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Cover Page Footnote

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OHIO CIVIL RULE 11: TIME FOR CHANGE

Stephen R. Ripps*

I. INTRODUCTION

Rule 11 of the Ohio Rules of Civil Procedure (Ohio Rule 11),¹ like its federal counterpart, Rule 11 of the Federal Rules of Civil Procedure (Federal Rule 11), aims to prevent frivolous litigation. Both Ohio Rule 11 and Federal Rule 11 allow courts to impose sanctions upon an attorney or *pro se*² party who files a groundless lawsuit. A major difference exists, however, between the tests that Ohio courts and federal courts use to determine whether Rule 11 sanctions are appropriate. Federal Rule 11 provides an *objective* standard to determine whether or not an attorney has filed a frivolous pleading. In contrast, Ohio Rule 11 employs a *subjective* standard to determine if a pleading is well grounded.

The 1983 amendment to Federal Rule 11 created the difference between the standards employed by Ohio and federal courts. The 1983 amendment to Federal Rule 11 replaced the lenient subjective standard embodied in old Federal Rule 11 with a stricter objective standard.³ The objective standard places an affirmative duty on counsel and *pro se* parties to make a reasonable inquiry into the facts constituting the basis for a claim before commencing the litigation process. If an attorney or *pro se* party fails to investigate the facts giving rise to the pleading and the court later finds the pleading to be groundless, the attorney or *pro se* party may be sanctioned under Federal Rule 11.

The more lenient subjective standard employed by Ohio Rule 11 allows an attorney or *pro se* party to file a pleading if the attorney or *pro se* party believes that the pleading is not frivolous. If the court

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1. Ohio Rule 11 was enacted in 1970, and amended on July 1, 1994. OHIO CIV. R. 11.

2. A *pro se* party is a party that represents himself or herself without the assistance of counsel. The 1994 amendment of Ohio Rule 11 extended the power of the courts to sanction not only attorneys, but *pro se* parties as well. Prior to the 1994 amendment, Ohio Rule 11 permitted courts to sanction only attorneys. See *infra* notes 70-77 and accompanying text.

3. The most recent amendments to Federal Rule 11, which took effect on December 1, 1993, include a new, non-mandatory sanctioning power and a 21 day "safe harbor" period, during which time the movant may withdraw his or her motion or other paper without a penalty. FED. R. CIV. P. 11(c)(1)(A). Notwithstanding the 1993 amendments, Ohio Rule 11 should be interpreted in the same manner as Federal Rule 11, and Ohio courts should follow an objective standard when determining sanctions.

finds the pleading to be frivolous, the court may impose sanctions at its discretion—subject to a significant limitation.⁴ The court may impose sanctions only if the attorney or *pro se* party willfully violated Ohio Rule 11 by submitting a complaint he or she knew or should have known to be frivolous. Ohio Rule 11 does not therefore place a duty on the attorney or *pro se* party to investigate all of the facts leading to the pleading. The subjective standard used by Ohio courts should be abandoned in favor of the objective standard successfully used in federal courts for over a decade.

This Article begins with a brief historical background of the changes to and application of Federal Rule 11 sanctions.⁵ Next, this Article examines Ohio Rule 11 as it was interpreted prior to amendment on July 1, 1994, and compares it to interpretations of Federal Rule 11.⁶ Next, this Article discusses the July 1, 1994 amendments to Ohio Rule 11.⁷ Finally, this Article recommends that Ohio courts adopt an objective standard when interpreting Ohio Rule 11.⁸

II. FEDERAL RULE 11

A. *The Original Federal Rule 11 as Enacted in 1938*

The Supreme Court created Federal Rule 11 in 1938 to prevent potential abuse of the legal process.⁹ This original Federal Rule 11 re-

4. The 1994 amendment of Ohio Rule 11 expressly permits the award to the opposing party of expenses and reasonable attorney fees incurred in responding to the frivolous pleading. OHIO CIV. R. 11. Prior to the 1994 amendment, Ohio courts limited the imposition of sanctions solely to payment of the opposing party's attorney fees by the attorney filing the frivolous complaint. *See, e.g., Woods v. Savannah Foods & Indus., Inc.*, 1993 Ohio App. LEXIS 1151 (Feb. 26, 1993); *Weiner v. Nutter*, 617 N.E.2d 756 (Ohio Ct. App. 1992); *Millis Transfer v. Z. & Z. Dist.*, 602 N.E.2d 766 (Ohio Ct. App. 1991); *Couto v. Gibson*, 587 N.E.2d 336 (Ohio Ct. App. 1990); *Stevens v. Kiraly*, 494 N.E.2d 1160 (Ohio Ct. App. 1985).

5. *See infra* notes 9-63 and accompanying text.

6. *See infra* notes 64-132 and accompanying text.

7. *See infra* notes 133-36 and accompanying text.

8. *See infra* notes 137-63 and accompanying text.

9. FED. R. CIV. P. 11 (1938). The 1938 version of Federal Rule 11 provided:

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 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 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 the 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.

quired attorneys to "certify"¹⁰ that: (1) the pleadings were well grounded in fact and law; and (2) the pleadings were not filed for the purpose of delaying any proceeding.¹¹ By requiring certification, Federal Rule 11 aimed to discourage attorneys from deliberately including false claims in their pleadings.¹² The original rule applied only to pleadings, and allowed the courts to strike any pleadings that were not filed in good faith.¹³

The original rule also gave federal courts the discretion to impose sanctions against attorneys for "willful violations" of the rule.¹⁴ The original rule did not permit courts to impose sanctions against a *party* if the party was represented by an attorney.¹⁵ The rule had little effect

Id. (reprinted in 5A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1331 (2d ed. 1990)). Rule 11 stands to remind attorneys of their continuing obligation to the legal system as well as to the interests of justice. JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 260 (1993). For a general discussion relating to the history of the original rule, see D. Michael Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems With Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1 (1976).

Risinger notes that American courts have historically asserted inherent power to discipline members of the legal profession. *Id.* at 44. This inherent power included the power to order an attorney to make compensatory payments to anyone aggrieved by the attorney's misconduct. *Id.* Additionally, the 1993 Advisory Committee Notes state that "a variety of possible sanctions exist [Rule 11] does not attempt to enumerate the factors a court should consider in deciding whether to impose a sanction or what sanctions would be appropriate" FED. R. CIV. P. 11 advisory committee's note. The inherent discretion and power to sanction are important reasons for the Ohio courts or legislature to replace the subjective standard of interpreting Ohio Rule 11 with an objective standard similar to that of Federal Rule 11.

10. Under Federal Rule 11 prior to 1983, the signature of an attorney on any pleading filed with the court was deemed to be a "certification" that the attorney had read the pleading and that the pleading was well grounded in fact. See Risinger, *supra* note 9, at 8.

11. WRIGHT & MILLER, *supra* note 9; see also Proposed Amendment to the Federal Rules of Civil Procedure, 97 F.R.D. 165 (1983).

12. See *American Auto. Ass'n v. Rothman*, 104 F. Supp. 655 (E.D.N.Y. 1952).

13. FED. R. CIV. P. 11 (1938). One example of a court striking an obviously false pleading is found in *Brown v. District Unemployment Compensation Bd.*, 411 F. Supp. 1001 (D.D.C. 1975). Courts were generally reluctant to strike a pleading if the pleading contained any valid claim or defense. The courts recognized that to do so would punish the party too severely when the false pleading was truly the fault of the attorney. FRIEDENTHAL ET AL., *supra* note 9, at 261. One commentator concluded that the statutory language was not carefully drafted. See Risinger, *supra* note 9, at 33-34. Pleadings that were actually "signed with intent to defeat the purpose of the rule" would be labelled merely "false" and stricken solely for that reason. *Id.*

14. Risinger, *supra* note 9, at 33-34; see also, Susan Lawshe, *Rule 11*, 3 GEO. J. LEGAL ETHICS 71, 74 (1989) (explaining that original Federal Rule 11 did not require courts to impose sanctions for noncompliance with rule).

15. FED. R. CIV. P. 11 (1938). Additionally, Professor Risinger's position regarding Rule 11 is based upon "the historical and functional relationship between summary judgment and the motion to strike as sham." Risinger, *supra* note 9, at 29-30; see also D. Michael Risinger, *Another Step in the Counter-Revolution: A Summary Judgment on the Supreme Court's New Approach to Summary Judgment*, 54 BROOK L. REV. 35 (1988). Professor Risinger, in his *Counter-Revolution* article, advocates a completely new summary judgment rule, one that "places the burden of production and persuasion on the claim that the trial record can be confidently predicted pretrial squarely on the movant, whether plaintiff or defendant." *Id.* at 43. Professor Risinger

in preventing any abuse of litigation, as judges experienced difficulty in defining the subjective type of behavior that warranted sanctions.¹⁶ Courts rarely invoked the rule prior to its amendment in 1983.¹⁷ The rule's lack of guidance about the types of sanctions that courts could impose, as well as its failure to define the type of behavior that warranted sanctions, contributed to the non-use of the rule.¹⁸ Rule 11's minimal standards and the heavy burden to prove violations also contributed to the rule's failure to deter abuses of the litigation process.¹⁹ The Federal Rules Advisory Committee amended Federal Rule 11 in 1983 to address the rule's weaknesses.²⁰

B. *The 1983 Amendment to Federal Rule 11*

The increase of frivolous litigation, discovery abuses, and unfair litigation practices provoked the 1983 amendments to Federal Rule 11.²¹ The drafters designed these amendments to further promote the

argues that the burden of the 1983 changes to the Federal Rules (Rule 11 as well) falls more heavily on plaintiffs than on defendants. *Id.* at 35.

