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COMMENTARY

FEDERAL RULE 11 AND PUBLIC INTEREST LITIGATION

ARTHUR B. LAFRANCE*

I. INTRODUCTION

We all know that there are ten commandments. As your Law Review banquet speaker, much in your debt for a day of courtesy and conviviality, it would be unkind of me to test you on your knowledge of those commandments. Instead, in return for your many kindnesses and the hospitality of your Dean, my long-time friend Ivan Bodensteiner, I want to advance your knowledge and explore an Eleventh Commandment. Because I want to encourage your interest in public service by commending to you the avenue of public interest litigation,¹ I will particularly examine the implications of this Eleventh Commandment, to be found in Rule 11 of the Federal Rules of Civil Procedure,² on the prospects and values of that important area of

* Professor of Law, Lewis and Clark Law School. This article is derived from a speech given by Professor LaFrance at the Valparaiso University School of Law, in May, 1987. The original text has been augmented, and footnotes added. The colloquial tone of the speech has been preserved.

1. The author has, for over fifteen years, trained legal services attorneys in federal litigation for the poor. Such litigation seeks to enforce public law entitlements, either under the Constitution or federal statutes, in such diverse contexts as welfare, housing, education, employment discrimination, prisoner's rights, and First Amendment interests. It is therefore referred to as public interest litigation. See Chayes, *Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4 (1982); Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976). Two surveys of the subject by the author may be found in LaFrance, *Federal Litigation for the Poor*, 1972 LAW & SOC. ORD. 1, [hereinafter, LaFrance, *Federal Litigation*], and LaFrance, *Constitutional Law Reform for the Poor: Boddie v. Connecticut*, 1971 DUKE L.J. 487.

2. Rule 11 requires that:

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompa-

litigation.

Rule 11 of the Federal Rules of Civil Procedure has been around a long time. In rough terms, it imposed a subjective test of good faith on lawyers, requiring that they file pleadings only when, in good faith, they believed that the pleadings served a valid purpose within the litigation.³ Not surprisingly, all lawyers, at all times, hold such belief. Hence, Rule 11 was rarely invoked and operated, if at all, only as a kind of gentle reminder that we should all go forth and do good. The Advisory Committee on Civil Rules felt more was needed to curb unspecified "abuses."⁴

In 1983, the Rule was amended. There was to be a threefold focus: prior inquiry was required to assure that pleadings were "well grounded in

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

FED. R. CIV. P. 11.

Rule 11 has become a growth industry for academic commentators. Among the recent pieces before and — primarily — after the speech which led to this Article are Cavanagh, *Developing Standards Under Amended Rule 11 of the Federal Rules of Civil Procedure*, 14 HOFSTRA L. REV. 499 (1986); Nelken, *Sanctions Under Amended Federal Rule 11 — Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L. REV. 1313 (1986); Note, *Litigant Responsibility: Federal Rule of Civil Procedure 11 And Its Application*, 27 B.C.L. REV. 385 (1986) [hereinafter Note, *Litigant Responsibility*]; Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 HARV. L. REV. 630 (1987) [hereinafter Note, *Plausible Pleadings*]; Comment, *Ask Questions First and Shoot Later: Constraining Frivolity in Litigation Under Rule 11*, 40 U. MIAMI L. REV. 1267 (1986) [hereinafter Comment, *Ask Questions*]; Comment, *The Dynamics of Rule 11: Preventing Frivolous Litigation By Demanding Professional Responsibility*, 61 N.Y.U. L. REV. 300 (1986) [hereinafter Comment, *The Dynamics of Rule 11*]; Note, *The 1983 Amendments to Rule 11: Answering the Critics' Concern with Judicial Self-Restraint*, 61 NOTRE DAME L. REV. 798 (1986) [hereinafter Note, *The 1983 Amendments*].

3. A general review of the development and scope of Rule 11 and the 1983 amendments may be found in 2A J. Moore, J. Lucas, & G. Grotheer, *Moore's Federal Practice* § 11.01 (2d ed. 1987) [hereinafter *Moore's Federal Practice*]; 5 C. Wright, A. Miller, & M. Kane, *Federal Practice & Procedure*, §§ 1331-1335 (Supp. 1987).

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

fact," advanced a tenable legal theory, and were "not interposed for any improper purpose." Previously, the Rule had looked only at subjective intent and willful misconduct. The amendments substituted a reasonable attorney, "objective" test to determine whether pleadings were appropriately filed.⁵ On the surface, these changes may seem only minor tinkering.

These changes have a major impact, however, on public interest litigation. This form of litigation advances interests assured by innovative and oftentimes controversial legislation which creates rights or entitlements in social programs such as welfare, education, healthcare, and the like. Such litigation is often constitutionally grounded and brought on behalf of prisoners, welfare recipients, racial minorities, and other representatives of the powerless and the unpopular in our society. It is all very new, and much of it is very, very controversial.⁶

Rule 11 is antithetical to public interest litigation. The principles advanced by public interest litigation invite lawyers to right wrongs and change the world. Rule 11, to oversimplify, commands that we do so as reasonable people, without disturbing the *status quo ante*. The difference in perspectives could hardly be clearer. There is no "norm" for public interest litigation since much of it is brought to challenge and change existing

5. Prior to 1983, Rule 11 read as follows:

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

FED. R. CIV. P. 11 (amended 1983). See MOORE'S FEDERAL PRACTICE, *supra* note 3, at § 11.02[3], as to the principle effects of the 1983 amendments to Rule 11:

The primary effect of the 1983 amendment was the elimination of Rule 11's 'good faith' defense and the creation of a 'reasonable inquiry' duty. Because the old Rule disciplined only wilful violators who *knew* their pleadings were without good ground to support them, 'unless the pleading was preposterous on its face, the less the pleader inquired, the safer he was from sanction.' The current Rule requires legal and factual inquiry by the signer of a pleading, motion or other paper, and it places the signer at risk if the inquiry proves not to have been 'reasonable.' In determining what is reasonable, the standard generally applied is that of a competent attorney.

Id. (emphasis in original) (footnotes omitted). For the full text of Rule 11, as amended, see *supra* note 2.

6. See generally Chayes, *supra* note 1; Note, *Plausible Pleadings*, *supra* note 2.

norms of community behavior and create new norms in their stead.

Public interest litigation is largely brought by lawyers from the ACLU, National Lawyers Guild, NAACP, Sierra Club, and federally-funded legal services programs. Such suits are often defended by government or corporate attorneys. Rule 11, then, is a conservative check, pitting conservative and liberal factions of the bar against each other. It also embodies a struggle between our judicial system, that most conservative of forces, and Congress, which has adopted public interest legislation that is to be enforced by public interest litigation. So the conflict created in 1983 by Rule 11 implicates values fundamental to our system of constitutional government. It also represents a collision between the democratizing values of federal reform of the 1930s, which led to the Federal Rules of Civil Procedure, and the efforts during the 1980s, to close the federal courts to the poor and the powerless.

This article will discuss why Rule 11 has come about and why we should see it for what it is: a swing of the pendulum away from fifty years of progress in individual rights and civil liberties. The swing has been powerful and its sweep has been broad. In four years of existence, the 1983 amendments to Rule 11 have generated literally hundreds of opinions; prior to 1983, there were only a few dozen.⁷ These cases are not randomly distributed — they are disproportionately concentrated in areas of interest to public interest lawyers.⁸ It is not insignificant that during roughly the same time, the Reagan Administration has appointed nearly 50% of the present federal judiciary. Rule 11, then, is only one small part of a political agenda imposing an ambitious, conservative philosophy on the federal courts.⁹

At issue is not only public interest litigation, but the public interest itself.

7. Under old Rule 11, there were at most only a few dozen instances when sanctions were requested or imposed from 1938 to 1983. Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1, 34 (1976). See also Cavanagh, *supra* note 2, at 504-06 and accompanying notes; Nelken, *supra* note 2, at 1314 n.5 (citing Risinger, *supra*). In the first two years after adoption, there were 200 reported cases under Rule 11. Nelken analyzes these in considerable detail finding that most were concentrated in a few urban centers. *Id.* at 1325-29.

8. A useful survey of cases, by circuit and result, is found in the appendices to Nelken's article. Nelken, *supra* note 2, at 1354-69.

9. President Reagan has, for two decades, been hostile to public interest litigation. As Governor of California, he vetoed federal funding for California Rural Legal Assistance, a statewide legal aid program. His judicial appointments, he has openly declared, have been selected to be consistent with his conservative views. The tenor and quality of his views have all been recently affirmed by the Bork-Ginsburg-Kennedy saga which unfolded during the summer of 1987, after this speech was delivered but before this Article was finished.

II. A FEW WORDS ABOUT PUBLIC INTEREST LITIGATION

A. *In the Beginning* . . .

In the beginning, litigation was not brought to enforce the public interest. Indeed, most litigation remains as it was two or three hundred years ago, dedicated to advancing private interest, usually in property or contract or tort.¹⁰ The public is interested enough to create a cause of action on my behalf, and it will provide a neutral forum in the form of a court; but society will not encourage me to sue you.¹¹ Moreover, the recent emphasis on alternative dispute resolution indicates that the public is most interested now, in the 1980s, in having me *not* use that forum, but is interested in having me settle my claim by some other means.¹²

All of this is consistent with what for centuries was an abhorrence of litigation. It truly is the American view that litigation is to be avoided above all things except perhaps death and pestilence. In small towns in America, litigious people are still avoided, and making a "fuss" or "federal case" over something remains a sure way of making yourself a social pariah. Getting along is the better way, socially and legally.

