 743 (S.D.N.Y. Nov. 1, 1984) (securities)

Other
Klein v. Churchill Coal Co., No. 84 Civ. 6509 (S.D.N.Y. June 26, 1985, as amended July 16, 1985) (securities; sanctions against defendant held in abeyance)
Mendell v. Greenberg, 612 F. Supp. 1543 (S.D.N.Y. 1985) (securities; rule 12(b)(6) motion; sanctions against plaintiff held in abeyance)
Argus Inc. & Interphoto Corp. v. Eastman Kodak Co., 612 F. Supp. 904 (S.D.N.Y. 1985) (rule 56 motion; sanctions against plaintiff held in abeyance)
Kamar v. Esterow, No. 84 Civ. 971 (S.D.N.Y. July 1, 1985) (sanctions against plaintiff held in abeyance)
Dooley v. International Paper Co., No. 83 Civ. 6070 (S.D.N.Y. Feb. 29, 1984) (civil rights; rule 56 motion; defendant granted opportunity to show bad faith)

Third Circuit
Sanctions Granted Against Client
Johnson v. United States, 1 Fed. R. Serv. 3d (Callaghan) 627 (E.D. Pa. 1985) (tax; against plaintiff)

Against Attorney
Pittsburgh Penn Oil Co. v. Mr. Bar-B-Q, No. 84-1421 (W.D. Pa. Mar. 19, 1985) (contract; against plaintiff)

Sanctions Denied
Skepton v. County of Bucks, No. 84-4395 (E.D. Pa. July 19, 1985) (contract/civil rights; rule 12(b)(6) motion; sanction against plaintiff denied)

Amcon Int'l v. United States, Nos. 84-4940, 84-4945, 84-4946, 84-4947, 84-4948 (E.D. Pa. Mar. 29, 1985) (tax; sanction against plaintiff denied)


*Warnings*

Graves v. Western Union, No. 84-4191 (E.D. Pa. May 3, 1985) (civil rights)


*Other*


**FOURTH CIRCUIT**

*Sanctions Granted Against Client*

Steele v. Morris, 1 Fed. R. Serv. 3d (Callaghan) 956 (S.D.W. Va. 1985) (against defendant)

*Against Both*


*Sanctions Denied*


*Warnings*

Reasor v. City of Norfolk, 1985-1 Trade Cas. (CCH) ¶ 66,368 (E.D. Va. 1984) (contract)

Atlantic Purchasers v. Aircraft Sales, 101 F.R.D. 779 (W.D.N.C. 1984)


FIFTH CIRCUIT

Sanctions Granted Against Client

Kirksey v. Danks, 608 F. Supp. 1448 (S.D. Miss. 1985) (civil rights; sua sponte; against defendant)

Parker v. Regan, No. 84-470 (M.D. La. Nov. 7, 1984) (tax; rule 12(b)(6) motion; against plaintiff)


Spicer v. United States, 54 A.F.T.R.2d (P-H) ¶ 84-5444 (W.D. Tex. 1984) (tax; sua sponte; against plaintiff)

Meyers v. United States, 54 A.F.T.R.2d (P-H) ¶ 84-5350 (M.D. La. 1984) (tax; sua sponte; against plaintiff)

Harris v. United States, 84-2 U.S. Tax Cas. (CCH) ¶ 9900 (S.D. Tex. 1984) (tax; rule 12(b)(6) motion; against plaintiff)

Against Attorney

Woodfork v. Gavin, 105 F.R.D. 100 (N.D. Miss. 1985) (against plaintiff)

Against Both


Sanctions Denied


Other


SIXTH CIRCUIT

Sanctions Granted Against Attorney


Barton v. Williams, No. 83-4425 (N.D. Ohio Nov. 17, 1983) (sua sponte; against plaintiff)

Against Both

Mohammed v. Union Carbide Corp., 1 Fed. R. Serv. 3d (Callaghan) 507 (E.D. Mich. 1985) (contract; rule 56 motion; against plaintiff)
Sanctions Denied

