AFTER A DECADE, THE PENDULUM SWINGS BACK: AN EXAMINATION OF THE HISTORY AND PRACTICAL IMPLICATIONS OF THE 1993 AMENDMENTS TO RULE 11

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I. INTRODUCTION

Federal Rule of Civil Procedure 11, one of the most controversial and critically examined features of our federal civil procedural system, has recently undergone its second radical transformation within a decade, one which will no doubt spur as much debate in the coming years as the old rule created in the past. This Note attempts to provide the reader with a glimpse into the historical background of Rule 11,[1] the policy reasons behind the Rule's historical alterations,[2] and the practical impacts that the 1993 amendments will most likely exert on federal civil practice.[3]

Rule 11 requires the signature of counsel be included on written submissions to the court and generally provides for guidelines as to what constitutes permissible pleadings and motions, acceptable litigant representations, and the sanctions for violations of these minimum standards.[4] To fully

1. *See infra* Part II.
2. *See infra* Part II, III.A.
3. *See infra* Part III.B.
4. Each version of Rule 11 has required a signature to pleadings, motions, and other

understand Rule 11, it should not be examined in isolation, but rather in the context of how it fits into the relatively open notice pleading scheme of the federal rules.[5] Thus, one must also consider its relationship with other procedural tools available to litigants and district courts to resolve irresponsible submissions.[6]

II. HISTORY AND CRITICISMS OF PRIOR VERSIONS OF RULE 11

The original version of Rule 11, as promulgated by the Advisory Committee on the Rules and adopted in 1938, inadequately set out cognizable standards and enforcement measures.[7] The 1938 version of Rule 11 required an attorney to sign pleadings, thereby certifying that to the best of "his knowledge, information, and belief" there was "good ground to support" the pleading.[8] In theory, the courts had discretionary power to strike "as sham and false" groundless pleadings and had the power to subject infringing attorneys to "appropriate disciplinary action."[9] However, Rule 11's standards were confusing, and courts were disinclined to discipline abusive attorney submissions.[10]

Due to the deficiencies of the original version of Rule 11, the Rule was amended in 1983.[11] The 1983 amendments led to an explosion in litigation

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papers, which acts as the signer's certification of the veracity of the submission. FED. R. CIV. P. 11, 28 U.S.C. at 2616-17 (1940); 28 U.S.C. app. at 575 (1988); FED. R. CIV. P. 11.

5. The Federal Rules of Civil Procedure initially require a plaintiff to plead a short and plain statement of (1) the grounds upon which the court's jurisdiction depends, (2) the claim showing the pleader is entitled to relief, and (3) a demand for judgment. FED. R. CIV. P. 8(a); Dioguardi v. Durning, 139 F.2d 774 (2d Cir. 1944). In *Dioguardi*, the court set forth what has become the seminal notice pleading standard, allowing litigants who set forth plausible potential causes of action to have their day in court. *Id.* at 775.

6. *See, e.g.*, FED. R. CIV. P. 12(b)(6) (motion to dismiss for failure to state a claim upon which relief can be granted); FED. R. CIV. P. 41 (dismissal of actions); FED. R. CIV. P. 56 (summary judgment). For an excellent contextual examination of Rule 11, see Jeffrey W. Stempel, *Sanctions, Symmetry, and Safe Harbors: Limiting Misapplication of Rule 11 by Harmonizing It with Pre-Verdict Dismissal Devices*, 60 FORDHAM L. REV. 257 (1991).

7. There is generally consensus that the 1938 version of Rule 11 was deficient. "Experience shows that in practice Rule 11 has not been effective in deterring abuses." FED. R. CIV. P. 11 Advisory Committee Notes (1983 amendment) [hereinafter Advisory Committee Notes].

8. 5A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1331, at 9 (1990).

9. 5A *id.*

10. Advisory Committee Notes, *supra* note 7 ("There has been considerable confusion as to (1) the circumstances that should trigger striking a pleading or motion or taking disciplinary action, (2) the standard of conduct expected of attorneys who sign pleadings and motions, and (3) the range of available and appropriate sanctions."). Some surveys have indicated as few as 19 reported cases of invocation of Rule 11 between the rule's inception and the 1983 amendment. D. Michael Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1, 35-37 (1976).

11. FED. R. CIV. P. 11, 28 U.S.C. app. at 575 (1988). FED. R. CIV. P. 11, as amended in 1983, read:

involving invocation of the new rule and concomitant requests for sanctions.[12] Commentators, especially those from the academy, scathingly attacked the newly amended rule.[13]

A. *Rule 11's Alleged "Chilling Effect" on Plaintiffs*

One of the greatest criticisms of the 1983 amendments to Rule 11 and the resulting judicial decisions was that they created an atmosphere which had

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> 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. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by the corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by the 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 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.

Id.

