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Foreword

Georgene M. Vairo

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FOREWORD

*Georgene M. Vairo**

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I. INTRODUCTION

Twenty years ago, just as I was beginning my career as a law professor, the Advisory Committee on Civil Rules of the Judicial Conference of the United States gave birth to a new tool for dealing with civil litigation abuse: Rule 11. A few months into my career, just months before the 1983 amendments to Rule 11 would become effective, Sol Schreiber, a former United States Magistrate Judge, invited me to join the faculty for an American Law Institute-American Bar Association Federal Practice program. He told me that a new version of Rule 11 was about to become effective. He wanted me to become THE expert on the rule and talk about it at the program. To my embarrassment, I admitted to my ignorance about the rule. He told me not to worry: nobody else had heard much, if anything, about Rule 11 either, but the amendments would be very controversial and would change federal practice forever. I agreed to prepare a talk and have been writing about Rule 11 ever since.

As we all know, Sol was right. He was so right that Rule 11 is still an important part of my academic efforts: the American Bar Association's Center for Professional Responsibility as well as its Tort, Trial & Insurance Practice Section have just co-published the third edition of my 1,000 page, 5.2 pound treatise on the rule.¹ When my non-lawyer friends see the treatise sitting on my coffee table (it will be removed soon), they always ask me: "What's Rule 11?" To lawyers, particularly federal litigators, the words "Rule 11 Sanctions" immediately conjure up very strong opinions about our

1. GEORGENE M. VAIRO, 2 RULE 11 SANCTIONS (Richard G. Johnson ed., 3rd ed. 2004) [hereinafter VAIRO, RULE 11 SANCTIONS].

system of civil justice: Too many frivolous lawsuits! Heavy-handed judges! Chilling effective advocacy and novel claims! Rambo lawyering! In a nutshell, I tell my non-lawyer friends that the rule provides the courts with a way for dealing with frivolous litigation—real or imagined,² and I try to explain the controversy about the rule, and why it is worth writing and continuing to think about.

Rule 11 became a metaphor for our civil justice system. The debate took on a political flavor, and Rule 11 became an important symbol or line in the sand: Will we have open courts? Or, will we begin to shut the doors of the court to those perhaps most in need? This Symposium is important because it provides a variety of reflections on the importance of the rule, and whether it is or can be a positive force in improving the administration of civil justice.

Parents are all-too-familiar with the “terrible twos,” when their cute little baby becomes a small version of the Terminator. And so it was with Rule 11. Looking back, by 1985, two years after its birth, Rule 11, although designed to become a tool for curbing abuse and streamlining litigation, had become a tool of abuse in the opinion of most commentators, including many of its early supporters.³ After much ink was spilled, and after continued debate,⁴ ten years ago, a

2. Paul D. Carrington & Andrew Wasson, *A Reflection on Rulemaking: The Rule 11 Experience*, 37 LOY. L.A. L. REV. 563, 564 n.7 (2004) (questioning whether civil litigation abuse “was or is” a problem).

3. VAIRO, RULE 11 SANCTIONS, *supra* note 1, § 1.07. See, e.g., William W. Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013, 1017–18 (1988) (Judge Schwarzer, a well-known commentator on Rule 11, notes his support for Rule 11 along with his acknowledgment of the Rule’s shortcomings.).

4. VAIRO, RULE 11 SANCTIONS, *supra* note 1, at 2.

Major empirical studies, books and numerous law review articles were written about practice under the 1983 version of Rule 11. Empirical studies include: *Report of the Comm. on Federal Courts: Sanctions and Attorneys’ Fees* (New York State Bar Ass’n June 8, 1987); AM. JUDICATURE SOC’Y, RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULES OF CIVIL PROCEDURE 11, 75–77 (1989) [hereinafter THIRD CIRCUIT TASK FORCE]; SAUL M. KASSIN, AN EMPIRICAL STUDY OF RULE 11 SANCTIONS (1985); JOHN SHAPARD ET AL., REPORT OF A SURVEY CONCERNING RULE 11, FEDERAL RULES OF CIVIL PROCEDURE (1995); ELIZABETH C. WIGGINS & THOMAS E. WILLGING, RULE 11: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES (1991) [hereinafter FINAL REPORT]; THOMAS E. WILLGING, THE RULE 11 SANCTIONING PROCESS 174–75 (1988) [hereinafter FJC Study]; Lawrence C. Marshall et al., *The Use and Impact of Rule 11*, 86 NW. U. L. REV. 943, 943–49 (1992); Melissa L. Nelken, *The Impact of Federal*

grown-up version of Rule 11 was born.⁵

Although the literature spawned by Rule 11 in both its 1983 and 1993 incarnations has contributed to the thinning of various forests, these anniversaries are a good time to reflect anew on the Rule 11 phenomenon. Has it grown up? Is it still going through growing pains? What should Rule 11 look like by its thirtieth birthday?

Happily, I was able to persuade a distinguished cast of authors to provide us with their thoughts about Rule 11 at the time of its amendments' tenth and twentieth birthdays. Is it a "Happy Birthday," or is Rule 11 still falling short of its goals and promises to curb litigation abuse and streamline litigation without unnecessarily chilling the assertion of novel claims or defenses? What can we expect from Rule 11 in the future? Can Rule 11 enhance professionalism in the litigation arena and promote the administration of justice?

The articles submitted explore these questions and more. Some of our participants believe Rule 11, as it exists now, has largely achieved its purposes. Others believe the 1983 version of Rule 11 was a cure worse than any disease. They worry, too, that Rule 11 has opened a Pandora's box: Although the 1993 amendments were largely effective in rooting out some of the worst abuses of Rule 11 litigation, judges can and are using alternative sanctions tools in

Rule 11 on Lawyers and Judges in the Northern District of California, 74 JUDICATURE 147, 148-49 (1990); Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 199-203 (1988) [hereinafter Vairo, *Critical Analysis*]; Georgene M. Vairo, *Rule 11: Where We Are and Where We Are Going*, 60 FORDHAM L. REV. 475, 478-87 (1991) [hereinafter Vairo, *Where We Are*].

It is fair to say that the debate about the 1983 version of Rule 11 prompted the need for empirical study in the rulemaking process. Prior to that debate, the Advisory Committee had not relied on empirical support for proposed rules changes. See Thomas E. Willging, *Past and Potential Uses of Empirical Research in Civil Rulemaking*, 77 NOTRE DAME L. REV. 1121, 1121-22 (2002) [hereinafter Willging, *Empirical Research*] (the Advisory Committee was criticized in the late 1980s for failing to have empirical support for the 1983 version of Rule 11). Notably, several of the authors contributing to this Symposium undertook empirical analysis.

5. Communication from the Chief Justice of the United States Supreme Court Transmitting Amendments to the Federal Rules of Civil Procedure and Forms, pursuant to 28 U.S.C. § 2072, reprinted in 146 F.R.D. 402. See also VAIRO, RULE 11 SANCTIONS, *supra* note 1, § 1.08[e] (explaining the process of amendments and hearings by the Advisory Committee and Judicial Conference leading up to the 1993 amendments to Rule 11).

troubling ways. Finally, two of our authors offer a different vision of Rule 11. In essence, they argue that Rule 11 can be reformed to achieve the higher purpose of enforcing the Model Rules of Professional Conduct. Below, I will offer my thoughts on Rule 11, as I summarize and explain the importance of these articles.

II. RULE 11: A SUCCESSFUL OR FAILED EXPERIMENT IN RULEMAKING?

A. Professor Paul D. Carrington & Attorney Andrew Wasson— Rule 11: A Triumph of Rulemaking

The Symposium begins with “A Reflection on Rulemaking: The Rule 11 Experience,”⁶ by Professor Paul D. Carrington and attorney Andrew Wasson. Professor Carrington served as the Reporter to the Advisory Committee on Civil Rules in the years prior to the 1993 amendments to Rule 11.⁷ From his unique perspective as a rule-maker, Professor Carrington, along with Mr. Wasson, explore and describe the gestation, birth, and re-birth of Rule 11. More provocatively, he and Mr. Wasson explain that the problems engendered by Rule 11 stem from the challenge of rule-making itself.

They argue that rule-makers face difficult problems. Rule-makers must understand that their job is to create rules that will effectuate the “command of substantive lawgivers who make constitutions, statutes, and administrative rules to real events as best they can be perceived.”⁸ This is a “very tall order”⁹ necessitating elastic rules that judges can tailor to achieve substantial justice. However, such elasticity can lead judges and parties away from the very goals underlying the substantive law. Even more troubling, the procedures themselves may end up being used for various improper purposes: “Alas, pity the poor procedural lawgivers whose work is

6. Carrington & Wasson, *supra* note 2.

7. *Id.* at 565 (explaining that the 1983 amendments to Rule 11 were a response to the perception of some federal judges and corporate lawyers that the principles of liberality and tolerance embedded in the Federal Rules of Civil Procedure has created problems in need of a solution).

8. *Id.* at 563.

9. *Id.*

forever the object of subversion by crafty professionals.”¹⁰

The problems with the administration of the 1983 version of Rule 11 have been well-documented. It was definitely subverted by crafty professionals. Although Rule 11 intended the effect of cutting down on some litigation misconduct, Rule 11 motion practice became a problem of its own. Rule 11 became “something a good procedure rule should not” ever become—“a celebrated issue.”¹¹

Despite the challenges facing rule-makers, Professor Carrington and Mr. Wasson conclude that Rule 11, as it now exists, is an example of successful rulemaking. “In its 1938 form, Rule 11 afforded no such shelter for judges inclined to deter abuse. In its 1983 form, perhaps it afforded too much. Possibly, at least for this time and place, the 1993 version has it about right.”¹²

In my view, Professor Carrington and Mr. Wasson are correct that a good procedural rule should be “seen and not heard.” Whether they are correct that the 1993 amendments struck the right balance is a theme discussed by the next article in this Symposium.

