Applying Rule 11 to Rid Courts of Frivolous Litigation Without Chilling the Bar's Creativity

Robin Johnson Collins
University of Kentucky

Follow this and additional works at: https://uknowledge.uky.edu/klj
Part of the Civil Procedure Commons
Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation
Collins, Robin Johnson (1988) "Applying Rule 11 to Rid Courts of Frivolous Litigation Without Chilling the Bar's Creativity," Kentucky Law Journal: Vol. 76 : Iss. 4 , Article 3. Available at: https://uknowledge.uky.edu/klj/vol76/iss4/3

This Note is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledgest@lsv.eky.edu.
Notes

Applying Rule 11 to Rid Courts of Frivolous Litigation Without Chilling the Bar’s Creativity

Sometimes there are reasons to sue when one cannot win. Bad court decisions must be challenged if they are to be overruled, but the early challenges are certainly hopeless. The first attorney to challenge Plessy v. Ferguson was certainly bringing a frivolous action, but his efforts and the efforts of others eventually led to Brown v. Board of Education.*

INTRODUCTION

Along with the 1983 proposals to amend Rule 11 of the Federal Rules of Civil Procedure¹ came valid concerns. The proponents of the new rule declared that the changes were necessary to deter frivolous claims and abusive pleading and motion tactics.² The subjective "good faith" standard of former Rule 11 had been ineffective in discouraging misuse of the judicial

² Excerpt from the Report of the Judicial Conference Committee on Rules of Practice and Procedure, reprinted in 97 F.R.D. 165, 189 (1983) [hereinafter Report of the Judicial Conference Committee]. The Judicial Conference Committee states: “These proposals are designed to reduce discovery abuse and the abuse of process and for the scheduling and management of litigation by district judges.” Id. Fed. R. Civ P 11 advisory committee’s note provides: “Greater attention by the district courts 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.”
Those opposing the amendments, however, feared the changes would cause extensive satellite litigation, erode attorney-client relationships, and chill creative advocacy. Nevertheless, the rule was amended on August 1, 1983, with the hope that more precise standards and mandatory sanctions would rid the courts of unnecessary and frivolous litigation.


5 FED. R. CIV P 11 advisory committee's note ("The rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories.").

6 Report of the Judicial Conference Committee, supra note 2, at 192 ("[T]he majority was of the view, either expressly or impliedly, that precise standards, including a duty of reasonable inquiry, would reduce frivolous claims, defenses or motions by leading litigants to stop, think and investigate more carefully before serving and filing papers."); see FED. R. CIV P 11 advisory committee's note.

Rule 11 provides:

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his 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 corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief [there is good ground to support it; and that it is not interposed for delay] 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. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted. If a pleading, motion, or other paper is signed
Has amended Rule 11 been successful? Without question, the number of Rule 11 decisions has increased dramatically since the 1983 amendments. Such a result is not surprising because the rule "generates its own momentum." Yet, complaints abound that no uniform standards have emerged and that the rule itself has become a means of harassment and delay. In spite of the criticisms, Professor Arthur Miller, a principal drafter of the new rule, has stated that Rule 11 is working "exactly the way it was supposed to" and is a "useful weapon against unnecessary litigation." In the process, however, the rule may be deterring creative and novel legal theories, an effect not intended by the rule's drafters.

This Note advocates the view that Rule 11 can be applied to achieve a higher level of responsibility among attorneys without stifling attempts to expand current law. Initially, the background of Rule 11 and the changes made to Rule 11 by the 1983 amendments will be discussed. Then the policies and effects of Rule 11 will be explored in conjunction with the various approaches courts have taken in applying the rule. The focus of


7 See Nelken, Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment, 74 Geo. L.J. 1313, 1326 (1986). Between August 1, 1983, and August 1, 1985, 233 reported district court cases involved Rule 11 sanctions. Because few district court opinions are published, however, the number of Rule 11 cases are undoubtedly much greater than those found in the reporters. Id., see also Note, Plausible Pleadings: Developing Standards for Rule 11 Sanctions, 100 Harv. L. Rev 630, 631 n.5 (1987) (noting there have been more than 200 reported cases involving Rule 11 sanctions since the 1983 amendments).

8 Joseph, supra note 3, at 88; see Fed. R. Civ. P 11 advisory committee's note (with the reasonableness standard "it is expected that a greater range of circumstances will trigger its violation").

9 Joseph, supra note 3, at 89.


11 Id.

12 See supra note 5.

13 See infra notes 16-96 and accompanying text.

14 See infra notes 97-248 and accompanying text.
this Note will be on those approaches that do not sacrifice "one of the chief virtues of the American justice system, the creativity of the bar."  

I. THE NEED TO STREAMLINE LITIGATION

During the past decade, the federal courts have been inundated with an unprecedented number of lawsuits. As a result of this "litigation explosion," the American litigant has been subjected to undue delays and excessive costs. In 1981 the Judicial Conference Advisory Committee on the Federal Rules of Civil Procedure proposed several amendments stressing judicial management and attorney restraint. Because many commentators felt that abuse of the court system had contributed to the problem of increased litigation, Rule 11 was specifically amended, effective August 1, 1983, to deter attorneys' abusive tactics and to rid the courts of frivolous claims.

Prior to the 1983 amendments to Rule 11, an attorney's signature on a pleading certified that "to the best of his knowl-

---

16 "In 1953 the federal courts had 99,000 United States District Court filings and 3,200 appellate filings. In 1983 Chief Justice Burger reported current filings of 240,000 in the district courts and 28,000 at the appellate level, an increase of 142% and 775%, respectively, in 25 years." Johnson & Cassady, Frivolous Lawsuits and Defensive Responses to Them—What Relief Is Available? 36 ALA. L. REV 927, 927 n.1 (1985).
17 Miller, supra note 15, at 2-12, 20 & n.62.
18 Id. at 3; see Nelken, supra note 7, at 1313 (changes to Rule 11 were "provoked by a decade of criticism of the spiraling costs, delay, and abuse that have come to characterize the pretrial stage of litigation").
20 Arthur Miller, one of the drafters of the amendments, made the following observation regarding the American judicial system:
In many ways, contemporary federal litigation is analogous to the dance marathon contests of yesteryear. The object of the exercise is to select a partner from across the "v," get out on the dance floor, hang on to one's client, and then drift aimlessly and endlessly to the litigation music for as long as possible, hoping that everyone else will collapse from exhaustion. Miller, supra note 15, at 9.
22 FED. R. CIV. P 11 advisory committee's note; Report of the Judicial Conference Committee, supra note 2, at 192.
23 Rule 11 was promulgated in 1938 and was never changed prior to the 1983 amendments. Nelken, supra note 7, at 1314.
edge, information and belief there is good ground to support it; and that it is not interposed for delay.”24 The rule placed no affirmative duty on the attorney to investigate the claim25 and appeared to require no investigation beyond the four corners of the document.26 Not surprisingly, courts were confused as to what conduct violated the rule.27 They settled on the lenient standard of subjective bad faith and required that a claim be “entirely without color and made for reasons of harassment or delay or for other improper purposes” before triggering a violation.28 This high threshold provided a “safe harbor”29 for attorneys filing groundless pleadings.

