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# PROPOSED AMENDMENTS TO FEDERAL RULE OF CIVIL PROCEDURE 11: NEW, BUT NOT NECESSARILY IMPROVED

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# PROPOSED AMENDMENTS TO FEDERAL RULE OF CIVIL PROCEDURE 11: NEW, BUT NOT NECESSARILY IMPROVED

KIMBERLY A. STOTT

## I. INTRODUCTION

LESS than a decade after Rule 11 of the Federal Rules of Civil Procedure was amended[1] to give it "teeth,"[2] changes have been

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1. Federal Rule of Civil Procedure 11 was amended in 1983 to read:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

FED. R. CIV. P. 11.

The 1983 amendments replaced the original Rule 11, which was adopted in 1937:

> 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 attor-

proposed to lessen the rule's sting.[3] Rule 11 is designed to keep law-

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> ney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

Fed. R. Civ. P. 11, 308 U.S. 676 (1939).

2. The "teeth" of Rule 11, as amended in 1983, "is the possible award of attorney's fees to a party that is the victim of a violation by his opponent." Steven E. Reichert, Note, *Rule 11: A Matter of Individual Responsibility: A Case Analysis of* Pavelic & LeFlore v. Marvel Entertainment Group, 110 S. Ct. 456 (1989), 13 HAMLINE L. REV. 373, 388 (1990). The United States Supreme Court has noted that the 1983 amendments *deliberately* expanded Rule 11's coverage. Business Guides, Inc. v. Chromatic Communications Enters., 111 S. Ct. 922, 931 (1991). The Advisory Committee Notes following the text of Rule 11 point out that "[e]xperience shows that in practice Rule 11 has not been effective in deterring abuses." FED. R. CIV. P. 11 advisory committee's note. The Advisory Committee said it hoped the new rule would "reduce the reluctance of courts to impose sanctions." *Id.* The Committee cautioned that the courts must limit the scope of sanctions proceedings to ensure that those proceedings do not become "satellite litigation." *Id.* Satellite litigation, if unchecked, could offset any efficiencies achieved by placing controls on the pleadings process.

3. In 1991 the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States proposed amendments to Rule 11 that would maintain the spirit of the 1983 amendments, but would address these problems:

> (1) Rule 11 impacts plaintiffs to a greater extent than defendants;
> (2) The fear of Rule 11 sanctions can deter parties from asserting novel legal claims;
> (3) Cost-shifting, not nonmonetary sanctions, have become the norm;
> (4) Rule 11 may provide a disincentive for lawyers to abandon positions after determining they cannot be supported by fact or law;
> (5) The rule has created conflicts between attorneys and clients; and
> (6) Dealing with Rule 11 motions has become time-consuming.

Attachment to Letter from Sam C. Pointer, Jr., Chair, Advisory Committee on Civil Rules, to Robert E. Keeton, Chair, Standing Committee on Rules of Practice and Procedure (June 13, 1991) (on file with author).

The proposals to amend Rule 11 were the subject of much debate and discussion. *See infra* text accompanying note 120.

The preliminary draft of Rule 11 amendments was issued in August 1991. It read:

> RULE 11. SIGNING OF PLEADINGS, MOTIONS, AND OTHER PAPERS; REPRESENTATIONS TO COURT; SANCTIONS.
>
> (a) SIGNATURE. Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. It shall state such person's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.
>
> (b) REPRESENTATIONS TO COURT. By presenting or maintaining a claim, defense, request, demand, objection, contention, or argument in a pleading, written motion, or other paper filed with or submitted to the court, an attorney or unrepresented party is certifying, until it is withdrawn, that to the best of the person's knowledge, information, and belief formed after an inquiry reasonable under the circumstances—
>
> (1) it is not being presented or maintained for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) it is warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; and
>
> (3) any allegations or denials of facts have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for

yers from abusing the judicial process by imposing sanctions for filing

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further investigation or discovery.

(c) SANCTIONS. Subject to the conditions stated below, the court shall impose an appropriate sanction upon the attorneys, law firms, or parties determined, after notice and a reasonable opportunity to respond, to be responsible for a violation of subdivision (b).

(1) HOW INITIATED.

(A) BY MOTION. A motion for sanctions under this rule shall be served separately from other motions or requests, and shall describe the specific conduct alleged to violate subdivision (b). It shall not be filed with, or presented to, the court unless the challenged claim, defense, request, demand, objection, contention, or argument is not withdrawn or corrected within 21 days (or such other time as the court may prescribe) after service of the motion. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion.

(B) ON COURT'S INITIATIVE. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) NATURE OF SANCTIONS; LIMITATIONS. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter comparable conduct by persons similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a monetary penalty into court, or, if imposed on motion, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other costs incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded, either on motion or on the court's initiative, against a represented party unless it is determined to be responsible for a violation of subdivision (b)(1).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court's order to show cause is issued before a voluntary dismissal or settlement of the claims made by or against the party to be sanctioned.

(3) ORDER. If requested, the court, when imposing sanctions, shall recite the conduct or circumstances determined to constitute a violation of this rule and explain the basis for the sanction imposed.

FED. R. CIV. P. 11 (Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Aug. 15, 1991, 1-4) [hereinafter FED. R. CIV. P. 11 (proposed amendments 1991)]. The proposed rule and the Advisory Committee Notes are reprinted in 137 F.R.D. 74-82 (1991).

The 1991 amendments were modified in 1992 and sent to the U.S. Supreme Court for review. The proposed text of Rule 11 now reads:

RULE 11. SIGNING OF PLEADINGS, MOTIONS, AND OTHER PAPERS; REPRESENTATIONS TO COURT; SANCTIONS.

(a) SIGNATURE. Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) REPRESENTATIONS TO COURT. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an

unfounded, harassing, and bad-faith papers. Major revisions pro-

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attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) SANCTIONS. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) HOW INITIATED.

(A) BY MOTION. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) ON COURT'S INITIATIVE. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) NATURE OF SANCTION; LIMITATIONS. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) ORDER. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) INAPPLICABILITY TO DISCOVERY. Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.

FED. R. CIV. P. 11 (proposed amendments 1992).

posed in 1991 and 1992 would require that opposing counsel provide written notice of and describe a Rule 11 violation before seeking sanctions.[4] The proposed amendments would not change the basic philosophy that litigants must "stop and think" before filing papers in federal court.[5] Instead, they are intended to make the rule "clear, more precise and predictable."[6] Despite the drafters' good intentions, these laudable reforms could be undermined by the imposition of a continuing duty to ensure that a paper meets the rule's requirements.[7]

The sweeping amendments to Rule 11 that were enacted in 1983 prompted an explosion of cases aimed at potential violations.[8] The amendments have also generated considerable controversy.[9] For example, a nonscientific poll of attorneys conducted in 1991 found that

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4. Henry J. Reske, *Gentler Sanctions: Rule 11 Changes Sent to High Court*, A.B.A. J., Dec. 1992, at 29 [hereinafter Reske, *Gentler Sanctions*]; Henry J. Reske, *A Kinder, Gentler Rule 11*, A.B.A. J., Aug. 1991, at 25 [hereinafter Reske, *Kinder, Gentler*]. Both the 1991 and 1992 proposals provide a "safe harbor" of 21 days that allows a litigant to withdraw a paper that is the target of a Rule 11 violation. *See infra* text accompanying notes 13-16 for a discussion of the procedure involved in adopting the amendments.

The process for revising federal rules was modified when Congress passed the Judicial Improvements and Access to Justice Act of 1988. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642 (1988) (codified at 28 U.S.C. §§ 2071-2077 (1988)).

5. Reske, *Kinder, Gentler*, *supra* note 4 (quoting committee member Arthur Miller, a Harvard law professor, about the 1991 proposal).

