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ARTICLES

ACHIEVING BALANCE IN THE DEVELOPING LAW OF SANCTIONS*

A. Leo Levin**
and Sylvan A. Sobel***

The Brendan Brown Lecture Series was inaugurated at the Columbus School of Law of The Catholic University of America in most auspicious fashion by Chief Judge Edward D. Re of the United States Court of International Trade.¹ Tributes to Brendan Brown are to be found in the pages of this law review and elsewhere.² Suffice it to say simply that his career provided another example of decanal scholarship, following in the tradition established by men like Wigmore, McCormick, and Erwin Griswold.³ It is a great honor to join the very distinguished company of Brendan Brown lecturers.

To understand the developing law of sanctions it is necessary to go back to the 1980 amendments to the Federal Rules of Civil Procedure.⁴ At that time three Justices of the Supreme Court dissented from the promulgation of the proposed amendments, not because the amendments were "inherently objectionable," but because the dissenters believed that the proposed changes "fall

* This article is an expanded version of the Brendan Brown Lecture delivered by A. Leo Levin on February 24, 1987 at the Columbus School of Law of The Catholic University of America in Washington, D.C. The opinions expressed herein are those of the authors and not necessarily those of the Federal Judicial Center. On matters of policy the Center speaks only through its Board.

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1. Re, *The Lawyer as Counselor and the Prevention of Litigation*, 31 CATH. U.L. REV. 685 (1982).

2. See Re, *supra* note 1; Markey, *Thomas More—Circa 1975*, 21 LOY. L. REV. 807 (1975); Papale, *A Tribute to Dr. Brendan F. Brown*, 21 LOY. L. REV. 803 (1975).

3. On the rich tradition of decanal scholarship, see Chadbourne, *Charles T. McCormick—The Legal Scholar*, 28 TEX. L. REV. 12 (1949).

4. Amendments to the Federal Rules of Civil Procedure, 446 U.S. 997 (1980) [hereinafter *1980 Amendments*].

short of those needed" to accomplish reforms in civil litigation that would address the twin problems of abuse of discovery and the cost of litigation.⁵ The 1983 amendments,⁶ and particularly the amendment to Federal Rule of Civil Procedure 11,⁷ have been subjected to criticism with a very different

5. *Id.* at 997-98 (Powell, J., dissenting). Justice Powell was joined by Justice Stewart and Justice Rehnquist.

6. Amendments to the Federal Rules of Civil Procedure, 461 U.S. 1095 (1983). Rules 7, 11, 16, and 26 of the Federal Rules of Civil Procedure were amended in 1983 as part of what Professor Arthur Miller, the reporter to the Advisory Committee, has called "an integrated package." A. MILLER, *THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE 2* (Federal Judicial Center 1984). Rule 7 was amended to make explicit that the certification requirement and sanctions provisions of rule 11 are applicable to motions and other papers. FED. R. CIV. P. 7(b)(3). Rules 16 and 26 were amended, in part, to include the following sanctions provisions:

If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the judge, upon motion or his own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), (D). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing him or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

FED. R. CIV. P. 16(f).

Every request for discovery or response or objection thereto made by 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 the request, response, or objection and state his address. The signature of the attorney or party constitutes a certification that he has read the request, response or objection, and that to the best of his knowledge, information, and belief formed after a reasonable inquiry it is: (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response or objection and a party shall not be obligated to take any action with respect to it until it is signed.

If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

FED. R. CIV. P. 26(g).

7. As amended in 1983, rule 11 provides:

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address

thrust: there has been concern that they are too radical, threatening basic change in the role of the advocate and his or her relations with both court and client.⁸

Such concern is not altogether groundless, as will be demonstrated below. Our thesis, however, is that the courts are taking a balanced approach to the interpretation and application of the provisions of these amendments, and that the new and evolving "jurisprudence of sanctions" promises to provide some useful correctives to the litigation problems it addresses while avoiding excesses that would indeed pose the risk of negative side effects.

We begin with the language of the rule, quoting only that portion which is immediately relevant: "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 [the lawyer], a represented party [the litigant], or both, an appropriate sanction . . ."⁹ Sanctions for violations are thus made mandatory and may be imposed upon the court's initiative in the absence of a motion by an opposing party. The plain meaning of the rule makes this much clear, and commentators and cases are in accord.¹⁰ More-

shall be stated. A party who is not represented by an attorney shall sign his pleading, motion or other paper 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 or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information and belief formed after reasonable inquiry it is well-grounded in fact and is warranted by existing law or a good faith argument for 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.

8. See, e.g., Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313, 1338-52 (1986); Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 HARV. L. REV. 630, 633-44 (1987) [hereinafter *Plausible Pleadings*]; Comment, *Reasonable Inquiry Under Rule 11—Is the Stop, Look, and Investigate Requirement a Litigant's Roadblock?*, 18 IND. L. REV. 751 (1985) [hereinafter *Reasonable Inquiry*]; Snyder, *The Chill of Rule 11*, 11 LITIGATION, Winter 1985, at 16; Rothstein & Wolfe, *Innovative Attorneys Starting to Feel Chill From New Rule 11*, Legal Times, Feb. 23, 1987, at 18, col. 1.

9. FED. R. CIV. P. 11.

10. See, e.g., *Unioil, Inc. v. E.F. Hutton & Co.*, 809 F.2d 548, 559 (9th Cir. 1986); Al-

over, on closer analysis, it also appears clear that so long as a violation is apparent to the court, sanctions are mandatory even where no adversary has so moved. The provisions do, indeed, carry the potential for far-reaching change.

To provide perspective, it is helpful to recognize that an amendment of this type to rules of procedure typically reflects the social and intellectual climate of the times. This is certainly true in the case of the sanctions amendments, which were adopted amidst concern over frivolous lawsuits, discovery abuse, and unfair litigation tactics—all perceived as contributing causes to the rising cost of litigation.¹¹ The emphasis on sanctions as a remedy also reflects the courts' experience with increased resort to sanctions under other rules and statutes,¹² and the promulgation of the new rules promised to accelerate this trend. Indeed, the amendments were designed to encourage imposition of sanctions. Lest anyone fail to discern this much from the rules themselves, the Advisory Committee, in the official notes, explicitly said so.¹³

The amendments became effective in August 1983, almost four years ago, and appellate opinions are being handed down in increasing numbers. They are beginning to form patterns; contours are emerging. Accordingly, it is time for a report card. On the whole, in our view the grades are good; the results of the first few years under the revised sanctions regime are favorable.

bright v. Upjohn Co., 788 F.2d 1217, 1221-22 (6th Cir. 1986); Westmoreland v. CBS, Inc., 770 F.2d 1168, 1174-75 (D.C. Cir. 1985); Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 254 n.7 (2d Cir. 1985) (*Eastway I*); Nelken, *supra* note 8, at 1321-22. *But cf.* Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 200 (1985) ("It is not likely that courts will consider themselves bound by the rule's mandatory language to impose sanctions.").

11. See, e.g., *1980 Amendments*, *supra* note 4, 446 U.S. at 1000-01 (Powell, J., dissenting); ABA Section of Litigation, *Second Report of the Committee for the Study of Discovery Abuse*, reprinted in 5 LITIGATION NEWS, April 1980, at 9; AMERICAN BAR ASSOCIATION SECTION OF LITIGATION, REPORT OF THE SPECIAL COMMITTEE FOR THE STUDY OF DISCOVERY ABUSE (1977); see generally Levin & Colliers, *Containing the Cost of Litigation*, 37 RUTGERS L. REV. 219, 219-22 (1985); Sofaer, *Sanctioning Attorneys for Discovery Abuse Under the New Federal Rules: On the Limited Utility of Punishment*, 57 ST. JOHN'S L. REV. 680, 681-83 (1983).