B. Professor Carl Tobias—Rule 11: Setting a Bad Example for Rulemaking

The next article, “Rule 11 and Rule Revision,”¹³ by Margaret L. Sanner and Professor Carl Tobias, takes a more critical look at the Rule 11 experience as well as rulemaking in general. In contrast to Professor Carrington and Mr. Wasson, Ms. Sanner and Professor Carl Tobias discuss the dangers of ad hoc rulemaking without the benefit of empirical data. They argue that when rules are adopted without due consideration of the reality of practice, unfortunate and unintended consequences may result.¹⁴ Ms. Sanner and Professor Tobias begin by reviewing the difficulties the 1983 version of Rule 11 presented for many plaintiffs’ attorneys, particularly in the civil rights arena, and the many articles and reports that chronicled the problems with the administration of the rule.¹⁵ They then provide an

10. *Id.* at 564.

11. *Id.* at 566.

12. *Id.* at 572.

13. Margaret L. Sanner & Carl Tobias, *Rule 11 and Rule Revision*, 37 LOY. L.A. L. REV. 573 (2004).

14. *Id.* at 588-89.

15. *Id.* at 576, 577-80.

overview of the 1993 Rule 11 amendment process and conclude with several important recommendations.¹⁶

Ms. Sanner and Professor Tobias argue first that federal rule makers should consider the frequency and number of amendments.¹⁷ Second, they argue that the ninety-four federal district courts should refrain from enacting local rules that conflict with the Federal Rules of Civil Procedure.¹⁸ Third, they argue that the rule makers should rely more on the Federal Judicial Center and other research arms for empirical and analytical support.¹⁹ Finally, they suggest that there should be greater synergy between federal and state rule makers to ensure greater uniformity and less confusion, where appropriate.²⁰

According to Ms. Sanner and Professor Tobias, an important lesson of the Rule 11 experience is that rulemaking based on anecdote rather than empirical data has detrimental consequences for judges, parties, and lawyers, as well as for the rulemaking process itself.²¹ They lament that rule makers have not learned from the Rule 11 experience, and that they are still using anecdotal evidence rather than empirical data as the basis for modifying rules. For example, the 1993 amendments to Rule 26 requiring immediate disclosure of materials adverse to a party's interests shocked many members of the bar. Many lawyers believed that requiring such disclosure without a request from an adversary intruded fundamentally on the attorney-client relationship and placed the attorney at odds with his or her own client. The 1993 amendments to Rule 26 were made without empirical support. These amendments became as controversial as the 1983 version of Rule 11, prompting the need for further amendments to tone down the more objectionable aspects of the 1993 disclosure amendments.

Ms. Sanner and Professor Tobias further demonstrate that the volume of rulemaking changes, whether through the rules amendment process or by Congress, over the last two decades or so has undermined respect for the amendment process.²² For example,

16. *Id.* at 580-97.

17. *Id.* at 593-94.

18. *Id.* at 594-95.

19. *Id.* at 595.

20. *Id.* at 596-97.

21. *Id.* at 588.

22. *Id.* at 589-90.

they argue that the Rule 11 experience provided district judges a prototype for doing what they wanted to do any way they wanted to, rather than applying rules consistently. Thus, they note that many judges now routinely follow their own rules rather than the mandated rules in a number of areas. This, of course, as Ms. Sanner and Professor Tobias correctly suggest, subverts the original purpose of the Federal Rules of Civil Procedure that there be a uniform federal practice.

III. IS RULE 11 WORKING AS INTENDED?

A. Professor Charles Yablon—Rule 11 Is Alive and Working Well

Professor Charles Yablon's article, "Hindsight, Regret and Safe Harbors in Rule 11 Litigation,"²³ provides the empirical support for Professor Carrington's and Mr. Wasson's claim that Rule 11 has struck the correct balance. The article surveys the evidence that the 1993 amendments have been successful in substantially reducing both frivolous litigation and abusive Rule 11 motions. Professor Yablon describes the role that "hindsight and regret" have played in that success.²⁴ The 1993 safe-harbor provision deprived Rule 11 movants of the powerful "hindsight effect" under which judges, having just dismissed a case as non-meritorious, would be more inclined to find that the claim should never have been brought in the first place.²⁵ By decreasing hindsight bias, and by increasing the ability of certain categories of litigants to act on their own feelings of regret over having filed baseless or frivolous claims, the 1993 amendments protect access to the federal courts without increasing frivolous filings, by facilitating an efficient resolution of allegations of frivolous conduct.

Professor Yablon's article is important for a number of reasons. First, he makes a strong case for the proposition that the 1993 version did get it right. He confirms, based on the existing evidence and his own empirical analysis, that the volume of Rule 11 motions has diminished significantly, which was an important goal of the

23. Charles Yablon, *Hindsight, Regret and Safe Harbors in Rule 11 Litigation*, 37 LOY. L.A. L. REV. 599 (2004).

24. *Id.* at 604-05, 608.

25. *Id.* at 618-31.

1993 Advisory Committee.²⁶ More importantly, he argues that the rule is equally as effective at deterring frivolous conduct as the 1983 version—even with the safe-harbor provision that Justice Scalia said would render Rule 11 “toothless,” when he dissented from the adoption of the 1993 amendments.²⁷ The reason is that although the 1993 amendments purported to maintain the same objective standard for Rule 11 violations, in effect, the standard was changed in result to a more objective one. Specifically, the safe-harbor provision has made it more difficult for a Rule 11 movant to win a Rule 11 motion, because the safe-harbor removes “hindsight bias,”²⁸ which affected how judges ruled on Rule 11 motions.

Of course, Professor Yablon is correct. However, it is also true that hindsight bias is removed only if the paper is withdrawn. When an attorney/litigant refuses to withdraw a filing, because of their subjective belief in the merits, and the case is dismissed, the court is forced to deal with the Rule 11 Motion. Arguably the court is apt to be even more hindsight biased, once it considers that the attorney/litigant had an opportunity to act after the Rule 11 notice, but didn’t do so.

Nonetheless, Professor Yablon makes an important contribution to the legal scholarship in general—and about Rule 11 in particular—through the use of cognitive bias theory. “[O]ne of the most widespread and powerful of the behavioral heuristics discovered by cognitive psychologists studying behavioral theory,”²⁹ “hindsight bias” is the “tendency of most people to view past events as more probable than they really were.”³⁰ Accordingly, when a Rule 11 motion is decided at or after the time a judge considers the merits of a claim that has also been attacked as frivolous, the judge will have a tendency to engage in hindsight bias. If the judge dismisses the claim, that additional information will make it more likely that the judge will also find the claim to be frivolous. Professor Yablon discusses a study that confirms this hypothesis, which may be intuitive in result, but for which there was no previous

26. *Id.* at 614-15.

27. *Id.* at 611.

28. *Id.* at 618-31.

29. *Id.* at 621-22.

30. *Id.* at 622.

data to support this common sense.³¹

Having removed hindsight bias—but as I suggested above, possibly only in part—is only one of the improvements of the 1993 version of Rule 11. Professor Yablon also addresses the “toothless” problem predicted by Justice Scalia and others: that frivolous filings would increase, because the safe-harbor amendment would provide abusive litigants with “one free pass” before having to worry about being sanctioned. He provides a novel lexicon for different types of litigators: 1) “tricksters”—litigators who know that their claim lacks merit, but who think that they can hide the reality from their adversaries in order to run up costs and promote settlement; 2) “Don Quixotes”—litigators who maintain ideological or other positions regardless of the current state of the law on the subject; 3) “slackers”—litigators who are lazy or negligent, and who do not care about the merits; and 4) “gamblers”—litigants who are uncertain about the prospects of taking a particular position, but who are willing to take long shots.³²

He shows that the safe-harbor provision is sufficient to deal with the slackers and gamblers. Once slackers are shown the error of their positions, they are likely to withdraw. Similarly, a gambler is not likely to take the economic risk of continuing to litigate once he or she is called on the merits issue. Only “tricksters” and “Don Quixotes” are likely to be undeterred by any form of Rule 11, and such litigants, according to Professor Yablon, make up only a small percentage of the litigators. Thus, he concludes, as did Professor Carrington and Mr. Wasson, that Rule 11 has matured into an effective tool for weeding out claims that ought not be in the federal courts.

Without further empirical study, it is difficult to know whether Professor Yablon is correct that only a small subset of lawyers are likely to continue to be Rule 11 violators. His article suggests the need for further cognitive and other research into the motivations of attorneys. It is important to know who is truly abusing the judicial process. Perhaps it is the case that Rule 11 is not capable of reaching such conduct, but as the next two articles remind us, there are other

31. *Id.* at 622-23 (citing *Baruch Fischhoff, Hindsight ≠ Foresight: The Effect of Outcome Knowledge Under Uncertainty*, 1 J. EXPERIMENTAL PSYCHOL. 288, 289 (1975)).

32. *Id.* at 606-07.

sanctions tools that courts can use to punish egregious conduct. However, the authors of these articles also remind us that the use of these tools, after the 1993 amendments to Rule 11, potentially at least raise many of the same problems as the 1983 version of the rule.

*B. Professor Danielle Kie Hart—The Aftermath of Rule 11:
Enhanced Use of Other Sanctioning Powers*

As the title to Professor Danielle Kie Hart's article, "And the Chill Goes on—Federal Civil Rights Plaintiffs Beware: Rule 11 vis-à-vis 28 U.S.C. § 1927 and the Court's Inherent Power"³³ suggests, some of the problems associated with the use of the 1983 version of Rule 11 did not disappear with the 1993 amendments.

Professor Hart begins by exploring the standards for imposing sanctions under Rule 11, section 1927 and the court's inherent power.³⁴ She then tests her hypothesis that the 1993 amendments have led to more activity under section 1927 and the inherent power authority by setting forth the results of her research on the sources of sanctioning power after the 1993 amendments.³⁵ Her review of reported cases shows that Rule 11 activity has decreased and that alternate sanctioning activity has increased.³⁶

More importantly, Professor Hart's examination of the text of the decisions she surveyed shows that in many cases, the defendants in civil rights cases have used the alternative devices because they had failed to comply with the Rule 11 safe-harbor.³⁷ In some of these "sidestepping" cases, sanctions were imposed under these alternative devices—even though the court suggested that the violation was more akin to a Rule 11 violation than a bad-faith violation, which is the standard under both section 1927 and the court's inherent power. Professor Hart notes that much more research needs to be done to confirm her preliminary findings. And, one contribution of her article is to point out the need for empirical

33. Danielle Kie Hart, *And the Chill Goes On—Federal Civil Rights Plaintiffs Beware: Rule 11 vis-à-vis 28 U.S.C. § 1927 and the Court's Inherent Power*, 37 LOY. L.A. L. REV. 645 (2004).

