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## I. INTRODUCTION

Some judges and legal commentators have complained that "frivolous" litigation clogs federal and state court dockets.[1] Fearing that dispute resolution might come to a standstill, these prognosticators urge that courts adopt stronger measures to curb frivolous litigation.[2] Their recommendations have found receptive audiences. Legislative and judicial bodies at the federal and state levels have spun a web of statutes and procedural rules allowing courts to impose substantial sanctions against those who sponsor frivolous litigation.[3] Most of these provisions have become effective within the last decade.[4] The growing number of these provisions parallels the growing and justifiable dissatisfaction that the public exhibits toward courts and the legal

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1. *See, e.g.*, R.J. Gerber, *Victory vs. Truth: The Adversary System and its Ethics*, 19 ARIZ. ST. L.J. 3, 6-7 (1987); Scott S. Partridge et al., *A Complaint Based on Rumors: Countering Frivolous Litigation*, 31 LOY. L. REV. 221, 222 (1985); John W. Wade, *On Frivolous Litigation: A Study of Tort Liability and Procedural Sanctions*, 14 HOFSTRA L. REV. 433, 433 (1986); David A. Shaneyfelt, Comment, *Courts Are No Place for Fun and Frivolity: A Warning to Vexatious Litigants and Over-Zealous Attorneys*, 20 WILLAMETTE L. REV. 441, 443 (1984). While American courts are overcrowded, it is unclear whether "frivolous" litigation has contributed disproportionately to the crowded court dockets. *See infra* pp. 1125-52.

2. *See* Partridge, *supra* note 1, at 254-63 (proposing broader causes of action for frivolous litigation, including elimination of the "proof of malice" requirement in malicious prosecution actions); Wade, *supra* note 1, at 494 (arguing that courts should not require proof of subjective bad faith as prerequisite to severe sanctions against parties who file frivolous lawsuits); Shaneyfelt, *supra* note 1, at 455 (arguing that courts should require parties who file frivolous lawsuits to bear the attorneys' fees of their opponents).

3. *See infra* pp. 1072-1125.

4. *See, e.g.*, ALA. CODE §§ 12-19-270 to 276 (Supp. 1993) (Alabama Litigation Accountability Act) (effective 1987); MISS. CODE ANN. §§ 11-55-1 to -15 (Supp. 1993) (Litigation Accountability Act of 1988) (effective 1988); S.C. CODE ANN. §§ 15-36-10 to -50 (Law. Co-op. Supp. 1993) (South Carolina Frivolous Civil Proceedings Sanctions Act) (effective 1988). Even as late as 1986, Dean Wade reported that 18 states had enacted statutes addressing frivolous litigation. Wade, *supra* note 1, at 457-68. Currently, 35 states have enacted some kind of statute addressing frivolous litigation, and the remaining states (as well as the District of Columbia) have at least promulgated some kind of procedural rule addressing frivolous litigation. *See infra* pp. 1072-1125.

Of the few sanctions provisions in effect before the 1980s, most have since been amended to provide for a broader range of sanctions. *See, e.g.*, FED. R. CIV. P. 11 (amended 1983); FLA. STAT. ch. 57.105 (Supp. 1993) (amended 1986); ARK. R. CIV. P. 11 (amended 1986); MINN. R. CIV. P. 11 (amended 1985); MO. R. CIV. P. 55.03 (amended 1985).

profession.[5] But the rising tide of sanctions provisions raises a troubling question: "Just what is frivolous litigation?"

Few doubt, at least in the abstract, that the courts must do something to eliminate litigation that serves no function other than to consume court time and stall the progress of justice. Some lawsuits are nuisance claims that litigants file not to redress legitimate grievances, but to coerce opposing parties into making desirable economic compromises.[6] Other lawsuits—"nut cases," in the absence of a better term—assert exotic factual claims that lack a rational foundation. For example, in recent years, the federal courts have entertained lawsuits alleging that Bill Clinton and Ross Perot conspired to kill 10 million African-American women in concentration camps,[7] that the devil and his assistants inflicted emotional distress upon the plaintiff,[8] and that Coretta Scott King should be arrested and detained as a threat to the Catholic Church.[9] Lawsuits like these, as well as comparable defenses,

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5. *See* Wade, *supra* note 1, at 436; *cf.* William J. Brennan, Jr., *Are Citizens Justified in Being Suspicious of the Law and the Legal System?*, 43 U. MIAMI L. REV. 981, 982 (1989) ("Law is regarded as an obstacle to, rather than an instrument of, the creation of a just and generous society."). Public frustration with the justice system, and in particular the amount of time it takes to resolve a civil lawsuit as a consequence of crowded court dockets, has contributed to the growth of alternative methods of dispute resolution. *See* Charles W. Joiner, *Our System of Justice and the Trial Advocate*, 24 U.S.F. L. REV. 1, 18 (1989).

6. *See, e.g.*, Joseph J. Brecher, *The Public Interest and Intimidation Suits: A New Approach*, 28 SANTA CLARA L. REV. 105, 113 (1988) (observing that some developers use counterclaims to punish public interest litigants for challenging development projects); Gerber, *supra* note 1, at 8 (observing that some defendants in contract actions file counterclaims to gain "litigation leverage"); Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1, 17 (1984) (observing that some parties use lawsuits to increase their opponents legal costs). The growing number of nuisance suits reflects an apparent decline in legal professionalism. More and more frequently, lawyers have abjured their roles as officers of the court, believing that the concept of "zealous representation" permits them to stretch procedural rules and obstruct the progress of justice. *See* Byron C. Keeling, *A Prescription for Healing the Crisis in Professionalism: Shifting the Burden of Enforcing Professional Standards of Conduct*, 25 TEX. TECH L. REV. 31, 39 (1993) [hereinafter Keeling, *A Prescription for Healing the Crisis in Professionalism*] (discussing the zealous resentation of lawyers in the name of client interest); Tommy Prud'homme, *The Need for Responsibility Within the Adversary System*, 26 GONZ. L. REV. 443, 446-49 (1991) (pointing out how the adversarial system leads to lawyers' zealous behavior).

7. Tyler v. Carter, 151 F.R.D. 537, 538 (S.D.N.Y. 1993).

8. United States *ex rel.* Mayo v. Satan & His Staff, 54 F.R.D. 282, 284 (W.D. Pa. 1971).

9. Windsor v. Pan Am. Airways, 744 F.2d 1187, 1188 (5th Cir. 1984).

are doubtlessly "frivolous," and their sponsors should be subject to some kind of sanction.[10]

The focus of the sanctions debate has been on whether sanctions provisions should go beyond proscribing nuisance claims and nut cases. Not surprisingly, different jurisdictions have defined the term "frivolous" in different ways. A few jurisdictions have crafted sanctions provisions—or a scheme of related sanctions provisions—that define "frivolous" narrowly, limiting sanctions to conduct that reflects subjective bad faith.[11] These jurisdictions desire to ensure that litigants have fair access to the courts. Accordingly, because the sanctions schemes in these jurisdictions are limited in their reach, the schemes do not inhibit individuals from approaching the courts with colorable, albeit novel, legal arguments. The limited reach of the sanctions schemes, however, precludes courts from redressing conduct that, while perhaps undesirable or unreasonable, does not rise to the level of bad faith.[12]

Conversely, other jurisdictions have crafted sanctions provisions or schemes that define "frivolous" broadly.[13] These jurisdictions allow courts to impose sanctions against individuals whose conduct breaches an objective standard of reasonableness. Under sanctions schemes based upon an objective standard, courts might sanction litigants for failing to conduct a reasonable prefiling review of the facts[14] or for filing a pleading that a reasonable person would have known was meritless.[15] Because the objective standard of reasonableness is much

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10. Keeling, *A Prescription for Healing the Crisis in Professionalism*, *supra* note 6, at 61-62.

11. *See, e.g.*, CAL. CIV. PROC. CODE § 128.5 (West Supp. 1994) ("'Frivolous' means . . . totally and completely without merit or . . . for the sole purpose of harassing an opposing party."); FLA. STAT. ch. 57.105 (Supp. 1993) (providing a defense if the attorney has acted in good faith).

12. *See* Mark S. Cady, *Curbing Litigation Abuse and Misuse: A Judicial Approach*, 36 DRAKE L. REV. 483, 503 (1987) ("A subjective standard tends to interfere with the goals of . . . [a sanctions provision] by making it difficult to find a breach of the duties it imposes.").

13. *See, e.g.*, FED. R. CIV. P. 11 (stating that "the pleading, motion, or other paper . . . [must not be] interposed for any improper purpose"); GA. CODE ANN. § 9-15-14 (Michie 1993) (stating that an attorney or party can be sanctioned if the action "lacked substantial justification"); N.D. CENT. CODE § 28-26-01 (1991) (awarding sanctions "if there is such a complete absence of actual facts or law that a reasonable person could not have thought a court would render judgment in their favor"); WASH. REV. CODE § 4.84.185 (Supp. 1994) (allowing the judge to "consider all evidence presented . . . to determine whether the position of the nonprevailing party was frivolous").

14. *See, e.g.*, FED. R. CIV. P. 11 ("The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief *formed after reasonable inquiry* it is well grounded in fact . . . and that it is not interposed for any improper purpose . . . .") (emphasis added).

15. *See, e.g.*, N.D. CENT. CODE § 28-26-01 (1991) ("Such costs must be awarded

broader than the subjective bad faith standard, sanctions schemes predicated on an objective standard give courts a more effective weapon against litigation abuse. Defining the term "frivolous" with respect to an objective standard, however, sacrifices clarity.[16] No clear line divides the reasonable lawsuit from the unreasonable—and sanctionable—lawsuit.[17] Sanctions schemes based upon an objective standard, therefore, tend to chill individuals from exercising their rights of fair access to the courts.[18] The threat of sanctions under these schemes does more than discourage litigants from pursuing "frivolous" arguments; it also discourages litigants from pursuing some legitimate and colorable arguments.[19]

Drafting a sanctions provision that preserves both the goals of redressing litigation abuse and encouraging fair access to the courts has proven to be a daunting task.[20] The existing sanctions schemes in the federal and state courts, regardless of whether they define "frivolous"

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regardless of the good faith of the attorney or party making the claim for relief if there is such a complete absence of actual facts or law that a reasonable person could not have thought a court would render judgment in their [sic] favor . . . .").

16. *See* H. Paul Honsinger, *Attorney Sanctions: A Primer for Louisiana Lawyers*, 39 LA. B.J. 347, 348 (1992) (stating that the reasonableness test "sets a flexible standard"); *cf.* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 33, at 193 (5th ed. 1984) ("The application of this standard of reasonable conduct is as wide as all human behavior. There is scarcely any act which, under some conceivable circumstances, may not [be unreasonable].").

17. In almost all cases that reach trial, the defendant can be expected to proclaim that the claims against it are unreasonable. *See* Arthur B. LaFrance, *Federal Rule 11 and Public Interest Litigation*, 22 VAL. U. L. REV. 331, 332 (1988).

18. *See* John M. Johnson & G. Edward Cassady III, *Frivolous Lawsuits and Defensive Responses to Them—What Relief is Available?*, 36 ALA. L. REV. 927, 928 (1985) ("[A]ny attempt to devise a system for responding to spurious actions is, by its very nature, in conflict with the value placed on free access to courts in American society."). In addition to the due process guarantees in the United States Constitution, most states have constitutional "open courts" provisions that ensure fair access to the courts. *Id.* at 928 n.8.

19. *See* Jane P. Mallor, *Punitive Attorneys' Fees for Abuses of the Judicial System*, 61 N.C. L. REV. 613, 642 (1983) ("Several courts have indicated that the rigorous subjective standard is necessary to ensure that plaintiffs with meritorious claims or colorable but novel claims are not deterred from bringing suit."); *See also* Melissa L. Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313, 1338-43 (1986) [hereinafter Nelken, *Some 'Chilling' Problems*].

20. *Cf.* Mallor, *supra* note 19, at 643 ("The balance between maintaining free access to the courts and deterring groundless claims is difficult, and perhaps impossible, to strike.").

narrowly or broadly, suffer two essential flaws. First, the existing schemes use either a subjective or an objective standard but never both. The various jurisdictions assume, incorrectly, that sanctions schemes cannot incorporate the best aspects of both the subjective and objective standards. Second, the existing sanctions schemes encourage the courts to impose attorney fee awards as the predominant form of sanction. In emphasizing the circumstances of the victim rather than the circumstances of the offense and the offender, fee awards fail to advance the main purposes for sanctions awards in the first place—punishment and deterrence.

Sanctions schemes, in sum, must strive to achieve a more balanced approach to frivolous litigation.[21] This Article will review the existing sanctions provisions available to the federal and state courts; observing that none of the existing provisions offer a satisfactory solution. The Article will then recommend a sanctions scheme that would achieve a better balance between the goals of encouraging fair court access and redressing litigation abuse. The Article concludes that sanctions schemes should require courts to impose sanctions commensurate with the offense and the individual circumstances of the offender. Ultimately, the Article suggests that sanctions schemes must harmonize the best aspects of the subjective and objective standards. The ideal sanctions scheme should give the courts a wide range of minor sanctions with which to punish conduct that violates an objective standard, but it should preclude the courts from imposing severe sanctions absent a finding of subjective bad faith.

## II. SANCTIONS PROVISIONS: AN OVERVIEW

The increasing use of judicial sanctions against lawyers and their clients is perhaps the most significant recent development in federal and state civil procedure.[22] Without exception, the trial courts in each federal and state jurisdiction currently possess at least one available sanctions provision that they can enforce against persons who file or

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21. *See* Soffos v. Eaton, 152 F.2d 682, 683 (D.C. Cir. 1945) ("Some sort of balance has to be struck between the social interests in preventing unconscionable suits and in permitting honest assertion of supposed rights."); *see also* Anderson v. Beatrice Foods Co., 900 F.2d 388, 395 (1st Cir.) (stating that a judge assessing sanctions "should take pains neither to use an elephant gun to slay a mouse nor to wield a cardboard sword if a dragon looms"), *cert. denied*, 498 U.S. 891 (1990).

22. *See* Neil H. Cogan, *The Inherent Power and Due Process Models in Conflict: Sanctions in the Fifth Circuit*, 42 SW. L.J. 1011, 1011 (1989) (commenting that sanctions litigation has become the "hot topic" of federal civil procedure); Paul Marcotte, *Rule 11 Changes: Blessing or Curse?*, A.B.A. J., Sept. 1, 1986, at 34 (commenting that sanctions litigation is fast becoming a "cottage industry").

sponsor "frivolous" litigation.[23] The most influential of these provisions is Federal Rule of Civil Procedure 11. Besides being the foremost weapon in the federal sanctions arsenal,[24] Federal Rule 11, in its various manifestations, has provided the model for dozens of state sanctions provisions.[25] As influential as it is, though, Rule 11 does not represent the final or definitive approach to preventing frivolous litigation. A number of states have crafted sanctions provisions which deviate from the approach set forth in Federal Rule 11. These provisions run the gamut from those that define frivolous litigation broadly in the interest of curbing abuses, to others that define frivolous litigation narrowly in the interest of encouraging free access to the courts.[26] This Section will examine Federal Rule 11, its state analogues, and the various state sanctions provisions that have charted a different course than the federal rules.

### *A. Federal Rule 11*

Federal courts possess several weapons that they can use against lawyers or litigants who abuse the judicial process. Under 28 U.S.C. § 1927, for example, federal courts can sanction lawyers who "unreasonably and vexatiously" multiply the proceedings in a lawsuit.[27] Under

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23. *See infra* pp. 1073-1125.

24. *See infra* pp. 1073-94.

25. For state sanctions provisions based, at least in large part, upon the 1983 amendments to Federal Rule 11, see CAL. CIV. PROC. CODE § 447 (West Supp. 1993); KAN. CIV. PROC. CODE ANN. § 60-211 (Vernon Supp. 1992); LA. CODE CIV. PROC. ANN. art. 863 (West Supp. 1994); OKLA. STAT. ANN. tit. 12, § 2011 (West 1993); R.I. GEN. LAWS § 9-29-21 (Supp. 1992); S.D. CODIFIED LAWS ANN. § 15-6-11(a) & (b) (Supp. 1993); VA. CODE ANN. § 8.01-271.1 (Michie 1992); WIS. STAT. ANN. § 802.05 (West Supp. 1992); ALASKA R. CIV. P. 11; ARIZ. R. CIV. P. 11(a); ARK. R. CIV. P. 11; COL. R. CIV. P. 11; DEL. CHAN. R. 11; D.C. SUP. CT. R. CIV. P. 11; HAW. R. CIV. P. 11; IDAHO R. CIV. P. 11(a)(1); IOWA R. CIV. P. 80; KY. R. CIV. P. 11; MICH. R. CIV. P. 2.114; MINN. R. CIV. P. 11; MO. R. CIV. P. 55.03; MONT. R. CIV. P. 11; NEV. R. CIV. P. 11; N.C. R. CIV. P. 11; N.D. R. CIV. P. 11; OR. R. CIV. P. 17; TENN. R. CIV. P. 11; UTAH R. CIV. P. 11; VT. R. CIV. P. 11; WASH. SUP. CT. R. 11; W. VA. R. CIV. P. 11; WYO. R. CIV. P. 11. For state sanctions provisions based upon original Federal Rule 11, see ALA. R. CIV. P. 11; IND. TRIAL R. 11(A); MAINE R. CIV. P. 11; MD. R. CIV. P. 1-311(a)-(c); MASS. R. CIV. P. 11(a); MISS. R. CIV. P. 11; N.H. R. CIV. P. 15; N.J. R. CIV. P. 1:4-8; N.M. R. CIV. P. 1-011; OHIO R. CIV. P. 11; R.I. R. CIV. P. 11; S.C. R. CIV. P. 11.

26. *See infra* pp. 1094-1125. Some of these sanctions provisions supplement sanctions provisions that are based upon Federal Rule 11.

27. 28 U.S.C. § 1927 (Supp. 1992). As enacted in 1813, § 1927 permitted the court to assess costs against the offending lawyer. Johnson & Cassady, *supra* note 18, at 956. In 1980, § 1927 was amended to require that the offending lawyer pay "the ex-

their inherent judicial power, federal courts can sanction litigants who act "in bad faith, vexatiously, wantonly, or for oppressive reasons."[28] The most significant weapon in the federal sanctioning arsenal, though, is Rule 11 of the Federal Rules of Civil Procedure. Under amendments effective in 1983, Rule 11 authorizes sanctions, principally in the form of fee awards, against persons who sign legal documents that are not "well grounded in fact and . . . warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law."[29] The 1983 version of Rule 11 changed the nature of federal litigation, compelling lawyers to conduct more serious investigations of the facts and law supporting their claims.[30] Although the rule was amended again in 1993 to soften some of its more repressive effects, the focus of Rule 11 as a weapon against frivolous litigation has not changed.[31] Rule 11 continues to cast a large shadow over litigation in the federal courts.

1. The Original Rule 11

The original version of Federal Rule 11 was not nearly as far reaching as its amended versions. Enacted with the bulk of the Federal Rules of Civil Procedure in 1938, Rule 11 required lawyers to sign all pleadings filed in federal court.[32] According to the rule, the lawyer's

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cess costs, expenses, and attorneys' fees reasonably incurred" as a consequence of her unreasonable or vexatious conduct. 28 U.S.C. § 1927 (Supp. 1992). Although not as prominent a sanctions provision as Federal Rule of Civil Procedure 11, federal courts are invoking § 1927 more frequently. Gregory P. Joseph, *Rule 11 is Only the Beginning*, 74 A.B.A. J., May 1, 1988, at 62. For a general discussion of § 1927, see Janet Eve Josselyn, Note, *The Song of the Sirens—Sanctioning Lawyers Under 28 U.S.C. § 1927*, 31 B.C. L. REV. 477 (1990).

28. Chambers v. NASCO, Inc., 111 S. Ct. 2123, 2133 (1991) (quoting F.D. Rich Co. v. United States *ex rel.* Industrial Lumber Co., 417 U.S. 116, 129 (1974)). The Supreme Court in *Chambers* reasoned that specific sanctions provisions, such as Rule 11 or § 1927, do not circumscribe the "inherent power" to punish bad faith conduct. *Id.* at 2134. Thus, the "inherent power" recognized in *Chambers* allows federal courts to punish certain egregious conduct that falls outside the precise boundaries of the specific sanctions provisions. *Id.*

The inherent power doctrine is, for the most part, a creature of the federal courts. Mallor, *supra* note 19, at 631. Only a few state courts have recognized an inherent power to punish bad faith conduct—although the number is growing. *See, e.g.*, Kikkert v. Krumm, 474 N.E.2d 503 (Ind. 1985); Arnold v. Edelman, 392 S.W.2d 231 (Mo. 1965); Atkinson v. Pittsgrove Township, 471 A.2d 1215 (N.J. Ch. Div. 1983); City Nat'l Bank & Trust Co. v. Owens, 565 P.2d 4 (Okla. 1977); Andrews v. Bible, 812 S.W.2d 284, 291 (Tenn. 1991).

29. FED. R. CIV. P. 11 (1983).

30. *See infra* pp. 1077-89.

31. *See infra* Section II.A.3, pp. 1090-94.

32. FED. R. CIV. P. 11 (1938). The rule provided that an unrepresented litigant

signature certified that the lawyer had read the pleading, that to the best of his belief there was good ground to support it, and that the pleading was not filed to stall court proceedings.[33] The main purpose of the rule was not to deter pleadings that lacked factual or legal merit, but rather to deter pleadings that manifested a *subjective* intent to abuse the judicial process.[34] Therefore, the range of available sanctions was narrow. The rule prescribed that if "a pleading is not signed or is signed with intent to defeat the purpose of this rule," the court could strike the pleading.[35] For a wilful violation, the rule provided that the court could subject the offending lawyer to "appropriate disciplinary action."[36]

The original Rule 11 did not leave much of an impression in the federal case law. Only about two dozen published opinions addressed the original rule, and few of those opinions awarded sanctions.[37] A prominent factor in the disuse of Rule 11 was the language requiring a subjective intent to abuse the judicial process.[38] Few parties invoking the rule could prove that the offending lawyer filed the objectionable pleading with the knowledge that it lacked "good grounds."[39]

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should sign his or her own name to the pleading. *Id.*

33. *Id.* The rule did not indicate whether the signature of an unrepresented litigant carried a certification that a pleading had "good grounds" to support it. *Id.*

34. *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, 59 (1976) (noting that Rule 11 standards are subjective; "that is, that violation is dependent upon what the attorney knew and believed at the relevant time"); *see also id.* at 14 ("[T]he only reasonably certain observation we can make about the 'good ground' requirement . . . is that it was meant to secure lawyer honesty.").

35. FED. R. CIV. P. 11 (1938). A pleading signed "with intent to defeat the purpose" of Rule 11 was a pleading that either (1) was advanced to stall court proceedings, or (2) was advanced despite the attorney's knowledge that the pleading lacked good grounds to support it. Risinger, *supra* note 34, at 15.

36. FED. R. CIV. P. 11 (1938). Professor Risinger observed that the term "appropriate disciplinary action" might include "[p]unitive fine or imprisonment through the contempt power, formal reprimand by the court, or even disbarment." Risinger, *supra* note 34, at 43. A federal district court in Pennsylvania suggested that the phrase also authorized an award of expenses to the parties who defended the improper pleading. Kinee v. Abraham Lincoln Fed. Sav. & Loan Ass'n, 365 F. Supp. 975, 983 (E.D. Pa. 1973).

37. *See* Risinger, *supra* note 34, at 34-37; Jeffrey W. Stempel, *Sanctions, Symmetry, and Safe Harbors: Limiting Misapplication of Rule 11 by Harmonizing it with Pre-Verdict Dismissal Devices*, 60 FORDHAM L. REV. 257, 257 (1991).

38. *See supra* text accompanying note 34.

39. *See, e.g.*, LaFrance, *supra* note 17, at 332; William W Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 182-83 (1985).

The strict subjective standard in the original rule, however, does not fully explain the small number of sanctions decisions issued under the rule.[40] Another factor contributing to the disuse of original Rule 11 was the spirit of the times.[41] During the first three decades of Rule 11, litigation abuse was not a serious problem in the federal courts.[42] Because opposing members of the bar were usually cooperative,[43] judges rarely imposed sanctions, preferring instead to deal with the few rotten apples through established procedural methods.[44] Federal judges thus resolved "frivolous" litigation, whenever it arose, through orders granting summary judgment or a directed verdict.[45] The congenial relationship between the bench and bar lasted until the late 1970s, when the federal courts experienced a dramatic increase in civil litigation.[46] The increased number of civil lawsuits during that period

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40. While no one doubts that it would be easier to find conduct sanctionable under an objective standard than a subjective standard, a subjective standard does not make a sanctions provision "inherently unworkable." Risinger, *supra* note 34, at 60. Although the original Federal Rule 11 might have fallen into disuse, other sanctions provisions with strict standards—such as 28 U.S.C. § 1927 and § 128.5 of the California Civil Procedure Code—have not. Indeed, in recent years, sanctions awards under some of these strict provisions have become commonplace. *See* Joseph, *supra* note 27, at 62 (discussing the use of § 1927); Fred Woods, *Sanctions—Stepchild or Natural Heir to Trial and Appellate Court Delay Reduction?*, 17 PEPP. L. REV. 665, 673 (1990) (discussing the use of California Civil Procedure Code § 128.5).

41. *See* David J. Webster, Note, *Rule 11: Has the Objective Standard Transgressed the Adversary System?*, 38 CASE W. RES. L. REV. 279, 294 (1987) ("Notwithstanding the empirical evidence, the reluctance of the courts [before the 1983 amendments] to issue sanctions may be less attributable to an inability to prove bad faith and more attributable to the spirit of the Federal Rules of Civil Procedure and the adversary process.").

42. *See* Eugene A. Cook, *Professionalism and the Practice of Law*, 23 TEX. TECH L. REV. 955, 960 (1992) (describing the professional nature of trial practice before the 1970s).

43. *See id.* For much of this period, the organized bar was small and clubbish. Even in large cities, the ratio between lawyers and residents remained small until the 1970s. *See id.* at 961 (the ratio for the United States as a whole has gone from one lawyer for every 695 persons in 1951 to one lawyer for every 340 persons in 1988). Over half of the lawyers either were solo practitioners or practiced with one or two partners. *See* Prud'homme, *supra* note 6, at 454.

44. *See* Abraham D. Sofaer, *Sanctioning Attorneys for Discovery Abuse Under the New Federal Rules: On the Limited Utility of Punishment*, 57 ST. JOHN'S L. REV. 680, 717 (1983).

45. *See id.* at 718 ("Consequently, when practical, judges usually will opt for non-disciplinary resolution of a problem.").

46. *See* John H. Barton, *Behind the Legal Explosion*, 27 STAN. L. REV. 567, 567 (1975); Robert H. Bork, *Dealing with the Overload in Article III Courts*, 70 F.R.D. 231, 232 (1976); *see also* Bayless Manning, *Hyperlexis: Our National Disease*, 71 NW. U. L. REV. 767, 768 (1977) (discussing the increase in criminal litigation). *But see* Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About our Allegedly Contentious and Litigious Society*, 31

compelled federal judges, for the first time, to view sanctions provisions as a means of weeding the chaff from their dockets.[47] The dramatic change in their attitude toward sanctions precipitated the adoption of the 1983 amendments to Rule 11 and, ultimately, the explosion in sanctions litigation.[48]

2. The 1983 Amendments to Rule 11

The 1983 amendments to Rule 11, which became effective August 1, 1983, were specifically designed to "reduce the reluctance of courts to impose sanctions."[49] Under amended Rule 11, all pleadings, motions, and other papers filed in federal court must contain the signature of the filing lawyer or, if the litigant lacks legal representation, the signature of the filing litigant.[50] The signature of a lawyer or litigant, according

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UCLA L. REV. 4, 5 (1983) (arguing that litigation levels during the 1970s and early 1980s reflected a slight rise, but were "not historically unprecedented"). The number of civil lawsuits filed in federal district court increased from 98,560 in 1973 to 241,842 in 1983. A. Leo Levin & Denise D. Colliers, *Containing the Cost of Litigation*, 37 RUTGERS L. REV. 219, 227 n.24 (1985). As the number of lawsuits increased, so did the size and competitiveness of the organized bar. *See* Cook, *supra* note 42, at 962-63.

The expanding civil dockets, and the competitiveness that they inspired, were reflected in the motions for sanctions filed under Rule 11. Litigants made the same number of sanctions motions during the first five years of the 1970s as they made during the first 32 years that Rule 11 existed. Risinger, *supra* note 34, at 5 n.12.

47. *See* Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 192 (1988) ("Shortly before the 1983 amendments were adopted, federal courts had begun to impose more frequently awards of attorneys' fees and other sanctions for abusive litigation practices."). At the urging of prominent judges such as William W. Schwarzer and Abraham D. Sofaer, federal judges gradually began placing greater reliance upon sanctions as a means of policing the courts. *See* Schwarzer, *supra* note 39, at 201; Sofaer, *supra* note 44, at 729-30. Within five years after Rule 11 was amended in 1983, federal judges had come full circle in their attitude towards sanctions. *See* Sam D. Johnson et al., *The Proposed Amendments to Rule 11: Urgent Problems and Suggested Solutions*, 43 BAYLOR L. REV. 647, 659 (1991) (noting that the 1983 amendments to Rule 11 inspired federal judges to impose severe sanctions as a docket control device).

48. *See* Levin & Colliers, *supra* note 46, at 219-20 (discussing the 1983 amendments to Federal Rules of Civil Procedure as an effort to cope with escalating litigation); *cf.* James L. Robertson, *Discovering Rule 11 of the Mississippi Rules of Civil Procedure*, 8 MISS. C. L. REV. 111, 133 (1988) ("It is not so much the new language that has wrought the explosion of Rule 11 litigation in the federal courts . . . . What is new is the sub silentio 'and we really meant it' behind Federal Rule 11.").

49. FED. R. CIV. P. 11 advisory committee's notes (1983).

50. FED. R. CIV. P. 11 (1983). The amended rule extended to all papers filed in

to the amended rule, certified (1) that the signing individual had read the document, (2) that after a reasonable inquiry the signing individual believed the document was well grounded in fact and warranted either by existing law or a good faith argument for extension, modification, or reversal of existing law, and (3) that the signing individual had not filed the document for an improper purpose, such as to harass the opposing litigant or to stall court proceedings.[51] If the signing individual violated the rule, amended Rule 11 required that the court impose an appropriate sanction against that individual.[52] The rule did not dictate the form that the sanction should take, but it stated that an appropriate sanction could include an award of legal fees to the offended parties.[53]

Perhaps the most significant addition to the 1983 version of Rule 11 was the clause providing that the signature of the signing individual certified that the individual conducted a "reasonable inquiry" which revealed, "to the best of his knowledge, information, and belief," that the document was well grounded in fact and law.[54] The language requiring a "reasonable inquiry" imposed an objective standard: If the signing individual failed to conduct a reasonable inquiry into the law and facts, then the signing individual was subject to Rule 11 sanctions.[55] Conversely, the language requiring that the signing individual find the document well grounded in fact and law, to the best of her "knowledge, information or belief," seemed to impose a subjective standard.[56] In principle, therefore, while amended Rule 11 authorized sanctions against signing individuals who failed to conduct reasonable prefiling inquiries, the rule did not authorize sanctions against signing individuals

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federal court, not just pleadings. *Id.*

51. *Id.*

52. *Id.* Unlike original Rule 11, the 1983 version of Rule 11 stated that an award of sanctions was mandatory if the signing individual violated the requirements in the rule. *Id. See* Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 876 (5th Cir. 1988) (en banc) ("There are no longer any 'free passes' for attorneys and litigants who violate Rule 11. Once a violation of Rule 11 is established, the rule mandates the application of sanctions."); *see also* Albright v. Upjohn Co., 788 F.2d 1217, 1222 (6th Cir. 1986); Westmoreland v. CBS, Inc., 770 F.2d 1168, 1174 (D.C. Cir. 1985).

53. FED. R. CIV. P. 11 (1983). While amended Rule 11 required an award of sanctions in the event that a signing individual violated the rule, *see supra* note 52, the rule left the trial judge the discretion to determine the form that the sanctions award should take. Doering v. Union County Bd. of Chosen Freeholders, 857 F.2d 191, 194 (3d Cir. 1988) ("The language of Rule 11 evidences the critical role of judicial discretion, stating that when the district court determines that a filing is in violation of the rule, the court 'shall' impose sanctions that 'may'—not 'shall'—'include an order to pay' the other party's expenses.").

