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Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11

D. Michael Risinger*

I. INTRODUCTION

It has been generally accepted at least since God gave Moses the Eighth Commandment that one should not bear false witness against one's neighbor. The standard English translation of that Commandment makes it sound as if God were thinking primarily in terms of lawsuits.¹ However that may be, fabricating a lawsuit is recognized as a serious wrong. And, though dishonestly defending a lawsuit may not generate the same disapproval as dishonestly bringing one, in the individual case it is certainly as dishonest and probably as unjust.

Lawyers quite clearly may play a role in fostering or discouraging dishonesty in lawsuits. Indeed, they may misuse their office to become the authors of such dishonesty, and as long as dishonesty exists lawyers will be suspected of having a hand in it, even though it is clear enough that dishonesty can occur without a lawyer's actual connivance, and even in the face of his best efforts to prevent it.

The attorney wears many different hats. The lawyer's proper role in civil counseling, civil litigation, criminal defense work, and criminal prosecution varies sharply from area to area, and different ethical standards inevitably apply to each role. What is improper in counseling before the fact may be proper in litigating after the fact; what is proper in criminal defense work may be improper in civil litigation; and what is ethical for a criminal defense attorney may be improper for a prosecutor. Each function presents its own role-structured ethical dilemmas, and a separate code of ethics is often appropriate to each.²

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1. "Thou shalt not bear false witness against thy neighbor." Exodus 20:16 (King James).

2. This fact is not effectively embodied in existing codes, which too often fail to recognize role differences, and contain overgeneralization, internal contradiction, and high sounding generalities more intended

The responsibilities of the attorney in civil litigation, to which this Article is limited, differ from those in criminal defense work primarily because of the privilege against self-incrimination.³ Because we fear the government's awesome power and suspect its possible motivations, we allow the criminal defendant to put the government to its proof. The existence of the right creates a context and an opportunity to enforce other basic rights, such as the right to privacy. But in the civil context the government is usually not a party. There is a presumed parity of resources between plaintiff and defendant, at least closer than that between the government and criminal defendant, and there is no way of predicting which party a disparity in resources will favor. Further, individual liberty is rarely at stake in civil litigation, and indirect threats to civil liberties are not nearly as great as in the criminal context. For these reasons there is no constitutional equivalent in civil cases to the privilege against self-incrimination, and a civil defendant has no constitutional right to put a plaintiff to his proof.⁴ Therefore, it can quite properly be demanded of a defending party, and his attorney, that all allegations and denials be honest, even if this means admitting liability in some cases.

On the other hand, the civil litigation attorney does not have the same ethical responsibilities as a prosecuting attorney to reveal information helpful to his opponent. Because the

for public relations with non-lawyers than for the guidance of the lawyer facing a tough dilemma and seeking a resolution to it consistent with the ethical requirements of the role he is then playing in the legal system. See generally M. FREEDMAN, *LAWYER'S ETHICS IN AN ADVERSARY SYSTEM* (1975). See also Thode, *The Ethical Standards for the Advocate*, 39 TEXAS L. REV. 575 (1961).

The Code of Professional Responsibility of the American Bar Association (ABA) was promulgated in 1969 to remedy some of the problems of overgenerality of the old Canons of Professional Ethics, which it did; but many problems remain in the final formulation. See generally FREEDMAN, *supra* at 9-26. And there is a serious question about how much of either the Code or the old Canons is concerned with ethics and how much is actually directed toward trade union concerns. See, e.g., ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101, 102, 103, & 105, pertaining to advertising by attorneys.

3. U.S. CONST. amend. V.

4. The language of the fifth amendment is specifically limited to criminal cases. However, a common law right allowing a civil defendant to put plaintiff to his proof has been widely assumed. See, e.g., *Miley v. Walls*, 1 Dowl. 648 (Ex. 1833); *Pogson, Truth in Pleadings*, 8 N.Y.U.L.Q. REV. 41, 47-48 (1930). Insofar as there ever was such a common law right, the provisions of FED. R. CIV. P. 8(b) and 11 requiring honesty in denials, and FED. R. CIV. P. 11 and 36 requiring honesty in answering requests for admissions, have abolished it in federal practice.

prosecutor wields such power over the lives and liberty of the people, he must be most closely mewed up by the check of conscience. A prosecutor has or should have a general ethical responsibility to reveal and present any information which might aid in arriving at the truth, regardless of more particularized rules on pleading, discovery, and burden of persuasion.⁵ The civil attorney, on the other hand, may rely on the particularized rules the law has provided in these areas to define the limits of his and his client's duty to disclose information detrimental to their case.⁶

In speaking of the allegations made in a lawsuit, I have been careful thus far to speak of honesty and not of truth. As Henry Berry Pogson has pointed out, to think primarily in terms of truth when defining a lawyer's duty with respect to allegations in pleadings and other papers is to miss the point.⁷ In any issuable controversy, with one side alleging a proposition and the other side denying it, one side's position is inevitably untrue, though both sides may be honest in asserting their contentions. This is the very situation that the legal system exists to resolve. Furthermore, even today, fictions may play some part in litigation, though they are clearly not as prevalent as at common law.⁸ Where such fictions exist and are generally recognized, their conventional allegation does not create questions of dishonesty, even though the allegations are concededly untrue. This is not to say that truth has nothing to do with honesty. The basis of a

5. See *Giles v. Maryland*, 386 U.S. 66 (1967); *Brady v. Maryland*, 373 U.S. 83 (1963); FREEDMAN, *supra* note 2, at ch. 7; Note, *Discovery and Disclosure, Dual Aspects of the Prosecutor's Role in Criminal Procedure*, 34 GEO. WASH. L. REV. 92 (1965); Note, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant*, 74 YALE L.J. 136 (1964).

6. See text accompanying notes 187-88 *infra*.

7. Pogson, *supra* note 4, at 41, 43.

8. For example, the problem of domiciliary allegations by foreign residents in "friendly" divorce cases in states such as Nevada is probably best handled by recognizing that the allegations are fictional. The ABA Committee on Ethics and Grievances took the position in its Opinion 84 that a lawyer could not ethically have a hand in such allegations where they were known to be false. ABA Formal Opinion on Ethics No. 84 (Aug. 27, 1932). This was at a time when the Supreme Court held in *Andrews v. Andrews*, 188 U.S. 14 (1903), that such divorces were collaterally attackable on this ground despite the full faith and credit clause. With the Supreme Court's reversal of this position in *Sherrer v. Sherrer*, 334 U.S. 343 (1948), *Johnson v. Muelberger*, 340 U.S. 581 (1951), and *Cook v. Cook*, 342 U.S. 126 (1951), the vitality of *Andrews* has been drained. See generally H. DRINKER, *LEGAL ETHICS* 80-82 (1953) and authorities cited therein.

lawyer's honesty is a process of reasonable judgment honestly undertaken. Underlying this process are certain conventional epistemological assumptions of a rough empirical kind appropriate to the legal process.⁹ It is clear at the very least that if a proposition is tested against the kind of truth so assumed, and the proposition appears to be affirmatively untrue, it cannot be honestly alleged without a fictional convention authorizing it. In other words, fictions aside, it is dishonest for a lawyer to allege or be the agent for alleging propositions he affirmatively knows to be untrue. This is neither a startling nor a very controversial statement. It is also of very little help in deciding the hard cases, for the hard cases arise when the lawyer is not sure of either the truth or the falsity of the proposition in question.

Despite the difficulty of determining what constitutes honesty in the context of a lawsuit, the Federal Rules of Civil Procedure (FED. R. CIV. P.) and analogous state rules impose an obligation on attorneys to pursue litigation honestly and provide potentially severe penalties for those who fail to do so. This Article concerns one such rule, FED. R. CIV. P. 11, requiring honesty in pleading. It will examine the historical development of Rule 11 and discuss the serious inconsistency between the obligations the rule imposes and the mechanism it provides for their enforcement. It will then propose an interpretation of Rule 11 that allows the use of enforcement measures better suited to achieving the rule's objectives.

II. THE RULE ON ITS FACE

Federal Rule of Civil Procedure 11 is the most famous and widely applicable binding precept¹⁰ regulating lawyer honesty in

9. See generally Allen, *Scientific Versus Judicial Fact-Finding in the United States*, 2 IEEE TRANSACTIONS ON SYSTEMS, MAN, AND CYBERNETICS 548 (1972); Allen, *The Doctors vs. the Lawyers*, 39 CONN. MEDICINE 112 (1975).

10. An ethical precept is binding if members of the profession must follow it in their practice on pain of discipline. It is merely advisory if somebody has issued it for the recommended guidance of the profession, but no official body has indicated that not following it can be the basis of disciplinary action. The ABA Code of Professional Responsibility is merely advisory in some jurisdictions. In others it has been made binding. The absence of a large body of literature in this area leaves many questions unexplored. Do disciplinary bodies apply a sort of Nuremberg Principle for cases of first impression which turns a precept from advisory to binding? What happens when the binding precepts of two systems collide, and the same person is a member of both systems? If federal courts recognize a practice as acceptable which state authorities

pleading. In the 37 years of its existence, Rule 11 has been cited in relatively few cases¹¹ though it is clearly being invoked more often of late.¹² While the rule appears on its face to be reasonably straightforward and uncontroversial, the handful of courts that have treated it more than in passing have had more trouble with its interpretation than a glance would suggest.¹³ The rule reads as follows:

SIGNING OF PLEADINGS

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

Our initial examination of the rule may be most conveniently divided into two parts: the duties required of counsel by the rule and the mechanisms prescribed to enforce those duties.

A. REQUIREMENTS OF THE RULE

Rule 11 requires all pleadings to be signed in an individual name and with an accompanying address. The term "pleadings"

consider unethical, can the state discipline a lawyer who follows that practice in federal proceedings in that state? Of course, like any binding legislation, binding precepts of professional ethics can create problems of civil disobedience. For example, while a binding precept may state that it is unethical to advance costs to a plaintiff without expectation of repayment, there are situations where many people might feel that it was indeed ethically commendable or even required that they do so. A thorough examination of these questions is beyond the scope of this Article.

11. See cases collected in 2A MOORE'S FEDERAL PRACTICE ¶ 11.01 *et seq.* (1975), and 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1331 *et seq.* (1969).

12. Nearly half the adversary Rule 11 based motions reported since the promulgation of the rules in 1938 have come in the last five years. See note 116 and accompanying text *infra*.

13. See cases discussed in text accompanying notes 110-38 *infra*.

is a narrow term of art applying to a limited number of documents as defined by Rule 7(a),¹⁴ but the duties imposed by Rule 11 also seem to apply to motions and other documents through incorporation by reference in Rule 7(b)(2).¹⁵ The rule widely followed under "Field Code" pleading systems that all pleadings had to be supported by a verifying affidavit, is specifically abolished.¹⁶ The old equity rule requiring sworn testimony to over-

14. FED. R. CIV. P. 7(a) refers to "pleadings" as follows:

There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

15. FED. R. CIV. P. 7(b)(2) provides:

The rules applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

Although this Rule refers only to "signing . . . and other matters of form," it seems that good ground is part and parcel of the formal requirement of signature found in Rule 11. This was the opinion of the only court to have considered the matter. See *U.S. ex rel. Foster Wheeler Corp. v. American Surety Co. of N.Y.*, 25 F. Supp. 225 (E.D.N.Y. 1938). This reading seems also to have been accepted by Prof. Moore, see 2A MOORE'S FEDERAL PRACTICE ¶ 7.05 (1975), and by Wright and Miller, see 5 WRIGHT & MILLER, *supra* note 11, at § 1332 n. 8.

16. The history of the general requirement of verification is a sad one. Prior to the mid-19th century, pleadings were verified by party oath only in exceptional circumstances, some of which are discussed in text accompanying note 46 *infra*. Perhaps the specialness and rarity of the oath made it psychologically more effective, perhaps not. But David Dudley Field was of the opinion that a general requirement that all pleadings be sworn would have a salutary effect on the honesty of the whole system. What Field opined he inserted into the 1848 New York Practice Code (he was chairman of the Commission responsible for that mighty work, and its principal drafter), and so such a requirement became law. 1848 N.Y. Laws, c. 379, § 133. The section was changed in 1849 to dispense with the requirement of verification *per se*, but to allow either party to require verification of all subsequent pleadings by the simple expedient of verifying his own. 1849 N.Y. Laws, c. 438, § 157. Most states adopted practice codes in the 19th or early 20th centuries which followed one of the two patterns. See generally C. CLARK, CODE PLEADING § 36 (2d ed. 1947).

Field would probably have been shocked to find that his morality-promoting proposal created problems, and even had somewhat the opposite of its intended effect. The trouble with these general verification requirements was twofold. First, they created conceptual problems, based on the idea of truth and the magic of the oath. See, e.g., *Bell v. Brown*, 22 Cal. 671 (1863) (verification of inconsistent counts raises specter of *per se* perjury), and note 86 *infra*. A modern example of such a problem may be found in *City of Kingsport v. Steel & Roof Structure, Inc.*, 500 F.2d 617 (6th Cir. 1974), where the court of appeals

come an answer, which inevitably resolved one-on-one swearing contests in favor of a defendant, is also abolished.¹⁷

Pleadings of a party represented by an attorney must be signed by the attorney. The rule speaks of signature by the "attorney of record." This raises the first question of interpretation. Does this mean that an attorney must have filed a formal appearance to be subject to the signature requirement, or that by complying with the signature requirement an attorney becomes an attorney of record? If the former, some of the bite could, at least in theory, be taken out of Rule 11 by the attorney's staying off the record until after the pleading stage, and the client's then signing the pleadings *pro se*, as Rule 11 permits for one "not represented by counsel." The central thrust of the first section of Rule 11, however, is to obtain on the record the individual signature of any attorney professionally responsible for the pleading filed. Thus it is more consistent with the purpose of the signature requirement to conclude that whenever an attorney has had any substantial part in the preparation of pleadings, the party is "represented by counsel" within the meaning of Rule 11, and the attorney therefore must sign the pleading. Since Rule 11 is designed to replace the codes' major reliance on party verification by affidavit as the central mechanism for obtaining honesty in pleading with central reliance on attorney good faith,¹⁸ an attorney who is substantially involved in preparation

reversed the district court's erroneous position that a plea both interposing the defense of the statute of limitations *and* requesting indemnity violated Rule 11. Another example of the problem can be seen in the lower's court's treatment of *Surowitz v. Hilton Hotels*, 342 F.2d 596 (7th Cir. 1965), *rev'd*, 383 U.S. 363 (1966). See text accompanying notes 174-91 *infra*. Second, the general requirement of verification could often be counterproductive. It permitted rationalizations by which the attorney and the client could pass the buck to each other, the client pointing to the legal jargon of the pleading and the attorney to the party verification, neither taking any responsibility either psychologically or practically for content. Actual perjury prosecutions for verification violations were very rare, for obvious reasons of volume and difficulty of proof. The verification requirement was taken so lightly that it encouraged cynicism rather than honesty and favored "the unscrupulous litigant at the expense of his conscientious opponent." R. MILLAR, *CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE* 173 (1952).

17. The demise of this irrational rule had no mourners. For an illustration of the rule in practice and its tendency to benefit possibly undeserving defendants, see *Greenfield v. Blumenthal*, 69 F.2d 294 (3d Cir. 1934).

18. "If the courts themselves promulgate a specific rule on the subject in the form of the Federal Rule the result ought to be that the courts would feel a more serious obligation resting upon them to enforce the rules and attorneys might take more seriously their obligations on this

of pleadings must bear the responsibility of ensuring their honesty.¹⁹

Rule 11 makes the signature of an attorney a certification that he has in fact read the pleading. It may have been drafted in part or in whole by someone else, but the signing attorney must have read it. The signature is also a certification that, "to the best of [the attorney's] knowledge, information and belief there is good ground to support [the pleading] and . . . it has not been interposed for delay." The insertion of the certification that the pleading has not been interposed for delay seems logically redundant, since a pleading interposed *only* for delay could not have "good ground" no matter how that term is ultimately defined, and a pleading with independent "good ground" is not likely to be rendered improper because tactical considerations of delay entered into the ultimate decision of whether or not to file an otherwise honest, meritorious, and proper pleading.²⁰

subject." Gavit, *The New Federal Rules and State Procedure*, 25 A.B.A.J. 367, 371 (1939). See U.S. *ex rel.* Foster Wheeler Corp. v. American Surety Co. of N.Y., 25 F. Supp. 225 (E.D.N.Y. 1938). As Prof. Sunderland, one of the drafters of the rules, observed: "In view of the futility of ordinary verifications of pleadings, this plan of a certificate of counsel seems at least worth trying." Sunderland, *The Availability of the New Federal Rules for Use in the State Courts of Ohio*, 4 OHIO STATE L.J. 143, 146 (1938).

19. The only court to consider the question of whether a professionally aided party can sign *pro se* has intimated that the party cannot do so without his lawyer's violating Rule 11. *Ellis v. Maine*, 448 F.2d 1325, 1328 (1st Cir. 1971). See also *First Iowa Hydro Elec. Coop. v. Iowa-Illinois Gas & Elec. Co.*, 245 F.2d 613 (8th Cir.), *cert. denied*, 355 U.S. 871 (1957).

20. We shall see that the enforcement provisions of Rule 11 reveal a history of less than careful draftsmanship. See text accompanying notes 33-36 *infra*. There are other indications of this carelessness as well. The Advisory Committee note to Rule 11 states in pertinent part:

This is substantially the content of Equity Rules 24 (Signature of Counsel) and 21 (Scandal and Impertinence) consolidated and unified. Compare Equity Rule 36 (Officers Before Whom Pleadings Verified). Compare to similar purposes, English Rules Under the Judicature Act (The Annual Practice, 1937) O 19, r 4, and *Great Australian Gold Mining Co. v. Martin*, 1 L.R. 5 ChDiv 1, 10 (1877). Subscription of pleadings is required under many codes. 2 Minn. Stat. (Mason, 1927) § 9265; NYRCP (1937) Rule 91; 2 ND Comp. Laws Ann (1913) § 7455.

This note is virtually unchanged from the note accompanying Rule 11 (then Rule 10) in the first preliminary draft, see ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE, PRELIMINARY DRAFT OF RULES OF CIVIL PROCEDURE 20-21 (May 1936) (hereinafter cited as PRELIMINARY DRAFT) and it seems inaccurate as applied to the final draft. In the first preliminary draft of the Federal Rules, there was no provision corresponding to Rule 12(f), which, as originally promulgated in 1938, provided for a

What constitutes "good ground" is a difficult and many-faceted question. The phrase has an interesting, if not too helpful, history which is intimately intertwined with the history of the signature requirement itself. The origin of the "good ground" language in the context of equity pleading was an 1838 treatise on equity pleading by Joseph Story, in which he wrote:

We may conclude, what is here said on the general structure and form of a bill, by the remark, that every Bill, whether original or not, must have the signature of counsel annexed

motion to strike any "redundant, immaterial, impertinent, or scandalous matter" from a pleading. Fed. R. Civ. P. 12(f), 308 U.S. 679 (1939). In the preliminary draft the only section arguably authorizing a motion to strike for scandal was the "similar action" clause of Rule 11 (then Rule 10): "Similar action may be taken if scandalous or indecent matter . . . [is] inserted." PRELIMINARY DRAFT, *supra* at 20. Thus, the allegation that the Rule embodied the content of Equity Rule 21 was arguably justified at least in part, since Equity Rule 21 provided for a motion to strike for scandal or impertinence, a common practice both at law and in equity for generations. See *Craven v. Wright*, 2 P.Wms. 181, 24 Eng. Rep. 691 (K.B. 1723); 1842 Equity R. 26. Nevertheless, the claim that the preliminary draft of Rule 11 (then Rule 10) was a "substantial" consolidation of Equity Rules 24 and 21 was weak because the draft of the rule contained no provision for a motion to strike for impertinence. Instead the ground "indecency" was inserted, a ground without deep common law or code pleading roots. The ambiguities of construction involved in the "similar action" clause are discussed in W. SULLIVAN, A TREATISE ON THE FEDERAL RULES OF CIVIL PROCEDURE § 367 (1949).

