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William W. Schwarzer

UC Hastings College of the Law, schwarz@uchastings.edu

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COMMENTARIES

RULE 11 REVISITED

*William W Schwarzer**

The current version of rule 11 of the Federal Rules of Civil Procedure took effect four and one-half years ago. In an article published two years later, I argued:

When [the need for sanctions arises] courts must not hesitate to enforce Rule 11 with due regard for lawyers' obligations to their clients [I]f judges turn from Rule 11 and let it fall into disuse, the message to those inclined to abuse or misuse the litigation process will be clear. Misconduct, once tolerated, will breed more misconduct¹

Courts appear to have heeded this admonition. The number of reported decisions enforcing the rule is estimated now to exceed 600,² and there are presumably many more unreported rulings granting or denying sanctions under rule 11. A jurisprudence of considerable dimension has developed, although it is not entirely clear and consistent, to say the least. Rule 11 has become a significant factor in civil litigation, with an impact that has likely exceeded its drafters' expectations.

Controversy over the impact of the rule is growing. Its supporters argue that it has curbed litigation abuse, that its benefits outweigh whatever detriment it may cause, and that no alternative yet proposed can do the job. Its critics argue that it breeds wasteful litigation and chills vigorous, creative advocacy. The intensity of the ongoing debate warrants an examination of what we know about the rule and its effects, and consideration of how its enforcement can be channeled to better serve its purposes.

This Commentary first addresses the two major problems with the current operation of the rule: the lack of predictability of the standard of compliance and the excessive amount of litigation the rule generates. It then suggests an approach to enforcement designed to accomplish the rule's purposes more effectively and at less cost.

* United States District Judge, Northern District of California. I am indebted to my law clerk Leora Gershenzon for her assistance in preparing this Commentary. I am also grateful to Professor Georgene M. Vairo and to Jerrold Solovy of the Chicago Bar, who read and commented on the manuscript.

¹ Schwarzer, *Sanctions Under the New Federal Rule 11 — a Closer Look*, 104 F.R.D. 181, 204-05 (1985).

² As of July 1, 1987, there had been 564 reported rule 11 decisions in the district courts and courts of appeals. See Vairo, Report to the Advisory Committee on Amended Rule 11 of the Federal Rules of Civil Procedure 5 (unpublished, Sept. 1987).

I. ASSESSING THE IMPACT OF RULE 11

There is little empirical evidence assessing the impact of rule 11. The few studies that are available indicate that most lawyers and judges favor rule 11,³ although many attorneys are concerned about its chilling effect on meritorious claims.⁴ Anecdotal evidence suggests that district judges, although they are not of one mind, predominantly favor the rule and, in varying degrees, enforce it. District judges tend to share the widespread concern over litigation abuse.⁵ In addition, they have a somewhat different perspective from that of lawyers, formed by daily exposure to a constant flow of poorly prepared, ill-considered, and often misleading, if not downright deceptive, papers filed by attorneys.

Many district judges feel, as I do — although I would not quantify the number — that rule 11 has raised the consciousness of lawyers to the need for a careful prefiling investigation of the facts and inquiry into the law. To a considerable extent, I believe, it has accomplished its drafters' purpose of causing lawyers to "stop [and] think"⁶ before filing. Of course, many lawyers who file papers in federal court are out of the mainstream: lawyers who do not participate in continuing legal education programs or who are in federal court so rarely that they have not yet received the message. But my unscientific observations lead me to believe that the majority of the lawyers practicing in federal courts must be aware by now of the requirements of rule

³ To say that most lawyers support the rule, however, is not to say that all sectors of the profession support it to the same degree. In a recent comprehensive survey conducted by the New York State Bar Association, 93% of the judicial officers and 77% of the lawyers who responded agreed that sanctions were necessary to discourage attorneys from bringing frivolous cases or making frivolous motions. But approximately 50% of the plaintiff's lawyers and solo practitioners expressed the belief that the threat of sanctions discourages meritorious litigation. See New York State Bar Association, Report of the Committee on Federal Courts: Sanctions and Attorneys' Fees 3 (June 8, 1987). About 75% of the judicial officers, 66% of all attorneys responding, and half of the plaintiffs' lawyers and solo practitioners did not believe that the rule discouraged the assertion of meritorious claims. See *id.* Out of 8000 persons surveyed, 20% of the lawyers and 40% of the federal judicial officers responded. See *id.* at 2. The plaintiffs' bar's less enthusiastic support for rule 11 may reflect the fact that the overwhelming majority of motions for sanctions are made against plaintiffs' lawyers, and that such motions are granted at a rate of approximately 60%, whereas only 50% of sanctions motions made against defense counsel are granted. See Vairo, *supra* note 2, at 6-7.

