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THE REALITY OF "A LAST VICTIM" AND ABUSE OF THE SANCTIONING POWER

*George Cochran**

Prior to 1983, Rule 11 (Rule) of the Federal Rules of Civil Procedure set forth the simple proposition that "[t]he signature of an attorney . . . constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay."¹ Although it also provided that "a willful violation" could result in "appropriate disciplinary action," sanctions were rarely sought.² In 1983, however, against a background of concerns expressed about a caseload crisis,³ alleged "lawyer incompetence,"⁴ and what was then and remains today the

* Professor of Law, University of Mississippi. As with all my work in this area, I dedicate this piece to the late Morton Stavis who was instrumental in putting the Rule 11 Project in place at the Center for Constitutional Rights. In addition, I want to thank Professor Georgene Vairo, Professor Stephen Burbank, Professor Jeffrey Stempel, Alan Morrison, David Vladeck, Jerold Solovy and Laura Kaster for the pro bono services provided to public interest lawyers targeted by the 1983 version of Rule 11 and the work they performed individually and collectively to support what ultimately became the 1993 amendment. With respect to the latter, there is also the work of another great lawyer, the late John Frank, who dedicated a significant portion of his professional time to develop the "Bench-Bar Amendment" that incorporated many of the changes now found in the 1993 version. And finally, there is the work of Chief Judge Mary M. Schroeder and Senior Judge Sam D. Johnson who, from the appellate level, stood steadfast for the lawyer-sensitive "least severe sanction adequate to deter" approach now found in the amended Rule.

1. FED. R. CIV. P. 11 (1980) (amended 1983). See Amendments to the Federal Rules of Civil Procedure, 97 F.R.D. 165, 197 (1983).

2. Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 191 (1988) (noting that from "1950 to 1976 only nineteen Rule 11 motions were reported.").

3. See, e.g., Ronald D. Rotunda, *Lawyers and Professionalism: A Commentary on the Report of the American Bar Association Commission on Professionalism*, 18 LOY. U. CHI. L.J. 1149, 1159 (1987).

4. See CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 185-86 n.2 (1986) (detailing Chief Justice Burger's dissatisfaction with the American bar).

unproven charge that American courts were inundated with frivolous lawsuits,⁵ the Rules Committee took an ill-considered, precipitous step.⁶ it amended the Rule to provide that the signature of an attorney certified that a "pleading, motion, or other paper" was not brought for an improper purpose and reflected a "reasonable inquiry [that] 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"⁷ In contrast to the earlier version, once a violation was found, the Rule imposed mandatory sanctions which could "includ[e] a reasonable attorney's fee."⁸

After the Rule had been in place for two years, I concluded that positive benefits were possible if administered by a lawyer-sensitive

5. In 1991, a Federal Judicial Center survey of 546 federal judges determined that "[a]lthough approximately nine out of ten judges said there is some degree of groundless litigation . . . 65% of 546 respondents said the problem is small or very small, and an additional 22% said it is moderate." Elizabeth C. Wiggins et al., *Special Issue on Rule 11*, 2 FJC DIRECTIONS, Nov. 1991, at 28. In this same time frame, and after soliciting the views of over twelve thousand lawyers and judges and conducting public hearings, a Committee of the New York State Bar found that there was no data to suggest that frivolous complaints were a problem confronting that state's courts. See New York State Bar Ass'n, Report of the Special Committee to Consider Sanctions for Frivolous Litigation in New York State Courts, 1990 FORDHAM URB. L.J., 3, 4, 8; see also Thomas B. Edsell, *Battle Over Damage Awards Takes a More Partisan Turn: Trial Lawyers—Key Democratic Donors—Say They're Targets*, WASH. POST, August 10, 2003, at A4 ("The Florida Medical Association, which had complained 'frivolous' lawsuits are driving up insurance costs, conceded that frivolous lawsuits are not a problem under Florida law."); Danielle Kie Hart, *Still Chilling After All These Years: Rule 11 of the Federal Rules of Civil Procedure and Its Impact on Federal Civil Rights Plaintiffs After the 1993 Amendments*, 37 VAL. U. L. REV. 1, 118 n.524 (2002) (no empirical support for past and present contentions that "frivolous" litigation is a concern); Samuel J. Levine, *Seeking a Common Language for the Application of Rule 11 Sanctions: What is "Frivolous"?*, 78 NEB. L. REV. 677, 682 (1999) ("[E]ven a brief survey of some of the standards articulated by the courts in a number of circuits reveals broad differences in formulation that betray both a lack of uniformity among courts and a more general lack of a clearly defined standard for frivolous activity.").

6. See George Cochran, *Rule 11: The Road to Amendment*, 61 MISS. L.J. 5, 7 (1991) (outlining nine issues relating to the amended Rule that were not anticipated).

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

8. *Id.*

judiciary.⁹ Soon thereafter, however, it became apparent that the attractiveness of an award of fees against opposing counsel, coupled with an increasing propensity for many courts to impose monetary sanctions for both major and minor violations of the Rule,¹⁰ was producing a torrent of satellite litigation.¹¹

By the end of 1987 there were over 688 Rule 11 decisions published in the federal reporters, consisting of 496 district court opinions and 192 circuit court opinions.¹² As a result of the ever-increasing number of cases targeting those involved in public-interest litigation, in May of that year I submitted a proposal to the Center For Constitutional Rights to put in place what was to become known

9. George Cochran, *Sanctions Under Rule 11*, 1986 Fifth Cir. Rep. 209, 223; see also George Cochran & Georgene Vairo, *Rule 11: An Eventful Year*, in CIVIL RIGHTS LITIGATION AND ATTORNEY FEES ANNUAL HANDBOOK 343, 360 (Barbara M. Wolvowitz ed., 1988) (expressing desire that Rule would be "interpreted sensibly").

10. For example, a study by the American Judicature Society found that monetary sanctions were awarded in approximately 95% of the cases in which sanctions were imposed. See Lawrence C. Marshall et al., *The Use and Impact of Rule 11*, 86 NW. U. L. REV. 943, 956-57 (1992); see also Elizabeth C. Wiggins et al., *supra* note 5, at 3, 18 ("Rule 11 sanctions have typically taken the form of monetary fees payable to an opposing party."); Sam D. Johnson et al., *The Proposed Amendments to Rule 11: Urgent Problems and Suggested Solutions*, 43 BAYLOR L. REV. 647, 649 (1991) (noting that "some form of attorneys' fees award is assessed in ninety-six percent of all cases involving a Rule 11 violation"); *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence*, 137 F.R.D. 53, 64 (1991) (noting that the Advisory Committee found that Rule 11 "has too rarely been enforced through nonmonetary sanctions, with cost-shifting having become the normative sanction").

11. Research conducted by Professor Vairo led to her conclusion that at the time of the 1993 amendment, there were approximately 7000 reported cases involving the Rule. Georgene Vairo, *Rule 11 and the Profession*, 67 FORDHAM L. REV. 589, 599 (1998). Relying on an empirical study by the Federal Judicial Center, Greg Joseph concludes that when unreported decisions are included, "actual activity under the Rule dwarfs" the 7000 number. GREGORY P. JOSEPH, *SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE* 14 n.9 (3d ed., Matthew Bender & Co., Inc. 2000) (1989). Also noteworthy is the fact that in addition to Mr. Joseph's work, the period also witnessed two additional treatises on the subject. GEORGENE M. VAIRO, *RULE 11 SANCTIONS: CASE LAW PERSPECTIVES AND PREVENTIVE MEASURES* (2d ed. 1992 & Supps. 1993-1995); JEROLD S. SOLOVY, *SANCTIONS UNDER RULE 11* (2003).

12. Vairo, *supra* note 11, at 599.

as the "Rule 11 Projects."¹³ Designed to provide pro bono representation for lawyers involved in public interest litigation, the Project had only one criteria: representation would only be provided after a determination that the attorney seeking assistance had not engaged in any professional behavior that would warrant sanctioning under the "improper purpose" prong of Rule 11.

13. The proposal included the following:

Issues or Propositions Which Have or Can Be Proven:

(a) . . . Regardless of the Advisory Committee's intent and the belief that "satellite litigation" was to be avoided, Rule 11 now plays a significant role in federal litigation.

(b) At this point, the plaintiff's bar in general and the civil rights bar in particular is the primary victim of the Rule's penalties.

(c) The financial enticement of the Rule, *i.e.*, fee shifting, has put in place a litigation philosophy that generates Rule 11 motions whenever the opportunity presents itself.

(d) Rule 11 motions supercharge a case, poison the atmosphere, increase litigation costs and endanger the attorney-client relationship.

(e) There is no correlation between the imposition of sanctions in the form of fee shifting and legitimate objectives such as speedier trials and upgrading professional behavior of attorneys practicing in federal court.

(f) Marginal cases (which in the past have been precedent setting) are not being filed.

. . . .

(h) As discovered by a research project conducted by the Federal Judicial Center, when faced with an identical set of facts, judges are in disagreement as to whether or not a Rule 11 violation has occurred.

(i) Although one goal sought to be attained through the increased use of sanctions is to ameliorate the "case load crisis" the result has been an increase in satellite litigation and cases being channeled onto the appellate docket which heretofore would not have been appealed. Specifically, anyone who follows F.2d understands that cases involving decisions to impose *or* deny sanctions by district courts are now forming a recognizable segment of the appellate docket.

. . . .

(k) In most instances, "attorney misconduct" is a difference of opinion between counsel and a federal judge as to whether a case is warranted by existing law or extension modification or reversal thereof, *not* willful, knowing, intentional or vexatious behavior by counsel.

Memorandum from George Cochran, to Morton Stavis on Sanctions Project (May 20, 1987) (on file with author).

What followed was a five-year period of intensive, often emotional¹⁴ litigation that produced little professional satisfaction.¹⁵ The objective of this presentation, however, is not to reconfirm the proposition that the action taken in 1993 to amend the Rule was correct¹⁶ by detailing the experiences of those represented by the Project. Rather, I will focus on one case that highlights the unexpected, tragic consequences of the 1983 amendment. Since the subject is the alleged abuse of power by federal judges, it is necessary to place the event in a historical context. To this end, I invite the reader to revisit the impeachment proceedings of United States District Court Judge Robert Peck.

