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Has the Chancellor Shot Himself in the Foot? Looking for a Middle Ground on Rule 11 Sanctions

by

MELISSA L. NELKEN*

Since its amendment in 1983 as part of a package of amendments to the Federal Rules of Civil Procedure, Rule 11 has gone from a rarely used or discussed rule to the focus of extensive litigation, commentary, and controversy. As of December 1987, the district and circuit court levels had reported almost 700 Rule 11 decisions. In 1988 alone, four circuits accounted for another seventy-five appellate decisions.

Sanctions are mandatory for violations of the rule; the usual sanction, attorney’s fees and expenses, is often substantial. Many commenta-

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This Article is dedicated to Carol Jessop, M.D., without whose help it would not have been written. I am indebted to Lisa Helpert and Beth McGowen for research assistance.


4. In the Second, Fifth, Seventh, and Ninth Circuits, there were 75 decisions on Rule 11 issues. Many other cases in those circuits referred to Rule 11 or mentioned it in passing (LEXIS, Genfed library). See, e.g., Terrydale Liquidating Trust v. Barness, 846 F.2d 845 (2d Cir. 1988); Bennett v. Corroon & Black Corp., 845 F.2d 104 (5th Cir. 1988); DeMallory v. Cullen, 855 F.2d 442 (7th Cir. 1988); Toth v. TWA, 862 F.2d 1381 (9th Cir. 1988). The same circuits decided a total of 45 Rule 11 cases in 1986 and 45 in 1987 (through December 14, 1987). Vairo, supra note 3, at 236-40.

5. “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 . . . an appropriate sanction.” Fed. R. Civ. P. 11 (emphasis added). See, e.g., Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 254 n.7 (2d Cir. 1985) (“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.”), cert. denied, 108 S. Ct. 269 (1987).
tors and practitioners have argued that the threat of sanctions chills developments in the case law and creates intolerable conflicts with the lawyer's duty to represent her client zealously. Despite the intentions of the Advisory Committee, the rule has spawned considerable "satellite litigation" that shows little sign of abating as the rule completes its sixth year. Judges face a mountain of cases presenting difficult issues, including the potential chilling effect of the rule, the lawyer's dual role as officer of the court and client advocate, and the process due both lawyer and client before imposition of sanctions.

Most rules of procedure lead quiet lives, ruffling a few feathers now and then, and sometimes being tinkered with and amended as times change. The 1983 amendments were an experiment, designed to increase judicial control over litigation and to rein in some of the perceived excesses of burgeoning lawsuits and free-form discovery. The mandatory sanctions provisions of Rule 11 and the publicity it received at the time of its amendment destined the rule for a central role in this shift away from lawyer-centered litigation. Although some degree of consistency has been achieved among the circuits on basic interpretation of the rule, considerable conflict still exists about the appropriate standards for appellate review and, most importantly, about the rule's purpose.

Has the experiment failed? Is the storm surrounding Rule 11 inevitable in adjusting to a new, but basically sound system, or are the benefits from using sanctions outweighed by the costs to lawyers, judges, and society? Section I of this Article discusses the scope of Rule 11, the origi-

To assure that the efficiencies achieved through more effective operation of the pleading regimen will not be offset by the cost of satellite litigation over the imposition of sanctions, the court must to the extent possible limit the scope of sanction proceedings to the record. Thus discovery should be conducted only by leave of the court, and then only in extraordinary circumstances.

Id.

The person from Mars looking down... might say:...'[Y]ou know what contemporary federal civil litigation is like? It's like those dance marathon contests. The object is to get out on the dance floor, sort of hug your opponent, and move aimlessly and shiftlessly to the music with no objective in mind other than to outlast everybody else.'

8. Rule 26(g), added in 1983, also provides for mandatory sanctions; but these relate solely to discovery and, perhaps because of the more familiar sanctions provisions already set forth in Rule 37, are rarely used. The new sanctions provisions in Rule 16(f), dealing with pretrial conferences, are not mandatory. The Lexis database shows fewer than 150 cases involving Rule 16(f) and fewer than 80 cases involving Rule 26(g) since the 1983 amendments (LEXIS, Genfed library).
nal purpose of the rule, and how application of the rule has undermined that purpose. Section II explores the major sources of opposition to Rule 11, using cases from the courts with the highest volume of Rule 11 litigation—the Second, Fifth, Seventh, and Ninth Circuits—to illustrate the problems that have arisen and the responses to those problems that different courts have adopted. This Article argues that the rule should not be repealed, as some have urged, but that it should be amended to clarify its intended focus on the adequacy of the lawyer's prefiling inquiry9 and to lessen its chilling effect, particularly in civil rights cases. Section III proposes amendments to the rule to achieve those goals and to reflect more accurately the rule's purpose. This section also proposes language for an Advisory Committee note to accompany the rule change.

I. The Scope of Rule 11

Rule 11 imposes a duty on lawyers to make a “reasonable inquiry” into the facts and the law before filing a pleading or other paper. The lawyer's signature certifies that she has done so, that she believes the paper is “well grounded in fact and warranted by existing law or a good faith argument” to modify or extend the law, and that the paper is not filed for any improper purpose.10 The amended language is intended to “stress[ ] the need for some prefiling inquiry into both the facts and the law to satisfy the affirmative duty imposed” by the rule's certification provisions.11 The rule provides for sanctions in order to emphasize its “deterrent orientation in dealing with improper . . . papers.”12 The sanctions imposed “may include . . . a reasonable attorney's fee.”13

The relatively modest goal of getting lawyers to “stop and think”14 before filing papers is a laudable one. The Advisory Committee intended the amended rule to establish a “standard of conduct that is more focused” than that of its predecessor, so as “to reduce the reluctance of courts to impose sanctions.”15 The volume of Rule 11 cases indicates that reluctance to sanction lawyers is no longer an obstacle. What the

10. FED. R. CIV. P. 11. For a detailed discussion of the rule's new provisions see Nelken, supra note 1, at 1318-23.
11. FED. R. CIV. P. 11 advisory committee's note to 1983 amendments. In this respect, Rule 11 fits in with the more explicit case management aims of Rules 16 and 26 as a means of “discourag[ing] dilatory or abusive tactics,” but it is not designed to address the merits of a party's case. Id.
12. Id.
14. A. MILLER, supra note 7, at 15.
15. FED. R. CIV. P. 11 advisory committee's note to 1983 amendments.
rule has failed to produce, however, is a reasonable level of agreement about what conduct is sanctionable. This is due in part to the tendency of some circuits and some judges to read the rule as a mandate to evaluate the paper filed, rather than to determine the reasonableness of the prefiling inquiry.\textsuperscript{16} The resulting uncertainty in applying Rule 11 undermines its deterrent aim, and the tendency to award attorneys' fees as the usual sanction may result in overdeterrence, especially in the area of civil rights.\textsuperscript{17}

These factors contribute to the chilling effect of the rule and to the volume of Rule 11 litigation, problems that the Advisory Committee foresaw and sought to mitigate in formulating the rule. Unless the rule can be refocused on its original goals, it will alter permanently the character of civil litigation and the reality of access to court, without providing substantial benefits in terms of reduced cost and delay in the judicial system.