⁴ The advisory committee note states that "[t]he rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories." FED. R. CIV. P. 11 advisory committee note to 1983 amendments, reprinted in 97 F.R.D. 165, 199 (1983) [hereinafter "Advisory Notes"].

⁵ See, e.g., Nelken, *Sanctions Under Amended Federal Rule 11 — Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313, 1316-17 (1986) (noting the frustration of one district judge).

⁶ Advisory Notes, *supra* note 4, at 192; see Miller & Culp, *Litigation Costs, Delay Prompted the New Rules of Civil Procedure*, NAT'L L.J., Nov. 28, 1983, at 24; Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1, 19 (1984).

11. This awareness has certainly deterred some frivolous, wasteful, or abusive litigation.

But at what cost? According to its critics, rule 11 deters lawyers from asserting marginal yet potentially meritorious claims or defenses. In addition, they charge, motions for sanctions breed extensive satellite litigation that adds to the waste and delay the rule was supposed to eliminate.

II. THE PROBLEMS WITH RULE 11

A. *Unpredictability Under the Rule*⁷

In interpreting and applying rule 11, the courts have become a veritable Tower of Babel. Courts have upheld sanctions:

- (1) "[w]hen an attorney recklessly creates needless costs";⁸
- (2) "[w]here . . . [the plaintiff's attorney] has made no inquiry or has made an inquiry that has revealed no information supporting a claim";⁹
- (3) where the attorney insisted "on litigating a question in the face of controlling precedent . . . and failure to discover such overwhelming precedent suggests a lack of reasonable inquiry";¹⁰
- (4) where a paper is "frivolous, legally unreasonable, or without factual foundation";¹¹
- (5) "where it is patently clear that a claim has absolutely no chance of success under the existing precedents, and where no reasonable argument can be advanced to extend, modify or reverse the law";¹²
- (6) where there is "no support in any possible theory of law or any possible interpretation of the facts."¹³

⁷ This Commentary is limited to the first prong of rule 11:

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 formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for extension, modification, or reversal of existing law 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

This Commentary does not address the prohibition against papers filed for an improper purpose. Few courts have imposed sanctions on this ground, and I am aware of no claim that to do so would chill legitimate advocacy. The improper purpose inquiry turns on the sufficiency of the evidence to support the finding, something with which the courts are well qualified to deal. See Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 HARV. L. REV. 630, 643-44 (1987).

⁸ *In re TCI Ltd.*, 769 F.2d 441, 446 (7th Cir. 1985).

⁹ *Foster v. Michelin Tire Corp.*, 108 F.R.D. 412, 415 (C.D. Ill. 1985).

¹⁰ *Nixon v. Phillipoff*, 615 F. Supp. 890, 896 (N.D. Ind. 1985), *aff'd*, 787 F.2d 596 (7th Cir. 1986).

¹¹ *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 831 (9th Cir. 1986).

¹² *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 254 (2d Cir. 1985).

¹³ *Carr v. Times Picayune Publishing Corp.*, 619 F. Supp. 94, 98 (E.D. La. 1985).

Perhaps they are all saying the same thing in different words. In the logic of the law, however, the use of different words at least raises an inference that a different meaning is intended.

Even if all of the courts meant the same thing, they have not applied the rule in the same way. Although the standard that governs attorneys' conduct is objective reasonableness, what a judge will find to be objectively unreasonable is very much a matter of that judge's subjective determination.¹⁴ Judges differ in what they expect of lawyers and in the way they accommodate the values in tension in the adversary system: the duty owed to the client versus the obligation owed to the court. A survey conducted by the Federal Judicial Center, in which some 300 district judges participated, illustrates the disparate responses of different judges to identical fact situations.¹⁵

One of the principal sources of confusion is the emphasis on the merits of claims and defenses that has become a dominant theme in rule 11 proceedings. This orientation has been reflected both in the papers filed in motions for sanctions and in the decisions on these motions.¹⁶ The prevailing approach is illustrated by the Second Circuit's "absolutely no chance of success and no reasonable argument" standard, listed above as item (5). Undoubtedly there are claims and defenses on whose patent lack of merit lawyers and judges would generally agree, but they are rare. It is difficult, however, to predict with certainty whether a particular claim or defense will be held to fall within that definition.

