

# DISCIPLINARY REFERRALS UNDER NEW FEDERAL CIVIL RULE 11

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## I. INTRODUCTION

The amendments to Federal Civil Procedure Rule 11 enacted in 1983,<sup>1</sup> concerning sanctions for frivolous litigation papers, prompted much controversy and satellite litigation. By the latter 1980s many called for further changes to the “stop and think” rule. Recent dialogue, aided by new empirical research, culminated in amendments that took effect on December 1, 1993. In part, the 1993 rule reduces a party’s incentives to pursue sanctions because fewer types of misconduct are sanctionable. Additionally, attorney’s fees are available less often even when sanctions are warranted because more public interest remedies like reprimands, fines, orders of continuing education, and disciplinary referrals will be used. These changes present not only new challenges, but also the prospect of new controversies.

This Article will focus on the increasing number of bar disciplinary referrals likely to be prompted by the new rule. While the 1993 rule

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1. The 1983 amendments to Rule 11 (underlined) and the deleted portions of the earlier 1938 rule (lined through) are as follows. They appear with the final advisory committee notes in the Amendments to the Federal Rules of Civil Procedure, 97 F.R.D. 165, 196-201 (1983) [hereinafter 1983 Amendments].

Rule 11. Signing of Pleadings, Motions, and Other Papers; Sanctions

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief ~~there is good ground to support it; and that it is not interposed for delay~~ formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. ~~or is signed with intent to defeat the purpose of this rule; it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.~~ If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney’s fee.

*Id.* at 196-97.

expressly invites more disciplinary referrals, it provides little guidance on the procedural and substantive guidelines. The new rule is not even clear on which recipient agencies are contemplated for the referrals, or when and what forms of “vigilante” discipline would be appropriate as alternatives, or supplements, to these referrals. Further, many state disciplinary agencies are ill prepared to handle a flood of Rule 11 referrals. This Article will address these issues, as well as offer suggestions on the relationship between disciplinary referrals and other available sanctions under the new Rule 11.

## II. THE RECENT HISTORY OF RULE 11: FEWER FEE AWARDS AND MORE DISCIPLINARY REFERRALS

### A. *Changes in Sanctionable Conduct and Sanctioning Authority Under Rule 11 in the 1980s and 1990s*

Pursuant to the August 1983 amendments to Federal Civil Rule 11, the signature of an attorney on a court paper constituted a certification by the attorney that “to the best of his knowledge, information, and belief formed after reasonable inquiry” the paper was “well grounded in fact.”<sup>2</sup> If an attorney violated this standard, the trial court was required to impose “an appropriate sanction,” which was most often imposed on an attorney,<sup>3</sup> and frequently required the payment of money to defray the opposing party’s legal expenses, including attorney’s fees. The 1983 amendments were intended to discourage frivolous filings by lawyers in order to “streamline the litigation process.”<sup>4</sup> Although the 1983 rule required attorneys to certify that papers were “well grounded in fact,” the previous rule, which became effective in 1938, required only certifications as to “good ground.”<sup>5</sup> The 1983 rule also expressly required attorneys to undertake “some prefiling inquiry into both the facts and the law,”<sup>6</sup> but the 1938 rule contained no such explicit requirement.<sup>7</sup> The 1983 amendments were thus intended to

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2. *Id.* at 196.

3. *Id.* at 197; *see also id.* at 200 (advisory committee note). Although the rule provided that a violation of the signature requirement may have resulted in sanctions against “the person who signed it, a represented party, or both,” *id.* at 197, the federal courts were not disposed toward sanctioning a client for misconduct solely the responsibility of his attorney. *See, e.g.,* *Cine Forty-Second St. Theater Corp. v. Allied Artists Pictures Corp.*, 602 F.2d 1062, 1069 (2d Cir. 1979) (Oakes, J., concurring) (“It would be with the greatest reluctance, however, that I would visit upon the client the sins of counsel, absent client’s knowledge, condonation, compliance, or causation.”).

4. 1983 Amendments, *supra* note 1, at 198 (advisory committee note).

5. *Id.* at 197.

6. *Id.* at 198 (advisory committee note).

7. *Id.* at 197. Though the phrase “formed after reasonable inquiry” was added in 1983, a few cases read a duty of inquiry into the former rule. *See United States v. Price*, 577 F. Supp. 1103, 1108 (D.N.J. 1983); *Kinee v. Abraham Lincoln Fed. Sav. & Loan Ass’n*, 365

make the certification standard for attorneys "more stringent" and to create an expectation that "a greater range of circumstances [would] trigger" violations of the signature rule.<sup>8</sup>

The 1983 amendments were intended to increase court responsibility for frivolous papers. The 1983 rule required that judges "shall impose" sanctions for violations of the signature requirement, whereas the 1938 rule provided only that attorneys "may be subjected to appropriate disciplinary action."<sup>9</sup> Additionally, the 1983 rule required sanctions for intentional and unintentional violations, but the 1938 rule permitted disciplinary action only for "wilful" violations.<sup>10</sup> The 1983 amendments were said to stress "a deterrent orientation in dealing with improper . . . papers"<sup>11</sup> and were intended to "focus the court's attention on the need to impose sanctions."<sup>12</sup> The only "appropriate sanction" expressly mentioned in the 1983 rule was "an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing . . . , including a reasonable attorney's fee."<sup>13</sup> The 1938 rule failed to elaborate on or illustrate what might constitute "appropriate disciplinary action."

The 1983 amendments produced so much literature and litigation that in 1990 some federal rule-makers issued a Call for Written Comments<sup>14</sup> on the recent Rule 11 experience. Shortly after its promulgation, the 1983 rule was criticized for its unfair administration. Although many said its application discriminated against particular groups of lawyers or parties, others urged that its sanctions procedures were deficient. The 1983 rule was also deemed too expensive by some who viewed the resulting financial costs in satellite litigation as exceeding any benefits. Further, some expressed concern about the "incremental injury to the civility of litigation that results from lawyers impugning one another's motives and professionalism, and seeking to impose burdens directly on one another."<sup>15</sup>

The 1990 Call for Comments was followed by a series of proposed amendments to Rule 11 beginning in August 1991.<sup>16</sup> These proposals

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F. Supp. 975, 982-83 (E.D. Pa. 1973); *Freeman v. Kirby*, 27 F.R.D. 395, 397 (S.D.N.Y. 1961).

8. 1983 Amendments, *supra* note 1, at 198-99 (advisory committee note).

9. *Id.* at 197.

10. *Id.*

11. *Id.* at 199-200 (advisory committee note).

12. *Id.* at 200 (advisory committee note).

13. *Id.* at 197.

14. Committee on Rules of Prac. and Proc., Judicial Conf. of the U.S., Call for Written Comments on Rule 11 of the Federal Rules of Civil Procedure and Related Rules, 131 F.R.D. 335 (1990) [hereinafter 1990 Call for Comments].

15. *Id.* at 346.

16. Committee on Rules of Prac. and Proc., Judicial Conf. of the U.S., Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence, 137 F.R.D. 53 (1991) [hereinafter 1991 Draft Amendments].

resulted in the new rule that took effect on December 1, 1993.<sup>17</sup> The 1993

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17. The 1993 amendments and advisory committee notes to Rule 11 appear in Amendments to the Federal Rules of Civil Procedure and Forms, 146 F.R.D. 401 (1993) [hereinafter 1993 Amendments]. The new rule is as follows:

**Rule 11. Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions**

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

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

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

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

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

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

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

(1) **How Initiated.**

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

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

rule continues to provoke some controversy, though most critics of the 1983 rule prefer the change.

The 1993 rule "is intended to remedy problems that have arisen in the interpretation and application of the 1983 revision of the rule."<sup>18</sup> For example, under the 1983 rule, the Supreme Court imposed a restriction that a court may impose sanctions only against the signing attorney but not against the attorney's law firm, even when the attorney signs on behalf of the firm.<sup>19</sup> The new rule now allows trial courts to sanction the law firms of attorneys who present frivolous papers.<sup>20</sup> In addition, violations of the rule no longer automatically trigger a sanction; rather, sanctions are left to the "significant discretion" of the trial court.<sup>21</sup> The new rule also seeks "to equalize the burden of the rule upon plaintiffs and defendants."<sup>22</sup> It promotes deterrence rather than compensation as a primary goal, so that

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

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

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

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

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

*Id.* at 419-24.

18. *Id.* at 583 (advisory committee note).

19. *Pavelic & Leflore v. Marvel Entertainment Group*, 493 U.S. 120, 126-27 (1989). State laws modeled after the 1983 federal rule have been read differently. *See, e.g., Brubakken v. Morrison*, 608 N.E.2d 471, 476 (Ill. Ct. App. 1992) (holding the law firm and attorney jointly and severally liable for sanctions imposed against the attorney).

20. 1993 Amendments, *supra* note 17, at 580-82 (Rule 11(c)(1)(A) and (c)(1)(B)); *id.* at 588-89 (advisory committee note).

21. *Id.* at 587 (advisory committee note).

22. *Id.* at 586 (advisory committee note). For example, the new rule adds that "denials of factual contentions" must be warranted by the evidence or "reasonably based on a lack of information or belief." *Id.* at 580 (Rule 11(b)(4)).

monetary sanctions “should ordinarily be paid into court as a penalty.”<sup>23</sup> Generally, the 1993 rule “places greater constraints on the imposition of sanctions,”<sup>24</sup> particularly by affording many who are subject to possible sanction an opportunity to take corrective action during the so-called safe harbor.<sup>25</sup> While the 1993 rule does somewhat broaden the range of those ultimately responsible for frivolous papers<sup>26</sup> and the types of frivolous papers covered,<sup>27</sup> overall the number of hearings on Rule 11 violations should decrease.

