The New Rule 11: Past as Prologue

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THE NEW RULE 11: PAST AS PROLOGUE?

Georgene M. Vairo*

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I. INTRODUCTION

In a 1991 article,¹ I wrote about Linda Brown and Rule 11.² Brown, of course, was the lead plaintiff in the school desegregation case of Brown v. Board of Education.³ Brown sought to challenge a well-entrenched judicial doctrine, “separate but equal,” that the Supreme Court established almost sixty years earlier in Plessy v. Ferguson.⁴ Since the 1896 Plessy decision, the courts consistently had reaffirmed their commitment to the separate but equal philosophy.⁵ Despite the strong authority weighing against their arguments, Brown and her attorneys knew they could still bring the case to court and be heard. Indeed, litigants like Linda Brown and Alan Bakke,⁶ who pursued the then novel reverse discrimination theory, “understood [that] they might lose because of the novelty of their claims . . . but they did not have to fear the immediate threat of sanctions for trying.”⁷

². FED. R. CIV. P. 11. Rule 11 was amended in 1983 as part of a package of amendments designed to curb perceived abuses of litigation and unnecessary cost and delay in federal litigation. GEORGENE M. VAIRO, RULE 11 SANCTIONS: CASE LAW PERSPECTIVES AND PREVENTIVE MEASURES § 1.01, at 1-5 to -6 (2d ed. 1992 & Supp. 1993).
⁷. Vairo, supra note 1, at 476.
However, these challenges to established authority were made before the watershed year of 1983, during which significant amendments to Rule 11 were made. In the aftermath of these amendments, this Author suggested that the "calculus" for determining whether to assert such challenges was changing. This Author concluded that Rule 11 was forcing too many litigants, like the modern Linda Browns or perhaps today's antiabortion protesters, to "think twice before proceeding" or to forgo litigation entirely even though important rights may be at stake.

The 1993 amendments to Rule 11 have now become effective and, as Judge Schwarzer ably explains, significant changes have been made in an attempt to improve the administration of the rule. But will they work? If the proverbial Linda Brown walked into your law office and presented her problem to you, would you take the case? Rule 11 would still play a major role in your decision, and the Rule's new safe harbor provision would not necessarily make the decision any easier. The safe harbor provision might merely push back the time frame for deciding when to bail out on the client.

Why revisit this hypothetical? The only purpose is to demonstrate that many of the Rule's old problems remain. Many attorneys still would not take a case like Linda Brown's for fear of sanctions. Although the 1993 amendments are a step in the right direction, fundamental conceptual problems—as well as practical ones—remain unresolved. Perhaps these fundamental conceptual problems were glossed over too quickly in the debate over the new amendments.

Although this paper is keyed to Federal Rule of Civil Procedure 11, the same issues and concerns arise under state law; for example, California has been experimenting with Rule 11-like statutes over the last decade. The most recent version of the general California sanctions rule is section 447 of the Code of Civil Procedure, which was most recently amended in January of 1993. It reads very much like the 1983 version of Rule 11 but contains some limitations. For example, a court cannot impose sanctions against plaintiffs in class action cases. And, like the 1993 Rule 11 amendments, the California stat-

8. Id.
9. Id.
12. Id. § 447.
ute requires that notice and an opportunity to be heard be provided and that a written order "recit[ing] in detail" the justification for sanctions be issued.\textsuperscript{14} Section 447 also contains a sunset provision—the statute will expire on January 1, 1998.\textsuperscript{15} However, the provision is in effect only in Riverside and San Bernardino counties.\textsuperscript{16}

A more limited, bad-faith rule also exists in California.\textsuperscript{17} A trial court may order "a party, the party's attorney, or both, to pay reasonable expenses, including attorneys' fees, incurred" because of bad-faith actions or tactics that are frivolous or intended solely to cause unnecessary delay.\textsuperscript{18}

Essentially, Rule 11 and similar state statutes dramatically change the dynamics of the attorney-client relationship, shifting the attorney's duty away from client advocacy toward judicial efficiency and case management as an officer of the court. However, one issue that must be addressed squarely is whether, in moving toward this model of lawyering,\textsuperscript{19} Rule 11 may be moving lawyers too far away from the traditional model of a legal profession independent from the state and in close association with particular client interests.

\textbf{A. The Importance of Lawyer Independence}

Before addressing how Rule 11 interferes with lawyer independence, it is crucial to understand why lawyer independence is important. Independence is not important simply because it is a "good deal for lawyers" to regulate themselves and control their own lives;\textsuperscript{20} lawyer independence must promote some public good. Two justifications are frequently given for an independent legal profession: ensuring the separation of powers and guarding the framework of democracy.\textsuperscript{21}

The separation of powers argument can be quickly dismissed in the case of Rule 11. According to this argument, regulation of the bar should fall exclusively within the province of the judiciary because lawyers principally function within the court system. Therefore, legislative interference with lawyer regulation would usurp judicial power and directly contravene the constitutional principle of three independ-

\begin{itemize}
  \item \textsuperscript{14} Id.
  \item \textsuperscript{15} Id.
  \item \textsuperscript{16} Id.
  \item \textsuperscript{17} CAL. CIV. PROC. CODE § 128.5 (West 1982).
  \item \textsuperscript{18} Id.
  \item \textsuperscript{19} Judge Schwarzer supports this model. See Schwarzer, supra note 10, at 32-37.
\end{itemize}
ent branches of government. Rule 11, however, gives the judicial branch sole power to regulate lawyers through sanctions.22

Rather, it is Rule 11’s potential effects on lawyer independence from the perspective of democratic theory—what Robert Gordon calls “the ideal of liberal advocacy”23—that should concern us. The ideal of liberal advocacy promotes an independent bar as the only way to ensure a democratic government.24 “Only an independent legal profession can adequately protect the rights of individuals against state power.”25 It is this function, “the vindication of individual rights”26 vis-a-vis the state, that necessitates lawyers’ need to be able to “assert and pursue client interests free of external controls.”27 Thus, lawyers must remain free and independent from “all potentially corrupting influences that might cloud or distort their considered assessments of what legality requires.”28 Failure to remain independent from external state control results in significant societal costs and endangers individual liberties. The extreme embodiment of such a failure can be seen in the legal system of Nazi Germany.

In Nazi Germany the law became an instrument of fascist policy, and both judges and the legal profession obligingly assisted in its implementation. Indeed, the legal profession’s abject failure to challenge the Third Reich was partly responsible for the Nazi regime’s success.29 As Udo Reifner writes, the German judicial system—both its personnel and structure—legitimized state terrorism, giving Nazi racist policies “a seemingly rational image and making murderous intentions legally realizable.”30 With the German bar’s assistance, the Nazis were able “to abolish the limitations imposed by the legal order on their power by denying the individual and collective rights of those who opposed their political and military aims.”31

24. Id.
25. Wilkins, supra note 21, at 859.
27. Id.
28. Wilkins, supra note 21, at 863.
31. Id. at 99.
To accomplish this goal, the attorney’s role was changed from independent advocate to officer of the state. The attorney’s right to information was no longer seen as a right to be exercised on his client’s behalf but rather as part of his role as an ‘officer of the court’ and therefore only to be exercised in the interest of the State. Attorneys accepted this integration into the Nazi system even to the point of demanding, in at least one case, the death sentence for their own clients. Lawyers watched as the Nazi government “effectively abolished any procedural rights which had been designed to protect citizens from arbitrary political or social power.” The lawyer was considered to be under the judge’s command, not the client’s, and if the lawyer did not comply voluntarily, sanctions ranged from ethical rebuke to torture. Actions were instituted against legal professionals for invoking their clients’ rights, for criticizing the rulings of judges, and for challenging state practices or laws.

One might wonder why lawyers would have gone along with such repressive measures. In large part economic and politically based anti-Semitism led to the expulsion of Jews from the German legal profession and encouraged the remaining lawyers to become tools of the state. While the German bar was generally perceived as dedicated to defending individual rights, Jewish lawyers, at least arguably, dominated the segment of the profession actually working to protect individual rights. Jewish lawyers were especially noted for their particular liberalism, and were thus an obvious target for the Nazi regime.

In the guise of redressing the economic problems of the legal profession, the Nazi government enacted a number of laws that effec-

32. See id. at 99, 107-10.
33. Id. at 113 (quoting 29 Entscheidungen des Ehrengerichtshofs [Decisions of the Court of Ethics] 28, 112 n.59 (1935)).
34. Id. at 120.
35. Id. at 111.
36. Id. at 113.
37. Id. at 112.
38. Id. at 112-13.
39. See id. at 99, 107-10.
40. Id. at 104-07.
41. Id. at 106.

Jewish lawyers were generally active in areas where reactionary, militarist and feudal tendencies were challenged. In this sense the Nazi slogan of a “Jewish Conspiracy” was a reflection of fact: the political right itself had inspired strong devotion on the part of Jewish lawyers to social progress and democracy in Germany.

Id. at 107.
tively eliminated Jewish and women lawyers from the profession and made the use of lawyers compulsory in actions where their use had not previously been required, for example, small claims court. Thus, economically distressed individuals who could not afford representation were denied access, and the lawyers who had previously represented them were eliminated. In contrast lawyers who represented business interests were provided more economic freedom.

As a historical footnote, in 1947 the United States Supreme Court decided Hickman v. Taylor, which advanced a broad work-product privilege for attorneys. Justice Murphy’s opinion was based on the conception that although an attorney is an officer of the court, an attorney must "faithfully [protect] the rightful interests of his clients." Accordingly, there exists a "general policy against invading the privacy of an attorney's course of preparation [that] is so well recognized and so essential to an orderly working of our system of legal procedure." Justice Jackson concurred but went even further. He wrote of the need and importance of protecting the legal profession, stating:

But it too often is overlooked that the lawyer and the law office are indispensable parts of our administration of justice. Law-abiding people can go nowhere else to learn the ever changing and constantly multiplying rules by which they must behave and to obtain redress for their wrongs. The welfare and tone of the legal profession is therefore of prime consequence to society, which would feel the consequences . . . .

Justice Jackson objected to the disclosure of work product because it ultimately could turn a lawyer into a witness against his or her client's interests. While we can only speculate, perhaps it was the experience of Nazi Germany that motivated his opinion. Justice Jackson served as the American Chief of Prosecution during the Nurem-

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42. Id. at 116-19.
43. Id. at 117.
44. Id. at 114-20. Judge Schwarzer has noted the "unprecedented competitiveness" facing American lawyers in the eighties. See Schwarzer, supra note 10, at 8. Such problems have not abated significantly and one hopes that American lawyers would not subscribe to discriminatory tactics to preserve their economic welfare.
45. 329 U.S. 495 (1947).
46. Id. at 510.
47. Id. at 512.
48. Id. at 514-15 (Jackson, J., concurring).
49. Id. at 516-17 (Jackson, J., concurring).
berg trials in the year before *Hickman v. Taylor* was decided. Perhaps learning about what happened to the German legal profession, and what happened when it became an arm of the state, reminded Justice Jackson of the supreme importance of an independent legal profession.

This is not to suggest that Rule 11 is the first step toward Nazism. However, several parallels do exist between the experience of the German bar under the Nazis and our legal profession’s experience under Rule 11. In both cases the legal profession’s independence is compromised and individual rights are not vindicated. Just as opponents or supposed “enemies” of the Nazi state found, some citizens under our system—the modern-day Linda Browns—and their attorneys are finding that they are unable to be heard in our courts without the fear of reprisal.

Moreover, as Judge Schwarzer demonstrates, the purpose of the Rule 11 amendments—and Rule 26’s new disclosure rules—is, in essence, to split the lawyer’s duty between the needs of the client and those of the legal system.51 Lawyers are to be concerned, along with judges, about speeding up the queue. Thus, they are essentially being asked to bail out on their clients sooner rather than later and to worry about their responsibility to the court as much as the interests of the client. As a result there is the potential for the judicial system to co-opt lawyers to the detriment of their clients’ interests.

