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I. INTRODUCTION

Attorneys are trained to represent their clients to the greatest extent of their abilities within the bounds of the law and legal ethics. Developments over the past several years, however, have caused courts to scrutinize more closely the conduct of attorneys and to distinguish zealous from "frivolous"[1] legal representation.

The number of lawsuits has increased dramatically in the past twenty years.[2] This increase in litigation, however, has not come without cost to all involved. Attorneys are finding it more difficult to maintain control over their practice, and courts are increasingly unable to manage their dockets. Consequently, litigants are disheartened by the time and expense involved in resolving even the most rudimentary issues.

Pleadings, motions, pretrial discovery, and costly and lengthy litigation have inundated the bench and bar to the point of calling into question whether the litigation process has grown beyond manageable bounds. The problem is aptly described by the United States Court of Appeals for the Fourth Circuit in *Gullo v. Hirst*[3]:

> While we must be careful to assure that courts are always open to complaining parties, we have an equal obligation to see that its processes are not abused by harassing, or by recklessly invoking court action in frivolous causes or by foot dragging and delaying in order to deny or postpone the enforcement of unquestioned rights. Lawyers have an obligation as officers of the court not to indulge in any of these practices. Vexatious litigation and the law's delays have brought the courts in low repute in many instances, and when the responsibility can be fixed, remedial action should be taken.

Members of the legal community have expressed concern about the present state of affairs in the litigation process. Unfortunately, their dissatisfaction for the most part has been directed at one another and not at the problem *in toto*. The plaintiffs' bar is criticized for bringing lawsuits without sufficient factual or legal ground to support their claims. The defense bar, on the other hand, is criticized for burdening the litigation process by generating unnecessary pleadings and motions filed only to buy additional time for their clients, or to make lawsuits so expensive that they must be abandoned out of economic necessity. Ironically, the typical climax to this costly and burdensome litigation process is a settlement reached on the courthouse steps.

Rule 11 of the Federal Rules of Civil Procedure was amended in 1983 in an effort to increase lawyers' responsibility to their clients and to the courts when filing any pleading, motion, or other paper. Amended Rule 11 provides that the attorney or party's signature on any court paper certifies that the signer

> has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.[4]

In essence, Rule 11 requires "litigants to stop, think and investigate more carefully before serving and filing papers . . . ."[5]

The Advisory Committee on Civil Rules – the drafters of the 1983 amendments to Rule 11 -- envisioned that amended Rule 11 would curtail the so-called "litigation explosion" by *requiring* that courts impose sanctions whenever Rule 11 was violated. By requiring imposition of Rule 11 sanctions, the Committee sought to limit judicial discretion in finding violations of the rule, which, in turn, would promote more consistent and predictable application of the rule. Unfortunately, the ambiguities of amended Rule 11 have promoted rather than discouraged judicial discretion, and have added to the litigation explosion by generating thousands of conflicting court opinions on the meaning and application of Rule 11

to particular conduct.

This Article addresses the operation and some of the shortcomings of Rule 11 and discusses the disparate impact of Rule 11 on the litigation process. This Article posits that Rule 11 is applied against the plaintiffs' bar more frequently and has the incidental effect of deterring vigorous advocacy.[6] The objective reasonableness standard mandated by Rule 11 has discouraged uniformity in court decisions, and has created considerable uncertainty in the minds of attorneys who cannot predict whether their conduct is sanctionable.

II. AMENDED RULE 11: AN OVERVIEW

Amended Rule 11 *requires* the imposition of "appropriate sanctions" when the rule is violated by the attorney or party to the action. Rule 11 is therefore distinguishable from other laws which leave the penalty of sanction to the discretion of the court.[7] Even under Rule 11, however, judges retain considerable discretion in determining the appropriate sanction and against whom that sanction should be assessed, whether it be the attorney, the client, or both.[8]

Attorneys' fees are the most common sanction,[9] although such an award rarely represents the total fees incurred by the party requesting sanctions.[10] Sanctions may also take the form of reimbursement for the reasonable expenses incurred to deal with the frivolous filing,[11] fines,[12] the striking of unsigned pleadings,[13] injunctions against bringing new or amended suits,[14] or disciplinary action independent of Rule 11.[15]

Sanctions are sought in a variety of circumstances, the most frequent of which are in connection with 12(b)(6) motions to dismiss for failure to state a claim or Rule 56 motions for summary judgment, actions customarily initiated by defendants.[16] Sanctions issues arise more frequently in complex litigation involving alleged civil rights violations, employment discrimination, securities fraud, RICO violations and tax disputes -- cases which typically present difficult problems of factual proof for the plaintiff.[17]

Rule 11 does not establish the timing for imposing sanctions. Most courts agree, however, that sanctions should be imposed promptly after the offending conduct to maximize Rule 11's deterrent effect on subsequent abuses.[18] Sanctions for frivolous motions are typically assessed at the time of or soon after the motion is ruled on, whereas sanctions for frivolous pleadings are usually assessed after the litigation has concluded.[19]

Sanctions are awarded pursuant to a motion filed by a party to the action or by the trial judge *sua sponte*. Rule 11 sanctions have even been imposed by appellate courts for frivolous appeals,[20] although sanctions awards are more routinely reversed on appeal.[21]

The circuit courts are split over the issue of whether Rule 11 imposes on counsel and the parties a "continuing duty" to reevaluate their case as the litigation progresses and to discontinue the action if it becomes clear that a filing no longer has a factual or legal basis. This split of opinion exists despite the advisory nommittee notes to Rule 11 which caution that "[t]he court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring into what was reasonable to believe *at the time . . . the paper was submitted.*"[22]

The majority of jurisdictions, including the Fourth Circuit, have heeded the advisory committee's recommendation and hold that the signer's acts must be judged against the facts and law known at the time court papers are signed.[23] Accordingly, if counsel at the time of filing believes a claim to be colorable, but later becomes aware that the claim is in fact frivolous, he will not be subject to Rule 11 sanctions for failing to discontinue the action.[24] These courts find that Rule 11 sanctions cannot be based on the *failure* to file or amend pleadings or other papers. This approach is consistent with the plain language of Rule 11 and the advisory committee notes.[25]

