


January 1986

Practice and Procedure under Amended Rule 11 of the Federal Rules of Civil Procedure

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ARTICLES

PRACTICE AND PROCEDURE UNDER AMENDED RULE 11 OF THE FEDERAL RULES OF CIVIL PROCEDURE

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I. INTRODUCTION

Effective August 1, 1983 Rule 11 of the Federal Rules of Civil Procedure¹ was amended in an apparent effort to provide a more expansive standard for the imposition of attorneys' fees.² Prior ex-

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1. FED. R. CIV. P. 11.

2. See *Blair v. Shenandoah Women's Center, Inc.*, 757 F.2d 1435, 1437-38 & n.5 (4th Cir. 1985). The Fourth Circuit stated in *Blair* that more teeth were put in

perience³ had shown that the former version of Rule 11 was not effective in deterring abuses and that there had been confusion in the federal courts regarding the circumstances which should compel a court to take disciplinary action, the standard of conduct to which attorneys are expected to adhere, and the range of appropriate sanctions.⁴ Accordingly, the Advisory Committee Notes to the 1983 amendments expressly recognize that the amendments were intended "to reduce the reluctance of courts to impose sanctions, . . . by emphasizing the responsibilities of the attorney and reinforcing those obligations by the imposition of sanctions."⁵

Experience of practice under the new provisions of Rule 11 demonstrates that, rather than curbing abuses in federal practice, the promise of sanctions has perhaps caused an upswing in motion proceedings and may be spawning what one federal judge has termed "satellite litigation," i.e. "ancillary proceedings that may themselves assume the dimensions of litigation with a life of its own."⁶ Further, while the 1983 amendments to Rule 11 may have

Rule 11 by the 1983 amendments in order to further discourage "dilatatory or abusive tactics" and help "streamline the litigation process" by lessening the amount of frivolous matters brought before the federal courts. *Id.* at 1437. *Accord* Coburn Optical Indus. v. Cilco, Inc., 610 F. Supp. 656, 659 (M.D.N.C. 1985); Federal Procedure Committee, *Sanctions: Rule 11 and Other Powers* 3-4 (Litigation Section, American Bar Association) (1986) [hereinafter *Sanctions*].

Effective January 1, 1987 the North Carolina counterpart to Federal Rule 11, N.C. R. Civ. P. 11, was amended to parallel the federal rule. *See* ch. 1027, § 55, 1985 N.C. SESS. LAWS.

3. Before the 1983 amendments to Rule 11, attorneys' fees could be imposed against counsel pursuant to 28 U.S.C. § 1927 (1982) or by the inherent power of the court. *See* Roadway Express, Inc. v. Piper, 447 U.S. 752, 765-67 (1980); *Robinson v. Ritchie*, 646 F.2d 147, 148-49 (4th Cir. 1981). *See infra* text accompanying notes 8-28. Additionally, certain federal statutes permit a prevailing party to shift attorneys' fees and other costs to a losing party. *See infra* note 8.

4. FED. R. CIV. P. 11 advisory committee note, 97 F.R.D. 198 (1983), reprinted in 2A J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE § 11.01[4] at 11-4 (1985).

5. *Id.* *See* *Tedeschi v. Smith, Barney, Harris, Upham & Co.*, 579 F. Supp. 657, 659-60 & n.3 (S.D.N.Y. 1984), *aff'd per curiam*, 757 F.2d 465 (2d Cir. 1985); *See also* *Index Fund, Inc. v. Hagopian*, 107 F.R.D. 95, 99 (S.D.N.Y. 1985) (purpose of amended Rule 11 is two-fold: to deter abuses in the signing of pleadings by penalizing the offender and to compensate the injured party); *Taylor v. Prudential-Bache Securities, Inc.*, 594 F. Supp. 226, 229 (N.D.N.Y.) (same), *aff'd*, 751 F.2d 371 (2d Cir. 1984).

6. Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 183 (1985). Judge Schwarzer notes with irony that "an offending party seeking to obstruct and delay litigation may welcome the resulting prolifer-

made federal judges more willing to penalize lawyers for their abusive litigation practices, there is little uniformity in the manner in which the rule's requirements are being applied.⁷

The purpose of this article is to explore the substantive provisions of amended Rule 11 and its historic antecedents, the procedure by which sanctions may be sought and/or imposed, the sanctions which the court may impose and the persons upon whom the sanctions can be imposed.

ation of proceedings as serving his purposes." *Id.* at 183-84.

Sanctions have been imposed against counsel for making an inappropriate and untimely Rule 11 motion. *See Fisher Bros. v. Cambridge-Lee Indus.*, 585 F. Supp. 69, 72 (E.D. Pa. 1983). Regarding this decision, it has been stated that the "emphasis on the availability of sanctions will create a pathology of seeking them They may clog the courts with needless sanction motions—the problem of satellite proceedings." Miller & Culp, *Litigation Costs, Delay, Prompted the New Rules of Civil Procedure*, NAT'L L.J., Nov. 28, 1983 at 28. *See also* Coburn Optical Indus. v. Cilco, Inc., 610 F. Supp. 656, 661 (M.D.N.C. 1985) (sanctions imposed against defense counsel who responded to plaintiff's Rule 11 motion with their own motion for fees and costs); Parness, *Groundless Pleadings and Certifying Attorneys in the Federal Courts*, 1985 UTAH L. REV. 325, 327 n.5. The costs to society of frivolous litigation and "satellite litigation" are difficult to measure. It should be noted, however, that one 1982 study concluded that a single hour spent by a federal judge on a case costs the taxpayer six hundred dollars. J. KAKALIK & A. ROBYN, COSTS OF THE CIVIL JUSTICE SYSTEM: COURT EXPENDITURES FOR PROCESSING TORT CASES 49 (Rand Institute for Civil Justice 1982). Three years later, another commentary estimated the cost to be even higher. Levin and Colliers, *Containing the Cost of Litigation*, 37 RUTGERS L. REV. 219, 227 (1985). *Accord* Advo Sys., Inc. v. Waeters, 110 F.R.D. 426, 433 (E.D. Mich. 1986).

7. S. KASSIN, AN EMPIRICAL STUDY OF RULE 11 SANCTIONS 45 (Federal Judicial Center 1985). Mr. Kassin's report was based upon a survey of 292 federal district court judges. In his report Mr. Kassin concluded that although the 1983 amendments to Rule 11 had apparently increased judicial readiness to enforce the new certification requirements, their success to date has been limited by interjudge disagreement about the breadth of the changes, inaccurate judicial perception of other judges' attitudes and a continued neglect of alternative, non-monetary sanctions. *Id.* at xi. *See also* Parness, *Three Suggestions For Trial Judges Overseeing Certification Standards*, NAT'L L.J., Mar. 3, 1986, at 28. Critical commentary concerning the amended rule includes Comment, *Recent Changes in the Federal Rules of Civil Procedure: Prescriptions to Ease the Pain?*, 15 TEX. TECH. L. REV. 887, 900-01 (1984) (sanctioning provisions that were intended to streamline litigation may create additional work and occupy valuable judicial resources); Sofaer, *Sanctioning Attorneys for Discovery Abuse Under the New Federal Rules: On the Limited Utility of Punishment*, 57 ST. JOHN'S L. REV. 680, 700-01 (1983) (new rules went too far in imposing additional burden on majority for abuses of minority).

II. IMPOSITION OF ATTORNEYS' FEES PRIOR TO THE 1983 AMENDMENTS TO RULE 11

Under the traditional "American Rule," each side in litigation bears its own attorneys' fees and expenses.⁸ Several exceptions to this rule, however, have been developed by the federal courts. For example, where, as a result of a party's efforts a fund is created or preserved for the benefit of a class, that party's attorney's fee may be paid on an equitable basis from the fund.⁹ Second, fees may be awarded by the court for "willful disobedience" of a court order,¹⁰ or when the losing party has acted "in bad faith, vexatiously, wantonly, or for oppressive reasons."¹¹ These exceptions reflect the inherent power of the federal courts to allow attorneys' fees in certain limited cases.¹²

Statutory enactments have increased the power of the federal courts to impose sanctions against attorneys appearing before them. In 1813, Congress enacted a statute providing that any per-

8. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 759 (1980). The "American Rule" differs from practice in England where, since at least 1278, courts have been authorized to award counsel fees to successful plaintiffs in litigation. Statute of Gloucester, 1278, 6 Edw. 1, ch. 1. A summary of English practice was offered by the Supreme Court in *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717 (1967). The Supreme Court has on numerous occasions reaffirmed its adherence to the American Rule. See *Roadway Express, Inc. v. Piper*, 447 U.S. at 759; *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. at 718.

While the traditional "American Rule" requires each party to bear its own litigation costs, various statutory provisions permit a prevailing party to shift attorneys' fees and other costs to an unsuccessful party. See, e.g., Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. § 1988 (1982) (court may allow prevailing party, other than the United States, a reasonable attorney's fee as part of the costs); Clayton Act, 15 U.S.C. § 15(a) (1982) (prevailing plaintiff in antitrust suit may recover attorney's fee). See also *Eastway Const. Corp. v. City of New York*, 762 F.2d 243, 252 (2d Cir. 1985) (enumerating statutory exceptions to American Rule), *on remand*, 637 F. Supp. 558, 563-64 (E.D.N.Y. 1986) (same).

9. See *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 392 (1970); *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116, 125 (1885).

10. See *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. at 718.

11. *F.D. Rich Co. v. United States ex rel Indus. Lumber Co.*, 417 U.S. 116, 129 (1974); *Hall v. Cole*, 412 U.S. 1, 5 (1973). See, e.g., *Callow v. Amerace Corp.*, 681 F.2d 1242, 1243 (9th Cir. 1982) (fees assessed against plaintiff tax protester who asserted that Federal Reserve notes were not valid money). See generally *Tedeschi v. Smith, Barney, Harris, Upham & Co.*, 757 F.2d 465, 466 (2d Cir. 1985) (*per curiam*) (discussing "bad faith" exception to American Rule).

12. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 259 (1975); *Eash v. Riggins Trucking, Inc.*, 757 F.2d 557, 568 (3d Cir. 1985).

son who "multiplied the proceedings in any cause . . . so as to increase costs unreasonably and vexatiously" could be held liable for "any excess of costs so incurred."¹³ Codified as 28 U.S.C. § 1927,¹⁴ the statute was interpreted by the Supreme Court in its 1980 *Roadway Express* decision¹⁵ as being restricted to clerk's and marshal's fees, court reporter charges, printing and witness fees, copying costs, interpreting costs and the fees of court-appointed experts.¹⁶ Congress promptly amended section 1927 to include attorneys' fees.¹⁷ Imposition of sanctions under the statute, however, remains limited to attorneys¹⁸ whose conduct is both "unreasonable and vexatious."¹⁹

13. Act of July 22, 1813, 3 Stat. 21 (1813). The Act is believed to be the response to the practices of certain United States Attorneys who, being compensated on a piecework basis, "apparently had filed unnecessary lawsuits to inflate their compensation." *Roadway Express, Inc. v. Piper*, 447 U.S. at 759 n.6. See also H.R. 25, 27th Cong., 3d Sess., 21-22 (1842), 26 ANNALS OF CONG. 29 (1813).

14. Prior to 1980 the statute provided:

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs. 28 U.S.C. § 1927 (1976). See generally Annotation, *Construction and Application of 28 U.S.C.S. § 1927 Authorizing Imposition of Liability for Costs on Counsel Who Multiplies the Proceedings Unreasonably and Vexatiously*, 12 A.L.R. FED. 910 (1972 & Supp. 1985).

