Rule 11 and the Profession

Georgene Vairo
RULE 11 AND THE PROFESSION

Georgene Vairo*

INTRODUCTION

There may be no better example than Federal Rule of Civil Procedure 11 ("Rule 11")\(^1\) of how the law of civil procedure has influenced the legal profession. After it was amended in 1983,\(^2\) Rule 11 dramatically altered the conduct of lawyers litigating in federal courts. Although Rule 11 ultimately was toned down in 1993,\(^3\) its impact on the profession has been profound.

This Article will attempt to relate the ascendancy of Rule 11 over organized bar discipline, at least with respect to regulating civil litigation conduct, to the much discussed problem of the decline in professionalism and the free-fall decline in the public's perception about the legal profession. Of course, Rule 11 in itself did not cause the decline in public perception, but its use and frequent abuse exacerbated tensions among lawyers. Hence, Rule 11 became yet another emblem of

---

* Professor of Law and William Rains Fellow, Loyola of Los Angeles Law School.


the “professionalism problem” facing us. Even though the adoption of amended Rule 11 in 1983 was in large measure an attempt to deal with the abuses that undermined civility and professionalism, it appears that Rule 11 contributed significantly to the further decline in civility. This, in turn, may have contributed to further undermining the public’s confidence in the profession as well. The availability of compensatory sanctions made possible by the amended rule also created a new form of pernicious attorney conduct: the all-too-frequent making of Rule 11 motions.

On the other hand, these motions often targeted what many in the bench and bar believe to be unprofessional or incompetent conduct that previously had been ignored by organized bar discipline. Indeed, there can be no argument that Rule 11 has changed lawyer conduct in some significantly positive ways. Empirical studies about Rule 11 showed that lawyers engaged in more serious pre-filing research than before, and that they decided after such research not to file marginal pleadings or motions. In that respect, the judicial enforcement of sanctions standards has had a more dramatic impact on the regulation of the profession than the enforcement of ethical codes by disciplinary authorities. Thus, the sanctions regime initiated by the 1983 amendments to Rule 11 dramatically altered how the profession is regulated, shifting the onus of regulation of many forms of misconduct from bar disciplinary boards to the judiciary.4 Or, more precisely, it created a vehicle for punishing certain kinds of conduct that were largely unreachable or untouched before. The open judicial punishment of such attorney conduct ultimately may help restore confidence in the profession in ways that the generally still very private disciplinary enforcement of ethical codes do not.

Moreover, the emergence of Rule 11 after 1983 raised the consciousness of the bench and the bar of the need to deal with the abuses in our civil legal system. The bench and the bar apparently became more aware than ever of the need to provide a better picture to the public of lawyers’ behavior. The “consciousness raising” engendered by the Rule 11 experience may have provided the boost the profession needed to develop positive strategies for improving its image and the public’s confidence in it.

I will discuss these important effects of Rule 11. Part I of this Article will discuss the genesis of amended Rule 11. Part II will discuss the aggressive enforcement of Rule 11 by the federal courts and detail the wide range of conduct that became subject to Rule 11. Part III will review empirical research on Rule 11 to demonstrate the impact that the rule has had, both positive and negative, on attorney conduct.

4. As Professor David Wilkins has detailed, bar disciplinary processes have been supplanted or complemented by various other forms of regulation, one of which is Rule 11. See David B. Wilkins, Who Should Regulate Lawyers?, 105 Harv. L. Rev. 799, 822-30 (1992).
Part IV will show how the judiciary is using Rule 11 to essentially replace organized bar discipline by imposing a wide range of monetary and disciplinary sanctions. Finally, Part V will discuss the decline in the public's opinion of the legal profession. Like the attempts of disciplinary authorities, judicial enforcement of Rule 11 has failed to curtail all the abuses in the profession or to restore public confidence. At the least, however, the attention paid to Rule 11, together with the undermining of public confidence, has led the organized bar to try to deal with its problems in a positive way.

I. THE RISE OF RULE 11

A. The 1983 Amendments

As is well-known by now to anybody connected with the legal profession, Rule 11 was amended significantly in 1983. In contrast to its pre-1983 obscurity, amended Rule 11 met with more controversy than perhaps any other Federal Rule of Civil Procedure. The debate surpassed that which accompanied the 1966 amendments to Rule 23, the class action rule, which liberalized the use of that powerful procedural device. In the years since the 1983 amendments to Rule 11, there have been several major empirical studies published, dozens of law

5. Professor Arthur Miller, the Reporter to the Advisory Committee when the 1983 amendments were adopted, has argued that the Rule 11 controversy mimics the Rule 23 controversy. See Arthur R. Miller, Remarks at the Federal Bar Council Annual Winter Meeting (Feb. 1987) [hereinafter Miller, Remarks]; see also Arthur R. Miller, Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the “Class Action Problem,” 92 Harv. L. Rev. 664, 678-80 (1979) (discussing time needed to work out problems and effectively implement 1966 amendments to Rule 23). The amendments to Rule 26(a) in 1993 requiring disclosure of certain materials generated a large hue and cry prior to their adoption. But once the rule became effective, the controversy largely disappeared. See Ruth E. Piller, Suggested Rules Seek to Develop a Kinder, Gentler—and Cheaper—Discovery Process, Litig. News (ABA Litig. Sec.), July 1998, at 1, 10 (“In districts where initial mandatory disclosure is practiced, it is generally liked and believed to lessen the costs of litigation.”). See generally Lisa J. Trembly, Mandatory Disclosure: A Historical Review of the Adoption of Rule 26 and an Examination of the Events that have Transpired since its Adoption, 21 Seton Hall Legis. J. 425 (1997) (exploring the problem of discovery abuse and discussing the amendments to Rule 26).

review articles written, several books and monographs published, hundreds of reported opinions filed, and numerous legal and non-legal newspaper and bar association journal articles written which explore the reach and impact of Rule 11.

To understand the controversy about Rule 11 and the impact it has had on the legal profession, it is important to remember the context in which the rule was first amended. For decades, criticisms of the civil litigation process became increasingly loud and frequent. For example, in 1976, then Chief Justice Warren Burger complained that professionalism had declined and that the costs and delays in civil litigation had become intolerable. For a time, the focus was on curbing discovery abuse. At about the same time, the Kutak Commission was working on a revised Model Rules of Professional Conduct for the American Bar Association. Although there was vociferous debate about the content of the Rules, as well as the discovery amendments, from a day-to-day perspective, lawyers, especially litigators, were more concerned about discovery amendments. These were the rules that would have a more direct impact on the way in which lawyers would practice than any changes in disciplinary authority enforcement of ethics codes or rules would have had.

Impact of Federal Rule 11 on Lawyers and Judges in the Northern District of California, 74 Judicature 147 (1990); Vairo, Critical Analysis, supra note 1, at 199-203; Vairo, Where We Are, supra note 1, at 478-86.

7. For a listing of law review articles discussing Rule 11, see Vairo, Rule 11 Sanctions, supra note 1, at app. F.


9. See First FJC Report, supra note 6, at 67-81; Vairo, Critical Analysis, supra note 1, at 199-203.


11. At the 1976 National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, Chief Justice Burger expressed his alarm at the "widespread feeling that the legal profession and judges are overly tolerant to lawyers who exploit the inherently contentious aspects of the adversary system to their own private advantage at public expense." H.R. Rep. No. 104-62, at 9 (1995).


13. Of course, there is judicial enforcement of such codes as well, and increasingly so, of matters such as attorney disqualification and conflicts of interest, as the practice has become nationalized. Disciplinary authorities, however, continue to regulate most of the matters covered by the codes, including those over which there is overlap with judicially enforced rules such as Rule 11. See Restatement (Third) of the Law Governing Lawyers §§ 1-14 (Proposed Final Draft No. 2, 1998).
In 1980, the Supreme Court adopted discovery rules changes, but they were characterized by Justice Powell as mere "tinkering changes."\(^{14}\) Moreover, for litigators working at the time, few noticed much practical difference and business continued as usual. Thus, the perceived problems did not go away, and the Advisory Committee began to work again at dealing with the problems the organized bar continued to complain about.

The 1983 amendments that resulted, in contrast to the 1980 and earlier amendments, did generate change. Indeed, in 1983, a series of amendments were adopted.\(^{15}\) As with the 1980 amendments, the new provisions were intended to improve the conduct of civil litigation in the federal courts. The Advisory Committee adopted two key mechanisms for achieving this goal. First, Rule 16, the pretrial conference rule, was amended to require judges to become more involved in managing and controlling litigation.\(^{16}\) Second, Rule 11 was amended to require lawyers to act more responsibly toward the court, rather than as mere narrow-minded adversaries, with appropriate sanctions, including attorneys' fees, looming as the stick.\(^{17}\)

The characterization of the 1980 amendments to the Federal Rules of Civil Procedure as mere "tinkering changes"\(^{18}\) could not be applied to the 1983 amendments. The requirement that judges impose sanctions, including compensatory sanctions, was unprecedented. Indeed, 1983 may be viewed as a watershed year. From an academic perspective, the sanctions amendments represented more than a subtle shift in procedural thinking. After years of trying to cope with the expense and delays purportedly caused by notice pleading and liberal discovery, the courts and many litigants sought a return to pre-1938 fact pleading.\(^{19}\) From a practical perspective, the sub silencio purpose of Rule 11 may have been a desire to return to "classical lawyering" when elite segments of the bar controlled the profession.\(^{20}\) Notice pleading and liberal discovery arguably made practice too easy in

---

17. See Amendments to the Federal Rules of Civil Procedure, 97 F.R.D. 165, 190-92 (1983) [hereinafter 1983 Amendments]; cf. City of East St. Louis v. Circuit Court, 986 F.2d 1142, 1143 (7th Cir. 1993) ("Rule 11 establishes duties to both the opposing side and the legal system as a whole that are designed to curb needless expense and delays and to free the courts from litigation that strains scarce judicial resources.").
19. See generally Richard L. Marcus, The Revival of Fact Pleading Under the Federal Rules of Civil Procedure, 86 Colum. L. Rev. 433, 435 (1986) (noting that fact pleading "seems to be enjoying a revival in a number of areas in which courts refuse to accept 'conclusory' allegations as sufficient under the Federal Rules").
20. See infra Part V.
what was supposed to be a learned profession. Thus, there was a perceived need to tighten up procedures in an attempt to curtail those viewed as less professional.

In any event, there is no doubt that the sanctions provisions of the 1983 amendments, particularly Rule 11, were intended to effect a change in lawyer conduct, and that shortly after their adoption, they became the subject of vociferous debate within the bench and bar. This debate about the operation of the rule led the Advisory Committee and Judicial Conference to propose major changes in the text of Rule 11, which became effective in December 1993. Though most of the changes were intended to scale back the more draconian aspects of Rule 11, the mindset occasioned by the 1983 amendments to Rule 11 remained.

B. Why the Focus on Rule 11?

A brief review of the history of sanctions in federal courts may explain why the Advisory Committee used Rule 11 as a way of combating the complained-of litigation abuse. Courts always have had an inherent power to punish individuals for abusing judicial process. Moreover, since 1918, courts have had statutory authority, pursuant to the predecessor statute to 28 U.S.C. § 1927, to impose excess costs against attorneys who have “unreasonably and vexatiously” increased the costs of litigation by “multipl[y]ing the proceedings.” Nevertheless, these sanctions tools were ineffective in curbing abuses.

Sanctions were imposed rarely for two reasons. First, both § 1927 and the court’s inherent power required a finding of bad faith. See infra Part V.

21. See infra Part V.
22. See infra Part V.
23. See Vairo, Rule 11 Sanctions, supra note 1, § 1.08(e).
25. See Gregory P. Joseph, supra note 8, for an excellent summary and analysis of all federal sanctions tools.
28. See, e.g., Roadway Express, 447 U.S. at 765-66 (stating that a finding of bad faith must precede the award of attorneys’ fees under a court’s inherent power to sanction); Kiefel v. Las Vegas Hacienda, Inc., 404 F.2d 1163, 1167 (7th Cir. 1968) (noting that § 1927 applies only to a “serious and studied disregard for the orderly processes of justice”).
ond, most judges were notoriously reluctant to impose sanctions even when faced with apparently serious breaches of professionalism, such as discovery abuse. To counter this reluctance, Rule 37 was amended in 1970 to create a presumption in favor of awarding expenses unless the opposition to the motion to compel was "substantially justified" or "other circumstances make an award of expenses unjust." It was thought that by creating a presumption in favor of awards, and by using the compensatory phrase "award of expenses of motion" rather than the punitive word "sanction," the social/moral aspect of the judicial reluctance would be ameliorated.

Nonetheless, most judges continued to ignore the presumption contained in Rule 37(a)(4) and did not award expenses to the moving party with any regularity. One study found that judges usually imposed sanctions only after he or she first ordered discovery, gave a party a second chance to comply, and the failure to comply was willful or not explained. Judges cited several reasons for declining to impose sanctions: a distaste for becoming involved in discovery disputes that litigants should be able to resolve themselves; a feeling that litigants should seek sanctions against an adversary only when they have been without fault in complying with discovery; and a feeling that the imposition of a sanction embarrasses or humiliates the attorney or party and should thus be resorted to only in extreme situations.

Having failed to turn Rule 37 into an effective tool, the Advisory Committee turned to the feasibility of using Rule 11 to improve attorney conduct. The Advisory Committee focused on Rule 11 as the vehicle for implementing its goal of making lawyers more responsible to the court because it was the only rule dealing with attorney conduct per se. Since Rule 11's original enactment in 1938, an attorney's signature on a pleading or motion constituted a certification that the attorney "has read the pleading [or other paper]; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay." Promulgated to curb tendencies toward untruthfulness, the effect of the rule was to place a moral obligation on attorneys to satisfy themselves that good grounds ex-

29. Although some commentators have disputed whether there really was, or is, a discovery abuse problem, influential members of the profession appeared to believe that there was in fact a significant problem. Moreover, there was a widely-shared belief that there was a problem, as evidenced by the extensive attention paid to it by the legal and mainstream media.
32. Ellington, supra note 31, at 110.
33. See id. at 111-16.
34. See 1983 Amendments, supra note 17, at 198.
isted for the action or defense. If the pleading was not signed, if "scandalous or indecent material" was inserted, or if the attorney violated the certification, the pleading could "be stricken as sham and false," and the attorney could be "subjected to appropriate disciplinary action."

Rule 11, however, was largely ignored. Its certification provisions were described as not read enough, not demanding enough, and not honored enough. Commentators and the 1983 Advisory Committee noted confusion and lack of clarity as to the standard of conduct applicable to attorneys who signed court papers, specifically the extent of investigation required and what conduct—bad faith or something less—would trigger the rule's sanction provision. Moreover, attorneys did not use the rule against each other; perhaps they were reluctant to go after an adversary for engaging in suspect tactics because they knew they would want to employ those tactics themselves.

Rule 11 was also thought to be inadequate because of limitations in the sanction part of the rule. Prior to its amendment, Rule 11 permitted the discretionary imposition of sanctions by the court. If a document was unsigned, or signed in violation of the rules, it could be stricken as sham and false. The striking provision, however, was used rarely, and when it was used, the decisions confused the issue of attorney honesty with the merits of the action. Whether the courts had the power to impose monetary sanctions was also in dispute.


39. See Wright & Miller, supra note 36, § 1355; 1983 Amendments, supra note 17, at 198.

40. See 1983 Amendments, supra note 17, at 199.

41. See id.; see also Brown v. Cameron-Brown Co., 30 Fed. R. Serv. 2d (Callaghan) 1181, 1189 (E.D. Va. 1980) (refusing to dismiss, pursuant to Rule 11, a meritless claim because the court was "unable to conclude 'beyond peradventure' that the allegations [were] sham, false, and devoid of factual basis"), rev'd on other grounds, 652 F.2d 375 (4th Cir. 1981).