54. FED. R. CIV. P. 11 (1983).

55. STEPHEN B. BURBANK, RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11 at 14 (1989).

56. *Id.* at 15.

who filed documents that the individuals believed were well grounded in fact and law, even if the documents were actually not "reasonable" in an objective sense.[57] In practice, however, federal courts ignored the subjective "knowledge, information or belief" language in the certification clause. Under the 1983 version of Rule 11, the courts concluded that filed documents themselves must be "reasonable"—that is, well grounded in fact, and warranted either by existing law or a good faith argument for the extension, modification, or reversal of existing law.[58]

The 1983 amendments succeeded in their goal of encouraging the federal courts to impose sanctions more frequently.[59] Because Rule 11, as interpreted, allowed the federal courts to review the objective reasonableness of filed documents rather than the subjective knowledge or beliefs of the individuals who signed the documents, the courts found it much easier to impose sanctions.[60] As the courts became familiar with

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57. *Id.* Professor Burbank described the certification clause in amended Rule 11 as a "conduct" approach to sanctions, requiring sanctions for unreasonable conduct—i.e., an inadequate prefiling review of the facts and law. He distinguished the "conduct" approach from a "product" approach, which requires sanctions for an unreasonable final product—i.e., the filing itself. Professor Burbank praised the "conduct" approach, observing that it gives signing individuals a more precise idea of the things they must do to avoid sanctions. *Id.* at 21. Moreover, he observed that unlike the "product" approach, the "conduct" approach is less likely to encourage judges to use hindsight to second guess the arguments contained in filed documents. *Id.* at 19 ("The message of the product approach for the lawyer who is sanctioned . . . is either 'be smarter' or, at any rate, 'think as I think.'").

58. *See* Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073, 1080 (7th Cir. 1987) (en banc), *cert. dismissed*, 485 U.S. 901 (1988); Zaldivar v. City of Los Angeles, 780 F.2d 823, 830-31 (9th Cir. 1986); Davis v. Veslan Enters., 765 F.2d 494, 497 (5th Cir. 1985); Eastway Const. Corp. v. City of New York, 762 F.2d 243, 254 (2d Cir. 1985); *see also* Schwarzer, *supra* note 39, at 184-85 (reasoning that amended Rule 11 requires that filed documents 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). The federal courts follow a "product" approach to Rule 11 sanctions. *See supra* note 57. Conceptually, the difference between a "conduct" approach to sanctions and the "product" approach to sanctions is slight. Even in a court that follows a "conduct" approach, the mere existence of a groundless pleading might compel the court to presume that the individual who signed the pleading failed to conduct a reasonable inquiry. Nonetheless, the adoption of a "product" approach is significant in the message that it sends litigants. It signals that federal courts are ardent in their desire to reduce perceived "frivolous" litigation, even to the extent of sacrificing the doctrine of fair access. *See* BURBANK, *supra* note 55, at 20.

59. *See supra* text accompanying note 49.

60. *See* LaFrance, *supra* note 17, at 341-42. The other prong in the certification clause, requiring that signing individuals ensure that their pleadings, motions, or other

the new rule, they became more willing to use the rule as a docket control device.[61] Their enthusiasm fed upon itself. Seeing that federal courts were more willing to impose sanction awards, litigants became more willing to request them, spurring the courts to impose still more awards.[62] Within five years, federal district and appellate courts published 688 Rule 11 decisions.[63] Empirical studies revealed that the published decisions reflected just "the tip of the iceberg."[64] In sum, the

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papers are "not interposed for any improper purpose," was not often used as a basis for sanctions under the 1983 version of Rule 11. Almost exclusively, federal courts have tended to base sanctions upon perceived violations of the "reasonable inquiry" prong of the certification clause. *See* Melissa L. Nelken, *Has the Chancellor Shot Himself in the Foot? Looking for a Middle Ground on Rule 11 Sanctions*, 41 HASTINGS L. J. 383, 406 (1990)[hereinafter Nelken, *Looking for a Middle Ground*].

61. *See* Johnson et al., *supra* note 47, at 659.

62. *See* Daniel Slocum Hinerfeld, *The Sanctions Explosion*, CAL. LAW., Nov. 1987, at 33. Although a large proportion of the Rule 11 sanctions decisions issued before 1986 involved sanctions orders that the judge made sua sponte, the proportion of sua sponte sanctions decisions has since declined. Most of the recent Rule 11 sanctions decisions are based upon a motion from the offended litigant. *Compare* Nelken, *Some "Chilling" Problems*, *supra* note 19, at 1327-28 (finding that 30.6% of Rule 11 decisions issued before 1986 involved sua sponte consideration) *with* Gerald F. Hess, *Rule 11 Practice in Federal and State Court: An Empirical, Comparative Study*, 75 MARQ. L. REV. 313, 318 (1992) (finding that 4% of Rule 11 decisions issued between August 1, 1983, and December 31, 1990 in the Eastern District of Washington involved sua sponte consideration).

63. Vairo, *supra* note 47, at 199 (reviewing the decisions published between August 1, 1983, and December 15, 1987).

64. BURBANK, *supra* note 55, at 59. According to the available empirical data, Rule 11 sees widespread use. A survey conducted by the American Judicature Society in ten federal judicial districts found that, during a twelve month period, 7.6% of the respondents had been involved in a lawsuit in which Rule 11 sanctions were imposed, and 24.3% had been involved in a lawsuit in which either litigants had filed Rule 11 motions or judges had issued show cause orders based upon Rule 11. Lawrence C. Marshall et al., *The Use and Impact of Rule 11*, 86 NW. U. L. REV. 943, 952 (1992). In another survey, conducted in the Northern District of California, 41% of the respondents reported that since 1983 their firms had sought Rule 11 sanctions at least once, and 43% reported that their firms had been the targets of Rule 11 sanctions requests at least once. Melissa L. Nelken, *The Impact of Federal Rule 11 on Lawyers and Judges in the Northern District of California*, JUDICATURE, Oct.-Nov. 1990, at 148-49 [hereinafter Nelken, *The Impact of Federal Rule 11*].

After the 1983 amendments, some commentators predicted that Rule 11 sanctions activity would blossom for a few years and then decline as lawyers became more familiar with the rule. *See, e.g.*, Judith L. Maute, *Sporting Theory of Justice: Taming Adversary Zeal with a Logical Sanctions Doctrine*, 20 CONN. L. REV. 7, 27 (1987); Nancy H. Wilder, Note, *The 1983 Amendments to Rule 11: Answering the Critics' Concern With Judicial Self-Restraint*, 61 NOTRE DAME L. REV. 798, 817-18 (1986). This prediction would have seemed reasonable: some increased activity is inevitable after a new procedural rule is implemented, but eventually, the activity should diminish after courts fill the gaps in the language of the new rule. Nelken, *Looking for a Middle Ground*, *supra* note 60, at 388-89. Empirical research revealed, however, that the

1983 amendments to Rule 11 fueled a sanctions explosion,[65] engendering a wide range of problems related to the fundamental nature of litigation in the federal courts.

*Lack of a Precise Standard.* Not surprisingly, the insertion of an objective standard in the 1983 amendments made the amended Rule 11 far less predictable than the original rule. Although federal courts promised that Rule 11 sanctions would be confined to unreasonable claims or defenses,[66] in practice judges could not agree which claims were reasonable and which were not.[67] Research conducted under the auspices of the Federal Judicial Center, for instance, found that on the same set of facts, half of the responding judges would have awarded sanctions, while the other half would have declined sanctions.[68] This research was confirmed in actual litigation. Frequently, appellate judges differed about whether pleadings merited sanctions.[69] Sanctioned litigants often appealed from sanctions awards and succeeded in securing reversals not just on the sanctions but also on the merits of the litigation.[70] Repeated incidents in which judges could not agree

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forecasted decline in Rule 11 activity did not occur, in part because the rule gave lawyers an incentive to recover their fees. *See* Hess, *supra* note 62, at 319 ("The number of Rule 11 requests did follow the predicted pattern from 1984 through 1988: it rose, plateaued, and tapered off. However, the formal Rule 11 activity initiated in 1989 and 1990 increased dramatically.").

65. Hinerfeld, *supra* note 62, at 33.

66. *See* Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073, 1080 (7th Cir. 1987) (en banc), *cert. dismissed*, 485 U.S. 901 (1988); Zaldivar v. City of Los Angeles, 780 F.2d 823, 830-31 (9th Cir. 1986).

67. *See* George Cochran, *Rule 11: The Road to Amendment*, 61 MISS. L.J. 5, 8-9 (1991); *see also* Charles M. Shaffer, Jr., *Rule 11: Bright Light, Dim Future*, 7 REV. LITIG. 1, 11 (1987) ("No matter what words are used as the objective yardstick, the application of [Rule 11] to different facts by different judges inevitably will yield inconsistent results."). While purporting to follow the same objective standard, the courts of appeals took different approaches to enforcing Rule 11. *Compare* Linda R. Hirshman, *Tough Love: The Court of Appeals Runs the Seventh Circuit the Old Fashioned Way*, 63 CHI.-KENT L. REV. 191, 199 (1987) (noting that the Seventh Circuit enforces Rule 11 aggressively) *with* Frederic C. Tausend & Lisa L. Johnsen, *Current Status of Rule 11 in the Ninth Circuit and Washington State*, 14 U. PUGET SOUND L. REV. 419, 425 (1991) (noting that the Ninth Circuit enforces Rule 11 passively).

68. SAUL M. KASSIN, AN EMPIRICAL STUDY OF RULE 11 SANCTIONS 17 (1985).

69. *See, e.g.*, Federal Sav. and Loan Ins. Corp. v. Molinaro, 923 F.2d 736 (9th Cir. 1991); Mareno v. Rowe, 910 F.2d 1043 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 681 (1991); International Shipping Co. v. Hydra Offshore, Inc., 875 F.2d 388 (2d Cir.), *cert. denied*, 110 S. Ct. 563 (1989).

70. *See, e.g.*, *In re* Edmonds, 924 F.2d 176 (10th Cir. 1991); Cooper v. City of Greenwood, 904 F.2d 302 (5th Cir. 1990); Masson v. New Yorker Magazine, Inc., 895

whether certain claims were reasonable fostered the perception, not altogether unwarranted, that the difference between a legitimate pleading and a sanctionable pleading depended upon the whim and caprice of the beholding judge.[71] Inevitably, the lack of a precise standard in Rule 11 encouraged abuse and, at the same time, discouraged litigants from filing marginal claims.

*Chilling Effect.* Although the 1983 amendments to Rule 11 did not dictate the form that sanctions should take, the last sentence in the amended rule stated that an appropriate sanction could include an award of legal fees to the offended litigant.[72] Latching upon this sentence, federal district courts used Rule 11, almost exclusively, as a device to reimburse litigants for legal expenses incurred in challenging "frivolous" motions or pleadings.[73] Some of the fee awards that the

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F.2d 1535 (9th Cir. 1989), *rev'd on other grounds*, 111 S. Ct. 2419 (1991); Operating Eng'rs Pension Trust v. A-C Co., 859 F.2d 1336 (9th Cir. 1988).

71. *See* Cochran, *supra* note 67, at 11. Because the objective standard in amended Rule 11 is a flexible standard, some commentators have suggested that federal judges, consciously or subconsciously, use Rule 11 sanctions to reinforce their decisions on the merits. *See* Lawrence M. Grosberg, *Illusion and Reality in Regulating Lawyer Performance: Rethinking Rule 11*, 32 VILL. L. REV. 575, 635 (1987) ("There seems to be an ineluctable pressure on judges to reinforce the propriety of their initial legal determinations by extending them a step further, thus concluding that their legal analysis is so correct and perhaps even self-evident that anybody but a fool, an incompetent lawyer, or one misusing the courts should have reached the same conclusion."); *see also* Daniel E. Lazaroff, *Rule 11 and Federal Antitrust Litigation*, 67 TUL. L. REV. 1033, 1058 (1993); Mark S. Stein, *Rule 11 in the Real World: How the Dynamics of Litigation Defeat the Purpose of Imposing Attorney Fee Sanctions for the Assertion of Frivolous Legal Arguments*, 132 F.R.D. 309, 316 (1990).

72. *See supra* text accompanying note 53.

73. Johnson et al., *supra* note 47, at 649; *see* Marshall et al., *supra* note 64, at 956-57 (concluding that 95% of all sanctions awards under Rule 11 were monetary sanctions, such as fee awards); Nelken, *Some "Chilling" Problems*, *supra* note 19, at 1333 (concluding that some form of fee award is assessed in 96% of all cases involving a Rule 11 sanction).

Interestingly, the Supreme Court attempted to discourage district courts from depending upon fee awards, concluding that the function of Rule 11 was not to compensate offended litigants, but rather to deter baseless filings. Business Guides, Inc. v. Chromatic Communications Enters., Inc., 498 U.S. 533, 553 (1991); Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 393 (1990). In addition, the federal circuit courts cautioned the district courts to enforce the "least severe sanction adequate" to serve the deterrence function of Rule 11, which might include "a warm friendly discussion on the record, a hard-nosed reprimand in open court, compulsory legal education . . . or other measures appropriate to the circumstances." Thomas v. Capital Sec. Servs., 836 F.2d 866, 878 (5th Cir. 1988) (en banc); *see also* White v. General Motors Corp., 908 F.2d 675, 685 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 788 (1991); Hilton Hotels Corp. v. Banov, 899 F.2d 40, 46 (D.C. Cir. 1990); Jackson v. Law Firm of O'Hara, Ruberg, Osborne & Taylor, 875 F.2d 1224, 1229 (6th Cir. 1989). The district courts, however, did not get the hint. They continued to impose fee awards as a matter of course, usually without considering whether the awards were the least se-

courts granted under Rule 11 were substantial.[74] Moreover, in an overwhelming percentage of the cases in which the courts assessed a fee award, plaintiffs—and especially, civil rights and other public interest plaintiffs—were the targets of the sanction.[75] The threat of large fee awards under the 1983 amendments, coupled with the unpredictable objective standard for the imposition of sanctions,[76] had the effect of chilling potential plaintiffs, or their lawyers, from pursuing novel or unusual claims.[77] Often, litigants and practitioners could not bear the risk of incurring fee awards where their positions, though tenable, departed from existing law.[78]

*Increased Tension Between Adversaries.* As the federal courts began to impose Rule 11 sanctions more frequently, the expanding po-

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vere sanction adequate to serve the deterrence function underlying Rule 11. *See* Johnson et al., *supra* note 47, at 658 (discussing the preference that district court judges demonstrated for fee awards).

74. *See, e.g.*, Doyle v. United States, 817 F.2d 1235, 1236 (5th Cir.) (affirming $38,872 sanction), *cert. denied*, 484 U.S. 854 (1987); Unioil, Inc. v. E.F. Hutton & Co., 809 F.2d 548, 559 (9th Cir. 1986) (affirming $294,141.10 sanction), *cert. denied*, 484 U.S. 822 (1987); *In re* Ginther, 791 F.2d 1151, 1154 (5th Cir. 1986) (affirming $52,000 sanction); Calloway v. Marvel Entertainment Group, 111 F.R.D. 637, 651 (S.D.N.Y. 1986) (imposing $200,000 sanction); Day v. Amoco Chems. Corp., 595 F. Supp. 1120, 1126 (S.D. Tex. 1984) (imposing $10,000 sanction against *pro se* litigant), *dismissed without opinion*, 747 F.2d 1462 (5th Cir. 1984), *cert. denied*, 470 U.S. 1086 (1985). *But see* Marshall et al., *supra* note 64, at 957 (noting that while the cases involving huge fee awards have generated wide publicity, 44.6% of Rule 11 cases assessing monetary sanctions involved an amount smaller than $1500, and 91.3% involved $25,000 or less).

75. *See* Vairo, *supra* note 47, at 200-01. The American Judicature Society study reported that the plaintiff was the target in 70.3% of the cases in which Rule 11 sanctions were imposed. Marshall et al., *supra* note 64, at 953. In particular, the study found that lawyers who spent most of their time representing plaintiffs in civil rights suits were "far more likely to be affected by Rule 11 than other lawyers." *Id.* at 971; *see also* Margaret L. Sanner & Carl Tobias, *Recent Work of the Civil Rules Committee*, 52 MONT. L. REV. 307, 313 (1991) (noting that civil rights plaintiffs were 2.6 times more likely to be sanctioned than other litigants) (citing FEDERAL JUDICIAL CENTER, RULE 11: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES (Feb. 27, 1991)).

76. *See supra* text accompanying notes 66-71.

77. *See* Nelken, *Looking for a Middle Ground*, *supra* note 60, at 394; *see also* Marshall et al., *supra* note 64, at 961, 971 (19.3% of respondents reported that within the survey year they had declined to present a claim or defense they believed to be meritorious because they were concerned about Rule 11; 31% of lawyers representing civil rights plaintiffs reported that they had declined to present a claim they believed to be meritorious).

78. *See* Johnson et al., *supra* note 47, at 650.

tential for sanctions increased the tension between opposing lawyers, often creating a judicial atmosphere that was more hostile than adversarial.[79] The increased tension in part was an unavoidable consequence of the perception that federal judges would keep lawyers on a tighter leash.[80] Some of the tension, though, was also attributable to the expanding use of Rule 11 as a weapon in litigation.[81] Observing that the objective standard in the 1983 amendments was unpredictable and exerted a chilling effect, some lawyers would file motions for Rule 11 sanctions as a tactic to induce their opponents to withdraw undesirable arguments.[82] Even if unsuccessful in cowing their opponents, lawyers who pursued this tactic believed that the mere presence of the sanctions motions would influence federal judges to reach a favorable decision.[83] Understandably, the victims of unfounded sanctions motions felt compelled to retaliate with sanctions motions of their own, further exacerbating the problem.[84] As a result of the increased ten-

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79. *See* Lazaroff, *supra* note 71, at 1056; Stein, *supra* note 71, at 330; *see also* Nelken, *The Impact of Federal Rule 11*, *supra* note 64, at 150 (49% of respondents believed that Rule 11 had contributed to deteriorating relations between lawyers).

80. *See* Michael H. Dettmer, *Observations on Professionalism*, 68 MICH. ST. B.J. 842, 843 (1989) ("Increased judicial pressure imposed on our profession [from sanctions and the growing malpractice problem] causes us to lash out against each other."); Sofaer, *supra* note 44, at 717 ("Often, punishing lawyers will change the atmosphere in which a judge works from one of cooperation to one that is combative and less effective in bringing controversies to just, speedy, and inexpensive resolutions.").

81. *See* Sidney A. Fitzwater, *Toward a Renaissance of Professionalism in Trial Advocacy*, 20 TEX. TECH L. REV. 787, 800 (1989) (discussing the increase in lawyers who use Rule 11 motions as a litigation tactic); Keeling, *A Prescription for Healing the Crisis in Professionalism*, *supra* note 6, at 47-48 (same).

82. *See* William I. Weston, *Court-Ordered Sanctions of Attorneys: A Concept that Duplicates the Role of Attorney Disciplinary Procedures*, 94 DICK. L. REV. 897, 899 (1990) ("Even more troublesome is the use of attorney sanctions as a weapon . . . . Lawyers threaten one another to force or prevent specific conduct.").

83. *See* Stein, *supra* note 71, at 315. Stein states that:

> [A] request for sanctions may in some cases succeed in affecting the judge's decision on the merits. The judge may be convinced by the lawyer's attempt to focus attention not on whether the opponent's position is wrong, but on how wrong it is. The judge may also use the request for sanctions as an opportunity to 'split the difference' by ruling for the party requesting sanctions on the merits but denying sanctions."

*Id.*

84. *See* Fitzwater, *supra* note 81, at 801 ("Unfounded requests for sanctions that accuse the opposing lawyer of filing a claim or defense that is not based upon an adequate investigation of the facts or analysis of the law can trigger an instinctive reaction in the adversary to launch a retaliatory strike."). Unfounded sanctions motions are themselves subject to Rule 11 sanctions. *Id.* at 800. As with lawyers who file nuisance suits to gain an economic advantage for their clients, however, lawyers who file unfounded sanctions motions to gain leverage in litigation do not find Rule

sion, competing lawyers became less willing to cooperate with each other, impeding the progress of settlement negotiations and other attempts to reach a compromise.[85]

*Satellite Litigation.* With more and more litigants filing motions for Rule 11 sanctions, the 1983 amendments engendered substantial satellite litigation.[86] Each sanctions motion required, at a minimum, that a federal judge review the factual and legal basis for the challenged document and then make a ruling on the motion. Naturally, given the large number of sanctions motions, this process consumed valuable court time.[87] The federal courts tried to reduce the burdens of satellite litigation—for example, by abridging due process safeguards[88] and refusing to make written factual findings[89]—but their efforts could not stem the tide of sanctions activity. As the Ninth Circuit observed, "Asking judges to grade accuracy of advocacy in connection with every piece of paper filed in federal court multiplies the decisions which the court must make as well as the cost for litigants."[90] Thus, rather than

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11 a serious obstacle. *See* Cochran, *supra* note 67, at 19.

85. *See* Lazaroff, *supra* note 71, at 1056.

86. *Id.* at 1060-61; Nelken, *Looking for a Middle Ground*, *supra* note 60, at 388; Schaffer, *supra* note 67, at 21.

87. *See* Nelken, *Looking for a Middle Ground*, *supra* note 60, at 387-88. Some lawyers took advantage of the time that courts had to invest in addressing sanctions motions. *See* Schwarzer, *supra* note 39, at 182-84 (lawyers "may welcome the resulting proliferation of proceedings"). Whenever it was desirable to prolong proceedings, such as to avoid as long as possible paying a potentially adverse judgment, these lawyers would file Rule 11 motions as a stalling tactic. Keeling, *A Prescription for Healing the Crisis in Professionalism*, *supra* note 6, at 47.

88. *See infra* text accompanying notes 92-99.

89. *See* Johnson et al., *supra* note 47, at 660. Encouraging this practice, some federal appellate courts declined to impose a rigid rule requiring that district judges enter specific factual findings to support sanctions awards under the 1983 amendments. *See* Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 883 (5th Cir. 1988) (en banc) (rejecting "a rule that would impose upon district courts the onerous and often time-consuming burden of making specific findings and conclusions in all Rule 11 cases"); *see also* Brown v. Federation of State Medical Bds., 830 F.2d 1429, 1438 (7th Cir. 1987); Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073, 1084 (7th Cir. 1987) (en banc), *cert. dismissed*, 485 U.S. 901 (1988). *But see In re* Kunstler, 914 F.2d 505, 523 (4th Cir. 1990) (requiring specific factual findings), *cert. denied*, 499 U.S. 969 (1991); White v. General Motors Corp., 908 F.2d 675, 684-85 (10th Cir. 1990) (same), *cert. denied*, 498 U.S. 1069 (1991).

90. Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531, 1540 (9th Cir. 1986) (Schroeder, J.). On more than one occasion, judges in the Ninth Circuit complained about the satellite litigation that resulted from Rule 11 motions. *See* Townsend v. Holman Consulting Corp., 881 F.2d 788, 792 (9th Cir. 1989) ("Since Rule

streamlining court dockets through eliminating "frivolous" pleadings—a function that, at least ostensibly, the 1983 amendments were intended to serve—the amendments to Rule 11 expanded court dockets.[91]

*Abridged Due Process Rights.* The proliferation in satellite litigation led federal courts to abridge the due process safeguards afforded to individuals who were subject to a potential sanctions award.[92] Several federal appellate courts, for example, concluded that a district judge need not send lawyers who filed groundless complaints specific notice that the judge was considering an award of Rule 11 sanctions.[93] These courts reasoned that the mere existence of Rule 11 was adequate notice that the judge could impose sanctions.[94] In addition, most appel-

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11 was amended six years ago, it has increasingly become the wellspring of the very 'satellite litigation' we have consistently decried.") (Reinhardt, J.); *see also* Jensen Elec. Co. v. Moore, Caldwell, Rowland & Dodd, Inc., 873 F.2d 1327, 1330 (9th Cir. 1989) (Schroeder, J., concurring) ("[E]ven in the hands of our ablest judges Rule 11 can lead to costly and aimless satellite litigation having nothing to do with the dispute between the parties. Here indeed the sanctions tail is wagging the dog.").

91. Lazaroff, *supra* note 71, at 1061.

92. *See* Cochran, *supra* note 67, at 17 ("Concerns with 'satellite litigation' and the perceived need to 'streamline cases' result in truncated proceedings."); Carl Tobias, *Civil Rights Plaintiffs and the Proposed Revision of Rule 11*, 77 IOWA L. REV. 1775, 1784 (1992) (the absence of specific due process safeguards in the 1983 amendments "meant that numerous judges provided very few, and inconsistent, procedures, particularly for satisfying due process"). Publicly, the federal courts admitted that judges could not impose Rule 11 sanctions without giving sanctioned individuals fair due process notice and an opportunity to respond. *See, e.g.*, Eisenberg v. University of N.M., 936 F.2d 1131, 1134 (10th Cir. 1991); Spiller v. Ella Smithers Geriatric Ctr., 919 F.2d 339, 346 (5th Cir. 1990); Hudson v. Moore Business Forms, Inc., 898 F.2d 684, 686 (9th Cir. 1990). By interpreting the elements of due process narrowly, however, the courts attempted to escape the demands that a full range of due process safeguards would have entailed. *See* Byron C. Keeling, *Neither an Elephant Gun Nor a Cardboard Sword: Due Process Requirements in Sanctions Litigation*, 12 REV. LITIG. 343, 344 (1993) [hereinafter Keeling, *Due Process Requirements*]; Charlene Cullen, Comment, *Rule 11: Due Process Reconsidered*, 22 CUMB. L. REV. 729, 737-38 (1992).

93. *See, e.g.*, Mike Ousley Prods., Inc. v. WJBF-TV, 952 F.2d 380, 383 (11th Cir. 1992); 1488, Inc. v. Phisec Inv. Corp., 939 F.2d 1281, 1292 & n.5 (5th Cir. 1991); *Eisenberg*, 936 F.2d at 1135; *Spiller*, 919 F.2d at 346; Davis v. Carl, 906 F.2d 533, 535 (11th Cir. 1990); Donaldson v. Clark, 819 F.2d 1551, 1560 (11th Cir. 1987). Some of these decisions drew a distinction between complaints that lacked a factual basis and complaints that lacked a legal basis: for the former, these decisions reasoned that the courts need not provide notice as a prerequisite to sanctions, but for the latter, the decisions required specific notice. *See Spiller*, 919 F.2d at 346-47; *Donaldson*, 819 F.2d at 1560.

94. *See 1488, Inc.*, 939 F.2d at 1292 n.5 ("Rule 11, standing alone, will constitute sufficient notice of an attorney's responsibilities."); *Donaldson*, 819 F.2d at 1560 ("Rule 11 alone should constitute sufficient notice of the attorney's responsibilities."). *But see* Jones v. Pittsburgh Nat'l Corp., 899 F.2d 1350, 1357 (3d Cir. 1990) (Rule 11 itself is not adequate due process notice for the imposition of sanctions); Tom Growney Equip., Inc. v. Shelley Irrigation Dev., 834 F.2d 833, 836 n.5 (9th Cir. 1987)

late courts concluded that, regardless of the circumstances, a district judge need not give the subjects of potential sanctions awards an oral hearing before imposing the sanctions.[95] To allow individuals an adequate chance to respond to a sanctions motion, according to these appellate courts, all that a district judge had to do was allow the individuals to file written briefs defending their conduct.[96] The limits that

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(same). The conclusion that a procedural rule like Rule 11 in itself could provide notice for the imposition of a sanction under that rule distorted the requirements of the due process clause:

> Sanctions provisions, like other statutes that penalize misconduct, provide general notice that penalties can be assessed for infractions of the rules. Due process, however, requires more than general notice that penalties *can* be assessed. The purpose of the notice requirement is to apprise interested parties that the imposition of penalties *is imminent*. A sanctions provision, in itself, cannot provide this form of direct notice.

Keeling, *Due Process Requirements*, *supra* note 92, at 360-61; *see* Morton Stavis, *Rule 11: Which is Worse—The Problem or the Cure?*, 5 GEO. J. LEGAL ETHICS 597, 604 (1992) ("One of the most surprising features of Rule 11, as it has been implemented, is the overt denial of due process in proceedings which may lead to sanctions.").

95. *See, e.g.*, Dodd Ins. Servs., Inc. v. Royal Ins. Co., 935 F.2d 1152, 1160 (10th Cir. 1991); *Spiller*, 919 F.2d at 347; *In re* Kunstler, 914 F.2d 505, 521 (4th Cir. 1990), *cert. denied*, 499 U.S. 969 (1991); G.J.B. & Assocs., Inc. v. Singleton, 913 F.2d 824, 830 (10th Cir. 1990); White v. General Motors Corp., 908 F.2d 675, 686 (10th Cir. 1990), *cert. denied*, 498 U.S. 1069 (1991); Hudson v. Moore Business Forms, Inc., 898 F.2d 684, 686 (9th Cir. 1990). Rule 11 itself contributed to this conclusion. The advisory committee notes that accompanied the 1983 amendments to Rule 11 recited that courts "must to the extent possible limit the scope of sanction proceedings to the record." FED. R. CIV. P. 11 advisory committee note to 1983 amendment.

The appellate courts reasoned that due process *never* required an oral hearing. *See* INVST Fin. Group, Inc. v. Chem-Nuclear Sys., Inc. 815 F.2d 391, 405 (6th Cir.) ("[N]o hearing is required where an attorney is sanctioned for filing frivolous motions ungrounded in law or fact."), *cert. denied*, 484 U.S. 927 (1987). Certainly, in most cases the circumstances did not require a hearing: either the facts were clear and concise or the threatened sanction was small. In other cases, however, the circumstances did require some kind of hearing, even if not an evidentiary hearing. *See* Keeling, *Due Process Requirements*, *supra* note 92, at 369 (arguing that a hearing should be required "before a court imposes a sanction so severe that it precludes presentation of the merits"); The Committee on Federal Courts, *Procedural Rights of Attorneys Facing Sanctions*, 40 REC. 313, 323-24 (1985) (arguing that a hearing should be required "when the imposition of the sanction is dependent upon facts genuinely in dispute"); *cf.* Stephen A. Stallings, Note, *Rule 11: What Process is Due?*, 62 ST. JOHN'S L. REV. 586, 599 (1988) ("[W]hile there should be a presumption against an evidentiary hearing, a party should at least be allowed to submit briefs and affidavits, and present oral arguments against the imposition of sanctions.").

96. *See Dodd Ins. Servs.*, 935 F.2d at 1160; *White*, 908 F.2d at 686. Some appellate courts went so far as to suggest that judges need not give individuals a chance to

the federal appellate courts recognized upon pre-sanction notice and oral hearings found little support in the established due process jurisprudence,[97] ensuring that persons sanctioned under amended Rule 11 received "less process than would be necessary to seize a refrigerator."[98] Without the sobering reflection that broad due process safeguards encouraged, federal judges found few reasons to temper their sanctions awards.[99]

*Deferential Standard of Review.* Just as the federal appellate courts attempted to reduce the demands that sanctions litigation placed upon the district courts, the appellate courts also attempted to reduce the demands placed upon themselves. The Supreme Court in *Cooter & Gell v. Hartmarx Corp.*[100] concluded that the appellate courts should apply the deferential abuse of discretion standard in reviewing "all aspects" of a Rule 11 sanctions decision.[101] The abuse of discretion stan-

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defend their conduct *before* sanctions are imposed. *See* G.J.B & Assocs., 913 F.2d at 832 (hearing on a motion to vacate is adequate opportunity to respond); Westmoreland v. CBS, Inc., 770 F.2d 1168, 1178 (D.C. Cir. 1985) (appeal is adequate opportunity to respond).

97. *See* Keeling, *Due Process Requirements*, *supra* note 92, at 357. The established due process jurisprudence recognizes that due process is a flexible concept that "calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481 (1972); *see also* Cafeteria & Restaurant Workers Union Local 473 v. McElroy, 367 U.S. 886, 895 (1961) ("The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."). In concluding that due process *never* requires specific notice for lawyers who file groundless complaints and that due process *never* requires an oral hearing as a prerequisite to sanctions, the federal appellate courts ignored the flexible nature of due process, favoring rigid rules.

98. Cochran, *supra* note 67, at 16; *see also* COMMENT OF THE CHICAGO BAR ASSOCIATION TO THE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 13 (Nov. 2, 1990) ("It is astonishing to realize that a $500,000 sanctions award is subject to fewer procedural protections than . . . a $50,000 diversity case.").

99. *See* Keeling, *Due Process Requirements*, *supra* note 92, at 374.

100. 496 U.S. 384 (1990).

101. *Id.* at 405. Before *Cooter & Gell*, the courts of appeals disagreed over the proper standard of review for Rule 11 decisions. Some circuits applied the abuse of discretion standard to all factual and legal issues arising under Rule 11. *See, e.g.*, Mars Steel Corp. v. Continental Bank N.A., 880 F.2d 928, 933 (7th Cir. 1989); Kale v. Combined Ins. Co. of America, 861 F.2d 746, 757-58 (1st Cir. 1988); Adamson v. Bowen, 855 F.2d 668, 673 (10th Cir. 1988); Teamsters Local Union No. 430 v. Cement Express, Inc., 841 F.2d 66, 68 (3d Cir.), *cert. denied*, 488 U.S. 848 (1988); Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 872 (5th Cir. 1988) (en banc). Other circuits applied a tripartite standard of review: (1) reviewing factual findings under a clearly erroneous standard, (2) reviewing legal findings related to whether an individual violated Rule 11 under a *de novo* standard; and (3) reviewing the choice of sanction under an abuse of discretion standard. *See, e.g.*, International Bd. of Teamsters v. Association of Flight Attendants, 864 F.2d 173, 176 (D.C. Cir. 1988); Zaldivar v. City of Los Angeles, 780 F.2d 823, 828 (9th Cir. 1986).

dard permitted the appellate courts to take a "hands off" approach to sanctions decisions in the lower courts.[102] Thus, even though the appellate courts required that district courts impose the least severe sanction adequate to serve the functions of Rule 11,[103] the appellate courts nonetheless rubberstamped most lower court decisions related to the form and size of sanctions.[104] In the absence of more vigorous appellate review, the appellate courts could not police possible abuses of Rule 11, encouraging larger sanctions awards and, in turn, further contributing to the chilling effect that the rule exerted on good faith litigation.[105]

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Although the Court in *Cooter & Gell* rejected a tripartite standard of review, it nonetheless concluded that "[a] district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Cooter & Gell*, 496 U.S. at 405. Thus, while the standard in *Cooter & Gell* remained a deferential standard, in practice it differed little from the tripartite standard that the Court rejected. Johnson et al., *supra* note 47, at 661-62.