In addition to the confusion regarding the standard of conduct required by the rule, courts were also uncertain as to the type of sanctions to impose upon violators.30 The rule stated that a pleading “may be stricken as a sham and false”31 and that for willful violations “attorney[s] may be subjected to appropriate disciplinary action.”32 The language did not require sanctions, leaving it within the court’s discretion whether to penalize the violator.33 Striking a pleading was viewed as an extreme punishment against the client, not the attorney, and

---

26 But see Rhinehart v. Stauffer, 638 F.2d 1169, 1171 (9th Cir. 1979) (“Before filing a civil action, the attorney has a duty to make an investigation to ascertain that it has at least some merit, and further to ascertain that the damages sought appear to bear a reasonable relation to injuries actually sustained.”).
27 Fed. R. Civ P 11 advisory committee’s note (“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.”).
29 Joseph, supra note 3, at 87; see Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 253 (2d Cir. 1985); cert. denied, 108 S. Ct. 269 (1987) (stating that “subjective good faith no longer provides the safe harbor it once did”).
30 See supra note 27.
31 See Carter, supra note 25, at 7 (noting that courts would strike a pleading under Rule 11 “only if it contradicted matters of public record,” or if it was “sham and false beyond peradventure,” or if the plaintiff “had no capacity to sue”).
32 Fed. R. Civ P 11.
33 Id.
thus was seldom used. Furthermore, the rule failed to specify the sanctions available for willful violations. The omission of available sanctions and the subjective bad faith standard led courts to impose penalties only in extreme cases. Moreover, the courts' reluctance to sanction attorneys caused general disregard of the rule. As a result, Rule 11, an ineffective deterrent against abusive and dilatory practices, was targeted for major revision by the 1983 amendments.

II. Amended Rule 11

The 1983 amendments to Rule 11 focus on attorney responsibility by expanding the rule's certification requirement and by providing clearer standards for measuring attorney conduct. The amendments also focus on deterring judicial system abuse by establishing mandatory sanctions for Rule 11 violations.

34 FED. R. CIV. P. 11, advisory committee's note (commenting that the provision was rarely used and that courts "have tended to confuse the issue of attorney honesty with the merits of the action"); Miller, supra note 15, at 25 (stating that "striking pleadings have seemed too draconian to impose on clients for what typically is the misbehavior of the attorney or mere procedural failings").

35 FED. R. CIV. P. 11.


37 FED. R. CIV. P. 11 advisory committee's note: "The perceived reluctance of judges to impose sanctions has several sources: judges' sympathy, as former practitioners, for the pressures on lawyers, concern that available sanctions often punish the client for the lawyer's misdeeds; and uncertainty about the court's power to impose sanctions on its own initiative." Nelken, supra note 7, at 1321-22.

38 Id. at 1316 (suggesting that the rule's disuse was not caused by the language of Rule 11, but the belief that attorneys should not be sanctioned).

39 FED. R. CIV. P. 11 advisory committee's note.

40 Nelken, supra note 7, at 1316.

41 C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 1333 (Supp. 1987) [hereinafter WRIGHT].

42 See Report of the Judicial Conference Committee, supra note 2, at 190; Lovejoy, supra note 19, at 208.

43 FED. R. CIV. P. 11 advisory committee's note; Report of the Judicial Conference Committee, supra note 2, at 190.
A. The Certification Requirement

Amended Rule 11 expands on the certification requirement by applying it to motions and other papers as well as to pleadings. The rule also applies to unrepresented parties. Thus, under the amended rule, the signature of an attorney or pro se party certifies two things: (1) that based on a "reasonable inquiry [the paper] 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 (2) that "it is not interposed for any improper purpose." Courts and commentators have drawn from the rule a two-prong analysis, the first prong dealing with frivolous litigation, and the second prong dealing with abusive tactics.

B. The First Prong: Reasonable Inquiry into Facts and Law

The first prong of Rule 11 places an affirmative duty on the signer to conduct a prefiling inquiry into both the facts and the law. The inquiry is to be measured against a standard of "reasonableness under the circumstances," an objective stan-

---

44 Wright, supra note 41, at 175.
46 Id. See Schwarz, supra note 3, at 185-86 for a discussion of the certification responsibilities of co-counsel and forwarding counsel.
47 Zaldivar v. City of Los Angeles, 780 F.2d 823, 830 (9th Cir. 1986) (stating that "[t]he certificate 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"); Nelken, supra note 7, at 1320 & n.51.
48 Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 253 (2d Cir. 1985), cert. denied, 108 S. Ct. 269 (1987) (stating that "new Rule 11 explicitly and unambiguously imposes an affirmative duty on each attorney to conduct a reasonable inquiry into the viability of a pleading before it is signed"); Fed. R. Civ P 11 advisory committee's note; Wright, supra note 41, at § 1333.
49 Fed. R. Civ. P 11 advisory committee's note; Schwarz, supra note 3, at 194: What is reasonable depends on the circumstances. For example, an attorney holding himself out as an expert in the field can be expected to be better versed in the controlling law than a general practitioner; a firm with substantial research facilities, including access to Lexis or Westlaw, can be expected to discover authorities that may be overlooked by less well-endowed lawyers.
dard as interpreted by the courts. With this lower threshold, attorney conduct should be violative of the rule more often than with the subjective standard of former Rule 11.

When determining whether an attorney has conducted a reasonable prefiling inquiry, the Advisory Committee cautions courts against using the "wisdom of hindsight." Obviously, the attorney's knowledge of the facts and the law should not be viewed in light of information revealed during the discovery or the trial process. Rather, the standard of "reasonableness under the circumstances" applies to facts and law which the attorney should have reasonably believed when the paper was filed. In

---

50 E.g., Cabell v. Petty, 810 F.2d 463, 466 (4th Cir. 1987) ("[T]he court must first examine the actions at issue according to a standard of objective reasonableness."); Albright v. Upjohn Co., 788 F.2d 1217, 1222 n.1 (6th Cir. 1986) (Guy, J., dissenting) ("The parties and the court are in agreement that the standard used in evaluating an alleged Rule 11 violation is an objective one."); Zaldivar, 780 F.2d at 829 ("The new text represents an intentional abandonment of the subjective focus of the Rule in favor of an objective one."); Rodgers v. Lincoln Towing Serv., Inc., 771 F.2d 194, 205 (7th Cir. 1985) ("The standard used is an objective one of reasonableness under the circumstances."); Westmoreland v. CBS, Inc., 770 F.2d 1168, 1177 (D.C. Cir. 1985) ("Unlike the pre-1983 amendment Rule 11, which required a showing of subjective bad faith, Rule 11 now incorporates, an objective test."); Eastway Constr. Corp., 762 F.2d at 253-54 ("[W]e hold that a showing of subjective bad faith is no longer required to trigger the sanctions imposed by the rule.").


William O. Bertelsman, U.S. District Judge for the Eastern District of Kentucky, made the following observation:

No more unfounded motions for summary judgment or responses thereto. No more suing a battery of defendants when a reasonable investigation would show some of them are not liable. No more denial of a debt due in a collection action just to buy your client some time. No more shotgunning the complaint with a couple of glamorous but spurious claims to add some pizazz to the more mundane but valid ones. And perhaps most importantly, no more getting off the hook by relying on the natural reluctance of the trial judge to sock you with sanctions.

Bertelsman, Rule 11 Rears Its Ugly Head, Ky. Bench and Bar, Summer 1986, 21, 21, 50.

52 When referring to certification requirements, use of the word "attorney" in this Note is intended to include pro se parties.


54 Fed. R. Civ P 11 advisory committee's note; Schwarzer, supra note 3, at 197 ("To avoid the risk, or the appearance of relying on hindsight, the decision on sanctions is best made as promptly as possible after the violation is disclosed.").