The new rule contemplates different sanctions for violations than were appropriate under either the 1938 or 1983 rule. The 1938 rule mentioned only “disciplinary action” and the 1983 rule allowed only “appropriate” sanctions, exemplified solely by an award of litigation expenses, including attorney’s fees.<sup>28</sup> The 1993 rule expressly recognizes as appropriate sanctions “directives of a nonmonetary nature, an order to pay a penalty into court, or . . . an order directing payment to the movant of some or all of the reasonable attorneys’ fees and other expenses incurred as a direct result of the violation.”<sup>29</sup> Directives of a nonmonetary nature include court orders “striking the offending paper; issuing an admonition, reprimand, or censure; requiring participation in . . . educational programs; . . . and referring the matter to disciplinary authorities (or, in the case of government attorneys, to [a superior]).”<sup>30</sup> When a monetary sanction is imposed under the 1993 rule, “it should ordinarily be paid into court as a penalty,”<sup>31</sup> as the purpose always “is to deter rather than to compensate.”<sup>32</sup> Awards of attorney’s fees

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23. *Id.* at 587-88 (advisory committee note). Rule 11(c)(2) provides that each sanction must “be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated.” *Id.* at 582.

24. *Id.* at 584 (advisory committee note).

25. *Id.* at 581 (Rule 11(c)(1)(A) provides a safe harbor period within which frivolous papers may be withdrawn or corrected so as to avoid motions for sanctions.).

26. *See supra* note 20 and accompanying text (discussing law firm responsibilities).

27. 1993 Amendments, *supra* note 17, at 579 (1993 rule covers papers signed, filed, submitted, or later advocated, and 1983 rule covers papers signed.).

28. *See supra* notes 9-13 and accompanying text.

29. 1993 Amendments, *supra* note 17, at 582 (Rule 11(c)(2)).

30. *Id.* at 587 (advisory committee note).

31. *Id.* at 588 (advisory committee note).

32. *Id.* at 587 (advisory committee note). No explanation is given as to why fines payable to the court are more effective deterrents of Rule 11 misconduct than awards of attorney’s fees. Perhaps the federal rule-makers found that the lure of attorney’s fees caused excessive Rule 11 motions due to economic self-interest, and that federal judges could be trusted to detect and objectively sanction significant Rule 11 misconduct even though the injured party might not help when monetary incentives are removed. The federal rule-makers distinguished discovery abuse from Rule 11 misconduct and continued to permit a broader opportunity for the recovery of attorney’s fees for harm resulting from discovery misconduct. *Id.* at 627, 684-85, 687 (Rules 26(g)(3), 37(a)(4), and 37(c)(1)).

under the 1993 rule are appropriate only when other sanctions provide "ineffective" deterrence,<sup>33</sup> most typically when the violations involve papers presented for improper purposes,<sup>34</sup> "such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."<sup>35</sup>

The 1993 rule should reduce the number of motions seeking Rule 11 sanctions. It should also prompt more court-initiated inquiries into so-called public interest sanctions against lawyers.<sup>36</sup> Such sanctions are encouraged under the new rule, and include fines, reprimands, required professional training, and disciplinary referrals. Public interest sanctions provide a vehicle for judges to address the misconduct of lawyers when no adverse party complains. These sanctions are quite different from private interest sanctions, such as an award of litigation expenses or the striking of a frivolous paper, which are typically ordered at the urging of an injured adverse party.

One of the more significant forms of public interest sanctions is a disciplinary referral, involving a federal judge's referral of an errant lawyer to a disciplinary authority. While such referrals were occasionally made under the 1983 rule,<sup>37</sup> and perhaps under its predecessor,<sup>38</sup> their express recognition in the legislative history accompanying the 1993 rule should trigger at least a small cottage industry involving referrals in the coming

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33. *Id.* at 588 (advisory committee note) (indicating the need for "unusual circumstances" to merit the award of attorney's fees).

34. *Id.* (advisory committee note) (indicating unusual circumstances particularly likely for Rule 11(b)(1) violations).

35. *Id.* at 580 (Rule 11(b)(1)). Some federal courts approached attorney's fee awards under the 1983 rule in much the same way. *See, e.g.,* F.D.I.C. v. Day, 148 F.R.D. 160, 186-87 (N.D. Tex. 1993) (holding that the most effective deterrent to the filing of frivolous claims is awarding the amount of expenses incurred during frivolous litigation to the defendant).

36. For a discussion of public and private interest sanctions under the 1983 rule, see Jeffrey A. Parness, *The New Method of Regulating Lawyers: Public and Private Interest Sanctions During Civil Litigation for Attorney Misconduct*, 47 LA. L. REV. 1305 (1987).

37. The 1983 rule authorized federal judges to impose an "appropriate sanction" upon rule violators, *see supra* note 2 and accompanying text, and such a sanction occasionally was a disciplinary referral to a state disciplinary authority, *see, e.g.,* Keener v. Department of Army, 136 F.R.D. 140 (M.D. Tenn. 1991), or to the local trial court's own disciplinary mechanism, *see, e.g.,* Blue v. United States Dep't of Army, 914 F.2d 525 (4th Cir. 1990) (explaining when referrals to an internal disciplinary mechanism are required by local court rules).

38. The 1938 rule authorized federal judges to subject "wilful" violators to "appropriate disciplinary action." *See supra* notes 10-11 and accompanying text; *see also* AAA v. Rothman, 101 F. Supp. 193 (E.D.N.Y. 1951), *order granted*, 104 F. Supp. 655-56 (E.D.N.Y. 1952) (name of attorney found guilty of misconduct under 1938 rule was indexed in the court clerk's office for easy reference in case of additional inquiries into future misconduct).

years. Such referrals will compete for consideration with other forms of public interest sanctions recognized under the new rule.

Under the 1993 rule, disciplinary referrals may be ordered for many forms of Rule 11 violations, including situations in which the misconduct is corrected soon after notice of concern is given by either an adverse party (via the notice preceding any motion) or by the judge (via a show cause order). While the safe harbor within which frivolous papers may be corrected or withdrawn can be used by attorneys to avoid or lessen fee awards, and while corrective action within the safe harbor can mitigate the otherwise harsher public interest sanctions that might follow, correction or withdrawal of Rule 11 violations will not absolutely protect attorneys against all sanctions for conduct preceding a notice of concern.

Further, because attorney's fees may only be awarded when all other sanctions provide "ineffective" deterrence and after time has been allotted for the correction of the misconduct, outside disciplinary referrals and other public interest sanctions will likely come after a court has taken initiative, not after a party's motion, because the judge, rather than an adverse party, is more interested in addressing the public concern with rule violations. Such initiatives may be difficult at times, however, as private parties have little incentive to inform the court about Rule 11 misconduct, especially if it has been corrected. Thus, trial judges may have difficulty learning about some of the very rule violations they might wish to sanction in the public interest.

The procedural mechanisms and substantive criteria for disciplinary referrals and other public interest sanctions should vary dramatically from the guidelines for attorney's fee awards, the most prevalent sanctions under the 1983 rule. While both disciplinary referrals and fee awards are forms of sanctions that can address similar litigation misconduct, their purposes are typically quite different. Disciplinary referrals, as with other public interest sanctions such as fines payable to the court, are most often intended to address the harm caused to the public at large; fee awards, like other private interest sanctions, are usually intended to address chiefly the harm caused to particular individuals or entities. Thus, disciplinary referrals are usually considered at the urging of a public representative, and fee awards are typically requested by the individuals or entities harmed. In considering harm to the public caused by civil litigation misconduct, the public representative is typically most interested in protecting scarce governmental resources, general deterrence, and quasi-criminal punishment. The same misconduct causes a private party to focus on compensation for personal loss, specific deterrence, and perhaps punitive damages (possibly constituting a windfall). Disciplinary referrals for civil litigation misconduct are frequently considered by judges on their own initiative upon evidence of especially egregious behavior, thus placing these judges in the uncomfortable position of performing both prosecutorial and judicial functions. These judges may also need to undertake legislative functions (when the guidelines are unclear) and to serve as witnesses (when the misconduct occurred in

their presence or when the reasonable person standard applies). With fee awards, judges can remain more disinterested.

Finally, the public interest sanctions available under the new Rule 11 may be either disciplinary or nondisciplinary in nature and need not involve outside disciplinary agencies to be characterized as disciplinary. The relevant distinctions are difficult to discern. Surely, an admonition, reprimand, or censure of an attorney for professional misconduct during litigation seems like a disciplinary action. But is the action disciplinary if it involves a violation of a code of professional conduct governing all attorneys admitted to practice in a given jurisdiction; of a code of civil procedure governing all attorneys practicing before a particular court; or, of a court order involving certain persons and entities involved in a single case before a judge? May professional discipline be imposed only by a body whose exclusive jurisdiction involves errant professionals? The public interest sanction of a frivolous litigant paying a fine to the court does not inevitably appear to be disciplinary in nature. When an attorney pays such a fine, often discipline is not involved because compensating the court for lost resources may be the primary motivation and the fine might not be based on a violation of the professional conduct rules governing only lawyers. Distinctions between disciplinary and nondisciplinary public interest sanctions against lawyers aside, the limits of a court's professional disciplinary responsibility need to be carefully considered so that undue interference with traditional bar disciplinary bodies can be avoided.

