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THE RELATIONSHIP BETWEEN CIVIL RULE 11 AND LAWYER DISCIPLINE: AN EMPIRICAL ANALYSIS SUGGESTING INSTITUTIONAL CHOICES IN THE REGULATION OF LAWYERS

*Peter A. Joy**

The more laws that you make,
the greater the number of criminals.¹

I. INTRODUCTION

Drafters have always intended Federal Rule of Civil Procedure 11 (Rule 11)² to limit or eliminate abusive litigation behavior by lawyers, though commentators, practicing lawyers, judges, and the public have often questioned whether or not Rule 11 has been effective. For many, various versions of Rule 11 have either been ineffective in or counterproductive to improving lawyers' conduct. The first iteration of Rule 11, in effect from 1938 through 1983, produced only nineteen reported cases in which parties filed Rule 11 motions during a thirty-eight year period.³ Of these cases, courts

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1. TAO TE CHING 57 (J. McDonald trans.), available at <http://edepot.com/tao15.html>.

2. FED. R. CIV. P. 11.

3. See D. Michael Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1, 34-35 (1976) (compiling Rule 11 cases from 1938 through 1976).

found violations in eleven and sanctioned lawyers in only three.⁴ If the pre-1983 form of Rule 11 was little used to control lawyers' conduct and nothing more than a blinking yellow traffic light on the litigation road, the amended form of Rule 11, in effect from 1983 through 1993, was a full-fledged speed trap resulting in nearly 7000 published Rule 11 opinions in less than ten years.⁵

The stepped-up application of sanctions under the 1983 version of Rule 11 became the subject of "vociferous debate within the bench and bar" that led the Advisory Committee on Civil Rules of the Judicial Conference (Advisory Committee) to "scale back the more draconian aspects of Rule 11" and amend it once more in 1993.⁶ The Advisory Committee indicates that this third, and so far final, iteration of Rule 11 "is intended to remedy problems that have arisen in the interpretation and application of the 1983 revision of the rule"⁷ and that a possible sanction under the 1993 version of Rule 11 may include "referring the matter to disciplinary authorities."⁸

As a result of the Advisory Committee's statement that Rule 11 may be linked to possible lawyer discipline, some commentators have either predicted or argued for more disciplinary referrals based upon Rule 11 proceedings.⁹ Now, some ten years after the 1993

4. *Id.* at 36-37.

5. Georgene Vairo, *Rule 11 and the Profession*, 67 FORDHAM L. REV. 589, 626 (1998). Professor Vairo found 6947 cases reported on computer databases that cited or interpreted Rule 11 between 1983 and June of 1993. *Id.* at 626 n.259. The actual number of Rule 11 cases is probably much higher because not all cases result in published opinions. For example, a Third Circuit Court of Appeals study of Rule 11 cases found that less than forty percent of Rule 11 cases are available on Lexis or Westlaw. See STEPHEN B. BURBANK, AMERICAN JUDICATURE SOCIETY, RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11, at 59 (1989). On the other hand, as the data collected and analyzed for this article demonstrate, the number of cases citing the 1993 version of Rule 11 far exceeds the number of cases in which courts imposed sanctions on lawyers for their federal litigation conduct. See *infra* Part III.

6. Vairo, *supra* note 5, at 594; see also *infra* Part II.C for a discussion of the controversy concerning the 1983 version of Rule 11.

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

8. Vairo, *supra*, note 5, at 587.

9. See generally Lonnie T. Brown, Jr., *Ending Illegitimate Advocacy: Reinvigorating Rule 11 Through Enhancement of the Ethical Duty to Report*, 62 OHIO ST. L.J. 1555, 1617 (2001) (arguing for more frequent reporting of lawyers' misconduct to disciplinary authorities); Jeffrey A. Parness, *Disciplinary Referrals Under New Federal Civil Rule 11*, 61 TENN. L. REV. 37,

amendments to Rule 11, it is fitting to consider two questions about the relationship between Rule 11 sanctions against lawyers and professional discipline against these lawyers for that same conduct. First, is there any empirical evidence to support a relationship between Rule 11 sanctions against lawyers and professional discipline for their litigation conduct? Second, *should* lawyers face professional discipline for litigation conduct giving rise to Rule 11 sanctions? The answers to these two questions shed some light on the role Rule 11 plays and should play in the regulation of the legal profession.

Part II of this Article explores the history and types of lawyer regulation and how Rule 11 fits into the scheme of regulating lawyers for their litigation conduct in federal courts.¹⁰ Part III analyzes the enforcement of the 1993 version of Rule 11 by the federal courts over the last ten years and the correlation of Rule 11 sanctions and lawyer discipline for the same conduct. The data collected demonstrate that there is little correlation between Rule 11 sanctions against lawyers and reported cases of disciplinary bodies imposing discipline on the lawyers for their litigation conduct. Finally, Part IV evaluates the institutional choices implicit in the current relationship between Rule 11 and lawyer discipline and discusses whether there should be more disciplinary sanctions against lawyers for Rule 11 violations. I argue that the present institutional choice, which does not require lawyer discipline in every instance where a federal judge sanctions a lawyer's litigation conduct, is a wise choice.

44 (1993) [hereinafter Parness, *Disciplinary Referrals*] (predicting an increase in public interest sanctions including disciplinary referrals in light of the 1993 amendments to Rule 11).

10. Although the focus of this article is on Rule 11 and lawyers' litigation conduct in federal courts, there are provisions similar to Rule 11 in most state rules. See RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 110 cmt. c, reporter's note 9 (2000) [hereinafter RESTATEMENT]. It is beyond the scope of this article to discuss discipline under the state counterparts to Rule 11, or to explore state analogs to other federal laws, rules, and the inherent power of federal courts to regulate lawyers' litigation conduct.

II. RULE 11 AND LAWYER REGULATION

A variety of institutions comprise the current regulatory scheme for lawyers.¹¹ Among these are the self-regulatory institutions of the bar and state supreme courts that oversee bar admissions and lawyer discipline. Apart from these self-regulatory institutions sit the trial courts that regulate lawyers' litigation conduct through their inherent powers and through evidentiary and procedural rules, such as Federal Rule of Civil Procedure 11. The institutional constraints on lawyers'

11. A number of commentators have described this system as increasingly complex. For example, Professor Ted Schneyer describes lawyer regulation as consisting of three classes of institutions. See Ted Schneyer, *Legal Process Scholarship and the Regulation of Lawyers*, 65 *FORDHAM L. REV.* 33, 35 (1996). The first class consists of the legal institutions "with broad missions that include some incidental regulation of lawyers" such as judges and juries deciding legal malpractice and fee dispute cases, legislators passing antitrust and consumer protection laws, trial courts regulating lawyers through sanctions and evidentiary rules, and administrative agencies that promulgate their own rules for lawyers appearing before them. *Id.* at 35-36. The second class consists of private institutions that exert influence over lawyers, such as clients in the legal marketplace regulating fees, law firms with internal policies affecting partner and associate conduct, watchdog journalists writing about lawyers, and liability insurers imposing conditions for malpractice coverage. *Id.* at 36. The third class of institutions consists of bar organizations, such as bar associations establishing ethics rules, and bar agencies and disciplinary counsel, supervised by state supreme courts, that license and discipline lawyers for violating ethics rules. *Id.* at 37.

Professor David Wilkins divides the regulation of lawyers into enforcement systems consisting of "four models: disciplinary controls, liability controls, institutional controls, and legislative controls." David B. Wilkins, *Who Should Regulate Lawyers?*, 105 *HARV. L. REV.* 799, 805 (1992). The American Law Institute (ALI) discusses the regulation of lawyers in terms of "[l]awyer codes and background law," "inherent powers of courts," "role of bar associations," "[c]ivil remedies," "[p]rocedural and evidence law," and "[c]riminal law." *RESTATEMENT, supra* note 10, § 1, cmt. b-d, f-h.

The multiplicity of institutions and enforcement systems regulating lawyers' conduct has led Professor Charles Wolfram to describe contemporary law practice in the United States as a "regulated industry." Charles W. Wolfram, *Toward a History of the Legalization of American Legal Ethics—II the Modern Era*, 15 *GEO. J. LEGAL ETHICS* 205, 207 (2002). This reliance on a rule and law approach to regulating lawyers' conduct is not universal. In Britain, for example, the behavior of barristers and solicitors primarily results from the "close-knit character of the Bar . . . [with] many unwritten rules of professional conduct, and in the tendency for even the written rules to be enforced largely by peer pressure." Maimon Schwarzschild, *Class, National Character, and the Bar Reforms in Britain: Will There Always Be an England?*, 9 *CONN. J. INT'L L.* 185, 196 (1994).

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. The various rules and institutions regulating lawyers' conduct share the common purpose of prohibiting lawyers from raising frivolous claims or defenses or otherwise engaging in abusive litigation. The ways in which they regulate lawyers' conduct differ, however.

A. Ethics Rules Proscribing Abusive Litigation Conduct

Sociologists and legal commentators point to self-regulation as one of the defining characteristics of the legal profession.¹² The high court in each jurisdiction adopts ethics rules, principally based on the American Bar Association (ABA) Model Rules of Professional Conduct (Model Rules),¹³ and disciplinary authorities enforce the

12. See, e.g., ABA, COMM'N ON PROFESSIONALISM, "... IN THE SPIRIT OF PUBLIC SERVICE": A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 10 (1986) (defining law as a profession in part because "the occupation is self-regulating"); Michael J. Powell, *Professional Divestiture: The Cession of Responsibility for Lawyer Discipline*, 1986 AM. B. FOUND. RES. J. 31, 31-32 (stating that sociologists view self-regulation as a defining characteristic of a profession).

The term "self-regulation" as used here refers to the fact that the locus of control over the work of professionals is in the professions themselves rather than in external agencies. In large part "self-regulation" designates the formal mechanisms and processes by which the professions control the admission and behavior of their members.

Id. at 32 n.2.

13. MODEL RULES OF PROF'L CONDUCT (2002) [hereinafter MODEL RULES]. The American Bar Association (ABA) adopted the Model Rules in 1983 and has amended them frequently—most recently in 2002. By adopting the Model Rules, the ABA replaced the ABA Model Code of Professional Responsibility (Model Code), which the ABA had adopted in 1969 and amended in 1980. MODEL CODE OF PROF'L RESPONSIBILITY (1980) [hereinafter MODEL CODE]. More than forty states and the District of Columbia have adopted some version of the Model Rules. See STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS xxvi (2002); RICHARD A. ZITRIN & CAROL M. LANGFORD, LEGAL ETHICS IN THE PRACTICE OF LAW 6 (2d ed. 2002); ABA/BNA LAWYERS' MANUAL ON PROF. CONDUCT § 01:3 (2002) [hereinafter LAWYERS' MANUAL]. Most of the states that have not adopted some version of the Model Rules base their ethics rules on the Model Code, though usually with some variations. See ZITRIN & LANGFORD, *supra*, at 6.

ethics rules through state disciplinary processes.¹⁴ Courts usually rely on the prevailing ethics rules to enforce clients' rights against lawyers, as in motions to disqualify a lawyer due to a conflict of interest or in actions seeking damages for legal malpractice.¹⁵ And the ABA maintains the view "that disciplinary agencies operating under the supervision of state supreme courts should retain primary responsibility for ensuring that lawyers live up to their professional obligations."¹⁶

The ABA Model Rules, which serve as the basis for most state ethics rules,¹⁷ prohibit lawyers from filing frivolous or unwarranted claims or defenses.¹⁸ Model Rule 3.1 sets forth the basic rule and states that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and

14. The high court in each state oversees the discipline of lawyers, and the judiciary's authority to regulate lawyers is firmly established. "[T]hirteen state constitutions expressly grant the judiciary authority to regulate lawyers[, and] . . . state high courts' opinions [are] unanimous that regulation of lawyers is an inherent judicial function." ABA, COMM'N ON EVALUATION OF DISCIPLINARY ENFORCEMENT, LAWYER REGULATION FOR A NEW CENTURY 2 (1992) [hereinafter MCKAY REPORT].

15. Courts often rely on the jurisdiction's ethics rules defining conflicts of interest when deciding motions to disqualify a lawyer or law firm. *See, e.g.*, *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751, 753 (2d Cir. 1975) (stating that the ethics rules are the starting point in considering a motion to disqualify); *Portland Gen. Elec. Co. v. Duncan, Weinberg, Miller & Pembroke, P.C.*, 986 P.2d 35, 43 (Or. Ct. App. 1999) (using ethics rules to analyze a motion to disqualify absent any argument to the contrary).

Although a violation of an ethics rule alone does not constitute a cause of action for legal malpractice, proof of an ethics rule violation may be some evidence in considering the standard of care or duty owed to a client. *See, e.g.*, *Williams v. Mordkofsky*, 901 F.2d 158, 163 (D.C. Cir. 1990) (holding that violations of the ethics rules "certainly constitute evidence" in a malpractice action); *Allen v. Lefkoff, Duncan, Grimes & Dermer, P.C.*, 453 S.E.2d 719, 721-22 (Ga. 1995) (considering the violation of an ethics rule as evidence in a malpractice action); *Krischbaum v. Dillon*, 567 N.E.2d 1291, 1301 (Ohio 1991) (stating that "norms of behavior expressed in the Code of Professional Responsibility are directly relevant" to the standard of care in legal malpractice).

16. Wilkins, *supra* note 11, at 802. *See also* Ted Schneyer, *A Tale of Four Systems: Reflections on How Law Influences the "Ethical Infrastructure" of Law Firms*, 39 S. TEX. L. REV. 245, 266-67 (1998) (noting that the ABA often resists administrative agency attempts to regulate lawyers).

17. *See* GILLERS & SIMON, *supra* note 13, at xxvi.