12. See *Oliveri v. Thompson*, 803 F.2d 1265, 1273 (2d Cir. 1986) (discussing 1980 amendments to 28 U.S.C. § 1927), *cert. denied*, 55 U.S.L.W. 3602 (U.S. Mar. 10, 1987); see generally Levin & Golash, *Alternative Dispute Resolution in Federal District Courts*, 37 U. FLA. L. REV. 29, 51-58 (1985). Moreover, interest in sanctions as a means of curbing abusive litigation practices is not limited to the federal courts. It was reported more than one year ago that "nearly a dozen states have adopted the new Rule 11 since 1983." Federal and State Judges Levy Stiff Penalties on Lawyers Who Abuse Legal Process, 4 ALTERNATIVES TO THE HIGH COST OF LITIGATION, February 1986, at 3, 12.

13. FED. R. CIV. P. 11 advisory committee's note ("The new language is intended to reduce the reluctance of courts to impose sanctions.").

It is fair to say that frivolous suits are being sanctioned, and hopefully deterred, and that unethical excesses in litigation are being restricted, and hopefully deterred.¹⁴ At the least, litigation costs and attorneys' fees are being shifted to give relief to innocent parties at the expense of those guilty of grossly improper conduct.¹⁵ Appellate courts have, on the whole, been deferential to trial judges, but affirmances have not come as a matter of course. Where there has been a failure of the trial court to act in cases that appear clearly to demonstrate sanctionable conduct, reversal has followed.¹⁶ Perhaps of greater significance, when trial judges attempted too much, when the rule was read as authority for sanctioning conduct that hardly could be viewed as egregious, where the reach of the rule was extended to a point that did, indeed, threaten to chill zealous advocacy, the appellate courts have, on the whole, been hesitant to follow.¹⁷

A review of recent cases will illustrate what rule 11 sanctions can accomplish. First, however, we will consider what sanctions cannot do, and what sanctions should not be allowed to do. Finally, in light of these considerations, we will explore some technical aspects of the rule, as reflected in judicial decisions and in the theories on which they rest.

I. WHAT SANCTIONS CANNOT DO; WHAT THEY SHOULD NOT BE ALLOWED TO DO

There has been much talk of a litigation explosion and of unwarranted

14. See, e.g., Nelken, *supra* note 8, at 1333 ("The sheer number of cases in which attorney's fees have been awarded for violation of rule 11 cannot fail to have a generalized deterrent effect on lawyers."). We agree that it is reasonable to infer that increased use of sanctions has had, or will have, such a deterrent effect. Proof of causation in this context is, of course, notoriously difficult, the more so since so little time has elapsed since the rule became effective.

15. For a discussion of the cost-shifting aspects of rule 11 sanctions, see A. MILLER, *supra* note 6, at 17, 28, 39. See also *Symposium, Amended Rule 11 of the Federal Rules of Civil Procedure: How Go the Best Laid Plans?*, 54 *FORDHAM L. REV.* 1, 29 (1985) (remarks of Judge Charles Sifton) ("I submit that [rule 11] is being enforced in an effort to shift the cost, the crushing cost of litigation, in recognition of the fact that one of the injuries that can occur in this society is the injury that is inflicted by the receipt of one's own lawyers' bill.").

16. See, e.g., *Albright v. Upjohn Co.*, 788 F.2d 1217 (6th Cir. 1986); *Westmoreland v. CBS, Inc.*, 770 F.2d 1168 (D.C. Cir. 1985).

In *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 254 (2d Cir. 1985) (*Eastway I*), the court of appeals reversed the district court's denial of a motion for attorneys' fees, and remanded to the district court to impose sanctions, including expenses and attorneys' fees. On remand, the district court discussed the mitigating factors pointing toward imposition of minor sanctions, and awarded \$1,000 in attorneys' fees as a sanction. *Eastway Constr. Corp. v. City of New York*, 637 F. Supp. 558, 584 (E.D.N.Y. 1986) (*Eastway II*).

17. See, e.g., *Oliveri v. Thompson*, 803 F.2d 1265, 1280 (2d Cir. 1986), *cert. denied*, 55 U.S.L.W. 3602 (U.S. Mar. 10, 1987); *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531 (9th Cir. 1986); *Kamen v. American Tel. & Tel. Co.*, 791 F.2d 1006 (2d Cir. 1986).

filings.¹⁸ Sanctions cannot be expected to effect a radical reduction in filings, which are now running at about 250,000 civil cases per year in the federal system.¹⁹ If fear of sanctions were to induce 2,500 plaintiffs not to bring lawsuits they had contemplated, a reduction of only one percent would result, assuming that the rate of increase were held to zero. Similarly, reports of discovery abuse and of the enormous cost of litigation are common.²⁰ But, in the vast majority of cases, there is no oppressive discovery, and one study has shown that in half of federal civil cases there is no discovery at all.²¹

This does not imply that there are no problems or that they are not serious. The problems in the litigation system have been likened to a pollutant.²² As in a clear reservoir, it does not take much to contaminate the whole. It does not take much to make the contamination evident, particularly when the pollutants are strikingly visible, be they in the form of mammoth cases that command great public interest, with seemingly endless discovery followed by interminable trials, or patently frivolous cases that make for good media copy—both of which can be a serious burden to the courts.

How much can sanctions help? We should neither overestimate nor underestimate their effectiveness.

In the first two years after the amendment to rule 11, there were 233 reported district court cases in which sanctions under the rule were considered.²³ Recent review of reported decisions indicates that in less than twice that time the number has tripled;²⁴ sanctions have clearly become a significant issue in a growing number of cases. Moreover, there are surely many more cases, not reported, in which informal sanctions have been imposed.²⁵ Based not only on the numbers, but on the reported cases, it appears fair to

18. See, e.g., Address by Chief Justice Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 275 (1982). For an opposing view on the question of excessive litigation, see Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986).

19. Civil filing in the 12-month period ending September 20, 1986 totaled 246,733. For the 12-month period ending September 20, 1985, civil filings totaled 279,965. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL JUDICIAL WORKLOAD STATISTICS 1, 18 (Sept. 1986).

20. See *supra* note 11.

21. P. CONNOLLY, E. HOLLEMAN & M. KUHLMAN, *JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: DISCOVERY 28* (Federal Judicial Center 1978).

22. See A. MILLER, *supra* note 6, at 19.

23. Nelken, *supra* note 8, at 1326.

24. One recent survey found that there have been at least 500 reported district court cases since August 1, 1983 in which rule 11 sanctions were considered. Rothstein & Wolfe, *supra* note 8. Our LEXIS search on March 5, 1987 generated more than 700 district court cases that contain discussion of sanctions in connection with rule 11.

25. See Nelken, *supra* note 8, at 1326; Rothstein & Wolfe, *supra* note 8.

say that increased resort to sanctions is having some impact.²⁶ It can and does provide important relief to the litigants and the judges involved; it can and does add respect for the law.

The underlying premise of the Advisory Committee that formulated the 1983 amendments is that the imposition of sanctions has the capacity to modify conduct. More is involved than fee-shifting in the particular case; the Advisory Committee chose to emphasize the deterrent effect of the new rule 11. Indeed, as the Committee's notes point out, the very choice of the title to the rule—"Sanctions"—was intended to emphasize the deterrent aspect.²⁷

However, if sanctions have the capacity to modify conduct in a way that improves the litigation process, they could also have the capacity to modify conduct in other ways as well; they might deter conduct that we do not want deterred because it is considered socially desirable. Specifically, there is at least the risk that the threat of sanctions might deter a zealous advocate from litigation designed to attack or dilute precedent²⁸ that he or she believes should be overruled. Classic examples of such precedents abound, and chilling the zeal of those who would achieve change through litigation would be counterproductive.²⁹ Moreover, the more severe the sanctions imposed, the greater the risk of a chilling effect. Simply put, there is the possibility, if not the probability, that misapplied sanctions would have undesirable side effects.

