

1993

Why Change Rule 11? Ramifications of the 1992 Amendment Proposal

James R. Simpson

Follow this and additional works at: <https://scholarlycommons.law.cwsl.edu/cwlr>

Recommended Citation

Simpson, James R. (1993) "Why Change Rule 11? Ramifications of the 1992 Amendment Proposal," *California Western Law Review*: Vol. 29 : No. 2 , Article 7.

Available at: <https://scholarlycommons.law.cwsl.edu/cwlr/vol29/iss2/7>

This Comment is brought to you for free and open access by CWSL Scholarly Commons. It has been accepted for inclusion in California Western Law Review by an authorized editor of CWSL Scholarly Commons. For more information, please contact alm@cwsl.edu.

WHY CHANGE RULE 11? RAMIFICATIONS OF THE 1992 AMENDMENT PROPOSAL

We are about to embark on yet another Rule 11 odyssey. From our past journey we anticipate a rocky road. Federal Rule of Civil Procedure 11 sanctions frivolous pleadings to deter baseless filings. Most attorneys have had some experience with Rule 11 and there is evidence that the benefits outweigh the harms.¹ However, a significant number of commentators disagree, and they have offered varying forms of change, ranging from outright abandonment to minor adjustments in sanction determination.² In reaction, the Advisory Committee for Judicial Rules, in 1990, solicited comments from interested lawyers, judges, and scholars regarding a possible amendment of Rule 11.³ The Advisory Committee's final recommendation significantly changes Rule 11.⁴ The proposal "broadens the scope of [the attorney's duty to conduct reasonable inquiry], but places greater constraints on the imposition of sanction. . . ."⁵ What will be the impact of this new Rule 11 on attorney conduct, and will it produce the results envisioned by the Rules Committee?⁶

This Note examines the 1992 proposal to amend Rule 11. Part I explains the history of the 1983 amendment and discusses its operation and intended goals. Part II discusses the perceived inadequacies of the 1983

1. Melissa L. Nelken, *The Impact of Federal Rule 11 on Lawyers and Judges in the Northern District of California*, 74 JUDICATURE 147, 150 (1990); see also Claude Stern, *Rule 11 in the Ninth Circuit, Report of the Ninth Circuit Rule 11 Study Committee* (1992).

2. For proposals that recommend abandoning or substantially changing Rule 11, see George Cochran, *Rule 11: The Road To Amendment*, 61 MISS. L.J. 5 (1991); John P. Frank, *Bench-Bar Amendment and Comment*, 61 MISS. L.J. 31 (1991); GREGORY J. JOSEPH, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE (Supp. 1992). For proposals that generally recommend a less radical change, see Stern, *supra* note 1; STEPHEN B. BURBANK, RULE 11 IN TRANSITION THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11 (1989). For a book that includes a complete list of law review articles on Rule 11, see GEORGENE M. VAIRO, RULE 11 SANCTIONS: CASE LAW PERSPECTIVES AND PREVENTIVE MEASURES (Supp. 1991). This Note primarily relies on the research of one course study conducted by Jerold S. Solovy for its citation to case law as it is a unique list of all leading Rule 11 opinions. See JEROLD S. SOLOVY ET AL., SANCTIONS UNDER FEDERAL RULE OF CIVIL PROCEDURE 11, ALI-ABA, Course of study material (1992).

3. In July 1990, with approval of the Standing Committee, the Committee issued a call for written comments on Rule 11. See 131 F.R.D. 344, 344.

4. Text of Proposed amendment to Federal Rule of Civil Procedure 11 [hereinafter 1992 Proposal]. Refer to Appendix. (The 1992 Proposal and Advisory Committee notes are on file at California Western School of Law, Law Review). This document was directly obtained from the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Supreme Court Building, Washington, DC 20544.

5. FED. R. CIV. P. 11, Advisory Committee notes (Proposed Amendment 1992) [hereinafter 1992 Proposal, Advisory Committee notes].

6. On September 22, 1992, the Judicial Conference, chaired by Chief Justice William H. Rehnquist, approved the proposed changes which now will be considered by the Supreme Court and Congress. If approved, the proposal could become effective as early as Dec. 1, 1993. See *The Judicial Conference Would Alter Rule 11*, THE NAT'L L.J., Oct. 5, 1992, at 5.

amendment which led to the recent proposal. Part III analyzes each recommended change to the rule, its effect on attorney conduct, and potential problems the proposal may present. Part IV considers an omission from these changes.

I. HISTORY OF RULE 11

Prior to the 1983 amendment, an attorney's signature on a pleading represented a "good faith" belief it was well founded in fact and law.⁷ The Rule gave the court the power to strike pleadings and discipline parties for willful violation of the Rule such as submitting pleadings to harass or delay.⁸ Due to the difficulty in proving subjective bad faith, the rule was rarely invoked during its first 45 years prior to the 1983 amendment.⁹

In the early 1980s, concern arose in response to a perceived caseload crisis.¹⁰ Debate as to the cause of this crisis resulted in the conclusion that the federal courts were "an arena for abusive litigation tactics."¹¹ Dissatisfied with the bar, the Chief Justice even alleged "lawyer incompetence."¹² The pre-1983 form of the rule did not provide enough "teeth" to compel attorney compliance.

In response, Congress amended Rule 11.¹³ The 1983 Advisory Committee wanted to curb abusive litigation tactics and reduce costly, unnecessary litigation.¹⁴ The new rule was "more stringent than the original good-faith formula . . . [creating] a greater range of circumstances [that will] trigger its violation."¹⁵ The Advisory Committee thought this would streamline litigation by decreasing abusive tactics and frivolous claims.¹⁶

The 1983 Amendment's force lay in two major substantive changes. The first change created an objective certification standard. The Committee

7. Melissa L. Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle between Compensation and Punishment*, 74 GEO. L.J. 1313, 1315 (1986) (Attorney's signature represented that there was "'good ground to support [the pleadings]' . . .").

8. Proposed Amendments to the Federal Rules of Civil Procedure, 97 F.R.D. 165, 197 ("For a willful violation of this rule an attorney may be subjected to appropriate disciplinary action.").

9. Michael Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1, 34-35 (1976).

10. Cochran, *supra* note 2, at 6 n.4 (citing Ronald D. Rotunda, *Lawyers & Professionalism: A Commentary on the Report of the American Bar Association Commission of Professionalism*, 18 LOY. U. CHI. L.J. 1149, 1159 (1987)).

11. Cochran, *supra* note 2, at 6.

12. *Id.* at n.5. (citing C. WOLFRAM, *MODERN LEGAL ETHICS* 185 n.2 (1986)).