18. MODEL RULES, *supra* note 13, R. 3.1.

fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.”¹⁹ Under Rule 3.1, a comment explains that a lawyer has a “duty not to abuse legal procedure,” and that “in determining the proper scope of advocacy, account must be taken of the law’s ambiguities and potential for change” but that “both procedural and substantive” law “establish[] the limits within which an advocate may proceed.”²⁰ Another comment notes that lawyers must “inform themselves about the facts of their clients’ cases and the applicable law and determine that they can make good faith arguments in support of their clients’ positions” even if lawyers have not first “fully substantiated” the facts in a claim or defense.²¹

Other Model Rules that regulate lawyers’ conduct in this area include: Rule 1.1, requiring competent representation;²² Rule 3.2, mandating reasonable efforts to expedite litigation;²³ Rule 3.3, requiring candor toward the tribunal;²⁴ Rule 3.4(d), prohibiting

19. *Id.* Lawyers have been disciplined professionally for violating state ethics rules based on Model Rule 3.1. See, e.g., *In re Caranchini*, 956 S.W.2d 910, 919–20 (Mo. 1997) (disbarring a lawyer for pursuing claims after it became apparent that they were not supported by the facts); *In re Jackson*, 682 N.E.2d 526, 529–30 (Ind. 1997) (suspending a lawyer from the practice of law for no less than three years for making false claims and pursuing a claim that had been previously litigated to finality in prior lawsuits); *In re Plunkett*, 432 N.W.2d 454, 455 (Minn. 1988) (issuing a public reprimand for a lawyer bringing a frivolous lawsuit).

20. MODEL RULES, *supra* note 13, R. 3.1 cmt. 1.

21. *Id.* R. 3.1 cmt. 2.

22. “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” *Id.* R. 1.1.

23. “A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.” *Id.* R. 3.2.

24. Rule 3.3 provides that, among other things, “[a] lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.” *Id.* R. 3.3(a)(1). A comment to Rule 3.3 states that the “advocate is responsible for pleadings and other documents prepared for litigation,” and “an assertion purporting to be on the lawyer’s own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry.” *Id.* R. 3.3 cmt. 3.

frivolous discovery requests and practices;²⁵ Rule 4.4, prohibiting a lawyer from engaging in conduct that has "no substantial purpose other than to embarrass, delay, or burden a third person;"²⁶ and Rule 8.4(d), prohibiting a lawyer from engaging in conduct that is "prejudicial to the administration of justice."²⁷

The Model Code,²⁸ which preceded the Model Rules, also contains several provisions proscribing certain types of lawyers' litigation conduct. The basic provision is DR 7-102, which states:

(A) In his representation of a client, a lawyer shall not:

(1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

(2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.²⁹

In addition to DR 7-102(A), other Model Code provisions that regulate lawyers' litigation conduct include: DR 1-102(A)(4),

25. Rule 3.4 requires a lawyer to deal fairly with the opposing party and counsel stating that "[a] lawyer shall not . . . make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party." *Id.* R. 3.4(d).

26. *Id.* R. 4.4. "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person." *Id.*

27. *Id.* R. 8.4(d). "It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice" *Id.*

28. MODEL CODE, *supra* note 13.

29. *Id.* DR 7-102(A). Lawyers have been professionally disciplined for violating state ethics rules based on this Model Code provision. *See, e.g.,* Iowa Sup. Ct. Bd. of Prof'l Conduct v. Ronwin, 523 N.W.2d 515, 557 (Iowa 1996) (revoking attorney's license to practice law for filing lawsuits meant to harass and maliciously injure others); *State ex rel. Neb. State Bar Ass'n v. Zakrzewski*, 560 N.W.2d 150, 157 (Neb. 1997) (suspending lawyer from practice of law for eighteen months for failing to investigate a matter and filing a false affidavit); *Columbus Bar Ass'n v. Finneran*, 687 N.E.2d 405, 408 (Ohio 1997) (imposing an indefinite suspension from the practice of law against a lawyer for using dilatory tactics and for voluntarily dismissing cases then serially refiled them in an attempt to generate acceptable settlement offers).

prohibiting conduct involving dishonesty, fraud, deceit, or misrepresentation;³⁰ DR 1-102(A)(5), prohibiting conduct that is prejudicial to the administration of justice;³¹ DR 1-102(A)(6), prohibiting a lawyer's "conduct that adversely reflects on his fitness to practice law;"³² DR 6-101(A)(1), forbidding a lawyer from handling a matter the lawyer is not competent to handle;³³ DR 6-101(A)(2), prohibiting handling a matter without adequate preparation;³⁴ and DR 7-106(C)(7), prohibiting a lawyer from intentionally or habitually violating a rule of procedure or evidence.³⁵

The most common forms of discipline and sanctions for violating applicable ethics rules are public or private reprimands, probation, suspension, and disbarment.³⁶ The ABA Model Rules for

30. "A lawyer shall not . . . [e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation." MODEL CODE, *supra* note 13, DR 1-102(A)(4).

31. "A lawyer shall not . . . [e]ngage in conduct that is prejudicial to the administration of justice." *Id.* DR 1-102(A)(5).

32. *Id.* DR 1-102(A)(6).

33. "A lawyer shall not . . . [h]andle a legal matter which he knows or should know that he is not competent to handle . . ." *Id.* DR 6-101(A)(1).

34. "A lawyer shall not . . . [h]andle a legal matter without preparation adequate in the circumstances." *Id.* DR 6-101(A)(2).

35. "In appearing in his professional capacity before a tribunal, a lawyer shall not . . . [i]ntentionally or habitually violate any established rule of procedure or of evidence." *Id.* DR 7-106(C)(7).

36. LAWYERS' MANUAL, *supra* note 13, § 101:3001. The Lawyers' Manual also lists fines and costs as other sanctions. *Id.* However, while the current ABA Model Rules for Disciplinary Enforcement do not list fines, they do list costs. MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 10(A)(7) (2001). The ABA previously discouraged the use of fines. See Leslie C. Levin, *The Emperor's Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions*, 48 AM. U. L. REV. 1, 77 (1998). The ABA Center for Professional Responsibility has a National Discipline Data Bank, which collects statistics on the various sanctions imposed. The Data Bank does not have information on private reprimands because they are not reported. LAWYERS' MANUAL, *supra* note 13, § 101:3002.

The ABA also administers a Survey on Lawyer Discipline by sending questionnaires to lawyer disciplinary agencies. ABA Standing Comm. on Prof'l Discipline, *Survey on Lawyer Discipline* (2000), available at http://www.abanet.org/cpr/discipline/sold/toc_2000.html (last visited Sept. 27, 2003) [hereinafter *Survey on Lawyer Discipline*]. The disciplinary agencies in Idaho and Montana did not respond, and some states provided only partial data in response to the survey in 2000. The data show that the lawyer disciplinary agencies had jurisdiction over 1,207,076 lawyers, that 114,281 complaints were received by the reporting agencies during 2000, and that 32,302

Lawyer Disciplinary Enforcement state that the highest priority of discipline and lawyer regulation based on the applicable ethics rules is "to deter unethical behavior."³⁷ In addition, the ABA Model Standards for Imposing Lawyer Sanctions state that "[t]he purpose of lawyer discipline proceedings is to protect the public and the administration of justice from lawyers" who are failing "to discharge their professional duties to clients, the public, the legal system, and the legal profession."³⁸ Courts and disciplinary authorities often characterize four goals for lawyer discipline: (1) "protect the

complaints were pending from the prior year. *Id.* chart I. The agencies reported that they dismissed 57,247 complaints for lack of jurisdiction and investigated 90,359 complaints. *Id.* Of the complaints investigated, the agencies dismissed 42,126 after investigation, found that 7050 of the complaints warranted filing of formal charges, and ultimately charged 3360 lawyers with formal complaints. *Id.* Some of the lawyers charged with formal complaints may have had more than one complaint warranting formal charges pending against them, and some of the complaints warranting formal charges may have been resolved with private sanctions or through some other mechanism, such as permitting the lawyer to resign from the practice of law prior to the filing of a formal charge. Telephone Interview with Ellyn S. Rosen, Associate Regulation Counsel, ABA Center for Professional Responsibility (Nov. 17, 2003).

Disciplinary agencies imposed some form of private sanction in 2734 matters, and public sanctions in a total of 4010 matters. *Survey on Lawyer Discipline, supra*, chart II. Thus, private sanctions comprise nearly 41% of all discipline imposed on lawyers. With regard to public discipline, the disciplinary agencies reported that 1719 lawyers were suspended from the practice of law, 856 received public reprimands, admonitions, or censures, 625 were placed on probation, 486 were involuntarily disbarred, 443 consented to disbarments, and 307 received interim suspensions due to the risk of potential harm to clients or the lawyers' criminal convictions. *Id.*

Several agencies did not report the average time necessary from receipt of a complaint to imposition of a sanction, but those reporting the timeframes indicated a wide range—from a low of three months (Iowa, Kentucky, and North Dakota) to a high of nearly three years (Alaska). *Id.* chart V. Of those reporting, the average length of time from receipt of a complaint to imposition of a sanction was nearly one year. *See id.*

37. MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT, *supra* note 36, R. 1 cmt. The Restatement notes that lawyer discipline operates not only "specifically to deter future wrongful conduct seemingly threatened by the lawyer found to have violated mandatory rules" but also "to deter wrongful conduct by other lawyers." RESTATEMENT, *supra* note 10, § 5 introductory note.

38. ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT, STANDARDS FOR IMPOSING LAWYER SANCTIONS: BLACK LETTER RULES AND COMMENTARY 9 (1992).

public,” (2) “protect the integrity of the legal system and ensure the administration of justice,” (3) “deter future unethical conduct and, where appropriate, rehabilitate the lawyer,” and (4) “educate other lawyers and the public” and deter unethical conduct by other lawyers.³⁹

The disciplinary authority of the jurisdiction where the lawyer is admitted to practice has jurisdiction over the lawyer, but the lawyer may be subject to discipline both where the lawyer is admitted to practice and in any other jurisdiction where alleged unethical conduct occurs.⁴⁰ Federal courts usually adopt the ethics rules of the state where the court sits,⁴¹ and federal courts exercise authority

39. *Id.* Some commentators have noted that in addition to deterrence, courts and disciplinary authorities focus on three purposes for lawyer discipline: protect the public, maintain the integrity and standards of the legal profession, and preserve public confidence in the legal profession. See, e.g., Stephen G. Bené, Note, *Why Not Fine Attorneys?: An Economic Approach to Lawyer Disciplinary Sanctions*, 43 STAN. L. REV. 907, 912 & 912 n.18 (1991) (citing these three justifications for lawyer discipline in a study of attorney discipline cases); Levin, *supra* note 36, at 17 (citing these three reasons in several cases).

40. MODEL RULES, *supra* note 13, R. 8.5(a); see also RESTATEMENT, *supra* note 10, § 1. The Model Code does not contain a provision dealing with disciplinary authority and choice of law issues. See CENTER FOR PROF'L RESPONSIBILITY, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 641 tbl. A (5th ed. 2003) [hereinafter ANNOTATED MODEL RULES].

41. RESTATEMENT, *supra* note 10, § 1; cf. *Carlsen v. Thomas*, 159 F.R.D. 661, 663 n.2 (E.D. Ky. 1994) (noting that not all federal courts adopt the ethics rules of the states where the courts sit). Professors Judith McMorro and Daniel Coquillette surveyed the ninety-four federal district courts and found:

[T]here are five districts (5%) that have no local rules governing attorney conduct. Eighty-two districts (87%) have local rules that adopt the state standards of the relevant state. A large group, 62 districts (66%), have local rules that adopt state standards when the state has adopted some form of the *ABA Model Rules* of 1983. There's another group of 14 districts (15%) that also adopt state standards, but where the relevant state still refers to the *ABA Model Code* of 1969 In addition, the four California districts refer to the unique California Rules of Professional Conduct, and two Illinois districts adopt a state version of the ABA model rules that also adopted many standards from the old ABA code, while a third, the N.D. Illinois, its own "rules of preferred conduct."

JUDITH A. MCMORROW & DANIEL R. COQUILLETTE, *MOORE'S FEDERAL PRACTICE, THE FEDERAL LAW OF ATTORNEY CONDUCT* § 802.01 (3d ed. 2001) (citations omitted). McMorro and Coquillette also prepared a chart

pursuant to statutes, rules, and their inherent powers to regulate the conduct of lawyers appearing before them.⁴²

B. Statutes, Inherent Judicial Power, and Court Rules Proscribing Abusive Litigation Conduct

Although state ethics rules based on the Model Rules or Model Code heavily proscribe certain lawyers' conduct in litigation, there are also various federal statutes, inherent judicial power of the courts, and court rules aimed at preventing groundless litigation and punishing lawyers who engage in it. In terms of applicable federal statutes, 28 U.S.C. § 1927 governs litigation conduct at the trial level; it states that any lawyer in federal court "who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."⁴³ Additionally, in federal appellate courts, lawyers must not only follow § 1927 but also 28 U.S.C. § 1912, which provides: "Where a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs."⁴⁴

Federal courts also rely on their inherent powers to regulate lawyers' litigation conduct, which include "the inherent power to evaluate the professional conduct of attorneys practicing before them, and to sanction unprofessional conduct."⁴⁵ As one court observed, "The most prominent of the court's inherent powers is . . .

listing the various rules of professional conduct in the district courts. *See id.* § 802.06.

42. RESTATEMENT, *supra* note 10, § 1 cmt. c; *see* Jeffrey A. Parness, *Enforcing Professional Norms for Federal Litigation Conduct: Achieving Reciprocal Cooperation*, 60 ALB. L. REV. 303, 305 (1996) [hereinafter Parness, *Reciprocal Cooperation*].

43. 28 U.S.C. § 1927 (2003).

44. 28 U.S.C. § 1912 (2003).

45. *Carlsen*, 159 F.R.D. at 663; *see also* *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 227 (1821) ("Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates . . ."); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765 (1980) ("[I]n narrowly defined circumstances federal courts have inherent power to assess attorney's fees against counsel.").

the power to hold . . . a lawyer . . . in contempt.”⁴⁶ In addition to contempt powers, the Supreme Court has held that federal courts have the power to control lawyer admissions to practice in federal courts and to discipline lawyers appearing before them.⁴⁷ This inherent power includes the authority to assess attorneys’ fees and expenses.⁴⁸

As discussed previously, federal district courts usually adopt the state ethics rules where the court sits.⁴⁹ This practice results in a wide variety of ethics rules governing attorney conduct in federal district courts. On the other hand, Federal Rule of Appellate Procedure 46 (Rule 46)⁵⁰ sets forth one set of standards concerning attorney admissions, suspensions, and disbarment for all thirteen circuit courts. Yet, instead of solely relying on Rule 46’s “conduct unbecoming a member of the court’s bar” as a standard for lawyer discipline,⁵¹ many courts of appeals have used their authority under 28 U.S.C. § 2071 to adopt local rules.⁵² The local rules differ from one court of appeals to another and are often inconsistent.⁵³

46. *Schutts v. Bently Nev. Corp.*, 966 F. Supp. 1549, 1561 (D. Nev. 1997) (citing *Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 510 (1873)). The contempt power of courts has been called “ancient,” and courts use contempt power to keep court proceedings orderly. CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* § 2.2.2 (1986).