But there have been three constitutional revolutions in America, one in the 1700s, one in the 1800s, and a third in our century. Each has some bearing on the public interest in litigation. I will trust that you know about the Revolution in 1776. It led to the Bill of Rights.

We called the revolution in the 1800s a Civil War. It led to the Civil Rights Acts of the 1870s, which created causes of action on behalf of those who were denied federal rights under color of state law.¹³ These statutes were intended to ensure that the newly freed slaves and the federal agents who went into the South on their behalf were all treated fairly.¹⁴ They were not to be jailed or dispossessed or otherwise denied rights under color of state law. Those statutes lay virtually unused for 100 years.¹⁵

The catalyst which awoke those slumbering provisions was the American Revolution of our own century, the New Deal. After the Great Depression, our concept of our national obligation toward the unemployed, the

10. See generally Chayes, *supra* note 1.

11. *Id.*

12. See, e.g., J. FOLBERG & A. TAYLOR, *MEDIATION — A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION* (1984).

13. See 42 U.S.C. §§ 1981-1988 (1982).

14. See generally LaFrance, *Federal Litigation*, *supra* note 1.

15. *Id.* *The Civil Rights Cases*, 109 U.S. 3 (1883), read the Reconstruction Civil Rights Acts very restrictively. Not until the desegregation cases, *Brown v. Board of Education*, 347 U.S. 483 (1954), were they fully exercised. Even then, the focus remained on the facial practices which prompted the 13th, 14th, and 15th Amendments.

elderly, the deprived, and the disadvantaged changed radically. For the first time, Congress declared, through the Social Security Act, that this nation would not leave the poor to starve, the elderly to waste away, the unemployed to beg, or the children of America to grow up in poverty.¹⁶ In *Edwards v. California*,¹⁷ the Supreme Court affirmed that this is one nation and that we cannot turn our backs upon our poor or disadvantaged. By the end of the Second World War, this awakening was completed by the return of veterans who had fought a terrible war to advance national ideals of a nation committed to social justice. They insisted that those ideals be a reality.

B. Coming Up to Date

All of this underlay what is both the fountainhead and the model of public interest litigation, the lawsuit which became known as *Brown v. Board of Education*.¹⁸ That case is best known for having declared an end to segregation in schools. The lawsuit was hardly a fender bender or a collections case. It is the classic model of public litigation: no private injury was asserted, no dollars in redress were sought, no individual person was prosecuted as a wrongdoer, and no past focus limited the remedy or the role of the Court. Instead, *Brown v. Board of Education* fulfilled all of the criteria Professor Chayes has identified in his superb article, *The Role of the Judge in Public Interest Litigation*:¹⁹ relief was uniquely injunctive, the role of the judge was ongoing and forward-looking, court authority was managerial, and relief was sought under constitutional principles, pursuant to public interest statutes, for a broad class of people, numbering in the thousands, perhaps millions. Perhaps most importantly, the issues were grounded on unclear, yet fundamental concepts which challenged decades of custom entrenched in legal protections.

The Reconstruction Civil Rights Acts made *Brown* possible. They created a cause of action on behalf of anyone who was denied federal rights under color of state law.²⁰ After *Brown* came a far less famous but equally important case: *Monroe v. Pape*.²¹ In *Monroe*, thirteen Chicago police of-

16. With apologies to others, but for ease of convenience, the author at this point in the speech and article, is citing to his own works whenever possible. See generally A. LAFRANCE, WELFARE LAW: STRUCTURE AND ENTITLEMENT (1979).

17. 314 U.S. 160 (1941).

18. 347 U.S. 483 (1954).

19. Chayes, *supra* note 1.

20. Absent such a statute, a constitutional claim must rest directly on the underlying constitutional provision, and the courts must then create a remedy, something they are reluctant to do. *But see* *Bivens v. Six Unknown, Named Agents*, 403 U.S. 388 (1971) (permitting such a suit against federal agents for violations of the Fourth Amendment).

21. 365 U.S. 167 (1961).

ficers invaded Willie Monroe's home one night, strip-searched him, took him downtown, held him until morning, and then kicked him out onto the streets. When he complained that he wanted justice, they replied that this *was* justice, Chicago-style. Monroe decided he wanted *constitutional* justice and made a federal case out of it under the Reconstruction statutes.

The Chicago police and the City of Chicago were astonished. The police had not *intended* to deprive Monroe of "rights," just a little dignity and privacy. If he wanted to sue in tort, the state courts were available, and he should exhaust those remedies. Moreover, if, as Monroe said, the police were acting illegally, then they could hardly be said to be acting under "color of state law." Think about it. There were other arguments of that quality, all of which the United States Supreme Court rejected.²² The Court affirmed the policy of the Reconstruction: to place the federal judiciary squarely in the path of state injustice and on the side of citizens seeking to correct such injustice in the public interest.

At about the same time, Congress was taking important steps. It was considering civil rights legislation and social programs which were as profoundly important as the Social Security Act had been. Well into the 1980s, Congress was correcting the imbalance of social justice in favor of blacks, hispanics, women, the handicapped, children requiring special education, and other underprivileged groups. Congress mandated fair and equal treatment in such areas as education, employment, housing, and public accommodations.²³ Along with this, came important new social legislation which created programs in healthcare, welfare, education, and the environment.

Public interest litigation was either expressly or impliedly to be the vehicle for individuals to enforce these new rights. Governmental agency

22. The Court held that the City of Chicago was immune from suit under 42 U.S.C. § 1983 (1976), a holding later overruled in *Monell v. New York Dep't of Social Services*, 436 U.S. 658 (1978).

23. It would hardly make sense here to string dozens of citations to document the proposition in the text, which the author assumes is common ground and common knowledge. What is astonishing, however, is that a mere twenty-five years ago, the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a-2000h-6 (1982)), was not yet law. We had not yet committed ourselves to ending discrimination in employment, public accommodations, and voting. Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701-716, 78 Stat. 253, 253-66 (codified as amended at 42 U.S.C. 2000e-2000e-17 (1982)), directed at discrimination in employment, and the Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C. §§ 1411-1420 (1982 & Supp. III 1985)), aimed at assisting the handicapped to get a free and appropriate education, were not yet law. The many state public accommodations statutes of the 1970s are only ten or fifteen years old. The explosion in creating and protecting individual rights has been phenomenal and reflects a fundamental shift in this nation's commitment to individual rights.

enforcement was not enough.²⁴ Individuals were to have an individual right to enforcement. The Reconstruction Civil Rights Acts became a vehicle for enforcing these new entitlements and interests. Where Congress had not expressly created a right to sue, 42 U.S.C. § 1983 guaranteed federal rights, constitutional or statutory, against private or public infringement under color of state law.²⁵ This included the new federal social programs.²⁶ In 1966, when I first looked at section 1983 and brought my first action in federal court, the annotations in U.S.C.A. were only ten pages long.

The last time I looked, they filled an entire volume.

C. *Has This Been a Good Thing?*

I view this as progress. Perhaps only a law school Dean or an old 1960s litigator could find comfort and progress in a floodtide of litigation. But I can attest, and others can attest along with me, that America is a vastly better place than it was in the mid-1960s. Our prisons are better, our police are better, our schools and our mental hospitals are better. To a considerable extent, we can attribute this to the vision of legislators in Washington and in our state capitols. But we should also attribute this, and do so frankly, to the courage of individual citizens — and their attorneys — who challenged injustice in the public interest.

The best recognition of this view has come from the Congress of the United States. In 1976, the 200th anniversary of the Declaration of Independence, Congress passed what is one of the most important laws in the history of civil rights legislation,²⁷ the Civil Rights Attorney's Fees Awards Act of 1976.²⁸ It is no mistake that this enactment appears as an amend-

24. Governmental enforcement through the EEOC or other agencies is useful but also has its limits and is particularly susceptible to political considerations. Hence, Congress has frequently created individual entitlements to sue. An example of this dual approach exists in employment discrimination under Title VII. Other examples abound. *See, e.g., Jones v. Alfred H. Mayer & Co.*, 392 U.S. 409 (1968); *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1973).

25. These statutes create causes of action against those denying rights under "the Constitution and laws" of the United States. The "and laws" language incorporates statutory entitlements, such as welfare benefits. *See Maine v. Thiboutot*, 448 U.S. 1 (1980).

26. In addition, federal courts have often "implied" a direct, independent right to sue under federal program statutes, and have found congressional intent to be advanced thereby. *See Cort v. Ash*, 422 U.S. 66 (1975). The criteria for finding such implied intent are a matter of much dispute within the present Supreme Court, since *not* finding such intent restricts litigation. *See Wright v. Roanoke Redevelopment and Housing Authority*, 107 S. Ct. 766 (1987).