13. Federal Rules of Civil Procedure, 97 F.R.D. 165, 167-68 (1983); *see* Appendix.

14. FED. R. CIV. P. 11, Advisory Committee notes.

15. *Id.*

16. *Id.* ("Greater attention by the district courts to pleading and motion abuses and the imposition of sanctions when appropriate, should discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses").

changed the subjective good-faith requirement to an objective standard that required a pleading to be filed only “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. . . .”¹⁷ The Committee deleted the willful clause and inserted a higher standard to prohibit filings for an “improper purpose.”¹⁸

The second change made sanctions mandatory, arising either by a party’s motion or *sua sponte*.¹⁹ Every violation, no matter how minor, had to be sanctioned. This limitation on the court’s discretionary power served three purposes: to discourage inconsistent rulings; to avoid sympathetic determinations; and to reward a movant’s efforts.²⁰ Additionally, the rule dictated that sanctions, if monetary, should be based on reasonable expenses, including “reasonable attorney’s fees.”²¹ The judge should fashion any sanction, to give effect to the rule’s deterrent purpose²² and to account for each party’s unique position and relative liability.²³

The purpose of the 1983 amendment was to make an attorney “stop and think” before filing a pleading.²⁴ The goal was to deter frivolous suits and decrease costly, unnecessary litigation. The Rule gave powerful tools to the bench and bar to achieve those goals. It is interesting to note that three Supreme Court Justices dissented from the 1983 amendment, not because of

17. FED. R. CIV. P. 11; *see also* ABA Standards and Guidelines, 121 F.D.R. 101, 121-22.

In determining whether a pleading, motion, or other paper is warranted by a good argument for the extension, modification, or reversal of existing law, the court considers all relevant circumstances, including:

- a. whether the signer has offered arguments in support of the extension, modification or reversal of existing law;
- b. the legal sufficiency and plausibility of those arguments;
- c. the creativity, novelty or innovativeness of those arguments;
- d. any other objective indication that the signer sought the extension, modification or reversal of existing law;
- e. the candor and adequacy of the discussion of existing law, including adverse precedent;
- f. the clarity or ambiguity of existing law;
- g. the nature of the case, including whether constitutional doctrines are implicated; and
- h. the danger of chilling either (i) the enthusiasm or creativity of counsel or (ii) reasonable efforts to extend, modify, or reverse existing law.

Id.

18. FED. R. CIV. P. 11, Advisory Committee notes.

19. *Id.*

20. *Id.* *See also* Nelken, *supra* note 7, at 1321-22.

21. FED. R. CIV. P. 11.

22. *See Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120 (1989); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990); *Business Guides, Inc. v. Chromatic Communication Enterprises, Inc.*, 498 U.S. 533 (1991).

23. FED. R. CIV. P. 11, Advisory Committee notes.

24. *Id.*

its potential impact but because they believed the proposed rule fell short of the changes needed to accomplish the reforms in civil litigation.²⁵

The 1983 amendment has had an impact on attorney conduct, although it is difficult to quantify that impact because there is little empirical data.²⁶ However, some generalizations can be made. Rule 11 has forced lawyers to "stop and think" before filing a pleading.²⁷ One study concluded that "the rule has had a significant deterrent effect and . . . lawyers have changed the way they practice as a result of the amendment[] to Rule 11."²⁸ It has changed attorney behavior in their pre-filing factual and legal inquiries, their review of papers prepared by other attorneys and their pre-filing documentation activity.²⁹ While this outcome is significant, many judges still view Rule 11 as only the fifth most effective method to manage frivolous suits.³⁰ Additionally, many attorneys approach the Rule pragmatically, only increasing their pre-filing inquiry when practicing before a judge with a reputation for strict Rule 11 enforcement.³¹ Thus, the Rule has achieved some progress, but it is not an overwhelming success.

The Rule's modest success has not come without detrimental side-effects. Its use has arguably produced a chilling effect on creative arguments, created destructive satellite litigation, increased incivility among members of the bar, and has interfered with the attorney-client relationship.

A. The Chilling Effect

Some commentators believe that a chilling effect is produced by judicial intolerance for novel theories,³² and inconsistent application of the Rule.³³

25. Amendments to the Federal Rules of Civil Procedure, 446 U.S. 997, 998 (1980) (Powell, J., dissenting, joined by Justice Stewart and Justice Rehnquist).

26. There have been three recent studies. The American Judicature Society study focused on attorney experience in the Fifth, Seventh, and Ninth Circuits; the Federal Judicial Center study focused on federal district court judges' experience around the country, see FJC Directions #2, *Special Issue on Rule 11*, Nov. 1991; and Nelkin, *supra* note 1; additionally, the Ninth Circuit published a report that combines all three prior studies, see Stern, *supra* note 1.

27. H. Kritzer, et al., *Rule 11: Moving Beyond The Cosmic Anecdote*, 75 JUDICATURE 269, 269 (1992). "The Advisory Committee on Civil Rules notes that the goal of the 1983 version of Rule 11 is to get litigants to 'stop and think' . . . The data confirms that Rule 11 has had some effect in this regard." *Id.*

28. Nelken, *supra* note 1, at 151.

29. Stern, *supra* note 1, at 25-26.

30. *Id.* at 27. "The judges ranked Rule 11's effectiveness behind prompt rulings on 12(b) motions; prompt rulings on summary judgment motions; Rule 16 conferences; and informal admonitions." *Id.*

31. Nelken, *supra* note 1, at 149.

32. BURBANK, *supra* note 2. ("In even a close case, we think it extremely unlikely that a judge, who has already decided that the law is not as a lawyer argued it, will also decide that the loser's position was warranted by existing law." (citing *Golden Eagle Distributing Corp. v. Borroughs Corp.*, 801 F.2d 1531, 1540 (9th Cir. 1986)).)

The Advisory Committee addressed judicial intolerance in the 1983 Rule. They attempted to dispel concern that the new rule would chill creative advocacy declaring that “[this] rule is not intended to chill an attorney’s enthusiasm or creativity in pursuing factual or legal theories, [and courts are to refrain] from using the wisdom of hindsight.”³⁴ Consistent with this recommendation, a Judge of the Fifth Circuit, recently advised Judges “[t]o put up with a certain amount of borderline, or even bad, lawyering.”³⁵ While the Rule is intended to discourage frivolous pleadings, it becomes destructive when it deters meritorious claims. The problem of course, is in consistently distinguishing between the two.

Inconsistent application of the Rule also chills creative arguments.³⁶ Inconsistent application has been the hallmark of Rule 11 activity.³⁷ While the Rule applies an objective standard to judge the reasonableness of a pleading, reasonableness is determined through a judge’s subjective beliefs.³⁸ A study that presented 292 judges with ten hypothetical Rule 11 situations found that almost half of the judges would have awarded sanctions while the other half would have found merit.³⁹ Such a remarkable conflict in application obviously causes attorneys to file only safe claims to avoid the chance of sanctions. Additionally, attorneys may use Rule 11’s inconsistent application as another tool to prevail on the merits. An attorney may threaten opposing counsel with sanctions to induce the latter to dismiss meritorious claims.⁴⁰ Due to judicial inconsistency, the opposing counsel may yield to this threat out of fear of sanctions.⁴¹

The empirical data neither confirms nor refutes the chilling effect phenomena. Twenty-seven percent of the attorneys in the Fifth, Seventh, and Ninth Circuits have altered their pre-filing inquiry due to possible sanc-

33. See, e.g., Mark S. Stein, *Rule 11 in the Real World: How the Dynamics of Litigation Defeat the Purpose of Imposing Attorney Fee Sanctions for the Assertion of Frivolous Legal Arguments*, 132 F.R.D. 309, 316 (1990); Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1941 (1989); William W. Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013, 1016 (1988).

