Rule 11 Sanctions and Standards: Blunting the Judicial Sword

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Rule 11 of the Federal Rules of Civil Procedure provides federal courts with a means of imposing sanctions on attorneys for filing frivolous law suits. Even though the Rule addresses the ever-growing problem of judicial economy, Professor Oliphant suggests that additional standards are necessary to assist the judiciary in effectively applying the Rule in future cases. The standards discussed in this Article are designed to promote a more uniform application of Rule 11.

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Introduction

The American judiciary is growing increasingly bold in its imposition of fines and other sanctions for abuse of process in civil litigation. This boldness is a reaction to the escalating volume of litigation, recent changes in the Federal Rules of

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Civil Procedure,¹ and an impatience with inappropriate and costly tactics associated with some litigation performances by attorneys.

This Article will examine some of the events which led to the development of stricter rules aimed at attorneys whose conduct, while not of such a nature as to place them in contempt of court, nevertheless warrants judicial intervention. Primary emphasis is placed on Rule 11 of the Federal Rules of Civil Procedure,² and the increased use of the sanction provisions within that Rule. The Article will briefly trace the roots of the sanction provisions found in Rule 11, and critically explore the current procedures and standards employed by judges when sanctions are considered. The Article also contains a number of suggestions aimed at reducing the possibility that unreasonable, arbitrary sanctions will be imposed on lawyers, their clients, or pro se litigants.

I. Events Which Fostered the Need for Stricter Control Over the Lawyering Process

There is no question that the wheels of American civil justice are grinding ever more slowly. The inability of the judicial system to respond to its citizens effectively and economically is an issue of major concern.

Despite the advent of computerized recordkeeping, modern word processing equipment, and the addition of hundreds of judges, law clerks, and secretaries, the judicial system continues to swelter beneath a growing pile of litigation demands. The system struggles against becoming a place of legal ineptitude as did the Chancery court portrayed by the nineteenth century social critic Charles Dickens in his classic tale Bleak House.

One reason for the skyrocketing litigation is the enormous increase in the number of lawyers in America.³ Today, there is one lawyer for every 400 citizens.⁴ In 1980, there was approxi-

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¹. Rule 11 of the Federal Rules of Civil Procedure was amended in 1983 specifically "to reduce the reluctance of courts to impose sanctions." FED. R. CIV. P. 11, advisory committee notes.

². For the complete text of Rule 11, see infra note 14.


mately one lawyer for every 325 citizens. In 1950, there was approximately one lawyer for every 750 citizens. It is estimated that by the mid-1990's there will be 1,000,000 lawyers in the United States.

The expansion of law schools during the seventies resulted in the tremendous increase in new attorney graduates, and with those graduates came the crush of new filings. Consequently, a corresponding need for more judges and administrative support personnel followed on the heels of the attorney explosion. Statistics from the federal system reflect the enormity of the litigation problem.

Federal district court filings more than doubled during the past ten years, and trials lasting thirty days or more have tripled in number. One hundred years ago there were fifty-five United States district judges, nine United States circuit judges, and thirty-nine state supreme courts. Today, there are 758 district judges, 226 circuit judges authorized, and about 27,000 state court judges. When Chief Justice Warren took office at the beginning of the 1953 term of the United States Supreme Court, there were 1,463 cases on the docket; in the term ending July, 1985, there were 5,100.

Americans have become the most litigious people in the history of the world. Even when a traditional avenue of redress is foreclosed, such as occurred with the advent of the "no-fault" motor vehicle insurance in many states, attorneys find new, more creative, and imaginative litigation avenues. For example, complex age, sex, antitrust, and race discrimination cases, have become a regular part of the grist of the federal court system. As a result, these cases have partially filled the no-fault void. Class actions involving claims of millions of dollars are not unusual, and verdicts well in excess of a million dollars are not uncommon. To some, the legal system has become the place to prospect for the pot of gold at the "end of the litiga-

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5. See id.
6. See id. The number of attorneys in the United States has doubled since 1960. Bok, supra note 3, at 40, reprinted in 33 J. LEGAL EDUC. at 571.
10. Id. at 87.
As you might predict, the Chief Justice has called for more mediation and arbitration in an effort to reduce the tension on a system which is already overburdened. And, as you might also predict, the system itself is becoming less liberal in its openness to any and all claims.

While there are many explanations for the heightened emphasis on controlling the lawyering process through promulgation of stricter procedural rules, the dramatic increase in the number of lawyers has, without doubt, been the primary catalyst. To its credit, the system is proceeding cautiously, evincing a genuine concern that it not be overreactionary.

II. History and Purpose of Lawyer Sanctions

The idea that lawyers can be the object of sanctions is neither new nor novel. Lawyer abuse was first addressed by Congress in 1813 when it adopted legislation providing that any attorney "who multiplied the proceedings in any cause . . . so as to increase costs unreasonably and vexatiously' could be held liable for 'any excess of costs so incurred.' "12 Federal courts have been able to impose sanctions for vexatious and bad faith actions through the exercise of their inherent power to control the proceedings before them.13

With the advent of a comprehensive set of federal rules of civil procedure in 1939, a modest effort was made in Rule 11 to insure that lawyers who drafted and filed pleadings met a minimum standard before going forward. Accordingly, the Rule adopted a "good faith" standard.14 As a practical matter, how-

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14. The original Rule 11 adopted by the Supreme Court provided:

Rule 11. Signing of Pleadings. Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this
ever, there is little evidence to suggest that in 1939 sanction provisions were needed in order to control lawyer pretrial behavior.

The "good faith" requirement has its roots in former Equity Rule 24 relating to the signature of counsel and former Equity Rule 21 relating to scandalous matters. It was developed in equity where it was seldom used. The "good faith" concept in old Rule 11 was likewise seldom used in the federal system. Prior to the 1983 amendment, there were a meager number of reported cases in which sanctions were applied to errant lawyers. One study indicated that between 1938 and 1976, there were only twenty-three reported cases in which a party invoked former Rule 11 to strike a pleading and only nine cases in which violations of Rule 11 were found. According to the Advisory Committee Notes to the 1983 amendment to Rule 11, there was a great deal of confusion over the application of the prior rule, the standards required of attorneys, and the availability of appropriate sanctions.

As noted above, courts applying old Rule 11 believed that only a willful violation could subject an attorney to sanctions. To show willfulness, a party seeking sanctions had to demonstrate subjective bad faith on the part of the party opponent. This burden of proof was obviously difficult to meet. Courts were reluctant to discipline attorneys under the old Rule for objective misconduct "attributable to mistake, inadvertence or error of judgment."

rule, it may be stricken as sham and false and the action may proceed as though the pleadings 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.


15. See, e.g., Rhinehart v. Stauffer, 638 F.2d 1169, 1171 (9th Cir. 1979).
17. The Advisory Committee Notes on the 1983 amendment state the following: There has been considerable confusion as to (1) the circumstances that should trigger striking a pleading or motion or taking disciplinary action, (2) the standard of conduct expected of attorneys who sign pleadings and motions, and (3) the range of available and appropriate sanctions. The new language is intended to reduce the reluctance of courts to impose sanctions, by emphasizing the responsibilities of the attorney and reinforcing those obligations by the imposition of sanctions.

FED. R. CIV. P. 11, advisory committee notes (citations omitted).

18. In re Sutter, 543 F.2d 1030, 1035 (2d Cir. 1976) (quoting portions of Rule 8).
By 1983, the litigation crunch set the stage for a reform initiative in the federal system. As a result, Rule 11 and several other pretrial rules were amended. The amendments were designed to provide the judiciary with tools for more effective management of the cases coming to it, as well as to create stricter standards for dealing with abusive lawyer pretrial behavior.

Along with Rule 11, Rules 7(b), 16, and 26 of the Federal Rules of Civil Procedure were also amended. Rule 7 was amended to make it clear that sanctions could be imposed in motion practice. Rule 16 was amended to give the judiciary greater control over filing, as well as control over the negotiation stage of a proceeding. Rule 16(f) illustrates the nature of the control courts are expected to wield. For example, it authorizes imposition of sanctions for failing to participate in good faith in pretrial proceedings. Amended Rule 26 focuses on the problem of abusive discovery and provides the judiciary with enlarged power to limit and control discovery. Rule 26(g) provides for sanctions for abuse of the discovery process, by imposing a certification requirement similar to that under Rule 11 with respect to discovery requests and responses.