*B. The Intent Behind the Push for More Disciplinary  
Referrals in the 1990s*

What prompted the federal rule-makers to encourage more disciplinary referrals and to move away from fee awards? The rule-makers seemed chiefly concerned with channeling attention away from compensation and toward deterrence, assuring fair application of Rule 11, reducing satellite litigation by allowing many violations later corrected to go unsanctioned, and adding greater judicial discretion to sanctioning. Fee awards are now reserved for the most serious violations, and federal judges are trusted to find the best ways to deter future litigation misconduct. The 1993 rule-makers did reject the urging of many to return Rule 11 to its pre-1983 form so that only willful violations were addressed and only disciplinary actions were available as sanctions; trial judges thus retain the power to inquire into unintentional bad acts and to remedy such acts through either disciplinary or nondisciplinary actions.

While the goals of the 1993 rule are somewhat clear, the particular ways in which disciplinary referrals and other disciplinary actions and sanctions will serve these goals are not so clear. Surely, the newly recognized rule authority of district judges to issue "show cause" orders on their own initiative invites greater consideration of all public interest sanctions. The 1993 rule-makers did refer to the *Manual for Complex Litigation* when

discussing "the variety of possible sanctions,"<sup>39</sup> and the *Manual* includes within the recognized "types of sanctions" a referral "to the bar association."<sup>40</sup> The *Manual* does not say much about when outside referrals are most appropriate, but does include within its list of available sanctions the removal of an attorney from a pending case, the temporary suspension of an attorney from practice before the court, and disbarment. Thus, disciplinary referrals to the trial court's own attorney regulatory mechanism, and discipline undertaken solely by the trial judge (what might be called vigilante discipline), seemingly would also be appropriate forms of disciplinary sanctions under the *Manual* and under the 1993 rule. The *Manual* goes on to say that in imposing any sanction, a court should consider "the nature of the sanctionable conduct, its consequences on others, and the purposes to be served by a sanction."<sup>41</sup>

In addition to these varying forms of disciplinary authority over misconducting attorneys, the 1993 rule-makers suggested that other persons having some relationship to the errant lawyer might also be employed in helping to deter future misconduct. Thus, when government attorneys present frivolous papers, the rule-makers contemplated that referrals might be made "to the Attorney General, Inspector General, or agency head."<sup>42</sup> With attorneys employed in private practice, the rule-makers encouraged using the law firms, partners, or associates of the errant lawyers for educational or rehabilitative purposes.<sup>43</sup> The 1993 rule now expressly permits vicarious Rule 11 liability, that is, sanctions against attorneys or law firms who have not themselves presented frivolous papers but who are nevertheless "responsible" for them.<sup>44</sup> A law firm that imposes "substantial restrictions on the discretion of individual attorneys employed by it" can now be held responsible when those restrictions result in a violation;<sup>45</sup> in certain circumstances, the individual attorney making the improper presentation may not even be sanctioned.<sup>46</sup> Because law firm responsibility for its agents' misconduct is to follow "established principles of agency" under the new rule,<sup>47</sup> Rule 11 sanctions will now more frequently include orders that law firms "institute internal approval procedures to assure that future filings" comply with the certification standard.<sup>48</sup>

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39. 1993 Amendments, *supra* note 17, at 587 (advisory committee note).

40. MANUAL FOR COMPLEX LITIGATION § 42.3 (2d ed. 1985).

41. *Id.*

42. 1993 Amendments, *supra* note 17, at 587 (advisory committee note).

43. Education and rehabilitation have been recognized as proper goals under the 1983 rule. *See, e.g.,* Harmony Drilling Co. v. Kreutter, 846 F.2d 17, 20 (5th Cir. 1988).

44. 1993 Amendments, *supra* note 17, at 581 (Rule 11(c)).

45. *Id.* at 589 (advisory committee note).

46. *Id.* (advisory committee note).

47. *Id.* (advisory committee note).

48. Comment of the Chicago Bar Association to the Committee on Rules of Practice

The 1993 rule-makers provide little guidance, however, on how district judges should approach outside disciplinary referrals (beyond the trial court) and on how they should coordinate such referrals with other forms of discipline and with nondisciplinary sanctions. In encouraging outside referrals and other public interest sanctions, the federal rule-makers did consider the responses to their 1990 Call for Comments.<sup>49</sup> Only a few of the responses, however, spoke significantly of outside disciplinary referrals and other public interest sanctions.<sup>50</sup> Few, if any, of the responses mentioned the *Manual for Complex Litigation*, the relevant procedural or substantive guidelines, or the relationship between the varying forms of appropriate sanctions.

One of the more extensive responses to the 1990 Call for Comments was issued in November 1990 by the Committee on Federal Courts of the New York City Bar Association.<sup>51</sup> That Association's proposal sought to establish Rule 11 as the "single sanctions rule relating to the permissible conduct of counsel and litigants."<sup>52</sup> Specifically, it sought to define an "appropriate sanction" for litigation misconduct as

a fine, a reprimand, censure, referral to disciplinary authorities, mandatory continuing legal education, an order precluding the introduction of certain evidence, an order precluding the litigation of certain issues, an order precluding the litigation of certain claims and defenses, entry of default judgment, dismissal of the action, injunctive relief limiting the offender's future access to the courts, an order to pay to injured persons financial compensation such as expenses and counsel fees reasonably incurred because of the abusive conduct or any other sanction the court, in its discretion, finds appropriate.<sup>53</sup>

Standards guiding choice of sanction, unfortunately, were absent.

In the fall of 1990, the Chicago Council of Lawyers responded to the 1990 Call for Comments by urging that new forms of sanctions be expressly

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and Procedure of the Judicial Conference of the United States 12 (Nov. 2, 1990) (on file with author) [hereinafter Comment of the Chicago Bar Association]. Such procedures have occasionally been ordered under the 1993 rule. See, e.g., *Nault's Auto Sales, Inc. v. American Honda Motor Co.*, 148 F.R.D. 25, 37-38 (D.N.H. 1993) (holding that all future filings by plaintiff shall be reviewed by a "Rule 11 committee" of at least two experienced partners at plaintiff's law firm who are "not directly involved" in the case).

49. See 1990 Call for Comments, *supra* note 14, at 335.

50. With the much appreciated assistance of the federal rule-makers' staff, the author reviewed all written correspondence relevant to the 1990 Call for Comments on May 13, 1993 in Washington D.C.

51. See Committee on Fed. Cts., *Comments on Federal Rule of Civil Procedure 11 and Related Rules*, 46 REC. OF THE ASS'N OF THE BAR OF THE CITY OF N.Y. 267 (1991).

52. *Id.* at 296. Regarding attorney conduct, the association urged a "subjective bad faith" standard that did not necessarily require an inquiry into "an attorney's subjective state of mind." *Id.* at 296-97.

53. *Id.* at 300-01.

recognized under Rule 11.<sup>54</sup> Specifically, the Council sought an amendment to “make clear that a nonmonetary sanction is a legitimate form of sanction under the Rule.”<sup>55</sup> The Council urged that Rule 11 should expressly recognize a reprimand as appropriate.<sup>56</sup> In support, the Council noted that the explicit recognition of attorney’s fees in the 1983 rule tended to remove “the judge’s traditional and necessary discretion in case management, and fall especially heavily on pro-se [sic] and indigent litigants and the attorneys who volunteer to represent them on a pro-bono [sic] or reduced-fee basis.”<sup>57</sup> The 1983 rule was also said to inhibit judges from taking “mitigating and exculpating circumstances into account” when imposing sanctions.<sup>58</sup>

In the fall of 1990, the Chicago Bar Association also answered the call by urging that “greater consideration be given to non-monetary sanctions.”<sup>59</sup> Its proposal contemplated that no attorney’s fees be awarded unless other sanctions were “insufficient to deter future violations and that the amount of the sanction is the least severe sufficient to deter future violations.”<sup>60</sup> Besides attorney’s fees, the sanctions noted by the Association included continuing legal education; the use of unpublished, rather than published, opinions; and orders that law firms “institute internal approval procedures to assure that future filings comply with the rule.”<sup>61</sup> Sanctions under the rule would be based on the deterrence of frivolous litigation.<sup>62</sup>

Like the Chicago associations, the National Bar Association asked federal rule-makers in the fall of 1990 to direct more attention to nonmonetary sanctions.<sup>63</sup> On behalf of a membership heavily involved in federal civil rights litigation,<sup>64</sup> the Association suggested that federal judges be “encouraged to utilize innovative approaches as a preferred deterrence to

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54. Letter from the Chicago Council of Lawyers to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (Nov. 1, 1990) (on file with author).

55. *Id.* at 3.

56. *Id.* The Council recommended, “The words ‘or a non-monetary sanction, such as the striking of the pleading, motion, or other paper, or a reprimand’ should be added after the phrase ‘including a reasonable attorney’s fee.’” *Id.*

57. *Id.* at 2.

58. *Id.*

59. Comment of the Chicago Bar Association, *supra* note 48, at 12.

60. *Id.* at 2 (citing language contained in part (c) of the Association’s proposed amendments to Rule 11).

61. *Id.* at 12.

62. *Id.* at 11 (“The Association believes that the primary purpose of Rule 11 should be to deter frivolous litigation, rather than to compensate the aggrieved party.”).