15. *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980).

16. *Id.* at 757-58; 28 U.S.C. § 1920 (1976).

17. 28 U.S.C. § 1927 (1980) now provides:

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so 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.

Id.

18. Section 1927 does not authorize the imposition of damages and costs upon parties. *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 831 (9th Cir. 1986); *Maneikis v. Jordan*, 678 F.2d 720, 723 (7th Cir. 1982) (per curiam).

19. Schwarzer, *supra* note 6, at 182 (footnote omitted). Before imposing sanctions under § 1927 the federal courts will require a showing that the transgressing attorney acted in "bad faith." *Estate of Blas v. Winkler*, 792 F.2d 858, 860 (11th Cir. 1986); *Zaldivar v. City of Los Angeles*, 780 F.2d at 831; *Eavenson, Auchmuty & Greenwald v. Holtzman*, 775 F.2d 535, 544 n.17 (3d Cir. 1985); *Nelson v. Piedmont Aviation, Inc.*, 750 F.2d 1234, 1238 (4th Cir. 1984), *cert. denied*, ___ U.S. ___, 105 S. Ct. 2358 (1985); *Badillo v. Central Steel and Wire Co.*, 717 F.2d 1160, 1164-65 (7th Cir. 1983); *Nemeroff v. Abelson*, 620 F.2d 339, 350 (2d Cir. 1980). See, e.g., *Wold v. Minerals Eng'g Co.*, 575 F. Supp. 166, 167 (D. Colo. 1983) (sanctions imposed under § 1927 where attorney filed motion to disqualify opposing

The third source of sanctioning power in the federal courts was Rule 11, originally adopted in 1938.²⁰ Prior to its 1983 amendment, Rule 11 stated that 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."²¹ The rule was intended to provide a minimal ethical standard which attorneys were bound to observe when filing pleadings with the court. In the

law firm in order to harass opposing counsel, cause unnecessary delay and needlessly increase cost of litigation). See generally Schwarzer, *supra* note 6, at 191 & n.34.

20. FED. R. CIV. P. 11. See Advisory Committee Note of 1937, reprinted in 2A J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE § 11.01[2] at 11-3 (1985). In its original version Rule 11 stated:

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 willful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

The original version of the rule consolidated former Equity Rules 21 (proscribing the inclusion of scandalous material and impertinence in pleadings) and 24 (requiring the signature of counsel on pleadings). See also Equity Rule 36 (officers before whom pleadings verified). See generally Schwarzer, *supra* note 6, at 183; 2A J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE § 11.01[2] at 11-3 (1985); 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1331 at 495 (1969). The Federal Equity Rules of 1912 may be found at Rules of Practice for the Courts of Equity of the United States, 226 U.S. 627 (1912). See also RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES WITH NOTES AND PROCEEDINGS OF THE INSTITUTE ON FEDERAL PRACTICE 24-25 (W. Dawson ed. 1938). A historical discussion of Rule 11 and its purposes are presented in Risinger, *Honesty in Pleading and its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1, 9-14 (1976). See also Carter, *The History and Purposes of Rule 11*, 54 FORDHAM L. REV. 4, 5 (1985).

21. FED. R. CIV. P. 11.

words of one court, however, the rule was not promulgated as a "means of compelling lawyers to compile all of their evidence prior to signing and filing a complaint"²² and reference to pre-amendment cases indicates that its minimal standards were easily met.²³ Moreover, Rule 11 provided only two sanctions for counsel's failure to sign a pleading or for signing it "with intent to defeat the purpose" of the rule or if "scandalous or indecent matter" was inserted in the pleading. First, the pleading could be "stricken" as being "sham and false" and the action would proceed "as though the pleading had not been served."²⁴ Second, a "willful" violation of former Rule 11 could subject an attorney to "appropriate disciplinary action."²⁵

As the Advisory Committee Note to the 1983 amendments states, the first sanction provided under former Rule 11 (i.e., striking pleadings and motions as sham and false) had "rarely been utilized."²⁶ Similarly, perhaps because former Rule 11 did not specify

22. *United States v. Price*, 577 F. Supp. 1103, 1108 (D.N.J. 1983).

23. *See Anderson v. Cryovac, Inc.*, 96 F.R.D. 431, 432 (D. Mass. 1983) (plaintiff's counsel's statement that he had checked the complaint line by line with his retained expert and was advised that each allegation was justified satisfied Rule 11 test); *In re Ramada Inns Securities Litigation*, 550 F. Supp. 1127, 1134-35 (D. Del. 1982) (Rule 11 satisfied where plaintiff's counsel in class action securities fraud suit relied solely upon information published in the *Wall Street Journal* to support claims). *See generally* 5 C. WRIGHT & A. MILLER, *supra* note 20, at § 1333.

24. FED. R. CIV. P. 11.

25. *Id.*; *see generally* 5 C. WRIGHT & A. MILLER, *supra* note 20, § 1334 at 501.

26. FED. R. CIV. P. 11 advisory committee note, 97 F.R.D. at 199 (1983), reprinted in 2A J. MOORE & J. LUCAS, *supra* note 20, § 11.01[4] at 11-6. Professors Wright and Miller state:

A motion to dismiss as sham under Rule 11 should not be granted if there is any possibility that the party can prove his case. Appropriately, the courts have been reluctant to characterize a pleading as sham unless it contradicts matters of public record. As was noted by the Supreme Court in the early case of *Bates v. Clark*, "[a motion to strike a plea as sham and frivolous] is an unscientific and unprofessional mode of raising and deciding a pure issue of law. . . . A motion to strike out a plea is properly made when it has been filed irregularly, is not sworn to, if that is required, or wants signature of counsel, or any defect of that character; but if a real and important issue of law is to be made, that issue should be raised by demurrer." Rule 11 should not be used to raise issues of legal sufficiency that more properly can be disposed of by a motion for a more definite statement or by a motion for summary judgment. The signature rule, which is designed to encourage honesty in the bar when bringing and defending actions, ought to be employed only in those rare

what types of disciplinary action might be taken by the court in response to an attorney's violation of the rule, sanctions were infrequently imposed.²⁷ Accordingly, the Advisory Committee concluded that former Rule 11 was ineffective in deterring abuses and, further, that there had been "considerable confusion" regarding (1) circumstances which should trigger the imposition of sanctions; (2) the standard of conduct expected of attorneys; and (3) the range of available and appropriate sanctions.²⁸

cases in which an attorney deliberately presses an unfounded claim or defense.

5 C. WRIGHT & A. MILLER, *supra* note 20, § 1334 at 502-03 (quoting *Bates v. Clark*, 95 U.S. 204, 205-06 (1877)). According to one commentator, during the period between 1950 and 1976 only nineteen adversarial Rule 11 motions were made. Risinger, *supra* note 20, at 35. In ten of these cases the district courts found violations of the rule and struck pleadings or dismissed the suit. *Id.* at 36. Far more often, however, the courts denied motions to strike pleadings, relying on the presumption that counsel had filed the pleading in good faith. *See, e.g.*, *Lau Ah Yew v. Dulles*, 236 F.2d 415, 416 (9th Cir. 1956); *Murchinson v. Kirby*, 27 F.R.D. 14, 19 (S.D.N.Y. 1961); *United States v. Long*, 10 F.R.D. 443, 445 (D. Neb. 1950).

An excellent survey of pre-1983 practice under Rule 11 may be found in Note, *Civil Procedure—The Demise of a Subjective Bad Faith Standard Under Amended Rule 11*, 59 TEMP. L.Q. 107, 115-21 (1986). *See also* Risinger, *supra* note 20, at 34-42.

27. 5 C. WRIGHT & A. MILLER, *supra* note 20, § 1334 at 503; FED. R. CIV. P. 11 advisory committee note, 97 F.R.D. at 200, *reprinted in* 2A J. MOORE & J. LUCAS, *supra* note 20, § 11.01[4] at 11-7.

It would appear that only in "rare circumstances" did the federal courts rely solely on former Rule 11 in awarding attorneys' fees. Note, *supra* note 26, at 120. Between 1950 and 1976 only one such case was reported. Risinger, *supra* note 20, at 37 n.123. *See Kinee v. Abraham Lincoln Fed. Sav. and Loan Ass'n*, 365 F. Supp. 975, 983 (E.D. Pa. 1973) (attorneys' fees imposed under Rule 11 against plaintiffs' attorney who failed to investigate properly factual basis of allegations before filing a complaint against incorrectly named defendants). Following *Kinee*, other federal courts used former Rule 11 to impose sanctions. *See, e.g.*, *Hedison Mfg. Co. v. NLRB*, 643 F.2d 32, 35 (1st Cir. 1981) (frivolous complaint); *Anderson v. Allstate Ins. Co.*, 630 F.2d 677, 684 (9th Cir. 1980) (refiling time-barred complaint); *Lucha, Inc. v. Goeglein*, 575 F.Supp. 785, 788 (E.D. Mo. 1983) (frivolous motion to dismiss).

28. FED. R. CIV. P. 11 advisory committee note, 97 F.R.D. at 198 (citing R. RODES, H. RIPPLE & C. MOONEY, SANCTIONS IMPOSABLE FOR VIOLATIONS OF THE FEDERAL RULES OF CIVIL PROCEDURE 64-65 (Federal Judicial Center 1981)). Judge Schwarzer has flatly stated that "[w]idespread concern over frivolous litigation and abusive practices of attorneys" led to the 1983 amendments to Rule 11. Schwarzer, *supra* note 6, at 181.

III. 1983 AMENDMENTS TO RULE 11

A. *An Overview of the Rule*

Effective August 1, 1983 Rule 11 was amended.²⁹ The following reprint features the new material in italics and the portions of the former rule which were deleted in brackets:

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 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 [there is good ground to support it; and that it is not interposed for delay] *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.* [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 willful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.] *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.*³⁰

29. FED. R. CIV. P. 11, 97 F.R.D. 165, 167-68, *reprinted in* 2A J. MOORE & J. LUCAS, *supra* note 20, § 11.01[3] at 11-4.

30. *Id.* at 196-97.

Significant amendments to the rule may be summarized as follows:

(1) Rule 11 applies to *every* paper filed in court, not just pleadings; it applies to attorneys as well as parties;³¹

(2) The Rule mandates "reasonable prefiling inquiry" by counsel "with respect to the facts and the law on which the paper is based";³²

31. As noted above (*see supra* note 18) 28 U.S.C. § 1927 applies only to attorneys. In its former version, Rule 11 similarly authorized the imposition of sanctions only against attorneys (*see supra* note 20). As the Advisory Committee commented on this change in Rule 11 applicability:

If the duty imposed by the rule is violated, the court should have the discretion to impose sanctions on either the attorney, the party the signing attorney represents, or both, or on an unrepresented party who signed the pleading, and the new rule so provides. Although Rule 11 has been silent on the point, courts have claimed the power to impose sanctions on an attorney personally, either by imposing costs or employing the contempt technique. . . . This power has been used infrequently. The amended rule should eliminate any doubt as to the propriety of assessing sanctions against the attorney.

Even though it is the attorney whose signature violates the rule, it may be appropriate under the circumstances of the case to impose a sanction on the client. . . . This modification brings Rule 11 in line with practice under Rule 37, which allows sanctions for abuses during discovery to be imposed upon the party, the attorney, or both.

