JENNER&BLOCK

Practice Series

Sanctions Under Rule 11

Jerold S. Solovy

Norman M. Hirsch

Margaret J. Simpson

© 2010 JENNER & BLOCK LLP ALL RIGHTS RESERVED

JENNER&BLOCK

Offices

- 353 N. Clark Street
  Chicago, Illinois 60654-3456
  Firm: 312 222-9350
  Fax: 312 527-0484

- 633 West 5th Street
  Suite 3500
  Los Angeles, CA 90071-2054
  Firm: 213 239-5100
  Fax: 213 239-5199

- 919 Third Avenue
  37th Floor
  New York, New York 10022-3908
  Firm: 212 891-1600
  Fax: 212 891-1699

- 1099 New York Avenue, NW
  Suite 900
  Washington, DC 20001-4412
  Firm: 202 639-6000
  Fax: 202 639-6066

Website

- www.jenner.com

Author Information

- Jerold S. Solovy
  Chairman Emeritus of the Firm
  Jenner & Block
  Tel: 312 923-2671
  Fax: 312 840-7671
  E-Mail: jsolovy@jenner.com

- Norman M. Hirsch
  Partner
  Jenner & Block
  Tel: 312 923-2782
  Fax: 312 840-7782
  E-Mail: nhirsch@jenner.com

- Margaret J. Simpson
  Partner
  Jenner & Block
  Tel: 312 923-2857
  Fax: 312 840-7257
  E-Mail: msimpson@jenner.com

© 2010 Jenner & Block LLP. Jenner & Block is an Illinois Limited Liability Partnership including professional corporations. This publication is not intended to provide legal advice but to provide information on legal matters and Firm news of interest to our clients and colleagues. Readers should seek specific legal advice before taking any action with respect to matters mentioned in this publication. The attorneys responsible for this publication are Jerold S. Solovy, Norman M. Hirsch and Margaret J. Simpson. Prior results do not guarantee a similar outcome.

Attorney Advertising.

Table of Contents

I. Introduction

In 1983, Rule 11 of the Federal Rules was introduced in its modern form. In 1993, the U.S. Supreme Court approved sweeping changes to the rule. The amended Rule 11 took effect on December 2, 1993, when Congress failed to act to alter, cancel or defer the amendment. In 1995, Congress passed the Private Securities Litigation Reform Act ("PSLRA"), which changes the law of sanctions for all private securities cases.

A. Supreme Court Cases Involving Rule 11

In the years just preceding the 1993 revision to Rule 11, the Supreme Court was active in deciding issues under the Rule. Since 1993, the Court has been largely silent on issues relating to the Rule, with the exception of its decision in Cunningham v. Hamilton Cty., 527 U.S. 198 (1999), concerning whether sanctions imposed on non-parties, including counsel, are appealable collateral orders. The Supreme Court decisions regarding Rule 11 are:

Pavelic & LeFlore v. Marvel Entm't Group, 493 U.S. 120 (1989) — The Court adopted a literal reading of the 1983 version of the rule, holding that only the attorney actually signing a pleading, and not that attorney's law firm, may be sanctioned under Rule 11. The 1993 amendment overruled Pavelic by allowing courts to "sanction [ ] the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation." Rule 11(c). The Court in Pavelic also noted that the primary purpose of Rule 11 is to deter frivolous filings, not to reimburse the innocent party.

Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990) — The Court confirmed that Rule 11 is not a fee-shifting statute, and that its central purpose is to deter baseless filings. The Court held that a plaintiff's voluntary dismissal of a complaint does not deprive the district court of jurisdiction to award sanctions based on the frivolousness of the complaint. The Court also established that federal courts of appeal must apply an abuse of discretion standard in reviewing district court decisions under Rule 11. Finally, the Court held that Rule 11 does not apply to appellate proceedings; Rule 38 of the Federal Rules of Appellate Procedure must be invoked to obtain fees on appeal.

Business Guides, Inc. v. Chromatic Communications Enters., Inc., 498 U.S. 533 (1991) — In a decision of limited scope, interpreting the 1983 version of the Rule, the Court held that the conduct of a party who signs a pleading is judged

under an objective standard of reasonableness. The Court did not discuss the standard to be applied to a party in the more usual situation in which a pleading is filed on behalf of a party without the party's signature. Nor did the Court address whether objective reasonableness is different for a lay person and a lawyer. The Court again confirmed that the main objective of Rule 11 is not to reward victimized parties, but to deter baseless filings.

Chambers v. NASCO, Inc., 501 U.S. 32 (1991) — Although interpreting the district court's inherent power to sanction, not Rule 11, the Court rendered the relevant holding that a court's authority to sanction under its broad inherent power is not limited by the fact that more narrowly tailored procedural provisions, such as Rule 11 or section 1927, could govern the same conduct.

Willy v. Coastal Corp., 503 U.S. 131 (1992) — The Court affirmed a ruling by the Fifth Circuit that the district court had authority to impose Rule 11 sanctions despite the fact that the case had been improperly removed to federal court and the district court, therefore, lacked subject-matter jurisdiction.

Cunningham v. Hamilton Cty., 527 U.S. 198 (1999) — The Court held that even where a Rule 37(a) discovery sanction was imposed in a definite amount on a party's former counsel, the sanction was not subject to immediate appeal. Although the case concerned a sanction under Rule 37(a), its reasoning appears to apply equally well to sanctions imposed on counsel under Rule 11.

B. Scope of Outline

This outline does not address sanctions under the federal courts' other sources of sanctioning power, including their inherent power, other rules of civil procedure (including Rule 37, which pertains to discovery), and federal statutes (including 28 U.S.C. § 1927). Nevertheless, anyone dealing with sanctions issues should pay close attention to other sanctions provisions and to the inherent powers of the courts. Even when a motion fails to meet the requirements of Rule 11, the courts may look elsewhere for authority to impose sanctions. In Chambers v. NASCO, Inc., 501 U.S. 32 (1991), the Supreme Court affirmed the imposition of nearly $1 million in sanctions pursuant to the district court's inherent power, despite the fact that other, narrower sanctions provisions also regulated the conduct.

Overruling criminal penalties imposed for misrepresentations in court filings, the Supreme Court has ruled that false statements in judicial proceedings are not punishable under 18 U.S.C. § 1001, the federal false-statements statute. Hubbard v. United States, 514 U.S. 695 (1995).

This outline also does not specifically address the application of Rule 11 to bankruptcy proceedings. When Rule 11 was amended on December 1, 1993, no change was made to Bankruptcy Rule 9011, the bankruptcy rule equivalent to Rule 11. The discrepancy between the two rules continued until December 1, 1997, when Bankruptcy Rule 9011 was amended to substantially conform to the 1993 amended Rule 11. Courts have looked to Rule 11 cases to interpret Bankruptcy Rule 9011. See In re Kriss, 217 B.R. 147, 159 (Bankr. S.D.N.Y. 1998); In re Nichols, 221 B.R. 275, 278 n.4 (Bankr. N.D. Okla. 1998); In re U. S. Voting Mach., Inc., 224 B.R. 165, 170 (Bankr. D. Colo. 1998) (relying on Advisory Committee Notes to the 1993 amendment to Rule 11). However, there are instances where courts interpreting Rule 9011 have decided to deviate somewhat from Rule 11 cases. See In re Marsch, 36 F.3d 825, 830 (9th Cir. 1994) (differences between bankruptcy proceedings and ordinary civil litigation justify rejection of some Rule 11 principles; court adopted a "sliding scale" approach to frivolousness and improper purpose, where "the more compelling the showing as to one element, the less decisive need be the showing as to the other").

C. History of Rule 11

The existence of a rule requiring that counsel sign pleadings dates back to English equity practice at the time of Sir Thomas More. The original purposes behind the rule seem to have been to assure that pleadings complied with the correct forms and to grant lawyers a monopoly over cases brought before chancery courts. See generally D. Michael Risinger, Honesty in Pleading and its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11, 61 Minn. L. Rev. 1, 8-14 (1976). In the nineteenth century, however, Justice Story believed that counsel's signature served to guarantee that "there is good ground for the suit in the manner, [sic] in which it is framed." J. Story, Equity Pleadings § 47 (1838). As a result of Justice Story's influence, Rule 24 of the Federal Equity Rules of 1842, 42 U.S. (1 How.) xlvii, required every bill to contain counsel's signature as an "affirmation" that there was "good ground" for the suit. Rule 24 of the Equity Rules of 1912, 226 U.S. 627, 655 (1912), retained the provision that counsel's signature constituted a "certificate" that the pleading

had "good ground." The equity rule supplied the foundation for Federal Rule of Civil Procedure 11, which remained unchanged until it was amended for the first time in 1983.

In the decade between the 1983 amendment and the adoption of the current Rule 11 in 1993, Rule 11 became the subject of widespread criticism in the legal community. In explaining an early version of the 1993 amendment, the Advisory Committee on Civil Rules explained that:

> [T]here was support for the following propositions: (1) Rule 11, in conjunction with other rules, has tended to impact plaintiffs more frequently and severely than defendants; (2) it occasionally has created problems for a party which seeks to assert novel legal contentions or which needs discovery from other persons to determine if the party's belief about the facts can be supported with evidence; (3) it has too rarely been enforced through nonmonetary sanctions, and with cost-shifting having become the normative sanction; (4) it provides little incentive, and perhaps a disincentive, for a party to abandon positions after determining they are no longer supportable in fact or law; and (5) it sometimes has produced unfortunate conflicts between attorney and client, and exacerbated contentious behavior between counsel. In addition, although the great majority of Rule 11 motions have not been granted, the time spent by litigants and the courts in dealing with such motions has not been insignificant.

Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence, reprinted in 137 F.R.D. 53, 64 (1991) (letter from Advisory Committee accompanying proposal); see also Carl Tobias, Civil Rights Plaintiffs and the Proposed Revision of Rule 11, 77 Iowa L. Rev. 1775 (1992) (1983 Rule 11 led to costly satellite litigation and had disproportionate impact on civil rights plaintiffs); Lawrence C. Marshall et al., The Use and Impact of Rule 11, 86 Nw. U. L. Rev. 943 (1992) (plaintiffs, particularly in civil rights cases, were sanctioned more than other litigants). But see Carl Tobias, Reconsidering Rule 11, 46 U. Miami L. Rev. 855, 864 (1992) (recent studies suggest few civil rights plaintiffs are sanctioned).

These criticisms led to the sweeping 1993 amendment to Rule 11. However, the 1993 amendment, like the rule it replaced, was controversial. Justice Scalia, joined by Justice Thomas, dissented from the April 1993 order transmitting the rule (along with a package of other amendments to the Federal Rules) to Congress. Amendments to the Federal Rules of Civil Procedure and Forms (Apr. 22, 1993), reprinted in 146 F.R.D. 401, 507 (1993). In his dissent, Justice Scalia warned that "[t]he proposed revision would render the Rule toothless." Id.

On the other hand, some critics of the 1983 rule were at least initially dissatisfied with the 1993 amendment, arguing that it did not go far enough to reduce the problems of satellite litigation, incivility, and the "chilling effect" on disfavored, but reasonable, claims. See Carl Tobias, Reconsidering Rule 11, 46 U. Miami L. Rev. 855, 905 (1992) ("If the new Rule 11 closely resembles the proposal, there will be little improvement."); see also George Cochran, Rule 11: The Road to Amendment, 61 Miss. L.J. 5, 27 (1991) (concern over hostility between bench and bar points toward returning Rule 11 to its pre-1983 state).

Shortly after the Supreme Court transmitted the revised rules, several bills were introduced in Congress to delay or cancel the effective date of many of the 1993 amended rules. However, Congress did not act on any of those bills before December 1, 1993; as a result, the 1993 Rule 11 took effect that day.

As the rest of this outline will show, the 1993 amendment to Rule 11 was unlikely to satisfy either the most vocal critics of Rule 11 or the staunch defenders of the old rule. However, its drafters clearly believed it would "deter presentation and maintenance of frivolous positions, while also reducing the frequency of Rule 11 motions." 137 F.R.D. at 64, 65 (1991) (Advisory Committee letter explaining rule).

II. Private Securities Litigation Reform Act of 1995

The Private Securities Litigation Reform Act of 1995, Pub. L. 104-67, 109 Stat. 737, which became law on December 22, 1995 (the "Act"), establishes pleading rules, directs the court to stay discovery under specified circumstances, and changes class action practice. With regard to Rule 11, the Act goes even further. It not only cross-references portions of Rule 11, it amends and partially repeals Rule 11 exclusively for securities cases.

Recognizing "the need to reduce significantly the filing of meritless securities lawsuits without hindering the ability of victims of fraud to pursue legitimate claims," Congress passed the PSLRA to give "teeth" to Rule 11. Simon DeBartolo Group, LP v. Richard E. Jacobs Group, Inc., 186 F.3d 157, 166-67 (2d Cir. 1999). The Congressional purpose is made explicit in the Joint Explanatory Statement of the Committee of Conference (attached in Appendix III), which specifically states that the Act was intended to address certain specific abuses:

> (1) the routine filing of lawsuits against issuers of securities and others whenever there is a significant change in an issuer's stock price, without regard to any underlying culpability of the issuer, and with only faint hope that the discovery process might lead eventually to some plausible cause of action; (2) the targeting of deep pocket defendants . . .; (3) the abuse of the discovery process to impose costs so burdensome that it is often economical for the victimized party to settle; and (4) the manipulation by class action lawyers of the clients whom they purportedly represent. These serious injuries to innocent parties are compounded by the reluctance of many judges to impose sanctions under Federal Rule of Civil Procedure 11, except in those cases involving truly outrageous misconduct.

H.R. Conf. Rep. No. 396, 104th Cong., 1st Sess. 31 (1995).

The differences between the Act and Rule 11 as amended in 1993 are substantial. The Act changes the procedure for imposing Rule 11 sanctions and it makes sanctions mandatory, removing any discretion from the district courts. In addition, the Act presumes that the opposing party's attorneys' fees will be the

sanction, rejecting the focus on deterrence reflected in Rule 11. These changes apply in all private securities actions, not just class action lawsuits. See Inter-County Resources, Inc. v. Medical Res., Inc., 49 F. Supp. 2d 682, 684 (S.D.N.Y. 1999). The Securities Litigation Reform Act drastically changes the way Rule 11 applies in private securities litigation. In pertinent part, the Act adds the following language to the 1933 and 1934 Securities Acts:

> (c) SANCTIONS FOR ABUSIVE LITIGATION.—
>
> (1) MANDATORY REVIEW BY COURT.— In any private action arising under this title, upon final adjudication of the action, the court shall include in the record specific findings regarding compliance by each party and each attorney representing any party with each requirement of Rule 11(b) of the Federal Rules of Civil Procedure as to any complaint, responsive pleading, or dispositive motion.
>
> (2) MANDATORY SANCTIONS.— If the court makes a finding under paragraph (1) that a party or attorney violated any requirement of Rule 11(b) of the Federal Rules of Civil Procedure as to any complaint, responsive pleading, or dispositive motion, the court shall impose sanctions on such party or attorney in accordance with Rule 11 of the Federal Rules of Civil Procedure. Prior to making a finding that any party or attorney has violated Rule 11 of the Federal Rules of Civil Procedure, the court shall give such party or attorney notice and an opportunity to respond.
>
> (3) PRESUMPTION IN FAVOR OF ATTORNEYS' FEES AND COSTS.—
>
> (A) IN GENERAL.— Subject to subparagraphs (B) and (C), for purposes of paragraph (2), the court shall adopt a presumption that the appropriate sanction —

(i) for failure of any responsive pleading or dispositive motion to comply with any requirement of Rule 11(b) of the Federal Rules of Civil Procedure is an award to the opposing party of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation; and

(ii) for substantial failure of any complaint to comply with any requirement of Rule 11(b) of the Federal Rules of Civil Procedure is an award to the opposing party of the reasonable attorneys' fees and other expenses incurred in the action.

(B) REBUTTAL EVIDENCE.— The presumption described in subparagraph (A) may be rebutted only upon proof by the party or attorney against whom sanctions are to be imposed that —

(i) the award of attorneys' fees and other expenses will impose an unreasonable burden on that party or attorney and would be unjust, and the failure to make such an award would not impose a greater burden on the party in whose favor sanctions are to be imposed; or

(ii) the violation of Rule 11(b) of the Federal Rules of Civil Procedure was de minimis.

(C) SANCTIONS.— If the party or attorney against whom sanctions are to be imposed meets its burden

> under subparagraph (B), the court shall award the sanctions that the court deems appropriate pursuant to Rule 11 of the Federal Rules of Civil Procedure.

15 U.S.C. §§ 77z-1(c) and 78u-4 (c) (also attached in Appendix III).

The key differences between Rule 11 and the Act are both procedural and substantive. First, a party may only invoke Rule 11 by a separate motion, which may be filed with the court only after the movant has served the opposing party and provided a "safe harbor" — 21 days within which to withdraw or correct the challenged paper. Rule 11(c)(1)(A). Under the Act, the court is required to make Rule 11 findings "upon final adjudication." 15 U.S.C. §§ 77z-1(c)(1) and 78u-4(c)(1).

The PSLRA does not define final adjudication, but at least one court has held that a plaintiff's voluntary dismissal of a complaint does not constitute a final adjudication requiring a court to make Rule 11 findings. In Blaser v. Bessemer Trust Co., No. 01 Civ. 11599, 2002 U.S. Dist. LEXIS 19856, at *1 (S.D.N.Y. Oct. 21, 2002), the plaintiff sued an investment corporation, alleging that the defendant executed unauthorized securities transactions in plaintiff's investment account. The defendant moved to dismiss and for sanctions, and the plaintiff, before expiration of the 21-day safe harbor, voluntary dismissed the complaint. Id. at *2. Relying on the plain meaning of "final adjudication," the court held that even if the PSLRA eliminates the safe harbor requirement, a voluntary dismissal still does not trigger Rule 11 review. Id. at *4.

In Dimarco v. Depotech Corp., 131 F. Supp. 2d 1185 (S.D. Cal. 2001), the district court for the Southern District of California considered whether a district court's adjudication of a claim is final, even though an appeal is pending. Also relying on the plain meaning of "final adjudication," the court held that a "final adjudication" under the PSLRA refers to the district court's adjudication of the action, not to the exhaustion of appeals. Id. at 1188. The Court further reasoned that a contrary ruling "would inevitably postpone Rule 11 findings for years and needlessly lead to yet another appeal after the district court ruled thereon." Id. at 1187.

Upon final adjudication, the district court is required to make specific findings on the parties' compliance with Rule 11. The Second Circuit has held

that the district court's failure to make these findings required remand to permit the district court to do so. Gurary v. Winehouse, 190 F.3d 37, 47 (2d Cir. 1999). The Act does not state whether the court must make unprompted findings that each party and lawyer has met the requirements of Rule 11(b) with regard to the complaint and answer alone, or must undertake a Herculean review of each and every pleading filed prior to resolution of the claims (including any non-securities act claims contained in the complaint). It seems clear, however, that there is no need to file any motion with regard to the complaint. To the extent the need to file a motion is eliminated, so is the safe harbor provision. See Smith v. Smith, 184 F.R.D. 420, 422 (S.D. Fla. 1998).[1]

In Smith v. Smith, 184 F.R.D. 420 (S.D. Fla. 1998), the court held that the 1995 Reform Act eliminates the safe harbor provision of Rule 11 in those cases for which the Act mandates that the court impose a sanction. The court found that the plaintiff's actions in the case before it "violate[d] the Reform Act's central purpose of preventing frivolous lawsuits initiated to intimidate defendants and force them into a quick settlement," id. at 423, and concluded "[i]t appears . . . that [plaintiff] mistakenly assumed he was protected by the safe harbor provision and took advantage of it to file his complaint." Id.

The Act is not unique in permitting the court to act on its own. Rule 11 also permits the court to make findings sua sponte, but under Rule 11 the court is left discretion to initiate the procedure only in those cases where the court believes the rule has been violated. Rule 11(c)(1)(B). In such cases, Rule 11 provides that the court may initiate a proceeding by describing the specific conduct that appears to violate the rule and by directing the attorney, law firm, or party to show cause why it has not violated the Rule in that respect. Id. Although the Act now makes Rule 11 findings mandatory in all securities cases, it is silent as to the specificity of notice the court must provide prior to entering such findings. Judicial economy and due process dictate that following the court's initial review of the pleadings, the notice under the Act should be notice of the specific conduct that the court views as problematic. See Roadway Express v. Piper, 447 U.S. 752, 767 (1980).

---

[1]Although the Act requires the court to make Rule 11 findings without motion, it in no way curtails the right of either party to file a Rule 11 motion — observing all requirements of Rule 11 — during the case.

Second, Rule 11 favors prompt filing and early resolution of motions claiming a Rule 11 violation. For example, the rule specifies that certain types of sanctions are unavailable when the court initiates the sanctions proceeding late in the case. Under Rule 11(c)(2)(B), monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims. This provision was carefully thought out because, as the Notes of the Rule 11 Advisory Committee on Rules state: "Parties settling a case should not be subsequently faced with an unexpected order from the court leading to monetary sanctions that might have affected their willingness to settle or voluntarily dismiss a case." 146 F.R.D. at 592. The Act rejects this approach and instead requires that the Rule 11 findings be made upon "final adjudication." 15 U.S.C. §§ 77z-1(c)(1) and 78u-4(c)(1). Thus, under the Act, the parties may be unable to prevent precisely the unexpected effect on settlement noted by the Advisory Committee.

Moreover, by eliminating any need for prompt resolution of Rule 11 issues, the Act rejects another important goal of Rule 11 reflected in the 1993 comments: "Ordinarily the motion should be served promptly after the inappropriate paper is filed, and, if delayed too long, may be viewed as untimely . . . . Given the 'safe harbor' provisions . . . a party cannot delay serving its Rule 11 motion until conclusion of the case (or judicial rejection of the offending contention)." 146 F.R.D. at 590. In contrast, under the Act, claimed Rule 11 violations which could have been corrected early do not become stale and Rule 11 issues follow rather than precede the ruling on motions and the case as a whole.

Third, Rule 11 rejected mandatory sanctions, leaving the decision whether to impose punishment within the discretion of the district court. Rule 11(c). In addition, since 1993, Rule 11 has disfavored sanctions in the form of attorneys' fees and has not endorsed wholesale fee shifting. Rule 11(c)(2). Indeed, reflecting a very different philosophy, Rule 11 provides that sanctions "shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated." Id. Deterrence can be achieved under Rule 11 by directives of a nonmonetary nature, a penalty paid to court, or a payment for some or all of the reasonable attorneys' fees and other expenses incurred "as a direct result of the violation." Id.

The Act rejects this approach. According to the Conference Committee:

> Existing Rule 11 has not deterred abusive securities litigation. Courts often fail to impose Rule 11 sanctions even where such sanctions are warranted. When sanctions are awarded, they are generally insufficient to make whole the victim of a Rule 11 violation: the amount of the sanction is limited to an amount that the court deems sufficient to deter repetition of the sanctioned conduct, rather than imposing a sanction that equals the costs imposed on the victim by the violation. Finally, courts have been unable to apply Rule 11 to the complaint in such a way that the victim of the ensuing lawsuit is compensated for all attorneys' fees and costs incurred in the entire action.

H.R. Conf. Rep. No. 396 at 39 (footnote omitted). Therefore, under the Act, the district court has no discretion; sanctions are mandatory for any violation of Rule 11(b) (as they were prior to the 1993 amendment to Rule 11). Moreover, under the Act, courts are directed to presume attorneys' fees should be imposed.

Moreover, because of the view that a frivolous complaint is particularly pernicious, the Act imposes more stringent sanctions if the Rule 11 violation relates to a complaint rather than some other pleading or motion. Thus, the Act purposely impacts plaintiffs more than defendants. If a complaint is in "substantial" violation of Rule 11, the presumptively appropriate sanction is an award of all of the defendant's attorneys' fees and other expenses for defending the action. 15 U.S.C. §§ 77z-1(c)(3)(A)(ii) and 78u-4(c)(3)(A)(ii). In contrast, if a party files a sanctionable responsive pleading or dispositive motion, the presumptively appropriate sanction is an award limited to the opposing party's attorneys' fees and other expenses resulting from that pleading or motion. 15 U.S.C. §§ 77z-1(c)(3)(A)(i) and 78u-4(c)(3)(A)(i) (emphasis added). Thus, the Act can be read to impose on plaintiffs or their attorneys all defense costs incurred as a result of a complaint which violates Rule 11, while imposing on defendants or their attorneys only the costs directly caused by the frivolous pleading or motion. This represents a departure from the current Rule 11 and also from the version of Rule 11 in effect prior to the 1993 amendments. Under the pre-1993 version of Rule 11, the court was required to impose a sanction on the sanctioned party — plaintiff or defendant — in the amount of the reasonable expenses incurred because of the sanctionable conduct. See, e.g., Leventhal v. New Valley

Corp., 148 F.R.D. 109, 113-14 (S.D.N.Y. 1993). As to the current version of Rule 11, the committee comments state that any monetary sanction payable to the opposing party should be commensurate with the fees "directly and unavoidably" caused by the violation. 146 F.R.D. at 588. Thus, under Rule 11 as applied outside of securities actions, if one count in a multi-count complaint is frivolous, attorneys' fees if awarded at all would be appropriate only to the extent that they relate directly to the cost of responding to that count.

The conference report to the securities law states that the provision allowing costs of the entire action to be imposed on plaintiffs "does not mean that a party who is sanctioned for only a partial failure of the complaint under Rule 11, such as one count out of a 20-count complaint, must pay for all of the attorneys' fees and costs associated with the action." H.R. Conf. Rep. No. 396 at 39. Rather, the conference anticipated that a provision in the new law that allows the presumptions to be rebutted by a showing that a violation was de minimis would protect a plaintiff in that situation. Id. at 40. The presumption may also be rebutted by a showing that the "award of attorneys' fees and other expenses will impose an unreasonable burden on that party or attorney and would be unjust, and the failure to make such an award would not impose a greater burden on the party in whose favor sanctions are to be imposed." 15 U.S.C. §§ 77z-1(c)(3)(B)(i) and 78u-4(c)(3)(B)(i). If the presumption is successfully rebutted, the court will be required to award other appropriate Rule 11 sanctions. 15 U.S.C. §§ 77z-1 (c)(3)(c) and 78u-4(c)(3)(c). The premise of the test for rebutting the presumptions, according to the conference report, "is that, when an abusive or frivolous action is maintained, it is manifestly unjust for the victim of the violation to bear substantial attorneys' fees." H.R. Conf. Rep. No. 396 at 40. However, the conference report fails to clarify important issues. For example, would one sanctionable count out of three counts in a complaint (which may raise claims other than securities act claims) qualify as de minimis, would it constitute a "substantial" violation of Rule 11, or would it fall somewhere in between? See, e.g., Morris v. Wachovia Sec., Inc., 448 F.3d 268, 278-79 (4th Cir. 2006) (holding that district court did not err in concluding that complaint was not a 'substantial' violation based on one frivolous claim that did not impose a large burden on the defendant). Thus, in the case of a complaint, but no other pleading, the Act provides that a Rule 11(b) violation will presumptively lead to fee shifting.

One court interpreting the "substantial failure" language of the Act observed that a single frivolous count in a two-count complaint may not be a

substantial violation of Rule 11. In Simon DeBartolo Group, LP v. Richard E. Jacobs Group, Inc., 186 F.3d 157, 177-78 (2d Cir. 1999), the Second Circuit remanded a case governed by the Act for the district court to determine whether the plaintiff substantially failed to comply with Rule 11. In so doing, the court stated "[w]e doubt that the statute meant for the district court to presume that when a single claim in an action is frivolous, the proper sanction is reasonable attorneys' fees and other expenses incurred in the entire action." Id. at 178. See also Polar Int'l Brokerage Corp. v. Reeve, 120 F. Supp. 2d 267, 272 (S.D.N.Y. 2000) (reducing fee award under PSLRA by 20% based on determination that one of five claims was colorable).

In Gurary v. Nu-Tech Bio-Med, Inc., 303 F.3d 212 (2d Cir. 2002), the Second Circuit considered whether a "substantial violation" warrants sanctions when the plaintiff's complaint contains both frivolous and non-frivolous claims or arguments. In Gurary, after granting summary judgment dismissing the plaintiff's four-count complaint, the district court, on remand for findings of compliance with Rule 11, ruled that because two counts were frivolous and two were meritless, sanctions should be imposed in the amount of half of the defendant's attorney fees and costs. Id. at 217-19. On appeal, the Court held that a "substantial violation" of Rule 11 can warrant sanctions for the bringing of an entire action even if not all claims are frivolous. The Court further held that a "substantial violation" is found "whenever the non-frivolous claims that are joined with frivolous ones are insufficiently meritorious to save the complaint as a whole from being abusive." Id. at 222. Declining to decide precisely how strong the non-frivolous counts or arguments of a complaint must be in order to limit sanctions only to the frivolous portions of the complaint, the Court held that, because the two non-frivolous claims before it patently lacked merit — even though they were not frivolous — those claims "could not suffice to relieve the complaint from being an unfounded action as a whole." Id. at 223-24. The Court thus remanded the case for imposition of full sanctions, including appellate expenses. Id. at 224. On remand, the district court awarded sanctions in the full amount of defendant's total costs and fees, plus the costs and fees incurred on appeal and in opposing plaintiff's petition for certiorari in connection with the appeal. See Gurary v. Winehouse, 270 F. Supp. 2d 425, 428 (S.D.N.Y. 2003). Compare Byrne v. Buythisfast Network, Inc., No. 03 Civ. 1999 (HB), 2005 U.S. Dist. LEXIS 9178, at *12-14 (S.D.N.Y. May 17, 2005) (distinguishing Gurary

and declining to find a "substantial violation" where two of four claims were frivolous but one of the two non-frivolous claims was not "patently without merit").

In light of this potential to incur sanctions for frivolous claims, the Act may have serious consequences for attorneys and plaintiffs who assume the role of lead plaintiff and counsel after the complaint is filed, a possibility the Act contemplates.[2] At a minimum, lead counsel will be obligated to carefully review a complaint filed by others and promptly amend any portions of the complaint which raise Rule 11 concerns. This obligation is created by Rule 11(b), to which the Act refers. Under Rule 11(b), the fact that an attorneys' signature does not appear on the complaint is no longer controlling in determining Rule 11 obligations. Rule 11(b) provides obligations for any attorney or party "signing, filing, submitting or later advocating" a pleading, motion or other paper. (Emphasis added.) Therefore, a lead attorney who "later advocates" someone else's complaint will be held to have made all the substantive representations set forth in detail in Rule 11(b).

In addition, the Act explicitly allows courts to require bonding of parties and/or their attorneys in class actions under the 1934 Act. 15 U.S.C. § 78u-4(a)(8). The conference report notes that this is already permitted "in the express private right of action in Section 11 of the 1933 Act and in Sections 9 and 18 of the 1934 Act." H.R. Conf. Rep. No. 104-396 at 40. The conference report makes clear that bonding is specifically authorized in order to "ensure the viability of potential sanctions as a deterrent to meritless litigation." Id. In addition, the report states that this measure will prevent the sanctions provision from becoming "in practice, a one-way mechanism only usable to sanction parties with deep pockets." Id.

---

[2]The Act provides for the appointment of the member or members of the purported plaintiff class that the court determines to be most capable of adequately representing the interests of class members as lead plaintiff, and the best lead plaintiff is rebuttably presumed to be the plaintiff with the largest financial interest in the relief sought by the class. Lead counsel is, subject to the approval of the court, selected and retained by the lead plaintiff. 15 U.S.C. §§ 77z-1(a)(3)(B) and 78u-4(a)(3)(B).

As to the allocation of this burden between parties and their attorneys, the report notes that:

> [t]he legislation expressly provides that such undertakings may be required of parties' attorneys in lieu of, or in addition to, the parties themselves. In this regard, the Conference Committee intends to preempt any contrary state bar restrictions that much inhibit attorneys' provision of such undertakings in behalf of their clients. The Conference Committee anticipates, for example, that where a judge determines to require an undertaking in a class action, such an undertaking would ordinarily be imposed on plaintiffs' counsel rather than upon the plaintiff class, both because the financial resources of counsel would ordinarily be more extensive than those of an individual class member and because counsel are better situated than class members to evaluate the merits of cases and individual motions.

Id. at 40-41. Thus, it appears that by favoring the imposition of a bond on counsel in securities class actions, the committee presumes that any sanctions are likely to be imposed on attorneys rather than plaintiffs. This follows from the conference committee's view that professional plaintiffs and plaintiffs' lawyers collude "to file abusive securities class action lawsuits." Id. at 32. The "professional plaintiff" problem is addressed by provisions that impose stringent requirements on the selection of lead plaintiffs in securities class actions. 15 U.S.C. §§ 77z-1 (a)(3) and 78u-4(a)(3). The bonding requirement serves to rein in perceived abuses by attorneys.

However, the Act itself omits any express discussion of the division of sanctions between attorney and client. The 1993 amendment to Rule 11(2)(A) provided that "Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2)." Section (b)(2) deals with the legal validity of claims, defenses, and other legal contentions. The drafters of the 1993 amendment felt that only the lawyer should be responsible for judging the legal sufficiency of a claim or responsive pleading. See 146 F.R.D. at 589. The Act contains no similar provision and, because it arguably rejects all of the sections of Rule 11 other than 11(b), the absence of any specific provision is troubling. The Act does provide that the court must find that a "party or an attorney" violated the rule and the court shall impose sanctions on "such party or attorney." 15 U.S.C.

§§ 77z-1 (c)(2) and 78u-4(c)(2). This disjunction leaves open the argument that a represented party should not be sanctioned if the source of the Rule 11 violation is a lack of legal — as opposed to factual — support. Under those circumstances, any sanctions should be borne by the attorney. See de la Fuente v. DCI Telecomms., Inc., 259 F. Supp. 2d 250, 273 (S.D.N.Y.), aff'd in part and remanded in part, 82 Fed. Appx. 723 (2d Cir. 2003) (holding that individual plaintiffs did not violate Rule 11 where "[i]t was plaintiffs' counsel's responsibility to make a reasonable inquiry into the relevant statute of limitations").

The Act also fails to address the Rule 11 liabilities of law firms. In Pavelic & LeFlore v. Marvel Entm't Group, 493 U.S. 120 (1989), the Supreme Court held that under the pre-1993 version of Rule 11, only the signer of the pleading could be held responsible — and not that attorney's law firm. The 1993 amendment changed that rule by providing specifically:

> the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

Rule 11(c). And,

> [a]bsent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates and employees.

Rule 11(c)(1)(A).

In contrast, the Act provides that the court "shall include in the record specific findings regarding compliance by each party and each attorney" (no mention of law firm) and "shall impose sanctions on such party or attorney" (again no mention of law firm). 15 U.S.C. §§ 77z-1(c)(1), (2) and 78u-4(c)(1), (2). It is therefore possible that the kind of strict statutory construction that led to the result in Pavelic would lead to a similar result under the Act. But see Simon DeBartolo Group, LP v. Richard E. Jacobs Group, Inc., 186 F.3d 157, 166-178 (2d Cir. 1999) (affirming sanctions against law firm under the Act). Only the individual attorney who signs or "later advocates" the pleading or paper may be

sanctioned. Lead class counsel may wish to avoid having junior attorneys signing papers or "later advocating" positions to avoid subjecting them to the onus of sanctions.

The changes in the Rule 11 procedure and in the scope of the discretion to regulate litigants and parties in court that are reflected in the Private Securities Litigation Reform Act have been adopted by Congress not to achieve any important change in judicial administration, but to discourage a particular type of substantive claim. By ignoring the need for uniform rules and focusing exclusively on discouraging securities claims, the Act has seriously undermined the principle of uniform application of the Rules of Civil Procedure and requires specialized knowledge of securities law practitioners on their Rule 11 obligations.

III. Text of Rule 11

This is the text of Rule 11, as amended effective December 1, 1993:

> Rule 11. Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions
>
> **(a) Signature.** Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.
>
> **(b) Representations to Court.** By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, —

> **(1)** it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> **(2)** the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> **(3)** the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> **(4)** the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

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

> **(1) How Initiated.**
>
> > **(A) By Motion.** A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted,

the court may award to the party prevailing on the motion the reasonable expenses and attorneys' fees incurred in presenting or opposing the motion.

Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

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

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

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

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

> **(3) Order.** When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.
>
> **(d) Inapplicability to Discovery.** Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.

IV. Rule 11(a)

> ***(a) Signature.*** *Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.*

A. What Must Be Certified: The Reach of Rule 11

Rule 11 applies to written documents, whether containing statements made under oath or not, that a party or its attorneys submit to a federal court. The rule does not, however, apply to assertions of law or fact made orally before the court, except when a person "later advocates" orally an assertion that was first made in a written document. As a result, the rule does not reach statements a party or attorney may make in arguing an oral motion. The Advisory Committee explains this distinction by noting that, in speaking to matters arising for the first time in an oral presentation to the court, "counsel may make statements that would not have been made if there had been more time for study or reflection." 1993 Advisory Committee Notes.

See Section IX for a fuller description of the reach of Rule 11.

B. Who Must Certify

If a party is represented by counsel, at least one attorney of record must sign each paper to which Rule 11 applies. Moreover, the attorney must sign the paper in her individual name, rather than with the name of a law firm or with the party's name. If the party is not represented by counsel, then the party must sign each paper. More than one court has held that, because a corporation may appear in the federal courts only through licensed counsel, the signature of an officer or director of a corporation is not sufficient to constitute a signature under 11(a). See Tinsley v. Union Planters Corp., No. 02-2606-Ma/A, 2002 U.S. Dist. LEXIS 26254, at *5 (W.D. Tenn. Aug. 7, 2002); Operating Engineers Local 139 Health Benefit Fund v. Rawson Plumbing, Inc., 130 F. Supp. 2d 1022, 1024 (E.D. Wis. 2001).

C. Required Statements

In addition to affixing a signature, the person signing each paper must also provide her address and telephone number, if any. Although by signing the paper, the signer certifies that the paper meets the reasonable inquiry requirements of Rule 11(b), the signer is not required to include a separate statement to that effect in the document.

D. Consequences of Not Certifying

If a party or attorney does not sign a paper, the court must strike the paper, unless the party or attorney corrects the deficiency promptly after it is called to the party's or attorney's attention. This requirement is designed to ensure that the substantive, reasonable inquiry requirements of Rule 11 apply to all papers. Rather than impose the substantive requirements directly, the rule requires that every paper be signed, and then makes adherence to the substantive requirements a part of signing the paper.

V. Rule 11(b)

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

A. Contents of the Certificate

Rule 11 provides that an attorney's or a party's signature on a pleading, motion, or other paper constitutes a certificate that (1) it is not "presented for any improper purpose," such as harassment, delay, or an unnecessary increase in cost; (2) it is "warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law"; (3) the 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) any factual denials "are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief." Rule 11(b).

B. Objective Standard

The 1983 rule rejected the older subjective standard and required courts to analyze whether attorneys and parties had made a reasonable inquiry. This was to be tested by objective standards. The 1993 amendment retained this requirement, changing the language slightly. Now the certificate represents to the court that the attorney or party has conducted "an inquiry reasonable under the circumstances." Rule 11(b).

1. Frivolousness Test

Even before the 1993 amendment introduced the word "frivolous" to the text of Rule 11, courts often employed that term when determining the appropriateness of sanctions. See, e.g., Rush v. McDonald's Corp., 966 F.2d 1104, 1122 n.67 (7th Cir. 1992) ("'An attorney takes a frivolous position if he fails to make a reasonable inquiry into facts (which later prove false) or takes a position unwarranted by existing law or a good faith argument for its modification.'") (quoting Magnus Elecs., Inc. v. Masco Corp., 871 F.2d 626, 629 (7th Cir. 1989)).

The 1993 amendments codified this rule: a pleading, motion, or paper violates Rule 11 if it is frivolous, legally unreasonable, or factually without foundation, even though not signed in subjective bad faith. Prof'l Mgmt. Assocs. v. KPMG LLP, 345 F.3d 1030, 1033 (8th Cir. 2003) (finding that court abused its discretion by refusing to sanction a plaintiff and his attorney for filing and maintaining a frivolous lawsuit asserting claims barred by res judicata); Corroon v. Reeve, 258 F.3d 86, 92 (2d Cir. 2001) ("Rule 11 is violated when it is clear under existing precedents that a pleading has no chance of success and there is no reasonable argument to extend, modify, or reverse the law as it stands."); Chaudry v. Gallerizzo, 174 F.3d 394, 410-11 (4th Cir.) (sanctions upheld where trial court determined that plaintiffs brought claims against debt collectors based on evidence that no "rational person" would have believed supported their claim), cert. denied, 120 S. Ct. 215 (1999); Ind. Risk Ins. v. M.A.N. Gutehoffnungshutte GmbH, 141 F.3d 1434, 1448 (11th Cir. 1998) (frivolousness defined as having

"no factual and legal support in the record"), cert. denied, 525 U.S. 1068 (1999); Montrose Chem. Corp. of Cal. v. American Motorists Ins. Co., 117 F.3d 1128, 1133-34 (9th Cir. 1997) (reversing award of sanctions because assertion of subject matter jurisdiction did not "completely lack" a factual foundation); Gap, Inc. v. Stone Int'l Trading Inc., 169 F.R.D. 584, 589-92 (S.D.N.Y.) (no sanctions awarded for case voluntarily dismissed by plaintiff since objectively reasonable factual basis existed for claims), aff'd, 125 F.3d 845 (2d Cir. 1997). Cf. Four Star Financial Serv., LLC v. Commonwealth Man. Assoc., 166 F. Supp. 2d 805, 809 (S.D.N.Y. 2001) ("the requirement that the facts alleged have evidentiary support requires, at a minimum, that there is reason to believe that, when all the facts are known, the Court will find they support the relief requested"). The Supreme Court has clarified that an argument is not frivolous, even though "foreclosed by circuit precedent," where the issue has "divided the District Courts and its answer [is] not so clear as to make [the] position frivolous." McKnight v. Gen. Motors Corp., 511 U.S. 659, 660 (1994).

In complex areas, the standard for frivolity may be more lenient. See Thomas v. City of Baxter Springs, No. 04-2257 JWL, 04-2256 JWL, 2006 U.S. Dist. LEXIS 11304, at *4 (D. Kan. March 10, 2006) ("The court must allow counsel some latitude in testing the uncertain contours of the law — particularly in the dynamic realm of § 1983 liability — without facing the wrath of sanctions."); M,G&B Servs., Inc. v. Buras, No. 04-1512 c/w 04-1509, 2004 U.S. Dist. LEXIS 18268, at *4 (E.D. La. Sept. 9, 2004) (denying sanctions motion; "defendants' argument for removal on the basis of federal preemption presented a less than clear-cut issue involving a complex area of law."); Divane v. Krull Elec. Co., No. 95 C 2075, 1995 U.S. Dist. LEXIS 13270, at *16-17 (N.D. Ill. Sept. 13, 1995) (denying sanctions motion because of complexity of ERISA, even though pleadings lacked "lucidity"); Salzmann v. Prudential Sec. Inc., No. 91 Civ. 4253, 1994 U.S. Dist. LEXIS 6377, at *42 n.12 (S.D.N.Y. May 13, 1994) (court denied sanctions, giving plaintiffs "benefit of doubt" due to complexity of issues, despite fact that allegations were groundless); Kearns v. Orr, No. 93-2377, 1994 U.S. Dist. LEXIS 5870, at *28 (D. Kan. Apr. 20, 1994) (pleading not frivolous "especially in light of the complicated issues involved"). In addition, at least one court has declined on "equitable grounds" to award the opposing party costs and fees for opposing a frivolous motion, although the motion came "dangerously close to sanctionable conduct." Chelcher v. Spider Staging Corp., 895 F. Supp. 95, 96-97 (D.V.I. 1995). The court noted that the opposing party, who was "the

one party most responsible for [the plaintiff's] injuries" already "escaped potentially substantial liability" in the case by obtaining a release from the plaintiff for the injuries. Id. cf. Association of Minority Contractors and Suppliers, Inc. v. Halliday Properties, Inc., No. 97-274, 1998 U.S. Dist. LEXIS 12596, at *20 (E.D. Pa. Aug. 13, 1998) (refusing to impose sanctions in part because of the potential to chill litigation where bid-rigging allegations involved misuse of public funds).

On the other hand, courts may be more willing to find that certain types of actions are frivolous. In Hicks v. Bexar County, 973 F. Supp. 653 (W.D. Tex. 1997), aff'd without op., 137 F.3d 1352 (5th Cir. 1998), for example, the court held that sanctions were especially appropriate against a plaintiff that had frivolously assailed judges in a Section 1983 lawsuit. Id. at 688. "[S]uch lawsuits are not only an affront to the dignity of the courts but also an assault upon the integrity of our judicial system." Id. See also Katzman v. Victoria's Secret Catalogue, 167 F.R.D. 649, 660 (S.D.N.Y. 1996) (sanctions are especially appropriate for bringing frivolous RICO claims, given the stigmatizing effect on named defendants), aff'd, 113 F.3d 1229 (2d Cir. 1997).

2. Purpose of Objective Test

The primary purpose of Rule 11 is to deter unnecessary complaints and other filings. 1993 Advisory Committee Notes. See also Fries v. Helsper, 146 F.3d 452, 458 (7th Cir. 1998), cert. denied, 525 U.S. 930 (1998). This is consistent with prior law under the 1983 rule. See Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990); Pavelic & LeFlore v. Marvel Entm't Group, 493 U.S. 120 (1989); Harlyn Sales Corp. Profit Sharing Plan v. Kemper Fin. Servs., 9 F.3d 1263, 1270 (7th Cir. 1993); White v. Gen. Motors Corp., 908 F.2d 675, 683 (10th Cir. 1990) (sanctions serve many purposes — deterrence, punishment, compensation, streamlining dockets — but deterrence is the primary goal). Successful deterrence works for the benefit of the judicial system as much as of the defendants. "Rule 11 defines a new form of legal malpractice. . . . In the ordinary case of legal malpractice the victim is the lawyer's client. . . . In the Rule 11 setting the victims are the lawyer's adversary, other litigants in the court's queue, and the court itself." Hays v. Sony Corp. of Am., 847 F.2d 412, 418 (7th Cir. 1988). See Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073, 1077 (7th Cir. 1987) ("Unnecessary complaints sap the time of judges, forcing parties with substantial disputes to wait in a longer queue and condemning them

to receive less judicial attention when their cases finally are heard."); see also In re Yagman, 796 F.2d 1165, 1182 (9th Cir. 1986); Westmoreland v. CBS, Inc., 770 F.2d 1168, 1180 (D.C. Cir. 1985); Quiros v. Hernandez Colon, 800 F.2d 1, 3 (1st Cir. 1986) (Rule 11 deters filing of meritless claims and compensates those forced to respond).

C. Reasonable Inquiry

1. Affirmative Duty of Inquiry

The 1993 rule imposes an affirmative duty to investigate just as the 1983 Rule 11 did. See Holgate v. Baldwin, 425 F.3d 671, 675-77 (9th Cir. 2005) (an attorney must conduct an objectively reasonable inquiry into the facts and law to make sure the complaint is well-founded); U.S. Bank Nat. Ass'n, N.D. v. Sullivan-Moore, 406 F.3d 465, 470 (7th Cir. 2005) (Rule 11 requires counsel to read and consider relevant court documents before litigating); Coonts v. Potts, 316 F.3d 745, 753 (8th Cir. 2003) ("To constitute a reasonable inquiry, the prefiling investigation must uncover a factual basis for the plaintiff's allegations, as well as a legal basis."); Battles v. City of Ft. Myers, 127 F.3d 1298, 1300 (11th Cir. 1997) (attorney for Section 1983 plaintiff sanctioned for failing to conduct reasonable factual investigation); Worldwide Primates, Inc. v. McGreal, 87 F.3d 1252, 1254 (11th Cir. 1996) (attorney sanctioned for failing to conduct any independent inquiry into whether his client had been damaged by the alleged tortious interference with a business relationship); Land v. Chicago Truck Drivers, 25 F.3d 509, 517 (7th Cir. 1994) (reversed denial of sanctions where plaintiff failed to conduct adequate pre-filing inquiry into law prior to filing constitutional challenge to ERISA statute; plaintiff provided no good faith argument for "color of state law" claim); In re Ulmer, 19 F.3d 234, 236 (5th Cir. 1994) (attorney failed to conduct reasonable pre-filing inquiry where statute clearly prohibited filing Chapter 7 case within 180 days of voluntarily dismissing Chapter 13 case; arguments did not embody existing legal principles or a good faith argument for the extension, modification, or reversal of existing law). As one court has stated, "[t]he day is past when our notice pleading practice . . . [and] liberal discovery rules invited the federal practitioner to file suit first and find out later whether he had a case or not." Hale v. Harney, 786 F.2d 688, 692 (5th Cir. 1986); see also Stewart v. RCA Corp., 790 F.2d 624, 633 (7th Cir. 1986) ("Rule 11 requires lawyers to think first and file later, on pain of personal liability."); Lieb v. Topstone Indus., Inc., 788 F.2d 151, 157 (3d Cir. 1986) (Rule 11 "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.'"); Bernal v. All American Investment Realty, Inc., 479 F. Supp. 2d 1291, 1326-27 (S.D. Fla. 2007) (attorney has affirmative duty under federal rules to conduct reasonable inquiry into validity of pleading before it is signed); R & A Small Engine, Inc. v. Midwest Stihl, Inc., 471 F. Supp. 2d 977, 978-79 (D. Minn. 2007) (to satisfy the requirements of Rule 11, an attorney is obligated to conduct a reasonable inquiry into the factual and legal basis for a claim); Willis v. City of Oakland, 231 F.R.D. 597, 598 (N.D. Cal. 2005) (attorney did not conduct an adequate investigation before filing complaint and was liable for Rule 11 sanctions); Edwards v. Fiddes & Son, Ltd., 227 F.R.D. 19, 23-24 (D. Me. 2005) (an attorney has an affirmative duty to inquire into the facts and law before filing a pleading; the inquiry must be reasonable under the circumstances); Cameron v. United States, CV-S-02-1421, 2003 U.S. Dist. LEXIS 13157, slip. op. at *3-4 (D. Nev. May 15, 2003) (sanctions imposed where "[a] simple glance at the Declaratory Judgment Act, . . ., would have revealed that Plaintiff's claims were prohibited under the federal tax exception"); Silberman v. Innovation Luggage, Inc., 01 Civ. 7109 (GEL), 2003 U.S. Dist. LEXIS 5420, at *44-46 (S.D.N.Y. Apr. 3, 2003) (sanctions imposed where plaintiff asserted claims under Swiss law, the basis for which were completely disavowed by plaintiff's own experts); Soler v. Puerto Rico Tel. Co., 230 F. Supp. 2d 232, 238 (D.P.R. 2002) (sanctions imposed where plaintiff failed to conduct objectively reasonable inquiry into citizenship of defendants for purposes of diversity jurisdiction); Aspacher v. Rosenthal Collins Group, No. 00 C 7520, 2001 U.S. Dist. LEXIS 24919, at *24 (N.D. Ill. Aug. 14, 2001) (sanctions imposed where plaintiff failed to conduct even a cursory review of the law of res judicata before "re-filing" his previously dismissed case); Fobare v. Weiss, Neuren & Neuren, Nos. 99-CV-1539, 99-CV-1452, 99-CV-2007, 2000 U.S. Dist. LEXIS 6905, at *2-3 (N.D.N.Y. May 16, 2000) (sanctions appropriate where attorney engaged in the "cookie-cutter" practice of law, filing form complaints without conducting inquiry into their validity with respect to each client); Cohen v. Kurtzman, 45 F. Supp. 2d 423, 436-38 (D.N.J. 1999) (sanctions appropriate where plaintiff and attorney failed to conduct even a cursory legal or factual investigation regarding domicile of limited partnership for purposes of diversity jurisdiction); Sinnerard v. Ford Motor Co., No. Civ. A. 95-2708, 1996 U.S. Dist. LEXIS 13995, at *7-8 (E.D. Pa. Sept. 23, 1996) (sanctions appropriate where attorney failed to inquire whether client had retained title to vehicle before bringing Lemon Law claim, despite client's query whether retention of title was

necessary); Hallmark Ins. Adm'rs, Inc. v. Colonial Penn Life Ins. Co., No. 87 C 1770, 1994 U.S. Dist. LEXIS 2516, at *5 (N.D. Ill. Mar. 2, 1994) (court sanctioned defense counsel for making false statement in motion that defendant had obtained a bond in the amount of judgment pending the appeal, where a reasonable inquiry would have revealed that no bond was secured). But cf. FDIC v. Elefant, 790 F.2d 661, 667 (7th Cir. 1986) ("Fees are awarded . . . only when the failure to investigate leads to the taking of an objectively unreasonable position.").

However, courts agree that attorneys' inquiry into the legal and factual basis of their claims need only be reasonable under the circumstances. See Vernon v. Port Authority of N.Y., 95 Civ. 4594 (PKL), 2003 U.S. Dist. LEXIS 9566, at *17-18 (S.D.N.Y. June 6, 2003) (declining to award sanctions on attorney for misstating status of discovery record where attorney was new to case, prior attorney's files had been destroyed, and information was not apparent from record); Zenith Elecs. Corp. v. Exzec, Inc., No. 93 C 5041, 1997 U.S. Dist. LEXIS 20762, at *38-41 (N.D. Ill. Dec. 24, 1997) (use of "information and belief" pleading not sanctionable at early stages of litigation where facts are complex), aff'd, 182 F.3d 1340 (Fed. Cir. 1999).

In the context of patent infringement claims, where claimants may have very limited access to information prior to conducting discovery, courts will evaluate a claimant's pre-filing investigation in light of the evidence available at the time of filing. See Intamin, Ltd. v. Magnetar Techs. Corp., 483 F.3d 1328, 1338 (Fed. Cir. 2007); Hoffman-LaRoche, Inc. v. Invamed, Inc., 213 F.3d 1359, 1365 (Fed. Cir. 2000). In Intamin, the Federal Circuit upheld a district court's order refusing to impose Rule 11 sanctions, even though a plaintiff did not deconstruct a sample of an allegedly infringing product and did not conduct any further testing prior to filing its patent infringement claim. The Court explained that, "the technology presented the patentee with unreasonable obstacles to any effort to obtain a sample of [defendant's] amusement ride brake system, let alone the difficulty of opening the [metal] casing." 483 F.3d at 1338. Hence, the plaintiff conducted sufficient pre-filing investigation by reviewing publicly available documents, inspecting the product visually, taking photos, and reviewing those photos with experts. The Federal Circuit reached a similar result in Hoffman-LaRoche. 213 F.3d at 1365. In Hoffman-LaRoche, the plaintiffs sought unsuccessfully to determine whether their patent was infringed through reverse engineering and by asking the defendants to disclose the method by which

their product was made. Id. at 1363. When that failed, the plaintiffs filed their complaint on information and belief. The court held that the plaintiffs conducted a pre-filing investigation sufficient under Rule 11, reasoning that "it is difficult to image what else [plaintiffs] could have done to obtain facts relating to [defendant's] alleged infringement of their process patents." Id. at 1364.

Nevertheless, the Federal Circuit has held that a claimant's attorney must perform an independent claim construction analysis and infringement analysis, and may not merely rely on his or her client's review of the technology and review of publicly available information. View Eng'g, Inc. v. Robotic Vision Sys., Inc., 208 F.3d 981, 985-86 (Fed. Cir. 2000); Pellegrini v. Analog Devices, Inc., No. 02-11562-RWZ, 2006 U.S. Dist. LEXIS 726, at *7-11 (D. Mass. Jan. 11, 2006) (dismissing a patent infringement claim as a Rule 11 sanction, where plaintiff's pre-filing investigation relied primarily on a picture of the accused product, taken from an advertisement); Verve, LLC v. Hypercom Corp., No. CV-05-0365-PHX-FJM, 2006 U.S. Dist. LEXIS 58398, at *11-13 (D. Ariz. Aug. 16, 2006) (no adequate pre-filing investigation was performed where plaintiff never obtained a sample of an accused product and simply stated in conclusory terms that its counsel "conducted an infringement analysis," without producing any written documentation of any pre-filing infringement studies).

However, an infringement analysis "can simply consist of a good faith, informed comparison of the claims of a patent against the accused subject matter." Q-Pharma, Inc. v. Andrew Jergens Co., 360 F.3d 1295, 1302 (Fed. Cir. 2004) (a patent infringement claim was supported by sufficient factual basis where plaintiff obtained a sample of the accused product, reviewed statements made in the advertising and labeling of the accused product, and, "most importantly, compared the claims of the patent with the accused product"). See also Matweld, Inc. v. Portaco, Inc., Civ. No. 04-3177 (JRT/RLE), 2006 U.S. Dist. LEXIS 60027, at *8-9 (D. Minn. Aug. 23. 2006) (plaintiff met its pre-filing obligations by providing a catalogue page depicting an accused product to its counsel, who before filing requested, received, and analyzed technical drawings from the alleged infringer). The district court should evaluate the adequacy of the attorney's pre-filing infringement analysis in light of the claim construction the attorney proposes (so long as that construction is nonfrivolous), rather than the claim construction that ultimately prevails. See Antonious v. Spalding & Eventio Cos., 275 F.3d 1066, 1077 (Fed. Cir. 2002).