27. I would view the Reconstruction Civil Rights Acts as the most important and the Administrative Procedure Act, particularly the portions creating judicial review, 5 U.S.C. § 701-706 (1982 & Supp. III 1985), a close second; the two together create a scheme of governmental accountability to individual citizens.

28. Pub. L. No. 94-559, 90 Stat. 2641 (codified at 42 U.S.C. § 1988 (1982)).

ment to the crucial Reconstruction enactments of 100 years earlier. The 1976 Act says that a prevailing party may be awarded attorney's fees from the other side in a suit brought under civil rights statutes or other federal legislation.²⁹ You can now do well for yourself by doing good for others.

Perhaps this is not testimony to the idealism and social conscience of public interest lawyers. I think it is. But for those who feel that the Civil Rights Attorney's Fees Award Act is only testimony to lawyers' mendacity, I will respond by saying that fees are no less important to lawyers who represent the poor than to those who represent the wealthy. Attorney's fees awards are the catalyst for vindicating the interests of the poor, the handicapped, the disadvantaged, and a huge multitude of others who seek a more just society.³⁰ These groups are now helped in their quest by the prospect of attorneys being available through payment by the wrongdoer at the same rates which make the best attorneys available to the most powerful corporations.

In short, Congress has been a liberalizing force under our Constitution, extending the reach of social legislation and of the federal courts. Congress' consistent policy has been to open access to those courts and to do so in the public interest.³¹

III. AND NOW, A FEW WORDS ABOUT RULE 11 . . .

A. *Reading, 'Riting, and 'Rithmetic*

The impact of Rule 11 on all of this is perhaps not self-evident. All the Rule seems to do is require that lawyers read their pleadings before signing them, file those pleadings only after making good faith factual inquiry, and check the pleadings against the tote board of tenable legal theory. Reading, writing, and arithmetic are what we expect of elementary school children. Shouldn't we expect them as well of lawyers?

29. The Act was a direct response to the Supreme Court's reaffirmation of the "American Rule" that litigants bear their own expenses in the absence of bad faith or the creation of a common fund. See *Aleyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975). By that decision, the Supreme Court rejected a decade of liberal development of awarding attorney's fees where litigants, in the public interest, had acted as private attorneys general. This tension between Congress and the Court will be developed further *infra* and is central to an understanding of Rule 11.

30. Multiple citations seem unnecessary, but some of the flavor of the importance and the impact of attorney's fees awards may be found in Justice Powell's dissent, and the Appendix thereto, in *Maine v. Thiboutot*, 448 U.S. 1, 11-37 (1980).

31. It is worth noting that the 1976 Attorney's Fees Act also removed the \$10,000 jurisdictional requirement in federal question cases. This had been a major barrier in public interest cases to access to federal courts. Act of Oct. 21, 1976, Pub. L. No. 94-574, § 2, 90 Stat. 2721 (codified at 28 U.S.C. § 1331 (1982)).

The answer, which will not create surprise, is both yes and no. Yes, we should expect lawyers to be careful. We should expect lawyers to investigate beyond what their clients have told them and to research beyond the law which occurs to them over lunch. This is a learned profession, after all. We should expect lawyers to learn about their cases and about the law throughout their lives. Those of you who are law students may soon be done paying your tuition but you will never be done paying your dues.

Rule 11 does far more, however, than simply assure care on the part of attorneys. It changes our roles and responsibilities, and those of the courts, in profound and troubling ways. The impact is felt uniquely by public interest lawyers. First, Rule 11 makes every judge in every court and in every case, in effect, a bar disciplinary committee of one. This is new. It is different. It radically changes the function of courts and the relation of counsel to those courts.³² It ups the ante in every lawsuit. It puts the lawyers on trial.

Usually, we separate the deciders of lawsuits from the discipliners of lawyers. By separating disciplinary proceedings from the practice of the discipline, we stretch out time, and we import objective, detached decisionmakers. In the crucible of a lawsuit, tempers flare and time becomes compressed. The judge who has judged the case and has been challenged, perhaps confronted, by the attorneys, should not — precisely because of the risks of pique and prejudice — also sit in judgment on those attorneys. We leave that to others.

But Rule 11, by tracking the language of the Code of Professional Responsibility, imports that vague and complex structure into every court proceeding.³³ In an adversary proceeding, counsel must act independently of the judge. Yet Rule 11 confuses these roles, so crucial to our system of truth-seeking.³⁴ Rule 11 is, at bottom, just one more step in the “domestication” of attorneys, a process which has serious implications for access to the court by the poor, the powerless, and the disadvantaged.³⁵

32. Nelken puts it this way: “The federal judge is now required not only to be an active case manager, but also to police lawyers who overuse, misuse, or otherwise abuse the litigation process.” Nelken, *supra* note 2, at 1313.

33. The parallel between Rule 11 and the Code of Professional Responsibility is discussed in Comment, *The Dynamics of Rule 11*, *supra* note 2, at 316-17; Cavanagh, *supra* note 2, at 525-26.

34. The role confusion threatened by Rule 11 was rejected by the Ninth Circuit:

[N]either Rule 11 nor any other rule [requires] that [a] lawyer, in addition to advocating the cause of his client, step first into the shoes of opposing counsel to find all potentially contrary authority and finally into the robe of the judge to decide whether the authority is indeed contrary or whether it is distinguishable.

Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531, 1542 (9th Cir. 1986).

35. See Nelken, *supra* note 2, at 1345-52. The Miami Law Review misses the point in saying that critics of Rule 11 “desire to protect [a] sacred paradigm” of adversarial litigation

A second troubling feature of Rule 11 is the abrupt shift from a subjective standard to an objective standard in evaluating attorneys. The importance of this bears repeating. Until 1983, Rule 11 sanctioned attorneys only when it could be said *in fact, subjectively, actually*, that they *intended* to abuse the process.³⁶ Failure to read a pleading, failure to conduct adequate factual investigation, or failure to stay within tenable bounds of legal theory might lead to dismissal of a case. But previously, they could not lead to dismissal of a lawyer's career. Now, even absent bad faith, they can be a basis for sanctions.

Indeed, the 1983 amendments seem to permit sanctions for objective failures *and* for subjective failures, vaguely undefined as "any other improper purpose."³⁷ Is indignation "improper"? Anger? Outrage? A hunger for justice? Suppose a suit is otherwise valid — may, or should, a court nevertheless inquire into motive? And if, as is always true, a client's motives are mixed, is the lawyer subject to sanctions? Should not such questions have been answered *before* Rule 11 was amended, and not left hanging, leaving lawyers twisting slowly in the winds of political change?³⁸

and "the sacred lair of the adversarial lion" by keeping a passive judge. Comment, *Ask Questions, supra* note 2, at 1288-89. Rather, the critics support the active judge but insist on active counsel as well. That is the point of the adversary process, missed both by Rule 11 and the Miami Law Review.

36. All authorities concur that subjective bad faith is no longer required by the amended Rule 11. *See, e.g., Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 253 (2d Cir. 1985); Cavanagh, *supra* note 2, at 511-13; Nelken, *supra* note 2, at 1318-20.

37. Rule 11's requirements as to theory may, in fact, now be both objective and subjective. The Rule requires "belief formed after reasonable inquiry." The attorney also certifies the *absence* of "improper motive." *In re Ronco*, 105 F.R.D. 493 (N.D. Ill. 1985). Consequently, the 1983 amendments may justify sanctions where an attorney is *either* subjectively *or* objectively at fault. *See* Judge Weinstein's critical and careful analysis in *Eastway*, 762 F.2d at 253. This hardly provides guidance for court or comfort for counsel. *See* Cavanagh, *supra* note 2, at 526-28. Nelken writes "it is more accurate to say that the rule adds an objective layer to the subjective core of traditionally sanctionable bad faith conduct." Nelken, *supra* note 2, at 1320.

38. As to Rule 11's containing both a subjective *and* objective element, MOORE'S FEDERAL PRACTICE states:

Although Rule 11 calls for the imposition of sanctions in the case of papers filed with 'any improper purpose,' the stricter and more straightforward standard of liability adopted for filings not preceded by adequate factual and legal inquiry has caused most cases to be decided without an examination of the filing's real 'purpose.' It has even been suggested that filings that are solidly grounded in law and fact are not susceptible to Rule 11 sanctions, regardless of the subjective purpose behind their filing. In light of the Rule's plain language to the effect that a signature constitutes a certification as to both an adequate basis for the filing and the absence of an improper purpose, however, a filer's malicious intent should still suffice to subject him to sanctions. Where it is clear that a filing is motivated by a desire to harass or delay, the 'improper purpose' clause remains as an independent means of imposing liability.

MOORE'S FEDERAL PRACTICE, *supra* note 3, § 11.02[4], at 11-24 to -25 (footnotes omitted).

In the last three years, over two hundred reported cases have dealt with sanctions against attorneys. There may be hundreds unreported. Yet none answers these questions I have just posed. So each of you, when filing a lawsuit in federal court, runs the risk of making new law, rather than practicing it.³⁹ The impact on independence of counsel is obvious. Vagueness in sanctions is the best way to chill rights, whether in a First Amendment context or in the adversary process. The right to sue, to petition for redress of grievances, is an important element of the First Amendment. It is seriously compromised by Rule 11.

