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Illusion and Reality in Regulating Lawyer Performance: Rethinking Rule 11

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ILLUSION AND REALITY IN REGULATING LAWYER PERFORMANCE: RETHINKING RULE 11

LAWRENCE M. GROSBERG*

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I. Introduction

Two subjects that have received a tremendous amount of attention in recent years are the alleged inadequacy of lawyering and the very large increase in the amount of litigation. Some


observers have maintained that at least part of the latter problem is caused by the former, that incompetent and unethical lawyering has contributed to excessive litigiousness in the United States. Thus, the argument goes, if we could curb frivolous litigation—the purposeful misuse of the judicial processes and the negligent or incompetent use of litigation—the overall pressure on court dockets would be ameliorated.

These societal concerns about improper lawyering and supposed litigiousness came together in a recent amendment to Rule 11 of the Federal Rules of Civil Procedure. In 1983 this rule was

from 1940 to 1960. This figure increased to 106% from 1960 to 1975.


4. Robert J. Carter, United States District Judge, has said: “I think that it is fair to say that the 1983 amendment to Rule 11 is part of an effort to reduce delays and expenses in litigation, and to dam the flood of litigation that is threatening to inundate the courts.” Carter, The History and Purposes of Rule 11, 54 FORDHAM L. REV. 4, 4 (1985). Rule 11, as amended, is as follows:

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

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,
amended to make it easier for a federal court to conclude that a lawsuit or a motion was baseless and to mandate the imposition of a sanction on the offending person. Such a rule, the drafters hypothesized, would discourage the use of "dilatory or abusive tactics," deter frivolous lawsuits and thus "streamline the litigation process." To apply amended Rule 11, a court would assess the lawyer's performance under the rule's slightly refined set of criteria. Although the drafters spoke only of their concern to reduce the quantity of baseless litigation, one may reasonably conclude that an unstated secondary objective was to improve the level of lawyering competence and ethics. For if lawyers more deftly, proficiently and ethically use the litigation process, this will reduce the number of baseless litigation actions and thereby relieve the pressures on the federal courts' docket. Or, at least, this is the implicit premise underlying Rule 11.

This article examines how the courts have applied amended Rule 11 and to what ends. The rule greatly expands the opportunities for federal courts to evaluate lawyering competence and ethics. I look closely at the language and stated purposes of Rule 11 and at what the courts have actually said about and done with the rule. But my particular concern, which I approach from my

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. or is signed with intent to defeat the purpose of this rule; it may be stricken as sham and false and the action may proceed as though the pleading had not been served. 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 in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

combined perspective as a clinical teacher and a civil procedure teacher, is the secondary impact which this rule might or could have on improving the general quality of lawyering. The central question here is whether the judiciary ought to be performing the task of assessing lawyering competence and ethics. And if not, are there alternatives which might facilitate more effectively both the improvement of lawyering and the pursuit of the stated goal of Rule 11—to deter frivolous litigation.

After summarizing the premises and stated objectives of Rule 11, I go on to discuss the drafters’ attempt to clarify Rule 11 lawyering criteria (Part II). While neither the language of the rule nor the advisory committee’s notes is especially clear, the courts nevertheless have cut through the ambiguities and generally simplified the rule by applying an objective standard: if the mythical “reasonable lawyer” would have filed the paper, it is not frivolous and therefore not a violation of Rule 11. I offer a different, tripartite, analytical framework for purposes of looking both at the rule’s evaluative function and later at the possible misuse of the rule. I then illustrate the unstated evaluative function of Rule 11 in the last section in Part II. In Part III, I review non-Rule 11 situations in which courts have been called on to evaluate lawyers’ present or past competence and ethics. I do this to point up the substantial expansion of the evaluative function that Rule 11 has occasioned and to contrast the quite liberal potential use of Rule 11 with the much more circumscribed situations in which courts can use non-Rule 11 vehicles to assess lawyering. And then in examining how Rule 11 has actually been used (Part IV), I discuss both the purposes of procedural rules generally, and the ways Rule 11 goes beyond those goals. There are two principal ways in which Rule 11 can be misused: when sanctions are applied to discourage radical or creative lawyering, and when they are used simply to make it easier for a court to reach or support its primary legal conclusion. I consider those adverse consequences of Rule 11. In the next section (Part V), I look briefly at other ways, besides Rule 11, which might be used to improve lawyering.7 In

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7. Few of the proposals for improving lawyering have been implemented. See King Committee Report, supra note 1, at 16 (pursuant to the Devitt Committee Report, supra note 1 (experimental lawyer improvement programs were es-
particular, I consider whether the bar's disciplinary authorities could not be performing the same evaluative functions now being performed by the federal courts pursuant to Rule 11. And finally, I offer some suggestions for changing the Rule 11 procedures (Part VI) in ways that would satisfy my concern that the courts generally stay out of the business of unnecessarily evaluating lawyering competence. My proposal combines peer review responsibilities with the Rule 11 evaluative functions and places them in a committee or panel that would replace the court as the primary vehicle for enforcing Rule 11.

II. RULE 11 AS VEHICLE TO DETER FRIVOLOUS LITIGATION

A. Premises and Goals of Amendment

The 1983 amendments to Rule 11, together with some other changes to the procedural rules effected at the same time, were intended to make the judicial mechanisms for deterring abuses of the system more effective. By trying to clarify the standards in Rule 11 for acceptable lawyering behavior, the drafters expected that courts would become less reluctant to impose sanctions, thereby deterring the filing of baseless litigation and ultimately, lessening the burdens on the courts. To further assist the courts, the drafters mandated sanctions, but preserved discretion in the courts as to what the sanction would be. The drafters also cautioned that the purpose of the amended rule was not to chill creative lawyering or to produce excessive satellite litigation.

Implicit in the drafters' notes is the supposition that there is too much litigation and that some portion of it is due to baseless or frivolous lawyering. Neither of these two premises, however, has yet been universally accepted despite the fact that much has

8. For text of Rule 11, see supra note 4. In addition to Rule 11, amendments to Rules 16 and 26 were effected in 1983. A theme of all of these amendments was to increase the use of sanctions for any abuse of the litigation process. See Cavanaugh, The August 1, 1983 Amendments to the Federal Rules of Civil Procedure: A Critical Evaluation and a Proposal for More Effective Discovery Through Local Rules, 30 Vill. L. Rev. 767 (1985); Miller, supra note 6.

9. 97 F.R.D. at 198 advisory committee's note. There is serious question whether the drafters achieved their objective of clarifying the standards for the application of Rule 11. For discussion of this proposition, see infra notes 44-61 and accompanying text.

10. 97 F.R.D. at 199, 201.
been written about the so-called litigation explosion.\textsuperscript{11} This is not the place to try to resolve the debate of whether Americans are too litigious or, indeed, what the causes are of the increase in the number of lawsuits,\textsuperscript{12} or what the best solutions might be.\textsuperscript{13} It is enough for purposes of this inquiry to recognize two unassailable propositions. First, while the number of lawsuits has increased,\textsuperscript{14} there are several potential explanations, some have a more positive societal derivation than others.\textsuperscript{15} Second, although much has been said and written about alleged misuse of the courts and sloppy lawyering (most especially by former Chief Justice Burger)\textsuperscript{16} and about the public's generally low regard for law-


12. For example, it has been argued that the increase in the number of practicing lawyers from 285,000 in 1960 to 542,000 in 1980 and 654,000 in 1985 has either: a) made legal services accessible to more Americans or b) added "fuel to the nation's litigation explosion." Lindsey Businesses Change Ways in Fear of Lawsuits, N.Y. Times, Nov. 18, 1985, at 1. The debate on the utility of America's lawyers has been intense. Compare Bok, A Flawed System of Law Practice and Training, 33 J. Legal Ed. 570 (Dec. 1983) with Steel, Deregulation in Cambridge, The Nation, June 4, 1983. Other causes for more lawsuits include increased consumer consciousness; newly created governmental entitlements; more demanding and sophisticated environmental concerns; more complex and devastating human-caused disasters (e.g. Bhopal); etc. See also Van Valkenberg, Book Review, 85 Colum. L. Rev. 216, 221 (1985) (reviewing J. Auerbach, Justice Without Law? (1983) (regarding the need of the disenfranchised to have access to the courts)).