55 Fed. R. Civ P 11 advisory committee's note. In Albright, the Sixth Circuit
determining "reasonableness" the court may consider the time available for inquiry, the sources of factual information, and the plausibility of the legal arguments set forth in the paper.\textsuperscript{56} Because courts are allowed to relax the standard under extenuating circumstances, arguably the rule's effect will not be so harsh as to "chill an attorney's enthusiasm or creativity in pursuing factual or legal theories."\textsuperscript{57}

The rule also requires that an argument for the "extension, modification, or reversal" of the law be made in good faith.\textsuperscript{58} This part of the rule retains the subjective language of former Rule 11. Nevertheless, knowledge of existing law is necessary to make a good faith argument for its change.\textsuperscript{59} Some courts have held that the "good faith" language requires an objective analysis rather than a subjective one.\textsuperscript{60}

---

held that the plaintiff had failed to conduct a reasonable prefiling inquiry into the facts. Her suit against nine pharmaceutical manufacturers alleged that the defendants had manufactured and distributed tetracycline-based drugs which caused the discoloration of her teeth. Discovery revealed that only three of the defendants should have been sued by the plaintiff. The Sixth Circuit reversed the district court's denial of Rule 11 sanctions. \textit{Albright}, 788 F.2d at 1218-19, 1221.

\textsuperscript{56} Fed. R. Civ P 11 advisory committee's note; see \textit{Albright}, 788 F.2d at 1220-21. The \textit{Albright} court rejected the plaintiff's argument that a reasonable inquiry was conducted due to the following circumstances: her attorneys filed eight separate suits against tetracycline manufacturers on the same day; medical records were old and difficult to read; certain medical records could not be found; and, the defendant had been named in similar suits.

\textsuperscript{57} Fed. R. Civ P 11 advisory committee's note; see infra notes 169-76 and accompanying text.

\textsuperscript{58} Fed. R. Civ P 11.

\textsuperscript{59} Zaldivar, 780 F.2d at 831 (stating that "[a] good faith belief in the merit of a legal argument is an objective condition which a competent attorney attains only after 'reasonable inquiry' ").

\textsuperscript{60} Id., see \textit{Eastway Constr. Corp.}, 762 F.2d at 254 (the rule is violated if "after reasonable inquiry, a competent attorney could not form a reasonable belief that the pleading is a good faith argument for the extension, modification or reversal of existing law").

William Schwarzer, U.S. District Judge for the Northern District of California, made the following statement regarding arguments for extending the law:

Subject then to the obligation to disclose the controlling authorities he can reasonably be expected to have discovered, counsel is free to make an argument at odds with existing law. He can argue by analogy or extension from existing law. He can predict what he believes a court would or should hold on an issue not heretofore decided. He can urge that existing law should lead to a result in the particular case even if that issue
Predicting how courts will apply the rule’s objective standard to the actual facts in a case is difficult. A review of the case law, however, reveals that courts hold the first prong of the rule to require: that an attorney have a reasonable basis for believing he has a case against each defendant named in the complaint; that in class action suits, the same plaintiff’s claims be typical of the class and protective of the class’ interests; that an attorney recognize and deal with the established law and not present arguments devoid of any “colorable legal basis”; that an attorney know the law regarding federal subject matter jurisdiction; and that an attorney have knowledge of well-established res judicata principles.

Along with the above specific holdings, courts have provided some general guidelines regarding Rule 11’s required prefiling inquiry. In *Golden Eagle Distributing Corp. v Burroughs Corp.*, Judge Noonan of the Ninth Circuit Court of Appeals contended that “[a]n argument in the teeth of uncited and undistinguished contrary authority is not warranted by existing law. An argument that does not mention directly contrary authority is not a good faith argument for its modification or reversal.” Judge Kaufman of the Second Circuit Court of Appeals in *Eastway Construction Corp. v City of New York* stated that “where it is patently clear that a claim has absolutely no chance of success under the existing precedents, and where no reasonable argument has not heretofore been decided.

Schwarzer, *supra* note 3, at 194; see *infra* notes 193-204, 209-10 and accompanying text for the limitations Judge Schwarzer places on arguments for changing the law.

* Albright, 788 F.2d at 1221; see Underwood, Legal Ethics and Class Actions: Problems, Tactics and Judicial Responses, 71 Ky. L.J. 787, 819 (1982-83) (“[N]ew sanctions provided in the rule will deter counsel from filing frivolous claims against multiple defendants, ‘dragnet-style.’”).

* Albright, Inc. v. E. F Hutton & Co., 809 F.2d 548, 558 (9th Cir. 1986), cert. denied, 108 S. Ct. 83 (1987); see *infra* notes 141-54 and accompanying text for a discussion of the *Albright* holding.

* Rodgers, 771 F.2d at 206.

* Orange Prod. Credit v. Frontline Ventures Ltd., 792 F.2d 797, 801 (9th Cir. 1986).

* Cannon v. Loyola Univ. of Chicago, 784 F.2d 777, 782 (7th Cir. 1986), cert. denied, 107 S. Ct. 880 (1987).

* 809 F.2d 584 (9th Cir. 1987) (Noonan, J., dissenting from the denial of a sua sponte request for en banc hearing).

* Id. at 586; see *infra* notes 209-10 and accompanying text.

can be advanced to extend, modify or reverse the law as it stands, Rule 11 has been violated.\textsuperscript{76} In addition, the court in \textit{Zaldivar v City of Los Angeles}\textsuperscript{70} held that sanctions must be imposed "if the paper is frivolous, legally unreasonable, or without factual foundation."\textsuperscript{71}

Even though the requirement of a reasonable prefiling inquiry applies to both attorneys and unrepresented parties, courts retain discretion not to hold pro se parties to the higher objective standard.\textsuperscript{72} The Advisory Committee notes to Rule 11 provide that the court may "take account of the special circumstances that often arise in pro se situations."\textsuperscript{73}

\textbf{C. The Second Prong: Improper Purpose}

Rule 11's second prong requires that the pleading, motion, or other paper must not be filed "for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."\textsuperscript{74} The only improper purpose violating former Rule 11 was intent to cause delay in the litigation process.\textsuperscript{75} The drafters of the amended rule recognized that attorneys abuse the judicial system for reasons other than delay.\textsuperscript{76} Thus, a finding of \textit{any} improper purpose will violate the amended rule.\textsuperscript{77}

\textsuperscript{76} \textit{Id.} at 254.
\textsuperscript{70} 780 F.2d 823 (9th Cir. 1986).
\textsuperscript{71} \textit{Id.} at 831.
\textsuperscript{72} \textit{Fed. R. Civ P} 11 advisory committee's note; see Miller, \textit{supra} note 15, at 27: Since a higher standard of conduct can be demanded from an attorney than from a lay client, the type of behavior required to trigger sanctions need not be as culpable as that which warrants dismissal. At least the court now has the discretion to punish the individual at fault. Not only does this conform more closely to our notions of fairness, but it is more likely to have a deterrent effect on future abuse.
\textsuperscript{73} \textit{Fed. R. Civ P} 11 advisory committee's note.
\textsuperscript{74} \textit{Fed. R. Civ P} 11.
\textsuperscript{75} \textit{Id.}
\textsuperscript{76} \textit{Fed. R. Civ P} 11 advisory committee's note; see Schwarzter, \textit{supra} note 3, at 196 ("Improper purpose may be manifested by excessive persistence in pursuing a claim or defense in the face of repeated adverse rulings, or by obdurate resistance out of proportion to the amounts or issues at stake.").
"Improper purpose" implies that courts should inquire into an attorney's subjective motivations. Some courts, however, apply an objective standard due to the ambiguity of the language and policies underlying the amendments. They infer from the record and circumstances whether a legitimate purpose exists.