102. *Cooter & Gell*, 496 U.S. at 402 ("[T]he district court is better situated than the court of appeals to marshal the pertinent facts and apply the fact-dependent legal standard mandated by Rule 11."); *see also* Johnson et al., *supra* note 47, at 662. Illustrating the deferential nature of the abuse of discretion standard, the Federal Circuit has reasoned that it can find an abuse of discretion in only four instances: (1) the lower court decision is clearly unreasonable, arbitrary, or fanciful; (2) the decision is based upon an erroneous conclusion of law; (3) the factual findings contained in the lower court decision are clearly erroneous; or (4) the record contains no evidence upon which the lower court rationally could have based its decision. Hendler v. United States, 952 F.2d 1364, 1372 (Fed. Cir. 1991).

103. *See supra* note 73.

104. *See* Johnson et al., *supra* note 47, at 663. Sometimes an appellate court, in a case in which the district court ignored the least severe sanction doctrine, would vacate the sanction and remand the case for reconsideration in light of the doctrine. *See, e.g.*, Jennings v. Joshua Indep. Sch. Dist., 877 F.2d 313, 321-22 (5th Cir. 1989); Cabell v. Petty, 810 F.2d 463, 466-67 (4th Cir. 1987). More often than not, though, the appellate courts have affirmed sanctions awards regardless of whether the district court considered the least severe sanction doctrine. *See* Johnson et al., *supra* note 47, at 663 ("[T]he appellate courts have simply acquiesced in the sanction selected by the district court, even if the sanction is a substantial monetary award that clearly is not the least severe sanction adequate to deter future misconduct.").

105. *See* Johnson et al., *supra* note 47, at 662; *see also* Lazaroff, *supra* note 71, at 1068 ("By adopting a deferential standard of review for all aspects of Rule 11 jurisprudence, the Supreme Court may encourage chilling of creative advocacy."); Georgene M. Vairo, *Rule 11: Where We Are and Where We Are Going*, 60 FORDHAM L. REV. 475, 489 (1991) ("Neither the goal of reducing the indeterminacy of Rule 11 nor the goal of fairness to those sanctioned is served by the highly deferential type of abuse review envisioned by the Court.") [hereinafter Vairo, *Where We Are*].

3. The 1993 Amendments to Rule 11

After an extended review and revision process,[106] the existing version of Federal Rule 11 became effective December 1, 1993.[107] Designed to "remedy [the] problems that [had] arisen in the interpretation and application of the 1983 revision of the rule,"[108] the 1993 amendments to Rule 11 have effected a sweeping change in the spirit of the principal federal sanctions provision.[109] The 1993 amendments, for instance, ensure that district courts give sanctions decisions more studied consideration than the courts gave such decisions under the 1983 revision. One of the provisions requires courts to enter specific factual findings.[110] Specifically, the new rule states that "[w]hen imposing sanctions, the court shall describe the conduct determined to constitute a violation . . . and explain the basis for the sanction imposed."[111] Likewise, another provision in the new rule gives the potential subjects

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106. Tobias, *supra* note 92, at 1777-78. The Advisory Committee on the Civil Rules of the United States Judicial Conference issued a Call for Written Comments on Rule 11 in August 1990 and conducted a public hearing in February 1991. *Id.* at 1778. The Committee agreed that the rule should be amended, and in May 1991, it proposed a series of amendments. *Id.* The Committee on Rules of Practice and Procedure of the United States Judical Conference, known as the "Standing Committee," studied the proposed amendments and then, after making various changes, approved the amendments in June 1992. *Id.*

107. FED. R. CIV. P. 11. The United States Supreme Court approved the 1993 amendments to Rule 11 over the dissents of Justices Scalia and Thomas. *See* 61 U.S.L.W. 4365 (April 27, 1993).

108. Johnson et al., *supra* note 47, at 680 (quoting FED. R. CIV. P. 11 comment (Proposed Amendments 1991)).

109. Several articles discuss the potential effects of the 1993 amendments to Rule 11. *See, e.g.*, Johnson et al., *supra* note 47, at 663-66; Lazaroff, *supra* note 71, at 1110-19; Tobias, *supra* note 92, at 1779-92; Vairo, *Where We Are*, *supra* note 105, at 495-500; Kerian Bunch, Note, *Taming the Fury: Do the 1991 Proposed Amendments to Rule 11 Go Far Enough?*, 5 GEO. J. LEGAL ETHICS 957, 959-70 (1992); 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 U. KAN. L. REV. 199, 220-24 (1992); James R. Simpson, Note, *Why Change Rule 11? Ramifications of the 1992 Amendment Proposal*, 29 CAL. W.L. REV. 495, 503-12 (1993).

110. FED. R. CIV. P. 11(c)(3). This provision requiring specific factual findings was a recent addition to the amendments. Originally, the proposed amendments required factual findings only at the request of counsel. FED. R. CIV. P. 11 (Proposed Amendments 1991). *See also* Johnson et al., *supra* note 47, at 673-76; Bunch, *supra* note 109, at 968.

111. FED. R. CIV. P. 11(c)(3). While the rule requires district courts to enter specific factual findings in cases in which sanctions are imposed, the rule does not appear to require written findings. Presumably, the rule would allow courts to enter oral findings into the record of sanction hearings that the courts might conduct. *See id.*

of sanctions awards greater due process safeguards.[112] Subsection (c) states that a person must receive "notice and a reasonable opportunity to respond" before a district court can impose sanctions against the person.[113] Although the rule provides courts with little guidance concerning the response element of due process,[114] the rule specifies the form of notice that a sanctioned individual must receive. Before a district court imposes a sua sponte award of monetary sanctions, the court must issue an order that describes the offensive conduct and requires the offender to show cause for her actions.[115] Before a litigant files a motion for Rule 11 sanctions, the litigant must serve the motion upon the offender, describing the conduct alleged to violate the rule.[116]

Another significant change in the 1993 version of Rule 11, and perhaps the change that has attracted the most attention, is the addition of a "safe harbor" provision.[117] Under the 1993 amendments, a litigant cannot file or present a sanctions motion to the district court until twenty-one days after serving the motion on the alleged offender.[118] Within the twenty-one day "safe harbor," the offender can withdraw or correct the challenged document and thus avoid sanctions.[119] The function of the "safe harbor" provision is to lessen the chilling effect of Rule 11 by insulating litigants from sanctions for correctable mis-

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112. *See* Simpson, *supra* note 109, at 503-04.

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

114. All that the 1993 amendments state is that opportunities to respond must be "reasonable." *See* FED. R. CIV. P. 11(c). Presumably, this language will not change the presumption under the 1983 amendments that due process requires *only* that sanctioned litigants be able to file written briefs defending their conduct. *See supra* notes 92-99 and accompanying text. *Cf.* Bunch, *supra* note 109, at 968 ("No oral hearing is mandated, but it appears that the party on notice will at least be permitted an opportunity to submit a written brief.").

115. FED. R. CIV. P. 11(c)(1)(B), 11(c)(2)(B). It is unclear whether a district court must issue a show cause order before imposing an award of nonmonetary sanctions. *See* Bunch, *supra* note 109, at 967 (concluding that a show cause order would not be required).

116. FED. R. CIV. P. 11(c)(1)(A). The motion must "be made separately from other motions or requests . . . ." *Id.*

117. *See* Tobias, *supra* note 92, at 1784-85, 1785 n.63 (stating that safe harbor is an "important protective mechanism"); Bunch, *supra* note 109, at 967 (safe harbor serves the goals of "deterring abusive behavior and promoting judicial efficiency").

118. FED. R. CIV. P. 11(c)(1)(A). The "safe harbor" provision does not protect individuals from sanctions that the district court issues sua sponte. Accordingly, it is unclear whether sua sponte sanctions are appropriate against a litigant who has filed, but then withdrawn, a groundless legal document. *See* Bunch, *supra* note 109, at 967.

119. *See* FED. R. CIV. P. 11(c)(1)(A).

takes.[120] As the drafters of the new rule explained, "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."[121]

To counter the administrative burdens that the new due process and "safe harbor" provisions might entail, the 1993 amendments add three provisions that attempt to decrease Rule 11 sanctions activity. First, the new rule gives district courts the discretion to decline sanctions even in circumstances that establish a technical Rule 11 violation.[122] Second, the rule requires that district courts limit sanctions awards to a form "sufficient to deter repetition" of the sanctioned behavior.[123] Third, while the rule allows district courts to award sanctions against litigants responsible for Rule 11 violations,[124] it limits awards of monetary sanctions against litigants who have legal representation.[125] These provisions, taken together, aim to reduce the number

120. *See* Bunch, *supra* note 109, at 966.

121. FED. R. CIV. P. 11 advisory committee's note (Proposed Amendments 1993).

122. Johnson et al., *supra* note 47, at 667; *see also* FED. R. CIV. P. 11(c). Under the 1983 revision, Rule 11 sanctions were mandatory if the circumstances established a violation. *See supra* note 52.

123. FED. R. CIV. P. 11(c)(2). Under the 1983 revision, federal appellate courts urged district judges to enforce the "least severe sanction adequate" to deter repetition of the sanctionable behavior, but the district judges frequently ignored this admonition. *See supra* note 73. In incorporating the "least severe sanction adequate" doctrine into the text of Rule 11, the drafters of the 1993 amendments hoped to reemphasize the doctrine and curtail reliance upon fee awards as sanctions. Johnson et al., *supra* note 47, at 666. To that end, subsection (c)(2) of the new Rule 11 authorizes district judges to enforce "directives of a nonmonetary nature." FED. R. CIV. P. 11(c)(2).

124. FED. R. CIV. P. 11(c) ("[T]he court may . . . impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.").

125. FED. R. CIV. P. 11(c)(2)(A). The rule forbids monetary sanctions—such as fee awards—against represented parties for a violation of subsection (b)(2), which requires that the challenged document be "warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." FED. R. CIV. P. 11(b)(2). Apparently, the rule would not forbid monetary sanctions against represented parties in instances in which they filed a factually groundless contention in violation of subsections (b)(3) or (b)(4) or filed a contention for an improper purpose in violation of subsection (b)(1). Neither would the rule affect unrepresented parties. As a class, unrepresented parties are responsible for the documents that they present to the court and, accordingly, are therefore subject to the full range of Rule 11 sanctions. *See* FED. R. CIV. P. 11(b) (stating that by presenting a legal document to the court, unrepresented parties certify that the document meets the substantive requirements of Rule 11). Of course, the rule does not prevent courts from imposing fee awards or other monetary sanctions against lawyers as opposed to parties.

of fee awards assessed as Rule 11 sanctions and, accordingly, to reduce the incentive for lawyers to use Rule 11 as a litigation tactic.[126]

Nonetheless, even though it is too soon to reach definitive conclusions about whether the 1993 amendments will succeed in eliminating the problems that arose under the 1983 amendments, it seems safe to predict that Rule 11 will continue to cast a brooding presence over litigation decisions in federal court. The 1993 amendments do not significantly alter the prevailing objective "reasonableness" standard for Rule 11 sanctions.[127] While the amendments attempt to reduce reliance upon fee awards,[128] the amendments do not forbid the application of fee awards as sanctions against persons—other than represented litigants—who file pleadings that fail the prevailing objective standard.[129] As long as Rule 11 allows district courts to assess fee awards for violations of an objective "reasonableness" standard, the rule will exert a chilling effect upon litigation—safe harbor or not.[130] Unquestionably,

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126. Lazaroff, *supra* note 71, at 1117. *See supra* notes 79-85 and accompanying text.

127. *See* Tobias, *supra* note 92, at 1781-82. Indeed, the 1993 amendments have bolstered slightly the objective standard for imposing Rule 11 sanctions. Although the new rule retains the language requiring that the signing individual certify the propriety of the filed document to the best of her subjective "knowledge, information, and belief," FED. R. CIV. P. 11(b), the rule states that the signing individual must certify, if appropriate, that the document is warranted by a "nonfrivolous" rather than "good faith" argument for the "extension, modification or reversal of existing law or the establishment of new law." FED. R. CIV. P. 11(b)(2). The substitution of the word "nonfrivolous" for the word "good faith" implies that the drafters of Rule 11 intended to eliminate subjective language from the rule, thus reemphasizing the product approach to sanctions. *See supra* notes 54-58 and accompanying text.

128. *See supra* notes 122-26 and accompanying text.

129. *See* Tobias, *supra* note 92, at 1788; *see also* Johnson et al., *supra* note 47, at 666 (stating that the 1993 amendments "are unlikely to wean the district courts from their excessive and damaging reliance on awards of attorneys' fees.").

130. *See* Lazaroff, *supra* note 71, at 1118-19.

> The Advisory Committee's unwillingness to reconsider a subjective bad faith standard for Rule 11 . . . may also be criticized. When combined with the retention of attorney's fees as a viable sanction under Rule 11, this could encourage continued fee shifting despite the Supreme Court's and the Advisory Committee's rejection of that approach.

*Id.*

Moreover, as long as Rule 11 exerts a chilling effect on litigation, it encourages litigants to use Rule 11 motions as a tactic to dissuade their opponents from pursuing undesirable arguments. *See* Tobias, *supra* note 92, at 1788. Indeed, in some sense, the 1993 amendments promote even greater use of Rule 11 as a litigation tactic because they allow district judges to award parties who file successful Rule 11 motions the fees incurred in presenting and arguing the motions. FED. R. CIV. P. 11(c)(2). *See*

the 1993 amendments to Rule 11 improve a sanctions provision that since 1983 had been repressive and unwieldy. Even after the 1993 amendments, however, Rule 11 still does not represent a balanced approach to frivolous litigation.[131]

### *B. State Sanctions Provisions*

Like the federal courts, state courts and legislatures have struggled to devise a balanced response to frivolous litigation. Some states have been content to follow the lead of the federal courts, amending their procedural rules to keep pace with the evolution of Federal Rule 11.[132] But while almost all of the states have enacted statutes or procedural rules that parallel Federal Rule 11,[133] the range of state sanctions schemes nonetheless varies widely, in large part because most states have crafted sanctions provisions that either supplement or supplant provisions based on Rule 11.[134] The state law schemes for addressing frivolous litigation, although disparate and often quite dissimilar, fall

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Tobias, *supra* note 92, at 1788 (noting that the 1993 amendments make "filings cost free").

131. *See* Johnson et al., *supra* note 47, at 676-77 (concluding that the 1993 amendments "offer some measure of relief" but "[f]urther changes are required if Rule 11 is to become a useful tool in the fair and effective administration of justice").

132. Currently, nine states and the District of Columbia have a procedural rule that mimics the 1983 version of Federal Rule 11 as their sole sanctions provision against frivolous litigation. *See infra* note 169. Surprisingly, however, few states have drafted procedural rules that altogether replicate the Federal Rules of Civil Procedure. *See* John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1427 (1986). Especially in the area of sanctions, states have been willing to experiment with procedural rules that deviate from the federal model.

133. *See supra* note 25. Most states are expected to amend their statutes or procedural rules to reflect the 1993 amendments to Federal Rule 11. *See, e.g.*, REPORT OF THE TEXAS SUPREME COURT TASK FORCE ON SANCTIONS 72-75 (1993) (proposing various amendments modeled upon the 1993 amendments to Rule 11); Sanner & Tobias, *supra* note 75, at 325-29 (discussing the likelihood that Montana will adopt the 1993 amendments).

134. *See supra* note 25-26 and accompanying text. Almost all of these supplemental sanctions provisions are statutes. Some commentators have challenged the constitutional basis for these statutes, arguing that state legislatures do not have the power to promulgate statutes that affect the operation of state courts. *See, e.g.*, Gary D. Nissenbaum & Nancy Lem, *Stop, Look, and Listen: Selected Defenses to the New Jersey Frivolous Lawsuit Statute*, 20 SETON HALL L. REV. 184, 192 (1989) (noting that "[t]he New Jersey Constitution empowers the New Jersey Supreme Court, not the legislature, to promulgate rules governing the practice and procedure in all state courts"); Robertson, *supra* note 48, at 113 (noting that "the response to the problem of frivolous filings, though a matter of general and legitimate public concern, is ultimately the responsibility of the judiciary of [Mississippi], not its legislature") (citations omitted).

into three rough models: a "high threshold" model that favors the interest of preserving free access to the courts;[135] a "low threshold" model that favors the interest of reducing perceived litigation abuse;[136] and a "hybrid" model that borrows elements from both the high threshold and low threshold models.[137] Although all three models—like Rule 11—encourage sanctions in the form of a fee award, the sanctions schemes in the "high threshold" model are dependent upon a subjective standard, while the sanctions schemes in the "low threshold" and "hybrid" models are dependent upon an objective standard. Failing to harmonize the best aspects of both the subjective and objective standards, state sanctions schemes suffer predictable consequences related to their dependence upon one or the other standard alone. This Section will review the various state sanctions models in turn.

1. The High Threshold Model

The high threshold model is the most lenient of the three sanctions models. Typically, the states that follow a high threshold sanctions model require some kind of subjective bad faith—or the absence of good faith—as a condition to an award of sanctions, usually a fee award. Eight states have adopted sanctions schemes that fall within the high threshold model. California, for instance, uses as its principal sanctions provision a statute that requires the trial court to find that the sanctioned individual acted in subjective bad faith.[138] Florida uses a

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135. *See infra* Section II.B.1, pp. 1095-1102.

136. *See infra* Section II.B.2, pp. 1102-11.

137. *See infra* Section II.B.3, pp. 1111-25.

138. CAL. CIV. PROC. CODE § 128.5 (West Supp. 1993). Section 128.5 provides that a California trial court "may order a party, the party's attorney, or both to pay any reasonable expenses, including attorney's fees, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay." *Id.* Although the California appellate courts are split, most have concluded that § 128.5 requires a finding of subjective bad faith as a condition to the imposition of sanctions. *See* Llamas v. Diaz, 267 Cal. Rptr. 427, 430 (Ct. App. 1990) ("Our study of the legislative history of § 128.5, from its inception in 1981, through two amendments, in 1984 and 1985, convinces us there must be an assessment of *subjective* bad faith in addition to finding a particular action or tactic was frivolous."); *see also* Javor v. Dellinger, 3 Cal. Rptr. 2d 662, 664 (Ct. App. 1992); Summers v. City of Cathedral City, 275 Cal. Rptr. 594, 608-09 (Ct. App. 1990); *cf.* West Coast Dev. v. Reed, 3 Cal. Rptr. 2d 790, 795 (Ct. App. 1992) (agreeing that precedent requires a finding of subjective bad faith, but noting that "[o]f course the prosecution of a frivolous action may in itself be evidence from which a finding of subjective bad faith may be made"). *But see* On v. Cow Hollow Properties, 272 Cal. Rptr. 535,

statute that allows evidence of good faith to serve as a defense against sanctions.[139] Maine, New Mexico, and Pennsylvania use sanctions provisions that are based upon the pre-1983 version of Federal Rule 11.[140] Massachusetts and South Carolina also use sanctions provisions

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539 (Ct. App. 1990) (stating that § 128.5 requires either a finding of bad faith or frivolousness, but not both). For a discussion of the subjective nature of § 128.5, see Maryann Jones, *"Stop, Think & Investigate": Should California Adopt Federal Rule 11?*, 22 SW. U. L. REV. 337, 357-63 (1993).

From 1988 to 1993, California experimented in San Bernardino and Riverside counties with a sanctions provision based upon the 1983 amendments to Federal Rule 11. *See* CAL. CIV. PROC. CODE § 447 (West Supp. 1993). Section 447 provided that it would remain in effect until January 1, 1993. During its short existence, § 447 found little use, "largely due to the bar's lack of familiarity with the section." Jones, *supra*, at 365. A new § 447 has since been extended to be effective until January 1, 1998. CAL. CIV. PROC. CODE § 447 (West Supp. 1994).

139. FLA. STAT. ANN. § 57.105 (West Supp. 1993). Section 57.105 provides, in pertinent part:

> The court shall award a reasonable attorney's fee to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney in any civil action in which the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the complaint or defense of the losing party; provided, however, that the losing party's attorney is not personally responsible if he has acted in good faith, based on the representations of his client.

*Id. See* Johnson & Cassady, *supra* note 18, at 959 (noting that the sanctions statute in Florida "appear[s] to require a more grievous transgression before a court will impose sanctions"). It is unclear whether section 57.105 would allow a losing party to claim good faith as a defense to a fee award.

140. *See* MAINE R. CIV. P. 11; N.M. R. CIV. P. 11; PA. R. CIV. P. 1023. The Pennsylvania version of Rule 11 is a relatively new rule that, by its express terms, suspends former § 8355 of the Pennsylvania Judicial Code—a sanctions provision which was almost identical to the 1983 version of Federal Rule 11. GOODRICH-AMRAM PROCEDURAL RULES SERVICE 403-04 (2d ed. 1991). Neither the Maine nor the Pennsylvania courts have attempted to calculate the measure of evidence needed to support sanctions under their versions of Rule 11. But the New Mexico courts have interpreted their version of Rule 11, and like the federal courts with pre-1983 Federal Rule 11, have concluded that their rule requires evidence of a subjective intent to abuse the judicial process. *See* Lowe v. Bloom, 813 P.2d 480, 481 (N.M. 1991) ("Imposition of Rule 11 sanctions requires subjective evidence that a willful violation has occurred."); Rivera v. Brazos Lodge Corp., 808 P.2d 955, 960 (N.M. 1991) ("Unlike the [1983] federal counterpart, the good ground provision in New Mexico's Rule 11 is to be measured by subjective standards at the time of the signing of the pleading.").

All three states supplement their Rule 11 provisions with narrow sanctioning powers that govern specific situations. Maine, for example, recognizes the inherent power of its trial courts "to sanction parties and attorneys for abuse of the litigation process." Chiappetta v. LeBlond, 544 A.2d 759, 760 (Me. 1988). New Mexico has two statutes that allow trial courts to sanction parties who bring "frivolous" securities claims or agricultural nuisance claims. N.M. STAT. ANN. § 47-9-7 (Michie 1991) (agricultural nuisance actions); N.M. STAT. ANN. § 58-13B-40(H) (Michie 1991) (actions under the New Mexico Securities Act of 1986). Pennsylvania has a statute that codi-

based upon the pre-1983 version of Rule 11,[141] but these two states supplement their Rule 11 provisions with frivolous litigation statutes that apply subjective standards for the imposition of sanctions.[142] Connecticut, the sole state without a general sanctions provision against frivolous litigation, uses an assortment of narrow sanctioning powers, most of which also enforce a subjective bad faith standard.[143]

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fies the common law abuse of process action. 42 PA. CONS. STAT. § 8351 (1982). None of these narrow supplemental sanctioning powers, however, have seen much use.

141. *See* MASS. R. CIV. P. 11; S.C. R. CIV. P. 11.

142. *See* MASS. GEN. L. ch. 231, § 6F (1986); S.C. CODE ANN. §§ 15-36-10 to -50 (Law. Co-op. Supp. 1992). The Massachusetts statute allows trial courts to award attorney fees as sanctions against litigants who advance claims or defenses which are "wholly insubstantial, frivolous and not advanced in good faith." MASS. GEN. L. ch. 231, § 6F (1986). Under the plain language of this statute, a sanctions award requires evidence both that the challenged claims or defenses are frivolous *and* that the sanctioned litigant advanced the claims or defenses in bad faith. Mel L. Greenberg, *Sanctions: In Search of Standards*, 74 MASS. L. REV. 155, 165-66 (1989). Recently, however, Massachusetts courts have shown a willingness to fudge on the bad faith prong of the statute. *See infra* notes 162-65 and accompanying text.

The South Carolina statute states that a person who takes part in the "procurement, initiation, continuation, or defense" of a civil lawsuit is subject to a fee award if (1) that person acts with a purpose other than securing proper adjudication of the claim upon which the proceedings are based and (2) the proceedings terminate in favor of the individual seeking the sanction. S.C. CODE ANN. § 15-36-10 (Law. Co-op. Supp. 1992). According to the statute, a person acts with a proper purpose if he "reasonably believes" in the existence of the facts upon which his claim is based and if he either "reasonably believes" that his claim is legally valid or he relies in good faith upon the legal advice of counsel. *Id.* § 15-36-20. The elements for a "proper purpose" under the South Carolina statute seem to hinge upon a subjective belief in the factual and legal validity of the challenged claim or defense. Thus far, though, the South Carolina courts have not attempted to interpret the statute, which became effective in April 1988. When the South Carolina courts finally address this issue, they might conclude that the word "reasonably" in section 15-36-20 injects an objective standard into the determination of whether a person acted with a proper purpose.

143. *See* Daniel Cassidy & Marina Lee, *Connecticut State Practice: Judicial Authority to Impose Sanctions Against Attorneys*, 65 CONN. B.J. 472, 472-76 (1991). Cassidy and Lee observe:

> There are three statutes in Connecticut which permit the imposition of sanctions on attorneys. The first, § 52-99, which imposes a ten dollar fine for submission of an untrue pleading, is seldom used. The second, § 52-190a, is limited to sanctioning an attorney for his or her failure to make a reasonable inquiry before filing a negligence claim against a health care provider. The court, upon motion or its own initiative, can impose "appropriate" monetary sanctions. The third, § 51-84, which permits courts to promulgate rules to

Of the three sanctions models, the high threshold model goes the farthest in attempting to preserve free access to the courts.[144] Sanctions schemes in the high threshold model direct their penalties against the most egregious litigation abuse, hoping that in confining the availability of sanctions, litigants will not abandon legitimate claims for fear of incurring sanctions.[145] Unfortunately, the high threshold model tips the balance too far in favor of the principle of free access. States adopt sanctions provisions, regardless of their views about the principle of free access, to punish and deter litigation abuse.[146] Even in tolerant states like California, the legislature designs sanctions schemes to discourage litigants from abusing the judicial process.[147] High threshold sanctions schemes, however, tend to be ineffective in punishing and deterring litigation abuse.[148] Specifically, high threshold sanctions schemes offer state court judges few options for dealing with the abusive conduct that for one reason or another falls through the cracks of the subjective standard.

The problem with high threshold sanctions schemes is *not*, in itself, the fact that the schemes use a subjective standard. While a subjective standard is, admittedly, more difficult to prove than an objective standard,[149] a subjective standard is not impossible to prove.[150] As one commentator has observed, "There is nothing . . . unworkable

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sanction counsel, is limited to monetary fines of no more than $100.00. *Id.* at 472-73 (citations omitted). Still another Connecticut statute allows a court, in its discretion, to impose an award of fees against a litigant who pursues a frivolous claim or defense in a products liability action. CONN. GEN. STAT. § 52-240a (1991). Further, the Connecticut rules of practice allow a court, in its discretion, to impose an award of fees up to $250 against a litigant who files allegations or denials which the court finds untrue and made without reasonable cause. Cassidy & Lee, *supra*, at 473 (citing CONNECTICUT PRACTICE BOOK § 111). If none of the above provisions are applicable, Connecticut Superior Courts retain the inherent power to impose sanctions against a litigant who files a bad faith pleading. Fattibene v. Kealey, 558 A.2d 677, 685 (Conn. App. Ct. 1989). In *Fattibene*, the court vacated a sanctions order from a trial court which, recognizing that Connecticut had no general sanctions provision against frivolous litigation, used Federal Rule 11 as the basis for imposing sanctions. *Id.* at 683.

144. For a discussion of the principle of free access, see *infra* Section III.A, pp. 1126-34.

145. *See, e.g.*, Greenberg, *supra* note 142, at 157 (noting that because Federal Rule 11 has produced a chilling effect upon litigation, among other problems, "[t]here currently appears no fervor [in Massachusetts] to follow the federal model").

146. *See infra* Section III.B, pp. 1134-52.

147. *See* On v. Cow Hollow Properties, 272 Cal. Rptr. 535, 540 (Ct. App. 1990) (maintaining that a purpose of § 128.5 is to control "burdensome and unnecessary legal tactics").

148. *See, e.g.*, Jones, *supra* note 138, at 362-63.

149. *See* Mark S. Cady, *Curbing Litigation Abuse and Misuse: A Judicial Approach*, 36 DRAKE L. REV. 483, 503 (1986-87).

150. Risinger, *supra* note 34, at 60.

about subjective standards. If there were, the requirement of scienter would render convictions in criminal cases impossible."[151] Just as in criminal cases, a judge in a sanctions proceeding can look behind protestations of innocence. Some litigants might be able to hide wrongful conduct behind a shield of "good faith," but in most instances in which a litigant violates a subjective standard, the record will bear enough evidence of bad faith to support an award of sanctions even under a high threshold sanctions scheme.[152]

And while a subjective standard covers fewer situations than an objective standard, a subjective standard is not a toothless dinosaur. Although the pre-1983 version of Federal Rule 11, which embraced a subjective standard, did not see much active use,[153] the prevailing attitude toward sanctions at the time was much different from the attitude that judges express toward sanctions today.[154] With the evolution of litigation into a combative—rather than adversarial—device for resolving disputes,[155] judges are far more willing to use sanctions as a means of compelling desirable litigation behavior.[156] California judges, for exam-

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151. *Id.*

152. *See id.* ("Intellectually honest examination of evidence proffered in particular cases can result in the effective enforcement of even subjective standards of ethics."). Recently, for example, several courts have heard claims that real estate developers brought against public interest spokespersons to dissuade them from opposing development projects. These claims often take the form of meritless actions for malicious prosecution, abuse of process, intentional interference with contractual or business relations, or libel. *See* John C. Barker, *Common-Law and Statutory Solutions to the Problem of SLAPPs*, 26 LOY. L.A. L. REV. 395, 402-03 & n.34 (1993); Brecher, *supra* note 6, at 105; *see also infra* text accompanying notes 323-36. Frequently, the developers in these SLAPPs leave enough evidence of bad faith—e.g., falsified affidavits, a lack of cooperation with requests for depositions, a track record of meritless claims against public interest spokespersons—to support an award of sanctions under a subjective standard. *See generally* David Sive, *Environmental Litigation Countersuits and Delay*, C427 ALI-ABA 1319 (1989) (available in Westlaw, ALI-ABA Database).

153. *See supra* text accompanying note 37.

154. *See supra* text accompanying notes 41-48.

155. *See supra* note 6. *Cf.* Edwin J. Wesely, *Pretrial Development in Major Corporate Litigation*, LITIG., Spring 1975, at 12 ("Litigating the big case is the ultimate in civilized warfare. It is warfare—strategy and tactics are at least as important as the law and the facts. It is civilized—there is a resolution short of bloodshed and short of medieval trial by combat.").

156. *See* Robertson, *supra* note 48, at 133. *But see* Sofaer, *supra* note 44, at 718 (noting that judges, if they have the discretion to do so, will not impose sanctions for minor infractions because the sanctions would not be worth the time and trouble).

ple, have imposed and upheld several large sanctions within the last five years,[157] and despite the subjective standard in the California statute, their reliance upon the sanctions statute is increasing.[158]

The inherent flaw in the high threshold sanctions schemes is, instead, that the schemes confine *all* sanctions to conduct that reflects subjective bad faith. Under the high threshold schemes adopted in eight states, judges are unable to impose sanctions—even nominal sanctions—absent some proof that the challenged conduct violates a subjective standard. Judges in high threshold states, therefore, have no means with which to reach persons who, acting in subjective good faith, pursue pleadings or motions that offend the judicial process—e.g., claims that raise allegations which ignore binding adverse precedent, "nut" claims that make wild factual assertions, and motions that reassert arguments a court has earlier rejected.[159] Likewise, judges in the high threshold states have no means with which to reach persons who, although pursuing meritless pleadings or motions in actual bad faith, have been careful to ensure that the record does not reflect their subjective bad faith.[160] High threshold sanctions schemes, in sum, are less effective than other forms of sanctions schemes in policing the judicial process.

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157. *See, e.g.*, Bach v. McNelis, 255 Cal. Rptr. 232, 248-49 (Ct. App. 1989) (affirming fee award of more than $11,000); Dwyer v. Crocker Nat'l Bank, 240 Cal. Rptr. 297, 306-09 (Ct. App. 1987) (affirming fee award of $75,258). *Cf.* Woods, *supra* note 40, at 673 ("Notwithstanding the growing pains California has experienced with the increasing use of sanctions, the courts in recent years have imposed and upheld sizeable sanctions.").