12. The Ninth Circuit noted in 1989 that over 1,000 cases had been published explaining and interpreting Rule 11. Townsend v. Holman Consulting Corp., 881 F.2d 788, 792 (9th Cir. 1989). Another survey indicated that between 1983 and 1990 there were over 3,000 reported Rule 11 cases. NEW YORK BAR ASS'N, COMMENTS ON RULE 11 OF THE FEDERAL RULES OF CIVIL PROCEDURE 4 (Nov. 1990).

13. For vocal and articulate criticism of the 1983 version of Rule 11, see Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 198 (1988); Georgene M. Vairo, *Rule 11: Where We Are and Where We Are Going*, 60 FORDHAM L. REV. 475 (1991) [hereinafter *Where We Are Going*]; Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFF. L. REV. 485 (1988) [hereinafter *Civil Rights*]; Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270 (1989); Carl Tobias, *Rule 11 Recalibrated in Civil Rights Cases*, 36 VILL. L. REV. 105 (1991).

For an excellent bibliography of the literature on the 1983 version of Rule 11, see generally *Call for Written Comments on Rule 11 of the Federal Rules of Civil Procedure and Related Rules, reprinted in* 131 F.R.D. 335, 350-58 (1990) [hereinafter *Call for Written Comments*].

a "chilling effect" on plaintiffs, especially civil rights plaintiffs.[14] This result, commentators argued, was especially disastrous in light of congressionally enacted civil rights legislation that effectively provided for defendants' attorneys' fees in successful lawsuits.[15] The 1983 amendments to Rule 11 allowed civil rights defendants who successfully defended themselves to then go after the civil rights plaintiffs with a motion for Rule 11 sanctions, including costs and attorneys' fees.[16] This effectively created an English rule counterpart to the fee-shifting civil rights statute, thereby emasculating congressional intent.[17]

The chilling effect on plaintiffs was, critics argue, even more apparent when the claim involved a potential cause of action yet unrecognized by existing law.[18] Critics argued that to the extent the fear of Rule 11 chilled plaintiffs from bringing claims involving potentially novel causes of action, the Rule was also responsible for retarded development in the law.[19]

B. *Satellite Litigation*

Another potent criticism of the 1983 version of Rule 11 is that it failed in streamlining litigation because more litigation actually resulted from invocation of the rule ("satellite litigation") than it reduced.[20] Some commentators have elaborated that Rule 11 sanction litigation has created a virtual "cottage industry" of separate litigation.[21] It is undeniable that litigation involving Rule 11 increased after the 1983 amendment took effect, however, it is questionable whether alarm regarding the initial explosion of lawsuits warranted generalizations about the frequency of Rule 11 invocation.[22] Studying the use of the rule is much easier than studying whether the

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14. *See* Melissa L. Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313, 1327, 1340 (1986); *Where We Are Going*, *supra* note 13, 484-85. *But see* Carl Tobias, *Civil Rights Plaintiffs and the Proposed Revision of Rule 11*, 77 IOWA L. REV. 1775, 1777 (1992) (noting improvement in 1988 Rule 11 application and courts' growing solicitude for civil rights plaintiffs).

15. Stempel, *supra* note 6, at 264-65; *see also* 42 U.S.C. § 1988 (1994) (allowing successful civil rights plaintiffs to shift attorneys' fees and costs to losing defendants).

16. Stempel, *supra* note 6, at 266-68; *see also, e.g.*, Avirgan v. Hull, 705 F. Supp. 1544 (S.D. Fla. 1989).

17. Stempel, *supra* note 6, at 266-68.

18. *Where We Are Going*, *supra* note 13, at 485 (explaining the possibility that courts are less willing to accept innovative causes of action in civil rights law because it is arguably already more developed than other areas of the law).

19. *See* Paul Kaufman, Note, *A Prospective Cap on Rule 11 Sanctions*, 56 BROOK. L. REV. 1275, 1281-82, 1297 (1991).

20. *Where We Are Going*, *supra* note 13, at 480-81.

21. *Id.* at 481.

22. *Call for Written Comments*, *supra* note 13, at 346 ("There is indeed a familiar phenomenon, illustrated by experience with previous revisions of the Federal Rules of Civil Procedure, of a bell-shaped curve of litigation activity responsive to rule change: the activity peaks and then declines to normality as the profession's understanding of the rule is stabilized."); *see also* Lawrence C. Marshall et al., *The Use and Impact of Rule 11*, 86 NW. U. L. REV. 943, 985 (1992) (concluding that although the impact of Rule 11 has been broadly felt in

effect of Rule 11 has actually decreased the filing of frivolous lawsuits, because the only way to measure the stop-think effect of the Rule in cases which are never filed is through surveys and other attempts to peer into the minds of individual attorneys.[23]

Much has been written analyzing the costs and benefits of 1983 Rule 11, and adherents of the law and economics school set forth some of the most cogent reasons why the rule was inefficient.[24] Although the 1983 version of Rule 11 deserved thorough cost-benefit scrutiny, in retrospect, it appears that the benefit aspect of the inquiry was examined too often with the assumption that it was secondary to the judicial economy that the rule encouraged. For example, although the 1983 version may have had costs in terms of satellite litigation, as the Advisory Committee's official comments noted, Rule 11's purpose was not exclusively judicial economy.[25] It was to deter frivolous litigation, arguably an end in itself, at least to the extent that one might place value on maintaining the integrity of the federal trial courts as places where a certain degree of professionalism and seriousness of purpose exists.[26] Indeed, one may hypothesize that there is an ethical obligation, independent of efficiency, to keep the judicial system from becoming a forum for frivolous litigation.