FED. R. CIV. P. 11 advisory committee note, 97 F.R.D. at 200, *reprinted in* 2A J. MOORE & L. LUCAS, *supra* note 20, § 11.01[4] at 11-7 (citations omitted).

32. FED. R. CIV. P. 11. *See* Schwarzer, *supra* note 6, at 185. The Advisory Committee offered the following explication of this requirement:

The new language stresses the need for some prefiling inquiry into both the facts and the law to satisfy the affirmative duty imposed by the rule. The standard is one of reasonableness under the circumstances This standard is more stringent than the original good-faith formula and thus it is expected that a greater range of circumstances will trigger its violation.

FED. R. CIV. P. 11 advisory committee note, 97 F.R.D. at 198-99, *reprinted in* 2A J. MOORE & J. LUCAS, *supra* note 20, § 11.01[4] at 11-5 (citations omitted). *See also* Note, *Reasonable Inquiry Under Rule 11—Is the Stop, Look and Investigate Requirement a Litigant's Roadblock?*, 18 IND. L. REV. 751 (1985).

The "prefiling inquiry" requirement may be violated if the attorney fails to adequately investigate the *facts* of the case, *see, e.g.*, *Florida Monument Builders v. All Faiths Memorial Gardens*, 605 F. Supp. 1324, 1326-27 (S.D. Fla. 1985) (failure to conduct independent investigation before alleging statewide antitrust conspiracy involving nearly fifty cemeteries); *Weisman v. Rivlin*, 598 F. Supp. 724, 725 (D.D.C. 1984) (filing a complaint that revealed on its face a lack of complete diversity of citizenship between all defendants and all plaintiffs); *Viola Sportwear, Inc. v. Mimun*, 574 F. Supp. 619, 621 (E.D.N.Y. 1983) (Rule 11 sanctions of

(3) The Rule specifies that the papers filed must be “well grounded in fact and warranted by existing law or a good faith argument for the extension, modification or reversal of existing law”;³³

(4) The Rule requires a certification that the paper “is not interposed for any improper purpose, such as to harass or to cause

\$20,000 in attorneys' fees imposed upon plaintiff and its attorneys for alleging a nationwide trademark conspiracy based on the sale of a single pair of designer jeans for ten dollars), or for failure to research the law adequately, *see, e.g.,* *Rodgers v. Lincoln Towing Serv., Inc.*, 596 F. Supp. 13, 22 (N.D. Ill. 1984) (failure to research case properly before filing civil rights action), *aff'd*, 771 F.2d 194 (7th Cir. 1985). *See also*, *Lepucki v. Van Wormer*, 765 F.2d 86, 87 (7th Cir. 1985), *cert. denied*, — U.S. —, 106 S. Ct. 86 (1986) (attorney has duty to screen claims for factual veracity and legal sufficiency); *Smith v. United Transp. Union Local No. 81*, 594 F. Supp. 96, 101 (S.D. Cal. 1984) (gross negligence in research and inquiry requires imposition of sanctions).

33. FED. R. CIV. P. 11. *See* Schwarzer, *supra* note 6, at 185. In the words of the Advisory Committee:

The rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories. The court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted. Thus, what constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available to the signer; whether he had to rely on a client for information as to the facts underlying the pleading, motion, or other paper; whether the pleading, motion, or other paper was based on a plausible view of the law; or whether he depended on forwarding counsel or another member of the bar.

FED. R. CIV. P. 11 advisory committee note, 97 F.R.D. at 199, *reprinted in* 2A J. MOORE & J. LUCAS, *supra* note 20, § 11.01[4] at 11-5. Applying this principle, the court in *Van Dorn Co. v. Howington*, 623 F. Supp. 1548, 1560 (N.D. Ohio 1985), denied defendants' motion for sanctions because the parties were litigating an action “in an area of the law [civil racketeering] that is not well settled.” *Cf.* *Davis v. A.G. Edwards & Sons, Inc.*, 635 F. Supp. 707, 717 (W.D. La. 1986) (court would not impose sanctions against plaintiffs for bringing a time-barred civil RICO action where the pertinent limitations period is “yet unsettled”). Notwithstanding the specific language used by the Advisory Committee, one commentator has stated that the effect of amended Rule 11 is that judges discourage frivolous claims at the expense of stifling legitimate legal innovation by sanctioning arguments on the erroneous assumption that a bright line separates warranted from unwarranted legal theories. Synder, *The Chill of Rule 11*, 11 LITIGATION 16, 55 (Winter 1985). *See also* Note, *Reasonable Inquiry under Rule 11—Is the Stop, Look and Investigate Requirement a Litigant's Roadblock?* 18 IND. L. REV 751 (1985) (amended Rule 11 may have effect of chilling willingness to bring innovative civil actions).

unnecessary delay or needless increase in the cost of litigation”;³⁴

(5) The court may impose sanctions for violations of the Rule “upon motion or upon its own initiative”;³⁵

(6) If a violation of the Rule is found, the court “shall impose

34. FED. R. CIV. P. 11. See FED. R. CIV. P. 11 advisory committee note (“[g]reater attention by the district courts to pleading and motion abuses and the imposition of sanctions when appropriate, should discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses”, FED. R. CIV. P. 11 advisory committee note, 97 F.R.D. at 198, reprinted in 2 J. MOORE & J. LUCAS; *supra* note 20, § 11.01[4], at 11-5).

In several cases the courts, after finding that the attorney breached the “reasonable inquiry” standard, concluded that the conduct was such that it was motivated by an “improper purpose.” See, e.g., *McLaughlin v. Western Cas. & Sur. Co.*, 105 F.R.D. 624, 626 (S.D. Ala. 1985) (dilatory filing of removal petition). See generally Note, *supra* note 26, at 128-29.

35. FED. R. CIV. P. 11. Regarding the courts’ ability to impose sanctions upon their own initiative the Advisory Committee commented:

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 detection 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.

FED. R. CIV. P. 11 advisory committee note, 97 F.R.D. at 200, reprinted in 2A J. MOORE & J. LUCAS, *supra* note 20, § 11.01[4] at 11-6 to 11-7 (citations omitted). Procedural considerations regarding Rule 11 motions include the following:

A party seeking sanctions should give notice to the court and the offending party promptly upon discovering a basis for doing so. The time when sanctions are to be imposed rests in the discretion of the trial judge. However, it is anticipated that in the case of pleadings the sanctions issue under Rule 11 normally will be determined at the end of the litigation, and in the case of motions at the time when the motion is decided or shortly thereafter. The procedure obviously must comport with due process requirements. The particular format to be followed should depend on the circumstances of the situation and the severity of the sanction under consideration. 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.

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

FED. R. CIV. P. 11 advisory committee note, 97 F.R.D. at 200-01, reprinted in 2A J. MOORE & J. LUCAS, *supra* note 20, § 11.01[4] at 11-7.

. . . an appropriate sanction”;³⁶ and

(7) Appropriate sanctions may include an order to pay to the opposing party “the amount of the reasonable expenses incurred [because of the filing of the pleading or other paper] including a reasonable attorney’s fee.”³⁷

B. General Application of Rule 11

As noted above, Rule 11 applies to *every* pleading, motion and other paper of a party³⁸ filed in federal civil litigation.³⁹ If a party

36. FED. R. CIV. P. 11 (emphasis added). As noted above (*see supra* text accompanying notes 26-27) experience had proven that sanctions were infrequently imposed under the former version of Rule 11. The 1983 amendments to the Rule were seemingly designed to force the district courts’ hands:

The text of the amended rule seeks to dispel apprehensions that efforts to obtain enforcement will be fruitless by insuring that the rule will be applied when properly invoked. The word “sanctions” in the caption, for example, stresses a deterrent orientation in dealing with improper pleadings, motions or other papers. This corresponds to the approach in imposing sanctions for discovery abuses And the words “shall impose” in the last sentence focus the court’s attention on the need to impose sanctions for pleading and motion abuses. The court, however, retains the necessary flexibility to deal appropriately with violations of the rule. It has discretion to tailor sanctions to the particular facts of the case, with which it should be well acquainted.

FED. R. CIV. P. 11 advisory committee note, 97 F.R.D. at 199-200, *reprinted in* 2A J. MOORE & J. LUCAS, § 11.01[4] at 11-6 (citation omitted).

Once a determination is made that Rule 11 has been violated, the court is obliged to impose sanctions. *See Weisman v. Rivlin*, 598 F. Supp. 724, 726 (D.D.C. 1985); *Wold v. Mineral Engineering Co.*, 575 F. Supp. 166, 167 (D. Colo. 1984). *See also* Note, *supra* note 26, at 141 (failure of judges to ignore clear directives of Rule 11 may undermine the rule’s effectiveness and defeat the drafter’s intent); *Schwarter*, *supra* note 6, at 201 (judges have duty to enforce Rule 11 even if it is an unpleasant experience).

37. FED. R. CIV. P. 11.

38. The term “other paper of a party” contained in Rule 11 includes notices and replies to motions, briefs, memoranda of law, reports and other papers required or permitted by local rule or court order. 2A J. MOORE & J. LUCAS, *supra* note 20, § 11.02[1] at 11-8 n.2. One circuit court has cautioned, however, that other rules should be invoked where more appropriate. *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 830 (9th Cir. 1986); *see, e.g.*, FED. R. CIV. P. 26(g) (excessive discovery requests); FED. R. CIV. P. 56(g) (inappropriate summary judgment affidavits).

39. FED. R. CIV. P. 11. It should be noted that there is no counterpart to Rule 11 in the Federal Rules of Appellate Procedure, hence, Rule 11 is seemingly not applicable to appeals. *See Thiem v. Hertz Corp.*, 732 F.2d 1559, 1563 (11th Cir. 1984) (notice of appeal not signed by counsel in accordance with Rule 11 during

is represented by counsel, the requisite subscription must be made by at least one attorney of record in his own name and the rule operates by giving effect to the signature of the attorney.⁴⁰

Judge Schwarzer, cognizant of the realities of modern federal practice, has stated that Rule 11 sanctions should be directed at the attorney who is "responsible" for the offending paper.⁴¹ This jurist would absolve from blame the innocent law firm associate who violates the rule while following a partner's instructions⁴² and in other situations would inquire into the role played by local counsel in preparing the offending paper.⁴³

period for appeals was nevertheless sufficient to invoke appellate jurisdiction). *Accord* 2A J. MOORE & J. LUCAS, *supra* note 20, § 11.02[1] at 11-8 to 11-9 n.5 (terming it "doubtful" whether Rule 11 is applicable to appellate proceedings). In *Hansen v. Prentice-Hall, Inc.*, 788 F.2d 892, 894 (2d Cir. 1986), the Second Circuit flatly stated that the provisions of FED. R. CIV. P. 11 are not applicable to appellate proceedings.

Under the provisions of FED. R. APP. P. 38, however, the courts of appeals may award "just damages and single or double costs" to the appellee if it is determined that an appeal is "frivolous." See generally 9 J. MOORE, B. WARD & J. LUCAS, *MOORE'S FEDERAL PRACTICE* ¶ 238.02 (1985).

40. FED. R. CIV. P. 11.

41. Schwarzer, *supra* note 6, at 186.

42. Judge Schwarzer writes:

The person signing the paper may not necessarily be the one responsible for it. An associate in a law firm charged with preparing a paper for filing may be carrying out the instructions of a partner who made the decision to file it. In such a situation, sanctions are more appropriately imposed on the principal rather than the agent carrying out his orders, and nothing in the rule bars its application in that manner.

Id. at 185.