The fact is that lawsuits are often brought on scanty facts for the simple reason that the facts are in the hands of the adverse party.⁴⁰ Also, novel legal theories may be invoked to deal with newly emerging injuries or to vindicate newly conceived interests. The genius of the common law and of our Constitution has been the capacity to grow and change, and litigation serves a vital role in this process.⁴¹ Yet Rule 11 creates both objective and subjective tools which empower judges to curb attorneys and bring them to heel. Rule 11 chills not only the exercise of rights and the exercise of advocacy, but also the healthy process of growth in the law.⁴²

A third consideration, profoundly troubling, about Rule 11 is that it

39. The Harvard Law Review discusses several cases, making the indisputable point that courts cannot agree as to what is a tenable legal theory avoiding sanctions under Rule 11 and observing that in a 1985 Federal Judicial Center survey of 292 judges, "half of the judges in the survey would have sanctioned as frivolous the same paper that the other half of the responding judges thought did not violate the Rule." Note, *Plausible Pleadings*, *supra* note 2, at 641.

40. The difficulties under Rule 11 with respect to facts are illustrated by the rather thoughtless declaration in one Comment that "omitting material facts or pleading false ones is a definitive violation of Rule 11's requirement that factual theories be 'well grounded' and therefore warrants sanctions." Comment, *The Dynamics of Rule 11*, *supra* note 2, at 320. An attorney cannot know what is "material" until the other side submits a responsive pleading. Similarly, an attorney cannot know what is "false" until after discovery or trial and, oftentimes, not even then.

41. [V]iewed as part of expanded expectations of justice, increased litigation may not look so undesirable. New ideas of justice reflected in the very categories of cases to which Rule 11 is most often applied have in recent years expanded the meaning of equality, the scope of individual rights, and the strength of the welfare state. The degree to which the legal system should remain open as a forum for debate about, and even adoption of, new versions of justice is part of what is at stake in decisions about how broadly to use Rule 11.

Note, *Plausible Pleadings*, *supra* note 2, at 632.

42. Rule 11 not only ignores the difficulty in determining when a claim is tenable but also assumes there is no judicial interest in the growth of the law. By subordinating attorneys to judges, the Rule confounds both process and roles. "Although it may be the role of judges to keep the development of doctrine within workable bounds, litigators uniquely contribute to doctrinal dynamism by creating pressure for change. Rule 11 should not be construed to demand that lawyers behave like judges when pre-screening their clients' claims." Note, *Plausible Pleadings*, *supra* note 2, at 649-50.

makes sanctions mandatory and does so regardless of who has prevailed in the case, without any criteria for setting the amount of such sanctions.⁴³ Indeed, even the *purpose* of sanctions — compensation, deterrence, or punishment⁴⁴ — is not specified. And the *measure*, quite apart from the *purpose*, is left wholly to discretion. If the measure is “reasonable” attorney’s fees *caused* by the misconduct,⁴⁵ the element of causation in litigation is hard indeed to trace. Not surprisingly, estimates as to what *amount* is “reasonable” vary widely even between courts involved in the same case. Thus, the trial court in *Eastway Construction Corp. v. City of New York*⁴⁶ at first imposed no sanctions, then imposed \$1,000 on reversal and remand, and then was reversed again by the Court of Appeals, which imposed sanctions of \$10,000. The defendant had sought over \$50,000.⁴⁷

Rule 11 is troublesome enough when viewed within its own terms. But the Rule’s true impact emerges only when it is viewed in a broader context. So viewed, the Rule collides with Congress’ support of social legislation. It also represents an attack on the liberal policies underlying the Federal Rules reform of federal courts. It is a clear challenge to Congress’ recent encouragement of litigation through attorney’s fees.

B. *Setting the Rule in Context*

Our nation’s advances over the past decades in welfare, education, housing, the environment, and civil rights consistently have come from Congress. Law teachers and law students are prone to criticize the legislative process as inept and political, and to view it as bending to expediency and pandering to prejudice. But the reality is that Congress has consistently legislated for social reform, individual rights, and the public interest. Courts, in contrast, have consistently — and perhaps properly — responded

43. The sanctions under the 1983 amendments are *mandatory*, a most unusual feature. Schwarzer, *Sanctions Under the New Federal Rule 11 — A Closer Look*, 104 F.R.D. 181, 200 (1985), suggests courts will nevertheless insist on inherent discretion. This seems unlikely. See *infra* notes 79-85 and accompanying text.

44. Significantly, Rule 11 not only broadens the definition of offending conduct but also the range and frequency of sanctions. Nelken, *supra* note 2, at 1321-23. But it offers conflicting purposes — punishment and compensation — with no guidance as to when to invoke or apply them. *Id.* at 1323-25. It is clear that some believe that fees assessed under Rule 11 are intended as sanctions and as punishment. See Schwarzer, *supra* note 43, at 201. In the view of some, the punishment and deterrence functions of Rule 11 are predominant. See Comment, *The Dynamics of Rule 11*, *supra* note 2, at 328-29. Fee-shifting is, however, asserted as an equally important objective and sanction. *Id.* at 331.

45. Generally, the sanction is limited to “reasonable” attorney’s fees, but some courts have gone beyond these. Nelken, *supra* note 2, at 1333 n.130.

46. 762 F.2d 243 (2d Cir. 1985), *on remand*, 637 F. Supp. 558 (E.D.N.Y. 1986), *modified*, 821 F.2d 121 (2d Cir.), *cert. denied*, 108 S. Ct. 269 (1987).

47. *Eastway*, 637 F. Supp. at 577. See *infra* notes 79-85 and accompanying text.

to these initiatives in the most conservative of ways. Often this is simply a product of the responsibility for interpreting the Constitution.

But Rule 11 is not so based. It is a *legislative, regulatory* creation of the Supreme Court. It tends toward closing access to the courts, and directly collides with Congress' will as expressed over the past fifty years.⁴⁸

Congress approved in detail the policy and procedures underlying the adoption of the Federal Rules nearly fifty years ago. The basic thrust is to open courts, not close them.⁴⁹ Among other innovations, the new rules led to "notice" pleading, expanded discovery, and such innovations as summary judgment and the pretrial conference.⁵⁰ Rule 11 now returns us to a dishonored era of fact pleading.⁵¹ The Supreme Court, by its 1983 amendments, has thus begun a rollback of fundamental congressional policy.

The courts have masked this rejection of congressional policy of open courts by claiming that there is a need to curb frivolous litigation⁵² and reduce delay in the courts. Yet the Advisory Committee in 1983 did not

48. There is a real question as to the legitimacy of those amendments. The 1983 amendments were adopted pursuant to the Rules Enabling Act, 28 U.S.C. § 2072 (1982). At the threshold, one may ask whether that Act permits imposing sanctions and then, next, *requiring* sanctions. See Burbank, *Sanctions in the Proposed Amendments to the Federal Rules of Civil Procedure: Some Questions About Power*, 11 HOFSTRA L. REV. 997 (1983); Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982). Beyond this, that Act can hardly authorize rules conflicting with other legislation, such as 28 U.S.C. § 1927 or 42 U.S.C. § 1988. No commentary on Rule 11 has thus far considered this point of infirmity. See Comment, *Ask Questions*, *supra* note 2, at 1293-94.

49. By freighting and formalizing the beginning of the process, Rule 11 runs counter to the special genius of the Federal Rules and counter to "the realist jurisprudential roots of the Federal Rules system. Reading the Rule too broadly promotes efficiency only at the cost of deterring undeveloped and nonstandard claims. The realist reformers who wrote the Federal Rules of Civil Procedure aimed to accommodate precisely those claims." Note, *Plausible Pleadings*, *supra* note 2, at 632.

50. Rule 11's insistence on extensive pre-filing fact inquiry runs precisely against the basic policy of the Federal Rules to abandon fact pleading in favor of notice pleading and to expand pre-trial, formal discovery. See Cavanagh, *supra* note 2, at 514 n.108.

51. Although the "well grounded-in-fact" requirement does not explicitly modify the standards governing notice pleading under Rule 8, the effect is to require articulating facts and theory with much greater particularity. The result is to repeal 50 years of reform under the Federal Rules. Note, *Plausible Pleadings*, *supra* note 2, at 635-36. There is a similar impact on the other great innovation of the Federal Rules, pre-trial discovery, since now a complaint must be "well grounded in fact." This moves discovery from pre-trial to pre-filing, eliminating or sanctioning cases "for factually undeveloped pleadings regardless of the potential for finding additional factual support through discovery." *Id.* at 636, 644-51.

52. A concern for frivolous and abusive litigation or tactics, it is said, prompted the 1983 amendments to Rule 11. FED. R. CIV. P. 11 advisory committee's note to 1983 amendment. But the advisory committee notes do not document the causes or contours of this problem or explain how the amendments will solve it. This author's common sense hunch is that the problem has grown no faster than the volume of litigation itself. At least, no one has shown otherwise. *But see* Schwarzer, *supra* note 43, at 181-82.

provide statistics substantiating this "problem."⁵³ Nor is there any reason to believe Rule 11 will "solve" the problem,⁵⁴ although it will clearly create the problems discussed earlier, and will generate new litigation, compounding these problems.