Since its amendment in 1983, Rule 11 has drawn particular attention. The amendment was designed to provide judges with the necessary tools to curb frivolous litigation and abusive motion practices. Consequently, the amendment provides judges with the power to objectively measure a lawyer's pre-

21. The 1983 amendment created Rule 7(b). The Advisory Committee Notes provide:
   One of the reasons sanctions against improper motion practice have been employed infrequently is the lack of clarity of Rule 7. That rule has stated only generally that the pleading requirements relating to captions, signing, and other matters of form also apply to motions and other papers. The addition of Rule 7(b)(3) makes explicit the applicability of the signing requirement and the sanctions of Rule 11, which have been amplified.
Fed. R. Civ. P. 7, advisory committee notes.
25. See, e.g., Roadway Express, 447 U.S. at 757 n.4.
26. Despite the apparent objective nature of this standard, the Seventh Circuit in two opinions emphasized that Rule 11 requires a finding of subjective bad faith on the part of the person against whom fees are to be assessed. Suslick v. Rothschild
trial behavior and control through the use of sanctions.\textsuperscript{27} It was hoped that the creation of a clearer, narrower standard would more effectively highlight lawyers’ obligations when filing complaints or bringing motions.\textsuperscript{28}

The core of Rule 11 is the declaration that the signature on a pleading certifies that “to the best of his knowledge, information and belief formed after reasonable inquiry [the pleading, motion, or other paper] is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing laws 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 [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 has not been served. For a willful violation of this rule an attorney may be subject to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.] 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.

\textsuperscript{27} See, e.g., \textit{Roadway Express}, 447 U.S. at 757 n.4.

\textsuperscript{28} The following text indicates the additions and deletions effected by the 1983 amendment (italics indicates additions, brackets deletions):

\textbf{Rule 11. Signing of Pleadings}

\textbf{Motions and Other Papers; Sanctions}

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper, that to the best of his knowledge, information, and belief [there is good ground to support it; and that it is not interposed for delay] 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 laws 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 [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 has not been served. For a willful violation of this rule an attorney may be subject to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.] 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.
sion, modification, or reversal of existing law..." 29 The language requires that an attorney have more than just a belief that the law is or should be a certain way. The Advisory Committee Notes state, "what constitutes a reasonable inquiry may depend on . . . whether the pleading, motion, or other paper was based on a plausible view of the law," and is thus a more stringent standard than the original standard of "good faith." 30

Amended Rule 11 applies to every paper filed in court; not merely the initial pleadings. 31 It also applies to pro se litigants as well as attorneys and parties. 32 The rule places an obligation on the moving party to conduct a reasonable prefiling inquiry with respect to both facts and law. 33 Papers filed with the court must be well grounded in fact and warranted by existing law or by a good faith argument for its extension, modification, or reversal. 34 Therefore, papers may not be interposed for delay, to harass, or to needlessly increase the cost of litigation. 35 Courts are given wide latitude in terms of what sanctions they may impose either on counsel or the client. 36 Reasonable expenses, including attorney fees, may be imposed for violation of the Rule. 37

The drafters considered and specifically rejected the prior requirement that an attorney's conduct must be "willful" before sanctions may be imposed. The committee comments and recent decisions make it abundantly clear that it is not necessary to demonstrate "subjective" bad faith in order to justify imposition of sanctions. The Advisory Committee Notes declare that the "standard is one of reasonableness under the circumstances," 38 and expressly refer to the fact that wilfullness is no longer a prerequisite to disciplinary action. 39

29. FED. R. CIV. P. 11.
30. Id. advisory committee notes.
31. FED. R. CIV. P. 11.
32. Id.
33. Id.
34. Id.
35. Id. advisory committee notes.
36. Id.
38. FED. R. CIV. P. 11, advisory committee notes.
39. Id. The references in the former text to wilfulness as a prerequisite to disciplinary action has been deleted.
Amended Rule 11 requires a much more serious preinstitution inquiry by attorneys or pro se litigants than did its predecessor. The Rule applies not only to frivolous proceedings and those brought in bad faith, but also to proceedings which, although not without merit, constitute an abuse of legal process because they are initiated for an improper purpose. Appropriate application of Rule 11 by the judiciary "should discourage dilatory or abusive tactics and help to streamline the litigation process." Amended Federal Rule 11 has already made a significant impact on state civil procedure. Since its amendment in 1983, Arizona, Kentucky, Michigan, Wisconsin, and Minnesota have adopted similar provisions. Several other states have also adopted sanctions for inappropriate behavior.

The immediate objective of sanctions is to compensate the opposing party for the time and expense spent on the matter and to punish the offender for wasting the limited time and resources of the court. The long-term objective is to deter frivolous pleadings, thereby reducing the number of frivolous cases taken to the court. Deterring frivolous pleadings also, however, serves another purpose; specifically, it protects litigants in other cases whose motion and trial dates are delayed because the court must spend time on the frivolous matters. Compensation will more likely be the objective when the defendant files a motion seeking a monetary award, while deter-

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40. Cf. Fed. R. Civ. P. 11, 308 U.S. 676 (1939), amended by Fed. R. Civ. P. 11, 461 U.S. 1099 (1983) ("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 . . .") with Fed. R. Civ. P. 11 ("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. . . .") (emphasis added).


42. Ariz. R. Civ. P. 11(a).


46. Minn. R. Civ. P. 11.

47. Fruin, Inherent Power Sanctions Can Help Deal with Litigation Abuse When Lawyers Bend the Court Out of Shape, Judges L.J., Fall 1982, at 14, 17.
rence will be cited more often if the court raises the issue on its own motion.

Adoption of the new standards is aimed at reducing the problem of court calendar congestion. While an admirable goal, its achievement is a long way off. In addition, the new standards have created additional legal difficulties. One of these difficulties is the extent to which constitutional protections will be afforded lawyers and litigants prior to the imposition of sanctions.

III. PROTECTING THE LAWYER AND LITIGANT: WHAT PROCESS IS DUE?

A major area of concern is the potential for selective, arbitrary imposition of sanctions against different lawyers appearing before the same judge. The possibility of differing standards being applied by various judges within the same federal district or state court system is of similar concern. Worse, there is a possibility of different standards being applied by the same judge for identical misconduct. Absent a uniform approach and an application of agreed upon standards among the judiciary, the potential for arbitrariness exists. Without articulation of clear standards, a climate of uneasiness, wariness, and confusion will persist. The development of standards through local rules will diminish anxiety in this area.

Standards are needed to assist judges in setting the amount of the penalty in a given case, as well as to suggest alternatives to financial sanctions. Financial penalties should not be the only remedy considered when sanctions are to be imposed. It is obvious that monetary sanctions alone will not act as a deterrent to errant lawyering practices in every case. Financial penalties in the form of sanctions may, however, have greater indirect deterrent value. The adverse publicity generated by imposition of a fine as a sanction may have an impact on a lawyer's reputation in the community at large as well as among his peers at the bar.48 A statement by the court and the subsequent publication of an opinion that counsel's conduct has been subject to sanction amounts to a public censure. Such a statement may have a detrimental impact in the future of a law-

yer's practice.49

Because of the impact sanctions may have on a lawyer's reputation and his finances, basic fairness dictates that those interests be given due process consideration. Due process standards, which provide the opportunity for notice and hearing, are essential means of preventing judicial mistakes. Due process standards also guard against arbitrary and capricious judicial behavior. Three decisions by the United States Supreme Court shed some light on the due process requirements when the issue involves imposition of a sanction.

Over twenty-five years ago, the Supreme Court in Societe Internationale Pour Participations Industrielles Et Commerciales, S.A. v. Rogers,50 reversed on due process grounds a district court's dismissal of an action because the plaintiff failed to produce certain documents when ordered to do so.51 Although the case argued for a thorough due process analysis, one was not given. Rather, the Supreme Court made it clear that federal courts possessed inherent power to impose sanctions for lawyer conduct which did not constitute contempt.52 The opinion left uncertain the reach of the courts and the minimum protections required prior to imposition of sanctions.53

Societe Internationale was followed by Roadway Express, Inc. v. Piper.54 In Roadway, the Court approved the use of its inherent power to impose monetary sanctions on trial counsel in appropriate circumstances. In doing so, it relied in part on an earlier decision, Link v. Wabash Railroad Co.,55 where the Court had

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49. Public sanctions may be extremely damaging to an attorney's reputation. Reputation as well as financial interests are entitled to due process consideration. In Wisconsin v. Constineau, 400 U.S. 433 (1971), the Supreme Court said, "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." Id. at 437.


51. Id. at 203. The trial judge had dismissed with prejudice a party's complaint where it had failed to comply with a court order under Rule 34 to produce Swiss banking records. Id. at 203. The Court said that dismissal was not warranted where disclosure would have subjected the party to criminal sanctions in Switzerland. Id. at 211-12.

52. Id. at 206-07 (court stated that the case should not rest upon Rule 41 or upon the district court's "inherent power" to impose sanctions).


