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## Rule 11 and Papers Not Warranted by Law

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# RULE 11 AND PAPERS NOT WARRANTED BY LAW

## INTRODUCTION

Since its amendment in 1983,<sup>1</sup> federal courts have "labored mightily . . . to give meaningful content to the dictates of Rule 11."<sup>2</sup> The Rule has engendered difficult problems of interpretation and application, problems made more difficult by a welter of conflicting policies<sup>3</sup> and attitudes.<sup>4</sup> An index of the uncertainty surrounding Rule 11 is not only the huge bibliography it has generated, but the extent to which courts have turned to scholarly commentary on Rule 11.<sup>5</sup> Some of the deepest divisions and most enduring problems have arisen in the area of sanctions for papers without legal basis, partly because there is no "bright line" between a weak legal position and a sanctionably weak position,<sup>6</sup> and partly be-

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1. Federal Rule of Civil Procedure 11, as amended, reads in part:

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 to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

2. C. Wright, A. Miller and M. Kane, 5 *Federal Practice and Procedure* 251 (Supp. 1989). See Shaffer, *Introduction to A.B.A. Section of Litigation, Sanctions: Rule 11 and Other Powers* 2 (2d ed. 1988).

3. See Untereiner, *A Uniform Approach to Rule 11 Sanctions*, 97 *Yale L.J.* 901, 901-02 (1988). Professor Untereiner observes that:

[c]ritics of amended Rule 11 argue that it chills creative advocacy, generates wasteful satellite litigation, interferes with the attorney-client relationship, sours relations between opposing counsel and between bench and bar, overdeters particular types of claimants, and conflicts with the liberal pleading regime of the Federal Rules. Supporters . . . contend that it deters much frivolous litigation (thereby conserving judicial resources), compensates the victims of vexatious litigation, and educates the bar about appropriate standards of conduct.

*Id.* (citations omitted).

4. *Compare Dreis & Krump Mfg. Co. v. International Ass'n of Machinists & Aerospace Workers*, Dist. No. 8, 802 F.2d 247, 255 (7th Cir. 1986) (Rule 11 is being and will continue to be "enforced in this circuit to the hilt.") with *Townsend v. Holman Consulting Corp.*, 881 F.2d 788, 797 (9th Cir. 1989) ("With few exceptions, those affected by the flood of Rule 11 motions would not object if the next five years brought substantially fewer.").

5. For example, federal courts have cited Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181 (1985), more than 125 times. For other commonly cited articles, see the list provided by *Gaiardo v. Ethyl Corp.*, 835 F.2d 479, 482 n.2 (3d Cir. 1987).

6. See *Eastway Constr. Corp. v. City of New York*, 637 F. Supp. 558, 574 (E.D.N.Y. 1986) (claims span the entire continuum, some claims being clearly frivolous, some clearly nonfrivolous and some difficult to call). The court in *Eastway* stated:

Attorneys are . . . placed in a dilemma because they have the . . . ethical obligation . . . to present to the court all the nonfrivolous arguments that might be made on their clients' behalf, even if only barely nonfrivolous. They are forced by their position as advocates in the legal profession to live close to the line, wherever the courts may draw it. Yet Rule 11 threatens them with severe sanctions if they miscalculate ever so slightly the location of that line. As a

cause it is here that the policies and attitudes of the judiciary conflict most sharply.<sup>7</sup>

In formulating standards for judging the legal basis of a paper under Rule 11,<sup>8</sup> federal courts have raised and answered differently three questions: Must a lawyer cite contrary authority?<sup>9</sup> If a lawyer is making an argument for an extension or modification of existing law, must he identify his argument as such?<sup>10</sup> Must the lawyer actually make a reasonable argument in support of his legal position or is it sufficient that a reasonable argument could be made?<sup>11</sup>

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result many members of the bar are concerned that Rule 11 will discourage attorneys from pursuing novel yet meritorious legal theories.

*Id.* According to Professor Georgene Vairo, "[w]hile many of the cases in which sanctions have been imposed appear to be frivolous, there are many very close cases." Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 217 (1988); see also Snyder, *The Chill of Rule 11*, 11 Litigation 16, 55 (Winter 1985) (no bright line between frivolous and nonfrivolous). But see *Coleman v. Commissioner of Internal Revenue*, 791 F.2d 68, 71 (7th Cir. 1986) (citations omitted):

[T]he ambiguities that lurk in "frivolous" (or any other word) in marginal cases do not prevent the imposition of penalties. Uncertainty is a fact of legal life. The "law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree." "Whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the . . . law to make him take the risk."

7. There is an inherent conflict between the Advisory Committee's goal of lessening frivolous claims and motions and its desire not to chill innovative legal arguments and the law's ability to change. See Advisory Committee Note, 97 F.R.D. 198, 199-201 (1983); Bloomenstien, *Developing Standards for the Imposition of Sanctions Under Rule 11 of the Federal Rules of Civil Procedure*, 21 Akron L. Rev. 289, 325 (1988); see also Risinger, *Honesty in Pleading and its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 Minn. L. Rev. 1, 57 (1976) ("Today's frivolity may be tomorrow's law, and the law often grows by an organic process in which a concept is conceived, then derided as absurd (and clearly not the law), . . . then accepted as the law."); Levinson, *Frivolous Cases: Do Lawyers Really Know Anything at All?*, 24 Osgoode Hall L. J. 353, 374-78 (1987) (quoting Risinger); Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 Geo. L.J. 1313, 1341 (1986) (same). Other courts, who perceive the flood of litigation as a threat to the courts' ability to administer justice, are little concerned with "chill" and more concerned with deterring excess litigation. See *International Shipping Co., S.A. v. Hydra Offshore, Inc.*, 875 F.2d 388, 393 (2d Cir.), cert. denied, 110 S. Ct. 563 (1989). It was also feared that Rule 11 would create satellite litigation. See Advisory Committee Note, 97 F.R.D. 198, 201 (1983). This problem may also be more acute in the area of legal arguments, because when the question of sanctions is perceived as close, there are more likely to be appeals. See Schwarzer, *Rule 11 Revisited*, 101 Harv. L. Rev. 1017-18 (1988).

8. For the language of Rule 11, see *supra* note 1.

9. See *DeSisto College, Inc. v. Line*, 888 F.2d 755, 765 (11th Cir. 1989); *Hill v. Norfolk & W. Ry. Co.*, 814 F.2d 1192, 1198 (7th Cir. 1987); *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 103 F.R.D. 124 (N.D. Cal. 1984), rev'd, 801 F.2d 1531, 1542 (9th Cir. 1986), sua sponte request for en banc hearing denied, 809 F.2d 584 (9th Cir. 1987).

10. See *DeSisto*, 888 F.2d at 766 & n.20 (11th Cir. 1989); *Thornton v. Wahl*, 787 F.2d 1151, 1154 (7th Cir.), cert. denied, 479 U.S. 851 (1986); *Golden Eagle*, 103 F.R.D. at 127.

11. See *In re Ronco, Inc.*, 838 F.2d 212, 218 (7th Cir. 1988); *Golden Eagle*, 103 F.R.D. at 126.

The different answers given to these questions reflect a larger and more basic disagreement on the purpose, policy, and theory of Rule 11. They reflect as well some of the difficulties of defining a legally frivolous motion, pleading or other paper or otherwise defining a violation under the legal prong of Rule 11. These answers are also influenced by the practical problems of applying a particular definition of frivolity, that is, of formulating and applying a test to determine what papers meet the definition.

Part I of this Note examines the arguments for and against the imposition of Rule 11 sanctions on the grounds of failure to cite contrary authority, failure to identify an argument as one for the extension or modification of law, and failure to make a reasonable argument in support of a paper when one is available. Part II analyzes differing interpretations of the language of Rule 11. Part III discusses the practical problems in applying the Rule under these interpretations. This Note concludes that courts should use a two-part test, consisting of, first, a determination that the paper is unwarranted "by existing law or a good faith argument for the extension, modification, or reversal of existing law,"<sup>12</sup> and, second, a determination that the attorney has not made a reasonable prefiling inquiry into the law. This Note also concludes that Rule 11 sanctions should not be imposed for failure to cite opposing authority, failure to indicate whether an argument is being made under existing law or for the extension or modification of existing law, or failure to make a reasonable argument when one exists.

## I. STANDARDS FOR THE LEGAL BASIS OF PLEADINGS, MOTIONS AND OTHER PAPERS

These questions were first litigated in *Golden Eagle Distributing Corp. v. Burroughs Corp.*<sup>13</sup> Judge Schwarzer of the District Court for the Northern District of California, a noted authority on Rule 11,<sup>14</sup> sanctioned attorneys for a motion for summary judgment that failed to cite contrary, though distinguishable, authority<sup>15</sup> and for a brief on choice of law in which its authors did not indicate that they were arguing for an extension or modification of existing law.<sup>16</sup> The opinion also made it plain that because at the time of filing the papers the attorneys had failed to make what the judge considered a reasonable argument in support of

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12. Fed. R. Civ. P. 11.