Sanctions must not be allowed to chill advocacy or to infringe upon the loyalty owed to clients. There is no disagreement on this point. The Advisory Committee made clear that "the rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories."³⁰ The Second Circuit, even as it reversed the trial judge for failure to impose sanctions, asserted that it did "not intend to stifle the enthusiasm or chill the creativity"³¹ of advocates, characterizing those attributes as "the very life-

26. Moreover, the figures discussed in the text relate only to rule 11. As noted *supra* note 6, amendments to other rules form part of the "integrated package." The number of sanctions under these rules has not been reflected in these figures; however, they have probably increased.

27. FED. R. CIV. P. 11 advisory committee's note; see *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 643 (1976) (referring to deterrent effect of sanctions on "other parties to other lawsuits" in "other district courts").

28. See *Constr. Corp. v. City of New York*, 637 F. Supp. 558, 574-75 (E.D.N.Y. 1986) (*Eastway II*) ("Unless Rule 11 is applied in a way that minimizes the tension between creativity and sanctions, a chilling effect seems inevitable. . . . Bad court decisions must be challenged if they are to be overruled, but the early challenges are certainly hopeless.").

29. See *supra* note 8.

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

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

blood of the law.”³² And, as if this was not sufficiently persuasive, the opinion continues: “Vital changes have been wrought by those members of the bar who have dared to challenge the received wisdom, and a rule that penalized such innovation and industry would run counter to our notion of the common law itself.”³³

Such statements, however eloquent, only serve to begin analysis, not to conclude it. It is important to recognize while assuring that zeal and creativity remain undeterred in fact as well as in theory, what they do not properly include. Zealous representation never included subornation of perjury. Nor did zealous representation ever include unethical conduct. This much is universally conceded.

Defining what is and what is not unethical has, however, proved more difficult and more controversial. Even where there is agreement in principle that it is unethical to conduct discovery for the purpose of draining an adversary financially, the principle has too often been honored in the breach. Neither in theory nor in practice does the proposition receive the same acceptance as that concerning perjury. Too many of the practicing bar have been prone to add caveats and exceptions. The sanction rules, and the holdings interpreting them, present a great educational opportunity—the opportunity to articulate and to enforce standards of litigation conduct that encourage zealous advocacy within the limits of the attorney’s obligations as an officer of the court.

A second point is closely related. It is sometimes said that sanctions infringe on the independence of counsel. Sanctions are somehow lumped together with the phenomenon known as “managerial judges,”³⁴ and both are considered undesirable, if not reprehensible.

Judges should, however, be “managers” of their own caseloads. Independence of counsel does not and should not include a license to start a lawsuit and allow it to languish, either because more important cases have come into the office, or because opposing counsel has asked for a continuance and is owed a favor. True, a claim is a private matter. Once filed, however, a case becomes public business. Thus, with due concern for the legitimate interests of litigants and counsel, a court should assure that a case moves expeditiously and fairly to resolution. The concept of judges as case managers is generally accepted today.³⁵

32. *Id.*

33. *Id.*

34. See Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

35. See generally, Oliphant, *Rule 11 Sanctions and Standards: Blunting the Judicial Sword*, 12 WM. MITCHELL L. REV. 731, 743 (1986) (“Even attorneys who see themselves as vigilant guardians of every aspect of a client’s case, no longer oppose stronger judicial involve-

Sanctions can help judges manage their caseloads in the small percentage of cases in which sanctions are necessary. Indeed, rule 16(f) is based on this premise.³⁶ The obligation, however, to manage a caseload is independent of the authority to impose sanctions under the federal rules.

II. SANCTIONS IN ACTION—APPLICATIONS OF RULE 11

One can imagine a range of situations in which rule 11 sanctions may be applicable. Such cases may run from the clearly frivolous claim, to the not-quite-so-frivolous motion made for an improper purpose, to the situation where the manner in which a case is being litigated, rather than the substance of the litigation, is called into question. Confronted with cases of these types, the courts are beginning to define the boundaries of the rule.

In *McLaughlin v. Bradlee*,³⁷ the plaintiff conducted a "seven-year campaign of litigation" against those involved in certain investigations and prosecutions in which he had been a target.³⁸ Summarized briefly, the plaintiff subsequently lost in the Maryland state courts, lost in the District of Columbia federal court, and lost in the Maryland federal court.³⁹ He then began the instant litigation, his fourth suit, in the United States District Court for the District of Columbia.

The trial judge dismissed all counts of the complaint based on the res judicata effect of the rulings in the three previous suits.⁴⁰ He denied a request for sanctions, but warned the plaintiff that sanctions would be reconsidered if the plaintiff persisted in attempting to relitigate previously adjudicated claims.⁴¹ Nonetheless, there came a flood of post-judgment motions from plaintiff. A sanction of more than \$12,900 was imposed;⁴² the court of appeals affirmed in an opinion by Judge Bork.

Another example of the kind of patently frivolous case clearly within the ambit of rule 11 is *Thiel v. First Federal Savings & Loan Association*.⁴³ Briefly, the case began as a mortgage default for failure to carry insurance on the financed property, but spawned an independent pro se action by the defaulting parties based on some very peculiar theories concerning the mone-

ment in the pretrial area."); see also Flanders, *Blind Umpires—A Response to Professor Resnik*, 35 HASTINGS L.J. 505 (1984); Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CALIF. L. REV. 770 (1981).

36. FED. R. CIV. P. 16(f).

37. 803 F.2d 1197 (D.C. Cir. 1986).

38. *Id.* at 1200.

39. *Id.*

40. *Id.* at 1201.

41. *Id.*

42. *Id.*

43. 646 F. Supp. 592 (N.D. Ind. 1986).

tary system.⁴⁴ The plaintiffs were warned by the court that their case was without merit, warned by the court of similar cases in which sanctions had been imposed, and warned by the court of the possibility of sanctions in their case.⁴⁵ Nonetheless, in the words of the court, the "plaintiffs refused to take the final step and abandon a cause of action that obviously has abused the judicial system."⁴⁶ The court imposed sanctions in the form of a \$3,600 fine for the cost of six hours of the court's time based on a figure of \$600 per hour, plus attorneys' fees and costs to the opposing party.⁴⁷

McLaughlin and *Thiel* are but two examples of the kind of frivolous litigation that finds its way into federal court. It is sometimes surprising to see the number of cases based on impossible theories, such as cases involving the constitutionality of the income tax, or the number of cases that try to tangle the court in procedural knots, for example, with numerous discovery motions. Such cases are of great concern to judges because of the time each can take. Imposition of sanctions is intended to send a message to those who are found to be toying with the system. In colloquial terms, the message to those who want to play games with the courts is simply: Go play in someone else's sandbox.

This message is also reflected in cases such as *Davis v. Veslan Enterprises*,⁴⁸ a wrongful death action brought in a Texas state court that arose out of a truck accident. A jury rendered a verdict of \$1 million in compensatory damages and \$12 million in punitive damages.⁴⁹ After plaintiff moved for judgment on the verdict, but before a scheduled hearing on the motion, defendant filed a petition for removal to federal court.⁵⁰ There was no real basis for removal; the federal court found that the argument for removal

44. *Id.* at 593-95.

45. *Id.* at 597-98.