54. 447 U.S. 752 (1980).

affirmed a lower court dismissal of a complaint for lack of prosecution. In Roadway, the Court said, "[s]ince the assessment of counsel fees is a less severe sanction than outright dismissal, Link strongly supports [the assessment of money sanctions.]"\textsuperscript{56} The Court characterized sanctions as an important vehicle for "deterrence and punishment."\textsuperscript{57} It announced that federal courts must apply sanctions "diligently both 'to penalize those whose conduct may be deemed to warrant such a sanction, [and] to deter those who might be tempted to such conduct in the absence of such a deterrent.'"\textsuperscript{58} The Court also discussed the due process implications associated with imposition of sanctions. "Like other sanctions," wrote the Court, "attorney's fees should not be assessed lightly or without fair notice and an opportunity for a hearing on the record."\textsuperscript{59}

Despite the notice and hearing language in Roadway, the Court did not hold that notice and a hearing are always required. Link, which was cited favorably by the Court, upheld imposition of sanctions against due process claims.\textsuperscript{60} The district judge, in Link, dismissed the case after counsel had defaulted and failed to attend a hearing.\textsuperscript{61} The attorney had called the clerk's office and explained that he could not attend the hearing, but gave no details.\textsuperscript{62} When the case was called, the trial judge noted the attorney's absence and then \textit{sua sponte} dismissed the case.\textsuperscript{63}

The Supreme Court in Link, stated:

The adequacy of notice and hearing respecting proceedings that may affect a party's rights turns, to a considerable extent, on the knowledge which the circumstances show such party may be taken to have of the consequences of his own conduct. The circumstances here were such as to dispense with the necessity for advance notice and hearing.\textsuperscript{64}

\textsuperscript{56} Roadway Express, 447 U.S. at 765.
\textsuperscript{57} Id. at 763-64.
\textsuperscript{58} Id. In Herbert v. Lando, 441 U.S. 153 (1979), the Supreme Court said, "[t]here have been repeated expressions of concern about undue and uncontrolled discovery, and voices from this Court have joined the chorus." Id. at 176. The court also stated that "judges should not hesitate to exercise appropriate control over the discovery process." Id. at 177.
\textsuperscript{59} Roadway Express, 447 U.S. at 767 (emphasis added).
\textsuperscript{61} Id. at 628-29.
\textsuperscript{62} Id. at 627-28.
\textsuperscript{63} Id. at 628-29.
\textsuperscript{64} Id. at 632.
Thus, the Court apparently has taken the position that no hearing is constitutionally compelled in certain circumstances where established rules are transgressed.\textsuperscript{65} One immediate difficulty, of course, is determining what are "established rules."

These decisions provide a starting point for exploring the nature and extent of procedural protections that should be afforded litigants and counsel prior to imposition of sanctions. To some extent, the decisions also reflect the temerity with which courts in the past have viewed the issue of attorney sanctions less than contempt. The time has arrived, however, for courts to abandon such temerity. Even attorneys who see themselves as vigilant guardians of every aspect of a client's case, no longer oppose stronger judicial involvement in the pretrial area. They have become convinced of the need for greater involvement from firsthand participation in the system. In fact, attorneys have experienced the atmosphere of lawlessness created by an opponent who has regularly missed deadlines, filed frivolous motions (and complaints), refused to cooperate in settlement conferences, and was otherwise noncooperative.

The judiciary has only recently begun to pay significant attention to initiation of a law suit. In the past, cases were silently filed with the clerk of court and unobtrusively made their way to the court docket for settlement, or eventually, to trial. The judiciary viewed itself as a passive, detached arbiter of citizen disputes. However, of necessity, the role of the judiciary is changing fast, and the 1983 amendments reflect that change. Judges have become case managers and docket controllers. They are asserting management control through stricter application of procedural rules, increased settlement and management conferences, and the imposition of sanctions. Concomitantly, they can no longer enjoy the status of passive arbiter.

The concern for efficiency and management provides added importance to the development of due process standards for the protection of attorneys. Justice should not, after all, be

\textsuperscript{65} The power to punish without notice and a hearing was said in \textit{In re Oliver}, 333 U.S. 257 (1948) (a direct contempt proceeding), to be a "departure from accepted standards of due process. . . ." \textit{Id.} at 274. But some form of notice and hearing—formal or informal—is required before deprivation of property interest that "cannot be characterized as de minimus." \textit{Fuentes v. Shevin}, 407 U.S. 67, 90 n.21 (1972) (citing \textit{Sniadach v. Family Finance Corp.}, 395 U.S. 337, 342 (1969)).
sacrificed on the altar of expediency. The principal question is: where should the judiciary go from here?

One recommendation is to encourage the rapid development of more detailed, articulated procedures among the various courts. Model procedural rules, for example, could be developed at a national or circuit court level. It is envisioned that the model rules would provide the basic structure for discussion, which would eventually lead to adoption of local rules by various trial courts. Local rules will improve consistency among trial judges, reduce uneasiness of lawyers regarding imposition of sanctions, and insure that an adequate record is made of each occurrence. Thus, the integrity of the process would be protected, and the result should be a fair and workable system.

California has experience with developing procedures to protect lawyers who are about to be sanctioned. The experience grew out of a 1978 decision, *Bauguess v. Paine.* In that case, the California Supreme Court was asked to determine the nature and extent of the California courts’ inherent or nonstatutory power to assess monetary sanctions against litigants for improper litigation tactics. It held that in the absence of express statutory authority, a trial court’s ability to sanction lawyers was limited to contempt. The primary reason for rejecting the inherent power doctrine was the court’s concern over the absence of procedural protections for lawyers and litigants. The court also felt that the contempt power was sufficient to control errant counsel and that it contained within its statutory procedural framework safeguards against judicial arbitrariness. The court stated that “[t]he use of courts’ inherent power to punish misconduct by awarding attorney’s fees may imperil the independence of the bar and therefore undermine the adversary system.”

The decision, in *Bauguess,* spawned a successful effort by the California Judges Association to obtain legislation which reversed the result. As a part of the legislative effort, the following procedural requirement was adopted:

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67. *See id.* at 637-38, 586 P.2d at 948-49.
68. *Id.* at 638, 586 P.2d at 949.
69. *Id.*
70. 22 Cal. 3d at 638, 586 P.2d at 949.
Expenses pursuant to this section shall not be imposed except on notice contained in a party's moving or responding papers; or the court's own motion, after notice and opportunity to be heard. An order imposing expenses shall be in writing and shall recite in detail the conduct or circumstances justifying the order.\textsuperscript{71}

While requirements of notice and hearing are essential to prevent arbitrary imposition of sanctions, they may prove to be time consuming for court and counsel. It is ironic that the provisions designed to deter litigation abuse may result in increasing the clutter of the already overburdened channels of litigation.

Besides the fundamental question of notice and an opportunity to be heard, there are a number of other related questions needing answers. Questions such as the limits of the Supreme Court's decision in \textit{Link}, the possibility of a bifurcated hearing where a lawyer's client is barred, the need for a detailed record, the possibility of using sanction options other than financial penalties, and the basic question of what standards to use when assessing attorney fees need to be examined. Difficult issues, such as when a court may dispense with advance notice and a hearing because a lawyer is assumed to already possess sufficient knowledge of the consequences of his own conduct, need analysis and resolution.

There remains a question in some judicial minds as to whether Rule 11 mandates application of an objective standard.\textsuperscript{72} Some believe, for example, that the Seventh Circuit has taken the position that a subjective standard still applies.\textsuperscript{73} In sanctioning errant taxpayers under Rule 11, the district court judge in \textit{Cameron v. I.R.S.}\textsuperscript{74} found that the plaintiffs' insistence on litigating their claim despite controlling precedents that removed any colorable basis in law was sufficient evidence to show subjective bad faith which according to the court, was the applicable standard. A careful reading of \textit{Badillow v. Central Steel & Wire Co.},\textsuperscript{75} upon which the \textit{Cameron} decision was based, indicates that the court was discussing Rule 11 as it existed

\textsuperscript{71} CAL. CIV. PROC. CODE § 128.5(c) (West Supp. 1986).
\textsuperscript{73} See Cameron v. I.R.S., 593 F. Supp. 1540, 1557 (N.D. Ind. 1984).
\textsuperscript{74} Id. at 1557.
\textsuperscript{75} 717 F.2d 1160 (7th Cir. 1983).
before the amendment.\textsuperscript{76} Any remaining question of whether subjective bad faith is required before sanctions may be imposed can be laid to rest by clear local rules.

It also has been suggested that under certain circumstances, the question of sanctions should be addressed to an attorney in a separate judicial proceeding outside the presence of a client. It has been argued that in such a setting counsel can argue his own case against imposition of sanctions and not be bound by that of his client.\textsuperscript{77} Such a suggestion raises critical questions regarding the fundamental nature of the attorney-client relationship, and suggests a divergent shift in our thinking on the lawyering process. Such proposals need thoughtful discussion and careful analysis before adoption.