47. In 1824 the Court recognized that in order to preserve “the respectability of the bar” and to preserve “harmony with the bench,” there was power “incidental to all Courts” to control attorney admissions and to discipline lawyers. *Ex parte Burr*, 22 U.S. (9 Wheat.) 529, 530–31 (1824). See *In re Snyder*, 472 U.S. 634, 643 (1985) (“Courts have long recognized an inherent authority to suspend or disbar lawyers.”).

48. In *Chambers v. Nasco, Inc.*, 501 U.S. 32, 35 (1991), the Court held that a district court “properly invoked its inherent power in assessing as a sanction for a party’s bad-faith conduct attorney’s fees and related expenses paid by the party’s opponent to its attorneys.”

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

50. FED. R. APP. P. 46.

51. Rule 46 states:

A court of appeals may discipline an attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with any court rule. First, however, the court must afford the attorney reasonable notice, an opportunity to show cause to the contrary, and, if requested, a hearing.

Id.

52. “The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules

In addition to their inherent powers, § 1912, Rule 46, and any local rules a circuit court may have adopted, federal courts of appeals may also rely on Federal Rule of Appellate Procedure 38 (Rule 38)⁵⁴ to address the issue of frivolous appeals. Rule 38 states: "If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee."⁵⁵

Finally, at the trial level, district courts have available and use Rule 11 to control attorney conduct associated with bringing frivolous cases.

C. Rule 11's Role in Controlling Lawyers' Litigation Conduct

Rule 11 was a little used federal rule until it was amended in 1983 to provide for a more meaningful system of sanctions for frivolous filings.⁵⁶ Under the pre-1983 Rule 11,⁵⁷ a lawyer's

shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title." 28 U.S.C. § 2071(a) (2003). Long before there was statutory authority for circuit courts to adopt rules regulating lawyers' conduct, the Supreme Court recognized that "Circuit Courts, as well as all other Federal courts, have authority to make and establish all necessary rules for the orderly conducting business in the said courts, provided such rules are not repugnant to the laws of the United States." *Heckers v. Fowler*, 69 U.S. (2 Wall.) 123, 128 (1864).

53. MCMORROW & COQUILLETTE, *supra* note 41, § 803.02; *see also id.* § 803.08 (containing a chart specifying the rules of professional conduct in the various circuits).

54. FED. R. APP. P. 38.

55. *Id.*

56. *See* JEROLD S. SOLOVY & CHARLES M. SHAFFER, JR., *RULE 11 AND OTHER SANCTIONS: NEW ISSUES IN FEDERAL LITIGATION* 15 (1987). "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." FED. R. CIV. P. 11 advisory committee's note to 1983 amendment. The original Rule 11 however was not effective in deterring abuses. *Id.* *See supra* notes 3-4 and accompanying text (noting that the original version of Rule 11 was rarely used to sanction lawyers). *See also* Vairo, *supra* note 5, at 596 (stating that the pre-1983 version of Rule 11 "was largely ignored").

57. FED. R. CIV. P. 11 (1982) (effective Sept. 16, 1938) (current version at FED. R. CIV. P. 11). The 1938 version of Rule 11 provided:

Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney

signature on a pleading certified that there was good cause for the pleading and that it was not brought for the purpose of delay.⁵⁸ This earlier version of Rule 11, in effect from 1938 until the 1983 amendments, was criticized "on the grounds that 'good cause' was poorly defined and that other abuses, such as litigation intended to harass or to force the opposing party to incur unnecessary expenses, were not prohibited."⁵⁹

In response to these concerns, as well as growing complaints among lawyers, judges, and the public over frivolous litigation, the Advisory Committee amended Rule 11 in 1983.⁶⁰ The 1983 version

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. Similarly action may be taken if scandalous or indecent matter is inserted.

Id.

58. "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." *Id.*

59. SOLOVY & SHAFFER, *supra* note 56, at 17.

60. FED. R. CIV. P. 11 (Supp. IV 1986) (effective Aug. 1, 1983) (current version at FED. R. CIV. P. 11). The 1983 version of Rule 11 provided:

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,

of Rule 11 expanded the significance of the lawyer's signature to require an affirmative duty upon the lawyer to conduct a "reasonable [prefiling] inquiry" demonstrating that the filing "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."⁶¹ In addition, the signature certified that the filing "is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."⁶²

The changes to Rule 11 proved to be significant. First, a "reasonable inquiry" or objective standard replaced the "good faith" or subjective standard of the old version of Rule 11.⁶³ Second, the amended version of Rule 11 expanded the improper purposes for filing to include "any improper purpose" and not just delay.⁶⁴ Third, the 1983 version of Rule 11 required the judge to sanction the offending lawyer for violating Rule 11 rather than leaving discretion

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.

Id.

61. *Id.*

62. *Id.*

63. The 1983 version of Rule 11 stated:

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.

Id. (emphasis added).

64. Indeed, the 1983 version of Rule 11 specifically noted that filings "to harass" or cause "needless increase in the cost of litigation" were examples of improper purposes in addition to filings designed to delay litigation. *Id.*

with the judge for imposing discipline on a lawyer as stated in the old version of the rule.⁶⁵ These changes combined to expand the scope of Rule 11 violations to make them easier to prove, and to require a sanction for every violation. As a result, Rule 11 sanctions became more commonplace, and the threat or use of Rule 11 sanctions spawned “[m]eetings and publications of lawyers, judges, and academics . . . filled with ‘war stories’ and analyses” that either praised or criticized Rule 11.⁶⁶

As Professor Georgene Vairo has pointed out, at least one thing is certain about the 1983 version of Rule 11—every empirical study showed that the amended version caused lawyers to “stop and think” and engage in “significantly more prefilings research than they had before Rule 11 was amended.”⁶⁷ The 1983 version of Rule 11 also began to take up a significant portion of lawyers’ energies and court deliberations. One multi-circuit study found that in a one-year period nearly 25% of lawyers who practiced in federal court had been involved in cases in which Rule 11 motions or show cause orders had been filed but did not lead to sanctions, and nearly 8% had been involved in cases where judges imposed sanctions.⁶⁸ In addition, this study found that during the same one-year period over 30% of lawyers had received out-of-court threats of sanctions and nearly 25% had received in-court threats of sanctions in cases where no formal Rule 11 sanctions requests or procedures were initiated.⁶⁹

Understandably, the threats and sanctions took a toll on lawyer relations. A Federal Judicial Center study in 1991 demonstrated that over 50% of the 483 federal judges responding to the survey believed that Rule 11 motions “exacerbate unnecessarily contentious behavior

65. The 1983 version of Rule 11 stated:

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.

Id. (emphasis added).

66. Lawrence C. Marshall et al., *Public Policy: The Use and Impact of Rule 11*, 86 NW. U. L. REV. 943, 943 (1992).

67. Vairo, *supra* note 5, at 621.

68. Marshall et al., *supra* note 66, at 952.

69. *Id.* at 955–56.

of counsel toward one another."⁷⁰ Similarly, a 1992 study by the American Judicature Society (AJS) found that 64% of the lawyers surveyed thought that Rule 11 had caused a decline in lawyer civility.⁷¹

Responding to these and other studies and complaints about Rule 11, the Advisory Committee wrote a 1992 report in which it found that "widespread criticisms of the 1983 version of the rule, though frequently exaggerated or premised on faulty assumptions, were not without some merit."⁷² The Advisory Committee concluded that in many ways the 1983 version was counterproductive to promoting efficient and ethical litigation conduct, and it proposed amendments designed to correct some of the problems and inefficiencies.⁷³

Among its changes, the 1993 version of Rule 11 provided that the purpose of Rule 11 sanctions is solely the deterrence of

70. Vairo, *supra* note 5, at 627 (citing ELIZABETH C. WIGGINS ET AL., FEDERAL JUDICIAL CTR., RULE 11: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 9-10 (1991)).

71. Marshall et al., *supra* note 66, at 964.

72. Letter to Honorable Robert E. Keeton, Chairman, Standing Committee on Rules of Practice and Procedure, *reprinted in* 146 F.R.D. 519, 523 (1993).

73. After receiving comments on Rule 11 and reviewing data from studies and surveys, the Advisory Committee found:

[T]here was support for the following propositions: (1) Rule 11, in conjunction with other rules, has tended to impact plaintiffs more frequently and severely than defendants; (2) it occasionally has created problems for a party which seeks to assert novel legal contentions or which needs discovery from other persons to determine if the party's belief about the facts can be supported with evidence; (3) it has too rarely been enforced through nonmonetary sanctions, with cost-shifting having become the normative sanction; (4) it provides little incentive, and perhaps a disincentive, for a party to abandon positions after determining they are no longer supportable in fact or law; and (5) it sometimes has produced unfortunate conflicts between attorney and client, and exacerbated contentious behavior between counsel. In addition, although the great majority of Rule 11 motions have not been granted, the time spent by litigants and the courts in dealing with such motions has not been insignificant.

The Committee then drafted a proposed amendment with the objective of increasing the fairness and effectiveness of the rule as a means to deter presentation and maintenance of frivolous positions, while also reducing the frequency of Rule 11 motions.

Id. at 523.

objectionable filings,⁷⁴ made the imposition of sanctions discretionary,⁷⁵ provided a “safe harbor” against sanctions for filings that are withdrawn,⁷⁶ permitted the filing of factual allegations without evidentiary support at the time of filing provided they were likely to have evidentiary support after discovery,⁷⁷ and removed discovery activity from the scope of the rule.⁷⁸ The Advisory Committee’s note emphasized that a “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; [and] referring the matter to disciplinary authorities.”⁷⁹

A few years after the 1993 amendments to Rule 11, the Federal Judicial Center surveyed judges and lawyers for their views on the effects of the amendments.⁸⁰ Among the issues surveyed, the

74. “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.” FED. R. CIV. P. 11(c)(2).

75. “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.” FED. R. CIV. P. 11(c).

76. In describing how a Rule 11 proceeding is initiated, Rule 11 provides:

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 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.

FED. R. CIV. P. 11(c)(1)(A).

77. The 1993 version of Rule 11 states that “the allegations and other factual contentions [must] have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.” FED. R. CIV. P. 11(b)(3).

78. Rule 11 labels subdivision (d) “Inapplicability to Discovery,” and it states that “[s]ubdivisions (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.” FED. R. CIV. P. 11(d).

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

80. JOHN SHAPARD ET AL., FEDERAL JUDICIAL CENTER, REPORT OF A SURVEY CONCERNING RULE 11, FEDERAL RULES OF CIVIL PROCEDURE 1

questionnaires asked whether Rule 11 should be modified to better deter groundless filings,⁸¹ and whether sanctions should be mandatory rather than discretionary.⁸² Of those responding, the largest percentages—52% of judges, 41% of plaintiffs' attorneys, 37% of defendants' attorneys, and 40% of other attorneys—stated that Rule 11 "is just right as it now stands."⁸³ With regard to discretion in sanctioning, only 22% of judges, 24% of plaintiffs' lawyers, 27% of defendants' lawyers, and 25% of other lawyers stated that a "court should be required to impose a sanction when a violation is found."⁸⁴

Whether or not one agrees with the majority of judges or lawyers responding to the 1995 Federal Judicial Center survey that the current version of Rule 11 does not need further amendments, the 1993 version of Rule 11 is regulating lawyers' conduct. In some respects, Rule 11 sanctions have an advantage over professional discipline systems because Rule 11 holds lawyers directly accountable for many of their actions in pending federal litigation. In this way, Rule 11 serves as an internal control mechanism, much like the inherent judicial power of contempt, to identify and correct lawyers' misconduct where it happens and close in time to when it happens. Yet, the same conduct that gives rise to Rule 11 sanctions may serve as the basis for discipline by disciplinary agencies. Because of this possibility, and because disciplinary referrals were contemplated by the Advisory Committee, at least one commentator predicted more disciplinary referrals,⁸⁵ and another has argued for more disciplinary referrals, even in instances where lawyers are not

(1995). Questionnaires were mailed to representative samples of 148 federal district court judges and 1130 federal trial attorneys. *Id.*

81. The questionnaire asked survey participants if, given other federal statutes, rules, and inherent judicial authority regulating lawyers' conduct, "[b]ased on your view of how effective or ineffective those other methods are, how, if at all, should Rule 11 be modified?" *Id.* app. B, 14.

82. "Should the court be *required* to impose a monetary or nonmonetary sanction when a violation is found?" *Id.* app. B at 13.

83. *Id.* at 7, tbl. 7. Smaller percentages of respondents—32% of the judges, 11% of the plaintiffs' lawyers, 37% of the defendants' lawyers, and 24% of other attorneys—stated that Rule 11 "should be modified to increase its effectiveness in deterring groundless filings (even at the expense of deterring some meritorious filings)." *Id.*

84. *Id.* at 6, tbl. 5.

85. See Parness, *Disciplinary Referrals*, *supra* note 9, at 38–39, 44–47.

sanctioned under Rule 11 because they have availed themselves of the safe harbor provision by withdrawing the suspect filing.⁸⁶

Setting aside for the moment the question of whether lawyers *should* face discipline for their federal litigation conduct that triggers a Rule 11 sanction, the next part of this article examines whether there *is* empirical evidence demonstrating a relationship between Rule 11 sanctions against lawyers and professional discipline for their litigation conduct.

III. THE USE OF RULE 11 AND SUBSEQUENT PROFESSIONAL DISCIPLINE

Several challenges exist to investigating the use of Rule 11 sanctions. There are no reporting requirements for the federal courts to track and report the use of Rule 11, so researchers must use surveys of lawyers and judges, research actual court dockets, or rely on electronic database searches to understand the uses of Rule 11. Of these common investigation routes, researching electronic databases is the lowest cost, quickest, and easiest method to capture data, but there are many problems with analyzing Rule 11 activity by researching cases on electronic databases.