16. 6 WRIGHT & MILLER, *supra* note 9, § 1334. For a more thorough discussion on litigation abuse, see GREGORY P. JOSEPH, *SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE* (1989).

17. Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270 (1989). As of 1989, there were approximately 1000 reported opinions involving Rule 11 sanctions. *Id.* For a discussion on the effects of the 1983 amendments to Rule 11, see Cary Coglianesse, Note, *Insuring Rule 11 Sanctions*, 88 MICH. L. REV. 344, 344 n.2 (1983) (citing Schwarzer, *Rule 11 Revisited*, HARV. L. REV. 1013, 1013 n.2 (1988)) (counting the number of reported decisions as of 1987).

18. See Lawshe, *supra* note 14, at 74.

19. Edward D. Cavanagh, *Developing Standards Under Amended Rule 11 of the Federal Rules of Civil Procedure*, 14 HOFSTRA L. REV. 499 (1986).

20. FED. R. CIV. P. 11 advisory committee's note (reprinted in 7 F.R.D. 165 (1983)). The committee determined that "Rule 11 has not been effective in deterring abuses." *Id.* at 198; see also Lawshe, *supra* note 14, at 74 (explaining that Federal Rules Advisory Committee sought to reduce courts' limitation on the implementation of the rule which was "provid[ing] a forum for abusive tactics and [for] increas[ing] the cost and complexity of litigation").

21. Lawshe, *supra* note 14, at 74. Specifically, the requirement that an attorney sign (certify) each pleading was substantially rewritten to highlight the importance of the certification and to allow the courts to enforce any violation of the rule. FRIEDENTHAL ET AL., *supra* note 9, at 261. With the 1983 amendments to Federal Rule 11, Congress sought to restrict litigation abuse, to hold attorneys responsible for their actions, and to curb the increasing federal caseload. The Advisory Committee noted that former Rule 11 was ineffective in deterring litigation abuses. The Advisory Committee thus amended the rule to be more effective by providing mandatory sanctions that would prohibit courts from minimizing violations, thereby maximizing the deterrent effect. FED. R. CIV. P. 11 advisory committee's note; see also Lawshe, *supra* note 14, at 74-75 (citing reasons for 1983 amendments to Rule 11); Victor Kramer, *Viewing Rule 11 as a Tool to Improve Professional Responsibility*, 75 MINN. L. REV. 793 (1991) (asserting that courts have applied Rule 11 inconsistently); Thomas F. Maffei, *Rule 11—The Wrong Approach to Professionalism in Civil Litigation*, 73 MASS. L. REV. 98 (1988); Adam H. Bloomenstein, *Developing Standards For the Imposition of Sanctions Under Rule 11 of the Federal Rules of Civil Procedure*, 21 AKRON L. REV. 289 (1988); Melissa L. Nelken, *Sanctions Under Amended Federal Rule 11—Some*

original purpose of Rule 11 by providing changes to deter perceived abuses.²² The introduction of a new standard for determining whether an attorney could be sanctioned constituted one of the rule's most significant changes.

Prior to the 1983 amendment, Federal Rule 11 required an attorney to certify that he or she had read the pleading, and that to the best of his or her knowledge, the pleading was "well grounded and not interposed for delay."²³ Thus, an attorney was held to a subjective standard of good faith because the rule did not impose a duty to investigate or make a reasonable inquiry into the factual basis underlying the claim.²⁴ Due to the difficulty of determining whether or not an attorney acted in good faith, the 1983 amendment dropped the subjective good faith standard and replaced it with an objective standard that required the attorney²⁵ to make a reasonable inquiry into the factual basis for every type of pleading.²⁶ This more stringent standard enabled courts to more

'Chilling' Problems In The Struggle Between Compensation And Punishment, 74 GEO L. J. 1313 (1986) (discussing the 1983 amendments and their effects); Robert L. Carter, *The History And Purpose of Rule 11*, FORDHAM L. REV. 4 (1985).

22. In drafting the amendments to Rule 11, the Advisory Committee stressed the deterrent purpose of the sanctions: "[I]mposition of sanctions where appropriate, should discourage the dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses." FED. R. CIV. P. 11 advisory committee's note (1983); see also *Matter of Yagman*, 796 F.2d 1165 (9th Cir. 1986) (noting that primary purpose of sanctions is to deter subsequent abuses), *cert. denied*, 484 U.S. 963 (1987); *Calloway v. Marvel Entertainment*, 111 F.R.D. 637 (S.D.N.Y. 1986), *aff'd in part and vacated in part*, 854 F.2d 1452 (holding that under Federal Rule 11 court was not obligated to grant full amount of attorneys fees since Rule 11 award was primarily intended to impose deterrent sanction against conduct of counsel rather than compensate "injured" party for out-of-pocket expenses), *cert. denied*, 114 S. Ct. 1829 (interim ed. 1994).

23. FED. R. CIV. P. 11 (1938).

24. *Id.*

25. The 1983 amendment expanded Rule 11 to apply to *pro se* parties as well as to attorneys. FED. R. CIV. P. 11 (1983).

26. *Id.* The Advisory Committee's Note explains that the standard for determining a reasonable inquiry is one of "reasonableness under the circumstances." FED. R. CIV. P. 11 advisory committee's note (1983). The rule, as amended in 1983, provides:

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in viola-

easily evaluate whether an attorney or *pro se* party had made a reasonable inquiry before filing the pleading. The 1983 amendment also mandated that the court impose sanctions if, at the time of filing, a reasonable inquiry would have led to the conclusion that the pleading was not well-grounded in fact or law or not warranted by existing law or by a good faith argument for the modification of existing law.²⁷ Rule 11 allowed a court to exercise discretion in determining which sanction would be imposed for a Rule 11 violation.²⁸

The Ninth Circuit Court of Appeals set forth the manner in which an attorney or *pro se* party could fulfill his or her duty to make a reasonable inquiry in *Golden Eagle Distributing Corp. v. Burroughs Corp.*²⁹ *Golden Eagle* involved an appeal from sanctions imposed under Federal Rule 11.³⁰ The district court sanctioned the appellant for filing an unsuccessful motion for summary judgment in which the appellant argued that one state's statute of limitations applied over another state's statute of limitations.³¹ The appellant implied to the court that

tion 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 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.

Id.

The 1983 rule effected many changes. First, the rule provided a definite standard requiring reasonable prefiling inquiry as to facts and law. *Id.* Second, the 1983 rule applied to all persons appearing *pro se* as well as to attorneys and parties. *Id.* Third, the rule provided that the pleadings had to be "well grounded" in fact and warranted by existing law or by a good faith argument for the extension, modification, or reversal of existing law. *Id.* Fourth, papers filed could not be used for improper purposes, such as harassment. *Id.* Furthermore, the court was required to impose a sanction on an attorney or party who violated the rule. *Id.* Finally, the sanction imposed was an "appropriate sanction," which included reasonable expenses and attorneys' fees. *Id.*

27. FED. R. CIV. P. 11 (1983). The courts have since provided some indication of the level of investigation necessary for an attorney to meet this standard. See *Shrock v. Altru Nurses Registry*, 810 F.2d 658, 661-62 (7th Cir. 1987); *Kamen v. American*

Tel. & Tel. Co., 791 F.2d 1006, 1012-14 (2d Cir. 1986); see also *Lawshe, supra* note 14, at 74.

28. *Lawshe, supra* note 14, at 74. The additional language provides that "[i]f a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or its own initiative, shall impose . . . an appropriate sanction." FED. R. CIV. P. 11 (1983). Sanctions could be imposed on the person who signed, whether the signer was the attorney or the client. *Id.* For an empirical analysis of Federal Rule 11, see Lawrence C. Marshall et al., *Public Policy: The Use and Impact of Rule 11*, 86 NW. U. L. REV. 943 (1992); Gerald F. Hess, *Rule 11 Practice in Federal and State Court: An Empirical Comparative*, 75 MARQ. L. REV. 313 (1992).

29. 801 F.2d 1531 (9th Cir. 1986).

30. *Id.* at 1533.