The pre-filing inquiry also includes the obligation to investigate affirmative defenses. See Tura v. Sherwin-Williams Co., Nos. 90-3419, 90-3445, 1991 U.S. App. LEXIS 11792, at *8 (6th Cir. May 28, 1991); White v. Gen. Motors Corp., 908 F.2d 675, 682 (10th Cir. 1990), cert. denied, 498 U.S. 1069 (1991); Profile Publishing & Management Corp. APS v. Musicmaker.com, Inc., 242 F. Supp. 2d 363, 2003 U.S. Dist. LEXIS 991, at *11-12 (S.D.N.Y. Jan. 24, 2003) (awarding sanctions where defendant's counsel failed to make reasonable inquiry into affirmative defenses). The inquiry, however, does not have to cover all possible affirmative defenses, just those that are "obvious." Tura, 1991 U.S. App. LEXIS 11792, at *8; see also In re Edmonds, 924 F.2d 176, 181-82 (10th Cir. 1991) (under Bankruptcy Rule 9011, analogous to Rule 11, colorable arguments against applicability of affirmative defenses sufficient to avoid sanctions); Thompson v. United Transp. Union, 167 F. Supp. 2d 1254, 1260-61 (D. Kan. 2001) (with regard to Rule 11 certification requirement, part of a reasonable attorney's prefiling investigation must include determining whether any obvious affirmative defenses bar the case); cf. Gartenbaum v. Beth Israel Med. Ctr., 26 F. Supp. 2d 645, 647-49 (S.D.N.Y. 1998) (sanctioning attorney in Title VII case where plaintiff could make out a prima facie case but court found no factual support from which intent to discriminate could be inferred). For example, courts have found that sanctions are not warranted if the potential affirmative defense is factually complex and all necessary facts are not available to the plaintiff. See In re Berger Indus., Inc., 298 B.R. 37, 42 (Bankr. E.D.N.Y. 2003) (interpreting Bankruptcy Rule 9011).

One empirical study suggests that Rule 11 does have an impact on frivolous filings by causing a substantial number of attorneys to increase the amount of pre-filing fact and law inquiry. Gerald F. Hess, Rule 11 Practice in Federal and State Court: An Empirical, Comparative Study, 75 Marq. L. Rev. 313, 328 (1992). However, critics of the pre-1993 Rule 11 also noted that the threat of sanctions can chill the filing of legitimate lawsuits. For instance, commentators have noted that Rule 11, before the 1993 amendment, had a disproportionate impact on civil rights plaintiffs. Carl Tobias, Civil Rights Plaintiffs and the Proposed Revision of Rule 11, 77 Iowa L. Rev. 1775 (1992). In response to worries about chilling legitimate legal activity, the 1993 rule's drafters made sanctions discretionary with the court; however, the 1993 rule retains the objective standard and codifies the "frivolous" test for determining when the objective standard is violated.

In addition to pre-filing inquiry, under the current rule an attorney has a continuing duty to reassess the validity of his or her client's claim. The Advisory Committee Notes to the 1993 Amendment state the revision "emphasizes the duty of candor by subjecting litigants to potential sanctions for insisting upon a provision after it is no longer tenable." In that connection, the First Circuit rejected an attorney's argument that imposing sanctions for signing a case statement that lacked reasonable inquiry filed subsequent to a complaint would be tantamount to requiring a "continuing obligation" in contravention of First Circuit and other federal precedent. O'Ferral v. Trebol Motors Corp., 45 F.3d 561, 563 (1st Cir. 1995). The court said that by filing the case statement, the attorney "effectively reasserted the position taken in the complaint." Id. While the court characterized its analysis as avoiding the "continuing obligation" question, it noted that one sentence of Rule 11(b) "concerns 'later advocating' an earlier filed document." Id. In Rodriguez v. Banco Cent., 155 F.R.D. 403, 407 (D.P.R. 1994), the court held that the plaintiffs' attorneys earned sanctions by "continuing to litigate [the] case when it became clear that any viable legal theory . . . had long before been foregone" as to some of the defendants and "[t]he remaining legal claim had no basis in fact." The court also noted that because at earlier stages, the court had gone "out of its way to allow the plaintiffs the opportunity to try their case," the court's accommodation "made it incumbent upon plaintiffs to examine their evidence honestly." Id. See also Int'l Union v. Aguirre, 410 F.3d 297, 304 (6th Cir. 2005) (sanction imposed under pre-1993 Rule 11 for pursuing claim after discovery had revealed that it was factually meritless, despite fact that plaintiff had withstood a motion to dismiss); Ideal Instrs., Inc. v. Rivard Instrs., Inc., 243 F.R.D. 322, 342 (N.D. Iowa 2007) (duty of a party to assess the evidentiary viability of a claim under Rule 11 is not measured solely at the time the claim was valid, but is a continuing one); Gambello v. Time Warner Communications, Inc., 186 F. Supp. 2d 209 (S.D.N.Y. 2002) (sanctions appropriate where a defendant persisted in argument flatly contradicted by plaintiff's deposition testimony); Perry v. S.Z. Rest. Corp., 45 F. Supp. 2d 272, 274-75 (S.D.N.Y.) (sanctions appropriate for pursuing claim that had survived two summary judgment motions; information plaintiffs received from defendants would have prompted an objectively reasonable attorney to make a more thorough investigation of his client), appeal dismissed, 201 F.3d 432 (2d Cir. 1999); In re Diet Drugs Prods. Liab. Litig., Civ. No. 98-20070, 1999 U.S. Dist. LEXIS 7727, at *7-8 (E.D. Pa. May 19, 1999) (sanctions warranted where plaintiff failed to withdraw claim against particular defendant after it was clear that defendant had

nothing to do with claim). But see Corley v. Rosewood Care Ctr., Inc., 388 F.3d 990, 1013-14 (7th Cir. 2004) ("The focus in Rule 11 sanctions is on what counsel knew at the time the complaint was filed, not what subsequently was revealed in discovery."); Fleming v. United States, 211 F.R.D. 455, 456 (M.D. Fla. June 12, 2002) ("[T[he Eleventh Circuit has determined that the obligation imposed by Rule 11 is not seen as continuing, as long as the complaint was reasonably interposed in the first instance.").

Courts may be more lenient toward an attorney who pursues frivolous claims if the attorney attempts to withdraw upon discovering that the client's claims lack evidentiary support. White v. Camden City Bd. of Ed., 251 F. Supp. 2d 1242, 1249 (D.N.J. 2003). In White, the court found that plaintiff's counsel failed to adequately investigate the basis of his client's age discrimination claims prior to filing papers on her behalf. Id. However, the court declined to impose sanctions because, upon discovering the weaknesses of the case, counsel attempted to settle the claims, but his client refused. When that effort failed, counsel attempted to withdraw from the case, but the court denied his request. Thus, the court found that although it was a "close call," sanctions under Rule 11 for pursuing plaintiff's lawsuit were not appropriate because counsel "ha[d] already suffered the pains of accepting a case and representing a client without adequately investigating the evidence supporting the allegations." Id.

2. Requirement to Specifically Identify Lack of Evidentiary Support

Under the 1993 rule, plaintiffs are required to specifically state when they do not presently have evidentiary support for an asserted fact but are likely to obtain such support after "further investigation or discovery." Rule 11(b)(3). Likewise, defendants must specifically identify when their denials of facts are based on a lack of information or belief reasonable under the circumstances. Rule 11(b)(4).

The 1993 Advisory Committee Notes also make clear that this requirement allows plaintiffs to plead allegations on "information and belief," but only when an "inquiry reasonable under the circumstances" supports that belief but does not yield the required evidentiary support. See Zuk v. Eastern Pa. Psychiatric Inst. of the Med. College of Pa., 103 F.3d 294, 299 (3d Cir. 1996) (affirming Rule 11 sanctions where, although allegations were made on

information and belief, inquiry could have readily resolved the "obvious" statute of limitations issue to which the allegations pertained); Zenith Elecs. Corp. v. Exzec, Inc., No. 93 C 5041, 1997 U.S. Dist. LEXIS 20762, at *40 (N.D. Ill. Dec. 24, 1997) ("Given the complexity of the alleged facts of this case, . . . , this court finds that the use of 'information and belief' pleading is sufficient at this stage for Rule 11 purposes."), aff'd 182 F.3d 1340 (Fed. Cir. 1999). Moreover, once additional time allows sufficient inquiry to uncover evidence, a plaintiff must either shift from "information and belief" to a factually grounded allegation or refrain altogether from later advocating the allegation.

3. Different Language for Factual Contentions and Denials

Under the 1983 rule, both affirmative factual contentions and denials were held to a "well grounded in fact" standard. The 1993 amendment made three changes to this standard. First, it adopted different language for factual contentions and for factual denials. Second, it abandoned the phrase "well grounded in fact" for both categories, adopting instead the language requiring that the factual allegations have "evidentiary support" for contentions and are "warranted on the evidence" for denials. Third, as noted above, the amendment required litigants to specifically identify those contentions and denials which require further investigation.

The 1993 Advisory Committee Notes explain the different language for contentions and denials, noting that a party may reasonably deny an allegation if, after reasonable inquiry, it has no access to information about the allegation. Alternatively, a party might reasonably question the credibility of the plaintiff's evidence without having in hand its own evidence to affirmatively refute the allegation. Thus, the rule requires denials to be "warranted on the evidence" rather than requiring "evidentiary support."

4. Reasonableness of Inquiry

The 1993 rule clarifies that the reasonableness of an investigation must be assessed in light of the circumstances of each case, as the rule requires "an inquiry reasonable under the circumstances." Rule 11(b). See also In re Yagman, 796 F.2d 1165, 1182 (9th Cir. 1986) (evaluating investigation, under 1983 rule, in light of circumstances).

At a minimum, some affirmative investigation on the part of the attorney is required. See Christian v. Mattel, Inc., 286 F.3d 1118, 1129 (9th Cir. 2002) (sanctions imposed where attorney could have obtained needed copyright information simply by examining Barbie doll heads); Terran v. Kaplan, 109 F.3d 1428, 1435 n.7 (9th Cir. 1997) (sanctionable to claim mental and emotional stress-related damages without first interviewing plaintiff's doctor or reviewing medical records); Durr v. Intercounty Title Co., 14 F.3d 1183, 1188 (7th Cir. 1994) (affirming district court's sanction against attorney where pre-filing inquiry into claims was inadequate because, although class claims were asserted, there were no other injured plaintiffs or evidence to show that plaintiff believed there were other plaintiffs); Bolivar v. Pocklington, 975 F.2d 28, 32 (1st Cir. 1992) (upholding district court's imposition of sanctions where reasonable inquiry would have revealed that plaintiff-shareholder had no personal cause of action for injury to the corporation); Hartz v. Friedman, 919 F.2d 469, 475 (7th Cir. 1990) (affirming sanction against counsel for failing to make reasonable inquiry into applicable law regarding RICO claim before filing); Saltz v. City of N.Y., 129 F. Supp. 2d 642 (S.D.N.Y. 2001) (sanctions awarded where attorney failed to investigate his client's § 1983 claim during the period of over one year between when he was first retained and when he filed complaint); Boyce v. Microsoft Corp., No. 92 C 7075, 1994 U.S. Dist. LEXIS 629, at *12 (N.D. Ill. Jan. 25, 1994) (attorney sanctioned for failing to inquire as to whether client signed a non-disclosure agreement and for failing to provide sufficient legal authority for claim); Levy v. Aaron Faber, Inc., 148 F.R.D. 114 (S.D.N.Y. 1993) (attorneys' failure to cite any relevant case law showing why claims were not barred by statute of limitations, why plaintiff's lack of diligence should be excused, or why RICO claims could be supported by conclusory pleading demonstrated that counsel "failed to conduct the requisite inquiry into the facts and the law"); Williams v. Balcor Pension Investors, 150 F.R.D. 109 (N.D. Ill. 1993) (sanctions awarded where attorneys "failed to make reasonable inquiry to determine whether the crux of plaintiffs' claim was factually and legally tenable"); Greenfield v. United States Healthcare, 146 F.R.D. 118 (E.D. Pa. 1993) (Rule 11 violated by plaintiff class action attorneys who made no inquiry into whether named party could adequately protect interests of class and who relied on Wall Street Journal article without independent inquiry), aff'd sub nom. Garr v. United States Healthcare, 22 F.3d 1274 (3d Cir. 1994); Estate of Calloway v. Marvel Entm't Group, 138 F.R.D. 646 (S.D.N.Y. 1991) (where client who was mentally ill claimed his signature was forged, his attorney was sanctioned for pursuing claim

on basis of such an untrustworthy source), aff'd in part and vacated in part, 9 F.3d 237 (2d Cir. 1993); Ierardi v. Lorillard Inc., 90-7049, 1991 U.S. Dist. LEXIS 8855 at *10 (E.D. Pa. June 28, 1991) (sanctions awarded where court found that plaintiffs, if they had researched the summary judgment standard, would have realized that the court was not permitted to assess credibility on a motion for summary judgment); Thornton v. Acme Steel Co., No. 88 C 3658, 1989 U.S. Dist. LEXIS 9046, at *7 (S.D.N.Y. Aug. 2, 1989) (counsel sanctioned for failure to question client concerning key element of claim, which would have revealed total lack of factual basis for allegations included in the complaint). An attorney's post-filing actions may be considered in determining whether the attorney failed to conduct a reasonable inquiry prior to filing complaint. Jones v. Int'l Riding Helmets, Ltd., 49 F.3d 692, 695-96 (11th Cir. 1995).

As in the case of the 1983 rule, a reasonable inquiry does not require, however, "that an investigation into the facts be carried to the point of absolute certainty." Forbes v. Eagleson, 228 F.3d 471, 488 (3d Cir. 2000) (internal citations omitted). See also Greenberg v. Sala, 822 F.2d 882, 887 (9th Cir. 1987) ("We hold that a complaint based upon a reasonable inquiry should not be found to be factually frivolous unless some clear authority or a litigant's own clear admission erases the factual underpinning from some essential element of the litigant's pleading."); Agron, Inc. v. Lin, No. CV 03-05872 MMM (JWJx), 2004 U.S. Dist. LEXIS 26605, at *45 (C.D. Cal. March 16, 2004) ("Rule 11 does not require [plaintiff] to show, upon the filing of a complaint, that it has evidence to make out a prima facie case."). The 1993 rule may also incorporate into the concept of "reasonable under the circumstances" the cost-benefit analysis reflected in Nemmers v. United States, 795 F.2d 628, 632 (7th Cir. 1986). See Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073, 1083 (7th Cir. 1987) (Rule 11 does not require steps that are not cost-justified or unlikely to produce results); Cambridge Prods., Ltd. v. Penn Nutrients, Inc., 962 F.2d 1048, 1050 (Fed. Cir. 1992) (upholding denial of sanctions where attorney undertook a reasonable pre-filing inquiry, where "[w]ithout the aid of discovery, any further information was not practicably obtainable"); In re Excello Press, Inc., 967 F.2d 1109 (7th Cir. 1992) (where plaintiff's attorney did not have access to information necessary to assess the strength of a successfully-asserted defense, attorney's pre-filing inquiry was reasonable); Rachel v. Banana Republic, Inc., 831 F.2d 1503, 1508 (9th Cir. 1987); G-I Holdings, Inc. v. Baron & Budd, No. 01 Civ. 0216 (RWS), 2002 U.S. Dist. LEXIS 15443, at *43 (S.D.N.Y. Aug. 16, 2002) (relying

on a single non-party witness was reasonable where plaintiff's investigation did not uncover any evidence contradicting or putting into doubt that witness's statement); Goldberg v. Rainbow Path, Inc., No. 96 C 6548, 1998 U.S. Dist. LEXIS 2487, at *14-16 (N.D. Ill. Feb. 27, 1998) (attorney's investigation was reasonable under the circumstances where one party was uncooperative, the attorney's client had little information, and discovery was needed to develop the facts).

Under the 1993 rule, as under the 1983 rule, counsel must explore readily available avenues of factual inquiry. Christian v. Mattel, Inc., 286 F.3d 1118, 1129 (9th Cir. 2002) (sanctions imposed where attorney could have obtained needed copyright information simply by examining Barbie doll heads); Security Farms v. International Bhd. of Teamsters, 124 F.3d 999, 1017 & n.24 (9th Cir. 1997) (sanctioning attorney for "blindly relying" on representations of private investigator that declarations obtained by investigator and filed with pleadings were authentic and well-grounded in fact); Chapman & Cole v. Itel Container Int'l, 865 F.2d 676, 684 n.11 (5th Cir. 1989) (counsel's reliance on "unverified hearsay" without questioning witness about underlying facts and circumstances did not constitute a reasonable factual inquiry); Abner Realty, Inc. v. Adm'r of Gen. Servs. Admin., No. 97 Civ. 3075 (RWS), 1998 U.S. Dist. LEXIS 11042, at *10-14 (S.D.N.Y. July 22, 1998) (sanctions imposed where the needed facts could have been obtained in a number of ways, including a LEXIS/NEXIS or Internet search or through inquiry to the Registrar of Deeds); Jones v. International Riding Helmets, Ltd., 145 F.R.D. 120 (N.D. Ga. 1992) (sanctions imposed where even "[t]he most minimal investigation" would have revealed company's incorporation date and, thus, that company was not a proper party to the suit), aff'd, 49 F.3d 692 (11th Cir. 1995). One court has held that an attorney's total reliance on another attorney to evaluate the facts and prepare the complaint is itself a Rule 11 violation. In re Kunstler, 914 F.2d 505, 514 (4th Cir. 1990) (citing Pavelic & LeFlore v. Marvel Entm't Group, 493 U.S. 120 (1989)). The nature of the claims brought may require a heightened investigation. See Anderson v. County of Montgomery, 111 F.3d 494, 501 (7th Cir.) (before charging court officers with criminal wrongdoing attorney should have conducted "a serious investigation"), cert. denied, 522 U.S. 951 (1997), overruled on other grounds by Dewalt v. Carter, 224 F.3d 607, 613-18 (7th Cir. 2000).

Most courts hold that a reasonable inquiry must be conducted prior to filing to comply with Rule 11. Thus, materials developed after the fact, at the

sanctions stage, even if "chock-full of case citations and discussion" are not sufficient to avoid sanctions. Martin v. American Kennel Club, Inc., No. 87 C 2151, 1989 U.S. Dist. LEXIS 201, at *17 (N.D. Ill. Jan. 3, 1989); see also Pathe Computer Control Sys. Corp. v. Kinmont Indus., Inc., 955 F.2d 94, 96 (1st Cir. 1992) (non-frivolous legal arguments were "too little, too late" because time and place to make them was district court when motion to transfer was first brought); Williams v. Balcor Pension Investors, No. 90 C 0726, 1995 WL 23061, at *1-2, n.1 (N.D. Ill. Jan. 17, 1995) (debating but not resolving whether "recklessly made allegation that turns out, by luck, to be true" can be sanctioned under amended rule). But cf. Katz v. Household Int'l, Inc., 36 F.3d 670, 673 (7th Cir. 1994) (vacating district court's sanctions award where the district court had overlooked an alternative theory on which the complaint might have withstood sanctions).

The Third Circuit has held that, even if a suit is objectively meritorious, sanctions may be imposed if the pre-filing investigation was objectively inadequate. In Garr v. United States Healthcare, 22 F.3d 1274, 1279 (3d Cir. 1994), the plaintiff's attorneys filed a securities class action complaint by taking another recently filed complaint and filling in the names of their clients. The attorneys had read a Wall Street Journal article reporting that insiders at the defendant allegedly sold stock before a rapid decline in price, and the attorneys discussed the issue with the law firm that filed the original complaint. The district court held that this was an inadequate independent pre-filing inquiry because Garr's complaint was based only on information from a Wall Street Journal article, an identical complaint, and the attorney who had filed the original complaint. Id. at 1277. While admitting that some circumstances justify a signer's reliance on information from other persons (such as witnesses), the court held that in this case there was no justification for the attorneys filing the complaint without first investigating the substantive facts of the case. Id. The district court noted that only one of the 26 paragraphs of allegations in the original complaint was based on the Wall Street Journal article; the remaining paragraphs were based on information from sources never reviewed by Garr's attorneys. Greenfield v. United States Healthcare, 146 F.R.D. 118, 127 n.19 (E.D. Pa. 1993), aff'd sub nom. Garr v. United States Healthcare, 22 F.3d 1274 (3d Cir. 1994). In addition to sanctions, the district court also referred the matter to the state's Attorney Disciplinary Board. Id. at 128.

On appeal, Garr's attorneys argued that they should not be sanctioned if their complaint was well-grounded in fact and law. Garr, 22 F.3d at 1281. The

Third Circuit, however, held that Garr's attorneys violated Rule 11 by signing the complaint without making an independent pre-filing inquiry. Id. "[A] signer making an inadequate inquiry into the sufficiency of the facts and law underlying a document will not be saved from a Rule 11 sanction by the stroke of luck that the document happened to be justified." Id. at 1279. Judge Roth dissented, criticizing the majority opinion for imposing sanctions for inadequate pre-filing inquiry, despite the fact that there may be a meritorious complaint. Roth stated that "the court should not go on to inquire whether the attorney conducted an adequate investigation prior to filing the complaint." Id. at 1281 (Roth, J., dissenting).

The Ninth Circuit has adopted the Garr dissent analysis, concluding that an attorney may not be sanctioned for filing a well-founded complaint, even though the attorney fails to conduct a reasonable pre-filing inquiry. In re Keegan Mgmt. Co., Sec. Litig., 78 F.3d 431, 434 (9th Cir. 1996). In Keegan, the district court had sua sponte imposed sanctions on attorneys who filed securities fraud class action suits that were based on allegations the court found "reckless." Id. at 433. The Keegan district court applied a "subjective-objective" test that queried whether "[o]bjectively. . .a reasonable attorney [would] have believed plaintiffs' complaint to be well-founded in fact based on what plaintiffs' attorneys subjectively knew at the time." Id. at 434. Applying this test, the district court refused to consider evidence that buttressed the plaintiffs' claims but was unknown to plaintiffs' counsel at the time the complaint was filed. Id.

The Ninth Circuit reversed the sanction award, finding that circuit precedent required an "objective-objective" test. Id. Under this approach, a party or attorney need not prove actual reliance on the facts or principles of law which demonstrate that a claim is not frivolous in order to escape sanctions. Id. The court noted that refusing to sanction "complaints which have merit on their face" would do "little to undermine the deterrent goals of the Rule." Id. at 435. However, imposing sanctions on meritorious complaints could "increase the frequency of the collateral litigation that is Rule 11's unfortunate side effect." Id. Under the objective-objective test that the Keegan court adopted, evidence discovered after the filing of the complaint rendered the complaint nonfrivolous and barred Rule 11 sanctions. Id. The court also refused to uphold sanctions under 28 U.S.C. § 1927 and the court's inherent power. Id. at 435-36. See also View Eng'g, Inc. v. Robotic Vision Sys., 208 F.3d 981, 985 n. 4 (Fed. Cir. 2000) (applying Ninth Circuit test in patent context); Montrose Chem. Corp. of Cal. v.

American Motorists Ins. Co., 117 F.3d 1128, 1133-34 (9th Cir. 1997) (sanctions inappropriate even where attorney failed to conduct reasonable inquiry where key factual assertion did not completely lack a factual foundation).

Various factors, such as those set forth below, may be examined to determine whether an investigation is reasonable. See also 1983 Rule 11, Advisory Committee Notes (see Appendix I) (listing factors, which likely remain applicable after the 1993 amendment).

(a) Time Available for Investigation

The use of the words "reasonable under the circumstances" in the 1993 rule codifies the courts' previous conclusion that the thoroughness of the inquiry required by Rule 11 depends in part upon the time available for investigation. Rule 11 (b). The Supreme Court held under the 1983 rule, that "[a]n inquiry that is unreasonable when an attorney has months to prepare a complaint may be reasonable when he has only a few days before the statute of limitations runs." Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 401-02 (1990); see also Smith v. Our Lady of the Lake Hosp., Inc., 960 F.2d 439, 447 (5th Cir. 1992) (existence of two month period before statute of limitations would run was one factor supporting appellate court's conclusion that attorneys had conducted a reasonable inquiry); CTC Imports & Exports v. Nigerian Petroleum Corp., 951 F.2d 573, 579 (3d Cir. 1991) (sanctions were reversed because attorney had less than 24 hours to make an inquiry and prepare pleadings); City of El Paso v. City of Socorro, 917 F.2d 7, 8-9 (5th Cir. 1990) (district court abused its discretion in finding that attorney did not make a reasonable inquiry into the law where district court failed to consider the severe time constraints under which the attorney was operating); Jenkins v. Missouri, 904 F.2d 415, 421 (8th Cir. 1990); In re TCI Ltd., 769 F.2d 441, 446 (7th Cir. 1985); Simpson v. Putnam County Nat'l Bank of Carmel, 112 F. Supp. 2d 284, 290 (S.D.N.Y. 2000) (reliance on pro se plaintiff's prior filings constituted reasonable inquiry where plaintiff's counsel faced "serious time pressure"); Kepler v. C.G.F. Helmets, Inc., No. 98-1678 Section K(5), 1999 U.S. Dist. LEXIS 3441, at *6 (E.D. La. Mar. 22, 1999) (plaintiffs conducted a reasonable investigation in light of other factors the court can consider, such as "time pressure, reliance on the client for information, and the extent to which

development of the facts requires discovery"); Durham v. United States, No. 97-1480, 1998 U.S. Dist. LEXIS 16064, at *9-10 (M.D. Pa. Sept. 29, 1998) (plaintiffs conducted a reasonable investigation where they had some evidence of a claim against defendant and "an approaching statute of limitations").

Timing problems cannot be self-created. See Southern Leasing Partners, Ltd. v. McMullan, 801 F.2d 783, 788 (5th Cir. 1986) (per curiam) ("Failure to do the work of a lawyer cannot be explained away by the approaching limitations bar, as counsel's delay of almost three months in investigating the merits of the case created the problem."), overruled in part on other grounds, Childs v. State Farm Mut. Auto. Ins., 29 F.3d 1018 (5th Cir. 1994); Cabell v. Petty, 810 F.2d 463, 466 (4th Cir. 1987) (complaint violated Rule 11 despite impending statutory bar). Of course, the fact that a lesser duty of inquiry exists for one under time constraints cannot justify a cursory investigation by one not facing time limitations. Artco Corp. v. Lynnhaven Dry Storage Marina, Inc., 898 F.2d 953, 956 (4th Cir. 1990).

(b) Availability of Evidence

(1) All evidence in client's hands must be reviewed.

Absent time pressures, a reasonable inquiry requires that counsel interview the available witnesses and prior legal representatives. See Wigod v. Chicago Mercantile Exch., 981 F.2d 1510, 1523 (7th Cir. 1992) (upholding sanctions award against plaintiff's attorney who failed to interview attorneys who represented plaintiff in related proceedings and other available witnesses); In re Ginther, 791 F.2d 1151, 1155 (5th Cir. 1986); Brubaker Kitchens, Inc. v. Brown, Civ. No. 05-6756, 2006 U.S. Dist. LEXIS 89622, at *10 (E.D. Pa. Dec. 11, 2006) (holding that, given the absence of time pressures, counsel should have interviewed employee to verify client's speculative statements about a defendant's involvement); Wold v. Minerals Eng'g Co., 575 F. Supp. 166, 167 (D. Colo. 1983) (cursory telephone conversation insufficient). But cf. Foster v. Michelin Tire Corp., 108 F.R.D. 412, 414 n.1 (C.D. Ill. 1985) (reasonable inquiry does not necessarily require interview of a key witness). Counsel should also review the relevant documents that are available to his or her client, see Insurance Benefit Adm'rs, Inc. v. Martin, 871 F.2d 1354 (7th Cir. 1989); In re Ginther, 791 F.2d at 1155; Am. Roller Co. v. Foster Adams Leasing, LLP, 421 F. Supp. 2d 1109, 1116 (N.D. Ill. 2006) (quoting Teamsters Local No. 579 v. B&M Transit,

Inc., 882 F.2d 274, 280 (7th Cir. 1989) ("Rule 11 requires at a minimum that a party read the document whose terms it is contesting and school itself in principles of law that directly apply to the arguments at hand."); or that are otherwise accessible, see Medical Emergency Serv. Assocs. v. Foulke, 844 F.2d 391, 400 (7th Cir. 1988); Albright v. Upjohn Co., 788 F.2d 1217, 1221 (6th Cir. 1986); Rodriguez v. Local 112, Int'l Fed'n of Technical Eng'rs, No. Civ. 87-0142, 1989 U.S. Dist. LEXIS 9071, at *15 (D. Mass. Aug. 3, 1989) (documents refuting allegations of discrimination complaint available from state agency); and explore other readily available avenues of inquiry, see Callahan v. Schoppe, 864 F.2d 44, 46 (5th Cir. 1989) (assuming that only listing in telephone directory is the proper defendant is not reasonable inquiry). In the absence of investigation, counsel cannot carelessly or deliberately represent inferences as facts. Ryan v. Clemente, 901 F.2d 177, 179-80 (1st Cir. 1990); Skycom Corp. v. Telstar Corp., 813 F.2d 810, 819 (7th Cir. 1987) ("Either the lawyers did no investigation or they decided to misstate facts readily knowable.").

(2) Evidence in the opponent's exclusive control.

Reasonable inquiry does not require the impossible. In the event that the evidence necessary to prove or disprove a claim is in an opposing party's exclusive possession, the 1993 amendment permits a claim or answer to be based on information and belief but requires parties to specifically state when their factual contentions depend on an opportunity for further investigation or discovery. Thus, if the complaint or answer specifically states that the allegation is not currently supported, and the inability to obtain further information is supported by the circumstances, no sanctions should be imposed.

Cases under the 1983 rule and the 1993 rule recognize that a "reasonable" inquiry depends on the availability of the evidence. Thus, in Katz v. Household Int'l, Inc., 36 F.3d 670 (7th Cir. 1994), the Seventh Circuit vacated a sanctions award where one of the plaintiff's claims relied on information that was in the exclusive control of the defendant. Id. at 675-76. Because the plaintiff had no access to the needed information prior to discovery, that part of the complaint was reasonable, and it was an abuse of discretion to award sanctions. Id. Likewise, in Mary Ann Pensiero, Inc. v. Lingle, 847 F.2d 90, 95 (3d Cir. 1988), the Third Circuit concluded that the plaintiff had not violated Rule 11 in pleading a conspiracy to restrain trade in violation of section 1 of the Sherman Act based on "facts that supported a reasonable suspicion of cooperation between defendants

and other parties who could have been expected to benefit from the defendants' intransigence." In First Nat'l Bank & Trust Co. v. Hollingsworth, 931 F.2d 1295, 1309-10 (8th Cir. 1991), the court of appeals affirmed a decision not to sanction plaintiffs who correctly asserted that a fraudulent scheme existed, but incorrectly alleged that the scheme included three of the named defendants. Based on the information available at filing, it was reasonable for plaintiffs to assert that the three complaining defendants, who were associated with the actual perpetrators, were connected with the complex, disguised scheme. In Krim v. BancTexas Group, 99 F.3d 775, 778 (5th Cir. 1996), decided under old Rule 11, the Fifth Circuit reversed a sanctions award against a plaintiff's attorney for failing to conduct a reasonable factual investigation before filing a third amended complaint in a securities class action. The Fifth Circuit observed that, as a practical matter, discovery was the only way to further investigate the facts and that the local rules prevented plaintiff from conducting merits discovery before the class was certified. See also Hoffman-LaRoche, Inc. v. Invamed, Inc., 213 F.3d 1359, 1365 (Fed. Cir. 2000) (holding in a patent case that plaintiffs had conducted an adequate pre-filing investigation where their attempts to determine whether their patent was infringed through reverse engineering had failed and defendants had refused to disclose the method by which their product was made); Smith v. Our Lady of the Lake Hosp., Inc., 960 F.2d 439, 446 (5th Cir. 1992) (the fact that almost all of the factual materials relevant to proving plaintiff's RICO claim were in the hands of the defendant was one factor supporting appellate court's reversal of district court's imposition of sanctions); McGuire Oil Co. v. Mapco, Inc., 958 F.2d 1552, 1564 (11th Cir. 1992) (affirming denial of sanctions where party made reasonable inquiry in light of the complexity of the issues and the difficulty in gaining access to information in other party's control); DiSante v. Litton Indus. Automation Sys., Nos. 89-1931, 89-1968, 1991 U.S. App. LEXIS 4711, at *11 (6th Cir. Mar. 19, 1991) (in choosing a sanction, court may properly consider the difficulty in making a pre-filing inquiry when virtually all of the information that might reasonably be obtained through pretrial investigation is in the opposing party's hands); Beverly Gravel, Inc. v. DiDomenico, 908 F.2d 223, 226 (7th Cir. 1990) (where pre-filing inferences supported claim, court held it not unreasonable to file a claim "so as to obtain the right to conduct discovery"); White v. General Motors Corp., 908 F.2d 675, 682 (10th Cir. 1990); Kraemer v. Grant County, 892 F.2d 686, 689-90 (7th Cir. 1990) (fact that conspiracy ultimately could not be proven insufficient to warrant Rule 11 sanctions where attorney performed pre-filing investigation and uncovered some support for the conspiracy allegation);

Lebovitz v. Miller, 856 F.2d 902, 906-07 (7th Cir. 1988) (reversing sanctions where the attorney who filed a RICO claim had sufficient facts to "permit a reasonable inference that some wrongdoing was afoot"); Oliveri v. Thompson, 803 F.2d 1265, 1279 (2d Cir. 1986); In re Yagman, 796 F.2d 1165, 1186 (9th Cir. 1986); Bhd. Mutual Ins. Co. v. Ervin Cable Constr., LLC, No. 05 C 3408, 2006 U.S. Dist. LEXIS 86967, at *22 (N.D. Ill. Nov. 27, 2006) (holding that duty of reasonable inquiry did not require plaintiffs to contact defendant prior to filing suit); Association of Minority Contractors and Suppliers, Inc. v. Halliday Properties, Inc., No. 97-274, 1998 U.S. Dist. LEXIS 12596, at *20 (E.D. Pa. Aug. 13, 1998) (refusing to impose sanctions in part because many of the crucial facts depended solely on information known only to the alleged bid-rigging conspirators); Zambrano v. International Ass'n of Machinists, No. 89 C 6109, 1992 U.S. Dist. LEXIS 2221, at *9 (N.D. Ill. Feb. 19, 1992) (rejecting magistrate's recommendation to impose sanctions where plaintiffs' attorneys attempted to investigate the allegations made by their clients, but prospective defendants were not cooperative); Tutton v. Garland Indep. Sch. Dist., 733 F. Supp. 1113, 1118 (N.D. Tex. 1990) (courts should exercise caution in discrimination actions, where defendants usually control evidence and will not admit wrongdoing); see also Thomas v. Evans, 880 F.2d 1235, 1242 (11th Cir. 1989) (refusing to uphold sanctions that were issued while a motion to compel discovery remained pending); Parenteau v. Kim, 97 Civ. 8863, 1998 U.S. Dist. LEXIS 16660, at *19, 20 (S.D.N.Y. Oct. 22, 1998) (refusing to grant sanctions where plaintiff and his attorney refused to withdraw complaint, but where discovery was ongoing), aff'd, 1999 U.S. App. LEXIS 15101 (2d Cir. June 9, 1999).

(c) Reliance Upon Client's Statements

A reasonable investigation may include reliance upon a client's statements when appropriate. Hilton Hotels Corp. v. Banov, 899 F.2d 40, 43 (D.C. Cir. 1990) (under old rule); see also Kepler v. C.G.F. Helmets, Inc., No. 98-1678 Section K(5), 1999 U.S. Dist. LEXIS 3441, at *6 (E.D. La. Mar. 22, 1999) (plaintiffs conducted a reasonable investigation in light of other factors the court can consider, such as "time pressure, reliance on the client for information, and the extent to which development of the facts requires discovery"). The Second Circuit has noted that "[t]he new version of Rule 11 makes it [clear] that an attorney is entitled to rely on the objectively reasonable representations of the client." Hadges v. Yonkers Racing Corp., 48 F.3d 1320, 1329-30 (2d Cir. 1995).

The court stated that under the amended rule, in deciding whether an attorney may be sanctioned for relying on a client's statements, courts must determine whether there was "evidentiary support" corroborating factual misrepresentations. Id. Because there was "evidentiary support" in the record below, the court reversed the sanctions award before it. Id.

Under the 1993 rule, as under the 1983 rule, reliance solely on unverified statements that readily could be corroborated generally is not sufficient. Readily available public and private information must be reviewed if the cost is not inordinately high. See Battles v. City of Ft. Myers, 127 F.3d 1298, 1300 (11th Cir. 1997) (affirming sanctions on attorney where district court found that the attorney did not make reasonable inquiry prior to trial to ensure that he could procure evidence to support his client's positions); Worldwide Primates, Inc. v. McGreal, 87 F.3d 1252, 1255 (11th Cir. 1996) ("Absent . . . extenuating circumstances, an attorney cannot simply rely on the conclusory representations of a client, even if the client is a long-time friend."); Hendrix v. Naphtal, 971 F.2d 398, 400 (9th Cir. 1992) ("Blind reliance on a lay client's ability to decide the legal question of domicile does not constitute a reasonable inquiry under Rule 11."); Mike Ousley Prods., Inc. v. WJBF-TV, 952 F.2d 380, 383 (11th Cir. 1992) (counsel relied upon client's statement even though he could have contacted the two men from whom his client claimed to have received information); Blue v. United States Dep't of Army, 914 F.2d 525, 541 (4th Cir. 1990) (where plaintiff's claims of racial discrimination rested on plaintiff's "gut feelings," counsel should have undertaken further investigation); Lloyd v. Schlag, 884 F.2d 409, 412-13 (9th Cir. 1989) (sanctions imposed on counsel who relied on client's mistaken assurance that all necessary steps had been taken to record and protect copyright); Southern Leasing Partners, Ltd. v. McMullan, 801 F.2d 783, 788 (5th Cir. 1986) (per curiam) (overruled in part on other grounds, Childs v. State Farm Mut. Auto Ins., 29 F.3d 1018 (5th Cir. 1994) ("Blind reliance on the client is seldom a sufficient inquiry" under Rule 11.); Brubaker Kitchens, Inc. v. Brown, Civ. No. 05-6756, 2006 U.S. Dist. LEXIS 89622, at *10 (E.D. Pa. Dec. 11, 2006) (holding that, given the absence of time pressures, counsel should have interviewed employee to verify client's speculative statements about a defendant's involvement); Banco de Ponce v. Buxbaum, No. 90 Civ. 6344, 1992 U.S. Dist. LEXIS 15730, at *66 (S.D.N.Y. Oct. 14, 1992) (attorney sanctioned where "he took at face value the version of the facts that [client's husband] was giving out" without any reasonable inquiry), aff'd without op., 43 F.3d 1458 (2d

Cir. 1994). However, an attorney's duty to corroborate is not absolute, particularly where he or she has limited access to such information. See Uy v. Bronx Mun. Hosp. Ctr., 182 F.3d 152, 156 (2d Cir. 1999) (requiring an attorney to ascertain whether the opposing party's witnesses would corroborate a client's assertion would impose "an unreasonable burden on counsel"); Greenberg v. Hilton Int'l Co., 870 F.2d 926, 935 (In an employment discrimination case based on an alleged failure-to-promote, "plaintiff's counsel . . . was entitled to rely upon plaintiff's statements, particularly since much of the relevant information was within control of the defendant."), reh'g granted and remanded on other grounds, 875 F.2d 39 (2d Cir. 1989).

It is unreasonable to file a pleading or a motion founded upon the client's knowledge if the client is not relying on personal knowledge but on second-hand assertions. See Mike Ousley Prods., Inc. v. WJBF-TV, 952 F.2d 380, 383 (11th Cir. 1992) (counsel sued one defendant relying solely on hearsay furnished by his client); Bockman v. Lucky Stores, Inc., 108 F.R.D. 296, 298 (E.D. Cal. 1985), aff'd, 826 F.2d 1069 (9th Cir. 1987).

The attorney is obligated to evaluate the client's statements. If they are facially implausible, the attorney must investigate further. See, e.g., Patsy's Brand, Inc. v. I.O.B. Realty, Inc., No. 99 Civ. 10175 (JSM), 2002 U.S. Dist. LEXIS 491 at *2 (S.D.N.Y. Jan. 16, 2002) (sanctioning attorneys who "simply closed their eyes to the overwhelming evidence that statements in [their] client's affidavit were not true"); Schiebel Elektronische Geraete Gmbh v. Polestar Tech., Inc., No. 97-10231, 1998 U.S. Dist. LEXIS 17998, at *5 (D. Mass. Aug. 3, 1998) (despite earlier dealings with client, "the very nature of the assurances [the lawyer] was receiving . . . created a compelling need for him to press for more supporting information from his own client"); Bayan El Dada v. Oil Mart Corp., No. 94 C 3829, 1995 U.S. Dist. LEXIS 13740, at *2-3 (N.D. Ill. Sept. 19, 1995) (sanctioning attorney under Rule 11 and 28 U.S.C. § 1927 where attorney "continued to press ahead with [the] lawsuit well after a reasonable attorney should have become suspicious of his client's assertions"); cf. Albrecht v. Stranczek, 136 F.R.D. 155, 156-57 (N.D. Ill. 1991) (refusing to award sanctions where "counsel had no reason to question [his client's] representation"); Lemaster v. United States, 891 F.2d 115, 119 (6th Cir. 1989); Reed v. Iowa Marine & Repair Corp., 143 F.R.D. 648, 651 (E.D. La. 1992) (reasonable for attorney to rely upon client for information regarding client's prior medical and litigation history; "holding [attorney] liable for failing to distrust his client and for

failing to seek corroboration would impose an undue burden upon plaintiffs' attorneys' preparation of cases"), rev'd on other grounds, 16 F.3d 82 (5th Cir. 1994); Williams v. Whitmill, No. 84 C 4910, 1986 U.S. Dist. LEXIS 21707, at *5-8 (N.D. Ill. Aug. 12, 1986) (reasonable for counsel to rely upon client's representation that apparently authentic document was genuine). But see Cirino v. Federal Express Corp., No. 94 Civ. 4787, 1995 U.S. Dist. LEXIS 11690, at *1-3 (S.D.N.Y. Aug. 15, 1995) (plaintiff's attorney was "entitled to rely on the information provided by his client" even though testimony of three of defendants' employees directly contradicted plaintiff's story and "the evidence that plaintiff's claim was a fraud was overwhelming").

It may be more reasonable to depend upon the statements of a long-standing client who has demonstrated his reliability than upon a client who is unknown to the attorney. See generally Edwin A. Rothschild et al., Rule 11: Stop, Think, and Investigate, 11 Litig., No. 2 at 13, 14 (1985). See also Anderson v. County of Montgomery, 111 F.3d 494, 501 (7th Cir.) (not sufficient to rely on client's word where client was "a man who admits to skipping town to avoid child support, assuming aliases and obtaining credit under false names, and failing to pay off his creditors"), cert. denied, 522 U.S. 951 (1997), overruled on other grounds by Dewalt v. Carter, 224 F.3d 607 (7th Cir. 2000).

(d) Consultation with the Client

The attorney should confer directly with the client to verify the accuracy of the claims. See McGhee v. Sanilac County, 934 F.2d 89, 93 (6th Cir. 1991) (appellate court reversed decision not to sanction where attorney neglected to ask client whether allegedly defamatory statements were actually false). An attorney's failure to verify with the client the accuracy of all factual allegations made in a complaint constitutes a basis for sanctions under Rule 11. In re Jerrels, 133 B.R. 161, 164 (Bankr. M.D. Fla. 1991) (where attorney certified that he informed both husband and wife as to alternatives under the bankruptcy code and he had in fact only informed the wife, sanctions were warranted); Chris & Todd, Inc. v. Arkansas Dep't of Fin. & Admin., 125 F.R.D. 491, 494 (E.D. Ark. 1989) (sanctions imposed upon attorney who discussed general content of amended complaint with clients prior to filing but did not inform clients of exact wording of new allegations, which proved to be false).

(e) Reliance upon Other Attorneys

Attorneys acting as local counsel and in referred cases should view themselves as having an independent non-delegable duty under Rule 11. See generally Greenfield v. United States Healthcare, 146 F.R.D. 118 (E.D. Pa. 1993), aff'd sub nom. Garr v. United States Healthcare, 22 F.3d 1274 (3d Cir. 1994).

Even though the 1993 rule speaks in terms of sanctioning attorneys who are "responsible" for a Rule 11 violation, courts may conclude that a local counsel who entirely relies on another attorney is "responsible" for a violation.

However, referring counsel are expected to inform local counsel of important information, and some courts under the 1983 rule applied a more lenient standard where an attorney received a case from another attorney. Miller v. Bittner, 985 F.2d 935, 939 (8th Cir. 1993) (affirming denial of sanctions against attorneys where forwarding attorney had not advised them of earlier adverse ruling; "[a] lawyer could reasonably expect another lawyer to inform him of previous adverse rulings that might affect the viability of the contemplated lawsuit"); Smith v. Our Lady of the Lake Hosp., Inc., 960 F.2d 439, 446 (5th Cir. 1992) ("[A]n attorney receiving a case from another attorney is entitled to place some reliance upon that attorney's investigation."); CTC Imports & Exports v. Nigerian Petroleum Corp., 951 F.2d 573, 579 (3d Cir. 1991) (reversing imposition of sanctions against local counsel because information attributable to forwarding attorney could not have been reasonably obtained by local counsel).

At least in the context of § 1927, courts are reluctant to impose sanctions on an attorney for relying on representations of referring counsel when the circumstances of the case make it difficult for counsel to conduct an independent investigation. See Schwartz v. Millon Air, Inc., 341 F.3d 1220, 1226 (11th Cir. 2003). In Schwartz, an attorney was sanctioned pursuant to § 1927 for failing to conduct a proper investigation into claims filed against an airline on behalf of victims of a plane crash in Ecuador based on representations of licensed Ecuadorian counsel when those claims turned out to be fraudulent. Id. at 1124. The Eleventh Circuit reversed the sanctions award, holding that the attorney's reliance on referring counsel was reasonable, given that the claims involved "great distance across international borders," "foreign languages and cultures," "medical records and a great many clients." Id. at 1126. The Eleventh Circuit explained that it did not want to create a rule whereby "an American lawyer

cannot represent a client who resides in a distant country unless the lawyer and the client — before the suit is filed or early in the litigation — meet face-to-face, even when the client is not an English speaker and even if a face-to-face meeting would involve a go-between, such as an interpreter." Id. According to the Eleventh Circuit, such a rule "would be a substantial bar to foreign nationals being able to litigate claims in American courts that the law says American courts have the authority to hear." Id.

At the same time, courts impose sanctions on attorneys for "blindly relying" on statements of other parties. For instance, the Ninth Circuit affirmed sanctions against an attorney for "blindly relying" on a private investigator's representations that declarations supporting the complaint were authentic and well-grounded in fact. Security Farms v. International Bhd. of Teamsters, 124 F.3d 999, 1017 (9th Cir. 1997). See also Greenfield v. United States Healthcare, 146 F.R.D. 118 (E.D. Pa. 1993) (sanctioning attorneys who relied upon another law firm's investigation without any independent inquiry), aff'd sub nom. Garr v. United States Healthcare, 22 F.3d 1274 (3d Cir. 1994). Further, the District Court for the Northern District of Illinois held that plaintiff's attorneys cannot blindly rely on allegations made by other litigants in different actions against the same defendants to state a case. Gienko v. Padda, No. 00 C 5070, 2002 U.S. Dist. LEXIS 3316, at *15-21 (N.D. Ill. Feb. 27, 2002). The court explained that "Plaintiffs' attorneys cannot shirk their Rule 11 obligations to conduct an appropriate investigation into the facts that is reasonable under the circumstances by merely stating that '[a third party] alleges certain additional facts." Id. at *21.

Rule 11 violations also can result when attorneys responsible for different aspects of actions fail adequately to communicate. The Seventh Circuit upheld Rule 11 sanctions for filing a motion for order of possession, where a default judgment was obtained in the foreclosure action because the property owner was never served. The lawyer who filed the motion for order of possession attempted to argue that his conduct was not sanctionable because of the law firm's practice of assigning one attorney to handle a foreclosure and a different attorney to handle the related eviction. U.S. Bank Nat'l Ass'n, N.D. v. Sullivan-Moore, 406 F.3d 465 (7th Cir. 2005). The court considered the failure of the law firm to have a mechanism in place to transmit information about the foreclosure to the attorney handling the eviction part of the improper conduct in the case, and affirmed as a sanction that all attorneys in the law firm attend or view a 16-hour civil procedure course. Id. at 469-71.

(f) Responsibilities of Pro Se Litigants

Pro se litigants must conduct the inquiries required by Rule 11. The rule requires them to sign their own names to papers filed in court, and because they are unrepresented by counsel, they are "responsible" for any violations. Moreover, the amended rule provision shielding represented parties from sanctions for frivolous legal arguments does not apply to pro se litigants.

As a result, pro se litigants remain exposed to the full effect of the rule, as pre-1993 case law had made clear. Carman v. Treat, 7 F.3d 1379, 1381 (8th Cir. 1993) ("[P]ro se status did not entitle [plaintiff] to disregard the Federal Rules of Civil Procedure."); Joiner v. Delo, 905 F.2d 206, 208 (8th Cir. 1990) (pro se plaintiff sanctioned for his "blatant misrepresentation" of the facts); Vukadinovich v. McCarthy, 901 F.2d 1439, 1445 (7th Cir. 1990) ("[S]tatus as a pro se litigant may be taken into account, but sanctions can be imposed for any suit that is frivolous."). See also Fleishman v. Hyman, 00 Civ. 0009 (GBD) (KNF), 2005 U.S. Dist. LEXIS 15809, at *20 (S.D.N.Y. July 27, 2005) (ordering pro se plaintiff to pay fees and costs incurred in filing motions to dismiss and for sanctions, and $5,000 to the court); Sieverding v. Colorado Bar Ass'n, No. 02-M-1950, 2003 U.S. Dist. LEXIS 18469, at *85 (D. Colo. Oct. 14, 2003) (ordering pro se litigants to pay all defendants' attorneys fees and costs, requested or not, because the pro se litigants persisted in filing frivolous lawsuits, despite warnings "from both court and counsel, including counsel whom they themselves consulted"); Armstead v. Gray, No. 3-03-cv-1350-m, 2003 U.S. Dist. LEXIS 12710, at *5 (N.D. Tex. July 23, 2003) (prohibiting a litigant from filing any additional complaints in *forma pauperis* without first paying the required filing fee or obtaining leave of court, where the litigant previously had filed more than 20 frivolous lawsuits); Burger v. Bay Ship Mgmt., Inc., No. Civ. 99-3342, 2000 U.S. Dist. LEXIS 3344-T(3), at *13-14 (E.D. La. Mar. 10, 2000) (court imposed $7,500 in sanctions, finding that plaintiff's pro se status was no longer an excuse for successive, meritless suits); Baasch v. Reyer, 846 F. Supp. 9, 11 (E.D.N.Y. 1994) (court imposed $1000 in Rule 11 sanctions against pro se civil rights plaintiff for filing motion for new trial after court warned him to not bring more frivolous litigation); Witherspoon v. Roadway Express, Inc., 782 F. Supp. 567, 570 (D. Kan. 1992) (pro se litigant sanctioned for filing *in forma pauperis* petition which he knew was not well grounded in fact); Thomas v. Taylor, 138 F.R.D. 614, 617 (S.D. Ga. 1991) (if pro se plaintiff had conducted a reasonable inquiry, he would have ascertained that no basis for injunctive relief existed against a non-

party); Bombalski v. United States, No. Civ. 91-285, 1991 U.S. Dist. LEXIS 16854, at *7-8 (W.D. Pa. Oct. 29, 1991) (notwithstanding the pro se status of many tax protesters, courts have grown indignant with the increasing number of frivolous tax suits); Kirkland v. Local 32B/32J, Int'l Serv. Workers Union, No. 90 Civ. 2238, 1990 U.S. Dist. LEXIS 11822, at *15 (S.D.N.Y. Sept. 10, 1990) (denying motion for sanctions against pro se plaintiff because plaintiff did not reach "point of clear abuse"); Golyar v. McCausland, 738 F. Supp. 1090, 1098 (W.D. Mich. 1990) (court sanctioned plaintiff, despite consideration of his pro se status, where plaintiff filed clearly meritless claim which was identical to an action the court previously dismissed); Pfeifer v. Valukas, 117 F.R.D. 420, 423 (N.D. Ill. 1987) (plaintiff's pro se status did not give him an "unfettered license to wage an endless campaign of harassment" against defendants or to abuse the judicial process).

Even under the 1983 rule, parties appearing pro se, however, were allowed greater latitude with respect to the reasonableness of their legal theories than attorneys. As one court noted, "[a] layman cannot be expected to realize as quickly as a lawyer would that a legal position has no possible merit, and it would be as cruel as it would be pointless to hold laymen who cannot afford a lawyer . . . to a standard of care that they cannot attain even with their best efforts." Bacon v. American Fed'n of State, County & Mun. Employees, 795 F.2d 33, 35 (7th Cir. 1986) (sanctions imposed for filing an "incoherent" brief that a reasonable person in the same position would have known not to file); accord Zimmerman v. Bishop Estate, 25 F.3d 784, 789 (9th Cir. 1994) (sanctions against pro se plaintiff reversed where he "had at least an arguable basis for bringing a malicious prosecution claim"); Israel v. Everson, No. 4:05-CV-00184-JEG, 2005 U.S. Dist. LEXIS 28255, at *34-35 (S.D. Iowa Oct. 14, 2005) (stating that, although arguments like the plaintiffs' "have been categorically rejected as frivolous," given their pro se status, "[l]eniency is . . . deserved."); Sayer v. Tarnow, No. 89 Civ. 8485, 1990 U.S. Dist. LEXIS 12057, at *14 (S.D.N.Y. Sept. 12, 1990) ("'[T]he court may consider the special circumstances of litigants who are untutored in the law.'") (citing Maduakolam v. Columbia Univ., 866 F.2d 53, 56 (2d Cir. 1989)); see also Thomas v. Evans, 880 F.2d 1235, 1243 (11th Cir. 1989) (sanctions against pro se litigant reversed where record did not support res judicata dismissal); Maduakolam v. Columbia Univ., 866 F.2d 53, 56 (2d Cir. 1989) (reversing sanctions against pro se litigant where nothing in record showed that motion to re-open case was time-barred); Kurkowski v. Volcker, 819 F.2d

201, 204 (8th Cir. 1987); Lazo v. United States, Nos. 98 CV0119-B (LSP), 99 CV0037-B (RBB), 1999 U.S. Dist. LEXIS 3555, at *9 (S.D. Cal. Feb. 10, 1999) (declining to sanction pro se plaintiffs despite warning); Kent v. United States, No. Civ. 93-216, 1994 U.S. Dist. LEXIS 2123, at *10 (D. Or. Feb. 11, 1994) (sanctions not imposed on pro se litigant because he "made a sincere, albeit misguided, attempt to understand and apply the law"); Grossbard v. President Container, 840 F. Supp. 296, 299 (S.D.N.Y.) (in denying Rule 11 sanctions, court gave "deference to the pro se status of plaintiffs," even though the complaint "constituted a waste of time for defendants" and the court), aff'd without op., 41 F.3d 150 (2d Cir. 1994); Scheck v. General Elec. Corp., No. Civ. 91-1594, 1992 U.S. Dist. LEXIS 134, at *13 (D.D.C. Jan. 7, 1992) (pro se plaintiff would not be sanctioned for frivolous RICO lawsuit because RICO is a complicated statute and plaintiff had no notice that Rule 11 sanctions were possible).

The latitude given to the pro se litigants in these cases is reflected in the comments to the 1993 rule. One of the factors that courts must consider in determining when to award monetary sanctions is "whether the responsible person is trained in the law." 1993 Advisory Committee Notes. (See Appendix I.)

The extra latitude for pro se litigants is unlikely to apply in the context of factual misstatements. One court has noted that where the "sanctionable conduct has been in the form of actual misrepresentation, both by commission and omission, the impropriety . . . should be known to lawyers and non-lawyers alike." Durant v. Traditional Invs., Ltd., 135 F.R.D. 42, 49 (S.D.N.Y. 1991).

Moreover, courts are reluctant to give extra latitude to an attorney who represents himself. See Collie v. Kendall, Civ. 3:98-CV-1678-G, 1999 U.S. Dist. LEXIS 10435, at *12 (N.D. Tex. July 6, 1999) (attorney proceeding pro se should be held to the more demanding standards applicable to attorneys); Segarra v. Messina, 153 F.R.D. 22, 30 (N.D.N.Y. 1994) (attorney proceeding pro se treated same as other attorneys because to do otherwise would be contrary to reason for special protection of pro se litigants); cf. Wesley v. Don Stein Buick, Inc., 184 F.R.D. 376, 378-79 (D. Kan. 1998) (sanctioning pro se attorney for disregarding controlling Supreme Court precedent).

(g) Attorney's Inexperience

An attorney's inexperience in a particular field of law does not reduce his or her Rule 11 obligations. See Hays v. Sony Corp. of Am., 847 F.2d 412, 419 (7th Cir. 1988). The Seventh Circuit has held that the Rule 11 standard, like the negligence standard in tort law, is an objective standard. "A lawyer who lacks relevant expertise must either associate with a lawyer who has it, or must bone up on the relevant law at every step on the way in recognition that his lack of expertise makes him prone to error." Id. See also Zuk v. Eastern Pa. Psychiatric Inst. of the Med. College of Pa., 103 F.3d 294, 300 (3d Cir. 1996) (court "sympathetic" to fact that this was first copyright case that attorney had handled, but that fact "is more toward the nature of the sanctions to be imposed rather than to the initial decision whether sanctions should be imposed"). An attorney may not avoid sanctions on the ground that she is unfamiliar with the law of the jurisdiction in which papers are filed. Les Mutuelles du Mans Vie v. Life Assurance Co., 128 F.R.D. 233, 237 (N.D. Ill. 1989).

However, even under the 1983 rule, an attorney's inexperience in the practice of law in general could shield her from sanctions. In Blue v. United States Dep't of Army, 914 F.2d 525, 546 (4th Cir. 1990), the court set aside a sanctions award where the attorney was a junior associate working on her first case, entered the case near the end of discovery, was merely following the directions of a senior partner in charge of the case, and was left in the position of lead counsel on a massive discrimination case for which the background factual investigation and corroboration had never been done. See also Trout v. O'Keefe, 144 F.R.D. 587, 595 (D.D.C. 1992) (denying sanctions against attorney who was new to case and had relied heavily on more senior attorneys). The 1993 rule seems to codify this concept both by permitting sanctions against the law firm and by the emphasis on persons "responsible" for the violation.