Whitesel Family Estate v. United States, 84-2 U.S. Tax Cas. (CCH) ¶ 9890 (S.D. Ohio 1984) (tax; rule 56 motion; sanction against plaintiff denied)

McCarthy v. KFC Corp., 607 F. Supp. 343 (W.D. Ky. 1985) (rule 12(b)(6) motion; sanction against plaintiff denied)

Warnings


SEVENTH CIRCUIT

Sanctions Granted Against Client

Peth v. Breitzmann, 611 F. Supp. 50 (E.D. Wis. 1985) (tax; rule 12(b)(6) motion; against plaintiff)

Eske v. Hynes, 601 F. Supp. 142 (E.D. Wis. 1985) (tax; rule 12(b)(6) motion; against plaintiff)

Ridley v. Goldman, No. 84-C-4580 (N.D. Ill. Oct. 23, 1984) (civil rights; sua sponte; against plaintiff)

Synder v. IRS, 596 F. Supp. 240 (N.D. Ind. 1984) (tax; rule 56 motion; against plaintiff)

Cameron v. IRS, 593 F. Supp. 1540 (N.D. Ind. 1984) (tax; rule 12(b)(6) motion; sua sponte; against plaintiff), aff'd, 773 F.2d 126 (7th Cir. 1985)

Young v. IRS, 40 Fed. R. Serv. 2d (Callaghan) 239 (N.D. Ind. 1984) (tax; rule 56 motion; against plaintiff)

Frederick v. Clark, 587 F. Supp. 789 (W.D. Wis. 1984) (tax; rule 12(b)(6) motion; against plaintiff)

Against Attorney

Cannon v. Loyola Univ., 609 F. Supp. 1010 (N.D. Ill. 1985) (civil rights; rule 12(b)(6) motion; against plaintiff), aff'd, 784 F.2d 777 (7th Cir. 1986)

In re Ronco, Inc., 105 F.R.D. 493 (N.D. Ill. 1985) (sua sponte; sanction of creditors challenging bankruptcy court decision)

Ring v. R.J. Reynolds Indus., 597 F. Supp. 1277 (N.D. Ill. 1984) (civil rights; rule 12(b)(6) motion; against plaintiff)

RPS Corp. v. Owens-Corning Fiberglas Corp., 1984-2 Trade Cas. (CCH) ¶ 66,268 (N.D. Ill. 1984) (rule 56 motion; against plaintiff)


Brownlow v. General Servs. Employees Union, 35 Empl. Prac. Dec. (CCH) ¶ 34,886 (N.D. Ill. 1984) (civil rights; rule 56 motion; against plaintiff)

AM Int'l Inc. v. Eastman Kodak Co., No. 80-C-4016 (N.D. Ill. June 27, 1984) (against defendant)
Rodgers v. Lincoln Towing Serv., No. 83-7038, (N.D. Ill. Mar. 19, 1984) (civil rights; sua sponte; against plaintiff), aff'd, 771 F.2d 194 (7th Cir. 1985)

Against Both

Fleming Sales Co. v. Bailey, 611 F. Supp. 507 (N.D. Ill. 1985) (contract; rule 56 motion; against plaintiff)

Unspecified


Davenport v. Bell, 85-1 U.S. Tax Cas. (CCH) ¶ 9193 (N.D. Ill. 1984) (tax; rule 12(b)(6) motion; against plaintiff)


Sanctions Denied


International Union of Operating Eng'rs, Local 150 v. Arrow Road Constr., No. 84-8639 (N.D. Ill. June 25, 1985) (sanction against defendant denied)

Harris Trust & Sav. Bank v. Ellis, 609 F. Supp. 1118 (N.D. Ill. 1985) (securities; sanction against defendant denied)

Coleman v. Frierson, No. 82-4460 (N.D. Ill. Apr. 30, 1985) (civil rights; sanction against defendant denied)

Doe v. Thomas, 604 F. Supp. 1508 (N.D. Ill. 1985) (rule 56 motion; sanction against plaintiff denied)

Davis v. United States, 104 F.R.D. 509 (N.D. Ill. 1985) (tax; rule 56 motion; sanction against plaintiff denied)