42. Courts differed as to whether Rule 11 authorized an award of attorneys' fees for violation of the rule. For example, the Ninth Circuit ruled that Rule 11 provided no authority for awarding attorneys' fees. See United States v. Standard Oil Co., 603
The Advisory Committee realized that to make Rule 11 an effective tool, it had to be revised in several significant ways to: (1) provide a less stringent standard than bad faith for finding a violation; (2) allow the court itself to raise the Rule 11 question; (3) provide for mandatory sanctions; and (4) expressly permit monetary sanctions, including attorneys' fees. To get at attorney conduct, Rule 11's certification provisions were revised substantially in an attempt to clarify what an attorney must do before filing a litigation document. Under the 1983 version of the rule, an attorney's signature constituted a five-fold certification that the attorney or party:

[1] has read the [document]; [2] that to the best of [his] knowledge, information and belief formed after reasonable inquiry; [3] it is well grounded in fact and [4] is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and [5] that it is not interposed for any improper purpose such

F.2d 100, 103-04 (9th Cir. 1979). It noted that the rule said nothing about disciplining a party by imposing attorneys' fees upon him for any act of his lawyer, even if his lawyer willfully violated the rule. See id. at 103 n.2; see also Orenstein v. Compusamp, Inc., 19 Fed. R. Serv. 2d (Callaghan) 466, 469 n.6 (S.D.N.Y. 1974) ("Rule 11 does not provide for imposition of costs or attorneys' fees."). On the other hand, some courts recognized that attorney's fees and costs may be awarded under Rule 11. For example, in Driscoll v. Oppenheimer & Co., 500 F. Supp. 174, 175 (N.D. Ill. 1980), the court found that attorneys' fees may be awarded in the exercise of its "inherent power" under Rule 11. See also Badillo v. Central Steel & Wire Co., 717 F.2d 1160, 1166-67 (7th Cir. 1983) (holding that attorneys' fees may be an appropriate sanction under Rule 11); Textor v. Board of Regents of N. Ill. Univ., 711 F.2d 1387, 1395-96 (7th Cir. 1983) (stating that monetary sanctions may be awarded only after a hearing and that the burden of proof is on the party seeking the award); Hedison Mfg. Co. v. NLRB, 643 F.2d 32, 35 (1st Cir. 1981) (concluding that the frivolous nature of contentions made award of counsel fees and expenses appropriate); Anderson v. Allstate Ins. Co., 630 F.2d 677, 684 (9th Cir. 1980) (sanctioning an attorney for having abused the court's process); Public Interest Bounty Hunters v. Board of Governors, 548 F. Supp. 157, 160 (N.D. Ga. 1982) (stating that Rule 11 "corroborates" authority to impose attorneys' fees for abuses of judicial process); LeGare v. University of Pa. Med. Sch., 488 F. Supp. 1250, 1257 (E.D. Pa. 1980) (denying a motion for costs and fees because it was too early in the litigation "to make informed judgments as to whether the action is groundless").

43. See Miller, Remarks, supra note 5.

44. The new certification and sanction provisions of Rules 7 and 11 are the same. They are set forth in Rule 11 and incorporated by reference into Rule 7. The language of Rule 11 now makes clear that this provision applies to pleadings, motions, and any other litigation papers. See 1983 Amendments, supra note 17, at 196 ("[Rule 7] stated only generally that the pleading requirements relating to captions, signing, and other matters of form also apply to motions and other papers. The addition of Rule 7(b)(3) makes explicit the applicability of the signing requirement and the sanctions of Rule 11."). While the Advisory Committee notes that Rule 11's provisions always had such application, some courts had held that Rule 11 does not apply to motions. See, e.g., Medusa Portland Cement Co. v. Pearl Assur. Co., 5 F.R.D. 332, 333 (N.D. Ohio 1945) ("Rule 11 provides that a sham pleading may be stricken but contains no such provision with regard to motions."). The Advisory Committee, however, cautions that while Rule 11 governs discovery motions, the certification requirements of amended Rule 26(g) apply to discovery requests, responses, and objections. See 1983 Amendments, supra note 17, at 201.
as to harass or to cause unnecessary delay or needless increase in
the cost of litigation.\textsuperscript{45}

Perhaps more significantly, judicial discretion was curbed. Bad
faith findings were not required. Rather, an attorney's conduct would
be put to an objective test, and, to counter their reluctance to impose
sanctions, courts were required to impose sanctions whenever an at-
ttorney violated the new certification provision. Amended Rule 11
thus represented an aggressive attempt to remedy the ineffectiveness
of its predecessor and other sanctions tools, to prevent abuses, and to
streamline the civil litigation process by dispelling apprehensions that
efforts to obtain enforcement under the rule would be fruitless. The
amendments sought to eliminate any doubt as to the propriety, and
indeed the necessity, of imposing sanctions. The theory underlying
the new mandatory sanction provision was that the mandatory imposi-
tion of sanctions would reinforce attorneys' new certification
obligations.\textsuperscript{46}

II. THE RULE 11 EXPERIENCE

The ostensibly good intentions of the 1983 Advisory Committee ob-
viously would have gone for naught had the bench and bar failed to
apply and to comply with Rule 11 as intended. The 1983 Advisory
Committee's first fear was that amended Rule 11 would be as little-
used as Rule 37. Its other fear was that Rule 11 would be overused.\textsuperscript{47}
Their second fear became reality. The 1983 Advisory Committee's in-
vitation to use Rule 11 to attack pleadings and motions triggered an
avalanche of "satellite litigation."

Beginning in 1984, the volume of cases decided under the rule in-
creased dramatically. By the end of 1987, the number of reported
Rule 11 cases had plateaued. Even though the number of reported
cases leveled off, motions under the amended rule continued to be
made routinely, especially by defense counsel, as many attorneys were
unable to pass up the opportunity to force their adversaries to justify
the factual and legal bases underlying motions and pleadings.\textsuperscript{48} In-
deed, one study found that in a one-year period, almost one-third of
the respondents to the survey reported being involved in a case in
which Rule 11 motions or orders to show cause were made.\textsuperscript{49} The
same study showed that almost 55\% of the respondents had expe-
renced either formal or informal threats of Rule 11 sanctions.\textsuperscript{50} The

\textsuperscript{46} See 1983 Amendments, supra note 17, at 198.
\textsuperscript{47} See Miller, Remarks, supra note 5.
\textsuperscript{48} See Vairo, Rule 11 Sanctions, supra note 1, § 2.03(a)(2).
\textsuperscript{49} AJS Study, supra note 6, at 952-53 (finding that in 7.6\% of the survey's cases,
sanctions were imposed, and in 24.3\% of the survey's cases, sanctions were not
imposed).
\textsuperscript{50} See id. at 952, 954-56.
excessive invocation of Rule 11 ultimately led to the 1993 "safe harbor" amendments to Rule 11.\textsuperscript{51}

What caused the explosion of Rule 11 activity? The answer has three parts. First, there were a number of appellate decisions that signaled that the courts would be serious in enforcing the amended rule to combat unprofessional conduct.\textsuperscript{52} Second, in most cases in which a Rule 11 violation was found, the sanction imposed was compensatory in nature, i.e., costs and attorney's fees.\textsuperscript{53} Third, once lawyers knew that the courts would grant sanctions motions, and that the likely sanction would be an award of costs and attorney's fees, lawyers had an incentive to bring sanctions motions to achieve cost-shifting, which otherwise would largely be unavailable due to the American Rule.\textsuperscript{54}

Hence, at this point it is appropriate to discuss the landmark cases that signaled an aggressive enforcement of Rule 11, and the decisions that interpreted the Rule to cover various forms of unprofessional conduct that had never been successfully dealt with by formal disciplinary processes.\textsuperscript{55}

A. Aggressive Appellate Control

The reported cases show that the courts of appeals took an active role in enforcing amended Rule 11. Early courts of appeals cases set the tone that the amended rule should be interpreted strictly in accord with the Advisory Committee's intent. This tone, in turn, was supported by the Supreme Court's strict interpretation of Rule 11.\textsuperscript{56}

As with the district court cases, the number of reported circuit court cases relating to Rule 11 sanctions grew every year from 1983 to 1987, and then began to level off.\textsuperscript{57} By the time Rule 11 was re-amended in 1993, there were over 600 reported circuit court decisions. The courts of appeals affirmed district courts' awards of sanctions in 38.5% of appeals, and they affirmed district courts' refusal to award sanctions in

\textsuperscript{51} See Vairo, Past as Prologue, supra note 1, at 63-65.
\textsuperscript{52} See infra Part II.A.
\textsuperscript{53} See infra Part II.A.3.
\textsuperscript{54} See infra Part II.A.3. Pursuant to the American Rule, each party normally bears the costs and attorney's fees of their litigation. For a discussion of the arguments for and against the American Rule and its exceptions, see Thomas D. Rowe, Jr., The Legal Theory of Attorney Fee Shifting: A Critical Overview, 1982 Duke L.J. 651.
\textsuperscript{55} See Wilkins, supra note 4, at 822-830 (demonstrating why such processes are ineffective); see also Cooper & Humphreys, supra note 12, at 931 (arguing in favor of a broad professionalism analysis that looks beyond the Rules). For example, to demonstrate the broader reach of Rule 11, as discussed above, almost one-third of lawyers surveyed were involved in cases in which a formal Rule 11 proceeding occurred. Relatively few lawyers, however, are disciplined. In New York, for example, only 231 lawyers were disciplined in 1997. See Statistics Show Drop in Number of Lawyers Disciplined, State B. News (New York State Bar Ass'n, Albany, N.Y.), July-Aug. 1998, at 2, 2.
\textsuperscript{56} See Vairo, Where We Are, supra note 1, at 486-92.
\textsuperscript{57} See Vairo, Rule 11 Sanctions, supra note 1, § 2.02(b)(7).
30.2% of appeals. Thus, courts of appeals agreed with the district courts in 68.7% of the reported cases. Although this figure is somewhat lower than the 80% affirmance rate reported for all types of issues, a two-thirds affirmance rate suggests a more aggressive, but still limited, degree of control. Not surprisingly, however, it is in the cases in which the circuit courts disagree with the district courts that one finds most of the opinions with extensive exposition of the rule, as can be seen in the next section. Between 1983 and 1987, the courts of appeals reversed sanctions in 19.2% of the cases, and reversed the refusal to grant sanctions in 12% of the cases. Thus, at least during the heyday of Rule 11, it appears that the circuit courts were rather aggressive in setting the tone for how the rule ought to be interpreted.

1. Rule 11 and Unprofessionalism: The Enforcement Principle Emerges

As discussed in Part I, Rule 11 was designed to give district court judges an effective tool to cut down on the abuses that often accompany federal litigation. The brief analysis in the above section suggests that the rule was enforced aggressively. In addition, the language in many of the early circuit court decisions made clear their insistence that the district courts apply Rule 11 to ensure that abusive conduct, i.e., unprofessionalism, be curbed. The cases discussed below provide examples of how the circuit courts interpreted Rule 11 to attack what they viewed as unprofessional conduct, which was precisely the conduct that had escaped sanction by organized disciplinary enforcement efforts. In other words, the courts emphasized the need for

58. See id. The First FJC Report shows a somewhat different picture. While a comparable number of decisions affirming the imposition of sanctions were reported (37.8%), there were fewer cases in which the refusal to impose sanctions was affirmed (18.9%). See First FJC Report, supra note 6, at 81 tbl.15.

59. See Vairo, Rule 11 Sanctions, supra note 1, § 2.02(b)(7); cf. First FJC Report, supra note 6, at 81 tbl.15 (showing a slightly higher reversal of sanctions rate, 24.3%).

60. See Vairo, Rule 11 Sanctions, supra note 1, § 2.02(b)(7). The First FJC Report showed that 5.4% of the cases were reversed for refusal to impose sanctions. Perhaps one reason for the relatively large difference is that this author's study included in this category cases in which the court refuses to reverse, but opines that there probably was a violation, or remands. See First FJC Report, supra note 6, at 81 tbl.15.

61. See infra notes 65-98 and accompanying text.

62. See Vairo, Rule 11 Sanctions, supra note 1, § 2.02(b)(7); cf. First FJC Report, supra note 6, at 81 tbl.15.

63. See Vairo, Rule 11 Sanctions, supra note 1, § 2.02(b)(7). The First FJC Report showed that 5.4% of the cases were reversed for refusal to impose sanctions. Perhaps one reason for the relatively large difference is that this author's study included in this category cases in which the court refuses to reverse, but opines that there probably was a violation, or remands. See First FJC Report, supra note 6, at 81 tbl.15.

64. The adoption of an across-the-board abuse of discretion standard of appellate review by the Supreme Court in 1990, however, resulted in fewer reversals of district court refusals to award sanctions. See Vairo, Rule 11 Sanctions, supra note 1, § 8.04(d)(3)–(5) (analyzing Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990), and subsequent court of appeals cases applying the abuse of discretion standard of review).
clear enforcement, what we may refer to as the enforcement principle, despite paying lip-service to the need to avoid chilling effective advocacy.

Perhaps the earliest important case in this area is *Eastway Construction Corp. v. City of New York.*65 There, a contractor was denied access to various redevelopment projects sponsored by New York City. Upon losing a state court case, it sued the City and others in federal court, alleging violations of federal antitrust and civil rights statutes. The district court granted the defendant's motion for summary judgment.66 The court refused, however, to award sanctions under Rule 11 because, in its view, the case was not frivolous.67

The Second Circuit affirmed the dismissal.68 Judge Kaufman, writing for the panel, then turned to the City's cross-appeal from the portion of the district court order denying attorneys' fees under Rule 11. After reviewing the case law and statutes on the American Rule and its exceptions, the court noted that Rule 11 as amended "provides a somewhat more expansive standard for the imposition of attorneys' fees."69 Citing the 1983 Advisory Committee Note, he stated that:

The addition of the words "formed after a reasonable inquiry" 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.

In framing this standard, we do not intend to stifle the enthusiasm or chill the creativity that is the very lifeblood of the law. Vital changes have been wrought by those members of the bar who have dared to challenge the received wisdom, and a rule that penalized such innovation and industry would run counter to our notions of the common law itself. Courts must strive to avoid the wisdom of hindsight in determining whether a pleading was valid when signed, and any and all doubts must be resolved in favor of the signer. But where it is patently clear that a claim has absolutely no chance of success under the existing precedents, and where no reasonable argument can be advanced to extend, modify or reverse the law as it stands, Rule 11 has been violated. Such a construction serves to punish only those who would manipulate the federal court system for ends inimicable to those for which it was created.70

65. 762 F.2d 243 (2d Cir. 1985).
66. See id. at 249.
67. See id.
68. See id. at 254.
69. Id. at 253 (citation omitted).
70. Id. at 253-54 (citations omitted).
Note that the court proclaims in the last sentence that its construction of Rule 11 would punish only those who “manipulate the federal court system.”71 “Manipulation” of the system connotes an improper purpose, a willful disregard for the strictures of the rule, and certainly a lack of professionalism. Thus, Judge Kaufman construed the rule to permit the sanctioning of those whose practice may be deemed unprofessional. Then, applying its reasonably “competent attorney” standard, the court found that while neither the plaintiff nor its counsel had acted in subjective bad faith or to harass the defendants, a competent attorney, after reasonable inquiry, would have recognized that the action was “destined to fail.”72 Accordingly, the court held that it was error for the district court to deny the defendants’ motion for attorneys’ fees and remanded the case for the imposition of sanctions including attorney’s fees.73

Eastway illustrates the “enforcement principle.” In an attempt to deter future unprofessional conduct and frivolous litigation, the court of appeals undertook a de novo review74 of the district court ruling that there was no Rule 11 violation and reversed the denial of sanctions. On remand, Judge Jack B. Weinstein, the district judge, wrote a lengthy opinion focusing on numerous issues which suggested that a small sanction, $1000, was appropriate.75 The City of New York, which had incurred almost $53,000 in attorney’s fees, appealed once again. In Eastway II, the Second Circuit decided that although the district court’s decision as to the amount of the sanction was protected by the abuse of discretion standard, the zone of discretion started at $10,000.76

If one purpose of Rule 11 is to streamline litigation, it hardly makes sense to encourage close review of sanctions decisions. Eastway makes the point dramatically: there were four Eastway sanctions-related opinions. On the other hand, if the purpose of the rule is to prevent abuses and to improve professionalism, it makes perfect sense for the court of appeals to take an aggressive approach. Clearly, in Eastway we did not learn much about when judges might agree as to whether a filing suggested that the attorney was “reasonably competent,” or whether a claim is frivolous. We did, however, learn that the court of appeals meant business, and that the court would insist on aggressive enforcement of the amended rule.

A Seventh Circuit case provides another example of the enforcement principle. This time, a circuit court attacked a routine, though

71. Id. at 254.
72. Id.
73. See id.
74. The standard of review is now an across-the-board abuse-of-discretion standard. See supra note 64.
A problem that arises in many cases is the "kitchen sink" problem: the filing of boiler-plate claims, defenses, and motions. While the assertion of such claims does not generally command much attention from the parties or the courts, respect for the enforcement principle resulted in a crusade against such practices. In *Rodgers v. Lincoln Towing Service, Inc.*, the district court imposed sanctions on the plaintiff in a civil rights case for filing a frivolous lawsuit.

Rodgers, who was represented by three attorneys, filed a seventeen-page complaint, alleging claims under 42 U.S.C. § 1983, 42 U.S.C. §§ 1985 and 1986, and an array of claims under state law.

The district court granted the defendants' motion to dismiss, and, *sua sponte*, found a Rule 11 violation. What appeared to bother the court the most was the plaintiff's laundry list approach to pleading. Indeed, the court conceded that the plaintiff came close to stating a claim on some theories. Nevertheless, the court faulted the plaintiff's lawyers for inartful pleading and for mixing "worthless claims" with claims of possible merit:

> With 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. At any rate, what would not have been done after proper research was what occurred here: the filing of a ponderous, extravagant, and overblown complaint that was largely devoid of a colorable legal basis. This was a clear-cut violation of rule 11.