Other courts have held that the signer's duty is continuous, so that developments transpiring at any point during the course of litigation may make an originally legitimate filing frivolous and may justify imposing sanctions if the filing is not revised or discontinued.[26] Even courts which find no continuing duty under Rule 11 hold that Rule 11 is violated when subsequent papers ratify or reassert frivolous factual or legal allegations of the original filing. Thus, if the plaintiff discovers after the original filing that his claim is without legal or factual merit, his opposition to a motion for summary judgment or dismissal would violate Rule 11 because it is a new filing which tacitly reasserts the frivolous factual or legal basis of the original filing.[27]

A. The Signer's Certification Under Rule 11

A signature on any pleading, motion or other paper certifies that the signer (1) has conducted a reasonable inquiry into the facts and law supporting the filing, (2) has submitted a filing which embodies existing law or a good faith argument for the extension, modification or reversal of existing law; and (3) has not interposed the filing for an improper purpose. If the court finds one or more of these requirements violated, it must impose an appropriate sanction under Rule 11.

1. Reasonable Factual Inquiry

Rule 11 does not specify the type of factual inquiry required prior to a filing other than to require that the inquiry be objectively reasonable. Under this standard, courts must ask whether a reasonable attorney in like circumstances would believe his inquiry to be reasonable.

Rule 11 plays a significant role in deterring claims which are not grounded in fact. Before 1983, the liberal pleading and motions rules did not deter groundless factual allegations, and, in fact, encouraged ambiguity and

overgeneralized statements of claims.[28] These liberal pleading rules remain part of the Federal Rules, although their continued efficacy in the wake of amended Rule 11 is less than clear.[29]

Insufficient factual inquiry takes many shapes. Use of boilerplate language in a complaint or other pleading may be grounds for Rule 11 sanctions.[30] Blind reliance on the client's or co-counsel's representation of the facts supporting a complaint without independent investigation or reference to the case file may justify Rule 11 sanctions where the allegations are later proved insufficient to sustain the action.[31] Insufficient factual inquiry may even be found where the amount of damages sought in the complaint are wholly disproportionate to the injuries actually sustained by the plaintiff.[32]

Some courts refuse to impose sanctions before discovery is complete.[33] The majority of jurisdictions, however, hold that the pleader cannot rely on pretrial discovery to cure a factually defective pleading in order to avoid Rule 11 sanctions.[34]

Rule 11 discourages courts from considering post-filing developments when judging whether a paper is frivolous, and encourages the courts to consider circumstances such as time, prefiling preparation, and the attorney's ability to interview the client. Judges, however, may experience understandable difficulty considering the facts as they existed at the time of filing, especially when the motion for sanctions may not be decided until many months after the allegedly frivolous paper was submitted. Judicial opinion may encompass, not what the attorney should have known to be true of the facts at the time of filing, but what the judge knows of the facts at the time the request for sanctions is before him.

Success on certain pretrial motions make the award of Rule 11 sanctions more likely. A party who prevails on a motion to dismiss pursuant to Federal Rule 12(b)(6) is much more likely to request and receive sanctions.[35] The standard for dismissal under Rule 12(b)(6) necessarily suggests why sanctions are so frequently awarded in connection with motions to dismiss.

The Supreme Court in *Conley v. Gibson*[36] established a very difficult standard for dismissal pursuant to Rule 12(b)(6). A defendant must prove "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[37] This standard, if met by the defendant, suggests the extent to which the plaintiff's action is obviously deficient and thus may legitimate the defendant's request for sanctions. By the same token, a plaintiff who successfully defeats a motion to dismiss should be immune from Rule 11 sanctions if the filing is later alleged to be frivolous.[38]

The benchmark for imposing sanctions should not be whether the party loses a motion or verdict, rather it should be whether the plaintiff had "a glimmer of a chance of prevailing."[39] Courts must adhere strictly to Rule 11's dictate that the filing be judged as of the filing date and not as of the date the motion for sanctions is before the court.[40]

2. Reasonable Legal Inquiry

The reasonable legal inquiry requirement of Rule 11 establishes a two-fold duty on the part of the attorney. First, the attorney must conduct a diligent prefiling inquiry into the law of the applicable jurisdiction. Second, he must not submit a pleading or other paper which takes an unreasonable legal position "in light of existing law or a good faith extension, modification, or reversal of existing law. . . ." According to this standard, the pleader must assert an objectively reasonable argument in support of what the law is or should be to avoid Rule 11 sanctions.

The reasonableness of the attorney's legal inquiry may depend on a number of factors. These factors include the time available for legal research,[41] the existence of conflicting legal opinion, the difficulty of the legal issue, or the complexity of the case itself.

Rule 11 is violated where the attorney fails to undertake legal research which would have revealed the existence of primary authority directly contrary to the legal position taken in the paper.[42] Likewise, a filing is not well grounded in law where it interposes a legal position which is directly contrary to settled precedent in the relevant circuit, even if it is supported by law in another circuit.[43] The same is true for causes of action which are initiated well after the applicable statute of limitations has run,[44] or which are plainly barred by the doctrines of res judicata or collateral estoppel.[45] A filing is not well grounded in law if it fails to confront or mischaracterizes adverse authority to its argument for the modification or extension of existing law.[46]

Courts generally refuse to award sanctions where the paper raises a question of first impression.[47] Likewise, courts will refuse to award sanctions where a filing takes a legal position directly contrary to district court authority in a jurisdiction where only appellate decisions are considered controlling precedent.[48]

The advisory committee notes warn that Rule 11 should not be applied in such a way as to chill an attorney's enthusiasm or creativity.[49] However, it is easy to envision how Rule 11 could have such an effect on zealous advocacy.

