Mississippi College Law Review

Volume 15
Issue 2 *Vol. 15 Iss. 2*

Article 4

1995

Revised Rule 11: Is It Safer

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REVISED RULE 11: IS IT SAFER?

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I. INTRODUCTION

This Article addresses the status of the United States Fifth Circuit Court of Appeals' authorities delineating counsel's duties pursuant to the recently amended Federal Rule of Civil Procedure 11. The Fifth Circuit's thorough and thoughtful decision in *Thomas v. Capital Security Services, Inc.*,[1] written by the Honorable Sam D. Johnson on behalf of a unanimous en banc court, outlines the parameters of counsel's duties pursuant to the version of Rule 11 in effect from 1983 through December 1, 1993. The 1993 amendment to the Rule has changed some, but not all, of the principles espoused by the *Thomas* Court. Part II of this Article discusses the problems posed by the pre-1993 Rule 11 and describes the Fifth Circuit's intelligent solutions. Part III outlines the procedure required and the safe harbor provided by the new Rule, and describes the tenets of the en banc *Thomas* decision that are now obsolete, as well as those that should have continued validity. Part IV highlights selected decisions in the area of Rule 11, and the final Part discusses the extent to which the safe harbor procedure of the newly amended Rule could be evaded by application of a court's inherent powers.

II. THE QUALITY OF MERCY HATH NOT STRAINED: THE *Thomas* COURT'S MERCIFUL RESPONSE TO AN OPPRESSIVE RULE

Federal Rule of Civil Procedure 11 was adopted in 1937 as a consolidation and unification of former Equity Rules on the subjects of "Signature of Counsel" and "Scandal and Impertinence."[2] In 1983, the Rule was amended "to reduce the reluctance of courts to impose sanctions" and "streamline the litigation process by lessening frivolous claims or defenses."[3] References to "scandalous and indecent

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1. 836 F.2d 866 (5th Cir. 1988) (en banc).

2. 28 FED. R. CIV. P. 11 advisory committee's notes on Rule's 1937 adoption.

3. FED. R. CIV. P. 11 advisory committee's notes on 1983 amendment. The Fifth Circuit recently described the 1983 version's enactment as follows:

> Rule 11 was originally enacted in 1938 to curb tendencies toward untruthfulness in pressing a client's suit. Despite this laudable goal, Rule 11 was largely ignored. This changed in 1983, though, when growing concern over misuse and abuse of the litigation process prompted amendments to Rule 11. These amendments were designed to "reduce the reluctance of courts to impose sanctions by emphasizing the responsibilities of attorneys and reinforcing those obligations through the imposition of sanctions."

Childs v. State Farm Mut. Auto. Ins. Co., 29 F.3d 1018, 1023 (5th Cir. 1994) (quoting *Thomas*, 836 F.2d at 870) (citation omitted).

matters" and the prerequisite of willfulness were deleted in 1983, and sanctions were made mandatory upon a party's violation.

The 1983 amended version of Rule 11 generated enough problems in its decade of effectiveness to require "fairly radical surgery in 1993."[4] Critics of the "tortuous path taken"[5] under the 1983 Rule claim that its inconsistent application and threat to good faith litigation stifled the development of the law and harmed attorneys' relationships with their clients and colleagues.[6] The 1983 Advisory Committee has been charged with acting precipitously based upon "little experience with sanctions and no knowledge of the costs and benefits either to the judicial system or attorneys that would occur by expanding the scope of sanctionable conduct."[7] The 1993 amendment is a response to widespread criticism and claims that no amount of judicial construction could possibly salvage the former Rule.[8]

Prior to the 1993 amendment, the call for judicial tolerance was received and answered by the Fifth Circuit in *Thomas v. Capital Security Services, Inc.*[9] The Fifth Circuit has been hailed for its sympathetic, lawyer-sensitive approach to a problematic Rule.[10] Judge Sam Johnson, writing for an en banc court in *Thomas*, outlined the Fifth Circuit's sanction framework. Seizing on the 1983 Advisory Committee's denial that the Rule was intended to chill attorneys' enthusiasm or creativity, the *Thomas* Court softened the blow of the "mandatory" nature of sanctions under the 1983 Rule by declaring that "the rulemakers inserted the discretionary language in Rule 11 in response to concerns that mandatory sanctions would chill the adversarial process. . . . [T]he broad discretion given district courts in determining sanctions was intended as a 'safety valve' to reduce the pressure of mandatory sanctions."[11]

The *Thomas* Court further declined to "impose upon [counsel] a continuing obligation" to review and reevaluate a position taken in a signed pleading, as the

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4. Ware v. Jolly Roger Rides, Inc., 857 F. Supp. 462, 465 (D. Md. 1994).

5. George Cochran, *Rule 11: The Road to Amendment*, 61 MISS. L.J. 5, 6 (1991).

6. *Id. See also* Sam D. Johnson et al., *The Proposed Amendments to Rule 11: Urgent Problems and Suggested Solutions*, 43 BAYLOR L. REV. 647, 648 (1991); Scott Nehrbass, Comment, *The Proposed Amendment to Federal Rule of Civil Procedure 11: Balancing the Goal of Deterrence with Considerations of Due Process and Fairness*, 41 KANSAS L. REV. 199 (1992). The chorus of disapproval has been summarized as follows:

> In recent years, Rule 11 of the Federal Rules of Civil Procedure has come under tremendous scrutiny. It has been the subject of numerous articles in legal publications and has sparked much controversy within the legal profession. Critics have accused the Rule of having a deleterious effect on attorney-client relationships, relations between counsel, and the development of new law. Attorneys who have been sanctioned under the Rule frequently complain that it is not being applied in a uniform manner and that basic principles of due process and fundamental fairness are being breached. This widespread malcontent has led to the formulation of a proposed amendment to the Rule.

Nehrbass, *supra*, at 199 (footnotes omitted). *See also Thomas*, 836 F.2d at 871 n.4 (listing the complaints the Center for Constitutional Rights had amassed regarding the 1983 version).

7. Cochran, *supra* note 5, at 7 (citing Stephen B. Burbank, *The Transformation of America Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1927 (1989)).

8. *Id.* at 8; Johnson, *supra* note 6, at 675-76.

9. 836 F.2d 866 (5th Cir. 1988) (en banc).

10. *See, e.g.*, Cochran, *supra* note 5, at 5, 28; GEORGE M. VAIRO, RULE 11 SANCTIONS: CASE LAW PERSPECTIVE AND PREVENTATIVE MEASURES §§ 11.06, 11-66, 11-69 (2d ed. 1992 & Supp. 1993).