The circumstances of the cases also affect whether a court will find a particular paper to violate rule 11. Although one of the major elements of the 1983 revision of the rule was the deletion of all reference to wilfulness,¹⁷ judges will be influenced by whether they perceive the action as reflecting deliberate decision or only inexperience or negligence.

¹⁴ See, e.g., *Zaldivar*, 780 F.2d at 830; *Eastway*, 762 F.2d at 254; *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1538 (9th Cir. 1986).

¹⁵ See Kassir, *An Empirical Study of Rule 11 Sanctions* (Federal Judicial Center 1985). The Center asked judges how they would rule on 10 fact situations arising under rule 11. Although 97% of the judges agreed that one of the problems involved a rule 11 violation, and 85% said they would impose sanctions, there was no such consensus on most of the other problems. See *id.* at 17. The survey was conducted in 1984, when rule 11 was new and the law under it only beginning to develop. Its results are not necessarily representative of the current state of opinion.

¹⁶ See, e.g., *Zaldivar*, 780 F.2d at 830-31; *MGIC Indemnity Corp. v. Weisman*, 803 F.2d 500, 503-05 (9th Cir. 1986); *Hasty v. Paccar, Inc.*, 583 F. Supp. 1577, 1579-80 (E.D. Mo. 1984); *Dore v. Schultz*, 582 F. Supp. 154, 158 (S.D.N.Y. 1984); *Lucha, Inc. v. Goeglein*, 575 F. Supp. 785, 788 (E.D. Mo. 1983).

My criticism of merit-oriented rule 11 jurisprudence does not imply that I think these particular cases were wrongly decided. Moreover, the circumstances in which some rule 11 cases arise may make it unnecessary to address the prefiling investigation in the decision.

¹⁷ See Advisory Notes, *supra* note 4, at 197, 200.

Unpredictability also stems from the volatile character of many areas of the law.¹⁸ Consider, for example, the case of the apparently intoxicated driver who recovered from a telephone booth manufacturer for the injuries she sustained when her car veered off the road, jumped a curb, crossed a sidewalk, entered a parking lot, and crashed into the telephone booth.¹⁹ As the Ninth Circuit recently said of the law of wrongful discharge: "The rapid and recent evolution of the law in this area highlights the precariousness of drawing a line between plausible and sanctionable arguments."²⁰

Thus, there is good ground for arguing that the standard a court will apply under rule 11 is unpredictable. Whether this unpredictability has chilled advocacy, however, is less clear. Proof that conduct has been deterred is elusive. The facts in the reported cases are egregious. Whatever the vagueness of the standards the cases articulate, lawyers should have little to fear in light of the type of conduct that courts have punished. My own experience has disclosed no anecdotal evidence of chilling.²¹ The question probably can never be resolved other than on an intuitive level.

Regardless of how one resolves the debate over the existence of chilling effects, however, there is a problem of fairness. Sanctions may have penal consequences, including injury to a lawyer's reputation, investigation by state bar associations, and adverse effects on malpractice insurance coverage. Such consequences may well be appropriate in particular cases, but fairness requires that those cases be defined with reasonable certainty and predictability.²²

B. Excessive Litigation Under the Rule

The second problem is the excessive amount of litigation activity rule 11 has spawned. The drafters explicitly warned against allowing

¹⁸ See, e.g., *Gaiardo v. Ethyl Corp.*, No. 87-5248, slip op. at 6-8 (3d Cir. Dec. 14, 1987) (denying motion for sanctions under Rule 11 for filing of wrongful discharge action).

¹⁹ See *Bigbee v. Pacific Tel.*, 34 Cal. 3d 49, 665 P.2d 947, 198 Cal. Rptr. 857 (1983).

²⁰ *Hudson v. Moore Business Forms, Inc.*, 827 F.2d 450, 454 (9th Cir. 1987).

²¹ Critics of the rule have argued that it is antithetical to the liberal notice pleading regime created by the Federal Rules of Civil Procedure when they were adopted in 1937. See Note, *supra* note 7, at 630. The argument ignores subsequent history characterized by widespread litigation abuse and misuse within the framework established by the rules. It was the reaction to this development that fueled the 1983 amendments, which represent a substantial change from the conception in 1937. See Nelken, *supra* note 5, at 1313.