The Seventh Circuit affirmed. The plaintiff was sanctioned for throwing in the kitchen sink even though some claims may well have been actionable. Indeed, one commentator demonstrated that cases cited by plaintiff's lawyers showed that these claims were supportable. Because the plaintiff's lawyers conceded that some of the claims were listed by error, the court was convinced that the district court's ruling should be affirmed and sanctions imposed. If the plaintiff's

---

78. *See id.* at 28.
79. *See id.* at 15.
80. *See id.* at 17.
81. *See id.* at 19-20.
82. *Id.* at 22.
83. *See Rogers v. Lincoln Towing Serv., Inc.*, 771 F.2d 194, 197 (7th Cir. 1985).
85. *See Rogers*, 771 F.2d at 205.
lawyers had been more prepared, and more professional in presenting the case, by persuasively arguing the applicability of the cited cases to the claims asserted, the court would have lacked the basis to impose sanctions. Thus, the plaintiff’s lawyers were sanctioned because of their unprofessional conduct rather than because the case lacked merit.

A Sixth Circuit case, Albright v. Upjohn Co., further demonstrates how the courts would use Rule 11 to get at what they perceived to be unprofessional conduct. The plaintiff’s attorneys filed a products liability action, alleging that tetracycline-based drugs had caused the permanent staining and discoloration of the plaintiff’s teeth. On the same day, the same attorneys filed seven other actions against the same nine companies. The plaintiff alleged that each of the defendants were strictly liable to her, even though she did not know the brand name or manufacturer of the particular drug she had used. She alleged that one or more of the defendants had some connection with the drugs she had used, that the nine manufacturers had engaged in “conscious parallelism,” and claimed that because she did not know which of the defendants manufactured, sold and distributed the drugs she used, the burden of proof was on each defendant to exculpate itself by proving that its drug did not injure her.

Records produced by the plaintiff during discovery directly connected some of the defendants with the drugs the plaintiff used. It was not possible to obtain the records of all the doctors who might have prescribed tetracycline-based drugs for the plaintiff. Upjohn and four other defendants moved for summary judgment on the ground that they had not been identified as manufacturers, distributors, or sellers of the drug that the plaintiff used. The court granted the summary judgment motion. Upjohn then moved to amend its judgment to include an award of attorney’s fees under Rule 11. The court denied the motion and Upjohn appealed.

In a two-to-one decision, the Sixth Circuit reversed. Without discussing the arguments made by either party, the majority found that plaintiff’s attorney’s pre-filing investigation “was insufficient because it failed to disclose that the claim against Upjohn was ‘well grounded

86. 788 F.2d 1217 (6th Cir. 1986).
87. See id. at 1218-19.
88. See id. at 1221.
89. See id. at 1218-19.
90. See id.
91. See id. at 1219.
92. See id.
93. See id.
94. See id.
95. See id.
96. See id. at 1219-20.
97. See id. at 1222.
in fact' within the meaning of Rule 11 or that there existed any likelihood that additional medical records would be located that could not have been found through reasonable inquiry prior to filing." 98 It therefore found that the district court had abused its discretion in denying the motion for sanctions.

Note, however, that the court ignored a possible enterprise liability theory as a basis for joining Upjohn. Even if the relevant state’s law did not clearly support such a claim, arguably a good faith argument for changing the law could have been made. Perhaps a better prepared lawyer would have made the argument. Albright is thus another example of a court allowing sanctions when it considered conduct to be unprofessional.

2. The Widening Net for Unprofessional Conduct

As the three cases in the prior section demonstrate, the circuit courts seized upon the new “reasonable inquiry” requirement as the primary weapon in Rule 11 to curb unprofessional attorney conduct. The following sections discuss examples of types of conduct that the courts have found to be subject to Rule 11.

a. Affirmative Duty to Investigate

That Rule 11 was aimed at conduct is unquestionable. The 1983 Advisory Committee Note stated that the language of Rule 11 “stresses the need for some prefiling inquiry into both the facts and the law to satisfy the affirmative duty imposed by the rule.” 99 As the Second Circuit put it, 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.” 100 The Third Circuit stated: “The rule imposes on counsel a duty to look before leaping and may be seen as a litigation version of the familiar railroad crossing admonition to ‘stop, look, and listen.’” 101 The Supreme Court also recognized the affirmative duty Rule 11 places on those who present papers to the court. The rule “imposes a duty on attorneys to certify that they have conducted a reasonable inquiry and have determined that any papers filed with the court are well grounded in fact, legally tenable, and ‘not interposed for any improper purpose.’” 102 Courts will not hesitate to find a Rule 11 violation if a rea-

98. Id. at 1221.
100. Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 253 (2d Cir. 1985).
reasonable investigation is not made. The duty to conduct a reasonable investigation continues throughout the case. For example, in Childs v. State Farm Mutual Automobile Insurance Co., the court found that the plaintiff's attorney had conducted a reasonable investigation before filing an action against the insurance company on behalf of his client who had been involved in a hit-and-run accident. During the course of discovery, the insurance company developed substantial evidence that the accident had been staged for the purpose of collecting insurance money. The plaintiff's attorney failed to conduct any discovery of his own into the allegations of the insurance company. The district court accordingly imposed a $30,000 sanction against the attorney. The Fifth Circuit affirmed:

We must agree that this inquiry was deficient. State Farm's evidence of fraud was powerful, and yet, all of [the attorney's] investigative efforts can be summed up as asking [his client] and his alleged co-conspirators if they were frauds and reviewing the evidence. Never did [the attorney] conduct any affirmative discovery to test the verity of the evidence developed by State Farm. He never conducted a single deposition. He never sent out any interrogatories, requests for production or requests for admission. Lastly, he never hired his own experts to support his client and to refute the damaging reports by State Farm's experts. In light of the compelling evidence of fraud in this case, [the attorney's] inquiry cannot be said to be reasonable.

Although the Fifth Circuit applied the 1983 version of Rule 11, its analysis is consistent with the 1993 version. Liability in Childs attached because the attorney continued to file papers in support of his client's position. Under the "snap-shot" rule, it was these later filed papers that triggered the Rule 11 liability, not the initial complaint. The triggering event for Rule 11 liability was enlarged in the 1993 amendments to Rule 11. An attorney need not formally withdraw papers filed once it becomes apparent that the paper lacks a legal or factual basis. However, an attorney may not continue to advocate the
positions taken in the paper. Rule 11(b) provides that later advocating a position will trigger Rule 11 liability. Thus, continuing to press on with the case in the face of State Farm's evidence, either by filing additional papers or by orally representing that he intended to continue to pursue the case, triggered Rule 11.

Although some courts have held that the failure to engage in a reasonable inquiry will result in sanctions only when the paper ultimately filed is frivolous as well, other courts take a strict conduct approach, meaning that the failure to investigate, by itself, will result in sanctions. In one sense, the first approach is sensible. There seems to be no efficiency justification for permitting an adversary to question the prefiling steps taken if the paper itself is colorable. On the other hand, Rule 11 was designed to alter behavior. The point of the rule is to impose an affirmative duty on attorneys. Under that view, it may be appropriate to sanction an attorney correctly certifying that a paper is well-grounded where the attorney lacked the knowledge or belief that would have come from a reasonable inquiry. Imposing sanctions when a paper is well-grounded, but when the attorney failed to investigate, is an example of regulating the new professionalism standard.

Consider the debate in the Third and Ninth Circuits engendered by serial filings by different attorneys. In Garr v. U.S. Healthcare, Inc., the Third Circuit sanctioned lawyers who filed a complaint in a securities class action that was substantially the same as that previously filed in another jurisdiction by another lawyer. The lawyers relied on the pretrial investigation of the other attorney, whom they knew and had worked with and whose investigation was held to comply with Rule 11. The Third Circuit found that such reliance was inappropriate:

We recognize that it could be argued that it would have been pointless for [the attorneys] to make an inquiry into the merits of the case sufficient to satisfy Rule 11 as [the other attorney] already had done so. Yet Rule 11 requires that an attorney signing a pleading must make a reasonable inquiry personally. The advantage of duplicate personal inquiries is manifest: while one attorney might find a complaint well founded in fact and warranted by the law, another, even after examining the materials available to the first attorney, could come to a contrary conclusion.

111. See id. § 1.08(e)(1)(B)(i).
113. See, e.g., FDIC v. Elefant, 790 F.2d 661, 667 (7th Cir. 1986) (recognizing that Rule 11 requires an investigation). The court noted, however, that sanctions should be awarded "only when the failure to investigate leads to the taking of an objectively unsupported position." Id.
114. 22 F.3d 1274 (3d Cir. 1994).
115. See id. at 1283.
116. See id. at 1277.
117. Id. at 1280.
One wonders, however, what this means in the context of Rule 11's objective test. Supposing the first attorney is reasonably competent, it should follow that the suit has sufficient merit to be filed. If the purpose of Rule 11 is to prevent nonmeritorious filings, the Garr decision does nothing to achieve that result. It might, however, advance the more substantive policy of avoiding the quick filing of securities class actions. This goal was achieved substantively a year later when the Private Securities Litigation Reform Act of 1995 was passed.118

In contrast, in In re Keegan Management Securities Co.,119 a divided panel reversed a $100,000 sanctions award imposed against the plaintiffs' attorneys.120 The district court had imposed sanctions under Rule 11, 28 U.S.C. § 1927, and the court's inherent power.121 The defendant was a franchisee of a successful weight loss center that made an initial public offering, with a subsequent rise in share value.122 When controversy about the safety of the weight loss system used in the center became the subject of Congressional hearings and articles in the Wall Street Journal, the value of the defendant's stock fell ten percent.123 Later that year, attorneys from two plaintiff securities class action firms were consulted about filing law suits on the theory that the defendant knew of, or recklessly failed to disclose, the health risks the system posed, and accordingly, violated the securities laws. Two class actions were filed early the next year.124

The district court granted the defendant's motion for summary judgment, finding the plaintiffs' evidence of scienter, and any known link between the weight loss program and the health risks, to be "entirely lacking."125 The defendant moved for Rule 11 sanctions,126 but withdrew the motion as part of settlement negotiations.127 The parties reached a settlement, but the district judge, sua sponte, issued an order to show cause why Rule 11 sanctions should not be entered.128 After a hearing, the court imposed a total of $100,000 in sanctions against the two plaintiffs' attorneys and their respective firms pursuant to Rule 11, 28 U.S.C § 1927, and the court's inherent power.129 The court concluded that it was reckless for the attorneys to file the

119. 78 F.3d 431 (9th Cir. 1996).
120. See id. at 433.
121. See id.
122. See id.
123. See id.
124. See id.
125. Id.
126. The 1983 version of Rule 11 was in effect at the time. Accordingly, it was proper for the defendant to make a post-dismissal motion for sanctions, because the "safe harbor" of the 1993 version was not yet in effect.
127. See Keegan, 78 F.3d at 433.
128. See id.
129. See id.
class actions when they could “at best only guess that [the defendant] recklessly failed to disclose health risks when issuing the IPO.”

The Ninth Circuit reversed the sanctions award. By a two-to-one majority, the court reversed the Rule 11 sanctions as well as the § 1927 and inherent power sanctions. The dissenting judge disagreed with the majority on the disposition and analysis of the Rule 11 sanctions issue but agreed that the § 1927 and inherent power sanctions should be reversed. An examination of the court’s opinions details the tensions manifested by the conduct/product aspects of Rule 11.

According to the majority, the district court erred because it focused only on what the plaintiffs’ attorneys knew and did before they filed the action. Additionally, it failed to consider after-acquired evidence submitted by the plaintiffs’ attorneys on the motion for summary judgment which the district court conceded adequately supported the allegations in the complaint. That evidence was not sufficient to defeat the motion for summary judgment, but did tend to support the claims made in the complaint. Indeed, the district court noted that if the plaintiffs’ attorneys had the information in their possession before filing the complaint, Rule 11 would have been satisfied.

The majority and the dissent sparred over the correct interpretation and standard for applying Rule 11. Specifically, they disagreed over how objective the inquiry about an attorney’s conduct should be. The majority opted for a purely objective analysis which would excuse a failure to engage in a reasonable investigation—the “product approach”—if the resulting filing is objectively reasonable. The dissent would not excuse a failure to investigate, taking the “conduct approach.”

On the merits of the disagreement, any construction of Rule 11 that limits satellite litigation should be preferable to one that may not. Arguably, there is no systemic harm if the attorney’s guess proves to be correct. The legal system is not burdened in such a case. If a hunch proves to be wrong, the “product” may well be deemed frivolous, and sanctions may be in order. In other words, attorneys who file pleadings without engaging in a reasonable inquiry run the risk that their “guess” or “hunch” that there has been wrongdoing will result in sanctions. Obviously, all attorneys would be well-served by complying with the reasonable inquiry requirement, rather than simply going

130. Id.
131. See id.
132. See id. at 437.
133. See id. at 434-35.
134. See id.
135. See id.
136. See id.
137. See id. at 434.
138. See id. at 437.
with their hunches. Knowing the risks entailed when one guesses wrong should be a sufficient incentive to comply with the rule's affirmative duty to investigate. On the other hand, the enforcement principle suggests that Rule 11 is a more effective deterrent to unprofessional conduct when an attorney that has failed to comply with its dictates is sanctioned, even when the attorney has guessed correctly.

b. Inexperienced, Busy, or Sole Practitioners

A variation on this theme is presented by the case of inexperienced, busy, or sole practitioners. The enforcement principle has been worked hard in cases where attorneys seek to defend or justify an inadequate prefiling inquiry on the grounds that they are sole practitioners, or, for whatever reason, they lack sufficient resources and time to prepare to the extent required by Rule 11. While many courts are sensitive to the impact a lack of resources may have on an attorney’s ability to conduct a thorough prefiling investigation, such defenses generally fall on deaf ears. In re TCI Ltd.,139 despite its lengthy set of facts, provides a textbook example of this Rule 11 problem.

TCI operated a restaurant in a building leased from a company, Marathon, and bought fixtures and furnishings for the restaurant, with proceeds from a bank loan that was secured by the lease. The loan was guaranteed by two individuals.140 When TCI fell behind in its rental payments, Marathon obtained an eviction order from a state court. Before TCI could be evicted, it filed for bankruptcy, apparently to take advantage of the automatic stay provision that freezes the relationship among the debtor and its creditors. Marathon and the bank successfully petitioned the bankruptcy court for relief from the stay.141 The order required the trustee to abandon all right to the leasehold and the bank agreed not to pursue the guarantors for ninety days. The practical effect of the order was to terminate TCI’s lease and leave it to Marathon and the bank to work out any rights that the bank may have retained. Marathon then sold the property.142

In one of TCI’s filings to the bankruptcy court, it stipulated that Marathon had a claim of $56,108.35 against TCI, apparently for back rent.143 Three weeks later, the same attorney who had stipulated to the claim, filed a proceeding against Marathon and the bank on behalf of TCI and the individuals who had guaranteed the loan, alleging in essence that Marathon had been ordered by the court to give notice to them before the sale, and that the plaintiffs still owned the fixtures.144

139. 769 F.2d 441 (7th Cir. 1985).
140. See id. at 442.
141. See id. at 443.
142. See id.
143. See id.
144. See id.
The district court dismissed the amended complaint and a second amended complaint for failure to state a claim, because the bankruptcy court order contained no obligation on Marathon with respect to the sale of the property and because the only way to have the bankruptcy court's order set aside would be to allege fraud, which was not alleged.\footnote{145} The court found that the attorney was under intense pressure from the individual clients to make sure that the sale be undone and that no action be taken against the guarantors. Nevertheless, the district court awarded sanctions under Rule 11 because there was no "effort to ascertain whether it had a basis in law."\footnote{146} Although the first complaint was frivolous, the court stated that "[t]he initial attempt may well be deemed creative. Subsequent efforts to plead the case, however, lacked the real or imagined urgency which may have justified [the attorney's] first effort . . . . Creativity does not demonstrate itself in slight variations on a theory previously and emphatically rejected."\footnote{147}

The plaintiffs had two main arguments for avoiding sanctions: first, the attorney had to file the complaints to keep the business of the clients and, second, what the attorney did was standard bankruptcy practice in Chicago.\footnote{148} The unanimous Seventh Circuit panel opinion, written by Judge Easterbrook, rejected those arguments.\footnote{149} With respect to the first argument, the court said that while the desire to keep clients is an inevitable part of legal practice, attorneys "must understand that their adversary's fees become a cost of their business."\footnote{149} Judge Easterbrook rejected the second argument that because bankruptcy work is a high-volume, low-margin practice, it is excusable for attorneys to file pleadings before doing research. While agreeing that not all pleadings need to be handcrafted, and that $2000 of research is not required in a $200 case, he wrote:

The premise of routinized legal service, however, is precisely the routine nature of the claims. A lawyer may handle a large number of cases quickly by applying standard legal principles to each one. This does not support a complaint that proffers a new theory—not only in the sense that there is no precedent but also in the sense that it cuts against much precedent. Such a complaint is not a routine part of a busy practice. Rule 11 now requires a lawyer to undertake research before filing such a complaint . . . . An attorney who wants to strike off on a new path in the law must make an effort to deter-

\footnote{145} See id. at 444.\footnote{146} Id.\footnote{147} Id. (quoting In re Chronopoulos, 36 B.R. 364, 367 (Bankr. N.D. Ill. 1984)).\footnote{148} See id. at 446-47.\footnote{149} The decision was actually based on 28 U.S.C. § 1927 because amended Rule 11 was not in effect at the time the pleadings were filed. The court made clear, however, that its reasoning was supported by Rule 11. See id. at 446-47.\footnote{150} Id. at 446 (citing Steinle v. Warren, 765 F.2d 95, 102 (7th Cir. 1985) (imposing $2500 damages for yielding to client's demand)).
mine 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.\textsuperscript{151}

While the Seventh Circuit's opinion provides some guidelines, it does not suggest what an attorney in a busy, routinized practice should do, especially in the face of a nearing statute of limitations deadline, when a non-routine matter walks through the door. Is the attorney to always refer the matter to a more specialized, high-powered law firm that is better equipped to do the necessary research? What if the clients cannot afford such a firm, which is why they went to the legal clinic or other high-volume legal services office? Who pays if the high-priced law firm decides there is no claim or that there is a claim, but the research costs as much as the claim is worth? In other words, how much leeway does an attorney have to fly by the seat of his pants when he has a sense that the claim is a good one?