If there is indeed a problem, the Federal Rules have long given judges broad managerial authority to regulate class actions and discovery and to dispose of cases by summary judgment.⁵⁵ Moreover, in 1983 that authority was considerably broadened.⁵⁶ So the amendments to Rule 11 were doubly unnecessary.⁵⁷ The simple fact is that Rule 11 now represents a direct challenge to congressional policy, of nearly fifty years' duration, that the courts should be open, not closed, to the public.

This challenge is also on a collision course with congressional support for public interest litigation. Congress has fought over the last decade to keep the Legal Services Corporation alive and to keep it serving the poor. It has created legal entitlements and rested enforcement upon what is now the slimming reed of public interest litigation. Significantly, when Congress decided in 1980 to make sanctions possible against attorneys, it chose 28 U.S.C. § 1927, not Rule 11, amending the former so that attorney's fees would be awarded only where the offending attorney had multiplied pro-

53. There simply is no evidence that frivolous claims or vexatious litigation have created "the problem" prompting Rule 11 and its sanctions. No empirical study has been undertaken to show cause, consequence, or cure. Professor Miller opines that we may simply be victims of that peculiar form of truth-telling known as the "cosmic anecdote." Comment, *Ask Questions*, *supra* note 2, at 1289 n.142. Such anecdotes in the past had us living on a flat world, with the sun revolving around us.

54. Courts and commentators agree that Rule 11, as amended, is intended not only to reduce misconduct but also costs and delay. See sources cited *supra* at note 3. See also Schwarzer, *supra* note 43, at 182-83; Marcus, *Reducing Court Costs and Delay*, 66 JUDICATURE 363 (1983). But most increases in costs and delay are a product of the increase in volume and complexity of litigation, an inevitable product of our times. The emerging caselaw under Rule 11 suggests that litigating *about* Rule 11 will consume far more resources, time, and money than the litigation deterred by it. Consider, for example, the *Eastway* and *Golden Eagle* cases discussed in the text. Consider, also, that much — or at least some — of the litigation *about* Rule 11 is itself frivolous or intended to harass litigants.

55. Case management is better achieved by "pretrial conferences, discovery conferences, limitations on discovery requests, allocation of discovery expenses, and dismissal. Reliance on these procedures where feasible is more compatible with the realist emphasis on increasing rather than restricting the flow of information relevant to legal disputes." Note, *Plausible Pleadings*, *supra* note 2, at 649.

56. See *supra* note 5 and accompanying text.

57. It may be granted that there have been abuses in litigation maintenance, particularly in discovery. But amending Rule 11 was not necessary to address those. At the time of that amendment, Rule 7, 16, and 26 were also amended, giving federal judges vastly increased authority over discovery and pre-trial conferences. See Nelken, *supra* note 2, at 1313-17. These alone should have sufficed. At least it would have been wise to try them in isolation, particularly since vigorous judicial case management is a relatively new phenomenon. See Resnik, *Managerial Judges*, 96 HARV. L. REV. 376, 376-77 (1982).

ceedings unreasonably or engaged in vexatious conduct.⁵⁸ Rule 11 goes well beyond this and thus runs counter to congressional choices and policy.⁵⁹

The conflict is particularly acute in the arena of attorney's fees statutes. Congress had created literally dozens of statutes which award attorney's fees to prevailing parties in public interest litigation cases.⁶⁰ Notwithstanding these statutes, Congress has deliberately and carefully not repealed the American Rule, leaving each party to bear its own costs.⁶¹ This array, or balance, is designed to assure optimum use of the courts in the public interest.⁶² The Supreme Court, by amending Rule 11, has upset this. It has provided that in "American Rule" cases, where Congress has chosen *not* to award fees, they may nevertheless be awarded as sanctions, contrary to congressional policy. In cases where Congress has authorized attorney's fees for prevailing parties, Rule 11 may offset these by sanctions awarded to losing parties. Moreover, Rule 11 mandates fees for defendants by an objective standard, although attorney's fees statutes, such as the 1976 Act, award fees to defendants only in extraordinary cases for outrageous misconduct.⁶³

58. Prior to Rule 11's 1983 amendments, courts could invoke either their inherent equity powers or their statutory powers under 28 U.S.C. § 1927 (1982) to impose sanctions for willful abuse or bad faith by attorneys. Cavanagh, *supra* note 2, at 507-10. But the standard, as with Rule 11 prior to 1983, required actual, subjective bad faith. *Oliveri v. Thompson*, 803 F.2d 1265, 1272 (2d Cir. 1986). See Nelken, *supra* note 2, at 1316-17.

59. Consistently with the American Rule, ample provision exists in a federal court's inherent powers to deal with bad faith or vexatious litigation. See *Aleyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975); Comment, *The Dynamics of Rule 11*, *supra* note 2, at 309. Statutory authority also exists in 28 U.S.C. § 1927 (1982).

60. The "American Rule" requires each party to bear its own fees and expenses. *Aleyeska*, 421 U.S. at 240. As the Supreme Court noted in *Aleyeska*, there are multiple exceptions, created by Congress. A few of these exceptions were designed to shift costs against parties, to deter misconduct. See, e.g., 28 U.S.C. § 1927 (1982). The vast majority, literally dozens of statutes, were designed to enforce public policy by encouraging litigation through awarding fees to prevailing parties. The most important of these, the Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (codified at 42 U.S.C. § 1988 (1982)), was passed after *Aleyeska*, in which the Supreme Court adhered to the American Rule. See *Marek v. Chesney*, 473 U.S. 1 (1985) (App. to Opinion of Brennan, J.).

61. Congressional policy, broadly stated, is reflected in the "American Rule" governing attorney's fees. Essentially, each party bears its own costs. The result is a democratic ideal. "Unfettered access to the courts for all citizens with genuine legal disputes has become a cornerstone of the American concept of justice. All persons are entitled to their day in court, however poor they may be and however rich their opponents." Comment, *The Dynamics of Rule 11*, *supra* note 2, at 304. Rule 11 runs counter to this.

62. It has been said that the American Rule encourages frivolous litigation, Comment, *The Dynamics of Rule 11*, *supra* note 2, at 306-07, and that Rule 11 is therefore a necessary counterpoint. The reasoning, if that is what it is, is hard to fathom. The American Rule means that much litigation is, in fact, never brought, because there are no fees even for a prevailing attorney. The assertion that, in such a setting, litigation will be brought "simply to gain access to discovery," is simply unsubstantiated. *Id.* at 306.

63. The experience and policy under fee-shifting statutes have been to award fees rou-

The impact on public interest attorneys is serious, indeed. The risks are substantial; the outcomes unclear. The attorneys' deference to the judge must now be greater; their commitment to the client must be diminished.⁶⁴ Their utility as advocates of social policy is compromised.

C. *And Now, A Few Examples*

It is worthwhile looking at a few cases to see in microcosm the impact of Rule 11. It bears emphasis that these are only a few of several hundred cases. Moreover, they involve some of the most sophisticated and able members of the bar. If trial judges are sanctioning these attorneys, the portent is ominous indeed for the rest of us. As the old saw goes, only the angels can afford justice, the rest of us cry for mercy.

In *Golden Eagle Distribution Corp. v. Burroughs Corp.*,⁶⁵ a trial judge sanctioned Kirkland and Ellis under Rule 11. This major Chicago law firm had successfully pursued its client's interests with vigor and imagination. Nevertheless, a \$5,000 fine was imposed on the attorneys for two reasons. First, they had failed to state whether they were invoking existing law or arguing for its extension. Secondly, the judge held that Kirkland and Ellis had not cited authority contrary to their position, as required by the Code of Professional Responsibility.

In effect, the court found unprofessional and perhaps incompetent conduct. Such a finding is devastating, whether against a sole practitioner or a major national law firm. Kirkland and Ellis appealed. In a well-reasoned opinion, the Ninth Circuit reversed. The court found that the trial judge had exceeded the bounds of Rule 11 by converting it into a Code of Professional Responsibility. The implications of such a conversion are endless. The Ninth Circuit also concluded that the trial judge had put the law firm to the impossible task of having to play the roles of judge, plaintiff's counsel, and defense counsel, an impossible task, indeed. The court noted that

tinely to prevailing plaintiffs, but to award them to defendants rarely. *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 418-20 (1978); *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402-03 (1968). This implements congressional policy to encourage civil rights litigation. It avoids chilling enforcement of the public interest. The 1983 amendments to Rule 11 fly in the face of this congressional policy. See Cavanagh, *supra* note 2, at 509-11.