We should not accept the argument that Lord Brougham’s and Lon Fuller’s ideals—that a lawyer’s duty is first and only to the client—are out of date or too costly in modern society. As Fuller put it, a lawyer’s arguments should be presented with “partisan zeal.... His task is not to decide but to persuade.”54 “[A lawyer] plays an important role in the process of social decision.”55 “The central and recurring theme in our profession’s narratives portrays lawyers as champion, defending the client’s life and liberty against the government....”56 Efficiency concerns cannot override social concerns.

51. See id.
52. 2 Proceedings in the House of Lords, Trial of Queen Caroline 5 (Duncan Stevenson & Co. ed., 1820).
54. *Id.* at 35.
55. *Id.* at 41.
B. How Rule 11 Interferes with Lawyer Independence

Judge Schwarzer's presentation illuminates some of the thinking underlying the most recent amendments to the Federal Rules of Civil Procedure, including Rule 11, and raises some interesting and provocative questions. It is hard to argue with many of his basic points. For example, it sounds "Mom & Pop and apple pie" to argue that lawyers should act more responsibly to the court and should not continue to press a position once it ceases to have any merit, and that Rule 11 ought to be used to enhance lawyers' professional responsibility.

To the extent that the recent amendments to Rule 11 are designed to control the bad lawyer conduct that has generated public disdain for the legal profession, they seem important and justifiable. Such regulation should come with little or no cost because the Rule will be primarily conduct regulating, as opposed to content regulating. Thus, the intent is to silence the critics of Rule 11 who argue that its existence and application has created the so-called chilling effect.

This Author finds herself in general agreement with much of what Judge Schwarzer has presented. In fact, there is little doubt that if judges focused on egregious conduct instead of content when interpreting Rule 11, many of the problems associated with the Rule would abate. The problem, however, is that Rule 11, as amended, may not be interpreted in the way Judge Schwarzer suggests or in the way the Advisory Committee intends. Moreover, this Author has important disagreements with Judge Schwarzer over some of his basic premises.

In the first place, Judge Schwarzer's presentation begs an important question. Implicit in his argument is the premise that courts are a "'societal resource, not merely the private playpen of the litigants,'" and therefore we must undertake the difficult task of discouraging hyperactivity.57 Another important premise that has gone unchallenged is that lawyers owe an important duty to the court.

There are two problems here. First, we ought to question what it means to say that courts are a societal resource and whether it is a good thing to reorient lawyers to act more as officers of the court. Of course courts are a societal resource; they are publicly funded and much of the adjudication process is within the public domain. But who uses the courts? Often it is individuals with complaints against the government or a larger economic entity. These individuals' right

57. Schwarzer, supra note 10, at 17 (quoting Arthur R. Miller, The Adversary System: Dinosaur or Phoenix, 69 MINN. L. REV. 1, 19 (1984)). This premise is attributed to Arthur Miller, the architect of the 1983 version of Rule 11.
to invoke the judicial process ought not to be impeded because of someone's concerns about "hyperactivity."  

As Judge Benjamin Cardozo wrote, "To enforce one's rights when they are violated is never a legal wrong, and may often be a moral duty." Judge Cardozo continued: "A great jurist, Rudolf von Jhering, in his Struggle for Law, ascribes the development of law itself to the persistence in human nature of the impulse to resent aggression ...." Rudolf von Jhering, a great pre-World War I German jurist, developed the notion of rechtsgefühl, which Judge Joseph M. McLaughlin has translated as "a feeling of legal right, but implying the pain and irritation a person feels when he has been put upon." It is somewhat ironic to refer to a German jurist to recommend a loose interpretation of Rule 11 so as to prevent the Rule's chilling effect. Germany has shown us the horrors that can occur when the legal profession loses its independence and lawyers turn their backs on clients rather than seek to vindicate their rights. Sanctions may be appropriate when lawyers engage in wrongdoing. The process of winning and losing, however, takes ample care of the wrongheaded.

In our society lawyers have played an important role in securing the rights inherent in the Constitution and federal law. At the state level, lawyers have pushed the boundaries of common law. In the sanctions climate that exists today, would an attorney feel free to push a novel "enterprise liability theory" like that ultimately approved by the California Supreme Court in Sindell v. Abbott Laboratories? Without lawyers, how well would Linda Brown, of Brown v. Board of Education, have fared? If Thurgood Marshall and his comrades had been concerned about their role as officers of the court via Rule 11, would they, or more importantly, could they have afforded to press so hard in the face of Plessy v. Ferguson? Many will reply that the Brown decision would not have been different, that Thurgood Mar-

58. Id.
63. See VAIRO, supra note 2, app. H at H-18.
64. 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, cert. denied, 449 U.S. 912 (1980).
67. Judge Schwarzer argues, for example, that the law had begun to evolve almost 15 years before Brown was decided. See Schwarzer, supra note 10, at 35. He may, therefore,
shall would not, and should not, have feared Rule 11. It is easy to say that in 1994. But was it so easy an argument fifty years ago? Perhaps Marshall would not have feared Rule 11, but perhaps he should have. Indeed, one of his successors at the National Association for the Advancement of Colored People (NAACP), Julius Chambers, was sanctioned when he unsuccessfully litigated a race discrimination civil rights lawsuit while in private practice.68

Second, what is hyperactivity and who defines it? Unfortunately, interpretation of Rule 11 is likely to involve a continuing focus on the merits, that is, the contents, of papers. This will lead to many of the same chilling effect problems associated with the Rule’s 1983 version. There is also likely to be a tendency to focus on the “speedy and inexpensive” aspects of Rule 11, as opposed to the “just” part. The stakes are high. If we reorient the legal profession toward a significant role as officers of the court, we run the serious risk that we will be impairing the independence of the bar, independence that contributed to the evolution of law in this country.

There are striking examples of what can happen when a lawyer becomes a tool of the state. It may seem farfetched to remind ourselves of what happened in Nazi Germany, but startlingly similar examples of injustice have occurred in the United States: Lawyers enforced the Jim Crow laws, contributed to keeping ethnic Japanese confined at concentration camps in the United States during World War II, and turned their backs on persons accused of being commu-

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nists during the McCarthy era. These are just a few examples of what can happen when lawyers ignore individual rights.

There may be times when the majority is so alarmed about a real or perceived threat that political pressures are created, resulting in laws or policies that infringe on individual or group rights. Those fears are understandable. But that is all the more reason why it is important to protect from retribution those lawyers willing to take on the unpopular client or cause of the day.

C. The Need to Protect Individual Access to Courts

Another form of lawyer independence must be mentioned. There is a risk that the federal courts will succeed in weeding out individual-oriented cases, leaving the courts open primarily for big corporate disputes. In 1914 Louis Brandeis wrote of the threat presented to our society when lawyers become mere tools for corporate America. He stated that

[i]t is true at the present time the lawyer does not hold as high a position with the people as he held seventy-five or indeed fifty years ago; but the reason is not lack of opportunity. It is this: Instead of holding a position of independence, between the wealthy and the people, prepared to curb the excesses of either, able lawyers have, to a large extent, allowed themselves to become adjuncts of great corporations and have neglected the obligation to use their powers for the protection of the people.69

The drive toward greater “professionalism,” especially in the context of Rule 11, may in essence be a code word for keeping the little people, with their petty grievances and unpolished lawyers, out of the system. Meanwhile big-firm lawyers may be engaging in the very practices that Judge Stanley Sporkin lamented during the Savings and Loan (S&L) crisis: “Where were [the lawyers]” and “[w]hy didn’t any of them speak up or disassociate themselves from the transactions?”70

Judge Schwarzer is correct in pointing out that Judge Sporkin criticized the lawyers in the S&L debacle for failing to exercise their independent judgment.71 However, blind independence in favor of corporate interests is as dangerous to individual liberties as governmental repression because both corporations and the government are

71. See Schwarzer, supra note 10, at 34.
powerful agents vis-a-vis the people. Judge Schwarzer quotes attorney Sol Linowitz’s recent observation that lawyers have “lost the ability to differentiate between what you can do and what you ought to do.”

Harkening back to Lord Brougham and Lon Fuller, as well as Louis Brandeis, it is the representation of individuals—the less powerful and influential—and the necessity that lawyers be able to seek to vindicate individual rights that is of critical concern.

Moreover, the irony is that the generally highly paid lawyers who engage in corporate-driven practices are far less likely to be sanctioned pursuant to a procedural rule like Rule 11. On the other hand, those lawyers, typically solo practitioners, who represent individual or group interests against governmental or corporate interests—generally with no prospect of significant financial remuneration—run the risk of sanctions, sometimes of a draconian nature.

Society cannot afford to chill the Thurgood Marshalls or the Julius Chambers or their hundreds of lesser-known, and sometimes concededly lesser-prepared, -organized, and -coherent comrades. To the extent that Rule 11 is chilling lawyers, especially lawyers who bring individual rights cases, it is a cure for abuse that we cannot afford. Indeed, a recent survey demonstrated that 19.3% of lawyers reported

72. Id.
73. See supra text accompanying notes 52-54, 70.
74. Although the average Rule 11 sanction is approximately $2500, there are a substantial number of five- and six-figure awards and even a few seven-figure awards. VAIRO, supra note 2, § 9.03[a], at 9-16 to -17 & n.60.

More importantly, it is well recognized that lawyers for individuals are far more likely to be chilled than corporate lawyers or those working for other entities, such as the State. See, e.g., Wilkins, supra note 21, at 871 nn.319-21. Professor Wilkins explains:

The picture looks quite different, however, from the perspective of the typical individual client trying to convince her lawyer to pursue a marginal but viable claim despite the threat of external sanctions. If the lawyer is operating under a contingent fee agreement, she must weigh the already speculative possibility of winning on the merits and recovering a substantial fee against the danger that she will lose the case and be sanctioned. For these lawyers, sanctions may make an already risky legal practice economically infeasible. If the client is paying by the hour, she will have difficulty determining whether certain actions—such as massive discovery requests, extensive legal research, consulting with experts—are being taken for her benefit or the lawyer’s. In either case, the individual client with a plausible legal claim is likely to be the loser.

Of course, the fear of personal liability will undoubtedly chill some corporate lawyers from pursuing legitimate client projects. Indeed, one can easily imagine a legislatively created administrative agency similar to OSHA adopting a set of procedures—for example, giving administrative officials substantial discretion to disbar lawyers for initiating "frivolous" claims against the [S]tate—that would significantly cool the ardor of even the most highly paid and closely monitored corporate advocate. Nevertheless, the risk that the threat of sanctions will chill creative advocacy is a much greater problem for individuals than for corporations. Id. at 871-72 (footnotes omitted).
not filing papers they thought had merit because of Rule 11.\textsuperscript{75} That number is excessively high.

Turning now to where Judge Schwarzer left off, will courts interpret Rule 11 as a conduct-regulating rule? How will the amendments work? Will the amendments cure the problems inherent in the 1983 version of the Rule? This Article examines the provisions of the amended Rule in the context of the criticisms raised about the 1983 version, and in the context of the threat to our adversarial system. This Article then comments on whether the provisions improve the 1983 version. The Article concludes with concerns over the drift away from merits-based adjudication to the use of procedural reform to curb perceived abuses that may lead to undermining the independence of the bar to the detriment of us all.

II. THE 1993 AMENDMENTS TO RULE 11

A. The Amendment Process

Beginning in August 1990, the Advisory Committee undertook an extensive study of Rule 11 by issuing a call for comments.\textsuperscript{76} The committee held hearings in February 1991, and issued a proposed draft of an amended Rule that spring and a revised draft the following spring.\textsuperscript{77} The Advisory Committee took seriously the issues that Rule 11 critics raised and made a valiant attempt to save the Rule's beneficial aspects yet fix those aspects that created problems. The effort may prove unsuccessful, but it is a positive development to see the Advisory Committee so responsive to the concerns of the bar.