31. *Id.* at 1533-34. The district court imposed sanctions despite the court's acknowledgment that the positions taken by appellant were legally and factually supportable. *Id.* at 1534. The court determined that sanctions were warranted because the appellant had implied that appellant's position was "warranted by existing law," rather than stating that appellant's position was "grounded in a good faith argument for the extension, modification or reversal of existing law." *Id.* at 1534. The district court held that the moving papers filed by appellant failed to cite con-

existing law supported appellant's position when, in fact, appellant's motion for summary judgment, if successful, would have modified or reversed existing law.³² The district court also sanctioned the appellant for failure to cite contrary authority.³³ The district court noted that the failure to cite contrary authority violated an ABA Model Rule of Professional Conduct.³⁴

The Ninth Circuit Court of Appeals determined that the district court improperly imposed sanctions.³⁵ The appellate court reversed the district court's broad application of Rule 11, holding that the appellant did not have to identify whether or not appellant's position was supported by existing law or by a good faith argument for the reversal or modification of existing law.³⁶ The court of appeals stated that neither the history of the rule nor the rule itself supported the type of identification argument made by the district court.³⁷

The court of appeals further held that the imposition of Rule 11 sanctions for the failure to cite adverse authority imposed a burden beyond the scope of the rule.³⁸ This extension of Rule 11 would force attorneys or *pro se* parties to exhaust every possible theory on an issue before filing suit.³⁹ The extension would also force courts to conduct research to ensure that attorneys or *pro se* parties did not overlook any applicable case law.⁴⁰

In one respect, *Golden Eagle* extended the courts' Federal Rule 11 power—the court approved the use of Rule 11 sanctions to punish a party responsible for filing a pleading. The court concluded that Fed-

itary authority and, therefore, violated Rule 3.3 of the American Bar Association's MODEL RULES OF PROFESSIONAL CONDUCT (1983), thus breaching Rule 11. *Id.*

32. *Id.* at 1534.

33. *Id.*

34. *Id.* at 1535-36 (referring to MODEL RULES OF PROFESSIONAL CONDUCT 3.1, 4.4 (1983)); see also AMERICAN BAR ASSOCIATION & THE BUREAU OF NATIONAL AFFAIRS, PRACTICE GUIDE ON RULE 11 (1992).

35. *Golden Eagle*, 801 F.2d at 1534.

36. *Id.* at 1539-40.

37. *Id.* at 1539-41.

38. *Id.* at 1542. The court stated that "Rule 11 should not impose the risk of sanctions in the event that the court later decides that the lawyer was wrong. The burdens of research and briefing by a diligent lawyer anxious to avoid any possible rebuke would be great." *Id.*

39. *Id.* Such an extension would also impose an undue burden upon the court to determine if the attorneys did, in fact, conduct exhaustive investigations. *Id.*

40. *Id.* In *Golden Eagle*, the district court charged the appellant with constructive notice because the cited authorities were listed in Shepard's as "distinguishing" the case upon which the appellant relied. *Id.* The appeals court noted that the district court's implementation of Rule 11 would increase litigation by creating "two ladders for after-the-fact review of asserted unethical conduct: one consisting of sanction procedures, the other consisting of the well-established bar and court ethical procedures." *Id.* The decision emphasized that a court is not powerless with respect to sanctioning lawyers who take positions that are not supported by law. *Id.* The appeals court noted that "Rule 11 is not the only tool available to judges in imposing sanctions on lawyers." *Id.*

eral Rule 11 authorized the courts to sanction both the attorneys and the party the attorneys represented if both the attorney and the party were responsible for the unfounded lawsuit.⁴¹

*Albright v. Upjohn*⁴² also addressed an attorney's duty to make a reasonable inquiry into the factual basis of a motion or a pleading.⁴³ Albright sued Upjohn for manufacturing the drug that caused her injuries.⁴⁴ Some of Albright's medical records were incomplete and some were illegible.⁴⁵ Accordingly, uncertainty existed concerning whether Upjohn manufactured the drug that injured Albright.⁴⁶ Albright based her lawsuit upon the fact that Upjohn had been a defendant in similar suits.⁴⁷ Albright then relied upon discovery to determine if her claim had merit. The Sixth Circuit sanctioned Albright under Federal Rule 11 because she asserted a claim against Upjohn before she knew whether the claim had any basis in fact.⁴⁸ Under amended Rule 11, Albright had a duty to make a reasonable inquiry into the facts before filing a pleading or motion;⁴⁹ Albright did not comply with this duty.

41. *Id.* at 1536. This extension by the federal courts supports this author's recommendation that Ohio courts follow the legislative interpretation rather than the common-law interpretation.

42. 788 F.2d 1217 (6th Cir. 1986).

43. *Id.* The "objective unreasonableness" defined in *Albright* has been uniformly adopted as the standard under Federal Rule 11 as amended in 1983. *See* *Lemaster v. United States*, 891 F.2d 115 (6th Cir. 1989); *Hudson v. Moore Business Forms, Inc.*, 827 F.2d 450 (9th Cir. 1987); *Eavenson, Auchumty & Greenwals v. Holtzman*, 775 F.2d 535 (3d Cir. 1985); *Rodgers v. Lincoln Towing Servs.*, 771 F.2d 194 (7th Cir. 1985); *Westmoreland v. CBS*, 770 F.2d 1168 (D.C. Cir. 1985); *Davis v. Vislan Enters.*, 765 F.2d 494 (5th Cir. 1985); *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243 (2d Cir. 1985).

44. *Albright*, 788 F.2d at 1218. Albright alleged that as an infant, she ingested tetracycline-based drugs that were manufactured, distributed, publicized and sold by Upjohn and possible unknown defendants who could have been in the same business at the time and that these drugs caused the discoloration of her teeth. *Id.*

45. *Id.* at 1220. In response to Upjohn's contention that Albright failed to conduct a reasonable pre-filing investigation, Albright asserted that her medical records were old and illegible, that the records of her deceased doctor were lost, and that she was continuously searching for other medical records. Albright asserted that these factors, in addition to the fact that Upjohn was named as a leading defendant in such actions, demonstrated her reasonable inquiry into the factual basis of her claims. *Id.* at 1220-21.

46. *Id.*

47. *Id.* Albright first discovered the connection between the drugs and her injuries on September 22, 1982, when she read an article about another lawsuit filed against tetracycline manufacturers. *Id.* at 1219.

48. *Id.* at 1221. The court stated that Albright's pre-filing investigation was insufficient to satisfy Federal Rule 11 as "it failed to disclose that the claim against Upjohn was 'well grounded in fact' within the meaning of Rule 11 or that there existed any likelihood that additional medical records would be located that could not have been found through reasonable inquiry prior to filing." *Id.*

49. *Id.* "The new language stresses the need for some pre-filing 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." *Id.* (citing FED. R. CIV. P. 11 advisory committee's note (1983)).

Therefore, Rule 11 demanded that the court impose sanctions against Albright.⁵⁰

In addition to exploring the *factual* basis for a claim, the duty to make a reasonable inquiry under Federal Rule 11 also extends to the *legal* basis of a claim. An attorney has a duty to make a reasonable inquiry into whether existing law supports a pleading or whether a legitimate argument exists to warrant modification of existing law.⁵¹ This duty was examined by the Second Circuit Court of Appeals in *Eastway Construction Corp. v. New York*.⁵² In that case, the petitioner raised two claims in federal court. One claim involved an antitrust violation and the other claim involved a civil rights violation.⁵³ The federal court dismissed both claims because the claims lacked merit.⁵⁴ The court also imposed sanctions on Eastway's attorneys, stating that had the attorneys conducted a reasonable inquiry, the attorneys would have known that no legal basis supported the allegations.⁵⁵

The 1983 amendment to Federal Rule 11 dramatically impacted the number of sanctions imposed against attorneys.⁵⁶ The cases above provide examples of how the federal courts have been able to use the objective standard to impose sanctions on attorneys and parties for irresponsible conduct. The replacement of a subjective standard with an objective standard in Federal Rule 11 has proven effective in guiding the imposition of sanctions for the filing of frivolous pleadings in federal court.⁵⁷ Despite this effectiveness, Federal Rule 11 was amended in

50. *Id.* at 1222. The court stated that the language of Rule 11 clearly mandate the imposition of sanctions once a violation is found. *Id.*

51. *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 253 (2d Cir. 1985) (involving construction company that was denied entry to redevelopment programs taking place in New York City and sought relief in federal court), *cert. denied*, 484 U.S. 918 (1987).

52. 762 F.2d 243 (2d Cir. 1985), *cert. denied*, 484 U.S. 918 (1987).

53. *Id.* at 248. Eastway was in the business of constructing publicly financed housing projects in New York City. *Id.* at 246. During the early 1970's, the City's loan program was under scrutiny for illegal operations. *Id.* Eastway's president was heavily involved in the scandal and had defaulted on city loans. *Id.*

54. *Id.* The court dismissed the civil rights claim because Eastway did not allege a deprivation of any federally protected right. *Id.* at 249. The court dismissed the antitrust claim because no injury to competition existed. *Id.* at 251. The court stated that if Eastway's antitrust claim were allowed to proceed, "every joint decision to hire one contractor over another . . . would be assailable under the Sherman Act," and such a result would be contrary to the Act's intention. *Id.*

55. *Id.* at 251-54. The court refrained from saying that Eastway or its attorneys acted in bad faith. *Id.* at 254. The court stated, however, that any "competent attorney," upon reasonable inquiry, would have realized the claims were "destined to fail." *Id.*

56. See Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189 (1988) (noting increase in federal sanction litigation and resulting effects).

57. Recently, a New Jersey court sanctioned an attorney who initiated a frivolous lawsuit. The court awarded the defendant attorneys' fees and reasonable costs totaling \$75,000 for having to defend the lawsuit. *Hamilton v. Parcels*, L-30327-89 (N.J. Super. 1993) (unreported). The *Hamilton* case involved the New York Giants and former player Hamilton. *Id.* Hamilton alleged

1993 to include a twenty-one day period of “safe harbor” during which time a party that has filed a motion or other paper in court may withdraw that motion or paper and escape sanctions under Rule 11. Also, the new rule does not include the former mandatory sanction provision. If a violation is found, the judge retains discretion to determine whether sanctions should be imposed.