First, not all cases involving Rule 11 result in published opinions or unreported opinions appearing on electronic databases. For example, one circuit study found that less than 40% of Rule 11 cases are available on electronic databases.⁸⁷

Second, when one conducts an electronic database search for Rule 11 cases, the number of reported cases citing "Rule 11" is likely to be greater than the number of cases in which Civil Rule 11 sanctions are interpreted or applied.⁸⁸ Searching for federal cases citing to "Rule 11" will identify cases in which Federal Rule of Civil Procedure 11 is cited merely as dicta, as well as those cases citing to

86. See Brown, *supra* note 9, at 1593–96, 1604–13.

87. BURBANK, *supra* note 5, at 59.

88. Professor Georgene Vairo found 6947 cases citing "Rule 11" when she conducted the following search of LEXIS: "Genfed Library, Courts File (Oct. 20, 1998) (search for sanction! and (Fed. R. Civ. P. 11 or Rule 11) and date (aft 1983) and date (bef 6/1993))." Vairo, *supra* note 5, at 626 n.259. Although this search strategy found every reported case citing "Rule 11" in the database, there is no way of knowing why Rule 11 was cited without looking at each case.

every other type of Rule 11, such as Federal Rule of Criminal Procedure 11,⁸⁹ which has nothing to do with Federal Rule of Civil Procedure 11.⁹⁰

Given the inherent problems with electronic database searches, researching court dockets is a more accurate method for identifying actual motions or judicial orders referencing Rule 11. Searching the thousands of cases filed each year in over one hundred federal district courts and federal circuit courts,⁹¹ however, is a more time

89. FED. R. CRIM. P. 11.

90. Federal Rule of Criminal Procedure 11 outlines the types of pleas available to and rights of a criminal defendant entering a plea of guilty or *nolo contendere*. See *id.*

In researching for this article, I replicated Professor Vairo's search for the same period and found 7037 cases. Search of LEXIS, Federal Court Cases Combined (Sept. 25, 2003) (search for sanction! and (Fed.R.Civ.P.11 or Rule 11) and date(geq (01/01/1984) and leq (06/01/1993))). A further modification of the search revealed that 294 of the 7037 cases identified with the original search were likely criminal cases. Search of LEXIS, Federal Court Cases Combined (Sept. 25, 2003) (search for sanction! and (Fed.R.Civ.P.11 or Rule 11) and criminal and name (state or (u.s. or united states)) and date(geq (01/01/1984) and leq (06/01/1993))). Most of the criminal cases cited to Federal Rule of Criminal Procedure 11. See, e.g., *United States v. Anderson*, 993 F.2d 1435, 1439 (9th Cir. 1993) (holding that court abused its discretion and violated Rule of Criminal Procedure 11); *United States v. Cholak*, 1993 U.S. App. LEXIS 514, at *3 (6th Cir. 1993) (discussing Rule of Criminal Procedure 11 in the facts); *United States v. Frazier*, 971 F.2d 1076, 1078 (4th Cir. 1992) (discussing Rule of Criminal Procedure 11 in the facts). Some of the criminal cases did cite to Federal Rule of Civil Procedure 11. See, e.g., *United States v. Bertoli*, 994 F.2d 1002, 1013 n.9 (3d Cir. 1993) (discussing Rule of Civil Procedure 11 in dicta); *United States v. Dickstein*, 971 F.2d 446, 450 (10th Cir. 1992) (discussing Rule of Civil Procedure 11 in dicta).

The modified search, however, was not successful in identifying only criminal cases because it yielded some civil cases relying on or citing to Federal Rule of Civil Procedure 11. See, e.g., *New York State Nat'l Org. for Women v. Terry*, 961 F.2d 390, 400 (2d Cir. 1992) (reversing Federal Rule of Civil Procedure 11 sanctions); *Cent. States, Southeast & Southwest Areas Pension Fund v. Lady Balt. Foods, Inc.*, 960 F.2d 1339, 1347 (7th Cir. 1992) (analogizing Federal Rule of Civil Procedure 11).

The modified search also identified ninety more cases than Vairo did in 1998. The additional cases are likely the result of more cases being added to LEXIS because of changes to the database since 1998.

91. There are eighty-nine federal district courts in the fifty states, five additional district courts for territories and the District of Columbia, and thirteen federal circuit courts. U.S. Courts, *The Federal Judiciary, Frequently Asked Questions*, at <http://www.uscourts.gov/faq.html> (last visited Sept. 6, 2003).

consuming and expensive enterprise. Furthermore, searching the dockets will not reveal implied or explicit threats of use of Rule 11, which some researchers want to investigate.⁹² Given the limitations of using electronic databases and actual court dockets, some researchers prefer sampling lawyers to investigate various features of Rule 11 activity.⁹³

Some aspects of Rule 11 activity are amenable to electronic database searches, however. Although electronic database searches of reported cases are both underinclusive and overinclusive to some investigations, there are ways to control for some of the overinclusiveness issues. For example, some search strategies are better at identifying Federal Rule of Civil Procedure 11 cases,⁹⁴ and reviewing the case decisions a search produces can identify those in which courts impose sanctions on lawyers for their litigation conduct.

In the following subsections, I discuss the total number of reported cases citing the 1993 version of Rule 11 for the past ten years and identify the much smaller number in which lawyers or lawyers and their clients are sanctioned. Next, I investigate the frequency with which federal courts explicitly make disciplinary referrals of lawyers for their conduct. Finally, I examine the correlation between reported disciplinary cases and Rule 11 cases in which lawyers are sanctioned and the correlation between cases in which courts make explicit disciplinary referrals pursuant to Rule 11 and reported disciplinary cases resulting from the referrals.

A. Reported Rule 11 Cases Imposing Lawyer Sanctions Pursuant to the 1993 Amendments: 1993-2003

Despite the difficulties of using electronic databases for researching issues concerning the use of Rule 11 sanctions, the data

92. See Marshall et al., *supra* note 66, at 951–56.

93. *Id.*

94. For example, a search for “Rule 11” will identify other types of Rule 11, such as Federal Rule of Criminal Procedure 11. See *supra* notes 88–90. However, limiting the search to commonly used forms of Federal Rule of Civil Procedure 11, such as “Fed. R. Civ. P. 11,” “Federal Rule of Civil Procedure 11,” and “Federal Rules of Civil Procedure 11,” will limit the results to just those cases citing to Federal Rule of Civil Procedure 11. See *infra* notes 95, 97, and accompanying text for a discussion of the search strategy used for this article.

from those searches do tell a story that is useful in understanding the interplay between Rule 11 sanctions and lawyers' discipline for the same conduct. A search of computerized databases for cases decided from the adoption of the amendments to Rule 11 in 1993 until July of 2003 revealed 2171 cases that cited Federal Rule of Civil Procedure 11 and also contained iterations of the words "sanction" or "discipline" in close proximity to the various words for "lawyer."⁹⁵

An examination of the cases citing to Rule 11 based on circuit-specific searches revealed the following:⁹⁶

95. Search of Westlaw, Federal Judicial Circuit, all cases by circuit (search: da (aft 12/01/1993) & da (bef 07/01/2003) & (((rule) (fed.r.civ.p.) ("federal rule of civil procedure") ("federal rules of civil procedure") /1 11) ("federal rule of civil procedure 11") ("federal rules of civil procedure 11") ("fed rules civ. proc. rule 11") ("fed.r.civ.p. 11") /s (attorney counsel lawyer) /s (sanct! disciplin!)). This search revealed the following: First Circuit, Sept. 18, 2003, identified 86 cases; Second Circuit, Sept. 19, 2003, identified 543 cases; Third Circuit, Aug. 1, 2003, identified 207 cases; Fourth Circuit, July 30, 2003, identified 113 cases; Fifth Circuit, July 28, 2003, identified 209 cases; Sixth Circuit, July 24, 2003, identified 155 cases; Seventh Circuit, July 14, 2003, identified 285 cases; Eighth Circuit, July 11, 2003, identified 73 cases; Ninth Circuit, Aug. 1, 2003, identified 229 cases; Tenth Circuit, Aug. 1, 2003, identified 125 cases; Eleventh Circuit, Aug. 1, 2003, identified 92 cases; D.C. Circuit, Sept. 18, 2003, identified 36 cases; Federal Circuit, Sept. 18, 2003, identified 18 cases. A search of all of the circuits combined made toward the end of the data collection revealed a total of 2176 cases, or five more cases than the individual circuit searches. Search of Westlaw, All Federal Cases (Sept. 17, 2003) (search: da (aft 12/01/1993) & da (bef 07/01/2003) & (((rule) (fed.r.civ.p.) ("federal rule of civil procedure") ("federal rules of civil procedure") /1 11) ("federal rule of civil procedure 11") ("federal rules of civil procedure 11") ("fed rules civ. proc. rule 11") ("fed.r.civ.p. 11") /s (attorney counsel lawyer) /s (sanct! disciplin!)) (revealing 2176 cases). The five additional cases were likely added to the database after some of the earlier circuit searches were completed because recently decided cases are being added to the databases as they become available. Telephone Interview with Cheryl Johnson, Research Attorney, Westlaw (Oct. 7, 2003).

To put the number of Rule 11 cases identified for this article into context, consider that a Westlaw Keycite search of Federal Rule of Civil Procedure 11 within the same timeframe identified 5496 cases. *Id.* Therefore, the total number of cases citing to Rule 11 during the timeframe in question is slightly more than two and one-half times greater than the number of Rule 11 cases that discuss some form of the words "sanction" or "discipline" in close proximity to "attorney," "counsel," or "lawyer."

96. See *supra* note 95 and accompanying text.

Circuit	District Court	Circuit Court	Total Cases
First	69	17	86
Second	470	73	543
Third	180	27	207
Fourth	69	44	113
Fifth	78	131	209
Sixth	78	77	155
Seventh	206	79	285
Eighth	44	29	73
Ninth	103	126	229
Tenth	79	46	125
Eleventh	70	22	92
D.C.	27	9	36
Federal	0	18	18
Total Cases	1473	698	2171

Further examination of the cases by reading each case reveals that a much smaller number of cases citing to Rule 11 involved imposing Rule 11 sanctions on lawyers or parties. Of the 1473 district court cases citing to Rule 11, trial judges imposed sanctions on lawyers or lawyers and parties in only 274 cases and imposed sanctions solely on parties in ninety-two additional cases.⁹⁷ The circuit-by-circuit breakdown follows:⁹⁸

97. In analyzing the cases, those cases based on the 1983 version of Rule 11 but decided after December 1, 1993, the effective date of the 1993 version of Rule 11, were not counted. Although Federal Rule of Bankruptcy Procedure 9011 ("Rule 9011") and Rule 11 are analogous, bankruptcy cases involving Rule 9011 were excluded because they were not explicitly Rule 11 cases. *See, e.g., In re Armwood*, 175 B.R. 779, 790 (Bankr. N.D. Ga. 1994) (sanctioning attorney using Rule 9011). Bankruptcy cases that relied on Rule 11 either solely or in conjunction with Rule 9011 were included. *See, e.g., In re Rogers*, 239 B.R. 318, 322 (Bankr. E.D.N.C. 1999) (sanctioning attorney using Rule 11).

98. *See supra* note 95 and accompanying text. A review of each case identified in the initial electronic search produced the smaller numbers of cases that involved Rule 11 sanctions against lawyers, against lawyers and parties, or solely against parties.

Circuit	District Court		Total Cases
	Lawyer or Lawyer and Party Sanctioned	Solely Party Sanctioned	Sanction Cases
First	20	1	21
Second	70	16	86
Third	28	9	37
Fourth	12	10	22
Fifth	23	14	37
Sixth	17	8	25
Seventh	37	10	47
Eighth	8	2	10
Ninth	26	10	36
Tenth	12	3	15
Eleventh	19	9	28
D.C.	2	0	2
Federal	0	0	0
Total Cases	274	92	366

Similarly, further examination of the Rule 11 cases at the circuit level reveals that, of the 698 circuit court cases citing Rule 11 during the ten year period, only 437 of the cases actually involved matters in which lawyers and parties were sanctioned or in which there were appeals challenging the trial court decisions not to impose Rule 11 sanctions. Of these cases, the circuit courts affirmed the trial courts' decisions in 310 cases, reversed in sixty-six cases, and took other action, such as remanding or vacating trial court decisions, in sixty-one cases.⁹⁹ The circuit-by-circuit breakdown appears in Appendix A.

99. These cases, in which the courts took a variety of actions other than affirming or reversing, are coded as "other" in Appendix A. The cases are difficult to categorize because there are many different reasons the courts used for remanding or vacating trial court decisions. For example, in one case, the Second Circuit vacated sanctions imposed on a party and remanded with instructions to the district court to decide whether sanctions should have been imposed upon counsel. *United Republic Ins. Co., in Receivership v. Chase Manhattan Bank*, 315 F.3d 168, 171 (2d Cir. 2003). Another example is vacating because the trial court failed to comply with Rule 11 procedural notice requirements. *Bass v. E.I. Dupont de Nemours & Co.*, 324 F.3d 761, 767-68 (4th Cir. 2003). Some other examples include vacating sanctions because a grant of summary judgment had been vacated, *Ottiano v. Credit Data*

Further analysis of the cases reveals that the circuit courts affirmed sanctions against lawyers in 170 cases¹⁰⁰ and against parties in fifty-eight cases while affirming decisions to deny sanctions against lawyers in twenty-four cases and against parties in fifty-eight cases. During the period in question, circuit courts reversed decisions imposing sanctions on lawyers in fifty-two cases and on parties in ten cases, and reversed decisions denying sanctions against lawyers in two cases and against parties in two cases. The circuit-by-circuit breakdown appears in Appendix B.

The foregoing analyses of reported Rule 11 cases involving lawyer sanctions tell a partial story. The data illustrate the frequency of Rule 11 sanctions against lawyers, but they do not provide us with information about disciplinary referrals under Rule 11, nor professional discipline against lawyers for the conduct underlying their Rule 11 sanctions. The next two sections explore the correlations between reported Rule 11 cases and professional discipline against the lawyers receiving Rule 11 sanctions.

B. Reported Cases Including Disciplinary Referrals as Part of Rule 11 Sanctions

There are very few reported cases including disciplinary referrals as part of Rule 11 sanctions. A search of computerized databases for cases decided from the adoption of amendments to Rule 11 in 1993 until July of 2003 revealed only fifty-one cases in which some form of the words "discipline" or "ethic" appeared within ten words of some form of the word "refer" when added to the original search strategy for Rule 11 cases.¹⁰¹ A further review of the

Southwest, Inc., 54 Fed. Appx. 640, 641 (9th Cir. 2003), and remanding the denial of sanctions because the trial court failed to make findings in support of its denial. *Prewitt v. City of Rochester Hills*, 54 Fed. Appx. 817, 819 (6th Cir. 2002).

100. Some of the circuit cases affirmed sanctions against lawyers appearing in district court cases found in the databases. See, e.g., *Augustine v. Adams*, 24 Fed. Appx. 941, 941 (10th Cir. 2001) (affirming *Augustine v. Adams*, 2000 WL 1375288 (D. Kan. 2000)).