13. 103 F.R.D. 124 (N.D. Cal. 1984), *rev'd*, 801 F.2d 1531 (9th Cir. 1986), *sua sponte* request for *en banc* hearing denied, 809 F.2d 584 (9th Cir. 1987). It has been said of *Golden Eagle* that "[p]erhaps no Rule 11 decision is more controversial." Shaffer, *supra* note 2, at 17.

14. Judge Schwarzer is the author of *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181 (1985), and *Rule 11 Revisited*, 101 Harv. L. Rev. 1013 (1988), and a well-known proponent of the vigorous use of Rule 11 sanctions. See Strasser, *Sanctions: A Sword Is Sharpened*, Nat'l L.J., Nov. 11, 1985, at 1, 32.

15. *Golden Eagle*, 103 F.R.D. at 127.

16. *Id.*

their position, the fact that a reasonable argument could have been made, and in fact was later made, was not sufficient to excuse them from sanctions.<sup>17</sup>

The Ninth Circuit reversed, holding that because the underlying motion was itself non-frivolous, failure to cite opposing authority or to identify an argument as one for the extension or modification of law did not render it sanctionable.<sup>18</sup> The Ninth Circuit also held that Rule 11 was satisfied if a reasonable argument in support of an attorney's legal position existed—it was not necessary that the attorney actually make the argument.<sup>19</sup> Reaction to the reversal ranged from praise<sup>20</sup> to condemnation;<sup>21</sup> some of the severest criticism came from within the Ninth Circuit itself.<sup>22</sup> Other circuits have split, some rejecting all or part of the Ninth Circuit's reasoning in *Golden Eagle*,<sup>23</sup> others following at least in part.<sup>24</sup>

The arguments for and against "argument identification," as the Ninth

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17. *Id.* at 126, 129.

18. *Golden Eagle Distr. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1540-41 (9th Cir. 1986).

19. *Id.* at 1541.

20. Professor Georgene Vairo commented: "The *Golden Eagle* case led to the bar's great consternation. The line between vigorous advocacy and an attorney's obligation to the court shifted quite far. The bar need no longer fear *Golden Eagle*. The Ninth Circuit has shot it down." Vairo, *Structural Changes and Sanctions: An Analysis of the August 1983 Amendments to the Federal Rules of Civil Procedure 89* (ALI-ABA Resource Materials 1986). For criticism of the district court's opinion, see Nelken, *supra* note 7, at 1347-50.

21. See Note, *Attorney Sanctions—Rule 11—Deterring Unethical Motion and Pleading Practice—Golden Eagle Distributing Corp. v. Burroughs Corp.*, 36 Kan. L. Rev. 173, 184-87 (1987).

22. See *Golden Eagle Corp. v. Burroughs Corp.*, 809 F.2d 584 (9th Cir. 1987) (Noonan, J., dissenting from denial of sua sponte request for en banc hearing) (joined by four other Ninth Circuit judges). Judge Noonan later called the Ninth Circuit's approach to Rule 11 "a straightforward gutting" of the Rule. *Townsend v. Holman Consulting Corp.*, 881 F.2d 788, 797 (9th Cir. 1989) (Noonan, J., dissenting).

23. The Seventh Circuit has expressly rejected the Ninth Circuit's reasoning in *Golden Eagle* and has upheld sanctions on all three grounds. See, e.g., *In re Ronco*, 838 F.2d 212, 218 (7th Cir. 1988) (requiring that a reasonable argument actually be made); *Thornton v. Wahl*, 787 F.2d 1151, 1154 (7th Cir.) (sanctions imposed for not identifying argument as one for the extension or modification of law), *cert. denied*, 479 U.S. 851 (1986); *Hill v. Norfolk & W. Ry. Co.*, 814 F.2d 1192, 1198 (7th Cir. 1987) (upholding sanctions for the "ostrich-like tactic of pretending that potentially dispositive authority against a litigant's contention does not exist"). The Second Circuit, revising an earlier standard under which Rule 11 was violated "where no reasonable argument can be advanced to extend, modify or reverse the law as it stands," *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 254 (2d Cir. 1985) (emphasis added), *cert. denied*, 484 U.S. 918 (1986), now requires that the reasonable argument actually be made. See *International Shipping Co., S.A. v. Hydra Offshore, Inc.*, 875 F.2d 388, 390 (2d Cir.) (changing *Eastway* standard by replacing "can be" with "has been") (citing *Norris v. Grosvenor Marketing, Ltd.*, 803 F.2d 1281, 1288 (2d Cir. 1986)), *cert. denied*, 110 S. Ct. 563 (1989).

24. See *Kale v. Combined Ins. Co. of Am.*, 861 F.2d 746, 759 (1st Cir. 1988) ("Sanctions should not be imposed where a 'plausible good faith argument can be made . . .'" (quoting *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 833 (9th Cir. 1986))); *Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90, 96 (3d Cir. 1988) ("counsel may not be found to have violated Rule 11 merely for failing to 'label' the argument advanced").

Circuit dubbed the lower court's requirement that attorneys label an argument for the extension or modification of law as such,<sup>25</sup> are based upon the language of Rule 11, the practical problems of line-drawing, and the policies behind Rule 11. A broad reading of the Rule finds in the words "warranted under existing law or by a good faith argument for the extension, modification, or reversal of existing law" an implicit requirement to state which argument is being made.<sup>26</sup> This implicit requirement springs from the "duty of candor" which Judge Schwarzer and others imported into Rule 11 from the A.B.A.'s Model Rules of Professional Conduct,<sup>27</sup> calling it a "necessary corollary of the certification required by Rule 11."<sup>28</sup> According to this view, a duty of candor must exist under Rule 11: without it the Rule does not function to achieve its goal, which Judge Schwarzer defined as ensuring that the court is "fully informed" so that it can fairly decide the substantive issues before it.<sup>29</sup>

The duty of candor thus discovered under Rule 11 is violated by an argument for the extension of existing law "disguised" as one based on existing law.<sup>30</sup> Such an argument "misrepresents existing law."<sup>31</sup> It does not "accurately describe the law and then call for change."<sup>32</sup> Some decisions have held a lack of argument identification to be sanctionable either as a misrepresentation or as a failure to do a reasonable prefiling inquiry to ascertain the state of existing law.<sup>33</sup> As one decision put it, "Counsel either are trying to buffalo the court or have not done their

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25. See *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1539 (9th Cir. 1986).

26. For the text of Rule 11, see *supra* note 1.

27. See *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 103 F.R.D. 124, 127-28 (N.D. Cal. 1984) (quoting A.B.A. Model Rule of Professional Conduct 3.3 (1983), and Model Code of Professional Responsibility EC 7-23 (1979)), *rev'd*, 801 F.2d 1531 (9th Cir. 1986).

28. *Id.* at 127; see also *Wojan v. General Motors Corp.*, 851 F.2d 969, 976 (7th Cir. 1988) (accepting duty of candor under Rule 11); *Lyle v. Charlie Brown Flying Club, Inc.*, 112 F.R.D. 392, 398 (N.D. Ga. 1986) (Rule 11 implies duty of candor), *rev'd without opinion*, 822 F.2d 64 (1987); Schwarzer, *supra* note 5, at 193 (duty of candor a necessary corollary of Rule 11).

29. See *Golden Eagle*, 103 F.R.D. at 127; Schwarzer, *supra* note 5, at 193. The Supreme Court recently spoke of the purpose of Rule 11 as deterrence of frivolous or improper motions. See *Pavelic v. Marvel Entertainment Group*, 110 S. Ct. 456, 460 (1989). The use of Rule 11 as a cure-all for all manner of attorney misconduct has been criticized. See *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 829-30 (9th Cir. 1986); Nelken, *supra* note 7, at 1351. Other courts, also arguing for a broad application of Rule 11, see a requirement of argument identification as necessary to stem the flood of frivolous claims and defenses. See *International Shipping Co. v. Hydra Offshore, Inc.*, 875 F.2d 388, 393 (2d Cir.) ("The quality of Justice depends upon our ability to control the flood of litigation."), *cert. denied*, 110 S. Ct. 563 (1989).

30. See *Golden Eagle*, 103 F.R.D. at 127.

31. *Thornton v. Wahl*, 787 F.2d 1151, 1154 (7th Cir.), *cert. denied*, 479 U.S. 851 (1986).