34. FED. R. CIV. PROC. 11, Advisory Committee notes.

35. Sam D. Johnson et al., *The Least Severe Sanction Adequate: Reversing the Trend in Rule 11 Sanctions*, 61 MISS. L.J. 39, 54 (1991).

36. See *supra* note 33.

37. “The study within the Ninth Circuit found 21.4% of judges had not imposed sanction at all in the past year; 25% imposed sanctions once or twice during this time period, but approximately 26% imposed sanctions five or more times.” Stern, *supra* note 1, at 10; “Our census results indicate that Rule 11 is being applied unevenly.” CARL B. HILLIARD & MICHAEL E. CHISHOLM, REPORT TO THE FEDERAL BAR ASSOCIATION RULE 11 SURVEY 12 (1992).

38. See e.g., William G. Swindal, *Frivolity in Court: New Rule 11*, 13 LITIG. 3, 4 (1987).

39. Vairo, *supra* note 1, at 1-22. (citing S. Kasin, *An Empirical Study of Rule 11 Sanctions* 38 (Fed. Judicial Center 1985)). A recent survey found that judges were divided within the margins of 40% to 60% over four hypothetical questions. Hilliard & Chisholm, *supra* note 37, at 12.

40. Stein, *supra* note 33, at 312.

41. *Id.*

tions.⁴² Of this group, twenty-seven percent of the Ninth Circuit did not raise a particular claim or defense.⁴³ The study does not delineate whether this result represents the exclusion of frivolous papers or the chilling of creative argumentation.

B. *Satellite Litigation*

Rule 11 has created substantial satellite litigation that is dedicated to the resolution of conflicts that are ancillary to the legal disputes. Its activity has "spawned a body of substantive law."⁴⁴ Over 3,000 Rule 11 cases currently appear on Lexis, and this figure underestimates the actual activity.⁴⁵ In response to this activity, a Shepard's Rule 11 service has emerged. The reported opinions typically describe a costly, time-consuming appellate battle that lends credence to the theory that Rule 11 has created unjustifiably destructive satellite litigation.⁴⁶ This increased satellite litigation frustrates a key objective of the Rule, to reduce "cost and delay in the Courts."⁴⁷

Some commentators, however, claim these cases are necessary for circuit development of precedent dealing with a new rule.⁴⁸ This "shake-out" period was expected to last five years, ending in 1988.⁴⁹ Even accepting these predictions, given the potential for high awards⁵⁰ in addition

42. Stern, *supra* note 1, at 25.

43. *Id.*

44. Jeffery Neal Cole, *Rule 11 Now*, LITIG., Spring 1991, at 10, 10.

45. See FJC Directions #2, *Special Issue on Rule 11*, Nov. 1991, at 7 (showing that over 1,000 cases involved Rule 11 in five districts over a three year period, while only 66 opinions were published during a six year period including the studied period).

46. Prime examples of this type of satellite activity are the *Eastway I* and *Eastway II* decisions. This single Rule 11 dispute involved two trips to the Second Circuit where there was considerable judicial disagreement, finally resolving the issue with a \$10,000 award. *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243 (2d Cir. 1985) (*Eastway I*); and *Eastway Constr. Corp. v. City of New York*, 821 F.2d 121 (2d Cir. 1987) (*Eastway II*).

47. *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1540 (9th Cir. 1986).

48. T.E. WILLGING, *THE RULE 11 SANCTIONING PROCESS* 108 (1988).

49. *Id.*

50. GREGORY J. JOSEPH, *SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE* 387 (1990) (citing *Jennings v. Joshua Indep. School Dist.*, 869 F.2d 870 (5th Cir. 1989), *cert. denied*, 496 U.S. 935 (\$84,113.01 sanction award vacated and remanded; Rule 11 violation affirmed), *aff'd in part, vacated in part*, 877 F.2d 313 (5th Cir. 1989); *Smith Int'l, Inc. v. Texas Commerce Bank*, 844 F.2d 1193 (5th Cir. 1988) (\$230,000 sanction award and remanded for reconsideration); *Flip Side Prods., Inc. v. Jam Prods., Ltd.*, 843 F.2d 1024 (7th Cir. 1988) (\$79,870 sanction award affirmed in part, reversed in part), *cert. denied*, 488 U.S. 909 (1988); *Unioil, Inc. v. E.F. Hutton & Co.*, 809 F.2d 548 (9th Cir. 1986) (\$294,141.10 sanction award affirmed), *cert. denied sub nom. Barton v. E. F. Hutton & Co.*, 484 U.S. 822 (1987), *cert. denied sub nom. Alioto & Alioto v. E.F. Hutton & Co.*, 484 U.S. 823 (1987); *In re Yagman*, 796 F.2d 1165 (9th Cir. 1986) (\$250,000 sanction award reversed), *cert. denied sub nom. Real v. Yagman*, 484 U.S. 963 (1987)).

to the inconsistent application of the Rule,⁵¹ a significant decrease in satellite litigation is unlikely.⁵²

The 1983 Committee recognized the potential cost, in terms of extra pleadings and hearings, associated with Rule 11 litigation. To mitigate the cost, they recommended sanction proceedings be limited to the record already established in the case.⁵³ This would reduce the time required for both the court and the attorneys to resolve a Rule 11 dispute. However, in practice, due to the impact sanctions have on the violator, judges may feel compelled to use more reliable means of determining a violation of Rule 11 than examining the record.

There is little empirical evidence about the extent of satellite litigation.⁵⁴ However, that Rule 11 has assumed a litigation life of its own leads to the conclusion that satellite litigation is a significant problem.

C. Incivility Problem Among the Bar

Rule 11 has contributed to an increasing problem of incivility within the bar. Incivility is defined as "irregular; improper; out of the due course of law."⁵⁵ One study concluded that "lack of civility can escalate . . . litigation cost."⁵⁶ A senior associate attorney stated, "When you seek Rule 11 sanctions against another lawyer, it's sort of a declaration of war."⁵⁷ Each motion for sanctions reflects on the professionalism of the opposing attorney. Rule 11 provides a valuable tool to every attorney who vigorously represents his client. A threat of sanctions can persuade an opposing attorney to dismiss a complaint which is based on a novel but meritorious position.⁵⁸ The threatening attorney must not only consider the costs of threatening the opposing attorney. The primary risk in threatening sanctions is it tends to poison the relationship with opposing counsel and be viewed as cutthroat.⁵⁹ This factor exacerbates the growing incivility problem of the bar. A recent

51. See *supra* note 37.

52. Cf. Stein, *supra* note 40. (Author argues that a lawyer's decision whether to seek sanctions is determined by "the likelihood of success, the value of success and the costs and risks of invoking Rule 11"). *Id.* at 312.

53. FED. R. CIV. P. 11, Advisory Committee notes.

54. Stern, *supra* note 1, at 5 ("more work needs to be done in assessing the extent of satellite litigation.").

55. BLACK'S LAW DICTIONARY 762 (6th ed. 1990) (definition of incivility as it relates to its Latin root *incivile*).

56. MARVIN E. ASPEN, FINAL REPORT OF THE COMMITTEE ON CIVILITY OF THE SEVENTH FEDERAL JUDICIAL CIRCUIT 6 (1992).

57. Paul D. Freeman, *The Rule 11 Ruckus: Sanctions Have Changed Federal Practice—and Bitterly Divided the Bar*, 11 MAY CAL. LAW. 17, 20 (1991).

