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Developing Standards Under Amended Rule 11 of the Federal Rules of Civil Procedure

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DEVELOPING STANDARDS UNDER AMENDED RULE 11 OF THE FEDERAL RULES OF CIVIL PROCEDURE*

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I. INTRODUCTION

Rule 11 of the Federal Rules of Civil Procedure[1] is designed to ensure the integrity of pleadings and other papers filed in federal district court. The rule was amended in 1983 in response to the widely held perception that its provisions, as originally promulgated, had proven ineffective in deterring strike suits, litigation abuses, and lawsuits used as instruments of delay and oppression.[2] Amended

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1. FED. R. CIV. P. 11 provides:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay 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.

2. FED. R. CIV. P. 11 advisory committee's note. *Cf.* Rodgers v. Lincoln Towing Serv.,

Rule 11 introduces more stringent standards designed to make attorneys stop and think[3] about their legal obligations before signing pleadings and motions. These obligations are reinforced by imposing mandatory sanctions upon violation of the standards.[4] The drafters had a twofold purpose in amending Rule 11: (1) to deter dilatory or abusive behavior; and (2) to streamline litigation.[5] In addition, the new Rule 11 is aimed at increasing a judge's willingness to hold attorneys accountable for their misconduct by encouraging courts to impose sanctions.[6] Once a violation of Rule 11 has been found, sanc-

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Inc., 596 F. Supp. 13, 16 (N.D. Ill. 1984) (Rule 11 amended to curb filing of complaints and other papers lacking a proper foundation in law and fact), *aff'd*, 771 F.2d 194 (7th Cir. 1985); Day v. Amoco Chems. Corp., 595 F. Supp. 1120, 1122 (S.D. Tex.), *appeal dismissed*, 747 F.2d 1462 (5th Cir. 1984), *cert. denied*, 470 U.S. 1086 (1985) (Rule 11 amended to eliminate confusion among district courts as to when sanctions should be imposed); Pudlo v. IRS, 587 F. Supp. 1010, 1011 (N.D. Ill. 1984) (attorney's fees rarely awarded under old Rule 11). *See* Schwarzer, *Sanctions Under the New Federal Rule 11 — A Closer Look*, 104 F.R.D. 181, 182 (1985):

> The growing cost, complexity and burdensomeness of civil litigation has been a serious concern to judges, lawyers and the public. There is no single cause nor is there a single remedy for this problem. But there is considerable opinion, supported by at least anecdotal evidence, that misuse and abuse of the litigation process have contributed to the problem. Resort to frivolous litigation, maintenance of baseless defenses, and harassment of one's opponent are practices that judges and lawyers engaged in civil litigation encounter regularly.

See generally 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §1334 (1969) ("there is little evidence of frequent use of sanctions for the violation of Rule 11"); Rothschild, Fenton & Swanson, *Rule 11: Stop, Think, and Investigate*, 11 LITIGATION 13 (1985); Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 HARV. L. REV. 630, 631 (1987) (concern that the existing mechanisms did not sufficiently screen frivolous claims prompted the 1983 amendments to Rule 11); Comment, *Courts Are No Place for Fun and Frivolity: A Warning To Vexatious Litigants and Over-Zealous Attorneys*, 20 WILLAMETTE L.J. 441, 465-66 (1984) (effect of amended Rule 11 will be to lessen frivolous claims); Miller & Culp, *Litigation Costs, Delay Prompted the New Rules of Civil Procedure*, Nat'l L.J., Nov. 28, 1983, at 24, col. 1 (overview as to why Rule 11 was amended).

3. Marcus, *Reducing Court Costs and Delay: The Potential Impact of the Proposed Amendments to the Federal Rules of Civil Procedure*, 66 JUDICATURE 363, 364 (1983).

4. FED. R. CIV. P. 11 advisory committee's note. *See, e.g.*, Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 254 (2d Cir. 1985) (sanctions imposed when claim has "no chance of success"); Rodgers v. Lincoln Towing Serv., Inc., 596 F. Supp. 13, 22 (N.D. Ill. 1984) (finding of subjective bad faith not necessary under amended Rule 11), *aff'd*, 771 F.2d 194 (7th Cir. 1985). *See also* Miller & Culp, *supra* note 2, at 34, col. 1; Sussman & Sussman, *Decisions Under Amended Rule 11 Require Care*, Legal Times of N.Y., June 1984, at 6, col. 1 (purpose of amendment is to prevent abuse by permitting courts to award expenses to litigants); Sussman, *Changes in Federal Rules Create Risks, Opportunities*, Legal Times, Sept. 19, 1983, at 34, col. 1 (judges required to impose sanctions for violations of Rule 11 standards).

5. Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531, 1536 (9th Cir. 1986).

6. *See* FED. R. CIV. P. 11 advisory committee's note.

tions are mandatory. Judges, however, have broad discretion in choosing the appropriate penalty and are explicitly authorized to award attorney's fees to the abused party.[7]

The topic of sanctions is unpleasant for judges and attorneys alike.[8] Sanctions escalate tensions among litigants, undermine collegiality among members of the bar, and create hostility between bench and bar. Perceived abuses by litigants and their attorneys, however, have led some courts and Congress to place greater reliance on sanctions as a mechanism for improving litigation within the federal system. Nevertheless, the net utility of widespread imposition of sanctions remains the subject of intense debate among scholars.[9] For the time being, the sanctions advocates, with the promulgation of amended Rule 11, are having their way.

Indeed, the reported decisions to date under Rule 11 reflect the drafters' intent to curb litigation abuses by sanctions,[10] and because many sanctions decisions go unreported, these reported cases represent only the "tip of the iceberg."[11] While sanctions may be effective in limiting delay and abusive practices, the expansive use of sanctions may create several undesirable side effects. First, greater utilization of sanctions threatens to chill creativity in advocacy and thereby to impede the traditional ability of the common law to adjust to changing situations.[12] Second, sanctions practice is likely to

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7. FED. R. CIV. P. 11 advisory committee's note. The 1983 amendments to the Federal Rules gave increased emphasis to sanctions and cost-shifting as a means of controlling litigation abuse. Attorneys should expect that the courts will, in appropriate cases, impose sanctions, which may include dismissal of a claim or defense or a default judgment. In addition to the nonmonetary sanctions available under the Rules, it may be appropriate for the courts to shift the cost of improper tactics to the abusing party. *See Revised Report of the Special Committee on Effective Discovery in Civil Cases for the Eastern District of New York to the Honorable Jack B. Weinstein, Chief Judge*, 102 F.R.D. 357, 391-94 (1984) [hereinafter *Eastern District Report*].

8. Oliveri v. Thompson, 803 F.2d 1265, 1271 (2d Cir. 1986).

9. *See, e.g.*, Lewin, *A Legal Curb Raises Hackles*, N.Y. Times, Oct. 2, 1986, at D1, col. 4. This article briefly summarizes the debate between the anti-sanctions school led by Chief Judge Jack B. Weinstein (sanctions "have become another way of harassing the opponent and delaying the case") and sanctions proponents such as Arthur Miller ("Rule 11 is a useful weapon against unnecessary litigation").

10. Lewin, *supra* note 9. For an analysis of the impact of sanctions under the Federal Rules of Civil Procedure, including Rule 11, see *Sanctions: Rule 11 and Other Powers*, Section of Litigation, ABA (1986). For a listing of district court cases involving Rule 11 sanctions from August 1, 1983 through August 1, 1985, see Nelken, *Sanctions Under Amended Rule 11 — Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313, 1354-69 (1986).

11. Lewin, *supra* note 9, at D8, col. 4.

12. Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531, 1536 (9th Cir.

generate expensive and time consuming satellite litigation, which obscures the real controversy between the litigants.[13] Third, imposing mandatory sanctions where difficult legal issues are involved increases the likelihood of arbitrariness and decreases the probability of uniform enforcement of Rule 11.[14] Fourth, addition of Rule 11 sanctions to the existing sources of judicial sanctioning power threatens to muddy further an area of law which has been neither clearly articulated nor consistently applied.[15]

As decisions begin to percolate to the circuit court level, clarity and consistency in the application of Rule 11 sanctions have yet to emerge. This Article proposes to: (1) summarize the bases for imposition of sanctions prior to the promulgation of amended Rule 11;[16] (2) review and analyze amended Rule 11 and the emerging case law thereunder;[17] and (3) attempt to fashion clear and consistent standards to serve as a guide for both courts and practitioners on Rule 11 issues.[18]

II. REMEDYING ABUSIVE LITIGATION TACTICS PRIOR TO THE 1983 AMENDMENTS

Traditionally, courts have used three separate grounds to attack abusive litigation tactics: (1) Rule 11; (2) the inherent equitable powers of the court to police the conduct of attorneys appearing before it;[19] and (3) various federal statutes which award attorney's fees to prevailing parties[20] or tax costs and attorney's fees against counsel who have conducted proceedings in a vexatious manner.[21] Although the power to police the conduct of attorneys appearing before a court is theoretically separate from the power to shift fees and costs, the two concepts have become inextricably intertwined, and fee shifting is the most common sanction imposed by the courts. Nevertheless, none of these devices was particularly effective in stemming frivolous suits or abusive litigation tactics prior to the

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1986); Nelken, *supra* note 10, at 1338-42.

13. Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d at 1557; Rosenberg, *The Federal Civil Rules After Half A Century*, 36 ME. L. REV. 243, 244 (1984).

14. Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d at 1541.

15. Oliveri v. Thompson, 803 F.2d 1265, 1271 (2d Cir. 1986).

16. *See infra* text accompanying notes 25-76.

17. *See infra* text accompanying notes 77-265.

18. *See infra* text accompanying notes 266-322.

19. FED. R. CIV. P. 11 advisory committee's note.

20. *See* Note, *Awards of Attorney's Fees in the Federal Courts*, 56 ST. JOHN'S L. REV. 277, 287 n.34 (1982).

21. *See, e.g.*, 28 U.S.C. § 1927 (1982).

adoption of the 1983 amendments.[22]

A. *Rule 11 as Originally Promulgated*

Old Rule 11 was designed specifically to assure the integrity of pleadings filed in federal court[23] by requiring that each pleading be signed by an attorney.[24] By signing the pleading the attorney certified that: (1) he had read the document; (2) to the best of his knowledge, information, and belief, there was "good ground" to support it; and (3) the submission was not interposed for delay.[25] The old Rule gave courts broad discretion to remedy any violation of the certification requirement. Thus, a pleading signed with the intent to defeat the purpose of the Rule could be stricken.[26] An attorney was subject to disciplinary proceedings if a "wilful violation"[27] could be shown. While old Rule 11 did not specifically address the issue of whether imposition of attorney's fees constituted an "appropriate disciplinary

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22. *See* FED. R. CIV. P. 11 advisory committee's note.

23. *See* 5 C. WRIGHT & A. MILLER, *supra* note 2, § 1333; Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1, 7-8 (1976).

Chief Justice Warren E. Burger described the signature requirement as follows: "When the elder statesmen among you here today came to the bar, I am sure you were told, as I was, that your signature on a pleading or motion was something like your signature on a check. There was supposed to be something to back it up." Rodgers v. Lincoln Towing Serv., Inc., 596 F. Supp. 13, 27 (N.D. Ill. 1984) (quoting Address by then Chief Justice Warren Burger, American Law Institute Annual Meeting (May 15, 1984)), *aff'd*, 771 F.2d 194 (7th Cir. 1985).

24. If a party is proceeding *pro se*, the party must sign the pleading. FED. R. CIV. P. 11. This provision appears in both old Rule 11 and amended Rule 11.

25. Prior to 1983, Rule 11 read:

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

FED. R. CIV. P. 11, *reprinted in* 28 U.S.C. app. at 540-41 (1982).

26. *Id.*

27. *Id.*

action,"[28] it was well established that the old Rule empowered courts to shift the cost of suit, including attorney's fees, to the abusing party.[29]

Sanctions under old Rule 11 were rarely imposed.[30] The certification standards were too lenient; good faith on the part of the pleader was all that was needed to avoid sanctions. In addition, the key requirement that there be "good ground" to support the pleading was ill-defined.[31] The "good ground" standard affirmatively obligated the signing attorney to represent his honest belief that facts and law existed to support the claims asserted in the pleading.[32] The precise nature of the attorney's responsibilities remained unclear.[33] For example, it was not apparent that the "good ground" language necessitated a prefiling investigation by the attorney.[34] Given this un-

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28. Badillo v. Central Steel & Wire Co., 717 F.2d 1160, 1166 (7th Cir. 1983); Nemeroff v. Abelson, 620 F.2d 339, 350 (2d Cir. 1980).

29. *See* Hedison Mfg. Co. v. NLRB, 643 F.2d 32, 35 (1st Cir. 1981) (attorney's fees assessed due to frivolous nature of contentions); Anderson v. Allstate Ins. Co., 630 F.2d 677, 684 (9th Cir. 1980) (sanctions imposed on plaintiff's attorney due to determination of abuse of process). *See also* Nemeroff v. Abelson, 620 F.2d 339, 350 (2d Cir. 1980) ("Assuming arguendo that an award of attorneys' fees is a permissible sanction under Rule 11, our conclusion that the instant action was not without foundation and hence not commenced in bad faith necessarily precludes the award of such fees under Rule 11."). *But cf.* United States v. Standard Oil Co., 603 F.2d 100, 103 n.2 (9th Cir. 1979) ("Rule 11 of the Federal Rules of Civil Procedure provides no authority for awarding attorney's fees against an *unsuccessful litigant.* . . . The rule says nothing about disciplining a party by imposing attorney's fees upon him for any act of his lawyer, even if his lawyer willfully violated Rule 11." emphasis added).

30. Indeed, as Kassin points out:

> In a review of litigation activity from 1938 to 1976, it was found that rule 11 motions had been filed in only nineteen reported cases. Among these cases, violations were found in eleven instances, and attorneys were sanctioned in only three. Lest these findings be dismissed as outdated, another report reviewed the relevant case law through 1979 and found only one additional reported opinion in which counsel was disciplined under rule 11.

S.M. KASSIN, AN EMPIRICAL STUDY OF RULE 11 SANCTIONS 2 (Federal Judicial Center 1985) (footnotes omitted). *See also* Mr. Frank, Inc., v. Waste Management, Inc., 591 F. Supp. 859, 870 (N.D. Ill. 1984); Pudlo v. IRS, 587 F. Supp. 1010, 1011 (N.D. Ill. 1984).

31. FED. R. CIV. P. 11 advisory committee's note.

32. *See, e.g.*, Helfant v. Louisiana & S. Life Ins. Co., 82 F.R.D. 53, 56-57 (E.D.N.Y. 1979) (attorney has affirmative obligation to satisfy himself that there is good reason to support the claim).

33. *See* 5 C. WRIGHT & A. MILLER, *supra* note 2, § 1333.

34. *See id.* ("the cases do not make it clear to what extent an attorney must investigate his client's case prior to signing" (footnote omitted)). *But see* Helfant v. Louisiana & S. Life Ins. Co., 82 F.R.D. 53, 56-57 (E.D.N.Y. 1979) (attorney has "an affirmative obligation that he be satisfied in good faith that there is good reason to support the claim"). *See also* Kinee v. Abraham Lincoln Fed. Sav. & Loan Ass'n, 365 F. Supp. 975, 982-83 (E.D. Pa. 1973) (plaintiffs' attorneys taxed with costs where improper prefiling investigation inconvenienced certain dismissed parties).

certainty, the courts were reluctant to impose sanctions.[35]

Under old Rule 11 disciplinary action was appropriate for an attorney's willful violation of the rule.[36] Establishing willful misconduct by an attorney necessitated a finding of subjective bad faith.[37] The test for subjective bad faith was whether there was clear evidence that the claims in question were "entirely without color and . . . asserted wantonly, for purposes of harassment or delay, or for other improper reasons."[38] A colorable claim needed "some legal and factual support . . . in light of the reasonable beliefs of the individual making the claim."[39] Thus, the test was "whether a reasonable attorney could have concluded that facts supporting the claim *might be established*, not whether such facts actually *had been established*."[40]

Apart from the nebulous standards of old Rule 11, courts were reluctant to impose sanctions on members of the bar;[41] when they

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35. FED. R. CIV. P. 11 advisory committee's note.