32. *Id.*

33. See, e.g., *DeSisto College, Inc. v. Line*, 888 F.2d 755, 766 (11th Cir. 1989); *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 103 F.R.D. 124, 126, 129 (N.D. Ca. 1984), *rev'd*, 801 F.2d 1531 (9th Cir. 1986).

homework."<sup>34</sup>

In contrast, the Ninth Circuit, finding no explicit requirement of argument identification in the language of the Rule,<sup>35</sup> has declined to go beyond the terms of the Rule to impose one.<sup>36</sup> This narrow reading of Rule 11 also rejects a duty of candor under Rule 11, seeing such ethical considerations as more properly governed by the review procedure established by the bar<sup>37</sup> and as beyond the scope of amended Rule 11. This scope is defined by the Rule's purpose "to deter the filing of baseless pleadings and motions, not to punish lawyers for making meritorious arguments in a way that the court deems to exceed the bounds of acceptable advocacy."<sup>38</sup>

A narrow reading of Rule 11 has the advantage of removing the difficulty of drawing a line between papers warranted by existing law and papers warranted by a good faith argument for the extension of law,<sup>39</sup> and the consequent closeness of sanctions decisions on this ground.<sup>40</sup> Courts have noted that close decisions on argument identification are likely to result in sanctions based on "the level of assurance used by the

34. *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1082 (7th Cir. 1987), cert. dismissed, 108 S. Ct. 1101 (1988).

35. *See Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1539 (9th Cir. 1986).

36. *See id.* at 1539-40; *Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90, 96 (3rd Cir. 1988).

37. *See Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d at 1542; Nelken, *supra* note 7, at 1350-51. The court in *Golden Eagle* noted: "The district court's interpretation of Rule 11 requires district courts to judge the ethical propriety of lawyers' conduct with respect to every piece of paper filed in federal court. This gives us considerable pause." *Golden Eagle*, 801 F.2d at 1539; *see also Mary Ann Pensiero*, 847 F.2d at 96 (following *Golden Eagle* in rejecting the "duty of candor").

38. Nelken, *supra* note 7, at 1351.

39. *See Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1540 (9th Cir. 1986); *see also Nelken, supra* note 7, at 1350 ("Can anyone determine with precision when a position has become an argument for the 'extension' or 'modification' of existing law?"); Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 Harv. L. Rev. 630, 638 (1987) ("Because almost every new claim varies to some degree from reported decisions, virtually all cases present novel questions not determined by existing law.").

40. *See Golden Eagle*, 801 F.2d at 1540. The closeness of sanctions for lack of argument identification also varies depending on the definition of "existing law" used by the sanctioning judge. If existing law is defined narrowly as law which has already been decided, *see Schwarzer, supra* note 5, at 194, more arguments will come within the ambit of sanctions. On the other hand, an argument under existing law may be defined to include arguments where the issue has been left open, unsettled, or uncertain. *See, e.g., In re Ronco, Inc.*, 838 F.2d 212, 219 (7th Cir. 1988) (no sanctions for argument asserted by opponent to be unwarranted under existing law, when argument though "weak" was "not precluded by any existing precedent"); *National Union Fire Ins. Co. v. Continental Ill. Corp.*, 113 F.R.D. 637, 639 (N.D. Ill. 1987) (pleading or motion is warranted by existing law if it "addresses a question of first impression, or if it concerns an issue on which the law is unsettled" (quoting Solovy, Wedoff & Bart-Howe, *Sanctions Under Federal Rule of Civil Procedure 11*, at 15 (Oct. 11, 1986))). Under this definition, fewer arguments will be in the category of arguments for the extension of law and subject to a requirement of argument identification. The problem for lawyers is understanding in advance a particular judge's definition of existing law.

brief-writer,<sup>41</sup> or a lack of sophistication in the brief writer.<sup>42</sup> When mandatory sanctions ride upon close judicial decisions, “[t]he danger of arbitrariness increases and the probability of uniform enforcement declines.”<sup>43</sup> The result is a chilling effect on advocacy<sup>44</sup> and on the ability of the law to change.<sup>45</sup>

Rather than assisting courts, broadly applying Rule 11 with a requirement of argument identification saddles the judiciary with the extra burden of “grad[ing] accuracy of advocacy in connection with every piece of paper filed in federal court”<sup>46</sup> and “multiplies the decisions which the court must make.”<sup>47</sup> This extra burden defeats Rule 11’s goal of reducing cost and delay.<sup>48</sup> Close decisions on argument identification also result in appeals and satellite litigation on sanctions issues, again creating cost and delay.<sup>49</sup>

Many of the same arguments apply to sanctions for failure to cite contrary authority. Both a breach of the duty of candor and a failure to make a reasonable inquiry that would have disclosed the contrary authority have been urged as a rationale for sanctions.<sup>50</sup>

The Ninth Circuit argued that sanctions for failure to cite contrary authority, when the paper itself was not frivolous,<sup>51</sup> would result in close

41. *Golden Eagle*, 801 F.2d at 1540 (quoting appellant’s brief); see *Calloway v. Marvel Entertainment Group*, 854 F.2d 1452, 1478-79 (2d Cir. 1988) (referring to the sanctioned motion in the *Golden Eagle* case as “a memorandum . . . that overstated a legal argument.”), *rev’d on other grounds sub nom. Pavelic & Leflore v. Marvel Entertainment Group*, 110 S. Ct. 456 (1989).

42. See *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1085-86 (7th Cir. 1987) (Cudahy, J., concurring in part, dissenting in part), *cert. dismissed*, 108 S. Ct. 1101 (1988).

43. *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1541 (9th Cir. 1989). For expressions of concern about the lack of uniformity in the application of Rule 11, see Schwarzer, *supra* note 7, at 1015; Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 202-03 (1988); A.B.A. Section of Litigation, *Standards and Guidelines for Practice Under Rule 11 of the Federal Rules of Civil Procedure*, 121 F.R.D. 101, 104 (1988).

44. See *Golden Eagle*, 801 F.2d at 1541; see also *id.* at 1540 (noting possible “conflict between the lawyer’s duty zealously to represent his client and the lawyer’s own interest in avoiding rebuke”) (citation omitted); Strasser, *supra* note 14, at 32 (quoting statement in sanctioned firm’s brief that the *Golden Eagle* sanctions would “produce a more subservient, more cautious, even a more timid bar” and “change basic notions of advocacy”).

45. See *Golden Eagle*, 801 F.2d at 1540.

46. *Id.*; see also *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1085 (7th Cir. 1987) (Cudahy, J., concurring in part, dissenting in part) (“under this approach the judicial process becomes a task not unlike the grading of law school examinations”), *cert. dismissed*, 108 S. Ct. 1101 (1988).

47. *Golden Eagle*, 801 F.2d at 1540.

48. See Advisory Committee Note, 97 F.R.D. 198, 198 (1983).

49. See *Golden Eagle*, 801 F.2d at 1541; see also Advisory Committee Note, 97 F.R.D. at 201.

50. See *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 103 F.R.D. 124, 129 (N.D. Cal. 1984), *rev’d*, 801 F.2d 1531 (9th Cir. 1986); see also Note, *Attorney Sanctions—Rule 11—Deterring Unethical Motion and Pleading Practice—Golden Eagle Distributing Corp. v. Burroughs Corp.*, 36 U. Kan. L. Rev. 173, 183, 185 (1987).

51. The court pointed out that the situation is very different if the position taken by a lawyer is unsupportable:



questions and burden the court with extra research to make sure papers submitted by attorneys had not omitted any relevant case.<sup>52</sup> In addition, it believed that sanctions for failure to cite cases would undermine the advocacy system by blurring the roles of judge and advocate:

[N]either Rule 11 nor any other rule imposes a requirement that the lawyer, in addition to advocating the cause of his client, step first into the shoes of opposing counsel to find all potentially contrary authority, and finally into the robes of the judge to decide whether the authority is indeed contrary or whether it is distinguishable. It is not the nature of our adversary system to require lawyers to demonstrate to the court that they have exhausted every theory, both for and against their client. Nor does that requirement further the interests of the court. It blurs the role of judge and advocate.<sup>53</sup>

The issues of "argument identification" and failure to cite adverse authority may both be subsumed under the larger question of whether a lawyer must actually make a reasonable argument in support of his legal position or whether it is enough that a reasonable argument exists. Although the district court in *Golden Eagle* did not address this issue separately, the Ninth Circuit viewed this as the basic issue and began its discussion of the case by stating: "The district court did not focus on whether a sound basis in law and in fact existed for the defendant's motion for summary judgment. Indeed it indicated that the motion itself was nonfrivolous. Rather, the district court looked to the manner in which the motion was presented."<sup>54</sup>

Again broad and narrow readings of the language of Rule 11 have been proposed. The broad reading focuses on the words "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law"<sup>55</sup> and concludes that an argument demonstrating one or the other must be present for the attorney to escape sanctions.<sup>56</sup> Another view argues that allowing an attorney to defend an unsupported motion by demonstrating afterward that a reasonable argument could have been made defeats Rule 11's requirement that a reasonable inquiry be performed *before* filing.<sup>57</sup> According to one court, "[t]he

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In rejecting the district court's broad interpretation of Rule 11, we do not suggest that the court is powerless to sanction lawyers who take positions which cannot be supported. A lawyer should not be able to proceed with impunity in real or feigned ignorance of authorities which render his argument meritless. *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1542 (9th Cir. 1986).  
52. *See id.*

53. *Id.*; *see also* M. Freedman, *Lawyers' Ethics in an Adversary System* 51 (1975) (a lawyer should not prejudge a client's case).