As suggested in its interim report, the Advisory Committee concluded that although some of the criticisms of Rule 11 were “exaggerated or premised on faulty assumptions,” widespread criticisms were “not without some merit.”\textsuperscript{78} The Committee noted that Rule 11: (1) has impacted plaintiffs “more frequently and severely than defendants;” (2) has “occasionally” created problems for litigants seeking to

\textsuperscript{75} Lawrence C. Marshall et al., \textit{The Use and Impact of Rule 11}, 86 NW. U. L. REV. 943, 983 (1992). The problem is not limited to “public interest” cases. There are other arenas, such as antitrust law, in which overly zealous application of Rule 11 will chill effective advocacy and hinder the development of law in complex areas. See Daniel E. Lazaroff, \textit{Rule 11 and Federal Antitrust Litigation}, 67 TUL. L. REV. 1033 (1993).

\textsuperscript{76} See VAIRO, supra note 2, § 2.04, for a discussion of the amendment process.

\textsuperscript{77} Id.

assert novel legal positions or needing discovery from an adversary; (3) is enforced too infrequently “through nonmonetary sanctions, with cost-shifting having become the normative sanction;” (4) contains no incentive to withdraw claims that become insupportable; and (5) sometimes creates attorney-client conflicts and “exacerbate[s] contentious behavior between counsel.”

The Advisory Committee refused to adopt the suggestion that, in essence, it return the Rule to its pre-1983 state. The nature of the Advisory Committee’s amendments to Rule 11 indicates its belief that the Rule was overinclusive in some respects and underinclusive in others. Thus, some of the amendments would narrow, and others broaden, the scope of the Rule.

The Advisory Committee rewrote the Rule and organized it into four sections. Perhaps most importantly, the Advisory Committee replaced the fifth sentence of Rule 11, which contained the 1983 version of the certification requirements, with new subsection (b), which now contains the triggering events for Rule 11 liability and the new certification requirements. The Committee also added subsection (c), which contains a number of important new procedural protections. Finally, in subsection (d), the Advisory Committee made Rule 11 wholly inapplicable to discovery. The purpose of the revisions was to “remedy problems that have arisen in the interpretation and application of [Rule 11]” and to “reduce the number of motions for sanctions presented to the court.”

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79. Id.
80. According to the Advisory Committee, the revision is designed to increase “the fairness and effectiveness of the rule as a means to deter presentation and maintenance of frivolous positions, while also reducing the frequency of Rule 11 motions.” Id. The revision does not adopt the suggestions made by many that sanctions be imposed only for willful violations. Such changes would be inappropriate in view of the modifications in the wording of the obligations, in effect permitting a party, especially if candid in its papers, to advance innovative theories of law and make allegations on information and belief. Such changes would also be inappropriate in view of the “safe harbor” from Rule 11 motions through the opportunity, after notice, to withdraw voluntarily from insupportable positions. See id. In light of these changes, violations would rarely involve conduct that is not either willful or deceptive, and hence some form of sanctions should be imposed. Id.
81. See VAIRO, supra note 2, § 1.04 and chs. 5 and 6 for a complete discussion of the certification requirements of Rule 11 and the importance of the signature.
82. See infra part II.B.2.
84. Id. at J-22.
B. Analysis of Amended Rule 11

This part of the Article analyzes the amendments that pertain to the chilling effect and satellite litigation problems that pose the greatest threats to attorney independence.

1. Rule 11(b)—representations to the court

Amended Rule 11 provides in pertinent part:

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

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

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

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

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information and belief.85

a. new triggering event

Signing a paper in violation of Rule 11's standard triggered a violation of the Rule under the 1983 amendments. Under this so-called snapshot rule, a court could not sanction an attorney who had made a reasonable inquiry before filing a paper but who refused to withdraw the paper when subsequent discovery or research showed the position taken was untenable.86 However, the new operative event for triggering Rule 11 is "presenting to the court (whether by signing, filing, sub-

86. Vairo, supra note 1, at 496.
mitting, or later advocating) a paper that violates the Rule's standard. Thus, the proposed Rule does not expressly incorporate the continuing duty to withdraw papers.

But, the 1993 amended Rule embraces the "continuing duty theory": Once it is clear that a position is no longer tenable, a litigant may not continue to press the position in writings or in oral presentations to the court. As revised, it is clear that although there is no duty to formally withdraw the paper or position taken, withdrawal of the paper will generally immunize the target from sanctions.

Signing a paper in violation of the Rule's standards continues to trigger the amended Rule. In addition, "filing, submitting, or later advocating" a paper triggers the amended Rule. The word "advocating" in the text of the proposed Rule means that continuing to advocate a position orally after a paper has been signed, filed, or submitted may trigger Rule 11.

The "later advocating" portion of the Rule raises some interesting questions. It seems clear that orally arguing a frivolous claim at a status conference would subject a litigant to Rule 11 sanctions. But would serving a discovery request aimed at proving a baseless claim be considered later advocating?

More importantly, the later advocating language raises the same kinds of questions that an attorney must confront when served with a Rule 11 motion. Judge Schwarzer notes that attorneys will have difficulty deciding when a claim ceases to have any merit. For example, when should an attorney know that testimony, documents, or other information are "sufficiently conclusive to render a prior allegation baseless"?

In any event this broadening of the Rule was unnecessary; it is relatively easy to retrigger Rule 11. If discovery or further research reveals that a position is unsupportable, and an adversary refuses to

88. Id.
89. See 1993 advisory committee's notes, supra note 83, at J-23.
90. Id.
91. Id.
92. Id.
93. See id. at J-28 to -29.
94. Schwarzer, supra note 10, at 16.
95. Id. For a discussion of the case law that presumably survives the 1993 amendments on the question whether an attorney is required to disbelieve a client, see VAIRO, supra note 2, § 6.03[b][2].
withdraw it, Rule 11 is retriggered when the adversary files baseless papers in opposition to a dispositive motion.

b. reasonable inquiry requirement retained

While modifying the language slightly, the 1993 amended version of Rule 11 retains the “reasonable inquiry” requirement. The Advisory Committee rejected the suggestion of some commentators that it would be preferable to delete the reasonable inquiry requirement and to require instead that only nonfrivolous papers be filed. There had been criticism of the “conduct” approach because it could lead to wasteful judicial inquiry into an attorney’s actions before filing, even when the paper filed was colorable.

According to most commentators, however, the requirement that attorneys stop and think before filing has been effective in deterring baseless filings. The Advisory Committee understandably saw no reason to abandon the one aspect of the Rule that has been somewhat successful. On the other hand, courts should not inquire into what an attorney did before filing unless the paper is groundless; such inquiry adds to wasteful satellite litigation without weeding out unmeritorious claims. That level of scrutiny also raises the privacy concerns discussed by Justices Murphy and Jackson almost fifty years ago in *Hickman v. Taylor.* Successful—or lucky—guessers should not be punished because the effect would be to chill access to the courts.

c. duty of candor

The Advisory Committee makes clear in its Notes that one of Rule 11’s purposes is to emphasize the duty of candor. Although continuing to “require litigants to ‘stop-and-think’ before initially making legal or factual contentions,” the revised Rule places equal emphasis on the duty of candor and on the obligation to withdraw from positions when they are no longer tenable.

There are two problems with the incorporation of the duty of candor. First, to the extent that the duty permits sanctions to be imposed because of the way in which a position is argued, the duty is an unnecessary extension of the Rule. If the argument identification, miscitation, or misrepresentation of fact is willful, other sanctions exist

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97. 329 U.S. 495 (1947); *see supra* notes 46-49 and accompanying text.
98. 1993 advisory committee’s notes, *supra* note 83, at J-23. For a discussion of cases on the duty of candor, see *VAIRO, supra* note 2, § 5.03[c].
to punish the offender, such as 28 U.S.C. § 1927\textsuperscript{100} or the court's inherent power as discussed in \textit{Chambers v. NASCO, Inc.}\textsuperscript{101} There is no need to augment Rule 11.

This Author agrees with Judge Schwarzer's view that it is a good idea to punish lawyers who lie to the court.\textsuperscript{102} As the Ninth Circuit in \textit{Golden Eagle Distributing Corp. v. Burroughs Corp.}\textsuperscript{103} pointed out, however, the line between appropriate advocacy on behalf of the client and out-and-out lying and misrepresentation on the other, is sometimes a hard line to draw.\textsuperscript{104} Clearly the system ought to punish the latter, but Rule 11 was not necessary to address such abuses.

Second, Judge Schwarzer’s argument becomes dangerous when he claims that Rule 11 is intended to do more than stop abuse.\textsuperscript{105} There is no question that lawyers should be careful and litigate in a

\begin{footnotesize}
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  \item \textsuperscript{101} 501 U.S. 32 (1991) (discussing federal courts' inherent power to impose sanctions for bad-faith conduct in litigation).
  \item \textsuperscript{102} See Schwarzer, \textit{supra} note 10, at 32.
  \item \textsuperscript{103} 801 F.2d 1531 (9th Cir. 1986).
  \item \textsuperscript{104} See Schwarzer, \textit{supra} note 10, at 29. When lying is identified, however, bad faith should easily be established, thereby implicating either 28 U.S.C. § 1927 or the court's inherent power to sanction.
  \item Enforcement proceedings are an important arena for debating conflicting visions of the lawyer's role. Consider again \textit{Golden Eagle Distributing Corp. v. Burroughs Corp.} At one level, \textit{Golden Eagle} simply represents a disagreement between the district judge and the appeals panel over the literal command of rule 11. Such an interpretation, however, masks the importance of the disagreement expressed in the opinions. The district court's opinion, based squarely on the need to protect the court's ability to reach accurate decisions, argues that candor to the court must take precedence over "creativity" in advancing client interests. The court of appeals opinion, on the other hand, rejects the view that rule 11 was designed to protect the integrity of the court, and instead characterizes the conflict as between a "lawyer's duty zealously to represent his client . . . and the lawyer's own interest in avoiding rebuke." Not surprisingly, it concludes that the former duty must take precedence.
  \item The opinions in \textit{Golden Eagle}, therefore, represent a fundamental disagreement about the proper balance between public and private understandings of professional independence. What is most significant is that this debate is taking place at all. For the first time, judges are actively debating the proper balance between client and systemic interests. And, because these discussions occur around the decisions of actual cases, these debates confront issues of institutional competence and the significance of context.
  \item Whatever sanctioning systems we employ, therefore, must do more than efficiently control a static set of professional norms; they must also help us choose among competing conceptions of the lawyer's role. At a minimum, enforcement proceedings should presumptively be open and accessible to ensure that information about the conduct in question and the standards being applied can be reviewed and critiqued.
  \item Wilkins, \textit{supra} note 21, at 883-84 (quoting \textit{Golden Eagle}, 801 F.2d at 1540).
  \item See Schwarzer, \textit{supra} note 10, at 12-13.
\end{itemize}
\end{footnotesize}
manner that keeps costs and delay to a reasonable level, thereby promoting the aims of Rule 1. But in the face of Rule 11's potential chilling effects and the rights that may be at stake, where is the case for "broadening" the scope of attorneys' obligations to the courts?

d. certification

The new certification language is quite different from the 1983 version of Rule 11.

i. facts

The certification with respect to facts has been totally rewritten. The Advisory Committee recognized that the 1983 version of Rule 11 placed an unequal burden on plaintiffs and defendants and that a litigant may have good reason to believe, without actually knowing, that a fact is true or false. Thus, the Advisory Committee modified the certification language with respect to facts.

The revision created two subsections to distinguish between factual contentions and factual denials. Subsection (b)(3) of the 1993 amendments pertains to contentions and requires that "the allegations and other factual contentions have evidentiary support or, if specifically so identified, [be] likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." Subsection (b)(4) pertains to denials and requires that "the denials of factual contentions [be] warranted on the evidence or, if specifically so identified, [be] reasonably based on a lack of information or belief."

There is no quarrel here with using different language for contentions and denials so long as courts do not treat baseless complaints less harshly than baseless denials.

To ensure that the proposal will be understood as softening the Rule, the Advisory Committee noted that the standard is not whether a party has sufficient facts to prevail, but rather whether the contention has or is likely to have "evidentiary support." In that sense the

106. Fed. R. Civ. P. 1. Rule 1 provides that the Federal Rules of Civil Procedure "be construed and administered to secure the just, speedy, and inexpensive determination of every action." Id.