46. *Id.* at 598.

47. *Id.* In setting a value on the court's time, the district court cited Levin & Colliers, *supra* note 11, at 226-27, which reported that a 1982 study sponsored by the Rand Corporation Institute for Civil Justice had concluded that a single hour spent by a federal judge in a tort case costs the government approximately \$600. See J. KAKALIK & A. ROBYN, COSTS OF THE CIVIL JUSTICE SYSTEM: COURT EXPENDITURES FOR PROCESSING TORT CASES 49 (Rand Institute for Civil Justice 1982). Judge Lee, who decided *Thiel*, has indicated on several other occasions that he will use this formula when imposing fines under rule 11 to compensate the government for the court's time. See *Robinson v. Moses*, 644 F. Supp. 975, 982-83 (N.D. Ind. 1986); *Dominguez v. Figel*, 626 F. Supp. 368, 374 (N.D. Ind. 1986); *Hilgefurd v. Peoples Bank*, 110 F.R.D. 700, 702 (N.D. Ind. 1986). Other judges have indicated approval of this formula. See *Dyson v. Sposeep*, 637 F. Supp. 616, 624 (N.D. Ind. 1986) (Miller, J.); *Advo Sys. v. Walters*, 110 F.R.D. 426, 433 (E.D. Mich. 1986) (Pratt, C.J.).

48. 765 F.2d 494 (5th Cir. 1985).

49. *Id.* at 496.

50. *Id.*

lacked "plausibility."⁵¹ Rather, the court inferred that defendant filed for removal in an attempt to save money, because there could not be an entry of judgment until the case was remanded to the state court and, under Texas law at that time, no interest could run until judgment was entered.⁵² Accordingly, the court imposed sanctions of more than \$5,800 in attorneys' fees, plus almost \$33,000 in lost interest.⁵³ These sanctions were affirmed by the court of appeals.

In cases where the limits of rule 11 have been tested, there have been some fortunate developments in the appellate courts. *Golden Eagle Distributing Corp. v. Burroughs Corp.*⁵⁴ was a diversity case that involved complex questions of change of venue and choice of law. The district court imposed sanctions on the defendant for misleading the court by presenting an argument for the extension of existing law as one warranted under existing law,⁵⁵ and for failing to disclose all adverse authority.⁵⁶

The court of appeals reversed,⁵⁷ holding that rule 11 "does not impose upon the district courts the burden of evaluating under ethical standards the accuracy of all lawyers' arguments."⁵⁸ The court explained, in part, that:

This use of Rule 11, far from avoiding excess litigation, increases it. We must not interpret Rule 11 to create two ladders for after-the-fact review of asserted unethical conduct: one consisting of sanction procedures, the other consisting of the well-established bar and court ethical procedures. Utilizing Rule 11 to sanction motions or pleadings not well-grounded in fact or law, or papers filed for improper purposes, gives full and ample play to the 1983 amendment.⁵⁹

In our view, *Golden Eagle* reaches a desirable result not only for technical reasons, but for reasons of policy as well. The appellate court makes clear that rule 11 is neither a panacea for all ills nor an enforcement mechanism for all rules of professional responsibility.⁶⁰ Viewed from a narrow perspec-

51. *Id.* at 500.

52. *Id.*

53. *Id.* at 497. Another example of harassing litigation tactics that have been sanctioned are frivolous motions to disqualify opposing counsel. *North Am. Foreign Trading Corp. v. Zale Corp.*, 83 F.R.D. 293 (S.D.N.Y. 1979). See *Oliphant, supra* note 35, at 763-64.

54. 103 F.R.D. 124 (N.D. Cal. 1984), *rev'd*, 801 F.2d 1531 (9th Cir. 1986).

55. 103 F.R.D. at 125-28.

56. *Id.* at 128-29.

57. 801 F.2d 1531 (9th Cir. 1986).

58. *Id.* at 1542.

59. *Id.*

60. *But cf.* *Blackwell v. Department of Offender Rehabilitation*, 807 F.2d 914, 915-16 (11th Cir. 1987) (upholding imposition of rule 11 sanctions against attorney for failure to discharge "duty of candor" in seeking attorneys' fees after settlement of § 1983 action without

tive, it would indeed be unfortunate if rule 11, with its provision for mandatory sanctions even on the court's own motion, were read to encompass the full range of ethical trespasses. No matter how minimal the penalties, bench-bar relations would inevitably be exacerbated. Viewed more broadly, an attempt to make rule 11 do too much could be expected to be counterproductive. As with so many things in life, the effort to do too much results in less being accomplished than would have been the case with a more realistic program.

The courts of appeals have also taken a balanced approach in another regard. Rule 11 specifically mentions attorneys' fees as an appropriate sanction.⁶¹ The law of attorneys' fees is a complex, technical area.⁶² Formulas and methodologies have been developed based on "lodestar figures" and "multipliers."⁶³ A potentially no less complicated "12-factor" formula was developed,⁶⁴ but seems to be falling out of favor.⁶⁵ A recent series of Supreme Court cases⁶⁶ has addressed a number of the issues arising in attorneys' fee litigation, yet some issues remain unresolved.⁶⁷

Thus far, however, the esoterica that characterizes the law of attorneys' fees has not been imported into the law of sanctions.⁶⁸ The assessment of sanctions in rule 11 cases—including awards of attorneys' fees—is less precise. Generally, the courts are concerned more with reasonableness and fairness in determining how large a sanction to impose, rather than with the

disclosing to court that such claims were foreclosed under the terms of the settlement); *Jorgenson v. County of Volusia*, 625 F. Supp. 1543, 1547-49 (M.D. Fla. 1986) (sanction of \$500 fine imposed on counsel for "misleading and unethical representation of the controlling law;" court emphasized the "reprehensible" conduct of counsel in "deliberately" omitting *controlling* authority from a memorandum of law, especially when counsel had personally participated in one of the controlling cases).

61. FED. R. CIV. P. 11.

62. For a recent survey of the various procedures and techniques used to handle attorney's fee requests, see A. TOMKINS & T. WILLGING, *TAXATION OF ATTORNEY'S FEES: PRACTICES IN ENGLISH, ALASKAN AND FEDERAL COURTS* 49-77 (Federal Judicial Center 1986).

63. See, e.g., *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 167-68 (3d Cir. 1973) (*Lindy I*); *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 112-22 (3d Cir. 1976) (*Lindy II*).

64. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974).

65. See *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 106 S. Ct. 3088, 3097 (1986) (*Lindy* lodestar formulation provides "a more analytical framework for lower courts to follow than the unguided 'factors' approach provided by *Johnson*.").

66. See *Delaware Valley*, 106 S. Ct. at 3088; *City of Riverside v. Rivera*, 106 S. Ct. 2686 (1986); *Blum v. Stenson*, 465 U.S. 886 (1984); *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

67. *Delaware Valley*, 106 S. Ct. at 3100 (ordering reargument on the risk of loss multiplier issue).

68. See, e.g., *Davis v. Veslan Enters.*, 765 F.2d 494, 500 n.12 (5th Cir. 1985) (In calculating attorneys' fees awarded as a sanction under rule 11, the district court was not required to use the "detailed analysis" set forth in *Johnson*.).

technique by which the sanction is calculated.⁶⁹ The courts of appeals recognize that sanctions under rule 11 serve several purposes—punishment and deterrence, e.g., as well as compensation,⁷⁰ and are, therefore, inclined to rely on the trial court to impose a sanction that serves either or both of these purposes, rather than fine tune or second-guess the judgment of the district courts.⁷¹ Moreover, in contrast with the situation in which an award of attorneys' fees is of right, in the rule 11 cases, the entire award is discretionary. True, sanctions may be mandatory, but both the selection of attorneys' fees as a sanction, as well as the amount awarded, are expressly within the discretion of the trial judge.⁷²

In general, appellate courts have responded well in honoring trial court

69. See, e.g., *United Food & Commercial Workers Union Local No. 115 v. Armour & Co.*, 106 F.R.D. 345, 349 (N.D. Cal. 1985) ("rule 11 only authorizes 'reasonable' fees, not necessarily actual fees").