14. For a discussion of the increasing number of cases, see supra note 2.

15. On a positive note, a poor person who is a victim of a wrongdoing and who previously did not have access to legal recourse, might now be able to sue for compensation (perhaps due to free legal services lawyers or attorneys fees award statutes inducing lawyers to take a case). Less positively, if simplified pleadings rules, for example, have encouraged the use of suits as an extortionate device, the litigation process is not achieving a societal good.

16. Burger, supra note 3; see also Bok, supra note 12, at 579. Professor Garth concludes that former Chief Justice Burger, former Chief Judge Kaufman (Second Circuit) and others who decry the quality of lawyering are elitists and are not adequately concerned with the consumer of legal services or with access to the courts and that generally, such promoters of higher levels of competence have the same constituencies as the "ones behind restricting entry into the profession earlier in this century." Garth, supra note 1, at 658; see also Resnick, Failing Faith: Adjudicatory Procedure in Decline, 53 U. Chi. L. Rev. 494, 556 (1986).
yers and their ethics and morality, there is little, if any, empirical
data correlating attorney abuse of the judicial system with the in-
crease in court filings. Indeed, there is support for the proposi-
tion that incompetent or improper lawyering is relatively
unusual. Notwithstanding the absence of hard data, the sup-
posed causal connection between docket pressures and bad law-
yering often is fueled by what Professor Miller calls the “cosmic
anecdote.” One person’s hyperbolic example of bad lawyering
is passed on to another, probably in an enhanced version and
then passed on to another, and so on.

The alleged nexus between an increase in the number of law-
suits and frivolous lawyering also reflects the frustration of many
in not being able to solve easily and quickly a particular problem.

17. For an excellent discussion of the problem of how to deal with so-called
frivolous litigation, see J. Lieberman, supra note 11, at 176. “Because frivolous-
ness is judgmental, it is not reflected in court statistics.” Professor Lieberman
notes that “little is known” about the scope of the problem of frivolous litiga-
tion. Therefore, he recommends that a first order of business is to do a study of
the problem. Also, he points out that whether awarding fees to prevailing de-
defendants would deter frivolous suits is not as simple as conventional wisdom
would suggest. The problem is more subtle. The studies, he proposed, need-
less to say, have not been undertaken. See Lieberman & Goldstein, Why Have

18. In his dissent to the King Committee Report, A. Leon Higginbotham,
Jr. (Judge, Third Circuit) observed that the district judges who were surveyed
found that in only 3.5% of their cases was the quality of lawyering either “poor”
or “very poor,” and in an additional 5.1% of their cases was the lawyering found
to be “not quite adequate;” these were the three lowest ratings categories. (“Or
to phrase the issue more positively, more than 91% of lawyer performances
ranged from adequate to as good a job as could have been done.”) King Com-
mittee Report, supra note 1, at 33 (citing the Devitt Committee Report, supra
note 1, at 3); see also Marcus, The Revival of Fact Pleading Under the Federal Rules
of Civil Procedure, 86 COLUM. L. REV. 433, 492 (1986) (“circumstances do not actu-
ally seem so urgent as portrayed by many”). But see Burger, supra note 3, at 234
(“[F]rom one-third to one-half of the lawyers who appear in the serious cases are
not really qualified to render fully adequate representation.”); Cook, supra note
1 (citing data from an American Bar Association study that claims “55% of the
state and federal judges polled agreed ‘professionalism was declining’ ”).

19. A. Miller, The August 1983 Amendments to the Federal Rules of
Civil Procedure, 11 (1984). An example of the kind of case that provides the
anecdote which gets rapidly spread by word of mouth is Lepucki v. Van Wormer,
765 F.2d 86 (7th Cir.), cert. denied, 474 U.S. 827 (1985). There, plaintiff’s lawyer
had apparently filed a series of lawsuits in which he asserted that the I.R.S. could
not withhold wages because “wages are not income” and “dollars are not legal
tender.” All of these claims were promptly dismissed as “outrageous” or “so
absurd that it merits no response.” The Seventh Circuit upheld a Rule 11 sanc-
tion in this case but the plaintiff’s arguments in Lepucki certainly do not exemplify
the typical lawyer. Indeed, it is this kind of case which provides the grist for
the rumor mill to which Professor Miller refers.
Proposed solutions to rising insurance premiums for medical malpractice illustrate the point. The palliatives, like Rule 11, are to penalize the initiator of so-called baseless malpractice claims. Similarly, growing caseloads often lead many to grasp at nearly any suggestion which even sounds like it will assist in cutting back the caseload or at least in stopping it from increasing at the same rapid rate. Nevertheless, the most realistic estimates remain modest ones as to what portion of the increased docket is attributable to baseless court filings.

Therefore, the reasoning and the data underlying the stated need and purpose for the Rule 11 amendments have definite gaps. Even if we assume that there generally is too much litigation, we cannot attribute much, if any of it, to frivolous lawyering. Even if we could, it is unclear whether amended Rule 11 would have any deterrent effect. While there is an appealing logic to the theory that the imposition of penalties will deter violations of Rule 11, there is no empirical confirmation of this proposition. Indeed, there is much debate about whether the use of sanctions will be effective in deterring procedural abuses of any kind.

20. In the State of New York, as elsewhere, legislators are grappling with the problem of steeply rising malpractice premiums for doctors. Concern is expressed that adequate medical care will be cut back. Without any empirical evidence supporting a conclusion that baseless malpractice claims are being filed, let alone causally connected to the rise in premiums, legislative solutions include stiff penalties on lawyers found to have filed frivolous malpractice claims. See Kelner & Kelner, New Med-Mal Law: Frivolous Claims, N.Y.L.J., Sept. 11, 1985, at 1, col. 1. No consideration seems to have been given to the satellite litigation engendered by such solutions.

21. See Marek v. Chesny, 473 U.S. 1 (1985), on remand, 775 F.2d 160 (7th Cir. 1985) (Supreme Court construed Rule 68 to preclude fees to prevailing plaintiff, for work done from point in litigation when plaintiff refused settlement offer (higher than judgment ultimately obtained after trial) to conclusion of case). Despite a heated dissent, the policy underlying the majority's conclusion was clear: to "lessen docket congestion, . . . settlements rather than litigation will serve the interests of plaintiffs as well as defendants." See also Marcus, supra note 18, at 471 n.230 (fact that certain kinds of cases have increased in number is basis for scrutinizing such claims more closely).

22. See Devitt Committee Report, supra note 1; King Committee Report, supra note 1 (8.6% of lawyers found by district judges to be "not quite adequate" to "very poor").

23. See R. Marcus, Complex Litigation 621 (1985); Rosenberg, The Federal Civil Rules After Half a Century, 36 Me. L. Rev. 243 (1984); Sofaer, supra note 2, at 696-731; Sanctions Imposable for Violations of the Federal Rules of Civil Procedure, Report to the Federal Judicial Center, July 1981. I should note, however, an illuminating observation of a U.S. Magistrate at a conference on Rule 11. Magistrate Naomi Reice Buchwald noted that the true significance of Rule 11 may be in the additional tool it provides lawyers in counseling upset or even recalcitrant clients not to take a particular action. This positive impact of the rule, as indicated above, does not seem susceptible to empirical confirmation. Response to a Practitioner's Commentary on the Actual Use of Amended Rule 11, 54 Fordham L. Rev. 28, 33
Further, as is discussed below, it may very well be that the additional satellite litigation engendered by Rule 11 is a greater burden on judicial resources than any frivolous litigation that theoretically might have been deterred by the rule changes.24

The drafters of Rule 11 spoke only of deterrence as a goal for the 1983 amendments.25 But the judges in applying it have seen other purposes as well for Rule 11. According to a recent comprehensive survey of district judges, while 59% of the judges said deterrence was "the most important purpose" of the Rule 11 sanctions, 21% said compensation of the victim of frivolous lawyering was the courts primary concern and 20% said punishment of the violator was the key rationale.26 The justifications, while different from the stated purposes for the rule, suggest a rationale for the promulgation and continued use of Rule 11. For example, the lawyer who misuses the judicial process certainly is deserving of some kind of sanction. Since it is highly unlikely that any other legal institution would impose such sanctions,27 Rule 11 may be the only way to achieve that punitive objective. But this is not the purported justification for Rule 11. Similarly, compensating the victims of frivolous lawyering for their legal expenses is a theoretical justification for Rule 11 for it would provide a far more accessible remedy than the traditional tort claims for malicious prosecution or abuse of process. Rule 11 makes it a lot easier for the victims to obtain recompense.