C. *Post-Verdict Sanctions*

Much of the most fervent criticism of Rule 11's failings centered around times in which plaintiffs' cases had survived defendants' motions to dismiss, the plaintiffs litigated the case to an unsuccessful conclusion, and then, post-trial, defendants moved for Rule 11 sanctions and were awarded

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the bar, sanctions are usually modest and lawyers have not devoted large blocks of time to Rule 11 activities).

For more narrowly conducted Rule 11 surveys, see generally Gerald F. Hess, *Rule 11 Practice in Federal and State Court: An Empirical, Comparative Study*, 75 MARQ. L. REV. 313 (1992); and STEPHEN B. BURBANK, RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11 (1989).

23. CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS § 69A, at 489 (5th ed. 1994) ("[The] affirmative response[s], however, [are] not evidence of the chilling of creativity or good advocacy, but rather is evidence that the rule is working as it was intended and is deterring baseless litigation in the federal courts.").

24. *See* A. Mitchell Polinsky & Daniel L. Rubinfeld, *Sanctioning Frivolous Lawsuits: An Economic Analysis*, 82 GEO. L.J. 397, 402 (1993) (concluding that the best way to eliminate inefficiency and still maintain deterrence is to "decouple" imposition of sanctions on frivolous parties from compensation of nonfrivolous parties, which will provide less incentive to nonfrivolous parties to bring compensation-motivated motions and thus reduce Rule 11 litigation costs).

25. The 1983 version sought to "emphasiz[e] the responsibilities of the attorney and reinforc[e] those obligations by the imposition of sanctions." Advisory Committee Notes, *supra* note 7. However, the Advisory Committee did acknowledge that it was important "[t]o assure the efficiencies achieved through more effective operation of the pleading regimen [is] not offset by the cost of satellite litigation." *Id.*

26. Business Guides v. Chromatic Comm. Enter., 498 U.S. 533, 552 (1991) ("There is little doubt that Rule 11 is reasonably necessary to maintain the integrity of the system of federal practice and procedure, and that any effect on substantive rights is incidental.").

attorneys' fees.[27] This use of Rule 11 seemed especially unfair in cases in which judges determined that the cases had sufficient merit to survive summary judgment and when the litigation had gone on for some time, making the attorneys' fees quite onerous.[28] This aspect of the rule disturbed commentators who saw these tactics often being used against civil rights' litigants.[29]

D. *Courts' Misconstruction of Rule 11's Deterrent Purpose*

The language of the 1983 amendment clearly indicated its deterrent purpose,[30] yet courts often interpreted the rule in such a manner as to convert it into more of a compensatory measure.[31] Commentators argued that Rule 11's language[32] encouraged courts to award sanctions determined more in light of the compensation appropriate for the nonviolating party than to award sanctions simply determined with an aim at deterring the violating party's conduct.[33] Thus Rule 11 often served as a fee-shifting device, in effect creating an English rule of attorney compensation.[34]

III. PROPOSED AND ADOPTED 1993 AMENDMENTS

After vigorous discussion and debate in the legal community about the above mentioned problems with the 1983 version of Rule 11, including an

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27. *See* Stempel, *supra* note 6, at 279-83.

28. *Id.*

29. *See generally Civil Rights*, *supra* note 13.

30. Advisory Committee Notes, *supra* note 7 ("The word 'sanctions' in the caption, for example, stresses a deterrent orientation in dealing with improper pleadings, motions, or other papers."). For the Supreme Court's unequivocal reiteration of deterrence as Rule 11's purpose, see Cooter v. Gell, 496 U.S. 384, 393 (1990).

31. Polinsky & Rubinfeld, *supra* note 24, at 400 n.10 ("Current practice appears to favor compensation."); *see also Where We Are Going*, *supra* note 13, at 478-80.

32. An example of this is the use language which requires courts find a violation in order to impose "an appropriate sanction, which may include an order to pay the other party or parties the amount of the reasonable expenses incurred because of the filing . . . including a reasonable attorney's fee." FED. R. CIV. P. 11, *supra* note 11.

33. *See Where We Are Going*, *supra* note 13, at 478-80.

34. Stempel, *supra* note 6, at 282. This is not to deny that the English Rule does have a significant deterrent effect upon the filing of frivolous lawsuits:

> The English Rule, under which the loser pays the winner's legal costs, tends to discourage frivolous lawsuits because, if frivolous plaintiffs have a higher probability of losing than legitimate plaintiffs, making a losing plaintiff pay the winning defendant's legal costs imposes a higher expected cost on frivolous plaintiffs than legitimate plaintiffs.

Polinsky & Rubinfeld, *supra* note 24, at 402.