Neither Rule 11 nor case precedent provide much guidance for attorneys who attempt to challenge existing law. In fact, several important questions remain unanswered. For example, which jurisdiction's law must an attorney and the court consider when determining the plausibility of a particular claim? Is it enough for the plaintiff to rely for his legal argument on a case decided by the California Supreme Court, or must he refer solely to the law in his own jurisdiction before filing?[50] One would expect that a party seeking to reverse existing law would be justified in relying on extrajurisdictional law for support. The real question in

light of the case law interpreting Rule 11 is whether a party would ever be justified in seeking a reversal of existing law.

Along the same line, it is unclear whether the reasonable legal inquiry standard is national in scope (similar to the standard applied when judging a physician's standard of care), or whether a local standard applies. One distinguished commentator suggests that attorneys should be held to a standard similar to that which is applied to physicians holding themselves out as experts, where the reasonableness of the inquiry into existing law will depend on the attorney's field of expertise, available research facilities, and his economic resources.[51]

Although Rule 11 requires that the court apply an objective reasonableness standard for determining whether a filing, or an argument for a modification or reasonable extension of the law, is improper in light of existing law, judges have sufficient latitude in deciding whether any reasonable attorney would have expected that the law was ripe for change.

There can be little doubt that the nature of the court and the philosophies of the judge may well dictate whether a legal claim is frivolous or acceptable.[52] A strict constructionist, for example, may be unwilling to disturb settled precedent and may conclude that any attempt to disturb existing law is sanctionable. A judge who is a judicial expansionist, however, may well find arguments advocating deviation from settled precedent acceptable and possibly desirable. Not only will such a judge be more likely to deny a motion to dismiss the action, but he may be more inclined to deny a request by opposing counsel for sanctions.

It is difficult to determine the extent to which Rule 11 affects advocacy, particularly because the reported cases reflect only those claims which proceeded to trial and not those claims which were never initiated or were initiated and abandoned.[53]

Although careful scrutiny is encouraged and intended by Rule 11, there is an increased risk that legitimate cases will be refused by those attorneys who are risk adverse. Rule 11 may deter lawyers from taking cases and pursuing needed changes in the common law. The attorney is faced with the rule and its uncertainties when deciding whether to take a case. He may scrutinize the plaintiff and his case more closely, and may refuse a case which, in his legal opinion, is barely colorable. The lawyer is required, in essence, to pre-judge the factual and legal bases of a client's case.

A lawyer should not be forced to make decisions which may preclude the plaintiff with a colorable claim from ever seeking legal redress. It is ultimately the client who suffers as a result of an attorney's walk along Rule 11's legal tightrope. Clearly, the drafters of Rule 11 did not intend for the rule to chill zealous advocacy, although the rule's ambiguities necessarily produce such a result.[54]

Rule 11 adds strength to the doctrine of stare decisis by imposing on lawyers an obligation to avoid disturbing settled precedent. The law must accommodate everchanging societal needs and expectations. History indicates that courts have overturned settled common law without the slightest forewarning or academic explanation.[55] As one commentator has noted, "[t]oday's frivolity may be tomorrow's law."[56] Similarly, what the trial court may find an implausible legal argument and thus sanctionable, an appellate court may find acceptable.[57]

Rule 11 places a barrier in front of the innovative or persistent lawyer who seeks to challenge settled precedent by affording the judiciary unfettered discretion to determine under which legal theory (if any) a reasonable attorney should seek recompense for his client.

3. Papers Filed for an Improper Purpose

Rule 11 defines the term "improper purpose" to include actions which are intended "to harass or to cause unnecessary delay or needless increase in the cost of litigation."[58] Any paper filed for a purpose other than to vindicate the rights of a party in court is deemed to have been filed for an improper purpose.[59] A party challenging a particular motion or pleading need not show bad faith on the part of the filer, although proof of bad faith practically guarantees success on a motion for sanctions. An improper purpose may also be found where an attorney files a pleading which, if challenged, he has no intention of defending.[60]

The overlap between an improper purpose for filing a paper and one which is unreasonable in light of existing law is apparent where an attorney persists in asserting a claim or defense untenable by existing law.[61] Similarly, claims brought without factual foundation or with numerous factual inaccuracies which could have been avoided through cursory investigation may be interpreted as being brought for an improper purpose.[62]

Amended Rule 11 requires that courts assess the underlying purpose of the filing under an objective standard of reasonableness.[63] Unlike the standards of Rule 11 prior to its 1983 amendment, subjective bad faith of the filer need not be shown, although such a showing increases the likelihood that sanctions will be awarded.[64]

Many courts find the objective standard for evaluating the purpose of the filing unworkable, and consider instead the "motive of the signer in pursuing the suit."[65] Other courts embrace the objective standard and consider the circumstances of the case, the court's own experience in the litigation process, and the law and rules of the bar in determining whether the paper was filed for an improper purpose.[66]

An inquiry into the subjective intent of the filer appears the better approach for determining the purpose underlying the filing. Such a subjective inquiry protects the filer from judicial second-guessing over the reason for the filing, and discourages courts from considering matters such as increased cost and delay as a basis for finding an improper purpose, matters which are difficult to anticipate when the paper is filed.[67]

III. DISPARATE IMPOSITION OF RULE 11 SANCTIONS

Numerous cases have discussed the obligation of plaintiffs to inquire into the factual and legal bases underlying a claim before bringing suit. Only a handful of cases, however, have addressed the defendant's obligation to make reasonable inquiry before answering a complaint or filing other papers.[68]

Statistics compiled since Rule 11 was amended in 1983 suggest that plaintiffs are subjected to Rule 11 sanctions more frequently than are defendants.[69] One study, for example, indicates that

> [i]n the 57.8% of the cases in which a Rule 11 violation is found, the plaintiff is the violator in 46.9% of the cases, while the defendant is the violator in only 10.9% of the cases. This great difference, however, is explained by the fact that the plaintiff is the *target* of the sanctions motion in 536 of the 680 cases (78.8%) in which sanctions were requested.[70]

Defense attorneys do not face the same pressures in defending suits as do plaintiffs' attorneys in initiating them, and accordingly, their conduct is not as susceptible to Rule 11 inquiry. Of course, some of the pressures which plaintiffs' counsel experience "come with the turf." The plaintiff and his attorney have to contend with the statute of limitations. The plaintiff also carries the affirmative burden of proving the elements of his case. Plaintiff also may be less inclined to make a motion for sanctions since the additional litigation may take on a life of its own, thus reducing the amount of a prospective judgment by the additional costs of litigating the Rule 11 issue. Likewise, the scarcity of judicial opinion on the propriety of Rule 11 sanctions for defendants' conduct may lead plaintiffs' counsel to consider any request for sanctions futile.