There are numerous other issues of lesser importance, but which nevertheless need deliberation. For example, when should a detailed transcript of a sanction proceeding be prepared? When should a trial judge make oral findings rather than written findings? Does the power of the court permit it to use sanctions to reimburse the judicial system for time needlessly spent in a courtroom by administrative personnel as well as the judge because of attorney misconduct?

Another issue needing agreement involves conduct of counsel. Should courts be less inclined to grant attorney fee awards where counsel is nonobstructionist and forthright in admitting a mistake?\textsuperscript{78} Should lawyers, who are inexperienced in the particular court system, be given special treatment by the court? Should new law graduates be treated more gently? Local rules should address these questions and questions of mitigation and extenuation.

Ground rules regarding the use of formal and informal conferences between erring counsel and the trial judge should be established. With experienced trial judges and lawyers, common sense suggestions on the most appropriate approaches to use will not be difficult to draft.

\textsuperscript{76} See id. at 1166-67. It does not support the position that Rule 11 mandates application of a subjective standard.

\textsuperscript{77} An example of the type of investigation required of an attorney before filing a suit in federal courts is illustrated in such cases as Van Berkel v. Fox Farm & Road Mach., 581 F. Supp. 1248, 1250 (D. Minn. 1984).

\textsuperscript{78} See, e.g., Pudlo v. Director, 587 F. Supp. 1010, 1012 (N.D. Ill. 1984) (the district judge indicated that counsel's confession of error was a favorable factor in considering whether sanctions under Rule 11 should be imposed).
Another issue needing resolution involves the standards to be used in establishing the appropriate size of a monetary penalty. Should it make a difference whether the case involves a single client or a giant conglomerate? Should the experience of counsel play a role in establishing the amount of the monetary sanction? Furthermore, what should a trial judge do about imposition of monetary fines when the other side makes no request for them? 79

Should the following procedure, for example, be adopted as the proper procedure to use when sanctions are imposed? Assume the court has decided that sanctions are warranted. The moving or petitioning attorney under a new local rule presents the judge with detailed time records of the hours expended by every lawyer on the case. The records should be sufficiently detailed so the judge will have a clear understanding of the nature of the work done, the status of each lawyer who worked on the case, and the hours expended. 80 The fee applicant provides specific evidence of the prevailing rate in the community for the type of work for which he seeks an award. Attached to the request are affidavits reciting the fees similarly qualified attorneys have received from paying clients in comparable cases. 81

There is little reason justifying delay in developing and promulgating standards and guidelines which either adopt or modify existing procedures such as the attorney fee example set forth in the previous paragraph. Most of the issues and problems are apparent and need not await a case-by-case resolution. Delaying until a series of decisions has carved out a procedural path is a clumsy, costly, and inefficient method of dealing with these problems. There already exist a reasonable number of decisions which sharpen the issues and answer many of the questions being raised. In the remaining sections of this Article, several of those decisions will be discussed.

79. Attorney fees and costs for delay and frivolous appeals are given regularly. See Renken v. Harvey Aluminum, Inc., 475 F.2d 766 (9th Cir. 1973); see, e.g., Wood v. Santa Barbara Chamber of Commerce, Inc., 699 F.2d 484 (9th Cir. 1983), cert. denied, 104 S. Ct. 1445 (1984).
IV. UNJUSTIFIED RESISTANCE OF INDISPUTED CLAIM BY THE DEFENDANT

While most of the attention of the Rule 11 certification requirement has focused on the plaintiff and frivolous or unfounded actions against parties, as much (or arguably more) emphasis should be placed on the defendant’s obligation to properly respond to a complaint. When a defendant causes unwarranted expense for the opponent or the courts by resisting without justification an indisputable claim, he should be considered for sanctions under Rule 11. By his actions, the defendant is wasting both private and judicial resources.

Precedent for assessing attorney fees against a defendant whose resistance was unjustified can be found in a non-Rule 11 decision, *Vaughan v. Atkinson*. In this case, a seaman brought suit in admiralty against his former employer. The employer failed, without justification, to respond to the seaman’s claim for maintenance and cure. The seaman was awarded attorney’s fees under the rubric of compensatory damages. The Supreme Court, however, emphasized the role that the defendant’s bad faith played in the court’s decision. The Court found that as a result of the defendant’s callous attitude and recalcitrance in neither admitting nor denying the claim, the plaintiff had been forced to hire an attorney to get what plainly was owed to him under well-settled law. Under the new Rule 11, the defendant’s obligation goes much further than the test applied by the court in *Vaughan*. A defendant’s obligation is identical to that of the plaintiff in terms of examination of existing law and conducting a reasonable factual inquiry. As plaintiffs become more aware of the Rule’s significance in terms of its use to reduce frivolous, tactically-delaying answers, more sanctions involving defense counsel can be anticipated.

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82. 369 U.S. 527 (1962).
83. *Id.* at 528-29.
84. *Id.* at 530-31.
85. *Id.* The court stated:

In the instant case respondents were callous in their attitude, making no investigation of libellant’s claim and by their silence neither admitting nor denying it. As a result of that recalcitrance, libellant was forced to hire a lawyer and to go court to get what was plainly owed him under laws that are centuries old. The default was willful and persistent. It is difficult to imagine a clearer case of damages suffered for failure to pay maintenance than this one.

*Id.*
V. What Constitutes a Reasonable Factual Inquiry?

It is evident from recent case law that courts are moving away from the subjective, bad faith standard of evaluating pre-trial lawyering behavior in favor of the objective standard. *Van Berkel v. Fox Farm & Road Machinery* is indicative of this trend. Following a hearing, the trial judge sanctioned the plaintiff’s lawyer, citing noncompliance with Rule 11 because he failed to properly investigate the facts before filing the action. The trial judge also sanctioned him under 28 U.S.C. § 1927 for unreasonably and vexatiously multiplying the proceedings by refusing to dismiss the action when it became clear it was time barred.

The facts which led to imposition of sanctions arose from a serious farm accident. The plaintiff lost his right arm on September 6, 1976 while using a corn chopper that was manufactured, sold, and distributed by the defendant corporation. Seven years later, the plaintiff filed suit against the defendant, basing his theories of recovery on negligence, strict liability, and breach of express and implied warranties. The complaint alleged that the accident occurred on September 6, 1977. The accident, however, actually occurred exactly one year earlier. As a result of the error, the action was time barred.

The defendant discovered that the claim was time barred while examining hospital records made when the plaintiff was treated for the injury. Upon discovery, defense counsel informed plaintiff’s counsel by letter. In his letter, defense counsel also enclosed a copy of the medical records showing precisely the date the injury was treated. A week later, defense counsel called plaintiff’s attorney asking that the action be dismissed. The telephone call was later confirmed by a second letter. This correspondence contained a clipping from a local newspaper reporting the accident. The clipping was intended to further confirm that plaintiff had not timely filed the matter. Defense counsel then filed a formal summary judg-

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87. *Id.* at 1251.
88. *Id.*
89. *Id.*
90. *Id.* The statute of limitations period for the action was six years. *Minn. Stat.* § 541.05 (1985).
92. *Id.*
ment motion asking for judgment as well as an award of costs and attorney fees.93

At the summary judgment hearing, the plaintiff did not file a responsive memorandum in advance of the hearing.94 However, on the issues of costs, attorney fees, and improper investigation, the plaintiff's attorney offered a personal affidavit stating that "his client had told him the accident happened on September 6, 1977, that he had no reason to believe otherwise, and that he acted in good faith and believed his client acted in good faith."95 When asked what investigation he had made before filing the action, the attorney said that an expert witness examined the machine, that he had talked to the plaintiff and family members at their farm home, and that he had received copies of the operator's and owner's manuals.96 The attorney admitted that he did not obtain or review his client's medical records before starting the law suit. He did not see the records until they were furnished by defense counsel four or five months after the suit was begun.97

The district court rejected counsel's argument that the information his client had provided regarding the date of the accident was sufficient to constitute a "reasonable inquiry" under Rule 11. The court stated:

Had [counsel] . . . made even a minimum investigation into the facts of this case, he would have determined the accurate date of the accident. The hospital and medical records reflected it. . . . [H]e had adequate time to obtain and examine all pertinent records and make additional needful inquiry [before instituting the action.]98

93. Id. at 1250. The plaintiff's lawyer in McConnell v. Critchlow, 661 F.2d 116 (9th Cir. 1981), had ignored the relevant statute of limitations. Id. at 117. Plaintiff had brought a civil rights claim against individuals as well as the government based on arrests that occurred fifteen years before the complaint was filed. Id. The district court dismissed on the ground the claims were barred by the statute of limitations. Id. On appeal, the plaintiff made no argument as to how the statute of limitations could be avoided. Id. The appeals court awarded attorney fees against plaintiff's lawyer under 28 U.S.C. § 1927 and FED. R. APP. P. 38. McConnell, 661 F.2d at 118. The attorney argued that the court should not impose sanctions against him because his client insisted that the appeal be made. Id. at 119. The court of appeals rejected this argument noting that the lawyer must have known the appeal was frivolous. Id. at 118.