The distinction is that although the English Rule has an incidental deterrent effect upon the filing of frivolous lawsuits, deterrence was the 1983 version's primary purpose, and any fee-shifting was incidental. *See* Business Guides v. Chromatic Comm. Enter., 498 U.S. 533, 553 (1991).

official call for comments in August 1990,[35] the Advisory Committee submitted new amendments to the rule.[36]

A. *Noteworthy Proposals*

The period leading to the 1993 amendments witnessed voluminous literature about how the federal civil sanctions rule should be changed. In light of the vast amount that has been written about the 1983 amendments to Rule 11, it is beyond the scope of this Note to attempt to detail every suggestion that Rule 11 critics advanced. However, several independent proposals are particularly noteworthy because of how they differ from those the Advisory Committee ultimately set forth.

1. *Harmonizing Rule 11 with Other Pre-Verdict Dismissal Devices*

One of the most novel concepts, suggested to deal with the perceived harshness that the 1983 version of Rule 11 had on those cases in which sanctions were imposed at the end of protracted litigation (and in which attorneys' fees and costs were concomitantly higher), would have been to create a "safe harbor" and immunize litigants who survived certain pre-verdict dismissal devices (for example, summary judgment) from susceptibility to Rule 11 sanctions.[37] The safe harbor hypothesis was that survival of such pre-verdict measures should constitute an affirmation of the nonfrivolous nature of the litigation.[38] This safe harbor would protect litigants from the stinging post-verdict fee-shifting effect of the 1983 version of the rule.

The proposal could be adopted without involving the complicated formal rule-amending process. Furthermore, the Supreme Court's trilogy of cases interpreting Rule 56, to shift a greater burden upon the party resisting summary judgment,[39] bolstered the concept's viability.[40] Moreover, the concept of survival of pre-verdict dismissal to remedy Rule 11 deficiencies has already been employed as an effective bulwark against equivalent sanction enforcement problems in at least one state.[41]

2. *Setting Caps on Rule 11 Sanction Awards*

Another suggestion was to set limits on the monetary awards which courts could award for Rule 11 violations.[42] This would have eliminated some

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35. *See Call for Written Comments*, *supra* note 13.

36. *See Proposed Amendments to the Federal Rules of Civil Procedure*, 137 F.R.D. 53, 74-77 (1991).

37. Stempel, *supra* note 6, at 279-82.

38. *Id.* at 282.

39. Anderson v. Liberty Lobby, 477 U.S. 242 (1986); Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

40. Stempel, *supra* note 6, at 270-71.

41. *See* Uselmann v. Uselmann, 464 N.W.2d 130 (Minn. 1990).

42. *See* Kaufman, *supra* note 19.

of the often criticized, abnormally large court-granted awards.[43] The adoption of Rule 11 monetary limits would help stymie much of the alleged chilling effect of Rule 11, because it was not just a fear of sanctions themselves, but rather the possibility of being socked with financially crippling awards grossly disproportionate to the violation that deterred litigants from pursuing tenuously nonfrivolous claims.[44]

A monetary limit could have been implemented either in a fixed dollar amount or through a formula calculated to appropriately punish the party violating the rule.[45] Such a formula could have incorporated considerations of the violation's severity.[46] It could have also set out a maximum penalty proportionate to the income of the attorney, with increased proportions for subsequent violations.[47] The advantages of imposing Rule 11 caps would have been the simplicity of the solution and a decrease in Rule 11's alleged chilling effect. It is difficult, however, to envision how caps would have decreased the extent of Rule 11 satellite litigation, because sanctioned parties presumably would still be as apt to litigate the sanction findings themselves.

B. *Finally Adopted 1993 Rule 11*

In 1993, after the Supreme Court accepted the Advisory Committee's recommendations,[48] and Congress's statutory period for review passed,[49] the new rules, including Rule 11, went into effect.[50] The new Rule 11 bears

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43. *Id.* at 1276-77; *see also, e.g.*, Avirgan v. Hull, 705 F. Supp. 1544 (S.D. Fla. 1989) (awarding more than $1 million in attorneys' fees to defendants who were successful against allegations based on unsubstantiated rumor and speculation).

44. Kaufman, *supra* note 19, at 1285-88.

45. *Id.* at 1294-97.

46. *Id.*

47. *Id.*

48. 61 U.S.L.W. 4390, 4390-94 (Apr. 27, 1993).

49. On April 22, 1993, the Supreme Court transmitted the 1993 Amendments to the Federal Rules of Civil Procedure to Congress, which had until December 1, 1993 to intervene and change the amendments.

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

> (a) Signature. Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.
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> (b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—
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> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

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

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

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

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

(1) How Initiated.

