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The Intended Application of Federal Rule of Civil Procedure 11: An End to the "Empty Head, Pure Heart"Defense and a Reinforcement of Ethical Standards

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I. INTRODUCTION

The American public has long viewed the legal profession with a puzzling mixture of respect and envy tempered by distaste and mistrust.[1] Nevertheless, Americans especially are amenable to invoking judicial processes when a wrong is perceived.[2] This tendency has led to the well-publicized problems of overcrowded dockets and lengthy trial

1. Public opinion of attorneys and levels of confidence in attorneys have declined sharply in recent years. Burger, *The State of Justice*, 70 A.B.A. J., Apr. 1984, at 62 (annual report presented during the mid-year meeting of the American Bar Association).

2. Partridge, Wilkinson & Krouse, *A Complaint Based on Rumors: Countering Frivolous Litigation*, 31 LOY. L. REV. 221, 227 (1985).

proceedings,[3] both of which contribute to making the American legal system the most expensive in the world.[4] Commentators,[5] the legal community,[6] and other citizens increasingly criticize the litigiousness of the American legal system.[7]

The legal profession generally is exempt from governmental regulation because the bar adopts and enforces its own internal standards.[8] These standards, which attempt to instill in the bar a sense of ethics and proper moral conduct,[9] appear in the *Model Code of Professional Responsibility*[10] (the *Code*) and the more recent *Model Rules of Profes-*

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3. *Id.* at 228-32.

4. Burger, *supra* note 1, at 63. The number of lawyers in the United States has increased more than 50% since 1960. Bok, *Law and Its Discontents: A Critical Look at Our Legal System*, 8 B. LEADER, Mar.-Apr. 1983, at 21. The United States has the largest per capita ratio of attorneys in the world. *Id.* at 21-22.

5. *See* Franaszek, *Justice and the Reduction of Litigation Cost: A Different Perspective*, 37 RUTGERS L. REV. 337 (1985). Franaszek discusses the relationship hetween justice for all people and the excessive costs of litigation. Society's concern with the increasing costs of litigation is based on "more than an interest in efficiency or court administration. This focus on expense is prompted by a fundamental fear that litigation cost hinders the legal system's capacity to deliver justice. . . . [T]he high cost of litigating may systematically preclude various parties from resolving their differences." *Id.* at 337.

6. Burger, *supra* note 1, at 62.

7. *Id.* at 65-66. Chief Justice Burger stated:

> The entire legal profession—lawyers, judges, law teachers—has become so mesmerized with the stimulation of the courtroom contest that we tend to forget that we ought to be healers—healers of conflicts. Doctors, in spite of astronomical medical costs, still retain a high degree of public confidence because they are perceived as healers. Should lawyers not be healers? Healers, not warriors? Healers, not procurers? Healers, not hired guns?

Id. at 66; *see also* Proceedings of the Forty-Fourth Judicial Conference of the District of Columbia, 100 F.R.D. 109, 207-12 (1983) [hereinafter Judicial Conference] (message of Chief Justice Warren Burger); Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 7 (1983) (observing that Americans are the most litigious and contentious society in the world).

8. Cooper, *Opening Statement*, 12 LITIGATION, Spring 1986, at 1.

9. For a discussion of human decency and moral obligations in the legal profession, see Freedman, *Lawyer and Client: Personal Responsibility in a Professional System*, in ETHICS AND ADVOCACY: FINAL REPORT: ANNUAL CHIEF JUSTICE EARL WARREN CONFERENCE 45 (1978). Professor Freedman discusses the growing fear in the legal community that a truly "professional" lawyer cannot also show human decency, and that the concepts of a "good lawyer" and a "good person" are incompatible. *Id.* at 45.

10. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1981) [hereinafter MODEL CODE]. The preamble provides:

> The continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual and his capacity through reason for enlightened self-government. . . .
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> Lawyers, as guardians of the law, play a vital role in the preservation of society. . . . A consequent obligation of lawyers is to maintain the highest standard of ethical conduct.
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> . . . [I]n the last analysis it is the desire for the respect and confidence of the members of his profession and of the society which he serves that should provide to a lawyer the incentive for the highest possible degree of ethical conduct. The possible loss of the respect and confi-

sional Conduct (the *Rules*).[11] The *Code* and the *Rules* both stress the high standards of integrity and competence that attorneys owe to their clients and to the public in general.[12] The *Code* and the *Rules* also require attorneys to enforce the standards by reporting any violations by their colleagues.[13] Moreover, the *Code* requires attorneys to exhibit respect for the law by at all times "refrain[ing] from all illegal and morally reprehensible conduct."[14] Despite these ethical criteria, many commentators perceive the legal profession as amoral, or even immoral.[15] Attorneys typically attempt to justify overzealous, far-reaching behavior as a manifestation of the lawyer's duty diligently to represent his client[16] and as an important factor in the adversary system.[17] This duty compels the lawyer to do "all that the laws or the Constitution allows."[18] Perhaps the most unusual and beneficial attribute of the American attorney is his devotion to and zeal in representing his client.[19] This same broad allegiance, however, has contributed to society's low esteem for the legal process and to the need for external regulation of lawyers.[20]

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dence is the ultimate sanction. So long as its practitioners are guided by these principles, the law will continue to be a noble profession.

MODEL CODE, *supra*, preamble.

11. The *Model Rules of Professional Conduct* were adopted by the House of Delegates of the American Bar Association on August 2, 1983. As of July 1987 the *Model Rules* were in effect in various form in 24 states—Arizona, Arkansas, Connecticut, Delaware, Florida, Idaho, Indiana, Louisiana, Maryland, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Oregon, Virginia, Washington, Wisconsin, and Wyoming.

The preamble of the *Model Rules* provides:

A lawyer is a representative of the legal system and a public citizen having special responsibility for the quality of justice.

As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.

. . . A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers, and public officials.

MODEL RULES OF PROFESSIONAL CONDUCT preamble (1983) [hereinafter MODEL RULES].

12. MODEL CODE, *supra* note 10, EC 1-1, EC 1-2; MODEL RULES, *supra* note 11, Rule 1.1.

13. MODEL CODE, *supra* note 10, EC 1-4; MODEL RULES, *supra* note 11, Rule 8.3.

14. MODEL CODE, *supra* note 10, EC 1-5.

15. *See, e.g.*, Freedman, *supra* note 9, at 47.

16. MODEL CODE, *supra* note 10, DR 7-101.

17. *Id.* at EC 7-19.

18. Burger, *supra* note 1, at 63.

19. Rifkind, *Professionalism Under Siege: A Call to Combat Commercialism*, 11 B. LEADER, Sept.-Oct. 1985, at 13, 14.

20. Public perception may be distorted by current legal crises such as the Dalkon Shield, ashestos, medical malpractice, and the insurance/tort reform controversies. Cooper, *supra* note 8, at 56. Individual lawyers must make every effort to allay these concerns. *See, e.g., id.* The bar is

This Note analyzes Rule 11[21] of the Federal Rules of Civil Procedure as a potentially effective means for regulating attorney abuses of the legal system. Part II examines the traditional American rule, which denies recovery of attorney fees and requires each litigant to bear his own expenses. Part II also discusses the original 1938 version of Federal Rule 11 and the courts' hesitation to apply it. Part III outlines and analyzes the substantive revision of Rule 11 in 1983 and traces the practical application of the amended Rule by the courts. Part IV discusses the various social and professional concerns that motivate judicial inclination or reluctance to find violations of Federal Rule 11. Finally, Part V concludes that the strong deterrent and punitive potential of the Rule must be utilized in order to create a major change in the typical litigation process.

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committed to regulation by means of sanctions under the *Code of Professional Responsibility* and the *Model Rules of Professional Conduct*. In 1984 the Bar spent more than $30 million for lawyer discipline in 46 states. Few other professions have as thorough an internal regulatory policy. Sanctions include disbarment, suspension, and public reprimand. *See* Austern, *How Lawyers Police Themselves*, 22 TRIAL, Apr. 1986, at 17; *see also* Bierig, *Whatever Happened to Professional Self-Regulation?*, 8 B. LEADER, Mar.-Apr. 1983, at 19; Silas, *What Bars Are Doing to Enhance Professionalism*, 11 B. LEADER, Sept.-Oct. 1985, at 15.

21. Federal Rule of Civil Procedure 11 provides for the signing of pleadings, motions, and other papers as well as for sanctions if the rule is violated. It states:

> 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 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 the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in 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.

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

II. PRE-AMENDMENT STANDARDS

A. The American Rule

Federal courts traditionally have recognized the "American rule," which prevents a prevailing litigant from recovering attorney's fees.[22] The losing party may be assessed "costs,"[23] but the term "costs" generally is defined statutorily to exclude attorney's fees.[24] Therefore, each party, including the exonerated defendant, must pay his own attorney's fees.[25] The United States Supreme Court has refused to abandon the American rule, which was first upheld judicially in 1796[26] and later congressionally sanctioned.[27]

The origin of the American rule is not clear.[28] The American rule differs from the English rule, as well as the rules in most other industrialized democracies, which impose attorney's fees on the losing party.[29] One suggested explanation for the development of the American rule is that during the colonial period lawyers quickly liberated themselves from governmental fee regulation and allowed the free market to determine their fees.[30] This competitive system eliminated the need to rely on a fee-shifting arrangement. The lawyer-client contract dictated each

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22. *See, e.g.*, Roadway Express, Inc. v. Piper, 447 U.S. 752, 759 (1980); Alyeska Pipeline Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975).

23. "Costs" are a "pecuniary allowance, made to the successful party . . . for his expenses in prosecuting or defending an action. . . . [and include] [f]ees and charges required by law to be paid to the courts or some of their officers . . . *e.g.* filing and service fees." BLACK'S LAW DICTIONARY 312 (5th ed. 1979).

24. *Roadway Express*, 447 U.S. at 757-58.

25. H. COHEN, REPORT ON AWARDS OF ATTORNEYS' FEES BY FEDERAL COURTS AND FEDERAL AGENCIES 1 (1985).

26. *See* Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796); *see also Roadway Express*, 447 U.S. at 759.

27. *See Alyeska Pipeline*, 421 U.S. at 260-71.

> We do not purport to assess the merits or demerits of the "American Rule" with respect to the allowance of attorneys' fees. It has been criticized. . . . But the rule followed in our courts with respect to attorneys' fees has survived. It is deeply rooted in our history and in congressional policy; and it is not for us to invade the legislature's province by redistributing litigation costs. . . .

Id. at 270-71 (footnotes omitted).

Although Congress has passed numerous fee-shifting statutes in response to *Alyeska Pipeline*, the legislators have never abandoned the American rule. The general rule is that each side bears his own costs of litigation in the absence of a specific carved-out exception. Starr, *The Shifting Panorama of Attorneys' Fees Awards: The Expansion of Fee Recoveries in Federal Court*, 28 S. TEX. L. REV. 189, 195 (1986)

28. For an analysis of various theories on the origin of the American rule, see Starr, *supra* note 27, at 189.

29. H. COHEN, *supra* note 25, at 1.

30. Starr, *supra* note 27, at 190.

party's financial obligation.[31] A second explanation is that in the late eighteenth century the general public greatly distrusted attorneys; therefore, the American legal system rejected the English rule in order to quell the fear that attorneys would abuse the fee-shifting system.[32] A third theory explains the rejection of the English rule as simply one element of the pervasive anti-English sentiment of the colonial period.[33]

Regardless of the origin of the American rule, the consensus among commentators is that the purpose of the American rule is to encourage litigation. The rule ensures that the plaintiff may bring suit without the threat of being assessed the defendant's attorney's fees if the action is unsuccessful.[34] This unhindered access to the courts also furthers the American policy of protecting individual rights.[35]

Despite the acceptance of the American rule, courts retain an inherent equitable power to shift fees in certain limited situations.[36] One exception occurs when a court finds that the losing party has acted "in bad faith, vexatiously, wantonly, or for oppressive reasons."[37] This common law exception applies when the court makes a subjective determination that a party filed or conducted the litigation in bad faith.[38] Moreover, Congress explicitly has provided a number of specific instances in which the court has discretionary power to award attorney's fees.[39] As the judicial system becomes increasingly complex and costly and the dockets become increasingly overcrowded, some commentators have advocated complete abandonment of the American rule as a way of deterring too much litigation.[40]

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31. *Id.*

32. *Id.*

33. *Id.* at 190-91.

34. *Id.* at 191.

35. *Id.* at 191-92.