95. Id. (emphasis added).

96. Id.

97. Id. 

98. Id.
The district court also rejected counsel's argument that after notification that the action was time barred, he was compelled to continue unless he obtained his client's approval. Counsel argued that he had an "ethical duty to [his] client" to not dismiss the action on his own motion. The court observed the following:

Attorneys are officers of the court and their first duty is to the administration of justice. Whenever an attorney's duties to his client conflict with those he owes to the public as an officer of the court, he must give precedence to his duty to the public. Any other view would run counter to a principled system of justice.99

Several specific factors led the Van Berkel court to impose sanctions. One factor was the amount of time available to the attorney prior to commencing the action. The attorney was not "pressed" to take swift action in order to toll the running of the statute of limitations. The court felt that having a case in the office for more than a year prior to the statute's expiration compelled the attorney to conduct an independent investigation to determine the accident date. The requirement of an independent investigation also draws support from the court's refusal to accept, in place of an independent investigation, reliance on a client's version of the event.100

Although not expressly discussed in Van Berkel, another factor in the case seems to have been the defendant's economic hardship caused by the plaintiff's persistence in pursuing a time-barred claim. Despite written notification, phone calls, and other documentation being sent to him, the plaintiff remained fixed in his refusal to dismiss. The court felt the defendant suffered unjustified attorney fees and costs because of counsel's behavior.

The reasonableness of the defense counsel's actions in attempting to resolve the matter without additional judicial involvement also may have been a factor. The attorney wrote and phoned the opposition in a reasonable and timely manner.101

99. Id. at 1251.
100. See Fed. R. Civ. P. 11, advisory committee notes (courts are to consider whether the attorney was forced to rely on the client's version); Wold v. Minerals Eng'g Co., 575 F. Supp. 166, 167 (D. Colo. 1983) (the court ordered defendant's attorney to pay the plaintiff's attorneys fees due, inter alia, to the failure to make a reasonable investigation before filing a motion to disqualify).
He neither confused nor misled the plaintiff. Accordingly, the plaintiff was provided with appropriate notice of defendant's position, including supporting documents. Thus, when an attorney gives appropriate advance notice of a particular fact, and does so in a reasonable fashion as illustrated in Van Berkel, courts will be much more inclined to impose sanctions on an opponent who forces unwarranted costs by needless court appearances.

The clarity of the legal issue is likewise a factor to consider in weighing the imposition of sanctions. In Van Berkel, once the facts were known, no argument could be or was made that the law did not require a dismissal of the claim.

The opinion also helps resolve whether counsel's failure to conduct a reasonable prefiling inquiry must be "willful" before Rule 11 sanctions may be employed. Willfulness is not required nor is it the appropriate standard to be applied. In rejecting application of the "willfulness" standard, the court joined other commentators and most other courts who have carefully examined the 1983 amendment. Attorneys must have more than a reasonable belief that a client has a cause of action; a belief in and of itself is simply not sufficient justification for going forward with an action. Rule 11 requires the lawyer or party to certify that on the basis of a reasonable factual prefiling inquiry, he believes that the paper has a factual and legal basis and that it is not interposed for delay. The reasonable inquiry standard holds an attorney to a higher standard of knowing his case than under former Rule 11. In addition, the standard provides for a greater range of circumstances to trigger violation of the existing Rule. Courts recognize that "there is no position—no matter how absurd—of which an advocate cannot convince himself." This is the reason the objective standard was adopted in 1983.

Van Berkel is in line with decisions holding that an attorney may not persist in claims or defenses beyond a point where

102. See id.
103. Id. at 1249-50.
104. The same objective standard was adopted by Judge Murphy in Rauenhorst v. United States, 104 F.R.D. 588, 605 (D. Minn. 1985), and by Judge Gesell in Weisman v. Rivlin, 598 F. Supp. 724, 726 (D.C. Cir. 1984).
they can no longer be considered well grounded.\textsuperscript{107} The case also raised the issue and provided limited guidance on the question of the amount of protection the rules of professional conduct give an attorney.\textsuperscript{108} From this opinion it is clear that a lawyer may not shield himself from sanctions by asserting that he did only what his client wanted him to do.\textsuperscript{109} The decision also makes it clear that an attorney is not a "hired gun" whose conduct is completely directed by a client. It recognizes the legitimate obligation of a lawyer to the court, a client, and the public, and then draws an understandable line between a lawyer's obligation to a client and to the court and the public.

A decision which is consistent with \textit{Van Berkel}, but with a different outcome, is \textit{Rauenhorst v. United States}.\textsuperscript{110} The United States sought relief from a judgment under Rule 60(b)(3) in several cases previously tried to the court.\textsuperscript{111} The previous cases arose out of an airplane crash in 1978 in which the pilot and all five passengers were killed. The trustees for the estates of the passengers sued the United States for negligence on the basis that the government's air traffic controllers had not exercised reasonable care in routing the plane around bad weather. The United States settled with the five passengers' estates for $3,926,310 and then sought contribution and/or indemnity from the pilot's estate. The owner of the airplane, Southwest Aircraft Leasing, Inc. (Southwest) also sued the United States.

In that case, the United States brought a counterclaim for contribution and/or indemnity against the estate of the pilot. Southwest's suit against the United States and the United States' actions against the pilot were consolidated and tried.\textsuperscript{112} The court found that government air traffic controllers had agreed to route the airplane around bad weather, but then

\begin{footnotes}
\footnotetext{107.} See, e.g., Nemeroff v. Abelson, 620 F.2d 339, 350-51 (2d Cir. 1980) (although the court found the action was commenced in good faith, it remanded to the district court for a determination of whether during the litigation sufficient facts became known to the appellants which would demonstrate that a failure at that point to withdraw the action was in bad faith).

\footnotetext{108.} Judge Devitt used both Rule 11 and 28 U.S.C. § 1927 as authority for his decision in \textit{Van Berkel}, 581 F. Supp. at 1251. He imposed attorney fee sanctions against plaintiff's attorney in the amount of $2,894. \textit{Id.}

\footnotetext{109.} 661 F.2d at 119. An attorney also may not shield himself from sanctions on the ground that he is not "more" blameworthy than his client. \textit{See Blair}, 757 F.2d at 1438.

\footnotetext{110.} \textit{Rauenhorst}, 104 F.R.D. at 588.

\footnotetext{111.} \textit{Id.} at 591.

\footnotetext{112.} \textit{Id.} at 591-92.
\end{footnotes}
failed to exercise reasonable care in doing so.\textsuperscript{113} The plane crashed after being caught in a thunderstorm and buffeted by severe downdrafts and updrafts.\textsuperscript{114}

After the contribution/indemnity case was tried, the government learned of the existence of a punch in the gas tank.\textsuperscript{115} The punch had been found in the airplane gas tank nearly a year before trial; however, the government was not informed of the existence of the punch until after the settlement was reached with the defendants.\textsuperscript{116} As a result, the government sought a new trial. It claimed that opposing counsel had wrongfully concealed a critical piece of evidence—the six-inch long metal punch allegedly found in the rubberized fuel cell of the aircraft.\textsuperscript{117} The existence of the punch, and the possibility that during the turbulent weather it could have perforated the bladder, were known to several of the parties during the course of the litigation. This possibility was not revealed to the government until after settlement and trial when an anonymous tip was received at the United States Attorney’s Office concerning a “‘foreign object’ which had been found in one of the fuel tanks of the aircraft.”\textsuperscript{118} The government claimed that the punch was “most probably” the cause of the crash.\textsuperscript{119} The government contended that it was entitled to relief under 60(b)(3) of the Federal Rules of Civil Procedure on the grounds of suprise, fraud, misrepresentation, and other misconduct.\textsuperscript{120} It named twelve parties in its action for recovery, all to some degree involved in the prior litigation.\textsuperscript{121} The government sought damages in excess of fourteen million dollars from the attorneys and other parties involved in the settlement and investigation of the crash and subsequent litigation.\textsuperscript{122}

The trial judge concluded that the acts and/or omissions put forth by the United States failed to show any affirmative misconduct on the part of the defendants. Specifically, the court concluded the defendants had no duty to disclose the punch.

