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Rule 11: Entering a New Era

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RULE 11: ENTERING A NEW ERA

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Extensive amendments to the Federal Rules of Civil Procedure (FRCP) went into effect on December 1, 1993, including a significant revision of Rule 11.[1] That Rule has long been controversial;[2] the 1993 amendments are intended to make it less so.[3] At the same time they build on an initiative that first appeared in the 1983 amendment of Rule 11. While to that time the FRCP had been largely procedural regulations, the 1983 amendment was the first substantial attempt to regulate lawyers' behavior.[4] The 1993 amendments advance this initiative. In doing so they raise new issues concerning the way in which Rule 11 should be interpreted and applied. This Article will examine the background of the 1993 amendments, analyze the principal changes in the Rule in the context of other FRCP changes made in 1993, and then consider how the amendments may affect the courts' interpretation of the revised Rule and, in particular, of the obligations of attorneys under it.

I. BACKGROUND—THE 1983 AMENDMENT

Rule 11, as originally adopted in 1937,[5] provided that an attorney's signature on a pleading certified that there was good ground to

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1. FED. R. CIV. P. 11, Proposed Amendments to the Federal Rules of Civil Procedure, *reprinted in* 146 F.R.D. 401 (1993) [hereinafter 1993 Proposed Amendments].

2. The Rule has spawned a profusion of law review articles, other commentary, and a number of studies. *See generally* GREGORY P. JOSEPH, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE (2d ed. 1994) (analyzing history of Rule 11 sanctions and applications of 1993 amendments); GEORGENE M. VAIRO, RULE 11 SANCTIONS: CASE LAW, PERSPECTIVES AND PREVENTIVE MEASURES (2d ed. 1993) (evaluating practice under Rule 11 and summarizing authorities).

3. FED. R. CIV. P. 11, Proposed Amendments to Federal Rules of Civil Procedure, advisory committee's notes, *reprinted in* 146 F.R.D. 401, 583 (1993) [hereinafter 1993 advisory committee's notes].

4. *See, e.g.*, 5A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1331 (2d ed. 1990) ("The 1983 amendments to Rule 11 . . . address the problems of pretrial cost and delay by emphasizing the need to improve attorney behavior.").

5. Rule 11, however, was not the first provision authorizing imposition of sanctions. As far back as 1813, Congress adopted legislation providing that any attorney who "multi-

support the pleading and that it was not interposed for delay. The Rule also stated that a pleading signed "with intent to defeat the purpose of the rule . . . may be stricken [and that] [f]or a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action."[6] During the succeeding forty-five years, the Rule proved to be ineffective and little used.[7] Beginning in the late 1970s, a chorus of complaints arose about increasing litigation abuse and judges' reluctance to impose sanctions. It is difficult to identify the factual basis for the complaints of abuse. However, it is clear that the volume of civil litigation in the federal courts—and probably its adversariness—had increased and with it the volume of complaints. A number of other factors may also have had an impact: the appearance of new causes of action, such as those created by civil rights, labor, environmental, and securities laws, and novel theories of recovery; the expanding use of class actions; and the steep increase in the number of lawyers, particularly those engaged in litigation.[8] As a result, litigation activity mushroomed. There is no empirical evidence that abusive practices grew disproportionately, but it could be expected that they would increase at least in proportion to the increase in filings. Moreover, restraints on attorney behavior were loosening at the time, epitomized by the near disappearance of restrictions on lawyers' advertising.[9] In addition, the 1980s ushered in an era of unprecedented competitiveness in all sectors of the economy, including the legal profession which saw aggressiveness grow and collegiality decline.[10]

These developments led to insistent demand for strengthening the FRCP to curb litigation abuse. Rule 11 as it then stood was not an effective weapon against excess or abuse in the conduct of litigation. Judges, disinclined generally to impose sanctions on the participants in the adversary process, were even more reluctant to find that an attorney had engaged in willful misconduct. Commenting on the Rule's inutility, the 1983 Advisory Committee's Note (the 1983 Note) stated, "[t]here has been considerable confusion as to (1) the circumstances

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plied the proceedings in any cause . . . so as to increase costs unreasonably" could be held liable for "any excess of costs so incurred." Act of July 22, 1813, ch. 14, 3 Stat. 21 (current version at 28 U.S.C. § 1927 (1988)).

6. *See* 5A WRIGHT & MILLER, *supra* note 4, § 1331.

7. *Id.*; Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1, 24 (1984) ("Historically, however, the threat of sanctions has been virtually a toothless tiger.").

8. Reasons for the expansion of litigation in the United States are discussed in Miller, *supra* note 7, at 2-12.

9. For the seminal decision, see Bates v. State Bar, 433 U.S. 350 (1977).

10. *See* Miller, *supra* note 7, at 15-19.

that should trigger striking a pleading or motion or taking disciplinary action, (2) the standard of conduct expected of attorneys who sign pleadings and motions, and (3) the range of available and appropriate sanctions."[11]

The 1983 amendment made major changes in Rule 11, principally by adopting a standard of objective reasonableness of pleadings, motions, and papers. Also, once a violation was found, courts were required to impose sanctions which could include the payment of the opponent's reasonable expenses incurred as the result of the violation.

What was the purpose of the 1983 amendment? The 1983 Note appeared to send conflicting signals. The Note began by stating that "[t]he new language is intended to reduce the reluctance of courts to impose sanctions by emphasizing the responsibilities of the attorney and reenforcing those obligations by the imposition of sanctions."[12] That language obligated attorneys to conduct "some prefiling inquiry into both the facts and the law [that was to be] reasonable[ ] under the circumstances [and under a standard] more stringent than the original good-faith formula."[13] But it went on to say:

> The amended rule attempts to deal with the problem by building upon and expanding the equitable doctrine permitting the court to award expenses, including attorney's fees, to a litigant whose opponent acts in bad faith in instituting or conducting litigation. Greater attention by the district courts to pleading and motion abuses and the imposition of sanctions when appropriate, should discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses.[14]

The 1983 Note thus offered two strands of interpretation—controlling attorney conduct and regulating pleading content—but left open the question of how they related to each other in the enforcement of Rule 11. That question remained open. As to conduct, it seemed to suggest standards based on attorney responsibility, that is, professionalism—avoiding "dilatory tactics"—but also on "bad faith," the latter obviously much narrower. As to content, it suggested both an abuse of

11. FED. R. CIV. P. 11, Proposed Amendments to the Federal Rules of Civil Procedure, advisory committee's note, *reprinted in* 97 F.R.D. 165, 198 (1983) [hereinafter 1983 advisory committee's note].

12. *Id.* (citation omitted).

13. *Id.* at 198-99 (citation omitted).

14. *Id.* at 198 (citation omitted).

process standard and frivolousness, the latter likely to be much more inclusive.

The 1983 Note's ambiguity quite accurately, if inadvertently, foreshadowed the difficulties courts were to encounter in applying Rule 11. Though they had abundant opportunity, the courts never succeeded in articulating universally accepted and workable standards of sanctionable conduct and sanctionable content.[15] Nor for that matter has the underlying tension between conduct and content been resolved:[16] Is otherwise abusive-appearing conduct excused if pursued in a meritorious cause? Can an inept investigation be reasonable and, if so, can it warrant filing what turns out to be a frivolous paper?

At bottom the difficulty may lie in a lack of consensus on the purpose for which sanctions are to be imposed. Unquestionably, Rule 11's drafters were concerned over the infliction of unjustified costs on parties through improper litigation conduct.[17] Although there has been wide agreement on the Rule's deterrent purpose, there has been less on whether deterrence is to be achieved primarily through redress or through punishment.[18] Beyond these fairly practical concerns lies the question of whether the Rule is to be administered to serve a much larger purpose of compelling attorney adherence to "their general duty to society and their special duty to the publicly funded judicial system."[19] As Professor Miller, then the Advisory Committee's reporter, put it, "[O]nce it is understood that the court system is a societal resource, not merely the private playpen of the litigants, the difficult task of discouraging hyperactivity must be undertaken. The 1983 amendments . . . represent a modest step in that direction."[20] Other commentators described the purpose to "create a higher

15. *See generally* VAIRO, *supra* note 2, §§ 2.03[b], 5.03[a], [b] (detailing problem of content versus conduct controversy).

16. Melissa L. Nelken, *Has the Chancellor Shot Himself in the Foot? Looking for a Middle Ground on Rule 11 Sanctions*, 41 HASTINGS L.J. 383, 401 (1990); William W Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013 (1988).

17. STEPHEN B. BURBANK, AMERICAN JUDICATURE SOC'Y, RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11 (1989).

18. *Id.* at 10-12; 5A WRIGHT & MILLER, *supra* note 4, § 1332; *see also* Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 203-04 (1988) (rejecting use of Rule 11 as fee-shifting device in favor of sanctions serving goals of deterrence).

19. 5A WRIGHT & MILLER, *supra* note 4, at § 1331 (stating rule "mandates that all signers consider their behavior in terms of the duty they owe to the court system to conserve its resources and avoid unnecessary proceedings").