But, once again, neither punishment nor compensation was a stated purpose for the amendment to the rule. And if they were, it would raise serious questions whether this is an appropriate function for a rule of civil procedure.28 It would also raise fundamental questions about the continued desirability of the Ameri-
can rule regarding attorneys' fees (i.e., each party pays for his or her own fees regardless of who wins). More pointedly, is the availability of fees to a litigation winner pursuant to Rule 11 an indirect way to begin an effort to eliminate the American rule? If so, though not addressed by the drafters, or, I believe, by the judges\(^\text{29}\) or the commentators, this would be a drastic step and one which would very much change the character of American litigation.\(^\text{30}\) It ought not to be a result that we back into without full and open debate. If this is on the unstated agenda of Rule 11 proponents,\(^\text{31}\) it needs to be brought out in the open.\(^\text{32}\) If not we should accept the drafters at their word—deterrence is the purpose of Rule 11.

The Kassin study stated at the outset that the “goal of Rule 11 is accountability.”\(^\text{33}\) Lawyers are no longer permitted to do whatever they wish in court, but rather have to be prepared to justify the propriety of their performance. In another compilation of recent Rule 11 decisions, the authors asserted that the rule is a “tool to discipline the bar” in the event they fail to adhere to a new and “higher standard of factual and legal pleading.”\(^\text{34}\) Those same authors also wrote that Rule 11 “promises to be a mechanism by which judges can actively monitor the quality of lawyering.”\(^\text{35}\) This point underlies a large part of this paper. By trying

\(^\text{28}\) promulgate procedural goals. For a discussion of these issues, see infra notes 282-84 and accompanying text.

\(^\text{29}\) See Alyeska Pipeline Serv. Co. v. Wilderness Soc’y, 421 U.S. 240 (1975); see also Attorney Fee Shifting, 47 LAW & CONTEMP. PROBS. 1 (Wint. 1984).

\(^\text{30}\) An exception is Calloway v. Marvel Entertainment Group, 111 F.R.D. 637, 651 (S.D.N.Y. 1986). In explaining his imposition of Rule 11 sanctions after a six week trial, Judge Sweet stated: “Perhaps this case is a classic demonstration of the desirability of the English practice, toward which Rule 11 seems to be pointing.” Id. at 651.

\(^\text{31}\) Former Chief Justice Burger, a strong proponent of Rule 11 type sanctions, has noted his praise for the English system and his opinion that, if implemented here, the English system would result in relief for the U.S. courts by deterring some lawsuits. Burger, supra note 3.

\(^\text{32}\) In a recent survey it was disclosed that lawyers generally praised the use of sanctions, but evidenced a much more ambivalent, if not inconsistent, response about retention of the American rule. “Half [of the 1400 responding lawyers] . . . suggested losers should pay winners attorneys fees more often than is now the case.” But 90% also opposed the adoption of the so-called English rule requiring the loser to pay all costs and attorneys fees. Report of New York State Bar Association, N.Y.L.J., June 11, 1987, at 1, col. 4. These findings suggest that a full, open and careful debate is necessary and appropriate in order for the bar to appreciate the consequences of a total or gradual elimination of the American rule.

\(^\text{33}\) S. Kassin, supra note 6, at 2.

\(^\text{34}\) Federal Procedure Committee, supra note 6, at 3.

\(^\text{35}\) Id.
to eliminate frivolous lawyering, the courts necessarily will have to evaluate lawyering. That evaluative function could be one of minimal monitoring (with a limited deterrent effect on bad lawyering) or one of actively improving or perhaps even teaching better lawyering. The present structure of Rule 11 is inadequate and ill-suited to achieving the latter educational objective. While it does provide a vehicle for minimal monitoring, it does so at a substantial costs—chilling effects and satellite litigation—and with few real educational gains with respect to improving lawyer performance. Paradoxically, therefore, while the present rule theoretically permits a very intrusive evaluative role for courts, it does not provide the procedures, standards or tools to ensure maximum educative effects or even educational achievements which are consistent. I suggest below changes aimed at ameliorating some of these tensions.36

After four years of experience under Rule 11, it is clear that the number of Rule 11 decisions continues to increase at a substantial rate,37 and that sanctions litigation has become a significant part of federal procedural practice.38 Weighing the degree to which the ostensible aims of Rule 11 have been achieved against the concerns that the drafters were trying to avoid, a final verdict is not yet in. The stated objective of Rule 11 was to deter frivolous litigation and, thereby lessen the pressures on court dockets. Courts have often applied Rule 11, however, having in mind the secondary and unstated objectives of penalizing the of-

36. See infra notes 424-50 and accompanying text.
37. By “Rule 11 decisions” I mean opinions that specifically decided whether or not to impose Rule 11 sanctions and that are either reported or available in slip opinion form. They increased from 79 in the first year to 139 in the second year. Also, the number of times Rule 11 has been cited in reported decisions has increased substantially, from 48 in the year preceding the amended rule, to 117 in the first year of the rule, to 228 in the second year of the rule. The third and fourth year figures clearly will be higher. Further, “[t]he large number of reported opinions can only be a fraction of the number of instances in which sanctions have been imposed [under amended Rule 11].” Zaldívar v. City of Los Angeles, 780 F.2d 823, 829 (9th Cir. 1986); see Nelken, supra note 6, at 1326.
38. Professor Miller recently analogized the extensive attention given to Rule 11 by the Bar to that given to Rule 23 after the class action provisions were amended in 1966. Similarly, he suggested that within a relatively short time, perhaps six or seven years, the attention will dissipate as it did regarding Rule 23. Unpublished remarks of Professor Miller at Federal Bar Forum, sponsored by Federal Bar Council, in New York City (June 11, 1986). But see Miller, Proceedings of the Second Circuit Judicial Conference, 101 F.R.D. 161, 200 (1983) (Professor Miller then predicted that use of sanctions would decline by second or third year; opposite seems to be occurring). For a further discussion, see sources cited supra note 6.
fending lawyer and compensating the victim of needless litigation. As of now there is not any evidence (concrete or otherwise) to support a finding that frivolous litigation has diminished (indeed, as noted above, there is no data to suggest it ever even existed to any great extent), or that case dockets are decreasing. Possibly the most interesting statistic to speculate over, therefore, is the one which is not available—the number of baseless actions, if any, not taken because of Rule 11. The chief concerns of the drafters that creative lawyering not be chilled and that satellite litigation not exceed the baseless litigation presumably deterred have turned out to be real concerns. The quantity of Rule 11 opinions suggests that satellite litigation is a problem. Further, the case law suggests that Rule 11 may be misused to strengthen the validity of a threshold legal conclusion or used punitively (to strike out at certain litigators or certain kinds of lawsuits), or applied in a way that chills certain kinds of litigation. I examine these findings further when I consider why the Rule 11 evaluative function as currently being performed is not a constructive task for the courts.

Of the data on the early use of amended Rule 11, perhaps the most illuminating is that only a handful of judges are using the rule. During the first two years under Rule 11 three district courts (of 94 in the country) rendered 45 of the 98 reported decisions in which sanctions were imposed. This highly selective

41. For further discussion of the Rule 11 evaluative function, see infra notes 86-113 and accompanying text.
42. The three courts are: the Southern District of New York (26 Rule 11 decisions); the Northern District of Illinois (12); and, the Northern District of California (7). Even more specifically, a handful of judges issued a disproportionate share of Rule 11 opinions; of the 345 opinions during the first two years under Rule 11 in which amended Rule 11 was cited, Judge Shadur (N.D. Ill.) had twenty-six, Judge Schwarzer (N.D. Cal.) had nine, and Judge Haight (S.D.N.Y.) had fourteen. Each issued opinions imposing sanctions in three, five and four cases respectively. Thus, for the first two years, these three judges (of the 684 sitting judges) wrote 14.2% of the opinions in which Rule 11 was cited and 12.2% of the opinions in which Rule 11 sanctions were imposed. This wide variation in use among courts and individual judges has been confirmed elsewhere. See S. Kassin, supra note 6; Nelken, supra note 6 at 1326; Medina, Henifin & Cone, A Supplemental Analysis of Reported Decisions Applying the 1983 Amendments to Rules 11, 16 and 26 of the FRCP (February 22, 1985) (available in the Columbia Law School Library). The Kassin study used as a basis for its empirical conclusions, not a survey of reported Rule 11 decisions such as I have used in this footnote, but rather the results of a questionnaire he sent to all active federal district court judges. (He noted that either basis could produce valid data. His conclusions regarding variation in use very much confirm those that I have reached.)
use of Rule 11 is further confirmed in published comments of federal judges reflecting substantial disagreement whether Rule 11 is an appropriate judicial response. It suggests a possible arbitrariness in the manner and frequency of application of Rule 11 in that the same quality lawyering will be treated harshly by only a few judges; to the rest it either is acceptable or not worthy of attention by the court.