43. Judge Schwarzer analogizes the innocent associate to local counsel in federal litigation:

A similar problem may arise when a paper is signed and filed by local counsel at the direction of out-of-state counsel. Local counsel may be called on to share in the preparation of a paper and in the decision to file it. On the other hand, a client may find it more economical to place responsibility on an out-of-state firm which will use local counsel only as a conduit for papers and communications. Rule 11 is not intended to increase the cost of litigation by requiring review of papers by an additional set of lawyers. What the rule does require is that the lawyer who elects to sign a paper take responsibility for it, even if that responsibility is shared. Where control of the litigation rests with other lawyers, therefore, local counsel may be well advised to let one of those lawyers sign papers to be filed.

Even if the paper is signed by out-of-state counsel, however, the presence of the name of local counsel or his firm on the paper raises an

C. *Requisite Pre-Filing Inquiry*

Under amended Rule 11, the person⁴⁴ signing the pleading,

inference that he has authorized or at least concurred in its filing. It would be difficult for a lawyer to disclaim all responsibility for a paper bearing his name. Rule 11 may therefore make it advisable for attorneys acting as local counsel to consider the extent to which they can perform the role of a passive conduit consistent with the responsibilities the rule imposes.

Id. at 186. (footnote omitted).

In *Golden Eagle Distributing Corp. v. Burroughs Corp.*, 103 F.R.D. 124 (N.D. Cal. 1984), *rev'd on other grounds*, No. 84-2602 (9th Cir. Oct. 9, 1986), a Rule 11 motion proceeding arising out of defendant's filing of a frivolous motion for summary judgment, the court imposed sanctions only upon out-of-state lead counsel who were responsible for its preparation. Local counsel, who had signed the motion but did not actively participate in its preparation or the decision to file, were criticized but not subjected to sanctions. *Id.* at 125 n.1. Compare *Coburn Optical Indus. v. Cilco, Inc.*, 610 F. Supp. 656, 660 (M.D.N.C. 1985) (local counsel's firm held liable for Rule 11 sanctions where it "seemed blindly to follow the commands of its out-of-state associates who in all probability prepared most, if not all, of the [offending] motion").

In *Long v. Quantex Resources, Inc.*, 108 F.R.D. 416 (S.D.N.Y. 1985), where local counsel relied upon foreign counsel before signing papers and representing them to the court, the district court imposed sanctions against local counsel when the argument advanced in the papers was subsequently abandoned. Judge Owens there commented:

It therefore seems to me that at the very least, a local counsel that signs the papers of foreign counsel must read the papers, and from that have a basis for a good faith belief that the papers on their face appear to be warranted by the facts asserted and the legal arguments made, and are not interposed for any improper purpose.

Id. at 417. Cf. *Pravic v. U.S. Industries-Clearing*, 109 F.R.D. 620, 623 (E.D. Mich. 1986) (attorney may not rely upon legal memorandum prepared by second lawyer without independently verifying the reasoning of the cases in the memorandum and "Shepardizing" those cases).

44. Under Rule 11 a person appearing *pro se* must sign the papers he files and the rule "gives the same effect to his signature as to that of an attorney." Schwarzer, *supra* note 6, at 185 n.17. The courts have recognized that Rule 11 applies to *pro se* litigants, see *Cavallary v. Lakewood Sky Diving Center*, 623 F. Supp. 242, 246 (S.D.N.Y. 1985); *Pawlowske v. Chrysler Corp.*, 623 F. Supp. 569, 572-73 (N.D. Ill. 1985); *Bigalk v. Fed. Land Bank Ass'n of Rochester*, 107 F.R.D. 210, 213 (D. Minn. 1985); *Blume v. Leake*, 618 F. Supp. 95, 97 (D. Idaho 1985), and have not hesitated to impose sanctions against them. See, e.g., *Fox v. Boucher*, 794 F.2d 34, 37-38 (2d Cir. 1986) (affirming imposition of sanctions totaling \$4,000 against attorney who filed frivolous *pro se* action); *Cannon v. Loyola Univ. of Chicago*, 784 F.2d 777, 782 (7th Cir. 1986) (sanctions imposed against *pro se* litigant whose ten-year "penchant for litigation" constituted harassment of defendants); *Smith v. Egger*, 108 F.R.D. 44, 45 (E.D. Cal. 1985) (filing frivolous tax-

motion, or other paper certifies that "to the best of his knowledge, information and belief *formed after reasonable inquiry* it is well grounded in fact and . . . law"45 Hence, there is an affirmative duty placed upon the attorney or party to investigate the facts and the law *prior* to signing and filing the paper.⁴⁶ The failure to do so may subject them to sanctions under Rule 11. For example, in *Goldman v. Belden*⁴⁷ where plaintiff alleged fraud on the part of defendant without having first conducted a proper inquiry, the court dismissed the complaint and then considered whether Rule 11 sanctions would properly be imposed against plaintiff and his attorney. Noting that the slightest investigation by plaintiff's attorney would have clearly disclosed the insubstantiality of the fraud allegations, the court imposed sanctions of \$2,500 against plaintiff and his attorney. The court recognized that the standard for imposing sanctions prior to the August 1983 amendments to Rule 11 was whether the action was commenced in "good faith." Judge Schwarzer stated, however, that "[t]he new standard is much stricter and permits the imposition of sanctions for failure by the attorney to make reasonable pre-filing inquiry into the facts and the law of the case."⁴⁸

payer's suit earns *pro se* plaintiff sanctions of \$3,743.36); *Williams v. Duckworth*, 617 F. Supp. 597, 601-02 (N.D. Ind. 1985) (prisoner fined \$300 for filing frivolous civil rights suit); *Nixon v. Phillipoff*, 615 F. Supp. 890, 897-98 (N.D. Ind. 1985) (frivolous suit arising out of mortgage foreclosure earns *pro se* litigant sanctions of \$2,750). *Accord Johnson v. United States*, 607 F. Supp. 347, 349-50 (E.D. Pa. 1985) (frivolous taxpayer's suit).

45. FED. R. CIV. P. 11 (emphasis added). *See supra* note 31.

46. Professor Arthur Miller has described this as a "stop-and-think obligation." A. MILLER, *THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY* (Federal Judicial Center 1984). *Accord Stewart v. RCA Corp.*, 790 F.2d 624, 633 (7th Cir. 1986) (Rule 11 requires attorneys to think first and file later); *Duncan v. WJLA-TV, Inc.*, 106 F.R.D. 4, 5-6 (D.D.C. 1984); *Sealtite Corp. v. Gen. Serv. Admin.*, 614 F. Supp. 352, 355 (D. Colo. 1985). *See also Rothschild, Rule 11: Stop, Think and Investigate*, 11 LITIGATION 13 (1985).

47. 580 F. Supp. 1373 (W.D.N.Y. 1984), *vacated on other grounds*, 754 F.2d 1059 (2d Cir. 1985).

48. 580 F. Supp. at 1381 (footnote omitted). An excellent elucidation of the type of pre-filing "reasonable inquiry" required under Rule 11 may be found in Schwarzer, *supra* note 6, at 186-89. *See also* 2A J. MOORE & J. LUCAS, *supra* note 20, § 11.02[2] at 11-11 to 11-15.

In *Wagner v. Allied Chem. Corp.*, 623 F. Supp. 1407 (D. Md. 1985), the court held that consulting with an expert, talking to former employees of defendant's pesticide plant about their disabilities and receiving an oral opinion from a doctor

A number of district courts have imposed sanctions because of counsel's failure to conduct the type of prefiling inquiry mandated by the rule.⁴⁹ For example, in *Zaldivar v. City of Los Angeles*,⁵⁰ an action brought under the Voting Rights Act,⁵¹ the court held that intervenors were entitled to attorneys' fees and costs of \$14,951.25 under Rule 11 because the complaint was not well-grounded in law or fact. Senior Judge Williams excoriated plaintiff's counsel and pointed out the broad public policy which the rule is designed to serve:

Plaintiff's arguments are so without merit that their claim can be

who had examined most of the former employees was sufficient inquiry on the part of plaintiff's counsel to avoid the imposition of sanctions. *Id.* at 1411-12.

49. See, e.g., *Brown v. Nationwide Mut. Ins. Co.*, 634 F. Supp. 72, 73 (S.D. Miss. 1986) (sanctions of \$1,000 imposed against attorney who filed frivolous bad faith action against insurance company); *Advo Systems, Inc.*, 110 F.R.D. 426, 432-33 (E.D. Mich. 1986) (sanctions totaling \$5,821 imposed under Rule 11 against employer and employer's attorney who brought frivolous tort suit against former employee); *Barrios v. Pelham Marine, Inc.*, 106 F.R.D. 512, 514 (E.D. La. 1985) (sanctions of \$750 imposed against defense counsel who filed frivolous third-party complaint); *Gilmer v. City of Cleveland*, 617 F. Supp. 985, 989 (N.D. Ohio 1985) (sanctions of \$2,000 imposed against counsel who filed frivolous civil rights suit); *Steele v. Morris*, 608 F. Supp. 274, 277 (S.D. W. Va. 1985) (defendant who filed frivolous motion to dismiss ordered to pay \$337.50 in attorneys' fees); *Nat'l Survival Game, Inc. v. Skirmish, U.S.A., Inc.*, 603 F. Supp. 339, 341-42 (S.D.N.Y. 1985) (in action based upon unfair competition claim court denied defendant's motion to dismiss and, on its own motion, ordered defense counsel to bear plaintiff's costs relating to the motion; defense counsel failed to conduct reasonable inquiry required by Rule 11 where they failed to cite a single authority in support of their position and ignored established precedent directly to the contrary); *Kuzmins v. Employee Transfer Corp.*, 587 F. Supp. 536, 538 (N.D. Ohio 1984) (same—counsel for plaintiff in sex discrimination action ordered to pay \$100 to defense counsel); *Hasty v. Paccar, Inc.*, 583 F. Supp. 1577, 1580 (E.D. Mo. 1984) (in view of plaintiff's "utter failure" to come forward with even the slightest connection between a corporate defendant and Missouri so as to satisfy that state's long-arm statute, district court invited defendant to file a Rule 11 motion); *Booker v. City of Atlanta*, 586 F. Supp. 340, 341 (N.D. Ga. 1984) (city attorneys who asserted a frivolous argument regarding civil rights immunity held liable for payment of fees and costs); *Van Berkel v. Fox Farm & Road Machinery*, 581 F. Supp. 1248, 1251 (D. Minn. 1984); (counsel for plaintiff hit with \$2,894.62 in sanctions for failing to determine that products liability case was time-barred before signing complaint and for thereafter failing to dismiss it after learning that it was untimely).

50. 590 F. Supp. 852 (C.D. Cal. 1984), *rev'd*, 780 F.2d 823 (9th Cir. 1986).