In the final draft of the Federal Rules the precise office of Equity Rule 21 was provided for in Rule 12(f). The only thing the "similar action" clause in Rule 11 as finally promulgated could refer to was the possibility of attorney discipline mentioned in the preceding clause of the Rule, a feature not found in Equity Rule 21, or specifically provided for under any Equity Rule. Thus, despite what the Advisory Committee note says, Equity Rule 21 has nothing to do with Rule 11 as finally promulgated. Moreover there is obviously much more going on in the Rule than ever envisioned by the Equity Rules. The phrase providing that a pleading "may be stricken as sham and false" did not come from equity practice, but the Advisory Committee note is silent both as to the antecedents of this phrase, and how it is intended to operate. Carrying forward an advisory committee note of doubtful appropriateness from an earlier draft to the final draft is one indication that Rule 11 may in some of its particulars be a Homeric nod.

It is of utmost importance to remember that each of the terms referred to above as well as others we shall discuss, were terms of art with generally well defined meanings at common law and under the code practice of the 19th and early 20th century. The drafters of the Federal Rules did not always keep this point in mind. For example, viewed in light of these definitions, the 1938 Fed. R. Civ. P. 12(f), quoted in part *supra*, suffers from one of the abuses which it seeks to remedy, namely, redundancy. The word "immaterial" and the word "impertinent" both meant and were incorporated to mean exactly the same thing: irrelevant. Further, the word "redundant" means nothing more than that the repetition of a material allegation is unnecessary and therefore irrelevant. All

to it. This rule appears to have been adopted at an early period, and at least as early as the time of Sir Thomas More. The great object of this rule is, to secure regularity, relevancy, and decency in the allegations of the Bill, and the responsibility and guaranty of counsel, *that upon the instructions given to them, and the case laid before them, there is good ground for the suit in the manner, in which it is framed.*²¹

In the quoted passage it seems as if the great man is as much dictating his view of what the role of counsel's signature should be as narrating what that role was in equity practice up to that time. It appears true that the rule stemmed from the time of Sir Thomas More, but the requirement of counsel's signature was originally a boon rather than a burden to counsel, for it ensured that they were consulted before a Bill was filed.²² Their task

redundancies are irrelevant, though all irrelevancies are not necessarily redundant. Thus the single term "irrelevant" (or "immaterial" or "impertinent") would encompass the first three bases for striking set forth in Rule 12(f). The preferred term, and that used most commonly in the 19th and early 20th century (and in Rule 21 of the 1912 Equity Rules), was "impertinent." Perhaps by 1938 the word "impertinent" was problematic because of its popular connotation of "impolite," not merely "not pertinent." The use of at least two terms—for example, immaterial and impertinent—may thus be explained by the drafters' desire to guard against mistaken definition of the earlier term of art while preserving the large body of case law interpreting and applying that term.

Similarly, the term "scandalous" was a well defined term of art applying only to material that was irrelevant, but also something more: gratuitously insulting, defaming, or immoral. But it was well settled that to be scandalous, material had to be irrelevant. We may wonder, then, why a separate ground to strike for scandal was ever provided, when the more inclusive ground of impertinence or irrelevancy would have covered the situation. The motivation was probably atavistic, giving the offended party a stronger name to call the offending material than merely irrelevant, for the effects of the two motions do not appear to have ever been different. For an early explanation of the distinctions between scandal and impertinence, see FOWLER'S EXCHEQUER PRACTICE 36, 37 (1795). See also B. SHIPMAN, LAW OF EQUITY PLEADING § 241 (1897).

21. J. STORY, EQUITY PLEADINGS ch. 11, § 47 (1838) (footnotes omitted and emphasis supplied).

22. The promulgation of the signature requirement seems to have had more to do with internecine struggles within the legal profession than with an attempt to secure honesty on the honor of counsel. To understand this we must examine the split nature of the legal profession which has obtained in England from antiquity to the present. See generally H. COHN, HISTORY OF THE ENGLISH BAR AND ATTORNATUS TO 1450 (1929); R. POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES (1953). The legal profession as a separate calling began to emerge in England between 1066 and the reign of Edward I (1274-1307). In the earliest times a party to a law suit usually appeared in person before the court, and spoke for himself with little aid from anyone. This put the unlearned or ineloquent at a severe disadvantage, and early on the party was allowed to bring a learned person to advise him and to speak for him. Such advisors appear to have been generally allowed at least

was the quasi-judicial function of examining the Bill as to form, and their signature certified nothing concerning the ground of the Bill, which apparently did not even have to be laid before them. This was how the office of counsel's signature was under-

earlier than 1150. See COHN, *supra* at 169. These persons were "counsel". By the time of Sir Thomas More, Henry VIII's Chancellor from 1529 to 1532, there were various kinds of counsel. The most important were the serjeants, an elite group who held special royal commissions, see POUND, *supra* at 82, and the apprentices at law, or barristers, who belonged to one of the four barristers' inns of court and were allowed to plead in all the royal courts except Common Pleas (where the serjeants had a monopoly) but who did not hold a royal commission as serjeant. (The term "apprentice at law" was the older term, slowly displaced by the term "barrister" in the 17th century. *Id.* at 101). Apprentices were admitted to practice by their inn, only after a rigorous education, and were subject to its discipline. *Id.* at 85, 87-92.

A party can be allowed counsel but still be required to appear in person, and indeed the privilege of appearing in a suit by an attorney was not generally granted until long after the right to appear *with* counsel was recognized. Holdsworth asserted that "[t]he idea that one man can represent another is foreign to early English Law." 6 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 432 (4th ed. 1927). It was not until the Statute of Westminster II, 13 Edw. I, c. 10 (1285), that a broad right to appear by attorney was granted, although the king had occasionally granted the boon in particular cases prior to that time. The general right to appear by attorney without at least formal leave of court may have not been fully established until the reign of Elizabeth I. See COHN, *supra* at 271 *et seq.*; POUND, *supra* at 86. This historical development accounts in part for the great functional split in the English profession into groups now call barristers and solicitors. When the right to appear by attorney was first granted there of course were few professional attorneys, and parties appeared by friends and servants. However, professional attorneys-at-law soon appeared, skilled in legal affairs, but without the professional organization that the barristers had, and subject to direct discipline by the courts in which they did business. POUND, *supra* at 86. Sometime in the 14th century, pleadings began to change from oral to written, see J. COUND, J. FRIEDENTHAL & A. MILLER, CASES ON CIVIL PROCEDURE, 316 n.1 (2d ed. 1974). The onerous task of drafting these pleadings fell to the attorney, but he had no right to speak in court, since that privilege was reserved to counsel, that is, to the apprentices (barristers) and serjeants. Originally attorneys could be heard from side bar, a partition in Westminster Hall from which certain *ex parte* motions, dealing primarily with pleadings, were made and usually granted as a matter of course. Even this limited right of audience disappeared by the 18th century, however, as the division between barristers and attorneys solidified. POUND, *supra* at 98. As chancery practice grew more important in the 16th century, the same group of counsel who had the right of audience in the common law courts served as counsel in the Court of Equity, but a separate group of attorneys developed called solicitors (just as in the admiralty and domestic courts the attorneys were called proctors). Solicitors were at the outset merely agents for attorneys in the common law courts, but they attached themselves to the rising prerogative court of Chancery in the 15th and 16th centuries, where the name stuck. See *id.* at 98-111. It may be true that at least

stood by Story's source, Cooper, and apparently by every other writer,²³ but Story saw a better office for it and gave his view-

initially the right of audience in Chancery was formally unrestricted, but the prudent man hired an oralist, that is, counsel. *See id.* at 107. (Nothing further need be said in this Article concerning the proctors and other practitioners in the Admiralty, Domestic, Merchant (Roman Law) and Ecclesiastical Courts and their progeny. They also followed a split-profession pattern in England; "barristers" being called, after the continental practice, "Doctors of Laws." *See id.* at 61-70. These courts had a limited sphere of jurisdiction, but exercised it until the great reforms of the second half of the 19th century.) Another group of persons who then formed a separate section of the profession were the Masters in Chancery, whose function and prestige changed greatly over time. Originally they functioned as common clerks but finally came to have the status of junior judges. The title arose before Chancery developed extensive judicial functions. In the 14th century Chancery was an administrative bureaucracy with numerous clerks. Chief among these were Masters, and at the very head, the Master of the Rolls. Pollock and Maitland indicate that "Master" was then a title given to those clerks with a university degree. F. POLLOCK & F. MATTLAND, *THE HISTORY OF THE ENGLISH LAW BEFORE THE TIME OF EDWARD I* at 174 (2d ed. 1898). With the rise of the Chancellor's judicial function in the 15th and 16th centuries, the Masters were delegated various quasi-judicial roles, delegations of power which ebbed and flowed a good deal over the two centuries between 1500 and 1700 but ended up with the Masters functioning as judicial officers, especially the Master of the Rolls. By the 16th century their number was fixed at eleven, plus the Master of the Rolls, and the number remained constant into the 19th century. *See generally* G. CRABBE, *A HISTORY OF ENGLISH LAW* 535-38 (1829); W. WALSH, *OUTLINES OF THE HISTORY OF ENGLISH & AMERICAN LAW* 158-59 (2d ed. 1948). They were supposed to be learned in the law, and early claimed a status equal to a serjeant at law. ANONYMOUS, *A TREATISE OF THE MAISTERS OF THE CHAUNCERIES* (circa 1600), *reprinted in* F. HARGRAVE, *A COLLECTION OF TRACTS RELATIVE TO THE LAWS OF ENGLAND* 300 (1788) [hereinafter cited as *TREATISE OF THE MAISTERS*].

Story's source concerning the origin of the signature requirement is Cooper. J. STORY, *EQUITY PLEADINGS* ch. 2, § 47 n.1 (1938). Cooper's source is a tract written by an anonymous Master of Chancery between 1596 and 1603 and reprinted in 1788 in F. HARGRAVE, *A COLLECTION OF TRACTS RELATIVE TO THE LAWS OF ENGLAND* (1788). *See* G. COOPER, *EQUITY PLEADINGS* 18 n.(k) (1813). Cooper infers from this piece that sometime before More's chancellorship the court itself examined a proffered Bill to see if it was too prolix or contained irrelevant or scandalous matter before accepting it. This is quite likely correct, but our anonymous Master is quite clear that this ministerial function was once delegated to the Masters of Chancery, and was taken from them by Sir Thomas More and given to Counsel. (He was also quite indignant about it). *TREATISE OF THE MAISTERS, supra* at 301.

23. *See, e.g.*, H. MADDOCK, *A TREATISE ON THE PRINCIPALS AND PRACTICE OF THE HIGH COURT OF CHANCERY* 166 (3d Amer. ed. 1827). *See also* *Brown v. Bruce*, 2 Mer. 1, 35 Eng. Rep. 841 (Ch. 1816).

It is quite likely that in some cases one counsel would examine the bill for form and another conduct the later proceedings. *See* POUND, *supra* note 22, at 104. None of this is to say that counsel who performed

point the stamp of history.²⁴ And, since Story was then on the Supreme Court, it is not surprising that his vision was incorporated as Rule 24 in the Equity Rules of 1842,²⁵ which required counsel's signature as an affirmation of good ground. The 1842 rule was replaced by the substantially similar 1912 Equity Rule,²⁶ which also made the lawyer's signature a certification that there was good ground for the plea. The Advisory Committee Note to Rule 11, in turn, refers to the 1912 Equity Rule (Rule 24) as the source of Rule 11's provisions.²⁷ Thus the history of the phrase "good ground" suggests little beyond the phrase itself except that the original inclusion of the phrase in the federal rules was based on an historical misconception of the original function of the signature requirement.

Early decisional law sheds no more light upon the meaning of the term "good ground" than does its history. The term seems to have had no more fully analyzed or concrete meaning

his office without due diligence, thereby prejudicing the opposing party, might not be made to pay costs. *See Emerson v. Dallison*, 1 Ch. Rep. 192, 21 Eng. Rep. 547 (1660).

24. He did it so well that his position was later accepted (without his being specifically credited as the source) as both functionally and historically correct by the Supreme Court of Judicature of England in *Great Australian Gold Mining Co. v. Martin*, 5 Ch. D. 1, 10 (1877) (dictum). This is why the Advisory Committee note to Rule 11 refers to this case. *See* note 20, *supra*.

25. Equity R. 24, 42 U.S. (1 How.) xlvii (1842) provided:

Every bill shall contain the signature of counsel annexed to it, which shall be considered as an affirmation on his part that upon the instructions given to him and the case laid before him, there is good ground for the suit, in the manner in which it is framed.

26. Equity R. 24, 226 U.S. 655 (1912) provided:

Every bill or other pleading shall be signed individually by one or more solicitors of record, and such signatures shall be considered as a certificate by each solicitor that he has read the pleading so signed by him; that upon the instructions laid before him regarding the case there is good ground for the same; that no scandalous matter is inserted in the pleading; and that it is not interposed for delay.

This rule differed from its predecessor in that it substituted the term "solicitor" for "counsel" (a change of limited importance in a country where the bar is not functionally split as it was in England, and the old terms are mere nostalgic echoes rather than appellations referring to different roles). *See* note 22 *supra*. The Rule also extended the requirement of signature by counsel to all pleadings, explicitly restored the historical office of being a safeguard against impertinence and scandal, and added the new certification that the pleading was not interposed for delay. This latter certification is clearly directed at defensive pleadings, and, as previously stated, seems to overlap with the good ground requirement. *See* text accompanying note 20 *supra*.

27. *See* Advisory Committee Note to Fed. R. Civ. P. 11, *supra* note 20.

than whatever can be gleaned from the words themselves, for as far as I can discover, the "good ground" standard never figured in the decision of a reported case or any proceeding against a lawyer from 1842 to 1938. This is probably because there were no related enforcement provisions of any kind in either the 1842 or 1912 Equity Rules. The post-1938 cases do offer some insight on the meaning of good ground, but that is a discussion we must postpone for now.²⁸ About the only reasonably certain observation we can make about the "good ground" requirement Story fathered in Federal Equity practice is that it was meant to secure lawyer honesty and was limited to that.

From this discussion of the rule's requirements, we can identify six general ways to violate Rule 11. One can fail to sign a pleading; the signature can fail to be in an individual name; an address can be omitted; a party can sign *pro se* when in fact represented by counsel within the meaning of the rule; an attorney signing a pleading may not have read it; an attorney may sign a pleading without "good ground" to support it. To prevent such violations and obtain compliance with the requirements of Rule 11, there must be effective enforcement procedures and sanctions. It is in these sanction provisions that Rule 11 reveals less than careful drafting. Clearly, what is appropriate to ferreting out and disciplining the first three violations, which are obvious from the face of the pleading, easily corrected, and most likely the result of oversight, may not be appropriate to the latter three, which are not often obvious, and, when undertaken, are often undertaken for improper purposes. Yet not only does the Rule fail to delineate different sanctions for the various types of violations, but those sanctions that are expressly provided are both confused and confusing.

B. ENFORCEMENT

The text of the rule provides that if a pleading is not signed, or is signed "with intent to defeat the purpose" of the rule the pleading "may be stricken as sham and false" and the action in that event may proceed as if the pleading had not been served. If the violation involves an attorney, and is "willful," the attorney may be subject to "appropriate disciplinary sanction." The rule then says that similar action (presumably disciplining an attorney) may be taken if "scandalous" or "indecent" matter is inserted (presumably, in a pleading).

28. See notes 137-40 *infra* and accompanying text.

The authority of the court to deal with omissions of address or with signature in a firm name instead of in an individual name is not clearly set out. Perhaps a pleading signed in such a way is not "signed" within the meaning of the Rule, but the court's authority to deal with such a violation short of "striking it as sham and false" is unclear. Every court that has ever faced the issue has luckily had the good sense to find an implied power both to order and to allow the technically offending pleading to be corrected.²⁹ Presumably, a refusal to correct such a technical error would be ground to infer some sort of improper motive and wilfulness in the original error, and perhaps justify "striking" the pleading, but such a case would obviously be very rare.³⁰

The hard cases are raised in exploring the court's authority under the second clause, which appears to authorize striking a pleading which is regular on its face as sham and false when it has been signed with "intent to defeat the purpose of the rule." It seems fairly clear that a pleading is signed "with intent to defeat the purpose" of Rule 11 if it is "interposed for delay" or does not have "good ground." And since the possible existence of the former is dependent on the absence of the latter, as we have already seen,³¹ the question of a violation by signature which will trigger the enforcement mechanism turns on the meaning of the term "good ground," a discussion which we must once again postpone³² except to note that it is a difficult concept to define.

Perhaps it would be difficult to envision the ramifications of any enforcement scheme based on such a nebulous standard as the existence of "good ground," but the intended operation of Rule 11 became even more confused when the drafters tied the good ground requirement of pleading honesty to the sanction of "striking the pleading as sham and false." Nowhere in the 1842 or 1912 Equity Rules is there any provision for a motion to strike a pleading as sham, or as sham and false. No such motion

29. On the issue of omitted address, *see, e.g.*, *Miller v. Long*, 152 F.2d 196, *aff'd* 71 F. Supp. 603 (E.D.S.C. 1945). As to failure to sign, *see, e.g.*, *Holley Coal Co. v. Globe Indemnity Co.*, 186 F.2d 291 (4th Cir. 1950); *Burak v. Comm. of Pa.*, 339 F. Supp. 534 (E.D. Pa. 1972); *Universal Labs. Inc. v. Vivaudou Inc.*, 8 FED. R. SERV. 11.51, Case 1 (S.D.N.Y. 1944).

30. Indeed, the case seems never to have arisen, though *Hummel v. Wells Petroleum Co.*, 111 F.2d 883 (7th Cir. 1940), has overtones of such a situation.

31. *See* text accompanying note 20 *supra*.

32. *See* text accompanying notes 176-85 *infra*.

ever existed in equity practice, in the United States or in England. The term "sham" was a specifically defined term of art restricted to the law courts.³³ Although the motion to strike as sham was directed at attorney honesty, it also required a finding of *falsity* in the challenged pleading, a practice consistent with the right to have fact issues determined by a jury. As we shall see, there has never been any mechanism to dispose of a pleading on the ground of dishonesty before and independent of a finding of falsity.³⁴ Such a procedure in the federal courts would be of dubious constitutionality in many cases since the seventh amendment requires jury determination of the existence or nonexistence of any germane fact in civil actions descended from, or analogous to, any action at common law.³⁵ Yet on the surface this appears to be the procedure intended under Rule 11. If to avoid those problems we say that what was intended under Rule 11 was a procedure requiring findings both of dishonesty and falsity, then the sanction of "striking" the pleading seems superfluous, since any pleading that would qualify for such "striking" would be a proper subject for summary judgment under Rule 56.³⁶ "Striking" seems to be of questionable propriety either way. Yet there the authorization seems to be.

The drafters apparently did not notice the problem created by connecting the pure honesty standard of equity with the honesty-falsity sanction of law practice. Nor did they notice the anomaly that would arise if the honesty-falsity finding were interpreted as part of Rule 11, in the face of the more sweeping and flexible procedure for disposing of paper issues on the ground of falsity alone under Rule 56. While these oversights leave the enforcement provisions of Rule 11 ambiguous and perplexing they are more understandable than one might initially presume, given the historical context from which they arose.

33. The term "sham" as a term of art referred only to the motion practice of the law courts. Groundless suits in equity had to await a Master's hearing for disposition. See, e.g., *Cockle v. Whiting*, 1 Russ. & M. 43, 29 Eng. Rep. 17 (Ch. 1829). This seems to have been the rule virtually everywhere as long as law and equity practice were formally divided. The single recorded exception seems to be *Aubrey v. Aspinall*, Jacob 441, 37 Eng. Rep. 719 (Ch. 1822) where Chancery appears to follow the law practice, which was then at its apogee. See text accompanying notes 72-77 *infra*. The absence of any such motion may spring from the fact that most chancery pleadings were required to be sworn as a matter of course.