63. Rule 11 and Civil Rights Lawyers: Comments of National Bar Association in Response to the Call for Comments Issued by the Advisory Committee on the Civil Rules (Nov. 1, 1990) (on file with author) [hereinafter Rule 11 and Civil Rights Lawyers].

64. *Id.* at 1.

monetary sanctions in light of the dearth of attorneys who choose to practice civil rights law and the unprofitability of practicing civil rights law."<sup>65</sup> Possible approaches could include private and public reprimands; referrals to state disciplinary bodies; attorney license suspensions; required legal education; and the circulation of a copy of the sanction order involving an attorney within his or her law firm, a remedy deemed "educational and rehabilitative in nature."<sup>66</sup>

Also in the fall of 1990, Professor John Leubsdorf urged federal rule-makers "to replace the present discretionary sanctioning provisions [of Rule 11] with a requirement of fixed but relatively small lawyer fines."<sup>67</sup> This change would move the sanctioning scheme toward deterrence and away from compensation and "provide protection against sanctions that are unfairly large."<sup>68</sup> He added, "To make it easy to know whether a lawyer had been penalized under the rule before and to make penalty information available to disciplinary authorities and the public, courts imposing rule 11 sanctions would be required to report them to a national rule 11 registry."<sup>69</sup>

Finally, in the fall of 1990, Professor Victor H. Kramer of the University of Minnesota Law School urged federal rule-makers to rewrite Rule 11 so that it would serve as "an instrument to improve professional responsibility," and thus become "primarily a lawyer discipline device."<sup>70</sup> He advocated that each federal "district should adopt a local rule to provide that every violation of Rule 11 by a lawyer be reported to the disciplinary authority in the state in which the offending lawyer both has been authorized to practice law and has his own principal office."<sup>71</sup> Yet, presumably because he believed these state authorities had not fully enforced professional conduct standards,<sup>72</sup> he suggested the new rule should expressly

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65. *Id.* at 12.

66. *Id.* at 14-15.

67. Letter from John Leubsdorf, Visiting Professor at Columbia University School of Law, to Professor Paul Carrington 1 (Nov. 16, 1990) (on file with author) [hereinafter Letter from Leubsdorf].

68. *Id.* at 2.

69. *Id.* at 1.

70. Letter from Professor Victor H. Kramer, Professor of Law, University of Minnesota, to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States 4 (Oct. 23, 1990) (on file with author) [hereinafter Letter from Kramer]. Professor Kramer also said that judges should think of the amended rule "as a tool to make more professionally responsible lawyers litigating in the federal courts." *Id.* at 3.

71. *Id.*

72. Victor H. Kramer, *Viewing Rule 11 As a Tool to Improve Professional Responsibility*, 75 MINN. L. REV. 793, 797-98 (1991). Kramer writes:

For many years, state rules have made it unethical for lawyers to file suits or take other action in litigation that is legally insupportable or designed to harass the opposing side. The state lawyer-disciplinary bodies, however, have failed to enforce these provisions. Rule 11 thus offers the federal courts an opportunity to

recognize fines payable to the court as a civil penalty<sup>73</sup> and should encourage judges to “take pains to name” lawyers found to have violated the rule.<sup>74</sup>

The 1993 rule should prompt fewer motions seeking attorney’s fees and more court initiatives regarding alleged attorney misconduct. Although the result should be a greater number of referrals to outside disciplinary authorities, the process and criteria for these referrals remain unclear. When outside referrals were ordered under the 1938 and 1983 rules, the results were often unfair. The same has been true of outside referrals under other procedural laws. This history further challenges the judges responsible for outside disciplinary referrals under the 1993 rule. Case by case approaches seem inevitable, with local court rules an option—especially in the larger trial courts where an absence of such guidelines could lead to unfortunate and avoidable disparities.

Part III of this Article will review earlier experience with outside disciplinary referrals. Part IV will offer some suggestions on the use of disciplinary actions under the 1993 rule. The relationships between outside disciplinary referrals and other public interest sanctions—which may include other opportunities for discipline—will also be explored in Part IV.

### III. DISCIPLINARY REFERRALS OF FEDERAL CIVIL LITIGATION MISCONDUCT TO DATE

While the 1993 rule expressly invites more outside bar disciplinary referrals, such referrals occasionally occurred under the earlier versions of Rule 11 and under other procedural laws. Further, such referrals have long been authorized, if not mandated, by state professional conduct standards for judges and lawyers. First, these standards will be reviewed. Next, experience under the earlier versions of Rule 11 and under other procedural laws will be assessed. In making these assessments, the varying recipients of disciplinary referrals by federal trial judges will be recognized. These recipients include not only outside bar disciplinary agencies under state authority, but also the federal courts’ own internal disciplinary mechanisms. Recipients of referrals occasionally have been nondisciplinary entities, such as the employers of the misconducting lawyers, who certainly have differing interests than do state or federal licensing agencies. Referrals to disciplinary

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enforce professional responsibility rules that state disciplinary bodies have been unable or unwilling to enforce.

*Id.* (footnotes omitted).

73. Letter from Kramer, *supra* note 70, at 5-6 (stating that fines would “deter unprofessional conduct [as well as] compensate the courts for . . . causing them to engage in needless expense arising from frivolous litigation”).

74. *Id.* at 3.

and nondisciplinary entities, of course, do not preclude the referring judges from also imposing their own public or private interest sanctions.

*A. State Professional Conduct Rules and  
State Disciplinary Referrals*

The Model Code of Judicial Conduct of the American Bar Association, on which many state judicial codes are based, requires a judge to inform the appropriate disciplinary authority whenever there is knowledge that a lawyer has violated the Model Rules of Professional Conduct in a manner "that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness."<sup>75</sup> The Model Code of Judicial Conduct defines "appropriate authority" as an authority with the power to initiate disciplinary proceedings with respect to the violation reported.<sup>76</sup> Further, the Model Rules of Professional Conduct indicate that lawyers having knowledge of serious rule violations by other lawyers should report them to the appropriate professional authority.<sup>77</sup> Serious professional misconduct seemingly includes many forms of civil litigation misconduct.<sup>78</sup> The Model Rules do not define what is meant by "appropriate professional authority," but the accompanying commentary indicates that reports should usually be sent to bar disciplinary agencies.<sup>79</sup>

Because such reporting requirements have been in place for awhile, questions arise about their use under earlier versions of Rule 11. To address these questions, inquiries were sent in the falls of 1992 and 1993 to state bar

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75. MODEL CODE OF JUDICIAL CONDUCT Canon 3(D)(2) (1990).

76. *Id.* (terminology section).

77. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3(a) (1992) ("A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority."). For a history and analysis of the rule, as well as one explanation of why it is not enforced, see Gerard E. Lynch, *The Lawyer as Informer*, 1986 DUKE L.J. 491. For a recommendation on a "more realistic" rule, which contains a more limited but rigorous standard, see *id.* at 539, 547 ("I would, however, tentatively suggest three categories [of Rule 11 violations]: professional misconduct involving dishonesty toward a client or the legal process; serious criminal conduct involving dishonesty . . . ; and incompetence clearly amounting to malpractice.").

78. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3(a) cmt.

79. Rule 3.1 of the Model Rules is somewhat analogous to the Model Code; thus, the reporting requirements of both the Model Code and the Model Rules would seem to require judges and lawyers to report violations of Rule 11 to bar disciplinary committees. For discussion and suggestions on reporting by lawyers, see Committee on Prof. Resp., *The Attorney's Duties to Report the Misconduct of Other Attorneys and to Report Fraud on a Tribunal*, 47 REC. OF THE ASS'N OF THE BAR OF THE CITY OF N.Y. 905 (1992) [hereinafter *Attorney's Duties*].

disciplinary personnel nationwide requesting information on their experience with reports of Rule 11 violations by federal district judges.<sup>80</sup> Specifically, the letter requested information on the number of Rule 11 violations referred and the possible res judicata effects in state disciplinary proceedings of earlier federal court rulings. The letter also requested information on the procedures to monitor lawyer misconduct in the federal courts, as well as comparisons of state and federal judicial referrals.

Of the sixty-eight letters mailed, covering over fifty American jurisdictions, forty-eight responses were received. These responses generally indicated that few, if any, Rule 11 violations had been reported and thus few res judicata questions were entertained.<sup>81</sup> Yet, an Indiana official noted that while reporting from federal offices generally was haphazard, formal referrals from the United States Court of Appeals for the Seventh Circuit had recently increased.<sup>82</sup> Many of the respondents reported having no official system for monitoring attorney misconduct during federal civil litigation; some respondents indicated that they followed newspaper articles and the like as best they could.<sup>83</sup>

Despite the general lack of referrals, a few state disciplinary personnel commented further. A Wisconsin official noted that federal judges had referred a few serious matters to its Professional Responsibility Board, although not all referrals related to Rule 11 violations.<sup>84</sup> The official noted the difference between finding a Rule 11 violation and a state ethics law violation is that the latter involved subjective standards. Other disciplinary officials discussed possible res judicata implications. A North Carolina official reported that a federal court finding of a Rule 11 violation would not by itself mean that there was a violation of the state's rules.<sup>85</sup> A Utah

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80. A copy of the letter mailed in the fall of 1992 appears in the Appendix. This letter was followed by a second request delivered about a year later to those failing to respond to the first. The descriptions of the responses that follow in the text do not differentiate between responses received in 1992 or 1993.