36. *Alyeska Pipeline*, 421 U.S. at 259; *see also* Clark v. C.I.R., 744 F.2d 1447 (10th Cir. 1984).

37. *Alyeska Pipeline*, 421 U.S. at 258-59 (quoting F.P. Rich Co. v. United States *ex rel.* Industrial Lumber Co., 417 U.S. 116, 129 (1974)); *see also* Actors Equity Ass'n v. American Dinner Theatre, 802 F.2d 1038 (8th Cir. 1986) (stating that the "underlying rationale of fee-shifting is punishment of the wrongdoer rather than compensation of the victim").

38. Hall v. Cole, 412 U.S. 1, 15 (1973); *see also* Nemeroff v. Abelson, 620 F.2d 339, 348 (2d Cir. 1980) (requiring " '[c]lear evidence' that the claims are 'entirely without color *and* made for reasons of harassment or delay or for other improper purposes' " (emphasis in original)). To be colorable, a claim must have "some legal and factual support considered in light of the reasonable beliefs of the individual making the claim." *Id.*

39. *See, e.g.*, 28 U.S.C.A. § 1927 (West Supp. 1987). This statute provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excessive costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

Id.

40. *Cf.* Starr, *supra* note 27, at 191.

B. The 1938 Version of Rule 11

The original version of Rule 11[41] took effect in 1938 with the initial enactment of the Federal Rules of Civil Procedure.[42] Under the pre-existing standards of code pleading, the attorney's signature on a pleading merely certified that the pleading met the requisite substantive form.[43] The signer made no representation regarding the factual or legal sufficiency of the allegations or content of the pleading.[44] The 1938 version of the Rule added a new dimension to the attorney's signature on a pleading by placing on the attorney the burden of ensuring that the pleadings were accurate.[45]

The original Rule 11 included two significant provisions: (1) the attorney's certification of the reasonableness and propriety of the pleadings, and (2) the court's power to strike "sham"[46] pleadings. The intent of the Rule was to promote honesty and efficiency.[47] The Rule provided that an attorney could be subjected to disciplinary action for a willful violation of its terms. Generally, a showing of subjective bad faith was required to prove a willful violation.[48] This bad faith requirement gave the attorney a viable defense if he could demonstrate a good faith reliance on his analysis of the law or his client's rendition of the facts.[49] The judicial reasoning in cases under the original version of Rule 11 is

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41. The version of Rule 11 enacted in 1938 provided:

> Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity tbat the averments of an answer must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolisbed. The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a willful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

FED. R. CIV. P. 11 (1940).

42. Note, *The Demise of a Subjective Bad Faith Standard Under Amended Rule 11*—Eastway Construction Corp. v. City of New York, 762 F.2d 243 (2d Cir. 1985), 59 TEMP. L.Q. 107, 108 (1986).

43. Note, *Reasonable Inquiry Under Rule 11—Is the Stop, Look, and Investigate Requirement a Litigant's Roadblock?*, 18 IND. L. REV. 751, 752 (1985).

44. *Id.* at 752-53. There is some dispute on this premise. *See* Note, *Attorneys: Deterrence of Improper Pleading Practices by Awards of Attorneys' Fees*, 39 OKLA. L. REV. 59, 64-65 (1986).

45. Note, *supra* note 43, at 753.

46. A pleading is a "sham" if it is devoid of factual merit. A pleading lacking a meritorious legal basis is considered "frivolous." Note, *supra* note 44, at 65.

47. Note, *supra* note 42, at 116.

48. *Id.*

49. *Id.* at 117.

indistinguishable from that under the common law exception to the American rule for vexatious or oppressive litigation brought in bad faith.[50]

Nemeroff v. Abelson[51] is an excellent example of how courts applied the subjective bad faith standard under Rule 11. A shareholder brought an action under Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934 against the publisher, author, editor, and five investors of a financial column.[52] The plaintiff claimed that a financial columnist obtained nonpublic information, which he deliberately leaked in his column and which the investors used to manipulate the price of the stock for their own financial gain.[53] After several months of discovery failed to produce any evidence to support the plaintiff's claims, the plaintiff voluntarily dismissed the suit.[54] In the district court, the defendant publisher sought and was awarded $50,000 in attorney's fees against the plaintiff and his counsel for bringing the action in bad faith.[55] In reversing the award, the Second Circuit found that the plaintiff's attorney had possessed sufficient facts to support the claim despite a subsequent discovery that these facts were false.[56] The court stated that the failure to validate facts before instituting an action, or the possibility that the facts are false, is irrelevant to the issue of bad faith.[57] Instead, the court concluded that under original Rule 11, the test is whether the action was instituted "in bad faith, vexatiously, wantonly or for oppressive reasons."[58] The court indicated that the standard under Rule 11 is interchangeable with the general common law exception to the American rule for vexatious or oppressive litigation.[59]

Badillo v. Central Steel & Wire Co.[60] is another classic decision under the original Rule 11. In this case, the defendant company fired a Mexican employee for cursing at his foreman.[61] The employee filed a

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50. *Compare* cases discussed *infra* notes 51-68 and accompanying text *with* cases discussed *supra* notes 36-38 and accompanying text.

51. 620 F.2d 339 (2d Cir. 1980).

52. *Id.* at 341.

53. *Id.*

54. *Id.* at 342.

55. *Id.* The district court found that the action filed against the five investors was not in bad faith and refused to award them attorney's fees and expenses. Nemeroff v. Abelson, 469 F. Supp. 630, 641 (S.D.N.Y. 1979), *aff'd in part, rev'd in part*, 620 F.2d 339 (2d Cir. 1980).

56. *Nemeroff*, 620 F.2d at 348-49.

57. *Id.* at 349. The Second Circuit stated that "[t]he question is whether a reasonable attorney could have concluded the facts supporting the claim *might be established*, not whether such facts actually *had been established*." *Id.* at 348 (emphasis in original).

58. *Id.* at 349 (quoting Browning Debenture Holder's Comm. v. DASA Corp., 560 F.2d 1078, 1087-88 (2d Cir. 1977)).

59. *Id.*

60. 717 F.2d 1160 (7th Cir. 1983).

61. *Id.* at 1162.

Title VII class action after obtaining authorization from the Equal Employment Opportunity Commission.[62] The named class included all blacks, women, and hispanics who had been victims of the defendant's discriminatory policies in biring, training and placement, promotion, termination, and discipline. The plaintiff further charged that the class members had been victims of intimidation, threats, and verbal abuse.[63] The plaintiff clearly lacked standing on virtually all the class claims. Moreover, he had voluntarily withdrawn the class claims for which he had standing, leaving the issue of Badillo's termination as the only issue in the case.[64] The district court granted summary judgment in favor of the defendant.[65] In adjudicating the defendant's subsequent motion for attorney's fees under the original Rule 11, the court recognized the appropriateness of sanctioning willful violations that do not rise to a level requiring disbarment.[66] Moreover, the court affirmed the necessity of applying the Rule in appropriate cases.[67] In grasping for the correct standard under which to judge the behavior of the plaintiff's counsel, the court held that the subjective bad faith standard required a showing of willful conduct. The defendant's failure to establish subjective bad faith on the plaintiff's part defeated the claim.[68]

Thus, although the original Rule 11 was part of the Federal Rules of Civil Procedure from 1938 until the 1983 amendment, courts rarely invoked the Rule.[69] From 1938 until 1976 only nineteen Rule 11 motions were made, with the first not occurring until 1950.[70] The develop-

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62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.* at 1163.
66. *Id.* at 1166.
67. *Id.* at 1167.
68. *Id.*
69. In Kinee v. Abraham Lincoln Federal Savings & Loan Association, 365 F. Supp. 975 (E.D. Pa. 1973), the plaintiffs brought a class action against 177 mortgage-writing defendants complaining that the defendants' failure to pay interest on escrow deposits constituted a conspiracy to eliminate competition in violation of the antitrust laws. *Id.* at 977. In selecting the proper defendants, the plaintiffs simply named every individual or lending institution listed in the Philadelphia phone book under headings related to mortgage brokers. Over 25% of the defendants subsequently were dismissed from the action because they did not maintain escrow accounts. *Id.* at 977 n.1. The court stated:

> The plaintiffs' attorneys set out a dragnet. Having put large numbers of parties to the inconvenience, expense and possible anxiety of being sued, they then were able conveniently to separate the wheat from the chaff without great effort. They chose to inconvenience a large number of parties rather than to inconvenience themselves with proper investigation as to who the proper parties would be.

Id. at 982. The court refused to dismiss tbe entire action based upon the defendants' Rule 11 motion; however, the court intimated that the dismissed defendants were allowed to seek reimbursement of their costs. *Id.* at 983.

70. *See* Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with*

ment of liberal pleading rules created an environment of vague, generalized pleadings.[71] The original Rule imposed no affirmative duty to investigate claims, and the good faith defense sheltered all but the most egregiously frivolous suits.[72] Moreover, the common law already provided an independent remedy in equity for frivolous, bad faith suits, eliminating the need to invoke Rule 11.[73] Courts, therefore, virtually ignored Rule 11.

III. AMENDED RULE 11

A. *Reasons for Amendment*

The Federal Rules Advisory Committee amended Rule 11[74] in 1983,

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Federal Rule of Civil Procedure 11, 61 MINN. L. REV. 1, 34-36 (1976). Professor Risinger provides an extensive list of the cases that applied Rule 11 during the 1938-76 time period. *See, e.g.*, Bertucelli v. Carreras, 467 F.2d 214 (9th Cir. 1972); Lau Ah Yew v. Dulles, 236 F.2d 415 (9th Cir. 1956); Econo-Car Int'l, Inc. v. Antilles Car Rentals, Inc., 61 F.R.D. 8 (D.V.Is. 1973), *rev'd on other grounds*, 499 F.2d 1391 (3d Cir. 1974).

71. *See* Shuchman, *Relations Between Lawyers*, in ETHICS AND ADVOCACY: FINAL REPORT: ANNUAL CHIEF JUSTICE EARL WARREN CONFERENCE 78 (1978) (stating that pleadings are essentially lies and that an attorney knows that the recipient of a pleading drafted by him will not believe that all the allegations can be proven; nor will plaintiff's counsel believe all the denials or claims of lack of information in the answer).

72. *See* Note, *supra* note 43, at 755, 760; Note, *supra* note 42, at 116.

73. *See supra* notes 36-38 and accompanying text.

74. The italicized portions below indicate additions to the original Rule 11; the language in parentheses has been deleted from the Rule.

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

FED. R. CIV. P. 11, *reprinted in* 97 F.R.D. 165, 196-97 (1983).

for two reasons.[75] First, courts had been reluctant to sanction attorneys for Rule 11 violations. Second, proving subjective bad faith was difficult. The use of the original Rule 11 had been limited to instances of bad faith, even though courts had inherent common law power to sanction attorneys and claimants for vexatious litigation.[76] By limiting the application of the original Rule 11, the courts, in effect, provided a forum for abusive tactics[77] and increased the cost and complexity of litigation.[78] Concern over frivolous litigation[79] had multiplied, and the Committee determined that a strengthened Rule would provide the courts with a method to quell the abuses.[80] The Advisory Committee noted that their goal was to discourage abusive tactics and to make the litigation process more efficient by eliminating many frivolous claims.[81]

The drafters of amended Rule 11 deliberately altered and revised the Rule's language to heighten the duty of counsel and specifically provide the sanction of fee shifting as an exception to the American rule.[82] The new Rule allows the court discretion in assessing sanctions against the client, directly against the attorney, or against both.[83] Considering the goals of the Rule, which are to sanction violations and deter abusive practices, the best alternative in most cases is to sanction the attorney directly[84] and mandate that the sanctions be nonreimbursable by, or

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75. FED. R. CIV. P. 11 advisory committee's notes, *reprinted in* 97 F.R.D. 165, 196-97 (1983) [hereinafter Advisory Notes].

76. Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 182 (1985).

77. 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1331 (Supp. 1986) [hereinafter WRIGHT & MILLER].

78. Schwarzer, *supra* note 76, at 182.

79. Preis & Krump Mfg. Co. v. International Ass'n of Machinists & Aerospace Workers, 802 F.2d 247, 255-56 (7th Cir. 1986) (stating that "[m]ounting federal caseloads and growing public dissatisfaction" require active use of sanctions—"[l]awyers practicing in the Seventh Circuit, take heed!"); Coburn Optical Indus., Inc. v. CILCO, Inc., 610 F. Supp. 656, 658 n.4 (M.D.N.C. 1985) (holding that "widespread concern over frivolous litigation led to amendment"); *see also* Galanter, *supra* note 7, at 5-6. The condition of American society may be described as "Hyperlexis."