51. 42 U.S.C. § 1973 *et seq.* (1982). In *Zaldivar* plaintiff supporters of a city councilman brought the action against the city contending that a recall election violated the Act. *Zaldivar*, 590 F. Supp. at 854.

deemed frivolous. The statutes upon which they base their claim clearly do not provide support. A cursory reading of the statutes would indicate to a reasonable person that there is no basis for bringing this lawsuit . . . Rule 11 proscribes the filing of claims such as the one before this Court even though not brought in subjective bad faith. Counsel should not file actions not well founded in fact and law because the end result is the burdening of an already crowded docket and the incurring of unnecessary legal expenses for the parties involved. The best means of ensuring this is to impose sanctions.⁵²

On the other hand, plaintiff's counsel who conducts (and can docu-

52. *Zaldivar*, 590 F. Supp. at 857. The court ordered plaintiffs and their attorneys to share the burden of paying intervenors' fees and costs:

The Advisory Committee Note to Rule 11 states that where the circumstances are appropriate, the court may impose a sanction on the client as well as the attorney. Implicit in that provision is that both parties may share the burden of satisfying the sanction. The circumstances attendant to this case indicate that both counsel and their clients should share the burden of paying Intervenors' attorney's fees and costs. It is reasonable to conclude that plaintiffs were aware of the legal defects in the claim filed in their behalf. The same claim was raised in state court and it was dismissed. In addition, plaintiffs appear to be ready and willing parties in an effort to stall the recall petition process initiated by Intervenors. Every attempt in state court to derail the recall process failed and plaintiffs made a last ditch effort in this court. The Court cannot allow the judicial system to be used for such purposes when there is neither a factual nor legal basis for the claim.

Id.

As noted above (*see supra* note 49), on appeal the district court's decision in *Zaldivar* imposing sanctions under Rule 11 was reversed. *Zaldivar v. City of Los Angeles*, 780 F.2d 823 (9th Cir. 1986). Reviewing Judge Williams' decision *de novo*, the Ninth Circuit concluded that plaintiffs had a "good faith" claim under the Voting Rights Act and that their suit was neither "frivolous" nor brought for purposes of "harassment" in violation of Rule 11. *Id.* at 833-35. It is submitted that the reversal of Judge Williams' *Zaldivar* decision represents the subjective nature of applying Rule 11 standards and indicates the difficulty in predicting when sanctions might be imposed in a particular case.

This problem is exacerbated when different courts seemingly apply different standards and accordingly reach inconsistent conclusions regarding the same conduct. Compare *Donaldson v. Clark*, 105 F.R.D. 526 (M.D. Ga. 1985), *rev'd on other grounds*, 786 F.2d 1570 (11th Cir. 1986) (application of objective standard in case where spouse and judges accused of civil rights conspiracy in divorce proceeding results in Rule 11 violation) with *Williams v. Birzon*, 576 F. Supp. 577 (W.D.N.Y. 1983), *aff'd*, 740 F.2d 955 (2d Cir. 1984) (application of subjective standard where spouse alleged civil rights violated in divorce suit by conspiracy between spouses and state court judges results in no Rule 11 violation).

ment) an adequate investigation into the facts and law of a case before filing suit will not be subjected to sanctions.⁵³

The reasonableness of an attorney's belief is assessed "in light of the circumstances at the time the paper is signed."⁵⁴ In some cases, however, an attorney's belief that there was a reasonable basis for the paper when it was filed may well change in light of later developments, such as revelations in discovery, which may render a claim or defense untenable. Judge Schwarzer has written that "[t]o persist in claims or defenses beyond a point where they could no longer be considered well-grounded in fact may violate . . . [Rule 11]."⁵⁵ For example, in *Woodfork v. Gavin*,⁵⁶ a wrongful death action where the issue was whether a state court suit or a federal court action would have priority under Mississippi law,⁵⁷ sanctions were sought by an intervenor law firm (counsel for plaintiff in the

53. See *Fisher Bros. v. Cambridge-Lee Indus. Inc.*, 585 F. Supp. 69, 71-72 (E.D. Pa. 1983) (antitrust action). See generally *Sanctions*, *supra* note 2, at 9-11 (listing practical suggestions to avoid Rule 11 sanctions). See also *infra* note 115.

The Advisory Committee observed that "what constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available to the signer; whether he had to rely on a client for information as to the facts underlying the paper . . . ; or whether he depended on forwarding counsel or another member of the bar." Advisory Committee Notes to Amended Rule 11, 97 F.R.D. at 199, reprinted in 2A J. MOORE & J. LUCAS, *supra* note 20, § 11.01[4], at 11-5. See Schwarzer, *supra* note 6, at 187-88.

54. Schwarzer, *supra* note 6, at 189. The Advisory Committee Notes state that 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." Advisory Committee Notes to Amended Rule 11, 97 F.R.D. at 199, reprinted in 2A J. MOORE & J. LUCAS, *supra* note 20, § 11.01[4] at 11-5. It should be noted that the 1983 amendments may not be applicable to cases filed before their effective date. See *Hashemi v. Campaigner Publications, Inc.*, 784 F.2d 1581, 1583-84 (11th Cir. 1986) (amended Rule 11 not applicable to defamation complaint filed before amendments' effective date).

55. Schwarzer, *supra* note 6, at 189. See *Stevens v. Lawyers Mut. Liab. Ins. Co.*, 107 F.R.D. 112, 115 (E.D.N.C. 1985), *rev'd on other grounds*, 789 F.2d 1056 (4th Cir. 1986).

56. 105 F.R.D. 100 (N.D. Miss. 1985).

57. Miss. CODE ANN. § 11-7-13 (Supp. 1984) provides that there shall be only one pending suit for the same wrongful death and that that action shall ensue for the benefit of all beneficiaries. Upon the filing of a wrongful death suit, other claimants must join in that suit rather than file separate actions. *Woodfork*, 105 F.R.D. at 102 n.1. The dispute in *Woodfork* arose out of a state court suit filed on August 2, 1983 and a federal action filed six days later by other beneficiaries of the decedent. *Id.* at 102-03.

earlier filed state court suit) against attorneys representing the plaintiff in the subsequently filed federal court suit. The latter had alleged that the former had obtained priority by acting through "fraud, collusion, misrepresentation, and an alteration of court records" to procure an incorrect (and earlier) filing date in the state court suit.⁵⁸ Even after deposition testimony had revealed that their allegations were incorrect, plaintiff's attorneys in the federal court suit did not retract their assertions. In holding that sanctions would properly be assessed against them under *both* Rule 11 and 28 U.S.C. § 1927,⁵⁹ Judge Biggers concluded that plaintiff's attorneys had failed to make an adequate investigation of the facts before leveling their charges and had been remiss in failing to abandon their position when it became clear that it was untenable:

The recent amendment to Rule 11, which was in effect at the time the plaintiff's attorneys made their allegations of fraud, requires reasonable inquiry rather than the lesser standard of good faith. The court believes that this rule as amended obligates an attorney who signs a document not only to conduct a reasonable investigation into the facts before filing, but also to continually review, examine, and re-evaluate his position as the facts of the case come to light. 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, giving due regard to the standard of proof, then that attorney is under an obligation to re-evaluate the earlier certification of the cause under Rule 11.⁶⁰

58. *Id.* at 103.

59. In the words of Judge Biggers:

This court determines that the plaintiff's attorneys, Mr. Johnnie E. Walls and Mr. Robert E. Buck, did not discharge the duties and standard of care imposed upon them as attorneys at law and officers of this court either at the time they filed the response to the motion to dismiss or in the unjustified maintenance of their position. The court finds that they violated both the spirit and letter of Rule 11, and that their assertion of the affirmative defense contained in the response to the defendants' motion was with such reckless disregard as to truth or falsity that the pleading violates the prohibition of 28 U.S.C § 1927 against vexatious litigation.

Id. at 106.

60. *Id.* at 104. See also *Olga's Kitchen of Hayward, Inc. v. Papo*, 108 F.R.D. 695 (E.D. Mich. 1985) (Rule 11 sanctions including attorneys' fees of \$15,911.25 imposed against defendant and his counsel for the manner in which they conducted their defense in a landlord-tenant dispute); *Weir v. Lehman Newspapers*,

It is clear, therefore, that the duty under Rule 11 to make a "reasonable inquiry" is a continuing one.

D. *Applicable Standard of Care*

Under amended Rule 11 the attorney (or party) signing the paper must certify that it is "well grounded in fact" and warranted by existing law or "a good faith argument for the extension, modification, or reversal of existing law."⁶¹ Although the Advisory Committee Notes state that the rule is "not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories,"⁶² it has been suggested that Rule 11 could be used to stifle the creative development of the law.⁶³

In applying the former version of the rule, the courts followed what has been termed "a somewhat nebulous good faith standard."⁶⁴ In other words, prior to August 1, 1983 sanctions would be imposed under Rule 11 if an action was brought in "bad faith,"⁶⁵

Inc., 105 F.R.D. 574, 576 (D. Colo. 1985); (attorney required to pay attorney fees since the plaintiff failed to raise a federal question and complaint was a duplication of a state court action based on an identical complaint); Coburn Optical Indus. v. Cilco, Inc., 610 F. Supp. 656, 660 (M.D.N.C. 1985) ("To persist in claims or defenses beyond a point where they can no longer be considered well grounded violates Rule 11").

61. FED. R. CIV. P. 11. As noted above (*see supra* note 31) courts have found Rule 11 violations where an attorney misstates, misrepresents, or omits pertinent law, *see* Golden Eagle Distrib. Corp. v. Burroughs Corp., 103 F.R.D. 124, 128-29 (N.D. Cal. 1984), *rev'd on other grounds*, No. 84-2602 (9th Cir. Oct. 9, 1986); where an attorney fails to research legal precedent adequately, *see* Heuttig & Schromm, Inc. v. Landscape Contractors Council, 582 F. Supp. 1519, 1522 (N.D. Cal. 1984), *aff'd*, 790 F.2d 1421 (9th Cir. 1986); or where the claim is clearly unsupported by precedent, *see* Rodgers v. Lincoln Towing Serv., Inc., 596 F. Supp. 13, 22 (N.D. Ill. 1984), *aff'd*, 771 F.2d 194 (7th Cir. 1985). *See generally* Note, *supra* note 26, at 131-33.

62. FED. R. CIV. P. 11 advisory committee note, 97 F.R.D. at 199, *reprinted in* 2A J. MOORE & J. LUCAS, *supra* note 20, § 11.01[4] at 11-5.

63. *See supra* note 33.

64. 2A J. MOORE & J. LUCAS, *supra* note 20, § 11.02[2] at 11-13. The courts applying amended Rule 11 have, in most cases, recognized that good faith is no longer relevant. *See* Foster v. Michelin Tire Corp., 108 F.R.D. 412, 415 (C.D. Ill. 1985); Interior Finish Contractors Ass'n v. Drywall Finishers Local No. 1955, 625 F. Supp. 1233, 1241 (E.D. Pa. 1985).

65. *See* Nemeroff v. Abelson, 620 F.2d 339, 350 (2d Cir. 1980) (court of appeals reversed district court's award of attorneys' fees to defendants, holding that the action was not entirely without foundation and therefore was not commenced in "bad faith"). *Accord* Hashemi v. Campaigner Publications, Inc., 784 F.2d 1581, 1583 (11th Cir. 1986); Rubin v. Buckman, 727 F.2d 71, 73 (3d Cir. 1984); Gieringer

meaning that it was "entirely without color" and asserted "wantonly, for the purpose of harassment or delay, or other improper reasons."⁶⁶ The new standard was expressed by Judge Knapp in the following terms:

The question therefore presented under Rule 11 is: must there be a finding of *subjective* bad faith before sanctions may be applied? It seems to us that the question answers itself. Given the nature of advocacy it would be well nigh impossible ever to establish that an advocate acted in "subjective bad faith." If that were the criteria the Rule might as well be repealed. We think therefore, that the Rule must mean that the Court may impose sanctions where it finds that there is no *objective* basis for an attorney's belief that a motion 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."⁶⁷

While all circuit courts addressing the issue have endorsed the *objective* standard embraced by Judge Knapp,⁶⁸ until recently the

v. Silverman, 731 F.2d 1272, 1281 (7th Cir. 1984) (applying pre-amendment standard).