54. *Golden Eagle*, 801 F.2d at 1538 (citation omitted).

55. Fed. R. Civ. P. 11.

56. *See Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 103 F.R.D. 124, 126, 129 (N.D. Cal. 1984), *rev'd*, 801 F.2d 1531 (9th Cir. 1986); *see also Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 809 F.2d 584, 589 (9th Cir. 1987) (Noonan, J., dissenting from denial of sua sponte request for en banc hearing).

57. *See International Shipping Co. S.A. v. Hydra Offshore, Inc.*, 875 F.2d 388, 390

Rule compels us to focus on counsel's conduct at the time of the submission."<sup>58</sup>

On the other side, it has been argued that the Rule itself focuses on the *existence* of a reasonable argument in support of the pleading or motion, not on the way an argument is framed. Close calls on whether a paper is sanctionable would result from a requirement that the reasonable argument actually be made, rather than merely exist, and Rule 11 would be applied in situations in which an argument "did have some merit" but the attorney "was not fully aware of that fact at the initial filing."<sup>59</sup> An attorney would be subject to sanctions "[a]nytime [he] did not fully flesh out an argument."<sup>60</sup>

In its narrow reading of Rule 11, the Ninth Circuit focused on the words "pleading, motion, or other paper,"<sup>61</sup> arguing that Rule 11 does not require attorneys to certify that individual arguments in support of pleadings, motions or papers are warranted by law, but only that the paper itself is warranted.<sup>62</sup> This argument makes a distinction between the merits of a paper (possible ground for sanctions) and the manner of presentation (not a ground for sanctions).<sup>63</sup>

## II. "CONDUCT" VERSUS "PRODUCT"

The issues in the *Golden Eagle* case have evolved into a debate over whether Rule 11 should focus on conduct (the prefiling inquiry) or product (the substantive merits of the paper filed).<sup>64</sup> The conduct/product debate begins with the language of the rule and centers on some of the

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(2d Cir.) (calling attorney's assertion that a reasonable argument could have been made "post hoc sleight of hand'") (citing Schwarzer, *Rule 11 Revisited*, 101 Harv. L. Rev. 1013, 1022 (1988)), *cert. denied*, 110 S. Ct. 563 (1989); *Lyle v. Charlie Brown Flying Club, Inc.*, 112 F.R.D. 392, 399 (N.D. Ga. 1986), *rev'd.*, 822 F.2d 64 (11th Cir. 1987).

58. *Hydra*, 875 F.2d at 390. In support of this view, the court in *Hydra* cited the Advisory Committee Note, apparently referring to the Committee's statement that the court "should test the signer's conduct by inquiring what was reasonable to believe at the time [of submission]." Advisory Committee Note, 97 F.R.D. 198, 199 (1983); see *Hydra* at 390. But this statement was made in contemplation of the opposite situation, where a position that seemed reasonable at the time of filing turns out to be unwarranted. The Advisory Committee makes it clear that courts are to "avoid using the wisdom of hindsight" in order not to "chill an attorney's enthusiasm or creativity." Advisory Committee Note, 97 F.R.D. at 199. The Advisory Committee Note does not support the reverse proposition that a position which turns out to be warranted should be sanctioned if the attorney did not adequately investigate before filing.

59. *Kale v. Combined Ins. Co. of Am.*, 861 F.2d 746, 759 (1st Cir. 1988).

60. *Id.*

61. For the language of Rule 11, see *supra* note 1.

62. See *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1541 (9th Cir. 1986).

63. See *id.*; Nelken, *supra* note 7, at 1351.

64. See, e.g., *Townsend v. Holman Consulting Corp.*, 881 F.2d 788, 792 (9th Cir. 1989) (following narrow reading of Rule 11 focusing on product); *Mars Steel Corp. v. Continental Bank N.A.*, 880 F.2d 928, 932 (7th Cir. 1989) ("Rule 11 focuses on inputs rather than outputs, conduct rather than result."); Schwarzer, *supra* note 7, at 1020-25 (Rule 11 should focus on conduct); Rule 11 in Transition: The Report of the Third

changes<sup>65</sup> made in the text of the rule in 1983, particularly the implications of the added phrase "formed after reasonable inquiry."<sup>66</sup> There has been relatively little controversy over what constitutes a "reasonable inquiry"—the rulemakers were helpful on that point.<sup>67</sup> They gave less help, however, on the question of how the courts should go about applying Rule 11, and if and to what extent the judges should turn their attention from the merits of a paper to the prefiling investigation.<sup>68</sup> While the Advisory Committee Note establishes the existence of an affirmative duty to conduct some prefiling inquiry and clearly envisions the courts deciding whether one has taken place,<sup>69</sup> it fails to address several important questions: What is the function of the reasonable inquiry requirement in the Rule itself, and what is the relationship between the components of this prong of the rule—the reasonable inquiry, the belief, knowledge and information, and the legal and factual basis of the paper? Are they separate grounds for sanctions, or must a paper fail in all three to be sanctionable?

#### A. *The Negligence Interpretation of Rule 11*

Several decisions have interpreted Rule 11 by analogizing it to negligence.<sup>70</sup> This idea was expressed even before the amending of Rule 11 in

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Circuit Task Force on Federal Rule of Civil Procedure 11, at 20 (American Judicature Society 1989) (advocating focus on conduct).

65. The relevant section of the old rule read: "The signature of an attorney constitutes a certificate by him . . . that to the best of his knowledge, information, and belief there is good ground to support [the pleading]." Amendments to the Rules, 97 F.R.D. 165, 197 (1983). The amended rule reads: "that to the best of his knowledge, information, and belief formed after reasonable inquiry [the pleading, motion or other 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 . . ." Fed. R. Civ. P. 11.

66. Commentators have called the addition of the words "formed after reasonable inquiry" the most significant change made in the 1983 amendments to Rule 11. See 2A J. Moore & J. Lucas, *Moore's Federal Practice*, 11.02(3) (1989); Nelken, *supra* note 7, at 1319. *But see* Risinger, *supra* note 7, at 54 n. 181 (citing cases that imposed requirement of reasonable inquiry under old Rule 11).

67. The Advisory Committee Note states:

The court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted. Thus, what constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available to the signer; whether he had to rely on a client for information as to the facts underlying the pleading, motion, or other paper; whether the pleading, motion, or other paper was based on a plausible view of the law; or whether he depended on forwarding counsel or another member of the bar.

Advisory Committee Note, 97 F.R.D. 198, 199 (1983). Judge Easterbrook has suggested other factors: "In most cases the amount of research into legal questions that is 'reasonable' depends on whether the issue is central, the stakes of the case, and related matters that influence whether further investigation is worth the costs." *Mars Steel Corp. v. Continental Bank N.A.*, 880 F.2d 928, 932-33 (7th Cir. 1989).

68. See Advisory Committee Note, 97 F.R.D. at 198 (1983).

69. See *id.*

70. See *Hays v. Sony Corp. of Am.*, 847 F.2d 412, 418 (7th Cir. 1988); *Continental*

an influential article by Professor Risinger, *Honesty in Pleading and its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*.<sup>71</sup> Although arguing that the subjective standard of former Rule 11 ("to the best of [the signer's] knowledge, information, and belief"<sup>72</sup>) was not unenforceable,<sup>73</sup> Professor Risinger nevertheless suggested that Rule 11 should perhaps be amended to include an objective standard, noting that such a standard would in effect "take us from the realm of ethical consideration to the realm of negligence."<sup>74</sup>

The effect of this entry into the realm of negligence would be, according to Risinger, that Rule 11 would then apply to some people whose actions were only the result of negligence.<sup>75</sup> "However," he observed, "it might better promote the ends of Rule 11 if it also reprobated gross negligence. This standard would encompass actions such as the filing of an unfounded suit which proper investigation would have revealed was unfounded, or the assertion of denials or defenses in similar circumstances."<sup>76</sup>

After Rule 11 was amended, the addition of "after reasonable inquiry" was seen as incorporating the objective standard (and thus a negligence standard) that Professor Risinger had proposed.<sup>77</sup> Decisions then began making a more explicit equation between negligence and Rule 11, one decision interpreting Rule 11 as "defin[ing] a new form of legal malpractice."<sup>78</sup> Other courts have looked for the elements of negligence—duty, breach, causation, injury—in the Rule 11 context.<sup>79</sup> These courts agree that Rule 11 imposes a duty to conduct a reasonable prefiling inquiry, and that a failure to do so is a breach of that duty.<sup>80</sup>

There is disagreement, however, on the definition of the injury which must be caused by the breach of duty. One view defined the injury as the bringing of a frivolous lawsuit. Under this definition, an attorney who

*Air Lines, Inc. v. Group Systems Int'l*, 109 F.R.D. 594, 597 (C.D. Cal. 1986); see also *Whittington v. Ohio River Co.*, 115 F.R.D. 201, 203 n.1 (E.D. Ky. 1987) (Rule 11 requires "causative element") (citing *Continental Air Lines*, 109 F.R.D. 594).

