The Rule 11 Sanctioning Process

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The Rule 11 Sanctioning Process

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HIGHLIGHTS AND SUMMARY

Highlights

This report provides qualitative and quantitative information about issues involving application of amended rule 11 of the Federal Rules of Civil Procedure by federal courts. Those issues include the following:

- Do experienced attorneys and judges generally find the rule to be beneficial?
- Do the procedures used to implement the rule satisfy due process without creating unnecessary satellite litigation?
- Have the sanctions imposed under the rule had a chilling effect on creative advocacy?
- Has the rule, as interpreted, made progress toward achieving its primary purpose of deterring the filing of frivolous cases?

The highlights of the report are as follows:

1. Rule 11 has widespread support among the bench and bar, even among lawyers who have been sanctioned, but that support is qualified by substantial concerns.

2. Case law and field research reveal two goals of sanctions: deterrence and compensation. Satellite litigation occurs primarily in cases involving large compensatory sanctions awards; modest monetary sanctions and nonmonetary sanctions are far less likely to generate significant satellite litigation.

3. Modest sanctions tend to facilitate rather than impede the settlement process, further limiting satellite litigation. At the same time, judges and lawyers warned that while the threat or imposition of sanctions is a powerful settlement tool, it is also potentially coercive.

4. Active judicial case management in the early stages of litigation may prevent accumulation of the large sanctions awards that create incentives for satellite litigation.

5. Most legitimate complaints from lawyers about surprise and lack of due process can be accommodated without elaborate satel-

lite evidentiary hearings by giving attorneys prior notice identifying specific sanctionable behavior and providing them an informal or formal opportunity to explain their behavior.

6. Little evidence was found that sanctions have a chilling effect on creative advocacy or unpopular causes.

7. Sanctioned lawyers are not limited to a few marginal repeat offenders: Most had considerable experience and many were not solo practitioners.

8. Rule 11 has begun to achieve its goal of deterring frivolous filings. Change has occurred primarily by making lawyers more aware of their specific professional duty to investigate and research claims before filing. Development of standards in the case law and promotion of educational programs within the bar enhance this change.

Methodology

The findings presented in this report are based on several data sources. The primary source is interviews with thirty-six judges and sixty lawyers. The judges and lawyers were drawn from three different groups: (1) judges and attorneys involved in closed sanctions cases, most of which were unpublished, in districts with high levels of sanctioning activity (six courts); (2) judges in districts with low levels of sanctioning activity (two courts); and (3) attorneys with substantial experience in federal court (drawn from both high- and low-sanctioning courts).

The interview data were supplemented by an analysis of the characteristics of rule 11 cases, such as the type and amount of sanction, the type of case, and the timing and form of procedures for sanctioning. These data were derived from a 25 percent sample of all published district and appellate opinions from August 1983 to April 1987 that primarily involved rule 11.

I obtained information about other sanctions by using computer-assisted legal research sources.

Finally, I obtained data about bar discipline involving the attorneys targeted with sanctions in the published cases from state bar disciplinary offices.

Discussion of Highlights

1. *Rule 11 has widespread support among the bench and bar, even among lawyers who have been sanctioned, but that support is qualified by substantial concerns.*

Asked whether benefits of rule 11 outweighed harms, both judges and lawyers registered substantial approval. Endorsement ranged from better than 80 percent of the sixteen judges in high-sanctioning districts to half of the fourteen sanctioned attorneys.

Judges generally saw the primary benefit of rule 11 as being the deterrence of frivolous pleading. Judges also regarded rule 11 as beneficial in giving them additional power to manage their dockets.

Attorneys also saw deterrence of frivolous pleading as a primary benefit of rule 11. Some attorneys saw a further benefit in that rule 11 gives them a personal stake in attempting to counter client demands to pursue a frivolous course of litigation. At the same time, more than one-third of the lawyers expressed concern about potential chilling effects on lawyers' collective willingness to advocate novel theories or to represent unpopular clients. Some attorneys also voiced concerns about the distractions of satellite litigation, threats leading to coercive settlements, and lack of clear procedural safeguards. These issues are discussed below.

Overall, the interviews revealed both a broad base of support for the goal of deterring frivolous litigation and a range of deep, passionately expressed concerns. The vast majority of attorneys and judges interviewed accept, even applaud, rule 11's articulation of the professional duty to investigate the basis for legal and factual assertions.

2. *Case law and field research reveal two goals of sanctions: deterrence and compensation. Satellite litigation occurs primarily in cases involving large compensatory sanctions awards; modest monetary sanctions and nonmonetary sanctions are far less likely to generate substantial satellite litigation.*

Cases and commentary interpreting amended rule 11 reveal two distinct approaches. One approach focuses on the conduct of the

attorney or party who files an unfounded pleading. This approach emphasizes deterrence and seeks to impose the least severe sanction compatible with deterring future misconduct. This approach represents the majority view both in the case law and in the field study, where more than two-thirds of the judges stated that deterrence was their primary purpose in imposing sanctions in the case being examined.

The other approach focuses on the effect an unfounded filing has on the opposing party. This approach has as its goal compensation of the opposing party, using attorneys' fees as the measure of the injury. Because they do not conceive of fault as a necessary element of the process, judges using this model are more likely to impose sanctions. Sanctions imposed under this model are likely to be substantial because they are based on attorneys' fees and are not limited to the amount necessary to deter professional misconduct.

Data from both the field study and the published reports by expert commentators support the conclusion that satellite litigation arises from cases in which sanctions are used as a fee-shifting mechanism. If sanctions were limited to the amount or type (including nonmonetary sanctions) necessary to deter violations, satellite litigation would almost surely be reduced.

If one looks only at the published cases, it appears that satellite litigation is a necessary by-product of enforcement of amended rule 11. Characteristics of the published opinions, however, suggest that this perception may be based on a temporary phenomenon. First, these early opinions tended to involve fee-shifting. In addition, many appear to have been published to effect general deterrence and to set standards for interpretation of the rule. The prospect of recovering major fees may afford an incentive for the moving party. On the other side of the table, the amount of the award may provide an incentive for the sanctioned party to appeal the sanctions award and perhaps the merits. Appellate decisions reinforce this tendency by requiring more formal procedures for those sanctions cases in which substantial financial awards are made.

In contrast to the published opinions, the unpublished rule 11 decisions used in the field study involved small awards. Judges in

those cases reported little or no burden from satellite proceedings. In some of these unpublished cases, sanctioned attorneys reported that the small amount of the award and the finding of frivolity combined to discourage appeals on the sanctions award or on the merits.

Rule 11 gives the trial judge full discretion to fashion an "appropriate sanction," which may range from a friendly discussion to a major fee-shifting award. Nonmonetary alternatives include continuing legal education, referral to disciplinary authorities, and targeted dissemination of decisions imposing sanctions (e.g., to colleagues or a client). In the sample of eighty-five published opinions, nonmonetary sanctions were imposed twice, both times in the form of a sua sponte warning from the judge. None of the twenty-two cases in the field study involved nonmonetary sanctions, and only three of the sixteen judges interviewed in the field study reported considering nonmonetary alternatives. Appellate court adoptions of the "least severe sanction" standard suggest, however, that trial judges need to give more attention to using nonmonetary sanctions to deter frivolous filings.

3. *Modest sanctions tend to facilitate rather than impede the settlement process, further limiting satellite litigation. At the same time, judges and lawyers warned that while the threat or imposition of sanctions is a powerful settlement tool, it is also potentially coercive.*

The impact of sanctions on settlement will be a major factor in determining whether or not satellite litigation will result. The expectation that sanctions will "poison the well of settlement" was not borne out in field interviews with attorneys. In many of the cases in the field study, lawyers reported that sanctions had no effect on settlement because the sanctions either accompanied or followed a final disposition of the case on the merits. On the other hand, attorneys reported that sanctions, or the threat of sanctions, may play a role in ongoing litigation, where they can be used as a bargaining chip. This use of sanctions may explain why most attorneys who saw an effect on settlement said sanctions facilitate rather than inhibit settlement.

Use of sanctions as a bargaining chip, however, may create a conflict of interest between attorney and client in that an attorney facing a threat of prejudgment sanctions may seek to avoid these sanctions by bargaining away a client's rights.

Reports from judges and experienced attorneys in districts with low rates of sanctioning activity indicate that a credible threat of imposition of sanctions encourages settlement. The effect on attorneys is strong and, attorneys report, sometimes coercive.

4. *Active judicial case management in the early stages of litigation may prevent accumulation of the large sanctions awards that create incentives for satellite litigation.*

Amended rule 11 is part of a package of pretrial case management tools that are designed to improve pretrial procedures, including disposition of frivolous litigation. In interviews with judges in districts with low sanctioning levels, information about alternatives to rule 11 was elicited. In those districts, judges and magistrates identified procedures they use to "separate the wheat from the chaff." Traditional methods such as summary judgment and motions to dismiss are reportedly used on a regular basis, as are less formal methods.

Judges in low-sanctioning districts also reported frequent use of rule 16 conferences, telephonic or otherwise, to narrow issues and weed out frivolous claims. In addition, these judges may use warnings or reprimands, sometimes at motions hearings, sometimes with clients present, to deter frivolous pleadings. Some of the judges reported as well that they use gentle reprimands in chambers to educate inexperienced lawyers.

Several judges state that they routinely warn attorneys about potential sanctions when granting a motion to dismiss with leave to amend. Others selectively use warnings during settlement conferences. One judge reports trying to avoid coercion in such a context, recognizing the susceptibility of the situation to that danger.

Shifting attorneys' fees pursuant to statute rather than rule 11 is also seen as an effective alternative in some situations.

In general, judges in low-sanctioning districts see the active monitoring of cases as a primary alternative to sanctions and report that such monitoring has been effective in dealing with frivolous

pleadings. In contrast, courts in the districts with high and moderate sanctioning levels had heavier dockets and presumably heavier workloads than those in districts with low sanctioning levels. Increased work demands associated with high caseloads may limit the opportunity for intensive case management, resulting in greater reliance on the use of sanctions.

5. *Most legitimate complaints from lawyers about surprise and lack of due process can be accommodated without elaborate satellite evidentiary hearings by giving attorneys prior notice identifying specific behavior and providing them an informal or formal opportunity to explain their behavior.*

Without question, the due process clause applies to sanctions proceedings and requires notice and an opportunity to be heard. That formulation, however, leaves room for disagreement on the definitions of notice and hearing opportunities. The Advisory Committee, while recognizing the applicability of due process requirements, expressed concern that notice and hearing procedures would engender satellite litigation. The Advisory Committee's Note, in turn, provoked lawyers' concerns that procedural fairness would be subordinated to efficiency.

The Advisory Committee called for flexible hearing procedures, adjusted to the severity of the sanctions and the circumstances of the case. When coupled with the call to limit the scope of proceedings to the record whenever possible, the Advisory Committee comments appear to encourage informal procedures.

Case law shows that the notice and hearing can be quite informal. A hearing on the merits may also serve as a hearing on sanctions if the notice of the hearing on the merits is broad enough to encompass the imposition of sanctions. Notice of the sanctions issue should be given promptly by counsel or the court, but the timing of the decision on the issue rests with the court.

The courts, however, have split on the issue of whether a full evidentiary hearing is required in rule 11 sanctions cases, with one circuit establishing evidentiary hearings as the norm and another sharply limiting hearings to situations in which the court seeks assistance in deciding the issue. The majority see the hearing requirement as mandating that there be an opportunity to be heard in

some fashion. Where substantial financial awards are involved, most courts call for strict due process safeguards.

In the field study, judges perceived their procedures as adequate. However, a number of lawyers, including lawyers who moved for sanctions, voiced serious complaints about some of the procedures. One such complaint was that some judges fail to provide accepted due process guarantees such as notice or warning. Other complaints focused on the practice of merging decisions on the merits with the sanctions decisions, without providing a separate opportunity to be heard on the issue of sanctionability (e.g., by looking at the prefiling inquiry or hearing the lawyer's justification). At least one bar group has recommended separate proceedings to decide the sanctions issue. Such a process is likely to improve the notice process and also effectuate the Advisory Committee's admonition to "avoid using the wisdom of hindsight" in judging attorneys' behavior. In most cases, such proceedings need provide only an informal opportunity to respond orally or in writing to a specific charge in order to satisfy the letter and spirit of due process.

6. *Little evidence was found that sanctions have a chilling effect on creative advocacy or unpopular causes.*

Critics of rule 11 assert that penalizing lawyers and clients for filing frivolous cases creates the risks of inhibiting access to the courts and of curbing creative advocacy for novel, and sometimes unpopular, claims. The drafters of rule 11 incorporated standards designed to avoid such chilling effects. One standard is that good-faith arguments for change in the law are outside the purview of the "warranted by existing law" certification required by rule 11. In addition, the Advisory Committee directed courts to examine papers according to what could reasonably be known at the time of filing and thereby avoid judging by hindsight. Third, provision of specific notice and an opportunity to be heard prior to sanctions decisions also serve to guard against erroneous chilling of arguable claims.

Case law has generally given effect to rule 11's protection of good-faith arguments for change in the law. The standard is that an argument should have "absolutely no chance of success under ex-

isting precedents" and that "no reasonable argument can be advanced to extend, modify, or reverse the law." More concrete standards are being developed. For example, one can safely say that a court is more likely to impose sanctions when an argument has been rejected by an unbroken string of authorities, was previously rejected by the court in the same or related litigation, or fails to confront adverse authority.

Concerns about chilling effects are widespread. In the field interviews, more than one-third of the lawyers cited the danger of chilling effects as a harm of rule 11. Four judges volunteered their perception that rule 11 might be improperly used by some judges to punish disfavored attorneys or to discourage disfavored types of cases.

Twenty percent of the lawyers indicated that they had experienced a chilling effect in a particular case. Analysis of their descriptions, however, showed that the attorneys rejected some cases because the merits were too weak, chose to file some cases in state courts, or in some cases expressed only general concerns about chilling. In no more than three cases did the fear of sanctions appear to inhibit presentation of a specific claim, and these claims did not appear to involve novel arguments for changes in the law or to present unpopular causes.

Lawyers did, however, provide some evidence that general chilling effects are operating. A number of lawyers reported that the threat of sanctions has caused them to raise their threshold for handling close cases: They now demand a higher probability of success, limiting access to the courts for more marginal claims.

Another general effect reported by the lawyers is a chilling of public interest and pro bono representation out of fear that sanctions will be imposed on the lawyer personally for behavior that may be attributable to the client. If the client is indigent and without resources to reimburse the lawyer for sanctions, the freedom of the lawyer to pursue arguable claims is likely to be more limited than where a lawyer represents a client who can reimburse the lawyer for any sanctions.

Field interviews as well as published opinions reveal a high risk of incurring sanctions in the following types of cases: securi-

ties, antitrust, commercial, RICO, and employment discrimination cases, mass tort cases, and class actions. The common features of these high-risk cases seem to be complexity, high stakes, personal allegations of moral turpitude, and a difficulty in pinning down facts before filing.

Statistical measurement of a chilling effect based on comparing the proportion of sanctions to the proportion of case filings of a particular type of case is inherently unreliable. Nevertheless, some commentators have concluded that there is statistical evidence of disproportionate sanctioning of plaintiffs' attorneys in civil rights cases. These analyses, however, suffer from a lack of baseline data. For example, comparison of rates of civil rights filings with rates of filings of other categories of cases can be misleading because some of the case categories (e.g., contracts cases) include many routine filings of standard complaints (e.g., defaulted student loans). The opportunities for frivolous pleading in those cases are simply not comparable to such opportunities in more complex litigation. In the final analysis, case-by-case documentation of specific abuses of rule 11 may be the only way to test the validity of claims of chilling effects.

The concerns about chilling can be addressed by continued monitoring of specific claims of chilling effects and by enforcement of the Advisory Committee's recommendations in the comments about good-faith arguments for change. Procedural safeguards should also aid in redirecting a court's attention to the information reasonably available at the time of filing and thereby prevent hindsight judgments.

7. *Sanctioned lawyers are not limited to a few marginal, repeat offenders: Most had considerable experience and many were not solo practitioners.*

Some commentators have portrayed the subjects of rule 11 sanctions as marginal, inexperienced solo practitioners who repeatedly file frivolous papers, but the surveyed data from published opinions and disciplinary records do not support such an image. Sanctioned attorneys had been admitted to the bar for an average of fifteen years, and only one of fifty-three had less than five years' experience. At least 40 percent were not solo practition-

ers, but collected data were not available to produce a definitive figure on the size of the law firms of the majority of sanctioned attorneys. All of the sanctioned lawyers for whom data were available were with private law firms or corporate counsel; none were from governmental offices, nonprofit organizations, or legal services offices.

Approximately one in eight of the sanctioned attorneys in the sample of published opinions had a history of other discipline or sanctions. Six were the subject of sanctions in other reported decisions; six were the subject of final disciplinary action, such as disbarment or suspension; and one had been both disciplined and sanctioned.

In the field study, I asked the sanctioning judge for an assessment of the professional reputation of the sanctioned attorney. Only three of the ten sanctioned attorneys for whom judges gave ratings were deemed to have professional reputations "below minimum standards."

8. *Rule 11 has begun to achieve its goal of deterring frivolous filings. Change has occurred primarily by making lawyers more aware of their professional duty to investigate and research claims before filing. Development of standards in the case law and promotion of educational programs within the bar enhance this change.*

Measuring the effectiveness of amended rule 11 in terms of achieving its stated goal of deterring frivolous filings cannot be done directly and definitively. Using several indirect measures, the study presents evidence of progress toward the reduction of frivolous filings.

More than one-third of the lawyers interviewed reported that their pleading practices had changed because of rule 11. Examples of the reported changes include elimination of overstatement in pleadings, avoidance of boilerplate answers and defenses, and deflation or elimination of inflated damage requests. Among the attorneys who did not report changes, a substantial number said they were concerned about accuracy in pleading but that this concern predated the rule 11 amendments.

Rule 11 case law has developed in such a way that its deterrent effects should increase as the standards for imposing sanctions become clearer. A review of case law under amended rule 11 reveals some initial confusion about legal standards and some differences in the application of those standards to specific fact patterns. Later cases have clarified the standards, but differences in application probably cannot be avoided, because cases have idiosyncratic fact patterns that require case-by-case treatment.

As an example of the clarification of standards, the duty to inquire into the factual basis for an argument can be charted in reasonably clear general terms. Some prefiling factual inquiry is clearly necessary. A client's version of a claim can be relied on only if the claim is plausible and there is no opportunity for further investigation. Failure to investigate in the face of warnings from the opposing party is presumptively unreasonable. In contrast, reliance on a plausible client story as opposed to the undocumented word of the opposing party is presumptively reasonable.

Similarly, analysis of case law with an eye toward the lawyer's behavior provides the foundation for the development of a code of conduct under rule 11. Commentators and bar groups have begun that task.

Deterrence of sanctionable behavior depends not only on clear guidelines for attorney behavior, but also on dissemination of information. On this score, the educational effects of rule 11 are palpable. Rule 11 appears to have generated intense professional and judicial interest in the professional obligations of the civil lawyer. The volume of written materials, educational conferences, bar association meetings, and circuit-level judicial conference programs attests to this effect. Bar association studies of sanctioning practices are extensive and continue to increase.

In the field study, interviews with lawyers and judges revealed routine discussions about rule 11 within law firms, chambers, and in bar–bench discussions. Even in a district with little formal sanctioning activity, a judge reported that "rule 11 is the buzzword among lawyers." Another judge in the same district routinely points out examples of sanctionable behavior at a motions docket, where he has a captive audience of lawyers.

While writings and speeches about rule 11 are often critical of the rule, they also identify the professional behavior necessary to avoid sanctions. For example, lawyers advising one another about how to avoid sanctions usually discuss such topics as interviewing a client, dissuading a client from filing a specious claim, anticipating responses of opposing parties, reviewing relevant documents, interviewing witnesses, and consulting with experts. The field interviews also revealed lawyers' concerns about these same topics.

Conclusion

In describing the benefits of rule 11 in response to an open-ended question about the benefits and harms of rule 11, judges and lawyers generally saw the deterrence of frivolous pleadings as the primary benefit of the amended rule. As described at the outset of this summary, these judges and lawyers expressed widespread general support for the rule, while recognizing its dangers and deficiencies. Their responses provide a preliminary indication that the 1983 amendments have been effective in meeting the goal of deterring frivolous filings.

I. INTRODUCTION AND BACKGROUND

Amended rule 11 of the Federal Rules of Civil Procedure was born in controversy. The debate continues, albeit with unexpected twists. After the fifth anniversary of amended rule 11, the issues have evolved from automatic support or opposition to the rule to more refined questions about its operation.

The text of the relevant portions of the amended rule is as follows:

> 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 the party's pleading, motion, or other paper and state the party's address. . . . 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 paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Issues

The following questions have been raised regarding rule 11:

- Have the amendments to the rule achieved their purpose of overcoming the reluctance of trial judges to police the behavior of lawyers and thereby deter frivolous filings?
- Has the increased incidence of sanctioning brought with it an increase in satellite litigation?[1] If so, what, if any, benefits have accompanied the rule change?
- What types and amounts of sanctions have been imposed and in what types of cases?
- What alternatives have been used by judges who infrequently impose monetary sanctions under rule 11?
- How have the courts defined and implemented due process protections?
- Have rule 11 sanctions or the threat of sanctions had a chilling effect on creative advocacy?
- Have the amendments to rule 11 sanctions had a salutary effect on advocacy by reinforcing professional norms of competent practice?
- What are the professional backgrounds of lawyers who are sanctioned, and how do they compare to expectations about the type of lawyer who would be sanctioned under the amended rule?

The fundamental empirical questions are, Has amended rule 11 achieved its purposes, and if so, at what cost?

Study Methods

I have adopted a number of approaches designed to address these issues in a systematic way and to obtain primarily qualitative answers. I have also collected quantitative information to describe the context in which the rule 11 sanctioning process operates. While the ultimate answers remain elusive and value-laden, the data

[1]Judge Schwarzer defines "satellite litigation" as "ancillary proceedings that may themselves assume the dimensions of litigation with a life of its own." Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 183 (1985) [hereinafter Schwarzer I].

in this report are designed to provide a factual basis for the ongoing debate about rule 11.

My primary methods of inquiry were the following:

- field interviews with judges and attorneys regarding closed rule 11 sanctions cases in six federal district courts with moderate to high levels of sanctioning activity;
- field interviews with experienced federal practitioners in eight districts (including the six just mentioned), two of which had little sanctioning activity, to examine methods for controlling frivolous litigation, as well as interviews with judges who rarely sanctioned attorneys;[2]
- examination and coding of procedural and sanctions data from a 25 percent random sample of all published opinions involving rule 11;[3]
- research into public records regarding the education, experience, disciplinary history, and prior sanctions history of the sanctioned lawyers in the random sample of cases (see chapter 9 *infra*); and
- review of the writings of judges and lawyers about rule 11, including the few empirical studies that have been done.[4]

Organization

In chapters 2 and 3, I discuss the purposes behind the amendments to rule 11 and examine the standards that have evolved in the cases. Chapter 4, on educational and preventive effects, examines how lawyers have interpreted rule 11 standards.

In chapter 5, I look at empirical data on the cl aracteristics of sanctions cases, including their procedural development. In chapter

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[2]Throughout this report, I refer to information collected in these two steps as the "field study." *See* appendix A for a detailed discussion of the methodology.

[3]I refer to this sample as the "sample of published opinions." *See* appendix B for a detailed description of its creation.

[4]*See, e.g.*, New York State Bar Association, Report of the Committee on Federal Court Sanctions and Attorneys' Fees (1987) [hereinafter NYSBA Report]; S. Kassin, An Empirical Study of Rule 11 Sanctions (Federal Judicial Center 1985).

6, I examine procedural due process issues by looking at case law, field research, and statistical analysis of published opinions. Out of this procedural context, discussion about satellite litigation (chapter 7) flows naturally. In chapter 8, I address the use of alternatives to monetary sanctions, drawing primarily on field data.

In chapters 9 and 10, I describe the characteristics of sanctioned attorneys and scrutinize concerns of chilling effects on attorneys. In the final chapter, I summarize the evaluations of rule 11 by all sixty attorneys and thirty-six judicial officers who participated in the study and discuss their implications.

II. PURPOSES OF AMENDED RULE 11 AS SEEN BY DRAFTERS AND USERS

Background: Purposes of the 1983 Amendments

Prior to its amendment in 1983, rule 11 was captioned "Signing of Pleading," which described its effect. The signature of an attorney was deemed to be a certificate that the attorney had "read the pleading" and had a subjective "belief [that] there is good ground to support it; and that it was not interposed for purposes of delay."[5] The stated remedy for failure to abide by the rule was for the pleading to "be stricken as sham and false." For a willful violation of the rule, an attorney might have been, but rarely was, "subjected to appropriate disciplinary action."[6]

The 1983 amendments revamped the rule, using the shell as a vehicle for imposing broader affirmative duties and prohibitions on attorneys and clients. Signaling the changes in content, the caption now includes the term "sanctions."[7] It also refers to "motions and other papers" to clarify its applicability to matters beyond the initial pleadings. The changes broadened the base of conduct subject to

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[5]Fed. R. Civ. P. 11 (1982).

[6]From 1938 to 1976 only nineteen reported cases were found involving allegations of rule 11 violations. In eleven of those cases, the court found violations of the rule, and in three of these eleven cases the court disciplined the attorney. In one of the cases, Kinee v. Abraham Lincoln Savings & Loan Ass'n, 365 F. Supp. 975 (E.D. Pa. 1973), the court ordered the sanctioned attorney to pay the costs and attorneys' fees of the opposing party. In another, the court disbarred an attorney, but the decision was reversed on procedural due process grounds. *In re* Lavine, 126 F. Supp. 39, 51 (S.D. Cal.), *rev'd sub nom. In re* Los Angeles County Pioneer Soc'y, 217 F.2d 190 (9th Cir. 1954). In the third case, the court "indexed" the name of the attorney for use in the event of similar future violations. American Automobile Ass'n v. Rothman, 101 F. Supp. 193 (D.D.C. 1952). Kassin, *supra* note 4, at 2 (citing Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 Minn. L. Rev. 1 (1976)).

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

the operation of the rule, shifted the test of the attorney's prefiling inquiry into the merits of the papers from a subjective test to an objective one, made imposition of sanctions mandatory, and clarified the authority of the courts to impose a wide range of sanctions, including costs and attorneys' fees. I discuss the new standards more fully in the next chapter. At this juncture, the pertinent questions are, Why was rule 11 amended? and How have judges interpreted and implemented the purposes of rule 11?

According to the Judicial Conference's Advisory Committee on Civil Rules, the drafters of the 1983 amendments, "[t]he new language is intended to reduce the reluctance of courts to impose sanctions."[8] However, the changes were not simply intended to increase the quantity of sanctions activity. The underlying assumption was that "[g]reater attention by the district court to pleading and motion abuses and the imposition of sanctions when appropriate, should discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses."[9]

Commentators have asserted that deterrence of abuses of the litigation process is the primary goal of the 1983 amendments.[10] Kassin observed that the Advisory Committee "articulated only a deterrent rationale."[11] Judge William W. Schwarzer found the changes to be "aimed at deterring and, if necessary, punishing improper conduct rather than merely compensating the prevailing

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[8]Fed. R. Civ. P. 11, Advisory Committee Note [hereinafter Advisory Comm. Note], 97 F.R.D. 165, 198 (1983).

[9]*Id.*

[10]*See, e.g.*, Note, *Rule 11 Sanctions: Toward Judicial Restraint*, 26 Washburn L.J. 337, 347 (1987) [hereinafter Washburn Note] ("Indeed, compensation to the moving party is a mere incidental side effect of the punitive purpose behind the rule. The courts have instead emphasized the increased likelihood of deterrence as the primary target of the mandatory requirement . . . ."); Carter, *The History and Purposes of Rule 11*, 54 Fordham L. Rev. 4 (1985) (old rule was designed to deter frivolous filings, and 1983 amendment was designed to "put teeth into the old rule").

[11]Kassin, *supra* note 4, at 29.

party."[12] Indeed, a clear majority of federal judges surveyed by Kassin declared that deterrence is the most important purpose of rule 11 sanctions.[13] One appellate court has stated that regardless of disagreements about compensatory versus punitive purposes, "the imposition of sanctions pursuant to Rule 11 is meant to deter attorneys from violating the rule."[14]

An overarching view of rule 11 sanctions is that they are part of a package of case management tools that are designed to enable judges to separate cases that warrant full judicial attention from those that are frivolous or meritless. The advisory committee that drafted the original set of federal rules envisioned that "discovery, summary judgment, and pretrial conference provisions . . . would limit the scope of disputes and dispose of frivolous claims."[15] Following this approach, the committee rejected a proposal to require verification of the complaint. It also rejected a more stringent version of rule 11 that would have required an attorney to certify the truth of matters contained in pleadings.[16]

Experience with the federal rules proved that the pre-1983 pretrial procedures were not adequate to the task of eliminating frivolous claims and defenses. The 1983 amendments to the federal rules were designed as a package to remedy that failure. Seen in this context, rule 11 is one of a number of options available for reviewing cases for frivolity during the pretrial process.[17] A judge

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[12]Schwarzer I, *supra* note 1, at 185 (1985); *See also* Schwarzer, *Rule 11 Revisited,* 101 Harv. L. Rev. 1013, 1020 (1988) [hereinafter Schwarzer II] ("The proper role of rule 11, however, is not to compensate parties for such [unnecessary] costs; it is to deter litigation abuse." (citations omitted)).

[13]Kassin, *supra* note 4, at 29–32.

[14]Donaldson v. Clark, 819 F.2d 1551, 1556 (11th Cir. 1987) (en banc); *see also* Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 877 (5th Cir. 1988) (en banc) (quoting *Donaldson* for same point); Brown v. Federation of State Medical Bds. of the U.S., 830 F.2d 1429, 1438 (7th Cir. 1987) ("Compensation, although an important consideration, is not the only purpose underlying Rule 11. An even more important purpose is deterrence.").

[15]Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective,* 135 U. Pa. L. Rev. 909, 979 (1987).

[16]*Id.* at 977.

[17]*See generally* Elliott, *Managerial Judging and the Evolution of Procedure,* 53 U. Chi. L. Rev. 306 (1986).

can dispose of a frivolous complaint by granting a motion to dismiss or an early motion for summary judgment. The judge can also narrow or eliminate claims or defenses through rulings at a pretrial conference, a ruling on discovery disputes, or a number of formal or informal pretrial actions. Indeed, one commentator defines managerial judging as "the selective imposition by judges of costs on *lawyers* for the purpose of rationing the use of procedures available under the Federal Rules of Civil Procedure."[18] According to this view, sanctions alter the incentive structure in degree, but not in kind.

Viewed as case management tools, sanctions are employed after the fact. Typically, the case has been dismissed or the motion decided before sanctions are imposed. Early screening of cases through active pretrial management may serve as a preventive measure, limiting the opportunity for sanctionable behavior or mitigating the harm from a frivolous paper.

Field Interviews

In the field portion of this study, I asked the sanctioning judges the open-ended question, "What was your primary purpose in imposing sanctions in this case?" Twelve of the seventeen judges (71 percent) who responded to this question asserted that their *primary* purpose in imposing sanctions was to deter violations of the rule, a finding similar to the responses Kassin elicited in his survey of federal judges.[19] Typical answers to my open-ended question were, "To get a message to lawyers to research the law before filing and to try to discourage automatic motions," "To alert the lawyer to his responsibilities in the case," "To deter abuses of the system," "To discourage repetition of the same conduct," "General deterrence of spurious issues, especially in bankruptcy appeals," and "Discourage [unfounded] removal of cases for strategic purposes." Most of the comments suggested a concern for general deterrence,

[18] *Id.* at 312.

[19] Kassin found that "the majority of judges (59.4 percent) expressed a belief that deterrence is the most important purpose of sanctions." Kassin, *supra* note 4, at 29. Twenty-one percent stated that deterrence was the most important purpose, and 19.6 percent stated that punishment was. *Id.*

using the case at hand to send a more general message to lawyers. In a couple of situations, the judge sought specific deterrence by imposing a mild sanction on the offending lawyer at the beginning of the case.

The comments of judges also revealed a substantial purpose of providing compensation to the party that was subjected to the offensive filing. Three of the seventeen judges (18 percent) indicated that compensation was their primary purpose, and several of the judges indicated that it was a typical purpose. One judge said, "Usually I try to compensate the opposing party, but I doubted that the lawyer or client could pay."

The judges who said that compensation was their primary purpose in imposing sanctions saw fee shifting as the general remedy for rule 11 violations. Their comments included, "The main reason was to compensate the moving party. This was a gross case, and I had no discretion to deny sanctions" and "To enforce rule 11, the primary purpose of which is fee shifting." These judges typify the "compensatory, fee-shifting" model of sanctions decision making described later in this chapter.

One of the seventeen judges indicated that his primary purpose was to punish the attorney. None indicated a primary purpose of compensating the court or punishing the client.

Attorneys involved in a sanctions case had a different view of the judge's purpose from that of the judge. The attorneys also disagreed among themselves. Only one of the sanctioned attorneys and five of the nonsanctioned attorneys saw deterrence as a primary judicial purpose. Most of the responses created unanticipated categories. Nonsanctioned attorneys were more likely to respond that the judge was simply "enforcing rule 11," without attributing any more specific purpose. Assuming that deterrence is the primary purpose of rule 11, enforcing the rule implies deterrence. Combining the clear deterrence and rule-enforcement categories, eleven of sixteen nonsanctioned attorneys identified deterrence and enforcement as the judge's primary purpose.

Sanctioned attorneys, perhaps looking for an explanation not related to their own behavior or perhaps reduced to speculation because of the lack of direct confrontation by the judge, were likely to

see the judge as seeking to expedite disposition of the case or to press for a settlement. Three of the sanctioned attorneys saw the sanctions as highly personal expressions of judicial anger, stating that the judge "got perturbed," "express[ed] his anger at repeated abuses," or "did not like senior counsel." Another responded that he couldn't say: "It may have been that the case had been going [on] too long." Others said the judge "wanted to move the case along as quickly as possible" and acted "to make the litigation stick to the track." In summary, communications of judicial purposes were not clearly understood by lawyers on either side of the sanctions issue. Each side took its own interpretation, which frequently differed from the judge's.

Despite the views of judges and commentators that deterrence is the primary purpose of amended rule 11, the discussion of purposes remains fraught with ambiguity. Even the concept of deterrence has its own ambiguity. Specific deterrence of an attorney or party from engaging in offensive conduct during a given case is distinct from general deterrence of other attorneys or parties from copying the offensive behavior. The latter is generally a more challenging goal that may require special strategies, such as public referral to a disciplinary body, promulgation of an opinion detailing the sanctioned behavior, or dissemination of information through educational programs.

While deterrence is clearly the primary purpose of the majority of judges in the study, all of the judges had additional purposes in mind. As in the criminal justice system, notions of deterrence are intertwined with punitive, compensatory, and rehabilitative goals. In the interviews, reports of multiple purposes for the imposition of sanctions were the norm. Table 1 displays the responses of judges and attorneys to the question, Which of the major purposes of sanctions were involved in the judge's decisions?

All of the interviewees saw multiple purposes in the judges' decisions. Compared with their opposing attorneys and the judges, sanctioned attorneys were likely to see fewer purposes in the decisions and were much less likely to see deterrence as a purpose.[20]

[20]The differences between their responses is statistically significant (p = .0319), using the Irwin–Fisher test. For a description of the test, see L.

However, they were more likely than the nonsanctioned attorney to see a punitive purpose on the part of the judge.[21]

TABLE 1

Judges' Purposes in Imposing Sanctions As Viewed by Judges and Attorneys in Field Study

	Judges ($n = 18$)	Sanctioned Attorneys ($n = 15$)	Opposing Attorneys ($n = 20$)
Deter future violations	15 (83%)	8 (53%)	17 (85%)
Compensate opposing party	12 (67%)	7 (47%)	12 (60%)
Compensate court	3 (17%)	2 (13%)	3 (15%)
Punish attorney	9 (50%)	8 (53%)	6 (30%)
Punish client	5 (28%)	3 (20%)	1 (05%)

Discussion

Tracing the purposes of the drafters of amended rule 11 and of the judges who administer it is not simply an academic exercise. Selection of the type of sanction should generally vary according to the judge's purpose. For example, if a judge seeks to deter specific behavior in a case, a warning or reprimand may be sufficient. If, however, the purpose is compensatory, an assessment of the damage to the aggrieved party will guide the decision. If the purpose is punitive, fines and penalties should be considered.[22]

Kassin found that federal judges "who favored a compensatory rationale were the most likely to impose sanctions."[23] The increased tendency to impose sanctions under a compensatory rationale

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Marascuilo & M. McSweeney, Nonparametric and Distribution-Free Methods for the Social Sciences (1977).

[21]This difference is not statistically significant.

[22]Note, *Divining an Approach to Attorney Sanctions and Iowa Rule 80(a) Through an Analysis of Federal and State Civil Procedural Rules*, 71 Iowa L. Rev. 701, 718–19 (1987).

[23]Kassin, *supra* note 4, at 31.

"makes conceptual sense."[24] Once a violation is detected, the thrust of the compensatory rationale is to presume fault and examine the damage to the opposing party and gauge sanctions by this relatively objective measure. [25] In contrast, judges seeking deterrent sanctions look to the conduct and state of mind of the actor, asking the question, What will it take to deter similar behavior?[26] Within this orientation, the threshold for imposing sanctions is likely to be higher because the court must find fault—some element of misconduct by attorney or client or both—to correct and deter.

In reviewing the literature and cases and talking with judges about rule 11 sanctions, I found that there are two general models for approaching the issue. One is a compensatory, fee-shifting

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[24]*Id.*

[25]Despite its apparent objectivity, determining attorneys' fees precisely can be a complex judicial function. *See generally* A. J. Tomkins & T. E. Willging, Taxation of Attorneys' Fees: Practices in English, Alaskan, and Federal Courts (Federal Judicial Center 1986); T. E. Willging & N. A. Weeks, Attorney Fee Petitions: Suggestions for Administration and Management (Federal Judicial Center 1985). Special concerns, such as considering the appropriateness of fee shifting, gauging sanctions to the offense and to the ability of the sanctioned party to pay, and mitigating damages, alter the fee determination issues in sanctions cases.

Courts have developed separate rules for appraising attorney fee issues in sanctions cases. For example, there is no entitlement to a "lodestar" of full attorneys' fees; courts have discretion to award less than the full amount. Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 879 (5th Cir. 1988); Eastway Constr. Corp. v. City of New York, 821 F.2d 121 (2d Cir. 1987); INVST Financial Group v. Chem-Nuclear Systems, 815 F.2d 391, 404 (6th Cir. 1987), *cert. denied*, 108 S. Ct. 291 (1987); Lieb v. Topstone Indus., Inc., 788 F.2d 151, 158 (3d Cir. 1986). In addition, courts have imposed a duty on the part of a party opposing a frivolous pleading to mitigate damages "by correlating his response, in hours and funds expended, to the merits of the claims." *Thomas*, 836 F.2d at 879.