66. *Tedeschi v. Smith, Barney, Harris, Upham & Co. Inc.*, 579 F. Supp. 657, 661 (S.D.N.Y. 1984) (applying pre-amendment standard), *aff'd*, 757 F.2d 465 (2d Cir. 1985). For example, in *Dore v. Schultz*, 582 F. Supp. 154 (S.D.N.Y. 1984), sanctions of \$200 were imposed against counsel for a mother whose child had been taken out of the country by his natural father without her consent. The mother sued the State Department and the Secretary of State for negligently failing to enforce a federal statute making it unlawful for a citizen to leave the United States without a passport. The court found the action to be "frivolous" and "completely lacking in merit." *Id.* at 158.

67. *Wells v. Oppenheimer & Co.*, 101 F.R.D. 358, 359 (S.D.N.Y. 1984) (emphasis in original) (quoting FED. R. Civ. P. 11) (footnote omitted). In a footnote following the words "might well be repealed," Judge Knapp offered the following cogent comment: "Having been many years at the Bar before being on the Bench, we know from our own experience that there is no position—no matter how absurd—of which an advocate cannot convince himself." *Wells*, 101 F.R.D. at 359 n.3. Judge Knapp there imposed sanctions against defense counsel who improvidently filed a motion for summary judgment. *Id.* at 359. After the case was settled, however, the court held that an award of attorneys' fees was no longer appropriate. *Wells v. Oppenheimer & Co.*, 106 F.R.D. 258 (S.D.N.Y. 1985).

68. *See Stites v. I.R.S.*, 793 F.2d 618, 620 (5th Cir. 1986) ("in addition to a subjective, good faith belief that the pleading is well founded in both fact and law" Rule 11 "now requires that the belief be objectively reasonable."); *See Stevens v. Lawyers Mut. Liab. Ins. Co. of North Carolina*, 789 F.2d 1056, 1060 (4th Cir. 1986) ("a court must judge the attorney's conduct under an objective standard of reasonableness rather than by assessing subjective intent. . ."); *Lieb v. Topstone Indus.*, 788 F.2d 151, 57 (3d Cir. 1986) (same); *Zaldivar v. City of Los*

situation in the Seventh Circuit could best be described as "confused." In two post-1983 cases⁶⁹ the Seventh Circuit maintained that the appropriate criterion for an award of attorneys' fees under Rule 11 is a finding of subjective bad faith.⁷⁰ Although the two cases were decided *after* August 1, 1983, the court was judging conduct occurring before the amendment to the rule, hence, application of the former⁷¹ standard was proper. A broader reading of these decisions, however, suggested confusion surrounding the appropriate standard. In *Suslick* the Seventh Circuit quoted the amended version of the rule⁷² and then stated that it "*requires* a finding of subjective bad faith . . ."⁷³ Whether the court's use of the present tense represented a typographical error or not, the *Suslick* decision caused confusion in that circuit.⁷⁴ To a certain de-

Angeles, 780 F.2d 823, 829 (9th Cir. 1986) ("subjective bad faith is not an element to be proved under present Rule 11 . . ."); *Laborista v. Cervceria India, Inc.*, 778 F.2d 65, 66 (1st Cir. 1985) (same); *Eavenson, Auchmuty & Greenwald v. Holtzman*, 775 F.2d 535, 540 (3d Cir. 1985) ("subjective bad faith is no longer a predicate to a Rule 11 violation; the test is now an objective one of reasonableness."); *Indianapolis Colts v. Mayor & City Council of Baltimore*, 775 F.2d 177, 181 (7th Cir. 1985); *Westmoreland v. CBS*, 770 F.2d 1168, 1177 (D.C. Cir. 1985); *Moore v. City of Des Moines*, 766 F.2d 343, 346 (8th Cir. 1985); *Eastway Constr. Co. v. City of New York*, 762 F.2d 243, 253-54 (2d Cir. 1985); *Maier v. Orr*, 758 F.2d 1578, 1584 (Fed. Cir. 1985).

69. *Gieringer v. Silverman*, 731 F.2d 1272 (7th Cir. 1984); *Suslick v. Rothchild Securities Corp.*, 741 F.2d 1000 (7th Cir. 1984).

70. *Gieringer*, 731 F.2d at 1281; *Suslick*, 741 F.2d at 1007.

71. *See* *Badillo v. Central Steel & Wire Co.*, 717 F.2d 1160, 1166 (7th Cir. 1983). *See supra* text accompanying notes 64-65.

72. *Suslick*, 741 F.2d at 1003 n.3.

73. *Id.* at 1007 (emphasis added).

74. *Compare In re Ronco, Inc.*, 105 F.R.D. 493, 497 (N.D. Ill. 1985) (Shadur, J.) ("This Court does not view itself as bound by the *Suslick* mistaken footnote citation.") *with* *Davis v. United States*, 104 F.R.D. 509, 512 n.2 (N.D. Ill. 1985) (Hart, J.) ("it is clear that *Suslick* itself was interpreting the amended version of Rule 11 . . . and this court is bound by that interpretation"). Judge Schwarzer has rejected any sort of bad faith formulation:

To test compliance with the rule, as some courts have done, by reference to whether bad faith has been shown is inconsistent with its text and purpose. The Advisory Committee Notes point out that "the standard is more stringent than the original good-faith formula and thus it is expected that a greater range of circumstances will trigger its violation;" wilfulness as a prerequisite to disciplinary action was deleted by the 1983 amendment which "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." Reasonable belief that a paper is "warranted by law" should therefore be

gree, disparity of standards persists in other courts as well.⁷⁵

It should be noted that, notwithstanding the standard which they are applying, federal judges are not imposing sanctions with-

treated as an objective standard turning on the facts and circumstances of the case, not on the attorney's state of mind.

Schwarzer, *supra* note 6, at 191 (footnotes omitted).

The Seventh Circuit seemingly got back on the right track when it recognized the objective standard in *Thornton v. Wahl*, 787 F.2d 1151, 1154 (7th Cir. 1986); *Indianapolis Colts v. Mayor & City Council of Baltimore*, 775 F.2d 177, 181 (7th Cir. 1985); *Frazier v. Cast*, 771 F.2d 259, 265 n.4 (7th Cir. 1985); and *Rodgers v. Lincoln Towing Serv.*, 771 F.2d 194, 205 (7th Cir. 1985). See also *Pawlowske v. Chrysler Corp.*, 623 F. Supp. 569, 572 n.4 (N.D. Ill. 1985) (objective standard followed); *Beck v. Cantor, Fitzgerald & Co.*, 621 F. Supp. 1547, 1566 (N.D. Ill. 1985) (same); *Sloan v. United States*, 621 F. Supp. 1072, 1075 (N.D. Ind. 1985) (same). Commentary on the Seventh Circuit's tortuous trail may be found in Note, *supra* note 26, at 124-25.

75. Consider the hybrid standard formulated by one district judge:

Turning now to the motion of the plaintiff for sanctions, which motion has been exhaustively supported by the briefs and supporting documents furnished by plaintiff, the court, being fully apprised of the amendments to Rule 11, and the cases which have come down since that amendment, nonetheless does not conclude that this case justifies the sanctions provided for in that rule. It is certainly true that the case has involved a good deal of the court's time, that the defenses asserted, when properly analyzed by consideration of the record, simply do not defend against the claim of the plaintiff, but it cannot be said objectively that these defenses have been asserted in bad faith. It is agreed that the test is not subjective bad faith, but objective bad faith. Accepting the objective standard, the court is not able to conclude with sufficient clarity that the assertions of these defenses were objectively in bad faith. As a consequence, the motion for sanctions is denied.

Ancona v. Umstadter, No. 84-0025-C (W.D. Va. Jan. 28, 1985), *aff'd on other grounds*, No. 85-1470 (4th Cir. Sept. 10, 1986) (per curiam). Compare *Nelson v. Piedmont Aviation, Inc.*, 750 F.2d 1234, 1238 (4th Cir. 1984) (finding requirement of bad faith in new Rule 11), *cert. denied*, 105 S.Ct. 2358 (1985), with *Stevens v. Lawyers Mut. Liab. Ins. Co. of North Carolina*, 789 F.2d 1056, 1060 (4th Cir. 1986) (in applying amended Rule 11 "a court must judge the attorney's conduct under an objective standard of reasonableness rather than by assessing subjective intent . . ."); See also, Parness, *Groundless Pleadings and Certifying Attorneys in the Federal Courts*, 1985 UTAH L. REV. 325, 362 & n.148 (noting continued confusion); *Kobak & Barrett, Amended Federal Rule 11 and Antitrust Litigation*, N.Y.L.J. July 22, 1985, at 4, col. 1 (same); *Jeffers v. Convoy Co.*, 636 F. Supp. 1337, 1342 (D. Minn. 1986) (apparently applying "bad faith" standard); *D.G. Rung Indus. v. Tinnerman*, 626 F. Supp. 1062, 1065 (W.D. Wash. 1986) (same); *Sam & Mary Housing Corp. v. New York State*, 632 F. Supp. 1448, 1452 (S.D.N.Y. 1986) (same); *Can Am Indus. v. Firestone Tire & Rubber Co.*, 631 F. Supp. 1180, 1185 (C.D. Ill. 1986) (same).

out regard to the vagaries of counsel. While the rule mandates sanctions for every "violation" and purports to make sanctions mandatory by directing that in the event of a violation the court "shall impose . . . an appropriate sanction,"⁷⁶ the courts have not imposed sanctions where an offending attorney was laboring under a "mistake" and acknowledged the error.⁷⁷ For example, in *Weisman v. Rivlin*,⁷⁸ where sanctions were imposed against plaintiff's counsel who mistakenly filed a complaint that on its face disclosed a lack of diversity jurisdiction, the court granted defendant's Rule 11 motion but awarded only \$200 of the \$7,800 requested.⁷⁹

Rule 11 as amended also authorized the court to impose sanc-

76. FED. R. CIV. P. 11. See *supra* note 35.

77. See, e.g., *Baranski v. Serhant*, 106 F.R.D. 247, 249-50 (N.D. Ill. 1985) (plaintiff's counsel not subjected to Rule 11 sanctions where they admitted that second and third amended complaints filed on behalf of additional plaintiffs were time-barred). The Advisory Committee Notes specify that the court "retains the necessary flexibility to deal appropriately with violations of the rule. It has discretion to tailor sanctions to the particular facts of the case, with which it should be well acquainted." Advisory Committee Note to Amended Rule 11, 97 F.R.D. at 200, reprinted in 2A J. MOORE & J. LUCAS, *supra* note 20, § 11.01[4] at 11-6.

78. 598 F. Supp. 724 (D.D.C. 1984).

79. *Id.* at 726-27. Attention is also directed to statements made by District Judge Brieant in denying a Rule 11 motion for sanctions arising out of plaintiff's improper selection of venue:

While imposition of sanctions serves an essential purpose in cases where allegations concerning the merits are unfounded or discovery is being abused, it must be remembered that for every social benefit in litigation, there is also likely to be a corresponding detriment. The detriment in the case of sanctions is that the attorney or party upon whom sanctions are imposed must justify his or her conduct in his relationships with his or her client and his or her office colleagues. Furthermore, his or her own self-esteem may come to be at stake, although it should not be. These factors tend to destroy the atmosphere of friendly cooperation and professional collegiality which should exist between opposing attorneys in civil litigation. A cordial, professional relationship must be preserved between attorneys if civil litigation is to be resolved promptly and fairly on the merits and with minimum expense to society and the participants. That this is true is shown from the fact that almost 85% of our cases are settled prior to appellate finality. A lawyer who has been sanctioned by the Court at the instance of an adversary is likely to be resentful toward the adversary and counterphobic in his or her actions, therefore less effective in achieving a just settlement or in resolving those minor controversies which often arise during pre-trial proceedings. The Court, and counsel who request attorneys fees or sanctions, should remain conscious of these fundamental truths.