158. Woods, *supra* note 40, at 673-74. Likewise, the subjective standard in the California statute has not inhibited lawyers from filing large numbers of sanctions motions. Professor Roberts estimated that the Central District of the Los Angeles Superior Court faces around 4900 sanctions motions annually. Florrie Young Roberts, *Pretrial Sanctions: An Empirical Study*, 23 PAC. L.J. 1, 15 (1991). From that estimate, Roberts concluded that "attorneys apparently perceive that their adversaries have engaged in conduct which not only violates pre-trial rules but does so in a fashion that is sanctionable because it is 'without substantial justification' or is in 'bad faith,' 'frivolous,' or 'for the purpose of delay.'" *Id.*

Other high threshold states, such as Maine and South Carolina, have not experienced much sanctions litigation. Few sanctions decisions appear in the published cases of these states. The absence of sanctions litigation in these states, though, does not suggest that the subjective standard in the respective sanctions statutes has inhibited sanctions motions. Instead, it seems that the more probable reason for the absence of sanctions litigation is that these states are more rural and, therefore, do not experience as much litigation abuse. *See* Donald D. Landon, *Clients, Colleagues, and Community: The Shaping of Zealous Advocacy in Country Law Practice*, 1985 AM. B. FOUND. RES. J. 81, 107 (1985).

159. *See* Shaneyfelt, *supra* note 1, at 451-52.

160. *See* Cady, *supra* note 149, at 503.

Understandably, state court judges experience a great deal of frustration when high threshold sanctions provisions leave them unable to redress perceived litigation abuse.[161] Judges in Massachusetts, in fact, tinkered with the subjective standard in their sanctions provisions in an attempt to reach a broader range of undesirable litigation conduct. Thus, while the Massachusetts sanctions statute requires findings that the challenged claims or defenses are "wholly insubstantial, frivolous *and* not advanced in good faith,"[162] some Massachusetts state court judges have suggested that the statute does not impose a "wholly subjective" standard.[163] These judges reason that absence of good faith, as required in the Massachusetts statute, can be inferred from objective criteria, such as the reasonableness and significance of the factual and legal grounds advanced in opposing a sanctions award.[164] Judges in other high threshold states, although perhaps not as inclined to tinker with their sanctions statutes, express similar dissatisfaction with the subjective standards in their statutes.[165]

Because high threshold sanctions schemes do not go far enough in allowing judges to redress litigation abuse, the high threshold model does not represent a balanced approach to frivolous litigation. Unquestionably, the high threshold sanctions model advances the laudable goal of protecting free access to the courts. As laudable as that goal might be, though, it does not excuse lawsuits that serve no legitimate function other than to consume valuable court time.[166] Commentators might ar-

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161. *See* Jones, *supra* note 138, at 362.

162. MASS. GEN. L. ch. 231, § 6F (1986) (emphasis added). *See supra* note 142.

163. Massachusetts Adventura Travel, Inc. v. Mason, 537 N.E.2d 609, 612 (Mass. App. Ct. 1989).

164. *Id.* at 613-14 (affirming fee award of $13,608). *See also* Hahn v. Planning Bd., 529 N.E.2d 1334, 1338 (Mass. 1988) (affirming fee award of $3795 and noting that "[s]ufficient evidence existed in the record before both the Superior Court judge and the single justice of the Appeals Court from which to infer an absence of good faith"). *But see* Greenberg, *supra* note 142, at 166 (noting that Massachusetts judges often determine whether a claimant is subject to a fee award under the sanctions statute "exclusively by examining the subjective beliefs of the claimant rather than inferring bad faith from the facts").

165. *See* Jones, *supra* note 138, at 362 (discussing California judges). Professor Jones conducted an informal poll of more than 50 California judges about their experience with the California sanctions provision. Of the 27 judges responding, 15 reported that the sanctions provision was ineffective, and many called it a "waste of time." *Id.* at 362 & n.211.

166. *See infra* Section III.A, pp. 1126-34.

gue that the number of frivolous lawsuits is small,[167] but even if that is true, judges still perceive that frivolous claims and defenses are congesting their dockets. And as long as judges hold that perception, judges will be dissatisfied with sanctions measures that allow certain frivolous claims or defenses to go unpunished. Sanctions schemes must attempt both to preserve free access to the courts *and* to give judges reasonable measures with which to reach litigation misconduct that might not rise to the level of subjective bad faith.

2. The Low Threshold Model

Compared with the other sanctions models, the low threshold model gives state court judges the greatest power to combat perceived litigation abuse. States that follow a low threshold model use an objective standard to determine when sanctions are appropriate. Thus, under a sanctions scheme in a low threshold state, a person can be subject to sanctions if she acts unreasonably—regardless whether she acts in subjective bad faith.[168] The states with low threshold sanctions schemes are divisible into three categories: (1) states that adopted the 1983 version of Federal Rule 11 as their sole sanctions provision;[169] (2) states that adopted the 1983 version of Federal Rule 11 as their principal, but not sole, sanctions provision;[170] and (3) states that created, as their

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167. *See infra* Section III, pp. 1125-52.

168. *See supra* notes 13-15 and accompanying text.

169. Nine states, as well as the District of Columbia, have enacted as their sole sanctions provision a procedural rule modeled upon the 1983 version of Federal Rule 11. *See* OKLA. STAT. tit. 12, § 2011 (1993); VA. CODE ANN. § 8.01-271.1 (Michie 1992); ARK. R. CIV. P. 11; DEL. SUP. CT. R. CIV. P. 11; D.C. R. CIV. P. 11; MONT. R. CIV. P. 11; N.C. R. CIV. P. 11(a); TENN. R. CIV. P. 11; VT. R. CIV. P. 11; W. VA. R. CIV. P. 11.

170. Twelve states have adopted the 1983 version of Rule 11 as their principal, but not sole, sanctions provision:

> *Idaho*—The Idaho version of Rule 11 is identical to the 1983 federal rule, except that it requires a resident Idaho lawyer to sign all pleadings or other legal documents which a represented litigant files in Idaho state court. IDAHO R. CIV. P. 11(a)(1). A provision in the Idaho Code allows trial courts to award reasonable fees to a litigant who suffers "frivolous conduct," which the provision defines as (1) conduct that "serves merely to harass or maliciously injure" *or* (2) conduct that "is not supported in fact or warranted under existing law" or "a good faith argument for an extension, modification or reversal of existing law." IDAHO CODE § 12-123 (1990). The statute specifies, however, that it does not limit the application of other statutes or procedural rules, meaning that the Idaho version of Rule 11 tends to be the more prominent sanctions provision in Idaho. *Id.* § 12-123(4).
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> *Iowa*—The Iowa version of Rule 11 is identical to the 1983 federal rule, except that it allows a court to require a plaintiff who has filed three or more frivolous actions in a five-year period to post a bond before proceeding in another lawsuit. IOWA R. CIV. P. 80. *See* Cady, *supra* note 149, at 490 ("The

federal rule is strikingly similar to Iowa Rule of Civil Procedure 80(a) . . . ."); Carol C. Knoepfler, Note, *Divining an Approach to Attorney Sanctions and Iowa Rule 80(a) Through an Analysis of Federal and State Civil Procedure Rules*, 72 IOWA L. REV. 701, 704-05 (1987) ("Like many other states that have amended their civil procedure rules, the Iowa amendment closely tracks Federal Rule of Civil Procedure 11 . . . .") (citations omitted). A provision in the Iowa Code reinforces this procedural rule by providing that a court can require a plaintiff who has filed three or more frivolous actions in a five-year period to post a bond before proceeding in another lawsuit. IOWA CODE § 617.16 (Supp. 1993).

*Kansas*—The Kansas version of Rule 11 is almost identical to the 1983 federal rule. KAN. CIV. PROC. CODE ANN. § 60-211 (Vernon Supp. 1992). In addition, a Kansas statute requires that a trial court assess a fee award against litigants who have asserted a claim or defense "without a reasonable basis in fact *and* not in good faith." *Id.* § 60-2007 (emphasis added). The annotations to the respective sanctions provisions reveal that the Rule 11 provision has produced a much greater effect upon Kansas litigation than the fee statute.

*Minnesota*—The Minnesota version of Rule 11 is, with a few minor changes, almost identical to the 1983 federal rule. MINN. R. CIV. P. 11. In addition, a Minnesota statute authorizes a trial court, in its discretion, to award reasonable attorney fees and costs against a lawyer or litigant who has acted fraudulently or in bad faith, has asserted a claim that is frivolous and costly to the opposing party, or has asserted a position that is intended solely to delay or to harass. MINN. STAT. § 549.21 (1988).

*Missouri*—With the exception of one inconsequential deleted sentence, the Missouri version of Rule 11 is identical to the 1983 federal rule. MO. R. CIV. P. 55.03. *See* William E. Corum, Note, *Sanctions Under Missouri Rule 55.03: Problems and Promises*, 61 UMKC L. REV. 381, 381 (1992); Ronald K. Medin, Comment, *Rule 55.03: Good Intentions No Longer Good Enough in Missouri Courts?*, 52 MO. L. REV. 417, 420-21 (1987). A Missouri statute requires trial courts to award expenses against a litigant who asserts a cause "frivolously *and* in bad faith." MO. REV. STAT. § 514.205 (Supp. 1993) (emphasis added). The sanctions statute, though, has not had as much effect upon litigation in Missouri state court as Rule 55.03. *See* Steven M. Gray, *Sanctions Against Attorneys for Frivolous Litigation*, 42 J. MO. B. 391, 391 (1986).

*Nevada*—The Nevada version of Rule 11 is almost identical to the 1983 federal rule. NEV. R. CIV. P. 11. A Nevada statute allows trial courts to award fees against a litigant who asserts a claim or defense "without reasonable grounds or to harass the prevailing party." NEV. REV. STAT. § 18.010 (1986).

*North Dakota*—With the exception of one inconsequential deleted sentence, the North Dakota version of Rule 11 is identical to the 1983 federal rule. N.D. R. CIV. P. 11. The North Dakota Code contains two additional sanctions provision. One provision requires that trial courts award fees against a lawyer or litigant who asserts a claim for which there is "such a complete absence of actual facts or law that a reasonable person could not have thought a court would render judgment in their favor." N.D. CENT. CODE § 28-26-01 (1991). The other provision allows a trial court to award fees against a lit-

principal sanctions provision, a sanctions statute—other than a Rule 11 duplicate—that uses an objective standard.[171] While perhaps differing

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igant who makes allegations or denials in a pleading "without reasonable cause and not in good faith." *Id.* § 28-26-31.

*Oregon*—The Oregon version of Rule 11 is identical to the 1983 federal rule, except that it requires a member of the Oregon Bar to sign all pleadings and other legal documents filed in Oregon state court. OR. R. CIV. P. 17. An Oregon statute provides that a court, in its discretion, can award attorney fees against a litigant who "wilfully disobeyed a court order or acted in bad faith, wantonly or solely for oppressive reasons." OR. REV. STAT. § 20.105 (1988).

*Rhode Island*—Unlike the other states in this category, Rhode Island maintains a procedural rule that follows the pre-1983 version of Federal Rule 11. R.I. R. CIV. P. 11. A state statute, however, adopts the 1983 version of Rule 11 and thus is the principal sanctions provision in Rhode Island. R.I. GEN. LAWS § 9-29-21 (Supp. 1992).

*South Dakota*—The South Dakota version of Rule 11 is almost identical to the 1983 federal version. S.D. CODIFIED LAWS ANN. § 15-6-11(a) & (b) (Supp. 1993). A South Dakota statute provides, in addition, that "[i]f a civil action or special proceeding is dismissed and if the court determines that it was frivolous or brought for malicious purposes, the court may order the plaintiff to pay part or all expenses incurred by the person defending the matter, including reasonable attorneys' fees." *Id.* § 15-17-51.

*Washington*—The Washington version of Rule 11 is, with a few minor changes, almost identical to the 1983 federal version. WASH. SUP. CT. R. 11. The Washington Code provides that a court can, in its discretion, assess a fee award against a litigant who files a claim or defense that is "frivolous and advanced without reasonable cause." WASH. REV. CODE § 4.84.185 (Supp. 1993). The state Rule 11 provision, however, has had a much greater effect upon litigation in Washington state court. *See* Tausend & Johnsen, *supra* note 67, at 443.

*Wyoming*—The Wyoming version of Rule 11 is identical to the 1983 federal version, except that it requires a member of the Wyoming bar to sign all pleadings and papers filed in Wyoming state court. WYO. R. CIV. P. 11. A Wyoming statute likewise is almost identical to the 1983 version of Federal rule 11, but the statute, unlike the Wyoming rule, authorizes Wyoming courts to grant sanctions "up to double the amount of the reasonable expenses incurred by the other party . . . including reasonable attorney's fees." WYO. STAT. § 1-14-128 (1992).

Because the Rule 11 provision in these states uses an objective standard, and thus is easier to prove, it sees more use than the other sanctions provisions. Indeed, in all of these states, the supplemental sanctions provisions do little more than reinforce the Rule 11 provisions. If the supplemental sanctions provision is a fee shifting statute, in practice all it accomplishes is to ensure that frivolous claims falling within its terms are subject to a fee award, rather than some other form of sanction. *Cf. supra* note 73 and accompanying text (observing that the 1983 version of Federal Rule 11 did not require that district courts impose fee awards).

171. Only one low threshold state, Georgia, has deviated from the Rule 11 pattern and fashioned, as its principal sanctions provision, a provision that uses an objective standard. Georgia, in fact, has no Rule 11 equivalent. Its principal sanctions provision is a statute which provides (1) that a Georgia court must award attorney fees and expenses of litigation against a litigant who asserts a claim or defense "with respect

from each other in language and scope, the sanctions schemes in each of these categories share the characteristic of chilling litigants from bringing colorable claims.

Just as the defect in the high threshold model is that it confines *all* sanctions to conduct that reflects subjective bad faith,[172] the defect in the low threshold model is that it confines *all* sanctions to conduct that breaches an objective standard of reasonableness. None of the low threshold states limits the most severe sanctions, such as large fee awards, to conduct that reflects subjective bad faith. Accordingly, the threat of severe sanctions in low threshold states will influence the filing decisions of potential litigants who, albeit in good faith, desire to pursue claims or defenses that are difficult to prove.[173] These potential litigants realize that if their claims or defenses are for one reason or another unsuccessful, opposing counsel might file a motion for sanctions alleging that the unsuccessful claims or defenses violated the prevailing objective standard.[174] Further, these litigants recognize that

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to which there existed such a complete absence of any justiciable issue of law or fact that it could not be reasonably believed that a court would accept the asserted claim [or] defense" and (2) that a Georgia court can, in its discretion, award attorney fees and expenses against a litigant who asserts a claim or defense either that lacks substantial justification, that was interposed for delay or harassment, or that unnecessarily expanded the proceedings. GA. CODE ANN. § 9-15-14 (Michie 1993). Other Georgia sanctions powers supplement the principal sanctions provision. A Georgia statute allows a jury in civil litigation to award expenses against a defendant who has "been stubbornly litigious or has caused the plaintiff unnecessary trouble and expense." *Id.* § 13-6-11. Moreover, a Georgia Supreme Court decision, *Yost v. Torok*, gives litigants a tort cause of action for special damages against opposing litigants who pursued a claim or defense that either lacked substantial justification or lacked a justiciable issue of law or fact. Yost v. Torok, 344 S.E.2d 414, 417 (Ga. 1986), The Georgia legislature has since codified the *Yost* cause of action, creating a statutory action for "abusive litigation." GA. Code Ann. 171. § 51-7-81 to 85 (Michie 1993). *See generally* Robert A. Elsner & John A. Bender, Jr., *The Torok Tort: Recovery for Abusive Litigation*, 23 GA. ST. B.J. 84 (1986); Charles T. Huddleston & J. Randolph Evans, *Litigators on Trial: Professionalism Implications of* Yost v. Torok, 23 GA. ST. B.J. 88 (1986); L. Ray Patterson, Yost v. Torok: *Taking Legal Ethics Seriously*, 4 GA. ST. U.L. REV. 23 (1988); Anne Proffitt Dupre, Comment, Yost v. Torok *and Abusive Litigation: A New Tort to Solve an Old Problem*, 21 GA. L. REV. 429 (1986).

172. *See supra* text accompanying notes 159-60.

173. *Cf. supra* text accompanying notes 72-78 (discussing the chilling effect of the 1983 amendments to Federal Rule 11).

174. *See* Hinerfeld, *supra* note 62, at 82. A motion for sanctions is becoming an automatic response to a losing legal argument. *Id.* "'There's an attitude that losing is sanctionable,' says San Francisco lawyer Alvin H. Goldstein Jr., former chair of the State Bar's Litigation Section. 'The rationale is that if you lose you shouldn't have

an objective standard is unpredictable: an argument which is reasonable to one judge, even if unpersuasive, might be both unpersuasive and unreasonable to another judge.[175] Faced with the prospect of bearing not just an undesirable judgment but also a fee award—the predominant form of sanction[176]—potential litigants in low threshold states often will abandon claims or defenses which, while tenable, stand a less than even chance of succeeding.[177]

A prime example of a state in which large sanctions produce a chilling effect upon litigation is Georgia—the one low threshold state that does not use a Rule 11 duplicate.[178] Georgia has perhaps the most repressive sanctions scheme among the fifty states. The principal sanctions statute in Georgia declares that a trial court must impose an award of fees and expenses against a litigant who brings a claim or

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been there to begin with.'" *Id.* at 33.

175. *Cf. supra* text accompanying notes 66-71 (observing that the objective standard in the 1983 amendments to Federal Rule 11 led to inconsistent results). Using an objective standard to test the reasonableness of a legal conclusion presumes that the judge will be competent "to ascertain what the conclusion should have been." Webster, *supra* note 41, at 301. This presumption does not hold true in all cases. Just as the biases of a lawyer will color her perception of whether her client has a legitimate claim or defense, the biases of a judge will color her perception of whether a lawsuit is reasonable.

Judge Mark Cady of the Iowa courts argues that an objective standard is no less unpredictable for lawyers and litigants than it is for defendants in negligence actions. He suggests, "Our society judges others by an objective standard and lawyers are entitled to no less." Cady, *supra* note 149, at 503. His argument is too simplistic. When the circumstances require a more predictable rule of law, our society will in fact judge others by a subjective standard, rather than by an objective standard. State courts use an objective standard in negligence actions because the principal function of tort law is to compensate the victim. But while sanctions provisions might incidentally serve to compensate the victim of a frivolous lawsuit, the principal function of sanctions provisions is to punish or deter the wrongdoer. *See infra* Section III.B, pp. 1134-52. Laws that carry the stigma of severe punishment, such as criminal laws, typically employ a subjective standard—the circumstances demand a greater degree of precision in ensuring that the object of the punishment is in fact a wrongdoer. *See* OLIVER WENDELL HOLMES, THE COMMON LAW 107-10 (1881).

176. Besides the various Rule 11 duplicates that authorize fee awards as one permissible form of sanction, many low threshold states also have supplemental sanctions statutes that allow or require state courts to impose fee awards against litigants who file claims or defenses that breach an objective standard. *See supra* notes 170-71.

177. *See* Hess, *supra* note 62, at 345. The chilling effect of low threshold state sanctions schemes is much more likely to be felt upon claims than defenses. Empirical research in Washington state court has revealed, for example, that the Washington state sanctions scheme has "a disproportionate impact on plaintiffs," and thus, has a greater chilling effect on plaintiffs. *Id.* at 346.

178. *See supra* note 171.

defense that lacks "a justiciable issue of law or fact."[179] In addition, the statute provides that a trial court can, in its discretion, impose an award of fees against a litigant who brings a claim or defense that lacks "substantial justification."[180] And as if that were not enough, the Georgia legislature, codifying the decision of the Supreme Court in *Yost v. Torok*,[181] has created a tort cause of action that a person can assert against a litigant who brings a claim or defense with malice and without substantial justification.[182] These measures raise the threat of large sanctions for the violation of an unpredictable objective standard.

The Georgia sanctions measures, taken together, have effected a dramatic increase in sanctions litigation in the Georgia state courts. Although the empirical data is sketchy,[183] the available evidence suggests that sanctions motions and *Yost* actions are common responses to claims and defenses filed in Georgia state courts.[184] The case law, in

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179. GA. CODE ANN. § 9-15-14(a) (Michie 1990). *See supra* note 171.

180. GA. CODE ANN. § 9-15-14(b) (Michie 1990). The statute defines the term "lacked substantial justification" to mean "substantially frivolous, substantially groundless, or substantially vexatious." *Id.* By comparison, the term "complete absence of any justiciable issue of law or fact" in subsection (a) means, presumably, completely frivolous or completely groundless. *See* Moore v. Harris, 410 S.E.2d 804, 805 (Ga. Ct. App. 1991).

181. 344 S.E.2d 414 (Ga. 1986).

182. GA. CODE ANN. § 51-7-81 (Michie 1993). The "abusive litigation" or *Yost* cause of action in Georgia goes farther than the malicious prosecution causes of action in most states. Keeling, *A Prescription for Healing the Crisis in Professionalism*, *supra* note 6, at 57-58. According to the supreme court in *Yost*:

> Any party who shall assert a claim, defense, or other position with respect to which there exists such a complete absence of any justiciable issue of law or fact that it reasonably could not be believed that a court would accept the asserted claim, defense, or other position; or any party who shall bring or defend an action, or any part thereof, that lacks substantial justification, or is interposed for delay or harassment; or any party who unnecessarily expands the proceeding by other improper conduct, including, but not limited to, abuses of discovery procedures, shall be liable in tort to an opposing party who suffers damage thereby.

*Yost*, 344 S.E.2d at 417. While the decision in *Yost* allowed the claimant to recover "special damages other than attorneys fees and expenses of litigation," *Id.* The abusive litigation statute allows the claimant to recover all allowable damages, "including costs and expenses of litigation" and reasonable attorneys' fees." GA. Code Ann. § 51-7-83 (Michie 1993).

183. The one empirical survey examining Georgia sanctions litigation addresses the opinions of 17 trial judges in Atlanta. Michael Gruber, *Battling the Many-Headed Hydra: Abusive Litigation in Georgia*, 25 GA. ST. B.J. 65, 69 (1988).

184. *See* Keeling, *A Prescription for Healing the Crisis in Professionalism*, *supra*

fact, indicates that sanctions litigation in Georgia has become almost a cottage industry. Dozens of published Georgia decisions have addressed one or another of the Georgia sanctions measures,[185] and undoubtedly, dozens more unpublished decisions or sanctions orders have been issued.[186] Two factors have contributed to this flood of sanctions litigation: (1) the objective standards in the Georgia sanctions measures encourage litigants to assert sanctions motions and claims as a means of recovering fees[187] and (2) the comprehensive nature of the

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note 6, at 59; *see also* Dupre, *supra* note 171, at 464 n.167 ("'I'll *Yost* you' is becoming the battle-cry of the Georgia litigator."). One commentator found in a survey of 17 trial court judges in Atlanta that "about one-third of the judges felt that parties rarely failed to assert *Yost* claims when they could properly do so." Gruber, *supra* note 183, at 70.

Interestingly, although Gruber recognized that a significant portion of the judges he surveyed believed that parties asserted *Yost* claims frequently, he concluded that "the flood of abusive litigation counterclaims which was anticipated two years ago has not materialized." *Id.* at 65. His conclusion, however, seems inconsistent with the published case law. *See infra* text accompanying note 185. Moreover, the statistics that Gruber gleaned from his survey are less than conclusive. According to Gruber, 13 of the judges reported that less than 25% of the cases on their dockets included requests for sanctions under § 9-15-14 or *Yost*, one judge reported that between 25% to 50% of his cases included sanctions requests, and three judges gave no answer. Gruber, *supra* note 183, at 69. Even if 10% or 15% of the 100,000 or so civil cases handled annually in the Georgia courts included sanctions requests, the result could in fact be a flood of sanctions litigation. *See* Keeling, *A Prescription for Healing the Crisis in Professionalism*, *supra* note 6, at 59 n.168.

185. For a small sample of the published case law discussing the Georgia sanctions measures, see Porter v. Felker, 405 S.E.2d 31, 32 (Ga. 1991) (noting that denial of summary judgment does not preclude sanctions under § 9-15-14); Haggard v. Board of Regents, 360 S.E.2d 566, 568 (Ga. 1987) (affirming fee award of $15,403.64 under § 9-15-14); S. Hammond Story Agency, Inc. v. Baer, 414 S.E.2d 287, 288 (Ga. Ct. App. 1991) (affirming fee award under § 9-15-14); Moore v. Harris, 410 S.E.2d 804, 806 (Ga. Ct. App. 1991) (affirming fee award under § 9-15-14); Patterson v. Butler, 409 S.E.2d 531, 537 (Ga. Ct. App. 1991) (affirming fee award under § 9-15-14); Covrig v. Miller, 406 S.E.2d 239, 241 (Ga. Ct. App. 1991) (finding that denial of *Yost* damages did not preclude award of fees under § 9-15-14); Souder v. Webb, 401 S.E.2d 630, 631 (Ga. Ct. App. 1991) (affirming $150 fee award against pro se litigant under § 9-15-14); Haywood v. Aerospec, Inc., 388 S.E.2d 367, 369 (Ga. Ct. App. 1989) (affirming fee award under § 9-15-14); Maddox v. Brown, 387 S.E.2d 584, 586 (Ga. Ct. App. 1989) (finding sufficient evidence for a recovery under *Yost* claim), *cert. denied*, 408 S.E.2d 719 (GA. 1991).

186. Certainly, using statistics on reported and unreported opinions to draw generalizations about sanctions activity is problematic. BURBANK, *supra* note 55, at 56. "Apart from the obvious problems of under-inclusiveness and double-counting, those statistics are subject to question on the basis of possible biases in publication practices and possible differential rates of appeal." *Id.* Nonetheless, while these statistics might not give an accurate picture of the exact amount of sanctions orders or proceedings, they can be useful in calculating the trends in sanctions activity. Vairo, *Where We Are*, *supra* note 105, at 478. The amount of sanctions decisions emanating from Georgia courts reflects a clear trend of increasing sanctions activity.

187. *See* Keeling, *A Prescription for Healing the Crisis in Professionalism*, *supra*

sanctions measures implies that Georgia courts must be diligent in eradicating frivolous litigation.[188] The flood of sanctions litigation increases the odds that a Georgia litigant will incur sanctions for an unsuccessful legal argument and, thus, magnifies the fear that litigants might feel when asserting novel or creative propositions.[189] Rather than submit themselves to possible sanctions, some Georgia litigants will, inevitably, choose to abandon otherwise legitimate claims or defenses.[190]

Obviously, Georgia is a good example of the chilling effect that low threshold sanctions schemes can exert upon litigation. The flood of sanctions litigation in Georgia ensures that litigants in the state remain conscious of the threat that their claims or defenses might bear sanctions. Nonetheless, low threshold sanctions schemes exert a chilling effect upon litigation even in states in which courts impose sanctions infrequently. As a general practice, trial courts in the states that have adopted the 1983 version of Federal Rule 11, either as their principal or sole sanctions provision,[191] do not impose sanctions as often as the federal courts.[192] Although state courts are becoming less reluctant to impose Rule 11 sanctions,[193] state courts still do not experience the

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note 6, at 59-60.

188. Yost v. Torok, 344 S.E.2d 414, 415 (Ga. 1986) ("There is a continuing concern over the abuse of the judicial process, and a justifiable interest in its prevention . . . . There is the need to contain the corrupting effect of groundless claims, and of those which, while having *some* merit, are brought with the principal intent or effect of harassment, coercion, or embarrassment.")

189. Heightening the repressive effect of the Georgia sanctions scheme is the fact that there are significant differences between the scope of § 9-15-14 and the scope of the *Yost* cause of action. Unlike § 9-15-14 for instance, the statute that codifies the decision in *Yost* specifically directs its remedies against parties, not lawyers. GA. Code Ann. § 51-7-81 (Michie 1993); *See Yost*, 344 S.E.2d at 417 ("Any *party* who shall assert a [frivolous] claim . . . shall be liable in tort to an opposing party who suffers damage thereby."). *See* Dupre, *supra* note 171, at 465. Thus, because *Yost* strikes so close to home, litigants—who otherwise might have been willing to assert a claim on the word of their lawyer that the claim is meritorious—might have second thoughts about advancing cause of actions that would elicit a *Yost* claim. *Id.*

190. *See* Patterson, *supra* note 171, at 49; Dupre, *supra* note 171, at 443.

191. *See supra* notes 169-70.

192. *See* Hess, *supra* note 62, at 325-26 (observing that Washington courts impose few Rule 11 sanctions); Sanner & Tobias, *supra* note 75, at 325 (observing that Montana courts impose few Rule 11 sanctions); Pierre G. Walker III, Note, *Chris and Todd, Inc. v. Arkansas Department of Finance and Administration: Rule 11 in the Federal Courts—Unanswered Questions in Arkansas*, 43 ARK. L. REV. 847, 872 (1990) (observing that Arkansas courts impose few Rule 11 sanctions).

193. *See* Lucian T. Pera, *Rule 11 Comes to Tennessee: The Emerging State Law of*

same degree of satellite litigation that has plagued the federal courts under the federal rule.[194] Nonetheless, while the odds of incurring Rule 11 sanctions are greater in federal court than in state court, the mere potential that low threshold sanctions schemes create for large sanctions awards is sufficient to inhibit creative advocacy.

Empirical research in the Washington state courts has revealed, for instance, that the threat of large sanctions awards under the Washington version of Rule 11 is just as apt to chill colorable litigation as the threat of sanctions under Federal Rule 11.[195] The research compared sanctions litigation in the United States District Court for the Eastern District of Washington under Federal Rule 11 with sanctions in Spokane County Superior Court under Washington Superior Court Rule 11. Specifically, the author of the study, Professor Gerald F. Hess of Gonzaga University School of Law, reviewed the files of cases involving sanctions in both the federal and state trial courts, and then, he surveyed the lawyers who practiced in those courts about their experiences with Rule 11 sanctions.[196] The resulting data indicated that, as a consequence of Rule 11, 20% of the respondents who practiced in state court exhibited a decreased willingness to make arguments to extend or change the law—compared with 11% of the respondents who practiced in federal court.[197] Fourteen percent of the respondents who practiced in state court had declined to assert meritorious claims or defenses because of their concern about Rule 11 sanctions—compared with 23% of the respondents who practiced in federal court.[198] In both federal and state court, low threshold sanctions schemes produced a similar chilling effect.

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*Sanctions*, TENN. B.J., Jan./Feb. 1992, at 24 ("Until recently, for lawsuits filed in Tennessee courts the simple answer has been that, although state courts have had their own, substantively identical, Rule 11 since 1987, most state judges have been much more reluctant than federal judges to consider imposing sanctions. Well, times are changing."); Sanner & Tobias, *supra* note 75, at 325 ("The Montana Supreme Court has issued relatively few Rule 11 opinions, and there apparently has been comparatively little Rule 11 activity in the state district courts. Nonetheless, the supreme court has published more decisions recently, while Rule 11 activity seems to be increasing in the trial courts.").

194. *See* Hess, *supra* note 62, at 345 ("satellite litigation is not a serious problem in state court").

195. *Id.* (finding that while the state courts in Washington assessed far fewer Rule 11 sanctions than the federal courts, the chilling effect of Rule 11 "in state court was similar to its effect in federal court"). *Cf.* Tausend & Johnsen, *supra* note 67, at 443 ("While far fewer cases involving sanctions under amended Washington State CR 11 have reached the appellate level, the state appellate courts seem to give solid encouragement to the use of the amended rule to curb abuses in attorney conduct.").

196. Hess, *supra* note 62, at 316-17 (discussing the methodology of the study).

197. *Id.* at 337.

198. *Id.*

Because low threshold sanctions schemes chill legitimate claims and defenses, the low threshold model is just as inadequate as the high threshold model in providing a balanced approach to frivolous litigation. When sanctions schemes are so severe that the mere fact of their existence exerts a chilling effect upon litigation, the schemes can, potentially, retard the development of the law. The law is not, and should not be, static. It must evolve over time to reflect changing economic and sociological circumstances. But if litigants are inhibited from pursuing attempts to change the law, the law will not evolve and, accordingly, will not be able to address the different circumstances of an advancing society. To ensure that the law will evolve, the courts must remain open to litigants who desire to change existing law.[199] Certainly, the courts should possess sufficient measures with which to control litigation that abuses the judicial process, but the courts should not be permitted to impose repressive sanctions against litigants whose offense is, simply, to press a position that departs from the current popular conception of the law.[200] Sanctions schemes must strive for a reasonable balance between redressing litigation abuse and preserving free access to the courts.

3. The Hybrid Model

Of the three sanctions models, the hybrid model goes the farthest in attempting to accommodate the competing goals of curbing litigation abuse and preserving free access. States that follow this model preserve an objective standard for the imposition of sanctions, but nonetheless, they incorporate into their sanctions schemes one or more procedural devices intended to mitigate the repressive effects of the objective standard. The states that have enacted hybrid sanctions schemes divide into four categories: (1) states that have adopted a hybridized version of the 1983 Federal Rule 11 as their sole sanctions provision;[201] (2) states

199. *See infra* Section III.A, pp. 1126-34.

200. *See infra* Section IV, pp. 1152-59.