[26]*See, e.g., Thomas*, 836 F.2d at 881 ("when a court's *primary* purpose in imposing sanctions is to deter . . . the relevant considerations become the conduct and resources of the party to be sanctioned"; *see also* Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 Geo. L.J. 1313, 1336–38 (1986).

model; the other a behavioral, disciplinary model (see table 2).[27] Both emphasize deterrence, but in different ways.[28]

The compensatory model looks at deterrence in a systemwide context. Under this model, the remedy to the litigation "crisis" is to change the economic incentives to litigation by imposing costs on the losing party, as in the English system of routine fee shifting.[29]

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[27]These models are composites, intended to be heuristic and not descriptive of the behavior or thought of all judges or even of any single judge. In practice, the thoughts and applications of judges are more varied and complex than these models.

[28]The Third Circuit Task Force on Federal Rule of Civil Procedure 11 has recently completed an eighteen-month empirical and normative study of rule 11 sanctions in the Third Circuit. The task force found two models of interpretation of rule 11, which it labeled the "conduct" and "product" models and which it found to have pervasive effects on rule 11 case law and administration. *See generally* Third Circuit Task Force on Federal Rule of Civil Procedure 11, Report (Discussion Draft, Aug. 29, 1988). These models parallel the "behavioral, disciplinary" and "compensatory, fee-shifting" models described in table 2.

The Committee on Federal Courts of the Association of the Bar of the City of New York reported similar findings based on interviews with federal judges in the Southern and Eastern Districts of New York. Among judges who imposed sanctions frequently, the committee found two judges who "took the view that sanctions were intended to be punitive and not compensatory" and two who "were equally clear that the principal purpose of sanctions was compensation." Committee on Federal Courts, Association of the Bar of the City of New York, Rule 11: A Progress Report 27 (June 1987) [hereinafter ABCNY Report]. Judges who favor the compensation theory "tend to award the prevailing party its actual costs" (perhaps adjusted for reasonableness). Judges who favor the punishment theory "consider the prevailing party's costs, but also look to other factors such as the gravity of the breach and the offender's resources." *Id. See, e.g.*, Eastway Constr. Corp. v. City of New York, 637 F. Supp. 558, 572–74 (E.D.N.Y. 1986) (*Eastway II*), *modified and remanded*, 821 F.2d 121 (2d Cir. 1987) (*Eastway III*).

[29]*See generally* A. J. Tomkins & T. E. Willging, *supra* note 25. Fee shifting under the over one hundred federal statutes has pressed courts to explore ways to expand their capacity to cope with attorney fee petitions. *Id.* at 1–3. *See also* Report of the Third Circuit Task Force, *Court Awarded Attorney Fees*, 108 F.R.D. 237 (1986).

Expansion of fee shifting through the sanctions process also stretches the authority of the courts under the Rules Enabling Act to its limits, and perhaps beyond. Burbank, *Sanctions in the Proposed Amendments to the Federal Rules of Civil Procedure: Some Questions About Power*, 11 Hofstra L. Rev. 997,

A substantial minority of American judges, approximately one third by a recent count,[30] reportedly favor adoption of the English system. The American Bar Association Commission on Professionalism concluded that the experience with fee shifting through sanctions in appeals cases "could provide valuable insights into whether to apply the concept more broadly to matters in the trial courts."[31] For a judge who follows the fee-shifting model, the objective standard of rule 11 and the explicit authorization to award attorneys' fees combine to form a favorable environment for experimenting with the effects of the model, such as satellite litigation effects and chilling effects.

The disciplinary model looks at the problem as one involving individual practitioners and attempts to deter marginal lawyers and prevent abuses by competent lawyers. The focus of this approach is a lawyer's competence to practice law. The economic incentives of competent practitioners are affected marginally, if at all. Other effects may flow from these models. Because the models' standards are different, their procedures may differ and satellite litigation and chilling effects may also differ. I discuss these in separate chapters.

1011 (1983) [hereinafter Burbank I] ("Where our elected representatives [in considering amendments to 28 U.S.C. § 1927] have concluded that choices among standards for imposing sanctions on attorneys implicate the effectiveness of representation of clients, it seems to me a fair question whether these choices should be made by the rulemakers or by Congress."); *see generally* Burbank, *The Rules Enabling Act of 1934*, 130 U. Pa. L. Rev. 1015 (1982) [hereinafter Burbank II]; *see also* LaFrance, *Federal Rule 11 and Public Interest Litigation*, 22 Val. U.L. Rev. 331, 345–46 (1988) ("Rule 11 now represents a direct challenge to congressional policy, of nearly fifty years' duration, that courts should be open, not closed, to the public."). See generally W. Brown, Federal Rulemaking: Problems and Possibilities 86–102 (Federal Judicial Center 1981) for a discussion of the limits of the rule-making power.

[30]Rosen, *The View from the Bench*, Nat'l L.J., Aug. 10, 1987, at S-1, S-6.

[31]ABA Commission on Professionalism, *". . . In the Spirit of Public Service:" A Blueprint for the Rekindling of Lawyer Professionalism*, 112 F.R.D. 243 (1986).

TABLE 2

Behavioral, Disciplinary and Compensatory, Fee-Shifting Sanctioning Models

	Behavioral-Disciplinary Model	Compensatory, Fee-Shifting Model
Perception of problem	Attorney negligence, incompetence, or intentional abuse of the system	Congestion in the courts, delay, and an explosion of litigation
Purpose of sanctions	Change attorney behavior to require investigation and analysis before filing	Restore litigants to the status quo; deter marginal filings through threat of fee shifting
Remedial focus	Attorney behavior, state of mind, susceptibility to rehabilitation	Objective appraisal of reasonableness of claim
Appropriate sanctions	Wide range, including reprimands, partial or total fee awards, and suspension or disbarment	All or part of opposing party's fees and expenses; all or part of the court's costs
Principles guiding award	Least severe alternative adequate to serve the purpose	Reasonable compensation to the court or opposing party or both, with a duty to mitigate
Timing	Prompt imposition preferable	Prompt notice required—imposition may be delayed

Given that the drafters of rule 11 made explicit reference to awards of costs and attorneys' fees, there is "a natural tendency of district courts to gravitate toward imposing these types of sanc-

tions."[32] In practical terms, this means that, under a compensatory model, sanctions awards are measured by the hourly rates of attorneys. Therefore, a sanctions award that has accumulated during the course of lengthy litigation is likely to be both punitive and compensatory. Viewed as a deterrent, however, the award may be excessive[33] and may invite resistance rather than compliance.

Thus, the categories of deterrence, compensation, and punishment are not easily distinguishable. My systematic examination of the amount of sanctions imposed in a representative sample of published opinions involving rule 11 revealed an average award of $44,118 and a median award of $5,153. Fees and expenses were the basis of the sanction award in 66 percent of the cases studied.[34]

An "appropriate sanction" may be either monetary or nonmonetary.[35] In determining an appropriate sanction, courts have rejected the concept of an entitlement to full compensation for attorneys' fees and have adopted the principle that "'the least severe sanction [that is] adequate to serve the purpose should be imposed.'"[36] The purpose of compensation under rule 11, moreover, is related to its goal of implementing the bad faith provisions of the rule.[37] Fol-

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[32]*Thomas*, 836 F.2d at 877.

[33]*See, e.g., In re* Yagman, 796 F.2d 1165, 1183 (9th Cir. 1986), *cert. denied*, 108 S. Ct. 450 (1987) ("single post-judgment retribution" in the form of a fee award of $250,000 reversed because the procedure of accumulating sanctions "flies in the face of the primary purpose of sanctions, which is to deter subsequent abuses"); *see also* Nelken, *supra* note 26, at 1337–38.

[34]See discussion at table 14 *infra*.

[35]See chapter 8 for an extensive discussion of nonmonetary sanctions.

[36]Brown v. Federation of State Medical Bds. of the U.S., 830 F.2d 1429, 1437 (7th Cir. 1987) (citing Caleb v. Petty, 810 F.2d 463, 466 (4th Cir. 1987), which in turn quotes Schwarzer I, *supra* note 1, at 201); *see also Thomas*, 836 F.2d at 878 ("the basic principle governing the choice of sanctions is that the least severe sanction adequate to serve the purpose should be imposed").

[37]*See Brown*, 830 F.2d at 1437. Burbank I, *supra* note 29, argues that extension of fee shifting beyond the bad faith exception to the rule raises a serious issue of whether the amended rule exceeds the limits of the U.S. Supreme Court's authority by effecting a change in substantive law. Interpreting rule 11 to have the primary purpose of deterrence deflects the thrust of that argument.

lowing this rationale to its logical conclusion, compensation as a primary purpose would be limited to bad faith situations, that is, those involving the "improper purpose" language of rule 11.[38] Empirical evidence supports the proposition that judges are more likely to award attorneys' fees when they find the rule 11 violation to be willful.[39]

Case Management Purposes

Both the disciplinary model and the compensatory model are compatible with the view that rule 11 is a powerful vehicle for judicial case management. I began this study with the hypothesis that the judges who use sanctions are active case managers.[40] After visiting eight districts and interviewing thirty-one judges and five magistrates, I found that this is true, but is not the whole truth. The overwhelming majority of judges with whom I spoke are active case managers. Some of them, however, rarely impose sanctions on lawyers or parties; they apparently find acceptable alternatives to sanctions.

For the most part, in the cases I studied, sanctions were imposed early in the pretrial process in conjunction with a ruling on a motion, often a motion to dismiss or for summary judgment (see table 11, *infra*). The sanction reinforced a decision made under that ruling and served as a notice aimed at deterring future filings of similar cases. In those cases, the sanction paralleled the active pretrial case management contemplated under the pre-1983 rules. The

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[38]Robinson v. National Cash Register Co., 808 F.2d 1119, 1130 (5th Cir. 1987) ("Rule 11 is addressed to two separate problems: first, the problem of frivolous filings; and second, the problem of misusing judicial procedures as a weapon for personal or economic harassment." Accordingly, the terms "warranted by existing law or . . ." and "improper purpose" are separate and independent grounds for imposition of sanctions.).

[39]Kassin, *supra* note 4, at 20 ("the vast majority of judges who perceived the action in question as a willful violation granted the request for attorneys' fees").

[40]Nelken speculated that judges in large urban districts with a high rate of sanctioning "may be motivated to be more aggressive case managers and, therefore, to encourage the use of rule 11 to curb litigation abuses and increase the efficiency of case handling." Nelken, *supra* note 26, at 1326.

sanction in this type of case will be relatively modest, since pretrial procedures were brief and costs not allowed to accumulate because the case was dismissed summarily. Indeed, a judge interviewed in a New York study of sanctions stated that he never imposed sanctions of more than $2,000 because that was the most that should be required to dispose of a truly frivolous case.[41] In this type of case, probably the vast majority, the sanctions process complements an active, "hands on" form of case management and generates few problems like satellite litigation.

However, those judges who used rule 11 sanctions as an isolated case management tool in an otherwise passive approach to litigation produced some consequences not intended by the drafters of the amended rule. In one case, for example, defendant's attorneys informed me that they were litigating each issue, despite clear liability, for strategic purposes. They successfully moved for sanctions on a minor motions issue, gaining support for their strategic goals. In several other cases, courts permitted discovery and preliminary motions to proceed, allowing expenses to build for a motion for sanctions. If the judge takes a compensatory approach at this stage, the stakes are so high that an appeal of the decision imposing sanctions, sometimes hundreds of thousands of dollars, becomes a rational economic proposition. These isolated examples raise the question whether the use of sanctions has been sufficiently integrated into a case management system. The examples suggest the value of early screening of cases and judicial familiarity with the context of the litigation.[42]

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[41]ABCNY Report, *supra* note 28, at 27–28.

[42]*See generally* Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 Rutgers L. Rev. 253 (1985); Manual for Complex Litigation, § 42.1–.4 (2d ed. 1985); D. Levine, *Perspective of Lawyers, Clients, and Evaluators Detailed in Survey of Early Neutral Evaluations*, 2 BNA ADR Report 278 (1988); D. Levine, *Early Neutral Evaluation: A Preliminary Appraisal*, paper presented at Law & Society Ass'n, Annual Meeting (May 1986) (copy on file at the Federal Judicial Center).

Summary

The multiple purposes of amended rule 11 provide opportunity for confusion and inconsistency in the application of the rule. The behavioral, disciplinary model and the compensatory, fee-shifting model start from widely divergent assumptions and principles. Given the divergence in starting points, it is not surprising that some lawyers and commentators view the outcomes as arbitrary and unpredictable.[43] Have the courts been able to define standards for interpreting rule 11 in a way that will reduce the tendency toward disparate sanctioning that flows from the two models?

[43]*See, e.g.*, Joseph, *The Trouble with Rule 11*, A.B.A. J., Aug. 1, 1987, at 87; Joseph, *Rule 11 Is Only the Beginning*, A.B.A. J., May 1, 1988, at 62; Swindal, *Frivolity in Court: New Rule 11*, 13 Litigation 3 (1987).

III. DEVELOPING RULE 11 STANDARDS

Clear standards are essential to the effectiveness of rule 11 or any other sanctioning effort. With over 200,000 cases filed in federal court each year[44] and, it seems safe to assume, an equal or greater number of motions, courts cannot monitor each paper filed for rule 11 violations.[45] Reasonably clear standards are necessary to inform attorneys about how to avoid sanctions. Clear standards activate the deterrent effects and deactivate the chilling effects of rule 11.

This is not to say that judicial decisions must be uniform, or even consistent, under a system with clear standards. Judges are likely to have different thresholds for judging the sufficiency or motivation of an attorney's efforts in a given case. Even if the standards are clear, judgments will continue to be necessary because the facts and circumstances of each claim of frivolity or improper purpose vary.[46] The goal is the articulation of standards within a circuit that will provide an objective general guide for the behavior of lawyers in that circuit, as well as afford a basis for appellate review to guard against the chilling of creative advocacy or

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[44]In 1987, 202,582 original civil actions were filed in federal district courts. In addition, there were 21,070 removals from state courts. In 1986, there were 254,828 original filings and in 1985, 242,884. Administrative Office of the United States Courts, 1987 Annual Report of the Director, at 109, table S-8.

[45]*Cf.* Levin & Sobel, *Achieving Balance in the Developing Law of Sanctions*, 36 Cath. U.L. Rev. 587, 608–09 (1987) ("In the final analysis, sanctions will prove successful if they create a climate in which both the need for sanctions is drastically reduced and the standards of professional responsibility are understood and adhered to in a way that precludes the use of financial attrition as an accepted litigation tactic.").

[46]Bates, *The Rule 11 Debate, 4 Years Later*, Nat'l L.J., Oct. 12, 1987, at 3 ("'standards are susceptible to a wide range of interpretation and leave a great deal of discretion to the court,'" and conflicts among circuits are unlikely to be resolved at the Supreme Court level because of the wide variety of sanctionable circumstances).

the abuse of sanctioning power by individual judges due to personal animus against an attorney.[47]

In 1985, Kassin found a wide variation in judicial responses to hypothetical sanctions cases.[48] Have the standards become clearer since then?[49]

Evolution of Objective Standards

Historically, federal courts interpreted the pre-1983 version of rule 11 in a way that was commensurate with the "American rule" that each party to a lawsuit pays its own expenses and attorneys' fees, with certain well-defined exceptions.[50] As one exception to the rule, if the litigation was brought or maintained in bad faith, the court could award attorneys' fees. Determination of bad faith was based on a subjective assessment of whether the attorney knowingly and "beyond peradventure" filed "sham" claims.[51] The presumption was that an attorney acted in good faith. In other words, if the attorney had the proverbial "pure heart and empty head," the good faith test was satisfied.[52]

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[47]*See generally* Oliphant, *Rule 11 Sanctions and Standards: Blunting the Judicial Sword,* 12 Wm. Mitchell L. Rev. 731, 740 (1986) ("Absent a uniform approach and an application of agreed upon standards among the judiciary, the potential for arbitrariness exists."); *see also* Editorial, *Thomas Jefferson, Andrew Hamilton and Rule 11 of the Federal Rules of Civil Procedure,* The Bedeviled Advocate (Birmingham, Alabama), Nov. 10, 1987, at 2, col. 1 ("All judges are not fair people . . . .").

[48]Kassin, *supra* note 4, at 17–29.

[49]Kassin collected data beginning in January 1985, less than eighteen months after the adoption of the amended rule in August 1983. At that time, courts exhibited confusion about the basic issues, such as whether a subjective test or an objective test applied and whether imposition of sanctions was mandatory under the rule. Kassin described the period as one of "transition and uncertainty," with some courts exhibiting "an element of nonrecognition of the revised standard." *Id.* at 6–7.

[50]Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975).

[51]Murchison v. Kirby, 27 F.R.D. 14, 19 (S.D.N.Y. 1961) (cited in Kassin, *supra* note 4, at 3); *see also* Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980).

[52]Schwarzer I, *supra* note 1, at 186–87 (despite its prior force, there is "no room for a pure heart, empty head defense under Rule 11").

During the 1970s, a few court decisions moved toward a stricter standard of conduct for lawyers filing pleadings.[53] These decisions, however, were a distinct minority. The courts, in Judge Robert Carter's words, "came to settle on the subjective and rather nebulous standard of good faith."[54] Under that standard, rule 11 came to be viewed as ineffective, in large part because bad faith is so difficult to prove. In addition, the reward for the effort of proving bad faith could be minuscule (e.g., striking of sham pleadings); severe sanctions (e.g., discipline of a lawyer for a willful violation) were highly improbable in a federal court. Within that rubric, the traditional reluctance of a court to impose sanctions on lawyers and the traditional reluctance of lawyers to seek sanctions against each other severely limited the use of the pre-1983 version of rule 11.[55]

Amended rule 11 continues to treat the attorney's signature as a certificate from which any liability for sanctions flows. The first element of the attorney's certificate is basic: that the attorney has "read the pleading, motion, or other paper." In lieu of the prior rule's standard of "best of his knowledge, information, and belief," however, the drafters mandated that the knowledge, information, and belief of the attorney be "formed after reasonable inquiry."[56] Furthermore, the attorney certifies that the inquiry produced evidence and legal authority sufficient to show that the claim "is well grounded in fact and is warranted by existing law or a good faith

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The subjective test flowed from the language of the rule:

> The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay.

Fed. R. Civ. P. 11 (1982).

[53]*See, e.g.*, Freeman v. Kirby, 27 F.R.D. 395 (S.D.N.Y. 1961) (failure to investigate memorandum of attorneys questioning a fraud claim violates rule 11); Miller v. Schweickart, 413 F. Supp. 1059, 1060 (S.D.N.Y. 1976) (lawyers must "ascertain that a legal basis exists").

[54]Carter, *supra* note 10, at 6; *see also* Kassin, *supra* note 4, at 2–3.

[55]*See* discussion at note 6 *supra*.

[56]Fed. R. Civ. P. 11. The drafters made it clear that they intended to replace the subjectivity of the prior rule with a "more focused" objective standard that is "more stringent than the original good-faith formula." Advisory Comm. Note, *supra* note 8, at 198–99.

argument for the extension, modification, or reversal of existing law."[57] Finally, the attorney certifies that the paper "is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."[58]

The attorney's principal affirmative duties are to conduct a reasonable legal and factual inquiry and to certify the absence of any improper purpose. The intent of the drafters was to articulate a "standard of conduct that is more focused."[59] Has the new formulation been sufficient to afford attorneys a clear view of the standards by which their conduct will be measured under the amended rule? The early response to this question was a loud "No." Commentators examined the standards and found a lack of consistency in their language and application.[60] Some commentators argued that the standards under rule 11 are ambiguous, including objective and subjective elements.[61] During the first two to three years after the

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[57]Fed. R. Civ. P. 11. The Advisory Committee stressed "the need for some prefiling inquiry into both the facts and the law to satisfy the affirmative duty imposed by the rule." Advisory Comm. Note, *supra* note 8, at 198. The general standard is one of "reasonableness under the circumstances." The Advisory Committee specified some of the circumstantial factors that might affect the application, including the time available for inquiry, the need to rely on the client, the plausibility of the legal theory, and reliance on other counsel. Advisory Comm. Note, *supra* note 8, at 199.

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

[59]Advisory Comm. Note, *supra* note 8, at 198.

[60]*See, e.g.*, Nelken, *supra* note 26, at 1329 ("There is little consistency among judges, however, concerning the characteristics of an objectively unacceptable pleading."); Roddy & Webb, *Practice and Procedure Under Amended Rule 11 of the Federal Rules of Civil Procedure*, 9 Camp. L. Rev. 11, 28 n.52 (1986) ("different courts seemingly apply different standards and accordingly reach inconsistent conclusions regarding the same conduct").

[61]Patton, *New Rules Intended to Streamline Pretrial Process*, Legal Times, May 16, 1983, at 14, col. 1 (Each of the elements of the amendment "contains subjective factors that might be disputed easily . . . ."); Note, *Divining an Approach to Attorney Sanctions and Iowa Rule 80(a) Through an Analysis of Federal and State Civil Procedural Rules*, 71 Iowa L. Rev. 701, 708–09 (1987) [hereinafter Iowa Note] (Terms such as "harass," "well-grounded," and "good faith argument" are not defined.); Wade, *On Frivolous Litigation: A Study of Tort Liability and Procedural Sanctions*, 14 Hofstra L. Rev. 433, 477–89

amendments, some courts failed to delineate the shift from a standard of subjective bad faith to one of objective reasonableness.[62] Indeed, the first appellate case clearly adopting an objective test did not appear until 1985.[63] In a survey begun in January 1985, some federal judges drew a distinction between willful and bad faith violations of the rule, two terms that previously had been thought to be synonymous.[64]

Some of the confusion between objective standards and subjective standards seemed to be natural and foreseeable. During the first year or two of amended rule 11's existence, appellate cases were still concerned with behavior that had occurred prior to August 1983. Judges were reluctant to apply the revised standard retroactively. Given its punitive aspects, such reluctance is understandable. Indeed, Arthur Miller, reporter for the Advisory Committee on Civil Rules at the time of the 1983 amendments, has predicted that the "shakeout" period for definition of standards will

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(1986) (amended rule purports to be objective, but leaves questions such as what is a "reasonable inquiry"?).

[62]Vairo, *Structural Changes and Sanctions: An Analysis of the August 1983 Amendments to the Federal Rules of Civil Procedure*, 1 ALI-ABA Resource Materials, Civil Litigation and Practice in Federal and State Courts 43, 66–71 (4th ed. 1986) [hereinafter Vairo I] thoroughly traces the evolution of the cases from the early emphasis on subjectivity to the emerging consensus that the amendments demand an objective test); *see also* cases cited in Kassin, *supra* note 4, at 7 ("Some [appellate] opinions reflect an element of nonrecognition of the revised standard.") and cases cited in Iowa Note, *supra* note 61, at 709–10 ("One approach, adopted by the Fourth and Eighth Circuits . . . requires a showing of malice or bad faith.").

[63]Vairo I, *supra* note 62, at 69 (citing Eastway Constr. Corp. v. City of New York, 762 F.2d 243 (2d Cir. 1985) (*Eastway I*). For other cases adopting an objective test at about the same time, see Albright v. Upjohn Co., 788 F.2d 1217, 1221 (6th Cir. 1986); Zaldivar v. City of Los Angeles, 780 F.2d 823 (9th Cir. 1986); Rodgers v. Lincoln Towing Serv., 771 F.2d 194, 205 (7th Cir. 1985).

[64]Kassin, *supra* note 4, at 22–23. This distinction, however, does not relate to the language of the rule itself. Judges surveyed by Kassin may have seen "willful" conduct as premeditated and designed to cause harm. "Bad faith" conduct may include reckless and grossly negligent behavior.

last about five years, after which the amount of litigation about rule 11 should taper off.[65]

Out of the initial confusion about the meaning of amended rule 11, some of which was related to antagonism to the rule, there has begun to emerge a relatively clear set of doctrinal standards. This is not to say that a narrowly defined code of conduct has emerged; however, appellate and district court opinions have etched the outlines of a code of conduct. Problem areas remain, but commentators have concluded that courts have clarified the standards emanating from rule 11's signature requirement.[66]

The consensus is that "[b]y the end of 1986, all of the circuits had clearly embraced an objective test," and "circuit court disagreement over the standards to be applied in rule 11 cases was minimal."[67] The test for sanctioning a legal argument as unfounded or frivolous was whether it "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."[68]

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[65]Personal communication, May 29, 1987; *see also* Lewin, *A Legal Curb Raise Hackles*, N.Y. Times, Oct. 2, 1986, at D1, col. 1 ("There's a shakeout period with any procedural change and we're in that period right now."); Miller & Culp, *Litigation Costs, Delay Prompted the New Rules of Civil Procedure*, Nat'l L.J., Nov. 28, 1983, at 23.

[66]It is not the purpose of this report to restate the case law that has emerged. Further references to case law can be found in the following excellent and thorough articles: Vairo I, *supra* note 62; Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189 (1987) [hereinafter Vairo II]; Cavanagh, *Developing Standards Under Amended Rule 11 of the Federal Rules of Civil Procedure*, 4 Hofstra L. Rev. 499 (1986); Nelken, *supra* note 26. *See also* Commentary, *Rule 11 Sanctions in 1987*, 10 Attorney Fee Awards Reporter, August 1987, at 1 (collection and summary of recent appellate decisions).

[67]Vairo II, *supra* note 66, at 14–15.

[68]*Eastway I*, 762 F.2d at 253–54; *see also* INVST Financial Group, Inc. v. Chem-Nuclear Sys., Inc., 815 F.2d 391, 402 (6th Cir. 1987) ("absolutely no legal basis upon which . . . [the sanctioned attorney] could have reasonably believed that adverse rulings in prior cases were sufficient"); Brown v. Federation of State Medical Bds., 830 F.2d 1429, 1435 (7th Cir. 1987) (referring to the "frivolousness clause" of rule 11 and reciting the Advisory Committee guidelines); Thomas v. Capital Security Servs., Inc., 836 F.2d 866, 874 (5th Cir.

One leading commentator has already questioned the depth of doctrinal agreement, however, referring to the "unraveling consensus."[69] One of the areas of debate is whether an attorney has a continuing duty to modify papers or alter the course of the litigation on learning that previous positions have become frivolous. These discoveries may be the bitter fruits of subsequent investigations or warnings from opposing counsel. The plain language of the rule and of the Advisory Committee notes, however, seems to have resolved this dispute.

An attorney's signature is the sine qua non of rule 11 liability. By signing a "pleading, motion, or other paper," the attorney certifies that it meets rule 11 standards. If the paper is not signed, it "shall be stricken," perhaps automatically through a ministerial rejection by a clerk, unless the failure is corrected. If a paper "is signed in violation of this rule," sanctions must be imposed on "the person who signed it, a represented party, or both."[70] The Advisory Committee on Civil Rules underscored its intent not to impose a continuing duty by cautioning courts to "avoid using the wisdom of hindsight" and to "test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted."[71]

The plain language of the rule was applied in the Second Circuit in *Oliveri v. Thompson*,[72] a decision that has been widely followed in other circuits. [73] The court in *Oliveri* found that "the key to rule 11 lies in the certification flowing from the signature."[74] In an en banc decision that has rewoven the "unraveling consensus," the Fifth Circuit echoed that premise: "Like a snapshot, Rule 11 review

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1988) ("Rule 11 . . . imposes a standard of [objective] good faith and reasonable investigation as of the date of that signing.").

[69]Vairo II, *supra* note 66 at 15.

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

[71]Advisory Comm. Note, *supra* note 8, at 199.

[72]803 F.2d 1265 (2d Cir. 1986).

[73]*See Thomas*, 836 F.2d at 874 and cases cited therein.

[74]*Oliveri*, 803 F.2d at 1274.

focuses upon the instant when the picture is taken—when the signature is placed on the document."[75]

These decisions do not, however, mean that there is no continuing obligation. An attorney's later filings will likewise be measured by what is known, or should be known after a reasonable inquiry, at the time of signing. For example, an attorney who receives conclusive factual information that removes the factual basis for a case cannot certify that an opposition to a motion to dismiss or to a motion for summary judgment is "well grounded in fact."[76] The unifying principle is that the attorney's signature certifies that each pleading, motion, or other paper complies with rule 11. This same principle has been applied to deny sanctions for claims that a complaint removed from state court to federal court was frivolous.[77] Because the complaint and signature related to the state court proceeding, there is no rule 11 certificate to support an award of sanctions.

As the preceding discussion shows, a consensus has evolved as to the general framework for applying rule 11. The challenges

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[75]*Thomas*, 836 F.2d at 874. The en banc decision in *Thomas* reversed a panel decision that held that an attorney was under a continuing obligation to reevaluate a position based on new information. Thomas v. Capital Sec. Servs., Inc., 812 F.2d 984, 988–89 (5th Cir. 1987). That decision in turn was based on other Fifth Circuit panel decisions that are now reversed. *Thomas*, 836 F.2d at 874. These decisions were the source of Vairo's characterization of the consensus as "unraveling."

[76]Fed. R. Civ. P. 11. *See, e.g.*, Jackson Marine Corp. v. Harvey Barge Repair, Inc., 794 F.2d 989, 992 (5th Cir. 1986) (dicta that "plaintiffs are not required by Rule 11 or [28 U.S.C.] § 1927 to voluntarily dismiss their claims once they decide not to pursue the claims. It is enough that they do not oppose the defendant's efforts to secure summary dismissal of the claims."); Hamer v. Lake County, 819 F.2d 1362, 1370 n.15 (7th Cir. 1987) (dicta that under rule 11, "liability . . . can be based on pleadings advocating an unreasonable position after [an adverse decision in a related case]").

[77]Vairo II, *supra* note 66, at 21–22 and cases cited therein. *See also* United Energy Owners Comm., Inc. v. United Energy Management Sys., Inc., 837 F.2d 356, 364–65 (9th Cir. 1988) (rule 11 could not be applied to a failure to instruct the marshal that writs of attachment had been vacated. No paper was improperly signed, and rule 11 does not provide a "general basis" for sanctions.).

arise, however, in defining the conduct that is required to satisfy the objective certification requirements of the rule: What is a "reasonable inquiry" into the legal and factual basis of a claim? How is the objective test applied to determine whether the paper was filed for an "improper purpose?"

"Reasonable Inquiry" into Law

Rulings on the adequacy of the inquiry into the legal basis for a claim touch closely on the concern that sanctions will chill creative legal advocacy.[78] The primary standards for applying the legal-inquiry part of the rule are that rule 11 "is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories" and that courts should "avoid using the wisdom of hindsight . . . by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted."[79] A further test is whether the filing "was based on a plausible view of the law."[80]

Commentators have observed that many courts have given effect to these guidelines in a conscious effort to avoid chilling effects on advocacy.[81] At the same time, these same commentators have expressed concern that rule 11 is applied disproportionately to "disfavored" types of litigation, especially civil rights cases.[82]

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[78]Nelken, *supra* note 26, at 1341; Vairo II, *supra* note 66, at 24–25.

[79]Advisory Comm. Note, *supra* note 8, at 199.

[80]*Id.*

[81]*See, e.g.*, Vairo II, *supra* note 66, at 24–25 ("Most courts appear to apply Rule 11 with due regard to the concern for chilling advocacy, especially in cases of first impression, and cases involving unsettled or difficult areas of law."); Washburn Note, *supra* note 10, at 369–70 ("The courts are sensitive to this concern [about chilling "creativity and enthusiasm"] as a general rule and some have declined to sanction specifically for this reason.").

[82]Vairo II, *supra* note 66, at 25 n.83 ("Rule 11 is being used zealously against plaintiffs in 'disfavored' lawsuits. While many of the cases in which sanctions have been imposed appear to be frivolous, . . . there are many close cases."); *see* Washburn Note, *supra* note 10, at 371 ("Trends in the use of this sanctioning power suggest that court bias has the potential for influencing the decision of what will be deemed reasonable."). *See also* Kassin, *supra* note 4, at 38 (In an empirical study of hypothetical cases, judges who imposed sanctions

I analyze this issue further in chapter 10.[83]

Judicial reformulations of the standards for testing the adequacy of a legal inquiry, with one notable exception, appear faithful to the Advisory Committee's concern about chilling effects. For example, before sanctions can be imposed, one circuit demands that it be "patently clear" that a legal argument have "absolutely no chance of success under the existing precedents" and that "no reasonable argument can be advanced to extend, modify, or reverse the law."[84] Another circuit applies an analogous standard from the civil rights cases for fee awards to prevailing defendants. Under this standard, fees may be awarded only if plaintiff's claims are found to be "frivolous, legally unreasonable, or without factual foundation."[85] Another standard is whether a proposition is plausible or arguable.[86]

An apparent corollary of the preceding formulations is that an argument is plausible and has some chance of success if a federal judge at the trial or appellate level deems it so. While this may be the rule silently applied in the vast majority of cases, instances of its breach have generated criticism of the courts' application of rule

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frequently were more likely to impose sanctions in civil rights cases than in other hypothetical cases, and the differences were statistically significant.).

[83]*See* discussion at notes 388–98 *infra*.

[84]Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 254 (2d Cir. 1985) (*Eastway I*). *But cf.* Eastway Constr. Corp. v. City of New York, 637 F. Supp. 558, 578 (E.D.N.Y. 1986) (*Eastway II*), *modified and remanded*, 821 F.2d 121 (2d Cir. 1987) (*Eastway III*) ("While the law of the case [based on the appellate court's ruling] is that *Eastway*'s claims were frivolous, investigation of the underlying substantive law reveals considerable support for *Eastway*'s position.").

[85]Zaldivar v. City of Los Angeles, 780 F.2d 823, 831 (9th Cir. 1986).

[86]Davis v. Veslan Enters., 765 F.2d 494, 498 (5th Cir. 1985). For an articulation of the "arguable" standard, as that term has developed in a criminal law context, *see* McCoy v. Court of Appeals of Wis., Dist. 1, 56 U.S.L.W. 4520 (U.S. June 6, 1988) (appointed counsel seeking to withdraw from a criminal appeal may be required to submit a brief discussing anything in the record that might arguably support an appeal), and Anders v. California, 386 U.S. 738, 739 (1967) (appointed counsel seeking to withdraw from a criminal appeal must submit a brief referring to anything in the record that might arguably support the appeal).

11 and other sanctioning provisions.[87] In the cited cases, the majority and dissents seem incompatible with the commonly accepted standard of frivolity. An argument that persuades a federal judge of its reasonable chance of success should by that fact be deemed nonfrivolous.[88]

A similar issue arises when an appellate court reviews a district judge's decision that an argument is not frivolous. There is a split in the circuits about the proper standard of appellate review.[89] Several circuits hold that the standard for appellate review concerning sanctionability is a matter of law, subject to de novo review.[90] The

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[87]Hirshman, Foreword, *Tough Love: The Court of Appeals Runs the Seventh Circuit the Old Fashioned Way*, 63 Chi.-Kent L. Rev. 191, 200 (1987–1988) (For example, in Analytica, Inc. v. NPD Research, Inc., 708 F.2d 1263 (7th Cir. 1983), lawyers were sanctioned "for making contentions sufficiently meritorious to elicit one dissent in support of the disfavored contentions and at least one more vote for a rehearing en banc.").

In another recent case, the appellate panel majority's sua sponte decision to impose sanctions for a frivolous appeal under Fed. R. App. P. 38 (interpreted with "guidance" from rule 11) elicited a vigorous dissent from the conclusion of frivolity and the sanctions award. Hill v. Norfolk & Western Ry., 814 F.2d 1192, 1200, 1203–08 (7th Cir. 1987). The dissent concluded that "the [sanctioned] argument . . . is at least reasonable." *Id.* at 1206. Nevertheless, the court imposed sanctions for the expenses for defending the appeal.

[88]A related, but distinct, phenomenon is the case in which the district court applied sanctions and the court of appeals reversed, finding not only that the original claim was not sanctionable, but that it had merit. *See, e.g.*, Goldman v. Belden, 580 F. Supp. 1373, 1381-82 (W.D.N.Y. 1984), *vacated*, 754 F.2d 1059, 1071–72 (2d Cir. 1985). *See also* Cheng v. GAF, 713 F.2d 886, 891 (2d Cir. 1983) (In a case arising under 28 U.S.C. § 1927, the court reversed a sanctions award based on an allegedly frivolous motion to disqualify, stating: "Indeed, in light of our earlier decision on the merits in Cheng's favor, his attorney may have been ethically obligated to pursue his disqualification efforts."). Such apparent errors invite strong criticism for lawyers. Weiss, *A Practitioner's Commentary on the Actual Use of Amended Rule 11*, 54 Fordham L. Rev. 23, 26 (1985) ("Many judges, like it or not, don't know what is going on and a lot of them have deep-seated biases and are out to get individual lawyers."). Although they are apparently the exception to the rule that sanctions are generally applied to obvious cases, extremely erroneous applications or abuses of power fuel calls for repeal of rule 11.

[89]Vairo II, *supra* note 66, at 37–39.

[90]*Id.* at 37–38.

rule that has emerged recently in other circuits is that an abuse-of-discretion standard should be applied across the board to all sanctions issues.[91] As of September 1987, approximately one in eight appellate decisions has involved a reversal of a district judge's decision not to impose sanctions.[92] In those cases the district judge decided that an argument or claim was not without a legal and factual basis. To the extent that the appellate decisions conclude that an argument was frivolous as a matter of law,[93] they appear to be incompatible with the standards articulated by the circuits for judging frivolity. In other words, a standard of frivolity that depends on an argument's having absolutely no chance of success implies giving deference to a trial judge who finds a chance of success.

These anomalies in the articulation and application of standards of frivolity may be attributed to the "shakeout period" during which the courts are developing familiarity with the workings of rule 11. The initial thrust of the rule was to overcome the reluctance of courts to apply it. Once the practices under rule 11 become settled,

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[91]*See Thomas*, 836 F.2d at 871–73 and cases cited therein. The court considered the issues, especially the heavy dependence on facts of sanctioning decisions, and declined to adopt "a standard of review in Rule 11 cases which would effectively usurp the discretion of district courts." *Id.* at 873.

[92]Vairo II, *supra* note 66, at 10. *See also* table 15, *infra*, which shows two of nine reversals on such grounds in a 25 percent sample of appellate decisions.