> . . . Whether or not America has experienced a "litigation explosion," or is suffering from "legal pollution," or is in thrall to an "imperial judiciary," there has surely been an explosion of concern about the legal health of American society. A battery of observers has concluded that American society is overlegalized.

Id.

80. Schwarzer, *supra* note 76, at 181; Advisory Notes, *supra* note 75, at 198.

81. Advisory Notes, *supra* note 75, at 198.

82. Anschutz Petroleum Mktg. Corp. v. E.W. Saybolt & Co., 112 F.R.D. 355 (S.D.N.Y. 1986) (holding that Rule 11 is not intended to do away with the American rule completely and that courts have discretion in fashioning sanctions).

83. *See supra* note 21 (reprinting text of amended Rule 11).

84. Former Chief Justice Burger stated that "[j]udges in some state courts and in federal courts have exercised their discretionary authority to impose sanctions both on attorneys, and their clients for filing frivolous cases. . . . A few carefully considered, well-placed $5,000 or $10,000 penalties will help focus attention on the matter of abuses by lawyers." Burger, *supra* note 1, at 65;

nonchargeable to, the client. Thus, Rule 11 will no longer allow the attorney to assert that his client directed or required his abusive behavior. The attorney is in control of the litigation tactics and is in the best position to prevent abuses. Any pleading, motion, or paper filed with the court is prepared by, or under the direction of, the lawyer, and he is ultimately responsible.

By its express terms, the original Rule 11 applied only to "pleadings."[85] Once the litigation proceeded beyond the initial pleading stage, the attorney's signature on any motion or other filing provided no explicit certification. The amendments to Rule 11 extended the Rule's application so that an attorney's signature on "every pleading, motion, or other paper"[86] now creates the same certification that original Rule 11 required only of the initial pleadings.[87]

The amended Rule does not define what constitutes "other paper," and the question remains whether the courts have Rule 11 jurisdiction over "other signed papers" not filed with the court. At least one court has answered this question in the negative. In *Adduono v. World Hockey Association*[88] the Eighth Circuit held that district courts lack jurisdiction to sanction an attorney for violating a settlement agreement

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see also Anschutz Petroleum Mktg. Corp., 112 F.R.D. at 357 (indicating that "the district court has the discretion to fashion a sanction for purposes of deterrence which awards part, but not all, of the opposing party's attorney's fees. That is to say: adequate *deterrence* may permissibly fall short of full *compensation*" (emphasis in original)).

85. For the text of the original Rule 11, see *supra* note 41.

86. Rule 11 applies to an answer in the form of a general denial. *See* United States v. Minisee, 113 F.R.D. 121 (S.D. Ohio 1986). In defending an action for the collection of a defaulted student loan, the defendant filed a general denial refuting the claim that the plaintiff applied for the loan or received the proceeds. The court held that sanctions were mandatory under Rule 11 because counsel knew, or should have discovered, that the plaintiff received the loan proceeds and should have admitted this in the answer. *Id.* at 122. The court found that the appropriate sanction was a public reprimand of counsel for his inappropriate behavior. *Id.* at 123; *see also* Brown v. National Bd. of Medical Examiners, 800 F.2d 168 (7th Cir. 1986) (dictating a $2538 attorney's fee sanction against counsel for filing a groundless Motion to Produce Documents and Place Under Court Seal and an additional $250 sanction for a groundless Motion for Reconsideration of Rule 11 Sanctions).

In Westmoreland v. CBS, Inc., 770 F.2d 1168 (D.C. Cir. 1985), defendant CBS filed an order to show cause why a nonparty witness should not be held in contempt for refusing to submit to deposition by videotape absent a court order. The D.C. Circuit affirmed the district court finding that the law clearly required CBS to obtain a court order specifically subjecting the witness to deposition hy videotape; therefore, the petition to show cause "had absolutely no reasonable basis in law or in fact." *Id.* at 1177. Because Rule 11 mandates sanctions for such a violation, the circuit court reversed the lower court's denial of attorney's fees. *Id.* at 1178.

87. Rule 11 works in tandem with and complements the liberal fact pleading standards of the American judicial system. *See* Woods v. Princeton Packaging, Inc., 655 F. Supp. 215, 217-18 (W.D. Wash. 1987). *But see* Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 HARV. L. REV. 630, 633-34 (1987) (arguing that recent interpretations of Rule 11 serve to undermine the entire federal scheme of liberal pleadings).

88. 824 F.2d 617 (8th Cir. 1987).

term that was never submitted to the court or incorporated into any document filed with the court.[89] The court explained that the term "other paper" does not include such a settlement agreement.[90] On the other hand, nothing in the express language of the Rule strictly limits its application to filed papers. Moreover, no policy analysis justifies a distinction in the certification standards for filed and unfiled papers.

The amended Rule imposes a duty of "reasonable inquiry" on the attorney who signs any paper filed with the court.[91] According to the Advisory Committee, a good faith belief in the validity of the facts or law is no longer sufficient;[92] the attorney has an affirmative duty to conduct a preliminary inquiry into the law and facts.[93] The concept of "reasonable inquiry,"[94] however, is difficult to define, particularly be-

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89. *Adduono* arose from a suit that was filed on behalf of 28 plaintiffs, primarily former hockey players, against 84 defendants, including the World Hockey Association (WHA) and the National Hockey League (NHL), alleging *inter alia*, antitrust violations and seeking pension benefits. After two years, the original parties executed a settlement agreement that conditioned the defendants' payment on a promise by plaintiffs' counsel not to represent any other plaintiffs in similar actions against either the WHA or the NHL. Two months before the settlement was signed, plaintiffs' attorney contacted a client who was not involved in the lawsuit and informed him of his potential claims against the WHA and the NHL. The attorney then referred the client to the law firm that had retained the attorney as an expert consultant. *Id.* at 618-19. The WHA sought Rule 11 sanctions for the plaintiffs' violation of the settlement agreement. The district court awarded the WHA and the NHL $5000 each in fines and attorney's fees for counsel's "patent violation of his obligations as an attorney to conduct himself honestly and forthrightly before the court." *Id.* at 619 (quoting Adduono v. World Hockey Ass'n, 109 F.R.D. 375, 380 (D. Minn. 1986)). The award was overturned on appeal. *Id.* at 622.

90. *Id.* at 621. The only reference to the filing of the pleading, motion, or other paper is in the Rule's discussion of sanctions: "[A]n appropriate sanction, which may include an order to pay . . . expenses incurred because of the filing of the pleading, motion, or other paper." FED. R. CIV. P. 11 (1983); *see supra* note 21 (reprinting the complete text of current Rule 11).

91. *See supra* note 21.

92. The Advisory Notes state:

> While amended rule 11 purports to apply an objective test for what is reasonable inquiry, the courts are faced with a very narrow interpretation of reasonableness on a case-by-case basis. . . . Questions of subjective bad faith are still relevant where interpretation of the law is involved and where the motive for filing a pleading, motion, or paper may be questioned.

Note, *supra* note 43, at 766.

93. *See* Advisory Notes, *supra* note 75, at 198; 5 WRIGHT & MILLER, *supra* note 77, § 1333; *see also* Cleveland Demolition Co., Inc. v. Azcon Scrip Corp., 827 F.2d 984 (4th Cir. 1987) (holding that the failure to conduct a reasonable inquiry into fact and law may result in sanctions against the plaintiff and his attorneys).

94. The Advisory Committee's Notes provide analytical factors to aid in the analysis of the reasonableness of the inquiry. These factors include the amount of time available to the attorney, the necessity of reliance only on the client for information, and the credibility of the legal argument.

The Fifth Circuit, in Thomas v. Capital Security Services, Inc., 812 F.2d 984 (5th Cir. 1987), provided a list of factors for district courts to consider in determining whether a party has made a reasonable inquiry. With regard to the inquiry into facts, the court should assess the amount of time available to the signer for investigation; the extent that factors necessitated the signer's reliance on the client's factual account; the feasibility of a prefiling investigation and the need for post-filing discovery to round out the factual claims; the complexity of the issues; and whether

cause, unlike "reasonable care" or "reasonable person," "reasonable inquiry" in the context of Rule 11 lacks a well-established history of judicial interpretation.[95] Nevertheless, the legal profession is familiar with the concepts of "reasonable inquiry" and "due diligence" in other contexts.[96] The intent of the Rule is to induce an attorney to conduct an investigation and substantiate his factual allegations and legal theories before filing any papers.

Under the amended Rule, the court "shall" impose sanctions for violations.[97] Because alleged violations of Rule 11 must be brought to the attention of the court by way of a motion requesting sanctions, Rule 11 is not self-enforcing; the court may impose sanctions on its own motion or on the motion of a party.[98] The new language is intended to encourage courts to impose sanctions.[99] An attorney also may bring an

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present counsel received the case from previous counsel. Regarding the legal issues, the court should consider the amount of time available to prepare the document, the plausibility of the legal arguments, and the complexity of the issues. *Id.* at 988.

See Kamerman v. Steinberg, 113 F.R.D. 511 (S.D.N.Y. 1986) (finding that reliance on newspaper articles in the *Wall Street Journal* and public SEC disclosure documents may be sufficient to satisfy a reasonable factual investigation in a securities fraud action).

95. Rothschild, Fenton & Swanson, *Rule 11: Stop, Think, and Investigate*, 11 LITIGATION, Winter 1985, at 13. These commentators suggest the following factors to consider when deciding whether reliance on a client's account of the facts constitutes a "reasonable inquiry" into the facts: (1) The existence of corroborating evidence; (2) costs of obtaining other evidence; (3) source of client's information; (4) length and nature of attorney's relationship with the client; and (5) believability of client's story. *Id.* at 14.

96. Securities lawyers are familiar with the necessity of creating a paper trail to substantiate a "due diligence" defense. One practitioner suggests that attorneys protect themselves by "documenting efforts made to verify the accuracy and sufficiency of filings." Bates, *The Rule 11 Debate, 4 Years Later: Lawyers Say It's Applied Unfairly*, Nat'l L.J., Oct. 12, 1987, 3, col. 1 & at 42, col. 4.

The district judge in Whittington v. Ohio River Co., 115 F.R.D. 201 (E.D. Ky. 1987) suggested:

> Although Rule 11 does not literally require it, it would be my advice to all attorneys to be sure that the file contains at least a skeleton memo outlining concretely, not just abstractly, the legal basis for every claim or defense. It should apply the law disclosed by reasonably extensive legal research to the facts disclosed by a reasonably adequate factual investigation.

The analysis should be that of a reasonably competent attorney admitted to federal practice. *Id.* at 208.

97. FED. R. CIV. P. 11 (1983); *see supra* note 21 (reprinting text of Rule 11). In Wold v. Minerals Engineering Co., 575 F. Supp. 166 (D. Colo. 1983), the plaintiff filed a motion to disqualify the defendant's counsel even though the plaintiff and his counsel had no ground for the motion. Plaintiff's counsel failed to make a "reasonable inquiry" prior to filing the motion. The court found that Rule 11 had been violated; therefore, the court was "compelled by [Rule 11] to impose appropriate sanctions." *Id.* at 167. The court ordered plaintiff's counsel to pay the defendant's expenses, including attorney's fees, with no reimbursement from the plaintiff. *Id.* at 168.

98. *Cf.* 5 WRIGHT & MILLER, *supra* note 77, § 1334.

99. According to Judge Schwarzer: "[L]awyers are generally reluctant to seek sanctions and judges to impose them. The process is unpleasant, adds to the existing work, and increases the tensions in the courtroom. . . . Judges may be uneasy about appearing to assume the role of policeman, teacher, or moral guardian." Schwarzer, *supra* note 76, at 182. Moreover, standards of appropriate conduct may be highly subjective, and judges are wary of imposing their own personal concepts of professionalism on lawyers. *Id.* at 184; *see also* Note, *supra* note 42, at 141 (stating

action under Rule 11[100] in the appropriate circumstances,[101] but should bear in mind that an improper motion under Rule 11 may invoke Rule 11 liability for the one seeking its sanctions.[102]

Former Chief Justice Warren Burger observed that old standards

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that the "Rule encourages, and even tacitly demands, that judges take a more active role"); Advisory Notes, *supra* note 75, at 200.