201. Three states have enacted as their sole sanctions provision a hybridized procedural rule modeled upon the 1983 version of Federal Rule 11:

*Alaska*—The Alaska version of Rule 11 is almost identical to the 1983 federal rule, except that since 1990 the Alaska rule does not contain a sentence that authorizes courts to award sanctions. *See* ALASKA R. CIV. P. 11. Interpreting this rule, the Alaska courts have concluded that sanctions are discretionary, not mandatory, for a violation of the rule. *In re* Benson, 816 P.2d 200, 201 n.1 (Alaska 1991). Significantly, in Alaska, unlike in other states, prevailing

that have adopted a hybridized version of the 1983 Federal Rule 11 as their principal, but not sole, sanctions provision;[202] (3) states that have

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parties in litigation receive a portion of their attorney fees as a matter of course. ALASKA R. CIV. P. 82; *see also* ALASKA STAT. § 09.60.010 (1993) (requiring supreme court to "determine by rule or order what costs, if any, including attorney fees, shall be allowed the prevailing party in any case"). *See* John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AMER. U.L. REV. 1567, 1622-26 (1993); Gregory J. Hughes, Comment, *Award of Attorney's Fees in Alaska: An Analysis of Rule 82*, 4 UCLA-ALASKA L. REV. 129, 139-45 (1974); Kevin Michael Kordziel, Note, *Rule 82 Revisited: Attorney Fee Shifting in Alaska*, 10 ALASKA L. REV. 429, 448-53 (1993).

*Illinois*—The Illinois sanctions provision is substantially similar to the 1983 version of Federal Rule 11, but it contains two significant differences. First, unlike the mandatory federal rule, the Illinois rule states that a court "may" in its discretion, but need not, award an appropriate sanction for a violation of the rule. *See* ILL. S. CT. R. 137. Second, the Illinois rule states that the trial judge must "set forth with specificity the reasons and basis of any sanction so imposed either in the judgment order itself or in a separate written order." *Id. See generally* Donald B. Hilliker & David F. Wentzel, *Coping in the '90s: The Demand on Illinois Litigators Under Supreme Court Rule 137*, 80 ILL. B.J. 168, 168 (1992); Jeffrey A. Parness, *Observations on Recent Efforts to Deter Frivolous Papers in the Illinois Circuit Courts*, 21 LOY. U. CHI. L.J. 859, 860-61 (1991); George W. Timberlake & Nancy Pionk, *Attorney Sanctions in Illinois Under Illinois Supreme Court Rule 137*, 20 LOY. U. CHI. L.J. 1027, 1027-28 (1989).

*Kentucky*—The Kentucky version of Rule 11 is almost identical to the 1983 federal rule, except that it requires that courts "postpone ruling on any Rule 11 motions filed in the litigation until after entry of a final judgment." *See* KY. R. CIV. P. 11. Further, unlike the federal appellate courts, at least one Kentucky appellate court has reviewed a Rule 11 sanctions decision under a tripartite standard of review. Clark Equip. Co. v. Bowman, 762 S.W.2d 417, 421 (Ky. Ct. App. 1988). *Cf. supra* note 101.

202. Seven states have adopted a hybridized version of 1983 Federal Rule 11 as their principal, but not sole, sanctions provision:

*Arizona*—The Arizona version of Rule 11 is virtually indistinguishable from the 1983 federal rule. *See* ARIZ. R. CIV. P. 11. *See generally* Chad Steven Campbell, Note, *Risky Business: The Nuts and Bolts of Amended Rule 11(a)*, 19 ARIZ. ST. L.J. 145, 145-46 (1987). Significantly, though, the comments adjoining the Arizona rule, and the Arizona cases interpreting the rule, adopt a conduct rather than product approach to Rule 11 sanctions. ARIZ. R. CIV. P. 11 state bar committee note ("The signing of a pleading, motion or other paper . . . now constitutes a certification of a *bona fide* belief formed after reasonable inquiry that it is well grounded in fact and warranted by law or a good faith argument for extension, modification or reversal of existing law . . . ."); *see also* Boone v. Superior Court, 700 P.2d 1335, 1341 (Ariz. 1985) (en banc) ("The new rule requires no more than a good faith belief, *formed on the basis of [a] reasonable investigation*, that a colorable claim exists."). *Compare* Wright v. Hills, 780 P.2d 416, 422 (Ariz. Ct. App. 1989) (suggesting that Rule 11 standard does not incorporate any notion of subjec-

tive good faith) *with* James, Cook & Hobson, Inc. v. Lake Havasu Plumbing & Fire Protection, 868 P.2d 329 (Ariz. Ct. App.) (abrogating *Wright*), *rev. denied* (March 1, 1994). Supplementing the Rule 11 provision, an Arizona statute requires that a court award attorney fees to a claimant when clear and convincing evidence demonstrates that the opposing litigant filed a claim or defense that "constitutes harassment, is groundless *and* [was] not made in good faith." ARIZ. REV. STAT. ANN. § 12-341.01 (1992).

*Colorado*—The Colorado version of Rule 11 is almost identical to the 1983 federal rule, except that the Colorado rule adds a safe harbor provision which allows litigants to withdraw or dismiss frivolous pleadings and papers with impunity from sanctions. *See* COLO. R. CIV. P. 11. In addition, a Colorado statute requires that courts impose attorney fees against any lawyer or litigant who brought an action which lacked substantial justification, was interposed for delay or harassment, or unnecessarily expanded proceedings. COLO. REV. STAT. § 13-17-102(4) (1987). As used in the statute, the term "lacked substantial justification" means "substantially frivolous, substantially groundless, or substantially vexatious." *Id.* Like the procedural rule, the statute extends a safe harbor that allows litigants to withdraw or dismiss frivolous actions with impunity. *Id.* § 13-17-102(5).

*Hawaii*—The Hawaii version of Rule 11 is almost identical to the 1983 federal rule. *See* HAW. R. CIV. P. 11. Until recently, the Hawaii courts reviewed Rule 11 sanctions decisions under a tripartite standard rather than the abuse of discretion standard that most state appellate courts use to review sanctions decisions. *Compare* Coll v. McCarthy, 804 P.2d 881, 886-87 (Haw. 1991); *see also* DeSilva v. Burton, 832 P.2d 284, 288 (Haw. Ct. App. 1992), *overruled by* Matter of Hawaiian Flour Mills, Inc., 868 P.2d 419 (Haw. 1994). In addition, a Hawaii statute allows a Hawaii court, "as it deems just," to assess a fee award against a litigant who brings a frivolous claim or defense. HAW. REV. STAT. § 607-14.5 (Supp. 1992). In a decision interpreting the statute, the Hawaii Supreme Court has defined the term "frivolous" narrowly, concluding that fee awards are appropriate under the statute if the challenged claim or defense is "manifestly and palpably without merit, so as to indicate bad faith." *Coll*, 804 P.2d at 887 (quoting Kawaihae v. Hawaiian Ins. Co., 619 P.2d 1086, 1091 (Haw. Ct. App. 1980)). Obviously, the Hawaii version of Rule 11 has a much more significant impact than the sanctions statute. Given the apparent change of perspective in the Hawaii Supreme Court, from the time of *Coll* to *Hawaiin Flower Mills*, though, Hawaii may be the one state to be regressing from a hybrid model to a low threshold model. *See infra* note 212.

*Louisiana*—The Louisiana version of Rule 11 is similar to the 1983 federal rule, but the Louisiana rule contains two significant differences. First, the Louisiana rule states that a court must conduct a hearing before it can impose sanctions. LA. CODE CIV. PROC. ANN. art. 863(E) (West Supp. 1993). Second, the Louisiana rule includes a safe harbor provision which states that a court cannot impose a sanction for an original petition that is filed within 60 days of a prescriptive date and then dismissed within 90 days later. *Id.* art. 863(F). *See generally* Honsinger, *supra* note 16, at 348. Louisiana statutes

also contain a sanctions provision that allows courts to award fees against a litigant who brings a "frivolous" discrimination claim. LA. REV. STAT. ANN. § 49:145 (West 1987).

*Michigan*—The Michigan version of Rule 11 operates much like the 1983 federal rule, except that the Michigan rule specifies that it does not allow punitive damages as sanctions. *See* MICH. R. CIV. P. 2.114. Further, the Michigan appellate courts review Rule 2.114 sanctions decisions under a tripartite standard. *See* Contel Sys. Corp. v. Gores, 455 N.W.2d 398 (Mich. Ct. App. 1990). Besides the Rule 11 provision, a Michigan statute also provides that, upon the motion of a prevailing party in a civil lawsuit, a Michigan court must award attorney fees and costs against a litigant who initiated a claim or defense that meets one of the following conditions: (1) it was initiated with the purpose of harassing, embarrassing or injuring the prevailing party; (2) it lacks a reasonable factual basis; or (3) it is devoid of arguable legal merit. MICH. COMP. LAWS ANN. § 600.2591 (West Supp. 1993). But although Rule 2.114 is a hybridized rule, it is still broader than the Michigan statute, which applies solely to prevailing parties; accordingly, Rule 2.114 is the principal sanctions provision in Michigan. *See* JAMES A. MARTIN, ROBERT DEAN & ROBERT B. WEBSTER, MICHIGAN COURT RULES PRACTICE 62 (3d ed. Supp. 1992); L. Paul Hudgins, Comment, *Vexatious and Frivolous Lawsuits: Attorney Sanctions in Michigan*, 8 COOLEY L. REV. 657, 670-71 (1991); Marianne E. Lebeuf, Note, *Frivolous and Abusive Litigation Practices: A Survey of Michigan Procedural and Substantive Remedies*, 64 U. DET. L. REV. 247, 269 (1986).

*Utah*—The Utah version of Rule 11 is almost identical to the 1983 federal rule. *See* UTAH R. CIV. P. 11. The Utah appellate courts, however, review Rule 11 sanctions decisions under a tripartite standard rather than the abuse of discretion standard that most state appellate courts use to review sanctions decisions. *See* Barnard v. Sutliff, 846 P.2d 1229, 1235 (Utah 1992). A Utah statute requires a Utah court to award fees to a prevailing litigant "if the court determines that the action or defense to the action was without merit *and* not brought or asserted in good faith." UTAH CODE ANN. § 78-27-56 (1992) (emphasis added). The statute gives a court discretion to reduce or even decline a fee award if either (1) the offending litigant files an affidavit of impecuniosity or (2) the court enters into the record the reasons for not awarding fees. *Id. See* Kevin Richards, Comment, *Recent Developments in Utah Law: The Awarding of Attorney's Fees in Frivolous Law Suits*, 1989 UTAH L. REV. 342, 345-46.

*Wisconsin*—The Wisconsin version of Rule 11 is similar to the 1983 federal rule, except that the Wisconsin rule gives trial courts the discretion to refuse a sanction award even if the circumstances establish a technical violation of the rule. *See* WIS. STAT. ANN. § 802.05 (West Supp. 1992). Besides § 802.05, the Wisconsin statutes also include a provision that requires a court to impose costs and fees against a litigant who either (1) brings or continues a claim or defense "in bad faith, solely for purposes of harassing or maliciously injuring another" or (2) brings a claim or defense that she know or should have known "was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law." *Id.* § 814.025. *See* Jay W. Endress, Comment, *Is Wisconsin's Frivolous Claim Statute Frivolous? A Critical Analysis of Wis. Stat. § 814.025*, 68 MARQ. L. REV. 279, 298-99 (1985) (arguing that § 814.025 is ineffective because both prongs of the statute have an element of subjec-

created, as their principal sanctions provision, a hybridized sanctions statute other than a Rule 11 duplicate;[203] and (4) states that supple-

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tivity). Section 814.025 states, however, that § 802.05 controls over § 814.025 in instances in which both sanctions provisions are applicable. WIS. STAT. ANN. § 814.025 (West Supp. 1992).

As was the case in the low threshold states that supplemented a sanctions provision based upon the 1983 version of Federal Rule 11 with a sanctions statute, the supplemental statutes in these hybrid states do little more than reinforce the dominant Rule 11 provisions. *See supra* note 170.

203. Three states, although perhaps borrowing a few elements from Rule 11, have deviated from the Rule 11 model and drafted their own unique hybridized sanctions schemes:

*Nebraska*—The Nebraska sanctions statute requires Nebraska courts to assess reasonable fees and costs against any lawyer or litigant who asserts a claim or defense "which a court determines is frivolous or made in bad faith." NEB. REV. STAT. § 25-824(2) (1989). If a court grants a sanction award, the statute requires that the court list the reasons for the award. *Id.* § 25-824.01. Moreover, the statute provides a safe harbor: sanctions are unavailable against a lawyer or litigant who dismisses a claim within a reasonable time after the person knew or should have known that he would not prevail. *Id.* § 25-824(5).

*New York*—The principal New York sanctions provision states that a New York court can, in its discretion, award fees or other financial sanctions against a lawyer or litigant who engages in "frivolous conduct." N.Y. RULES § 130-1.1. The provision defines "frivolous conduct" as conduct—i.e., a pleading, motion or other paper—that either (1) is "completely without merit in law or fact and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law" or (2) is "undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another." *Id.* The provision requires that before imposing sanctions, a court must make written factual findings stating its reasons for doing so, and the provision limits the total amount of a financial award, whether a fee award or some other form of financial sanction, to $10,000. *Id.* § 130-1.2. A New York statute supplements the principal sanctions provision. The statute provides that a New York court must award reasonable attorney fees—not exceeding $10,000—against a litigant who asserts a frivolous claim or defense "in an action to recover damages for personal injury, injury to property or wrongful death." N.Y. CIV. PRAC. L. & R. § 8303-a(a) (McKinney Supp. 1993). The statute defines "frivolous" in much the same manner as does the principal New York sanctions provision. *Id.* § 8303-a(c). Essentially, the sanctions statute does nothing more than remove the discretion of the court to decline a sanctions award in the range of cases that fall within the scope of the statute. *See* DAVID D. STIEGEL, NEW YORK PRACTICE 633-34 (2d ed. 1991); *see also* Barbara A. Schaus, Comment, *Sanctions for Frivolous Litigation Take Hold in New York*, 38 BUFF. L. REV. 289, 304-05 (1990).

*Texas*—The Texas sanctions provision, like Federal Rule 11, requires that all pleadings or other legal documents filed in Texas state court must be signed.

ment a pre-1983 version of Federal Rule 11 with a hybridized sanctions statute.[204] Unfortunately, the hybrid sanctions schemes in these states

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*See* TEX. R. CIV. P. 13. According to the Texas rule, a signature upon a document filed in Texas court certifies that the signing individual has read the document and that, to the best of his knowledge and belief, the document "is not groundless and brought in bad faith or groundless and brought for the purpose of harassment." *Id.* If a document is signed in violation of this requirement, the court must impose an appropriate sanction. *Id.* The rule declares, however, that a court must presume that legal documents are filed in good faith. *Id.* Moreover, the rule states that "[n]o sanctions . . . may be imposed except for good cause, the particulars of which must be stated in the sanction order." *Id. See* Watkins v. Pearson, 795 S.W.2d 257, 260 (Tex. Ct. App. 1990) ("A mere recitation that 'good cause being shown' does not satisfy [Rule 13] . . . . [T]he rule inherently makes it incumbent upon the trial court to point out with sufficient particularity the offensive acts so that remedial action may be taken by the party or his counsel."). In effect, the Texas rule lessens the burden that a pleader must bear in proving that she acted appropriately: "under state practice, a pleader satisfies the requirement if *any* basis exists in law or fact; under federal practice, a pleader must meet a much tougher standard, by demonstrating a 'well-grounded' basis." REPORT OF TEXAS SUPREME COURT TASK FORCE ON SANCTIONS 69-70 (1992). *See* David J. Beck, *Sanctions Under New Rule 13: A More Effective Tool to Prevent Overzealous Advocacy*, 51 TEX. B.J. 1120, 1121 (1988); Alan B. Rich, *Certified Pleadings: Interpreting Texas Rule 13 in Light of Federal Rule 11*, 11 REV. LITIG. 59, 75-79 (1991).

204. Eight states supplement a sanctions provision based upon the pre-1983 version of Rule 11 with a hybridized sanctions statute that uses an objective standard to define conduct that merits sanctions:

*Alabama*—The Alabama version of Rule 11 is almost identical to the pre-1983 version of the federal rule, except that the Alabama rule applies to motions and other papers as well as pleadings—an addition that the federal rule did not adopt until the 1983 amendments. *See* ALA. R. CIV. P. 11. The more significant Alabama sanctions provision is the Alabama Litigation Accountability Act. *See* ALA. CODE §§ 12-19-270 to -276 (Supp. 1992). The Act requires that an Alabama court assess fees and costs against a lawyer or litigant who brings a claim or defense that the court determines to be "without substantial justification." *Id.* § 12-19-272(a). To mitigate the effect of the objective "without substantial justification" standard, however, the Act includes a safe harbor clause, *id.* § 12-19-272(d), and requires that a court make specific factual findings before imposing a fee award. *Id.* § 12-19-273.

*Indiana*—The Indiana version of Rule 11 is, with few significant deviations, almost identical to the pre-1983 version of the federal rule. *See* IND. TRIAL R. 11. Thus, the more significant sanctions provision in Indiana is a statute that allows a court, in its discretion, to award fees against a litigant who either (1) brought a frivolous, unreasonable, or groundless action or defense, (2) continued to litigate an action or defense after the action or defense became frivolous, unreasonable, or groundless *or* (3) litigated an action in bad faith. IND. CODE § 34-1-32-1 (1986). *See* Donald Clementson-Mohr & Jeffrey A. Cooke, *Frivolous, Unreasonable or Groundless Litigation: What Shall the Standard Be for Awarding Attorney's Fees?*, 22 IND. L. REV. 299, 304 (1988)

(observing that because the conditions in the Indiana statute are not stated in the disjunctive, the statute does not require subjective bad faith as a condition to a fee award); Andrew W. Hull, *Attorney's Fees for Frivolous, Unreasonable or Groundless Litigation*, 20 IND. L. REV. 151, 156-57 (1987) (same). The Indiana statute does not define the words "frivolous" or "groundless." *See* Clementson-Mohr & Cooke, *supra* at 304 ("The problem facing Indiana courts now is determining an appropriate legal standard with which to construe the language of [the statute]. 'Frivolous, unreasonable, or groundless' are not self-defining terms.").

*Maryland*—The Maryland version of Rule 11 is similar to the pre-1983 federal rule. *See* MD. R. CIV. P. 1-311. Maryland has supplemented its Rule 11 provision with another procedural rule which states that a Maryland court, in its discretion, can award reasonable fees against a lawyer or litigant whose conduct "in maintaining or defending any proceeding was in bad faith *or* without substantial justification." MD. R. CIV. P. 1-341 (emphasis added). The Maryland Supreme Court has required that sanctioning courts give advance notice before imposing an award of sanctions. Zdravkovich v. Bell Atlantic-Tricon Leasing Corp., 592 A.2d 498, 503 (Md. 1991). The supreme court also has concluded that sanctioning courts must make explicit factual findings supporting the award. *Id.*

*Mississippi*—The Mississippi version of Rule 11 is similar to the pre-1983 federal rule, except that the Mississippi rule applies to motions as well as pleadings. *See* MISS. R. CIV. P. 11. Moreover, and perhaps more significantly, the Mississippi rule includes a clause which allows a court, in its discretion, to award fees and expenses against a litigant who advances a motion or pleading that "is frivolous or is filed for the purpose of harassment or delay." *Id.* A Mississippi statute, the Litigation Accountability Act of 1988, offers an additional sanctions provision for the Mississippi courts. MISS. CODE ANN. §§ 11-55-1 to -15 (Supp. 1992). *But see* Robertson, *supra* note 48, at 116 (arguing that the Mississippi Act is not an independent sanctions provision in itself, but rather serves as an aid for interpreting Mississippi Rule 11). The Act requires that Mississippi courts must assess reasonable fees and costs against a lawyer or litigant who asserts a claim or defense that "is without substantial justification" or that "was interposed for delay or harassment." MISS. CODE ANN. § 11-55-5(1) (Supp. 1992). Like the Alabama Act, the Mississippi Act includes a safe harbor clause, *id.* § 11-55-5(2), and requires that sanctioning courts make factual findings supporting sanctions awards. *Id.* § 11-55-7.

*New Hampshire*—The New Hampshire version of Rule 11 is similar to the pre-1983 federal rule. *See* N.H. R. CIV. P. 15. Another New Hampshire rule states that a court "may assess reasonable costs, including reasonable counsel fees, against any party whose frivolous or unreasonable conduct makes necessary the filing of or hearing on any motion." N.H. R. CIV. P. 59. In addition, a New Hampshire statute provides that in tort or contract actions, the court can, in its discretion, award fees and costs against a litigant who asserts a claim or defense that "is frivolous or intended to harass the prevailing party." N.H. REV. STAT. ANN. § 507:15 (Supp. 1992). The statute adds that besides

awarding fees, the court should report the offensive conduct to the Supreme Court Committee on Professional Conduct. *Id. See* Merrick C. Weinstein, *Frivolous Lawsuits and RSA 507:15—Let the Proponent Beware*, 28 N.H. B.J. 103, 109-10 (1986).

*New Jersey*—The New Jersey version of Rule 11 is almost identical to the pre-1983 federal rule, except that the New Jersey rule states that both lawyers and pro se litigants can be subject to contempt for a willful violation. *See* N.J. R. CIV. P. 1:4-8. The New Jersey appellate courts have concluded that the rule forbids monetary sanctions, reasoning that the rule allows trial courts only to pursue a disciplinary action or a contempt proceeding against a lawyer who files a bad faith pleading. *See, e,g.*, Berthelsen v. Hall, 475 A.2d 1275, 1277 (N.J. Super. Ct. App. Div. 1984). Accordingly, the more prominent sanctions provision in New Jersey is the frivolous litigation statute, which states that a court, in its discretion, can impose reasonable attorney fees against a litigant who files a frivolous claim or defense. N.J. REV. STAT. § 2A:15-59.1(a) (Supp. 1993). The statute defines a "frivolous" claim or defense to include either (1) a claim or defense that "was commenced, used or continued in bad faith, solely for the purpose of harassment, delay or malicious injury" or (2) a claim or defense that the sanctioned litigant "knew, or should have known . . . was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law." *Id.* § 2A:15-59.1(b). *See* Iannone v. McHale, 583 A.2d 770, 776 (N.J. Super. Ct. App. Div. 1990) (stating that the statute imposes a standard of objective reasonableness); *see also* Nissenbaum & Lem, *supra* note 134, at 185 (same).

*Ohio*—The Ohio version of Rule 11 is almost identical to the pre-1983 federal rule. *See* OHIO R. CIV. P. 11. Like the original federal rule, the Ohio rule is based upon a narrow subjective standard. *See* Haubeil & Sons Asphalt and Materials, Inc. v. Brewer & Brewer Sons, Inc., 565 N.E.2d 1278, 1279 (Ohio Ct. App. 1989) ("Before a court may subject an attorney to 'appropriate action' under Civ. R. 11, the attorney must have *willfully* violated the rule . . . ."); *see also* James L. Graham, *Navigating Between the Scylla of Tolerating Litigation Abuse and the Charybdis of Chilling Legitimate Advocacy: An Overview of Federal Rule 11 and Comparable Ohio Provisions*, 18 CAP. U. L. REV. 1, 28 (1989) ("[T]he Ohio Rule is subject to the same limitations as was the original Federal Rule"). An Ohio statute offers a more objective standard for measuring frivolous conduct. OHIO REV. CODE ANN. § 2323.51 (Anderson 1991). The statute authorizes an Ohio court, in its discretion, to award reasonable attorney fees to a litigant who has suffered frivolous conduct. *Id.* § 2323.51(B)(1). The statute defines "frivolous conduct" to include either (1) conduct that "serves merely to harass or maliciously injure" or (2) 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.* § 2323.51(A)(2). Before a court imposes sanctions under this statute, the court must conduct a hearing in which parties can present relevant evidence. *Id.* § 2323.51(B)(2)(c). *See generally* Raymond A. Nolan, Comment, *Ohio's Frivolous Conduct Statute: A Need for Stronger Deterrence*, 21 CAP. U.L. REV. 261 (1992).

In almost all of these states, the supplemental sanctions statutes offer the state courts a far more attractive weapon against litigation abuse. The objective standard in the supplemental statutes is much easier to establish than is the subjective standard in the

tend to have almost as much of a chilling effect upon litigation as low threshold sanctions schemes.[205]

The procedural devices that states have used to "hybridize" their sanctions schemes do not negate the repressive effects of the objective standard for imposing severe sanctions. Sanctions provisions that give judges the discretion to refuse to grant a sanctions award, for instance, do little good in reducing the disadvantages of sanctions litigation. Usually, these sanctions provisions recite that a judge "may"—not "shall"—assess sanctions against the offending litigant.[206] Inserting discretionary language into a sanctions provision, however, does not in itself ensure that judges will exercise reasonable discretion in asserting their sanctioning power.[207] If a judge is predisposed toward using sanctions as a docket control device, the fact that the relevant sanctions provision states that sanctions "may" be imposed, rather than "shall" be imposed, will not discourage the judge from assessing sanctions awards.[208] And if judges are not discouraged from exercising

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provisions based upon the pre-1983 version of Federal Rule 11. *See supra* note 149 and accompanying text.

205. *See infra* text accompanying notes 206-23.

206. *See, e.g.*, IND. CODE § 34-1-32-1 (1986) ("In any civil action, the court may award attorney's fees [for frivolous conduct] . . . ."); N.H. REV. STAT. ANN. § 507:15 (Supp. 1992) (If "it clearly appears to the court that the action or any defense is frivolous or intended to harass the prevailing party, then the court . . . may award against the party who brought such action or raised such defense the amount of costs and attorneys' fees incurred by the prevailing party."); WISC. STAT. ANN. § 802.05 (Supp. 1992) ("If the court determines that an attorney or party failed to read or make the determinations required under this subsection before signing any petition, motion or other paper, the court may . . . impose an appropriate sanction . . . ."); ILL. S. CT. R. 137 ("If a pleading, motion, or other paper is signed in violation of this rule, the court . . . may impose upon the person who signed it, a represented party, or both, an appropriate sanction . . . ."); MD. R. CIV. P. 1-341 ("[I]f the court finds that the conduct of any party in maintaining or defending any proceeding was in bad faith or without substantial justification the court may require the offending party or the attorney advising the conduct or both of them to pay . . . reasonable expenses, including reasonable attorney's fees.").

207. *See* Tobias, *supra* note 92, at 1786. The converse is also true. Mandatory sanctions provisions in themselves are no more likely to foster excessive sanctions activity than discretionary sanctions provisions. *See* Robertson, *supra* note 48, at 133 (noting that "[i]n cases where, under pre-1983 Rule 11, the district court would not be inclined to impose sanctions, the court today will merely find that there is no violation in the first place").

208. *See* Tobias, *supra* note 92, at 133. Certainly, discretionary sanctions provisions are not without advantages and, indeed, are preferable to mandatory sanctions provisions in many ways. For example, discretionary sanctions provisions allow judges to

their sanctioning power excessively, then the threat that sanctions pose to potential litigants remains an inhibitive influence upon litigation.[209] Thus, as long as a sanctions scheme permits large sanctions awards for conduct that breaches an objective standard, the sanctions scheme will continue to exert a chilling effect upon litigation, regardless of whether sanctions awards are discretionary or mandatory.

Another procedural safeguard that some states have adopted to hybridize their sanctions schemes is a tripartite—or "three-standard"—standard of appellate review for sanctions decisions. Rejecting the logic of the Supreme Court in *Cooter & Gell* that appellate courts should review all sanctions decisions under an abuse of discretion standard,[210] the courts in these states instead exercise three different standards for reviewing aspects of the sanctioning process.[211] Generally, the appellate courts in these states review factual findings for clear error, review legal decisions about the scope and operation of the relevant sanctions provision de novo, and review the form and amount of sanctions for abuse of discretion.[212] In adopting the tripartite standard,

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overlook minor or technical offenses that should not require sanctions awards. *See* Johnson et al., *supra* note 47, at 668 ("In some cases, the violation of the rule is insignificant and has little or no effect on the administration of justice. The district court in such cases should have the discretion to conclude that the violation does not warrant any sanction—in effect, that the 'appropriate' sanction is no sanction at all."); *see also* Simpson, *supra* note 109, at 511.

209. *Cf.* Robertson, *supra* note 48, at 133 (noting that the reason the 1983 amendments to Federal Rule 11 effected a sanctions explosion was not necessarily related to the fact that sanctions under the amended rule were mandatory, but rather was related to the fact that the amended rule sent a message to federal judges that litigation abuse would not be tolerated).

210. *See supra* text accompanying notes 100-05.

211. *See infra* text accompanying note 212. Interestingly, the supreme court in at least one state, Michigan, has deviated from the *Cooter & Gell* model but has not adopted a tripartite standard of review. In Contel Sys. Corp. v. Gores, 455 N.W.2d 398 (Mich. Ct. App. 1990), the Michigan Supreme Court concluded that Michigan appellate courts should use the clearly erroneous standard, rather than the abuse of discretion standard, to review findings of fact under Rule 2.114—the Michigan equivalent of Federal Rule 11. *Id.* at 400. While the supreme court did not expressly adopt a tripartite standard, though, it did not foreclose the possibility that it might use a de novo standard to review legal conclusions regarding the scope and interpretation of Rule 2.114. *See id.*

212. *See, e.g.*, DeSilva v. Burton, 832 P.2d 284, 288 (Haw. Ct. App. 1992) (disapproved by Matter of Hawaiian Flour Mills, Inc., 868 P.2d 419 (Haw. 1994)); Clark Equip. Co. v. Bowman, 762 S.W.2d 417, 421 (Ky. Ct. App. 1988); Barnard v. Sutliff, 846 P.2d 1229, 1235 (Utah 1992). The three categories tend to blend together. A factual finding about the "frivolous" actions of a particular litigant, for instance, differs little from a legal conclusion about the scope of a sanctions provision. The Hawaii courts illustrate this problem rather dramatically. In *DeSilva v. Burton*, the Hawaii Court of Appeals concluded that the question whether, for purposes of Hawaii Rule 11, a document is well grounded in fact and warranted under the existing law is a

these states intend to curtail the discretion vested in the trial courts and, in the process, ensure more uniform sanctions decisions "in an area that . . . suffers from ambiguity."[213]

Nonetheless, the tripartite standard is insufficient in itself to quell the chilling effect of a sanctions scheme based upon an objective standard of conduct. First, while few can quibble with the notion that appellate courts should exercise more rigorous review over sanctions decisions,[214] the tripartite standard gives appellate courts no more power to review the most important sanctions decisions than does the abuse of discretion standard that the Supreme Court articulated in *Cooter & Gell*.[215] A principal reason that the sanctions explosion in the federal and state courts has chilled litigation is the fact that appellate courts have been reluctant to vacate excessive fee awards.[216] The tripartite standard will not change that fact: even under the tripartite standard, appellate courts will continue to defer to trial court decisions regarding the form and amount of sanctions.[217] Second, the success of the tripartite standard in mitigating the repressive effects of sanctions schemes depends, unavoidably, upon the cooperation of appellate judg-

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legal question reviewed de novo. *DeSilva*, 832 P.2d at 288. But in *Coll v. McCarthy*, the Hawaii Supreme Court concluded that the question whether a pleading is "frivolous" under § 607-14.5 of the Hawaii statutes is a mixed question of law and fact reviewed for clear error. *Coll v. McCarthy*, 804 P.2d 881, 886-87 (Haw. 1991).

213. *Barnard*, 846 P.2d at 1235.

214. *See* Johnson et al., *supra* note 47, at 672 ("More vigorous appellate review is the *only* mechanism available to police possible abuses of the [sanctions rules].")

215. The difference between the standard of review articulated in *Cooter & Gell* and other standards of review for sanctions decisions "appears to be one of terminology, rather than one of substance." MARTIN ET AL., *supra* note 202, at 62. Even while the Supreme Court in *Cooter & Gell* rejected a tripartite standard that would authorize de novo review for legal conclusions and clear error review for factual findings, the Court observed that "[a] district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990). *See* Johnson et al., *supra* note 47, at 662 ("In essence, the decision in *Cooter & Gell* may have implicitly adopted the same tripartite standard of review it expressly rejected.").

216. *See* Johnson et al., *supra* note 47, at 650 & 658-59; *cf.* Mallor, *supra* note 19, at 615 ("Although the shifting of attorneys' fees for abuses of the judicial system holds out the promise of alleviating the congestion that cripples courts, it also holds out the threat of intimidating litigants with potentially meritorious claims and inhibiting the growth and refinement of the substantive law.").

217. *See DeSilva*, 832 P.2d at 288; *Clark Equip. Co.*, 762 S.W.2d at 421; *Barnard*, 846 P.2d at 1235.

es. Just as discretionary sanctions provisions will not slow the sanctions explosion if trial judges remain predisposed towards using sanctions as a docket control device,[218] the tripartite standard of review will not slow the sanctions explosion if appellate judges refuse to assume a more vigorous role in reviewing sanctions decisions.[219] Third, the costs of overturning a sanctions award remain the same under a tripartite standard. As long as the trial court continues to evaluate conduct objectively, the mere fact that a litigant might be able to secure reversal on appeal will not inspire the litigant to run the risk of asserting a novel or unusual claim.