20. Miller, *supra* note 7, at 19.

standard of attorney behavior,"[21] and "elevate the standards of practice."[22]

Courts, for the most part, did not subscribe to such lofty goals and generally adopted a much more modest rationale geared toward eliminating abusive litigation practices.[23] Nevertheless there appears to be consensus among proponents as well as opponents that the 1983 amendment had a significant effect on practice in the federal courts, even if the precise nature and extent of that effect was not quantifiable. There seems to be wide agreement that Rule 11 accomplished the principal objective of its drafters: to lead litigants "to stop, think and investigate more carefully before serving and filing papers."[24] Observers agree that lawyers generally are using more care before filing pleadings and motions.[25] A Federal Judicial Center survey of judges found that eighty percent believed that the overall effect of the Rule was positive though they also acknowledged its potential for causing satellite litigation and exacerbating relations between counsel.[26] But there is disagreement over whether the Rule chilled vigorous advocacy, deterring lawyers from filing marginal yet innovative and potentially meritorious claims or defenses.[27] Only five percent of the judges thought it did.[28] There has also been controversy about whether the Rule has had a disparate impact.[29] The Federal Judicial Center studied case files in five representative districts. The study discovered that Rule 11 motions and orders targeted plaintiffs more often than defendants, and that plaintiffs in represented civil rights

21. Richard L. Marcus, *Reducing Court Costs and Delay: The Potential Impact of the Proposed Amendments to the Federal Rules of Civil Procedure*, 66 JUDICATURE 363, 365 (1983).

22. Edwin A. Rothschild et al., *Rule 11: Stop, Think and Investigate*, LITIG., Winter 1985, at 13, 54.

23. *See* Gaiardo v. Ethyl Corp., 835 F.2d 479, 483 (3d Cir. 1987) ("The goal of Rule 11 . . . is not wholesale fee shifting but correction of litigation abuse.").

24. 1983 advisory committee's note, *supra* note 11, at 192.

25. *See* VAIRO, *supra* note 2, §§ 2.01, 2.02[b]; Melissa L. Nelken, *The Impact of Federal Rule 11 on Lawyers and Judges in the Northern District of California*, 74 JUDICATURE 147, 149-50 (1990); Report of the Committee on Federal Courts: Sanctions and Attorneys' Fees, New York State Bar Ass'n, 2-3 (1987) (reporting survey was sent to 8000 attorneys—of whom 20% responded; over 33% reported they had intensified their pre-filing factual and legal investigation since adoption of amended rule; 86% believed that affirmative inquiry requirements of rule were reasonable).

26. Federal Judicial Ctr., Rule 11: Final Report to the Advisory Committee on Civil Rules of the Judicial Conference of the United States, §§ 1A, 2A (1990) (78% of the 751 judges surveyed responded) [hereinafter Final Report].

27. *See* VAIRO, *supra* note 2, § 2.02[b][4].

28. *See* Final Report, *supra* note 26.

29. *See* VAIRO, *supra* note 2, § 2.02[b][3].

cases, as opposed to pro per cases, were targeted disproportionately and also less frequently than plaintiffs in contract and tort actions.[30] The study also showed that the overall use of the Rule was less than widely believed—activity occurred in only about two to three percent of the cases and sanctions were imposed in less than a quarter of the affected cases.[31]

Given its deterrent purpose, Rule 11 suffers from the inevitable weakness of all deterrent devices it cannot be calibrated with precision. There is always some risk of overdeterrence just as there is a risk that the intended target may escape. The Rule may to a degree have been found wanting, suffering from some overdeterrence as well as from ineffectiveness, in part, at least, because judges have taken divergent approaches to its interpretation and application. There is strong evidence, however, that on the whole it has served a useful purpose in helping to deter frivolous and abusive pleadings.

Nevertheless the complaints and concerns about the 1983 version of Rule 11 were sufficiently persuasive to lead the Judicial Conference's Advisory Committee on Civil Rules, following lengthy study and hearings, to propose extensive amendments which, after review by the Judicial Conference of the United States and the Supreme Court, became effective on December 1, 1993.

II. THE 1993 AMENDMENTS

A. Their Purpose

The overriding purpose of the 1993 amendments was, as the 1993 Advisory Committee's Notes (the 1993 Notes) state, to remedy problems perceived to have arisen in the interpretation and application of the 1983 revision of Rule 11. But examination of the revised Rule and the accompanying 1993 Notes shows that the committee was also motivated by a purpose to expand the enforcement of attorneys' professional obligations, a purpose that clearly emerges when the Rule is viewed in the context of other FRCP amendments, in particu-

30. *See* Final Report, *supra* note 26, § 1B, 14-15; FJC Directions, Nov. 1991, at 19. The study found, generally, that Rule 11 activity occurred in 2 to 3% of cases, and that sanctions were imposed in less than 20% of those cases—that is, in 0.4 to 0.6% of all cases in the study. Sanctions were imposed far more frequently on plaintiffs than on defendants. Although the incidence of Rule 11 activity was somewhat higher in civil rights cases than in other categories, the rate at which sanctions were imposed in all civil rights cases was generally in line with the rate imposed in other categories; the rate at which sanctions were imposed in represented—as opposed to pro per—cases was lower than in other categories.

31. *See* Final Report, *supra* note 26, § 1B at 2-12.

lar those to Rule 26. The 1993 Notes state that the Rule "retains the principle that attorneys . . . have an obligation to the court to refrain from conduct that frustrates the aims of Rule 1. The revision broadens the scope of this obligation, but places greater constraints on the imposition of sanctions . . . ."[32]

Rule 1, of course, calls for the "just, speedy, and inexpensive determination of every action."[33] Conduct that frustrates that objective certainly is not limited to the filing of a frivolous paper without a prior reasonable investigation; in fact, conduct of that sort encompasses litigation tactics that many will regard as well within the legal mainstream. The significance of the amended Rule 11 lies not in enlarging the content-based prohibitions but rather in its shift of emphasis to conduct.

With these thoughts concerning the drafters' purposes in mind, we turn to examine the principal provisions of the 1993 amendments.

B. Representations to the Court

The 1993 amendments retain the general framework of the 1983 version which is founded upon attorney certification of compliance with Rule 11's standards. But the Rule's language has changed in significant respects, including these: the Rule permits, subject to constraints, pleading on information and belief; the certification is not limited to the paper as a whole but extends also to the separate claims, defenses, and legal contentions it contains; and certification of compliance occurs, not only upon the initial filing of a paper, but also upon the later presenting or advocating of its contents.[34] The effect of these changes is discussed in the following paragraphs.

1. Factual allegations on information and belief

Unequal party access to relevant information creates a common problem in the administration of Rule 11. In an employment discrimination case, for example, the relevant data will frequently be in the possession of the employer. In personal injury litigation, the defendant will lack many relevant facts about the plaintiff. Nevertheless a litigant may have good reason to believe that a factual basis exists for a claim or defense but may not have been able to fully ascertain the facts through prefiling investigation.[35] The amended Rule permits al-

32. 1993 advisory committee's notes, *supra* note 3, at 584.
33. FED. R. CIV. P. 1.
34. 1993 Proposed Amendments, *supra* note 1, at 579-80.
35. *See, e.g.*, Kamen v. American Tel. & Tel. Co., 791 F.2d 1006 (2d Cir. 1986).

legations to be "specifically . . . identified [as] likely to have evidentiary support after a reasonable opportunity for further investigation or discovery" and it permits denials of factual contentions if "specifically identified" and "reasonably based on lack of information and belief."[36] The making of such "specifically identified" allegations and denials, however, "does not relieve litigants from the obligation to conduct an appropriate investigation into the facts that is reasonable under the circumstances," nor is it "a license to join parties, make claims, or present defenses without any factual basis or justification. Moreover, if evidentiary support is not obtained after a reasonable opportunity for further investigation or discovery, the party has a duty under the rule not to persist with that contention."[37]

The availability of pleading on information and belief, while easing access to the court, will not relieve lawyers from their obligation to refrain from making unqualified allegations lacking evidentiary support. To the contrary, it will lessen the justification for such allegations and, hence, the courts' tolerance of them.

2. Assessing the paper

One of the troublesome issues under the 1983 version of Rule 11 was whether a paper containing both legitimate and frivolous claims could be the basis for sanctions. It was argued by some that a paper which contained any nonsanctionable claims could not be treated as frivolous.[38] On the other hand, one could say that even when combined with legitimate claims, a frivolous claim could still bring about the adverse impact on parties and the judicial process that the Rule was intended to prevent.[39] Certainly when a complaint joins defendants against whom legitimate claims are stated with others named only in frivolous claims, the latter group are no less adversely affected than if they alone had been named.

The amended Rule 11 requires the presenting counsel to certify that "the claims, defenses, and other legal contentions" as well as the "allegations and other factual contentions" in a paper meet the standards of the Rule.[40] The certification therefore clearly runs separately to each of the claims, defenses, and contentions, not only to the paper

36. 1993 Proposed Amendments, *supra* note 1, at 580.

37. 1993 advisory committee's notes, *supra* note 3, at 585-86.