\section{II. The Opposition to Rule 11}

The opposition to Rule 11 has focused on two main concerns: (1) the increased workload of already overworked federal judges created by the satellite litigation of Rule 11 sanctions issues; and (2) the chilling effect of the rule on novel and disfavored claims, especially in the area of civil rights. The latter category includes not only concern about inhibiting developments in the law, but also a more general opposition to increased case management and to the judge's intrusion into the lawyer's traditional preserve of litigation decisionmaking. Both sources of opposition have led to calls for the repeal or amendment of Rule 11\textsuperscript{18} or, at a minimum, for drastic narrowing of its scope through judicial interpreta-

\begin{itemize}
\item \textsuperscript{16} See infra notes 103-20 and accompanying text.
\item \textsuperscript{17} During the first two years after the rule was amended, 96\% of the cases imposing sanctions awarded attorneys' fees. Nelken, \textit{supra} note 1, at 1333. That trend appears to have continued, although some courts have begun to impose fines payable into court, in addition to fees, as the burden of Rule 11 litigation has become more onerous. See infra note 26.
\item \textsuperscript{18} The Advisory Committee has received correspondence from individual lawyers, law professors, and lawyer organizations urging that further action be taken with respect to Rule 11, in light of experience to date with the amended rule. Telephone conversation with Paul Carrington, Reporter, Advisory Comm. on Civil Rules (June, 1989). On July 22, 1989, the American Trial Lawyers' Association Board of Governors issued a resolution urging the Advisory Committee to hold nationwide hearings "to re-examine Rule 11" because of concern about the rule's "disproportionate" effect on plaintiffs, especially civil rights plaintiffs, and about the increase in satellite litigation (copy on file at The Hastings Law Journal). See also LaFrance, \textit{Federal Rule 11 and Public Interest Litigation}, 22 \textit{Val. U.L. Rev.} 331, 352-58 (1988) (suggesting repeal or curtailment of Rule 11 due to its chilling effect on public interest litigation); Tobias, \textit{Rule 11 and Civil Rights Litigation}, 37 \textit{Buffalo L. Rev.} 485 (1989) (suggesting repeal or amendment of Rule 11 due to its chilling effect on civil rights litigants).
\end{itemize}
tion of the existing rule. This section examines the case law of the amended rule in light of these concerns and argues that these concerns can be adequately addressed by refocusing the rule on its original purpose.

A. Satellite Litigation

Given the level of inter- and intra-circuit conflicts about proper interpretation of Rule 11, the lack of guidance from the Supreme Court, and the high stakes involved, a significant decrease in Rule 11 litigation is unlikely in the near future. The potential for increased litigation over sanctions—not only during an initial period of defining the parameters of Rule 11, but also indefinitely, at least where substantial sanctions are sought—did not escape the Advisory Committee responsible for the 1983 amendments. The Committee proposed that “to the extent possible” the sanctions proceedings be limited to the record already established in the case. Concern for due process and for effective appellate review of


20. The Supreme Court has granted certiorari in only two Rule 11 cases. See Calloway v. Marvel Entertainment Group, 854 F.2d 1452 (2d Cir. 1988), cert. granted sub nom. Pavelic & Leflore v. Marvel Entertainment Group, 109 S. Ct. 1116 (1989) and Danik, Inc. v. Hartmarx Corp., 875 F.2d 890 (D.C. Cir.), cert. granted sub. nom. Cooter & Gell v. Hartmarx Corp., 110 S. Ct. 275 (1989). The Court granted certiorari in Calloway in order to resolve a conflict among the circuits about whether a law firm or the signing lawyer only is liable for Rule 11 sanctions. In Calloway, the Second Circuit ruled that the law firm, which was formed during the pendency of the case, was liable for the sanctions attributable to the papers filed while it was in existence. 854 F.2d at 1478. The Fifth Circuit, however, has ruled that only the lawyer whose signature appears on the paper in question is sanctionable. Robinson v. National Cash Register Co., 808 F.2d 1119, 1132 (5th Cir. 1987). In Danik, the court will hear argument on the following issues: (1) whether the district court has jurisdiction to impose Rule 11 sanctions after plaintiff’s voluntary dismissal under FED. R. CIV. P. 41(a)(1)(f); (2) whether review of Rule 11 sanctions under an “abuse of discretion” standard is appropriate; and (3) whether the court of appeals can automatically impose Rule 11 sanctions for appeal upon affirming a Rule 11 award. See infra notes 35-49, 96-102 and accompanying text for a discussion of the latter two issues.


22. FED. R. CIV. P. 11 advisory committee’s note to 1983 amendments. The Committee’s focus on discovery overlooks the costs to all actors imposed by briefings, hearings, and, in
sanctions decisions, however, makes it difficult for the district judge to confine herself to examination of the record, particularly when the adequacy of counsel's prefiling inquiry is at issue. The burden of Rule 11 litigation has been considerable, in both the district and the appellate courts, and the failure to integrate it with pretrial procedures for deciding cases on the merits has only exacerbated that burden.

(1) Do the Benefits Outweigh the Costs?

As early as 1986, the Ninth Circuit addressed the prospect that implementation of Rule 11 would increase the burden on the courts to the point where it outweighs any benefits in *Golden Eagle Distributing Corp. v. Burroughs Corp.* In reversing the district court, which interpreted Rule 11 to include a duty of candor requiring a lawyer not only to have a good faith argument for the extension of law but also to so designate it in his brief, the panel pointed out:

The imposition of the district court's requirement appears to be at cross purposes with the Rule 11 amendments in...[this] fundamental respect. The key objective of the amendments to the Rule was to reduce cost and delay in the courts... Asking judges to grade accuracy of advocacy in connection with every piece of paper filed in federal court multiplies the decisions which the court must make as well as the cost for litigants.

If "reduc[ing] cost and delay in the courts" was a key objective of the rule, the large number of reported cases and unpublished opinions and orders of both the district and circuit courts indicate that the rule has not achieved the objective. Some of this activity is inevitable in the early years after a significant rule change before interpretation fills in the

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23. 801 F.2d 1531 (9th Cir. 1986).
24. *Id.* at 1540. Judge Cudahy expressed a similar concern in his dissent from the reversal of the district court's denial of Rule 11 sanctions in *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073 (7th Cir. 1987), cert. dismissed, 108 S. Ct. 1101 (1988):

I would be more inclined to accept the judgments of the district courts in these matters and not generally to require much explanation if sanctions are refused. The alternative is to pursue a nit-picking appellate review that will add more to our burdens than sanctions for 'objectively frivolous' cases will take away.

*Id.* at 1086 (Cudahy, J., concurring in part, dissenting in part).
25. In the Third Circuit, for example, almost two-thirds of the total number of decisions on Rule 11 issues and two-thirds of the Rule 11 sanctions decisions were unpublished during the year studied by the Third Circuit Task Force on Rule 11. Burbank, *Rule 11 in Transition—The Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11 Am. JUDICATURE SOC'Y 59* (1989) [hereinafter Third Circuit Report]. According to the Westlaw database, there were 387 reported Rule 11 opinions at the district court level in 1988 alone (WESTLAW, DCT library).
gaps and ambiguities in the rulemakers' language. Rule 11, however, has become a vehicle for recouping a major element of the private costs of litigation—attorneys' fees. The public costs and delay engendered by the private recovery that Rule 11 makes possible are largely ignored. This potential for private recovery has, in effect, created a cause of action for fees, and failing to include a prayer for sanctions in many pleadings would be malpractice on the part of a lawyer when the client has a colorable argument for them. Although a party who has won a summary judgment motion will not necessarily be entitled to sanctions, he almost certainly will not be risking an award of sanctions against him by requesting them. The problem foreseen in Golden Eagle in 1986 appears to have become a reality, even without the expansive interpretation of the rule advocated by some of its earliest proponents.

26. Some courts have imposed fines payable to the court in place of or in addition to attorneys' fees to the opponent. See, e.g., DeLuca v. Long Island Lighting Co., 862 F.2d 427, 428 (2d Cir. 1988) ($2500 fine, $2489 fees and costs); Four Keys Leasing & Maintenance Corp. v. Simithis, 849 F.2d 770, 771-72 (2d Cir. 1988) ($2500 fine, $5000 legal fees); Whittington v. Lynaugh, 842 F.2d 818, 820-21 (5th Cir. 1988) ($15 court costs levied against plaintiff prisoner), cert. denied sub nom. Johnson v. Lynaugh, 109 S. Ct. 108 (1988); National Ass'n of Radiation Survivors v. Turnage, 115 F.R.D. 543, 559 (N.D. Cal. 1987) ($15,000 to court clerk); and cases cited in Nelken, supra note 1, at 1333 n.130.

27. It may be malpractice not to seek Rule 11 sanctions when they are arguably available. According to some, the rule itself "defines a new form of legal malpractice" because it "[i]n effect ... imposes a negligence standard" on the signing attorney. Hays v. Sony Corp. of Am., 847 F.2d 412, 418 (7th Cir. 1988); accord Mars Steel Corp. v. Continental Bank N.A., 880 F.2d 928 (7th Cir. 1989) (en banc). The Seventh Circuit also has espoused the view that Rule 11 "effectively picks up the torts of abuse of process ... and malicious prosecution ... ." Szabo Food Serv., Inc. v. Canteen Corp. 823 F.2d 1073, 1083 (7th Cir. 1987), cert. dismissed, 108 S. Ct. 1101 (1988). This view may thereby increase the obligation to seek sanctions.