\textsuperscript{113} Id.
\textsuperscript{114} Id.
\textsuperscript{115} Id. at 592, 594.
\textsuperscript{116} Id.
\textsuperscript{117} Id. at 592-93, 597.
\textsuperscript{118} Id. at 597.
\textsuperscript{119} Id. at 593.
\textsuperscript{120} Id. at 592.
\textsuperscript{121} Id. at 593.
\textsuperscript{122} Id. at 591.
Defendant's motion asked for attorney fees pursuant to Rule 11. The court rejected the request, reasoning that there was not sufficient evidence showing that the United States' filings were "frivolous." Further, the court stated that the government's filing was based on a "reasonable belief" at the time that relief was valid. The court noted that the actions of the United States also did not violate 28 U.S.C. § 1927. It further observed that the alleged misconduct in filing the complaint must be found to be without a plausible legal or factual basis and lacking in justification.

_Rauenhorst_ is instructive for several reasons. First, the trial judge correctly observed that courts, when applying Rule 11, are not to use a subjective or "bad faith" standard. Under application of a "bad faith test," no basis existed for considering imposition of sanctions against the United States. By rejecting the subjective standard, the trial judge was required to objectively evaluate all the facts in determining whether to impose sanctions. Second, in applying the objective standard, the court asked whether the filings were so without factual and legal foundation that they could be considered frivolous or unreasonable. In deciding this question, the court looked at what was reasonable to believe at the time the complaint was

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123. _Id._ at 605. The court stated:

Applying Rule 11 to the facts and circumstances of this case, the court concludes that it has not been violated. Under the objective standard, it cannot be said that the United States filings are so without factual and legal foundation that they can be considered frivolous or unreasonable. (citations omitted). Prior to filing these matters, the United States obtained the affidavits of Wermerskirchen and Schroeder, both of whom had firsthand knowledge of the punch and the parties' conduct. It also had a copy of a statement given previously by Schroeder, and it had contacted Donald Sime, the attorney who had handled the case for the United States. Only after reviewing the information provided by these individuals did the United States take action.

_id._

124. _Id._ The court stated:

The court's rulings on the merits today are not relevant to the inquiry on sanctions. A court is not to use the wisdom of hindsight but instead should inquire into what was reasonable to believe at the time the papers were submitted. (citations omitted). The inquiry made by the United States gave it a sound basis in law and fact to file its papers seeking relief based on fraud; accordingly, there is no basis for the imposition of any sanctions.

_id._ (emphasis added).

125. _Id._ at 605 n.25.

126. _Id._

127. _Id._ at 605 (citing Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978)).
filed. Here, reasonableness was found in the fact that the government had obtained affidavits from two persons, both of whom had firsthand knowledge of the punch and of the parties’ conduct. The government had also obtained a copy of a statement previously given by another witness and had contacted the attorney who handled the case for the United States to verify that he was not provided information regarding the punch. Only after obtaining this data, did the government move to set aside the settlement judgments. Thus, a reasonable factual investigation was made prior to the action—not later. Finally, the court correctly observed that sanctions will not necessarily flow from a court’s ruling on the merits or a motion. If a court adopted such a position, virtually every losing party would be sanctioned.

Blair v. Shenandoah Women’s Center is an illustrative case of the “frivolous” ineffective litigation at which Rule 11 is aimed. The plaintiff’s attorney in Blair was sanctioned after he brought a lawsuit against a women’s shelter in which his client’s wife sought refuge from abuse. The attorney included as defendants the United Way, the state of West Virginia, unknown police officers, a local board of education, and several employees of the shelter. The claim sought recovery of ten million dollars for discrimination based on sex, conspiracy, false arrest, malicious prosecution, assault and battery, defamation, and harassment.

The defendants initially moved to dismiss for failure to state a claim. The plaintiff’s counsel then filed a series of motions requesting extensions of time and leave to amend. The trial court dismissed the baseless complaint after the plaintiff failed to either amend or respond to defendant’s discovery requests. The court, after a hearing on defense counsel’s dismissal motion, concluded that both plaintiff and his attorney should be sanctioned. In support of the sanction, the court

129. Id.
130. Id.
131. Id.
132. 757 F.2d 1435 (4th Cir. 1985).
133. Id. at 1436.
134. Id.
noted that Rule 11 applies to conduct during the course of litigation as well as to the filing of a complaint.\textsuperscript{135}

The court strongly rejected arguments by plaintiff’s attorney that he was “obliged as [plaintiff’s] attorney to make the allegations desired by [his client] and to conduct the case as [the client] wished.”\textsuperscript{136} In rejecting the arguments, the court stated:

A lawyer must always remember that he is an officer of the court. He may zealously represent his client, but only within the bounds of 28 U.S.C. § 1927, Fed. R. Civ. P. 11, as amended, and the court’s inherent power to govern and regulate the conduct of litigation before it. (citations omitted) We emphatically reject any suggestion that a lawyer may shield his transgressions behind the simplistic plea that he only did what his client desired.\textsuperscript{137}

VI. FAILURE TO PROPERLY APPLY EXISTING LAW OR TO SUCCESSFULLY ARGUE THE NEED FOR EXTENSION, MODIFICATION, OR REVERSAL

There are a limited number of pre- and post-1983 Rule 11 cases which are helpful in determining the nature of the obligation to investigate the existence of law, as well as the standard for determining whether there existed a basis for extension, modification, or reversal of it.

Failure to adequately investigate the law surrounding a court’s jurisdiction may result in sanctions. For example, a complaint without a jurisdictional basis resulted in dismissal and costs and fees of $1,392 in Overnite Transportation Co. v. Chicago Industrial Tire Co.\textsuperscript{138} The court observed that there was a clear difference between asserting an unlikely claim and repeatedly

\textsuperscript{135} Id. The court reasoned as follows:

"[T]his Court has inherent power to assess attorney’s fees against an attorney, which power is not limited to cases filed in bad faith but includes actions leading to the filing of suit and include conduct during the course of litigation." The district court justified assessing fees against Blair based both on this inherent power and on Fed. R. Civ. P. 11. It noted, however, that the August 1, 1983 Amendments to Rule 11 regarding the imposition of attorney sanctions did not become effective until after Bennett’s case was dismissed.

\textsuperscript{136} Id at 1438.

\textsuperscript{137} Id. at 1438 (citations omitted).

\textsuperscript{138} 535 F. Supp. 114, 116 (N.D. Ill. 1982).
advancing a jurisdictional argument with no basis in law.\textsuperscript{139} The plaintiff’s lawyer had attempted to pursue a $2,210 claim in federal court.\textsuperscript{140} In \textit{Textor v. Board of Regents of Northern Illinois University},\textsuperscript{141} the court found the plaintiff had no conceivable ground for jurisdiction over out-of-state defendants and imposed sanction.\textsuperscript{142}

In \textit{WSB Electric Co., Inc. v. Rank & File Committee to Stop the 2-Gate System},\textsuperscript{143} an employer who brought an action seeking injunctive relief against mass picketing alleged Hobbs Act, RICO and civil rights conspiracy claims. The employer and its attorneys were sanctioned after the court granted the defendant’s motion to dismiss. Upon examining the facts and the law, the court stated it could find neither a factual nor a legal basis for the plaintiff’s complaint.\textsuperscript{144}

The Internal Revenue Service is particularly aggressive in seeking attorney fee awards. It was successful in persuading a trial judge that Rule 11 was violated by a \textit{pro se} plaintiff who contended that the Internal Revenue Code did not apply to him and his wages despite the fact that courts had consistently ruled that wages are taxable income.\textsuperscript{145} A recent law school graduate was given a fifty dollar sanction when he brought an action against the City of San Francisco and its officials challenging an ordinance that prohibited him from playing softball in portions of the public parks.\textsuperscript{146} The court granted defendant’s summary judgment motion on the basis that the claim was not warranted by existing law or a good-faith argument for its extension.\textsuperscript{147} The sanction was limited to fifty dollars because the court considered the attorney’s economic situation and inexperience.

In \textit{Pilcher v. Swalec},\textsuperscript{148} the defendants had removed a case to

\textsuperscript{139} \textit{Id.}
\textsuperscript{140} \textit{Id.} at 115. The jurisdictional limit was in excess of $10,000.
\textsuperscript{141} 87 F.R.D. 751 (N.D. Ill. 1980).
\textsuperscript{142} In imposing sanctions, the court stated, “[t]his case is fortunately atypical, but it is also unfortunately symptomatic of some of the ills that afflict the litigation process. Free access to the courts is essential, but the role of the bar is to make certain that the right to access is exercised responsibly.” \textit{Id.} at 754.
\textsuperscript{143} 103 F.R.D. 417 (N.D. Cal. 1984).
\textsuperscript{144} \textit{Id.} at 420.
\textsuperscript{145} Cameron v. I.R.S., 593 F. Supp. 1540, 1558 (N.D. Ind. 1984).
\textsuperscript{146} Heimbaugh v. City & County of San Francisco, 591 F. Supp. 1573 (D.C. Cal. 1984).
\textsuperscript{147} \textit{Id.} at 1577.
\textsuperscript{148} 540 F. Supp. 1373 (N.D. Ill. 1983).
federal court, even though the complaint was based on violation of the state constitution. The federal judge remanded the case, and in doing so, suggested that the plaintiff’s lawyer apply for fees as provided by 28 U.S.C. § 1928. The court stated there “[w]as no way in which the removal could have been undertaken in good faith by responsible counsel.” The complaint clearly stated that the constitutional claims asserted were state, not federal constitutional claims.