81. Although many of the respondents indicated that they did not keep official statistics on the origin of referrals, a large number commented from personal experience. Further, the impression among most disciplinary personnel was that state court judges were more likely to report violations than were federal judges. However, neither state nor federal court referrals triggered much of the typical agency's work.

82. Letter from the Disciplinary Commission of the Indiana Supreme Court to Jeffrey A. Parness (July 22, 1993) (on file with author).

83. These responses were similar to those received from state disciplinary officers surveyed as part of a recent study in the Federal Third Circuit Court of Appeals. STEPHEN B. BURBANK, AM. JUDICATURE SOC'Y, STUDIES OF THE JUSTICE SYSTEM: RULE 11 IN TRANSITION, THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11, at 89 (1989).

84. Letter from the Wisconsin Board of Attorneys Professional Responsibility to Jeffrey A. Parness (June 12, 1992) (on file with author).

85. Letter from the North Carolina State Bar to Jeffrey A. Parness (May 18, 1992)

official noted that issue preclusion would not apply because the standard of proof in a disciplinary action was clear and convincing evidence, while in a Rule 11 case it was a preponderance of the evidence.<sup>86</sup> Finally, an Oregon official noted that while a finding of a Rule 11 violation would not necessarily be binding in a state disciplinary proceeding, it would be given great weight in determining whether to initiate a disciplinary action.<sup>87</sup>

### B. Disciplinary Referrals Under the Old Rule 11

As noted, the 1938 version of Federal Civil Rule 11 covered only willful violations, which when found, might subject an attorney only "to appropriate disciplinary action." By comparison, the 1983 version contemplated both willful and nonwillful violations, which when found, would trigger "an appropriate sanction," exemplified only by an order requiring the reimbursement of reasonable expenses, including attorney's fees. Assuming comparable willful violations, both the 1938 and 1983 versions of Rule 11 seemingly allowed a disciplinary referral as a form of appropriate sanction, and the 1983 rule may have allowed referrals even for certain nonwillful conduct. Yet neither rule mandated, encouraged, nor generated many referrals.<sup>88</sup> In the last few years, however, the 1983 rule, together with comparable rules in such areas as appellate practice, has prompted a slowly growing number of federal court referrals to state disciplinarians, which were apparently unnoticed by some of the survey respondents.

Little dialogue on the preclusive effects of Rule 11 findings, and even less talk of the complexities raised by the mixture of federal and state interests, has accompanied the slow rise in federal court referrals to state disciplinarians.<sup>89</sup> There has also been little discussion of Rule 11 referrals to federal disciplinary authorities, though district judges often have relevant disciplinary mechanisms established by their own courts' local rules. Little

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(on file with author).

86. Letter from the Utah State Bar to Jeffrey A. Parness (July 17, 1992) (on file with author).

87. Letter from the Oregon State Bar to Jeffrey A. Parness (May 26, 1992) (on file with author). For a general discussion of issue preclusion when civil proceedings precede disciplinary actions, see Lester Brickman & John M. Bibona, *Collateral Estoppel as a Basis for Attorney Discipline: The Next Step*, 5 GEO. J. LEGAL ETHICS 1 (1991).

88. See, e.g., THOMAS E. WILLGING, FEDERAL JUD. CTR., *THE RULE 11 SANCTIONING PROCESS* 127-28 (1988) (review of Rule 11 case law reveals "sporadic" use of alternatives to awards of litigation expenses, with "primary" alternatives being warnings and fines payable to the court); Melissa L. Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313, 1333 (1986) (noting that in the first two years under the 1983 rule, a survey of opinions showed 96% of sanctions involved awards of litigation expenses).

89. See, e.g., BURBANK, *supra* note 83, at 89-90, 100 (stating that "the use made of Rule 11 sanctions by bar discipline groups . . . warrant[s] further study").

analysis has been made of vigilante discipline, which occurs when federal judges act on their own under Rule 11 to order such traditional disciplinary remedies as reprimands, censures, temporary suspensions, apologies, mandated education, and counselling.<sup>90</sup> Nor have the relationships between all forms of discipline and other sanctions been analyzed.<sup>91</sup> Typically, under the 1983 rule, referrals to disciplinary agencies and vigilante discipline have occurred during rulings on a private party's motion for attorney's fees; referrals are not often requested by the movants and the possibility is usually not even raised by the court prior to its ruling.<sup>92</sup>

Absent referrals of lawyer misconduct under the 1983 rule, the relevant disciplinary agency rarely becomes aware of even egregious lawyer misconduct. No evidence suggests that other lawyers, their clients, or the represented parties of the errant lawyers reported serious Rule 11 misconduct to state or federal disciplinary agencies, even after it was conclusively found by a federal court after a Rule 11 hearing. Additionally, there is little evidence that state disciplinary agencies have systematically tracked the growing numbers of Rule 11 violators. The reporting provisions of state judicial and professional standards rules have drawn scant attention from those interested in the sanctions explosion under the 1983 rule.

### C. *Disciplinary Referrals Under Other Laws*

In the last decade, increasing numbers of disciplinary referrals have been made under other federal laws that, like Rule 11, address civil litigation misconduct. On occasion, Rule 11 is used in conjunction with one or more of these laws. This experience is comparable to the referrals undertaken solely under the 1983 rule.

One federal provision employed to refer attorneys to disciplinary authorities is Rule 46(c) of the Federal Rules of Appellate Procedure, dealing with misconduct before a circuit court of appeals. Other federal

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90. *But see* *Blue v. United States Dep't of Army*, 914 F.2d 525 (4th Cir. 1990) (distinguishing cases in which reprimands by individual judges may be warranted—such as threats to the orderly administration of justice in the courtroom—from cases in which referrals to the federal court's own disciplinary mechanism are required).

91. *But see* William I. Weston, *Court-Ordered Sanctions of Attorneys: A Concept That Duplicates the Role of Attorney Disciplinary Procedures*, 94 DICK. L. REV. 897 (1990) (utilization of court-ordered sanctions is bad because it undermines the role of attorney discipline agencies).

92. *See, e.g.,* *Keener v. Department of Army*, 136 F.R.D. 140 (M.D. Tenn. 1991) (referral to state disciplinary board); *Matthews v. Freedman*, 128 F.R.D. 194 (E.D. Pa. 1989) (reprimand with order and opinion sent to state disciplinary board); *Kenna v. United States Dep't of Justice*, 128 F.R.D. 172 (D.N.H. 1989) (similar referral to state conduct committee); *Lyle v. Charlie Brown Flying Club, Inc.*, 112 F.R.D. 392, 403-04 (N.D. Ga. 1986) (imposing a reprimand and requiring its publication in a local legal newspaper advertisement to be paid for by the reprimanded attorneys).

support for bar disciplinary referrals is found in various local federal district court rules. A final law is embodied in the concept of inherent court power as defined by the U.S. Supreme Court.

### 1. Federal Appellate Procedure Rule 46(c)

Disciplinary referrals have long been recognized as "appropriate disciplinary action" under Rule 46(c) of the Federal Rules of Appellate Procedure. That rule provides:

A court of appeals may, after reasonable notice and an opportunity to show cause to the contrary, and after hearing, if requested, take any appropriate disciplinary action against any attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with these rules or any rule of the court.<sup>93</sup>

One appellate court employed the rule to refer an attorney, who had been admonished in an earlier case to follow court rules and orders,<sup>94</sup> to "appropriate state disciplinary authorities."<sup>95</sup> In doing so, the court noted that "state bar officials have great responsibilities in this area and have a right to expect our cooperation," while observing that these state officials "are in a far better position to assess the overall professional performance of the attorney."<sup>96</sup>

### 2. Local Federal Court Rule

Disciplinary referrals for civil litigation misconduct have also been made pursuant to local district court rules. In the Eastern District of Pennsylvania, where the federal trial court's rules of professional conduct are the rules adopted by the Supreme Court of Pennsylvania,<sup>97</sup> a local rule provides that a federal judge shall refer "misconduct or allegations of misconduct which

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93. FED. R. APP. P. 46(c). Sanctions for frivolous appeals (which may extend beyond "disciplinary action") can be also based on other laws, including 28 U.S.C. § 1927 (1988) (attorney liability for excess costs, expenses, and fees arising from unreasonable and vexatious multiplication of proceedings); FED. R. APP. P. 38 ("damages and single or double costs" possible for appellee when appeal is deemed frivolous); FED. R. APP. P. 46(b) (suspension or disbarment for "conduct unbecoming a member of the bar"); a circuit court rule; the court's inherent authority; or some combination of these. A plea for a single rule covering all appellate court misconduct by lawyers is found in Robert J. Martineau, *Frivolous Appeals: The Uncertain Federal Response*, 1984 DUKE L.J. 845.

94. *United States v. Dominguez*, 810 F.2d 128, 129 n.\* (7th Cir. 1987).

95. *Id.* at 129 (attorney had been ordered to file a jurisdictional memorandum or a motion for extension of time and failed to do so).

96. *Id.* Similar is *United States v. Stillwell*, 810 F.2d 135 (7th Cir. 1987). In both cases, fines payable to the court were also levied upon the attorney.

97. U.S. DIST. CT. E.D. PA. R. CIV. P. IV(B).

... would warrant discipline ... to counsel for investigation” and the possible prosecution of a formal disciplinary proceeding.<sup>98</sup> Thereafter, the rule discusses possible results of a counsel’s investigation.<sup>99</sup> Although an investigation at the federal level is clearly contemplated, this rule has also been employed to justify a referral solely to the Disciplinary Board of the Pennsylvania Supreme Court.<sup>100</sup> The rule exists alongside another local rule that reserves to individual judges “such powers as are necessary for the court to maintain control over proceedings conducted before it,”<sup>101</sup> which seemingly includes certain disciplinary powers (such as the power to reprimand).