64. Rule 11 inquiries, because they arise in the same context as the litigation prompting them, inevitably create attorney-client conflicts. Nelken, *supra* note 2, at 1343-44. This is inherent in fee-shifting statutes. See Evans v. Jeff D., 475 U.S. 717 (1987). But because Rule 11 operates independently of whether a party prevails on the merits, it strikes uniquely at the attorney's performance and therefore his or her relationship with the client. This is exacerbated by the judge's discretion to force the attorney to pay sanctions from the attorney's resources. See Huettig & Schromm v. Landscape Contractors Council, 582 F. Supp. 1519 (N.D. Cal. 1984); Comment, *The Dynamics of Rule 11*, *supra* note 2, at 331 n.228.

65. 801 F.2d 1531 (9th Cir. 1986).

the Rule 11 proceeding has engendered extensive and expensive litigation, contrary to the very objectives of the Rule.

If a major law firm is at risk, imagine then the plight and vulnerability of public interest lawyers, who typically are of far less stature and are endowed with far fewer resources. In *Kamen v. AT&T*,⁶⁶ an attorney advanced a claim on behalf of a client who maintained that she had been discharged because of an allergy to cigarette smoke. She had requested a transfer. In essence, the suit maintained that American Telephone & Telegraph had discharged her rather than accommodate her needs. The suit was brought under a statute which prohibited discrimination in federally funded programs.

Kamen is typical of much public interest litigation. It invoked a relatively new statute of unclear meaning. It advanced the public interest of assuring fair treatment and employment of the handicapped. It involved a disparity of power of enormous proportions, a single individual against one of the most powerful corporations in the world. And, at a ground level of litigation, it pitched a small firm against sophisticated and well-entrenched counsel, in a case where the defendants alone knew the true facts of the corporate motivation and policy.

The trial judge granted summary judgment against the plaintiff and imposed Rule 11 sanctions. Essentially, the court said that the plaintiff's attorney should not have relied upon his client's description of what had happened. The plaintiff's attorney responded that he could hardly rely on AT&T's counsel's representations that section 504 did not apply to AT&T. Rather, only discovery could determine whether the necessary federal funding was involved for section 504 to apply and whether in fact discrimination had taken place. For discovery to be possible, a lawsuit was necessary.

The Third Circuit reversed the sanctions. Counsel had reasonably relied on his client's representations. He undertook the factual verification that was available. His legal theory, while innovative, was appropriate. He was vindicated on appeal.⁶⁷ But the stigma, the anxiety, and the cost of fighting the sanctions had all been imposed and exacted. The trial court and the opposing counsel had extracted their pound of flesh.

66. 791 F.2d 1006 (2d Cir. 1986).

67. The Advisory Committee to Rule 11 noted that factual inquiry, although required to meet the objective standard of the 1983 amendments, must be evaluated in light of the time available, the need to rely on the client, reliance on referring counsel, and other factors; it should not be evaluated with a court's subjective hindsight. FED. R. CIV. P. 11 advisory committee's note to 1983 amendment. Yet, the purpose was to expand the range and frequency of sanctions. Therefore, the reality is to disadvantage plaintiff's attorneys when facing powerful governmental or corporate opposition, as was the case in *Kamen* and is the case in much public interest litigation.

Golden Eagle and *Kamen* represent the approaches of appellate courts which are relatively sympathetic to public interest litigation. We should pause now to consider a case from a circuit which is far less enlightened. In *Szabo Food Service, Inc. v. Canteen Corp.*,⁶⁸ the Seventh Circuit reversed a lower court's denial of Rule 11 sanctions. Szabo had served food at the Cook County Jail for some eight years. It lost the contract in 1986 and sued, claiming racial discrimination, denial of due process, and various violations of state law. Szabo asked for an expedited hearing on its motion for preliminary hearing, but then withdrew its case and filed in state court, where it ultimately lost. The defendants asked for Rule 11 sanctions, which were denied. The trial court gave no reasons other than being "well aware of the case."⁶⁹

The Seventh Circuit reversed. It noted that the defendants were not "prevailing parties" under the Civil Rights Attorney's Fees Award Act and also were barred from getting costs under Rule 41(a)(1)(i), since voluntary dismissals are — after all — much to be encouraged. But, Judges Easterbrook and Posner wrote, Rule 11 sanctions are more like a contempt charge than a disposition on the merits. If Szabo "imposed costs on its adversary and the judicial system by violating Rule 11, it must expect to pay."⁷⁰ That has a comforting Old Testament ring to it, but dissenting Judge Cudahy more aptly analogized it to grading law school examinations, with the consequence that "[a]nything falling on the far side of the 'C' merits not only loss of one's case but loss of one's shirt as well."⁷¹

The *Szabo* majority reversed denial of sanctions even though the defendants, when originally moving for sanctions in the trial court, had violated rules below on pleading and filing such motions! This rush to judgment could be explained only by the majority's distaste for the due process and equal protection claims filed by *Szabo*. The majority dismissed the complaint's due process theory in an ultra-conservative critique of the plaintiff's citing of cases.⁷² This part of the *Szabo* opinion should embarrass the court and counsel alike. The fact is that the plaintiff cited the wrong cases for the right theory.

The court's hostility to public interest litigation is even more clear in the majority's discussion of Szabo's racial claim that Szabo qualified for

68. 823 F.2d 1073 (7th Cir. 1987). For a balanced appraisal of the Seventh Circuit's performance in this area, see also *Brown v. Federation of State Medical Bds. of the United States*, 830 F.2d 1429 (7th Cir. 1987) (reversing \$30,000 in sanctions against a law professor for bringing claims on behalf of a medical school graduate who failed licensing exams; case remanded for findings on why, although the claims lacked merit, sanctions were necessary).

69. *Szabo*, 823 F.2d at 1076.

70. *Id.* at 1079.

71. *Id.* at 1085.

72. *Id.* at 1080-82.

minority set-asides under county ordinances and that the defendant did not. Judges Easterbrook and Posner concluded that such set-asides are unconstitutional, a conservative view not universally shared.⁷³ Moreover, it hardly seems appropriate for two judges to have reached out and decided constitutional merits not before them; the case had been voluntarily dismissed before any responsive pleading.

Judges Easterbrook and Posner also critiqued the factual underpinning of the plaintiff's claim. As with most public interest litigation, the facts were in the hands of the defendant governmental agency. Ignoring this fact, the majority mouthed plausible platitudes such as, "[d]iscovery fills in the details, but you must have the outline of a claim at the beginning. Rule 11 requires 'independent inquiry.'" ⁷⁴ Yet there was no basis before the Court of Appeals or the trial court to suggest that the plaintiffs had *not* made independent inquiry. Instead, the two-judge majority simply stated that the *reasons* for bringing suit *may* be improper, for example to harass defendants, and that inquiry, therefore, was necessary. Yet this will be true in every case, and it forces plaintiffs in every case to prove that they are pure of heart, a condition which can be true, if ever (one must infer), only of Judges Easterbrook and Posner.

The majority in *Szabo* emphasized the subjective test of inquiring into the *motive* for bringing the suit, and thereby created a pre-trial focus unlike that under former Rule 11. Presumably courts must now inquire into, and presumably sanction, the mixed motives which every litigant has, because, and this is important, as *Szabo* says, "[t]he Rule effectively picks up the torts of abuse of process and malicious prosecution."⁷⁵

Thus Rule 11 will now serve as a source of tort jurisprudence. Dissenting Judge Cudahy found this prospect daunting because it would transform "Rule 11 from a protection against frivolous litigation, a boon to the parties and the court, into a fomenter of derivative litigation, a mire for unwary parties and overzealous courts."⁷⁶ Later, Judge Cudahy noted that "[w]e are in danger of creating a whole new cottage industry of sanctions."⁷⁷ Judge Cudahy shares my concern that the impact of this will be felt discriminatorily by public interest litigants, especially those asserting due process or civil rights claims, "[f]or the chilling effect of today's decision will reach as tellingly to the most meritorious such claim as to the least."⁷⁸

73. See *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (upholding minority set-aside in congressional legislation).

74. *Szabo*, 823 F.2d at 1083.

75. *Id.*

76. *Id.* at 1085 (Cudahy, J., concurring in part and dissenting in part).

77. *Id.* at 1086.

78. *Id.*

The problems and perplexities posed by Rule 11 are particularly well illuminated by the rather extraordinary legal saga of Eastway Construction Corporation, which failed in its bids on redevelopment projects in New York City. After failing in its lawsuits in New York's courts, Eastway then brought an antitrust and civil rights action in federal court. These claims were painted with a rather broad brush, since Eastway had essentially been shut out of contracts because of defaulting on millions of dollars of earlier contracts and engaging, through its president, in fraudulent maneuverings in the 1970s. Not only did the Court of Appeals have no troubling affirming summary judgment against Eastway, but it also reversed denial of attorney's fees for the defendants.⁷⁹ The court held that Eastway's claims were so groundless that, under an objective standard, sanctions were necessary under Rule 11.

It may well be that the Second Circuit read Rule 11 correctly in reversing and remanding. The plot, as they say, however now thickens. On remand, a year or so later, Chief Judge Jack Weinstein authored a twenty-three page opinion, complete with a Table of Contents. In effect, he gave short shrift to the Court of Appeals' opinion. The lower court was going to award only \$1,000 in fees because Eastway had proceeded in good faith and its "pleading was only marginally frivolous."⁸⁰ The City of New York had asked for \$53,000.