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

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

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

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

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

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

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

marked differences from, and in most respects, significantly ameliorates the more stringent standards of the 1983 version. The new rule is longer and more detailed, divided into four different sections, two of which contain multiple subheadings of their own.[51]

1. *Changes Which Strengthen Rule 11*

Although the 1993 amendments have generally reduced Rule 11's deterrent purpose, two changes arguably made Rule 11 tougher. First, "absent exceptional circumstances," Rule 11 makes law firms "jointly responsible for violations committed by its partners, associates, and employees."[52] The possibility of sanctions imposed upon a law firm itself should increase deterrence because it gives the firm incentive to be cognizant of potentially frivolous submissions, and thus will hopefully encourage a more active oversight of attorney conduct. Second, the new Rule 11 explicitly imposes a continuing duty upon the signer to maintain the validity of the submission.[53] Thus, if an attorney presented a motion to the court and then later became aware that the motion was no longer tenable, the attorney would be violating Rule 11 by continuing to advocate that position.[54] Among the more technical changes, Rule 11 now requires those who submit motions to list their telephone number, if they have one, along with their address.[55]

2. *Procedural Barriers*

Under Rule 11, requests for sanctions must now be submitted as separate motions.[56] The rationale for this change is that parties are less apt to request sanctions if they must go through the trouble of drafting and submitting independent motions as opposed to simply tagging the request for sanctions onto another motion or as an addendum to the main pleading.[57]

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through 37.

FED. R. CIV. P. 11.

51. *Id.*

52. *Id.* R. 11(c)(1)(A).

53. *Id.* R. 11(b). One certifies a submission by "signing, filing, submitting, *or later advocating*" the position of the submission. *Id.* (emphasis added).

54. *Id.* The Advisory Committee addressed this issue in the context of the 1983 amendments:

> [A] litigant's obligations with respect to the contents of these papers are not measured solely as of the time they are filed with or submitted to the court, but include reaffirming to the court and later advocating positions contained in those pleadings and motions after learning that they cease to have any merit.

Advisory Committee Notes, *supra* note 7.

55. R. 11(a).

56. *Id.* R. 11(c)(1)(A).

57. FED. R. CIV. P. 11 Advisory Committee Notes (1993 Amendments) [hereinafter Advisory Committee Notes (1993 Amendments)]. The Rule provides that requests for sanctions must be made as a separate motion, i.e., not simply included as an additional prayer for relief contained in another motion. *Id.*

Where previously there was no guideline, the new Rule explains in detail how motions must be initiated, and it requires the motion for sanctions to specifically describe the alleged violative conduct of the other party.[58] Although Rule 11 allows a court to invoke sanctions on its own initiative, the Rule requires a court to enter an order similarly describing the specific allegedly violative conduct, and to allow the signer "to show cause why it has not violated" the Rule.[59]

3. *The Twenty-One Day Safe Harbor*

Perhaps the greatest and most controversial change in the sanctions provisions of the new Rule is the twenty-one day "safe harbor" provision. Under section (c)(1)(A), a party who wants to request sanctions must first serve the motion for sanctions on the other party twenty-one days before it presents the motion to the court.[60] Only if the "challenged paper, claim, defense, contention, allegation, or denial is not withdrawn" or corrected within this twenty-one day period may the party moving for sanctions present its motion to the court.[61] This twenty-one day safe harbor, therefore, allows parties who have submitted improper pleadings to escape unscathed if they only make sure that they withdraw the pleadings when the other party informs them they will move for sanctions.[62]

This change contravenes the opinion of the Court in *Cooter & Gell v. Hartmarx Corp.*:[63] "Baseless filing puts the machinery of justice in motion, burdening courts and individuals alike with needless expense and delay. Even if the careless litigant quickly dismissed the action, the harm triggering Rule 11's concerns has already occurred."[64] Under Rule 11, careless litigants may file as many baseless filings as they wish, as long as they withdraw them within twenty-one days of being notified by the opposing party that the opposing party will move for sanctions against the nonmeritorious claim. This gives the careless litigant two different chances to stop and think: once, before the submission is made, and again, after the party has been called to task for the dubious merit of the submission.[65]

The twenty-one day safe harbor will also eliminate the possibility of a party moving for sanctions after the nonmeritorious claim has already been

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58. R. 11(c)(1)(A).
59. *Id.* R. 11(c)(1)(B).
60. *Id.* R. 11(c)(1)(A).
61. *Id.*
62. Advisory Committee Notes (1993 Amendments), *supra* note 57 ("If, during this period, the alleged violation is corrected, as by withdrawing (whether formally or informally) some allegation or contention, the motion should not be filed with the court.").
63. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990).
64. *Id.* at 398.
65. The Court explained that allowing litigants to escape punishment by withdrawing improper pleadings would decrease deterrence: "If a litigant could purge his violation of Rule 11 merely by taking a dismissal, he would lose all incentive to 'stop, think and investigate more carefully before serving and filing papers.'" *Id.* (quoting Amendments to Federal Rules of Civil Procedure, 97 F.R.D. 165, 192 (1983) (Letter from Judge Walter Mansfield, Chairman, Advisory Committee on Civil Rules) (Mar. 9, 1982)).

judicially decided or after the conclusion of the case.[66] Because consideration of Rule 11 motions will only be considered at the outset of litigation or before the contested issue in question has been judicially resolved, eventually this change may actually encourage more motions for sanctions at earlier stages of the litigation.[67]