Notwithstanding the plaintiff's increased susceptibility to Rule 11 sanctions, more attention should be given to the conduct of defendants and defense counsel. Equal application of Rule 11 against defendants will encourage prompt case settlement, since the defendant will be forced to confront weaknesses of their cases much sooner.[71] As one commentator suggests, "[i]f plaintiffs begin to challenge the factual and legal adequacy of defendants' pleadings under rule 11, the use of sanctions will profoundly affect the 'game' of litigation."[72]

IV. RULE 8 AND RULE 11: THE CONFLICT BETWEEN LIBERAL PLEADING AND REASONABLE INQUIRY

Rule 8 of the Federal Rules of Civil Procedure permits alternative pleading and allows the plaintiff to assert legal theories of recovery which are contradictory to one another. Rule 8 permits such pleading as a matter of equity, so that if there is any conceivable theory of recovery, the plaintiff has the option of invoking the theory. The language of Rule 8(e)(2) exemplifies the liberal pleading regime of the Federal Rules:

> A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal, equitable, or maritime grounds. All statements shall be made subject to the obligations set forth in Rule 11.[73]

The standards for filing imposed by Rule 11 appear at odds with the notice pleading concept authorized by Rule 8 even though the drafters of Rule 8 attempted to make its standards harmonious with Rule 11's.

The complexity of modern litigation requires that plaintiffs be permitted to assert alternate or inconsistent pleadings as permitted by Rule 8.[74] Rule 8 requires that pleadings provide a general summary of the case which gives fair notice to the opposing party.[75] Rule 8 does not require that a pleading state "facts sufficient to constitute a cause of action."[76] Rule 11, however, requires lawyers to articulate their legal and factual bases more fully and much sooner than required by Rule 8.[77] The specificity in pleadings required by Rule 11 is inconsistent with the concept that claims should be made by short plain statements for relief.[78]

Rule 11's requirement that claims be warranted by existing law is almost identical to the code pleading rules eliminated by the Federal Rules of Civil Procedure, where the pleader was required to state his claim in terms of established "causes of action."[79] Rule 11's requirements that a filing have a sufficient factual and legal basis renders meaningless the liberal pleading allowances of Rule 8.

V. THE FUTURE OF AMENDED RULE 11

In August 1991, in response to numerous criticisms of current Rule 11, the Advisory Committee on the Civil Rules published a Proposed Draft of Rule 11 which seeks to remedy many of the Rule's infirmities. Upon Supreme Court recommendation and con-

gressional approval, the Proposed Draft shall take effect on December 1, 1993.

Many of the changes to Rule 11 are contained in proposed Rule 11(b), which reads:

> *(b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper filed with or submitted to the court, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief formed after an inquiry reasonable under the circumstances,--*
>
> *(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;*
>
> *(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;*
>
> *(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and*
>
> *(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.*[80]

The language of subsection (b) and other subsections of the Proposed Draft evidences several major changes to current Rule 11.

A. Continuing Duty

The triggering event for a Rule 11 violation under the Proposed Draft is the "presenting or maintaining" of a filing. The advisory committee's notes explain that the Proposed Draft imposes a continuing duty on lawyers and litigants to reevaluate their factual and legal positions after the paper is submitted, and to discontinue actions which no longer have merit. Proposed Rule 11 therefore abandons the "snapshot" rule, pursuant to which the paper is judged as of the date it is signed and filed.[81]

The continuing duty rule embodied in the Proposed Draft encourages courts to use "hindsight and wisdom" when judging a paper's legitimacy, an approach which the advisory committee notes to current Rule 11 expressly cautioned against.[82] The continuing duty rule would also allow opposing counsel to assert Rule 11 violations throughout the case, and would require litigants to closely track the factual and legal developments of their cases.[83] This will further complicate the litigation process and will impede parties from developing the merits of their positions.[84] The continuing duty rule also unfairly favors wealthy litigants who can afford to pay for their attorney's constant monitoring. Plaintiffs and their attorneys may be unable to satisfy the stringent burden imposed by the continuing duty rule, and may avoid bringing meritorious lawsuits for this reason.[85]

B. Safe Harbor

In response to criticisms that Rule 11 tends to chill zealous advocacy, the advisory committee included several "safe harbor" provisions within subsection (c) of the Proposed Draft. One safe harbor requires a party alleging a violation of Rule 11 to give the offending party notice by separate motion of the "specific conduct alleged to violate" the rule.[86] Likewise, a motion for sanctions cannot not be filed with the court "unless the challenged claim, defense, request, demand, objection, contention, or argument is not withdrawn or corrected within 21 days (or other such time as the court may prescribe) after service of the motion."[87] This 21 day window affords parties time to withdraw their filings to avoid the risk of Rule 11 sanctions. This safe harbor appears to reject the Supreme Court's decision in *Cooter & Gell v. Hartmarx Corp.*,[88] where the Court held that the district courts may impose Rule 11 sanctions even when a case is voluntarily dismissed pursuant to Rule 41(a)(1)(i).[89]

Subsection (c)(1)(B) of the Proposed Draft establishes another safe harbor. It prohibits courts from imposing Rule 11 sanctions *sua sponte* after a case has been settled or voluntarily dismissed, unless it enters an order "describing the specific conduct which appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto."[90]

The safe harbor provisions of the Proposed Draft are perhaps the most beneficial change to current Rule 11 because they discourage use of Rule 11 as a tactical device to discourage the filing or maintenance of legitimate claims. They also provide parties with the opportunity to withdraw a frivolous filing in time to avoid Rule 11 sanctions.