Hot Locks, Inc. v. Ooh LaLa, Inc., 107 F.R.D. 751, 751-52 (S.D.N.Y. 1985).

tions if a paper is interposed for any "improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."⁸⁰ For example in *Heuttig & Schromm, Inc. v. Landscape Contractors Council*,⁸¹ where an employer brought a frivolous labor law action against a union local, Judge Schwarzer granted the local's motion for sanctions because he concluded that the action was brought for an "improper purpose."⁸² Basing his decision in part on the fact that the attorneys representing the employer held themselves out as specialists in labor law,⁸³ the court indicated that public policy comes into play when Rule 11 is invoked:

Rule 11 is a response to a widely felt need to end abuse of the litigation process such as occurred here. If the Court were to tolerate this kind of conduct, the capacity of the judicial system to serve the ends of justice would soon become impaired. Sanc-

80. FED. R. CIV. P. 11. See *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 831-32 (9th Cir. 1986) (discussion of meaning of the Rule 11 "improper purpose" clause).

81. 582 F. Supp. 1519 (N.D. Cal. 1984), *aff'd*, 790 F.2d 1421 (9th Cir. 1986).

82. 582 F. Supp. at 1522.

83. After quoting the portion of the Advisory Committee Note reproduced in *supra* note 32, Judge Schwarzer commented on the employer's attorneys' conduct and experience:

Plaintiff's counsel's conduct in this case cannot be attributed to enthusiastic or creative advocacy of their client's cause. The fact is that counsel knew or should have known that, at least in the matter of Local 3, their client had neither a cause of action nor any claim to invoke this Court's jurisdiction. Attorneys do not serve the interests of their clients, of the profession, or of society when they assert claims or defenses grounded on nothing but tactical or strategic expediency.

As the quoted Note states, in arriving at a decision respecting sanctions, the Court must take into account all of the circumstances, not limited to the abstract legal issues. One of the relevant circumstances is the experience and standing of the attorneys in question. Counsel in this case are not newly admitted to the bar or engaged as general practitioners not well versed in labor law. The complaint is signed by a partner of San Francisco firm of Littler, Mendelson, Fastiff & Tichy admitted to the bar for twelve years, and an associate of that firm seven years at the bar. Both hold themselves out as specializing in labor law. The Littler, Mendelson firm holds itself out as preeminent in labor law. Lawyers of that firm appear regularly and frequently in labor litigation in this Court. Given the claimed expertise and experience of these attorneys, a strong inference arises that their bringing of an action such as this was for an improper purpose.

Heuttig, 582 F. Supp. at 1522 (citation omitted).

tions must therefore be imposed by the Court but counsel should realize that the heaviest sanction they will suffer is the one they have inflicted on themselves—loss of the courts' confidence in their probity.⁸⁴

Judge Schwarzer ordered employers' counsel to pay sanctions of \$5,625 to the local and directed them to comply with two other unique requirements.⁸⁵

E. Rule 11 Procedure

Under amended Rule 11, the court may impose sanctions either upon the motion of the aggrieved party or upon its own motion, but it is within the court's discretion to decide the procedure, timing and appropriateness of imposing a particular sanction.⁸⁶ The Advisory Committee Notes to amended Rule 11 state that in the case of "pleadings" the issue of sanctions "normally will be determined at the end of litigation" while in the case of "motions" the propriety of imposing sanctions normally will be determined "at the time when the motion is decided or shortly thereafter."⁸⁷ The courts have indicated that due process requires that the offending party be given notice and an opportunity for a hearing on the record⁸⁸ but a jury trial is unnecessary.⁸⁹ Discovery is usually

84. *Id.* *Accord* *Lepucki v. Van Wormer*, 765 F.2d 86, 87 (7th Cir. 1985); *Fleming Sales Co. v. Bailey*, 611 F. Supp. 507, 519-20 (N.D. Ill. 1985).

85. Judge Schwarzer ordered employer's counsel to certify "that no part of the [the sanctions] has been or will be charged to or paid, directly or indirectly" by the employer, *Huettig*, 582 F. Supp. at 1522, and ordered counsel to certify to the court that a copy of the memorandum opinion and order had been given to each partner and associate in the firm. *Id.* at 1522-23.

Other cases where courts have imposed sanctions under the "improper purpose" clause of Rule 11 include *Pin v. Texaco, Inc.*, 793 F.2d 1448, 1455 (5th Cir. 1986) (frivolous federal securities claims brought to secure tactical advantage in state court action pending in another court); *Orange Prod. Credit Ass'n v. Frontline Ventures, Ltd.*, 792 F.2d 797, 801 (9th Cir. 1986) (affirming sanctions of \$50,102 in attorneys' fees and \$3,952 in costs against party and attorney who filed an action in a court which lacked subject matter jurisdiction); *WSB Elec. Co. v. Rank & File Comm. to Stop the 2-Gate Sys.*, 103 F.R.D. 417, 420-21 (N.D. Cal. 1984) (sanctions of \$6,125 in attorneys' fees imposed against counsel for employer who filed suit for an improper purpose). See generally Schwarzer, *supra* note 6, at 195-97.

86. Fed. R. Civ. P. 11; 2A J. MOORE & J. LUCAS, *supra* note 20, § 11.02[2] at 11-20; Schwarzer, *supra* note 6.

87. FED. R. CIV. P. 11 advisory committee note, 97 F.R.D. at 200-01, *reprinted in* 2A J. MOORE & J. LUCAS, *supra* note 20, § 11.01[4] at 11-6.

88. See *Eavenson, Auchmuty & Greenwald P.C. v. Holtzman*, 775 F.2d 535,

not allowed regarding a Rule 11 motion.⁹⁰

In *Donaldson v. Clark*,⁹¹ the Eleventh Circuit Court of Appeals recently reversed a district court's imposition of sanctions under Rule 11 because the offending attorney was not afforded the procedural safeguards applicable to criminal contempt proceedings.⁹² Concluding that the district court must comply in such cases with the due process requirements set forth in Rule 42(b) of the Federal Rules of Criminal Procedure,⁹³ the appellate court

540 (3d Cir. 1985); *Hearld v. Barnes and Spectrum Emergency Care*, 107 F.R.D. 17, 20 (E.D. Tex. 1985); FED. R. CIV. P. 11 advisory committee note, 97 F.R.D. at 201 ("The procedure obviously must comport with due process requirements"); Schwarzer, *supra* note 6, at 198.

89. *In re Intel Securities Litigation*, 596 F. Supp. 226, 232 n.7 (N.D. Cal. 1984), *aff'd*, 791 F.2d 672 (9th Cir. 1986).

90. See *Indianapolis Colts v. Mayor & City Council of Baltimore*, 775 F.2d 177, 182-83 (7th Cir. 1985) (city not entitled to discovery related to its Rule 11 motion in order to garner evidence of its opponent's motivation in filing an inter-leader claim). As the Advisory Committee has cautioned:

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

FED. R. CIV. P. 11 advisory committee note, 97 F.R.D. at 201.

91. 786 F.2d 1570 (11th Cir. 1986).

92. In *Donaldson*, the plaintiff brought a civil rights action alleging that various county officials and private individuals had conspired to unlawfully expedite her divorce proceeding and to restrain her from visiting and perhaps reconciling with her husband. The district court granted defendants' motions for summary judgment and imposed sanctions (a fine of \$500) against plaintiff's attorney under Rule 11. *Donaldson v. Clark*, 105 F.R.D. 526, 532 (M.D. Ga. 1985).

In reversing the district court's decision the Eleventh Circuit noted the nature of certain Rule 11 proceedings:

[B]ecause of the penal and deterrent purposes of Rule 11, we hold that there may be circumstances under which it is appropriate for a court to impose a fine for the purpose of punishing an attorney for violating the provisions of that rule. However, since the purpose of such a fine would be to punish the attorney for past conduct, the fine would be in essence a sanction in the nature of criminal contempt. Accordingly, in such cases—where the attorney is "fined" as punishment—the court imposing the fine must follow the procedures as required in criminal contempt proceedings.

Donaldson, 786 F.2d at 1577 (citations omitted).

93. Rule 42(b) provides in pertinent part:

A criminal contempt . . . shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the

found the procedure followed by the lower court to be lacking.⁹⁴ While Rule 11 does not require the court to prepare findings of fact or conclusions of law, Judge Schwarzer has urged his colleagues to do so in order to assist the appellate review process and assure litigants that a Rule 11 determination was the product of thoughtful deliberation. He has also urged district courts to publish their Rule 11 decisions because this "enhances the deterrent effect of the ruling."⁹⁵

As noted above, Rule 11 provides that if a pleading, motion, or other paper is signed in violation of the rule, the court 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 reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.⁹⁶

preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the Court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides.

FED. R. CRIM. P. 42(b).

94. In the words of Judge Johnson:

The district court in the instant case failed to afford Mr. Howard the procedural safeguards applicable to criminal contempt proceedings. The court did not inform Mr. Howard in advance of the specific reasons for which he might be fined. Also, the court did not give Mr. Howard a reasonable opportunity to prepare a defense against specific charges, or a hearing at which to present such a defense. *Compare Kleiner v. First National Bank of Atlanta*, 751 F.2d 1193 (11th Cir. 1985) (prior to assessing fine against a party, the court gave the party notice of specific conduct subject to sanction and, two weeks later, held a three-day evidentiary hearing on the matter). The district court thus acted improperly in assessing the \$500 fine against Mr. Howard.

Donaldson, 786 F.2d at 1577. *Accord Cotner v. Hopkins*, 795 F.2d 900, 903 (10th Cir. 1986).

95. Schwarzer, *supra* note 6, at 199. *Accord Kreager v. Solomon & Flanagan*, P.A., 775 F.2d 1541, 1543 (11th Cir. 1985). *See Stevens v. Lawyers Mut. Liab. Ins. Co. of North Carolina*, 107 F.R.D. 112, 116 (E.D.N.C. 1985) (Boyle, J.) ("This memorandum opinion is also to be published in the hope that the publication will impress upon plaintiff's counsel and others that Rule 11 will be enforced where appropriate"), *aff'd.in part, rev'd. in part*, 789 F.2d 1056 (4th Cir. 1986).

96. FED. R. CIV. P. 11. On the use of reprimands, *see Stevens*, 107 F.R.D. at 116 (plaintiff's counsel publicly reprimanded); Schwarzer, *supra* note 6, at 201-02

The courts have not hesitated to impose monetary sanctions where appropriate.⁹⁷ There is, however, a duty to mitigate one's damages.⁹⁸ For example, in a recent labor case⁹⁹ a union filed suit contending that the defendant's employer had failed to arbitrate a grievance. The district court granted the employer's motion for summary judgment and its Rule 11 motion for sanctions but only awarded the employer \$7,500 of the \$22,000 sought because of its failure to mitigate. Noting the failure of employer's counsel to bring the obvious factual misrepresentations contained in the union's complaint to the court's attention through an informal status conference, Chief Judge Peckham expounded on the duty to mitigate:

[W]hile an informal means may not always work to dispose of frivolous lawsuits quickly, the parties have a duty to try to re-

(discussing reprimand as appropriate sanction under Rule 11); Kassin, *supra* note 7, at 40 (finding judicial reprimands of Rule 11 violators to be "fairly uncommon" but suggesting that "reprimands of all shapes and sizes should be considered more closely "because they are effective deterrents).