34. See text accompanying note 87 *infra*.

35. U.S. CONST. amend. VII.

36. See text accompanying notes 96-104 *infra*.

Part III of this article sets forth that historical context. It will show that the motion to strike a pleading as sham was a surprisingly recent development in common law practice. It was a tardy attempt to create some way short of an expensive trial to eliminate pleadings which, though both untrue and dishonest, created on their face a formally valid issue for trial. The motion to strike as sham initially required determinations of both falsity and dishonesty. It prepared the way for the creation of modern summary judgment procedures by its ground-breaking elimination of the requirement that all formally valid paper issues (must proceed to trial). Indeed, by the elimination of the requirement of a finding of dishonesty, some American jurisdictions in the late 19th century converted the motion to strike as sham into the first modern summary judgment procedure, although it was generally available only to plaintiffs. It should become clear, however, that since the common law motion to strike as sham required determinations of both falsity and dishonesty to be successful, and modern summary judgment requires only a determination of falsity, any motion to strike as sham where summary judgment is available is either without any practical function, or contemplates some undefined procedure not related to the pre-statutory meaning of the words.

III. STRIKING AS SHAM IN THE LIGHT OF HISTORY

A. ENGLISH DEVELOPMENT

The earliest reported reference to pleadings as "sham," found in *Anonymous*, 2 Salk. 517, 91 Eng. Rep. 440 (K.B. 1697), does not appear to refer to "sham" at all as that word came to be defined as a term of art in the 1800's.³⁷ During the 19th

37. The English system of justice was concerned with the problem of dishonesty in lawsuits and the lawyer's role in it from an early point, though often in a more or less desultory way. The famous Statute of Westminster I, 3 Edw. 1, c. 29 (1275), made it a criminal offense for "any Serjeant, Pleader, or other" to engage in "any manner of deceit or Collusion in the King's Court, or to consent unto it in deceit of the Court, or beguile the Court or a Party." The enforcement of the statute was less than vigorous, though occasionally a court would find an attorney (rarely a barrister) in violation, usually for practices that deprived the king of fees, fines, or amercements. See, e.g., *Jerome's Case*, Cro. Car. 74, 79 Eng. Rep. 665 (K.B. 1628) and cases cited in 4 E. COKE, *INSTITUTES* 101 (1644). In 1567, Common Pleas used a special jury to investigate "falsities, erasures, contempts and imprisions" by attorneys. O. SCHROEDER, *LAWYER DISCIPLINE; THE OHIO STORY* 2 (1967). Seventeenth

century, both in England and America, the term sham meant good in form but false in fact and dishonestly pleaded for some unworthy purpose.³⁸ Frivolous, on the other hand, meant obviously false upon the face of a pleading, as when something was pleaded that conflicted with a judicially noticeable fact or was logically impossible, such as a plea of judgment recovered before the accrual of the cause of action.³⁹ In *Anonymous* the terms are used together—"frivolous sham pleas"—and the major thrust of the court's disapproval seems to be what was later defined as "frivolity," for the court recommended as a remedy a process of required review by counsel much like the chancery practice previously discussed⁴⁰ which would have had little effect on "sham" pleadings as later defined.⁴¹

The common law seems to have been *procedurally* concerned with dishonesty only in the case of defensive pleas. Indeed, as we shall see, the term "sham" only applied to defensive pleadings.⁴² This was not necessarily because the common law system was plaintiff or creditor oriented,⁴³ though this may have

century cases prior to *Anonymous* involving what would later be defined as sham pleas included, *inter alia*, *Pierce v. Blake*, 2 Salk. 515, 91 Eng. Rep. 439 (K.B. 1697) and *Veale v. Warner*, 1 Saund. 323, 85 Eng. Rep. 463 (K.B. 1670).

38. 1. J. CHITTY, PLEADINGS 541 (1809); H. STEPHEN, TREATISE ON THE PRINCIPLES OF PLEADING 442 (4th Amer. Ed. 1841).

39. For an early example, see *Lamb v. Pratt*, 1 Dowl. & Ry. 577 (K.B. 1822). The definition of "frivolous" is explicitly set out in *Papineau v. King*, 10 M. & W. 216, 152 Eng. Rep. 448 (Exch. 1842). The distinction between sham and frivolous was generally observed in the United States and England in the 19th and early 20th centuries. See, e.g., *Goodson v. Grierson*, [1908] 1 K.B. 761; *Baum v. Lincoln Highway Bldg. & Loan Ass'n*, 158 A. 467, 108 N.J.L. 534 (E. & A. 1932); *Lefferts v. Snediker*, 1 Abb. Pr. 1 (N.Y. Sup. Ct. 1854); *Hull v. Smith*, 8 How. Pr. 149 (N.Y. Sup. Ct. 1852). There were occasional anomalous cases, of course; see, e.g., *Lawrance v. Norreys*, 15 App. Cas. 210 (1890).

40. See note 22 *supra*.

41. *Anonymous* is short enough for convenient reproduction here in full. It sounds more like the promulgation of a directive than the decision of a case:

The Court resented the number of frivolous sham pleas which came before them, saying, it was against the duty of counsel, and against the Statute W. 1, c. 29, and that the old rule ought to be revived, viz. that counsel should set their hands to the books delivered to the Judges, which was anciently so ordered, that the Court might not be troubled with frivolous pleas.

21 Salk. 517, 91 Eng. Rep. 440 (1697).

42. See notes 51-77 *infra* and accompanying text.

43. No such bias appeared, for example, in the statute, *Westminster I*, 3 Edw. 1, c. 29 (1275), which reprobated attorney dishonesty generally. See note 37 *supra*.

44. The distinction between fine and amercement was based upon

been a factor. A more important factor may have been the effect of the primary mechanism for obtaining honesty in litigation, the system of fines and amercements.

The fines and amercements system reflects the common law's failure to distinguish falsity and dishonesty in a very sophisticated manner. The losing party to a lawsuit had to pay a sum of money to the king for having been in the wrong before the king's court. In some actions this money was called an amercement and in others it took the form of a fine.⁴⁴ In either case it was supposed to be flexible and just, fitting the severity of the wrong in bringing or defending the suit.⁴⁵ The private litigant who brought a sham suit merely to harass his opponent ran a high risk for his pleasure, and the actual danger of civil "strike suits" therefore was probably not very great. However, a defendant who was going to lose was going to be amerced or fined in any event, and was likely to plead anything in order to buy time.

The English legal system responded from time to time against the dishonest affirmative defenses most popularly used for delay. Thus, by the 17th century, the courts required "foreign pleas," that is, pleas that alleged occurrences or conditions outside the jurisdiction of the court which would deprive it of jurisdiction, to be sworn.⁴⁶ Similarly, the statute, 4 & 5 Anne, c. 16, § 11 (1706), required all pleas in abatement to be sworn. An unsworn plea that was required to be sworn was a nullity, and the plaintiff merely signed judgment as if there had been a default.⁴⁷ As

whether the court could fix the sum itself or had to resort to the process of afeerment, that is, the fixing of the sum by two peers of the losing party, as guaranteed in Magna Charta. The former was a fine, the latter an amercement. A whole body of technical learning surrounded the subject. In general, the power to fine depended on the power to arrest for the offense implied in the loss, and it existed in regard to losing defendants, and in some cases losing plaintiffs, in all those forms of action based upon a protection of the king's peace, that is, trespass and its progeny, as well as in some other actions. See generally 4 BACON'S ABRIDGEMENT 229 (7th ed. 1868); 2 F. POLLOCK & F. MATTLAND, THE HISTORY OF ENGLISH LAW 511-14 (2d ed. 1898).

45. Theory and practice sometimes diverged, generally in favor of the king's purse. It was such abuses that led to the insertion of the requirement of afeerment of amercements in Magna Charta. See 1 W. FINLASON, REEVE'S HISTORY OF THE ENGLISH LAW 280 n.(a) (1800). By the 18th century the toll seems to have been more or less regularized, and complaints of excessiveness are uncommon.

46. See *Dudeny v. Collyer*, Style 226, 82 Eng. Rep. 665 (K.B. 1650).

47. See *CHITTY*, *supra* note 38, at 461-62; *Pether v. Shelton*, 1 Strange, 638, 93 Eng. Rep. 750 (K.B. 1738[?]) (the date is apparently Michaelmas 12 Geo. I, though the first general heading of the section at

no effect was given to such a plea there was no need for a motion to strike it, and none was required.⁴⁸ If the plea did not fall into a category required to be sworn, it created an issue no matter how sham. Sworn or unsworn, it could not be disposed of short of trial. And, of course, a plaintiff's declaration that was good in form was likewise bound for trial regardless of falsity or honesty.⁴⁹ We do not come upon a mechanism to pierce a paper issue which would otherwise go to trial until the creation of the motion to strike as sham, and this is not until the 19th century.⁵⁰

By 1800 English pleading had grown into the snarled thicket of technicalities which finally precipitated the reform movement later in the century. Originally built upon the procrustean requirement of a single issue,⁵¹ the system continued to pay

1 Strange 637 reads 11 Geo., a court term covered earlier at 1 Strange 606 *et seq.*).

48. Whether or not such a motion would even be accepted, and in what circumstances, is a difficult question. Chitty maintains that one had a right to proceed by motion as an alternative to signing judgment directly, CHITTY, *supra* note 38, at 462. This might have been useful in cases where the plea was supported by an affidavit of questionable sufficiency. To sign judgment wrongfully might have led to an award of the costs of reopening. But the cases Chitty cites for his proposition do not all bear him out. Far from sanctioning proceeding by motion, his earliest citation, Pether v. Shelton, 93 Eng. Rep. 750 (K.B. 1738[?]), indicates that the motion made in that case was superfluous and a questionable practice. One case, Rex v. Grainger, 3 Burrows 1617, 97 Eng. Rep. 1010 (K.B. 1765), was a criminal case where judgment could obviously not be signed directly and is no authority for the civil procedure. Two King's Bench cases, Cunningham v. Johnson, 96 Eng. Rep. 788 (K.B. 1752), and Pearce v. Davy, 96 Eng. Rep. 884 (K.B. 1756), did allow proceeding by rule in cases where a plea was sworn but the oath was challenged as insufficient. As late as 1818, however, Common Pleas held that no such motion practice was proper; the only mode of procedure was to sign judgment even when questioning the sufficiency of an oath. Bray v. Haller, 2 Moore 213 (C.P. 1818).

49. See Pierce v. Blake, 2 Salk. 515, 91 Eng. Rep. 439 (K.B. 1697). The Pierce court appeared cognizant of its lack of any mechanism to inquire into the falsity of a declaration prior to trial. Perhaps as a result of an imprecise headnote to the opinion in this case, however, Pierce has often been misconstrued to have involved some actual action taken by the court to strike the pleading (Pogson, *supra* note 4, at 46 n. 21, where the date of Pierce is given incorrectly as 1822!) or to discipline the attorney involved. (See the reference by Bayley, B., in Miley v. Walls, 1 Dowl. 648 (C.P. 1833)).

50. There is a dictum reference to a possible earlier practice of piercing a paper issue before trial in Hole v. Finch, 2 Wils 394, 95 Eng. Rep. 880 (K.B. 1769), but there is no trace of its actual application. Again, as in *Anonymous*, the practice may refer to what later came to be known as frivolous, as opposed to sham, pleas. See note 37 *supra* and accompanying text.

51. See generally B. SHIPMAN, HANDBOOK OF COMMON LAW PLEADING 418 (3d ed. 1923).

lip service to this hollow abstract ideal while for generations it had been in the constant process of creating elaborate devices to avoid it. These devices had the ill-fitting logic one would expect a slow incremental process of self-delusion to generate, and they provided a breeding ground for a convention of sham defenses which threatened to become sanctified as accepted fiction.

Originally, at common law, one could only join two counts in a single writ and declaration if they were based on distinct causes of action of the same form, for to allow two alternative statements of the same cause of action would have resulted in forbidden duplicity.⁵² By 1800 that rule had been eliminated in deference to the reality that it is sometimes impossible to know at the pleading stage exactly how things will develop at trial; but in form each count still had to be framed to sound like it was based on a different cause of action.⁵³ Furthermore, originally only a single plea tendering a single issue was allowed.⁵⁴ This rule was eventually relaxed to allow multiple pleading by leave of court, and leave finally became obtainable virtually as a matter of course.⁵⁵ Since multiple counts were then permitted on the same cause of action, but the formal fiction that each count was a distinct cause was maintained, a plea to each count was allowed as a matter of course. Apparently there was no requirement that the pleas be viewed together for honest consistency. By 1800 it had become common practice in the defense of actions brought by creditors to put in dishonest pleas which took advantage of this situation to the fullest extent possible. A defendant's simplest course would have been to submit a false denial, but for the debtor seeking either to buy time or escape his debt altogether, the false denial was not as satisfactory a device as the false affirmative plea. A denial joined issue, and trial would then follow fairly quickly, while a false affirmative plea made another round of pleading necessary. The existence of uncarefully regulated multiple pleading meant that a skillful attorney could frame a plea which would at worst take a long time to respond to, and at best might provide a subtle trap into

52. *Id.* at 200-06.

53. This relaxation appears to have taken place at a very early date. *Id.* at 204. As to the requirement that separate counts sound like separate causes, see *id.* at 206.

54. *Id.* at 420.

55. The relaxation was embodied in the statute, 4 Anne, c. 16, § 4 (1706). See generally STERNEN, *supra* note 38, at 421.

which the plaintiff might fall, delaying things further, or possibly even resulting in victory for the defendant on some technicality. This practice seems to have become extremely common by 1800. Unlike some other fictional pleadings within the system, however, these pleas served no desirable function.

Lord Kenyon squarely faced up to the existence of this Augean stable in *Solomons v. Lyon*⁵⁶ in 1801. He strongly condemned the use of sham pleas. Unfortunately he had no very good ideas as to what should be done about them. The plaintiff in *Solomons* sued in assumpsit, and the defendant put in the favorite sham plea of two set-offs, one upon a recognizance alleged to be of record in the court of Exchequer, and the other on a note. These set-offs tendered issues requiring two modes of trial, the first by the record and the second by jury. The plaintiff fell into the trap by filing a technically bad rejoinder which "concluded to the country," that is, called only for jury trial, to which the defendant demurred. The court allowed the plaintiff to amend his rejoinder without costs, which were usually imposed as a matter of course, "with an eye to discountenancing" sham pleas. But since the plea remained on the record, and the defendant was the beneficiary at least of the desired delay, similarly situated defendants and their attorneys were probably not too discountenanced. Apparently the torrent of sham pleas continued apace, for seven years later in *Blewitt v. Mardsen*,⁵⁷ the court complained with

great indignation against the abuse which had grown up of late and was continually increasing, of loading and degrading the rolls of the court with sham pleas of this non-sensical nature, making them vehicles of indecorous jesting; but which it sometimes happened that the time of the court, which ought to be better employed, and was sufficiently engaged with the real business of the suitors, was taken up in a futile investigation of nice points which might arise on demurrer to such sham pleas.⁵⁸

The court further noted that there were "several other causes wherein the same form of plea had been filed."⁵⁹

The plea that drew this wrath was rather cute. Plaintiff brought action as acceptor of a bill of exchange. Defendant pleaded *res judicata* by a judgment previously recovered in the the court of Piepoudre at Bartholomew Fair. The courts of Piepoudre (dusty feet) were inferior courts originating in medi-

56. 1 East 369, 102 Eng. Rep. 143 (K.B. 1801).

57. 10 East 237, 103 Eng. Rep. 765 (K.B. 1808).

58. *Id.* at 238, 103 Eng. Rep. at 766.

59. *Id.*

eval times which were convened at the various fairs of England to try disputes arising from the dealings and misdealings at those fairs.⁶⁰ By 1808 they were of little importance, and of severely restricted jurisdiction.⁶¹ The likelihood of anyone's litigating over a bill of exchange there was almost zero, but a demurrer to the plea would have been dangerous and potentially disastrous. It would have necessitated time-consuming examination of the possible jurisdiction of that moribund court to see if such litigation was theoretically possible. If the litigation proved to be theoretically possible, a demurrer could result in judgment for the defendant since the demurrer admitted the truth of the allegations in the plea. And it was questionable whether the issue of the impossibility of the plea was even litigable on demurrer.⁶²

Faced with this plea, the plaintiff's attorney took bold action. Possibly influenced by the treatment afforded unsworn foreign or dilatory pleas,⁶³ he obtained a rule to the defendant to show cause why the plea should not be disregarded, and plaintiff be at liberty to sign judgment for want of a plea. The defendant, in answering the rule, *admitted the falsity of the plea*. This is important, because it saved the court from having to decide whether a plea as unlikely as the one there involved could be treated as false on its face, when there was a remote chance that it might be true. The court then made the rule absolute (granted plaintiff's motion) in the above quoted language.

In the same year as *Blewitt v. Marsden* there is a curious case in the Court of Common Pleas, *Charles v. Marsden*.⁶⁴ Whether they involved the same defendant does not appear. Although the complained-of plea in that case was found proper, the court alluded to some existing practice of generally requiring pleas challenged as sham to be sworn. If such a practice existed,

60. 2 BACON'S ABRIDGEMENT 789 (7th ed. 1868); 3 W. BLACKSTONE, COMMENTARIES ch. 24 (4th Chase ed. 1914); T. PLUNKNETT, CONCISE HISTORY OF THE COMMON LAW 590 (3d ed. 1940).

61. They were most certainly *not* merely fictitious or "jesters courts" as Pogson mistakes. Pogson, *supra* note 4, at 49 n.26. They administered the law merchant from a very early period and lasted into the 19th century. See generally the very excellent discussion of their jurisdiction in H. POTTER, AN HISTORICAL INTRODUCTION TO ENGLISH LAW & ITS INSTITUTIONS 182 *et seq.* (3d ed. 1948).

62. The demurrer gave color to all averments in the declaration but those contravened by judicially noticeable fact. See STEPHEN, *supra* note 38, at 282 *et seq.*

63. See text accompanying note 47 *supra*.

64. 1 Taunt. 224, 127 Eng. Rep. 818 (C.P. 1808).

it was not only far ahead of its time, but it mysteriously vanished without a trace, for no other discoverable cases make any reference to it. Two years later, faced with an ambiguous and tricky plea, Common Pleas decided a rule to show cause why the plaintiff should not be allowed to sign judgment for want of a plea, not by requiring verification by affidavit, but by allowing the defendant to amend, a practice not calculated to discourage sham pleas.⁶⁵

The next important case in the development of the motion to strike as sham was *Penfold v. Hawkins* (1814),⁶⁶ an action of debt on a bond. The plea, as in *Solomons v. Lyon*, was two set-offs, one on the usual recognizance in the Exchequer, and one on the money counts of assumpsit. The plaintiff here was even bolder than the one in *Blewitt v. Mardsen* had been. He simply treated the pleas as a nullity and signed judgment for want of a plea. The defendant moved to set aside the judgment, and the court refused, one judge referring to *Blewitt v. Mardsen* without further exposition. The court also found a fatal formal defect in the plea, however, and this may have been the real reason the judgment was permitted to stand. In other words, the plea may have been judged a nullity not because it was sham but because it was defective.

A similar attempt to graft the procedure applying to unsworn foreign pleas onto sham pleas had been rebuffed in Common Pleas two years earlier.⁶⁷ The procedure must have seemed theoretically out of kilter, and potentially disruptive, perhaps leading to the necessity of verification of all affirmative pleas without any supervision or interference by the court, which would have been an unthinkable change in common law practice. At any rate if *Penfold* does represent a successful attempt to sign judgment directly against a sham plea without a motion,⁶⁸ it is the only one save one, *Phillips v. Bruce*,⁶⁹ and that case arguably

65. *White v. Howard*, 3 Taunt. 339, 128 Eng. Rep. 135 (C.P. 1810).

