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Ripps and Drowatzky: Federal Rule 11: Are the Federal District Courts Usurping the Dis

FEDERAL RULE 11: ARE THE FEDERAL DISTRICT COURTS USURPING THE DISCIPLINARY FUNCTION OF THE BAR?

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Rule 11 of the Federal Rules of Civil Procedure (Rule 11 or the Rule) is perhaps one of the most controversial and debated rules among judges, attorneys and academics today. Rule 11 is intended to prevent frivolous litigation by allowing courts to impose sanctions upon an attorney or pro se¹ party who files a case in bad faith, without substantial justification, or without reasonable investigation.² The current version of Rule 11, enacted in 1993, provides an objective standard to determine whether or not an attorney has filed a groundless pleading.

Originally, Rule 11 imposed merely a subjective "good faith" standard on attorney's pleadings. Change came as the result of a substantial increase in frivolous lawsuits. The 1983 amendment to Rule 11 replaced the lenient subjective standard, embodied in the original 1938 version of Rule 11, with a stricter objective standard.³ Under the objective standard, attorneys no longer have an excuse to avoid the affirmative duty to conduct a reasonable inquiry. In addition to this new standard, the 1983 Rule provided for mandatory sanctions. The Rule also allowed compensation for the attorney's fees incurred by the injured party.

Rule 11 took another step when the 1993 amendment imposed a continuing duty on an attorney to correct or withdraw a pleading or motion

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1. A pro se party is a party that represents himself or herself without the assistance of counsel.

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

3. The most recent amendments to Rule 11, which took effect on December 1, 1993, include a new, non-mandatory sanctioning power and a twenty-one day "safe harbor" period, during which time the movant may withdraw his or her motion or other paper without a penalty. FED. R. CIV. P. 11(c)(1)(A).

after it is signed if the documents appear to have become frivolous in light of new facts or law. The present form of Rule 11 places an affirmative duty on counsel throughout the proceedings to make a reasonable inquiry into the facts constituting the basis for a claim.⁴ If an attorney or pro se party fails to investigate the facts giving rise to the pleading, and the court later finds the pleading to be groundless, the attorney or pro se party may be sanctioned under Rule 11. The 1993 version uses the same objective standard as the 1983 version. However, in the 1993 revision, sanctions became discretionary with the court, rather than mandatory. The current Rule 11 also created a twenty-one day "safe harbor" during which a party may withdraw the pleading without penalty.

Currently, a bill is before Congress which, if passed, would substantially alter the provisions of Rule 11 by reinstating some of the aspects of the 1983 Rule, and also by taking a further step. The House of Representatives passed section 104(B) of the Common Sense Legal Reforms Act (CSLRA) on March 7, 1995, as section 4 of the Attorney Accountability Act of 1995 (AAA).⁵ This new bill may be a response to criticism that the 1993 version left Rule 11 with little power.⁶ Specifically, AAA would make the imposition of sanctions for violation of Rule 11 mandatory, rather than discretionary,⁷ thus "put[ting] a bigger emphasis on the Rule's compensatory function by clarifying that sanctions should be sufficient to deter repetition and to compensate the parties that were injured."⁸ Further, AAA provides mandatory compensation for attorney's fees as a part of the sanction.⁹ In addition, it would eliminate the "safe harbor" provision of the current Rule 11(c), which allows an attorney or litigant twenty-one days to withdraw

4. Rule 11 has gone full circle in how the judges should treat violations of the Rule: the 1938 Rule employed a subjective standard; the 1983 Rule employed an objective standard with mandatory sanctions; and the 1993 Rule employed an objective standard with discretionary sanctions and a twenty-one day "safe harbor" provision. The more lenient subjective standard employed by the 1938 Rule allowed an attorney or pro se party to file a pleading if the attorney or pro se party believed that the pleading was not frivolous. Today, if the court finds the pleading to be frivolous, the court may impose sanctions at its discretion. Thus, violations of the 1993 Rule do not automatically trigger sanctions; rather, sanctions are left to the discretion of the trial court. Jeffrey A. Parness, *The New Federal Rule 11: Different Sanctions, Second Thoughts*, 83 ILL. B.J. 126, 126-27 (1995).

5. H.R. 988, 104th Cong. § 5 (1995). See also Carl Tobias, *Common Sense and Other Legal Reforms*, 48 VAND. L. REV. 699, 721-22 (1995).

6. SUPREME COURT OF THE U.S., reprinted in AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND FORMS, 146 F.R.D. 401, 507-10 (1993) (Scalia, J., dissenting) [hereinafter SUPREME COURT].

7. In essence, this new bill would return Rule 11 back to the 1983 version. See FED. R. CIV. P. 11 (1983 revision), reprinted in 97 F.R.D. 165, 167-68 (1983).

8. H.R. Rep. No. 104-62, at 18 (1995).

9. *Id.*

challenged pleadings without penalty or sanction.¹⁰ Finally, AAA would require application of Rule 11 to discovery, thus returning to the 1983 formula.¹¹

Part I of this Article sets forth a brief historical background of the changes to, and application of, the Rule 11 sanctions.¹² Part II will discuss and analyze the 1991 and 1995 published surveys.¹³ In Part III, the 1996 data collected from bar associations and federal courts by the authors will be reviewed and analyzed. Included in the data are the opinions of the bench and bar relating to non-mandatory sanctions and the "safe harbor" provisions contained in the present rule. The authors will also discuss whether the federal district courts are usurping the function of the bar association and disciplinary processes when no local court rules refer substantial Rule 11 violations to these bodies. This Article will conclude by proposing a modification of the current Rule 11 and the proposed Rule 11, which reflects a compromise between the 1993 Rule and the 1995 version of the Rule. The proposal calls for the elimination of the "safe harbor" provision but the retention of the judge's discretion regarding non-mandatory sanctions. The policy behind this proposal is that the "safe harbor" allows attorneys to file frivolous lawsuits with impunity. While frivolous claims may not be filed on a large scale, these claims give the appearance of attorney impropriety. This appearance of impropriety can be more detrimental to the profession than any actual impropriety.

I. FEDERAL RULE 11

A. *The Original Rule 11 as Enacted in 1938*

The Supreme Court created Rule 11 in 1938 to prevent potential abuse of the legal process.¹⁴ This original Rule 11 required attorneys to

10. *Id.*

11. *Id.*

12. *See infra* notes 14-84 and accompanying text.

13. ELIZABETH WIGGINS ET AL., FEDERAL JUDICIAL CENTER, RULE 11: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES (1991) [hereinafter FINAL REPORT]; ELIZABETH C. WIGGINS ET AL., FEDERAL JUDICIAL CENTER'S DIRECTIONS—SPECIAL ISSUE ON RULE 11 (1991) [hereinafter FJC'S DIRECTIONS]; FEDERAL JUDICIAL CENTER, REPORT OF A SURVEY CONCERNING RULE 11, FEDERAL RULES OF CIVIL PROCEDURE (1995).