58. Stein, *supra* note 33 at 312. "In his effort to prevail on the merits, the responding lawyer will be led to make different use of Rule 11 than he would were he motivated by the purposes that motivated the drafter[s] of the Rule. The responding lawyer will use Rule 11 to deter what he most needs to deter: not frivolous arguments, but dangerous arguments." *Id.*

59. *Id.*

survey found that seventy nine percent of the attorneys in the Seventh Circuit feel an incivility problem exists.⁶⁰ “[I]ncreased tensions among the parties . . . mak[es] it more difficult to conduct the litigation in a rational manner and reach accommodation.”⁶¹ As long as the Rule provides a means to victory, the detrimental side effect of increased incivility may not deter many attorneys from such cutthroat activity, and civility among the bar will continue to deteriorate.

D. The Attorney-Client Relationship

The Rule is structured in a way that inherently intrudes on the attorney-client relationship. Rule 11 requires a reasonable pre-filing inquiry into the facts and law and mandates sanctioning of “the person who signed it, a represented party [if they signed], or both.”⁶² To analyze the reasonableness of the attorney’s pre-filing activity, the court must pry into the counsel’s conduct while preparing the paper. This conduct includes client communications and other involvement which falls under the attorney-client privilege. Also, the threat of sanctions on both the represented party and the attorney may place their interests at odds. This is especially true in sanction proceedings based on inadequate factual inquiry. “Because a lawyer may reveal client confidences to defend against charges of wrongdoing, the privilege will often cease to exist.”⁶³ Indeed, some courts have required separate representation for the party and counsel.⁶⁴

II. THE PURPOSE OF THE 1992 PROPOSAL

As discussed above, the 1983 amendment had positive and negative impacts. While some commentators would like the Rule to be severely limited, the general consensus is the benefits have outweighed the costs.⁶⁵ The 1992 proposal is intended to maintain the positive effect of increased pre-filing investigation while limiting the Rule’s negative effects.

Two characteristics of the current formulation, inconsistent application of the Rule and large monetary awards, seem to intensify and encourage each of the negative side-effects. Consequently, any attempt to reform Rule 11 must focus on reforming these characteristics. For example, inconsistent application of the Rule causes attorneys to shy away from taking creative positions for fear of sanctions. Large monetary awards lure opposing

60. Mark Hansen, *Incivility a Problem, Survey Says*, A.B.A. J., July 1991, at 22.

61. William W. Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013, 1018 (1988).

62. FED. R. CIV. P. 11, Advisory Committee notes; *see also* *White v. American Airlines*, 915 F.2d 1414 (10th Cir. 1990).

63. Cole, *supra* note 44, at 51.

64. *Calloway v. Marvel Entertainment Group*, 854 F.2d 1452 (2d Cir. 1988), *rev'd in part on other grounds*, 493 U.S. 120 (1989).

65. *See supra* note 1.

attorneys into filing a Rule 11 action as a cost shifting possibility. And both characteristics have contributed to the recent decrease in civility in the bar and increased the potential for intrusion into the attorney-client relationship. In the end, these negative characteristics may not be controllable, nevertheless any far-reaching reform of Rule 11 must attempt to contain both of these unfortunate effects.

The drafters of the 1992 proposal learned from the last decade and have provided a version that attempts to reduce inconsistent application and large monetary sanctions. This "should reduce the number of motions for sanctions presented to the court."⁶⁶ "The revision, in part, expands the responsibilities of litigants to the court, while providing greater constraint and flexibility in dealing with infractions of the rule."⁶⁷

III. 1992 PROPOSAL

A. Procedural Requirements

Obviously, proceedings under the current Rule must satisfy due process requirements.⁶⁸ Without notice and an opportunity to be heard, sanctions are not sustained.⁶⁹ Current debate centers on what constitutes minimal standards for notice and an opportunity to be heard. The standard necessary to satisfy notice differs depending on the conduct to be sanctioned. Many courts treat proceedings involving factually frivolous papers differently from those involving legally frivolous or dilatory papers.⁷⁰ Regarding the standards necessary for an opportunity to be heard, the majority of courts agree that this right does not include oral hearings.⁷¹ The Advisory Committee recommends "the court must to the extent possible limit the scope of sanction proceedings to the record."⁷²

The proposal explicitly adopts due process standards. The proposal incorporates two changes that provide notice: a safe harbor period which

66. 1992 Proposal, Advisory Committee notes.

67. *Id.*

68. FED. R. CIV. P. 11, Advisory Committee notes. "The procedure must . . . comport with due process requirements . . . [and] the format to be followed should depend on the circumstances of the situation and the severity of the sanction under consideration." *Id.*; see also *Henderson v. Department of Public Safety*, 901 F.2d 1288 (5th Cir. 1990); *G.J.B. & Assoc., Inc. v. Singleton*, 913 F. 2d 824, 830 (10th Cir. 1990).

69. *Securities Industry Assn. v. Clarke*, 898 F.2d 318 (2d Cir. 1990).

70. Many courts held that Rule 11 itself provided notice of proceedings involving factually frivolous pleadings. *Davis v. Carl*, 906 F.2d 533 (11th Cir. 1990). *Contra Tom Growney Equipment Co. v. Shelley Development, Inc.*, 834 F.2d 833 (9th Cir. 1987) & *Media Duplication Servs. v. HDG Software*, 928 F.2d 1228, 1238 (1st Cir. 1991). However, courts require specific notice, including reasons, when dealing with potential dilatory or legally frivolous paper. *Spiller v. Ella Smithers Geriatric Center*, 919 F.2d 339, 346-47 (5th Cir. 1990); *McGregor v. Board of Commissioners of Palm Beach County*, 956 F.2d 1017(11th Cir. 1992).

71. *E.g.*, *Hudson v. Moore Business Forms*, 898 F.2d 684 (9th Cir. 1990).

72. FED. R. CIV. P. 11, Advisory Committee notes.

grants a potential violator time to change or withdraw from a frivolous position without fear of sanctions,⁷³ and a requirement that a show cause order be issued to a potential violator prior to a *sua sponte* imposition of sanctions.⁷⁴ Also, the proposal maintains the current minimum standard of an opportunity to be heard, either by written submission or oral argument at the court's discretion.⁷⁵ The Rule further mandates that a party seeking sanctions make a request for sanctions in a separate motion and not by simply including it as an addendum to other motions.⁷⁶

The safe harbor provision prevents a movant from filing a motion for sanctions with the court until 21 days after the motion has been served on the opposing party.⁷⁷ During this period, if the opposing party corrects his position the motion should not be filed.⁷⁸ When appropriate, an attorney should encourage, in writing, opposing counsel to investigate possible factually or legally infirm positions using the threat of Rule 11 sanctions.⁷⁹ The use of threats, as envisioned by the safe harbor provision, codifies common and recommended practice.⁸⁰ The potential violator can dispense with the threat "by acknowledging candidly that [he or she] does not currently have evidence to support a specified allegation."⁸¹

The safe harbor provision has been severely criticized because it will add "enormously to the cost of litigation . . . [and] accentuate[] the deterioration of professional relations."⁸² Some critics feel this correspondence will become a case of "'you did it' and 'no I didn't'."⁸³ The fact that attorneys currently threaten the use of sanctions even without the safe harbor requirement⁸⁴ suggests that a safe harbor provision would not create this destructive correspondence. The safe harbor provision only codifies current

73. 1992 Proposal at (C)(1)(A).