11. *Thomas*, 836 F.2d at 877.

original panel opinion had required.[12] Instead, the court promulgated the "snapshot" Rule: "Like a snapshot, Rule 11 review focuses upon the instant when the picture is taken – when the signature is placed on the document."[13] The attorney's state of mind at the time of signature is the focus, and "wisdom of hindsight" should be avoided.[14] Relevant factors in determining whether counsel has run afoul of the Rule include the "time available . . . for investigation; the extent of the attorney's reliance upon his client for factual support . . .; the feasibility of a pre-filing investigation;" whether other counsel previously handled the case; the case's factual and legal complexity; and the extent to which discovery is necessary to develop the facts.[15]

Consistent with its lawyer-sensitive theme, the *Thomas* Court cautioned trial judges to bear in mind the potential damage to a lawyer's reputation and career that may result from criticism from the bench.[16] The *Thomas* Court's concern with criticism levelled against counsel is consistent with its opinion that the purpose of Rule 11 is to "instill among members of the bar a sense of responsibility to prevent public perception of the legal profession as one tolerant of abuse in its midst."[17] The court's attempt to curb insults from the bench perhaps was responsive to the concern that Rule 11, if overused, would degrade the legal profession. The integrity of the profession as a whole will be inevitably debased if its own officers are routinely and vicariously belittled from the bench.[18]

The *Thomas* decision also took issue with "the natural tendency of district courts to gravitate toward imposing" monetary sanctions in the form of attorneys' fees,[19] and required exploration of the full spectrum of alternatives to monetary sanctions.[20] Only the least severe penalty to deter the sanctionable conduct is permitted, and in some instances "a warm friendly discussion on the record" will be a sufficient deterrent, explained the court.[21] As a compliment to its skepticism that attorney fee awards are an appropriate sanction, *Thomas* imposes upon moving parties a duty to mitigate the damages caused by the sanctionable conduct.[22] Thus, a court awarding attorneys' fees must ensure "the extent to which the non-violating party's expenses and fees could have been avoided or were self-imposed."[23]

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12. *Id.*

13. *Id.*

14. *Id.* at 875.

15. *Id.*

16. *Id.* at 878 (" 'Judges are prone to forget the sting of public criticism delivered from the bench.' ") (quoting William W. Schwarzer, *Sanctions Under the New Federal Rule 11 – A Closer Look*, 104 F.R.D. 181, 201 (1985)).

17. *Id.* at 884-85.

18. "Lawyers whose careers are at stake deserve more than an adjectival flippancy. . . . [L]awyers are officers of the court, not members of Two Live Crew." Cochran, *supra* note 5, at 12.

19. Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 877 (5th Cir. 1988) (en banc).

20. *See id.* at 877-78.

21. *Id.* at 878.

22. *Id.* at 879, 880.

23. *Id.* at 879.

III. OPERATION OF THE NEW RULE 11

The new Rule 11, effective December 1, 1993,[24] places greater constraints on the imposition of sanctions and, at the same time, broadens the scope of counsel's

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24. As amended April 22, 1993, effective December 1, 1993, Rule 11 provides:

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

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

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

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

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

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

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

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

(1) How Initiated.

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

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

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

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

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

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

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

5A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE ch. 4 (Supp. 1994).

obligations. The drafters intended to preserve the central purpose of imposing upon attorneys an obligation to the court, not just to their clients.[25] The new Rule also accomplishes the housekeeping chore of clarifying the relationship between Rule 11 and the discovery rules; new subdivision (d) removes from Rule 11's scope all discovery disputes subject to the provisions of Rules 26 through 37.

A. Safe Harbor and the New Motion Procedures

The amended provision most relevant to practitioners is the change in Rule 11 motion procedure. Litigators are no longer permitted to tag an "and sanctions" request at the end of their briefs, but instead must motion for Rule 11 sanctions separately from other motions and requests.[26] Rule 11 movants additionally must comply with the safe harbor provision of subdivision (c)(1)(A) prior to filing a Rule 11 motion. Compliance with the safe harbor procedure requires that counsel effect service of the Rule 11 motion upon opposing counsel or pro se litigants in compliance with Rule 5 and then wait twenty-one days.[27] If, and only if, the opposing party has not withdrawn the challenged assertion within twenty-one days after service, then the Rule 11 motion may be filed with the court. Thus, the steps are as follows: (1) prepare a separate motion; (2) serve opposing counsel; (3) wait twenty-one days; and then, (4) file with the court.

Since the effective date of Rule 11, sanctions consistently have been denied on procedural grounds in cases in which the moving party has failed to comply with the safe harbor mandate.[28] This result is appropriate in light of the mandatory language imposing the safe harbor procedure. The history of the amendment, moreover, reflects that the safe harbor is meant as a significant change and is a major component of the 1993 amendment's downgrade of the oppressive 1983 Rule.

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25. *Cf.* FED. R. CIV. P. 11 advisory committee's notes to 1993 amendment ("The rule retains the principle that attorneys and pro se litigants have an obligation to the court to refrain from conduct that frustrates the aim of Rule 1.").

26. FED. R. CIV. P. 11(c)(1)(A) ("A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b)."). Notably, this "separate" motion rule applies to Rule 11 sanctions only. *See* FED. R. CIV. P. 11(d).

27. Federal courts are permitted to prescribe a time period other than 21 days.

28. *See* Tate v. Lau, 865 F. Supp. 681, 691 (D. Nev. 1994); Loewen Group Int'l., Inc. v. Haberichter, 863 F. Supp. 629, 634-35 (N.D. Ill. 1994); Davis v. Holliswood Care Ctr., 858 F. Supp. 18, 22 n.3 (E.D.N.Y. 1994); Hoydal v. Prime Opportunities, Inc., 856 F. Supp. 327, 329 (E.D. Mich. 1994); Dunn v. Pepsi-Cola Metro. Bottling Co., 850 F. Supp. 853, 856 n.4 (N.D. Cal. 1994); Thomas v. Treasury Management Assocs., 158 F.R.D. 364, 369 (D. Md. 1994) (the Rule 11(c)(1)(A) procedure requiring a 21 day waiting period is "absolutely prerequisite"); *In re* VMS Sec. Litig., 156 F.R.D. 635, 641 (N.D. Ill. 1994); Weinreich v. Sandhaus, 156 F.R.D. 60, 63 (S.D.N.Y. 1994); Voice Sys. Mktg. Co. v. Appropriate Technology Corp., 153 F.R.D. 117, 120 (E.D. Mich. 1994); Collins v. Morsillo, No. 94-CV-884, 1994 WL 542204, at *3 (N.D.N.Y. Sept. 19, 1994); Furman & Halpen v. Nexgen Software Corp., No. CIV.A.93-CV-2788, 1994 WL 287795, slip op. at 7-8 (E.D. Pa. June 28, 1994); Relo Ins. Group, Inc. v. Salisbury, No. 93 C 7039, 1994 WL 194053, at *2-3 (N.D. Ill. May 13, 1994); Dennis v. Horizon Serv. Co., No. CIV.A.93-5881, 1994 WL 135436, slip op. at 3 n.3 (E.D. Pa. Apr. 15, 1994); Rondolino v. Provident Life & Accident Ins. Co., No. 92-1010-CIV-T-17A, 1994 WL 143066, at *2 (M.D. Fla. Apr. 11, 1994); National Kitchen Prods. Co. v. Butterfly, No. CIV.A.93-2912 <WGB>, 1994 WL 391422, at *8 (D.N.J. Apr. 5, 1994); Smith v. Talcott, No. CIV.A.94-122, 1994 WL 116173, at *1 (D.D.C. Mar. 17, 1994); Israel Travel Advisory Serv., Inc. v. Israel Identity Tours, Inc., No. 92 C 2379, 1994 WL 30984, at *6 (N.D. Ill. Jan. 28, 1994); *see also* Curl v. Wilson, No. C 93-2376 FMS, 1994 WL 323998, slip op. at 3 (N.D. Cal. June 23, 1994) (sanctions denied because nonmoving party made good faith effort to avail himself of safe harbor).