Some courts also have suggested that the Rule 11 inquiry may vary as between lawyers: "what is reasonable for a pro se litigant or, perhaps, for a sole practitioner, may be quite different from what is reasonable for a large law firm." Robinson v. Dean Witter Reynolds, Inc., 129 F.R.D. 15, 22 (D. Mass. 1989); see also In re Smith, 111 B.R. 81, 86 (Bankr. E.D. Pa. 1990) (under Bankruptcy Rule 9011, the bankruptcy counterpart to Rule 11, court denied sanctions, in part, based on lawyer's experience as a small community, general practitioner); Miller v. Borough of Riegelsville, 131 F.R.D. 90, 93 (E.D. Pa. 1990) (attorney

inexperienced in field was not sanctioned because he had endeavored to consult with more seasoned attorneys). But see Johnson v. Tower Air, Inc., 149 F.R.D. 461, 473 (E.D.N.Y. 1993) (sanctioning solo practitioner unfamiliar with federal proceedings where opposing counsel had warned inexperienced attorney that claims were baseless and had given attorney opportunity to withdraw claims prior to filing Rule 11 motion).

(h) Inadvertent Factual Errors

At least one court has held that inadvertent errors should not form the basis for sanctions, so long as the party opposing the motion can demonstrate that the error was an honest mistake made after an adequate pre-filing investigation. In Milwaukee Concrete Studios, Ltd. v. Fjeld Mfg. Co., 8 F.3d 441, 449 (7th Cir. 1993), the Seventh Circuit overturned a district court's sanction of a plaintiff who made a factual error in a responsive memorandum as to a key third party's location under the federal copyright venue statute, 28 U.S.C. § 1400(a). Id. The district court found that the plaintiff made a reasonable pre-filing inquiry, but concluded that sanctions were required to deter such serious factual errors in the future. Id. The Seventh Circuit, however, reversed the sanctions award, concluding that "the error was inadvertent and therefore not sanctionable." Id. The Seventh Circuit stated that the error may have "bolstered [plaintiff's] contention that venue was proper," but the single "erroneous fact was not central to the venue theory advanced in its memorandum." Id. at 450. While the court stated that it does not condone such factual errors, it held that sanctions were not necessary to deter similar conduct in the future. Id. at 450-51. Cf. Carona v. Falcon Services Co., 72 F. Supp. 2d 731, 732-33 (S.D. Tex. 1999) (rejecting claim that defendants committed "an honest mistake" when they submitted inconsistent affidavits by the same individual regarding defendant's own principal place of business).

D. Warranted by Law

Rule 11 provides that a pleading, motion, or paper must be "warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law." Rule 11(b)(2). This language varies slightly from the 1983 language, which was from Disciplinary Rule 7-102(a)(2) of the Model Code of Professional Responsibility. DR 7-102(a)(2) provides that "a lawyer shall not . . . [k]nowingly advance a claim or defense that is unwarranted under existing

law, except that . . . [a lawyer] may advance such claim or defense if it can be supported by a good faith argument for an extension, modification, or reversal of existing law." Cf. Model Rules of Professional Conduct Rule 3.1 (duty not to bring frivolous claims). See Cleveland Demolition Co. v. Azcon Scrap Corp., 827 F.2d 984, 988 (4th Cir. 1987). While the 1993 amendment shifted the language from "good faith argument" to "nonfrivolous argument," the committee that proposed the change did not intend it to change the legal standard; instead, they aimed to adopt language that several circuits were already using to explain the 1983 provision. Carl Tobias, Reconsidering Rule 11, 46 U. Miami L. Rev. 855, 871 (1992).

As with factual contentions, legal contentions are subject to an objective — not a subjective — standard. The 1993 rule's "nonfrivolous" language clearly indicates the objective standard. However, courts generally agreed that the "good faith" language of the 1983 rule incorporated a notion of objective reasonableness. Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073, 1081-82 (7th Cir. 1987); Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 254 (2d Cir. 1985), modified, 821 F.2d 121 (2d Cir. 1987); see also Gregory P. Joseph, Sanctions: The Federal Law of Litigation Abuse § 12(A) (Matthew Bender, 3d ed. 2000).

The following sub-sections focus on when an argument is "warranted by existing law," when it is not, and when it is instead warranted by a "nonfrivolous argument for the extension, modification, or reversal of existing law." The last sub-section describes the 1993 rule's requirement that arguments for a change in law be specifically noted.

1. Warranted by Existing Law

The language of "warranted by existing law" did not change in 1993. As a result, as under the 1983 rule, a filing is warranted by existing law if it concerns an issue for which there is any support. It also permits claims as to which the law is unsettled or vague. See Anderson v. Smithfield Foods, Inc., 353 F.3d 912, 915 (11th Cir. 2003) (vacating sanctions where there was "scant on-point authority to guide the reasonable lawyer" to conclude that RICO claims were not warranted by existing law); Hunter v. Earthgrains Co. Bakery, 281 F.3d 144, 156 (4th Cir. 2002) (vacating sanctions against plaintiff's attorney where question of law was "in a state of flux," with plaintiff's position arguably more consistent with

Supreme Court authority and with the majority of circuits having adopted a position contrary to that of the Fourth Circuit); Larez v. Holcomb, 16 F.3d 1513, 1522 (9th Cir. 1994) (affirming denial of sanctions, noting that courts should be cautious in sanctioning attorneys for "efforts to secure the court's recognition of new rights"); LaSalle Nat'l Bank of Chicago v. County of DuPage, 10 F.3d 1333, 1338-39 (7th Cir. 1993) (sanctions not warranted where existing law is vague and not easily applied); In re Excello Press, Inc., 967 F.2d 1109, 1115 (7th Cir. 1992) (court reversed bankruptcy judge's imposition of sanctions under Bankruptcy Rule 9011, the bankruptcy counterpart to Rule 11, where there was a split of authority among bankruptcy courts on a controlling legal issue and neither the Seventh Circuit nor the bankruptcy court in the Northern District of Illinois had addressed the issue); In re Carraher, 971 F.2d 327, 328 (9th Cir. 1992) (reversing sanctions award where issue was previously undecided in the Ninth Circuit); Smith v. National Health Care Servs., 934 F.2d 95, 98-99 (7th Cir. 1991) (sanctions vacated where attorney repleaded previously dismissed claims in second and third amended complaints, as governing law was unclear as to whether rights would be preserved absent repleading); Beverly Gravel, Inc. v. DiDomenico, 908 F.2d 223, 229 (7th Cir. 1990) (RICO pattern element so undefined at time of filing that plaintiff could not be sanctioned); Bank of Maui v. Estate Analysis, Inc., 904 F.2d 470, 471-72 (9th Cir. 1990) (under Bankruptcy Rule 9011, no sanctions where party advanced argument as to authority of bankruptcy appellate panels which had yet to be clarified); Securities Indus. Ass'n v. Clarke, 898 F.2d 318, 321-22 (2d Cir. 1990) ("[W]here a particular point of law is unsettled, parties and (or) their attorneys need not accurately prognosticate the correct law in order to avoid sanctions."); Official Publications, Inc. v. Kable News Co., 884 F.2d 664, 669-70 (2d Cir. 1989) (in light of Supreme Court's recognition that infinite variety of antitrust claims precludes formulation of black letter rules, unsuccessful antitrust complaint alleging unique facts was not sanctionable); Laborers Local 938 v. B.R. Starnes Co., 827 F.2d 1454, 1458 (11th Cir. 1987); Davis v. A.G. Edwards & Sons, Inc., 823 F.2d 105, 108 (5th Cir. 1987); Vatican Shrimp Co. v. Solis, 820 F.2d 674, 680-81 (5th Cir. 1987); Kamen v. AT & T, 791 F.2d 1006, 1013-14 (2d Cir. 1986); Eavenson, Auchmuty & Greenwald v. Holtzman, 775 F.2d 535, 544 (3d Cir. 1985); Indianapolis Colts v. Mayor of Baltimore, 775 F.2d 177 (7th Cir. 1985) ("[T]he fact that judges who have ruled on the merits of the pleading disagree provides significant evidence that the pleading was not frivolous or unreasonable."); County, Mun. Employees' Supervisors and Foreman's Union Local No. 1001 v.

Laborers' Pension Fund, 240 F. Supp. 2d 827 (N.D. Ill. 2003) (plaintiff's position not frivolous where there were "some snippets of authority"); Gordon v. Mendelsohn (In re Who's Who Worldwide Registry, Inc.), 232 B.R. 38, 49 (E.D.N.Y. 1999) ("[I]f there is even a modest difficult [sic] in resolving the merits of the challenged legal position, then the Rule 11 certification has been satisfied."); Scott v. Real Estate Fin. Group, ERA, 956 F. Supp. 375, 386 (E.D.N.Y. 1997) (sanctions not appropriate where there was little case law addressing plaintiffs' claims under the federal and state Fair Credit Reporting Acts), aff'd in part, rev'd in part, 183 F.3d 97 (2d Cir. 1999); American Home Assurance Co. v. Republic Ins. Co., 155 F.R.D. 77, 80 (S.D.N.Y. 1994) (law at time of suit was not clear enough to warrant sanctions against plaintiff for bringing legally-insufficient claim); Sease v. School Dist. of Philadelphia, No. Civ. 91-2113, 1994 U.S. Dist. LEXIS 2757, at *9 (E.D. Pa. Mar. 4, 1994) ("Although several of the arguments presented by Plaintiffs were novel, they were neither plainly unreasonable nor frivolous."); Friedman v. HHL Fin. Servs., No. 93 C 1545, 1994 U.S. Dist. LEXIS 557, at *7-8 (N.D. Ill. Jan. 24, 1994) (Rule 11 sanctions denied because arguments, though novel, were not "totally foreclosed by the language of the [FDCPA] or by any binding precedent"); Grand Cru Vineyards, Inc. v. Grand Cru, Inc., No. 87 Civ. 7680, 1992 U.S. Dist. LEXIS 106, at *5-8 (S.D.N.Y. Jan. 7, 1992) (in Lanham Act case, where poll of consumers showed confusion of products and where two trademark lawyers attested that the complaint was grounded in the law, sanctions were not warranted); Nationwide Cellular Serv., Inc. v. American Mobile Communications, Inc., Nos. 90 Civ. 6493, 91 Civ. 3587, 1991 U.S. Dist. LEXIS 15329, at *53 (S.D.N.Y. Oct. 29, 1991) (while plaintiff's RICO complaint was dismissed, plaintiff's pleading was not patently without basis considering that the Supreme Court has specifically held that determinations of continuity depend on the facts of each case); Nagle v. John Hancock Mut. Life Ins. Co., 767 F. Supp. 67, 72 (S.D.N.Y. 1991) (where there was "pervasive uncertainty" in the area of federal jurisdiction over state civil rights law, plaintiff's counsel was not sanctioned); Crismar Corp. v. United States, No. Civ. 88-5205, 1990 U.S. Dist. LEXIS 5173, at *5-6 (E.D. La. Apr. 26, 1990) (claim not frivolous where issue not decided by 5th Circuit, and plaintiff's position supported by footnote in 9th Circuit decision); Carlton v. Jolly, 125 F.R.D. 423, 429 (E.D. Va. 1989) (in light of contrary decisions in other circuits defining the RICO pattern requirement, RICO complaint was not sanctionable), aff'd without op., 911 F.2d 721 (4th Cir. 1990); see also Protective Life Ins. Co. v. Dignity Viatical Settlement Partners, LP, 171 F.3d 52, 57 (1st Cir.

1999) (reversing award of sanctions for "aggressive" use of precedent although agreeing that the defendants tried "to squeeze too much" from cases they cited to the district court). A party may not be sanctioned merely because the position it advances is rejected by decisions rendered after filing. Sheets v. Yamaha Motors Corp., 891 F.2d 533, 536 (5th Cir. 1990).

A pleading or motion is also warranted by existing law if it addresses a question of first impression. See United States v. Alexander, 981 F.2d 250 (5th Cir. 1993) (reversing sanctions where case was one of first impression in Fifth Circuit and position had support from plain words of environmental statute, text of settlement agreement, and one district court opinion); Nelson v. Piedmont Aviation, Inc., 750 F.2d 1234, 1238 (4th Cir. 1984); Gehl v. Jahoda, No. 91 C 1417, 1992 U.S. Dist. LEXIS 10246, at *5 (N.D. Ill. July 15, 1992) (attorney's argument presented a novel issue of law and therefore was reasonably based in law); Brown Mackie College v. Graham, No. Civ. 88-2220, 1991 U.S. Dist. LEXIS 18676, at *3 (D. Kan. Dec. 18, 1991). But see Ozee v. American Council on Gift Annuities, Inc., 143 F.3d 937, 941 (5th Cir. 1998) (affirming sanctions imposed under F.R. App. P. 38 because "the novelty of a legal issue merely cuts against, but does not preclude, the imposition of sanctions"), cert. denied sub nom. American Bible Society v. Richie, 526 U.S. 1064 (1999); Collie v. Kendall, Civ. 3:98-CV-1678-G, 1999 U.S. Dist. LEXIS 10435, at *8-10 (N.D. Tex. July 6, 1999) (imposing sanctions, despite argument issue was of first impression, because the claims were "utterly unsupportable, . . . [w]ith all the law on the subject going against the respondents").

(a) Filing Need Not Ultimately Prevail

An argument contained in a filing need not ultimately prevail to be warranted by existing law. The relevant inquiry is whether the pleader presented an objectively reasonable argument in support of his or her view of what the law is or should be. American Reliable Ins. Co. v. Stillwell, 336 F.3d 311 (4th Cir. 2003) (affirming district court's decision not to impose Rule 11 sanctions on attorney based on motion for attorney's fees where, even though the court denied the plaintiff's motion the plaintiff's argument was not frivolous); FDIC v. Calhoun, 34 F.3d 1291, 1296 (5th Cir. 1994) (complaint for fraud and fraudulent transfer was reasonable under the circumstances because of the "snapshot" rule that measures reasonableness at the time the complaint was signed and filed; it was irrelevant that the case was a "loser"); National Wrecking Co. v. International

Bhd. of Teamsters Local 731, 990 F.2d 957, 963 (7th Cir. 1993) (reversing sanctions imposed in arbitrator's award because claims, although losers, "[did] not rise to the level of groundlessness required for Rule 11 sanctions"); Associated Indem. Corp. v. Fairchild Indus., Inc., 961 F.2d 32, 36 (2d Cir. 1992) (party's "argument may have been a loser, but it was not a sanctionable loser"); Harrison v. Dean Witter Reynolds, Inc., 974 F.2d 873 (7th Cir. 1992) (rejecting defendant's argument that its successful summary judgment motion proved that plaintiffs had not conducted a reasonable inquiry and must be sanctioned); Harsch v. Eisenberg, 956 F.2d 651, 661-62 (7th Cir. 1992) (fact that district court denied several pretrial motions does not necessarily mean there was a Rule 11 violation); Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg., 982 F.2d 363, 370 (9th Cir. 1992) (affirming denial of sanctions for "appallingly ill-advised" filing because case law was sufficient to support reasonable belief that case was not frivolous); Conn v. Borjorquez, 967 F.2d 1418, 1421 (9th Cir. 1992) (reversing sanctions where although attorney's motion for reconsideration was unsuccessful, her arguments were soundly based in fact and in law); McGuire Oil Co. v. Mapco, Inc., 958 F.2d 1552, 1563-64 (11th Cir. 1992) ("Although we have held that this position is unavailing, . . . it is not frivolous."); Operating Eng'rs Pension Trust v. A-C Co., 859 F.2d 1336, 1344 (9th Cir. 1988) ("[F]orceful representation often requires that an attorney attempt to read a case or an agreement in an innovative though thoughtful way."); Dura Sys., Inc. v. Rothbury Invs., Ltd., 886 F.2d 551, 558 (3d Cir. 1989) (tenuous argument not sanctionable; only "patently unmeritorious or frivolous" arguments warrant sanctions); Smith Int'l, Inc. v. Texas Commerce Bank, 844 F.2d 1193, 1199 (5th Cir. 1988) (signature on a pleading not a guarantee of correctness, but only in that reasonable inquiry has been conducted); Teamsters Local Union No. 430 v. Cement Express, Inc., 841 F.2d 66, 70 (3d Cir. 1988) (reversed sanctions where novel and unsuccessful legal theory was not plainly unreasonable).

Courts may give leeway for a minor or obscure argument that lacks merit if reasonable research is conducted and the signer argues rationally for a new legal theory. Mars Steel Corp. v. Continental Bank N.A., 880 F.2d 928, 932-33 (7th Cir. 1989) (en banc). In Mars Steel, the court stated that while an objectively unreasonable legal position on an obscure legal issue created an inference that the signer did not do sufficient research, the signer could overcome this inference by showing he conducted a reasonable amount of research. Id. The court concluded

that in determining the issue the district court should consider "whether the issue is central, the status of the case and related matters that influence whether further investigation is worth the costs." Id.

(b) Dismissal of Action

Dismissal of the case or denial of relief was not alone a basis for sanctions under the 1983 rule and does not establish frivolousness under the 1993 rule. 1993 Advisory Committee Notes. See Salkil v. Mount Sterling Twp. Police Dept., 458 F.3d 520, 530 (6th Cir. 2006) ("[T]he district court improperly evaluated [plaintiff's attorney's] conduct with the wisdom of hindsight, thereby abusing its discretion"); Tahfs v. Proctor, 316 F.3d 584, 595 (6th Cir. 2003) ("A complaint does not merit sanctions under Rule 11 simply because it merits dismissal pursuant to Rule 12(b)(6)."); Protective Life Ins. Co. v. Dignity Viatical Settlement Partners, LP, 171 F.3d 52, 58 (1st Cir. 1999) ("The mere fact that a claim ultimately proves unavailing, without more, cannot support the imposition of Rule 11 sanctions."); Harlyn Sales Corp. Profit Sharing Plan v. Kemper Fin. Servs., Inc., 9 F.3d 1263, 1269 (7th Cir. 1993) ("court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading . . . was submitted" (citations omitted)); Kizer v. Children's Learning Ctr., 962 F.2d 608, 613 (7th Cir. 1992) (denial of sanctions upheld where although court granted summary judgment for defendants, court could not conclude that plaintiff filed her claim with either improper motive or inadequate investigation); Mellon Bank Corp. v. First Union Real Estate Equity & Mortgage Invs., 951 F.2d 1399, 1413 (3d Cir. 1991) (merely because plaintiff's arguments "failed to win the day" on summary judgment motion does not warrant Rule 11 sanctions); Thompson v. Duke, 940 F.2d 192, 197-98 (7th Cir. 1991) (reversing sanctions against plaintiff after affirming summary judgment in favor of defendants, noting that "Rule 11 focuses on an attorney's conduct rather than on the resolution of a case"); Miltier v. Downes, 935 F.2d 660, 664 (4th Cir. 1991); Hartman v. Hallmark Cards, Inc., 833 F.2d 117, 124 (8th Cir. 1987) (court granted summary judgment and plaintiff had a weak case, but plaintiff's claims were not baseless and did not warrant Rule 11 sanctions); Teamsters Local Union No. 430 v. Cement Express, Inc., 841 F.2d 66, 69 (3d Cir. 1988) ("Rule 11 may not be invoked because an attorney, after time for discovery, is unable to produce adequate evidence to withstand a motion for summary judgment."); Mover's & Warehousemen's Ass'n of Greater New York v. Long Island Moving & Storage Ass'n, 98 CV 5373 (SJ), 1999 U.S. Dist.

LEXIS 20667, at *27 (E.D.N.Y. Dec. 16, 1999) ("That plaintiff's claims do not survive a motion to dismiss render them neither frivolous nor necessarily untrue; they are merely insufficiently alleged."); Farmer v. City of Fort Lauderdale, 814 F. Supp. 1101, 1103 (S.D. Fla. 1993) (court granted summary judgment but found that plaintiff's claim was not unreasonable because there was a legitimate question as to whether claim was barred by statute of limitations); cf. Runfola & Assocs., Inc. v. Spectrum Reporting II, Inc., 88 F.3d 368, 372 (6th Cir. 1996) (under 1983 rule 11, where sanction is for pursuing claim after discovery reveals that it is factually meritless, the fact that plaintiff withstood motion to dismiss is irrelevant); Curley v. Brignoli Curley & Roberts Assocs., 128 F.R.D. 613, 617 (S.D.N.Y. 1989) (sanctions not likely where summary judgment neither requested nor received).

The Sixth Circuit has noted that a court should be hesitant to sanction a party when a suit is dismissed under Rule 12(b)(6) and there is nothing before the court save the base allegations of a complaint. Tahfs v. Proctor, 316 F.3d 584 (6th Cir. 2003). In Tahfs, the Sixth Circuit reasoned that there ordinarily is little or no evidence before the court at the pleading stage, and thus it is difficult for a court to determine whether a complaint is "for any improper purpose," "unwarranted by existing law," or without "evidentiary support." Id. at 594; cf. Amphenol T&M Antennas, Inc. v. Centurion Int'l Inc., No. 00 C 4298, 2001 U.S. Dist. LEXIS 13795, at *14 (N.D. Ill. Sept. 5, 2001) ("Courts should not decide whether to grant sanctions for pleading violations until the party who has authored the pleading has had a full chance to develop its proof.").

In addition, a court examining a sanctions motion must evaluate whether the claims can be justified on alternative bases disclosed by the pleading. The Seventh Circuit vacated a sanctions award in a case where such dual theories existed. The complaint in Katz v. Household Int'l, Inc., 36 F.3d 670 (7th Cir. 1994), alleged that the defendant released materially false and misleading information that artificially inflated the price of its stock. Id. at 671. Plaintiff based his claim on two theories: primarily, that the defendant made unqualified positive statements when it knew that the projections depended on overall economic recovery; and, secondarily, that nonpublic financial information in defendant's possession made clear that the positive predictions were unreasonable. Id. at 672. The district court dismissed the claim, holding that the complaint failed to identify any "'facts from which a plausible inference of fraudulent intent could be drawn.'" Id. Sanctions were then imposed.

The Seventh Circuit vacated the sanctions, holding that the district court abused its discretion because it (1) had not fully explained the basis for the sanctions; (2) suggested in its ruling that the sanctions were based on only one of the theories supporting the claims; and (3) did not discuss the plaintiff's other theory, which would have required discovery of material in defendant's possession. Id. at 672-76. The plaintiff's second theory, the Seventh Circuit held, was clearly asserted and could have sustained much of the class action suit. Therefore, the court vacated the sanctions and remanded for the district court to more clearly explain the award of sanctions. Id. at 676.

2. Not Warranted by Existing Law

(a) Adhering to Position After Court's Warning

An attorney is likely to be sanctioned if he or she proceeds in the face of a court's warning that a position is likely to be rejected. Under the 1993 version of Rule 11, a judge's warning may provide a litigant with more certain knowledge that a position is frivolous; if the attorney then later advocates the position, he or she is exposed to the risk of sanctions. See Blickenstaff v. R.R. Donnelley & Sons Co. Short Term Disability Plan, 378 F.3d 669 (7th Cir. 2004) (upholding sanctions for amending complaint to state claims previously dismissed with prejudice); Berwick Grain Co., Inc. v. Illinois Dept. of Agric., 217 F.3d 502, 504-05 (7th Cir. 2000) (sanctioning attorney who refiled Rule 60(b) motion to set aside summary judgment despite district court's earlier ruling that motion was barred by the statute of limitations); Estate of Miles Davis v. Trojer, 287 F. Supp. 2d 455, 456 (S.D.N.Y. 2003) (sanctioning attorney after noting that "the Court specifically admonished Trojer from filing the instant Rule 11 motion, which is meritless"); Gold v. Last Experience, 97 Civ. 1459 (JGK), 1999 U.S. Dist. LEXIS 3266, at *7-8 (S.D.N.Y. Mar. 18, 1999) (imposing sanctions on counsel and noting that the Magistrate Judge had explicitly advised counsel the case was frivolous). But see Anderson v. Smithfield Foods, 353 F.3d 912, 915 (11th Cir. 2003) (vacating sanctions where district court's order dismissing claims "did not give such a clear warning" not to refile that only an unreasonable lawyer would have repleaded); Hinkle Eng'g, Inc. v. 175 Jackson LLC, No. 01 C 5078, 2002 U.S. Dist. LEXIS 19420, at *18-19 (N.D. Ill. Oct. 2, 2002) (declining to impose sanctions even though some of counterclaims "were in direct contradiction to the clearly established law of the case" because court assumed these arguments were raised to preserve appellate rights). That result is consistent with the case law

under the 1983 rule. See Saunders v. Bush, 15 F.3d 64, 68 (5th Cir. 1994) (sanctions imposed after plaintiff ignored court's warning and filed another frivolous lawsuit); Sweeney v. Resolution Trust Corp., 16 F.3d 1, 7 (1st Cir. 1994) (plaintiff sanctioned for bringing motion that was almost identical to two previous motions which were denied by court); Pelletier v. Zweifel, 921 F.2d 1465, 1519-20 (11th Cir. 1991) (rejecting argument that complaints and briefs were product of incompetent lawyering, and thus excusable, because plaintiff had been warned by two judges that if he continued to pursue his claim he was likely to run afoul of Rule 11). Moreover, the court need not allow an attorney any "safe harbor" before imposing sanctions on its own initiative, although it must issue a show-cause order and then permit the attorney to respond before issuing sanctions.

However, if an attorney informs the court of the procedure and position that he or she intends to take and the court does not warn the attorney that the conduct may be unacceptable, the court may not be able to later impose sanctions. Pacific Dunlop Holdings, Inc. v. Barosh, 22 F.3d 113 (7th Cir. 1994). In Pacific Dunlop, the defendants filed a motion to disqualify plaintiff's attorneys. Plaintiff's attorneys demurred, informing the court on four different occasions they were responding to the motion "as a matter of law." Id. at 116 & 118. Defendants objected, asserting that a factual issue was raised. The court ruled for defendants five months later and required the plaintiff to file a factual response. Id. at 117. Thereafter, the court imposed Rule 11 sanctions on the plaintiff's attorneys for their "tactical decision" to defend against the motion on purely legal grounds because it caused considerable delay and expense. Id. at 117. The Seventh Circuit reversed, pointing out that the district court permitted the attorneys to proceed on this basis. Id. at 118-19. Further, the Seventh Circuit stated that challenging the motion as a matter of law in no way violated a Federal Rule of Civil Procedure, local rule, or court order. Id. The court concluded that "attorneys should not suffer the consequences" of a district judge's admitting that there may have been "an error in allowing a certain procedure." Id. at 119. See also Kalnit v. Eichler, 99 F. Supp. 2d 327, 345 (S.D.N.Y. 2000) (sanctions were not warranted after dismissal of amended complaint, where district court had expressly granted plaintiff leave to file an amended complaint); Brenner v. Phillips, Appel & Walden, Inc., No. 93 Civ. 7838, 1998 U.S. Dist. LEXIS 10334

(S.D.N.Y. May 4, 1998) (unpublished order) (declining to impose sanctions because, *inter alia*, court had twice granted plaintiffs leave to amend their complaint) (citing Clifford v. Hughson, 992 F. Supp. 661 (S.D.N.Y. 1998)).

(b) Sanctions for Filing a Frivolous Summary Judgment Motion

Under the 1983 rule, courts awarded sanctions when a motion for summary judgment was brought despite the existence of genuine issues of material fact; no relevant provision of the rule changed during the 1993 amendment. See, e.g., Goka v. Bobbitt, 862 F.2d 646, 650 (7th Cir. 1988); In re Cendant Corp. Derivative Action Litig., 96 F. Supp. 2d 403, 406 (D.N.J. 2000) (granting sanctions because summary judgment motion "had not a 'ghost of a chance' for success"); Dong Hwa Kim v. Conrail, No. 89 Civ. 5127, 1991 U.S. Dist. LEXIS 2495, at *8 (S.D.N.Y. Feb. 28, 1991) (awarding sanctions where summary judgment motion filed despite fact that record was replete with open questions of fact); Rivkin v. Diversified Realty Group Partners, No. 86 Civ. 9048, 1991 U.S. Dist. LEXIS 2026, at *7 (S.D.N.Y. Feb. 19, 1991) (finding that because the record "bristle[d]" with questions of fact precluding summary judgment, the motion could not pass Rule 11 scrutiny). But cf. Dunn v. Gull, 990 F.2d 348, 352 (7th Cir. 1993) (upholding denial of sanctions where motion for summary judgment was not legally baseless); AML Int'l Ltd. v. Orion Pictures Corp., No. 89 Civ. 2048, 1991 U.S. Dist. LEXIS 8452, at *12 (S.D.N.Y. June 21, 1991) (although court denied defendant's motion for summary judgment, due to existence of disputed material facts and erroneous legal analysis, court found motion not so "objectively unreasonable" as to warrant sanctions).

(c) Assertion Contrary to Settled Precedent

Likewise, pleadings or motions have been held to be unwarranted by existing law if contrary to settled precedent. See, e.g., Prof'l Mgmt. Assocs., Inc. v. KPMG LLP, 345 F.3d 1030, 1032-33 (8th Cir. 2003) (remanding for imposition of sanctions where "[g]iven the well-settled law of res judicata under the circumstances," counsel should have known second lawsuit was barred); Hernandez v. Joliet Police Dep't, 197 F.3d 256, 264-65 (7th Cir. 1999) (affirming Rule 11 sanctions where plaintiff's attorney overlooked defendant's "obvious" 11th Amendment defense and failed to voluntarily dismiss defendant after it was brought to his attention); Chambers v. American Trans Air, Inc., 17 F.3d 998,

1006 (7th Cir. 1994) (affirming Rule 11 sanctions where complaint requested liquidated and exemplary damages under Title VII at a time when such damages clearly were not allowed); Smith v. Blue Cross & Blue Shield United, 959 F.2d 655, 659 (7th Cir. 1992) (upholding sanctions where suit had "no chance of success under existing precedent"); McGregor v. Board of Comm'rs, 956 F.2d 1017, 1022 (11th Cir. 1992) (sanctions imposed where settled Florida law on at-will employment contracts made plaintiff's constitutional claim frivolous); Norris v. Grosvenor Mktg. Ltd., 803 F.2d 1281, 1288 (2d Cir. 1986); Stites v. IRS, 793 F.2d 618, 621 (5th Cir. 1986); Chu v. Griffith, 771 F.2d 79, 81 (4th Cir. 1985); Westmoreland v. CBS, Inc., 770 F.2d 1168, 1176 (D.C. Cir. 1985); Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 254 (2d Cir. 1985) (Rule 11 is violated when "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."), modified, 821 F.2d 121 (2d Cir. 1987); EB-Bran Prods., Inc. v. Warner Elektra Atlantic, Inc., No. 03-75149, 2006 U.S. Dist. LEXIS 17939, at *17-18 (E.D. Mich. April 10, 2006) (awarding sanctions where plaintiff proceeded in face of adverse rulings in companion case that made continued opposition to summary judgment motion unreasonable); Galasso v. Eisman, Zucker, Klein & Ruttenberg, 310 F. Supp. 2d 569, 577 (S.D.N.Y. 2004) (sanctions appropriate where applicable exemptions were clear from text of FLSA and state labor law); Elsman v. Standard Fed. Bank, 238 F. Supp. 2d 903, 909 (E.D. Mich. 2003) (plaintiff's "complaint is sanctionable because it contains summary assertions without including or explaining citations to any legal authority to support his contentions"); Todd v. City of Natchitoches, 238 F. Supp. 2d 793, 801 (W.D. La. 2002) (sanctions imposed where plaintiff "offers no case law to support [his claim], and the case law that is cited is frequently irrelevant or misconstrued"); Truesdell v. Southern California Permanente Medical Group, 209 F.R.D. 169, 177 (C.D. Cal. 2002) (sanctions imposed where attorney presented "absolutely no authority" undermining a clear line of precedent); Goldstein v. Gordon, No. 3:00-CV-0022-P, 2002 U.S. Dist. LEXIS 3348 (N.D. Tex. Feb. 27, 2002) (sanctions appropriate for tortured reading of the law and resultant misrepresentation to court); Burekovitch v. Hertz, 2001 U.S. Dist. LEXIS 12173, at *36 (E.D. N.Y. July 24, 2001) (sanctions imposed where "plaintiff failed to identify or discuss any authority" that suggested his claim was permissible under the Uniform Standards Act or Delaware law); Noll v. Peterson, 2001 U.S. Dist. LEXIS 9683 (D. Idaho June 15, 2001), adopting Magistrate's Report and Opinion, 2001 U.S.

Dist. LEXIS 8191, at *23 (D. Idaho May 14, 2001) ("In light of this clearly established law, the Court concludes that Plaintiffs' claims . . . are frivolous and without merit."); Williams v. Wilkinson, 122 F. Supp. 2d 894, 903 (S.D. Ohio 2000) (sanctioning attorney for filing motion to dismiss that failed to cite or distinguish adverse controlling circuit precedent); Mitchell Plastics, Inc. v. Glass, Molders, Pottery, Plastics & Allied Workers Int'l Union, 946 F. Supp. 401, 407 (W.D. Pa. 1996) ("Rather than a hurdle, which, at least in sports, runners almost always reach the other side of, binding, recent authority is better viewed as a wall. The complaining party must be prepared to show us exactly where the door is and the key to unlock it."); Knestrick v. IBM, 945 F. Supp. 1080, 1083 (E.D. Mich. 1996) (attorney's failure to uncover contrary case law unreasonable where the court easily found contrary cases "simply by running an exceedingly straightforward search in the 'Westlaw' electronic database"); Knipe v. Skinner, 146 F.R.D. 58, 61 (N.D.N.Y. 1993) (sanctions imposed for complaint based on legal arguments that had been soundly rejected by four courts of appeal because attorney neither tried to distinguish those cases nor advanced reasonable argument for modification or reversal of existing law), remanded, 19 F.3d 72 (2d Cir. 1994); Medcom Holding Co. v. Baxter Travenol Lab., No. 87 C 9853, 1993 U.S. Dist. LEXIS 2756, at *15-16 (N.D. Ill. Mar. 3, 1993) (motion to reconsider was frivolous because it contained no new evidence and no new law); United Pac. Ins. Co. v. Durbano Constr. Co., 144 F.R.D. 402, 406 (D. Utah 1992) (where defendants advanced argument in contravention of well established and universally accepted jurisdictional rule, court found that claim was frivolous); Villar v. Crowley Maritime Corp., 780 F. Supp. 1467, 1487 (S.D. Tex. 1992) (acceptance of plaintiff's argument would have required the court to go against almost every case that has ever considered the Erie Doctrine), aff'd, 990 F.2d 1489 (5th Cir. 1993); Sheldon v. McGraw-Hill, Inc., 777 F. Supp. 1369, 1373 (E.D. Mich. 1991) (plaintiff's brief entirely misstated Michigan law regarding at-will contracts); Route Messenger Servs., Inc. v. Holt-Dow, Inc., 139 F.R.D. 311, 312 (S.D.N.Y. 1991) (plaintiff violated Rule 11 by relying on a statute that was repealed eight years prior); Kelly v. Mercoid Corp., 776 F. Supp. 1246, 1258 (N.D. Ill. 1991) (where plaintiff alleged violation of the Fourth Amendment based on private employer's urinalysis testing, court found failure to perform cursory research which would have revealed that only government action or state action may be challenged under Fourth Amendment was sanctionable); Collins Dev. Corp. v. Marsh & McLennan, Inc., No. 90 Civ. 4675, 1991 U.S. Dist. LEXIS 9735, at *13-15 (S.D.N.Y. July 17, 1991) (filing of complaint was sanctionable

when statute of limitations had expired); Marley v. Wright, 137 F.R.D. 359, 363 (W.D. Okla. 1991) (civil rights suit against judges was sanctionable because of well-settled precedent of absolute judicial immunity), aff'd without op., 968 F.2d 20 (10th Cir. 1992); Lapine v. Boehm, No. 89 C 8420, 1990 U.S. Dist. LEXIS 12313, at *6 (N.D. Ill., Sept. 18, 1990) (sanctions imposed where mere reading of relevant case law would have disclosed that motion to reconsider is improper way to raise new arguments which could and should have been brought in briefing the original motion); Mooneyham v. SmithKline & French Lab., No. G89-4039, 1990 U.S. Dist. LEXIS 6158, at *22 (W.D. Mich. May 18, 1990) (RICO claim not well grounded in law where plaintiffs' attorney stated, at a hearing before a magistrate, "we didn't know how solid we were on the RICO claim, but that we wanted some discovery before we knew exactly where we stood"), aff'd without op., 931 F.2d 56 (6th Cir. 1991). See also Senese v. Chicago Area I.B. of T. Pension Fund, 237 F.3d 819 (7th Cir. 2001) (remanding for imposition of sanctions in ERISA claim where party knew that he did not meet plan requirements).

The unsettled or evolving nature of the law in an area will probably not insulate counsel from sanctions for claims that are patently inadequate in light of the development of the law at the time the complaint is filed. Even if the attorney is seeking a change in law, he or she still violates the rule, as the rule only allows "nonfrivolous" arguments. Rule 11(b)(2). This is in accord with case law under the 1983 rule. See Crabtree v. Muchmore, 904 F.2d 1475, 1478 (10th Cir. 1990); Ryan v. Clemente, 901 F.2d 177, 181 (1st Cir. 1990); O'Malley v. New York City Transit Auth., 896 F.2d 704, 709 (2d Cir. 1990) (remanding for imposition and sanctions against plaintiff filing utterly frivolous RICO claims — "lack of clarity in the general state and some areas of RICO law cannot shield every baseless RICO claim from Rule 11 sanctions"); Lemaster v. United States, 891 F.2d 115, 119 (6th Cir. 1989) (unsettled nature of law in related area cannot insulate party who presents claim that clearly has been rejected); Henry v. Farmer City State Bank, 127 F.R.D. 154, 156 (C.D. Ill. 1989) (court rejected counsel's argument that sanctions for filing a RICO claim were inappropriate due to "fluctuation and development" of the parameters of the RICO statute, noting that the RICO claims asserted were outside the "gray area of possibly colorable claims" under the statute); cf. Ozee v. American Council on Gift Annuities, 143 F.3d 937, 941 (5th Cir. 1998) (refusing to overturn F.R. App. P. 38 sanctions award where Congress subsequently amended the law to conform to the sanctioned parties' interpretation), cert. denied sub nom. American Bible Society v. Richie, 526 U.S.

1064 (1999). Moreover, it is no defense to sanctions that counsel was unaware of authority that should have been known to a competent attorney. See Hewitt v. City of Stanton, 798 F.2d 1230, 1233 (9th Cir. 1986). But see Stojanovski v. Strobl & Manoogian, P.C., 783 F. Supp. 319, 322 n.3 (E.D. Mich. 1992) (where attorney was unaware that law had been amended to rescind relevant provision, court declined to impose sanctions on the ground that attorney's misstatement of the law was not malicious).

Further, repeated filing of identical claims that are dismissed based on the current law may result in sanctions because they are "patently frivolous." See Roundtree v. United States, 40 F.3d 1036, 1040 (9th Cir. 1994) (attorney repeatedly bringing the same case, but with different plaintiffs, sanctioned under pre-amended Rule 11 for bringing "patently frivolous" complaint); Jacob v. United States, No. 94-2127, 1994 U.S. App. LEXIS 30528, at *5-7 (10th Cir. Nov. 2, 1994) (sanctions imposed under pre-amended Rule 11 against "tax protester" who brought frivolous suit that merely restated arguments he made in prior dismissed lawsuits).

(d) Advocating Legal Positions Where Issue Is Of First Impression in the Circuit

Rule 11 permits an attorney to argue for an extension or modification of existing law. Under the language authorizing arguments for the extension of law, a party should not be sanctioned for raising an issue of first impression in one circuit, even if other courts have resolved the issue to the contrary. See Farrell v. Hellen, No. 03 Civ. 4083 (JCF), 2004 U.S. Dist. LEXIS 3638, at *19-20 (S.D.N.Y. March 10, 2004) (denying motion for sanctions; "[j]ust as there is no legal authority clearly supporting the plaintiffs' theory, so there is no precedent clearly rejecting it."); Neighborhood Research Inst. v. Campus Partners for Cmty. Urban Dev., 212 F.R.D. 374, 379 (S.D. Ohio 2002) ("This Court will not impose sanctions on the Plaintiffs for asserting claims contrary to existing law when the only existing law comes from jurisdictions whose precedent is not binding on the Court."). This is consistent with precedent under the 1983 rule. United States v. Stringfellow, 911 F.2d 225, 226-27 (9th Cir. 1990) (no sanctions for failing to cite contrary authority from other jurisdiction; sanctionable to proceed in the face of uncited adverse authority only where the authority renders claims frivolous); Winstead v. Indiana Ins. Co., 855 F.2d 430, 435 (7th Cir. 1988) (stating in dicta that "it is most unlikely that a district court faced with an issue of first impression

in its own circuit would impose Rule 11 sanctions on a party who, while recognizing adverse precedent elsewhere, nevertheless urged the court to find differently"); Danese v. City of Roseville, 757 F. Supp. 827, 830 (E.D. Mich. 1991) (no sanctions for proceeding in face of contrary authority from other circuit); Aggregates (Carolina), Inc. v. Kruse, 134 F.R.D. 23, 26 (D.P.R. 1991) (despite defendant's "painfully weak" argument, sanctions inappropriate where argument had not been rejected previously by Circuit or Supreme Court authority).

Thus, sanctions are not warranted where a party advocates a "reasonable legal position" on the meaning of a new law or rule, even if the district court disagrees with that position. Hartmarx Corp. v. Abboud, 326 F.3d 862, 868 (7th Cir. 2003). In Hartmarx, plaintiff filed suit against defendant, a group of investors, for failing to commence a tender offer within a reasonable time as required by tender offer rules promulgated under Section 14(e) of the Securities Exchange Act and making misleading statements about the firmness of its financing for the proposed deal. Id. at 864-65. The district court, without finding liability under Section 14(e), issued sanctions against the defendant under the PSLRA and Rule 11, concluding that defendant's pleadings contained misstatements about its financing commitments. Id. at 866. The Seventh Circuit reversed, finding that, given the new amendments to the SEC rules, the defendant's statements "did not run so far afoul of the governing standards under the tender offer rules that sanctions were warranted." Id. at 864. The Seventh Circuit explained that, although the defendant's statements throughout the pleadings presented a "close question," its interpretation of its obligations under the new SEC rules was reasonable. Id. at 868.

(e) Advocating Position Rejected by Circuit Court, but Accepted By Other Courts

If the law in the relevant circuit is unfavorable and well-settled, and an attorney is not specifically seeking a change in law, the case law suggests that a filing is not well-grounded simply because another circuit's law is more favorable. In re Kunstler, 914 F.2d 505, 537 (4th Cir. 1990); De Sisto College v. Line, 888 F.2d 755, 765-66 (11th Cir. 1989).

A party may not be sanctioned for proceeding in the face of an adverse district court decision from the relevant district court. See TMF Tool Co. v.

Muller, 913 F.2d 1185, 1191 (7th Cir. 1990) (sanctions improper where plaintiff proceeded in the face of adverse district court authority in a relevant jurisdiction, because only appellate court decisions were held to be controlling law of the circuit). However, the amended rule strongly suggests that an attorney has a duty to advise the district court of contrary decisions in the same district. See Maciosek v. Blue Cross & Blue Shield United, 930 F.2d 536, 542 (7th Cir. 1991) (sanctions imposed where attorney raised claims which were identical to claims rejected by same district court, in case brought by same attorney, where attorney did not mention previous case).

(f) Asserting a Claim with Clear Procedural or Jurisdictional Defects

Assertion of a claim with a clear, insurmountable procedural or jurisdictional defect has been held to be sanctionable conduct. See Bethesda Lutheran Homes and Servs., Inc. v. Born, 238 F.3d 853, 858 (7th Cir. 2001) (reversing denial of sanctions because "it should have been obvious to any lawyer that relief was barred on multiple grounds, including res judicata, the Eleventh Amendment, judicial estoppel, and qualified immunity"); Walker v. Norwest Corp., 108 F.3d 158, 161 (8th Cir. 1997) (sanctions appropriate where lack of complete diversity among parties was evident from face of complaint); Roundtree v. United States, 40 F.3d 1036, 1040 (9th Cir. 1994) (palpable lack of Federal Tort Claims Act jurisdiction over case sufficient to warrant sanctions); Crookham v. Crookham, 914 F.2d 1027, 1030 (8th Cir. 1990) (sanctions where cause of action was time-barred); White v. General Motors Corp., 908 F.2d 675, 682 (10th Cir. 1990), Searcy v. Houston Lighting & Power Co., 907 F.2d 562, 565 (5th Cir. 1990) (sanctions where plaintiff lacked standing); Banner v. Raisin Valley, Inc., 213 F.R.D. 520, 521 (N.D. Ohio 2003) (sanctions imposed where a motion for reconsideration raised only arguments that could have been raised in the original brief); Soler v. Puerto Rico Tel. Co., 230 F. Supp. 2d 232, 238 (D.P.R. 2002) (sanctions imposed where complaint contained only conclusory allegations of diversity jurisdiction and there was no reasonable basis for federal question jurisdiction); McIllwain v. Bank of Harrisburg, Arkansas, No. 3:01CV0045, 2001 U.S. Dist. LEXIS 13284, at *7 (E.D. Ark. Aug. 23, 2001) (sanctions imposed where claim barred by both statute of limitations and res judicata); Inter-County Res., Inc. v. Medical Res., Inc., 49 F. Supp. 2d 682, 684 (S.D.N.Y. 1999) (sanctioning attorney for filing 10b-5 claim where plaintiff lacked standing); United Pac. Ins. Co. v. Durbano Constr. Co., 144 F.R.D. 402,

406 (D. Utah 1992) (finding claim frivolous where it was asserted in contravention of well established and universally accepted jurisdictional rule); Commercial Coin Laundry Sys. v. Wiechmann, No. 91 C 1992, 1992 U.S. Dist. LEXIS 46, at *7 (N.D. Ill. Jan. 6, 1992) (asserting federal diversity claim where damages did not exceed $50,000 was sanctionable); Route Messenger Servs., Inc. v. Holt-Dow Inc., 139 F.R.D. 311, 312 (S.D.N.Y. 1991) (plaintiff misstated its own principal place of business in order to establish federal court jurisdiction); Sindram v. Johnson, No. Civ. 89-1579, 1991 U.S. Dist. LEXIS 13168, at *7 (D.D.C. June 14, 1991) (plaintiff lived in Maryland but asserted D.C. citizenship; jurisdictional allegations were made in bad faith and were sanctionable), aff'd, 979 F.2d 248 (D.C. Cir. 1992); Leptha Enters., Inc. v. Logenback, No. 90 Civ. 7704, 1991 U.S. Dist. LEXIS 12625, at *9-10 (S.D.N.Y. Sept. 3, 1991) (sanctions for filing claims barred by res judicata); Khalil v. Town of Cicero, No. 89 C 620, 1991 U.S. Dist. LEXIS 7928, at *8-9 (N.D. Ill. June 7, 1991) (sanctions for filing complaint long after expiration of limitations period and supporting flawed claim with frivolous tolling argument); Cudjoe v. F & V Mechanical Plumbing & Heating Corp., No. 90 Civ. 4001, 1991 U.S. Dist. LEXIS 4054, at *8 (S.D.N.Y. Apr. 2, 1991) (counsel sanctioned for bringing civil rights action on behalf of plaintiff, a citizen of Ghana, despite fact that governing statute provides rights to "all citizens of the United States"); Kostovski v. Getty Petro. Corp., No. 87 CV 1475, 1990 U.S. Dist. LEXIS 5710, at *4 (E.D.N.Y. Apr. 12, 1990) (sanctions for wholly meritless assertion of diversity jurisdiction); Neustein v. Orbach, 130 F.R.D. 12, 14 (E.D.N.Y. 1990) (sanctions imposed for arguing that district court had jurisdiction over a custody dispute). But cf. Productos Mercantiles E Industriales v. Faberge USA, 23 F.3d 41, 47 (2d Cir. 1994) (affirming denial of sanctions where plaintiff improperly asserted diversity jurisdiction based upon poor investigation of defendants' business structures, although court noted that plaintiff "showed poor judgment and engaged in sloppy legal work"); Black Hills Inst. v. South Dakota Sch. of Mines & Tech., 12 F.3d 737, 745 (8th Cir. 1993) (reversing sanctions for including improper defendant where inclusion was neither baseless nor lacking in plausibility because of possible interest that the party could have in the suit); CJC Holdings, Inc. v. Wright & Lato, Inc., 989 F.2d 791, 793 (5th Cir. 1993) (reversing imposition of sanctions where plaintiff's argument that the Supreme Court's decision in Chambers v. NASCO, Inc., a case holding that a district court had the inherent power to sanction a party for conduct before other tribunals, permitted Texas court to impose sanctions for defendant's conduct in New Jersey court, although rejected, was reasonable); Gottlieb v.

Westin Hotel Co., 990 F.2d 323 (7th Cir. 1993) (upholding denial of sanctions against defense attorneys who improperly removed case to federal court; given the complexity of the transaction at issue, reasonable inquiry would not necessarily have led to conclusion that removal was improper); Mareno v. Rowe, 910 F.2d 1043, 1047 (2d Cir. 1990) (reversing sanctions where district court was without personal jurisdiction, but interpretation of state jurisdictional rules were not so clear as to make assertion of claims sanctionable); Crowley v. Peterson, 206 F. Supp. 2d 1038, 1048 (C.D. Cal. 2002) (denying sanctions where action was time-barred because "California case law does unambiguously define what constitutes 'actual and appreciable harm' that will trigger the running of the limitations clock"); Ross v. County of Lake, 764 F. Supp. 1308, 1310 (N.D. Ill. 1991) (where civil rights plaintiff reasserted pendent state claims previously dismissed by Seventh Circuit, district court did not sanction plaintiff because her conduct was not motivated by an improper purpose such as harassment or delay); Marr v. Smith Barney, Harris Upham & Co., No. 3:91-148-Misc: CV, 1991 U.S. Dist. LEXIS 12872, at *5-6 (D. Or. Sept. 4, 1991) (court lacked subject matter jurisdiction, but claim not sufficiently unreasonable to warrant award of attorneys' fees); Derby v. Perschke, No. 88 C 3835, 1991 U.S. Dist. LEXIS 2213, at *8-9 (N.D. Ill. Feb. 20, 1991) (although plaintiff's claims held to be time-barred, no sanctions where statute of limitations issue was not clear at the time of filing).

3. Warranted by a Nonfrivolous Argument for a Change of Law

Even before the 1993 amendment replaced the language requiring "good faith" with the requirement that arguments for a change in law be "nonfrivolous," courts employed an objective standard. See Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073, 1081-82 (7th Cir. 1987). A pleading or motion makes a frivolous argument for the extension, modification, or reversal of existing law when no reasonable argument can be advanced for a change of law. Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 254 (2d Cir. 1985), modified, 821 F.2d 121 (2d Cir. 1987); see also Spiller v. Ella Smithers Geriatric Ctr., 919 F.2d 339, 341 (5th Cir. 1990) (conclusory allegation contrary to current jurisprudence that is made without any support whatsoever does not represent a good faith effort to modify existing law).

On the other hand, an argument that has been accepted by other courts is likely to be nonfrivolous. Pierce v. F.R. Tripler & Co., 955 F.2d 820, 829 (2d Cir.

1992) (where one state supreme court had accepted party's argument, in the absence of controlling authority to the contrary, this was enough to support party's good faith argument for extension or modification of existing law); see also Smith v. National Health Care Servs., 934 F.2d 95, 97-98 (7th Cir. 1991) (sanctions vacated where attorney cited contrary authority and argued that later-decided cases demonstrated that the circuit's law should be changed); Federal Sav. & Loan Ins. Corp. v. Molinaro, 923 F.2d 736, 739 (9th Cir. 1991) (no sanctions where party based claim that FSLIC was not entitled to sovereign immunity on fact that, under analogous statute, circuit had held FDIC not entitled to sovereign immunity); Carlton v. Jolly, 125 F.R.D. 423, 427 (E.D. Va. 1989), aff'd without op., 911 F.2d 721 (4th Cir. 1990); Cole v. U.S. Capital, Inc., 02 C 1858, 2003 U.S. Dist. LEXIS 14138, at *6-7 (N.D. Ill. Aug. 13, 2003) (where another district court within the Circuit had accepted plaintiff's argument, plaintiff's allegations were warranted by a nonfrivolous argument for a change of law); Swihart v. Pigeon River Materials, Inc., 4:02-CV-220, 2003 U.S. Dist. LEXIS 13306, at *8 (W.D. Mich. June 3, 2003) (holding that plaintiff's argument for a change of law "is nonfrivolous especially considering the diversity of opinions . . . amongst the federal circuits and lower courts."); Gallo v. United States Dep't of State Foreign Serv. Grievance Bd., 776 F. Supp. 1478, 1482 (D. Colo. 1991) (where Tenth Circuit had not addressed the issue but other circuits had rejected plaintiff's argument, plaintiff would not be sanctioned for raising a good faith argument for its position).

(a) Argument Rejected in the Past

An argument that has been rejected in the past is not necessarily frivolous. See, e.g., Murray v. City of Austin, 947 F.2d 147, 153 (5th Cir. 1991) (plaintiff's claims in the "sensitive area" of First Amendment litigation should not have been sanctioned because of the good faith argument provision of Rule 11); Hamer v. County of Lake, 819 F.2d 1362, 1367 (7th Cir. 1987) (Interpreting 42 U.S.C. § 1988, the court stated: "It is often through vigorous advocacy that changes and developments in the law occur and new precedent is created. Innovative, even persistent advocacy in the face of great adversity must not be unreasonably penalized with hindsight. Subsequent failure is not the test."); Aetna Cas. & Sur. Co. v. Fernandez, 830 F.2d 952, 956 (8th Cir. 1987) ("We are also mindful that excessive 'sanctionitis' under Rule 11 . . . might discourage and 'chill' vigorous and ingenious advocacy, especially in matters of controversial character where there is a reasonable likelihood of achieving potential change in the law.");

Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 254 (2d Cir. 1985) ("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."), modified, 821 F.2d 121 (2d Cir. 1987); Donohoe v. Consolidated Operating & Prod. Corp., 139 F.R.D. 626, 633 (N.D. Ill. 1991) (where law was in a state of uncertainty but lower courts had rejected plaintiff's argument, counsel should not be sanctioned for urging the argument until a definitive ruling from circuit court); Estate of Blas ex rel. Chargualaf v. Winkler, 792 F.2d 858, 861 n.4 (9th Cir. 1986) (merely rearguing previously rejected arguments is not necessarily evidence of bad faith or an intent to harass); Sovereign Metal Corp. v. Ciraco, No. 91 Civ. 751, 1992 U.S. Dist. LEXIS 6, at *9 (S.D.N.Y. Jan. 3, 1992) (while securities claim was untenable under current law, it was not an unreasonable attempt to extend existing coverage of the federal securities laws).

An argument for the reversal of existing law which is made to preserve the issue for higher review is not subject to sanctions merely because a lower court is bound by existing law to reject the argument. See Gilmore v. Shearson/American Express Inc., 811 F.2d 108, 111-12 (2d Cir. 1987). If a plaintiff includes a novel legal theory in a complaint, which by its nature does not completely describe and defend that theory, a court should carefully examine the arguments counsel later presents to determine if the plaintiff is, in fact, arguing for a change in the law. Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073, 1082 (7th Cir. 1987).

At least one court has questioned whether a diversity action is an appropriate forum to ask for a change in existing law. Lind-Waldock & Co. v. Caan, 121 F.R.D. 337, 343 n.7 (N.D. Ill. 1988) ("[U]nder Erie a federal district court cannot properly stretch the established frontiers of state law."). Under this view, litigants would be prohibited from arguing for changes in state law in diversity actions. However, this view generally has not been a factor in case law under the rule.

(b) Duty of Candor in Arguing for Change of Law

Although the 1993 amendment requires litigants to specifically denote factual contentions that are not yet supported by evidence, it does not require litigants to specifically identify those legal arguments that call for a change in law. An earlier version of the proposed rule did so require, but the provision was

removed from the final amendment. Gregory P. Joseph, Sanctions: The Federal Law of Litigation Abuse § 11(H) (Matthew Bender, 3d ed. 2000). Some attorneys may seize on the deletion of this requirement to argue that no duty exists to disclose specifically arguments for a change in law. But it may be better practice and discipline for attorneys to alert courts that they are arguing for a change in law. In particular, if an attorney fails to disclose unfavorable case law, his or her argument cannot be "warranted by existing law," as the undisclosed precedent clearly does not warrant the argument. Nor can it be a nonfrivolous argument for changing law as it purports to be a statement of the law's current state. Indeed, several courts had reached this conclusion under the 1983 rule. See Thornton v. Wahl, 787 F.2d 1151, 1154 (7th Cir. 1986) (plaintiff's "brief misrepresents existing law; she does not accurately describe the law and then call for change"); see also Hughes v. City of Fort Collins, 926 F.2d 986, 990 (10th Cir. 1991) (court stated that proponent of change in law must articulate basis for change and noted that such assertions should be viewed critically, but reluctantly affirmed district court decision not to sanction plaintiff who did relatively little to address and distinguish controlling, contrary authority); Tabrizi v. Village of Glen Ellyn, 883 F.2d 587, 593 (7th Cir. 1989) (party must actually make a plausible argument, "'not merely assert after-the-fact that a reasonable argument could have been made'") (quoting In re Ronco, 838 F.2d 212, 218 (7th Cir. 1988)); see also Newsome v. James, 968 F. Supp. 1318, 1324 (N.D. Ill. 1997) (under amended rule 11 party may argue for an extension of law, but not by misrepresenting the current law). See generally William W. Schwarzer, Sanctions Under the New Federal Rule 11 — A Closer Look, 104 F.R.D. 181, 193-95 (1985); cf. Blackwell v. Department of Offender Rehabilitation, 807 F.2d 914, 915 (11th Cir. 1987) (upheld district court's imposition of Rule 11 sanctions on attorney for his lack of factual candor in his original brief and motion). An attorney's duty of candor may be even higher where she appears at an ex parte hearing, such as a motion for TRO. Maine Audubon Soc'y v. Purslow, 907 F.2d 265, 268 (1st Cir. 1990).