C. 1993 Amendment to Federal Rule 11

Although use of Rule 11 increased after the 1983 amendments, the 1993 amendment contains new revisions to the rule that will alter the manner in which courts apply the rule. These changes do not, however, alter the rule’s purpose of preventing litigation abuses.⁵⁸ Since the purpose of Federal Rule 11 is to deter and not to compensate the oppo-

that the head coach had promised him a coaching position and then reneged on the basis of Hamilton’s race. *Id.* The plaintiff’s lawyer introduced a tape at trial that showed only that Hamilton had been promised a position as a coach. *Id.* The court found that the plaintiff and his attorney violated Federal Rule 11 as well as New Jersey’s frivolous claims statute. *Id.*

Other recent awards of sanctions include: *Sable v. Southmark/Envicon Capital Corp.*, 819 F. Supp. 324 (S.D.N.Y. 1993) (sanctions imposed on counsel for failure to conduct reasonable inquiry); *Levy v. Aaron Faber, Inc.*, 148 F.R.D. 114 (S.D.N.Y. 1993) (failure to conduct reasonable inquiry); *Mariani v. Doctors Assocs.*, 983 F.2d 5 (1st Cir. 1993) (upholding award of \$7,500 imposed against counsel for failure to conduct reasonable inquiry). A single violation of the rule could result in a sanction ordering payment of hundreds of thousands of dollars. *See, e.g., Avirgan v. Hull*, 705 F. Supp. 1544, 1551 (S.D. Fla. 1989) (\$1,034,381.36 in sanctions), *aff’d*, 932 F.2d 1572 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 913 (1992); *see also Brandt v. Schal Assocs.*, 960 F.2d 640, 644 (7th Cir. 1992) (\$351,664.96 sanction imposed by court for filing unsupported RICO action); *Dayan v. McDonald’s Corp.*, 466 N.E.2d 945 (Ill. Ct. App. 1984) (court awarded Rule 11 sanction of \$1.8 million for filing frivolous lawsuit).

58. The substantive provisions of Rule 11 now provide:

(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) [representation to the court certifying that attorney conducted reasonable inquiry under the circumstances]. 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.

nent, the 1993 amended rule provides that any monetary sanction should be paid to the court as a penalty.⁵⁹ The citation revisions were proposed and adopted even though eighty percent of district court judges surveyed by the Advisory Committee stated that the 1983 ver-

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

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b) (2). (B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

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

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

FED. R. CIV. P. 11.

The Advisory Committee stated that "this revision is intended to remedy problems that have arisen in the interpretation and application of the 1983 revision of the rule." FED. R. CIV. P. 11 advisory committee's note. The 1993 amendments generally retain the principle that attorneys and *pro se* litigants have a duty to the court to avoid conduct that frustrates the goal of Federal Rule 11. *Id.* The 1993 amendments broaden the scope of this duty. *Id.* The 1993 amendments, however, place greater restraints on the imposition of sanctions. *Id.* These restraints are expected to reduce the number of Rule 11 motions presented to the court. For example, the new subdivision (d) removes from the scope of Rule 11 all "discovery requests, responses, objections, and motions subject to the provisions of Rule 26 through 37." *Id.*

On July 24, 1990, the Advisory Committee published a "Call For Comments" on Rule 11. The Advisory Committee highlighted ten areas of concern. The Committee also proposed changes and suggested alternative civil rules to replace sanction provisions. The Committee on Federal Courts responded to this call by labelling Rule 11 "problematic" for reasons including: Rule 11 placed the burden too heavily on plaintiffs; the rule lacked uniformity in its application; the rule restricted judicial discretion; and the rule furthered the use of "shifting" counsel fees rather than imposing other sanctions. *Comments on Federal Rule of Civil Procedure 11 and Related Rules*, in 46 RECORD OF THE ASSOC. OF THE BAR OF THE CITY OF NEW YORK 267 (1991). Nevertheless, the Supreme Court adopted the amended rule and the rule took effect December 1, 1993. 146 F.R.D. 401 (1993).

The greatest dilution of the rule is found in the "safe harbor" provision. Although judges probably will not veer too far off the course from their interpretation of the 1983 amendments, enforcement may become more difficult due to the safe harbor provisions of 1993 rule as attorneys and parties test how far the rule may be stretched. Justice Scalia raises a good point in his dissenting opinion opposing the new rule. Justice Scalia notes that the original intent of Rule 11 may be lost unless judges implement the 1993 rule in the same strong manner as the 1983 rule has been administered. *Id.* at 507-10 (Scalia, J., dissenting).

59. When deterrence may be ineffective, however, the court could also require the wrongdoer to make a payment to the injured party. FED. R. CIV. P. 11 advisory committee's note.

sion of Rule 11 had an overall positive effect on curbing litigation abuses.

On April 23, 1993, the United States Supreme Court adopted revisions of Rule 11, and the revisions took effect on December 1, 1993.⁶⁰ Prior to the 1993 amendments, critics argued that Federal Rule 11 was more detrimental to plaintiffs than to defendants. This concern resulted from the fact that plaintiffs were estopped by the rule from freely raising novel issues out of fear that the court would impose Rule 11 sanctions.⁶¹ In addition, "sometimes a litigant may have good reason to believe that a fact is true or false but may need discovery, formal or informal, from opposing parties or third persons to gather and confirm the evidentiary basis for the allegation."⁶² Plaintiffs were unable to obtain this needed discovery, however, without filing suit and risking exposure to the possibility of Rule 11 sanctions. In response to these concerns, the 1993 revisions provide for a twenty-one day "safe harbor." Under the safe harbor provision, if the party accused of making a frivolous motion or filing a frivolous pleading withdraws the motion or pleading within the prescribed time period, the court will not impose Rule 11 sanctions.⁶³

It may be that too many changes to Rule 11 constitute an "over-read" and that judges, if honest, will enforce Federal Rule 11 as

60. 28 U.S.C. § 447 (Supp. V 1993). Justice Scalia dissented from the Supreme Court's adoption of the rules, stating that the much feared Rule 11 has been rendered "toothless, by allowing judges to dispense with sanctions, by disfavoring compensation for litigation expenses, and by providing a 21-day 'safe harbor.'" 146 F.R.D. 401, 507-10 (Scalia, J., dissenting). Further, Justice Scalia did not believe that Rule 11, as it was amended in 1983, was ineffective. *Id.*

This author agrees with Justice Scalia's proposition that the 1983 version of Rule 11 was not proving to be ineffective. To the contrary, Federal Rule 11 has successfully deterred litigation abuses. For example, Federal Rule 11 has caused the formation of Rule 11 committees within firms, whose purpose is to ensure a claim does not violate the rule. See BRIAN J. REDDING, ATTORNEY'S LIABILITY ASSURANCE SOCIETY, INC., SANCTIONS AGAINST LAWYERS: RECENT DEVELOPMENTS AND SOME THOUGHTS ABOUT PREVENTION 4 (1992).

61. Risinger, *supra* note 9, at 56 n.183. Rule 11 sanctions were frequently imposed on plaintiff's lawyers. David Frum, *Shoot the Hostages*, 150 FORBES 138 (1992) (commenting that "if the Supreme Court rubber-stamps the new, weaker version of Rule 11, it will only be adding to the country's litigation overload").

62. FED. R. CIV. P. 11 advisory committee's note. The Committee qualifies this statement with the following reminder:

Tolerance of factual contentions in initial pleadings by plaintiffs or defendants when specifically identified as made on information and belief does not relieve litigants from the obligation to conduct an appropriate investigation into the facts . . . ; it is not a license to join parties, make claims or present defenses without factual basis or justification.

Id.

63. FED. R. CIV. P. 11(c)(1)(a). "To stress the seriousness of a motion for sanctions and to define precisely the conduct claimed to violate the rule, the revision provides that the 'safe harbor' period begins to run only upon service of the motion." FED. R. CIV. P. 11 advisory committee's note.

before. The intent driving development of Federal Rule 11, as well as accompanying statutory and case law interpretations, is readily applicable for use in the interpretation of Ohio Rule 11. This holds true regardless of the new provisions, the safe harbor, and nonmandatory sanctions provided in the 1993 amended version of Federal Rule 11.

III. OHIO RULE 11 FROM 1970 TO 1994

Ohio Rule 11 was enacted in 1970 and amended on July 1, 1994. Ohio Rule 11 requires that all pleadings be signed either by the attorney or by the *pro se* litigant. When Ohio Rule 11 was adopted in 1970, the requirement of verification or affidavits with all the pleadings was abolished.⁶⁴ The current signature requirement, however, imposes the same verification burden as does Federal Rule 11.⁶⁵ By signing the document, the attorney certifies that, to the best of his or her knowledge, information, and belief, good grounds support the pleading. The rule places the burden for truthfulness of the pleading on the attorney.

The purpose underlying Ohio Rule 11 is similar to that of Federal Rule 11 in that both are designed to deter pleading and motion abuses.⁶⁶ On its face, the purpose of Ohio's Rule 11 does not appear to differ from the purpose of Federal Rule 11. Both rules are designed to assure the court that the attorney filed the pleading or motion in good

64. OHIO CIV. R. 11 (1970). The 1970 rule provided:

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 these rules, pleadings need not be verified or accompanied by affidavit. 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 a 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 action. Similar action may be taken if scandalous or indecent matter is inserted.