74. 1992 Proposal at (C)(1)(B).

75. 1992 Proposal, Advisory Committee notes ("Whether the matter should be decided solely on the basis of written submissions or should be scheduled for oral argument (or, indeed, for evidentiary presentation) will depend on the circumstances.").

76. 1992 Proposal (C)(1)(A).

77. 1992 Proposal, Advisory Committee notes. "The motion for sanction is not, however, to be filed until at least 21 days (or such other periods as the court may set) after being served." *Id.*

78. 1992 Proposal, Advisory Committee notes.

79. *Cole*, *supra* note 33, at 20. *See also* Stein, *supra* note 33, at 312. ("[t]hreats of sanctions are a significant element in litigation practice . . . Ideally, frivolous papers are met with the threat of sanctions. The frivolous paper is then withdrawn, obviating satellite litigation over sanctions and conserving litigation resources").

80. *Donaldson v. Clark*, 819 F.2d 1551 (11th Cir. 1987) (en banc.); *Fred A. Smith Lumber Co. v. Edidin*, 845 F.2d 750 (7th Cir. 1988); *Walter v. Fiorenzo*, 840 F.2d 427 (7th Cir. 1988).

81. 1992 Proposal, Advisory Committee notes.

82. Frank, *supra* note 2, at 32.

83. *Id.*

84. *See supra* note 79.

attorney conduct, while providing the salutary effect of ridding the court of baseless positions.⁸⁵

The Committee proposal requires the court to serve a "show cause" order on the potential violator prior to a *sua sponte* imposition of sanctions.⁸⁶ The show cause order will describe the conduct alleged to violate the Rule⁸⁷ and provide notice and an opportunity to be heard.⁸⁸ Sanctions will not be imposed if the show cause order is issued after a voluntary dismissal or a settlement agreement.⁸⁹ The drafters of the proposal want to avoid affecting settlement by subsequently hitting parties with sanctions.⁹⁰

While *sua sponte* orders to show cause account for only about 14.5% of the total Rule 11 activity,⁹¹ such orders are most often based on legal frivolousness. "In even a close case, we think it extremely unlikely that a judge, who has already decided that the law is not as a lawyer argued it, will also decide that the loser's position was warranted by existing law."⁹² As discussed earlier, there is fear that Rule 11 has chilled creative advocacy. The proposal recognizes this fear, and thus attempts to diminish the chance that Rule 11 will have this effect in the future.⁹³ It introduces a new standard of "nonfrivolous[ness]" to judge creative arguments.⁹⁴ This creates an "objective standard intended to eliminate any 'empty-headed pure-heart' justification for patently frivolous arguments."⁹⁵ Frivolousness has been defined as the absence of any basis for the proffered argument.⁹⁶ With a lower standard for frivolousness, creative legal arguments should be less susceptible to sanctions. Practically speaking, to avoid potential sanctions, when representing a novel or creative position, the attorney should be candid

85. JOSEPH, *supra* note 2, at 18.

86. 1992 Proposal (C)(1)(B). See also *City of El Paso v. City of Socorro*, 917 F.2d 7 (5th Cir. 1990); *Maisonville v. F2 America, Inc.*, 902 F.2d 746 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 674 (1991).

87. *Id.*

88. Solovy, *supra* note 2, at 74. The old Rule method of imposing *sua sponte* sanctions had the potential to conflict with due process requirements. Often a *sua sponte* decision is made prior to the violator's notice that sanctions are under consideration, and before the violator is provided with an opportunity to be heard. Thus some courts reversed *sua sponte* sanctions conducted without notice or opportunity to be heard. *G.J.B. & Assocs., Inc. v. Singleton*, 913 F.2d 824, 830-31 (10th Cir. 1990); *Sanko S.S. Co., Ltd. v. Galin*, 835 F.2d 51, 53 (2d Cir. 1987). *Id.* at 75.

89. 1992 Proposal Advisory Committee notes.

90. *Id.*

91. Vairo, *supra* note 2, at 1-26. The 14.5% figure was computed by dividing the Sua Sponte Rule orders (67) by the Total Rule 11 motions/*sua sponte* orders (1264).

92. BURBANK, *supra* note 2, at 21.

93. JOSEPH, *supra* note 2, at 22.

94. Proposal (B)(2).

95. 1992 Proposal Advisory Committee notes ("[T]he extent to which a litigant has researched the issues and found some support for its theories even in minority opinions, in law review articles, or through consultation with other attorneys should . . . be taken into account. . .").

96. JOSEPH, *supra* note 2, at 23; see also Swindal, *supra* note 38, at 4.

in recognizing the contrary authorities and be clear that he is seeking a modification of existing law.⁹⁷

The proposal maintains the current standard for an opportunity to be heard by retaining the court's discretion to determine when an evidentiary hearing is necessary. While the Rule states only that an evidentiary hearing's appropriateness "will depend on the circumstances,"⁹⁸ courts have recognized certain situations in which a hearing may be proper: (1) When the sanction is based on the improper purpose of the paper;⁹⁹ (2) when the sanctioning judge does not have adequate familiarity with the case because he did not participate in the underlying proceeding;¹⁰⁰ (3) when the violator alleges inability to pay the sanction;¹⁰¹ (4) when a large monetary sanction is involved;¹⁰² and, (5) when the court must resolve factually disputed areas.¹⁰³

B. Appellate Review

Until the *Cooter & Gell v. Hartmarx Corp.*¹⁰⁴ decision, circuits applied differing standards of review in considering Rule 11 decisions. That case required federal appellate courts to apply an abuse of discretion standard in reviewing the decisions of district courts.¹⁰⁵

Additionally, the current Rule does not require the district court provide findings as to why it found the pleading, or motion frivolous. However,

97. Cole, *supra* note 44, at 21. See 1992 Proposal Advisory Committee notes ("[A] contention [that is identified as an argument for change of law] should be viewed with greater tolerance under the rule"). See also *Beeman v. Fiester*, 852 F.2d 206, 212 (7th Cir. 1988); *Szabo Food Service, Inc. v. Canteen Corp.*, 823 F.2d 1073 (7th Cir. 1987), *cert. dismissed*, 485 U.S. 901 (1988).

98. 1992 Proposal, Advisory Committee notes.

99. Solovy, *supra* note 2, at 75. (citing *Brown v. National Bd. of Medical Examiners*, 800 F.2d 168, 173 (7th Cir. 1986); *Rodgers v. Lincoln Towing Serv.*, 771 F.2d 194, 206 (7th Cir. 1985); *INVST Fin. Group v. Chem-Nuclear Sys.*, 815 F.2d 391, 405 (6th Cir. 1987), *cert. denied*, 484 U.S. 927 (1987). *But see In re Kunstler*, 914 F.2d 505, 521 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1607 (1991); *O'Neil v. Retirement Plan for Salaried Employees of RKO General, Inc.*, 1992 U.S. Dist. LEXIS 237 (S.D.N.Y. 1992)).