The Ninth Circuit, however, has held that "[t]he failure to cite relevant authority, whether it be case law or statutory provisions, does not alone justify the imposition of sanctions. . . . However, if the omitted case law and statutory provisions would render the attorney's argument frivolous, he or she 'should not be able to proceed with impunity in real or feigned ignorance of [them],' . . . and sanctions should be upheld." United States v. Stringfellow, 911 F.2d 225, 226

(9th Cir. 1990) (quoting Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531, 1542 (9th Cir. 1986)). In Golden Eagle, the Ninth Circuit reversed sanctions imposed on defense counsel whose arguments were legally and factually supportable but who argued for the extension of law as if it were existing law. The Ninth Circuit reasoned that imposing a duty of candor on attorneys in such circumstances would require courts to make fine distinctions as to whether or not an adverse decision should have been called to its attention and would discourage attorneys from zealously representing their clients. Accordingly, it concluded that Rule 11 does not require litigants to identify specifically arguments for a change in law. See Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531, 1539-42 (9th Cir. 1986); see also Carter v. United States, No. C-89-20440, 1990 U.S. Dist. LEXIS 14370, at *20 (N.D. Cal. Aug. 21, 1990) (courts should not sanction attorneys for failing to cite adverse authority), aff'd in part and rev'd in part, 973 F.2d 1479 (9th Cir. 1992); Televideo Sys., Inc. v. Mayer, 139 F.R.D. 42, 49 (S.D.N.Y. 1991) (while counsel made several false statements of fact, the misstatements neither unduly prolonged litigation nor increased cost of defending suit and no Rule 11 violation was found); Mary Ann Pensiero, Inc. v. Lingle, 847 F.2d 90, 96 (3d Cir. 1988) ("[C]ounsel may not be found to have violated Rule 11 merely for failing to 'label' the argument advanced. Counsel should not be sanctioned for choosing the wrong characterization for their theories."). See generally Ellers, Oakley, Chester & Rike, Inc. v. Haith & Co., 728 F. Supp. 646, 650 (D. Kan. 1989) (no sanctions where "filing arguably could have been based upon a good faith argument for modification"), rev'd on other grounds sub nom. Ellers, Oakley, Chester & Rike, Inc. v. St. Louis Air Cargo Servs., 984 F.2d 1108 (10th Cir. 1993). But see Golden Eagle Distrib. Corp. v. Burroughs Corp., 809 F.2d 584 (9th Cir. 1987) (Noonan, J., dissenting from denial of rehearing en banc).

Litigants should inform the court that a change in law is sought, to be sure that they are insulated from sanctions for making an argument contrary to precedent. In Crookham v. Crookham, 914 F.2d 1027, 1029-30 (8th Cir. 1990), the court held that the lower court did not abuse its discretion by awarding sanctions where attorneys argued for a private cause of action under section 17(a) of the Securities Act and were unaware of definitive Eighth Circuit case law to the contrary. Thus, one must be aware of existing law to make a non-frivolous argument for a change in that law. See A-Abart Elec. Supply, Inc. v. Emerson Elec. Co., 956 F.2d 1399 (7th Cir. 1992) (upholding sanctions where attorney,

without stating that modification of existing law was sought, quoted from U.S. Supreme Court dissent as if it were the majority opinion and quoted from Third Circuit case although the Supreme Court had rejected its reasoning); Rush v. McDonald's Corp., 966 F.2d 1104, 1123 (7th Cir. 1992) (sanctions upheld where one of plaintiff's claims was based upon bill pending in state legislature, and claim was not dismissed by plaintiff until more than two-and-a-half months after legislature adjourned); Knipe v. Skinner, 146 F.R.D. 58, 60 (N.D.N.Y. 1993) (sanctions imposed for complaint based on legal arguments that had been soundly rejected by four courts of appeal because attorney neither tried to distinguish those cases nor advanced reasonable argument for modification or reversal of existing law), remanded, 19 F.3d 72 (2d Cir. 1994); Bhatia v. Air India, No. 90 Civ. 5445, 1992 U.S. Dist. LEXIS 13172, at *31-32 (S.D.N.Y. Sept. 2, 1992) (sanction imposed where defendant cited case which had been overruled by a later case and defendant did not explain why court should depart from established law of the circuit). Likewise, at least one court has held that sanctions may be appropriate where the court is not informed of legal developments occurring in the case before it. See Bardney v. United States, 945 F. Supp. 152, 155 (N.D. Ill. 1996) (attorney bringing habeas action sanctioned for failing to inform district court of appellate court's affirmance of conviction and Supreme Court's denial of petition for certiorari).

E. Improper Purpose

Both the 1983 and 1993 rules expressly bar any pleading, motion, or paper that is brought for any improper purpose, such as harassment, delay, or an unnecessary increase in costs. In fact, the 1993 amendment did not change the "improper purpose" provisions at all. Federal courts have generally evaluated charges of improper purpose by looking at the facts of the case, the reasonableness of the pleadings, and the circumstances in which the suit was filed. The standard most frequently used in the inquiry has been an objective one. See, e.g., In re Kunstler, 914 F.2d 505, 518-20 (4th Cir. 1990) (objective standard based on circumstances of filing); Deere & Co. v. Deutsche Lufthansa Aktiengesellschaft, 855 F.2d 385, 393 (7th Cir. 1988); National Ass'n of Gov't Employees, Inc. v. National Fed'n of Fed. Employees, 844 F.2d 216, 223-24 (5th Cir. 1988); Lieb v. Topstone Indus., Inc., 788 F.2d 151, 157 (3d Cir. 1986); Cross v. Harris Corp., No. 97-3703, 1998 U.S. Dist. LEXIS 12183, at *5 (E.D. Pa. Aug. 7, 1998). But see Zagano v. Fordham Univ., 720 F. Supp. 266, 268

(S.D.N.Y. 1989) (counsel who unjustifiably waited till shortly before trial to voluntarily dismiss not sanctioned because "counsel's conduct did not arise . . . out of bad faith"), aff'd, 900 F.2d 12 (2d Cir. 1990).

The improper purposes prong of the rule creates a tension between competing policies. On the one hand, an attorney has a duty to represent his client zealously. On the other hand, Rule 11 was designed to reduce frivolous claims, defenses, and motions. "The challenge facing the court, therefore, is to construe the Rule in a manner that will promote the goal of limiting harassment, delay and expense, without impeding zealous advocacy or freezing the common law in the status quo." Aetna Life Ins. Co. v. Alla Med. Servs., Inc., 855 F.2d 1470, 1476 (9th Cir. 1988); accord Stitt v. Williams, 919 F.2d 516 (9th Cir. 1990).

Courts infer the purpose of a filing from the consequences of the pleading or motion. For example, an improper purpose may be inferred when the effect of a pleading or motion is to delay the proceedings. Bay State Towing Co. v. Barge Am. 21, 899 F.2d 129, 132 (1st Cir. 1990) (record supported district court's conclusion that frivolous opposition to summary judgment motion was filed for purposes of delay); see also Henderson v. Department of Pub. Safety & Corrections, 901 F.2d 1288, 1296-97 (5th Cir. 1990); Davis v. Veslan Enters., 765 F.2d 494, 500 (5th Cir. 1985); Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Division Sales, Inc., No. 91 C 2192, 1991 U.S. Dist. LEXIS 13522, at *7 (N.D. Ill. Sept. 30, 1991) (frivolous motion to disqualify opposing counsel that was brought five months after complaint was filed was for improper purpose). But see General Elec. Co. v. Berkshire Gas Co., No. 00-30164-MAP, 2002 U.S. Dist. LEXIS 15275, at *13-15 (D. Mass. Aug. 9, 2002) (refusing to find "improper purpose" even though defendant's denial of its clear liability resulted in an "extraordinary waste of time, needless increase in the cost of the litigation, and unnecessary delay").

1. Harassment

Absent direct evidence of harassment, courts have found that a pleading or motion is interposed to harass the opposing party when it merely repeats previously unsuccessful claims against the same defendant and where those claims were clearly barred by res judicata. See G.C. & K.B. Invs., Inc. v. Wilson, 326 F.3d 1096, 1110 (9th Cir. 2003); Coats v. Pierre, 890 F.2d 728, 734 (5th Cir.

1989); Fox v. Boucher, 794 F.2d 34, 36-38 (2d Cir. 1986); Nugget Hydroelectric, LP v. Pacific Gas & Elec. Co., 981 F.2d 429, 439 (9th Cir. 1992) (where second motion to compel largely duplicated unsuccessful earlier motion, court found motion filed for the improper purpose of harassing opposing party); McLaughlin v. Bradlee, 803 F.2d 1197, 1205 (D.C. Cir. 1986); Cannon v. Loyola Univ. of Chicago, 784 F.2d 777, 782 (7th Cir. 1986) (sanctions appropriate where plaintiff's thirteenth suit in ten years against universities that denied her admission to medical school was clearly barred by previous actions); Brenda R. v. Aurora E. Sch. Dist. 131, No. 03 C 3423, 2003 U.S. Dist. LEXIS 20276, at *6 (N.D. Ill. Nov. 4, 2003) ("[Plaintiff's] continuous filing of frivolous litigation against the District is done for no purpose other than harassment."). But see Jackson Nat'l Life Ins. Co. v. Greycliff Partners, Ltd., 226 B.R. 407, 421 (E.D. Wis. 1998) (filing several actions against defendants to 'forum-shop' insufficient to show improper motive); Hill-Harriss v. Gingiss Int'l, Inc., No. 91 C 6682, 1992 U.S. Dist. LEXIS 1182, at *27-28 (N.D. Ill. Feb. 5, 1992) (although suit was barred by res judicata, sanctions denied because the plaintiffs' attorney did not represent plaintiffs in prior suits, and he had no knowledge of those suits). Courts also often consider the history of the litigation, and find a filing to have been filed for an improper purpose where it follows an established pattern of groundless claims. See Tarkowski v. County of Lake, 775 F.2d 173, 176 (7th Cir. 1985) (history of unfounded litigation establishes prima facie entitlement to attorneys' fees). See also Liptak v. Former State Judge Paul Banner, No. 3:01-CV-0953-M, 2002 U.S. Dist. LEXIS 940 (N.D. Tex. Jan. 18, 2002) (injunction against further suits on same facts appropriate because of pattern of prior suits); Smith v. Prudential Ins. Co., No. 98 C 5903, 2000 U.S. Dist. LEXIS 6003, at *18-19 (N.D. Ill. Apr. 28, 2000) (imposing sanctions for non-frivolous complaint based on plaintiff's litigious history and deposition testimony that he sought to "bleed [defendants] of their resources").

Courts have also inferred an intent to harass where the claim is patently frivolous and the situation indicates the filing party has some motive to harass, such as retaliation. See Chaudry v. Gallerizzo, 174 F.3d 394, 410-11 (4th Cir.) (sanctions upheld where trial court determined that plaintiffs brought claims against debt collectors based on evidence that no "rational person" would have believed supported their claim), cert. denied, 120 S. Ct. 215 (1999); Derechin v. State Univ. of New York, 963 F.2d 513, 517 (2d Cir. 1992) (sanctions upheld where attorney filed pretrial statement listing over two hundred witnesses as a

harassing tactic to retaliate for what she believed was harassment by opposing counsel); Danvers v. Danvers, 959 F.2d 601, 604 (6th Cir. 1992) (court concluded that plaintiff filed federal action against his ex-wife to harass her and increase her litigation costs unnecessarily where even cursory research would have revealed that his cause lacked merit); Pelletier v. Zweifel, 921 F.2d 1465, 1520 (11th Cir. 1991) (affirming sanctions award where suit was brought for purposes of harassing and forcing a quick settlement); McMahan v. First Union Nat'l Bank, No. SA-01-CA-0782 FB, 2003 U.S. Dist. LEXIS 4305, at *10 (W.D. Tex. Mar. 7, 2003) ("Plaintiff's only apparent reason for filing this suit was to try to keep their home, despite the clear authority of this Court and Fifth Circuit that the challenges to the loan secured by their home were without legal merit or evidentiary support."); Lipin v. Nat'l Union Fire Ins. Co., 202 F. Supp. 2d 126, 140 (S.D.N.Y. 2002) (sanctions against plaintiff under Rule 11(b)(1) were warranted, where plaintiff's claims were clearly barred by collateral estoppel and were brought with the apparent purpose of disrupting state disciplinary proceedings against her attorney); White v. Clay, No. 3:00CV-430-S, 2001 U.S. Dist. LEXIS 11959, at *9-13 (W.D. Ky. Mar. 14, 2001) (concluding that plaintiff's claim was brought for the improper purpose of harassing his ex-wife, her divorce attorneys, and others where the claim is the latest in a series of frivolous claims relating to plaintiff's divorce proceeding), aff'd, 23 Fed. App'x 407 (2001); Abner Realty, Inc. v. Adm'r of Gen. Servs. Admin., No. 97 Civ. 3075 (RWS), 1998 U.S. Dist. LEXIS 11042, at *18 (S.D.N.Y. July 22, 1998) ("[T]he total lack of substance in the fraud claim . . . and the egregious and unjustified neglect to (sic) the 'reasonable inquiry' requirement of Rule 11 give rise to the inference that the action was filed for improper purposes."); Washington v. Alaimo, 934 F. Supp. 1395, 1398 (S.D. Ga. 1996) (inmate's filing of over seventy-five harassing pleadings, including "Motion to Kiss My Ass," found sanctionable); Lukas v. Nasco Int'l, Inc., 128 F.R.D. 619, 623 (D.N.J. 1989) (party sanctioned for filing meritless motion to bar testimony in hopes of inducing opponent to drop sanctions petition).

In Stewart v. Am. Int'l Oil & Gas Co., 845 F.2d 196, 201 (9th Cir. 1988), the Ninth Circuit upheld sanctions against a plaintiff who filed a contrived third-party complaint in an attempt to induce the district court to transfer. The Ninth Circuit has also held that a prayer for a damage award can be sanctioned for harassment under Rule 11. In Hudson v. Moore Bus. Forms, Inc., 836 F.2d 1156, 1162 (9th Cir. 1987), the court upheld the trial judge's decision to impose Rule 11

sanctions on attorneys who counter-claimed against an unemployed woman, over 50 years of age, for $4.2 million in damages. The trial court noted that "'the nature and lack of justification for defendants' unconscionable damage claim raise[d] a strong inference that the defendants' motive in bringing the counterclaim was to harass [this woman] and to deter similar actions from being brought.'" Id. But cf. Calfayan v. Gunn, No. 88 C 0058, 1988 U.S. Dist. LEXIS 13712, at *2 (E.D.N.Y. Nov. 23, 1988) ("The quality of plaintiff's counsel's papers, for both the motion to dismiss and the motion for attorneys' fees, suggests that this action was not filed in order to harass or punish defendants").

Courts take a variety of factors and circumstances into consideration in deciding whether a filing was for the purpose of harassment. See Galonsky v. Williams, No. 96 Civ. 6207 (JSM), 1997 U.S. Dist. LEXIS 19570, at *18-19 (S.D.N.Y. Dec. 10, 1997) (in suit against talk show host, court considered plaintiff's holding of a press conference as well as plaintiff's conduct in another court during a related case in assessing good faith); O'Neil v. Retirement Plan for Salaried Employees of RKO Gen., Inc., No. 88 Civ. 8498, 1992 U.S. Dist. LEXIS 237, at *12 (S.D.N.Y. Jan. 7, 1992) (lack of merit to attorney disqualification motion, taken together with two year delay in bringing the motion, strongly suggested a purpose to harass); Novak v. National Broad. Co., 779 F. Supp. 1428 (S.D.N.Y. 1992) (plaintiffs who referred to defendants' counsel as "Laurel and Hardy" in briefs were sanctioned for harassment); see also Kahre v. United States, CV-S-02-0375-LRH-LRL, 2003 U.S. Dist. LEXIS 6948 (D. Nev. March 10, 2003) (sanctioning attorney for $1,500, stating "[a]busive language toward opposing counsel can constitute harassment and has no place in documents filed before the Court."); cf. Matta v. May, 118 F.3d 410 (5th Cir. 1997) (defamation claim not filed for improper purpose where it was a fair response to a front-page newspaper article).

In addition to possible Rule 11 sanctions, attorneys who regularly engage in consumer-debt collection litigation can be liable under the Fair Debt Collection Practices Act for misleading statements made in the course of that litigation. See Heintz v. Jenkins, 514 U.S. 291 (1995).

2. Delay

Rule 11 prohibits filing a paper for the purpose of delay. Rule 11(b)(1). Case law under the 1983 rule suggests that a court will find an improper purpose

where the alleged Rule 11 violator made statements to the effect that his purpose was to cause delay. See Bay State Towing Co. v. Barge Am. 21, 899 F.2d 129, 132-33 (1st Cir. 1990). In addition, courts have found that a pleading or motion was prompted by an improper purpose in cases in which the movant stands to benefit from delay. See Wright v. Tackett, 39 F.3d 155, 158 (7th Cir. 1994) (improper purpose found where plaintiff filed lawsuit just to delay foreclosure proceedings); Pathe Computer Control Sys. Corp. v. Kinmont Indus., Inc., 955 F.2d 94, 97 (1st Cir. 1992) (timing of motion to transfer indicated a last minute effort to delay a likely adverse decision on the merits); INVST Fin. Group v. Chem-Nuclear Sys., Inc., 815 F.2d 391, 402 (6th Cir. 1987); Davis v. Veslan Enters., 765 F.2d 494, 500 (5th Cir. 1985); In re Oximetrix, Inc., 748 F.2d 637, 644 (Fed. Cir. 1984); Marine Midland Bank, N.A. v. Goyak, No. 84 Civ. 1204, 1984 U.S. Dist. LEXIS 14997, at *10 (S.D.N.Y. July 12, 1984) ("[T]he defenses alleged . . . are, bluntly stated, stalling operations to delay plaintiff in obtaining its judgment."); see also Uwaydah v. Van Wert County Hosp., 246 F. Supp. 2d 808, 814 (N.D. Ohio 2002) (holding that plaintiff's motion to compel arbitration after 18 months of litigation was filed as a delay tactic and threatening to impose sanctions in the event that plaintiff sought interlocutory appeal); Banco de Ponce v. Buxbaum, No. 90 Civ. 6344, 1995 U.S. Dist. LEXIS 2692, at *23-24 (S.D.N.Y. Mar. 7) (imposing sanctions where defendant's responses to interrogatories were interposed to cause delay by requiring plaintiff to use the formal discovery process to obtain the information sought from defendant's husband), aff'd without op., 99 F.3d 402 (2d Cir. 1995). Courts also may award sanctions without expressly considering the benefit of delay when a party deliberately chooses to ignore court-established procedures for expeditiously resolving a matter, and instead files unnecessary and multiplicitous papers. Kapco Mfg. Co. v. C & O Enters., Inc., 886 F.2d 1485, 1492 (7th Cir. 1989); Glass v. IDS Fin. Serv., Inc., 137 F.R.D. 262, 263 (D. Minn. 1991) (plaintiff's law firm and defendant's law firm were sanctioned $50,000 each for exceeding court-imposed page limit by over 600 pages).

3. Other Improper Purposes

Rule 11 reaches pleadings, motions, and papers prompted by any improper purpose, which includes but is not limited to harassment, delay, and unnecessary increases in cost. For example, the initiation of a lawsuit against a judge for the purpose of compelling the judge to recuse himself from presiding over another case is subject to sanctions. See Chu v. Griffith, 771 F.2d 79, 81 (4th Cir. 1985);

Steinle v. Warren, 765 F.2d 95, 101-02 (7th Cir. 1985); see also Maier v. Orr, 758 F.2d 1578, 1583-84 (Fed. Cir. 1985) (factually unfounded recusal motion). A motion that is filed merely to determine whether it would be resisted by the opposing party has also been found to violate the improper purpose clause. See Cohen v. Virginia Elec. & Power Co., 788 F.2d 247, 249 (4th Cir. 1986). See also Mercury Air Group, Inc. v. Mansour, 237 F.3d 542 (5th Cir. 2001) (imposing sanctions where party filed frivolous complaint hoping to discover information that would reveal a basis for a legitimate lawsuit). But see Investors Ins. Co. v. Dorinco Reinsurance Co., 917 F.2d 100 (2d Cir. 1990) (mentioning inadmissible evidence in the course of making a motion or pleading does not indicate that a motion was filed for an improper purpose). In another case, where plaintiffs filed a complaint but never served it, the court assessed sanctions after inferring that the action was filed for the improper purpose of capitalizing on the publicity surrounding the criminal sentencing of one of the defendants. Bryant v. Brooklyn Barbecue Corp., 932 F.2d 697, 699 (8th Cir. 1991); see generally MHC Inv. Co. v. Racom Corp., 323 F.3d 620, 626 (8th Cir. 2003) (affirming district court's finding that claims and defenses were used for the improper purpose of delaying defendant's payment of money owed plaintiff, where defendant "persisted in asserting claims and defenses which were not justifiable either in law or in fact"); In re Rainbow Magazine, Inc., 136 B.R. 545 (Bankr. 9th Cir. 1992) (affirming district court's determination that filing a bankruptcy petition to interfere with secured creditor's rights was an improper purpose); Jordaan v. Hall, 275 F. Supp. 2d 778, 789 (N.D. Tex. 2003) (finding improper purpose of "attempting to circumvent state appellate process and to collaterally attack — in the guise of a federal civil rights action — the validity of a state court divorce decree and other related orders"); Dillon v. Diamond Offshore Mgmt. Co., No. 02-160, 2002 U.S. Dist. LEXIS 20851, at *14 (E.D. La. Oct. 25, 2002) (finding improper purpose of attempting to circumvent another district court's order where plaintiff's claims were clearly barred by res judicata); Deluxe Labs., Inc. v. International Alliance of Theatrical Stage Employees, Local 683, No. CV 01-3469, 2001 U.S. Dist. LEXIS 18099, at *25 (C.D. Cal. Aug. 30, 2001) (finding that petition to vacate arbitration award was brought at least in part for an improper purpose of soothing the bruised ego of the General Counsel and Vice President of the losing party in the arbitration); In re Cendant Corp. Derivative Action Litig., 96 F. Supp. 2d 403, 406 (D.N.J. 2000) (finding improper purpose where party sought summary judgment despite existence of genuine issues of material fact in an effort to bring issues in a class action settlement to the court's attention); In re Nasdaq Market-

Makers Antitrust Litig., 187 F.R.D. 124, 130 (S.D.N.Y. 1999) (finding improper purpose where party objected to settlement and moved to intervene in order to seek compensation for his own unrelated claims); Trizec Colony Square, Inc. v. Gaslowitz (In re Addon Corp.), 231 B.R. 385, 390 (Bankr. N.D. Ga. 1999) (holding that filing a bankruptcy petition to frustrate lessor's rights was an improper purpose); Mendez v. Plastofilm Indus., Inc., No. 91 C 8172, 1992 U.S. Dist. LEXIS 5704, at *13-14 (N.D. Ill. Apr. 14, 1992) (finding improper purpose where attorneys conditioned their response opposing plaintiff's motion for remand upon the court's dismissal of two of plaintiff's claims). However, in light of the safe harbor provision in the amended rule, it is not clear whether all of these cases remain good law.

Courts applying the 1983 rule held that a party also violates Rule 11 by repeatedly filing similar motions in pursuit of relief that is clearly not available. In Kapco Mfg. Co. v. C & O Enters., Inc., 886 F.2d 1485, 1492 (7th Cir. 1989), the court sanctioned an attorney who repeatedly ignored court-established procedures for efficient handling of the dispute, despite the fact that the attorney's unnecessary and vexatious filings could not have benefitted the client more than the court's suggested approach. Cf. Conservative Club v. Finkelstein, 738 F. Supp. 6, 14-15 (D.D.C. 1990) (meritless claims brought to avoid effect of binding settlement of earlier litigation warrant sanctions). In one case, the Northern District of Illinois dismissed a groundless suit brought by an *in forma pauperis* litigant, stating: "Threshold dismissals such as the one ordered by this opinion serve to protect [the plaintiff] from . . . Rule 11 sanction[s] . . .". Bode v. Coal City Police Dep't, No. 90 C 5868, 1990 U.S. Dist. LEXIS 14328, at *5 (N.D. Ill. Oct. 23, 1990). Contemporaneous filings of substantially similar actions, however, are not grounds for sanctions. Brown v. Brown, 920 F.2d 932 (6th Cir. 1990), vacated in part on reh'g, 929 F.2d 700 (6th Cir. 1991).

The use of unfounded litigation to pursue purely economic or political objectives also may violate Rule 11, according to case law under the 1983 rule. In Saltany v. Reagan, 886 F.2d 438, 440 (D.C. Cir. 1989), a group of Libyan citizens sued former President Ronald Reagan, former British Prime Minister Margaret Thatcher, the United Kingdom and others for damages arising from the 1986 United States air strike on Libya. The district court dismissed the claim as wholly groundless, but declined to impose sanctions because the action was brought as a "political statement." The D.C. Circuit reversed the denial of Rule 11 sanctions, finding that the plaintiffs' possible motives made no

difference; they brought a frivolous suit and Rule 11 required that they be sanctioned. See also Valve & Primer Corp. v. Val-Matic Valve & Mfg. Corp., No. 87 C 8726, 1990 U.S. Dist. LEXIS 11173, at *9 (N.D. Ill. Aug. 24, 1990) (sanctions appropriate where case brought more as an extension of plaintiff's competition in the relevant market than as an attempt to vindicate its legal rights), aff'd, No. 90-3379, 1991 U.S. App. LEXIS 18463 (7th Cir. Aug. 2, 1991). But cf. Newton v. Thomason, 22 F.3d 1455, 1463-64 (9th Cir. 1994) (attorney did not violate Rule 11 by selecting inconvenient venue where improper purpose not shown; attorney only obligated to select proper, not most convenient, venue); Storage Technology Partners II v. Storage Technology Corp., 117 F.R.D. 675, 679 (D. Colo. 1987) (filing of claim in federal court instead of state court in order to take advantage of superior discovery procedures did not constitute improper purpose under Rule 11). But see Washington v. Williams, 696 F. Supp. 237, 240 (S.D. Miss. 1988) (filing in improper venue to obtain benefit of longer statute of limitations violates rule), aff'd without op., 884 F.2d 576 (5th Cir. 1989).

4. Mixed Purposes

A paper obviously may be presented for many purposes, both proper and improper. Although Rule 11 authorizes sanctions if the paper is being presented for any improper purpose, courts are often reluctant to impose sanctions when both proper and improper purposes exist. See Sussman v. Bank of Israel, 56 F.3d 450 (2d Cir. 1995). Courts have found, however, that if the proper purposes are subordinate to the improper purposes, sanctions are appropriate. See In re Kunstler, 914 F.2d 505, 518 (4th Cir. 1990) ("[I]f a complaint is filed to vindicate rights in court, and also for some other purpose, a court should not sanction counsel for an intention that the court does not approve, so long as the added purpose is not undertaken in bad faith and is not so excessive as to eliminate a proper purpose").

One objective that often coexists with a proper purpose is the desire to generate adverse publicity towards one's opponent. The courts have reached different conclusions regarding whether the desire to seek publicity is a sanctionable improper purpose if the paper is otherwise meritorious.

The Fifth Circuit, sitting en banc, found that an attorney's conduct in seeking a writ of execution of judgment was sanctionable, regardless of whether his legal position was frivolous, because it was "objectively ascertainable" that he

acted with an improper purpose. Whitehead v. Food Max of Miss., Inc., 332 F.3d 796 (5th Cir. 2003). In Whitehead, plaintiffs' counsel, after winning a $3.4 million judgment against Kmart on behalf of a woman and her daughter who were abducted from a Kmart parking lot, obtained a writ of execution and — accompanied by news reporters — went to the local Kmart with two federal marshals to seize cash from the store's registers and safe. Id. at 800. On the defendant's motion, the district court imposed sanctions against plaintiffs' counsel, finding that, based on a Mississippi rule automatically staying execution of judgment, plaintiffs' counsel's writ was frivolous and was obtained for an improper purpose. A panel of the Fifth Circuit reversed, finding that, although plaintiffs' counsel's actions were "patently inappropriate," his conduct complied with the mandates of Rule 11. Id. at 802. The en banc Fifth Circuit vacated the panel decision and reinstated the district court's sanctions award. Id. The Court reasoned that subparts (b)(1) and (b)(2) of the Rule provide independent bases for sanctions. Id. at 803. Thus, regardless of whether plaintiffs' counsel made a reasonable inquiry before seeking the writ, his conduct was sanctionable because it was done for the improper purposes of embarrassing his adversary and seeking personal recognition. Id. at 807. Compare National Ass'n of Gov't Employees, Inc. v. National Fed'n of Fed. Employees, 844 F.2d 216, 223 (5th Cir. 1988) (agreeing with Ninth Circuit cases holding that well-grounded complaints may not be sanctioned for improper purpose).

On the other hand, in Sussman v. Bank of Israel, 56 F.3d 450, 459 (2d Cir. 1995), the Second Circuit addressed whether a party could be sanctioned for filing a non-frivolous complaint, where before the complaint was filed, the party's attorney allegedly warned of damaging publicity which would result to the defendant from filing the complaint. The Second Circuit stated that "[m]ere warnings by a party of its intention to assert nonfrivolous claims, with predictions of those claims' likely public reception, was not improper" and held that "[a] party should not be penalized for or deterred from seeking and obtaining warranted judicial relief merely because one of his multiple purposes in seeking that relief may have been improper," and reversed the sanctions judgment against the attorney. Id.

There is often overlap between the inquiry regarding whether a pleading is frivolous and whether it was filed for an improper purpose. The Fourth Circuit has stated that a district court should first consider whether the complaint is well grounded in fact and law before making an improper purpose determination. In re

Kunstler, 914 F.2d at 518. The Ninth Circuit similarly has noted that the "frivolous and improper purpose prongs of Rule 11 overlap, and 'evidence bearing on frivolousness . . . will often be highly probative of purpose'." In re Grantham Bros., 922 F.2d 1438, 1443 (9th Cir. 1991) (quoting Townsend v. Holman Consulting Corp., 914 F.2d 1136, 1140 (9th Cir. 1990), aff'd in part and rev'd in part, en banc, 929 F.2d 1358 (9th Cir. 1991)). However, the Second Circuit has held that a finding of frivolousness is not enough, standing alone, to support a finding of improper purpose. Simon DeBartolo Group, LP v. Richard E. Jacobs Group, Inc., 186 F.3d 157, 176-77 (2d Cir. 1999) (reversing district court's finding of improper purpose based solely on the frivolity of the claims because such action would "render a client responsible for the frivolous claims asserted by its attorneys, contrary to Rule 11(c)(2)(A)'s explicit prohibition"). A court's speculation into a party's motives is not enough to merit finding an improper purpose outweighs a proper purpose. See Reed v. Great Lakes Cos., 330 F.3d 931, 936 (7th Cir. 2003) (reversing the district court's imposition of improper purpose sanctions based on the party's history of litigation that the district court speculated was extortionist, but did not find frivolous).

5. Filing a Well-Founded Complaint for Improper Purpose

Courts are split as to whether a party may be sanctioned for filing a well-founded complaint for an improper purpose. The Second, Fifth, Ninth, and Tenth Circuits have held that a party may not be sanctioned for filing a non-frivolous complaint for an improper purpose. In Westlake N. Prop. Owners Ass'n v. City of Thousand Oaks, the Ninth Circuit stated that pleadings must first be found frivolous before they can be found to have been filed for an improper purpose. 915 F.2d 1301, 1305 (9th Cir. 1990). The court in Townsend v. Holman Consulting Corp. restated this rule, explaining that the complaint is how a party enforces his substantive legal rights and enforcement of these rights benefits the individual and likely the public because "the bringing of meritorious lawsuits by private individuals is one way that public policies are advanced." 929 F.2d 1358, 1362 (9th Cir. 1991) (en banc). See Hudson v. Moore Bus. Forms, Inc., 836 F.2d 1156, 1159 (9th Cir. 1987) ("[B]ecause of the objective standard applicable to Rule 11 analyses, a complaint that is found to be well-grounded in fact and law cannot be sanctioned as harassing, regardless of the attorney's subjective intent."); National Ass'n of Gov't Employees, Inc. v. National Fed'n of Fed. Employees, 844 F.2d 216, 223 (5th Cir. 1988) (same); Carlton v. Jolly, 125 F.R.D. 423, 428-29 (E.D. Va. 1989) ("[A party's motives] do not serve to make a legally and

factually acceptable pleading sanctionable"), aff'd without op., 911 F.2d 721 (4th Cir. 1990); Burkhart v. Kinsley Bank, 852 F.2d 512, 515 (10th Cir. 1988) (if complaint filed were not frivolous, "then any suggestion of harassment would necessarily fail."). See generally Jerold S. Solovy, et al., Sanctions Under Rule 11: A Cross-Circuit Comparison, 37 Loy. L.A. L. Rev. 727, 736-745. The Second Circuit has agreed, stating that "[a] party should not be penalized for or deterred from seeking and obtaining warranted judicial relief merely because one of his multiple purposes in seeking that relief may have been improper." Sussman v. Bank of Israel, 56 F.3d at 459. See also Storey v. Cello Holdings, LLC, 347 F.3d 370, 391 (2d Cir. 2003) (reversing improper purpose sanctions where arguments were neither contrary to existing law nor frivolous, and finding that an improper purpose cannot be inferred merely because one party has deeper pockets and is more litigious). However, in an opinion issued shortly after Sussman, that circuit held that a party may be sanctioned for asserting punitive and compensatory damages claims in defiance of earlier court rulings. Given the plaintiff's blatant disregard of the court's orders, the court of appeals affirmed sanctions based on improper purpose, without determining whether or not the claims were frivolous. Morley v. Ciba-Geigy Corp., 66 F.3d 21, 25 (2d Cir. 1995).

The Fourth and Seventh Circuits, on the other hand, have held that an attorney may be sanctioned for filing a non-frivolous complaint for an improper purpose. The Seventh Circuit has stated that it may be necessary to inquire into the subjective intent of an attorney or party in filing a pleading, even though the pleading was objectively reasonable. See Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073, 1083 (7th Cir. 1987) (Rule 11 has a subjective component as well as objective); Brown v. Fed'n of State Med. Bd., 830 F.2d 1429, 1436 (7th Cir. 1987) ("Subjective bad faith is relevant in situations involving malicious prosecution of claims, although not in situations where a party has repeatedly pursued implausible claims."); In re Kunstler, 914 F.2d at 518 (4th Cir. 1990) (stating that a party may be sanctioned if the improper purpose is "so excessive as to eliminate a proper purpose"). Other courts have taken a similar position. See Argentieri v. Fisher Landscapes, Inc., 15 F. Supp. 2d 55, 63 (D. Mass. 1998) ("Even if there was a grain of legal merit in the complaint, in the context of this relatively minor and simple dispute, [the sanctioned attorney] clearly sought to raise the stakes improperly."); In re Flinn, 139 F.R.D. 698, 699 (S.D. Fla. 1991) (filing of a pleading for an improper purpose is not immunized from Rule 11

sanctions just because it is well-grounded in fact and law), aff'd without op., 22 F.3d 1097 (11th Cir. 1994); In re Park Place Assocs., 118 B.R. 613, 616 (Bankr. N.D. Ill. 1990) ("If a paper is 'interposed for any improper purpose,' it is sanctionable even if it is warranted by existing law and supported by the facts.") (quoting Mars Steel Corp. v. Continental Bank N.A., 880 F.2d 928, 931-32 (7th Cir. 1989)); Smith v. Prudential Ins. Co., 98 C 5903, 2000 U.S. Dist. LEXIS 6003, at *18 (N.D. Ill. Apr. 28, 2000) ("Although Smith's case had a sufficient legal and factual basis so as to escape being deemed frivolous, this court finds [based on plaintiff's litigious history and deposition testimony that he sought to "bleed" defendants of resources] that the case was brought with an improper purpose."); Crismar Corp. v. United States, No. Civ. 88-5205, 1990 U.S. Dist. LEXIS 5173 (E.D. La. Apr. 26, 1990) (refusing to sanction counsel, as legal positions were not groundless, but sanctioning clients who were found to have filed suit with intent to harass); Whittington v. Ohio River Co., 115 F.R.D. 201, 208 (E.D. Ky. 1987) ("'improper purpose' provision is a subjective requirement"; "meritorious litigation positions, if taken for purposes of harassment or other improper reason, can violate Rule 11").

In the bankruptcy context, the Ninth Circuit applies a different approach than it does in other contexts. The Ninth Circuit has held that bankruptcy courts "must consider both frivolousness *and* improper purpose on a sliding scale, where the more compelling the showing as to one element, the less decisive need be the showing as to the other." In re Marsch, 36 F.3d 825, 830 (9th Cir. 1994). The court found that the reasons for eliminating improper purpose as an independent basis for imposing sanctions that it had articulated in Townsend did not apply with as much force in the bankruptcy context, where proceedings "are subject to a degree of manipulation and abuse not typical of civil litigation." Id.

The Fifth and Ninth Circuits have taken a different approach to the question of mixed purposes in filing papers other than complaints. The Fifth Circuit in Sheets v. Yamaha Motors Corp., held that a party can be sanctioned for a filing that is well-grounded in fact and law only under unusual circumstances, such as the filing of excessive motions. 891 F.2d 533, 538 (5th Cir. 1990). See also Aetna Life Ins. Co. v. Alla Med. Servs., Inc., 855 F.2d 1470, 1476 (9th Cir. 1988) ("[T]here comes a point when successive motions and papers become so harassing and vexatious that they justify sanctions even if they are not totally

frivolous."); In re Itel Sec. Litig., 791 F.2d 672, 675 (9th Cir. 1986). But see United States v. Stringfellow, 911 F.2d 225, 226-27 (9th Cir. 1990) (if motion is not frivolous, it cannot fall within the 'improper purpose' clause of Rule 11).

F. Piecemeal Evaluation of Papers

Under the 1993 rule, each asserted claim, answer, or other pleading is evaluated; the filing is not evaluated "as a whole." Several circuits had held under the 1983 rule that a single frivolous argument in an otherwise meritorious pleading could not be grounds for a sanction. However, the revision rejected this holding. Under the 1993 revised rule, each of "the claims, defenses, or other legal contentions" must be warranted in order to avoid violating the rule. Rule 11(b)(2).

However, fees and expenses may not be awarded unless they are incurred as a "direct result of the violation." Rule 11(c)(2). Moreover, the 1993 Advisory Committee Notes to the rule emphasize that Rule 11 motions should not be prepared or threatened for insignificant violations of the rule. The Advisory Committee saw this note as a means to further soften any undue incentive to file a Rule 11 motion that permitting piecemeal evaluation might cause. See Advisory Committee, Letter to Judge Robert E. Keeton (chairman of the Standing Committee), May 1, 1992, reprinted in 146 F.R.D. 519, 524 (1993).

VI. Rule 11(c)

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

(1) How Initiated.

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

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

> ***(2) Nature of Sanction; Limitations.*** *A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.*
>
> > ***(A)*** *Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).*
> >
> > ***(B)*** *Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.*
>
> ***(3) Order.*** *When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.*

A. Notice and Reasonable Opportunity to Respond

Prior to the 1993 amendment, the text of Rule 11 did not specifically require notice and an opportunity to be heard before a court sanctioned a party or attorney. However, many courts had already interpreted the rule to impliedly require these due process elements. With the 1993 amendment, the rule now explicitly requires notice and a reasonable opportunity to respond. In addition, the rule contains an explicit 21-day "safe harbor" provision.

1. "Safe Harbor" Provision

The most important effect of the "safe harbor" provision is to give parties opposing a sanctions motion 21 days in which to correct or withdraw challenged pleadings. Under the 1993 rule, a separate Rule 11 motion must be filed and it must describe the specific conduct alleged to have violated the rule. Rule 11(c)(1)(A). See also Nuwesra v. Merrill Lynch, Fenner & Smith, Inc., 174 F.3d 87, 94-95 (2d Cir. 1999); Nagel v. ADM Investor Serv., Inc., Nos. 96 C 2675 et al., 1999 U.S. Dist. LEXIS 12438, at *48-49 (N.D. Ill. Aug. 5, 1999) (sanctions motion that identified some allegations in the complaint as violating Rule 11 did not preserve defendant's demand for sanctions based on other allegations in the complaint). The Rule 11 motion may not simply be included as a prayer for relief in another motion. In addition, the separate Rule 11 motion must be served on the opposing party well before it is filed with the court. After service, the target of the motion has 21 days in which to withdraw or "appropriately correct[]" the challenged claim. Rule 11(c)(1)(A). See also Arends v. Mitchell Sav. Bank, No. 97 C 4078, 1997 U.S. Dist. LEXIS 19014, at *7 (N.D. Ill. Nov. 21, 1997) (safe harbor period begins running upon date that motion is mailed to party). "[T]he timely withdrawal of a contention will protect a party against a motion for sanctions" ever being ruled on by the court. 1993 Advisory Committee Notes. See also United States ex rel. Wilson v. Graham County Soil & Water Cons. Dist., No. 2:01CV19, 2007 U.S. Dist. LEXIS 59703, at *17-18 (W.D.N.C. Aug. 14, 2007) (plaintiff's dismissal of movant prior to expiration of safe harbor period precludes sanctions); Tri-Tech Machine Sales, Ltd. v. Artos Eng'g Co., 928 F. Supp. 836, 840 (E.D. Wis. 1996) (appropriate correction of pleadings within safe harbor shields against sanctions).

In a recent case, the Southern District of New York addressed the issue of whether, if the correction made in response to the service of the sanctions motion is deemed unsatisfactory by the movant, the movant must serve another Rule 11 motion challenging the correction or may simply file the original motion. See Am. Home Ass. Co. v. Merck & Co., No. 03 Civ. 3850 (VM) (JCF), 2004 U.S. Dist. LEXIS 19135, at *14-16 (S.D.N.Y. Sept. 24, 2004). The court, citing Gregory P. Joseph, Sanctions: The Federal Law of Litigation Abuse § 17(A)(2)(a), at 316 (Matthew Bender, 3d ed. 2000), held that the plain language of the rule, which requires the pleading be "appropriately corrected," contemplates that the original motion may be filed. Id. at *15.

The majority of courts to consider the issue have required strict compliance with the safe harbor provision and have denied outright Rule 11 motions that failed to comply with the safe harbor provision. See Roth v. Green, 466 F.3d 1179, 1191-93 (10th Cir. 2006) (vacating sanctions award, holding that warning or "safe harbor" letters do not satisfy Rule 11's requirement that party intending to seek sanctions serve its motion on offending party 21 days prior to filing motion; expressly disagreeing with the Seventh Circuit's decision in Nisenbaum v. Milwaukee County, 333 F.3d 804, 808 (7th Cir. 2003)); see also Gordon v. Unifund CCR Partners, 345 F.3d 1028, 1029 (8th Cir. 2003) (vacating sanctions award because moving party sent warning e-mail and letter to opposing party, rather than serving motion as contemplated by Rule 11(c) and because request for sanctions was not filed as separate motion); Perpetual Secs., Inc. v. Tang, 290 F.3d 132, 142 (2d Cir. 2002) (vacating sanctions award because of failure to satisfy safe harbor provision); Tompkins v. Cyr, et al., 202 F.3d 770, 788 (5th Cir. 2000) (affirming district court's denial of Rule 11 sanctions for failure to comply with safe harbor requirements); Radcliffe v. Rainbow Constr. Co., 254 F.3d 772, 788 (9th Cir. 2001) (same); Corley v. Rosewood Care Center, Inc., 142 F.3d 1041, 1058 (7th Cir. 1998) (reversing sanctions award under Rule 11 where motion neither complied with safe harbor requirements nor was presented in a separate motion); Elliott v. Tilton, 64 F.3d 213, 216 (5th Cir. 1995) (reversing sanctions award where Rule 11 motion was not served on opposing party prior to filing); Miller v. Relationserve, Inc., No. 05-61944-Civ.-Dimitrouleas/Torres, 2006 U.S. Dist. LEXIS 87139, at *17 (S.D. Fla. Dec. 1, 2006) (predicting that Eleventh Circuit would require strict compliance with the safe harbor provision); Evans v. Taco Bell Corp., No. 04-CV-103-JD, 2005 U.S. Dist. LEXIS 20997 (D.N.H. Sept. 23, 2005) (denying sanctions award where Rule 11 motion was not served on opposing party prior to filing); North Philadelphia Health Sys. v. District 1199C, Miscellaneous Action No. 02-194, 2002 U.S. Dist. LEXIS 22267, at *8-9 (E.D. Pa. Oct. 24, 2002) (denying motion for sanctions because of failure to comply with safe harbor provision); Clement v. Public Serv. Elec. & Gas Co., 122 F. Supp. 2d 551, 555 (D.N.J. 2000) (denying party's motion for sanctions because included as an additional prayer for relief, rather than as separate motion, but entering order to show cause for same conduct); In re Sammon, 253 B.R. 672, 678-79 (Bankr. D.S.C. 2000) (denying motion for sanctions under B.R. 9011 because it was included with Objection to Proof of Claim and was not served on opposing party 21 days prior to its filing); Cannon v. Cherry Hill Toyota, Inc., 190 F.R.D. 147, 159-60 (D.N.J. 1999)

(denying cross motions for sanctions, one for failure to comply with safe harbor provision and one because the court could not determine if the party had complied); Allied Mechanical Servs., Inc. v. Local 337 of the United Ass'n of Journeymen, No. 4:98-CV-113, 1999 U.S. Dist. LEXIS 4654, at *20 (W.D. Mich. Mar. 30, 1999) (denying sanctions motion because record contained no indication party complied with safe harbor provision); United States v. Schiefen, 926 F. Supp. 877, 887 (D.S.D. 1995) (sanctions motion denied where separate motion procedure not followed), aff'd without op., 81 F.3d 166 (8th Cir. 1996); Voice Sys. Mkt. Co. v. Appropriate Tech. Corp., 153 F.R.D. 117, 120 (E.D. Mich. 1994) (Rule 11 sanctions denied because request included in motion to dismiss). But see Szucs v. Committee of Interns and Residents, 34 F. Supp. 2d 224, 230 (S.D.N.Y. 1999) (giving both parties, neither of whom had filed a separate motion for sanctions, thirty days within which to do so); cf. Perpetual Sec., Inc. v. Tang, No. 00 Civ. 9389 (RO), 2003 U.S. Dist. LEXIS 5016, at *1 (S.D.N.Y. April 1, 2003) (issuing order to show cause and granting sanctions, after Second Circuit reversed and remanded grant of Rule 11 sanctions for failure to comply with safe harbor provision); Crabtree v. Buchanan, 1:95CV00659, 1998 U.S. Dist. LEXIS 21904, at *9-10 (M.D.N.C. Oct. 1, 1998) (sanctioning under inherent power a complaint filed for an improper purpose, because defendants did not comply with safe harbor provision and sanctions imposed sua sponte could not be awarded to the defendants). In Photocircuits Corp. v. Marathon Agents, Inc., 162 F.R.D. 449, 452 (E.D.N.Y. 1995), the court rejected a party's argument that it could circumvent the requirements of the safe harbor provision by receiving leave of court to move for sanctions. In addition, the court dismissed as "misplaced" the party's argument that the opposing party had more than 21 days to correct the material, in view of the rule's clear mandate that the 21-day period begins after service of the motion. Id.

The Ninth Circuit has held that a party who independently fails to satisfy the safe harbor provision may not do so by styling its late-filed motion for sanctions as a joinder of a co-defendant's properly-filed Rule 11 motion. See Holgate v. Baldwin, 425 F.3d 671, 679 (9th Cir. 2005) ("We are not convinced that a party receives sufficient notice of the allegations against him when only one of several co-defendants indicates its intention to seek sanctions.") In Holgate, however, the Ninth Circuit did not apply its rule strictly, approving sanctions awarded to one defendant who had joined in the sanctions motion, but denying

sanctions to another defendant who filed a "joinder" six months later, after the plaintiff's attorney had withdrawn from the case and the complaint had been voluntarily dismissed.

The Seventh Circuit has applied a somewhat more relaxed standard to the safe harbor provision, concluding that "effective" compliance with the safe harbor provision is sufficient to support sanctions. In Divane v. Krull Electric Co., 200 F.3d 1020, 1025-28 (7th Cir. 1999), the court held that a motion for sanctions based on defendant's frivolous counterclaim that was filed after trial satisfied the safe harbor provision because a motion for sanctions related to the counterclaim had been served over a year earlier. Although the district court had dismissed the pre-trial sanctions motion as premature, because defendant's counterclaim raised questions of fact that had yet to be discovered, the Seventh Circuit stated that this ruling on the previous sanctions motion "effectively extended the safe harbor . . . until trial, by which time the factual basis for the answer and counterclaim would have been determined," Divane, 200 F.3d at 1027; and "[did] not vitiate the numerous effective warnings" that had been given the sanctioned party. Id. Thus, the district court's award of sanctions after judgment was proper. Id.; see also United States ex rel. Eitel v. Reagan, 35 F. Supp. 2d 1151, 1160 & n.7 (D. Ariz. 1998) (finding that letter notices of alleged Rule 11 violations were sufficient to satisfy the safe harbor provision).

Similarly, in Nisenbaum v. Milwaukee County, 333 F.3d 804, 808 (7th Cir. 2003), the Court reversed the district court's denial of Rule 11 sanctions, holding that defendants substantially complied with Rule 11(c)(1)(A) by sending the plaintiff's lawyers a "letter" or "demand" rather than a "motion," to withdraw the offending pleading. Another court found substantial compliance with Rule 11(c)(1)(A) where the party moving for sanctions attempted to cure the defect of prematurely filing the motion by continuing the motion for twenty-one days after it was first served on the opposing party. The court reasoned that, although it would have been preferable for the moving party to withdraw the Rule 11 motion and refile it after the safe harbor period had run, the plaintiff ultimately had more than twenty-one days to withdraw its motion and thus the goal of the safe harbor provision was met. Muhammud v. Louisiana, No. 99-3742, 2000 U.S. Dist. LEXIS 18807, at *7-8 (E.D. La. Dec. 21, 2000). In addition, the Ninth Circuit has allowed an exception for cross-motions for

sanctions, holding, "A party defending a Rule 11 motion need not comply with the separate document and safe harbor provisions when counter-requesting sanctions." Patelco Credit Union v. Sahni, 262 F.3d 897, 913 (9th Cir. 2001).

The Sixth Circuit has also suggested some flexibility in its approach to the safe harbor provision. In First Bank of Marietta v. Hartford Underwriters, 307 F.3d 501, 510-11, 527-28 (6th Cir. 2002), the Sixth Circuit reaffirmed its position that "Rule 11 is unavailable where the moving party fails to serve a timely 'safe harbor' letter," but suggested that timely service of a warning letter, rather than the motion itself, may under some circumstances satisfy the safe harbor provision.

The Fourth Circuit has held that Rule 11's safe harbor provision may be waived if not raised in response to a sanctions motion. See Brickwood Contractors, Inc. v. Datanet Eng'g, Inc., 369 F.3d 385 (4th Cir. 2004). Sitting *en banc*, the Court held that "the safe-harbor provisions of Rule 11(c)(1)(A), while mandatory, do not implicate the district court's subject-matter jurisdiction and thus may be forfeited if not timely raised." Id. at 399; accord DiPaolo v. Moran, 407 F.3d 140 (3d Cir. 2005) (affirming district court's denial of Rule 60(b) motion to vacate sanctions award for noncompliance with the safe harbor provision, finding the party had waived the safe harbor defense by failing to raise it in response to sanctions motion); Nyer v. Winterthur Int'l, 290 F.3d 456, 460 (1st Cir. 2002) (safe harbor defense waived when not raised before the magistrate judge); see also Retail Flooring Dealers of Am., Inc. v. Beaulieu of Am., LLC, 339 F.3d 1146, 1150 n. 5 (9th Cir. 2003) (noting the safe-harbor provision was not raised before the district court, but deciding whether the provision had been satisfied in order "to prevent manifest injustice."); Rector v. Approved Fed. Sav. Bank, 265 F.3d 248 (4th Cir. 2001) (drawing an analogy between the safe harbor provision and statutes of limitation, which may be raised as an affirmative defense but do not deprive courts of jurisdiction to hear untimely claims); In re Kitchin, 327 B.R. 337, 359-62 (Bankr. N.D. Ill. 2005) (holding that plaintiffs waived the 21-day safe harbor requirement under Bankruptcy Rule 9011 where the opposing party moved orally for sanctions and plaintiffs did not object or raise the safe harbor issue but rather continued to argue the validity of their complaint); Giganti v. Gen-X Strategies, Inc., 222 F.R.D. 299, 306-07 (E.D. Va. 2004) (granting sanctions, holding the decision by party not to raise Rule 11's safe harbor constituted a valid, effective waiver of the Rule's twenty-one day safe harbor period). But see Siegel v. Pro-Ex Secs., 02 Civ. 610, 2002 U.S. Dist. LEXIS 9960, at *7 (S.D.N.Y. May 31, 2002) ("The Second Circuit construes Rule 11's

safe harbor provision strictly, see Hadges v. Yonkers Racing Corp., 48 F.3d 1320, 1328 (2d Cir. 1995), and even though the plaintiff did not raise the requirements of the safe harbor provision in her opposition to the motion for sanctions, the defendants' non-compliance with this provision requires the denial of the Rule 11 motion.").

One court has pointed out a quirk with the safe harbor provision in relation to frivolous complaints. In Religious Tech. Ctr. v. Gerbode, No. CV 93-2226, 1994 U.S. Dist. LEXIS 6432, at *7 n.6 (C.D. Cal. May 2, 1994), the court noticed that, even if the complaint is apparently frivolous, the defendant must still respond to the complaint within 20 days. Id. Thus, because of the 21 day safe harbor, a Rule 11 motion cannot be filed with the court until after the response is due. Id. See also Wesley v. Don Stein Buick, Inc., No. 97-2271-JWL, 1998 U.S. Dist. LEXIS 17588, at *6 (D. Kan. Oct. 29, 1998) ("Rule 11 contains no provision to allow its requirement of 21 days to be circumvented merely because the response time to the allegedly offending document intervenes"). Another court noted that the 21-day waiting period "is often impractical" in cases involving orders to show cause and preliminary injunctions. Bowler v. U.S. INS, 901 F. Supp. 597, 604 (S.D.N.Y. 1995). In Bowler, the court lifted a stay of deportation — thus terminating the action — before the government "had the opportunity to discover and react" to the petitioner's attorneys' misconduct. Id. When the government later filed a motion for sanctions at the court's invitation, the court declined to impose sanctions under Rule 11 "because of the ambiguity of whether [the amended rule's] procedural requirements have been met." Id. Instead, the court imposed sanctions under 28 U.S.C. § 1927. Id. at 605. See also United States v. Sweet, No. 8:01-CV-331-T-23TGW, 2001 U.S. Dist. LEXIS 17131 (M.D. Fla. Sept. 17, 2001) (declining to sanction party for frivolous motion to quash service of process where motion had been denied before 21 day safe harbor period had expired, but sanctioning subsequent motion for reconsideration). Yet another court has noted that, by the terms of Rule 11 (c)(1)(A), a party seeking sanctions in a situation in which the 21-day waiting period is impractical may request that the court prescribe a shorter waiting period. Neighbors Concerned About Yacht Club Expansion v. Grosse Pointe Yacht Club, No. 99-70325, 1999 U.S. Dist. LEXIS 8646, at *28-29 (E.D. Mich. May 26, 1999). In Neighbors Concerned, the defendants, who had moved to sanction the plaintiffs for filing a frivolous motion for preliminary injunction, were precluded from complying with the safe harbor provision by the short period between the filing of the motion for preliminary

injunction and the hearing on that motion. Id. Nonetheless, the court denied their sanctions motion for failure to comply with the safe harbor provision because they had failed to request a shorter waiting period. Id.

A "withdrawal" of a pleading for purposes of the safe harbor provision also may be accomplished by acquiescing in the result that would have been proper in the absence of the frivolous filing. Thus, one court found that the parties' stipulation to remand a case within the safe harbor period was "equivalent" to a withdrawal of the defendant's challenged removal petition, thus protecting the defendant from sanctions under the rule. Confed Admin. Servs., Inc. v. United Health Care Org. Inc., No. 95 Civ. 4985, 1995 U.S. Dist. LEXIS 15178, at n.1 (S.D.N.Y. Oct. 16, 1995). Furthermore, a party may not have to actually withdraw or correct a challenged claim in order to fall within the safe harbor provision. In Nagle Indus. v. Ford Motor Co., 173 F.R.D. 448, 459 (E.D. Mich. 1997), aff'd, 194 F.3d 1339 (Fed. Cir. 1999), for example, the plaintiff sought to dismiss the challenged claims without prejudice. The defendant refused to agree to dismissal without prejudice, but the court held that the plaintiff's unsuccessful efforts were sufficient to shield the plaintiff from sanctions under Rule 11(c)(1)(A). Id. See also Dee-K Enterprises, Inc. v. Heveafil Sdn. Bhd., 177 F.R.D. 351, 355 (E.D. Va. 1998) (refusing to impose sanctions where plaintiffs "informally withdrew" the allegedly sanctionable claim within the safe harbor period by seeking leave to file a second amended complaint which sought dismissal of a defendant without prejudice). But see Harris v. Franklin Williamson Human Serv., Inc., 97 F. Supp. 2d 892, 910 (S.D. Ill. 2000) (holding that filing of motion for leave to amend complaint does not correct sanctionable filing within safe harbor period where leave to amend had not been granted and first complaint was still valid complaint on file).