C. Signer's Certification Respecting the Facts

The Proposed Draft seeks to equalize the disparate impact of Rule 11 on plaintiffs by changing the certification with respect to facts. Rather than requiring that the filer certify that his paper is well grounded in fact, the Proposed Draft requires that the paper's "allegations and other factual contentions have evidentiary support or, if specifically so identified, *are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.*"[91] This is a more forgiving standard for plaintiffs who, for legitimate reasons, may not possess sufficient facts at the time of fil-

ing.

The Proposed Draft appears to reject the position of some courts that a party cannot use discovery to cure a defective pleading.[92] Disputes over whether discovery will bear out facts sufficient to support the filing will likely generate considerable Rule 11 litigation if the Proposed Draft becomes law.[93]

D. Signer's Certification Respecting the Law

The signer's certification with respect to the law remains essentially the same under the Proposed Draft as under current Rule 11. The signer must undertake a reasonable prefiling inquiry into the law to ensure that the position asserted by the paper is "warranted by existing law." Proposed Rule 11, however, requires that the signer further certify that the paper is "warranted by existing law or a *nonfrivolous* argument for the extension, modification, or reversal of existing law or the establishment of new law."[94]

The difference between Proposed Rule 11 and current Rule 11 is the use of the term "nonfrivolous" rather than "good faith." This difference in terminology, which appears purely semantic, does not clarify the attorney's or party's duty not to initiate or maintain causes which are without legal merit. In fact, by using the term "nonfrivolous," attorneys may be more inclined to refer to the universe of reported Rule 11 decisions and undertake more exhaustive research to determine whether a particular legal position has merit. The "nonfrivolous" standard may require more prefiling deliberation by the attorney than is justified.

E. Imposition of Sanctions is Discretionary

Another significant change reflected in the Proposed Draft is new subsection (c), which eliminates the *requirement* that an appropriate sanction be imposed by the court upon a violation of the Rule. The Proposed Draft leaves the decision to impose an "appropriate sanction" to the discretion of the court.[95] This change allows courts needed flexibility in evaluating the particular situation of the filer before determining whether sanctions are appropriate.

F. Relationship Between Rule 11 and Rule 56

The advisory committee recognized the frequency with which Rule 11 sanctions are imposed against parties who are defeated on Rule 56 motions for summary judgment. To remedy this, the advisory committee notes to the Proposed Draft state: "[t]hat summary judgment is rendered against a party does not necessarily mean, for purposes of this certification, that it had no evidentiary support for its position."[96] The committee notes go on to state, however, that "if a party has sufficient evidence with respect to a contention that would suffice to defeat a motion for summary judgment based thereon, it would have had sufficient 'evidentiary support' for purposes of Rule 11."[97] There is some inconsistency with this approach which presumes the legitimacy of a pleading which survives a motion for summary judgment, but which cautions against presuming the existence of a Rule 11 violation when the pleading is defeated on summary judgment.[98]

VI. CONCLUSION

The 1983 amendments to Rule 11 have given rise to more questions and inconsistent judicial opinion than the drafters likely expected. Although the rule may have reduced the number of frivolous claims initiated or maintained in the courts, it also may be deterring lawyers and clients from bringing arguably legitimate claims and making plausible legal arguments for the extension or reversal of existing precedent.

The Proposed Draft attempts to remedy many of Rule 11's infirmities by recognizing the unique position of plaintiffs in the litigation process which makes them more susceptible to Rule 11 scrutiny. Only time will tell whether the proposed amendments to Rule 11 will ameliorate the problems plaguing Rule 11 in its present form.

Endnotes

[1]The term "frivolous" as used in this Article is not limited to its dictionary meaning, and is used to describe any action which, although not wholly illegitimate, raises serious questions as to the propriety of a filing in light of the facts, existing law, and reason for the filing as of the date the paper is submitted for the court's consideration. Other courts and commentators find a continuing duty to avoid frivolous filings beyond the date the paper is signed and filed. For a discussion of the continuing duty rule, *see infra* notes 22-27 and accompanying text.

[2]*See generally* Barbara S. Meierhoefer & Eric V. Armen, Federal Judicial Center, *The Caseload Experience of the District Courts From 1972 to 1983: A Preliminary Analysis* (1985); Thomas B. Marvel, *Caseload Growth--Past and Future Trends*, 71 Judicature 151 (1987).

[3]332 F.2d 178, 179 (4th Cir. 1964) (per curiam).

[4]Fed. R. Civ. P. 11.

[5]Report of the Judicial Conference Committee on Rules of Practice and Procedure, App. C (Mar. 9, 1982) (comments of Chairman Mansfield), *reprinted in* 97 F.R.D. 190, 192 (1983).

[6]*See infra* Part III for further discussion of the disparate application and impact of Rule 11. This author relies on the results of several comprehensive empirical studies on Rule 11 for his conclusion that sanctions are disproportionately imposed on plaintiffs and their counsel. *See generally* Thomas E. Willging, *The Rule 11 Sanctioning Process* (1988); Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189 (1988); Saul M. Kassin, *An Empirical Study of Rule 11 Sanctions, in* Practicing Law Institute, *Rule 11 and Other Sanctions: New Issues in Federal Litigation* 473 (Jerold S. Solovy & Charles M. Shaffer, Jr., eds. 1987); Melissa L. Nelken, *Sanctions Under Amended Rule 11 -- Some "Chilling" Problems in the Struggle Be-*

tween Compensation and Punishment, 74 Geo. L.J. 1313 (1986); William W. Schwarzer, *Sanctions Under the New Federal Rule 11 -- A Closer Look*, 104 F.R.D. 181 (1985).

[7]Under Fed. R. Civ. P. 37 and 28 U.S.C. § 1927, courts are given discretion to deny sanctions where they appear unwarranted under the circumstances of the case.