VII. Failure to Cite Recent and Controlling Authority

Lawyers who advance legal arguments that are clearly wrong or who ignore controlling authority risk the possibility of sanctions. One of the most noted cases on this issue is *Golden Eagle Distributing Corp. v. Burroughs Corp.* In this case, the United States District Court for the Northern District of California imposed a fine of $3,155 in attorney fees on counsel who had misled the court by advancing arguments that purported to reflect existing law while failing to “cite authority adverse to movants’ position.” The plaintiff brought an action in Minnesota state court for fraud, negligence, and breach of contract against Burroughs Corporation, the manufacturer of an allegedly defective computer system sold to plaintiff. The defendant removed to federal court in Minnesota on the basis of diversity of citizenship, and that court, on defendant’s motion, transferred the action to Federal District Court, Northern District California. The defendant moved for summary judgment alleging that all four claims were time barred under California law. The plaintiff conceded that the limitations period for the contract claim was time barred, but argued that the limitations period for the remaining claims was governed by Minnesota law under which they would not be time barred. The defendant then moved to dismiss plaintiff’s claim for economic loss arising from negligent manufacture as being barred

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149. *Id.* at 1374.
150. *Id.*
151. *Id.*
152. 103 F.R.D. 124 (1984). As of the time this Article was written, the decision was still pending before the Ninth Circuit Court of Appeals.
153. *Id.* at 125-27.
154. *Id.* at 125.
155. *Id.*
156. *Id.*
by California law. The motion was denied, and the defendant was asked to submit a memorandum explaining why sanctions should not be imposed under Rule 11.\textsuperscript{157}

In its brief to the district court, the defendant cited a 1965 California Supreme Court decision supporting its contention that economic damages cannot be sought in a negligence case. The brief, however, omitted mention of a contrary opinion of the California Supreme Court in 1979.\textsuperscript{158} The trial judge was upset because the 1979 decision had been discussed by two lower appellate courts which the defense also failed to mention. The court stressed the ethics of informing the court of all applicable case law.\textsuperscript{159}

Sanctions were also applied by the federal district court in \textit{Jorgenson v. County of Volusia},\textsuperscript{160} where plaintiff failed to cite two controlling cases. The court found counsel's actions particularly "reprehensible" because counsel omitted cases he had

\textsuperscript{157} \textit{Id.}.

\textsuperscript{158} \textit{Id.} at 128. The 1979 California ruling did not mention the 1965 decision. In briefs later submitted by the defendant they argued that the 1965 decision had never been overruled. \textit{Id.} at 129.

\textsuperscript{159} \textit{Golden Eagle}, 105 F.R.D at 127-28. The court was adamant regarding the ethical considerations of fully informing a court on the applicable law. The court stated:

A court has a right to expect that counsel will state the controlling law fairly and fully; indeed, unless that is done the court cannot perform its task properly. A lawyer must not misstate the law, fail to disclose adverse authority (not disclosed by his opponent), or omit facts critical to the application of the rules of law relied on.

Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. . . . [A]n advocate has a duty to disclose directly adverse authority in the controlling jurisdiction which has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case. Model Rules of Professional Conduct Rule 3.3 comment (1983).

Ethical Consideration 7-23 under the former ABA Model Code further explains: "The complexity of law often makes it difficult for a tribunal to be fully informed unless the pertinent law is presented by the lawyer in the cause. A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it. The adversary system contemplates that each lawyer will present and argue the existing law in the light most favorable to his client. Where a lawyer knows of legal authority in the controlling jurisdiction directly adverse to the position of his client, he should inform the tribunal of its existence unless his adversary has done so, but having made such disclosure, he may challenge its soundness in whole or in part." Model Code of Professional Responsibility EC 7-23 (1979).

\textit{Id.}

\textsuperscript{160} 625 F. Supp. 1543 (M.D. Fla. 1986).
personally litigated.\textsuperscript{161} Obviously, counsel had stretched the limits of advocacy.

Opponents of imposition of sanctions such as those imposed in the above two cases charge that the sanctions will produce a more timid bar. It is feared that the result will be a change in the basic notion of advocacy which is rooted in the classic and common law legal tradition. On the other hand, judges, such as Judge Schwarzer of the United States District Court of the Northern District of California, have made clear their views on sanctions. Judge Schwarzer, in an article in the Federal Rules Decisions in 1985, wrote:

\begin{quote}
Unlike the polemicist haranguing the public from his soapbox in the park, the lawyer enjoys the privilege of a professional license that entitles him to entry into the justice system. . . . [he is obligated] to conduct himself in a manner consistent with the proper functioning of that system.\textsuperscript{162}
\end{quote}

Increasingly, judges are critically examining every aspect of the pretrial lawyering process and cautiously exploring the nature and the extent of the power provided by Rule 11. They are demanding that legal citations and factual allegations contained in briefs and moving documents be founded on something more than a "good faith" belief that they exist. False or misleading statements of law or fact as well as omission of controlling authority may well result in sanctions. Previously accepted explanations for errors may no longer be tolerated. For example, it is common for an out-state law firm to associate itself with local counsel when it has a client in a jurisdiction where it has no office. In some jurisdictions, such association is required. In the past, local counsel has played little or no role in the actual handling of the lawsuit. Motions and other documents were prepared by out-state counsel, but with local counsel's name signed to them. The nature of the arrange-

\textsuperscript{161} Id. The court stated as follows:

The Court finds it reprehensible that plaintiff's counsel . . . omitted \textit{Bellanca} and \textit{Del Percio} from the supporting memorandum of law, especially, when he personally represented respondents in \textit{Del Percio}. . . . It is abundantly evident to the Court that plaintiff's counsel are aware of the Florida Supreme Court decisions and that they deliberately chose not to cite that case and \textit{Bellanca}, the controlling United States Supreme Court case, let alone attempt to further distinguish them . . . .

\textit{Id.} at 1547.

\textsuperscript{162} Schwarzer, \textit{infra} note 129, at 184.
ment, and "good faith" shielded local counsel from blame for misleading, frivolous, or otherwise poorly presented pretrial motions or briefs. Under the new Rule 11, the shield has been removed.

The severity of sanctions among lawyers may vary according to experience, specialty, and responsibility. Lawyers holding themselves out as specialists may be held to a higher standard than that applied to a novice. Neither, however, will be excused from compliance with the Rule. 163 Senior partners cannot escape responsibility for poorly prepared or misleading motions. The excuse by a senior partner that "a new associate prepared the document" and "I didn't have time prior to the hearing to 'really' review the research" may well fall on unsympathetic ears. Counsel will be shielded, of course, where the state of the law is in flux or is nonexistent.

VIII. MISCELLANEOUS APPLICATIONS OF RULE 11

The increasing number of reported Rule 11 decisions at the federal level is an indication of its potency. As courts escalate their demand for compliance with the Rule, the variety of situations in which it will be applied will likewise increase. For example, in United Food & Commercial Workers Union Local No. 115 v. Armour & Co., 164 the plaintiff filed a claim against the defendant contending it had refused to arbitrate when, in fact, it had not been asked to arbitrate. 165 After the defendant informed the plaintiff that it would arbitrate the claim, plaintiff filed an amended complaint charging the same refusal. When imposing a $7,500 fine as a sanction against the plaintiff, the court declared that there was no longer a need to make a threshold

163. In Huettig & Schromm, Inc. v. Landscape Contractors Council of N. Cal., 582 F. Supp. 1519 (N.D. Cal. 1984) the court discussed the different standards as follows:

One of the relevant circumstances is the experience and standing of the attorneys in question. Counsel in this case are not newly admitted to the bar or engaged as general practitioners not well versed in labor law. The complaint is signed by a partner of the San Francisco firm of Littler, Mendelson, Fastiff & Tichy admitted to the bar for twelve years, and an associate of that firm seven years at the bar. Both hold themselves out as specializing in labor law . . . Given the claimed expertise and experience of these attorneys, a strong inference arises that their bringing of an action such as this was for an improper purpose.

Id. at 1522.