70. For discussions of the various purposes that sanctions are thought to serve, see Nelken, *supra* note 8, at 1323-25; Oliphant, *supra* note 35, at 739-40; Schwarzer, *supra* note 10, at 201. Almost 60% of the 292 federal district judges responding to a Federal Judicial Center study expressed a belief that deterrence is the most important purpose of sanctions. S. KASSIN, AN EMPIRICAL STUDY OF RULE 11 SANCTIONS 29 (Federal Judicial Center 1985).

71. See, e.g., *Oliveri v. Thompson*, 803 F.2d 1265, 1281 (2d Cir. 1986), *cert. denied*, 55 U.S.L.W. 3602 (U.S. Mar. 10, 1987). In particular, the court of appeals stated:

[G]iven the underlying purpose of sanctions—to punish deviations from proper standards of conduct with a view toward encouraging future compliance and deterring further violations—it lies well within the district court's discretion to temper the amount to be awarded against an offending attorney by a balancing consideration of his ability to pay.

Id. (citations omitted); see also *Unioil, Inc. v. E.F. Hutton & Co.*, 809 F.2d 548, 559 (9th Cir. 1986) (award of \$294,141.10 of expenses and attorneys' fees was not "patently unreasonable in light of the massive liability that the complaint . . . threatened to impose upon multiple defendants"); *Davis v. Veslan Enters.*, 765 F.2d at 501 ("[c]onsidering the facts of the case . . . and the particular abuse the district court sought to deter, the district court's use of an interest calculation to tailor the amount of the sanction was most appropriate").

72. See *Unioil*, 809 F.2d at 559; *Oliveri*, 803 F.2d at 1280; *Davis*, 765 F.2d at 500-01; *Robinson v. National Cash Register Co.*, 808 F.2d 1119, 1126 & n.12 (5th Cir. 1987); *Albright v. Upjohn Co.*, 788 F.2d 1217, 1222 (6th Cir. 1986); *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1174-75 (D.C. Cir. 1985). *But cf.* *Constr. Corp. v. City of New York*, 762 F.2d 243, 254 & n.7 (2d Cir. 1985) (*Eastway I*) (while noting that district courts retain broad discretion in fashioning appropriate sanctions, the court of appeals remanded to the district court with instructions that "appropriate" sanctions on this case "shall include" expenses, including attorneys' fees).

On remand, the trial judge interpreted the court of appeals' decision to be a holding that failure to impose attorney's fees would be an abuse of discretion. *Constr. Corp. v. City of New York*, 637 F. Supp. 558, 577 (E.D.N.Y. 1986) (*Eastway II*).

The various standards of review that may be applicable in rule 11 cases have been stated succinctly as follows:

If the facts relied upon by the district court to establish a violation of the Rule are disputed on appeal, we review the factual determinations of the district court under a clearly erroneous standard. If the legal conclusion of the district court that the facts constitute a violation of the Rule is disputed, we review that legal conclusion *de novo*.

discretion and in displaying a deferential standard toward the judges who, in the words of Judge MacKinnon in one rule 11 case, have "tasted the flavor of the litigation."⁷³ District courts have employed the broad discretion granted them by the rule to impose a variety of sanctions, including fines to compensate the government for the court's time,⁷⁴ and reprimands.⁷⁵ Some judges, in addition to imposing monetary sanctions, have required certification from the sanctioned attorney that every lawyer in the firm receive a copy of the opinion.⁷⁶ Indeed, simply publishing an opinion imposing sanctions can, in itself, constitute a very severe sanction.⁷⁷

It would be wrong to suggest that appellate courts have abdicated their role in contributing to the developing law of sanctions. A plethora of appellate opinions testifies to the contrary.⁷⁸ Yet, the willingness to respect the discretion of the trial judge is clearly evident and sharply reduces the risk of what would otherwise be an intolerably burdensome proliferation of satellite litigation. The appellate courts have chosen a more balanced approach, which constitutes a major contribution toward developing a practicable program in which sanctions play an appropriate, and not a counterproductive, role.

There is yet another area in which appellate courts have demonstrated a desire to achieve a balanced approach in the use of rule 11. They have shown a commendable awareness of the realities of litigation and a sensitivity to the fact that sanctionable tactics are often rooted in improprieties of the adversary. Fighting fire with fire may not always be a defense, but it would be wrong to ignore blatant provocation where it exists. Thus, in *Mossman v. Roadway Express, Inc.*,⁷⁹ a case involving race and sex discrimi-

Finally, if the appropriateness of the sanction imposed is challenged, we review the sanction under an abuse of discretion standard.

Zaldivar v. City of Los Angeles, 780 F.2d 823, 828 (9th Cir. 1986). *Accord Robinson*, 808 F.2d at 1126.

73. *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1174 (D.C. Cir. 1985).

74. *See supra* note 47 and accompanying text.

75. *Allen v. Faragasso*, 585 F. Supp. 1114, 1119 (N.D. Cal. 1984).

76. This requirement has been imposed on several occasions by Judge William W Schwarzer. *See, e.g., Larkin v. Heckler*, 584 F. Supp. 512, 514 (N.D. Cal. 1984) (order must be shown to all assistant United States attorneys in district engaged in social security litigation); *Huettig & Schromm, Inc. v. Landscape Contractors Council*, 582 F. Supp. 1519, 1522-23 (N.D. Cal. 1984), *aff'd*, 790 F.2d 1421 (9th Cir. 1986); *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 103 F.R.D. 124, 129 (N.D. Cal. 1984), *rev'd on other grounds*, 801 F.2d 1531 (9th Cir. 1986).

77. *See Schwarzer, supra* note 10, at 202; *see generally Nelken, supra* note 8, at 1326.

78. Our LEXIS search performed on March 5, 1987 generated 161 cases from the 13 federal circuit courts of appeals that have discussed sanctions in the context of rule 11 since August 1, 1983.

79. 789 F.2d 804 (9th Cir. 1986).

nation claims, the plaintiff was sanctioned for bringing an improper motion for summary judgment, and was ordered to pay \$5,500 to compensate the defendant for attorneys' fees incurred in responding to the motion.⁸⁰ The court of appeals agreed that the plaintiff's conduct was sanctionable, but was concerned that the defendant, too, had engaged in sanctionable conduct by pleading thirty-seven affirmative defenses in answer to the original complaint.⁸¹ Properly, the appellate court made no effort to resolve such questions on appeal. Instead, it remanded to the district court to consider what portion, if any, of the attorneys' fees awarded were attributable to the defendant's conduct. The district court was therefore instructed to reconsider the amount of attorneys' fees awarded in light of the defendant's own misconduct.⁸²

III. "CHILLING" EFFECTS AND CONTINUING OBLIGATIONS

As already noted, commentators have expressed concern over the potential "chilling" effect of the new approach to sanctions on legitimate advocacy, and the "reasonable inquiry" and certification requirements of rule 11 have been the focus of that concern.⁸³ In particular, the fear has been expressed that "the amendments articulate a standard for avoiding sanctions that requires a complaint to specify legal and factual bases to a fuller extent than that necessary to survive a motion to dismiss."⁸⁴

Such concerns, however, should be allayed by appellate court decisions holding that the amendments to rule 11 do not modify the standards for summary judgment and dismissal,⁸⁵ and that "[a] plaintiff does not have to be prepared to meet a summary judgment motion as soon as the complaint is filed."⁸⁶ The appellate decisions indicate that while rule 11 has changed what a party must do before it can plead, it has not altered the pleading requirements. In functional terms, these cases typically turn on whether, and to what extent, discovery will be available to plaintiffs who have made reasonable inquiry before filing, but who must have the benefit of at least some discovery if they are to survive pretrial motions to dismiss.