38. *See* Townsend v. Holman Consulting Corp., 881 F.2d 788 (9th Cir. 1989), *vacated en banc*, 929 F.2d 1358 (9th Cir. 1990).

39. *See, e.g.*, Frantz v. United States Powerlifting Fed'n, 836 F.2d 1063, 1067 (7th Cir. 1987).

40. 1993 Proposed Amendments, *supra* note 1, at 580.

as a whole. A valid claim, defense, or contention will no longer provide cover for others that are frivolous or baseless. However, since sanctions cannot now be imposed unless the opposing party has first been given an opportunity to withdraw the offending allegation, the substantial reduction in the punitive consequences of the amendment should open the way to stricter enforcement of attorneys' professional obligations.

3. The continuing duty

The courts were divided over whether the 1983 version of Rule 11 imposed on a party a duty that continued after the filing of a paper. Taking a textual view, most held that compliance with the Rule was to be determined as of the time of filing and no obligation existed to correct or abandon a claim or defense once a paper had been filed. Thus a party could not be sanctioned for pursuing an allegation even after later developments rendered it entirely baseless where, for example, a key supporting witness had repudiated it.[41]

The amended Rule 11 goes beyond measuring compliance solely by reference to the state of affairs at the moment of filing. It provides that an attorney certifies compliance "[b]y presenting to the court (whether by signing, filing, submitting, *or later* advocating) a pleading, written motion, or other paper."[42] This takes the Rule onto new ground. The 1993 Notes make clear that the Rule "applies only to assertions contained in papers filed with or submitted to the court. It does not cover matters arising for the first time during oral presentations to the court."[43] But a litigant may not continue to assert a position previously taken in a pleading that has become no longer tenable, even though the pleading did not violate the Rule at the time it was filed. Thus, a claim in a pleading that ceases to be tenable may be sanctionable if not withdrawn, as may be a motion for summary judgment if it is maintained after an intervening deposition discloses the existence of an arguably material disputed issue of fact.[44] As the 1993 Notes put it, "[a] litigant's obligations with respect to the contents of . . . papers are not measured solely as of the time they are filed with or submitted to the court, but include reaffirming to the court and advo-

41. *See* Oliveri v. Thompson, 803 F.2d 1265 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987); VAIRO, *supra* note 2, § 5.04[b].

42. 1993 Proposed Amendments, *supra* note 1, at 579 (emphasis added).

43. 1993 advisory committee's notes, *supra* note 3, at 585.

44. Similarly a paper filed originally in state court may become sanctionable after removal if the offending claims or defenses are maintained—that is, "present[ed]." *Id.*

cating positions contained in [them]. . . after learning that they cease to have any merit."[45]

The 1993 Notes point out that while "the rule continues to require litigants to 'stop-and-think' before initially making legal or factual contentions," it also "emphasizes the duty of candor by subjecting litigants to potential sanctions for insisting upon a position after it is no longer tenable."[46]

The amended Rule 11, while not explicitly resolving the tension between conduct and content, clearly takes a step beyond where the 1983 Rule left off. The Advisory Committee recognized that what occurs at the moment a paper is filed, though important, is not controlling in determining whether the aims of Rule 1 will be frustrated since the harm caused by an offending allegation continues after the filing. Indeed an allegation may become offensive only after later developments in the case. Thus, the Advisory Committee enlarged the obligation of attorneys while lessening their exposure to sanctions.

The heightened obligation imposed by this provision will need to be administered with great care. The determination whether the filing of a paper is warranted at the outset of litigation based upon a reasonable prefiling investigation is likely to be less complicated and ambiguous than assessing the justification for continuing to maintain it in the light of discovery and other developments as the litigation progresses. Moreover, were the quoted comment from the 1993 Notes taken literally, it might be read as exposing an attorney to the risk of sanctions for judgments about the "merits" of a client's case as it unfolds and more facts become known. Presumably the 1983 Notes' "cease to have any merit" language contemplates the application of the same standard that would have been applied had these facts been known or accessible to the proponent at the time the paper was filed. But even under that standard, one can expect attorneys will confront difficult questions: When is a witness's testimony or a document sufficiently conclusive to render a prior allegation baseless? When does an attorney's hope or expectation that something will turn up in further discovery justify continuing to "advocate" a position that has suffered a seemingly fatal blow? This amendment clearly adds a new dimension to Rule 11, implementing the aims of Rule 1, and reflecting a point of view expressed earlier by Arthur Miller that the courts must

45. *Id.*
46. *Id.*

be treated as a "societal resource, not merely the private playpen of the litigants."[47]

The impact of this continuing duty will, however, be ameliorated by the "safe harbor" provision of Rule 11, discussed below. Because the opponent must give notice of intent to move for sanctions with respect to an allegation, the proponent of that allegation will have an opportunity to consider whether it should be withdrawn before being exposed to the risk of sanctions. While the safe harbor provision does not apply to sanctions imposed on the court's own initiative, subsection (c)(1)(B) requires the court to enter an order to show cause describing the specific conduct said to violate the Rule before sanctions may be imposed.

4. Rule 11 and mandatory prediscovery disclosure under Rule 26(a)(1)

Amended Rule 11 does not stand alone. It must be read in the context of other FRCP amendments adopted in 1993, in particular the discovery amendments, which echo the heightened professional obligations imposed by Rule 11 and contain complementary provisions. Rule 26(a)(1) requires reciprocal disclosure of core information by the parties prior to discovery: The identity of witnesses likely to have discoverable information relevant to facts alleged with particularity, a description of documents likely to contain such information, a computation of claimed damages, and relevant insurance agreements.[48] The prediscovery disclosure requirement of amended Rule 26(a)(1) and amended Rule 11 complement each other. Compliance with both rules entails the making of an early and reasonable investigation: prior to filing under Rule 11, prior to disclosure under Rule 26. A party's failure to come forward with some witness and document identification generally supportive of its pleading when disclosure is due will raise a question whether one or both of the rules have been violated: either because the pleading lacks the evidentiary support Rule 11 requires or, even if it does not, because its proponent has not complied with the Rule 26 disclosure requirement.[49]

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47. *See* Miller, *supra* note 7, at 19.

48. FED. R. CIV. P. 26, Proposed Amendments to Federal Rules of Civil Procedure, *reprinted in* 146 F.R.D. 401, 606-07 (1993) [hereinafter Rule 26 Proposed Amendments].

49. There are, of course, limits to the impact of Rule 26(a)(1): Courts may opt out or modify the requirement, parties may stipulate around it, or a party may deliberately accept the risk of not alleging facts with particularity in an effort to avoid or delay disclosure of its own evidence.

It is perhaps noteworthy that the controversy about Rule 26(a)(1) has been principally directed at the obligation to produce information that may be *adverse* to the disclosing party. Opponents argued that having to search for, identify, and produce information harmful to one's case could undermine the adversary process and lawyer-client relations.[50] But it may well be that it is Rule 26, which requires parties to disclose the information supporting their case, that will have the greater impact. Disclosure will expose the product of a party's prefiling inquiry, and inferentially its adequacy, to immediate scrutiny. Having to reveal through disclosure early in the litigation that a paper lacks the factual or legal support to which the filing party must certify should reinforce the "stop and think before filing" purpose of Rule 11. A party filing a complaint that contains wide-ranging charges of RICO violations, for example, will be in an exposed position if it has nothing probative to disclose before discovery can begin. Rule 26(a)(1), together with Rule 11, should be the death knell of the discredited corollary of notice pleading: that the complaint is nothing more than a ticket to making one's case on discovery.

As a result, the two rules should be mutually reinforcing. The necessity for avoiding the appearance of noncompliance with Rule 11—that is, a failure to conduct a reasonable prefiling investigation—will deter parties from withholding information disclosable under Rule 26. Conversely, the obligation under Rule 26(a)(1) to disclose information gathered during the prefiling investigation will deter parties from filing until they are able to demonstrate some factual basis for their allegations.

Another incentive for conducting a reasonable prefiling investigation is the provision of Rule 26(a)(1) that limits the obligation to disclose to "information relevant to disputed facts alleged with particularity."[51] To the extent a party fails to allege facts with particularity, it will be deprived of the benefit of Rule 26(a)(1) by relieving the opposition of its obligation to make disclosure. A complaint that alleges in conclusory terms only that a product manufactured by defendant was defective will not obligate the defendant to make disclosure.[52] There will be an incentive, therefore, to obtain specific factual information through a prefiling investigation in order to be able to allege facts with particularity in the initial pleading. In those cases

50. *See* Griffin B. Bell et al., *Automatic Disclosure in Discovery—The Rush to Reform*, 27 GA. L. REV. 1 (1992).

51. Rule 26 Proposed Amendments, *supra* note 48, at 606-07.

52. *Id.* at 631.

where the critical information is in the hands of the opponent and the ability to conduct a prefiling investigation is limited, the amended Rule, as noted, gives a qualified right to plead based on information and belief.