I. THE PECK IMPEACHMENT

Following the Louisiana Purchase, retiring French and Spanish officials were “not above feathering their nests.”¹⁷ To this end, they back-dated grants to enormous tracts of land in the state of Missouri. The fate of these grants soon became “a foremost question of life,

14. “Emotional” in the context of representing lawyers who firmly believed their lawsuit was well grounded in fact or law, and who had both their professional reputation and bank account on the line because of opposing counsel’s decision to file a Rule 11 motion.

15. There were, however, some exceptions. See, e.g., *Thomas v. Capital Sec. Servs., Inc.*, 812 F.2d 984, 989 (5th Cir. 1987), *aff’d in part, vacated in part and remanded*, 836 F.2d 866, 878 (5th Cir. 1988) (altering a “no free passes” rule to mandating a “least severe sanction” approach); *Blue v. United States Dept. of the Army*, 914 F.2d 525 (4th Cir. 1990) (reversing a \$12,000 sanction against junior associate), *cert. denied*, 499 U.S. 959 (1991).

16. As Linda Mullenix explains:

We are often alerted to a problematic rulemaking by the hue and cry of the practicing bar. Perhaps the most famous example of this was the 1983 amendment to Rule 11, the federal sanctioning provision, which was intended “to put teeth” into the sanctioning rule. It certainly did. In the ensuing decade, the federal courts were inundated with Rule 11 petitions and sanctions. The outrage of the practicing bar to the amended Rule 11 finally led to further amendment of Rule 11 in 1993, thereby providing a “safe harbor” for alleged attorney improprieties. The 1993 amendments did the trick. I am very willing to suggest that the 1993 Rule 11 amendments are a fine example of a good rulemaking.

Linda S. Mullenix, *Some Joy in Whoville: Rule 23(f), A Good Rulemaking*, 69 TENN. L. REV. 97, 100 n.17 (2001) (citation omitted).

17. Walter Nelles & Carol Weiss King, *Contempt by Publication in the United States*, 28 COLUM. L. REV. 401, 424 (1928).

law, business and politics”¹⁸ in the state. One group aligned with speculative interests in unconfirmed titles was headed by a United States Senator, Thomas Hart Benton. Following his election, “the person who in fact succeeded him as leader of the legal forces interested (contingent fees were the rule) . . . was Benton’s intimate crony, an Irish adventurer named Luke Lawless.”¹⁹

In 1826, Lawless brought a test case captioned *Heirs of Antoine Soulard*. When filed, it was described by Missouri’s other Senator as “a subject of sheer speculation by a few lawyers, including a corrupt Senator [Benton] and a common swindler [Lawless].”²⁰ The claim was for a tract of ten thousand acres.²¹ It was tried in Judge Peck’s court whose appointment had been secured by the political enemies of Benton and Lawless.²²

Judge Peck’s decision against the *Soulard* claimants had a devastating impact on Lawless’ clients’ interests in that case. What concerned Lawless even more was the fact that Judge Peck’s “view, if persisted in, was fatal to substantially the whole mass of unconfirmed claims” in seventy-two of which Lawless was counsel.²³

Eight days after final judgment was entered by Judge Peck, there appeared in a St. Louis newspaper a letter anonymously authored by Lawless but signed by “A Citizen.” As described in the letter, its purpose was “to counteract the effect that Judge Peck’s opinion was calculated to produce on the value of the unconfirmed French and Spanish land titles” and was held out to present a “concise statement of some of the principal errors into which . . . Judge Peck had fallen.”²⁴ As evaluated by historians studying the event:

[The letter] could have no end except to subject the court to contumely and promote sympathy with the land claimants, making fair juries unobtainable in their cases; and that it would tax even judicial fortitude to withstand the “loose and interested public opinion” to which it appealed.

18. *Id.* at 425.

19. *Id.* at 425–26.

20. *Id.* at 426.

21. *Id.* at 427.

22. *Id.* at 426.

23. *Id.*

24. *Id.* at 428.

[Further,] . . . the publication could not fail to stimulate extra-mural pressure upon the administration of justice in the remaining cases—a pressure, moreover, distinctly likely in that pioneer society to take the form of lawless violence.²⁵

Judge Peck proceeded by writ of attachment against Lawless. After four days of heated argument, Lawless was found guilty of contempt and sentenced to one day's imprisonment and suspension from practice for eighteen months.

Lawless turned to Congress and filed a petition with the House of Representatives for the impeachment of Judge Peck. In his statement to that body, he explained:

That your petitioner, [in writing the letter], not only availed himself of what he believed to be his right as a private citizen, but acted from a sense of duty to those numerous land claimants by whom [he] was employed as counsel.

That the object of your petitioner was, if possible, to counteract the effect that Judge Peck's opinion was calculated to produce on the value of unconfirmed [land titles].²⁶

In response, Judge Peck drafted a "memorial" to the House. This document condemned Lawless' representations relating to freedom of the press and "the liberty of the American citizen," as "trite topics continually resorted to . . . in vain, in Great Britain . . ."²⁷ In a subsequent letter, Peck also commented that his decision might have been different if "*the subject-matter had not still [been] in the same tribunal, though in different names . . .*"²⁸ Continuing:

It was the string of legal absurdities imputed to the court, calculated to excite the contempt and indignation of the public at large against the tribunal; to prejudice the public mind with regard to the claims of the same character yet remaining for decision before the same court; to impair the

25. *Id.* at 428, 526.

26. ARTHUR J. STANSBURY, REPORT OF THE TRIAL OF JAMES H. PECK 2 (1833).

27. *Id.* at 10.

28. *Id.* at 16 (emphasis in original).

confidence of the suitors in the purity and intelligence of the tribunal before which the claims were depending; to awaken their resentment against the Judge . . . and thus to restrain the court in the free, and fearless, and independent exercise of its judgment in the remaining cases . . . and this more especially, when the contempt is considered as having been committed by an officer of the court, pursuing his practice therein under its protection, and bound, therefore, to treat it and its decisions with respect.²⁹

Judge Peck's defense to issuance of Articles of Impeachment by the House continued by pointing out that Lawless had admitted, that his purpose in publishing the letter was "to produce an effect, not on Soulard's claim, but on other claims in which he was counsel, and which were still depending [sic] before the Court."³⁰ Whatever "right" there was to publish, therefore, must take into account Lawless' purpose of "poisoning the public mind with regard to causes . . . before they are heard" and the court's common-law responsibility to "keep the streams of justice clear and pure."³¹ The House responded by voting 123 to 49 to issue the Articles of Impeachment.³²

Before the Senate, Congressman McDuffie (a manager designated by the House) initiated the debate by pointing out that "necessity, to be sure is the tyrant's plea . . . and that our judges and lawyers have [through reliance on English common law] become imbued with principles which are utterly incompatible with every just concept . . . of liberty."³³

A major portion of House Manager (later President) James Buchanan's argument focused on the First Amendment and the proposition that all segments of the federal government (including the judiciary) were bound by its restrictions.³⁴ Asking for a

29. *Id.*

30. *Id.* at 19.

31. *Id.* at 39.

32. *Id.* at 36.

33. *Id.* at 87.

34. Turning his attention to repudiation of the Sedition Act of 1798, Buchanan stated:

It is now, I believe, freely admitted by every person . . . that Congress, in passing this Act, had transcended their powers . . . [I]f any principle has been established beyond a doubt by the almost

conviction "in the name of the people of the United States, whose constitution and laws [Peck] has violated by tyranny and oppression,"³⁵ he concluded:

I will venture to predict, that whatever may be the decision of the Senate upon this impeachment, Judge Peck has been the last man in the United States to exercise this power, and Mr. Lawless has been its last victim.³⁶

Judge Peck escaped impeachment by one vote. Within twenty-four hours of acquittal, the House instructed its Judiciary Committee "to inquire into the expediency of defining by statute all offenses which may be punished as contempts of the courts of the United States."³⁷ Without debate, the two houses enacted what is now the modern contempt statute. It provides, among other things, that the contempt power shall not extend to any cases except the "[m]isbehavior of any person in [the] presence [of the court] or so near thereto as to obstruct the administration of justice"³⁸

In 1928, Walter Nelles and Carol King published the seminal work on contempt by publication.³⁹ In contrast to Buchanan's "last victim" pronouncement during the Peck debates, the authors uncovered a large number of state and federal cases employing the

unanimous opinion of the people of the United States, it is that the sedition law was unconstitutional

Shall then a petty judge[,] although Congress itself dare not pass a law for the punishment of libellers against its own members, or the President of the United States be permitted to sit as the sole judge in his own cause, and in palpable violation of the constitution, fine and imprison at his own pleasure the author of a libel against him? . . . Shall [the] courts of justice exercise a power as a bare incident, vastly beyond what their creators could confer upon them?

You might as well attempt to stop the flowing tide, lest it might overwhelm the temporary hut of the fisherman upon the shore, as to arrest the march of public opinion in this country, because in its course it might incidentally affect the merits of a cause depending between individuals.

Id. at 447-48.

35. *Id.*

36. *Id.* at 430.

37. GALES & SEATON'S REGISTER OF DEBATES, 21st Cong., 2d Sess., col. 560 (1831).

38. 18 U.S.C. § 401(1) (1971).

39. Nelles & King, *supra* note 17.

pre-Peck, common law analysis to contempts by publication.⁴⁰ Finding the decisions utterly lacking in analysis, the authors focused on what they perceived as the mind set of the judges involved:

That the personal feelings of judges were not dormant in these cases there is much evidence: in protestations of impersonality and self-righteousness which true judicial serenity would find superfluous; in exuberances of indignation and pathos; in the extraordinary length of many opinions; in monumental but uncritical citation authorities; in strained construction of statutory and constitutional provisions and powers; . . . and in the significant non-occurrence of cases of punishment for publications concerning pending litigation which are friendly to the position finally adopted by the court.⁴¹

II. THE PECK IMPEACHMENT AND PROFESSOR BARRY NAKELL

In the fall of 1985, the Fordham Law School hosted a symposium on the 1983 amendment to Rule 11. During the proceedings one participant commented that judges "can be very arbitrary . . . and a lot of them have deep-seated biases and are out to get particular lawyers. And boy, Rule 11 is some tool to do it with."⁴² His point is obvious: as proved the case with Judge Peck's open-ended justification to "keep the streams of justice clear and pure,"⁴³ the objective envisioned by the Advisory Committee to "streamline the litigation process by lessening frivolous claims or defenses"⁴⁴ could and would be the subject of abuse by a certain segment of the federal judiciary.⁴⁵ I submit that of the thousands of

40. *Id.* at 533-43.