In *Kamen v. American Telephone & Telegraph Co.*,⁸⁷ for example, the

80. *Id.* at 806.

81. *Id.*

82. *Id.*

83. See, e.g., Nelken, *supra* note 8, at 1338-43; *Plausible Pleadings*, *supra* note 8, at 634-44; *Reasonable Inquiry*, *supra* note 8; Rothstein & Wolfe, *supra* note 8.

84. *Plausible Pleadings*, *supra* note 8, at 634.

85. *Kamen v. American Tel. & Tel. Co.*, 791 F.2d 1006, 1011-12 (2d Cir. 1986).

86. *Oliveri v. Thompson*, 803 F.2d 1265, 1279 (2d Cir. 1986) (citing *Kamen*, 791 F.2d at 1011-12), *cert. denied*, 55 U.S.L.W. 3607 (U.S. Mar. 10, 1987).

87. 791 F.2d 1006 (2d Cir. 1986).

plaintiff brought an action against her employer under the Rehabilitation Act.⁸⁸ As a jurisdictional matter, the plaintiff had to show that AT&T received "federal financial assistance" as defined by the Act.⁸⁹ The defense counsel informed the plaintiff's counsel that the company received no such assistance, and threatened to seek sanctions if the plaintiff did not voluntarily discontinue the action.⁹⁰ The plaintiff's counsel responded that he was not about to dismiss a claim solely upon his adversary's representations, particularly in view of the broad and technical statutory definition of "assistance," and requested information on transactions by which the company received federal funds or services.⁹¹ He offered to dismiss the action if the information showed that the company did not receive federal financial assistance. The defendants ignored the plaintiff's offer, however, and moved for dismissal and for sanctions under rule 11, which were granted by the district court.⁹²

The court of appeals reversed, holding that it was improper for the district court to deny the plaintiff limited discovery on the jurisdictional question.⁹³ The court held that rule 11 does not modify the standards for summary judgment or dismissal, and further found that the district court's application of rule 11 had the effect of preventing a party who was opposing a summary judgment motion from obtaining discovery of facts that were exclusively or largely in the adversary's possession.⁹⁴

The Second Circuit reiterated this reasoning in *Oliveri v. Thompson*,⁹⁵ a civil rights action involving unconstitutional arrest and other claims. Among the sanctions imposed against the attorney, but reversed by the court of appeals, were sanctions for claims against a county and its police commissioner for failure to supervise the police officers involved.⁹⁶ The court of appeals acknowledged that these allegations had the appearance of "boiler-plate," but concluded that without formal discovery it would be unlikely for any citizen to be in possession of information either supporting or negating such claims.⁹⁷

We recognize . . . that when commencing a suit of this type neither the plaintiff nor his attorney is likely to know much about the rele-

88. 29 U.S.C. § 794 (1982).

89. 791 F.2d at 1008.

90. *Id.*

91. *Id.* at 1008-09.

92. *Id.* at 1009.

93. *Id.* at 1011.

94. *Id.* at 1011-12.

95. 803 F.2d 1265, 1279 (2d Cir. 1986).

96. *Id.* at 1278-79.

97. *Id.* at 1279.

vant internal operations of the police department, nor about the disciplinary history and record of the particular police officers involved. In view of the strong policies favoring suits protecting the constitutional rights of citizens, we think it would be inappropriate to require plaintiffs and their attorneys before commencing suit to obtain the detailed information needed to prove a pattern of supervisory misconduct A plaintiff does not have to be prepared to meet a summary judgment motion as soon as the complaint is filed.⁹⁸

This is not to say that rule 11 has not affected a party's ability to bring suit, particularly in cases where prefiling investigation is available to establish the basis for a claim, or lack thereof. When reasonable inquiry should have revealed that a claim has no legal or factual basis, but the claim is filed nonetheless, the appellate courts have found that rule 11 sanctions are appropriate, and plaintiffs are not entitled to further discovery.

This was the situation in *Albright v. Upjohn*,⁹⁹ where the plaintiff brought suit against nine pharmaceutical manufacturers, even though investigation of available medical records revealed that only three of the defendants had actually supplied the medication in issue. The claims against the other defendants were dismissed after they moved for summary judgment and the plaintiff amended the complaint to remove them as defendants, but the district court denied a request for sanctions by one of the former defendants.¹⁰⁰ The court of appeals reversed and remanded, holding that the prefiling investigation conducted by the plaintiff's attorneys was insufficient because it failed to disclose that the claim against that particular defendant was grounded in fact or that there was "any likelihood that additional medical records would be located that could not have been found through reasonable inquiry prior to filing."¹⁰¹

98. *Id.* (quoting *Kamen v. American Tel. & Tel. Co.*, 791 F.2d 1006, 1011-12 (2d Cir. 1986)).

99. 788 F.2d 1217 (6th Cir. 1986).

100. *Id.* at 1219-20.

101. *Id.* at 1221. In a similar "enterprise liability" case, the Third Circuit recently reversed sanctions of more than \$165,000 against attorneys who brought suit against 96 chemical manufacturers, 89 of whom were subsequently dismissed. *Glaser v. Cincinnati Milacron, Inc.*, 808 F.2d 285 (3d Cir. 1986). Applying the pre-amendment version of rule 11, the court found that the attorneys' prefiling investigation was not so lacking as to constitute subjective bad faith under the former rule 11 standard. *Id.* at 291. The court noted, however, that it expressed no opinion as to whether counsel's "limited investigation" would be sufficient under the reasonable inquiry standard of rule 11 as amended. *Id.* at 291 n.5.

Similarly, commentators have warned that the once prevalent practice in malpractice cases "of including as defendants all doctors, nurses, and orderlies on call at the time of the event would now be likely to result" in rule 11 sanctions. Rothschild, Fenton & Swanson, *Rule 11: Stop, Think & Investigate*, 11 LITIGATION, Winter 1985, at 13, 15.

Thus, the cases have taken a balanced approach in defining "reasonable inquiry." Heeding the Advisory Committee's admonition that what constitutes reasonable inquiry may depend on a variety of factors,¹⁰² the courts have looked to the practicalities in deciding what is reasonable. When the relevant information is exclusively, or at least realistically, in the hands of the defendants, then the plaintiff is, and should be, entitled to discovery. This is not to suggest a right to proceed with full discovery ranging over all the issues of the case, but rather a grant of limited discovery for a limited purpose with the limitations defined by the realities of the situation. Thus, if the threshold issue is one of jurisdiction and, applying this standard, the plaintiff is entitled to discovery, that entitlement is limited to what is relevant to determining jurisdiction.¹⁰³ When, however, information that would negate a claim is reasonably available prior to filing, and the claim is nevertheless filed, rule 11 sanctions properly come into play.¹⁰⁴

Closely related is the question of whether rule 11 imposes any continuing obligations. What happens when reasonable pre-filing inquiry indicates that a claim or defense is well-grounded in fact and law, but subsequent discovery reveals that the claim is baseless? Is there a continuing obligation constantly to reexamine one's pleadings and other papers, and to modify or withdraw them as a case develops? There are intimations in the case law¹⁰⁵ and commentary¹⁰⁶ that the rule does impose a duty on attorneys to review and re-evaluate their positions as new facts come to light, or otherwise risk sanctions.