An objective standard was used to determine an "improper purpose" in *Davis v Veslan Enterprises*. In a state court action, the plaintiff Davis sued two in-state defendants, Veslan and Collins, for the negligent operation of a tractor-trailer allegedly causing the death of Davis' son. Davis subsequently added two out-of-state defendants, Mack Trucks, Inc. and Wagner, the manufacturer of the brake system in the tractor-trailer. The jury awarded Davis $1 million in compensatory damages and $12 million in punitive damages. On the date set for hearing Davis' motion for judgment on the verdict, Wagner filed a petition to remove the case to federal court. The state court judgment could not be entered until the case was remanded. The Fifth Circuit held that because Wagner would benefit in substantial interest savings by delaying entry of the judgment, an improper purpose could be inferred.

---

78 See Nelken, supra note 7, at 1320 & n.51 (commenting that the improper purpose clause retains the subjective standard of former Rule 11). But see Schwarzer, supra note 3, at 195 ("In considering whether a paper was interposed for an improper purpose, the court need not delve into the attorney's subjective intent.").

79 E.g., *Golden Eagle Distrib. Corp.*, 801 F.2d at 1538; *Zaldivar*, 780 F.2d at 831; *McLaughlin*, 603 F. Supp. at 982.

80 *McLaughlin*, 603 F. Supp. at 982 ("The filing of this removal petition was not an oversight caused by inexperience. The Court finds that some improper motive was present"); see Huettig & Schromm, Inc. v. Landscape Contractors Council, 582 F. Supp. 1519, 1522 (N.D. Cal. 1984) ("Given the claimed expertise and experience of these attorneys, a strong inferences arises that their bringing of an action such as this was for an improper purpose."); Schwarzer, supra note 3, at 195:

The record in the case and all of the surrounding circumstances should afford an adequate basis for determining whether particular papers for proceedings caused delay that was unnecessary, whether they caused increase in the cost of litigation that was needless, or whether they lacked any apparent legitimate purpose. Findings on these points would suffice to support an inference of an improper purpose.

81 765 F.2d 494 (5th Cir. 1985).

82 Id. at 495.

83 Id. at 496.

84 Id.

85 Id.

86 Id. at 500.
D. Violations

An obvious question facing courts is whether both prongs of amended Rule 11 must be violated before sanctions are imposed. The "reasonable inquiry" language and the "improper purpose" language are connected by the word "and," suggesting an independent analysis of conduct under each prong. Nevertheless, the court in In re Ronco, Inc., addressing the issue squarely, concluded that the absence of an improper purpose "does not insulate from sanctions the lawyer who fails the alternative objective standard."87

Similarly, in Eastway Construction Corp. v City of New York, the Second Circuit interpreted amended Rule 11's standard to be whether the "pleading has been interposed for any improper purpose, or where, after reasonable inquiry, a competent attorney could not form a reasonable belief that the pleading is well grounded in fact and law."91 Although the court found no evidence that the suit was brought for an improper purpose, sanctions were imposed based on the attorney's failure to conduct a reasonable prefiling inquiry.

The Ninth Circuit in Zaldivar v City of Los Angeles raised the issue of a two-prong violation requirement but reached a limited holding: if a paper satisfies the rule's prefiling inquiry into the facts and law, it is not sanctionable as harassment. Unlike the Zaldivar court, many courts do not address the "improper purpose" question until they have determined that the paper fails under the first prong of the rule.96

87 Zaldivar, 780 F.2d at 832.
89 Id. at 498 (emphasis in original). The court observed, however, that evidence of an improper purpose "could well be an aggravating factor." Id.
90 762 F.2d at 243.
91 Id. at 254 (emphasis in original).
92 Id.
93 Id. Contra McLaughlin, 603 F Supp. at 982 (stating that "if an attorney fails out of negligence to discharge the first burden, improper motive must still be proven").
94 780 F.2d at 823.
95 Id. at 832; see Schwarzer, supra note 3, at 196 ("If a reasonably clear legal justification can be shown for the filing of the paper in question, no improper purpose can be found and sanctions are inappropriate.").
96 See, e.g., Huettig & Schromm, Inc., 790 F.2d at 1427; Davis, 765 F.2d at 500; Chevron, U.S.A., Inc., 763 F.2d at 1185, 1187; McLaughlin, 603 F Supp. at 982.
III. Rule 11's Deterrent Policy

A major reason for former Rule 11's ineffectiveness was its failure to deter abuses of the judicial system. This failure was primarily due to the reluctance of courts to sanction attorneys. To encourage the deterrence policy underlying the new rule, the drafters of the amendments removed the court's discretion regarding attorney discipline by mandating sanctions for rule violations.

A. Mandatory Sanctions

Amended Rule 11 provides for sanctions as follows:

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 reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

The most significant part of the sanction provision is the mandatory language “shall impose.” This directive requires

---

97 Fed. R. Civ P 11 advisory committee's note.
98 Id., supra notes 37-38 and accompanying text.
99 Fed. R. Civ P 11 advisory committee's note ("Greater attention by the district courts 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."); Schwarzer, supra note 3, at 185 (Judge Schwarzer believes the rule "is aimed at deterring and, if necessary, punishing improper conduct rather than merely compensating the prevailing party."); Eastway Constr. Corp. v. City of New York, 637 F Supp. 558, 564 (E.D.N.Y. 1986), cert. denied, 108 S. Ct. 269 (1987). But see Nelken, supra note 7, at 1323 ("Although denominated a sanction provision, in reality it is more appropriately characterized as a cost-shifting technique.").

100 "The word 'sanctions' in the caption, for example, stresses a deterrent orientation in dealing with improper pleadings, motions or other papers." Fed. R. Civ P 11 advisory committee's note.
102 Id.
103 Id.
104 Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 254 n.7 (2d Cir. 1985), cert. denied, 108 S. Ct. 269 (1987) ("Unlike the statutory provisions that vest the district court with 'discretion' to award fees, Rule 11 is clearly phrased as a directive.").
the court to sanction the violator once it determines a violation has occurred. The rule’s language thus focuses the court’s attention on punishing pleading and motion abuses.105

Other parts of the sanction provision work with the mandatory language to accomplish the deterrent effect desired by the amendment drafters.106 First, in addition to a party’s motion for sanctions, the court itself may initiate the sanction process.107 Second, sanctions may apply to a pro se party, an attorney, his client, or both an attorney and his client.108 Third, the rule’s example of appropriate sanctions—reasonable expenses and attorney’s fees—provides courts with some guidance in punishing violators.109

In addition to the actual language of amended Rule 11, the Advisory Committee’s note emphasizes the court’s role in deterring judicial system abuses. As expressed by the Committee: “[t]he detection and punishment of a violation of the signing requirement is part of the court’s responsibility for securing the system’s effective operation.”110

B. The Court’s Discretionary Power

Under Rule 11’s sanction provision, the court retains discretion to determine the appropriate sanctions for the violation in question,111 as well as who should be sanctioned: the attorney,
the client, the attorney and the client, or the pro se party. As stated by the Advisory Committee, courts may "tailor sanctions to the particular facts of the case." Interestingly, the Committee suggests that courts consider the subjective intent of the violator:

The reference in the former text to wilfulness as a prerequisite to disciplinary action has been deleted. However, 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.