101. Search of Westlaw, All Federal Cases (Sept. 17, 2003) (search: da (aft 12/01/1993) & da (bef 07/01/2003) & (((rule) (fed.r.civ.p.) ("federal rule of civil procedure") ("federal rules of civil procedure") /1 11) ("federal rule of civil procedure 11") ("federal rules of civil procedure 11") ("fed rules civ. proc. rule 11") ("fed.r.civ.p. 11")) /s (attorney counsel lawyer) /s (sanct! disciplin!) & (disciplin! ethic! w/10 refer!))).

fifty-one cases indicated that only two involved referrals solely to the relevant state bar disciplinary or ethics authorities.¹⁰² One additional case involved a referral to federal court officials for disciplinary consideration,¹⁰³ and one involved a referral to both state and federal authorities.¹⁰⁴ The remaining forty-seven cases mentioned disciplinary referrals in many other contexts, such as noting the prior disciplinary referral of counsel as part of a Rule 11 sanction,¹⁰⁵ reversing or rejecting sanctions that include disciplinary referrals,¹⁰⁶ stating that a disciplinary referral was not necessary,¹⁰⁷ and cases involving the 1983 version of Rule 11.¹⁰⁸

Thus, the data reveal a very low number—only four cases—of disciplinary referrals in cases reported to computer databases. After discipline was referred in these cases, disciplinary authorities could either decide not to take action, to issue private discipline, or to issue public discipline.¹⁰⁹ Because only the public discipline cases appear as reported cases, correlating Rule 11 sanctions that include referrals to disciplinary authorities with resulting discipline captures only the public discipline cases, which comprise slightly less than sixty

102. *Comuso v. Nat'l R.R. Passenger Corp.*, 267 F.3d 331, 334, 340 (3d Cir. 2001) (dismissing an appeal from a district court sanction, which included a referral to Supreme Court of Pennsylvania Disciplinary Board); *Bullard v. Chrysler Corp.*, 925 F. Supp. 1180, 1191–92 (E.D. Tex. 1996) (referring the matter to the Texas State Bar Association Attorney Discipline Committee).

103. *Giangrasso v. Kittatinny Reg'l High Sch. Bd. of Educ.*, 865 F. Supp. 1133, 1143 (D.N.J. 1994) (referring the matter to district court's chief judge).

104. *Kramer v. Tribe*, 156 F.R.D. 96, 111 (D.N.J. 1994) (referring the matter to district court's chief judge and to the New Jersey Office of Attorney Ethics).

105. *See, e.g., Grove Fresh Distribs., Inc. v. John Labatt, Ltd.*, 299 F.3d 635, 638 (7th Cir. 2002) (stating that the attorney in question had been referred to the Illinois Attorney Registration and Disciplinary Commission in 1993).

106. *See, e.g., United States v. Wunsch*, 84 F.3d 1110, 1120 (9th Cir. 1996) (reversing sanctions that included referring the matter to the district court Standing Committee on Discipline); *Marks v. Stinson*, 1995 WL 118189, at *2, *4 (E.D. Pa. 1995) (rejecting request for sanctions including referral to state disciplinary authorities).

107. *See, e.g., Obert v. Republic W. Ins. Co.*, 264 F. Supp. 2d 106, 111 (D.R.I. 2003) (stating that referral to the district court disciplinary panel was not required).

108. *See, e.g., Garr v. United States Healthcare, Inc.*, 22 F.3d 1274, 1281 (3d Cir. 1994) (affirming orders from February and July, 1993).

109. *See supra* text accompanying note 36.

percent of all lawyer discipline cases.¹¹⁰ Nevertheless, the following explains the results of the four explicit disciplinary referrals.

The two cases in which disciplinary referrals were made solely to the relevant state bar disciplinary or ethics authorities did not result in subsequent reported discipline cases indicating that the lawyers were disciplined for the same conduct that triggered their Rule 11 sanctions. There was a disciplinary action against one lawyer, however, but the action was held in abeyance after the lawyer notified the disciplinary authorities that he was suffering from a disabling condition making it impossible for him to prepare a defense.¹¹¹ The reported disciplinary case indicates that the lawyer was transferred to inactive status, but it does not indicate the alleged disciplinary violations against him.¹¹² There was not a reported discipline case involving the second lawyer whose sanction included a referral to state lawyer disciplinary authorities.¹¹³

The case involving a referral to federal court officials for possible discipline¹¹⁴ did not result in a subsequent reported federal case involving discipline against the lawyer.¹¹⁵ A search of state discipline cases involving this same lawyer, however, revealed that the lawyer had been named in disciplinary matters predating his Rule 11 sanction. The first disciplinary matter included, among other alleged violations, a violation of the New Jersey ethics rule for failing to expedite litigation.¹¹⁶ He received a public reprimand, was

110. See *supra* text accompanying note 36 (noting that lawyer disciplinary agencies report that nearly forty percent of all lawyer discipline consists of private sanctions).

111. Office of Disciplinary Counsel v. Barish, 829 A.2d 667, 667 (Pa. 2003). The Rule 11 sanction case against Marvin Barish was decided in 2001. See Comuso v. Nat'l R.R. Passenger Corp., 267 F.3d 331, 331 (3d Cir. 2001)

112. See *Barish*, 829 A.2d at 667. It is possible that this case was based on his conduct that resulted in Rule 11 sanctions, but the reasons for the discipline case are not a matter of public record.

113. Search of LEXIS, TX Supreme Court Cases (Sept. 25, 2003) (search: (E. or Todd or T.) w/2 Tracy and (ethic! or disciplin!). E. Todd Tracy is the name of the lawyer in the second case where the court made a disciplinary referral to the Texas State Bar Association Attorney Discipline Committee. See Bullard v. Chrysler Corp., 925 F. Supp. 1180, 1191 (E.D. Tex. 1996).

114. Giangrasso v. Kittatinny Reg'l High Sch. Bd. of Educ., 865 F. Supp. 1133, 1143 (D.N.J. 1994) (referring matter to district court's chief judge).

115. Search of LEXIS, NJ Federal and State Courts, Combined (Oct. 5, 2003) (search for (Edward w/2 Gaffney) and (ethic! or discipline!)).

116. *In re Gaffney*, 627 A.2d 105, 105 (N.J. 1993).

ordered to see a psychiatrist, and was ordered to practice law under the supervision of a proctor.¹¹⁷ A year later, he was temporarily suspended from the practice of law for failing to appear at a hearing to show cause why he should not be suspended from the practice of law.¹¹⁸ Later that same year, the New Jersey Supreme Court followed the recommendation of the Disciplinary Review Board and suspended him from the practice of law for two years and six months for professional misconduct that included gross neglect of client matters, lack of diligence, and failure to keep clients informed.¹¹⁹ In proceedings two years later, ethics violations led to his suspension from practice for three more years.¹²⁰

The last sanction case involved disciplinary referrals to both federal and state disciplinary authorities.¹²¹ There is no subsequent reported federal case involving discipline against the lawyer, but there are several state disciplinary cases involving the lawyer.¹²² The first discipline case against him occurred prior to the Rule 11 sanction case, and the New Jersey Supreme Court publicly reprimanded him for, among other ethics violations, gross neglect of client matters, failure to act with reasonable diligence, and failure to protect clients' interests after terminating representation.¹²³ Neither of the two subsequent state discipline cases, both decided after his Rule 11 sanctions, involved a response to the disciplinary referral made pursuant to his Rule 11 sanctions.¹²⁴ The most recent case, however, mentioned the Rule 11 sanction case.¹²⁵ The New Jersey Supreme Court disbarred the lawyer based on reciprocal discipline principles because he had been previously disbarred in New York.¹²⁶

117. *Id.*

118. *In re Gaffney*, 638 A.2d 134, 134-35 (N.J. 1994).

119. *In re Gaffney*, 648 A.2d 723, 723 (N.J. 1994).

120. *In re Gaffney*, 1996 N.J. LEXIS 1111, at *1-*2 (NJ Oct. 21, 1996).

121. *Kramer v. Tribe*, 156 F.R.D. 96, 111 (D.N.J. 1994) (referring matter to district court's chief judge and to the New Jersey Office of Attorney Ethics).

122. Search of LEXIS, N.J. Federal and State Courts, Combined (Oct. 5, 2003) (search for (Steven w/2 Kramer) and (ethic! or disciplin!)).

123. *In re Kramer*, 617 A.2d 663, 663 (N.J. 1993).

124. See *In re Kramer*, 691 A.2d 816 (N.J. 1997); *In re Kramer*, 800 A.2d 111 (N.J. 2002).

125. *Kramer*, 800 A.2d at 114.

126. *In re Kramer*, 677 N.Y.S.2d 576, 578 (N.Y. App. Div. 1998). In an earlier New York discipline case against the same lawyer, the New York disciplinary authorities based the discipline in part on findings by a federal

It is difficult to make any empirical or normative claims about the relationship between explicit disciplinary referral cases and subsequent discipline for the same conduct. Three of the four lawyers involved in explicit disciplinary referrals, however, had lawyer discipline cases that resulted in their suspension, disbarment, or placement on inactive status even though one cannot say for certain that any of their discipline was based in whole or in part on the same conduct giving rise to their Rule 11 sanctions. It is also important to remember that judges could be making private disciplinary referrals, and such referrals would not appear in current case databases.

The next section explores the correlation between Rule 11 cases and professional discipline using a different technique. The section investigates whether lawyers receiving Rule 11 sanctions are also likely to receive public discipline for that same conduct, or for other unethical conduct, even when an explicit disciplinary referral is not made.

C. Correlation Between Lawyers Sanctioned in Reported Rule 11 Cases and Public Discipline of Those Lawyers

As a final step to uncover the relationship between reported Rule 11 sanctions against lawyers and discipline against these lawyers for that same conduct, I reviewed published discipline cases against the lawyers after the date of their Rule 11 sanctions.¹²⁷ I read each discipline case to see if the basis for the discipline explicitly referred to the Rule 11 sanction.

court that the lawyer had made false statements in an affidavit. *See In re Kramer*, 664 N.Y.S.2d 1, 2–3 (N.Y. App. Div. 1997).

127. The search methodology started with identifying the lawyer's name from the federal case imposing or affirming a Rule 11 sanction against the lawyer. Next, the case was reviewed to identify the state where the district court imposing the sanction was located. Then, a database search was conducted to identify cases containing the lawyer's name in the case title appearing after the date of the case in which the lawyer received the Rule 11 sanction. For example on July 31, 1995, in the case of *Gray v. Millea*, 892 F. Supp. 432 (N.D.N.Y. 1995), the district court in New York sanctioned a lawyer named Thomas Snow for failing to present arguable legal claims. *Id.* at 437–38. Thus, the following search was conducted on Westlaw, New York Cases (search: da (aft 07/31/1995) & TI (Thomas w/2 Snow)).

As discussed previously, trial judges imposed Rule 11 sanctions against lawyers in 274 district court cases, and circuit courts affirmed sanctions against lawyers in 170 cases. In searching subsequent discipline cases involving the lawyers from the combined total of 444 district and circuit cases, only twenty-two of the lawyers sanctioned in these cases were publicly disciplined. Upon analyzing each of the discipline cases against these twenty-two lawyers, I found that only three of the lawyers were disciplined in whole or in part for the same conduct that triggered their Rule 11 sanctions.¹²⁸ In one other case, the Supreme Court of South Carolina suspended a lawyer from practice based upon a finding of criminal contempt against him that accompanied a Rule 11 sanction imposed by a federal court.¹²⁹ In the other subsequent discipline cases, authorities sanctioned lawyers for other conduct,¹³⁰ or the discipline orders did not explain the reason for the action taken.¹³¹ Because

128. See *In re Boone*, 66 P.3d 896, 898 (Kan. 2003) (stating that the district court had found Rule 11 sanctions warranted against the lawyer in *Augustine v. Adams*, 88 F. Supp. 2d 1166 (D. Kan. 2000)); *Kramer*, 800 A.2d at 114 (noting that the district court imposed Rule 11 sanctions on the lawyer in *Kramer v. Tribe*, 156 F.R.D. 96 (D.N.J. 1994)); *In re Disciplinary Action Against Pinotti*, 585 N.W.2d 55, 59–61 (Minn. 1998) (stating that the district court imposed Rule 11 sanctions on the lawyer in *Bergeron v. Northwest Publ'ns, Inc.*, 165 F.R.D. 518 (D. Minn. 1996)); *Kramer*, 664 N.Y.S.2d at 2–3 (stating that the district court imposed Rule 11 sanctions on the lawyer in *Kramer v. Tribe*, 156 F.R.D. 96 (D.N.J. 1994)). As the foregoing cases indicate, one of the lawyers was disciplined in two different states in part for reported Rule 11 conduct.

129. See *In re Bilbro*, 559 S.E.2d 318, 318 (S.C. 2001) (citing *U.S. v. Bilbro*, 81 F.3d 151 (4th Cir. 1996)).

130. See, e.g., *In re Malat*, 830 A.2d 499 (N.J. 2003) (suspending lawyer for ethical violations unrelated to Rule 11 sanctions imposed in *Carlino v. Glouster City High Sch.*, 57 F. Supp. 2d 1 (D.N.J. 1999)); *Cuyahoga County Bar v. Okocha*, 697 N.E.2d 594 (Ohio 1998) (disbarring lawyer for ethical violations unrelated to Rule 11 sanctions affirmed in *Johnson v. Cleveland Heights/Univ. Heights Sch. Dist. Bd. of Educ.*, 66 F.3d 326 (6th Cir. 1995)).

131. See *In re Christopherson*, 62 P.3d 1146, 1146 (Nev. 2000) (stating “Bar Order” in a decision without opinion); Attorney Grievance Comm’n of Md. v. Mraz, 676 A.2d 78, 78 (Md. 1996) (stating the thirty day suspension from the practice of law was by consent). The Fourth Circuit affirmed a district court Rule 11 sanction against Paul Mraz, the lawyer in the Maryland discipline case, for filing an action not supported by the law. *Mraz v. Bright*, 46 F.3d 1125 (4th Cir. 1995). The Ninth Circuit affirmed the district court’s imposition of a Rule 11 sanction against Ian Christopherson, the lawyer in the Nevada discipline case, for filing a “baseless” motion that was “a mere attempt

approximately 40% of all lawyer discipline cases involve private unreported sanctions,¹³² it is not possible to determine whether Rule 11 sanctions result in private sanctions.