Still other states have required, as a means of hybridizing their sanctions schemes, that their courts conduct an oral hearing before imposing sanctions,[220] issue factual findings in support of sanctions awards,[221] or postpone rulings on sanctions motions until final judgment.[222] Each of these procedural safeguards serves a laudable function—encouraging judges to give their sanctions decisions more time and attention.[223] Undoubtedly, each of these procedural safe-

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218. *See supra* text accompanying note 208.

219. *See* Johnson et al., *supra* note 47, at 672.

220. *See, e.g.*, LA. CODE CIV. PROC. ANN. art. 863 (West 1994) ("A sanction . . . shall be imposed only after a hearing at which any party or his counsel may present any evidence or argument relevant to the issue of imposition of the sanction."); OHIO REV. CODE ANN. § 2323.51(B)(2)(c) (Anderson 1991) (stating that a court may award reasonable attorney fees only after it conducts a hearing in which it "allows the parties and counsel of record involved to present any relevant evidence").

221. *See, e.g.*, ALA. CODE § 12-19-273 (Supp. 1992) ("When granting an award of costs and attorneys' fees, the court shall specifically set forth the reasons for such award . . . ."); MISS. CODE ANN. § 11-55-7 (1993) ("When granting an award of costs and attorney's fees, the court shall specifically set forth the reasons for such award . . . ."); NEB. REV. STAT. § 25-824.01 (1989) ("When granting an award of costs and attorney's fees, the court shall specifically set forth the reasons for such award . . . ."); ILL. S. CT. R. 137 ("Where a sanction is imposed under this rule, the judge shall set forth with specificity the reasons and basis of any sanction so imposed either in the judgment order itself or in a separate written order."); N.Y. RULES § 130-1.2 ("The court may make an award of costs or impose sanctions or both only upon a written decision setting forth the conduct on which the award or imposition is based, the reasons why the court found the conduct to be frivolous, and the reasons why the court found the amount awarded or imposed to be appropriate."); TEX. R. CIV. P. 13 ("No sanctions under this rule may be imposed except for good cause, the particulars of which must be stated in the sanction order.").

222. *See, e.g.*, KY. R. CIV. P. 11 ("The Court shall postpone ruling on any Rule 11 motions filed in the litigation until after entry of a final judgment.").

223. For the most part, these procedural safeguards—requiring oral hearings, requiring factual findings and postponing sanctions decisions—protect the subjects of sanctions motions against awards that a judge might be inclined to make in "the heat of the moment." Requiring a brief hearing in which lawyers can argue the merits of a sanctions award, for example, serves three functions: (1) it permits the subjects of the proposed sanctions to explain their conduct; (2) it allows the judge the time to

guards improves the sanctions scheme to which it is attached. None is sufficient in itself, however, to temper the repressive effects of the objective standard for imposing sanctions. Oral hearings and factual findings cannot diminish the fear that litigants might have for incurring large sanctions awards. If a sanctions scheme authorizes large awards even in circumstances evincing good faith, the mere fact that a court must conduct a hearing before imposing sanctions or must enter its reasons for imposing sanctions into the record will not encourage litigants to bear the risk of pressing positions which, while colorable, are less than certain to succeed.

Empirical data about the chilling effect of hybrid sanctions schemes is, regrettably, nonexistent.[224] The closest available data is a recent poll of Texas lawyers and judges, which found that the Texas sanctions scheme does not represent an acceptable answer to the problem of litigation abuse.[225] Significantly, the Texas sanctions scheme, in

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consider the "severity and propriety" of the proposed sanctions; and (3) it ensures that "the facts supporting the sanctions will appear in the record." Miranda v. Southern Pac. Transp. Co., 710 F.2d 516, 522-23 (9th Cir. 1983). *See also* Keeling, *Due Process Requirements*, *supra* note 92, at 365-74. Requiring factual findings as a prerequisite to sanctions ensures that appellate courts can understand the reasons for a sanctions award and thus exercise appropriate appellate review. *See* Johnson et al., *supra* note 47, at 674-75. Postponing sanctions decisions until the end of litigation ensures that sanctioning judges will have a "complete rather than piece-meal picture" of the circumstances that, arguably, warrant sanctions. Eric K. Yamamoto & Danielle K. Hart, *Rule 11 and State Courts: Panacea or Pandora's Box*, 13 U. HAW. L. REV. 57, 86 (1991). *But see* Weston, *supra* note 82, at 906-07 (sanctions decisions should not be postponed until the end of litigation because "[j]udicial hindsight, like any post mortem review, is likely to find questionable conduct").

224. The available anecdotal evidence suggests that the courts in states which follow a hybrid sanctions model are no less willing to impose large sanctions awards than courts in low threshold states. *See, e.g.*, MARTIN ET AL., *supra* note 202, at 58-59 ("The latest opinions out of the [Michigan] state courts reflect an equal readiness [compared with the federal courts] to impose stiff sanctions when the circumstances warrant.").

225. REPORT OF THE TEXAS SUPREME COURT TASK FORCE ON SANCTIONS 2 (1993). The Texas Supreme Court Task Force on Sanctions, a committee that the Texas Supreme Court appointed to review the Texas sanctions provisions, conceived the poll to solicit input from judges and lawyers. *Id.* at 1. The Task Force published a questionnaire in the *Texas Lawyer* and, at the same time, set the questionnaire to all Texas trial court judges. *Id.* at 7. Responding were 112 judges and 139 lawyers. The Task Force was concerned that using the *Texas Lawyer* to forward the questionnaire to lawyers might produce a sample that was unrepresentative. *Id.* "[B]ut the large number of judges who responded, and more importantly, who agreed with lawyer respondents on many issues, gave the Task Force some measure of comfort that the questionnaire

comparison with other state sanctions schemes based upon objective standards of conduct, perhaps best protects the principle of fair access to the courts: it allows a litigant to avoid sanctions for a frivolous pleading if the litigant can assert *any* basis in law or fact for the challenged pleading.[226] Nonetheless, the poll results suggested that the Texas sanctions scheme, even with its language designed to reduce judicial reliance upon sanctions awards, generates a large amount of sanctions activity.[227] Of the 112 judges who responded to the poll, 74.3% either "agreed" or "strongly agreed" that the sanctions rules in Texas encouraged courts and practitioners to spend excessive time and expense on sanctions litigation.[228] Likewise, of the 139 lawyers who responded, 74.5% either "agreed" or "strongly agreed" that the sanctions rules encouraged courts and practitioners to spend excessive time and expense on sanctions litigation.[229] Although the poll does not reveal the extent to which the Texas sanctions rules might exert a chilling effect upon litigation, the poll does reveal that, even in hybrid states, objective standards in sanctions schemes create the same problems that they create in low threshold jurisdictions.

The procedural safeguards in hybrid sanctions schemes are, at best, an adhesive bandage over a gaping wound. While these safeguards give the subjects of sanctions motions greater protection against judicial abuse of the sanctioning power, the procedural safeguards in hybrid sanctions schemes do not change the oppressive nature of the

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at least served to identify major points of dissatisfaction among the practicing bar and bench." *Id.* at 8.

226. TEX. R. CIV. P. 13. *See supra* note 203. In addition, the Texas sanctions rule requires that a signing individual attest that a legal document is neither "groundless *and* brought in bad faith" nor "groundless *and* brought for the purpose of harassment." TEX. R. CIV. P. 13 (emphasis added). The plain language of the rule thus seems to suggest that a groundless legal document does not warrant sanctions unless the signing individual also filed the document in bad faith or with the purpose of harassment. *Id.* "The only logical explanation for this grammatical formulation is that it represents a deliberate attempt by Texas Rule 13's drafters to make more difficult the separation of improper purpose from groundlessness under Texas Rule 13, thus giving the Texas rule a meaning different from Federal Rule 11." Rich, *supra* note 203, at 66.

227. REPORT OF THE TEXAS SUPREME COURT TASK FORCE ON SANCTIONS 2 (1993) ("Courts, attorneys and litigants [in Texas] have spent too much time, money, and other resources on sanctions proceedings, and too often procedural determinations have substituted for adjudications on the merits.").

228. *Id.* at App. J (noting that 37.6% of Texas judges "strongly agreed" and 36.7% "agreed" with the proposition that "current sanctions rules result in too much time and money spent on sanctions practice").

229. *Id.* at App. J (noting that 38.3% of Texas lawyers "strongly agreed" and 36.2% "agreed" with the proposition that "current sanctions rules result in too much time and money spent on sanctions practice").

objective standard for imposing sanctions. Even in hybrid states, courts can award large sanctions against litigants who acted honestly and innocently. The objective standard has the same effect in the hybrid states that it does in the low threshold states. The available empirical evidence suggests that hybrid sanctions schemes breed just as much sanctions litigation as the low threshold sanctions schemes.[230] Moreover, despite the absence of specific empirical data, there seems little doubt that hybrid sanctions schemes exert just as much of a chilling effect as low threshold schemes.[231] While perhaps going the farthest to accommodate the competing goals of redressing litigation abuse and preserving free access, hybrid sanctions schemes still do not balance these competing goals appropriately.

## III. THE COMPETING INTERESTS: PRESERVING FREE ACCESS AND REDRESSING LITIGATION ABUSE

Drafting a sanctions scheme that comprises a balanced approach to frivolous litigation is no simple task. On the one hand, a sanctions scheme must preserve free access to the courts.[232] American courts have, traditionally, been willing to entertain claims that were novel or unpopular. Indeed, if the courts had not been willing to hear novel claims from individuals such as Linda Brown[233] or Alan Bakke,[234] the landscape of American law would be much different.[235] On the other hand, a sanctions scheme must provide courts an effective means with which to redress litigation abuse.[236] While the line between a novel claim and a frivolous claim often is less than clear, no one doubts that

230. *See supra* text accompanying notes 224-29.

231. *See supra* text accompanying notes 206-23.

232. *See infra* Section III.A, pp. 1126-34.

233. *See* Brown v. Board of Educ., 347 U.S. 483 (1954). Linda Brown, one of several plaintiffs in the *Brown* school desegregation cases, argued that the Supreme Court should overrule its entrenched "separate but equal doctrine." *See* Vairo, *Where We Are*, *supra* note 105, at 475 n.3.

234. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). Using a "reverse discrimination" argument that had been unsuccessful in previous lawsuits, Alan Bakke succeeded in challenging the quota-based affirmative action plan at a state medical school. *See* Vairo, *Where We Are*, *supra* note 105, at 475 n.4.

235. *See* Vairo, *Where We Are*, *supra* note 105, at 476 (People like Linda Brown and Alan Bakke "understood they might lose because of the novelty of their claims or defenses, or the lack of clear or specific proof, but they did not have to fear the immediate threat of sanctions for trying, because they asserted claims in good faith.").

236. *See infra* Section III.B, pp. 1134-52.

some novel claims cross the line and are in fact frivolous.[237] The courts should not be compelled to tolerate the claims that cross the line and, more specifically, should not be prevented from taking appropriate steps to punish or deter the wrongdoers. This Section will examine the competing interests of preserving free access and redressing litigation abuse.

### A. *Preserving Free Access*

Several of the developments in American civil procedure over the last dozen decades or so trace their origins to the goal of ensuring free access to the adjudicative process. The courts in the United States serve the function of providing a forum in which opposing parties can resolve disputes fairly and impartially.[238] In fulfilling this function, the courts must exercise a neutral role in the adversarial process, detaching themselves from the parties and their grievances.[239] The courts have avoided taking actions that would compromise their neutrality.[240] Thus, at least historically, the courts have refused to make critical or injudicious comments about the motives of particular litigants.[241] The courts have refused to make premature judgments about the correctness of legal assertions.[242] And most significantly, recognizing that the law is elastic, the courts have been willing to entertain novel and uncertain claims.[243] As Dean John W. Wade has observed, the American

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237. *See* Shaneyfelt, *supra* note 1, at 446 (at least in some instances, "[a]n attorney's conduct may be conspicuously frivolous, despite our failure to articulate a definition of frivolous conduct").

238. *See* Wade, *supra* note 1, at 433.

239. *See* Weston, *supra* note 82, at 898 ("The legal system enjoys credibility in part because the judge is viewed as detached and objective, not only with regard to the subject matter of the litigation, but also with regard to the litigators and parties.").

240. *See* CODE OF JUDICIAL CONDUCT Canon 1 (1990) ("A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved.").

241. *See id.* Canon 3(B)(4) ("A judge shall be patient, dignified, and courteous to litigants . . . .").

242. While the various federal and state rules of civil procedure do not allow courts to make premature rulings, the rules do, of course, permit courts to make appropriate pretrial dispositive rulings. Nonetheless, even when the rules permit the courts to make pretrial dispositive rulings, the rules still encourage the courts to err in favor of trial proceedings. Moreover, the rules encourage the courts to make pretrial dispositive rulings in a manner that does not stigmatize the losing litigant. Courts in most American jurisdictions, for example, cannot impose summary judgment unless the filed documents reveal no genuine issue of material fact. *See, e.g.*, FED. R. CIV. P. 56. A summary judgment suggests only that the losing litigant failed to assert a winnable case: it does not suggest either that the losing litigant abused the judicial process or offended the canons of legal ethics.

243. *Cf.* CODE OF JUDICIAL CONDUCT Canon 3(B)(7) (1990) ("A judge shall accord to

courts have tried to ensure that a person who believes he has been aggrieved can "approach the courts for relief without having to guarantee that he is correct."[244]

The goal of ensuring free access has been an important fixture in federal civil procedure since the Supreme Court adopted the Federal Rules of Civil Procedure in 1938. The first rule in the Federal Rules of Civil Procedure expresses the vision of its drafters: the federal courts should conduct their operations to effect "just, speedy, and inexpensive" dispute resolution.[245] To achieve the goal of inexpensive and efficient justice, the drafters of the federal rules attempted to make the federal adjucative process more accessible.[246] For instance, the drafters replaced the formalistic fact pleading regime that existed in the federal courts before 1938 with a liberal notice pleading regime.[247] In addition, the drafters expanded the scope of discovery in the federal courts to encourage a greater exchange of information between opposing parties.[248] The drafters of the federal rules conceived that these reforms would elevate substance over form in resolving disputes, thus opening the adjudicative process to people whom procedural technicalities would have excluded under the old practice.[249] Although the Fed-

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every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law . . . .").

244. Wade, *supra* note 1, at 433.

245. FED. R. CIV. P. 1.

246. *See* Eric K. Yamamoto, *Efficiency's Threat to the Value of Accessible Courts for Minorities*, 25 HARV. C.R.-C.L. L. REV. 341, 356 (1990). Coinciding with the adoption of the Federal Rules of Civil Procedure were other factors that helped ensure greater access to the federal courts: "a powerful civil rights movement, the expansion of the contingency fee, a huge growth in the power of the bar, and a genuine sense of devotion by most members of the legal profession to the principle that all Americans have the right to vindication of what the substantive law in theory affords." Jack B. Weinstein, *The Ghost of Process Past: The Fiftieth Anniversary of the Federal Rules of Civil Procedure and Erie*, 54 BROOK. L. REV. 1, 3 (1988).

247. *See* Yamamoto, *supra* note 246, at 357; *see also* FED. R. CIV. P. 8 ("A pleading . . . shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks.").

248. *See* Yamamoto, *supra* note 246, at 357; *see also* FED. R. CIV. P. 26 (permitting discovery of any relevant matter not privileged).

249. *See* Weinstein, *supra* note 246, at 2-3 ("When the Rules were first adopted, they were optimistically intended to clear the procedural clouds so that the sunlight of substance might shine through. Litigants would have straightforward access to

eral Rules of Civil Procedure have evolved in the last decade to give courts expanded power to resolve disputes without reaching the merits,[250] the rules continue to reflect elements that foster greater access to the federal courts.

Likewise, the goal of ensuring free access has become an important fixture in state civil procedure. The rules of civil procedure in the various states have, increasingly, followed the lead of the federal rules in adopting provisions that eliminate archaic procedural technicalities and open the adjudicative process to a wider range of aggrieved people. Several states have adopted procedural rules that mimic the Federal Rules of Civil Procedure.[251] The courts in these states follow the same liberal pleading and discovery requirements that have fostered greater access to the federal courts. Other states, while exercising their independence to craft procedural rules that deviates from the Federal Rules of Civil Procedure, have adopted liberal pleading or discovery requirements which are similar, if not identical, to the federal rules.[252]

Besides procedural rules that foster free access, most states have also adopted constitutional "open courts" or "remedies" provisions that, among other things, have the effect of guaranteeing reasonable access to the adjudicative process.[253] Generally, open courts provisions, which

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courts . . . ."); Yamamoto, *supra* note 246, at 357 (the reforms reflected in the 1938 rules "responded to the technical rigidity of prior systems, which had fostered procedural manipulation and deemphasized decisions on the merits").

250. *See* Yamamoto, *supra* note 246, at 344 (noting that the federal rules have been retooled "in the name of systemic efficiency"). Rule 11 is, of course, the most obvious example of the evolution in the federal rules toward allowing judges to restrict free access. In addition, the United States Supreme Court has reformulated the summary judgment standards to give federal judges greater power to resolve disputes before trial. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). The reformulation of the summary judgment standards has further restricted free access to the courts. *See* Yamamoto, *supra* note 246, at 376 ("One apparent effect of the changes has been to preclude trials of claims of public concern not supported by hard evidence. Another effect has been to deprive juries of opportunities to reassess the meaning of undisputed 'facts' in light of changing social conditions.").

251. *See* Oakley & Coon, *supra* note 132, at 1377. At the time of their article, Oakley and Coon identified 23 states, including the District of Columbia, that had adopted a set of procedural rules modeled, at least substantially, upon the Federal Rules of Civil Procedure. *Id.*

252. *Cf. id.* at 1377-78. Oakley and Coon identified 11 states that have adopted procedural rules which deviate from the federal model but nonetheless incorporate a regime of notice pleading. *Id.*

253. *See* ALA. CONST. art. I, § 13; ARIZ. CONST. art. II, § 11; ARK. CONST. art. 2, § 13; COLO. CONST. art. II, § 6; CONN. CONST. art. I, § 10; DEL. CONST. art. I, § 9; FLA. CONST. art. I, § 21; GA. CONST. art. I, § 1, ¶ XII; ILL. CONST. art. I, § 12; IND. CONST. art. I, § 12; KY. CONST. § 14; LA. CONST. art. I, § 22; MAINE CONST. art. I, § 19; MD. CONST. DECL. OF RIGHTS art. 19; MASS. CONST. pt. I, art. XI; MINN. CONST. art. I, § 8;

trace their lineage back to the Magna Carta,[254] declare that the courts of a state should remain available to all,[255] should provide remedies to those who suffer injuries,[256] and should treat litigants fairly and equally.[257] Although state courts have reached differing conclusions about

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MISS. CONST. art. 3, § 24; MO. CONST. art. I, § 14; MONT. CONST. art. II, § 16; NEB. CONST. art. I, § 13; N.H. CONST. pt. I, art. 14; N.C. CONST. art. 1, § 18; N.D. CONST. art. I, § 9; OHIO CONST. art. I, § 16; OKLA. CONST. art. II, § 6; OR. CONST. art. I, § 10; PA. CONST. art. I, § 11; R.I. CONST. art. I, § 5; S.C. CONST. art. I, § 9; S.D. CONST. art. VI, § 20; TENN. CONST. art. I, § 17; TEX. CONST. art. I, § 13; UTAH CONST. art. I, § 11; VT. CONST. ch. I, art. 4; W. VA. CONST. art. III, § 17; WIS. CONST. art. I, § 9; WYO. CONST. art. I, § 8.

254. *See* Note, *Constitutional Guarantees of a Certain Remedy*, 49 IOWA L. REV. 1202, 1203 (1964). Article 40 of the Magna Carta of 1215 provides: *"Nulli vendemus, nulli negabimus, aut differemus, rectum aut justiciam"* ("to no one will we sell, to no one will we refuse or delay, right or justice"). *Id.* (quoting MAGNA CARTA art. 40 (1215)). Interpreting article 40, Sir Edward Coke commented that "every Subject . . . for injury done to him *in bonis, terris, vel persona*, by any other Subject . . . may take his remedy by the course of the Law, and have justice, and right for the injury done to him, freely without sale, fully without any denial, and speedily without delay." *Id.* (quoting EDWARD COKE, SECOND INSTITUTE 55-56 (4th ed. 1671)). The interpretation that Coke gave the Magna Carta influenced American colonists. *See* John H. Bauman, *Remedies Provisions in State Constitutions and the Proper Role of the State Courts*, 26 WAKE FOREST L. REV. 237, 243 (1991). Some American colonists, indeed, urged that James Madison and his compatriots enact an open courts provision into the Federal Bill of Rights. Although unsuccessful in securing an open courts provision for the federal constitution, colonists did succeed in securing open courts provisions for the various state constitutions. *See* David Schuman, *The Right to a Remedy*, 65 TEMP. L. Q. 1197, 1199-1200 (1992) (citing BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 967-68 (1971)). States that were later admitted to the Union later often copied the open courts provisions in the state constitutions from the original colonies. *Id.*

255. *See, e.g.*, COLO. CONST. art. II, § 6 ("Courts of justice shall be open to every person . . . ."); DEL. CONST. art. I, § 9 ("All courts shall be open . . . ."); OR. CONST. art. I, § 10 ("No court shall be secret, but justice shall be administered, openly . . . .").

256. *See, e.g.*, ARK. CONST. art. II, § 13 ("Every person is entitled to a certain remedy in the laws for all injuries or wrongs he may receive in his person, property or character . . . ."); ILL. CONST. art. I, § 12 ("Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation."); MISS. CONST. art. III, § 24 ("All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law . . . .").

257. *See, e.g.*, ILL. CONST. art. I, § 12 ("Every person . . . shall obtain justice by law, freely, completely, and promptly."); MASS. CONST. art. XI, pt. 1 ("Every subject of the commonwealth . . . ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without

the scope of the various state open courts provisions,[258] several state courts have interpreted their open courts provisions to proscribe procedural barriers that prevent litigants from having a reasonable chance to pursue a colorable claim.[259] Such procedural barriers, according to these courts, interfere with the right of free access guaranteed in state open courts provisions.[260]

Measures like liberal procedural rules and state open courts provisions that advance free access to the courts recognize that the law is not, and must not be, static; acts or omissions, which at one time were tolerable, might become intolerable with the passage of time.[261] If the

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delay; conformably to the laws."); MO. CONST. art. I, § 14 ("That the courts of justice shall be open to every person . . . and that right and justice shall be administered without sale, denial or delay.").

258. *See* Schuman, *supra* note 254, at 1203 (the state courts have adopted a "daunting variety of remedy guarantee interpretations"). Some state courts read their open courts provisions to state nothing more than a suggestion that courts should conduct trials swiftly, without showing favoritism toward one side or another. *See* Goldberg v. Musim, 427 P.2d 698, 702 (Colo. 1967) (en banc) (construing COLO. CONST. art. II, § 6 as a mandate to the judiciary rather than to the legislature); Harrison v. Schrader, 569 S.W.2d 822, 827 (Tenn. 1978) (interpreting TENN. CONST. art.I, § 17 as a mandate to the judiciary and not as a limitation upon the legislature, and citing Scott v. Nashville Bridge Co., 223 S.W. 844 (Tenn. 1920) in support of this assertion). Other state courts read their open courts provisions expansively; indeed, the courts in some states have ruled that open courts provisions restrict state legislatures from abolishing or circumscribing common law causes of action. *See* Grantham v. Denke, 359 So. 2d 785, 787 (Ala. 1978) (reasoning that a statutory ban on actions against co-workers offends state open courts provision); Kluger v. White, 281 So. 2d 1, 4 (Fla. 1973) (reasoning that no-fault insurance legislation limiting recovery for property damage offends state open courts provision); Lucas v. United States, 757 S.W.2d 687, 690 (Tex. 1988) (reasoning that damages cap in medical malpractice actions offends state open courts provision).

259. *See* Bauman, *supra* note 254, at 250-51. States impose many procedural barriers to litigation, including statutes of limitations, statutes of repose, notice requirements and special pleading rules. Usually, the courts will uphold these procedural barriers unless the barriers arbitrarily limit the rights of action for a particular class of plaintiffs. *See, e.g.*, Aldana v. Holub, 381 So. 2d 231, 237 (Fla. 1980) (reasoning that a statute providing for the use of a screening panel for medical malpractice cases offended the state open courts provision because it had "proven unworkable and inequitable"); Sax v. Votteler, 648 S.W.2d 661, 667 (Tex. 1983) (reasoning that while statutes of limitations did not offend the state open courts provision generally, a strict two-year limitations statute offended the constitution when applied to a minor who could not bring a suit herself); State *ex rel.* S.M.B. v. D.A.P., 284 S.E.2d 912, 913-14 (W. Va. 1981) (reasoning that a three-year statute of limitations for paternity actions offended the state open courts provision).

260. *See Sax*, 648 S.W.2d at 667 (holding a statute unconstitutional because it contained an arbitrary limitations provision that deprived a litigant of "having her day in court").

261. *See* Johnson et al., *supra* note 47, at 676 ("There are few shades of black or white, and on the most difficult questions, there often are only varying shades of

law continues to maintain that an act or omission is tolerable long after the public has judged the act or omission intolerable, the public will perceive that the law is unfair and rebel against it.[262] Cultural mores change, and the law must not lag too far behind. Ensuring that litigants have free access to the courts, and in particular ensuring that litigants can raise novel or uncertain claims, allows the law to evolve along with changing cultural mores.[263] Litigants might lose novel or uncertain claims initially, but if the courts at least are willing to entertain the claims, the litigants will have a forum in which to argue that social conditions warrant a change in the law.[264] Eventually, as has happened

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gray.").

262. *Cf.* Yamamoto, *supra* note 246, at 391. Professor Yamamoto has observed that if the law does not redress perceived grievances—and especially if the courts do not even entertain claims based upon perceived grievances—the frustration that the victims might experience could spill into violence. "Forcible protest is encouraged, or at least not discouraged, . . . when groups perceive that their grievances are not even likely to be addressed let alone redressed by those with decisional power." *Id.* This conclusion—that lack of access can breed violence—assumes a worst case scenario: people with *minority* perspectives are prevented from voicing their views in a peaceful forum.

Violence seems much less probable in the converse situation in which a *majority* of the public perceives that the law is outmoded or antiquated. More often than not, the public in that situation will express its dissatisfaction in more subtle ways—for example, resolving disputes through arbitration or alternative dispute resolution (ADR) rather than through the courts. *See* Joiner, *supra* note 5, at 18 (noting that the growth of ADR to some extent reflects public dissatisfaction with both procedural and substantive elements of the law). Nonetheless, violent solutions are not impossible. Some aggrieved individuals, believing that public opinion would support their extreme measures, may rebel against the law by turning to self help or vigilanteeism. *See* Talamini v. Allstate Ins. Co., 470 U.S. 1067, 1070-71 (1985) (Stevens, J., concurring in dismissal of appeal for want of jurisdiction) ("The courts provide the mechanism for the peaceful resolution of disputes that might otherwise give rise to attempts at self-help.").

Justice, of course, is not forged in the crucible of public opinion. While public opinion might compel the law to follow a new course, often the converse is just as true. Courts can be "great engines of social change." Johnson et al., *supra* note 47, at 650. Were it not for the courageous leadership of a handful of judges in the United States Court of Appeals for the Fifth Circuit, for instance, the dictates of Brown v. Board of Education, 347 U.S. 483 (1954) might never have been enforced in the racially polarized South. HARVEY C. COUCH, A HISTORY OF THE FIFTH CIRCUIT 1891-1981 (1982). Even when judges are inclined to change the law, however, they cannot do so if they interfere with the goal of free access by erecting procedural barriers that preclude litigants from bringing novel or uncertain claims.

263. *See* Mallor, *supra* note 19, at 619 ("[D]isputed and uncertain claims are instruments for the development and refinement of the substantive law.").

264. *Cf.* Yamamoto, *supra* note 246, at 426 (observing that especially for minorities,

in the past,[265] litigants might be able to persuade the courts to change the law—but for that to continue to happen, the courts must not erect procedural barriers that preclude litigants from bringing novel or uncertain claims.[266]

Unfortunately, sanctions provisions based on an objective standard of conduct offend the goal of free access.[267] Because the objective standard is flexible,[268] it fails to give litigants a clear line between frivolous and legitimate lawsuits. Rather than run the risk of a large sanctions award, some litigants will suppress their grievances and forego asserting novel or uncertain claims that a judge in an uncharitable mood might, conceivably, find frivolous.[269] Conversely, some litigants, whether blindly or intentionally, will run the risk of sanctions and file novel or uncertain claims. Despite a subjective good faith belief that the law should redress their grievances, the litigants might find, perhaps quite to their astonishment, that a judge will decree their claims frivolous and assess large sanctions against them.[270] In either event, sanctions provisions raise an impediment to free access: either the sanctions provisions induce litigants to relinquish their right to raise novel or uncertain claims or the sanctions provisions give judges a club with which to bludgeon litigants who exercise that right.

Sanctions provisions are no less an impediment to free access if the provisions purport to allow litigants to make a good faith or nonfrivolous argument "for the extension, modification, or reversal of existing law."[271] Judges have not found language of this kind to super-

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courts provide a forum in which individuals with perspectives that diverge from the accepted view can articulate their positions and achieve a degree of legitimacy).

265. *See supra* notes 232-35 and accompanying text.

266. *See* Mallor, *supra* note 19, at 619 ("In a society in which flexibility and growth in the law are prized, it does not make sense to erect obstacles to the institution of such [disputed and uncertain claims]. This is particularly true in areas of the law, such as tort law, that are growing rapidly.").

267. *See* Sandra C. Segal, Comment, *It Is Time to End the Lawyer's Immunity from Countersuit*, 35 UCLA L. REV. 99, 138 (1987) ("On its face, the policy of securing to all injured parties the freedom to vindicate their rights through the adversarial system is not in harmony with a policy of discouraging legal proceedings and encouraging settlements."); *cf.* Stein, *supra* note 71, at 329 (asserting that sanctions provisions based upon an objective standard have the "effect of stultifying the law").

268. *See* Honsinger, *supra* note 16, at 348.

269. *See supra* text accompanying notes 72-78 and 172-77.

270. Experience with the 1983 version of Federal Rule 11 suggested that litigants could not predict with any reliability whether a judge would find their claims sanctionable. Indeed, judges often expressed differing views whether particular claims were reasonable. *See supra* text accompanying notes 66-71.

271. FED. R. CIV. P. 11 (1983). Until the 1993 amendments, Federal Rule 11 stated that a signature in a pleading constituted a certificate that the pleading was either well grounded in law or supported by a "good faith" argument for modifying or

impose a subjective standard upon sanctions provisions that otherwise enforce an objective standard of conduct.[272] Accordingly, judges have not refrained from assessing sanctions against litigants who, despite a subjective good faith belief that the law should redress their grievances, advance a proposition that lacks a reasonable foundation in the established law.[273] Language in sanctions provisions authorizing good faith arguments to change existing law, in essence, is insufficient to prevent judges from punishing litigants for pursuing novel or uncertain claims. If judges find that arguments "for the extension, modification, or reversal of existing law" are unreasonable or farfetched, the judges will assess sanctions against the litigants who advanced the arguments—just as the judges would assess sanctions against litigants who advanced arguments that lacked a reasonable factual basis. And if judges assess large sanctions against litigants who pursue good faith attempts to change existing law, litigants will think twice about pursuing novel or uncertain claims that challenge existing law.[274]

At the risk of stunting the growth in the law, sanctions measures must not give the courts so much power that the courts can, effectively if not intentionally, ban novel or uncertain claims. Admittedly, free access is not a talisman that precludes the courts from punishing frivolous lawsuits.[275] Claims and defenses that serve no function other than

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reversing existing law. *Id.* The 1993 amendments changed the term "good faith" to the word "nonfrivolous," suggesting that the drafters of the amendments desired to eliminate language that implied a subjective standard. *See* Tobias, *supra* note 92, at 1781.

Several state sanctions provisions, including both Rule 11 duplicates and other forms of sanctions measures, include language that authorizes good faith or nonfrivolous arguments for changing the law. *See, e.g.*, GA. CODE ANN. § 9-15-14(c) (Michie 1990); MASS. GEN. L. ch. 231, § 6F (1986); MINN. STAT. § 549.21 (1988).

272. *See* Yamamoto & Hart, *supra* note 223, at 73 (observing that federal courts measure good faith arguments objectively, asking the question: "Did counsel, following reasonable inquiry, have *any reasonable basis* for her arguments to change the law?").

273. *See* Beeman v. Fiester, 852 F.2d 206, 211 (7th Cir. 1988) ("[T]he good faith requirement of the third prong of Rule 11 looks to the quality of the argument for the extension of a doctrine, not to the counsel's state of mind."); Wisconsin v. Glick, 782 F.2d 670, 673 (7th Cir. 1986) ("When a defendant makes an argument so empty that no responsible lawyer could think the argument supportable by any plausible plea for a change in the law the court may reply with a penalty."); *cf.* Hughes v. City of Fort Collins, 926 F.2d 986, 990 (10th Cir. 1991) ("An unadorned and forlorn hope that a court may change settled law" is not enough to avoid Rule 11 sanctions).

274. *See supra* text accompanying notes 72-78 and 172-77.