Nonetheless, TCI and later cases make clear that a minimum standard applies to all attorneys, including those who are not experienced federal practitioners, such as the plaintiff's lawyer in \textit{Hays v. Sony Corp. of America}.\textsuperscript{152} In that case, a small-city practitioner with apparently little federal court experience, and even less experience in copyright law, filed an action on behalf of certain school teachers.\textsuperscript{153} The teachers had prepared a word processing manual on how to operate DEC computers for their employer. The school then bought word processors from Sony, and gave the plaintiffs' manual to Sony to modify it for use with Sony word processors.\textsuperscript{154} The plaintiffs believed that the defendant had co-opted their manual. They first registered their manual with the Copyright Office, then filed a federal action alleging common law and federal copyright causes of action.\textsuperscript{155} They also alleged that Sony "'made large profits by reason of appropriating to its own use Plaintiffs' workbook.'"\textsuperscript{156}

The district court dismissed the claims, and granted the defendant's motion for sanctions. However, the court awarded $14,895.46, instead of the full fee request of $47,000, against the plaintiffs' attorney, but not the plaintiffs. A motion to vacate the award was denied September 8, 1987.\textsuperscript{157}

Looking to the attorney's conduct, the circuit court pointed out that he was a "solo practitioner in [a] town of . . . 14,000" people and that

\begin{itemize}
\item \textsuperscript{151} \textit{Id.} at 447 (citations omitted).
\item \textsuperscript{152} 847 F.2d 412 (7th Cir. 1988).
\item \textsuperscript{153} \textit{See id.} at 413.
\item \textsuperscript{154} \textit{See id.}
\item \textsuperscript{155} \textit{See id.}
\item \textsuperscript{156} \textit{Id.} (quoting the Complaint).
\item \textsuperscript{157} \textit{See id.}
\end{itemize}
he was not a specialist in federal practice or copyright law. The court said further:

[The attorney] is not to be criticized for having failed to acquire expertise in an esoteric field of federal law and the niceties of federal procedure. But the Rule 11 standard, like the negligence standard in tort law, is an objective standard, as we have said. It makes no allowance for the particular circumstances of particular practitioners.

The court went on to complete its analogy to legal malpractice: "There is no 'locality rule' in legal malpractice . . . and while a legal specialist may be held to an even higher standard of care than a generalist . . . the generalist acts at his peril if he brings a suit in a field or forum with which he is unacquainted." Because the attorney failed to heed that precept, sanctions were imposed.

Similarly, another panel of the Seventh Circuit stated: "We are not insensitive to the realities of practice, and we recognize that persons practicing law by themselves or in small firms may not have instant access to the latest court decisions." Thus, it excused the plaintiff's attorney for not knowing about a two-month-old controlling decision at the time she filed the complaint, but sanctioned her for filing an amended complaint four months later and almost six months after the decision.

Under the 1993 version of Rule 11, as with the 1983 version, litigating cases in federal court that are beyond one's expertise may result in sanctions. In Anderson v. County of Montgomery, plaintiff was convicted of a misdemeanor, then brought civil rights claims against defendants who allegedly violated his rights in connection with the

---

158. Id. at 418.
159. Id. at 418-19 (citation omitted).
160. Id. at 419 (citations omitted).
162. See Rush, 966 F.2d at 1123. But see Blue v. United States Dep't of the Army, 914 F.2d 525 (4th Cir. 1990). The Fourth Circuit reversed sanctions imposed by the district court on a junior associate who had become "primary trial counsel" after a massive Title VII discrimination case had suffered some serious blows. See id. at 546. The court rejected the district court's narrow view of its authority and its failure to consider a broad range of factors. See id. It stressed the extraordinary circumstances confronting the junior associate. She was only 18 months out of law school, and only six months out of her clerkship, when she was assigned to the massive case. Only one month of discovery remained in the case at the time. A year and a half later, the senior partner in the case left the law firm, and the associate was put in charge and, at times, litigated the case virtually alone against an eleven person defense team. See id. Moreover, the court pointed out that the problem with the case was that it was not properly investigated and should not have been brought in the first place. To permit sanctions against a person who came on the scene years after the case was filed was inappropriate. See id. at 550.
163. 111 F.3d 494 (7th Cir. 1997).
His lawyer was sanctioned because he failed to conduct a reasonable investigation into the claims. The failure was especially egregious because of the serious nature of the assertions of wrongdoing made, which should have prompted a more thorough pre-filing investigation. The attorney admitted that he was "in over his head" in federal court, and promised not to litigate cases there again. While the matter was pending, however, the district court learned that the attorney had taken on another complex federal case. The district court sanctioned the attorney $9,681.95.

These cases take a quite expansive view as to the type of conduct subject to Rule 11. The language in these decisions sends a message to attorneys unfamiliar with federal practice to engage in extra investigation than they might otherwise think appropriate, consult a more experienced federal practitioner, or keep out. "A lawyer who lacks relevant expertise must either associate with him a lawyer who has it, or must bone up on the relevant law at every step in the way in recognition that his lack of experience makes him prone to error." Attorneys will not escape sanctions on the theory that they are unfamiliar with the law of the jurisdiction in which papers are filed.

164. See id. at 499.
165. See id. at 501.
166. See id. at 498. The attorney offered several excuses by way of mitigation of the amount of the sanctions. The court of appeals rejected the attorney's inability to pay argument because the attorney had told the district court that he could afford to pay and that the amount was reasonable. At the oral argument on the sanctions motion in the district court, the attorney made an argument that one might want to avoid making in future cases:

And I purposely did not bring [my inability to pay] to the Court's attention because the truth of the matter is I sought big bucks against these people, I sought punitive damages. And for me to be a wimp and say, oh my God, I can't pay it, that's not right. But so you don't jam me for contempt of court, and I realize I have to provide detailed financial statements; I have negative net worth. But if it is the last thing I ever do, I will pay these people off. If it's not reversed on appeal, I swear to God I will pay them off, because some things are just not morally right.

Id. at 502.

167. Hays v. Sony Corp. of Am., 847 F.2d 412, 419 (7th Cir. 1988) (citations omitted); see also Brubaker v. City of Richmond, 943 F.2d 1363, 1373 (4th Cir. 1991) (holding that "[i]nexperienced or incompetent attorneys are not held to a lesser standard under Rule 11" (citation and footnote omitted)); Gibson v. City of Alexandria, 855 F. Supp. 133, 137 (E.D. Va. 1994) (finding that inexperience is no excuse for sanctionable conduct and further noting that the state's ethical rules require an attorney to be competent in an area or to associate with competent co-counsel).

168. See Les Mutuelles du Mans Vie v. Life Assurance Co., 128 F.R.D. 233, 237 (N.D. Ill. 1989); cf. Muthig v. Brant Point Nantucket, Inc., 838 F.2d 600, 605 (1st Cir. 1988) (refusing to sustain a claim that would not have been made had the attorney made a reasonable inquiry into the facts of the case). But see Landin v. E. Daskal Corp., 136 F.R.D. 363, 364 (S.D.N.Y. 1991) (denying a motion for Rule 11 sanctions despite the fact that the errors made were due to counsel's lack of familiarity with federal practice and ordering counsel to become familiar with federal practice and local rules for all future proceedings).
Exercising poor judgment, or performing work carelessly may also result in sanctions.\(^{169}\)

While consulting with another attorney may prevent some Rule 11 problems, it may add considerably, sometimes unnecessarily, to the costs of litigation. On the other hand, courts, and the adversaries of inexperienced attorneys or attorneys with limited resources, may rightly be concerned about the extra trouble and expenses these attorneys may create. The Advisory Committee Note to amended Rule 11, however, makes clear that courts should determine whether the attorney acted reasonably under the circumstances. Certainly, inexperience and lack of resources are part of these circumstances, and arguably should serve as mitigating factors with respect to both whether there has been a Rule 11 violation and what an appropriate sanction should be.\(^{170}\) They rarely, however, form the basis for a complete defense, and instead, the enforcement principle usually results in a finding of a Rule 11 violation.

c. Miscellaneous Conduct

Over the past few years, the courts have discussed a number of types of routine, arguably unprofessional, practices, and imposed sanctions in many instances where they occurred. A number of these cases illustrate classic lawyer mistakes that now may result in sanctions that would not have come to the attention of disciplinary authorities before the advent of Rule 11.

i. Use of Form Complaints

In *Terran v. Kaplan*,\(^{171}\) the Ninth Circuit affirmed the district court's imposition of Rule 11 sanctions.\(^{172}\) The plaintiff's attorney had used a form complaint, and the court concluded that the attorney had not engaged in a reasonable prefiling investigation into many of the claims alleged.\(^{173}\)

ii. Failure to Read Statute or the Omission of Words in Quotations

In *In re Cascade Energy & Metals Corp.*,\(^{174}\) at oral argument, an attorney admitted that he had not read the entire statute that he had relied upon to assert his position in connection with a bankruptcy pro-

\(^{169}\) See Productos Mercantiles E Industriales, S.A. v. Faberge USA, Inc., 23 F.3d 41, 47 (2d Cir. 1994) (affirming district court's decision not to impose sanctions despite attorney's poor judgment and work performance).

\(^{170}\) See Vairo, Rule 11 Sanctions, \textit{supra} note 1, §§ 6.02(e), 9.03(a)(3)(D).

\(^{171}\) 109 F.3d 1428 (9th Cir. 1997).

\(^{172}\) See \textit{id.} at 1434-35.

\(^{173}\) See \textit{id.} at 1435.

\(^{174}\) 87 F.3d 1146 (10th Cir. 1996).
ceeding. The court was also concerned that when quoting from the statute, the attorney had omitted certain words:

These admissions negate any claim that he formed a belief after reasonable inquiry that his reliance on [the statute] was well grounded in fact or warranted by existing law. The first and most fundamental step in making the required inquiry must be to know what a statute relied upon actually says. This is particularly true when the reference to the statute in the signed paper shows on its face that words have been omitted. Recognizing that any omission has the potential to change the meaning of quoted material, a careful attorney will read the statute in its entirety to be certain that the omissions have not had that effect.

iii. Reliance on Conclusory Statements of Client

In Worldwide Primates, Inc. v. McGreal, the plaintiff's attorney was sanctioned $25,000 for filing a frivolous complaint without making a reasonable investigation. The attorney had not performed an independent investigation with respect to the factual basis for the essential element of damages in a state law action for tortious interference with a business relationship. Rather, the attorney simply relied on the conclusory statements of his long-time client that the client had suffered injury. In fact, had the attorney checked further, he would have learned that the letters the client claimed harmed his ability to deal with third parties did not affect those third parties' decision as to whether to deal with the plaintiff. This case reminds us that although courts generally permit an attorney to rely on clients' statements, particularly when there is little time to conduct an independent investigation, to avoid sanctions, attorneys ought to check all relevant documents at the client's disposal, question the client closely about the facts pertinent to all aspects of the claim, and at least try to interview third parties with relevant information before filing a pleading.

The 1993 amendments to Rule 11 have worked a subtle, but important change in the certification as to facts. Hadges v. Yonkers Racing Corp., involved the question of whether an attorney is allowed to

175. See id. at 1151.
176. Id. at 1151.
177. 87 F.3d 1252 (11th Cir. 1996).
178. See id. at 1254-55.
179. See id. at 1254.
180. See id.
181. See id.
183. 48 F.3d 1320 (2d Cir. 1995).
rly on the objectively reasonable statements of his or her client.\textsuperscript{184} In answering the question in the affirmative, the court stated: “No longer are attorneys required to certify that their representations are ‘well-grounded in fact.’ The current version of the Rule requires only that an attorney conduct ‘an inquiry reasonable under the circumstances’ into whether ‘factual contentions have evidentiary support.’”\textsuperscript{185}

Thus, the certification has less to do with whether the facts themselves are true. Rather, it has to do with whether there is objectively reasonable evidence from which an attorney could suggest that a trier of fact could find that the facts are true.

iv. Reliance on Private Investigators

The Ninth Circuit, in a two-to-one decision, has taken a harsh look at attorneys’ reliance on private investigators. In Security Farms v. International Brotherhood of Teamsters, Chauffers, Warehousemen & Helpers,\textsuperscript{186} the plaintiff-employers filed suit against various unions alleging illegal strike and picketing activity.\textsuperscript{187} The plaintiffs filed suit largely on the strength of “smoking gun” declarations from workers who claimed knowledge of the alleged wrongdoing.\textsuperscript{188} Subsequently, the district court determined that the private investigator who had obtained the declarations for the plaintiffs was not licensed and that he and the declarants lacked credibility.\textsuperscript{189} The majority criticized the plaintiffs for “accept[ing] at face value Vidal’s representation that he held a private investigator’s license and was fluent in both English and Spanish,” rather than conducting an inquiry into the investigator’s background.\textsuperscript{190} The majority rejected the plaintiffs’ counsel’s attempt to shift blame to Vidal, agreeing with the district court that “by blindly relying on Vidal under these circumstances, counsel violated its duty to conduct a reasonable inquiry.”\textsuperscript{191}

Judge Kleinfeld dissented, concluding that the plaintiffs’ attorneys were not relying on a “pure heart and empty head” defense.\textsuperscript{192} Rather, they were not required to investigate further because they had good reason to think that the declarations were genuine and true when filed: “A lawyer should not have to investigate independent investigators he hires and witnesses whose plausible affidavits he files,
or else be in jeopardy of Rule 11 sanctions if opposing counsel attacks
them. 193

v. Reliance on Forwarding Counsel

Another case involving a securities class action raised a common
problem: the extent to which a lead attorney may rely on the assert-
tions of forwarding counsel. In In re Frontier Insurance Group,
Inc., 194 a consolidated class action complaint was filed. 195 Co-lead
counsel named as a plaintiff an individual who was represented by
other attorneys. 196 Co-lead counsel believed that they were author-
ized to name him, based on their conversations with the other attor-
neys. 197 Later, the plaintiff indicated that he had not authorized the
filing of the suit by any attorney on his behalf. 198 The defendants
sought to defeat class certification by arguing, among other things,
that this episode revealed that the person named by co-lead counsel
was not an adequate representative of the class. 199 The court rejected
the argument, finding that "[a]bsent any reasonable indication of a
problem, an attorney may legitimately rely on the representation by
another attorney that he or she is authorized to act on behalf of a
client." 200 The court suggested, however, that the other counsel may
have violated Rule 11: "[E]ven though [the other counsel] may be
held responsible for their failure adequately to verify their authoriza-
tion to represent Bernstein, co-lead counsel are not rendered inade-
quate class counsel by virtue of their reliance on [the other counsel's]
assurances that they were so authorized." 201

3. Rule 11 and Fee Shifting

Early circuit court cases created a strong incentive for private en-
forcement of Rule 11 by making it a powerful fee-shifting device.
Although the 1983 Advisory Committee Note suggested that the
amended rule was designed to deter abusive litigation behavior, 202 a
Federal Judicial Center Study found several purposes to be served by
the rule: "to penalize the violator, to compensate the offended party,
and to deter others from engaging in similarly abusive conduct." 203
Confusion over which one of these purposes is the primary purpose
led to inconsistent results in the cases. For example, the Federal Judi-

193. Id.
195. See id. at 34-35.
196. See id. at 37.
197. See id.
198. See id.
199. See id. at 40.
200. Id. at 45.
201. Id.
203. Kassin, supra note 6, at 29.
cial Center's study demonstrated that "compensation-oriented judges were more likely to impose sanctions than were those who were either punishment or deterrence oriented." More importantly for our purposes, however, apart from concerns about the purpose of the rule, as a practical matter, the courts settled on the use of compensatory sanctions as the primary sanction.

The Ninth Circuit was the first court of appeals to expressly confront this issue. In *In re Yagman*, the Ninth Circuit ruled that the "primary purpose" of Rule 11 is to "deter subsequent abuses" in that litigation. Thus, the rule was designed to achieve a specific deterrent effect. Accordingly, the district court judge should monitor the attorneys closely and tell them that their conduct is sanctionable at the time the offending conduct occurs. Because the district court judge in *Yagman* had tolerated abuses during the course of the litigation without warning the attorney that his conduct was sanctionable, the attorney could not be subjected to a compensatory $250,000 sanction. Finding a Rule 11 violation at the end of the litigation and imposing the sanction would not achieve the specific deterrent effect articulated by the court.