107. For a discussion of this problem, see Vairo, supra note 2, §§ 4.01[b], 6.03[f].


109. Id.

110. Some courts view frivolous complaints as more problematic than frivolous answers or other papers because the complaint "starts" the battle. See Vairo, supra note 2, §§ 4.01[b][2][A], 5.05[b]; infra notes 264-70.

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proposal narrows the Rule. It then broadens the Rule by requiring that the contention be withdrawn when the position taken is no longer warranted. The concept is positive to the extent that it provides a more forgiving standard when a litigant is not in possession of relevant facts. The problem, however, will be in the implementation. If the amended Rule is used like the 1983 version, this change will likely cause an increase in satellite litigation. Moreover, the new provision can be used to whipsaw litigants in connection with the new disclosure requirement of Rule 26. For example, adversaries can argue that failure to disclose implicates a prima facie Rule 11 violation.

ii. law

The 1993 amendment to Rule 11(b)(2) requires that "the claims, defenses, and other legal contentions therein [be] warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." The key change is the substitution of the words "nonfrivolous argument" for "good faith argument." The attempt is to provide a more objective-sounding standard. A paragraph has been added to the 1993 Advisory Committee's Notes to provide guidance as to the meaning of "nonfrivolous." The Notes explain that so long as there is some support for a legal position, for example, a dissenting opinion, the standard in another jurisdiction, or a law review article—but presumably not one's own—the proponent of a paper should be immunized from sanctions.

Judge Schwarzer agreed that the standard under the 1983 version of Rule 11 did not provide sufficient guidance to courts and that there was excessive variance in finding Rule 11 violations. For example, a recent Federal Bar Association study showed that federal judges disagree sixty percent of the time on whether a particular fact pattern justifies sanctions. The big "if" in the interpretation of amended Rule

112. Id. at J-23 to -25.
113. FED. R. CIV. P. 26; see Schwarzer, supra note 10, at 17-19.
114. FED. R. CIV. P. 11(b)(2).
116. Id.
117. See Schwarzer, supra note 10, at 10-12.
118. CARL B. HILLIARD & MICHAEL E. CHISHOLM, REPORT OF THE FEDERAL BAR ASSOCIATION, RULE 11 SURVEY 12 (1992). Indeed, Judge Schwarzer concedes that although courts have "had abundant opportunity, [they have] never succeeded in articulating universally accepted and workable standards of sanctionable conduct and sanctionable
11 is whether, with regard to frivolousness, courts will continue to "know it when they see it," or whether they will analyze legal arguments in the more forgiving way that the Advisory Committee suggests. As Judge Schwarzer notes, the concern is that judges will focus unduly on content rather than conduct and thereby turn losing arguments into sanctionable ones in too many cases.

2. Rule 11(c)—sanctions

The 1993 amendments make a number of important changes in subsection (c). First, sanctions are no longer mandatory. Second, a number of procedural protections have been added, including express provisions for notice and opportunity to be heard, and a requirement that the court imposing sanctions describe the violation and explain the basis for the sanction chosen. Third, a safe harbor provision has been added. Fourth, law firms, in addition to the signers of papers, can be held responsible for Rule 11 violations. Fifth, there are important limitations on the sanctions that may be imposed. The 1993 Advisory Committee's Notes contain a detailed explanation of most of the changes.119

a. from "shall" to "may"

As in the 1991 proposal, the May 1992 Advisory Committee proposal continued to require mandatory sanctions for violations of Rule 11. The proposed Rule provided that if a court determines that Rule 11 had been violated, the court "shall" impose an appropriate sanction.120 At its meeting in June 1992, the Standing Committee responded to critics of mandatory sanctions by voting to change the word "shall" to "may" in order to give courts discretion as to whether a sanction should be imposed. The 1993 Advisory Committee's Notes to subsections (b) and (c) do not reflect this change in the text, continuing to state that the rule "mandat[es] sanctions for violations of these obligations."121 This language probably will be deleted to reflect the change. However, certain language in the Notes does reflect the spirit

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120. 1993 Proposed Amendments, supra note 85, at J-14.
121. 1993 advisory committee's notes, supra note 83, at J-23.
of the change: "Whether a violation has occurred . . . [is] committed to the discretion of the trial court . . . ."\textsuperscript{122}

Although the change from "shall" to "may" may appear cosmetic, it was an important point for critics of Rule 11.\textsuperscript{123} Moreover, the change is critical because it is a signal that courts and litigants should be less zealous in using Rule 11 in cases involving relatively minor infractions of the Rule. This decreased reliance on Rule 11 should result in less satellite litigation.

\textit{b. procedural changes}

\textit{i. due process}

There was no mention of due process requirements in the text of the 1983 version of Rule 11, although the 1983 Advisory Committee's Note contained a brief discussion of due process.\textsuperscript{124} A complex body of case law discussing the degree of due process required in connection with Rule 11 has evolved.\textsuperscript{125} The 1993 version of Rule 11 now explicitly requires "notice and a reasonable opportunity to respond."\textsuperscript{126}

Two other changes in the Rule ensure that proper notice will be given. First, Rule 11(c)(1)(A) requires litigants to make a separate Rule 11 motion describing the conduct believed to be a Rule 11 violation, and provides the target of the motion twenty-one days to withdraw or correct the challenged paper.\textsuperscript{127} Second, Rule 11(c)(1)(B) requires judges who wish to impose Rule 11 sanctions \textit{sua sponte} to describe the conduct that appears to violate the Rule and to issue an order to show cause why the target has not violated the Rule.\textsuperscript{128}

Unfortunately, the 1993 Advisory Committee's Notes do not provide the courts with much guidance as to the meaning of the phrase "a reasonable opportunity to be heard." The Notes state that "[w]hether the matter should be decided solely on the basis of written submissions or should be scheduled for oral argument (or, indeed, for evidentiary presentation) will depend on the circumstances."\textsuperscript{129} The Notes do suggest, however, that it would be inappropriate for a court

\textsuperscript{122} Id. at J-28.
\textsuperscript{123} See Vairo, supra note 1, at 500-01.
\textsuperscript{125} See VAIRO, supra note 2, §§ 7.01-7.04.
\textsuperscript{126} Fed. R. Civ. P. 11(c).
\textsuperscript{127} Fed. R. Civ. P. 11(c)(1)(A).
\textsuperscript{128} Fed. R. Civ. P. 11(c)(1)(B).
\textsuperscript{129} 1993 advisory committee's notes, supra note 83, at J-28.
to impose sanctions without at least entertaining papers on the question of whether the Rule was violated.\textsuperscript{130}

ii. findings

Courts have disagreed over the need for, or extent of, findings required under the 1983 version of Rule 11.\textsuperscript{131} In the 1993 version, Rule 11(c)(3) requires courts to describe the conduct that violates the Rule and to explain the basis for the sanction imposed.\textsuperscript{132} This is a positive development that provides some protection for Rule 11 targets. It will be insufficient for a court simply to state that a claim is frivolous and that $XXX will be imposed as a sanction. The 1993 Advisory Committee's Notes state that the required findings must be made in a written submission or on the record.\textsuperscript{133} The Notes also suggest that the right to these findings can be waived.\textsuperscript{134} Thus, sanctioned attorneys are well advised to invoke Rule 11(c)(3) in all cases.

The text does not require findings if a court decides not to impose sanctions. Because Rule 11 movants have no right to a sanctions award, and because the 1993 proposed Rule is discretionary and not mandatory, there should be no need for findings if a court decides not to impose sanctions. Nevertheless, part of a sentence in the 1993 Advisory Committee's Notes may result in some confusion: "[T]he court should not ordinarily have to explain its denial of a motion for sanctions."\textsuperscript{135}

iii. standard of review

The text of the proposed Rule makes no mention of the appropriate standard of review, but the 1993 Advisory Committee's Notes make clear that the abuse of discretion standard adopted by the Supreme Court in \textit{Cooter & Gell v. Hartmarx Corp.}\textsuperscript{136} should be applied.\textsuperscript{137} This clarification is important because if the "loose abuse" standard is applied in cases in which sanctions are imposed, an important safeguard will be lost.

\textsuperscript{130} See id.
\textsuperscript{131} See \textit{VAIRO}, supra note 2, § 7.05.
\textsuperscript{132} FED. R. CIV. P. 11(c)(3).
\textsuperscript{133} 1993 advisory committee's notes, supra note 83, at J-28.
\textsuperscript{134} See id.
\textsuperscript{135} Id. (emphasis added).
\textsuperscript{136} 496 U.S. 384 (1990); see also \textit{VAIRO}, supra note 2, § 8.04[d][5] (discussing cases applying \textit{Cooter & Gell} standard).
\textsuperscript{137} 1993 advisory committee's notes, supra note 83, at J-28.
iv. timing questions

The text of the proposed Rule also fails to address the various timing questions that have been discussed in the Rule 11 case law since 1983. The 1993 Advisory Committee's Notes, however, do address the timing question and provide district courts with some guidance and considerable flexibility. The Notes suggest that Rule 11 motions should generally be filed "promptly" but indicate that in some cases it would be inappropriate to move until after the target has had time for reasonable discovery. This positive suggestion is consistent with the proposed textual changes that recognize that a litigant may not possess all the relevant facts supporting his or her position until after discovery is taken. As to when the motion should be decided, the Notes encourage courts to defer the ruling until the end of the case in order to prevent conflicts of interest and attorney-client privilege problems.

c. safe harbor provision

Rule 11(c)(1)(A) ensures that adequate notice will be given to Rule 11 targets, clarifies the procedure for making Rule 11 motions, and provides a "safe harbor." Subsection (c)(1)(A) requires a separate motion to be served under Rule 5 but "not . . . filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected." The purpose of this revision is to make it possible for a litigant to withdraw a claim that he or she knows is not supportable without having to risk Rule 11 sanctions. The motion must set forth specifically the defect in the pleading. This specificity requirement is probably intended to reduce the current practice of making threats or sending vague "Rule 11 letters" aimed at bullying an opponent into withdrawing a paper or abandoning a position.

138. For a discussion of when a notice of a Rule 11 violation or a Rule 11 motion should be made, see VAIRO, supra note 2, §§ 1.05[b][2], 2.02[a][3], 7.07[a]-[f]. For a discussion of the timing of the court's decision, see id. § 7.07[f].
140. For a discussion of these problems, see VAIRO, supra note 2, § 7.04[f].
141. FED. R. CIV. P. 11(c)(1)(A).
142. See 1993 advisory committee's notes, supra note 83, at J-29.
143. See id.
Subsection (c)(1)(B) provides another “safe harbor” when a court imposes sanctions *sua sponte* after a case has been settled or voluntarily dismissed. In that situation the court may not impose monetary sanctions unless it issues an order specifically describing the Rule-violating conduct and requiring the party to show cause why the Rule was not violated.\(^{144}\)

The safe harbor is an important protection for Rule 11 targets. Moreover, it serves the streamlining purpose that the 1983 architects of Rule 11 originally envisioned. It immunizes litigants from Rule 11 sanctions if they withdraw the challenged paper. The 1993 Note explains that under existing case law, litigants “were sometimes reluctant to abandon a questionable contention lest that be viewed as evidence of a violation of Rule 11.”\(^{145}\) A litigant who has made a mistake should have the opportunity to withdraw a paper without suffering sanctions. However, to the extent that the proposed amendments shift the focus from a paper as a whole to each individual aspect of a paper, there will be a potential for more mistakes and thus more opportunity to attack. Unfortunately, therefore, the safe harbor may provide little relief and, when combined with other proposed amendments, instead increase confusion and collateral litigation.\(^{146}\)

The 1993 amendment’s safe harbor is an improvement over the 1991 proposed amendment. Although both versions fail to incorporate the “paper-as-a-whole” doctrine,\(^{147}\) the 1993 version deletes some of the litany of aspects of a paper that may trigger Rule 11. This change, together with permissive rather than mandatory sanctions,\(^{148}\) and the de-emphasis of fee-based sanctions,\(^{149}\) offers a better chance that the latest version of Rule 11 will result in fewer Rule 11 motions.