We believe, however, that the better position concerning continuing obligations has been taken by the Second Circuit in *Oliveri*, which stated that "[r]ule 11 applies only to the initial signing of a 'pleading, motion or other

102. FED. R. CIV. P. 11 advisory committee's note. The note stated that:

[W]hat constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available to the signer; whether he had to rely on a client for information as to the facts underlying the pleading, motion, or other paper; whether the pleading, motion, or other paper was based on a plausible view of the law; or whether he depended on forwarding counsel or another member of the bar.

Id.

103. See *supra* note 93 and accompanying text.

104. See *supra* note 101 and accompanying text.

105. See, e.g., *Robinson v. National Cash Register Co.*, 808 F.2d 1119, 1127 (5th Cir. 1987) ("[R]ule 11 is not a one time only obligation. Counsel have a continuing obligation to review and reevaluate their position as the case develops.") (dicta); *Woodfork v. Gavin*, 105 F.R.D. 100, 104 (N.D. Miss. 1985) ("If an attorney subsequently becomes aware of information or evidence which reasonably leads him to believe that there is no factual or legal basis for his position . . . then that attorney is under an obligation to re-evaluate the earlier certification of the cause under Rule 11.") (dicta).

106. See *Nelken*, *supra* note 8, at 1331; *Parness, Groundless Pleadings and Certifying Attorneys in the Federal Courts*, 1985 UTAH L. REV. 325, 337-42; *Schwarzer*, *supra* note 10, at 200.

paper.’”¹⁰⁷ Like the court in *Oliveri*, we believe the plain language of the rule limits its application to conduct at the time of signing.¹⁰⁸ This is stated clearly enough in the advisory committee note.¹⁰⁹ Moreover, as the court noted in *Oliveri*, the drafters of the rule could have easily extended its reach if they so desired; the duty to supplement or to amend created by rule 26(e)¹¹⁰ provided a readily available model. The failure so to provide was hardly inadvertent.

In addition, there are several other reasons why we believe rule 11 should not be expanded to include a continuing obligation. First, inquiry into what a party or attorney knew can be difficult enough; expanding the inquiry to include when he or she knew it inevitably invites the kind of satellite litigation the drafters sought to avoid. Second, because rule 11 applies to “other papers” in addition to pleadings, sanctions can be imposed for continuing to assert a baseless claim in such subsequent filings as notices of deposition or trial briefs, without resort to any continuing obligation to modify groundless pleadings.¹¹¹ Of course, where sanctions otherwise become appropriate, a party’s persistence in pursuing a groundless claim may be relevant to choice of sanctions.

Finally, in truly egregious cases, other sources of authority exist to impose sanctions against an attorney who continues to pursue a claim even well after it is apparent that the claim is groundless.¹¹²

IV. DUE PROCESS CONSIDERATIONS

The Advisory Committee, in its notes to amended rule 11, foresaw the

107. *Oliveri v. Thompson*, 803 F.2d 1265, 1274 (2d Cir. 1986), *cert. denied*, 55 U.S.L.W. 3602 (U.S. Mar. 10, 1987).

108. *Id.*

109. FED. R. CIV. P. 11 advisory committee’s note (“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.”).

110. FED. R. CIV. P. 26(e).

111. Moreover, it has been noted that the amendments to rules 16 and 26, by extending attorney liability to pretrial conferences and to all discovery requests, responses, and objections, impose potential liability for conduct throughout the pretrial process. Sherman & Kinard, *Federal Court Discovery in the 80’s—Making the Rules Work*, 95 F.R.D. 245, 282 (1982).

112. *See, e.g.*, *Woodfork v. Gavin*, 105 F.R.D. at 105-06 (imposing sanctions under both rule 11 and 28 U.S.C. § 1927); *Steinberg v. St. Regis/Sheraton Hotel*, 583 F. Supp. 421, 425-26 (S.D.N.Y. 1984) (citing § 706(k) of tit. VII, the “bad faith” exception to the “American Rule” against awards of attorneys’ fees, 28 U.S.C. § 1927, and rule 11 as authority for award of attorneys’ fees); *Van Berkel v. Fox Farm & Road Mach.*, 581 F. Supp. 1248, 1251 (D. Minn. 1984) (imposing sanctions under 28 U.S.C. § 1927 for failing to dismiss suit after learning that it was barred by statute of limitations); *see also Parness, supra* note 106, at 339-42 (suggesting that local rules or the courts’ inherent authority may provide authorization for postfiling certification responsibilities).

possibility that litigation over the imposition of sanctions, if allowed to flourish unchecked, could more than offset the efficiency that the amendments were designed to promote.¹¹³ It could create the sort of sideshow series of hearings and appeals that Professor Arthur Miller, reporter to the Advisory Committee, has described as his "Kafkaesque dream."¹¹⁴ This recurrent nightmare culminates when a sanction motion is denied, at which point the vindicated party leaps up and says: "I hereby move to sanction the sanction motion."¹¹⁵

Certainly, due process is required in order to impose sanctions.¹¹⁶ Precisely how much process is due in each of a myriad of factual situations can be a challenging intellectual question. Of greater concern is the practical question: Will the courts find themselves mired in the processes necessary to enforce the rules designed to simplify? Sanctions for discovery abuse, for example, could in theory give rise to the need for several rounds of discovery to challenge the need for sanctions, to dispute the selected sanctions, and to mitigate the severity of proposed sanctions.

The draftsmen foresaw the potential problem and warned against so bizarre a result. Discovery concerning sanctions was to be "only by leave of the court, and then only in extraordinary circumstances."¹¹⁷ The scope of sanctions proceedings must, in the normal case, be limited to the record.¹¹⁸ The Advisory Committee's admonition to avoid satellite litigation does seem

113. FED. R. CIV. P. 11 advisory committee's note (seeking to assure that "efficiencies achieved through more effective operation of the pleading regimen will not be offset by the cost of satellite litigation").

114. A. Miller, Remarks at Annual Judicial Conference of the Second Judicial Circuit of the United States (Sept. 30, 1983), *reprinted in* 101 F.R.D. 161, 200 (1984).

115. *Id.*; see also A. MILLER, *supra* note 6, at 41. A scenario similar to Professor Miller's nightmare has indeed occurred in *Stevens v. Lawyers Mut. Liab. Ins. Co.*, 789 F.2d 1056 (4th Cir. 1986), in which the plaintiff responded to the defendant's rule 11 motion by moving to sanction the sanction motion. The district court granted the defendant's motion for sanctions, denied the plaintiff's motion for sanctions, and awarded defendant costs incurred in responding to the plaintiff's sanction motion. *Id.* at 1059. The court of appeals found that the district court abused its discretion in granting the defendant's motion, but affirmed the denial of the plaintiff's motion for sanctions. *Id.* at 1060-61. The appellate court did not deal explicitly with the award of costs to the defendant.

116. See *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1980) ("Like other sanctions, attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record."). As discussed *infra*, the nature of the process that is due varies with the circumstances of each case; the relevant due process considerations in rule 11 cases are developing in the emerging case law.

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

118. *Id.* ("In many situations the judge's participation in the proceedings provides him with full knowledge of the relevant facts and little further inquiry will be necessary. . . . [T]he court must to the extent possible limit the scope of sanction proceedings to the record.").

to have been met with some measure of success, largely because of five factors that mitigate to some degree the need for formal sanction proceedings.