28. See Golden Eagle Distrib. Corp. v. Burroughs Corp., 103 F.R.D. 124 (N.D. Cal. 1984) (Schwarzer, J.), rev'd, 801 F.2d 1531 (9th Cir. 1986); Schwarzer, Sanctions Under the New Federal Rule 11—A Closer Look, 104 F.R.D. 181 (1985). The concerns expressed by Judge Schroeder in her Ninth Circuit opinion in Golden Eagle were recently addressed again in her concurring opinion in Jensen Elec. Co. v. Moore, Caldwell, Rowland & Dodd, Inc., 873 F.2d 1327, 1330 (9th Cir. 1989) ("even in the hands of our ablest judges Rule 11 can lead to costly and aimless satellite litigation having nothing to do with the dispute between the parties. Here indeed the sanctions tail is wagging the dog."). and by the majority in Townsend v. Holman Consulting Corp., 881 F.2d 788, 792 (9th Cir. 1989) ("Since Rule 11 was amended six years ago, it has increasingly become the wellspring of the very 'satellite litigation' we have consistently decried."). Judge Noonan, dissenting in Townsend, took issue not only with the majority's reversal of the sanctions awarded below, but also denounced his fellow judges' attitude toward Rule 11:

The whole opinion breathes a hostility to the imposition of sanctions that is truly extraordinary. . . . The court complains that "much of this court's time" in the last six years has been occupied by the subject of Rule 11 sanctions. . . . It is hard to believe that anyone seriously thinks that issues arising in less than one percent of this court's cases take up "much of its time."

Id. at 792 (Noonan, J., dissenting).
No clearly articulated standards regarding the interaction of Rule 11 with the primary methods for pretrial determination of a case on the merits, dismissal under Rule 12 and, more importantly, summary judgment under Rule 56, exist to mitigate the effect of Rule 11 on the federal caseload. Recently, the Supreme Court has eased the burden on the moving party in a summary judgment motion and aligned the standard for a successful motion with that of a motion for directed verdict at trial. The increased availability of summary judgment should make it easier to dispose of meritless cases before trial and, in that regard, should work in tandem with Rule 11 to reduce the burden such cases impose on the court system. The interest in the early disposition of meritless cases is not served, however, when post-trial motions for Rule 11 sanctions, based on the filing of a frivolous complaint, are granted when the moving party previously lost a summary judgment motion. Such rulings only encourage a “never say die” attitude toward sanctions motions and increase the burden of satellite litigation.

A recent Second Circuit case proposes a sensible way of dealing with this problem without insulating a party from sanctions if later changes in the law make the repeated assertion of a claim untenable. In Greenberg v. Hilton International Co., the plaintiff’s constructive discharge claim was unlikely to succeed when it was filed. While the case was pending, the law in the Second Circuit “hardened in a fashion even more clearly unfavorable to the plaintiff.” The court concluded that Rule 11 sanctions should not be imposed for the plaintiff’s failure to withdraw the claim. Noting that the defendant had not renewed its earlier unsuccessful summary judgment motion after the change in the law occurred, the


30. See, e.g., Jennings v. Joshua Indep. School Dist., 869 F.2d 870, 878 (5th Cir. 1989), aff’d in part, vacated in part, 877 F.2d 313 (5th Cir. 1989); In re Yagman, 796 F.2d 1165, 1195 (9th Cir. 1986), cert. denied sub nom. Real v. Yagman, 1078 S. Ct. 450 (1987). This practice also reduces the deterrent effect of sanctions and increases the chilling effect, as the Ninth Circuit recognized in Yagman, but the Fifth Circuit in Jennings did not, at least initially. See infra notes 87-91 and accompanying text. Such rulings also encourage a return to fact pleading unwarranted by the language of Rule 8. See Oliveri v. Thompson, 803 F.2d 1265, 1279 (2d Cir. 1986), cert. denied sub nom. Suffolk County v. Graseck, 480 U.S. 918 (1987); Marcus, The Revival of Fact Pleading under the Federal Rules of Civil Procedure, 86 COLUM. L. REV. 433 (1986).

31. 870 F.2d 926 (2d Cir.), reh’g granted, 875 F.2d 39 (2d Cir. 1989).

32. Id. at 936.
court concluded that a plaintiff should not be subject to sanctions in such a situation as long as:

(i) the defeat of [the summary judgment] motion was not obtained by misleading the court; (ii) the adversary has not attempted through some means on the record to obtain withdrawal of that claim based on a change or clarification of existing law; and (iii) the claim has not been repeated in papers filed after the change or clarification of law. 33

When motion to dismiss under Rule 12 or a summary judgment motion is denied, the party who made the motion should not later be awarded Rule 11 sanctions for the period before the motion was made. A party who has survived a summary judgment motion or a motion to dismiss certainly has no reason to believe that the court considers its claim or defense frivolous; indeed, the opposite is the case. It is both inefficient and fundamentally unfair in such a situation to impose Rule 11 sanctions unless, through subsequent discovery or changes in the controlling law, it becomes clear that a particular factual or legal position is no longer tenable. 34

(3) The Standard of Review on Appeal

Satellite litigation is a problem not only at the district court level, where the judges must make the initial determinations about the propriety and amount of sanctions, but also at the appellate level, where the courts must determine an appropriate standard of review. The standard of review affects the appellate court's burden, as well as the degree of oversight of district court decisions.

There is presently considerable variation, among and sometimes within circuits, in the standard for reviewing sanctions decisions on appeal. The Ninth Circuit, in Zaldivar v. City of Los Angeles, 35 adopted a tripartite standard of review: (1) factual determinations of the district court are reviewed on a clearly erroneous test; (2) legal conclusions (including the conclusion that the facts found constitute a violation of the rule) are reviewed de novo; and (3) the appropriateness of the sanction

33. Id. at 937.
34. The court in Greenberg specifically recognized that Rule 11 "does not place an ongoing obligation on attorneys to withdraw papers previously filed." Id. (citing Oliveri, 803 F.2d at 1274-75). The interpretation proposed in Greenberg, however, incorporates the view, consonant with Rule 11, that later papers will be judged in light of the state of the law and the facts at the time they are filed. 870 F.2d at 936. A once reasonable position may become unreasonable at some point in the litigation. See Thomas v. Capital Sec. Servs., Inc., 836 F.2d. 866, 874-75 (5th Cir. 1988) (en banc). The chilling effect of permitting sanctions for the entire litigation even after summary judgment has been resisted successfully is discussed infra at notes 86-91 and accompanying text.
35. 780 F.2d 823 (9th Cir. 1986).
chosen is reviewed for abuse of discretion.36 A similar standard is used in the Second Circuit.37 The Fifth Circuit followed a single abuse of discretion standard with respect to sanctions decisions38 until one panel opted for the differentiated standard used in the Ninth Circuit.39 Finally, in *Thomas v. Capital Security Services, Inc.*,40 the Fifth Circuit, sitting en banc, returned to the abuse of discretion standard, reasoning that the “fact-intensive inquiry” appropriate to a Rule 11 sanctions decision should not be second guessed by an appellate court reviewing the record.41 “The perspective of a district court is singular. The trial judge is in the best position to review the factual circumstances and render an informed judgment as he is intimately involved with the case, the litigants, and the attorneys on a daily basis.”42 The Seventh Circuit has applied several variations of the two approaches discussed above;43 but a recent en banc decision, *Mars Steel Corp. v. Continental Bank N.A.*,44 adopted the abuse of discretion standard across the board.45

Both the tripartite standard and the abuse of discretion standard have advantages and shortcomings. The former gives the appellate courts greater ability to shape Rule 11 jurisprudence and to control judges who lack or abound in zeal for sanctions. On the other hand, it requires more detailed appellate review of each step in the sanctions decision, taking up more judicial time with satellite litigation. The converse is true of the abuse of discretion standard.

Is the cure worse than the disease? As *Golden Eagle* demonstrates,46 some judges question whether the frivolous cases Rule 11 keeps out of court might not be less of a burden on the system than the litigation the rule generates over sanctions. Although the need for intra-cir-

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38. See cases cited in *Thomas*, 836 F.2d at 871.


40. 836 F.2d 866 (5th Cir. 1988).

41. *Id.* at 873.