The foregoing analysis of reported cases demonstrates very little correlation between reported state discipline cases based upon the same conduct triggering Rule 11 sanctions since the 1993 amendments. This data is consistent with a survey of lawyer disciplinary authorities in 1992 and 1993 revealing that "few, if any, Rule 11 violations had been reported" under the 1983 version of Rule 11.¹³³ Although this investigation demonstrates little empirical evidence of a relationship between Rule 11 sanctions and subsequent lawyer discipline, it begs the question, advanced by some commentators, of whether there should be such a relationship. In the next part of this article, I analyze the institutional interests at stake and discuss whether lawyers should face discipline for the conduct underlying their Rule 11 sanctions.

IV. RULE 11 SANCTIONS AND STATE LAWYER DISCIPLINE REGIMES: INSTITUTIONAL CHOICES

The rules and institutions controlling lawyers' conduct comprise a complex system. As discussed previously, ethics rules, statutes, inherent judicial power, and court rules often proscribe the same conduct.¹³⁴ Thus, a court can sanction a lawyer for abusive litigation conduct and the applicable lawyer disciplinary authority may discipline the lawyer for the same conduct that triggered the Rule 11 sanction. The fact that courts and disciplinary agencies may work in tandem in this fashion has led some commentators to predict or recommend more Rule 11 disciplinary referrals and more lawyer discipline following Rule 11 sanctions.¹³⁵ But is this a good idea?

to vex the defendants or to gain a tactical advantage." *Kalinauskas v. Wong*, No. 95-16645, 1997 WL 67691, at *2 (9th Cir. Feb. 14, 1997).

132. See *Survey on Lawyer Discipline*, *supra* note 36, chart II.

133. Parness, *Disciplinary Referrals*, *supra* note 9, at 52-53.

134. See *supra* Part II.

135. See Brown, *supra* note 9, at 1606-16 (advocating mandatory reporting of all Rule 11 violations to disciplinary authorities); Parness, *Disciplinary Referrals*, *supra* note 9, at 38-39, 44-47 (predicting that the 1993 version of Rule 11 should produce more disciplinary referrals).

A. Institutional Relationship Between Rule 11 and Ethics Rules in Disciplinary Enforcement

1. Rule 11 conduct and the Model Rules

Presumably, lawyer discipline cases based on Rule 11 sanction cases would be grounded on a state's ethics rule equivalent to ABA Model Rule 3.1, which provides that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."¹³⁶ The language of Model Rule 3.1 is strikingly similar to Rule 11's language that by filing, submitting, or advocating a pleading or other filing to the court, the lawyer is "certifying that . . . 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."¹³⁷

Although Rule 11 sanctions may implicate conduct proscribed by other ethics rules,¹³⁸ authorities agree that "Rule 3.1 parallels and is best analyzed in tandem with Rule 11 of the Federal Rules of Civil Procedure."¹³⁹ This connection between Model Rule 3.1 and Rule 11 is reinforced by the fact that most states follow the Model Rules.¹⁴⁰ Since most states follow the Model Rules, the analysis of the institutional relationship between Rule 11 and ethics rules will focus primarily on the Model Rules.

2. Rule 11 disciplinary referrals and reporting professional misconduct under the Model Rules

In addition to the closely aligned language between Rule 11 and Model Rule 3.1, referrals to disciplinary authorities as sanctions

136. MODEL RULES, *supra* note 13, R. 3.1.

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

138. See *supra* Part II.A for a discussion of several other ethics rules proscribing conduct that may give rise to Rule 11 sanctions.

139. ANNOTATED MODEL RULES, *supra* note 40, at 321; see also Brown, *supra* note 9, at 1604 (noting that "there is an undeniable link between Rule 11 and Model Rule 3.1").

140. See *supra* note 13 and accompanying text (stating that more than forty states base their ethics rules on the Model Rules).

under Rule 11 have a counterpart in the duty to report professional misconduct under Model Rule 8.3.¹⁴¹ Under Model Rule 8.3, a lawyer “who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.”¹⁴² Model Rule 8.3 also states that the duty to report does

141. See FED. R. CIV. P. 11 advisory committee’s note to 1993 amendment (discussing disciplinary referrals under Rule 11).

142. MODEL RULES, *supra* note 13, R. 8.3(a). Although more than forty jurisdictions base their ethics rules on the Model Rules, several states have not adopted a reporting requirement analogous to Model Rule 8.3, “believing it unnecessary.” Julie L. Hussey, *Reporting Another Attorney for Violating the Rules of Professional Conduct: The Current Status of the Law in the States Which Have Adopted the Model Rules of Professional Conduct*, 23 J. LEGAL PROF. 265, 270 (1998/1999). For example, Georgia and Kentucky have adopted the Model Rules without the reporting requirement. See *id.* Illinois adopted the reporting requirement, but limited it to reporting only certain criminal acts, dishonesty, fraud, deceit, or misrepresentation. ILL. SUP. CT. R. PROF’L CONDUCT, R. 8.3 (2003) (limiting the duty to report to violations of Rule 8.4(a)(3) or (a)(4)). The related Illinois ethics rule states: “(a) A lawyer shall not . . . (3) commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects; (4) engage in conduct involving dishonesty, fraud, deceit or misrepresentation.” ILL. SUP. CT. R. PROF’L CONDUCT, R. 8.4(a)(3)–(4) (2003).

Other states, such as Washington, have adopted a non-mandatory duty to report by stating that lawyers “should promptly inform the appropriate professional authority” of a lawyer’s violation of the Rules of Professional Conduct. WASH. R. PROF’L CONDUCT 8.3(a) (2003). On the other hand, Louisiana has a stricter reporting standard, and states that “[a] lawyer possessing unprivileged knowledge of a violation of this code shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.” LA. ST. BAR ASS’N ART. XVI, RPC 8.3(a) (2003). Thus, under the Louisiana rule, a lawyer or judge must report all violations of the ethics code and not just those that raise a “substantial question” as to the lawyer’s honesty, trustworthiness, or fitness as a lawyer.

The Model Code analog to Model Rule 8.3 is DR 1-103(A), which states: “A lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.” MODEL CODE, *supra* note 13, DR 1-103(A). DR 1-102 states:

(A) A lawyer shall not:

(1) Violate a Disciplinary Rule.

(2) Circumvent a Disciplinary Rule through actions of another.

(3) Engage in illegal conduct involving moral turpitude.

not require disclosure of information protected by client confidentiality,¹⁴³ thereby subordinating the duty to report to the duty of confidentiality.¹⁴⁴ Therefore, before a lawyer has a duty to report in a jurisdiction that follows Model Rule 8.3, a four-part test must be met: (1) Does the lawyer "know" or have sufficient knowledge of the facts and conduct of the putative lawyer? (2) Does the conduct of the putative lawyer constitute a violation of the ethics rules? (3) Does the lawyer's knowledge of the putative lawyer's conduct fall under the protection of client confidentiality or does it fall under an exception? (4) Does the putative lawyer's violation of the ethics rules raise a substantial question concerning the offending lawyer's honesty, trustworthiness, or fitness as a lawyer?¹⁴⁵

In considering the reporting obligation under Model Rule 8.3 in the context of Rule 11 sanctions, the first two prongs of the four-part test will usually be met. The finding of the court in imposing the sanction usually will satisfy the knowledge requirement,¹⁴⁶ and the

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(5) Engage in conduct that is prejudicial to the administration of justice.

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

Id. DR 1-102. Thus, under the Model Code approach, the duty to report extends to the violation of any disciplinary rule.

143. "This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program." MODEL RULES, *supra* note 13, R. 8.3(c). Model Rule 1.6 provides that a lawyer "shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted" by carefully defined exceptions, such as "to prevent reasonably certain death or substantial bodily harm." *Id.* R. 1.6.

144. ANNOTATED MODEL RULES, *supra* note 40, at 599.

145. An opinion of the District of Columbia Bar Ethics Committee sets forth the four-part test. See D.C. Bar Op. 246 (1994).

146. The Model Rules definitional section states: "'Knowingly,' 'known,' or 'knows' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." MODEL RULES, *supra* note 13, R. 1.0(f). Thus, the filing by the putative lawyer and the subsequent Rule 11 procedures and sanctions will provide the bases for both the judge and the other lawyers involved in the case to "know" the conduct of the putative lawyer.

Rule 11 standard proscribes conduct that is the same as, or at least similar to, conduct the Model Rules prohibit.¹⁴⁷

The third prong—that client confidentiality must not preclude a lawyer from reporting the Rule 11 violation—may be a more difficult test to meet. Although the putative lawyer’s conduct will be made known by the public filing of a pleading or other paper with the court, the confidentiality rule provides that “in the absence of the client’s informed consent, the lawyer must not reveal information relating to the representation.”¹⁴⁸ Confidential information under the applicable ethics rule is much more expansive than attorney-client privilege, which only protects lawyer communications to or from the client under certain conditions.¹⁴⁹ Thus, the confidentiality rule “applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.”¹⁵⁰ Most courts and ethics opinions agree that the duty of confidentiality requires a lawyer to obtain a client’s consent to report another lawyer’s ethical misconduct.¹⁵¹ This

147. See *supra* Part IV.A.1.

148. MODEL RULES, *supra* note 13, R. 1.6 cmt. 2.

149. Although client confidentiality and attorney-client privilege are closely related doctrines justified by many of the same rationales, such as encouraging full and frank communication between client and lawyer, they are not the same. The two doctrines are often confused, and many lawyers and judges mistakenly use the words “privileged and confidential . . . interchangeably as synonyms for one another.” See Peter A. Joy & Kevin C. McMunigal, *Teaching Ethics in Evidence*, 21 QUINNIPIAC L. REV. 961, 963 (2003). The confidentiality rule is directed at lawyers and controlled by ethics rules while “[t]he rule of attorney-client privilege is aimed at the government—usually judges—and commands them not to compel lawyers to divulge privileged communications.” *Id.* at 968.

150. MODEL RULES, *supra* note 13, R. 1.6 cmt. 3.

151. For example, the District of Columbia Bar Ethics Committee has stated that even when information is a “matter of public record” a client must still give consent to the lawyer to use the information under the reporting obligation of Model Rule 8.3. D.C. Bar Op. 246 (1994). See also *In re* Ethics Advisory Opinion No. 92-1, 627 A.2d 317, 322–23 (R.I. 1993) (stating that the duty to report professional misconduct does not authorize a lawyer to disclose any information relating to “the representation of a client” without the client’s consent); Ariz. Ethics. Op. 94-09 (1994) (stating that a lawyer may not report attorney misconduct learned in the representation of a client without the client’s consent). The Illinois Supreme Court took a different view, however, and stated that “[a] lawyer may not choose to circumvent the [reporting] rules by simply asserting that his client asked him to do so.” *In re* Himmel, 533

restriction, however, would not apply to judges, who also have a duty to report professional misconduct.¹⁵²

A client may withhold permission and prevent her lawyer from reporting an opposing lawyer's violation of Rule 11, thereby frustrating the reporting requirement for any number of reasons. The client may believe that reporting the Rule 11 violation will have a negative impact on negotiating a settlement or may further complicate and prolong the litigation,¹⁵³ reporting the opposing lawyer's misconduct would embarrass or otherwise harm the client,¹⁵⁴ or reporting is unnecessary because the Rule 11 sanction was a sufficient punishment.

Even if the potential reporter is a judge, who does not need a client's consent to report misconduct, or a lawyer, who has a client's permission to report conduct triggering a Rule 11 sanction, the fourth prong of the test must still be satisfied before the reporting duty is required. The putative lawyer's violation of the ethics rule must raise a "substantial question" concerning the lawyer's honesty, trustworthiness, or fitness as a lawyer. Satisfying this fourth prong is much more difficult because there is no precise definition of which ethics violations meet this "substantial question" test.

The terminology section of the Model Rules defines "substantial" as "a material matter of clear and weighty

N.E.2d 790, 793 (Ill. 1988). Ethics authorities have criticized the *Himmel* case for failing to analyze the apparent conflict between the duty to report and the duty of confidentiality owed to a client. See, e.g., LAWYERS' MANUAL, *supra* note 13, at 101:203-04 (stating that critics of the *Himmel* case point to the court's failure to reconcile the competing duties); Ohio Sup. Ct. Bd. of Comm'rs on Grievances & Discipline, Op. 90-1 (1990) (rejecting the *Himmel* analysis).

152. "A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct [substitute correct title if the applicable rules of lawyer conduct have a different title] that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate authority." MODEL CODE OF JUDICIAL CONDUCT Canon 3(D)(2) (2003). According to the American Judicature Society, approximately twenty jurisdictions have adopted codes of judicial conduct based on the ABA Model Code of Judicial Conduct. See GILLERS & SIMON, *supra* note 13, at 622. Approximately fifteen additional jurisdictions have adopted some provisions of the ABA Model Code of Judicial Conduct. See *id.*

153. See D.C. Ethics Op. 246 (1994).

154. See Or. Ethics Op. 1991-95 (1995).

importance.”¹⁵⁵ A comment to Model Rule 8.3 provides no more guidance. It states “‘substantial’ refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware.”¹⁵⁶

The “safe harbor” provision in the current version of Rule 11, however, suggests that courts are sanctioning conduct that disciplinary authorities should not only view as Model Rule 3.1 violations but as issues raising a “substantial question” at least in regard to a lawyer’s fitness to practice law. Under the safe harbor provision, a lawyer may make a filing that is not grounded in fact or supported by law and still avoid sanctions by withdrawing or correcting an offending filing within twenty-one days of service of a motion by an opposing party.¹⁵⁷ Pursuant to the safe harbor mechanism, courts sanction only those lawyers who persist in asserting a contention for which they did not have support after receiving notice that their position lacked merit. Such conduct appears to be exactly the type of conduct proscribed by Model Rule 3.1, and it appears to demonstrate a lawyer’s recalcitrant nature.

However, the analysis of Rule 11 conduct in light of how ethics committees treat the “substantial question” requirement is less clear. Except in the few jurisdictions where all ethics violations must be reported,¹⁵⁸ ethics committees “seem reluctant to announce any

155. MODEL RULES, *supra* note 13, R. 1.0(l).

156. *Id.* R. 8.3 cmt. 3.

157. Rule 11(c)(1)(A) provides:

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.

FED. R. CIV. P. 11 (c)(1)(A). The safe harbor, however, does not apply when the court imposes sanctions on its own initiative. *See* FED. R. CIV. P. 11(c)(1)(B).