66. 2 M. & S. 606, 105 Eng. Rep. 508 (K.B. 1814).

67. *Thomas v. Smithies*, 4 Taunt. 668, 128 Eng. Rep. (C.P. 1812).

68. As has been noted, the plea in *Penfold* was also technically bad, and Chitty later argued that this was the true basis for the *Penfold* decision. *Draycott v. Pilkington*, 5 M. & S. 519, 105 Eng. Rep. 1141 (K.B. 1816) (a case Chitty himself reports *sub nom.* *Drayest v. Pilkington* in note (a) of his report of *Idle v. Crutch*, 1 Chitty 524 (K.B. 1819)).

69. *Phillips v. Bruce* (K.B. 1817) is reported only in note (a), *Idle v. Crutch*, 1 Chitty 524 (K.B. 1819). The plea was *res judicata* by a judgment recovered in the Irish Exchequer allegedly before the bills upon which the action was based were even in existence. The defendant's counsel objected to the procedure of direct signing of judgment,

involved not a sham pleading but frivolity. Every other attempt so to proceed was rebuffed,⁷⁰ and the courts consciously restrained the practice of direct signing of judgment before it got out of hand.

In 1815 the King's Bench decided a case,⁷¹ which represented the wave of the future. The action was debt and the plea was our old friend, two set-offs, one a recognizance in the Exchequer and one on a bond. The plaintiff applied to set aside the plea, *and supported the application by his own affidavit of the falsity of the plea.* The defendant did not specifically admit that the plea was sham, but refused to verify it, claiming its technical propriety and the impropriety of the procedure attacking it. The court called such sham pleas "novel devices" and set aside the plea, allowing plaintiff to sign judgment. This is apparently the first example in Anglo-American jurisprudence in which a formally correct paper issue was disposed of on motion utilizing extraneous proofs.

This was to become the standard method of attacking sham pleas. Still, in 1815 there was no concrete indication of exactly when the procedure could be invoked. Common law courts did not generally like to carry novel procedures too far too fast. For the next fifteen years or so the courts vacillated from case to case as to just how far the procedure to set aside for sham could be carried. The proper scope of the procedure was finally defined very narrowly, just in time for the practice to fall into disuse. As finally decided, a dishonest denial was not subject to the procedure,⁷² nor was a single plea that bore no evidence

saying it was improper, and Lord Ellenborough agreed generally, but said,

[t]hat is where there is any doubt on the plea, and not where it is clearly and distinctly on the face of it a sham plea, and absurd, as this is. If sham pleas are used, they must not be new and fantastic, and framed to deceive the parties who are to reply to them. If pleaders wish to be as mischievous as their ancestors, they must be as dull; we must have no novelties.

See also *Lamb v. Pratt*, 1 Dowl. & Ry. 577 (K.B. 1822).

70. *Anonymous* (K.B. 1815), reported in note (a), *Idle v. Crutch*, 1 Chitty 524 (K.B. 1819); *Draycott v. Pilkington*, 5 M. & S. 519, 105 Eng. Rep. 1141 (K.B. 1816); *Duberly v. Phillips* (K.B. 1816), reported in note (a), *Bones v. Bunter*, 1 Chitty 564 (K.B. 1819); *Bell v. Alexander*, 6 M. & S. 133, 105 Eng. Rep. 1193 (K.B. 1817) (reported by Chitty *sub nom.* *Bill v. Alexander* in note (a), *Idle v. Crutch, supra*).

71. *Anonymous* (K.B. 1815) reported in note (a), *Bones v. Bunter*, 1 Chitty 564 (K.B. 1819).

72. This was because of the assumed right of defendant to put plaintiff to his proof. See note 4 *supra*. The only qualification to this was that a general denial might be struck if it was part of a dishonest

of falsity on its face⁷³ (unless it was really a double plea masquerading as a single plea and containing some trick or trap),⁷⁴ nor were any double pleas that were not tricky or at least well known conventional shams (usually one and the same thing).⁷⁵ The procedure fell into disuse because the Hilary Rules of 1834 contained provisions effectively curbing most of the popular sham pleas.⁷⁶ The summary procedure provisions of 1855⁷⁷ eliminated altogether the opportunity to use them in that class of commercial cases to which they had been almost entirely restricted. But the concept of the motion to strike as sham had fallen on more fertile ground elsewhere.

B. THE AMERICAN MOVEMENT

The term "strike" as applied to proceedings to rid the record of sham pleadings was rarely used in English practice.⁷⁸ It is

and tricky double plea. *Body v. Johnson* (K.B. 1822), reported in note (a), *Shadwell v. Berthoud*, 5 B. & Ald. 750, 106 Eng. Rep. 1365 (K.B. 1822); *Corbett v. Powell* (K.B. 1822), reported in note (a), *Shadwell v. Berthoud*, *supra*.

73. *Smith v. Backwell*, 4 Bing. 512, 130 Eng. Rep. 865 (C.P. 1828); *Idle v. Crutch*, 1 Chitty 524 (K.B. 1819). At one point it looked as if the courts were moving towards allowing a general motion to strike single pleas. See *Shadwell v. Berthoud*, 5 B. & Ald. 750, 106 Eng. Rep. 1365 (K.B. 1822) (also reported *sub nom.* *Shadbolt v. Berthoud*, 2 Chitty 355 (K.B. 1822), 1 D. & R. 446 (K.B. 1822)) (where the court stretches to find a single plea tricky where it does not appear to be); *Richley v. Proone*, 1 B. & C. 286, 107 Eng. Rep. 107 (K.B. 1823). *Merington v. Becket*, 2 B. & C. 81 (K.B. 1823), put an end to this trend. Common Pleas followed *Merington* in *Young Gadderer*, 1 Bing. 381 (C.P. 1823). But see *Vere v. Carden*, 5 Bing. 413 (C.P. 1829), the report of which is too short to tell exactly what happened. It may represent a frivolous pleading like *Lamb v. Pratt*, 1 Dowl. & Ry. 577 (K.B. 1822).

74. *Smith v. Hardy*, 8 Bing. 435 (C.P. 1832).

75. *Everett v. Wright* (K.B. 1818) reported in note (a), *Idle v. Crutch*, 1 Chitty 524 (K.B. 1819).

76. The Hilary Rules of 1834 made the most common sham plea, judgment recovered, unavailable without marginal notation of the court record involved. Reg. Pl. Hil., 4 Will. 4, c. I, § 8, enacted pursuant to 3 & 4 Will. 4, c. 42, § 1 (1833), reprinted in A. REPPY, INTRODUCTION TO CIVIL PROCEDURE 792 (1954).

77. The Summary Procedure on Bills of Exchange Act, 18 & 19 Vict., c. 67 (1855), covered most types of commercial cases which had given rise to the reported attempts to strike for sham. See Bauman, *The Evolution of the Summary Judgment Procedure*, 31 IND. L.J. 329, 334-342 (1956).

78. The only reported English case in which the term was used is the relatively late Common Pleas case, *Jones v. Studd*, 4 Bing. 663, 130 Eng. Rep. 924 (C.P. 1828). Usually the courts spoke not of "striking" defendant's plea, but of allowing plaintiff to sign judgment for want of a plea.

an American usage, applied to the procedure from its initial appearance in American courts.⁷⁹ The first American decisions adopting the practice came from New York, and by mis-analysis or design, took a comparatively broad view of the motion to strike for sham. Thus, in the very early case of *Brewster v. Hall*,⁸⁰ the court said:

Thus it will be seen that the English cases do not entirely agree, as to the kind of pleas which the court will strike out. They do all agree that the plea must be without pretence in point of fact; but when we come to its legal nature, we find precedents for setting aside both those which are plainly good; and others of a doubtful validity. Sometimes the criterion is delay and expense; and sometimes ingenuity and delusion. In truth, perhaps, no general rule can be laid down on the subject. Courts have never yet set aside the general issue; but beyond that, it seems to me, the matter must in a great measure rest in sound discretion. The power to set aside sham pleas is now well established. The great object is to prevent delay and expense to the plaintiff; and consuming the time of the courts in passing upon pleas which are a mere fiction, an unseemly and expensive incumbrance upon the record, and a fraud upon the rule which allows double pleading.⁸¹

This comparatively flexible and receptive attitude set the tone for the American practice, and over the next decades, while the English practice was falling into disuse, the American was expanding. Between 1824 and 1848 the practice was apparently restricted exclusively to New York. It was incorporated into the Field Code of 1848 and the Code's successors as a codification of the common law practice as it was then understood in New York.⁸² As the code reform movement swept the country, the provisions on the power to strike as sham went with it, and the New York practice was generally followed elsewhere.⁸³

The practice of striking pleas as sham, as it existed in American jurisdictions around 1870, had many of the earmarks of a

79. The language first appears in *Steward v. Hotchkiss*, 2 Cow. 634 (N.Y. 1824), the first recorded case of piercing a sham pleading in the United States.

80. 6 Cow. 34 (N.Y. 1826) (decided in 1826 after the King's Bench had already decided *Merington v. Beckett*, 2 B. & C. 8, 107 Eng. Rep. 313 (K.B. 1823), which signalled the retreat of the English courts from the potentials of their practice with regard to sham pleas).

81. 6 Cow. at 36-37 (N.Y. 1826).

82. Section 152 of the N.Y. Code of Procedure of 1852 reflects the final wording of this codification: "Sham and irrelevant answers and defenses may be stricken out on motion, and upon such terms as the court may in their discretion impose." See generally Pogson, *supra* note 4, at 58-68.

83. On the phenomenon of the spread and influence of the Field Code, see generally CLARK, *supra* note 16, at ch. 1, § 8.

nascent motion for summary judgment. It had the *sine qua non*, the ability to pierce a well-pleaded paper issue. It was available only in favor of plaintiffs,⁸⁴ however, and it did not apply to denials.⁸⁵ An unsophisticated approach was often taken to the form and use of extraneous proofs, leading to decisions that cursorily verified pleadings could not be struck.⁸⁶ Perhaps most importantly, the usual definition of sham—"good in form but false in fact and interposed for some unworthy purpose such as delay"⁸⁷—implied two findings. One was the falsity of the pleading. This is of central importance to this Article, of course. *There is not one reported case prior to the adoption of the Federal Rules where a finding of falsity was not required before a plea could be deemed sham.* The second finding was the dishonesty of the pleader. Judges were understandably reluctant to grant a motion that necessarily implied a finding that the attorney involved was dishonest. Perhaps because of this, certain jurisdictions began to de-emphasize the finding of dishonesty, defining sham as merely synonymous with "false in fact."⁸⁸ But not a single jurisdiction ever embraced any formulation of the definition of sham which did not include the requirement of an affirmative finding of the untruth of the challenged pleading. It must also be borne in mind that this "finding" or conclusion of falsity invariably had to be made in a manner that comported

84. Indiana provided the earliest (and until 1928, only) practice of allowing a complaint to be attacked as sham. See *Lowe v. Thompson*, 86 Ind. 503 (1882); *Stars v. Hammersmith*, 67 N.E. 554 (App. Ct. Ind. Div. 2 1903). Prior to the statute the Indiana courts had followed the usual rule. Indiana also provided for interrogatories but no other extraneous proofs, to be used on the motion. *Stars v. Hammersmith, supra*.

85. See *Pogson, supra* note 4, at 79-80; cases collected at 49 CORPUS JURIS Pleading § 994 n.73 (1930).

86. See cases collected at 49 C.J.S. Pleading § 995 n.83 (1930); J. POMEROY, CODE REMEDIES § 561, at 914 (5th ed. 1929).

87. For various word formulas basically to the same effect, see cases collected under the headings sham, sham answer, sham defense, sham denial, sham matter, and sham plea, in WORDS & PHRASES 196-207 (1953). Some cases omit any reference to honesty in their formulas, even in states where such omission was not customary, e.g., *Howe v. Elwell*, 57 App. Div. 357, 67 N.Y.S. 1108 (Sup. Ct. 1901), but none omit reference to falsity.

88. See, e.g., *State ex rel. Engelhard v. Webber*, 96 Minn. 422, 105 N.W. 490 (1905); *Goldberg v. Fisher*, 11 N.J. Misc. 657, 168 A. 232 (Sup. Ct. 1933). The courts of some states varied their word formulas from time to time and place to place. Compare *People v. McCumber*, 18 N.Y. 315 (Ct. App. 1858) with *Lefferts v. Snediker*, 1 Abb. Pr. 41 (N.Y. Sup. Ct. 1854); *Arata v. Tellurium Gold & Silver Mining Co.*, 65 Cal. 340, 4 P. 195, modified, 4 P. 344 (1884) with *Continental Building & Loan Ass'n v. Boggess*, 145 Cal. 30, 78 P. 245 (1904).

with the guaranty of jury trial which exists in the Federal Constitution and in most state constitutions.⁸⁹ In making a preliminary finding of falsity the courts were restricted, then as now, to the fairly stringent rules surrounding a court's power, not to try issues, but to determine whether there were any issues to be tried. This is one reason cursorily verified pleadings gave American courts such problems.⁹⁰ Nevertheless, the motion to strike as sham had a handy potential for evolution by judicial decision which was almost realized in a few jurisdictions, most notably New Jersey and Minnesota. New Jersey was the first jurisdiction to allow the striking of denials in 1871,⁹¹ and Minnesota followed in 1883.⁹² Both jurisdictions allowed verified pleadings to be struck.⁹³ More importantly, perhaps, Minnesota in 1905 specifically and emphatically abolished the requirement of a suggestion or finding of bad faith on the part of the pleader,⁹⁴ and the Minnesota decisions did not restrict the availability of the motion to any narrowly defined class of cases. From 1905 Minnesota had, in the motion to strike as sham, a full blown modern summary judgment procedure available to plaintiffs, and it was probably the most functionally advanced such device in the English speaking world until the 1930's.⁹⁵

C. SUMMARY JUDGMENT

Since much of my position regarding Rule 11 is based upon the historical and functional relationship between summary judg-

89. See U.S. CONST. art. III, § 2, cl. 3, and, e.g., MINN. CONST. art. 1, § 4; N.J. CONST. art. 1, ¶ 9.

90. See generally Pogson, *supra* note 4, at 53-55.

91. *Walter v. Walker*, 35 N.J.L. 262 (Sup. Ct. 1871).

92. *Hayward v. Grant*, 13 Minn. 154 (1868).

North Carolina and Ohio also allowed denials to be struck. See *Flack v. Dawson*, 69 N.C. 42 (1873); *Werk v. Christie*, 6 Ohio C. Dec. 255 (Hamilton Cir. Ct. 1895); *Wentzel v. Zinn*, 10 Ohio Dec. 97 (Hamilton C.P. 1900). New York had an early flirtation with the practice in *People v. McCumber*, 18 N.Y. 315 (Ct. App. 1858), but this position was repudiated in *Wayland v. Tysen*, 45 N.Y. 281 (1871). See Pogson, *supra* note 4, at 67 and cases collected therein at n.95.

93. *Coykendall v. Robinson*, 39 N.J.L. 98 (1876); *Nelson Lumber Co. v. Richardson*, 31 Minn. 267, 17 N.W. 388 (1883). The practice seems to have been much more common in Minnesota. See cases collected at 49 CORPUS JURIS Pleading § 995 n.85 (1930).

94. *State ex rel. Engelhard v. Webber*, 96 Minn. 422, 105 N.W. 490 (1905).

95. One can only appreciate the sophistication of the Minnesota approach by an examination of such cases as *Brown-Forman Co. v. Petersen*, 101 Minn. 53, 111 N.W. 733 (1907), and *Bank of Richards v. Sheasgreen*, 153 Minn. 363, 190 N.W. 484 (1922). New Jersey also seems to have had an advanced approach.

ment and the motion to strike as sham, the concept of summary judgment should be discussed before proceeding further. Summary judgment is a mechanism for piercing allegations in the pleadings by the examination of various extraneous proofs such as documents and affidavits proffered by the parties, to determine if there is in fact an issue which demands trial. Summary judgment properly applied requires a detailed and sophisticated examination of extraneous proofs to determine the existence of an issue.⁹⁶ It is a creation of the 20th century, and virtually all the jurisprudence of summary judgment as a general mechanism comes from the last forty-five years. True summary judgment is not inherently concerned with honesty, for there can certainly be suits honestly brought and defenses honestly made which nevertheless are proper subjects for summary judgment. For example, as a third party beneficiary, I may sue an uncooperative person for a contract violation with a quite honest and reasonable belief in the legal propriety of the action, only to have him produce documentary evidence available only to him which conclusively establishes the existence of a defense. This is not to say that summary judgment is not useful against dishonesty, but merely to recognize that much of its strength and utility lies in the fact that it is not inherently concerned with dishonesty.⁹⁷

One defining characteristic of modern summary judgment is the ability to eliminate a paper issue which would, but for this mechanism, require trial. Judgments upon defaults and violation

96. See F. JAMES, *CIVIL PROCEDURE* 230-36 (1965).

97. One should also distinguish between summary judgment as a technical mechanism and a summary procedure. When the movement to streamline civil procedure was gathering steam in the 1920's the two terms were often used almost interchangeably, which can today cause some confusion when examining the seminal articles in the area. A summary procedure is anything which cuts down on the procedural technicalities and inherent delays in an existing procedural system. It is concerned, not with seeing whether there are issues to be tried, but with cutting down the time, technicality, and expense at every stage of the trial. Summary judgment may be part of a process of summary procedure recommended for the reform in whole or part of an existing system, but the two concepts are not the same. Many of the historical materials presented in Millar, *Three American Ventures in Summary Civil Procedure*, 38 *YALE L.J.* 193 (1928), and in Clark & Samenow, *The Summary Judgment*, 38 *YALE L.J.* 423 (1928), do not concern forerunners of summary judgment as it is now conceived, except in the broad sense that the desire for efficiency and simplicity in pleading and other areas influenced the adoption of a summary judgment procedure also. See also Bauman, *The Evolution of the Summary Judgment Procedure*, 31 *IND. L.J.* 329 (1956).

of requirements that pleadings be verified by affidavit cannot be regarded as very direct precursors of this main attribute of modern summary judgment, because they result from rules declaring that no paper issue has been joined, and their main focus is not truth in fact. Default even in response to a false declaration leads to judgment regardless of the actual truth of the allegations in the pleading. No investigation of the assertions is attempted, and though the law may be said to deem the allegations true for purposes of the default, this has no necessary relation to truth in fact. Similarly, to disregard an unsworn plea may be to disregard a factually true plea, and the same observations apply *mutatis mutandis* as those made in the case of a default. There may be some inference of falsity resulting from failure to counter allegations with a *sworn* denial, but the inference is not particularly strong.

Many point to the 1855 English Summary Procedure on Bills of Exchange Act⁹⁸ as the precursor of modern summary judgment.⁹⁹ While it is true that the procedure influenced some important aspects of the mechanism in some major functional respects, it is not the antecedent it is assumed to be. In form, it was an adaption of the procedures applied by the Statute of Anne to dilatory pleas. As previously noted, that statute merely made a plea in abatement ineffective unless verified by affidavit.¹⁰⁰ The 1855 Act carried this concept one step further. It applied to *all* substantive defenses in certain narrowly prescribed types of cases—basically the same creditor actions which had been the battleground of the courts and the sham pleaders in the early part of the century.¹⁰¹ If the plaintiff was willing to file an affidavit of merit in such a case, the defendant was not allowed to plead as a matter of course. Rather, he needed leave of court to defend and had to convince the court of the existence of a triable issue in order to get it.¹⁰² It seems to have been from this practice that detailed extraneous proofs came to be tendered, accepted, and carefully inspected. The conclusory

98. 18 & 19 Vict., c. 67 (1855).

99. See, e.g., CLARK, *supra* note 15, at 557; F. JAMES, CIVIL PROCEDURE 233 (1965); C. WRIGHT, LAW OF FEDERAL COURTS 442 (2d ed. 1970); and the Advisory Committee note to FED. R. CIV. P. 56 itself.