36. FED. R. CIV. P. 11, *reprinted in* 28 U.S.C. app. at 540-41 (1982).

37. Miller & Culp, *supra* note 2, at 24, col. 4. *See* Browning Debenture Holders' Comm. v. DASA Corp., 560 F.2d 1078, 1087-88 (2d Cir. 1977) (analysis of bad faith in context of decision regarding whether or not to apply exception to American rule).

38. Browning Debenture Holders' Comm. v. DASA Corp., 560 F.2d 1078, 1088 (2d Cir. 1977).

39. Nemeroff v. Abelson, 620 F.2d 339, 348 (2d Cir. 1980). In *Nemeroff*, the court faced the issue of the bad faith exception to the American rule, which governs the allocation of litigation costs. The rule places the burden of counsel fees on each party, regardless of the outcome of the suit.

40. *Id.* (emphasis in original).

41. *See* Schwarzer, *supra* note 2, at 183-84:

> Reliance on sanctions as a remedy, however, raises a series of problems of which lawyers and judges must be aware. First, lawyers are generally reluctant to seek sanctions and judges to impose them. The process is unpleasant, adds to the existing work, and increases the tensions in the courtroom. Lawyers may not want to inhibit their own freedom by calling their opponents' practices into question. Judges may be uneasy about appearing to assume the role of policeman, teacher or moral guardian.
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> Second, judges may fear that initiating the process of imposing sanctions may spawn satellite litigation, i.e. ancillary proceedings that may themselves assume the dimensions of litigation with a life of its own. Indeed, an offending party seeking to obstruct and delay litigation may welcome the resulting proliferation of proceedings as serving his purposes.
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> Third, judges may also be chary about criticizing a lawyer's conduct out of concern that they are or will be perceived as imposing their personal standards of professionalism on others. The standards of the bar in these matters span a wide spectrum, and just where the line lies between the acceptable and unacceptable is not always clear.
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> Fourth, imposing sanctions on lawyers for their conduct of litigation raises the spectre of chilling advocacy. The Advisory Committee states in its Notes that the

did so, sanctions amounted to little more than a published opinion reprimanding the offending attorney.[42] Nor were courts eager to strike pleadings, because to do so would be to punish the parties for the mistakes of their attorneys.[43] Given the minimal standards of Rule 11, the heavy burden to prove violation, and the hesitancy of judges to impose sanctions, the old Rule did not effectively deter abuses of the litigation process.[44]

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rule "is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories." Nevertheless lawyers can be expected to resist the imposition of sanctions as penalizing them for discharging their duty to their clients, and judges may be sensitive to that concern.

Id.

42. Miller & Culp, *supra* note 2, at 24, col. 4, 34, col. 1. ("All things considered, former Rule 11 needed change because it was plagued by low visibility, soft standards and was enforced by meaningless sanctions.").

43. *Id.* at 24, col. 4.

44. Kassin offers the following explanation for the ineffectiveness of the original Rule 11:

> First, the courts had exhibited confusion over the standard of inquiry lawyers were expected to satisfy (i.e., how thoroughly must they investigate a client's case before signing the pleading?). Some judges defined the standard narrowly, viewing attorney conduct as abusive only "when it appears beyond peradventure that it is sham and false and that its allegations are devoid of factual basis." Others, however, adopted a broader interpretation, explicitly requiring lawyers to "ascertain that a reasonable basis exists for the allegations, even if the allegations are made on information and belief."
>
> Second, the enforcement mechanism provided by rule 11 was ambiguous and difficult to translate into specific policy (i.e., when was a violation sanctionable, and what disciplinary actions were then available?). To begin with, it was never clear precisely what kinds of sanctions were considered appropriate. If a pleading violated the requirements of rule 11, it could be stricken. Understandably, judges were reluctant to dispose of a client's case because of counsel's indiscretions. With regard to attorney sanctions, assessing costs, reprimands, contempt citations, and disbarment were possible reactions, but under what conditions? According to the rule, only "willful" violations were to provoke such disciplinary responses. Because of the subjectivity of this standard and the difficulty of making judgments about lawyers' underlying motives and intentions, the courts were unclear about the conditions that triggered the use of sanctions. Consequently, sanctions were rarely threatened or imposed, and their availability apparently did not deter frivolous conduct.
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> Finally, a third explanation for the ineffectiveness of rule 11 should be added to the list - judges, as a general rule, seem reluctant to impose attorney sanctions. Section 1927 of title 28 of the U.S. Code, first enacted in 1813, provides for cost shifting when a lawyer "multiplies the proceedings in any case as to increase costs unreasonably and vexatiously." Yet, as with rule 11, relatively few courts have invoked this statute. In another, related context, several writers have observed the same kind of infrequent use of sanctions under federal rule 37, which articulates several types of disciplinary response to abusive pretrial discovery practices. As early as 1958, it was argued that the judiciary did not vigorously employ its power to elicit compliance with discovery guidelines. Today, research shows that even though there is a consensus among lawyers that such sanctions are an effective but

B. *Inherent Equitable Powers of the Court*

The Supreme Court has recognized that the federal courts have inherent equitable power to require a losing party to pay its adversary's attorney's fees when the losing party has acted oppressively, vexatiously, or in bad faith in commencing or maintaining an action.[45] Taxing attorney's fees under such circumstances presents an exception to the so-called American rule which requires litigants to bear responsibility for their own attorney's fees, irrespective of which party ultimately succeeds, unless statutory or contractual authorization provides otherwise.[46] Sanctions may be imposed against the losing party or its attorney.[47] Not only has the use of the court's inherent equitable powers been invoked infrequently, it also has been limited to situations where counsel has either acted in bad faith,[48] or interposed a claim or defense without probable cause.[49] Like old Rule 11, this doctrine shifts fees and costs only in egregious cases.[50] Thus, it has not been an effective deterrent to frivolous litigation.

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underutilized means of control, judges are, for a variety of reasons, generally reluctant to use them. In short, at least part of the problem is attributable not to the language of rule 11 per se, but to judges' unwillingness to follow it.

S.M. KASSIN, *supra* note 30, at 3-4 (footnotes omitted). *See* FED. R. CIV. P. 11 advisory committee's note.

45. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 258-59 (1975); F.D. Rich Co. v. United States *ex rel.* Industrial Lumber Co., 417 U.S. 116, 129 (1974); Oliveri v. Thompson, 803 F.2d 1265, 1272 (2d Cir. 1986). *See also* Roadway Express, Inc. v. Piper, 447 U.S. 752, 765-66 (1980) (American rule does not apply when opposing party acted in bad faith). Not all state courts share this inherent power. *See, e.g.*, A.G. Ship Maintenance Corp. v. Lezak, 69 N.Y.2d 1 (1986) (absent specific statute or court rule authorizing monetary sanctions, court would not impose them).

46. Note, *supra* note 20, at 278 n.2. In contrast to the American rule, the so-called English rule permits the prevailing parties to recover the costs of suit, including reasonable attorney's fees. Schwarzer, *supra* note 2, at 205. For a history of the English rule and the American rule, see Note, *supra* note 20, at 278-79 nn.1-2.

47. *See, e.g.*, Dow Chemical Pacific, Ltd. v. Rascator Maritime, S.A., 782 F.2d 329, 344 (2d Cir. 1986) (award made against party will be upheld upon showing of bad faith); Weinberger v. Kendrick, 698 F.2d 61, 80-81 (2d Cir. 1982) (award made against attorney will be upheld upon clear evidence of bad faith or vexatiousness), *cert. denied sub nom.* Lewy v. Weinberger, 464 U.S. 818 (1983).

48. The term "bad faith" has been narrowly defined. *See* Oliveri v. Thompson, 803 F.2d. 1265, 1272 (2d Cir. 1986).

49. Tedeschi v. Smith Barney, Harris Upman & Co., 757 F.2d 465, 466 (2d Cir.), *cert. denied sub nom.* Chapman v. Smith Barney, Harris Upman & Co., 106 S. Ct. 147 (1985); Day v. Amoco Chems. Corp., 595 F. Supp. 1120, 1122 (S.D. Tex.), *appeal dismissed*, 747 F.2d 1462 (5th Cir. 1984), *cert denied*, 470 U.S. 1086 (1985). *See also* Roadway Express, Inc., v. Piper, 447 U.S. 752, 764-65 (1980) (inherent powers must be used with restraint because they are beyond "direct democratic controls").

50. *See* Badillo v. Central Steel & Wire Co., 717 F.2d 1160, 1165 (7th Cir. 1983).

C. *Statutory Bases*

In addition to Rule 11 and the inherent equitable powers of the courts, various federal statutes carve out exceptions to the American rule and permit attorney's fees to be shifted to the losing party in cases where the litigation is found frivolous or is conducted in a vexatious manner.[51] Among the most important of these statutes is section 1927 of Title 28 of the United States Code,[52] "the thrust of which is 'to curb dilatory practices and the abuse of the court processes by attorneys.' "[53] Under this statute, an attorney may be held personally liable for an adversary's legal fees when his conduct in representing either plaintiff or defendant "multiplies the proceedings . . . unreasonably and vexatiously."[54] Since section 1927 specifically provides that the offending lawyer, not the client, be taxed with the adversary's attorney's fees, the remedy it provides differs from both fee shifting under Rule 11[55] and fee shifting based on the court's inherent equitable powers.[56] As originally enacted, the statute permitted the costs of a lawsuit to be borne by an attorney but did not specifically address attorney's fees.[57] It was amended in 1980, however, to include the award of attorney's fees reasonably incurred by vexatious conduct.[58] The party seeking fees must clearly prove bad faith and vexatious multiplication of proceedings.[59] As is the

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51. For a survey of federal statutes permitting awards of attorney's fees to the prevailing parties, see Note, *supra* note 20, at 287-88 n.34.

52. 28 U.S.C. § 1927 (1982) provides in full:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

Id.

53. Tedeschi v. Smith Barney, Harris Upman & Co., 579 F. Supp. 657, 661 (S.D.N.Y. 1984) (quoting Colucci v. New York Times Co., 533 F. Supp. 1011, 1013 (S.D.N.Y. 1982)), *aff'd*, 757 F.2d 465 (2d Cir.), *cert. denied sub nom.* Chapman v. Smith Barney, Harris Upham & Co., 106 S. Ct. 147 (1985).

54. 28 U.S.C. § 1927 (1982).

55. FED. R. CIV. P. 11. The fact that the statute specifically provides that an adversary's legal fees will be taxed to the attorney rather than to the client may make courts even more reluctant to impose sanctions under this statute than they would be under Rule 11 or their inherent equitable powers. *See supra* note 41.

56. Roadway Express, Inc. v. Piper, 447 U.S. 752, 766-67 (1980).

57. Act of June 25, 1948, ch. 646, § 1927, 62 Stat. 869, 957 (amended 1980).

58. 28 U.S.C. § 1927 (1982).

59. Oliveri v. Thompson, 803 F.2d 1265 (2d Cir. 1986); Day v. Amoco Chems. Corp., 595 F. Supp. 1120, 1123 (S.D. Tex.), *appeal dismissed*, 747 F.2d 1462 (5th Cir. 1984), *cert. denied*, 470 U.S. 1086 (1985). *See also* West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079,

case with awards made pursuant to the court's inherent power, awards under section 1927 are proper where the "attorney's actions are so completely without merit . . . that they must have been undertaken for some improper purpose such as delay."[60] The standards for proving bad faith under section 1927 and under the inherent powers rule are thus the same.[61] The key difference is that awards are taxable only against the offending attorney under section 1927, while an award made under the court's inherent power may be made against an attorney, a party, or both.[62] Since courts view section 1927 as penal in nature, it has been strictly construed[63] and rarely invoked.[64]

Prevailing parties are permitted to recover reasonable attorney's fees under other federal statutes, particularly civil rights statutes.[65] Such statutes generally have a dual purpose: (1) to compensate plaintiffs for the cost of enforcing legal rights as "private attorneys general" implementing important public policies; and (2) to deter baseless claims or defenses and compensate the victims of such claims or defenses for costs which they never should have incurred.[66] Although a detailed discussion of these statutes exceeds the scope of this Article, the statutes and cases have drawn a distinction between the rights of a prevailing plaintiff and the rights of a prevailing defendant to recover attorney's fees.[67] For example, although the strong policy considerations that militate in favor of permitting a prevailing civil rights plaintiff routinely to recover counsel fees are

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1092 (2d Cir.) (28 U.S.C. § 1927 provides that a court may award double costs and damages in cases of "frivolous and vexatious appeals;" however, such an award requires "a clear showing of bad faith"), *cert. denied sub nom.* Cotler Drugs, Inc. v. Chas. Pfizer & Co., 404 U.S. 871 (1971).

60. Oliveri v. Thompson, 803 F.2d 1265, 1273 (2d Cir. 1986) (citing Acevedo v. INS, 538 F.2d 918, 920 (2d Cir. 1976)).

61. *Id.*

62. *Id.*

63. Badillo v. Central Steel & Wire Co., 717 F.2d 1160, 1166 (7th Cir. 1983).

64. S.M. KASSIN, *supra*, note 30, at 4. *See* Note, *Sanctions Imposed by Courts on Attorneys Who Abuse the Judicial Process*, 44 U. CHI. L. REV. 619, 623-29 (1977).

65. Note, *supra* note 20, at 287 n.34. *See, e.g.*, 42 U.S.C. § 1988 (1982) (civil rights actions); Civil Rights Act of 1964 § 204(b), 42 U.S.C. § 2000a-3(b) (1982).

66. Eastway Constr. Corp. v. City of New York, 637 F. Supp. 558, 563 (E.D.N.Y. 1986).

67. Thus, for example, under the antitrust laws, only prevailing plaintiffs may recover attorney's fees. 15 U.S.C. § 15(a) (1982). Under the patent laws, however, attorney's fees may be awarded to the prevailing party. 35 U.S.C. § 285 (1982). Nevertheless, even where fees are authorized for the prevailing party, the courts may apply different standards to plaintiffs and defendants. *See infra* notes 69-76 and accompanying text.

not applicable where the defendant prevails,[68] courts have permitted successful defendants in civil rights actions to recover fees in limited circumstances.[69] A victorious defendant in a Title VII case may recover counsel fees when the action is found to be "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith."[70] A victorious plaintiff in a Title II case, on the other hand, will recover attorney's fees "unless special circumstances would render such an award unjust."[71] Courts have been liberal in permitting prevailing civil rights plaintiffs to recover attorney's fees.[72] In enforcing the civil rights laws, plaintiffs are acting as private attorneys general, and this conduct "is to be encouraged by liberal compensation."[73] The more rigorous standard applicable to prevailing defendants is designed to assure that plaintiffs with arguably meritorious claims will not be deterred from bringing suits by the specter of having to pay enormous attorney's fees if the action proves unsuccessful.[74] At the same time, permitting defendants to recover counsel fees in the very limited circumstances described above protects them from patently baseless and burdensome litigation.[75] Whereas the statutory provisions permitting recovery of fees by prevailing plaintiffs are designed to compensate, those favoring prevailing defendants are principally aimed at deterrence.[76]

In sum, prior to the 1983 amendments to Rule 11, regardless of whether one proceeded under Rule 11, the court's equitable powers, or a federal statute, the standards for shifting costs of abusive litigation tactics to the abusing party were severe and presented formidable hurdles. As a result, none of these bases of attack proved effective in deterring improper conduct by litigants.

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68. Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 418-19 (1978).

69. *See, e.g.*, Carrion v. Yeshiva University, 535 F.2d 722, 727 (2d Cir. 1976) (defendant should be permitted to recover counsel fees "only where the action brought is found to be unreasonable, frivolous, meritless or vexatious").

70. Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978).

71. Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968).

72. Eastway Constr. Corp. v. City of New York, 637 F. Supp. 558, 564 (E.D.N.Y. 1986).

73. *Id.*

74. *See* Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 422 (1978); Note, *supra* note 20, at 301-02 (policy considerations underlying award of attorney's fees to prevailing plaintiff in civil rights action are inapplicable to prevailing defendant).