Judge Weinstein noted,⁸¹ correctly in my view, that courts should insist on discretion in imposing sanctions and should keep them to the minimum necessary to deter frivolity. Moreover, contrary to the Court of Appeals, he insisted that subjective good faith remains relevant under amended Rule 11. Unlike fee-shifting statutes designed to compensate plaintiffs for enforcing the public interest, awards to defendants — whether under Rule 11 or statutes — should be premised on a deterrence rationale. Hence, amounts awarded should be far less, largely on a cost-based analysis, and should be reduced further by other factors, such as ability to pay.⁸²

By now, Eastway had been ensnared in this satellite litigation for years, but it was not yet done. For there was yet another chapter on the Rule 11 issues, written by Judge Newman in a second opinion by the Second Circuit, known as *Eastway II*.⁸³ Again, the lower court was reversed. The sanctions awarded against Eastway were increased to \$10,000. It is hard to tell why. The Court of Appeals agreed that there was discretion,

79. *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 254 (2d Cir. 1985).

80. *Eastway Constr. Corp. v. City of New York*, 637 F. Supp. 558, 582-84 (E.D.N.Y. 1986).

81. *Id.* at 565-66.

82. *Id.* at 570-72.

83. *Eastway Constr. Corp. v. City of New York*, 821 F.2d 121 (2d Cir.), *cert. denied*, 108 S. Ct. 269 (1987).

that the “lodestar” amount need not routinely be imposed, and that Judge Weinstein had “thoughtfully considered a variety of factors.”⁸⁴ And then, turning the table on Judge Weinstein, the Court of Appeals gave short shrift to his lengthy opinion by increasing his award tenfold without giving a single reason. Moreover, it reversed his finding that counsel had been free of fault and ordered that counsel pay half of the \$10,000 in sanctions.⁸⁵ The court then declared that, although there was a remand, there would be — could be — no further fees. In essence, it told Judge Weinstein to put up, and then shut up.

Eastway is an extraordinary case. Simply litigating the Rule 11 issue prolonged the case by at least two — possibly four — years. It provoked three lengthy and not very helpful, opinions. It failed to provide or even suggest guidelines for important questions such as when sanctions are appropriate, how much those sanctions should be, and against whom they should be imposed. It left the trial and appellate courts in disagreement by a factor of ten (\$10,000 versus \$1,000) in an area where the Court of Appeals noted that most awards were even less than the trial court’s. Finally, it totally abandoned any pretense that the Court of Appeals would be constrained or restrained by the usual principles of appellate deference to trial court discretion.

The portent for public interest litigation is not, to say the least, auspicious.

IV. WHITHER PUBLIC INTEREST LITIGATION?

A. *The Impact on Public Interest Litigation*

Perhaps I have now persuaded you that there is a problem. However, the dimensions remain to be developed. Perhaps *Szabo* and *Eastway* are rare exceptions; perhaps the calm reason of *Kamen* and *Golden Eagle* prevails. That is not true, but even if it were, it would only mean that appellate courts were insisting on reasons.⁸⁶ Some have suggested that the trial courts are also being appropriately cautious and measured in imposing

84. *Id.* at 123.

85. *Id.* at 124.

86. As to the standard of appellate review, MOORE’S FEDERAL PRACTICE states: In reviewing Rule 11 cases on appeal, several different standards are applied. As to the legal issue of whether a violation occurred and sanctions were required, the appeals court reviews the trial court’s determination de novo. To the extent that any factual issues are involved, the trial court’s findings must stand unless clearly erroneous. In terms of the specific sanction imposed upon the finding of a violation, the trial court is accorded a wide degree of discretion which will not be disturbed unless that discretion has been abused.

MOORE’S FEDERAL PRACTICE, *supra* note 3 § 11.02[4], at 11-27 (footnotes omitted).

sanctions.⁸⁷ Others, including the Advisory Committee, claim that the 1983 amendments should not discourage creative risk-taking in litigation.⁸⁸ But the early returns are coming in, and the reality confounds the rhetoric.

Although civil rights cases constitute less than 8% of case filing in federal court, they amounted to more than 22% of *reported* Rule 11 cases between 1983 and 1985.⁸⁹ Unreported cases would increase those numbers, as would certain public interest litigation (i.e., welfare or housing rights) that is not classified as "civil rights." If the categories are broadened to include civil rights, employment discrimination, and other relevant categories, these categories account for 29.9% of Rule 11 motions, with sanctions being granted 68% of the time. Another 25.1% of the *reported* Rule 11 cases involved antitrust, RICO, and securities claims.⁹⁰ Such cases have in common congressionally enacted authority, often accompanied by attorney's fees statutes. They are also uniquely targeted by Rule 11 because their facts cannot be adequately developed until after suit,⁹¹ and because their theories are often on the forefront of developing law.⁹²

It is not only certain classes of *cases* which are being discriminated against but also certain classes of *attorneys*. Those whose clients do not have the resources or access of great corporations or governmental agencies are uniquely disadvantaged. Such attorneys are likely to be small firm practitioners or are likely to be employed by public interest groups or legal services programs.⁹³ Thus, Rule 11 targets both public interest litigation and public interest litigators. Significantly, a number of critics of Rule 11 have noted that *Brown v. Board of Education*⁹⁴ would be particularly vulnerable today,⁹⁵ since it was public interest litigation brought by a public interest

87. A study of judges' attitudes in 1984 by the Federal Judicial Center suggested, in response to questionnaires, that they might impose sanctions reluctantly and might continue to require bad faith. S. KASSIN, AN EMPIRICAL STUDY OF RULE 11 SANCTIONS (Fed. Jud. Center 1985). Experience since then demonstrates that the study was too soon and too optimistic. *But see* Cavanagh, *supra* note 2, at 515-16.

88. The Reporter for the Advisory Committee, Professor Arthur Miller, has consistently urged that the 1983 amendments are value-neutral and not intended to dampen adversarial enthusiasm. *See* Miller & Culp, *Litigation Costs*, NAT'L L.J., Nov. 28, 1983, at 24.

89. *See* Nelken, *supra* note 2, at 1327.

90. *See* Comment, *The Dynamics of Rule 11*, *supra* note 2, at 323.

91. Cavanagh notes that the "nebulous" nature of the pre-filing inquiry requirement is especially bothersome in gender-based discrimination cases, which must typically be proven from a defendant's files *after* suit has been initiated. Cavanagh, *supra* note 2, at 517-18.

92. The increasing inhospitality over the past few years toward civil rights claims makes the chilling effect, prospectively and pervasively projected, especially troublesome. Nelken, *supra* note 2, at 1340-41. This is particularly true since discovery is frequently necessary in such cases even to frame a complaint with great specificity and articulate a theory with precision. *Id.* at 1342-43.

93. *See* Note, *Plausible Pleadings*, *supra* note 2, at 643.

94. 830 F.2d 1429 (7th Cir. 1987).

95. *In Eastway Constr. Corp. v. City of New York*, 637 F. Supp. 558 (E.D.N.Y. 1986),

law firm.

Like many such litigators, the lead attorneys were members of a racial minority.

B. Roll Back Rule 11

The experience with Rule 11 is now less than five years old, but the dangers which many saw from the outset are now being realized. It does not seem too early simply to repeal the 1983 Amendment. Congress could undertake such a step if the courts choose not to, and doing so would advance important congressional policies.

This would mean that regulation of attorneys would be left, as it properly has been, to the court admissions procedures of licensing and testing, and to the bar complaint procedures and regulations. Over the past decade, these latter procedures have expanded dramatically, with public panels being appointed, full-time attorneys and commissioners being retained, and the volumes of complaints and sanctions against attorneys expanding dramatically. This approach seems to me clearly proper: it separates the administrative functions concerning the bar from the adjudicatory functions of resolving specific cases.

If the 1983 Amendments are retained, they should be sharply curtailed. Deficiencies in inquiry in facts⁹⁶ or legal theory⁹⁷ should be made circumstances evidencing bad faith rather than actionable failings in and of themselves.⁹⁸ The requirement of subjective bad faith should be restored.

Judge Jack Weinstein, referring to *Brown and Swain v. Alabama*, 380 U.S. 202 (1965), observed that “[b]ad court decisions must be challenged if they are to be overruled, but the early challenges are certainly hopeless.” Yet, he concluded, they should still be brought. *Id.* at 575. See also Cavanagh, *supra* note 2, at 544.

96. By imposing a pre-filing requirement of factual inquiry, Rule 11 implies that certain facts should *deter* filing, but it does not say which facts or what quantity of facts. Facts may develop a waivable defense, or information from an adversary which runs counter to a claim, or defects in the client’s own documentation or evidence, or theoretical elements falling into work product, or other privilege. Cavanagh, *supra* note 2, at 517-24. But the Rule and subsequent caselaw do not distinguish such possibilities or provide guidelines for dealing with them. *Id.*

97. Sanctions for frivolous theory are especially worrisome, since “today’s frivolity may be tomorrow’s law.” Risinger, *supra* note 7, at 57. Sanctions for defective research or briefing are hardly more tolerable, since seemingly “mechanical” deficiencies may reflect stratagems in advocacy. The clearest and best approach would be to stay with dismissals under Rule 12(b)(6) and award attorney’s fees to prevailing parties.