275. *See* Clementson-Mohr & Cooke, *supra* note 204, at 311 ("Our legal system is

to consume court time and stall the progress of justice do not fall within the class of litigation that the free access principle protects.[276] The problem lies, however, in drawing the line between frivolous claims that fall outside the protected class of litigation and otherwise legitimate novel or uncertain claims. Drawing the line with an objective standard, such that litigants who bring "unreasonable" claims or defenses are subject to large sanctions awards, raises the threat that courts will find novel or uncertain claims sanctionable. If litigants cannot bring novel or uncertain claims without incurring the risk of sanctions, then the adjudicative process in the United States has failed in its goal of providing a fair and impartial forum in which opposing parties have free access to resolve disputes.[277]

### *B. Redressing Litigation Abuse*

While sanctions schemes must preserve free access to the courts, sanctions schemes also must provide courts an effective means with which to redress litigation abuse. Federal and state court judges are becoming more and more frustrated with the increasing size of their dockets.[278] Rightly or wrongly,[279] judges perceive that a principal factor in the increasing size of their dockets is litigation abuse—in particular, frivolous filings.[280] Judges desire sanctions measures that will

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*not* enhanced by the toleration of genuinely meritless litigation, even when it is conducted with minimal competence, solely on the ground that the system requires a fearless bar, ready and willing to extend the law."); Greenberg, *supra* note 142, at 157 ("[S]triking a fair balance between requiring that all material facts be assembled at the filing stage and allowing for novel, creative and broad-based pleading does not preclude the need for a pleading control device to eliminate patently infirm claims."). In particular, states have not found that the open courts provisions in their state constitutions preclude sanctions schemes that punish lawyers or litigants for bringing frivolous actions. *See, e.g.*, Williams v. State, 405 N.W.2d 615, 624-25 (N.D. 1987).

276. Lebeuf, *supra* note 202, at 251.

277. *See supra* text accompanying note 238.

278. Both federal and state courts have experienced regular and dramatic increases in their caseloads. *See* REPORT OF THE ABA WORKING GROUP ON CIVIL JUSTICE SYSTEM PROPOSALS, ABA BLUEPRINT FOR IMPROVING THE CIVIL JUSTICE SYSTEM 5-6, 46-48 (1992); *cf.* Levin & Colliers, *supra* note 46, at 227 n.24 & n.26 (observing that civil filings in federal court increased 145% between 1973 and 1983 and that civil filings in state court increased 20% between 1978 and 1983).

279. Several commentators have argued that litigation abuse plays little, if any, role in the increasing size of court dockets. *See, e.g.*, Galanter, *supra* note 46, at 61 (a narrow elite of judges "tend to identify as general problems things such as discovery abuse that apply only in a tiny minority of cases"); Vargo, *supra* note 201, at 1631 ("U.S. courts are overcrowded; however, there is absolutely no empirical data from any source that indicates that the overcrowding is caused by nonmeritorious actions or defenses.").

280. *See* Gerber, *supra* note 1, at 6.

allow them to police their dockets, and even if litigation abuse is not as pervasive as judges might perceive, sanctions schemes should not be so circumscribed that judges feel powerless to control misconduct during the litigation process.[281] Sanctions schemes must effectuate a purpose that redresses litigation abuse. The federal and state courts have at various times identified three main purposes for sanctions awards and, especially, fee awards: (1) deterring frivolous filings,[282] (2) punishing lawyers and litigants who pursue frivolous filings,[283] and (3) compensating the victims of frivolous filings.[284] Of these purposes, both deterrence and punishment offer legitimate grounds for assessing a sanctions

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281. Even if litigation abuse has not been a significant factor in rising court caseloads, that does not mean that litigation abuse should be either ignored or tolerated. *See* Keeling, *A Prescription for Healing the Crisis in Professionalism*, *supra* note 6, at 39 n.47; Thomas M. Reavley, *Response to "One Year After Dondi: Time to Get Back to Litigating?,"* 17 PEPP. L. REV. 851, 851 (1990).

282. *See, e.g.*, Business Guides, Inc. v. Chromatic Communications Enters., Inc., 498 U.S. 533 (1991); Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990); Canton Farm Equip., Inc. v. Richardson, 501 So. 2d 1098, 1108-09 (Miss. 1987). Presumably, states that depend upon federal case law as a guide in interpreting their sanctions provisions would find that the main purpose of the sanctions provisions is deterring frivolous filings. *Cf.* Tausend & Johnsen, *supra* note 67, at 443 (suggesting that purpose of Washington version of Rule 11, like the federal rule, is to "curb abuses").

283. *See, e.g.*, Willy v. Coastal Corp., 112 S. Ct. 1076, 1081 (1992); Batson v. Neal Spelce Assocs., 765 F.2d 511, 516 (5th Cir. 1985); Fagas v. Scott, 597 A.2d 571, 584 (N.J. Super. Ct. Law Div. 1991).

284. *See, e.g.*, Collins v. Walden, 834 F.2d 961, 966 (11th Cir. 1987) (noting that an award of fees under Rule 11 "is a means by which to return to the status quo the party which incurred legal expenses as a result of an action . . . which ought never have been filed"); Mars Steel Corp. v. Continental Bank N.A., 880 F.2d 928, 939 (7th Cir. 1989) (stating that an award of fees is "designed to make the adverse party whole—to put the party opposing the motion in as good a position as it would have occupied had the motion never been made"). The Supreme Court in *Cooter & Gell* rejected the reasoning of the courts of appeal in *Collins* and *Mars Steel*, concluding that Rule 11 serves the function of deterrence, not compensation. *See supra* text accompanying note 282. Nonetheless, the decisions in *Collins* and *Mars Steel* reflect a belief that is common among judges and other commentators in the area of sanctions litigation. *See* Sofaer, *supra* note 44, at 706 (monetary sanctions "serve the important purpose of restitution, enabling courts to rectify the improper imposition of costs on one party by another"); *cf.* Shaneyfelt, *supra* note 1, at 455 ("The quickest way to a frivolous litigator's heart is through his pocketbook.").

States that have adopted sanctions provisions authorizing fee awards as the sole form of sanction, *see supra* notes 170, 202 & 204, necessarily encompass a compensatory rationale. *See* Wade, *supra* note 1, at 492 (noting that granting fees as a sanction serves "to compensate the recipient of the award from [sic] the exact harm at which the wrongful conduct was aimed").

award *so long as* the sanction is commensurate with the offense. The predominance of fee awards under the existing sanctions schemes, though, limit the extent to which judges can achieve these purposes fairly and effectively.

1. Deterrence

Deterring frivolous filings is a legitimate purpose for sanctions schemes to serve. Regardless of whether frivolous litigation is a pervasive problem, the courts should not be expected to endure claims or defenses that lack conceivable merit.[285] Instead, courts should be able to compel lawyers and litigants, through appropriate sanctions, to think twice before pursuing meritless claims or defenses. An ideal sanctions scheme would deter litigants from bringing frivolous claims or defenses but would not inhibit litigants from bringing colorable claims or defenses that challenge existing law. Regrettably, however, the existing sanctions schemes do not pursue their goal of deterrence effectively: they manage, at the same time, to deter too much licit litigation and to deter too little illicit litigation.[286]

*Too Much Deterrence.* As discussed earlier, the existing sanctions schemes that depend upon an objective standard of conduct—both low threshold and hybrid schemes—tend to chill creative advocacy.[287] The 1983 version of Federal Rule of Civil Procedure 11, for example, discouraged lawyers and litigants from pursuing claims that, while tenable, stood a better than even chance of losing.[288] According to one commentator, sanctions under the 1983 amendments "escalate[d] the professional and financial risk of litigating cases that are important to bring but difficult to win."[289] The recent 1993 amendments, which do not alter the prevailing objective standard for sanctions under Rule 11,[290] seem unlikely to reduce the chilling effect of the rule significantly.[291] Even under the 1993 amendments, litigants continue to bear a large professional and financial risk for pursuing novel or uncertain claims. As long as sanctions measures create the risk that litigants will incur severe sanctions for conduct that does not rise to the level of subjective bad faith, sanctions measures will inhibit creative advocacy.[292]

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285. *See supra* note 281 and accompanying text.
286. *See* Stein, *supra* note 71, at 327-28.
287. *See supra* notes 72-78 and 168-231 and accompanying text.
288. *See, e.g.*, Hess, *supra* note 62, at 336-37; Marshall et al., *supra* note 64, at 971.
289. Yamamoto, *supra* note 246, at 370.
290. *See supra* Section II.A.3, pp. 1090-94.
291. *See* Lazaroff, *supra* note 71, at 1118-19.
292. *See infra* text accompanying notes 300-02.

Some commentators have reasoned that Rule 11 chills litigation because the rule encourages courts to impose sanctions excessively.[293] Interestingly, though, the available empirical studies suggest that the frequency with which the federal courts impose Rule 11 sanctions—although a factor that lawyers consider in making their litigation decisions—does not itself explain the chilling effect that the rule exerts upon litigation. In an American Judicature Society study comparing sanctions activity in three federal circuits, Lawrence C. Marshall, Herbert M. Kritzer, and Frances Kahn Zemans found that Rule 11 produced a greater effect upon litigation decisions in the Fifth Circuit than it did in the Seventh Circuit[294]—even though district courts in the Fifth Circuit imposed sanctions far less frequently than district courts in the Seventh.[295] Observing that lawyers in the Fifth Circuit were more likely than lawyers in the Seventh Circuit to be involved in lawsuits in which sanctions were threatened but not imposed,[296] the researchers concluded that "attorneys are deterred not only by the fear of the actual imposition of sanctions, but by the fear of involvement in a proceeding in which sanctions are considered or threatened."[297]

Another empirical study, going one step farther than the American Judicature Society study, revealed that sanctions measures based upon

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293. *See, e.g.*, Nancy Burger-Smith, *Avoiding Sanctions Under Federal Rule 11: A Lawyer's Guide to the "New" Rule*, 15 WM. MITCHELL L. REV. 607, 636 (1989) ("While the rule serves to deter duplicitous litigation, to unclutter the court dockets, and to prevent unnecessary costs from being imposed upon innocent parties, its frequent enforcement and liberal interpretation may pose considerable risks to the free spirit of the adversarial system."). The drafters of the 1993 amendments seemed to accept this reasoning, tailoring their amendments to reduce the frequency with which courts imposed sanctions. *See* Johnson et al., *supra* note 47, at 680 (explaining that the 1993 amendments "call[] for greater restraint in considering the imposition of sanctions") (quoting Fed. R. Civ. P. 11 comment (Proposed Amendment 1991)).

294. Marshall et al., *supra* note 64, at 982-83. The researchers found, for example, that 22.0% of respondents from the Fifth Circuit had declined a case as a direct result of Rule 11, compared with 20.5% of respondents from the Seventh Circuit. *Id.* at 983. They also found that 34.1% of respondents from the Fifth Circuit had discouraged a client from pursuing a particular course of action, compared with 29.8% of respondents from the Seventh Circuit. *Id.*

295. *Id.* at 981-82 ("We found that the Seventh Circuit had the highest rate of sanctions imposed as a proportion of motions filed (24.5%), with the Fifth and Ninth Circuits having a considerably lower rate (14.6% and 14.4% respectively).").

296. *Id.* at 982 (finding that 28.2% of the respondents from the Fifth Circuit "had been involved in a case in which sanctions were formally proposed but not imposed," compared with 22.7% of the respondents from the Seventh Circuit).

297. *Id.*

an objective standard can chill litigation even if courts invoke the sanctions measures infrequently. Comparing sanctions practices in Washington state court with sanctions practices in Washington federal court, Professor Gerald Hess discovered that the Washington state sanctions scheme exerted almost the same chilling effect upon litigation in state court that Rule 11 exerted upon litigation in federal court.[298] Professor Hess did not speculate about the reasons for this finding, but significantly, he observed both (1) that litigants in Washington state court threatened sanctions infrequently and (2) that Washington state courts imposed sanctions infrequently.[299] The frequency with which courts impose sanctions, in sum, does not contribute meaningfully to the chilling effect that low threshold or hybrid sanctions schemes exert upon litigation.

A more important causal factor is, instead, the degree to which courts can impose severe sanctions against parties who proceed in good faith. Several prominent sanctions decisions, in both federal court and in state court, have involved substantial sanctions awards.[300] While

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298. Hess, *supra* note 62, at 345. *See also supra* notes 195-98.

299. Hess, *supra* note 62, at 322-23. Professor Hess found that during the 1990 calendar year, litigants filed 48 sanctions requests in civil cases in Spokane County Superior Court. The court granted 8% of the requests. *Id.* at 322-23.

Most state courts do not impose sanctions as often as their federal counterparts. Some state courts, for example, impose few sanctions because their judges are elected and do not wish to offend potential voters. *See id.* at 327 (stating that because Washington judges are elected, "it is difficult for them to come down hard on either attorneys or clients") (quoting a comment given in response to a survey about the effects of Washington Rule 11); *see also* Robertson, *supra* note 48, at 112 n.8 (discussing sanctions practices under the Mississippi system of elected judges); Timberlake & Pionk, *supra* note 201, at 1048 (1989) (discussing sanctions practices under the Illinois system of elected judges).

Some state courts impose few sanctions because their legal community is small, and as a result, lawyers do not file sanctions motions that might jeopardize existing friendships or business relationships. *See* Sanner & Tobias, *supra* note 75, at 314 (stating that Montana imposes few sanctions, reflecting a "local 'legal culture' in which most lawyers and many litigants know one another personally and are reluctant to jeopardize continuing relationships and civility among attorneys, parties and judges by invoking Rule 11").

Finally, some state courts impose few sanctions because their procedural rules require more specific fact pleading, allowing judges to dismiss insupportable claims or defenses before the litigation reaches a stage in which other, more severe, sanctions would be appropriate. *See* Walker, *supra* note 192, at 872 (Under Arkansas Rule 8, which imposes something of a code pleading regimen, "the threat of sanctions looms less for the very reason that 'facts sufficient to state a cause of action' calls implicitly for an inquiry sufficient to meet the pleading standard").

300. *See* Winters v. Gould, 539 N.Y.S.2d 686 (Sup. Ct. 1989) (affirming a $10,000 sanction award); Con-Tech, Inc. v. Sparks, 798 S.W.2d 250 (Tenn. Ct. App. 1990) (affirming a $31,510.93 sanction award); *see also* federal cases cited in *supra* note 53 in Section II. In another well publicized (but unpublished) sanctions decision, a state

these substantial awards perhaps fall outside the norm—the predominant form of sanction is a fee award that involves an amount less than $10,000[301]—they highlight the risk that litigants must bear in asserting novel or uncertain arguments. Recognizing that the objective standard is imprecise, litigants fear that some arguments, even if asserted in good faith, might offend the sensibilities of a particular judge and thus incur sanctions that the litigants could ill afford.[302] If litigants perceive that the objective standard in a sanctions provision will allow a court to impose severe sanctions against them for asserting certain arguments, then regardless whether the court imposes severe sanctions frequently, the litigants will decline to run the risk of asserting the arguments. As one practitioner has observed, "The power of the sword of Damocles is not in that it falls, but rather in that it hangs."[303]

The empirical evidence is consistent with this conclusion. One possible explanation for the results from the American Judicature Society study, for instance, is that large sanctions awards can inhibit lawyers—even those who practice in another federal circuit—from asserting claims that advance unusual or unprecedented propositions. Thus, severe sanctions that a judge in the Seventh Circuit imposes against a litigant can, if well publicized, affect the litigation decisions of a lawyer in the Fifth Circuit, especially after opposing counsel threatens the lawyer with sanctions.[304] Likewise, one possible explanation for the results from the Hess study is that large sanctions awards in federal court can inhibit lawyers practicing in state court from asserting novel or unusual claims: a Spokane lawyer, realizing that the Washington sanctions provision is based upon Federal Rule 11, might be disinclined to advocate in state court a position that has incurred substantial sanctions in federal court.[305]

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court judge in Texas assessed a $994,000 sanction against two solo practitioners and their client for filing a frivolous pleading. *See* Mark Ballard, *Losers Face $1M Fine for Trial Tactics: Rule 13 Sanctions Catches Task Force's Eye*, TEX. LAW., May 25, 1992, at 1, 30.

301. Marshall et al., *supra* note 64, at 957.

302. *Cf.* Keeling, *A Prescription for Healing the Crisis in Professionalism*, *supra* note 6, at 48 ("Rule 11 allows severe sanctions in indefinite situations—a dangerous combination.").

303. Personal Conversation with J. Stephen Ravel, a member of the firm Bickerstaff, Heath & Smiley in Austin, Texas (Nov. 5, 1993).

304. *See supra* text accompanying notes 294-97.

305. *See supra* text accompanying notes 298-99.

Unavoidably, sanctions schemes that allow courts to impose severe sanctions against a litigant who offends an objective standard of conduct exert a chilling effect upon litigation. Reducing the frequency with which the courts impose sanctions under these schemes will not vitiate their chilling effect. Even in jurisdictions—such as Washington state—that impose sanctions infrequently, sanctions schemes based upon an objective standard tend to inhibit lawyers and litigants from asserting novel arguments. To lessen the chilling effect that these sanctions schemes exert upon litigation, therefore, federal and state courts must attempt to divorce the objective standard from remedial language that permits severe sanctions. In other words, sanctions schemes must limit the most severe sanctions, such as large fee awards, to situations involving subjective bad faith.[306] Absent such a limitation, sanctions schemes will continue to deter too much legitimate litigation.

*Too Little Deterrence.* While sanctions schemes sometimes can chill litigants from pursuing legitimate arguments, the same schemes often might have little deterrent effect upon litigants who desire to pursue illegitimate arguments. At some level, all commentators—no matter their perspective about free access to the courts—would agree that certain motions or pleadings have no business consuming court attention: "nut" cases that raise exotic factual or legal allegations,[307] groundless claims or defenses that a litigant files to gain leverage in legal or business negotiations,[308] and unfounded sanctions motions

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306. *See infra* Section IV, pp. 1152-59.

307. The commentators who have criticized the perceived increase in frivolous litigation often cite a series of "nut" cases to illustrate the dangers that frivolous litigation poses to the judicial process. *See, e.g.*, Gerber, *supra* note 1, at 6; Partridge et al., *supra* note 1, at 233; Shaneyfelt, *supra* note 1, at 443. But while "nut" cases are frivolous and, certainly, should be subject to some kind of sanctions, it seems doubtful that "nut" cases alone pose much of a threat to the judicial process. *Cf.* Galanter, *supra* note 46, at 64 (stating that the "reappearance of the same atrocity stories [suggests] that the 'litigation explosion' might be thought of as an item of elite folklore").

308. *See* Miller, *supra* note 6, at 17. A defendant in a civil lawsuit, for example, might file a large counterclaim to induce the plaintiff to settle the original claim for a lesser amount. *See* Gerber, *supra* note 1, at 8. Consider a situation in which the plaintiff files a wrongful termination action seeking damages in the form of $150,000 in lost wages. The defendant, in turn, files a $200,000 counterclaim alleging that the plaintiff breached an employment contract or interfered with prospective business relations. Even if the counterclaim is groundless, the defendant will gain leverage in settlement negotiations against the plaintiff, who suddenly finds that he is just as subject to a potential damages award as the defendant. The plaintiff might agree to a quick $20,000 or so settlement, rather than take his chances with a jury. *Cf.* Brecher, *supra* note 6, at 113 (discussing the increasing number of intimidation counterclaims, which developers and other commercial defendants use to punish public interest litigants for challenging development projects).

Similarly, corporations have learned to use lawsuits affirmatively as a means of business competition. *See* Miller, *supra* note 6, at 7 ("Intercorporate warfare in the

that a lawyer files as a hardball tactic during litigation.[309] The existing sanctions schemes, however, do not deter litigants from pursuing these kinds of motions or pleadings. As long as sanctions schemes continue to encourage courts to assess fee awards as the exclusive form of sanction, some litigants will continue to pursue arguments that serve no function other than to consume court time and stall the progress of justice.

As might be expected, a high threshold sanctions scheme that requires proof of subjective bad faith as a prerequisite to sanctions is the least effective kind of sanctions scheme in deterring litigation abuse.[310] Because the subjective standard limits the range of conduct that merits sanctions, a high threshold scheme will not intimidate litigants who believe in good faith that their conduct is appropriate.[311] Even if aware that the sanctions scheme exists,[312] litigants who act in good faith will conclude, correctly, that their conduct is impervious to sanctions. A high threshold sanctions scheme therefore fails to deter pro se litigants from filing "nut" cases that raise exotic factual or legal allegations.[313] Most pro se litigants—even including those pro se litigants who assert outrageous claims—possess a quixotic belief that their arguments are legally sound and factually correct.[314]

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courts, particularly in the antitrust and competitive tort fields, also has mushroomed. Virtually unknown ten or fifteen years ago, waging intercorporate lawsuits has become 'business by other means' for many corporations."). A corporation might decide, for example, to file an antitrust suit against its principal competitor, alleging an "avant garde" theory of liability. Concerned about adverse publicity, as well as potential liability in an evolving area of the law, the defendant competitor might offer the plaintiff corporation concessions in the marketplace. *See* Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664, 672 (1979).

309. *See* Keeling, *A Prescription for Healing the Crisis in Professionalism*, *supra* note 6, at 35. Lawyers have learned to use sanctions motions as a means of deflecting attention from their own actions. *Id.* at 48. *See also* Hinerfeld, *supra* note 62, at 33 ("Some judges say the same combative attitudes that necessitated the rule in the first place have led to excessive requests for sanctions under Rule 11."); Segal, *supra* note 267, at 150 ("Any shield against abuse can become a sword for abuse."); Weston, *supra* note 82, at 899 ("Even more troublesome is the use of attorney sanctions as a weapon . . . . Lawyers threaten one another to force or prevent specific conduct.").

310. *See* Lebeuf, *supra* note 202, at 277 (arguing that the subjective standard is insufficient to deter litigants from taking a frivolous position).

311. *See supra* text accompanying note 159.

312. *See infra* text accompanying note 315.

313. *See* Mallor, *supra* note 19, at 642-43.

314. *Cf.* Eric J.R. Nichols, Note, *Preserving Pro Se Representation in an Age of*

The existing sanctions schemes that depend upon an objective standard, though, are not much more effective in deterring litigation abuse. Low threshold and hybrid sanctions schemes are no more effective than high threshold sanctions schemes, for instance, in deterring litigants from filing "nut" claims. Two factors limit the general deterrence value of sanctions schemes in cases involving "nut" claims.[315] First, because pro se litigants file a large proportion of the nut claims,[316] the litigants, lacking legal training, might not even be aware that their claims are susceptible to sanctions.[317] Second, because the predominant form of sanction is a remedial fee award,[318] litigants who file "nut" claims, even if aware that their claims are susceptible to sanctions, cannot conceive that a potential sanctions award would pose them a threat. Unlike parties who might face financial devastation and social disapprobation after incurring a sanctions award,[319] litigants

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*Rule 11 Sanctions*, 67 TEX. L. REV. 351, 351 (1988) (stating that pro se litigants "may seek out courtrooms as forums to vent strongly held but legally unfounded social and political theories or as battlegrounds to satisfy private, legally unredressable vendettas").

315. "General deterrence" is a kind of deterrence under which, in a sanctions situation, a litigant refrains from taking a position because the litigant fears being sanctioned. Stein, *supra* note 71, at 327. In contrast, "specific deterrence" is a kind of deterrence under which a litigant abandons a position because that specific litigant has been sanctioned or threatened with sanctions. *Id.* Just as sanctions schemes have little general deterrence value against "nut" claims, sanctions schemes also have little specific deterrence value. Because "nut" claims often can be resolved quickly through a motion for summary judgment or dismissal, the parties defending against the claims seldom need to request sanctions. Accordingly, the litigants who file "nut" claims frequently avoid sanctions threats that might compel them to abandon their claims. *Id.* at 330.

316. *See* Nichols, *supra* note 314, at 359 (noting that pro se litigants file many of the more "nonsensical" claims in federal court). A large proportion of these pro se litigants are, in turn, prison inmates filing civil rights claims. *See* Douglas A. Blaze, *Presumed Frivolous: Application of Stringent Pleading Requirements in Civil Rights Litigation*, 31 WM. & MARY L. REV. 935, 937 (1990).

317. *See* Nichols, *supra* note 314, at 373. Most pro se litigants have received no formal legal education. Accordingly, pro se litigants do not understand the complexities of court procedural rules. *Id.* at 361-62. Even if these litigants manage to discover that procedural rules allow courts to sanction frivolous pleadings, pro se litigants will have trouble ascertaining whether their own pleadings are sanctionable. *Id.* at 372 ("Attorneys and judges often disagree on the questions of which claims lack basis in law and of what constitutes a 'good faith' attempt to change the law. Untrained pro se parties doubtless have no less difficulty.").

318. *See supra* text accompanying notes 73 and 176.

319. Large fee awards can produce "devastating professional and financial consequences." Cochran, *supra* note 67, at 6. Moreover, they can have a profound stigmatizing effect. In a recent case, a federal district court in North Carolina assessed substantial sanctions under Rule 11 against a respected law professor who, in good faith, had represented a class of Native Americans in a civil rights action. *See* Johnson,

who file claims that raise exotic factual or legal allegations, especially if proceeding prose, often are indigent and have little social status to lose.[320]

Similarly, both the existing sanctions schemes that use a subjective standard and the existing sanctions schemes that use an objective standard are ineffective in deterring litigants from filing groundless claims or defenses for the sole purpose of gaining leverage in legal or business negotiations. If there were one kind of pleading that sanctions schemes should deter, it would be groundless pleadings that litigants file to gain leverage against their opponents. Leverage suits represent litigation at its worst: the parties who bring these suits have no interest in vindicating justice or otherwise effecting justice. Rather, the parties who bring leverage suits desire to effect advantageous economic ends, even if achieving those ends requires pursuing illegitimate means.[321] The threat of sanctions, however, is not a large enough stick with which to chastise parties who bring leverage suits. The largest sanction that a court might impose under most sanctions schemes, whether based upon an objective standard or a subjective standard, is an award of fees.[322] To parties who file leverage suits, the cost of expending a potential fee award does not even begin to approach the benefit of compelling opposing litigants to settle embarrassing legal disputes or to concede larger shares of the relevant market.

An example of a leverage suit that can produce benefits which exceed the risk of sanctions is a public interest intimidation suit, sometimes called a SLAPP.[323] The most common form of SLAPP—Strategic Lawsuit Against Public Participation—is a claim that a real estate developer asserts against public interest activists either to punish them for

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*supra* note 47, at 650 (citing Memorandum Regarding Nature of Sanctions, Robeson Defense Committee v. Britt, No. 89-06 CIV-3-H (E.D.N.C. 1991)). As a consequence of the sanctions, the professor for a time was unable to attend classes and other school and community functions. *Id.*

320. *See* Nichols, *supra* note 314, at 369-70; *see also* Blaze, *supra* note 316, at 988 ("Monetary sanctions simply are not effective in the case of indigent litigants."); *cf.* Mallor, *supra* note 19, at 643 (observing that because litigants who bring "nut" claims "are not likely to be proceeding on rational bases anyway, it would seem that they are not likely to be deterred by the possibility that they may be liable for their opponents attorneys' fees").

321. *See, e.g.*, Brecher, *supra* note 6, at 105.

322. *See supra* text accompanying notes 73 and 176.

323. *See* George W. Pring & Penelope Canan, *Strategic Lawsuits Against Public Participation*, 35 SOC. PROBS. 506, 506 (1988); George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 PACE ENVTL. L. REV. 3, 4 (1989).

opposing past development projects or to discourage them from challenging future projects.[324] Such intimidation suits might allege that the public interest activists abused civil process, interfered with contractual or other prospective business relations, or libeled the developer.[325] Usually, these SLAPPs are patently groundless. Nonetheless, developers continue to file SLAPPs, invariably knowing that the claims are groundless and therefore sanctionable. The developers perceive that the sanctions a court might impose against them for filing a SLAPP are, simply, an unavoidable cost of doing business.[326]

Additionally, and perhaps most curiously, sanctions schemes are ineffective in deterring lawyers from filing unfounded sanctions motions. Although unfounded sanctions motions are just as sanctionable under the existing sanctions schemes as unfounded pleadings,[327] lawyers have persistently used sanctions motions as a means for gaining a

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324. *See* Brecher, *supra* note 6, at 105; *see also supra* note 152. "These suits are effective for four main reasons: (1) they transform the position of the parties; (2) they increase the risks involved; (3) they divert the attention of the [public interest activists]; and (4) they delay resolution of the original issue." Victor J. Cosentino, Comment, *Strategic Lawsuits Against Public Participation: An Analysis of the Solutions*, 27 CAL. W.L. REV. 399, 403 (1991).

SLAPPs are distinguishable from intimidation counterclaims, which a developer might file to intimidate a plaintiff in an ongoing legal challenge to a development project. Cosentino, *supra* at 405. The purpose of an intimidation counterclaim, though, is identical to the purpose of a SLAPP. Both are intended to allow a developer to gain leverage against public interest activists. *See* Brecher, *supra* note 6, at 113-14.

325. *See* Brecher, *supra* note 6, at 113. Professor Pring has cited several examples of SLAPP suits in the New York City area, including an $11,200,000 libel and conspiracy suit that a developer brought against nine homeowner groups for testifying against a luxury development project and a $6,652,000 business interference and defamation suit that another developer brought against seven private citizens for lobbying against a two-home development. *See* Pring, *supra* note 323, at 13.

326. *See* Cosentino, *supra* note 324, at 416. Fee awards do not present a significant threat to developers who pursue SLAPP suits. Cosentino notes that the average damages request in a SLAPP is $9 million, while the average amount of fees expended in defending a SLAPP is $8500. *Id.* "Even assuming that the plaintiff's actual damages due to the defendant's petitioning action are only a fraction of those claimed, the economic incentive to sue vastly outweighs the costs of suing and paying attorney's fees." *Id. Cf.* Barker, *supra* note 152, at 420 ("Sanction amounts, when awarded, are too small to deter."); Brecher, *supra* note 6, at 137 ("[T]he typical sanction award is a relatively minimal amount and is usually imposed against an attorney, rather than his client. Thus, a determined developer is not likely to be discouraged from filing a retaliation suit by the remote possibility of sanctions.").

327. *See* Woods, *supra* note 40, at 666 n.2 (noting that sanction motions are often themselves frivolous). Some jurisdictions include in the text of their sanctions provisions a specific warning that groundless sanctions motions are sanctionable. *See, e.g.*, N.Y. CT. RULES § 130-1.1(c) ("Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section.").

procedural advantage in litigation.[328] Even if they know that their motions are groundless, they believe that the benefits of filing the sanctions motions outweigh the risks. More often than not, they are right. A sanctions motion, even if unfounded, can intimidate an opposing litigant who fears incurring a large fee award.[329] It can stall pre-trial proceedings while the judge examines the law and facts.[330] It can influence the judge to reach a favorable decision on the merits.[331] Taken together, or even individually, these benefits can far exceed the risks of a sanctions award that, typically, would amount to a minimal award of the fees that opposing counsel expended in challenging the sanctions motion.

Sanctions schemes, in sum, cannot achieve effective deterrence as long as the predominant form of sanction that courts impose under the sanctions schemes is a fee award. Some individuals, such as litigants who file "nut" cases, might not even think about the risk of a fee award before filing suit. These individuals often lack the competence or sophistication to understand that their pleadings are sanctionable.[332] Imposing a large fee award against these individuals is akin to beating a deaf child for failing to respond to a dinner bell: like the deaf child, these individuals do not possess the skills to know that their conduct is

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328. *See* Fitzwater, *supra* note 81, at 798-801; *see also* David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 838 (1992) (stating that "adversaries may gain a number of strategic advantages from reporting lawyer misconduct").

329. *See supra* text accompanying notes 287-306.

330. Keeling, *A Prescription for Healing the Crisis in Professionalism*, *supra* note 6, at 47; *see also* Schwarzer, *supra* note 39, at 183-84 (a lawyer seeking to stall litigation "may welcome the resulting proliferation of proceedings as serving his purposes"); *cf.* Fitzwater, *supra* note 81, at 800 ("Practitioners should recognize that unfounded Rule 11 motions must be ruled upon and that district courts are required to give the motions sufficient attention to facilitate appellate review. This likewise diminishes available resources and gives rise to the dual evils of delay and excessive cost."). A lawyer often might find it desirable to stall pre-trial proceedings. Although the ethical merit of the practice is questionable, stalling pre-trial proceedings can increase litigation costs, compelling a less well financed opponent to initiate settlement negotiations. *See* Keeling, *A Prescription for Healing the Crisis in Professionalism*, *supra* note 6, at 37.