34. *Id.* at 649-56.

35. *Id.* at 659-62.

36. *Id.* at 662.

37. *Id.* at 662-67.

research to be done on this issue.

Professor Hart next discusses the implications of her research that shows that alternative sanctioning activity has increased. The key problem as she sees it is that sanction seekers are using section 1927 and the court's inherent power to "sidestep" the procedural protections adopted in the 1993 amendments to Rule 11.³⁸ Specifically, litigants who fail to comply with the safe-harbor provision routinely seek sanctions under section 1927 or the court's inherent power. According to Professor Hart, the problem is all the more severe for the civil rights plaintiff. "Sidestepping" has the further potential of eviscerating the 1993 amendments to Rule 11, which she suggests were a step in the right direction.

Professor Hart recommends that courts refuse to impose alternative sanctions when it is clear that the sanctions seeker is trying to evade the safe-harbor. She also notes that the standard for imposing sanctions under section 1927 and the court's inherent power is higher, generally requiring bad faith, than the objective standard of Rule 11. She recommends that the courts make sure that, when imposing sanctions under section 1927 and the court's inherent power, they scrupulously apply the higher substantive, generally subjective standards for imposing such sanctions strictly.

It must be recalled that the purpose of the 1983 amendments was to impress on the courts the duty to impose sanctions in appropriate cases.³⁹ It got the job done: instead of close to zero Rule 11 activity in the years between 1938 and 1983, the federal courts decided thousands of Rule 11 motions, prompting the need for the 1993 amendments.⁴⁰ It may have been difficult for many judges to have imposed sanctions the first time, but once they realized the potency of the tool, such reluctance faded. Now it seems that the sanctioning consciousness continues to persist in other forms.

Professor Hart has expanded on my argument that the existence of the safe-harbor provision has driven many sanctions seekers to other sanctions tools.⁴¹ Indeed, I added a chapter on alternative sanctions devices to the 2004 third edition of my Rule 11 treatise,

38. *Id.* at 669-71.

39. VAIRO, RULE 11 SANCTIONS, *supra* note 1, at ch. 1.

40. See Georgene Vairo, *Rule 11 and the Profession*, 67 FORDHAM L. REV. 589, 598-99 (1998).

41. See *id.* at 689-90.

because they have assumed such importance after the 1993 amendments to Rule 11.⁴²

Professor Hart's article is important because she demonstrates through her research what I have observed only anecdotally: While the volume of sanctions activity under Rule 11 has diminished, section 1927 and the court's inherent power activity has increased. So, even if a civil rights plaintiff is now protected by the safe-harbor provision, such litigants still need to fear sanctions motions, whether the court imposes sanctions or not. While the year 2003 may well be a Happy Birthday for Rule 11, it seems that Rule 11's rediscovered siblings have yet to reach maturity.

One answer to the problems posed by Professor Hart would be to adopt a bright line rule precluding use of section 1927 and the court's inherent power sanctions, if Rule 11 would have been applicable, but for the failure to follow the safe harbor. To the extent that, as the Supreme Court in *Chambers v. NASCO, Inc.*,⁴³ decided, Rule 11 and the other sanctions tools reach different conduct, adoption of such a rule may be problematic. Take, for example, the case of one of Professor Yablon's "tricksters" or "gamblers." Is it good policy to allow someone who has willfully sought to abuse the judicial process to take advantage of an adversary's failure to comply with the safe harbor when it is apparent that the trickster has acted in bad faith? Clearly, Professor Hart is not worried about such a litigant; rather she seeks to protect the civil rights lawyer who has perhaps acted negligently, but certainly not in bad faith.

42. See VAIRO, RULE 11 SANCTIONS, *supra* note 1, at ch. 12 (Richard G. Johnson ed., 3rd ed. 2004); Vairo, *Rule 11 and the Profession*, *supra* note 40, at 643.

43. 501 U.S. 32 (1991). ("We discern no basis for holding that the sanctioning scheme of the statute and the rules displaces the inherent power to impose sanctions for the bad-faith conduct described above. These other mechanisms, taken alone or together, are not substitutes for the inherent power, for that power is both broader and narrower than other means of imposing sanctions. First, whereas each of the other mechanisms reaches only certain individuals or conduct, the inherent power extends to a full range of litigation abuses. At the very least, the inherent power must continue to exist to fill in the interstices.").

C. Professor George Cochran—Can Judges Be Trusted with Sanctions?

Professor George Cochran's article, "The Reality of 'A Last Victim' and Abuse of the Sanctioning Power," picks up, in a dramatic way, on the problem identified by Professor Hart that courts may be tempted to use alternative sanctions devices when the party seeking Rule 11 sanctions has failed to comply with its procedural requirements theme in a dramatic way.⁴⁴ Professor Cochran agrees with Professor Hart that the 1993 version of Rule 11 is an improvement. However, he warns about the potential for the abuse of power of federal judges by telling the story of the impeachment of United States District Court Judge Robert Peck in the aftermath of land disputes following the Louisiana Purchase some two centuries ago.⁴⁵

In that story, Judge Peck had ruled against a lawyer in one politically charged case involving back-dated land grants in Missouri. After Judge Peck had issued his opinion and had sought to attach the land in question, the attorney, Luke Lawless, wrote an anonymous article in the newspaper excoriating Judge Peck for his opinion. Judge Peck held Lawless in contempt. Lawless then took Judge Peck to task by filing a letter seeking Judge Peck's impeachment in the United States House of Representatives. The House voted to impeach by a huge majority on the ground that Judge Peck had engaged in tyranny, and that he had violated the First Amendment, among other things. Judge Peck escaped conviction in the United States Senate by only one vote. In the wake of the impeachment proceedings, Congress enacted the first laws governing the federal court's contempt power.

Of course, Lawless was not a perfect "victim" himself. His conduct may well have violated the ABA Code of Professional Responsibility as well as its successor Model Rules of Professional Conduct. The question, however, is abuse of judicial power. The question of the extent to which attorneys may criticize judges is an important one, clearly implicating First Amendment concerns. Even if Lawless stepped over some boundaries, the question is whether

44. George Cochran, *The Reality of "A Last Victim" and Abuse of the Sanctioning Power*, 37 LOY. L.A. L. REV. 691 (2004) [hereinafter Cochran].

45. *Id.* at 695-700.

Judge Peck overreacted with his awesome power as a judge.

Why tell the story of Judge Peck's impeachment? When Congress enacted the contempt laws, it was seeking to ensure that Luke Lawless would be the "Last Victim" of abusive judicial power. Thus, just as Judge Peck had held Lawless in contempt to "keep the streams of justice clear and pure,"⁴⁶ the purpose of the 1983 amendments to Rule 11 was to "streamline the litigation process by lessening frivolous claims or defenses,"⁴⁷ and this purpose was maintained in the 1993 amendments. In the early days of the 1983 amendments, one commentator noted that there are judges who act very arbitrarily, have biases, and who seek to 'get' particular lawyers;⁴⁸ "[a]nd boy, Rule 11 is some tool to do it with."⁴⁹ So, somewhat ironically, Congress vested within the Judiciary the ability to abuse its power through the Rule 11 sanctioning process.

Luke Lawless, reprehensible though he may have been, was not the "Last Victim" of the abuse of judicial power. Professor Cochran continues by telling the story of the sanctioning of Professor Barry Nakell.⁵⁰ Professor Nakell was also involved in a politically charged case. He was on the losing end of the merits, and he too became the object of a federal district judge's wrath in a highly publicized case. In that case, the court imposed substantial sanctions upon him, most of which were vacated on appeal. The Rule 11 violation finding, however, was not disturbed, and Professor Nakell's professional and personal life became a nightmare. The Dean of his law school as well as his Rabbi noted the powerful effects the case had on him. His psychological distress led to a shoplifting charge to which he pled guilty. He was suspended by the bar, and he lost his teaching position—despite years of nothing but exemplary comments about his performance.

According to Professor Cochran, the moral of the story is that the 1993 amendments to Rule 11 have been a step in the right

46. *Id.* at 698 (Quoting ARTHUR J. STANSBURY, REPORT OF THE TRIAL OF JAMES H. PECK 36 (1833)).

47. FED. R. CIV. P. 11 advisory committee's note to 1983 amendment.

48. Cochran, *supra* note 44, at 110 (quoting Melvyn I. Weiss, *A Practitioner's Commentary on the Actual Use of Amended Rule 11*, 54 *FORDAM L. REV.* 23, 26 (1985)).

49. *Id.* at 700.

50. *Id.* at 700-708.

direction.⁵¹ The safe-harbor should ensure that Professor Nakell is the “Last Victim” of Rule 11. Had the safe-harbor been in effect for him, the district court judge in the case Professor Nakell had brought would have lacked the power to impose monetary sanctions on him, because he had sought to withdraw the case, when it had become clear the claims were not sustainable.⁵²

Professor Cochran, however, notes that being the last victim of Rule 11 does not ensure that Professor Nakell is the last victim of abusive sanctioning power.⁵³ He surveys the case law under section 1927 and the court’s inherent power, and he concludes it is necessary for the federal courts to ensure such tools be used only when bad faith is clear. Not all the federal circuits are as strict in construing such tools as they should be. More importantly, it is difficult to remove all bias from all federal judges. Thus, it is unlikely that we have seen the last victim of sanctions abuse.

As an aside, Professor Cochran and I worked together *pro bono* during the 1980’s on several Rule 11 cases. One such case involved a young attorney in a civil rights case. We were successful in having the sanctions that had been imposed on her vacated. I thought it would be useful to have her perspectives as a part of this Symposium. Thanks to the internet, I was able to track her down. I was delighted to see that in the ensuing years, she had accomplished much in her career, and that she had engaged in significant public service as well. Despite her exoneration and all these accomplishments, the whole Rule 11 experience had been so painful to her that she declined to participate here. Professor Cochran’s article is therefore all the more important, because, as always, he reminds us that it is real people, who cannot always speak for themselves, that are affected by abuses of sanctioning authority.

D. Attorneys Jerold S. Solovy, Norman Hirsch, Margaret Simpson & Christina T. Tomares—Nicely Done, But Case Law Confusion Persists

On a general level, each of the articles discussed above are generally positive about the benefits of the 1993 version of Rule 11.