71. 61 Minn. L. Rev. 1 (1976).

72. For the text of old Rule 11, see *supra* note 64.

73. Risinger, *supra* note 7, at 60 ("I would suggest that the problem has not been with the standards but with the enforcers of those standards. There is nothing inherently unworkable about subjective standards.")

74. *Id.*

75. *Id.* at 60 n.193.

76. *Id.*

77. See *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 830-31 (9th Cir. 1986); *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 253-54 (2d Cir. 1985), *cert. denied*, 484 U.S. 918 (1987).

78. *Hays v. Sony Corp. of Am.*, 847 F.2d 412, 418 (7th Cir. 1988).

79. See *Whittington v. Ohio River Co.*, 115 F.R.D. 201, 204 (E.D. Ky. 1987); *Continental Air Lines Inc. v. Group Systems Intern.*, 109 F.R.D. 594, 597 (C.D. Cal. 1986). According to one court, Rule 11 also "recognizes the doctrine of *res ipsa loquitur*." *Mars Steel Corp. v. Continental Bank N.A.*, 880 F.2d 928, 932 (7th Cir. 1989).

80. See *Hays*, 847 F.2d at 418; *Whittington*, 115 F.R.D. at 204; *Continental Air Lines*, 109 F.R.D. at 597.

fails to conduct a reasonable inquiry but brings a suit that turns out to be "well grounded in fact" and "warranted by . . . law" has not caused an injury and therefore has not violated Rule 11.<sup>81</sup> Another view of injury under Rule 11 emphasizes the shifting of the burden of research onto the opposing party by bringing a suit that is inadequately researched. This injury, it seems, can occur even if there is some substantive merit to the suit.<sup>82</sup> Thus, in *Mars Steel Corp. v. Continental Bank N.A.*,<sup>83</sup> the court stated, "[A] motion may be sanctionable even though something could have been said in its behalf. Litigants 'may not pretend that the law favors their view and impose on the court or their adversaries the burden of research to uncover the basic rule.'"<sup>84</sup>

### B. *The Conduct Approach*

Some courts and commentators, while rejecting the analogy of Rule 11 to negligence,<sup>85</sup> still see the reasonable inquiry requirement as the heart of the rule.<sup>86</sup> Urging a focus on "conduct" rather than "product," they take the view that a failure to make a reasonable pre-filing inquiry is in itself a Rule 11 violation.<sup>87</sup> In accordance with this view, Judge Schwarzer paraphrases Rule 11 as "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."<sup>88</sup> This paraphrase trans-

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81. *Continental Air Lines*, 109 F.R.D. at 596; see also *Whittington*, 115 F.R.D. at 203 n.1.

82. See *Mars Steel*, 880 F.2d at 939 (opposing party "dodged a bullet" when sanctioned party brought inadequately argued motion); *Hays v. Sony Corp. of Am.*, 847 F.2d 412, 419 (7th Cir. 1988) ("meritorious though modest" claim sanctioned along with "unequivocally frivolous" claims, because the suit "had not been pursued effectively"). But see *Elson & Rothschild, Rule 11: Objectivity and Competence*, in 5 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* 241, 248 (Supp. 1989) (client, not opposing party, is principal victim and Rule 11 does nothing for him).

83. 880 F.2d 928 (7th Cir. 1989).

84. *Id.* at 938 (quoting *In re Central Ice Cream Co.*, 836 F.2d 1068, 1073 (7th Cir. 1987)) (citations omitted). But see *Continental Air Lines, Inc. v. Group Systems Int'l*, 109 F.R.D. 594, 597 (C.D. Cal. 1986) ("although [defendant's] failure to cite *Burger King* may have resulted in extra work for plaintiff, it did not . . . result in the motion being frivolous").

85. See Rule 11 in Transition, *supra* note 64, at 23; see also Schwarzer, *supra* note 7, at 1024 n.56 (rejecting a requirement of causation).

86. See Schwarzer, *supra* note 7, at 1022 ("addition of the pre-filing investigation requirement was a major purpose of the 1983 amendment" and "promises to be its most effective and meaningful provision").

87. See *Mars Steel Corp. v. Continental Bank N.A.*, 880 F.2d 928, 933-35 (7th Cir. 1989); Schwarzer, *supra* note 7, at 1025.

88. Schwarzer, *supra* note 7, at 1020; see also *id.* at 1024 (Rule 11 "requir[es] the filing lawyer to certify that a pre-filing investigation indicates that the paper is warranted by the facts and a good faith legal argument."); *Lyle v. Charlie Brown Flying Club, Inc.*, 112 F.R.D. 392, 397 (N.D. Ga. 1986) ("The plain meaning of the amended rule is that every signature . . . certifies . . . that the attorney has conducted reasonable inquiry to assure that the pleading is well grounded in fact, and warranted by existing law or constitutes a good faith argument for a change in the existing law."), *rev'd*, 822 F.2d 64 (11th Cir. 1987).

forms reasonable inquiry into the major component of what is certified. Thus, Judge Schwarzer cites with approval a case which he describes as "not ask[ing] whether the claim had a plausible basis, but whether the plaintiff's attorney had conducted a reasonable prefiling inquiry."<sup>89</sup>

To paraphrase the Rule as requiring attorneys to certify that they have made a reasonable prefiling inquiry rewrites the Rule.<sup>90</sup> Two questions arise: Is Judge Schwarzer's statement a correct interpretation of the language of Rule 11, and does the conclusion he draws from his paraphrase (that the courts should focus on the prefiling inquiry and not on the merits) conform with the intent of the amenders?<sup>91</sup>

The answer to the first question is that Judge Schwarzer's paraphrase does not conform with the meaning and language of Rule 11.<sup>92</sup> The grammatical structure of the Rule indicates that the content of the certification is that the paper has factual and legal merit; the prepositional phrase "to the best of his knowledge, information and belief formed after reasonable inquiry" qualifies that certification, identifying the extent of the attorney's responsibility to ensure the legal and factual merit of the paper.<sup>93</sup> Moreover, amended Rule 11 expands the old Rule's "there is good ground to support it" to "it . . . is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law." This expansion of what is essentially the Rule's definition of a nonfrivolous paper is evidence that the drafters did not intend to direct the courts' attention away from the merits of the paper, but instead intended to aid the courts by providing a standard by which to judge the merits.

Nonetheless, Judge Schwarzer is not alone in asserting that Rule 11 directs judges to look exclusively at the prefiling inquiry. The Third Circuit Task Force on Rule 11 reached the same conclusion by a somewhat different route.<sup>94</sup> Their study asked not what the attorney is certifying, but what (and how many) duties this prong of Rule 11 imposes:

Simply stated, the question is whether the . . . language imposes two duties or three. It unquestionably imposes a duty of reasonable inquiry. It would appear to impose a duty of reflection upon the results

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89. Schwarzer, *supra* note 7, at 1021 (citing *Kamen v. AT&T*, 791 F.2d 1006 (2d Cir. 1986)).

90. In fact, it has been recently proposed that this prong of Rule 11 be amended to read: "The signature of an attorney or party constitutes a certificate by the signer . . . 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 inquiry, 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 . . ." Nelken, *Has the Chancellor Shot Himself in the Foot? Looking for a Middle Ground on Rule 11 Sanctions*, 41 *Hastings L.J.* 383, 407 (1990).

91. There are also practical problems in applying Rule 11 under this interpretation. See *infra* notes 118-127 and accompanying text.