"Tolerance is required. The Advisory Committee has recognized as much—the . . . amendments give attorneys an opportunity to correct innocent mistakes."[29] The Advisory Committee explained that one purpose of the safe harbor is to eliminate a dilemma with which counsel was plagued under the 1983 version. Prior to the amendment, counsel accused of a violation logically feared that to withdraw the contention would evince that the contention was sanctionable all along and that the withdrawal would be tantamount to an admission of guilt. The safe harbor procedure solves this problem by affording counsel the opportunity to retreat with impunity.[30]

B. Who May Be Sanctioned

The 1993 amendment preserves counsel's nondelegable duty to the court and at the same time expands the Rule. Pursuant to the 1993 version of Rule 11, pro se parties, counsel, and law firms bear exposure for Rule 11 liability. The potential for sanctions against firms represents an expansion in the scope of Rule 11. The Supreme Court in *Pavelic & LeFlore v. Marvel Entertainment Group*[31] held that the 1983 version of Rule 11 proscribed sanctions against the law firm of an attorney who ran afoul of the Rule.[32]

As a general rule, a firm will be held responsible when one of its partners, associates, or employees violates the Rule. The Advisory Committee determined that "established principles of agency" render joint liability appropriate considering that the safe harbor provision allows twenty-one days in which sanctions may be avoided by withdrawal.[33] Because all partners or directors may consider whether the challenged contention be withdrawn, the imposition of liability on a firm as a whole is not inconsistent with the judicial philosophy that "the punishment and deterrent effects of sanctions are maximized when awarded against the attorney personally."[34] The expansion of Rule 11 sanctions to law firms thus underscores that district courts should strictly adhere to the safe harbor procedure.

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29. Johnson, *supra* note 6, at 676 (discussing the then-proposed amendment). Notably, even prior to the 1993 amendments, the Fifth Circuit required that the nonviolating party give notice. *See* Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 880 (5th Cir. 1988) (en banc).

30. The Advisory Committee explained:

> These provisions are intended to provide a type of "safe harbor" against motions under Rule 11 in that a party will not be subject to sanctions on the basis of another party's motion unless, after receiving the motion, it refuses to withdraw that position or to acknowledge candidly that it does not currently have evidence to support a specified allegation. Under the former rule, parties were sometimes reluctant to abandon a questionable contention lest that be viewed as evidence of a violation of Rule 11; under the revision, the timely withdrawal of a contention will protect a party against a motion for sanctions.

FED. R. CIV. P. 11 advisory committee's notes to 1993 amendment.

31. 493 U.S. 120 (1989).

32. *Id.* at 124-26.

33. FED. R. CIV. P. 11 advisory committee's notes to 1993 amendment ("Since [a Rule 11] motion may be filed only if the offending paper is not withdrawn or corrected within 21 days after service of the motion, it is appropriate that the law firm ordinarily be viewed as jointly responsible under established principles of agency.").

34. *Marvel Entertainment Group*, 493 U.S. at 126.

C. No More "Snapshots"

The "snapshot" rule of *Thomas*—focusing upon the instant that the attorney signs the offending document[35]—is changed under the new Rule 11. Pursuant to the 1993 Rule, a litigant may be sanctioned for post-signature "presentations" to the court.[36] If, for example, counsel signs a pleading that at the time is based on reasonable evidentiary support, after-acquired information would not be an issue under the old Rule as interpreted by the Fifth Circuit. Under the new Rule, however, the moment of signing is no longer talismanic, and counsel could be at risk for arguing a claim to the court if post-signing information has made the contention unreasonable.[37]

The practical distinction between the old snapshot and the new Rule may be trivial, however, as the Fifth Circuit's decision in *Childs v. State Farm Mutual Automobile Insurance Co.*[38] illustrates. Plaintiff's counsel in *Childs* was sanctioned $30,000 for pursuing an automobile accident case that the jury found to be meritless and fraudulent.[39] The Fifth Circuit found that counsel's initial investigation of his client's claimed auto accident was reasonable,[40] but that his signatures on pretrial orders and on an answer to the insurance fraud counterclaim were sanctionable because, by the time these documents were signed, defense counsel for the insurance company had disclosed substantial and compelling evidence that the plaintiff's alleged accident was deliberately staged.[41] *Childs* illustrates that the frequency of signatures in the course of litigation renders the 1993 expansion to post-signature information a greater philosophical change than a practical one. The *Thomas* Court noted with regard to the application of the 1983 Rule that "[a]s a practical matter, while the review of an attorney's conduct . . . is isolated to the moment the paper is signed, virtually all suits will require a series of filings."[42]

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35. *See* Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 874 (5th Cir. 1988) (en banc).

36. FED. R. CIV. P. 11 advisory committee's notes to 1993 amendment.

37. The Advisory Committee explains:

> A litigant's obligations with respect to the contents of these papers are not measured solely as of the time they are filed with or submitted to the court, but include reaffirming to the court and advocating positions contained in those pleadings and motions after learning that they cease to have any merit. For example, an attorney who during a pretrial conference insists on a claim or defense should be viewed as "presenting to the court" that contention and would be subject to the obligations of subdivision (b) measured as of that time. Similarly, if after a notice of removal is filed, a party urges in federal court the allegations of a pleading filed in state court (whether as claims, defenses, or in disputes regarding removal or remand), it would be viewed as "presenting"—and hence certifying to the district court under Rule 11— those allegations.

FED. R. CIV. P. 11 advisory committee's notes to 1993 amendment.

38. 29 F.3d 1018 (5th Cir. 1994).

39. *Id.* at 1023, 1029.

40. *Id.* at 1024-25.

41. *Id.* at 1022-23, 1023 n.16.

42. Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 875 (5th Cir. 1988) (en banc).

D. Bar on Fines for Legal Claims

Pursuant to the 1993 amendment, attorneys' fees are not applicable as a punishment for unwarranted legal contentions.[43] This change addresses the criticism that the determination of when a legal contention crosses the sanctionable line is inherently subject to inconsistent opinions.[44] Notably, however, nonmonetary sanctions are still available, as well as sanctions for contentions made for an "improper purpose."[45]

E. Quantities of Sanctions

A major symptom of the 1993 downgrade of Rule 11 is that sanctions are no longer mandatory upon violation of the Rule. The 1993 language specifies that "the court *may* . . . impose an appropriate sanction."[46] The mandatory language in the 1983 Rule, in any event, had been softened by the *Thomas* Court's finding that a "warm friendly" chat on the record could constitute a Rule 11 sanction.[47] Now the Rule's literal language specifies that sanctions are discretionary.