Blair v. United States Treasury Dep't, 596 F. Supp. 273 (N.D. Ind. 1984) (tax; rule 56 motion; sanction against plaintiff denied)

Manarchy, Ltd. v. Figi Giftware, Inc., No. 84-2358 (N.D. Ill. Sept. 5, 1984) (rule 12(b)(6) motion; sanction against plaintiff denied)

Kittler v. City of Chicago, No. 84-1649 (N.D. Ill. July 30, 1984) (civil rights; sanction against defendant denied)

McCarthy v. KFC Corp., 35 Empl. Prac. Dec. (CCH) ¶ 34,598 (N.D. Ill. 1984) (civil rights; rule 12(b)(6) motion; sanction against plaintiff denied)

Pudlo v. Director, IRS, 587 F. Supp. 1010 (N.D. Ill. 1984) (tax; sanction against plaintiff denied)


THOMPSON v. MIDLAND PRODS. CO., No. 83-7469 (N.D. Ill. Jan. 20, 1984) (civil rights; rule 56 motion; sanction against plaintiff denied)
PERTA v. COMPREHENSIVE SERV. CO., No. 83-5518 (N.D. Ill. Nov. 30, 1983) (rule 12(b)(6) motion; sanction against plaintiff denied)

Warnings

SELSOR v. CALLAGHAN & CO., 609 F. Supp. 1003 (N.D. Ill. 1985) (civil rights)
CASHCO OIL CO. v. MOSES, 605 F. Supp. 70 (N.D. Ill. 1985)
MILLER v. AFFILIATED FIN. CORP., 600 F. Supp. 997 (N.D. Ill. 1984) (securities)
GAWRON v. SARGENT & LUNDY ENG’G CO., No. 84-6032 (N.D. Ill. Oct. 31, 1984) (civil rights)
ILEKA v. ANCO MEDICAL REAGENTS, No. 84-1331 (N.D. Ill. July 20, 1984) (securities)
JAFFE v. FEDERAL RESERVE BANK, 586 F. Supp. 106 (N.D. Ill. 1984) (civil rights)
GIACOMINO CONSTR. CO. v. NATIONAL BONDING & ACCIDENT INS. CO., No. 84-1478 (N.D. Ill. May 10, 1984) (contract)
IN re CONTINENTAL SEC. LITIG., No. 82-4712 (N.D. Ill. Apr. 9, 1984) (securities)
POWERAMA DISTRIBUT. CORP. v. ATLANTIC RICHFIELD CO., No. 82-5688 (N.D. Ill. Mar. 28, 1984)
LANCASTER v. THOMPSON, No. 82-5548 (N.D. Ill. Dec. 15, 1983) (civil rights)
BROWN v. FEDERATION OF STATE MEDICAL BDS., No. 82-7398 (N.D. Ill. Nov. 10, 1983)
COOLING TOWER ERECTORS, INC. v. WILLIAMS, No. 81-6678 (N.D. Ill. Nov. 3, 1983)
KELLY v. UNITED STATES POSTAL SERV., No. 83-993 (N.D. Ill. Sept. 20, 1983)

Other

TURNER v. U.S., 84-2 U.S. Tax Cas. (CCH) ¶ 9805 (S.D. Ind. 1984) (tax; motion for sanctions invited)

Eighth Circuit

Sanctions Granted Against Client

MILLER v. UNITED STATES, 604 F. Supp. 804 (E.D. Mo. 1985) (tax; rule 56 motion; against plaintiff)
VALLE v. TAYLOR, 587 F. Supp. 514 (D.N.D. 1984) (civil rights; sua sponte; against plaintiff)
Against Attorney


Fisher v. CPC Int'l, Inc., 591 F. Supp. 228 (W.D. Mo. 1984) (civil rights; rule 56 motion; against plaintiff)


Against Both

Sanctions Denied

Sanction against defendant denied

Rauenhorst v. United States, 104 F.R.D. 588 (D. Minn. 1985) (rule 56 motion; sanction against plaintiff denied)