92. For the language of Rule 11, see *supra* note 1.

93. See *infra* notes 112-117 and accompanying text.

94. See Rule 11 in Transition, *supra* note 64, at 15-25.

of that inquiry ("to the best of the signer's knowledge, information and belief"). Does it also impose a duty to sign a paper only if a *reasonably competent* attorney would conclude, after reasonable inquiry, that 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?"<sup>95</sup>

The Third Circuit Task Force concluded that Rule 11 does not require that the product be well grounded in fact and warranted by law, but that the language of Rule 11 imposes only two duties—reasonable inquiry and reflection upon the results of the inquiry in order to arrive at knowledge, information and belief.<sup>96</sup> This conclusion rests on analysis of the language of Rule 11, particularly of the words "to the best of the signer's knowledge, information and belief," the subjective element that the amenders retained from the old rule:

"[T]o the best of the signer's knowledge, information, and belief" focuses attention on the individual. If the individual's honest conclusion about the results of an objectively reasonable inquiry had been deemed irrelevant (or at least not a sufficient defense), one would have expected the rulemakers to omit references to the individual, providing simply "that it is well grounded in fact and is warranted by existing law . . . ."<sup>97</sup>

The Third Circuit Task Force then proposed a reading of Rule 11 that would have courts focus entirely on "conduct" without addressing the merits of the paper.<sup>98</sup>

There are weaknesses in this analysis. First, although it claims to be analyzing the language of Rule 11, it refuses to look at that language as a syntactic whole.<sup>99</sup> Instead, it takes the separate semantic elements of Rule 11 ("reasonable inquiry," "knowledge, information, and belief" and "well grounded in fact and warranted by . . . law") and examines not the syntactic connections between them—that is, how the language of the Rule relates and subordinates them—but rather the logical connections in the chronological sequence between conduct (the inquiry), belief

95. *Id.* at 15 (emphasis in original). For another view of how many duties Rule 11 imposes, see *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1080 (7th Cir. 1987), *cert. dismissed*, 108 S. Ct. 1101 (1988):

The Rule contains several strands. There must be "reasonable inquiry" into both fact and law; there must be good faith (that is, the paper may not be interposed 'to harass') [the improper purpose clause]; the legal theory must be objectively "warranted by existing law or a good faith argument" for the modification of existing law; and the lawyer must believe that the complaint is "well grounded in fact." The attorney filing the complaint or other paper must satisfy all four requirements.

96. See Rule 11 in Transition, *supra* note 64, at 15.

97. *Id.* For a similar conclusion concerning the force of "knowledge, information and belief," see Elson & Rothschild, *supra* note 82, at 243.

98. See Rule 11 in Transition, *supra* note 64, at 20-25. But see *id.* at 20 ("product is an appropriate basis for inference about conduct in some cases") (emphasis in original).

99. See R. Dickerson, *The Interpretation and Application of Statutes* 46 (1975).

(which derives from the inquiry), and the product (the paper which is the end result). This analysis views the process from the perspective of the lawyer, who first conducts the inquiry, arrives at belief, knowledge and information, and then produces the paper. From this perspective, the subjective, individual good faith element ("to the best of his knowledge, information and belief") is interposed between the inquiry and the paper and prevents a requirement that the paper derive directly or reasonably from the inquiry. The individual is there with his individual knowledge, information and belief, and we cannot rewrite the rule to insert the "reasonably competent attorney" in his stead.<sup>100</sup> The individual attorney must believe that the paper is supported by the inquiry; it is not necessary that a reasonable attorney would believe it. From this the Task Force concludes that courts are prevented from examining the merits of the "product" at all under Rule 11.<sup>101</sup>

Although the Third Circuit Task Force's analysis presents a logical construction of what the Rule implies happens as a lawyer prepares a paper, the conclusion does not follow that judges should consider only the prefiling inquiry, and not the merits of the paper. There is nothing in the Rule or the Advisory Committee Note to suggest that courts are meant to decide whether a violation has occurred by an inquiry that follows chronologically the lawyer's steps in preparing the paper.<sup>102</sup> For a judge, the chronological order is reversed; the judge meets first with the paper and from the paper forms an impression as to whether there has been a reasonable inquiry.<sup>103</sup> Therefore, and in light of the emphasis the language of the Rule places on the paper and its legal and factual basis,<sup>104</sup> it seems sensible that the judicial inquiry begin with the paper.

Two reasons beyond the language of the Rule support the conduct-oriented approach advanced by Judge Schwarzer and the Task Force. First, a product-oriented approach generates unpredictability and arbitrariness.<sup>105</sup> According to Judge Schwarzer, the problem is not just the

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100. *But see Eastway Constr. Corp. v. City of New York*, 637 F. Supp. 558, 567 (E.D.N.Y. 1986) ("Even the subjective component has objective aspects since, as a matter of evidence, the judge will rely on what reasonable lawyers would have known or believed under the circumstances in deciding what this lawyer believed.") Others insert the reasonable attorney in place of the individual attorney without comment. *See, e.g., Bloomenstein, Developing Standards for the Imposition of Sanctions under Rule 11 of the Federal Rules of Civil Procedure*, 21 Akron L. Rev. 289, 314 (1988) ("the court must conclude that a reasonable attorney would believe that the case presented a plausible legal claim").

101. *See supra* notes 93-97 and accompanying text.

102. *See Fed. R. Civ. P. 11; Advisory Committee Note*, 97 F.R.D. 198, 198-99 (1983).

103. *See Mars Steel Corp. v. Continental Bank N.A.*, 880 F.2d 928, 932 (7th Cir. 1989) ("[a]n objectively frivolous legal position supports an inference that the signer did not do a reasonable amount of research"); *see also* Rule 11 in Transition, *supra* note 64, at 20 (courts draw inferences from product about conduct).

104. *See supra* notes 91-92 and accompanying text.

105. *See Schwarzer, supra* note 7, at 1015-17. The Third Circuit Task Force observes that:

[L]aw tends to be, if not indeterminate, then "underdeterminate" . . . . A trial



difficulty of predicting how judges will react to a particular claim or defense, but the inherent difficulty of defining frivolity and formulating a standard by which to evaluate the plausibility of legal arguments.<sup>106</sup> Second, an emphasis on the merits of the paper may result in sanctions for incompetence, rather than misconduct.<sup>107</sup> The Third Circuit Task Force concludes that because the purpose of Rule 11 is deterrence, and because it is impossible to deter stupidity, Rule 11 should focus on conduct.<sup>108</sup> In response to this last argument, it may be observed that an inadequate inquiry may also be the result of incompetence, rather than of abusive carelessness or shirking.<sup>109</sup>

### C. Reasonable Inquiry in the Rule

Other decisions and commentators have set forth other interpretations of the language of Rule 11 and the function of "reasonable inquiry." It has been suggested that the purpose of the addition of "reasonable inquiry" is to create some flexibility<sup>110</sup> in the Rule in view of its mandated sanctions.<sup>111</sup> Others suggest that the "reasonable inquiry" requirement was meant to do away with what has been termed the "empty head, pure heart defense" of the old Rule 11.<sup>112</sup> This view has some historical validity, since one of the problems perceived in old Rule 11 was its subjective

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court espousing a product approach to Rule 11 is free (as free as the law is underdeterminate) to regard the conclusion as objectively unreasonable ("frivolous"), and if it does so, the court is obligated to impose sanctions.

Rule 11 in Transition, *supra* note 64, at 18-19.

106. See Schwarzer, *supra* note 7, at 1016-17.

107. See Rule 11 in Transition, *supra* note 64, at 19; see also Schwarzer, *supra* note 7, at 1018-20 (proper case management by judges can dispose of frivolous claims and defenses quickly; Rule 11 should be used to discourage dilatory and abusive tactics).

108. See Rule 11 in Transition, *supra* note 64, at 19; Elson & Rothschild, *supra* note 82, at 245.

109. For a description of the process of characterization an attorney must go through before and as he researches a legal problem, see K. Ripple, *Constitutional Litigation 4-7* (1984) (quoting R. Leflar, *American Conflicts Law* § 87, at 175 (3d ed. 1977)).

110. See *In re Central Ice Cream Co.*, 836 F.2d 1068, 1072 (7th Cir. 1987) ("Although . . . a court must impose a sanction once a violation has been established, the decision whether there has been a violation is a judgment call. The Rule speaks of "reasonable" pre-filing inquiry . . ."). But see Schwarzer, *supra* note 7, at 1022 (rejecting suggestion that "reasonable inquiry" was added to create flexibility).

111. Amended Rule 11 states that "If a pleading, motion or other paper is signed in violation of this rule, the court . . . shall impose . . . an appropriate sanction." Fed. R. Civ. P. 11 (emphasis added).

112. See *Thornton v. Wahl*, 787 F.2d 1151, 1154 (7th Cir.), *cert. denied*, 479 U.S. 851 (1986); *Hale v. Harney*, 786 F.2d 688, 692 (5th Cir. 1986); *Gaiardo v. Ethyl Corp.*, 835 F.2d 479, 482 (3d Cir. 1987); *In re Ronco, Inc.*, 105 F.R.D. 493, 496 (N.D. Ill. 1985); cf. *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 253 (2d Cir. 1985) ("subjective good faith no longer provides the safe harbor it once did"), *cert. denied*, 484 U.S. 918 (1986). Judge Schwarzer in his earlier article saw the purpose of the reasonable inquiry requirement as "to eliminate ignorance as an excuse. There is no room for a pure heart, empty head defense under Rule 11." Schwarzer, *supra* note 5, at 187.

good faith standard; because judges were once reluctant to sanction,<sup>113</sup> that standard was in nearly every instance a complete defense to a charge of frivolousness.<sup>114</sup> Because “formed after reasonable inquiry” is an adjectival phrase modifying “knowledge, information, and belief,” it makes sense to believe that the phrase was intended to change or remove this defense. Still others have suggested that a reasonable inquiry is itself a defense to the charge of a Rule 11 violation, thus “protect[ing] attorneys who reach reasonable, but erroneous, conclusions about the validity of their cases”<sup>115</sup> and “ensur[ing] that counsel may take novel innovative positions.”<sup>116</sup>

In fact, the intent of the amenders in adding “reasonable inquiry” to the Rule was probably a mixture of these things. The Rule seeks to strike a balance, intending at once to encourage the use of sanctions and to hedge in their use with protections for innovative pleading and lawyerly creativity.<sup>117</sup> Thus the Rule may be said to have removed or qualified the good faith defense and replaced it or augmented it with what is both a new duty and a new defense.