41. *Id.* at 545-47.

42. Melvyn I. Weiss, *A Practitioner's Commentary on the Actual Use of Amended Rule 11*, 54 FORDHAM L. REV. 23, 26 (1985).

43. STANSBURY, *supra* note 26, at 36.

44. FED. R. CIV. P. 11 advisory committee's note to 1993 amendment.

45. "During the past three decades, utilization of litigation, pleadings, and procedure has become more and more contentious. Claims of filing frivolous suits and threats of sanctions have permeated the courtrooms to the extent that the legal arena resembles guerilla warfare between Rambo attorneys representing Rambo clients before Rambo judges." Thomas E. Richard, *Professionalism: What Rules Do We Play By?*, 30 S.U. L. REV. 15, 26 (2002).

cases litigated under the 1983 Rule,⁴⁶ none exemplify that abuse more than what was experienced by Professor Barry Nakell.⁴⁷ Once understood, I also submit that if James Buchanan were alive today, he would conclude that the “last man” pronouncement made with respect to Luke Lawless is equally applicable to Professor Nakell.

Barry Nakell was a tenured law professor at the University of North Carolina. Having served on the faculty for almost twenty years, by 1988 he was one of the most “admired and successful individuals” in the Chapel Hill community.⁴⁸ A recipient of the Frank Porter Graham Award as an individual who had given outstanding service to the preservation and advancement of civil liberties in North Carolina, he was also co-author of a major book on the death penalty⁴⁹ and counsel of record in the Supreme Court’s landmark decision in *Bounds v. Smith*.⁵⁰ His impact on those around him was described by an ex-student as follows:

No attorney in this state . . . has demonstrated a more sincere commitment to the cause of treating prisoners with basic dignity and humaneness than Barry Nakell. . . . In all of my dealings with Barry Nakell, he has exhibited unquestioned personal integrity and adherence to high ideals of professionalism. He has been a source of inspiration to me, both personally and professionally.⁵¹

46. See *supra* note 11 and accompanying text.

47. Major commentary and critical analysis of Rule 11 has, and continues to be provided by Professor Carl Tobias. See, e.g., Carl Tobias, *The 1993 Revision of Federal Rule 11*, 70 IND. L.J. 171 (1994); Carl Tobias, *Environmental Litigation and Rule 11*, 33 WM. & MARY L. REV. 429 (1992); Carl Tobias, *Civil Rights Plaintiffs and the Proposed Revision of Rule 11*, 77 IOWA L. REV. 1775 (1992); Carl Tobias, *Reconsidering Rule 11*, 46 U. MIAMI L. REV. 855 (1992). Included in his publications is an exhaustive, in-depth exploration of Professor Nakell’s case. Carl Tobias, *Civil Rights Conundrum*, 26 GA. L. REV. 901 (1992) [hereinafter Tobias, *Civil Rights Conundrum*].

48. Memorandum of Professor Barry Nakell Regarding Nature of Sanctions, *Robeson Defense Comm. v. Britt*, No. 89-06CIV-3-H (E.D.N.C. Aug. 5, 1991) [hereinafter Sasser & Geer Memorandum]. This document, as well as a subsequent brief filed with the Fourth Circuit, see note 87, *infra*, were authored by Mr. Jonathan Sasser & Ms. (now Judge) Martha Geer, attorneys practicing in Raleigh.

49. BARRY NAKELL & KENNETH A. HARDY, *THE ARBITRARINESS OF THE DEATH PENALTY* (1986).

50. 430 U.S. 817 (1977).

51. Sasser & Geer Memorandum, *supra* note 48, at 5.

And, as described by his Dean, "Professor Nakell has sincerely presented himself to his colleagues and students as a deeply committed civil rights lawyer, who has not been afraid to take on difficult and controversial cases, but who has done so within the best ethical traditions of our profession."⁵²

After taking his position on the faculty, Professor Nakell became involved with the Lumbee Indian community⁵³ in Robeson County, a poor, rural area located in eastern North Carolina. With a population distribution of approximately one-third African American, one-third white, and one-third Lumbee,⁵⁴ the County has historically been both a center for acts of racism as well as all other problems endemic to poverty-stricken areas.⁵⁵ As time went on, Professor Nakell's personal and professional life became so intertwined with the Lumbee community that the editor of their local newspaper, *The North Carolina Indian Voice*, named his daughter, Brandi Nakell Barton, in his honor.⁵⁶

The year 1988 was a tumultuous period in Robeson County. In order to bring to the public's attention what they contended to be widespread corruption, two members of the Lumbee tribe, Eddie Hatcher and Timothy Jacobs, staged an armed take-over of an office building and held twenty hostages for ten hours.⁵⁷ Following negotiations that included a promise that a Governor's Task Force would investigate the charges made, the event ended peacefully with a surrender to federal authorities.⁵⁸

52. *Id.* at 5–6.

53. The plight of this discrete segment of the American Indian population was recently described as follows:

Lumbee Indians make up more than half of the 19,000 Indian students in North Carolina's school system. Most of them live in Robeson County, where 261 of the 545 dropouts in 2002 were Lumbees, according to the report. The county had a dropout rate of 7.23 percent, the highest in North Carolina.

SUN-NEWS, June 3, 2003.

54. Tracing the County's history, one community leader explained: "We had three-way segregation in Robeson then—white, black and Indian. There were three entrances to the movie theater, three water fountains, and six bathrooms." Stan Swofford, *Revels Was Leader in Fight Against Racism*, NEWS & RECORD, July 12, 2003, at A1.

55. See Tobias, *Civil Rights Conundrum*, *supra* note 47, at 901.

56. Sasser & Geer Memorandum, *supra* note 48, at 6.

57. Tobias, *Civil Rights Conundrum*, *supra* note 47, at 902.

58. *Id.* at 902–03.

Subsequently, a federal grand jury indicted Hatcher and Jacobs on weapons charges.⁵⁹ In these proceedings, the former was represented by the well-known civil rights lawyer William Kunstler and Professor Nakell, the latter by Lewis Pitts, director of a local public interest law firm.⁶⁰ Following a three-week trial, the jury entered a verdict of not guilty.⁶¹ Commenting on the impact of the jury's decision, the *Charlotte Observer* editorialized:

Obviously the allegations that Mr. Hatcher and Mr. Jacobs made about conditions in their county were not only credible, but persuasive enough to convince the jury that they acted without criminal intent. . . . And jurors reached that conclusion without some of the most damaging testimony about the criminal justice system [by] Maurice Geiger, a lawyer and co-director of the Rural Justice Center. . . . He said there were pervasive local assertions that law enforcement officers are involved in drug dealing. . . . There are simply too many rumors and assertions of corruption and injustice there for state and federal officials to ignore.⁶²

Immediately following dismissal of the criminal proceedings, Hatcher began an intensive campaign in Robeson County to expose corruption, and also conducted a petition drive to remove the Sheriff and his Deputy from office.⁶³ In response to what was perceived to be intimidating acts by members of the State Bureau of Investigation and the Sheriff's Department, Hatcher and other members of the Lumbee community sought assistance from Professor Nakell and Pitts.⁶⁴ Professor Nakell concluded that the situation warranted an investigation by the Attorney General's Office and wrote seeking assistance. The request was rejected.⁶⁵

At this point, additional legal concerns were raised by two separate events. Criminal proceedings for kidnapping were brought

59. *Id.* at 909.

60. *Id.* at 909–10.

61. *Id.*

62. *Verdict Indicts Robeson-Shocking Decision Challenges Gov. Martin, Other Officials*, CHARLOTTE OBSERVER, Oct. 17, 1988, at A17.

63. Tobias, *Civil Rights Conundrum*, *supra* note 47, at 910–11.

64. *Id.* at 911.

65. *Id.* at 911–12.

against Hatcher and Jacobs in state court, an action considered to be in violation of an agreement implicit in negotiations leading up to their surrender to federal authorities.⁶⁶ In addition, while Jacobs was in New York fighting extradition, he received information that attempts were being made through his parents to have Pitts dismissed as his lawyer.⁶⁷

The cumulative impact of all these events triggered extensive research by both Professor Nakell and Pitts that resulted in the drafting of a thirty-five page omnibus complaint on behalf of Jacobs, Hatcher, and six other Lumbee Indians.⁶⁸ It alleged that state and local officials were engaged in intentional behavior designed to infringe First and Sixth Amendment rights, and sought an injunction against the then pending criminal prosecution. After circulating the draft to numerous lawyers including an attorney experienced in civil rights litigation,⁶⁹ the complaint was filed in the court of United States District Judge Malcom Howard. Subsequently, it was amended to add William Kunstler as counsel.

Soon after the filing of the amended complaint, the harassment stopped.⁷⁰ Coupling this fact with a decision by Jacobs to enter into a plea agreement and counsels' reassessment of defenses available to Hatcher in his trial, the decision was made to dismiss the case.⁷¹ To effectuate the latter, Professor Nakell telephoned opposing counsel in the Attorney General's Office and reached an agreement⁷² that there was no objection for him to proceed with a voluntary dismissal under Rule 41(a)(2).⁷³ The filing was made and Judge Howard proceeded to enter a final order. Six weeks later, the Attorney General's Office,

66. *Id.* at 912.

67. *Id.*

68. *Id.* at 913-14.

69. *Id.*

70. *See id.* at 914-15; *see also* WILLIAM M. KUNSTLER, MY LIFE AS A RADICAL LAWYER 390 (1994) (discussing how harassment stopped after filing complaint).