B. Clarity of New Rule

For purposes of examining both the evaluative function of Rule 11 and the problems of the misuse of the rule, it is necessary first to scrutinize the language of the rule, particularly in light of the drafters' deterrence goal. This brief diversion will include a suggested framework by which to examine Rule 11 opinions. The framework also should help in future applications of Rule 11, whether by the courts (the present forum), or by a peer review...

43. Other than in judicial opinions, a number of federal judges have been quite outspoken in their views about Rule 11. See Becker, The Judge's Perspective, 51 ANTITRUST L.J. 437, 439 (1983) ("If you want to proliferate litigation, if you want to cause further delay, pass these rules (including the 1983 amendment to Rule 11) because we will have sanctions hearings coming out of our ears, and lawyers won't hesitate to use them."); Duffy, Remarks of Kevin Thomas Duffy, 54 FORDHAM L. REV. 20, 20 (1985) (Judge Duffy intimated that perhaps the organized bar should "clean its own house" rather than passing off the responsibility of guarding against frivolous lawsuits to the judiciary); Weinstein, Reflections on 1983 Amendments to U.S. Rules of Civil Procedure, N.Y.L.J., Nov. 14, 1983, at 1. Judge Weinstein points out that "Few trial judges were asking for" the 1983 Federal Rules of Civil Procedure changes, and that, "I'm embarrassed at the notion . . . of punishing lawyers to educate them." Judge Walter Mansfield, on the other hand, urged compliance with amended Rule 11 because "these changes in the law can hardly be disregarded as hasty or ill-conceived." Mansfield, Compliance with 1983 Changes in Rules of Civil Procedure, N.Y.L.J., Dec. 19, 1983, at 1, col. 4; see also In re Agent Orange Prod. Liab. Litig., 611 F. Supp. 1296, 1304 (E.D.N.Y. 1985) ("The threshold of egregiousness required to make out a case under Rule 11 is so high and the probability of successful motion for improper certification so low, that the Rule in general provides little protection for the prospective defendants, the public, or the courts."). See also the extensive discussions of Rule 11 in the published opinions of Judges Schwarzer and Shadur. Further, Judge Schwarzer, a prolific commentator, has also written an article on the subject. See Schwarzer, supra note 6. But see Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531 (9th Cir. 1986) (strong criticism of Judge Schwarzer's application of Rule 11.). Both Judge Schwarzer and Judge Shadur, who are strong supporters of vigorous enforcement of the Rule 11 proscriptions on bad lawyering, are members of courts where there is active use of Rule 11. The converse may also be true. In the Eastern District of New York where Chief Judge Weinstein is an opponent of Rule 11, there is relatively little Rule 11 activity, certainly in comparison to the Southern District of New York, the Northern District of Illinois and the Northern District of California. Thus far, local judicial leadership seems to have had a large impact on the use of Rule 11.
The authors of the Rule 11 amendments wanted to eliminate the confusion caused by the lack of precision or clarity of the earlier language. According to the drafters, the amended rule contains a standard of lawyering conduct which demands more than the absence of bad faith and is more focused than the old "good ground" language. The drafters intended that the new standard be more stringent and that "a greater range of circumstances trigger its violation." More specifically, the new rule added the requirement that a lawyer conduct a "reasonable inquiry" before taking any action. Although the drafters did not use the word "objective" to describe this standard, that is the label often used by the courts in distinguishing the current criteria from the prior requirement that lawyers act in good faith (or in a non-willful manner), a more subjective standard. In short, the drafters presumably concluded that through the use of refined lawyering standards, courts could more easily evaluate the performance of lawyers and find that the minimum competence requirements had not been satisfied.

Despite their good intentions, the courts have not yet eliminated all of the confusion. In large part, this is due to the continuing ambiguity of the language of the rule. The drafters eliminated the requirement that a court could find a Rule 11 violation only if the attorney's misfeasance was done willfully because purposeful misconduct can be difficult to prove. Nevertheless, some courts still seem to require some kind of bad

44. 97 F.R.D. at 198 advisory committee's note.
45. Id. at 199.
46. See, e.g., Zaldivar v. City of Los Angeles, 780 F.2d 823, 831 n.9 (9th Cir. 1986).
47. See S. KASSIN, supra note 6, at 22-23 (discussion of difference between willfulness and subjective bad faith; latter being an easier standard for allegedly offending lawyer to overcome).
48. Kassin's questionnaire sought from the judges answers to questions based on hypothetical Rule 11 cases that were taken from actual Rule 11 cases. Based on the answers to his questions he concluded there is "substantial disagreement" as to the appropriate standard by which to apply Rule 11. Notwithstanding the drafters' efforts to add a more objective standard for assessing lawyering competence, Kassin found that a significant percentage of judges disregarded this new standard and refused to impose sanctions unless there was a good faith violation. Indeed, he found that 8% of the judges refused to impose sanctions even if bad faith were found. Id. at 26. The confusion on standards is further exacerbated by the overlap of Rule 11 and other sources of sanctioning authority such as 28 U.S.C. § 1927. For a discussion of the multiple sources of sanctioning, see infra notes 208-11 and accompanying text.
The drafters also added the requirement that a lawyer could not sign a legal paper without first conducting a reasonable inquiry. This is the clearest addition to the rule and, in those circumstances when a pre-filing fact investigation is indisputably deficient, it provides a firm basis for finding a Rule 11 violation.

The new rule also directs the court to impose a sanction, though it reserves to the court the discretion as to what sanction.

49. See Lepucki v. Van Wormer, 765 F.2d 86, 89 (7th Cir.), cert. denied, 474 U.S. 827 (1985) (in affirming district court's imposition of attorney's fees pursuant to Rule 11, the court of appeals warned that “[w]e will no longer tolerate abuse of the judicial process by irresponsible counsel who obstinately continue to use the courts in bad faith.”); State v. Western Paving Constr. Co., 650 F. Supp. 206 (D. Colo. 1986) (citing preamendment decision, the court relies significantly on absence of bad faith by state plaintiff in its denial of defendant's request for sanctions); Davis v. United States, 104 F.R.D. 509, 512 (N.D. Ill. 1985) (“Rule 11 of the Federal Rules serves a different purpose—to punish attorneys and parties who file lawsuits [not tax returns] in bad faith or for improper purposes.”), aff'd, 799 F.2d 753 (7th Cir. 1986); Williams v. Birzon, 576 F. Supp. 577, 580 n.5 (W.D.N.Y. 1983), aff'd, 740 F.2d 955 (2d Cir. 1984) (Judge Telesca interpreted amended Rule 11 to apply against “a litigant who acts in bad faith in instituting an action”). In discussing the similarity and overlap between the ethical code rules (i.e. DR 7-102(A) and M.R.3.1), Professors Hazard and Hodes note that the new Rule 11 standard “does not mean that a lawyer's state of mind is irrelevant, for due process concerns dictate that a lawyer not be punished unless his conduct is knowing and therefore culpable.” However, they go on to note that, “knowledge may be inferred from the circumstances.” G. Hazard & W.W. Hodes, The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct 329-31 (1986).

50. See Hale v. Harney, 786 F.2d 688, 692 (5th Cir. 1986); Maier v. Orr, 758 F.2d 1578 (D.C. Cir. 1985); Blair v. Shenandoah Women's Center, Inc., 757 F.2d 1435 (4th Cir. 1985); In re Oximetrix, Inc., 748 F.2d 637 (D.C. Cir. 1984); Florida Monument Builders v. All Faith Memorial Gardens, 605 F. Supp. 1324, 1326-27 (S.D. Fla. 1984). But even as to the “reasonable inquiry” test, heated disputes have developed about how much a lawyer must do, or even can do before filing a legal document. See Kamen v. American Tel. & Tel. Co., 791 F.2d 1006 (2d Cir. 1986) (trial court's conclusion that plaintiff's counsel failed to conduct reasonable investigation as to whether defendant AT&T received requisite federal "financial assistance" to satisfy subject matter jurisdiction; Second Circuit in split opinion reversed and concluded that plaintiff's attorney had done as much as any minimally competent lawyer would have done); see also Albright v. Upjohn Co., 788 F.2d 1217 (6th Cir. 1986) (plaintiff's attorney conducted deficient prefiling investigation as to which drug manufacturers had distributed drug in question to plaintiff).