### III. THE APPLICATION OF RULE 11

The interpretations of Rule 11 described above have resulted in the use of different tests to determine whether a violation has occurred. This Part discusses some of the practical problems in applying the conduct approach and the negligence approach. It then proposes a two-step test, which focuses first on product and then on conduct. This test follows the interpretation of “reasonable inquiry” as a new defense and a new duty under Rule 11.

There are practical problems in applying the interpretation of Rule 11 that focuses on the conduct of the attorney. Courts and commentators have noted that the conduct test may be unpredictable.<sup>118</sup> It also consumes judicial time: Because the facts of the prefiling inquiry (how much time was available to the attorney, how much time was spent, what was done)<sup>119</sup> are not usually evident from the paper filed, judges may be forced to go beyond the briefs or papers filed and inquire into the prefiling investigation.<sup>120</sup> Without briefs or a hearing on the facts of the prefiling investigation, the examination of the prefiling inquiry is no more than

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113. See Advisory Committee Note, 97 F.R.D. 198, 198-199 (1983); Schwarzer, *supra* note 5, at 183.

114. See Risinger, *supra* note 7, at 60.

115. *Eastway Constr. Corp. v. City of New York*, 637 F. Supp. 558, 567 (E.D.N.Y. 1986).

116. *Mars Steel Corp. v. Continental Bank N.A.*, 880 F.2d 928, 932 (7th Cir. 1989).

117. See Advisory Committee Note, 97 F.R.D. 198, 198-99 (1983).

118. See Rule 11 in Transition, *supra* note 64, at 18.

119. For factors to determine whether a reasonable prefiling inquiry has taken place, see Advisory Committee Note, 97 F.R.D. 198, 199 (1983).

120. *But see* Rule 11 in Transition, *supra* note 64, at 22 (“procedural minimalism” not important advantage in product approach).

a process of drawing inferences from the paper filed.<sup>121</sup>

The major problem with the conduct test, however, is that it fails to acknowledge and to systematize the step the court takes in deciding to examine the attorney's prefiling investigation.<sup>122</sup> In the normal course of events, a judge does not look into the reasonableness of the prefiling inquiry<sup>123</sup> unless something occurs to trigger an examination.<sup>124</sup> Often the trigger will be a perception, either the judge's or the opposing party's, that the paper is frivolous<sup>125</sup>—not "well grounded in fact" or "warranted by . . . law."<sup>126</sup> Thus, although the conduct approach asserts that an examination of the merits of the paper is not called for under Rule 11, a court in deciding to examine the prefiling inquiry has often in effect decided that the paper is frivolous without setting forth its reasoning or making a careful examination of the paper's legal basis. There is also a danger that examination of the prefiling inquiry may be triggered by the presiding judge's anger or dislike of a lawyer.<sup>127</sup> To ensure fairness and

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121. See *Mars Steel Corp. v. Continental Bank N.A.*, 880 F.2d 928, 932 (7th Cir. 1989) ("An objectively frivolous legal position supports an inference that the signer did not do a reasonable amount of research, but an inference, no matter how impressive, is still no more than an inference."); Rule 11 in Transition, *supra* note 64, at 20:

Unless . . . a court is prepared to consider representations about conduct and to find no violation of Rule 11 if the person who signed the paper in question provides sufficient demonstration of a reasonable pre-filing inquiry and of an honest (good faith) belief based on that inquiry, that court is doing more than drawing inferences. It is establishing irrebuttable presumptions.

For examples of courts drawing inferences, see *International Shipping Co. v. Hydra Off-shore, Inc.*, 875 F.2d 388, 394 (2d Cir.) (Pratt, J., dissenting) (majority upheld sanctions imposed for failure to conduct a reasonable inquiry because a "cursory review" of a hornbook would have revealed the jurisdictional defect, while dissent felt that hornbooks supported sanctioned attorney's position), *cert. denied*, 110 S. Ct. 563 (1989); *Zaldivar v. City of Los Angeles*, 590 F. Supp. 852, 857 (C.D. Cal. 1984) ("cursory reading of the statutes would indicate to a reasonable person that there is no basis for bringing this lawsuit"), *rev'd*, 780 F.2d 823 (9th Cir. 1986).

122. Cf. *M. Freedman*, *supra* note 53, at 81 (discussing the "dangerous power" of the "decision to investigate" as a matter of prosecutorial discretion).

123. About 250,000 civil cases are filed per year in the federal system, but a March 5, 1987 LEXIS search going back to 1983 found only 700 district court cases discussing Rule 11 sanctions. See Levin & Sobel, *Achieving Balance in the Developing Law of Sanctions*, 36 Cath. U.L. Rev. 587, 592 n.24 (1987). Even if the 700 cases available on LEXIS represent only the "tip of the iceberg," Rule 11 in Transition, *supra* note 64, at 59, the vast majority of cases proceed without the question of Rule 11 sanctions being raised.

124. See *Mars Steel*, 880 F.2d at 934. For example, courts have held that "Shepardizing" is part of a reasonable prefiling inquiry into law. See *Pravic v. U.S. Industries-Clearing*, 109 F.R.D. 620, 623 (E.D. Mich. 1986); *Blake v. National Casualty Co.*, 607 F. Supp. 189, 191 n.4 (C.D. Cal. 1984). However, unless a failure to shepardize results in the filing of a paper that relies on an overruled or reversed case, no court will ask whether the attorney's prefiling inquiry included shepardizing. Cf. *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 830 (9th Cir. 1986) (although Rule 11 requires that every paper be read by signing attorney, "an obviously meritorious paper will go unchallenged, whether read or not").

125. See *Mars Steel*, 880 F.2d at 931-32.

126. Fed. R. Civ. P. 11.

127. See *Hill v. Norfolk & W. Ry. Co.*, 814 F.2d 1192, 1203 (7th Cir. 1987) (Parsons, J., concurring in part, dissenting in part); Grosberg, *Illusion and Reality in Regulating*

consistency in the application of the legal prong of Rule 11, it is important to establish some uniform, objective standard for the "trigger." The conduct test, which moves directly to a consideration of the prefiling inquiry without first making clear what provoked the inquiry, lends itself to unfairness or at least the appearance of unfairness.

Under the negligence theory of Rule 11, courts have worked out a test which looks first at the prefiling inquiry and then at the merits of the paper.<sup>128</sup> This bifurcation of the Rule 11 analysis leads to a clear exposition of the grounds for imposing (or not imposing) sanctions. *Continental Air Lines v. Group Systems International*<sup>129</sup> provides an example of the clarity of analysis under this approach when the issue is failure to cite cases. The *Continental* decision looked first to see if there had been a breach of duty—a failure to make a reasonable inquiry:

By any objective standard, the duty of reasonable inquiry on an issue of constitution law (here, the due process limits of the exertion of personal jurisdiction) must include, at the least, inquiry to ascertain whether or not and when the United States Supreme Court has ruled on the issue. Here, the Supreme Court had spoken on the issue four months before the motion was filed. *Burger King* received at least the average amount of attention a Supreme Court opinion receives, *i.e.*, it was widely reported by the legal press. It was old enough to have been printed in the advance sheets. Counsel fell below the required standard of reasonable inquiry in not knowing of the existence of *Burger King*.<sup>130</sup>

However, the court did not stop after determining that a reasonable inquiry did not take place:

That determination, however, does not end the inquiry. Rule 11 requires "causation," *i.e.*, that the failure to make a reasonable inquiry result in the filing of a frivolous motion. There is no such nexus here . . . Essentially, the same arguments were available—and were made—by the defendant's reliance on pre-*Burger King* Ninth Circuit authority.<sup>131</sup>

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*Lawyer Performance: Rethinking Rule 11*, 32 Vill. L. Rev. 575, 633 (1987); Note, *supra* note 39, at 650 n.101; *cf.* M. Freedman, *supra* note 53, at 81 (1975) (quoting Justice Robert Jackson) (danger of prosecutorial discretion is that it allows prosecutor to "pick the people he thinks he should get rather than pick cases that need to be prosecuted," and a prosecutor "stands a fair chance of pinning at least a technical violation on almost anyone.")). One practicing attorney commented:

[W]hy should I, representing a plaintiff filing a lawsuit, be subjected to the vagaries of judges, some of whom can be very arbitrary and, believe it or not, not very clever. Many judges, like it or not, don't know what is going on and a lot of them have deep-seated biases and are out to get particular lawyers. And boy, Rule 11 is some tool to do it with.