14. FED. R. CIV. P. 11 (1938). 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 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 averments

“certify”¹⁵ that: (1) their pleadings were well-grounded in fact and law; and (2) their pleadings were not filed for the purpose of delaying any proceeding.¹⁶ By requiring certification, Rule 11 aimed to discourage attorneys from deliberately including false claims in their pleadings.¹⁷ The original Rule applied only to pleadings and allowed courts to strike any pleadings that were not filed in good faith.¹⁸

The original Rule also gave federal courts the discretion to impose sanctions against attorneys for “willful violations” of the Rule.¹⁹ However,

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 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 the rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a willful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

Id., reprinted in 5A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1331 (2d ed. 1990). Rule 11 serves to remind attorneys of their continuing obligation to the legal system as well as to the interests of justice. JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 260 (2d ed. 1993). For a history of the original rule, 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 (1976). Risinger notes that American courts have historically asserted inherent power to discipline members of the legal profession. *Id.* at 44. This inherent power encompasses the power to require an attorney to make compensatory payments to those aggrieved by the attorney’s misconduct. Additionally, the 1993 Advisory Committee Notes state that “[t]he court has available a variety of possible sanctions [Rule 11] does not attempt to enumerate the factors a court should consider in deciding whether to impose a sanction or what sanctions would be appropriate. . . .” FED. R. CIV. P. 11 advisory committee’s note, reprinted in 146 F.R.D. 583, 587 (1993). See also Stephen R. Ripps, *Ohio Civil Rule 11: Time for Change*, 20 U. DAYTON L. REV. 133, 134-45 (1994).

15. Prior to 1983, Rule 11 required the signature of an attorney of any pleading filed with the court. This signature was deemed to be a “certification” that the attorney had read the pleading and that the pleading was well-grounded in fact. See Risinger, *supra* note 14, at 8.

16. See FED. R. CIV. P. 11 (1938), reprinted in WRIGHT & MILLER, *supra* note 13, § 1331.

17. See *American Auto. Ass’n v. Rothman*, 104 F. Supp. 655 (E.D.N.Y. 1952).

18. FED. R. CIV. P. 11 (1938). For example, in *Brown v. District Unemployment Compensation Bd.*, the court struck down an obviously false pleading. 411 F. Supp. 1001 (D.D.C. 1975). Generally, courts were reluctant to strike a pleading that contained any valid claim or defense. The courts recognized that to do so would punish the party too severely when the false pleading was truly the fault of the attorney. FRIEDENTHAL ET AL., *supra* note 14, at 261. Professor Risinger concluded that the statutory language was not carefully drafted. See Risinger, *supra* note 14, at 33-34. Pleadings that were actually “signed with intent to defeat the purpose of the rule” would be labeled merely “false” and stricken solely for that reason. *Id.*

19. Risinger, *supra* note 14, at 33-34; see also Susan Lawshe, *Rule 11*, 3 GEO. J. LEGAL ETHICS 71, 74 (1989) (explaining that the original Rule 11 did not require courts to impose sanctions for noncompliance with the Rule).

courts could not impose sanctions against a party if the party was represented by an attorney.²⁰ The Rule had little effect in preventing any abuse of litigation, as judges experienced difficulty in defining the subjective type of behavior that warranted sanctions.²¹ Thus, courts rarely invoked the Rule prior to its amendment in 1983.²² The Rule's lack of guidance about the types of sanctions that courts could impose, as well as its failure to define the type of behavior that warranted sanctions, contributed to the non-use of the Rule.²³ Also, Rule 11's minimal standards and the heavy burden to prove violations contributed to the Rule's failure to deter abuses of the litigation process.²⁴ The Federal Rules Advisory Committee amended Rule 11 in 1983 to address the Rule's weaknesses.²⁵

B. The 1983 Amendment to Rule 11

Federal courts have always had the authority to sanction frivolous pleadings and papers.²⁶ Historically, judicial, statutory, and procedural guidelines were vague, which made sanctions rare.²⁷ The increase in

20. FED. R. CIV. P. 11 (1938). In addition, Professor Risinger based his position, regarding Rule 13, upon "the historical and functional relationship between summary judgment and the motion to strike as sham." Risinger, *supra* note 14, at 29-30; *see also* D. Michael Risinger, *Another Step in the Counter-Revolution: A Summary Judgment in the Supreme Court's New Approach to Summary Judgment*, 54 BROOK. L. REV. 35 (1988). In his *Counter-Revolution* article, Professor Risinger argues for a new summary judgment rule, one that "places the burden of production and persuasion on the claim that the trial record can be confidently predicted pretrial squarely on the movant, whether plaintiff or defendant." *Id.* at 43. Professor Risinger maintains that the burden of the 1993 changes to the federal rules, including Rule 11, falls more heavily on plaintiffs than on defendants. *Id.* at 35.

21. 6 WRIGHT & MILLER, *supra* note 14, § 1334. For a more thorough discussion on litigation abuse, *see* GREGORY P. JOSEPH, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE (2d ed. 1994).

22. Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270 (1989). As of 1989, there were approximately 1000 reported opinions involving Rule 11 sanctions. *Id.* For a discussion on the effects of the 1983 amendments to Rule 11, *see* Cary Coglianese, Note, *Insuring Rule 11 Sanctions*, 88 MICH. L. REV. 344, 344 n.2 (1983) (citing William W. Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013, 1013 n.2 (1988) (counting the number of reported decisions as of 1987)).

23. *See* Lawshe, *supra* note 19, at 74.

24. Edward D. Cavanagh, *Developing Standards Under Amended Rule 11 of the Federal Rules of Civil Procedure*, 14 HOFSTRA L. REV. 499 (1986).

25. FED. R. CIV. P. 11 (1983 revision) advisory committee's note, *reprinted in* 97 F.R.D. 165, 198 (1983). The committee determined that "Rule 11 has not been effective in deterring abuses." *Id.*; *see also* Lawshe, *supra* note 19, at 74 (explaining that Federal Rules Advisory Committee sought to reduce courts' limitation on the implementation of the Rule which was "provid[ing] a forum for abusive tactics and [for] increas[ing] the cost and complexity of litigation").

26. H.R. Rep. No. 104-62, at 9 (1995).

27. *Id.*

frivolous litigation, discovery abuses, and unfair litigation practices provoked the 1983 amendments to Rule 11.²⁸ The drafters designed these amendments to further promote the original purpose of Rule 11 by providing changes to deter perceived abuses.²⁹ The introduction of a new standard for determining whether an attorney could be sanctioned constituted one of the Rule's most significant changes.