The *Thomas* Court's insistence that attorneys' fees are not automatic should have continued validity under the 1993 Rule. Only an "appropriate" sanction is permitted under the amended Rule.[48] "A sanction imposed for violation of [Rule 11] shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated."[49] The Advisory Committee explained in its notes that "the principle that the sanctions should not be more severe than reasonably necessary to deter repetition of the conduct" limits the district court's discretion in sanctioning counsel.[50]

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43. Pursuant to the amended Rule, "[m]onetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2) [proscribing unwarranted legal contentions]." FED. R. CIV. P. 11(c)(2)(A).

44. *See, e.g.*, Cochran, *supra* note 5, at 6-8.

45. FED. R. CIV. P. 11(b)(1).

46. FED. R. CIV. P. 11(c) (emphasis added).

47. Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 878 (5th Cir. 1988) (en banc).

48. FED. R. CIV. P. 11(c).

49. FED. R. CIV. P. 11(c)(2).

50. The Committee notes are explicit in their limitation of Rule 11 damages:

> The court has significant discretion in determining what sanctions, if any, should be imposed for a violation, subject to the principle that the sanctions should not be more severe than reasonably necessary to deter repetition of the conduct by the offending person or comparable conduct by similarly situated persons.
>
> Since the purpose of Rule 11 sanctions is to deter rather than to compensate, the rule provides that, if a monetary sanction is imposed, it should ordinarily be paid into court as a penalty. However, under unusual circumstances, particularly for (b)(1) violations, deterrence may be ineffective unless the sanction not only requires the person violating the rule to make a monetary payment, but also directs that some or all of this payment be made to those injured by the violation. Accordingly, the rule authorizes the court, if requested in a motion and if so warranted, to award attorneys' fees to another party. Any such award to another party, however, should not exceed the expenses and attorneys' fees for the services directly and unavoidably caused by the violation of the certification requirement. If, for example, a wholly insupportable count were included in a multi-count complaint or counterclaim for the purpose of needlessly increasing the cost of litigation to an impecunious adversary, any award of expenses should be limited to those directly caused by inclusion of the improper count, and not those resulting from the filing of the complaint or answer itself.

FED. R. CIV. P. 11 advisory committee's notes to 1993 amendment.

The *Thomas* philosophy that attorneys' fees are not to be awarded for the nonviolating party's self-imposed damages should remain in full force. The Advisory Committee to the 1993 amendment made clear that payment of the nonviolating party's attorneys' fees is the exception, not the rule. In the ordinary case, any penalty should be paid to the court.[51] "[U]nder unusual circumstances," the court is authorized to order that attorneys' fees be paid to the opposing party.[52] In this case, only attorneys' fees "directly and unavoidably caused" by the offending conduct are permitted.[53] The prohibition on the collection of avoidable fees is consistent with the offended party's duty to mitigate.

F. Effective Date of the New Rule

The 1993 amendment went into effect on December 1, 1993. The amendment is mandatory for cases filed after the effective date and, by order of the Supreme Court, applies to cases pending on the effective date if application is practical and would not work an injustice.[54] In two published decisions of cases pending on the effective date, the Fifth Circuit has stated simply that the 1993 amendment did not apply because the offending conduct occurred prior to the effective date.[55] Other circuit courts similarly have interpreted the substantive provisions of the 1993 Rule to control only that conduct occurring after December 1, 1993. The First Circuit held application of the amended provisions to be infeasible where the sanction motion was made and disposed of prior to the effective date and the case was pending on appeal on December 1, 1993.[56] Likewise, the Second Circuit did not apply every provision of the new Rule to a sanction decided in the district court prior to the December 1, 1993 effective date.[57] The court did decide, however, that because sanctions should be meted out with caution, the discretionary aspect of the new Rule should benefit the allegedly offending party on remand.[58] According to this philosophy, courts should strive, where possible, to give counsel the benefit of the Rule's greater leniency.

With regard to the safe harbor procedure of subdivision (c), district courts have determined compliance with the new Rule to be mandatory as of December 1, 1993, regardless of the date the case was filed. In an apparent eagerness by many district courts to embrace the new Rule, discard "mandatory" sanctions, and quickly dispose of sanction requests, courts have explained the procedural

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51. *Id.*

52. *Id.*

53. *Id.*

54. Silva v. Witschen, 19 F.3d 725, 728 (1st Cir. 1994) (citing Order Amending Federal Rules of Civil Procedure, 113 S. Ct. CDLXXVIII (Apr. 22, 1993) (citations omitted)).

55. *See* FDIC v. Calhoun, 34 F.3d 1291, 1296 n.3 (5th Cir. 1994) (applying "[R]ule 11, as in effect at the time of the proceedings at issue here"); Childs v. State Farm Mut. Auto. Ins. Co., 29 F.3d 1018, 1023 n.17 (5th Cir. 1994) ("Since the conduct at issue here occurred prior to [the December 1, 1993 effective] date, the newly amended Rule 11 does not apply.").

56. *Silva*, 19 F.3d at 728-29.

57. *See* Knipe v. Skinner, 19 F.3d 72, 78 (2d Cir. 1994).

58. *See id.*

provision's effectiveness as follows: "For motions filed after December 1, 1993, a request for an award of sanctions must be made in accordance with Rule 11(c)(1)(A)."[59]

IV. JUDICIAL CONSTRUCTION

The new amendment, although it has changed many aspects of Rule 11 practice, still embraces the signer's guarantee that factual contentions are reasonable and that legal arguments are warranted by existing law or nonfrivolous arguments for the extension or establishment of new law. Similarly applicable under both the 1983 and 1993 Rules is the duty to mitigate damages. This Part discusses significant Fifth Circuit cases applying the 1983 Rule and interpreting counsel's Rule 11 duties to make reasonable factual and legal arguments and to mitigate damages before seeking attorneys' fees as a Rule 11 sanction.

A. Factual Contentions

A signature is a guarantee that the document's "allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery,"[60] and that the signer's "knowledge, information and belief[ ] [is] formed after an inquiry reasonable under the circumstances."[61] The amendment appears substantially unchanged with regard to counsel's duty to plead reasonable facts.[62] Although curbed as a punishment for legal arguments, fines are still available as a sanction for unreasonable factual contentions.

The Fifth Circuit explained counsel's obligations to investigate factual contentions in a recent decision, *Childs v. State Farm Mutual Automobile Insurance Co.*[63] In *Childs*, the panel affirmed a $30,000 sanction imposed against plaintiff's

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59. Relo Ins. Group, Inc. v. Salisbury, No. 93 C 7039, 1994 WL 194053, slip op. at 3 (N.D. Ill. May 13, 1994); *see also* Kirk Capital Corp. v. Bailey, 16 F.3d 1485, 1488-89 (8th Cir. 1994) (dicta that counsel would be entitled to safe harbor of Rule 11(c)(1)(A) if motion had been considered and disposed of after December 1, 1993); Ware v. Jolly Roger Rides, Inc., 857 F. Supp. 462, 464 n.1 (D. Md. 1994) (reasoning date of filing of sanctions motion controls; old Rule applied because motion for sanctions and even opposition filed prior to December 1, 1993); Harris Custom Builders, Inc. v. Hoffmeyer, No. 90 C 0741, 1994 WL 329962, slip op. at 4 n.3 (N.D. Ill. July 7, 1994) ("[F]or [a Rule 11] motion filed after December 1, 1993, a request for an award of sanctions must be made in accordance with Rule 11(c)(1)(A)."); Anderson v. Cooper, No. 92 C 5949, 1994 WL 46675, slip op. at 2 n.2 (N.D. Ill. Feb. 14, 1994) ("[F]or motions filed after December 1, 1993, a request for an award of sanctions must be made in accordance with Rule 11(c)(1)(A).").