331. Keeling, *A Prescription for Healing the Crisis in Professionalism*, *supra* note 6, at 45. Stein argues that lawyers seek sanctions not against frivolous arguments, but rather against dangerous arguments. A motion for sanctions thus is a form of emphatic behavior, suggesting that the challenged argument is so wrong that it is frivolous. Stein, *supra* note 71, at 315. The judge hearing the motion may use it "as an opportunity to 'split the difference' by ruling for the party requesting sanctions on the merits but denying sanctions." *Id.*

332. *See supra* text accompanying notes 316-17.

disfavored. Rather than assessing fee awards to deter "nut" cases generally,[333] courts should consider alternative sanctions that would deter specific litigants from pursuing additional "nut" claims in the future—e.g., reprimanding the offenders, requiring the offenders to read materials that cover the appropriate substantive legal area and to prepare a report about them, requiring the offenders to seek court approval before filing future claims. Sanctions schemes that encourage these alternative sanctions would continue to allow courts to redress groundless "nut" claims, but at the same time, the sanctions schemes would achieve their deterrence function through educating the offenders, not coercing them.[334]

Other individuals might think about the risk of a fee award before filing suit and nonetheless conclude that the potential benefits are worth running the risk. Thus, while a fee award might deter private individuals from filing a public interest class action that raises a novel or uncertain claim, it might not deter a large corporation from filing a bad faith leverage suit. Corporations, in general, are much better able to afford the expense of a fee award.[335] Likewise, a fee award might not deter a lawyer from filing a sanctions motion that the lawyer knows is unfounded. The amount of fees that opposing counsel would expend in challenging an unfounded sanctions motion in most cases will not be as prohibitive as the amount of fees opposing counsel would expend in challenging a frivolous claim or defense.[336]

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333. For the differences between general deterrence and specific deterrence, see *supra* note 315.

334. Repeated frivolous filings, notwithstanding intervening non-monetary sanctions designed to educate the offender, might suggest that the offender is acting with a bad faith intent to abuse the judicial process. Even then, however, courts should entertain sanctions that would have a prospective, rather than remedial, effect upon the offender. For example, a sanction that imposes a limit upon the number of lawsuits a litigant can file, absent court approval, might be more effective than a fee award or other monetary sanction. *See* Blaze, *supra* note 316, at 988.

335. *See* Cosentino, *supra* note 324, at 402.

336. Most jurisdictions use the lodestar method to calculate fee awards. *See, e.g.*, White v. General Motors Corp., 908 F.2d 675, 684 (10th Cir.) (applying the "reasonableness (lodestar) calculation"), *cert. denied*, 111 S. Ct. 788 (1991). Under the lodestar method, a court calculates attorney fees by multiplying the customary hourly rate for the services rendered and the number of hours reasonably expended. The court can then adjust this figure, taking into account several factors:

> (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill required to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of

For individuals who make a conscious decision to abuse the judicial process, courts must impose a sanction that is more stringent than a fee award. Courts might consider imposing a fine that would exceed the amount of a fee award and, accordingly, create a larger disincentive against litigation abuse. In egregious cases, courts might consider suspending the lawyers who brought the offensive pleadings or motions from practicing in those courts. But regardless of the sanction, the federal and state courts must do a better job of tailoring the sanction to fit the offense and the offender. Otherwise, sanctions schemes, whether based upon a subjective or objective standard of conduct, will continue to be ineffective in deterring illegitimate litigation.

2. Punishment

Another valid purpose for sanctions measures is to punish individuals who abuse the judicial process. Although one goal of punishment is to deter offensive behavior[337]—and, to that extent, the terms "deterrence" and "punishment" are often used interchangeably[338]—punishment also serves the larger goal of condemning offensive behavior.[339] Punishment, in short, is retribution. Regardless whether it deters offensive behavior, it satisfies the collective societal desire for revenge against the offender.[340] Judicial sanctions measures allow the

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the professional relationship with the client; and (12) awards in similar cases. Hensley v. Eckerhart, 461 U.S. 424, 430 n.3 (1983) (citing MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106 (1980)).

337. Traditionally, punishment serves four goals: deterrence, incapacitation, rehabilitation and retribution. Michele H. Kalstein et al., Comment, *Calculating Injustice: The Fixation on Punishment as Crime Control*, 27 HARV. C.R.-C.L. L. REV. 575, 576 (1992).

338. *Compare* Cooter & Gell v. Hartmarx Corp., 110 S. Ct. 2447, 2454 (1990) ("It is now clear that the central purpose of Rule 11 is to deter baseless filings . . . .") *with* Willy v. Coastal Corp., 112 S. Ct. 1076, 1081 (1992) ("Rule 11 is designed to punish a party who has already violated the court's rules").

339. *See* Lawrence Crocker, *The Upper Limit of Just Punishment*, 41 EMORY L.J. 1059, 1063 (1992). In most cases, emphasizing punishment will not produce a result different from emphasizing deterrence. Nonetheless, in some circumstances, the two goals might produce different results. Conceivably, harsh sanctions might be appropriate to punish a recalcitrant litigant- even where the litigant is so intent upon abusing the judicial process that the sanctions would have little deterrent effect.

340. *See* JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 170 (1776); A.C. EWING, THE MORALITY OF PUNISHMENT: WITH SOME SUGGESTION FOR A GENERAL THEORY OF ETHICS 32-35 (1929); *see also* OLIVER W. HOLMES, JR., THE COMMON LAW 40 (1881) ("It certainly may be argued, with some force, that it

courts to condemn abusive litigation behavior. With sanctions, the courts can exact some measure of vengeance against individuals who have consumed court time and docket space despite lacking a colorable reason for doing so.

But while sanctions measures can and should serve a retributive function, the range of sanctions available for particular offenses must be circumscribed. Punishment, in other words, must be commensurate with the moral guilt of the offender.[341] If the sanction is not severe enough for the offense, the sanction will have little retributive effect upon the offender. Perceiving that the sanction is, in context, equivalent to a mere slap on the wrist, the offender will be encouraged to commit in the future the same abusive behavior for which she received the sanction. Conversely, if the sanction is too severe for the offense, the sanction will "dehumanize" the offender.[342] Perceiving that the sanction is unfair, the offender will feel victimized and might, in fact, suffer some measure of emotional trauma. The federal and state appellate courts have for these reasons recognized the need to circumscribe the range of sanctions, concluding that sanctions should be no more severe than is adequate to punish the offender effectively.[343] Unfortunately, the trial courts often fail to assess sanctions that bear a reasonable relationship with the seriousness of the offense.[344]

Just as it limits their deterrence value, the predominance of fee awards limits the retributive value of sanctions schemes. In most instances in which a sanction scheme authorizes a trial court to assess a

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has never ceased to be one object of punishment to satisfy the desire for vengeance.").

341. *See* Crocker, *supra* note 339, at 1101 ("[T]here is widespread agreement that the severity of punishment should bear some relationship to the seriousness of the crime"); Kalstein, *supra* note 337, at 650 ("Rather than punish offenders for the sake of some other end, the system should punish offenders to the extent that they deserve it.").

342. Kalstein, *supra* note 337, at 646.

343. *See, e.g.*, White v. General Motors Corp., 908 F.2d 675, 685 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 788 (1991); Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 878 (5th Cir. 1988) (en banc); Bryant v. Joseph Tree, Inc., 829 P.2d 1099, 1107 (Wash. 1992) (en banc); Williams v. Board of Trustees, 589 A.2d 901, 911 (D.C. Ct. App.), *cert. denied*, 112 S. Ct. 190 (1991). The 1993 amendments to Federal Rule 11 include language that codifies the "least severe sanction adequate" requirement. FED. R. CIV. P. 11(c)(2) ("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."). *Cf.* Note, *The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions*, 91 HARV. L. REV. 1033, 1053 (1978) ("[A] sanction aimed at vindicating the authority of the law . . . may be no more severe than necessary to achieve that end.").

344. *See* Johnson et al., *supra* note 47, at 655 (noting lower courts' failure to observe "the 'least severe sanction adequate' requirement").

sanction award against a litigant for pursuing frivolous litigation, the court will assess a sanction that reimburses the victim for his legal expenses. Some litigants, though, will not view a fee award as a compelling sanction. A developer who files a SLAPP suit to induce public interest activists to cease their opposition to a development project, for example, might find that a fee award is nothing more than a minor irritation—an expense of doing business that the profits from the development project will more than offset.[345] For such a litigant, a fee award does not serve the purposes of punishment at all: the developer is not forced to experience a pain or loss that is commensurate with his moral guilt. Especially when the developer has filed its action in subjective bad faith, the developer ought to be subject to a more fitting sanction.

In comparison, individuals who have acted in good faith, and thus possess far less moral guilt, might find that a fee award is an unbearable sanction. Besides the fact that a fee award can in some circumstances pose a large financial obstacle, a fee award can also produce devastating emotional consequences.[346] The weight of a punitive fee sanction on the shoulders of an individual who has pursued a course of conduct in good faith, in particular, can be enormous. To state the obvious, an individual who acts in good faith neither knows nor believes that her conduct is improper. Assessing a sanction that suggests that her conduct is not just wrong, but so wrong that it justifies a fee award that resembles a criminal fine, implies that the individual possesses a higher degree of moral guilt than in fact she possesses. A rebuke of that magnitude against an individual who neither knew nor believed that her conduct was improper is a bitter pill. While the conduct might in fact support some kind of sanction, the weight of a fee award in that instance far exceeds the seriousness of the offense, whether the individual filed a "nut" claim that raises exotic factual assertions or filed a novel claim that raises legal arguments which offend an objective standard of reasonableness.

Sanctions schemes, in sum, give courts a means with which to punish litigation abuse, but the sanctions that courts impose under these schemes must be appropriate. If a sanction is not commensurate with the offense, then the sanction both ignores the nature of the offense and the individual circumstances of the offender. In essence, the sanction fails to be a reasoned response to the offensive conduct and

345. *See supra* notes 323-26 and accompanying text.
346. *See* Johnson et al., *supra* note 47, at 650.

instead becomes punishment for the mere sake of punishment. Although fee awards sometimes can be an appropriate sanction, fee awards are too often a mindless form of punishment that courts impose against offenders for the mere sake of punishing the offenders. In focusing upon a sanction that considers the expenses of the victim and not the nature of the offense or the circumstances of the offender, federal and state courts have abdicated their duty to ensure that the punishment they impose against litigation abuse is commensurate with the offense.

3. Compensation

Of the three main purposes that the courts have identified for sanctions awards, the third purpose—compensating the victims of litigation abuse—is the least justifiable. The compensation rationale purports to "make whole" the victims of litigation abuse—i.e., to reimburse the victims for the expenses that they incurred in challenging the abusive conduct.[347] Unlike the general policies of deterrence and punishment, therefore, the compensation rationale *requires* that courts impose fee awards as the sanction for litigation abuse. Because it emphasizes the victim rather than the offender, the compensation rationale abrogates judicial discretion to craft a sanction, other than a fee award, that would balance the competing interests in preserving free access and redressing litigation abuse. Predictably, fee awards produce the same undesirable consequences under a compensation rationale that fee awards produce under a deterrence or punishment rationale.[348] In requiring that courts impose fee awards as the sanction for litigation abuse, though, the compensation rationale magnifies these consequences considerably.

First, the compensation rationale suggests that the law is indifferent to litigation abuse.[349] As under the deterrence and punishment theories, the predominance of fee awards under the compensation rationale offers little disincentive against abuse of the judicial process. As

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347. *See* Sofaer, *supra* note 44, at 706 (fee awards "serve the important purpose of restitution, enabling courts to rectify the improper imposition of costs on one party by another"). The compensation rationale thus conflicts with the "American rule" for attorney fee shifting. Under the American rule, each side in litigation must bear its own attorney fees. *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247-59 (1975); *see also* DAN B. DOBBS, LAW OF REMEDIES § 3.10(1), at 276 (1993) (observing that the rule in the United States "is that the losing party . . . is not liable to pay the winner's attorney fee").

348. *See supra* Section III.B.1. & 2, pp. 1136-50.

349. *See* Robertson, *supra* note 48, at 121 ("Compensation theory says to the frivolous filer that the law does not care if he signs, files, serves and pursues a frivolous point . . . .").

long as individuals are willing to reimburse their victims, then the threat of a fee award will not intimidate the individuals from filing a frivolous motion or pleading in bad faith.[350] At least under sanctions schemes that give courts the discretion to impose a sanction other than a fee award there remains some minimal threat that a court in a particular case might impose a sanction which would exceed a mere fee award. Sanctions schemes that follow a compensation rationale remove all doubt. Knowing that the sole possible sanction is a fee award, individuals can calculate the exact cost of abusing the judicial process and decide whether the cost justifies the potential rewards. The compensation rationale thus implies that the courts will tolerate abuse if the offenders can "pay their own way."

Second, the compensation rationale further increases the administrative burdens that the courts must bear. Although the compensation rationale abrogates judicial discretion to craft a sanction other than a fee award, it nonetheless requires that for each sanctionable offense, a court must calculate an appropriate fee award. This process consumes valuable court time,[351] and moreover, it is itself ripe for abuse.[352] Because the compensation rationale ensures that courts will assess a fee award for violations of a sanctions provision, it entices litigants to flood the courts with sanctions motions, hoping to recover some or all of their legal expenses.[353] The courts must wade through these motions, dividing the wheat from the chaff. Even when the sanctions motions are

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350. *Id.*

351. *See* Dan B. Dobbs, *Awarding Attorney Fees Against Adversaries: Introducing the Problem*, 1986 DUKE L.J. 435, 489.

352. Keeling, *A Prescription for Healing the Crisis in Professionalism*, *supra* note 6, at 53.

353. *See* Dobbs, *supra* note 351, at 436 (noting the "considerable secondary litigation over attorney fees"); Keeling, *A Prescription for Healing the Crisis in Professionalism*, *supra* note 6, at 53. Fee awards are a "tempting carrot." Fitzwater, *supra* note 81, at 799. In Alaska, the one American jurisdiction that allows prevailing parties in civil litigation to recover part of their attorney fees as a matter of course, fee awards are "the single most appealed issue in civil cases." Hughes, *supra* note 201, at 145 (quoting James Blair, former president of the Alaska Bar Association). *See also* Kordziel, *supra* note 201, at 438 ("[T]he ambiguity inherent in determining a reasonable fee resulted in a large number of appealed awards. According to a 1982 survey, more than one-fifth of the cases coming before the Alaska Supreme Court contained attorney fee issues."); *cf.* Angela L. v. Pasadena Indep. Sch. Dist., 918 F.2d 1188, 1190 (5th Cir. 1990) ("Perhaps the fiercest legal battles emerge not from knotty questions of a plaintiff's right to justice, but rather from comparatively trivial questions of an attorney's right to compensation.").

valid, the documents that support the motions often contain exaggerated claims of expenses and billable hours.[354]

The legislative and judicial bodies that draft sanctions measures must eliminate the language in their statutes and rules that encourages courts to assess fee awards. Certainly, in some instances, a fee award will be an appropriate sanction. But even then, the award must serve the policies of deterrence and punishment, not compensation. A sanction should be a reasoned response to the nature of the offense and the circumstances of the offender, not an automatic attempt to reimburse the victim. To ensure a balanced approach to frivolous litigation, sanctions schemes should compel courts to emphasize sanctions other than fee awards. For conduct that does not reflect subjective bad faith, sanctions schemes should require courts to impose minor sanctions, such as nonmonetary sanctions or a nominal monetary fine. For conduct that reflects subjective bad faith, sanctions schemes should authorize courts, where the circumstances warrant, to impose monetary sanctions even larger than a fee award.

## IV. A BALANCED APPROACH: COMBINING THE BEST ASPECTS OF THE OBJECTIVE AND SUBJECTIVE STANDARDS

To represent a balanced approach to frivolous litigation, a sanctions scheme must respect both the interest in preserving free access to the courts and the interest in redressing litigation abuse. Thus, a sanctions scheme should not threaten large sanctions against litigants whose conduct does not reflect subjective bad faith. Even if large sanctions are assessed infrequently, the mere threat of large sanctions can chill litigants from pursuing novel or uncertain claims. But at the same time, a sanctions scheme should give courts appropriate means with which to punish and deter frivolous litigation. If a litigant abuses the judicial process, whether in bad faith or in good faith, a court should be able to respond with a sanction that is commensurate with the offense. Ultimately, in balancing the competing interests of preserving free access and redressing litigation abuse, a sanctions scheme must combine the best aspects of the objective and subjective standards for imposing sanctions.

The 1993 amendments to Federal Rule 11 do *not* provide a workable model for drafting a balanced sanctions scheme. Although it is too soon to measure the effects of the 1993 amendments, the 1993 amendments will, undoubtedly, continue to exert a chilling effect upon litiga-

354. *See* Dobbs, *supra* note 351, at 436 n.11 (characterizing such exaggerated claims as "common").

tion.[355] Rather than confine large sanctions to individuals whose conduct reflects subjective bad faith,[356] the 1993 amendments attempt to lessen the chilling effect of the rule with various procedural devices—among other things, a "safe harbor" provision and a provision that gives judges the discretion to refuse a sanctions award.[357] These procedural devices do not eliminate the conditions that inhibit litigants from filing novel or uncertain claims. While the "safe harbor" provision might allow litigants to withdraw an erroneous pleading,[358] it does not ensure that litigants can assert a novel legal argument—after the safe harbor period has expired—without bearing the risk of a large fee award.[359] While the provision that gives judges discretion to refuse an award might allow judges to ignore de minimis violations,[360] it does not ensure that judges will refrain from assessing large fee awards against litigants who act in good faith.[361] The 1993 amendments to Rule 11, in

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355. *See supra* Section II.A.3.

356. The 1993 amendments provide that federal district courts should limit sanctions awards to a form "sufficient to deter repetition" of the sanctioned behavior. FED. R. CIV. P. 11. But while this language is an improvement over the 1993 version of Rule 11, which contained no express language limiting sanctions awards, it remains little more than an exhortation that courts should act reasonably. *See* Johnson et al., *supra* note 47, at 666 ("emphasis alone will not bring any real change to Rule 11 practice"). Nothing in the 1993 amendments prevents district courts from imposing fee awards against litigants who act in good faith. *See id.*; *see also* Lazaroff, *supra* note 71, at 1118-19.

357. FED. R. CIV. P. 11.

358. *See* Bunch, *supra* note 109, at 966.

359. While on the whole the "safe harbor" provision is a significant protective mechanism, it does not in itself ensure that sanctions provisions will preserve the right of free court access. *See* Tobias, *supra* note 92, at 1784-85. Indeed, the "safe harbor" provision might increase, rather than decrease, the chilling effect of Rule 11 sanctions. The provision might inspire some lawyers to file sanctions motions as a tactical maneuver to coerce opposing counsel to withdraw undesirable pleadings. *See id.* at 1785; *see also* Keeling, *A Prescription for Healing the Crisis in Professionalism*, *supra* note 6, at 48 n.112. *But see* Bunch, *supra* note 109, at 966 (arguing that fears that the safe harbor provision might invite abusive litigation tactics are "highly speculative").

Similar to the 1983 version of Rule 11, the 1993 amended version purports to allow litigants to make a nonfrivolous argument "for the extension, modification, or reversal of existing law." FED. R. CIV. P. 11. This language, however, is insufficient to prevent judges from assessing sanctions against litigants for pursuing novel or uncertain claims. *See supra* text accompanying notes 62-64.

360. *See* Simpson, *supra* note 109, at 511.

361. *See* Tobias, *supra* note 92, at 1786 ("[T]he decision to reinstate discretionary sanctioning may be less significant than numerous observers . . . have suggested. For

short, do not represent a balanced approach to frivolous litigation.

A sanctions scheme that represents a balanced approach to frivolous litigation would, first, limit the most severe sanctions to individuals whose conduct reflects subjective bad faith—i.e, a willful intent to harass the opposing side or to stall pre-trial or trial proceedings. If the evidence establishes bad faith,[362] the sanctions scheme would authorize a court to impose any sanction that the court in its discretion found appropriate to deter future litigation abuse and punish the offender, subject to the requirements that the sanction be commensurate with the offense and consistent with due process.[363] Among the kinds of sanctions that a court could impose against an individual whose conduct reflected bad faith would be a fee award. But in the interest of advancing the policies of deterrence and punishment, the sanctions scheme should not emphasize fee awards as the predominant form of sanction. Even against individuals whose conduct reflects bad faith, other kinds of sanctions—such as a large fine payable to the court or an order precluding an offending lawyer from practicing before the court—might be more appropriate in some circumstances than a fee award.

Conversely, in some circumstances, a sanction even greater than a fee award might be appropriate. Against a corporate litigant that abuses the judicial process to produce desirable economic ends, for instance, a fee award would have little or no deterrent effect. Indeed, if the corporate litigant possesses substantial assets, a potential fee award would have about the same effect as a mosquito bite on the hind leg of an ele-

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instance, there is little reason to think that trial judges who impose substantial sanctions on civil rights plaintiffs under existing Rule 11 will exercise this discretion differently . . . .").

362. To avoid allowing individuals to hide bad faith conduct behind a facade of good faith, courts should be able to examine protestations of innocence critically. Thus, if the preponderance of the evidence—either direct or circumstantial—establishes that the offender acted in bad faith, the courts should be able to enforce a severe sanction, regardless of whether the offender claims the mantle of good faith. *See* Keeling, *A Prescription for Healing the Crisis in Professionalism*, *supra* note 6, at 62.

363. Conceivably, due process requires, at least to some extent, that sanctions awards be reasonable in size and amount. *See* Keeling, *Due Process Requirements*, *supra* note 92, at 383. *Cf.* Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991) (in deciding whether a punitive damages award satisfies due process, "general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus"). Presumably, though, a sanctions award that is commensurate with the nature of the offense and the circumstances of the offender will meet the requirements of due process. *Cf.* Eichenseer v. Reserve Life Ins. Co., 934 F.2d 1377, 1382 (5th Cir. 1991) (concluding that a punitive damages award is not unreasonable if some "circumstances of probative force" support the amount of the award).

phant. A sanctions scheme should not prevent courts from assessing a sanction that is commensurate with the offense and the circumstances of the offender. If a litigant acts in subjective bad faith and the facts establish that a fee award—or any lesser sanction—would neither deter nor punish the litigant adequately, then a court should be able to assess a fine or other monetary sanction that is even larger than a fee award.

Certainly, confining the most severe sanctions to conduct that reflects bad faith would allow some egregious conduct to go unpunished—or at least to incur nothing more than a comparable slap on the wrist—where the offender is able to suppress evidence of its subjective bad faith.[364] This disadvantage, however, does not offer a compelling reason for clinging to the existing sanctions models. First, few bad faith offenders will be able to escape a punishment that is commensurate with their offense. Just as criminal offenders find it almost impossible to pull off a crime without leaving some evidence that would establish their criminal intent, litigants will find it almost impossible to abuse the judicial process intentionally without leaving some evidence that would establish their bad faith.[365] And because judges—perceiving that litigation practice has become too confrontational—are more than willing to look behind false protestations of good faith, litigants should expect that if they abuse the judicial process intentionally, judges will more often than not find sufficient evidence of bad faith to impose severe sanctions.[366]

Moreover, confining the most severe sanctions to conduct that reflects bad faith preserves the goal of ensuring that sanctions schemes will not inhibit litigants from pursuing novel or uncertain claims. The existing low threshold and hybrid sanctions schemes exert a chilling effect upon litigation because they raise the threat that litigants might

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364. For this reason, some commentators, including the author, have argued that the legal profession itself should be more diligent in punishing lawyers who act unprofessionally. *See* Keeling, *A Prescription for Healing for Healing the Crisis in Professionalism*, *supra* note 6, at 74; Thomas M. Reavley, *Rambo Litigators: Pitting Aggressive Tactics Against Legal Ethics*, 17 PEPP. L. REV. 637, 643-44 (1990).

365. *See supra* notes 151-52.

366. Judges in high threshold states have not complained that bad faith litigation abuse slips through the cracks of their sanctions schemes—indeed, in some of these states, judges have imposed several large sanctions awards against litigants whose conduct reflects bad faith. *See* Woods, *supra* note 40, at 673-74. Rather, the judges in these states have complained that high threshold sanctions schemes do not allow them to reach conduct that, while troubling, does not rise to the level of bad faith. *See supra* text accompanying notes 161-65.

be required to bear a large fee award or other severe sanction for pressing a position that a judge finds unreasonable. If litigants were reassured that courts could not impose the most repressive sanctions absent evidence that the sanctioned individual intended to harass the opposing side or to stall trial proceedings, then the litigants would feel more free to pursue claims and defenses that pushed the outer boundaries of the existing law. As long as the litigants believed in good faith either that their arguments were valid or that their arguments reflected legitimate grounds for changing the law, the litigants would be immune from the kinds of sanctions that otherwise might inhibit their free access to the courts.

Finally, while a sanctions scheme that represents a balanced approach to frivolous litigation should confine the most severe sanctions to conduct that violates a subjective standard, it does not confine *all* sanctions to conduct that violates a subjective standard. If the evidence fails to establish that the offender acted in subjective bad faith, but nonetheless establishes that the offender failed to conduct a reasonable investigation into the law and facts supporting his motion or pleading,[367] a sanctions scheme should give a court a limited range of less severe sanctions that the court could impose against the offender. The sanctions that a court could impose against an individual who violates an objective standard of reasonableness might include the following: (1) a nominal fine, (2) a public or private reprimand, (3) an order requiring the offender to send the victim of her conduct a formal written apology, (4) an order requiring the offender to read materials that cover the appropriate substantive area and to prepare a written report on them, (5) an order requiring an offending lawyer to attend continuing educational instruction in the relevant substantive area, and (6) an order requiring the offender to seek court approval before filing future motions or pleadings. While the sanctions scheme would not permit a judge to assess a fee award that was greater than a nominal amount, it would not require that a judge sit on her hands if she perceived that a litigant had acted unreasonably.[368]

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367. The objective standard should be directed toward prefiling conduct, not the final product. *See supra* note 57.

368. Presumably, there would be no harm in assessing a $1000 fee award against a deep pockets litigant whose conduct, while offending an objective standard of reasonableness, does not rise to the level of subjective bad faith. But while a $1000 sanction might be insignificant to some litigants, it might be unbearable to others. To avoid a situation in which litigants might haggle over whether a sanction is "large" enough to require subjective bad faith as a prerequisite, a sanction scheme should prescribe some nominal amount—$50 or $100—that would define the upper limit of a monetary sanction for individuals whose conduct does not reflect subjective bad faith. Keeling, *A Prescription for Healing the Crisis in Professionalism*, *supra* note 6, at 64.

Limiting the range of sanctions for conduct that offends an objective standard of reasonableness does not leave courts powerless to redress litigation abuse. A reprimand, in particular, can be an effective sanction. As one federal court has observed, the "biggest sanction" often is a formal rebuke in open court that tells the sanctioned individual that her conduct was inappropriate.[369] Although more and more lawyers seem to be willing to abuse the judicial process whatever the costs to their reputation, most lawyers remain conscious of their public image.[370] While a reprimand is not so severe that its threat would chill litigation, it can nonetheless sting its proud victims. Moreover, it satisfies the desire that judges feel to react to conduct that they find unreasonable. Especially when the offensive conduct is nothing more than mere neglect or oversight, a reprimand generally is sufficient to compel its victims to be more attentive in the future.[371] In many circumstances, therefore, a reprimand will both adequately punish lawyers whose conduct violates an objective standard and deter them from committing future violations.

Even if judges find that a reprimand is an unacceptable sanction, they retain a wide range of options other than fee awards. With an appropriate order requiring a lawyer to attend continuing legal education classes, for example, a judge could ensure that the lawyer receives instruction in the nuances of the relevant substantive area, but at the same time, would not inhibit the lawyer from handling novel or creative claims. Against a pro se litigant who files repeated meritless claims, albeit in good faith, a judge could require that the litigant seek court approval before filing future claims, thus limiting the amount of time that the judge must devote to meritless claims but not preventing the litigant from exercising his right to test the limits of the law. In each instance, the sanction allows the judge to redress perceived litigation abuse. Because the sanctions do not involve fee awards or other financial penalties, though, the sanctions pose a lesser threat of chilling litigation. While these sanctions will sting their recipients, and perhaps even embarrass them, these sanctions remain a much more bearable risk than a potential fee award that might devastate its recipients financially.

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369. Unanue-Casal v. Unanue-Casal, 898 F.2d 839, 841 (1st Cir. 1990).

370. *See* Keeling, *A Prescription for Healing the Crisis in Professionalism*, *supra* note 6, at 66.

371. *See* Keeling, *A Prescription for Healing the Crisis in Professionalism*, *supra* note 6, at 66-67.

If a sanctions scheme incorporated the best aspects of both the objective and subjective standards, then the sanctions scheme would represent a more balanced approach to frivolous litigation than the existing sanctions models. The drafters of the sanctions scheme can, of course, add procedural devices that might further temper its repressive effects. In particular, the drafters might consider adding a provision that would require a trial court to draft factual findings in cases in which it imposes a severe sanction, ensuring that the appellate court will have adequate information with which to review the sanction.[372] Additionally, the drafters of a sanctions scheme might consider adding a provision that would require a trial court to give the offender notice and an oral hearing before imposing a severe sanction, ensuring that the offender receives adequate due process protection.[373] While these procedural devices in themselves would be insufficient to cure the ills inherent in sanctions schemes that use an objective standard of conduct, these procedural devices might be useful additions to a sanctions scheme that incorporates both an objective and subjective standard.

At a minimum, however, a sanctions scheme must combine the best aspects of the objective and subjective standards. If a sanctions scheme limited the most severe sanctions to conduct that reflected subjective bad faith, it would preserve the goal of ensuring free access to the courts. At the same time, if the sanctions scheme authorized a

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372. *See* Johnson et al., *supra* note 47, at 673-74. In the absence of factual findings that explain the basis for a sanctions award, meaningful appellate review is almost impossible. An appellate court more often than not must affirm the sanctions award "because the record—bare as it is—provides no basis on which to determine whether the district court abused its discretion." *Id.* at 661. In cases that involve a harsh sanction, such as a large fee award, the appellate court must have some means of determining both that the offender in fact acted in bad faith and that the sanction is appropriate to the offense. *See id.* at 675.

373. *See* Keeling, *Due Process Requirements*, *supra* note 92, at 374. Due process is a flexible concept. However, in general, "The more serious the possible sanction both in absolute size and in relation to actual expenditures, the more process that will be due." Donaldson v. Clark, 819 F.2d 1551, 1558 (11th Cir. 1987). Particularly in cases involving harsh sanctions, due process might require comprehensive procedural safeguards: harsh sanctions can produce devastating professional and financial consequences, and the risk that a court will impose an unjust sanction is high. Keeling, *Due Process Requirements*, *supra* note 92, at 352-53. *See* Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976) (requiring that a court consider three factors in determining the amount of process due: (1) the individual interest of the recipient, (2) the risk of erroneous deprivation, and (3) the government interest). But even if due process does not require comprehensive procedural safeguards as a prerequisite to harsh sanctions, notice and an oral hearing can still serve valuable functions, including (1) permitting the subjects of the proposed sanctions to explain their conduct, (2) allowing the trial court judge the time to consider the severity and propriety of the proposed sanctions, and (3) ensuring that the facts supporting the sanction will appear in the record. Miranda v. Southern Pac. Transp. Co., 710 F.2d 516, 522-23 (9th Cir. 1983).

range of lesser sanctions against conduct that violated an objective standard, it would preserve the goal of permitting the courts some means of redressing perceived litigation abuse. The existing schemes, which predicate sanctions awards upon one or the other standard, have failed to balance these competing goals and often have engendered more problems than they have cured. Only a scheme that manages to incorporate both an objective and subjective standard will reflect a balanced approach to frivolous litigation.

## V. CONCLUSION

In sanctions schemes, as in life itself, moderation is a virtue. An ideal sanctions scheme would attempt to balance two competing goals: redressing litigation abuse and preserving free access to the courts. While it would allow courts to control the judicial process, it would not inhibit litigants from pursuing novel or uncertain claims. The existing sanctions schemes in the federal and state courts, however, fail to steer a moderate course, either defining "frivolous" litigation too narrowly or too broadly. As might be expected, therefore, the existing schemes sacrifice one of the two goals for the other. The sanctions schemes that confine sanctions to situations in which a litigant acts in subjective bad faith leave courts unable to redress conduct which, while harmful to the judicial process, does not rise to the level of bad faith. Conversely, the sanctions schemes that define "frivolous" litigation with respect to an objective standard exert a chilling effect upon litigants who, despite possessing legitimate claims or defenses, fear incurring a large fee award.

To balance the competing goals of redressing litigation abuse and preserving free access to the courts, sanctions schemes must incorporate the best aspects of the subjective and objective standards. Sanctions schemes should confine the most severe sanctions to conduct that reflects subjective bad faith. At the same time, sanctions schemes should give courts a range of lesser sanctions enforceable against litigants whose conduct, while perhaps not reflecting subjective bad faith, violates an objective standard of reasonableness. If sanctions schemes were to pursue this moderate course, then the schemes would allow judges to redress litigation abuse—regardless of whether the abuse reflected subjective bad faith. But in addition, the schemes would reduce judicial dependence upon the kinds of severe sanctions most apt to chill legitimate litigation.

Sanctions schemes, in sum, must reflect a balanced approach to

"frivolous" litigation. The schemes should not ignore frivolous litigation: while frivolous litigation might not be as pervasive as some have feared, it need not be condoned when it arises. Neither should sanctions schemes, however, attempt to punish frivolous litigation more severely than the circumstances might require. In most instances, preserving the integrity of the judicial process does not require imposing sanctions that demean individual offenders or threaten them with bankruptcy. Moderation should be the goal for which sanctions schemes strive. Rather than discourage too much licit litigation and encourage too much illicit litigation, sanctions schemes should attempt to encourage licit litigation and discourage illicit litigation.