Prior to the 1983 amendment, Rule 11 required an attorney to certify that he or she had read the pleading and that, to the best of his or her knowledge, the pleading was well-grounded and "not interposed for delay."³⁰ Thus, an attorney was held to a subjective standard of good faith

28. Lawshe, *supra* note 19, at 74. At the 1976 National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, then Chief Justice Burger was alarmed by the "widespread feeling that the legal profession and judges are overly tolerant to lawyers who exploit the inherently contentious aspects of the adversary system to their own private advantage at public expense." H.R. Rep. No. 104-62, at 19 (1995). The 1983 amendments addressed these problems. Specifically, the requirement that an attorney sign (certify) each pleading was substantially altered, emphasizing the importance of certification and allowing the courts to enforce any violation of the Rule. FRIEDENTHAL ET AL., *supra* note 14, at 261. Congress had three purposes in promulgating the 1983 version of Rule 11: restrict litigation abuse, hold attorneys responsible for their actions, and curb the increasing federal case load. The Advisory Committee noted that former Rule 11 was ineffective by providing mandatory sanctions that would prohibit courts from minimizing violations, thereby the deterrent effect. FED. R. CIV. P. 11 (1983 revision) advisory committee's note, *reprinted in* 97 F.R.D. 165, 198 (1983); *see also* Adam H. Bloomenstein, *Developing Standards for the Imposition of Sanctions Under Rule 11 of the Federal Rules of Civil Procedure*, 21 AKRON L. REV. 289 (1988); Robert L. Carter, *The History And Purposes of Rule 11*, 54 FORDHAM L. REV. 4 (1985); Victor H. Kramer, *Viewing Rule 11 as a Tool to Improve Professional Responsibility*, 75 MINN. L. REV. 793, 793-96 (1991) (asserting that courts have applied Rule 11 inconsistently); Lawshe, *supra* note 19, at 74-75 (citing reasons for 1983 amendments to Rule 11); Thomas F. Maffei, *Rule 11—The Wrong Approach to Professionalism in Civil Litigation*, 73 MASS. L. REV. 98 (1988); Melissa L. Nelken, *Sanctions Under Amended Federal Rule 11—Some 'Chilling' Problems in the Struggle Between Compensation And Punishment*, 74 GEO. L.J. 1313 (1986) (discussing the 1983 amendments and their effects).

29. In drafting the amendments to Rule 11, the Advisory Committee stressed the deterrent purpose of the sanctions: "[I]mposition of sanctions when appropriate, should discourage the dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses." FED. R. CIV. P. 11 (1983 revision) advisory committee's note, *reprinted in* 97 F.R.D. 165, 198 (1983); *see also* Yagman v. Baden, 796 F.2d 1165, 1183 (9th Cir. 1986) (noting that primary purpose of sanctions is to deter subsequent abuses), *cert. denied*, 484 U.S. 963 (1987); Calloway v. Marvel Entertainment Group, 111 F.R.D. 637 (S.D.N.Y. 1986), *aff'd in part and vacated and remanded in part*, 854 F.2d 1452 (2d Cir. 1988) (holding that under Rule 11 court was not obligated to grant full amount of attorneys' fees since Rule 11 award was primarily intended to impose deterrent sanction against conduct of counsel rather than compensate "injured" party for out-of-pocket expenses), *cert. denied*, 511 U.S. 1081 (1994).

30. FED. R. CIV. P. 11 (1983 revision) advisory committee's note, *reprinted in* 97 F.R.D. 165, 198 (1983). In comparison, the 1938 Rule required only certification as to "good ground." *Id.*

because the Rule did not impose a duty to investigate the factual basis underlying the claim.³¹ Due to the difficulty of determining whether or not an attorney acted in good faith, the 1983 amendment dropped the subjective good faith standard and replaced it with an objective standard that required the attorney³² to make a reasonable inquiry into the factual basis for every type of pleading.³³ Thus, the 1983 amendments were intended to make the certification requirement "more stringent" with the expectation "that a greater range of circumstances will trigger" violations of the signature rule.³⁴ The 1983 amendment also mandated that the court impose sanctions on either the party or his or her lawyer. Sanctions were imposed if, at the time of filing, a reasonable inquiry would have revealed that the pleading was not well-

31. *Id.*

32. The 1983 amendment expanded Rule 11 to apply to pro se parties as well as to attorneys. FED. R. CIV. P. 11 (1983 revision), *reprinted in* 97 F.R.D. at 165.

33. *Id.* The Advisory Committee's Note explains that the standard for determining a reasonable inquiry is one of "reasonableness under the circumstances." FED. R. CIV. P. 11 (1983 revision) advisory committee's note, *reprinted in* 97 F.R.D. at 198.

The Rule, as amended in 1983, 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, 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 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.

FED. R. CIV. P. 11 (1983 revision), *reprinted in* 97 F.R.D. at 167-68.

The 1983 Rule effected many changes. First, the Rule provided a definite standard requiring reasonable prefiling inquiry as to facts and law. Second, the 1983 Rule applied to all persons appearing pro se as well as to attorneys and parties. Third, the Rule provided that the pleadings had to be "well grounded" in fact and warranted by existing law. Fourth, papers filed could not be used for improper purposes, such as harassment. Furthermore, the court was required to impose a sanction on an attorney or party who violated the Rule. Finally, the sanction imposed was an "appropriate sanction," which included reasonable expenses and attorneys' fees.

34. FED. R. CIV. P. 11 (1983 revision), *reprinted in* 97 F.R.D. at 198-99.

grounded in fact, or if the pleading party lacked a good faith argument for the modification of existing law.³⁵ Rule 11 allowed a court to exercise discretion in determining which sanction would be imposed for a Rule 11 violation.³⁶ If a court found a Rule 11 violation, that party, under the 1983 Rule, could have been held responsible for his opponent's expenses and legal fees.³⁷

In *Golden Eagle Distributing Corp. v. Burroughs Corp.*,³⁸ the Ninth Circuit Court of Appeals set forth the manner in which an attorney or pro se party could fulfill his or her duty to make a reasonable inquiry. *Golden Eagle* involved an appeal from sanctions imposed under an unsuccessful motion for summary judgment in which the appellant argued that one state's statute of limitations applied over another state's statute of limitations.³⁹ The appellant implied to the district court that existing law supported appellant's position when, in fact, appellant's motion for summary judgment, if successful, would have modified or reversed existing law.⁴⁰ The district court also sanctioned the appellant for failure to cite contrary authority which violated the ABA Model Rules of Professional Conduct.⁴¹

35. *Id.* The courts have since provided some indication of the level of investigation necessary for an attorney to meet this standard. See *Shrock v. Altru Nurses Registry*, 810 F.2d 658, 661-62 (7th Cir. 1987); *Kamen v. American Tel. & Tel. Co.*, 791 F.2d 1006, 1012-14 (2d Cir. 1986); see also *Lawshe, supra* note 19, at 74.

36. *Lawshe, supra* note 19, at 75. The additional language provides that "[i]f a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose . . . an appropriate sanction." FED. R. CIV. P. 11 (1983 revision), reprinted in 97 F.R.D. at 167. Sanctions could be imposed on the person who signed, whether the signer was the attorney or the client. *Id.* For an empirical analysis of Rule 11, see Gerald F. Hess, *Rule 11 Practice in Federal and State Court: An Empirical, Comparative Study*, 75 MARQ. L. REV. 313 (1992); Lawrence C. Marshall et al., *Public Policy: The Use and Impact of Rule 11*, 86 NW. U. L. REV. 943 (1992).

37. FED. R. CIV. P. 11 (1983 revision), reprinted in 97 F.R.D. at 167-68.

38. 801 F.2d 1531 (9th Cir. 1986).

39. *Id.* at 1533-34. Though the district court acknowledged that appellant's positions were legally and factually supportable, it nevertheless imposed sanctions. *Id.* at 1534. Because the appellant had implied that appellant's position was "warranted by existing law," rather than stating that its position was "grounded in good faith argument for the extension, modification or reversal of existing law," the district court determined that sanctions were warranted. The district court held that the moving papers filed by appellant failed to cite contrary authority and, therefore, violated Rule 3.3 of the American Bar Association's Model Rules of Professional Conduct (1983), thus breaching Rule 11. *Id.*

40. *Id.*

41. *Id.* at 1535-36 (referring to Model Rules of Professional Conduct 3.1, 4.4 (1983)); see also American Bar Association & The Bureau of National Affairs, *Practice Guide on Rule 11* (1992).