[93]The *Eastway* case illustrates the lack of congruence between the appellate standards and their application. Prior to the Second Circuit's decision in *Eastway I*, the district judge rejected the application for sanctions, stating "I can't say this was a frivolous case." 762 F.2d 243, 249 (2d Cir. 1985). On appeal the Second Circuit reversed the denial of sanctions and ordered that "the district court shall impose appropriate sanctions." *Id.* at 254. At the same time, the court stated that sanctions must be imposed "where it is patently clear that a claim has absolutely no chance of success under the existing precedents and where no reasonable argument can be advanced to extend, modify, or reverse the law as it stands." *Id.* On remand, in determining the amount of the sanction, the district court wrote for three pages on the antitrust issues, showing precedent supporting *Eastway*'s position, and concluded that it was "bound by the Court of Appeals' characterization of frivolousness." *Eastway II*, 637 F. Supp. 558, 581 (E.D.N.Y. 1986). As to *Eastway*'s due process claim, the court concluded that "[m]any competent lawyers might have believed this claim to be viable." *Id.* at 582.

standards of frivolity may become more consistent and decision criteria more precise.

Toward Concrete Guidelines

Standards of frivolity depend on interpretations by judges and lawyers of general terms such as "reasonable under the circumstances," "frivolous," "plausible," and "arguable."[94] Can more concrete guidelines be developed to guide lawyers through the thicket of rule 11 practice? Lawyers understandably seek a "code of conduct," and bar groups are making efforts to formulate such a code. To illustrate the state of the art, I will detail and chart the efforts of one commentator to extract consistent rules from the cases and formulate a code. Later, I summarize some of the lessons that members of the bar communicate to each other and document changes they have described to me in interviews.

Edward D. Cavanagh, a law professor with considerable experience in the private practice of law, set forth the following guidelines, derived from case law, in an attempt to develop "bright line rules" regarding rule 11 sanctions.[95] Courts are more likely to impose sanctions when a party fails to confront adverse authority and advances an argument that is

- rejected by an unbroken string of authority (as opposed to an argument relating to a questionable or more complex area); or
- previously rejected by the court in the same or closely related litigation.[96]

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[94]For a listing of more than a dozen additional adjectives that the courts have used to describe pleadings that are not well grounded in law, see Cavanagh, *supra* note 66, at 528–29; *see also* Schwarzer II, *supra* note 12, at 1015–16.

[95]Cavanagh, *supra* note 66, at 535–46. For a recent effort to categorize conduct subject to rule 11 and to articulate objective standards for application of rule 11, see Bloomenstein, *Developing Standards for the Imposition of Sanctions Under Rule 11 of the Federal Rules of Civil Procedure*, 21 Akron L. Rev. 289 (1988).

[96]*Id.* at 529–32.

TABLE 3

Taxonomy of Attorney Conduct Subject to Sanctioning Under the "Well-Grounded in Law" Standard of Rule 11

	Mid-Spectrum		
Clearly Reasonable	Presumptively Reasonable	Presumptively Unreasonable	Clearly Unreasonable
Thoroughly researching law and applying it as follows	Novel (plausible) theories based on analogies	Farfetched analogies that imply improper purpose	Settled law opposes argument and no rational distinction proffered
Argument based on statutes and Supreme Court sions	Plausible theories in a complicated area of law	Misrepresentation of governing law to mislead court	Identical argument by same pleader previously decirejected in same or related case
Argument based on circuit case law			Argument rehashes a rejected claim in different form
Circuit case law unsettled, but case law of another circuit or district supports argument			Fatal, irremediable defect on face of pleading
Circuit case law poses argument, but other circuit supports it			No legal opresearch regarding dubious legal propositions
Case of first impression with plausible argument			

(*continued*)

TABLE 3 (Continued)

	Mid-Spectrum		
Clearly Reasonable	Presumptively Reasonable	Presumptively Unreasonable	Clearly Unreasonable
Compelling facts or values suggest reexamination of settled precedent			
Settled precedent is distinguishable factually (and presumably the case meets one of the above standards)			

Source: Cavanagh, *Developing Standards Under Amended Rule 11 of the Federal Rules of Civil Procedure*, 4 Hofstra L. Rev. 499, 543–46 (1986).

Building on case law, Cavanagh proposed a framework for judging whether attorney conduct is sanctionable; I have converted this framework into table 3.

The first and last columns in the table represent zones of safety and extreme danger, respectively. Conduct within either of the columns is almost conclusively nonsanctionable or sanctionable, absent a "compelling showing" to the contrary.[97] In the middle spectrum, conduct is classified according to rebuttable presumptions: This is a caution zone, and the burden will be on the attorney to justify taking presumptively unreasonable action.

The important element of this table is the structure. The content of the individual cells within this taxonomy remains debatable and subject to the evolutionary process through case law developments or further amendments to the rule. The table is designed with a national audience in mind; in a given case, the standards of a district judge or appellate court may remove ambiguities inherent in attempting to synthesize practice across districts and circuits.

[97]*Id.* at 537.

This effort to codify rule 11 into more or less bright-line statements has the potential of providing detailed guidance to both bar and bench. Such guidance should, in turn, narrow the zone of discretion under rule 11 and reduce the potential chilling effect.

"Reasonable Inquiry" into Facts

Perhaps more troublesome to lawyers than the standards for judging the adequacy of the legal inquiry are the standards for judging the adequacy of factual investigations. Legal research can be defined and controlled more easily than factual investigation in many areas of litigation. One can always do more investigation. The qualities of thoroughness and persistence in marshaling facts that are the mark of a well-prepared trial lawyer could paralyze the same lawyer in drafting a complaint under the open-ended strictures of rule 11.

Guidance from the Advisory Committee on this subject is terse and general. In determining "what constitutes a reasonable inquiry," a court should examine "how much time for investigation was available," the need to "rely on a client for information as to the facts," and dependence on forwarding counsel or another lawyer.[98] Case law has only "begun to define some of the contours" of the duty to conduct a reasonable prefiling investigation.[99] Cavanagh has formulated some general rules from an analysis of the decisions:

- Some prefiling inquiry is necessary.
- Filing in the face of a factually clear defense runs a high risk of incurring sanctions even though the defense may be waivable,
- Adverse information supplied by an adversary constitutes notice of the need for further investigation, and failure to investigate is strong evidence of a violation of the rule.
- Reliance on a client's story is not sufficient if further investigation is reasonable and feasible; however, if verification is not feasible, an attorney may proceed if the client's story is plausible and credible.

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[98]Advisory Comm. Note, *supra* note 8, at 199.

[99]Cavanagh, *supra* note 66, at 518.

• Reliance on the investigation of other attorneys is sufficient if the lawyer obtains sufficient credible facts from prior attorneys to support the allegations.[100]

While these formulations are more concrete and behaviorally oriented than the rule or the notes, the level of guidance for a practicing lawyer remains vague. A taxonomy based on logical extensions and interpretations of the case law provides further guidance and may also serve as the structure for a comprehensive code of conduct. Table 4 is derived from Cavanagh.[101]

Case law developments, which have been plentiful since the Cavanagh article, may provide a basis for elaboration of this taxonomy and for filling gaps—a project beyond the scope of this report. Attention should be given to framing standards in terms of the specific tasks that can be expected of lawyers in specific types of cases (e.g., reviewing the state administrative agency findings in an employment discrimination case; writing a demand letter to the opposing party; searching public records for evidence of defendant's principal place of business; reviewing medical records before asserting a statute of limitations defense).

TABLE 4
Taxonomy of Attorney Conduct Subject to Sanctioning Under the "Well-Grounded in Fact" Standard of Rule 11

	Mid-Spectrum		
Clearly Reasonable	Presumptively Reasonable	Presumptively Unreasonable	Clearly Unreasonable
Conferring with client, review of verifying documents	Reliance on client plus lack of time to confirm	Reliance on general impressions of forwarding counsel	No prefiling inquiry

(*continued*)

[100]*Id.* at 517–23.
[101]*Id.* at 536–43.

TABLE 4 (Continued)

Clearly Reasonable	Mid-Spectrum: Presumptively Reasonable	Mid-Spectrum: Presumptively Unreasonable	Clearly Unreasonable
	Reliance on client plus inaccessible or expensive verifying data	Failure to investigate	Filing based on rumor, hearsay
	Reliance on plausible client story against word of opposing party	Ineffective efforts to verify client's facts	Willful misrepresentation of facts
	Reliance on forwarding counsel without opportunity to verify facts	Ignoring adverse information such as claims of adversary	Continued maintenance of action (filing of pleadings) despite uncontradicted evidence that claim or defense is invalid
		Investigation of documents or witnesses provided by opponent and obtaining information that confirms or fails to refute plausible client story	

Source: Cavanagh, *Developing Standards Under Amended Rule 11 of the Federal Rules of Civil Procedure*, 4 Hofstra L. Rev. 499, 536-43.

Some special needs in regard to defining a reasonable inquiry are establishment of standards for filing rule 11 motions (see chap-

ter 10 *infra*) and definition of procedural safeguards (see chapter 6, *infra*). One approach to ascertainment and codification of standards is to examine the interpretations that lawyers have given to rule 11 and the preventive effects they have reported in their practices. I pursue that approach in the next chapter.

IV. EDUCATIONAL AND PREVENTIVE EFFECTS

As I noted at the outset of chapter 3, the volume of federal litigation is such that the purposes underlying rule 11 cannot be accomplished through direct policing by the courts. If every frivolous matter must be drawn to the attention of a judge and be the subject of a ruling on its frivolity, there is no improvement in the court's efficiency. The ruling on frivolity involves the same amount of time as a ruling dismissing the case on the merits. Indeed, the time required to administer a fee-shifting system could far outweigh any benefits. In this study, some judges articulated this concern as a reason for their continuing reluctance to invoke rule 11 on their own initiative.

Deterrence of violations is not simply a primary purpose of rule 11; it is essential to the success of the amended rule. For deterrence to work, at least two conditions are necessary: (1) dissemination of information about the rule to those likely to be affected and (2) development of reasonably clear guidelines for the behavior of those individuals. I refer to the first condition as the "educational effects" of the rule, acknowledging that there is no clear borderline between educational effects and chilling effects. I refer to the second condition as "preventive effects." Educational effects can be measured by examining the volume of communications about rule 11 to and among lawyers. Preventive effects can be estimated by talking to lawyers and asking about practices that they engage in that might have the effect of avoiding rule 11 violations.

Educational Effects

The educational effects of rule 11 are palpable. If litigation about rule 11 has become the latest "cottage industry" of the legal profession,[102] writings and lectures on rule 11 are the voice of that industry. The volume of writings in the academic law journals has

[102]Bates, *The Rule 11 Debate, Four Years Later*, Nat'l L.J., Oct. 12, 1987, at 3.

been remarkable for an issue relating primarily to the practice of law.[103] Professional journals have also had numerous articles on the subject.[104] The legal weekly newspapers have treated rule 11 as a continuing controversy, dating back to the proposed 1983 amendment.[105] Bar association conferences and continuing legal education programs frequently cover the topic.

Printed collections of educational materials about rule 11 have expanded the distribution of legal and empirical studies.[106] The Section of Litigation of the American Bar Association has produced two editions of a circuit-by-circuit review of the developing case

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[103]For example, a field search on June 3, 1988, of the law reviews that are included in the LEXIS data base revealed thirty-three articles that deal primarily with sanctions for frivolity in pleadings. (The search term was "Rule 11 w/10 sanction! or federal." Articles that did not appear to deal primarily with pleadings or sanctions were excluded.)

[104]*See, e.g.*, Joseph, *The Trouble With Rule 11*, A.B.A. J., Aug. 1, 1987, at 87; Patton, *The Mighty Rule 11*, The Washington Lawyer, May/June 1988, at 33. A June 3, 1988, title search of the "LGLIND/Legal Resource Index" library in LEXIS for the term "rule w/1 11" revealed fifty-three references to articles in professional journals other than law reviews. Many of these articles are in state or local journals, such as the Los Angeles Daily Journal, the New York Law Journal, and the Pennsylvania Law Journal. This number understates the writing on the subject because it includes only articles with rule 11 in the title. A search for the term "sanction!" would have generated more titles than were practical to examine.

The titles in these professional journals and newspapers suggest a deterrent and preventive effect orientation (e.g., "9th Circuit Slaps L.A. Lawyer with Tough Rule 11 Sanctions," "Basic Guidelines for Avoiding Sanctions," "Reasonable Inquiry Required Before Pleading," and "Look Before Leaping").

[105]*See, e.g.*, Patton, *New Rules Intended to Streamline Pretrial Process*, Legal Times, May 16, 1983, at 14, col. 1; *see also* Miller & Culp, *Litigation Costs, Delay, Prompted The New Rules of Civil Procedure*, Nat'l L.J., Nov. 28, 1983, at 1; Lewin, *A Legal Curb Raises Hackles*, N.Y. Times, Oct. 2, 1986, at D1, col. 1. The LEXIS search described in note 104 revealed eleven references to articles with rule 11 in the title that were published in national newspapers. Ten were in the National Law Journal or the Legal Times; one was in the New York Times.

[106]*See, e.g.*, Practicing Law Institute, Rule 11 and Other Sanctions: New Issues in Federal Litigation (1987).

law[107] and is conducting a national empirical survey of attorneys' experiences with rule 11.

Numerous bar associations and bench/bar committees have undertaken extensive empirical and legal research into the workings of rule 11. The following is a listing of efforts that have come to my attention.

- The Committee on Federal Courts of the Association of the Bar of the City of New York has produced at least two major reports on the subject of rule 11.[108]
- The New York State Bar Association completed a report that included extensive surveys of practitioners and judges throughout the state.[109]
- The Third Circuit has appointed a task force to gather empirical data and prepare a report on rule 11 sanctions.[110]
- The Center on Constitutional Rights has undertaken a national project to collect information about the administration of rule 11, especially as it applies to the plaintiffs' civil rights bar.[111]
- The D.C. Bar Association is in the midst of a study that will include interviews with judges.

Circuit conferences have often elected to include rule 11 as a topic.[112] Programs at circuit conferences generally include representatives of the bench and bar. Continuing education programs routinely cover rule 11 in federal practice seminars. In one state with a mandatory continuing legal education requirement, at least

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[107]Section of Litigation, ABA, Sanctions: Rule 11 and Other Powers (2d ed. 1988) [hereinafter Sanctions].

[108]ABCNY Report, *supra* note 28; Committee on Federal Courts, Association of the Bar of the City of New York, *Procedural Rights of Attorneys Facing Sanctions*, 40 Rec. 313 (1985).

[109]NYSBA Report, *supra* note 4.

[110]*Task Force Convened to Study Sanctions Under Rule 11*, 6 Third Circuit J., Spring/Summer 1987, at 1.

[111]*See Thomas*, 836 F.2d at 871 n.4 (citing Cochran, *Recent Developments in Response to Rule 11 Problems*, 9 Cornerstone November/December 1987, at 1).

[112]Without attempting to collect systematic data on this subject, I am aware of programs dealing with sanctions in at least six circuits during the past two years. The Third Circuit will devote its entire October 1988 conference to a discussion of sanctions.

thirty minutes of each daily session must be devoted to ethics. Rule 11 has reportedly become a useful vehicle for discussion about legal ethics in those sessions.

The educational effects of rule 11 are not limited to formal public programs. In the field interviews, one lawyer, who had been the subject of an $800 sanctions order, said simply, "We talk about rule 11 a lot." Other lawyers interviewed for this study gave the following examples of practices in their law firms:

- routine reading and circulation of memos about recent rule 11 decisions;
- informal "brown bag" discussions of rule 11 developments;
- incorporation of rule 11 into training programs for new associates or, in one case, for the entire firm after the 1983 amendments; and
- regular firm meetings dealing with specific rule 11 issues in current litigation.

Judges are aware of the interest of the bar in rule 11 and participate actively in educational efforts. Even in districts that rarely use formal sanctions to enforce rule 11, judges participate in seminars and continuing education programs. One judge, from a district with relatively little sanctions activity, summarized the informal educational effects: "Rule 11 is the buzzword among lawyers. The rule acts as its own deterrent." Another judge, also from a district with little formal sanctioning, furthers the preventive effects on motions day by pointing out examples of candidates for sanctions to a captive audience of forty or more lawyers.

Further detailing of the educational effects of rule 11 would confirm what is already known: Rule 11 has generated a massive educational effort to inform lawyers about their obligations under the rule. Perhaps born of fear or lawyers' continuing quest for a competitive advantage, or of a reawakened sense of professionalism, these programs appear to have generated as much interest in the professional duties of lawyers as any other event in the history of the bar in America. The Clark Report on enforcement of professional discipline[113] and the Devitt Committee report on the quality of

[113]ABA Special Committee on Evaluation of Disciplinary Enforcement, Problems and Recommendations in Disciplinary Enforcement (1970).

advocacy in the federal courts[114] pale by comparison and have already faded. Rule 11 has afforded the legal profession an opportunity to reflect on its standards and practices.

Preventive Effects

A quest for clear and certain standards, applied consistently to similar cases, seems to drive the educational process.[115] While the tone of the educational process is often critical of rule 11 and its application by the courts, the end result is the identification of professional behavior that will avoid difficulties with rule 11. The resulting educational effects lay the foundation for the deterrent effects sought by the drafters and users of rule 11.

Commentators, judges, and lawyer–interviewees have identified steps for lawyers to take to avoid sanctions. Many of the suggestions reflect basic, commonplace, commonsensical professional skills. The general rules for "How to Avoid Rule 11 Sanctions" are "no more and no less than good lawyering has always required in all events."[116] Discussion of these issues demonstrates a reexamination of professional norms and roles stimulated by rule 11. Although rule 11 may be the immediate stimulus, the concern about identifying and reinforcing professional skills seems part of a broader reevaluation of the role of the legal profession in facing sweeping demographic and cultural changes in the legal system.[117]

In a typical case, assuming that there is no emergency and no need to rely exclusively on a client's statement of the facts, a

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[114]A. Partridge & G. Bermant, The Quality of Advocacy in the Federal Courts: A Report to the Committee of the Judicial Conference of the United States to Consider Standards for Admission to Practice in the Federal Courts (Federal Judicial Center 1978).

[115]*See, e.g.*, Joseph, *The Trouble with Rule 11*, A.B.A. J., Aug. 1, 1987, at 87 (Standards are unsettled on important issues, such as the duty of candor, liability of local cocounsel, and arguments for law reform. References to "reasonable" practices create a "minefield" for practitioners.)

[116]Sanctions, *supra* note 107, at 26.

[117]*See generally* ABA Commission on Professionalism, *supra* note 31; Bok, *A Flawed System*, 85 Harv. Mag., May–June, 1983, at 38.

lawyer is well advised to do the following before filing a complaint, answer, or other major pleading:

1. **Interview the client or clients personally.** A reasonable factual inquiry demands a thorough personal interview with the client, including the identification of key witnesses and the review of pertinent documents.[118] Lawyers interviewed for this study added some practical advice that embellishes this guideline and makes it more concrete. Several would elicit a written version of the client's claim. One would even get an affidavit in an appropriate case. Several lawyers indicated that they review the factual allegations in the pleadings with the client prior to filing. Others refer to "cross-examination" of clients in appropriate contexts.[119]
2. **Dissuade the client from filing a specious claim and try to find other ways to address the problem.**[120] As one lawyer I interviewed put it, rule 11 "involves the lawyer in the decision to sue, no longer [simply] serving the wishes of the client." Rule 11 affords the lawyer an independent reason to discourage specious, dilatory claims or defenses.
3. **Identify or anticipate responses of opposing parties.**[121] The lawyers surveyed identified several ways of

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[118]*See* Sanctions, *supra* note 107, at 3, 25 (citing Unioil, Inc. v. E. F. Hutton, Inc., 809 F.2d 548 (9th Cir. 1986), *cert. denied*, 108 S. Ct. 83 (1987) (attorney must either interview client or elicit facts from forwarding counsel that support the legal claim); *see also* Wold v. Minerals Eng'g Co., 575 F. Supp. 166, 167 (D. Colo. 1983) (personal interviews with knowledgeable witnesses should be conducted if a party is on notice that its factual assertions may be suspect).

[119]Klausner, *The Dynamics of Rule 11: Preventing Frivolous Litigation by Demanding Professional Responsibility*, 61 N.Y.U. L. Rev. 300 (1986) (citing Coburn Optical Indus. v. Cilco, Inc., 610 F. Supp. 656, 659 (M.D.N.C. 1985)).

[120]*Id.* at 303, 316–17 (quoting Elihu Root: "About half the practice of a decent lawyer consists in telling would-be clients that they are damned fools and should stop." *Id.* at 300 n.1.).

[121]Cavanagh, *supra* note 66, at 519–20. Cavanagh posed the question of how to deal with the issue of a waivable defense that is known to the plaintiff's

anticipating the opponent's claims. One time-honored method is to send a demand letter prior to filing suit. Another is to "look at the interplay between the client and the opposing party," as one lawyer expressed it. By reviewing the correspondence and evidence of the relationship between the parties, a lawyer can get a sense of the defenses that might be raised. In one office, the lawyer's partner took the role of lawyer for the opposing party and prepared a memorandum in support of a motion to dismiss. Playing the devil's advocate in less formal modes was commonplace among the lawyers.

4. **Review relevant documents.**[122] In many of the cases involving high risks of sanctions, such as securities actions, documents are available for review before filing. In employment discrimination cases, such review can be a problem because of delays in administrative proceedings and the need for discovery to obtain records from employers. Lawyers are held accountable for reading and analyzing available documents.
5. **Interview witnesses if they are available.**[123] Many lawyers suggested obtaining affidavits from witnesses and having an investigator do the interviews.
6. **Examine tangible evidence if available.**
7. **Consult with an expert in the area of law or the area of factual dispute.**[124] Larger firms routinely require consultation with a litigation specialist who is well versed in the demands of rule 11. For lawyers who practice infrequently in federal court, consultation with an experi-

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attorney. The practical issue is whether the opposing party knows of the defense and will assert it. Making a demand on the defendant should elicit any clear defenses that might be asserted.

[122]*See* Sanctions, *supra* note 107, at 25 (citing Fuji Photo Film USA, Inc. v. Aero Mayflower Transit Co., 112 F.R.D. 664 (S.D.N.Y. 1986)) (failure to examine annual report of corporation, obtained for another purpose, to determine status of related entity).

[123]Swindal, *Frivolity in Court: New Rule 11*, 13 Litigation 3, 64 (Summer 1987).

[124]*Id.*

enced federal practitioner may be a practical necessity in a matter of any complexity. For solo practitioners, consultation with another lawyer may be an indispensable means of obtaining an objective analysis of a close case.

Changes in Pleading Practices

Commentators and the lawyers interviewed have also offered more general advice on how to avoid rule 11 sanctions. Many of these general suggestions relate to pleading practices, the mechanism for communicating the results of prefiling inquiries to the court.

Few of the attorneys in the field study reported making changes in their pleading practices as a result of rule 11. Seventeen of forty-nine (35 percent) reported that they had made some changes in their pleading.[125] Many of those who reported no change, however, showed a high preexisting level of concern for accuracy in pleadings. One attorney's comment was typical: "I always plead conservatively, understating or precisely stating what I [can] prove." Along the same lines, another attorney said, "I've always pleaded facts to show the court that I'm not using a shotgun approach."

In a similar manner, one lawyer changed his practice in drafting complaints by omitting unnecessary adjectival descriptions of terms like conspiracy and fraud. Others indicated that they had modified their use of boilerplate answers and defenses. One "eliminated boilerplate affirmative defenses, such as failure to state a claim or a statute of limitations bar." Similarly, another lawyer reported that "all defenses are tailored to the case." This spirit of concern has even extended to use of denials in answers. One lawyer said, "I used to think that denials had no downside. Now I review the file and decide on the facts."

My field interviews suggest that reduction of boilerplate language through prefiling inquiry into the factual basis for any claim

[125]This finding is similar to that of the New York State Bar Association. In its survey, 39 percent of the attorneys reported more extensive prefiling factual inquiry and 35 percent reported more extensive prefiling legal inquiry after the 1983 amendments. NYSBA Report, *supra* note 4, at A3.

is the major pleading effect of rule 11. Even the flamboyant and astronomical claims for damages may become relics of a more freewheeling era. Several lawyers reported that they no longer request a specific dollar amount. For one lawyer, rule 11 reinforced a strategic decision: "We never pray for a specific amount. Rule 11 gives us an excuse not to do so and reinforces our strategy decision to remove this issue from cross-examination of plaintiffs." The ABA Section of Litigation's report, based on case law, recommends careful examination of the prayer for damages.[126]

Some of the advice from lawyers regarding pleadings is more general. Several suggested attention to pitfalls in pleadings, especially "secondary claims," like the strategic counterclaim for malicious prosecution, the third cause of action, or the boilerplate affirmative defense. In a similar vein, the ABA Section of Litigation's report advises lawyers to "[m]ake sure that all arguments and subarguments in your brief comply with rule 11 requirements."[127] However routine certain claims may have become, they are now subject to reexamination in the light of amended rule 11.

Rule 11 itself may be the subject of rule 11 scrutiny, bringing to reality Miller's Kafkaesque nightmare.[128] One judge reported that

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[126]Sanctions, *supra* note 107, at 26 (citing Hudson v. Moore Business Forms, 827 F.2d 450, 458 (9th Cir. 1987)) (prayer for $4.2 million in compensatory and punitive damages in a counterclaim against an unemployed plaintiff was sanctionable: "assertion of offhanded, casual, or retaliatory damage prayers is one of the abuses that Rule 11 is particularly designed to discourage").

[127]*Id.* (citing Golden Eagle Distrib. Corp. v. Burroughs Corp., 809 F.2d 584 (9th Cir. 1987)).

[128]Miller recounted the experience as follows:

> I must tell you in closing, though, that I do have a recurrent nightmare. I wake up in the middle of the night and what I have dreamed is that in a complicated case one of the parties has made a gigantic discovery request, and the other party leaps up and says: "I move to sanction my opponent for violation of the certification requirement in rule 26, because that discovery request is disproportionate, it is redundant, it violates this or that." The judge holds a hearing. At the end of the hearing the court rules that it was an enormously complex and detailed discovery request, but it did not violate rule 26. The sanction motion is denied, at which point the discovering party leaps up and says: "Your Honor, I hereby move to sanction the sanction motion." As Kurt Vonnegut would say, and so it might go.

rule 11's main effect on pleadings is to add a routine request for sanctions at the end of every pleading. Under rule 11, however, an unfounded request for rule 11 sanctions is itself sanctionable.

The ABA Section of Litigation's report contains a clear recommendation that a lawyer seeking sanctions should make his or her "own Rule 11 fact and law inquiry, and [should] not seek sanctions unless there is a clear-cut violation of Rule 11."[129] Such advice and the application of rule 11 to rule 11 applications, despite its bizarre appearance at first blush, make sense. Failure to police rule 11, as I explain more fully in the chapters on due process and satellite litigation, can skew the process. If requests for sanctions are to serve as notice to the opposing party, they must be substantial enough to be taken seriously. Frivolous or routine requests send false signals, dulling the notice process.

How does the advice to lawyers detailed in this chapter compare to the standards articulated by Cavanagh in chapter 3? Following the advice in this chapter would equate with the "clearly reasonable" category of conduct described in table 4. Following the advice would also negate the "clearly unreasonable" actions and would tend to be inconsistent with the "presumptively unreasonable" behavior. The relationship of the recommended actions to the "presumptively reasonable" category of conduct is less clear because that category tends to include behavior that applies when investigation of the client's story is infeasible or fruitless.

In summary, the reports and comments presented in this chapter indicate that reasonably clear general guidelines for conduct are being developed and communicated to and among the bar. These exhortations remain at a relatively general level, however. Further specification of acceptable attorney conduct is needed, perhaps cir-

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A. Miller, The August 1983 Amendments to the Federal Rules of Civil Procedure: Promoting Effective Case Management and Lawyer Responsibility 41 (Federal Judicial Center 1984). *See also* Comment, *Has a "Kafkaesque Dream" Come True? Federal Rule of Civil Procedure 11: Time for Another Amendment?*, 67 B.U.L. Rev. 1019 (1987) (citing 101 F.R.D. 161, 200 (1983)).

[129]Sanctions, *supra* note 107, at 27.

cuit by circuit, to guide lawyers and judges in the administration of rule 11.

V. INCIDENCE OF SANCTIONS AND PROCEDURAL CHARACTERISTICS OF PUBLISHED CASES

Prior Studies

A major assumption underlying the adoption of amended rule 11 is that there is a vast amount of abusive behavior that would be sanctionable under the amended rule.[130] Opinions that the level of sanctioning is too high or too low probably are derived from assumptions about the level of sanctionable behavior. Major disagreements have erupted over this issue.[131] The current state of knowledge, however, is that there is no quantitative baseline information about how often sanctions should be imposed.

This void of knowledge allows commentators to cover a broad range of territory. One can truthfully say that there has been a "[p]henomenal increase in the use of Rule 11 since it was amended,"[132] given the pre-1983 baseline of nineteen reported cases, only three of which resulted in sanctions.[133] At the other extreme, an observer in the district with the highest level of reported sanctions decisions can safely say that there is no need "to worry

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[130]The total amount of behavior that would be sanctionable under rule 11 is not determinable by ordinary quantitative measures. A full study of sanctionable behavior would require expert judgments of a representative sample of lawyer behavior, a massive undertaking far beyond the scope of this project.

[131]*See, e.g.*, Schwarzer I, *supra* note 1, at 182 ("[T]here is considerable opinion, supported by at least anecdotal evidence, that misuse and abuse of the litigation process have contributed to the problem [of the cost, complexity and burdensomeness of civil litigation]. "); LaFrance, *supra* note 29, at 344–45 ("yet the Advisory Committee in 1983 did not provide statistics substantiating this 'problem' [of frivolous litigation]"); Grosberg, *The Rule 11 Debate: Circuit Gives No Guidance in* Eastway, Nat'l L.J., Sept. 14, 1987, at 22 ("There is no empirical or other evidence, however, to support the proposition that any significant part of caseload pressures is due to frivolous litigation or even that there is a litigation explosion, as some have contended.").

[132]Washburn Note, *supra* note 10, at 345.

[133]Kassin, *supra* note 4, at 2.

about drowning in a sea of sanctions."[134] Using the number of federal district and appellate judges as a reference point, there is approximately one published rule 11 opinion per federal judge.[135]

Reports of published sanctions decisions have become quite precise. Vairo noted that from August 1, 1983, to December 15, 1987, 688 rule 11 decisions were reported, 496 from the district courts and 192 from the circuit courts of appeals.[136] Almost a third of these decisions arose out of the Southern and Eastern Districts of New York and the Northern District of Illinois.[137] Unfortunately, there is no comparable data base for unreported rule decisions.[138] A current study in the Third Circuit is designed to provide data about the incidence of reported and unreported decisions in the district courts throughout the circuit for a fixed period of time. Although understandably limited to a single region, the data may illuminate a murky issue. A time study being conducted by the Federal Judicial Center should build a data base that will include national data on the incidence of sanctions in the district courts and allow further research on the exact nature of satellite litigation.

Some information about the incidence of unreported sanctions can be estimated from data in Kassin's 1985 survey of federal district judges.[139] The average number of requests for sanctions during the twelve months preceding the survey was 5.35 per judge

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[134]Chrein, *The Actual Operation of Amended Rule 11*, 54 Fordham L. Rev. 13, 17 (1985).

[135]As of April 1, 1988, there were 539 active district judges and 156 active circuit judges, a total of 695 active judges. As of December 15, 1987, there were 688 published rule 11 decisions. *See* note 136 *infra*.

[136]Vairo II, *supra* note 66 at 199. Taking the report at face value, it appears that this count includes both district court opinions and appellate court opinions in the same case if both were published. Such data overstate the incidence of sanctions, but not the amount of satellite litigation.

[137]*Id.* at 200. See note 136 regarding the possibility of double-counting of some cases.

[138]There is a procedure for courts to report all sanctions decisions to the Administrative Office of the United States Courts, but compliance is sporadic. A review of the data shows that many reported decisions are not included and that many courts do not report any decisions.

[139]Kassin, *supra* note 4, at 36–39.

(median estimate = 3.04).[140] Of these, the actual awards averaged 1.62 per judge. Even assuming that the respondents were more likely than the average judge to be sanctioners,[141] this report gives a rough, albeit probably inflated,[142] estimate of the number of sanctions requests presented to the courts during the first years of the amended rule's life.

Using the average number of weighted case filings per year per judge as a reference point,[143] Kassin's data yield an estimate of one request for sanctions for every eighty-five cases and one sanctions award for every 280 filings. These figures translate into a request for sanctions in less than 1 percent of all cases and a sanctions award in less than three-tenths of 1 percent of all cases.

The New York State Bar Association's survey of attorneys and federal judges and magistrates also provides a basis for some speculative estimates of the incidence of sanctions activity.[144] The NYSBA data, however, are from an atypical jurisdiction and are much rougher approximations. Of the forty-three judicial officers who responded to the survey, 53 percent were from the Southern District and 20 percent from the Eastern District.[145] Of the forty-three, 54 percent reported receiving requests for sanctions in less than 10 percent of their cases and 35 percent in from 10 to 25 percent of their cases. Using the weighted filings for the Southern

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[140]*Id.* at 36.

[141]Only 53 percent of the judges who responded to the survey completed the questions on the incidence of sanctions activity. They may not be representative of the federal judiciary or even of the 292 judges (60 percent of the active judges) who participated in the survey. Kassin, *supra* note 4, at 37–39.

[142]Kassin cautioned against use of his data to estimate sanctions activity in the federal courts because it is likely to produce "spuriously inflated estimates." This is due to the likelihood that respondents in that study were more likely to have used sanctions than judges who chose not respond. *Id.* at 38.

[143]The average number of weighted cases per judgeship during 1985 was 453. Administrative Office of the United States Courts, Federal Court Management Statistics 168 (1987).

[144]NYSBA Report, *supra* note 4.

[145]*Id.* at 21. Twenty-one of the respondents were district judges, three were circuit judges, eight were bankruptcy judges, and ten were magistrates. Identification of one was missing. *Id.* at A7.

District of New York,[146] and averaging the responses at the midpoint of the estimates, yields an average of fifty-three sanctions requests per judge per year. Of these, assuming a random distribution among the judges based on their rate of sanctioning, the figures produce an estimate of 6.85 sanctions awards per judge per year, more than four times the probably inflated estimates generated by extrapolation of Kassin's figures. The NYSBA estimates certainly seem high, but they may reflect the high incidence of sanctions in the Southern and Eastern Districts of New York.[147]

Field Data

I asked the judges in the field portion of this study to estimate the number of sanctions awards they had issued in the past year. Table 5 shows that none of the judges in the low-sanctioning districts reported invoking sanctions more than one to five times. In the high-sanctioning districts, six of seventeen judges exceeded that range. The activities of these six judges in the high-sanctioning districts served to distinguish those districts from the low-sanctioning districts.[148]

Eleven of the seventeen judges in the high-sanctioning districts sanctioned at about the same levels as the judges in the low-sanctioning districts. The results in the table are probably skewed toward showing more sanctions in the high-sanctioning districts because the judges interviewed in those districts (an average of three per district) were selected on the basis of having issued a written sanctions order. In the low-sanctioning districts, all of the judges and magistrates were contacted for interviews. The data do, however, provide a view of the range of sanctioning activity among districts and among judges within a single district.

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[146]The figure for 1987 is 461 weighted filings per judgeship. Administrative Office, *supra* note 143, at 168.

[147]*See* discussion at note 148 *infra* and appendix A.

[148]*See* Bragar, *Second Circuit: Rule 11*, in Rule 11 and Other Sanctions 339 (J. Solovy & C. Shaffer eds. 1987).

A commentator in the Second Circuit observed that "in the Southern District of New York, three or four judges are responsible for most of the reported cases and several judges have none as to Rule 11." *Id.* at 348.

TABLE 5
Judges' Estimates of the Incidence of Sanctions Activity in High- and Low-Sanctioning Districts, Reported in Field Interviews

	No. of Judges	
No. of Sanctions Issued Per Judge	High-Sanctioning Districts ($n = 17$)	Low-Sanctioning Districts ($n = 16$)
0	3	6
1–5	8	10
6–10	2	0
11–15	2	0
16–25	2	0

Data from Published Opinions

In addition to the field research, this study examined a sample of at least 25 percent of the published opinions involving amended rule 11 from August 1983 to April 1987. The process of selecting the cases and eliminating the duplication is described in appendix A. The original number selected was 156 cases from a WESTLAW search that produced 222 appellate decisions and 307 district court decisions. After eliminating duplications, consolidating district and appellate decisions relating to the same sanctions activity, and eliminating cases that did not deal directly with rule 11 as a basis for sanctions, there were 85 published decisions in the data set. Of these, 48 were district court decisions and 37 were appellate decisions, some of which reviewed published district court decisions.

Table 6 shows the distribution of the published decisions among the circuits, by district or appellate court. The distribution of the decisions over time is shown in table 7.

TABLE 6
Incidence of Published Opinions Involving Rule 11 by Appellate and District Courts

Circuit	Number of District Court Opinions	Number of Appellate Court Opinions
First	1	0
Second	11	5
Third	2	0
Fourth	3	6
Fifth	5	6
Sixth	4	0
Seventh	5	9
Eighth	7	0
Ninth	1	8
Tenth	2	1
Eleventh	4	2
D.C.	3	0
Totals	48	37

TABLE 7
Year of Decision in Sample of Published Rule 11 Opinions

Year of Decision	Number of District Court Opinions	Number of Appellate Court Opinions	Total Number of Opinions
1983	1	0	1
1984	7	2	9
1985	9	4	13
1986	21	21	42
1987 (1st quarter)	10	10	18
Totals	48	37	83

Note: Two opinions (one appellate, one district court) were issued after April 1987.

The number of cases with rule 11 sanctions has increased steadily over the years since the amendment in August 1983.[149] Vairo reports that the number of reported district court opinions involving rule 11 has leveled off, while the number of appellate decisions continues to increase at a dramatic rate.[150] Table 7 shows that appellate court opinions equaled the number of district court decisions in 1986 and that the number of cases continues to increase for both the district and appellate courts.

Trends remain unclear. These aggregates may mask considerable differences among districts and circuits. Vairo's figures show decreases in published district court decisions in the Second and Seventh Circuits from 1985 to 1987.[151] Perhaps this finding is a sign that deterrent goals are being accomplished in those districts and that the need to publish decisions has diminished. It does not, however, indicate whether frivolous filings have decreased.

The nature of the cases in our sample of rule 11 published opinions, based on the Administrative Office's categories, is reported in table 8. The concentrations of cases parallel those discussed by attorneys in the field interviews in response to questions about high-risk cases.[152]

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[149]Vairo II, *supra* note 66, at 234, shows similar trends for the universe of published rule 11 decisions.

[150]*Id.* at 199, 234.