A motion for sanctions must be filed as soon as practicable after discovery of a Rule 11 violation. Divane v. Krull Elec. Co., 200 F.3d 1020, 1027 (7th Cir. 1999); XCO Int'l, Inc. v. Pacific Scientific Co., No. 01-C-6851, 2003 U.S. Dist. LEXIS 7286 (N.D. Ill. Apr. 29, 2003). In XCO, the plaintiff moved for sanctions against the defendant, claiming that the defendant filed frivolous counterclaims, more than one hundred days after the court entered summary judgment against the defendant on the counterclaims. 2003 U.S. Dist. LEXIS 7286 at *8. The plaintiff argued that its sanctions motion was not untimely because it was not until the resolution of the summary judgment proceeding that the lack of evidentiary support for the defendant's claims became clear. Id. at *8-9. The court denied

the sanctions motion as untimely. Id. at *9. Relying on prior filings in which the plaintiff warned defendant that defendant was violating Rule 11 by maintaining its counterclaims, the court found that plaintiff knew the counterclaims lacked merit well before it served and filed the sanctions motions. Id. at *9-10. Because plaintiff failed to timely file the sanctions motion and offered no equitable considerations to explain its delay, the court found that the plaintiff failed to comply with the safe harbor provision. Id. at *11.

Other courts have recognized that the "safe harbor" section of the rule also effectively requires parties to file Rule 11 motions before the court has ruled on the pleading at issue. See Retail Flooring Dealers of Am., Inc. v. Beaulieu of Am., LLC, 339 F.3d 1146, 1150 (9th Cir. 2003) (reversing sanctions award where motion was filed after complaint had been dismissed and time within which to amend had expired); Barber v. Miller, 146 F.3d 707, 710 (9th Cir. 1998); Ridder v. City of Springfield, 109 F.3d 288, 295 (6th Cir. 1997), cert. denied, 522 U.S. 1046 (1998); Geer v. Cox, No. 01-2583-JAR, 2003 U.S. Dist. LEXIS 16858, slip op. at *8-9 (D. Kan. Sept. 25, 2003) (holding that Rule 11 motions filed after dismissal of complaint violated safe harbor, even though served more than twenty-one days before dismissal order); Pendleton v. Central N.M. Corr. Facility, 184 F.R.D. 637, 640 (D.N.M. 1999); see also Augustine v. Adams, No. 98-2422-GTV, 2000 U.S. Dist. LEXIS 5920, at *2-3 (D. Kan. Apr. 19, 2000) (holding that a Rule 11 motion filed subsequent to summary judgment violates the safe harbor provision); Deshiro v. Branch, 183 F.R.D. 281, 287 (M.D. Fla. 1998) (holding that where motion for summary judgment had already been granted, the service and filing of a Rule 11 motion "failed to adhere to the underlying policy supporting the 'safe harbor' provision"). Another court rejected a non-movant's argument that a motion for sanctions is untimely if the challenged complaint is dismissed by the court before the 21-day safe harbor period has passed. Truesdell v. S. Cal. Permanente Med. Group, 209 F.R.D. 169, 179 (C.D. Cal. 2002). In that case, the court rejected the non-movant's argument that sanctions were inappropriate because his opportunity to avoid sanctions by withdrawing the complaint was "cut off" by the dismissal order before the 21-day period had elapsed. See also In re Shubov, 253 B.R. 540 (Bankr. 9th Cir. 2000) (holding that parties moving for sanctions under Fed. R. Bankr. P. 9011 are not permitted to circumvent safe harbor provision by waiting until it is too late to withdraw or correct the offending matter). But see Divane v. Krull Elec. Co., 200 F.3d 1020, 1025-28 (7th Cir. 1999) (holding that Rule 11 motion was properly filed after

final judgment where the defendants had been served with a Rule 11 motion over a year before the judgment and the district court had found that the lack of evidentiary support for defendant's counterclaim could not have been determined until trial was completed); Powell v. Squire, Sanders & Dempsey, 990 F. Supp. 541, 544-45 (S.D. Ohio 1998) (holding that Rule 11 motion was properly filed after final judgment where plaintiff was served with the proposed motion almost four months prior to dismissal), vacated in part on other grounds, 182 F.3d 918 (6th Cir. 1999). The 1993 Advisory Committee Notes provide that the court may defer its ruling on a Rule 11 motion until final resolution of the case. This power to defer a ruling will help protect privileged information during the pendency of the litigation and may allow the court to be more dispassionate. On the other hand, the courts will have to be careful not to view the pleading with the wisdom of hindsight.

The 1993 rule eliminates a court's ability to impose monetary sanctions on a party *sua sponte* if the case has already been voluntarily dismissed or settled. Rule 11(c)(2)(B). Parties will not have to fear that sanctions for past Rule 11 violations will upset the settlement calculus.

Before the 1993 changes in Rule 11, one commentator speculated that the safe harbor provision could reduce the chilling effects that critics say the rule has on some plaintiffs. Carl Tobias, Civil Rights Plaintiffs and the Proposed Revision of Rule 11, 77 Iowa L. Rev. 1775, 1785 (1992). However, he also observed that the provision may cause strategic behavior, including "threat and retreat" behavior, in which one litigant pushes the limits of acceptable behavior under Rule 11, then retreats in the face of possible Rule 11 action. Id. Justice Scalia echoed this fear in his dissent to the amendments, predicting "parties will be able to file thoughtless, reckless, and harassing pleadings, secure in the knowledge that they have nothing to lose." 146 F.R.D. 507, 508 (1993). But see Gregory P. Joseph, Sanctions: The Federal Law of Litigation Abuse § 17(A)(2) (Matthew Bender, 3d ed. 2000) (court may sanction under other sanctions powers in cases of safe harbor abuse). Other commentators had expressed fear that the safe harbor provision might generate letter-writing wars. Bench-Bar Proposal to Revise Civil Procedure Rule 11, reprinted in 137 F.R.D. 159, 163 (1991) (statement commenting on Advisory Committee's early draft) (hereinafter "Bench-Bar Proposal" and included as Appendix II).

2. Due Process Requirements

Even if the target of the motion refuses to withdraw a contention, it is still protected by a "due process" provision. After the Rule 11 motion is filed with the court, the responding party must be given "notice and a reasonable opportunity to respond" to the sanctions motion. Rule 11(c). The court can decide the motion on the basis of written submissions or allow either oral argument or an evidentiary hearing; the decision is to "depend on the circumstances." 1993 Advisory Committee Notes. See Schlaifer Nance & Co. v. Estate of Warhol, 194 F.3d 323, 335 (2d Cir. 1999) (no hearing required where decision was based on "well-known facts contained in the existing record" and extensive written responses); Union Planters Bank v. L&J Dev. Co., Inc., 115 F.3d 378, 385 (6th Cir. 1997) (no hearing required where judge had presided over pretrial and trial proceedings and was thus intimately familiar with the facts at issue); Attwood v. Singletary, 105 F.3d 610, 613 (11th Cir. 1997) (no hearing needed to determine whether plaintiff misstated his financial status under in forma pauperis statute where another court had found plaintiff not indigent one year beforehand); Polar Int'l Brokerage Corp. v. Reeve, 196 F.R.D. 13, at *5 n.5 (S.D.N.Y. 2000) (in light of parties' written submissions and adequate record in the case, court's denial of request for oral arguments did not violate due process); Knestrick v. IBM, 945 F. Supp. 1080, 1082 n.4 (E.D. Mich. 1996) (oral argument not necessary where the imposition of sanctions hinges upon party's legal representations). See also Merriman v. Security Ins. Co. of Hartford, 100 F.3d 1187, 1192 (5th Cir. 1996) (decided under old Rule 11) ("[T]he opportunity to respond through written submissions usually constitutes sufficient opportunity to be heard."); Cook v. American S.S. Co., 134 F.3d 771, 774-76 (6th Cir. 1998) (no hearing required to impose sanctions under 28 U.S.C. § 1927 on grounds attorney was responsible for mistrial, even though incident happened outside of court's presence); Lapidus v. Vann, 112 F.3d 91, 97 (2d Cir.) (violation of due process to impose sanctions under 28 U.S.C. § 1927 where notice mentioned only Rule 11), cert. denied, 522 U.S. 932 (1997); Collie v. Kendall, No. 3:98-CV-1678-G, 1999 U.S. Dist. LEXIS 7629, at *1-2 (N.D. Tex. May 20, 1999) (stating that in Rule 11 cases, opportunity to respond through written submissions usually suffices). In Dailey v. Vought Aircraft Co., 141 F.3d 224 (5th Cir. 1998), the Fifth Circuit held that an attorney's due process rights were violated when the district court failed to warn her that she would be disbarred if she did not pay the Rule 11 sanctions that had been assessed against her by a specific date. Id. at 229-31.

If the court finds a Rule 11 violation, it must describe the conduct that it finds violated the rule and explain the basis of the sanction imposed, if any. Rule 11(c)(3). See also Nuwesra v. Merrill Lynch, Fenner & Smith, Inc., 174 F.3d 87, 92-93 (2d Cir. 1999) (vacating and remanding sanctions award against attorney where order stated sanctions would be awarded under one of several sources of sanctioning power, including Rule 11, and didn't specify sanctionable conduct). It is not enough for a court simply to cite the rules upon which it relies in imposing sanctions; the court must explain the relationship between the grounds for the sanctions and the offending conduct. Martin v. Brown, 63 F.3d 1252, 1263-64 (3d Cir. 1995) (vacating and remanding sanctions award against attorney where court "stated without elaboration" that sanctions were imposed under Rule 11, Rule 37, 28 U.S.C. § 1927 and court's inherent powers).

If the court raises a potential Rule 11 violation on its own initiative, the revision requires that the court give notice of the legal basis of the possible sanctions, identify the specific conduct that appears to violate the rule and give the charged party an opportunity to show cause why it has not violated the rule. Rule 11(c)(1)(B). See also Johnson v. Cherry, 422 F.3d 540, 549-50 (7th Cir. 2005) (vacating sanctions order where show cause order did not specify on what authority and for what conduct district court was contemplating sanction); Martens v. Thomann, 273 F.3d 159, 177 (2d Cir. 2001) (vacating sanctions order where district court failed to issue an order to show cause and to describe the specific allegations of a motion that lacked evidentiary support); Anjelino v. The New York Times Co., 200 F.3d 73, 80 (3d Cir. 1999) (vacating sanctions order because "the order to show cause did not give notice as to the legal basis of the possible sanctions"); Thornton v. General Motors Corp., 136 F. 3d 450, 454-55 (5th Cir. 1998) (reversing sanctions order where show cause order did not place attorney on notice of specific conduct that court found sanctionable); Jacob v. Illanes, No. Civ. 93-916, 1993 U.S. Dist. LEXIS 17972, at *5 (D.N.M. Dec. 10, 1993); cf. Nuwesra v. Merrill Lynch, Fenner & Smith, Inc., 174 F.3d 87, 93-94 (2d Civ. 1999) (remanding in part because district failed to give attorney reasonable opportunity to respond before imposing sanctions by not questioning attorney about all instances of conduct for which it later sanctioned him). But cf. In re Allen, No. 06-1429, 2007 U.S. App. LEXIS 22445, at *15-16 (10th Cir. Sept. 19, 2007) (holding that show cause order provided adequate notice by informing the party that sanctions were being considered against her for signing the complaint without conducting a reasonable inquiry into the law and facts);

Clark v. United Parcel Serv., Inc., 460 F.3d 1004, 1008-09 (8th Cir. 2006) (holding that the district court was not required to enumerate every failing of sanctionable summary judgment motion and statement of uncontroverted facts to provide adequate notice). However, the 21-day "safe harbor" provision permitting the withdrawal of the offending filing does not apply when the court acts on its own initiative.

In Vollmer v. Publishers Clearing House, 248 F.3d 698 (7th Cir. 2001) (Vollmer I), the Seventh Circuit held that if the district court considers an attorney's or party's past improper conduct in determining an appropriate sanction, the evidence of such conduct "must be stated with some specificity in the record, and the offending party must be given a full and fair opportunity to respond to the charge." Id. at 710. In Vollmer, the district court was permitted to consider two attorneys' past conduct and professional reputation as "professional objectors" to class action settlements in deciding whether to sanction them for filing their motion to intervene and the magnitude of those sanctions. Id. However, since there was reason to believe the district court had utilized sources not disclosed to the sanctioned attorneys or presented in the record to fashion its sanctions award, the award was remanded. Id. On appeal for a second time, the Seventh Circuit determined that there was insufficient evidence in the record that the two attorneys intervened for an improper purpose. Vollmer v. Publishers Clearing House, 350 F.3d 656, 661 (7th Cir. 2003) (Vollmer II). In the process, the court of appeals noted that the district court had ignored its instructions in Vollmer I.

B. Court May Impose a Sanction

Under the 1983 rule, once a court found a violation, the rule mandated that the court impose some type of sanction. Where the 1983 rule provided that the court "shall" impose a sanction when a violation has been found, the 1993 rule provides that the court "may" impose a sanction. The shift from mandatory to discretionary sanctions was one of the major changes of the 1993 revision. It was the subject of extensive debate prior to the recommendation of the rule to the Supreme Court. Opponents of mandatory sanctions argued that they contributed to the vast increase in sanctions practice. See, e.g., Bench-Bar Proposal. The Advisory Committee approved a version of the amendment that would have preserved mandatory sanctions; the Committee on Rules of Practice and Procedure ("Standing Committee"), which next received the proposal, changed

the proposal to drop the mandatory requirement. Excerpt from the Report of the Judicial Conference Committee on Rules of Practice and Procedure (Sept. 1992), reprinted in 146 F.R.D. 515 (1993); see also Carl Tobias, Congress and the 1993 Civil Rules Proposals, 148 F.R.D. 383, 387 (1993).

This change was controversial. Justice Scalia predicted that "[t]he proposed revision would render the Rule toothless." 146 F.R.D. 507 (1993) (Scalia, J., dissenting from Supreme Court order transmitting amended rules to Congress). Scalia argued that judges would hesitate to impose sanctions if not required to do so, and that the resulting lack of punishment for Rule 11 violations would weaken the prohibition on frivolous and unfounded filings. Id. at 508. One commentator concerned about overuse of Rule 11 has worried that the shift to discretionary authority will do nothing to control judges who are too prone to impose sanctions. Carl Tobias, Reconsidering Rule 11, 46 U. Miami L. Rev. 855, 889 (1992).

C. Who May Be Sanctioned

Under the 1983 rule, courts could sanction only the person who signed the paper submitted to the court and the represented party. 1983 Rule 11(c). The 1993 rule is broader, making anyone who signs, files, or submits a paper without complying with the rule potentially liable. The revised rule also provides that "[a]bsent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees." Rule 11(c)(1)(A). This provision is designed to overrule Pavelic & LeFlore v. Marvel Entm't Group, 493 U.S. 120 (1989), in which the Supreme Court held that sanctions could be imposed only on the signing attorney, and not on the attorney's law firm. For a discussion of who may be "responsible" for a violation, including a discussion of the definition of "law firm" and the problems of responsibility within corporations and the federal government, see Gregory P. Joseph, Sanctions: The Federal Law of Litigation Abuse § 5(E)(1) (Matthew Bender, 3d ed. 2000).

The 1993 rule prohibits the court from imposing monetary sanctions against a represented party based on unwarranted legal contentions contained in a filing. Rule 11(c)(2)(A). See also Salovaara v. Eckert, 222 F.3d 19, 34 n. 10 (2d Cir. 2000). Thus, the attorney is responsible for legal arguments. The client's responsibility will lie in providing the attorney with accurate and complete facts

about the case. Both attorney and client are responsible for pleadings that are filed with an improper purpose, such as harassment or delay. The following subsections describe the application of Rule 11 to attorneys and parties in more detail.

1. Attorneys

(a) Certifying Attorney

Before its 1993 amendment, Rule 11's literal language stated that the attorney who signed a pleading or motion was the attorney who certified that the filing complied with the rule. In Pavelic & LeFlore v. Marvel Entm't Group, 493 U.S. 120 (1989), the Supreme Court held that only the attorney who actually signed the pleadings was liable. In Pavelic, the Court stated that the language of Rule 11 was explicit, and referred only to liability for "'the person who signed [the paper], a represented party, or both.'" Id. at 125 (quoting the 1983 Rule 11).

As discussed above, the 1993 amendment overturns Pavelic by adding language allowing courts to "sanction [] the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation." Rule 11(c). See also Poole v. Textron, Inc., 192 F.R.D. 494, 511 n.24 (D. Md. 2000) (noting that Rule 11, unlike Rules 37 and 26, allows sanctions against law firms). Thus, the 1993-amended Rule 11 still covers attorneys signing papers, but the scope is now much broader. The rule states that anyone who presents to the court, by signing, filing, submitting, or later advocating, a pleading, written motion, or other paper, certifies compliance with Rule 11. Rule 11(b). Thus, the current rule now gives courts broad power to decide who should bear the burden of sanctions.

A signing attorney faces sanctions for violating Rule 11, regardless of whether the attorney played a limited role in filing the pleading or motion with the court. In Polar Int'l Brokerage Corp. v. Reeve, 120 F. Supp. 2d 267, 269-70 (S.D.N.Y. 2000), the court considered to what extent it should impose sanctions against a law firm that acted primarily at the discretion of lead counsel in filing frivolous claims with the court. The court held that the firm could not escape sanctions, even though it neither received nor had knowledge of various warning letters from defense counsel indicating that the claims were frivolous, because it signed its name to the filings. However, the court reduced the amount of sanctions to reflect the limited role of the firm in bringing the frivolous claims.

Id. See also Schottenstein v. Schottenstein, 230 F.R.D. 355, 361-62 (S.D.N.Y. 2005) (sanctioning attorney who signed and filed a frivolous complaint for a colleague who was not admitted to practice in the district, but apportioning only 5% of the sanction to the signing attorney and the remainder to the attorney who authored the complaint).

(b) Local Counsel

The expansion of Rule 11 to cover anyone who files a pleading, regardless of whether it is the same person who signs it, has a clear impact on local counsel. See Ideal Instrs., Inc. v. Rivard Instrs., Inc., 243 F.R.D. 322, 348 (N.D. Iowa 2007) (local counsel have a nondelegable responsibility under Rule 11). Under the language of the 1993 rule, local counsel may be held liable simply for filing or submitting a frivolous paper, even though he or she did not sign it. Ultimately, however, the emphasis on identifying the party actually responsible for the violation may favor local counsel. See de la Fuente v. DCI Telecomms., Inc., 269 F. Supp. 2d 229, 232-35 (S.D.N.Y. 2003) (declining to award sanctions against local counsel who performed an "essentially administrative" role; "[n]ot only does this Court not expect that local liaison counsel will independently confirm the assertions made in pleadings or research the arguments made in briefs, but I would be unlikely to award attorneys' fees for such duplication."). Cf. Pannonia Farms, Inc. v. USA Cable, No. 03 Civ. 7841 (NRB), 2006 U.S. Dist. LEXIS 73519, n.26 (S.D.N.Y. Oct. 5, 2006) (sanctioning local counsel who signed complaint without identifying himself as local counsel and who received the safe harbor letter and attended a conference at which the problems with the claims were discussed, but did nothing to prevent the Rule 11 violation).

Under the pre-1993 Rule 11, courts found that the rule's obligations reached local counsel who signed and submitted a pleading or motion even when another attorney was "responsible." See Val-Land Farms, Inc. v. Third Nat'l Bank, 937 F.2d 1110, 1118 (6th Cir. 1991) (expressly rejecting notion that sanctions are inappropriate for local counsel who rely on primary outside counsel — if local attorneys "signed complaint relying entirely on the representations of [outside counsel], so much the worse for them"); Long v. Quantex Resources, Inc., 108 F.R.D. 416, 418 (S.D.N.Y. 1985), aff'd without op., 888 F.2d 1376 (2d Cir. 1989); Itel Containers Int'l Corp. v. Puerto Rico Marine Mgmt., Inc., 108 F.R.D. 96 (D.N.J. 1985). But cf. CTC Imports & Exports v. Nigerian Petroleum Corp., 951 F.2d 573, 579 (3d Cir. 1991) (in assessing

sanctions, court considered that local counsel was not on equal footing as to knowledge, access to information, and time constraints); Golden Eagle Distrib. Corp. v. Burroughs Corp., 103 F.R.D. 124 (N.D. Cal. 1984) (declining to require local counsel to pay fee award in the absence of active participation in the preparation of, or the decision to file, a pleading or motion), rev'd on other grounds, 801 F.2d 1531 (9th Cir. 1986).

(c) Substitute Counsel

Courts have held that counsel who substitute into a case have an independent duty to evaluate their client's position, particularly where they sign additional pleadings in the case. See Turner v. Sungard Bus. Sys., Inc., 91 F.3d 1418, 1421 (11th Cir. 1996) (sanctioning substitute counsel, who had submitted only notice of appearance, but not sanctioning original counsel); Judin v. United States, 110 F.3d 780, 785 (Fed. Cir. 1997) (interpreting Rule 11 of the Court of Federal Claims, patterned after the 1983 federal Rule 11, and stating that some circumstances may justify substitute attorneys' reliance on forwarding counsel, but substitute attorney cannot simply delegate duty of reasonable inquiry); United States v. Kirksey, 639 F. Supp. 634, 636-37 (S.D.N.Y. 1986) (successor counsel sanctioned for failure to conduct his own "reasonable inquiry"); cf. Schweitzer v. Testaverde, No. 86 Civ. 2498, 1990 U.S. Dist. LEXIS 1672, at *4 (S.D.N.Y. Feb. 15, 1990) (refusing to sanction original counsel, who had since withdrawn from practice, or substitute counsel); General Elec. Credit Corp. v. Yasparro, 122 F.R.D. 33, 34 (M.D. Fla. 1988) (court will not consider failure of successor counsel to defend or prosecute motion for summary judgment as proof that original counsel violated Rule 11).

2. Parties

(a) Represented Parties

The Supreme Court has held that Rule 11 "imposes on any party who signs a pleading, motion, or other paper — whether the party's signature is required by the rule or is provided voluntarily — an affirmative duty to conduct a reasonable inquiry into the facts and the law before filing, and that the applicable standard is one of reasonableness under the circumstances." Business Guides, Inc. v. Chromatic Communications Enters., Inc., 498 U.S. 533, 551 (1991); see also Estate of Calloway v. Marvel Entm't Group, 138 F.R.D. 646, 651 (S.D.N.Y.

1991) (district court imposed an objective standard of reasonableness on party who signed pleadings and affidavits), aff'd in part and vacated in part, 9 F.3d 237 (2d Cir. 1993); Sassower v. Field, 138 F.R.D. 369, 374 (S.D.N.Y. 1991) (plaintiffs, both as represented parties and pro se litigants, may be held responsible for Rule 11 sanctions), aff'd on other grounds, 973 F.2d 75 (2d Cir. 1992).

Because the 1993 amendment allows courts to sanction anyone who is responsible for a violation, the question of whether a party has signed a pleading should not determine whether the party should be sanctioned. Instead, a court will determine a party's responsibility for a violation by analyzing the facts leading up to the violation, rather than by reference to whose signature appears on the paper. See, e.g., In re Kilgore, 253 B.R. 179, 187 (Bankr. D.S.C. 2000) (citing this outline); Devine v. Wal-Mart Stores, Inc., 52 F. Supp. 2d 741, 744-45 (S.D. Miss. 1999) (plaintiff but not counsel sanctioned, where complaint and other pleadings were filed for improper purpose, and based on false testimony of witness procured by plaintiff). But see Hope v. Connell, No. 3:98-CV-0929-D, 1999 U.S. Dist. LEXIS 12555, at *16-17 (N.D. Tex. Aug. 11, 1999), aff'd, 239 F.3d 365 (5th Cir. 2000) (plaintiff could not be sanctioned when represented by counsel where plaintiff did not sign or otherwise present documents to the court). Note, as well, that a court cannot impose a monetary sanction on a represented party for an unwarranted legal argument. See Salovaara v. Eckert, 222 F.3d 19, 34 n.11 (2d Cir. 2000) (noting that Rule 11(c)(2)(A) precludes imposition of sanctions against a party); Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp., 222 F.3d 52, 57 (2d Cir. 2000). Nonetheless, courts under the 1983 rule had already laid down precedents to guide the decision on sanctioning a party, and some of that case law remains persuasive under the 1993 rule. See Stern v. LIT Am., No. 93 Civ. 1074, 1994 U.S. Dist. LEXIS 2260, at *11 (S.D.N.Y. Mar. 2, 1994) (plaintiff sanctioned for contradicting his own prior deposition testimony by filing a signed affidavit for the purpose of opposing a summary judgment motion).

Under the 1983 version of Rule 11, the Seventh Circuit found that where a plaintiff was only a "nominal plaintiff," he should not be forced to pay a substantial sum of money for his counsel's offending conduct. Burda v. M. Ecker Co., 954 F.2d 434, 440-41 (7th Cir. 1992), modified after remand, 2 F.3d 769 (7th Cir. 1993). Moreover, in Independent Fire Ins. Co. v. Lea, 979 F.2d 377 (5th Cir. 1992), the Fifth Circuit held that Rule 11 does not require that all parties on one side of a lawsuit be sanctioned. "[T]he 'represented party' against which

sanctions are levied must be a party who had some direct personal involvement in the management of the litigation and or (sic) the decisions that resulted in the actions which the court finds improper under Rule 11." Id. at 379. Thus, the Fifth Circuit upheld a sanctions award against one plaintiff but reversed the imposition of sanctions against two other plaintiffs who neither signed any paper filed with the court nor took an active role in the litigation. Id.

One court refused to sanction a "represented party" who had been sued "only in his official capacity" and had resigned subsequent to the filing of the sanctionable memorandum. Trout v. O'Keefe, 144 F.R.D. 587, 595-96 (D.D.C. 1992). The court in Trout also declined to sanction the former official's replacement — the new "represented party" — stating that it would be "both inconsistent with the purposes of Rule 11 and illogical" to do so. Id. at 596.

(b) Pro Se Litigants

The 1993 rule excuses only represented parties from some of its requirements. Therefore, like the previous rule, it does apply fully to pro se litigants. See Carman v. Treat, 7 F.3d 1379, 1381 (8th Cir. 1993) (pro se litigant's claims dismissed with prejudice after he ignored court's warnings and missed opportunities to comply with Rule 11; monetary sanctions were not a practicable alternative); Searcy v. Houston Lighting & Power Co., 907 F.2d 562, 565 (5th Cir. 1990) (court affirmed $109,335.30 sanction of pro se plaintiff); United States v. Carley, 783 F.2d 341, 342 (2d Cir. 1986), Hilgeford v. Peoples Bank, 776 F.2d 176, 177 (7th Cir. 1985) (per curiam); Sanders v. Tyco Elec. Corp., 235 F.R.D. 315, 322-25 (W.D.N.C. 2006) (sanctioning pro se litigant, but accounting for the "significant amount of paranoia which may motivate much of Plaintiff's conduct" in fashioning sanction); Satterfield v. Pfizer, Inc., No. 04 Civ. 3782 (KMW) (GWG), 98 Civ. 8040 (KMW) (GWG), 2005 U.S. Dist. LEXIS 4180, at *31-41 (S.D.N.Y. Mar. 17, 2005) (declining to impose monetary sanctions, but enjoining pro se litigant from filing new lawsuits on the same facts); Sabbagh v. Charles Schwab & Co., No. 01 Civ. 4824 (WHP) (KNF), 2002 U.S. Dist. LEXIS 14679, at *19-20 (S.D.N.Y. Aug. 9, 2002) (sanctioning pro se plaintiff for relying on forged document and not heeding defendant's warning that reliance on a statute was misplaced); Burger v. Bay Ship Mgmt., Inc., No. 99-3342-T(3), 2000 U.S. Dist. LEXIS 3344, at *13-14 (E.D. La. Mar. 10, 2000) (sanctioning pro se litigant for filing frivolous claims and warning that any further filings on same allegations will be met with more severe sanctions); Sharp v. U.S.

Dep't of the Treasury IRS, 5:97 CV 179-SPM, 1999 U.S. Dist. LEXIS 7201, at * 3-5 (N.D. Fla. Apr. 21, 1999); Ivy v. Mason, 30 F. Supp. 2d 1273, 1275 (D. Idaho 1998) (awarding sanctions against tax protestors, despite pro se status); Tornichio v. United States, No. 5:97CV2794, 1998 U.S. Dist. LEXIS 3950, at *13-15 (N.D. Ohio Mar. 12, 1998) (same), aff'd without op., 173 F.3d 856 (6th Cir. 1999); United States v. Barker, 182 F.R.D. 661, 662-64 (S.D. Ga. 1998) (imposing monetary sanctions and enjoining pro se litigant from filing additional lawsuits in future unless certain conditions met); Lal v. Borough of Kennett Square, 935 F. Supp. 570, 576-77 (E.D. Pa. 1996) (monetarily sanctioning represented party for violation of Rule 11(b)(2) because party was acting pro se at time complaints were filed), aff'd without op., 124 F.3d 187 (3d Cir. 1997); Meuli v. Farm Credit Serv., No. 91-1018-C, 1992 U.S. Dist. LEXIS 1387, at *14-15 (D. Kan. Jan. 27, 1992) (imposing sanction of costs against pro se plaintiff who did not research case law interpreting statutes upon which he relied); Bombalski v. United States, No. Civ. 91-285, 1991 U.S. Dist. LEXIS 16854, at *7-8 (W.D. Pa. Oct. 29, 1991) (notwithstanding the pro se status of many tax protesters, courts have grown indignant with the increasing number of frivolous tax suits); Durant v. Traditional Invs., Ltd., 135 F.R.D. 42, 49 (S.D.N.Y. 1991) (considering belief that pro se party was receiving in-house legal advice in awarding sanctions against party); In re Burse, 120 B.R. 833, 838 (Bankr. E.D. Va. 1990) (awarding sanctions against pro se litigant pursuant to Bankruptcy Rule 9011); Day v. Amoco Chems. Corp., 595 F. Supp. 1120, 1126 (S.D. Tex. 1984) (awarding $10,000 in fees against pro se plaintiff proceeding *in forma pauperis*), dismissed without op., 747 F.2d 1462 (5th Cir. 1984); see also Louisville v. Armored Transp. of Cal., No. C-90-0266, 1991 U.S. Dist. LEXIS 2523, at *9 (N.D. Cal. Feb. 26, 1991) (suspending sanctions order for 30 days, giving pro se plaintiff the opportunity to explain to the court why she reasonably believed that her complaint had merit).

However, the reasonable inquiry that is required of pro se litigants may differ from the reasonable inquiry attorneys must make. See Sieverding v. Colorado Bar Ass'n, No. 02-M-1950, 2003 U.S. Dist. LEXIS 18469 (D. Colo. Oct. 14, 2003) (holding that, to determine the reasonableness of a pro se litigant's inquiry, a court must decide "what a reasonable person in the *pro se* litigant's position would have done"). Indeed the Committee Notes require the court to consider whether the object of a Rule 11 motion has been trained in the law. Thus, case law under the 1983 and 1993 rules suggests that pro se litigants, while

subject to Rule 11 sanctions, should be held to less stringent standards. Mendoza v. Lynaugh, 989 F.2d 191, 197 (5th Cir. 1993) (finding that sanction imposed against pro se litigant was "too strict"; case remanded for a less onerous sanction); Casserly v. Nienhouse, No. 02 C 227, 2002 U.S. Dist. LEXIS 13073, at *8 (N.D. Ill. July 16, 2002) (declining sanctions against pro se plaintiff because of "his lack of familiarity with legal principles and his ignorance of the issues presented"); Murungi v. Mercedes Benz Credit Corp., No. 01-714, 01-2006, & 00-3200, 2001 U.S. Dist. LEXIS 19490, at *4-5 (E.D. La. Nov. 21, 2001) ("since the Murungis are proceeding pro se, the Court will not impose sanctions for their repeated frivolous filings at this time"); Aarismaa v. Jordan (In re Aarismaa), 233 B.R. 233, 248 (Bankr. N.D.N.Y.) ("As a pro se litigant it is reasonable to believe that he had no understanding of the limited and somewhat confusing jurisdiction of [the Bankruptcy] Court"), aff'd, 182 F.3d 898 (2d Cir. 1999); Mousel v. Knutson Mortgage Corp., 823 F. Supp. 658, 663 (D. Minn. 1993) ("[C]ourts traditionally afford pro se parties some leeway under Rule 11."); Babigian v. Ass'n of the Bar, 144 F.R.D. 30, 34 (S.D.N.Y. 1992) (although court found that pro se plaintiff completely ignored relevant legal standards and called plaintiff's allegations "illogical," "bizarre," and "irrational," it nonetheless determined that sanctions were not warranted given plaintiff's pro se status), aff'd without op., 990 F.2d 623 (2d Cir. 1993); Loss v. Kipp, No. 1:91-CV-157, 1991 U.S. Dist. LEXIS 8195, at *8 (W.D. Mich. June 11, 1991) (court holds a pro se litigant should be given more leeway and should be sanctioned only when the litigant continues to file frivolous suits repeatedly raising the same claims); Thomas v. Taylor, 138 F.R.D. 614, 616 (S.D. Ga. 1991) (although a pro se litigant is held to the same objective standard of reasonable inquiry under the circumstances, the court must also review the complaint in light of the general view that pro se pleadings are to be held to a less stringent standard than formal pleadings drafted by lawyers); Vizvary v. Vignati, 134 F.R.D. 28, 31 (D.R.I. 1990) (objective standard to be applied asks what a reasonable person in the pro se litigant's position would have done); Redfield v. Wood, No. 1:90-CV-61, 1990 U.S. Dist. LEXIS 16176, at *7 (W.D. Mich. Nov. 30, 1990) (declining to impose sanctions against pro se plaintiff because "[m]any people not trained in the law believe the Constitution provides broader civil rights protection that it in fact does"); Cooper v. Adair, No. CV-88-2272, 1989 U.S. Dist. LEXIS 5089, at *7 (E.D.N.Y. May 1, 1989) (sanctioning a pro se litigant "requires a showing of malice").

At least one court held that Rule 11 sanctions against pro se litigants are inappropriate where: (a) there is no evidence the litigant filed an action in bad faith; (b) the litigant has not filed repeated motions lacking in merit; and (c) he or she has received no prior warnings from the court. Boggs v. Fliedermaus, LLP, 286 F. Supp. 2d 291, 302 (S.D.N.Y. 2003) (declining to impose sanctions on a pro se litigant for conduct about which he has not been explicitly warned).

Where a pro se plaintiff is an attorney or demonstrates knowledge of the law, courts may refuse to relax the Rule 11 standards. See Jones v. City of Buffalo, No. 96-CV-0739E(F), 1998 U.S. Dist. LEXIS 6070, at *19 (W.D.N.Y. Apr. 22, 1998) (sanctions awarded, in part, because plaintiff "is a highly sophisticated pro se litigant who has a thorough understanding of substantive and procedural law and a capability to generate cogent, albeit copious, legal documents"); In re Caledonia Springs, Inc., 185 B.R. 712, 717 (Bankr. D.V.I. 1995) (bankruptcy judge did not abuse discretion in sanctioning pro se plaintiffs who had access to counsel and had consulted attorneys before filing); Davis v. Hudgins, 896 F. Supp. 561, 573 (E.D. Va. 1995) (sanctioning pro se plaintiff who was an attorney), aff'd, 1996 U.S. App. LEXIS 14592 (4th Cir. June 14, 1996). But see Moore v. Time, Inc., CV-98-3886 (ERK), 1998 U.S. Dist. LEXIS 22167, at *7 (E.D.N.Y. Oct. 6, 1998) (declining to sanction pro se attorney who filed suit alleging that defendants fraudulently sent him notice that he was a sweepstakes winner when he was not, in part because it appeared from the complaint and other pleadings that he was 'not sophisticated'), aff'd, 180 F.3d 463 (2d Cir.), cert. denied, 528 U.S. 932 (1999).

In addition, courts have begun to express concern where pro se plaintiffs have received informal and anonymous assistance from lawyers in the drafting of legal documents. See, e.g., Rossi v. Rossi (In re Rossi), No. 98 B 19055, 1999 Bankr. LEXIS 435, at *37 (N.D. Ill. Apr. 27, 1999) (sanctioning law firm pursuant to inherent power and section of bankruptcy code, where law firm helped pro se plaintiff in drafting objectionable pleadings); Johnson v. Board of County Comm'rs, 868 F. Supp. 1226, 1231-32 (D. Colo. 1994), aff'd as modified, 85 F.3d 489 (10th Cir. 1996). Courts have suggested that such "ghost-written" documents are problematic in that they unfairly exploit the courts' leniency towards pro se plaintiffs. Furthermore, courts have held that the ghost-writing attorney violates the certification requirement of Rule 11 when he or she fails to sign the legal document. See Duran v. Carris, 238 F.3d 1268, 1273 (10th Cir. 2001) (holding "that any ghostwriting of an otherwise pro se brief must be

acknowledged by the signature of the attorney involved"); Delso v. Trs. for the Ret. Plan, Civ. Action No. 04-3009 (AET), 2007 U.S. Dist. LEXIS 16643, at *47-55 (D.N.J. Mar. 5, 2007) ("The Court further finds that the undisclosed . . . submission of ghostwritten papers . . . did not *per se* violate [Rule 11], but did contravene the spirit of [the Rule]."); In re Brown, 354 B.R. 535, 543 (N.D. Okla. 2006) (holding that 10th Circuit rule against ghostwriting applies whether or not the ghostwriter is the party's attorney at the time the document was written); In re Mungo, 305 B.R. 762, 768 (D.S.C. 2003); Wesley v. Don Stein Buick, Inc., 987 F. Supp. 884, 885-86 (D. Kan. 1997); Laremont-Lopez v. Se. Tidewater Opportunity Ctr., 968 F. Supp. 1075, 1077-79 (E.D. Va. 1997), aff'd without op., 172 F.3d 44 (4th Cir. 1999).

(c) Sovereign Immunity Problem When United States Violates Rule 11

Under the 1993 rule, as under the 1983 rule, seeking sanctions against the federal government raises a unique issue — sovereign immunity. Courts considered this issue under the 1983 rule, and the same analysis should apply under the 1993 rule. In Adamson v. Bowen, 855 F.2d 668, 670-72 (10th Cir. 1988), the court rejected the government's sovereign immunity defense, concluding that Congress had waived sovereign immunity against Rule 11 attorney fee awards by enacting the Equal Access to Justice Act. The Ninth Circuit has also concluded that, in a civil action, sovereign immunity does not exempt the United States government from Rule 11 sanctions. Mattingly v. United States, 939 F.2d 816, 818 (9th Cir. 1991); United States v. Gavilan Joint Cmty. Coll. Dist., 849 F.2d 1246, 1251 (9th Cir. 1988); see also United States ex rel. Smith v. Gilbert Realty Co., 34 F. Supp. 2d 527, 532 (E.D. Mich. 1998); Larkin v. Heckler, 584 F. Supp. 512 (N.D. Cal. 1984) (awarding sanctions against government without discussing sovereign immunity doctrine). But see In re Graham, 981 F.2d 1135, 1140 (10th Cir. 1992) (finding no waiver of sovereign immunity sufficiently explicit in Bankruptcy Rule 9011, the bankruptcy court equivalent of Rule 11, to justify fee award against government); Barry v. Bowen, 884 F.2d 442, 444 (9th Cir. 1989) (dicta regarding whether the rulemaking procedure adopting Rule 11 constitutes an explicit waiver of sovereign immunity); Mager v. Heckler, 621 F. Supp. 1009, 1012-13 (D. Colo. 1985) (awarding plaintiff attorneys' fees under the Equal Access to Justice Act, but refusing to sanction the government attorney under Rule 11 because the government attorney cannot fire a client who will not take the litigator's advice).

Courts have also applied Rule 11 to state governments. See Frazier v. Cast, 771 F.2d 259, 260 (7th Cir. 1985) (imposing sanction on Cook County State's Attorney); Simpson v. City of Philadelphia, 660 F. Supp. 951 (E.D. Pa. 1987). Moreover, in Derechin v. State Univ. of New York, 963 F.2d 513, 519-20 (2d Cir. 1992), the Second Circuit upheld both a district court's imposition of sanctions against a state-employed lawyer and its prohibition that she not be afforded indemnification under an otherwise applicable state statute.

3. Allocation of Sanctions Between Party and Attorney

Before the 1993 amendment, courts already sought to allocate sanctions between the attorney and the party according to their relative responsibility for the Rule 11 violation. See Chevron, USA, Inc. v. Hand, 763 F.2d 1184, 1187 (10th Cir. 1985); Bastien v. R. Rowland & Co., 116 F.R.D. 619, 621-22 (E.D. Mo. 1987), aff'd, 857 F.2d 482 (8th Cir. 1988). But see American Academy of Disability Evaluating Physicians Ass'n v. American Disability Evaluation Research Inst., No. 90 C 6038, 1991 U.S. Dist. LEXIS 18640, at *5 (N.D. Ill. Dec. 24, 1991) ("ordinary practice" in Seventh Circuit is for the court to impose attorneys' fees on the party, and leave the party and its attorney to settle their own accounts). This practice, which demonstrates the inherent conflict of interest raised when sanctions motions are filed, is partially addressed by the 1993 rule. Under the 1993 rule, legal errors must be laid at the attorney's door. More generally, the 1993 rule specifically directs sanctions to those "responsible" for the violation, implying that courts should attempt to allocate responsibility when shared.

As under the 1983 rule, sanctions should fall on the client either when a party has misled its attorney as to the facts or the purpose behind a proceeding or when the client is involved heavily in the investigation of the factual bases of its claims. See Pan-Pacific & Low Ball Cable Television Co. v. Pacific Union Co., 987 F.2d 594, 597 (9th Cir. 1993) (upholding sanctions against party where although "well-positioned to investigate the facts supporting its claims," party failed to make reasonable inquiry into bases of several of its claims); Healey v. Chelsea Resources Ltd., 947 F.2d 611 (2d Cir. 1991); Chevron, USA, Inc. v. Hand, 763 F.2d 1184, 1187 (10th Cir. 1985); In re Kilgore, 253 B.R. 179, 188 (Bankr. D.S.C. 2000) (imposing sanctions under Fed. R. Bankr. P. 9011 on creditor, not creditor's attorney who relied on information from creditor in filing foreclosure action); Horizon Unlimited, Inc. v. Richard Silva & SNA, Inc.,

No. 97-7430, 1999 U.S. Dist. LEXIS 13320, at *19-20 (E.D. Pa. Aug. 31, 1999) (imposing sanctions for "patently frivolous" action only on party, where party's president "was willing to testify to anything he thought supported his claim" and party's counsel filed for voluntary dismissal once it became clear the action was groundless; "[c]ounsel is permitted to assume his client is honest with him unless and until circumstantial evidence is obviously to the contrary"); Refac Int'l, Ltd. v. Hitachi Ltd., No. CV87-6191, 1991 U.S. Dist. LEXIS 20733, at *3 (C.D. Cal. Dec. 23, 1991) (sanctions imposed upon plaintiff but not upon plaintiff's counsel, where counsel reasonably relied on both plaintiff's C.E.O. and plaintiff's expert counsel); Cirino v. Federal Express Corp., No. 94 Civ. 4787, 1995 U.S. Dist. LEXIS 11690, at *2 (S.D.N.Y. Aug. 15, 1995) (imposing sanctions against the client only where counsel was entitled to rely on information provided by client). Cf. Margo v. Weiss, No. 96 CIV. 3842 (MBM), 1998 U.S. Dist. LEXIS 17258, at *8-9 (S.D.N.Y. Nov. 3 1998) (imposing larger share of sanctions against attorneys when plaintiffs filed affidavits in an unreasonable attempt to disavow deposition testimony, because attorneys were "at once the worthier targets of deterrence and more likely... to be able to afford the payment"), aff'd, 213 F.3d 55 (2d Cir. 2000); Bayan El Dada v. Oil Mart Corp., No. 94 C 3829, 1995 U.S. Dist. LEXIS 13740, at *2-3 (N.D. Ill. Sept. 19, 1995) (imposing sanctions on attorney where "a reasonable attorney should have become suspicious of his clients' assertions").

(a) Joint and Several Liability

Under the 1993 as under the 1983 rule, joint and several liability for attorney and client is still available. See Med. Supply Chain, Inc. v. Neoforma, Inc., 419 F. Supp. 2d 1316, 1334 (D. Kan. 2006) (both counsel and represented party responsible for bringing lawsuit after previous two claims based on same facts were dismissed); Estate of Calloway v. Marvel Entm't Group, 138 F.R.D. 646, 651-52 (S.D.N.Y. 1991) (both counsel and represented party failed to uphold their respective responsibilities to set forth accurate facts), aff'd in part and vacated in part, 9 F.3d 237 (2d Cir. 1993); Arco Indus. Corp. v. Travelers Ins. Co., 730 F. Supp. 59, 70 (W.D. Mich. 1989) (shared responsibility for proceeding despite lack of evidence). That counsel carried out his client's instructions does not shelter him from sanctions. See In re TCI, Ltd., 769 F.2d 441, 446 (7th Cir. 1985) ("When lawyers yield to the temptation to file baseless pleadings to appease clients, . . . they must understand that their adversary's fees become a cost of their business.").

Given the focus on the person "responsible," joint and several liability for sanctions may be viewed as inappropriate when there are significant differences in the conduct of the offending parties. The Fifth Circuit, Smith Int'l, Inc. v. Texas Commerce Bank, 844 F.2d 1193, 1202 (5th Cir. 1988), vacated the district court's order of sanctions because the lower court had failed to apportion the award among the offending parties. The court explained that one of the plaintiffs was involved in the litigation for nearly one year before the other plaintiffs and that there were significant differences in the number of claims that each plaintiff asserted. According to Smith Int'l, these kinds of differences must be considered in determining what amounts are appropriate under Rule 11. Id.

The 1993 rule reflects recognition of conflict of interest and attorney-client privilege issues. See, e.g., 1993 Advisory Committee Notes, 146 F.R.D. at 590. This suggests that the practice of one district court judge under the 1983 rule may be instructive. One court universally imposed joint and several liability in every case in which there is not a clear indication of sole responsibility on the grounds that such a result avoids any forced disclosure of lawyer-client communications or other protected matters. Martin v. American Kennel Club, Inc., No. 87 C 2151, 1989 U.S. Dist. LEXIS 201, at *22-23 (N.D. Ill. Jan. 3, 1989); accord Integrated Measurement Sys., Inc. v. International Commercial Bank of China, No. 89 C 9019, 1991 U.S. Dist. LEXIS 9806, at *16 (N.D. Ill. July 15, 1991).

The district court retains authority to ensure that its allocation is followed. In one case, the district court first imposed $4,000 in Rule 11 sanctions and directed that the entire amount was to be paid by counsel. When counsel attempted to retain half of the sanction from a settlement obtained on behalf of plaintiffs, the district court properly ordered the attorney to release the retained amount to the plaintiffs. The court of appeals affirmed the district court's actions, noting that the trial court's authority to impose and apportion Rule 11 sanctions "obviously included the authority to make the express terms of the sanction order effective." Farino v. Walshe, 938 F.2d 6, 8 (2d Cir. 1991).

(b) Insurability of Sanctions

Whether malpractice or general liability insurance will cover a sanctions award is a difficult question. As a practical matter, attorneys should negotiate with their insurance carriers over the terms of the insurance to be sure that

exclusionary clauses in their policies cannot be interpreted to exclude coverage for Rule 11 sanctions. Even if an attorney and an insurance carrier draft a clear policy, courts may require the attorney to shoulder the burden of a sanction notwithstanding the policy. The insurability of sanctions raises two issues for the courts: the duty to defend and the duty to indemnify. Courts have determined that coverage depends on the policy's terms, the nature of the challenged conduct, and public policy.

(1) Duty to Defend

A determination of whether coverage is available for Rule 11 sanctions often turns on the particular language of the policy. In Green v. National Union Fire Ins. Co. of Pittsburgh, 924 F.2d 1051, 1991 U.S. App. LEXIS 5212 (4th Cir. 1991) (unpublished), the Fourth Circuit considered the language of a malpractice insurance policy to determine whether coverage was available for a Rule 11 sanctions claim. Id. at *1. The court found that the policy specifically excluded sanctions from liability coverage and that the policy provided for a duty to defend only claims "which are payable under the terms of this policy." Thus, the court held that the insurer was not obligated to indemnify for fees or costs associated with defending against the sanctions claim. See also Rooney v. Chicago Ins. Co., No. 00 Civ. 2335, 2001 U.S. Dist. LEXIS 2796 (S.D.N.Y.), aff'd, 26 Fed. App'x 53 (2d Cir. 2001) (finding no duty to defend sanctions claim because claim did not meet policy's definition of a covered claim).

An insurer's duty to defend also was raised in Figari & Davenport, LLP v. Continental Casualty Co., 846 F. Supp. 513, dismissed and vacated on other grounds, 864 F. Supp. 11 (N.D. Tex. 1994). In Figari, plaintiff's counsel asked their insurance company to defend them against a motion for sanctions under Colorado's state version of Rule 11. The insurance company refused to defend, citing the insurance policy which provided that the company will not "defend or pay . . . any claim arising out of . . . any dishonest, fraudulent, criminal or malicious act or omission[;] . . . any fine, penalty or claim for return of fees; . . . [or] any punitive or exemplary amounts." Id. at 518. The suit against the insurance company was removed to federal court. The district court looked to Texas state insurance law to determine the insurer's duty to defend. Id. at 519. The court focused on Texas' "eight corners" rule, which required the court to consider only the third party's pleading (i.e., the motion for sanctions) and the insurance policy to determine if there was a duty to defend. Id. The court,

resolving doubts as to the meaning of the policy in favor of the insured and in favor of coverage, had to determine whether the language of the policy excluded a duty to defend under the facts asserted in the sanctions motion. Id.

The Figari sanctions motion alleged that the plaintiff's attorney "believed in the validity of his client's case after the point at which an objectively reasonable attorney would have given up and dismissed the case." Id. at 520. This, the court said, did not allege any dishonest, fraudulent, criminal or malicious acts sufficient for the insurance company to refuse to defend. At most, the misplaced belief would be negligence covered by the policy. Id. at 520-21. The court pointed out that a sanctions claim was not per se excluded from the policy as a "fine or penalty" because other types of sanctions could be imposed, including "reimbursement" for fees and expenses. Thus, the court found that the policy exclusion clause was vague and should be construed in favor of the insured. Id. at 521; see also O'Connell v. Home Ins. Co., No. Civ. 88-3523, 1990 U.S. Dist. LEXIS 11848, at *16 (D.D.C. Sept. 8, 1990) (denying insurer's summary judgment motion in suit for costs and fees to defend motion for Rule 11 sanction where sanctions were not a fine or penalty but compensation; ambiguity of policy coverage construed against insurer); Bar Plan v. Campbell, No. 57946, 1991 Mo. App. LEXIS 1429, at *16 (Mo. Ct. App. Sept. 17, 1991) (insurer had duty to defend against Rule 11 sanctions motion where policy provided for duty to defend even for claims excluded by damages definition in policy). But cf. Wellcome v. Home Ins. Co., 758 F. Supp. 1375, 1380-81 (D. Mont. 1991), aff'd, 993 F.2d 887 (9th Cir. 1993) (no duty to defend where court-imposed sanctions are not "damages" as defined by policy and policy only provided duty to defend for covered damages).

Under the Figari and O'Connell analysis, a motion seeking Rule 11 sanctions without limiting the type of sanctions sought (i.e., reimbursement, fine, penalty) would likely invoke the insurance company's duty to defend because it is possible that sanctions could include reimbursement for attorneys' fees and/or costs. On the other hand, if the only sanction available under the amended rule 11 would be a payment to the court — for example, if the court sua sponte issues a rule to show cause why sanctions should not be imposed — the results may be different because a payment to the court would be more like a fine or penalty.

(2) Duty to Indemnify

The duty to indemnify for sanctions turns on the policy language and the conduct that forms the basis for the sanctions award. Figari & Davenport, LLP v. Continental Cas. Co., 864 F. Supp. 11 (N.D. Tex. 1994). In Figari, the state trial court determined that no state Rule 11 sanctions would be imposed, and instead awarded fees and expenses under Colorado's fee-shifting statute. Id. at 522. The state court found that the litigation was not conducted in bad faith. The district court, considering the coverage issues once the suit was removed to federal court, ruled that the insurance company was liable for reimbursement under the fee-shifting statute. The district court indicated that its ruling would have been different if the sanctioning state court had found that the attorneys acted in bad faith.

Some courts have also found that indemnification violates public policy, and have therefore refused to allow indemnification. The Second Circuit, in Derechin v. State Univ. of New York, 963 F.2d 513 (2d Cir. 1992), held that a district court may require an attorney to assume personally the burden of a sanction without benefit of insurance or indemnification. Although Derechin itself involved indemnification by an employer, the court saw the problem as extending to insurance as well: "[t]he availability of insurance for Rule 11 sanctions might increase the possibility for full recovery of attorneys' fees, but would weaken the deterrent effect of the sanction by allowing the sanctioned attorney to shift the burden of the sanction. Deterrence would be undermined if district courts could not impose Rule 11 sanctions without the possibility of indemnity — whether from a client, an employer, or an insurer." Id. at 519; see also Chilcutt v. United States, 4 F.3d 1313, 1326-27 (5th Cir. 1993) (affirming refusal by district court to allow government attorneys to be reimbursed for Rule 37 sanctions, citing "economic deterrence" language in Pavelic and LeFlore v. Marvel Entm't Group, 493 U.S. 120, 126 (1989)); In re South Bay Med. Assocs., 184 B.R. 963, 972 (Bankr. C.D. Cal. 1995) (denying indemnification although provided for in a lease where sanctions were imposed under bankruptcy code).

Other circuits have not decided whether to follow Derechin. In part, the insurability of sanctions seems to depend on whether courts focus on the sanctionable activity's similarity to malpractice or, as in Derechin, on Rule 11's goal of deterrence. In general, insurance policies contain specific exclusions for intentional conduct. In construing such an exclusion, the courts may focus on the

nature of the Rule 11 motion. If the critical issue under Rule 11 is whether an attorney fulfilled a duty to conduct a reasonable inquiry of the facts and the law, it is an issue closely analogous to the issue in malpractice cases generally. Because Rule 11 requires no finding of intent, some courts have specifically stated that Rule 11 violations are akin to malpractice. The Seventh Circuit, in Hays v. Sony Corp. of Am., 847 F.2d 412, 418 (7th Cir. 1988), viewed Rule 11 conduct in a malpractice light: "[r]estating the standard in negligence terms helps one to see that Rule 11 defines a new form of legal malpractice." However, depending upon the specific nature of the claimed Rule 11 violation, Rule 11 sanctions may under some circumstances be analogous to an intentional and knowing wrong excludable under the policy. In addition, regardless of exclusion language, the courts may determine that, as a matter of public policy, Rule 11 sanctions should be considered analogous to punitive damages, which courts have frequently held may not be reimbursed through insurance or indemnification because the deterrent effect of the award would be diminished. Under this view, insurability would weaken an attorney's non-delegable duty to comply with the rule's requirements. At a minimum, the courts should analyze the underlying conduct being sanctioned to determine whether the conduct complained of is covered by the language of the policy. See generally Jerold S. Solovy et al., Sanctions in Federal Litigation §§ 8.01-8.03 (1991).

(c) Attorney-Client and Work Product Privileges and Other Ethical Considerations

A number of Rule 11 commentators believe that Rule 11 proceedings, particularly during ongoing litigation, have a profound effect on the lawyer-client relationship and the work product privilege. See, e.g., Georgene M. Vairo, Rule 11: A Critical Analysis, 118 F.R.D. 189 (1988); Melissa L. Nelken, Sanctions Under Amended Federal Rule 11: Some 'Chilling' Problems in the Struggle Between Compensation and Punishment, 74 Geo. L.J. 1313, 1344 (1986); William W. Schwarzer, Sanctions Under the New Federal Rule 11 — A Closer Look, 104 F.R.D. 181, 191 (1985).

The 1993 amendment attempts to ameliorate any attorney-client or ethical concerns, through admonitions in the Committee Notes that Rule 11 motions should not be filed "to create a conflict of interest between attorney and client, or to seek disclosure of matters otherwise protected by the attorney-client privilege or the work-product doctrine." In addition, the Committee Notes suggest that the

court may defer a ruling on a Rule 11 motion until final resolution of the case to avoid creating attorney-client conflicts. Id. This expression of concern should counsel that judges are sensitive to these issues. Nevertheless, the rule retains the power to raise serious concerns.

Given that an attorney's reasons for filing a claim or defense are often based on confidential communications from the client and work product, a court's inquiry into the subjective intent of an attorney or her client, or the reasonable inquiry conducted by an attorney, may encroach into privileged areas. See, e.g., Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073, 1083 (7th Cir. 1987) (in examining subjective intent, district court must find out why the plaintiff filed the suit); Estate of Calloway v. Marvel Entm't Group, 854 F.2d 1452 (2d Cir. 1988) (although client's failure to invoke privilege barred its consideration on appeal, attorney raised argument that attorney-client privilege barred him from raising defense that he was misled by client), rev'd on other grounds, 493 U.S. 120 (1989); see also Brandt v. Schal Assoc., Inc., 121 F.R.D. 368, 385 n.48 (N.D. Ill. 1988), aff'd, 960 F.2d 640 (7th Cir. 1992). In some cases, information relevant to a Rule 11 inquiry may be disclosed either in a pleading or discovery. If the information is not obtained in a pleading or discovery, the judge could make an in camera inspection. See William W. Schwarzer, Sanctions Under the New Federal Rule 11 — A Closer Look, 104 F.R.D. 181, 191 (1985). In Int'l Business Counselors, Inc. v. Bank of Ikeda, Ltd., No. 89 Civ. 8373, 1991 U.S. Dist. LEXIS 4112 (S.D.N.Y. Apr. 2, 1991), for example, the judge granted counsel's motion for leave to file correspondence between counsel and his former client for *in camera* inspection.