The Ninth Circuit determined that the district court improperly imposed sanctions.⁴² The appellate court reversed the district court's broad application of Rule 11, holding that the appellant did not have to identify whether or not appellant's position was supported by existing law.⁴³ The Ninth Circuit stated that neither the history of the Rule nor the Rule itself supported the type of identification argument made by the district court.⁴⁴

The Ninth Circuit further held that the imposition of Rule 11 sanctions for the failure to cite adverse authority imposed a burden that went beyond the scope of the Rule.⁴⁵ The extension of Rule 11 would force attorneys or pro se parties to exhaust every possible theory on an issue before filing suit.⁴⁶ The extension would also force courts to conduct research to ensure that attorneys or pro se parties did not overlook any applicable case law.⁴⁷

In one respect, *Golden Eagle* extended the Rule 11 power of courts. The Ninth Circuit approved the use of Rule 11 sanctions to punish a party responsible for filing a frivolous pleading. The court concluded that Rule 11 authorized the courts to sanction both the attorneys and the party that the attorneys represented if both the attorney and the party were responsible for the unfounded lawsuit.⁴⁸

In *Albright v. Upjohn*,⁴⁹ the Sixth Circuit also addressed an attorney's duty to make a reasonable inquiry into the factual basis of a motion or a

42. *Golden Eagle*, 801 F.2d at 1534.

43. *Id.* at 1539-40.

44. *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1539-41 (9th Cir. 1986).

45. *Id.* at 1542. The court stated that "Rule 11 should not impose the risk of sanctions in the event that the court later decides that the lawyer was wrong. The burdens of research and briefing by a diligent lawyer anxious to avoid any possible rebuke would be great." *Id.*

46. *Id.* Such an extension would also impose an undue burden upon a court to determine if the attorneys did, in fact, conduct exhaustive investigations.

47. *Id.* In *Golden Eagle*, the district court charged the appellant with constructive notice because the cited authorities were listed in Shepard's as "distinguishing" the case upon which the appellant relied. The appeals court noted that the district court's implementation of Rule 11 would increase litigation by creating "two ladders for after-the-fact review of asserted unethical conduct: one consisting of sanction procedures, the other consisting of the well established bar and court ethical procedures." *Id.* The decision emphasized that a court is not powerless with respect to sanctioning lawyers who take positions that are not supported by law. The appeals court noted that "Rule 11 is not the only tool available to judges in imposing sanctions on lawyers." *Id.*

48. *Id.* at 1536. This extension by the federal courts supports this author's recommendation that Ohio courts follow the legislative interpretation rather than the common-law interpretation.

49. 788 F.2d 1217 (6th Cir. 1986).

pleading.⁵⁰ Albright sued Upjohn for manufacturing the drug that caused her injuries.⁵¹ Some of Albright's medical records were incomplete while others were illegible.⁵² Accordingly, uncertainty existed concerning whether Upjohn manufactured the drug that injured Albright.⁵³ Albright based her lawsuit on the fact that Upjohn had been a defendant in similar suits.⁵⁴ Albright then relied upon discovery to determine if her claim had merit. The Sixth Circuit sanctioned Albright under Rule 11 because she asserted a claim against Upjohn before she knew whether the claim had any basis in fact.⁵⁵ Under amended Rule 11, Albright had a duty to make a reasonable inquiry into the facts before filing a pleading or motion.⁵⁶ When Albright did not comply with this duty, Rule 11 demanded that the court impose sanctions against her.⁵⁷

In addition to exploring the *factual* basis for a claim, the duty to make a reasonable inquiry under Rule 11 also extends to the *legal* basis of a claim.

50. *Id.* The "objective unreasonableness" defined in *Albright* has been uniformly adopted as the standard under Rule 11 as amended in 1983. See *Lemaster v. United States*, 891 F.2d 115 (6th Cir. 1989); *Hudson v. Moore Bus. Forms, Inc.*, 836 F.2d 1156 (9th Cir. 1987); *Eavenson, Auchumty & Greenwals v. Holtzman*, 775 F.2d 535 (3d Cir. 1985); *Rodgers v. Lincoln Towing Servs.*, 771 F.2d 194 (7th Cir. 1985); *Westmoreland v. CBS Inc.*, 770 F.2d 1168 (D.C. Cir. 1985); *Davis v. Veslan Enters.*, 765 F.2d 494 (5th Cir. 1985); *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243 (2d Cir. 1985).

51. *Albright*, 788 F.2d at 1218-19. Albright alleged that, as an infant, she ingested tetracycline-based drugs that were manufactured, distributed, publicized and sold by Upjohn and possible unknown defendants who could have been in the same business at the time and that these drugs caused the discoloration of her teeth.

52. *Id.* at 1220-21. In response to Upjohn's contention that Albright failed to conduct a reasonable pre-filing investigation, Albright asserted that her medical records were old and illegible, that the records of her deceased doctor were lost, and that she was continuously searching for their medical records. Albright asserted that these factors, in addition to the fact that Upjohn was named as a leading defendant in such actions, demonstrated her reasonable inquiry into the factual basis of her claims.

53. *Id.*

54. *Id.* at 1219. Albright first discovered the connection between the drugs and her injuries on September 22, 1982, when she read an article about another lawsuit filed against tetracycline manufacturers.

55. *Albright v. Upjohn*, 788 F.2d 1217, 1221 (6th Cir. 1986). The court stated that Albright's pre-filing investigation was insufficient to satisfy Rule 11 as "it failed to disclose that the claim against Upjohn was 'well grounded in fact' within the meaning of Rule 11 or that there existed any likelihood that additional medical records would be located that could not have been found through reasonable inquiry prior to filing." *Id.*

56. *Id.* ("The new language stresses the need for some pre-filing inquiry into both the facts and the law to satisfy the affirmative duty imposed by the rule. The standard is one of reasonableness under the circumstances.") (citing FED. R. CIV. P. 11 (1983 revision) advisory committee's note).

57. *Albright*, 788 F.2d at 1222 (stating that the language of Rule 11 clearly mandates the imposition of sanctions once a violation is found).

The Second Circuit, in *Eastway Construction Corp. v. New York*,⁵⁸ held that an attorney has a duty to make a reasonable inquiry into whether existing law supports a pleading or whether a legitimate argument exists to warrant modification of existing law.⁵⁹ In that case, the petitioner raised two claims in federal court. One claim involved an antitrust violation, and the other claim involved a civil rights violation.⁶⁰ The federal district court dismissed both claims because the claims lacked merit.⁶¹ The court also imposed sanctions on Eastway's attorneys, stating that the attorneys would have known that no legal basis supported the allegations had the attorneys conducted a reasonable inquiry.⁶²

The 1983 amendment to Rule 11 dramatically increased the number of sanctions that courts could impose against attorneys.⁶³ The cases above provide examples of how the federal courts have been able to use the objective standard to impose sanctions on attorneys and parties for irresponsible conduct. Replacing the subjective standard with the objective standard in Rule 11 has proven effective in guiding the imposition of sanctions for the filing of frivolous pleadings in federal court.⁶⁴

58. *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243 (2d Cir. 1985), cert. denied, 484 U.S. 918 (1987) (involving construction company that was denied entry into redevelopment programs taking place in New York City and sought relief in federal court).