60. FED. R. CIV. P. 11(b)(3).

61. FED. R. CIV. P. 11(b).

62. The Fifth Circuit interpreted the 1983 Rule to impose the following duties:

> 1) that the attorney has conducted a reasonable inquiry into the facts which support the document;
> 2) that the attorney has conducted a reasonable inquiry into the law such that the document embodies existing legal principles or a good faith argument for the extension, modification, or reversal of existing law; and
> 3) that the modification is not interposed for purposes of delay, harassment, or increasing the costs of litigation.

Childs v. State Farm Mut. Auto. Ins. Co., 29 F.3d 1018, 1024 (5th Cir. 1994) (quoting Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 874 (5th Cir. 1988) (en banc)).

63. 29 F.3d 1018 (5th Cir. 1994).

counsel for pursuing a case without making a reasonable inquiry under the circumstances.[64]

The *Childs* plaintiff sued under the uninsured-motorist provision of an insurance policy to collect damages from an unwitnessed accident involving a phantom hit-and-run car.[65] During the course of the litigation, the defendant insurance company presented substantial and compelling evidence that the plaintiff's suit was a case of insurance fraud and counterclaimed accordingly.[66] Not only had Childs and his cohorts experienced similar purported accidents, but Childs had taken "no less than thirteen disability policies of insurance."[67] Further, defense counsel acquired the opinions of three experts to the effect that the accident as described by the plaintiff was a physical impossibility.[68]

After a trial in which the plaintiff received no damages and the defense succeeded in its counterclaim, the district court sanctioned plaintiff's counsel.[69] The court found that " 'had [plaintiff's counsel] conducted a modest amount of evaluation, investigation into the facts of his client's claim against State Farm, he would have and should have determined that the facts to which he attested . . . [were] false and void.' "[70]

Notable about the *Childs* decision is that the Fifth Circuit agreed that plaintiff's counsel's initial investigation was reasonable.[71] Before filing and signing the pleading, plaintiff's counsel "interviewed his client, inspected the vehicle, visited the [putative] accident site, interviewed [rescue personnel] . . . obtained the police report and reviewed the medical records."[72] Counsel ran afoul of Rule 11 by pursuing the case after the defense presented "clear and overwhelming" evidence that the accident was staged.[73] The *Childs* panel explained where counsel went wrong in failing to respond to the defendant's proof of foul play:

> [Plaintiff's counsel] wishes to argue that evaluation of this evidence does not inexorably lead to the conclusion that Childs committed a fraud. Even if this is so, the evidence of fraud was sufficient, at a minimum, to prompt a reasonable attorney, aware of his obligations under Rule 11, to conduct a further inquiry before he signed a paper and thereby certified to the court that the claim was well-grounded in fact. It was this inquiry, or lack thereof, that the district court found deficient.[74]

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64. *Id.* at 1023, 1029.
65. *Id.* at 1020.
66. *See id.* at 1021-22.
67. *Id.* at 1021.
68. *Id.* at 1021-22.
69. *Id.* at 1022-23.
70. *Id.* at 1022 n.15 (alteration in original).
71. *See id.* at 1024-25.
72. *Id.*
73. *Id.* at 1025.
74. *Id.* at 1024 n.19.

An abusive exercise of Rule 11 sanction power, on the other hand, is illustrated in the Fifth Circuit's decision in *Smith v. Our Lady of the Lake Hospital, Inc.*,[75] in which a fine in excess of $300,000 against plaintiff's counsel was reversed on appeal.[76] The *Smith* sanction was imposed "under [Rules] 11 and 26(g), 28 U.S.C. § 1927, and the inherent power of the [district] court" after the plaintiff voluntarily dismissed the case.[77] The Fifth Circuit disagreed with the district court's conclusions that plaintiff's counsel's contentions were factually and legally frivolous.[78]

Sanctioned counsel in *Smith* filed suit on behalf of a doctor for claimed RICO violations against a hospital with which he was once affiliated.[79] The plaintiff alleged that the hospital used the mail and telephone to execute a plan to defraud him and that this plan culminated in the termination of his hospital privileges.[80] The district court held that counsel's factual investigation was sanctionably flawed.[81] The Fifth Circuit disagreed; not only did the evidence reviewed by counsel establish that the hospital violated its own bylaws in terminating the plaintiff's privileges, but counsel's interview notes revealed a basis for the factual allegation that the plaintiff was not fired because of his lack of skill.[82] The Fifth Circuit concluded that although the evidentiary basis of the complaint was not conclusive, the information counsel gleaned in their investigation "was sufficient for the attorneys to draw a 'reasonable inference that some wrongdoing was afoot.' "[83]

B. Legal Contentions

When a lawyer places his or her signature on a paper to be filed with a court, that lawyer guarantees, inter alia, that the legal contentions made therein are "warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law."[84] The limitations on counsel's legal arguments have been modified slightly by the 1993 amendment. The word "non-frivolous" in the new Rule substitutes for "good faith" in the 1983 Rule. The phrase "or the establishment of new law" is new as well.

One criticism of the 1983 Rule 11 was that it squelched lawyers' creativity and unjustly robbed counsel of the right to present cases pursuant to their visions of justice. On a purely practical note and disregarding any philosophical debate of what counsel should be able to do, the Rule also was criticized for being inherently unworkable: "Cases abound in which appellate panels split on the issue of whether legal arguments are sufficiently frivolous to warrant sanctions."[85]

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75. 960 F.2d 439 (5th Cir. 1992).
76. *Id.* at 443, 448.
77. *Id.* at 443.
78. *Id.* at 444-45, 448.
79. *Id.* at 442.
80. *Id.*
81. *Id.* at 443.
82. *Id.* at 445.
83. *Id.* at 446 (quoting Lebovits v. Miller, 856 F.2d 902, 906 (7th Cir. 1988) (citations omitted)).
84. FED. R. CIV. P. 11(b)(2).
85. Cochran, *supra* note 5, at 9 (footnote omitted).

Although monetary sanctions may no longer be imposed as punishment for unwarranted legal contentions, certain district courts have used the old Rule to issue, in addition to fines, public reprimands and personalized legal education curricula.[86] Litigators may do well to remember the possibility that this practice could continue in some district courts. Monetary sanctions are not proscribed for violations of subdivision 11(b)(1), applying to presentations made "for any improper purpose." One court, sanctioning under the old Rule for unwarranted legal contentions, claimed that the sanctioned party filed a frivolous suit for the improper purpose of forcing a settlement.[87] Therefore, evasion of the bar on fines for legal contentions is at least a possibility.