Thus, to further the deterrent policy of the amendments, an attorney who deliberately abuses the system should be subjected to more severe sanctions than one who violates the rule due to lack of experience or ability.

William W. Schwarzer, United States District Judge for the Northern District of California, considered an authority on Rule 11, follows the above approach. He believes that the same standard of conduct should not apply to all attorneys, and that when tailoring sanctions courts should be free to consider factors such as the attorney's reputation, prior misconduct, experience, competence and intent.

---

112 Fed. R. Civ. P. 11 advisory committee's note; see Miller, supra note 15, at 27 (Rule 11 is enforced by imposing sanctions against either the party or the lawyer).


114 Id.

115 Id.


117 Id., Schwarzer, supra note 3, at 201-02.

118 Schwarzer, supra note 3, at 201-02.

119 Id. at 201.

120 Id.
Landscape Contractors Council opinion serves as an illustration. Judge Schwarzer stated that the attorneys bringing the labor-related lawsuit "knew or should have known that their client had neither a cause of action nor any claim to invoke this court's jurisdiction." Because of their experience and expertise in labor law, Judge Schwarzer held that "a strong inference arises that their bringing of an action such as this was for an improper purpose." He then sanctioned the attorneys in the amount of $5,625.00, which represented the amount of the opposing counsel's fees. He further directed that the client pay no part of the sanctions and that the court's opinion be circulated within the sanctioned attorneys' firm.

C. Selecting Appropriate Sanctions

Courts are not limited to imposing reasonable attorney's fees as the sanction for Rule 11 violations. Other alternatives exist which may be more appropriate for the conduct in question. Because the rule's goal is to punish and to deter abuses of the judicial system, not simply to shift costs, courts must penalize violators in a manner which furthers deterrence. However, to deter only abuse, not creative use of the system, courts should impose the "least severe" sanctions necessary to effect a punishment.

Judge Schwarzer's variable standard of conduct is useful in determining which sanctions are appropriate. A bench repri-
mand or an order of reprimand circulated within the sanctioned attorney's firm may suffice as punishment for inexperienced attorneys or first-time violators. On the other hand, for attorneys repeatedly or intentionally violating the rule, the only effective sanction may be referring the matter to the state bar association for disciplinary action or barring the attorney from court for a period of time. Courts must keep in mind, however, that severe sanctions such as these must comply with due process requirements, including a full hearing prior to the imposition of the sanctions.

Reasonable attorney's fees may be the appropriate sanction for conduct lying between the above two extremes. Courts must ensure that the fees are both "reasonable" and limited to those actually generated by the misconduct. Therefore, any request for attorney's fees should be accompanied by an hourly breakdown showing the time spent resisting the offending claim or motion. Because courts have interpreted the rule to impose a duty to mitigate damages, fees representing a vigorous defense to a frivolous claim should be closely scrutinized and probably reduced.

D Sanction Power in Action

In Unioil, Inc. v E. F Hutton & Co., the court upheld Rule 11 sanctions involving a sizeable amount of attorneys' fees. The plaintiffs had filed a class action suit against the defendants for allegedly scheming "to sell Unioil stock short

---

132 Schwarzer, supra note 3, at 201-02.
133 Id. at 204.
134 FED. R. CIV. P 11 advisory committee's note.
135 Schwarzer, supra note 3, at 204.
136 Due process considerations also come into play when attorney's fees are imposed as a sanction. See Schwarzer, supra note 3, at 202 ("[C]ourts need to be wary about imposing fines under the rule. The criminal character of a fine brings into play additional due process safeguards.").
137 Id. at 202-03.
138 In re Yagman, 796 F.2d at 1185.
139 Id., see Schwarzer, supra note 3, at 202.
140 In re Yagman, 796 F.2d at 1185.
141 809 F.2d 548 (9th Cir. 1986), cert. denied, 108 S. Ct. 83 (1987).
142 Id.
143 The defendants named were professional investment companies and individuals.
Id. at 552.
in violation of federal antitrust and securities laws." The plaintiffs were Unioil, Unioil's chairman of the board, the Heck companies which owned large amounts of Unioil stock, and Zelezny, a stockbroker who owned Unioil stock. Zelezny was the only plaintiff not connected with Unioil management. The plaintiffs were represented by Alioto and co-counsel Barton. Alioto never personally determined whether Zelezny was a suitable representative for the class of Unioil stockholders. Zelezny's deposition testimony revealed that he was not a suitable representative.

The complaint alleged that Unioil stockholders sold stock at a loss due to the defendants' misrepresentations; Zelezny testified that he did not sell Unioil stock but purchased stock believing the price would go up. The complaint alleged that the plaintiffs sold Unioil stock at "artificially depressed prices" for a three-month period; Zelezny testified that the prices were fair during that period. The complaint alleged that the plaintiffs bought and sold stock in reliance on the defendants' misrepresentations; Zelezny testified his stock transactions were not made in reliance on the defendants' statements.

Shortly after the deposition, the plaintiffs requested a voluntary dismissal, without prejudice, of the class action. The court conditioned the dismissal on the requirement that the plaintiffs and/or their attorneys pay the defendants' expenses and attorneys' fees in an amount of $165,774.84. The court also imposed Rule 11 sanctions against Alioto. Among other things, the court found that he had not conducted a reasonable inquiry into the facts to ensure Zelezny's claims were typical of the class or to ensure there was no conflict of interest in representing both Unioil and its stockholders. Alioto was directed

---

144 Id.
145 Id.
146 Id.
147 Id. at 552-53.
148 Id.
149 Because the suit was a class action, the plaintiffs moved for dismissal under Fed. R. Civ. P 23(e) and 41(a)(1). The plaintiffs then requested the court to approve the dismissal without prejudice under Fed. R. Civ. P 41(a)(2). Id. at 553.
150 Id. at 554.
151 Id. at 558.
to pay defendants $294,140.10 in attorneys’ fees within thirty days. That amount would be reduced by any payments made by the plaintiffs or their attorneys within the thirty-day period pursuant to the conditioned dismissal.152

The Ninth Circuit upheld the Rule 11 sanction award on the following basis: Alioto’s firm claimed to be experienced in business matters; Alioto was under no time constraints and therefore could have made a more thorough prefiling inquiry; and, the lawsuit “threatened defendants with massive liability and foreseeably aroused a vigorous and costly defense.”153 The court further held that although a sanction in the amount of $294,141 was substantial, it was not “patently unreasonable.”154

The Ninth Circuit had reached a different conclusion in the earlier In Re Yagman decision.155 In a defamation action lasting two years, the district court granted a directed verdict in favor of the defendants and sanctioned the plaintiffs’ attorney in the amount of $250,000156 based on violations of Rule 11 and 28 United States Code section 1927 157 The Ninth Circuit upheld the directed verdict158 but reversed the order of sanctions.159

The appellate court found, first of all, that the sanctions were based upon “an accumulation of all perceived misconduct from filing through trial, [resulting in] a single postjudgment retribution in the form of a massive sanction award.”160 Rejecting this manner of imposing sanctions, the court stated that the deterrence policy of Rule 11 would be better served by imposing sanctions promptly when a violation occurs.161 The court also