100. See text accompanying note 47 *supra*.

101. See Clark & Samenow, *supra* note 97, at 424, 430-31.

102. 18 & 19 Vict., c. 67, § 2 (1855). The defendant had one option, posting security to cover the demanded judgment. See also Bauman, *supra* note 97, at 339.

103. See, e.g., Wallingford v. Directors, etc., of the Mutual Society, 5 App. Cas. 685 (1880). See also Bauman, *supra* note 97, at 350-52.

affidavit which might have escaped summary disposition under earlier practices relating to sham pleadings was no longer enough.¹⁰³

The 1855 provisions and their successors performed no small accomplishment in contributing a sophisticated approach to the handling of extraneous proofs. But the 1855 provisions were at odds with modern theory in important ways. First, they were available only in favor of plaintiffs. More significantly, however, they depended on a procedural model that made it virtually impossible to extend the provisions to defendants. The model was that of a pleading which remained ineffective or nonexistent until the proponent of the pleading did something—that is, until the defendant obtained leave to answer. It was during the proponent's attempt to obtain leave that the presence of an issue was decided. Now try to turn the model around. It is difficult, if not impossible, to think of a complaint being functionally ineffective until leave of court is obtained. This would require a hearing prior to the court's giving leave to file the complaint, which would probably require notice to the defendant prior to the filing. The notice would then begin to serve the purpose of the original complaint, and the entire procedure would waste judicial time. In short, the model used by the 1855 English provisions was asymmetrical; not only was summary judgment, so called, accorded only to plaintiffs, but that was the only possibility the procedural model afforded.¹⁰⁴

In light of this background we see that it is difficult to overstate the radical nature of Fed. R. Civ. P. 56 when it was promulgated in 1938. It was the third such provision to be made generally available to defendants as well as plaintiffs,¹⁰⁵ and the first to provide a simple procedure that could be used in all types of cases without requiring inherent judgments concerning the honesty of the case ultimately subject to summary judgment.¹⁰⁶ Its enactment rendered virtually meaningless any reference to any previously known procedure to strike as sham,

104. Note that this is not true of the motion to strike. A motion can efficiently be accorded to both sides after the paper issue is joined. This is one reason modern summary judgment provisions have abandoned the British form and returned to the form of the motion to strike, that is, a speaking motion addressed to, and seeking to pierce, a pleading adequate on paper.

105. New Jersey by statute made the motion to strike as sham available to defendants in 1928. 1928 N.J. Laws ch. 151. The Indiana practice has already been referred to, *supra* note 84.

106. See generally Bauman, *supra* note 97, at 352-55.

since, as we have already seen, the concept of sham inevitably required at least a finding of falsity without resolution of jury issues.¹⁰⁷ Thus any pleading strikeable as sham prior to Rule 56 would be subject to summary judgment after the promulgation of Rule 56.

What then do we make of the reference in Rule 11 authorizing a court to strike a pleading as "sham" (and false, too) when it is "signed with intent to defeat the purpose of the rule" (that is, without good ground)? We have two alternatives. We can say that the language is the product of less than careful drafting and was never meant to authorize inquiring into honesty before or independent of falsity. Prior to an attempt to determine the existence of a Rule 11 violation, then, there would have to be a judicial finding of the falsity of the pleading challenged, either through summary judgment, trial, or otherwise. This makes sense functionally, but is hard to reconcile with the language of the rule since it would seem possible to sign a factually accurate pleading without "good ground." Or we can say that the rule was intended to authorize an inquiry into the honesty of a pleading prior to and independent of any inquiry into the falsity of the pleading. This seems to square better with the language of the rule (except for the troublesome phrase "and false"), but it is objectionable on a number of grounds.

First, such a proceeding would violate the jury trial guarantee,¹⁰⁸ since the court would not be performing the traditional common law function of disposing of the case by finding that there was no real triable issue, even though one appeared on the face of the paper pleadings.¹⁰⁹ Second, administration of the rule in this fashion could result in rather bizarre proceedings that would only serve to foster delay and injustice, without providing any benefit not provided by an initial determination of falsity alone.

Most cases where the dishonesty of a pleading can be demonstrated would seem to be proper subjects for summary judgment. In the rare case where a court may be convinced that the pleading was filed without good ground, even though the averments might be true, we are faced with the possibility that the real culprit might benefit, because even though the allegations were

107. See text accompanying note 34 *supra*.

108. U.S. CONST. amend. VII.

109. CLARK, *supra* note 16, at 564, and cases collected therein nn. 237-39.

true, the pleader had no rational knowledge of the fact. It verges on the absurd to have a procedure of questionable constitutionality which could prove vexatious in practice to protect such dubious beneficiaries from their opponent's dishonesty. Thus I will take the position that it is never proper to have a Rule 11 inquiry prior to a final determination of falsity, which in the normal case will occur either by trial or by summary judgment.¹¹⁰ This is not to say that it might not be proper in some cases to dispose of Rule 11 contentions at the same time summary judgment is given; that is, to consider falsity and honesty together, and to determine the issue of honesty immediately after finding falsity. It might be that certain violations are so obvious at that point that they can be fairly dealt with immediately. However, special proceedings directed toward Rule 11 questions in advance of a normal determination of falsity¹¹¹ are at best a waste of time, and the allowance of discovery directed only toward such Rule 11 issues, such as depositions of a party's attorney to determine what he knew and how he knew it when he signed the complaint,¹¹² could perform no proper function, but only serve to harass and raise serious questions concerning the attorney-client privilege.

VI. RULE 11 IN PRACTICE

With the foregoing observations in mind, the question is, how have the cases applied Rule 11? The answer is, not very often, or very helpfully. Since the Rule was promulgated in 1938, there have been only 23 reported cases where one party attempted to have all or part of the opposing party's pleading stricken "as sham

110. *Kinee v. Abraham Lincoln Fed. Sav. & Loan Ass'n*, 365 F. Supp. 975 (E.D. Pa. 1973), presented an abnormal case. See text accompanying notes 139-41 *infra*. The plaintiff had voluntarily discontinued suit against the parties damaged by the Rule 11 violation. In such a case the court must have a residual power to determine both falsity and lack of good ground in order to protect persons from impositions that would otherwise be shielded from scrutiny because of discontinuances. No constitutional issue is present in such a case, as the proceedings are ancillary to the suit in which the pleading has already been voluntarily abandoned by the party.

111. Rule 11 does not by its terms authorize or refer to a right to enforce it by motion. However, Rule 7(b)(1) directs that "an application to the court for an order shall be by motion . . .," and since the court must have *some* power to make orders to enforce Rule 11, and since the Rule's purpose, at least in part, is to protect the opposing party, he must have the right to make such a motion in an appropriate case. The courts have generally accepted such motions. See cases cited in note 113 *infra*.

112. Such discovery has been allowed by courts. See *Papilsky v.*

and false."¹¹³ Four of these are early cases that are not pertinent since they were brought under another rule and do not deal at all with Rule 11 or the problems we have been discussing.¹¹⁴ That leaves us with 19 genuine adversary Rule 11 motions. The first did not occur until 1950.¹¹⁵ Nearly half have come since 1971.¹¹⁶ Seven have ended with more or less affir-

Berndt, 59 F.R.D. 95 (S.D.N.Y. 1973); Murchison v. Kirby, 27 F.R.D. 14 (S.D.N.Y. 1961); Freeman v. Kirby, 27 F.R.D. 395 (S.D.N.Y. 1961). See also Lau Ah Yew v. Dulles, 236 F.2d 415 (9th Cir. 1956).

113. Bertucelli v. Carreras, 467 F.2d 214 (9th Cir. 1972); Ginsberg v. Stern, 251 F.2d 49 (3d Cir.), *cert. denied*, 356 U.S. 932 (1958); Lau Ah Yew v. Dulles, 236 F.2d 415 (9th Cir. 1956); Child v. Beame, 412 F. Supp. 593 (S.D.N.Y. 1976); Acker v. Provident Nat'l Bank, 373 F. Supp. 56 (E.D. Pa. 1974), *modified*, 512 F.2d 729 (3d Cir. 1975); Orenstein v. Compusamp Inc., 1974 CCH FED. SEC. L. REP. ¶ 96779 (S.D.N.Y. 1974); Kinee v. Abraham Lincoln Fed. Sav. & Loan Ass'n, 365 F. Supp. 975 (E.D. Pa. 1973); Papiisky v. Berndt, 59 F.R.D. 95 (S.D.N.Y. 1973); Econo-Car Int'l, Inc. v. Antilles Car Rentals, Inc., 61 F.R.D. 8 (D.V.Is. 1973), *rev'd on other grounds*, 499 F.2d 1391 (3d Cir. 1924); *In re Cope-land*, 350 F. Supp. 943 (D. Del. 1972); Heart Disease Research Foundation v. General Motors Corp., 15 FED. R. SERV. 2d 11.41 (S.D.N.Y.), *aff'd on other grounds*, 463 F.2d 98 (2d Cir. 1972); Lewis v. Wells, 325 F. Supp. 382 (S.D.N.Y. 1971); Spencer v. Dixon, 290 F. Supp. 531 (N.D. La. 1968); Brand v. Tisch, 253 F. Supp. 122 (E.D.N.Y. 1966); Freeman v. Kirby, 27 F.R.D. 395 (S.D.N.Y. 1961); Murchison v. Kirby, 27 F.R.D. 14 (S.D.N.Y. 1961); Nichols v. Alcker, 126 F. Supp. 679 (E.D.N.Y. 1954), *aff'd*, 231 F.2d 68 (2d Cir.), *cert. denied*, 352 U.S. 829 (1956); AAA v. Rothman, 101 F. Supp. 193, 104 F. Supp. 655 (E.D.N.Y. 1952); Intra Mar Shipping (Cuba) S.A. v. John S. Emory & Co., Inc., 11 F.R.D. 284 (S.D.N.Y. 1951); United States v. Shuster, 11 F.R.D. 151 (D. Neb. 1950); United States v. Long, 10 F.R.D. 443 (D. Neb. 1950); Roosevelt Field Inc. v. Town of North Hempstead, 84 F. Supp. 456 (E.D.N.Y. 1949); Yale Transport Corp. v. Yellow Trucking & Coach Mfg. Co., 3 F.R.D. 440 (S.D. N.Y. 1944); Thierfield v. Postman's Fifth Ave. Corp., 37 F. Supp. 958 (S.D.N.Y. 1941).

114. Intra Mar Shipping (Cuba) S.A. v. John S. Emory & Co., 11 F.R.D. 284 (S.D.N.Y. 1951); Roosevelt Field Inc. v. Town of North Hempstead, 84 F. Supp. 456 (E.D.N.Y. 1949); Yale Transport Corp. v. Yellow Trucking & Coach Mfg. Co., 3 F.R.D. 440 (S.D.N.Y. 1944); Thierfield v. Postman's Fifth Ave. Corp., 37 F. Supp. 958 (S.D.N.Y. 1941). These cases were attempts to graft a procedure onto Rule 12(f) by brute force, whereby discrete allegations or parts of pleadings could be the subject of partial summary judgment (that is, stricken as sham with sham defined merely as falsity in fact), even though under the circumstances of the cases a full motion for summary judgment would not have been in order to bring the partial summary judgment provisions of that rule into play.

115. United States v. Long, 10 F.R.D. 443 (D. Neb. 1950).

116. Bertucelli v. Carreras, 467 F.2d 214 (9th Cir. 1972); Child v. Beame, 416 F. Supp. 543 (S.D.N.Y. 1976); Orenstein v. Compusamp Inc., 1974 CCH FED. SEC. L. REP. ¶ 96779 (S.D.N.Y. 1974); Acker v. Provident Nat'l Bank, 373 F. Supp. 56 (E.D. Pa. 1974); Kinee v. Abraham Lincoln Fed. Sav. & Loan Ass'n, 365 F. Supp. 975 (E.D. Pa. 1973); Econo-Car Int'l, Inc. v. Antilles Car Rentals, Inc., 61 F.R.D. 8 (D.V.Is. 1973), *rev'd on*

mative findings of no violation,¹¹⁷ while three others have avoided the issue by decisions on other grounds.¹¹⁸ In nine cases violations have been found.¹¹⁹ In addition, Rule 11 violations have been found by the court *sua sponte* in two other cases.¹²⁰ Of these 11 cases resulting in findings of violation,

other grounds, 499 F.2d 1391 (3d Cir. 1974); *Papilsky v. Berndt*, 59 F.R.D. 95 (S.D.N.Y. 1973); *In re Copeland*, 350 F. Supp. 943 (D. Del. 1972); *Heart Disease Research Foundation v. General Motors Corp.*, Fed. R. Serv. 2d 11.41 (S.D.N.Y.), *aff'd on other grounds*, 463 F.2d 98 (2d Cir. 1972); *Lewis v. Wells*, 325 F. Supp. 382 (S.D.N.Y. 1971).

117. *Lau Ah Yew v. Dulles*, 236 F.2d 415 (9th Cir. 1956); *Child v. Beame*, 412 F. Supp. 593 (S.D.N.Y. 1976); *Orenstein v. Compusamp Inc.*, 1974 CCH Fed. Sec. L. Rep. ¶ 96779 (S.D.N.Y. 1974); *Papilsky v. Berndt*, 59 F.R.D. 95 (S.D.N.Y. 1974); *Murchison v. Kirby*, 27 F.R.D. 14 (S.D.N.Y. 1961); *United States v. Shuster*, 11 F.R.D. 151 (D. Neb. 1950); *United States v. Long*, 10 F.R.D. 443 (D. Neb. 1950). The opinions in *Long*, *Shuster*, and *Papilsky* tend to indicate some suspicion on the respective courts' part that an intensive inquiry directed toward striking the pleading on Rule 11 grounds might be improper.

118. *Acker v. Provident Nat'l Bank*, 373 F. Supp. 56 (E.D. Pa. 1974) (case disposed of on summary judgment); *In re Copeland*, 350 F. Supp. 943 (D. Del. 1972) (refusal to disturb bankruptcy referee's discretion); *Ginsburg v. Stern*, 148 F. Supp. 663 (W.D. Pa. 1956) (case disposed of for failure to state a claim). The *Ginsburg* case is a little strange, because the court eschews any formal decision on the Rule 11 issue, but then makes some grumpy comments which come suspiciously close to a Rule 11 finding against the plaintiff, who was an attorney representing himself. (That is not the only strange thing about the case. The plaintiff was suing a large percentage of the state judiciary of Pennsylvania, including every member of its supreme court, for conspiracy to deprive him of his civil rights). *Ginsburg* is surprisingly similar both in subject and tone to *Spencer v. Dixon*, 290 F. Supp. 531 (W.D. La. 1968), another very strange opinion wherein the court, *inter alia*, concluded that an amended pleading was ineffective because filed without leave of court, and then went on to strike it anyway.

119. *Bertucelli v. Carreras*, 467 F.2d 214 (9th Cir. 1972); *Kinee v. Abraham Lincoln Fed. Sav. & Loan Ass'n*, 365 F. Supp. 975 (E.D. Pa. 1973); *Econo-Car Int'l, Inc. v. Antilles Car Rentals, Inc.*, 61 F.R.D. 8 (D.V.Is. 1973), *rev'd on other grounds*, 499 F.2d 1391 (3d Cir. 1974); *Heart Disease Research Foundation v. General Motors Corp.*, 15 Fed. R. Serv. 2d 11.41 (S.D.N.Y.); *aff'd on other grounds*, 463 F.2d 98 (2d Cir. 1972); *Lewis v. Wells*, 325 F. Supp. 382 (S.D.N.Y. 1971); *Spencer v. Dixon*, 290 F. Supp. 531 (W.D. La. 1968); *Freeman v. Kirby*, 27 F.R.D. 395 (S.D.N.Y. 1961); *Nichols v. Alker*, 126 F. Supp. 679 (E.D. N.Y. 1954), *aff'd*, 231 F.2d 68 (2d Cir. 1956); *AAA v. Rothman*, 101 F. Supp. 193, 104 F. Supp. 655 (E.D.N.Y. 1952).

120. *Gulf Oil Co. v. Bill's Farm Center, Inc.*, 52 F.R.D. 114 (W.D. Mo. 1970), *aff'd*, 449 F.2d 778 (8th Cir. 1971); *In re Lavine*, 126 F. Supp. 39 (S.D. Cal.), *rev'd sub nom. In re Los Angeles County Pioneer Soc'y*, 217 F.2d 190 (9th Cir. 1954). *City of Kingsport v. Steel & Roof Structure, Inc.*, 500 F.2d 617 (6th Cir. 1974), may be another such case. In reversing the lower court, the court of appeals indicated that Rule 11 was an alternative ground for the lower court's disposition, but the lower court opinion is unreported. 500 F.2d at 619. The lower court's disposition seems to have been based less on a finding of dishonesty than on a mistaken notion concerning the availability of alternative and inconsistent theories in federal practice. See note 16 *supra*.

four were disposed of on other sufficient grounds so that the propriety of the alternative ground of "striking the pleading" was not readily testable on appeal.¹²¹ Of the remaining seven cases, no disciplinary action was taken against offending counsel in two¹²² and alternative sanctions were imposed on the attorneys involved in three.¹²³ One case of "striking" was reversed on appeal¹²⁴ and one case was ultimately successful.¹²⁵

121. *Econo-Car Int'l, Inc. v. Antilles Car Rentals, Inc.*, 61 F.R.D. 8 (D.V.Is. 1973); *Heart Disease Research Foundation v. General Motors Corp.*, 15 FED. R. SERV. 2d 11.41 (S.D.N.Y.), *aff'd on other grounds*, 463 F.2d 98 (2d Cir. 1972); *Spencer v. Dixon*, 290 F. Supp. 531 (W.D. La. 1968); *Nichols v. Alker*, 126 F. Supp. 679 (E.D.N.Y. 1954).

122. *Lewis v. Wells*, 325 F. Supp. 382 (S.D.N.Y. 1971); *Gulf Oil Corp. v. Bill's Farm Center, Inc.*, 52 F.R.D. 114 (W.D. Mo. 1970).

123. *Kinee v. Abraham Lincoln Fed. Sav. & Loan Ass'n*, 365 F. Supp. 975 (E.D. Pa. 1973) (attorneys made to pay personally all expenses occasioned by violation including attorney's fees); *In re Lavine*, 126 F. Supp. 39 (S.D. Cal. 1954) (attorney initially disbarred but the disbarment was reversed on appeal for failure to give minimal due process in determination to disbar, *sub nom. In re Los Angeles Pioneer Society*, 217 F.2d 190 (9th Cir. 1954)); *AAA v. Rothman*, 101 F. Supp. 193, 104 F. Supp. 655 (E.D.N.Y. 1952) (case disposed of on summary judgment; the attorney's name was indexed for easy reference, in case he got in trouble again!?! The effectiveness of such a sanction is doubtful.).

124. *Bertucelli v. Carreras*, 467 F.2d 214 (9th Cir. 1972). *Bertucelli* is a strange case. It was a civil rights action by a prisoner who did happen to be represented by counsel. One of the many theories for relief involved an allegation that the warrant under which he was arrested was unsigned. The district court found that, since the warrant was on file in the state court and was signed, the allegation of lack of signature was a violation of Rule 11 (probably on a "duty of investigation" theory, see text accompanying note 182 *infra*). The district court then struck or dismissed the complaint on the alternative grounds of Rule 11 violation and violation of the Rule 8(a) strictures against prolixity. The court of appeals claimed to agree with the finding of a Rule 11 violation, but reversed the district court, remanding to allow an amendment that could only remedy the prolixity. Thus the final posture of the case was that no action was taken on what was found to be a Rule 11 violation. Note that this case is essentially different from *Lau Ah Yew v. Dulles*, 236 F.2d 415 (9th Cir. 1956), where the district court's implied *finding* of a Rule 11 violation was reversed on appeal.