The above changes, along with the fact that the twenty-one day rule encourages a more informal communication between opposing parties,[68] may raise the specter of litigants using threats of Rule 11 invocation more frequently against opponents to get them to withdraw submissions before they get their day in court.[69] The Advisory Committee Notes recognize this possibility and admonish against it, but the 1993 version of Rule 11 incorporates no procedural solution to the problem.[70] Although the Advisory Committee Notes state that a court may defer its ruling until final resolution of the case, this puts targets of such behavior in the uncomfortable position of either withdrawing submissions without penalty, or risking the same sort of post verdict sanctions which existed under the 1983 version of Rule 11.[71] Viewed from this vantage point, the twenty-one day safe harbor does little to protect proper submissions from Rule 11 abuse, and merely serves to protect the careless litigator who submits nonmeritorious claims. Justice Scalia struck the same cord when he dissented from the Court's approval of the 1993 amendments to Rule 11.[72]

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66. Advisory Committee Notes (1993 Amendments), *supra* note 57 ("[A] party cannot delay serving its Rule 11 motion until [the] conclusion of the case.").

67. *Id.* The Advisory Committee's comments strongly encourage movants to file early and make clear that delay in motioning for sanctions may constitute a waiver. "Ordinarily the motion should be served promptly after the inappropriate paper is filed, and, if delayed too long, may be viewed as untimely." *Id.*

68. Although Rule 11(c)(1)(A) states that motions are to be served as provided in Rule 5 (at least twenty-one days before filed in court) "[i]n most cases, however, counsel should be expected to give informal notice to the other party, whether in person or by a telephone call or letter, of a potential violation before proceeding to prepare and serve a Rule 11 motion." *Id.*

69. *See* Tobias, *supra* note 14, at 1785. Professor Wright explains the problem of litigants using threats of Rule 11 invocation: "[I]f [the] plaintiffs are deterred from offering their claim at all, then the problem is worse. . . . [T]hen effective advocacy is being deterred by the rule and the 'chilling effect' feared by some critics has become a reality." WRIGHT, *supra* note 23, § 69A.

70. Advisory Committee Notes (1993 Amendments), *supra* note 57 ("Rule 11 motions should not be made . . . for minor, inconsequential violations . . . . Nor should Rule 11 motions be prepared to . . . intimidate an adversary into withdrawing contentions . . . .").

71. *Id.* ("As under the prior rule, the court may defer its ruling . . . until final resolution of the case . . . .").

72. Order Adopting 1993 Amendments to the Federal Rules of Civil Procedure, 61 U.S.L.W. 4390, 4392 (1993) (Scalia, J., dissenting).

> [T]hose who file frivolous lawsuits and pleadings should have no safe harbor. The Rules should be solicitous of the abused (the courts and the opposing party), and not of the abuser. Under the revised Rule, parties [are] able to file thoughtless, reckless, and harassing pleadings, secure in the knowledge that they have nothing to lose: If objection is raised, they can retreat without penalty.

Id.

4. *Sanctions No Longer Mandatory*

The 1993 amendments removed the mandatory imposition of sanctions for Rule 11 infractions and placed sanctions within the discretionary power of the court.[73] The 1983 version of Rule 11 directed that "[i]f a pleading, motion, or other paper is signed in violation of this rule, *the court . . . shall impose . . . an appropriate sanction*."[74] The 1993 Rule 11 specifies: "[i]f . . . the court determines that [Rule 11] has been violated, *the court may . . . impose an appropriate sanction* upon the attorneys, law firms, or parties that have violated the Rule."[75] This change is likely to reduce the deterrent effect of the Rule, because the relevant inquiry courts made under the 1983 version was merely whether a violation had occurred. Once the court determined a violation had occurred, the imposition of sanctions was mandatory, and the court's discretion was limited to determining the proper sanction. Under the 1993 version, sanction determination involves a three-part analysis: (i) whether there has been a Rule 11 infraction, (ii) whether any sanction is warranted, and (iii) if a sanction is warranted, what is the appropriate sanction.

The new Rule, which allows judges to decide whether infractions merit sanctions on a case-by-case basis, will almost certainly result in fewer sanctions. As Justice Scalia argues: "Judges, like other human beings, do not like imposing punishment when their duty does not require it, especially upon their own acquaintances and members of their own profession."[76] Indeed, a judge's ability to objectively sanction fellow colleagues, many of whom the judge may frequently have contact with in a professional capacity (let alone acquaintances), is arguably much more difficult than to objectively preside over individual cases. Moreover, it is difficult for judges functioning in their individual capacities to see the system-wide benefits of sanctions when, in contrast, "they are intensely aware of the amount of their own time it would take to consider and apply sanctions in the case before them."[77]

One may question the logic of allowing Rule 11 infractions to be found without some sort of accompanying punishment. Although conceivable situations may exist in which equitable considerations may justify a mild punishment, allowing infractions with no punishment at all has no deterrent value.