The Pennsylvania rule is unclear on the distinctions between the varying forms of disciplinary proceedings. Further, the rule is quite different from other local federal rules. Thus, trial attorneys who practice before several federal trial courts frequently confront divergent local regulations on disciplinary referrals and other discipline.<sup>102</sup> As contrasted with the Pennsylvania rule, a local Utah court rule provides that show cause orders involving possible disciplinary action are issued only upon evidence of discipline elsewhere, a conviction of a misdemeanor involving moral turpitude, or “a repeated lack of competence to practice.”<sup>103</sup> The rule recognizes that the traditional contempt powers remain unimpaired.<sup>104</sup> A second Utah rule reserves to individual judges the power to impose

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98. *Id.* at V(A).

99. *Id.* at V(B).

100. *See Greenfield v. United States Healthcare, Inc.*, 146 F.R.D. 118, 129 (E.D. Pa. 1993).

101. U.S. DIST. CT. E.D. PA. R. CIV. P. XII.

102. For a review of differing local rules, see Burton C. Agata, *Admissions and Discipline of Attorneys in Federal District Courts: A Study and Proposed Rules*, 3 HOFSTRA L. REV. 249, 282-83 (1975). In 1973, the United States Judicial Conference approved for transmittal to Congress a draft bill that would have regularized disciplinary procedures in all federal courts by permitting a court to request the F.B.I. to investigate charges that a member of the bar was subject to disciplinary action and by authorizing the Attorney General to prosecute a formal disciplinary proceeding at a court’s request. JUDICIAL CONF. OF THE U.S., REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 43-44 (Apr. 5-6, 1973) [hereinafter REPORTS OF PROCEEDINGS]. A study of all federal district court local rules authorized by the United States Judicial Conference found in 1988 that of 94 district courts, 93 had admission to the bar rules, and 90 had attorney discipline rules; but the study proceeded no further as its researchers were “instructed to refrain from a further analysis of these subjects.” SECTION ON HIST. & METHODOLOGY, JUDICIAL CONF. OF THE U.S., REPORT OF THE LOCAL RULES PROJECT: LOCAL RULES ON CIVIL PRACTICE 1, 9, app. A (1988).

103. U.S. DIST. CT. UTAH R. OF PRACTICE 103-5(d).

104. *Id.* at 103-5(h).

sanctions for violations of local rules, which may include assessments of costs, attorney's fees, or fines.<sup>105</sup>

In the Eastern District of North Carolina, the rules of disciplinary procedure were previously quite like the Pennsylvania rules. Yet, in North Carolina, referrals to internal federal mechanisms were read by a federal appeals court to be mandatory under the local rules, even when only a reprimand was suggested; the imposition of a sua sponte disciplinary penalty by the trial judge was read as permitted only when an attorney's conduct threatened the orderly administration of justice in the courtroom.<sup>106</sup> Since the appeals court decision, the local rules have been amended so that referrals are made discretionary,<sup>107</sup> and a new rule was added recognizing that referrals should not interfere with or supplant "the inherent authority of the court to discipline lawyers licensed to practice" before the court.<sup>108</sup>

### 3. Inherent Court Power

Disciplinary referrals, as well as other forms of disciplinary action, for civil litigation misconduct may also be undertaken pursuant to inherent court power, "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs."<sup>109</sup> Disciplinary action by trial judges may be deemed appropriate "in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the District Courts,"<sup>110</sup> and may be especially helpful in addressing bad faith, vexatious, wanton, or oppressive attorney conduct.<sup>111</sup> The power to control admission to the bar and to discipline attorneys has long been viewed as within "the scope of inherent power of the federal courts."<sup>112</sup>

## IV. DISCIPLINARY ACTIONS UNDER THE NEW RULE 11

In inviting increasing disciplinary referrals and other disciplinary actions, the 1993 rule-makers provided some guidance on procedural and substantive standards. The 1993 rule expressly mandates that "notice and a reasonable opportunity to respond"<sup>113</sup> be given prior to the imposition of any sanction. Seemingly, disciplinary referrals can be ordered upon notice of, and an opportunity to respond to, a court-initiated inquiry, and perhaps after a

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105. *Id.* at 104.

106. *Blue v. United States Dep't of Army*, 914 F.2d 525, 550 (4th Cir. 1990).

107. U.S. DIST. CT. E.D.N.C. D.R. 104.02 (as amended on Feb. 5, 1992).

108. *Id.* at 113 (as amended on Feb. 5, 1992).

109. *Link v. Wabash R.R.*, 370 U.S. 626, 630 (1962).

110. *Id.* at 629-30.

111. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 258-59 (1975).

112. *Chambers v. NASCO, Inc.*, 111 S. Ct. 2123, 2132 (1991).

113. 1993 Amendments, *supra* note 17, at 580 (Rule 11(c)).

hearing on a private party's motion for attorney's fees or some other private interest sanction.<sup>114</sup> Further, the 1993 rule says that any sanction order must be accompanied by a description of the conduct constituting the violation, as well as an explanation of "the basis for the sanction imposed," whether requested or not.<sup>115</sup>

The rule-makers further indicated a preference for public interest sanctions such as disciplinary referrals. A party may only be awarded attorney's fees when necessary for effective deterrence of the "conduct or comparable conduct by others similarly situated"<sup>116</sup> and after the safe harbor period has passed. Thus, motions for Rule 11 fee awards should typically be contemplated only when the movants have some good reason to believe that the misconduct will not be corrected or withdrawn during the safe harbor, and when the trial court finds that a fee award constitutes the only effective means to achieve deterrence. Movants for fees will likely urge that their opponents presented papers for improper purposes, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.<sup>117</sup> With the expected drop in Rule 11 motions, disciplinary referrals, like other public interest sanctions under the 1993 rule, should increasingly be dependent upon court initiatives.

With court initiatives the norm, how will federal trial judges distinguish between the disciplinary agencies to which referrals might be made? What forms of misconduct should trigger any such referrals, and what additional process should be employed? Finally, when might vigilante discipline, or other forms of Rule 11 public interest sanctions (such as fines), be considered as alternatives, or additions, to disciplinary referrals?

#### A. *Guiding Principles on Disciplinary Referrals and Vigilante Discipline*

Disciplinary referrals should be guided by the principles that serious professional misconduct by attorneys during federal civil litigation is best left to traditional state disciplinary agencies, and that less serious misconduct is best handled by the trial judge presiding in the relevant civil case. The distinction between serious and less serious misconduct is difficult to draw, yet should normally be based on the reporting duties for judges and lawyers in the state in which the misconduct occurred.<sup>118</sup> As noted earlier, the

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114. *Cf.* *Link v. Wabash R.R.*, 370 U.S. 626, 632-33 (1962) (dismissal of complaint for failure to prosecute can occur without notice of possibility of dismissal and without adversary hearing as long as party knew generally of possible consequences of his conduct).

115. 1993 Amendments, *supra* note 17, at 583 (Rule 11(c)(3)).

116. *Id.* at 582 (Rule 11(c)(2)).

117. *Id.* at 588 (advisory committee note).

118. The judge and lawyers in a federal civil case most often are all members of the bar of the state in which the case is pending; when such is not the case, perhaps some other

distinction drawn in the American Bar Association's model codes involves conduct violative of professional norms "that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness."<sup>119</sup> Violations raising such substantial questions are better left to state agencies, as federal courts typically defer to state authority on the standards for competent legal practice.<sup>120</sup> The internal disciplinary bodies of federal district courts, where they do exist,<sup>121</sup> simply do not have the expertise and experience, and perhaps resources, of traditional state agencies.<sup>122</sup>

By contrast, less serious Rule 11 violations are best left to the presiding trial judge. These lesser violations often require such public interest sanctions as a reprimand or a fine payable to the court in order to promote general deterrence. The private interest sanction of a fee award no longer adequately serves to deter such violations, because corrections of violations made within the safe harbor can negate the possibility of any such award.<sup>123</sup> Violations that are corrected within the safe harbor nevertheless involve rule violations that may need to be deterred and which can trigger a public interest sanction other than a disciplinary referral in order to promote such deterrence.<sup>124</sup> Referral of less serious violations to a federal

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state's reporting duties should be observed.

119. *E.g.*, MODEL CODE OF JUDICIAL CONDUCT Canon 3(D)(2) (1990); *see supra* notes 75-77 and accompanying text. For an elaboration on what constitutes serious misconduct warranting a report, *see Attorney's Duties, supra* note 79, at 911-14, wherein the authors conclude that lawyers now have no "clear indication of when they must make a report," *id.* at 927. The intent behind the changes to the A.B.A. Judicial Code was, however, "to diminish the number of instances in which judges take it on themselves to impose sanctions for professional misconduct without such reporting." LISA MILORD, A.B.A. CTR. FOR PROF. RESP., THE DEVELOPMENT OF THE A.B.A. JUDICIAL CODE 25 (1992).

120. This deference continues today although the interstate uniformity of state professional conduct norms has diminished since the adoption of the A.B.A. Model Rules, creating an increasing disuniformity among local federal courts. Stephen B. Burbank, *State Ethical Codes and Federal Practice: Emerging Conflicts and Suggestions for Reform*, 19 FORDHAM URB. L.J. 969, 972 (1992).