---

152 Id. at 559.
153 Id. at 557.
154 Id. at 559. The court was sensitive to the amount of potential liability the defendants faced.
156 Id. at 1182. The defendants’ actual attorney’s fees amounted to $293,000; however, they requested sanctions in the reduced amount of $250,000. Id.
157 The district court also found the plaintiff in violation of local rule 27.1. Id.
158 Id. at 1176.
159 Id. at 1188.
160 Id. at 1183.
161 Id. The court stated that “[a] proper sanction assessed at the time of a transgression will ordinarily have some measure of deterrent effect on subsequent abuses and resultant sanctions.” Id.
noted that judges could lessen the amount of sanctions by not allowing abuses to continue until the end of the case.\textsuperscript{162}

Secondly, the court rejected the sanction order because the district court failed to assess the reasonableness of the attorneys’ fees claimed by the defendant.\textsuperscript{163} The district court should have required the defense attorneys to “itemize and quantify” the time spent resisting the sanctionable actions and should have considered the defendants’ failure to mitigate damages in an action they claimed was “frivolous from the start.”\textsuperscript{164} Moreover, the district court should not have overlooked Yagman’s ability to pay a $250,000 penalty\textsuperscript{165}

In addition to rejecting the manner in which the sanctions were imposed, the Ninth Circuit also rejected the district court’s finding that Rule 11 had been violated.\textsuperscript{166} Speaking for the court, Judge Andersen stated that judges must be certain the alleged misconduct indeed violates the rule and that the awarded sanctions are just and imposed in a manner furthering the purposes of the rule.\textsuperscript{167} Otherwise, the “balance between sanctioning improper behavior and chilling vigorous advocacy” will be threatened.\textsuperscript{168}

\section*{IV Rule 11’s Effect on Creative Advocacy}

The purpose of Rule 11 is to encourage “litigants to stop, think and investigate” their claims before filing them.\textsuperscript{169} The rule’s requirements, however, may cause attorneys to “think, double-think, and triple-think themselves into paralysis.”\textsuperscript{170} The

\begin{itemize}
\item \textsuperscript{162} \textit{Id.} Ironically, the court remarked: “It appears the efficiency achieved by levying two years’ worth of sanctions in one post-trial lump has been paid for in wasted judicial resources and money.” \textit{Id.}
\item \textsuperscript{163} \textit{Id.} at 1185.
\item \textsuperscript{164} \textit{Id.} “To allow punishment, however, to take the form of such a generic, all-encompassing, massive, post-trial retribution, with no indication whatsoever of reasonableness, would send shivers through the bar.” \textit{Id.}
\item \textsuperscript{165} \textit{Id.}
\item \textsuperscript{166} \textit{Id.} The Ninth Circuit applied the subjective good faith standard of former Rule 11 to the case because the 1983 amendments had not been enacted when Yagman filed the complaint. \textit{Id.}
\item \textsuperscript{167} \textit{Id.} at 1183.
\item \textsuperscript{168} \textit{Id.}
\item \textsuperscript{169} \textit{Report of the Judicial Conference Committee, supra note 2, at 192.}
\item \textsuperscript{170} Miller, \textit{supra} note 15, at 32.
\end{itemize}
Advisory Committee recognized this potential "chilling" effect on creative advocacy and suggested that in applying the rule courts consider whether a claim is based on a "plausible view of the law".\textsuperscript{171}

\textbf{A. The "Plausible" Standard}

"Plausible" may be defined as "superficially worthy of belief."\textsuperscript{172} This definition indicates that a subjective determination is made when applying the term to a particular position or argument. Therefore, it is not surprising that courts differ as to whether a certain legal argument satisfies this standard.\textsuperscript{173} As expressed by one commentator, "[j]udges sanctioning legal arguments assume that a bright line divides legal theories that are warranted from those that should be sanctioned. But the line is not so clear. One lawyer's novel extension of the law is another's unwarranted abuse of the judicial system."\textsuperscript{174}

In dealing with an imprecise standard, attorneys cannot predict which legal theories may win and which may fail.\textsuperscript{175} Inevitably, such indefiniteness will cause attorneys to avoid filing novel claims altogether, especially if their arguments are based on innovative theories for modifying current law.\textsuperscript{176}

\textbf{B. Interpretations of the Standard}

The \textit{Zaldivar v City of Los Angeles}\textsuperscript{177} decision illustrates how courts can differ regarding the plausibility standard. The plaintiffs alleged that a recall election violated the federal Voting Rights Act.\textsuperscript{178} The Act required that in jurisdictions subject to

\begin{footnotes}{\footnotesize
\item[171] FED. R. CIV. P 11 advisory committee's note.
\item[172] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1981).
\item[173] See Note, supra note 7, at 640-41 for a discussion of cases differing on the standard. Courts have equated the "plausible" standard to a "frivolous" standard.
\item[175] Note, supra note 7, at 639.
\item[176] Id. "Conflicting notions of plausibility, as much as overly narrow ones, have a chilling effect on litigation, leading prudent lawyers to steer wide of even potential implausibility by avoiding filing nonstandard claims." Id. \textit{But see} Miller, supra note 15, at 32-33 ("[T]hose who choose to become lawyers—especially litigators—are not likely to lose their advocate's instinct or zeal out of fear of sanctions.").
\item[177] 780 F.2d 823 (9th Cir. 1986).
\item[178] Id. at 826; 42 U.S.C. §§ 1973(b)(f), 1973(c)(1) (1982).
\end{footnotes}
its bilingual provisions, any materials relating to the electoral process must be published in both the English language and the language of the minority group. The defendants initially failed to follow these bilingual requirements.\footnote{Zaldivar, 780 F.2d at 826.} The district court stated that a "cursory reading of [the Voting Rights Act] would indicate to a reasonable person that there was no basis for bringing this lawsuit."\footnote{Id. at 832.} It found the plaintiffs' argument to be "totally frivolous"\footnote{Id. at 827.} because the Act applied only to state entities publishing recall notices, not to private individuals as in the case at hand. The district court further reasoned that the recall notice "was not information relating to the electoral process."\footnote{Id. at 833.} The Ninth Circuit reversed, finding the plaintiffs' contrary arguments to be plausible.\footnote{Id.}

Another case bringing the plausibility standard into issue is  
\textit{Stevens v Lawyer's Mutual Liability Insurance Co.}\footnote{789 F.2d 1056 (4th Cir. 1986).} Stevens sued attorney Nimocks and the partnership of Nimocks and Taylor for malpractice in relation to Stevens' criminal trial held in November of 1977.\footnote{Id. at 1057-58.} During the pendency of the malpractice suit, Nimocks was declared bankrupt and dismissed from the case. Taylor, who was not sued individually, joined another partnership.\footnote{Id. at 1058.} The new partnership's insurance carrier, Lawyer's Mutual, provided liability coverage on all partners for any claims arising after April 1, 1977.\footnote{Id.}

When Stevens sought a declaratory judgment that Lawyer's Mutual would be liable for any judgment entered against Taylor in the malpractice suit, Lawyer's Mutual responded with a motion to dismiss and a motion for Rule 11 sanctions.\footnote{Id.} The court dismissed the complaint because Stevens never alleged that Lawyer's Mutual insured Nimocks or the Nimocks and Taylor part-
In his motions for reconsideration, Stevens directed the court’s attention to a North Carolina statute making “[a]ll partners jointly and severally liable for the acts of the partnership.” The court, nevertheless, found Stevens’ arguments to be frivolous because Lawyer’s Mutual had no obligation to insure the defendant named in the underlying suit. Rule 11 sanctions were imposed. The Fourth Circuit reversed the sanctions, holding that the action for declaratory relief “had a reasonable basis in fact and law and was not objectively frivolous.”