Another problem arises when the court must decide whether to sanction the lawyer or the client. The Second Circuit has found that there is a "potential for conflict inherent" in a sanctions motion directed at a client and counsel even when both agree that an action was fully warranted in fact and law. A sanctions motion attacking the factual basis for the suit will "almost inevitably" place the two in conflict. Healey v. Chelsea Resources Ltd., 947 F.2d 611, 623 (2d Cir. 1991); see also Kibbee v. City of Portland, CV-98-675-ST, 2000 U.S. Dist. LEXIS 17205, at *31-32 (D. Or. Oct. 12, 2000) (recognizing that attorney may be constrained by attorney-client privilege from explaining submission of inaccurate information to court and thus declining to impose sanctions absent proof of intentional misrepresentation by attorney); O'Neil v. Retirement Plan for Salaried Employees of RKO Gen., Inc., No. 88 Civ. 8498, 1992 U.S. Dist. LEXIS 237, at

*13 (S.D.N.Y. Jan. 7, 1992) (court deferred a hearing on allocating Rule 11 sanctions until after trial on the merits because of the prospect that the hearing would disclose privileged work product information). According to Model Code of Professional Responsibility DR 4-101(c)(4), a lawyer may disclose confidential information necessary to defend herself against charges of wrongful conduct. Some commentators have suggested that this "self-defense" exception applies to Rule 11 proceedings. See, e.g., Melissa L. Nelken, Sanctions Under Amended Federal Rule 11: Some 'Chilling' Problems in the Struggle Between Compensation and Punishment, 74 Geo. L.J. 1313, 1345 (1986). But this rule normally contemplates a separate action or charge by the client against the lawyer, not by the client's opponent. Therefore, there is some question whether it applies in the Rule 11 context. Moreover, if a court's consideration of Rule 11 sanctions releases an attorney from the traditional obligations inherent in the attorney-client relationship, an attorney might reveal privileged information in order to shift full or partial responsibility to the client. This raises the specter that in "an otherwise bona fide suit against the client, the plaintiff may assert claims against the attorney for the sole purpose of forcing counsel to divulge confidential material in order to defend himself." First Fed. Sav. & Loan Assoc. of Pittsburgh v. Oppenheim, Appel, Dixon & Co., 110 F.R.D. 557, 566 (S.D.N.Y. 1986). In addition, a lawyer's attempt to defend herself in a Rule 11 proceeding raises questions under Canon 5 of the Model Code of Professional Responsibility which states that a lawyer should exercise independent professional judgment on behalf of a client. An attorney's loyalty to her client might be compromised when she is threatened with Rule 11 sanctions. See White v. General Motors Corp., 908 F.2d 675 (10th Cir. 1990) (allocation of sanctions issue presents clear conflict of interests); Martin v. American Kennel Club, Inc., No. 87 C 2151, 1989 U.S. Dist. LEXIS 201, at *22-23 (N.D. Ill. Jan. 3, 1989) ("Absent a clear indication of sole responsibility of one or the other, this Court's view is that it is ordinarily appropriate to impose joint and several liability for Rule 11 sanctions on both lawyer and client. That result avoids any forced disclosure of lawyer-client communications or other protected matters.").

The possibility of such revelations prompted one Rule 11 commentator to write that a lawyer may need to give a client "a Miranda-type warning; if sanctions are sought, anything said by the client may be used against him, and he may well need to consult another attorney." Timothy B. Phelps, Note, Rule 11 Sanctions: Toward Judicial Restraint, 26 Washburn L.J. 337, 373 (1987).

Another commentator noted, "Prudence would suggest that a lawyer not only make complete disclosure to the client of how the client's interests differ from the lawyer's interests under the circumstances, but also that the lawyer document his disclosure and consultation with the client, as well as the client's consent to continued representation." Yeomans, Conflict of Interest, Confidential Information, and Rule 11, Attorney Sanctions Newsletter 8, 9 (Dec. 1990).

A conflict of interest may also arise between local counsel and out-of-town counsel when a court attempts to allocate responsibility for a Rule 11 violation. See William W. Schwarzer, Sanctions Under the New Federal Rule 11 — A Closer Look, 104 F.R.D. 181, 191 (1985). Clients may become increasingly reluctant to tell their attorney everything they know about a case when they discover that Rule 11 may require their attorney to reveal confidential information.

In a New York County Lawyers' Ethics Opinion, the Committee on Professional Ethics of the New York County Lawyers' Association responded to the following inquiry:

> May an attorney include in a retainer or other agreement with a client a provision requiring the latter to pay any sanctions which might be imposed in the future? After sanctions are imposed, may the attorney accept reimbursement from the client?

Committee on Professional Ethics of N.Y. County Lawyers' Assoc., Op. 683 (1990). The Committee stated that it believes there are certain situations in which a lawyer may never shift the burden of costs and sanctions to a client. For example, where a court specifically assesses sanctions against the lawyer, it would violate public policy for the lawyer to shift the burden of the assessment to the client. See Farino v. Walshe, 938 F.2d 6, 8 (2d Cir. 1991) (court ordered counsel to release $2500 in client funds which counsel had retained to help pay for $4000 in sanctions imposed solely on counsel). The committee also stated that it would be improper for a lawyer to request reimbursement for sanctions imposed because of the lawyer's negligence, recklessness, willful misconduct or malpractice. Attorneys faced with a sanctions motion must, at a minimum, consider whether separate counsel is required for the sanctions proceeding and consider a request to postpone the sanctions proceeding until the merits of the underlying suit are resolved.

D. Who May Seek Sanctions

A request for sanctions may not be brought by a client against his or her own attorney under Rule 11. Mark Indus. v. Sea Captain's Choice, Inc., 50 F.3d 730, 732 (9th Cir. 1995). In Mark Industries, the court said that the rule's "express reference to 'other party [or parties]' implies that sanctions are payable to adversaries, not by a violating lawyer to his own client." Id. While the court relied on the language of the 1983 rule, the same result should obtain under the amended version of Rule 11. The words "other party or parties" are no longer in the text of the rule, but the Advisory Notes still provide guidance as to the intent of the rule. In stating that monetary sanctions should ordinarily be paid to the court, the Advisory Notes acknowledge that the rule authorizes an award of fees to "another party." Advisory Notes, 146 F.R.D. 583, 588.

In limited circumstances, courts have recognized that non-parties may have standing to seek sanctions. See, e.g., United States ex rel. Shaw v. AAA Eng. & Drafting, Inc., No. CIV-95-950-M, 2006 U.S. Dist. LEXIS 19351, at *4-5 (W.D. Okla. Mar. 8, 2006) (permitting non-party served with document subpoena to seek sanctions based on allegations made in filings in the case).

E. District Court Practice

1. Sanctions Initiated by Motion

A court may impose a Rule 11 sanction either on a party's motion or on the court's own initiative. Under the 1993 amended rule, each of these methods of initiating sanctions is detailed in a separate paragraph; Rule 11(c)(1)(A) describes how sanctions can issue on a party's motion.

First, a party must make a Rule 11 motion separately from any other motion. This provision serves to discourage the practice of routinely adding a request for sanctions to other motions, such as summary judgment motions. Courts will not consider sanctions requests that do not comply with this requirement. See L.B. Foster Co. v. America Piles, Inc., 138 F.3d 81, 89-90 (2d Cir. 1998) (reversing sanctions award in part because request for sanctions was brought in letter requesting Rule 54(b) certification); Pannonia Farms, Inc. v. Re/Max Int'l, Inc., 405 F. Supp. 2d 41, 46 (D.D.C. 2005) (denying sanctions where motion was included with supplemental motion to dismiss and motion for

attorneys' fees); Kleinpaste v. United States, No. 97-884, 1997 U.S. Dist. LEXIS 22377, at *16 (W.D. Pa. Dec. 19, 1997) (sanctions denied because requirement of filing a separate motion is mandatory); Dunn v. Pepsi-Cola Metro. Bottling Co., 850 F. Supp. 853, 855 (N.D. Cal. 1994) (sanctions denied because, inter alia, motion not presented separate from other motions); Israel Travel Advisory Serv. Inc. v. Israel Identity Tours, Inc., No. 92 C 2379, 1994 U.S. Dist. LEXIS 751, at *16 (N.D. Ill. Jan. 26, 1994), aff'd, 61 F.3d 1250 (7th Cir. 1995) (sanctions request denied because merely included in motion for a new trial and not in a separate motion as required under the amended Rule 11). In addition, the separate filing requirement facilitates the "safe harbor" provision described below.

However, in Ridder v. City of Springfield, 109 F.3d 288 (6th Cir. 1997), cert. denied, 522 U.S. 1046 (1998), the Sixth Circuit stated that the requirement that a Rule 11 motion be made separately is satisfied if the Rule 11 motion is combined with motions for sanctions under other provisions. Id. at 294 n.7. Accord Kron v. Moravia C. Sch. Dist., No. 5:98-CV-1876, 2001 U.S. Dist. LEXIS 6573 (N.D.N.Y. May 3, 2001). The Ridder court reasoned that the requirement is intended to highlight the sanctions request by preventing it from being tacked onto or buried in motions on the merits. Id.

Second, the motion must describe specific conduct that the filing party believes violates Rule 11(b). But see In re Mahendra, 131 F.3d 750, 759 (8th Cir. 1997) (holding that specificity requirement of Bankruptcy Rule 9011 is satisfied if brief accompanying the motion details the conduct), cert. denied, 523 U.S. 1107 (1998).

Third, the motion must be served on the opposing party at least 21 days before it is filed with the court. Moreover, if the opposing party withdraws or amends the challenged paper within the 21 days, the motion cannot be filed at all. This is the so-called "safe harbor" provision. The 1993 Advisory Committee Notes explain that the filing of a sanctions motion can force an opposing party into tenaciously adhering to a questionable contention; the safe harbor provision is intended to encourage parties to withdraw from those contentions.

The 1993 amendment specifically allows a court to award expenses and attorneys' fees to a party that prevails on a Rule 11 motion in pursuing or defending the motion. See EEOC v. Tandem Computers Inc., 158 F.R.D. 224, 229 (D. Mass. 1994) (court awarded fees under amended Rule 11 to the

successful opponent of a Rule 11 motion; the court stated that the sanctions motion need not be frivolous). See also discussion infra at section VI E 9. This revision creates a symmetry between parties filing and parties opposing sanctions motions; previously, a party that successfully opposed a Rule 11 motion could not recoup fees without filing a cross motion seeking sanctions for the opposing party's frivolous Rule 11 motion, while a party that successfully filed a motion frequently would recoup fees in the form of the sanction itself. Thus, the 1993 Advisory Committee Notes stress that, under the amended rule, cross motions "should rarely be needed." It should be noted that under the 1993 rule, the court may only award fees and expenses "if warranted"; similarly, the court may only award fees and expenses as part of a sanction "if warranted for effective deterrence." Rule 11(c)(2). At least one district court has held that, where sanctions were warranted for effective deterrence, defendants could not as part of a settlement agree to waive an award of attorneys' fees against the plaintiff. See Young v. Polo Retail, LLC, No. C-02-4546 VRW, 2007 U.S. Dist. LEXIS 27269, at *24-28 (N.D. Cal. March 28, 2007) ("[P]ermitting parties to contract around the court's issuance of sanctions would blunt the rule's deterring force.").

2. Sanctions on Court's Initiative

A court may also impose Rule 11 sanctions on its own initiative. Although the safe harbor provisions do not apply when the court initiates the consideration of sanctions, the court must give a party or attorney notice and an opportunity to be heard before imposing sanctions. Moreover, under Rule 11(c)(1)(B), two procedural requirements apply when the court initiates the process.

First, the court must issue a "show cause" order to the party or attorney who is exposed to sanctions. See Bass v. E.I. DuPont de Nemours & Co., 324 F.3d 761, 767(4th Cir. 2003) (vacating sanctions award where court did not issue order to show cause); Methode Elecs., Inc. v. Adam Techs., Inc., 371 F.3d 923, 927 (7th Cir. 2004); Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp., 222 F.3d 52, 57 (2d Cir. 2000). Second, the show cause order, like a party's sanctions motion, must describe the specific conduct that appears to violate Rule 11(b). Thornton v. General Motors Corp., 136 F.3d 450, 455 (5th Cir. 1998); Bullard v. Chrysler Corp, 925 F. Supp. 1180, 1186 (E.D. Tex. 1996) (citing Sanctions Under Federal Rule of Civil Procedure 11). At least one court of appeals has held that an inordinate delay between the issuance of the show cause order and the

imposition of sanctions would contravene the purposes of the Rule. See Hunter v. Earthgrains Co. Bakery, 281 F.3d 144, 151 (4th Cir. 2002) (delay of over two years). See also Bass, 324 F.3d at 767-68 (explaining that failure of district court to resolve sua sponte sanctions issues before resolution of the merits of the case requires that the sanctions award receive "particularly stringent review"). This requirement is an important part of the due process protection the rule affords a litigant facing sanctions. In addition, when a court finds a Rule 11 violation sua sponte and imposes monetary sanctions, these sanctions must be paid to the court and not to the opposing party. Rule 11(c)2; 1993 Advisory Committee Notes. (See Appendix I.) See also Norsyn, Inc. v. Desai, 351 F.3d 825, 831 (8th Cir. 2003); Baffa, 222 F.3d at 57. Cf. Vollmer v. Publishers Clearing House, 248 F.3d 698, 711 n.11 (7th Cir. 2001) (stating that sanctions imposed by the district court on its own initiative may be directed only to the court, not to a local charity).

A higher standard may also apply; more than one court of appeals has held that because no "safe harbor" applies to sanctions imposed on the court's own initiative, particular care must be taken not to impose sanctions in a manner that will deter zealous advocacy. See MHC Inv. Co. v. Racom Corp., 323 F.3d 620, 623 (8th Cir. 2003) (stating that Rule 11 standards are applied with "particular strictness" where the court imposes sanctions, because there is no safe harbor); Hunter v. Earthgrains Co. Bakery, 281 F.3d 144, 151 (4th Cir. 2002) (same); United Nat'l Ins. Co. v. R&D Latex Corp., 242 F.3d 1102, 1118 (9th Cir. 2001) (reversing sua sponte sanctions because conduct "was in neither purpose nor substance 'akin to contempt'").

Indeed, the Second Circuit has held that where a court sua sponte initiates sanctions proceedings under circumstances where the lawyer has no opportunity to correct or withdraw the challenged submission, a bad faith, rather than objective reasonableness, standard applies. In re Pennie & Edmonds LLP, 323 F.3d 86 (2d Cir. 2003). In In re Pennie & Edmonds LLP, the court, relying heavily on the Advisory Committee's notes to the 1993 amendments to Rule 11(b), which, according to the court, contemplated court-initiated sanctions only for conduct akin to contempt of court, reasoned that a heightened standard is warranted to protect zealous advocacy in cases where a lawyer is not afforded the protection of the safe harbor rule and does not have an opportunity to withdraw the offensive submission. Id. at 91. The court specifically left open the question of whether a bad faith standard applies in sanctions proceedings initiated by a court at a time in the litigation when the challenged submission could be corrected

or withdrawn. Id. at 91-92. Although the Second Circuit considered this case to be one of first impression, the dissent points out that the weight of authority supports the application of the objective reasonableness standard, even for court-initiated sanctions proceedings. See also Commercial Fin. Servs., Inc. v. Great Am. Ins. Co. of N.Y., No. 02 Civ. 7168, 2003 U.S. Dist. LEXIS 9872, at *32 (S.D.N.Y. June 25, 2003) (relying on In re Pennie & Edmonds and ordering a Rule 11 hearing to determine whether the counsel had adequate evidentiary support to bring a suit).

The First and Fifth Circuits have reached the opposite conclusion, and apply the same standard when sanctions are initiated by the court as when they are initiated by motion. In Young v. City of Providence ex rel. Napolitano, the First Circuit acknowledged that the Second Circuit in Pennie & Edmonds had held, based on the Advisory Committee Notes, that only egregious conduct may be sanctioned by a court acting *sua sponte*. The First Circuit, however, disagreed with the Pennie & Edmonds analysis, holding that the language of the Rule does not support a higher standard for court-initiated sanctions. 404 F.3d 33, 39 (1st Cir. 2005). The court noted that the specific purpose of the 1993 amendment was to reject a bad faith requirement. Id. at 40. See also Jenkins v. Methodist Hospitals of Dallas, Inc., 478 F. 3d 255, 264 (5th Cir. 2007) (holding that the same standard is applied regardless of who initiates the sanctions proceedings); Nat'l Union Fire Ins. Co. of Pittsburgh v. Wilkins, No. 1:04-CV-401, 2006 U.S. Dist. LEXIS 19092, at *8-9 (S.D. Ohio April 13, 2006) ("The plain language of the rule allows sanctions to be imposed, either by motion or court initiative, whenever conduct is not 'reasonable under the circumstances.'"). But cf. Obert v. Republic W. Ins. Co., 398 F.3d 138, 146 (1st Cir. 2005) (reversing award of sanctions where the court of appeals concluded the show cause order was motivated by the district court's incorrect perception that counsel had misrepresented facts in frivolous motion to recuse: "[c]ounsel every day file motions that are hopeless . . . [p]erhaps a court could sanction counsel under *Rule 11* for many such hopeless motions, but doing so routinely would tie courts and counsel in knots.")

3. The Nature of Sanctions and Limitations on Sanctions

(a) Discouraging Monetary Awards

Prior to the 1993 amendment, the typical sanction imposed was a monetary award payable to the opposing party. See Sam D. Johnson et al., The Proposed Amendments to Rule 11: Urgent Problems and Suggested Solutions, 43 Baylor L. Rev. 647 (1991) (arguing judicial readiness to impose costs as sanction is inconsistent with goal of imposing least severe sanction adequate to deter violation of the rule).

The 1993 amendment discourages monetary awards as sanctions on the ground that fee awards create a financial incentive to file Rule 11 motions. Like the pre-1993 rule, the amended rule gives courts discretion as to the nature of an appropriate sanction; unlike the pre-1993 rule, the amended rule constrains that discretion.

A sanction cannot exceed the amount the court finds sufficient to deter repetition of the sanctioned conduct, either by the party or attorney sanctioned, or by others similarly situated. While the 1993 Advisory Committee Notes indicate that this language will not cause appellate courts to depart from the current abuse of discretion standard in reviewing Rule 11 decisions (see Section VIII B below), the standard has been changed to reflect the rulemakers' concern over the frequent use of monetary sanctions.

In particular, the 1993 rule disfavors monetary awards to the proponent of the Rule 11 motion. The revised rule provides that a sanction "shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated." Rule 11(c)(2). The rule lists several suggested sanctions — directives of a nonmonetary nature, an order to pay a penalty into court, or, if necessary for effective deterrence, payment to the movant of some or all of the reasonable attorneys' fees incurred as a direct result of the violation. Rule 11(c)(2).

The Committee Notes also discuss criteria for determining when monetary sanctions, either payable to the court or the opposing party, should be awarded to deter frivolous filings. The criteria are: (1) whether the improper conduct was willful, or negligent; (2) whether the improper conduct was part of a pattern of

activity, or an isolated event; (3) whether the violation infected the entire pleading, or only one particular count or defense; (4) whether the violator has engaged in similar conduct in other litigation; (5) whether the improper conduct was intended to injure; (6) what effect the violation had on the litigation process in time or expense; (7) whether the violator is trained in the law; (8) what amount, given the financial resources of the violator, is needed to deter that person from repetition in the same case; and (9) what amount is needed to deter similar activity by other litigants. See Landscape Properties, Inc. v. Whisenhunt, 127 F.3d 678, 685 (8th Cir. 1997) (inability to pay sanction should be treated as an affirmative defense, and therefore burden is upon sanctioned party to offer evidence of financial status); Willhite v. Collins, 459 F.3d 866 (8th Cir. 2006) (upholding $66,698.30 sanction for half the attorneys' fees, but remanding for further proceedings as to additional sanction of suspension of admission to practice before the district court); Union Planters Bank v. L&J Dev. Co., Inc., 115 F.3d 378, 386 (6th Cir. 1997) (upholding $50,000 sanction where unfounded factual contentions were advanced to delay the proceeding and gain settlement leverage); MHC Inv. Co. v. Racom Corp., 209 F.R.D. 431, 437 (S.D. Iowa 2002) (imposing monetary sanctions on attorneys in part because attorneys' "superior training in the law" made it more likely that frivolous defenses and counterclaims were advanced for an improper purpose and less likely that alternative sanctions such as continuing legal education would be helpful); Chauvet v. Local 1199, Nos. 96 Civ. 2934 (SS) & 96 Civ. 4622 (SS), 1996 U.S. Dist. LEXIS 17080, at *60-61 (S.D.N.Y. Nov. 18, 1996) (electing to not impose monetary sanctions against attorney who was completely unfamiliar with ERISA, lacked basic legal and writing skills, had recently filed for bankruptcy, was unable to secure work, and was the single parent of two children). The relative size of the law firms representing the parties has been held to be irrelevant for purposes of imposing sanctions. "[I]mpecunious individual practitioners are just as capable of generating unnecessary work as wealthy firms, and they are no less bound by the rules." Chalais v. Milton Bradley Co., No. 95 Civ. 0737 (MBM), 1996 U.S. Dist. LEXIS 13438, at *7 (S.D.N.Y. Sept. 16, 1996).

In addition, courts applying the amended rule have considered whether the conservation of judicial resources counsels against a sanctions proceeding. See Simmons v. Suare, 4:94CV131, 1995 U.S. Dist. LEXIS 14948, at *11 (W.D.N.C. Sept. 15, 1995) (stating court would impose sanctions "but for the further expenditure of federal resources and taxpayers' money which such proceedings

would entail"); Bowler v. United States INS, 901 F. Supp. 597, 604 n.2 (S.D.N.Y. 1995) (stating order for show cause for sanctions would not be issued "to bring some measure of finality" to the litigation); Kramer v. Pollock-Krasner Found., 890 F. Supp. 250, 259 (S.D.N.Y. 1995) (denying sanctions after granting motion to dismiss because evaluating the complaint's factual basis would "waste scarce judicial resources").

The 1993 Advisory Committee Notes emphasize that when monetary sanctions are found to be necessary, they "should ordinarily be paid into court as a penalty." Indeed, the Committee Notes state that only "under unusual circumstances," particularly for violations of Rule 11's improper purpose subsection, will monetary sanctions payable to the opposing party be an effective deterrent. 1993 Advisory Committee Notes. See also Divane v. Krull Elec. Co., 200 F.3d 1020, 1030 (7th Cir. 1999) (citing to Advisory Committee Notes). But see Mercury Air Group, Inc. v. Mansour, 237 F.3d 542, 548 (5th Cir. 2001) ("This Court, however, has affirmed a district court's determination that the least severe sanction for a lawsuit that is wholly frivolous is the imposition of reasonable attorneys' fees and expenses.").

Further, any monetary sanction payable to the opposing party should be commensurate with the fees "directly and unavoidably" caused by the violation. 1993 Advisory Committee Notes. In Divane v. Krull Electric Co., 200 F.3d 1020, 1030-31 (7th Cir. 1999), for instance, the Seventh Circuit remanded the case to the district court for a determination of which of the defendant's legal costs were the direct result of plaintiff's sanctionable counterclaim. Although the Seventh Circuit affirmed the district court's decision to award attorneys' fees, it disagreed that plaintiff's sanctionable conduct could have "infected" the entire proceeding so as to make all of defendant's legal expenses the direct result of the sanctionable conduct. Id. at *28-29. See also Jayhawk Investments, LP v. Jet USA Airlines, Inc., No. 98-2153-JWL, 1999 U.S. Dist. LEXIS 12022, at *4 (D. Kan. June 8, 1999) (defendants were entitled only to attorney's fees incurred in connection with venue transfer of the case and not, inter alia, for fees incurred in bringing the motion to dismiss with respect to the substantive aspects of the case); see generally Vinson v. Vinson, No. 3:99CV054-B-A, 2000 U.S. Dist. LEXIS 6950, at *3-5 (N.D. Miss. May 8, 2000) (adjusting downward sanctions imposed upon pro se litigant because opposing counsel sought duplicative fees for work performed in virtually identical cases involving the same parties). Cf. Shelton v. Ernst & Young, LLP, 143 F. Supp. 2d 982, 995 (N.D. Ill. 2001) (stating that

payment of attorneys' fees was "meant as a partial recoupment by defendants of their expenditures in defending these clearly baseless allegations"); Bridgestone/Firestone, Inc. v. Recovery Credit Servs., Inc., No. 93 Civ. 168 (JSM), 1997 U.S. Dist. LEXIS 6134, at *13-14 (S.D.N.Y. May 5, 1997) (in a case governed by old Rule 11 court sanctioned defendant for the full amount of plaintiff's attorneys' fees, even though this amount exceeded the fees that plaintiff was forced to incur as a direct result of defendant's conduct, where defendant's "reprehensible conduct" involved numerous incidents of perjury). Thus, if one count in a multi-count complaint is frivolous, attorneys' fees should only be awarded to cover the cost of responding to that count. See Charland v. Little Six, Inc., 112 F. Supp. 2d 858, 867-68 (D. Minn. 2000) (recommending percentage reduction of sanctions because two of six counts filed could have been supported by nonfrivolous extension, modification, or reversal of existing law and because opposing counsel failed to provide detailed billing records). In addition, an award of sanctions has been reversed where the court concluded that the moving party had waived any claim to sanctions by waiting until the suit had progressed five years after the filing of an obviously frivolous complaint. DeStefano v. Twentieth Century Fox Film Corp., 111 F.3d 123, 1997 U.S. App. LEXIS 12665, at *1 (2d Cir. 1997) (unpublished).

In Divane v. Krull, 319 F.3d 307 (7th Cir. 2003), the Seventh Circuit addressed the appropriate framework for apportioning fees to sanctionable conduct. The Court explained that "where recoverable claims are closely interwoven factually and legally with nonrecoverable ones," a district court is not obligated to analyze each line-item entry in a fee petition. Id. at 316-17. Rather, the district court may determine a base fee (by computing the reasonable number of hours expended multiplied by a reasonable hourly rate) and then deduct nonrecoverable fees from that base fee. Id. at 318.

More than one court of appeals has held that a party proceeding *pro se* is not entitled to an award of attorneys' fees. See Massengale v. Ray, 267 F.3d 1298, 1301 (11th Cir. 2001). See also Pickholtz v. Rainbow Techn. Inc., 284 F.3d 1365, 1374 (Fed. Cir. 2002) (following Massengale in context of Rule 37 sanctions). Rule 11(c)(2) states that a sanction may include "an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses *incurred* as a direct result of the violation." (emphasis added) The Eleventh Circuit reasoned that "[b]ecause a party proceeding *pro se* cannot have

incurred attorney's fees as an expense, a district court cannot order a violating party to pay a *pro se* litigant a reasonable attorney's fee as part of a sanction." 267 F.3d at 1302-03.

The rule also prohibits monetary sanctions in two special cases. First, a court cannot monetarily sanction a represented party for a frivolous legal argument. Tropf v. Fid. Nat'l Tit. Ins. Co., 289 F.3d 929, 939 (6th Cir. 2002) (monetary sanctions against client inappropriate for 11(b)(2) violation); Drewicz v. Dachis, No. 01 C 1928, 2002 U.S. Dist. LEXIS 7972, at *5 (N.D. Ill. May 2, 2002) (monetary sanctions appropriate for 11(b)(2) violation only against attorney of represented party). Thus, represented parties may rely on their attorneys for guidance on purely legal issues.

Second, the revised rule explicitly states that when a court finds a Rule 11 violation sua sponte and imposes monetary sanctions, those sanctions must be paid to the court and not to the opposing party. Rule 11(c)(2); 1993 Advisory Committee Notes.

In Nuwesra v. Merrill Lynch, Fenner & Smith, Inc., 174 F.3d 87 (2d Cir. 1999), the Second Circuit vacated the district court's sua sponte award of $25,000 in attorneys' fees to the defendants in an ADA case. Id. at 95. The court stated that, by its terms, Rule 11(c)(2) precludes a court from awarding attorneys' fees on its own initiative. Id. at 94.

Thus, deterrence, rather than compensation, is the focus under the 1993 amended Rule 11. See Jayhawk Investments, LP v. Jet USA Airlines, Inc., No. 98-2153-JWL, 1999 U.S. Dist. LEXIS 16413, at *2 (D. Kan. Aug. 25, 1999) ("It is well-settled that the primary purpose of Rule 11 sanctions is to deter future violations, rather than to compensate the moving party."). See also Jackson v. Levy, Nos. 98 Civ. 8890 (WHP) et al., 2000 U.S. Dist. LEXIS 825, at *28-29 (S.D.N.Y. Feb. 1, 2000) (court declined to award further monetary sanctions against two attorneys because "the deterrent purpose of sanctions has been accomplished without the need to impose a further potentially ruinous financial penalty"). For many, if not most, violations this should mean the courts will impose nonmonetary sanctions, such as a reprimand on the record. For other especially egregious violations, monetary sanctions could be imposed. See, e.g., MHC Inv. Co. v. Racom Corp., 323 F.3d 620, 627-28 (8th Cir. 2003) (affirming sua sponte imposition of $25,000 sanction; although "rather large," the "district

court explained in great detail its reasons for imposing $25,000 in sanctions," and the Eighth Circuit agreed the amount was necessary for appropriate deterrence); Lorentzen v. Anderson Pest Control, 64 F.3d 327, 330 (7th Cir. 1995) (upholding sanctions award of fees where "only a substantial monetary sanction would deter [the sanctioned party] from engaging in similar conduct in the future"), cert. denied, 517 U.S. 1136 (1996); In re Gen. Plastics Corp., 184 B.R. 1008, 1023 (Bankr. S.D. Fla. 1995) (finding monetary sanction appropriate where "[m]ere disapproval" would not be sufficient to deter similar conduct in other cases). However, absent "unusual circumstances," it is likely that such monetary sanctions will be paid into the court.

(b) Nonmonetary Sanctions

The 1993 Advisory Committee Notes elaborate on the variety of nonmonetary sanctions available for a Rule 11 violation. These sanctions include: (1) striking the offending paper; (2) issuing an admonition; (3) requiring participation in seminars or other educational programs; and (4) referring the matter to disciplinary authorities. See, e.g., Ace Am. Ins. Co. v. Bennett & Co., Civil Action 00-D-782-N, 2000 U.S. Dist. LEXIS 15858, at *5 (M.D. Ala. Oct. 26, 2000) (striking answer under Rule 11 where it denied all allegations, including those of venue and jurisdiction). In at least one recent case, the court imposed a more creative sanction: dissemination of the district court's opinion to each lawyer in the represented firm, accompanied by a memorandum regarding ethics. Patsy's Brand, Inc. v. I.O.B. Realty, Inc., No. 99 Civ. 10175 (JSM), 2002 U.S. Dist. LEXIS 491, at *27-28 (S.D.N.Y. Jan. 16, 2002). See also Mendez v. Correctional Officer Draham, 182 F. Supp. 2d 430, 431 (D.N.J. 2002) (admonishing often-sanctioned attorney and stating that if sanctionable complaint was not brought into compliance the matter would be referred to disciplinary authorities). But see Williams v. Balcor Pension Investors, No. 90 C 0726, 1995 WL 23061, at *2 (N.D. Ill. Jan. 17, 1995) (imposing monetary sanctions and lamenting that "reprimand and admonition have lost force even when uttered by judges").

The selection of a nonmonetary sanction will depend in large part upon the facts of a given case. In Ortman v. Thomas, 99 F.3d 807, 811 (6th Cir. 1996), the attorney, acting pro se, engaged in a protracted litigation in which he claimed that the numerous defendants were seeking to deprive him of his right to earn a living by practicing law. The district court permanently enjoined the attorney from

asserting any claims arising out of the action and imposed a sanction of $24,809.99. The Sixth Circuit affirmed the monetary sanction, but it viewed the absolute bar to further litigation as too broad. Id. Therefore, the court modified the injunctive sanction, and required the attorney to first obtain certification from a Magistrate Judge that a suit is not brought for an improper purpose before bringing a related suit. Id. See Fernicola v. Specific Real Prop. in Possession of Healthcare Underwriters Mut. Ins. Co., No. 00 Div. 5173, 2001 U.S. Dist. LEXIS 21724 (S.D.N.Y. Dec. 26, 2001) (barring plaintiffs from filing any further suits against defendants with respect to same allegations). See also In re Brooks-Hamilton, 329 B.R. 270 (B.A.P. 9th Cir. 2005) (holding that, given attorney's prior conduct, a six month suspension from practice before the district's bankruptcy courts was not an abuse of discretion); In re Chapman, 328 F.3d 903, 905 (7th Cir. 2003) (per curiam) (affirming Executive Committee's exercise of inherent authority to pose filing restrictions on "prolific filer" that required that all future materials tendered by him for filing in the district court be screened and approved by the Committee before they are forwarded to the Clerk for filing).

In one case, Balthazar v. Atlantic City Med. Ctr., 279 F. Supp. 2d 574 (D.N.J. 2003), a district court imposed non-monetary sanctions on an attorney for attempting to bring claims in federal court that previously had been litigated in state court. The court ordered plaintiff's counsel to attend and complete two continuing legal education courses, one in court practice and procedure and one in attorney professionalism. Id. at 595. The court stated that, "[a]s a result of attending these continuing legal education courses, hopefully [plaintiff's counsel] will become familiar with the legal principles that have apparently escaped him during the course of this litigation." Id. at 596. See also Dangerfield v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 02 CV 2561 (KMW), 2003 U.S. Dist. LEXIS 16908, at * 38-39 (S.D.N.Y. Sept. 26, 2003) (explaining why, under the circumstances, admonishing attorney as a sanction was more appropriate than a monetary sanction).

Courts do not have unlimited discretion to fashion appropriate sanctions. See In re Dragoo, 186 F.3d 614, 616-17 (5th Cir. 1999) (district court properly suspended two attorneys but abused its discretion in conditioning readmittance of one attorney upon a showing of mental stability where there was no evidence that the attorney suffered from mental illness); In re Sargent, 136 F.3d 349, 352-53 (4th Cir. 1998) (stating that the court could 'envision no circumstances' in which it would be appropriate to impose a sanction which enjoined application against

an inmate litigant of 28 U.S.C.A. § 1915, as enacted by the Prison Litigation Reform Act of 1995), cert. denied, 525 U.S. 854 (1998); In re Tutu Wells Contamination Litig., 120 F.3d 368, 381-85 (3d Cir. 1997) (district court did not have power to require sanctioned party to contribute to halfway house, since sanction was legislative in nature); Whelan v. Heffler, Radetich & Saitta, LLP, No. 3:99-CV-0337-P, 1999 U.S. Dist. LEXIS 15979, at *20 (N.D. Tex. Oct. 13, 1999) (lifetime permanent injunction enjoining attorney from local bankruptcy practice was excessive).

The D. C. Circuit has held that dismissal of a claim may be an appropriate sanction in circumstances involving "serious misconduct when lesser sanctions would be ineffective or are unavailable." See Marina Mgmt. Serv., Inc. v. Vessel My Girls, 202 F.3d 315, 325 (D.C. Cir. 2000) (affirming dismissal of five counterclaims, where district court properly concluded that claims were designed to harass, given the contentious history of the litigation); cf. Dome Patent LP v. Permeable Tech., Inc., 190 F.R.D. 88, 90 (W.D.N.Y. 1999) (stating, where sanctions motion sought only dismissal, that "'Rule 11 should not be used to raise issues of legal sufficiency that more properly can be disposed of by a motion to dismiss or a motion for a more definite statement or a motion for summary judgment.'") (quoting 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1336 at 97 (2d ed. 1990)).

More recently, the Seventh Circuit held that a court may, in its discretion, dismiss an entire action, even if all of the plaintiffs' claims are not based solely on the sanctionable conduct. Jimenez v. Madison Area Tech. Coll., 321 F.3d 652 (7th Cir. 2003). In Jimenez, the district court dismissed with prejudice the plaintiffs' amended complaint in its entirety and awarded monetary sanctions after finding that the plaintiffs had filed "obviously fraudulent documents" in support of their claims. Id. at 655-56. The Seventh Circuit affirmed, finding that dismissal was within the district court's discretion "given the egregious nature" of plaintiff's conduct, which "amounted to a veritable attack on our system of justice." Id. at 657.

(c) No Sua Sponte Sanctions Proceeding May Be Instituted After a Case Is Settled or Voluntarily Dismissed

In Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990), the Supreme Court held that the pre-1993 Rule 11 allowed courts to sanction violations even

after a case was settled or otherwise voluntarily dismissed under Rule 41(a)(1). In contrast, under amended Rule 11(c), unless an order to show cause is issued before a case is voluntarily dismissed, a court may not impose monetary sanctions on its own initiative.

Thus, if the settling parties agree that no Rule 11 sanctions may be sought after settlement, they cannot be surprised by the court's sua sponte action.

In one case, the court noted that it was improper for the trial court to retain jurisdiction after a voluntary dismissal to assess, upon the defendant's motion, attorneys' fees and costs against the plaintiff and his attorneys in the event that any of the plaintiff's present attorneys were to bring an action against the defendants in another forum. See Woodard v. STP Corp., 170 F.3d 1043, 1044-45 (11th Cir. 1999). Applying sanctions as punishment for bringing a subsequent lawsuit is not a proper use of Rule 11, the court explained, because "Rule 11 sanctions are properly applied to cases before the court, not to cases in other courts." Id. at 1045.

4. Requirements for the Sanctions Order

Regardless of whether a court imposes sanctions in response to a party's motion or on its own initiative, the 1993 amendment requires that the court's sanctions order describe the sanctioned conduct and explain the basis for the sanction. The rule should be interpreted to require the court to explain the basis for its selection of an appropriate sanction, in addition to explaining why the conduct at issue violated the rule. Chia v. Fidelity Invs., No. 05-7184, 2006 U.S. App. LEXIS 20296 (D.C. Cir. Aug. 3, 2006) (remanding for the district court to state its grounds for imposing sanctions); Zuk v. Eastern Pa. Psychiatric Inst. of the Med. College of Pa., 103 F.3d 294, 301 (3d Cir. 1996) (remanding for further consideration of appropriate sanction where district court failed to explain basis for its imposition of severe sanctions and failed to consider mitigating factors). See also Finance Inv. Co. v. Geberit AG, 165 F.3d 526, 534 (7th Cir. 1998) (remand for the "necessary explanation" of basis for amount of award and allocation between lawyer and client).

The circuits have taken different positions on the issue of whether the trial court must give a reasoned basis for denying sanctions. The Federal, Eighth, and Ninth Circuits have all held that the district court is required to give a reasoned

basis for denying sanctions. See S. Bravo Sys., Inc. v. Containment Techs. Corp., 96 F.3d 1372, 1375 (Fed. Cir. 1996); Teamsters Nat'l Freight Indus. Negotiating Comm. v. MME, Inc., No. 95-3533, 1996 U.S. App. LEXIS 29152, at *1-2 (8th Cir. Nov. 8, 1996); Warren v. Guelker, 29 F.3d 1386, 1390 (9th Cir. 1994). However, the First and Second Circuits do not require articulation of the reasons for the denial of sanctions. See Perez v. Posse Comitatus, 373 F.3d 321, 327 (2d Cir. 2004) (affirming denial of sanctions, citing R. 11 advisory committee note (1993), which states: "the court should not ordinarily have to explain its denial of a motion for sanctions."). Lichtenstein v. Consolidated Servs. Group, Inc., 173 F.3d 17, 24 (1st Cir. 1999) ("We have never required more than that the court's rationale [for denying sanctions] be apparent from the face of the record and supported by the facts."); compare Teamsters Nat'l Freight Indus. Negotiating Comm. v. MME, Inc., 116 F.3d 1241, 1242 (8th Cir. 1997) (affirming denial of sanctions despite "rather perfunctory generalized response" by district court to circuit court's previous instructions to district court upon earlier remand to certify its reasons for denying sanctions).

5. Obligation to Mitigate

Under the 1993 Rule 11, as under the prior rule, parties have the continued obligation to mitigate damages resulting from a Rule 11 violation. See Hamil v. Mobex Managed Servs. Co., 208 F.R.D. 247, 250 (N.D. Ind. 2002) ("[A] party must request Rule 11 sanctions as soon as practicable after discovery of a Rule 11 violation."); Noga v. Kimco Corp., No. 96 C 6108, 1997 U.S. Dist. LEXIS 21128, at *12-21 (N.D. Ill. Jan. 6, 1998) (reducing amount of sanctions because counsel, despite earlier knowledge of opposition's sanctionable conduct, unreasonably delayed filing sanctions motion until after summary judgment); see also In re Addon Corp., 231 B.R. 385, 391 (Bankr. N.D. Ga. 1999) (sanctions under Rule 9011 must be reasonable and directly related to the actionable conduct to "prevent a creditor from 'padding' expenses in an attempt to mete out punishment of its own"). Although the safe harbor provision provides the offending party with an opportunity to withdraw or correct defective filings, the party moving for sanctions will still need to give sufficient "safe harbor" notice in order to mitigate damages. Rule 11's purpose still is to reduce the costs due to frivolous filings. Courts have reasoned from this premise that the party opposing a pleading or a motion that violates Rule 11 bears an obligation to mitigate its attorneys' fees. See Pollution Control Indus. of Am. v. Van Gundy, 21 F.3d 152, 156 (7th Cir. 1994) (vacating sanctions against plaintiffs and remanding for appropriate award

where defendants had duty to mitigate costs, but failed to raise the dispositive issue in prompt and cost-efficient manner); Thomas v. Capital Sec. Serv., 836 F.2d 866, 879 (5th Cir. 1988) ("A party seeking Rule 11 costs and attorneys' fees has a duty to mitigate those expenses by correlating his response, in hours and funds expended, to the merit of the claims".); accord Danvers v. Danvers, 959 F.2d 601, 605 (6th Cir. 1992) (remanded for reduction of sanctions award where defendant's attorney spent several hours researching and preparing for discovery on meritless action rather than moving to dismiss); Jennings v. Joshua Indep. Sch. Dist., 948 F.2d 194 (5th Cir. 1991); Melrose v. Shearson/American Express, Inc., 898 F.2d 1209, 1216 (7th Cir. 1990) (party defending against frivolous filing must correlate response in hours and funds expended to the merits of the claim); Dubisky v. Owens, 849 F.2d 1034, 1038 (7th Cir. 1988) (because litigant failed to alert court and offending party of a possible Rule 11 violation, court held that district court erred in awarding litigant entire fees and costs incurred in defending litigation); INVST Fin. Group v. Chem-Nuclear Sys., Inc., 815 F.2d 391, 404 (6th Cir. 1987); Oliveri v. Thompson, 803 F.2d 1265, 1280 (2d Cir. 1986); In re Yagman, 796 F.2d 1165, 1185 (9th Cir. 1986); Kahre-Richardes Family Found., Inc. v. Village of Baldwinsville, 953 F. Supp. 39, 42 (N.D.N.Y. 1997) (sanctions limited where defendants delayed in bringing motion to dismiss claims that were clearly barred by res judicata), aff'd, 1998 U.S. App. LEXIS 2156 (2d Cir. Feb. 5, 1998); Vandeventer v. Wabash Nat'l Corp., 893 F. Supp. 827, 843 (N.D. Ind. 1995) (Rule 11 motions should be filed as soon as practicable after discovery of a possible violation); KRW Sales, Inc. v. Kristel Corp., No. 93 C 4377, 1993 U.S. Dist. LEXIS 17246, at *8 (N.D. Ill. Dec. 3, 1993) (sanctions denied because plaintiff should have mitigated its damages by notifying defendant and attempting to have the problem corrected instead of waiting and filing Rule 11 motion); ATA Info. Servs., Inc. v. J.C.I., Inc., No. 89 C 9615, 1992 U.S. Dist. LEXIS 10121, at *2-3 (N.D. Ill. July 6, 1992) (defendant's failure to move for either summary judgment or sanctions when he first realized he was improperly named as a defendant and his failure to promptly send a letter to opposing counsel informing them of their error, were considered by court in determining the amount of sanctions to be awarded); United Food & Commercial Workers Union Local No. 115 v. Armour & Co., 106 F.R.D. 345, 349-50 (N.D. Cal. 1985) (court reduced fee request because counsel over-litigated the case); In re Smith, 111 B.R. 81, 87 (Bankr. E.D. Pa. 1990) (party seeking sanctions is under a duty to "measure its opposition" and not expend so much time and money as to "overwhelm[] the relatively weak resources of the opposition"). A party must mitigate expenses to

a "reasonable extent." See Silva v. Witschen, 19 F.3d 725, 732 (1st Cir. 1994) (party is not required to mitigate all expenses, just expenses to a reasonable extent).

Even under the 1983 Rule 11, courts had held that Rule 11 does not intend that the sanctioned party automatically be responsible for the full amount of the prevailing party's attorneys' fees. Anschutz Petroleum Mktg. Corp. v. E.W. Saybolt & Co., 112 F.R.D. 355, 357 (S.D.N.Y. 1986). A court, therefore, will not award fees for proceedings that could have been avoided by the party seeking sanctions. See Brown v. Capitol Air, Inc., 797 F.2d 106, 108 (2d Cir. 1986); Mossman v. Roadway Express, Inc., 789 F.2d 804, 806 (9th Cir. 1986) (fees incurred because of misconduct of party seeking sanctions should not be awarded as sanction); Donohoe v. Consolidated Operating & Prod. Corp., 139 F.R.D. 626, 633 (N.D. Ill. 1991) (sanctions for plaintiff were rejected because defendants had not shown effort to mitigate damages by informing plaintiffs of a recent circuit decision rejecting plaintiff's argument); Murphy v. Klein Tools, Inc., 123 F.R.D. 643, 647 (D. Kan. 1988) (sanction consisted of written reprimand rather than fees when defendant waited over four years before raising statute of limitations defense). But see Mariani v. Doctors Assocs., Inc., 983 F.2d 5, 8 (1st Cir. 1993) (because there was no mistake of fact by plaintiffs that could have been easily corrected by defendants, appellate court did not reverse sanction award on ground that defendants failed to mitigate); Harmony Drilling Co. v. Kreutter, 846 F.2d 17, 19 (5th Cir. 1988) ("While certainly the alternative used by the litigant is a relevant consideration to the district court's determination of a sanctions award, the failure to use the least expensive alternative does not per se bar the imposition of sanctions".).

The Seventh Circuit has held that untoward conduct by the party requesting sanctions may be considered as a "mitigating factor" resulting in a lesser sanction. Automatic Liquid Packaging, Inc. v. Dominik, 909 F.2d 1001, 1006 (7th Cir. 1990) (affirming sanction of less than all fees where movant's attorney had himself generated unnecessary litigation through improper papers). Courts may also deny sanctions where the moving party shares the blame for raising the costs to the judicial system. See also Andretti v. Borla Performance Indus., Inc., 426 F.3d 824 (6th Cir. 2005) (holding that district court did not err in considering that the movant was also at fault in denying sanctions). Woodcrest Nursing Home v. Local 144, Hotel, Hosp., Nursing Home & Allied Serv. Union, 788 F.2d 894, 899 (2d Cir. 1986) (affirming denial of sanctions when litigation

tactics of party seeking sanctions "hardly represented a model of propriety"). Similarly, a long delay in seeking sanctions will be held against a party moving for Rule 11 sanctions. See Mellon Bank Corp. v. First Union Real Estate Equity & Mortgage Invs., 951 F.2d 1399, 1413 (3d Cir. 1991) (party waited two and one-half years after the suit was removed to federal court).

In addition, courts may decline to award fees where the amount requested is exorbitant. See Budget Rent-A-Car Sys., Inc. v. Consol. Equity LLC, 428 F.3d 717, 718 (7th Cir. 2005) (under Rule 38; "When an award of fees is permissive, denial is an appropriate sanction for requesting an award that is not merely excessive, but so exorbitant as to constitute an abuse of the process of the court asked to make the award.") Cf. Morris v. Wachovia Sec., Inc., 448 F.3d 268, 283-84 (4th Cir. 2006) (holding that, although sanctions were mandatory under the PSLRA, "[i]t does not follow, however, that [the fee claimant] had no duty to present proper documentation for its fee request.").

6. Timing of a Rule 11 Motion

Under the amended rule, it appears that a party must serve its Rule 11 motion before the court has ruled on a pleading and thus, before the conclusion of the case. Cf. Harding University v. Consulting Services Group, LP, 48 F. Supp. 2d 765, 771-72 (N.D. Ill. 1999) (motion for sanctions by certain defendants was untimely where it was filed after the defendants had been voluntarily dismissed with prejudice). Otherwise the purpose of the safe-harbor provision rule would be nullified. (See infra Section VI A 1.) However, courts have taken different approaches. For example, one court held that where a court enters final judgment on some claims but other aspects of the case remain before the court, a motion for sanctions relating to the decided claims must be brought within a reasonable period after judgment on those claims. Sethness-Greenleaf, Inc. v. Green River Corp., Nos. 89 C 9203, 91 C 4373, 1995 U.S. Dist. LEXIS 13796, at *22-23 (N.D. Ill. Sept. 20, 1995). In addition, because motions in the middle of a case can lead to the forced disclosure of attorney-client communications and a patent conflict of interest between the lawyer and client, the 1993 Advisory Committee Notes provide that the court may defer its ruling on a Rule 11 motion until final resolution of the case. Delaying ruling on a sanctions motion may also allow the court to be more dispassionate. On the other hand, the court must be careful not to view the pleading with the wisdom that hindsight brings.

The Third Circuit has adopted a supervisory rule that requires sanctions motions to be filed and district courts to resolve Rule 11 sanctions issues prior to or concurrent with the resolution of the merits of the case. See Simmerman v. Corino, 27 F.3d 58, 63 (3d Cir. 1994) (supervisory rule applies to Rule 11 sanctions imposed sua sponte by the district court); Mary Ann Pensiero, Inc. v. Lingle, 847 F.2d 90, 92 (3d Cir. 1988) (adopting supervisory rule requiring parties to file Rule 11 motions before entry of a final order); see also Prosser v. Prosser, 186 F.3d 403, 406 (3d Cir. 1999) (extending the rule of Mary Ann Pensiero and Simmerman to sanctions under § 1927 and the court's inherent power). Cf. Comuso v. National R.R. Passenger Car Corp., Civ. No. 97-7891, 2000 U.S. Dist. LEXIS 5427, at *6 (E.D. Pa. Apr. 25, 2000) (refusing to interpret Mary Ann Pensiero as establishing a per se test for determining whether a motion for sanctions is timely filed and awarding sanctions under court's inherent power 148 days after resolution of the case).

A Rule 11 action may not be brought as a counterclaim, crossclaim, third party claim, or in the complaint. In addition, the amended rule requires that Rule 11 motions be brought separately from any other motion or filing. Courts have noted that Rule 11 does not create an independent cause of action and that its nature is procedural. Hofmann v. Fermilab NAL/URA, 205 F. Supp. 2d 900, 904 (N.D. Ill. May 30, 2002) ("Rule 11 affords no private right of action."); New York News, Inc. v. Newspaper and Mail Deliverers' Union, 139 F.R.D. 291, 293 n.1 (S.D.N.Y. 1991), aff'd, 972 F.2d 482 (2d Cir. 1992). See also In re 72nd St. Realty Assocs., 185 B.R. 460, 473 (Bankr. S.D.N.Y. 1995) (same analysis applies under Bankruptcy Rule 9011).

A number of courts have held that the determination of Rule 11 issues is not a res judicata or collateral estoppel bar to litigating the same or related issues in subsequent malicious prosecution or other actions. See, e.g., Cohen v. Lupo, 927 F.2d 363, 365 (8th Cir. 1991) (malicious prosecution claim not barred); Amwest Mortgage Corp. v. Grady, 925 F.2d 1162, 1164-65 (9th Cir. 1991) (affirming district court's denial of permanent injunction staying state court proceedings because federal court's denial of Rule 11 motion does not bar state claims alleging malicious prosecution, libel, intentional infliction of emotional distress, and conspiracy); McShares, Inc. v. Barry, 970 P.2d 1005, 1013-16 (Kan. 1998) (holding that, as a procedural tool, Rule 11 cannot bar a state court action for malicious prosecution and abuse of process), cert. denied, 119 S. Ct. 2048 (1999); see also Faigin v. Kelly, 184 F.3d 67, 77-79 (1st Cir. 1999) (holding that

Rule 11 sanctions imposed against a plaintiff for filing a complaint alleging that defendants had misled him about certain investments did not warrant collateral estoppel on the issue of the truth of the same allegations in one defendant's subsequent defamation action against plaintiff); Xantech Corp. v. Ramco Indus., Inc., 159 F.3d 1089, 1094 (7th Cir. 1998) (noting that "[f]ederal case law indicates that fee requests made under Rule 11 do not pose a res judicata bar to subsequent actions for claims akin to malicious prosecution.").

7. Magistrate Judges

Magistrate judges have authority to hear and determine most procedural pretrial matters referred by a district judge, and the district judge may only reverse the magistrate judge when a non-dispositive pre-trial order is "clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A). A magistrate judge may consider substantive or case dispositive motions, subject to de novo review by the district judge. 28 U.S.C. § 636(b)(1)(B). Courts have differed over whether Rule 11 motions fall within magistrate judges' authority to hear and determine pretrial matters, or whether only the district judge can make a final decision on a Rule 11 motion.

Many courts have accepted a magistrate judge's authority to decide Rule 11 motions without analysis. See, e.g., FTC v. Amy Travel Servs., Inc., 894 F.2d 879 (7th Cir. 1989); Mylett v. Jeane, 879 F.2d 1272 (5th Cir. 1989).

In Maisonville v. F2 Am., Inc., 902 F.2d 746, 747 (9th Cir. 1990), the Ninth Circuit held that Rule 11 motions fell within magistrate judges' pretrial-matter authority. The court noted that Rule 11 sanctions — at least those short of dismissal of a claim — are typically not dispositive of a claim or defense. Rule 11 motions are also not listed in the statute's list of exceptions to pretrial matters that magistrate judges can permissibly determine. In Grimes v. City & County of San Francisco, 951 F.2d 236, 240-241 (9th Cir. 1991), the Ninth Circuit similarly held that discovery sanctions under Rule 37 are also appropriate for determination by magistrate judges. Accord Robinson v. Eng, 148 F.R.D. 635, 641 (D. Neb. 1993) (magistrate judge has authority to issue orders resolving Rule 11 motions; restriction to "pretrial matters" does not preclude magistrate judge from resolving post-judgment, procedural matters that arose earlier in the case); Bergeson v. Dilworth, 749 F. Supp. 1555, 1563 (D. Kan. 1990) (if a motion for sanctions can be characterized as nondispositive, the magistrate judge has

authority to dispose of the matter, subject to review under "clearly erroneous" standard); San Shiah Enter. Co. v. Pride Shipping Corp., No. 88-0944, 1991 U.S. Dist. LEXIS 16046, at *14 n.1 (S.D. Ala. Oct. 23, 1991) (same), aff'd in part, rev'd in part on other grounds, 783 F. Supp. 1334 (S.D. Ala. 1992). On the other hand, a magistrate judge presiding over a Rule 11 motion that is dispositive of a claim or defense may only make recommendations, which are subject to de novo review by the district judge.

The Sixth Circuit, however, has held that magistrate judges can only make recommendations in any Rule 11 matter. Bennett v. General Caster Serv. of N. Gordon Co., 976 F.2d 995, 998 (6th Cir. 1992). In Bennett, the Sixth Circuit remanded a case to the district court because the district judge had not conducted a de novo review of a magistrate judge's Rule 11 decision. The court concluded that it lacked jurisdiction over the appeal because there was no final, appealable decision on the Rule 11 motion. See also Plante v. Fleet Nat'l Bank, 978 F. Supp. 59, 64-65 (D.R.I. 1997) (de novo review applies regardless of whether magistrate issues order or recommendation); Zambrano v. International Ass'n of Machinists, No. 89 C 6109, 1992 U.S. Dist. LEXIS 2221, at *13-14 (N.D. Ill. Feb. 19, 1992) (rejecting, after de novo review, magistrate judge's recommendation to impose sanctions).

8. Discovery

The 1993 amendment is designed to reduce the incentive for extensive satellite litigation. See Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence, reprinted in 137 F.R.D. 53, 64 (1991) (letter from Advisory Committee accompanying proposed amendment); see also Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531 (9th Cir. 1986) (Rule 11 should not be interpreted in a fashion that will increase litigation); Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073, 1086 (7th Cir. 1987) (Cudahy, J., dissenting) ("We are in danger of creating a whole new cottage industry of sanctions."). Discovery had been discouraged even under the 1983 rule when the record afforded the court an adequate basis to determine whether sanctions are necessary. See Indianapolis Colts v. Mayor of Baltimore, 775 F.2d 177, 183 (7th Cir. 1985); ASX Inv. Corp. v. Newton, No. Civ. 13452, 1994 Del. Ch. LEXIS 61, at *8 (Del. Ch. May 3, 1994) (interrogatory answers contain sufficient information for defendants to make threshold determination as to whether complaint was frivolous; further discovery denied). However, in CPR

Assocs., Inc. v. Southeastern Pa. Chapter of the Am. Heart Assoc., No. 90-3758, 1990 U.S. Dist. LEXIS 16343, at *9-10 (E.D. Pa. Dec. 1, 1990), the court allowed limited discovery to defendants on the issue of whether a reasonable inquiry was performed prior to institution of suit and to plaintiffs on the issue of the reasonableness of defendants' attorneys' fees and defendants' attorneys' impressions of the behavior of plaintiff's former attorney.

9. Sanctions for Filing a Frivolous Sanctions Motion

The 1993 Advisory Committee Notes reaffirm that the requirements of Rule 11 apply to motions for sanctions under Rule 11. See also Riccard v. Prudential Ins. Co., 307 F.3d 1277, 1294 (11th Cir. 2002) (affirming sanctions against plaintiffs for filing a frivolous motion for sanctions); Caldwell v. Caesar, No. 98-1857, 2002 U.S. Dist. LEXIS 16897 (D.D.C. Sept. 6, 2002). However, the notes observe that cross-motions for sanctions will rarely be needed, as courts have power, even without a motion, to award a party fees when forced to defend against a frivolous sanctions motion. 1993 Advisory Committee Notes; see Rule 11(c). See also Caribbean Wholesales & Serv. Corp. v. U.S. JVC Corp., 101 F. Supp. 2d 236, 246 (S.D.N.Y. 2000) (applying Rule 11(c)(1)(A) and awarding attorneys' fees to party forced to defend against frivolous sanctions motion).