100. Solovy, *supra* note 2, at 75 (citing *Donaldson v. Clark*, 819 F.2d 1551, 1561 (11th Cir. 1987); *Oliveri v. Thompson*, 803 F.2d 1265, 1280 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987)).

101. Solovy, *supra* note 2, at 75 (citing *Jones v. Pittsburgh Nat'l Corp.*, 899 F.2d 1350, 1359 (3d Cir. 1990); *McLaughlin v. Bradlee*, 803 F.2d 1197, 1206 (D.C. Cir. 1986)).

102. *Id.* (citing *In re Kunstler*, 914 F.2d 505, 521-22).

103. *Id.* at 76. (citing *Donaldson v. Clark*, 819 F.2d 1551, 1561 (11th Cir. 1987); *Media Duplication Services, Ltd. v. HDG Software, Inc.*, 928 F.2d 1228, 1238 (1st Cir. 1991)).

104. 110 S. Ct. 2447 (1990).

105. *Id.*

where the reasons for the district court's decision are not obvious, many circuits require findings to provide an adequate record for appellate review.¹⁰⁶

The proposal codifies an abuse of discretion standard of review.¹⁰⁷ In approving the language of *Cooter & Gell*, the drafters provided that if sanctions are based on an erroneous view of the law, or a clearly erroneous assessment of the evidence, the district court has abused its discretion.¹⁰⁸ This recognizes the potential problem with an excessively deferential standard of review.¹⁰⁹

Unlike the current Rule, the proposal mandates findings in all proceedings resulting in sanctions, monetary or non-monetary. "The court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed."¹¹⁰ Some have concluded that findings would have the salutary effect of providing guidance to attorneys.¹¹¹

For general and specific deterrence, attorneys must know what conduct violated the rule so that they can conform their conduct.¹¹² However, some have criticized this requirement as conflicting with the goal of efficient court practice.¹¹³ This procedure would impose the burden on district courts of making specific findings and conclusions in every Rule 11 case. When the justification for the Rule 11 violation is readily discernible, there is no need to require such an inefficient practice.¹¹⁴

106. The Fifth and Seventh Circuits thoroughly analyzed a findings requirement. *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1084 (7th Cir. 1987), *cert. dismissed*, 485 U.S. 901 (1988); *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866 (5th Cir. 1988). The 2nd and 4th Circuits have held that findings are required if sanctions are based on Rule 11. *Sanko S.S. Co. Ltd. v. Galin*, 835 F.2d 51, 53 (2d Cir. 1987); *Straitwell v. National Steel Corp.*, 869 F.2d 248, 252-53 (4th Cir. 1989). However, in *Miltier v. Beorn*, 896 F.2d 848, 855 (4th Cir. 1990), the court suggested that findings may not be required in certain circumstances.

107. 1992 Proposal, Advisory Committee notes.

108. *Id.*

109. *Cf.* Johnson, *supra* note 35. "In approving the language from *Cooter & Gell*, the Advisory Committee recognized that the imposition of sanctions cannot be left to the unfettered discretion of the district court. To enforce the "least severe sanction adequate" doctrine, the appellate court must vigorously review the district court findings." *Id.* at 51 n.4.

110. 1992 Proposal (B)(2)(3).

111. BURBANK, *supra* note 2, at 43-44.

112. *Id.*

113. *Yancey v. Carroll County*, 674 F. Supp. 572, 575 (E.D. Ky. 1987); *Storage Technology Partners II v. Storage Technology Corp.*, 117 F.R.D. 675, 678 (D. Colo. 1987); *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d at 883. *But see* Johnson, *supra* note 35, at 52. (This author advocates that a more specific standard is necessary, one that specifies: (1) what pleading, motion, or other paper is in violation of Rule 11; (2) why it is in violation; (3) what factors the court considered in choosing an appropriate sanction; (4) what sanctions, if any, were considered and rejected; (5) why the court believes that the sanction imposed is the least severe sanction necessary to deter similar misconduct).

114. *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 883 (5th Cir. 1988).

C. *Continuing Duty*

The current Rule does not impose a continuing duty on an attorney; that is, the attorney does not have to amend or withdraw a pleading if the pleading is later found to be baseless. For example, an attorney files a belief pleading and later it is found to have no merit; the attorney is not required to re-amend his pleading. The Rule applies a bright-line test which requires that only at the time of signing the pleading need the attorney satisfy the certification standard. Thus, in the previous example, if the attorney had conducted reasonable inquiry before filing the belief pleading, he is immune from sanctions regardless of whether the pleading is later known by him to be baseless. The majority of courts agree that there is no continuing duty after the bright-line test is satisfied.¹¹⁵ However, in practice, the bright line test operates as a continuing duty since many cases require multiple pleadings.¹¹⁶

Similarly, the proposal does not impose a continuing duty. However, the proposal, adopts a somewhat different approach. Similar to current Rule 11, the proposal requires a court to evaluate a pleading when submitted to the court. However, the proposal expands the term "submit." In addition to the recognized meaning of "submit," the proposal defines it to include advocating the position as well. Therefore, the new proposal would not only continue to apply the Rule 11 standard to a subsequent filing, but it would treat oral support for an unfounded position as sanctionable.¹¹⁷

An earlier proposal¹¹⁸ submitted by the Advisory Committee, received severe criticism because the proposed rule forced a party to re-plead or face sanctions if the party later finds his position baseless.¹¹⁹ This requirement was criticized as an inefficient "retroactive exercise in perfecting pleadings."¹²⁰ Recognizing this criticism, the proposal does not require re-pleading but focuses on punishing an active continuation of an untenable position. Thus, if the party later finds his position baseless, he should not continue to advocate that position. The Rule "does not require a formal amendment to pleadings."¹²¹ It is apparent from the changes the commenta-

115. Solovy, *supra* note 2, 31-32. (citing *Brubaker v. City of Richmond*, 943 F.2d 1363, 1381 (4th Cir. 1991); *MGIC Indemnity Corp. v. Moore*, 1991 U.S. App. LEXIS 29889 (9th Cir. 1991); *Beverly Gravel, Inc. v. DiDomenico*, 908 F.2d 223, 226 (7th Cir. 1990); *Jackson v. O'Hara, Ruberg, Osborne and Taylor*, 875 F.2d 1224, 1229 (6th Cir. 1989). *See contra* *The Sixth Circuit has upheld an award of sanctions against a plaintiff who failed to meet a continuing duty to "review and reevaluate" his pleadings. Herron v. Jupiter Transp. Co.*, 858 F.2d 332, 336 (6th Cir. 1988)).

116. *Thomas v. Capital Sec. Serv.*, 836 F.2d 866, 875 (5th Cir. 1988).

117. 1992 Proposal, Advisory Committee notes.