75. *See* Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 422 (1978); Steinberg v. St. Regis/Sheraton Hotel, 583 F. Supp. 421, 424 (S.D.N.Y. 1984).

76. Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 418-22 (1978).

III. AMENDED RULE 11

A. *Standards*

In an effort to curtail frivolous claims, defenses, and motions more effectively, to foster judicial economy, and to prevent delay in litigating legitimate matters, a revised Rule 11 was promulgated on April 28, 1983.[77] The amended Rule introduces more stringent standards for pleadings,[78] and explicitly extends the attorney's certification requirement to all papers filed with the court, including motions.[79] It also mandates imposition of sanctions for violation of the certification procedures.[80] Furthermore, the substantive certification requirements have been expanded to impose greater obligations upon attorneys.[81] By signing a pleading, motion, or other filing, an attorney certifies

> 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.[82]

Under amended Rule 11, the attorney now has an affirmative obligation to make some prefiling inquiry with respect to both the facts and the law.[83] "The standard is one of reasonableness under the circumstances,"[84] determined by investigation of the following factors: (1) the time available for investigation; (2) whether the attorney had to rely on the client for information regarding the under-

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77. FED. R. CIV. P. 11 advisory committee's note. *See* Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531, 1536 (9th Cir. 1986); Marcus, *supra* note 3; Note, *Reasonable Inquiry Under Rule 11 — Is The Stop, Look, and Investigate Requirement A Litigants' Roadblock?*, 18 IND. L. REV. 751, 773 (1985).

78. Indianapolis Colts v. Mayor of Baltimore, 775 F.2d 177, 181 (7th Cir. 1985).

79. FED. R. CIV. P. 11. Note, however, that the provisions of Rule 11 had "always applied to motions and other papers by virtue of incorporation by reference in Rule 7(b)(2)." FED. R. CIV. P. 11 advisory committee's note. This was made explicit by the amendment to Rule 11 and the addition of Rule 7(b)(3). *Id.*

80. FED. R. CIV. P. 11 advisory committee's note.

81. *Id.*

82. FED. R. CIV. P. 11.

83. FED. R. CIV. P. 11 advisory committee's note. *See* Miller & Culp, *supra* note 2, at 34, col. 1.

84. FED. R. CIV. P. 11 advisory committee's note; *In re* Yagman, 796 F.2d 1165, 1182 (9th Cir. 1986).

lying facts; (3) whether the filing was based on "a plausible view of the law"; or (4) whether the attorney depended on forwarding counsel or another member of the bar.[85] If the sufficiency of pretrial inquiry is at issue, neither the attorneys nor the parties are required to divulge privileged communications or work-product.[86] Where necessary, *in camera* proceedings will be used to protect work-product and privileged materials.[87] Courts are cautioned to avoid using hindsight in measuring the reasonableness of an attorney's certification; rather, reasonableness should be determined by examining what was appropriate at the time the pleading was filed.[88]

In addition, the "good ground" language of old Rule 11 has been expanded and made more explicit.[89] The claim or defense must have a basis in fact, and must be warranted by existing law or a good faith argument for a change in existing law.[90] It is not enough that an attorney believes in his client's cause or that there is theoretical justification for the claim.[91] The new language is not meant to "chill an attorney's enthusiasm or creativity,"[92] but the new standard is intended to be more demanding than the prior test of subjective good faith.[93] A greater range of circumstances may precipitate a violation.[94] Amended Rule 11 standards apply equally to *pro se* plaintiffs, although courts have discretion to take into account spe-

85. FED. R. CIV. P. 11 advisory committee's note.
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. FED. R. CIV. P. 11.
91. *See* Fisher v. CPC Int'l, Inc., 591 F. Supp. 228, 235-36 (W.D. Mo. 1984); Address by Senator Howell T. Heflin, 44th Judicial Conference of the District of Columbia Circuit, 100 F.R.D. 109, 205 (1983) (amended Rule 11 "provides that the attorney's belief in the validity of the filing must have been formed after reasonable inquiry, and cannot simply represent loyalty to the client or wishful thinking").
92. FED. R. CIV. P. 11 advisory committee's note.
93. *See* Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 253 (2d Cir. 1985) ("subjective good faith no longer provides the safe harbor it once did"); SFM Corp. v. Sundstrand Corp., 102 F.R.D. 555, 557 (N.D. Ill. 1984) ("[counsel's] subjective belief is not the standard for determining the propriety of Rule 11 sanctions"); Wells v. Oppenheimer & Co., Inc., 101 F.R.D. 358, 359 (S.D.N.Y. 1984) (Rule 11 sanctions are appropriate where "there is no *objective* basis for an attorney's belief that a motion 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' " (emphasis in original)), *vacated on other grounds*, 106 F.R.D. 258 (S.D.N.Y. 1985); Zaldivar v. City of Los Angeles, 590 F. Supp. 852, 856 (C.D. Cal. 1984) (tone of advisory committee's note and elimination of willfulness as a prerequisite to imposition of sanctions indicates that courts need not find subjective bad faith before imposing sanctions), *rev'd on other grounds*, 780 F.2d 823 (9th Cir. 1986).
94. *See* Schwarzer, *supra* note 2, at 206.

cial circumstances which may exist in such cases.[95]

Equally significant is that amended Rule 11 prohibits filings made for any improper purpose, not merely those made to cause delay.[96] Thus, motion papers designed to harass and increase the adversary's litigation expenses are specifically prohibited.[97]

B. *Remedies*

In line with other 1983 amendments to the Federal Rules of Civil Procedure,[98] amended Rule 11 contains a heightened emphasis on sanctions as a mechanism for deterring abusive litigation tactics. In order to dispel the perceived judicial reluctance to impose sanctions and to eliminate any apprehension on the part of litigants that efforts to enforce Rule 11 will be futile, sanctions under amended Rule 11 are mandatory.[99] Once a violation of Rule 11 is established, courts are given broad discretion in choosing a suitable sanction, and are explicitly authorized to shift the cost of the infraction, including attorney's fees, to the abusing party.[100]Moreover, when appropriate, sanctions may be imposed exclusively on the attorney and not on the client.[101]

Arguably, however, the remedies under amended Rule 11 have been limited. Under old Rule 11, pleadings signed with intent to defeat the purpose of the Rule could be stricken, as could pleadings with scandalous or indecent materials.[102] The amended Rule has eliminated language specifically authorizing the striking of sham

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95. FED. R. CIV. P. 11 advisory committee's note. *See, e.g.*, Carbana v. Cruz, 595 F. Supp. 585, 588 (D.P.R. 1984) (court took note of plaintiff's *pro se* status in deciding not to impose additional attorney's fees on plaintiff for filing a groundless motion to disqualify the judge from hearing defendant's application for attorney's fees), *aff'd*, 767 F.2d 905 (1st Cir. 1985).

96. FED. R. CIV. P. 11. *See* Miller & Culp, *supra* note 2, at 34, col. 1.

97. FED. R. CIV. P. 11.

98. *See, e.g.*, FED. R. CIV. P. 16(f), 26(g).

99. FED. R. CIV. P. 11 advisory committee's note. The mandatory nature of the Rule 11 sanctions provision was underscored by the court of appeals in Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 254 n.7 (2d Cir. 1985). *See infra* notes 252-57 and accompanying text. *But see* Schwarzer, *supra* note 2, at 200:

> It is not likely that courts will consider themselves bound by the rule's mandatory language to impose sanctions. That the problems giving rise to the rule may be urgent does not diminish the critical role of discretion in the exercise of judicial power under the rule. The decision whether to impose sanctions and what they should be will turn on an assessment of the gravity of the conduct at issue.

100. FED. R. CIV. P. 11 advisory committee's note.

101. *Id.*

102. *See supra* note 25.

pleadings.[103] While this deletion has been criticized,[104] motions to strike may be better dealt with under Rules 8, 12, or 56.[105] In any event, courts clearly have power to tailor sanctions to a particular violation,[106] and striking a pleading may well be an appropriate remedy in some cases.

IV. Issues Raised by Amended Rule 11

While Rule 11, as amended, is intended to create a higher standard of behavior for attorneys, the new criteria for attorney conduct are somewhat amorphous and therefore may "chill an attorney's enthusiasm or creativity in pursuing factual or legal theories."[107] Of even greater importance, however, is the real danger that fear of sanctions will deter litigants from prosecuting claims long recognized as legitimate because of a paucity of precomplaint data.[108] In applying amended Rule 11, courts must be discerning in evaluating cases, and should take precautions to avoid overinclusive, heavy-handed approaches which would undercut the policies of the Federal Rules of Civil Procedure.[109]

This section examines the standards which have emerged under amended Rule 11 since its adoption in 1983. The discussion focuses on judicial attitudes toward the new Rule as ascertained through the

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103. Fed. R. Civ. P. 11 advisory committee's note.

104. Lerner & Schwartz, *Why Rule 11 Shouldn't Be Changed*, Nat'l L.J., May 9, 1983, at 13, col. 1.

105. Fed. R. Civ. P. 11 advisory committee's note.

106. *Id.*; Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 254 n.7 (2d Cir. 1985) ("district courts retain broad discretion in fashioning sanctions"). *See generally* Schwarzer, *supra* note 2, at 201-04 (reviewing the types of sanctions available to the court).

107. Fed. R. Civ. P. 11 advisory committee's note. *See* Sussman, *supra* note 4, at 34 (the Rule 11 standard of reasonableness under the circumstances is "less-than-illuminating").

108. This is precisely the kind of result the Federal Rules were intended to avoid. The basic thrust of the Federal Rules is that a meritorious claimant is entitled to his day in court and ought not be derailed by technical pleading requirements. *See* 5 C. Wright & A. Miller, *supra* note 2, § 1202. To this end, "fact" pleading was abolished in favor of "a short and plain statement of the claim." Fed. R. Civ. P. 8(a). The plaintiff's complaint can be fleshed out during discovery. 5 C. Wright & A. Miller, *supra* note 2, § 1202. There was no requirement that the litigant be prepared to try the case before filing the complaint. Indeed, if there is any basis upon which a plaintiff might recover, the complaint cannot be dismissed. *See* Conley v. Gibson, 355 U.S. 41, 47-48 (1957). An overly literal interpretation of Rule 11 threatens to undo some of the most significant and enlightened reforms introduced by the Federal Rules of Civil Procedure.

109. Judge Schwarzer has recommended that the decision on whether to impose sanctions and the nature of the sanctions should turn on an assessment of the gravity of the conduct in question. Schwarzer, *supra* note 2, at 200. In making that assessment, courts should (1) avoid making *post hoc* judgments; (2) consider the impact of the violation; and (3) take into account the need for punishment and deterrence. *Id.* at 200-01.

empirical study of Rule 11 sanctions conducted under the aegis of the Federal Judicial Center,[110] and as evidenced through reported decisions.

A. *The Federal Judicial Center Study*

In order to determine whether the courts were adopting more stringent standards for pleadings and motions in accordance with the design of amended Rule 11, the Federal Judicial Center conducted an empirical study focusing on the way federal judges interpret and apply the new provisions of that rule.[111] Among other things, the participating judges were asked to read one of ten case summaries, each adapted from published opinions involving Rule 11 issues, and to complete a questionnaire indicating whether a willful violation of Rule 11 had occurred, and whether the offending party should be required to pay attorney's fees.[112] The judges were also asked questions regarding the offending attorney's motives, the sufficiency of prefiling inquiries, the reasons for imposing sanctions, and their thoughts on how fellow judges would rule on the same issues.[113] Overall, the findings demonstrate an increased willingness on the part of judges to impose sanctions for Rule 11 violations.[114] The data, however, also indicate significant differences among judges as to what constitutes a violation of Rule 11, and hence yield no consensus rationale for the imposition of sanctions.[115]

Moreover, the study indicates that many judges appear willing to consider subjective factors in determining whether Rule 11 has been violated, notwithstanding the irrelevance of subjective factors under the Rule as amended.[116] Thus, a significant percentage of participating judges would not impose sanctions where a party acted in good faith, provided the conduct in question did not amount to a willful violation of Rule 11.[117] Where the violation was found to have been willful, however, sanctions would normally be imposed even if

110. The Federal Judicial Center was created by Congress to conduct and to stimulate research and development on matters of judicial administration. The Chief Justice of the United States serves as Chairman of the Board of the Federal Judicial Center.

111. *See generally* S.M. KASSIN, *supra* note 30.

112. *Id.* at ix.

113. *Id.*

114. *Id.* at 45.

115. *Id.*

116. *Id.* at 18-29.

117. *Id.* at 19-23.

the party did act in good faith.[118] The judges surveyed are thus less inclined to view an instance of misconduct as evidencing bad faith than as evidencing willful violation.[119] Unlike the advisory committee to the Federal Rules of Civil Procedure, these judges do not view the terms "willful" and "bad faith" as synonymous.[120] Hence, many judges have chosen to eschew the objective "reasonable inquiry" standard of Rule 11 in favor of more subjective criteria, but at the same time do not define the critical elements of any subjective test with uniformity. Judges tend to sanction negligence or laziness more frequently than they do incompetence or inexperience, even though none of these terms would suggest bad faith.[121]

The data further indicate that judges take into account whether the conduct in question involves counsel or a *pro se* litigant.[122] Although the judges viewed a particular action as a Rule 11 violation irrespective of whether counsel was involved, they were less likely to infer subjective bad faith where a party was proceeding *pro se*.[123] Furthermore, judges tended to impose less weighty sanctions on *pro se* litigants than on counsel.[124]

B. *Key Rule 11 Issues and the Courts*

The reported decisions dealing with amended Rule 11 do not comprise the entire universe of Rule 11 sanctions decisions, and may represent only the tip of the iceberg. Since judges have traditionally been reluctant to publicize the imposition of sanctions on attorneys, many sanctions rulings remain unpublished.[125] These unreported decisions nevertheless have an impact on the bar.[126]

The most troublesome concerns under amended Rule 11 are: (1) the undefined scope of the prefiling inquiry requirement; (2) the standards for determining when a pleading is "well grounded in fact and is warranted by existing law or a good faith argument for the

118. *Id.* at 22-23.
119. *Id.* at 22.
120. *Id.* at 23.
121. *Id.* at 27.
122. *Id.* at 41-43.
123. *Id.* at 42.
124. *Id.* at 43.
125. Some courts have a nonpublication policy and will not publish decisions which are not precendential, thereby shielding sanctioned attorneys from public embarrassment. Simon, *More Penalties Seen for Litigation Abuses*, Nat'l L.J., Aug. 22, 1983, at 26, col. 4 (specifically referring to the Ninth Circuit).
126. For example, outside of major metropolitan areas, word of sanctions decisions tends to spread rapidly by word of mouth.

extension, modification, or reversal of existing law"; (3) the impact of the certification requirement on summary judgment motions made to obtain discovery; (4) the possibility that that Rule's renewed emphasis on sanctions will prove counter-productive and bog the courts down with expensive and time-consuming satellite litigation; and (5) the scope of appellate review of a district court's sanctions order.

1. Prefiling Inquiry. — a. *Inquiry into facts.* — While amended Rule 11 clearly requires some investigation as to both the facts and law prior to the filing of a pleading, it does not specify how comprehensive an investigation must be in order to meet this requirement.[127] The suggestion in the advisory committee notes is to use a sliding scale standard of "reasonableness under the circumstances."[128] Thus, Rule 11 does not mandate that prefiling factual inquiries be the best possible under the circumstances, but only that the inquiries be reasonable. This standard provides little guidance to the bench and bar. Moreover, the factors that the advisory committee suggests as germane[129] do not adequately clarify the precise nature of an attorney's obligations under the Rule. For example, the advisory committee notes imply that attorneys should not limit their prefiling inquiries to the client;[130] apparently, however, attorneys may rely solely on their clients if they have no other reasonable alternative.[131]

Although the Rule clearly does not require that an attorney be prepared to try a case prior to filing the complaint,[132] it makes no attempt to indicate what steps, short of full-scale trial preparation, constitute compliance. Such vagueness may have been intentional so that practitioners might aspire to higher than prescribed minimum standards. While raising the standards of practice by attorneys is a desirable goal, a nebulous criterion for determining the sufficiency of prefiling inquiry is not the appropriate vehicle for accomplishing that goal. Such vagueness may deter legitimate actions where little information is available prior to suit.[133] In gender-based discrimination

127. *See* Sussman & Sussman, *supra* note 4, at 36, col. 3.