Under the old rule, courts occasionally did award sanctions to a party successfully defending a frivolous Rule 11 motion. See Love v. Kwitny, 772 F. Supp. 1367, 1378 (S.D.N.Y. 1991) (prevailing plaintiff nevertheless sanctioned for filing frivolous motion for sanctions), aff'd without op., 963 F.2d 1521 (2d Cir. 1992); Jarblum, Solomon & Fornari, PC v. Becker, No. 87 Civ. 8950, 1990 U.S. Dist. LEXIS 17118, at *16 (S.D.N.Y. Dec. 20, 1990) (sanctions awarded to defendant for defending unsuccessful sanctions motion); Local 106, Serv. Employees Int'l Union v. Homewood Mem'l Gardens, 838 F.2d 958, 961 (7th Cir. 1988); see also Gaiardo v. Ethyl Corp., 835 F.2d 479, 485 (3d Cir. 1987) (court may sanction attorney on its own initiative when Rule 11 is invoked for an improper purpose); In re Express Am., Inc., 132 B.R. 542, 546 (Bankr. W.D. Pa. 1991) (noting possibility of sanctions, but concluding that, in this case, Rule 11 motion was not an attempt to harass or intimidate opposing party). But see Conklin v. United States, 812 F.2d 1318, 1318-19 (10th Cir. 1987) (although court vacated Rule 11 award based on an incomplete and misleading version of the facts supplied by the government regarding the plaintiff's conduct, no sanction or fees were imposed on the government).

10. Motion for Reconsideration

If a motion is frivolous, then a motion for reconsideration of the denial of the original motion may also violate Rule 11. See Am. Trim, LLC v. Oracle Corp., 230 F. Supp. 2d 803, 805 (N.D. Ohio Nov. 6, 2002) ("Lawyers and litigants who file [motions to reconsider] should expect that, if those motions fail, they will have to pay the costs and fees incurred by the prevailing party"); United States v. Sweet, No. 8:01-CV-331-T-23TGW, 2001 U.S. Dist. LEXIS 17131 (M.D. Fla. Sept. 17, 2001) (sanctioning motion for reconsideration even though fact that 21 day safe harbor period had not expired when motion was denied precluded sanctions on original motion); Mangel v. Loeb Rhoades & Co., No. 77 C 2536, 1990 U.S. Dist. LEXIS 16253, at *3-4 (N.D. Ill. Nov. 28, 1990) (finding frivolous motion to reconsider was directly related to the filing and thus compensable); see also Roger Edwards, LLC v. Fiddes & Son Ltd., 437 F.3d 140, 143-44 (1st Cir. 2006) (frivolous Rule 60(b) motion); Blachy. v. Butcher, 129 F. App'x 173, 180-81 (6th Cir. 2005) (same); Unioil, Inc. v. E.F. Hutton & Co., 809 F.2d 548, 559 (9th Cir. 1986); Fox v. Boucher, 794 F.2d 34, 37 (2d Cir. 1986); cf. EBI, Inc. v. Gator Indus., Inc., 807 F.2d 1, 6 (1st Cir. 1986) ("[A]lthough most motions for reconsideration ultimately prove unavailing and . . . many may indeed have little merit, courts should be slow to sanction such efforts if based on reasonably arguable grounds."). Moreover, a motion for reconsideration may warrant sanctions if it contains no new evidence and offers no new law. Medcom Holding Co. v. Baxter Travenol Lab., No. 87 C 9853, 1993 U.S. Dist. LEXIS 2756, at *15-16 (N.D. Ill. Mar. 3, 1993).

However, if a court entertains a litigant's application for reconsideration, the grant of the application may be equivalent to a tacit acknowledgment that a basis exists for consideration by the court of the relief sought. See O.N.E. Shipping, Ltd. v. Flota Mercante Grancolombiana, S.A., 830 F.2d 449, 454 (2d Cir. 1987) (because the court entertained plaintiff's application for reargument and reconsideration of the order dismissing the complaint, no basis existed for imposing sanctions under Rule 11, on the grounds that the application was frivolous). Furthermore, that a district court has assessed sanctions for a violation of Rule 11 does not necessarily mean that a motion for reconsideration of the court's sanctions order is frivolous. See Pan-Pacific & Low Ball Cable Television Co. v. Pacific Union Co., 987 F.2d 594, 597 (9th Cir. 1993) (finding

that district court erred by including in sanction award expenses incurred by successful Rule 11 movant in opposing motion to reconsider); Estate of Blas ex rel. Chargualaf v. Winkler, 792 F.2d 858, 860-61 (9th Cir. 1986).

11. Frivolous Challenge to Arbitration Awards

Courts impose Rule 11 sanctions when parties file frivolous challenges to an arbitration award. See CUNA Mut. Ins. Soc'y v. Office and Prof'l Empl. Int'l Union, 443 F.3d 556, 561 (7th Cir. 2006) (citing "the long line of Seventh Circuit cases that have discouraged parties from challenging arbitration awards and have upheld Rule 11 sanctions in cases where the challenge to the award was substantially without merit."). See also Rueter v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 440 F. Supp. 2d 1256, 1265-67 (N.D. Ala. 2006) (imposing Rule 11 sanctions for frivolous motion to vacate arbitration award; "[c]ourts cannot prevent parties from trying to convert arbitration losses into court victories, but it may be that we can and should insist that if a party on the short end of an arbitration award attacks that award . . . without any real legal basis for doing so, that party should [face] sanctions.") (quoting B.L. Harbert Int'l, LLC v. Hercules Steel Co., 441 F.3d 905, 914 (11th Cir. 2006); Mitchell Plastics, Inc. v. Glass, Molders, Pottery, Plastics and Allied Workers Int'l Union, 946 F. Supp. 401, 407-09 (W.D. Pa. 1996) ("[T]he party who challenges an arbitration award simply must give closer scrutiny to his decision, leaving as little room as possible for the risk that his creativity will be construed as a repudiation of his own choice [to arbitrate] that courts properly should discourage."). In CUNA, the Seventh Circuit found that the party appealing the award had tried to "sidestep the deferential standard under which arbitration awards are reviewed" by "dress[ing] up" its arguments on the merits in "arbitrability clothing." 443 F.3d at 562-63. Since there was no true question of arbitrability, however, sanctions were warranted. Id. at 563.

VII. Rule 11(d)

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

In addition to Rule 11, Rule 37 also gives federal courts the power to sanction for abuse of the litigation process. Rule 37, however, is confined to abuses of discovery, while Rule 11 applies generally. Prior to the 1993 amendment, Rule 11 was silent as to whether it also applied to discovery situations. The revised Rule 11 by its terms is inapplicable to disclosures and discovery requests, responses, objections, and motions that are subject to Rules 26 through 37. Rule 11(d). According to the Advisory Committee, "[i]t is appropriate that Rule 26 through 37, which are specially designed for the discovery process, govern such documents and conduct." 1993 Advisory Committee Notes. (See Appendix I.) See Tec-Air, Inc. v. Nippondenso Mfg. USA, No. 91 C 4488, 1994 U.S. Dist. LEXIS 2026, at *24-25 (N.D. Ill. Feb. 23, 1994) (Rule 11 sanctions no longer allowed for discovery issues).

VIII. Appellate Procedure

A. Appellate Jurisdiction

1. Appealability

Before the Supreme Court's decision in Cunningham v. Hamilton Cty., 527 U.S. 198 (1999), the courts of appeal had been divided on the issue of whether sanctions imposed on non-parties (usually counsel), imposed in a definite amount before judgment, were appealable collateral orders. Compare Crookham v. Crookham, 914 F.2d 1027, 1029 n.1 (8th Cir. 1990) (appealable) with Starcher v. Correctional Medical Sys., Inc., 144 F.3d 418, 423-24 (6th Cir. 1998) (not immediately appealable), aff'd sub nom. Cunningham v. Hamilton Cty., 527 U.S. 198 (1999); cf. Walker v. City of Mesquite, TX, 129 F.3d 831, 832 (5th Cir. 1997) (holding that a sanction of a party's former as opposed to present counsel, is an appealable collateral order). However, the Supreme Court in Cunningham

held that even where a Rule 37(a) discovery sanction was imposed on a party's former counsel, the sanction is not subject to immediate appeal. Although Cunningham concerned a sanction under Rule 37(a), its reasoning appears to apply equally well to sanctions imposed on counsel under Rule 11.

The Court observed that the collateral order doctrine permits immediate appeal only of decisions that are conclusive, resolve important questions separate from the merits, and are effectively unreviewable on appeal from the final judgment in the underlying action. Id. at 1920. The Court then reasoned that a sanction or order such as the one before it was not an appealable collateral order because it "often will be inextricably intertwined with the merits of the action." Id. at 1920-21. The same is typically true in Rule 11 sanctions. Moreover, the court concluded that even if the merits were completely divorced from the sanctions issue, the collateral order doctrine requires that the order be effectively unreviewable on appeal from a final judgment. Id. at 1921.

The sanctioned attorney had argued that the order would be effectively unreviewable, relying on a line of cases holding that one who is not party to a judgment generally may not appeal from it. Id. The Court rejected this argument, reasoning that the "effective congruence of interests between clients and attorneys counsels against treating attorneys like other nonparties for purposes of appeal." Id. The Court also rejected the attorney's attempt to analogize a sanctions order to a contempt order issued against a nonparty, which would be immediately appealable, stating that a sanctions order lacks any prospective effect and is not designed to compel compliance. Id.

Typically, an order assessing sanctions against only a party would not be immediately appealable as such an order could be reviewed effectively on an appeal on the merits. However, before Cunningham the courts had not applied a uniform rule in determining whether an immediate appeal may be taken from a fee award entered against a party, or jointly and severally against a party and counsel. One court has held that where a Rule 11 sanction award against a party is effectively unreviewable on appeal from final judgment, it may be immediately appealable. Transamerica Commercial Fin. Corp. v. Banton, Inc., 970 F.2d 810 (11th Cir. 1992). In Transamerica, the Eleventh Circuit found that a sanction in the form of summary and default judgments against two of eleven defendants was immediately appealable because it was "effectively unreviewable on appeal from a final judgment." Id. The Court reasoned that since the defendants had been

"severed from the underlying case," they might not be able to appeal from a final judgment, since the remaining defendants could settle or decide not to appeal. Id. Thus, the Court concluded that the case "more closely resembles cases in which non-parties face the distinct possibility of never having a sanction order reviewed." Id. Because similar reasoning would apply to appeals by attorneys, it is not clear that this reasoning survives Cunningham.

An order awarding fees without determining the amount of fees is not an appealable order. See Pannonia Farms, Inc. v. USA Cable, 426 F.3d 650, 652 (2d Cir. 2005) (holding that sanctions order was not final where it did not fix the amount of sanctions to be awarded); Lazorko v. Pennsylvania Hosp., 237 F.3d 242 (3d Cir. 2000) (holding that award of sanctions is not appealable until the district court determines the amount of the sanction and that the district court's subsequent entry of final order does not cure premature appeal and make it timely); View Eng'g, Inc. v. Robotic Vision Sys., Inc., 115 F. 3d 962, 964 (Fed. Cir. 1997) (requiring determination of sanction amount before allowing appeal promotes efficiency by eliminating possibility of two appeals); Lee v. L.B. Sales, Inc., 177 F.3d 714, 717 (8th Cir. 1999) (holding that party had not waived right to appeal award of sanctions under § 1927 because award did not become final and appealable until amount is fixed); Southern Travel Club, Inc. v. Carnival Air Lines, Inc., 986 F.2d 125, 131 (5th Cir. 1993) (finding no jurisdiction to consider appeal from Rule 11 sanction order where order did not "reduce sanctions to a sum certain"); John v. Barron, 897 F.2d 1387, 1390 (7th Cir. 1990); Jensen Elec. Co. v. Moore, Caldwell, Rowland & Dodd, Inc., 873 F.2d 1327, 1329 (9th Cir. 1989); Sidag Aktiengesellschaft v. Smoked Foods Prods. Co., 813 F.2d 81, 84 (5th Cir. 1987); Gates v. Central States Teamsters Pension Fund, 788 F.2d 1341, 1343 (8th Cir. 1986); cf. Thornton v. General Motors Corp., 136 F.3d 450, 454 (5th Cir. 1998) (exercising pendant jurisdiction over unquantified attorneys' fees award, where it was "inextricably intertwined" with final order suspending the attorney). The Third Circuit has distinguished Rule 11 sanctions from the Supreme Court's holding in Budinich v. Becton Dickinson & Co., 486 U.S. 196 (1988), that decisions of liability and damages are final despite a pending determination of costs and fees. The court noted that "the decision to impose sanctions and the decision fixing the amount of sanction are far more closely intertwined both substantively and practically, than the decision about counsel fees and costs is to the underlying merits." Napier v. Thirty or More Unidentified

Fed. Agents, Employees or Officers, 855 F.2d 1080, 1090 (3d Cir. 1988) (sanctions order not final until amount of sanction determined); accord Collier v. Marshall, Dennehey, Warner, Coleman & Goggin, 977 F.2d 93 (3d Cir. 1992).

The circuits are split on the issue of whether factual findings, without the imposition of monetary sanctions, are appealable. The Seventh Circuit is the only circuit to state that anything short of monetary sanctions is not appealable. See Seymour v. Hug, 485 F.3d 926, 929 (7th Cir. 2007); see also Crews & Assoc., Inc. v. United States, 458 F.3d 674, 677 (7th Cir. 2006); Clark Equip. Co. v. Lift Parts Mfg. Co., Inc., 972 F.2d 817, 820 (7th Cir. 1992) (citing Bolte v. Home Ins. Co., 744 F.2d 572, 573 (7th Cir. 1984). In Seymour, the district court's opinion criticized an attorney as being less than honest, but did not categorize the comments as an official sanction. On appeal, the Seventh Circuit, reaffirmed that its jurisdiction is limited to appeals of monetary sanctions. Id. at 929.

All other circuits ruling on this issue do not limit review to monetary sanctions. However, these circuits still differ as to whether judicial criticism must be expressly identified as a reprimand to be appealable.

The First and Federal Circuits require an order expressly to identify the criticism as a formal reprimand for the order to be appealable. See Young v. City of Providence ex rel. Napolitano, 404 F.3d 33, 38 (1st Cir. 2005) (holding district court's official sanctions of censorship and reprimand were appealable, as such actions were distinguishable from mere criticism); Precision Specialty Metals Inc. v. United States, 315 F.3d 1346, 1353 (Fed. Cir. 2003) (holding a public reprimand can be appealed, noting that nothing in the opinion suggests "that other kinds of judicial criticisms of lawyers' actions, whether contained in judicial opinions or comments in the courtroom, are also directly reviewable."); compare In re Williams, 156 F.3d 86, 89 (1st Cir. 1998) (holding mere criticism of a lawyer's conduct is not appealable).

The Third, Fifth, Ninth, Tenth, and D.C. Circuits, with slight nuances, permit appeals from orders that find misconduct even where they do not expressly identify such findings as a reprimand. The Ninth Circuit will permit an appeal where there is more than merely "routine judicial commentary." United States v. Talao, 222 F.3d 1133, 1137 (9th Cir. 2000) (holding orders that are "inordinately injurious to a lawyers reputation" can be appealed, but not "routine judicial commentary."); Bowers v. Nat'l Collegiate Athletic Ass'n, 475 F.3d 524, 543-44

(3rd Cir. 2007) (finding the district court's order rose above mere judicial criticism, and was therefore appealable); Walker v. City of Mesquite, 129 F.3d 831, 832-33 (5th Cir. 1997) (holding order finding attorney misconduct alone was appealable, stating "the importance of an attorney's professional reputation, and the imperative to defend it when necessary, obviates the need for a finding of monetary liability or other punishment as a requisite for the appeal of a court order finding professional misconduct."); Butler v. Biocore Med. Techn., Inc., 348 F.3d 1163, 1166-69 (10th Cir. 2003) (holding that "an order finding attorney misconduct but not imposing other sanctions is appealable . . . even if not labeled as a reprimand."); Sullivan v. Committee on Admissions and Grievances, 395 F.2d 954, 956 (D.C. Cir. 1967) (holding that a finding of misconduct is appealable).

Where the district court has completely resolved the case on the merits, the court's deferral of action on a pending motion for sanctions will not preclude appellate jurisdiction over the merits. Jackson v. Cintas Corp., 425 F.3d 1313, 1316 (11th Cir. 2005) (noting that "every other circuit has held that the pendency of a motion for sanctions after a dismissal on the merits does not bar appellate jurisdiction"); Cooper v. Salomon Bros., 1 F.3d 82, 85 (2d Cir. 1993) (holding that court had jurisdiction over final decisions in case but lacked jurisdiction to review sanctions award); Southern Travel Club, Inc. v. Carnival Air Lines, Inc., 986 F.2d 125, 130 (5th Cir. 1993) (same); Cleveland v. Berkson, 878 F.2d 1034, 1036 (7th Cir. 1989) (finding the Supreme Court's holding in Budinich v. Becton Dickinson & Co., 486 U.S. 196 (1988), to be "instructive" as to the severability between liability on the merits and a motion for sanctions).

2. Standing

Not only must a decision be final and appealable, a party also must possess standing before an appeal from a sanctions order may be heard. When a district court has awarded fees against an attorney alone, the attorney, and not the client, is the proper party to appeal from the sanctions order. Hays v. Sony Corp. of Am., 847 F.2d 412, 414 (7th Cir. 1988); Reynolds v. East Dyer Dev. Co., 882 F.2d 1249, 1254 (7th Cir. 1989); cf. In re Taylor, 884 F.2d 478, 484 n.7 (9th Cir. 1989) (standing issue undecided in Ninth Circuit). Because the client has no pecuniary interest in a fee award against only its attorney, the client lacks standing to appeal. See Marshak v. Tonetti, 813 F.2d 13, 21 (1st Cir. 1987).

Under the 1983 rule, federal circuits were split over the issue of whether, after sanctions are imposed, the settlement of the underlying action moots an appeal of the sanctions award; because the 1993 amendment does not make any changes relevant to this issue, the dispute has not been resolved. In Riverhead Sav. Bank v. Nat'l Mortgage Equity Corp., 893 F.2d 1109 (9th Cir. 1990), the Ninth Circuit considered the question of whether a settlement of the underlying action after the district court decided the case and awarded sanctions, served to moot a party and its attorney's appeal from the sanctions. The Ninth Circuit found that in the settlement before it, which expressly addressed the question of sanctions, the appeal was moot. The Ninth Circuit stated that the result would have been different if the sanctions award included payments to the court instead of only payments to the opposing party. Id. at 1112. Similarly, the Seventh Circuit in Clark Equip. Co. v. Lift Parts Mfg. Co., 972 F.2d 817 (7th Cir. 1992), held that settling a case on the merits moots an appeal of monetary sanctions payable to the opposing party. The Seventh Circuit concluded that although courts have an interest in ensuring that rules of procedure are obeyed, that interest is not sufficient to keep a compensatory sanction alive for appeal after the parties have settled. Id. at 819. In Clark, however, the Seventh Circuit left open the possibility that if the sanctioned attorney were later able to show concrete harm to his reputation from the existence of the district judge's opinion, mandamus might then "be an appropriate remedy." Id. at 820. In contrast, the Eighth Circuit in Perkins v. General Motors Corp., 965 F.2d 597, 599 (8th Cir. 1992), held that the district court retained jurisdiction over the enforcement of sanctions even after the parties voluntarily settled the case. The Eighth Circuit reasoned that if a sanctioned attorney were unable to appeal the sanctions, this could present a conflict between a client's desire to settle the merits of the case and the attorneys' wish to appeal the sanctions. Id. at 600. Moreover, the court reasoned, a court's interest in having its rules of procedure obeyed does not disappear merely because the parties settle the case. Id. at 599. In a case involving sanctions under 28 U.S.C. § 1927 and 17 U.S.C. § 505, the Second Circuit held that settlement rendered the appeal moot as to the sanctioned party, but recognized that an attorney may have a significant interest in being vindicated on appeal. Agee v. Paramount Commc'ns Inc., 114 F.3d 395, 398-99 (2d Cir. 1997) ("However, we have some concern about the application of the mootness doctrine to [the attorney] because his reputation-the basis of the attorney's livelihood-is at stake and, unlike his client, he did not voluntarily enter into the settlement in

question."). Ultimately, the court was not required to "resolve this vexing issue" because the attorney had not listed himself as a party to the appeal. Agee, 114 F.3d at 399.

3. Notice of Appeal

Unless a sanctioned attorney's name appears on the notice of appeal, the appellate court may have no jurisdiction to review a sanctions order against the attorney. In Torres v. Oakland Scavenger Co., 487 U.S. 312, 315 (1988), the Supreme Court held that the specificity requirement of Rule 3(c) of the Federal Rules of Appellate Procedure precluded the appellate court from exercising jurisdiction over a party (one of sixteen) whose name was unintentionally omitted from the notice of appeal. Several courts have applied the Torres rule to preclude consideration of a sanctions question on appeal when the award was against the attorney but the notice of appeal named only the party. Collier v. Marshall, Dennehey, Warner, Coleman & Goggin, 977 F.2d 93, 94 (3d Cir. 1992); CTC Imports & Exports v. Nigerian Petroleum Corp., 951 F.2d 573, 576 (3d Cir. 1991); Landon v. Hunt, 938 F.2d 450, 452 n.2 (3d Cir. 1991) (reversing sanctions against parties, but holding that the court lacked authority to review sanctions against attorney who did not appeal in his own name); De Luca v. Long Island Lighting Co., 862 F.2d 427, 429-30 (2d Cir. 1988); accord Mylett v. Jeane, 879 F.2d 1272, 1275 (5th Cir. 1989); FTC v. Amy Travel Servs., Inc., 875 F.2d 564, 577 (7th Cir. 1989); Rogers v. National Union Fire Ins. Co., 864 F.2d 557, 560 (7th Cir. 1988). But cf. In re Case, 937 F.2d 1014, 1020-21 (5th Cir. 1991) (because of differences between Bankruptcy Rule 8001 and Fed. R. App. P. 3(c), strict rule of Torres and Mylett does not apply in appeals to district court from bankruptcy court, and notice of appeal naming only party was adequate to provide jurisdiction over sanctions against party's counsel).

Despite Torres, the Ninth Circuit has held that when the only party sanctioned was the law firm, and when the law firm was listed in the notice of appeal as the party "by and through" which the appeal was taken, there was no opportunity for confusion or prejudice and the appeal was not barred. Aetna Life Ins. Co. v. Alla Med. Servs., Inc., 855 F.2d 1470, 1473 (9th Cir. 1988). Likewise, in Retail Flooring Dealers of Am., Inc. v. Beaulieu of Am., LLC, 339 F.3d 1146, 1148 (9th Cir. 2003), the Ninth Circuit ruled that it has jurisdiction to hear counsel's appeal, even though the counsel's name did not appear on the notice of appeal, where "it appears on the face of the notice that an appeal is intended by a

party not named." Accord Detabali v. St. Luke's Hosp., 482 F.3d 1199, 1204 (9th Cir. 2007) (counsel's clear intent to appeal the district court's sanction makes him a party to the appeal, even though counsel's name was not on the notice of appeal). The Fourth Circuit has followed Aetna and found that, where the appeal was from an order affecting only plaintiff's counsel, there was no danger of confusion and a notice of appeal listing only plaintiff was the "functional equivalent" of what Fed. R. App. P. 3 required. Miltier v. Downes, 935 F.2d 660, 663 (4th Cir. 1991).

Other cases have questioned the viability of Torres following the December 1, 1993, amendment to Fed. R. App. P. 3(c). In Garcia v. Wash, 20 F.3d 608, 609 (5th Cir. 1994), the defendants cited Torres as precedent for denying jurisdiction in a sanctions appeal because the attorney was not formally named as a party in any notice of appeal. The Fifth Circuit rejected the argument, noting that Fed. R. App. P. 3(c) — which had formed the basis for the Torres decision — was amended on December 1, 1993, effectively overturning Torres. Id. at 609-10. The court pointed to the 1993 rule's language and the advisory comments in support of its decision. The 1993 rule states that "[a]n appeal will not be dismissed . . . for failure to name a party whose intent to appeal is otherwise clear from the notice." Fed. R. App. P. 3(c). Even though the notices of appeal in the Garcia case were filed prior to the December 1, 1993, effective date, the Fifth Circuit held that the amendments to the Federal Rule of Appellate Procedure are to be given retroactive effect where possible. The court bolstered this "retroactivity" position by stating that the rule was amended to provide a remedy to the exact procedural problem before the court. Thus, it was "just and practicable" to apply the 1993 rule to the current case. The court held that, under the new Fed. R. App. P. R. 3(c), there was sufficient evidence of the attorney's intent to appeal the sanctions order in at least one of the notices of appeal, which was sufficient to meet the new requirement. The Seventh and Tenth Circuits have cited Garcia for the proposition that amended Rule 3(c) overrules Torres. Laurino v. Tate, 220 F.3d 1213, 1218 (10th Cir. 2000); Bailey v. United States, 35 F.3d 1118, 1119 at n.3 (7th Cir. 1994); cf. Corroon v. Reeve, 258 F.3d 86, 91 (2d Cir. 2001) (declining to hear non-lead counsel's appeal of a sanction, where counsel's intent to appeal was not "otherwise clear from the notice," and counsel's motion to intervene in the appeal "could not secure the resurrection of its appeal time"); Bogle v. Orange County Bd. of City Comm., 162 F.3d 653, 661

(11th Cir. 1998) (dismissing appeal of sanctions award where there was "nothing in [the] notice of appeal to suggest that counsel intended to participate in her own right as a party appellant").

B. Standard of Review

The Committee Notes to the 1993 rule state that the abuse of discretion standard adopted by the Supreme Court in Cooter & Gell should continue to be applied to Rule 11 cases on appeal. See Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990) (establishing abuse of discretion as the standard to govern appellate court review of district court decisions under Rule 11); see also Kropelnicki v. Siegel, 290 F.3d 118, 131 (2d Cir. 2002) (district court did not abuse discretion in failing to award sanctions because not completely inconceivable that a new legal theory could have been created); LaSalle Nat'l Bank of Chicago v. County of DuPage, 10 F.3d 1333, 1339 (7th Cir. 1993) (district court did not abuse discretion in denying sanctions where court recognized that proving conspiracies is difficult and plaintiff's claims were reasonable under the circumstances); Carman v. Treat, 7 F.3d 1379, 1382 & n.2 (8th Cir. 1993) (district court did not abuse discretion in imposing dismissal with prejudice of pro se complaint as a Rule 11 sanction because monetary sanctions were not a practicable alternative). In adopting the abuse of discretion standard for all issues, the Supreme Court stressed the relatedness of factual and legal inquiries under Rule 11, the district court's familiarity with the issues and litigants, and the comparative ease with which a deferential standard can be applied. Id. at 401-05; see also McLane, Graf, Raulerson & Middleton, P.A. v. Alfred Rechberger, 280 F.3d 26, 41 (1st Cir. 2002) (district court entitled to "extraordinary deference" in denying sanctions); Estiverne v. Sak's Fifth Ave., 9 F.3d 1171, 1174 (5th Cir. 1993). At least one decision after Cooter & Gell has held that the deferential standard of review applies even where the judge rendering the sanctions decision is not the same judge who presided over the litigation on the underlying claim. Automatic Liquid Packaging, Inc. v. Dominik, 909 F.2d 1001, 1005-06 (7th Cir. 1990) (different district court judge still more familiar with local practices and better able to determine sanction necessary to provide deterrence); see also In re Grand Hotel Ltd., 121 B.R. 657, 659 (Bankr. S.D. Fla. 1990) (abuse of discretion standard under Rule 11 is synonymous with the clearly erroneous standard of Bankruptcy Rule 8013 applicable in reviewing Bankruptcy Rule 9011 findings).

While an abuse of discretion standard controls, this does not mean district court decisions are automatically affirmed. A district court necessarily "abuses its discretion if it bases its decision on an erroneous view of the law or on a clearly erroneous assessment of the evidence." Revson v. Cinque & Cinque, P.C., 221 F.3d 71, 78 (2d Cir. 2000); see also In re Allen, No. 06-1429, 2007 U.S. App. LEXIS 22445, at *9 (10th Cir. Sept. 19, 2007) (sanctions are reviewed under abuse of discretion standard, "[h]owever, any statutory interpretation or other legal analysis which provides the basis for the award is reviewable de novo") (internal citations omitted); Blickenstaff v. R.R. Donnelley & Sons Co. Short Term Disability Plan, 378 F.3d 669 (7th Cir. 2004) (same; reversing the portion of a sanctions award based on the district court's factual mistake); Prof'l Mgmt. Assocs., Inc. v. KPMG LLP, 345 F.3d 1030, 1033 (8th Cir. 2003) (finding that, given the well-settled law of res judicata under the circumstances of the case, the district court abused its discretion in refusing to impose sanctions); Mercury Air Group, Inc. v. Manour, 237 F.3d 542, 548 (5th Cir. 2001); United Nat'l Ins. Co. v. R&D Latex Corp., 242 F.3d 1102, 1115 (9th Cir. 2001) ("[W]e review findings of historical fact under the clearly erroneous standard, the determination that counsel violated the rule under a de novo standard, and the choice of sanction under an abuse of discretion standard."); FirsTier Bank v. Zeller, 16 F.3d 907, 914 (8th Cir. 1994) (abuse of discretion found where district court imposed sanctions based on legal issue that was unclear and undecided in circuit); Rounseville v. Zahl, 13 F.3d 625, 632 (2d Cir. 1994) (because all doubts are to be resolved in favor of the signer, district court abused discretion in sanctioning plaintiffs based on the court's questionable determination that the civil rights claim was "baseless in both law and fact"); Smith v. Our Lady of the Lake Hosp., Inc., 960 F.2d 439, 444 (5th Cir. 1992) (finding that district court abused its discretion in basing sanctions award on an erroneous view of the law as it applied to the facts of the case); Pulaski County Republican Comm. v. Pulaski County Bd. of Election Comm'rs, 956 F.2d 172, 174 (8th Cir. 1992) (appeals court reversed district court's imposition of sanctions based upon two erroneous views of the law); Pierce v. F.R. Tripler & Co., 955 F.2d 820, 829-30 (2d Cir. 1992) (reversing district court's imposition of sanctions which was based upon its application of an incorrect legal standard); Federal Sav. & Loan Ins. Co. v. Molinaro, 923 F.2d 736, 739 (9th Cir. 1991); cf. Apostolic Pentecostal Church v. Colbert, 169 F.3d 409, 417 (6th Cir. 1999) (remand because district court did not specifically inquire into whether contentions in garnishee disclosure had evidentiary support). In addition, the Seventh Circuit has noted that, even with an abuse of discretion standard,

"[c]oncerns for the effect on both an attorney's reputation and for the vigor and creativity of advocacy by other members of the bar necessarily require that we exercise less than total deference to the district court in its decision to impose Rule 11 sanctions." Thompson v. Duke, 940 F.2d 192, 195 (7th Cir. 1991) (quoting Mars Steel Corp. v. Continental Bank N.A., 880 F.2d 928, 936 (7th Cir. 1989) (en banc)); see also Schlaifer Nance & Co. v. Estate of Warhol, 194 F.3d 323, 333-34 (2d Cir. 1999) (since power to impose sanctions may mean that trial court may act as "accuser, fact finder and sentencing judge," abuse of discretion standard must be exercised so as "to ensure that any such decision is made with restraint and discretion"); Land v. Chicago Truck Drivers, 25 F.3d 509, 515 (7th Cir. 1994) (although review is deferential, it is not "toothless"; review must be sufficiently rigorous to ensure that district judges impose or deny sanctions only after serious consideration).

C. Selection of Sanction on Appeal

Even under the old rule, the choice of sanction was within the discretion of the district court. That discretion is broadened under the 1993 rule, which permits the court to decline to award any sanctions even if it finds the rule has been violated. Review likely will be highly deferential so long as a rationale supports the result.

D. Applicability of Rule 11 to Conduct in Appellate Proceedings

There is no suggestion in the 1993 rule of any intent to expand Rule 11 to the courts of appeals. In Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990), the Supreme Court suggested that appellate conduct is controlled only by Fed. R. App. P. 38. Thus, the Ninth Circuit in a post-Cooter & Gell case declared that "Rule 11 does not apply here." Louisiana-Pacific Corp. v. Asarco, Inc., 909 F.2d 1260, 1266 (9th Cir. 1990). In Partington v. Gedan, 923 F.2d 686, 688 (9th Cir. 1991) (en banc), the Ninth Circuit overruled a line of earlier cases insofar as those cases authorized Rule 11 sanctions on appeal. See also In re 60 East 80th Street Equities, Inc., 218 F.3d 109, 119 n.4 (2d Cir. 2000) (Rule 38, not Rule 11, governs sanctions on appeal); DDI Seamless Cylinder Int'l v. General Fire Extinguisher Corp., 14 F.3d 1163, 1167-68 (7th Cir. 1994) (same); Cottrell v. Bendix Corp., Nos. 89-1867, 89-2091, 1990 U.S. App. LEXIS 17345, at *13 (6th Cir. Sept. 28, 1990) (per curiam) (Rule 11 not applicable to appellate proceedings); Mortell v. Mortell Co., 887 F.2d 1322, 1328 (7th Cir. 1989)

(Rule 11 inapplicable to appellate proceedings, but it does influence appellate court decisions under Fed. R. App. P. 38); cf. In re Akros Installations, Inc., 834 F.2d 1526, 1531 (9th Cir. 1987) (Rule 11 not applicable to bankruptcy appeal to district court). However, the court has held that Fed. R. App. P. 46 authorizes the appellate court to impose sanctions on an attorney whose conduct violates Rule 11. Mays v. Chicago Sun-Times, 865 F.2d 134, 140 (7th Cir. 1989); see also Fed. R. Civ. P. 1 (Rules of Civil Procedure govern district court proceedings).

The Ninth Circuit relied upon Cooter & Gell to extend principles underlying the computation of Rule 11 sanction awards to fee awards under Fed. R. App. P. 38. Lyddon v. Geothermal Properties, Inc., 996 F.2d 212, 214 (9th Cir. 1993). The Ninth Circuit stated, "No circuit court has defined the limits of Rule 38. . . . We recognize the similarity between Rule 11 and Rule 38 sanctions and agree with those courts which have concluded that the principles governing the interpretation of Rule 11 should control in interpreting Rule 38." Id.

E. Fees on Appeal

Rule 38 of the Federal Rules of Appellate Procedure, which authorizes courts of appeal to award damages for frivolous appeals, was amended April 29, 1994 effective December 1, 1994 to provide:

> If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

The amendment requires that before imposing a sanction, the court must provide notice and an opportunity to be heard. In addition, the Advisory Committee Note to the 1994 amendment states that a party's mere mention of double costs or sanctions in an appeal brief will not suffice. A separate motion must be filed.

Appellate courts have the authority to award fees and double costs for frivolous appeals of Rule 11 sanctions under Federal Rule of Appellate Procedure 38. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 407 (1990); Dal Pozzo v. Basic Machinery Co., Inc., 463 F.3d 609 (7th Cir. 2006) (imposing reasonable fees and double costs pursuant to Rule 38 for filing frivolous appeal of Rule 11 sanction); Bridgewater Operating Corp. v. Feldstein, 346 F.3d 27 (2d Cir.

2003) (awarding, under Rule 38, double costs — 50% to be paid personally by plaintiffs, 50% to be paid by plaintiff's counsel — for filing a frivolous appeal from the district court's judgment); Taiyo Corp. v. Sheraton Savannah Corp., 49 F.3d 1514, 1515 (11th Cir. 1995); A-Abart Elec. Supply, Inc. v. Emerson Elec. Co., 956 F.2d 1399 (7th Cir. 1992); Peerless Indus. Paint Coatings Co. v. Canam Steel Corp., 979 F.2d 685, 687 (8th Cir. 1992) (Rule 38 allows appellate court to award damages and double costs for frivolous appeal); Uithoven v. U.S. Army Corps of Eng'rs, 884 F.2d 844, 847 (5th Cir. 1989) (granting double fees because both original complaint and appeal are frivolous); Borowski v. DePuy, Inc., 850 F.2d 297, 305 (7th Cir. 1988) (Rule 38 permits court of appeals to award just damages and single or double costs to the appellee if an appeal is frivolous); Indianapolis Colts v. Mayor of Baltimore, 775 F.2d 177, 184 (7th Cir. 1985) (same); see also Greenberg v. De Tessieres, 902 F.2d 1002, 1005 (D.C. Cir. 1990) (appellee denied her costs as a sanction for frivolously appealing her rejected sanctions motion); Gianfriddo v. Western Union Tel. Co., 787 F.2d 6, 7 (1st Cir. 1986) (court assessed double costs and attorneys' fees under Fed. R. App. P. 38 and 28 U.S.C. § 1912); Caldwell v. Palmetto State Sav. Bank, 811 F.2d 916 (5th Cir. 1987). The purpose of an award of attorney fees under Rule 38 is not only to compensate the appellee, but to deter frivolous appeals. Sun-Tek Indus., Inc. v. Kennedy Sky-Lites, Inc., 865 F.2d 1254, 1255 (Fed. Cir. 1989).

Sanctions under Rule 38 are imposed only on a case-by-case basis. Burlington Northern R.R. v. Woods, 480 U.S. 1, 8 (1987). Courts applying Rule 38 have equated frivolity with lack of merit but also have discussed improper purpose, delay, and harassment. NLRB v. Cincinnati Bronze, Inc., 829 F.2d 585, 591 (6th Cir. 1987). See also In re 60 East 80th Street Equities, Inc., 218 F.3d 109, 118 (2d Cir. 2000) (sanctions appropriate where appeal was frivolous and accompanied by baseless attacks on lower courts). Although there is a split in the circuits, the majority of circuits have not required "bad faith" or "intentional misconduct." See Wilton Corp. v. Ashland Castings Corp., 188 F.3d 670, 676-77 (6th Cir. 1999) (collecting cases). The Supreme Court has held that an appeal was not frivolous even though "foreclosed by circuit precedent," where the issue had divided the district courts and the Supreme Court had not spoken definitively on the issue. McKnight v. General Motors Corp., 511 U.S. 659 (1994). Courts have held that Rule 38 does not bar good faith challenges of credibility determinations, even though those findings are rarely disturbed on appeal. NLRB v. Lucy Ellen Candy Div., 517 F.2d 551, 555 (7th Cir. 1975). However, appeals dealing

exclusively with credibility have sometimes been subjected to Rule 38 sanctions. See, e.g., Rennie v. Dalton, 3 F.3d 1100, 1110 (7th Cir. 1993); Ashkin v. Time Warner Cable Corp., 52 F.3d 140, 146 (7th Cir. 1995). Sanctions are also inappropriate where not all of an appellant's arguments are without substance. Northwestern Nat'l Ins. Co. v. Baltes, 15 F.3d 660, 664 (7th Cir. 1994). However, an appeal is frivolous where it concerns issues that are "extraneous to the judgment." McDonough v. Royal Caribbean Cruises, Ltd., 66 F.3d 150, 151 (7th Cir. 1995). An appeal also is frivolous if it "grossly distorts" the record in the district court. Dube v. Eagle Global Logistics, 314 F.3d 193, 195 (5th Cir. 2003) (sanctioning attorney "bent on misleading the court for misstating the record by using ellipses to misrepresent statements out of context), vacated as moot, Feb. 4, 2003. An otherwise frivolous appeal may not be sanctionable if the party relied on favorable comments by the trial judge. See McDonald v. Schencker, 18 F.3d 491, 499 (7th Cir. 1994) ("observations" made by the district court as to the merits of plaintiff's claims may have encouraged the appeal). Further, the voluntary dismissal of an appeal is not equivalent to an admission that the appeal was frivolous. Ormsby Motors Inc. v. General Motors Corp., 32 F.3d 240, 241 (7th Cir. 1994) (to infer frivolousness would discourage voluntary dismissals).

The district court has no power to make Rule 38 awards, as the authority to award fees for a frivolous appeal is reserved to the appellate courts alone. See In re Emergency Beacon Corp., 790 F.2d 285, 288 (2d Cir. 1986); see also Vaughn v. American Honda Motor Company Inc., 2007 WL 3172068, *1-2 (5th Cir. Oct 31, 2007) (Rule 38 governing frivolous appeals allows only an appellate court to impose damages and costs in a frivolous appeal). Moreover, although Rule 38 speaks only in terms of sanctions in favor of appellees, courts have considered motions for sanctions in favor of appellants. See, e.g., A.V. Consultants, Inc. v. Barnes, 978 F.2d 996, 1003 (7th Cir. 1992) (entertaining Rule 38 motion for sanctions against appellees, but finding conduct not sanctionable on the merits). But see Walker v. City of Borgalusa, 168 F.3d 237, 241 (5th Cir. 1999) (denying appellants' motion for sanction under Rule 38 "because, by its very language, the rule applies only to *appellees* and only to frivolous *appeals*"). A party who requests Rule 38 sanctions without careful investigation of an opponent's appeal or defense may itself be sanctioned under the same rule. See Meeks v. Jewel Cos., 845 F.2d 1421, 1422 (7th Cir. 1988). The Seventh Circuit noted: "We are troubled by the frequency with which lawyers in this court,

whether representing appellants or appellees, are including in their briefs groundless requests for Rule 38 sanctions. The attitude seems to be, it can't hurt to ask." Id.

IX. Reach of Rule 11

A. Any Paper

Rule 11 applies to all written, signed pleadings, motions, and other papers filed in court. See Business Guides, Inc. v. Chromatic Communications Enters., Inc., 498 U.S. 533, 549 (1991) (Rule 11 reaches a signed affidavit); In re Gioioso, 979 F.2d 956, 960 (3d Cir. 1992) (reversing bankruptcy court's denial of sanctions against debtors who filed false affidavits); Eisenberg v. University of New Mexico, 936 F.2d 1131, 1133-34 (10th Cir. 1991) (affirming impositions of sanctions for unsupported allegations contained in signed affidavit attached to signed filing); Cellar Door Prods., Inc. v. Kay, 897 F.2d 1375, 1379 (6th Cir. 1990) (affirming sanctions imposed for misleading answers on civil cover sheet required by local rules); Gould v. Kemper Nat'l Ins. Cos., No. 93 C 7189, 1995 U.S. Dist. LEXIS 14102, at *12 (N.D. Ill. Sept. 6, 1995) (ordering law firm to show cause why it should not be sanctioned for filing frivolous motion to purge references in court's opinion to "sloppiness and inattention" of attorneys); A & V Fishing, Inc. v. Home Ins. Co., 145 F.R.D. 285, 288 (D. Mass. 1993) (Rule 11 sanctions may be imposed for false answer to request for admission); Bruno v. City of New York, No. 89 Civ. 6661, 1992 U.S. Dist. LEXIS 4921, at *11-12 (S.D.N.Y. Apr. 15, 1992) (although sanction award could not be based upon complaint which had never been filed, court sua sponte imposed sanctions for meritless affidavit which was filed in opposition to adverse party's motion to dismiss); First Interstate Bank, N.A. v. Estates Partnership, 117 F.R.D. 683, 686 (D. Colo. 1987) (sanctioning local counsel for submitting pro hac vice motion without affidavit revealing prior disciplinary record, as required). For a general discussion of what documents are and are not "papers" for Rule 11 purposes, see Gregory P. Joseph, Sanctions: The Federal Law of Litigation Abuse § 5(D)(2) (Matthew Bender, 3d ed. 2000).

On its face, Rule 11 applies only to written pleadings, motions and other papers. See United States v. Int'l Bhd. of Teamsters, 948 F.2d 1338, 1346 n.4 (2d Cir. 1991). Rule 11, "by its own terms, can never be the basis for sanctions for

failure to file certain papers." Simpson v. Welch, 900 F.2d 33, 36-37 (4th Cir. 1990); see also Sakon v. Andreo, 119 F.3d 109, 115 (2d Cir. 1997) (failure to meet deadline for filing amended complaint not sanctionable under Rule 11); Coltrade Int'l, Inc. v. United States, 973 F.2d 128, 131-32 (2d Cir. 1992) (remanded with instructions to district court to specify what papers were submitted in violation of Rule 11); Hamer v. Career College Ass'n, 979 F.2d 758, 760 (9th Cir. 1992) (reversing sanctions award based on argument which was not contained in signed filings in district court); United States v. Int'l Bhd. of Teamsters, 948 F.2d 1338, 1344 (2d Cir. 1991) (for a paper to trigger Rule 11, it must be both signed and filed in court); Gottlieb v. Convergent Techs., Nos. 90-15084, 90-16576, 90-16817, 1991 U.S. App. LEXIS 20616 at *33 (9th Cir. Aug. 26, 1991) (general reference to "overall conduct" cannot support Rule 11 sanctions); In re Kunstler, 914 F.2d 505, 520 (4th Cir. 1990) (sanctions could not be imposed for publication of baseless claims through media); Nike, Inc. v. Top Brand Co., 00 Civ. 8179 KMW RLE, 2003 U.S. Dist. LEXIS 11416 (S.D.N.Y. July 3, 2003) (Rule 11 does not apply to letters written by counsel and to representations made by counsel in conferences before the court, even if inaccurate, unless presented in conjunction with an offending filing); Weiss v. Weiss, 984 F. Supp. 682, 686 (S.D.N.Y. 1997) (Rule 11 sanctions not appropriate for sending copies of temporary restraining order to two brokerage houses at which opposing party maintained accounts); Southmark Inv. Group 86, Inc. v. Turner Dev. Corp., 140 F.R.D. 1, 3 (M.D. Fla. 1991) (Rule 11 does not apply to oral argument or attorney conduct); VDI Technologies v. Price, 781 F. Supp. 85, 95 (D.N.H. 1991) (signed letters to customers are not "filings in district court"); Breaux v. Housing Auth. of Westwego, No. Civ. 90-1523, 1991 U.S. Dist. LEXIS 8420, at *5 (E.D. La. June 18, 1991) (sanctions not warranted for failure to comply with signed settlement agreement where agreement not filed with the court); United States v. Leasehold Interest in Property Located at 850 S. Maple, 743 F. Supp. 505, 513-14 (E.D. Mich. 1990) (sanctions could not be imposed based on wrongful government publication of issues relating to movant's case); Curley v. Brignoli Curley & Roberts Assoc., 128 F.R.D. 613, 616 (S.D.N.Y. 1989) (Rule 11 applies only to papers served or filed with the court; a letter to the court may not form the basis for sanctions). But see Legault v. Zambarano, 105 F.3d 24, 27-28 (1st Cir. 1997) (affirming sanctions for letter sent to opposing counsel, and copied to the court); Crismar Corp. v. United States, No. Civ. 88-5205, 1990 U.S. Dist. LEXIS 5173, at *18 (E.D. La. Apr. 26, 1990) (sanctioning plaintiffs for harassing letters written and signed by plaintiffs, not counsel); Banco

Portugues do Atlantico v. Magi France, Ltd., No. 88 Civ. 5221 (JES), 1990 U.S. Dist. LEXIS 1642, at *7 n.4 (S.D.N.Y. Feb. 14, 1990) (letter to court may form basis of sanctions award).

Generally, Rule 11 covers only the initial signing of a pleading, motion or other paper. See Simpson v. Putnam County Nat'l Bank of Carmel, 112 F. Supp. 2d 284, 291 (S.D.N.Y. 2000) (noting that the rule "refers repeatedly to the signing of papers; its central feature is the certification established by the signature"). See also Ayalla v. U.S. Postal Service Postmaster General, John E. Potter, No. 01-2527-KHV, 2002 U.S. Dist. LEXIS 21707, at *12 (D. Kan. Nov. 7, 2002) (sanctions could not be imposed for failure of plaintiff to dismiss her claims after being informed of relevant case law, where she had a good faith basis at the time her complaint was signed). However, the 1993 amendment states that "signing, filing, submitting, or later advocating" a paper constitutes the presenting of that paper to the court. Therefore, oral statements which later advocate or reaffirm positions originally set forth in a filing may be sanctionable in some circumstances. O'Brien v. Alexander, 101 F.3d 1479, 1489 (2d Cir. 1996). In O'Brien, the Second Circuit relied on the amended language of Rule 11 and the Advisory Committee Notes to state that an oral statement may be sanctionable if it "relate[s] directly to a particular representation contained in the document that the lawyer is then advocating." Id. at 1490. The court adopted the following test to determine whether an oral representation is sanctionable: "(1) it must violate the certification requirement of Rule 11(b), e.g., by advocating baseless allegations, and (2) it must relate directly to a matter addressed in the underlying paper and be in furtherance of that matter to constitute advocating within the meaning of subsection (b)." Id.

Rule 11 does not apply to factual accounts given at trial if they were not previously articulated during pre-trial proceedings. See R.B. Ventures, Ltd. v. Shane, No. 91 Civ. 5678 (CSH), 2000 U.S. Dist. LEXIS 10170, at *5-6 (S.D.N.Y. July 20, 2000) ("[I]f a factual account given for the first time by a party at trial bears no resemblance to any prior description of the pertinent events in pleadings or deposition testimony, that account by definition cannot fall within certification of those pretrial 'papers' to which Rule 11 applies.").

Rule 11 is not "a mechanism for imposing sanctions for any and all improper conduct of a party or its counsel during the litigation." F.H. Krear & Co. v. Nineteen Named Trustees, 810 F.2d 1250, 1268 (2d Cir. 1987); see also

Whitehead v. Food Max of Miss., Inc., 277 F.3d 791, 796 (5th Cir. 2002), reh'g en banc granted by 308 F.3d 472 (5th Cir. 2002) (where plaintiff's counsel appropriately sought and obtained a Writ of Execution, his conduct in seeking to execute the judgment by going to defendant's store with newspaper and television reporters was not sanctionable under Rule 11); Christian v. Mattel, Inc., 286 F.3d 1118, 1131 (9th Cir. 2002) ("Because we do not know for certain whether the district court granted Mattel's Rule 11 motion as a result of an impermissible intertwining of its conclusion about the complaint's frivolity and [plaintiff's attorney's] extrinsic misconduct, we must vacate the district court's Rule 11 order."); Beck v. Secretary of HHS, 924 F.2d 1029, 1038 (Fed. Cir. 1991) (no relief for "a general charge of litigation misconduct"); Trulis v. Barton, 67 F.3d 779, 789 (9th Cir.) (Rule 11 sanctions inappropriate for alleged attorney misconduct involving attempted "bribery"), modified, 107 F.3d 685 (9th Cir. 1995); Fong Chi v. Age Group, Ltd., No. 94 Civ. 5253, 1995 U.S. Dist. LEXIS 13809, at *22 (S.D.N.Y. Sept. 21, 1995) (counsel's alleged "extortion" not sanctionable under Rule 11). But see In re White, No. Civ. 93-4895, 1995 U.S. Dist. LEXIS 15318, at *13-14 (E.D. Pa. Aug. 31, 1995) (stating that sanctions under Bankruptcy Rule 9011 could be imposed for unauthorized practice of law).

However, in Precision Specialty Metals, Inc. v. United States, 315 F.3d 1346 (Fed. Cir. 2003), the Federal Circuit held that although the "central purpose" of Rule 11 is to deter baseless filings, the scope of the rule is broad enough to reach a government attorney's conduct in using selective quotations to conceal a key Supreme Court case on the issue, the effect of which was to give the Court of International Trade a "misleading impression of the state of the law on that point." Id. at 1355. Compare United Nat'l Ins. Co. v. R&D Latex Corp., 242 F.3d 1102, 1117 (9th Cir. 2001) (stating that "[a] manipulative order of presentation designed to downplay the pertinence of information or legal precedent unfavorable to one's client is, however, an unfortunately familiar desire . . . [a]s long as the critical information is not absent altogether, lawyers may not be sanctioned for such misjudgments.").

In addition, Rule 11 does not protect a party from an award of costs under Federal Rule of Civil Procedure 54(d). In Association of Minority Contractors and Suppliers, Inc. v. Halliday Properties, Inc., Civ. 97-274, 1999 U.S. Dist. LEXIS 10328, at *6 (E.D. Pa. June 24, 1999), the court stated that a plaintiff's good faith in bringing a claim is not a proper ground for a denial of costs

following judgment for defendants. Otherwise, "most litigants in federal court would be absolved from a taxation of costs," thus rendering Rule 54(d) "meaningless." Halliday Properties, 1999 U.S. Dist. LEXIS 10328, at *6.

As discussed more fully in Section VII above, the 1993 amendment clarifies that Rule 11 does not apply to discovery. Courts have similar sanctioning authority that is applicable to discovery, under Rules 26 and 37.

B. Papers Prior to Litigation

Rule 11 does not apply to conduct that occurred before litigation began. The rule is "not a panacea intended to remedy all manner of attorney misconduct occurring before or during the trial of civil cases." Adduono v. World Hockey Ass'n, 824 F.2d 617, 621 (8th Cir. 1987); see also Simpson v. Welch, 900 F.2d 33, 36 (4th Cir. 1990) (Rule 11 is inapplicable where a party had a "lackadaisical attitude in failing to respond to defendants' Motion for Award of Attorneys' Fees"). Similarly, Rule 11 does not apply to an attorney's refusal to settle a case. Insurance Benefit Adm'rs, Inc. v. Martin, 871 F.2d 1354, 1361 (7th Cir. 1989) ("[T]he loss of an opportunity for settlement should not be considered as a factor in determining the propriety or the amount of sanctions."). See National Ass'n of Gov't Employees, Inc. v. National Fed'n of Fed. Employees, 844 F.2d 216, 223 (5th Cir. 1988) (reversed sanctions because plaintiff's refusal to accept the settlement suggested by the court did not constitute grounds for imposing sanctions).

C. Other Sanctions Provisions

The Committee Notes to the 1993 revised Rule 11 emphasize that Rule 11 does not supplant other possible remedies, including statutes permitting awards of attorneys' fees to prevailing parties and 28 U.S.C. § 1927. The Committee Notes also address the issue of the federal court's "inherent powers" to sanction, which came into prominence with the United States Supreme Court opinion in Chambers v. NASCO, Inc., 501 U.S. 32 (1991). Chambers upheld sanctions of nearly one million dollars based on the court's inherent powers where Rule 11 did not reach all of the offending party's fraudulent conduct and abusive tactics in litigation. The Committee Notes to the revised Rule 11 emphasize that Chambers cautioned against relying on inherent powers if appropriate sanctions can be imposed under such provisions as Rule 11. In any event, the Committee Notes

state that the procedures specified in the revised Rule 11 — notice, opportunity to respond, and findings — should ordinarily be employed when imposing a sanction under the court's inherent powers. See Methode Elecs., Inc. v. Adam Techs., Inc., 371 F.3d 923, 927 (7th Cir. 2004) ("Rule 11 has not robbed the district courts of their inherent power to impose sanctions for abuse of the judicial system.") In Methode, the Seventh Circuit upheld the district court's sanction of $45,000 in attorney's fees pursuant to its inherent power, finding the district court provided notice and an opportunity to respond. Id. at 927-28.

Indeed, in a case under the 1983 Rule 11 where Rule 11 sanctions were found to be inappropriate, one dissenting opinion would have remanded the case for consideration of sanctions under the inherent power of the court. Homico Constr. & Dev. Co. v. Ti-Bert Sys., Inc., 939 F.2d 392, 395 (6th Cir. 1991) (Joiner, dissenting). See also DLC Management Corp. v. Town of Hyde Park, 163 F.3d 124, 135-36 (2d Cir. 1998) (holding that the fact party's discovery abuses could not have been sanctioned pursuant to Fed. R. Civ. P. 37, which requires violation of a court order, did not preclude sanctions under the court's inherent power where there is a finding of bad faith); China Healthways Inst., Inc. v. Hsin Ten Enter. USA, Inc., No. CV 02-5493 LGB (JWJx), 2003 U.S. Dist. LEXIS 16286, at *38 (C.D. Cal. March 12, 2003) (imposing sanctions under court's inherent power where movant failed to comply with safe harbor provision). The Third Circuit, however, has held that a district court could not impose sanctions under its "inherent power" where the court, in rejecting the imposition of Rule 11 sanctions, had previously found the claim to be reasonable. Gillette Foods Inc. v. Bayernwald-Fruchteverwertung, 977 F.2d 809, 814 (3d Cir. 1992). The Third Circuit reasoned that a claim deemed reasonable for Rule 11 purposes could not have been brought in bad faith, as is required before a court may sanction under its "inherent power." Id.

Courts have invoked § 1927 to impose substantial sanctions awards against attorneys. See, e.g., In re Brand Name Prescription Drugs Antitrust Litig., No. 94 C 897, MDL 997, 1999 U.S. Dist. LEXIS 6968 (N.D. Ill. Apr. 30, 1999) (awarding a defendant nearly $2.1 million in attorneys' fees and expenses under § 1927 where the court found that Class Plaintiffs' counsel misrepresented significant facts relevant to the defendant's summary judgment motion). Courts will also impose sanctions against attorneys under combinations of sanctions provisions, including Rule 11 and § 1927.

One court of appeals suggested that it might be appropriate to use Rule 11 as a means for adjusting inequities created by the application of other procedural rules. Where the district court assessed a $10,000 sanction against the plaintiff under Section 706(k) of Title VII, the First Circuit remanded so that the district court could consider whether some portion of this sanction could be shifted to plaintiff's attorney under Rule 11, which allows sanctioning of client and/or attorney. Quiroga v. Hasbro, Inc., 934 F.2d 497, 504-05 (3d Cir. 1991). The Ninth Circuit has held that Rule 11 may be used as a basis for imposing sanctions, other than attorneys fees, on attorneys for the United States government who have already been ordered to pay an opponent's attorneys fees under the Equal Access to Justice Act or 26 U.S.C. § 7430 in tax cases. Mattingly v. United States, 939 F.2d 816, 818-19 (9th Cir. 1991).

D. Standing to Seek Sanctions

Courts have considered the issue of when one has standing to seek Rule 11 sanctions at the district court level. In New York News, Inc. v. Kheel, 972 F.2d 482, 486 (2d Cir. 1992), the Second Circuit affirmed the district court's determination that a non-party and non-participant in the case lacked standing to seek Rule 11 sanctions against a plaintiff and a plaintiff's counsel for making allegedly baseless allegations against him in a complaint they had filed. The Second Circuit stated that it believed that "as a general rule only parties to an action and certain other participants have standing to move for sanctions under Rule 11." Id.; see also Port Drum Co. v. Umphrey, 852 F.2d 148, 150 n.2 (5th Cir. 1988) (Rule 11 is designed to regulate proceedings between parties already before the court in a particular case although in some cases a non-party witness may be allowed to move for sanctions). However, nonparties who are brought in or are attempted to be brought into litigation involuntarily do have standing to bring a motion for sanctions. Hochen v. Bobst Group, 198 F.R.D. 11, 14-15 (D. Mass. 2000).