118. Vairo, *supra* note 2, at I-35.

119. Frank, *supra* note 2; *see also* JOSEPH, *supra* note 2, at 15.

120. Frank, *supra* note 2, at 32.

121. 1992 Proposal, Advisory Committee notes.

tors made in this area of the proposal that they intended to avoid the “perfect pleadings” criticism.¹²²

D. The Responsible Parties

The current rule holds only the signer responsible for certification of the pleadings. In *Pavelic & LeFlore v. Marvel Entertainment Group*, the Court held that Rule 11 could not be construed to authorize sanction against anyone but the actual signer.¹²³ Thus, responsibility cannot be extended to the signer’s law firm.

The proposal changes this, authorizing the sanctioning of non-signers such as “attorneys, law firms, or parties . . . [who are determined to be] responsible for the violation.”¹²⁴ The proposal provides that “the court can make an additional inquiry in order to determine whether the sanction should be imposed on such persons, firms, or parties either in addition to, or, in unusual circumstances, instead of the person actually making the presentation to the court.”¹²⁵ A firm may be particularly susceptible to sanction under the safe harbor provision. As the safe harbor provision provides at least 21 days to reconsider a filing, firms may be viewed as jointly responsible with the signer.¹²⁶ This provision has the salutary effect of preventing a situation where a senior attorney would have a junior associate actually sign the pleading to insulate himself from liability.

E. Denials, Informational & Belief Pleadings

The proposal requires that denials of factual contentions, formed after reasonable inquiry, be “warranted on the evidence.”¹²⁷ Counsel does not have to admit an allegation when there is no contradictory evidence; rather counsel should specifically identify any denials based on lack of information or belief.¹²⁸ If later the denial is found unwarranted, “the defendant should not continue to insist on that denial. While sometimes helpful, formal amendment of the pleadings to withdraw . . . [a] denial is not required. . . .”¹²⁹

122. An earlier proposal stated the certification requirement is triggered by a party’s “presenting or *maintaining* a claim, defense, request . . . *until it is withdrawn*. . . .” Vairo, *supra* note 2, at I-36. The final amendment provides that an attorney certifies “by presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading. . . .” 1992 Proposal, Advisory Committee notes.

123. 493 U.S. 120 (1989).

124. 1992 Proposal, Advisory Committee notes.

125. *Id.*

126. *Id.*

127. 1992 Proposal (B)(4).

128. Similar to the burden created by Federal Rule of Civil Procedure 8 (b).

129. 1992 Proposal, Advisory Committee notes.

The proposal additionally codifies the current ability of the signer to plead on the basis of information and belief.¹³⁰ While current Rule 11 does not sanction information and belief pleadings, the proposal's codification will prevent any future inconsistencies. Again, if the position is later found unwarranted, the party has the duty not to continue to advocate the position.¹³¹

F. Discretionary Imposition of Sanctions

The current Rule requires the court "shall impose . . . an appropriate sanction" on the violator if it is determined that a violation has occurred.¹³² Every violation, no matter how minor, must be sanctioned. As stated earlier, the drafters wanted to avoid inconsistent rulings and sympathetic determinations; they wanted also to reward a movant's efforts.¹³³

Critics argue, however, that in practice the mandatory sanctioning provision actually makes inconsistent rulings more likely.¹³⁴ This is a result of differing judicial interpretation of Rule 11. Some judges currently view Rule 11 sanctions as entirely discretionary, relying on their discretion under the Rule to fashion the appropriate sanctions.¹³⁵ Other judges, however, feel constrained by the "shall impose" language, thus sanctioning in situations where, if they had discretion, they would not impose sanctions.¹³⁶ Thus, inconsistent application of the Rule continues, with the outcome dependent upon a judge's view of Rule 11.¹³⁷

The proposal provides for a discretionary standard, stating "If . . . the court determines that [there has been a violation], the court may impose an appropriate sanction"¹³⁸ While envisioning a case-by-case determination,

130. 1992 Proposal (B)(4).

131. 1992 Proposal, Advisory Committee notes.

132. FED. R. CIV. P. 11.

133. See *supra* note 20.

134. Vairo, *supra* note 2, at I-23; see JOSEPH, *supra* note 2, at 34.

135. *Oliveri v. Thompson*, 803 F.2d 1265, 1280 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987) (creating class of "de minimis" or "technical" violations). See HILLIARD & CHISHOLM, *supra* note 37, at 12 (Once . . . a Rule 11 violation is established sanctions must be applied. Nevertheless, up to 10% of the judges who responded . . . indicated that they would not impose sanctions even after finding that Rule 11 had been violated.).

136. Vairo, *supra* note 2, at I-23.

137. *Id.* at I-22. ("[M]ember of the bar who follow such matters view some judges as 'pro-sanctions' and some as 'anti-[sanctions]'"). See also FJC, *supra* note 26. (One judge dismissed sanctions in all of 8 rulings while another judge imposed 7 sanctions in 9 rulings made); See also accompanying note 39.

138. 1992 Proposal (C).

the proposal nonetheless provide certain factors that the courts should consider in their sanctioning decision.¹³⁹

Therefore, if sanctions are discretionary, but the discretion is limited by well defined factors, the current inconsistency will no longer persist and rulings will become more consistent.¹⁴⁰ Additionally, a discretionary standard will permit flexibility. Currently, de minimis violations of Rule 11 demand sanctions. The flexibility of a discretionary standard would allow judges to sanction only when appropriate.

Once a court determines that a sanction is appropriate, the proposal strongly recommends that the "sanctions should not be more severe than reasonably necessary to deter repetition of the conduct by the offending person or comparable conduct by similarly situated persons."¹⁴¹ This "least-severe sanction adequate" provision would codify the majority of circuit's interpretation of Rule 11.¹⁴² The provision attempts to maintain the Rule's deterrent purpose while minimizing the detrimental effects.¹⁴³ The sanction may be entirely monetary, non-monetary or a combination of both. In principal, because the Rule's purpose is to deter rather than compensate, monetary sanctions are paid into the court under the proposed rule.¹⁴⁴ However, if requested in a motion and warranted by the inability to effectively deter except through the use of a fee-shifting award, the court may award attorney's fees to moving party.¹⁴⁵ Sanctions that involve monetary awards may not be imposed on a client when the basis for the

139. The factors include: (1) whether the improper conduct was willful, or negligent; (2) whether it was part of a pattern of activity, or an isolated event; (3) whether it infected the entire pleading, or only one particular count or defense; (4) whether the person has engaged in similar conduct in other litigation; (5) whether it was intended to injure; (6) what effect it had on the litigation process in time or expense; (7) whether the responsible person is trained in law. 1992 Proposal, Advisory Committee notes.

140. *See supra* note 134.

141. 1992 Proposal, Advisory Committee notes.

142. *White v. General Motors Corp.*, 908 F.2d 675, 684 (10th Cir. 1990); *Hilton Hotels Corp. v. Banov*, 899 F.2d 40, 46 (D.C. Cir. 1990); *Jackson v. Law Firm of O'Hara, Ruberg, Osborne & Taylor*, 875 F.2d 1224, 1229 (6th Cir. 1989); *Doering v. Union County Bd. of Chosen Freeholders*, 857 F.2d 191, 194 (3d Cir. 1988); *Thomas v. Capital Security Serv. Inc.*, 836 F.2d 866, 878 (5th Cir. 1988); *Brown v. Federation of State Medical Bds.*, 830 F.2d 1429, 1437 (7th Cir. 1987); *Cabell v. Petty*, 810 F.2d 463, 466 (4th Cir. 1987). *See also* William W. Schwarzer, *Sanctions under the new Federal Rule 11, A Closer Look*, 104 F.R.D. 181, 201 (1985).