Id.

65. *Stevens v. Kiraly*, 494 N.E.2d 1160, 1163 (Ohio Ct. App. 1985) (awarding sanctions against appellant, not his attorney, for filing complaint that did not support request for punitive damages where no additional pleadings were filed to address deficiency). Additionally, the same ethical and moral obligations accompanying Federal Rule 11 are associated with Ohio Rule 11. *Id.* The signature requirement and the associated obligations suggest another justification for the Ohio courts to utilize Federal Rule 11's standard of objectiveness. The *Stevens* court seems to recognize that Ohio Rule 11 should not be restricted to a narrow interpretation.

66. *Id.* Additionally, the purpose of Ohio Rule 11 is to "assure the court that the pleading or motion was filed in good faith with sufficient grounds to support it." *Id.* This represents Ohio's subjective standard, not the objective standard associated with the federal rule. Given the *Stevens* court's analysis of the Federal Rule 11 as applied to Ohio Rule 11, however, it is apparent that the federal objective standard can be read into the Ohio rule.

faith with sufficient grounds to support it.⁶⁷ A court may find a willful violation of Ohio Rule 11 if the court determines that an attorney filed a motion or pleading intending to defeat the purpose of the rule. Upon finding a willful violation of the rule, the court may strike the document. The court also possesses the power to sanction the attorney who signed the pleading or motion and thereby certified the motion or pleading as true. The court imposes these sanctions on a case-by-case basis.⁶⁸ The sanctions will only be reversed by a higher court upon a finding that the lower court abused its discretion.⁶⁹

Prior to amendment in 1994, Ohio Rule 11 did not allow courts to impose sanctions against the party responsible for the pleading or motion.⁷⁰ Ohio Rule 11 only allowed sanctions against a party's counsel. In *Stevens v. Kiraly*,⁷¹ the appellant's attorney appealed a Rule 11 sanction imposed by the trial court against the appellant and his attorney.⁷² The appellant's attorney had filed a complaint that contained a request for punitive damages.⁷³ The evidence did not support the request for punitive damages.⁷⁴ Furthermore, the appellant failed to file any additional pleadings supporting the request for punitive damages.⁷⁵ Instead of awarding attorneys' fees to the appellee by sanctioning the violating attorney directly, the court fined the appellant.⁷⁶ The appellate court reversed, stating that Ohio Civil Rule 11 does not authorize courts to impose sanctions on parties represented by counsel.⁷⁷

67. The courts interpret Ohio Rule 11 and Federal Rule 11 differently. This author is not convinced that the courts should interpret the rules differently, in light of the modern interpretation of the federal statute.

68. *Id.* at 1164. The court stated that it has the "discretion to tailor sanctions to the particular facts of the case." *Id.* at 1164 (citing 2A MOORE'S FEDERAL PRACTICE ¶ 11.001[4] (1985)). Such sanctions may include: a reprimand, banning the attorney from practicing in a particular court for a period of time, or even disbarment. *Id.*

69. *Id.* at 1164. The trial court possesses wide latitude regarding the extent of sanctions. *Id.* The *Stevens* court stated that since the Ohio Rule 11 staff notes offer little explanation as to the procedure to be followed in imposing sanctions, it is necessary to look to Federal Rule 11 and case law for guidance. *Id.*

70. Federal Rule 11 is more explicit: "If . . . the court determines that subdivision (b) [regarding representations to the court] has been violated, the court may . . . impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation." FED. R. CIV. P. 11.

71. 494 N.E.2d 1160, 1162 (Ohio Ct. App. 1985) (exploring the scope and meaning of the 1970 Ohio Rule 11, and repeatedly noting that the rule is "vague" as to the nature of the sanctions that may be imposed against the attorney).

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 1163-64.

77. *Id.* at 1162. "The trial court assessed attorney's fees against plaintiff. Both the language and the spirit of [Ohio Rule 11] provide for sanctions against the attorney who signed the plead-

In order for a court to impose sanctions on counsel, a willful violation of Ohio Rule 11 must occur.⁷⁸ Case law clarifies the meaning of "willful violation." In *State ex rel. Ward v. Lion's Den*,⁷⁹ the appellant sought sanctions against the appellee under Rule 11 as well as under Ohio Revised Code section 2323.51⁸⁰ for having been named in a lawsuit by the appellee.⁸¹ The appellant filed a motion to dismiss for failure to state a claim and a motion for summary judgment.⁸² In addition, the appellant filed motions for sanctions, alleging that existing law did not support appellee's position that a statutory agent for a corporation could be liable for the acts of a corporation.⁸³ Furthermore, the appellant asserted that the action by appellee was designed to harass and maliciously injure the appellant.⁸⁴

The court of common pleas granted the appellant's motion for summary judgment and overruled the sanctions motions, finding that the appellee's conduct was not frivolous.⁸⁵ The court of appeals affirmed the lower court's decision and held that the appellee's conduct was not frivolous based upon the complicated corporate structure.⁸⁶ The appellate court determined that the appellee had misread the stat-

ing rather than the party for whom the attorney acted." *Id.* (quoting *Stevens v. Kiraly*, Nos. 1957, 1983, 1984 WL 4031 (Ohio Ct. App. Nov. 15, 1984)). Ohio Rule 11 has not been amended to allow for sanctions against the party as well as the attorney. *Id.* The federal rule allows for such sanctions. See FED. R. CIV. P. 11. The 1994 amended version of Ohio Rule 11 still requires a "willful violation" to warrant the imposition of sanctions.

78. Although Ohio Rule 11 has been expanded to permit courts to sanction *pro se* parties, the 1994 amendment contains no reference that allows a court to directly sanction a party who is represented by counsel. See OHIO CIV. R. 11.

79. No. 1867, 1992 Ohio App. LEXIS 6012 (Nov. 25, 1992).

80. *Id.* at *1. This statute is known as the "Frivolous Conduct Statute." Ohio common pleas courts use this statute. This statute is patterned after DR 7-102 (A)(1) and (2). Like Federal Rule 11, the statute's purpose is to prevent litigation abuse. The frivolous conduct statute aims to sanction and deter flagrant conduct. Ohio Rule 11's purpose is to deter pleadings abuse and to ensure that pleadings are filed in good faith. For an analysis of Ohio Revised Code § 2323.51, see *Turowski v. Johnson*, 70 Ohio App. 3d 118 (1991).

81. *Lion's Den*, 1992 Ohio App. LEXIS 6012. The complaint named several parties, alleging that appellant was the statutory agent of the Lion's Den, and as such, was responsible for the public nuisance operated on the premises (lewdness and prostitution). *Id.* at *1.

82. *Id.* at *2.

83. *Id.* at *1. The court stated that the particular naming of appellant was made worse by the fact that appellee did not withdraw appellant's name from the case when appellee learned that appellant was merely a statutory agent, as opposed to an agent, of the defendant corporation. *Id.* at *17 n.3.

84. *Id.* at *1.

85. *Id.* at *1. Appellant contended that the trial court abused its discretion in overruling appellant's Ohio Rule 11 motion and appellant's motion under Ohio Revised Code § 2323.51. *Id.* at *12. Appellant pointed out that as a statutory agent, appellant was merely an alternative person available to accept service of process and thus not subject to the public nuisance claim. *Id.* at *13.

86. *Id.* at *5. The dissent in *Lion's Den* claims that this opinion sets a "dangerous precedent by jeopardizing the method of using a statutory agent for service of process." *Id.* at *6. The

ute regarding agency and that this mistake did not amount to a willful violation under Ohio Rule 11 or Ohio Revised Code section 2323.51.⁸⁷

In *Woods v. Savannah Foods & Industries, Inc.*,⁸⁸ an Ohio appellate court found a willful violation of Rule 11. In *Woods*, Attorney Reams was sanctioned for willfully violating Ohio Rule 11 by filing frivolous pleadings on behalf of a client, Ms. Woods.⁸⁹ Appellant Woods had a health condition that prevented her from working certain shifts at her place of employment.⁹⁰ Woods' employer, Savannah Foods, assigned Woods to the third shift; however, the shift was inappropriate considering Wood's health.⁹¹ Woods' doctor sent Savannah Foods a letter stating that Woods could not work the third shift.⁹² Woods stated, however, that she would work the second shift if her doctor approved.⁹³ Savannah Foods then instructed Woods to report to the first shift and submit to a physical examination to be conducted by Savannah Foods' physician. Woods refused to return to work or submit to a physical exam, whereupon she voluntarily resigned.⁹⁴ On Woods' behalf, Reams filed two actions. One action was for unlawful discharge and the other action was for handicap discrimination in violation of Ohio Revised Code section 4112.02.⁹⁵

dissenting judge argues that this suit is 'truly frivolous' and that by not allowing attorney's fees in this instance, the court is encouraging, rather than deterring, frivolous suits. *Id.* at *7.

87. *Id.* at *5. To be considered a willful violation under Ohio Revised Code § 2323.51, the conduct must meet the statute's definition of "frivolous conduct." Frivolous conduct is conduct that serves merely to harass or maliciously injure a party or conduct that is not warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law. *Id.* at *4.