[151]*Id.* at 236, 239. District courts in the Second Circuit had thirty-eight published decisions in both 1985 and 1986 and twenty-five in 1987. District courts in the Seventh Circuit had thirty-two published decisions in 1985, twenty-seven in 1986, and twenty-five in 1987.

[152]*See* discussion at notes 387–89 *infra*.

TABLE 8
Nature of Cases in Sample of Published Opinions (N = 83)

General Type	AO Number	Specific Type	Number	Percent
Contract	110	Insurance	3	4
Contract	152	Defaulted Student Loan	1	1
Contract	190	Other	11	13
Real Property	230	Rent Lease & Ejectment	1	1
Torts	320	Assault, Libel & Slander	4	5
Torts	360	Other Personal Injury	2	2
Torts	365	Personal Injury-Product Liability	1	1
Personal Property	370	Other Fraud	1	1
Other Statutes	410	Antitrust	4	5
Bankruptcy	422	Appeal	1	1
Other Statutes	430	Banks & Banking	1	1
Civil Rights	440	Other Civil Rights	13	15
Civil Rights	441	Voting	1	1
Civil Rights	442	Employment	8	9
Other Statutes	470	Racketeer Influence & Corrupt Organizations (RICO)	7	8
Labor	720	Labor/Mgt. Relations	4	5
Labor	740	Railway Labor Act	1	1
Labor	790	Other Labor Litigation	1	1
Property Rights	820	Copyrights	2	2
Property Rights	830	Patent	1	1
Other Statutes	850	Securities/Commodities Exchange	4	5
Social Security	861	(42 U.S.C. § 1395 et seq.)	1	1
Federal Tax Suits	870	Taxes (U.S. Party)	1	1
Other Statutes	890	Other Statutory Actions	8	9
Other Statutes	893	Environmental Matters	1	1

Plaintiffs were the target of sanctions in sixty-eight cases, or 80 percent of the sample, and defendants were the target in seventeen cases (see table 9).[153] Table 9 shows that although plaintiffs were more likely than defendants to be targeted for sanctions, they were less likely to have sanctions imposed. The rate of imposition of sanctions on defendants was 76 percent, whereas the rate for plaintiffs was 60 percent.[154]

TABLE 9
Imposition of Sanctions on Plaintiffs and Defendants in Sample of Published Opinions

	Plaintiff ($n = 68$)	Defendant ($n = 17$)
Sanctions imposed	41 (60%)	13 (76%)
Sanctions not imposed	26 (38%)	3 (18%)
Not available	1 (1%)	1 (6%)

Table 10 distinguishes the rate of imposition of sanctions on attorneys and their clients. These data show that clients were sanctioned in approximately half of the cases in which any sanctions were imposed. In almost all of this subset, sanctions were imposed on both attorney and client; rarely was the client sanctioned alone. In these cases—and perhaps also in cases in which the attorney is sanctioned alone—payment by the client will soften the financial impact of the sanctions on the attorney.[155]

[153]Vairo's data showed exactly the same ratio (4:1) of plaintiff to defendant. Vairo II, *supra* note 66, at 200.

[154]Vairo's data showed that plaintiffs were sanctioned in 59.6 percent of their cases and defendants in 51.8 percent of their cases. *Id.* One reason for the differences between her figures and mine may be that my sample collapses district court and appellate decisions on the same issue. If a plaintiff was sanctioned by the district court and that decision was reversed on appeal, that was not recorded as a sanction in my data base. In fact, eight of the cases in my sample fit that description. If those eight cases had been recorded as sanctions, plaintiffs would have been sanctioned in 64 percent of the cases.

[155]*See* discussion at notes 401–02 *infra*.

TABLE 10
Imposition of Sanctions on Attorneys and Clients in Sample of Published Opinions (N = 78)

	Plaintiff (n = 59)	Defendant (n = 19)
Attorney sanctioned	39 (95%)	12 (92%)
Attorney only	21 (51%)	6 (46%)
Attorney and client	18 (44%)	6 (46%)
Client sanctioned	20 (49%)	7 (54%)
Client only	2 (5%)	1 (8%)
Client and attorney	18 (44%)	6 (46%)

In sixty (82 percent) of the seventy-three cases for which information was available, the proceedings originated with a motion from the opposing lawyer. In the other thirteen cases (18 percent), the court raised the issue sua sponte. In eleven of those thirteen cases, the lawyer was sanctioned; in one, the client alone was sanctioned, and in three, the lawyer and client were sanctioned. In one of the sua sponte cases, no sanctions were imposed.

Forty percent of the sanctions decisions appear to have been issued simultaneously with the motion to dismiss, whereas 12 percent were decided separately after the decision on dismissal.[156] It is notable that none of the sanctions were considered after a voluntary dismissal of the case. This finding may alleviate the concern expressed during the field study that a voluntary dismissal might invite a motion for sanctions.

Table 11 shows the procedural stage at which the sanctions were imposed in the sixty cases for which this information was available.

[156]*See* discussion at notes 179–82 *infra* and discussion following note 255 *infra* regarding the issue of separation of the sanctions decisions from the merits.

TABLE 11
Procedural Stage of Sanctions Issued in Sample of Published Opinions (N = 60)

Procedural Stage	Number of Opinions	Percentage of Total Opinions
With motion to dismiss	24	40
After dismissal by court	7	12
After voluntary dismissal	0	0
During or after summary judgment	16	27
After court trial	7	12
After jury trial	3	5
After settlement	3	5

The type of conduct that led to the sanctions decision is listed in table 12. Not surprisingly, the filing of the complaint led to the majority of sanctions issued. The filing of a motion or other pleading accounts for most of the balance.[157]

[157]By its terms, rule 11 does not apply to trial evidence unless the evidence is signed. It also does not apply to the filing of an appeal, but at least one circuit has decided that rule 11 provides guidance for application of Fed. R. App. P. 38. Hill v. Norfolk & Western Ry., 814 F.2d 1192, 1200 (7th Cir. 1987). In the one case listed in the table as involving an appeal, the court imposed sanctions under rule 38 for filing a frivolous appeal of rule 11 sanctions. Hewitt v. City of Stanton, 798 F.2d 1230, 1233 (9th Cir. 1986). In the case involving trial evidence, the issue was the filing of a misleading affidavit that had been drafted by an attorney. William S. v. Gill, 572 F. Supp. 509 (N.D. Ill. 1983) (counsel ordered to file statement explaining filing of misleading affidavit).

TABLE 12
Conduct Leading to Sanctions Decision in Sample of Published Opinions (N = 76)

Conduct	Number of Opinions	Percentage of Total Opinions
Filing complaint	44	58
Filing appeal	1	1
Filing motion or other pleading	14	18
Trial evidence	1	1
Discovery dispute	0	0
Violation of court order	1	1
Other	15	20

Note: In some cases, more than one activity was specified.

What procedures do the courts use to decide the issuance of sanctions? An analysis of the sample of published decisions suggests that hearings[158] on the issuance of sanctions are infrequent (see table 13). In only sixteen of eighty-two cases (20 percent) did the court indicate that a hearing had been held.[159] The most common procedure used was a ruling on a motion after a response from the target of the sanctions.

Of the twenty-four cases at the motion-to-dismiss stage (see table 11 *supra*), eighteen were decided by a ruling on the motions papers (combining the merits and sanctions) without a separate hearing or briefing. A show cause procedure, which received favorable comments from attorneys in the field study and from the Association of the Bar of the City of New York,[160] was used in 11 percent of the cases.

[158]I use the term "hearing" to include any form of oral argument, formal or informal, or an evidentiary hearing.

[159]In the coding of the decisions, the absence of a reference to a hearing was treated as a case in which no hearing was held.

[160]ABCNY Report, *supra* note 28, at 24–25, 34–35; several cases mandate such a procedure. *See* notes 189, 199, 232, and 238 *infra*.

TABLE 13
Procedures Used to Decide on the Issuance of Sanctions in Sample of Reported Opinions (N = 66)

Procedure	Number	Percentage
Motion and response (no hearing)	47	71
Motion, response, and hearing	12	18
Order to show cause (no hearing)	3	5
Order to show cause and hearing	4	6

Warnings to the attorneys were noted in six of eighty-two cases (7 percent). In the thirteen sua sponte decisions in the sample, one was the subject of a warning. In four of those thirteen cases, a hearing was held. In the remaining eight cases, there is no indication that a hearing was held or that a warning was given. In these eight cases, sanctions in the form of attorneys' fees were imposed on the attorney in seven cases and on the client in three of those seven. Three of the cases were appealed, and two originated in the court of appeals. Two of the three appealed cases were affirmed, and one could not be traced. These figures correspond with concerns and complaints expressed by sanctioned attorneys during the field interviews that procedures were not adequate to give fair warning and an opportunity to respond to sanctions issued.[161]

In three of the sampled opinions, there were references to other sanctions imposed against the same attorney in the same case. In one case, there was a reference to a sanction imposed in another case.[162]

The sanctions imposed were primarily monetary. In eight cases, fines were imposed. The amounts ranged from $75 to $5,000. The mean was $1,734 and the median was $500, with three of the fines in that amount.

In fifty-six cases (66 percent), monetary fees or expenses were awarded to the opposing party (see table 14). Five cases in the sample involved both fines and fee awards to the opposing party.

[161]*See* discussion following table 16 to note 191 *infra.*

[162]*See also* discussion at notes 366–71 *infra* regarding repeat sanctions.

The average amount of the fees in the 29 cases for which information was available was $44,118. The awards ranged from $0.00 to $250,000, with $5,153 being the median. Almost half of the awards were below $5,000. Approximately a third were from $5,000 to $99,000, and 17 percent were above $100,000.

Thirteen awards were $10,000 or higher. Of these, six were appealed and one originated in the court of appeals. Of the five awards that exceeded $100,000, four were appealed.

TABLE 14
Amounts of Monetary Awards in Sample of Published Opinions (*N* = 29)

Amount (in dollars)	Number	Cumulative Percentage
0–999	7	24
1000–1999	0	24
2000–2999	3	34
3000–3999	1	37
4000–4999	3	47
5000–9999	2	54
10,000–14,999	4	68
15,000–99,999	4	82
100,000–199,999	2	89
200,000–250,000	3	99

Note: Ranges are not divided equally. *Mean* = 44,118. *Median* = 5,153.

In only two of the eight-five cases in the sample did the court impose nonmonetary sanctions. Both were reprimands designed to give notice to the bar that specific practices would not be tolerated in the future.

Of the eighty-two cases in the sample for which data were available, thirty-seven (45 percent) were appellate decisions.[163]

[163]This is not to say that the rate of appeal was 45 percent. Many of the cases had, of course, already been appealed when included in the sample.

Table 15 shows the disposition of those appeals. Most sanctions are affirmed. Reversal for procedural irregularity is rare.

TABLE 15
Disposition of Appeals in Sample of Reported Opinions (N = 37)

Imposition of sanctions affirmed	14
Imposition of sanctions reversed	9
on procedural grounds	2
on nonprocedural grounds	7
Refusal to impose sanctions affirmed	7
Refusal to impose sanctions reversed	2
on procedural grounds	0
on nonprocedural grounds	2
Not available	5

Having shown that the procedures used in the sample of published opinions infrequently include a separate hearing on the issue of sanctions and that appeals have infrequently reversed decisions on procedural grounds, it seems appropriate to discuss the procedural standards under rule 11 and the due process clause. In the next chapter, I examine these issues from the perspectives of the lawyers and judges in the field study and then from the vantage point of case law.

VI. DUE PROCESS IN THEORY AND PRACTICE

Procedural Safeguards in Rule 11

Commentators on rule 11 have generally concluded that the due process clause of the U.S. Constitution applies to sanctions decisions.[164] The drafters of the amended rule explicitly recognized the need for due process in imposing sanctions, stating that the "procedure obviously must comport with due process requirements."[165] The specific procedures demanded by the Constitution are not so obvious, however, and the Advisory Committee left the decision on a "particular format" to be determined according to the "circumstances of the situation and the severity of the sanction under consideration."[166] The rule itself contains no procedural steps.[167]

The Advisory Committee was faced with competing values, as are the courts. On the one hand is a concern for procedural fairness to the individual facing a risk of sanctions. On the other is the concern that a system of sanctioning is likely to be effective only if it is efficient, that is, if it takes less time to administer than the perceived time savings it generates.[168] In the committee's words, "[t]o assure

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[164]*See, e.g.*, Schwarzer I, *supra* note 1, at 197–99; Iowa Note, *supra* note 59, at 715–18; Oliphant, *supra* note 45, at 740–47; *see also* ABCNY Report, *supra* note 28, at 33–36.

[165]Advisory Comm. Note, *supra* note 8, at 201.

[166]*Id.*

[167]*Cf.* Fed. R. Crim. P. 42 (procedures for criminal contempt; rule 42 specifies conditions for summary dispositions and details procedures for dispositions upon notice and hearing).

[168]One difficulty with measuring the efficiency or effectiveness of rule 11 sanctions is the difficulty in measuring the reduction in frivolous filings. Reduction in filings is the direct measure of success, but, as one judge said to me, "It's hard to measure the business you didn't get." Because these deterred filings are nonevents, they escape any statistical net cast. A valid statistical study of the overall effect of rule 11 would require controlling for the many variables that might affect the rate of litigation, including the amendments to rule 16 and 26 that were promulgated at the same time as the rule 11 amendments. Absent a general statistical measurement of the effects of rule 11, courts are left with

that the efficiencies achieved through more effective operation of the pleading regimen will not be offset by the cost of satellite litigation over the imposition of sanctions, the court must to the extent possible limit the scope of sanction proceedings to the record."[169]

Rule 11, as amplified through the Advisory Committee notes, leaves the development of procedural safeguards to case law. Commentators have noted the absence of procedural guidelines, some in vitriolic terms[170] and others in constructive critiques, with suggestions for making the rule more palatable to the bar by formulating more precise procedures.[171] As will be discussed later, courts have addressed the issue, but inconsistencies and areas of perceived injustice remain.

Specific concerns shared by many commentators are that judges, caught up in the "concern for efficiency and management," will sacrifice procedural fairness on the "altar of expediency"[172] and that lawyers "cannot take much comfort from the picture of due process in sanctioning painted by the Advisory Committee."[173] Given these concerns, due process standards are means of

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qualitative studies, such as this one, or with their own experiences. Isolated experiences with satellite litigation may distract attention from the general deterrent effects of the rule.

[169]Advisory Comm. Note, *supra* note 8, at 201.

[170]*See, e.g.*, Swindal, *Frivolity in Court: New Rule 11*, 13 Litigation 3, 4 (1987) ("The procedures for imposing sanctions under Rule 11 vary from the nonexistent to the inadequate."); *Rule 11, Federal Rules of Civil Procedure—Is the Road to Judicial Tyranny Paved with Administrative Efficiencies?*, The Bedeviled Advocate, Nov. 17, 1987, at 10, col. 1 ("The recognition of . . . [administrative efficiency] on an equal basis with the justice of the action taken is, frankly, disgusting.").

[171]*See, e.g.*, Oliphant, *supra* note 47, at 743–44 ("One recommendation is to encourage the rapid development of more detailed, articulated procedures among the various courts. Model procedural rules, for example, could be developed at a national or circuit court level."); ABCNY Report, *supra* note 28, at 33–36 (recommends hearings in situations involving factual issues, but not for "frivolous Rule 11 applications that only require cursory treatment" or for dealing with adequacy of legal arguments).

[172]Oliphant, *supra* note 47, at 743–44.

[173]Burbank I, *supra* note 29, at 1009.

"preventing judicial mistakes."[174] There also is the "potential for selective, arbitrary imposition of sanctions against different lawyers appearing before the same judge."[175] Finally, there is the almost universal concern, anticipated by the Advisory Committee,[176] that rule 11 might be used to chill creative advocacy, particularly regarding unpopular causes.[177] To what extent, if at all, do attorneys who have been involved in sanctions cases share these concerns?

Interview Data

In my interviews with lawyers and judges in cases in which sanctions were imposed, I discovered a glaring discrepancy between lawyers' perceptions of the fairness of various procedures used to impose sanctions and those of judges. As table 16 indicates, the sanctioning judges, when asked whether their procedures were "adequate to give the sanctioned attorney(s) a sense that they had a fair hearing on the reasons why sanctions should not be imposed," uniformly responded that they were.

Sanctioned attorneys and nonsanctioned attorneys (who were generally the movants) were asked a similar question.[178] A majority (eight of fifteen) of the sanctioned attorneys answered in the negative. Most of the nonsanctioned attorneys approved of the procedures; three out of eighteen found them inadequate.

What were the procedures used in these cases? According to the judges interviewed, only one of the sixteen cases involved an evidentiary hearing. Seven involved written argument, and six others involved some form of oral argument. In no case was both written and oral argument provided. In nine of the cases, the judges indicated that there was no particularized prior notice (other than that

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[174]Oliphant, *supra* note 47, at 741.

[175]*Id.* at 740.

[176]Advisory Comm. Note, *supra* note 8, at 199. ("The rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories. The court is expected to avoid using the wisdom of hindsight . . . . ").

[177]*See generally* Nelken, *supra*, note 26; Vairo II, *supra*, note 66, at 7–8.

[178]The exact question was, "Were these procedures adequate to give you and your opponent an opportunity to present evidence and arguments for and against sanctions?"

provided by the opposing party), and in only two of the cases did the judges indicate that there was general prior notice or a warning. In those two cases, the notice or warning was the only procedure used; no hearing, briefing, or argument was afforded the sanctioned attorney. In one case, there was no notice or hearing whatsoever.

TABLE 16
Adequacy of Sanctioning Procedures As Seen by Judges, Sanctioned Attorneys, and Nonsanctioned Attorneys in Field Study

	Procedures Adequate	Procedures Not Adequate
Sanctioning judges	17	0
Judges in low-sanctioning districts	5	0
Chief judges	2	0
Total judges	24 (100%)	0
Sanctioned attorneys	7 (47%)	8 (53%)
Nonsanctioned attorneys	15 (83%)	3 (17%)
Total attorneys	22 (67%)	11 (33%)

What were the complaints about the procedures and how did the perceptions of the lawyers differ from those of the judges? In one of the cases, sanctions were imposed sua sponte in the amount of $250 for filing a motion that the court found to be legally frivolous. The nonsanctioned attorney stated that the opponents "had no knowledge beforehand that they were susceptible to sanctions." The judge said: "I just [imposed sanctions]. . . based on a gut level decision." The sanctioned attorney, whose client paid the sanction, did not appeal or complain, saying, "I presume we would have had a [reconsideration] hearing if I requested it." Thus, this judge could honestly state that he was not aware of any complaints about the procedures used. Other judges may have been similarly shielded by the unwillingness of the sanctioned attorney to appeal or complain.

Another source of complaints, expressed by two nonsanctioned lawyers, involved the combining of the sanctioning decision with the decision on the merits. Although the lawyers—or their clients—benefited from a unitary procedure, both preferred a separate hearing or oral argument to address the sanctions issue and examine the attorney's prefiling inquiry. They deemed the issue of the adequacy of the prefiling inquiry to be separate from the merits of the legal arguments in the case. In both of these cases, the sanctioned attorney also complained of the procedure.

In one case, which involved a sanction of full attorneys' fees (in an amount to be determined) for filing a complaint found to be frivolous, the sanctioned attorney said, "There was no hearing and there should be. In addition, the merits should be separated from the sanctions issues." It is interesting that the judge in that case reported reaching the decision on the merits and sanctions after reviewing the briefs on the merits. The sanctioned attorney moved for reconsideration and demonstrated to the court that substantial prefiling legal research had been conducted and that the issue of state law was unsettled. Based on this showing, the court reconsidered and reversed its decision to impose sanctions.

Another complaint from a sanctioned attorney involved a sua sponte imposition of sanctions after an appeal was taken. The attorneys in that case concluded that the court was without jurisdiction to enter the sanction and chose to ignore it. The case settled without payment or waiver of payment.

All of the complaints from attorneys about the procedures involved either the absence of specific warnings that sanctions might be imposed or the absence of any hearing or briefing devoted to the question whether sanctions should be imposed. A common scenario is that an attorney seeking to dismiss a complaint adds a pro forma request for sanctions, perhaps in the prayer for relief at the end of a motion to dismiss. No argument is addressed specifically to the issue of sanctions, and no supporting facts or affidavits are included. The opposing attorney chooses to ignore the request because treating it seriously distracts from the argument on the mer-

its.[179] If the judge rules directly on the pro forma request, there is no confrontation or hearing of the issue.

In this scenario, there may be a tendency to merge the sanctions issue with the merits, rather than focusing on the "reasonableness under the circumstances" of the lawyer's prefiling inquiry.[180] Looking at the prefiling inquiry directs the decision maker's attention to the time of the filing and may help to implement the Advisory Committee's admonition to "avoid using the wisdom of hindsight."[181] Common sense and empirically tested data demonstrate that hindsight can have a powerful effect on legal decisions.[182]

One sanctioned attorney, who supported rule 11 in general, summarized his situation: "My expectation from state court was that a motion for sanctions would be routinely denied. We had no warning that this was a serious issue. I was flabbergasted when the court imposed sanctions."

Judges corroborated the attorney reports in three of the cases that generated complaints from the sanctioned attorney. In those cases, the judge reported that his sua sponte impression of frivolousness began and ended the process. In contrast, in only one sua sponte case did the sanctioned attorney find that the procedure was adequate. These comments suggest that the absence of warning in sua sponte situations is likely to lead to complaints from attorneys about sanctions procedures.

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[179]The form of the argument in this context would be: "Even if our position on the merits is without merit, my client's claim is not totally frivolous." Such an argument undermines the argument on the merits. Indeed, for that reason, it may be unethical for an advocate to present it.

[180]Advisory Comm. Note, *supra* note 8, at 198.

[181]*Id.* at 199.

[182]Casper, Benedict & Perry, *Juror Decision-Making, Attitudes, and the Hindsight Bias*, American Bar Foundation Working Paper No. 8702 (undated) (In a simulated study of juror decision making in civil suits against police officers alleged to have engaged in illegal searches, the authors found that knowledge of the outcome of the search and individual attitudes on awards for police misconduct are related to decisions of individual mock jurors.); *see also* Casper, Benedict & Perry, *The Tort Remedy in Search and Seizure Cases: A Case Study in Juror Decision-Making*, forthcoming in 13 Law & Soc. Inquiry (1988), in which the policy implications of the simulated study are discussed.

These cases involve judgments made with such conviction that a confrontation of the lawyer is seen as unnecessary; the court cannot envision a defense. A published appellate decision illustrates the phenomenon. In *Hill v. Norfolk & Western Railway Co.*,[183] the court found that a hearing on the sua sponte imposition of sanctions for filing of an appeal that was "objectively frivolous" would be "pointless." After assuming that the lawyer and not the client was responsible for the conduct,[184] the court limited the right to a hearing "to cases where a hearing would assist the court in its decision."[185] The court reasoned that "[a]ll the relevant 'conduct' is laid out in the briefs themselves; neither the mental state of the attorney nor any other factual issue is pertinent . . . ."[186] Under this rationale, the actual inquiry of the lawyer into the law is irrelevant.[187] The objective reasonableness of the argument is judged solely on the briefs presented to the court. No explanation can justify the attorney's action.[188] No warning about sanctionability of specific behavior is necessary under this rationale because, as the court stated,

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[183]814 F.2d 1192 (7th Cir. 1987). While this case was decided explicitly under Fed. R. App. P. 38, the court found that Fed. R. Civ. P. 11 does "provide guidance in interpreting the rules that do control the proceedings in this court . . . ." *Id.* at 1200.

[184]*Cf.* Braley v. Campbell, 832 F.2d 1504, 1514 (10th Cir. 1987) (en banc) ("But the determination to impose sanctions on an attorney for bringing a frivolous appeal involves another step—placing the blame.").

[185]*Hill*, 814 F.2d at 1201.

[186]*Id.* at 1201–02.

[187]The Seventh Circuit may have changed its position on this issue. In Brown v. Federation of State Medical Bds., 830 F.2d 1429, 1435 (7th Cir. 1987), the court said that "[t]o determine whether the attorney in question made a reasonable inquiry into the law, the district court should consider: the amount of time the attorney had to prepare the document and research the relevant law; whether the document contained a plausible view of the law; the complexity of the legal questions involved; and whether the document was a good faith effort to extend or modify the law . . . ." Presumably the attorney would be permitted to address those questions, after notice.

[188]In *Braley*, the Tenth Circuit, en banc, considered and rejected this approach, holding that "consideration [of] the defenses which might absolve the lawyer of the responsibility for taking the frivolous appeal" both "justifies and requires notice and opportunity to be heard before final judgment," either at the appellate level or in a remand to the district court. *Braley*, 832 F.2d at 1514.

"[t]he text of Rule 38, and our previous decisions applying it, provide all the notice that an attorney could reasonably demand . . . ."[189]

Lawyers in the Seventh Circuit, when interviewed during this study, complained vociferously about decisions such as *Hill*. They see such decisions as unpredictable and chilling. Throughout the field study, I asked lawyers whether they had rejected any "arguably meritorious" cases because of concerns about sanctions.[190] The only clear example of a chilling effect came from a lawyer in Chicago who rejected an appeal of a novel theory in an Employee Retirement Income Security Act (ERISA) case out of fear of fee-shifting sanctions. Because the client was indigent, there was no opportunity for indemnification of the risk of a large fee award against the attorney.[191]

These field interviews reveal that only a few sanctions cases confirm the commentators' concerns. Specifically, the interviews show that, in some cases, administrative-efficiency goals have precluded opportunities for hearings. Similarly, chilling effects have emanated from a lack of warning or predictability of sanctions decisions. To what extent have cases articulated standards that address the due process concerns of attorneys and commentators?

Procedures Under Rule 11 Case Law

Case law begins with the fundamental proposition that the imposition of sanctions involves a deprivation of property or reputational interests[192] that activates the application of the due process

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[189]*Hill*, 814 F.2d at 1202; *cf. Braley*, 832 F.2d at 1515 ("On those occasions when the court intends to consider such sanctions sua sponte, due process is satisfied by issuance of an order to show cause why a sanction should not be imposed and by providing a reasonable opportunity for filing a response.").

[190]*See* discussion following table 28 to note 404 *infra*.

[191]In another case in which a challenge to existing law was rejected primarily on the merits, the lawyer cited the relative unpredictability of the Seventh Circuit as a factor in the decision not to file a test case. *See* discussion at note 400 *infra*.

[192]On the protections afforded reputational interests under the liberty branch of the due process clause, see generally Wisconsin v. Constantieau, 400 U.S. 433 (1971); *cf.* Paul v. Davis, 424 U.S. 693 (1976). In Robinson v. National

clause.[193] No cases or commentaries dispute that notice and an opportunity to be heard are essential ingredients of the required process. Substantial debate, however, has evolved concerning the details of the notice, such as the timing, content, and specificity, and the form of the opportunity to be heard.

Notice

An elementary requirement of due process is notice reasonably calculated to apprise interested parties of adverse actions and to afford them an opportunity to present evidence or argument, or both, in support of their position.[194] Regarding rule 11, the Advisory Committee Note instructs that "[a] party seeking sanctions should give notice to the court and the offending party promptly upon dis-

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Cash Register Co., 808 F.2d 1119, 1131 (5th Cir. 1987), the Fifth Circuit indicated that the impact of sanctions on an attorney's reputation should be taken into consideration. *See also* Brown v. Federation of State Medical Bds. of the U.S., 830 F.2d 1429, 1437 (7th Cir. 1987) ("Due to the impact sanctions may have on a party or an attorney's career and personal well-being, sanctions should not be lightly imposed."); Schwarzer I, *supra* note 1, at 201–02.

[193]The modern origin of the application of due process to sanctions procedures is Roadway Express v. Piper, 447 U.S. 752 (1980), in which the Court ruled that "[l]ike other sanctions, attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record." *Id.* at 767. In *Roadway,* the Court relied on Link v. Wabash R.R., 370 U.S. 626 (1962), to find authority for the court's power to impose monetary sanctions.

In *Link,* however, the Court upheld the dismissal of a case as a sanction despite the absence of specific notice and a hearing, but the facts of *Link* may limit the reach of the holding. The attorney in *Link* defaulted and failed to attend a hearing. The attorney's call to the clerk's office failed to give a reason for nonattendance. The court found that "[t]he circumstances here were such as to dispense with the necessity for advance notice and hearing." *Id.* at 632. The Court also implied that the attorney in *Link* had "knowledge . . . of the consequence of his own conduct." *Id. Link* has been interpreted as standing for the proposition that "no hearing is constitutionally compelled in certain circumstances where *established rules* are transgressed." Oliphant, *supra* note 47, at 743.

[194]*See, e.g.,* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

covering a basis for doing so."[195] The committee does not give any indication of how to proceed when the sanctions are ordered sua sponte. The Supreme Court in *Roadway* simply called for "fair notice."[196]

The circuits appear to have generally accepted the idea of a due process notice requirement in sanctions cases.[197] However, they have divergent opinions on what constitutes sufficient notice. At issue is the degree of specificity required. At one end of the spectrum are courts that have held that an attorney receives adequate notice of the possibility of sanctions from the existence of a rule, such as rule 11, or a statute authorizing the sanction.[198] At the other end of the spectrum are courts that mandate a more stringent notice requirement.

The Ninth Circuit has taken the position that an attorney must have specific, advance notice that sanctions are being considered.[199]

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[195]Advisory Comm. Note, *supra* note 8, at 200.

[196]*Roadway*, 447 U.S. at 767.

[197]The exception seems to be *Hill; see* notes 183–91 *supra*. That exception may be limited to appellate decisions on the adequacy of a legal inquiry and may have been modified by a later case. *See* note 187 *supra*.

[198]*Hill*, 814 F.2d 1192, 1202 (7th Cir. 1987) (Fed. R. App. P. 38); *Donaldson*, 819 F.2d 1551, 1560 (11th Cir. 1987) ("If an attorney is said to have submitted a complaint without any basis in fact, Rule 11 alone should constitute sufficient notice of the attorney's responsibilities since the rule explicitly requires the attorney to certify that a complaint is well grounded in fact."). *Cf.* Eash v. Riggins Trucking, 757 F.2d 557 (3d Cir. 1985) (dicta suggest that in some instances the presence of a statute may satisfy the prior-notice requirement). *See also* Rowland v. Fayed, 115 F.R.D. 605, 608 (D.D.C. 1987) ("Rule 11 itself placed them on notice that they could be subject to sanctions.").

[199]Tom Growney Equip., Inc. v. Shelly Irrigation Dev., Inc., 834 F.2d 833 (9th Cir. 1987) (sanctions order that failed to specify the objectionable filings and allegations prior to sua sponte imposition of sanctions held violative of procedural due process); FTC v. Alaska Land Leasing, Inc., 799 F.2d 507, 510 (9th Cir. 1986) (notice insufficient because the application for sanctions under 28 U.S.C. § 1927 did not name counsel specifically); Miranda v. Southern Pac. Transp. Co., 710 F.2d 516, 522–23 & n.12 (9th Cir. 1983) (earlier warnings by the court did not constitute adequate notice for sanctions imposed for violation of local rules; opportunity to show cause at a separate hearing is required). *Cf.* Toombs v. Leone, 777 F.2d 465, 471–72 (9th Cir. 1985) (actual

sources."[209] Early notice is also consistent with the duty to mitigate attorneys' fees and expenses. Indeed, "a failure to provide prompt notice of an alleged violation to the court *and* the offending party [may] reduce the ultimate award."[210]

The Fifth Circuit has adopted a flexible approach to the proper form for notice of allegations of sanctionable activity by opposing counsel.[211] The court chose not to require written notice or notice through formal pleadings. Instead, "[n]otice may be in the form of a personal conversation, an informal telephone call, a letter, or a timely Rule 11 motion."[212] However, "to avoid misunderstanding and permit appellate review, the notice given, or evidence of the giving of notice, should be made a part of the record."[213] To that end, the court in *Thomas* suggested that "prudence dictates that notice should be reduced to writing and given to both the court and the offending party."[214]

An issue remains regarding the adequacy of a notice in the form of a standard request for sanctions and attorneys' fees in the prayer for relief. Interviews with lawyers revealed that cursory notice is unlikely to be taken seriously because it creates a conflict between representation of a client and mounting a defense against sanctions.[215] While no cases have been found directly on point, the principle of having clear, unambiguous notice of the nature of the allegations is inconsistent with reliance on a pro forma request for relief to serve as notice.

On a related matter, two courts have addressed the issue of whether a hearing on the merits will suffice as a hearing on the sanctionability of the arguments presented in that hearing. The question is whether an attorney is entitled to notice and a hearing specifically on the sanctions issue or whether a hearing on another related matter will satisfy the requirement. The answer from these

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[209]*Tom Growney*, 834 F.2d at 836 n.5 (citing Matter of Yagman, 796 F.2d at 1184.

[210]*Thomas*, 836 F.2d at 879 (citing *Donaldson*, 819 F.2d at 1560).

[211]*Id.* at 880.

[212]*Id.*

[213]*Donaldson*, 819 F.2d at 1560. *See also Thomas*, 836 F.2d at 880.

[214]*Thomas*, 836 F.2d at 880.

[215]*See* discussion at notes 179–80 *supra*.

courts is that a hearing on the merits may suffice as a hearing on sanctions if the notice of the hearing is broad enough to encompass the imposition of penalties or attorneys' fees.

In one case,[216] the Seventh Circuit allowed a defendant's motion for fees and costs (presumably against the plaintiffs and not their attorney) to act as a substitute for notice to plaintiff's counsel that fees might be awarded against him under rule 11. The attorney failed to attend the hearing on the defendant's motion for costs and fees, and at the hearing the defendant orally moved for sanctions under rule 11 and the motion was immediately granted. The Seventh Circuit upheld the award of sanctions against the lawyer, recognizing that "appellant did not have explicit notice that the court would consider imposing costs and fees against him." Because the attorney "knew that the court would consider generally the imposition of penalties," the "notice was sufficient under the circumstances."[217]

In a similar vein, the Ninth Circuit has held that due process was satisfied by a hearing on a motion to strike the attorneys' brief and exhibits from the record in a case involving sanctions under the local rules.[218] The court reasoned that the attorneys had sufficient opportunity at that hearing to argue and explain their conduct and that "[a]ny mitigating excuse they might have offered for their conduct presumably would have been forthcoming in that hearing."[219] A hearing specifically on the issue of sanctions was not required.[220]

These cases adhere to the principle that an individual is entitled to notice that adverse consequences may ensue from a hearing. Notice of the hearing and of the general consequences that might flow from it is deemed sufficient to inform an attorney of the possibility that sanctions will be awarded. While the application in the Seventh Circuit case seems strained because of the leap from notice

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[216]Lepucki v. Van Wormer, 765 F.2d 86 (7th Cir. 1987) (rule 11). *Cf. Hill*, 814 F.2d at 1201–03 (separate hearing on frivolousness of appeal arguments would be "pointless").

[217]*Lepucki*, 765 F.2d at 88.

[218]Toombs v. Leone, 777 F.2d 465, 471–72 (9th Cir. 1985).

[219]*Id.* at 472.

[220]Of what value is the "right to a hearing" if the notice of the hearing and the substance of the hearing do not explicitly involve the issue of sanctions?

The rationale is that specific notice of the conduct in question will give attorneys "'an opportunity to prepare a defense and to explain their questionable conduct at a hearing.'"[200] The notice and hearing will also allow the judge to "have time to consider the severity and propriety of the proposed sanction in light of the attorneys' explanation for their conduct."[201] Finally, use of these procedures will facilitate appellate review.[202] To illustrate the type of notice that would be helpful, the court referred to a "pattern and practice" allegation in a counterclaim that the district court later found to be sanctionable. Neither rule 11 itself nor general references to signatures on papers were sufficient to point out a specific portion of the many papers filed and apprise the attorneys of the specific reasons for sanctions.[203]

In an en banc decision in *Donaldson,* the Eleventh Circuit articulated a novel, hybrid approach to the notice dilemma: Due process notice varies according to the reason for the sanction.[204] If an attorney is to be sanctioned for submitting a complaint without any basis in fact, then rule 11 alone constitutes "sufficient notice of the attorney's responsibilities."[205] However, if the sanctions involve questions of whether an attorney made a good faith argument under the law or whether an attorney interposed a pleading, motion, or paper for an improper purpose, then more specific notice of the reasons for contemplating sanctions is required. The rationale is that rule 11 "explicitly" requires the certification that a complaint is

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notice that sanctions were being considered under the local rules was not required; advance notice of a hearing to argue a motion to strike a brief constituted sufficient notice).

[200]*Tom Growney,* 834 F.2d at 836 (quoting *Miranda,* 710 F.2d at 522–23).

[201]*Id.*

[202]*Id.*

[203]*Id.* at 834 n.2 shows a transcript of the efforts of the attorney to obtain specific charges and the frustrations of receiving a general allegation in response to a request for specifics. This colloquy is a poignant illustration of the opportunities for miscommunication that can arise in a sanctions context.

[204]*Donaldson,* 819 F.2d at 1559–60.

[205]*Id.* at 1560. In speaking about general notice of the attorney's responsibilities, the court may be drawing a contrast with specific "notice that his or her conduct may warrant Rule 11 sanctions." *Id.*

well grounded in fact. Issues of whether there has been a "good faith argument under the law" or whether an attorney interposed a paper for an "improper purpose," however, "are more ambiguous and may require more explicit notice of the reasons for contemplating sanctions."[206]

The *Donaldson* rationale can be read to comport with the reading of the *Link* case that makes an exception for notice when there is a violation of a specific established rule of the court.[207] Whether this rationale would extend to a fact situation like that faced by the Ninth Circuit in *Tom Growney* is uncertain because that case involved ambiguities regarding the exact statements that were alleged to be without factual support. The *Donaldson* rationale does not address the issue of how to proceed when there is a choice among several claims. The rationales of the two cases are compatible: namely, that a person faced with sanctions under rule 11 is entitled to unambiguous prior notice of the reasons for the proposed application of sanctions to the case at hand.

Timing and Form of Notice

The Advisory Committee has written that a "party seeking sanctions should give notice to the court and offending party promptly upon discovering a basis for doing so. The time when sanctions are to be imposed rests in the discretion of the trial judge." A number of courts have stressed the need for prompt notice, prior to the imposition of sanctions.[208] Such notice can improve the workings of rule 11 because "early notice can deter continuing violations, thereby saving monetary and judicial re-

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[206]*Id.*

[207]*See* discussion at note 193 *supra.*

[208]Matter of Yagman, 796 F.2d 1165, 1183–84 (9th Cir. 1986); *Tom Growney*, 834 F.2d at 833; *Donaldson*, 819 F. 2d at 1560; Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 878–81 (5th Cir. 1988) (en banc); McLaughlin v. Western Casualty & Sur. Co., 603 F. Supp. 978, 981 (S.D. Ala. 1985). *See* Eash v. Riggins Trucking, 757 F.2d 557 (3d Cir. 1985) (fundamental fairness may require some measure of prior notice that the conduct an attorney contemplates undertaking is subject to sanction by the court).

of adverse consequences to the client to notice of sanctions against the lawyer, the court did maintain that the principle of notice is applicable.