The effect of focusing on the purpose of Rule 11 was clear. Arguably, because the opposing counsel claimed that the attorney's sanctionable conduct resulted in $293,000 in attorney's fees and costs, the $250,000 sanction would have been appropriate if the primary purpose of the rule was to compensate the aggrieved side. Similarly, the "massive, post-trial retribution" may have served a punitive or general deterrent effect as well. Despite the result in *Yagman*, and although the 1993 amendments to Rule 11 made clear that the purpose of Rule 11 is purely deterrence, there continues to be broad support among the bench and bar for Rule 11 to incorporate a compensatory as well as deterrent purpose.

---

204. *Id.*

205. 796 F.2d 1165 (9th Cir. 1986), amended by 803 F.2d 1085 (9th Cir. 1986).

206. *Id.* at 1183; *see also* Independent Fire Ins. Co. v. Lea, 979 F.2d 377, 379 (5th Cir. 1992) (stating that the "basic policies of 'deterrence and education' [are] behind Rule 11"); White v. General Motors Corp., 977 F.2d 499, 502 (10th Cir. 1992) (asserting that the primary purpose of Rule 11 "should be deterring future violations" (citation omitted)).

207. *See Yagman*, 796 F.2d at 1183-84.

208. *See id.* at 1183-88.

209. *See id.*

210. *See id.* at 1185. The Ninth Circuit also ruled that the case be randomly reassigned on remand. *Id.* at 1188. When the district court judge refused, the sanctioned attorney filed a petition for mandamus, which was granted. *See Brown v. Baden*, 815 F.2d 575, 576 (9th Cir. 1987).

211. *See Vairo, Rule 11 Sanctions, supra* note 1, § 2.04(b).

212. *See FJC 1995 Report, supra* note 6, at 5-6 (noting that 66% of judges, 43% of plaintiffs' attorneys, and 63% of defendants' attorneys believe the purpose of a Rule 11 sanction should include compensation as well as deterrence).
Focusing on the purpose of Rule 11 became particularly important as the rule became used as a fee-shifting device. This, in turn, encouraged a counterproductive increase in Rule 11 motions. Indeed, Judge Weis, who was on the Advisory Committee at the time the 1983 version of Rule 11 was adopted, lamented that Rule 11 had become the subject of abuse. "Because the issues in this case are close, we consider the . . . invocation of Rule 11 to border on the abusive. We caution litigants that Rule 11 is not to be used routinely . . . ."\textsuperscript{213}

Thus, the judicial response to the Rule's standards contributed largely to the dramatic growth of Rule 11 activity. Ninety-six percent\textsuperscript{214} of the cases in which monetary sanctions including attorneys' fees were awarded implicitly endorsed the 1983 Advisory Committee's plan to provide the financial incentive necessary for attorneys to challenge adversaries for falling below Rule 11 standards.\textsuperscript{215} The prospect of fee-shifting, in turn, was primarily responsible for the explosion of Rule 11 litigation. However, the 1993 amendments are designed to deemphasize fee-based sanctions,\textsuperscript{216} and have occasioned a shift to the use of non-monetary sanctions.\textsuperscript{217} Nonetheless, the fee-shifting led to excessive satellite litigation, especially against plaintiffs' attorneys and in civil rights actions, and caused wide segments of the bar to take note of Rule 11's proscriptions.\textsuperscript{218}

\section*{III. How Lawyers Reacted to Rule 11}

As this part will show, Rule 11 has had a significant impact on attorneys. These effects, however, have been both positive and negative. This part will first discuss whether the rule had its intended effect of improving lawyer conduct. Then, it will review the evidence that the rule has had a negative impact on lawyer conduct. In summary, there is substantial evidence that Rule 11 caused the intended effect of im-

\textsuperscript{213} Morristown Daily Record, Inc. v. Graphic Communications Union, Local 8N, 832 F.2d 31, 32 n.1 (3d Cir. 1987); see also Waltz v. County of Lycoming, 974 F.2d 387, 390 (3d Cir. 1992) (stating that a "Rule 11 violation should [not] automatically result in an award of counsel fees and costs . . . . [T]he prime goal should be deterrence of repetition of improper conduct").

\textsuperscript{214} Cf. Melissa L. Nelken, Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment, 74 Geo. L.J. 1313, 1333 (1986) (concluding that in 96\% of cases in which sanctions were imposed monetary awards were employed). The FJC Final Report, supra note 6, § 1B, at 9, confirms that attorney's fees were the sanction of choice. The percentage of rulings imposing a sanction of attorney's fees were 80\%, 86\%, 90\%, 93\%, and 70\% in the five districts surveyed. See also AJS Study, supra note 6, at 956-57 (reporting similar findings, but noting that the amount of the sanction was generally small).

\textsuperscript{215} See supra Part I.

\textsuperscript{216} See Vairo, Rule 11 Sanctions, supra note 1, § 1.08(e)(1)(C)(v).

\textsuperscript{217} See infra Part IV.

\textsuperscript{218} See supra notes 10-12 and accompanying text.
proving some litigation practices.\textsuperscript{219} There is no doubt that the widespread publicity about the rule led to a greater sense of awareness by more attorneys of their professional obligations under the rule. Despite some evidence to the contrary,\textsuperscript{220} however, excessive satellite litigation undermined the goal of improving lawyer conduct as a means for streamlining litigation. Moreover, Rule 11 may have contributed to the professionalism problem as contentious sanctions practice contributed to a decrease in attorney civility.

There have been other effects of Rule 11, such as its disproportionate impact on plaintiffs, its chilling effect, and its possible overuse in civil rights cases, all of which have been discussed extensively in other articles and studies, and which have led to the 1993 amendments to Rule 11.\textsuperscript{221} They will not be reviewed extensively here, except to the extent that they are directly related to how lawyers have changed their actual conduct and practice in response to Rule 11.

1. The Good News

a. Rule 11 Caused Attorneys to Stop and Think

Rule 11 requires an attorney to engage in a reasonable inquiry into the legal and factual bases for the legal positions and allegations to be asserted. Quite clearly, the 1983 Advisory Committee intended the amendments to Rule 11 to effect a behavioral change, i.e., to encourage lawyers to “stop and think” before filing pleadings and motions.\textsuperscript{222} The question was whether lawyers would change their conduct in response to amended Rule 11. The answer, quite plainly, is that lawyers engaged in significantly more prefiling research than they had before Rule 11 was amended in 1983. Every empirical study confirms the finding. For example, a study conducted for the American Judicature Society (“AJS study”) showed that almost 40% of lawyers in the Fifth, Seventh, and Ninth Circuits had increased their pre-filing investigations in response to Rule 11,\textsuperscript{223} and a Third Circuit Study reported an over 43% increase in prefiling investigation.\textsuperscript{224} Further, 22.9% of the respondents in the AJS study indicated that the biggest impact of Rule 11 was to increase their factual investigation.\textsuperscript{225} Another 5.4% reported that Rule 11’s biggest impact was to increase time spent on legal research.\textsuperscript{226} Although the AJS Study indicated

\textsuperscript{219} See First FJC Report, supra note 6, at 174-75; Burbank, Third Circuit Report, supra note 6, at 75-77. The Third Circuit Task Force study was limited to cases within the Third Circuit.
\textsuperscript{220} See First FJC Report, supra note 6, at 112, 168; Burbank, Third Circuit Report, supra note 6, at 84-85.
\textsuperscript{221} See Vairo, Rule 11 Sanctions, supra note 1, §§ 2.01–2.04, at 2-4 to -69.
\textsuperscript{222} See 1983 Amendments, supra note 17, at 198-99.
\textsuperscript{223} See AJS Study, supra note 6, at 964.
\textsuperscript{224} See Burbank, Third Circuit Report, supra note 6, at 75-76.
\textsuperscript{225} See AJS Study, supra note 6, at 964.
\textsuperscript{226} See id.
that in most cases the extra effort was relatively small, and that the median sanction was relatively modest ($2500), the impact of Rule 11 is nevertheless dramatic.

Interestingly, the latest and most comprehensive study of lawyer conduct in response to Rule 11 showed that every segment of the bar—lawyers from small and larger firms and entities, and from the plaintiffs’ or defendants’ bars—engaged in greater prefiling inquiry because of the threat of Rule 11 sanctions. Moreover, and not surprisingly, lawyers who had had some experience with Rule 11 themselves conducted an even more thorough investigation. Overall, the AJS study revealed that over 60% of the lawyers surveyed took some action—either greater prefiling investigation, refusing to file a pleading, or other action—because of the threat of Rule 11 sanctions.

In some respects, as has been discussed by others, these are curious findings. If over 40% of lawyers increased their pre-filing investigation, there may have been a lot of lawyers acting unprofessionally before the 1983 amendments, which in turn confirms that existing disciplinary mechanisms for enforcing professional standards were not working. The responding lawyers, however, were asked about their extra effort in the context that suggests that they would not otherwise have acted unprofessionally:

Over and above what normal good lawyering would require in the absence of the provision for sanctions under Rule 11, how many extra hours did you and others in your firm spend on this case . . . out of concern that a Rule 11 challenge, justified or unjustified, might be brought against you?

Thus, at least at face value, the lawyers were reporting doing extra work, beyond that expected by a good professional. If only attorneys who were acting professionally in the first place altered their behavior, Rule 11 has not improved the conduct of those behaving unprofessionally. It is unlikely, however, that the attorneys would have admitted to acting unprofessionally before Rule 11 was amended. In that sense, Rule 11 has raised the level of attorney conduct. Moreover, the AJS study showed that the response to Rule 11 was across-the-board.

227. See id. at 958-59.
228. See id. at 957.
229. See id. at 975-77.
230. See id. at 985. Although the study did indicate that plaintiffs’ lawyers who are engaged in civil rights work increased their prefiling inquiries to an even larger degree. See id.
231. See id. at 980-81.
232. See id. at 961.
234. AJS Study, supra note 6, at 959.
Lawyers in big cities and small towns, working in large firms and small settings, representing plaintiffs and defendants, in all types of litigation reported similar behavioral changes in response to the threat of sanctions, even when the type of practice presented relatively little risk of sanctions. Thus, it is likely that the rule did indeed raise the level of lawyering across a broad spectrum of practice.

b. Is Rule 11 Deterring Meritless Claims?

Another measure of the positive impact of Rule 11 is the extent to which Rule 11 has deterred meritless claims. Professor Nelken's study of the Northern District of California revealed that Rule 11 has resulted in decreased filings of boilerplate defenses and counterclaims, and that it has discouraged "questionable cases." Firms established policies or guidelines regarding whether papers may be filed and whether Rule 11 motions should be made. The AJS study confirmed Professor Nelken's results. Nineteen percent of those surveyed reported declining marginal cases, 28.8% relied on Rule 11 to discourage a client from pursuing or defending a case, and 24.5% advised clients not to pursue a questionable case.

Whether Rule 11 is the best deterrent to improper filings, however, is open to question. The 1991 Federal Judicial Center Preliminary Report revealed some surprises. While over 80% of the judicial respondents indicated that they believed Rule 11 should be retained in its 1983 form, three-quarters of the responding judges thought groundless litigation was only a small problem. Moreover, only a few judges thought Rule 11 was "very effective" in deterring groundless pleadings. The judges indicated that other methods, such as prompt rulings on motions to dismiss or for summary judgment, were effective for regulating groundless litigation. Rule 16 status conferences and warnings were also viewed as much more effective than sanctions under Rule 11 or other devices.

235. See id. at 976.
236. See id. at 977 tbl.16.
237. See id. at 963 tbl.7.
238. See id. at 985.
239. See generally id. at 965-75 (discussing the effect of Rule 11 sanctions on different practice areas).
240. Nelken, supra note 6, at 149-50 (quoting lawyer surveyed).
241. See id. at 150.
242. See AJS Study, supra note 6, at 961.
243. See FJC Final Report, supra note 6, § 2A. The FJC did not ask the judges to evaluate specific proposals for amending Rule 11. Rather it asked judges to choose between the current rule, the pre-1983 version of the rule, or an amended version of the rule. Only 7% believed the rule should be returned to its pre-1983 language. However, 12.5% thought the rule should be amended in some way. See id.
244. See id. § 2A, at 2.
245. Id. § 2A, at 2. 5.
On the other hand, a great deal of anecdotal evidence exists that a large number of judges, including those who previously were less zealous in prodding the parties before them, cite Rule 11 in pretrial conferences and other proceedings on and off the record to remind litigants of their obligations under Rule 11, and that monetary consequences could follow violations of the rule. One district judge, responding to the Federal Judicial Center's Rule 11 Judge Survey, noted the *in terrorem* effect of the rule: "I think the existence of Rule 11, not its use, has helped."

Under the 1993 amendments to Rule 11, courts still have the power to impose sanctions *sua sponte*, and may impose fines as a sanction. Accordingly, courts continue to invoke Rule 11 at status conferences and the like. Moreover, the Federal Judicial Center's ("FJC") latest study of Rule 11 strongly suggests that a solid majority of judges and lawyers are opposed to amending Rule 11 yet again to restore it to its 1983, or pre-1983, form. The FJC's survey indicated that most judges and lawyers believe that the problem of groundless litigation in federal courts either never existed or is the same or smaller than it was before 1993.

---

247. Representative of this approach is the warning contained in *Brown v. Federation of State Medical Boards*, No. 82 C 7398, 1983 U.S. Dist. LEXIS 11795, at *1 (N.D. Ill. Nov. 10, 1983) ("Without expressing any view as to the merits of the case, the court admonished each side as to the possible sanctions which can be imposed pursuant to Amended Rule 11 . . . in the event either side would assert any position which is not well grounded in fact."). See also *J.O. v. Alton Community Unit Sch. Dist. 11*, 909 F.2d 267, 274 (7th Cir. 1990) (affirming dismissal of complaint, but granting leave to replead, warning: "In allowing an amendment, we remind the plaintiffs that they must make new, good faith factual allegations, pleading a new theory of liability other than the one rejected here"); *Horowitz v. Federal Kemper Life Assurance Co.*, 861 F. Supp. 1252, 1260 n.7 (E.D. Pa. 1994) (cautioning counsel "to undertake their duties under Rule 11 more responsibly in the future"), aff'd, 57 F.3d 300 (3d Cir. 1995); *St. Jarre v. Heidelberger Druckmaschinen A.G.*, 816 F. Supp. 424, 427 (E.D. Va. 1993) (denying motion for Rule 11 sanctions while admonishing counsel that the filing of baseless pleadings will in the future result in Rule 11 sanctions), aff'd, 19 F.3d 1430 (4th Cir. 1994); *Jones v. Westside-Urban Health Ctr., Inc.*, 760 F. Supp. 1575, 1582 (S.D. Ga. 1991) (same).


249. See *Vairo, Rule 11 Sanctions, supra* note 1, § 1.08(e)(1)(C)(ii). Courts, however, must issue an order to show cause, which should detail the sanctionable conduct and state why sanctions should not be imposed. See id.

250. See id. § 1.08(e)(1)(C)(v). Courts no longer may impose attorney's fees as a sanction *sua sponte*. See id.

251. See, e.g., *Moeller v. D'Arrigo*, 163 F.R.D. 489, 494 (E.D. Va. 1995) (directing plaintiff's attention to Rule 11, and warning plaintiff not to file other submissions without factual and legal support); *Salman v. Department of Treasury-IRS*, 899 F. Supp. 473, 474 (D. Nev. 1995) ("This lawsuit was nothing more than naked harassment, and Salman is now warned: Should he file another like it against the I.R.S. in the future, he will defend against not only a vexatious litigant order but severe monetary sanctions under Rule 11 . . . as well.").

Judicial resolve to enforce Rule 11 is typified by the warning in Dreis & Krump Manufacturing Co. v. International Association of Machinists: "Lawyers practicing in the Seventh Circuit, take heed!" On a "kindler, gentler" note, a major Federal Judicial Center study of Rule 11 found that judges are aware of the interest of the bar in Rule 11 and that "Rule 11 has generated a massive educational effort to inform lawyers about their obligations under the rule." Thus, it appears that the 1983 Advisory Committee's plan that judges use Rule 11 to remind attorneys of their obligations and to deal more effectively with frivolous cases and unprofessional conduct has been effective. At the same time, attorneys appear to be getting the message.

2. The Bad News

a. Has Rule 11 Spawned a Cottage Industry?

Any fear that amended Rule 11 would be as little used as a basis for imposing sanctions as its predecessor and other sanctions provisions has proved totally unfounded, at least when one uses published decisions as the yardstick. The emphasis on fee-based sanctions resulted in excessive satellite litigation. Indeed, some have said that Rule 11 replaced civil RICO actions as the cottage industry of the litigation bar. Unfortunately, it is next to impossible to determine whether the unreported experience is comparable to that of the reported cases, or whether the reported decisions are merely the tip of the iceberg.