42. *Id.*

43. For a discussion of the various standards applied in Seventh Circuit Rule 11 decisions before *Mars Steel* see *FDIC v. Tefken Constr. & Installation Co.*, 847 F.2d 440, 443 (7th Cir. 1988).

44. 880 F.2d 928 (7th Cir. 1989) (en banc).

45. *Id.* at 930.

46. See supra note 23 and accompanying text.
cuit consistency about what constitutes sanctionable activity argues in favor of the stricter Ninth Circuit standard of review in Rule 11 cases, the practical burdens such a standard imposes argue in favor of allowing district judges more leeway in making these fact centered decisions.\textsuperscript{47} If the scope of the rule is narrowed so that it focuses on prefiling conduct, an abuse of discretion standard of review will be not only more practical, but also more appropriate to the reviewing court's task.

The abuse of discretion standard also will reduce the need for detailed findings of fact and conclusions of law in Rule 11 cases, especially when sanctions are denied.\textsuperscript{48} The volume of Rule 11 litigation suggests that underuse of the rule is not a problem; thus, the additional burden of requiring detailed findings by the district court should be imposed only when sanctions are granted.\textsuperscript{49}

### B. Rule 11’s Chilling Effect

The central controversy about Rule 11’s mandatory sanction provisions relates to the chilling effect on novel or unpopular causes of action, particularly in the area of civil rights.\textsuperscript{50} Has the Supreme Court, by promulgating this rule of procedure, so altered the stakes in litigation that the substantive congressional policy of promoting suits to protect civil rights has been effectively stymied?\textsuperscript{51} The Advisory Committee note

\textsuperscript{47} In adopting the abuse of discretion standard for all Rule 11 sanctions issues in its en banc decision in Mars Steel, the Seventh Circuit noted that “[d]e novo review would be contrary to the spirit of many recent cases, reiterating the message that appellate courts should use deferential review for fact-intensive disputes, including the application of legal rules to facts.” 880 F.2d at 933 (citations omitted).

\textsuperscript{48} See Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073 (7th Cir. 1987) (Cudahy, J., concurring in part, dissenting in part).

\textsuperscript{49} The Fifth Circuit has ruled that an “adequate record for appellate review” must be made in cases where the violation “is not apparent on the record and the basis and justification for the trial judge's Rule 11 decision is not readily discernible.” Thomas v. Capital Sec. Servs., Inc., 863 F.2d 866, 882-83 (5th Cir. 1988) (en banc). The degree of specificity required will depend on various factors, such as “the severity of the violation, the significance of the sanctions, and the effect of the award.” Id. at 883. The court specifically stated that denials of sanctions, such as in that case, would be judged by the same standards. Id. In Szabo, the Seventh Circuit reversed the district court's “abrupt dismissal” of the defendant's Rule 11 motion and ruled that when a motion is “serious” (apparently in terms of the amount of money sought, here $10,000), the moving party and the appellate court “are entitled to explanations.” 823 F.2d at 1084. An explanation is not required, however, in all cases where sanctions are denied. See Local 232, Allied Indus. Workers of Am. v. Briggs & Stratton, 837 F.2d 782, 788 (7th Cir. 1988).

\textsuperscript{50} See Third Circuit Report, supra note 25; LaFrance, supra note 18; Nelken, supra note 1; Vairo, supra note 3.

warns that Rule 11 "is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories." The reality of large fee-shifting awards under the amended rule and the routine resort to attorneys' fees as the sanction of choice seriously undermine that goal. The courts of appeal have been sensitive to the rule's potential chilling effect, and the decisions contain repeated references to the importance of encouraging continuing development in the law through vigorous advocacy. Nonetheless, the sheer size of some of the sanctions awards affirmed on appeal must concern all but the most self-sacrificing of lawyers, particularly when they are faced with a district court bench that has become increasingly conservative since Rule 11 was amended.

(1) The Chill of Fee-Shifting

The reassuring words from the judiciary about avoiding a chilling effect are often only one part of the picture. Although the early emphasis on Rule 11 as a fee-shifting provision seems to have been motivated, at least in part, by a desire to make sanctions palatable to a judiciary not accustomed to imposing them, the effect has been both to produce the almost automatic use of fees as the starting point in determining sanctions and to guarantee that lawyers will seek fees aggressively.

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52. FED. R. CIV. P. 11 advisory committee's note to 1983 amendments.
53. See, e.g., Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 254 (2d Cir. 1985), cert. denied, 108 S. Ct. 269 (1987). The Ninth Circuit, indeed, has bent over backwards in this regard. In Hudson v. Moore Business Forms, Inc., 609 F. Supp. 467 (N.D. Cal. 1985), the district judge termed a counterclaim on behalf of a defendant employer alleging breach of an implied covenant of good faith and fair dealing in the plaintiff's employment contract to be "directly contrary to the developing body of law in the employment field." Id. at 483. In reversing the sanctions, the Ninth Circuit pointed out:

There may be many valid public policy reasons for not recognizing breach of implied covenant tort actions by employers against employees (e.g., chilling legitimate wrongful discharge claims), but such reasons are pertinent only to a decision whether to permit such a claim—not to whether a lawyer should be sanctioned for suggesting the claim . . . . The rapid and recent evolution of the law in this area highlights the precariousness of drawing a line between plausible and sanctionable arguments.

Hudson v. Moore Business Forms, Inc., 836 F.2d 1156, 1160 (9th Cir. 1986).

54. See cases cited supra note 21. In the Southern District of Texas, federal judges meted out over $700,000 in Rule 11 sanctions between January 27, 1984, and July 28, 1987, according to statistics compiled by the court. Texas Lawyer, Aug. 17, 1987, at 3, col. 1. Although only one-third of the sanctions reported were for Rule 11 violations, 97% of the attorney's fees and 96% of the fines during the period studied were awarded under Rule 11. Id. at cols. 2-3.


56. See Nelken, supra note 1, at 1323-24.

57. The courts have imposed various limitations on wholesale cost-shifting, based on the rule's reference to a "reasonable" attorney's fee as an appropriate sanction. These include a
In the Seventh Circuit, for example, until recently concern about the rule's chilling effect has been overshadowed by the appellate court's enthusiastic embrace of Rule 11 as a means of spreading the costs of litigation in an economically rational manner. In *Dreis & Krump Manufacturing Co. v. International Association of Machinists & Aerospace Workers, District 8*, the court reversed the district court and granted Rule 11 sanctions to the defendant union after summary judgment was granted against the plaintiff employer, which had sued to set aside an arbitrator's award. While recognizing that it "is human nature to crave vindication of a passionately held position," the court pointed to the "mounting federal caseloads and growing public dissatisfaction with the costs and delays of litigation" that had made the use of sanctions "imperative."

Without considering what the appropriate range of sanctions under Rule 11 might be, the court stated: "[T]he amended Rule 11 makes clear that he who seeks vindication [without an objectively reasonable basis in law] and fails to get it must pay his opponent's reasonable attorney's fees." Such judicial zeal, and the example of cases like *Szabo Food Service, Inc. v. Canteen Corp.*, raise considerable concern. In *Szabo*, a civil rights case, the district court denied Rule 11 sanctions in a suit by a disappointed bidder for a contract to supply food at the Cook County Jail. The suit was brought against the principal competitor for the contract, Canteen Corp., the County Board and its members, Cook County, and the County's purchasing agent. The suit alleged racial discrimination, violations of due process, and state law claims. The court gave Canteen seventy-two hours in which to respond to Szabo's motion for a duty to mitigate the expense incurred as a result of a Rule 11 violation and a requirement that informal methods of dealing with violations (e.g., a letter to opposing counsel citing cases that make her legal position untenable) be used before resorting to full-dress court proceedings such as motions for summary judgment. See *Dubisky v. Owens*, 849 F.2d 1034, 1037-39 (7th Cir. 1988); *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 878-81 (5th Cir. 1988) (en banc); *Nelken, supra* note 1, at 1334-36. All of these approaches, however, start with actual fees as the baseline figure.