Hearing Requirement

The other leg of the basic due process requirement is that a sanctioned attorney has a right to be heard in opposition to the proposed sanction. Again, the Advisory Committee left a wide range of discretion to district judges in deciding on the time, place, and method for hearings, directing that "[t]he particular format to be followed should depend on the circumstances of the situation and the severity of the sanction under consideration."[221] At the same time, the committee observed that "[i]n many situations the judge's participation in the proceedings provides him with full knowledge of the relevant facts and little further inquiry will be necessary."[222] Combined with the direction that the judge should "to the extent possible limit the scope of sanction proceedings to the record,"[223] the thrust seems to be to limit the formality of any hearing procedure.

Given the bipolar nature of the commitments to due process and efficient administration, it is not surprising that the circuits have split over what specifically is required—a full evidentiary hearing or merely an opportunity to respond. The Supreme Court in *Roadway* referred to "an opportunity for a hearing on the record."[224] Most courts cite *Roadway* for the proposition that the due process clause applies to attorney sanctions, but none has mandated a formal hearing on the record for all cases.

One of the main reasons courts have been reluctant to employ full-blown evidentiary hearings in sanctions cases is a concern over the effects of satellite litigation.[225] The Eleventh Circuit found that mandatory hearings would be incompatible with "[t]he major goals of Rule 11 [which] are to rid the courts of meritless litigation and to

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[221]Advisory Comm. Note, *supra* note 8, at 201.

[222]*Id.*

[223]*Id.*

[224]447 U.S. at 767.

[225]Chapter 7 is devoted to the topic of satellite litigation.

reduce the growing cost and burdensomeness of civil litigation."[226] "[M]andating extensive collateral procedures as prerequisites to the imposition of sanctions" would be "counterproductive."[227]

There also appears to be a threshold difference in perspectives among the courts as to the reasons for notice and hearings. One court asks whether a hearing "would assist the court in its decision."[228] Another court sees due process as affording absolute, basic protections for the individual, and, at the same time, involving a convergence of judicial, administrative, and individual interests.[229]

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[226]*Donaldson*, 819 F.2d at 1559.

[227]*Id.*

[228]*Hill*, 814 F.2d at 1201. The origin of the difference in approach may be the view that there is absolutely no defense, explanation, or justification for submitting documents that are objectively frivolous. For example, in *Hill*, the court stated that "[a]ll the relevant 'conduct' is laid out in the briefs themselves; neither the mental state of the attorney nor any other factual issue is pertinent to the imposition of sanctions for such conduct." *Id.* at 1201–02. In another case, the court rejected a proffer of evidence from counsel's files to show justification for filing the complaint, saying that "[c]ounsel's file cannot correct the complaint's legal deficiencies." Rodgers v. Lincoln Towing Serv., 771 F.2d 194, 206 (7th Cir. 1985).

This viewpoint appears to be based on a different premise from that of other courts and the Advisory Committee, which would look at the specific legal or factual inquiry involved in the case and determine whether it is objectively reasonable under the circumstances of that case. *See, e.g.*, Brown v. Federation of State Medical Bds. of U.S., 830 F.2d 1429, 1435 (7th Cir. 1987) ("The standard for imposing sanctions under Rule 11 is an objective determination of whether a sanctioned party's conduct was reasonable under the circumstances.") and cases cited therein. The Advisory Committee Note says, "what constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available to the signer . . . ." Advisory Comm. Note, *supra* note 8, at 199.

[229]*Tom Growney*, 834 F.2d at 835. The court stated that "[t]he individual's right to fairness and accuracy must be respected, as must the court's need to act quickly and decisively." The balancing of interests takes place in deciding the form of the hearing, not whether an opportunity for a hearing will be afforded. *See also* Iowa Note, *supra* note 61, at 715–16 (Due process in the form of specific prior notice and opportunity to prepare and present a defense serves the interests of the court in making accurate decisions as well as the interests of the attorney in preparing an adequate defense and the interests of the appellate court in having a record for review.).

Other courts see the due process issues in terms of interests of attorneys and clients that need protection, yet must be balanced with the interests of the courts.[230]

With one exception,[231] the circuits have rejected the notion that all attorneys are entitled to an opportunity for a full evidentiary hearing on the sanctions issue and have instead adopted an "opportunity to be heard" or "opportunity to respond" standard.[232]

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[230]*Donaldson*, 819 F.2d at 1558.

[231]The Ninth Circuit has held that, absent exigent circumstances, an attorney is entitled to "notice and an opportunity to be heard" before a court imposes sanctions. *Tom Growney*, 834 F.2d at 835 (rule 11) (citing Boddie v. Connecticut, 401 U.S. 371, 379 (1971). The court referred to a "meaningful evidentiary hearing," but it is not clear that an evidentiary hearing would be afforded in all cases. *Id.* at 836 n.6. *See* FTC v. Alaska Land Leasing, Inc., 799 F.2d 507, 510 (9th Cir. 1986) (28 U.S.C. § 1927); Toombs v. Leone, 777 F.2d 465, 471–72 (9th Cir. 1985) (local rules); Miranda v. Southern Pac. Transp. Co., 710 F.2d 516, 522–23 (9th Cir. 1983) (local rules); *In re* Itel Secs. Litig., 596 F. Supp. 226, 232 n.7 (N.D. Cal. 1984) (rule 11). *See also* United States v. Blodgett, 709 F.2d 608, 610 (9th Cir. 1983) (28 U.S.C. § 1927) (hearing required to establish bad faith on the record); T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 638 (9th Cir. 1987) (because of bad faith factor, hearing should precede imposition of sanctions under 28 U.S.C. § 1927).

[232]Sanko Steamship Co. v. Galin, 835 F.2d 51, 53–54 (2d Cir. 1987) (rule 11) (sua sponte sanctions deprived attorney of notice, opportunity to be heard, and reasons for imposing sanctions); Braley v. Campbell, 832 F.2d 1504, 1515 (10th Cir. 1987) (28 U.S.C. § 1927 and Fed. R. App. P. 38) ("an opportunity to file a brief or otherwise be heard" satisfies due process; for sua sponte sanctions, an order to show cause and "a reasonable opportunity for filing a response" suffices; evidentiary hearing not required); Oliveri v. Thompson, 803 F.2d 1265, 1280 (2d Cir. 1986) (rule 11) (due process "does not mean, necessarily, that an evidentiary hearing must be held. At a minimum, however, notice and an opportunity to be heard is required"); Charczuk v. Commissioner of Internal Revenue, 771 F.2d 471, 476 n.4 (10th Cir. 1985) (28 U.S.C. § 1927) ("At oral argument . . . an opportunity to explain why sanctions should not be imposed against him personally . . . satisfies any right he may have had to a hearing on the matter."); *Donaldson*, 819 F.2d at 1560 ("The accused must be given an opportunity to respond, orally or in writing as may be appropriate, to the invocation of Rule 11 and to justify his or her actions."). *See also* Knorr Brake Corp. v. Harbil, Inc., 738 F.2d 223, 227 (7th Cir. 1984) (28 U.S.C. § 1927) ("a court should provide counsel with some opportunity to be heard").

The relevant cases suggest that as long as the attorney has some opportunity, either orally or in writing, to explain the questionable conduct to the court, the minimum due process requirement is satisfied.

Courts have not mandated a single format for all sanctions decisions. If any procedure can be said to be mandated, it is a case-by-case balancing of the relevant factors, such as the interests at stake, the likelihood of erroneous application of sanctions, the value of additional procedures, and the fiscal and administrative burdens of such procedures.[233] The minimum, however, is that courts must afford timely notice and an opportunity to respond to specific allegations of sanctionable activity.

The format of an opportunity to respond to the allegations may vary considerably. Indeed, the notice and hearing might last no more than a few minutes "when the facts are clear and the person sanctioned is an attorney."[234] For more serious sanctions, the court should enter a formal order or dictate findings into the record, reciting the authority for the sanctions, the facts, and "explaining why less severe penalties are inappropriate." Some of the judges in the Southern District of New York bifurcate the issues of liability and the determination of an appropriate sanction.[235] A hearing before a magistrate, even one subsequent to a decision on liability for sanctions, has been deemed adequate to satisfy due process.[236]

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[233]*Donaldson*, 819 F.2d at 1558, following Matthews v. Eldridge, 424 U.S. 319, 335 (1976).

[234]Manual for Complex Litigation § 42.4 (2d ed. 1985) (citing *In re* Allis, 531 F.2d 1391 (9th Cir.), *cert. denied*, 429 U.S. 900 (1976)).

[235]These judges first establish liability, then call for affidavits and motions regarding the type and amount of sanctions. Silberberg, *Civil Practice Roundup in Southern District*, N.Y.L.J. Oct. 7, 1987, at 1, col. 1 (1987) (citing Bender v. Continental Towers Ltd. Partnership, No. M-3771, slip op. (S.D.N.Y. Aug. 15, 1987)).

[236]INVST Financial Group v. Chem-Nuclear Systems, 815 F.2d 391, 405 (6th Cir. 1987) (rule 11 hearing held before magistrate acting as special master in calculating amount of sanction was "more extensive due process protection than rule 11 and the courts require" because attorney had opportunity to explain conduct, cross-examine opposing attorneys, and submit documents, even though district had ruled prior to the referral to the magistrate that sanction should be imposed).

Issues relating to the timing of the opportunity to be heard have engendered some disagreement in the courts. The Seventh Circuit has held that a hearing prior to the imposition of sanctions is not required by due process and that a motion for reconsideration is sufficient.[237] The Ninth Circuit has taken the opposite position, explicitly holding that an attorney must be provided with an opportunity to show cause to the contrary before the court imposes sanctions and that a postsanction hearing on a motion to reconsider or change the sanctions decision does not satisfy due process.[238]

Several types of cases have been found to warrant more formality than notice and an opportunity to explain alleged misconduct. While criminal contempt procedures such as those outlined in Federal Rule of Criminal Procedure 42(b)[239] need not be followed in every sanctions proceeding, there may be cases of severe monetary sanctions that will call for strict due process safeguards.[240] Im-

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[237]Rodgers v. Lincoln Towing Serv., 771 F.2d 194, 205–06 (7th Cir. 1985); Brown v. National Bd. of Medical Examiners, 800 F.2d 168, 173 (7th Cir. 1986) (rule 11). These cases, however, may also be read as holding that no hearing whatsoever is required to decide whether an argument is frivolous as a matter of law.

[238]*Tom Growney*, 834 F.2d at 837. The idea that notice and the opportunity to be heard generally must precede the deprivation of a protected interest is well established. *See, e.g.*, North Georgia Finishing v. Di-Chem, 416 U.S. 600 (1974); Goldberg v. Kelly, 397 U.S. 254 (1970).

[239]Rule 42(b) provides in part:

> A criminal contempt except as provided in subdivision (a) ["Summary Disposition"] of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to trial by jury in any case in which an act of Congress so provides
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[240]*Donaldson*, 819 F.2d at 1559 n.10; *cf.* Brown v. Federation of State Medical Bds. of the U.S., 830 F.2d 1429, 1438 (7th Cir. 1987) (cases involving "substantial" sanctions awards, i.e., a large sum of money or a large award in relation to the offending conduct, should include findings and reasons).

position of substantial fines ($1,000 in one case) may mandate the procedural protections of rule 42(b).[241]

Similarly, a number of jurisdictions have held that where sanctions require a finding of bad faith, a hearing is required.[242] This rule might apply to findings of improper purpose or dealing with claims making a "good faith argument" for change in the existing law.[243]

Findings of Fact and Reasons

Judge William Schwarzer outlined reasons for requiring specific findings of fact and conclusions of law in sanctions decisions:

> Findings and conclusions, even if only brief, serve at least three useful purposes: (1) they assist in appellate review, demonstrating that the trial court exercised its discretion in reasoned and principled fashion; (2) they help assure the litigants, and incidentally the judge as well, that the decision was the product of thoughtful

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Data from published cases show that the average fine was $1,730, and the average monetary award was $44,118. See table 14, *supra.*

[241]Cotner v. Hopkins, 795 F.2d 900, 903 (10th Cir. 1986) (When the district court imposed a $1,000 fine as punishment for failure to comply with a previous order, the court "abused its discretion in failing to afford plaintiff the procedural protections of Fed. R. Crim. P. 42(b) prior to imposing the $1,000 fine.").

[242]United States v. Blodgett, 709 F.2d 608, 610 (9th Cir. 1983) ("To establish bad faith [under 28 U.S.C. § 1927] on this record, a hearing was required to determine if the appeal was taken solely for the purposes of delay."); *Donaldson,* 819 F.2d at 1560 (rule 11 issues involving good faith arguments and improper purpose "may require more specific notice"). *See also INVST,* 815 F.2d at 405 (rule 11 sanctions do not require a hearing "where the sanctions were not based on bad faith"); *Rodgers,* 771 F.2d at 206 (rule 11) ("The trial court has not based the sanctions on bad faith, which would require a hearing."); Brown v. National Bd. of Medical Examiners, 800 F.2d 168, 173 (7th Cir. 1986) (rule 11 sanctions were "based on counsel's incompetence in handling the matter rather than a finding of bad faith"); *Hill,* 814 F.2d at 1201–02 (hearing under Fed. R. App. P. 38 for filing a frivolous appeal would be "pointless" because of absence of factual issues regarding filing objectively groundless legal arguments).

[243]Fed. R. Civ. P. 11. *See Donaldson,* 819 F.2d at 1560.

> deliberation; and (3) their publication enhances the deterrent effect of the ruling.[244]

Appellate courts have expressed a general preference for specific findings of fact in sanctions cases. They have, however, stopped short of requiring the lower court to make specific findings of fact in all cases.

In *INVST Financial Group v. Chem-Nuclear Systems,*[245] the Sixth Circuit indicated that, while rule 11 does not require written findings of fact and conclusions of law, the presence of such a statement in the record greatly facilitates appellate review. The Seventh Circuit has taken the approach that "in cases involving substantial awards a district judge [should] state with some specificity the reasons for the imposition of a sanction, and the manner in which the sanction was computed."[246] Whether an award is substantial is a decision to be made on an ad hoc basis, taking into account the relation of the size of the award to the offending conduct. The court stressed in an en banc ruling that specific findings are not always called for: "When a motion for sanctions is foolish, or when the reasons for denying a colorable motion are apparent on the record, the judge need not belabor the obvious."[247]

The Fifth Circuit, en banc,[248] rejected a panel's approach of requiring specific findings and conclusions in all rule 11 sanctions cases.[249] Instead, the court adopted a rule similar to that followed by the Seventh Circuit. The court emphasized the need for specific findings to facilitate appellate review in "those cases in which the violation is not apparent on the record and the basis and justification for the trial judge's Rule 11 decision is not readily dis-

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[244]Schwarzer I, *supra* note 1, at 199.

[245]815 F.2d 391, 401 n.4 (6th Cir. 1987) (rule 11).

[246]Brown v. Federation of State Medical Bds. of the U.S., 830 F.2d 1429, 1438 (7th Cir. 1987) (rule 11). *See also* Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073 (7th Cir. 1987) (en banc), *petition for cert. filed* (Nov. 20, 1987).

[247]*Szabo*, 823 F.2d at 1084.

[248]*Thomas*, 836 F.2d at 882–83 (en banc).

[249]Thomas v. Capital Sec. Servs., Inc., 812 F.2d 984 (5th Cir. 1987), *modified*, 836 F.2d 866 (5th Cir. 1988) (en banc).

cernible."[250] The court went on to say that "justification for the Rule 11 decision in the record must correspond to the amount, type, and effect of the sanction applied."[251] Failure to justify rule 11 decisions on the record will result in a "prompt remand for such findings."[252] Denials of sanctions are subject to the same standard and remedy.

The Second Circuit has held that before a sanction is imposed under rule 11, the court must set forth its reasons or findings as to why the paper is frivolous.[253] Specifically, the court must explain why it is not "well grounded in law" or "warranted by existing law."

The Tenth Circuit appears to have taken the most comprehensive approach to findings of fact in sanctions cases. The court requires specific findings, without exceptions, whenever the trial court imposes sanctions, under any authority.[254] It remains to be seen whether these requirements prove to be onerous enough to discourage sanctions or to increase satellite litigation.

Summary and Conclusions

Some issues are clear and much is unclear regarding the development of procedures for deciding sanctions questions. All courts agree that due process is essential. The minimum standard followed by the great majority of courts is that an attorney or party is entitled to some form of prior notice and some opportunity to be heard before sanctions are imposed. The hearing can be as informal as a brief oral argument or opportunity for written submissions. Generally, courts have not required or provided an evidentiary hearing except in the most serious cases. Appellate courts have allowed some leeway in requiring findings of fact and reasons for imposing or rejecting sanctions.

In the cases studied in six federal districts, a clear majority followed the practices just outlined. However, complaints from

[250]*Thomas*, 836 F.2d at 883.

[251]*Id.* at 883.

[252]*Id.* at 883.

[253]Sanko Steamship Co., Ltd. v. Galin, 835 F.2d 51, 53 (2d Cir. 1987) (rule 11).

[254]Braley v. Campbell, 832 F.2d 1504, 1513 (10th Cir. 1987).

lawyers, verified through examination of the record and interviews with opposing counsel and the judge, indicate that these minimum standards have not always been met.[255] The failures, which may be part of the "shakeout" period for implementation of rule 11, relate to a lack of warning and opportunity to be heard prior to imposing sanctions. Now that most circuit courts of appeal have clearly articulated minimum standards, more uniform compliance is reasonable to expect.

Beyond the minimum standards, however, are issues that call for systematic attention, either through the articulation of standard procedures by the Advisory Committee or through appellate decisions or both. These issues originate in the natural tendency to address the merits of the case and the sanctions issue simultaneously, increasing the likelihood of adjudication by hindsight. Complaints about the need for separation of the sanctions issues from the merits seem well grounded in concerns for fairness and avoidance of chilling effects on creative advocacy. Attorneys do not receive fair notice of the danger of sanctions from pro forma requests for attorneys' fees and costs in the prayer for relief. The hearing or briefing on a motion is not the logical place to address the adequacy of the prefiling investigation. Identification of relevant evidence and defenses relating to the adequacy of the prefiling inquiry needs further development. Conclusory labeling of filings as frivolous may impose the wisdom of hindsight without affording due process.

[255]For example, the data derived from published decisions show that a substantial percentage of the sua sponte sanctions were imposed without any indication of a warning or an opportunity for a hearing prior to the decision. *See* discussion at notes 159–61 *supra*. This same problem was identified in the field study. *See* discussion at notes 178–91 *supra*.

VII. SATELLITE LITIGATION AND SETTLEMENT EFFECTS

An apparent counterforce to full implementation of due process protections is the concern about generating satellite litigation, that is, "ancillary proceedings that may themselves assume the dimensions of litigation with a life of its own."[256] Satellite litigation may originate in several ways, with different causes and potential cures. Universal entitlement to an evidentiary hearing on the issuance of sanctions may itself promote such attention and commitment of resources as to make the sanctioning process counterproductive.[257] Additional litigation related to hearings on sanctions should, of course, be considered directly attributable to due process concerns. However, failure to afford notice and an opportunity to be heard may itself stimulate satellite litigation.[258]

Other sources of satellite litigation, however, may not be fairly attributable to implementation of due process. The amount and type of sanctions may change the decision-making calculus of parties and attorneys regarding taking appeals or otherwise engaging in satellite litigation. Economics may be the primary factor in such decisions. Similarly, sanctions may prolong the life of a case by inhibiting settlement. Whether any or all of these causes are operating is an empirical question that I address in the following sections.

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[256]Schwarzer I, *supra* note 1, at 183.

[257]A full evidentiary hearing, however, does not seem to be necessary to satisfy the sense of fairness. Complaints from attorneys in the interviews related to procedures that failed to warn and provide an opportunity to respond.

[258]Any process lacking in fundamental fairness may provoke attorneys to appeal out of a sense of righteous indignation and afford grounds for success in those appeals.

Incidence

The initial question is, "How much satellite litigation has accompanied the increased use of sanctions?" Examination of published cases suggests that there has been an enormous increase in satellite litigation, but that view is misleading. The published cases may primarily represent efforts to articulate standards under a novel and vastly altered rule 11. Consistent with the purposes of the rule change, these cases are public pronouncements of judicial resolve to enforce the amended rule.[259] They should be seen as efforts at general deterrence rather than as a measure of normal litigation.

Particularly at the appellate level, published decisions may appear to represent a vast litigation effort, sometimes resulting in lengthy en banc decisions.[260] These decisions can only be seen as efforts to establish standards to govern future litigation. In addition, many of the initial district court cases involved fee-shifting awards amounting to hundreds of thousands of dollars.[261]

These cases, however, are consistent with the thesis propounded by the drafters of amended rule 11 that the first five years of the rule's life would be devoted to a "shakeout" period to develop standards.[262] A corollary of that thesis is that the initial decisions are likely to be designed to have general deterrent effects. Cases involving large fee-shifting awards against major law firms fit that description.[263] Because of their dramatic impact, they skew our vision of the typical case and the normal process.

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[259]For a dramatic and oft-cited example, see Dreis & Krump Mfg. Co. v. International Ass'n of Machinists, 802 F.2d 247, 256 (7th Cir. 1986), in which the court underscored its warning about sanctions in these terms: "Lawyers practicing in the Seventh Circuit, take heed!"

[260]*Thomas*, 836 F.2d at 866; *Donaldson*, 819 F.2d at 1551.

[261]*See* discussion surrounding table 14 *supra*.

[262]*See* discussion at notes 60–65 *supra*.

[263]*See* discussion at notes 276–80 and table 18 *supra*. *See also, e.g.*, Strasser, *Sanctions: A Sword Is Sharpened*, Nat'l L.J., Nov. 11, 1985, at 1, col. 2 ("In ever-growing numbers, state and federal judges are hitting lawyers with costly economic sanctions for abuse of process in civil litigation—and those lawyers include some from the nation's most prestigious firms."); Taylor, *Texas Jurists Target Frivolous Suits*, Nat'l L.J., Oct. 13, 1986, at 3, col. 1 (sanctions of $250,000 in one case and $167,850 in another, both on appeal).

Estimates of the amount of satellite litigation are based on counts of published opinions. Vairo noted that "[b]etween August 1, 1983 and July 1, 1987, 564 Rule decisions were reported, 417 district court opinions and 147 circuit court opinions" and that "the number of district court cases appears to have leveled off" and "the number of reported circuit cases continues to rise."[264] Such information is useful as an objective measure of the seriousness with which rule 11 has been received by litigants and judges. As a measure of satellite litigation, however, counts of published opinions may be misleading. Researchers recognize the limits of the reported data but have little hard data for comparison.[265]

In this state of knowledge, the data on the incidence of published opinions naturally occupy the attention of commentators. Litigation about rule 11 sanctions is reported to have become the new "cottage industry" of the legal profession.[266] Based on a few examples of published decisions, law review commentators have made reference to the sanctioning process as "quite frequently" involving "exhaustive litigation."[267] A practitioner has projected that as more decisions are reported, there will be more sanctions motions, multiplying exponentially and leading to "clogged courtrooms."[268] Another lawyer concluded that "Rule 11 generates its own momentum," with improper motions for sanctions adding to the problems.[269]

Assumptions about the causes of satellite litigation grow with assumptions about its proportions. It is natural and plausible to assume that "attorneys threatened with sanctions under this rule will fight first to preserve their reputations and will next turn to their opponents in kind."[270] Commentators surmise that applications for sanctions will "poison the well of settlement" from which all

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[264]Vairo II, *supra* note 66, at 5.

[265]*Id.; see also* discussion at notes 149–51 *supra.*

[266]Bates, *The Rule 11 Debate, 4 Years Later*, Nat'l L.J., Oct. 12, 1987, at 3. The term "cottage industry," however, does not fairly describe the generally commodious, high-rise working quarters of the lawyers I visited in this study.

[267]Washburn Note, *supra* note 10, at 375 & n.158.

[268]Weiss, *supra* note 88, at 25.

[269]Joseph, *The Trouble with Rule 11*, A.B.A. J., Aug. 1, 1987, at 87, 88.

[270]Washburn Note, *supra* note 10, at 375–76.

lawyers must drink.[271] These commentators tend to postulate that lawyers have an ego-driven compulsion to fight against sanctions until the last appeal has been exhausted, resisting settlement all the way. However, my interviews with lawyers and judges did not support such a theory.

I interviewed eighteen federal district judges who issued sanctions opinions or orders. They reported very little satellite litigation, and none reported any burden from the litigation.[272] Typical comments were that there was "no substantial effect," "slight satellite issue to decide motion for reconsideration," "brief motion required no time," and "hearing on show cause order only." One judge reported that "the case died after sanctions were imposed."

I also interviewed two chief judges in districts with high levels of sanctioning activity about their general experiences with rule 11. One described his district as one in which sanctions requests have become commonplace, with about 5 percent granted. In his words, "the burden is routine, not dramatic." The effect of this routineness carries over to the bar's perception of sanctions as being "judgments about lawyering style and ability to recognize legal merit" and not "judgments about moral character."

The other chief judge found more of a problem with satellite litigation. Sanctions frequently increase the amount of litigation in his experience: "In some cases it's two for one, with the sanctions and merits being decided together. In others, I impose $500 from the bench, which [causes] no problems. In other cases sanctions are more complex than the merits."

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[271]Chrein, *supra* note 134, at 15; *see also* Weiss, *supra* note 88, at 24 (Rule 11 "inject(s) in an atmosphere that is already a hostile one, an additional adversarial proceeding that will only exacerbate that hostility and reduce the possibilities of settlement.").

[272]This finding is similar to that of the Committee on Federal Courts of the Association of the Bar of the City of New York, which issued a report based on interviews with ten judges from the Eastern and Southern Districts of New York. The committee found that "[n]ot a single judge thought that the rule [11] was a burden to administer or that it had spawned vexatious 'satellite' litigation." ABCNY Report, *supra* note 28, at 23. The committee also found that "[f]ew judges had ever held an evidentiary hearing on a sanctions application." *Id.* at 25.

The cases in which the chief judge encountered problems were primarily cases in which sanctions are used as a fee-shifting mechanism to compensate the opposing party. Another judge, who sits in a district in which sanctions are imposed relatively infrequently,[273] reported a similar experience with limiting the amount of an award. In his two sanctions cases, he awarded $50 and $500. His rationale was that "the amount was gauged to give a message to the attorney, but low enough not to give an incentive to appeal."[274] A judge from the Southern District of New York reportedly uses a different rationale to achieve the same result. This judge awards no more than $2,000, on the grounds that this is the most that should be expended to respond to a truly frivolous filing.[275]

One of the few reports of burden came from a judge in a district in which sanctioning is infrequent. He reported that the determination of an evidentiary basis for rule 11 sanctions took about four days in a single case. His conclusion was that the sanctions had a major effect on discovery abuse and that "the benefit was proportionate to the effort." In another district an effort to allocate responsibility among three sets of lawyers in a motion involving fees in the hundreds of thousands of dollars was time-consuming and complex.

The perceptions of experienced federal practitioners in the eight districts were slightly different. The impression of some was that "rule 11 seems to be making federal courts work harder," that "unsuccessful rule 11 cases will exceed the amount of frivolous litigation," and that "any substantial sanction is likely to be ap-

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[273]In addition to the case interviews in six districts, I interviewed judges, magistrates, and experienced federal practitioners in two districts, Northern Alabama and Eastern Wisconsin, in which published and unpublished sanctions awards were infrequent.

[274]*Cf.* Bender v. Continental Towers Ltd. Partnership, No. M–3771, slip op. at 17 (S.D.N.Y. Aug. 15, 1987). In an effort to reduce satellite litigation, the judge decided that $1,000 was a reasonable sanction without affording movants an opportunity to prove that their fees and expenses were much greater. The court said that "a modest sanction without further litigation constitutes . . . a reasonable enforcement of Rule 11 without unduly prolonging the court proceedings." *Id.*

[275]ABCNY Report, *supra* note 28, at 27–28.

pealed." Some referred anecdotally to single cases in which the amount of additional litigation was substantial, in one case exceeding $100,000 in fees and expenses to appeal a sanctions order.

Several of these attorneys expressed a more global perspective on the subject, comparing the overall burden of satellite litigation with the benefits of enforcing rule 11. These attorneys found that satellite litigation was "not as much as we expected in 1983–1984" because "judges threaten more than they impose" and "the dollar amounts are too low to stimulate appeals." Another concluded that the litigation was "not a burden because it encourages other cases to be dismissed." Yet another referred to a study in which the court's time was found to be "less than 10 percent" of the time involved in the litigation in which sanctions were an issue.[276]

These comments and other systematically collected data tend to show that satellite litigation is not the problem suggested by the literature or the numbers of published opinions. A key finding is that the sanctions decisions are oriented more to deterrence of repeat behavior than to full compensation of the moving party. These data call into question assumptions about the likely reactions of attorneys to sanctions. Reexamination of those assumptions is in order.

Models of Sanctioned Attorneys' Behavior

There are competing explanations for satellite litigation. The "psychological model" states that there is ego-involvement of the attorney in the issue of whether his or her behavior was sanctionable, and the attorney fights to defend his or her reputation. This reaction may, of course, vary according to the circumstances. A modest sanction may not be interpreted to be as threatening as a substantial award. An unpublished opinion or order is presumably

[276]NYSBA Report, *supra* note 4, at 23. Seventy-seven percent of the judges reported that under 10 percent of total court time was spent on the subject of sanctions in the average litigation in which sanctions were sought. Ten percent was the smallest amount that appeared on the survey form. *Id.* at A9. The attorney–interviewee concluded that the study group had overestimated the amount of satellite litigation and failed to ask for low enough percentages to capture the actual amount.

less threatening than a public pronouncement. Appealing an unpublished order is likely to exacerbate the injury.

The local legal culture is also likely to influence the attorney's reaction to sanctions. If sanctions are commonplace, any moral or professional stigma may be minimal. If sanctions are rare, the attorney is faced with a dilemma. A successful appeal may vindicate the attorney, but an unsuccessful appeal may aggravate the damage to his or her reputation. Also, the unsuccessful appeal may itself be sanctionable.

The "economic model" for satellite litigation looks primarily at the financial incentives and disincentives of all the actors. Fee-shifting drives the satellite litigation in several ways. Seeking a large amount of fees becomes part of the lawyer's duty to the client. Failure to seek fees may be considered malpractice, adding a risk of major damages in close cases.

The prospect of recovering or paying substantial fees is also an incentive to lawyers and clients under this model. When substantial fees are awarded or denied, the incentive to appeal may be greater than when the award is small.[277] In addition, when the award is large, the procedural protections may be greater. According to some of the due process decisions, "substantial" or "serious" awards mandate different procedures than less substantial awards do.[278]

If the economic model accounts for the major portion of any satellite litigation, shifting to a system of specific deterrence and imposing sanctions that are sufficiently low will reduce such litigation. In brief, the goals of fee shifting and reduction of satellite litigation may be incompatible. Due process procedures marginally increase the amount of satellite litigation. Experience with attorneys' fees litigation (the other major legal "cottage industry" of the 1980s) shows the elusiveness of routine procedures for managing

[277]Several of the lawyers who did not appeal said they made a "business judgment" that the amount of the sanction did not justify the costs of an appeal and the risk of sanctions for a frivolous appeal. *See* discussion at notes 281 and 399 *infra.*

[278]*Thomas*, 836 F.2d at 882–83; *Donaldson*, 819 F.2d at 1561; *Brown*, 830 F.2d at 1438.

fee issues.[279] Unlike English courts, American courts have not created an alternative system for taxation of fees and costs with minimal satellite litigation.[280]

The economic and psychological models may overlap more than would be anticipated. The ego of the lawyer may be measured to a large extent by the amount of the sanction. Even the most egotistical lawyer must face the economics of taking an appeal and the costs of losing that decision. As with other decisions in the litigation system, the high risks of "winner take all" lubricate the wheels of settlement. My synthesis of the models is that both psychological and economic forces drive the lawyer toward settlement unless the prospects of a successful appeal are high and the transaction costs are proportionate to the fees at stake.

Decisions About Appeals

I asked the lawyers to gauge the effect of the judge's sanction decision on the decision about an appeal. One of fifteen sanctioned lawyers interviewed said that the sanctions order had a decisive effect on the appeal decision. The effect, however, was to encourage the attorney to decide not to appeal because "the sanctions made it clear that the appeal would be a loser."

In the only other case in which a sanctioned attorney identified a sanctions order as affecting the decision to appeal, the result was to postpone the decision. The attorney reasoned that taking an appeal on the merits in the face of an outstanding finding of frivolity would risk liability for additional attorneys' fees for a frivolous appeal. Accordingly, the attorney moved, successfully, for reconsideration and then appealed the decision on the merits.[281]

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[279]*See generally* T. E. Willging & N. A. Weeks, Attorney Fee Petitions: Suggestions for Administration and Management (Federal Judicial Center 1985).

[280]*See generally* A. J. Tomkins & T. E. Willging, Taxation of Attorneys' Fees: Practices in English, Alaskan, and Federal Courts (Federal Judicial Center 1986).

[281]The result was that the appeal on the merits was untimely, a result that highlights the unfairness of relying on the reconsideration process as the sole opportunity to be heard. *See* discussion at notes 237–38 *supra.*

In a case in which the sanctioned attorney was not interviewed, the opposing party thought that the sanctions order had a decisive effect on the sanctioned attorney's decision to take an appeal. The attorney sought to appeal only the sanctions order but was rebuffed on the grounds that it was not a final, appealable order. The case was later settled and the sanction paid from law firm funds. In another case, the nonsanctioned attorney was of the opinion that a sanctions order had the effect of alerting opposing counsel to the fact that an appeal on the merits would be as frivolous as the original case.

Judges may craft their decisions in ways that help to avoid appeals. As noted earlier, some judges gauge the amount of a sanction to discourage appeals. One judge resolved a dubious case by refusing to impose sanctions because she could not "resolve these charges [of deliberately distorting the record] without creating a satellite litigation and thereby frustrating the disposition of the underlying case."[282]

In sum, in only one of the cases did the sanctions order actually stimulate an appeal, which was untimely. In several other cases, the order apparently worked in the opposite manner, operating as a specific deterrent against more frivolous filings in the same case. In one case, there was a chilling effect, postponing and ultimately killing what the attorney believed to be a meritorious appeal on a novel issue of law.

Settlement Effects

As table 17 indicates, attorneys in the field study reported that sanctions rarely had an effect on settlement. More than half of the cases in the field study were ultimately settled. A third of the remaining cases were disposed of by a judgment for the party repre-

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This case also involved novel issues of law. The presence of the sanctions order effectively chilled the decision to appeal. The attorney informed me that the state supreme court ultimately agreed with the position (a matter of state law) that the district judges originally deemed to be frivolous.

[282]Grip-Pak, Inc. v. Illinois Tool Works, Inc., 651 F. Supp. 1482, 1484 (N.D. Ill. 1986).

sented by the sanctioned attorney, sanctions having been imposed for an ancillary matter.

TABLE 17
Effect of Sanctions Decision on Settlement in Field Study Cases As Viewed by Judges and Attorneys

	Sanctioned Attorneys (n= 15)	Nonsanctioned Attorneys (n = 18)	Judges (n = 18)
No effect	11 (73%)	13 (72%)	17 (94%)
Facilitated settlement	2 (13%)	4 (22%)	1 (6%)
Inhibited settlement	2 (13%)	1 (6%)	0

The comments of some of the participating lawyers illustrate the mechanics of the settlement effects. One effect of sanctions on the dynamics of settlement is that the lawyer's stake becomes personal and may conflict with the client's goals. One attorney who had successfully moved for sanctions found that they "slightly facilitated settlement." The effect was to "put pressure on" opposing counsel, who had seen himself as a "mouthpiece" for a recalcitrant client. After sanctions, he began "to focus on his own responsibility as an officer of the court." Another lawyer saw the sanctioned lawyer as motivated to get his client (who had arguably committed perjury) to settle and pay the fees because otherwise the lawyer might face personal liability under the sanctions order. Another beneficiary of a sanctions order saw the settlement effect in ethical terms:

> [Opposing counsel] had a conflict of interest. He was personally liable for the [sanctions] fee [award] and he sought to trade it against the [plaintiff's] claim. We refused to do so on ethical grounds. There is no way out but to treat the two issues separately and perhaps get outside counsel for the fee action.[283]

[283]This is comparable to the situation in which plaintiff's attorney negotiates simultaneously (or defendant offers a lump sum) to settle plaintiff's case and an attorney's fee. *See* Jeff D. v. Evans, 476 U.S. 717 (1986). *See also* T.

In part, this effect seems salutary: It focuses the attorney's attention on the limits of the professional role and the need to make judgments about the frivolity of a client's claim. However, it also provides an opportunity for the attorney to impose costs on the client for the attorney's professional dereliction. Some courts have attempted to avoid the latter situation by ordering that the attorney pay the sanctions personally.[284] The theory is that whatever the source of the frivolous claim, the lawyer had an opportunity to refuse to include it in the papers filed. The assumption that the lawyer is responsible for the legal papers also has the effect of avoiding a source of satellite litigation, namely "placing the blame" on attorney or client. [285]

In the seventeen cases in which I asked the sanctioning judge, "Were you aware of any discussion of settlement prior to the imposition of sanctions?", none of the judges responded affirmatively. Three of sixteen sanctioning judges responded that they were aware of settlement discussions after sanctions were imposed. These data show little direct effect of sanctioning on judicial involvement in settlement. At the same time, they raise an interesting question about the role of sanctions.

Judicial involvement in settlement has increased dramatically at the federal level in recent years.[286] At the same time, many traditional judges do not see it as their role to become involved in the parties' efforts to resolve their dispute informally. While there are no baseline empirical data about the rate of judges' involvement at various stages of the litigation, it is surprising that none of the sanctioning judges had been aware of settlement discussions prior to imposing sanctions.

E. Willging & N. A. Weeks, Attorney Fee Petitions: Suggestions for Administration and Management 65–70 (Federal Judicial Center 1985).

[284]As a practical matter, such an order is difficult to enforce. Generally, the court will not know the source of the payment of a sanctions order. In our interviews, of fourteen sanctioned attorneys who responded to the question, eight sanctions orders were paid from law office funds, two from personal funds, three from client funds, and one from a combination of the three sources.

[285]Braley v. Campbell, 832 F.2d 1504 (10th Cir. 1987) (en banc).

[286]*See generally* D. M. Provine, Settlement Strategies for Federal District Judges (Federal Judicial Center 1986).