51. *Id.* at 708-09.

52. *Id.* at 708-13.

53. *Id.* at 713-19.

Professors Hart and Cochran remind us, though, to beware of other sources of sanctioning authority, which have become more important in the wake of the 1993 amendments to Rule 11. But, what of the actual operation of Rule 11? How are the courts interpreting the new provisions? Are there any particular trouble spots? “Sanctions Under Rule 11: A Cross-Circuit Comparison,” by attorneys Jerold S. Solovy, Norman Hirsch, Margaret Simpson, and Christina T. Tomares provides answers to some of these questions.⁵⁴

The article begins by noting that, while Rule 11 has been designed to strike a balance between reducing frivolous claims and preserving fair access to courts, the various federal courts of appeals have approached Rule 11, and implicitly such balancing, in different ways in two key areas: 1) when a paper can be sanctioned for an improper purpose; and 2) how courts determine whether to impose sanctions, including the standard applied and the implementation of the safe-harbor procedures.⁵⁵

With respect to the improper purpose problem, the article surveys two key issues. First, it explores the meaning of an improper purpose.⁵⁶ What improper purposes subject a litigant to sanctions? Only those enumerated in the rule, itself, or others? A key problem here is whether the phrase “any improper purpose” encompasses the filing of a paper that is colorable as a matter of fact and law, but which has been filed to harass an adversary. Can such a paper be said to be filed for an improper purpose? The article notes that complaints are often filed for multiple purposes, including, sometimes, an improper purpose. The article shows that the courts of appeals are taking divergent positions with respect to many of these issues. For example, even though all courts agree the Rule 11 test is objective, they disagree as to whether state of mind can be considered as part of an objective analysis. The article argues that subjective purposes should be ignored.⁵⁷

The next problem tackled is whether filing a complaint, when one purpose is to create bad publicity for an adversary, is conduct sanctionable under the improper purpose clause. The article reviews

54. Jerold S. Solovy et al., *Sanctions Under Rule 11: A Cross-Circuit Comparison*, 37 LOY. L.A. L. REV. 727 (2004) [hereinafter Solovy].

55. *Id.* at 727.

56. *Id.* at 727-29.

57. *Id.* at 731-32.

a recent *en banc* Fifth Circuit opinion that concluded a filing designed to embarrass Kmart was sanctionable conduct.⁵⁸ The test in the Fifth Circuit for a mixed purpose case is that sanctions may be imposed only under unusual circumstances. Relying on rather sparse district court findings, the *en banc* opinion, over a strenuous dissent, reinstated sanctions.

On the other hand, the article points out that the Second Circuit vacated sanctions in a case in which a plaintiff had filed a complaint in New York against defendants, who were pursuing claims against him in Israel in order to obtain leverage in the Israeli case.⁵⁹ The Second Circuit quite clearly would not have imposed sanctions under the facts of the Fifth Circuit case. One is reminded of the "Last Victim" point made by Professor Cochran. Did the lawyer in the Fifth Circuit case enrage the court as Judge Peck had been earlier enraged, and therefore become a victim of his flamboyant publicity stunt?

Another improper purpose problem is whether a complaint may ever be sanctioned for an improper purpose on the ground that the complainant has a right to petition the government. Although the article takes no position on this problem, it makes plain that courts ought to tread lightly to protect any First Amendment rights implicated by a complaint seeking redress from the courts. Additionally, the paper argues that any paper that is legally and factually sound should not be sanctioned under the improper purpose clause.⁶⁰

The article then turns to a discussion of the safeguards afforded to targets of Rule 11 sanctions.⁶¹ Rule 11 affords courts the opportunity to impose non-monetary sanctions *sua sponte*. However, the court must issue an order to show cause that provides the target with the opportunity to be heard. The article reviews the approach of the courts in determining when it is appropriate for sanctions to be imposed *sua sponte*. It concludes that courts ought to use due care in imposing such sanctions, and they ought not impose such sanctions

58. *Id.* at 733-34 (citing *Whitehead v. Food Max of Miss., Inc.*, 332 F.3d 796 (5th Cir. 2003) (*en banc*)).

59. *Id.* at 734-36 (citing *Sussman v. Bank of Isr.*, 56 F.3d 450 (2d Cir. 1995)).

60. *Id.* at 745.

61. *Id.* at 745-55.

in less than egregious cases. It rejects the idea, however, that a subjective bad-faith standard ought to be applied as the Second Circuit held in the recent *In re Pennie & Edmonds, LLP*⁶² case. And, it appears that the Eleventh Circuit is inclined to follow their recommendation.⁶³

When a party initiates sanctions, it must comply with the safe-harbor requirement. The article shows that most courts enforce the safe-harbor strictly, as they should, but there are some signs that some courts of appeals are incorrectly loosening the technical requirements.⁶⁴ Instead of treating the safe-harbor requirement as jurisdictional in nature, some courts are, unfortunately, according to the authors, moving to a waiver model of enforcement. For example, the Fourth Circuit excused a lack of compliance, when the target failed to raise the safe-harbor issue until appeal, finding the safe-harbor was not a jurisdictional requirement.⁶⁵ The Seventh Circuit also has a more flexible approach to compliance with the safe-harbor.⁶⁶

The article concludes by returning to the balancing theme. It argues, correctly in my view, that court of appeals splits should be resolved in favor of protecting fair access to the courts rather than, as the Seventh Circuit generally would have it, by promoting the streamlining of litigation.⁶⁷ It also suggests the Advisory Committee tackle the First Amendment issue implicit in the improper purpose cases involving complaints.

The “Cross-Circuit Comparison” article is important because it gives us a snapshot of the current version of Rule 11 at the age of twenty. It confirms the essential position of all of our commentators that Rule 11—as it now exists—is maturing, and that the balance should be struck in favor of protecting fair access to courts without undue fear of sanctions. However, the article’s snapshot shows that

62. 323 F.3d 86 (2d Cir. 2003), *vacating* Patsy’s Brand, Inc. v. I.O.B. Realty, Inc., 2002 U.S. Dist. LEXIS 491 (S.D.N.Y. 2002).

63. See Solovy, *supra* note 54, at 754 (*citing* Kaplan v. DaimlerChrysler, 331 F.3d 1251, 1255 (11th Cir. 2003)).

64. *Id.* at 755–62.

65. See *id.* at 757–58 (*citing* Rector v. Approved Fed. Sav. Bank, 265 F.3d 248, 253 (4th Cir. 2001)).

66. See *id.* at 760–62 (*citing* Divane v. Krull Elec. Co., 200 F.3d 1020, 1027–28 (7th Cir. 1999)).

67. See *id.* at 762–63.

not all of the excesses of adolescence have been eliminated. There is room for courts to improve on interpreting Rule 11, as well as alternative sanctions tools, to ensure that there are no more "Last Victims."

IV. RELATIONSHIP BETWEEN RULE 11 AND THE REGULATION OF LAWYERS—THE FUTURE

What about the future? Does Rule 11 have room to mature further? The next two articles explore an often overlooked aspect of Rule 11—the relationship between Rule 11 and the regulation of lawyers. When the initial furor over the 1983 version of Rule 11 erupted, and when the first Symposium about the rule was held at the Association of the Bar of the City of New York, United States District Court Judge Thomas Duffy posed a question to the audience, which to paraphrase him was: "What is it with you guys? You complained and complained that the organized bar was not taking care of your bad guys, so you lobbied for a rule; now that you have it, you complain and complain."⁶⁸ In other words, Rule 11 was designed in part as a tool to discipline lawyers. It was the only Federal Rule of Civil Procedure that governed attorney ethical conduct *per se*.

There were two key problems with Rule 11 as originally enacted in 1938. First, Rule 11's certification provisions were "not read enough, not demanding enough and not honored enough."⁶⁹ Second, the sanctions provision was rarely invoked, and the kind of sanction that could be imposed was open to question.⁷⁰

Nevertheless, Rule 11 was the only Federal Rule of Civil Procedure specifically governing attorney ethical conduct. Accordingly, it seemed to be the appropriate vehicle for making lawyers act more responsibly to the court.⁷¹ Thus, in 1983, Rule 11's

68. See Symposium, *Amended Rule 11 Of The Federal Rules Of Civil Procedure: How Go The Best Laid Plans?*, 54 *FORDHAM L. REV* 1, 20 (1985) (Remarks of Kevin Thomas Duffy, U.S.D.J., S.D.N.Y.).

69. Arthur R. Miller & Diana G. Culp, *Federal Practice: Litigation Costs, Delay Prompted the New Rule of Civil Procedure*, *NAT'L L.J.*, Nov. 28, 1983, at 24.

70. See *FED. R. CIV. P. 11 advisory committee's note to 1983 amendment*, reprinted in 97 *F.R.D.* 165, 199 (1983).

71. See Miller & Culp, *supra* note 69, at 10–11 (discussing the 1983 amendments to Rule 11, emphasizing the need to "try and engineer improved

certification provision was substantially revised in an attempt to clarify what an attorney must do before filing a litigation document, and the sanctions provision was amended to provide for mandatory sanctions, which may include a reasonable attorney's fee.⁷² The 1993 version of the rule clarified these ethical requirements, such as the "later advocating" provision, while changing the procedures under the rule, and providing that sanctions are no longer mandatory.

Professor Peter A. Joy⁷³ and attorney Richard G. Johnson's⁷⁴ articles remind us that the language of Rule 11 and the rules of professional conduct governing attorneys are essentially the same. These articles make two important points that may suggest the future direction of Rule 11. First, Professor Joy's extensive empirical analysis shows that Rule 11, as opposed to formal bar discipline, has been the only effective tool for punishing lawyers who have engaged in litigation misconduct. Second, in perhaps the most provocative piece of this Symposium, Mr. Johnson, who is the editor of my Rule 11 treatise, argues that the scope of Rule 11 should be expanded to encompass all forms of unprofessional behavior under the rules of professional conduct. He takes the implications of Professor Joy's findings, that judges are better at enforcing rules of conduct than is the organized bar, and he suggests modifications to Rule 11 that would make it the tool for enforcing all of the Rules of Professional Conduct, not just those ethical rules that parrot the language of Rule 11.