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58. 802 F.2d 247 (7th Cir. 1986).
59. *Id.* at 255.
60. *Id.*
61. *Id.* The rule actually provides for imposition of "an appropriate sanction, which may include . . . a reasonable attorney's fee." Fed. R. Civ. P. 11 (emphasis added).
62. The opinion in *Dreis & Krump* ended with the following rhetorical flourish: "The rules . . . designed to discourage groundless litigation are being and will continue to be enforced in this circuit to the hilt. . . . Lawyers practicing in the Seventh Circuit, take heed!" 802 F.2d at 255-56 (Posner, J.).
64. *Id.* at 1074.
preliminary injunction: three hours before the papers were due, Szabo voluntarily dismissed the federal action and refiled its state law claims in state court. The court denied Canteen's motion for more than 10,000 dollars in Rule 11 sanctions without a hearing, declaring that it was "well aware of the case" and that it did not believe a Rule 11 violation had occurred. The Court of Appeals reversed. After an analysis "consuming five dense paragraphs and citing more than twenty cases," the majority concluded that the plaintiff's theory of due process was "wacky" and that fees should have been awarded: "if Szabo-Digby imposed costs on its adversary and the judicial system by violating Rule 11, it must expect to pay."

The risk of a chilling effect is great when trial court denials of sanctions, based on the circumstances of the case, are reversed after a "process . . . not unlike the grading of law school examinations . . . . Anything falling on the far side of 'C' merits not only loss of one's case but loss of one's shirt as well." Whatever the merits of the claim in Szabo, "[d]ue process, unfortunately, is an area where creativity and frivolity sometimes threaten to merge . . . . [T]he chilling effect of today's decision will reach as tellingly to the most meritorious such claim as to the least."

The Seventh Circuit has tempered its compensation orientation in some respects. In Brown v. Federation of State Medical Boards, for example, the court stated that "an even more important purpose [of Rule 11] is deterrence." Nonetheless, the court implied that compensation for fees and expenses incurred remains a valid independent ground for

65. Id. at 1076.
66. Id. at 1085 (Cudahy, J., concurring in part and dissenting in part).
67. Id. at 1080. Szabo apparently argued that, as the previous holder of the food contract, it had a property interest, in either its expectation of renewal or being afforded the process it was due under state law, which had been denied. The majority concluded that existing law did not support either theory and that Szabo was not arguing for a change in the law: "[C]ounsel either are trying to buffalo the court or have not done their homework." Id. at 1082. See infra notes 103-20 and accompanying text for a discussion of the Seventh Circuit's "product" orientation in deciding sanctions motions.
68. Szabo, 823 F.2d at 1079. Accord, Gorenstein Enter. v. Quality Care-USA, 874 F.2d 431, 438 (7th Cir. 1989) ("Rule 11 . . . entitled Quality Care to be made whole for the expenses it incurred in resisting the Gorensteins' frivolous [defense]"); Thornton v. Wahl, 787 F.2d 1151, 1154 (7th Cir.), cert. denied, 479 U.S. 851 (1986).
69. Szabo, 823 F.2d at 1085 (Cudahy, J., concurring in part and dissenting in part). As the majority in Szabo pointed out in remanding for the imposition of sanctions, "[r]ound-the-clock work by a large law firm does not come cheap." Id. at 1079.
70. Id. at 1085-86 (Cudahy, J., concurring in part and dissenting in part).
71. 830 F.2d 1429 (7th Cir. 1987).
72. Id. at 1438.
sanctions: "In some cases, the district court may choose to give a small portion of the fees requested as a sanction. . . . In a case where deterrence is the purpose behind the sanction, the trial court must strive to impose a sanction that fits the inappropriate conduct."73

In its recent en banc decision in Mars Steel Corp. v. Continental Bank N.A.,74 the Seventh Circuit disclaimed its earlier statement that "Rule 11 is a fee-shifting statute."75 The court in Mars Steel reaffirmed, however, the view that the rule "establishes a new form of negligence (legal malpractice),"76 and that "[s]anctions under Rule 11 frequently are designed to make the adverse party whole—to put the party opposing the motion in as good a position as it would have occupied had the motion never been made."77 Although the court has rejected the fee-shifting rationale that "the loser pays,"78 the standard it has adopted leads, presumptively at least, to the same result.

The Fifth Circuit, by contrast, has taken the position in Thomas v. Capital Security Services, Inc.,79 decided en banc, that while attorney's fees and expenses may be the appropriate sanction in a given case, the district court's broad discretion in choosing a sanction was designed as a "safety valve" to reduce the pressure of mandatory sanctions.80 Although the court recognized "the natural tendency of district courts to gravitate toward imposing [monetary] sanctions" because they are mentioned specifically in the text of Rule 11,81 it emphasized that whatever the sanction, the goal of deterring attorneys from violating the rule should be paramount. To minimize the potential chilling effect of Rule 11 sanctions, the court "specifically adopt[ed] the principle that the sanction imposed should be the least severe sanction adequate to the purpose of Rule 11."82

73. Id. at 1439 (emphasis added). The court affirmed the grant of sanctions but vacated the award, over $30,000, and remanded for further consideration of the appropriate amount. It requested that judges be specific, about both the reasons for imposing sanctions and how the award is computed, when the award is "substantial." Id. at 1438. Where modest sanctions are imposed "solely for the purpose of deterrence," no such specificity is required. Id. at 1439. See supra note 49.
74. 880 F.2d 928 (7th Cir. 1989).
75. Hays v. Sony Corp. of Am., 847 F.2d 412, 419 (7th Cir. 1988).
76. 880 F.2d at 932.
77. Id. at 939. The court also reaffirmed the view that, under this negligence standard, a party is presumptively entitled to attorney's fees under Rule 11 for defending a sanctions award on appeal. Id.; see infra notes 96-102, and accompanying text.
78. Id. at 932.
79. 836 F.2d 866 (5th Cir. 1988) (en banc).
80. Id. at 877.
81. Id.
82. Id. at 878. As examples of other possibly appropriate sanctions, the court mentioned
The Fifth Circuit's formulations of the primacy of deterrence in choosing sanctions under Rule 11 and of the importance of fashioning the sanction chosen so that the "least severe sanction adequate" to the violation is used are essential to mitigating the rule's potential chilling effect. The court's interpretation of Rule 11's sanctions provisions avoids the Seventh Circuit's excessive emphasis on attorneys' fees. The "least severe sanction" standard also deals explicitly with the fundamental tension between awarding substantial fees and encouraging developments in the law. Much of the reliance on fee-shifting in Rule 11 cases, as Thomas pointed out, stems from the fact that fees are mentioned, by way of example, in the text of the rule. In addition, much of the early publicity about the amended rule referred to it as a "cost-shifting technique." The Advisory Committee note, however, states that the word sanctions was used to "stress[ ] a deterrent orientation" similar to that found in the rules relating to discovery abuses.

Unfortunately, the Fifth Circuit's thoughtful and comprehensive opinion in Thomas has been of questionable effectiveness even in setting standards for the Fifth Circuit itself. A recent decision, Jennings v. Joshua Independent School District, originally affirmed Rule 11 sanctions of $84,113 dollars in a civil rights case arising out of a sniffing-dog search of a car in a school parking lot. The suit survived three motions for summary judgment before going to trial. Although the panel called the sanctions decision a "close case," it affirmed the district court's award of all but one of the defendants' full attorneys' fees for the entire litigation. The original decision mentioned Thomas in passing, but the court did not discuss the sanction in light of the "least severe sanction"

"a warm friendly discussion on the record, a hard-nosed reprimand in open court, [and] compulsory legal education." Id.