128. FED. R. CIV. P. 11 advisory committee's note.

129. *See supra* notes 83-85 and accompanying text.

130. *See* FED. R. CIV. P. 11 advisory committee's note.

131. *See id.*; Marcus, *supra* note 3, at 365.

132. *See supra* note 108 and accompanying text.

133. This is not to suggest that the Federal Rules should be drafted and read rigidly; on the contrary, the courts ought to have flexibility under Rule 11. Indeed, it is not unusual for Congress to enact broad statutes and then permit the courts to work out the details on a case by case basis. In Rule 11 matters, however, the stakes for attorneys and their clients are sim-

cases, for example, the plaintiff's case is typically proved from information in the defendant's files which is not available for discovery until *after* the action is filed. Fear of sanctions may discourage attorneys from pursuing these and similar cases where proof is largely statistical.

One may argue that vagueness is not a competent basis for attacking this provision. The Federal Rules are replete with vague terminology. For instance, Rule 8(a) requires that a complaint contain only a "short and plain statement of the claim."[134] Rule 56 permits summary judgment where "there is no genuine issue as to any material fact."[135] It may be further argued that the drafters of Rule 11 intentionally employed vague terminology to provide the courts with flexibility, enabling judges to develop clearer guidelines over time. While flexibility has virtue in the context of pleading or summary judgment, more certainty is desirable in the Rule 11 area because of the severe adverse consequences that may follow a public rebuke by the courts. A sanctioned attorney faces a loss of standing among colleagues at the bar and the loss of patronage by clients. It is therefore necessary that the line delineating what is permitted from what is proscribed be drawn with some precision.

The cases reported since amended Rule 11 became effective reveal that courts have not established definitive criteria as to when the duty of "reasonable inquiry" has been discharged.[136] Recent cases, however, have begun to define some of the contours of the "reasonable inquiry" test.[137] First, it is clear that *some* prefiling inquiry is

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ply too high to warrant case by case determinations; therefore, more certainty in the governing standards is appropriate.

134. FED. R. CIV. P. 8(a)(2).

135. FED. R. CIV. P. 56(c).

136. Many courts have simply concluded that, in light of the glaring deficiencies in the plaintiff's complaint, the most minimal investigation by the attorney would have revealed that his client's suit was groundless. *See, e.g.*, Kuzmins v. Employee Transfer Corp., 587 F. Supp. 536, 538 (N.D. Ohio 1984); Steinberg v. St. Regis/Sheraton Hotel, 583 F. Supp. 421, 426 (S.D.N.Y. 1984); Van Berkel v. Fox Farm & Road Mach., 581 F. Supp. 1248, 1250-51 (D. Minn. 1984); Viola Sportswear, Inc. v. Mimun, 574 F. Supp. 619, 621 (E.D.N.Y. 1983). *See also* Smith v. United Transp. Union Local No. 81, 594 F. Supp. 96, 100-01 (S.D. Cal. 1984) (defendants' counsel did not meet minimal standards of practice, since previously stricken affirmative defenses were raised in response to amended complaint).

137. Wold v. Minerals Eng'g Co., 575 F. Supp. 166, 167 (D. Colo. 1983). See AM Int'l, Inc. v. Eastman Kodak Co., 39 Fed. R. Serv. 2d 433 (N.D. Ill. 1984), in which sanctions were awarded where defendant's counsel implied that opposing counsel misrepresented the state of health of a witness to be deposed based solely upon opposing counsel's rescheduling of the deposition until three weeks later. Defendant's counsel failed to make reasonable inquiry as to the factual basis of the charge by omitting questions of the witness at deposition as to whether

necessary.[138] Where counsel has failed to make any inquiries, Rule 11 has been violated.[139] Thus, sanctions were imposed on an attorney for filing an antitrust complaint where: (1) the primary basis for accusing the defendant of illegal conduct was the mere existence of a prior antitrust action against the same defendant; and (2) where the facts known to the attorney at the time of filing precluded a successful prosecution of the claim.[140] Similarly, sanctions were imposed on an attorney for failure to elicit facts from an individual on deposition that could have obviated subsequent claims by the attorney made on behalf of his client.[141] Thus, Rule 11 prohibits the use of form pleadings and "file now, discover later" tactics.

The harder questions on pretrial inquiry arise where some investigation has been made but the sufficiency of that investigation is challenged. This, in turn, creates four separate issues to analyze: (1) whether a pleading may be filed where the filing attorney is aware of a clear, but waivable, defense such as statute of limitations or lack of personal jurisdiction; (2) the extent to which an attorney must take into account information furnished by the adversary; (3) the extent to which the attorney may rely on the client for facts; and (4) whether the prefiling investigation requirement invades the attorney-client privilege or the attorney work-product doctrine.

(i) Pleading in the face of a waivable defense. — The application of Rule 11 sanctions in situations where plaintiff's counsel is aware of the existence of a defense that is waivable raises difficult questions. If an attorney is sanctionable under these circumstances, then, in effect, the plaintiff is saddled with an additional burden which previously was placed on the defendant. The plaintiff must, at the pleading stage, negate possible defenses. On the other hand, where the plaintiff files a claim in the face of a good defense, sanctions may be justified since this is arguably the type of litigation abuse Rule 11 was designed to eliminate. While some courts have talked tough in this regard,[142] the decisions go both

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opposing counsel encouraged him to use his health as an excuse to avoid being deposed. *Id.* at 435.

138. *See* cases cited *supra* note 136.

139. *Id.*

140. RPS Corp. v. Owens-Corning Fiberglass Corp., 1984-2 Trade Cas. (CCH) ¶66, 268 (N.D. Ill. 1984), *aff'd without opinion*, 787 F.2d 595 (7th Cir. 1986).

141. AM Int'l, Inc. v. Eastman Kodak Co., 39 Fed. R. Serv. 2d 433 (N.D. Ill. 1984).

142. *See* Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 253-54 (2d Cir. 1985) (Rule 11 is violated if claim has no chance of success); Schwarzer, *supra* note 2, at 193 (an attorney "cannot fail to disclose [an affirmative defense] in the hope that it will be

ways.[143] The courts, however, have demonstrated a clear reluctance to impose sanctions where the application of a defense is debatable. Thus sanctions have been denied where the statute of limitations is a viable defense but questions of tolling or fraudulent concealment are in issue,[144] and where the defense of lack of personal jurisdiction exists but the defendant's minimum contacts with the forum are in issue.[145] Judges seem less inhibited in imposing sanctions where the defense is res judicata and the plaintiff appears to be instituting multiple actions for vexatious purposes.[146] Thus, the courts have imposed sanctions only where violations are clear. A legal rule, however, which would permit sanctions where a claim is interposed despite a "clear" legal defense is unsatisfactory and may be difficult to administer. First, a clear defense to one judge may not be as clear to another, resulting in divergent standards. Second, this approach does not address the fundamental problem raised at the outset: that imposition of sanctions on parties filing a claim in the face of a defense thereto, in effect, saddles those parties with burdens heretofore placed on defendants. Perhaps the way out of this thicket is a rule which provides that sanctions will be imposed only after a defendant has come forward with a clear defense, and the plaintiff continues to prosecute the action notwithstanding the clear defense.[147] This approach is consonant with traditional assignments of the burdens of pleading and will not significantly increase costs to defendants.

(ii) Information provided by the adversary. — Prior to the commencement of an action or shortly after the pleadings are filed, an attorney may furnish the adversary with information which arguably

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overlooked").

143. Sanctions were granted in Hasty v. Paccar, Inc., 583 F. Supp. 1577 (E.D. Mo. 1984) (personal jurisdiction lacking); Van Berkel v. Fox Farm & Road Mach., 581 F. Supp. 1248 (D. Minn. 1984) (statute of limitations). Sanctions were denied in Harris v. WGN Continental Broadcasting, No. 86 C 1772 (N.D. Ill. Dec. 18, 1986) (LEXIS, Genfed library, Dist. file) (statue of limitations); Baker v. Wheat First Sec., 643 F. Supp. 1420 (S.D. W. Va. 1986) (statute of limitations); Leema Enters., Inc. v. Willi, 582 F. Supp. 255, 257 (S.D.N.Y. 1984) (long-arm jurisdiction).

144. Harris v. WGN Continental Broadcasting, No. 86 C 1772 (N.D. Ill. Dec. 18, 1986) (LEXIS, Genfed library, Dist. file); Baker v. Wheat First Sec., 645 F. Supp. 1420 (S.D. W. Va. 1986).

145. Leema Enters., Inc. v. Willi, 582 F. Supp. 255, 257 (S.D.N.Y. 1984).

146. *See e.g.*, Cannon v. Loyola University, 784 F.2d 777, 782 (7th Cir. 1986) (sanctions justified where pattern of repetitive litigation demonstrates a "penchant for harassing defendants").

147. This was the case in Van Berkel v. Fox Farm & Road Mach., 581 F. Supp. 1248 (D. Minn. 1984), where plaintiff's counsel continued to prosecute a personal injury claim despite irrefutable documentary evidence that the claim was time-barred.

vitiates a claim or defense. Where this exchange occurs, the question presented is whether this information must be taken into account under Rule 11. The cases make clear that an attorney is not free to ignore information furnished by his adversary which contradicts his client's contentions; such information at the very least puts counsel on notice that further inquiry is needed.[148] Consequently, failure to make further inquiry may subject the attorney to sanctions.[149] Thus, an attorney representing a plaintiff in a personal injury action was sanctioned for failure to make reasonable inquiry for continued prosecution of a claim that was clearly barred by the statute of limitations.[150] The court further held that once an investigation reveals that a client's position is untenable on the facts, the attorney has a professional obligation to dismiss the action.[151]

On the other hand, an attorney is not required to disbelieve his own client and to dismiss the case merely because an adversary disputes the client's claim.[152] Nor is extensive prefiling investigation required where the relevant events occurred long ago and witnesses and documentation cannot readily be located.[153] Courts to date have

148. *See* Woodfork v. Gavin, 105 F.R.D. 100, 105 (N.D. Miss. 1985) (attorney under Rule 11 has the obligation continually to review client's position as new facts come to light); Van Berkel v. Fox Farm & Road Mach., 581 F. Supp. 1248, 1250-51 (D. Minn. 1984) (uncontradicted evidence presented showing claim was barred by statute of limitations). *But see* Oliveri v. Thompson, 803 F.2d 1265, 1274 (2d Cir. 1986) (Rule 11 does not impose a continuing obligation on counsel).

149. Van Berkel v. Fox Farm & Road Mach., 581 F. Supp. 1248 (D. Minn. 1984).

150. *Id.* at 1249-51. The record further indicated that: (1) the plaintiff had come to the attorney some time prior to 1980; (2) the plaintiff's case had been docketed on the law firm's computer in 1980, the attorney thereafter being periodically advised of the running of the statute of limitations; and (3) therefore the attorney had adequate time to review the records involved. *Id.* at 1250. Moreover, even if the attorney's failure to conduct a further investigation was excusable, he had been alerted to the statute of limitations problem by the defendant's answer raising that defense, and by the plaintiff's subsequent letter to him confirming that the accident had occurred on the date contended by the defendant. *Id.* at 1250-51.

151. *Id.* at 1251. Plaintiff's counsel had argued that his ethical responsibility to his client precluded any voluntary dismissal. Rejecting this contention, the court reasoned that an attorney has a professional obligation to dismiss a baseless claim, even over his client's objection, where he learns that such claim is baseless. *Id.*

152. Friedgood v. Axelrod, 593 F. Supp. 395, 397-98 (S.D.N.Y. 1984) (sanctions denied when defendant's previous disclosures were suspect and plaintiff's position was corroborated by others). Thus, facts given by a client need not be undisputed, but they must be substantial enough to support a reasonable belief that there is a basis to support the filing. Schwarzer, *supra* note 2, at 187. Mere speculation, surmise, or rumor is not enough. *Id.*

153. Touchstone v. G.B.Q. Corp., 596 F. Supp. 805, 810 (E.D. La. 1984). However, the court pointed out that "there comes a time after discovery has progressed that counsel should have knowledge of the specific facts that would support the conclusion that the action is 'well grounded in fact.'" *Id.*

generally imposed sanctions only in cases where the most fundamental inquiries would have revealed impediments to the pleadings in question.[154] The more complicated questions of sufficiency of the investigation arise where some prefiling inquiry has been made and the investigation has been more than "minimal." This area, however, has been left largely uncharted by the courts.

(iii) Reliance on the client. — From the foregoing discussion, a fundamental principle emerges: an attorney may not rely solely on the client where further investigation is reasonable. A leading case on the appropriateness of relying on the client under Rule 11 is *Kendrick v. Zanides*.[155] In *Kendrick*, the defendants, government prosecutors, sought sanctions following voluntary dismissal with prejudice of civil rights claims.[156] Plaintiff brought the civil rights action following his criminal conviction for securities fraud and perjury, claiming that the federal prosecutors had impeded his defense against the criminal charges by wrongfully searching and seizing files, removing documents, and concealing acts from the plaintiff.[157] Plaintiff's counsel conferred with the attorney who represented him in prior proceedings; plaintiff's prior counsel confirmed "in general" the facts set forth in the civil rights complaint.[158] However, counsel apparently did not, at the time of filing, review documents in the plaintiff's possession which refuted the civil rights claims.[159] Only after the complaint had been filed and plaintiff's files reviewed did counsel conclude that the claims were unprovable; he then dismissed the action with prejudice.[160]

In imposing sanctions, the court found that while Rule 11 does not mandate that plaintiff's attorneys conduct their own factual inquiry where another attorney has done so, the Rule does require that the attorneys have sufficient *credible* information to enable them to form a reasonable belief that the allegations in the complaint are well grounded in fact.[161] Thus, the opinions and conclusions of prior counsel are insufficient to satisfy the present attorneys' duty of prefiling inquiry, particularly when the present attorneys had in their pos-

154. *See supra* notes 141-51 and accompanying text.
155. 609 F. Supp. 1162 (N.D. Cal. 1985).
156. *Id.* at 1164-65.
157. *Id.* at 1165.
158. *Id.* at 1172.
159. *Id.*
160. *Id.*
161. *Id.*

session documents refuting their client's claims.[162] The court concluded that the action was pursued by plaintiff and his counsel to "serve their vindictive purpose to damage the defendants' reputations and subject them to personal harassment."[163]

(iv) Prefiling inquiry and privilege. — Uncertainty as to what constitutes the standards for prefiling investigation is not the only problem with amended Rule 11. The question of how reasonable inquiry can be established without compromising either the attorney-client privilege or the attorney work-product doctrine also arises. The advisory committee notes provide that the Rule does not require disclosure of privileged communications or work-product to prove compliance with the certification standards.[164] This position begs the question of what the proper procedures should be when there is a need for such disclosure, such as when an attorney proceeds solely on the basis of work product or client communications.[165] Such a problem might be illusory, however, since the information would have to be disclosed eventually either in pleadings or during discovery, and since disclosure of work-product or attorney-client matters may be authorized in such circumstances.[166]

The advisory committee notes suggest that unauthorized disclosure can be prevented by use of *in camera* proceedings.[167] This approach raises several unsettling possibilities. It provides an opportunity for ex parte communications, and therefore should be used only as a last resort.[168] In addition, the judge who will ultimately decide whether to impose sanctions under Rule 11 may demand access to privileged materials.[169] Once aware of this possibility, clients may be less than candid with their counsel, thwarting the basic purposes of the attorney-client privilege.[170] The purported "protections" under

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162. *Id.*

163. *Id.* at 1173.