[8]*Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 878 (5th Cir. 1988).

[9]Nelken, *supra* note 6, at 1333 (monetary awards were made in 96% of the cases in which Rule 11 sanctions were imposed).

[10]*In re Kunstler*, 914 F.2d 505, 522 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1607 (1991); *Thomas*, 836 F.2d at 878 ("the sanction imposed should be the least severe sanction adequate to the purpose of Rule 11."). The Supreme Court has ruled that Rule 11's purpose is primarily deterrent. *Business Guides, Inc. v. Chromatic Communications Enters., Inc.*, 111 S. Ct. 922, 934 (1991); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393 (1990); *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120 (1989); *accord Miltier v. Downes*, 935 F.2d 660, 665 (4th Cir. 1991).

[11]*See, e.g., Davis v. Veslan Enters.*, 765 F.2d 494, 500-01 (5th Cir. 1985) (awarding judgment interest lost due to delay caused by frivolous filing).

[12]*See, e.g., Hudson v. Moore Business Forms, Inc.*, 898 F.2d 684, 686 (9th Cir. 1990) (affirming a $2,000 "deterrent sanction" in addition to the award of attorneys' fees). *See generally* Jerold S. Solovy, et al., *Sanctions Under Federal Rule of Civil Procedure 11, in* Practicing Law Institute, *Current Problems in Federal Civil Practice* 29 (Barry H. Garfinkel ed., 1992).

[13]*Joiner v. Delo*, 905 F.2d 206, 208 (8th Cir. 1990). The 1983 amendment to Rule 11 eliminated the express authority of courts to strike pleadings. Many courts therefore hold that they lack such authority. *E.g., Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 878 (5th Cir. 1988).

[14]*See Stelly v. Commissioner of IRS*, 808 F.2d 442, 443 (5th Cir. 1987) (per curiam); *Moeller v. United States*, 127 F.R.D. 160, 164 (W.D. Ark.), *cert. denied*, 493 U.S. 815 (1989).

[15]*See Steinle v. Warren*, 765 F.2d 95, 102 (7th Cir. 1985) (recommending attention by appropriate disciplinary authority); *In re Boucher*, 837 F.2d 869 (9th Cir.) (suspended attorney for six months), *modified*, 850 F.2d 597 (9th Cir. 1988). *See generally* Schwarzer, *supra* note 6, at 204.

[16]Nelken, *supra* note 6, at 1327. These actions constituted one-third of the cases reported in the first two years after amended Rule 11 became effective. "The remaining cases cover a wide variety of procedural situations, including other rule 12(b) motions to disqualify counsel, and motions to remand to state court." *Id.*

[17]*See* Vairo, *supra* note 6, at 200-02.

[18]*Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d at 879-81; *see also Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 398 (1990) ("although Rule 11 does not establish a deadline for the imposition of sanctions, the Advisory Committee did not contemplate there would be a lengthy delay prior to their imposition"). *But see Hicks v. Southern Md. Health Sys. Agency*, 805 F.2d 1165, 1167 (4th Cir. 1986) ("In the absence of an applicable local rule in the district court, the only time limitation [on sanction requests] arises out of those equitable considerations that a district judge may weigh in his discretion.").

The Rules of the United States District Court for the District of Maryland mandate that claims for attorneys' fees not filed within twenty days of entry of judgment are waived. *See* United States District Court for the District of Maryland Local Rule 109(a). The court in *Hicks*, however, held that Local Rule 23 (the predecessor to Local Rule 109(a)) "contemplates that there may be departures from it by court order, and here the court has ordered payment of legal fees despite the existence of the rule." *Hicks*, 805 F.2d at 1167.

[19]Fed. R. Civ. P. 11 advisory committee notes (addressing 1983 amendments).

[20]*Coghlan v. Starkey*, 852 F.2d 806, 817 n.21 (5th Cir. 1988) ("the standards of rule 11, irrespective of the rule itself, govern appeals to our court"); *United States v. Carley*, 783 F.2d 341, 344-45 (2d Cir.), *cert. denied*, 476 U.S. 1142 (1986). *But see Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 402-04 (1990) (district courts are best suited to determine when Rule 11 has been violated); *see also Partington v. Gedan*, 923 F.2d 686, 688 (9th Cir. 1991).

[21]*See, e.g., Stevens v. Lawyer's Mut. Liab. Ins. Co.*, 789 F.2d 1056, 1060 (4th Cir. 1986) (reversing sanctions award against attorney for bringing allegedly frivolous declaratory judgment action); *Goldman v. Belden*, 754 F.2d 1059, 1071 (2d Cir. 1985) (vacating imposition of sanctions and decision on the merits because the court had improperly applied the standard for dismissal). Frequent reversals of sanctions awards are seen at the state level as well. Maryland appellate courts, for example, frequently reverse sanctions awards. *See Newman v. Reilly*, 314 Md. 364, 550 A.2d 959 (1988); *Yamaner v. Orkin*, 313 Md. 508, 545 A.2d 1345 (1988). *See generally* Albert D. Brault, *Maryland's Controversial Law of Sanctions*, 26 Md. Bar. J. 19, 24-26 (Jan. 1993); Susan Souder & Karen M. Crabtree, *Sanctions in Maryland*, 23 Md. Bar. J. 29, 31 (July/Aug. 1990).

[22]Fed. R. Civ. P. 11 advisory committee notes (emphasis added).

[23]*E.g., Oliveri v. Thompson*, 803 F.2d 1265, 1274 (2d Cir. 1986) ("rule 11 applies only to the initial signing of a 'pleading, motion, or other paper.' Limiting the application of rule 11 to testing the attorney's conduct at the time a paper is signed is virtually mandated by the plain language of the rule."), *cert. denied sub nom. County of Suffolk v. Graseck*, 480 U.S. 918 (1987); *Brubaker v. City of Richmond*, 943 F.2d 1363, 1381 (4th Cir. 1991).