The absence of judicial involvement in settlement of these cases raises some questions about the role of sanctions in case management. Do these data indicate that sanctioning judges see their role as focusing on the litigation and making judgments about the merits of the case as opposed to stimulating discussion about alternative dispute resolution? Do sanctioning judges avoid other forms of case management, using the threat or actuality of sanctions to stimulate self-policing? Do the data indicate that settlement-oriented judges do not use sanctions as part of their arsenal, perhaps out of concern for spoiling the atmosphere? Regardless of the judge, are sanctions more likely to be imposed in cases in which judicial involvement in settlement is contraindicated? The data do not permit definitive answers to these questions. They may, however, be evidence of different approaches to case management that I address later.[287]

In this study, I asked judges and magistrates from two districts with low rates of sanctioning activity to describe any effects of sanctions on the settlement of cases. Five judges and three magistrates responded with comments that are instructive on the dynamics of sanctions and settlement.[288] In all cases, the direction of the comments and the examples chosen indicated that sanctions facilitate settlement activity.

Three of the judicial officers mentioned cases in which the threat of sanctions was imminent and the effect on settlement was dramatic. A judge said,

> In one case, I dictated finding of sanctions from the bench. Before the order was written, I had a call saying that [the order] would not be necessary. This was after trial, and plaintiff said that sanctions were the only reason for negotiation and settlement. In another case that's pending, I expect a similar outcome.

A magistrate reported a similar experience in a rule 37 sanctions case. In another case, a judge's preclusion order precipitated settlement.

In addition to these specific examples, these judicial officers had general observations about the effect of sanctions on settle-

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[287] *See* discussion at notes 339–48 *infra*.

[288] These responses were, of course, wider-ranging than those of the sanctioning judges because they were not limited to discussion of a single case.

ment. One reported that, generally, specific threats of sanctions for particular misconduct tend to facilitate settlement. For example, a threat to entertain an application for fees under the Equal Access to Justice Act generally produces settlement in cases in which the government has been intransigent.

Other judges found that the threat of sanctions might facilitate settlement. One would limit that opinion to a situation in which a represented party has no basis for a claim or the client is aware of the situation. In some cases, the judge's opinion about the merits of a claim gives the attorney a way out of a case that turned out to be weak.

Unlike the lawyers in the sanctions cases, experienced federal practitioners reported that the threat or imposition of sanctions generally had the effect of stimulating settlement activity. Their comments reveal some hidden effects in cases that do not result in a written decision. They raise questions about the effects of granting lawyers the power to move for (or threaten to move for) sanctions.

Of twenty-seven attorneys interviewed, twelve either had no comment on the subject (nine) or thought there would be no effect (three). Of the remaining fifteen, fourteen thought that the effect of a sanctions order would be to encourage settlement.[289] That outcome, however, was not always seen as fair or just. Whether sought or imposed with that end in mind, sanctions—or the threat of sanctions—may become a bargaining chip.[290]

As simply stated by one attorney, the settlement effect described by these lawyers is that "often the attorney threatened with sanctions will settle more quickly and cheaply. Theoretically, sanctions might increase acrimony and impede settlement, but I have

[289]The attorney who disagreed (mildly) limited his statement to cases with good settlement prospects: "I would not seek or threaten sanctions in a case that was likely to settle."

[290] One experienced attorney interviewed in this study gave a straightforward example of the use of sanctions as a bargaining chip. His client was the beneficiary of a sanctions order. He and his client decided, however, that it would not be worthwhile to reduce the sanctions to judgment. Instead, they accepted a nominal amount for the sanctions and settled the case, including an agreement not to appeal. In another case, the same attorney reported that a $2,000 sanction became a credit in the final settlement.

not seen this." Another lawyer described two recent cases in which "a veiled or implicit threat of sanctions led to voluntary dismissals of our client without any demand for nuisance value." Vairo captured the phenomenon in these words: "Rule 11 helps take the strike out of what are perceived to be strike suits."[291]

Reports from these lawyers indicate that the effect is strong. One experienced federal practitioner recounted a case in which "the judge's imposition of sanctions so unnerved my clients that they renewed an offer that had been mooted by a jury verdict in their favor." In another, the lawyer reported that a written warning of rule 11 consequences produced a more focused discovery effort than had been anticipated.

The dark side of this effect is that it may produce unwarranted settlement by intimidating inexperienced lawyers. In the words of one experienced plaintiff's civil rights lawyer who reported reviewing the files of some cases of unwarranted settlements: "Some judges use threats of sanctions which have an excessive effect on inexperienced lawyers, pushing them to settle cases by demoralizing them. I've reviewed some of these cases and found no basis for the threat."

Another practitioner stated his concern more bluntly: "Rule 11 may produce bad settlements from lawyers who seek to protect themselves by selling out their client's case." Another said that "inexperienced practitioners are unlikely to be able to assess the impact of a threat of sanctions and might settle precipitously." Yet another said, "Younger lawyers read of cases in other districts and sell their own cases short. The defense bar is tough in their tactics and will attack personally." These reports suggest that there may be general chilling effects lurking behind some of the settlements.

These comments also suggest that sanctions do not always, or even frequently, poison the well of settlement. A strong settlement effect has been observed by a substantial number of lawyers. The expected reports of barriers to settlement were not forthcoming.

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[291]Vairo II, *supra* note 66, at 8.

amended rule expressly permits awards of attorneys' fees and other expenses, whether to exercise this option lies within the discretion of the district judge. In the words of one appellate court, "[w]hat is 'appropriate' may be a warm friendly discussion on the record, a hard-nosed reprimand in open court, compulsory legal education, monetary sanctions, or other measures appropriate to the circumstances."[308]

The options available to a district judge in tailoring a sanction for a given case seem limited only by the judge's imagination and the possibility of appellate review under an abuse-of-discretion standard.[309] The editors of the second edition of the Manual for Complex Litigation listed a variety of types of alternatives, including oral or written reprimands, cost shifting (or denial of cost or fees), remedial action (such as reconstruction of data), preclusion of evidence, dismissal or default, enjoining future litigation, removal or other discipline of counsel, fines or contempt, and referral for prosecution. In all, the manual lists twenty-one categories, spanning three pages of text.[310]

Empirical evidence and case law indicate that use of alternative forms of sanctions is rare. In Kassin's survey of federal judges' responses to hypothetical rule 11 sanctioning situations, only seven judges (2.4 percent of the respondents) reported that they would "warn, reprimand, chastise, or admonish the offending lawyer orally or in writing."[311]

A study of opinions published during the first two years of the operation of rule 11 showed that 96 percent of the sanctions were monetary awards of "reasonable" costs and attorneys' fees.[312] The same study showed that approximately 18 percent of the cases involved warnings issued sua sponte.[313] Developments since that time

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[308]*Id.* at 878.

[309]Eastway Constr. Corp. v. City of New York, 637 F. Supp. 558, 565–66 (E.D.N.Y. 1986) (*Eastway II*), modified, 821 F.2d 121 (2d Cir. 1987) (*Eastway III*).

[310]Manual for Complex Litigation § 42.25–.3 (2d ed. 1985).

[311]Kassin, *supra* note 4, at 40.

[312]Nelken, *supra* note 26, at 1333–34.

[313]*Id.* at 1326. Presumably, this study did not define a warning to be a sanction. *See* discussion at notes 308–10 *supra*. Apparently, all of the warn-

have clarified that the primary purpose of rule 11 sanctions is deterrence[314] and that courts should impose the "least severe sanction adequate to serve the purpose."[315] Application of the principle of the "least severe sanction" requires consideration of nonmonetary alternatives[316] as well as monetary sanctions less imposing than the shifting of all attorneys' fees and costs.[317]

A review of the case law under rule 11 reveals sporadic use of alternatives.[318] Aside from warnings, the primary alternative appears to be monetary fines, payable to the court.[319] Such alterna-

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ings were in cases in which sanctions were considered sua sponte. *Id.* at 1328 n.95.

[314]*See* discussion at notes 8–14 *supra.*

[315]*Thomas*, 836 F.2d at 878. *See also* discussion at notes 36–39 *supra.*

[316]*See, e.g., Thomas*, 836 F.2d at 878 ("district courts may choose to admonish or reprimand attorneys who violate Rule 11"; "educational effect of sanctions might be enhanced even by requiring some form of legal education").

[317]Eastway Constr. Corp. v. City of New York, 821 F.2d 121, 123 (2d Cir. 1987) (*Eastway III*) ("The case law under Rule 11 also reflects the exercise of discretion to award only that portion of a defendant's attorney's fee thought reasonable to serve the sanctioning purpose of the Rule (citations omitted)); *see also* Lieb v. Topstone Indus., Inc., 788 F.2d 151, 158 (3d Cir. 1986) ("Influenced by the particular facts of a case, the court may decide that the circumstances warrant imposition of only part of the adversary's expenses or perhaps only a reprimand."); Weisman v. Rivlin, 598 F. Supp. 724 (D.D.C. 1984) ($200 awarded despite request for actual fees of $7,800).

[318]*See generally* Washburn Note, *supra* note 10, at 349–50 ("Although the costs and attorney fees of the opposition, or some percentage amount, appear to be the most common sanction, some ingenuity has been exercised."); Nelken, *supra* note 246, at 1333 n.130 ("Only a handful of courts have imposed sanctions other than, or in addition to, fees and expenses."); Drummond, *Rule 11 Sanctions*, 48 Mont. L. Rev. 119 (1987) ("The language of the Advisory Committee Note indicates that a variety of sanctions were meant to be considered.").

[319]*See, e.g.*, Donaldson v. Clark, 105 F.R.D. 526, 527 (M.D. Ga. 1985), *rev'd on other grounds*, 794 F.2d 572 (11th Cir. 1986) (court fined plaintiff's counsel $500 and awarded attorneys' fees); Kirksey v. Danks, 608 F. Supp. 1448, 1451 (S.D. Miss. 1985) ($250 fine payable to court, plus attorneys' fees awarded to plaintiffs); Snyder v. IRS, 596 F. Supp. 240 (N. D. Ind. 1984) (pro se plaintiff who contested withholding of wages by employer for income tax was fined $500 and ordered to pay defendant $500 in attorneys' fees); Dominquez v. Figel, 626 F. Supp. 368, 374 (N.D. Ind. 1986) (fine based on rate of

Reducing Satellite Litigation

Based on the field interviews described earlier, a psychological model positing ego-driven fighting reactions of attorneys to sanctions does not appear to hold. In the routine case, as described by participants or by experienced attorneys based on examples from their own practice, there is little evidence of resistance to sanctions through satellite litigation. If the choice is "fight or flight," the latter seems to be the predominant response.

At the same time, published cases are written testimonials to an increase in litigation about sanctions. While the courts may be using these cases to set standards and enhance general deterrence, the attorneys involved in these cases have generally moved for sanctions and decided to appeal. What motivates them? In what way are these cases different from the cases in this study?

One way of determining these differences is to examine the amounts of the sanctions awards in the cases selected for field interviews and to compare those amounts with the awards in a random sample of published cases. The results of such a comparison are presented in table 18, which shows that the cases selected for the field interviews had dramatically lower monetary awards than the sample of published opinions.[292] This finding may reflect the fact that one criterion for inclusion in the field study was that the case be closed, a criterion that systematically excludes some cases with lengthy satellite proceedings.

In addition, fourteen of the field study cases were unpublished decisions. Monetary award information was available in eleven of these. The mean award in these eleven cases was $861 and the median was $578.

The findings on the amount of satellite litigation in the field study are, of course, limited by these data. The findings support the conclusion that auxiliary proceedings are unlikely to be a bur-

[292]These differences are statistically significant, using the large–sample approximation for the Wilcoxon test ($Z = 2.71$, $p < .01$, two-tailed). *See* L. Marascuilo & M. McSweeney, *supra* note 20, at 274–78.

den when the amount of the award is low and the opinion is not published.[293]

TABLE 18
Comparison of Amounts of Sanctions in Field Study Cases and Sample of Published Opinions

	Field Study Cases ($n = 22$)	Published Opinions Sample ($n = 29$)
Mean amount of award	4,345	41,118
Median	900	5,153
Range	200–11,500	0–250,000

Leading commentators on rule 11 have concluded that the source of the satellite litigation problem lies in the misuse of rule 11 for fee shifting. Judge Schwarzer, in revisiting rule 11 after more than four years of experience, found that "[m]uch of the pressure behind that litigation has undoubtedly come from clients seeing a way to recoup some of their legal expense."[294] Judge Schwarzer concluded that by focusing on encouraging prefiling inquiries and deterring litigation abuse, "rule 11 enforcement will move from private compensation to serving the larger interest of the judicial process."[295]

In a similar vein, Vairo found that the "prospect of fee-shifting has both attorney and client clamoring to make rule 11 motions."[296] She concluded that "shifting the focus from the compensatory pur-

[293]It is also possible that the published cases represent more serious violations of rule 11 and that the misconduct itself accounts for the high awards. In all cases, however, rule 11 commits the amount and timing of the sanction to the discretion of the district court.

[294]Schwarzer II, *supra* note 12, at 1025; *see also* Levin & Sobel, *supra* note 45, at 609 ("Achieving a sense of balance in the implementation of rule 11 will, in itself, go far toward reducing the risk of excessive satellite litigation.").

[295]Schwarzer II, *supra* note 12, at 1025.

[296]Vairo II, *supra* note 66, at 46.

pose to the specific deterrent purpose will have the positive effect of decreasing satellite litigation."[297]

Data from this study support the conclusions of these experts. If courts abandon fee shifting as a primary goal, the financial incentives for major fee litigation will be reduced and therefore lawyers and clients will be less inclined to get embroiled in such disputes. The natural tendency toward settlement will then predominate. One hopes that as experience with sanctions increases, the tendency of inexperienced lawyers to capitulate too easily to threats of sanctions will lessen. As any teacher knows, however, there is always a new crop of inexperienced lawyers.[298]

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[297]*Id.*

[298]Data from published opinions, however, indicate that the typical sanctioned attorney is not inexperienced. *See* Chapter 9 and table 20 *infra*.

VIII. ALTERNATIVES TO MONETARY SANCTIONS

Package of August 1983 Amendments

Amended rule 11 was adopted in August 1983 as part of an "integrated package" of amendments to the pretrial procedures of the Federal Rules of Civil Procedure.[299] Amendments to rules 7, 11, 16, and 26 created new tools for managing the pretrial phase of litigation. From the perspective of the judge, the Advisory Committee on Civil Rules acted on the theory that "increased judicial management . . . in the pretrial process cuts down the time frame from institution to pretrial determination, or resolution."[300] In other words, the committee postulated that efficient management of litigation could be achieved through a variety of mechanisms embodied in the amended rules.

For example, rule 16 mandates consultation with counsel and a scheduling order within 120 days of the filing of the complaint.[301] One of the authorized topics for a rule 16 consultation or conference is "the formulation and simplification of the issues, including the elimination of frivolous claims or defenses."[302] The intent was to "clarify and confirm the court's power to identify the litigable issues" without the need for "a formal motion for summary judgment."[303]

Obviously, the power to address frivolous filings in a rule 16 context can be combined with rule 11 to deter similar filings in the

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[299]A. Miller, The August 1983 Amendments to the Federal Rules of Civil Procedure: Promoting Effective Case Management and Lawyer Responsibility 2 (Federal Judicial Center 1984); *see also* Carter, *The History and Purposes of Rule 11*, 4 Fordham L. Rev. 4 (1985).

[300]Carter, *supra* note 299, at 10.

[301]Fed. R. Civ. P. 16(b). This mandatory feature of the rule applies unless the case falls within a category that was exempted by local district court rule. *See generally* N. Weeks, District Court Implementation of Amended Civil Rule 16: A Report on New Local Rules (Federal Judicial Center 1984).

[302]Fed. R. Civ. P. 16(c)(1).

[303]Fed. R. Civ. P. 16(c)(1); Advisory Comm. Note, *supra* note 8, at 209.

future. The elimination of a claim or defense from a case, on the grounds of frivolity, is a strong judicial rebuke to an attorney or a pro se litigant, whether or not it is labeled as a sanction. At this early stage of the proceedings, a fee award or a fine for use of the court's time is likely to be small enough to avoid generating satellite litigation.[304] Crafting an alternative nonmonetary sanction may reinforce the impact of the ruling on the merits and make clear that the blame lies with the lawyer.

Technically, rule 11 mandates the imposition of a sanction when a paper is signed in violation of the rule. Monetary awards of "reasonable expenses incurred because of the filing, . . . including a reasonable attorney's fee" are expressly permitted.[305] However, the court has discretion to determine and apply an "appropriate sanction." What is an appropriate sanction? What alternatives are available to a judge in a specific case? What case management alternatives are available to aid a judge generally in the effort to control frivolous filings? These are the primary issues addressed in this chapter.

Mandatory Sanctions and Alternative Sanctions

Courts have interpreted the language of rule 11 that "the court . . . shall impose . . . an appropriate sanction" as the drafters intended. The unavoidable conclusion is that "[o]nce a violation of Rule 11 is established, the rule mandates the application of sanctions."[306] Flexibility arises from the discretion of the trial judge to tailor an "appropriate sanction" to the circumstances of the violation. The history of the process of amending rule 11 indicates that the intent was to vest broad discretion in the district judge, including the power to impose minimal sanctions.[307] While the

[304]*See* discussion at notes 277–81 *supra.*

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

[306]Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 876 (5th Cir. 1988); *see also* Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 254 n.7 (2d Cir. 1985) (*Eastway I*) ("where strictures of the rule have been transgressed, it is incumbent upon the district court to fashion proper sanctions"); Nelken, *supra* note 26, at 1321–22.

[307]*Thomas,* 836 F.2d at 876–78.

tives, however, may raise more procedural problems for the courts because of strict due process procedures for criminal contempt.[320] Other alternatives have included requiring remedial education,[321] recording a written reprimand against counsel,[322] referring a copy of an opinion on sanctions to the state bar grievance committee,[323] ordering a show cause hearing on suspension from practice in the district court,[324] ordering payment of interest on a judgment delayed by frivolous filings,[325] dismissing claims against multiple defendants,[326] referring a matter to a disciplinary board,[327] and deeming claims admitted because of a sanctionable request for extension of time to answer.[328]

$600 per hour of court time). *Cf.* Hornbuckle v. Arco Oil & Gas Co., 732 F.2d 1233, 1237 (5th Cir. 1984) (where a fine is used as an alternative to dismissal, a condition of its use is an "express finding concerning whether plaintiff . . . had the ability to pay the sum assessed as an alternative to dismissal, and if not, whether any sanction less severe than dismissal . . . would be appropriate and sufficient").

[320]*See* discussion at notes 239–41 *supra.*

[321]Stevens v. City of Brockton, No. 87-0299-S (D. Mass. 1987) (sanctions warranted against both sides; counsel ordered to attend day-long program on federal practice at local law school).

[322]Allen v. Faragasso, 585 F. Supp. 1114, 1119 (N.D. Cal. 1984).

[323]McGoldrick Oil Co. v. Campbell, 793 F.2d 649, 654 (5th Cir. 1986) (review of the privilege of sanctioned attorney to appear in courts of the circuit deferred pending outcome of disciplinary proceedings); *see also* Lieb v. Topstone Indus., Inc., 788 F.2d 151 (3d Cir. 1986) ("reference to a bar association grievance committee may be appropriate").

[324]Kendrick v. Zanides, 609 F. Supp. 1162 (N.D. Cal. 1985).

[325]Davis v. Veslan Enters., 765 F.2d 494, 501 (5th Cir. 1985) (district court's order that defendant pay $32,988.99 in interest lost as a result of improper removal petition, plus attorneys' fees, held to be "most appropriate").

[326]Valle v. Taylor, 587 F. Supp. 514, 518 (D.N.D. 1984) (claims dismissed under rules 11, 16, and 41(b)). It should be noted that the Advisory Committee did not favor use of rule 11's authority to deal with claims on the merits. Advisory Comm. Note, *supra* note 8, at 199 (Motions to strike pleadings "generally present issues better dealt with under Rules 8, 12, or 56.").

[327]Steinle v. Warren, 765 F.2d 95, 102 (7th Cir. 1985).

[328]Johnson v. Department of Health, 587 F. Supp. 1117 (D.D.C. 1984) (order to show cause why contempt should not be imposed issued in same opinion).

Sanctions under rule 11 may have independent consequences that are the equivalent of alternative sanctions, especially on the disciplinary side. In Wisconsin, for example, violation of court rules, orders, or decisions regulating the conduct of counsel is deemed to be grounds for discipline.[329] Judges in that state feel that they are under an obligation to report formal sanctions to the disciplinary authorities.[330] In other jurisdictions, there were reports that some malpractice insurance carriers require that the imposition of sanctions be reported to them. By raising the stakes involved in sanctions, these consequences tend to increase any reluctance of judges to impose sanctions.

Criteria for selection among the wide range of alternatives have been outlined by the Advisory Committee and some courts. The Advisory Committee directs that "in considering the nature and severity of the sanctions to be imposed, the court should take account of the state of the attorney's or party's actual or presumed knowledge when the pleading or other paper was signed."[331] Based

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[329]*See* Hildebrand, *Introduction: Model Rules of Professional Conduct*, Wis. B. Bull., Aug. 1987, at 19 n.2 (citing Supreme Court Rule 20.8.4 and disciplinary cases).

[330]Whether this requirement accounts for all or part of the low sanctioning rate in the Eastern District of Wisconsin is impossible to tell. Wisconsin also has a statute that mandates fee shifting for frivolous filings, Wis. Stat. § 814.025 (1985–86), which may also account for the reported lack of problems with frivolous filings in that district. Judges and lawyers are aware of the rule, however, and they reported that informal sanctions, such as reprimands, are frequently used to correct attorney misconduct.

[331]Advisory Comm. Note, *supra* note 8, at 200. The American Bar Association has adopted the approach of looking at the state of mind of the lawyer as the source of criteria for determining the appropriate disciplinary response, such as disbarment, reprimand, and warnings. Factors of damage to the opposing party and creating adverse effect on the case are also relevant. *See generally* Cameron, *Standards for Imposing Lawyer Sanctions—A Long Overdue Document*, 19 Ariz. St. L.J. 91 (1987).

For example, a reprimand for abuse of the legal process "is generally appropriate when a lawyer negligently fails to comply with a court order or rule, and causes injury or potential injury to a client or other party, or causes interference or potential interference with a legal proceeding." *Id.* at 110–11 (§ 6.23). In comparison, an admonition "is generally appropriate when a lawyer engages in an isolated instance of negligence in complying with a court

on the ABA standards for imposing discipline, the courts could develop a model for sanctioning following the same structure.[332] A related guideline would look to the sanctioned attorney's history of filing papers for improper purposes or without the requisite factual or legal inquiry.[333]

Another general guideline, implying the use of a logical nexus between the sanction and the wrong, is to "tailor sanctions to the particular facts of the case."[334] For example, in awarding prejudgment interest in one case, the court fashioned a remedy that was directly proportionate to the delaying tactics of the sanctioned attorney.[335] Factors such as the ability of the sanctioned party or attorney to pay and the need of the opposing party for payment should also inform the choice of remedy.[336]

Guidelines for selection of an appropriate sanction remain extremely general. As do standards for judging the occurrence of violations, criteria for choosing among educational, disciplinary, and financial alternatives demand further attention. As noted earlier,[337] a sample of published opinions revealed only two nonmonetary sanctions, both of which were warnings to the attorneys and the bar in general.

Interview Data

Illustrating the absence of attention to nonmonetary alternatives, none of the twenty-two cases studied in the field portion of this project involved nonmonetary sanctions. When asked about what,

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order or rule, and causes little or no actual or potential interference with a legal proceeding." *Id.* at 111 (§ 6.24).

[332]*Id.*

[333]Schwarzer I, *supra* note 1, at 201 ("Thus a violation may stem from a variety of causes: inexperience, incompetence, neglect, willfulness or deliberate choice. The need for punishment and deterrence is a function of the cause of the violation.").

[334]*Id.*

[335]*Davis*, 765 F.2d at 500–01 ("To prevent [defendant] from deriving a significant financial benefit from filing its removal petition (and thus to deter future abuses), the district court applied a sanction based on a ten percent rate.").

[336]*Eastway II*, 637 F. Supp. at 573–74.

[337]See discussion following table 14 *supra*.

if any, alternatives to monetary sanctions they had considered, thirteen of the sixteen judges responded, "None." One judge reported being "under the impression that noncompensatory sanctions are disfavored."

Several of the judges supported the use of alternatives. One judge said that he had not considered alternatives but that he "would do so now." Another said that in some cases he considered striking the papers "because it gets the point across and may have to be explained to the client." Another reported that he had considered entering a default judgment, granting the plaintiff's motions, or imposing a higher amount, but "chose the minimum that [he] thought would get the attorney's attention."

These responses suggest that judicial consideration of nonmonetary alternatives is rare. However, some of the cases in this field study reflect a search for the least severe monetary sanction that will achieve the purpose of the rule. Courts have not automatically awarded full attorneys' fees and expenses.[338]

In summary, consideration of alternatives has the potential of adding to the complexity of the sanctioning process by forcing the judge to examine subjective factors, such as intent and ability to pay. However, evaluation of such factors is essential to selection of the least restrictive alternative compatible with the primary purpose of deterring rule 11 violations. Use of disciplinary alternatives or major fines may also require use of more formal procedures.

Case Management Alternatives

Sanctioning for frivolous filing parallels the original design of the traditional pretrial procedures under the Federal Rules of Civil Procedure, such as summary judgment and motions to dismiss. These procedures were intended to "separate the wheat from the chaff."[339] Interviews with judges and magistrates in two districts in which the judges rarely impose sanctions revealed widespread use of pretrial case management practices and informal alternatives to

[338]See discussion at notes 292–98 *supra*.

[339]Burbank, *The Costs of Complexity*, 85 Mich. L. Rev. 1463, 1476 (1987).

sanctions.[340] In this section, I will document some of those practices. The following descriptions are based on interviews with eleven federal district judges and five magistrates.[341]

My interviews confirm that traditional means of case management—especially early identification of issues and early rulings on the merits—serve to weed out frivolous cases and reduce the need for formal sanctions. Education of the bar about rule 11 requirements and judicial expectations also helps to prevent frivolous filings.

Rule 16(b) Conferences

Many of the judges reported using rule 16 conferences to identify the issues and weed out frivolous claims. The general principle, in the words of one judge, is that "rule 16(b) conferences force attention on the basis for the case." One judge's practice is to conduct a telephonic rule 16(b) conference within 90 days of filing. In this conference, he "schedules the case through trial, addresses discovery plans, joinder, amendment, and settlement. Claims of lack of merit should surface then and be treated as threshold matters, with limited or no discovery. This prevents the building of the nuisance value of a case."

Another judge uses rule 16(b) conferences and several status conferences to monitor the case. He finds that this "lets the lawyers know that the court is following the litigation and keeps lawyers from escalating squabbles."[342] The common element in all these

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[340]Of sixteen interviewees, six had not imposed rule 11 sanctions within the preceding year and ten had imposed them from one to five times.

[341]This is not to say that such practices are not used by judges in districts with higher rates of sanctioning. Because of time constraints I did not systematically or deeply examine case management practices in such districts. A comparison of case management practices in high- and low-sanctioning districts—or among high- and low-sanctioning judges—would make an interesting empirical study, but it was beyond the scope of this project.

[342]Another method of reducing unwarranted infighting is to require that lawyers make a sincere effort to resolve disputes before invoking the court's aid through motions for sanctions. One of the districts has such a rule, and several judges and magistrates reported that it serves to prevent the escalation of disputes to a level requiring formal sanctions.

uses of rule 16(b) is that the judge becomes actively involved in defining and limiting the issues at an early stage of the litigation.[343]

Rule 16(b) conferences have their limits, however. One judge indicated that they are useful only for eliminating "simplistic cases." Another reported that he does not conduct rule 16 conferences "routinely." Having tried them for a year, he found they "took too much time."[344] Selective use of scheduling conferences for cases that do not appear to be routine may be more efficient and effective.

Motions to Dismiss or for Summary Judgment

Most of the judges in the two low-sanctioning districts reported using the old-fashioned methods of disposing of frivolous papers: motions to dismiss and motions for partial or full summary judgment. One judge expressed his philosophy tersely: "The ultimate sanction is the dismissal of the plaintiff's case or the preclusion of a defense." Another equally terse comment was, "One control is to decide cases promptly on the merits."

In one of the two districts, some judges use a unique procedure to screen frivolous cases. In this district, defendants routinely file a pro forma motion to dismiss a complaint.[345] The primary purpose of the motion is to extend the time for answering the complaint. One judge will review the complaint and the motion and dismiss a particularly weak complaint. Leave to amend is allowed, but the

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[343]For a critical discussion of the procedural limits of and lack of procedural safeguards in this type of procedure, see generally Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. Chi. L. Rev. 306 (1986); *see also* Resnik, *Managerial Judges*, 96 Harv. L. Rev. 374 (1982). *Cf.* Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two Stage Discovery Planning and Alternative Dispute Resolution*, 37 Rutgers L. Rev. 253 (1985); Peckham, *The Federal Judge as Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 Calif. L. Rev. 770 (1981).

[344]*See generally* Weeks, *supra* note 301. Rule 16(b) mandates that a scheduling order be issued in all cases not exempted by local rule. The rule requires consulting with the attorneys for the parties "by a scheduling conference, telephone, mail, or other suitable means."

[345]One of the judges pointed out the irony of using what might be a frivolous motion as a device to screen cases for frivolity.

judge at this juncture seizes the opportunity to educate the lawyer about the relationship between a weak complaint and rule 11. In the order allowing leave to amend, he imposes a condition: that the lawyer "certify that he or she has read rule 11."

Another judge uses the pro forma motion somewhat differently. He will "separate it out and convert it to a motion for summary judgment with full briefing." He finds that this practice reduces any risk of an unfair dismissal and enhances the prospects of affirmance on appeal. At the same time, it weeds out the weak claims at an early stage.

Yet another judge uses partial summary judgment with a twist. He issues his partial summary judgment ruling together with a finding under rule 54(b), converting the finding to a final judgment and forcing the lawyer to accept the finding or appeal before trial of the remaining issues. The effect is to remove such claims from a jury trial.

Warnings and Reprimands

Judges and magistrates in the two low-sanctioning districts do not ignore rule 11. Many incorporate the essence of rule 11—the duty to conduct prefiling factual and legal inquiries—into their individual procedures. For example, one judge will "warn lawyers at the motions docket, and the grapevine carries it through the bar." Another has "lectured lawyers in front of their clients." Another says, "I try to take a positive approach and tell the lawyers about how valuable the time of the court is and that there is no time to deal with frivolous actions and that sanctions will be imposed."

Several of the judges reported that they use a private and informal approach to sanctionable behavior. One said, "I will privately reprimand an attorney, preferably alone, in chambers, after a case. If it's necessary to admonish an attorney in court, I'll do so lightly, outside the presence of the jury." This same judge expressed the opinion that "young lawyers can be taught. Some older lawyers are uneducable." At least two other judges reported using private reprimands, in chambers, to make their point.

Settlement Warnings

I asked judges whether they raised the issue of sanctions at settlement conferences. Three judges indicated that they occasionally do so and that the warning at this juncture is very effective. Attorneys who have received such warnings, however, find them quite coercive. Judges appear to recognize that such warnings are a powerful weapon, to be used sparingly and in situations that clearly warrant the likely outcome.

One judge stated a flat rule: "I do not threaten sanctions [because it] is an abuse, an effort to coerce settlement. I do warn about sanctions if [for example] I dismiss a case for failure to plead fraud with particularity and allow leave to amend." The distinction between warnings and threats seems narrow, but clear in that context. Specific warnings during discussions of settlement are likely to be seen as coercive.

Fee-Shifting Statutes and Rules

Two of the judges and one attorney interviewed find the use of reverse fee shifting under statutes and rules more effective than the use of sanctions to deter frivolous filings. One of the two judges finds fee-shifting statutes and rules more effective because they do not attempt to place the blame on the attorney and thereby invite appeals.[346] One experienced federal attorney who specializes in civil rights litigation said that such statutes and rules had much more of a chilling effect on his clients than did rule 11.

Magistrates

I asked judges and magistrates to discuss their use of magistrates in cases involving sanctions issues. Reports of referral of rule 11 sanctioning issues to magistrates were rare. One magistrate had conducted a hearing on a rule 37 discovery sanctions case to make findings about attorneys' fees.[347] Others reported frequent re-

[346]*See* discussion at notes 401–04 *infra.*

[347]*See also* INVST Financial Group v. Chem-Nuclear Systems, 815 F.2d 391, 405 (6th Cir. 1987) (rule 11 hearing held before magistrate acting as special master satisfied due process; hearing involved calculation of the amount of

ferral of discovery disputes and prisoner cases for frivolity review, but none of these cases involved rule 11.

These findings, of course, came from districts in which sanctions are relatively rare. In the few cases in which sanctions are a serious issue, the judge may choose to be directly involved in the determination of liability and the choice of an appropriate sanction. My impression from the six other districts is that magistrates are rarely, if ever, used. None of the twenty-two cases that composed the field study involved magistrates.

Disciplinary Referrals

I was not surprised to learn that judges in low-sanctioning districts do not use disciplinary referrals to the bar association as a substitute for rule 11 sanctions. The size and collegiality of the local bar in these two districts led me to expect few formal disciplinary referrals. In response to a question about such use, only one judge reported a referral. This finding is consistent with the conclusion of the Clark Committee relating to enforcement of professional discipline and suggests that little has changed in this regard.[348]

Judicial Resources

One of the judges in a low-sanctioning district articulated a precondition to effective case management: "Maintain a sufficient number of judges to manage the caseload." This assertion sent me to the statistics on judicial workload, and I discovered that the weighted filings per judge and the pending caseload per judge were

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sanctions, opportunity for sanctioned attorney to explain conduct, cross-examination of opposing attorneys, and review of documents).

[348]The Clark Committee "suggested that strong professional, social, or political ties within the legal community explain the dearth of complaints submitted to formal disciplinary agencies by fellow attorneys or judges." Comment, *Settling a Case: A Court's Inherent Power to Impose Sanctions Before and After* Eash v. Riggins Trucking Inc., 38 Rutgers L. Rev. 539, 541 (1986) (citing ABA Special Committee on Evaluation of Disciplinary Enforcement, Problems and Recommendations in Disciplinary Enforcement 167 (Final Draft 1970)).

substantially higher in the study districts that used sanctions more frequently (see table 19).

The two low-sanctioning districts in this study had an average of 401 weighted filings per judge in 1987, compared with 526 per judge in the six moderate- and high-sanctioning districts. The differences vary with the levels of sanctioning. As table 19 shows, the courts with a moderate level of sanctioning have a greater workload than those with a low level of sanctioning. In turn, the workload of courts with a high level of sanctioning exceeds that of courts with a moderate level.

TABLE 19
Weighted Filings Per Judge in Eight Study Courts, 1987

	Weighted Filing	National Rank	Pending Cases	National Rank
Low-sanctioning courts				
N. Ala.	417	54	291	84
E. Wis.	385	64	339	69
Mean	401	59	315	77
Moderate-sanctioning courts				
M. Fla.	486	28	466	43
N. Ind.	472	31	502	36
Mean	479	30	484	40
High-sanctioning courts				
N. Ill.	639	2	388	59
C. Cal.	530	16	529	29
S. Tex.	567	10	721	9
S. N.Y.	461	35	454	44
Mean	549	16	523	35

Source: Administrative Office of U.S. Courts, Federal Court Management Statistics (1987).

Table 19 does not show that workload determines sanctioning. Other variables, such as the size of the metropolitan area of the district, the number of judges on the court, and the ratio of lawyers to the population, might intervene. The data in the table do, neverthe-

less, present an interesting hypothesis, namely, that judges with a moderate caseload have the time to manage cases individually and avoid the need for major sanctions awards.

Summary

Some lawyers and judges in this study expressed the view that sanctions are not a good substitute for "hands on" case management.[349] Experience in the low-sanctioning districts suggests that the contrary may be true, that case management is a good substitute for sanctions. In other words, case management may help to avoid the need to confront sanctions issues. Judges in the low-sanctioning districts used a variety of case management options, from the traditional motions to dismiss and for summary judgment to the revised rule 16(b) conference complete with scheduling orders and frivolity reviews.

These systems appeared to work. My impression concurs with the opinions of experienced attorneys whom I interviewed in the eight districts. In the two low-sanctioning districts, six of the eight experienced attorneys answered "no" when asked whether there is a problem relating to unwarranted or frivolous pleadings by lawyers in the federal courts of their district. In the high-sanctioning districts, ten of the fifteen experienced attorneys asserted that there is such a problem. Thus, at least for the low-sanctioning districts studied, the absence of sanctions and the use of traditional case management alternatives are not associated with increased problems with frivolous pleadings. Whether the relative lack of problems with frivolous pleadings can be attributed to case management alternatives, however, is problematic. From the data I un-

[349]Commentators have also expressed this viewpoint. *See, e.g.*, Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 Harv. L. Rev. 630, 649 (1987) ("courts should prefer other tools for managing claims when no extra deterrence is needed. Such tools include pretrial conferences, discovery conferences, limitations on discovery requests, allocation of discovery expenses, and dismissal"); *see also* LaFrance, *supra* note 129, at 345 ("the Federal Rules have long given judges broad managerial authority to regulate class actions and discovery and to dispose of cases by summary judgment. Moreover, in 1983 that authority was considerably broadened.").

covered in this study, it does seem that the traditional case management alternatives require additional time for the judge to become familiar with each contested case. Whether the savings from the alternatives exceed the time required is questionable and warrants further study.

IX. ATTORNEYS INVOLVED IN THE SANCTIONING PROCESS

Who are the attorneys sanctioned under rule 11? In terms of experience and findings of unprofessional conduct, how do they compare to lawyers whom judges decline to sanction in a published opinion? How do they differ from their opposing counsel in cases involving sanctions? From experienced federal practitioners? How often have they been the subject of sanctions or professional discipline? Commentators have speculated about these issues. Using data from a sample of published decisions and data from field interviews, I can direct the first glimmers of empirical light on the subject.

I should caution the reader, however, that my findings are limited by the need to rely primarily on public sources of information about attorneys' backgrounds and disciplinary records, as well as on published opinions. Especially in the early years of the administration of rule 11, judges are likely to use rule 11 opinions as vehicles for communicating their standards to the bar in order to promote general deterrence. The attorneys involved in these cases may or may not be representative of attorneys sanctioned less visibly in unpublished opinions or in published opinions issued after the shakeout period.