In theory at least a party's case may turn out to have merit even when its initial disclosure reveals that no prefiling investigation was conducted. The circumstances of the case will need to be considered in determining whether the attorney's violation of the certification requirement is sanctionable. As a practical matter, the proponent of such a pleading would shortly be put to the test, either by a request to withdraw it under subsection (c)(1)(A) or by a motion for summary judgment. To successfully oppose the latter, the proponent would probably have to conduct discovery, and, to obtain leave to do so,[53] would have to make the requisite showing under Rule 56(f).

As in the case of the prefiling investigation duty, the continuing duty under Rule 11 is complemented by the enlarged obligation to supplement prior disclosure and discovery responses under amended Rule 26(e). Rule 26(e) now requires that such disclosure or responses must be supplemented or corrected whenever a party learns that its prior disclosure or response has become incomplete or incorrect as a result of subsequently acquired information—even if correct when initially made.[54] The obligation dovetails with that under Rule 11 to abandon or withdraw an allegation that, as a result of new information has become no longer tenable.

The interplay of Rules 11 and 26 thus heightens the professional obligations of attorneys so as to further the aims of Rule 1.[55]

C. Sanctions

1. Motions for sanctions

Perhaps the most drastic change is the new procedure for invoking Rule 11. A motion must be made separately from any other motion or paper; no longer may a Rule 11 charge be incorporated into

53. *Id.* at 619.

54. *Id.* at 620-22.

55. Other examples of heightened professional obligations under the amended rules are found in Rule 30(d)(1) providing that "[a]ny objection . . . during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. A party may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion [to suspend the deposition]"; in Rule 33(b) requiring a party to answer an interrogatory "to the extent [it] is not objectionable"; and in Rule 4(d)(2) imposing a "duty to avoid unnecessary costs of serving the summons [by waiving service of summons]."

another motion or responding paper. The motion, as well as a court's sua sponte order to show cause, must describe the specific conduct alleged to violate the Rule and must be served on the opponent. These provisions will constrain what critics have described as a sometimes overly liberal resort to motions for sanctions. Most important, a motion may not be filed with the court until after the opponent has been given notice and an opportunity to withdraw or correct the challenged paper, claim, defense, contention, allegation, or denial.[56] As the 1993 Notes state,

> These provisions are intended to provide a type of "safe harbor" against motions under Rule 11 in that a party will not be subject to sanctions on the basis of another party's motion unless, after receiving the motion, it refuses to withdraw that position or to acknowledge candidly that it does not currently have evidence to support a specific allegation.[57]

By inducing, if not compelling, opposing lawyers to communicate with each other, the latter provision also furthers the aims of Rule 1, as the amendments intend. It reflects a widely held view that much costly and time-consuming litigation activity could be avoided if lawyers talked to each other before they acted.[58] Rule 11 contemplates that "[i]n most cases . . . counsel should be expected to give informal notice to the other party, whether in person or by a telephone call or letter, of a potential violation before proceeding to prepare . . . a Rule 11 motion."[59]

Here again, Rule 26(f) contains a complementary requirement that early in the litigation the parties "meet to discuss the nature and

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56. 1993 Proposed Amendments, *supra* note 1, at 581. A motion "shall not be filed with or presented to the court unless within 21 days after service . . . the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected." *Id.*

57. 1993 advisory committee's notes, *supra* note 3, at 591.

58. The Civil Justice Reform Act Advisory Group Report for the United States District Court for the District of Colorado states, for example:

> Most judges agree that professionalism among lawyers has declined steadily over the last many years. Some attribute that decline to the increase in the number of lawyers and the resulting competition among lawyers. Almost all of the judges report that they sometimes must introduce adversaries to each other because the attorneys have not done so themselves. The failure of lawyers to confer among themselves to try to resolve some problem in the case, rather than filing a motion, is cited as a cause of excess cost and delay by about half the judges.

U.S. District Court, District of Colo., *Civil Justice Reform Act Advisory Group Report* 41 (1993).

59. 1993 advisory committee's notes, *supra* note 3, at 591.

basis of their claims and defenses."[60] Compliance with this Rule creates a vehicle for addressing, among other issues, a potential Rule 11 violation early in the litigation, thereby minimizing motion activity. Similar meet and confer provisions are found elsewhere in the amended rules: in Rule 16, calling on the parties to consider at the conference, among other things, "the appropriateness and timing of summary adjudication,"[61] thereby minimizing filing of baseless summary judgment motions; in Rule 26(c), requiring a conference before filing of a motion for protective order;[62] and in Rule 37(a)(2)(A)-(B), and 37(d), requiring the same in connection with disputes over disclosure and discovery.[63]

2. Nature of sanctions

The amended Rule 11 makes a significant course correction with respect to sanctions. First, by substituting "may" for "shall" in the former Rule, it no longer mandates imposition of sanctions when a violation is found. It has plainly retreated from the position taken in the 1983 Advisory Committee's Note that "[t]he new language is intended to reduce the reluctance of courts to impose sanctions . . . . [t]he words 'shall impose' . . . focus the court's attention on the need to impose sanctions for pleading and motion abuses."[64] Second, it has turned away from the compensatory orientation of the former Rule. The 1983 Note observed that it "buil[t] upon and expand[ed] the equitable doctrine permitting the court to award expenses, including attorney's fees, to a litigant whose opponent acts in bad faith in instituting or conducting litigation."[65] By way of contrast, the 1993 Notes state: "Since the purpose of Rule 11 sanctions is to deter rather than to compensate, the rule provides that, if a monetary sanction is imposed, it should ordinarily be paid into court as a penalty."[66]

The change reflects some concern over possible conflict with the Rules Enabling Act,[67] but more importantly a realization of the po-

60. Rule 26 Proposed Amendments, *supra* note 48, at 622.

61. FED. R. CIV. P. 16, Proposed Amendments to the Federal Rules of Civil Procedure, *reprinted in* 146 F.R.D 401, 599 (1993).

62. Rule 26 Proposed Amendments, *supra* note 48, at 617-18.

63. FED. R. CIV. P. 30, Proposed Amendments to the Federal Rules of Civil Procedure, *reprinted in* 146 F.R.D. 401, 682-89 (1993).

64. 1983 advisory committee's note, *supra* note 11, at 198-200.

65. *Id.* at 198.

66. 1993 advisory committee's notes, *supra* note 3, at 587-88.

67. 28 U.S.C. § 2072 (1988 & Supp. IV 1993); *see* Stephen B. Burbank, *Sanctions in the Proposed Amendments to the Federal Rules of Civil Procedure: Some Questions About Power*, 11 HOFSTRA L. REV. 997, 1003 (1983). *But see* Business Guides, Inc. v. Chromatic

tential of abuse of Rule 11 as a fee-shifting device. The prospect of being able to recover some part of one's attorney fees created a powerful incentive to file a Rule 11 motion. Amended Rule 11(c)(2) makes clear that the standard for imposing a sanction is "what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated."[68] The Rule enumerates three alternative approaches to sanctions: (1) non-monetary sanctions, (2) penalties paid into court, and (3) if "warranted for effective deterrence," payment of some or all of the movant's expenses incurred as a direct result of the violation.[69] The Advisory Committee's Notes explain that "under unusual circumstances, particularly for (b)(1) violations [improper purpose], deterrence may be ineffective unless the sanction not only requires the person violating the rule to make a monetary payment, but also directs that some or all of this payment be made to those injured by the violation."[70]

This revision is consistent with the emphasis of the amendment on furthering professional behavior as opposed to sanctioning misbehavior. Nonmonetary sanctions are often an adequate and preferable alternative because nothing more severe may be needed to get an attorney's attention and prevent future misconduct. Issuing an admonition or reprimand or mandating attendance at legal education programs, as suggested in the Advisory Committee's Notes, can in fact produce positive long-term benefits.[71]

But the amendment will also create difficulties for courts. In determining an appropriate sanction, courts will need to make a judgment about what is sufficient to deter repetition of such conduct, presumably both by the offender and "by others similarly situated."[72] While some attorneys are punctilious about their conduct and their reputation, others regard sanctions as a cost of doing business and perhaps even a part of their macho image; what will be effective to

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Communications Enters., 498 U.S. 533, 551-54 (1991) (upholding validity of fee-shifting sanctions under Rule 11 against challenge based on Rules Enabling Act).

68. 1993 Proposed Amendments, *supra* note 1, at 582.

69. *Id.* at 582.

70. *Id.* at 588.

71. *Id.* at 587.

72. *Id.* at 582. The Rule directs that sanctions "shall be limited to what is sufficient to deter repetition of such conduct *or* comparable conduct by others similarly situated." FED. R. CIV. P. 11 (emphasis added). Is the purpose of the Rule served if the sanctions are sufficient to deter others though not necessarily the particular offender—who may require more severe sanctions to be deterred? Or did the drafters intend that a sanction should be sufficient to deter both? Perhaps the drafters of the amended Rule meant "and" when they said "or."

deter one will not be sufficient for others. More generally, how is a court to determine whether in the particular case fee shifting is "warranted for effective deterrence"? Does such a determination require finding that neither a nonmonetary sanction nor a penalty paid into court will be "sufficient" to deter? How could one compare the deterrent effect of a penalty with that of having to pay an opponent's costs in the same amount? Finally, is the court to ignore entirely the costs inflicted by one party's violation on the other? Recalling the Advisory Committee's stated purpose of having litigants "refrain from conduct that frustrates the aims of Rule 1," which include the "inexpensive determination" of actions, should the court not consider the monetary consequences of such conduct by a party? In fact, are not the reasonable costs inflicted by a Rule 11 violation the most objective criterion for the appropriate sanction, and their assessment the most effective deterrent, considering that a party about to embark on conduct that may result in a violation will be able to estimate the likely cost of its conduct?