[24]*See, e.g., Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866 (5th Cir. 1988); *accord Oliveri*, 803 F.2d at 1274-75. This approach is frequently referred to as the "snapshot" approach. *Id.* Counsel may nonetheless be sanctioned pursuant to 28 U.S.C. § 1927 if he refuses to withdraw a paper after the presentation of uncontroverted proof which undermines the filing. *Thomas*, 836 F.2d at 875 n.12.

[25]*Oliveri v. Thompson*, 803 F.2d at 1274.

[26]*E.g., Robinson v. National Cash Register Co.*, 808 F.2d 1119, 1127 (5th Cir. 1987) ("a document that initially satisfies the requirements of rule 11 may later turn out to be the basis for rule 11 sanctions as new facts are discovered which show that there is no longer a good faith basis for the document.").

[27]*See Thomas*, 836 F.2d at 875; *see also Gaiardo v. Ethyl Corp.*, 835 F.2d 479, 484 (3d Cir. 1987).

[28]*See* Fed. R. Civ. P. 8(e)(2) (a party may state as many claims or defenses the party has regardless of consistency); *see also* 2A James Wm. Moore, et al., *Moore's Federal Practice* para. 8.13, at 8-57 (2d ed. 1991). For further discussion of the conflict between Federal Rules 8 and 11, *see infra* Part IV.

[29]*See infra* Part IV for further discussion of the conflict between Federal Rules 8 and 11.

[30]*Oliveri v. Thompson*, 803 F.2d 1265, 1280 (2d Cir. 1986), *cert. denied sub nom. County of Suffolk v. Graseck*, 480 U.S. 918 (1987).

[31]*See Southern Leasing Partners v. McMullan*, 801 F.2d 783, 788 (5th Cir. 1986) (per curiam) ("blind reliance on the client is seldom a sufficient inquiry"); *Unioil, Inc. v. E.F. Hutton & Co.*, 809 F.2d 548, 558 (9th Cir. 1986) (attorney cannot delegate to co-counsel his obligation to undertake a reasonable factual inquiry), *cert. denied sub nom. Barton v. E.F. Hutton & Co.*, 484 U.S. 822 (1987). *But see Unioil, Inc. v. E.F. Hutton & Co.*, 809 F.2d 548, 558 (9th Cir. 1986) (dictum) ("we agree that reliance on forwarding co-counsel may in certain circumstances satisfy an attorney's duty of reasonable injury.").

[32]*Rhinehart v. Stauffer*, 638 F.2d 1169, 1171 (9th Cir. 1979).

[33]*Oliveri*, 803 F.2d at 1279-80; *see also Beverly Gravel, Inc. v. DiDomenico*, 908 F.2d 223, 226 (7th Cir. 1990) (allowing a tenuous claim to proceed so as to afford the party a reasonable opportunity for discovery. *But see Collins v. Walden*, 834 F.2d 961, 965 (11th Cir. 1987):

> Although a litigant proceeding in good faith has a right to use civil discovery in attempts to prove the existence of a colorable claim for relief, filing a lawsuit is not a gratuitous license to conduct infinite forays in search of evidence. When it becomes apparent that discoverable evidence will not bear out the Claim, the litigant and his attorney have a duty to discontinue their quest.

[34]*See* Edward D. Cavanaugh, *Developing Standards Under Amended Rule 11 of the Federal Rules of Procedure*, 14 Hofstra L. Rev. 499, 519 (1986) (Rule 11 no longer permits "'file now, discover later' tactics."); *see also In re Kunstler*, 914 F.2d 505, 516 (4th Cir. 1990) ("the need for discovery to complete the factual basis for alleged claims is not an excuse to allege claims with no factual basis"), *cert. denied*, 111 S. Ct. 1607 (1991).

[35]*See supra* note 16 and accompanying text.

[36]355 U.S. 41 (1957).

[37]*Id.* at 45-46.

[38]*But see Lemaster v. United States*, 891 F.2d 115, 121 (6th Cir. 1989) (per curiam) (complaint that survives a motion for summary judgment or dismissal is not immune from Rule 11).

[39]*Hoover Universal, Inc. v. Brockway IMCO, Inc.*, 809 F.2d 1039, 1044 (4th Cir. 1987).

[40]*Thompson v. Duke*, 940 F.2d 192, 197-98 (7th Cir. 1991); *Miltier v. Downes*, 935 F.2d 660, 664 (4th Cir. 1991).

[41]*But see Zaldivar v. City of Los Angeles*, 780 F.2d 823, 831 (9th Cir. 1986) ("[e]xtended research alone will not save a claim that is without legal or factual merit from the penalty of sanctions.").

[42]*Crookham v. Crookham*, 914 F.2d 1027, 1029 (8th Cir. 1990).

[43]*DeSisto College, Inc. v. Line*, 888 F.2d 755, 765-66 (11th Cir. 1989), *cert. denied*, 495 U.S. 952 (1990).

[44]*Crookham*, 914 F.2d at 1030 (sanctions awarded for bringing of time-barred cause of action). *Contra O'Connell v. Champion Int'l Corp.*, 812 F.2d 393, 394-95 (8th Cir. 1987).

[45]*International Ass'n of Machinists & Aerospace Workers v. Boeing Co.*, 833 F.2d 165, 172 (9th Cir. 1987), *cert. denied*, 485 U.S. 1014 (1988).

[46]*Fox v. Acadia State Bank*, 937 F.2d 1566, 1569-70 (11th Cir. 1991); *Thornton v. Wahl*, 787 F.2d 1151, 1154 (7th Cir. 1986), *cert. denied*, 479 U.S. 851 (1986).

[47]*E.g., Nelson v. Piedmont Aviation, Inc.*, 750 F.2d 1234, 1238 (4th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985).

[48]*TMF Tool Co. v. Muller*, 913 F.2d 1185, 1191 (7th Cir. 1990).

[49]Fed. R. Civ. P. 11 advisory committee notes (addressing 1983 amendments); *see also Cabell v. Petty*, 810 F.2d 463, 466 (4th Cir. 1987).