C. The Golden Eagle Case

In *Golden Eagle Distributing Corp. v Burroughs Corp.*, Judge Schwarzer introduced two additional requirements for meeting the plausibility standard: argument identification and citation to contrary authority. Judge Schwarzer found that the defense attorneys’ firm, Kirkland & Ellis, had presented arguments “supportable, both legally and factually.” Because the arguments were not identified properly, however, they were in violation of Rule 11. More precisely, he stated that Kirkland & Ellis should have identified its arguments as being for the “extension, modification, or reversal of existing law,” not as being “warranted by existing law.” Such failure to identify the proper argument was an attempt to mislead the court.

The facts of the case reveal that Golden Eagle Distributing Corporation sued Burroughs in Minnesota state court for the negligent manufacture of a computer system. Burroughs removed the case to Minnesota federal district court and then successfully moved the court for a change of venue to the

---

189 Id.
191 The sanction imposed against the plaintiff’s attorney was a reprimand printed in a published opinion. The court also found the plaintiff’s attorney filed the second motion for reconsideration for an improper purpose. *Stevens*, 789 F.2d at 1059.
192 Id. at 1060.
193 103 F.R.D. 124 (N.D. Cal. 1984), rev’d, 801 F.2d 1531 (9th Cir. 1986).
194 *Golden Eagle Distrib. Corp.*, 801 F.2d at 1534.
195 Id.
197 *Golden Eagle Distrib. Corp.*, 801 F.2d at 1534.
In a motion for summary judgment, Kirkland & Ellis contended that California, not Minnesota, law applied and that under California law the plaintiff’s claim was time-barred. In support of its argument, Kirkland & Ellis relied on Van Dusen v Barrack, claiming that because Minnesota would have dismissed the suit on the basis of forum non conveniens, California law had to apply. They further asserted that “[t]his case falls squarely within the forum non conveniens exception noted by the Court in Van Dusen.”

The district court found the defendant’s argument to be misleading in two respects. First, Van Dusen had not carved out a forum non conveniens exception to the general rule that the transferring court’s law applies; the case merely raised the question without resolving it. Second, Kirkland & Ellis failed to mention that the Minnesota court could not have dismissed the case based on forum non conveniens unless there was an available alternative forum.

After Kirkland & Ellis presented its argument again in a brief opposing the Rule 11 sanctions, Judge Schwarzer recognized that the arguments satisfied the rule’s requirements, being a “good faith argument for the extension of existing law.” However, because the defendant’s original argument in support of the summary judgment motion had been presented as “warranted by existing law,” the court imposed sanctions. Judge Schwarzer “looked not to the merits of the position originally taken by the plaintiff, but to the manner in which the position was advocated.”

On appeal, the Ninth Circuit rejected the argument identification requirement, stating:

It is not always easy to decide whether an argument is based on established law or is an argument for the extension of existing law. Whether the case being litigated is or is not

---

198 Id.
201 Id. at 1535.
202 Id., FED. R. CIV. P 11.
203 Golden Eagle Distrib. Corp., 801 F.2d at 1534.
204 Id. at 1535.
materially the same as earlier precedent is frequently the very issue which prompted the litigation in the first place. Such questions can be close.\textsuperscript{205}

The court expressed concern over the chilling effect an argument identification requirement could have on the enthusiastic advocate.\textsuperscript{206} With such a requirement, an attorney may be found in violation of Rule 11 whenever he loses an argument which he claims is supported by established law. Courts rarely find a losing argument warranted by current law.\textsuperscript{207} Faced with potential sanctions, an attorney may choose to play it safe by not pursuing creative and novel legal theories.

In rejecting the argument identification requirement, the court also rejected the idea that one unsupportable argument within a pleading or motion is violative of Rule 11. The court stated that "[t]he Rule permits the imposition of sanctions only when the 'pleading, motion or other paper' itself is frivolous, not when one of the arguments in support of a pleading or motion is frivolous."\textsuperscript{208}

As an additional requirement for satisfying the plausibility standard, the district court held that Kirkland & Ellis should have cited authorities contrary to the case upon which it relied.\textsuperscript{209} Judge Schwarzer specifically found that Rule 3.3 of the Model Rules of Professional Conduct, which imposes a duty on attorneys to cite adverse authority, is a "necessary corollary to Rule 11."\textsuperscript{210}

\begin{itemize}
\item \footnotesize{\textsuperscript{205} Id. at 1540.}
\item \footnotesize{\textsuperscript{206} Id. The court noted that the requirement would "create a conflict between the lawyer's duty zealously to represent his client and the lawyer's own interest in avoiding rebuke. The concern on the part of the bar that this type of requirement will chill advocacy is understandable." Id.}
\item \footnotesize{\textsuperscript{207} Id.}
\item \footnotesize{\textsuperscript{208} Id.}
\item \footnotesize{\textsuperscript{209} Id. at 1535.}
\item \footnotesize{\textsuperscript{210} Id. at 1535-36.}
\end{itemize}

Rule 3.3 provides in pertinent part:

(a) A lawyer shall not knowingly:

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.

The Ninth Circuit clearly rejected this requirement, recognizing that "mandatory sanctions would ride on close decisions concerning whether or not one case is or is not the same as another."\textsuperscript{211} Not only would the attorney's burden of research be greatly increased, but the court would be evaluating arguments under both the Rule 11 standards and ethical standards.\textsuperscript{212} As expressed by the court,

\begin{quote}
neither Rule 11 nor any other rule imposes a requirement that the lawyer, in addition to advocating the cause of his client, step first into the shoes of opposing counsel to find all potentially contrary authority, and finally into the robes of the judge to decide whether the authority is indeed contrary or whether it is distinguishable.\textsuperscript{213}
\end{quote}

According to the Ninth Circuit, following the district court's approach would lead to an undesirable result—"blur[ring] the roles of judge and advocate."\textsuperscript{214}

The case did not end with the Ninth Circuit's reversal. The plaintiffs requested a hearing en banc, which was denied. Five judges dissented from the denial, however, and reported their opinion supporting Judge Schwarzer's holding.\textsuperscript{215}

Judge Noonan, writing for the dissenters, found that Kirkland & Ellis did more than fail to properly identify its argument—"[i]t simply misrepresented the law"\textsuperscript{216} Accordingly, the actions of Kirkland & Ellis were for an improper purpose—misleading the court—and were sanctionable under Rule 11. In addition, the dissenters supported the combination of ethical standards with Rule 11 standards. They observed that Rule 11's

\begin{footnotesize}
\textsuperscript{211} Golden Eagle Distrib. Corp., 801 F.2d at 1542.
\textsuperscript{212} Id.
\textsuperscript{213} Id.
\textsuperscript{214} Id. The court made the following observation:
The role of judges is not merely to "match the colors of the case at hand against the colors of many sample cases spread out upon their desk. It is when the colors do not match, when the references in the index fail, when there is no decisive precedent that the serious business of the judge begins."
\textsuperscript{216} Id. at 586.
\end{footnotesize}
language requiring a paper to be "warranted by existing law or a good faith argument for the extension, modification or reversal of existing law" was based on the language of Disciplinary Rule 7-102(A)(2) of the Model Code of Professional Responsibility. 217 Moreover, the dissenters suggested that the majority's concern with chilling zealous advocacy was misplaced, stating that "[v]igorous advocacy is, necessarily, truthful advocacy." 218

D  Restraining Courts' Sanction Powers

The Golden Eagle case supports one study's findings regarding Rule 11, namely that "there is a good deal of interjudge disagreement over what actions constitute a violation of the rule." 219 The lack of uniform standards together with the expansive application of the rule by some judges 220 will inevitably deter creative advocacy. Nonetheless, judges are the final arbiters, and the system is dependent upon them to "distinguish legitimate advocacy from illegitimate harassment or attrition and to avoid overkill by calibrating sanctions to fit the character of the conduct." 221

In Eastway Construction Corp. v City of New York, 222 the Second Circuit Court of Appeals recognized that the power to sanction abuses necessarily includes the power to "overkill." 223 Observing that "[v]ital changes have been wrought by those

217 Id. at 588.

DR 7-102(A)(2) provides:

(a) In his representation of a client, a lawyer shall not:

(2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(2) (1981). It should be noted that the language of DR 7-102(A)(2) provides for a subjective standard, rather than an objective standard.