98. Cavanagh proposes a “bright line” framework to resolve problems under Rule 11, but he nowhere notes the special problems of public interest litigants. Cavanagh, *supra* note 2, at 536. While he would grant latitude for counsel to proceed when Rule 22 suggests otherwise, for example, solely on a client’s representations, his footnotes and the caselaw provide little support.

Thus Rule 11 would have exclusively subjective elements, much as is true under fee-shifting statutes that make awards in public interest litigation.⁹⁹

The *Szabo* approach should clearly be rejected. A subjective standard should not become a vehicle for importing tort law into the Federal Rules. Abuse of process and kindred torts are subjects for separate litigation. One might point out to Judges Posner and Easterbrook, both self-proclaimed conservatives, that tort litigation is better left to state courts in our federal scheme of things.

Most importantly, Rule 11 sanctions should be altered in three respects.¹⁰⁰ First, criteria should be established as to the amount of sanctions. *Eastway* points up the imprecision and inequity in simple speculation by a court that an attorney somehow "caused" \$30,000 in work by the other side, and then having the court impose only \$10,000 in sanctions because of the attorney's ability to pay. Is the purpose to deter, punish, or compensate for injuries caused and costs incurred?

"Causation" is particularly slippery if it turns on the opponent's perception of an appropriate response. Under similar facts, counsel's response may vary from bemused indifference to crusading outrage, with an equal variance in time and resources allocated to the response. Then, too, assigning a dollar value per hour for the additional labor "caused" turns on the luck of the draw. Sanctions are thus made to turn on the thinness of the skin and the thickness of the wallets of opposing counsel. The public policy behind Rule 11 is to upgrade performance of counsel, and the incentives for doing so should not be limited by the dollar values of failing to do so.

I would further suggest, therefore, that the decision whether to impose sanctions should be discretionary. Mandatory sanctions simply are unenforceable. Also, other deterrents exist. Rule 11 should be set in its proper context and judges left with discretion to *decline* sanctions. This would place a premium, however, on improving the procedure surrounding imposition of sanctions, at a minimum requiring a hearing with detailed findings.¹⁰¹ Improved procedure is essential even if sanctions remain mandatory

99. The Harvard Law Review, while roundly criticizing Rule 11, mildly concludes that it should be interpreted so that sanctions would be imposed only when a pleading is so frivolous that it would be dismissed *and* no reasonable lawyer would think it tenable. Yet the Review concludes that the genius of the Rules has been to expand the "unthinkable" over the years. The Review fails to see that *any* interpretation of Rule 11, even its own, will put an end to that expansion. Note, *Plausible Pleadings*, *supra* note 2, at 650-52.

100. Nelken suggests that improvements in Rule 11 should include making sanctions non-mandatory, reading Rule 11 in light of Rule 8 to make sanctions unlikely at the pleadings stage and "circumscribing" the punishment rationale for sanctions. Nelken, *supra* note 2, at 1353. This is a curiously insubstantial set of recommendations given her far-reaching criticisms of the Rule, particularly as it applies to civil rights litigation.

101. See *Brown v. Federation of State Medical Bds. of the United States*, 830 F.2d

and articulated criteria are necessary in either event.

My final suggestion would be that sanctions be denied to a plaintiff who prevails on the merits and is awarded attorney's fees as a prevailing party. Rule 11 sanctions would be gilding the lily, rubbing salt in the wound, or some other such cliché. The attorney's fees award will adequately compensate for the additional work caused by the wrongdoing. Conversely, I would deny Rule 11 sanctions where a plaintiff loses, but the defendant does *not* qualify as a "prevailing party." Congress has declared that attorney's fees for a defendant may be available under 42 U.S.C. § 1988 only where the plaintiff acted in a frivolous, wholly baseless or vexatious fashion. That being true, Rule 11 should create no alternative or additional entitlement.¹⁰²

C. *What to do in the Meantime*

I view all of this with urgency, and so should you. I spend a good deal of my time encouraging young legal services attorneys about how to practice in federal court. The reason is that, in my experience, federal courts are the best forum for representing the poor and the powerless. But doing so is a new idea, and those who undertake such litigation now run the risks of Rule 11 as they break new ground and explore new frontiers.

If I had faced such a risk, I truly wonder whether I could have afforded to bring my first section 1983 action some 20 years ago. Our weekly food budget was \$20; our savings account balance was \$200. I could hardly have afforded the expensive attorneys on the other side. Indeed, the lawsuit itself was about the inability of client or counsel to pay filing fees in divorces brought on behalf of indigents.

I also wonder whether, some 15 years ago, I would have advised one of my teaching colleagues to challenge discriminatory denial of a zoning variance for his federally-subsidized housing proposal. I must ask similar questions concerning the recent filing of an amicus brief by my students and me on behalf of the ACLU, in which we invoked international human rights on behalf of a convicted sex offender who had been ordered by a trial judge to put signs on his car and his home warning people away. What does Rule 11 say about international conventions on human rights?

Let me offer some suggestions.

1429, 1434 (7th Cir. 1987).

102. Otherwise, prevailing plaintiffs and prevailing defendants would always get attorney's fees, either under Rule 11 or a statute like 42 U.S.C. § 1988. This would preclude the opportunity, experienced painfully by every attorney, of simply *losing*. It would result in automatic awards in every case, something even Rule 11 does not contemplate. See *Gaiardo v. Ethyl Corp.*, 835 F.2d 479 (3d Cir. 1987).

Your factual investigation now should be far better documented than was necessary before the amendments to Rule 11. Prior to filing, protective letters should be sent to the opposing side, presenting detailed interrogatories and allowing time to respond to factual inquiries.¹⁰³ You must now take seriously the remote possibility that arbitrary, indeed prejudiced, opponents will provide you information which they may later suppress or destroy. You should be careful to request meetings and conferences prior to litigation. You should offer settlement in good faith. In short, you should undertake efforts which your common sense will often tell you are utterly meaningless, but which will offer some protection against Rule 11.

Similarly, you must be more careful in developing your legal theories. Rule 11 expressly permits the expression of a theory based upon existing law, an extension of law, or a good faith challenge to existing law. Be clear in your pleadings and papers as to which of these you are undertaking. File a memorandum of law with each pleading. And at all times, carefully check the law of your circuit before suit.

Prior to bringing suit, one safe step might be to obtain opinion letters from experienced attorneys in the particular field of law, to the effect that respected experts endorse the theory you are advancing. Obtain a second opinion before suing. Talk to your neighborhood law professor — we love to see former students.¹⁰⁴ Yet another suggestion would be to request a statement of the law supporting denial of your client's rights from the potential defendant or counsel. Admissions as to facts may also be helpful. To some extent, admissions may be sought by pleading facts or attaching affidavits to complaints and motions for summary judgment.

Plead early. Plead Often. Plead well.

V. CONCLUSION

Rule 11 represents only another conservative effort to roll back the 20th century. It is a typically myopic elevation of "professionalism" as an ultimate good without regard to why we are professionals or who should be served by the profession. It reflects the same guild mentality which led the Luddites to destroy knitting machines and the AMA to oppose Medicare.

In a curious way, the rule is good. The people who would close the court doors to the poor, the disadvantaged, the minorities, and the powerless of our age, and who would deny lawyers to such people, have now taken

103. The creation of a "paper trail" has been suggested by others as indispensable under Rule 11. See Nelken, *supra* note 2, at 1344. Part of this will involve fruitless and pointless pre-trial inquiries for information and settlement, much like the excesses of "defensive" medicine.

104. Unless, of course, you are going to get us into the same hot water which threatened to cook Professor Brown's Visa card. See *Brown v. Federation*, 830 F.2d at 1431-33!!

a public stand, and Rule 11 is their platform. If this is their best shot, or their worst, there is little to fear. They will not succeed. Congress will act, and even if not, you will.

Each of you knows that the law is an instrument for good and that each of you is an advocate toward that end. No matter what three years of law school may have done to you, and no matter what fifty years of practice may yet do, you can recall that the reason you went to law school was to help others. Oliver Wendell Holmes said that it is necessary for all of us to involve ourselves in the great issues of our times in order to avoid being counted as not having lived at all.¹⁰⁵

Let me also recall for you the words of Alexander Solzhenitsyn. This great Russian intellectual, writer, and dissident spent years in Siberia imprisoned in the Russian Gulag Archipelago, which became the name of one of his best-known volumes. Imprisoned there, under the Russian legal system, he had rights but no remedies. He had a voice, but no advocate. He needed a lawyer. He wrote: “[i]t seems a virtual fairy tale that somewhere, at the ends of the earth, an accused person can avail himself of a lawyer’s help. This means having beside you in the most difficult moment of your life a clear-minded ally who knows the law.”¹⁰⁶

105. O. HOLMES, *Memorial Day*, in *THE MIND AND FAITH OF JUSTICE HOLMES* 9, 10 (M. Lerner ed. 1943).

106. A. SOLZHENITSYN, *Gulag Archipelago* 121 (1973).