51. Here also, the drafters may not have achieved their objective of simplifying the use of sanctions. Certainly, predictability has not been achieved. The recent numerous decisions in the Eastway case illustrate the difficulty. Eastway Constr. Corp. v. City of New York, 821 F.2d 121 (2d Cir. 1987) (Eastway III); Eastway Constr. Corp. v. City of New York, 637 F. Supp. 558 (E.D.N.Y. 1986) (Eastway II). The Second Circuit was quite clear in its original reversal of Judge Weinstein's initial refusal to impose Rule 11 sanctions and its direction to impose sanctions. Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 254 (2d Cir. 1985) (Eastway I). However, Judge Weinstein ultimately imposed a sanction of $1000 against the plaintiff only, and nothing against the lawyer. 637 F. Supp. at 584 (E.D.N.Y. 1986). In Eastway III, a divided panel of the Second
A key change is that the rule is now worded conjunctively. A lawyer must satisfy all of the standards in Rule 11 (i.e. that a reasonable inquiry be conducted; that the claim be well grounded in fact and law or that any change in the law be sought in good faith; and that the litigation process not be used for an improper purpose.) Failure to comply with any one of these strictures can produce a Rule 11 violation. It is this fact that has produced continuing confusion.

While a lawyer may no longer assert “good faith” as a defense to an alleged violation of all of the Rule 11 standards (e.g., failure to conduct a “reasonable inquiry” is a violation even if good faith is present), it would seem to remain a defense to the continuing prohibition in Rule 11 that a lawyer not file a paper “for any improper purpose, such as to harass, to cause delay, or to increase the cost of litigation.” Thus, the proscription on bad faith actions remains. Put differently, as several courts have phrased it,\(^{52}\) a lawyer’s proof of good faith is no longer a safe harbor as to an alleged Rule 11 violation based on a failure to conduct a reasonable inquiry. But the assertion that an act was done in “good faith” is certainly relevant to other Rule 11 norms. Indeed, the phrase itself remains in Rule 11.

The amended rule reads:

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 framed 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

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\(^{52}\) Circuit, in a conclusory fashion and without the benefit of any criteria, ruled that Judge Weinstein had exceeded the bounds of discretion and directed that the sanction be increased to $10,000. The lodestar amount in this case was $52,912. See also Barrios v. Pelham Marine, Inc., 796 F.2d 128 (5th Cir. 1986) (vacated $750 penalty and directed that more severe sanctions be considered).

delay or needless increase in the cost of litigation. (emphasis added)

The italicized language suggests three different standards, any one of which can produce a violation of Rule 11. Two include good faith components, one literally. Therefore, the courts and commentators, who refer to the new Rule 11 standard as objective and the old one as subjective, are oversimplifying the language and purpose of amended Rule 11.53

The first standard is the new one. It calls for an examination of objective factors; whether, "after a reasonable inquiry," the action is well-grounded in fact and warranted by existing law. If the legal or factual investigation was not appropriate, taking into account the surrounding circumstances, Rule 11 is violated. "[W]hat constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available to the signer, whether he had to rely on a client for information . . . ."54

The second standard explicitly states that an attempt to change existing law can be made if it is done in "good faith." Finally, the third standard under Rule 11 continues to prohibit any action taken for an "improper purpose" such as harassment. Implicitly, this last statutory norm requires a finding that the person (lawyer or party) acted purposefully, in bad faith, and basically misused the judicial process.

Let me suggest three labels for these Rule 11 standards which, while not absolutely precise, are helpful in examining the parameters of Rule 11. These standards constitute the minimum competence criteria which must be met to satisfy Rule 11 and pro-

53. Olga's Kitchen of Hayward, Inc. v. Papo, 108 F.R.D. 695, 701 (E.D. Mich. 1985) ("Now, the court must examine the objective reasonableness of a claim in light of existing law and facts."); see also Northern Trust Co. v. Muller, 616 F. Supp. 788, 789 (N.D. Ill. 1985) ("The (Rule 11) standard is an objective one."); Baranski v. Serhant, 106 F.R.D. 247, 250 (N.D. Ill. 1985) ("A survey of the case law indicates that courts are objectively assessing the gravity of the conduct at issue before imposing sanctions."); In re Ronco, Inc., 105 F.R.D. 493, 497 (N.D. Ill. 1985) ("This court adheres to its own decisions and to those of the other District Courts that have also looked at the revised Rule (and its background) and have found it dictates an objective test, rather than the old subjective bad faith standard."); appeal dismissed, 793 F.2d 1295 (7th Cir. 1986).

54. 97 F.R.D. at 199 advisory committee's note; see also Jacquez v. Procurier, 801 F.2d 789 (5th Cir. 1986); Kamen v. American Tel. & Tel. Co., 791 F.2d 1006 (2d Cir. 1986); St. Jude Medical, Inc. v. Intermedics, Inc., 612 F. Supp. 962 (D. Minn. 1985) ("blind faith" in the client "does not discharge the responsibility to investigate the factual and legal basis of plaintiff's claim"); Van Berkel v. Fox Farm & Road Mach., 581 F. Supp. 1248 (D. Minn. 1984) (reliance on client is not defense to Rule 11 violation.)
vidoe a workable vehicle for evaluating a lawyer's competence and ethics. The first standard is essentially an *investigatory* one. What should a lawyer do before filing a claim or making a legal argument under existing law? Both the language of the rule and the advisory committee’s notes make it clear that the investigation must be into the facts and the law. The leading Rule 11 decisions from the Second and Ninth Circuits have expanded this test beyond an inquiry into whether the lawyer took the appropriate and “reasonable” investigative steps; they have also required that the lawyer’s factual and legal conclusion(s) resulting from the investigation be “reasonable” or that which a minimally competent or reasonable lawyer would have reached. It is this liberal construction of the amended rule which accentuates the potential open-ended use of Rule 11 to suit a particular court’s proclivity toward sanctioning bad lawyering, and in turn, highlights the possible misuse or abuse of the rule.

The second standard, a *creative lawyering* one, is whether the action taken constitutes a good faith effort to change existing law. Whether creative lawyering under Rule 11 will only be countenanced if an advocate explicitly states she or he is trying to change the law is a question pursued below. In any event, lip service at least is given to the desirability of not chilling creative lawyering, both by many courts and the Rule 11 drafters. Finally, the third standard is an *ethical* one;

55. The rule states that the lawyer’s certification after a “reasonable inquiry” be that the action is “well-grounded in fact and is warranted by existing law [or a good faith attempt to change it].” The advisory committee’s notes state that the language of the old rule, “good ground to support” had been “interpreted to have both factual and legal elements. They have been replaced by a standard of conduct that is more focused.” 97 F.R.D. at 198 (citation omitted); see *In re Oximetrix*, 798 F.2d 637 (D.C. Cir. 1984) (there was not “reasonable inquiry” if “single phone call” would have demonstrated factual error in position being asserted).

56. See Zaldivar v. City of Los Angeles, 780 F.2d 823 (9th Cir. 1986); *Eastway I*, 762 F.2d 243 (2d Cir. 1985); see also Centra, Inc. v. Hirsch, 630 F. Supp. 42, 46 (E.D. Pa. 1985) (“Petitioner knew or should have learned through reasonable inquiry that their constitutional claim” was not supportable.).

57. See infra notes 223-84 and accompanying text.

58. See infra notes 75-80 and accompanying text. In *Golden Eagle Distributing Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1539 (9th Cir. 1986), the Ninth Circuit held that a lawyer need not announce in advance that she is trying to change the law.

59. See *Southern Leasing Partners, Ltd. v. Bludworth*, 109 F.R.D. 643, 646 (S.D. Miss.) (“The Rule is not intended to chill creativity . . . .”), aff’d, 801 F.2d 783 (5th Cir. 1986); *Continental Airlines, Inc. v. Group Sys. Int’l Far East, Ltd.*, 109 F.R.D. 594, 596 (C.D. Ca. 1986) (“not intended to chill an attorney’s enthusiasm or creativity”); *Pawlowske v. Chrysler Corp.*, 623 F. Supp. 569, 573 (N.D. Ill. 1985) (“The creativity must be in service of a good faith application of the law or at least a good faith request for a change in the law.”); *Blake By and
was the action in question, taken for improper purposes, in effect in violation of an ethical or moral norm regarding the proper use of the litigation process? This norm essentially is the bad faith proscription in old Rule 11. It is quite similar to the torts of malicious prosecution and abuse of process. Although the courts have generally not made the distinctions suggested here (indeed, many have unnecessarily obfuscated the differences), some of the Rule 11 decisions, as well as a hypothetical, may be used to illustrate the different situations. This framework as suggested above should also facilitate consideration of the potential educational impact of the rule.