125. *Freeman v. Kirby*, 27 F.R.D. 395 (S.D.N.Y. 1961) (motion to strike granted at trial; the case was not heard on appeal). See text accompanying notes 130-36 *infra*. One state court has granted an adversary motion to strike based upon a state version of Rule 11. *Halpern v. Barran*, 272 A.2d 118 (Del. Ch. 1970). *Halpern* was an adversary Rule 11 challenge concerning the propriety of a stockholder's derivative suit in which the court took the position of *Freeman v. Kirby* concerning the proper administration of the rule. Most of the criticisms of *Freeman* (see text accompanying notes 130-39 *infra*) can be applied to the reasoning of *Halpern* as well. The one extra wrinkle in *Halpern* is that the court claimed to decide that the attorneys involved did not have good ground for the complaint, but specifically found that they had acted honestly

No court faced with a Rule 11 motion has ever simply rejected it as being inappropriate when made prior to a finding of falsity by the regular modes, though some have expressed a certain queasiness at the implications of the procedure.¹²⁶ Even the Supreme Court of the United States was uneasy when faced with an analogous procedure under Rule 23.1, in *Surowitz v. Hilton Hotels Corp.*¹²⁷ Rule 23.1 retained the code type requirement of verification in stockholder derivative suits, ostensibly to prevent strike suits. The district court in *Surowitz* forced the plaintiff, the aged immigrant mother-in-law of a securities lawyer who had advised her in filing the suit, to undergo detailed examination on the intricacies of the securities act complaint filed in her name. No one seemed to be concerned with whether the allegations made were true. The district court found that her knowledge was insufficient to allow her to verify the complaint and dismissed, and the Seventh Circuit affirmed.¹²⁸ The Supreme Court reversed, through Mr. Justice Black. The Court held, on the only issue properly before it, that one could properly verify a pleading based on information and belief obtained from trusted advisors; however, the Court showed great doubt about the procedures followed below:

and in good faith. 272 A.2d at 124 n.4. Even in the face of its finding of honesty, the court struck the complaint without a determination of the falsity of the allegations. The court apparently did not believe that one proper function of a civil action is the use of discovery to investigate reasonable suspicion, or, perhaps, decided that although reasonable men could reach different conclusions, plaintiff's suspicion was not, in fact, reasonable. That Rule 11 should be the vehicle by which such a case is ended seems dubious. Striking the complaint under such circumstances is far afield from the rule's *raison d'être* of ensuring honesty in pleading. The case should have been allowed to go at least to a normal summary judgment.

126. The approach adopted by the court in its almost summary resolutions of the Rule 11 challenges in *United States v. Long*, 10 F.R.D. 443 (D. Neb. 1950), and *United States v. Shuster*, 11 F.R.D. 151 (D. Neb. 1950), appears to have been the product of some uneasiness with the procedure, at least in part. The court in *Papilsky v. Berndt*, 59 F.R.D. 95 (S.D.N.Y. 1974), expressed doubts about the propriety of the procedure, though it allowed discovery and resolved the Rule 11 challenge on the merits.

127. 383 U.S. 363 (1966).

128. 342 F.2d 596 (7th Cir. 1965). The circuit court held that the district court had properly concluded that the complaint was a "sham." 342 F.2d at 607. On the issue of procedure, the court concluded that there was an "inherent power to dismiss this complaint." 342 F.2d at 608. The suggestion in Note, *Verification as a Safeguard Against Abuse of Stockholders' Derivative Suits*, 18 STAN. L. REV. 1221, 1225 (1966), that FED. R. CIV. P. 41 provides a basis for dismissal does not speak to the anomaly of judging honesty before falsity.

We assume it may be possible that there can be circumstances under which a district court could stop all proceedings in a derivative cause of action, relieve the defendants from filing an answer to charges of fraud, and conduct a pre-trial investigation to determine whether the plaintiff had falsely sworn either that the facts alleged in the complaint were true or that he had information which led him to believe they were true. And conceivably such a pre-trial investigation might possibly reveal facts surrounding the verification of the complaint which could justify dismissal of the complaint with prejudice. However, here we need not consider the question of whether, if ever, Federal Rule 3(b) might call for such summary action. Certainly it cannot justify the court's summary dismissal in this case.¹²⁹

"[M]ay be possible"; "conceivably . . . might possibly"["!]; "whether, if ever"—it is difficult to imagine language more qualified by doubt, or with better reason, as an examination of the one successful pure Rule 11 challenge will illustrate.

The facts of the one successful Rule 11 case are somewhat complex. There was once a corporation called Allegheny Corporation, controlled by a man named Kirby.¹³⁰ Some internal hanky-panky occurred and two groups of stockholders sued the officers and directors on behalf of the corporation, one in state court in New York, and one in federal court. Clint Murchison (of fame and fortune) and Kirby were defendants in both actions (along with some others). A settlement of both suits was accomplished in December, 1959. Later investigation by Murchison, however, suggested that Kirby had procured the settlement by making a secret deal, hostile to the interests of Allegheny, with one of the plaintiffs, and Murchison contemplated suing on the corporation's behalf to rescind Kirby's settlement.

During the course of his investigation, Murchison was contacted by Jesse Holland, a lawyer who, although he had no apparent ownership interest in Allegheny, had examined the Kirby settlement, found it fishy, and decided to sue. He had one of his clients, an Allegheny stockholder, procure two other stockholders to act as plaintiffs. When Holland met with Murchison's legal advisor he was shown all the documents and reports developed in the Murchison investigation up to that time. Apparently Murchison wanted to encourage a two front war against the defendants, because he also seems to have agreed to pay Holland's litigation expenses. Holland apparently based the com-

129. 383 U.S. at 371.

130. The narrative that follows was constructed by distilling and combining the information given in *Murchison v. Kirby*, 27 F.R.D. 14 (S.D.N.Y. 1961) and *Freeman v. Kirby*, 27 F.R.D. 395 (S.D.N.Y. 1961).

plaint in his lawsuit (*Freeman v. Kirby*)¹³¹ on the draft complaint prepared by Murchison's lawyers, Townley, Updike, Carter and Rogers, for the Murchison suit (*Murchison v. Kirby*).¹³²

The complaints in both *Freeman* and *Murchison* were filed on the same day. The defendants in both actions were the same, and they moved in each action, *inter alia*, to strike the complaint for violation of Rule 11.¹³³ The *Murchison* motions came on first before Judge Weinfeld. At the argument, the plaintiffs' attorneys assured the court that they had spent a great deal of time investigating the allegations, and the court ruled that no violation had been shown.¹³⁴ The court was obviously sensitive to the need for a finding of falsity in fact, and disturbed by the attempt to inquire into good ground prior to a finding of falsity, taking a finding of falsity to be a *sine qua non* of a successful motion to strike as sham.¹³⁵ The implications of such a holding in light of Rule 56 were not explored.

The *Freeman* motions came on three months later before Judge Bicks. At that Rule 11 hearing, Townley, Updike, Carter and Rogers testified that in their professional opinion the information they had on September 1, 1960 was not sufficient ground to commence the suit, and it was not until at least September 7, after Holland's complaint had been prepared, that they obtained that ground. They did not say what new information had made the difference. Although the basic facts upon which both the *Freeman* and *Murchison* complaints were based were the same, Judge Bicks struck the *Freeman* complaint as lacking good ground.¹³⁶ This action could have been taken only upon a finding of dishonest pleading, since no effort was made to determine the truth of the allegations.

131. 27 F.R.D. 395 (S.D.N.Y. 1961).

132. 27 F.R.D. 14 (S.D.N.Y. 1961).

133. There was a challenge to Murchison's Rule 23 verification which presaged that in *Surowitz* (see text accompanying notes 127-29 *supra*), except that Murchison spoke more English than Mrs. Surowitz. The court denied it, holding that hired investigators may be relied on in a verification. (It should be noted that the court seems to have allowed, or the plaintiffs not to have challenged, discovery for the purposes of attacking the basis of verification.)

134. *Murchison v. Kirby*, 27 F.R.D. 14 (S.D.N.Y. 1961).

135. The court stated: "A pleading should be stricken only when it appears beyond peradventure that it is sham and false and that its allegations are devoid of factual basis; otherwise it would deprive a party of his right to a trial of the issues posed by his complaint—it would mean trial by affidavits." *Id.* at 19.

136. *Freeman v. Kirby*, 27 F.R.D. 395 (S.D.N.Y. 1961).

This case has certainly gone a long way toward making a hash out of the jurisprudence of Rule 11. In it we find inquiry into ground before and regardless of falsity, a very grudging standard of what constitutes good ground, an assumption of the power to strike for Rule 11 violations regardless of falsity, and an exercise of that assumed power. To be fair, there were many reasons to try to eliminate the *Freeman* complaint. The plaintiffs had been solicited, not to vindicate their rights, but to set up multiple litigation for tactical reasons and, perhaps, to multiply recoverable attorney's fees. Not only were the plaintiffs in *Freeman* not paying, but litigation expenses in both cases were ultimately to come from the same source. All these things raise serious ethical questions, and eliminating *Freeman* hurt no one, since the rights of the company derivatively asserted in both suits could be vindicated in *Murchison*. Dismissing the complaint actually did little but deprive Murchison of two days in court. A reading of Judge Bicks' opinion strongly implies that these were the real reasons for striking the complaint, but, obviously, none of these considerations have anything to do with Rule 11. To reach a desired result the case stretched the rule beyond recognition.¹³⁷

What seems improper about Holland's conduct is not that he lacked sufficient knowledge to support the allegations of his complaint, but that his plaintiff was not really interested in pursuing the litigation. If the situation in *Freeman* called for some judicial action, that action should not have been taken under the banner of Rule 11. Rule 11 is not a catchall provision for professional ethics, and, in any event, it appears that pleading was one of the few things that *Freeman's* attorney did properly. There is ample inherent power in the court to deal appropriately with a case like *Freeman v. Kirby* without muddying the jurisprudence of Rule 11.¹³⁸ Indeed, if we accept the position that the "strike as sham" provisions of the rule should not be read to authorize inquiry into the presence of good ground before the normal

137. This seems to have been the main basis for criticizing the case adopted in Recent Decisions, *Federal Procedure*, 47 VA. L. REV. 1434 (1961).

138. Less drastic alternatives appropriate to these circumstances might have been a requirement that Holland withdraw (as he seems to have done by the time the Rule 11 challenge was argued), discipline against Holland, and refusal to award costs or attorney's fees for multiplied proceedings should plaintiffs prevail. Striking the complaint did not have as severe implications in *Freeman* as in the usual case, since, as noted in the text accompanying note 137 *supra*, the corporation's rights could still be fully vindicated in the pending *Murchison* litigation.

inquiry into falsity, these inherent powers become the most logical and most effective means of enforcing the rule, as we will see by examining the approach taken in another case, *Kinee v. Abraham Lincoln Federal Savings and Loan Association*.¹³⁹

V. AN AVAILABLE AND CONSTITUTIONAL
ALTERNATIVE TO STRIKING PLEADINGS
IN THE ENFORCEMENT OF RULE 11

In *Kinee*, a group of mortgage borrowers sued some 177 banks. The plaintiffs had been forced by the terms of their mortgage agreement to put up money to cover potential tax liabilities on the property subject to the mortgage. These monies were held by the mortgagee in non-interest bearing escrow. The main thrust of the complaint was that there had been a conspiracy among mortgage-lending institutions to eliminate interest bearing escrow accounts as a point of competition in violation of the anti-trust laws. Before any significant pretrial actions were taken, the plaintiffs voluntarily dismissed 46 defendants from the action. The remaining defendants moved, among other things, to strike the complaint for violation of Rule 11. In the course of considering this motion the court (Judge Clarence Newcomer) discovered that there had indeed been a Rule 11 violation, but that the remaining defendants had not been affected by it. The court found that the plaintiffs and their attorneys had sufficient ground to plead the alleged conspiracy, but that the attorneys, rather than investigating who the potential members of the conspiracy were—mortgage lenders who did not offer interest bearing tax escrow accounts—had taken the shortcut of suing everyone listed under “mortgages” in the Philadelphia phone book. Then they simply waited for those persons who had nothing to do with the subject matter of the complaint, such as mortgage finding agents, to identify themselves, whereupon the attorneys voluntarily released them from the dragnet and dismissed them from the case. The court recognized that striking the complaint for the violation would not be appropriate. The court also realized, however, that a number of parties had been unfairly subjected to inconvenience and expense because of the violation.¹⁴⁰ The court did the most logical thing. It made the

139. 365 F. Supp. 975 (E.D. Pa. 1973).

140. The essence of the violation was that being listed in the phone book did not indicate membership in the conspiracy—hence the complaint lacked good ground. Note, however, that as a result of bringing the suit, the plaintiffs and their attorneys *did* have good ground to sup-

responsible persons, the plaintiffs' attorneys, personally pay the expenses incurred by the voluntarily-dismissed defendants.

There is much to recommend Judge Newcomer's solution as a general approach for handling Rule 11 violations. It fastens upon the offending attorney the obligation to fully compensate those who have been put out of pocket by his misconduct. At the same time, it creates no windfalls and eliminates the risk of penalizing an innocent client by striking the complaint when the misconduct is solely the attorney's. Further, the penalty or deterrent value of such action is significant, whether taken just after pleadings are filed, or after dismissal, summary judgment, or trial. Therefore, this procedure could be used even though inquiry into the question of pleading honesty is put off, as it should be, until after the normal determination of falsity has been made, or at least until it is certain that a normal determination of truth or falsity will not be made. Finally and perhaps most importantly, this approach ensures that no person will suffer financial loss because of demonstrable attorney misconduct in the courts.

There may be situations in which it is difficult to prove that a Rule 11 violation has put anyone out of pocket. If a single count of a multi-count indictment were the locus of the violation, determining expenses attributable to it might be difficult, and such expenses might be too small to have any deterrent effect. Award of expenses, however, is not the sole potential sanction for a Rule 11 violation. Punitive fine or imprisonment through the contempt power, formal reprimand by the court, or even disbarment might all be available sanctions within the meaning of other "appropriate disciplinary action," although that language in Rule 11 should not be read to authorize imposition of these sanctions without the procedural rights ordinarily accompanying such actions.¹⁴¹

port new or continued allegations that the *remaining* defendants were members of the alleged conspiracy.

141. For a general discussion of the due process requirement of a contempt determination, see N. DORSEN & L. FRIEDMAN, *DISORDER IN THE COURT* 218-39 (1973). See also note 150 *infra*. For a discussion of the limitations on the courts' contempt and disbarment powers in a Rule 11 context, see *In re Los Angeles County Pioneer Soc'y*, 217 F.2d 190 (9th Cir. 1954). Some caution is in order in relying on this opinion, however, as it does not distinguish between the contempt power and other sources of supervisory power over attorneys. See note 153 *infra*. For an example of a formal reprimand, see *AAA v. Rothman*, 101 F. Supp. 193, 104 F. Supp. 655 (E.D.N.Y. 1952).

One might argue that the courts lack authority to make attorneys pay anything for violating Rule 11, or at least lack authority to make them pay expenses above statutory costs (which rarely include attorney's fees), or that, at the *very* least, a jury trial is required.¹⁴² Anglo-American courts, however, have historically been involved in various ways in disciplining members of the legal profession. English judges very early asserted an inherent power to order attorneys or barristers to make compensatory payments to anyone aggrieved by misconduct arising from and affecting the course of a particular case before a court.¹⁴³ These orders were independent of the contempt power, with contempt reserved as a sanction for violating the order,¹⁴⁴ and they were of necessity post-trial.¹⁴⁵

After falsity had been established by trial or otherwise, a number of actions against an offending lawyer were open to the aggrieved party. Obviously he could sue independently for

142. The appellate history of the *Kinee* case offers no help with these questions. The plaintiff's attorneys attempted an appeal on the Rule 11 issues. They correctly viewed the district court's order of fees as final under the authority of *Gamble v. Pope & Talbot, Inc.*, 307 F.2d 729 (3d Cir.), *cert. denied sub nom.* United States Dist. Court v. Mahoney, 371 U.S. 888 (1962), but they captioned the appeal only with the party names, i.e. *Kinee, et al.* The court of appeals dismissed the case in a one line, unreported opinion, on the ground that the named appellants had no standing. No. 74-1458 (3d Cir. July 5, 1974). The attorneys' petition for rehearing en banc or for permission to insert their own names into the caption was denied. No. 74-1458 (3d Cir. Aug. 12, 1974), *cert. denied*, 419 U.S. 999 (1974). Since the time to take an independent appeal in their own names had run, they were denied any review of the substance of the lower court decision. The total costs imposed, incidentally, were in excess of \$15,000.

143. *Hickman v. Clarke*, (Ex. 1615), *reprinted in 2 FOWLERS EXECUTER PRACTICE* 478 (1795), is an early illustration of the power. Defendant's counsel signed a frivolous and scandalous answer (bad on its face, not sham) which was struck out of the file and defaced, and the *counsel* was made to pay plaintiff 20 nobles costs. In *Aubrey v. Aspinall, Jacob* 441, 37 Eng. Rep. 917 (Ch. 1822), the one equity "sham plea" case, the costs were imposed upon the solocitor who filed the plea. In *Vincent v. Groome*, 1 Chitty 182 (K.B. 1819), the attorney was made to pay the costs occasioned by the sham plea. *See also Thomas v. Vandermoolen*, 2 B. & A. 197, 106 Eng. Rep. 339 (K.B. 1818); *Clarke and Another, Executors of Lennard v. Gorman*, 3 Taunt. 492, 128 Eng. Rep. 195 (K.B. 1811); *Rolfe v. Rogers*, 4 Taunt. 191, 128 Eng. Rep. 302 (K.B. 1811).

144. *See generally* A. PULLING, *SUMMARY OF THE LAW AND PRACTICE RELATING TO ATTORNEYS* 44 *et seq.* (3d ed. *supra* 1862), and note 143 *supra*.

145. Indeed, one of the court's laments in the often misconstrued case of *Pierce v. Blake*, 2 Salk. 515, 91 Eng. Rep. 439 (K.B. 1697) (*see note 49 supra*), was that there was nothing it could do to inquire into false pleadings until trial or into lawyer dishonesty until after trial.

deceit.¹⁴⁶ The disadvantages of electing such a course included delay and the technical difficulties of satisfying the burden of persuasion, with the attendant risks of a possibly expensive defeat inherent in any jury trial. If the party wished to avoid a lawsuit he could appeal to the court that originally heard the case in which the misconduct occurred by using what came to be known as a summary application.¹⁴⁷ Alternatively, the party could ask the court to cite the offending lawyer for contempt.¹⁴⁸ A summary application could perhaps ultimately result in a lawyer's being held in contempt, but the basic distinction between the two proceedings and their underlying theoretical sources of power is important.¹⁴⁹

A contempt of court is a misdeed by any person which undermines the legitimacy or effectiveness of the court. A contempt is a crime, and may be *punished* by, *inter alia*, fine or imprisonment. For this reason the Supreme Court has wisely held that the normal procedural safeguards applicable to crimes, including the jury trial guarantee, may apply to serious cases of contempt.¹⁵⁰ The theory underlying orders under a summary application was different and no comparable reasons exist for applying any but minimal due process safeguards. The court was exercising its inherent supervisory power over its own "officers" or over the lawyers who had the special privilege of practicing before it.¹⁵¹ The court felt a special responsibility to ensure that no one was damaged because of the professional misconduct of lawyers, whose close association with the court itself provided opportunities for mischief in their professional capacity. Any

146. See 4 E. COKE, INSTITUTES 102 (1644); PULLING, *supra* note 144, at 419. See also Whitmore v. Mackeson, 16 Beav. 126, 51 Eng. Rep. 725 (Ch. 1852). For a modern analogue, see Berlin v. Nathan, Docket No. 75L-16838, July 1, 1976 (Cook County Court, Ill.) (*reported in* New York Times, July 3, 1976, § 1 at 20, col. 1 (late city ed.)).