6. *Id.*

7. The amendments proposed in 1991 said that one who files a paper is certifying "*until it is withdrawn*" that it is not being presented for an improper purpose, that it is warranted by existing law or good-faith modification, and that allegations have or are likely to have evidentiary support. FED. R. CIV. P. 11 (proposed amendments 1991) at 2-3 (emphasis added). The committee note expanded the scope of Rule 11 and said that the obligations were measured as long as the paper remained in court. This represented a change from the rule as amended in 1983. Courts have interpreted the 1983 rule as applying only when the paper is signed. *See* William W. Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 185 (1985); *see also infra* text accompanying note 32. Although the 1992 proposals remove the language "until it is withdrawn," they nonetheless maintain the continuing duty requirement. *See* FED. R. CIV. P. 11(b) (proposed amendments 1992) at 45.

> [A] litigant's obligations with respect to the contents of these papers are not measured solely as of the time they are filed with or submitted to the court, but include reaffirming to the court and advocating positions contained in those pleadings and motions after learning that they cease to have any merit.

*Id.* advisory committee's note at 51.

8. *See supra* note 2 (the Advisory Committee hoped the new rule would encourage judges to use the sanctions). Rule 11 "has spawned a cottage industry of satellite litigation" since its 1983 amendment. Randall Samborn, *Rule 11 Reforms Are Criticized*, NAT'L L.J., May 25, 1992, at 3, 28; *see also* D. Michael Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1 (1976). Rule 11 was a little-used tool before it was amended in 1983. Risinger found only 19 reported Rule 11 motions, only 11 of which resulted in findings of violation. *Id.* at 35-36. *See infra* notes 81-88 and accompanying text (discussing the increase in Rule 11 cases since the 1983 amendments).

9. *See infra* section IV.

twenty-two percent of those responding thought Rule 11 should be retained in its present form, twenty-five percent supported repealing Rule 11, forty-eight percent supported amending the rule, and five percent had no opinion.[10] While most respondents thought Rule 11 had forced attorneys to "stop and think" before signing pleadings,[11] slightly more than half thought Rule 11's costs had exceeded its benefits.[12] In response to considerable criticism of Rule 11, the Advisory Committee on Civil Rules, an arm of the United States Judicial Conference, proposed amendments in 1991 to define specifically what constitutes a violation and to require written notice that sanctions are being sought.[13] The proposals were modified in the fall of 1992.[14] The new proposed version of Rule 11 must now be approved by the United States Supreme Court and Congress.[15] If approved, it will take effect in December 1993.[16]

This Comment will examine Rule 11 as revised in 1983, then will discuss the proposed amendments. The amendments retain the primary purpose of the rule—to force attorneys to stop and think[17] before filing pleadings in federal court—while protecting litigants from being hit unexpectedly with sanctions. A strong Rule 11 is necessary because other available resources have not curbed abuses in federal litigation.[18] The proposed amendments adequately address many complaints about Rule 11 and may streamline the process of seeking sanctions.[19] However, the imposition upon lawyers of a continuing duty to comply with Rule 11 may undermine the drafters' purpose in amending the rule.[20]

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10. *Results of Rule 11 Litigation News Fax Poll*, LITIG. NEWS, June 1991, at 5. Approximately 800 attorneys responded to the poll, which was not designed to be statistically reliable. *Id.*

11. Nineteen percent strongly agreed with the statement, "Rule 11 has had the effect of making lawyers stop and think sufficiently before signing pleadings," and 53% agreed with the statement. *Id.* Twenty-one percent disagreed, and only five percent disagreed strongly. *Id.* Two percent had no opinion. *Id.*

12. Thirty-one percent strongly agreed with the statement, "The cost of Rule 11 proceedings has exceeded its benefit," and another 23% agreed with that statement. *Id.* Thirty-one percent disagreed and another 12% strongly disagreed. *Id.* Three percent had no opinion. *Id.*

13. *See supra* note 3 (FED. R. CIV. P. 11 (proposed amendments 1991)).

14. The Advisory Committee, whose members included judges, lawyers, and academics, received written comments, held public hearings, and reviewed surveys about the rule. Samborn, *supra* note 8, at 28.

15. *See* Reske, *Kinder, Gentler*, *supra* note 4, at 25; Samborn, *supra* note 8, at 3, 28.

16. *See* Reske, *Kinder, Gentler*, *supra* note 4, at 25; Samborn, *supra* note 8, at 3, 28.

17. *See* FED. R. CIV. P. 11 advisory committee's note.

18. *See infra* notes 130-38 and accompanying text.

19. *See infra* notes 119-48 and accompanying text.

20. *See infra* notes 149-56 and accompanying text.

## II. The 1983 Amendments

The original Rule 11, adopted in 1938, required attorneys to sign pleadings[21] filed in federal courts as certification that they had read them.[22] A pleading that did not meet Rule 11's requirements could be stricken as "sham and false and the action [could] proceed as though the pleading had not been served."[23] The original rule also allowed courts to impose sanctions, but only for *willful* violations that were measured against a subjective standard.[24] The 1938 rule had fundamental flaws that made it a "paper tiger": It addressed only limited abusive conduct, sanctions were discretionary, and the scope of sanctions was limited.[25] Consequently, sanctions were seldom imposed, and Rule 11 failed to deter misuses of the litigation process.[26]

Faced with abusive federal litigation that Rule 11 could not control,[27] members of the legal community agreed that a change was necessary.[28] As amended in 1983, the rule imposes a stricter standard of conduct on lawyers during the pretrial phases of litigation by making sanctions mandatory for failure to meet objective standards.[29] The committee that drafted the 1983 amendments specifically sought to

21. The original Rule 11 said, "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." Fed. R. Civ. P. 11, 308 U.S. 676 (1939) (emphasis added). *See also* Risinger, *supra* note 8, at 5-8 (discussing signature requirement).

22. The pre-1983 Rule 11 said the signature "*constitutes a certificate* by [the attorney] *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." Fed. R. Civ. P. 11, 308 U.S. 676 (1939) (emphasis added). *See also* Risinger, *supra* note 8, at 8.

23. Fed. R. Civ. P. 11, 308 U.S. 676 (1939).

24. *Id.* ("For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action.").

25. Marsha Grim, Comment, *The Horizon of Rule 11: Toward a Guided Approach to Sanctions*, 26 Hous. L. Rev. 535, 536 (1989).

26. *See* Fed. R. Civ. P. 11 advisory committee's note.

27. "Experience shows that in practice Rule 11 has not been effective in deterring abuses." *Id. See also* Melissa L. Nelken, *Has the Chancellor Shot Himself in the Foot? Looking for a Middle Ground on Rule 11 Sanctions*, 41 Hastings L.J. 383, 384 (1990) ("The 1983 amendments were an experiment, designed to increase judicial control over litigation and to rein in some of the perceived excesses of burgeoning lawsuits and free-form discovery.").

Rule 11 was one of several Federal Rules of Civil Procedure that were amended in 1983 to try to deter frivolous litigation. For a more complete discussion of the other rules that were amended, see Thomas v. Capital Security Services, 836 F.2d 866, 870 n.2 (5th Cir. 1988).

28. Grim, *supra* note 25, at 536.

29. "If a pleading, motion, or other paper is signed in violation of this rule, the court . . . *shall impose* . . . an appropriate sanction . . . ." Fed. R. Civ. P. 11 (emphasis added). *See also* Gregory P. Joseph, *The Trouble with Rule 11: Uncertain Standards and Mandatory Sanctions*, A.B.A. J., Aug. 1, 1987, at 87; Schwarzer, *supra* note 7, at 183 ("Amended Rule 11 is intended to deter misuse or abuse of the litigation process by the imposition of sanctions.").

give Rule 11 teeth and noted that it expected a greater range of circumstances to trigger Rule 11.[30]

Unlike the original Rule 11, which only applied to pleadings, the rule as amended in 1983 applies to all papers filed in federal court.[31] It includes three basic requirements: certification, a reasonable inquiry into the law and facts, and a legitimate purpose.