1. Investigatory Norm

Was the decision to take the action in question reached only after a “reasonable inquiry” had been completed which enabled the acting party to conclude that the action was “well grounded in fact and warranted by existing law?” The reasonableness of the investigation is directly tied to the taking of an action under existing law. Assume the following hypothetical. Client A, a black man, comes to lawyer L, in 1987 and claims to have been refused the right to rent an apartment because of his race. The lawyer had not previously met the man. After a thorough interview of A and a review of the substantive law with which L already had familiarity, L concludes that it appears that she can allege the elements of a prima facie violation of the federal civil rights act on behalf of A. L examines A’s pay stubs (to verify his financial

Through Blake v. National Casualty Co., 607 F. Supp. 189, 192 (C.D. Ca. 1984) (“But too strict a standard might unduly chill an attorney’s advocacy, especially for those advancing unpopular arguments.”); see also 97 F.R.D. at 199 advisory committee’s notes (“The rule is not intended to chill an attorney’s enthusiasm or creativity in pursuing factual or legal theories.”).

60. For a discussion regarding the nearly identical ethical code proscriptions on bad lawyering, see infra notes 325-66 and accompanying text. For a discussion regarding the similarity of the tort of malicious prosecution and Rule 11 infractions, see infra notes 248-50. The Ninth Circuit has raised the question without resolving it, whether an action which otherwise satisfies what I call the “investigatory” and “creative lawyering” standards of Rule 11, “may ever be the subject of a [Rule 11] sanction because it is signed and filed for an improper purpose.” Zaldivar, 780 F.2d at 832. If the answer were to be no, such a construction of Rule 11 would be in disregard of the “improper purpose” language of the rule. The Second Circuit has held “that there is no necessary subjective component to a proper Rule 11 analysis.” Oliveri v. Thompson, 803 F.2d 1265, 1275 (2d Cir. 1986), cert. denied, 107 S. Ct. 1373 (1987).


eligibility) and a newspaper advertisement describing the availability of the apartment. While L might like to conduct an investigative test\(^{63}\) to further confirm the strength of the claim, she concludes that it would take her at least three days to engineer a test, and an extraordinary amount of her time and resources to do so. Moreover, knowing the tight apartment market, L knows that if she does not act very quickly (perhaps within 24 hours) to enjoin the rental of the apartment, it is highly probable it will be rented to someone else. Accordingly, the next morning she files a complaint in federal court and moves to enjoin the rental pending a determination on the merits.

Has L satisfied the Rule 11 investigatory standard? Under the circumstances (namely, the pressures to move quickly), it would seem that she did.\(^{64}\) The advisory committee’s notes clearly state that the amount of time available for an investigation is a factor in determining the reasonableness of the inquiry.\(^{65}\) Indeed, if L did not file the papers she may very well have failed (in a malpractice sense)\(^{66}\) to adequately serve A. If it later turns out that plaintiff A loses (because the defendant has an airtight justification for the refusal to rent to A), should Rule 11 sanctions be imposed for filing the complaint and making the motion? I think

\(^{63}\) A “test” (also sometimes referred to as a “check” or an “audit”) consists of sending a white person (with characteristics similar to those of the black person allegedly being discriminated against) to the place where the unit is available, to seek to rent or buy that unit, as the case may be. If the white person is offered the unit whereas the black person was not, the test is successful and the testimony of the tester is admissible to establish the violation of law. See, e.g., Northside Realty Assocs. v. United States, 605 F.2d 1348, 1354-55 (5th Cir. 1979).

\(^{64}\) See, e.g., Kamen v. American Tel. & Tel. Co., 791 F.2d 1006 (2d Cir. 1986); Blake By and Through Blake v. National Cas. Co., 607 F. Supp. 189, 192 (C.D. Cal. 1984) (“Relevant factors to consider include the amount of time the attorney had to prepare the motion, the expertise of the attorney, the complexity of the law involved, and the extent to which the attorney supports the motion.”); Touchstone v. G.B.Q. Corp., 596 F. Supp. 805, 810 (E.D. La. 1984) (Rule 11 sanctions not imposed because of limited ability to inquire into facts); see also Parness, supra note 6, at 338; cf. Weaver v. Superior Court, 95 Cal. App. 3d 166, 186-89, 156 Cal. Rptr. 745, 756-58 (1979).

\(^{65}\) 97 F.R.D. at 199 advisory committee’s notes.

\(^{66}\) This is where L is caught in a potential Catch 22 bind; she has a duty of care to her client not to act negligently and to act zealously on his behalf. Now, under Rule 11, she has a similar duty to her client’s adversary and the court to act only as a reasonable lawyer would act. Or, putting it differently, she will violate this latter duty if she files what later may be deemed to be a frivolous lawsuit (pursuant to an objective standard of reasonableness). The potential conflict of interest between L’s duty to her client on the one hand and her duty to the court and her adversary on the other hand is a real one. See generally W. Keeton, Prosser and Keeton on the Law of Torts 186 n.27 (5th ed. 1984); Nelken, supra note 6, at 1345.
not, even under the so-called more stringent and more objective requirements of the new Rule 11, even though a relatively minimal prefiling investigation was made. Whether sanctions should be imposed for continuing a claim after it is found to be baseless is of course another matter. The minimal competence requirement regarding the pre-filing inquiry essentially is the “reasonable lawyer” standard; what would that mythical reasonable lawyer have done?

There are both legal and factual components of any good pre-filing investigation. Most of the decisions, however, which use or refer specifically to the “reasonable inquiry” requirement of Rule 11, deal only with the nature of the factual pre-filing investigative steps taken by the initiating lawyer. Thus a court will examine what steps a lawyer took or could have taken prior to filing complaint. In the hypothetical, for example, one might ask whether the lawyer, even with the press of time, could or

67. There are considerable difficulties if a lawyer wants to withdraw a lawsuit after learning of facts showing the case to be baseless. While there is a federal rule that exists to facilitate such a withdrawal, neither the adversarial system nor the courts encourages such withdrawals. FED. R. CIV. P. 41; see, e.g., Pantry Queen Foods, Inc. v. Lifschultz Fast Freight, Inc., 809 F.2d 451, 454-56 (7th Cir. 1987). Moreover, in the climate of Rule 11 sanctions, a defendant facing such a Rule 41 plaintiff request to voluntarily dismiss a claim, will be compelled to seek Rule 11 sanctions. Compare Thomas v. Capital Sec. Servs. Inc., 812 F.2d 984 (5th Cir. 1987) (there is continuing Rule 11 obligation to reevaluate client’s position during litigation) with Oliveri v. Thompson, 803 F.2d 1265, 1274 (2d Cir. 1986) (there is no continuing obligation under Rule 11 to reassess the propriety of previously filed papers).

Local District Court Rule 5(b)(iv), Eastern District of New York, Relief From Appointment, states that an attorney can leave a pro se case to which he has been assigned when,

the attorney believes that the party is proceeding for purposes of harassment or malicious injury, or that the party’s claims or defenses are not warranted under existing law and cannot be supported by good faith argument for extension, modification, or reversal of existing law.

N.Y. RULES OF COURT, § 5(b)(iv) (McKinney rev. ed. 1987). I am not aware of any other place (rules of procedure, ethical codes, etc.) where there is an explicit rule such as the Eastern District rule, which facilitates withdrawal in the ordinary situation not involving a court appointment.


69. See Albright v. Upjohn Co., 788 F.2d 1217 (6th Cir. 1986) (court held that sanctions were appropriate against plaintiff’s lawyer for his failure to con-
should also have talked to any witness to the incident or someone to corroborate the credibility of plaintiff. As to a legal investigative or research duty under the reasonable inquiry requirement, few Rule 11 decisions have examined the adequacy of a lawyer’s legal research skills. An occasional judicial reference—sometimes in the nature of a gratuitous insult—is made to a simple legal research step which could have been taken to uncover some law.