71. Tobias, *Civil Rights Conundrum*, *supra* note 47, at 915.

72. *Id.*

73. "Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper." FED. R. CIV. P. 41(a)(2).

without previous notice of any kind, filed a fifty-one page Rule 11 motion and brief in support.⁷⁴

Following extensive submissions by all parties, Judge Howard heard oral arguments on the motion.⁷⁵ Thereafter, on September 27, 1989, he requested that defense counsel submit affidavits specifying their fees and expenses and, without affording an opportunity to respond, issued his decision the following day.⁷⁶ In his opinion, Judge Howard held that the filing of the belated Rule 11 motion was procedurally proper.⁷⁷ Thereafter, and in the context of scathing denunciations of the complaint and the legal basis for its filing,⁷⁸ he determined that there were violations of both the reasonable inquiry into fact and law requirements of Rule 11 and the proscription against filings made for an improper purpose.⁷⁹

Turning to the issue of what he perceived to be a proper sanction serving the deterrent objective of Rule 11, Judge Howard prefaced his conclusion with the approach so eloquently described by Walter Nelles and Carol King seventy-five years ago.⁸⁰ Pointing out that since civil rights "attorneys have played an invaluable role in instigating and promoting numerous societal goals," he insures the reader that his decision required "great reflection."⁸¹ Certain that his order "in no way [would] deter civil rights lawyers from filing legitimate complaints in the future to protect the civil rights of others and the Constitution that we all hold so dear," he then proceeded to impose joint and several liability on all counsel in an amount equal to

74. Tobias, *Civil Rights Conundrum*, *supra* note 47, at 916.

75. By this time, the filings in the case reached a proportion suitable to an antitrust case: "On the Rule 11 motion alone, the defendants have written 97 pages of memoranda, the plaintiffs 90. Each side has submitted several hundred pages of appendices. The previous filings in the case are of similar length." *Robeson Def. Comm. v. Britt*, 132 F.R.D. 650, 652 n.1 (E.D.N.C. 1989).

76. Tobias, *Civil Rights Conundrum*, *supra* note 47, at 915.

77. *Robeson*, 132 F.R.D. at 653.

78. *See id.* at 656 (claim made not worthy of a "[f]irst year law student[]"); *id.* at 658 ("not impressed" by voluminous affidavits filed in support of factual allegations contained in complaint); *id.* at 659 (complaint reflected "minimal research and investigation").

79. *Id.* at 653-60. For a detailed analysis of the opinion see Tobias, *Civil Rights Conundrum*, *supra* note 47, at 916-20.

80. *See supra* note 41 and accompanying text.

81. *Robeson*, 132 F.R.D. at 659.

all fees requested: \$92,834.28.⁸² Concerned that the amount imposed was insufficient and (as was Judge Peck) incensed with publicity surrounding the filing of the case, he assessed additional "punitive sanctions" in the amount of \$10,000 against each attorney.⁸³

On appeal to the Fourth Circuit,⁸⁴ that segment of Judge Howard's decision with respect to substantive Rule 11 violations was affirmed.⁸⁵ However, the court remanded for reconsideration of the award of fees pursuant to the "least severe sanction" standard⁸⁶ and reversed the \$10,000 order penalty.⁸⁷ Subsequently, Judge Howard reduced the sanction to \$50,000⁸⁸ which was, in turn, affirmed by the Fourth Circuit.⁸⁹

82. *Id.*

83. *Id.* at 660.

84. *In re Kunstler*, 914 F.2d 505 (4th Cir. 1990), *cert. denied*, 499 U.S. 969 (1991). On the same day that the court handed down its decision in Professor Nakell's case, it also affirmed sanctions against counsel in another case coming from the Eastern District of North Carolina. *Blue v. United States Dept. of the Army*, 914 F.2d 525 (4th Cir. 1990). *Blue* was an appeal of a case involving alleged Title VII violations by the United States Army at Fort Bragg in which Judge James Fox imposed a total of \$85,000 in sanctions. *Id.* at 530-32. A large portion of this amount (\$30,000) was awarded against Julius Chambers, who graduated first in his class at the University of North Carolina, served as Editor-in-Chief of the *Law Review*, went on to establish and become senior partner in the premier civil rights firm in North Carolina and, at the time that he was sanctioned, was serving as Director of the NAACP Legal Defense Fund. *Id.* at 530. With slight modification, the court affirmed the sanctions against Mr. Chambers. *Id.* at 550-51.

85. With an approach as callous as that employed by Judge Howard. *See Kunstler*, 914 F.2d at 516 (claims in complaint reflected either "incompetency or wilful misconduct"); *id.* at 517 (fact that complaint was reviewed by independent attorney experienced in the field irrelevant because he "may" have been unfamiliar with facts and law); *id.* at 519 (dismissal indicates that there was never an intent to litigate the case and supports conclusion that complaint "wilfully included the baseless claims"). Although there had never been an evidentiary hearing of any type, the court also concluded that Judge Howard's refusal to hold a hearing on the conflicting issues of fact raised in affidavits and exhibits was correct because his "participation in the proceedings" gave him "full knowledge" of all "relevant facts." *Id.* at 522.

86. *Id.* at 523-24.

87. *Id.* at 525. For a critical analysis of the opinion, see Tobias, *Civil Rights Conundrum*, *supra* note 47, at 924-43.

88. *In re Pitts*, No. 91-2265, 1992 U.S. App. LEXIS 15265, at *2 (4th Cir. July 2, 1992); see Tobias, *Civil Rights Conundrum*, *supra* note 47, at 945-49

While the sanctions issue was being litigated, Professor Nakell's life spun out of control. Unlike an attorney in private practice, his position as a law professor placed him in an especially vulnerable position with respect to the consequences of the court's action. As described by his Dean:

The punitive effect of Rule 11 sanctions on any law teacher may be enormous. . . . The fact that a court has found the teacher guilty of improper conduct as a lawyer calls into question the teacher's integrity and credibility. . . . The long range effect of such sanctions on a law teacher's career may be disastrous. Decisions with regard to salary, administrative assignments, and job mobility may all be affected. . . . Most significantly, the law teacher's relationship with his or her colleagues and students may be adversely affected for the remainder of the teacher's career.⁹⁰

Furthermore, "the court's action, coupled with the language of the court's written opinion . . . has had a devastating effect on Professor Nakell. . . . [T]he emotional impact upon him has been catastrophic. He has become extraordinarily focused on this case and its impact upon him and his reputation."⁹¹

Professor Nakell's rabbi also observed the effect of the sanctions: "[The case] was a source of great distress to Barry and his family. Worse was the public implication that he, a lawyer known for ethics and altruism, had been convicted of being capricious and unethical. This shook Barry"⁹²

(setting forth what was contended to be numerous errors in Judge Howard's interpretation of "the least severe sanction" test).

89. *Pitts*, 1992 U.S. App. LEXIS 15265, at *6; cf. Tobias, *Civil Rights Conundrum*, *supra* note 47, at 949-51 (detailing unpublished opinion by court which found no abuse of discretion).

90. Brief of Appellant Barry Nakell at 11-12, *In re Barry Nakell*, No. 91-2266 (4th Cir. 1991).

91. Sasser & Geer Memorandum, *supra* note 48, at 4 (citation omitted). For those who question the thin ice on which law professors often skate, compare the language employed by Judge Howard and the Court of Appeals in their opinions, *supra* notes 78, 85, with the scenario of first-year law students being directed by their knowledgeable classmates to case citations. See *Robeson Def. Comm. v. Britt*, 132 F.R.D. 650 (E.D.N.C. 1989) and *Kunstler*, 914 F.2d 505.

92. Sasser & Geer Memorandum, *supra* note 48, at 4-5.

Professor Nakell's rabbi continued:

For Barry Nakell to be subjected to such negative public attention for these many months was a devastating punishment for him. . . . Not only did Professor Nakell's activity as a respected leader of the Jewish community diminish because of his embarrassment and the drain on his energies (he no longer attended Jewish Federation meetings or initiated programs in the Jewish Vegetarian Society which was so important to him), but he even stopped attending the Saturday morning Bible study group at which he was a regular.⁹³

The enormous psychological distress had its consequences. After becoming enraged while working on legal papers bearing on his case, Professor Nakell walked out of a store with a book. He was charged with and plead guilty to shoplifting. His "sense of integrity led him to plead guilty. . . . He felt guilty and could not, he felt, say otherwise."⁹⁴ Disciplinary proceedings initiated by the State Bar⁹⁵ resulted in a one-year suspension of his license,⁹⁶ and, over the objection of a faculty committee, he later lost his teaching position.⁹⁷

III. PROFESSOR NAKELL AND THE AMENDED RULE

Professor Linda Mullenix hits the nail on the head when she points out that the 1993 amendment is "a fine example of good rulemaking."⁹⁸ One major objective, to "reduce the number of motions for sanctions,"⁹⁹ has clearly been met.¹⁰⁰ Equally beneficial,

93. *Id.* at 5.

94. *Id.* at 6. See also *id.* at 7 (conclusion by his Dean that conviction stemmed "from the crushing effect of the court's imposition of sanctions and accompanying opinion").

95. *Id.* at 17.

96. See Todd Nelson, *Law Professor Suspended After Second Shoplifting Charge*, THE NEWS & OBSERVER, Oct. 3, 1996, at A3 (newspaper article detailing events, including a second, minor shoplifting incident occurring after imposition of sanctions).

97. See *Nakell's Bid for Appeal Denied by UNC Board*, NEWS & OBSERVER, June 14, 1997, at B3 (newspaper article reporting the fact that the Board of Governors of the University upheld the decision to terminate).

98. See Mullenix, *supra* note 16, at 100 n.17.

99. FED. R. CIV. P. 11 advisory committee's note to 1993 amendment.

100. One of the leading proponents of the 1983 version of Rule 11, Judge Milton Shadur of the Northern District of Illinois, has taken the position that

however, is the fact that the key provision responsible for the dramatic decrease in Rule 11 activity also insures that Professor Nakell will have been the "last" attorney targeted by a Rule 11 motion after the entry of a final judgment.