Knowledge about characteristics of sanctioned attorneys may be useful on several levels. First, such information can help judges assess the degree to which judicial decisions about sanctions overlap with bar disciplinary actions or the sanctioning activity of other judges. This aggregate information may help judges decide whether to seek similar information prior to imposing sanctions in individual cases.[350] Second, information about the relationship among

[350]One of the high-sanctioning courts in the field study kept a record, by attorney name and rule, of all sanctions imposed on attorneys. *Cf.* Cameron, *Standards for Imposing Lawyer Sanctions—A Long Overdue Document*, 19 Ariz. St. L.J. 91 (1987) (In American Bar Association standards for imposing

forms of professional discipline can alert courts and disciplinary bodies to opportunities to share information.[351] Finally, an empirically grounded composite picture of sanctioned and disciplined lawyers may help guide future legislative or rule-making action.

A review of commentaries on sanctions reveals the following predicted profile of the attorney likely to be sanctioned. This hypothetical attorney has a record of misconduct or a pattern or practice of abusive litigation practice and may be characterized as one of a "few marginal practitioners who abuse opponents and courts with unwarranted filings."[352] This attorney may be more experienced than one would otherwise expect, because an experienced attorney is held to a higher standard of professional conduct.[353] Lawyers who do not accept the limits of the profession or who lead "crusades" might be more susceptible to sanctions.[354] Similarly, an increasing number of "unclubbables," who have "no shared understanding of the law's margins" may be involved in sanctionable

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professional discipline, aggravating characteristics include prior offenses and patterns of misconduct.).

[351]In the course of gathering information about professional discipline for this project, I talked with several administrative personnel in state disciplinary offices. I was surprised to find little or no knowledge about sanctions as a source of information relevant to the disciplinary process. In Wisconsin, I am told, ethical rules impose a duty on the judge to report sanctions to the disciplinary authority. *See* discussion at notes 329–30 *supra.*

[352]W. Burger, 1985 Year-End Report on the Judiciary 11. *See also* Rosen, *The View from the Bench,* Nat'l L.J., Aug. 10, 1987, at S-1 to S-19 (In a survey of state and federal judges, 62 percent of the private lawyers and 63 percent of the government lawyers were deemed to be extremely competent or very competent. Thirty percent of each are rated as "marginally competent" and 1 percent as incompetent.).

[353]Chrein, *supra* note 134, at 18; *see also* ABA Commission on Professionalism, *supra* note 31, at 273 (citing an ABA study reporting that lawyers with more than ten years' experience have a disproportionate percentage of malpractice claims filed against them. Gates, *The Newest Data,* A.B.A. J., Apr., 2, 1984, at 78).

[354]Hirshman, *supra* note 87, at 204; *see also* LaFrance, *supra* note 129, at 332 (1988) ("Rule 11 is antithetical to public interest litigation.").

behavior.[355] However, courts may show a deference to innovative lawyers who may also be crusaders.[356]

Attorney Profile

Using a data set consisting of eighty-four attorneys "threatened"[357] with rule 11 sanctions in a sample of published opinions generated through WESTLAW, I tested aspects of the predicted profile. This set of eighty-four attorneys comprises two subsets: one consists of fifty-three attorneys who were sanctioned; the other consists of thirty-one attorneys who were not.

As predicted by some experts, the typical sanctioned attorney is experienced. The median and mean levels of experience, as measured by the date of admission to the practice of law, were both fifteen years for the sanctioned attorneys. Nonsanctioned attorneys had equivalent experience, with median and mean levels of sixteen years. Table 20 shows the distribution of experience among these lawyers.

Only one sanctioned attorney had less than five years' experience. Twenty-eight percent of the sanctioned attorneys and 26 percent of the nonsanctioned group had less than ten years' experience. As a comparison, in 1980, 42.2 percent of the total U.S. lawyer population had less than ten years' experience.[358] At the other end of the scale, eight (15 percent) of the sanctioned attorneys

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[355]Reidinger, *The Metes and Bounds of Advocacy*, A.B.A. J., July 1, 1987, at 66 (quoting Geoffrey Hazard).

[356]Chrein, *supra* note 134, at 19.

[357]"Threatened" here means that these lawyers faced the possibility of sanctions in a published rule 11 sanctions opinion. One attorney per case was listed. See appendix A for a description of the creation of the data base. Dates of admission to the bar were obtained either from Martindale-Hubbell or from the state regulatory office for the bar. The missing data represent refusals of bar regulatory offices to make such information available to the public.

[358]B. Curran, The Lawyer Statistical Report: A Statistical Profile of the U.S. Legal Profession in the 1980s at 8 (1985). As large numbers of individuals have entered the legal profession in recent years, the trend is for the level of experience to decrease. *Id.* While data are not available for the years beyond 1980, one would expect the current population to be less experienced than that in 1980.

and three (12 percent) of the nonsanctioned attorneys had more than thirty years' experience. In the total lawyer population in 1980, 21 percent had thirty or more years' experience.[359] Both inexperienced and very experienced lawyers are underrepresented in the sanctions cases. At the same time, attorneys facing the threat of sanctions—and those who are in fact sanctioned—are more experienced on average than the bar as a whole.

TABLE 20
Years of Admission to Practice for Nonsanctioned and Sanctioned Attorneys from Sample of Published Rule 11 Decisions (N = 84)

Years of Admission to Practice	Nonsanctioned Attorneys (n = 31) (Cumulative % of 31)	Sanctioned Attorneys (n = 53) (Cumulative % of 53)
0–5	1 (3%)	1 (2%)
6–10	7 (26%)	14 (28%)
11–15	3 (36%)	10 (47%)
16–20	7 (59%)	4 (55%)
21–25	2 (65%)	7 (68%)
26–30	3 (75%)	5 (77%)
31–35	0 (75%)	4 (85%)
36–40	1 (78%)	2 (89%)
>40	2 (84%)	2 (93%)
Missing (not available)	5 (100%)	4 (101%)

An effort to obtain information about the size of the law firms of the sanctioned attorneys met with limited success. The available data do show that the stereotype of the marginal solo practitioner[360] is not adequate to describe a sizable minority of the sanctioned attorneys. Twenty-three of the sanctioned attorneys (43 percent) had

[359] *Id.*

[360] *See, e.g.*, V. Countryman, T. Finman & T. Schneyer, The Lawyer in Modern Society 8–29 (2d ed. 1976) (citing and excerpting Ladinsky, *The Impact of Social Backgrounds of Lawyers on Law Practice and the Law*, 16 J. Legal Educ. 127 (1963), and J. Carlin, Lawyers on Their Own (1962)).

paid listings in Martindale-Hubbell, which provided a source of information about the size of their law firms. Of this group, only two were solo practitioners.[361] Thus, at a minimum, twenty-one (40 percent) of the sanctioned attorneys were from firms of more than one attorney.[362] To put this figure in context, in 1985, 47 percent of all private practitioners were in solo practice.[363]

Efforts to obtain data about the type of law practice (e.g., public vs. private) of the sanctioned attorneys produced equally limited data. Not surprisingly, all of the attorneys listed in Martindale-Hubbell were with private law firms, as were all but one of the attorneys for whom information was obtained from the bar disciplinary committee. There is some reason to believe that if legal services offices, public interest law associations, or nonprofit organizations had been involved in the sample of rule 11 cases, they would have been so designated in the published opinion.[364] A search for such designations in the sample of published rule 11 opinions yielded none.

Repeat Players

In the sample of published opinions, eleven (13 percent) of the eighty-four attorneys threatened with sanctions had either been the subject of final disciplinary action or had sanctions imposed in other cases, or both. Six had been disciplined,[365] and six had sanc-

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[361]Forty-three percent of those listed were in firms of two to ten lawyers, 22 percent in firms of eleven to twenty, and 18 percent in firms larger than twenty.

[362]Of course, it is possible that the remaining 60 percent were all solo practitioners. The data only allow the statement that 40 percent of the sanctioned attorneys were not solo practitioners.

[363]American Bar Foundation, The Lawyer Statistical Report: The U.S. Legal Profession in 1985 at 4 (Supp. 1986).

[364]The original data set included cases in which rule 11 was cited but was not the primary basis for the decision. Those cases, which were excluded from the final data set, included three government attorneys and one legal services attorney, no attorneys for nonprofit organizations, and four others, who were probably corporate house counsel.

[365]One attorney had been disbarred, four had been suspended from practice, and one had been given a public reprimand.

tions imposed in one or more other cases.[366] One attorney had been both disciplined and sanctioned. How did these attorneys fare in the rule 11 sanctioning process? Of the eleven attorneys with prior discipline or sanctions, ten were sanctioned.[367] Table 21 compares the sanctioning of attorneys with prior discipline with that of attorneys without prior discipline.

TABLE 21
Comparison of Sanctioning of Attorneys With and Without Other Discipline or Sanctions, from Sample of Published Opinions (N = 84)

	Attorneys With Other Discipline or Sanctions	Attorneys Without Other Discipline or Sanctions
Sanctioned	10 (91%)	43 (59%)
Not sanctioned	1 (9%)	30 (41%)

As table 21 shows, attorneys with other discipline or sanctions are far more likely to be sanctioned than attorneys without such discipline or sanctions. This difference is statistically significant.[368] Judges faced with choices about imposing sanctions may be reacting to the same behavioral factors as other judges or disciplinary bodies did in dealing with the same attorney. To the extent that marginal practitioners can be identified from public records, these attorneys are candidates. The data do give some reason to believe that judges are successful in identifying and sanctioning attorneys whose records suggest marginality.

[366]Three had been sanctioned once; one had been sanctioned twice; and two had been sanctioned three times.

[367]In two of the cases (both involving attorneys who were sanctioned in three other cases), the district court's imposition of sanctions was reversed on appeal. In one case, the reversal was for lack of authority to sanction the conduct in question under rule 11. In the other, the sanctions issue was remanded to the district court, but the decision on whether the attorney was ultimately sanctioned on remand was not available.

[368]P = .0481, Irwin–Fisher test. For a description of the test, see L. Marascuilo & M. McSweeney, *supra* note 20, at 100–07.

One can only speculate about the reasons for the congruence in judgments made about this small group of attorneys. These data do not indicate whether the disciplinary or sanctions record of the attorney determines the sanctions case at issue. Indeed, some of the disciplinary or sanctioning activity may have occurred after the published opinion.[369] In the published decisions, no judge referred to prior sanctioning activity regarding an attorney.[370] In only one court did I find an indication that records of prior sanctions are maintained systematically by the clerk's office.

Educated speculation might lead one to conclude that these repeat offenders have reputations that precede their appearance in a given case. Aware of their poor professional reputation, opposing counsel may be more likely to seek sanctions and a judge more likely to impose them. As will be shown later, in field interviews judges and opposing attorneys tended to agree in their assessments of lawyers whose professional reputations were considered to be below minimum standards.[371]

Sanctioned Attorneys: Field Study

In the field portion of this study, I was able to gain some qualitative information[372] about the level of federal practice of attorneys involved in the sanctioning process and about the effect of sanctions activity on federal practice. The sanctioned attorneys who agreed to be interviewed (five did not) practiced less frequently in federal court than did the opposing party. Table 22 is presented solely to describe the background of the attorneys in the field

[369]Data on discipline and other sanctions were collected during the period from September 1987 to April 1988. The sample of published opinions was drawn in April 1987 and reached back as far as August 1983.

[370]In one of the field study cases, the judge noted in an unpublished opinion that the attorney had previously been sanctioned for the same type of conduct.

[371]*See* discussion at tables 24 and 25 *infra*.

[372]It is important to note that the data from the field study, in contrast to the data from the published opinions, were not obtained randomly or in sufficient numbers to permit statistical generalization about the population from which they were drawn.

study. The table compares the percentage of practice in federal court of the sanctioned attorneys, the nonsanctioned attorneys, and experienced attorneys—attorneys selected for inclusion in the study because of their knowledge and experience in the federal courts.

TABLE 22
Percentage of Practice in Federal Court of Attorneys in Field Study

Percentage of Practice	Sanctioned Attorneys ($n = 15$)	Opposing Attorneys ($n = 18$)	Experienced Attorneys ($n = 27$)
< 5%	5 (33%)	4 (22%)	0
6%–25%	3 (20%)	4 (22%)	3 (11%)
26%–50%	3 (20%)	1 (6%)	4 (15%)
51%–75%	1 (7%)	2 (11%)	9 (33%)
76%–100%	3 (20%)	7 (39%)	11 (41%)

Almost three-fourths of the sanctioned attorneys, compared with one-half of their opposing counsel, spent 50 percent or less of their time in federal court. Opposing counsel, in turn, practiced less in federal court than did experienced attorneys.

The sanctioned attorneys in the field study appeared to be typical of the sanctioned attorneys in the sample of published rule 11 opinions described in the previous section. Their levels of experience were comparable: None of the field study attorneys had less than five years' experience. The median level of experience was fourteen years, and the average was seventeen years. Eight of twenty were listed in Martindale-Hubbell. For those, the median firm size was eight lawyers, and the average was eleven.

Two of the sanctioned attorneys in the field study had also been the subject of final disciplinary action, both because of suspensions from practice. One was not in good standing at the time of the study. One of the twenty sanctioned attorneys had sanctions imposed in another case that was published in LEXIS.

What effect did the sanctioning experience have on the level of federal practice of sanctioned attorneys and their opponents in the

field study? What effect did experienced federal practitioners report? The short answer to both questions is that these attorneys reported a slight effect.

Two of fourteen responding sanctioned attorneys indicated a slight decrease in the amount of their federal practice that they attributed to the sanctions imposed on them. One of these attorneys said, "I used to try to get into federal court; now I try to avoid it." The other reported "reducing the amount of federal practice generally due to costs and judicial attitudes." None of the eighteen opposing attorneys reported a decrease in federal practice, and one reported a slight increase in federal practice attributable to the sanctioning experience.

Four of twenty-six responding experienced attorneys stated that they had slightly decreased their amount of federal practice because of the general increase in sanctioning activity in federal courts. Two comments of the experienced lawyers indicated that this slight decrease was attributable to their perception, in the words of one, that "federal judges are more likely to impose sanctions than state judges." This perception leads attorneys to file their stronger cases in federal court and their more questionable cases in state court. An experienced lawyer would "seek to insulate against removal."

The comments of sanctioned and experienced lawyers suggest that there may be a mild general chilling effect regarding federal practice. The effect seems to be to shunt cases to state court rather than deny access to court. Whether state adoptions of equivalents of rule 11 would totally deny access remains to be seen. At present, the choice to pursue state court remedies appears to be a strategic one, originating in an imbalance of sanctioning rules.

The sanctioned attorneys in the field study were only slightly more likely than the other attorneys to be the subject of additional sanctions proceedings. As table 23 shows, 47 percent of the sanctioned attorneys, compared with 42 percent of the experienced attorneys and 36 percent of the opposing attorneys, reported that they were the subject of a sanctions proceeding in other cases. These differences are not statistically significant.[373]

[373]The chi-square (X^2) with two degrees of freedom is 0.36.

TABLE 23
Incidence of Field Study Attorneys' Involvement in Nonstudy Sanctions Cases

Level of Involvement	Sanctioned Attorneys ($n = 15$)	Opposing Attorneys ($n = 14$)	Experienced Attorneys ($n = 24$)
Movant	3 (20%)	5 (36%)	4 (16%)
Subject	7 (47%)	5 (36%)	10 (42%)
None	5 (33%)	4 (29%)	10 (42%)

Experienced attorneys were less likely to invoke the sanctions process than other attorneys in this study, but almost equally likely to be the subject of a sanctions proceeding. Given experienced attorneys' greater amount of practice in federal court (table 22), their incidence of involvement in sanctions is proportionately lower than that of the other attorneys.

I asked participants in the case-based portion of the field study to assess the professional reputations of the attorneys involved in the sanctions cases. Table 24 shows the sanctioning judges' comparative assessments of sanctioned and opposing counsel.

TABLE 24
Sanctioning Judges' Assessments of the Professional Reputation of Sanctioned and Opposing Attorneys in Field Study (N = 18)

Reputation	Sanctioned Attorney	Opposing Attorney
Outstanding	1	3
Above average	3	4
Average	2	3
Below average	1	0
Below minimum standards	3	0
Missing	8	8

Four of the ten sanctioned attorneys were rated below average or below minimum standards, whereas none of the opposing attor-

neys were so rated. These attorneys may represent the "few marginal practitioners" that were expected to be the subject of sanctions. However, four of the sanctioned attorneys were also rated above average or outstanding, suggesting that the sanctionable activity was aberrational.

Ratings of the sanctioned attorneys by their opposing counsel showed a similar pattern. Table 25 shows that opposing counsel rated six of sixteen sanctioned attorneys average or worse and four above average. In contrast, sanctioned attorneys rated opposing counsel as average or better.

TABLE 25
Field Study Sanctioned and Opposing Attorneys' Assessments of Each Other's Professional Reputations

Reputation	Opposing Attorney Rating of Sanctioned Attorney ($n = 18$)	Sanctioned Attorney Rating of Opposing Attorney ($n = 15$)
Outstanding	0	2 (13%)
Above average	4 (22%)	6 (40%)
Average	6 (33%)	3 (20%)
Below average	4 (22%)	0
Below minimum standards	2 (11%)	0
Missing	2 (11%)	4 (27%)

Looking behind the numbers in tables 24 and 25, how often did the judges and attorneys agree in their evaluations of specific attorneys? Evaluations of professional competence by judges and attorneys converged only at the low end of the continuum. Of the three attorneys deemed to be below minimum standards by the sanctioning judge, two were given the same rating by their opposing counsel and the third opposing counsel did not participate in the study. Of those rated below average, however, there was perfect disagreement between judge and opposing counsel. The lawyer rated below average by the judge was rated average by opposing counsel. Of the four attorneys given below-average ratings by opposing counsel, the judges rated one outstanding, another above average, another average, and one rating was missing.

Attorney–Attorney Relationships

In the field study, in all eight districts I asked experienced attorneys and judges to rate the relationships among members of the bar. I used a ten-point scale, with 1 being hostile and 10 being cooperative. I followed this rating with a question about whether increased sanctions activity had changed the relationships among members of the bar.

The perceptions of attorneys and judges differed. As table 26 indicates, attorneys in the six districts with high-sanctioning activity tended to characterize the relationships as less cooperative and more hostile than did attorneys from the low-sanctioning districts. Judicial officers from the two sets of districts showed no substantial difference in their ratings, however.

TABLE 26
Perceptions of Bar Relationships by Judges and Experienced Attorneys in High- and Low-Sanctioning Districts, Field Study

	Low-Sanctioning Districts	High-Sanctioning Districts
Judicial Officers	7.4 ($N = 12$)	7.3 ($N = 9$)
Experienced attorneys	8.28 ($N = 7$)	6.7 ($N = 14$)

Note: The scale was 1–10, with 1 = hostile, 10 = cooperative.

Differences in the attorneys' perceptions of relationships in the two sets of districts may reflect either cause or effect factors. Sanctions activity may be higher because of poor relationships, or the poor relationships may be a result of higher sanctions activity. I asked whether relationships had changed because of rule 11. Five of fourteen responses from the attorneys suggested that rule 11 was at least partially responsible for changes in attorney–attorney relationships. Most found that rule 11 had little or no effect.

Three of the four experienced attorneys who found that rule 11 had a significant effect on attorney relationships were from the Southern District of New York. Indeed, only one of the four ex-

perienced attorneys interviewed in that district thought that rule 11 did not have an impact on relationships. Outside of that district, experienced attorneys reported changes in relationships, but attributed them to factors such as the increased number of lawyers and increased competition. Likewise, judges in all the districts expressed the view that rule 11 had little to do with changes in bar relationships.

Bar–Bench Relationships

I asked the same participants in the field study to characterize the relationships among attorneys and judges in their districts using the same ten-point scale. I then asked whether amended rule 11 affected those relationships. Table 27 shows the responses to the scaled question. Differences within the groups of lawyers and judges were not substantial. Nor were differences among districts with low- and high-sanctioning rates. However, in both sets of districts judges tended to rate the relationships as better than did the lawyers in the same type of district.

TABLE 27
Perceptions of Bar–Bench Relationships by Judges and Experienced Attorneys in High- and Low-Sanctioning Districts, Field Study

	Low-Sanctioning Districts	High-Sanctioning Districts
Judicial officers	8.9 ($n = 12$)	8.3 ($n = 14$)
Experienced attorneys	6.8 ($n = 7$)	7.3 ($n = 16$)

Note: The scale was 1–10, with 1 = hostile, 10 = cooperative.

Attorneys were almost equally divided in their comments on whether changes in rule 11 had had an effect on their relationships with judges. Seven thought that they had not, and six thought that they had. There was no particular concentration in any single district. In the Southern District of New York, where relations within the bar had reportedly deteriorated because of rule 11, three of four

experienced attorneys and both judges who commented were of the opinion that rule 11 had not changed bar–bench relationships.

Some of the comments of the attorneys define the changes. Several attorneys reported that federal practice had become more formal and managerial in reaction to increased docket pressures. One reported an insidious change in these words: "Some lawyers see the weaker judges as susceptible to being fooled by sanctions motions." In contrast, several lawyers said they respected the judges who imposed sanctions. One said, "one of the harshest sanctioners is the easiest to practice before." Another reported "some friendly antagonism," and another stated that the only judge to impose sanctions in the district had the general respect of the bar.

Of the judges, only two reported that amended rule 11 affected their relationships with attorneys. One of the two answered the question in this manner: "Sanctions are an element of the relationship. I have promoted awareness of sanctions issues with a prophylactic goal of modifying attorney behavior. I disseminate cases and articles to my advisory committee to stimulate discussion and improve practice."

A judge who did not experience a change in relationships described how he avoided deterioration of relationships while invoking rule 11 on a relatively frequent basis. He found "great potential to change the relationship" because the amended rule "does force attorneys and judges to sit in active review of a fellow professional." He continued: "I have not felt any change despite being a rule 11 activist. But, I limit sanctions to exceptional cases, explain my reasons in detail, and I do not threaten sanctions, which is an abuse to coerce settlement." In a similar vein, a judge reported no change in relationships and said that all of the judges in the district "are circumspect about imposing sanctions, and generally even the sanctioned party accepts them. Appeals are rare."

Finally, several judges noted lawyers' concerns about chilling effects. Only one, however, thought that these concerns changed bar–bench relationships. One observed that rule 11 "may have affected lawyers who do not practice regularly in federal court."

Summary

The sanctioned attorneys for whom data were available through published opinions and Martindale-Hubbell listings do not fit the stereotype of the marginal practitioner from a solo law practice. Nor are they identifiable as public interest or legal services institutional lawyers. They tend to be experienced, averaging fifteen years since admission to the bar. Approximately one in five has experienced other disciplinary or sanctioning activity. Attorneys identified through published opinions who had a disciplinary or sanctions history or who were judged incompetent by their opposing counsel and the judge were sanctioned in every instance. The profile is distinctly general, and insufficient to support predictions of sanctionable behavior by a narrow class of attorneys. Indeed, only at the lowest level of competence did judges and attorneys agree on the reputation of the sanctioned attorney.

In the field study, attorneys rated bar relationships lower in districts in which sanctioning is more prevalent. However, the level of sanctioning did not appear to be related to bar–bench relationships.

X. CHILLING EFFECTS

Sources of Concerns

The value involved in the debate about chilling effects is a primary value in the American political and social system, namely, the promotion of access to the courts as a peaceful mechanism for airing and resolving grievances. A subsidiary value is that open access will permit the free flow of creative arguments essential to adaptation of the common law to the demands of a changing world.

Some contend that tolerance for meritless litigation may be necessary to maintain access.[374] The rationale is that systems for screening marginal cases, such as sanctions, impose additional risks on the lawyer. Cautious lawyers will react to such risks of personal liability by screening cases that are arguably meritorious, even though such screening dilutes their "professional duty to err on the side of the client."[375]

The American common-law system promotes the value of accessibility of the courts in several ways that distinguish it from the English system. These differences primarily involve a lesser degree of accountability for filing frivolous litigation.[376] For example, the

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[374]*See, e.g.*, Sifton, *Response to a Practitioner's Commentary on the Actual Use of Amended Rule 11*, 54 Fordham L. Rev. 28, 30–31 (1985); *see also* Weiss, *supra* note 88, at 24 ("I happen to be in basic disagreement with those who complain there is something wrong with the number of lawsuits that are instituted. . . . I believe our society is a great society, in part, because we have access to the courts as we do.").

[375]Nelken, *supra* note 26, at 1340 n.175.

[376]This is not to say that rule 11 is the only, or even the primary, source of accountability in the federal courts. Other rules, such as Fed. R. App. P. 38, Fed. R. Civ. P. 37, and 28 U.S.C. §§ 1912 and 1927 provided authority to impose sanctions for frivolous pleadings prior to the 1983 amendments. Reverse fee shifting under federal statutes also is a potent weapon for imposing financial sanctions for frivolous filings. *See, e.g.*, Christianburg Garment Co. v. EEOC, 434 U.S. 412, 422 (1978) (defendants can recover fees if the case was "frivolous, unreasonable or groundless").

American rule limits fee shifting to narrowly defined situations, including statutory fee shifting.[377] Statutes that permit fee shifting promote access to the courts by generally favoring the plaintiff. Limits on such one-way fee shifting, such as awards to defendants in some circumstances,[378] are seen as inhibiting access.

Similarly, restrictions imposed on the tort of malicious civil prosecution originate in concerns that plaintiffs not be chilled from filing cases.[379] Arguments about policies involved in defining this tort parallel the debates about rule 11, focusing on chilling effects and satellite litigation.[380]

Finally, the contingent-fee system, which is designed to promote access to the courts, has economic limits. Under a contingent system, a lawyer has little or no incentive to file a frivolous claim. The lawyer will be paid only if the claim is successful, through either trial or settlement.

As the preceding examples suggest, rule 11 should be viewed as one part of a set of rules designed to deter frivolous litigation. Its effects are sometimes difficult to distinguish from those of other sanctioning procedures, fee-shifting statutes, fee arrangements, or tort remedies. The effort to distinguish the effects of various rules and systemic factors, however, is critical to evaluation of rule 11 and consideration of alternatives to it.

Concerns about chilling effects include a fear that majoritarian opposition to unpopular causes or unconventional claims (or defenses) will work to penalize advocates of such causes or their clients. Specifically, reports that a disproportionate number of civil

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[377]Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975).

[378]Christianburg Garment Co. v. EEOC, 434 U.S. 412 (1978). Several attorneys in this study were of the opinion that the prospect of imposing the defendant's attorneys' fees on the plaintiff under the *Christianburg* standards did more to deter filings than the threat of sanctions under rule 11. *See* discussion at note 346 *supra* and notes 401–04 *infra*.

[379]One scholar concluded that "[c]ourts have looked openly with disfavor on this tort [malicious civil prosecution] and there are very few cases in which it has been successfully maintained. The restrictions imposed on it are quite onerous . . . ." Wade, *supra* note 61, at 454–55.

[380]*Id.* at 454–56.

rights cases have been the subject of rule 11 sanctions fuel this apprehension.[381] I address that issue later.[382]

Role of Legal Standards

Proponents of rule 11 have argued that legal standards can protect against use of rule 11 in ways that inhibit either access to the courts or creative advocacy for change in the law. As stated earlier,[383] there is a consensus among commentators and strong support in the case law for the proposition that sanctions should not be imposed simply because an argument was novel and unsuccessful.

The plain language of rule 11 protects "a good faith argument for the extension, modification, or reversal of existing law." The Advisory Committee stated flatly that the "rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual and legal theories," and it expressed a standard for limiting this danger. The committee directed courts to "avoid using the wisdom of hindsight" and instead to "test the signer's conduct by inquiring what was reasonable to believe at the time" of filing.[384] Appellate decisions have also directed district courts to protect against punishment of creative advocacy.[385] Formulation and application of such standards have reduced concerns about chilling effects.[386]

Lack of due process may chill creative advocacy by depriving attorneys of the assurance that their arguments will be judged fairly, taking their perspective into consideration. As documented in chapter 5, attorneys have complained that sanctions are some-

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[381]Nelken, *supra* note 26, at 1327 & n.92; Vairo II, *supra* note 66, at 25 n.83.

[382]*See* discussion at notes 388–98 *infra*.

[383]*See* discussion at notes 78–86 *supra*.

[384]Advisory Comm. Note, *supra* note 8, at 199.

[385]*See* cases cited and discussion at notes 83–86.

[386]*See, e.g.*, Vairo II, *supra* note 66, at 24 ("The reported cases that have analyzed Rule 11 make clear that while it does have new bite, courts will be somewhat more tolerant of those pursuing novel legal theories than those pressing positions lacking a factual basis."); *see also id.* at 25 ("Indeed, many of the cases in which Rule 11 violations have been found for lack of proper legal basis have been rather obvious cases.").

times imposed sua sponte without warning or an opportunity to be heard. Such practices exacerbate the natural tendency to judge the adequacy of arguments by hindsight. By failing to ascertain the attorney's actual inquiry, these procedures increase the attorney's fear that even well-documented research and testing of the plausibility of arguments will not protect against sanctions. In contrast, procedures that focus on the objective adequacy of the lawyer's inquiry encourage the lawyer to feel secure about filing arguably meritorious claims or defenses.[387]

High-Risk Cases

In the field study, I asked experienced federal practitioners whether there are "types of cases that involve a high risk of incurring sanctions." Fifteen of twenty-four respondents said that there were such cases. Agreement ended there. When asked to identify the types of cases, some identified complexity as a common ingredient, focusing on class action work in the securities, antitrust, and employment discrimination fields. Others observed, however, that individual cases with a high volume of filings overall, such as title VII and Social Security cases and diversity personal injury cases that are removed from state courts, have a high risk of sanctions. The common source of the problem in those cases is the inexperience of some of the lawyers with federal procedures and practices.

Specific types of cases mentioned more frequently as having a high risk of sanctions were securities, antitrust, and commercial (seven times), employment discrimination (five times) and civil rights (one time, but two times mentioned as not likely to be sanctioned because judges seek to avoid chilling effects), RICO and conspiracy cases (three times), mass tort cases (three times), and class actions (three times).[388]

Several factors seem to be at work in increasing the lawyers' perception of the risk of sanctions. One is the haste with which a

[387] *Cf.* Schwarzer II, *supra* note 12, at 1024–25 ("Shifting the focus of rule 11 enforcement . . . to scrutinizing what a lawyer actually did, should materially reduce subjectivity and inconsistency.").

[388] As the data set in chapter 5 shows, the attorneys' perception of the specific types of cases was quite accurate (see table 8).

complaint must be drafted and filed. For example, one specialist in plaintiffs' securities work explained that "because they seek to block an action or have a shareholder interest accommodated, they often have to be filed the day after a proposal is announced." A countervailing force, however, is the company's need to settle such cases to proceed with its proposal. As the settlement rate increases, the risk of sanctions decreases.

Another factor affecting the risk of sanctions is the degree to which the substance of the claims tends to stigmatize the defendant, stimulating a subjective desire for vindication and revenge. Title VII employment discrimination, RICO, and conspiracy charges are more likely to generate such a reaction, as are medical malpractice claims.

Several attorneys also identified the stakes involved and the resources of the parties as factors. Commercial and class action litigation implicates these factors.

Statistical studies of reported decisions show that there is a higher incidence of sanctioning in civil rights cases than would be warranted strictly on the basis of their percentage of the filings. For example, civil rights filings reportedly accounted for only 7.6 percent of the civil filings from 1983 to 1985, yet produced 22.3 percent of the published rule 11 decisions.[389] Contract cases, in contrast, accounted for 35.7 percent of the filings during that period and "only 11.2 percent of the rule 11 cases."[390]

As with many statistics about court proceedings, "it is difficult to generalize about what these statistics mean."[391] Part of the difficulty is that there is no baseline, that is, no reference point for how many civil rights or contracts cases are objectively frivolous at the time of filing and should be sanctioned.[392]

Even assuming that the rate of sanctioning should be proportionate for civil rights cases and other filings, the preceding figures need to be put into context. A large portion of the caseload of the federal courts consists of routine actions, often filed by the United

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[389]Nelken, *supra* note 26, at 1327.

[390]*Id.*

[391]Vairo II, *supra* note 66, at 7–8.

[392]*Cf. id.*

States as a plaintiff, to enforce obligations owed to the federal government based on student loans, federally insured mortgages, overpayments of federal benefits, or the like.[393] Based on the Federal Judicial Center's time study, which documents the relative burden of various types of cases on the federal courts, these cases typically require little, if any, judicial action.[394] Civil rights, securities, antitrust, and other commercial matters represent much higher burdens to the courts.[395]

Presumably, the relative burden of a case on the courts correlates highly with the need and opportunity for a judge to impose sanctions. For example, the vast majority of U.S. plaintiff cases are disposed of without judicial action, generally by a default judgment,[396] presenting no risk of sanctions. To the extent that case weights—which are empirical measures of judicial activity in litigation—are related to the likelihood of sanctions, one would expect a civil rights employment discrimination case to be more likely to generate sanctions than a case involving contractual enforcement of a student loan. The case weight of the employment discrimination case is eighty-one times that of the student loan case.[397]

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[393]For the twelve-month period ended June 30, 1985, 76,742 (28 percent) of the 273,670 cases filed were in categories that primarily consist of such cases. Administrative Office of the United States Courts, 1985 Annual Report of the Director, at 284, table C-3.

[394]The U.S. plaintiff-land condemnation cases have a weight of 0.3651; the forfeiture and penalty cases, 0.2913; the foreclosure cases, 0.0941; and the recovery/enforcement (student loan) cases, 0.0326. S. Flanders, The 1979 Federal District Court Time Study 5–6 (Federal Judicial Center 1980). A weight of 1.0 represents a case type that appears to present an average burden. *Id.* at 7 n.2.

[395]For example, a civil rights issue involving job discrimination represents a 2.6349 case weight; an antitrust case, 5.3499; a securities case, 2.3312, and an "other" personal injury case, 1.1152. *Id.* at 5–6.

[396]During the same time period used earlier (the second year of the two-year period used by Nelken), 46,154 (85 percent) of the 54,063 cases involving recovery of overpayment and enforcement of judgments were disposed of with "no court action." Administrative Office of the United States Courts, *supra* note 393, at 308, table C-4. In my sample of reported decisions, I found one student loan case that involved an issue of sanctions (see table 8).

[397]In addition to this measure of judicial activity in a case, the filing of frivolous cases may relate to social forces that are not so easily quantifiable.

Based on the reports of experienced attorneys and the statistical analyses discussed earlier, civil rights and commercial cases appear to present higher risks of incurring sanctions than do more routine federal cases. Whether these heightened risks are evidence of an unwarranted judicial disfavor of such cases is not likely to be susceptible to a statistical test. Objective and clearly documented qualitative or anecdotal information may be the most appropriate avenue to further knowledge.[398]

Interview Data

I asked all of the lawyers in the study, "Have you had any arguably meritorious cases that you might have filed in federal court but refrained from filing because of your concern or your client's concern about sanctions?" Eleven of fifty-five lawyers (20 percent) responded affirmatively. Table 28 shows the distribution of those responses among the sanctioned lawyers, opposing lawyers, and experienced lawyers.

TABLE 28
Perception of Specific Chilling Effects by Attorneys in Field Study

Response	Sanctioned Attorneys ($n = 15$)	Opposing Attorneys ($n = 18$)	Experienced Attorneys ($n = 27$)
Yes	4 (27%)	0	7 (26%)
No	10 (67%)	15 (83%)	19 (70%)
Missing	1 (7%)	3 (17%)	1 (4%)

For example, Nelken noted that tax suits, primarily those involving pro se plaintiffs, are disproportionately represented among published sanctions. Nelken, *supra* note 26, at 1327. In some federal districts, organized tax resistance campaigns promote citizen use of form pleadings that have been rejected. Use of these pleadings, especially repeated use after a warning, carries a high risk of sanctions. Knowing that this activity occurs, there is no reason to believe that the risk of incurring sanctions in a tax case should be equal to that of a typical contract case.

[398]*See* C. Lindblom & D. K. Cohen, Useable Knowledge (1979).

Three of the cases identified were filed in state court, one was delayed until the attorney received further information, and in three the firm declined to take the case and the client either absorbed the loss or sought other counsel. Two of the affirmative responses involved general reports of chilling effects, not specific cases. In addition to these cases, one of the field study cases evidenced a clear chilling effect that inhibited an appeal on the merits of an attempt to modify state law.[399]

Upon further analysis, most of the cases that were rejected involved decisions by lawyers that the merits of the case did not justify filing an action on a contingent-fee basis. For example, in one potential consumer class action, the lawyers faced an adverse precedent in their circuit that was twenty to thirty years old and a more recent favorable decision from another circuit. They decided that they would be unlikely to prevail in the circuit on the merits and would have to depend on the Supreme Court for a favorable ruling. Added to that factor was the risk that the circuit might impose sanctions.[400] Rule 11 was "a factor in making the decision as well as a motivator for looking at the case law more closely." The lawyers declined the case "because of the risk of loss at the district and circuit levels and the negligible opportunity for Supreme Court review."

In another case, the attorney inherited an action with some weak allegations that he was afraid to dismiss out of concern for rule 11. After getting a federal ruling on lack of jurisdiction, he filed the claims in state court. In yet another case, the lawyer abandoned an appeal after an unfavorable Supreme Court ruling removed its underpinnings. In another case, the client had poor or

[399]In that case the judge, upon reconsideration, reversed the imposition of sanctions, but the time for an appeal on the merits lapsed during the reconsideration period. The lawyer had been understandably reluctant to take an appeal on the merits in the face of a trial court finding that the claim was frivolous. Ultimately, in another case, the state supreme court ruled that the common law should be modified to accept the claim on the merits.

[400]The attorney said: "At the district court level we were confident that the judge would not impose sanctions for a straightforward challenge to a precedent, but the Seventh Circuit is far less predictable."

nonexistent records to support a claim, and rule 11 was "the tipping factor."

Removing the cases that were rejected primarily on the merits, there are six affirmative responses left. In two of these, the cases were filed in state court, presumably as a matter of strategy, to avoid any risk of sanctions. In two cases, the attorneys, both of whom had been sanctioned in another case, dropped claims out of fear of sanctions. In one of the two, a RICO claim was dropped out of concern that an adverse jury verdict might trigger sanctions. That case proceeded on a securities law theory. In the other case, a judge threatened to impose sanctions if a challenge to a handwriting claim proved to be unsupported. Lawyer and client decided not to take the risk of having to pay a $1,000 sanction (based on the fee of a handwriting expert) and dropped the claim.

In the last two responses, the lawyers reported a general chilling effect. One experienced attorney reported that he had "become reluctant to take cases that require extensive discovery after filing, such as those involving statistics about employment. . . . But you can't file without a basis in fact, creating a bind. This is where the chilling effect hits. There are a lot of cases close to the edge and rule 11 can tip the balance." In a similar vein, another experienced lawyer reported turning away arguably meritorious cases "every other month." He claimed, "I used to make arguments that had a 30 percent chance of success. Now the threshold is about 45 percent. I think about rule 11 every time I'm asked to sign a paper."