164. FED. R. CIV. P. 11 advisory committee's note.

165. Marcus, *supra* note 3, at 365.

166. *See, e.g.* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983) (disclosure of attorney-client discussion permitted when, for example, it is necessary to prevent a client from committing a crime likely to result in death or substantial bodily harm, or to respond to allegations in a proceeding concerning the attorney's representation of a client).

167. FED. R. CIV. P. 11 advisory committee's note.

168. Schwarzer, *supra* note 2, at 199.

169. *See* Sussman, *supra* note 4, at 34, col. 4 ("The implications of this procedure require no elucidation.").

170. *See* Nelkin, *supra* note 10, at 1345 ("Clients will certainly become less forthright as they learn of the varied circumstances in which rule 11 can drive a wedge between them and their lawyers.").

the new Rule may thus prove illusory. Potential privilege and work-product problems under amended Rule 11 may merit additional attention by the drafters in order to provide guidance to the practitioner.

b. *Inquiry into law.* — The amended Rule also requires prefiling inquiry with respect to the law.[171] It is not enough that an attorney or party believes "the law is or should be a certain way."[172] As with factual prefiling inquiries,[173] courts have not articulated a minimum standard for the amount of legal research required prior to the filing of pleadings under Rule 11, and the decisions in this area have taken on a similar visceral quality.

Courts have imposed sanctions where parties, by amended pleadings or subsequent actions, seek to interpose claims on legal grounds which have previously been rejected by a court and are supported by arguments which do no more than rehash earlier briefs.[174] Similarly, attorneys may be sanctioned when they persist in pursuing claims in the face of contrary, controlling, and indistinguishable authority brought to their attention by adversaries.[175] Courts are inclined to grant sanctions where a party seeks recovery on legal theories that have been uniformly rejected, and which contain no colorable basis for distinguishing them from governing precedents.[176] In *Rodgers v. Lincoln Towing Service, Inc.*,[177] for example, the plaintiff brought a civil rights action against a towing company, several of its employees, and various municipal officials, asserting claims "under virtually every conceivable theory" under the Bill of Rights and the federal civil rights laws.[178] Plaintiff's action followed his acquittal on charges of throwing paint on the towing company's building after his car had been towed from a private parking lot.[179] On

171. FED. R. CIV. P. 11.

172. Snyder v. IRS, 596 F. Supp. 240, 251 (N.D. Ind. 1984).

173. *See supra* notes 127-54 and accompanying text.

174. Smith v. United Transp. Union Local No. 81, 594 F. Supp. 96, 100-01 (S.D. Cal. 1984).

175. *Id.* at 101.

176. See, e.g., Sunn v. Dean, 597 F. Supp. 79, 83-84 (N.D. Ga. 1984), in which plaintiff's action was "patently frivolous" in alleging that jurors conspired to deprive him of his civil rights, since jurors have absolute immunity from subsequent civil rights actions for damages. *See also* Ring v. R.J. Reynolds Indus., Inc., 597 F. Supp. 1277, 1281-82 (N.D. Ill. 1984) (sanctions imposed where it was apparent that all four counts in plaintiff's complaint failed under well-established law).

177. 596 F. Supp. 13 (N.D. Ill. 1984), *aff'd*, 771 F.2d 194 (7th Cir. 1985).

178. *Id.* at 15.

179. *Id.* at 16.

defendant's motion, the trial court dismissed plaintiff's "ponderous, extravagant, and overblown complaint that was largely devoid of a colorable legal basis."[180] Noting that amended Rule 11 required only a "reasonable amount" of prefiling research, the trial court found a "clear-cut violation" of the Rule and stated: "[W]ith even the modest research that is now required under rule 11, any lawyer admitted to practice before this court quickly should have determined that this relatively minor incident did not amount to a federal case of constitutional dimension."[181]

Thus, counsel is no longer free to "plead now and analyze later."[182] Nor is a "shotgun approach" to pleadings acceptable under the amended Rule.[183] While a lawyer may handle a number of cases quickly by applying standard legal principles to each one, this approach is not permissible where one proffers a new theory or a theory that cuts against much of the precedent.[184] Moreover, even where counsel purports to have engaged in extensive prefiling research, sanctions are appropriate if pleadings are "heavily freighted" with claims having "no plausible legal basis."[185]

2. "Well grounded in fact and . . . law." — In changing the Rule 11 certification test from "good ground" to "well grounded in fact and . . . warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law,"[186] and by deleting the "willfulness" requirement, the stringent requirements for imposing sanctions under the former Rule are eased, thereby encouraging courts to punish recalcitrant parties or their attorneys more frequently.[187]

To determine whether a pleading is well grounded, the advisory

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180. *Id.* at 22.

181. *Id.*

182. *Id.* at 27 (citation omitted).

183. *Id.*

184. *In re* TCI, Ltd., 769 F.2d 441, 447 (7th Cir. 1985) ("An attorney who wants to strike off on a new path in the law must make an effort to determine the nature of the principles he is applying [or challenging]; he may not impose the expense of doing this on his adversaries — who are likely to be just as busy and will not be amused by a claim that the rigors of daily practice excuse legal research.").

185. *Rodgers*, 596 F. Supp. at 26.

186. FED. R. CIV. P. 11. This standard is borrowed from the MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1983), which states that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."

187. FED. R. CIV. P. 11 advisory committee's note. *See supra* notes 23-44 and accompanying text.

committee notes suggest that a court examine whether conduct was reasonable under circumstances existing at the time the pleading was filed.[188] The drafters' intent was to replace the former standard of subjective bad faith with "more focused" objective criteria[189] that serve to protect attorneys who reach reasonable but erroneous conclusions about the validity of their claims.[190] Nevertheless, as Judge Jack Weinstein pointed out in a very thoughtful opinion on remand in *Eastway Construction Corp. v. City of New York* [*Eastway II*],[191] Rule 11, as amended, has both subjective and objective components:

> The text suggests that the obligation imposed by the Rule is partly objective, and partly subjective. The requirement that the attorney base his certification on a "reasonable inquiry" is objective, because what is "reasonable" is judged by objective norms of reasonable attorneys. But the certification itself need only state that the motion is well grounded "to the best of [the attorney's] knowledge, information, and belief." Since the certification relates to the attorney's own beliefs, it appears that it should be judged by a subjective standard. Even the subjective component has objective aspects since, as a matter of evidence, the judge will rely on what reasonable lawyers would have known or believed under the circumstances in deciding what this lawyer believed.[192]

To the extent that judicial construction of Rule 11 ignores the subjective element and measures "well grounded" from the perspective of a hypothetical reasonable person, the very "wisdom of hindsight" that the drafters sought to avoid comes into play.[193]

While the courts have generally moved away from the rigorous subjective bad faith standard and have held that the amended Rule imposes an objective standard of conduct,[194] the criteria for deter-

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188. FED. R. CIV. P. 11 advisory committee's note.

189. *Id.*

190. Eastway Constr. Corp. v. City of New York, 637 F. Supp. 558, 567 (E.D.N.Y. 1986).

191. 637 F. Supp. 558 (E.D.N.Y. 1986).

192. *Id.* at 566-67.

193. *Cf.* FED. R. CIV. P. 11 advisory committee's note ("[t]he court is expected to avoid using the wisdom of hindsight," and instead determine whether the attorney's conduct was reasonable at the time the pleading or other document was filed).

194. *See, e.g.*, Eastway Constr. Corp. v. City of New York, 762 F.2d 243 (2d Cir. 1985). The court stated:

> Prior to the 1983 amendment, the rule spoke in plainly subjective terms: An attorney's certification of a pleading was an assertion that "to the best of his knowledge, information, and belief, there [was] good ground to support it." The rule, therefore, contemplated sanctions only where there was a showing of bad faith, and the only proper inquiry was the subjective belief of the attorney at the time the pleading was

mining whether a pleading is nevertheless "well grounded" remain somewhat elusive. The varying attitudes of judges toward imposing sanctions is partly responsible for the lack of consensus in this area. Some judges are simply opposed to sanctions in principle and are therefore reluctant to impose them.[195] Other judges may simply wish to move slowly with sanctions in order to give the bar an opportunity to familiarize themselves with the new standards. Another factor contributing to the lack of consensus may be the twin aims of monetary sanctions and their relationship to substantive standards. Monetary sanctions under Rule 11 are designed both to compensate the victims of abusive practices and to deter future misconduct. To the extent that deterrence is a goal, subjective intent is important. On

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signed.

> The addition of the words "formed after a reasonable inquiry" [in amended Rule 11] demand that we revise our inquiry. No longer is it enough for an attorney to claim that he acted in good faith, or that he personally was unaware of the groundless nature of an argument or claim. For the language of the new Rule 11 explicitly and unambiguously imposes an affirmative duty on each attorney to conduct a reasonable inquiry into the viability of a pleading before it is signed. Simply put, subjective good faith no longer provides the safe harbor it once did.

Id. at 253 (citations omitted). *See* Wells v. Oppenheimer & Co., 101 F.R.D. 358, 359 (S.D.N.Y. 1984) (court may impose sanctions where an attorney has no objective basis for believing that a motion is well grounded in fact and warranted by existing law or good faith argument to change the law), *vacated on other grounds*, 106 F.R.D. 258 (S.D.N.Y. 1985). *See also* Golden Eagle Distrib. Corp. v. Burroughs Corp., 103 F.R.D. 124, 128 (N.D. Cal. 1984) (absence of bad faith is irrelevant to the imposition of sanctions under amended Rule 11), *rev'd on other grounds*, 801 F.2d 1531 (9th Cir. 1986); *Rodgers*, 596 F. Supp. at 27 (standard under amended Rule 11 is an objective one of reasonableness; it is irrelevant what an individual lawyer thinks), *aff'd*, 771 F.2d 194 (7th Cir. 1985); Pudlo v. IRS, 587 F. Supp. 1010, 1011 (N.D. Ill. 1984) ("Unlike the bad faith standard [of old Rule 11], [amended] Rule 11 is objective in its application except to the extent a litigant argues for a change in the law."). *But see* Suslick v. Rothschild Sec. Corp., 741 F.2d 1000, 1007 (7th Cir. 1984) ("Rule 11 requires a finding of subjective bad faith on the part of the person against whom fees are to be assessed."). This "holding" in *Suslick* has generated much confusion, for it calls into question, at least in the Seventh Circuit, the precedential value of the contrary but persuasive holdings in that Circuit. Although *Suslick* dealt with alleged attorney misconduct in 1982, the Seventh Circuit inexplicably quoted amended Rule 11 in a footnote. *Id.* at 1003 n.3. The Seventh Circuit, in affirming *Rodgers*, reasoned that *Suslick*, having been decided under old Rule 11, did not apply to the amended rule. *Rodgers*, 771 F.2d at 205. Other Seventh Circuit cases have similarly cast doubt on the viability of the *Suslick* decision. *See, e.g.*, Indianapolis Colts v. Mayor of Baltimore, 775 F.2d 177, 181 (7th Cir. 1985) ("According to the Advisory Committee Notes, however, the amended standard is 'more stringent than a good faith formula' and is 'one of reasonableness under the circumstances.' "); *In re* TCI, Ltd., 769 F.2d 441, 445 (7th Cir. 1985) ("If a lawyer pursues a path that a reasonably careful attorney would have known, after appropriate inquiry, to be unsound, the conduct is objectively unreasonable and vexatious."). *But see* Nelson v. Piedmont Aviation, Inc., 750 F.2d 1234, 1238 (4th Cir. 1984) (applying bad faith standard), *cert. denied*, 471 U.S. 1116 (1985).

195. *See supra* note 84.

the other hand, intent is irrelevant if compensation is the goal. As discussed above,[196] some judges will not impose sanctions unless bad faith is shown, even though the new Rule 11 standard was intended by the drafters to be objective.

In *Eastway Construction Corp. v. City of New York* [*Eastway I*],[197] the Second Circuit held that sanctions would be appropriate where the pleading is interposed for an improper purpose or where, after reasonable inquiry, a competent attorney could form a reasonable belief that the pleading is not well grounded in fact or is not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.[198] The opinion, however, sheds no light on what constitutes "reasonable inquiry" or a "competent attorney." Rather, by restating Rule 11 so as to eliminate the subjective elements incorporated by the drafters, *Eastway II* holds attorneys strictly liable for mistakes in judgment that lead to filing claims subsequently deemed frivolous.[199]

The majority of courts, rather than plumbing the depths of Rule 11 and the advisory committee notes, have simply turned to less analytical surrogates to determine whether a pleading is well grounded from an objective point of view.[200] Thus, sanctions have been granted where the action of the party or its attorney is "baseless,"[201] "dishonest, cynical and mendacious,"[202] "frivolous,"[203]

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196. *See supra* note 113 and accompanying text.

197. 762 F.2d 243 (2d Cir. 1985).

198. *Id.* at 254.

199. *Eastway II*, 637 F. Supp. at 567.

200. *See infra* notes 201-215 and accompanying text.

201. Van Berkel v. Fox Farm & Road Mach., 581 F. Supp. 1248, 1251 (D. Minn. 1984).

202. *Cf.* Ornelas v. Heckler, 598 F. Supp. 1089, 1090 (D. Colo. 1984) (full compliance with Rule 11 found, but sanctions were awarded pursuant to the attorney fee provisions of the Equal Access to Justice Act and the Social Security Act).

203. Heimbaugh v. City of San Francisco, 591 F. Supp. 1573, 1577 (N.D. Cal. 1984); Fredrick v. Clark, 587 F. Supp. 789, 794 (W.D. Wis. 1984); Booker v. City of Atlanta, 586 F. Supp. 340, 341 (N.D. Ga. 1984); Dore v. Schultz, 582 F. Supp. 154, 158 (S.D.N.Y. 1984). *See also* Steinberg v. St. Regis/Sheraton Hotel, 583 F. Supp. 421, 425 (S.D.N.Y. 1984). The term "frivolous" is perhaps the most frequently invoked surrogate for the Rule 11 standard. It is synonymous with "less than a scintilla" or "manifestly insufficient or futile." *Eastway II*, 637 F. Supp. at 565. The term "frivolous" may be used as a shorthand description of the Rule 11 standard. Zaldivar v. City of Los Angeles, 780 F.2d 823, 831 n.7 (9th Cir. 1986). In *Zaldivar*, the court stated:

> Thus, we affirm that Rule 11 sanctions shall be assessed if the paper filed in district court and signed by an attorney or an unrepresented party is frivolous, legally unreasonable, or without factual foundation, even though the paper was not filed in subjective bad faith [footnote omitted].

"groundless,"[204] "harassing and vexatious,"[205] "irresponsible and inexcusable,"[206] "lacking in merit,"[207] "patently untenable,"[208] "specious,"[209] "grounded on nothing but tactical or strategic expediency,"[210] and "worthless."[211] Conversely, sanctions have been denied where the offending behavior was "not . . . unreasonable,"[212] not "devoid of basis,"[213] or "not imposed to harass."[214] In addition, several courts have denied sanctions upon failure to show "bad faith."[215]

While the above phrases are useful vehicles by which to decide individual cases, they do not furnish a meaningful benchmark by which to judge the propriety of sanctions in general. A review of cases, however, reveals a number of useful guidelines.[216] First, to be well grounded, a claim must have a plausible legal basis. Where a legal view is rejected by an unbroken line of Supreme Court authority, it is not objectively well grounded, no matter how fervently the attorney believes in the righteousness of his client's position.[217] On

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> We accept this formulation fully aware that no combination of abstract words may correctly apply to every case.

Id. at 831.

204. United States *ex rel.* U.S.-Namibia (Southwest Africa) Trade & Cultural Council, Inc. v. Africa Fund, 588 F. Supp. 1350, 1352 (S.D.N.Y. 1984).

205. Taylor v. Prudential-Bache Sec., Inc., 594 F. Supp. 226, 227 (N.D.N.Y.), *aff'd*, 751 F.2d 371 (2d Cir. 1984).

206. *Id.*

207. Dore v. Schultz, 582 F. Supp. 154, 158 (S.D.N.Y. 1984). *See Rodgers*, 596 F. Supp. at 27; Fredrick v. Clark, 587 F. Supp. 789, 793 (W.D. Wis. 1984).