83. Id. at 877.
85. FED. R. CIV. P. 11 advisory committee's note to 1983 amendments.
86. The Eleventh Circuit was the first to decide a Rule 11 case en banc. See Donaldson v. Clark, 819 F.2d 1551 (11th Cir. 1987) (en banc). That opinion focuses primarily on due process issues related to enforcement of the rule.
87. 869 F.2d 870 (5th Cir. 1989), aff'd in part, vacated in part, 877 F.2d 313 (5th Cir. 1989).
88. Id. at 879.
89. Id. The panel found that sanctions for the entire litigation were appropriate because "[a]ll of the material facts were known to [plaintiff and his lawyer] at the time they filed their complaint, and a reasonable inquiry into the law would have demonstrated that the complaint against the school authorities and the dog handlers was not warranted." Id. at 878-79. The court did not address the implication of the trial court's denial of the earlier summary judgment motions in this context. See supra notes 29-34 and accompanying text.
principle, nor did it consider the questionable deterrence value of imposing sanctions at the end of trial without prior warning that the court considered the complaint frivolous. Only after a motion for rehearing or rehearing en banc was filed did the court correct its original opinion and remand the sanctions issue to the district court for reconsideration in light of *Thomas*.91

Because attorney’s fees have so dominated the sanctions picture under Rule 11, and the fees awarded have often been substantial, the chilling effect of the rule’s mandatory sanctions provisions is magnified. The lawyers who decry the situation feel at the same time bound by their duty to clients to seek fees routinely.92 As long as fees remain the sanction of choice, lawyers will ask for them; and both the volume of sanctions litigation and its chilling effect are unlikely to decline markedly. Without the incentive of a pot of gold at the end of the sanctions battle, lawyers will become more selective about seeking sanctions, and the courts will be encouraged to be more reflective and creative in “tailor[ing sanctions] to the particular wrong.”93 If sanctions are refocused on the goal of deterrence rather than on compensation through fee-shifting, the rule’s chilling effect should be mitigated. As the Ninth Circuit stated recently in reversing a 10,000 dollar sanctions award against the plaintiff employee benefit trusts in *Operating Engineers Pension Trust v. A-C Co.*:94

Forceful representation often requires that an attorney attempt to read a case or an agreement in an innovative though sensible way. Our law is constantly evolving, and effective representation sometimes compels attorneys to take the lead in that evolution. Rule 11 must not be turned into a bar to legal progress.

District courts simply must use more restraint than was employed here. Rule 11 is an extraordinary remedy, one to be exercised with extreme caution.95

91. 877 F.2d. 313, 321 (5th Cir. 1989).
92. This tendency is furthered by a view similar to that expressed by lawyers in relation to discovery abuse, that what they did was hard-nosed playing by the rules but that what others did crossed the line and merited sanctions. Brazil, *Views from the Front Lines: Observations by Chicago Lawyers about the System of Civil Discovery*, 1980 AM. B. FOUND. RES. J. 219, 223-29 (1980).
93. *Thomas*, 836 F.2d at 877.
94. 859 F.2d 1336 (9th Cir. 1988).
95. *Id. at 1344-45*. The Ninth Circuit’s laudable concern that Rule 11 not overly deter creative lawyers sometimes has given way to arbitrary moralizing under the guise of deciding sanctions issues. *See Ault v. Hustler Magazine, Inc.*, 860 F.2d 877 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 1532 (1989). In *Ault*, the court reversed a sanctions award against an antipornography activist who had been featured in Hustler Magazine as “Asshole of the Month”
(2) Rule 11 Sanctions on Appeal

At least four circuits have awarded Rule 11 sanctions for conduct on appeal. In addition, the Seventh Circuit recently has espoused the view that Rule 11 is a fee-shifting statute and should be interpreted, like other fee-shifting statutes, to "entitl[e]" the party who successfully seeks sanctions "to obtain reasonable fees incurred in obtaining the [sanctions], plus reasonable fees in defending the award on appeal." Indeed, in Gorenstein Enterprises, Inc. v. Quality Care, the court stated that the "make-whole policy" of Rule 11 means that "the appeal of a litigant whose position in the district court was correctly adjudged frivolous is frivolous per se," entitling the prevailing party to fees on appeal.

This approach was approved by the court sitting en banc in Mars Steel: "Pyrrhic victories are the stuff of history but hardly balm for legal wounds. . . . Those to whom sanctions have been awarded should be induced to defend their awards, without additional costs to themselves."

The notion of entitlement to fees fits with the Seventh Circuit's compensation perspective on Rule 11, but it does not fit with the Advisory Committee's emphasis on the primacy of deterrence in implementing the for her efforts. The court affirmed the dismissal of each of plaintiff's claims, which her lawyer had failed to defend in responding to Hustler's motion to dismiss. It reversed the sanctions, however, stating that: "[i]f a case of this sort, where the plaintiff has clearly suffered a grievous assault to her human dignity we do not wish to endorse sanctions which can only serve to chill zealous advocacy." Id. at 884.

96. See Coghlan v. Starkey, 852 F. 2d 806, 817 n.21 (5th Cir. 1988). In addition, Rule 1-1 of the Ninth Circuit rules incorporates the Federal Rules of Civil Procedure "whenever relevant." See In re Disciplinary Action Boucher, 837 F.2d 869, 871 (9th Cir.) (Rule 11 sanctions imposed), order modified, 850 F.2d 597 (9th Cir. 1988).


98. 874 F.2d 431 (7th Cir. 1989).

99. Id. at 438; accord Borowski v. DePuy, Inc., 876 F.2d 1339 (7th Cir. 1989).

100. 874 F.2d at 438. The rationale of this approach, at least with respect to the amount of the sanctions, was questioned in Judge Cudahy's dissent in Borowski: "The majority's holding essentially means that, once conduct has been found to be sanctionable, the sanctioned party must acquiesce in his victim's request for fees, whatever the amount, on pain of suffering the imposition of additional sanctions attendant to a good faith challenge to the amount of fees requested." 876 F.2d at 1344 (Cudahy, J., dissenting).

101. 880 F.2d at 939. The court noted, however, the importance of exercising discretion as to the amount of sanctions when, as in this case, the parties defending the appeal benefitted from their opponent's legal error and the costs of defending were increased by the court's own actions. Here the court had set the case for reargument and requested further briefs. The court stated: "Hays sets the norm; today we see the exception." Id.
rule's sanctions provisions. Such an approach, together with routine awards of Rule 11 sanctions for expenses on appeal, can only compound the rule's chilling effect and should not be followed.

(3) "Product" versus "Conduct"

Most courts have resisted the argument that a losing paper is necessarily a sanctionable paper, the ultimate cost-shifting view. As the Szabo case illustrates, however, courts sometimes "grade" the lawyer's papers and sanction those that fail to pass muster, apparently without regard to what inquiry the lawyer actually made before filing. Although the Advisory Committee warned against "using the wisdom of hindsight" in deciding sanctions motions, it is inevitably difficult for a judge who is convinced that a lawyer has been wasting the court's time with a pleading or motion to resist the inference that a reasonable prefiling inquiry was not made.

As other commentators have noted, there is an underlying tension in the language of the rule between an evaluation focused on what the lawyer did before filing—a "behavior" or "conduct" approach—and an evaluation of the paper as filed—a "product" approach. Particularly with respect to legal arguments, a product approach threatens to increase the chilling effect of sanctions. Not surprisingly, reasonable minds differ in this area, as the number of reversals of district court sanctions decisions shows. An early Federal Judicial Center study on the

102. See Third Circuit Report, supra note 25, at 35-36 ("In our view, a party moving for the imposition of sanctions is entitled to nothing more than conscientious attention to the requirements of the Rule by the trial judge. A movant is certainly not entitled to attorney's fees if a violation is found.").

103. See supra notes 63-70 and accompanying text. The Szabo court specifically noted that "[t]he principal function of the 1983 amendment to Rule 11 was to add the requirement of adequate investigation before filing a complaint." 823 F.2d at 1083. The court, however, termed the plaintiff's due process theory "wacky" without any information available to it as to what legal investigation had actually been done. Id. at 1080.

104. FED. R. CIV. P. 11 advisory committee's note to 1983 amendments.


106. This tension is illustrated by Zaldivar v. City of Los Angeles, 780 F.2d 823 (9th Cir. 1986), one of the first extensive appellate discussions of the amended rule's requirements. Referring to the duty imposed by the rule in relation to legal arguments, the court said:

It is obvious from the text of the Rule that the pleader need not be correct in his view of the law. Thus the granting of a motion to dismiss the complaint for failure to state a claim, or the granting of a summary judgment against the pleader is not dispositive of the issue of sanctions. . . . Of course, the conclusion drawn from the research undertaken must itself be defensible. Extended research alone will not save a claim that is without legal or factual merit from the penalty of sanctions.

Id. at 830-31.
effects of amended Rule 11 showed a wide disparity among district judges in response to questions about the appropriateness of sanctions in different situations drawn from actual cases. The resulting uncertainty adds to the chilling effect of Rule 11.