Another lawyer, who did not respond affirmatively to the question about specific cases, had a similar reaction: "I look very carefully at all discrimination cases because I know that I start out 'in the hole' on those cases. The Sixth Circuit approved sanctions of $6,000 against a lawyer in a sexual harassment case. I have raised my threshold for such cases in the last five years."

In contingent-fee cases or when the lawyer depends on a court-awarded fee, the threat of sanctions is one factor in a more complex equation. The risk of loss of the entire fee may well supersede any fear of sanctions. In the words of one experienced lawyer: "The risk of not recovering one's own fee is the major concern because the lawyer has to decide whether to invest 200 to 300 hours of

time, plus costs. Rule 11 is redundant in that context." Several lawyers referred to the more dramatic threat of reverse fee shifting against the client under *Christiansburg Garment Co. v. EEOC*.[401] Client concerns about liability for fees dwarf attorney concerns about sanctions. Client concerns about fees may be overwhelming when the plaintiff represents a class in the litigation and has little expectation of personal financial gain from the litigation. Because of the potential for personal liability and damage to professional reputation, lawyers are more vulnerable to a threat of sanctions than they are to fee shifting.

Another element in analyzing the general chilling effect of rule 11 is the degree to which the client has the resources to reimburse the attorney for any sanctions imposed. Although some courts impose sanctions directly on the attorney and perhaps even enter an order prohibiting payment by the client,[402] such orders are difficult to enforce. In the field study, three of the sanctioned lawyers and four of the opposing lawyers indicated that sanctions had been paid from client funds.[403] The result is that a lawyer representing a low-income client is more susceptible to the effects of sanctions. Courts should be sensitive not to impose sanctions in marginal cases against attorneys for indigent clients or in pro bono cases unless the frivolity is clearly the fault of the lawyer.[404]

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[401]434 U.S. 412 (1978).

[402]*See, e.g.*, Manual for Complex Litigation, § 42.22 (2d ed. 1985).

[403]These responses represent six cases. In one of the cases, both counsel reported the same response; in another, the responses were opposite. In the other four, I only had responses from one attorney.

[404]One lawyer recounted the potential dilemma he faced in a case in which he was appointed to represent a prisoner. He persuaded the client to drop some frivolous claims. Had he been unable to do so, he would have withdrawn. Had he been unable to withdraw and had sanctions been imposed on him, he would have declined any future appointments.

Overall, several attorneys in the field study reported a decrease in their federal practice due to the increased use of sanctions.[405] This is evidence of a slight general chilling effect.[406]

In response to the question about specific chilling effects, some lawyers not only denied experiencing any specific chilling effects, but also recounted instances of resistance to threats of sanctions; others spoke of ways to prevent sanctions. A sanctioned attorney reported that in one case, a judge warned him about filing a second motion for summary judgment. The attorney said, "I believed we were right and filed it. The judge granted it." In another case, the lawyer rejected a threat to impose sanctions on a RICO claim because he "had all the elements of the claim." Threats frequently have the intended effect of forcing the lawyers to "stop and think" about a case or argument. In the cases in which the lawyers decided to pursue the claims after such review, sanctions were not imposed.

In several cases, lawyers reported that rule 11 aided them in telling a client why a claim could not be pursued. One lawyer said, "I used rule 11 as an excuse not to take a marginal case. It was useful in talking to the client." Another reported that rule 11 moves the attorney into a decision-making role. Because of the lawyer's personal and professional stake in avoiding sanctions, the lawyer can justify participation in the decision to sue or raise a defense.

Whether it can be classified as a chilling effect or not, lawyers reported a cautioning effect of rule 11. One lawyer said, rule 11 "causes us to pause and think" or to "stop, look, and listen." Another has been "careful not to stretch theories" and to "tell the court when we are arguing for a modification of existing law."

One lawyer sees rule 11 as simply a codification of a rule of common sense that he had followed in practice: "Rule 11 did not change the fact that all frivolous filings have costs for lawyers and clients, measured by a loss of credibility or an increase in animosity of a judge."

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[405]*See* discussion between tables 22 and 23 *supra*.

[406]It should be noted, however, that the decrease in federal practice does not necessarily mean that there is a decrease in client access to the courts. The effect may be to shift more cases to the state courts.

Summary

There is evidence that rule 11, in combination with a myriad of other consequences of filing frivolous litigation, has a general chilling effect, perhaps lowering the threshold probability that a lawyer will take a case or pursue an argument. In the absence of any consensus or clear definition of the appropriate threshold, rule 11 may combine with other factors to inhibit access to the courts for litigants with marginal, even arguable, claims or defenses.

Interviews with attorneys indicate that the specific effect seems to work primarily as intended, that is, by forcing a more careful review of the merits of claims or defenses. In the reports of chilling effects in specific cases, rule 11's impact seems marginal and weak. The impact on public interest litigation may be greater, but statistical methodology is unlikely to be able to uncover such an effect. Courts and policy-making bodies such as the rules committees will most likely have to rely on systematically collected and documented anecdotal evidence for further testing of the chilling-effect hypothesis.

XI. SUMMARY AND CONCLUSIONS

In a study based primarily on field interviews, it seems appropriate to have the participants summarize their thoughts and conclusions. The themes discussed in this report and echoed throughout the summary comments are those of the judges and attorneys who made this report possible. At the close of each interview, I asked the judge or attorney, "What are the primary advantages and disadvantages of rule 11?" After hearing both sides of the issue, I asked, "In your opinion, do the benefits outweigh the harms, or vice versa?"

Table 29 summarizes the responses of the judges by category. There is very little difference between the evaluations of the judges in districts with little sanctioning activity and those of judges in high-sanctioning districts. Overall, approximately three out of four of the judges surveyed support rule 11.

TABLE 29
Summary Evaluation of Rule 11 by Judges in Field Study

	Judges in High-Sanctioning Districts ($n = 16$)	Judges in Low-Sanctioning Districts ($n = 14$)
Favorable	13 (81%)	10 (71%)
Unfavorable	2 (13%)	2 (14%)
Ambivalent	1 (6%)	2 (14%)

These figures may underestimate the support for rule 11 among the judges interviewed and, at the same time, underestimate their concerns about potential abuses of the rule. All of the judges saw positive aspects of the rule, and most saw significant harms that might arise. I discuss their comments later.

Attorneys were less enthusiastic about rule 11. As table 30 shows, lawyers who had successfully invoked rule 11 tended to

validate their experience by endorsing the rule generally. Not surprisingly, sanctioned attorneys were less enthusiastic. Endorsement of rule 11 by half of the sanctioned attorneys who took a position was, however, a surprise. The experienced attorneys interviewed were divided, with less than three of five (59 percent) affirming the value of the rule. Overall, two out of three lawyers thought that the benefits of rule 11 outweighed the harms.

TABLE 30
Summary Evaluation of Rule 11 by Attorneys in Field Study

	Sanctioned Attorneys ($n = 15$)	Opposing Attorneys ($n = 18$)	Experienced Attorneys ($n = 27$)
Favorable	7 (47%)	15 (83%)	16 (59%)
Unfavorable	7 (47%)	3 (17%)	9 (33%)
Ambivalent	1 (7%)	0	2 (7%)

Looking only at the sanctioned attorneys and the experienced attorneys, the figures in table 30 show a magnitude of support for rule 11 somewhat lower than that found in the most extensive empirical study to date. Judges and opposing attorneys supported rule 11 in percentages roughly equivalent to those found in that study. The New York State Bar Association reported the following results, based on questionnaires from 141 attorneys and 43 judicial officers from the four federal districts of New York and the Second Circuit.[407] Seventy-seven percent of the lawyers and 83 percent of the judicial officers agreed that "provisions for sanctions are necessary to discourage bringing frivolous cases or making frivolous motions." Similarly, 85 percent of the attorneys found the rule 11 requirement of a reasonable factual and legal inquiry to be reasonable, and 87 percent of the judicial officers agreed that "rule 11

[407]NYSBA Report, *supra* note 4, at 17–24. One can only speculate about the reasons for the lower support for rule 11 found in my study. One reason may be that the need for sanctions is perceived more acutely in the Southern and Eastern Districts of New York than in some of the more moderate- and low-sanctioning districts in my study.

serves a useful purpose and should be retained in its present form." One would not glean the impression of such support from reading legal periodicals.[408] The limits of the lawyers' support of rule 11, especially that of the experienced lawyers in table 30, may be more evident from the attorneys' comments, discussed later.

Judicial Issues

Judges evaluate the benefits of rule 11 in familiar terms, piecing together a mosaic of the major issues involving rule 11. They see the rule as deterring frivolous filings by forcing the lawyer to "stop and think" about the legal and factual basis for pursuing an issue. Seventeen judges mentioned either the deterrence goal or the "stop and think" mechanism as one of the benefits of rule 11. One stated, rather graphically, that the benefit is "like nuclear weapons" in that rule 11 "provides deterrence and promotes self-policing." Many judges reiterated the "stop and think" phrase that the reporter for the Advisory Committee made famous.[409]

Understandably, judges are likely to frame the issue as one of giving a judge sufficient power to control and manage the progress of the litigation. Five of the judges highlighted this issue as one of the benefits of the rule. One said, for example, that "a benefit is to give a court additional means to control a case and move it expeditiously."

On the harms side of the judicial power issue, four judges asserted that rule 11 permits judges to apply their subjective notions of what is reasonable and that overzealous judges can abuse disfavored attorneys or litigants by improperly invoking rule 11. A typical comment was that "the harm would come from a judge who gets carried away and imposes sanctions too readily and in excessive amounts." One judge said simply that "a detriment is that rule 11 has basically a subjective standard that can be abused by judges."

Generally, the judges' concerns regarding rule 11 parallel those of the Advisory Committee and the legal literature with one excep-

[408]*See* discussion at notes 115–17 *supra*.

[409]Miller, *supra* note 128, at 15; Miller & Culp, *supra* note 65, at 34.

tion: There was no direct discussion of due process, either from critics or from supporters of the rule. Nineteen of the judges raised issues of a chilling effect and satellite litigation as potential or actual harms. Three judges questioned the intrusion of judges into the professional relationship between attorney and client. One judge rejected rule 11 on the grounds that "it closes another door to litigants, especially the average person, and favors the rich and institutionalized law firms."

Attorney Issues

Attorneys' summations of the issues surrounding rule 11 paralleled the comments and concerns of the judges in many respects. Notable differences also were found. As with the judges, a majority of the attorneys saw rule 11's primary benefit as the deterrence of frivolous filings by forcing the lawyers to stop and think about their cases. Some of the attorneys phrased this benefit in terms of increasing the professionalism of the bar and improving the bar's performance of its basic role in presenting genuine disputes for resolution. Two of the experienced attorneys explicitly recognized this benefit as a change in the lawyer's posture vis-à-vis the litigation. One said that the "personal stake gives the lawyer a response to the client who says 'Tell me the law and I'll decide the policy.'" The other said that "the primary benefit is that it [rule 11] gives lawyers a way to discourage clients from doing foolhardy things."

A handful of lawyers identified as a benefit the added power of the judge to manage the litigation. One also observed that rule 11 gives the court "an intermediate method of control, short of contempt or dismissal."

Questions regarding the actual and potential harms of rule 11 elicited a wider range of responses. As with the judges, many lawyers (twenty-one) exhibited direct concern about the potential chilling effect on creative advocacy and access to the courts. As one lawyer noted, "there are enough horror stories that the reality doesn't matter." The relationship between deterrent effects and chilling effects seemed clear to some of these attorneys. One described both these effects this way: "The benefit is the scarecrow effect. Rule 11 forces all of us to become better lawyers. The

detriment is that it is open-ended, without uniform guidelines or predictable penalties. The uncertainty of the process scares off some meritorious litigation." Another attorney said that "the benefit is that it will make attorneys think twice (or five times) and add a degree of care to claims that might previously have been filed to test the judge's reaction." Another said simply that rule 11 "overdeters."

Although the study did not examine applications of sanctions at the appellate level, two attorneys volunteered opinions regarding chilling effects at the appellate court level. The essence of their concern was that the sua sponte imposition of sanctions at the appellate level imposes a de facto "good cause" threshold, especially for litigants or attorneys who cannot afford to pay sanctions.[410]

Thirteen of the attorneys (five sanctioned attorneys and four each in the opposing and experienced groups) articulated concern about the potential for abuse of power by judges who disfavor particular attorneys or litigants or who seek broader social reforms. For example, one experienced attorney said that "an unreasonable judge may use it [rule 11] to express disapproval of behavior on personal grounds." Another found a danger in its application by hindsight and use for "everyday fee shifting."

A variant of the concern about abuse of power is an expressed fear that some judges will use rule 11 as a substitute for effective case management. At its roots, the concern is that rule 11 "gives some judges excessive power to coerce settlements." One attorney simply said that rule 11 is "dangerous in the hands of bad or self-righteous judges."

Few of the attorneys spoke directly of satellite litigation. They were more likely to be concerned about the effects of such litigation, especially its tendency to distract the judge from the merits of a case and to increase the costs of litigation. In this respect, a half-dozen lawyers concluded that rule 11 is biased in favor of wealthy defendants who can afford to litigate satellite issues. Similarly, a couple of lawyers attacked the failure of the courts to deal with frivolous rule 11 motions that distract from the merits and, in the

[410] *See* discussion at notes 281–82 *supra*.

words of one, "make trial practice a real misery, especially for the ethical practitioner." The latter attorney suggested an automatic fine of $5,000 for an unsuccessful rule 11 motion.

Three sanctioned attorneys, two of whom supported rule 11, considered the lack of established procedures for imposing sanctions to be a detriment. One said, "Rule 11 involves contempt without the procedural safeguards of a contempt proceeding."

Three lawyers also decried the effects of rule 11 in terms of increasing tensions among lawyers. In addition, two referred to malpractice effects: They expressed concerns that imposition of sanctions will invite malpractice actions. One reported that some malpractice insurers have taken the position that sanctions are events that must be reported to the insurer.

Discussion

What can be concluded from these wide-ranging evaluations? They clearly show a broad base of support for rule 11 among judges and attorneys, partially confirming earlier reports of even greater support in New York state.[411] At the same time, the judges and attorneys expressed a wide range of deep concerns. Such concerns are difficult to detect in a survey format; they emerge in a personal interview context. Judges and attorneys alike have reserved final judgment about the perceptions and reality of general and specific chilling effects, about the tendency of rule 11 to generate satellite litigation, about potential abuses of a potent weapon, and about the relative lack of clear standards and procedures to guard against abuses.

The source of support for rule 11 is in its articulation of a professional duty to examine and make a professional judgment about the legal and factual basis for an assertion of fact or law. The vast majority of judges and lawyers appear to welcome this definition of the professional role. The primary effect seems to be encouragement of careful review of papers by counsel and deterrence of unfounded or frivolous filings. Widespread familiarity with rule 11 and the depth of thought and emotion exhibited in these interviews

[411] *See* discussion at notes 407–08 *supra.*

convince me that rule 11 has had an unprecedented effect in terms of educating lawyers about the limits of their professional role.

This is not the place to analyze the full implications of this change; however, it is worth noting that rule 11 has changed the role of the attorney. No longer can the lawyer claim refuge in the passive role of being solely an agent for the client. The lawyer has a threshold obligation to determine a factual basis and a plausible, arguable legal theory before proceeding. This has come as a shock to some lawyers who previously defined their role as a "mouthpiece" or "hired gun." To prevent sanctions, a lawyer must take a position adverse to the client who insists on litigating a frivolous issue. After sanctions are imposed, the attorney and client may have a conflict of interest in allocating responsibility and liability.

Despite its apparent success in redefining the lawyer's role and in deterring frivolous filings, rule 11 remains experimental. There is much to be learned from the early years of operation. Most of the concerns common to judges and lawyers relate to potential chilling effects. Preventive medicine can alleviate, and perhaps eliminate, the chill. Continued articulation and application of standards that encourage novel claims and discourage motions for sanctions about arguable legal theories are necessary to reassure inexperienced lawyers about rule 11. Judicial concentration on the objective reasonableness of the lawyer's inquiry should produce more precise standards to guide such inquiries.[412] Focusing on the inquiry will force the decision maker to look objectively at the case as it appeared to the lawyer at the time of filing and will help to avoid reliance on hindsight.[413]

Both attorneys and judges expressed the view that overzealous judges can abuse the sanctioning process. These abuses can be in the form of biased applications of the rule against disfavored individuals or groups. They can also be manifest in widespread use of the rule to implement a personal preference for the English system of fee shifting, whereby the losing party pays at least part of the costs of the winning party. Experience with the administration of

[412]*See* discussion at notes 66–77 *supra*.

[413]Schwarzer II, *supra* note 12, at 1024–25.

rule 11 suggests that efforts to implement the rule for the principal purpose of fee shifting are a primary source of problems.[414]

Widespread fee shifting carries a need for ancillary litigation in at least two ways. First, some procedure is necessary to determine liability, to allocate responsibility to attorney or client, and to determine the reasonable fees.[415] Second, by raising the stakes of the ancillary litigation, fee shifting may serve to both demand more formal procedures[416] and provide an incentive to invoke those procedures fully. The bind is clear: Fee shifting necessitates satellite litigation or shortcuts of due process. Absence of notice and of an opportunity to be heard at the district court level breeds animosity and fuels professional concerns about chilling effects. These, in turn, erode professional support for the rule.[417] The remedy seems to be a renewed focus on deterrence and on limiting sanctions to the type or amount necessary to achieve the deterrent effect.[418]

Related to the question of compensation is the question of use of sanctions as a case management device to control the progress of a piece of litigation. Threats of sanctions have an impact on conscientious attorneys and should be used sparingly. Alternative case management procedures, invoked through continued monitoring of the course of nonroutine litigation, serve to control such litigation more directly than the bludgeon of posttrial sanctions or the distraction of pretrial sanctions disputes. Summary judgment and motions to dismiss are primary judicial pruning tools for frivolous claims.

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[414]*See generally* Schwarzer II, *supra* note 12.

[415]The English learned soon after adoption of fee shifting by statutes during the thirteenth through sixteenth centuries that a mechanism was needed to protect losing parties from "excessive demands for costs by avaricious" winning parties. A. J. Tomkins & T. E. Willging, Taxation of Attorneys' Fees: Practices in English, Alaskan, and Federal Courts 6 (Federal Judicial Center 1986). Use of masters served to deflect the burdens of this task to a specialized office and to permit judges to attend to the merits of litigation.

[416]*See* discussion at notes 240–41 *supra.*

[417]At the appellate level, this type of effect seems to be operating. *See* Hirshman, *supra* note 87.

[418]*See* discussion at notes 292–98 *supra.*

Finally, claims of systematic bias in the sanctioning process warrant some attention. That the same claims apply to parties with resources generally does not answer the criticisms. A special problem exists with regard to chilling effects on indigents or litigants of modest means. When clients are represented by volunteer counsel on a pro bono publico (public interest) basis, the threat of sanctions may have a dramatic chilling effect on the willingness of counsel to assume the risk that the opposing party will look to them for fee shifting because their client cannot afford it.

Some possible remedies would be for courts to screen out frivolous sanctions motions in such cases or for the public interest bar to create a mechanism to indemnify the risk of sanctions (as a wealthy client might). Absent some protection against frivolous sanctions motions, pro bono counsel might be driven from the field by the imposition of economic and professional disincentives in unpopular causes.

With knowledge that the basic deterrent mechanism of rule 11 is working, courts, bar groups, and the Advisory Committee can now address the remaining problems of adjusting the process to achieve greater fairness and consistency. Setting procedural and interpretive standards appears to be the next item on the agenda. Procedural standards should be varied according to the seriousness of the offense, with a recognition that any judicial sanction carries serious enough consequences to warrant some form of prior notice and opportunity to be heard. Interpretive standards need to be keyed to behavior that can reasonably be expected of a competent attorney, with variations for particular circumstances. Standards for judging the prefiling inquiry for rule 11 motions are an important part of this process, bringing Miller's nightmare of sanctions on sanctions to its logical conclusion.

APPENDIX A

METHODOLOGY FOR FIELD STUDY

Selections of Districts

The primary criterion for selection of districts for the field study was the level of sanctioning activity. The object was to study sanctioning practices in districts with high, moderate, and low levels of sanctioning activity. Table 31 shows the primary data used to inform the decision about which districts to include in the study. Based on a WESTLAW search conducted in May 1987, two major metropolitan district courts stood out. The Southern District of New York and the Northern District of Illinois (with fifty and thirty-six published decisions, respectively) each had three times the number of published rule 11 decisions found in the next closest districts. Vairo and Nelken also concluded that these two districts were among those with the most sanctioning activity. They were included in the study.

In addition to the published decisions, I had access to copies of sanctions decisions that were filed with the Administrative Office of the United States Courts and an Administrative Office printout of the distribution of rule 11 decisions as reported to it. The Administrative Office reports were clearly incomplete (for example, the Southern District of New York and the Northern District of Illinois did not report any sanctions activity in their districts despite the high volume of published decisions). Nevertheless, in districts that did submit reports, the data showed a high volume of rule 11 activity in two districts: Central California and Southern Texas. These districts were also included in the study.

TABLE 31
Characteristics of Courts with High Levels of Rule 11 Sanctioning Activity

District Court	Urban Center(s) (Population)	Rule 11 Decisions In WESTLAW	Rule 11 Decisions In AO Reports	Circuit	Region	No. of Judges
C.D. Cal.	Los Angeles (7,477,657)	2	78	Ninth[a]	West	21
S.D.N.Y.	New York City (Manhattan 1,427,533)	50	0	Second[a]	East	23
N.D. Ill. E. Div.	Chicago (3,005,072)	36	0	Seventh[a]	Midwest	18
S.D. Tex.	Houston (1,594,086)	5	30	Fifth[a]	South	13
N.D. Ind.	Gary (151,953) Ft. Wayne (172,196)	12	20	Seventh[a]	Midwest	5
E.D. Wis.	Milwaukee (964,988)	0	4	Seventh[b]	Midwest	3
D.N.J.	Camden (471,650) Newark (329,248) Trenton (92,124)	2	23	Third	East	13
S.D. Miss.	Jackson (118,015) Biloxi (49,311)	4	19	Fifth	South	5
E.D. Mich.	Detroit (1,203,339)	12	7	Sixth	Midwest	14

(*continued*)

TABLE 31 (Continued)

District Court	Urban Center(s) (Population)	Rule 11 Decisions In WESTLAW	Rule 11 Decisions In AO Reports	Circuit	Region	No. of Judges
N.D. Tex.	Dallas (1,556,549) Ft. Worth (385,141)	2	15	Fifth	South	9
M.D. Fla.	Tampa (271,153) Jacksonville (540,898) Orlando (128,394)	1	15	Eleventh[a]	South	9
N.D. Ala.	Birmingham (284,413) Huntsville (142,513)	0	5	Eleventh[b]	South	7
D. Minn.	Minneapolis (370,951) St. Paul (270,230)	7	9	Eighth	Midwest	7
N.D. Cal.	San Francisco (678,974)	6	7	Ninth	West	12
E.D. Pa.	Philadelphia (1,688,210)	9	3	Third	East	16

Note: Population statistics are from Rand McNally Atlas, 1984.
a. Recommended for inclusion in study based on high sanctioning activity.
b. Recommended for inclusion as a comparison court based on low activity.

Beyond these four districts, there was a rather large step to the next level of sanctioning activity. Relatively modest population centers, such as those in the Northern District of Indiana, the Middle District of Florida, and the Southern District of Mississippi, had a level of sanctioning activity similar to that of larger urban centers like Detroit, San Francisco, Minneapolis–St. Paul, Newark, Dallas, and Philadelphia. Two of the former districts (Middle Florida

and Northern Indiana) were chosen to examine sanctioning activity in more moderate urban areas in regions of the country in which the general culture is regarded as traditional and conservative. In such districts, I expected to find a relatively cohesive bar with relatively informal controls on attorney behavior.

Sanctioning Ratios Per Judge

As might be expected, there is a close relationship between the size of the metropolitan area in which the court is located and the number of judges on the court. The large urban courts have an average of nineteen judges per court, not counting senior judges. As table 31 shows, Middle Florida has nine judges; Northern Indiana, five; Northern Alabama, seven; and Eastern Wisconsin, three.

Using the larger of the WESTLAW or Administrative Office figures and dividing the number of sanctions orders by the number of judges (see table 31) produces the following ratios of sanctioning orders to judges: Central California (3.7:1), Southern New York (2.2:1), Northern Illinois (2:1), Southern Texas (2.3:1), Northern Indiana (4:1), and Middle Florida (1.7:1). Northern Alabama (0.7:1) and Eastern Wisconsin (1.3:1), both included on the basis of low sanctioning activity, show lower ratios than their comparison courts in Middle Florida and Northern Indiana. In other words, the sanctioning ratios tend to validate the selection of the courts.

Circuits and Regions

Selections based on high and moderate levels of sanctioning activity produced courts in the Second, Fifth, Seventh, Ninth, and Eleventh Circuits. Two courts were from the Seventh Circuit. Comparison courts were selected from the Seventh and Eleventh Circuits, resulting in three courts from the Seventh Circuit and two courts from the Eleventh Circuit.The five circuits selected include five of the seven with the most rule 11 sanctions orders, as shown in table 32.

The Eleventh Circuit has slightly fewer sanctions orders than the Third and the Eighth Circuits, but it was chosen for the demographic reasons discussed earlier. Inclusion of Northern Indiana

resulted in an overrepresentation of the Seventh Circuit, again for demographic reasons.

TABLE 32
Distribution of Rule 11 Sanctions Orders by Circuit

Rank	Circuit	Sanctions Orders
1	Ninth	149
2	Fifth	105
3	Second	83
4	Seventh	77
5	Eighth	46
6	Third	45
7	Eleventh	41
8	Sixth	39
9	Fourth	32
10	Tenth	29
11	First	18
12	D.C.	9

All regions of the country are represented in the eight courts recommended for selection. Three courts are from the South, three from the Midwest, and one each from the East and West Coasts. The added representation for the South and Midwest results primarily from the decision to include comparison courts.

Comparison Courts

As indicated earlier, Northern Alabama and Eastern Wisconsin were included because of their relatively low levels of sanctioning activity. Both of these courts showed a total absence of published sanctions decisions. The idea was to explore alternatives to sanctions in these districts. One of the primary reasons for the amendment to rule 11 was to reduce the reluctance of some courts to impose sanctions for filing frivolous pleadings. There is little direct evidence of the basis for this perceived reluctance. Research in areas with low levels of sanctions was designed to identify whether a problem with frivolous pleadings existed in those districts. If a

problem existed and rule 11 was not used, the reasons for the reluctance were explored. If no problem existed, preventive measures were explored.

The matching of the two comparison courts with other courts in the same circuit permitted a major variable—appellate court interpretations of rule 11—to be held constant. This permitted examination of other reasons for the variations in rates of sanctioning among courts in the same circuit.

In summary, I traveled to eight districts, six of which have high levels of sanctioning activity and two of which have low levels.

Selection of Cases

In each of the high-sanctioning districts, I selected three or four cases in which sanctions had been threatened or imposed. There were two primary criteria: (1) the case must have been closed and any appellate activity concluded and (2) the decision should be as recent as possible. Other factors being equal, the most recent decision was selected.

The next step was to contact the attorney for each side and the judge, informing them of the nature of the study and requesting a personal interview. I followed up these letters with telephone calls until either an appointment was scheduled or the judge or attorney declined to participate, which was rare. Overall, I interviewed eighteen judges, fifteen sanctioned attorneys, and twenty opposing attorneys in the twenty-two cases. The interviews generally lasted from 30 to 60 minutes and followed a separate structured protocol for each category of respondent. A copy of each protocol is on file with the Research Division of the Federal Judicial Center. I also conducted an informal interview with the clerk of court in the eight districts.

Experienced Attorneys

In each district, I interviewed three or four experienced attorneys. They were selected on the basis of frequency of practice in federal court, generally from information given by either the chief judge of the district or the clerk of court. I asked for and received

information that included the names of lawyers from the plaintiff and defendant sides and the names of lawyers with civil rights as well as commercial practices. In two districts, to achieve balanced representation of attorneys, I pursued independent sources of information to supplement the information from the courts. I also used a structured interview format for my discussions with these lawyers.

Low-Sanctioning Districts

In the two districts with low levels of sanctions, I attempted to interview all of the sitting judges and magistrates, using an interview format designed to explore their view of the presence or absence of problems with frivolous litigation and alternative approaches to any perceived problem. If no problem was seen, I explored preventive approaches.

Data Collection and Reporting

I conducted all of the interviews personally. Two interviews were conducted by telephone because the interviewee was not available during my visit to the district. Information from the interviews was collected systematically so that responses to each question could be compared and comments retrieved collectively.

Throughout the body of this report, I present counts of responses in tabular and text form. With exceptions noted in the text, the data in the tables are presented simply as qualitative descriptions of the responses of the attorneys and judges. They are not presented as representative of any population, and the number of responses is generally too small to be statistically significant.

Table 33 presents a district-by-district report of WESTLAW and Administrative Office sanctions decisions from 1983 to June 1987.

TABLE 33
Sanctions Decisions and Orders

Court	Published Decisions (1/1/83–6/87)	Unpublished (AO, 6/4/87 Report)
First Circuit		
Maine	3	3
Massachusetts	3	6
New Hampshire	0	2
Rhode Island	1	0
Puerto Rico	0	0
Total	7	11
Second Circuit		
Connecticut	1	0
New York (N)	3	8
New York (E)	8	1
New York (S)	50	0
New York (W)	3	8
Vermont	1	0
Total	66	17
Third Circuit		
Delaware	2	0
New Jersey	2	23
Pennsylvania (E)	9	3
Pennsylvania (M)	2	2
Pennsylvania (W)	0	2
Virgin Islands	0	0
Total	15	30
Fourth Circuit		
Maryland	2	1
North Carolina (E)	2	3
North Carolina (M)	1	3
North Carolina (W)	1	0
South Carolina	1	7
Virginia (E)	0	2
Virginia (W)	3	2
West Virginia (N)	0	0
West Virginia (S)	0	5
Total	10	22

(continued)

TABLE 33 (Continued)

Court	Published Decisions (1/1/83–6/87)	Unpublished (AO, 6/4/87 Report)
Fifth Circuit		
Louisiana (E)	5	0
Louisiana (M)	0	5
Louisiana (W)	2	6
Mississippi (N)	3	0
Mississippi (S)	4	19
Texas (N)	2	15
Texas (E)	2	0
Texas (S)	5	30
Texas (W)	0	7
Total	23	82
Sixth Circuit		
Kentucky (E)	0	0
Kentucky (W)	0	0
Michigan (E)	12	7
Michigan (W)	1	3
Ohio (N)	6	3
Ohio (S)	6	0
Tennessee (E)	0	1
Tennessee (M)	0	0
Tennessee (W)	0	0
Total	25	14
Seventh Circuit		
Illinois (N)	36	0
Illinois (C)	3	0
Illinois (S)	0	0
Indiana (N)	12	20
Indiana (S)	0	0
Wisconsin (E)	0	4
Wisconsin (W)	0	2
Total	51	26

(*continued*)

TABLE 33 (Continued)

Court	Published Decisions (1/1/83–6/87)	Unpublished (AO, 6/4/87 Report)
Eighth Circuit		
Arkansas (E)	0	0
Arkansas (W)	1	2
Iowa (N)	0	1
Iowa (S)	0	0
Minnesota	7	9
Missouri (E)	3	3
Missouri (W)	2	0
Nebraska	2	1
North Dakota	0	11
South Dakota	0	4
Total	15	31
Ninth Circuit		
Alaska	0	7
Arizona	2	1
California (N)	6	7
California (E)	3	0
California (C)	2	78
California (S)	2	8
Hawaii	0	3
Idaho	0	4
Montana	0	2
Nevada	1	7
Oregon	0	5
Washington (E)	0	2
Washington (W)	1	8
Guam	0	0
Northern Mariana Islands	0	0
Total	17	132

(continued)

TABLE 33 (Continued)

Court	Published Decisions (1/1/83–6/87)	Unpublished (AO, 6/4/87 Report)
Tenth Circuit		
Colorado	7	1
Kansas	3	7
New Mexico	0	0
Oklahoma (N)	0	0
Oklahoma (E)	0	0
Oklahoma (W)	1	3
Utah	1	1
Wyoming	1	4
Total	13	16
Eleventh Circuit		
Alabama (N)	0	5
Alabama (M)	0	1
Alabama (S)	2	2
Florida (N)	0	1
Florida (M)	1	15
Florida (S)	4	0
Georgia (N)	5	0
Georgia (M)	3	0
Georgia (S)	1	1
Total	16	25
D.C. Circuit	9	0
TOTALS	264	406

APPENDIX B

METHODOLOGY FOR CREATING DATA BASES OF PUBLISHED OPINIONS AND ATTORNEYS' DISCIPLINARY HISTORY

The Published Opinions Data Set

The process of creating the sanctions data base began in April 1987 with LEXIS word searches for cases involving rule 11. After some initial searches, we decided to use WESTLAW's key number system as the basis of the search. We used those cases to develop a list of four West key numbers. The key numbers that appeared to correspond most frequently with rule 11 cases were the following:

1. 45k24
2. 92k317(1)
3. 45k32(11)
4. 170ak2721

Step 1: The Initial WESTLAW Runs

Initially, a separate search was run on WESTLAW for each key number by court at the Supreme Court, appellate court, and district court levels. The results were as follows:

Supreme Court (SCT)	*No. of Cases Found*
45k24	0
92k317(1)	0
45k32(11)	0
170ak2721	1

Circuit Courts of Appeal (CTA)	*No. of Cases Found*
45k24	146
92k317(1)	10
45k32(11)	8
170ak2721	126

District Courts (DCT)	*No. of Cases Found*
45k24	188
921317(1)	5
45k32(11)	14
170ak2721	233

Step 2: Limiting the Search by Date

The results of the first set of WESTLAW searches included a lot of older cases, many of which were decided under old rule 11. Since we were primarily interested in the cases decided since the amendments to rule 11, the searches were run again, limiting the scope to those cases decided after 1983. The results were as follows:

SCT (date after 1983)	*No. of Cases Found*
45k24	0
92k317(1)	0
45k32(11)	0
170ak2721	0

CTA (date after 1983)	*No. of Cases Found*
45k24	137
92k317(1)	7
45k32(11)	8
170ak2721	70

DCT (date after 1983)	*No. of Cases Found*
45k24	161
92k317(1)	2
45k32(11)	13
170ak2721	131

Step 3: Picking a Random Sample

Because of the large number of cases generated by the searches, we decided to take a random sample to form the final data base. Applying a random numbers chart to the numbers generated on the WESTLAW printout of case citations, we identified a 25 percent sample of the 45k24 cases and the 170ak2721 cases. All of the 92k317(1) and 45k32(11) cases were kept in the set because there were so few of them. This process produced the following numbers:

SCT	*No. of Cases Selected for Sample*
Total	0

CTA	*No. of Cases Selected for Sample*
45k24	36
92k317(1)	7
45k32(11)	8
170ak2721	17
Total appellate	68

DCT	*No. of Cases Selected for Sample*
45k24	40
92k317(1)	2
45k32(11)	13
170ak2721	33
Total district	88

The total number of cases selected was 156.

Step 4: Reading the Cases and Eliminating Duplicates and Nonsanctions Cases

A number of cases had to be eliminated from the original sample of 156. First, there were some duplicates in the list; for example, cases reported in two reporters. In some instances both district court and appellate court decisions related to the same case, creating an unnecessary overlap of data. Second, information about a lower

court decision was coded into a form that was adapted to include information about any appellate court decision. An Instacite check was run on WESTLAW to determine and include the outcome of any appeal. In appellate cases, the lower court opinion was eliminated from the sample to avoid duplication. Third, several cases were found to involve sanctions in criminal cases, and they were removed from the sample. Finally, a few cases had to be taken out of the sample because it was apparent, after reading the decisions, that the cases did not involve the issue of rule 11 sanctions. Twenty-three cases decided primarily under other rules or 28 U.S.C. § 1927 were also eliminated at this juncture. Eighty-five cases constituted the final data set.

Using a standard format, two law students read all of the cases and contacted the local bar disciplinary body for information. The students extracted prescribed features of each opinion, such as the procedural stage at which sanctions were imposed, the conduct leading to the sanctions, the procedures used to impose sanctions, the amount and type of sanctions imposed, and the appellate history, if any.

To achieve uniformity of reporting, several guidelines were used. A hearing was listed as a procedure only if the district or appellate court specifically mentioned a hearing. Otherwise, the case was recorded as having no hearing. Rule 11 was treated as the primary rule involved in a case if it could be deemed an independent ground for decision. One student reviewed all of the cases for consistency of reporting.

Having been selected randomly and coded consistently, data from the published opinions are a representative sample of the universe of published opinions. Where appropriate, statistical tests have been used to support assertions that comparisons within the data set are statistically significant.

The Attorney Disciplinary Data Set

The data set of attorney records was broader than the published opinions data set. It included seventeen cases that were added during the field portion of the study as the subject of the field interviews. The attorneys' disciplinary data set also included thirty-nine

cases that primarily involved sanctions other than rule 11. In all, 141 cases were included. In each, the name of the attorney or attorneys who were the target of the sanctions proceedings were identified. A data set including 183 attorneys was compiled. In reporting these data, I concentrated on eighty-seven cases that primarily involved rule 11 and on the first lawyer identified in the case reports.

For each attorney in the data set, an effort was made to compile background information from the Martindale-Hubbell volumes of listings for lawyers by city and state. The volume for 1986 was used in this study. Eighty-two of the attorneys were listed. For those attorneys, information was elicited for age, law school, year of graduation, type of employer, and size of law firm. Reporting of this data was limited to cases primarily involving rule 11.

For all attorneys, contact was made with the bar licensing agency for the jurisdiction listed for that attorney in the case. From the licensing agency, information was elicited on the date of admission to the bar, current good standing, final disciplinary action (broken down by disbarment, suspension, public reprimand, private reprimand, and other), and pending complaints.

Finally, for each attorney, a LEXIS search was conducted to determine the extent of any other published cases involving sanctions.[419] The number of such cases and the outcome of the sanctions proceeding were recorded.

Data from this set were reported in two categories: Sanctioned attorneys and attorneys threatened with sanctions, but exonerated. In one instance, the difference between the two groups was tested for statistical significance and found to be significant at the .05 level.

[419]The exact LEXIS search was "counsel (full name of attorney from original case) and sanction! w/20 (attorney or counsel) and date >1982." A test of the search was whether it found the original case from which the name was taken. If the search found additional cases, the cases were read to determine if they involved sanctions and, if so, whether the attorney was sanctioned.

TABLE OF CASES

THE FEDERAL JUDICIAL CENTER

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