208. SFM Corp. v. Sundstrand Corp., 102 F.R.D. 555, 557 (N.D. Ill. 1984).

209. *See* Blair v. United States Treasury Dep't, 596 F. Supp. 273, 282 (N.D. Ind. 1984).

210. Huettig & Schromm, Inc. v. Landscape Contractors Council, 582 F. Supp. 1519, 1522 (N.D. Cal. 1984), *aff'd*, 790 F.2d 1421 (9th Cir. 1986).

211. *Rodgers*, 596 F. Supp. at 28.

212. Leema Enters., Inc. v. Willi, 582 F. Supp. 255, 257 (S.D.N.Y. 1984).

213. Gold v. Blinder, Robinson & Co., 580 F. Supp. 50, 55 (S.D.N.Y. 1984).

214. Meistrich v. Executive Monetary Mgmt., Inc., No. 83 Civ. 1636 (S.D.N.Y. Sept. 27, 1984) (LEXIS, Genfed Library, Dist. file).

215. Suslick v. Rothschild Sec. Corp., 741 F.2d 1000, 1007 (7th Cir. 1984); Williams v. Birzon, 576 F. Supp. 577, 580 (W.D.N.Y. 1983), *aff'd*, 740 F.2d 955 (2d Cir. 1984). *See also* Linker v. Custom-Bilt Mach., Inc., 594 F. Supp. 894, 899 (E.D. Pa. 1984) (court denied motion to strike an affirmative defense which alleged that plaintiff's amended complaint was commenced in bad faith, in part because "plaintiff's bad faith motive raises the issue of his compliance with Rule 11 of the Federal Rules of Civil Procedure").

216. *See infra* notes 217-24 and accompanying text.

217. *Rodgers*, 596 F. Supp. at 27. *See also* Young v. IRS, 596 F. Supp. 141, 151-52 (N.D. Ind. 1984) (action challenging general validity and applicability of income tax laws is appropriate for Rule 11 sanctions); Cameron v. IRS, 593 F. Supp. 1540, 1557-58 (N.D. Ind. 1984) (sanctions appropriate when, despite clear precedent demonstrating the claim's un-

the other hand, where there is no solid line of authority or the authorities are questionable, attorneys have greater leeway and less risk of incurring sanctions.[218] Second, the more complex the issues involved, the less likely that courts will impose sanctions. Courts have demonstrated a marked reluctance to impose sanctions in developing areas of the law presenting complicated questions, such as civil RICO[219] and personal jurisdiction.[220] Third, repeated instigation of lawsuits or repeated interposition of previously adjudicated claims suggests to courts that the claims are not well grounded, but rather are interposed for an improper purpose, such as delay or harassment.[221] Fourth, sanctions are not appropriate merely because a court, upon full consideration of the issue, has concluded that the complaint fails to state a claim.[222] Fifth, Rule 11 applies equally to *pro se* parties; courts have not hesitated to order sanctions where such parties have behaved irresponsibly.[223] Last, while courts are now less reluctant to impose sanctions, they still view sanctions as a very serious matter and tend to impose them most consistently where the abuse is clear-cut.[224]

A final issue relates to the obligation of the attorney in making a good faith argument "for the extension, modification, or reversal of

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tenability, the plaintiff argues that income taxes do not apply to him), *aff'd*, 773 F.2d 126 (7th Cir. 1985); Sunn v. Dean, 597 F. Supp. 79, 83-84 (N.D. Ga. 1984) (civil rights suits against jurors and counsel merely due to loss of claim are candidates for Rule 11 sanctions).

218. *See* Laborers Health & Welfare Trust Fund v. Hess, 594 F. Supp. 273, 282 (N.D. Cal. 1984) (novel jurisdictional issue under ERISA); Hudson v. LaRouche, 579 F. Supp. 623, 631 (S.D.N.Y. 1983) (confusing state of authority regarding RICO claims).

219. *See* Kostos v. Janney Montgomery Scott Inc., No. 83 Civ. 6305-CSH (S.D.N.Y. Sept. 10, 1984) (LEXIS, Genfed library, Dist. file); Gramercy 222 Residents Corp. v. Gramercy Realty Assocs., 591 F. Supp. 1408, 1415 (S.D.N.Y. 1984); Hudson v. LaRouche, 579 F. Supp. 623, 631 (S.D.N.Y. 1983).

220. Leema Enters., Inc. v. Willi, 582 F. Supp. 255, 257 (S.D.N.Y. 1984).

221. *See* Fried v. Fried, 113 F.R.D. 103 (S.D.N.Y. 1986) (sanctions granted where claim had been rejected in a prior suit); United States *ex rel.* U.S.-Namibia (Southwest Africa) Trade & Cultural Council, Inc., v. Africa Fund, 588 F. Supp. 1350, 1352 (S.D.N.Y. 1984).

222. Ring v. R.J. Reynolds Indus., Inc., 597 F. Supp. 1277, 1281 (N.D. Ill. 1984). *See* Universal City Studios, Inc. v. Nintendo Co., 109 F.R.D. 121, 125 (S.D.N.Y. 1985) ("Not every successful defense will result in attorneys' fees, only those which establish unusual facts to demonstrate . . . a lack of good faith in the initiation of the claim.").

223. *See, e.g.*, Young v. IRS, 596 F. Supp. 141, 151-52 (N.D. Ind. 1984); Carbana v. Cruz, 595 F. Supp. 585, 588 n.5 (D.P.R. 1984), *aff'd*, 767 F.2d 905 (1st Cir. 1985); Fredrick v. Clark, 587 F. Supp. 789, 794 (W.D. Wis. 1984). *But see* S.M. KASSIN, supra note 30, at 41-43 (survey conducted by Federal Judicial Center indicates that judges tend to be more lenient with *pro se* litigants than with counsel).

224. *See supra* notes 201-11 and accompanying text.

existing law."[225] On this question, little judicial guidance has been given. In *Golden Eagle Distributing Corp. v. Burroughs Corp.*,[226] the district court imposed sanctions on defense counsel for failure to indicate that arguments made in support of his client's positions were based, not on existing law, but rather on how counsel thought the law should be.[227] The court found that although the arguments advanced were meritorious, and hence not frivolous, it objected to the "misleading" manner in which the position was advocated.[228]

Reversing the district court, the Ninth Circuit held that the court below should have focused on whether there was a sound basis in fact or law for the argument, rather than requiring lawyers to identify which position is supported by existing law and which would extend the law.[229] The court of appeals rejected the district court's view that Rule 11 imposed an ethical duty of candor similar to that established by the ABA Model Rules.[230] The appellate court expressed special concern that standards enunciated by the court below would discourage zealous advocacy by creating a conflict between the lawyer's duty in representing the client and the lawyer's interest

225. FED. R. CIV. P. 11.

226. 103 F.R.D. 124 (N.D. Cal. 1984).

227. *Id.* at 126-28.

228. *Id.*

229. 801 F.2d 1531, 1538 (9th Cir. 1986).

230. *Id.* at 1539. The district court's decision was grounded on two bases: (1) that Rule 11 is violated where counsel does not distinguish between existing law and an argument to change existing law; and (2) that counsel's failure to cite adverse authority violated Rule 11. The circuit court rejected both these grounds. With regard to "argument identification," the court advanced the following five reasons for its rejection:

1. The text of the rule does not require counsel to distinguish between arguments based on existing law and arguments to change the law, *id.* at 1539;
2. To uphold the lower court's standard would chill advocacy by creating a conflict between the attorney's duty of zealous representation and desire to avoid criticism, *id.* at 1540;
3. Rule 11 applies to frivolous motions, not to non-frivolous motions that the court later determines are unjustified, *id*;
4. The lower court's rule would multiply the task of judges and increase the costs of litigation, *id.* at 1540-41;
5. The rule would inevitably be applied in close cases which would increase the danger of arbitrariness in the decision making process and decrease the probability of uniform enforcement, *id.* at 1541-42.

Similarly, the court of appeals rejected the second ground for the district court's decision. The appellate court noted that many of the same considerations that undermined the first argument were applicable here. *Id.* at 1541. The court expressed concern that the broad reading given by the lower court would unduly burden bench and bar. *Id.* at 1542. The court rejected the notion that Rule 11 should be interpreted to create "two ladders for after-the-fact review of asserted unethical conduct: one consisting of sanction procedures, the other consisting of well-established bar and court ethical procedures." *Id.* at 1542.

in avoiding rebuke.[231] In addition, the circuit court found it inappropriate to impose Rule 11 sanctions for counsel's failure to cite adverse authority.[232] The court reasoned that to permit sanctions on this basis would lead to sanctions on close issues, increase the burdens on the parties and the courts, and increase the cost of litigation.[233] The Ninth Circuit was obviously concerned that the trial court's formulation of attorney obligations under Rule 11 was too burdensome, but provided little instruction as to how an attorney, consistent with Rule 11, could make a good faith argument for a change in the law. One way for the advocate to avoid the Rule 11 thicket is simply to be honest with the court. If there is contrary authority, he should note that authority and state why it does not pertain. If analogy is the basis of the argument, he should make that point clear. Straightforwardness will increase the advocate's credibility in the eyes of the court, and lessen, if not eliminate, the likelihood of sanctions. While the cases provide some notion as to when sanctions are appropriate, the courts have only begun to give shape to the amorphous "well grounded" test. A broader standard of more universal applicability, discussed in part V of this Article, is therefore desirable.

3. Rule 11 and Summary Judgment. — Amended Rule 11 applies to motions, including summary judgment motions, as well as pleadings.[234] Traditionally, summary judgment motions have had two separate and distinct functions: (1) to determine whether there is a material issue of fact necessitating a trial, or whether the matter can be disposed of on questions of law without a trial; and (2) to gain discovery.[235] To defeat a motion for summary judgment, the party against whom the motion is made must come forward with facts demonstrating that it is entitled to a trial.[236] Essentially, that party must produce evidence that a trial is warranted, or else face summary disposition of its claims or defenses. A party which, for whatever reason, has been unable to pin down an opponent through

231. *Id.* at 1540.

232. *Id.* at 1541-42.

233. *Id.* at 1542.

234. FED. R. CIV. P. 7(b)(3) makes the Rule 11 certification requirement applicable to motions.

235. *See* C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 2712 (2d ed. 1983); C. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING § 88 (2d ed. 1947) (Rule 56 not only provides an effective means for summary action, but also serves as a discovery instrument by forcing disclosure of the merits of either claims or defenses).

236. C. WRIGHT, THE LAW OF FEDERAL COURTS § 99 (4th ed. 1983).

discovery, may wish to flush out the opponent by a summary judgment motion, even where material issues of fact exist.[237]

When a material issue of fact is undeniably present, a motion for summary judgment would not be well grounded and would clearly violate Rule 11.[238] On the other hand, summary judgment has been traditionally recognized as an appropriate discovery vehicle.[239] Therefore, as long as a summary judgment motion is reasonably calculated to flush out the facts underlying the opponent's contentions, and is not made for purposes of harassment or delay, Rule 11 sanctions should not be applied.

In addition, prohibition of summary judgment motions for discovery purposes would rob litigants of a potent weapon with which to force disclosure. Less disclosure may seriously impair meaningful settlement negotiations. Broad pretrial disclosure and encouragement of settlement, two policy goals which the Federal Rules seek to foster,[240] would be imperiled by a literal reading of amended Rule 11 as applied to summary judgment motions. Summary judgment motions, therefore, should be permitted as a discovery mechanism as long as such motions are geared to obtaining legitimate pretrial disclosure and not interposed for improper purposes.

4. Misuse of Rule 11 Sanctions. — While the arguments for increased use of sanctions as a tool to combat litigation abuse are sound, if not compelling, there nevertheless remains a danger that sanctions motions themselves may be misused and thereby become tools of oppression, and that sanctions will lead to widespread satellite litigation, which will increase expenses and prolong court delays.[241] The courts must be alert to prevent Rule 11 sanctions motions from becoming instruments of harassment, intimidation, retaliation, and delay. Sanctions motions raise serious questions of professional misconduct and are not appropriate every time a court denies a motion or dismisses part or all of a claim.[242] Nor should Rule 11 be used to test the sufficiency of the form or content of a pleading; the Federal Rules have adequate provisions to do so

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237. C. WRIGHT, A. MILLER & M. KANE, *supra* note 235, § 2712.

238. *In re* Digital Equip. Corp. Sec. Litig., 601 F. Supp. 311, 316 (D. Mass. 1984) (since summary judgment improper where disputes of material fact exist, counsel cannot properly make such a motion if he knows of a disputed fact).

239. *See supra* note 235 and accompanying text.

240. *See* C. WRIGHT, *supra* note 236, § 81.

241. *See* Schwarzer, *supra* note 2, at 183-84; Weinstein, *Reflections on 1983 Amendments to U.S. Rules of Civil Procedure*, N.Y.L.J., Nov. 14, 1983, at 1, col. 3.

242. *See* Weinstein, *supra* note 241, at 4, col. 1.

outside of Rule 11.[243]

A second caveat regarding sanctions is that their frequent use may prove counterproductive by spawning satellite litigation.[244] Sanctions hearings delay not only the case in question but also all other cases in the judicial pipeline. They also divert a court's attention from the key issues in dispute.[245] Use of sanctions motions tends to discourage cooperation among the parties.[246] Sanctions are most effective when used to remedy specific abuses in a particular lawsuit and can have an undesirable effect if employed as a panacea for all litigation abuse. Professor Maurice Rosenberg, a preeminent authority in the civil procedure field, noted that more intensive use of sanctions may undermine the basic purposes of the Federal Rules:[247] "More and 'better' rules may not be the answer. Rules require sanctions. Sanctions require enforcement proceedings. These absorb resources of time, energy, and money that it is the very purpose of the rules to spare."[248] Even Arthur Miller, the drafter of Rule 11 and a proponent of broader use of sanctions, confessed to having a "Kafkaesque dream" of courts being besieged by sanctions motions.[249] Indeed, courts have cautioned against routine sanctions filings.[250]

It is arguable, however, that the upsurge in sanctions motions is a short-term phenomenon, and that after an initial shakeout period of heightened activity in which standards are developed, Rule 11 motions will become less frequent.[251] Nevertheless, a disturbing

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243. *See* FED. R. CIV. P. 12(e), (f).

244. *Eastway II*, 637 F. Supp. at 564.

245. *See* Miller & Culp, *The New Rules of Civil Procedure: Managing Cases, Limiting Discovery*, Nat'l L. J., Dec. 5, 1983, at 23, col. 1.

246. *See* Weinstein, *supra* note 241, at 4, col. 1. Cooperation among the parties during all phases of a given case is desirable, and to the extent that courts encourage sanctions motions or evidence a willingness to entertain such motions routinely, the spirit of collegiality and cooperation among the parties may be impaired and a hostile atmosphere may develop which threatens the progress of the litigation. *See also Eastern District Report*, *supra* note 7, at 369 (cooperation and courtesy among counsel is essential to ensure the timely and cost-efficient exchange of information through discovery).

247. *See* Rosenberg, *supra* note 13, at 244.

248. *Id.*

249. *Annual Judicial Conference, Second Judicial Circuit of the United States*, 101 F.R.D. 161, 200 (1984) (remarks of Arthur Miller during panel discussion on topic of *Pretrial Preparation and Handling of Civil Cases*).

250. *See, e.g.*, C.P. Lam v. Mass Confusion Sportswear, Inc., No. 86-Civ. 2728 (S.D.N.Y. Sept. 16, 1986) (LEXIS, Genfed Library, Dist. file) ("It must be emphasized that a request for Rule 11 sanctions should not be appended to every moving paper as a mechanical gesture or 'client rebate.' ").