A. Professor Peter A. Joy—Rule 11: The Only Effective Tool for Punishing Lawyers

In his article, "The Relationship Between Civil Rule 11 and Lawyer Discipline: An Empirical Analysis Suggesting Institutional Choices in the Regulation of Lawyers," Professor Joy's exploration

or increased lawyer responsibility" and "moderate lawyer behavior in litigation).

72. FED. R. CIV. P. 11 advisory committee's note to 1983 amendment, *reprinted in* 97 F.R.D. 165, 200 (1983).

73. Peter A. Joy, *The Relationship Between Civil Rule 11 and Lawyer Discipline: An Empirical Analysis Suggesting Institutional Choices in the Regulation of Lawyers*, 37 LOY. L.A. L. REV. 765 (2004).

74. Richard G. Johnson, *Integrating Legal Ethics & Professional Responsibility with Federal Rule of Civil Procedure 11*, 37 LOY. L.A. L. REV. 819 (2004).

of the correlation between Rule 11 and professional discipline begins with the 1993 Advisory Committee Note, which suggested that a possible non-monetary sanction under Rule 11 may be "referring the matter to disciplinary authorities."⁷⁵ In the wake of the 1993 amendments, some commentators suggested that more disciplinary referrals ought to be made based upon Rule 11 proceedings.⁷⁶ Thus, Professor Joy asks two questions: 1) is there empirical evidence to suggest that there is a relationship between Rule 11 and disciplinary proceedings; and 2) should lawyers be disciplined for conduct that is subject to Rule 11 sanctions.

Professor Joy begins by exploring how Rule 11 fits within the overall scheme for lawyer regulation.⁷⁷ A complex system of different institutions comprise the regulatory scheme for lawyers. One such institution is the courts' enforcement of lawyer norms through the judicial process in actions ranging from legal malpractice and fee disputes to sanctions under Rule 11 or other devices. Another institution is the organized bar, whether through bar associations or the state supreme courts that set forth regulations governing attorney conduct. Private institutions also play a role. Journalists write about lawyers; clients exert pressures; the legal marketplace regarding fees and other matters play a role, and so forth. Legislatures also impact attorney conduct.

One need look no further than the furor over the Sarbanes-Oxley Act to see how lawyers react when Congress seeks to assert authority over lawyers and their respective duties to clients and courts. "The institutional constraints on lawyers' conduct converge with ethics rules promulgated by the bar, disciplinary systems involving the bar and state supreme courts, trial courts through their inherent powers, statutes, and rules of procedure such as Rule 11."⁷⁸

Professor Joy continues by comparing the modes of enforcement of the similar standards proscribing litigation abuse by disciplinary

75. Joy, *supra* note 73, at 766 (citing FED. R. CIV. P. 11 advisory committee's note to 1993 amendment, *reprinted in* 146 F.R.D. 401, 587 (1993)).

76. *Id.* (citing Lonnie T. Brown, Jr., *Ending Illegitimate Advocacy: Rein-vigorating Rule 11 Through Enhancement of the Ethical Duty to Report*, 62 OHIO ST. L.J. 1555 (2001); Jeffrey A. Parness, *Disciplinary Referrals Under New Federal Civil Rule 11*, 61 TENN. L. REV. 37 (1993)).

77. *Id.* at 768-85.

78. *Id.* at 768-69.

institutions on the one hand, and courts through sanctions tools on the other. This review leads Professor Joy to conclude that Rule 11 sanctions have a distinct advantage over professional discipline, because courts can more easily identify, correct, and control litigation misconduct that takes place before them in a timely fashion. Because Rule 11 and the rules of professional conduct enforce similar standards, and because the Advisory Committee suggested referral to disciplinary authorities as a sanction, he examined the extent to which the federal courts were imposing such a sanction, but he found that such referrals were rare.

Despite the acknowledged limitations of conducting electronic database research on the incidence of sanctions, it is clear that the data does “tell a story” about the relationship between Rule 11 sanctions and professional discipline for the same conduct.⁷⁹ An exhaustive analysis of the cases showed the overall volume of Rule 11 cases since the adoption of the 1993 version of Rule 11. This analysis confirms the research of Professor Hart that the volume of Rule 11 activity diminished after 1993. Nonetheless, over 2,000 cases were reported. Out of that group of cases, however, only fifty-one involved any discussion of discipline, and only four of these actually involved the imposition of a sanction of referral for professional discipline. Moreover, in the 444 cases in which the federal courts had imposed sanctions, Professor Joy found that the lawyer was sanctioned in a public disciplinary proceeding in only twenty-two of the cases, and in only three of the cases was the lawyer sanctioned for the same misconduct that gave rise to the Rule 11 violation. Thus, Professor Joy concludes, there is very little correlation between Rule 11 sanctions and state disciplinary proceedings.⁸⁰

He then turns to the normative question: notwithstanding the lack of a correlation, *should* there be a relationship?⁸¹ He begins his analysis by noting the similarity of the text of Rule 11 and Model Rule 3.1. He then takes a look at Model Rule 8.3, which governs when an attorney has a duty to report attorney misconduct. His analysis suggests that it is questionable whether Model Rule 8.3

79. *Id.* at 789.

80. *Id.* at 797.

81. *Id.* at 797–806.

provides the link to a higher correlation between Rule 11 and professional discipline. He argues that the bias against mandatory reporting is similar to the 1993 amendment that makes the sanctioning of attorneys discretionary, even if there is a Rule 11 violation.

He concludes by arguing that for the most part there ought not to be more of a correlation between Rule 11 and professional discipline.⁸² Harkening back to the division of labor discussed at the beginning of his article in terms of the various institutions that regulate attorney conduct, he suggests that attorney disciplinary authorities are unable or unwilling to control litigation misconduct, but that trial judges are in a unique position to do so. He persuasively demonstrates that disciplinary authorities have shown themselves to be relatively impotent in dealing with litigation abuse. In contrast, trial judges have shown themselves to be quite proficient at it. Accordingly, Professor Joy would leave it to the federal courts to continue to control abusive litigation conduct through Rule 11, especially because disciplinary authorities have failed to do the job.

As we all know, the legal profession does not stand in good stead in the public at large. While the problem of abusive litigation tactics and frivolous filings has been overstated by some, the public needs to be assured that the profession one way or the other punishes bad lawyers. As we have seen, however, using Rule 11 as the solution of all evils is problematic. Moreover, the debate in the famous *Golden Eagle* case⁸³ shows the federal courts are not happy about using the rule to enforce professional discipline.⁸⁴

B. Attorney Richard G. Johnson—Rule 11's Future: Enforcing the Model Rules of Professional Conduct

In his article, "Integrating Legal Ethics & Professional

82. *Id.* at 806–14.

83. *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531 (9th Cir. 1986).

84. The district court had imposed sanctions on a law firm because it had violated a "duty of candor" that the district court had read into Rule 11—the firm had argued that its legal position was based on existing law when in fact the legal position was based on an argument to change existing law. When reversing the district court, the Ninth Circuit opined that the district court's duty of candor undesirably would require the courts to enforce standards of conduct.

Responsibility with Federal Rule of Civil Procedure 11,⁸⁵ attorney Richard G. Johnson agrees with Professor Joy's conclusion that federal court enforcement of Rule 11 is the most appropriate vehicle for controlling litigation abuse, which otherwise could be punished by state disciplinary authorities. He too notes the disconnect between Rule 11 and the enforcement of litigation norms by disciplinary authorities. Like Professor Joy, he believes Rule 11 is an effective tool for combating attorney misconduct. But he argues that legal ethics and professional responsibility norms ought to be further integrated with the enforcement of Rule 11 as a key part of attorney regulation.

Mr. Johnson's article is an important contribution to the Rule 11 literature in general, and with respect to the argument that Rule 11 and professional ethics norms be further integrated, specifically, because he successfully uses the courts' and the commentators' own words to demonstrate the key issues. The language of Rule 11 is important, because it sets the tone and the parameters for what is acceptable conduct and what is not. As such, Mr. Johnson uses extensive quotes to illustrate the nuances of how the courts and commentators have generally side-stepped the legal ethics and professional responsibility rules that are binding upon lawyers, when determining Rule 11 issues. In over 8,000 Rule 11 opinions to date, the courts have discussed the Model Rules of Professional Conduct in less than 0.5% of them, which is amazing in the proverbial sense of missing the forest for the trees.

The article begins with a discussion of how the text of Rule 11 came to be.⁸⁶ It shows how the precepts of Rule 11 evolved out of the same litigation context as the efforts to adopt the Model Rules. On all fronts, whether the ABA or the Judicial Conference, there were concerns about the rise of abusive litigation. Rule 11, in essence, became the bridge between legal ethics and litigation conduct. Mr. Johnson then surveys the Rule 11 case law to demonstrate how the federal courts missed the opportunity to create a lasting bridge. He shows how the courts tended to interpret Rule 11 as incorporating a negligence standard of care as opposed to a code of conduct. Moreover, he shows that the federal courts, in

85. Johnson, *supra* note 74, at 819.

86. *Id.* at 819-32.

interpreting Rule 11, were reinventing the wheel, when all they had to do was look to Model Rules for guidance.

Mr. Johnson provides an exhaustive analysis of the relevant disciplinary rules, and the impact that those rules have had on Rule 11. He criticizes the refusal of the ABA to sanction (pun intended) the courts to use Rule 11 to enforce the Model Rules, and then argues that such rules ought to provide the standards for applying Rule 11. He demonstrates that much time was wasted in construing Rule 11 and amending it, with respect to matters such as the duty of candor, or the "later advocating" provision, and whether the Rule 11 standard on frivolousness is an objective one, for example. If the courts had adopted the Model Rule approaches on such topics, these would not have proven to be such tough issues.

He further proposes amendments to Rule 11 to integrate it with the rules of professional conduct, and he concludes by arguing that the courts ought to enforce such rules of conduct through Rule 11 as the enforcement vehicle.⁸⁷ Such integration will have the salutary effects of reducing the confusion implicit in having multiple systems for enforcing essentially the same norms. Moreover, even within the courts, using Rule 11 to enforce all professional rules governing litigation misconduct would obviate the need for multiple federal sources of sanctioning power, which feeds back into the warnings of Professors Hart and Cochran regarding the efforts to side-step the Rule 11's safe-harbor by turning to other, more stringent sanctions mechanisms, such as section 1927 and the court's inherent power.