59. 762 F.2d at 253.

60. *Id.* at 248. Eastway was in the business of constructing publicly financed housing projects in New York City. *Id.* at 246. During the early 1970's, the City's loan program was under scrutiny for illegal operations. *Id.* Eastway's president was heavily involved in the scandal and had defaulted on city loans. *Id.*

61. *Id.* The court dismissed the civil rights claim because Eastway did not allege a deprivation of any federally protected right. *Id.* at 249. The court dismissed the antitrust claim because no injury to competition existed. *Id.* at 251. The court stated that if Eastway's antitrust claim were allowed to proceed, "every joint decision to hire one contractor over another . . . would be assailable under the Sherman Act," and that such a result would be contrary to the Act's intention. *Id.*

62. *Id.* at 251-54. The court refrained from saying that Eastway or its attorneys acted in bad faith. *Id.* at 254. The court stated, however, that any "competent attorney," upon reasonable inquiry, would have realized the claims were "destined to fail." *Id.*

63. See Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189 (1988) (noting the increase in federal sanction litigation and resulting effects).

64. Recently, a New Jersey court sanctioned an attorney who initiated a frivolous lawsuit. The court awarded the defendant attorneys' fees and reasonable costs totaling \$75,000 for having to defend the lawsuit. *Hamilton v. Parcels, L-30327-89* (N.J. Super. Ct. 1993) (unreported). The *Hamilton* case involved the New York Giants and former player Hamilton. Hamilton alleged that the head coach had promised him a coaching position and then reneged on the basis of Hamilton's race. The plaintiff's lawyer introduced a tape at trial that showed only that Hamilton had been promised a position as a coach. The court found that the plaintiff and his attorney violated federal Rule 11 as well as New Jersey's frivolous claims statute. Another award of sanctions includes *Mariani v. Doctors Assocs.*, 983 F.2d 5 (1st Cir. 1993) (upholding award of \$7500 imposed against counsel for failure to conduct reasonable inquiry). A single

C. *The 1993 Amendment to Rule 11*

Despite its effectiveness in guiding sanctions, Rule 11 was amended in 1993 to include a twenty-one day period of "safe harbor" during which time a party, that has filed a motion or other paper in court, may withdraw that motion or paper and escape sanctions under Rule 11. The new Rule also does not include the former mandatory sanction provision. If a violation is found, the judge retains the discretion to determine whether sanctions should be imposed. Also, "all discovery requests, responses, objections, and motions subject to the provisions of Rule 26 through 37" were removed from the scope of Rule 11.⁶⁵

The criticism of the 1983 amendment centered around the belief that the Rule discriminated against certain lawyers or parties and that the sanctioning procedures were deficient.⁶⁶ Further, the 1983 version of Rule 11 resulted in satellite litigation,⁶⁷ the cost of which exceeded the benefits.⁶⁸ The Committee on Federal Courts found, among other reasons, that the 1983 version of Rule 11 placed too heavy of a burden on plaintiffs, lacked uniformity in its application, restricted judicial discretion, and furthered the use of "shifting" counsel fees rather than imposing other sanctions.⁶⁹ While the 1993 amendment altered the manner in which a court applied the Rule,

violation of the Rule could result in a sanction ordering payment of hundreds of thousands of dollars. *Sable v. Southmark/Envicon Capital Corp.*, 819 F. Supp. 324 (S.D.N.Y. 1993) (sanctions imposed on counsel for failure to conduct reasonable inquiry); *Levy v. Aaron Faber, Inc.* 148 F.R.D. 114 (S.D.N.Y. 1993) (failure to conduct reasonable inquiry). *See, e.g.*, *Avirgan v. Hull*, 705 F. Supp. 1544, 1551 (S.D. Fla. 1989) (\$1,034,381.36 in sanctions), *aff'd*, 932 F.2d 1572 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 913 (1992); *see also Brandt v. Schal Assocs.*, 960 F.2d 640, 644 (7th Cir. 1992) (upholding \$351,664.96 sanctions imposed by court for filing unsupported RICO action); *Dayan v. McDonald's Corp.*, 466 N.E.2d 945 (Ill. App. Ct. 1984) (awarding Rule 11 sanction of \$1.8 million for filing frivolous lawsuit).

65. FED. R. CIV. P. 11(d). *See also* 146 F.R.D. 584. Inapplicability to Discovery Rules 26-37, governing the discovery process, control the circumstances when sanctions may be imposed for inappropriate behavior to discovery. For that reason, Rule 11(d) provides that Rule 11(a), (b), and (c) have no applicability to discovery issues. *See, e.g.*, BAICKER-MCKEE, JANSEN & CORR, A STUDENTS GUIDE TO THE FEDERAL RULES OF CIVIL PROCEDURE 172 (1997); 146 F.R.D. 584.

66. Jeffrey A. Parness, *Fines Under New Federal Civil Rule 11: The New Monetary Sanctions for the "Stop-And-Think-Again" Rule*, 1993 BYU L. REV. 879, 883 (1993).

67. Satellite litigation is sanctions-related litigation in the courts outside the merits of the original case. WIGGINS ET AL., DIRECTIONS, *supra* note 13, at 6.

68. *Id.*

69. *See Federal Rule of Civil Procedure 11 and Related Rules*, in 46 RECORD OF THE ASSOC. OF THE BAR OF THE CITY OF NEW YORK 267 (1991). Nevertheless, the Supreme Court adopted the amended Rule, and the Rule took effect December 1, 1993. 146 F.R.D. 401 (1993).

these changes did not alter the Rule's purpose of preventing litigation abuses.⁷⁰ The Advisory Committee stated that "this revision is intended to remedy problems that have arisen in the interpretation and application of the 1983 revision of the rule."⁷¹ Concern also existed that plaintiffs were

70. The substantive provisions of Rule 11 now provide:

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

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

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

(1) How initiated.

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

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

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

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b) (2). (B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned. (3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed. (d) Inapplicability to Discovery. Subdivisions (a) through (c) of this rule do not apply to disclosure and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.

FED. R. CIV. P. 11 (1993).

71. FED. R. CIV. P. 11 advisory committee's note, *reprinted in* 146 F.R.D. 583 (1993).

discouraged by the 1983 Rule 11 from freely raising novel issues out of fear that the court would impose sanctions.⁷² In addition, the Committee opined that "sometimes a litigant may have good reason to believe that a fact is true or false but may need discovery, formal or informal, from opposing parties or third persons to gather and confirm the evidentiary basis for the allegation."⁷³

D. The Proposed 1995 Amendment to Rule 11

On April 23, 1993, the United States Supreme Court adopted revisions of Rule 11, which took effect on December 1, 1993.⁷⁴ Upon the promulgation of the 1993 version, Justice Scalia anticipated that the revision would eliminate a "significant and necessary deterrent" to frivolous litigation.⁷⁵ In his dissenting opinion to the 1993 amendments, Justice Scalia said,

72. Risinger, *supra* note 14, at 56. Rule 1 sanctions were frequently imposed on plaintiff's lawyers. David Frum, *Shoot the Hostages*, FORBES, Dec. 21, 1992, at 138 (commenting that "if the Supreme Court rubber-stamps the new, weaker version of Rule 11, it will only be adding to the country's litigation overload").