100. The timing of a motion for sanctions under Rule 11 may be determinative. In *In re* Yagman, 796 F.2d 1165 (9th Cir.), *amended*, 803 F.2d 1085 (9th Cir. 1986), the Ninth Circuit reversed the district court's decision directing the verdict in defendant's favor and awarded him $250,000 in attorney's fees for having to litigate the defamation suit. The Ninth Circuit disapproved of the district judge's allowing the entire trial to advance without mentioning sanctions then awarding fees following the judgment. The court of appeals stated:

> [This procedure] flies in the face of the primary purpose of sanctions, which is to deter subsequent ahuses. This policy is not well served by tolerating abuses during the course of an action and then punishing the offender after the trial is at an end. . . . [T]he accumulation procedure . . . "tends to perpetuate the waste and delay which the rule[s are] intended to eliminate."

Id. at 1183 (quoting Schwarzer, *supra* note 76, at 198); *see also* R.K. Harp Inv. Corp. v. McQuade, 825 F.2d 1101, 1103 (7th Cir. 1987) (holding that "the imposition of sanctions must be divorced from the ultimate disposition of the underlying action").

The appropriate time to move for sanctions depends on when the violation occurs. If the offense occurs in the initial pleadings, either in the complaint or answer, a motion for sanctions may be appropriate immediately. On the other hand, certain pleading offenses may not become obvious until the trial begins. The court should keep in mind the deterrence goal when deciding whether to sanction contemporaneously to the offense. Some pretrial abuses can be sanctioned in direct response to the offense. A motion should be filed in response to misconduct during the trial; final sanctions, bowever, should be withheld until the end of trial.

In Bannon v. Joyce Beverages, 113 F.R.D. 669 (N.D. Ill. 1987), the plaintiff alleged a number of instances of misrepresentation and nondisclosure of material information by the defendant in violation of federal securities laws. During discovery the plaintiff admitted that he used his own independent judgment in deciding to sell his stock and that he knew, in advance of receiving the allegedly fraudulent documents, information regarding four of the alleged misrepresentations and omissions. Shortly thereafter, the plaintiff amended his claims to drop those four allegations, but added six additional claims. The defendant sought sanctions under Rule 11 for defending the four claims. *Id.* at 670. The plaintiff requested that the court defer consideration on the motion until the end of the trial. The court refused to defer consideration because the plaintiff had removed the claims from the trial; therefore, the facts would develop no further. According to the court, "[T]he sanctions issue will only grow cold and stale as it ages." *Id.* at 671. The court awarded the defendant's counsel reimbursement for the amount of time expended discovering facts for the Rule 11 motions. *Id.* at 675.

101. Despite the general sentiment that the initiation of a sanctions proceeding is a "double-edged sword," the attorney must consider the damage that the opposing party's improper tactics causes his client. The injured client will typically be unaware of the availability of Rule 11 sanctions, and, because professional bar sanctions provide no monetary compensation, the client will be left without a remedy. "Thus, unethical conduct, if not egregious, remains essentially unchallenged by the lay and legal communities." Axelberg, *Sanctions Available for Attorney Misconduct: A Glimpse at the "Other" Remedies*, 47 MONT. L. REV. 87, 92 (1986).

102. The movant also may be awarded fees associated with pursuing the appeal of an improper denial of Rule 11 sanctions by the district court. "It is very possible that appellate expenses might exceed substantially the sanction in the district court, thus forcing many litigants . . . to conclude that the vindication of the Rule 11 interest is not worth the candle. Unquestionably, this would undermine the purposes behind Rule 11." Westmoreland v. CBS, Inc., 770 F.2d 1168, 1179 (D.C. Cir. 1985).

die hard, and new ideas generally are met with opposition.[103] This maxim is especially true about judges and lawyers accustomed to relying on precedent.[104] Not surprisingly, the negative commentary and predictions of doom regarding the amendments to Rule 11 have been voluminous.[105] Nevertheless, the litigation crisis has become so severe that outside intervention is necessary to reduce abuses and restore respect for the judicial system.[106] The drafters of the amended Rule provided this outside intervention by establishing reasonable guidelines to govern the conduct of litigants and counsel and prevent frivolous lawsuits.

Many legal professionals vigorously opposed stiffening sanctions under Rule 11 by arguing that attorney's fee motions would devolve into satellite litigation and hinder attorney creativity in developing new legal theories.[107] The Advisory Committee's Notes mandate that the court observe due process concerns while keeping in mind the Rule's purpose to decrease costs and condense litigation. For example, a party seeking sanctions under the Rule must file a motion and notify the offender of the motion. The court has the discretion to conduct a hearing or allow proof regarding the reasonableness of the offender's conduct.[108] The drafters recognized the danger of satellite litigation, but believed that the scope of such litigation could be limited to preserve the benefit of the Rule.[109] Likewise, the drafters recognized the Rule's potential for

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103. Judicial Conference, *supra* note 7, at 207.

104. *Id.*

105. *See, e.g.*, Joseph, *The Trouble with Rule 11*, 73 A.B.A. J., Aug. 1, 1987, at 87; Bates, *supra* note 96, at 3, col. 1; Middleton, *Was Request for Sanctions a Retaliatory Move?*, Nat'l L.J., May 18, 1987, at 10, col. 1.

106. "[L]awyers have got to stop using the court system as a means of enriching themselves at the expense of their clients. And the courts have got to stop allowing the lawyers to do it." Burger, *supra* note 1, at 65.

However, some commentators and judges believe that the courts have become so willing to invoke Rule 11 that the Rule has been overextended and that a rethinking of its application is necessary. In Whittington v. Ohio River Co., 115 F.R.D. 201 (E.D. Ky. 1987), for example, the court expressed these concerns before painstakingly setting out practical guidelines to which practitioners should conform.

107. Judge Schwarzer states:

> A lawyer may . . . be called on to explain the basis or purpose of a paper. But vigorous advocacy is not contingent on lawyers being free to pursue litigation tactics that they cannot justify as legitimate. . . . Unlike the polemicist haranguing the public from his soapbox in the park, the lawyer enjoys the privilege of a professional license that entitles him to entry into the justice system to represent his client and, in doing so, to pursue his profession and earn his living. He is subject to the correlative obligation to comply with the rules and to conduct himself in a manner consistent with the proper functioning of that system.

Schwarzer, *supra* note 76, at 184.

108. *See* Bannon v. Joyce Beverages, 113 F.R.D. 669, 674 (N.D. Ill. 1987).

109. In Donaldson v. Clark, 819 F.2d 1551 (11th Cir. 1987), the court discussed a number of factors for consideration in determining the level of process due:

> [I]nterests of attorneys and parties in having a specified sanction imposed only when justified;

chilling advocacy;[110] the notes expressly provide that the intent is not to hinder creativity in legal thought.[111] Courts recognize that the hallmark of the American legal system has been the creation of ingenious legal theories.[112] As long as the lawyer has formulated a plausible argument with ample support, the Rule protects his creativity.

Another major concern of the legal profession is the preservation of client confidences[113] and the attorney-client and work product privi-

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> the risk of an erroneous imposition of sanctions under the procedures used and the probable value of additional notice and hearing; and the interests of the court in efficiently monitoring the use of the judicial system and the fiscal and administrative burdens that additional procedural requirements would entail.

Id. at 1558. The court explained that the existence of the Rule itself provides a certain level of notice. Notice in writing is not required in all instances. Nor is the formality of pleadings. The accused always must be allowed to respond, but a separate sanction hearing is not always necessary. *Id.* at 1560.

> The procedure obviously must comport with due process requirements. . . . In many situations the judge's participation in the proceedings provides him with full knowledge of the relevant facts and little further inquiry will be necessary.
>
> To assure that the efficiencies achieved through more effective operation of the pleading regimen will not he offset by the cost of satellite litigation over the imposition of sanctions, the court must to the extent possible limit the scope of sanction proceedings to the record.

Advisory Notes, *supra* note 75, at 201.

110. Some judges have allegedly used Rule 11 to punish lawyers who "advance factual or legal theories that break new ground or legitimately challenge existing precedent." Snyder, *The Chill of Rule 11*, 11 LITIGATION, Winter 1985, at 16. Because no bright line divides acceptable claims from unwarranted claims that should be sanctioned, lawyers may face a dilemma. Although the attorney may consider the argument advanced a novel legal concept, the judge may deem the argument a serious abuse of the pleading rules. The goals of punishment and deterrence should not outweigh the drafters' obvious disinclination to "stifle legitimate innovation." *Id.* at 55.

Another commentator has observed that Rule 11 sanctions are most likely to be imposed in public interest litigation such as suits to vindicate civil rights or alleged violations like employment discrimination. The likelihood of sanctions may deter "[n]ew ideas of justice" and limit creative theories, which in the past helped develop non-traditional actions protecting welfare benefits, a right to integrated schools, the procreative choice and compensation for toxic torts. Note, *supra* note 87, at 631-32, 652; *see also* Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073, 1080 (7th Cir. 1987) (ruling that the plaintiff's "theory of due process is wacky, sanctionably so").

111. *See* Advisory Notes, *supra* note 75, at 199 (stating that the "rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories"); *see, e.g.*, Marco Holding Co. v. Lear Siegler, Inc., 606 F. Supp. 204 (N.D. Ill. 1985) (stating that, in an extremely close case, courts hesitate to impose sanctions, although initially inclined to do so, for fear of chilling enthusiasm or creativity).

112. For example, the Second Circuit indicated:

> [W]e do not intend to stifle the enthusiasm or chill the creativity that is the very lifeblood of the law. Vital changes have been wrought by those members of the bar who have dared to challenge the received wisdom, and a rule that penalized such innovation and industry would run counter to our notions of the common law itself.

Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 254 (2d Cir. 1985).

113. *Model Code of Professional Responsibility*, *supra* note 10, EC 4-1 (1981) provides:

> Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him. . . . The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full

leges.[114] When faced with a Rule 11 challenge, an attorney may feel compelled to divulge the contents of his legal research or conversations and interviews with his client or other witnesses in order to rebut the challenge.[115] The drafters did not intend the Rule to require disclosure of privileged communications,[116] but some commentators fear that such disclosure may be the only defense to liability.[117] Courts, however, should be skeptical of a claim of privilege. To rebut a Rule 11 motion, an attorney typically must disclose factual and legal research rather than confidential conversations with clients.[118] The evidence disclosed is the type that would eventually be disclosed during the litigation process.[119]

Although the attorney does have a duty to represent his client zealously,[120] the attorney cannot use the *Code of Professional Responsibility* as a buffer against Rule 11 sanctions for unwarranted litigation.[121] The lawyer has the prerogative, if not the duty, to choose his clients carefully. The lawyer must remain in control of the professional relationship and impress upon his client the proper ethical and legal standards, notwithstanding the client's personal standards.[122] A

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development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.

Model Code, *supra* note 10, EC 4-4 provides:

> The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege exists without regard to the nature or source of information or the fact that others share the knowledge.

114. *See* FED. R. EVID. 501.

115. Bannon v. Joyce Beverages, 113 F.R.D. 669, 674 (N.D. Ill. 1987).

116. Advisory Notes, *supra* note 75, at 199.

117. *See, e.g.*, Note, *supra* note 43, at 769; *see also* Schwarzer, *supra* note 76, at 183. The attorney-client privilege actually belongs to the client, who may absolutely prevent the attorney from invoking the privilege when challenged. Note, *supra* note 43, at 769.

118. *See* Schwarzer, *supra* note 76, at 199-200.

119. *Id.*

120. *Model Code*, *supra* note 10, Canon 7. (A Lawyer Should Represent a Client Zealously Within the Bounds of the Law).

121. In Itel Containers International v. Puerto Rico Marine Management, 108 F.R.D. 96, 101 (D.N.J. 1985), the court stated:

> The 1983 amendments were a response to the voices of bench and bar that litigation, in some quarters, at least, was becoming more like an alley brawl than a search for the truth by respected and respecting professional advocates. The adversary system commands vigorous and zealous representation of one's client. The "battle" should be fought hard—but fought fairly. Vigorous advocacy is not inconsistent with decent behavior toward one's adversary and respect for the court . . . does not mean the advocate may dishonor the judicial system and demean the court simply because it will advance his client's cause.