E. Substantive Private Right of Action

Rule 11 does not create a substantive cause of action. In Port Drum Co. v. Umphrey, 852 F.2d 148 (5th Cir. 1988), an employer sued two attorneys who had previously represented one of the employer's employees in a wrongful death action. In the wrongful death action, the attorneys, on behalf of the employee, sued a number of chemical manufacturers. In the Rule 11 case, the employer,

who was not involved in the wrongful death action, sought to recover because a number of the defendants in the wrongful death action were allegedly improperly named and now refused to do business with the employer. The court rejected the employer's "unique and imaginative theory," and ruled that Rule 11 confers no substantive rights, and would be invalid under the Rules Enabling Act if it attempted to do so. Id. at 150. The court also noted that such a cause of action is incongruous with the rule's primary purpose (deterrence not compensation) and language (rule invoked by "motion," not original complaint). In In re Rolls Constr. Corp., 108 B.R. 807, 808 (Bankr. S.D. Fla. 1989), the court rejected an attempt by plaintiffs to recover from their former attorney, under Rule 11 and Fed. R. Bankr. P. 9011, for inadequate representation in earlier litigation. The court noted that Rule 11 is strictly a procedural rule, designed to punish abuses caused by one party attempting to gain an unfair advantage over another party, not to redress client/counsel disputes. Similarly, cases decided under the 1993 rule hold that it does not create a substantive cause of action. See Bedi v. Grondin, 51 F.3d 265 (4th Cir. 1995) (Rule 11 does not create a private right of action).

Since Rule 11 is "a procedural tool with the central purpose of deterring unfounded claims, defenses, and contentions in federal district court," and does not create a substantive cause of action, it cannot be the exclusive remedy for a party that has been the target of a malicious lawsuit or has been subjected to improper claims. See U.S. Express Lines Ltd. v. Higgins, 281 F.3d 383, 393-94 (3d Cir. 2002) (explaining that "precepts of federalism and the Congressional decision to restrict the sanctions available in the federal system" militate against Rule 11's preemption of state laws dealing with litigation abuses); McShares, Inc. v. Barry, 970 P.2d 1005, 1013-16 (Kan. 1998) (holding that Rule 11 did not bar state action for malicious prosecution and abuse of process), cert. denied, 119 S. Ct. 2048 (1999).

F. State Court Proceedings

Papers filed in state court are not subject to Rule 11. This is true even where the state court filing is directly related to an action pending in federal district court. Nationwide Mut. Ins. Co. v. Burke, 897 F.2d 734, 739 (4th Cir. 1990) (no sanctions for allegedly improper attempt to enforce a settlement agreement in state court). See In re Case, 937 F.2d 1014, 1023 (5th Cir. 1991) (Bankruptcy Rule 9011, like Rule 11, applies only to frivolous pleadings before the sanctioning court; district court could not use 28 U.S.C. § 1927 and court's

inherent powers to supplement Rule 11 and serve as bases for assessment of attorneys fees incurred in defending related state court action); cf. Malkowski v. PTC Capital Corp., No. 96 C 3109, 1998 U.S. Dist. LEXIS 10193, at *16 (N.D. Ill. June 30, 1998) (Rule 11 does not apply to lis pendens notice filed with County Recorder of Deeds). However, many states have enacted sanctions provisions. See Jerold S. Solovy et al., Sanctions in Federal Litigation (1991).

Courts have held that papers filed in state court in a case that is removed to federal court also are not governed by Rule 11. See Edwards v. General Motors Corp., 153 F.3d 242, 245 (5th Cir. 1998); Worthington v. Wilson, 8 F.3d 1253, 1257-58 (7th Cir. 1993); Schoenberger v. Oselka, 909 F.2d 1086, 1087 (7th Cir. 1990); Dahnke v. Teamsters Local 695, 906 F.2d 1192, 1199 (7th Cir. 1990); Hurd v. Ralphs Grocery Co., 824 F.2d 806, 808 (9th Cir. 1987); Stiefvater Real Estate, Inc. v. Hinsdale, 812 F.2d 805, 809 (2d Cir. 1987); Kirby v. Allegheny Beverage Corp., 811 F.2d 253, 257 (4th Cir. 1987); Brown v. Capitol Air, Inc., 797 F.2d 106, 108 (2d Cir. 1986); Shapira v. Charles Schwab & Co., No. 02 Civ. 0425, 2002 U.S. Dist. LEXIS 3905 (S.D.N.Y. March 7, 2002); Moore v. County of Muskegon, No. 1:93-CV-236, 1993 U.S. Dist. LEXIS 18879, at *4 (W.D. Mich. Dec. 14, 1993); cf. In re Summers, 863 F.2d 20, 21 (6th Cir. 1988) (declining to impose sanctions on counsel who voluntarily dismissed a frivolous complaint immediately upon removal).

Under the "later advocacy" provision of the amended rule, there is no *per se* duty to amend or withdraw, but any subsequent written or oral advocacy of an improper assertion will expose the litigant to sanctions. Buster v. Greisen, 104 F.3d 1186, 1190 n.4 (9th Cir.), cert. denied, 522 U.S. 981 (1997); Bisciglia v. Kenosha Unified Sch. Dist., 45 F.3d 223, 227 n.5 (7th Cir. 1995); Dellefave v. Access Temporaries, Inc., No. 99 Civ. 6098, 2001 U.S. Dist. LEXIS 3165 (S.D.N.Y. March 21, 2001). Even before the 1993 amendment, several courts had ruled that, under the 1983 rule, a failure to re-evaluate or modify a state complaint removed to federal court could subject the filer to Rule 11 liability. Foval v. First Nat'l Bank of Commerce, 841 F.2d 126, 130 (5th Cir. 1988) (in removed case, plaintiff must modify case as soon as deficiencies are brought to its attention); Herron v. Jupiter Transp. Co., 858 F.2d 332, 335 (6th Cir. 1988) ("When a complaint is filed in state court which is subsequently removed to federal court, Fed. R. Civ. P. 11 applies at the instant the federal jurisdiction is invoked over the proceedings."); Nichols v. Firestone Tire & Rubber Co., 127 F.R.D. 526, 528 (D. Neb. 1989) (sanctions imposed for signing a pleading "in furtherance of" a

frivolous complaint that was removed to federal court). In addition, some federal courts have applied state sanctions rules to pleadings filed in state court before removal. See, e.g., Tompkins v. Cyr, et al., 202 F.3d 770, 787 (5th Cir. 2000); Griffen v. City of Oklahoma City, 3 F.3d 336, 341 (10th Cir. 1993).

Rule 11 applies to frivolous petitions for removal. See 28 U.S.C. § 1446(a) (requiring Rule 11 certification on notice of removal). Midlock v. Apple Vacations W., Inc., 406 F.3d 453 (7th Cir. 2005); Peabody v. Schroll Trust, 892 F.2d 772, 777 (9th Cir. 1989); News-Texan, Inc. v. City of Garland, 814 F.2d 216, 220 (5th Cir. 1987); Hewitt v. City of Stanton, 798 F.2d 1230, 1233 (9th Cir. 1986); Davis v. Veslan Enters., 765 F.2d 494, 497-501 (5th Cir. 1985); Wallic v. Owens-Corning Fiberglass Corp., 40 F. Supp. 2d 1185, 1190-91 (D. Colo. 1999); Okemos Pub. Sch. Dist. v. National Union Fire Ins. Co., No. 1:93-CV-840, 1993 U.S. Dist. LEXIS 18434, at *4 (W.D. Mich. Nov. 23, 1993) (Rule 11 sanctions imposed because co-defendant did not join in removal; improper purpose inferred); Mendez v. Plastofilm Indus., Inc., No. 91 C 8172, 1992 U.S. Dist. LEXIS 5704, at *13-14 (N.D. Ill. Apr. 14, 1992); cf. Lemos v. Fencl, 828 F.2d 616, 619 (9th Cir. 1987) (vacated Rule 11 sanctions because petition for removal was not frivolous or unreasonable); Vatican Shrimp Co. v. Solis, 820 F.2d 674, 680-81 (5th Cir. 1987) (Rule 11 sanctions for improper removal petition were not justified because counsel was incorrect in their view of the law in a complex and uncertain area). But see Miller v. Carelink Health Plans, Inc., 82 F. Supp. 2d 574, 578 (S.D. W. Va. 2000) (stating that the removal statute, 28 U.S.C. § 1447(c), rather than Rule 11, is the proper basis for an award of attorneys' fees and costs incurred because of an improper attempt to remove).

Moreover, courts uniformly agree that papers filed in federal court after removal are subject to sanctions under Rule 11. See Fed. R. Civ. P. 81(c); Maciosek v. Blue Cross & Blue Shield United, 930 F.2d 536, 541-42 (7th Cir. 1991) (noting inapplicability of Rule 11 to action filed in state court, but affirming sanctions based on plaintiffs' filing of a frivolous memorandum opposing a motion to dismiss after case had been removed); Meadow Ltd. Partnership v. Meadow Farm Partnership, 816 F.2d 970 (4th Cir. 1987); Brown v. Capitol Air, Inc., 797 F.2d 106, 108 (2d Cir. 1986); Fox v. Boucher, 794 F.2d 34, 37 (2d Cir. 1986); see also Mareno v. Jet Aviation of Am., Inc., 970 F.2d 1126, 1128 (2d Cir. 1992) (although vacating sanctions award based upon complaint filed in state court, appellate court remanded case to district court for consideration of whether sanctions were appropriate based upon papers filed in federal court after removal).

G. Criminal Proceedings

Notwithstanding that Rule 11 applies only to civil cases, see Rule 11, some courts incorrectly invoked the 1983 version of Rule 11 in criminal cases. See United States v. Hawley, 768 F.2d 249, 252 (8th Cir. 1985); see also United States v. White, 980 F.2d 836, 843 (2d Cir. 1992) (rejecting notion that Rule 11 applies to preparation of documents filed in criminal proceedings). Nevertheless, in contrast to criminal prosecutions, habeas corpus petitions may be characterized as civil in nature. See Fed. R. Civ. P. 81(a)(2) (Federal Rules of Civil Procedure are applicable to habeas corpus proceedings); Fed. R. Habeas Corpus 11 (same). The First Circuit has imposed a Rule 11 sanction upon counsel in a "frivolous" habeas corpus proceeding because petitioner was not pursuing traditional habeas relief, but was seeking to achieve the purely civil effect of preventing his deportation. United States v. Quin, 836 F.2d 654, 657 (1st Cir. 1988). The Fifth Circuit also deemed Rule 11 applicable to habeas proceedings, but stated that sanctions are appropriate "only in the most egregious circumstances and where the court has specifically found that sanctions are indispensable, that other remedies are inadequate and that its use of Rule 11 is tailored to the found wrong." Anderson v. Butler, 886 F.2d 111, 114 (5th Cir. 1989). See Robinson v. Dretke, No. 3:03-cv-1704-p, 2003 U.S. Dist. LEXIS 15796 (N.D. Tex. Sept. 9, 2003) (barring a habeas corpus petitioner, who collaterally attacked his parole revocation four times, from filing any further federal habeas corpus actions except upon a showing that the Fifth Circuit has granted leave for filing a successive petition); Davie v. Mitchell, 291 F. Supp. 2d 573, 634 (N.D. Ohio 2003) (notifying counsel representing capital habeas corpus petitioners that they are "not immune from the sanctions that should be and are imposed on counsel who file unfounded motions for reconsideration").

H. Administrative Proceedings

Rule 11 is not directly applicable to administrative proceedings. See Tri-State Steel Constr. Co. v. Herman, 164 F.3d 973, 979 (6th Cir. 1999) (proceeding before the Occupational Safety-Health Review Commission); Metropolitan Stevedore Co. v. Brickner, 11 F.3d 887, 891 (9th Cir. 1993) (Longshore & Harbor Workers' Compensation Act proceeding).

I. Jurisdiction

In Willy v. Coastal Corp., 503 U.S. 131 (1992), the Supreme Court decided that a federal court may impose Rule 11 sanctions notwithstanding that it is subsequently determined that the court lacked jurisdiction over the merits of a case. In Willy, the district court dismissed the plaintiff's case for failure to state a claim. Id. at 132-33. It also imposed Rule 11 sanctions on the plaintiff for conduct in the case that was unrelated to the jurisdiction issue. Id. On appeal, the Fifth Circuit found that the district court lacked subject matter jurisdiction, but it nevertheless upheld the decision to award sanctions. Id. at 133-34. The Supreme Court affirmed. Id. at 139.

Despite the magnitude of the changes worked by the 1993 amendment, nothing suggests that the amendment altered the holding in Willy. See Buster v. Greisen, 104 F.3d 1186, 1190 (9th Cir.), cert. denied, 522 U.S. 981 (1997). See also Perpetual Secs., Inc. v. Tang, 290 F.3d 132, 141 (2d Cir. 2002) (district court lacking subject matter jurisdiction over an action may still impose Rule 11 sanctions); Westlake N. Property Owners Ass'n v. City of Thousand Oaks, 915 F.2d 1301, 1303 (9th Cir. 1990); Wojan v. General Motors Corp., 851 F.2d 969, 972 (7th Cir. 1988); Orange Prod. Credit Ass'n v. Frontline Ventures, Ltd., 792 F.2d 797, 801 (9th Cir. 1986); Franco v. Maraldo, No. 99-3265"R"(1), 2000 U.S. Dist. LEXIS 3325, at *21 (E.D. La. Mar. 15, 2000) (asserting jurisdiction over Rule 11 motion after dismissing underlying claim for lack of subject matter jurisdiction); Kamkong Vongnaraj v. United States, No. Civ. 91-1462, 1992 U.S. Dist. LEXIS 4164, at *6-7 (D.D.C. Apr. 6, 1992) (sanctions imposed concurrently with dismissal of case for lack of subject matter jurisdiction); Mendez v. Plastofilm Indus., Inc., No. 91 C 8172, 1992 U.S. Dist. LEXIS 5704, at *7 (N.D. Ill. Apr. 14, 1992) (imposing sanctions on attorneys who improperly removed case to federal court and opposed remand). Courts accordingly have imposed sanctions for unfounded assertions of subject-matter jurisdiction, especially of diversity of citizenship, see Davis v. Veslan Enters., 765 F.2d 494, 497-501 (5th Cir. 1985); see also Fitzgerald v. Seaboard S.R., Inc., 760 F.2d 1249, 1251 (11th Cir. 1985); Harwood v. Gragg, No. 4:90-CV-72, 1991 U.S. Dist. LEXIS 1609, at *9-10 (W.D. Mich. Feb. 8, 1991) (court had jurisdiction to consider sanctions request after dismissal of case for lack of subject matter jurisdiction).

Federal courts also possess authority to award sanctions to a defendant over whom the court does not have personal jurisdiction, but who has been forced

to defend against a plaintiff's frivolous complaint claiming the existence of in personam jurisdiction. Mareno v. Rowe, 910 F.2d 1043, 1046-47 (2d Cir. 1990) (recognizing authority to sanction plaintiff for unfounded claim that court had jurisdiction over named defendant, but reversing sanctions where plaintiff's jurisdictional argument was not frivolous); Fox v. Boucher, 794 F.2d 34, 37-38 (2d Cir. 1986). In one of the few cases to address the issue, the court in VSA v. Von Weise Gear Co., 769 F. Supp. 1080, 1085-86 (E.D. Mo. 1991), rejected plaintiff's argument that a defendant, not otherwise subject to the court's jurisdiction, submitted itself to the court's jurisdiction by seeking Rule 11 sanctions after a dismissal.

Where a court does not have jurisdiction over a nonparty, it cannot impose sanctions against him. The Fifth Circuit reversed contempt sanctions imposed against a defendant corporation's in-house counsel for allegedly destroying documents, where he had never been served with process, was neither an attorney nor party in the case, was not a member of the district court's bar, and had no notice that sanctions might be imposed on him personally. McGuire v. Sigma Coatings, Inc., 48 F.3d 902, 907 (5th Cir. 1995). The court said that the fact that in-house counsel "had participated, to some extent, as a witness in the litigation, or had advised his employer about it" could not provide jurisdiction in the absence of proper notice. Id.

Cooter & Gell established that a district court retains jurisdiction over Rule 11 requests even after a voluntary dismissal. 496 U.S. at 395. See also Adams v. NVR Homes, Inc., 193 F.R.D. 257, 260 (D. Md. 2000) (asserting jurisdiction over sanctions motion but holding that it was not unreasonable for non-moving party to believe allegations in complaint were well grounded in fact). Applying this logic, courts have noted that the filing of a notice of appeal does not divest the district court of jurisdiction to consider a request for Rule 11 sanctions. The Eleventh Circuit explained that "Rule 11 motions raise issues that are collateral to the merits of an appeal, and as such may be filed even after the court no longer has jurisdiction over the substance of the case." Mahone v. Ray, 326 F.3d 1176, 2003 U.S. App. LEXIS 6344 (11th Cir. 2003) (holding that a district court erred by refusing to hear a Rule 11 motion during the pendency of appeal). See also Glucksberg v. Polan, 251 F. Supp. 2d 1294 (S.D. Va. 2003) (a district court retains jurisdiction to issue an order to show cause and to impose Rule 11 sanctions even during the pendency of appeal); Val-Land Farms, Inc. v. Third Nat'l Bank, 937 F.2d 1110, 1117 (6th Cir. 1991); In re Nasdaq Market-Makers

Antitrust Litig., 187 F.R.D. 124, 129 (S.D.N.Y. 1999). The Second Circuit has held that a district court had jurisdiction to impose sanctions after the Second Circuit had issued its mandate affirming the grant of judgment as a matter of law. Schlaifer Nance & Co. v. Estate of Warhol, 194 F.3d 323, 333 (2d. Cir. 1999). In another test of district court jurisdiction, the Eighth Circuit affirmed sanctions against a plaintiff who filed her complaint but never served the defendants. The court rejected plaintiff's argument that, because defendants had never been served, the district court lacked the power to award defendants a Rule 11 recovery of the costs spent dismissing the action. Bryant v. Brooklyn Barbecue Corp., 932 F.2d 697, 699 (8th Cir. 1991).

J. Impact of Rules Enabling Act

One commentator had challenged the 1983 rule's validity under the Rules Enabling Act, 28 U.S.C. § 2072. See Stephen B. Burbank, Sanctions in the Proposed Amendments to the Federal Rules of Civil Procedure: Some Questions About Power, 11 Hofstra L. Rev. 997 (1983). The Supreme Court has rejected this argument. Business Guides, Inc. v. Chromatic Communications Enters., Inc., 498 U.S. 533, 552-53 (1991); see also Sneed Shipbuilding v. Spanier Marine Corp., 125 F.R.D. 438, 442-43 (E.D. Tex. 1989) (Rule 11 valid under Rules Enabling Act because not inconsistent with Texas rule providing that, absent a verified denial, accounting matters are deemed admitted); cf. Port Drum Co. v. Umphrey, 852 F.2d 148, 150 (5th Cir. 1988) (Rule 11 confers no substantive rights, but would violate the Rules Enabling Act if it did so). The 1993 Advisory Committee Notes also observe that the provision preventing courts from imposing monetary sanctions on represented parties for frivolous legal arguments should further insulate Rule 11 from attack under the Rules Enabling Act.

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

Nelken, Melissa L., Sanctions Under Amended Federal Rule 11: Some 'Chilling' Problems in the Struggle Between Compensation and Punishment, 74 Geo. L.J. 1313 (1986) 121, 123

Phelps, Timothy B., Note, Rule 11 Sanctions: Toward Judicial Restraint, 26 Washburn L.J. 337 (1987) 123

Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence, reprinted in 137 F.R.D. 53 (1991)..... 4, 5, 145

Risinger, D. Michael, Honesty in Pleading and its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11, 61 Minn. L. Rev. 1 (1976) 3

Rothschild, Edwin A. et al., Rule 11: Stop, Think, and Investigate, 11 Litig., No. 2 (1985) 47

Schwarzer, William W., Sanctions Under the New Federal Rule 11 — A Closer Look, 104 F.R.D. 181 (1985)..... 75, 121, 122, 124

Solovy, Jerold S. et al., Sanctions in Federal Litigation §§ 8.01-8.03 (1991)..... 121, 171

Solovy, Jerold S. et al., Sanctions Under Rule 11: A Cross-Circuit Comparison, 37 Loy. L.A. L. Rev. 727 88

Story, J., Equity Pleadings § 47 (1838) 3

Tobias, Carl, Civil Rights Plaintiffs and the Proposed Revision of Rule 11, 77 Iowa L. Rev. 1775 (1992) 4, 31, 101

Tobias, Carl, Congress and the 1993 Civil Rules Proposals, 148 F.R.D. 383 (1993) 105

Tobias, Carl, Reconsidering Rule 11, 46 U. Miami L. Rev. 855 (1992) 4, 5, 55, 105

APPENDIX I:

RULE 11 AND THE ADVISORY COMMITTEE NOTES

which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk. ~~Papers may be filed by facsimile transmission if permitted by rules of the district court, provided that the rules~~ A court may, by local rule, permit papers to be filed by facsimile or other electronic means if such means are authorized by and consistent with standards established by the Judicial Conference of the United States. The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or any local rules or practices.

COMMITTEE NOTES

This is a technical amendment, using the broader language of Rule 25 of the Federal Rules of Appellate Procedure. The district court--and the bankruptcy court by virtue of a cross-reference in Bankruptcy Rule 7005--can, by local rule, permit filing not only by facsimile transmissions but also by other electronic means, subject to standards approved by the Judicial Conference.

Rule 11. Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions

(a) Signature. Every pleading, written motion, and other paper ~~of a party represented by~~

~~an attorney~~ shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. ~~whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address.~~ Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. ~~The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper~~

~~purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other~~ An unsigned paper ~~is not signed, it~~ shall be stricken unless ~~it is signed promptly after the~~ omission of the signature is corrected promptly after being called to the attention of the ~~pleader or movant~~ attorney or party.

(b) Representations to Court. ~~If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.~~ By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,--

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

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

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

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

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

parties that have violated subdivision (b) or are responsible for the violation.

(1) How Initiated.

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

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

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

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

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

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

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

COMMITTEE NOTES

Purpose of revision. This revision is intended to remedy problems that have arisen in the interpretation and application of the 1983 revision of the rule. For empirical examination of experience under the 1983 rule, see, e.g., New York State Bar Committee on Federal Courts, Sanctions and Attorneys' Fees (1987); T. Willging, The Rule 11 Sanctioning Process (1989); American Judicature Society, Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11 (S. Burbank ed., 1989); E. Wiggins, T. Willging, and D. Stienstra, Report on Rule 11 (Federal Judicial Center 1991). For book-length analyses of the case law, see G. Joseph, Sanctions: The Federal Law of Litigation Abuse (1989); J. Solovy, The Federal Law of Sanctions (1991); G. Vairo, Rule 11 Sanctions: Case

Law Perspectives and Preventive Measures (1991).

The rule retains the principle that attorneys and pro se litigants have an obligation to the court to refrain from conduct that frustrates the aims of Rule 1. The revision broadens the scope of this obligation, but places greater constraints on the imposition of sanctions and should reduce the number of motions for sanctions presented to the court. New subdivision (d) removes from the ambit of this rule all discovery requests, responses, objections, and motions subject to the provisions of Rule 26 through 37.

Subdivision (a). Retained in this subdivision are the provisions requiring signatures on pleadings, written motions, and other papers. Unsigned papers are to be received by the Clerk, but then are to be stricken if the omission of the signature is not corrected promptly after being called to the attention of the attorney or pro se litigant. Correction can be made by signing the paper on file or by submitting a duplicate that contains the signature. A court may require by local rule that papers contain additional identifying information regarding the parties or attorneys, such as telephone numbers to facilitate facsimile transmissions, though, as for omission of a signature, the paper should not be rejected for failure to provide such information.

The sentence in the former rule relating to the effect of answers under oath is no longer needed and has been eliminated. The provision in the former rule that signing a paper constitutes a certificate that it has been read by the signer also has been eliminated as unnecessary. The obligations imposed under subdivision (b) obviously require that a pleading, written motion, or other paper be read before it is filed or submitted to the court.

Subdivisions (b) and (c). These subdivisions restate the provisions requiring attorneys and pro se litigants to conduct a reasonable inquiry into the law and facts before signing pleadings, written motions, and other documents, and prescribing sanctions for violation of these obligations. The revision in part expands the responsibilities of litigants to the court, while providing greater constraints and flexibility in dealing with infractions of the rule. The rule continues to require litigants to "stop-and-

think" before initially making legal or factual contentions. It also, however, emphasizes the duty of candor by subjecting litigants to potential sanctions for insisting upon a position after it is no longer tenable and by generally providing protection against sanctions if they withdraw or correct contentions after a potential violation is called to their attention.

The rule applies only to assertions contained in papers filed with or submitted to the court. It does not cover matters arising for the first time during oral presentations to the court, when counsel may make statements that would not have been made if there had been more time for study and reflection. However, a litigant's obligations with respect to the contents of these papers are not measured solely as of the time they are filed with or submitted to the court, but include reaffirming to the court and advocating positions contained in those pleadings and motions after learning that they cease to have any merit. For example, an attorney who during a pretrial conference insists on a claim or defense should be viewed as "presenting to the court" that contention and would be subject to the obligations of subdivision (b) measured as of that time. Similarly, if after a notice of removal is filed, a party urges in federal court the allegations of a pleading filed in state court (whether as claims, defenses, or in disputes regarding removal or remand), it would be viewed as "presenting"--and hence certifying to the district court under Rule 11--those allegations.

The certification with respect to allegations and other factual contentions is revised in recognition that sometimes a litigant may have good reason to believe that a fact is true or false but may need discovery, formal or informal, from opposing parties or third persons to gather and confirm the evidentiary basis for the allegation. Tolerance of factual contentions in initial pleadings by plaintiffs or defendants when specifically identified as made on information and belief does not relieve litigants from the obligation to conduct an appropriate investigation into the facts that is reasonable under the circumstances; it is not a license to join parties, make claims, or present defenses without any factual basis or justification. Moreover, if evidentiary support is not obtained after a reasonable opportunity for further investigation or discovery, the party has

a duty under the rule not to persist with that contention. Subdivision (b) does not require a formal amendment to pleadings for which evidentiary support is not obtained, but rather calls upon a litigant not thereafter to advocate such claims or defenses.

The certification is that there is (or likely will be) "evidentiary support" for the allegation, not that the party will prevail with respect to its contention regarding the fact. That 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. On the other hand, if a party has evidence with respect to a contention that would suffice to defeat a motion for summary judgment based thereon, it would have sufficient "evidentiary support" for purposes of Rule 11.

Denials of factual contentions involve somewhat different considerations. Often, of course, a denial is premised upon the existence of evidence contradicting the alleged fact. At other times a denial is permissible because, after an appropriate investigation, a party has no information concerning the matter or, indeed, has a reasonable basis for doubting the credibility of the only evidence relevant to the matter. A party should not deny an allegation it knows to be true; but it is not required, simply because it lacks contradictory evidence, to admit an allegation that it believes is not true.

The changes in subdivisions (b)(3) and (b)(4) will serve to equalize the burden of the rule upon plaintiffs and defendants, who under Rule 8(b) are in effect allowed to deny allegations by stating that from their initial investigation they lack sufficient information to form a belief as to the truth of the allegation. If, after further investigation or discovery, a denial is no longer warranted, the defendant should not continue to insist on that denial. While sometimes helpful, formal amendment of the pleadings to withdraw an allegation or denial is not required by subdivision (b).

Arguments for extensions, modifications, or reversals of existing law or for creation of new law do not violate subdivision (b)(2) provided they are "nonfrivolous." This establishes an objective standard, intended to eliminate any "empty-head pure-

heart" justification for patently frivolous arguments. However, the extent to which a litigant has researched the issues and found some support for its theories even in minority opinions, in law review articles, or through consultation with other attorneys should certainly be taken into account in determining whether paragraph (2) has been violated. Although arguments for a change of law are not required to be specifically so identified, a contention that is so identified should be viewed with greater tolerance under the rule.

The court has available a variety of possible sanctions to impose for violations, such as striking the offending paper; issuing an admonition, reprimand, or censure; requiring participation in seminars or other educational programs; ordering a fine payable to the court; referring the matter to disciplinary authorities (or, in the case of government attorneys, to the Attorney General, Inspector General, or agency head), etc. See Manual for Complex Litigation, Second, § 42.3. The rule does not attempt to enumerate the factors a court should consider in deciding whether to impose a sanction or what sanctions would be appropriate in the circumstances; but, for emphasis, it does specifically note that a sanction may be nonmonetary as well as monetary. Whether the improper conduct was willful, or negligent; whether it was part of a pattern of activity, or an isolated event; whether it infected the entire pleading, or only one particular count or defense; whether the person has engaged in similar conduct in other litigation; whether it was intended to injure; what effect it had on the litigation process in time or expense; whether the responsible person is trained in the law; what amount, given the financial resources of the responsible person, is needed to deter that person from repetition in the same case; what amount is needed to deter similar activity by other litigants: all of these may in a particular case be proper considerations. The court has significant discretion in determining what sanctions, if any, should be imposed for a violation, subject to the principle that the sanctions should not be more severe than reasonably necessary to deter repetition of the conduct by the offending person or comparable conduct by similarly situated persons.

Since the purpose of Rule 11 sanctions is to deter rather than to compensate, the rule provides that, if

a monetary sanction is imposed, it should ordinarily be paid into court as a penalty. However, under unusual circumstances, particularly for (b)(1) violations, deterrence may be ineffective unless the sanction not only requires the person violating the rule to make a monetary payment, but also directs that some or all of this payment be made to those injured by the violation. Accordingly, the rule authorizes the court, if requested in a motion and if so warranted, to award attorney's fees to another party. Any such award to another party, however, should not exceed the expenses and attorneys' fees for the services directly and unavoidably caused by the violation of the certification requirement. If, for example, a wholly unsupportable count were included in a multi-count complaint or counterclaim for the purpose of needlessly increasing the cost of litigation to an impecunious adversary, any award of expenses should be limited to those directly caused by inclusion of the improper count, and not those resulting from the filing of the complaint or answer itself. The award should not provide compensation for services that could have been avoided by an earlier disclosure of evidence or an earlier challenge to the groundless claims or defenses. Moreover, partial reimbursement of fees may constitute a sufficient deterrent with respect to violations by persons having modest financial resources. In cases brought under statutes providing for fees to be awarded to prevailing parties, the court should not employ cost-shifting under this rule in a manner that would be inconsistent with the standards that govern the statutory award of fees, such as stated in Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978).

The sanction should be imposed on the persons--whether attorneys, law firms, or parties--who have violated the rule or who may be determined to be responsible for the violation. The person signing, filing, submitting, or advocating a document has a nondelegable responsibility to the court, and in most situations is the person to be sanctioned for a violation. Absent exceptional circumstances, a law firm is to be held also responsible when, as a result of a motion under subdivision (c)(1)(A), one of its partners, associates, or employees is determined to have violated the rule. Since such a motion may be filed only if the offending paper is not withdrawn or corrected within 21 days after service of the motion,

it is appropriate that the law firm ordinarily be viewed as jointly responsible under established principles of agency. This provision is designed to remove the restrictions of the former rule. Cf. Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120 (1989) (1983 version of Rule 11 does not permit sanctions against law firm of attorney signing groundless complaint).

The revision permits the court to consider whether other attorneys in the firm, co-counsel, other law firms, or the party itself should be held accountable for their part in causing a violation. When appropriate, the court can make an additional inquiry in order to determine whether the sanction should be imposed on such persons, firms, or parties either in addition to or, in unusual circumstances, instead of the person actually making the presentation to the court. For example, such an inquiry may be appropriate in cases involving governmental agencies or other institutional parties that frequently impose substantial restrictions on the discretion of individual attorneys employed by it.

Sanctions that involve monetary awards (such as a fine or an award of attorney's fees) may not be imposed on a represented party for causing a violation of subdivision (b)(2), involving frivolous contentions of law. Monetary responsibility for such violations is more properly placed solely on the party's attorneys. With this limitation, the rule should not be subject to attack under the Rules Enabling Act. See Willy v. Coastal Corp., ___ U.S. ___ (1992); Business Guides, Inc. v. Chromatic Communications Enter. Inc., ___ U.S. ___ (1991). This restriction does not limit the court's power to impose sanctions or remedial orders that may have collateral financial consequences upon a party, such as dismissal of a claim, preclusion of a defense, or preparation of amended pleadings.

Explicit provision is made for litigants to be provided notice of the alleged violation and an opportunity to respond before sanctions are imposed. Whether the matter should be decided solely on the basis of written submissions or should be scheduled for oral argument (or, indeed, for evidentiary presentation) will depend on the circumstances. If the court imposes a sanction, it must, unless waived, indicate its reasons in a written order or on the

record; the court should not ordinarily have to explain its denial of a motion for sanctions. Whether a violation has occurred and what sanctions, if any, to impose for a violation are matters committed to the discretion of the trial court; accordingly, as under current law, the standard for appellate review of these decisions will be for abuse of discretion. See Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990) (noting, however, that an abuse would be established if the court based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence).

The revision leaves for resolution on a case-by-case basis, considering the particular circumstances involved, the question as to when a motion for violation of Rule 11 should be served and when, if filed, it should be decided. Ordinarily the motion should be served promptly after the inappropriate paper is filed, and, if delayed too long, may be viewed as untimely. In other circumstances, it should not be served until the other party has had a reasonable opportunity for discovery. Given the "safe harbor" provisions discussed below, a party cannot delay serving its Rule 11 motion until conclusion of the case (or judicial rejection of the offending contention).

Rule 11 motions should not be made or threatened for minor, inconsequential violations of the standards prescribed by subdivision (b). They should not be employed as a discovery device or to test the legal sufficiency or efficacy of allegations in the pleadings; other motions are available for those purposes. Nor should Rule 11 motions be prepared to emphasize the merits of a party's position, to exact an unjust settlement, to intimidate an adversary into withdrawing contentions that are fairly debatable, to increase the costs of litigation, to create a conflict of interest between attorney and client, or to seek disclosure of matters otherwise protected by the attorney-client privilege or the work-product doctrine. As under the prior rule, the court may defer its ruling (or its decision as to the identity of the persons to be sanctioned) until final resolution of the case in order to avoid immediate conflicts of interest and to reduce the disruption created if a disclosure of attorney-client communications is needed to determine whether a violation occurred or to identify the person

responsible for the violation.

The rule provides that requests for sanctions must be made as a separate motion, i.e., not simply included as an additional prayer for relief contained in another motion. The motion for sanctions is not, however, to be filed until at least 21 days (or such other period as the court may set) after being served. If, during this period, the alleged violation is corrected, as by withdrawing (whether formally or informally) some allegation or contention, the motion should not be filed with the court. These provisions are intended to provide a type of "safe harbor" against motions under Rule 11 in that a party will not be subject to sanctions on the basis of another party's motion unless, after receiving the motion, it refuses to withdraw that position or to acknowledge candidly that it does not currently have evidence to support a specified allegation. Under the former rule, parties were sometimes reluctant to abandon a questionable contention lest that be viewed as evidence of a violation of Rule 11; under the revision, the timely withdrawal of a contention will protect a party against a motion for sanctions.

To stress the seriousness of a motion for sanctions and to define precisely the conduct claimed to violate the rule, the revision provides that the "safe harbor" period begins to run only upon service of the motion. In most cases, however, counsel should be expected to give informal notice to the other party, whether in person or by a telephone call or letter, of a potential violation before proceeding to prepare and serve a Rule 11 motion.

As under former Rule 11, the filing of a motion for sanctions is itself subject to the requirements of the rule and can lead to sanctions. However, service of a cross motion under Rule 11 should rarely be needed since under the revision the court may award to the person who prevails on a motion under Rule 11--whether the movant or the target of the motion--reasonable expenses, including attorney's fees, incurred in presenting or opposing the motion.

The power of the court to act on its own initiative is retained, but with the condition that this be done through a show cause order. This procedure provides the person with notice and an opportunity to respond. The revision provides that a monetary sanction imposed

after a court-initiated show cause order be limited to a penalty payable to the court and that it be imposed only if the show cause order is issued before any voluntary dismissal or an agreement of the parties to settle the claims made by or against the litigant. Parties settling a case should not be subsequently faced with an unexpected order from the court leading to monetary sanctions that might have affected their willingness to settle or voluntarily dismiss a case. Since show cause orders will ordinarily be issued only in situations that are akin to a contempt of court, the rule does not provide a "safe harbor" to a litigant for withdrawing a claim, defense, etc., after a show cause order has been issued on the court's own initiative. Such corrective action, however, should be taken into account in deciding what--if any--sanction to impose if, after consideration of the litigant's response, the court concludes that a violation has occurred.

Subdivision (d). Rules 26(g) and 37 establish certification standards and sanctions that apply to discovery disclosures, requests, responses, objections, and motions. It is appropriate that Rules 26 through 37, which are specially designed for the discovery process, govern such documents and conduct rather than the more general provisions of Rule 11. Subdivision (d) has been added to accomplish this result.

Rule 11 is not the exclusive source for control of improper presentations of claims, defenses, or contentions. It does not supplant statutes permitting awards of attorney's fees to prevailing parties or alter the principles governing such awards. It does not inhibit the court in punishing for contempt, in exercising its inherent powers, or in imposing sanctions, awarding expenses, or directing remedial action authorized under other rules or under 28 U.S.C. § 1927. See Chambers v. NASCO, ___ U.S. ___ (1991). Chambers cautions, however, against reliance upon inherent powers if appropriate sanctions can be imposed under provisions such as Rule 11, and the procedures specified in Rule 11--notice, opportunity to respond, and findings--should ordinarily be employed when imposing a sanction under the court's inherent powers. Finally, it should be noted that Rule 11 does not preclude a party from initiating an independent action for malicious prosecution or abuse of process.

APPENDIX II:

1991 BENCH-BAR PROPOSAL FOR AMENDING RULE 11

BENCH-BAR PROPOSAL TO REVISE CIVIL PROCEDURE RULE 11

Submitted by:

Judge A. Leon Higginbotham, Jr., Third Circuit Court of Appeals
Judge Patrick Higginbotham, Fifth Circuit Court of Appeals
Judge Mary M. Schroeder, Ninth Circuit Court of Appeals
Professor George C. Cochran, University, Mississippi
Francis Fox, Esq., Boston, Massachusetts
John P. Frank, Esq., Phoenix, Arizona
Hugh Jones, Esq., Syracuse, New York
Laura Kaster, Esq., Chicago, Illinois
Jerold S. Solovy, Esq., Chicago, Illinois
Bill Wagner, Esq., Tampa, Florida

The views expressed are those of the authors and do not necessarily reflect the views of the publisher.

BENCH-BAR PROPOSAL TO REVISE CIVIL PROCEDURE RULE 11

* * * * * * *

Any correspondence occasioned by this proposal can be directed to:

John P. Frank, Esq.
Lewis and Roca
40 North Central Avenue
Phoenix, Arizona 85004-4429

Table of Contents

BENCH-BAR PROPOSAL TO REVISE CIVIL PROCEDURE RULE 11

The following statement is the submission to the Standing Committee on Procedure of the Judicial Conference of the United States by those whose names are appended.

* * * * * * * *

The proposed revisions to Rule 11 as proposed by the Advisory Committee on Civil Rules make a very bad matter much worse than it was before. While some of us would repeal the Rule, all think it can be improved and this is an effort to do so.

1. The proposal now made is that we can have a sanctions controversy over every claim, every defense, every request, every demand, every objection, every contention and every argument. The change requires that we must certify whether we are seeking to extend, to modify or to reverse existing law or whether we are seeking to establish new law. This multiplies the points of agitation infinitely. The proposed Rule in this report would reverse Golden Eagle, 801 F.2d 1531 (9th Cir. 1986), repeatedly, and almost unanimously followed, and cited more than 150 times.

2. The proposal, as amplified in the note, that if a person has pleaded a denial of some allegation and that if after discovery it appears that that denial is no longer warranted the party must replead or face sanctions, turns a law suit not into a prospective search for the truth but into a retroactive exercise in perfecting pleadings. A more extreme device to undo notice pleading would be hard to imagine.

3. The business of (a) endless amplification of the grounds for sanctions; and (b) endless correspondence of the "you did it" and "no I didn't" variety adds enormously to the cost of litigation. These letters and answers must be responsible. Each one of them is good for five-tenths of an hour minimum; some will be more. From the cost end, we should not turn the legal system into a correspondence school. From the standpoint of one of the unhappiest aspects of Rule 11, the decrease of civility within the profession, the proposal accentuates the deterioration of professional relations. The adverse effect of Rule 11 on lawyer relations is expressly confirmed by the recent Seventh Circuit study on civility.

We are drowning in Rule 11 satellite litigation now. Once we start litigating whether par. 3 of the complaint should have been amended because of the answer of X at p. 1352, l. 6, of the deposition, or whether part IV B of the motion for summary judgment was to change or extend existing law, we will never find court time to try a case.

The proposed Rule should not be accepted. We tender the attached proposal from the named judges and lawyers.

The three sponsoring judges are Judge A. Leon Higginbotham, Jr. of the Third Circuit Court of Appeals, Judge Patrick Higginbotham of the Fifth Circuit Court of Appeals, and Judge Mary Schroeder of the Ninth Circuit Court of Appeals. Hugh R. Jones of Syracuse, formerly of the New York Court of Appeals and now in private practice, headed the New York State Bar Committee study of the sanctions problem. The other attorneys are Mr. Jerold S. Solovy and Ms. Laura Kaster of Chicago, active particularly in this connection with the

Litigation Section of the American Bar Association; Mr. Bill Wagner of Tampa, Florida, 1988-89 President of the American Trial Lawyers Association; Professor George C. Cochran, head of the Rule 11 project sponsored by the Center for Constitutional Rights; Mr. Francis Fox of Boston, Chairman of the Committee on the Federal Rules of Civil Procedure of the American College of Trial Lawyers; and Mr. John P. Frank of Phoenix, Arizona, from 1960 to 1970 a member of the Advisory Committee.

BENCH-BAR PROPOSED CIVIL PROCEDURE RULE 11

Rule 11. Signing of Pleadings, Motions, and Other Papers; Sanctions.

(1) Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign similarly and give the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the non-signer.

(2) The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief, formed after reasonable inquiry, the paper taken as a whole is well grounded in fact and law, including non-frivolous arguments for possible change of law, and that it is not interposed for any improper purpose such as harassment, delay, or needless increase in the cost of litigation.

(3) If a court upon motion or on its own initiative concludes that a pleading, motion or other paper was signed in violation of this rule it may order as a sanction that the person who signed the paper or that person's firm, a represented party, or both, shall pay an appropriate sum into the registry account of the clerk of the district court. The sanction shall be limited to what is sufficient to deter comparable conduct by persons similarly situated. The

represented party shall be liable only if the court concludes that the paper was filed to cause harassment, delay or needless cost increase.

(4) No sanction shall issue until the attorney or party who may be sanctioned has been given notice based upon a precisely stated alleged violation of the rule and has had the opportunity to be heard either orally or in writing. Any sanctions shall be based on written findings of fact and conclusions of law, which shall consider the duty violated; the actual injury caused; and the existence of aggravating or mitigating circumstances.

COMMENT ON BENCH-BAR PROPOSED CIVIL PROCEDURE RULE 11

Rule 11 is one of several devices in the procedural system for controlling abusive conduct by lawyers. As the Supreme Court has recently told us, there is inherent power to deal with gross out-of-court abusive conduct, Chambers v. Nasco, Inc., 59 L.W. (June 6, 1991). Rule 37 deals with discovery abuse, 28 U.S.C. § 1927 with unreasonable and vexatious litigation, and Rule 16 provides speedy means to rid cases of frivolous positions. Rule 11 is confined to filed writings.

In short, Rule 11 has a particular and precise niche to fill. Large segments of the bar have felt that despite the usefulness of the Rule 11 concept, severe abuses have crept into its application. To name major concerns, there has been too much costly satellite litigation over the application of the rule; if the cost (time and dollars) of the court system is the patient, Rule 11 as an operation is a success but the patient is dying. "Rule 11 has caused unnecessary satellite litigation . . . a legitimate question is whether the federal courts need Rule 11 at all," Sanctions, Rule 11 and Other Powers, Sec. Litig., ABA, 2d ed. 1988.

By scrutinizing the minor details of cases for possible sanctions instead of focussing on big picture abuse, the practical operation has created a Rule 11 industry instead of an occasional needed corrective. A Shepard's Rule 11 service, reporting 1000 reported Rule 11 cases, has recently come on the market. The rule has "assumed a life of its own -- spawned a body of substantive law and itself become a means of abuse," J. Coe, Rule 11 Now, 17 Litigation 10 (1991). The lack of clear procedures permits occasional uninformed arrogance.

The premium put on charge and counter-charge takes the focus off trying a case and puts it on trying the lawyers. The result is a depressing increase in the incivility of the bar, a major problem; for illustrations, see the recent Seventh Circuit study noted in the July, 1991 ABAJ, 22.

This Rule 11 proposal seeks to keep its virtues and eliminate the vices. The proposal draws generally on many sources but particularly the article by George Cochran, Rule 11: The Road to Amendment, 2 Attorney Sanctions 138 (Shepard's, June, 1991), forthcoming in 61 Miss. L.J.; and J. Solovy, L. Kaster, and N. Hirsch, "Sanctions and Federal Litigation" (1990). The draft is paragraphed so that the comment following can relate directly to the precise points of the Advisory Committee's proposed rule.

(a) This paragraph is essentially what is in the existing rule, slightly condensed.

(b) A comprehensive survey of Rule 11 and related problems of frivolous pleadings is the 1990 study of the New York State Bar Association special committee, endorsed by the House of Delegates of the New York State Bar Association on April 7, 1990; the resulting proposed rule is directed at "abusive conduct." That concept, though not the words, is a source of this draft. The proposed rule conforms to the definition and criteria of a leading Rule 11 case, Zaldivar v. City of Los Angeles, 780 F.2d 823 (9th Cir. 1986).

This section keeps the essence of the existing language with an important clarification: For sanction purposes, the paper is to be evaluated as a whole; see Golden Eagle Distrib. Co. v. Burroughs, 801 F.2d 1531, 1540 (9th Cir. 1986). The goal is to escape the practice of analyzing this word or that, this line

or that, this subsection or that. If the paper as a whole reflects reasonable inquiry and reasonable presentation of law or a non-frivolous proposal for change of law, it will meet the requirement; litigation which takes the form of parsing of fragments of the composition is intended to be eliminated. Sanctions for proposed changes of law are limited to proposals which are frivolous. This is taken from the recommendation of the Advisory Committee on Civil Procedure, par. (b)(2). On what is "frivolous," see quotations from Judge Frank Easterbrook, Rotunda, The Litigator's Responsibility, March, 1989, Trial, 98, 100, and Zaldivar v. City of Los Angeles, 780 F.2d 823, 830-31 (9th Cir. 1986). The fact that a Federal Judicial Center study shows judges almost evenly divided as to whether a given complaint is frivolous is evidence of a need to reduce such decisions; see J. M. Kassin, An Empirical Study of Rule 11 Sanctions, 26 (Fed. Jud. Center, 1985); and for more recent illustration of these problems, see M. Stein, Rule 11 in the Real World, 132 F.R.D. 309 (1990).

(c) This unit changes the sanction from mandatory to permissive, giving discretion to the court. This concept is taken directly from the proposal of the American College of Trial Lawyers, as is the provision that any amounts levied as sanctions shall be shall be paid to the court. For a thoroughly documented study leading to the conclusion that changing the focus of the rule from fee shifting to deterrence would decrease satellite litigation, see G. Vairo, Rule 11, A Critical Analysis, 118 F.R.D. 189, 233 (1988). A major purpose of this change is to reduce the elements of lawyers fighting with each other for personal gain.

The procedural requirements are also, in slightly condensed form, taken from the American College proposal. A primary scholar on the rule has stressed that permissive language would bring Rule 11 into accord with the well established sanctions standards of Rule 37, M. Nelken, Sanctions Under Rule 11, 74 Geo. L.J. 1313, 1353 (1986). The provision permitting sanction of the firm rather than the individual will give the court discretion, particularly where young attorneys are in fact directed by others, to consider where responsibility lies.

Since Cooter & Gell v. Hartmarx Corp., 110 S. Ct. 2447 (1990), decided that appellate review is limited to abuse of discretion, it is particularly important that there be clear notice, some opportunity for at least simple hearing, and some explicitness for the ground of the sanction.

The limitation on sanctions on the represented party is taken from the recommendation of the Advisory Committee on Civil Procedure, par. (c). The limitation on sanctions to deterrence is suggested by that same paragraph. This accords with the cases proposing the least severe sanctions to serve the purposes of the rule, Thomas v. Capital Sec. Serv. Inc., 836 F.2d 866, 878 (5th Cir. 1988); and see Cabell v. Petty, 810 F.2d 463, 466 (4th Cir. 1987); Doering v. Union County Board, 857 F.2d 191, 194 (3d Cir. 1988).

RULE 11 AS PROPOSED BY THE ADVISORY COMMITTEE ON CIVIL PROCEDURE

Rule 11. Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions

(a) **Signature.** Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. It shall state such person's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) **Representations to Court.** By presenting or maintaining a claim, defense, request, demand, objection, contention, or argument in a pleading, written motion, or other paper filed with or submitted to the court, an attorney or unrepresented party is certifying, until it is withdrawn, 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 or maintained for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) it is warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; and

(3) any allegations or denials of facts have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

(c) **Sanctions.** Subject to the conditions stated below, the court shall impose an appropriate sanction upon the attorneys, law firms, or parties determined, after notice and a reasonable opportunity to respond, to be responsible for a violation of subdivision (b).

(1) **How Initiated.**

(A) **By Motion.** A motion for sanctions under this rule shall be served separately from other motions or requests, and shall describe the specific conduct alleged to violate subdivision (b). It shall not be filed with, or presented to, the court unless the challenged claim, defense, request, demand, objection, contention, or argument is not withdrawn or corrected within 21 days (or such other time as the court may prescribe) after service of the motion. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion.

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

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

(A) Monetary sanctions may not be awarded, either on motion or on the court's initiative, against a represented party unless it is determined to be responsible for a violation of subdivision (b)(1).

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

(3) **Order.** If requested, the court, when imposing sanctions, shall recite the conduct or circumstances determined to constitute a violation of this rule and explain the basis for the sanction imposed.

APPENDIX III:

PRIVATE SECURITIES LITIGATION REFORM ACT OF 1995 AND CONFERENCE COMMITTEE REPORT — PROVISIONS RELEVANT TO RULE 11

PRIVATE SECURITIES LITIGATION REFORM ACT OF 1995
& CONFERENCE REPORT

(Provisions affecting Rule 11)

A. Private Securities Litigaton Reform Act of 1995 – selected provisions:

(c) SANCTIONS FOR ABUSIVE LITIGATION.—

(1) MANDATORY REVIEW BY COURT.— In any private action arising under this title, upon final adjudication of the action, the court shall include in the record specific findings regarding compliance by each party and each attorney representing any party with each requirement of Rule 11(b) of the Federal Rules of Civil Procedure as to any complaint, responsive pleading, or dispositive motion.

(2) MANDATORY SANCTIONS.— If the court makes a finding under paragraph (1) that a party or attorney violated any requirement of Rule 11(b) of the Federal Rules of Civil Procedure as to any complaint, responsive pleading, or dispositive motion, the court shall impose sanctions on such party or attorney in accordance with Rule 11 of the Federal Rules of Civil Procedure. Prior to making a finding that any party or attorney has violated Rule 11 of the Federal Rules of Civil Procedure, the court shall give such party or attorney notice and an opportunity to respond.

(3) PRESUMPTION IN FAVOR OF ATTORNEYS' FEES AND COSTS.—

(A) IN GENERAL.— Subject to subparagraphs (B) and (C), for purposes of paragraph (2), the court shall adopt a presumption that the appropriate sanction —

(i) for failure of any responsive pleading or dispositive motion to comply with any requirement of Rule 11(b) of the Federal Rules of Civil Procedure is an award to the opposing party of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation; and

(ii) for substantial failure of any complaint to comply with any requirement of Rule 11(b) of the Federal Rules of Civil Procedure is an award to the opposing party of the reasonable attorneys' fees and other expenses incurred in the action.

(B) REBUTTAL EVIDENCE.— The presumption described in subparagraph (A) may be rebutted only upon proof by the party or attorney against whom sanctions are to be imposed that —

(i) the award of attorneys' fees and other expenses will impose an unreasonable burden on that party or attorney and would be unjust, and the failure to make such an award would not impose a greater burden on the party in whose favor sanctions are to be imposed; or

(ii) the violation of Rule 11(b) of the Federal Rules of Civil Procedure was de minimis.

(C) SANCTIONS.— If the party or attorney against whom sanctions are to be imposed meets its burden under subparagraph (B), the court shall award the sanctions that the court deems appropriate pursuant to Rule 11 of the Federal Rules of Civil Procedure.

15 U.S.C. §§ 77z-1(c) and 78u-4(c).

B. Conference Report -- selected provisions:

Attorneys' fees awarded to prevailing parties in abusive litigation

The Conference Committee recognizes the need to reduce significantly the filing of meritless securities lawsuits without hindering the ability of victims of fraud to pursue legitimate claims. The Conference Committee seeks to solve this problem by strengthening the application of Rule 11 of the Federal Rules of Civil Procedure in private securities actions.

Existing Rule 11 has not deterred abusive securities litigation. Courts often fail to impose Rule 11 sanctions even where such sanctions are warranted. When sanctions are awarded, they are generally insufficient to make whole the victim of a Rule 11 violation: the amount of the sanction is limited to an amount that the court deems sufficient to deter repetition of the sanctioned conduct, rather than imposing a sanction that equals the costs imposed on the victim by the violation. Finally, courts have been unable to apply Rule 11 to the complaint in such a way that the victim of the ensuing lawsuit is compensated for all attorneys' fees and costs incurred in the entire action.

The legislation gives teeth to Rule 11 in new section 27(c) of the 1933 Act and new section 21D(c) of the 1934 Act by requiring the court to include in the record specific findings, at the conclusion of the action, as to whether all parties and all attorneys have complied with each requirement of Rule 11(b) of the Federal Rules of Civil Procedure.

These provisions also establish the presumption that the appropriate sanction for filing a complaint that violates Rule 11(b) is an award to the prevailing party of all attorney's fees and costs incurred in the entire action. The Conference Report provides that, if the action is brought for an improper purpose, is unwarranted by existing law or legally frivolous, is not supported by facts, or otherwise fails to satisfy the requirements set forth in Rule 11(b), the prevailing party presumptively will be awarded its attorneys' fees and costs for the entire action. This provision does not mean that a party who is sanctioned for only a partial failure of the complaint under Rule 11, such as one count out of a 20-count complaint, must pay for all of the attorney's fees and costs associated with the action. The Conference Committee expects that courts will

grant relief from the presumption where a *de minimis* violation of the Rule has occurred. Accordingly, the Conference Committee specifies that the failure of the complaint must be "substantial" and makes the presumption rebuttable.

For Rule 11(b) violations involving responsive pleadings or dispositive motions, the rebuttable presumption is an award of attorneys' fees and costs incurred by the victim of the violation as a result of that particular pleading or motion.

A party may rebut the presumption of sanctions by providing that: (i) the violation was de minimis; or (ii) the imposition of fees and costs would impose an undue burden and be unjust, and it would not impose a greater burden for the prevailing party to have to pay those same fees and costs. The premise of this test is that, when an abusive or frivolous action is maintained, it is manifestly unjust for the victim of the violation to bear substantial attorneys' fees. The Conference Committee recognizes that little in the way of justice can be achieved by attempting to compensate the prevailing party for lost time and such other measures of damages as injury to reputation; hence it has written into law the presumption that a prevailing party should not have the cost of attorney's fees added as insult to the underlying injury. If a party successfully rebuts the presumption, the court then impose sanctions consistent with Rule 11(c)(2). The Conference Committee intends this provision to impose upon courts the affirmative duty to scrutinize filings closely and to sanction attorneys or parties whenever their conduct violates Rule 11(b).

Limitation on attorney's conflict of interest

The Conference Committee believes that, in the context of class action lawsuits, it is a conflict of interest for a class action lawyer to benefit from the outcome of the case where the lawyer owns stock in the company being sued. Accordingly, new section 27(a)(8) of the 1933 Act and new section 21D(a)(9) requires the court to determine whether a lawyer who owns securities in the defendant company and who seeks to represent the plaintiff class in a securities class action should be disqualified from representing the class.

Bonding for payment of fees and expenses

The house hearings on securities litigation reform revealed the need for explicit authority for courts to require undertakings for attorney's fees and costs from parties, or their counsel, or both, in order to ensure the viability of potential sanctions as a deterrent to meritless litigation. Congress long ago authorized similar undertakings in the express private right of action in Section 11 of the 1933 Act and in Sections 9 and 18 of the 1934 Act. The availability of such undertakings in private securities actions will be an important means of ensuring that the provision of the Conference Report authorizing the award of attorneys' fees and costs under Rule 11 will not become, in practice, a one-way mechanism only usable to sanction parties with deep pockets.

The legislation expressly provides that such undertakings may be required of parties' attorneys in lieu of, or in addition to, the parties themselves. In this regard, the Conference Committee intends to preempt any contrary state bar restrictions that much inhibit attorneys' provision of such undertakings in behalf of their clients. The Conference Committee anticipates, for example, that where a judge determines to require an undertaking in a class action, such an

undertaking would ordinarily be imposed on plaintiffs' counsel rather than upon the plaintiff class, both because the financial resources of counsel would ordinarily be more extensive than those of an individual class member and because counsel are better situated than class members to evaluate the merits of cases and individual motions. This provision is intended to effectuate the remedial purposes of the bill's Rule 11 provision.

(Footnotes omitted.)