### A. *Certification*

Under the 1983 amendments, the signature certifies that the paper conformed to Rule 11's requirements at the time it was filed.[32] The certification requirement gives "effect to the signature of the attorney or party on a pleading, motion, or other paper."[33] Under the original Rule 11, the attorney's signature was considered a certificate that the lawyer "had read the document, that there were good grounds to support the pleading, and that the pleading was not interposed for delay."[34] This provision was ineffective, in part because of the subjective standard that applied to the "good grounds" requirement.[35] As the United States Supreme Court said in *Business Guides, Inc. v. Chromatic Communications Enterprises*, "The essence of Rule 11 is that signing is no longer a meaningless act; it denotes merit."[36] Rule 11 sanctions can be imposed only on the attorney who signed the offending paper and not against the entire firm.[37]

### B. *Reasonable Inquiry into the Law And Facts*

Under the 1983 amendments, a lawyer cannot sue first and ask questions later. The rule requires a reasonable prefiling inquiry into the facts and law, and requires lawyers to base their arguments on existing law or to indicate that they are seeking to modify, extend, or

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30. FED. R. CIV. P. 11 advisory committee's note. The Advisory Committee also said: "The new language is intended to reduce the reluctance of courts to impose sanctions . . . by emphasizing the responsibilities of the attorney and reenforcing those obligations by the imposition of sanctions." *Id.*

31. Rule 11, as amended in 1983, expressly applies to each "pleading, motion, and other paper" filed in federal court. FED. R. CIV. P. 11.

32. *See* Schwarzer, *supra* note 7, at 185.

33. *Id. See also supra* note 1, FED. R. CIV. P. 11; Arthur R. Miller, *The New Certification Standard Under Rule 11*, 130 F.R.D. 479 (1990); Michael O. Sutton & Gregory M. Luck, *Federal Rule 11: Basic Guidelines for Avoiding Sanctions*, FLA. B.J., Nov. 1987, at 31. Miller calls the duties created when an attorney or pro se litigant signs a pleading, motion, or other paper "perhaps the most significant and substantial change made in 1983." Miller, *supra*, at 479.

34. Miller, *supra* note 33, at 479-80.

35. *Id.* at 480.

36. 498 U.S. 533, 546 (1991).

37. Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120, 126-27 (1989).

reverse the law.[38] Although the pleader's view of law ultimately may be incorrect, the pleader must make a good-faith argument for that view.[39] Allegations of violations are now judged by an objective standard[40] of "reasonableness under the circumstances" at the time the paper was filed,[41] not by the subjective standard of the pre-1983 Rule 11. According to one judge, "There is no room for a pure heart, empty head defense under Rule 11."[42]

### C. *Legitimate Purpose*

The requirement of a "legitimate purpose" is designed to keep attorneys from filing papers for an improper purpose, such as repeatedly filing the same claim despite adverse rulings,[43] or filing papers to harass another party, to create a delay, or to needlessly increase the cost of litigation.[44] In *Dreis & Krump Manufacturing v. International Ass'n of Machinists*,[45] the court upheld Rule 11 sanctions against an attorney who apparently did not realize that based on existing law his suit did not have merit.[46] Allegations of violations are weighed under an objective standard. The signer's prefiling inquiry is "tested against

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38. Sutton & Luck, *supra* note 33, at 32; *supra* note 1, 1983 amendments to Federal Rule of Civil Procedure 11.

Some have suggested that requiring papers to be grounded in law and fact threatens to undermine the federal courts' otherwise liberal pleading standards. *See* Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 HARV. L. REV. 630, 633, 637 (1987) ("Liberal pleading favors decisions on the merits only after the particular circumstances of a claim have been revealed. Some interpretations of rule 11 place a higher value on ensuring that courts not spend time adjudicating claims that might turn out to have insufficient factual bases.").

39. Zaldivar v. City of L.A., 780 F.2d 823, 830-31 (9th Cir. 1986), *abrogated by* Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990).

40. Miller, *supra* note 33, at 482.

41. FED. R. CIV. P. 11 advisory committee's note.

42. Schwarzer, *supra* note 7, at 187. (Schwarzer was a United States District Judge in the Northern District of California, and is an authority on Rule 11. In 1990 Schwarzer took a five-year assignment as director of the Federal Judicial Center in Washington, D.C. *Tribute and Farewell to Judge William W. Schwarzer*, 747 F. Supp. lxvii (1990)). *See also* Oliveri v. Thompson, 803 F.2d 1265, 1275 (2d Cir. 1986), *cert. denied sub nom.* Suffolk County v. Graseck, 480 U.S. 918 (1987) ("there is no necessary subjective component to a proper rule 11 analysis"); Eastway Constr. Corp. v. City of N.Y., 762 F.2d 243, 253 (2d Cir. 1985) (an attorney's subjective good faith will not serve as a "safe harbor" against the imposition of sanctions).

43. Sutton & Luck, *supra* note 33, at 33; FED. R. CIV. P. 11.

44. Rule 11, as amended in 1983, says the signature certifies that the paper "is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." FED. R. CIV. P. 11. *See also* Szabo Food Serv. v. Canteen Corp., 823 F.2d 1073, 1080 (7th Cir. 1987) (discussing Rule 11 requirements); Robin J. Collins, Note, *Applying Rule 11 to Rid Courts of Frivolous Litigation Without Chilling the Bar's Creativity*, 76 KY. L.J. 891, 901 (1987-88) (describing what triggers Rule 11).

45. 802 F.2d 247 (7th Cir. 1986).

46. *Id.* at 255.

a standard of reasonableness under the circumstances,"[47] not against the subjective standard of good faith that was allowed under the old rule.

## III. SANCTIONS UNDER THE 1983 AMENDMENTS

Before Rule 11 was amended, courts had to find *subjective* bad faith before imposing sanctions.[48] Even then, sanctions were discretionary.[49] The rule did not expressly authorize monetary sanctions even when a lawyer acted in bad faith, but provided that the pleading should be stricken.[50] Amended Rule 11 now permits striking a pleading only if it is not signed.[51]

The Advisory Committee anticipated that sanctions would be imposed more often under the amended rule.[52] The 1983 amendments made sanctions mandatory for violations such as groundless or abusive filings.[53] Since Rule 11 was amended, sanctions have been imposed for misstating the law, for bringing suits for revenge, and for failing to allege facts necessary to state a particular cause of action.[54] Sanctions have also been imposed "when the party's position is

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47. Miller, *supra* note 33, at 483. Miller also notes that all thirteen circuits have adopted the objective standard of reasonableness. *Id.* at 484.

48. *See, e.g.*, Zaldivar v. City of L.A., 780 F.2d 823, 829 (9th Cir. 1986), *abrogated by* Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990) (discussing Rule 11 before the 1983 amendments). The pre-1983 rule had a subjective focus: "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." *Id.* at 829 (quoting Fed. R. Civ. P. 11, 308 U.S. 676 (1939)) (emphasis added).

49. *See* Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 191 (1988). The pre-1983 Rule 11 also said, "For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action." Fed. R. Civ. P. 11, 308 U.S. 676 (1939).