158. *See, e.g.,* LA. ST. BAR ASS’N ART. XVI, RPC 8.3(a) (2003) (requiring lawyers to report every unprivileged knowledge of “a violation” of the ethics

bright-line test clarifying what kind of conduct raises a 'substantial question about the lawyer's honesty, trustworthiness, or fitness as a lawyer.'"¹⁵⁹ As a result, ethics committees defer to the judgment of lawyers and judges to determine if the conduct of another lawyer satisfies the "substantial question" standard, and very few cases reveal lawyers being disciplined for their failure to report professional misconduct of another lawyer.¹⁶⁰

Thus, an ethics committee has stated that members of a bar journal executive committee "must decide for themselves" whether they have a duty to report a lawyer who admitted to plagiarizing another in an article the bar journal published.¹⁶¹ Another ethics committee determined that a lawyer must make a "preliminary subjective judgment" whether a forgery by a lawyer "rises to a level sufficient to raise a substantial question about the lawyer's honesty, trustworthiness or fitness to practice law."¹⁶² Yet another ethics committee stated that a lawyer "must exercise...[her] own professional judgment to determine whether the alleged conduct of

rules); see also *supra* note 142 (discussing the rules of states that have not adopted reporting requirements analogous to the Model Rule 8.3).

159. LAWYERS' MANUAL, *supra* note 13, at 101:205.

160. "If we look through all the courts of this land, it is virtually unheard of to find a case where a lawyer is disciplined merely for refusing to report another lawyer." Ronald D. Rotunda, *The Lawyer's Duty to Report Another Lawyer's Unethical Violations in the Wake of Himmel*, 1988 U. ILL. L. REV. 977, 982. The disciplinary charge of failing to report another lawyer's unethical conduct is usually one that is added to other charges—normally involving the lawyer aiding the unethical conduct the lawyer failed to report. See *id.* (citing cases where the lawyer is disciplined for doing something else wrong, typically aiding the unethical conduct the lawyer failed to report).

161. Md. Ethics Op. 98-16 (1998). A lawyer admitted to plagiarizing an article that appeared in a bar association journal, and the bar association executive committee asked the Maryland State Bar Association Ethics Committee if the members of the executive committee had a duty to report the plagiarism. *Id.*

162. Conn. Informal Ethics Op. 97-30 (1997). The lawyer requesting the ethics opinion represented a client in a lawsuit involving a real estate transaction where the putative lawyer admitted to signing someone else's name as the witness on a deed and signed the signature acknowledgment even though another signature was forged. *Id.* After considering all of the facts presented, and acknowledging that the lawyer must still decide the "substantial question" issue for himself, the ethics committee opined that it believed there was "a duty to report" the lawyer filing a forged deed document. *Id.*

the various lawyers” involved in perjury required reporting.¹⁶³ Other ethics committees appear to handle these questions on a case-by-case basis,¹⁶⁴ and a lawyer or judge must be familiar with the ethics decisions in the jurisdiction to understand the scope of the reporting duty.

Assuming that all four prongs of the reporting test are met, there is still one additional hurdle that may exist when a court has imposed a Rule 11 sanction. The reporting duty states that reports shall be made to the “appropriate professional authority,”¹⁶⁵ and a comment to Model Rule 8.3 refers to “the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances.”¹⁶⁶ Despite the language in the comment directing lawyers to report to the “bar disciplinary agency,” there are advisory ethics opinions stating that when a lawyer has reported the alleged misconduct to the court having jurisdiction over a case in which the misconduct arose, the lawyer’s reporting duty is discharged because the “courts are an appropriate disciplinary authority.”¹⁶⁷ If that is the view of the bar disciplinary authorities in

163. Md. Ethics Op. 2001-5 (2001).

164. For example, the Connecticut Bar Association Committee on Professional Ethics surveyed several of the committee’s prior opinions and determined that ex parte communications with a judge did not present the “requisite degree of odiousness” to implicate the duty to report. Conn. Informal Ethics Op. 94-33 (1994). Instead, the ethics committee noted that normally the conduct would have suggested “an intentional, perhaps even pre-meditated, effort to abuse the position of the attorney to the advantage of the offending attorney.” *Id.* See also Kan. Ethics Op. 94-13 (1994) (reasoning that verified sexual relations with a client “appears” to implicate the reporting rule if the information is not protected by client confidentiality).

165. MODEL RULES, *supra* note 13, R. 8.3(a).

166. *Id.* R. 8.3 cmt. 3.

167. Conn. Informal Ethics Op. 99-47 (1999). In another opinion, the Connecticut Bar Association Committee on Professional Ethics stated:

[R]eporting unethical conduct to a court having jurisdiction over a case in which the alleged misconduct arose discharges the reporting lawyer’s duty under Rule 8.3, precisely because the court is an appropriate disciplinary authority. Rule 8.3 mandates reporting misconduct by members of the bar; it does not impose an obligation beyond reporting to an appropriate disciplinary authority. Therefore, no duty to make further report is warranted.

Conn. Informal Ethics Op. 99-51 (1999).

a jurisdiction, then a lawyer may conclude that there is no other reporting duty when a judge imposes a Rule 11 sanction.

The numerous qualifications and hurdles necessary before a lawyer or a judge has a mandatory duty to report professional misconduct implicated in Rule 11 sanctions essentially means that for most lawyers and judges there is no mandatory duty to report. In many ways, the non-mandatory duty to report under the ethics rule is the counterpart of the non-mandatory requirement under Rule 11 for a judge to make disciplinary referrals a part of the sanction. The next section evaluates the policies underlying these institutional choices.

B. Institutional Choices Underlying the Relationship Between Rule 11 Sanctions and Disciplinary Enforcement of Ethics Violations for Rule 11 Conduct

The empirical analysis demonstrating a negligible correlation between the Rule 11 sanctions and reported lawyer discipline for that same conduct suggests a number of institutional choices underlying the relationship between Rule 11 sanctions and disciplinary enforcement of ethics violations for Rule 11 conduct. The empirical analysis points to an implicit division of authority concerning the regulation of lawyer litigation conduct in federal courts. In this division of authority, federal district court judges wield primary control over the litigation conduct of lawyers appearing before them. Structural features of both Rule 11 and prevailing ethics rules, both of which do not require either judges or lawyers to report Rule 11 violations to lawyer disciplinary authorities,¹⁶⁸ reinforce this division of authority by virtually guaranteeing that in most instances the Rule 11 sanctions will be the only public sanctions imposed on lawyers for their litigation conduct.¹⁶⁹

168. See *supra* Part IV.A.2.

169. Because approximately forty percent of all sanctions by attorney disciplinary bodies at the state level consist of private sanctions, such as private reprimands or admonitions, see *Survey on Lawyer Discipline*, *supra* note 36, chart II, one cannot say for sure that state disciplinary authorities are not issuing private sanctions to lawyers who receive Rule 11 sanctions. However, one survey of state disciplinary authorities suggests that they rarely, if ever, receive reports of lawyers violating Rule 11, and therefore rarely pursue disciplinary complaints based on Rule 11 sanctions. See Parness, *Disciplinary Referrals*, *supra* note 9, at 52-53 (reporting results of a 1992-1993 survey of state disciplinary authorities). Even if state disciplinary

In addition to the structural features of Rule 11 and the ethics rules, which do not require either referrals to or reporting of Rule 11 sanctions, there are at least four additional institutional choices that underlie the primacy of federal judges in controlling litigation conduct before them: first and foremost, lawyer disciplinary agencies are unable or unwilling to control litigation conduct; second, the legal profession has determined that trial judges are more effective in controlling litigation conduct in pending matters; third, prevailing standards for enforcing lawyer discipline and standards for imposing lawyer sanctions downplay imposing public sanctions for litigation conduct; and fourth, the legal profession's failure to coordinate federal courts' actions with and state lawyer disciplinary agencies contributes to vesting federal judges with the primary responsibility for enforcing norms of acceptable lawyer litigation conduct in bringing lawsuits and making other court filings. The following subsections analyze these institutional choices.

1. Unwillingness of lawyer disciplinary agencies to control litigation conduct

Writing about the impetus for the 1983 amendments to Rule 11, Professor Richard Underwood observed that escalating frivolous litigation and the "perceived inability or reluctance by the bar to police its ranks through disciplinary actions"¹⁷⁰ served to "encourage the use of Rule 11 as a sanctioning mechanism for deterring groundless litigation."¹⁷¹ Professor Underwood's observations hold true today, as lawyer disciplinary authorities rarely impose sanctions after receiving complaints against lawyers, and there is little indication that they impose discipline after lawyers receive Rule 11 sanctions.¹⁷²

authorities do issue private reprimands to lawyers receiving Rule 11 sanctions, those private sanctions simply promote specific deterrence on the lawyer sanctioned and have little or no general deterrent effect on other lawyers because the private sanctions usually are not publicized. See Levin, *supra* note 36, at 22.

170. Richard H. Underwood, *Curbing Litigation Abuses: Judicial Control of Adversary Ethics – The Model Rules of Professional Conduct and Proposed Amendments to the Rules of Civil Procedure*, 56 ST. JOHN'S L. REV. 625, 630–31 (1982).

171. *Id.* at 642.

172. See *supra* Part III.C.

In 2000, state lawyer disciplinary agencies dismissed approximately 39% of complaints against lawyers for lack of jurisdiction,¹⁷³ and disciplinary agencies dismissed nearly 47% of the complaints they investigated.¹⁷⁴ Of the remaining complaints, formal charges were filed in slightly less than 7% of the matters.¹⁷⁵ Once formal charges were filed, it appears that authorities imposed discipline in most instances, though the ABA does not specifically correlate the number of lawyers formally charged with the number disciplined.¹⁷⁶ When disciplinary agencies impose sanctions, nearly 41% of the sanctions are private and approximately 59% are public sanctions.¹⁷⁷ Thus, only a small fraction of complaints ever result in lawyer discipline, and a large percentage of the discipline meted out is in the form of private sanctions.

This data on lawyer discipline nationwide does not include a breakdown on the types of rule violations involved in lawyer

173. See *Survey on Lawyer Discipline*, *supra* note 36, chart I (stating that 57,247 of 146,583 complaints received and pending with disciplinary agencies were dismissed for lack of jurisdiction).

174. See *id.* (stating that 42,126 of 90,359 complaints investigated were dismissed after investigation).

175. See *id.* (stating that 3360 formal charges were brought against the remaining 48,233 complaints).

176. State disciplinary agencies reported to the ABA that the agencies formally charged 3360 lawyers. See *id.* chart I. The state disciplinary agencies reported that authorities imposed 4010 public sanctions. See *id.* chart II. The ABA does not ask agencies to report the number of lawyers sanctioned after formal charges are issued. See *id.* charts I, II; Telephone Interview with Ellyn S. Rosen, *supra* note 36 (stating that the ABA does not ask state disciplinary agencies to correlate the sanctions imposed with the number of lawyers formally charged). The data reported do not make it clear why there are a greater number of public sanctions than the number of lawyers formally charged, though the greater number of sanctions may result from disciplinary authorities imposing more than one type of public sanction on some formally charged lawyers. *Id.*

177. See *Survey on Lawyer Discipline*, *supra* note 36, chart II (stating that private sanctions were imposed in 2734 cases and that public sanctions were imposed in 4010 cases). The ABA urges state disciplinary agencies and high courts not to issue private sanctions after a formal complaint is filed, though agencies and courts do so anyway. Telephone interview with Ellyn S. Rosen, *supra* note 36; see, e.g., DEL. LAW. R. DISCIPLINARY PROC. 8(a)(6)-(7) (stating that the Delaware Supreme Court may issue a private admonition or private probation); *Id.* 9(d)(5) (stating that after formal disciplinary proceedings the disciplinary board shall submit findings and recommendations to the Delaware Supreme Court).

discipline, but reports from disciplinary agencies in state bar journals often do. An annual report from Missouri on the types of complaints made against lawyers in 2002 helps to illustrate how rarely complaints are made based on litigation conduct.¹⁷⁸

In 2002, 2002 letters of complaint were filed against lawyers in Missouri.¹⁷⁹ The Office of Disciplinary Counsel determined that 878 did not warrant investigation, 729 required formal investigation, 153 were referred for resolution outside of the disciplinary process, 139 were referred for informal resolution, and 103 were referred to fee dispute committees.¹⁸⁰

Of the 729 complaints opened by the Office of Disciplinary Counsel in Missouri, not a single complaint was based on a violation of Missouri Rule 3.1.¹⁸¹ The report on the informal resolution process similarly shows that not a single complaint involved filing frivolous lawsuits.¹⁸²

Communication problems with clients, lack of diligence, dishonesty or misrepresentation, conflicts of interest, and safekeeping client property issues comprised the greatest number of complaints.¹⁸³ This complaint data supports the view that lawyer discipline is primarily focused on client-centered issues;¹⁸⁴ abusive

178. See generally Maridee F. Edwards, *Report of the Office of Chief Disciplinary Counsel for the Year 2002 Together with the Financial Report of the Treasurer of the Advisory Committee Fund for 2002*, 59 J. MO. B. 238 (2003) (discussing the complaints filed against Missouri lawyers in 2002).

179. *Id.* at 242.

180. *Id.* The Chief Disciplinary Counsel in Missouri has the authority to refer complaints to three person volunteer complaint resolution committees whenever disciplinary counsel determines that the complaints should be resolved outside of the formal disciplinary process. See 1 MO. CT. R. 5.10 (2003). The court rule establishing the process does not define the types of matters that may be resolved by this informal, confidential process. See *id.*

181. See Edwards, *supra* note 178, at 246.

182. See *id.* at 247.

183. Out of the 729 complaints disciplinary counsel formally investigated, 295 involved communication problems, 163 diligence issues, 51 dishonesty, fraud, deceit or misrepresentation, 39 conflicts, and 38 safekeeping client property. See *id.* at 246.

184. Professor William Simon explains that the "Dominant View" in legal ethics assumes that the most important ethical duties are those owed to the client. See WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* 8 (1998). Simon points out that this Dominant View permeates the Model Code and the Model Rules. *Id.* Thus, it is no surprise that the bulk of the bar complaints in Missouri focused on issues directly

litigation conduct, such as frivolous filings, does not commonly trigger complaints leading to lawyer discipline.