The focus of the “reasonable inquiry” part of the Rule 11 analysis remains, however, on the fact and not the law investigation.

In applying the objective test of Rule 11, many courts have gone beyond analyzing what constitutes a “reasonable inquiry” in an investigative sense. Although the word “reasonable” modifies only inquiry in the rule, the objective standard which “reasonable” suggests (i.e. the reasonable lawyer standard) has also been applied to the phrase(s) following “inquiry” in the text of Rule 11—“well-grounded in fact and is warranted by existing law.”

The advisory committee’s notes, while emphasizing the rule change that requires reasonableness in the extent and method of the pre-filing investigation, also state that the lawyer’s conclusions or conduct be based on what it “was reasonable to believe” at the time a paper was signed. This appears to be the genesis of the leading Rule 11 decisions holding that the conclusions (both legal and factual) reached by a lawyer also satisfy an objective standard as to what the mythical reasonable lawyer would conclude.

Though the language of Rule 11 is far from clear,
neither the text of the rule nor even the drafters’ notes support an interpretation that establishes, in effect, a negligence standard for Rule 11. Nonetheless, it is this expansive interpretation of the “reasonable inquiry” test that is being followed and which greatly expands the opportunities for courts to use and also misuse Rule 11.

2. Creative Lawyering Norm

In this hypothetical, there is no issue of changing the law, only the reasonableness of the inquiry before filing the complaint. There also was no question about the reasonableness of the legal conclusion; the lawyer was familiar with the applicable law. Let me add an element of legal challenge to examine the continuing Rule 11 standard that changes in the actual governing law be sought only in “good faith.”

Assume, in my hypothetical, that A came to L’s office in New York in 1970 and not 1987. At that time, the Second Circuit’s standards for stating a prima facie housing discrimination claim under the federal civil rights laws were not yet clearly delineated. There were, however, some lower courts and other circuit courts that seemed to suggest that a plaintiff must allege that a defendant intentionally discriminated on the basis of race and that the refusal to rent was “solely” due to plaintiff’s race. In that context, L concluded in 1970, that the 1968 Civil Rights statute was intended to be applied more liberally in order to accomplish its aim (to eliminate racial discrimination in housing) and that an allegation of intentional discrimination was not required to state a prima facie claim under the law. Accordingly, assume that L filed the complaint and motion (just as in the 1987 hypothetical) and that she later lost either or both the motion and the case. Did she satisfy the Rule 11 creative lawyering standard that she may take an action if it is a “good faith argument” to change the law? Here, I use “good faith” to refer to the motives and

was] well grounded in fact and . . . warranted by existing law.”), cert. denied, 107 S. Ct. 178 (1986).


legitimacy in L's assertion of these legal arguments and not simply the adequacy of her factual or legal investigation under existing law. Whereas the investigation requirement is the objective reasonable lawyer standard, the "good faith" argument norm seems to require some inquiry into the motivations of the lawyer and her client. Or, at least this is a reading of amended Rule 11 that attempts to give cognizance to all and not just part of the language of the rule.

What is a "good faith" attempt to change the law? How would an advocate go about pursuing such a course of action? In the hypothetical, would L argue she wished to change the law (regarding proof of intent) or rather simply that the law is as she argues it is, which is in support of her client's position? Any advocate knows that the latter is the more effective route in a legal system using the doctrine of stare decisis. Further, how can a court determine that the argument is a good faith attempt to apply the law to favor her client? Should the court delve into the genuineness of L's motives through cross-examination or otherwise? Some courts, in their effort to simplify and to apply the new objective test(s) of Rule 11, have disregarded the remaining "good faith" language in Rule 11 or at least they have eliminated any element of subjectivity as to what it means. "In order to determine 'good faith' and 'improper motive' under Rule 11, a court must judge the attorney's conduct under an objective standard of reasonableness rather than by assessing subjective intent." This may be a difficult test for the lawyer on the cutting edge. At what point after 1896 and before 1954 would a lawsuit trying to undo the separate but equal doctrine have ceased to be a frivolous lawsuit under this interpretation of Rule 11? If the phrase "good faith" is to have any meaning, it seems to me that a court must be quite sensitive to the motives of a creative lawyer. Even if the court applies a so-called objective standard, the "reasonable lawyer" must be one who is a creative and progressive one.

77. See Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531, 1540 (9th Cir. 1986).
78. E.g., Oliveri v. Thompson, 803 F.2d 1265, 1275 (2d Cir. 1986).
79. Stevens v. Lawyers Mut. Liab. Ins., 789 F.2d 1056, 1060 (4th Cir. 1986) ("A good faith belief in the merit of a legal argument is an objective condition which a competent attorney attains only after a 'reasonable inquiry.'" (citing Zaldivar, 780 F.2d at 823)); see also Cannon, The History and Purposes of Rule 11, 54 FORDHAM L. REV. 10, 12 (1985); Note, Civil Procedure, supra note 6, at 144 (objective test also applies to standard for good faith attempt to change the law).
3. Ethical Norm

Rule 11 explicitly requires that an action not be interposed for "any improper purpose" such as harassment or delay. To return to my 1987 version of the hypothetical, assume in addition to the facts stated, that A told L (the lawyer) that he knew that the landlord had only one vacancy, that the landlord saw at least ten other people applying for the same apartment (some having arrived before A) and that because he, A, was in such dire need of an apartment he wanted to sue the landlord in order to gain a marginal advantage (though extortionate in nature) among the other applicants in having the landlord choose him. Under those circumstances, if L filed the complaint and motion would L have violated the "improper purpose" proscription in new Rule 11? Here, the evaluation of L's lawyering seems indistinguishable from the one utilized under old Rule 11. Did L act in bad faith to misuse the federal court to enable A to gain an upper hand? After all, if A sought no money but only a lease to the apartment, the landlord might easily decide to give A the apartment and literally not make a "federal case" of it, to avoid both the expense and the hassle of litigation. Were the landlord to resist and ultimately try to argue that the lawsuit was brought only as a club to coerce him into renting to A, he would have to establish the bad faith of A and/or his lawyer. This is a much different kind of analysis from one into the nature and reasonableness of L's inquiry or conclusions. Thus, even though the Rule 11 objective test as to whether L conducted a reasonable inquiry might be satisfied, there still can be a Rule 11 violation if bad faith is proven. This also is different from whether L is trying, in "good faith" to change the law. Nevertheless, even as to the improper purpose and harassment language in Rule 11, some courts have construed

83. Large damages awards have been obtained in relatively simple cases very similar to the one reflected in the hypothetical. See, e.g., Phillips v. Butler, Eq. Oppor. in Hous. Cas. (P-H) ¶ 15, 388 (N.D. Ill. Jul. 22, 1981) ($252,675), aff'd in part, 685 F.2d 184 (7th Cir. 1983); Brown v. Van Plaza Realty, Eq. Oppor. in Hous. Cas. (P-H) ¶ 15, 409 (E.D.N.Y. 1981) ($50,000). Does the fact that A may forego seeking such monetary relief sufficiently reduce or eliminate the extortionate aspect of bringing the lawsuit? Or does it remain (even as a purely injunctive action) a bad faith attempt to harass the landlord into a settlement?
these terms pursuant to an objective standard.\textsuperscript{84}

Thus, despite the protestations of some of the Rule 11 proponents, the language of amended Rule 11 does not eliminate the relevance of good faith. Nor, unfortunately, is the language unambiguous. Confusion seems to remain among the federal judges, even as to elimination of the requirement that bad faith be established before a Rule 11 violation can be found.\textsuperscript{85} Use of the three standards just suggested might aid in clarifying the application of Rule 11. This suggested clarification, however, will not alter the basic impact of the rule. It still would result in the judiciary's assumption of this substantially expanded responsibility of assessing lawyering performance.

C. Evaluative Function of Rule 11

What is the evaluative function which courts are now performing pursuant to Rule 11? Though the critique language or technique of a teacher is rarely used,\textsuperscript{86} whenever a court makes a Rule 11 determination that a "reasonable inquiry" was made, that a legal conclusion is one which a reasonable (i.e. minimally competent) lawyer would reach, or that a litigation action violates an ethical proscription against using the courts for improper purposes, it engages in the process of assessing the competence or the ethics of a lawyer. Lawyer competence and ethics, therefore, while not explicitly referred to in Rule 11, are at the core of the judicial Rule 11 exercise. Again, while courts eschew didactic terminology, the evaluative task is no different an analytical process than the one a clinician uses to provide a critique for a clinic stu-

\textsuperscript{84} See \textit{Zaldivar}, 780 F.2d at 831 n.9 (even "improper purpose" in Rule 11 has been interpreted to be one based on an "objective standard"). This reading of Rule 11 (which seems to disregard the plain language of the rule) would lead to the conclusion that Rule 11 has a single reasonable lawyer standard and any inquiries into motive or intent would be reserved for the exercise of other sanctioning powers pursuant to § 1927 or the inherent power of the court. Such a reading might make sense but it is contrary to the language of Rule 11.