147. PULLING, *supra* note 144, at 433.

148. A contempt proceeding was begun by attachment and was in theory purely punitive. See, e.g., Wright v. Mason, 8 Mod. 109, 88 Eng. Rep. 86 (K.B. 1723).

149. The distinction is best illustrated by comparing Wright v. Mason, 8 Mod. 109, 88 Eng. Rep. 86 (K.B. 1723), a pure contempt case, with Gynn v. Kirby, 1 Strange 402, 93 Eng. Rep. 594 (K.B. 1721), where the attorney was ordered to pay costs on summary application, and in default of payment was proceeded against for contempt. See also Cox v. Phillips, Cas. T. Hard. 238, 95 Eng. Rep. 152 (K.B. 1735).

150. See, e.g., Bloom v. Illinois, 391 U.S. 194 (1968) (jury trial); Mayberry v. Pennsylvania, 400 U.S. 455 (1971) (requirement of different judge). See also Vail v. Quinlan, 406 F. Supp. 951 (S.D.N.Y. 1976). See generally DORSEN & FRIEDMAN, *supra* note 141, at 218-39.

151. PULLING, *supra* note 144, at 419 *et seq.*

misfeasance, including dishonest pleading, could be the subject of a summary application ancillary to the proceeding in which the misfeasance took place. The authority under the summary application, however, was not punitive or penal; often the misfeasance complained of might be the result of negligence.¹⁵² The theory was compensatory, though like all compensatory actions it carried with it elements of disapproval and deterrence. A dishonest pleading might be both a contempt and a proper subject for a summary application, but the two were never manifestations of the same theory of power, as some courts have mistakenly concluded.¹⁵³ A proceeding by summary application is better analogized, for due process purposes, to proceedings where money might be lost, that is, to civil proceedings,¹⁵⁴ and it was a proceeding to which no right of jury trial attached at common law.

One can argue that proceedings of the summary application type and effect, like that utilized in *Kinee*, for example, are authorized by the "appropriate disciplinary action" language of Rule 11 itself, although the result of such action is as much compensatory as disciplinary. But even absent this argument, I incline toward the position that, given the historical precedents, the power to utilize such summary proceedings is inherent in the concept of judicial power in Anglo-American legal systems¹⁵⁵ and is possessed by any court of general judicial power,

152. For a negligence-based exercise of the power, see, e.g., *Pitt v. Walden*, 4 Burr. 2061, 98 Eng. Rep. 74 (K.B. 1767). By the 19th century, the courts asserted summary power to enforce lawyers' professional obligations generally. See PULLING, *supra* note 144. The practice does not seem to have been different in Chancery. See *Dungey v. Angove*, 2 Ves. Jun. 307, 30 Eng. Rep. 644 (Ch. 1794); *Gilbert v. Cooper*, 15 Sim. 343, 60 Eng. Rep. 651 (Ch. 1848). *But see* 2 Cox Ca. 283 (1791).

153. The occasional confusion probably stems from the mistaken analysis of *Ex parte Robbins & Jackson*, 63 N.C. 309, 312 (1869), an early and fairly influential American statement on the subject. A similar confusion of the contempt power with the disbarment power (not the summary application power) is shown in *In re Los Angeles County Pioneer Society*, 217 F.2d 190 (9th Cir. 1954), reversing *In re Lavine*, 126 F. Supp. 39 (S.D. Cal. 1954). (The reversal was probably correct on minimal due process grounds either way, however.)

154. In any due process balancing on this subject one should keep in mind the argument that in order to be effective, any mechanism to regulate dishonesty in pleading should be flexible and administered by the judge who also handles the case. See Pogson, *supra* note 4, at 71.

155. The summary application type power has generally been recognized in American courts when the issue has arisen in various contexts, with varying degrees of analytical and historical cogency. See the cases collected at 6 CORPUS JURIS *Attorney & Client* §§ 111, 112 (1916).

at least where the legislature has not specifically withheld the power.¹⁵⁶

American lawyers and American courts have always been less than aggressive in using their powers to fasten liability onto other lawyers. The slightly more aggressive posture of the British courts might be explained by the fact that, almost inevitably, charges of misconduct were leveled against solicitors, since barristers then and now insulated themselves against provable accusations of accessory status in regard to improper litigation decisions by insisting upon having only limited and hypothetical knowledge of the case.¹⁵⁷ Of course, judges were once barristers, not solicitors.

One might argue that *Kinee* violates legislative judgments inherent in the statute now codified as 28 U.S.C. § 1927. This statute states that counsel may be made personally liable for increased "costs" produced by his or her "multiplying . . . proceedings . . . unreasonably and vexatiously . . ."¹⁵⁸ One can assert that Congress intended section 1927 to be the exclusive source of power to fasten a personal obligation to make a money payment upon a lawyer. If this is so, then perhaps there was insufficient factfinding in *Kinee* to proceed under the authorization of section 1927 at all. Even if there were a sufficient implied finding of multiplying the proceedings "unreasonably and vexatiously," it could be further contended that Congress intended to restrict section 1927 awards to statutory costs and not include full expenses such as attorney's fees. The Supreme Court has never interpreted section 1927, though it has existed in substantially the same form for 162 years. There does not seem to be any legislative history on its promulgation. It seems probable that when it was passed, it was intended only as a codification of the common law and a reminder to the judiciary of their

156. It should be noted that an opposite result was reached under Rule 11 language, without extensive analysis, by the Supreme Court of Colorado in 1957. *Nelson v. District Court*, 320 P.2d 959 (Colo. 1957).

157. FREEDMAN, *supra* note 2, at 105-112.

158. 28 U.S.C. § 1927 (1971). The reluctance of American courts and lawyers to impose expenses on an attorney is illustrated by the history of this section. The statute was originally promulgated in 1813, Act of July 22, 1813, ch. 14, § 3, 3 Stat. 21 (1813), but did not figure in the decision of a reported case until over 90 years later, *In re Zier & Co.*, 127 F. 399 (D. Ind. 1904), *aff'd*, 142 F. 102 (7th Cir. 1905). Even in this case, the statute was only peripheral to the court's decision.

inherent power. If that view were accepted, there the matter might rest.¹⁵⁹

Unfortunately, until recently, the dominant interpretation reflected in the few cases decided under the statute was that the word "costs" meant only the scheme of statutorily allowable costs that Congress created in 1853,¹⁶⁰ and could not include compensation for actual expenses, including attorney's fees.¹⁶¹ Since, due to inflation, the costs provided by the statutory schedule had become mere token allowances by the beginning of the 20th century,¹⁶² this view virtually eliminated any usefulness the statutory provision might have had.

The decisions construing section 1927 thus restrictively were clearly influenced by the oft-repeated wisdom that the allowance of costs was unknown at common law, and was of statutory origin;¹⁶³ hence, without an authorizing statute, costs could not

159. *Toledo Metal Wheel Co. v. Foyer Bros. & Co.*, 223 F. 350 (6th Cir. 1915), seems to accept this interpretation in principle.

160. Act of Feb. 26, 1853, ch. 80, 10 Stat. 162 (1853).

161. See *Motion Picture Patents Co. v. Steiner*, 201 F. 63 (2d Cir.), *modifying* 192 F. 134 (S.D.N.Y. 1912); *In re Realty Assoc. Sec. Corp.*, 53 F. Supp. 1013 (E.D.N.Y. 1943); *Bone v. Walsh Constr. Co.*, 235 F. 901 (S.D. Iowa 1916).

162. The following language from *Motion Picture Patents Co. v. Steiner* is instructive:

The question here is not what the law should be, but what it is. Unquestionably, the laws of New York are much more liberal in the matter of costs and allowances than those of the United States, where the costs are hardly more than nominal. In isolated cases the inability of the court to make an adequate allowance may produce hardship. But, on the other hand, the federal system has advantages which are obvious to all who have practices in the courts of the United States.

201 F. 63, 65 (2d Cir. 1912).

163. Goodhart, *Costs*, 38 *YALE L.J.* 849, 851 (1929). For a summary of the history, see *id.* at 852-54. Despite the supposed "statutory" origin of costs, much of the law of costs was in fact judge-made; the whole complex English law up until 1875 grew by decision or court rule from a few statutes. Compare for example the Statute of Gloucester, 6 Edw. 1, c. 1 (1278), for centuries the basis of awarding costs to plaintiffs, with what Lord Coke purported to extract from it at 2 *E. COKE, INSTITUTES* 283 (1644).

In England, the Courts of Equity assumed a power to award and mold costs independent of statute. *Jones v. Coxater*, 2 *Atk.* 400, 26 *Eng. Rep.* 642 (Ch. 1742); *Corp. of Burford v. Lenthall*, 2 *Atk.* 551, 26 *Eng. Rep.* 731 (Ch. 1743); Goodhart, *supra* at 854. American courts have perhaps rightly not been too aggressive in exercising the equitable power in the face of an apparently general statute, though the power has generally been recognized. See *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 257-59 (1975), and the cases there cited. It is of great importance that the Court in *Alyeska Pipeline* specifically avoided justifying all past judicial exceptions to the statutory cost scheme by

be awarded in any case. However, even accepting this historical proposition at face value, it is not necessary to restrict section 1927 to the 1853 schedule of costs. The main rationale for doing so is the language of the 1853 statute, which provided "that in lieu of the compensation now allowed by law to attorneys, solicitors, and proctors in the United States courts . . . the following and no other compensation shall be . . . allowed,"¹⁶⁴ and then went on to list specific allowable items. Until 1853, the federal courts followed state practice in awarding attorney's fees as costs.¹⁶⁵ During this period a number of American states followed what is now known as the "English" rule rather than the "American" rule,¹⁶⁶ so that full attorney's fees were recoverable, either by court order or under a statutory schedule of allowances that reasonably approximated actual fees.¹⁶⁷ It is in this context that what is now section 1927 was originally enacted in

tortured reference to equitable powers, and refrained from restricting the power to equitable proceedings: "These exceptions are unquestionably assertions of inherent power in the courts to allow attorney's fees in particular situations, unless forbidden by Congress . . ." *Id.* at 259. If exceptions are to be fashioned by judicial action they should depend on policy, not historical accident. *But see* the dissent of Mr. Justice Marshall, in which the term "equitable" is used so broadly as to erase any historical distinctions. *Id.* at 272-88.

164. Act of Feb. 26, 1853, ch. 80, 10 Stat. 161 (1853) (substantially still in effect as 28 U.S.C. § 1920). The Supreme Court has held that the omission of the clause "and no other compensation shall be allowed" in the 1948 re-codification was not intended to work a substantive change. *Alyeska Pipeline Service Co. v. Wilderness Soc'y*, 421 U.S. 240, 255 n.29 (1975).

165. *Alyeska Pipeline Service Co. v. Wilderness Soc'y*, 421 U.S. 240, 247-48 (1975).

166. The "English Rule"- "American Rule" classification is in common usage. *See id.* at 247. The so-called "English Rule" regarding costs is that a winning party is entitled to compensation as a matter of course for litigation expenses which would still be in his pocket but for the actions of the loser (now known to have been unjustified) in prosecuting or resisting the lawsuit. The American approach of disallowing recovery of attorney's fees by a prevailing party in the absence of statutory authorization assumes that the controversy was (as many are) a good faith controversy in which reasonable people could have disagreed. It recognizes that the courts are there for the resolution of such controversies, and that the expenses of such litigation are merely a hazard of life which cannot justly be imposed entirely on either of the two (presumably) reasonably disagreeing parties to the lawsuit. One can debate the relative merits of each approach at great length on many fronts, as, for instance, which approach stimulates more shady litigation, discourages more just litigation, or is inherently fairer. *See* Goodhart, *supra* note 163, at 874-78, and the authorities collected in *Alyeska Pipeline Service Co. v. Wilderness Soc'y*, 421 U.S. 240, 270-71 n.45 (1975). *See also* Fleischman Distilling Corp. v. Maier Brewing, 386 U.S. 714, 766 (1966).

167. Goodhart, *supra* note 163, at 873-74.

1813. The lack of uniformity in measuring awardable attorney's fees among the states, and the size of the awards given in some states as a matter of course to the victorious party, later prompted Congress to pass the 1853 law.¹⁶⁸ But the language of that statute as originally enacted seems exclusively directed at costs awardable as a matter of course, that is, those that flow from the simple fact of victory. This is clear from the mandatory language of the statute that such costs "shall be allowed."¹⁶⁹ It is far from clear that this section was intended to affect at all the situation covered by section 1927. It is certainly a tenable interpretation that, whatever its position on the propriety of attorney fee awards as a matter of course,¹⁷⁰ Congress intended extraordinary awards under section 1927 to be treated differently and to be fully compensable.

Further, the Supreme Court of the United States, in several recent cases seems to have accepted the legitimacy of at least a narrow judicial power to fashion exceptions to the "American" rule.¹⁷¹ In both *F.D. Rich v. Industrial Lumber Co.*¹⁷² and *Alyeska Pipeline Service Co. v. Wilderness Society*,¹⁷³ the Court recognized a "bad faith" exception as a general proposition. The Court stated in *Rich*:

The American Rule has not served, however, as an absolute bar to the shifting of attorneys' fees even in the absence of

168. See remarks of Senator Bradbury, 27 Cong. Globe App., 32d Congress, 2d Sess., 207 (Feb. 12, 1853), reprinted in *Alyeska Pipeline Service Co. v. Wilderness Soc'y*, 421 U.S. 240, 251 (1975).

169. Act of Feb. 26, 1853, ch. 80, 10 Stat. 162 (1853).

170. The fee schedules provided in 1853 may not have been handsome, but at least in 1853 dollars they were not comical. The attorneys' docket fee of twenty dollars would be equivalent to about four hundred 1974 dollars. Moreover, the more involved, and hence more expensive, types of federal litigation such as antitrust, securities, and civil rights actions, had not then been created.

171. *Alyeska Pipeline Service Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975); *F.D. Rich Co. v. Industrial Lumber Co.*, 417 U.S. 116 (1974); *Fleischman Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1966). In *Fleischman* the Court spoke of sanctioning such exceptions "when overriding considerations of justice seemed to compel such a result." 386 U.S. at 718.

172. 417 U.S. 116, 129 (1973). This decision was the first general formulation of a "bad faith" exception by the Supreme Court.

173. 421 U.S. 240, 258-59 (1975), adopting and reinforcing the language of *F.D. Rich Co. v. Industrial Lumber Co.*, 417 U.S. 116 (1973). The majority accepts judicial power to fashion exceptions as a general proposition, but rejects its exercise on the rationale proffered in the case then before it. See note 161 *supra*. The reinforced acceptance of the general "bad faith" exception to the usual rule of costs is as potentially important a part of *Alyeska Pipeline* as its rejection of the proffered "private attorney general" exception.

statute or contract. . . . We have long recognized that attorney's fees may be awarded to a successful party when his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. . . .¹⁷⁴

This would seem to suggest that section 1927 itself should be interpreted to authorize awards of attorneys' fees, for what could better qualify as "bad faith" than vexatiously multiplying proceedings?

Finally the whole idea that section 1927 should even be affected by rules of construction and restricted judicial power springing from the general history of party and party costs is questionable. One should not confuse the law of costs between party and party with the law of "costs" chargeable to an attorney for malfeasance before the court. The latter law is not even arguably of statutory origin, and should not be governed by rules of statutory qualification concerning the former. This is not to say that the legislature might not affirmatively regulate and structure the court's inherent common law power to fasten compensatory costs upon erring attorneys. It is merely to say that section 1927 was not intended to do so.¹⁷⁵

In summary, to hold that the Court in *Kinee* was correct does not collide with section 1927, and is more in harmony with the Supreme Court's recognition of a "bad faith" exception to the law of costs between party and party than any contrary position would be. It affirms a general proposition that when any person under the authority of the court takes a position dishonestly or frivolously and expenses arise from that action, that person should pay full compensation.

This, moreover, is basically the position adopted in several other federal rules: FED. R. CIV. P. 56(g), relating to costs resulting from bad faith affidavits in connection with summary judgment; FED. R. CIV. P. 37(a)(4), relating to costs resulting from failure to make discovery; FED. R. CIV. P. 37(c), relating to the costs of failure to admit; and FED. R. CIV. P. 37(d), relating *inter alia* to costs of failure to attend one's own deposition. It should

174. 417 U.S. at 129 (footnote omitted).

175. It must have been these or similar considerations which led the Seventh Circuit in 1968 to authorize an award of attorney's fees under section 1927. *Kiefel v. Las Vegas Hacienda, Inc.*, 404 F.2d 1163, 1171 (7th Cir. 1968), *cert. denied*, 395 U.S. 908 (1969). It is a little difficult to tell exactly what the court considered, however, since it neither cited cases contra nor discussed the point. A later award of \$4000 attorney's fees was entered by the district court and upheld by the court of appeals in unreported opinions, *cert. denied*, 402 U.S. 930 (1971). See Annot., 12 A.L.R. FED. 910 (1972).

be noted that under both FED. R. CIV. P. 37(b)(4) and 37(d) an attorney can be made personally liable for such costs, including attorney's fees, in order to fully compensate the party aggrieved by the failure. Apropos of this, I find it difficult to believe that less could be intended by way of awards of attorney's fees in compensation for expenses incurred under Rule 11 than under Rule 37(c).

So, in favor of Judge Newcomer's action in the *Kinee* case, we have the historical power of the courts over attorneys practicing before them to ensure that no one is damaged by the attorney's misconduct; the language of Rule 11 allowing "other disciplinary action;" the examples found in Rules 56 and 37; and the now firmly recognized bad faith exception to the American rule of costs. Against the Newcomer approach we have the usual interpretation of 28 U.S.C. § 1927; the argument that this section represents the entire power of a federal court to order compensation for a Rule 11 violation (an *inclusio unius* argument); and the fact that Rule 11 fails to mention attorney fee awards, while Rule 37 shows that the draftsmen were aware of them and of the possibility of fastening them upon attorneys. There can perhaps be no absolute demonstration of the inevitable correctness of one position or the other in the face of the ambiguities of Rule 11 in its present form, but the strongest argument that Judge Newcomer's action is the proper action under Rule 11 is that it was reasonable, fair, and just and promoted the ends of the Rule more than any other which comes to mind. And, at least in close cases, those considerations should settle a controversy.

VI. GOOD GROUND

Our final and perhaps most important question is: How is one to judge the presence of a violation of Rule 11? What constitutes "good ground"?¹⁷⁶

176. Since there are a number of references to the Code of Professional Responsibility [hereinafter cited as CPR] in this section, an explanation of its scheme might be helpful. There are nine canons, which are basically broad statements akin to topic headings which the Preamble to the CPR calls "axiomatic norms." Each canon is followed by a section of Ethical Considerations [hereinafter cited as EC], and Disciplinary Rules [hereinafter cited as DR] both of which are footnoted. The Ethical Considerations raise possible ethical dilemmas under the canon, and give guides for conduct. The Disciplinary Rules are "mandatory," that is, they state the binding precepts of the Code. The Ethical Considerations are supposed to be "aspirational," but they may often be read as less demanding than the Disciplinary Rules. See note 185 *infra*, comparing the tone of EC 7-3 and EC 7-4 taken together with DR 7-102 (A)(2).

An exploration of the concept of "good ground" raises a number of closely related questions. What must be known in order to have good ground to allege or deny a proposition of fact? What should be done if an allegation or denial has been made upon good ground, but subsequently obtained knowledge destroys that ground? Must one have good ground for legal as well as factual propositions, and what might the term mean in that context? Is a certification that there is good ground for a complaint improper when there is clear knowledge of the existence of a good defense? All of these questions will be discussed below.

The heart of the good ground question is the application of the concept to factual allegations or denials. Under the federal system the theoretical strength of the circumstantial nexus that is required to justify an allegation is the same for both affirmative propositions and denials.¹⁷⁷ We can gain some insight on judging what strength of inference is necessary by exploring some hypothetical situations. The ones that follow all utilize affirmative allegations as examples for the sake of convenience in comparison, but what is said may be applied *mutatis mutandis* to denials as well.