121. For a review of the types of disciplinary mechanisms employed by federal district courts, *see Agata, supra* note 102, at 282-83; *see also* REPORTS OF PROCEEDINGS, *supra* note 102, at 43 (noting that while most district courts defer to state bar grievance committees and procedures, some use U.S. Attorneys and others appoint special committees of the bar—which normally lack adequate funding or personnel to make proper inquiry).

122. For recommendations on the establishment of a uniform set of federal standards for professional conduct and disciplinary enforcement, *see Agata, supra* note 102, at 284-85, and *Proposed Model Federal Rules of Disciplinary Enforcement*, 103 REP. OF A.B.A. 330-36 (1978).

123. 1993 Amendments, *supra* note 17, at 581 (Rule 11(c)(1)(A) disallows any motion for sanctions to be presented if the challenged paper was withdrawn or corrected during the safe harbor period.).

124. Specifically, the 1993 rule allows court initiatives on all rule violations, *id.* at 582 (Rule 11(c)(1)(B)), whether or not corrected during the safe harbor period, and only disallows

court's own disciplinary body would be both expensive and inefficient. On this matter, the previously described North Carolina experience is compelling testimony.<sup>125</sup> Less serious violations should be met by federal judges with sanctions such as reprimands and fines.

Public interest sanctions, such as reprimands and fines, which deter frivolous paper presentments in the federal trial courts, have been rightly entrusted to the "significant discretion" of district judges.<sup>126</sup> Judges are often exposed firsthand to the consequences of frivolous papers and are in a good position to determine responsibility. Many federal judges have gained much experience in hearing motions for fee awards under the 1983 rule. The timely imposition of public interest sanctions by the judge exposed to the violation and its effects serves to assure that delay does not deny the justice to which the public is entitled. Referrals of the more serious violations to traditional disciplinary agencies serve to ensure that proper deference is accorded state power<sup>127</sup> and that satellite litigation is reduced.

The 1993 rule allows court initiatives and public interest sanctions on all rule violations, whether corrected during the safe harbor or not, and only disallows monetary sanctions (as fines payable to the court) if voluntary dismissal or settlement has occurred. Thus, the 1993 rule permits nonmonetary sanctions (as disciplinary referrals or reprimands) against attorneys who have corrected or withdrawn their frivolous papers.<sup>128</sup> Thus, even when frivolous papers are removed during the safe harbor period, their presentment by lawyers should be reported to state disciplinary agencies when substantial questions are raised about the lawyers' honesty, trustworthiness, or fitness. The presentment of frivolous papers by lawyers might also trigger other public interest sanctions when such questions are not raised but when other sanctions are necessary for deterrence.

### B. Referrals to Employers

Another public interest sanction contemplated by the 1993 rule-makers that could serve as a deterrent is a referral of an attorney's frivolous present-

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court initiatives regarding monetary sanctions if voluntary dismissal or settlement has occurred, *id.* at 583 (Rule 11(c)(2)(B)), thus seemingly permitting nonmonetary sanctions (such as reprimands) against attorneys who have corrected their frivolous papers.

125. See *supra* notes 106-08 and accompanying text.

126. 1993 Amendments, *supra* note 17, at 587 (advisory committee note).

127. Unlike less serious misconduct, which may lead to fines or reprimands and which is explored openly during civil proceedings, more serious misconduct, which may lead to more serious sanctions, is usually handled by disciplinary agencies privately at the outset. Thus, alleged violators are protected early on against harm caused by allegations of serious misconduct that are later determined to be without foundation.

128. See *supra* note 124.

ment to the attorney's employer. The rule-makers expressly indicated that in addition to disciplinary referrals, "in the case of government attorneys" referrals might be made "to the Attorney General, Inspector General, or agency head."<sup>129</sup> The rule-makers also contemplated that a private employer, such as a law firm, could be asked to look at any of its attorneys' presentments that have been questioned by opposing counsel. If an attorney whose paper has been questioned does not offer corrections, and is thereafter found to have violated Rule 11 and to be liable for fees or other litigation expenses, the law firm will "ordinarily be viewed as jointly responsible under established principles of agency."<sup>130</sup> This all suggests that referrals of private attorneys to their employers may be appropriate after a violation has been found.

What purposes might be served by such referrals? Certainly, lawyers will be more careful if they know that their missteps will be reported to their bosses; thus, deterrence will be promoted. Additionally, reports of a lawyer's violation should cause at least some employers to look anew at their own policies regarding their employees' paper presentments, which also promotes deterrence. This form of deterrence was occasionally attempted under the 1983 rule. For example, one district judge required that his opinion finding a Rule 11 violation be circulated to members of the offending lawyer's firm.<sup>131</sup> But can a Rule 11 referral to an employer also encompass a trial judge's inquiry and possible dictates about the employer's and thus its attorneys' manner of preparing papers for presentment to a federal court?

Given the rule-makers' recognition of governmental employer referrals and of law firm responsibility for fees, trial court inquiries into institutional practices on paper presentments should be deemed available under the 1993 rule. The rule-makers expressly recognized that an employer's practices can so restrict an attorney that the attorney, "in unusual circumstances," may not be held personally responsible for presenting a frivolous paper.<sup>132</sup> Recall the Chicago Bar Association's suggestion that Rule 11 sanctions include orders that law firms "institute internal approval procedures to assure that future filings comply with the rule."<sup>133</sup> Such orders have already appeared under the 1983 rule. In one case, a trial court ordered that "all future pleadings submitted by or on behalf" of a party "be reviewed by a 'Rule 11

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129. 1993 Amendments, *supra* note 17, at 587 (advisory committee note).

130. *Id.* at 589 (advisory committee note); *see also id.* at 581 (Rule 11(c)(1)(A)).

131. *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 103 F.R.D. 124, 129 (N.D. Cal. 1984), *rev'd on other grounds*, 801 F.2d 1531 (9th Cir. 1986).

132. 1993 Amendments, *supra* note 17, at 589 (advisory committee note).

133. Comment of the Chicago Bar Association, *supra* note 48, at 11; *see supra* note 61 and accompanying text.

committee' of not fewer than two experienced litigation partners at the firm" employed by the party.<sup>134</sup>

*C. The Relationships Between Disciplinary Referrals, Reprimands, and Other Rule 11 Public Interest Sanctions*

Referrals to disciplinary agencies, referrals to employers, and trial court reprimands are only a few of the public interest sanctions available to the "significant discretion" of district court judges. As noted, other sanctions include "an order to pay a penalty into court"<sup>135</sup> and an order "requiring participation in seminars or other educational programs."<sup>136</sup> The 1993 rule-makers contemplated that penalties paid into court, or fines, would emerge as one of the most significant sanctions under the new rule, and would be the new rule's chief monetary sanction (replacing attorney's fee awards).<sup>137</sup> When, if ever, should fines be preferred to referrals or reprimands, and vice versa?

The rule-makers did not address these questions, and further chose not to enumerate all of the "factors a court should consider in deciding . . . what sanctions would be appropriate in the circumstances."<sup>138</sup> They did find the following questions to constitute "proper considerations"<sup>139</sup> when federal judges choose sanctions:

Whether the improper conduct was willful, or negligent; whether it was part of a pattern of activity, or an isolated event; whether it infected the entire pleading, or only one particular count or defense; whether the person has engaged in similar conduct in other litigation; whether it was intended to injure; what effect it had on the litigation process in time or expense; whether the responsible person is trained in the law; what amount, given the financial resources of the responsible person, is needed to deter that person from repetition in the same case; what amount is needed to deter similar activity by other litigants . . . .<sup>140</sup>

Given the breadth of discretion, generalizations are difficult. Yet, when the newly added prospect of law firm (or other institutional) responsibility for Rule 11 violations is considered, some guidelines on public interest sanctions emerge. Because deterrence is now the driving force in the choice

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134. *Nault's Auto. Sales, Inc. v. American Honda Motor Co.*, 148 F.R.D. 25, 37 (D.N.H. 1993).

135. 1993 Amendments, *supra* note 17, at 582 (Rule 11(c)(2)).

136. *Id.* at 587 (advisory committee note).

137. *Id.* at 587-88 (advisory committee note) ("Since the purpose of Rule 11 sanctions is to deter rather than to compensate, the rule provides that, if a monetary sanction is imposed, it should ordinarily be paid into court as a penalty.").

138. *Id.* at 587 (advisory committee note).

139. *Id.*

140. *Id.*

of sanctions against lawyers, and is to be "limited to what is sufficient to deter repetition" of the errant lawyers' misconduct or "comparable conduct by others similarly situated,"<sup>141</sup> misconduct by attorneys who work in major law firms (or other significant institutions) could trigger very different sanctions than comparable misconduct by solo practitioners. In the latter instance, assessments of fines against lawyers who actually pay them could appear more frequently, as could orders requiring participation in seminars or other educational programs. In the former, reprimands of individual lawyers might be accompanied by fines actually paid by the lawyers' employers and, when appropriate, orders regarding required "educational and rehabilitative"<sup>142</sup> efforts to be made by the employing institutions.