To effectuate his vision, Mr. Johnson proposes amending Rule 11 to expressly incorporate violations of the Model Rules or other state ethics rules as the basis for violating Rule 11. He concludes by arguing that the courts' refusal to enforce all ethical norms has been a major factor in the public's poor perception of the legal profession.

In my view, while the profession has done much of late to tame the excesses of practice, lawyers remain a target for reform efforts to a great extent because of their propensity to seek to maximize their legal fees in situations that may not be well-justified. For instance, by the time that this Symposium is published, Congress may have passed the Class Action Fairness Act, which targets what some believe are the filing of abusive class action lawsuits in state courts

87. *Id.* at 907-15.

to extort huge settlements from corporate defendants. The key perceived culprits here are the so-called coupon cases, where the plaintiffs receive little or nothing and the plaintiffs' attorneys receive millions of dollars.

Undoubtedly, some of the state court filings are appropriate, and notwithstanding the value to individual plaintiffs, they may serve a deterrent purpose; but there is at least a perception that these cases are brought essentially for the purpose of enriching the lawyers who bring them. Such conduct may violate the Model Rules—even when the merits of the case are not frivolous. Where is the consideration for the client? How can any significant legal fee be due and owing to the lawyers if they bring essentially no value to the client? In these situations, by redefining the client to be the class—and not the individuals—such lawyers can claim an aggregated benefit to the individuals in the class. Clearly, on an individual basis, no reasonable contingency lawyer would bring a hundred dollar or less case, yet that is what these coupon cases amount to, and the lawyers then make and receive fee applications sometimes in the seven-to-eight-to-even-nine-figure range. Is such conduct unethical? If so, is it ethical for such attorneys to receive such fees?

As such, Mr. Johnson's conception of Rule 11, as being the other side of the coin of legal ethics and professional responsibility would have a profound impact. Congress would not have to enact laws regarding such class action cases if the legal ethics and professional responsibility rules regarding reasonable fees were incorporated into Rule 11 just as is the prohibition against frivolous conduct. It is no understatement to say that if these two worlds were to collide, the courts, the lawyers, the parties, and the public may all by and large be better off, because there would be a consistent and unified playing field of what is right and wrong in the litigation context, at least in the federal courts.

A further question that must be explored, however, is whether it is appropriate for the federal courts, through Rule 11, to become the arbiters of rules of professional conduct. Currently, we look to each of the states to enforce their rules of conduct. Additionally, choice of law questions abound. Under the *Erie* doctrine,⁸⁸ would or should the federal court incorporate the professional conduct rules of the

88. *Erie RR v. Tompkins*, 304 U.S. 64 (1938).

state in which the federal court sits? Or, should the federal courts be free to adopt their own visions of how to use Rule 11 to enforce the standards in the Model Code? Finally, because Rule 11 does not in itself provide a cause of action, the only conduct that it can reach is that which arises in the context of litigation. So, professional conduct violations arising in transactional matters would seem largely to be beyond the reach of Rule 11, unless, somehow, incorporated into a legal malpractice cause of action.

Mr. Johnson's argument deserves careful thought. Professor Joy has demonstrated that Rule 11 is the most effective tool for enforcing rules of conduct. If the legal profession is serious about improving standards of conduct and improving the public's perception about the profession, Mr. Johnson's article should be explored seriously.

V. CONCLUSION

So, Happy Birthday Rule 11! You have grown up and are doing just fine. But, now that you are close to the age of graduating from college, it is time to get on with the real work. Mr. Johnson is absolutely correct that a more effective tool needs to be developed to deal with abusive litigation that includes improper dealings with clients or neglect for the clients' true interests, not to mention those of opposing parties. Of course, the problem remains: Who gets to determine whether the litigation is abusive, or whether the client's real interests have been served? And, as Professors Tobias, Hart, and Cochran have shown, the judiciary cannot always be counted upon to apply the rules as well as they should. But, as Professor Joy has demonstrated, Rule 11 appears to be the best tool available for enforcing the rules of professional conduct. And, Professors Carrington, Yablon, and attorneys Wasson, Solovy, Hirsh, Simpson, and Tomares have demonstrated that, by and large, after the 1993 amendments to Rule 11, courts are striking the balance just about right.

This Symposium's authors have provided plenty of food for thought. Rule 11 has served as a metaphor for the debates about the problems in the profession. It is likely to continue to do so. Quite clearly, now as always, there will be lawyers—be they tricksters or not—who will act in problematic ways. This Symposium tells us that Rule 11 as currently drafted is working pretty well. Nonetheless, questions remain: What about the migration to other

sanctions rules? Are such tools being overused? Or, should Rule 11 be taken further to get at broader ranges of unethical conduct? Would such an expansion lead to even greater problems, or finally to enhanced administration of civil justice in the federal courts? Stay tuned!

VI. APPENDIX—FEDERAL RULE OF CIVIL PROCEDURE 11 WITH ADVISORY COMMITTEE NOTES 1937–1993

A. FED. R. CIV. P. 11 (1937) (Signing of Pleadings)

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

ADVISORY COMMITTEE NOTE

1937 Adoption

This is substantially the content of former Equity Rules 24 (Signature of Counsel) and 21 (Scandal and Impertinence) consolidated and unified. Compare former Equity Rule 36 (Officers Before Whom Pleadings Verified). Compare to similar purposes, *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 19, r. 4, and *Great Australian Gold Mining Co. v. Martin*, L.R. 5 Ch. Div. 1, 10 (1877). Subscription of pleadings is required in many codes. 2 Minn. Stat. (Mason, 1927) § 9265; N.Y.R.C.P. (1937) Rule 91; 2 N.D.Comp.Laws Ann. (1913) § 7455.

This rule expressly continues any statute which requires a pleading to be verified or accompanied by an affidavit, such as: U.S.C., Title 28:

§ 381 [former] (Preliminary injunctions and temporary restraining orders)

§ 762 [now § 1402] (Suit against the United States)

U.S.C., Title 28, § 829 [now § 1927] (Costs; attorney liable for, when) is unaffected by this rule.

For complaints which must be verified under these rules, see Rules 23(b) (Secondary Action by Shareholders) and 65 (Injunctions).

For abolition of the rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances, see 12 P.S.Pa. § 1222; for the rule in equity itself, see *Greenfield v. Blumenthal*, C.C.A.3 1934, 69 F.2d 294.

B. FED. R. CIV. P. 11 (1983) (Signing of Pleading, Motions, and Other Papers; Sanctions)

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

ADVISORY COMMITTEE NOTE

1983 Amendment

Since its original promulgation, Rule 11 has provided for the striking of pleadings and the imposition of disciplinary sanctions to check abuses in the signing of pleadings. Its provisions have always applied to motions and other papers by virtue of incorporation by reference in Rule 7(b)(2). The amendment and the addition of Rule 7(b)(3) expressly confirms this applicability.

Experience shows that in practice, Rule 11 has not been effective in deterring abuses. See 6 Wright & Miller, *Federal Practice and Procedure: Civil* § 1334 (1971). There has been considerable confusion as to (1) the circumstances that should trigger striking a pleading or motion or taking disciplinary action, (2) the standard of conduct expected of attorneys who sign pleadings and motions, and (3) the range of available and appropriate sanctions. See Rodes, Ripple & Mooney, *Sanctions Imposable for Violations of the Federal Rules of Civil Procedure* 64–65, Federal Judicial Center (1981). The new language is intended to reduce the reluctance of courts to impose sanctions, see Moore, *Federal Practice* ¶ 7.05, at 1547, by emphasizing the responsibilities of the attorney and reinforcing those obligations by the imposition of sanctions.

The amended rule attempts to deal with the problem by building upon and expanding the equitable doctrine permitting the court to award expenses, including attorney's fees, to a litigant whose opponent acts in bad faith in instituting or conducting litigation. See, e.g., *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980); *Hall v. Cole*, 412 U.S. 1, 5 (1973). Greater attention by the district courts to pleading and motion abuses and the imposition of sanctions when appropriate, should discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses.

The expanded nature of the lawyer's certification in the fifth sentence of amended Rule 11 recognizes that the litigation process may be abused for purposes other than delay. See, e.g., *Browning Debenture Holders' Committee v. DASA Corp.*, 560 F.2d 1078 (2d Cir. 1977).

The words "good ground to support" the pleading in the original rule were interpreted to have both factual and legal elements. See, e.g., *Heart Disease Research Foundation v. General Motors Corp.*, 15 Fed.R.Serv.2d 1517, 1519 (S.D.N.Y. 1972). They have been replaced by a standard of conduct that is more focused.

The new language stresses the need for some prefiling inquiry into both the facts and the law to satisfy the affirmative duty imposed by the rule. The standard is one of reasonableness under the circumstances. See *Kinee v. Abraham Lincoln Fed. Sav. & Loan Ass'n*, 365 F. Supp. 975 (E.D. Pa. 1973). This standard is more stringent than the original good-faith formula and thus it is expected that a greater

range of circumstances will trigger its violation. See *Nemeroff v. Abelson*, 620 F.2d 339 (2d Cir. 1980).

The rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories. The court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted. Thus, what constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available to the signer; whether he had to rely on a client for information as to the facts underlying the pleading, motion, or other paper; whether the pleading, motion, or other paper was based on a plausible view of the law; or whether he depended on forwarding counsel or another member of the bar.

The rule does not require a party or an attorney to disclose privileged communications or work product in order to show that the signing of the pleading, motion, or other paper is substantially justified. The provisions of Rule 26(c), including appropriate orders after in-camera inspection by the court, remain available to protect a party claiming privilege or work product protection.

Amended Rule 11 continues to apply to anyone who signs a pleading, motion, or other paper. Although the standard is the same for unrepresented parties, who are obliged themselves to sign the pleadings, the court has sufficient discretion to take account of the special circumstances that often arise in pro se situations. See *Haines v. Kerner*, 404 U.S. 519 (1972).

The provision in the original rule for striking pleadings and motions as sham and false has been deleted. The passage has rarely been utilized, and decisions thereunder have tended to confuse the issue of attorney honesty with the merits of the action. See generally Risinger, *Honesty in Pleading and its Enforcement: Some "Striking" Problems with Fed.R.Civ.P. 11*, 61 Minn. L. Rev. 1 (1976). Motions under this provision generally present issues better dealt with under Rules 8, 12, or 56. See *Murchison v. Kirby*, 27 F.R.D. 14 (S.D.N.Y. 1961); 5 Wright & Miller, *Federal Practice and Procedure: Civil* § 1334 (1969).