The critical component of the new Rule 11 is referred to as the "safe-harbor" provision. Pursuant to its requirements, unless previously served on opposing counsel and no corrective action is taken within twenty-one days, a motion for sanctions cannot be filed with the court.¹⁰¹ Intended "to give the parties at whom the motion is directed an opportunity to withdraw or correct the offending contention,"¹⁰² the Notes admonish that "a party cannot delay serving

"Rule 11 is pretty much dead." Laura Duncan, *Sanctions Litigation Declining: Decrease Attributed to 1-Year-Old Safe Harbor-Amendments to Rule 11*, A.B.A. J., Mar. 1995, at 12. Professor Vairo concludes that "the volume of Rule 11 activity is greatly diminished. Some judges report that nobody is making Rule 11 motions any more. . . . My experience confirms these anecdotal reports. When the rule was in its heyday, I would rip handfuls of Rule 11 cases out of each . . . advance sheet reporter." Georgene M. Vairo, *Rule 11 Update*, in CIVIL PRACTICE AND LITIGATION IN FEDERAL AND STATE COURTS 277, 279 (1997). See also Laura Duncan, *supra*, at 12 (concluding that what was a flood is now a "trickle." "Initial results show a marked decline in reported cases under the new Rule 11, a trend confirmed by interviews with federal judges, lawyers and law professors."); Theodore C. Hirt, *A Second Look at Amended Rule 11*, 48 AM. U. L. REV. 1007, 1026 (1999) ("To date, there is relatively little academic or practitioner commentary on how the amended Rule operates. There is, however, some 'anecdotal' reporting, with some commentators stating that there are fewer sanctions motions filed under the amended Rule."); Sidney B. Hewlett, *New Frivolous Litigation Law in Texas: The Latest Development in the Continuing Saga*, 48 BAYLOR L. REV. 421, 438 (1996) (a "little more than a year since the federal rule governing sanctions was revised to stem the flood of litigation over frivolous lawsuits, the deluge appears to have slowed to a trickle."). But see Danielle Kie Hart, *Still Chilling After All These Years: Rule 11 of the Federal Rules of Civil Procedure And Its Impact on Federal Civil Rights Plaintiffs After the 1993 Amendments*, 37 VAL. U. L. REV. 1 (2002) (discussing issues of concern under the new Rule).

101. FED. R. CIV. P. 11(c)(1)(A) (The motion "describ[ing] the specific conduct alleged to violate" the Rule is served in person or by mail on counsel in accordance with Rule 5).

102. *AeroTech, Inc. v. Estes*, 110 F.3d 1523, 1528-29 (10th Cir. 1997) (quoting *Elliott v. Tilton*, 64 F.3d 213, 216 (5th Cir. 1995)); see also *Ridder v. City of Springfield*, 109 F.3d 288, 294-95, 297 (6th Cir. 1997) (discussing the history of the "safe harbor" provision and holding ineffective a Rule 11 motion filed after summary judgment); *Barber v. Miller*, 146 F.3d 707, 710 (9th Cir.

its Rule 11 motion [as was done in Professor Nakell's case] until conclusion of the case"¹⁰³

In a fascinating article, Professor Charles Yablon argues that many civil rights attorneys decide to file cases involving claims that have "a low (but not zero) probability of success."¹⁰⁴ Such claims, he argues, are not frivolous because frivolous claims, "[u]nder the standard view . . . are baseless claims that no reasonable lawyer would ever have brought."¹⁰⁵ By definition, therefore, because a long-shot has some, though minimal, probability of success, such claims are not frivolous.¹⁰⁶ This analysis is directly applicable to Professor Nakell's case.¹⁰⁷ It is also encompassed by another segment of the 1993 amendments designed as a shield for lawyers filing suits who base their claims for relief on not yet clearly defined rights.¹⁰⁸

The amended Rule 11 provides that lawyers may make arguments they believe to be "warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law"¹⁰⁹ Adding substance to the provision, the Advisory Committee's Note points out that the Rule is now intended to insure that courts are sensitive to the category of cases described by Professor Yablon. As explained:

[The Rule] 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

1998) (reversing Rule 11 sanction imposed on motion filed after dismissal of sanctionable pleading).

103. FED. R. CIV. P. 11 advisory committee's note to 1993 amendment.

104. Charles M. Yablon, *The Good, The Bad, and the Frivolous Case: An Essay on Probability and Rule 11*, 44 UCLA L. REV. 65, 67 (1996).

105. *Id.* at 81.

106. *Id.*

107. For a thorough review of the merits of claims found in Professor Nakell's complaint, see Tobias, *Civil Rights Conundrum*, *supra* note 47.

108. As such, it also provides the necessary breathing space for continued developments in the field of constitutional and federal statutory law. *Owen v. City of Independence*, 445 U.S. 622, 651 n.33 (1980) ("deleterious effect of freezing constitutional law" is a significant policy consideration in denying qualified immunity law defense to political subdivisions).

109. FED. R. CIV. P. 11(b)(2).

articles, or through consultation with other attorneys should certainly be taken into account in determining whether [the Rule] 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 [R]ule.¹¹⁰

The Rule also alters the test for liability when factual allegations are in dispute. The signature of an attorney now certifies that “to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . . 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”¹¹¹

Factual allegations in Professor Nakell’s *Robeson County* complaint were (1) formed after over twenty years of professional and personal experiences in the County; (2) at issue and sufficiently proven to the federal jury that entered the not guilty verdict on the kidnapping charge; (3) verifiable by Jacob’s parents (Sixth Amendment violations); or (4) verifiable by the six named Lumbee Indian plaintiffs (First Amendment violations). As such, they fit precisely the mold contemplated by the new Rule:

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.¹¹²

Finally, the new Rule places “greater constraints [on judges] . . . in dealing with infractions”¹¹³ In contrast to the 1983 version, with its not so subtle open-ended invitation for courts to shift fees once a violation was found,¹¹⁴ the new Rule incorporates specific guidelines. Sanctions “shall be limited to what is sufficient to deter,” and when imposed, judges are to consider “directives of a

110. FED. R. CIV. P. 11 advisory committee’s note to 1993 amendment.

111. FED. R. CIV. P. 11(b).

112. FED. R. CIV. P. 11 advisory committee’s note to 1993 amendment.

113. *Id.*

114. See *supra* note 10 and accompanying text.

nonmonetary nature”¹¹⁵ or “an order to pay a penalty into court”¹¹⁶ Although the option to select an award of attorneys’ fees remains, it may only be employed “for effective deterrence” and any award must be limited to the amount “incurred as a direct result of the violation.”¹¹⁷ The Committee Notes give further substance to the provision by making it clear that this alternative should only be employed in “unusual circumstances,”¹¹⁸ *such as* allegations made for “any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.”¹¹⁹

Strict restrictions are also imposed on the power of judges who unilaterally initiate Rule 11 proceedings. First, the court must enter a show cause order describing the specific conduct alleged to violate the Rule.¹²⁰ Second, the court must take that step before a voluntary dismissal or settlement of the claim, or claims, in question.¹²¹ Finally, if a monetary sanction is imposed, it may only be paid “into court” and not to opposing counsel.¹²²

Appellate courts are also requiring a higher standard of proof when court-initiated sanctions are initiated. As recently explained by the Second Circuit, “when a lawyer’s submission, unchallenged by an adversary, is subject to sanction by a court, the absence of a ‘safe harbor’ opportunity to reconsider risks shift[s] the balance to the detriment of the adversary process.”¹²³ Coupling this fact with a warning by the Advisory Committee that court-initiated sanction proceedings should only be used in egregious situations,¹²⁴ risk to the

115. FED. R. CIV. P. 11 (c)(2). Alternatives referred to in the Notes include “striking the offending paper; issuing an admonition, reprimand, or censure; requiring participation in seminars or other educational programs; . . . [or] referring the matter to disciplinary authorities.” FED. R. CIV. P. 11 advisory committee’s note to 1993 amendment.

116. FED. R. CIV. P. 11 (c)(2).

117. *Id.*

118. FED. R. CIV. P. 11 advisory committee’s note to 1993 amendment.

119. FED. R. CIV. P. 11(b)(1).

120. *Id.* 11(c)(1)(B).

121. *Id.* 11(c)(2)(B).

122. *Id.* 11(c)(2). *See also* Vollmer v. Publishers Clearing House, 248 F.3d 698, 711 n.11 (7th Cir. 2001) (reversing \$50,000 judge-initiated sanction payable to charity; monetary sanctions awarded must be “paid only to the court”).

123. *In re Pennie & Edmonds LLP*, 323 F.3d 86, 91 (2d Cir. 2003).

124. “Since show cause orders will ordinarily be issued only in situations that are akin to a contempt of court, the [R]ule does not provide a ‘safe harbor’

“adversary process” was minimized by requiring that counsel’s action be in subjective bad faith.¹²⁵ Conceding that the use of an objective standard “would deter some submissions deserving condemnation,” the court concluded in words equally applicable to Judge Peck:

As for [the district judge’s] appropriate concern for a court’s responsibility to “weed out abuses,” we believe . . . that his application of an “objectively unreasonable” standard, in the absence of either an explicit “safe harbor” protection or [similar protection], risks more damage to the robust functioning of the adversary process than the benefit it would achieve.¹²⁶

IV. 28 U.S.C. § 1927

The fact that the 1993 amendments to Rule 11 offer significant protections to attorneys in the position of Professor Nakell, however, does not end the matter. Rule 11 is but one of three primary sources of authority that enable courts to sanction lawyers for improper conduct.¹²⁷ Of the other two, inherent power¹²⁸ and 28 U.S.C. § 1927,¹²⁹ it is the latter that currently raises a serious issue with

to a litigant for withdrawing a claim, defense, etc., after a show cause order has been issued on the court’s own initiative.” FED. R. CIV. P. 11 advisory committee’s note to 1993 amendment.

125. *Pennie*, 323 F.3d at 91.

126. *Id.* at 93. See also *Kaplan v. DaimlerChrysler A.G.*, 331 F.3d 1251, 1255–56 (11th Cir. 2003) (agreeing with *Pennie* but finding it unnecessary to determine the *mens rea* issue); *Hunter v. Earthgrains Co. Bakery*, 281 F.3d 144, 153 (4th Cir. 2002) (*sua sponte* Rule 11 sanctions must be reviewed “with particular stringency”) (quoting *United Nat’l Ins. Co. v. R & D Latex Corp.*, 242 F.3d 1102, 1115 (9th Cir. 2001)).

127. Omitted from coverage in the monograph are sanctions that may arise for violation of the rules of discovery. For extensive analysis of this area, see JOSEPH, *supra* note 11, at 529–626.

128. In *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980), the court delivered the definitive summary of the bases on which a federal court may levy sanctions under its inherent power, *e.g.*, assessing attorneys’ fees against those “who willfully abuse judicial processes.” *Id.* at 767. A specific finding of bad faith must “precede any sanction under the court’s inherent powers.” *Id.* at 766. For a comprehensive analysis of what constitutes “bad faith,” see JOSEPH, *supra* note 11, at 448–50.