Unfortunately, however, in some cases the safe harbor may merely push back the time for making hard decisions. Assume that you decided to take Linda Brown’s case. Your adversary served a

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\(^{144}\) **FED. R. CIV. P. 11(c)(1)(B).**


\(^{146}\) *See* **VAIRO, supra** note 2, § 5.04[a].

\(^{147}\) *See id.* §§ 2.04[b][1][10], 2.04[e][1][B]. For a discussion of the paper-as-a-whole approach to evaluating Rule 11 motions, see *id.* § 4.01[e]. The Advisory Committee makes clear in its notes that each aspect of a paper should be analyzed and that the sanctions imposed should flow directly from that analysis. Thus, the paper-as-a-whole approach, by which a litigant who filed a paper containing baseless as well as colorable claims would not be sanctioned if the paper as a whole was colorable, has been abandoned. Unfortunately, the emphasis on each aspect, rather than on analyzing the paper-as-a-whole, will encourage counterproductive Rule 11 activity. *See id.*

\(^{148}\) *Id.* § 2.04[e][1][C][ii]; *see supra* part II.B.2.a.

\(^{149}\) *See* **VAIRO, supra** note 2, § 2.04[e][1][C][v]; *infra* part II.B.2.f.ii.
Rule 11 motion, citing *Plessy v. Ferguson*\(^{150}\) and its progeny. You want to respond that you are making a nonfrivolous argument for a change in the law, but will the judge agree with you? Judge Schwarzer would say that as long as you explain your argument's purpose and basis you will not be sanctioned.\(^{151}\) He would further argue that there has been some recent movement in the law.\(^{152}\) However, the Rule's standard is "nonfrivolous."\(^{153}\) Thus, you are left worrying about what the individual judge will think and what might happen on appeal. Studies have shown tremendous judicial variance as to when sanctions are appropriate.\(^{154}\)

d. jurisdiction after a case has been settled or voluntarily dismissed

The Advisory Committee would continue to permit sanctions to be imposed on motion if a case is settled or voluntarily dismissed.\(^{155}\) However, the requirement that a motion for sanctions be delayed until twenty-one days after the target has had the opportunity to settle or voluntarily withdraw\(^{156}\) should reduce the kind of "sandbagging" that the Supreme Court permitted in *Cooter & Gell v. Hartmarx Corp.*\(^{157}\) It was unfortunate that under the 1983 Rule, a party that voluntarily dismissed its claim would be subject to a postdismissal sanctions motion when it thought that the litigation was over.\(^{158}\) Under the 1993 amendment, a Rule 11 motion cannot be made unless there is some paper, claim, or contention that can be withdrawn.\(^{159}\) Thus, a potential Rule 11 target need not worry about sanctions if it withdraws a paper or its position before a motion is made.

Similarly, pursuant to subsection (c)(1)(B), when a court seeks to impose sanctions *sua sponte*, monetary sanctions may not be imposed unless the order to show cause was issued before settlement or voluntary dismissal.\(^{160}\) Thus, a party need not have to worry about postdismissal sanctions from either its adversary or the court.

152. See id. at 28-36.
154. See *supra* part II.B.1.d.ii.
156. Id. at J-19.
157. 496 U.S. 384 (1990); see *infra* notes 202-26, 242-43 and accompanying text.
158. See *VAIRO*, *supra* note 2, § 3.02[b].
In *Pavelic & LeFlore v. Marvel Entertainment Group*, the Supreme Court ruled that only the attorney signing a paper could be sanctioned under Rule 11. Other lawyers or the law firm could not be. Many have argued that a greater deterrent effect could be achieved by imposing sanctions on other attorneys also responsible for the violation. Thus, the 1993 amendments permit the court to impose sanctions on the law firm or other lawyers as well. Indeed, the 1993 Advisory Committee’s Notes accompanying the amendments suggest that the law firm ordinarily should be held responsible for the Rule 11 violations of its partners or associates.

The 1993 Advisory Committee’s Notes also suggest that courts may find it appropriate to make an inquiry to determine who should bear responsibility for the Rule 11 violation. The Notes state that in some cases the court may determine that it is appropriate to impose sanctions on other attorneys in the firm, co-counsel, the law firm, other law firms, or the party. The court also may determine that it is appropriate to sanction one or more of those persons rather than the signer. For example, employers often substantially restrict government or other institutional attorneys regarding the positions they may take. The 1993 Advisory Committee’s Notes suggest that in some cases it may be more appropriate to sanction the entity itself rather than the individual attorney.

The introduction of nonsigner liability will result in additional Rule 11 activity as the courts seek to determine who should be sanctioned. However, fairness and practicality require such activity. Law firms and experienced attorneys may otherwise escape Rule 11 liability by having an impecunious junior associate sign papers. The proposed amendment eliminates the “designated signer” problem. While

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162. Id. at 127.
163. See VARIO, supra note 2, § 10.02[a][4] (discussing Pavelic & LeFlore).
164. FED. R. CIV. P. 11(c)(1)(A).
165. 1993 advisory committee’s notes, supra note 83, at J-27.
166. Id.
167. Id.
168. Id.
169. Id. Under proposed subsection (c)(2)(A), monetary sanctions may not be awarded against a represented party unless it caused the presentation or maintenance of a position for an improper purpose. Id. at J-21. To the extent that the Advisory Committee was concerned about attorney-client relations, the proposal will do little. An attorney who seeks to avoid sanctions may still want to defend by pointing out that the client wanted a paper filed for some improper purpose, such as to delay the proceedings.
it would be ideal to expect young attorneys and institutional attorneys to stand up to their employers, it is preferable to place Rule 11 liability where it truly belongs. If senior attorneys, the institution, or the law firm are held responsible, better law firm and individual practices may be the result.

\[f.\] **limitations on sanctions**

i. **least severe sanction rule**

One of the critical problems with Rule 11 is that the use of fee-based sanctions has encouraged excessive satellite litigation.\(^{170}\) With attorneys’ fees or fee-based sanctions as the norm, there was an incentive to seek sanctions. In recognition of this problem, the 1993 amendments and 1993 Advisory Committee’s Notes de-emphasize fee-based sanctions,\(^{171}\) and Rule 11(c)(2) requires courts to impose a sanction that is “limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated.”\(^{172}\)

ii. **de-emphasis of fee-based sanctions**

Instead of isolating attorneys’ fees as a type of permissible sanction, subsection (c)(2) begins by listing a range of possible sanctions.\(^{173}\) Subsection (c)(2) provides for monetary sanctions, but makes clear that attorneys’ fees may be awarded only when sanctions are imposed on motion and only when necessary to achieve a deterrent effect.\(^{174}\) In addition that subsection provides that partial fees may be awarded and that only fees and costs “incurred as a direct result of the violation” may be awarded.\(^{175}\) The 1993 Advisory Committee’s Notes further explain that there is a duty of mitigation.\(^{176}\)

As to the types of sanctions courts should consider, Rule 11(c)(2) states:

[T]he sanction may consist of, or include, directives of a non-monetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of

\(^{170}\) See VAiRO, supra note 2, §§ 2.02(b), 2.03[a].

\(^{171}\) See 1993 advisory committee’s notes, supra note 83, at J-25 to -26.

\(^{172}\) FED. R. CIV. P. 11(c)(2).

\(^{173}\) Id.

\(^{174}\) Id.

\(^{175}\) Id.

\(^{176}\) 1993 advisory committee’s notes, supra note 83, at J-26.
the reasonable attorneys' fees and other expenses incurred as a direct result of the violation. The 1993 Advisory Committee's Notes reinforce the message. The Notes list a number of other nonmonetary sanctions that courts should consider and include a lengthy paragraph that discourages courts from imposing fee-based sanctions unless they are carefully justified. The Rule leaves the question of the appropriate sanction to the court's discretion. The 1993 Advisory Committee's Notes, however, list numerous factors that may be relevant, such as the wilfulness of the violation, whether the whole paper or minor parts violated the rule, the litigant's prior sanctions history, and the financial resources of the target.

The Rule contains several other limitations. First, Rule 11(c)(2)(A) prohibits the imposition of sanctions against a represented party if the Rule 11 violation is based on a legal position taken. Second, a court may not award a monetary sanction when imposing sanctions sua sponte, unless it issues an order to show cause before a case is voluntarily dismissed or settled.

3. Rule 11(d)—inapplicability to discovery

The 1983 version of Rule 11 applied to discovery motions, while Rule 26(g) applied to discovery requests and responses. Under the proposed amendments to Rule 11(d), Rule 11 would be wholly inapplicable to discovery. The 1993 Advisory Committee's Notes remind litigants that Rules 26(g) and 37 apply to the discovery process and point out that Rule 11 is not the only federal sanctions rule. Courts may impose sanctions for contempt under the court's inherent power, under 28 U.S.C. § 1927, or under similar rules or stat-

178. See 1993 advisory committee's notes, supra note 83, at J-25; see also VAIRO, supra note 2, § 9.03[b] (discussing nonmonetary sanctions).
184. See VAIRO, supra note 2, § 1.04[b].
186. Id. at J-30.
187. Id.
If courts interpret Rule 11 as the Advisory Committee intends, with less emphasis on fee-based sanctions, litigants may still turn to those alternative sources of sanctioning power. Moreover, Rule 26(g) has not been amended along the same lines as Rule 11. Signing discovery papers is the only way to trigger Rule 26(g) sanctions liability. However, Rule 26(g) contains no safe harbor or any of the other procedural protections that have been incorporated into Rule 11. It is possible, therefore, that there will be a shift to Rules 26(g) and 37 to curb perceived abuses of discovery; this would make a certain amount of sense given that discovery abuse has long been thought to be the main cause of delay and excess expense in the federal courts.

III. IMPACT OF THE 1993 AMENDMENTS

The 1993 amendments to Rule 11 will have little impact on the bulk of the case law that reviews a lawyer's affirmative duty to engage in reasonable investigation. There are substantial areas of case law, however, that will be affected by the amendments. For example, much of the law established by the Supreme Court's four Rule 11 cases will be overturned.

The four Supreme Court cases decided to date, Pavelic & LeFlore v. Marvel Entertainment Group, Cooter & Gell v. Hartmarx Corp., Business Guides, Inc. v. Chromatic Communications Enterprises, Inc., and Willy v. Coastal Corp., answered some specific questions about Rule 11 but raised others. The Court's general approach has been to interpret Rule 11 literally. The thrust of these opinions has been to enable a more aggressive approach to Rule 11 that ignores the chilling effect and satellite litigation problems.

189. See Fed. R. Civ. P. 26(g).
A. Pavelic & LeFlore v. Marvel Entertainment Group: May NonSigners Be Sanctioned?

The first case, Pavelic & LeFlore v. Marvel Entertainment Group,\(^{195}\) set the tone. Writing for the Court, Justice Scalia stated that the Court “give[s] the Federal Rules of Civil Procedure their plain meaning.”\(^ {196}\) The question in Pavelic & LeFlore was whether only the attorney who signed a paper that violated Rule 11 could be sanctioned, or whether the attorney’s law firm could be sanctioned as well. Finding that the language of the rule permitted only the signer to be sanctioned, the Court stated: “Our task is to apply the text, not to improve upon it.”\(^ {197}\)

Although the effect of Justice Scalia’s opinion was to limit law firm liability and appears to be the augur of a more sensitive, interpretive approach to the Rule, it is clear that he was not trying to limit Rule 11’s force. Rather, Justice Scalia took the occasion to opine about the Rule’s purpose. Although he agreed that it would “better guarantee reimbursement of the innocent party” to permit sanctions to be imposed against the law firm, he found that Rule 11’s key purpose is deterrence.\(^ {198}\) The Rule itself speaks in terms of “sanction” not reimbursement.\(^ {199}\) Moreover,

\[\text{[i]t is at least arguable that these purposes are better served by a provision which makes clear that, just as the court expects the signer personally—and not some nameless person within his law firm—to validate the truth and legal reasonableness of the papers filed, so also it will visit upon him personally—and not his law firm—its retribution for failing in that responsibility. The message thereby conveyed to the attorney, that this is not a “team effort” but in the last analysis yours alone, is precisely the point of Rule 11.}\(^ {200}\)

While the emphasis on the Rule’s deterrent effect was worthwhile to the extent that it minimized fee-shifting sanctions, it is clear that the Supreme Court had deterrence in mind and not amelioration. This strict interpretation of Rule 11 thus foreboded problems for those who would raise claims at the edge of the law. Under the 1983 Rule, if one filed such a claim but then voluntarily dismissed it, one still ran


\(^{196}\) Id. at 123.