Weiss, *A Practitioner's Commentary on the Actual Use of Amended Rule 11*, 54 Fordham L. Rev. 23, 26 (1985)

128. See *supra* notes 69-83 and accompanying text.

129. 109 F.R.D. 594 (C.D. Cal. 1986).

130. *Id.* at 597 (footnotes omitted).

131. *Id.*; see also *Whittington v. Ohio River Co.*, 115 F.R.D. 201, 203-4 n.1 (E.D. Ky.

This test, however, has the disadvantage of inefficiency. Under this approach every Rule 11 inquiry will require an examination of the facts of the prefiling investigation, as well as a determination as to the merits of the paper.<sup>132</sup> More importantly, this test is flawed by the same problem encountered in the conduct test: the unacknowledged but significant step taken by the court in deciding to examine the prefiling inquiry at all.<sup>133</sup>

A test is needed that conforms with the language of Rule 11 while avoiding the flaws and inefficiencies of the conduct and negligence approaches. This Note proposes a two-step test in line with the interpretation of the language of Rule 11 that sees the reasonable inquiry as a qualification of the extent of the attorney's duty to ensure that what he certifies under the legal and factual prong of Rule 11 is in fact so. As a first step, the court should look at the merits of the paper. If it is not frivolous, the attorney's certification is fulfilled, and there is no violation of Rule 11.<sup>134</sup> If the paper is frivolous, a second step is required: an examination of the prefiling investigation carried out by the attorney. If the prefiling investigation was not reasonable, then sanctions are in order.<sup>135</sup> If the prefiling investigation was reasonable and the paper frivolous, the question arises as to whether the attorney's "knowledge, information and belief" should be examined.<sup>136</sup> Here the Third Circuit Task Force's analysis is persuasive.<sup>137</sup> The courts should not require that the paper be a reasonable result of the inquiry. A reasonable pre-filing investigation should provide "sanctuary" from sanctions. To protect the process by which the law changes, a certain leeway for "absurd" legal positions is necessary.<sup>138</sup> Sanctuary as a result of a reasonable pre-filing investigation, without too strict an examination into the attorney's belief, will ensure that innovative legal argumentation is not chilled<sup>139</sup> and re-

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1987) ("Even if respondent's initial investigation did not disclose these facts, the causative element for Rule 11 sanctions would be missing if the facts were as subsequently stated in the affidavits."); *US Sprint Communications Co. v. Kaczmarek*, 121 F.R.D. 414, 417 (D. Kan. 1988) (for Rule 11 sanctions, lack of reasonable inquiry must "cause the filing of a frivolous pleading, motion, or other paper" (emphasis in original)) .

132. See *supra* notes 119-121 and accompanying text.

133. See *supra* notes 122-127 and accompanying text.

134. See *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1538-39 (9th Cir. 1986).

135. See *Nassau-Suffolk Ice Cream, Inc. v. Integrated Resources, Inc.*, 114 F.R.D. 684, 689 (S.D.N.Y. 1987).

136. Fed. R. Civ. P. 11.

137. See *supra* note 97-101 and accompanying text. If the court feels that the attorney had no belief in the legal position asserted, it is possible that the attorney has violated the "improper purpose" prong of Rule 11.

138. See *Risinger, supra* note 7, at 57 ("Today's frivolity may be tomorrow's law, and the law often grows by an organic process in which a concept is conceived, then derided as absurd (and clearly not the law), . . . then accepted as the law.")

139. See *Mars Steel Corp. v. Continental Bank, N.A.*, 880 F.2d 928, 932 (7th Cir. 1989).

duce the likelihood of satellite litigation.<sup>140</sup>

Under this test, there remains the question of the standard of frivolity by which a paper should be judged. In other words, it becomes necessary again to confront the issues that arose in *Golden Eagle*:<sup>141</sup> Should failing to cite a particular case render an otherwise nonfrivolous paper frivolous? Is a paper frivolous if it fails to identify an argument as one for the extension or modification of law? Need a reasonable argument in support of a position actually have been made or is it enough that the reasonable argument exist?

Because several years have passed since these issues first arose, it is worthwhile to reevaluate them in the light of accumulated experience. First, the hope or expectation of the amenders that after two or three years of litigation under Rule 11 a coherent Rule 11 practice would develop<sup>142</sup> has not been realized.<sup>143</sup> Interjudge disagreement is as great as ever.<sup>144</sup> Second, in spite of the fundamental disagreement as to the proper use of Rule 11, Rule 11 sanctions are being imposed far more often than its amenders expected.<sup>145</sup> Third, while it is not clear that Rule 11 is achieving its goal of deterring frivolous and abusive litigation,<sup>146</sup> it is clear that at least one of the feared ill effects of Rule 11 has eventuated, namely satellite litigation.<sup>147</sup> As for the other fear—of a chilling effect on advocacy and the ability of the law to change—there are those who perceive that this has also been realized.<sup>148</sup>

In view of the judicial discord over Rule 11, the burden of satellite litigation, and the widespread perception of a negative effect on advocacy, it may well be that it is time for courts to scale back the use of Rule 11 sanctions for legally baseless claims. A more restricted, more modest Rule 11 could be a more uniform and predictable and thus a more effective Rule 11.

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140. See *Oliveri v. Thompson*, 803 F.2d 1265, 1275 (2d Cir. 1986), cert. denied, 480 U.S. 918 (1987).

141. See *supra* notes 12-62 and accompanying text.

142. See Annual Judicial Conference—Second Judicial Circuit of the United States, 101 F.R.D. 161, 200 (1984) (remarks of Arthur Miller, reporter of the Advisory Committee for the Federal Rules) (although lawyers might be carried away for a time, management efficiency of district courts would overcome any temporary litigation burden); Miller, *The Adversary System: Dinosaur or Phoenix*, 69 Minn. L. Rev. 1, 31 (1984).

143. See *Vairo, supra* note 6, at 205; Joseph, *The Trouble with Rule 11*, A.B.A. J., Aug. 1987, at 89.

144. See *Elson & Rothschild, supra* note 82, at 246; *Shaffer, supra* note 2, at 8.

145. See *Shaffer, supra* note 2, at 2; *Vairo, supra* note 6, at 195. For the modest expectations of the amenders, see Miller, *The Adversary System: Dinosaur or Phoenix*, 69 Minn. L. Rev. 1, 19 (1984) (amendment of Rule 11 "a modest step").

146. See Grosberg, *Illusion and Reality in Regulating Lawyer Performance: Rethinking Rule 11*, 32 Vill. L. Rev. 575, 583 (1987); Joseph, *supra* note 143, at 87-88.

147. See *Townsend v. Holman Consulting Corp.*, 881 F.2d 788, 797 (9th Cir. 1989); *Elson & Rothschild, supra* note 82, at 246; *Schwarzer, supra* note 7, at 1017; *Vairo, supra* note 6, at 195.

148. See *Whittington v. Ohio River Co.*, 115 F.R.D. 201, 205 (E.D. Ky. 1987); *Shaffer, supra* note 2, at 22; *Snyder, supra* note 6, at 55 (1985); *Vairo, supra* note 6, at 200-01.

One way of scaling back is to follow the Ninth Circuit's restricted definition of frivolity.<sup>149</sup> The Ninth Circuit's restrictive approach to sanctions for legal arguments under Rule 11 is supported by the difficulty of defining frivolity.<sup>150</sup> The Ninth Circuit's answer to what makes a paper sanctionable draws a line that avoids the gray area between frivolous and creative legal arguments.<sup>151</sup> Following it may help transform Rule 11 back from a "fomentor of derivative litigation, a mire for unwary parties and overzealous courts" to a "protector against frivolous litigation, a boon to the parties and the courts."<sup>152</sup>

### CONCLUSION

In imposing sanctions under Rule 11 for pleadings, motions and other papers that are not "warranted by existing law or by a good faith argument for the extension, modification or reversal of existing law," judges should examine first the merits of the paper, and then the prefiling inquiry conducted by the attorney. In examining the merits of the paper, courts should follow the lead of the Ninth Circuit in not imposing sanctions for a failure to cite contrary authority or to identify an argument as one for the extension or modification of law, and in requiring only that a reasonable argument in support of the paper exist, not that it actually be made.

*Ellen P. Quackenbos*

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149. See *supra* notes 17-18 and accompanying text.

150. See Risinger, *supra* note 7, at 58; see also Note, *supra* note 39, at 652 (sanctions should be reserved for legal positions that are "unthinkable").

151. See Snyder, *supra* note 6, at 55.

152. Szabo Food Service, Inc. v. Canteen Corp., 823 F.2d 1073, 1085 (7th Cir. 1987) (Cudahy, J., concurring in part, dissenting in part), *cert. dismissed*, 108 S. Ct. 1101 (1988).