129. In addition, Rule 38 authorizes fees against appellants whose appeals reach the level of being labeled “frivolous.” Laying aside tax protester cases, counsel who proves to be totally inadequate (in briefing or arguing a case), or

respect to its application and the robust functioning of the adversarial process. This statute authorizes a court to enter an award of fees¹³⁰ against any attorney who "multiplies [proceedings in a case] unreasonably and vexatiously."¹³¹ Unaccompanied by a definitional

one using the appellate process for an improper purpose, the Rule should not be of concern. Referred to by Second Circuit Judge Miner as a provision giving rise to an "occasional sanction," Roger J. Miner, *Professional Responsibility in Appellate Practice: A View From the Bench*, 19 PACE L. REV. 323, 341 (1999), courts now take note of the fact that they "rarely find[] an appeal to be frivolous," *Stevenson v. E.I. Dupont De Nemours & Co.*, 327 F.3d 400, 410 (5th Cir. 2003). Or, when imposing sanctions, courts point to the "unique" nature of a lawyer's conduct. *Tareco Prop., Inc. v. Morriss*, 321 F.3d 545, 550 (6th Cir. 2003). The few journal articles on the subject speak in terms of a downward trend and a "surprising reluctance" to impose Rule 38 sanctions. Mark R. Kravitz, *Unpleasant Duties: Imposing Sanctions for Frivolous Appeals*, 4 J. APP. PRAC. & PROC. 335, 335 (2002). Others preface their offerings with concessions such as "[a]dmittedly, it is rare that a court will sanction an attorney for a frivolous appeal." Anastasia Parnham Campbell, *Frivolous Civil Appeals: How to Avoid Sanctions*, 25 J. LEGAL PROF. 135, 135-36 (2001); see also S. Jay Plager et al., *The Federal Circuit & Frivolous Appeals*, 12 FED. CIRCUIT B.J. 373, 391 (2003) (noting "dramatic decline" in recent years of sanctions imposed under Rule 38). Added to this is the complaint that when sanctions are imposed, they "fail adequately to compensate," the appellee for having to defend an appeal found frivolous. Kravitz, *supra*, at 335. Reality obviously plays a significant role with respect to the Rule's limited use. The circuits are confronted with an ever increasing caseload. See U.S. CTS. ANN. REP., Sept. 2002, at 39 tbl. S-3 (of 27,758 cases terminated on the merits, only 32% involved oral argument and 80.5% were handed down either in the form of affirmances without opinion or by unpublished opinions). This fact, coupled with the 1994 amendment to the Rule imposing a notice and opportunity to respond requirement is an obvious disincentive to spending valuable judicial time making determinations as to what are and are not "frivolous" appeals. Also lurking in the background is the reality (as demonstrated by the pattern established under the 1983 version of Rule 11) that any opinions indicating a willingness to entertain motions seeking full or partial fee shifting guarantees a dramatic increase in collateral litigation.

130. Restricted to that "reasonably incurred because of [the] conduct." 28 U.S.C. § 1927 (1994). See *Peterson v. BMI Refractories*, 124 F.3d 1386, 1396 (11th Cir. 1997) (although conduct was unreasonable and vexatious, sanctions denied because not connected to any multiplication of the proceedings).

131. 28 U.S.C. § 1927. Read literally, the statute cannot be used to attack a complaint (as was the case with Professor Nakell). "[A]s a matter of law . . . the filing of a single complaint cannot be held to have multiplied the proceedings unreasonably and vexatiously . . ." *DeBauche v. Trani*, 191 F.3d 499, 511-12 (4th Cir. 1999). See also *In re Keegan Mgmt. Co.*, 78 F.3d 431, 436 (9th Cir. 1996) (Section 1927 does not apply to filing of complaint); *In re*

component, it is obvious that with liability for fees at issue,¹³² the interpretation given the language is critically important.¹³³

The circuits are in conflict as to whether the term should be construed to impose liability under an objective test or read to incorporate a subjective bad faith requirement.¹³⁴ Compounding the issue, is the fact that the circuits that employ an objective test are unable to articulate a coherent, uniform approach.¹³⁵

Yagman, 796 F.2d 1165, 1187 (9th Cir. 1986) ("It is only possible to multiply or prolong proceedings after the complaint is filed."). The Seventh Circuit, however, reaches the opposite conclusion that "Congress [in enacting § 1927] rejected the theory that the common law litigant gets one free pleading." *In re TCI, Ltd.*, 769 F.2d 441, 448 (7th Cir. 1985).

132. Awards in some cases can be quite substantial. *Dube v. Eagle Global Logistics*, 314 F.3d 193, 195 (5th Cir. 2002) (\$71,117.75); *In re Prudential Ins. Co. of Am. Sales Practice Litig. Agent Action*, 278 F.3d 175, 180 (3d Cir. 2002) (\$50,000); *Toon v. Wackenhut Corr. Corp.*, 250 F.3d 950, 952 (5th Cir. 2001) (\$133,000); *In re Brand Name Prescription Drugs Antitrust Litig.*, No. 94-C897, 1999 WL 301653, at *11 (N.D. Ill. Apr. 30, 1999) (\$2.1 million); *Schlaifer Nance & Co. v. Estate of Warhol*, 194 F.3d 323, 331 (2d Cir. 1999) (\$400,000).

133. As analyzed by the Second Circuit:

We are cognizant of the unique dilemma that [§ 1927] sanctions present. On the one hand, a court should discipline those who harass their opponents and waste judicial resources by abusing the legal process. On the other hand, in our adversarial system, we expect a litigant and his or her attorney to pursue a claim zealously within the boundaries of the law and ethical rules. Given these interests, determining whether a case or conduct falls beyond the pale is perhaps one of the most difficult and unenviable tasks for a court.

Schlaifer Nance, 194 F.3d at 341.

134. In the District of Columbia Circuit, the standard remains unsettled. *See LaPrade v. Kidder Peabody & Co.* 146 F.3d 899, 905 (D.C. Cir. 1998), *cert. denied*, 525 U.S. 1071 (1999).

135. The situation is exacerbated by conflicting opinions within the circuits. In *Peterson*, 124 F.3d at 1395, a panel of the Eleventh Circuit concluded that "there is little case law in th[e] circuit concerning the standards applicable to the award of sanctions under § 1927." The court read the statute to only require a court to make its own determination as to what was "unreasonable and vexatious" and "multiplies the proceedings." *Id.* at 1396. In *Malautea v. Suzuki Motor Co.*, 987 F.2d 1536, 1544 (11th Cir. 1993) (quoting *Avirgan v. Hill*, 932 F.2d 1572, 1582 (11th Cir. 1991)), however, a panel concluded that the statute only applied to those attorneys "who willfully abuse the judicial process by conduct tantamount to bad faith." A recent opinion adopts the higher objective standard. *See Schwartz v. Millon Air, Inc.*, 341 F.3d 1220, 1225 (11th Cir. 2003) (describing the statute in terms of "willful abuse" and "conduct tantamount to bad faith"); *see also Cordoba v. Dillard's, Inc.*, 2003

The First Circuit considers conduct that is “unreasonable and harassing or annoying” and “more severe than mere negligence, inadvertence, or incompetence” sanctionable.¹³⁶ The Seventh Circuit also excludes “ordinary negligence,”¹³⁷ and holds that sanctions may be imposed “against an attorney where that attorney has acted in an objectively unreasonable manner by engaging in a ‘serious and studied disregard for the orderly process of justice’ . . . or where a ‘claim [is] without a plausible legal or factual basis and lacking in justification.’”¹³⁸ In addition, that Circuit has been careful to point out that the term “bad faith” has both subjective and objective components:

“Bad faith” sounds like a subjective inquiry, . . . [but it] has an objective meaning as well as a subjective one. A lawyer has a duty . . . to limit litigation to contentions “well grounded in fact and . . . warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.” If a lawyer pursues a path that a reasonably careful attorney would have known, after appropriate inquiry, to be unsound, the conduct is objectively unreasonable and vexatious. To put this a little differently, a lawyer engages in bad faith by acting recklessly or with indifference to the law, as well as by acting in the teeth of what he knows to be the law A lawyer’s reckless indifference to the law may impose substantial costs on the adverse party. Section 1927 permits a court to insist that the attorney bear the costs of his own lack of care.¹³⁹

WL 21499011, at *7 (M.D. Fla. June 12, 2003) (interpreting circuit precedent to require “merely that counsel’s conduct sunk so far beneath a reasonable standard of competence, much deeper than mere negligence, that it became essentially indistinguishable from bad faith”).

136. *McLane, Graf, Raulerson & Middleton, P.A. v. Rechberger*, 280 F.3d 26, 44 (1st Cir. 2002) (quoting *Cruz v. Savage*, 896 F.2d 626, 632 (1st Cir. 1990)).

137. *Kotsilieris v. Chalmers*, 966 F.2d 1181, 1184 (7th Cir. 1992).

138. *Pac. Dunlop Holdings, Inc. v. Barosh*, 22 F.3d 113, 119 (7th Cir. 1994) (quoting *Walter v. Fiorenzo*, 840 F.2d 427, 433 (7th Cir. 1988)).

139. *In re TCI Ltd.*, 769 F.2d 441, 445 (7th Cir. 1985) (citations omitted). For a detailed analysis of the rather confusing line of cases generated by the Seventh Circuit see JOSEPH, *supra* note 11, at 397–98.

In an en banc opinion,¹⁴⁰ the Tenth Circuit employed the “acting in the teeth” test as well as detailing a litany of proscribed conduct including that which is “cavalier . . . or bent on misleading the court, . . . reckless, . . . without a plausible basis . . . [or] flow[s] only from an intentional departure from proper conduct, or, at a minimum, from a reckless disregard of [his or her duty to the court].”¹⁴¹

The Sixth Circuit also has a multitude of tests. Liability is incurred in that circuit “when an attorney knows or reasonably should know that a claim pursued is frivolous,”¹⁴² or that his or her trial tactics “will needlessly obstruct the litigation of non-frivolous claims.”¹⁴³ Sanctions can also be imposed when “an attorney has engaged in some sort of conduct that, from an objective standpoint, ‘falls short of the obligations owed by the member of the bar to the court and which, as a result, causes additional expense to the opposing party.’”¹⁴⁴ This test, however, excludes “simple inadvertence or negligence,”¹⁴⁵ rather:

There must be some conduct on the part of the subject attorney that trial judges, applying the collective wisdom of their experience on the bench, could agree falls short of the obligations owed by a member of the bar to the court and which, as a result, causes additional expense to the opposing party.¹⁴⁶

Other circuits, while employing an objective test, have adopted a much more rigorous standard. The Fifth Circuit requires “evidence of bad faith, improper motive, or a reckless disregard of the duty owed to the court.”¹⁴⁷ This includes “the persistent prosecution of a

140. *Braley v. Campbell*, 832 F.2d 1504 (10th Cir. 1987) (en banc).