Prior to 1983, there were only a handful of reported Rule 11 decisions. Between August 1, 1983, and December 15, 1987, 688 Rule 11 decisions were published in the federal reporters, consisting of 496 district court opinions and 192 circuit court opinions. By 1989, the number of reported district court cases appears to have leveled off. The number of reported circuit court opinions continued to rise, however, as the circuit courts continued to struggle with interpreting the rule. Moreover, the number of cases reported on computerized

253. 802 F.2d 247, 256 (7th Cir. 1986).
254. First FJC Report, supra note 6, at 58.
255. See id. at 108-09.
256. See Michael Bates, The Rule 11 Debate, 4 Years Later, Nat'l L.J., Oct. 12, 1987, at 3. But see Burbank, Third Circuit Report, supra note 6, at 60-62 ("On the basis of our studies, we simply cannot agree either that Rule 11 is a cottage industry or that Rule 11 motions are routine in the Third Circuit.").
257. See Burbank, Third Circuit Report, supra note 6, at 59; First FJC Report, supra note 6, at 68.
databases continued to rise until 1993, when Rule 11 was amended again.259 A search as of June 1993 revealed nearly 7000 cases.260

A very significant number of lawyers were affected by Rule 11. As discussed above, the AJS study showed that over one-third of attorneys were involved in a sanctions motion during the prior year, and that almost 55% had been the target of formal or informal threats of Rule 11 sanctions.261 More recently, however, this trend began to reverse. The advent of the 1993 amendments to Rule 11 has led to a marked decline in formal Rule 11 activity.262

b. Effects on the Settlement Process

An early finding of a Rule 11 violation may affect the outcome of the suit. The sanctioned attorney would need to keep in mind the threat of a sanction while continuing to litigate the action. Moreover, on the positive side, by postponing the determination of the sanction until the end of the case, the district court may create a climate that is favorable to settling the action. On the other hand, the sanctioned attorney may feel pressured to settle cheap in the hopes of having the sanctions finding overturned.263 Lawyers believe that Rule 11 has an impact on the settlement process, but the evidence is unclear as to whether the overall impact is positive or negative.264

Indeed, some judges fear that Rule 11 leads to counterproductive results. As Rule 11 motions, and in many cases cross-motions, become more common, cordiality among attorneys breaks down, making it harder to settle cases, and satellite Rule 11 litigation increases.265 The Federal Judicial Center Judge Survey suggests widespread disa-

260. See supra note 259.
261. See supra note 6, at 952 n.36, 954-56.
262. See Laura Duncan, Sanctions Litigation Declining, A.B.A. J., Mar. 1995, at 12, 12 ("At this point, 'Rule 11 is pretty much dead.'" (quoting Judge Milton Shadur of the Northern District of Illinois)).
263. See, e.g., Denton v. Critikon, Inc., 781 F. Supp. 459, 461 (M.D. La. 1991) (stating that the plaintiff contended that the threat of sanctions tainted the voluntariness of voluntary dismissal).
264. See First FJC Report, supra note 6, at 115-20; see also supra note 6, at 964; Burbank, Third Circuit Report, supra note 6, at 85-88 (finding little evidence that Rule 11 has poisoned relationships between the bench and the bar, and some evidence that the rule has poisoned relationships among opposing counsel).
265. See Giorgio Morandi, Inc. v. Texport Corp., 139 F.R.D. 592, 594 (S.D.N.Y. 1991) (requiring a “strong showing of willful disregard for Rule 11...as] as a lesser showing will only encourage litigators to bring Rule 11 motions and engage in professional discourtesy, preventing prompt resolution of disputes, the trial court's primary function”); Hot Locks, Inc. v. Ooh La La, Inc., 107 F.R.D. 751, 751 (S.D.N.Y. 1985) (“The amendment of Rule 11... has called forth a flood of... collateral disputes within lawsuits, unrelated to the ultimate merits of the cases themselves.”); Randy L. Agnew, Comment, Recent Changes in the Federal Rules of Civil Procedure: Prescriptions to Ease the Pain?, 15 Tex. Tech. L. Rev. 887, 900-01 (1984); Jack B. Weinstein,
More than two-thirds of the judges responding believed that either Rule 11 has no impact on the settlement process—37%—or that the net effect of the rule is even—32%—because the rule promotes settlement as often as it impedes it. Twenty percent of the judges responding, however, believed that Rule 11 impedes settlement in more cases than not. Only 11% think it encourages settlement.

Many judges did not respond to the question about settlement effects, probably because judges are not always privy to the settlement practices or negotiations of the parties. To the extent that judges lack meaningful information about the settlement process, their responses may not be helpful. Taken together with their responses to a somewhat related question, however, one may be able to draw the inference that the overall impact of Rule 11 on the settlement process is negative.

c. Lawyer Relationships

For the first few years after Rule 11 was amended, almost one-third of the reported cases were out of the districts covering New York City and Chicago. This percentage declined as Rule 11 took hold throughout the country. Rule 11, at first, remained largely an urban phenomenon, perhaps because practice in these districts may be more impersonal, with less good-will among the attorneys, leading to less reluctance to bring Rule 11 motions. Similarly, the Third Circuit Task Force concluded that local legal culture regarding attitudes towards collegiality may have an effect on sanction incidence. Indeed, even the most recent studies showed that sanctions motions were made more frequently in urban areas, even as lawyers in all areas appeared to be modifying their behavior in response to the existence of Rule 11.

More recent studies also suggest that Rule 11 has a deleterious effect on lawyer relations. For example, the Federal Judicial Center reported in 1991 that over 50% of the 483 federal district court judges responding to its survey believed that Rule 11 motions exacerbate unnecessarily contentious behavior of counsel toward one another. Only 7.9% think Rule 11 motions curtail such behavior, and 7.9% think Rule 11 motions have no effect on the interactions of opposing


266. See FJC Final Report, supra note 6, § 2A, at 10-11.
267. See Burbank, Third Circuit Report, supra note 6, at 62-65. In fact, most of the New Jersey cases involved New York lawyers. In one New Jersey case, the New Jersey local counsel “believed that the Rule 11 issue was raised because two New York attorneys were fighting like cats and dogs over discovery disputes. . . . had [it] been two New Jersey attorneys, it would not have happened.” Id. at 63.
268. See AJS Study, supra note 6, at 977.
Similarly, Professor Nelkin's study of the Northern District of California reports that Rule 11 "has increased the hostility level in federal court significantly." Forty-nine percent of respondents indicated that relations among lawyers had deteriorated, and only 3% thought relations had improved. Respondents also indicated that they thought Rule 11 caused attorney relationships with the bench to worsen, while only 3% thought Rule 11 had resulted in an improved relationship with the bench.

The 1992 AJS study reported that 64% of the lawyers surveyed thought that Rule 11 had decreased civility, while 36% thought that the rule improved civility. Perhaps more significantly, almost a third—29.3%—of the participants in that survey thought that the impact on civility was the most significant impact of Rule 11. This is quite interesting because that percentage is greater than those who thought the most significant impact was increased factual investigation—22.9%—or increased legal research—5.4%—or increased fees—5.0%. Accordingly, although Rule 11, in contrast to the failure of disciplinary boards, has demonstrably altered some attorney conduct for the better, it appears that the most significant impact of the rule has been to cause a decline in civility. Thus, it is understandable that Rule 11 has been amended to reduce the number of contentious motions and to encourage non-monetary sanctions designed to improve practice, and that the bar and the bench has turned to civility codes as the next great solution to the problems of the profession.

IV. THE RELATIVE IMPACT AND ROLE OF RULE 11 AND PROFESSIONAL DISCIPLINE ON ATTORNEY CONDUCT

Early in the debate about amended Rule 11, the Association of the Bar of the City of New York held a Symposium on Rule 11. One of the participants, Hon. Kevin Thomas Duffy, of the United States District Court for the Southern District of New York, noted that Rule 11 came about because the organized bar had not done its job:

Why do lawyers bring stupid, senseless, baseless lawsuits? Because they get away with it. The organized bar itself is supposed to watch out for the activities of lawyers. Has the organized bar met its own requirements? Are lawyers still bringing stupid, senseless, baseless lawsuits? Sure. Why aren't they disbarred? Well, they are not, and it is quite obvious to the judiciary that if the organized bar is not

270. Thirty-four percent of the judges believed that Rule 11 had no net effect on the parties' behavior because in some cases it exacerbates poor behavior and in others it curtails it. See id. § 2A, at 10.
271. Nelken, supra note 6, at 150 (citing comments of a study participant).
272. See id.
273. See AJS Study, supra note 6, at 964.
274. See id.
275. See infra Part IV.
276. See infra Part V.
As discussed in Part II, Rule 11 was interpreted to provide a basis for sanctioning a wide range of conduct. As Judge Duffy suggests, the organized bar had not historically dealt with such conduct. There is a question whether it is appropriate for the courts, in contrast to organized bar discipline, to sanction such conduct. Indeed, the courts themselves have questioned the propriety of using Rule 11 to deter unprofessional conduct.

For example, Judge William W Schwarzer, a leading proponent of Rule 11 in its early years, interpreted Rule 11 expansively to cover attorneys' ethical obligations to avoid misrepresentations and to force attorneys to be more precise in characterizing their arguments, the so-called "Duty of Candor." In *Golden Eagle Distributing Corp. v. Burroughs Corp.*, the defendant's attorneys, from a prominent law firm, made the mistakes of characterizing their argument on a motion to dismiss as one based on existing law and of failing to cite adverse authority. After the court denied the motion to dismiss, it directed the defendant to submit a memorandum explaining why Rule 11 sanctions should not be imposed.

In its Rule 11 memorandum, it became clear that the motion to dismiss was based not on existing law, but rather on "a good faith argument for the extension ... of existing law." The court stated that the defendant's Rule 11 memorandum presented the argument

---


278. See id.; see also Sol Linowitz & Martin Mayer, *The Betrayed Profession: Lawyering at the End of the Twentieth Century* 141 (1994) (arguing that various disciplinary authorities have not effectively discharged their responsibilities).

279. See, e.g., Stephen R. Ripps & John N. Drowatzky, *Federal Rule 11: Are the Federal District Courts Usurping the Disciplinary Function of the Bar?*, 32 Val. U.L. Rev. 67 (1997) (arguing that Rule 11 violations should be reported to disciplinary boards for appropriate action). See generally Wilkins, supra note 4 (discussing the rise of new agencies, including judicial enforcement of Rule 11, for enforcement of rules of professional conduct and arguing that multiple enforcement by new agencies as well as traditional organized bar enforcement can be efficient and compatible with professional independence).


281. 103 F.R.D. 124 (N.D. Cal. 1984), rev'd, 801 F.2d 1531 (9th Cir. 1986).

282. Id. at 126.
with exemplary clarity and fairness. The difficulty is that this is not the argument presented when the motion was made. Had it been made then, there would be no question that it would have qualified under Rule 11 as "a good faith argument for the extension . . . of existing law" and the issue of sanctions would never have arisen. Instead of doing what they have now done, counsel presented an argument calculated to lead the Court to believe that it was "warranted by existing law."283

The court then reproduced in its opinion the relevant portions of the two briefs, and concluded:

The contrast between the two memoranda speaks for itself. It is a dramatic illustration of the sort of practice at which Rule 11 is aimed and result it seeks to achieve. There would be little point to Rule 11 if it tolerated counsel making an argument for the extension of existing law disguised as one based on existing law. The certification made by counsel signing the motion is not intended to leave the court guessing as to which argument is being made, let alone to permit counsel to lead the court to believe that an argument is supported by existing law when it is not.

The duty of candor is a necessary corollary of the certification required by Rule 11. A court has a right to expect that counsel will state the controlling law fairly and fully; indeed, unless that is done the court cannot perform its task properly. A lawyer must not misstate the law, fail to disclose adverse authority (not disclosed by his opponent), or omit facts critical to the application of the rule of law relied on.284

The Ninth Circuit reversed this interpretation of Rule 11.285 The court began by reviewing the policies underlying Rule 11 and the developing case law. This review demonstrated that: "If, judged by an objective standard, a reasonable basis for the position exists in both law and in fact at the time that the position is adopted, then sanctions should not be imposed."286 The court then noted that the district court agreed that the motion was nonfrivolous, but objected to the way in which the motion was presented. While complimenting the district court for its "salutary admonitions against misstatements of the law, failure to disclose directly adverse authority, or omission of critical facts,"287 the Ninth Circuit said that it was "with Rule 11 that we must deal."288 The court emphatically rejected the district court's interpretation of Rule 11 which would require "district courts to judge the ethical propriety of lawyers' conduct with respect to every piece of

283. Id.
284. Id. at 127.
286. Id. at 1538 (citations omitted).
287. Id. at 1539.
288. Id.
Moreover, "[a]sking judges to grade accuracy of advocacy in connection with every piece of paper filed in federal court multiplies the decisions which the court must make as well as the cost for litigants." A petition for rehearing en banc was denied, but five judges on the Ninth Circuit registered a vehement dissent, chiding the rest of the court for its refusal to recognize the ethical obligation implicit in Rule 11.

The confusion in the Ninth Circuit was typical. The circuit courts disagreed over a number of important aspects of the rule. A unanimous en banc opinion of the Fifth Circuit, Thomas v. Capital Security Services, Inc., and a Third Circuit opinion, Gaiardo v. Ethyl Corp., recognized that Rule 11 itself had become the source of abuse, and that some interpretations of the rule were counterproductive and insufficiently respectful of novel theories. None of these decisions, however, articulated a vision of the role Rule 11 should play in enforcing ethical standards that should have been enforced by formal disciplinary authorities.

Nevertheless, the courts began to impose disciplinary-type sanctions on attorneys who failed to live up to the new judicially-imposed professional standards of conduct. Under Rule 11, especially the 1993 version, courts have been imposing various types of non-monetary sanctions and, in fact, are encouraged to carefully choose the sanction most appropriate for the violation and the offender. By considering sanctions other than attorneys' fees, courts can serve the deterrent purpose of Rule 11 without encouraging the contentious satellite litigation that led to decreased civility. Perhaps such sanctions will be more effective in promoting improved attorney conduct.

\begin{itemize}
\item \textbf{Reprimands}
\end{itemize}

A public reprimand of a sanctioned attorney can be an appropriate sanction, particularly for a first time offender, or when the violation is not willful. For example, in Langer v. Monarch Life Insurance

289. Id.
290. Id. at 1540
291. See Golden Eagle Distrib. Corp. v. Burroughs Corp., 809 F.2d 584, 584 (9th Cir. 1987) (en banc).
292. 836 F.2d 866 (5th Cir. 1988).
293. 835 F.2d 479 (3d Cir. 1987).
294. See Schwarzer, A Closer Look, supra note 280, at 301-02.
295. See, e.g., Unanue-Casal v. Unanue-Casal, 898 F.2d 839 (1st Cir. 1990) (choosing a reprimand as the appropriate sanction); Thomas v. Capital Sec. Serv., Inc., 836 F.2d 866, 878 n.18 (5th Cir. 1988) (en banc) ("Influenced by the particular facts of a case, the court may decide that the circumstances warrant imposition of . . . perhaps only a reprimand."); Frantz v. United States Powerlifting Fed'n, 836 F.2d 1063, 1066 (7th Cir. 1987) ("[A] public censure, an important method of professional discipline, may be called for even when a monetary sanction is not.") (citations omitted)); In re Curl, 803 F.2d 1004, 1007 (9th Cir. 1986) (finding that the "public admonishment of this opin-
Co., the district court found that the plaintiff violated Rule 11, but did
not impose attorney's fees as the sanction.\textsuperscript{296} Instead, it reprimanded
counsel for his unprofessional conduct.\textsuperscript{297} The defendant appealed,
arguing that the district court had failed to impose a sanction as re-
quired under Rule 11.\textsuperscript{298} The Third Circuit affirmed the district court,
noting that in some circumstances a reprimand is an appropriate sanc-
tion, and found that the district court did not abuse its discretion.\textsuperscript{299}
Among the circumstances justifying the sanction chosen was the hard-
ball nature of the litigation by equally strong parties and well-
matched, able counsel.\textsuperscript{300}

Courts are mindful of the deterrent effect of public reprimands. For
example, in \textit{Burger v. Health Insurance Plan of Greater New York},\textsuperscript{301}
sanctioned attorneys requested that their names be deleted from the
court's opinion.\textsuperscript{302} The court denied this request explaining,
“[n]aming the individuals responsible serves the deterrent effect of
Rule 11 . . . . Deletion of the attorneys' names would vitiate the
rule.”\textsuperscript{303} Courts view a reprimand as a serious sanction. In \textit{Traina v.
United States},\textsuperscript{304} for example, plaintiff's counsel argued that monetary
sanctions should not be imposed against him under Rule 11 because
his adversary had earlier been sanctioned with a reprimand. The Fifth
Circuit noted that plaintiff's counsel did not complain that monetary
sanctions were inappropriate, but rather that in his view his adversary
had received a less severe sanction.\textsuperscript{305} The circuit court did not agree.