The product approach also threatens to turn Rule 11 into an all-purpose rule for shaping lawyers in the individual judge's image of acceptable practice. As an early judicial proponent of Rule 11 sanctions stated: "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."108

The uncertainty fostered by a product approach is illustrated by *International Shipping Co. v. Hydra Offshore, Inc.*109 A divided Second Circuit panel affirmed a 10,000 dollar sanctions award for what the majority ruled was a legally unfounded assertion of federal subject matter jurisdiction. Judge Pratt, dissenting, pointed out that the plaintiff's argument was not only a "plausible" one in an "unsettled area" of diversity jurisdiction but that an identical argument had been found not to violate Rule 11 in an earlier case at the district court level. Such contradictory outcomes, he said, preclude development of "comprehensible and fair standards" for applying Rule 11:

If rule 11 is to fulfill its purpose of deterring frivolous litigation, it is critical that courts articulate clear, objective standards by which attorneys can reliably measure their conduct and that we avoid the corrosive effect of arbitrary, seemingly contradictory applications of the rule. Here, identical arguments asserted in the same district were held in one case not to violate rule 11, but to "egregiously" violate it in the next; yet the same body of appellate and statutory law was available to both courts.110

The Seventh Circuit, which has been the chief example of a product approach to Rule 11 sanctions, announced in *Mars Steel* that "[u]nlike the traditional fee-shifting statute, Rule 11 focuses on inputs, not outputs, conduct rather than result."111 It is difficult to know how much difference this announcement will make in the way cases are decided. The Seventh Circuit also is committed to the view that Rule 11 creates a "new form of negligence,"112 which means that "Rule 11 no less than

108. Schwarzer, supra note 9, at 1016.
109. 875 F.2d 388 (2d Cir. 1989).
110. Id. at 395.
111. Mars Steel Corp. v. Continental Bank N.A., 880 F.2d 928, 932 (7th Cir. 1989) (en banc).
112. Id.
common law recognizes the doctrine of res ipsa loquitur."\textsuperscript{113} The filing of an objectively frivolous paper thus permits an inference of a lack of reasonable inquiry. While the court noted that "objectively frivolous filings support but do not compel an inference of unreasonable investigation,"\textsuperscript{114} the outcome seems likely to depend on the court's evaluation of the lawyer's product: "[o]ne standard for frivolousness is risibility—if you start laughing when repeating the argument, then it's frivolous."\textsuperscript{115}

The product approach simplifies the sanctions inquiry by focusing on the papers before the court and asking whether a reasonably competent lawyer would have made the argument presented, or would have believed that the facts supported such an argument. In that respect, this approach accords well with the Advisory Committee's note recommending that "to the extent possible" the sanctions inquiry should be limited to the record in order to minimize satellite litigation. It does not fit so well, however, with a basic goal of the amendments: to create "a standard of conduct that is more focused" and that "stresses the need for some prefiling inquiry into both the facts and the law."\textsuperscript{116} This language suggests that a conduct approach is more appropriate to the limited goals of the rule, especially in light of the Advisory Committee's warning against the use of hindsight in making sanctions decisions. If diligent research into the facts and the law produces a pleading or motion that is unsupported by either fact or law, the pleading will be dismissed or the motion denied. To impose sanctions in addition to the primary penalty—failure to achieve the goal of the litigation—is excessive.\textsuperscript{117}

Rule 11 will have accomplished a great deal if it makes lawyers routinely "stop and think" before filing papers. Using it as a vehicle for value judgments about the quality of a particular lawyer's arguments is not justified by the language of the rule. Such use also works against the Advisory Committee's attempt to strike a balance between the perceived need for sanctions to control abuses of the litigation process and the risk of chilling legitimate advocacy with overly broad sanctioning standards. The Advisory Committee notes need to be revised to clarify the limited scope of the rule and the importance of focusing the sanctions inquiry on what the lawyer actually investigated before filing the paper in ques-

\textsuperscript{113} Id.
\textsuperscript{114} Id. at 933.
\textsuperscript{115} Id. at 934.
\textsuperscript{116} FED. R. CIV. P. 11 advisory committee's note to 1983 amendments.
\textsuperscript{117} As Judge Schwarzer has commented, a product approach makes Rule 11 "analogous to an enhancement statute under which a penalty is added when a dismissal is sufficiently emphatic; courts distinguish between claims and defenses that are meritless and those that are so meritless as to warrant sanctions." Schwarzer, supra note 9, at 1018-19.
Inevitably, there will be cases when the final product is so deficient that it will be difficult to imagine how it could be the result of a reasonable inquiry into the facts and the law; but the temptation to draw such inferences must be checked as an unacceptable alternative to looking at what inquiry was undertaken. We must tolerate even "wacky" theories or we will undermine the values of court access and development of the law through the adversary process.\(^\text{120}\)

(4) Civil Rights Cases

The chilling effect of Rule 11 is by no means limited to civil rights cases.\(^\text{121}\) Nonetheless, studies of published decisions have shown a higher proportion of sanctions in civil rights cases than in other civil cases on the federal docket.\(^\text{122}\) This result is still poorly understood. What is clear, though, is that the threat of sanctions is a powerful deterrent to pursuing a type of claim that already has been made increasingly more difficult to win in recent years due to narrowing judicial interpretation of the applicable law.\(^\text{123}\)

\(^{118}\) Judge Schwarzer has suggested that such a shift in interpretation is necessary in order to deal with the problems arising both from uncertainty of application of the rule and from the "avalanche" of satellite litigation. \textit{Id.} at 1018. An early proponent of vigorous use of the amended rule, see Schwarzer, \textit{supra} note 28, Judge Schwarzer has concluded that experience requires us to "rethink the way in which we enforce it." Schwarzer, \textit{supra} note 9, at 1018. Although his views have been given considerable weight by his fellow judges in the past, his revised interpretation needs to be incorporated into the language of the rule, even if such "semantic surgery," \textit{id.}, cannot entirely solve the current problems with the rule.

\(^{119}\) See Greenburg v. Sala, 822 F.2d 882, 887 (9th Cir. 1987) (complaint is factually frivolous if "a competent attorney, after reasonable inquiry, could not form a reasonable belief that the complaint was well founded in fact"); \textit{supra} note 106.

\(^{120}\) Indeed, many might have considered the defendant's counterclaim in Hudson v. Moore Business Forms, Inc., 836 F.2d 1156 (9th Cir. 1988), alleging plaintiff employee's breach of the implied covenant of good faith and fair dealing in her employment contract, "wacky" enough to merit sanctions, as did the district judge. The Ninth Circuit, however, reversed. \textit{Id.} at 1161. \textit{See supra} note 53.

\(^{121}\) In a recent study by the Federal Judicial Center, 20% of the lawyers interviewed stated that they had refrained from filing an arguably meritorious case in federal court because of a concern about sanctions. T. WILLGING, \textit{THE RULE 11 SANCTIONING PROCESS} 163 (Federal Judicial Center 1989). Some filed in state court instead, and some simply declined to take the case, observing that their threshold for doing so had risen in response to Rule 11.

\(^{122}\) Nelken, \textit{supra} note 1, at 1327; Vairo, \textit{supra} note 3 at 200-01.

\(^{123}\) \textit{See}, e.g., Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989) (42 U.S.C. § 1981 provides no relief where alleged act of discrimination does not involve impairment of the specific rights to "make" contracts); Martin v. Wilks, 109 S. Ct. 2180 (1989) (the attribution of preclusive effect to a failure to intervene is inconsistent with the Federal Rules of Civil Procedure); Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989) (statistical evidence showing high percentage of nonwhite workers did not establish prima facie disparate impact); City of Richmond v. J.A. Croson Co. 109 S. Ct. 706 (1989) (relevant statistical pool for demonstrating discriminatory exclusion must be the number of minorities qualified for the task);
civil rights context amounts to overkill, not because civil rights lawyers should not be held to the same standards of conduct as other lawyers, but because they already take the risk of not being compensated at all unless they prevail and because their clients are unlikely to be able to absorb any sanctions awarded against the lawyer.

The Advisory Committee's note to Rule 11 warns against chilling a lawyer's "enthusiasm or creativity" in pursuing litigation, but makes no reference to the added concern in the civil rights area that operation of the rule may unduly burden the congressional policy in favor of such suits. While an exception to Rule 11 for civil rights cases may not be warranted, the Advisory Committee's note should be revised to advise special caution in the use of sanctions in those cases. Such a change will signal the district courts to consider the policy concerns noted above and will also encourage the appellate courts to address them specifically in reviewing sanctions decisions.