141. *Id.* at 1511–12. *But cf.*, *Hutchinson v. Pfeil*, 208 F.3d 1180, 1187 n.9 (10th Cir. 2000) (equating § 1927 with the court’s inherent power).

142. *Tareco Prop., Inc. v. Morriss*, 321 F.3d 545, 550 (6th Cir. 2003) (quoting *Jones v. Cont’l Corp.*, 789 F.2d 1225, 1230 (6th Cir. 1986)).

143. *Shepherd v. Wellman*, 313 F.3d 963, 969 (6th Cir. 2002) (quoting *Jones*, 789 F.2d at 1230).

144. *Id.* (citing *Holmes v. City of Massillon*, 78 F.3d 1041, 1049 (6th Cir. 1996) (quoting *In re Ruben*, 825 F.2d 977, 984 (6th Cir. 1987)).

145. *Ruben*, 825 F.2d at 984.

146. *Id.*

147. *Procter & Gamble Co. v. Amway Corp.*, 280 F.3d 519, 525 (5th Cir. 2002) (quoting *Edwards v. Gen. Motors Corp.*, 153 F.3d 242, 246 (5th Cir. 1998)). *See also* *Conner v. Travis County*, 209 F.3d 794, 799 (5th Cir. 2000)

meritless claim,"¹⁴⁸ but excludes representation by counsel that is determined to have been performed "with vigor."¹⁴⁹ Similarly, the Eighth Circuit asks whether the conduct "viewed objectively, manifests either intentional or reckless disregard of the attorney's duties to the court."¹⁵⁰ Adding further substance, the Ninth Circuit, after making it clear that "recklessness suffices for § 1927, but bad faith is required for [inherent power] sanctions,"¹⁵¹ sets specific criteria for behavior that is sanctionable. Specifically, "[f]or sanctions to apply, if a filing is submitted recklessly, it must be frivolous, while if it is not frivolous, it must be intended to harass. . . . [R]eckless nonfrivolous filings, without more, may not be sanctioned."¹⁵²

In contrast to the hodgepodge of tests employed by circuits using an objective test, those holding that the statute requires a finding of subjective bad faith approach the issue with some degree of uniformity. All agree that the standard for liability is strict and accords with that used when a court employs its inherent power.¹⁵³

(distinguishing § 1927 test from that employed under the court's inherent power).

148. *Browning v. Kramer*, 931 F.2d 340, 345 (5th Cir. 1991).

149. *Smith v. Our Lady of the Lake Hosp., Inc.*, 960 F.2d 439, 448 (5th Cir. 1992). As with the Eleventh Circuit, *supra* note 130, panels within the Circuit will take a conflicting approach. For instance, in *Lyn-Lea Travel Corp. v. American Airlines, Inc.*, 283 F.3d 282 (5th Cir. 2002), counsel did not appear with a certain witness at a hearing and the court imposed \$18,404 in sanctions. Judge Jones, writing for the Court affirmed, concluding: "All that is required to support § 1927 sanctions is a determination, supported by the record, that an attorney multiplied proceedings in a case in an unreasonable manner." *Id.* at 291.

150. *Lee v. First Lenders Ins. Serv., Inc.*, 236 F.3d 443, 445 (8th Cir. 2001) (citing *Lee v. L.B. Sales, Inc.*, 177 F.3d 714, 718 (8th Cir. 1999)).

151. *B.K.B. v. Maui Police Dept.*, 276 F.3d 1091, 1107 (9th Cir. 2002).

152. *Id.* (alterations in original).

153. *Schlaifer Nance & Co. v. Estate of Warhol*, 194 F.3d 323, 336 (2d Cir. 1999) ("[T]he only meaningful difference between an award made under § 1927 and one made pursuant to the court's inherent power is . . . that awards under § 1927 are made only against attorneys or other persons authorized to practice before the courts while an award made under the court's inherent power may be made against an attorney, a party, or both."); *see also In re Prudential Ins. Co. Am. Sales Practice Litig. Actions*, 278 F.3d 175, 181 (3d Cir. 2002) (equating § 1927 with inherent power); *Brubaker v. City of Richmond*, 943 F.2d 1363, 1382 n.25 (4th Cir. 1991) (equating § 1927 with inherent power).

As explained by the Second Circuit, a claim must have no “colorable basis” and be “motivated by improper purposes such as harassment or delay.”¹⁵⁴ However, “bad faith, may be inferred ‘only if actions are so completely without merit as to require the conclusion that they must have been undertaken for some improper purpose’”¹⁵⁵

The Third and Fourth Circuits require a finding of “willful bad faith on the part of the offending attorney” before § 1927 sanctions may be imposed.¹⁵⁶ As with the Second Circuit, “indications of bad faith [include] findings that the claims advanced were meritless, that counsel knew or should have known [that they were without merit], and that the motive for filing the suit was for an improper purpose such as harassment.”¹⁵⁷

In 1986, as today, the circuits were in conflict with respect to the correct standard for § 1927 liability. In that year, the Court dismissed a grant of certiorari in a case in which the Sixth Circuit held that § 1927 “does not require a finding of recklessness, subjective bad faith, or conscious impropriety; . . . [liability only requires] pursuing claims that [an attorney] should know are frivolous.”¹⁵⁸ Assuming a decision by the Court to revisit the issue, it is suggested that adherence to a clear legislative history would require a much higher threshold of liability than that envisioned by the Sixth Circuit.

V. LEGISLATIVE HISTORY OF SECTION 1927

Section 1927 originally¹⁵⁹ provided that only “excess costs” could be assessed against attorneys who multiplied litigation in a manner which could be characterized as “unreasonabl[e] and vexatious.”¹⁶⁰ In 1979, two independent works were completed that were to have a direct bearing on the statute. Judge Renfrew of the

154. *Schlaifer Nance*, 194 F.3d at 336.

155. *Salovaara v. Eckert*, 222 F.3d 19, 35 (2d Cir. 2000) (quoting *Shafii v. British Airways, PLC*, 83 F.3d 566, 571 (2d Cir. 1996)).

156. *Prudential*, 278 F.3d at 188; *Brubaker*, 943 F.2d at 1382 (equating bad faith under the court’s inherent power to requirements for § 1927).

157. *Smith v. Detroit Fed’n of Teachers*, 829 F.2d 1370, 1375 (6th Cir. 1987).

158. *Haynie v. Ross Gear Div. of TRW, Inc.*, 799 F.2d 237, 243 (6th Cir. 1986), *cert. dismissed*, 482 U.S. 901 (1987).

159. The statute was enacted in 1813. Ch. 14 § 3, 3 Stat. 21 (1813).

160. 28 U.S.C. § 1927 (1970).

Northern District of California wrote a provocative article¹⁶¹ calling for procedural reforms he believed necessary to interdict the dilatory behavior so predominant in antitrust cases and other areas of complex federal litigation. Focusing on § 1927, he suggested reconsideration of precedent giving a limited construction to the statute¹⁶² and an amendment to authorize an award of attorneys' fees.¹⁶³ Finally, he advocated giving notice to an offending attorney and "an opportunity to present evidence and arguments concerning the propriety" of sanctions.¹⁶⁴

The National Commission for the Review of Antitrust Laws and Procedures also issued a report¹⁶⁵ which made suggestions similar to those of Judge Renfrew. Focusing on the increase of "dilatory and abusive litigation" tactics in the antitrust area,¹⁶⁶ it called for the amendment of § 1927 "to incorporate a more realistic 'state of mind' requirement, and . . . to allow recovery of a fuller range of expenses, including attorneys' fees."¹⁶⁷ As a result of the report, what was to become the Antitrust Procedural Improvements Act of 1980¹⁶⁸ was introduced in Congress as Senate Bill 390. One provision substituted 1927's language in favor of an assessment of costs, expenses and

161. Charles B. Renfrew, *Discovery Sanctions: A Judicial Perspective*, 67 CAL. L. REV. 264 (1979). Compare H.R. DOC. NO. 25, 27th Cong., 3d Sess. 21 (1842) ("The statute [intended] to restrain the increase of costs unreasonably and vexatiously, has been disregarded in practice; or it is defective in its provisions, if insufficient to prevent the abuses and mischiefs which have occurred, and which it ought to prevent, if it [does] not."), with David W. Pollak, Comment, *Sanctions Imposed by Courts on Attorneys Who Abuse the Judicial Process*, 44 U. CHI. L. REV. 619, 623-29, 640 (1977) (noting the statute's disuse and arguing for more frequent application); David N. Edelstein, *The Ethics of Dilatory Motion Practice: Time for Change*, 44 FORDHAM L. REV. 1069, 1078 (1976) (calling for a change of § 1927).

162. Renfrew, *supra* note 161, at 270.

163. *Id.* at 269-70.

164. *Id.* at 281. See also M. Scott Cooper, Comment, *Financial Penalties Imposed Directly Against Attorneys in Litigation Without Resort to the Contempt Power*, 26 UCLA L. REV. 855, 857-58, 883 (1979) (arguing that minimal due process requires notice and hearing prior to the imposition of sanctions.).

165. NAT'L COMM'N FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES, REPORT TO THE PRESIDENT AND ATTORNEY GENERAL 81 (1979) [hereinafter NAT'L COMM'N REPORT].