The former reference to the inclusion of scandalous or indecent matter, which is itself strong indication that an improper purpose underlies the pleading, motion, or other paper, also has been deleted as unnecessary. Such matter may be stricken under Rule 12(f) as well

as dealt with under the more general language of amended Rule 11.

The text of the amended rule seeks to dispel apprehensions that efforts to obtain enforcement will be fruitless by insuring that the rule will be applied when properly invoked. The word “sanctions” in the caption, for example, stresses a deterrent orientation in dealing with improper pleadings, motions or other papers. This corresponds to the approach in imposing sanctions for discovery abuses. See *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639 (1976) (per curiam). And the words “shall impose” in the last sentence focus the court’s attention on the need to impose sanctions for pleading and motion abuses. The court, however, retains the necessary flexibility to deal appropriately with violations of the rule. It has discretion to tailor sanctions to the particular facts of the case, with which it should be well acquainted.

The reference in the former text to wilfulness as a prerequisite to disciplinary action has been deleted. However, in considering the nature and severity of the sanctions to be imposed, the court should take account of the state of the attorney’s or party’s actual or presumed knowledge when the pleading or other paper was signed. Thus, for example, when a party is not represented by counsel, the absence of legal advice is an appropriate factor to be considered.

Courts currently appear to believe they may impose sanctions on their own motion. See *North American Trading Corp. v. Zale Corp.*, 73 F.R.D. 293 (S.D.N.Y. 1979). Authority to do so has been made explicit in order to overcome the traditional reluctance of courts to intervene unless requested by one of the parties. The detection and punishment of a violation of the signing requirement, encouraged by the amended rule, is part of the court’s responsibility for securing the system’s effective operation.

If the duty imposed by the rule is violated, the court should have the discretion to impose sanctions on either the attorney, the party the signing attorney represents, or both, or on an unrepresented party who signed the pleading, and the new rule so provides. Although Rule 11 has been silent on the point, courts have claimed the power to impose sanctions on an attorney personally, either by imposing costs or employing the contempt technique. See 5 Wright & Miller, *Federal Practice and Procedure: Civil* § 1334 (1969); 2A Moore, *Federal Practice* ¶ 11.02, at 2104 n. 8. This power has been used infrequently. The amended rule should eliminate any doubt as to the

propriety of assessing sanctions against the attorney.

Even though it is the attorney whose signature violates the rule, it may be appropriate under the circumstances of the case to impose a sanction on the client. See *Browning Debenture Holders' Committee v. DASA Corp.*, supra. This modification brings Rule 11 in line with practice under Rule 37, which allows sanctions for abuses during discovery to be imposed upon the party, the attorney, or both.

A party seeking sanctions should give notice to the court and the offending party promptly upon discovering a basis for doing so. The time when sanctions are to be imposed rests in the discretion of the trial judge. However, it is anticipated that in the case of pleadings, the sanctions issue under Rule 11 normally will be determined at the end of the litigation, and in the case of motions, at the time when the motion is decided or shortly thereafter. The procedure obviously must comport with due process requirements. The particular format to be followed should depend on the circumstances of the situation and the severity of the sanction under consideration. In many situations the judge's participation in the proceedings provides him with full knowledge of the relevant facts and little further inquiry will be necessary.

To assure that the efficiencies achieved through more effective operation of the pleading regimen will not be offset by the cost of satellite litigation over the imposition of sanctions, the court must limit, to the extent possible, the scope of sanction proceedings to the record. Thus, discovery should be conducted only by leave of the court, and then only in extraordinary circumstances.

Although the encompassing reference to "other papers" in new Rule 11 literally includes discovery papers, the certification requirement in that context is governed by proposed new Rule 26(g). Discovery motions, however, fall within the ambit of Rule 11.

C. FED. R. CIV. P. 11 (1987)(Signing of Pleading, Motions, and Other Papers; Sanctions)

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

ADVISORY COMMITTEE NOTE

1987 Amendment

The amendments are technical. No substantive change is intended.

D. FED. R. CIV. P. 11 (1993) (Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions)

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

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

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

(1) How Initiated.

(A) By Motion. A motion for sanctions under this rule shall be

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

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

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

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

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

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

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

ADVISORY COMMITTEE NOTE**1993 Amendments**

PURPOSE OF REVISION. This revision is intended to remedy problems that have arisen in the interpretation and application of the 1983 revision of the rule. For empirical examination of experience under the 1983 rule, see, e.g., New York State Bar Committee on Federal Courts, *Sanctions and Attorneys' Fees* (1987); T. Willging, *The Rule 11 Sanctioning Process* (1989); American Judicature Society, *Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11* (S. Burbank ed., 1989); E. Wiggins, T. Willging, and D. Stienstra, *Report on Rule 11* (Federal Judicial Center 1991). For book-length analyses of the case law, see G. Joseph, *Sanctions: The Federal Law of Litigation Abuse* (1989); G. Solovy, *The Federal Law of Sanctions* (1991); G. Vairo, *Rule 11 Sanctions: Case Law Perspectives and Preventative Measures* (1991).

The rule retains the principle that attorneys and pro se litigants have an obligation to the court to refrain from conduct that frustrates the aims of Rule 1. The revision broadens the scope of this obligation, but places greater constraints on the imposition of sanctions and should reduce the number of motions for sanctions presented to the court. New subdivision (d) removes from the ambit of this rule all discovery requests, responses, objections, and motions subject to the provisions of Rule 26 through 37.

Subdivision (a). Retained in this subdivision are the provisions requiring signatures on pleadings, written motions, and other papers. Unsigned papers are to be received by the Clerk, but then are to be stricken if the omission of the signature is not corrected promptly after being called to the attention of the attorney or pro se litigant. Correction can be made by signing the paper on file or by submitting a duplicate that contains the signature. A court may require by local rule that papers contain additional identifying information regarding the parties or attorneys, such as telephone numbers to facilitate facsimile transmissions, though, as for omission of a signature, the paper should not be rejected for failure to provide such information.

The sentence in the former rule relating to the effect of answers under oath is no longer needed and has been eliminated. The provision in the former rule that signing a paper constitutes a certificate that it has been read by the signer also has been eliminated

as unnecessary. The obligations imposed under subdivision (b) obviously require that a pleading, written motion, or other paper be read before it is filed or submitted to the court.

Subdivisions (b) and (c). The subdivisions restate the provisions requiring attorneys and pro se litigants to conduct a reasonable inquiry into the law and facts before signing pleadings, written motions, and other documents, and prescribing sanctions for violation of these obligations. The revision in part expands the responsibilities of litigants to the court, while providing greater constraints and flexibility in dealing with infractions of the rule. The rule continues to require litigants to “stop-and-think” before initially making legal or factual contentions. It also, however, emphasizes the duty of candor by subjecting litigants to potential sanctions for insisting upon a position after it is no longer tenable and by generally providing protection against sanctions if they withdraw or correct contentions after a potential violation is called to their attention.

The rule applies only to assertions contained in papers filed with or submitted to the court. It does not cover matters arising for the first time during oral presentations to the court, when counsel may make statements that would not have been made if there had been more time for study and reflection. However, a litigant’s obligations with respect to the contents of these papers are not measured solely as of the time they are filed with or submitted to the court, but include reaffirming to the court and advocating positions contained in those pleadings and motions after learning that they cease to have any merit. For example, an attorney who during a pretrial conference insists on a claim or defense should be viewed as “presenting to the court” that contention and would be subject to the obligations of subdivision (b) measured as of that time. Similarly, if after a notice of removal is filed, a party urges in federal court the allegations of a pleading filed in state court (whether as claims, defenses, or in disputes regarding removal or remand), it would be viewed as “presenting”—and hence certifying to the district court under Rule 11—those allegations.

The certification with respect to allegations and other factual contentions is revised in recognition that sometimes a litigant may have good reason to believe that a fact is true or false but may need discovery, formal or informal, from opposing parties or third persons to gather and confirm the evidentiary basis for the allegation.

Tolerance of factual contentions in initial pleadings by plaintiffs or defendants when specifically identified as made on information and belief does not relieve litigants from the obligation to conduct an appropriate investigation into the facts that is reasonable under the circumstances; it is not a license to join parties, make claims, or present defenses without any factual basis or justification. Moreover, if evidentiary support is not obtained after a reasonable opportunity for further investigation or discovery, the party has a duty under the rule not to persist with that contention. Subdivision (b) does not require a formal amendment to pleadings for which evidentiary support is not obtained, but rather calls upon a litigant not thereafter to advocate such claims or defenses.

The certification is that there is (or likely will be) “evidentiary support” for the allegation, not that the party will prevail with respect to its contention regarding the fact. That summary judgment is rendered against a party does not necessarily mean, for purposes of this certification, that it had no evidentiary support for its position. On the other hand, if a party has evidence with respect to a contention that would suffice to defeat a motion for summary judgment based thereon, it would have sufficient “evidentiary support” for purposes of Rule 11.

Denials of factual contentions involve somewhat different considerations. Often, of course, a denial is premised upon the existence of evidence contradicting the alleged fact. At other times, a denial is permissible because, after an appropriate investigation, a party has no information concerning the matter or, indeed, has a reasonable basis for doubting the credibility of the only evidence relevant to the matter. A party should not deny an allegation it knows to be true; but it is not required, simply because it lacks contradictory evidence, to admit an allegation that it believes is not true.

The changes in subdivisions (b)(3) and (b)(4) will serve to equalize the burden of the rule upon plaintiffs and defendants, who under Rule 8(b) are in effect allowed to deny allegations by stating that from their initial investigation they lack sufficient information to form a belief as to the truth of the allegation. If, after further investigation or discovery, a denial is no longer warranted, the defendant should not continue to insist on that denial. While sometimes helpful, formal amendment of the pleadings to withdraw

an allegation or denial is not required by subdivision (b).