Fortunately, the Fifth Circuit has not adopted a stingy definition of "warranted" legal contentions. The court's recent decision in *FDIC v. Calhoun*[88] is a classic illustration of jurists disagreeing on whether a legal argument is within the realm of reasonability. *Calhoun* also demonstrates the Fifth Circuit's willingness to limit the district court's discretion to dole out sanctions on the basis of "unwarranted" legal arguments.[89] The Fifth Circuit reversed a $87,960.45 Rule 11 fine imposed by the Honorable John H. McBryde of the Northern District of Texas, who invited the sanctions motion.[90]

The *Calhoun* panel of the Fifth Circuit expressed a distinctly disparate point of view from the district court; declining to remand the case notwithstanding an omission in the district court findings, the court stated that the parties had sufficiently identified the critical legal dispute to reverse the sanctions on appeal.[91] "[T]he district court was not pellucid in explaining what legal issues were insufficiently researched or unwarranted"[92] but was apparently certain that the FDIC, as plaintiff, deserved the sanction: The district court "concluded that 'the only reasonable explanation' for the FDIC's conduct in instituting the action was to 'harass [the defendant] and burden it with costs of litigation to the end of aiding FDIC in its attempts to extract an unwarranted settlement payment.' "[93]

The FDIC became enmeshed in the *Calhoun* imbroglio after being appointed receiver for the Northwest Bank [hereinafter Bank], which was formerly controlled by Larry Calhoun. Calhoun, as president, chairman of the board, and owner of a Bank subsidiary, sold to himself, as an individual, a $5.5 million

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86. *See, e.g.*, FDIC v. Calhoun, 34 F.3d 1291, 1295-96 (5th Cir. 1994); Smith v. Our Lady of the Lake Hosp., Inc., 960 F.2d 439, 443 (5th Cir. 1992).

87. *Calhoun*, 34 F.3d at 1295.

88. 34 F.3d 1291 (5th Cir. 1994).

89. *See id.* at 1300.

90. *Id.* at 1295, 1300. Judge McBryde also sanctioned the FDIC's counsel $63,856.70 and ordered that they "attend fifteen hours of courses in ethical instruction and write a letter of apology to Trinity-Western." *Id.* at 1295-96. This fine was instituted under the auspices of 28 U.S.C. § 1927, and also was reversed by the Fifth Circuit. *Id.* at 1295, 1300.

91. *Id.* at 1297.

92. *Id.*

93. *Id.* at 1295.

building for the not-exactly-arms-length price of $2.5 million.[94] The sale was financed with a $4 million mortgage, an amount that the lending institution apparently believed to be the purchase price.[95] The $1.5 million difference between the mortgage price and the purchase price was the subject of Calhoun's "other plans."[96]

Trinity-Western served as escrow agent for the ill-fated loan.[97] After receiving and before disbursing the mortgage proceeds, a Trinity-Western agent was told by Calhoun that he " 'discovered a mistake' " in the statement and that he should be paid an extra $1.5 million.[98] The statement was "corrected" pursuant to Calhoun's instructions, and he received the $1.5 million from Trinity-Western.[99] After the FDIC was appointed receiver for the Bank, it sued for damages related to the sale, naming Trinity-Western as one of the defendants to claims for negligent misrepresentation and simple negligence.[100] Following a disastrous trial, the district court invited the sanctions motion and ultimately imposed a substantial fine against both the FDIC and its counsel.[101] While the district court did not identify explicit elements of legal claims that were unwarranted for Rule 11 purposes, the court did specify that Trinity-Western did not owe any duty to the Bank, that any harm was not proximately caused by Trinity-Western, and that the FDIC lacked capacity to sue.[102]

The Honorable Jerry E. Smith, writing for the Fifth Circuit panel, reversed the order in a thoughtful decision that outlines the parameters of tolerable legal argumentation. In *Calhoun*, the panel recited the Fifth Circuit rule that counsel "need not provide an absolute guarantee of the correctness of the legal theory advanced in the papers he files. 'Rather, the attorney must certify that he has conducted reasonable inquiry into the relevant law.' "[103] The court concluded that "[w]ithout agreeing with the merits of the FDIC's arguments or applauding the depths of its legal research, we find the FDIC's argument not to be implausible, unreasonable, or otherwise frivolous."[104]

The Fifth Circuit reasoned that the controversial subject of the expansion of tort liability to third parties, such as Trinity-Western, was within the scope of a good-faith extension of legal concepts.[105] The *Calhoun* panel rejected the district court's

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94. *Id.* at 1294.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 1294-95.

101. *Id.* at 1295.

102. *Id.*

103. *Id.* at 1296 (5th Cir. 1994) (quoting Smith v. Our Lady of the Lake Hosp., Inc., 960 F.2d 439, 444 (5th Cir. 1992)) (citation omitted).

104. *Id.* at 1298.

105. *Id.*

complaint that lack of reliance made the misrepresentation claim unwarranted.[106] Reliance is a factual issue and, as such, could have culminated differently:

> The district court . . . based sanctions upon a finding that the FDIC's claim was legally implausible, not factually unsupported. This finding was error. A plaintiff need not have a fully developed factual case in order to base a suit upon a well-recognized legal claim. Indeed, different factual findings by the district court would have supported the FDIC's claims . . . .[107]

With regard to the FDIC's capacity problem, the *Calhoun* panel noted that capacity was an affirmative defense for the opposing party to raise and that the reasonable inquiry imposed by Rule 11 "does not create a per se rule that a party research and brief every defense potentially at issue."[108] Moreover, the fact that the Supreme Court had recently rendered a decision in the area of the application of state law to suits brought by the FDIC as receiver illustrated that the law was not "so plain as to require sanctions."[109]

In support of its decision to reverse the substantial sanctions awarded against the FDIC, the *Calhoun* panel cited *Smith v. Our Lady of the Lake Hospital, Inc.*[110] The district court in *Smith* held that the plaintiff's RICO claim was legally frivolous.[111] The Fifth Circuit, however, determined that the complaint arguably was based on the law at the time it was filed.[112] Although RICO's scope was curtailed *after* the suit was instituted, at the time of the pleadings, two related acts of racketeering were all that were required.[113] The Fifth Circuit declined to assess the legal validity of the case "with the benefit of hindsight."[114] Because "an attorney need not provide an absolute guarantee of the correctness of the legal theory advanced in the paper he files,"[115] the sanction was an abuse of the court's discretion.