251. Arthur Miller suggested that sanctions activities, much like class action suits fol-

trend toward more frequent imposition of sanctions has emerged.[252] In *Eastway I*,[253] the district court dismissed the plaintiffs' claims but declined to impose sanctions on the grounds that the action was not frivolous.[254] Reversing the lower court on the latter point, the Second Circuit unambiguously endorsed the imposition of sanctions for Rule 11 transgressions:

> By employing the imperative "shall," we believe the drafters intended to stress the mandatory nature of the imposition of sanctions pursuant to the rule. Unlike the statutory provisions that vest the district court with "discretion" to award fees, Rule 11 is clearly phrased as a directive. Accordingly, where strictures of the rule have been transgressed, it is incumbent upon the district court to fashion proper sanctions.[255]

The message from the Second Circuit is clear: trial courts should not hesitate to impose sanctions.[256] As a result, in insurance cases and other matters involving third party interests, the parties may feel legally obligated to seek sanctions in the form of attorney's fees where claims are arguably frivolous. As Arthur Miller has suggested, sanctions practice may well prove to be the "cottage industry" of the 1980's.[257]

5. Standards for Review of Sanctions Orders. — With respect to standards for appellate review of sanctions orders, two issues arise: (1) whether Rule 11 has in fact been violated; and (2) whether the particular sanction imposed is appropriate.[258] In reviewing lower court orders on whether a violation has occurred, appellate courts may have to engage in several separate inquiries.[259] If the trial court

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lowing the 1966 amendments to Rule 23, will follow a bell-shaped pattern. Under this view, one would expect few sanctions proceedings as the Rule is introduced, followed by a flurry of activity which will decline and level off as standards are developed. *See Annual Judicial Conference, supra* note 249, at 200 (remarks of Arthur Miller).

252. Miller & Culp, *supra* note 245, at 34, col. 2 ("[A] number of federal judges have remarked: 'I issue many more sanction orders today,' or 'I engage in much more cost-shifting today than I used to.' ").

253. 762 F.2d 243 (2d Cir. 1985).

254. *Id.* at 248-49.

255. *Id.* at 254 n.7. The court further held that the appellate courts were as capable of determining Rule 11 violations as the lower courts, and, therefore, the decision of the court below was not entitled to any special deference. *Id.*

256. *But see* Fried v. Fried, 113 F.R.D. 103 (S.D.N.Y. 1986) ("In considering this motion [for sanctions], we start by noting that our Court of Appeals seems strongly opposed to district judges imposing sanctions.").

257. Miller & Culp, *supra* note 245, at 34, col. 3.

258. *See* Zaldivar v. City of Los Angeles, 780 F.2d 823, 828 (9th Cir. 1986).

259. *See id.*

has ordered sanctions based on a factual determination which is disputed on appeal, the findings are reviewed on a clearly erroneous standard.[260] If the district court concludes that the facts found constitute a violation of Rule 11, then a de novo standard of review is appropriate.[261] Where the issue on appeal is the appropriateness of the particular sanction imposed, however, the appellate court may reverse only if it finds an abuse of discretion,[262] since the trial court had discretion to tailor the sanction to the facts of the case.[263] As Judge Weinstein observed: "Necessarily, the district court will have a better grasp of what is acceptable trial-level practice among litigating members of the bar than will appellate judges."[264]

Thus, fee-shifting may not be an appropriate sanction in every case. Judges may consider imposing alternative sanctions, including a reprimand, an order to complete certain remedial courses, requiring consultation with more experienced practitioners, or obligating the sanctioned counsel to attend court sessions.[265]

V. A Proposed Framework for Rule 11 Enforcement

The standard for attorney conduct under Rule 11 — "reasonableness under the circumstances"[266] — is too vague to provide meaningful guidance for lawyers, litigants, or the courts. Under this standard, attorneys are always at risk of being second-guessed as to what more might have been done prior to filing. Although the principal thrust of amended Rule 11 is to deter frivolous suits, mandatory sanctions unquestionably have a punitive aspect, and are therefore akin to criminal penalties. The magnitude of these penalties dictates that the standards necessary to comport with Rule 11 must be clearly defined. Bright line rules are necessary under Rule 11 so that such standards will not be taken lightly. It may be argued that promulgation of such standards will encourage attorneys to aspire only to the minimum level of acceptable conduct. The benefits which

260. *Id. See* Westmoreland v. CBS Inc., 770 F.2d 1168, 1174-75 (D.C. Cir. 1985); *Eastway II*, 637 F. Supp. at 566.

261. Zaldivar v. City of Los Angeles, 780 F.2d 823, 828 (9th Cir. 1986). *See Eastway I*, 762 F.2d at 254 n.7.

262. Zaldivar v. City of Los Angeles, 780 F.2d 823, 828 (9th Cir. 1986).

263. *Eastway II*, 637 F. Supp. at 566; Fed. R. Civ. P. 11 advisory committee's note. *See* Albright v. Upjohn Co., 788 F.2d 1217, 1222 (6th Cir. 1986) (the selection of a particular sanction lies in the sound discretion of the court); Muslin v. Frelinghuysen Livestock Managers, Inc., 777 F.2d 1230, 1235 (7th Cir. 1985) (denial of attorney's fees is discretionary).

264. *Eastway II*, 637 F. Supp. at 566.

265. *Id.*

266. Fed. R. Civ. P. 11 advisory committee's note.

spring from reasonable certainty, however, outweigh the risks of undistinguished performances by attorneys.

Set forth below is a proposed objective framework containing bright line presumptions to assist in determining whether a pleading is based on "reasonable inquiry," and whether it is "well grounded" in fact and in law. The framework builds on the principles which have evolved in the lower court Rule 11 decisions, and is designed to provide standards broadly applicable to most cases. Since a number of different factors may determine whether a particular pleading is "reasonable under the circumstances," the standards of conduct are best visualized on a spectrum, rather than simply compartmentalized as "reasonable" or "unreasonable."

Within the spectrum there are three distinct zones: (1) clearly reasonable; (2) clearly unreasonable; and (3) a mid-zone where the conduct cannot be readily categorized. Where conduct is at either end of the spectrum, the presumption of propriety or impropriety is nearly conclusive and can be overcome only upon a compelling showing. Where conduct falls within the mid-zone, it may be "presumptively reasonable" or "presumptively unreasonable," depending on the specific circumstances involved. "Presumptively" as used herein simply means that if an attorney chooses to act differently, the burden is upon him to justify such conduct if it is challenged.[267] This mechanism leaves ample room to deal with aberrant situations or particular circumstances calling for different behavior.[268] These bright line standards are designed to clarify the obligations of the litigants and their attorneys, and thereby to reduce the need to impose sanctions. At the same time, presumptions facilitate the imposition of sanctions where the standards have been violated.

A. *Reasonable Inquiry*

1. Clearly Reasonable Zone. — Where an attorney has conferred with the client, independently verified the client's position through a review of the relevant documentary evidence, and thoroughly researched applicable law prior to the filing of a pleading, then he has done everything one could reasonably expect from an advocate. Such conduct, which is clearly above reproach, would epitomize "reasonable inquiry." Sanctions could be granted only upon a

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267. *Eastern District Report*, *supra* note 7, at 368.

268. *See id.* (concept of presumptive standards is similar to that adopted by Eastern District of New York in the *Standing Orders of the Court on Effective Discovery in Civil Cases*, 102 F.R.D. 339 (1984), which became effective on March 1, 1984).

clear and convincing showing to the contrary, and hence would normally be inappropriate. On the other hand, few cases are likely to fall within this zone, since it is always arguable that something more could have been done.

2. Clearly Unreasonable Zone. — Where an attorney fails to make any prefiling inquiry as to the facts or the law, his conduct does not meet even the lowest aspirations of Rule 11, and is therefore clearly unreasonable.[269] Clearly unreasonable conduct also includes situations where: (1) the suit is based on unverified rumor as hearsay;[270] (2) the pleader willfully misrepresents or mischaracterizes the law or the facts;[271] (3) the pleading reveals a fatal and irremedial defect on its face;[272] and (4) the pleader has continued to maintain a claim or defense, to the detriment of his adversary, even though uncontradicted and irrefutable facts destroying the claim or defense have been called to his attention by the adversary.[273] The strong presumption of unreasonableness in these cases can be overcome only upon a clear and convincing justification for the pleader's conduct.

3. Mid-Spectrum. — This vast middle area between the "clearly reasonable" and "clearly unreasonable" ends of the spec-

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269. *See, e.g.*, Wymer v. Lessin, 109 F.R.D. 114, 116 (D.D.C. 1985) (failure of the defense counsel to inquire into citizenship of client in a diversity case violates the Rule 11 prefiling investigation requirement); Steinberg v. St. Regis/Sheraton Hotel, 583 F. Supp. 421, 426 (S.D.N.Y. 1984); RPS Corp. v. Owens-Corning Fiberglass Corp., 1984-2 Trade Cas. (CCH), ¶66, 268 (N.D. Ill. 1984), *aff'd without opinion*, 787 F.2d 595 (7th Cir. 1986).

270. *See* Albright v. Upjohn Co., 788 F.2d 1217 (6th Cir. 1986) (prefiling investigation was found to be insufficient because it failed to disclose how the plaintiff's claim could be substantiated in the likely event that medical records could not be located). *See also* Miller v. Schweickart, 413 F. Supp. 1059, 1061 (S.D.N.Y. 1976) (plaintiffs had no justification, other than unconfirmed rumor, for including a particular defendant in the action).

271. *See, e.g.*, Smith v. United Transp. Union Local No. 81, 594 F. Supp. 96, 100-01 (S.D. Cal. 1984); Aller v. New York Bd. of Elections, 586 F. Supp. 603, 607-08 (S.D.N.Y. 1984).

272. Thus, for example, where it is clear that *in personam* jurisdiction over a party is lacking, the prefiling investigation is deficient. *See* Shaps v. D.F.D.S. A/F Copenhagen, 1 Fed. R. Serv. 3d 134 (S.D.N.Y. 1985); Hasty v. Paccar, Inc., 583 F. Supp. 1577, 1580 (E.D. Mo. 1984); Barton v. Williams, 38 Fed. R. Serv. 2d 966 (N.D. Ohio 1983). Similarly, Rule 11 is violated where subject matter jurisdiction is clearly lacking. *See* Wymer v. Lessin, 109 F.R.D. 114 (D.D.C. 1985); McLaughlin v. Western Casualty and Sur. Co., 603 F. Supp. 978, 981-82 (S.D. Ala. 1985); Huettig & Schromm, Inc. v. Landscape Contractors Council, 582 F. Supp. 1519 (N.D. Cal. 1984), *aff'd*, 790 F.2d 1421 (9th Cir. 1986); Schwarzer, *supra* note 2, at 190-91.

273. *See, e.g.*, City of Yonkers v. Otis Elevator Co., 106 F.R.D. 524, 525 (S.D.N.Y. 1985) (sanctions are appropriate where allegations of fraud clearly had no basis in fact, and where defendants had given plaintiff ample opportunity to withdraw its claim). *See supra* notes 148-52, 175 and accompanying text.

trum is the most difficult in which to develop bright line rules, since a number of factors may affect the reasonableness of the conduct in question. The conduct in this mid-zone is characterized as presumptively reasonable or presumptively unreasonable, and the party against whom the presumption lies bears the burden of justifying his conduct by a preponderance of the evidence. Set forth below are examples delineating an attorney's responsibilities in various factual settings.

a. *Reliance solely on the client — Presumptively reasonable.* — At the very least, Rule 11, with one possible exception discussed below,[274] requires that an attorney confer with his client prior to filing a pleading. While an attorney-client conference is generally a necessary condition of "reasonable inquiry," it is not clear to what extent such a prefiling conference is a sufficient condition of "reasonable inquiry." The advisory committee notes suggest that there are circumstances where reliance solely on the client is proper.[275] Such reliance may be sufficient where time constraints for filing the pleading are such that an attorney has no time to confirm independently the client's position, and therefore must rely on the client.[276] For example, where an attorney is retained just prior to the statute of limitations expiration date, or must respond promptly to a pleading under governing rules of procedure, the client's word should suffice.[277] Similarly, where verifying data is not readily accessible,[278] or would be unduly expensive to obtain considering the amount in controversy, the limitations on the client's resources, and the importance of the issues at stake,[279] independent verification should not be required. Hence, if corroborating information were located overseas or if its exact location were unknown, reliance on the client would be sufficient.[280]

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274. *See infra* notes 284-88 and accompanying text.

275. FED. R. CIV. P. 11 advisory committee's note.

276. *See* FED. R. CIV. P. 11 advisory committee's note (this is a circumstance contemplated by the drafters of Rule 11).

277. *See* Rothschild, Fenton & Swanson, *supra* note 2, at 14.

278. Such data may, for example, be in the hands of third parties and unavailable in the absence of a subpoena.

279. This standard incorporates the proportionality concept applicable to discovery requests under FED. R. CIV. P. 26(g). While the proportionality criteria are arguably vague, using this standard has two distinct advantages. First, it provides the court with general guidance on how extensive a pretrial investigation should be. Second, it adopts an existing standard and can thereby benefit from the case law which develops under Rule 26(g).

280. *Cf.* Touchstone v. G.B.Q. Corp., 596 F. Supp. 805, 810 (E.D. La. 1984) (" '[R]easonable inquiry' required by Rule 11 varies from case to case. This case involves

Reliance on the client also may be sufficient where the process of obtaining verifying data would be so time-consuming as to prejudice the attorney's ability to handle his other cases.[281] Finally, corroboration cannot be required when the client's information is impossible to verify.[282] In situations where it is the client's word against that of the other party and the client's position is plausible, the attorney may accept his client's position provided that the client's testimony is competent evidence.[283]

The one possible exception to the general rule that attorneys must consult with their clients prior to filing a pleading is where the case was forwarded by another attorney upon whom the attorney in question reasonably relied for the facts.[284] The advisory committee notes imply that the signing attorney should not be penalized for the errors of the forwarding attorney.[285] The key question here is whether the reliance was "reasonable."[286] The signing attorney should at least ascertain that the forwarding attorney had solid legal grounds for the claim.[287] Time permitting, an independent evaluation of the facts would be the safest course;[288] where time is of the essence, however, the signing attorney may have no choice but to rely on forwarding counsel. An independent evaluation of the law, however, is necessary.

b. *Reliance solely on the client — Presumptively unreasonable.* — There are instances where reliance solely on the client is presumptively unreasonable, and further investigation is required in or-

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events occurring as many as twenty-five years ago of which the principal witness . . . is now deceased. In such a case, before discovery, the facts available that may be inquired into may be limited.").

281. This standard is a further refinement of the standard set forth *supra* in the text accompanying note 276. It may be argued that the differences between sole practitioners with limited resources and large firms with deep pockets justify differences in standards. It would be unfair, however, to make practice standards depend on firm size. These standards were not designed to create undue burdens on large firms, or to call on sole practitioners to avoid their responsibilities.

282. *See* FED. R. CIV. P. 11 advisory committee's note (arguably, this is an example of the situation where the attorney "had to rely on a client for information as to the facts underlying the pleading, motion, or other paper"). *But see* Ditta G. Melli, S.N.C. v. C. Miller, Inc., No. 85 Civ. 9544-CSH (S.D.N.Y. Nov. 28, 1986) (LEXIS, Genfed library, Dist. file) ("Counsel act at their peril if they accept a client's file on faith as complete.").

283. Rothschild, Fenton & Swanson, *supra* note 2, at 14-15.

284. *See* FED. R. CIV. P. 11 advisory committee's note.

285. Rothschild, Fenton & Swanson, *supra* note 2, at 15.

286. *Cf. Eastway I*, 762 F. 2d at 253 (Rule 11 unambiguously imposes duty on each attorney to conduct a reasonable inquiry).