166. *Id.*

167. *Id.*

168. Pub. L. No. 96-349, 94 Stat. 1156 (1980).

“attorney’s fees” against counsel “who engages in conduct unreasonably and primarily for the purpose of delaying or increasing the cost of the litigation”¹⁶⁹

Witnesses in support of the bill included Judge Renfrew and John Shenefield, Chairman of the National Commission. Each supported increased sanctions in the form of attorneys’ fees.¹⁷⁰ In addition, they agreed that the newly proposed language was sufficient to override “restrictive interpretations”¹⁷¹ which had previously resulted in underutilization of § 1927. A report by the Antitrust Section of the American Bar Association, however, strongly opposed the change. Arguing that “a chilling effect on counsel becomes real when it is realized that a decision on whether or not delay is unnecessary and dilatory will often depend upon the subjective attitude” of a judge,¹⁷² it recommended the addition of certain safeguard:

[T]o minimize the chilling effect which will result from use of the personal sanctions. The safeguards are based on a presumption that all counsel are competent, diligent, and ethical. . . . Consequently, there should be a very substantial burden on anyone who contends that counsel is acting otherwise. Accordingly, it is believed that there should be three requisites for the imposition of sanctions or penalties:

- (1) a heavy burden of proving improper motive,
- (2) at least one warning by the judge with respect to the possible continuation of conduct which is deemed reprehensible, and
- (3) delays in the imposition of personal penalties upon the lawyer until the end of the case.¹⁷³

169. *Antitrust Procedural Improvement Act of 1979: Hearings on S. 390 Before the Subcomm. on Antitrust, Monopoly & Business Rights of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 127 (1979) [hereinafter *Hearings on S. 390*]. But see NAT’L COMM’N REPORT, *supra* note 165, at 94 n.13 (recommending language found in S. 390).

170. See *Hearings on S. 390*, *supra* note 169, at 8, 27–29.

171. *Id.* at 8, 27.

172. *Id.* at 230.

173. *Id.* at 233; see *id.* at 60 (testimony by David Foster concluding that the new language was “subjective in the extreme”). It is also interesting to note that there was only one isolated reference to the fact that the new amendment would apply to all litigation, not just that brought pursuant to the antitrust laws.

Subsequently, the Senate Judiciary Committee made significant amendments. They included: (1) inserting "intentionally" as the descriptive word for conduct proscribed, that is, "unreasonably and primarily for the purpose of delay . . ."; (2) adding a new subsection requiring hearings on motions for sanctions; and (3) prohibiting imposition of sanctions unless an attorney has "been previously warned by the court that continuation of such conduct would result in the imposition of . . . costs, expenses and attorney's fees."¹⁷⁴

On the House side, amendments to § 1927 were introduced as House Bill 4047, a bill identical to the original Senate Bill 390.¹⁷⁵ John Shenefield again testified that "this statute [§ 1927] has been underutilized and has received varying restrictive interpretations in the courts."¹⁷⁶ If accepted, he believed that House Bill 4047 "would provide a meaningful disincentive to unreasonable delay . . ."¹⁷⁷ He opposed Senate amendments, particularly the "requirement that an attorney be warned not to continue what has already been found to be unreasonable dilatory conduct, [which] might undermine the effectiveness"¹⁷⁸ of the statute.

See id. at 50 (testimony of Peter M. Gerhart noting that since "section 1927 applies to all Federal litigation, it might be desirable" to place it in a category other than antitrust improvements).

174. In its entirety, proposed § 1927 read as follows:

(a) Any attorney or other person admitted to conduct cases in any court of the United States or any territory thereof who intentionally engages in conduct unreasonably and primarily for the purpose of delaying or increasing the cost of the litigation may be required by the court to satisfy personally the excess costs, expenses and attorneys' fees reasonably incurred because of such conduct.

(b) Costs, expenses, and attorneys' fees shall be imposed under this section upon motion of any party only after a hearing, held after trial.

(c) No such costs, expenses, and attorneys fees shall be imposed unless the attorney continues to engage in conduct which is deemed to violate this section after having been previously warned by the court that continuation of such conduct would result in the imposition of such costs, expenses, and attorneys fees.

Id. at 137-38.

175. *Antitrust Procedural Improvements and Jurisdictional Amendments: Hearings on H.R. 4047 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 6 (1979) [hereinafter *Hearings on H.R. 4047*].

176. *Id.* at 23.

177. *Id.*

178. *Id.*

Judge Renfrew also supported House Bill 4047 and opposed Senate amendments. He believed that a specific intent standard was unnecessary since it "would not alter to any great extent the requirement . . . that an attorney's conduct must have been undertaken solely for delay to be sanctionable."¹⁷⁹ Arguments in opposition pointed to the "vagueness" of the proposed amendment and the fact that existing law "provide[d] for realistic boundaries of liability"¹⁸⁰

After the House and Senate failed to agree, Senate Bill 390 was sent to conference. At that point, a consensus was reached to retain the original wording of the section ("multiplies . . . unreasonably and vexatiously") and to expand the statute to include liability for attorneys' fees.¹⁸¹ The Conference Report also made it clear that the "existing standard" for dilatory behavior was the criterion for interpreting the statute.¹⁸²

On the floor of the House, Congressman Mazzoli emphasized what he believed to be the understandings reached by the Senate and House conferees:

The managers on the part of the House were firm in their resolve to maintain the tough standard of current law so that the legislation in no way would dampen the legitimate zeal of an attorney in representing a client.

Under the agreement of managers, an attorney may be required to pay costs, as well as expenses and attorneys' fees reasonably incurred on account of such attorney's dilatory conduct. But, the standard is that in current law, not the less-severe standard the Senate had agreed to originally.¹⁸³

Although neither the Conference Report or the House debate are accompanied by case authority, this "tough standard of [the] current

179. *Id.* at 61.

180. *Id.* at 87 (testimony of Howard A. Vine). Peter M. Gerhart, who undertook an empirical study for the National Commission for the Review of Antitrust Laws and Procedures, also pointed out that "care must be taken to insure that the standard for imposing sanctions is not so liberalized as to chill the vigorous litigation of legitimate claims and defenses." *Id.* at 152.

181. H.R. CONF. REP. NO. 96-1234, at 8 (1980), *reprinted in* 1980 U.S.C.C.A.N. 2781.

182. *Id.*

183. 126 CONG. REC. 23625-26 (1980).

law" is found in *Kiefel v. Las Vegas Hacienda, Inc.*,¹⁸⁴ a case cited by all witnesses arguing for a change in the then current "restrictive" standard of § 1927.¹⁸⁵

In *Kiefel*, the Seventh Circuit reviewed a decision by a trial court to impose § 1927 sanctions on an attorney who had engaged in intentional acts of misconduct that involved "serious breaches of the Canons of Ethics."¹⁸⁶ Viewing the language of § 1927 as imposing a "restrictive standard," the court affirmed the imposition of sanctions.¹⁸⁷ In doing so, it interpreted § 1927 liability to hinge on the issue of whether the conduct in question reflected a "serious and studied disregard for the orderly processes of justice."¹⁸⁸

Greg Joseph is the author of the major treatise providing an in-depth analysis of cases involving § 1927.¹⁸⁹ After his own exhaustive review of how circuits are managing (or mismanaging) the "unreasonably and vexatiously" issue,¹⁹⁰ he recommends that it should be interpreted to describe:

[C]onduct that, objectively viewed, evinces the intentional or reckless pursuit of a claim, defense or position (1) that is, or should be, known by the lawyer to be unwarranted in fact or law, or (2) that is advanced for the primary purpose of obstructing the orderly progress of a litigation.¹⁹¹

This restrictive definition, similar to that recently adopted by the Ninth Circuit,¹⁹² is clearly compatible with arguments Congress found persuasive in 1980: that § 1927 not be amended in a way that would chill advocacy or stray from the "substantial burden" considered explicit in the *Kiefel* "serious and studied disregard for the orderly processes of justice" test.¹⁹³ It should be adopted.

184. 404 F.2d 1163 (7th Cir. 1968), *cert. denied*, 395 U.S. 908 (1969).

185. *Hearings on S. 390, supra* note 169, at 8, 27; *Hearings on H.R. 4047, supra* note 175, at 23, 60, 152.

186. *Kiefel*, 404 F.2d at 1167.

187. *See id.*

188. *Id.*

189. *See* JOSEPH, *supra* note 11.

190. *Id.* at 395-401.

191. *Id.* at 400-01.

192. *See supra* text accompanying notes 151-52.

193. *Kiefel*, 404 F.2d at 1167.

VI. CONCLUSION

My position with respect to the 1993 amendment was finalized when, three years after it was put in place, I advised the Center for Constitutional Rights that there was no longer any need for the Rule 11 Project. Nothing in the interim has occurred to alter my conclusion that the revision reflects work done with surgical precision. Without question, it is now obvious the new Rule has drastically curtailed satellite litigation and minimized risks to the adversary process without reducing the role of the Rule in insuring a certain level of professional competence by members of the bar.

With respect to 28 U.S.C. § 1927, all circuits agree that the statute should only be employed in situations in which there is intentional lawyer conduct far in excess of that which can be labeled negligent. Moreover, even though some fail to fully implement a congressional desire to limit the statute's application to situations reflecting a "serious and studied disregard" of the judicial process, there is nothing in the reported cases of real or perceived abuses that raise issues similar to those arising from the 1983 version of Rule 11.¹⁹⁴

Finally, although the 1993 amendment to Rule 11 produced a much calmer environment in the legal community with respect to the role of sanctions, it is still in many ways a "capricious business."¹⁹⁵ As pointed out by Professor Vairo, given the wrong lawyer before the wrong judge with the wrong case, a decision to award sanctions will be made by a judge "advocating the correctness of his decision . . . [and who] has the power to make an attorney's argument seem frivolous."¹⁹⁶ Human factors such as personality and bias insure that there will always be conflict between some members of the bar and some judges. Thus, no matter how carefully crafted the restrictions, there will never be a "last man [or woman]" attorney subjected to what any objective observer would conclude is the

194. See JOSEPH, *supra* note 11, at 373-426.

195. *Weinstein v. Univ. of Ill.*, 811 F.2d 1091, 1099 (7th Cir. 1987) (Cudahy, J., concurring in part and dissenting in part).

196. Georgene Vairo, *Analysis of August 1, 1983 Amendments to the Federal Rules of Civil Procedure*, in 1 CIVIL PRACTICE & LITIGATION IN FEDERAL & STATE COURTS 77-78 (1985).

arbitrary imposition of sanctions.¹⁹⁷ This does not detract from the conclusion, however, that because of the 1993 amendments to Rule 11, lawyers litigate today in an environment far removed from that in place under the 1983 version.

197. Monroe H. Freedman, *The Need for a Rule 11 for Judges*, 128 F.R.D. 437, 439 (1989).