An example of sanctionable legal contentions is illustrated in *In re Ulner (Moran v. Frisard)*.[116] In *Ulner*, counsel for a debtor in bankruptcy was sanctioned for thwarting a creditor's efforts by filing a second bankruptcy petition on the heels of the first petition's voluntary dismissal—a tactic expressly forbidden by the Bankruptcy Code.[117]

Notably, pro se litigants are still subject to monetary sanctions for legal claims under the 1993 Rule. A perhaps extreme example of sanctionable legal contentions

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106. *See id.* at 1298-99.
107. *Id.* at 1298.
108. *Id.* at 1299 (citing *In re* Excello Press, Inc., 967 F.2d 1109, 1112-13 (7th Cir. 1992)).
109. *Id.* at 1300.
110. *Id.* at 1296.
111. *See* Smith v. Our Lady of the Lake Hosp., Inc., 960 F.2d 439, 443 (5th Cir. 1992).
112. *Id.* at 445.
113. *Id.*
114. *Id.* at 445 n.3.
115. *Id.* at 444.
116. 19 F.3d 234 (5th Cir. 1994).
117. *Id.* at 235-36 (citing 11 U.S.C. § 109(g)(2)).

by a pro se plaintiff is described in the Fifth Circuit's decision in *Saunders v. Bush*:[118]

> In previous matters of which the district court took judicial notice, [the pro se plaintiff's] claims against then President Reagan were dismissed as frivolous on the basis of the President's absolute immunity. [The plaintiff] was warned that sanctions would be imposed if he filed another frivolous suit. Despite this warning, [he] filed yet another frivolous suit, this time against former President Bush. We find no abuse in the district court's discretionary imposition of sanctions.[119]

C. Duty to Mitigate

Even counsel guilty of pleading sanctionable factual contentions may evade paying opposing counsel's attorneys' fees. The offended party has a duty to mitigate damages, which in many instances may mean catching the offending party's mistakes before incurring substantial fees. Opposing counsel who was also asleep at the wheel cannot collect attorneys' fees under Rule 11.

Judicial enforcement of the duty to mitigate is necessary to preserve the goals of Rule 11. If counsel is not required to mitigate damages before charging them as a sanction, then the very waste and delay that Rule 11 intends to eliminate instead is perpetuated, as parties would be " 'encouraged to litigate a [useless] action or defense past the point at which it could have been disposed of.' "[120] "One purpose of . . . Rule [11] is to bring about economies in the use of judicial resources. Imposition of sanctions in . . . circumstances [in which the nonviolating party caused superfluous proceedings] would reward one who caused diseconomies."[121] In the words of some jurists and philosophers, "people who live in glass houses shouldn't throw stones,"[122] and "pots" should not recoup attorneys' fees for "calling the kettle

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118. 15 F.3d 64 (5th Cir. 1994).

119. *Id.* at 68.

120. Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 879 n.19 (5th Cir. 1988) (en banc) (quoting Judge William W. Schwarzer's comments in *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 198-200 (1985)).

121. Brown v. Capitol Air, Inc., 797 F.2d 106, 108 (2d Cir. 1986); *see also* INVST Fin. Group, Inc. v. Chem-Nuclear Sys., Inc., 815 F.2d 391, 404 (6th Cir. 1987) ("The mitigation requirement prevents a party from misusing Rule 11 sanctions in order to benefit from the errors of opposing counsel."), *cert. denied*, 484 U.S. 927 (1987); *In re* Yagman, 796 F.2d 1165, 1187 (9th Cir. 1986) (cautioning that if courts award fees for unnecessary responses to Rule 11 violations, the purpose of the Rule will be wrongfully transformed), *amended*, 803 F.2d 1085 (9th Cir. 1986), *quoted in* VAIRO, *supra* note 10, §§ 11.06[A], 11-70.

122. Storment v. Gossage, 791 F. Supp. 215, 219 (C.D. Ill. 1992); Rateree v. Rockett, 630 F. Supp. 763, 778 n.26 (N.D. Ill. 1986).

black."[123] Consistent with the equitable origins of Rule 11, attorney fee awards also have been denied to parties who lack "clean hands."[124]

The Fifth Circuit's decision in *Spiller v. Ella Smithers Geriatric Center*[125] illustrates the court's philosophy that two wrongs do not add up to an attorney fee award to one side and a sanction to the other. The *Spiller* Court refused to grant defendant's requested attorney fee sanction against a plaintiff who filed a time-barred claim because defense counsel was remiss in failing to catch the error: "The very first task performed by counsel in such cases should always be to check the date. . . ."[126] The Fifth Circuit's philosophy that moving parties must mitigate their damages was also echoed in a Seventh Circuit decision, *Dubisky v. Owens*.[127] *Dubisky* interprets the duty to mitigate to mean that nonviolating counsel cannot hide behind a veil of alleged confusion when he or she could have clarified the problem.[128] Dubisky improperly invoked federal diversity jurisdiction due to an erroneous belief that the opposing party, "OAD," was a corporation instead of a general partnership.[129] Relying on the Fifth Circuit's decision in *Thomas*, the *Dubisky* Court reversed the fee award, reasoning that OAD's counsel should have clarified the problem at the onset of the case: "If OAD had contacted Dubisky and pointed out the apparent lack of complete diversity, Dubisky could have clarified his own citizenship, thereby eliminating OAD's need to explore every possible construction of the facts."[130]

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123. *See* Happy Chef Sys., Inc. v. John Hancock Mut. Life Ins. Co., 933 F.2d 1433, 1438 (8th Cir. 1991) (affirming refusal to sanction where the "motion for Rule 11 sanctions was a case of the pot calling the kettle black"); Bruno v. Scarkino, No. CIV.A.93-931, 1993 WL 302717, at *1 (E.D. La. July 29, 1993) (denying sanctions accordingly).

124. Covia Partnership v. River Parish Travel Ctr., Inc., No. CIV.A.90-3023, 1992 WL 364775, slip op. at 7 (E.D. La. Nov. 23, 1992) (noting "non-violating" party's lack of clean hands); Automatic Liquid Packaging, Inc. v. Dominik, No. 86 C 5595, 1989 WL 13305, slip op. at 4 (N.D. Ill. Feb. 10, 1989) (considering whether aggrieved party was guilty of unclean hands), *aff'd*, 909 F.2d 1001 (7th Cir. 1990); *see also* Schonholz v. Long Island Jewish Medical Ctr., 858 F. Supp. 350, 355 (E.D.N.Y. 1994) (holding that the moving party was "equally guilty of injecting into the motion to dismiss factual matters outside the complaint allegations"); Tracy v. Skate Key, Inc., No. 86 Civ. 3439, 1990 WL 9855, slip op. at 2 (S.D.N.Y. Feb. 2, 1990) (plaintiff's own sins "bear mention when plaintiff seeks recovery for defendants' alleged peccadillos"); Breaux v. National Tea Co., No. CIV.A.87-2290, 1989 WL 6005, at *4 (E.D. La. Jan. 23, 1989) (moving counsel criticized for unnecessarily prolonging the case by failing to disclose evidence to opposing counsel earlier); *In re* Stripper Well, No. MDL 378, 1987 WL 12421, slip op. at 3 (D. Kan. Apr. 22, 1987) (denying sanctions where basis for sanctions was as speculative as allegedly violating claim).

125. 919 F.2d 339 (5th Cir. 1990).

126. *Id.* at 348.

127. 849 F.2d 1034 (7th Cir. 1988).

128. *See id.* at 1038-39.

129. *Id.* at 1037-38.