Suppose that a client comes to his attorney and says: "I've just been assaulted. John Jones, a friend of mine, did it in a fit of anger. However, he's judgment proof, but I think we can sue Lou Jones, his rich twin brother, and win." Clearly if the attorney files a complaint alleging that rich Lou assaulted his client, the attorney violates Rule 11. This would be a knowingly fraudulent pleading, and such a pleading must inevitably be said to lack "good ground."¹⁷⁸

177. See note 183 *infra*.

178. Old Canon 15 (ABA Canon of Professional Ethics No. 15 (1908)) (original version of ABA Canons) forbade "any manner of fraud or chicanery" which, whatever else that may mean, would apply here. Old Canon 30 stated: "The lawyer must decline to conduct a civil cause or to make a defense when convinced that it is intended merely to harass or to injure the opposite party, or to work oppression or wrong . . ." Whatever else this means it should apply here.

Under CPR canon 7, DR 7-102(A) (1) states:
Representing a Client Within the Bounds of the Law.

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

(1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

This rule would undoubtedly apply here. Note that DR 7-102(A) (1) adopts a form of objective rather than purely subjective standard of

Now suppose that instead of the story above, the client tells his attorney this account: "I've just been assaulted. I don't know who did it, but on a hunch, I've picked Sam Smith out of the city phone book as the culprit." It is certain that an attorney filing a complaint against Smith for assault under these circumstances has violated Rule 11. Yet he has no affirmative knowledge that Smith was *not* the culprit. It is apparent that the bare ability to claim that there is no positive evidence that an allegation is untrue is not enough to furnish "good ground."¹⁷⁹

Affirmative and suggestive circumstances are apparently required to satisfy Rule 11, but the big question is, how suggestive must the circumstances be? Let us carry our previous hypothetical one step further. Suppose the client says to his attorney: "Last night I was beat up. I don't know who did it for sure, but I think it was Charley Summers. He has threatened to beat me up because he thinks I cheated him when we were partners." This, without more, or the possibility to obtain more, would probably be a sufficiently suggestive circumstantial situation to justify an allegation of assault by Summers under Rule 11. The exact judgment concerning the sufficiency of the inference is one that cannot be quantified, and we must inevitably fall back on the good faith of attorneys in making close judgments. Certain helpful observations can be made, however.

First, the circumstantial nexus between what is known here and the allegation to be made is clearly closer than it was in the phone book case above.¹⁸⁰ In some cases, the nexus might be so remote as to virtually preclude good faith allegation. Second, it is probably accurate to say that Rule 11 imposes upon an attorney some duty of affirmative investigation.¹⁸¹ What

judgment ("or when it is obvious"). See text accompanying notes 190-93 *infra* for a discussion of the subjective standards of Rule 11.

179. *Kinee* seems to be a case of this kind. The court in *Freeman v. Kirby*, 27 F.R.D. 395 (S.D.N.Y. 1961), properly rejected an attempt to limit Rule 11 only to pleadings affirmatively known to be false. *Id.* at 397.

180. See notes 139-40 *supra* and accompanying text.

181. Such a duty of investigation has been recognized by a number of courts. See *Bertucelli v. Carreras*, 467 F.2d 214 (9th Cir. 1972); *Kaehni v. Diffraction Co.*, 342 F. Supp. 523 (D. Md. 1972), *aff'd mem.* 473 F.2d 908 (4th Cir.), *cert. denied*, 414 U.S. 854 (1973); *Gulf Oil Corp. v. Bill's Farm Center*, 52 F.R.D. 114 (W.D. Mo. 1970). See also *Reed v. Turner*, 2 F.R.D. 12 (E.D. Pa. 1941); *Ice Plant Equipment Co. v. Martocello*, 43 F. Supp. 281 (E.D. Pa. 1941); *Nieman v. Bethlehem Nat'l Bank*, 32 F. Supp. 436 (E.D. Pa. 1940), *aff'd*, 113 F.2d 717 (3d Cir. 1940); *Nieman*

is required by that duty in a particular case is difficult to define with confident generality. At the very least, it is the detailed probing of one's own client which a competent attorney will do anyway for other, more practical, reasons. Thus in the case of the disgruntled partner just discussed, the attorney would be bound to elicit all the facts surrounding the alleged threats, the assault, and the past relationship of the client and Summers, the better to judge the reasonableness of the allegation that Summers assaulted the client. But the duty to investigate may go further in a particular case. This will depend on a number of factors. How easy would further relevant investigation be? How expensive would it be compared to the size of the litigation? What type of case is involved? Is it one likely to injure the reputation of the defendant by merely being brought, or is it more innocuous? How will the allegation affect the party opponent? How much expense will he incur in defending? What functions do the pleadings serve in a particular system?¹⁸²

The relevance of each of these factors is more or less obvious, but a word of caution is in order. They go only to judging the duty to investigate, and some are more important than others. If, under the circumstances, it is apparent that investigation would be fruitless or outrageously expensive or both, the other factors are irrelevant, and the only consideration is the existence of the proper suggestive circumstantial nexus without more. Attorneys must still represent clients, and a client should not be made to forego an inferably appropriate claim (or defense) where further investigation appears impractical, even if the consequences of the suit are onerous for the other party. A pleading

v. Long, 31 F. Supp. 30 (E.D. Pa. 1939) (a series of cases in which Judge Kirkpatrick, without mentioning Rule 11, excoriated the use of the general denial in federal practice and spoke of a duty of investigation). Compare the "reasonable inquiry" requirement of FED. R. CIV. P. 36(a) regarding responses to requests for admission. See generally M. ORKIN, *LEGAL ETHICS: A STUDY OF PROFESSIONAL CONDUCT* 80-81 (1957).

182. It is of course clear that a party may have good ground for the allegation of each of two inconsistent theories of a claim—usually when the party has no first hand knowledge of what actually happened, and each theory is consistent with what is known. In such a case it is proper to plead both theories. *City of Kingsport v. Steel & Roof Structure, Inc.*, 500 F.2d 617 (6th Cir. 1974). See also *Peter Kiewit & Sons Co. v. Summit Constr. Co.*, 442 F.2d 242 (8th Cir. 1969); *Carroll v. Morrison Hotel*, 149 F.2d 404 (6th Cir. 1945). This result is virtually dictated by the authorizations of FED. R. CIV. P. 8(a) for demands for relief in the alternative, FED. R. CIV. P. 18(a) for joinder of claims in the alternative, and FED. R. CIV. P. 19(a) for joinder of parties solely on alternative theories.

rule should not require an attorney to allege only sure winners for which overwhelming admissible evidence is in hand. One proper function of a legal system that undertakes the redress of private grievances is providing a mechanism of investigation where there is a reasonable suspicion of legal wrong, thereby ensuring that the wolves may not too easily hide among the sheep. A judge must be extremely cautious in deciding that what he personally believes to be a weak circumstantial nexus to support an allegation or denial is actually so weak that it violates Rule 11. All of the assumptions behind the reforms of the Federal Rules of Civil Procedure indicate a general weakening of the circumstantial nexus which the system demands to support the assertion of any affirmative proposition.¹⁸³

Under earlier systems perhaps a party was expected to make only allegations that he knew or believed he could probably support with admissible evidence at trial. This made it easy for wolves to hide among the sheep, for these systems so valued not bothering the sheep with the inconvenience of a potential "fishing expedition" that a wily wolf could remain quite comfortably concealed. The great expansion of the discovery process in the Federal Rules, coupled with the switch to broad notice pleading, indicates a subtle but important change. The federal civil action today serves two proper and important functions. One is its traditional function of giving a remedy to those who know they have been injured in violation of the law. The other is to provide a means by which those who reasonably think they have been so injured, but are not sure, may find out, when other sources of investigation are impracticable. Too grudging a definition of the circumstantial nexus that constitutes good ground

183. Note that the circumstantial nexus standard required for a denial has been raised by the application of Rule 11 in some places. See Pogson, *supra* note 4. This is not due to any difference between the nexus required for affirmative allegations and denials under the federal system. It is because there used to be a lower standard for denials in those jurisdictions under the civil analogue to the privilege against self-incrimination which has been rejected by the federal rules. See note 4 *supra*. So now throughout the federal system the circumstantial standard necessary to justify all allegations is a uniform one, that of "good ground".

Indeed, it is likely that the most common Rule 11 violation is the dishonest denial. This is partly because a civil analogue to the fifth amendment seems to be still widely assumed in practice, and partly because it takes a more abandoned heart to go to the trouble of filing a false claim, with all that that entails, than merely to be dishonest in denial when the alternative is immediate defeat by judgment on the pleadings.

could discourage attorneys and choke off the latter function, which is increasingly important in a world where technology allows actionable conduct to be secretly undertaken and easily concealed.

Now we must consider whether it is possible to violate Rule 11 by taking a *legal* position which is so bizarre or wrong that there can be said to be no good ground to support it. This raises questions of frivolity rather than sham. At first glance we would probably be inclined to say yes, such a violation is possible. If an attorney signs a complaint claiming damages because the defendant unjustly thought evil thoughts about the plaintiff, there would seem to be little behind such an action except harassment. But we must be extremely cautious. 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 theoretically tenable (though not the law), then accepted as the law. As a recent example we have the proposition that mutuality of estoppel is not or should not be a *sine qua non* for the application of collateral estoppel.¹⁸⁴ We must be very cautious not to discourage attorneys from advancing such concepts or to penalize them for doing so. How might the law have developed if, prior to 1954, an attorney might have been sanctioned for asserting, contrary to settled Supreme Court case law, that separate but equal was not equal? In a subjective sense, an unusual or unprecedented legal position may be justified if the attorney believes that it *should* be the law. That would lead, however, to justification of one of the most questionable practices relating to "good ground"—continuously raising legal issues in a series of cases even though the issues have been clearly and dispositively decided against the asserted position by a recent decision of the Supreme Court. Furthermore, we would not want to make an attorney's belief in the propriety of a position a *requirement* of good ground (though it might be one *basis* for good ground) because attorneys are supposed to advance proper legal positions for their clients whether they personally believe in the position or not. One might say that good ground is lacking where the legal rule put forth is so weak that any lawyer would know that the probability of its acceptance was virtually zero, and where, in addition, the signing attorney did not himself affirmatively

184. See *Therfield v. Postman's Fifth Ave. Corp.*, 37 F. Supp. 958 (S.D.N.Y. 1941).

believe that the proposition should be law.¹⁸⁵ But even this narrow course could raise serious questions. In spite of the fact that there are a few cases which can only be rationalized on such a ground,¹⁸⁶ a court should be very cautious before it ever finds a Rule 11 violation based on the improper espousal of a legal position.

A few concluding points: first, Rule 11 should probably be construed to impose upon the signing attorney a duty of continuing certification of good ground for the allegations contained therein. Suppose an attorney has good ground to deny the existence of any contract between a deceased party whose estate he represents and the plaintiff. Before trial, the situation develops to a point where the original denial would have been a violation if the attorney had then known what he knows now. Under such a construction, if he does not take steps to amend the original answer, he violates Rule 11. I think this reading of the duty imposed by the Rule is the one most in line with the Rule's pur-

185. CPR EC 7-4 skirts the issue with the following language:

The advocate may urge any permissible construction of the law favorable to his client, without regard to his professional opinion as to the likelihood that the construction will ultimately prevail. His conduct is within the bounds of the law, and therefore permissible, if the position taken is supported by the law or is supportable by a good faith argument for an extension, modification, or reversal of the law. However, a lawyer is not justified in asserting a position in litigation that is frivolous.

Just how one is to tell the difference between a "good faith argument for an extension, modification, or reversal of the law" and a "frivolous position" is not clear. We are told in CPR EC 7-3 that "[w]hile serving as an advocate, a lawyer should resolve in favor of his client doubts as to the bounds of the law." CPR DR 7-102(A) (2) then goes on to forbid "knowingly [advancing] a claim or defense that is unwarranted under existing law, except that . . . [a lawyer] may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law." This seems more demanding in emphasis than the Ethical Consideration quoted. It also seems more to restate the problem than to create a rule to help resolve it. Perhaps clearly restating the problem is the best we can currently do. It may be more practical in some areas to strive to alert the bar to the existence of a dilemma than to attempt to enforce or even arrive at a particular resolution of it. There are probably those who would hold that Rule 11 itself is best treated in this way.

186. See *Heart Disease Research Foundation v. General Motors Corp.*, 15 FED. R. SERV. 2d 11.41 (S.D.N.Y.), *aff'd on other grounds*, 463 F.2d 98 (2d Cir. 1972). See also *Denis v. Perfect Parts Inc.*, 142 F. Supp. 263 (D. Mass. 1956), which does not deal directly with a violation of Rule 11, but rather with the analogous attorney good faith requirement relating to an affidavit of bias under the recusement statute, 28 U.S.C. 144 (1971). Cf. *Kaehni v. Diffraction Co.*, 342 F. Supp. 523 (D. Md. 1972), *aff'd*, 473 F.2d 908 (4th Cir.), *cert. denied*, 414 U.S. 854 (1973).

pose. If the Rule is designed to obtain a lawyer's certification that there are proper issues on which to spend the court's and the opposing party's time, then only a continuing certification requirement fully promotes the purpose of the Rule.¹⁸⁷

Second, I earlier took the position that an attorney could properly rely upon the rules regarding the burden of pleading.¹⁸⁸ What this means, in its broadest implications, is that filing an affirmative pleading, even with absolute knowledge of the existence of a good defense, is not a violation of Rule 11. It is for the other side to elect to utilize the defense or not. However, one can make a strong argument that there should be a distinction between defenses which involve germane issues central to the existence of the primary right sued upon, and those which may defeat such a primary right for extrinsic policy reasons unrelated to the intrinsic characteristics of the basic right. Limitations and infancy belong to the latter group, and the existence of fraud, occurrence of conditions subsequent, and others, to the former. If such a distinction is accepted, then one could rely on the assignment of the burden of pleading in regard to "extrinsic" defenses, but if there were sure knowledge of the existence of fraud or other "intrinsic" defenses, there would not be good ground for a claim, even when there was no actual untruth in the pleading itself. The difficulty with taking such a position is the inevitable wrangling that would result over which defense was "intrinsic" and which "extrinsic," but its virtue is that it recognizes that there is something ethically questionable about bringing a claim knowing that the primary right of recovery is simply non-existent.¹⁸⁹

Third, it should be noted that the standards of Rule 11 are subjective standards, that is, that violation is dependent upon what the attorney knew and believed at the relevant time. Thus, as presently drawn, an attorney merely certifies "to the best of his knowledge, information and belief," and a violation must be

187. The Rule was so construed in *AAA v. Rothman*, 101 F. Supp. 193 (E.D.N.Y. 1951). The problem with such a construction is that the language of the Rule makes it sound as if the certification is limited to the point of signature of the pleading. Any revision of Rule 11 should include a duty of continuing certification, along the lines of Fed. R. Civ. P. 26(e) (2)'s provisions for required updating of certain responses to discovery.

188. See text accompanying note 6 *supra*.

189. Something of this sort seems to underlie the opinion in *In re Lavine*, 126 F. Supp. 39 (S.D. Cal. 1954), *rev'd on other grounds sub nom. In re Los Angeles Co. Pioneer Assocs.*, 217 F.2d 190 (9th Cir. 1954).

"with intent to defeat the purposes of the rule" or "wilful" before any of the enforcement provisions can come into play. Subjective standards for ethical guidance or discipline have recently come under heavy attack¹⁹⁰ as unenforceable, since attorneys can always avoid them by saying they did not really know for sure that something was wrong.¹⁹¹ 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. If there were, the requirement of scienter would render convictions in criminal cases impossible.¹⁹² The problem arises when the finder of fact is not willing to indulge in the normal process of circumstantial inference concerning the intentional or wilful nature of an act because he empathizes too closely with the attorney who is the subject of the inquiry. Intellectually honest examination of evidence proffered in particular cases can result in the effective enforcement of even subjective standards of ethics. This is not to say that if the Rule were redrafted, the standard might not be better if made objective.¹⁹³ However, this would sometimes take us from the realm of ethical consideration to the realm of negligence. Negligent behavior may sometimes smack of unethical behavior, especially when the negligence is the product of the more or less wilful creation or tolerance of sloppy work habits breeding negligent mistakes, none of which may individually be wilful. But

190. See FREEDMAN, *supra* note 2, at ch. 5.

191. FREEDMAN, *supra* note 2, at 56.

192. Although Dean Freedman criticizes subjective standards, in fairness to him, he does realize that subjective standards of knowledge work in the criminal area; he is skeptical of their potential effectiveness when applied to lawyers by lawyers. See FREEDMAN, *supra* note 2, at ch. 5.

193. The problem with subjective standards is enforceability. The problem with objective standards is that they inevitably cover some people whose actions were only the result of negligence. However, 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. As we have seen, some courts have already imposed such a duty of investigation. See note 181 *supra*. Of course, knowing dereliction of the duty is unethical, but many derelictions are probably negligent. An objective standard would clearly cover such situations, and would encourage the courts to enforce the provision more vigorously, since finding a violation would not carry the inevitable implication of affirmative sin. See text accompanying note 88 *supra*.

When all is said and done, it may be that Rule 11's most important function is not as a definable and enforceable set of standards, but as an exhortation to lawyers to examine themselves and their cases forthrightly and in good conscience.

some negligent mistakes have no ethical dimension at all. At any rate, the current standards are subjective, and should be reasonably workable if properly approached by the courts.

VII. CONCLUSION

Rule 11 seeks to obtain honesty in pleadings and other papers by requiring the signature of an attorney, and by requiring that there be good ground to support the document signed. Good ground cannot exist as to any alleged proposition known to be false, including a denial; further, an attorney must engage in reasonable investigation to determine the probability of any proposition he proposes to allege in a pleading or other document. In the common class of cases, where after investigation the attorney is neither sure that a proposition is true nor that it is false, the Rule demands at least a suggestive circumstantial nexus which would justify concluding that the truth of the proposition is likely enough to warrant resort to the discovery mechanism of the civil action to investigate it or to a jury to decide it. This standard is necessarily rather low so as not to discourage attorneys from zealous representation, or choke off resolution of the controversies that surround suspicious activity. The language of the Rule makes the standard a subjective one, but this should not pose many problems in good faith enforcement efforts, for the legal process daily resolves such subjective issues, including issues of intent in criminal cases, on the basis of which persons are daily sent to prison. Furthermore, the signature should be taken as continuing certification of good ground, so that if the attorney uncovers circumstances which, had he known them before, would have rendered the original signature improper, he is under an obligation to come forward and amend the document so that it conforms to his current knowledge. It may be possible to violate Rule 11 by adopting a frivolous legal position in a document, but again, a court must be extremely cautious in finding such a violation, so as not to discourage attorneys from advocating positions which, though today perceived as absurd, may become tomorrow's law.

As for the Rule itself, it is a piece of unfortunate draftsmanship. The reference to the power to "strike" a pleading for a Rule 11 violation is inappropriate and of questionable constitutionality, has no historical precedent, and should never be invoked. All fact issues raised by pleadings or other papers should be resolved by the usual litigation processes before ques-

tions of honesty are addressed, and no investigation or discovery directed only toward honesty should be allowed until such issues have been resolved, by trial or otherwise, in the moving party's favor. The only exception to this stricture would be dismissals, which would eliminate the possibility of a truth or falsity determination in the normal course. In such a case the court might inquire into honesty and falsity simultaneously, but no court should ever attempt to determine honesty of allegations independent of their truth or falsity. The normal response of a court finding a Rule 11 violation should be to impose upon the offending attorney personally the expenses which have resulted from the violation, including attorney's fees and other litigation expenses. Further sanctions, such as disbarment or contempt proceedings, might be called for in particular cases. Although the Rule as currently drafted can be interpreted and administered as just outlined, and the drafters very likely intended something along these lines, the Rule should probably be revised to eliminate the potential for confusion and mischief which is currently inherent in the language of the Rule.