²² Of course, discretion — and the possibility of substantially different outcomes before different judges — is an integral element of the litigation process: discretion is exercised, often on the basis of only a fragmentary record, in the granting and denying of injunctive relief and other substantive motions and in many kinds of evidentiary rulings. Such discretion is necessary if trial judges are to manage the litigation before them effectively. But that is a different matter from giving lawyers fair notice of what is required of them to avoid sanctions.

the cost of "satellite litigation" to offset the rule's benefits.²³ The avalanche of rule 11 cases suggests that the warning is being ignored. This situation results from the rule's inherent unpredictability and the readiness of lawyers to resort to any device available to exert pressure on their opponents. Despite its salutary effects, Rule 11 has added substantially to the volume of motions in the district courts and appeals in the circuit courts.

This activity leads to waste and delay. It also carries with it the potential for increased tension among the parties and with the court. Sanction proceedings can affect personal relations, making it more difficult to conduct the litigation in a rational manner and reach accommodation. This is not invariably true because there are some whose behavior improves only under the threat of sanctions; moreover, sanction-prone lawyers are not likely to litigate on a platonic level in any event. Nevertheless, when lawyers go to war under rule 11, litigation tends to become less manageable.

III. THE REMEDY

Rule 11 should not be repealed. The litigation abuse which necessitated the rule remains with us and requires ongoing remedial measures. Eliminating the rule would send the wrong message to lawyers.

Nor would semantic surgery overcome the rule's present problems. No one as yet has come up with a definition of frivolousness that would allow one to predict with some certainty whether a claim is so far beyond the pale that no judge would listen to it sympathetically; an attempt to do so would be disingenuous. One is reminded of the observation of the great physicist Niels Bohr: "I try not to speak more clearly than I think."²⁴

Instead, we must rethink the way in which we enforce rule 11. The purpose of the rule, as stated by the Advisory Committee, is twofold: "[to] discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses."²⁵ Without explicitly articulating an interpretative rationale, courts often tend to emphasize the second purpose, focusing on the merit — or lack of merit — of claims and defenses. This has made rule 11 analogous to an enhancement statute under which a penalty is added when a dismissal is sufficiently emphatic; courts distinguish between

²³ Advisory Notes, *supra* note 4, at 201.

²⁴ R. RHODES, *THE MAKING OF THE ATOMIC BOMB* 77 (1986). *See, e.g.*, Note, *supra* note 7, at 638, 650, 652 (urging a "general theory for evaluating the plausibility of legal arguments" but finally arriving at a standard based on whether the claim is "unthinkable").

²⁵ Advisory Notes, *supra* note 4, at 198.

claims and defenses that are meritless and those that are so meritless as to warrant sanctions.

Some courts, moreover, have tended to see rule 11 as an adjunct to case management. This approach finds implicit support in the Advisory Committee's unfortunate reference to "streamlin[ing] the litigation."²⁶ But as the distinction between dealing with the merits of litigation and dealing with lawyer misconduct is obscured, a risk arises that courts will do neither effectively. An illustration of this is presented when a court denies a motion for summary judgment but sanctions the lawyer after trial for having brought a frivolous action.²⁷ One might well wonder how a case could be so frivolous as to warrant sanctions if it has sufficient merit to get to trial.

One must keep in mind that the 1983 amendments to the Federal Rules of Civil Procedure, which included an overhaul of rule 11, also substantially revised rule 16, spelling out the extensive powers of the trial judge to conduct meaningful pretrial procedures to narrow issues and streamline the litigation so as to further the goals of economy and expedition. When applied in conjunction with rule 16, rule 12 (governing dismissal of claims) and rule 56 (summary judgment) provide an adequate set of tools for the early disposition of frivolous claims and defenses.

It may be argued that the deterrent effect of rule 11 sanctions is nevertheless needed to minimize the costs that frivolous claims or defenses impose on the opposing party. The force of that argument is diluted by the additional costs imposed by the rule 11 litigation itself. In any event, the minimization of the cost of frivolous claims and defenses is properly an objective of case management. The early elimination of such claims or defenses is one of the purposes of the scheduling conference, which is to be held within 120 days after an action is filed.²⁸ If a claim or defense is indeed frivolous, that fact should be sufficiently apparent, early in the litigation process, for the judge or opposing counsel to address it and, by motion or other appropriate measures, eliminate it with minimum expense. When this has not occurred, judicial indifference or the lawyers' preoccupation with collecting fees has probably been to blame. Resort to rule 11, however, is not a good way of curing deficiencies in case management.