50. The rule simply said that "an attorney may be subjected to appropriate disciplinary action." Fed. R. Civ. P. 11, 308 U.S. 676 (1939). *See also* Adam H. Bloomenstein, *Developing Standards for the Imposition of Sanctions Under Rule 11 of the Federal Rules of Civil Procedure*, 21 AKRON L. REV. 289, 293 (1988) ("Even if a court found that an attorney acted in bad faith, the rule lacked an express authorization for the imposition of monetary sanctions.").

51. "If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant." FED. R. CIV. P. 11.

52. "The new language is intended to reduce the reluctance of courts to impose sanctions . . . by emphasizing the responsibilities of the attorney and reenforcing those obligations by the imposition of sanctions." *Id.* advisory committee's note.

53. "If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, *shall impose* upon the person who signed it, a represented party, or both, an appropriate sanction." FED. R. CIV. P. 11 (emphasis added.) *See also* Westmoreland v. CBS, Inc., 770 F.2d 1168, 1175 (D.C. Cir. 1985) ("A refusal to invoke Rule 11 constitutes error.").

54. *See* cases cited in Kim M. Rubin, Note, *Has a "Kafkaesque Dream" Come True? Federal Rule of Civil Procedure 11: Time for Another Amendment?*, 67 B.U. L. REV. 1019, 1023-24 (1987).

groundless under existing law, there is a failure to cite controlling law, or there is a misstatement as to the content of existing law."[55] Courts have specifically rejected the subjective standard that applied under the pre-1983 rule. In *Zaldivar v. City of Los Angeles*, for example, the court held that Rule 11 sanctions were appropriate if a paper is frivolous, legally unreasonable, or without factual foundation, even if it was not filed in subjective bad faith.[56]

The goal of sanctions is to deter both the violator[57] and others.[58] Although the rule authorizes monetary sanctions, courts have held that sanctions should be "educational and rehabilitative . . . and . . . tailored to the particular wrong."[59] In *Thomas v. Capital Security Services*, the court held that sanctions "should be the least severe . . . adequate to the purpose of Rule 11."[60] Despite the availability of sanctions such as admonishments or reprimands, sanctions still tend to be monetary.[61] Although judges can impose sanctions on their own, the imposition of sanctions is typically triggered by an attorney's motion requesting sanctions.[62]

Despite the mandatory nature of Rule 11, violations do not always draw sanctions. Some courts have declined to impose sanctions for novel legal theories that have some merit.[63] In *Oliveri v. Thompson*,

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55. Miller, *supra* note 33, at 489.

56. 780 F.2d 823, 831 (9th Cir. 1986), *abrogated by* Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990).

57. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 390 (1990).

58. *See* Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1934 (1989).

One commentator argues that Rule 11 has led to *over-deterrence* because judges rule incorrectly on requests for sanctions and lawyers invoke Rule 11 against nonfrivolous positions. Mark S. Stein, *Rule 11 in the Real World: How the Dynamics of Litigation Defeat the Purpose of Imposing Attorney Fee Sanctions for the Assertion of Frivolous Legal Arguments*, 132 F.R.D. 309, 328-29 (1991).

59. Thomas v. Capital Sec. Servs., 836 F.2d 866, 877 (5th Cir. 1988).

60. *Id.* at 878. "What is 'appropriate' may be a warm friendly discussion on the record, a hard-nosed reprimand in open court, compulsory legal education, monetary sanctions, or other measures appropriate to the circumstances." *Id.*

61. *See* Nelken, *supra* note 27.

62. Rule 11 says that sanctions may be imposed by the court "upon motion or upon its own initiative." FED. R. CIV. P. 11). In addition, the advisory committee notes say,

> Courts currently appear to believe they may impose sanctions on their own motion . . . . Authority to do so has been made explicit in order to overcome the traditional reluctance of courts to intervene unless requested by one of the parties. The deduction and punishment of a violation of the signing requirement, encouraged by the amended rule, is part of the court's responsibility for securing the system's effective operation.

*Id.* advisory committee's note; *see also* Vairo, *supra* note 49, at 220.

63. *See, e.g.*, Card v. State Farm Fire & Casualty Co., 126 F.R.D. 654, 656 (D. Miss. 1989) ("Plaintiffs' positions are not required to be legally correct.")

for example, the court held that courts should resolve doubts in favor of the signer and should not use hindsight to determine whether a violation occurred.[64] However, there is a fine line between good advocacy and pursuing a groundless claim,[65] and this has contributed to some of the inconsistency in interpreting Rule 11.

The United States Supreme Court recently held in *Business Guides, Inc. v. Chromatic Communications Enterprises* that Rule 11 sanctions should not be tied to the outcome of the litigation.[66] Instead, the focus should be on whether a filing was well-founded.[67] Other courts have offered guidance to trial judges who must often draw these fine lines. For example, in *Brown v. Federation of State Medical Boards*, the court set forth factors that should be considered in determining whether a party made a reasonable inquiry into the facts and law of a case.[68] For factual inquiries, the court should consider the complexity of the case, whether discovery would have helped the factual development, and the time available for investigation.[69] The focus of legal inquiries should include the complexity of the legal questions, whether the party made a good faith effort to extend or to modify the law, and the time available for research.[70] However, appellate courts apply a deferential standard when reviewing a district court's imposition of sanctions and other findings.[71]

## IV. Criticisms of the 1983 Amendments

In attempting to curtail federal litigation, the drafters of the 1983 amendments created other problems. Most fundamentally, Rule 11's "reasonable factual inquiry" imposes strict requirements that seem to conflict with the federal rules' liberal pleading scheme.[72] The rule has

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64. 803 F.2d 1265, 1275 (2d Cir. 1986), *cert. denied sub nom.* Suffolk County v. Graseck, 480 U.S. 918 (1987). The Second Circuit also held in Eastway Construction Corp. v. City of New York, 762 F.2d 243, 254 (2d Cir. 1985), that courts should find a Rule 11 violation only when it is "patently clear that a claim has absolutely no chance of success . . . ."

65. Westmoreland v. CBS, Inc., 770 F.2d 1168, 1180 (D.C. Cir. 1985) (while a party should not be penalized for an aggressive litigation posture, attorneys should not assert claims or defenses "grounded on nothing but tactical or strategic expediency.").

66. 498 U.S. 533, 553 (1991).

67. *Id.*; *see also* Nelken, *supra* note 27, at 388 (discussing whether the benefits of implementing Rule 11 are outweighed by the increased burden of the courts).

68. 830 F.2d 1429 (7th Cir. 1987), *abrogated by* Mars Steel Corp. v. Continental Bank, 880 F.2d 928 (7th Cir. 1989).

69. *Id.* at 1435.

70. *Id.*

71. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 400 (1990).

72. *Cf.* Fed. R. Civ. P. 8 ("A pleading . . . shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief . . . .") For a brief discussion of Rule 11 and its interplay with the federal rules' liberal pleading scheme, *see* Grim, *supra* note 25, at 547, and Note, *supra* note 38, at 641-42.

also been criticized because it (1) has been inconsistently interpreted and applied;[73] (2) has generated expensive satellite litigation;[74] (3) has had a "chilling" effect on civil rights plaintiffs and lawyers;[75] (4) contains inappropriate sanctions to cure incompetence;[76] and (5) has been administered so that monetary sanctions are used as fee-shifting.[77]

One law professor notes that Rule 11 has been interpreted so inconsistently that "there is a conflict between or among circuits on practically every important question of interpretation and policy" under the rule.[78] Because of these inconsistencies, practicing under Rule 11 has been likened to "negotiating a minefield."[79] For example, the rule offers no assistance in determining when a position constitutes an argument for the extension, modification, or reversal of existing law, which the rule permits, or is simply rehashing an argument that is unwarranted by existing law, which the rule forbids.[80]

Once rare, motions under Rule 11 are now routine.[81] In trying to control federal litigation, the drafters created an increase in "satellite" litigation.[82] This is demonstrated by the number of Rule 11 cases reported. Where there were only a few Rule 11 cases reported before 1983,[83] there were 688 decisions reported between August 1, 1983, and December 15, 1987.[84] This increase has led one commentator to suggest that Rule 11 has become an "overused 'new toy.'"[85] Other commentators are critical because "the rule itself has become a means of

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73. *See supra* notes 78-80 and accompanying text.