Arguments for extensions, modifications, or reversals of existing law or for creation of new law do not violate subdivision (b)(2) provided they are “nonfrivolous.” This establishes an objective standard, intended to eliminate any “empty-head pure-heart” justification for patently frivolous arguments. However, the extent to which a litigant has researched the issues and found some support for its theories even in minority opinions, in law review articles, or through consultation with other attorneys should certainly be taken into account in determining whether paragraph (2) has been violated. Although arguments for a change of law are not required to be specifically so identified, a contention that is so identified should be viewed with greater tolerance under the rule.

The court has available a variety of possible sanctions to impose for violations, such as striking the offending paper; issuing an admonition, reprimand, or censure; requiring participation in seminars or other educational programs; ordering a fine payable to the court; referring the matter to disciplinary authorities (or, in the case of government attorneys, to the Attorney General, Inspector General, or agency head), etc. *See Manual for Complex Litigation, Second*, § 42.3. The rule does not attempt to enumerate the factors a court should consider in deciding whether to impose a sanction or what sanctions would be appropriate under the circumstances; but, for emphasis, it does specifically note that a sanction may be nonmonetary as well as monetary. Whether the improper conduct was willful, or negligent; whether it was part of a pattern of activity, or an isolated event; whether it infected the entire pleading, or only one particular count or defense; whether the person has engaged in similar conduct in other litigation; whether it was intended to injure; what effect it had on the litigation process in time or expense; whether the responsible person is trained in the law; what amount, given the financial resources of the responsible person, is needed to deter that person from repetition in the same case; what amount is needed to deter similar activity by other litigants: all of these may in a particular case be proper considerations. The court has significant discretion in determining what sanctions, if any, should be imposed for a violation, subject to the principle that the sanctions should not be more severe than reasonably necessary to deter repetition of the conduct by the offending person or comparable conduct by similarly

situated persons.

Since the purpose of Rule 11 sanctions is to deter rather than to compensate, the rule provides that, if a monetary sanction is imposed, it should ordinarily be paid into court as a penalty. However, under unusual circumstances, particularly for (b)(1) violations, deterrence may be ineffective unless the sanction not only requires the person violating the rule to make a monetary payment, but also directs that some or all of this payment be made to those injured by the violation. Accordingly, the rule authorizes the court, if requested in a motion and if so warranted, to award attorney's fees to another party. Any such award to another party, however, should not exceed the expenses and attorney's fees for the services directly and unavoidably caused by the violation of the certification requirement. If, for example, a wholly unsupportable count were included in a multi-count complaint or counterclaim for the purpose of needlessly increasing the cost of litigation to an impecunious adversary, any award of expenses should be limited to those directly caused by inclusion of the improper count, and not those resulting from the filing of the complaint or answer itself. The award should not provide compensation for services that could have been avoided by an earlier disclosure of evidence or an earlier challenge to the groundless claims or defenses. Moreover, partial reimbursement of fees may constitute a sufficient deterrent with respect to violations by persons having modest financial resources. In cases brought under statutes providing for fees to be awarded to prevailing parties, the court should not employ cost-shifting under this rule in a manner that would be inconsistent with the standards that govern the statutory award of fees, such as stated in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978).

The sanction should be imposed on the persons—whether attorneys, law firms, or parties—who have violated the rule or who may be determined to be responsible for the violation. The person signing, filing, submitting, or advocating a document has a nondelegable responsibility to the court, and in most situations should be sanctioned for a violation. Absent exceptional circumstances, a law firm is to be held also responsible when, as a result of a motion under subdivision (c)(1)(A), one of its partners, associates, or employees is determined to have violated the rule. Since such a motion may be filed only if the offending paper is not

withdrawn or corrected within 21 days after service of the motion, it is appropriate that the law firm ordinarily be viewed as jointly responsible under established principles of agency. This provision is designed to remove the restrictions of the former rule. *Cf. Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120 (1989) (1983 version of Rule 11 does not permit sanctions against law firm of attorney signing groundless complaint).

The revision permits the court to consider whether other attorneys in the firm, co-counsel, other law firms, or the party itself should be held accountable for their part in causing a violation. When appropriate, the court can make an additional inquiry in order to determine whether the sanctions should be imposed on such persons, firms, or parties either in addition to or, in unusual circumstances, instead of the person actually making the presentation to the court. For example, such an inquiry may be appropriate in cases involving governmental agencies or other institutional parties that frequently impose substantial restrictions on the discretion of individual attorneys employed by it.

Sanctions that involve monetary awards (such as a fine or an award of attorney's fees) may not be imposed on a represented party for violations of subdivision (b)(2), involving frivolous contentions of law. Monetary responsibility for such violations is more properly placed solely on the party's attorneys. With this limitation, the rule should not be subject to attack under the Rules Enabling Act. *See Willy v. Coastal Corp.*, 503 U.S. 131 (1992); *Business Guides, Inc. v. Chromatic Communications Enter. Inc.*, 498 U.S. 533 (1991). This restriction does not limit the court's power to impose sanctions. Remedial orders may have collateral financial consequences upon a party, such as dismissal of a claim, preclusion of a defense, or preparation of amended pleadings.

Explicit provision is made for litigants to be provided notice of the alleged violation and an opportunity to respond before sanctions are imposed. Whether 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. If the court imposes a sanction, it must, unless waived, indicate its reasons in a written order or on the record; the court should not ordinarily have to explain its denial of a motion for sanctions. Whether a violation has occurred and what sanctions, if

any, to impose for a violation are matters committed to the discretion of the trial court; accordingly, as under current law, the standard for appellate review of these decisions will be for abuse of discretion. See *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990) (noting, however, that an abuse would be established if the court based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence).

The revision leaves for resolution on a case-by-case basis, considering the particular circumstances involved, the question as to when a motion for violation of Rule 11 should be served and when, if filed, it should be decided. Ordinarily the motion should be served promptly after the inappropriate paper is filed, and, if delayed too long, may be viewed as untimely. In other circumstances, it should not be served until the other party has had a reasonable opportunity for discovery. Given the "safe harbor" provisions discussed below, a party cannot delay serving its Rule 11 motion until conclusion of the case (or judicial rejection of the offending contention).

Rule 11 motions should not be made or threatened for minor, inconsequential violations of the standards prescribed by subdivision (b). They should not be employed as a discovery device or to test the legal sufficiency or efficacy of allegations in the pleadings; other motions are available for those purposes. Nor should Rule 11 motions be prepared to emphasize the merits of a party's position, to exact an unjust settlement, to intimidate an adversary into withdrawing contentions that are fairly debatable, to increase the costs of litigation, to create a conflict of interest between attorney and client, or to seek disclosure of matters otherwise protected by the attorney-client privilege or the work-product doctrine. As under the prior rule, the court may defer its ruling (or its decision as to the identity of the persons to be sanctioned) until final resolution of the case in order to avoid immediate conflicts of interest and to reduce the disruption created if a disclosure of attorney-client communications is needed to determine whether a violation occurred or to identify the person responsible for the violation.

The rule provides that requests for sanctions must be made as a separate motion, i.e., not simply included as an additional prayer for relief contained in another motion. The motion for sanctions is not, however, to be filed until at least 21 days (or such other period as the court may set) after being served. If, during this period, the alleged

violation is corrected, as by withdrawing (whether formally or informally) some allegations or contentions, the motion should not be filed with the court. These provisions are intended to provide a type of “safe harbor” against motions under Rule 11 in that a party will not be subject to sanctions on the basis of another party’s motion unless, after receiving the motion, it refuses to withdraw that position or to acknowledge candidly that it does not currently have evidence to support a specified allegation. Under the former rule, parties were sometimes reluctant to abandon a questionable contention lest that be viewed as evidence of a violation of Rule 11; under the revision, the timely withdrawal of a contention will protect a party against a motion for sanctions.

To stress the seriousness of a motion for sanctions and to define precisely the conduct claimed to violate the rule, the revision provides that the “safe harbor” period begins to run only upon service of the motion. In most cases, however, counsel should be expected to give informal notice to the other party, whether in person or by a telephone call or letter, of a potential violation before proceeding to prepare and serve a Rule 11 motion.

As under former Rule 11, the filing of a motion for sanctions is itself subject to the requirements of the rule and can lead to sanctions. However, service of a cross motion under Rule 11 should rarely be needed since under the revision the court may award to the person who prevails on a motion under Rule 11—whether the movant or the target of the motion—reasonable expenses, including attorney’s fees, incurred in presenting or opposing the motion.

The power of the court to act on its own initiative is retained, but with the condition that this be done through a show cause order. This procedure provides the person with notice and an opportunity to respond. The revision provides that a monetary sanction imposed after a court-initiated show cause order be limited to a penalty payable to the court and that it be imposed only if the show cause order is issued before any voluntary dismissal or an agreement of the parties to settle the claims made by or against the litigant. Parties settling a case should not be subsequently faced with an unexpected order from the court leading to monetary sanctions that might have affected their willingness to settle or voluntarily dismiss a case. Since show cause orders will ordinarily be issued only in situations that are akin to a contempt of court, the rule does not provide a “safe

harbor" to a litigant for withdrawing a claim, defense, etc., after a show cause order has been issued on the court's own initiative. Such corrective action, however, should be taken into account in deciding what—if any—sanction to impose if, after consideration of the litigant's response, the court concludes that a violation has occurred.

SUBDIVISION (D). Rules 26(g) and 37 establish certification standards and sanctions that apply to discovery disclosures, requests, responses, objections, and motions. It is appropriate that Rules 26 through 37, which are specially designed for the discovery process, govern such documents and conduct rather than the more general provisions of Rule 11. Subdivision (d) has been added to accomplish this result.

Rule 11 is not the exclusive source for control of improper presentations of claims, defenses, or contentions. It does not supplant statutes permitting awards of attorney's fees to prevailing parties or alter the principles governing such awards. It does not inhibit the court in punishing for contempt, in exercising its inherent powers, or in imposing sanctions, awarding expenses, or directing remedial action authorized under other rules or under 28 U.S.C. § 1927. *See Chambers v. NASCO*, ___ U.S. ___ (1991). *Chambers* cautions, however, against reliance upon inherent powers if appropriate sanctions can be imposed under provisions such as Rule 11, and the procedures specified in Rule 11—notice, opportunity to respond, and findings—should ordinarily be employed when imposing a sanction under the court's inherent powers. Finally, it should be noted that Rule 11 does not preclude a party from initiating an independent action for malicious prosecution or abuse of process.