73. FED. R. CIV. P. 11 advisory committee's note (1993). The Committee qualifies this statement with the following reminder:

Tolerance of factual contentions in initial pleadings by plaintiffs or defendants when specifically identified as made on information and belief does not relieve litigants from the obligation to conduct an appropriate investigation into the facts [I]t is not a license to join parties, make claims, or present defenses without any factual basis or justification.

FED R. CIV. P. 11, advisory committee's note (1993). "To stress the seriousness of a motion for sanctions and to define precisely the conduct claimed to violate the rule, the revision provides that the 'safe harbor' period begins to run only upon service of the motion." *Id.*

74. SUPREME COURT, *supra* note 6, at 401. Justice Scalia dissented from the Supreme Court's adoption of the rules, stating that the much feared Rule 11 has been rendered "toothless by allowing judges to dispense with sanction, by disfavoring compensation for litigation expenses, and by providing a 21-day 'safe harbor'." *Id.* at 507-10 (Scalia, J., dissenting). Further, Justice Scalia did not believe that Rule 11, as it was amended in 1983, was ineffective. *Id.* at 509.

The authors agree with Justice Scalia's proposition that the 1983 version of Rule 11 was not proving to be ineffective. To the contrary, Rule 11 has successfully deterred litigation abuses. For example, Rule 11 has led to Rule 11 committees within firms, the purpose of which is to ensure that a claim does not violate the Rule. See BRIAN J. REDDING, ATTORNEY'S LIABILITY ASSURANCE SOCIETY, INC., SANCTIONS AGAINST LAWYERS: RECENT DEVELOPMENTS AND SOME THOUGHTS ABOUT PREVENTION 4 (1992). The authors are of the opinion that the "safe harbor" provision may encourage attorneys to file lawsuits without penalty and impunity. However, the Advisory Committee noted that, if deterrence is ineffective, the court could also require the wrongdoer to make a payment to the injured party. FED. R. CIV. P. 11 advisory committee's notes (1993).

75. H.R. Rep. No. 104-62, at 10 (1995).

[T]he proposed revision would render the Rule toothless, by allowing judges to dispense with sanctions by disfavoring compensation for litigation expenses, and by providing a twenty-one day 'Safe Harbor' within which, if the party accused of a frivolous filing withdraws the filing, he is entitled to escape with no sanction at all.⁷⁶

In fact, Justice Scalia stated that "[j]udges, like other human beings, do not like imposing punishment when their duty does not require it, especially on their own acquaintances and members of their own profession."⁷⁷ Indeed, Justice Scalia's beliefs regarding the 1993 amendments may have been correct. One year after the 1993 amendments went into effect, research showed that thirty-eight percent fewer Rule 11 motions were filed.⁷⁸

Currently pending in Congress is H.R. 988 which contains revisions of Rule 11 in five main areas.⁷⁹ First, and most importantly, H.R. 988 makes judicial imposition of sanctions for violations of Rule 11 mandatory rather than discretionary.⁸⁰ Second, attorney's fees are a mandatory part of the sanction.⁸¹ Third, the proposed Rule broadens the scope of the Rule's compensatory function.⁸² Emphasis is put not only on deterring repetition of violations, but also on compensating injured parties.⁸³ Fourth, H.R. 988 would eliminate the "safe harbor" provision.⁸⁴ Fifth, the proposed changes would again make Rule 11 applicable to discovery abuses.⁸⁵ These changes are intended to "send a clear message that abusive practices will not be tolerated by our judicial system or the judges who form its core."⁸⁶

Rule 11 has been influential in litigation practices, while at the same time being heavily debated over the years. With the proposed 1995 amendment, it appears history is repeating itself. However, the published

76. AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND FORMS, *reprinted in* 146 F.R.D. 401, 510 (1993) (Scalia, J., dissenting).

77. *Id.* at 508.

78. Laura Duncan, *Sanctions Litigation Declining: Decrease Attributed to 1-Year-Old Safe-Harbor Amendments to Rule 11*, A.B.A. J., March 1995, at 12.

79. This bill was passed by the House of Representatives on March 7, 1995. However, the Senate never addressed the bill. See H.R. Rep. No. 104-62, at 13-15 (1995).

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. See H.R. Rep. No. 104-62, at 14 (1995).

86. *Id.* at 11.

1991 and 1995 surveys and the research performed in preparation of this Article show that both bench and bar are satisfied with the 1993 version of Rule 11.

II. PUBLISHED SURVEYS

A. The 1991 Survey

In response to the 1983 version of Rule 11, the Judicial Conference's Advisory Committee on Civil Rules reviewed the Rule in 1990.⁸⁷ The Committee called for comments from the legal community and asked the Federal Judicial Center (FJC) to do an empirical study of the operation and impact of the Rule.⁸⁸

The judges' responses recorded two themes. First, most judges believed that the benefits of Rule 11 outweighed any additional requirements on judges' time.⁸⁹ Further, the judges believed that Rule 11 had an overall positive effect on litigation in the federal courts.⁹⁰ Specifically, when asked what the judges believed to be the overall effect of the Rule, 80% responded that it had been positive and favored retaining it in its 1983 form, and 72% thought the benefits of the Rule outweighed the outlay of judicial time required to implement it.⁹¹

Second, while judges reported that groundless litigation represented only a small problem on their dockets,⁹² they believed that Rule 11 had been moderately effective in deterring groundless papers.⁹³ Twenty percent of the judges believed that there was a moderate problem, while 75% said there

87. WIGGINS ET AL., FJC'S DIRECTIONS, *supra* note 13, at 1.

88. *Id.* Specifically, questionnaires were sent in November, 1990, to all active and senior United States district court judges. Of the 751 judges to whom the questionnaire was sent, 583 (78%) responded. *Id.* at 2.

89. WIGGINS ET AL., FINAL REPORT, *supra* note 13, at 1.

90. *Id.* This survey was done in consideration of the amendments to the 1983 Rule. After the conclusion of this survey, the 1993 amendments were later approved and incorporated.

91. *Id.*

92. Specifically, Rule 11 motions could be expected to be raised in two to three percent of all cases. *Id.*; FEDERAL JUDICIAL CENTER, REPORT OF A SURVEY CONCERNING RULE 11, FEDERAL RULES OF CIVIL PROCEDURE, *supra* note 13, at 3. Some critics argue that Rule 11 results in burdensome satellite litigation. However, based on these numbers, it is apparent that Rule 11 motions are not a significant burden.

93. WIGGINS ET AL., FINAL REPORT, *supra* note 13, at 1. Further, the survey showed that judges found several other methods more effective than Rule 11 in handling such litigation. *Id.* Specifically, judges found very effective prompt rulings on motions to dismiss and for summary judgment, Rule 16 conferences to narrow issues and informal admonitions. *Id.* at 31.

was a small problem or no problem at all.⁹⁴ However, as the FJC noted, the reasons for variations among judges in their sanctioning practices may be explained by the varying levels of judicial receptivity to Rule 11.⁹⁵ Therefore, these numbers are not determinative and may, in fact, be inconclusive.