74. *See supra* notes 81-88 and accompanying text.

75. Carl Tobias, *Uneven Use Mars Rule 11*, NAT'L L.J., Aug. 5, 1991, at 13.

76. *See supra* notes 93-94 and accompanying text.

77. *See infra* notes 92-104 and accompanying text.

78. *See* Burbank, *supra* note 58, at 1930-31, and cases cited therein. Burbank says conflicts have arisen about (1) the duties imposed on the person who signs a paper filed in district court; (2) procedural rights of those sanctioned; (3) on whom sanctions may be imposed; (4) the standard of appellate review; and (5) whether sanctions are mandatory. *Id.* Conflicts also exist within circuits. *Id.* at 1931.

79. *See* Joseph, *supra* note 29, at 87, 89. Joseph also raised a criticism that seems at odds with the purpose of Rule 11. He says attorney-client problems might develop because, under Rule 11, an attorney must refuse to bring a spurious, bogus, or meritless claim for a client. *Id.* at 90.

In addition, a Federal Judicial Center survey conducted in 1985 found substantial inconsistencies among judges' interpretations of Rule 11. *See* Note, *supra* note 38, at 641 (citing S. Kassin, *An Empirical Study of Rule 11 Sanctions* 38 (Federal Judicial Center 1985)).

80. *See* Joseph, *supra* note 29, at 88.

81. *See* Vairo, *supra* note 49, at 195.

82. *See, e.g.*, Thomas v. Capital Sec. Servs., 836 F.2d 866, 871 n.4 (5th Cir. 1988). Satellite litigation is a suit within a suit that does not deal with the merits of the case.

83. *See* Risinger, *supra* note 8.

84. *See* Vairo, *supra* note 49, at 199.

85. *See* Rubin, *supra* note 54, at 1024.

harassment and delay."[86] Satellite litigation wastes court time, particularly when viewed in light of statistics indicating that sanctions are granted infrequently.[87] In fact, in *Golden Eagle Distributing Corp. v. Burroughs Corp.*, the court suggested that satellite litigation might actually be more trouble than the frivolous suits Rule 11 is supposed to keep out of federal courts.[88]

The reported cases suggest that Rule 11 is being used disproportionately against plaintiffs, particularly in civil rights cases,[89] employment discrimination cases, securities fraud cases brought by investors, and antitrust cases brought by small companies.[90] The advisory committee notes to Rule 11 indicate that courts should not use hindsight to determine whether sanctions are appropriate, but should evaluate conduct in light of what was reasonable at the time the paper was signed.[91] Despite this guidance, the rule has been criticized because of the possibility that the fear of Rule 11 sanctions has "chilled" some plaintiffs from bringing certain cases.[92]

In addition, some critics have suggested that Rule 11 does nothing to ensure competence because punishment will not cure a lawyer of incompetence: "Neither the cane nor the dunce cap has proved to be an effective educational tool. While Rule 11 sanctions may have an impact on a lawyer's attitude or behavior, they will not pour wisdom into an 'empty head.'"[93] Instead, critics say, Rule 11 simply gives the "hardball" litigator another tool.[94]

Rule 11 has also been criticized for its use as a vehicle to recover attorney's fees.[95] Under the "American Rule," each side in litigation

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86. *See* Collins, *supra* note 44, at 893.

87. *See* Stein, *supra* note 58, at 330 (One study indicates that Rule 11 sanctions are awarded in only 13.6% of the cases in which motions are filed.).

88. 801 F.2d 1531, 1537 (9th Cir. 1986).

89. *See* Christopher A. Considine, Note, *Rule 11: Conflicting Appellate Standards of Review and a Proposed Uniform Approach*, 75 CORNELL L. REV. 727, 739 (1990).

90. *See* Vairo, *supra* note 49, at 200.

91. "The court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted." FED. R. CIV. P. 11 advisory committee's note.

92. *See* Vairo, *supra* note 49, at 200. The drafters of the 1983 amendments recognized this potential and said, "The rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories." FED. R. CIV. P. 11 advisory committee's note.

93. Alex Elson & Edwin A. Rothschild, *Rule 11: Objectivity and Competence*, 123 F.R.D. 361, 365 (1989); *see also* Vairo, *supra* note 49, at 233. ("An unthinking or barely competent attorney . . . should not be punished with fee-shifting.").

94. *See* Elson & Rothschild, *supra* note 93, at 366.

95. Indeed, one court has held that "Rule 11 is a fee-shifting statute . . . ." Hays v. Sony Corp., 847 F.2d 412, 419 (7th Cir. 1988), *abrogated by* Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990). However, the purpose of Rule 11 was not fee-shifting. *See* Burbank, *supra* note

must bear his or her own costs.[96] Rule 11 is one of several rules that provide exceptions to the American Rule in an attempt to deter groundless litigation.[97] The Rule limits recovery of attorney's fees to an amount that is both "reasonable" and caused by the violation.[98] One commentator says fee-shifting is "probably the most effective sanction" because it compensates innocent parties for the cost of defending a frivolous lawsuit and holds the violator accountable for damages.[99] However, critics argue that imposing attorney's fees does not promote the purpose of Rule 11—to make attorneys "stop and think" before filing pleadings.[100] Indeed, the courts' failure to use sanctions other than the imposition of fees is responsible for much of the satellite litigation that stems from Rule 11.[101]

Courts have tried to tie attorney's fees to the harm done. In *In re Yagman*, the court said sanctions of attorney's fees should be based on the "reasonableness of the claimed fees," and should not exceed the fees necessary to defend an action.[102] Despite the *Yagman* court's approach and other courts' calls to impose only the most appropriate sanction to deter the violator,[103] courts routinely impose attorney's fees—not alternative penalties—as sanctions.[104]

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58, at 1947.

*See also* Nelken, *supra* note 27, at 389. Nelken argues that the potential for recovering attorney's fees "has, in effect, created a cause of action for fees, and failing to include a prayer for sanctions in many pleadings would be malpractice . . . when the client has a colorable argument for them." *Id.* Nelken also has found that attorney's fees have been imposed as sanctions in 96% of the cases finding a Rule 11 violation. Melissa L. Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313 (1986).

*See also* Vairo, *supra* note 49, at 201-02 (arguing that as Rule 11 becomes seen as a fee-shifting device, the likelihood of motions for sanctions increases). "Indeed, the Kafka-esque nightmare of cross-motions for Rule 11 sanctions appears almost uniformly in such litigation." *Id.* at 202.

96. By comparison, the "English Rule" requires the losing party to pay the prevailing party's costs. *See* Rubin, *supra* note 54, at 1024 n.32.

97. *Id.* at 1024; *see also infra* notes 132-38 and accompanying text. In addition, Federal Rules of Civil Procedure 16 and 26 allow sanctions for abuse of discovery and other pretrial matters.

98. "If a pleading, motion, or other paper is signed in violation of this rule, the court . . . shall impose . . . the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee." FED. R. CIV. P. 11.

99. Neal H. Klausner, Note, *The Dynamics of Rule 11: Preventing Frivolous Litigation by Demanding Professional Responsibility*, 61 N.Y.U. L. REV. 300, 331 (1986).