When case management functions as intended under the Federal Rules of Civil Procedure, it serves the purpose of avoiding unnecessary

²⁶ See cases cited *supra* note 15.

²⁷ See, e.g., *Steinberg v. St. Regis/Sheraton Hotel*, 583 F. Supp. 421, 424 (S.D.N.Y. 1984); see also *Oliveri v. Thompson*, 803 F.2d 1265 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 1373 (1987). The court of appeals in *Oliveri*, in reversing the sanctions imposed below, noted that "it would be inequitable to permit a defendant to increase the amount of attorneys' fees recoverable as a sanction by unnecessarily defending against frivolous claims" *Id.* at 1280.

²⁸ See FED. R. CIV. P. 16.

costs. The proper role of rule 11, however, is not to compensate parties for such costs; it is to deter litigation abuse.²⁹ Although courts may do so by awards of fees and expenses in appropriate cases, the rule does not compensate parties for the costs of unmeritorious claims or defenses. Some courts have read the latter objective — straightforward fee-shifting — into the rule.³⁰ There is little evidence to support their view, however, and the vast majority of courts agree that the rule's purpose is to deter abuse, with fee-shifting simply one of several methods of achieving deterrence.³¹ The advisory committee note, although not entirely clear, speaks in terms of deterrence and does not specifically refer to fee-shifting.³² Rule 37 shows that when the drafters of the rules meant to provide for fee shifting, they knew how to do it.³³ Moreover, to attribute a broad fee-shifting rationale to rule 11 is contrary to the American Rule; fee shifting ought not to be undertaken without clear authority.³⁴

Courts therefore should focus on rule 11 as a vehicle to "discourage dilatory and abusive tactics."³⁵ Apart from targeting conduct deliberately undertaken for an improper purpose, the rule is well designed to address the filing of papers found to be dilatory and abusive under an objective standard. It does so by requiring lawyers to certify that they have made a reasonable inquiry prior to filing the paper to satisfy themselves that it is supported by fact and law.³⁶

²⁹ See *Anschutz Petroleum Marketing v. E.W. Saybolt Co.*, 112 F.R.D. 355, 357 (S.D.N.Y. 1986); see also Nelken, *supra* note 5, at 1323–25.

³⁰ See, e.g., *In re TCI Ltd.*, 769 F.2d 441, 446–47 (7th Cir. 1985).

³¹ See, e.g., *Gaiardo v. Ethyl Corp.*, No. 87-5248, slip op. at 6 (3d Cir. Dec. 14, 1987); *Donaldson v. Clark*, 819 F.2d 1551, 1557 (11th Cir. 1987); *In re Yagman*, 796 F.2d 1165, 1183 (9th Cir. 1986). There is some debate among commentators over whether the deterrence objective was to be accomplished by penal sanctions or by fee-shifting, but they seem to agree that deterrence of abuse is the overriding purpose. See, e.g., Levin & Sobel, *Achieving Balance in the Developing Law of Sanctions*, 36 CATH. U.L. REV. 587, 593 (1987); Nelken, *supra* note 5, at 1323–25. Although Professor Nelken criticizes what she perceives as a penal approach to sanctions, see *id.* at 1353, the more sparing use of sanctions under a penal rationale would mitigate whatever chilling effects the rule may have.

³² See Advisory Notes, *supra* note 4, at 198.

³³ See FED. R. CIV. P. 37(b)(2)(E), (c), (d), (g) (providing that on motions for discovery orders, the judge shall award fees and expenses to the prevailing party unless justice otherwise requires).

³⁴ See *Roadway Express Inc. v. Piper*, 447 U.S. 752, 759–61 (1980); *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 260 (1975); *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 252 (2d Cir. 1985).

³⁵ Advisory Notes, *supra* note 4, at 198.

³⁶ Some commentators have argued that prefilng inquiry increases costs unnecessarily by requiring the signing lawyer to duplicate investigations previously conducted by others. But that is not the case. The requirement is satisfied so long as someone has performed an investigation and the certifying lawyer has in hand not simply an assurance, but some product of that investigation. See *Kendrick v. Zanides*, 609 F. Supp. 1162, 1172 (N.D. Cal. 1985) (Schwarzer, J.); Schwarzer, *supra* note 1, at 187–88.