122. Freedman, *supra* note 9, at 46, 51. "[T]he lawyer is 'the master' who is 'to decide what is morally . . . right, and who serves the client's needs but only 'as the lawyer sees them, not as the client sees them.' " *Id.* at 46 (quoting Haynsworth, *Professionalism in Lawyering*, 27 S.C. L. REV. 627, 628 (1976)). The system of professional independence enjoyed by the bar must be protected. "Independence means the freedom to tell your client no. . . ." Cooper, *supra* note 8, at 57.

counterbalance to the "client control"[123] duty is the attorney's duty to refrain from trying facts. Provided that a client's account of the facts will be properly admissible testimony, the attorney may rely on the evidence even if he is not absolutely certain the assertions are true.[124] The attorney has no duty to assess the client's credibility once he satisfies the Rule 11 standard for reasonable inquiry.[125]

B. Duties Under Rule 11

The amended Rule imposes three significant duties on the attorney representing a party,[126] or the party representing himself,[127] who signs a pleading, motion, or other paper. The attorney's signature certifies that he has conducted a reasonable inquiry,[128] that the paper is well

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123. Freedman, *supra* note 9, at 46.

124. Rothschild, Fenton & Swanson, *supra* note 95, at 15.

125. *See infra* notes 130-63 and accompanying text.

126. When more than one attorney signs a pleading, the provision applies to each attorney. Moreover, an attorney who signs a paper drafted by a colleague may be liable for its contents. Coburn Optical Indus., Inc. v. CILCO, Inc., 610 F. Supp. 656, 660 (M.D.N.C. 1985) (deciding that even though Rule 11 requires the lawyer who elects or agrees to sign a paper to take responsibility for the contents this does not bar agency liability for those responsible for the filing); *accord* Schwarzer, *supra* note 76, at 185 (advocating that the Rule allow for application of agency principles to find a nonsigning principal liable for a paper signed by an agent); *cf.* Robinson v. National Cash Register Co., 808 F.2d 1119, 1128 (5th Cir. 1987) (holding that the nonsigning attorney who appeared in the litigation may not be sanctioned).

127. The Advisory Committee's Notes manifest the drafters' intent that the Rule apply to pro se litigants. The same standards apply; however, the court has wide discretion to consider "special circumstances." Advisory Notes, *supra* note 75, at 199.

In Young v. IRS, 596 F. Supp. 141 (N.D. Ind. 1984), a pro se plaintiff challenged an Internal Revenue Service tax assessment by making "preposterous" allegations. Applying a subjective bad faith standard, the district court found sanctions to be appropriate. *Id.* at 152. The court found that the plaintiff had "no reasonable expectation of success on the merits." *Id.*

Similarly, the Seventh Circuit found that amended Rule 11 requires the district court to impose sanctions on an unrepresented party who files a complaint "without some minimum of previous investigation." Shrock v. Altru Nurses Registry, 810 F.2d 658, 661-62 (7th Cir. 1987). The fact that the party prepared the complaint without the assistance of counsel is an invalid excuse for failing to investigate and verify the factual elements supporting the action. *Id.*; *see also* Hilgeford v. Peoples Bank, Inc., 113 F.R.D. 161 (N.D. Ind. 1986) (ordering a $1000 sanction against pro se litigants).

In Clark v. Green, 814 F.2d 221 (5th Cir. 1987), a pro se plaintiff brought suit against the University of Houston Police Department alleging that the police violated his constitutional rights by issuing traffic tickets to a third party. Stating that the plaintiff's complaint was "vague" and "incomprehensible," the district court dismissed the claim and ordered a sanction of $2500. The Fifth Circuit imposed double costs and a $250 fine for the frivolous appeal. The court held that "[w]hile [it does] not lightly impose sanctions at any time, [it is] particularly cautious when the appellant appears pro se. Pro se litigants are not held to the standard of professionals, yet are not granted unrestrained license to pursue totally frivolous appeals." *Id.* at 223.

128. An attorney may not rely on co-counsel to satisfy the inquiry requirement. Any certification requires sufficient personal knowledge by the signer. The duty cannot be delegated. Unioil, Inc. v. E.F. Hutton & Co., Inc., 809 F.2d 548, 558 (9th Cir. 1986). At the very least, the signer must have read any document that he signs. Whittington v. Ohio River Co., 115 F.R.D. 201, 206 (E.D.

grounded in fact and warranted by existing law or a good faith argument for modification, reversal, or extension of existing law, and that the paper is not interposed for any improper purpose.[129]

1. Reasonable Inquiry

The attorney's signature certifies that he has read the paper and made a reasonable inquiry into both the facts and law to obtain knowledge and information about and belief in the claims.[130] Rule 11 does not allow a "pure heart, empty head defense."[131] The Advisory Committee's Notes reiterate the necessity of conducting some prefiling inquiry; the scope of the inquiry should be that which a reasonably competent attorney practicing in federal court would conduct, taking into account all pertinent circumstances.[132] Under this standard, a mere hunch that a client has a cause of action is not enough; the attorney must have reasonably reliable information to support the claim.[133] Likewise, naming every possible defendant may no longer be a sound practice because the attorney must have a reasonable belief of each defendant's liability.[134]

Ky. 1987).

129. *See supra* note 21 (reprinting text of current Rule 11).

130. *Id.*

131. *See* Schwarzer, *supra* note 76, at 187.

132. *See Coburn Optical Indus.*, 610 F. Supp. at 659 (stating that the attorney cannot rely solely on his client's rendition of the facts even if the client is trustworthy because the attorney must make a reasonable inquiry); *see also* Mossman v. Roadway Express, Inc., 789 F.2d 804 (9th Cir. 1986) (allowing imposition of sanctions when the motion is not well grounded in fact).

133. Rothschild, Fenton & Swanson, *supra* note 95, at 15.

134. In Foster v. Michelin Tire Corp., 108 F.R.D. 412 (C.D. Ill. 1985), the plaintiff brought a products liability action against three tire manufacturers. The plaintiff's attorney admittedly did not know which of the defendant manufacturers actually produced the tires on the truck that was responsible for the death of the plaintiff's decedent. *Id.* at 414. The court held that the plaintiff's failure to conduct any prefiling inquiry into the facts was a clear violation of Rule 11. Although the Rule does not require perfect pleadings or production of "information sufficient to sustain a claim," some inquiry is necessary. *Id.* at 416. The court recognized that prefiling inquiry may be costly to the plaintiff, but emphasized the savings to the entire legal system. "Federal Rule of Civil Procedure 11 specifically aims at preventing the costs attendant upon a 'sue now, inquire later' mentality." *Id.* at 415.

In Albright v. Upjohn Co., 788 F.2d 1217 (6th Cir. 1986), the plaintiff filed a products liability action against nine pharmaceutical manufacturers who were involved in the manufacture and sale of tetracycline-based drugs, which allegedly discolored the plaintiff's teeth. *Id.* at 1218. The plaintiff's childhood medical records revealed only that the plaintiff took drugs manufactured by four of the defendants. *Id.* at 1219. The district court granted summary judgment for the other five defendants, including Upjohn. Upjohn sought Rule 11 sanctions on grounds that the plaintiff failed to conduct a reasonable prefiling inquiry into the facts. *Id.* The plaintiff had possession of or access to the medical records at least 11 months prior to filing. The plaintiff asserted a number of factual circumstances to support her contention that she had satisfied her Rule 11 duty, including the fact that her medical records were old, often illegible, and lost or missing in some cases, and that Upjohn was a leading defendant in tetracycline cases. *Id.* at 1220. The Sixth Circuit held that the plaintiff's prefiling investigation was insufficient because she had no specific factual evidence to support her claims against Upjohn. *Id.* at 1221-22.

Thus, the "shotgun" approach to pleading probably is now actionable.

A number of cases attempting to assess the reasonableness of the prefiling inquiry rest on whether the attorney conducted *any* inquiry.[135] In *Viola Sportswear Inc. v. Mimun*[136] the plaintiff, who had the exclusive license to manufacture and sell children's Sasson jeans, filed an action alleging unfair competition and trademark infringement. This case, which further alleged a nationwide trademark conspiracy, was based on the defendant's unauthorized sale of a single pair of jeans worth approximately ten dollars.[137] The plaintiff made no effort to investigate the facts or question the defendant before filing and refused to dismiss the action after initial discovery produced no factual basis for his complaint.[138] In assessing $20,000 in attorney's fees against the plaintiff and his attorneys, jointly and severally, the court held that sanctions were warranted by the plaintiff's failure to conduct *any* prefiling inquiry that would have produced facts to support his claims.[139]

The reasonable inquiry requirement is equally important, if not more so, when applied to the investigation into legal theories. Although misinformation or inaccuracy about the facts may be excused in some circumstances, misinformation about the law will not, or should not, be overlooked.[140] The attorney in certain circumstances may rely on his client to supply accurate facts; however, assessment of the legal theories is entirely within the realm of counsel.

In *Rodgers v. Lincoln Towing Service, Inc.*[141] the plaintiff filed a civil rights action in federal court against the city, a police superintendent, two policemen, a corporation, and two corporate employees for

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In a footnote, the court addressed the plaintiff's alternative contention that the complaint against the group of tetracycline manufacturers was justified under a joint enterprise theory of liability "warranted by existing law." *Id.* at 1221 n.5. In rejecting the alternative contention, the Sixth Circuit made an important distinction. A concert of action or joint enterprise theory of liability is a legal theory, applicable only when the plaintiff is unable to identify any specific product to which she was exposed. Upjohn, in its Rule 11 motion challenged the sufficiency and reasonableness of the plaintiff's factual inquiry. She had identified four manufacturers, but included nine defendants in her complaint in violation of Rule 11. A legal theory based on joint enterprise is warranted only if no evidence exists by which the plaintiff can identify the specific manufacturer of products to which she was exposed. *Id.* at 1221.

135. "The court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted." Advisory Notes, *supra* note 75, at 199.

136. 574 F. Supp. 619 (E.D.N.Y. 1983).

137. *Id.* at 620.

138. *Id.*

139. *Id.* at 621.

140. Rothschild, Fenton & Swanson, *supra* note 95, at 15; *see also In re* TCI Ltd., 769 F.2d 441, 447 (7th Cir. 1985) (stating that "[a]n attorney who wants to strike off a new path in the law must make an effort to determine the principles he is applying").

141. 596 F. Supp. 13 (N.D. Ill. 1984). For an in deptb criticism of *Lincoln Towing* as a judge's improper application of Rule 11, see Snyder, *supra* note 110, at 16.

violating his rights under the first, fourth, fifth, sixth, seventh, and eighth amendments to the United States Constitution and his fourteenth amendment due process guarantee. The plaintiff also alleged conspiracy and numerous state claims.[142] The claims arose out of the plaintiff's arrest, and later acquittal, for reportedly throwing paint on the defendant towing service's building after the company ordered the plaintiff's car towed.[143] The court found the plaintiff's claims completely unsupportable at law, a fact that a small amount of research would have revealed.[144] The failure to conduct a reasonable inquiry is a clear violation of amended Rule 11. The court held that the new Rule specifically was intended to eliminate the type of "shotgun" pleading involved in *Lincoln Towing*.[145]

Courts will not allow an attorney to justify violations of Rule 11 by relying on his duty to his client.[146] In *Mohammed v. Union Carbide Corp.*[147] a district court acknowledged counsel's duty to represent zealously his client. The plaintiff raised libel and slander claims, and his counsel did not obtain any evidence or conduct a reasonable inquiry into the claims.[148] The court found that an attorney has a duty to discourage his client from bringing specious claims.[149] The determination of whether "reasonable inquiry" has occurred to avoid these specious claims can be objectively made and proven by focusing on observeable events. The attorney, therefore, should have attempted to corroborate his client's account.[150] This standard allows for consideration of the facts specific to the case; but at the least, the attorney still must conduct some investigation and document the steps taken in order to satisfy his duty under Rule 11.[151]

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142. 596 F. Supp. at 15.

143. *Id.* at 16.

144. *Id.* at 16-17.

145. *Id.* at 27; *see also* Ring v. R.J. Reynolds Indus., Inc., 597 F. Supp. 1277 (N.D. Ill. 1984). The plaintiff, a salesman for 14 years, filed suit against his former employer following plaintiff's termination. The court dismissed the entire action for failure to state a claim on which relief could be granted. The plaintiff's employment was "at will," and his claim for age discrimination could not succeed because he was only 39-years-old. In awarding the defendants attorney's fees against plaintiff's counsel, the court found that the complaint "completely fail[s], under well established law, to state a claim." Counsel obviously made inadequate inquiry into the law. *Id.* at 1281.