The district court's admonition was as follows:

Counsel is admonished about her reliance on [inapplicable case law]
and is warned that her advocacy will receive strict scrutiny in future
cases. . . . [C]ounsel is hereby reprimanded for what was at the least
a careless reading of the caselaw. She is ordered to show a copy of
this Order and Reasons to her supervisor and to certify to the Court
that she has done so.\textsuperscript{306}

\textsuperscript{ion,” instead of monetary sanction, suffices because violation was not intentional),
\textit{overruled on other grounds} by Partington v. Gedan, 923 F.2d 686 (9th Cir. 1991) (en
banc); Corporate Printing Co. v. New York Typographical Union No. 6, 886 F. Supp.
340, 348 (S.D.N.Y. 1995) (same); C.T. Shipping, Ltd. v. DMI (U.S.A) Ltd., 774 F.
Supp. 146, 156 (S.D.N.Y. 1991) (same); Atkins v. Marathon Le Tourneau Co., 130

296. 966 F.2d 786, 810-12 (3d Cir. 1992).
297. See id. at 811.
298. See id. at 810.
299. See id. at 811.
300. See id. at 811-12.
302. See id. at *1.
303. Id.
304. 911 F.2d 1155, 1158 (5th Cir. 1990).
305. See id.
306. Id.
The Fifth Circuit then noted: "To characterize the above reprimand, as does appellant, as 'to simply admonish' is an absurd understatement. In our view, the above reprimand was significantly more severe than the relatively insignificant sum [$335.63] assessed against [plaintiff's] counsel.... No abuse of discretion by the district court is shown."\(^{307}\)

Other circuit courts are reminding the lower courts that a reprimand is a sanction that ought to be considered. For example, in *Figueroa-Ruiz v. Alegria*,\(^ {308}\) the district court failed to properly decide a Rule 11 motion.\(^ {309}\) The First Circuit reversed and remanded with instructions to impose a sanction if Rule 11 had been violated.\(^ {310}\) Apparently believing that the district court denied the Rule 11 motion because it thought monetary sanctions were inappropriate, the First Circuit specifically noted that a reprimand is an appropriate sanction.\(^ {311}\)

This is a positive development because it should move the courts away from fee-shifting sanctions.\(^ {312}\) By publishing the opinion which outlines the offender's infraction, the court in effect publicly reprimands the attorney.\(^ {313}\) A less severe method of reprimand would be an oral reprimand in court.\(^ {314}\)

b. Disciplinary Action

A court may consider disciplinary action against an attorney who violates Rule 11 to be appropriate. Most courts prefer to bring the offending conduct to the attention of the appropriate disciplinary committee, rather than disciplining the attorney directly. For example, in *Steinle v. Warren*,\(^ {315}\) the court directed the court clerk to for-

---

\(^{307}\) *Id.* (citation omitted).

\(^{308}\) 905 F.2d 545, 549 (1st Cir. 1990).

\(^{309}\) See *id*.

\(^{310}\) See *id*.

\(^{311}\) See *id*.

\(^{312}\) Other commentators view reprimands as an appropriate sanction. See, e.g., Victor H. Kramer, *Viewing Rule 11 as a Tool to Improve Professional Responsibility*, 75 Minn. L. Rev. 793, 808 (1991) (arguing for making public the identity of the sanctioned attorney as a deterrent against future misconduct).

\(^{313}\) See, e.g., Westfield Partners, Ltd. v. Hogan, 744 F. Supp. 180, 193 (N.D. Ill. 1990) (imposing Rule 11 sanctions and holding "that the appropriate sanction is censure of [plaintiff's] counsel, and this order shall serve as that censure"); United States v. Minisee, 113 F.R.D. 121, 123 (S.D. Ohio 1986) (holding that "a reprimand of counsel is the appropriate sanction").

\(^{314}\) See Gaiardo v. Ethyl Corp., 835 F.2d 479, 482 (3d Cir. 1987) ("In addition to financial penalties courts may sanction by warning, oral reprimands in open court, or written admonition."). For other cases in which reprimands were the Rule 11 sanction imposed, see Vairo, Rule 11 Sanctions, *supra* note 1, § 9.03(b)(2)(A).

\(^{315}\) 765 F.2d 95, 102 (7th Cir. 1985); *see also In re Rainwater*, 124 B.R. 133, 140-41 (Bankr. M.D. Ga. 1991) (holding that Bankruptcy Rule 9011 sanctions should be applied to the junior associate who signed the frivolous papers, as well as the non-signatory senior attorney who reviewed the papers, and sending a copy of the sanction order to the state disciplinary committee); Polanco v. 21 Arden Realty Corp., 121
ward a copy of the sanctions opinion to the state board of professional responsibility. In Cannon v. Loyola University of Chicago, the court directed "the clerk to send a copy of the opinion to the Illinois Attorney Registration and Disciplinary Commission and the Executive Committee of the United States District Court for the Northern District of Illinois for whatever actions they deem appropriate." A bankruptcy court noted the utility of referring sanctions matters to disciplinary bodies. In In re Shuma, debtors had filed a motion for recusal to remove a judge, the trustee, and the trustee's counsel. The bankruptcy court, applying Rule 11 case law, imposed Bankruptcy Rule 9011 sanctions against debtors' counsel. The court imposed a $375 sanction award but because "[i]mposing a mere monetary sanction in this instance would be tantamount to wielding a cardboard sword when a dragon looms ahead," the court also referred the sanction decision to the district's disciplinary committee.

One commentator believes that Rule 11 violations regularly should be reported to disciplinary authorities as a vehicle for improving professional responsibility. Professor Kramer wrote:

To maximize the deterrent effect of Rule 11 sanctions, courts should ensure that the identity of sanctioned lawyers is a matter of public record, and should routinely report imposition of sanctions on lawyers to the state bar disciplinary bodies of the fifty states. . . .

Once a court has imposed a sanction on an attorney, it is difficult to justify not reporting the sanction to the disciplinary body of the jurisdiction which has authorized the sanctioned attorney to engage in the practice of law. Reporting of Rule 11 sanctions will give state disciplinary authorities an opportunity to review the records of attorneys who previously had violated the state's code of professional responsibility in light of their Rule 11 violations. Regular reporting of all Rule 11 sanctions to state disciplinary authorities also would disclose multiple Rule 11 sanctions against the same lawyer. To effectively use this information, state disciplinary bodies should inves-
tigate every lawyer who has received more than one Rule 11 sanction. Reporting by federal district clerks to state authorities would make this salutary practice possible.\textsuperscript{322}

Professor Kramer's suggestion, together with a deemphasis on attorney's fees as the preferred Rule 11 sanction, has merit. Attorneys have always had a duty to report violations of professional responsibility codes, but they have not always done so. To the extent that Rule 11 incorporates aspects of such codes, i.e., the duty to represent a client zealously, but not to engage in abusive practices or to file groundless papers, Professor Kramer's suggestion is valuable. More importantly, it is unlikely that an adversary would move under Rule 11 seeking such sanctions when there is little to no prospect of obtaining attorney's fees. Thus, Rule 11 motions would be reserved for the most egregious cases.

On the other hand, when an attorney is sanctioned for some negligently filed paper, and that attorney has never engaged in abusive conduct or violated Rule 11 before, it seems unduly harsh to immediately report the offender to disciplinary authorities. Professor Parness has noted that under the 1993 amendments to Rule 11, courts are more likely to make disciplinary referrals as a sanction.\textsuperscript{323} He proposes standards and guidelines for such referrals, and argues that courts should distinguish between major and minor violations of Rule 11.\textsuperscript{324} For example, violations implicating attorney honesty should be treated more harshly.\textsuperscript{325}

In addition, the Fifth Circuit has noted that when the court chooses to take disciplinary action itself, there may be a due process problem. In \textit{Thomas v. Capital Security Services, Inc.},\textsuperscript{326} the court stated: "Finally, as to disciplinary action applied to an attorney under Rule 11, district courts should recognize a very real problem that might arise; due process considerations emerge if this type of penalty is applied."\textsuperscript{327}

Nevertheless, courts have imposed or threatened to impose disciplinary measures. In \textit{In re Boucher},\textsuperscript{328} the plaintiff's attorney was suspended from practice for six months because he misrepresented the factual record on appeal in violation of Federal Rule of Appellate Procedure 28(a)(3).\textsuperscript{329} Two other courts have issued warnings. In \textit{In

\textsuperscript{322.} Kramer, \textit{supra} note 312, at 808-09 (footnotes omitted).
\textsuperscript{324.} See \textit{id.} at 59-61.
\textsuperscript{325.} See \textit{id.} at 60.
\textsuperscript{326.} 836 F.2d 866 (5th Cir. 1988).
\textsuperscript{327.} \textit{id.} at 878 (citation and footnote omitted).
\textsuperscript{328.} 837 F.2d 869 (9th Cir. 1988), \textit{modified}, 850 F.2d 597 (9th Cir. 1988).
\textsuperscript{329.} See \textit{id.} at 871.
re Curt, the court stated that the court "will not hesitate to sanction future negligence with substantial monetary fines, suspension, or disbarment from practice before our court." Similarly, in Donaldson v. Clark, the court noted that "sanctions may include ... suspension or disbarment from practice." In American Airlines, Inc. v. Allied Pilots Ass'n, the Fifth Circuit affirmed Rule 11 sanctions of disbarment from practice before the district court in any matter for periods ranging from thirty days to six months. Moreover, a court is more likely to take disciplinary action when the attorney is a repeat offender of Rule 11.

On the other hand, a more drastic sanction than that discussed in American Airlines, such as suspending an attorney for two years from practicing before the district court, may be inappropriate. The Fifth Circuit has stated that "when a district court finds that a disciplinary sanction more severe than admonition, reprimand, or censure under Rule 11 is warranted, it should refer the matter to the appropriate disciplinary authorities."

c. Mandatory Continuing Legal Education

The court may consider mandatory legal education for attorneys a proper sanction. In Stevens v. City of Brockton, the court found that both attorneys had violated Rule 11. The court decided against imposing a monetary sanction, explaining that "[a]warding costs to both sides would simply cause a shuffling of funds, with the penalties canceling each other out . . . But an affirmative sanction is more likely to emphasize to the attorneys the unnecessary carelessness of

---

330. 803 F.2d 1004 (9th Cir. 1986), overruled on other grounds by Partington v. Gedan, 923 F.2d 686, 688 (9th Cir. 1991) (en banc).
331. Id. at 1007.
332. 819 F.2d 1551 (11th Cir. 1987) (en banc).
333. Id. at 1557 n.7 (citation omitted).
334. 968 F.2d 523 (5th Cir. 1992).
335. See id. at 533.
336. See, e.g., McGoldrick Oil Co. v. Campbell, Athey & Zukowski, 793 F.2d 649, 654 (5th Cir. 1986) (directing the clerk to forward the opinion to state grievance committees, noting that the sanctioned attorney is already the subject of disciplinary proceedings); Lepucki v. Van Wormer, 765 F.2d 86, 89 (7th Cir. 1985) (per curiam) (referring attorney to state disciplinary group "because of his pattern of abuse of the judicial process"); see also Pope v. Federal Express Corp., 138 F.R.D. 684, 690 (W.D. Mo. 1991) (imposing monetary sanctions instead of revoking attorney's license to practice).
337. Thornton v. General Motors Corp., 136 F.3d 450, 455 (5th Cir. 1998) (citation omitted).
339. See id. at 27.
their conduct." As an alternative, the court ordered both attorneys to attend a day-long program on federal trial practice.

In Smith v. Our Lady of the Lake Hospital, Inc., the court ordered a recent law school graduate to attend a continuing legal education program on federal practice and procedure, and to attend at least five sessions of an Inns of Court program. The senior attorneys in the firm were subjected to monetary sanctions.

The district court in Bergeron v. Northwest Publications Inc. also believed that continuing legal education was an appropriate sanction. The court noted that the focus of the 1993 amendments to Rule 11 was on deterrence rather than compensation, and that the least severe sanction to achieve that purpose ought to be imposed. The plaintiff's attorney, according to the court, had "filed rambling, confusing and contradictory motions" that reflected "a fundamental lack of knowledge of the Federal Rules of Civil Procedure." The court also noted that the attorney had been sanctioned before, but after being sanctioned he remained either "unrepentant, or . . . he still does not understand what he did wrong." An example of the attorney's mistakes was an irrelevant, "improper and incomprehensible reference to the 1995 [Oklahoma City] bombing" that could be interpreted as a "veiled threat" to the court or as "disrespectful to the victims of that atrocity."

Under the circumstances, the district court decided that the most appropriate sanction was a private course on the Federal Rules of Civil Procedure and the local rules of the court. The court specified that the course be taught by a professor of an accredited law school, and that the course consist of at least forty hours of individualized instruction. An affidavit by the attorney and the law professor had

341. See Stevens, 676 F. Supp. at 27.
343. See id. at 154-55.
344. See id.
346. See id. at 523.
347. See id. at 521.
348. Id. at 522.
349. Id.
350. Id.
351. See id. at 523.
352. See id.
to be filed, stating that the attorney completed the course and is proficient in the practice of law.\textsuperscript{353}

The District Court for the District of Columbia, adopting a suggestion by the targeted attorney, imposed a sanction which required the sanctioned attorney to deposit $500 to the registry of the court which would be used to provide scholarships for two young attorneys.\textsuperscript{354} The scholarships would enable the attorneys, who had between five and ten years experience litigating cases on a contingent fee basis, to attend continuing legal education programs.\textsuperscript{355}

In determining the sanction, the court looked to the purpose of the 1993 amendments, which were designed to deemphasize fee-based sanctions in favor of sanctions with a deterrent orientation.\textsuperscript{356} The court noted with sympathy the plaintiff's lawyers argument that Rule 11 sanctions could chill effective advocacy by lawyers who operate on a contingent fee basis.\textsuperscript{357} Because of the conduct of the attorney, however, some sanction was appropriate. The court also ordered the lawyer to pay an additional $3500 to the defendant.\textsuperscript{358}

d. Mandatory Pro Bono

In \textit{Bleckner v. General Accident Insurance Co. of America},\textsuperscript{359} the court found that although the plaintiff violated Rule 11, fee-shifting sanctions were unwarranted:

[Defendant's] attorneys themselves missed many of the legal issues raised and in any event spent little effort defending against the [sanctionable] count. Indeed, the rule 11 violations in this case flowed less from bad faith than carefree lawyering. [Plaintiff's] attorneys have wasted judicial resources that could have been used for the resolution of meritorious claims. An appropriate sanction should compensate the federal courts.\textsuperscript{360}

The appropriate sanction the court chose was to require the plaintiff's counsel to undertake representation of a pro se plaintiff from the district court judge's docket.\textsuperscript{361}

Assuming counsel does a credible job, and does not engage in further sanctionable conduct, this sanction would be a positive step to the extent that it provides for adequate legal services to the indigent. It is

\textsuperscript{353} See id.
\textsuperscript{355} See id.
\textsuperscript{356} See id. at 939.
\textsuperscript{357} See id.
\textsuperscript{358} See id. at 940.
\textsuperscript{359} 713 F. Supp. 642 (S.D.N.Y. 1989).
\textsuperscript{360} \textit{Id.} at 653 (footnote omitted).
\textsuperscript{361} See id.
unclear, however, whether the court has the power to employ such a sanction.362

e. Scarlet Letters

Some courts are requiring sanctioned attorneys to inform other courts about past Rule 11 violations. For example, the district court in In re Omnitrition International, Inc. Securities Litigation,363 ordered a law firm, which engaged in class action litigation as class counsel, to provide any court in which it sought to serve as class counsel with a copy of the order imposing sanctions against it.364 Unfortunately, the court failed to distinguish adequately between the conduct of the lawyer involved, who had forged signatures on affidavits, and the law firm itself which sought to correct the situation as soon as the partnership became aware of the wrongdoing. The law firm appealed this "scarlet letter" sanction and made a motion in the district court to have it vacated.

The district court found that it had jurisdiction to entertain the motion, and, after examining the records submitted to the court ex parte, the court vacated the order. It found that the order to provide copies of the opinion imposing sanctions "had and will likely continue to have an unintended and unnecessarily harsh effect on the firm."365 Moreover, the court found that the Order had already accomplished its goal of encouraging the firm to take steps to deter comparable future conduct. The court, however, rejected the efforts of the law firm to escape Rule 11 liability entirely, reaffirming its view that the partnership had not acted appropriately.

A law firm can no longer escape liability for the wrongdoing of its individual attorneys. Rule 11 makes law firms an appropriate target for Rule 11 sanctions. In addition, as the district court pointed out, state ethical rules make law firms responsible for the acts of their individual lawyers.366 The problem, however, is in the nature of the sanction. It may well be appropriate to shift all or part of a fee-based sanction to the law firm for the determinable harm caused by the acts of an individual lawyer. However, without explicit findings on the part of the district court as to the nature of the law firm's culpability, it is inappropriate to impose a sanction which suggests that the firm, as


364. See id. at *8.


366. See id. at *3.
opposed to an individual lawyer, practices unethically. If there is one bad apple, other courts ought to be warned about it. But there is no reason to raise a cloud over the rest of the tree, unless explicit evidence warrants it.

An example of where the "tree" was sanctioned is *Massey v. Prince George's County*. In *Massey*, the plaintiff brought a 42 U.S.C. § 1983 civil rights action against the police for use of excessive force. The court granted the defendants' motion for summary judgment. Subsequently, the court became aware of a case—the "*Kopf* case"—decided by the controlling court of appeals, which was directly adverse to the defendants' position in the motion for summary judgment, and which the County Attorney's office had defended. Neither the defendants, nor the plaintiff had cited the case, nor raised the case in oral argument, even though the defendant in the instant case had been the defendant in the *Kopf* case. The court ordered the defendants to show cause why the case had not been cited.