Questions aside, however, the amendment of Rule 11(c), by placing greater constraints on the imposition of sanctions, implements the drafter's purpose of broadening the scope of attorneys' obligation to the court. By reducing the potential adverse consequences of a default, it also reduces the obstacles to heightened expectations of professionalism.

III. JUDICIAL ENFORCEMENT OF PROFESSIONAL OBLIGATIONS

Analysis of the text of the amended Rule 11, in light of the 1993 Notes and the totality of the 1993 amendments, shows that it is intended to, and indeed does, provide for enforcement of heightened professional obligations of lawyers engaged in civil litigation in the federal courts. Although up to this time, the FRCP's purpose has been largely to regulate procedure, the amended FRCP in significant respects also regulate practice—and behavior—in the courts.[73] How will courts take this analysis into account in interpreting and applying the new Rule 11? Courts are of course bound by the Rule's text.[74] But the text is only the skeleton for which the courts must, as always, supply the flesh and skin. This was as true under the old Rule as it

73. As noted, the 1983 amendment took the first but modest step in that direction.

74. *See* Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120, 123 (1989) ("We give the Federal Rules of Civil Procedure their plain meaning."). At the same time, however, "any interpretation must give effect to the Rule's central goal of deterrence." Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 393 (1990).

will be under the amended Rule. Though the text contains a clear direction to emphasize the professional obligations of the bar, and in certain respects specifies them, it largely leaves it to the courts to define the contents. The purpose of furthering "the aims of Rule 1" is a broad charter of professionalism to which the court will need to give scope and meaning. That is a task that necessarily implicates the exercise of judicial discretion. Though always a concern, such discretion is inherent in a rule that calls on judges to draw lines. The impact of the exercise of that discretion will be tempered by the safe harbor and substantially moderated sanctions provisions, but the scope of discretion nevertheless remains large in defining sanctionable lawyer transgressions in the conduct of civil litigation. And so there will be a need to think about how that discretion will be informed.

A core element of professionalism in litigation is the lawyer's duty of candor. The existence of such a duty is not in dispute; as an officer of the court a lawyer is obligated not to make false or misleading statements to the court.[75] The relevance of that duty to the amended Rule 11 clearly was an underlying assumption of the drafters. How courts will factor that duty into the administration of the amended Rule may well become a test of its effectiveness. In any event it is an issue courts will not be able to avoid; whether they acknowledge that duty or ignore it, their action as much as their inaction will have a decisive effect on the conduct of civil litigation and on the prospects for achieving the aims of Rule 1.

A landmark decision on that issue is *Golden Eagle Distributing Corp. v. Burroughs Corp.*[76] The trial judge had imposed sanctions on defendant's counsel for having presented misleading legal arguments in support of a motion for summary judgment. The motion contended that the action, which had been removed from the Minnesota state court to the federal court and then transferred to California under 28 U.S.C. § 1404(a),[77] should be dismissed because (1) the Minnesota state court would have dismissed it for forum non conveniens had it not been removed, (2) in those circumstances federal courts would apply the law of the transferor, not the transferee district, and (3) under an early California Supreme Court case, recovery for economic loss would be barred. In fact there was no authority to support the first two propositions—courts had never addressed the issue. On the third, a later California Supreme Court decision, without citing the

75. *See* Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531 (9th Cir. 1986).
76. *Id.*
77. 28 U.S.C. § 1404(a) (1988).

earlier case, had taken the opposite position. The trial court, while recognizing that defendants could have made a reasonable argument for the modification or extension of existing law, imposed sanctions because the argument as made misrepresented the applicable law, stating:

> The duty of candor is a necessary corollary of the certification required by Rule 11. A court has a right to expect that counsel will state the controlling law fairly and fully; indeed, unless that is done the court cannot perform its task properly. A lawyer must not misstate the law, fail to disclose adverse authority (not disclosed by his opponent) or omit facts critical to the application of the rule of law relied on.[78]

The Ninth Circuit, treating the issue as being "whether Rule 11 requires the courts to enforce ethical standards of advocacy beyond the terms of the rule itself," reversed. It interpreted Rule 11 as being intended "to avoid delay and unnecessary expense in litigation."[79] Describing the trial court's ruling as requiring "argument identification," it held: "If, judged by an objective standard, a reasonable basis for the position exists in both law and fact at the time that the position is adopted, then sanctions should not be imposed."[80]

Five judges dissented from the denial of a petition for rehearing en banc. The dissenting opinion asks, rhetorically:

> How can a brief be warranted by existing law if its argument goes in the face of "directly contrary" authority from the highest court of the jurisdiction whose law is being argued? How can a brief be warranted to be a "good faith argument for the extension, modification, or reversal of existing law"

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78. Golden Eagle Distrib. Corp. v. Burroughs Corp., 103 F.R.D. 124, 127 (N.D. Cal. 1984). The present author was the trial judge. In reaching this conclusion, the judge relied on Rule 3.3 of the American Bar Association *Model Rules of Professional Conduct* (1983) which states: "A lawyer shall not knowingly: (1) make a false statement of material fact or law to a tribunal . . . ." The comment accompanying the rule states in part:

> The advocate's task is to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client is qualified by the advocate's duty of candor to the tribunal. . . .
>
> . . . .
>
> Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore . . . an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction which has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

79. *Golden Eagle*, 801 F.2d at 1536.

80. *Id.* at 1538.

> when there is not the slightest indication that the brief is arguing for extension, modification or reversal?[81]

Professors Wright and Miller comment at length on *Golden Eagle* in their treatise. Noting that "its reasoning and result leave a loophole between Rule 11 and the *Model Rules of Professional Conduct* that permits attorneys to mislead the court and then hide behind a no-bad-faith defense," they conclude that the result "is at odds with the stated intention of the amended rule to 'reduce the reluctance of courts to impose sanctions . . . by emphasizing the responsibilities of the attorney and reenforcing *those obligations* by the imposition of sanctions.' "[82] They point out that "[t]he court gave no reason to support the assertion that there is no relationship between the standards of behavior demanded by the ABA Model Code and those demanded by the Federal Rules of Civil Procedure."[83] Indeed, as the dissenting opinion pointed out, the Model Rules, which were adopted in August 1983, and Rule 11, which became effective at the same time, both drew their text from the earlier American Bar Association *Model Code of Professional Responsibility*.[84]

With respect to the possibility of imposing conflicting duties on counsel, the treatise says:

> [I]t is not a violation of any duty to one's client to inform the court that, because the law is unclear, it may be necessary to extend, modify, or reverse existing law in order to reach a desired conclusion. To the contrary, an attorney who deliberately refrains from disclosing whether he is asserting existing law or asking for a modification of the law pursues a questionable course at best and easily may violate his duty as an officer of the court.[85]

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81. Golden Eagle Distrib. Corp. v. Burroughs Corp., 809 F.2d 584, 586 (9th Cir. 1987).

82. 5A WRIGHT & MILLER, *supra* note 4, § 1335.

83. *Id.*

84. 809 F.2d at 588-89. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(2) (1976) (Lawyer shall not "knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law."); *see also* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1983) ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.").

85. 5A WRIGHT & MILLER, *supra* note 4, § 1335; *see also* David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 878 (1992) ("The preceding analysis shows that the district judge was correct. Chilling zealous advocacy below acceptable levels does not appear to be a major concern in [the] context [presented by *Golden Eagle*]. Corporate lawyers have ample incentive to discover and present every colorable argument

The question that now confronts courts is what effect to give to the 1993 amendments: Can it still be said, as the Ninth Circuit did, that the duty of candor is an "ethical standard[ ] of advocacy beyond the terms of the Rule itself[?]"[86] Those amendments, as the earlier discussion shows, emphasize the professional obligations which formed the background of the 1983 Rule 11. A textual analysis of the Rule, illuminated by the drafters' notes, now makes it difficult to avoid the conclusion that the Rule is intended to do more than stop abuse. It is an integral part of a new scheme that emphasizes the obligations of attorneys "[a]s officers of the court,"[87] designed to reduce unproductive adversariness. Its purpose is not only to "retain[ ] the principle that attorneys . . . have an obligation to the court to refrain from conduct that frustrates the aims of Rule 1" but also to "broaden[ ] the scope of this obligation."[88] The revision, according to the drafters, "expands the responsibilities of litigants to the court [and] emphasizes the duty of candor."[89]

The duty of candor is implicated in the obligation under Rule 11 to conduct a prefiling investigation reasonable under the circumstances since a failure to do so can lead to factual and legal misrepresentations, albeit unintentional.[90] But where a prefiling investigation *has* been performed, an attorney must be expected to act in conform-

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on behalf of their client. What is in danger, however, is the desire or indeed the ability of these lawyers to exert any moderating influence on their legally sophisticated client. By failing to consider these embedded controls, the court of appeals undermined professional independence in the sense of freedom from client domination in precisely the context in which this goal is most in need of support.").