88. No. L-92-160, 1993 Ohio App. LEXIS 1151 (Feb 26, 1993).

89. *Id.* at *1. Reams appealed from a lower court judgement awarding Ohio Rule 11 sanctions to Savannah Foods. *Id.* The trial court held that Reams had filed frivolous proceedings against Savannah Foods and that he had willfully violated Ohio Rule 11 by filing these pleadings. *Id.*

90. *Id.* at *8.

91. *Id.*

92. *Id.* Woods' supervisor explained that because Woods had low seniority, Woods had to work third shift. *Id.* at *9. Furthermore, Woods had been informed of the likelihood of a transfer from first to third shift when she was hired. *Id.* at *8. Woods then filed a grievance with the union, stating that her supervisor insisted she give up the first shift, even though her doctor declared that she was only fit to work the first shift. *Id.* at *9.

93. *Id.* Up until this offer, Woods insisted that her diabetic condition, which required daily insulin shots and consistent daily habits (eating, sleeping, exercise), would suffer if she worked any shift other than the first. *Id.* at *8. Woods was on medical leave and did not inform her doctor of the company's second shift offer. *Id.* at *13. Thereafter, Woods filed her second grievance with the union, alleging handicap discrimination. *Id.* at *9.

94. *Id.* Woods' supervisor sent Woods a letter stating that, should Woods refuse Savannah Foods' requests for a physical exam and her presence at first shift, Savannah Foods would consider Woods to have voluntarily resigned. *Id.* at *10. The employer interpreted Woods' lack of response as a voluntary resignation. *Id.*

95. *Id.* at *7.

Savannah Foods filed a motion for summary judgment.⁹⁶ The court granted Savannah Foods' motion based upon the deposition of Woods' doctor.⁹⁷ In the deposition, the doctor stated that he had never heard about the second shift offer and that had he heard about the second shift offer, he would have approved the switch to second shift.⁹⁸ Savannah Foods then filed a Rule 11 motion for sanctions against appellant.⁹⁹ The federal court denied the Rule 11 motion.¹⁰⁰ The state court, however, granted Savannah Foods' motion for sanctions pursuant to Ohio Rule 11, awarding attorney's fees to Savannah Foods.¹⁰¹ The court of appeals upheld the state court's imposition of Rule 11 sanctions.¹⁰² The appellate court stated that even though the federal court did not allow a Federal Rule 11 sanction against the appellant, the state court's sanction pursuant to Ohio Rule 11 was not barred by *res judicata*.¹⁰³ The court of appeals reasoned that both Federal Rule 11 and Ohio Rule 11 allow for sanctions due to conduct occurring in the course of an action under a court's supervision.¹⁰⁴ Therefore, the appellate court reasoned, conduct evaluated in federal court cannot serve as a basis for a ruling on a motion for sanctions in state court. The court of appeals concluded that a federal court's denial of Federal Rule 11 sanctions will not have a *res judicata* effect in an Ohio state court even though the underlying facts are identical and the state motion is filed against the same attorney.¹⁰⁵

Appellate courts review awards of Rule 11 sanctions using an abuse of discretion standard.¹⁰⁶ If an appellate court determines that a

96. *Id.* at *10.

97. *Id.* at *13. The doctor stated that when he wrote Woods' first letter, declaring that Woods was unable to leave first shift, Woods had led him to believe that the company wanted her to work a swing shift, not third shift. *Id.*

98. *Id.*

99. *Id.* at *14.

100. *Id.*

101. *Id.* at *16.

102. *Id.* at *26.

103. *Id.* at *6. In its analysis, the appeals court noted that the doctrine of *res judicata* consists of claim preclusion (barring the prevailing party in one action from relitigating the same cause of action against the same party) and issue preclusion (barring the prevailing party from relitigating an issue that has actually been litigated in a prior cause of action). *Id.*

104. *Id.* The appeals court reasoned that both rules require that an attorney's signature on a motion or pleading certifies that the attorney has read the pleading and that the pleading is, to the best of the attorney's knowledge, well grounded in fact. *Id.* Although the rules evaluate conduct using different standards (federal is objective; Ohio is subjective), both allow for sanctions when a violation of the rule is discovered. *Id.* The court further stated that the federal rule specifically allows for attorneys' fees, and that the 1970 Ohio rule had been interpreted to allow for the imposition of attorney fees. *Id.*

105. *Id.*

106. *Stevens v. Kiraly*, 494 N.E.2d 1160, 1164 (Ohio Ct. App. 1985); see also *State ex rel. Fant v. Sykes*, 505 N.E.2d 966 (Ohio 1987). In *Stevens*, the court stated that a court, when

lower court has abused its discretion in imposing Ohio Rule 11 sanctions, the decision imposing sanctions will be reversed by a higher court.¹⁰⁷ In *Millis Transfer, Inc. v. Z. & Z. Distribution Co.*,¹⁰⁸ the trial court denied appellant's motion for attorney fees pursuant to Ohio Rule 11.¹⁰⁹ Appellant Millis, a common carrier, sued the appellee to collect transportation and delivery charges.¹¹⁰ The appellee denied the claim and filed a counterclaim stating that improper refrigeration spoiled the goods.¹¹¹ The court dismissed the appellee's counterclaim for failure to prosecute.¹¹² The appellant moved for summary judgment, arguing that federal law required tariff collection, and therefore, the appellee's defense of improper refrigeration was barred.¹¹³ The appellant also filed the affidavit of its Director of Revenue Accounting, attesting that the appellee never filed a timely claim for damages due to improper refrigeration.¹¹⁴ The appellee failed to respond to the appellant's motion for summary judgment, and the court granted the appellant's motion for summary judgment on the complaint and counterclaim.¹¹⁵

The appellant subsequently filed a motion for sanctions under Ohio Rule 11, alleging that the appellee and his counsel acted in bad faith, thus justifying a recovery of legal fees.¹¹⁶ The appellant's attorney attached an affidavit to the motion for sanctions.¹¹⁷ The affidavit stated that the appellant's attorney had informed the appellee's attorney that the appellee's damage claim was not a valid defense for the collection of the tariff at issue.¹¹⁸ The appellant's attorney also mailed the appellee's attorney the statutes and regulations supporting the ap-

sanctioning violations of Ohio Rule 11, possesses the discretion to tailor the sanctions according to the facts of the case. *Stevens*, 494 N.E.2d at 1163. Due to this wide latitude, a sanction may be found improper only when an appellate court deems that the trial court abused its discretion. *Id.* at 1164.

107. *Millis Transfer, Inc. v. Z & Z Distrib. Co.*, 602 N.E.2d 766 (Ohio Ct. App. 1991).

108. *Id.* (finding that the trial court abused its discretion in denying request for attorney fees).

109. *Id.* at 769.

110. *Id.* at 767. Appellant also requested interest, expenses and additional costs. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* The appellee's defense was that the appellant had improperly refrigerated the goods. *Id.*

114. *Id.*

115. *Id.* The court awarded the appellant damages, interest, and costs. *Id.*

116. *Id.* Except for one statement on appellant's motion that "there is no doubt defendant and his counsel acted in bad faith," the remainder of appellant's law and argument centered around Ohio Rule 11. *Id.*

117. *Id.* at 768.

118. *Id.*

pellant's claim that no valid defense existed to the allegations.¹¹⁹ The municipal court denied the appellant's motion for sanctions.¹²⁰

The court of appeals reversed the lower court's denial of appellant's Ohio Rule 11 motion for attorneys' fees.¹²¹ The court of appeals inferred that by granting summary judgment to the appellant, the municipal court had found that no valid defense existed.¹²² The appeals court explained that the appellee's attorney had notice of the law and facts supporting the appellant's claim, yet the appellee's attorney still filed an answer denying the claim and setting forth a counterclaim.¹²³ The court of appeals deemed the appellee's conduct to be a willful violation under Ohio Rule 11.¹²⁴ Consequently, the appellate court held that the municipal court abused its discretion when the municipal court denied appellant's request for attorneys' fees under Ohio Rule 11.¹²⁵

In imposing Ohio Rule 11 sanctions, a trial court has a duty to determine whether an attorney has willfully violated the rule. A court employs a subjective standard to determine if an attorney willfully violated Ohio Rule 11. The court looks to whether an attorney signed his or her name to a pleading knowing it to be false or interposed for de-

119. *Id.* Appellant's attorney also stated that he was informed of appellee's refusal to pay the tariff. *Id.*

120. *Id.* Appellee argued that monetary sanctions were inappropriate because appellee was only trying to make appellant prove his claim. *Id.* Appellee further argued that appellant had not alleged unjustified pleading, and the American Rule only allows the recovery of attorney fees if the party acted in bad faith, wantonly, or for oppressive reasons. *Id.* In denying appellant's sanctions motion, the municipal court noted that appellant's motion specifically requested "expenses and attorney fees." *Id.*

121. *Id.* at 768-69. The appellate court stated that the decision to impose sanctions is left to the trial court's discretion. *Id.* at 768. This case exemplifies an instance in which the Ohio courts should grant more than just attorneys' fees for such a willful violation of Ohio Rule 11. In federal cases "[t]he court has available a variety of possible sanctions to impose for violations, such as striking the offending paper; issuing an admonition, reprimand or censure; requiring participation in seminars or other educational programs; ordering a fine payable to the court; [or] referring the matter to disciplinary authorities." FED. R. CIV. P. 11. advisory committee's note. The rule does not list the factors a court should consider in deciding whether the court should impose sanctions, but it does note that a sanction may be nonmonetary as well as monetary. *Id.*; see, e.g., *Thomas v. Capital Security Servs.*, 836 F.2d 866, 878 (5th Cir. 1988) ("district courts may theoretically still dismiss baseless claims or defenses"); *Donaldson v. Clark*, 819 F.2d 1551, 1557 (11th Cir. 1987); *Glick v. Gutbrod*, 782 F.2d 754, 757 (7th Cir. 1986) (striking the pleading or motion); *In re Curl*, 803 F.2d 1004 (9th Cir. 1986) (referring for disciplinary action); *Stevenson v. Brockton*, 676 F. Supp. 26 (D. Mass. 1987) (requiring attendance at seminar on Federal Rules and Professional Responsibility). Monetary sanctions may include attorneys' fees, expenses, and fines.