146. "The profession has . . . long recognized limits to zealous advocacy. While these limits are not marked by bright lines, the lawyer's concurrent obligations as an officer of the court have been repeatedly and clearly articulated." Schwarzer, *supra* note 76, at 189. For a discussion of the conflicts between a duty to the client and Rule 11 requirements, see Withered, *Lawyers Dilemma: Frivolous Lawsuits and Duties to Clients*, 30 RES GESTAE 164 (1986).

147. 606 F. Supp. 252 (E.D. Mich. 1985).

148. *Id.* at 261.

149. *Id.*

150. *Id.*

151. *Id.*

The certifications provided by the attorney's signature govern the entire proceeding so that subsequent developments may require the attorney to withdraw the claim.[152] In *Van Berkel v. Fox Farm & Road Machinery*[153] the plaintiff lost his arm in a corn chopper manufactured by the defendant. The complaint, which was based on the attorney's good faith reliance on oral information obtained from his client, alleged that the accident occurred in 1977.[154] The accident actually occurred in 1976 and, therefore, was barred by the statute of limitations when the action was filed.[155] The plaintiff's attorney had failed to review any of the client's medical records before filing even though the client had retained the attorney four years earlier.[156] The attorney claimed that an ethical duty to his client prevented him from dismissing the action when the actual date of the accident was brought to his attention.[157] The court found that the attorney had an ethical duty to dismiss the lawsuit when he learned that his client had no case, even if the client resisted dismissal.[158] As an officer of the court, the attorney's ethical duty to the judicial system and the general public outweighs any duty to his client when the two are in conflict.[159]

Similarly, in *Thomas v. Capital Security Services, Inc.*[160] the Fifth Circuit held that an attorney who fails to review and evaluate his position during the development of the case may be subject to Rule 11 sanctions.[161] The defendant employer requested attorneys' fees following an employee's unsuccessful thirteenth amendment, Title VII, and section 1981 claims. The court held that if the attorney discovers during the course of the litigation that the factual or legal basis for the litiga-

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152. Fuji Photo Film U.S.A., Inc. v. Aero Mayflower Transit Co., 112 F.R.D. 664, 667 (S.D.N.Y. 1986) (holding that counsel has a duty to continue the investigation during the interim between filing the initial complaint and the amended complaint three months later); *see also* Bannon v. Joyce Beverages, 113 F.R.D. 669, 675 (N.D. Ill. 1987) (finding that although the party is liable for all improper claims, dropping claims by amendment may mitigate damages so that the penalty would not be as harsh).

153. 581 F. Supp. 1248 (D. Minn. 1948).

154. *Id.* at 1249.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 1251; *see also* Woodfork v. Gavin, 105 F.R.D. 100, 104 (N.D. Miss. 1985) (stating that Rule 11 imposes a requirement that the attorney "continually review, examine, and re-evaluate his position"). *But see* Pantry Queen Foods v. Lifschultz Fast Freight, 809 F.2d 451, 454 (5th Cir. 1987) (holding that Rule 11 does not require a party or an attorney to continue his investigation after filing a paper or updating any filing); Oliveri v. Thompson, 803 F.2d 1265 (2d Cir. 1986) (explaining that "[l]awyers may not be penalized under Fed. R. Civ. P. 11 for failing to withdraw federal lawsuits that prove groundless after they are filed").

159. *Bannon*, 581 F. Supp. at 1251.

160. 812 F.2d 984 (5th Cir. 1987).

161. *Id.* at 988.

tion no longer exists, he has a duty to assure that the litigation does not proceed.[162] The attorney may choose one of a number of options depending on the facts, including withholding opposition to a summary judgment motion, abstaining from prosecution of the action, withdrawing a document, or dismissing the case.[163]

2. Well Grounded in Fact and Law

Federal Rule 11 further provides that an attorney's signature certifies that the paper "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."[164] This requirement takes the reasonable inquiry standard one step further: The attorney not only must inquire into the facts and research the law, but also must be candid with the court.[165] The duty of candor has been mandated by both the *Code of Professional Responsibility* and the *Rules of Professional Conduct.*[166] Now the duty is implicit in Rule 11's requirements.[167] The duty of candor requires that the attorney disclose any law of the controlling jurisdiction that is adverse to his position.[168] No aspect of the candor requirement, however, demands that the attorney refrain from encouraging change in or extension of existing law.[169]

In *Golden Eagle Distributing Corp. v. Burroughs Corp.*[170] Judge Schwarzer, an advocate of vigorous application of Rule 11,[171] made a strong statement regarding the duty of candor. The defendant, after successfully removing a breach of contract, fraud, and negligence action

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162. *Id.*

163. *Id.* at 989; *see also* Robinson v. National Cash Register Co., 808 F.2d 1119, 1127 (5th Cir. 1987) (stating that the duty under Rule 11 is "not a one time only obligation"); Jackson Marine Corp. v. Harvey Barge Repair, Inc., 794 F.2d 989, 992 (5th Cir. 1986) (finding that voluntary dismissal was not required, and that Rule 11 is satisfied if the party does not oppose a motion for summary judgment).

164. FED. R. CIV. P. 11. For the text of current Rule 11, see *supra* note 21.

165. Schwarzer, *supra* note 76, at 193.

166. MODEL CODE, *supra* note 10, DR 7-102(A)(3), (A)(5); DR 7-106(B)(1); *see also* MODEL RULES, *supra* note 11, Rule 3.3. Model Rule 3.3 provides:

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

. . . .

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; . . .

167. Schwarzer, *supra* note 76, at 193-94.

168. *See supra* note 166.

169. Rothschild, Fenton & Swanson, *supra* note 95, at 15; Schwarzer, *supra* note 76, at 194.

170. 103 F.R.D. 124 (N.D. Cal. 1984), *rev'd*, 801 F.2d 1531 (9th Cir. 1986).

171. Judge Schwarzer authored the article, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181 (1985), which explains the duty of candor and its relevance.

to federal court and transferring the action from Minnesota to California, moved for dismissal of the claims based on the running of the California statute of limitations.[172] The defendant's counsel submitted in support of the motion a memorandum which seemingly argued that existing principles of law bolstered the defendant's position. Judge Schwarzer denied the defendant's motion to dismiss for lack of merit and, on his own motion, gave notice of Rule 11 sanctions against counsel. In his memorandum opposing sanctions, defendant's counsel made a plausible argument for extension of present law, despite his prior claim that the existing law supported his position.[173] The court found the second argument to be valid, but held that the inconsistency between the two arguments was precisely the type of practice Rule 11 was designed to prohibit.[174] Judge Schwarzer was particularly offended by the misleading nature of counsel's argument and accordingly assessed more than $3000 of plaintiff's attorney fees against defendant's counsel.[175]

The Ninth Circuit reversed Judge Schwarzer's district court opinion in *Golden Eagle Distributing Corp.*, but rejected the implied duty of candor as described by Judge Schwarzer.[176] The court found that the literal text of Rule 11 does not require counsel to inform the court whether his argument is based on existing law or on an extension or modification of existing or contrary law.[177] The Rule 11 certification is simply a certification that the paper meets the proscribed requirements, and no further explanation is necessary.[178] The court expressed concern that at times counsel may not be able accurately to categorize his argument. Moreover, Rule 11 was amended to reduce costs and delay in the judicial process; yet the district court's application might increase costs and create excess litigation by requiring counsel to justify his arguments.[179] The Ninth Circuit believed that the district court's application of Rule 11 was an improper attempt to enforce ethical standards by means of procedural rules.[180]

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172. *Golden Eagle Distrib. Corp.*, 103 F.R.D. at 125.
173. *Id.* at 126.
174. *Id.* at 127.
175. *Id.* at 128.
176. Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531, 1541-42 (9th Cir. 1986).
177. *Id.* at 1538-39.
178. *Id.* at 1539-40.
179. *Id.* at 1541.
180. *Id.* at 1539. *But see* Lepucki v. Van Wormer, 765 F.2d 86 (7th Cir. 1985), in which the court stated:

> Perhaps the greatest safeguard against [the danger of frivolous claims] is the integrity and good sense of practicing lawyers who, as officers of the court, have both an etbical and a legal duty to screen the claims of their clients for factual veracity and legal sufficiency. . . . [We penalize attorneys under Rule 11] only where they have failed to maintain a minimum stan-

Although ethical standards clearly mandate a duty of candor and Rule 11 implicitly includes the same duty, the Ninth Circuit refused to incorporate the duty into Rule 11 standards.[181] The success of the amended Rule depends on its vigorous application, but this court seemingly is reluctant to sanction conduct that typically has been seen as "acceptable" in practice. Only to have his decision overturned on appeal, Judge Schwarzer, who witnessed the proceedings and had the "discretion" to fashion a sanction,[182] found counsel's conduct sufficiently egregious to warrant application of Rule 11.[183]

A number of courts have held that Rule 11 applies to the pleading or motion as a whole, so that Rule 11 cannot be utilized to challenge individual issues in an action. In *Martinez, Inc. v. H. Landau & Co.*[184] the plaintiff, citing four alternative grounds, filed a motion to dismiss the defendant's counterclaim. The plaintiff later withdrew the entire motion to dismiss following a Supreme Court decision in a similar case rejecting two of the grounds cited by the plaintiff.[185] In *Martinez* the defendant sought fees for defending against the motion to dismiss, labeling the motion without basis in law and contrary to precedent.[186] The defendant's Rule 11 challenge was directed solely toward the two grounds not addressed by the Supreme Court. The district court rejected the defendant's motion under Rule 11, holding that the Rule was designed to address the pleading as a whole.[187] The court feared that inconsistent results and an undesirable effect on courtroom strategy would occur if attorneys were discouraged from raising questionable legal issues together with valid issues.[188] According to the court, the application of Rule 11 to individual arguments would lead to the increased litigation and abusive tactics that the Rule was intended to quell.[189]

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dard of professional responsibility.
Id. at 87.

181. *Golden Eagle Distr. Corp.*, 801 F.2d at 1539.

182. Advisory Notes, *supra* note 75, at 200.

183. *See also* Hurd v. Ralphs Grocery Co., 824 F.2d 806 (9th Cir. 1987) (overturning the district court award of $5813 in sanctions to the defendants).

184. 107 F.R.D. 775 (N.D. Ind. 1985).

185. *Id.* at 776. In 1985 the United States Supreme Court settled a conflict between the Second Circuit and Seventh Circuit by hearing two cases on the issue, *see* Haroco, Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384 (7th Cir. 1984), *aff'd*, 105 S. Ct. 3291 (1985); Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 484 (2d Cir. 1984), *rev'd*, 105 S. Ct. 3275 (1985). The Court overturned *Sedima*, the case on which the *Martinez* plaintiff had relied.

186. *Martinez*, 107 F.R.D. at 776-77.

187. *Id.* at 777.

188. *Id.* at 778.

189. *Id.* at 779; *see also* Baranski v. Serhant, 106 F.R.D. 247 (N.D. Ill. 1985) (finding the sanction inappropriate against attorneys who filed pleading containing 38 viable claims and including 8 time-barred claims by mistake).

In contrast, the district court decision of *Kuzmins v. Employee Transfer Corp.*[190] found Rule 11 to be an acceptable sanction when portions of the plaintiff's complaint were without merit. The plaintiff instituted a sex discrimination case, which also alleged violations of her rights under the fifth and fourteenth amendments to the United States Constitution.[191] The plaintiff's civil rights claims were dismissed and stricken from the complaint for failure to meet the state action requirement.[192] The court assessed against the plaintiff's counsel the $100 attorney's fee incurred by the defendant in arguing the dismissal of the unfounded civil rights claims. The court found that counsel failed to make even a minimal inquiry into the law.[193]

3. Improper Purpose

The third certification under Rule 11 provides that the paper in question must not have an improper purpose, such as harassment or delay. The intended application of the language is unclear from the context of the Rule and the Advisory Notes. On its face, the Rule incorporates language that typically has dictated a subjective analysis of the drafters' intent.[194] The determination of whether a signer had an improper purpose or intended harassment or delay is not conducive to an objective analysis. Although the improper purpose language has not been interpreted uniformly by the courts, most courts and commentators now agree that the drafters of the Rule 11 amendments intended to limit subjective determinations of the signer's prefiling state of mind.[195] Thus, the courts now have adopted an objective analysis, overruling previous applications of Rule 11.[196]

The cases interpreting the improper purpose language indicate that a split may be developing.[197] On one side are courts that refuse to conduct any determination of subjective intent in assessing whether a Rule 11 violation has occurred.[198] If the signer has conducted a reasonable

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190. 587 F. Supp. 536 (N.D. Ohio 1984).

191. *Id.* at 537.