165. Id. at 347.
finding of subjective bad faith. A court must "examine whether the claim was reasonable in light of the existing law and facts, and the standard is one of reasonableness under the circumstances." 166

The question of how courts arrive at the amount of the potential financial penalty assessed against a lawyer violating the Rule is gaining considerable attention. The court, in United Food, held that Rule 11 authorizes only "reasonable fees, not necessarily actual fees." 167 It noted that "assessment of fees against a nonprevailing litigant must be fair and reasonable based upon the particular circumstances of the case." 168 He also observed that there was a duty on the part of each party to dispose of frivolous lawsuits quickly using the least expensive alternative. 169

Another issue facing judges is what facts, if any, will mitigate imposition of sanctions. Should the mere absence of willful misconduct automatically mitigate the amount of financial sanctions to be applied? In Weisman v. Rivlin, 170 the court felt the absence of willfulness was important. The court reduced the amount of the sanction because of the absence of willfulness. 171

An example of how far Rule 11 may be pushed can be found in such cases as AM International, Inc. v. Eastman Kodak Co. 172 There the court rejected a request to strike the brief of counsel found in violation of Rule 11 in favor of assessing a fine. The brief submitted to the court contained a footnote which the court described as a "conscious, sly innuendo, juxtaposing two literally true facts in such a way as to imply that [the plaintiff] is a liar whose falsehoods were designed to stonewall discovery." 173 The court concluded that Kodak intended the message of the footnote, rather than its literal truth, and imposed sanctions.

Harassing and delaying tactics through the filing of frivolous

166. Id.
167. Id. at 349.
168. Id. (quoting Tedeschi v. Smith Barney, Harris Upham & Co., Inc., 579 F. Supp. 657, 664 (S.D.N.Y. 1984)) (which arose while the old Rule 11 was in effect).
169. Id. at 350.
171. Id. at 727.
173. Id.
but nevertheless costly motions are being tolerated less. In *North American Foreign Trading Corp. v. Zale Corp.*, the trial judge assessed the sum of $28,800 against counsel personally as a sanction for having filed a frivolous motion to disqualify the opposing lawyers. The court concluded that counsel knew the facts, thus demonstrating the absence of merit in the disqualification motion. The court observed:

No purpose has been served by the instant motion other than to harass plaintiff and his counsel and to delay these proceedings further. The time has come to call a halt, or at least to have the burden of these puerile litigation tactics fall on counsel, where it belongs, rather than on the client or the court. . . . Counsel had knowledge of all the necessary facts long before this motion was instituted, and thus could only have made such a groundless motion in bad faith.

Attorneys who are sanctioned by the trial court and take an appeal on the issue are risking the possibility of additional financial sanctions being assessed against them if their appeal is unsuccessful. In *Bartel Dental Books Co. v. Schultz*, the court concluded that the lawyer for the appellants was attempting to obfuscate the fact that his clients had no federal claim. It noted that counsel failed to offer even a good faith argument for reversing the precedents that were "so hostile to his clients' claims." Using stern language, the court indicated its impatience with counsel and their arguments:

Bartel's and Mapleton's counsel in this case should have been on notice that our patience with frivolous appeals is at an end. (citations omitted) We refer him to our 'stern warning that the United States Courts are not powerless to protect the public, including litigants who appear before the Courts, from the depredations of those . . . who hold themselves out as attorneys but who abuse the process of the Courts.'

Harsh language, an award of double costs and attorney fees, and a remand to determine the amounts and appropriate ap-

175. *Id.* at 299.
176. *Id.* at 296-97.
177. 786 F.2d 486 (2d Cir. 1986).
178. *Id.* at 491.
179. *Id.*
180. *Id.*
portionment of them between the client and his attorney were the result in \textit{Hale v. Harney}.\textsuperscript{181} The court stated that, “\textbf{[n]}either we nor the trial courts sit to serve as implements of financial torture and delay, to be applied to hapless parties at the pleasure of counsel.”\textsuperscript{182}

The Eighth Circuit has similarly indicated its displeasure with frivolous appeals,\textsuperscript{183} although it has exercised restraint in assessing penalties. In \textit{Boomer v. United States},\textsuperscript{184} the \textit{pro se} taxpayer appellant was ordered by the Eighth Circuit to pay double costs and five hundred dollars in damages.\textsuperscript{185} In \textit{Nagy v. Jostens, Inc.},\textsuperscript{186} the appellees were awarded $2,500 on the ground the appeal was frivolous.\textsuperscript{187}

\section*{Conclusion}

It is debatable whether Rule 11 will ever be viewed as “essential to the administration of justice,”\textsuperscript{188} or “absolutely essential” for the functioning of the judiciary.\textsuperscript{189} Nevertheless, it is acquiring increased judicial recognition as a powerful tool for control of court dockets. The potential impact of this Rule should not be underestimated. As illustrated by several of the cases examined in this Article, the Rule is potent.

The need for the judicial system to function effectively must be balanced against the right of the American advocate to forcefully, creatively challenge the law in an arena where new thoughts, ideas, and suggestions are, while not always welcomed, nevertheless protected from unwarranted suppression because of the threat of severe financial penalties.

As demonstrated by this Article, there is an immediate need for standards to assist the judiciary when applying Rule 11, as well as to provide effective notice to lawyers and \textit{pro se} litigants who are subject to it. Procedural due process questions should be given prelitigation discussion and resolution. Standards

\begin{thebibliography}{99}
\bibitem{181} 786 F.2d 688 (5th Cir. 1986).
\bibitem{182} \textit{Id.} at 692.
\bibitem{183} \textit{See} \textit{Nagy v. Jostens, Inc.}, Nos. 85-5237, 85-5266 (8th Cir. filed Mar. 31, 1986); \textit{Boomer v. United States}, 755 F.2d 696 (8th Cir. 1985).
\bibitem{184} 755 F.2d 696 (8th Cir. 1985).
\bibitem{185} \textit{Id.} at 697.
\bibitem{186} Nos. 85-5237, 85-5266 (8th Cir. filed Mar. 31, 1986).
\bibitem{187} \textit{Id.} at 4.
\bibitem{188} \textit{Michaelson v. United States}, 266 U.S. 42, 65 (1924).
\end{thebibliography}
should be established so that only in the rarest case would financial penalties or other sanctions be imposed without notice and an opportunity to be heard.\textsuperscript{190} Procedures such as those used in \textit{Link} should be discouraged.

Standards will promote uniformity of application of the Rule among the judiciary and afford both judges and litigants an opportunity to efficaciously evaluate them. Questions which could be handled through the establishment of standards range from the need for an adequate record for appeal and the detail required in a court’s findings, to the issue of whether “system costs” may be a legitimate consideration calculating the amount a litigant should be fined.

Statutes, ethical canons, and lawyering customs need examination in the context of Rule 11 if appropriate lawyering admonition proceedings within the setting of a free and open litigation system can be fully developed. Defining which costs may be considered and which fees may be included in arriving at an appropriate fine need examination. Should an errant attorney, for example, be required to satisfy the full range of excess costs when his or her conduct causes the other party to incur costs and fees which would not otherwise have been incurred including witness fees, printing, attorney fees, and the costs of the forum itself? Questions such as those raised in \textit{Eash v. Riggin Trucking Inc.},\textsuperscript{191} should be addressed before they occur. There the district court ordered a lawyer to pay the government the cost of impaneling a jury because the judge felt he had unjustifiably delayed settlement negotiations and caused unnecessary costs to be imposed on the system.\textsuperscript{192}

A fundamental philosophical issue integrally related to Rule 11 is whether the Rule is silently eroding the foundation underlying the American rule against allowing attorney fees for the winning party. This nation’s democratic system of dispute resolution was founded upon this concept.

Mature consideration and informed discussion from all relevant quarters should be encouraged so that a comprehensive and integrated series of standards surrounding Rule 11 may be

\begin{itemize}
\item \textsuperscript{190} \textit{Roadway Express}, 447 U.S. at 767. A court may not disbar an attorney without fair notice and an opportunity to be heard. \textit{Ex parte} Bradley, 74 U.S. (7 Wall.) 364, 375 (1868).
\item \textsuperscript{191} 757 F.2d 557 (3d Cir. 1985).
\item \textsuperscript{192} \textit{Id.} at 571-72.
\end{itemize}
established. Although local rules may not be used to effectuate basic procedural innovations, they can be effective in outlining and explaining the meaning of the "basic" rules. Thus, local rules are the most appropriate setting for Rule 11 guidelines and standards.

The judiciary has sharpened its sword with the amendments to Rule 11. Most believe that this is a commendable and responsible action; it was, if anything, too long delayed. Most also agree that citizens with legitimate disputes should not be made to wait a year while frivolous cases which should have never been placed into the system bog it down. Nevertheless, the sharpened sword must be carefully controlled so it will not cut into the basic fabric of our democratic system of dispute resolution. The time is now to develop standards to assure that the worst fears of the critics of Rule 11 are not realized.