122. *Millis Transfer*, 602 N.E.2d at 769. The municipal court did not state a reason for denying the motion for sanctions. *Id.*

123. *Id.* Furthermore, appellee did not challenge the summary judgment motion filed by appellant as to the counterclaim. *Id.*

124. *Id.* The court also noted that appellee's attorney did not present any mitigating factors to justify his actions. *Id.*

125. *Id.*

lay.¹²⁶ In *Haubeil & Sons Asphalt & Materials v. Brewer & Brewer Sons, Inc.*,¹²⁷ the court imposed Ohio Rule 11 sanctions on the plaintiff's attorneys for filing an allegedly frivolous complaint.¹²⁸ The record showed that the attorneys were mistaken in their knowledge of the facts.¹²⁹ The court of appeals reversed the lower court's imposition of sanctions after evaluating the attorney's conduct under Ohio's subjective standard.¹³⁰ The appellate court concluded that the record failed to show that the attorneys signed a pleading which they knew to be false or which was interposed for delay.¹³¹ The court of appeals, therefore, did not find a willful violation of Ohio Rule 11.¹³²

IV. 1994 AMENDMENT TO OHIO RULE 11

The 1994 amendment to Ohio Rule 11 made three major changes to the rule.¹³³ First, Ohio Rule 11 was extended to include motions and other papers, not just pleadings.¹³⁴ Second, the amendment broadens Ohio Rule 11 to encompass actions by *pro se* parties in addition to actions by attorneys acting in their representative capacity.¹³⁵ Finally, the amendment adds language that expressly permits courts to award expenses and attorneys' fees to an opposing party as a sanction.¹³⁶

Despite the apparent good intentions of the Ohio legislature in clarifying Ohio Rule 11 and in bringing the Rule's applicability more in line with Federal Rule 11, the Ohio legislature failed to address the major flaw in Ohio Rule 11—the subjective standard.

126. *Id.*

127. 565 N.E.2d 1278 (Ohio Ct. App. 1989).

128. *Id.* at 1279 (holding that attorney willfully signed pleading which to best of his knowledge was not supported by good grounds).

129. *Id.* The court stated that the record did not provide any information proving the appellants knowingly signed a false pleading. *Id.* Further, the court stated that before a court can find a violation of Ohio Rule 11, a court must find that the attorney willfully signed a pleading which he or she knew to be false. *Id.*

130. *Id.*

131. *Id.* While the court found no violation of the rule, the court disagreed with appellant's proposition that an award of attorneys' fees may never be imposed for a violation of Ohio Rule 11. *Id.*

132. *Id.* This author believes that the *Haubeil* appellate court's reading of Ohio Rule 11 is too narrow an interpretation, because sanctions for a willful violation are based upon a subjective standard, which is difficult to meet. The Ohio legislature, or the Ohio courts through their decisions, should interpret Ohio Rule 11 in accordance with Federal Rule 11. By interpreting Ohio Rule 11 in accordance with Federal Rule 11, violations will be scrutinized under an objective and uniform standard.

133. See OHIO CIV. R. 11.

134. *Id.*

135. *Id.*

136. *Id.*

V. INTERPRETING OHIO RULE 11

Prior to amendment of Ohio Rule 11 in 1994, guidance for Ohio courts' application of the rule came from Federal Rule 11 staff notes and case law.¹³⁷ Ohio courts looked to staff notes and case law to determine how sanctions could be imposed under Ohio Rule 11. While Ohio courts looked to Federal Rule 11 for guidance in interpreting the rule, many major differences still existed between the two rules.¹³⁸ The first difference between the two rules concerned which parties could be sanctioned.¹³⁹ While Federal Rule 11 was expressly amended to extend its sanctioning power beyond attorneys to include the parties they represent, courts interpreted Ohio Rule 11 to allow for sanctions against attorneys alone.¹⁴⁰ The Ohio Supreme Court acknowledged this difference between Federal Rule 11 and Ohio Rule 11 in *Stevens v. Kiraly*.¹⁴¹ The *Stevens* court noted that Ohio had not amended its rule to allow for sanctions against a party represented by counsel.¹⁴² Prior to 1994, sanctions were only allowed against an attorney who filed a pleading or motion in violation of Ohio Rule 11.¹⁴³ The court in *Stevens* also recognized that Ohio Rule 11 was vague in describing the type of sanctions that could be imposed.¹⁴⁴ The *Stevens* court looked to

137. See *Stevens v. Kiraly*, 494 N.E.2d 1160, 1163 (Ohio Ct. App. 1985).

138. It is this author's contention that Ohio courts should begin expanding their interpretation of Ohio Rule 11 to mirror the Federal Rule 11 interpretation.

139. The amendment to Federal Rule 11, which became effective December 1, 1993, does not change who may be sanctioned. The relevant language provides:

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.

FED. R. CIV. P. 11.

140. Under the new Federal Rule 11, this sanctioning power will not change. *Id.* The corresponding restriction in Ohio Rule 11 should not limit Ohio courts if the courts begin implementing a more progressive statutory and decisional interpretation of the rule.

141. 494 N.E.2d 1160 (Ohio 1985).

142. *Id.* at 1162.

143. *Id.* at 1162 (quoting *United States v. Standard Oil of California*, 603 F.2d 100, 103 n.2 (9th Cir. 1979)). Federal Rule 11 sanctions include attorneys' fees, expenses, fines, striking a pleading or motion, referral for disciplinary action, and requiring attendance at Federal Rules and Professional Responsibility seminars.

In bad faith situations, federal courts have inherent equitable power to impose sanctions necessary to regulate the docket, promote judicial efficiency, deter frivolous filings and regulate the conduct of attorneys. See *Van Sickle v. Holloway*, 791 F.2d 1431 (10th Cir. 1986); *Easht v. Riggins Trucking, Inc.*, 757 F.2d 557 (3d Cir. 1985). The federal courts may use this power to dismiss cases involving parties who flagrantly disregard court orders and rules. See *Glick v. Gutbrod*, 782 F.2d 754, 757 (7th Cir. 1986). The use of the court's inherent power has become more common as a result of the 1983 amendments. No reason exists to explain why Ohio courts cannot impose similar sanctions under their inherent sanctioning power.

144. *Stevens*, 494 N.E.2d at 1163.

Federal Rule 11 for guidance and concluded that since Federal Rule 11 allows for attorneys' fees and other reasonable expenses, attorneys' fees were also appropriate under Ohio Rule 11.¹⁴⁵ Additionally, the *Stevens* court stated that, like Federal Rule 11, Ohio Rule 11 grants Ohio courts the authority to impose other sanctions aside from attorney fees.¹⁴⁶ Any sanction imposed by the trial court will be found improper when a court abuses its discretion in imposing the sanction. The 1993 amendment to Federal Rule 11 changed the imposition of Rule 11 sanctions from mandatory to discretionary.¹⁴⁷ Like current Federal Rule 11, Ohio Rule 11 grants the court discretion to impose sanctions when the court finds a violation of the rule.¹⁴⁸

An Ohio court of appeals examined another difference between Federal Rule 11 and Ohio Rule 11 in *Woods v. Savannah Foods and Industries, Inc.*¹⁴⁹ The *Woods* court noted that Federal Rule 11 specifically includes attorney fees as an allowable sanction, while Ohio Rule 11 had merely been *interpreted* to allow the sanction of attorney fees.¹⁵⁰ This difference has been eliminated by express language in the 1994 amended version of Ohio Rule 11.¹⁵¹ Additionally, the *Woods*

145. *Id.* at 1163-64. Additionally, the newly amended Federal Rule 11 does not change the extenuation of sanctions for attorney fees and other reasonable expenses. FED. R. CIV. P. 11. "[T]he sanction may consist of . . . 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." *Id.*

146. *Stevens*, 494 N.E.2d at 1163-64. Again, the newly amended Federal Rule 11 does not change the nature of allowable sanctions. "[T]he sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, . . . or an order directing payment to the movant . . ." FED. R. CIV. P. 11. For a list of alternative sanctions, see *infra* note 150.

147. Currently, under Federal Rule 11, sanctions are not mandatory. FED. R. CIV. P. 11. The rule states: "If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court *may* . . . impose an appropriate sanction . . ." *Id.* (emphasis added). In this author's opinion, even without mandatory sanctions, federal judges will still sanction as they did prior to the 1993 amendments. By implication, therefore, this new change will not affect Ohio's judiciary in court imposition of Ohio Rule 11 sanctions. Additionally, since Ohio does not provide a "safe harbor" period, Ohio's Rule 11 should reflect the intent and spirit of the 1983 Federal Rule 11, which also did not provide a "safe harbor."