192. *Id.* at 538.

193. *Id.*

194. *See supra* note 21.

195. *See infra* notes 226-37 and accompanying text.

196. *Id.*

197. *Compare* cases discussed *infra* notes 198-201 and accompanying text *with* cases discussed *infra* notes 202-204 and accompanying text.

198. *See* Greenberg v. Sala, 822 F.2d 882, 885 (9th Cir. 1987). In Hearld v. Barnes & Spectrum Emergency Care, 107 F.R.D. 17 (E.D. Tex. 1985), the plaintiff's attorney asserted a subjective good faith defense to a motion for fees under Rule 11. The court was hesitant to sanction the attorney because the judge was personally familiar with the reputation for ethical, competent behavior of hoth the attorney and his law firm. The court elected to ignore issues of subjective bad faith as irrelevant under amended Rule 11. *Id.* at 19.

inquiry to determine that the paper is factually and legally sufficient, the court will conclude that the paper was not interposed for any improper purpose. Under this reading, the improper purpose language is superfluous and places no additional duty on the signer. In *Zaldivar v. City of Los Angeles*[199] the Ninth Circuit held that Rule 11 does not require that a party's legal theory be correct. Therefore, the granting of summary judgment or dismissal for failure to state a claim does not resolve the sanction issue. Rather, the court must make an objective determination whether the party violated the Rule 11 requirements.[200] Likewise, a violation of the improper purpose clause requires an objective analysis.[201]

On the other side are courts that read the improper purpose language as establishing a distinct third duty incorporating a subjective analysis.[202] Under this interpretation, an attorney can violate Rule 11 even though the claim has merit if the attorney has an improper purpose.[203] Undoubtedly, the determination that an attorney adopted a position for an improper purpose may be difficult to make. Nevertheless, some courts have adopted a subjective analysis in the limited circumstances in which harassment or some other improper purpose is in issue.[204]

In assessing a $5000 sanction against the plaintiff's attorney, the court found that the plaintiff's response was filed for an "improper purpose." Although diversity had heen destroyed, the plaintiff had attempted to arrange the parties interested in the litigation to maintain an appearance of diversity. *Id.* at 19. "The federal court system was manipulated for ends inimicable to those for which it was created. The minimum standards of this noble profession were not maintained hut were subverted for improper purpose." *Id.* at 20; *see also In re* Ronco, Inc., 105 F.R.D. 493, 498 (N.D. Ill. 1985) (holding that "improper purpose" may be an aggravating factor for sanctions, but that its absence is not a defense under the objective standard).

199. 780 F.2d 823 (9th Cir. 1986).

200. *Id.* at 831.

201. *Id.*

> Harassment under Rule 11 focuses upon the improper purpose of the signer, objectively tested, rather than the consequences of the signer's act, subjectively viewed by the signer's opponent.
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> . . .
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> . . . We hold that a defendant cannot be harassed under Rule 11 because a plaintiff files a complaint against that defendant which complies with the "well grounded in fact and warranted by existing law" clause of the Rule.

Id. at 832.

202. *See, e.g.*, Whittington v. Ohio River Co., 115 F.R.D. 201, 208 (E.D. Ky. 1987).

203. *Id.*

204. In Hudson v. Moore Business Forms, Inc., 827 F.2d 450 (9th Cir. 1987), the defendant filed a counter claim requesting $200,000 compensatory damages and $4 million in punitive damages. On appeal the Ninth Circuit overruled the district court's dismissal of the counterclaim on the merits; however, the court affirmed Rule 11 sanctions against the defendant with regard to the damage prayer. The court found that such an outrageous prayer indicates that the counterclaim was brought for the improper purpose of harassing the plaintiff. *Id.* at 457.

Similarly, in Holley v. Guiffrida, 112 F.R.D. 172 (D.D.C. 1986), the court held the plaintiff's

C. Establishing an Appropriate Standard

Rule 11 causes confusion because it does not provide the courts with a standard for assessing counsel's state of mind. This confusion has spurred a debate over the viability of a good faith defense to a Rule 11 motion.[205] Under the original Rule 11, courts required that the movant prove that the offending counsel acted in bad faith.[206] By amending Rule 11, the drafters expressed their intent to remove the subjective analysis[207] from the Rule.[208] Willfulness is no longer a prerequisite for Rule 11 sanctions.[209] Courts not presently applying the objective standard provided by the amended Rule should consider changing their position. Rule 11 as amended will have its intended effect only if bad faith considerations are no longer relevant.[210]

1. Subjective

Despite the seemingly clear intent of Rule 11 as amended, some courts have continued to require a showing of bad faith before imposing sanctions.[211] Moreover, some courts either articulate no clear standard or claim to accept the new objective standard[212] and then conclude that

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$400 million damage prayer unreasonable and unrelated to any alleged damages: "Indeed, this confluence of barred claims and this outlandish prayer for damages forces this Court to conclude that plaintiff's suit was designed only to harass the defendants." *Id.* at 173.

205. *Compare* cases discussed *infra* notes 211-25 and accompanying text *with* cases discussed *infra* notes 226-37 and accompanying text.

206. *See supra* notes 41-68 and accompanying text.

207. Although the court is not required to delve into the attorney's psyche to assess his intent, a number of considerations may be relevant to the determination of the appropriateness of Rule 11 sanctions. The court may consider personal knowledge of the specific case and of litigation in general and the standards in the area. The court also may consider the burden and expense of the litigation.

208. Schwarzer, *supra* note 76, at 195 (stating that "the rule is not limited to papers filed in bad faith").

209. Advisory Notes, *supra* note 75, at 200. "This standard is more stringent that the original good-faith formula and thus it is expected that a greater range of circumstances will trigger its violation." *Id.* at 198-99.

210. Judge Schwarzer stated:

> Were a court to entertain inquires into subjective bad faith, it would invite a number of potentially harmful consequences, such as generating satellite litigation, inhibiting speech and chilling advocacy. At the same time, some offenders might escape for lack of sufficient evidence of bad faith. Finally, a bad faith test would make courts more reluctant to impose sanctions for fear of stigmatizing a lawyer by a bad faith finding.

Schwarzer, *supra* note 76, at 196.

211. *See, e.g., In re* TCI Ltd., 769 F.2d 441, 446 (7th Cir. 1985); Nelson v. Piedmont Aviation, Inc., 750 F.2d 1234, 1238 (4th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985).

212. In Itel Containers International Corp. v. Puerto Rico Marine Management, Inc., 108 F.R.D. 96 (D.N.J. 1985), the plaintiff erroneously alleged diversity jurisdiction in the complaint served on the defendant. Rather than assert an affirmative defense or deny diversity, the defendant allowed the litigation to proceed for two years. The defendant's strategy was to withhold his motion for dismissal until the statute of limitations had run. In assessing Rule 11 sanctions against

the accused party should be sanctioned because he met the bad faith standard. This occurred in *Tedeschi v. Smith Barney, Harris Upman & Co.*,[213] in which the plaintiff broker brought suit against his employer. A controversy had arisen over plaintiff's involvement in a transfer of stocks to a customer.[214] An arbitrator settled the dispute, finding that the customer was entitled to the transfer and that the plaintiff had acted properly.[215] Thereafter, the plaintiff filed suit against the employer and a branch manager for malicious prosecution in instituting arbitration proceedings, defamation, and emotional distress. His wife sought damages for loss of services.[216]

Although the *Tedeschi* case was decided under original Rule 11, the court noted that the recently enacted amendments were designed to emphasize powers already available to the court.[217] In applying the post-amendment standard, the court nevertheless required a showing of bad faith. The court described a claim as being brought in bad faith when it is entirely without merit and is brought for an improper purpose.[218] Under this bad faith standard, the court found the plaintiff's claim to be unsupportable in the law and assessed $5000 in attorney's fees against the plaintiff's counsel.

Likewise, in *Gieringer v. Silverman*[219] the Seventh Circuit refused to assess sanctions against the plaintiff because the defendant did not show bad faith.[220] The plaintiff shareholders alleged violations of securities laws in a stock redemption offer by the defendant corporate directors and officers.[221] The court granted summary judgment for the defendants because the one-year statute of limitations had expired.[222] The defendants sought sanctions under Rule 11, claiming that the plaintiff's action was without color or legal basis and was brought as a strike suit to harass the defendants.[223] The Court of Appeals upheld the district court's finding of lack of bad faith based on the plaintiff's attempt to negotiate a settlement of the price-per-share in advance of

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defendant's counsel, the court found bad faith. "A finding of willfulness or lack of good faith is not required in determining a violation of Rule 11; however, if there were such a requirement, it would here be met." *Id.* at 102 (citations and footnote omitted).

213. 579 F. Supp. 657 (S.D.N.Y. 1984), *aff'd*, 757 F.2d 465 (2d Cir. 1985) (per curiam), *cert. denied*, 106 S. Ct. 147 (1986).

214. *Id.* at 658-59.

215. *Id.* at 659.

216. *Id.*

217. *Id.* at 659 n.3.

218. *Id.* at 661.

219. 731 F.2d 1272 (7th Cir. 1984).

220. *Id.* at 1281.

221. *Id.* at 1275.

222. *Id.* at 1276.

223. *Id.* at 1281.

trial.[224] Moreover, the parties had a legitimate dispute over when the cause of action arose for statute of limitations purposes. The dispute over the issue of the statute of limitations added weight to the plaintiff's complaint and made sanctions unwarranted.[225]

2. Objective

Courts generally have recognized that amended Rule 11 requires an objective analysis of an attorney's conduct to assess whether he made a reasonable inquiry and whether the claim was well grounded in fact and warranted by existing law.[226] By deleting certain provisions of the original Rule,[227] the drafters intended to remove the issue of an attorney's honesty from Rule 11 analysis.[228] The courts' inquiry focuses only on the merits of the pleading gleaned from facts and law known or available to the attorney at the time of filing.[229] The court should determine objectively the propriety of sanctions without conducting an exploration of the attorney's subjective intentions.

In *Eastway Construction Corp. v. City of New York*[230] the Second

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224. *Id.*

225. *Id.* at 1282.

226. *See, e.g.*, Donaldson v. Clark, 819 F.2d 1551 (11th Cir. 1987); Invst Fin. Group v. Chem-Nuclear Sys., 815 F.2d 391 (6th Cir. 1987); Hoover Universal, Inc. v. Brockway Imco. Inc., 809 F.2d 1039, 1044 (4th Cir. 1987) (holding that Rule 11 sanctions are inappropriate if the plaintiff has a "glimmer of a chance of prevailing"); Dreis & Krump Mfg. v. International Ass'n of Machinists, 802 F.2d 247 (7th Cir. 1986) (ruling that a Rule 11 attorney's fee sanction is especially appropriate in response to an objectively unreasonable challenge to an arbitration award); Orange Prod. Credit Ass'n v. Frontline Ventures Ltd., 792 F.2d 797 (9th Cir. 1986); Lieb v. Topstone Indus., Inc., 788 F.2d 151, 157 (3d Cir. 1986) (stating that Rule 11 may "be seen as a litigation version of the familiar railroad crossing admonition to 'stop, look, and listen' "); Eastway Constr. Corp. v. City of N.Y., 762 F.2d 243 (2d Cir. 1985); Bethlehem Steel Corp. v. Chicago Metal Mfr. Co., No. 84C 7208 (N.D. Ill. Nov. 4, 1985).

227. The drafters deleted provisions for striking pleadings and motions as sham and false and references to scandalous and indecent matter. *See supra* note 74.

228. Advisory Notes, *supra* note 75, at 199.

229. *Id.*; *see also supra* note 135.

230. 762 F.2d 243 (2d Cir. 1985) [hereinafter *Eastway I*]. For an in-depth discussion of the *Eastway I* decision, see Note, *supra* note 42.

On remand for determination of the appropriate attorney's fee and allocation of fees between the party and counsel, Judge Weinstein observed that the purpose of the Rule 11 fee shifting provision is deterrence.

> Because such provisions 1) are in derogation of the general American policy of encouraging resort to the courts for peaceful resolution of disputes, 2) tend to breed time-consuming and expensive satellite litigation, and 3) increase tensions among the litigating bar and between bench and bar, the standard for imposition of sanctions is high. . . . [F]ees are to be awarded only if the claim or motion was entirely unjustified, i.e. frivolous.

Eastway Constr. Corp. v. City of N.Y., 637 F. Supp. 558, 564 (E.D.N.Y. 1986) [hereinafter *Eastway II*]. Although the defendant claimed over $52,000 in attorney's fees, the court limited the sanction to $1000 against the plaintiff only.