100. *See* Vairo, *supra* note 49, at 231.

101. *Id.* (Much Rule 11 litigation would cease "because the 'prevailing' party will no longer be lured by the prospect of recovering its fees.").

102. 796 F.2d 1165, 1184-85 (9th Cir. 1986), *cert. denied*, 484 U.S. 963 (1987).

103. *See, e.g.*, Thomas v. Capital Sec. Servs., 836 F.2d 866, 878 (5th Cir. 1988) ("[T]he district court should utilize the sanction that furthers the purposes of Rule 11 and is the least severe sanction adequate to such purpose.").

104. *See supra* notes 95-101 and accompanying text.

The United States Supreme Court has recently been criticized for broadening the reach of Rule 11. In 1991, in *Business Guides, Inc. v. Chromatic Communications Enterprises*, the Court broadened the reach of Rule 11 when it decided that the certification standard is the same for a party as it is for an attorney, regardless of whether the party was required to sign a paper.[105] Relying on the plain meaning of Rule 11, the Court upheld sanctions against a company whose employee signed a sworn application for a temporary restraining order.[106] The Court held that any party who signs a court document will be held to Rule 11's requirements even if he or she was not required to sign the document.[107] One critic has suggested that the *Business Guides* case is an example of the "very type of aggressive and unfounded litigation tactics that the revised Rule was aimed at ending."[108]

The dissent in *Business Guides*[109] criticized the majority for penalizing well-intentioned litigants "if they do not satisfy some objective standard of care in the preparation or litigation of a case."[110] The dissenters, acknowledging the strains on the court system, nonetheless wrote:

> Our annoyance at spurious and frivolous claims, and our real concern with burdened dockets, must not drive us to adopt interpretations of the rules that make honest claimants fear to petition the courts. We may be justified in imposing penalties on attorneys for negligence or mistakes in good faith; but it is quite a different matter, and the exercise of a much greater and more questionable authority, for us to impose that primary liability on citizens in general.[111]

In *Cooter & Gell v. Hartmarx Corp.*, the Court again broadened the reach of Rule 11 by holding that a district court may sanction a plaintiff even when the plaintiff has dismissed the complaint under

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105. 498 U.S 533, 543-48 (1991).

106. *Id.* at 545.

107. *Id.* at 554. Justice O'Connor wrote for the majority: "[A] represented party who signs his or her name bears a personal, nondelegable responsibility to certify the truth and reasonableness of the document." *Id.*

108. LITIG. NEWS, June 1991, at 5 (quoting Loren Kieve, co-chair of the Federal Procedure Committee). Kieve also said, "[T]he costs of Rule 11 proceedings, both financial and professional, have exceeded its benefit." *Id.*

109. Business Guides, Inc. v. Chromatic Communications Enters., 498 U.S. 533, 554 (1991) (Kennedy, J., dissenting) (joined by Marshall and Stevens, JJ., and in part by Scalia, J.).

110. *Id.*

111. *Id.* at 570 (Kennedy, J., dissenting).

Federal Rule of Civil Procedure 41(a)(1)(i).[112] Rule 41(a)(1) allows a plaintiff to dismiss an action voluntarily by filing a notice of dismissal before service by the opposing party of an answer or of a motion for summary judgment.[113] The Court held that the act of filing a baseless or improper complaint, even if it is eventually withdrawn, can be the basis of a Rule 11 sanction.[114]

In his dissent, Justice Stevens argued that the majority would eviscerate Rule 41(a)(1) by focusing on the filing of baseless complaints and not on whether they actually waste judicial resources.[115] "The filing of a frivolous complaint which is voluntarily withdrawn imposes a burden on the court only if the notation of an additional civil proceeding on the court's docket sheet can be said to constitute a burden,"[116] Stevens wrote. He argued that Rule 11 was designed to deter parties from abusing judicial resources, not from filing frivolous complaints.[117]

Another recent Rule 11 case from the United States Supreme Court, *Pavelic & LeFlore v. Marvel Entertainment Group*, narrowed the rule's impact somewhat by allowing sanctions only against the attorney who signed the document and not against an entire firm.[118]

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112. 496 U.S. 384 (1990). The Court affirmed a lower court ruling that Cooter & Gell had conducted a grossly inadequate prefiling investigation. *Id.* at 397-98. Cooter & Gell filed a lawsuit for Danik, Inc., alleging that Hartmarx and two subsidiaries engaged in a nationwide conspiracy to fix prices and to eliminate competition through a retail agent policy and a uniform pricing scheme. *Id.* at 388-89. The prefiling investigation consisted of telephone calls to retailers in four cities. Danik, Inc. v. Hartmarx Corp., 120 F.R.D. 439, 441 (D.D.C. 1988), *aff'd*, 875 F.2d 890 (D.C. Cir. 1989), *aff'd in part, rev'd in part sub nom.* Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990).

113. FED. R. CIV. P. 41(a)(1)(i).

114. *Cooter & Gell*, 496 U.S. at 395. *See also* Craig K. Van Ess, Comment, Cooter & Gell v. Hartmarx Corp., *Caveat Advocatus, The Growing Impact of Rule 11 Sanctions*, 25 VAL. U. L. REV. 311, 323 (1991). An attorney has a duty not to waste judicial resources. *Id.* at 325. Before *Cooter & Gell* reached the United States Supreme Court, an appellate court in Szabo Food Service v. Canteen Corp., 823 F.2d 1073, 1077 (7th Cir. 1987), held that a Rule 11 violation occurs when a paper is filed, regardless of the ultimate outcome of the case. Even a complaint that is ultimately dismissed under Rule 41(a)(1)(i) takes up the court's time. *Id.*

115. *Cooter & Gell*, 496 U.S. at 409 (Stevens, J., dissenting).

116. *Id.* at 411 (Stevens, J., dissenting).

117. *Id.*

118. 493 U.S. 120, 126 (1989). The Court said Rule 11 was supposed to "bring home to the individual signer his personal, nondelegable responsibility." *Id.* The lower court had held that Rule 11 sanctions "should generally be imposed on a signer's law firm as well as on the individual signing an offending paper." Calloway v. Marvel Entertainment Group, 854 F.2d 1452, 1479 (2d Cir. 1988), *rev'd in part sub nom.* Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120 (1989). The court gave numerous reasons for imposing sanctions on the entire firm, including that a law firm may also endorse the offending document, an individual attorney usually signs a document on the firm's behalf, partners in a law firm share revenues and costs generated from the firm's cases, and a paper that results in a sanction may be the product of several lawyers. *Id.*

## V. Proposed Amendments

With the many criticisms of Rule 11 in mind, Congress created the Advisory Committee on the Civil Rules of the Federal Judicial Conference in August 1990 to study the rule.[119] The Committee solicited input, much of which criticized the rule, and issued its proposed amendments in 1991.[120] These proposals, and the 1992 proposals ultimately sent to the United States Supreme Court, are designed to reduce the frequency of Rule 11 motions and to equalize the burden on plaintiffs and defendants.[121]

The proposed amendments:

— Require opposing counsel to supply specific, written notice to a party about a possible Rule 11 violation along with the reasons on which it is based before moving for sanctions. The 1992 proposals give a party twenty-one days to withdraw or correct a paper that is alleged to violate Rule 11.[122]

— Allow factual assertions that parties believe will be supported by evidence "after a reasonable opportunity for further investigation or discovery."[123]

— Emphasize that sanctions may be either monetary or non-monetary.[124] This includes restricting the sanctions "to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated."[125]

— Impose a continuing duty to ensure that papers are not filed to harass another party, and are warranted by existing law or a nonfrivolous argument for modification or reversal of existing law.[126]

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119. *See* Tobias, *supra* note 75, at 13.