Another factor militating against making sanctions discretionary is the backdrop of the other Rule 11 sanction guidelines. While judges have been granted discretion as to whether sanctions should be imposed, judicial discretion as to the type and extent of sanctions has been severely curtailed.[78] This apparent inconsistency clearly reflects the Advisory Committee's purposeful watering down of Rule 11.[79]

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73. FED. R. CIV. P. 11(c).

74. FED. R. CIV. P. 11, *supra* note 11 (emphasis added).

75. FED. R. CIV. P. 11(c) (emphasis added).

76. Order Adopting 1993 Amendments to the Federal Rules of Civil Procedure, 61 U.S.L.W. 4392 (Scalia, J., dissenting).

77. *Id.*

78. *See infra* text accompanying notes 87-99.

79. Advisory Committee Notes (1993 Amendments), *supra* note 57 (The 1993 revision

5. *More Difficult to Establish Rule 11 Violations*

The 1993 version of Rule 11 changes the standards for judicial determination of violations. The 1983 version required submissions to be "to the best of the signer's knowledge, information and belief formed after *reasonable inquiry*."[80] The 1993 version requires submissions to be "to the best of the person's knowledge, information, and belief, formed after an *inquiry reasonable under the circumstances* . . . ."[81] The modification of this language makes the determination of whether a violation occurred a more subjective inquiry because the 1993 rule explicitly calls for the determination to be made in light of the specific circumstances of each case.[82]

The standard is also eased with regard to the degree of certainty which signers must have before they may make submissions under the Rule. The 1983 version of Rule 11 required submissions to be "well grounded in fact,"[83] whereas the 1993 version generally requires submissions simply to have "evidentiary support."[84]

This change is underscored by the possibility that under the 1993 version, a submission can be made without having factual knowledge or evidentiary support. Such allegations merely must be "*likely to have evidentiary support* after a reasonable opportunity for further investigation or discovery."[85] The ability initially to submit factually improper pleadings is tempered by the provision imposing a continuing duty upon the signer to update submissions.[86] This provision, however, still allows submissions to be made, causing litigation to commence before any evidentiary support has been obtained.

6. *Nature and Scope of Sanctions Reduced*

Under the 1983 version of Rule 11, when a court determined a submission was improper, it was required to impose upon the person who signed it, or a represented party, or both "an appropriate sanction, which may include an order to pay the other party or parties the amount of reasonable expenses incurred because of the filing."[87] Besides changing the procedural dynamics

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"places greater constraints on the imposition of sanctions and should reduce the number of motions for sanctions presented to the court.").

80. FED. R. CIV. P. 11, *supra* note 11 (emphasis added).

81. FED. R. CIV. P. 11(b) (emphasis added).

82. *Id.* Although under the 1983 rule, the reasonableness of the inquiry was also supposed to be determined in light of the circumstances of each case, its codification into the new rule enunciates the standard. Advisory Committee Notes, *supra* note 7.

83. FED. R. CIV. P. 11, *supra* note 11.

84. FED. R. CIV. P. 11(b)(3).

85. *Id.* (emphasis added); *see also* Advisory Committee Notes (1993 Amendments), *supra*, note 57 ("The certification with respect to allegations and other factual contentions is revised in recognition that sometimes a litigant may have good reason to believe a fact is true or false but may need discovery . . . to gather and confirm the evidentiary basis for the allegation.").

86. *See supra* text accompanying notes 53-54.

87. FED. R. CIV. P. 11, *supra* note 11.

of sanction initiation, the 1993 amendments significantly changed—and drastically limited—the court's ability to impose sanctions for Rule 11 violations.[88]

Sanctions "shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated."[89] Thus, the new Rule explicitly provides that sanctions are to be awarded solely as a deterrent.[90] The 1993 version of Rule 11 also explicitly separates (1) "directives of a nonmonetary nature," (2) orders to pay penalties into the court, and (3) monetary payment to the party moving for the sanction.[91]

The Rule allows payment to the moving party only (1) upon a motion from the party, and (2) if "warranted for effective deterrence."[92] The new Rule further limits sanctions awarded to a moving party to a maximum of "some or all of the reasonable attorneys' fees and other expenses *incurred as a direct result of the violation.*"[93] By separating the different possible sanctions, the Advisory Committee clearly attempted to encourage judges to reign in monetary sanctions awarded to moving parties.[94]

Sanctions are further limited under Rule 11(c)(2)(A), which prohibits the awarding of monetary sanctions against a represented party for a submission that contains a frivolous argument for the extension of existing law or the establishment of new law.[95] Rule 11(c)(2)(B) prohibits the court from awarding monetary sanctions on its own initiative unless (1) it first issues an order to the offending party requesting it to show cause for the violation, and (2) the court issues the order before there has been a voluntary dismissal or before a settlement of the claims has been made.[96]

Rule 11(c)(3) requires that when the court imposes sanctions, it must describe the specific conduct upon which the sanction is based.[97] The court is

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88. FED. R. CIV. P. 11(c)(2).