What is the importance of requiring a prefiling investigation? Primarily, it makes lawyers "stop and think"³⁷ before they file papers. It forces them to consider whether the facts found and the law developed justify the risks and costs that will follow from filing a paper. An adequate investigation would disclose such crucial facts as whether an action is time-barred, whether relevant sales occurred, whether jurisdiction exists, or whether a boilerplate defense is baseless. The premise is that the conscientious lawyer will be deterred from filing a frivolous claim or defense, not so much by the fear of sanctions as by the negative results of the prefiling inquiry.

Courts are beginning to shift their focus from assessing the merits to assessing the adequacy of the prefiling inquiry. For example, in *Kamen v. American Telephone & Telegraph Co.*,³⁸ an appeal from sanctions imposed by the trial court after it dismissed the action, the issue was whether the plaintiff's lawyer had conducted an adequate prefiling inquiry into the factual basis of the action. The plaintiff's claim of handicap discrimination depended on proof that the defendant had received federal financial assistance. In considering whether sanctions were proper, the court did not ask whether the claim had a plausible basis, but whether the plaintiff's attorney had conducted a reasonable prefiling inquiry. In the absence of a specific finding by the trial judge that there was inadequate prefiling inquiry, the Second Circuit reversed the sanctions.³⁹ Judge Kears, dissenting, read the trial court's order below as implying such a finding, because the attorney was seeking the needed information by discovery and nowhere asserted what, if any, information he had obtained prior to filing.⁴⁰

In *Albright v. Upjohn Co.*,⁴¹ the plaintiff had sued several manufacturers of tetracycline-based drugs, alleging that the drugs had stained her teeth permanently. The defendant Upjohn moved for summary judgment on the ground that the plaintiff's interrogatory answers and her doctor's records showed that none of the drugs prescribed for the plaintiff were manufactured by Upjohn. The trial court granted the motion but denied sanctions. On defendant's appeal, a majority of the court held that the denial of sanctions was an abuse of discretion. The court found the plaintiff's attorney's prefiling investigation to be inadequate on the ground that such an investigation should have disclosed the absence of any facts or other records upon which to ground Upjohn's liability.⁴²

³⁷ See *Miller & Culp*, *supra* note 6, at 34, col. 1.

³⁸ 791 F.2d 1006 (2d Cir. 1986).

³⁹ See *id.* at 1014.

⁴⁰ See *id.* at 1014-16 (Kears, J., dissenting).

⁴¹ 788 F.2d 1217 (6th Cir. 1986).

⁴² See *id.* at 1221; see also *McCabe v. General Foods Corp.*, 811 F.2d 1336, 1340-41 (9th

Reliance on one's client as a source of facts will not necessarily constitute a "reasonable inquiry." As the Fifth Circuit has stated: "Blind reliance on the client is seldom a sufficient inquiry and certainly not when the prior history of a case at the courthouse may well be dispositive The rule's requirement of inquiry is a considered response to a perceived problem of baseless claims."⁴³ The advisory committee note explains that

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 . . . ; whether the pleading . . . was based on a plausible view of the law; or whether he depended on forwarding counsel or another member of the bar.⁴⁴

It has been suggested that this statement indicates that the purpose of the "reasonable inquiry" language was only to introduce flexibility into rule 11, not to create an independent duty.⁴⁵ That view, however, ignores the fact that the addition of the prefilng investigation requirement was a major purpose of the 1983 amendment. Adopting that view would gut rule 11 of what promises to be its most effective and meaningful provision.

The rule does not limit the "reasonable" prefilng inquiry requirement to facts; a lawyer must investigate the applicable law as well.⁴⁶ It may be true, as the Ninth Circuit has said, that "[e]xtended research alone will not save a claim that is without legal or factual merit from the penalty of sanctions,"⁴⁷ but prefilng research substantially in-

Cir. 1987); *Unioil Inc. v. E.F. Hutton & Co.*, 809 F.2d 548, 556-59 (9th Cir. 1986) *O'Rourke v. City of Norman*, 640 F. Supp. 1451, 1470 (W.D. Okla. 1986).

⁴³ *Southern Leasing Partners Ltd. v. McMullan*, 801 F.2d 783, 788 (5th Cir. 1986); *see also Kendrick v. Zanides*, 609 F. Supp. 1162, 1172 (N.D. Cal. 1985).

⁴⁴ Advisory Notes, *supra* note 4, at 199.

⁴⁵ *See* Note, *supra* note 7, at 642.