97. See *Brown v. Nationwide Mut. Ins. Co.*, 634 F. Supp. 72, 73 (S.D. Miss. 1986) (attorney fined \$1,000 for filing frivolous suit); *Continental Air Lines, Inc. v. Group Sys. Int'l Far East, Ltd.*, 109 F.R.D. 594, 600 (C.D. Cal. 1986) (sanctions of \$5,000 imposed against attorney for failure to make sufficient inquiry into facts determinative of motion to dismiss for lack of personal jurisdiction, rendering motion frivolous); *Navarro v. Cohan*, 109 F.R.D. 86, 89 (S.D. Fla. 1985) (\$2,500 sanction imposed against plaintiff's counsel for ignoring court orders and for lack of diligence in filing pleadings); *Jorgenson v. County of Volusia*, 625 F. Supp. 1543, 1549 (M.D. Fla. 1986) (plaintiff's counsel fined \$500 for his "misleading and unethical representation of the controlling law"); *Itel Containers Int'l Corp. v. Puerto Rico Marine Management Corp.*, 108 F.R.D. 96, 105-07 (D.N.J. 1985) (defense counsel who willfully followed a litigation strategy of actively concealing from the court and plaintiff as long as possible that the court was without power to hear the matter fined \$46,150.50); *Hudson v. Moore Business Forms, Inc.*, 609 F. Supp. 467, 481-85 (N.D. Cal. 1985) (defense attorneys who filed a frivolous counterclaim in an employee's wrongful discharge suit held liable for attorneys' fees and costs of \$14,692.50); *Martinez v. Financial Collection Agencies, Inc.*, No. 82-2432-K (D. Mass. May 20, 1985) (Keeton, J.) (defendants and counsel held jointly and severally liable for sanctions in the amount of \$29,700 for willful violations of discovery orders); *Taylor v. Belger Cartage Service, Inc.*, 102 F.R.D. 172, 181-83 (W.D. Mo. 1984) (attorneys' fees of \$14,736.95 imposed against counsel for terminated employee who filed a baseless suit against his former employer and union).

98. See *Filippini v. Austin*, 106 F.R.D. 425, 433-34 (C.D. Cal. 1985); *Taylor v. Prudential-Bache Sec., Inc.*, 594 F. Supp. 226, 228-29 (N.D.N.Y. 1984), *aff'd*, 751 F.2d 371 (2d Cir. 1984) (table); *Schwarzer*, *supra* note 6, at 202-03.

99. *United Food & Commercial Workers Union Local No. 115 v. Armour & Co.*, 106 F.R.D. 345 (N.D. Cal. 1985).

solve the frivolous claims using the least expensive alternative. The duty arises because the parties have the means available to them, both informal and formal, to gain early access to the judge presiding over their case. Because they have the means to keep the cost of litigation to a minimum, the parties should alert the court to problems that are possible to resolve early in the litigation, without the necessity for expensive, formal motions.

The duty is one of mitigation; it rests on the concept that the victim of a frivolous lawsuit must use reasonable means to terminate the litigation and to prevent the costs of that frivolous suit from becoming excessive. If a party eventually wins rule 11 sanctions, but has failed to use the least expensive route to early resolution, the court may rule that not all the expenses the successful party incurred in making formal motions were reasonable attorney's fees that should be awarded under rule 11.¹⁰⁰

In imposing sanctions the court must determine who is to pay them: the party or counsel or both. If the Rule 11 violation is primarily a professional dereliction (such as where a motion is unsupported by existing law) the sanction should be imposed against the attorney alone.¹⁰¹ On the other hand, where the Rule 11 violation reflects a "deliberate litigation strategy" sanctions may be imposed jointly and severally against attorney and client.¹⁰²

100. *Id.* at 350. One commentary on Rule 11 recently noted, however, that mitigation may be easier in theory than in practice:

As soon as the Rule 11 claim (frivolous and baseless complaint, groundless motion, invalid claim or defense, etc.) has surfaced, promptly attempt to mitigate the problem by making a written request of the adversary to drop the claim or motion. If unsuccessful, request a status conference with the court in those courts that require informal status conferences on matters at issue. Beware, however, that many federal district courts are not prone to adjudicate matters so informally. An attempt to mitigate the problem may be important to your later effort to obtain sanctions.

Sanctions, supra note 2, at 11 (citations omitted).

101. *Blake v. Nat'l Casualty Co.*, 607 F. Supp. 189, 193 (C.D. Cal. 1985) ("This sanction will be imposed against the attorney rather than the plaintiff because the motion [to remand] is unsupported by existing law, rather than unsupported by facts"); *Wold v. Minerals Eng'g Co.*, 575 F. Supp. 166, 167-68 (D. Colo. 1983) (sanctions for frivolous motion to disqualify counsel imposed against attorney alone). Note that the court may order the attorney to certify that no part of the sanctions will be charged to or paid by the client. See *Huetting & Schromm, Inc. v. Landscape Contractors Council*, 582 F. Supp. 1519, 1522 (N.D. Cal. 1984), *aff'd*, 790 F.2d 1421 (9th Cir. 1986).

102. See, e.g., *Am. Sec. Van Lines, Inc. v. Gallagher*, 782 F.2d 1056, 1057 (D.C. Cir. 1986) (both attorney and client held liable for advancing frivolous argu-

The circuit courts are thus far split on the issue of whether an order imposing Rule 11 sanctions upon counsel is final and appealable. Applying the *Cohen*¹⁰³ collateral order doctrine, the Ninth Circuit has permitted an immediate appeal to be taken by the party sanctioned.¹⁰⁴ The Third Circuit will permit such immediate appeals to be taken if the offending attorney withdraws from the case in the court below.¹⁰⁵

The circuit courts are also apparently divided on the appropriate standard of appellate review of Rule 11 orders. The Ninth¹⁰⁶ and Second¹⁰⁷ circuits have adopted a three-part review formula: (1) if the facts relied upon by the district court to establish a Rule 11 violation are disputed on appeal, the appellate court reviews the district court's factual determinations under a "clearly erroneous" standard; (2) if the legal conclusion of the district court that the facts constitute a Rule 11 violation is disputed, the appellate court reviews that legal conclusion *de novo*; and (3) if the appropriateness of the sanction imposed is challenged, the court applies an "abuse of discretion" standard.¹⁰⁸ The Third,¹⁰⁹ Fourth,¹¹⁰ Fifth,¹¹¹

ments); *Kendrick v. Zanides*, 609 F. Supp. 1162, 1173 (N.D. Cal. 1985) (same); *City of Yonkers v. Otis Elevator Co.*, 106 F.R.D. 524, 526 (S.D.N.Y. 1985) (\$5,000 in sanctions imposed jointly and severally against plaintiff and counsel who filed frivolous fraud claim). *Cf. The Committee on Federal Courts, Procedural Rights of Attorneys Facing Sanctions* 40 THE REC. 313, 325 (1985) (court should "allocate the imposition of sanctions between an attorney and his client based upon their culpability").

Chief Judge Weinstein states that where a client misleads his attorney and causes him to file frivolous papers, "it is apparent that the client, not the attorney, should be sanctioned." *Eastway Constr. Corp. v. City of New York*, 637 F. Supp. 558, 569 (E.D.N.Y. 1986).

103. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

104. *Optyl Eyewear Fashion Int'l Corp. v. Style Co.*, 760 F.2d 1045, 1047 n.1 (9th Cir. 1985).

105. *Eavenson, Auchmuty & Greenwald v. Holtzman*, 775 F.2d 535, 539-40 (3d Cir. 1985).

106. *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 828 (9th Cir. 1986). *See also Mossman v. Roadway Express, Inc.* 789 F.2d 804, 806 (9th Cir. 1986) (stating "[w]e review the factual basis for these sanctions under the clearly erroneous standard.>").

107. *Eastway Constr. Co. v. City of New York*, 762 F.2d 243, 254 n.7 (2d Cir. 1985).

108. *Id. Zaldivar*, 780 F.2d at 828; *Mossman*, 789 F.2d at 806.

109. *Sun Ship, Inc. v. Matson Navigation Co.*, 785 F.2d 59, 64 (3d Cir. 1986); *Eavenson, Auchmuty & Greenwald v. Holtzman*, 775 F.2d 535, 540 (3d Cir. 1985).

110. *Cohen v. Va. Elec. & Power Co.*, 788 F.2d 247, 248 (4th Cir. 1986); *La Rouche v. Nat'l Broadcasting Co.*, 780 F.2d 1134, 1140 (4th Cir. 1986); *Nelson v.*

Sixth,¹¹² and Seventh¹¹³ and Tenth¹¹⁴ Circuits generally apply an abuse of discretion standard.

IV. CONCLUSION

As the foregoing discussion demonstrates, the 1983 amendments to Rule 11 have dramatically altered the nature of practice in the federal courts. The rule changes may have altered the conduct of attorneys, clients and the courts in ways which cannot yet be measured in any accurate fashion.¹¹⁵ From the authors' experience, however, the requirements of the rule compel more elaborate

Piedmont Aviation, Inc., 750 F.2d 1234, 1238 (4th Cir. 1984), *cert. denied*, 105 S. Ct. 2358 (1985).

111. Jackson Marine Corp. v. Harvey Barge Repair, Inc., 794 F.2d 989, 992 (5th Cir. 1986).

112. Albright v. Upjohn Co., 788 F.2d 1217, 1221-22 (6th Cir. 1986).

113. Steward v. RCA Corp., 790 F.2d 624, 632 (7th Cir. 1986); Indianapolis Colts v. Mayor of Baltimore, 775 F.2d 177, 181 (7th Cir. 1985); Hilgefurd v. Peoples Bank, 776 F.2d 176, 179 (7th Cir. 1985).

114. Cotner v. Hopkins, 795 F.2d 900, 903 (10th Cir. 1986).

115. As the foregoing discussion should also indicate, there is no formula for avoiding Rule 11 sanctions. In one recently published commentary, however the authors offered the following "practical suggestions" for avoiding Rule 11 sanctions:

(1) recognize that your subjective good faith in filing a pleading is not enough to avoid sanctions;

(2) confirm that the pleading is not designed to harass your adversary or delay or extend the cost of litigation;

(3) conduct a thorough personal interview with the client and key witnesses *prior* to filing a pleading;

(4) review all pertinent documents which may provide a basis for the pleading;

(5) make your own personal assessment of legal issues such as venue, jurisdiction and the statute of limitations;

(6) if you are not experienced in a given legal field (*i.e.*, antitrust, securities fraud, or civil racketeering) consider getting an independent opinion from a more experienced attorney;

(7) do not delude the court as to the present state of the law; confirm that your legal theories are supported by existing law or a good faith argument for its extension, reversal, or modification; and

(8) if you are compelled to file a pleading in a hurry to avoid a time bar, do so and promptly thereafter carry out the following steps.

Sanctions, supra note 2, at 9-10. (emphasis added). Whether the experience under new N.C.R. Civ. P. 11 (effective January 1, 1987—*see supra* note 2) will be similar remains to be seen.

pre-filing inquiry and investigation in federal suits and increase the stakes and risks in litigating federal cases.