218 Golden Eagle Distrib. Corp., 809 F.2d at 588.


220 See Nelken, supra note 7, at 1323-25, 1347-52 for a discussion of Judge Schwarzer's expansive use of sanctions.

221 Miller, supra note 15, at 33.


223 Id. at 254.
members of the bar who have dared to challenge the received wisdom," the court cautioned against the use of hindsight and suggested that "any and all doubts must be resolved in favor of the signer."224

1. *A Better Approach*

The district court in *Eastway Construction Corp. v City of New York (Eastway II)*225 developed a two-part analysis for applying Rule 11 sanctions which would lessen the chilling effects on innovative and enthusiastic advocacy. The court first evaluated the costs incurred by the party entitled to the sanction award. Second, the court considered any mitigating factors which should reduce that amount.226 In determining the costs incurred, the court began with the lodestar figure: the reasonable number of hours the offended party spent resisting the claim multiplied by a reasonable attorney's fee. The court suggested increasing the lodestar amount if the offended attorney's work was notably outstanding, or if the sanctioned party's conduct was remarkably bad.227

As to mitigating circumstances, the court discussed several factors, including: whether the violation was wilful or negligent;228 whether the offender was an inexperienced attorney or a reputable attorney with no prior Rule 11 violations;229 whether the sanctioned party was able to pay the lodestar figure;230 whether the offended party needed the reimbursement;231 and, whether the type of litigation involved should be encouraged.232 Of major

224 Id.
226 Id. at 571.
227 Id. The court suggested that the attorney's fee be based on the hourly market rate. Id.
228 Id. The court stated that a finding of wilfulness was a more serious violation of the rule than negligence. Id. at 573.
229 Id. The court suggested that lenient sanctions would be appropriate for first-time offenders. "Similarly, where a filing has been deemed to be legally, as opposed to factually, frivolous, the court should be more lenient on nonspecialists." Id.
230 Id. "The poorer the offender, the smaller need be the sanction to ensure the desired deterrent effect." Id.
231 Id. at 574. The court stated that individuals should be reimbursed for costs more so than major corporations. Id.
232 Id., *see infra* notes 241-48.
importance, however, was the court’s consideration of the “degree of frivolousness” of the paper.

The *Eastway II* court recognized that not all arguments clearly fit into the frivolous-nonfrivolous dichotomy. Judges are forced to draw arbitrary lines in many cases. The result is that attorneys are placed in conflict-of-interest situations:

Attorneys are thus placed in a dilemma because they have the right—in fact, they have an ethical obligation (subject to tactical considerations)—to present to the court all the nonfrivolous arguments that might be made on their clients’ behalf, even if only barely nonfrivolous. They are forced by their position as advocates in the legal profession to live close to the line, wherever the courts may draw it. Yet Rule 11 threatens with severe sanctions if they miscalculate ever so slightly the location of that line.

The *Eastway II* court proposed a method to relieve the “tension between creativity and sanctions.” Instead of categorizing papers as being either frivolous or nonfrivolous, judges should determine where the arguments lie on a continuum. For those arguments found to be clearly frivolous, reasonable attorney’s fees should be awarded. For arguments approaching the nonfrivolous end of the continuum, the sanctions should be “more moderate.” Such an approach furthers the deterrent policy of the rule without stifling the innovativeness of the bar.

Applying this analysis to the facts before it, the *Eastway II* court found the plaintiff’s argument to be only “marginally frivolous.” That finding was important to the court’s decision to award sanctions in the amount of $1,000, instead of the originally requested $58,550 in actual attorney’s fees. The court, justifying the reduced award, admonished judges to “take care

---

233 *Id.* at 574.
234 *Id.*
235 *Id.*, see Nelken, *supra* note 7, at 1340 n.175 (stating that an attorney “has a professional duty to err on the side of the client. This duty is sorely tested by a rule which, in close cases, may lead to sanctions against the lawyer who fulfills it.”).
236 *Eastway Constr Corp.*, 637 F Supp. at 574.
237 *Id.*
238 *Id.* at 574-75.
239 *Id.* at 584.
not to use their almost unlimited Rule 11 powers to punish in a vindictive and excessively harsh manner."\(^{240}\)

2. Encouraging Challenges

The *Eastway II* court was sensitive to one factor which many courts apparently ignore, namely that "[s]ome litigations should be, if not encouraged, at least not discouraged."\(^{241}\) In the court's view, suits against the government fall into this category. They provide, among other things, a check on official "arrogance and lawlessness."\(^{242}\) The early challenges to the "separate but equal" doctrine of *Plessy v Ferguson*\(^{243}\) were no doubt considered frivolous. Nevertheless, hindsight proves that those challenges paved the way for the holding in *Brown v Board of Education*.\(^{244}\) Likewise, challenges to the *Swain v Alabama*\(^{245}\) decision led to the recent decision in *Batson v Kentucky*\(^{246}\)

In order to ensure that our law continues to expand and grow, courts should not apply Rule 11 in a manner that deters challenges to bad precedents.\(^{247}\) As expressed by one commentator, "[t]he development of the law is threatened if Rule 11 is read 'to penalize litigants because they choose to fight uphill battles.'"\(^{248}\)

CONCLUSION

Although the American judicial system prides itself on giving wronged persons their day in court, the ever-growing court docket requires that adjustments and modifications be made to stream-

\(^{240}\) *Id.*

\(^{241}\) *Id.* at 575.

\(^{242}\) *Id.*

\(^{243}\) 163 U.S. 537 (1896) (separate but equal facilities for different races do not violate the fourteenth amendment to the United States Constitution).

\(^{244}\) 347 U.S. 483 (1954) (doctrine of separate but equal facilities for different races violates the fourteenth amendment to the United States Constitution); *Eastway Constr. Corp.*, 637 F Supp. at 575.


\(^{246}\) 476 U.S. 79 (1986) (equal protection clause does not allow striking black jurors as a group); *Eastway Constr. Corp.*, 637 F Supp. at 575.

\(^{247}\) *Eastway Constr. Corp.*, 637 F Supp. at 575.

\(^{248}\) Nelken, *supra* note 7, at 1342.
line the litigation process. Amended Rule 11 can be a tool for controlling abusive practices and unnecessary litigation, thus making attorneys more responsible. But in addition, courts have a responsibility not to allow applications of Rule 11 to stifle efforts to change current law.

In order to avoid the chilling effect of the rule, courts should resolve questionable violations in favor of the signer. Moreover, when faced with clear violations, courts should impose the least severe sanctions necessary to punish the offender, taking into consideration any mitigating factors.

There is no way of knowing the extent of Rule 11’s “chill” on the bar’s creativity thus far. With proper application, however, the goals underlying the rule can be achieved without the undesirable effect of discouraging attorney innovation.

Robin Johnson Collins