287. Rothschild, Fenton & Swanson, *supra* note 2, at 15.

288. *Id.*

der to comply with Rule 11. It would be unreasonable to rely solely on the client's word where his position could be easily corroborated by checking additional sources.[289] Further investigation by the attorney is needed where the adversary furnishes data which undermine the client's contentions, or where the adversary notifies the attorney that such data can be obtained without undue effort or expense given the amount in controversy and the limitations on the client's resources.[290] Further investigation is also required where the client has a file of documents relevant to the claim or defense.[291]

Further investigation is also in order where the client's information is internally inconsistent. Hence, where the alleged facts are contradictory or where the client's story changes in response to the attorney's questions, independent verification of the client's position should be sought.[292] Independent verification should also be obtained where the client is not credible or has a motive to misrepresent facts.[293] Finally, outside corroboration should be sought where the client's allegations are simply implausible.[294] For example, if the client contends that the government has implanted a radio receiver in his brain and is monitoring his activities, the story is more likely than not the product of a defective or diseased mind, and the attorney should attempt to verify such facts before proceeding.

c. *Further investigation — Presumptively reasonable.* — Where the attorney undertakes inquiries beyond the information provided by his client, the next question concerns how extensive such inquiries must be. The answer depends on the nature of the information uncovered by the attorney in the course of making follow-up inquiries. The investigation must be fairly directed at the issues raised, and may not be a mere token effort. Thus, if the opposing attorney identifies certain documents which he contends conclusively

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289. Van Berkel v. Fox Farm & Road Mach., 581 F. Supp. 1248, 1249-51 (D. Minn. 1984).

290. *See supra* notes 148-51, 175 and accompanying text.

291. *See* Ditta G. Melli, S.N.C. v. C. Miller, Inc., 85 Civ. 9544-CSH (S.D.N.Y. Nov. 28, 1986) (LEXIS, Genfed library, Dist. file) (attorney is obligated to do a careful search of client's file).

292. *See, e.g.*, Van Berkel v. Fox Farm & Road Mach., 581 F. Supp. 1248, 1249-51 (D. Minn. 1984) (sanctions imposed where plaintiff's attorney refused to dismiss a negligence action after defendant's attorney had forwarded medical records and a copy of a news article disclosing that the action was time barred).

293. *See* Kendrick v. Zanides, 609 F. Supp. 1162, 1172 (N.D. Cal. 1985). *See also* Lyle v. Charlie Brown Flying Club, Inc., 112 F.R.D. 392 (N.D. Ga. 1986) (cannot accept client's word when reasonable inquiry reveals otherwise).

294. Rothschild, Fenton & Swanson, *supra* note 2, at 14.

undermines the client's claim, the attorney must review those documents.[295] Similarly, if the opposing attorney names witnesses whose testimony would vitiate a claim, the attorney should interview such witnesses if they are available.[296] In the end, the attorney must be satisfied that he has established a sufficient foundation upon which to proceed with a claim.[297]

Rule 11 does not require an attorney to capitulate to the adversary merely because the parties disagree as to the facts of the case or the applicable law.[298] Where further investigation confirms the opponent's view and destroys the client's case, dismissal of the claim or defense is appropriate.[299] Where further investigation results in information which tends to support the client's view, however, the case may properly proceed even though facts supporting the opponent's contentions may also exist.[300] If further investigation leads to information which neither confirms nor refutes the client's position, the attorney is entitled to rely on his client's version of the facts, provided it is plausible.[301]

d. *Further investigation — Presumptively unreasonable.* — The mere fact that an attorney has made efforts to verify independently the client's position does not satisfy the "reasonable inquiry" standard. The quality, not the quantity, of the prefiling investigation is significant.[302] It is not sufficient to rely on general nonspecific impressions of prior counsel.[303] Information provided by the adversary should not be ignored; attorneys who have neglected to pursue the obvious cannot absolve themselves by seeking out the esoteric. Thus,

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295. *See* Van Berkel v. Fox Farm & Road Mach., 581 F. Supp. 1248 (D. Minn. 1984) (while medical records revealed that plaintiff's action was time barred, plaintiff's attorney refused to respond to requests for dismissal).

296. *See In re* Ginther, 791 F.2d 1151, 1155 (5th Cir. 1986); Wold v. Minerals Eng'g Co., 575 F. Supp. 166, 167 (D. Colo. 1983).

297. *See* Touchstone v. G.B.Q. Corp., 596 F. Supp. 805, 810 (E.D. La. 1984) ("[T]here comes a time after discovery has progressed that counsel should have knowledge of the specific facts that would support the conclusion that the action is 'well grounded in fact.' ").

298. *See supra* note 152 and accompanying text.

299. Van Berkel v. Fox Farm & Road Mach., 581 F. Supp. 1248 (D. Minn. 1984).

300. *See* Friedgood v. Axelrod, 593 F. Supp. 395, 397-98 (S.D.N.Y. 1984).

301. *Cf.* Rothschild, Fenton & Swanson, *supra* note 2, at 14-15 (if a client's story is plausible but is contradicted by all other witnesses found during prefiling inquiry, an attorney may still sign the pleading as long as client's proposed testimony is supported by competent evidence).

302. *See, e.g.*, Friedgood v. Axelrod, 593 F. Supp. 395, 397-98 (S.D.N.Y. 1984) (sanctions denied where defendant's previous disclosures were suspect and plaintiff's position was corroborated by others).

303. Kendrick v. Zanides, 609 F. Supp. 1162, 1172 (N.D. Cal. 1985).

where an attorney fails to make the minimal inquiries which a reasonably competent attorney similarly situated would have made, and where such inquiries would demonstrate the meritlessness of the client's claim, the attorney may be subject to sanctions, irrespective of any additional inquiry he has made in other areas.[304]

B. *"Well Grounded"*

The inquiry into the adequacy of the prefiling investigation is only a threshold matter. Under Rule 11 the claim must also be "well grounded in fact" and "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law."[305] Thus, it is not enough that an attorney has crafted a logically compelling theoretical argument in support of claims. In setting criteria for determining when a claim is well grounded, the same three-zone analysis can be employed.

1. Clearly Reasonable Zone. — A claim which is supported by statutes and Supreme Court precedent is the essence of a well grounded position.[306] A claim is also clearly well grounded where, in the absence of Supreme Court precedent, the law of the circuit in which the case is pending supports the claim.[307] Similarly, interposition of a claim is proper where the law of the circuit is not settled but the decisions of either other trial courts within the district, appellate courts outside the circuit, or district courts outside the circuit support the claim.[308] If the law within the circuit is settled and does not support the claim, the claim may be pleaded if the law of one or more other circuits supports it.[309] A claim is also well grounded

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304. AM Int'l, Inc., v. Eastman Kodak Co., 39 Fed. R. Serv. 2d 433 (N.D. Ill. 1984) (counsel, who on deposition failed to inquire regarding the witness' previous availability to testify and subsequently filed motion papers suggesting that witness' counsel had improperly delayed the deposition, did not conduct an adequate prefiling inquiry).

305. FED. R. CIV. P. 11.

306. This is the clearest case of a well-grounded claim. *See, e.g.*, Confederacion Laborista v. Cerveceria India, Inc., 778 F.2d 65, 66 (1st Cir. 1985) ("Given the clarity of the precedents of both the Supreme Court and this court on this issue, plaintiffs' claim was entirely unwarranted by existing law or a good faith argument for modification of existing law.").

307. *See* Gramercy 222 Residents Corp. v. Gramercy Realty Assocs., 591 F. Supp. 1408, 1415 (S.D.N.Y. 1984) (although plaintiffs' complaint failed to meet the requirements needed to state a RICO claim under the controlling precedents in the Second Circuit, sanctions were not awarded under Rule 11 due to the "complexity and, previously, rather unclear status of the RICO statute").

308. *See* Kamen v. AT&T, 791 F.2d 1006, 1013-14 (2d Cir. 1986) (pleading is warranted by existing law where law is unsettled).

309. *See Eastway II*, 637 F. Supp. at 575 (noting that bad decisions must be challenged

where the case is one of first impression and the position is plausible.[310]

There are two situations in which an attorney could properly certify a claim even though settled law is to the contrary. Factual distinctions between the case in question and settled authority may make settled law inapplicable and therefore require a different result.[311] Furthermore, notwithstanding settled law to the contrary, a claim may be pleaded where there are compelling economic, sociological, political, or other bases which suggest that a reexamination or extension of the governing principles is appropriate.[312] Thus, the long-established rule of *Plessy* v. *Ferguson*,[313] which permitted states to operate "separate but equal" racially segregated public schools, would have been properly challenged in *Brown* v. *Board of Education*,[314] given the widespread recognition in the mid-twentieth century that such a segregated system was inherently unequal and denied blacks their basic constitutional rights. Both of these situations provide the good faith litigant with room for creativity and a measure of flexibility in pleading, thus allowing the law to develop to meet the needs of a changing society.

2. Clearly Unreasonable Zone. — Sanctions are proper where

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if they are to be overruled).

310. *See* Nelson v. Piedmont Aviation, Inc., 750 F.2d 1234, 1238 (4th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985).

311. Rothschild, Fenton & Swanson, *supra* note 2, at 15.

312. For example, state statutes making nonwhites second class citizens came under gradual attack as members of our society became better educated and more sensitive to the fact that such statutes were inconsistent with the fundamental rights bestowed by the United States Constitution.

313. 163 U.S. 537 (1896).

314. 347 U.S. 483 (1954). *Brown* is a very clear example of a situation in which a prior Supreme Court holding was properly overturned. The Supreme Court, however, has overturned rather recent decisions on issues having far less social impact. In February 1985, the Court, in Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985), held that state and local employees were subject to the federal Fair Labor Standards Act, thereby overruling its prior holding in National League of Cities v. Usery, 426 U.S. 833 (1976), wherein the Court had held, a decade earlier, that the tenth amendment barred the application of this federal statute to state and local employees. See *Eastway II*, 637 F. Supp. at 575, wherein Judge Weinstein stated:

> Sometimes there are reasons to sue even when one cannot win. Bad court decisions must be challenged if they are to be overruled, but the early challenges are certainly hopeless. The first attorney to challenge *Plessy v. Ferguson* was certainly bringing a frivolous action, but his efforts and the efforts of others eventually led to *Brown v. Board of Education*. Similarly, the apparently useless challenges by attorneys of the still relatively recent Supreme Court decision in *Swain v. Alabama* have induced the Court quickly to reconsider and reject that ill-conceived ruling. (citation omitted).

settled law rejects the claim or defense in question and the pleader offers no rational basis for distinguishing the case in question from the ruling precedents.[315] Challenges to the federal government's power to tax income fall into this category.[316] Sanctions are also appropriate where the claim is identical to one which the court has previously dismissed against the same pleader, either in an earlier phase of the case, or in previous actions between the same or related parties.[317] This situation frequently arises when the plaintiff, having had his action dismissed in state court, sues in federal court on the same grounds seeking a federal remedy.[318] Similarly, sanctions may be imposed where an attorney certifies a pleading which purports to raise a new claim or defense, but which really presents arguments identical to the ones that have been previously rejected.[319]

3. Mid-Spectrum Conduct — Presumptive Standards. —

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315. *See* National Survival Game, Inc. v. Skirmish, U.S.A., Inc., 603 F. Supp. 339, 342-43 (S.D.N.Y. 1985) (plaintiff offered no cases in support of his position and ignored settled law to contrary); Booker v. City of Atlanta, 586 F. Supp. 340, 341-42 (N.D. Ga. 1984) (sanctions were appropriate where counsel presented arguments rejected by a long, unbroken line of authority); Aune v. United States, 582 F. Supp. 1132, 1136 (D. Ariz. 1984) (action challenging constitutionality of federal income tax laws), *aff'd without opinion sub nom.* Brasseur v. United States, 765 F.2d 148 (9th Cir. 1985); Dore v. Schultz, 582 F. Supp. 154, 156-58 (S.D.N.Y. 1984) (sanctions were appropriate where plaintiff brought an action for negligent failure to enforce Immigration and Nationality Act, and "courts [had] repeatedly held that the negligent enforcement of federal statutes and regulations does not automatically result in governmental liability under the [Federal Tort Claims Act]").

316. *See* Fredrick v. Clark, 587 F. Supp. 789, 794 (W.D. Wis. 1984); Aune v. United States, 582 F. Supp. 1132, 1136 (D. Ariz. 1984), *aff'd without opinion sub nom.* Brasseur v. United States, 765 F.2d 148 (9th Cir. 1985).

317. *See* Cannon v. Loyola University, 784 F.2d 777, 782 (7th Cir. 1986) (court found that plaintiff's claim was barred by res judicata and that her "ten year history of litigation demonstrates her penchant for harassing the defendants"); *Eastway I*, 762 F.2d at 252 ("In addressing the issue of attorneys' fees, we find it particularly noteworthy that Eastway had already challenged the City's policy in the state courts, and had been unsuccessful."); Fried v. Fried, 113 F.R.D. 103 (S.D.N.Y. 1986) (sanctions granted where claim had been conclusively decided in previous action); Silverman v. Center, 603 F. Supp. 430, 431-32 (E.D.N.Y. 1985) (sanctions were awarded under Rule 11 where there had been prior state court action rendering the issue before court res judicata, and plaintiffs did not indicate this earlier proceeding in application for an order to show cause, but instead submitted a conclusory letter stating that this action was somehow "new and different"); Smith v. United Transp. Union Local No. 81, 594 F. Supp. 96, 100-01 (S.D. Cal. 1984) (counsel raised defenses previously stricken without stating why they were now sufficient); United States *ex rel.* U.S.-Namibia (Southwest Africa) Trade & Cultural Council, Inc. v. Africa Fund, 588 F. Supp. 1350, 1352 (S.D.N.Y. 1984) (plaintiff repeatedly initiated groundless actions).

318. *See Eastway I*, 762 F.2d at 252; Carrion v. Yeshiva Univ., 535 F.2d 722, 728 (2d Cir. 1976); Silverman v. Center, 603 F. Supp. 430, 431-32 (E.D.N.Y. 1985).

319. *See* Smith v. United Transp. Union Local No. 81, 594 F. Supp. 96, 100-01 (S.D. Cal. 1984); United States *ex rel.* U.S.-Namibia (Southwest Africa) Trade & Cultural Council, Inc., v. Africa Fund, 588 F. Supp. 1350, 1352 (S.D.N.Y. 1984).

a. *Presumptively reasonable.* — Although certain conduct falls very close to the clearly reasonable end of the spectrum, it should be examined on a case by case basis. For example, novel theories of recovery, particularly those which rely on analogies to unrelated fields of law, should be thoroughly scrutinized. Normally, such pleadings are proper and will give rise to sanctions only upon a showing that they are so far-fetched that they could only have been interposed for improper purposes. Similarly, the courts should hesitate before granting sanctions when the pleading involves a complicated area of the law, unless the adversary can show that the pleader's claim is merely a smokescreen actually designed to harass the adversary.[320]

b. *Presumptively unreasonable.* — Certain conduct lies so near the clearly unreasonable end of the spectrum that it gives rise to a rebuttable presumption of unreasonableness. For instance, where the pleader has misrepresented the governing law, sanctions are appropriate if the pleader was seeking to mislead the court.[321] Sanctions are not appropriate merely because a party misinterpreted the law and ultimately proved unsuccessful in the action. Nor are sanctions appropriate simply because a party has erred in describing the applicable law. However, where it can be shown that the pleader knew or should have known the governing law, and the pleader subsequently interposes a claim based on a standard other than the appropriate standard, sanctions may be imposed.[322]

VI. CONCLUSION

Since the 1983 amendments to the Federal Rules of Civil Procedure became effective, the courts have exhibited a greater willingness to impose sanctions under Rule 11. Nevertheless, the cases have been less than instructive on the precise obligations of attorneys under the Rule 11 certification requirement. The bright line presumptions proposed in this Article provide a much needed element of certainty to guide attorney conduct, and to help courts in deterring frivolous litigation tactics without chilling legitimate claims.

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320. *See supra* notes 218-20 and accompanying text.

321. *See, e.g.*, Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531, 1542 (9th Cir. 1986) ("A lawyer should not be able to proceed with impunity in real or feigned ignorance of authorities which render his argument meritless.").

322. *See* Smith v. United Transp. Union Local No. 81, 594 F. Supp. 96, 100-01 (S.D. Cal. 1984); Huettig & Schromm, Inc. v. Landscape Contractors Council, 582 F. Supp. 1519, 1521-22 (N.D. Cal. 1984), *aff'd*, 790 F.2d 1421 (9th Cir. 1986).