143. Schwarzer, *supra* note 142, at 201; WILLGING, *supra* note 48, at 113. ("[T]he goals of fee shifting and reduction of satellite litigation may be incompatible. Shifting to a system of specific deterrence and imposing sanctions that are sufficiently low will reduce such [satellite litigation]").

144. 1992 Proposal, Advisory Committee notes.

145. 1992 Proposal, Advisory Committee notes. "Factors in determining the amount of the sanction: (1) should only be for services directly and unavoidably caused by the violation and no more; (2) should not provide compensation for the inherent cost of court activity such as filing a complaint or answer; (3) movant should not be compensated for services that could have been avoided by an earlier disclosure of evidence or an earlier challenge to the groundless claim or defenses; (4) partial reimbursement of fees may be adequate for persons with "modest financial resources". *Id.*

monetary sanction is legal frivolousness.¹⁴⁶ Monetary responsibility for this type of violation is appropriately placed on the attorney because the attorney is solely responsible for researching legal sufficiency.¹⁴⁷

The "least-severe sanction adequate" provision receives significant support from judicial interpretation¹⁴⁸ and the commentaries.¹⁴⁹ However, it has been argued that the proposal will not create the "least-severe sanction adequate" as contemplated by the Advisory Committee.¹⁵⁰ In order to effectuate the "least-severe sanction adequate" provision, the Rule must provide for more rigorous appellate review¹⁵¹ in addition to the imposition of a specific factual findings requirement.¹⁵² Circuits have, in the past, articulated a "least-severe sanction adequate" policy¹⁵³ and a findings requirement for decisions not based on obvious reasoning;¹⁵⁴ nonetheless, district courts still award excessive monetary judgments.¹⁵⁵ Thus, as the circuit court relies on the discretion of the district court and the district court sidesteps the recommendations of the circuit court, the "least severe sanction adequate" policy is not realized. Based on this experience, the proposal, which codifies an abuse of discretion standard, may have a similar result.¹⁵⁶

IV. OMISSION FROM THE PROPOSAL

The proposal maintains the certification standard of the current Rule for papers warranted by existing law.¹⁵⁷ Leading opinions have interpreted this standard as requiring that the product of the attorney's inquiry itself be

146. 1992 Proposal (C)(2)(A).

147. 1992 Proposal, Advisory Committee notes. "However the court may still impose non-monetary sanctions such as preclusion orders." *Id.*

148. *See supra* note 142.

149. BURBANK, *supra* note 2; Johnson, *supra* note 35; WILLGING, *supra* note 48.

150. Johnson, *supra* note 35 at 51-52.

151. "[T]he appellate courts presently review sanctions only for an abuse of discretion, and as a result cognizable breaches of the least sanction adequate doctrine have gone uncorrected." *Id.* at 51.

152. *Id.*

153. *See supra* note 142.

154. *See supra* note 106.

155. *Lockette v. American Broadcasting Co.*, 118 F.R.D. 88, 91 (N.D. Ill. 1987); *Pfeifer v. Valukas*, 117 F.R.D. 420, 424 (N.D. Ill. 1987).

156. Johnson, *supra* note 35, at 49.

157. FED. R. CIV. P. 11. ("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. . .") *compare* Proposal (B)(1-3). Which slightly recasts this as follows: "that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, [the claims, defenses, and other legal contentions therein are] warranted by existing law or . . . and factual contentions. . . ."

objectively reasonable.¹⁵⁸ This product approach focuses on the competency of the attorney as evidenced her pleading rather than the reasonableness of the attorney's inquiry in preparation of the pleading. This focus can have the unfortunate result of punishing the attorney for "inadequate scholarship."¹⁵⁹ For example; an attorney conducts an objectively reasonable amount of pre-filing inquiry and drafts a complaint which she honestly believes is "warranted by existing law." If the court, following the product rule, finds the pleading is objectively unreasonable, then the attorney is sanctionable under Rule 11. Critics argue that this type of Rule 11 application over-deters meritless papers, chilling an attorney's creativity.¹⁶⁰ An attorney will shy away from creative representation for fear the court may find her submissions unreasonable.

The purpose of Rule 11 does not include the enforcement of lawyer competency. A more effective means of deterring lawyer incompetence is through informal peer monitoring. The client, not the court, is the primary victim of lawyer ineptness and Rule 11 offers nothing to the client other than the possibility of being sanctioned. It is ironic that under the proposed rule, the victim of improper representation may get punished "for having been victimized."¹⁶¹

It is the opinion of this writer that the proposal must provide guidance to the circuits for interpreting the certification standard. An approach that focuses on lawyer pre-filing inquiry would more appropriately achieve the Rule's goal of deterring baseless filings while minimizing destructive side-effects.

CONCLUSION

Since the 1983 amendment, courts have applied Rule 11 vigorously and inconsistently. While the Rule has improved pre-filing inquiry, it has also generated concern that it is chilling meritorious claims, increasing satellite litigation, contributing to the bar's incivility problem, and weakening the attorney-client relationship. In response, the Advisory Committee for Judicial Rules drafted a revision to the 1983 amendment. Their proposal would significantly change Rule 11 activity, primarily by reducing inconsistent application of the Rule and reducing the imposition of large monetary sanctions. In general, the proposal is sound and should meet its goal to "broaden the scope of this obligation, . . . [while] reduc[ing] the number of motions for sanctions presented to the court."

158. *Eastway Construction v. City of New York*, 762 F.2d 243 (2d Cir. 1985); *Zaldivar v. City of Los Angeles*, 780 F.2d 823 (9th Cir. 1986); *Hewitt v. City of Stanton*, 798 F.2d 1230 (9th Cir. 1986).

159. Alex Elson & Edwin A Rothschild, *Rule 11: Objectivity and Competence*, 123 F.R.D. 361, 364 (1988).

160. *Id.* at 365; *see also* BURBANK, *supra* note 2, at 21.

161. Elson & Rothschild, *supra* note 159, at 368.

APPENDIX
FEDERAL RULE OF CIVIL PROCEDURE 11 PROPOSAL

Italics indicate portion of previous formulation that are deleted from the proposal; underlined portions are the additions by the proposal. The unaffected language is regular type.

(a) Signature. Every pleading, written motion, and other paper of a party represented by an attorney shall be signed by a least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party, 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.* Each paper shall state the signer's address and telephone number, if any. 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 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 An unsigned paper is not signed, it shall be stricken unless it is signed promptly after the omission of the signature is corrected promptly after being called to the attention of the pleader or movant attorney or party.*

(b) Representation to Court. *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.* By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

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

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

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

(1) How Initiated.

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

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

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

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) Inapplicability to Discovery. Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.

*James R. Simpson**

* B.A., 1991, University of Colorado, Boulder; Expected J.D., 1994, California Western School of Law. The author wishes to thank Stephen W. Simpson, Professor William C. Lynch, and Dennis Prince for their constructive criticism and comment, and Christine Edwards for all her support.