The defendants' first response was that the Assistant County Attorney handling the instant case did not know of the *Kopf* case, possibly because he joined the office after the case had been decided. Further, they argued that the Assistant County Attorney who had handled *Kopf* did not participate in the instant case. The court took the County Attorneys office to task:

[Defendants'] further suggestion that more senior County Attorneys were not involved in the *Kopf* case (despite the presence of their names on the brief) or were not actively involved in the present case provides no justification at all. Attorneys who affix their names to a brief have an obligation to know what it is they are signing. . . . Moreover, Senior County Attorneys ought to be supervising the pleadings of more junior assistants. . . . It should never happen that an excessive force case in which [the current defendant] itself was a defendant, which went to the Fourth Circuit and is carried in the Federal Reporter, is not pervasively known throughout the County Attorney's Office.

The court declined to impose individual sanctions under Rule 11. However, it did issue an extensive order requiring the defendants' office to reveal to the court every case involving police brutality that was being handled by the County Attorneys' Office, the status of the

---

368. *See id.* at 906.
369. *See id.*
370. *See id.*
371. *See id.*
372. *See id.*
373. *See id.*
374. *See id.* at 906-07.
375. *Id.* at 908-09.
376. *See id.*
case, and a statement as to whether the Kopf case was cited in dispositive motions.\textsuperscript{377} The court informed the defendants that it would notify the judges handling the other excessive force cases about the problem "and leave it to each judge to follow up on the matter as the judge sees fit."\textsuperscript{378}

Another court required the sanctioned attorney to write letters of apology to the opposing attorneys.\textsuperscript{379} The apology had to be "courteous in tone [and] specific in retracting the unfounded charges."\textsuperscript{380} The requirement of an apology was in addition to the imposition of monetary sanctions.\textsuperscript{381}

\textbf{f. Taking Opposing Counsel Out to Lunch}

The court in Johnson v. Sullivan,\textsuperscript{382} noted that the defense's conduct "probably merits" Rule 11 sanctions.\textsuperscript{383} Nevertheless, the court refused to grant the plaintiff's motion for sanctions:

The imposition of such sanctions would unfairly single out the [defendant U.S. Government] as the sole villain in this litigation. At various points in the litigation, attorneys on both sides have engaged in unreasonable conduct, advancing legal arguments that were highly questionable if not indefensible. The court attributes this phenomenon to the rancorous relationship that has developed between the lawyers, a blood feud that evokes images of the Montagues and the Capulets. The attorneys' animosity toward each other has transformed zealous advocacy of noble principles into inflexible adherence to untenable positions. In this war of words between the attorneys, the only casualties have been the class members, some of whom have died while awaiting a rehearing on their disability claims. Although plaintiffs' attorneys may fancy themselves the white knights of this litigation, their outrageous posturing has contributed to the delay in their clients' receipt of relief.\textsuperscript{384}

Because attorneys for both sides of the litigation engaged in misconduct, the court "[saw] no point in sanctioning either of the parties at this late stage of the lawsuit."\textsuperscript{385} The court apparently thought that denying the motion and imposing stricter guidelines for the defendant's compliance with the remedial order would contribute to

\begin{itemize}
\item \textsuperscript{377} See id. at 909-12.
\item \textsuperscript{378} Id. at 909.
\item \textsuperscript{380} Id.
\item \textsuperscript{381} See id. at 38.
\item \textsuperscript{382} 714 F. Supp 1476 (N.D. Ill. 1989), aff'd, 922 F.2d 346 (7th Cir. 1990).
\item \textsuperscript{383} Id. at 1486.
\item \textsuperscript{384} Id.
\item \textsuperscript{385} Id.
\end{itemize}
"restor[ing] some semblance of civility and reasonableness to the litigation." 386

The court, however, missed a perfect opportunity to be creative. Perhaps there was no justification for imposing attorneys' fees as the appropriate sanction. Certainly, the plaintiffs' attorney should not receive a windfall when he himself engaged in improper tactics. Perhaps the court should have considered a combination of sanctions, and should have imposed them at the time of the conduct rather than waiting.

Rule 11 is part of a package to control litigation abuses. Clearly, Johnson was a hard-fought case. It is equally clear that the court tried its best to control the conduct of the litigation, which bounced around all levels of the federal judiciary. Aggressive use of Rule 16 management tools, together with prompt action at the time of a Rule 11 violation, may help the court.

Perhaps Johnson was an appropriate case for a novel sanction suggested at a Judicial Conference in 1987. A participant in those proceedings found that much of the grenade throwing in litigation resulted from the attorneys' lack of familiarity with each other. Accordingly, he suggested, somewhat tongue in cheek, a revision to the local rules which would require opposing counsel to have lunch with each other within ten days after the filing of the answer to improve the litigation climate. 387

It may be pure fantasy to think that dining together will solve our litigation ills. The breakdown in cordiality, however, certainly contributes to the problem, and Rule 11 sanctions historically have contributed to the problem. As Judge Schwarzer has noted, "sanction-prone lawyers are not likely to litigate on a platonic level." 388 The Third Circuit Study on Rule 11 shows that one reason why the Third Circuit has relatively few problems with Rule 11 is that relations among members of the bar are better than in New York, which has had a very high level of Rule 11 activity. 389

386. Id.
388. Schwarzer, Rule 11 Revisited, supra note 280, at 1018 ("[Rule 11] carries with it the potential for increased tension among the parties and with the court . . . [which makes] it more difficult to conduct the litigation in a rational manner and reach accommodation."); see Hot Locks, Inc. v. Ooh La La, Inc., 107 F.R.D. 751, 752 (S.D.N.Y. 1985) (stating that Rule 11 contributes to breakdowns in cordiality which makes settlements more difficult to achieve).
389. See Vairo, Rule 11 Sanctions, supra note 1, § 2.02(b)(2), at 15.
V. The Continuing Decline in Public Confidence

The operation of the 1983 version of Rule 11 led to many problems that have been discussed at length elsewhere. These problems led to the 1993 amendments to Rule 11, which, in turn, have led to a great decline in Rule 11 activity. The "safe harbor" provision, which provides one free bite, and the deemphasis on compensatory sanctions have reduced the incentive for lawyers to file Rule 11 motions. Thus, the "satellite litigation" problem has essentially disappeared, and, arguably, the chilling effect problem has been ameliorated as well.

What is the legacy of Rule 11, then, as it pertains to the topic of this Symposium?

Rule 11 has been replaced by an increased emphasis on other sanctions tools, such as 28 U.S.C. § 1927 and the court's inherent power. Now that the consciousness of the bench and bar regarding the need for sanctions in egregious cases has been raised, these tools appear to be used with much greater frequency than before Rule 11 was amended in 1983. While all these sanctions tools may have been relatively effective in dealing with some of the abuses about which lawyers had been complaining, such as unprepared, sloppy, or incompetent practice, sanctions tools have been ineffective in creating an improved litigation environment. Specifically, the increase in incivility has negatively affected the resolution of cases.

Hence, the good news is that Rule 11 did a better job than formal disciplinary processes of improving some attorney conduct. To the extent, however, that Rule 11 became another attack tool of the aggressive, Rambo-type lawyer, it has become part of the professionalism problem, and, therefore, has had no positive effect in improving the public's perception of the profession. Significantly, the bar may be turning to a more positive approach to self-regulation by promulgating "civility codes." Although it is hard to imagine that the largely aspirational civility codes will have a better chance of actually changing lawyer behavior, these codes may provide a better foundation for helping the profession improve its standing in the public mind.

Certainly, improving the public's perception of the profession is a positive goal. This does not mean, however, that I buy into the notion

\[390. \textit{See generally id. §§ 1.07-1.08, at 19-60 (criticizing the 1983 amended rule and suggesting further amendments).}\]

\[391. \textit{But see Vairo, Past as Prologue, supra note 1, at 40-52, 75-78 (discussing how many of the Rule's old problems remain).}\]

\[392. \text{For example, the reason why the American Bar Association undertook the task of formulating the Model Rules with enforcement power was because the aspirational codes lacked any enforcement mechanism, and were therefore ineffective in curbing the perceived problems of the profession. See Linowitz & Mayer, supra note 278, at 139-66; Cooper & Humphreys, supra note 12, at 927-28; Colin Croft, Reconceptualizing American Legal Professionalism: A Proposal for Deliberative Moral Community, 67 N.Y.U. L. Rev. 1256, 1304-1321 (1992); Wilkins, supra note 4, at 801-04.}\]
that the return of the lawyer-statesman is the ultimate goal, especially to the extent that such an ideal conjures up the picture of an elite, non-diverse, exclusionary profession. Rather, in a society governed by the rule of law, it is obviously important for society in general to have confidence in lawyers because lawyers play such prominent roles in all aspects of our legal system. Recent attempts of the profession to regulate the conduct of lawyers represent important means for achieving that goal. Although many have shown that lawyers have always been unpopular, the public's mistrust and dislike for lawyers is at an all-time high. From William Shakespeare to Samuel Taylor Coleridge to Jay Leno on late night television, lawyers have long been the target of jokes and disdain. Nonetheless, the level of disparagement today seems to have reached new levels, if only because lawyers themselves have joined in the lawyer-bashing. The mid-1990s witnessed the publication of several books written by thoughtful and highly-regarded academics and lawyers that discussed the decline in professionalism and the effect this decline will have on


395. See, e.g., Cooper & Humphreys, supra note 12, at 931 ("Respect for law itself is at stake."); Croft, supra note 392, at 1350 (stating that a minimalist approach to regulating ethics will result in negative public sentiment); Carl M. Selinger, The Public's Interest in Preserving the Dignity and Unity of the Legal Profession, 32 Wake Forest L. Rev. 861, 871-880 (1997) (discussing the costs of the public's losing respect for lawyers).


397. "The first thing we do, let's kill all the lawyers." William Shakespeare, The Second Part of King Henry the Sixth act 4, sc. 2, line 73 (Andrew S. Cairncross ed., 3d ed., Harvard University Press 1957). Although some have tried to argue that Shakespeare intended to portray lawyers as the protectors of the peace, most agree that Shakespeare did not intend to paint lawyers in a positive light. See Croft, supra note 392, at 1257 n.4.


society at large. Indeed, lawyers themselves have complained that standards of professionalism have fallen during the time they have practiced law.

As I discussed earlier, the ethical codes have not been successful in reining in the unprofessional conduct of many lawyers and Rule 11 has been a mixed blessing in that regard. Nonetheless, despite the widespread perception that the profession is in trouble, there are those who argue that professionalism has not declined; rather, the demographics of the profession have changed, and changed for the better. They argue that the so-called "Golden Age" of the profession was dominated by the White Anglo-Saxon Protestant elite from the best schools. The problem, this argument goes, is that all reform efforts represent the elite's perceived need to control the conduct of the growing numbers of non-Anglo-Saxon whites, especially Jews, women, and minority lawyers that have come into the profession.

Others have argued that the "loss of faith" in the profession has come about because the profession has experienced a Kuhnian "paradigm shift," and that the shift to the "business paradigm" is a positive development. The "professionalism paradigm," was predicated on the notion that the legal profession possessed esoteric knowledge inaccessible to laypersons. This paradigm was born in the late nineteenth century when the elite leaders of the bar became concerned that the profession's growing entrepreneurial aspects threatened its public reputation. In response, the bar formulated codes of legal ethics to regulate its members' conduct. In return for autonomous regulation of the bar, lawyers were to act as a profession for the good of clients and society, rather than as a business.

---

401. See Mary Ann Glendon, A Nation Under Lawyers: How the Crisis in the Legal Profession is Transforming American Society (1994); Kronman, supra note 393; Linowitz & Mayer, supra note 278.


403. See generally Auerbach, supra note 394, at 16 (describing a society in which lawyers were praised as aristocrats yet honored for their common virtues); Ross, supra note 394, at 851-855 (stating that the primary qualification for "Golden Age" law firms was to consist of White Anglo-Saxon Protestants).


406. See Pearce, Paradigm Shift, supra note 405, at 1231.


408. See Pearce, Paradigm Shift, supra note 405, at 1231.
I do not think it is necessary to choose sides in these debates. The real issue is not whether a more diverse profession is better than a relatively homogeneous one—of course it is—or whether the legal industry is a profession or a business. Rather, the issue is whether certain conduct, no matter who engages in it, should be curbed. Because the disciplinary codes have proven to be ineffective, and because Rule 11 has been a mixed blessing at best, the civility code approach has appeared. Since Rule 11 was amended in 1983, over 120 bar associations and courts have adopted civility codes to deal with the unprofessional conduct of their members.

Some argue that civility codes are simply the 1990s’ equivalent of earlier efforts of elite segments of the bar to “protect” the profession from the less well-educated or less polished newcomers.⁴⁰⁹ One commentator has characterized civility codes as reflecting “unconscious desires to impose a reactionary and authoritarian conformity upon a rapidly diversifying profession and to resist redistributions of power to those who have been historically excluded from the practice of law and denied access to legal services.”⁴¹⁰ Such characterizations, however, fail to deal with the reality that all segments of the profession engage in Rambo-lawyering and other forms of unprofessional conduct.⁴¹¹ As I discussed in the Rule 11 context, there is a danger that efforts at lawyer discipline will be used unprofessionally, and may over-deter some lawyers.⁴¹² In my view, however, civility codes represent a positive alternative to the draconian compensatory sanctions imposed by the courts in Rule 11’s heyday, sanctions which resulted in some cases in lawyers being financially unable to continue to practice law. Especially to the extent that the codes are not enforceable, they simply serve as a public statement that the profession is concerned with its image as overly-contentious, rude, and dishonest.

It is not elitist to suggest that returning phone calls, addressing one’s adversary civilly, and being truthful is good practice. Indeed, it is sad that lawyers need to be reminded of this. It is also true that good manners, accompanied by a stab in the back, accomplish little societal good. Nonetheless, promoting civility as a vehicle for improving professionalism is a worthy goal. As Aristotle’s writings⁴¹³ sug-

---

⁴⁰⁹ See Mashburn, supra note 404, at 663.
⁴¹⁰ Id. at 664.
⁴¹¹ For example, there are legendary discovery battles between elite law firms. See, e.g., Charles Yablon, Stupid Lawyer Tricks: An Essay on Discovery Abuse, 96 Colum. L. Rev. 1618, 1620-21 (1996) (examining cases involving discovery abuse); see also Wilkins, supra note 4, at 842 n.192 ("[O]ne of the most significant accomplishments of [Rule 11] is that, for the first time, a significant number of corporate clients and lawyers are being required to account for their abusive behavior."). For a study of large-law-firm attorneys’ attitudes towards ethics and discovery, see Report, Ethics: Beyond the Rules, 67 Fordham L. Rev. 691 (1998).
⁴¹² See Wilkins, supra note 4, at 842-43.
⁴¹³ As Professor Yablon has told us, Aristotle is “hot” today. See Yablon, supra note 411, at 1625-28.
gest, abusive, overly aggressive, or contentious litigation tactics are simply a form of "akrasia," i.e., "moral weakness" or "incontinence." All lawyers know better, but they often lack the self-control to stop themselves from engaging in ineffective or abusive conduct. To the extent that civility codes make it fashionable again to behave in ways less akrasiaticly, we will all be better off. Indeed, practicing random acts of civility in today’s climate generally will be an effective litigation tactic because it may well endear its practitioner to the court or jury.

Of course, I am not so naive to believe that civility codes are a cure-all. Incivility is a problem of society as a whole, not just the legal profession. Indeed, one wonders whether the public really wants its lawyers to behave civilly. As some T-shirts make clear, some clients prefer pit-bull lawyering to a sober civil approach. My own brother complains that his lawyer is not tough enough because he does not yell at his adversary and stomp around. Given what is at stake, however, it is certainly worth it for the profession to continue to try.

Conclusion

Overall, Rule 11 has been more effective in raising the profession’s ethical consciousness and in improving the standards of practice than disciplinary enforcement has been. The Rambo-like use of Rule 11 by too many lawyers, however, has resulted in increased acrimony within the profession, thereby exacerbating the public’s disenchantment with it. Nonetheless, Rule 11 as it stands now, with its lessened emphasis on compensatory sanctions and its new emphasis on curative sanctions, along with the emergence of civility codes, may be more effective in curbing unprofessional conduct, which in turn, may help restore public confidence in the profession. It is the responsibility of all segments of the profession—judges, lawyers, and academics—to continue to pay attention to the problem because the stakes are so high.

In any event, even if these efforts do not succeed in restoring a positive public perception of the profession, perhaps they will make it more rewarding to practice law again. Law is an “unhappy profession,” and lawyers are the most depressed occupational group. Studies have shown that at least as many lawyers leave the profession each year, because of dissatisfaction with the practice of law, as are

---

414. For example, many of us have seen people wearing a T-shirt bearing the pronouncement: “My lawyer can beat up your lawyer.”
417. See id.
admitted to law school. Even if the public is not convinced of the value of lawyers, it is nevertheless worthwhile to try to make it more rewarding for lawyers to practice law again.\footnote{See Croft, \textit{supra} note 392, at 1350-51.}