120. Fed. R. Civ. P. 11 (proposed amendments 1991).

121. *See* Reske, *Kinder, Gentler, supra* note 4, at 25 (quoting Judge Sam C. Pointer, Jr., Chair of the Advisory Committee); Fed. R. Civ. P. 11 (proposed amendments 1992) at 49; Fed. R. Civ. P. 11 (proposed amendments 1991) at 4 ("This revision is intended to remedy problems that have arisen in the interpretation and application of the 1983 revision of the rule."). The committee also said:

> The rule retains the principle that attorneys and pro se litigants have an obligation to the court to refrain from conduct that frustrates the aims of Rule 1. The revision broadens the scope of this obligation, but places greater constraints on the imposition of sanctions and should reduce the number of motions for sanctions presented to the court.

Fed. R. Civ. P. 11 (proposed amendments 1992) advisory committee's note at 50.

122. *Id.* at 47 (proposed amendments 1992).

123. *Id.* at 46.

124. *Id.* at 48-49.

125. *Id.* at 48.

126. *Id.* at 45-46.

### A. The Need for Amendments

Rule 11 was amended in 1983 as an experiment[127] to curtail abusive litigation by punishing violators. From that perspective, the increase in the amount of Rule 11 litigation tends to indicate that the experiment has been at least a partial success.[128] The rule as amended in 1983 requires some fine-tuning, however, to keep the focus on deterring violators and requiring lawyers to "stop and think" before they file pleadings. Rule 11 is not a cure-all for abusive litigation practices. It is, however, a necessary tool to encourage lawyers to devote close attention to litigation at the prefiling stages.[129]

Given the other resources available to courts to curb abusive litigation, courts might not seem to need Rule 11. The American Bar Association's (ABA) model rules[130] impose a duty on an attorney to avoid frivolous claims or defenses and to avoid malicious or harassing behavior.[131] These are precisely the abuses that Rule 11 targets. However, these ABA rules and standards are only guidelines, and do not carry the force of Rule 11.

Courts also have an inherent equitable power to award expenses, including attorneys' fees, to a litigant whose opponent brings a law-

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127. *See* Burbank, *supra* note 58, at 1927.

128. *See e.g.*, Nelken, *supra* note 27 (there were more than 700 Rule 11 decisions in the first four years after the 1983 amendments to Rule 11.). There were only a handful of cases before Rule 11 was amended in 1983. *See* Risinger, *supra* note 8, at 5.

129. *See* Van Ess, *supra* note 114, at 330. This will ensure both fewer frivolous lawsuits and more competent representation.

130. The American Bar Association's Model Rules of Professional Conduct were adopted in August 1983. *See* THOMAS D. MORGAN & RONALD D. ROTUNDA, 1991 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 1 (1991). These rules are intended to replace the ABA's Model Code of Professional Responsibility, which was adopted in 1970. *See id.* at 123; Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1251 (1991).

131. The Model Rules of Professional Conduct say, "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1990).

The Model Code of Professional Responsibility says:

(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.

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

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(1)-(2) (1981). Almost every state adopted the Code and federal courts recognize it to exercise powers over lawyers. *See* Hazard, *supra* note 130, at 1251.

suit in bad faith, or for oppressive reasons.[132] In addition, 28 U.S.C. § 1927 gives courts the authority to impose costs against lawyers who have "unreasonably and vexatiously" increased the costs of litigation by protracting proceedings.[133] Courts have been reluctant to rely on these provisions, however, primarily because they require a finding of bad faith.[134]

Sanctions that require a subjective finding of bad faith, therefore, are not the key to curbing abusive behavior. The "hammer" that forces attorneys to file meritorious, well-researched claims in federal court lies with the objective requirement found in Rule 11. The rule, with its 1983 amendments, focuses on investigative efforts, not the attorney's subjective state of mind. It has proven to be the vehicle for prodding lawyers into meeting that standard because it "gives legal force to the ethical directive that a lawyer's duty to his client cannot be permitted to override his duty to the justice system."[135] Overall, the proposed amendments keep the spirit of the 1983 amendments, but make modifications that could make the rule more palatable[136] by narrowing its scope.[137] Unfortunately, the amendments aimed at fairness

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132. *See, e.g.*, Roadway Express, Inc. v. Piper, 447 U.S. 752, 766-67 (1980), *superseded by* Morris v. Adams-Miller Corp., 758 F.2d 1352 (10th Cir. 1985); G.J.B. & Assocs. v. Singleton, 913 F.2d 824 (10th Cir. 1990).

133. An attorney who "multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. § 1927 (1988).

134. "Judges, sharing professional and social ties with attorneys and expecting vigorous advocacy, understandably have been reluctant to accuse lawyers of subjective bad faith. Not surprisingly, the threat of sanctions under the bad faith exception has been an ineffective deterrent of frivolous litigation." Klausner, *supra* note 99, at 311. Courts also have been reluctant to impose sanctions under § 1927: "Sanctions were rarely imposed . . . because of a restrictive judicial interpretation, generally requiring a showing of subjective bad faith." *Id.* at 312. *See also* Vairo, *supra* note 49, at 192. Among the cases Vairo cites, *id.* at 192 n.10, is Roadway Express, Inc. v. Piper, 447 U.S. 752, 766 (1980), where the court said a finding of bad faith must precede sanctions under the court's inherent powers.

135. Klausner, *supra* note 99, at 316. In addition, the advisory committee notes to the 1992 proposals indicate that "[r]ule 11 is not the exclusive source for control of improper presentations of claims, defenses, or contentions." FED. R. CIV. P. 11 (proposed amendments 1992) advisory committee's note at 58. However, the committee pointed out that the Court in Chambers v. NASCO, 111 S. Ct. 2123 (1992), cautioned that courts should rely on Rule 11—and not their inherent powers—if appropriate sanctions could be imposed under Rule 11. *Id.*

136. The committee notes say, "This revision is intended to remedy problems that have arisen in the interpretation and application of the 1983 revision of the rule." FED. R. CIV. P. 11 (proposed amendments 1992) advisory committee's note at 49.

137. The proposals eliminate the strict requirement that all papers must be based on information and belief available at the time the paper was filed. FED. R. CIV. P. 11 (proposed amendments 1992). Instead, the amendments would allow litigants to file papers that "are likely to have evidentiary support *after a reasonable opportunity for further investigation or discovery.*" FED. R. CIV. P. 11 (proposed amendments 1992) at 46 (emphasis added).

and fair warning may be undercut by a proposal that would impose a continuing duty on litigants.[138]

### B. Some Proposed Improvements

The 1992 proposals offer one chief improvement: They would allow a party to bring a claim that is likely to have evidentiary support only after further investigation or discovery.[139] This offers some leeway for fact development. The committee notes stress that this proposal "does not relieve litigants from the obligation to conduct an appropriate investigation into the facts . . . [and] is not a license to join parties, make claims, or present defenses without any factual basis or justification."[140] However, this proposal could help thaw the "chill" some plaintiffs have felt. It also will put plaintiffs on a more equal footing with defendants, who are allowed under Federal Rule of Civil Procedure 8 to include denials in their answers based on lack of information in their initial investigation.[141]

The proposals also point out that the rule provides for both monetary and nonmonetary awards. The committee notes indicate that a court has "significant discretion" in determining what sanctions should be imposed "subject to the principle that the sanctions should not be more severe than reasonably necessary to deter repetition of the conduct by the offending person or comparable conduct by similarly situated persons."[142] This appears to address the concern that monetary sanctions are not always the most effective penalties. In addition, the proposed amendments require monetary sanctions to be paid into

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138. The proposals say:

> By presenting to the court (whether by signing, filing, submitting, or *later advocating*) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . . .

FED. R. CIV. P. 11 (proposed amendments 1992) at 45 (emphasis added). See *infra* notes 149-56 for further discussion of this proposal. The 1991 preliminary draft contained the language "until it is withdrawn." FED. R. CIV. P. 11 (proposed amendments 1991). The committee notes to the 1992 proposals make clear that the drafters intended to impose a continuing duty. The Rule "emphasizes the duty of candor by subjecting litigants to potential sanctions for insisting upon a position after it is no longer tenable . . . ." FED. R. CIV. P. 11 (proposed amendments 1992) advisory committee's note at 51.

139. FED. R. CIV. P. 11 (proposed amendments 1992) at 46.

140. *Id.* advisory committee's note at 51.

141. *Id.* at 52. *See also* FED. R. CIV. P. 8(b) ("If a party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial.").

142. FED. R. CIV. P. 11 (proposed amendments 1992) advisory committee's note at 53. The committee notes point out that the purpose of Rule 11 sanctions "is to deter rather than to compensate." *Id.*

*court* as a penalty unless there are "unusual circumstances" such as those in section (b)(1).[143] This provision could decrease the use of Rule 11 as simply a fee-shifting provision.

Further, the proposals require written notification of a Rule 11 violation. The notice requirement would ease the potential sting by requiring requests for sanctions to be made as a separate motion and by giving alleged violators an opportunity to respond.[144] It also would provide a "safe harbor" by permitting someone to withdraw an untenable pleading without fear of sanctions.[145] In addition, the drafters rejected the United States Supreme Court's holding in *Pavelic & LeFlore v. Marvel Entertainment Group*, where the court said sanctions applied only to the person who actually signed the paper.[146] The proposed amendments broaden the scope of the rule and allow sanctions against whoever is responsible for the violation, whether it be a firm, a particular attorney, or a litigant.[147] The committee notes also indicate an intent to curb Rule 11 motions by pointing out that the rule "is not the exclusive source for control of improper presentations of claims, defenses, or contentions."[148]

### C. *Continuing Duty: A Bad Idea*

The drafters may have undermined their attempt to soften the sting of Rule 11 by imposing a continuing duty on someone who files a paper in court.[149] The committee notes say:

> "[A] litigant's obligations with respect to the contents of . . . papers are not measured solely as of the time they are filed with or submitted to the court, but include reaffirming to the court and

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143. *Id.* at 53-54.

144. FED. R. CIV. P. 11 (proposed amendments 1992) advisory committee's note at 50-51.

145. *Id.* at 57 ("[A] party will not be subject to sanctions on the basis of another party's motion unless, after receiving the motion, it refuses to withdraw that position or to acknowledge candidly that it does not currently have evidence to support a specified allegation."). Compare Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 397 (1990), where the United States Supreme Court held that a voluntary dismissal under Rule 41(a) would not eliminate a Rule 11 violation.

The "safe harbor" provision has drawn sharp criticism as "an endless exercise in aimless retrospectivity." Samborn, *supra* note 8, at 28 (quoting John P. Frank, a lawyer who sponsored an ad hoc Bench-Bar Proposal to Revise Civil Procedure Rule 11). However, the goal of Rule 11 is to keep frivolous papers out of court; the "safe harbor" will perform a valuable role in cutting down on needless litigation.

146. 493 U.S. 120, 126 (1989).

147. FED. R. CIV. P. 11 (proposed amendments 1992) at 46-47.

148. *Id.* advisory committee's note at 58. The committee notes specifically mention that courts can exercise their contempt powers or impose sanctions under other rules or under 28 U.S.C. § 1927. *Id.*; *see also supra* notes 132-38 and accompanying text.

149. FED. R. CIV. P. 11 (proposed amendments 1992) at 45.

advocating positions contained in those pleadings and motions after learning that they cease to have any merit."[150]

Under the current version of Rule 11, courts have rejected the idea that the 1983 amendments created a continuing duty.[151]

The committee notes to the 1992 amendments indicate that this proposal is intended to impose obligations on lawyers for failing to abandon or withdraw meritless positions.[152] If approved, this proposal would bring Rule 11 into line with 28 U.S.C § 1927, which imposes a continuing duty.[153] However, a continuing duty may be "overly burdensome and . . . impossible to satisfy in many types of litigation."[154] This broad proposal leaves open the possibility that a party may be subject to numerous Rule 11 motions throughout the litigation or could be punished simply because an opponent beats the lawyer to finding new case law that makes a position untenable under Rule 11. This standard might be reasonable if a lawyer worked on only one case at a time, but lawyers typically have many ongoing cases. This "continuing duty" standard penalizes a lawyer who puts aside a case to work on other matters, but who had no intention of advancing an unwarranted position. In short, the requirement may be almost impossible to meet because it is "exceedingly difficult to monitor continually . . . every allegation asserted for the purpose of identifying precisely when the allegation is no longer supportable and must be withdrawn."[155] Although the proposed amendments allow a lawyer to withdraw an untenable position,[156] the requirement of a continuing duty would undoubtedly generate Rule 11 motions that are time-consuming and contrary to the purpose of streamlining litigation.

## VI. CONCLUSION

The thrust of the 1983 amendments—to impose a stricter standard of conduct on lawyers or pro se litigants during the pretrial phases of litigation[157]—should be preserved because other avenues do not deter

150. *Id.* advisory committee's note at 51.

151. *See, e.g.*, Oliveri v. Thompson, 803 F.2d 1265, 1274 (2d Cir. 1986), *cert. denied sub nom.* Suffolk County v. Graseck, 480 U.S. 918 (1987) ("Limiting the application of rule 11 to testing the attorney's conduct at the time a paper is signed is virtually mandated by the plain language of the rule.").

152. FED. R. CIV. P. 11 (proposed amendments 1992) advisory committee's note at 51.

153. *See Oliveri*, 803 F.2d at 1274 ("a continuing prohibition against dilatory litigation is imposed by § 1927") (citations omitted).

154. *See* Tobias, *supra* note 75, at 13.

155. *Id.* at 13-14.

156. FED. R. CIV. P. 11 (proposed amendments 1992) at 47 advisory committee's note at 51.

157. *See supra* notes 29-31 and accompanying text.

those who abuse the judicial process.[158] The drafters of the 1992 proposed amendments said: "The revision broadens the scope of this obligation, but places greater constraints on the imposition of sanctions and should reduce the number of motions for sanctions presented to the court."[159] The notice provisions would allow a lawyer who may have violated Rule 11 to withdraw the pleading without penalty when the litigation has not consumed too much time.[160] The proposed amendments also keep the focus on using Rule 11 as a way of discouraging abusive tactics.[161] Regrettably, the fine-tuning done by these amendments is likely to be negated by the continuing duty requirement. Placing a continuing duty on lawyers is too ambiguous and too onerous. The standard is sure to generate more unwanted satellite litigation as courts try to define the scope of this requirement. The drafters of the proposed amendments aimed for a more effective and workable Rule 11. Unfortunately, the imposition of a continuing duty requirement—even with the "safe harbor" provisions—may leave them short of their mark.

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158. *See supra* notes 130-34 and accompanying text.

159. FED. R. CIV. P. 11 (proposed amendments 1992) advisory committee's note at 50.

160. The drafters used some common sense when they (apparently) realized there is little harm done when a pleading is filed and withdrawn. See also discussion of this issue in Stevens' dissent in Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 409 (1990) (Stevens, J., dissenting), discussed *supra* notes 115-17 and accompanying text.

161. FED. R. CIV. P. 11 (proposed amendments 1992) at 46-49. *See also* William W. Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013, 1020 (1988).