86. *Golden Eagle*, 801 F.2d at 1539. It has been argued that Rule 11 is not needed to enforce ethical obligations of attorneys in view of the availability of 28 U.S.C. § 1927 and the court's inherent powers. *See id.* at 1539, n.3; Eash v. Riggins Trucking Inc., 757 F.2d 557, 564-65 (3d Cir. 1985) (en banc); VAIRO, *supra* note 2, § 2.04[d]4. But those provisions are not a substitute for Rule 11: § 1927 addresses only prolonging of litigation, not particular filings, and requires proof of bad faith, for example, that counsel "multiplie[d] the proceedings in any case unreasonably and vexatiously." Samuels v. Wilder, 906 F.2d 272, 275 (7th Cir. 1990). The inherent powers of the court permit it to assess expenses only against counsel who "willfully abuse judicial processes." Roadway Express, Inc. v. Piper, 447 U.S. 752, 766 (1980).

87. 1993 advisory committee's notes, *supra* note 3, at 630.

88. *Id.* at 584.

89. *Id.* at 584-85.

90. Lloyd v. Schlag, 884 F.2d 409, 412 (9th Cir. 1989) (involving copyright infringement action where plaintiff had failed to discover prior to filing that his predecessor in title had failed to perfect requisite copyright registration); *see also* Brown v. Federation of State Medical Bds., 830 F.2d 1429, 1435-36 (7th Cir. 1987).

ity with it or else its purpose would be defeated.[91] Thus, sanctions were imposed where a union made a renewed motion for an order compelling arbitration without disclosing that its prior motion on the same ground had been denied and was on appeal, and also failed to disclose that a determinative arbitration was then pending.[92] Sanctions may be appropriate also where a party maintains a factual position that flies squarely in the face of deposition testimony,[93] or makes deceptive representations to the court.[94] A particularly egregious instance of nondisclosure occurred where the defendant in a diversity action concealed the facts concerning its citizenship by providing evasive responses to plaintiff's discovery, leading plaintiff to continue the litigation at great expense while the defendant rested assured that any adverse judgment would be a nullity for lack of subject matter jurisdiction.[95]

Imposition of sanctions for violation of the duty of candor with respect to matters of fact is less controversial than with matters of law. Legal issues are often close, and Rule 11 should not become a vehicle for chilling legitimate advocacy.[96] Nevertheless a failure to conduct a reasonable legal investigation resulting in the assertion of frivolous claims plainly violates the Rule.[97] And, as the First Circuit has held,

91. *See* William W Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013, 1023 (1988) ("It would therefore defeat the purpose of the prefiling investigation requirement if attorneys were left free to conceal or misrepresent critical adverse information.").

92. Pipe Trades Council v. Underground Contractors Ass'n, 835 F.2d 1275, 1281 (9th Cir. 1987) (reserving "whether sanctions were appropriate based on violation of a duty of candor").

93. Frazier v. Cast, 771 F.2d 259, 263-65 (7th Cir. 1985) (involving defendant who claimed to have entered house in exigent circumstances to save plaintiff's life when testimony showed that defendant entered to make arrest and supplied no corroboration of exigent circumstances).

94. Carroll v. Acme-Cleveland Corp., 955 F.2d 1107, 1116 n.4 (7th Cir. 1992) (misstatements of fact); Samuels v. Wilder, 906 F.2d 272, 275-76 (7th Cir. 1990) (moving party in postjudgment motion reversed its position whether there were triable issues precluding summary judgment and misrepresented statements made by trial judge handling earlier proceedings in case); Mays v. Chicago Sun-Times, 865 F.2d 134, 140 (7th Cir. 1989) (false statements about defendant's employment policies and practices); *In re* Ronco, 838 F.2d 212, 218 (7th Cir. 1988) (false statements in application for continuance in that applicant failed to disclose prior representation of party seeking continuance and true nature of "new evidence"); Blackwell v. Department of Offender Rehabilitation, 807 F.2d 914, 915-16 (11th Cir. 1987) (failure to disclose prior waiver of claim for attorney fees).

95. Itel Containers Int'l Corp. v. Puerto Rico Marine Management, Inc., 108 F.R.D. 96, 97 (D.N.J. 1985).

96. *See* Gaiardo v. Ethyl Corp., 835 F.2d 479, 483 (3d Cir. 1987).

97. Cabell v. Petty, 810 F.2d 463, 466 (4th Cir. 1987).

"the duty of reasonable inquiry includes . . . a duty of reasonable disclosure."[98]

The more difficult case is presented where counsel misrepresents the applicable law, asserting that the paper is warranted by existing law when it is not even though it might be justified by a "nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law."[99] It was at this point that the Ninth Circuit in *Golden Eagle* drew the outer limit of Rule 11, holding that requiring what it called "argument identification" would be inconsistent with counsel's obligations to the client, chill advocacy, and create burdens for the courts and the parties.[100] As the court viewed it, the fact that an argument in support of an otherwise valid paper is frivolous does not warrant a finding that the paper is frivolous.[101]

Most courts that have addressed the issue have not adopted the Ninth Circuit's view.[102] The Eleventh Circuit held that "[c]ounsel had a [Rule 11] duty to acknowledge [in the complaints or memoranda filed] that the binding precedent of this Circuit disfavored Plaintiffs' position . . . . Then Counsel could have in good faith requested the trial court to recognize the law expounded [elsewhere] . . . ."[103] In affirming sanctions in another case, that court said:

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98. Maine Audubon Soc'y v. Purslow, 907 F.2d 265, 268 (1st Cir. 1990) (involving failure to disclose that statutory notice period requirement precluded application for TRO).

99. 1993 Proposed Amendments, *supra* note 1, at 580.

100. *Golden Eagle*, 801 F.2d at 1540.

101. *Id.* at 1540-41. The court also rejected application of Rule 11 to failure to cite adverse authority essentially on the ground that it would impose undue burdens on parties. *Id.* at 1541-42.

102. The Third Circuit adopted that view in Mary Ann Pensiero, Inc. v. Lingle, 847 F.2d 90, 96 (3d Cir. 1988).

103. DeSisto College, Inc. v. Line, 888 F.2d 755, 766 (11th Cir. 1989) (holding that plaintiff's counsel's failure to acknowledge clear precedent entitling defendants to absolute immunity violated Rule 11), *cert. denied*, 495 U.S. 952 (1990); *see also* Maciosek v. Blue Cross & Blue Shield United, 930 F.2d 536, 541 (7th Cir. 1991) (stating that counsel failed to cite or refer to case brought by counsel in same district in which identical legal contentions had been rejected); Hill v. Norfolk & W. Ry., 814 F.2d 1192, 1198 (7th Cir. 1987) (allowing sanctions on appeal imposed for counsel's "ostrich-like tactic of pretending that potentially dispositive authority against a litigant's contention does not exist"); Bolls v. Middendorf's, Inc., 729 F. Supp. 1583, 1584 (S.D. Miss. 1990) (holding that counsel's belated assertion that counsel was attempting to change existing law was Rule 11 violation).

The existence of an ethical duty to disclose "legal authority in the controlling jurisdiction known to [the attorney] to be directly adverse to the position of his client and which is not disclosed by opposing counsel" has long been accepted. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-106(B)(1) (1976) (originally adopted in 1969); the same provision is found in the CODE OF TRIAL CONDUCT § 22(c), at 12 (Am. College of Trial Lawyers (1994).

> The appellants purported to describe the law to the district court in the hope that the description would guide and inform the court's decision. With apparently studied care, however, they withheld the fact that the long-awaited decision by the Supreme Court of Florida had been handed down. This will not do. The appellants are not redeemed by the fact that opposing counsel *subsequently* cited the controlling precedent. The appellants had a duty to refrain from affirmatively misleading the court as to the state of the law. They were not relieved of this duty by the possibility that opposing counsel might find and cite the controlling precedent . . . .[104]

The District of Columbia Circuit affirmed sanctions because plaintiff "has not only failed to conduct a reasonable pre-filing inquiry, as required by Rule 11 but also failed to explain *how* its claim was 'warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.' "[105] The Seventh Circuit affirmed the imposition of sanctions for falsely asserting that a motion for a stay automatically stays enforcement of a judgment, noting that "[w]e do not want to discourage vigorous advocacy, but an advocate must represent his client within the existing structure of the law, and not some imagined version of it."[106] Both the Seventh and Tenth Circuits have affirmed sanctions for legal contentions though a competent attorney could have made a colorable argument.[107] And even

104. Jorgenson v. County of Volusia, 846 F.2d 1350, 1352 (11th Cir. 1988).

105. International Bhd. of Teamsters v. Association of Flight Attendants, 864 F.2d 173, 177 (D.C. Cir. 1988) (quoting FED. R. CIV. P. 11).