⁴⁶ *See Thornton v. Wahl*, 787 F.2d 1151, 1154 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 181 (1986); *Saturn Systems, Inc. v. Saturn Corp.*, 659 F. Supp. 868, 871 (D. Minn. 1987).

Focusing on prefilng inquiry in enforcing rule 11 applies to motions as well as to claims and defenses in the pleadings. Because a properly presented motion draws its legal and factual support from the underlying pleadings, the papers presenting a motion should attest to evidence of the prefilng inquiry. If a motion as presented seems bereft of merit, a duty to mitigate is imposed on the opposing party. *See United Food & Commercial Workers Union Local No. 115 v. Armour & Co.* 106 F.R.D. 345 (N.D. Cal. 1985); *Nelken*, *supra* note 5, at 1334-35. A motion so patently baseless as to violate rule 11 should require little if any response. The judge by timely intervention will often be able to determine whether any response is necessary. *See supra* text accompanying note 28. Opposing counsel, in an effort to mitigate, may themselves suggest to the court that no opposition be filed. If the court so directs, and the motion is denied out-of-hand, there is little to warrant sanctions unless the court considers counsel's conduct to be genuinely abusive.

⁴⁷ *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 831 (9th Cir. 1986).

creases the likelihood that counsel will not file such a claim without developing a plausible argument.

The duty to make reasonable factual and legal inquiry only makes sense, however, if the courts adhere strictly to the *prefiling* requirement. The rule is explicit on that point: to permit challenged pleadings to be justified by what Judge Milton Shadur has described as "post-hoc sleight of hand" makes a travesty of the rule.⁴⁸ Yet that is what generally occurs in practice. For rule 11 to serve its purpose, lawyers must be prepared to show that they performed a reasonable prefiling investigation. To do so should add no new burdens: marshalling the available evidence to support the elements of one's claims or defenses and summarizing the controlling authorities before filing is no more than any responsible lawyer is expected to do. Far from adding costs, the prefiling inquiry reduces them by deterring frivolous claims and defenses.

A duty of reasonable prefiling inquiry assumes that attorneys will act in conformity with what the inquiry discloses. That will not invariably be true, however. Experience shows that at times lawyers will proceed in the teeth of facts and law that make their position wholly unmeritorious. It would therefore defeat the purpose of the prefiling investigation requirement if attorneys were left free to conceal or misrepresent critical adverse information. The Ninth Circuit recently acknowledged this principle in *Pipe Trades Council v. Underground Contractors Association*,⁴⁹ when it affirmed the imposition of sanctions on two grounds. It first held the union's motion to compel arbitration to be frivolous. It went on to hold, however, that the union's failure to disclose to the court that its prior motion on the same ground had been denied and was on appeal and that a determinative arbitration was then pending "constituted a breach of [the movant's] duty of candor to disclose critical facts."⁵⁰ Similarly, the Eleventh Circuit upheld sanctions against an attorney seeking an award of fees for failing to disclose his prior execution of a release of his claim for fees.⁵¹

The scope of the duty of disclosure under rule 11 is a matter of controversy. Thus, when sitting as trial judge in *Golden Eagle Distributing Corp. v. Burroughs Corp.*,⁵² I sanctioned an attorney for

⁴⁸ *In re Ronco*, 105 F.R.D. 493, 498 (N.D. Ill. 1985), *appeal dismissed*, 793 F.2d 295 (7th Cir. 1986); *see also* *Whittington v. Ohio River Co.*, 115 F.R.D. 201, 206 (E.D. Ky. 1987); *National Union Fire Ins. Co. v. Continental Illinois Corp.* 116 F.R.D. 252, 254-55 (N.D. Ill. 1987).

⁴⁹ 828 F.2d 609 (9th Cir. 1987).

⁵⁰ *Id.* at 615.

⁵¹ *See* *Blackwell v. Department of Offender Rehabilitation*, 807 F.2d 914, 915 (11th Cir. 1987).