\(^{197}\) Id. at 126.

\(^{198}\) Id.

\(^{199}\) FED. R. CIV. P. 11(c).

\(^{200}\) Pavelic & LeFlore, 493 U.S. at 126-27.
the risk of being sanctioned. Thus, the reasonable attorney, even one with a colorable claim, might not have risked pursuing a potentially meritorious claim for fear of sanctions. There clearly was no free bite of the apple. Under the 1993 Rule, however, an attorney can withdraw a paper when served with a Rule 11 motion\(^\text{201}\) without risking sanctions.

The 1993 amendments clearly will change the *Pavelic & LeFlore* result because the revisions expressly allow the court to impose sanctions on anyone who is culpable. However, the revisions also maintain the deterrent emphasis of the Rule; therefore, attorneys who fail to embrace the safe harbor provision may invite more severe sanctions.

**B. Cooter & Gell v. Hartmarx Corp.**

*Cooter & Gell v. Hartmarx Corp.*\(^\text{202}\) signaled an even tougher approach to Rule 11. The *Cooter & Gell* Court faced three issues: (1) whether the district court had the power to sanction a party who voluntarily dismissed an action; (2) what the appellate standard of review should be; and (3) whether additional sanctions in the form of attorneys’ fees may be imposed for defending a Rule 11 award on appeal.\(^\text{203}\) The Court’s answers to the first two questions signaled significant problems in terms of the Rule’s chilling effect and associated satellite litigation.

1. **When does a court have jurisdiction to sanction?**

With respect to the first issue, the Court found that the district court had jurisdiction even when a case is voluntarily dismissed under Rule 41(a)(1)(i).\(^\text{204}\) Justice O’Connor’s majority opinion stressed that the purpose of Rule 11 is to curb abuses of the judicial system. Because the issue under Rule 11 is collateral to the merits, courts have continuing jurisdiction to punish abuses.

This analysis was unfortunate. Permitting a litigant to “cure” a Rule 11 violation by voluntarily dismissing an action would effectively streamline litigation—one of the goals of the Advisory Committee.\(^\text{205}\)

But the Supreme Court allowed the litigant to be punished in *Cooter*
& Gell, years after the complaint was voluntarily dismissed. The Supreme Court’s opinion thus exacerbated the satellite litigation problem; the case was permitted to go on for the purpose of litigating the sanctions issue, long after the main case was dismissed. This comes at the cost of those waiting in the queue.

Fortunately, the 1993 amendments’ safe harbor provision will effectively overrule the result in Cooter & Gell because a litigant will be given twenty-one days to withdraw an offending paper. Thus, if a case is settled or withdrawn, the adversary will not be permitted to file a Rule 11 motion. Moreover, a court may not impose monetary sanctions *sua sponte* unless it issues an order to show cause before the case is dropped.

2. What is the appellate standard of review?

The Court’s adoption of the abuse of discretion standard of appellate review in Cooter & Gell is problematic. The Court correctly noted that the district court has the best overall view of the litigant’s conduct, but there is widespread concern that Rule 11 is not being applied fairly or consistently. Giving the courts of appeals the opportunity to quickly affirm denials of sanctions is one thing; giving undue deference to district courts that have imposed sanctions is another. The *Thomas* approach, which adopted an abuse of discretion standard but called for differing levels of scrutiny depending on the district court’s analysis, is preferable. The 1993 Advisory Committee’s Notes state that the abuse of discretion standard will continue to be employed. Thus, the approach to the standard of review taken by the courts of appeals will be critical.

208. *Id.* at J-21.
209. *Cooter & Gell*, 496 U.S. at 409. For a full discussion of this issue, see *VAIRO*, *supra* note 2, § 8.04. See also *id.* § 2.03[c][2] (discussing standard of appellate review necessary to alleviate chilling effect and satellite litigation problems).
212. *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 872-73 (5th Cir. 1988) (en banc); see *VAIRO*, *supra* note 2, § 2.03[c][2]; see also Johnson et al., *supra* note 211, at 45-47 (noting that federal appellate courts rarely reverse awards of monetary sanctions if they are reasonable).
Rule 11: Past as Prologue?

a. careful “abuse” review

The courts of appeals interpreting the 1983 Rule articulated how the standard was to work without always analyzing the consequences. On the other hand, some courts were sensitive to the problem of overzealous use of sanctions by the district courts. The First Circuit has stated that the court of appeals is not to act as a “rubber stamp” even though an across-the-board abuse of discretion standard is to be applied.214 Similarly, one panel of the Seventh Circuit has written that although appellate review is deferential, the court should give “careful reference to the standards governing the exercise of the court’s discretion and to the purposes Rule 11 is meant to serve.”215

When the district court imposes sanctions based on an erroneous view of the law, some courts have held that Cooter & Gell does not preclude reversal.216 One court, without citing Cooter & Gell, noted that “[a] district court’s decision whether a motion is legally sufficient is a question of law and subject to de novo review.”217 Obviously the court is technically incorrect.

As a practical matter, however, the Ninth Circuit’s erroneous application of law standard amounts to abuse of discretion when it results in a finding of a Rule 11 violation.218 This is a sensible approach. Sanctions should not be permitted to stand when the basis for the sanction is a district court judge’s misapplication of the law. It would be ironic indeed if the appellate court could reverse a grant of a motion to dismiss, for example, because the court misapplied the law, but had to affirm sanctions for the filing of—according to the district court—a frivolous complaint.

b. loose “abuse” review

Other cases demonstrate that appellate decision making is not guided by a desire to cure the effects of aggressive district court action. Indeed, consistent with the Supreme Court’s position, most post-Cooter & Gell opinions have emphasized the importance of the district court in the sanctions process. For example, in Automatic Liquid

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215. Beverly Gravel, Inc. v. DiDomenico, 908 F.2d 223, 225 (7th Cir. 1990) (quoting Kraemer v. Grant County, 892 F.2d 686, 689 (7th Cir. 1990)).
218. See Vairo, supra note 2, § 8.04[d][5][A], at 8-59.
Packaging, Inc. v. Dominik, the Seventh Circuit held that an appellate court must apply the deferential abuse of discretion standard in reviewing the decision to impose Rule 11 sanctions; this standard applies even in cases in which the district court had no special familiarity with the facts and evidence.

There is little indication in the reported cases that Cooter & Gell has had a dramatic impact on appellate dispositions. Courts are continuing to affirm the grant of sanctions, reverse the grant of sanctions, and affirm the denial of sanctions. Yet, an analysis of a few post-Cooter & Gell cases demonstrates the potential for harm from a "chilling effect" perspective.

In two cases there were two-to-one splits as to whether sanctions should have been imposed. In Mareno v. Rowe, the majority affirmed the dismissal of the complaint but reversed the sanctions imposed against the plaintiff because the district court failed to take into account the complexity of New York's long-arm jurisprudence. The dissenting judge believed that under Cooter & Gell's deferential standard of review, the sanctions should have been affirmed.

The majority approach is preferable. Especially in a case such as Mareno, in which the Rule 11 problem stems from the legal basis of a claim, the benefit of the doubt should go to the party asserting the "close" issue. Cooter & Gell should not insulate a district court's decision to impose sanctions from effective review in close cases.

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219. 909 F.2d 1001 (7th Cir. 1990).
220. Id. at 1004.
221. See Teamsters Local 760 v. United Parcel Serv., Inc., 921 F.2d 218 (9th Cir. 1990).
222. See, e.g., Federal Sav. & Loan Ins. Corp. v. Molinaro, 923 F.2d 736, 739 (9th Cir. 1991); United States v. Stringfellow, 911 F.2d 225, 227 (9th Cir. 1990); Mareno v. Rowe, 910 F.2d 1043, 1047 (2d Cir. 1990), cert. denied, 498 U.S. 1028 (1991).
223. See, e.g., First Nat'l Bank & Trust Co. v. Hollingsworth, 931 F.2d 1295, 1310 (8th Cir. 1991); Hughes v. City of Fort Collins, 926 F.2d 986, 990 (10th Cir. 1991) ("[W]hile we believe the case is a close one, under the clear standard so recently articulated by the Supreme Court in Cooter & Gell v. Hartmarx Corp., we cannot say that the district court abused its discretion . . . pursuant to Rule 11."); Nerman v. Alexander Grant & Co., 926 F.2d 717, 722 (8th Cir. 1991) ("[T]o find an abuse . . . we must find either that the district court based its decision [in refusing to impose sanctions] on an erroneous view of the law or a clearly erroneous assessment of the evidence." (quoting NAACP Special Contributions Fund v. Atkins, 908 F.2d 336, 339 (8th Cir. 1990))); Princess Fabrics, Inc. v. CHF, Inc., 922 F.2d 99, 104 (2d Cir. 1990).
225. Id. at 1047-49 (Van Graafeiland, J., dissenting); see also Molinaro, 923 F.2d at 743 (O'Scannlain, J., dissenting) (identifying "several drawbacks inherent in a non-deferential appellate review of a district court's Rule 11 determinations").
226. In cases in which the district court refuses to impose sanctions, the loose abuse standard will be protective. For example, in Hughes v. City of Fort Collins, 926 F.2d 986...
c. when is the law unsettled?

These decisions are important because they relate to the extent to which courts of appeals are likely to correct errors made by a district court taking too narrow a view of whether a claim or position is well grounded in law. For example, courts have taken divergent approaches to the question whether a claim has a legal basis if the law is unsettled. Is it enough that the Supreme Court has not ruled squarely on the issue?

Under the 1983 Rule the controlling issue was whether the circuit in which the action was brought had ruled on the points in question. *DeSisto College Inc. v. Line*\(^{227}\) illustrates this principle. That case raised a question of legislative immunity for a city council. Counsel relied on a First Circuit case and ignored Eleventh Circuit precedent. The Eleventh Circuit was not pleased:

Counsel . . . insist[s] that the position he has taken throughout is “warranted by existing law” of the First Circuit . . . .

. . . It is the rare law that does not exist somewhere; usually completely novel theories of law arise in areas of recent innovation or invention. Otherwise, *the question is not whether the law exists, but whether it pertains in the jurisdiction in which the law is being asserted*.\(^{228}\)

The court said that counsel should compare the law of jurisdiction \(A\) with the law of jurisdiction \(B\). “[T]he lawyer would be required to inform the court that she recognized that XYZ was not yet a cognizable action in B but that she believed that the law of B should be extended, modified, or reversed . . . . Only then would the lawyer have satisfied her obligations under Rule 11.”\(^{229}\) Counsel has a duty to recognize the binding precedent of the Eleventh Circuit.\(^{230}\) The 1993 Advisory Committee’s Notes, however, suggest that so long as there is

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\(^{227}\) 888 F.2d 755 (11th Cir. 1989), cert. denied, 495 U.S. 952 (1990).

\(^{228}\) *Id.* at 766 (emphasis added).

\(^{229}\) *Id.* at 990.