United States v. Archer-Daniels-Midland Co., 1984-2 Trade Cas. (CCH) ¶ 66,094 (S.D. Iowa 1984) (sanction against defendant denied)

Other


NINTH CIRCUIT

Sanctions Granted Against Client

Felix v. Arizona Dep't of Health Servs., 606 F. Supp. 634 (D. Ariz. 1985) (against plaintiff)

Heimbaugh v. City & County of San Francisco, 591 F. Supp. 1573 (N.D. Cal. 1984) (civil rights; rule 56 motion; against plaintiff)

Against Attorney

Hudson v. Moore Business Forms, Inc., 609 F. Supp. 467 (N.D. Cal. 1985) (civil rights; sua sponte; against defendant)

Kendrick v. Zanides, 609 F. Supp. 1162 (N.D. Cal. 1985) (civil rights; rule 12(b)(6) and 56 motions; against plaintiff)


In re Itel Sec. Litig., 596 F. Supp. 226 (N.D. Cal. 1984) (securities; against defendant), aff'd, 791 F.2d 262 (9th Cir. 1986)


Smith v. United Trans. Union Local No. 81, 594 F. Supp. 96 (S.D. Cal. 1984) (civil rights; sua sponte; against defendant)

Larkin v. Heckler, 584 F. Supp. 512 (N.D. Cal. 1984) (sua sponte; against defendant)

Allen v. Faragasso, 585 F. Supp. 1114 (N.D. Cal. 1984) (sua sponte; against plaintiff)

Huetting & Schromm, Inc. v. Landscape Contractors Council of N. Cal., 582 F. Supp. 1519 (N.D. Cal. 1984) (rule 12(b)(6) motion; against plaintiff)

Against Both

WSB Elec. Co. v. Rank & File Comm. to Stop the 2-Gate Sys., 103 F.R.D. 417 (N.D. Cal. 1984) (civil rights; rule 12(b)(6) motion; against plaintiff)

Zaldivar v. City of Los Angeles, 590 F. Supp. 852 (C.D. Cal. 1984) (rule 56 motion; against plaintiff), rev’d, 780 F.2d 823 (9th Cir. 1986)

Sanctions Denied

Micros Sys., Inc. v. Portland Cash Register Sys., 1985-1 Trade Cas. (CCH) ¶ 66,353 (D. Or. 1984) (contract; sanction against defendant denied)


In re Morrell, 42 Bankr. 973 (N.D. Cal. 1984) (sanction against plaintiff denied)

Other

Aune v. United States, 582 F. Supp. 1132 (D. Ariz. 1984), aff’d mem., 765 F.2d 148 (9th Cir. 1985) (tax; sua sponte; order to show cause against plaintiff)

TENTH CIRCUIT

Sanctions Granted Against Attorney


Sanctions Denied


Warnings

ELEVENTH CIRCUIT

Sanctions Granted Against Client

Sunn v. Dean, 597 F. Supp. 79 (N.D. Ga. 1984) (civil rights; rule 12(b)(6) motion; against plaintiff)

Against Attorney

Donaldson v. Clark, 105 F.R.D. 526 (M.D. Ga. 1985) (civil rights; sua sponte; against plaintiff), rev’d, 786 F.2d 1570, reh’g granted and opinion vacated, 794 F.2d 572 (11th Cir. 1986)


Against both

Florida Monument Builders v. All Faiths Memorial Gardens, 605 F. Supp. 1324 (S.D. Fla. 1984) (sua sponte and on defendant’s motion; against plaintiff)

Glover v. Libman, 578 F. Supp. 748 (N.D. Ga. 1983) (securities; sua sponte; against one plaintiff for vexatious motion to disqualify counsel for another plaintiff)

Sanctions Denied


Other


DISTRICT OF COLUMBIA CIRCUIT

Sanctions Granted Against Client


Johnson v. Secretary, Dep’t of Health & Human Servs., 587 F. Supp. 1117 (D.D.C. 1984) (sua sponte; against defendant)