130. *Id.* at 1038-39; *see also* FDIC v. Calhoun, 34 F.3d 1291, 1300 (5th Cir. 1994) (criticizing nonviolating party for failing to bring dispositive motions challenging the allegedly frivolous claim); Brown v. Capitol Air, Inc., 797 F.2d 106, 108 (2d Cir. 1986) (sanctions denied where nonviolating party brought expense upon itself); United Food & Commercial Workers v. Armour Co., 106 F.R.D. 345, 349 (N.D. Cal. 1985) ("attorney might have brought about the same result by a less formal and less costly means"), *quoted in Dubisky*, 849 F.2d at 1037; *cf.* GMAC v. Bates, 954 F.2d 1081, 1086-87 (5th Cir. 1992) (sanctions denied because motion filed too late).

V. THE INHERENT POWER THREAT

Although mercy was exercised by the Advisory Committee to the 1993 amendment, we do not practice law before the Advisory Committee, and it is not inconceivable that a district court judge could resist an erosion in his sanction powers. One judge, for example, expressed his power under the 1983 Rules as follows:

> [I]f I were all of you I'd be real careful about what you sign and file in this Court, being mindful of the strictures of Rule 11, unless you've got an extra eight or $10,000 dollars in your bank account that you'd like to pay as a penalty. . . .[131]

District courts seeking alternative methods to punish counsel have at their disposal, in addition to Rules 26 and 37, Congress' effort to curb legal abuse, § 1927 of Title 28:

> 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.[132]

A district court, moreover, can always resort to its "inherent power." The United States Supreme Court explained in *Chambers v. NASCO, Inc.*[133] that Rule 11 does not preclude a court's exercise of its inherent power to punish bad faith and fraud on the court to the extent of defiling "the very temple of justice."[134] An inherent power exercise ordinarily is inappropriate, however, to penalize conduct already regulated by other rules or statutes.[135] The nebulous and undefined nature of inherent power requires that it be exercised with great restraint.[136] According to the Advisory Committee to the 1993 amendment, district courts cannot exercise their "inherent power" to effect an end run around the new Rule 11 procedures.[137] The Committee goes one step farther than the *Chambers* Court by stating not just that

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131. Webster v. Sowders, 846 F.2d 1032, 1040 (6th Cir. 1988) (quoting District Judge Bertetsman of the Eastern District of Kentucky).

132. 28 U.S.C. § 1927 (1988).

133. 501 U.S. 32 (1991).

134. *Id.* at 46.

135. *Id.* at 50 ("[W]hen there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the Rules, the court ordinarily should rely on the Rules rather than the inherent power. But if in the informed discretion of the court, neither the statute nor the Rules are up to the task, the court may safely rely on its inherent power.").

136. *Id.* at 44 ("Because of their very potency, inherent powers must be exercised with restraint and discretion.").

137. The Advisory Committee explained that:

> Rule 11 is not the exclusive source for control of improper presentations of claims, defenses, or contentions. It does not supplant statutes permitting awards of attorneys' fees to prevailing parties or alter the principles governing such awards. It does not inhibit the court in punishing for contempt, in exercising its inherent powers, or in imposing sanctions, awarding expenses, or directing remedial action authorized under other rules or under 28 U.S.C. § 1927. Chambers cautions, however, against reliance upon inherent powers if appropriate sanctions can be imposed under provisions such as Rule 11, and the procedure specified in Rule 11—notice, opportunity to respond, and findings—should ordinarily be employed when imposing a sanction under the court's inherent powers. Finally, it should be noted that Rule 11 does not preclude a party from initiating an independent action for malicious prosecution or abuse of process.

FED. R. CIV. P. 11 advisory committee's notes to 1993 amendment (citation omitted).

inherent powers generally are inappropriate if Rule 11 applies, but also that "the procedures specified in Rule 11—notice, opportunity to respond, and findings—should ordinarily be employed when imposing a sanction under the court's inherent powers."[138] It is unclear, but certainly arguable, that the "notice" referenced by the Committee refers to the new safe harbor procedure.[139]

Application of the safe harbor procedure in the Rule 11 context could make the practice of law significantly "safer." One might suppose that "the very temple of justice"[140] is seldom defiled in a manner not already covered by Rules 11, 26, 37, or 28 U.S.C. § 1927. However, inherent power exercises are not uncommon[141] and can be severe. For example, in *Resolution Trust Corp. v. Bright*,[142] Judge Kendall, District Court Judge for the Northern District of Texas, disbarred two attorneys for the Resolution Trust Corporation on the ground that they allegedly " 'knowingly attempted to get a key witness . . . to commit to a sworn statement that they knew contained assertions of fact she had not made or told them previously in matters highly relevant to the plaintiff's civil claim.' "[143] Notwithstanding the seriousness of the sanction, "[t]he district court failed to make specific findings of how appellants violated the Disciplinary Rules."[144] Given that the district court never found that counsel asked the witness to make false statements, the district court's complaint that counsel attempted to persuade the witness to adopt in an affidavit certain statements which she had not expressly made did not compel the Fifth Circuit to affirm the sanction.[145] "Indeed, the district court pretermitted any consideration of the truth of the draft affidavits."[146] Moreover, the Fifth Circuit concluded after its review of the record that counsel "made sure that [the witness] signed the affidavit only if she agreed with its contents," warning her to read it carefully and pointing out any statements in the drafts that had not been previously discussed.[147] The district court's accusation that counsel manufactured evidence was without record support.[148] Moreover, the Fifth Circuit painstakingly outlined any possible state or federal disciplinary rule abridged by the disbarred counsel and could find nothing to support the district court holding that they were

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138. FED. R. CIV. P. 11 advisory committee's notes to 1993 amendment.

139. On the other hand, one might argue that the Advisory Committee does not have the power to impose an inherent power procedure over and above the "mandates of due process" required in *Chambers*. *See Chambers*, 501 U.S. at 50.

140. *Id.* at 46.

141. *See, e.g.*, Reed v. Iowa Marine and Repair Corp., 16 F.3d 82, 84 (5th Cir. 1994); Resolution Trust Corp. v. Bright, 6 F.3d 336, 340 (5th Cir. 1993); Smith v. Our Lady of the Lake Hosp., Inc., 960 F.2d 439, 443 (5th Cir. 1992).

142. 6 F.3d 336 (5th Cir. 1993).

143. *Id.* at 340 (quoting Judge Kendall's order).

144. *Id.* at 341.

145. *Id.*

146. *Id.*

147. *Id.* at 342.

148. *Id.* at 341 ("The district court characterized the attorneys' behavior as 'manufacturing' evidence, but there is no indication that the attorneys did not have a factual basis for the additional statements included in the draft affidavit.") (citation omitted).

unethical.[149] Notably, unless the new philosophy of leniency affects inherent power exercises, the 1993 amendment to Rule 11 would not have protected the disbarred counsel in *Bright*.

VI. CONCLUSION

The new and improved Rule 11 eliminates many of the old Rule's incentives to accuse opposing counsel of sanctionable conduct and escalate the acrimonious character of litigation. Most significantly, counsel must give the opposition twenty-one days to withdraw a motion before filing it with the district court, and monetary sanctions are no longer available as a penalty for unwarranted legal contentions. If the Fifth Circuit adheres to its past practice of being sensitive to litigators' points of view, then the court should be expected to embrace the amendment to Rule 11.

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149. *See id.* at 341-42.