[50]*See supra* note 43 and accompanying text.

[51]Schwarzer, *supra* note 6, at 194.

[52]Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 Harv. L. Rev. 630, 640 (1987).

[53]Carl Tobias, *Reconsidering Rule 11*, 46 U. Miami L. Rev. 855, 865 n.51 (1992).

[54]*See* Fed. R. Civ. P. 11 advisory committee notes (addressing the 1983 amendments).

[55]This Article cannot adequately discuss the various rationales for why courts make dramatic reversals of settled common law. Many courts and scholars have devoted considerable effort to the explanation of this phenomenon, and their works should be referred to for further insight. *See generally* Ruggero J. Aldisert, *Precedent: What It Is and What It Isn't; When Do We Kiss It and When Do We Kill It?*, 17 Pepp. L. Rev. 605 (1990).

[56]D. Michael Risinger, *Honesty in Pleading and its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 Minn. L. Rev. 1, 56 (1976).

[57]*See, e.g., Goldman v. Belden*, 754 F.2d 1059 (2d Cir. 1985); *see also supra* note 21 and accompanying text (rule 11 sanctions awards are frequently reversed on appeal).

[58]Use of the phrase "cause unnecessary delay" implicitly incorporates bad faith.

[59]*See In re Kunstler*, 914 F.2d 505, 518 (4th Cir. 1990) ("the purpose to vindicate rights in court must be central and sincere."), *cert. denied*, 111 S.Ct. 1607 (1991).

[60]*Cohen v. Virginia Elec. & Power Co.*, 788 F.2d 247, 249 (4th Cir. 1986).

[61]*See Andre v. Merrill Lynch Ready Assets Trust*, 97 F.R.D. 699, 702 (S.D.N.Y. 1983).

[62]*In re Kunstler*, 914 F.2d at 518 ("whether or not a pleading has a foundation in fact or is well grounded in law will often influence the determination of the signer's purpose, and we suggest a district court should consider the first two prongs of Rule 11 before making a determination of improper purpose.").

[63]*Stevens v. Lawyers Mut. Liab. Ins. Co.*, 789 F.2d 1056, 1061 (4th Cir. 1986); *see also Zaldivar v. City of Los Angeles*, 780 F.2d 823, 832 (9th Cir. 1986) ("harassment under Rule 11 focuses upon the improper purpose of the signer, objectively tested, rather than the consequences of the signer's act, subjectively viewed by the signer's opponent.").

[64]*In re Yagman*, 796 F.2d 1165, 1186 (9th Cir. 1986).

[65]*In re Kunstler*, 914 F.2d at 519.

[66]*E.g.*, Schwarzer, *supra* note 6, at 195 (footnote omitted):

> The record in the case and all of the surrounding circumstances should afford an adequate basis for determining whether particular papers or proceedings caused delay that was unnecessary, whether they caused increase in cost of litigation that was needless, or whether they lacked any apparent legitimate purpose. . . . The court can make such findings guided by its experience in litigation, its knowledge of the standards of the bar of the court, its familiarity with the case before it, and by reference to the relevant criteria under the Federal Rules such as those in Rule 11 or 26(b)(1).

[67]*But see* Schwarzer, *supra* note 6, at 196 ("were a court to entertain inquiries into subjective bad faith, it would invite a number of potentially harmful consequences, such as generating satellite litigation, inhibiting speech and chilling advocacy.").

[68]Cases granting plaintiffs' requests for sanctions against defendants for interposing frivolous defenses are even more scant. *See Smith v. United Transp. Union Local No. 81*, 594 F. Supp. 96, 100-01 (S.D. Cal. 1984). *But see Carl Hizel & Sons, Inc. v. Browning-Ferris, Inc.*, 600 F. Supp. 161, 163-64 (D. Colo. 1985).

[69]*See supra* note 6 and authorities cited therein.

[70]Vairo, *supra* note 6, at 200 (emphasis added).

[71]Nelken, *supra* note 6, at 1328.

[72]*Id.* at 1325.

[73]Fed. R. Civ. P. 8(e); *accord* Md. Rule 2-303(c) (1993).

[74]"Given the fact that litigation is becoming increasingly complex, and that some types of information are much more difficult to obtain in advance of suit, the elimination of any bar to good-faith alternative pleading is not only proper, but necessary." Jack H. Friedenthal, Mary K. Kane & Arthur R. Miller, *Civil Procedure* § 5.12, at 265 (1985).

[75]Moore, et al., *supra* note 28, para. 8-13 at 8-62.

[76]*Wade v. Johnson Controls, Inc.*, 693 F.2d 19, 21 (2d Cir. 1982).

[77]Note, *supra* note 52, at 641.

[78]Fed. R. Civ. P. 8(a)(2).

[79]*See* Note, *supra* note 52, at 637.

[80]Fed. R. Civ. P. 11(b) (Proposed Official Draft 1992).

[81]*See supra* notes 22-27 and accompanying text.

[82]*See supra* note 22 and accompanying text.

[83]Tobias, *supra* note 53, at 868.

[84]*Id.* at 869.

[85]*Id.* at 869-71.

[86]Fed. R. Civ. P. 11(c) (Proposed Official Draft 1992).

[87]Fed. R. Civ. P. 11(c)(1)(A) (Proposed Official Draft 1992).

[88]496 U.S. 384 (1990).

[89]*Id.* at 394-98.

[90]Fed. R. Civ. P. 11(c)(1)(B) (Proposed Official Draft 1992).

[91]Fed. R. Civ. P. 11(b)(3) (Proposed Official Draft 1992) (emphasis added).

[92]*See supra* note 34 and accompanying text.

[93]Vairo, *supra* note 6, at 198.

[94]Fed. R. Civ. P. 11(b)(2) (Proposed Official Draft 1992) (emphasis added).

[95]Fed. R. Civ. P. 11(c)(1)(A) (Proposed Official Draft 1992).

[96]*Id.*

[97]*Id.*

[98]*See supra* note 38.

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