In conclusion, the FJC noted that the data tended to show that the 1983 version of Rule 11 was working as intended, despite minor problems.⁹⁶ However, in 1993, Congress amended Rule 11.

B. The 1995 Survey

At the request of the Advisory Committee on Civil Rules of the Judicial Conference of the United States, the FJC surveyed attorneys and judges concerning Rule 11 as part of its review of the effects of the 1993 amendments and its consideration of the proposed 1995 changes.⁹⁷ Specifically, questionnaires were sent to 1130 federal attorneys and 148 federal district judges.⁹⁸ Responses were received from 82% of judges and 52% of attorneys.⁹⁹ While the data showed that there was a general opposition to the proposed changes,¹⁰⁰ the majority of judges and attorneys agreed that the purpose of Rule 11 sanctions should encompass compensation of injured parties as well as deterrence of violations.¹⁰¹

When asked their general views about Rule 11, the vast majority of respondents agreed that Rule 11 needed some reform, with notable

94. *Id.* The survey went on to report that few judges believed the Rule 11 violation problem increased, whereas 40% said it had decreased since Rule 11 was amended in August 1983:

95. WIGGINS ET AL., DIRECTIONS, *supra* note 13, at 11.

96. *Id.* at 27. These problems include indeterminacy, disproportionate application of the Rule to plaintiffs, overuse of monetary sanctions, and lack of procedural safeguards. *Id.*

97. FEDERAL JUDICIAL CENTER, REPORT OF A SURVEY CONCERNING RULE 11, FEDERAL RULES OF CIVIL PROCEDURE, *supra* note 13, at 1.

98. *Id.*

99. *Id.* The surveys sent to judges and attorneys were as similar as possible, but it should be recognized that judges and attorneys may have different perspectives on Rule 11, not only because of their different roles in the litigation process, but also because most attorneys work primarily on similar types of cases whereas judges have experience with different types of cases. *Id.*

100. Specifically, the majority of respondents found groundless litigation claims had little chance and supported the "safe harbor" rule.

101. *Id.* at 6. Specifically, 68% of judges, 63% of defendants' attorneys, 66% of other attorneys, and 43% of plaintiffs' attorneys agreed on this issue. The authors agree that deterrence should be a goal and encourage reporting violations to bar grievance committees as a preferred method of obtaining the goal.

differences in how the Rule should be modified.¹⁰² Responses included modifying the Rule to increase the Rule's effectiveness in deterring groundless filings, modifying the Rule to better avoid deterring meritorious filings, and leaving the Rule in the 1993 version.¹⁰³ Regardless of the form, however, Rule 11 is an integral part of the federal court rules system. This Article argues that handling substantial Rule 11 violations through bar grievance committees would further enhance the purpose and important role of Rule 11.

C. *Current Opinions on Rule 11*

Any modification of Rule 11 will affect federal judges, bar association grievance committees, and disciplinary counsel. Because the individuals in these positions have been involved with disciplinary actions in the past, it is necessary to consider their experiences with the present Rule 11 and their views as to how the proposed changes could affect future discipline. Current disciplinary procedures and concerns with current and proposed reporting positions should also be considered when pondering changes in Rule 11. Consequently, Part III of this Article considers these issues.

III. 1996 SURVEY OF BAR ASSOCIATIONS AND FEDERAL DISTRICT COURT: ANALYSIS AND PROPOSAL

A. *Analysis of Data*

In order to assess judicial and bar association opinions toward the present Rule 11 and the proposed Rule 11, the authors mailed 113 questionnaires to federal circuit and district court judges, and thirty-six questionnaires were returned. An additional sixty-four questionnaires were mailed to bar associations, with thirty-six questionnaires returned. All together, 41% of the questionnaires were returned to the investigators. The responses were tallied, and the Chi Square test for independence was used to analyze the responses. The number of responses for the different items varied as not all respondents answered each question. In addition, several questions permitted multiple responses. Finally, several questionnaires received from both judges and bar associations were not usable and were excluded from the analysis. Thus, the percentage of the questionnaire that was determined to be usable for this study and included in this analysis was 36%.

102. *Id.* at 7.

103. *Id.*

Here, in order to facilitate discussion, the analysis of responses is reported in the order of the questions in the questionnaire. All Chi Square ratios were tested for significance at the .10 level, and the obtained probability for each significant analysis is reported. Question 1 was not tested for significance because of the nature of the question and responses.

Question 1. How Often Do Judges Who Impose Sanctions Report Such Violations to a Bar Association (BA) or Disciplinary Committee (DC)?

In response, twenty-eight judges estimated that violations were reported 25% of the time or less, and one judge indicated that the percentage was unknown. Thirty BA/DC respondents reported that judges did so 25% of the time or less, two reported that judges did so between 25% and 50% of the time, and one indicated that the percentage was unknown.

Question 2. Is There a Local Rule Requirement for the Judges to Report Such Violations to a BA/DC?

All thirty judges reported there was no local rule, while twenty-five BA/DC reported there was no rule, and six BA/DC reported that there was a local rule. A Chi Square of 4.442 was significant at the 0.035 level, indicating a difference existing between the responses of the judges and those of the BA/DC, with more BA/DC reporting a local rule than judges. The reason for this difference is not known and could not be determined from the questionnaire.

Question 3. Do You Expect All Violations to Be Reported to a BA/DC?

In response to this question, one of the judges and eight of the BA/DC expected all violations to be reported, while twenty-seven of the judges and twenty-three of the BA did not expect all violations to be reported. A Chi Square of 4.038 was significant at the 0.044 level indicating a difference in the expectations of the judges and BA/DC. While the majority of both groups did not expect all violations to be reported to a BA/DC, more BA/DC respondents than judges held such an expectation.

Question 4. What Sanction Is Imposed for Violations?

A tally of the responses obtained for this question is contained in the following table. The major differences in responses lie in the "none", "reprimand" and other categories.

	None	Reprimand	Compensation	Both	Other
Judges	8	2	3	3	11
BA/DC	2	8	0	0	22

The Chi Square of 16.562 ($p < .01$) indicated that judges and BA/DC imposed different kinds of sanctions for violations. Judges were more likely to impose no sanctions, compensation for expenses, or both compensation and a reprimand than BA/DC. BA/DC were more likely to impose a reprimand or other sanctions than judges. The other disciplinary measures reported included warnings and suspensions, disbarments and dismissal. Still other respondents indicated that determinations were made on a case-by-case basis and were based on items such as the following: the nature and seriousness of the offense; the attorney's honesty, trustworthiness or fitness; and the presence of mitigating or aggravating circumstances.

Question 5. Do You Favor FRCP 11 Having Mandatory Reporting Positions Rather than the Current Discretionary Provisions?

Three judges said yes, and twenty-five judges said no. In contrast, twelve BA/DC responded yes, and nineteen said no. The Chi Square was significant at the .03 level indicating that, while the majority of both groups approved of the discretionary provisions, the BA/DC respondents were more likely to favor mandatory reporting than were judges.

When asked why they were not in favor of mandatory reporting provisions, the responses of the two groups varied. The major concern for both groups of respondents appeared to be a loss of judicial discretion when dealing with attorney discipline problems. The responses are summarized below.