Against Attorney


Sanctions Denied

Other

APPENDIX B
Court of Appeals Cases, by Circuit
Aug. 1, 1983-Nov. 1, 1985

FIRST CIRCUIT

Blanchette v. Cataldo, 734 F.2d 869 (1st Cir. 1984) (contract; defendant’s rule 11 violations in district court did not constitute abuse of process)

SECOND CIRCUIT

Eastway Constr. Corp. v. City of New York, 762 F.2d 243 (2nd Cir. 1985) (civil rights; affirming summary judgment, reversing denial of sanctions)
Lane v. Sotheby Parke Bernet, Inc., 758 F.2d 71 (2nd Cir. 1985) (civil rights; affirming summary judgment; remanded for findings whether plaintiff, who pleaded nonfrivolous course of action, should have continued action after completing discovery)
Tedeschi v. Barney, 757 F.2d 465 (2nd Cir.) (affirming sanctions), cert. denied, 106 S. Ct. 147 (1985)
Goldman v. Belden, 754 F.2d 1059 (2nd Cir. 1985) (securities; reversing rule 12(b)(6) dismissal and sanctions)
Envirotech Corp. v. Bethlehem Steel Corp., 729 F.2d 70 (2nd Cir. 1984) (contract; court notes availability of rule 11 sanctions)

FOURTH CIRCUIT

Chu v. Griffith, 771 F.2d 79 (4th Cir. 1985) (civil rights; affirming sanctions)

FIFTH CIRCUIT

Choo v. Exxon Corp., 764 F.2d 1148 (5th Cir. 1985) (vacating sanctions)
Cates v. International Tel. & Tel., 756 F.2d 1161 (5th Cir. 1985) (warning for pre-amendment filing)
Elliott v. Perez, 751 F.2d 1472 (5th Cir. 1985) (civil rights; remanded for consideration of compliance with rule 11)
Warren v. Reserve Fund, 728 F.2d 741 (5th Cir. 1984) (securities; affirming denial of sanctions)

SIXTH CIRCUIT

Thorpe v. United States, No. 85-5403 (6th Cir. Aug. 29, 1985) (tax; affirming sanctions)

SEVENTH CIRCUIT

Frazier v. Cast, 771 F.2d 259 (7th Cir. 1985) (civil rights; affirming sanctions)
Rodgers v. Lincoln Towing Serv., 771 F.2d 194 (7th Cir. 1985) (civil rights; affirming sanctions)
Mark v. Furay, 769 F.2d 1266 (7th Cir. 1985) (civil rights; court notes availability of rule 11 sanctions)

Steinle v. Warren, 765 F.2d 95 (7th Cir. 1985) (civil rights; affirming sanctions)

Lepucki v. Van Wormer, 765 F.2d 86 (7th Cir. April 4, 1985) (tax; affirming sanctions)

EIGHTH CIRCUIT

Purnell v. Missouri Dep’t of Corrections, 753 F.2d 703 (8th Cir. 1985) (consequences of signature on pleading)

TENTH CIRCUIT

Chevron, U.S.A. v. Hand, 763 F.2d 1184 (10th Cir. 1985) (affirming sanctions)

ELEVENTH CIRCUIT

Fitzgerald v. Seaboard Sys. R.R., 760 F.2d 1249 (11th Cir. 1985) (contract; warning)

Williams v. Greyhound Lines, 756 F.2d 818 (11th Cir. 1985) (affirming denial of sanctions)

Friedlander v. Nims, 755 F.2d 810 (11th Cir. 1985) (securities; warning)

Thiem v. Hertz Corp., 732 F.2d 1559 (11th Cir. 1984) (contract; court notes signature requirement of rule 11 in taking jurisdiction though appellant’s counsel didn’t sign appeal notice)

DISTRICT OF COLUMBIA CIRCUIT

Westmoreland v. Columbia Broadcasting Sys., 770 F.2d 1168 (D.C. Cir. 1985) (reversing denial of sanctions)

FEDERAL CIRCUIT

In re Oximetrix, 748 F.2d 637 (Fed. Cir. 1984) (contract; granting sanctions)