89. *Id.*

90. Advisory Committee Notes (1993 Amendments), *supra* note 57 ("Since the purpose of Rule 11 sanctions is to deter rather than to compensate, the rule provides that if a monetary sanction is imposed, it should ordinarily be paid into the court as a penalty.").

The provision providing that sanctions ordinarily be paid to the court rather than the opposing party maintains the emphasis on deterrence and should help decrease satellite litigation, which spawns from purely compensation-motivated Rule 11 motions. *See* Polinsky & Rubinfeld, *supra* note 24, at 400 n.10, 402.

91. FED. R. CIV. P. 11(c)(2).

92. *Id.*

93. *Id.* (emphasis added). Limiting monetary sanctions to expenses incurred as a direct result of the violation is actually inconsistent with maximizing deterrence, because monetary awards are thus reduced to a compensation-based calculus. Polinsky & Rubinfeld, *supra* note 24, at 402.

94. The Advisory Committee Notes explain that under normal circumstances, the court should not direct payment of monetary sanctions to movants. Advisory Committee Notes (1993 Amendments), *supra* note 57.

95. FED. R. CIV. P. 11(c)(2)(A).

96. FED. R. CIV. P. 11(c)(2)(B). This limitation provides yet another safeguard against post verdict sanctions.

97. FED. R. CIV. P. 11(c)(3).

required to give no explanation, however, for rejecting sanction requests.[98] There is no apparent reason for this dichotomy, but it may well operate to encourage the court to simply reject marginal sanction requests instead of having to take the trouble of explaining its rationale in close cases.[99]

7. *Frivolous Arguments*

The last change this Note discusses is the change in the standard for determining whether a representation is frivolous. The standard is now made more objective. The 1983 version of Rule 11 required that a submission be "warranted by the existing law" or "*a good faith argument for the extension, modification, or reversal of existing law.*"[100] The 1993 version changes this to "warranted by existing law or *by a nonfrivolous argument* for the extension, modification, or reversal of existing law *or the establishment of new law*."[101] The change makes the standard more objective,[102] but whether it will increase deterrence remains unknown.[103]

IV. CONCLUSION

The 1993 amendments to Rule 11 are as controversial as previous amendments. Although there was need to amend Rule 11 in order to decrease the Rule's chilling effects and satellite litigation, it appears that the commentators were unduly critical of the 1983 version. Commentators criticized the value the Rule placed on keeping federal courts clear of frivolous litigation vis-á-vis (1) its cost in terms of the stifling effects upon plaintiffs in certain causes of action, and (2) its cost in terms of the system's aggregate judicial efficiency.

Most of the critics' concerns should be allayed by the 1993 amendments. Considering the abysmal failure of the original 1938 version of Rule 11 in curtailing frivolous submissions, lawyers must seriously question whether the recent changes were an overreaction to legitimate criticisms of an

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98. Advisory Committee Notes (1993 Amendments), *supra* note 57 ("[T]he court should not ordinarily have to explain its denial of a motion for sanctions.").

99. This will obviously be an additional factor for judges who may be recalcitrant toward using their discretionary sanctioning power.

100. FED. R. CIV. P. 11, *supra* note 11 (emphasis added).

101. FED. R. CIV. P. 11 (emphasis added).

102. Advisory Committee Notes (1993 Amendments), *supra* note 57 (This standard is "intended to eliminate any 'empty-head pure-heart' justification for patently frivolous arguments.").

103. The advisory committee cautions against heavy-handed sanctioning of potentially frivolous litigants, listing factors to be considered in evaluating the legitimacy of the submission, for example: the extent of a litigant's research, support of the position in minority opinions, law review articles, and consultation with other attorneys. *Id.* The Advisory Committee Notes also point out that novel arguments for a change in the law should be given a greater presumption against frivolity if so identified. *Id.*

Besides references to decisions under the 1983 version of the Rule, exactly what is a frivolous submission will be further defined as a body of case law develops construing the new rule.

otherwise well intended and reasonably effective deterrent to baseless litigation. The additional context of the current disrepute with which so much of the public views the legal profession because of perceived frivolous litigation adds doubt to the prudence of the 1993 amendments.[104]

The author of this Note hopes that the foregoing historical analysis and commentary on prospective judicial interpretation of the 1993 version of Rule 11 will contribute to the continuing dialogue on the most appropriate procedural mechanisms to balance the competing interests in ensuring just, speedy, and inexpensive resolutions of civil actions brought to federal court.[105]

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104. *See, e.g.*, Stephen Budiansky, *How Lawyers Abuse the Law*, U.S. NEWS & WORLD REP., Jan. 30, 1995, at 50. The public has the perception that "[t]he part that lawyers play in fomenting bad or even fraudulent litigation for their own profit ranges from the subtle to flagrant . . . ." *Id.*; *see also* Randall Samborn, *Anti-Lawyer Attitude Up*, NAT. L.J., Aug. 9, 1993, at 1 ("Americans' cynicism toward lawyers is growing, presenting a deepening image crisis for the legal profession.").

105. *See* FED. R. CIV. P. 1.