\(^{230}\) The Seventh Circuit takes a similar approach. See TMF Tool Co. v. Muller, 913 F.2d 1185 (7th Cir. 1990).
supporting law or a dissenting opinion in another jurisdiction, sanctions should not be imposed.\textsuperscript{231}

There is no question under the 1993 Rule that if no circuit law exists, a litigant is free to make novel legal arguments.\textsuperscript{232} Similarly, under the 1993 Rule, dispositive law of another circuit should suffice to show that a claim is not groundless.\textsuperscript{233}

Clearly, however, litigants who cite supportive case law from another circuit, but ignore contrary dispositive case law of the home circuit, will still invite sanctions under the theory of a breach of the duty of candor. But what is "dispositive"? A dissenting judge in \textit{International Shipping Co. v. Hydra Offshore, Inc.}\textsuperscript{234} made a relevant point. The case presented a complete diversity issue: whether there is federal jurisdiction when there are aliens on both sides of a diversity case. The Second Circuit ruled that under the law of the circuit it was clear enough that there was no diversity and, therefore, the plaintiff's lawyer should be sanctioned. The dissent disagreed on both scores:

If [R]ule 11 is to fulfill its purpose of deterring frivolous litigation, it is critical that courts articulate clear, objective standards by which attorneys can reliably measure their conduct and that we avoid the corrosive effect of arbitrary, seemingly contradictory applications of the rule. Here, identical arguments asserted in the same district were held in one case not to violate Rule 11, but to "egregious[ly]" violate it in the next; yet the same body of appellate and statutory law was available to both courts. I fear the majority's ruling today

\textsuperscript{231} See 1993 advisory committee's notes, \textit{supra} note 83, at J-25.


\textsuperscript{233} For example, in \textit{Danese v. City of Roseville}, 757 F. Supp. 827 (E.D. Mich. 1991), the defendant argued that the law of another circuit that would have been dispositive rendered the plaintiff's claims frivolous. \textit{Id.} at 829. The district court disagreed:

[S]uch law does not present binding authority in this Court or in the Court of Appeals for the Sixth Circuit. Therefore, plaintiffs' failure to succumb to the dictates of [Fifth Circuit case law] does not amount to an unreasonable practice. Furthermore, even if [those cases] were sixth circuit cases, . . . plaintiffs were free under Rule 11 to argue for an extension, modification, or reversal of [existing law].

\textit{Id.} at 830.

may prove to be a step backward in the evolution of comprehensible and fair standards for applying Rule 11.\textsuperscript{235}

Thus, under the 1983 Rule it was possible to be sanctioned even if there were a judge who agreed that an argument was meritorious or, at least, not frivolous.\textsuperscript{236} This observation points out the subjectivity problem of Rule 11 and its potential for chilling the development of the law. In some cases a sanctioned litigant or attorney will ultimately succeed in reversing the sanctions imposed.\textsuperscript{237} In other cases the sanctioned party will not only succeed in reversing the sanctions, but will also prevail on the law.\textsuperscript{238}

There is no way of knowing if district courts will heed the 1993 Advisory Committee's admonition to deny sanctions motions if there is marginal support.\textsuperscript{239} Because the Advisory Committee's Notes to the 1993 amendments stated that the standard of review will continue to be abuse of discretion,\textsuperscript{240} it is questionable whether the law will change in this area. On the other hand, courts are required to make findings when sanctions are imposed but need not make findings when

\begin{itemize}
\item \textsuperscript{235} Id. at 395 (Pratt, J., dissenting).
\item \textsuperscript{236} For example, in \textit{Danese} the plaintiffs brought a civil rights action against city officials and employees. 757 F. Supp. at 828. The district court ruled in favor of plaintiffs. On appeal the Sixth Circuit reversed in a split decision. \textit{Id.} The defendants then moved to recover actual costs and attorney fees. \textit{Id.} The district court denied Rule 11 sanctions: [P]laintiffs' conduct was within the parameters of acceptable professional conduct. As evidenced by plaintiffs' success in the district court and by the split decision in the Court of Appeals, plaintiffs presented reasonable theories of recovery in their complaint based on an adequate inquiry into relevant facts and sufficient investigation of the relevant law.

Additionally, plaintiffs' contentions may have been warranted by a good-faith argument for the extension, modification, or reversal of existing law, as evidenced by the appellate court's split decision in favor of defendants. \textit{Id.} at 829-30. The court also noted that there was no evidence of bad faith or improper motive. \textit{Id.} at 830.

\item \textsuperscript{237} For example, in \textit{Alia v. Michigan Supreme Court}, 906 F.2d 1100 (6th Cir. 1990), the district court dismissed the complaint and imposed sanctions. \textit{Id.} at 1100. Two judges affirmed the dismissal of the complaint. \textit{Id.} at 1108. One of those judges and the dissenting judge reversed the sanctions. \textit{Id.} The dissenting judge believed that the majority had the law wrong and that the complaint should have been reinstated, as well as sanctions reversed. \textit{Id.} at 1103-08 (Wellford, J., dissenting).

\item \textsuperscript{238} In \textit{In re Edmonds}, 924 F.2d 176 (10th Cir. 1991), a creditor filed a complaint to revoke the debtor's discharge in a bankruptcy proceeding. \textit{Id.} at 178. The debtor moved to dismiss on laches and statute of limitations grounds. \textit{Id.} at 179. The bankruptcy court granted the motion and imposed Bankruptcy Rule 9011 sanctions. \textit{Id.} The district court affirmed. \textit{Id.} The Tenth Circuit disagreed: "[T]he bankruptcy court, creditor advanced a colorable argument why the affirmative defense of laches and the one-year statute of limitations should not bar its revocation." \textit{Id.} at 181. The court of appeals reinstated the complaint and reversed the sanctions. \textit{Id.} at 182.

\item \textsuperscript{239} 1993 advisory committee's notes, \textit{supra} note 83, at J-28.
\item \textsuperscript{240} \textit{Id.}
sanctions are not imposed. Thus, as a practical matter, it is likely that the courts will move toward closer scrutiny in the former situation and "loose abuse" in the latter.

3. No fees on fees

Finally, the Supreme Court in Cooter & Gell decided that it was inappropriate to allow a successful Rule 11 movant to add to a compensatory sanction costs and attorneys' fees for obtaining the sanctions. This portion of Cooter & Gell has been effectively replaced by the new provision in amended Rule 11 which allows the court to shift fees to the prevailing party on a Rule 11 motion.

C. Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.

In the third Supreme Court case, Business Guides, Inc. v. Chromatic Communications Enterprises, Inc., the Court, again using its literal approach to Rule 11, (1) applied the same objective standard to represented parties as to attorneys; (2) held Rule 11 valid under the Rules Enabling Act; and (3) adopted a test for determining which papers were subject to Rule 11.

1. Unrepresented parties are subject to the same standard as attorneys

In Business Guides the Court rejected the argument that imposing sanctions against a represented party that did not act in bad faith violated the Rules Enabling Act. The petitioner argued that Rule 11 imposed an objective standard of reasonableness on represented parties and thereby exceeded the limit of a court's power. Applying its "plain meaning" approach to the interpretation of Rule 11, the Court found that the Rule made no distinction between attorneys who signed papers subject to Rule 11 and others who sign papers.

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241. FED. R. CIV. P. 11(c)(3).
243. FED. R. CIV. P. 11(c)(2).
245. Id. at 550-51.
246. Id. at 551-53.
247. Id. at 543-46.
248. Id. at 551-53.
249. Id. at 551.
250. Id. at 541-44. One problem is determining who will be sanctioned when an individual signs a paper on behalf of a legal entity. See VAIRO, supra note 2, § 10.04.
The paper in issue in Business Guides was an affidavit signed by a represented party in connection with a motion for a temporary restraining order. The Court found that "[t]he essence of Rule 11 is that signing is no longer a meaningless act; it denotes merit. A signature sends a message to the district court that this document is to be taken seriously."

Accordingly, the Court held that a district court may sanction a represented party for signing a paper in violation of Rule 11. The Court stated that "[a] contrary rule would establish a safe harbor such that sanctions could not be imposed where an attorney, pressed to act quickly, reasonably relies on a client's careless misrepresentations."

2. Is there a hierarchy of papers?

In Business Guides the Supreme Court adopted a broad test for determining which "other papers" are subject to Rule 11; this test presumably survives the 1993 Rule. The debate between the majority and the dissent on this issue suggests that there is a hierarchy of papers. The paper in issue was an affidavit that the represented party signed in connection with a motion for a temporary restraining order (TRO). The Court's test was whether the litigant sought to invoke the court's power.

Justice Kennedy, writing in dissent, recommended a narrower test. He "would construe the 'papers' covered by Rule 11 to be those which, like pleadings or motions, invoke the power of the court, as distinct from supporting affidavits alleging factual matters as in this case or under Federal Rule of Civil Procedure 56." Thus, the motion for a TRO itself, which typically would be signed by the attorney, would be sanctionable, but the supporting affidavits, no matter who signed them, would not be.

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252. Id. at 546.
253. Id. at 554.
254. Id. at 550. Justice Kennedy dissented. He is probably correct that the Advisory Committee did not intend to extend Rule 11 to represented parties who sign a paper. See id. at 564-68 (Kennedy, J., dissenting). Clearly, the committee intended to make sure that pro se litigants were covered by the amended Rule. The key purpose of the 1983 amendments to Rule 11 was to provide an effective tool for disciplining lawyers who filed papers without adequate investigation. Id. at 558.
255. See id. at 544-45.
256. Id. at 558.
257. Id. at 544-46.
258. See id. at 554-55 (Kennedy, J., dissenting).
259. Id. at 562 (Kennedy, J., dissenting).
While narrow constructions of Rule 11 are to be applauded, Justice Kennedy's proposal should not be. He mentioned the "warranted by law" clause of Rule 11\(^{260}\) to support his construction, but neglected to mention the "warranted by the facts" clause.\(^{261}\) Rule 11 seeks to eliminate the filing of papers that are not warranted by the facts or law. Indeed, regarding the chilling effect of Rule 11, it is much less likely that there will be a close call as to whether a colorable factual statement or allegation—it either is or is not a fact—has been made, than whether a colorable legal argument has been made.

Moreover, factually frivolous filings are more problematic than legally frivolous filings. Frivolous legal arguments can be addressed with relative ease by motions either to dismiss for failure to state a claim or for summary judgment.\(^{262}\) The law is in the library. When an adversary claims to have the facts, however, and alleges them in an affidavit or other paper, it is relatively difficult to dispose of the matter without resorting to extensive discovery or an expensive trial.\(^{263}\) Neither the parties nor their attorneys should be able to file supporting papers setting forth facts, purportedly on personal knowledge, without risk of sanction.

Thus, the Business Guides opinion is likely to add fuel to an emerging Rule 11 issue: Does Rule 11 apply equally to all types of papers and all types of issues? This issue presents an important problem because there is no question that Rule 11 has been used aggressively against plaintiffs, thereby creating the chilling effect problem.\(^{264}\) In fact one court ruled that plaintiffs are subject to a heavier Rule 11 burden. In \textit{Stitt v. Williams}\(^{265}\) the Ninth Circuit found that a complaint should be judged more severely than a motion for summary judgment. The court stated:

\begin{quote}
The differences between the filing of an opposition to a motion for summary judgment and the filing of a complaint provide a persuasive rationale for treating the two actions differently for purposes of Rule 11. Although we have re-
\end{quote}

\(^{260}\) \textit{Id.} at 562 (Kennedy, J., dissenting) (construing Fed. R. Civ. P. 11(b)(2)).

\(^{261}\) \textit{See id.} (Kennedy, J., dissenting) (construing Fed. R. Civ. P. 11(b)(3)-(4)).

\(^{262}\) \textit{See Fed. R. Civ. P. 12(b)(6), 56.}

\(^{263}\) For a good example of this problem, see the troubled history of Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120 (1989). In \textit{Pavelic & LeFlore} the plaintiff's attorney filed a copyright infringement claim. \textit{Id.} at 121. Because the plaintiff continually changed its factual theory, it was difficult for the court to dispose of the matter by pretrial motion. \textit{See id.} After an expensive trial, the district court finally imposed sanctions of about $100,000. \textit{Id.} at 122.

\(^{264}\) \textit{See supra} part III.B.2.a-b.