⁵² 103 F.R.D. 124 (N.D. Cal. 1984), *rev'd*, 801 F.2d 1531 (9th Cir. 1986).

contending that existing law supported the motion when, in fact, only an argument to modify or extend existing law would support it. A panel of the court of appeals reversed, holding that rule 11 imposed no duty to disclose to the court that the argument being made was based not on existing law but on its modification or extension.⁵³

In enforcing the duty to make a reasonable prefiling investigation, courts will need to consider carefully the extent of the attorney's duty of candor to the court. Clearly an attorney is not obligated to make the opponent's case, to disclose client confidences, or to substitute for a judge in prescreening the client's claims.⁵⁴ It is equally clear, even under the pre-1983 rule 11, that deliberate deception of the court and opposing counsel about critical facts, such as a party's citizenship, the date of the accident, the absence of evidence to connect the defendant to the claim, or the existence of a controlling decision would be "totally inconsistent with the letter and the spirit of Fed. R. Civ. P. 11."⁵⁵

The question is where to draw the line between inadequate lawyering and litigation abuse. Rule 11 is not an all-purpose weapon to enforce lawyers' ethics. But it is aimed at abusive conduct. Its purpose is implemented by requiring the filing lawyer to certify that a prefiling investigation indicates that the paper is warranted by the facts and a good faith legal argument. If the failure to make such an investigation is abusive, then the failure to disclose that the results of the investigation refute the lawyer's certificate must be considered equally abusive.⁵⁶

IV. CONCLUSION

Shifting the focus of rule 11 enforcement from merits to process will not solve all problems. Redirecting it, however, from predicting what some future court might say about a claim or defense to scrutinizing what a lawyer actually did, should materially reduce subjec-

⁵³ Five judges of the court joined in a lengthy and detailed dissent from a denial of an en banc hearing. See 809 F.2d 584 (9th Cir. 1987).

⁵⁴ See *Golden Eagle*, 801 F.2d at 1542; Note, *supra* note 7, at 650.

⁵⁵ *Itel Containers Int'l Corp. v. Puerto Rico Marine Management, Inc.*, 108 F.R.D. 96, 102 (D.N.J. 1985); see also *Perkinson v. Gilbert/Robinson, Inc.*, 821 F.2d 686, 690-91 (D.C. Cir. 1987); *All Hawaii Tours, Corp. v. Polynesian Cultural Center*, 116 F.R.D. 645, 651-52 (D. Haw. 1987).

⁵⁶ See *O'Rourke v. City of Norman*, 640 F. Supp. 1457, 1469 (W.D. Okla. 1986); *Thornton v. Wahl*, 787 F.2d 1151, 1154 (7th Cir. 1986); *Blackwell v. Department of Offender Rehabilitation*, 897 F.2d 914, 951 (11th Cir. 1987). One court has said that "Rule 11 requires 'causation,' i.e., that the failure to make reasonable inquiry result in the filing of a frivolous motion." *Continental Air Lines v. Group Sys. Int'l*, 109 F.R.D. 594, 597 (C.D. Cal. 1986). Rule 11, by its terms, contains no such requirement and should not be read so narrowly. Presumably, a court will not concern itself with the adequacy of a lawyer's prefiling inquiry unless it is material. A material violation of rule 11 is a sufficient predicate for sanctions.

tivity and inconsistency. Lawyers and judges may not invariably agree on what constitutes a reasonable inquiry under the circumstances, but it is reasonable to expect a greater consensus on that question than on whether a claim or defense is frivolous. The former involves an assessment of prevailing professional practice; the latter a prognostication of how courts might in the future evaluate a claim or defense.

This shift in focus will not necessarily make a difference in every case, nor will it solve every problem. It probably will result in less frequent imposition of sanctions. There may be cases in which implausible claims are asserted but the lawyer's prefiling inquiry could not be faulted. Those cases are better relegated to case management remedies.

The suggested approach should better serve the rule's deterrent purpose, however. Being prepared to explain his or her actions will help to concentrate an attorney's thinking, yet not chill "enthusiasm or creativity."⁵⁷

At the same time, the approach should reduce the volume of rule 11 litigation. Much of the pressure behind that litigation has undoubtedly come from clients seeing a way to recoup some of their legal expense incurred as a result of what they considered a frivolous claim or defense. Once it becomes clear that an award of sanctions will turn on proof of the absence of a reasonable prefiling investigation, the added burden on the moving party will make sanctions motions less attractive. With private incentive to seek sanctions lessened, courts will use them "for the protection of the judicial process,"⁵⁸ leaving it to case management "to relieve the financial burden that baseless litigation imposes."⁵⁹ With the focus not on what the parties are doing to each other but on whether the lawyers are abusing the litigation process, rule 11 enforcement will move from private compensation to serving the larger interest of the judicial process.

⁵⁷ See *supra* note 4.

⁵⁸ *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1082 (7th Cir. 1987).

⁵⁹ *Id.*