III. Proposed Amendments

Rule 11 needs to be amended in order to reduce the burden of satellite litigation and to minimize the rule's chilling effect. The reference to attorney's fees as a potential sanction should be deleted. The fact that fees are the only potential sanction specifically mentioned in the text of the rule has encouraged the almost exclusive resort to fees as the basis for sanctions awards. The Advisory Committee's note should be revised to make clear that while fees may in a rare case be an appropriate sanction,

Marek v. Chesny, 473 U.S. 1 (1985) (when a statute defines "costs" to include attorney's fees, such fees are to be included as costs for Rule 68); City of Los Angeles v. Lyons, 461 U.S. 95 (1983) (equitable remedy under Article III is unavailable absent a showing of irreparable injury); Harlow v. Fitzgerald, 457 U.S. 800 (1982) (government officials whose special functions require complete protection from suits for damages are entitled to the defense of absolute immunity). "It's now the Court against the legislature," an attorney for the NAACP Legal Defense and Educational Fund reportedly said after hearing of the Supreme Court's decision in Wards Cove Packing, a civil rights case in which the Supreme Court ruled that, henceforward, plaintiffs would have the burden of proving the employer's lack of business justification for its hiring practices in a disparate impact case. N.Y. Times, June 7, 1989, at 16, col. 3. Senator Howard Metzenbaum of Ohio announced that he would introduce a bill to reverse the effect of the decision on civil rights plaintiffs. Id.


125. Lawyers representing clients on an hourly basis commonly pass on any sanctions assessed against them to the clients, as a matter of course. As one lawyer told me, "I'll stick my neck out for a client if it's important to him; but I'm not going to pay for it if we get sanctioned."

126. FED. R. CIV. P. 11 advisory committee's note to 1983 amendments.

127. See Oliveri, 803 F.2d at 1280-81.
lesser alternatives should be considered first; these alternatives should be rejected only when the violation is so egregious that nothing but an award of fees will adequately deter the conduct in question.

In order to focus the court's attention on prefiling conduct, the reference to "improper purpose" should also be deleted. This clause has rarely been used as a basis for sanctions independent of the reasonable inquiry requirements, and it diverts attention away from objective behavior in favor of a necessarily more subjective inquiry. Although the problem addressed by the improper purpose clause—abuse of the litigation process for strategic ends—is important, it can largely be dealt with under 28 U.S.C. section 1927 or the court's inherent power. The requirement of notice—especially when sanctions are addressed sua sponte by the judge—and a hearing before imposition of sanctions should be made explicit. Due process requires no less. This change will underline the importance of establishing what prefiling inquiry actually took place, as well as increasing the likelihood that any sanction imposed will be tailored to the specific conduct involved.

If these amendments are made, the relevant portion of Rule 11 would read as follows:

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when

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128. See, e.g., Aetna Life Ins. Co. v. Alla Medical Servs., Inc., 855 F.2d 1470, 1475-76 (9th Cir. 1988) (if a motion is filed in the context of a persistent pattern of clearly abusive litigation activity, it will be deemed to have been filed for an improper purpose); Hudson v. Moore Business Forms, 609 F. Supp. 467, 484 (N.D. Cal. 1985) (it is appropriate to consider both lack of factual or legal basis of claim, and purpose of bringing Rule 11 claim), aff'd in part, vacated in part, 836 F.2d 1156 (9th Cir. 1987); Huettig & Schromm v. Landscape Contractors Council, 582 F. Supp. 1519, 1522 (N.D. Cal. 1984) (court should take into account the signer's conduct by looking at what was reasonable to believe at the time of filing), aff'd, 790 F.2d 1421 (9th Cir. 1986). The Fifth and Ninth Circuits have held that a complaint well-grounded in fact and law is not sanctionable even if it is filed for an improper purpose. See National Ass'n of Gov't Employees v. National Fed'n of Fed. Employees, 844 F.2d 216, 224 (5th Cir. 1988); Zaldivar v. City of Los Angeles, 780 F.2d 823, 832 (9th Cir. 1986).


130. 28 U.S.C. § 1927 (1982) provides for sanctions against a lawyer who "so multiplies the proceedings in any case [as to increase costs] unreasonably and vexatiously." Although it does not provide for sanctions against a party, as Rule 11 does, the sanctionable conduct is of the sort usually governed by litigation strategy, and hence by lawyers. The practice of passing on such costs to clients in many cases increases the likelihood that the client will pay when the client takes part in the decision to use such abusive tactics. Although both § 1927 and the court's inherent power have been held to require a showing of bad faith, the conclusion by some courts and commentators that under Rule 11, improper purpose is measured by an objective standard seems to strain the plain meaning of the word. See supra note 128.
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 the signer that the signer has read the pleading, motion, or other paper; that the signer has made a reasonable prefiling inquiry into the facts and the law supporting it; and that, to the best of the signer's knowledge, information, and belief based on that formed-after reasonable inquiry, it the paper is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, after notice and a hearing, 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.

The language of the Advisory Committee's note also should be changed to clarify the import of these changes in the rule. The following language relates to the amendments proposed:

The amendment focuses the Rule 11 inquiry on the need for adequate factual and legal investigation before a paper is filed. Sanctions are to be imposed only when the court finds that a reasonable prefiling inquiry into the facts and the law was not made. To this end, the rule has been amended to make explicit the due process requirement of notice and a hearing before sanctions are imposed for failure to make an adequate prefiling inquiry.

The former language regarding "improper purpose" has been deleted in order to sharpen the focus on the prefiling inquiry and to avoid any necessity of examining the signer's subjective state of mind. Such conduct remains sanctionable under the inherent powers of the court and, with respect to attorneys, under 28 U.S.C. Section 1927.

The former language regarding attorney's fees as an appropriate sanction has been deleted in order to avoid routine awards of fees and to emphasize the need for careful attention to the circumstances of each case in choosing an appropriate sanction. While reasonable attorney's fees may, in an extraordinary case, be appropriate, the guiding principle must be that the "least severe sanction appropriate" to the violation will be imposed, keeping in mind the "educational and rehabilitative" function of sanctions. Thomas v. Capital Securities, 836 F.2d 866, 877-78 (5th Cir. 1988). The risk of overdeterrence from the imposition of attorney's fees as a routine sanction is significant, given the frequency and size of sanctions awards since the 1983 amendments went into effect. In choosing an appropriate sanction, the court should
pay careful attention to the rule’s potential chilling effect on the pursuit of innovative factual and legal theories, particularly in areas such as civil rights.

Conclusion

The sanctions experiment begun in 1983 with the amendments to Rules 11, 16, and 26 has led rapidly to widespread use of sanctions, especially under Rule 11. During the past six years with Rule 11, judges have not shied away from imposing heavy sanctions on lawyers who have violated the rule’s certification requirements. It is also clear that, at least in some circuits, the volume of Rule 11 satellite litigation imposes a significant burden of cost and delay at both the district and the circuit court level. In addition, the potential chilling effect of a broadly interpreted sanctions rule has been a matter of persistent concern, especially in the area of civil rights. In order to minimize both the burden of Rule 11 litigation and its chilling effect, it is necessary to amend the rule again in light of the experience of the last six years. The rule needs to be focused more specifically on its central purpose, ensuring that adequate factual and legal investigation precedes the filing of all pleadings and other papers in federal court. The emphasis should be on what the lawyer actually did before filing, rather than on evaluating the merits of the paper itself in the context of the litigation. Attorney’s fees, rather than being the primary sanction they have been since 1983, should be imposed only for the most flagrant violations of the rule’s certification provisions. In selecting the appropriate sanction in a given case, judges should be mindful of the educational potential of sanctions. In most cases a reprimand (on or off the record), compulsory continuing education, distribution of the court’s sanctions opinion within the sanctioned lawyer’s firm, or assessment of costs should suffice. Courts also must avoid inhibiting developments in the law by an excessively narrow view of either factual or legal theories, particularly in civil rights cases.

If the rule and the Advisory Committee’s note are revised to incorporate these changes, judges will have a more focused standard to apply to sanctions motions and lawyers will be less likely to seek them routinely in hopes of shifting part of the cost of litigation onto their adversaries. The rule then will be a more efficient tool for deterring frivolous filings, creating less of a burden on the court system. The narrower sanctioning standard and the repudiation of cost-shifting as a goal of sanctions also will decrease the rule’s potential chilling effect, a danger that needs to be addressed in any amendment of Rule 11.