\(^{265}\) 919 F.2d 516, 529 (9th Cir. 1990).
cently held that frivolous claims cannot find a "safe harbor" in a complaint merely because the complaint also contains non-frivolous claims, ... we need not be concerned about safe harbors here. The frivolous part of an opposition to a summary judgment motion does not in any way pose the same type of threat to the moving party that a frivolous claim in a complaint poses to an innocent defendant. Therefore, it is appropriate to evaluate such opposition papers under a different standard than we use for papers filed at the outset of the litigation.\(^{266}\)

The problem with this analysis is clear. In many cases the plaintiff may be unable to secure evidence on all elements of a claim until after discovery has been taken, especially when the problem is the factual basis of the claim. For example, in *Kraemer v. Grant County*\(^{267}\) the Seventh Circuit discussed the problems confronting plaintiffs and noted that direct proof of certain elements is difficult, if not impossible, to obtain.\(^{268}\) Thus, the court ruled that it could not require an attorney to procure a confession of participation in a conspiracy from one of the prospective defendants before filing suit . . . .

. . . .

. . . If discovery is necessary to establish a claim, then it is not unreasonable to file a complaint so as to obtain the right to conduct that discovery. "Rule 11 must not bar the courthouse door to people who have some support for a complaint but need discovery to prove their case."\(^{269}\)

It is unlikely that the revisions will have much impact on this issue. The 1993 amendments make it clear, however, that any paper or oral assertion "presented to the court" will implicate Rule 11.\(^{270}\) Thus, the rule can be interpreted quite broadly.

**D. Willy v. Coastal Corp.: Jurisdiction Revisited**

The Court again took a tough approach to enforcement of Rule 11 in *Willy v. Coastal Corp.*\(^{271}\) The plaintiff filed a wrongful discharge

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266. *Id.* (citation omitted).
267. 892 F.2d 686 (7th Cir. 1990).
268. *Id.* at 689.
269. *Id.* at 689-90 (quoting Frantz v. United States Powerlifting Fed'n, 836 F.2d 1063, 1068 (7th Cir. 1987)).
action against his employer in state court.272 The employer removed the case to the Southern District of Texas, arguing that the case presented a federal question.273 The plaintiff unsuccessfully opposed the removal.274 After denying the plaintiff’s motion to remand, the district court dismissed the plaintiff’s action for failure to state a claim and imposed over $22,000 in Rule 11 sanctions against the plaintiff and his attorney.275 The Rule 11 violation was based on the materials that the plaintiff submitted in opposition to the motion to dismiss, not on the materials submitted on the motion to remand.276

The Fifth Circuit reversed the district court on the removal question, finding that no federal question or other basis for federal subject-matter jurisdiction existed.277 Yet the court affirmed the Rule 11 sanction and remanded for reconsideration of the amount of the award.278

On appeal from the remand, the plaintiff argued that because the court decided that the district court lacked subject-matter jurisdiction, it also lacked jurisdiction to award sanctions for the papers submitted on the motion to dismiss.279 Relying on Cooter & Gell,280 the Fifth Circuit decided that the authority to impose sanctions rested in the federal courts’ inherent powers.281

The Supreme Court affirmed.282 It rejected the argument that Rule 11 impermissibly expanded the reach of federal jurisdiction beyond the limits of Article III of the Constitution if a court imposed sanctions in a case in which it lacked subject-matter jurisdiction.283 The Court stated that Congress has the power to make all laws “necessary and proper”284 to establish the courts authorized by Article III and to regulate the conduct of those courts.285 As for Rule 11, the Court held that although lack of subject-matter jurisdiction precludes further adjudication of a matter, a “final determination of lack of subject-matter jurisdiction . . . does not automatically wipe out all pro-

272. Id. at 1078.
273. Id.
274. Id.
275. Id.
276. See id.
277. Id.
278. Id.
279. Id.
282. Willy, 112 S. Ct. at 1081.
283. Id. at 1080.
284. Id. (citing U.S. Const. art. I, § 8, cl. 18).
285. Id.
ceedings had in the district court at a time when the district court operated under the misapprehension that it had jurisdiction.”

As in Cooter & Gell, the Court said that the sanctions question is collateral to the merits. Because the Rule 11 determination does not “signify a district court’s assessment of the legal merits of the complaint,” Rule 11 “does not raise the issue of a district court adjudicating the merits of a ‘case or controversy’ over which it lacks jurisdiction.”

The Court concluded that “there is no constitutional infirmity under Article III in requiring those practicing before the courts to conduct themselves in compliance with the applicable procedural rules in the interim, and to allow the courts to impose Rule 11 sanctions in the event of their failure to do so.”

Apart from its begging the question about whether there was a case or controversy, the Supreme Court’s decision in Willy is fundamentally unfair. The litigant sanctioned in Willy was dragged into the federal court, and ultimately correctly opposed the assertion of federal jurisdiction. If the district court had not erred, the plaintiff would not have been forced to defend the complaint. The opinion shows again just how supportive the Supreme Court is likely to continue to be in affirming the aggressive use of Rule 11. Nevertheless, under the proposed revisions, Willy would be sanctioned for “presenting” papers and making arguments in federal court that offended the Rule’s standards. Indeed, plaintiffs whose cases are removed can be sanctioned the second they suggest that they will not dismiss the complaint because they are in essence “presenting” by “later advocating” the claim to the court.

IV. Conclusion

Over the last ten years, federal practitioners and judges have been quite preoccupied with Federal Rule of Civil Procedure 11. There have been several empirical studies, and some statistics gen-

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286. Id.
288. Willy, 112 S. Ct. at 1080.
289. Id. (quoting Cooter & Gell, 496 U.S. at 396).
290. Id.
291. Id. at 1081.
292. See id. at 1078.
erated by this Author almost ten years ago may be part of the reason why. These "statistics," expanded and incorporated into an article about Rule 11, quickly became ammunition for critics of Rule 11. The statistics seemed to confirm that the Rule was being used disproportionately against plaintiffs, especially in civil rights, employment discrimination, and other types of "disfavored" litigation. The statistics also showed that Rule 11 had become a "cottage industry" and was counterproductively producing more litigation rather than streamlining current litigation proceedings. Professor Stephen Burbank, the reporter for the Third Circuit Task Force on Federal Rule of Civil Procedure 11, criticized this Author's survey of published Rule 11 cases as "highly problematic." In any event the more carefully planned and "statistically correct" studies conducted since this Author's frantic hand count generally confirmed its preliminary findings. Indeed the key trends reported by the Third Circuit Task Force and the Federal Judicial Center in 1988 are comparable to those identified by this Author's study. In addition, the most recent statistical analysis of Rule 11 also confirms most of this Author's findings.


298. Third Circuit Task Force Report, supra note 294, at 60.
299. Id. at 56.
300. See id.; Marshall et al., supra note 75, at 945.
301. Although this Author’s statistics, based on reported cases, are more dramatic, the trends identified by the other two surveys were remarkably similar. See Third Circuit Task Force Report, supra note 294, at 57-58; FJC Study, supra note 294, at 75.
302. See Marshall et al., supra note 75, at 945.

As we expected, our findings support many widely held intuitions about the use and impact of the Rule while at the same time rebutting some other aspects of conventional Rule 11 wisdom. For example, the study reveals that Rule 11 is having a pervasive impact on lawyers' practice, particularly in prompting lawyers to engage in increased pre-filing review of factual matters. The study also confirms the widespread belief that plaintiffs and plaintiffs' lawyers have been the target of sanctions and sanction activity far more frequently than defendants and their attorneys. Interestingly, though, when plaintiffs' and defense lawyers were asked to report the effects Rule 11 has had on their practices, they reported rather similar effects. Only in the area of civil rights did the results clearly differ by side represented. In that category, plaintiffs' lawyers' behavior was affected much more than their opponents' conduct. As for the sanctions themselves, we found that non-monetary sanctions are even more rare than has been believed,
The statistical picture that has emerged since Rule 11 was amended is an interesting one. The data strongly suggest that Rule 11’s impact has been far greater than the 1983 Advisory Committee predicted. Unfortunately, statistical studies do not help develop criteria for determining whether Rule 11 is worth its costs. The Rule 11 debate implicates fundamental tenets of the federal system of civil procedure and asks whether we can afford notice pleading and a liberal discovery system that stacks the deck in favor of plaintiffs. Thus, the Rule 11 dilemma cannot be resolved until the Advisory Committee meets that issue head on and examines our whole system of rules, rather than using Rule 11 as a quick fix for all the system’s perceived ills.

Indeed, drastic changes in the judicial climate over the last ten years parallel the issues that Rule 11 raises. The most important change is that the Supreme Court has been using summary judgment and doctrines such as standing and abstention to guard the federal courthouse door ever more zealously.303 The Court’s implementation of Rule 11 can be viewed as part of this trend to limit access to the federal courts. Unfortunately, even though the 1993 amendments to Rule 11 provide a “safe harbor,” there is a serious question whether it will protect litigants like Linda Brown, or their lawyers—whether they be Julius Chambers, Thurgood Marshall, or a solo practitioner. When a client and a lawyer believe in the merits of a case in good faith, all the safe harbor will do is push back the day of reckoning.

The new standard for interpreting the viability of legal positions will not provide much comfort. The switch from “good faith argument” to “nonfrivolous argument” is not likely to provide a more helpful standard. Courts will still “know it when they see it” or employ the Seventh Circuit’s highly sophisticated “wacky” standard.304

There is concern that the new concepts introduced will result in another wave of litigation to clarify the Rule’s meaning. However, the revisions and the 1993 Advisory Committee’s Notes are a clear and

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304. See Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073, 1080 (7th Cir. 1987) (declaring that plaintiff’s proffered theory of due process was “wacky, sanctionably so”).
emphatic signal that the abuses engendered by the 1983 version of the Rule should be stopped.

Unfortunately, it is uncertain whether district courts and litigants will heed the signal and exercise greater restraint by moving for and imposing sanctions only in clear cases of Rule 11 violations. It may be, for example, that too many district courts will routinely find, with scanty justification, that huge fee awards are necessary to achieve the deterrent purpose of the Rule. Courts of appeals may routinely affirm under the abuse of discretion standard rather than require detailed descriptions of the Rule 11 violation and careful explanations of the sanction imposed.

Nonetheless, on balance the 1993 amendments are a positive step forward. As Judge Robert E. Keeton, Chairperson of the Standing Committee, put it: "'It is a significant change. . . . Rule 11 problems are serious . . . . Something needs to be done.' "305 As Judge Keeton also pointed out, however, "'no solution will achieve consensus.' "306 Indeed, although a majority of the Supreme Court approved the amendments to Rule 11 in April 1993,307 Justices Scalia and Thomas registered a vigorous dissent:

The proposed revision would render the Rule toothless, by allowing judges to dispense with sanction, by disfavoring compensation for litigation expenses, and by providing a 21-day "safe-harbor" within which, if the party accused of a frivolous filing withdraws the filing, he is entitled to escape with no sanction at all.308

As demonstrated by the Supreme Court cases discussed above, the Court's Rule 11 decisions reveal two complementary interpretive approaches: (1) reading the Rule literally; and (2) applying the Rule strictly to combat perceived abuses in federal civil litigation. It remains to be seen whether the Supreme Court and the lower federal courts, under the prompting of Justices Scalia and Thomas, will continue to take a relatively strict approach to the interpretation of Rule 11 or whether the Court will continue to adhere to its literal approach.

306. Id. (quoting Hon. Robert E. Keeton).
Given the new language and purpose of the revisions, the latter approach would have a less draconian effect.\footnote{To date it is too soon to tell how the lower courts will approach the interpretation of Rule 11. Some courts have noted the "liberalizing" effect of the new rule. See, e.g., Hadges v. Yonkers Racing Corp., 845 F. Supp. 1037, 1041 (S.D.N.Y. 1994); Asllani v. Board of Educ. of Chicago, 150 F.R.D. 120, 121 (N.D. Ill. 1993).}

This Author suspects that the Rule 11 battle will go on precisely because, as Judge Schwarzer predicts, we are seeing the Federal Rules of Civil Procedure being used to regulate attorney conduct.\footnote{See Schwarzer, supra note 10, at 12-13.} As discussed at the outset of this Article, we must question the extent to which this apparently benign trend will go too far and undermine the independence of the legal profession and our adversarial system of civil justice—a system that has advanced the law in so many important ways.