	Loss of Discretion	Small Problem	No Problem	Deters Filings	Double Jeopardy	Other
Judges	16	14	6	2	0	0
BA/DC	13	3	1	3	0	8

The Chi Square of 18.1 ($p < .01$) indicated that the judges were more likely to view discipline as a small problem or no problem than were the BA/DC. Neither group appeared to feel strongly that it would deter meritorious filings or pose double jeopardy issues. The BA/DC were more

likely to indicate other issues than judges. Examples of other issues include the following: court-ordered sanctions make mandatory reporting superfluous; not all violations should be reported; not all Rule 11 violations involve ethics or professional conduct; and the same offense may result in multiple sanctions.

When asked why they were in favor of mandatory reporting provisions, the responses of the two groups also varied. The judges did not indicate any one area as a major reason for favoring mandatory reporting, while the BA/DC respondents indicated that mandatory reporting would strengthen the Rule and improve the practice of attorneys. Neither group expressed concern that the "safe harbor" provision weakened deterrence. Responses to this question are summarized below.

	Safe Harbor Problems	Strengthens the Rule	Imposes on All Violators	Improves Attorney Practice	Improves Image	Other
Judges	1	3	0	2	2	0
BA/DC	3	11	1	9	8	3

The Chi Square of 1.241 indicated that any difference between the responses of judges and BA/DC was due to chance. The other responses expressed a need by BA/DC to improve or maintain ethical standards and identify serial violators.

Question 6. Once a Violation Has Been Reported, What Procedure Is Used to Process the Violation? Please Briefly Describe the Procedure.

The following summary represents the typical response to this question. If a violation of Rule 11 were reported, the report would be treated as a complaint against the attorney in question. A disciplinary file would be opened, and the attorney would be presented with an opportunity to respond. Following the response, if there appeared to be a violation of any of the Rules of Professional Conduct, an investigation would be conducted. The investigation could result in any action from dismissal of the complaint to the filing of formal disciplinary charges.

Question 7. Do You Prefer the Current Discretion of Rule 11 or the Proposed Mandatory Version?

Twenty-four of the judges and twenty-three of the BA/DC preferred the current Rule 11, while six of the judges and seven of the BA/DC preferred the proposed version. The Chi Square of 1.00 was not significant, indicating no difference in the opinions of the two groups.

Question 8. Would You Be in Favor of a Compromise Change in the "Safe Harbor" Provision to Fewer Days, such as Seven or Fourteen Days?

Four of the judges and nine of the BA/DC favored a compromise, while twenty-two of the judges and thirteen of the BA/DC did not. The Chi Square of 2.745 indicated a slight ($p=.098$) tendency for the BA/DC to be more favorable toward a compromise than the judges.

Summary:

Judges reported violations to bar association disciplinary committees a small percent of the time, and they reported that no local rule required them to do so. Further, a large majority of the judges and bar associations did not expect all violations to be reported. The reported behaviors of judges was in keeping with the expectations of both the judges and bar associations. When violations of Rule 11 did occur and discipline was imposed, a large range of sanctions was used, including: reprimand, compensation of the other party, warnings, suspensions, disbarments and dismissal. The opinion was expressed that determinations were and should be made on a case-by-case basis. Both groups of respondents who were opposed to mandatory reporting felt that the major problem with mandatory reporting would be the loss of judicial discretion when dealing with problems. In addition, the judges were more likely than bar associations to view violations of Rule 11 as a small problem. While the analysis was not statistically significant, it is interesting to note that bar associations in favor of mandatory reporting were more likely to perceive that it would strengthen the Rule and improve attorney practice and image than judges supporting mandatory reporting. Finally, the large majority of both judges and bar associations reported that they favored the current Rule 11 over the proposed Rule 11.

B. Proposal

Thus, this survey disclosed that federal district courts do not have local rules mandating the reporting of at least substantial Rule 11 violations to the bar associations or disciplinary counsel. While the bench favors this situation, the bar would prefer some type of rule for reporting at least

substantial Rule 11 violations. Reporting, according to the bar, would deter the filing of frivolous suits. The reporting would be for substantial, but not all, violations of Rule 11.

The judges strongly believe in keeping their discretion relating to reporting substantial Rule 11 violations along with their sanctioning discretion. The survey also showed that judges were of the opinion that attorney discipline is a small problem. Neither reporting nor mandatory sanctioning would deter the filing of frivolous suits. This leads to the opinion that there may be a need to research law firms with large federal district court practices and explore the screening of cases and the percentage of filing cases under the 1983 Rule 11 and their filing practices under the 1993 Rule 11.

To satisfy both sides, this Article proposes that the only amendment to Rule 11 should be the removal of the "safe harbor" provision. That provision should be taken out of Rule 11 for several reasons: (1) if it does not actually reduce frivolous lawsuits, it would at least eliminate the public perception of attorneys filing frivolous lawsuits with impunity, as long as they withdraw the case during the twenty-one days; (2) it would screen cases that should not have been brought, and if brought, the court can exercise its discretion as to Rule 11 violations, e.g., reporting and sanctioning; and (3) law firms would more closely screen cases and think harder about filing lawsuits if the grace period were stricken.

The compromise would accomplish several things. It would maintain the attitude of both groups that the 1993 legislation is preferred. At the same time, it would put to rest a public perception of filing frivolous lawsuits without penalty to the plaintiff. It would allow for better law firm screening of the cases to be filed. It would create a balance of judges using Rule 11 for the intended procedural purpose and, at the same time, reporting substantial Rule 11 violations to the appropriate disciplinary body without usurping the disciplinary function of the bar.

APPENDIX

EXAMPLE QUESTIONNAIRE OF OPINIONS TOWARD FEDERAL
RULES OF CIVIL PROCEDURE PROPOSALS—RULE 11:

1. Federal Rules of Civil Procedure (FRCP) 11 allows for district court judges to sanction attorneys who violate its provisions. How often do judges who impose sanctions report such violations (% of all cases) to a Bar Association or grievance committee?

0-25% ___ 26-50% ___ 51-75% ___ 76-100% ___

2. Is there a local rule requirement for the judges to report such violations to the Bar Association or grievance committee? Yes ___ No ___

3. Do you expect all violations to be reported to the Bar Association or grievance committee? Yes ___ No ___

4. What sanction is imposed for the violations?

- ___ none
- ___ reprimand
- ___ compensation
- ___ both
- ___ other, please explain

5. Do you favor FRCP 11 having mandatory reporting provisions to grievance committees or disciplinary officers for both sanction and compensation for attorney fees rather than the current discretionary provisions? Yes ___ No ___

If no, why?

- ___ takes away judicial discretion (not all violations should be reported)
- ___ small problem, does not merit reporting
- ___ problem does not exist
- ___ deters meritorious filings
- ___ possible double jeopardy
- ___ other, please explain

If yes, why?

- safe harbor weakens deterrence
- reporting strengthens the rule
- should be imposed for all violations
- will improve the practice of attorneys
- improves professional image
- other, please explain

6. Once a violation has been reported, what procedure is used to process the violation? Please briefly describe the procedure.

7. A bill is pending in Congress that will eliminate the safe harbor provision of FRCP 11 and reimpose mandatory sanctions for violations. Do you prefer the current discretionary or the proposed mandatory version?

Current FRCP 11 Proposed FRCP 11

8. Would you be in favor of a compromise change in the safe harbor provision to fewer days, such as 7 or 14 days? Yes No