The defendant appealed the low award as an abuse of discretion. In Eastway Construction Corp. v. City of New York, 821 F.2d 121 (2d Cir. 1987) [hereinafter *Eastway III*], the Court of

Circuit clearly articulated the intent of amended Rule 11 in a decision overturning the district court's denial of sanctions, which was based on a finding that the plaintiff's case was not frivolous.[231] The court noted that although the original Rule was written to allow a subjective bad faith analysis, the amended Rule is markedly different. The court placed special emphasis on the words "formed after a reasonable inquiry" and held that the addition of these words places on the attorney an affirmative duty to inquire into the validity of the pleadings and destroys the availability of a good faith defense.[232] The court found the message of the amended Rule to be explicit and devoid of ambiguity. The court concluded that subjective good faith was no longer an absolute defense.[233]

In *McLaughlin v. Western Casualty & Surety Co.*[234] the defendant's counsel, in seeking removal to federal court, took a position in direct opposition to a long standing, well settled Supreme Court case. The court first recognized that the intent of the amendment of Rule 11 was to put some "bite" in the Rule.[235] In rejecting counsel's good faith defense,[236] the court distinguished between the acceptable practice of arguing a novel legal concept and the unacceptable "defiance of settled case law."[237]

The cases that apply the objective standard, as clearly explained in *Eastway I*, follow the intent of amended Rule 11. Courts should no longer use subjective bad faith language. References to and applications of outdated standards cloud the issues and prevent articulation of a predictable sanctioning policy. The rule cannot be an effective deterrent unless attorneys are able to anticipate the standard that the courts will apply.

Appeals, with little discussion, increased the award to $10,000 and ordered the plaintiff and counsel to divide the cost equally. The court recognized that Rule 11 allows the trial judge discretion to award only a portion of the prevailing party's attorney's fees as the sanction. Nevertheless, "[t]he concept of discretion implies that a decision is lawful at any point within the outer limits of the range of choices appropriate to the issue at hand; at the same time, a decision outside those limits exceeds or, as it is infelicitously said, "abuses" allowable discretion." *Id.* at 123.

231. *Eastway I*, 762 F.2d at 252.

232. *Id.* at 253-54.

233. *Id.* at 253.

234. 105 F.R.D. 624 (S.D. Ala. 1985).

235. *Id.* at 625.

236. Despite the articulated rejection of the subjective standard, the court seemed to place tremendous emphasis on the obvious bad faith of counsel in delaying the removal petition until the jury selection had begun. The court observed that the defendant's removal petition was only in response to a seemingly unfavorable jury. *Id.* at 626 n.1; *see also, supra* note 211.

237. *McLaughlin*, 105 F.R.D. at 625.

IV. Policy Considerations

A. Standard of Review

Typically, and correctly, appellate courts accord great deference to the decision of trial judges on the issue of attorney sanctions.[238] Deferential treatment is desirable because trial judges personally observe the proceedings and are best equipped to assess sanctions. The term "sanction," after all, denotes a punishment, and trial judges witness the wrongdoing that necessitates the punishment. When determining the the reasonableness of inquiry or grounding of the facts and law,[239] trial courts should not embark on a subjective analysis of an attorney's state of mind, but subjective considerations may be relevant to the determination of the severity of the sanction.[240]

Although the express language of Rule 11 requires that the district court impose an "appropriate" sanction, if a paper is signed in violation of the Rule, the determination of what constitutes an appropriate sanction is left to the discretion of the trial judge.[241] Moreover, the appellate courts may increase the district court's award to include an additional

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238. *See* Davis v. Veslan Enters., 765 F.2d 494, 500 (5th Cir. 1985); Tedeschi v. Smith Barney, Harris Upman & Co., 757 F.2d 465, 466 (2d Cir. 1985) (per curiam), *cert. denied*, 106 S. Ct. 147 (1986). In Zaldivar v. City of Los Angeles, 780 F.2d 823 (9th Cir. 1986), the court outlined the appropriate standard for review in a Rule 11 appeal. If the facts are disputed, the review is under the "clearly erroneous" standard. If the legal conclusions are disputed, the review is de novo. "Finally, if the appropriateness of the sanction imposed is challenged, we review the sanction under an abuse of discretion standard." *Id.* at 828.

239. *See supra* notes 226-37 and accompanying text.

240. The Advisory Notes, *supra* note 75, at 200, state: "[I]n considering the nature and severity of the sanctions to be imposed, the court should take account of the state of the attorney's or party's actual or presumed knowledge when the pleading or other paper was signed." *See also* Lieb v. Topstone Indus., Inc., 788 F.2d 151, 157 (3d Cir. 1986); Anschutz Petroleum Mktg. v. E.W. Saybolt & Co., 112 F.R.D. 355 (S.D.N.Y. 1986) (holding that the ability to pay and the financial status of the prevailing party also are relevant).

241. Invst Financial Group v. Chem-Nuclear Sys., 815 F.2d 391 (6th Cir. 1987) (ruling that determination of amount of award is discretionary and should take into account the Rule's goals of deterrence and punishment).

A number of commentators and practitioners are disturbed by the lack of guidelines available on which to base Rule 11 sanctions. *See* Grosberg, *The Rule 11 Debate: Circuit Gives No Guidance In* Eastway, Nat'l L.J., Sept. 14, 1987, at 19, col.4.

In *Eastway II*, Judge Weinstein listed a number of factors to be considered. The factors are:

a) the cost of the Rule 11 violation to the party seeking sanctions, and

b) mitigating factors such as i) whether the client and lawyer believed they were correct in taking the course they did; ii) whether there was vindictiveness or a desire to punish an opponent; iii) whether the lawyer is a neophyte who needs education, a repeat offender, or a person standing at the bar whose actions have heretofore been ethical and in the high tradition of the bar; iv) the ability to pay; v) the need for compensation; vi) the degree of frivolousness; and vii) the dangers in chilling the particular kind of litigation involved.

637 F. Supp. at 571. The Second Circuit did not expressly adopt the factors on appeal; however, the court did not disapprove of the factors. *See Eastway III*, 821 F.2d at 123.

sanction for pursuing an unsuccessful appeal.[242] The Rule requires only that the sanction imposed by the court be reasonable.[243] The determination of reasonableness should take into account various factors, including the actual increased costs directly attributable to the sanctioned behavior, the reasonableness of the fee claimed by the movant's attorney, the movant's duty to mitigate, and the sanctioned attorney's ability to pay.[244]

B. *Significance of Attorney Sanctions*

Many legal principles are geared toward allocating financial responsibility to the person accountable and compensating the injured party. Weighing against this policy is the American rule and its concern with equal access to the judicial system.[245] Moreover, unless the attorney is working on a contingency basis, attorneys generally collect their fees, win or lose. The attorney is not required to bear the risk of a judgment not being collected and may put a lien on the client's property or assets to secure his fee.

Rule 11 provides that attorney's fees are assessable against either the party or his attorney or both.[246] Sanctions directly against the attorney will most effectively serve the Rule's goals of deterrence and punishment.[247] Commentators argue that sanctioning the client for Rule 11 abuses is proper because the attorney serves merely as an advocate for the client.[248] The attorney fully informs the client of each tactical option and the potential consequences, allowing the client to select the desired option. The attorney acts at the direction of the client, and the client is, therefore, ultimately responsible.[249] The attorney, however, typically is in control of the entire litigation process and is most familiar with the workings of the judicial system. The attorney's duty goes beyond that to his client; it includes an ultimate duty to the legal sys-

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242. Barrios v. Pelham Marine, Inc., 796 F.2d 128, 133 (5th Cir. 1986).

243. Rule 11 speaks in terms of "reasonable expenses" and "reasonable attorney's fee." *See supra* note 21.

244. *Eastway III*, 821 F.2d at 125 (Pratt, J. dissenting) (stating that examples of sanctions include "requiring continuing legal education course work in areas of acute deficiency; in extreme cases, recommending disciplinary action by the bar; or something as simple as a judicial reprimand, whether rendered in private, in open court, or in a published opinion"); *In re* Yagman, 796 F.2d 1165 (9th Cir.), *amended*, 803 F.2d 1085 (9th Cir. 1986); Advo Sys., Inc. v. Walters, 110 F.R.D. 426, 431-33 (E.D. Mich. 1986) (ordering that in conjunction with Rule 11 sanctions, the plaintiff and counsel split costs for "drain on judicial resources," calculated based on the time the court spent trying the case).

245. *See supra* notes 25-40 and accompanying text.

246. For the text of amended Rule 11, see *supra* note 21.

247. *See supra* notes 82-84 and accompanying text.

248. *See, e.g.*, Axelberg, *supra* note 101, at 99.

249. *Id.*

tem as a whole.[250] In most cases, sanctioning the attorney, at least partially, will best serve the intent of Rule 11.

The predictability that will result from uniform sanctions imposed directly on counsel will benefit the entire system. Allowing an attorney to defend against Rule 11 sanctions by arguing that the client directed his actions will be less beneficial. The drafters of the Rule were concerned with satellite litigation, and these claims against clients will result in the worst type of spin-off litigation. The attorney and client would be forced to obtain separate counsel to litigate the issue of responsibility for Rule 11 violations. In contrast, uniform assessment of responsibility to the attorney will decrease such litigation and will best serve the deterrence goal.

V. CONCLUSION

The number of Rule 11 motions has increased since the 1983 amendment; however, the concepts and deterrence principles of the Rule are neither widely accepted nor generally effective throughout most of the country.[251] Approximately eighty percent of the sanctions are levied by only five percent of the judges. Moreover, uniformity in the scope and severity of the sanctions being awarded is seriously lacking between districts. Opponents of strict, zealous imposition of Rule 11 sanctions reiterate the concerns expressed by adversaries of the original implementation of the Rule. These opponents foresee the chilling of advocacy, increased costs of satellite litigation, and the development of a less aggressive bar.[252]

These results are neither necessary nor intended. The primary benefit from active application of Rule 11 is the deterrent effect. Because only the increase in Rule 11 motions and the seemingly adverse effects of a lengthened trial process or increased docket are subject to statistical measurement, foes of Rule 11 have what they consider to be strong empirical data of the Rule's failure. The entire legal community, how-

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250. *Id.* at 99-100.

251. The Second Circuit Judicial Conference on September 13, 1984 reported that since the 1983 amendments over 100 sanction applications had been filed, with four-fifths of those coming under Rule 11. Of the over 100 applications, three-fourths were against the plaintiff and 50% had been granted. Of the remaining one-fourth against the defendant, 70% were granted. However, the geographic distribution of the applications was disproportionate with certain areas of the country, creating "bot spots." Twenty-eight of the eighty-four Rule 11 motions were filed in Chicago. A large number also were filed in the Southern and Eastern Districts of New York. "It looks as if in the smaller districts, where the Bar is closer knit and better known to the judges, it isn't as common to apply for sanctions." Judicial Conference—Second Circuit, 106 F.R.D. 103, 183 (1984).

By August 1987 the courts had rendered more than 1000 decisions under the 1983 amendments to Rule 11. Joseph, *supra* note 105, at 88.

252. Meeting of Section of Antitrust Law at the Annual Meeting for the American Bar Association, 55 U.S.L.W. 2120 (Aug. 26, 1986).

ever, must keep in mind the obvious intent of the Rule as amended and strengthened in 1983. The number of improper, sanctionable pleadings, motions, or other papers that strict application of Rule 11 deters attorneys from filing cannot be easily measured. The reaction of the judicial system will determine whether the Rule will become an integral part of the system, as intended, or whether it will once again fall into a state of disuse. Either reaction will send a message to attorneys. If judges refuse to sanction violations or if attorneys refuse to move for sanctions when a violation is apparent, those attorneys who are inclined to abuse the system, even under the guise of zealous advocacy, will receive an unequivocal message that their behavior has been accepted.[253] The ultimate goal of the Rule is to heighten the standards of the legal profession.[254] Strict application by the courts of the strong sanctions provided by the Rule will inform the legal profession that the system will no longer tolerate irresponsible lawsuits. The end result will be an improved judicial system for the benefit of all.

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253. *See* Coburn Optical Indus., Inc. v. CILCO, Inc., 610 F. Supp. 656, 661 (M.D.N.C. 1985).

254. Rothschild, Fenton & Swanson, *supra* note 95, at 54. "The real objective of the amendments is not to handicap the ingenious nor even to punish the wicked but to elevate the standards of practice." *Id.*