Both the data correlating Rule 11 sanctions with subsequent lawyer discipline and the Missouri data on the types of complaints against lawyers suggest that, as Professor Jeffrey Parness has argued, only the most serious litigation misconduct should be referred to lawyer disciplinary agencies and trial judges presiding over cases are best able to handle less serious litigation misconduct.¹⁸⁵ Although neither federal district court judges nor bar disciplinary agencies acknowledge that such an institutional choice has been made, there appears to be little proof to the contrary.

2. Trial judges are more effective at controlling litigation conduct

Both the 1983 and 1993 versions of Rule 11 strengthened the role judges have in regulating lawyer litigation conduct in matters pending before trial courts. In many ways, the strengthening of Rule 11 responded to the call by former Chief Justice Warren Burger in 1980 to change rules and procedures that aided litigation abuse and for judges to act "to prevent or correct abuse and misuse of the system."¹⁸⁶ Justice Burger urged trial judges to "take a more active role in the management of litigation," and stated that "[s]anctions must be used to prevent or penalize abuses."¹⁸⁷

Justice Burger's call, more than twenty years ago, recognized that judges are more effective at controlling litigation conduct than the disciplinary processes of the legal profession. While some commentators have argued that federal district court judges are "usurping the function of the bar association and disciplinary

affecting clients, such as communication problems, lack of diligence, dishonesty or misrepresentation, conflicts of interest, and safekeeping property. See *supra* note 183. Indeed, nationwide clients file most disciplinary complaints. See Eric H. Steele & Raymond T. Nimmer, *Lawyers, Clients, and Professional Regulation*, 1976 AM. B. FOUND. RES. J. 917, 946-49, 973; Wilkins, *supra* note 11, at 823.

185. Parness, *Disciplinary Referrals*, *supra* note 9, at 59-60.

186. Warren E. Burger, *Annual Report on the State of the Judiciary - 1980*, 66 A.B.A. J. 295, 296 (1980).

187. *Id.*

processes" through the use of Rule 11 sanctions,¹⁸⁸ other commentators and courts have maintained that trial judges are best able to regulate lawyers' conduct in matters pending before them.¹⁸⁹ In many ways, federal district court judges use Rule 11 to enforce ethical norms for litigation conduct "that state disciplinary bodies have been unable or unwilling to enforce."¹⁹⁰ Judicial enforcement of acceptable norms for litigation is both consistent with the historical role of the judiciary and evidence that judges play a key role in regulating lawyer behavior in bringing and defending cases.

The efficacy of judicial control of litigation conduct is supported, at least in part, by the data on Rule 11 sanctions. Of the 274 Rule 11 sanction cases involving lawyers decided since 1993,¹⁹¹ only five lawyers were sanctioned in multiple cases.¹⁹² This data is confirmed by the anecdotal observation of one judge who observed that "[i]t is not often that one encounters a recidivist violator of Rule 11 of the Federal Rules of Civil Procedure."¹⁹³ The lack of repeat

188. Stephen R. Ripps & John N. Drowatzky, *Federal Rule 11: Are the Federal District Courts Usurping the Disciplinary Function of the Bar?*, 32 VAL. U. L. REV. 67, 69 (1997).

189. See, e.g., Harlan v. Lewis, 982 F.2d 1255, 1261 (8th Cir. 1993) (stating that district court judges are best able to preserve the integrity of trial proceedings); Parness, *Disciplinary Referrals*, *supra* note 9, at 59 (stating that sanctioning less serious professional misconduct is best handled by the trial judge).

190. Victor H. Kramer, *Viewing Rule 11 as a Tool to Improve Professional Responsibility*, 75 MINN. L. REV. 793, 797-98 (1991).

191. See *supra* note 97 and accompanying text.

192. Noemi A. Collie was sanctioned in two cases. See *Dailey v. Vought Aircraft Co.*, 141 F.3d 224 (5th Cir. 1998); *Collie v. Kendall*, 1999 WL 329740 (N.D. Tex. May 20, 1999). Samuel A. Malat was sanctioned three times. See *Carlino v. Gloucester City High Sch.*, 57 F. Supp. 2d 1 (D.N.J. 1999) *affirmed*; *Carlino v. Gloucester City High Sch.*, 44 Fed. Appx 599 (3d Cir. 2002); *Luallen v. Borough of Paulsboro*, 180 F. Supp. 2d 615 (D.N.J. 2002); *Mendez v. Draham*, 182 F. Supp. 2d 430 (D.N.J. 2002). Erik C. Mobius was sanctioned twice. See *Garcia v. Wash.*, 20 F.3d 608 (5th Cir. 1994) (affirming Rule 11 sanctions); *In re Wood*, 167 B.R. 83 (Bankr. W.D. Tex. 1994). Herbert H. Victor was sanctioned three times. See *Boyce v. Microsoft Corp.*, 1995 WL 153281 (N.D. Ill. April 6, 1995); *Burkhalter v. Brisk Transp., Inc.*, 1994 WL 411396 (N.D. Ill. 1994); *Fernandez v. Galen Hosp. Ill., Inc.*, 1997 WL 675042 (N.D. Ill. Oct. 28, 1997). Stephen A. Weingard was sanctioned twice. See *MAI Photo News Agency, Inc. v. Am. Broad. Co., Inc.*, 2001 WL 180020 (S.D.N.Y. Feb. 22, 2001); *Silberman v. Innovation Luggage, Inc.*, 2003 WL 1787123 (S.D.N.Y. April 3, 2003).

193. *Mendez*, 182 F. Supp. 2d at 431.

offenders is a strong indication that judicially imposed sanctions are working.

3. Lawyer disciplinary enforcement rules and standards for imposing sanctions disfavor lawyer discipline for litigation conduct

Until the mid-1980s, there were no standards for imposing lawyer discipline,¹⁹⁴ and the ABA did not adopt the Model Rules for Lawyer Disciplinary Enforcement until 1989.¹⁹⁵ The lack of standards was just one feature of largely dysfunctional lawyer disciplinary systems in the United States that a special ABA committee described as "scandalous" more than thirty years ago.¹⁹⁶ The ABA committee found that "the prevailing attitude of lawyers toward disciplinary enforcement ranges from apathy to outright hostility" and that "[d]isciplinary action is practically nonexistent in many jurisdictions."¹⁹⁷ Twenty years later, a new ABA commission found that "revolutionary changes" had taken place, and that many of the problems that existed in the late 1960s and early 1970s had been corrected.¹⁹⁸

The Model Rules for Disciplinary Enforcement set forth a category described as "lesser misconduct," which is described as "conduct that does not warrant a sanction restricting the respondent's license to practice law."¹⁹⁹ Rather than defining "lesser misconduct," the rules state that conduct may not be viewed as lesser misconduct if the conduct involves the "misappropriation of funds," "results in or is likely to result in substantial prejudice to a client or other person," "involves dishonesty, deceit, fraud, or misrepresentation," is a serious crime, is the same as conduct for which the respondent was disciplined within the past five years, or "is part of a pattern of similar misconduct."²⁰⁰ Thus, except in

194. Levin, *supra* note 36, at 31.

195. See MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT, *supra* note 36.

196. A.B.A. SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 1 (1970).

197. *Id.*

198. See MCKAY REPORT, *supra* note 14, at xiv.

199. MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT, *supra* note 36, R. 9B.

200. *Id.*

extreme cases of Rule 11 violations, or for lawyers who repeatedly violate Rule 11, the disciplinary enforcement rules permit potential ethics violations based on Rule 11 violations to be treated as lesser misconduct that would, if pursued by disciplinary authorities, not normally result in sanctions restricting the putative lawyer's right to practice law.²⁰¹

Similar to the Model Rules for Disciplinary Enforcement, the Model Standards for Lawyer Sanctions do not usually treat litigation misconduct prohibited by Rule 11 as a serious matter. The standard describing "abuse of the legal process" mentions the possibility of sanctions for "failure to expedite litigation or bring a meritorious claim."²⁰² Examples of sanctions under this standard focus on knowing violations of a court order or rule to gain an advantage in a matter,²⁰³ or other violations that do not involve violations of Rule 11.²⁰⁴ Although it is possible that a Rule 11 sanction may fit the definition of the sanction standard for abuse of legal process, the Model Standards fail to illustrate this possibility with an example. This failure to discuss or illustrate how Rule 11 conduct may lead to discipline appears to suggest that disciplinary sanctions for Rule 11 violations are not a priority under the Model Standards for Lawyer Sanctions. As Professor Ted Schneyer observed, "disciplinary agencies normally leave enforcement [of prohibitions against taking frivolous positions] to the courts."²⁰⁵

4. The legal profession fails to coordinate state lawyer discipline with the federal judiciary

The lack of data demonstrating a high correlation between state disciplinary proceedings following Rule 11 sanctions illustrates the general lack of coordination between the federal judiciary and lawyer disciplinary agencies. State courts reviewing federal discipline

201. *See id.*

202. MODEL STANDARDS FOR IMPOSING LAWYER SANCTIONS 6.2 (2003).

203. *See id.* 6.21 cmt. (stating that disbarment is appropriate for intentionally misusing the legal process to benefit the lawyer or another).

204. *See id.* 6.22 cmt. (stating that suspension is appropriate for knowing violations of court orders applying directly to lawyers); *id.* at 6.23 cmt. (stating that reprimands are appropriate for violating court orders or rules and injuring clients or others by causing delays or neglecting matters).

205. Schneyer, *supra* note 16, at 255.

reserve the right not to impose reciprocal discipline,²⁰⁶ thus state disciplinary authorities are not required to accept Rule 11 sanctions as per se indication of state ethics violations.

Similarly, despite the shared language between Rule 11 and Model Rule 3.1, one commentator notes "the ABA has stubbornly refused to acknowledge or sanction the use of the Model Rules as the standard for Civil Rule 11 or any other motion practice."²⁰⁷

As a result of this disjunction between the federal judiciary imposing Rule 11 sanctions and lawyer disciplinary agencies, federal judges regulate litigation practice by "prefer[ing] to sanction [Rule 11] violators directly, rather than referring them to disciplinary agencies."²⁰⁸ And this appears to be a wise choice, one that enables judges to control lawyers' litigation conduct directly, to fashion appropriate remedies, and to impose remedies close in time to the offense.

V. CONCLUSION

The lack of correlation between Rule 11 sanctions and subsequent lawyer discipline for the Rule 11 conduct suggests that enforcing norms against bringing or maintaining frivolous positions in federal courts is almost exclusively the province of judges. These data reflect an institutional division of authority that recognizes the many advantages judges have over lawyer disciplinary bodies in regulating lawyers' litigation conduct. Judges possess "expertise in evaluating pleadings and motions, a strong interest in protecting the integrity of proceedings in their own courtrooms, and power to dispose of the issue without initiating an entirely new proceeding."²⁰⁹

The primacy of federal judges controlling litigation conduct is further supported by the lack of mandatory duties to refer or report Rule 11 sanctions to disciplinary authorities, the structure of lawyer

206. MCMORROW & COQUILLETTE, *supra* note 41, § 806.04[4][c].

207. Richard G. Johnson, *Integrating Legal Ethics & Professional Responsibility with Federal Rule of Civil Procedure 11*, 37 LOY. L.A. L. REV. 819 (2004). Richard Johnson cites language from the scope provision of the Model Rules in which the ABA maintains that violation of an ethics rule should not, itself, give rise to a cause of action against the lawyer or serve as the basis for remedies in addition to a disciplinary action. *Id.* at zzz.

208. Schneyer, *supra* note 16, at 255–56.

209. *Id.* at 256.

disciplinary enforcement and sanction standards that focus more on ethics rule violations directly affecting clients rather than litigation conduct, and the lack of coordination between the federal judiciary and state disciplinary systems.

The institutional structures and relationships combine to create a system of lawyer regulation in which Rule 11 sanctions serve as the only punishment for lawyers asserting frivolous positions in most cases. The judges and lawyers involved in litigation matters, where frivolous positions have been asserted, have wide discretion to refer or report such violations, and there is little data to suggest that such referrals or reporting of Rule 11 violations routinely take place. Thus, public discipline of lawyers in addition to Rule 11 sanctions is rare, and the limited data available suggest that professional discipline for Rule 11 violations is reserved for the worst offenders or those involved in other ethics violations. Absent proof that a large number of lawyers are repeatedly violating Rule 11, the present informal allocation of primary authority to trial judges to curb frivolous litigation appears to be a sound institutional choice.

Appendix A

Appeals of Rule 11 Sanctions Against Lawyers or Lawyers and Parties*

Circuit	Affirmed	Reversed	Other	Total Cases
First	9	0	2	11
Second	30	10	17	57
Third	9	0	1	10
Fourth	23	2	6	31
Fifth	17	7	3	27
Sixth	51	4	6	61
Seventh	35	9	5	49
Eighth	20	1	1	22
Ninth	62	22	10	94
Tenth	30	2	4	36
Eleventh	12	4	0	16
D.C.	5	1	2	8
Federal	7	4	4	15
Total	310	66	61	437

* See *supra* note 95 and accompanying text. This chart provides the circuit-by-circuit breakdown of cases in which the circuit courts affirmed, reversed, or took other action, such as remanding or vacating trial court decisions, in cases where lawyers or lawyers and parties received Rule 11 sanctions, or the trial court declined to impose Rule 11 sanctions. See also *supra* note 99 and accompanying text.

Appendix B

Analysis of Circuit Rulings in Rule 11 Sanction Cases*

Cir.	Affirmed				Reversed				Other	Total
	Imposed Sanction		Denied Sanction		Imposed Sanction		Denied Sanction			
	Atty.	Party	Atty.	Party	Atty.	Party	Atty.	Party		
1 st	5	1	3	0	0	0	0	0	2	11
2 nd	15	5	4	6	8	2	0	0	17	57
3 rd	6	1	0	2	0	0	0	0	1	10
4 th	13	3	1	6	2	0	0	0	6	31
5 th	8	5	0	4	6	1	0	0	3	27
6 th	15	14	6	16	2	1	0	1	6	61
7 th	20	9	2	4	6	0	2	1	5	49
8 th	13	2	2	3	0	1	0	0	1	22
9 th	39	9	4	10	20	2	0	0	10	94
10 th	15	8	2	5	1	1	0	0	4	36
11 th	12	0	0	0	3	1	0	0	0	16
D.C.	5	0	0	0	1	0	0	0	2	8
Fed.	4	1	0	2	3	1	0	0	4	15
Total	170	58	24	58	52	10	2	2	61	437

* See *supra* note 95 and accompanying text. This chart provides the circuit-by-circuit analysis of rulings in Rule 11 sanction cases. See also *supra* note 101 and accompanying text.