106. Thornton v. Wahl, 787 F.2d 1151, 1154 (7th Cir. 1986); *see also* Borowski v. DePuy, Inc., 850 F.2d 297, 305 (7th Cir. 1988) (stating that counsel failed to cite controlling authority and misstated applicable law); *In re* TCI Ltd., 769 F.2d 441 (7th Cir. 1985); Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073, 1082 (7th Cir. 1987) ("When counsel represent that something cleanly rejected by the Supreme Court is governing law, then it is appropriate to conclude that counsel are not engaged in trying to change the law; counsel either are trying to buffalo the court or have not done their homework. Either way, Rule 11 requires the court to impose a sanction—for the protection of the judicial process as much as to relieve the financial burden that baseless litigation imposes on the other side."), *cert. denied*, 485 U.S. 901 (1985).

107. White v. General Motors Corp., 908 F.2d 675, 680 (10th Cir. 1990); Mars Steel Corp. v. Continental Bank N.A., 880 F.2d 928, 938 (7th Cir. 1989) ("Because Rule 11 is addressed to conduct (the adequacy of the pre-filing investigation) rather than to results, a motion may be sanctionable even though something could have been said in its behalf. . . . Litigants 'may not pretend that the law favors their view and impose on the court or their adversaries the burden of research to uncover the basic rule.' " (citation omitted)) (quoting *In re* Central Ice Cream Co., 836 F.2d 1068, 1073 (7th Cir. 1987)).

in the Ninth Circuit, notwithstanding *Golden Eagle*, the notion of a duty of candor survives.[108]

In considering the impact of the 1993 amendment, its legislative history must be noted. The Spring 1991 draft of the amendment provided that an assertion in a pleading must be "warranted by existing law or, *if specifically identified as such*, by a nonfrivolous argument for the extension, modification, or reversal of existing law."[109] The italicized portion was eliminated from the final version of the amendment. The 1993 Notes now state: "Although arguments for a change of law are not required to be specifically so identified, a contention that is so identified should be viewed with greater tolerance under the rule."[110]

While the 1991 proposal would have had the effect of specifically overruling *Golden Eagle*, its elimination cannot fairly be interpreted as reflecting a purpose to overrule those cases that do not follow *Golden Eagle*. The necessary inference to be drawn from the 1993 Notes is that arguments for a change of law are not immune from sanctions; while a failure to appropriately identify an argument is not invariably ground for sanctions, identification of the argument may be reason not to impose them. Clearly the degree to which counsel has made disclosure to the court may be relevant to the determination whether an argument qualifies as nonfrivolous under the amended Rule 11.[111]

The cited cases are persuasive authority for taking the duty of candor into account in assessing compliance with Rule 11. It is difficult to see how an argument can be regarded as nonfrivolous if it ignores controlling authority or pretends to be supported by nonexisting authority. The prefiling investigation requirement would have little

108. *See* Kern Oil & Ref. Co. v. Tenneco Oil Co., 840 F.2d 730, 740 (9th Cir. 1988) (stating that "Tenneco's motion did not discuss, or even mention, TECA's alternative holding that the EPAA could stand on retroactivity grounds. This Tenneco should not have done. The trial court's award of Rule 11 sanctions for this motion was justified because the motion, by ignoring a portion of existing law, was not 'warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.' " (quoting FED. R. CIV. P. 11)), *cert. denied*, 488 U.S. 948 (1988); *see also* United States v. Stringfellow, 911 F.2d 225, 226 (9th Cir. 1990) (stating that counsel "should not be able to proceed with impunity in real or feigned ignorance" of controlling authority (quoting *Golden Eagle*, 801 F.2d at 1542)).

109. JOSEPH, *supra* note 2, at 204 (emphasis added).

110. 1993 advisory committee's notes, *supra* note 3, at 587.

111. *See* JOSEPH, *supra* note 2, at 210 ("[A]ny failure to address existing law—or the failure to do so candidly, coming to grips with adverse authority—militates against a finding that the paper represents a nonfrivolous argument for a change of law."). Note that the text of the rule was changed from "good faith argument" to "non-frivolous argument" to emphasize the controlling objective standard. 146 F.R.D. at 586.

meaning if counsel, when challenged, could excuse a failure to take into account controlling adverse precedent by simply claiming an intention to argue for its revision.

Nor is the duty of candor inconsistent with the adversary process and the lawyer's duty to a client.[112] Clients have no claim to an attorney's loyalty that knows no ethical bounds. Judge John Noonan put it this way: "A client has as little right to the presentation of false arguments as he has to the presentation of false testimony. No conflict exists when a lawyer confines his advocacy by his duty to the court."[113] The lawyer's duty as an officer of the court is more than a ceremonial attribute. In the adversary process, the judge is not an independent actor but must look to the lawyers to present the facts and the law on which to base a decision. If the lawyers' presentations are tainted by falsehood and concealment, that taint will infect the decision of the court.[114] As Judge Easterbrook has pointed out, sanctions may be needed as much "for the protection of the judicial process as . . . to relieve the financial burden that baseless litigation imposes on the other side."[115]

IV. CONCLUSION

Critics of Rule 11, such as Dean Vairo writing in this Review,[116] argue that the Rule is moving lawyers from the traditional model of an independent legal profession. She sees Rule 11 as "dramatically chang[ing] the dynamics of the attorney-client relationship, shifting the attorney's duties away from client advocacy toward judicial efficiency and case management as an officer of the court."[117] These observations raise the important question of what is meant by an

112. Note that the *Golden Eagle* court repeatedly stressed in this connection that sanctions under Rule 11 were mandatory, which is no longer true under the 1993 amendments. *Golden Eagle*, 801 F.2d at 1541-42.

113. *Golden Eagle*, 809 F.2d 584, 589 (Noonan, J., dissenting).

114. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-23 (1976) ("The complexity of the law often makes it difficult for a tribunal to be fully informed unless the pertinent law is presented by the lawyers in the cause. A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it.").

115. *Szabo Food*, 823 F.2d at 1082; *see also* Wilkins, *supra* note 85, at 855-56 (discussing similar reasoning underlying NASCO, Inc. v. Calcasieu Television and Radio, Inc., 124 F.R.D. 120, 132 (W.D. La. 1989), *aff'd*, 894 F.2d 696 (5th Cir. 1990), *aff'd*, 501 U.S. 32 (1991)).

116. *See* Georgene M. Vairo, *Rule 11: Past as Prologue*, 28 LOY. L.A. L. REV. 39 (1994).

117. *Id.* at 42.

"independent legal profession."[118] Dean Vairo takes as an object lesson the failure of the legal profession in Nazi Germany to defend individual rights against a brutal and oppressive regime. The lesson she draws from that history is that if lawyers must worry about their responsibility to the court as much as about the interests of their clients, there is a danger that they will be co-opted by the judicial system to the detriment of their clients.[119]

There can be no quarrel with the general proposition that an independent bar is a vital part of a democratic society operating under the rule of law. Dean Vairo quotes Justice Jackson's observation in *Hickman v. Taylor*[120] that " 'the lawyer and the law office are indispensable parts of our administration of justice' " and that " '[t]he welfare and tone of the legal profession is therefore of prime consequence to society.' "[121] But it also seems hardly disputable that lawyers, as important actors in the administration of the rule of law, are themselves subject to rules and obligations. As Justice Murphy put it, writing for the Court in *Hickman*, "Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the *rightful* interests of his clients."[122]

Quoting Professor Gordon, Dean Vairo takes as her model of lawyer independence " 'the ideal of liberal advocacy.'"[123] But the difficulty with that ideal, as Professor Gordon points out, " 'is that it is a recipe for total sabotage of the legal framework.' "[124] Professor Gordon notes that under such a scheme, "lawyers' roles begin and end with vigorously pursuing their clients' interests within the limits of the law . . . . [This position] rests on incoherent premises and leads to indefensible conclusions . . . . [It] appears to license an untempered adversarial advocacy which when aggregated could easily nullify the purposes of any and every legal regime."[125] It is ironic, too, that Dean

118. *See generally* Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 2-6 (1988) (quoting eminent lawyers on meaning of professional independence); Wilkins, *supra* note 85, at 853 (discussing multiple meanings of lawyer independence).

119. Gordon, *supra* note 118, at 2-6; *see* Wilkins, *supra* note 85, at 860 (recognizing that attempted analogy breaks down because it ignores existence in this country of rules of professional conduct that would have been violated by actions German authorities coerced).

120. *Hickman*, 329 U.S. 495 (1947).

121. Vairo, *supra* note 116, at 45 (quoting *Hickman*, 329 U.S. at 514-15 (Jackson, J., concurring)).

122. 329 U.S. at 510 (emphasis added).

123. Vairo, *supra* note 116, at 43.

124. Gordon, *supra* note 118, at 20.

125. *Id.* at 71-72.