First, judicial notice is available, and the record itself is before the court that is considering whether and what sanctions are appropriate.¹¹⁹ Nor should one underestimate what court records can yield. In a suit against a deputy sheriff for warrantless entry into the home of a suspect who was killed in the process, the assistant state's attorney defending the deputy sheriff made an assertion concerning the defendant's motivation.¹²⁰ The assertion was flatly contradicted, however, by the deputy sheriff's own deposition. There was no need for a hearing on the issue of sanctions. The deposition was available for all to read, and a \$400 sanction was imposed.¹²¹ The size of the sanction was modest enough, but the fact that a monetary sanction had been imposed was not likely to be lost on others.

Second, concessions are often made by a party to the litigation, sometimes expressly, sometimes by clear implication.¹²² This, too, can eliminate the need for an elaborate sanction proceeding.

Third, a party subject to sanctions certainly has a right to a hearing, but not necessarily to an evidentiary hearing.¹²³ Moreover, it is a little late to argue on appeal that no sanctions hearing was afforded, when it was evident that a hearing could have been had below for the asking.¹²⁴

Fourth, sometimes the appeal itself, with its briefs and supporting papers, is adequate to satisfy due process, either alone or supplemented by a remand

119. *Id.* See *McLaughlin v. Bradlee*, 803 F.2d 1197, 1205-06 (D.C. Cir. 1986) which reasoned:

The trial court, as a primary participant in the proceedings, had already observed those elements of the litigation most relevant to the criteria for imposing sanctions under the rule, most notably [the plaintiff's] conduct during the trial. While a hearing might on some occasions aid in examining the financial situation of a litigant upon whom sanctions are to be imposed, here [the plaintiff] concedes that such information may be found in the record.

Id.; see also *Mohammed v. Union Carbide Corp.*, 606 F. Supp. 252, 262 (E.D. Mich. 1985) ("Plaintiff's failure to conduct any investigation whatsoever into [defamation] claims is apparent from the present record.").

120. *Frazier v. Cast*, 771 F.2d 259, 265 (7th Cir. 1985).

121. *Id.* at 263-66.

122. See, e.g., *McLaughlin*, 803 F.2d at 1206 (plaintiff concedes that information relevant to imposition of sanctions may be found in the record); *Mohammed*, 606 F. Supp. at 261 ("plaintiff conceded at his deposition that he had no evidence" to support allegations of defamation).

123. *Oliveri v. Thompson*, 803 F.2d at 1265, 1280 (2d Cir. 1986) *cert. denied*, 55 U.S.L.W. 3602 (U.S. Mar. 10, 1987); *Davis v. Veslan Enters.*, 765 F.2d 494, 500 n.12 (5th Cir. 1985).

124. See, e.g., *Lepucki v. Van Wormer*, 765 F.2d 86, 88 (7th Cir.) (per curiam), *cert. denied*, 106 S. Ct. 86 (1985) ("appellant, having voluntarily chosen not to attend [hearing on costs and fees] cannot now complain that he is entitled to additional process").

on a narrow issue. This was the case in *Westmoreland v. CBS, Inc.*,¹²⁵ in which the court of appeals reversed the trial court's denial of sanctions against CBS for bringing a groundless petition to hold a nonparty witness in contempt for refusing to consent to a videotape of his deposition.¹²⁶ The appellate court determined that sanctions were appropriate under rule 11, but remanded to the district court for assessment of costs and expenses.¹²⁷

Finally, if a sanctioned party causes additional delays by bringing a frivolous appeal—frivolity piled on frivolity—the courts do not hesitate to impose sanctions on appeal, on a variety of theories.¹²⁸ *In re Intel Securities Litigation*¹²⁹ is a useful example. The case involved a lawyer who was sanctioned by the trial court for objecting to a class action settlement, solely to improve his own bargaining position regarding fees in an unrelated case.¹³⁰ The findings of the district court as to these facts went unchallenged.¹³¹ On appeal, the lawyer argued that the petition clause of the first amendment of the United States Constitution guaranteed the right of any citizen to present any petition—however frivolous—and to do so without penalty.¹³² Said the appellate court: “This contention is frivolous,”¹³³ and promptly imposed sanctions for bringing the appeal.

In the final analysis, sanctions will prove successful if they create a climate in which both the need for sanctions is drastically reduced and the standards

125. 770 F.2d 1168 (D.C. Cir. 1985).

126. *Id.* at 1170.

127. *Id.* at 1179-80 (imposition of costs incurred both in the district court and on appeal were to be considered).

128. *See, e.g., In re Kelly*, 808 F.2d 549, 551 (7th Cir. 1986) (FED. R. APP. P. 46(c) allows appellate court to impose discipline on an attorney “for conduct unbecoming a member of the bar” and rule 11 requirements “help to define conduct becoming a member of the bar”); *In re Intel Sec. Litig.*, 791 F.2d 672, 676 (9th Cir. 1986) (awarding costs and attorneys’ fees on appeal pursuant to FED. R. APP. P. 38); *Thornton v. Wahl*, 787 F.2d 1151, 1153 (7th Cir. 1986) (imposing sanctions pursuant to rule 11 for frivolous appellate proceedings); *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1179-80 (D.C. Cir. 1985) (rule 11 authorizes award of expenses and attorneys’ fees on appeal that are incurred because of the filing of groundless petition); *see also McLaughlin v. Bradlee*, 803 F.2d 1197, 1206 (D.C. Cir. 1986) (placing attorneys on notice that court intends to impose sanctions under FED. R. APP. P. 38 and 28 U.S.C. § 1912 for frivolous appeals); *cf. Westinghouse Elec. Corp. v. NLRB*, 809 F.2d 419, 425 (7th Cir. 1987) (imposing sanctions pursuant to 28 U.S.C. § 1927 for filing a brief that did not comply with the court’s margin, spacing, and typepoint requirements, which as a result exceeded the court’s 50-page limit) (“[o]ne has the sense that the lawyers wrote what they wanted and told the word processing department to jigger the formatting controls until the brief had been reduced to 50 pages”).

129. 791 F.2d 672 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 880 (1987).

130. *Id.* at 674.

131. *Id.*

132. 791 F.2d at 676.

133. *Id.*

of professional responsibility are understood and adhered to in a way that precludes the use of financial attrition as an accepted litigation tactic. The more severe the sanction imposed, the more questionable the application of rule 11 to the particular conduct complained of, the more likely will be the demand for the fullest range of procedures in the sanctioning process. Achieving a sense of balance in the implementation of rule 11 will, in itself, go far toward reducing the risk of excessive satellite litigation.

V. CONCLUSION

The maze of technicalities and mass of detail that seem inevitably to accompany implementation of any change in procedural rules tend to obscure any sense of overall purpose. Lost in minutiae, concerned with parsing the words of an amended rule and the cases that have interpreted it, one may be forgiven for wondering at times whether the effort is worthwhile, whether it really makes a difference.

At such times it can be useful to consider Judge Griffin Bell's statement of the relationship of effective procedures to the delivery of justice:

Constitutional guarantees of human rights ring hollow if there is no forum available in fact for their vindication. Statutory rights become empty promises if adjudication is too long delayed to make them meaningful or the value of a claim is consumed by the expense of asserting it. Only if our courts are functioning smoothly can equal justice become a reality for all.¹³⁴

And at times it is even helpful to be reminded of the role of justice in our society. Perhaps Edmund Cahn best articulated what ought to be our common aspiration when he wrote: "I see a world where no nation is accounted strong except in justice, rich except in compassion, or secure except in freedom and peace."¹³⁵

134. THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 300 (A.L. Levin & R. Wheeler eds. 1979).

135. E. CAHN, THE PREDICAMENT OF DEMOCRATIC MAN 187 (1961).