While less serious Rule 11 misconduct might prompt differing approaches to choosing public interest sanctions for institutional and noninstitutional lawyers, more serious professional misconduct should be handled similarly for all lawyers. In the latter situation, state disciplinary agencies should be contacted when Rule 11 hearings lead to concerns about lawyers' "honesty, trustworthiness or fitness."<sup>143</sup> Because these disciplinary agencies typically do not consider law firms' (or other legal institutions') practices or histories<sup>144</sup> as distinct from the acts of their individual lawyers, district judges should be able to exercise authority over legal institutions engaged, or possibly engaged, in serious professional misconduct under Rule 11. This is so especially when such conduct extends far beyond their individual lawyers' acts and thus implicates institutional policy, custom, or routine. The 1993 rule-makers alluded to such institutional culpability, and to court power over it, when they noted that judges could inquire into "governmental agencies or other institutional parties that frequently impose substantial restrictions on the discretion of individual attorneys employed by it," and that "in unusual circumstances," sanctions might be imposed on the institutions and not on individual lawyers.<sup>145</sup>

#### *D. Process and Disciplinary Referrals*

Is it silly to consider the process required for disciplinary referrals under the 1993 rule, since codes of judicial and lawyer conduct either require or allow referrals of perceived attorney misconduct involving frivolous paper presentations? It is generally understood that referrals under the codes are authorized regardless of any rule of procedure on frivolous papers and can

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141. *Id.* at 582 (Rule 11(c)(2)).

142. Rule 11 and Civil Rights Lawyers, *supra* note 63, at 14-15.

143. MODEL CODE OF JUDICIAL CONDUCT Canon 3(D)(2) (1990).

144. *But see* Edward A. Adams, *Discipline Rules Should Cover Firms*, 15 NAT'L L.J., July 5, 1993 at 10 (reporting on a proposal of the Bar of the City of New York to extend attorney discipline rules to law firms).

145. 1993 Amendments, *supra* note 17, at 589 (advisory committee note).

occur without notice to those whose questionable conduct is reported.<sup>146</sup> Nevertheless, a disciplinary referral under the 1993 rule is described by the rule-makers as one of "a variety of possible sanctions."<sup>147</sup> Any sanction under the rule may be imposed only "after notice and a reasonable opportunity to respond;"<sup>148</sup> must be "limited to what is sufficient to deter repetition" of the violation by the culprit and "others similarly situated;"<sup>149</sup> and should be accompanied by a description of "the conduct determined to constitute a violation" and an explanation of "the basis for the sanction imposed."<sup>150</sup> Further, because motions for sanctions under the new rule will be quite limited, and because a private party's motion for attorney's fees or the striking of a frivolous paper will not usually include a request that the trial judge undertake a disciplinary referral, all disciplinary referrals under the new rule should be preceded by a court "initiative." The initiative should include "an order describing the specific conduct that appears to violate" Rule 11 and direct the alleged culprit "to show cause" why the rule has not been violated.<sup>151</sup>

This show cause order should also provide guidance on the standards and processes applicable at the show cause hearing, including whether and how oral or written testimony will be entertained,<sup>152</sup> whether discovery will be allowed prior to the hearing, whether other public interest sanctions might also be considered, and whether some special public representative (or an amicus) will participate as quasi-prosecutor at the hearing.<sup>153</sup> The court should articulate the applicable burden of proof at the hearing. If only a referral (based upon the existence of a "substantial question as to the lawyer's honesty, trustworthiness or fitness") is contemplated, then the court

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146. See MODEL CODE OF JUDICIAL CONDUCT Canon 3(D)(2) cmt. 1 (1990); see also *supra* note 75 and accompanying text.

147. 1993 Amendments, *supra* note 17, at 587 (advisory committee note).

148. *Id.* at 580 (Rule 11(c)).

149. *Id.* at 582 (Rule 11(c)(2)).

150. *Id.* at 583 (Rule 11(c)(3)).

151. *Id.* at 582 (Rule 11(c)(1)(B)).

152. *Id.* at 589 (advisory committee note) (stating that the availability of the chance for written submissions, oral arguments, or evidentiary presentations "will depend on the circumstances").

153. See, e.g., *Snow Machines, Inc., v. Hedco, Inc.*, 838 F.2d 718, 726 n.6 (3d Cir. 1988) (noting possibility of appointing an amicus when fines payable to the court are considered); see also *Young v. United States ex rel. Vuitton et Fils, S.A.*, 481 U.S. 787, 809 n.21 (1987) (under its supervisory power, court determines a criminal contemnor has a right to a disinterested prosecutor, but the prosecutor can not be the civil litigant whose injunction was allegedly disobeyed). While special prosecutors may be employed, it is usually unnecessary for differing judges to oversee the show cause hearing and the trial on the merits. Supreme Court of Ohio, Op. 89-32 (Oct. 13, 1989) ("A judge's filing of a disciplinary complaint against a lawyer does not, by itself, disqualify the judge from hearing any cases involving that lawyer.").

will need to indicate whether it will look for a demonstration that some evidence suggesting a referral is needed, whether probable cause exists to believe a "substantial question" exists, or whether some other defined standard will be employed.<sup>154</sup> If more than a disciplinary referral is contemplated, then the court should indicate what other sanctions are being contemplated and that factual issues will be resolved on a preponderance of the evidence standard.<sup>155</sup>

In making referrals, district judges must clearly differentiate between such probable cause and factual findings based upon a preponderance of the evidence. The latter will be needed if referrals are accompanied by other public interest sanctions such as fines or reprimands.<sup>156</sup> The latter will also prompt the type of issue preclusion questions discussed earlier involving disciplinary agency proceedings that follow Rule 11 determinations.<sup>157</sup> The differentiations are also important if national, state, or local registries of Rule 11 violators are ever established.<sup>158</sup>

## V. CONCLUSION

The new Federal Civil Rule 11 will redirect district judges from private party motions and attorney's fee awards to court initiatives and disciplinary referrals. Yet the new rule is unclear on the standards and procedures for these referrals and on the relationships between these referrals and other

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154. One report suggested the standard that the reporter have knowledge of a lawyer's conduct that the reporter "believes clearly to be in violation of Disciplinary Rules." *Attorney's Duties*, *supra* note 79, at 910.

155. *But see* Donaldson v. Clark, 819 F.2d 1551, 1559 n.10 (11th Cir. 1987) (severe Rule 11 sanctions require "extensive due process safeguards"); *see also* Santosky v. Kramer, 455 U.S. 745 (1982) (discussing when the "fair preponderance of the evidence" standard may be unconstitutional).

156. 1993 Amendments, *supra* note 17, at 583 (Rule 11(c)(3) requires that "the conduct determined to constitute a violation" be described.); *see id.* at 589 (advisory committee note) (required description can be waived).

157. *See supra* text accompanying notes 84-87.

158. *See* Letter from Leubsdorf, *supra* note 67, at 1 (Professor Leubsdorf's call for a "national rule 11 registry"); *see also* REP. OF THE COMM. ON THE EVALUATION OF DISCIPLINARY ENFORCEMENT, A.B.A. CTR. FOR PROF. RESP., LAWYER REGULATION FOR A NEW CENTURY 84-85 (1992) (recommendations for improving National Discipline Data Bank maintained by the A.B.A.); Agata, *supra* note 102, at 286-87 (discussing necessity of coordinating information on lawyers who have been disciplined). To date, federal courts have shown little concern with eliciting information on those members in its practicing bar that have been subjected to Rule 11 sanctions imposed by another court. *See, e.g.*, U.S. DIST. CT. N.D. ILL. LOCAL GENERAL R. 3.51 (Any attorney admitted to practice in the district must inform the court's clerk upon being subjected to "public discipline" by any other federal court or by a state court, which includes "censure, suspension, and disbarment, but not sanctions or contempt.").

public interest sanctions. Further, state disciplinary bodies have had little experience to date with federal court referrals. Thus, the new rule presents significant challenges to those overseeing federal civil litigation. This Article offers assistance to those applying the new Rule 11 by setting forth some guiding principles on disciplinary referrals, vigilante discipline, and other sanctions under the new rule. Further, it demonstrates that district judges may now look more to the employers of attorneys who err under the rule in order to help deter future litigation misconduct.

*Appendix*

To Lawyer Disciplinary Counsel:

I am writing to learn about the relationship between lawyers' litigation misconduct in federal courts and your state's scheme for disciplining lawyers (disbarment, reprimand, etc.). My interest is driven by my view that this relationship is important but seldom studied, and my perception that since the adoption in 1983 of amendments to Federal Civil Procedure Rule 11, there have been continuing increases in referrals of federal civil litigation misconduct to state disciplinary authorities. Given the recent proposals of the U.S. Judicial Conference's Advisory Committee on Civil Rules for changing Rule 11 (wherein the Committee Notes for the first time mention the possible sanction of referral to state disciplinary authorities), referrals should continue to increase.

In particular, I welcome information on the numbers and forms of such referrals in your jurisdiction (have there been more since 1983, are referrals increasing, etc.); on the manner in which such referrals are processed; and on the (res judicata) effects of earlier federal court decisions about misconduct (under Rule 11, inherent power, etc.) on later, related state disciplinary proceedings. As well, I am curious about whether your office on its own monitors federal actions involving lawyer misconduct, and which federal officers (district, appellate, magistrate, or bankruptcy judges) have been most and least involved in referrals. Finally, I want to learn about similar referrals of litigation misconduct made by judges within your state, as well as referrals from state courts outside your state (how do they compare to federal referrals).

I know a simple response is impossible and that you may not even be able to answer all my questions. I hope you devote some time to my requests, and copy this letter for others in your state who can also help me. Your aid will help me study this important area of lawyer discipline.

I prefer written responses. But please call (815-753-0340) with any questions. Thanks for your prompt attention.

Sincerely,

Jeffrey A. Parness  
Professor of Law