Vairo should find support for her conception of independence in Judge Sporkin's plaintive queries: "Where were [lawyers] and [w]hy didn't any of them speak up or disassociate themselves from the[se] transactions?"[126] What the judge was bemoaning was the failure of lawyers to exercise their independent professional judgment in the savings and loan debacle, not their failure to serve their clients unquestioningly. The true concern of lawyer independence is not freedom from the restraint of professional obligations but independence from their clients; as Sol Linowitz observed regretfully in a recent interview, " 'We've lost the ability to differentiate between what you *can* do and what you *ought* to do, ... [L]awyers have relinquished their independent judgment in favor of giving clients what they want."[127]

While one can, of course, only speculate about what Lord Brougham had in mind when he opened his spirited defense of Queen Caroline with the words, "[t]o save [his] client by all means and expedients, and at all hazards and costs to other persons . . . is [the lawyer's] first and only duty,"[128] it is well to remember the context in which that statement was made, the representation of a client confronted by the power of the King and his government in whose defense her attorney intended to impeach the King's title.[129] It is one thing to defend the independence of the bar to take unpopular cases and oppose entrenched power—courageous advocacy is an honored tradition in the American legal profession.[130] It is quite another, however, to claim that independence immunizes misrepresentation and concealment of the truth and harassment of and the infliction of unreasonable cost and delay on one's opponents. It is doubtful that Lord Brougham would have considered the latter to have been included in the former.

To examine Rule 11 through the lens of civil rights cases alone affords a misleading view. Those cases represent only a small piece of the universe of litigation in which Rule 11 operates. The evidence,

126. Vairo, *supra* note 116, at 50 (quoting Lincoln Sav. & Loan Ass'n v. Wall, 743 F. Supp. 901, 920 (D.D.C. 1990) (alteration in original).

127. Linda Greenhouse, *At The Bar*, N.Y. TIMES, Apr. 8, 1994, at B16 (quoting Sol Linowitz).

128. 2 Proceedings in the House of Lords, Trial of Queen Caroline 7 (Duncan Stevenson & Co. ed. 1820).

129. *See* LLOYD P. STRYKER, FOR THE DEFENSE—THOMAS ERSKINE 560-61 (1949).

130. *See* Wilkins, *supra* note 85, at 860 (describing various ways in which independence serves important societal values, including "dissuad[ing] recalcitrant clients from undermining long-term legal values.").

moreover, shows that civil rights cases have not been disproportionately impacted and that much of the sanctions activity was directed at plaintiffs who were not represented by counsel.[131] Linda Brown should not provide cover for lawyers who make baseless charges or assert frivolous defenses, subverting the justice system and inflicting harm on their opponents. Linda Brown's case[132] sought the Supreme Court's reversal of a position which, though previously taken by the Court, was one whose days were clearly numbered.[133] The Rule specifically contemplates argument for reversal of existing law; it merely asks that the argument be nonfrivolous and in 1954 it was not frivolous to argue that the "separate but equal" doctrine was no longer viable as applied to public schools.

None of this is said to make light of the legitimate concern that lawyers must be free to represent their clients without fear of reprisal or intimidation by the court. The amended Rule 11 incorporates safeguards to reduce the risks of the sanctions lawyers face. But removing—or lessening—the obligations and responsibilities of lawyers as officers of the court is not necessary—nor, for that matter, desirable—to enable lawyers to serve the *rightful interests of their clients*. Vigorous advocacy is consistent with prefiling investigations and candor toward the court.[134] Moreover a system in which lawyers are unrestrained by the obligations of the Rule exposes other parties to abuse, and their interests must be considered equally with the interests of those who may be restrained by Rule 11. Such a system, viewed from a neutral perspective, impairs the access of all parties to

131. *See* Final Report, *supra* note 26 and accompanying text.

132. Brown v. Board of Educ., 347 U.S. 483 (1954).

133. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 579 (1973).

> After 1940, the changing attitude of the Supreme Court was very noticeable. The black man's legal progress was incremental at first. In a series of cases, the Supreme Court declared this or that situation or practice (segregated law schools, for example) unconstitutional; but it did not want or dare to deny that segregation had *some* warrant in law. . . . Its decisions were clearly compromises; the blacks won, most of the time, in the particular case; on the other hand, the legality of segregation itself was not touched. The Court came closer to the heart of the system in *Shelley v. Kraemer* [334 U.S. 1] (1948). This struck down, as unenforceable, land covenants that forbade sale or rental of property to blacks.

Id. (footnote omitted).

134. As a practical matter, of course, a client is better served by a lawyer sufficiently competent to realize, in the words of Justice Benjamin Kaplan of the Massachusetts Supreme Judicial Court (formerly of Harvard Law School) that, "[a] brief or argument impresses [the court] in the degree to which it is willing actually to face rather than mask or evade the weaknesses of that side of the case." Benjamin Kaplan, Book Review, 95 HARV. L. REV. 528, 531 (1981) (reviewing FRANK M. COFFIN, THE WAYS OF A JUDGE: REFLECTIONS FROM THE APPELLATE BENCH (1980)). One might ask whether a justice system ought not to be designed to encourage competent lawyering rather than to denigrate it.

justice and thus defeats the very purpose the critics of the Rule wish to serve. Critics may argue that the remedy ought to be found outside the courts, lest the courts assume too much power over lawyers. But abusive conduct needs to be dealt with where and when it occurs for victims to be adequately protected and such conduct deterred.

These general considerations vindicate the need for Rule 11. By necessity it is a rule of discretion and as such it requires courts to draw lines. Critics argue that the discretion given courts creates the danger of chilling advocacy; if lawyers have to worry about crossing the line, they may be inhibited from giving effective representation to their clients.[135] It is difficult to evaluate the chilling argument: Is it that lawyers have been deterred from asserting claims or defenses for which they had no sufficient factual support, or to assert a legal argument rejected by courts in the jurisdiction and not supported by logic or analogous authority? Or is it that lawyers are deterred from filing actions designed to extract nuisance settlements? At what point should society become concerned that the assertion of legitimate interests is being frustrated?

Putting aside the inherent vagueness of the chilling argument, the concern about the necessity of lawyers having to observe lines defining their professional obligation seems curious. Trial lawyers must draw such lines constantly: advising a client about answering an embarrassing question at a deposition; determining how to handle a compromising paper in the course of document production; deciding how to respond to an intrusive interrogatory without unnecessarily disclosing a valuable lead to an opponent; deciding whether to offer the testimony of a witness of doubtful truthfulness. These are the daily grind of the lawyer's work, implicating professional obligations, potential conflicts with one's client's interests, and the risk of sanctions. Rule 11 simply calls on lawyers to do more of the same.

It is the business of lawyers and judges to draw lines. One cannot escape the necessity for doing so by moving the line; there would be no fewer close calls if first base were moved farther from home plate.[136] But would litigants, lawyers, and courts be better off if the

135. The risks have been greatly reduced by the discretionary character of sanctions and the safe harbor provision of the amended rule, and can be further reduced if judges make it clear, for example by issuing guidelines, what they expect of lawyers appearing in their court.

136. *See* Harold H. Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1336 (1988) ("Yogi Berra has been accused of another famous saying: 'We could eliminate all those close plays at first base if only we moved the bag one foot further from home plate.' ").

line were moved to enlarge the playing field for unprofessional conduct—if the Rule were limited, say to wilfull violations? Moving the line in that direction might reduce the volume of Rule 11 activity. But it will also lower the expectations of professional conduct. Lessening professional obligations will bring Gresham's law into play, leading standards of behavior to sink to the lowest common denominator. As I suggested early in the life of Rule 11: "Misconduct, once tolerated, will breed more misconduct and those who might seek relief against [it] will instead resort to it in self-defense."[137]

None of this is to say that administration of Rule 11 will be easy. The Rule places a heavy burden on judges, one many judges would just as soon pass up. Judges have an obligation to ensure that the consequences Dean Vairo fears will not come to pass, to use the Rule with care and restraint. Judges, like lawyers, can stop and think before imposing sanctions, minimizing mistakes;[138] and they have it within their power, through sensible case management, to prevent the eruption of satellite litigation. But judges also have an obligation to maintain the fairness of the justice process. When one party engages in litigation abuse in violation of the Rule, others suffer that abuse. When the Rule enforces the lawyers' "obligation to the court to refrain from conduct that frustrates the aims of Rule 1,"[139] it does not simply, as Dean Vairo puts it, subordinate client interests to the ideals of "judicial efficiency and case management."[140] The purpose of Rule 1 is to "secure the just, speedy, and inexpensive determination of every action." It serves the interests of litigants as well as those of the system. The new emphasis in Rule 11 and Rule 26, and elsewhere on professionalism, and the lawyer's obligation as an officer of the court lends substance to the general principle of Rule 1. If lawyers perform their obligations as officers of the court, unnecessary expense and delay will be avoided and just outcomes will be promoted.[141]

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137. William W Schwarzer, *Sanctions under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 205 (1985).

138. Rule 11 is no more free of mistakes in its administration than any other rule of law. It should not be evaluated on the basis of instances where mistakes have been made if, overall, it has filled a useful purpose.

139. 1993 advisory committee's note, *supra* note 3, at 584; *see supra* text accompanying note 30.

140. Vairo, *supra* note 116, at 42.

141. *See supra* text accompanying notes 77, 97.