148. *Stevens*, 494 N.E.2d at 1160. The court in *Stevens* noted that, "[Ohio Rule] 11 is vague as to the nature of the sanction which may be imposed against the attorney. It states only that the attorney may be subjected to 'appropriate action.'" *Id.* at 1163. This vagueness has been somewhat reduced by the 1994 amendment that expressly provides that "expenses and reasonable attorney fees" may be awarded as a sanction.

149. No. L-92-160, 1993 Ohio App. LEXIS 1151 (Feb. 26, 1993).

150. *Id.* at *18. Examples of alternative sanctions that serve as deterrence against litigation abuses are found in case law interpreting Federal Rule 11. Such alternative sanctions include monetary sanctions, attorney fees, expenses, fines, striking the pleading or motion, referral for disciplinary action, and requiring attendance at seminars on Federal Rules and Professional Responsibility. No reason exists to explain why the Ohio courts cannot incorporate these additional sanctions under their inherent power to sanction. See Risinger, *supra* note 9, at 44 (noting that courts have the inherent ability to sanction).

151. See OHIO CIV. R. 11.

court observed that when a trial court imposes Ohio Rule 11 sanctions, the court does not have to take into account the attorneys' ability to pay those sanctions.¹⁵²

The primary difference remaining between the application of Federal Rule 11 and the newly amended Ohio Rule 11 is the standard used to determine whether a violation has occurred. The Ohio legislature failed to address this critical difference in the 1994 amendment to Ohio Rule 11. A federal court applying Federal Rule 11 uses an objective standard.¹⁵³ This objective standard imposes upon counsel an affirmative duty to investigate the facts leading up to the filing of a motion or pleading. Ohio courts, however, apply a subjective standard in determining whether there is a violation of Ohio Rule 11. This subjective standard allows an attorney to file a pleading if, to the best of his or her knowledge, information and belief, there is good ground to support the claim and the claim is not interposed for delay.¹⁵⁴ If an attorney willfully violates Ohio Rule 11, that attorney may be subject to sanctions imposed by the trial court.¹⁵⁵

This significant difference between the two rules prompted a strong dissenting opinion in *Haubeil & Sons Asphalt & Materials, Inc. v. Brewer & Brewer Sons Inc.*¹⁵⁶ Judge Grey's dissent in *Haubeil* declared that in reversing sanctions imposed against the plaintiff's attorneys for filing an allegedly frivolous complaint, the majority had applied the old common-law willfulness standard to determine whether a mistake by the plaintiff's attorneys constituted a violation of Ohio Rule 11.¹⁵⁷ Judge Grey noted that this common-law concept has been replaced by Ohio Rule 11.¹⁵⁸ Judge Grey suggested that Ohio Rule 11 places an affirmative duty on the attorney to investigate the facts

152. *Woods*, 1993 Ohio App. LEXIS 1151, at *26.

153. The new Federal Rule 11 does not deviate from this objective standard. See FED. R. CIV. P. 11 "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." *Id.*

154. *Haubeil & Sons Asphalt & Materials, Inc. v. Brewer & Brewer Sons, Inc.*, 565 N.E.2d 1278, 1279 (Ohio Ct. App. 1989). This standard is almost impossible to meet for purposes of determining whether a violation requiring sanctions has occurred. This acknowledged difficulty is inherent in the Federal Advisory Committee's recommendation for a change from a subjective to an objective standard in the 1983 Federal Rule 11 amendments: "The [objective] standard is one of reasonableness under the circumstances This [objective] 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's note (1983).

155. OHIO CIV. R. 11.

156. 565 N.E.2d 1278 at 1280. The dissent argues that the majority did not fully contemplate the duty imposed upon counsel to conduct an adequate pre-filing investigation. *Id.* This author believes the dissent has correctly assessed the problem: Ohio Rule 11 is not stringent enough to emphasize the importance of pre-filing investigation.

157. *Id.* at 1279.

158. *Id.*

before signing a pleading or motion.¹⁵⁹ Therefore, Judge Grey theorized, since a defendant must answer or respond to the motion and incur expenses while defending a frivolous claim, it is reasonable for Ohio Rule 11 to recognize this inequity and to grant compensation for these expenditures.¹⁶⁰

Very few cases exist that interpret or apply Ohio Rule 11. Nor are the Ohio Rule 11 staff notes helpful in deciding which state interests are to be protected and which abuses are to be prevented by Ohio Rule 11.¹⁶¹ Construing Ohio Rule 11 to base the imposition of sanctions solely upon an attorney's subjective belief that the pleading or motion he or she is filing is true contravenes the basic premise underlying the rule. Ohio Rule 11 supports the logic that a true certification is only obtainable after an attorney has investigated the facts. Judge Grey suggests that it would be helpful to both the bench and the bar if the Ohio Supreme Court would provide a definitive holding concerning the purpose and use of Ohio Rule 11.¹⁶² Legislative intent strongly supports Judge Grey's position since the statute was intended to do go beyond a mere codification of the existing common law in establishing those abuses by attorneys that will be subject to sanction.

Judge Grey's dissent in *Haubeil* sought to bridge the gap between Federal Rule 11 and Ohio Rule 11 by, in effect, asking the Supreme Court of Ohio to interpret Ohio Rule 11 in the same manner as its federal counterpart. The willingness of some courts to look to Federal Rule 11 for guidance when interpreting Ohio Rule 11 implies that trial judges do indeed have the discretion and the inherent power to apply

159. *Id.* Judge Grey noted:

The Civil Rules did away with the demurrer, which was a simple, inexpensive, yet effective response to a spurious claim in the code pleading days. Under the Civil Rules, however, the defendant must answer, respond to discovery, etc. and generally incur legal expenses before he is entitled to a Rule 12 motion to dismiss or a Rule 56 motion for summary judgment.

Id. Judge Grey concluded that in *Haubeil* there was a total failure of counsel to investigate the facts, constituting actions deserving of Rule 11 sanctions. *Id.* at 1280.

160. *See id.* at 1279-80; *see also* State *ex rel.* Ward v. Lion's Den, No. 1867, 1992 Ohio App. LEXIS 6012 (Nov. 25, 1992). In *Lion's Den*, the court refused to impose sanctions against appellee for filing suit against the statutory agent when the statutory agent could not be held legally liable for the Lion Den's actions. *Id.* Judge Grey again dissented, stating that "the majority opinion sets a particularly dangerous precedent by jeopardizing the method of using a statutory agent for service of process." *Id.* at *19-20.

This author is in complete agreement with Judge Grey's assessment of Ohio Rule 11, and also believes that it would be helpful for the Ohio Supreme Court to establish a definitive ruling on the issue. The Ohio Supreme Court could base such a ruling on the inherent power of the courts to sanction.

161. *See Haubeil*, 565 N.E.2d at 1279 (Grey, J., dissenting).

162. *Id.* at 1280. This author agrees with Judge Grey that attorneys must investigate a case before they certify a pleading or motion, and hopefully Judge Grey's concern and this Article may promote implementation of an objective standard.

Federal Rule 11 by analogy. This willingness is overshadowed, however, by courts that do not fully exercise their discretion and continue to apply a common-law subjective standard which requires merely a good faith belief in the truthfulness of the pleading or claim. The refusal of some courts to look to Federal Rule 11, therefore, restricts the operation of Ohio Rule 11. Interpreting Ohio Rule 11 in accordance with Federal Rule 11 will allow Ohio courts to break away from the common-law concepts. The Supreme Court of Ohio should depart from these common-law concepts that dilute the deterrent effect of Ohio Rule 11.¹⁶³

VI. CONCLUSION

Interpreting Ohio Rule 11 consistently with the objective standard of Federal Rule 11 would abolish the ineffective good faith interpretation that presently allows attorneys to abuse Ohio Rule 11. Such an interpretation of Ohio Rule 11 would charge counsel with an affirmative duty to investigate the facts and law prior to the filing of a motion or pleading. The objective standard would provide courts greater latitude in invoking discretionary Ohio Rule 11 sanctions, because the standard would not rely on the court's decision regarding the subjective belief of an attorney or *pro se* litigant. In addition, the objective standard does not require a determination of counsel's intent at the time the pleading or motion was filed.

The implementation of Federal Rule 11 type sanctions will provide Ohio courts with greater sanctioning power. Federal Rule 11 includes attorney fees as an available sanction. Such sanctions imposed by the federal courts amount to much more than those sanctions presently imposed under Ohio courts' interpretation of Ohio Rule 11. Interpreting Ohio's Rule 11 in the same manner as Federal Rule 11 allows for various sanctions at the judge's discretion. The sanctioning power under Federal Rule 11 affords federal courts the power to prevent litigation abuse by the consequential impact on attorneys who violate the rule. The Ohio Supreme Court should allow its rule to have the same effect in deterring frivolous and groundless pleadings and motions in Ohio state courts.

163. Even with the "safe harbor" and nonmandatory sanctions that operate under amended Federal Rule 11, Ohio Rule 11 will still be more effective by applying a Federal Rule 11 interpretation than it is at present. This author hopes this Article provides enough history and precedent for the courts to go beyond the common-law concept of Rule 11 interpretation.