\textsuperscript{85} See \textit{Suslick v. Rothschild Sec. Corp.}, 741 F.2d 1000 (7th Cir. 1984) (requiring bad faith); \textit{S. Kassin, supra note 6}. \textit{But see Ronco, Inc. v. Plastics, Inc.}, 539 F. Supp. 391 (N.D. Ill. 1984) (Judge Shadur criticizes the \textit{Suslick} analysis).

\textsuperscript{86} Occasionally, a court will emphasize the evaluative and educative aspect of Rule 11. In reducing a possible fees sanction, one court noted that the "criticism (implied by the Rule 11 sanction) is intended to be constructive." \textit{Brown v. Nationwide Mut. Ins. Co.}, 634 F. Supp. 72, 73 (S.D. Miss.), aff'd as modified by, 805 F.2d 1242 (5th Cir. 1986); see also \textit{In re TCI Ltd.}, 769 F.2d 441 (7th Cir. 1985); cf. \textit{Schwarzer, supra note 1}, at 654. "([I]t is far preferable for the judge to monitor the adequacy of preparation before the trial begins than to wait until trial when remedial action becomes more difficult.").
dent as to the skillfulness and results of a particular case plan, an
interview, a motion or a deposition.

The Rule 11 evaluation can occur at several possible levels: at each the federal court is now obliged to assess lawyering perfor-

mance and it may do so by applying the three standards I sug-
gest above. In each instance the evaluation is a task being
performed by the court, above and beyond its judicial obligation
to decide a case or a motion on the merits. First, a federal judge
must examine the lawyer's pre-filing steps and determine whether
those actions satisfy the Rule 11 "investigatory norm" or reason-
able inquiry test, as to both the facts and the law. In terms of the
factual investigation, a court is called upon to assess the thor-
oughness, industriousness and effectiveness of a lawyer's investi-
gative steps. This could include implicitly or explicitly an
evaluation of a lawyer's ability to effectively: interview a client
and elicit all the facts; interview a third-party witness; obtain
and examine all ascertainable and relevant documents; or develop
an investigation plan calling for a series of consecutive steps.

With respect to Rule 11 judicial assessments of lawyers' pre-
filing factual inquiries, a few examples are helpful. In Bockman v.
Lucky Stores, the court in an action already certified as a class
action, gave parties until June 13th to file remaining pre-trial mo-
tions. On June 5th, defense counsel got a phone call from an ex-
husband of a class member claiming he was told by his former
wife that plaintiffs' counsel had told class members they would
not have to pay the costs of litigation. Without even obtaining an
affidavit from the husband, defense counsel made a motion on
June 12th to disqualify plaintiffs' counsel for alleged ethical code
violations. The court evaluated the investigative steps taken by
defense counsel, concluded that he had not complied with the
reasonable inquiry test of Rule 11 and therefore imposed sanc-
tions on him because he: 1) had not tried to verify the phone call;

89. See Federal Procedure Committee, supra note 6, at 4 (list of several fac-
tors which courts are using in evaluating lawyering performance in their Rule 11
assessments; e.g. level of lawyer's experience; whether personal interviews were
conducted; whether documents were reviewed; whether lawyer relied absolutely
on client information).
90. 108 F.R.D. 296 (E.D. Cal. 1985), aff'd, 826 F.2d 1069 (9th Cir. 1987); see also Oliveri v. Thompson, 803 F.2d 1265, 1269 (2d Cir. 1986) (description of
"reasonable" investigation).
2) had made no effort to interview the caller's former wife; and
3) had not requested an extension of time to file pre-trial motions
in order to complete either of the first two steps. Not only were
inadequate investigative steps taken, thus calling for Rule 11
sanctions, but the court went on to conclude that defense counsel
was quite inconsiderate at best in making such a sloppily prepared
motion which impugned the integrity of plaintiffs' counsel. In
conducting its evaluation of the lawyering performance of de-
fense counsel, the court utilized a reasonable lawyer competence
standard in accordance with the guidelines set forth in the advis-
ory committee's notes.

In another case, a Florida district court rejected a plaintiff's
argument that a pre-filing investigation was prohibitively expen-
sive and therefore not required when the result of plaintiff's inac-
tion was to file a lawsuit which it never could have won. In Norton
Tire Co. v. Tire Kingdom, the plaintiff asserted antitrust claims
which the court held required the plaintiff to satisfy substantive
law tests relating to defendant's "substantial market share." The
court found lawyering deficiencies both in terms of legal and fac-
tual aspects of plaintiff's pre-filing preparation. On the legal side,
the plaintiff seemed to be making legal arguments that the applic-
cable circuit court decision need not be followed in favor of a mi-
nority opinion from another circuit but failed to explain why or
how the district court should do this. The minority view would
have precluded the necessity of establishing that defendant had a
substantial market share. But, the plaintiff also argued, even
under the substantial share theory, that it would be able to satisfy
the test. The bases of plaintiff's conclusion were its own survey
and a newspaper article both of which, however, showed defend-
ant's percentage of the market to be less than what the law re-
quired it to be to satisfy the test. Finally, plaintiff, in response to
defendant's summary judgment motion, moved to withdraw the
claim without prejudice, because it could not afford to conduct a
survey to show defendant had a substantial share of the market.
The court applied the Rule 11 reasonable inquiry test and con-
cluded that plaintiff's consideration and rejection of the need to
hire a consultant should have occurred prior to filing.

In a third case, Duncan v. WJLA T.V., the court imposed

92. 106 F.R.D. 4 (D.D.C. 1984). The case also demonstrates the extent to
which a court can get diverted into assessments of lawyering which are extrane-
ous to the merits of a case. For a discussion of the potential misuses of the rule,
see infra notes 223-281 and accompanying text.
sanctions on a plaintiff’s lawyer who misstated which college a proposed trial expert had attended. Because this misstatement necessitated the opponent’s expenditure of time and money to rebut the expert’s qualifications, the court awarded fees to the party opposing the expert. The court examined the steps taken by the expert’s lawyer and concluded no reasonable inquiry had been undertaken to learn the qualifications of the person plaintiff designated as her expert. Indeed, according to the testimony of the expert in question, neither plaintiff nor her lawyer had ever inquired about the expert’s biographical information which that lawyer had submitted in writing to his adversary.

As to the requirement that a lawyer make a reasonable inquiry into the law, a court might appropriately under the present rule also evaluate a lawyer’s basic legal research skills. Though few courts have openly discussed this legal research skill, a court could examine an allegedly offending lawyer’s ability to use: Lexis or Westlaw; Shepards; the Guide to Legal Periodic Literature; looseleaf services; treatises; etc. From an educational viewpoint, it would be useful to let a lawyer know in what respects her or his legal research skills are deficient. There are available criteria which a court might use in assisting it to conduct a Rule 11 evaluation of legal research skills. In fact, it would seem to be part of the courts’ responsibility under Rule 11 to establish the necessary competence criteria as to all relevant skills, including research skills, by which to evaluate whether and how well a lawyer conducted a “reasonable inquiry.”

Recalling the tripartite framework I suggested above, a second norm which a court should evaluate under Rule 11 is the “creative lawyering” standard. Most courts, however, also as noted above, have disregarded the “good faith” language in Rule 11 and simply have applied an objective standard of reasonable-

93. See, e.g., Club Assistance Program Inc. v. Zuckerman, 598 F. Supp. 734 (N.D. Ill. 1984) (J. Shadur questioned lawyer’s legal research and analytical skills); cf. Noxell Corp. v. Firehouse No. 1 Bar-B-Que Restaurant, 771 F.2d 521 (D.C. Cir. 1985) (awarded fees to a prevailing defendant pursuant to attorney’s fee award provision when plaintiff’s legal research failed to disclose a U.S. Supreme Court case “precisely on point”).


95. Id. But see Schwarzer, supra note 1 at 654 (“There are no general and objective standards by which to test the adequacy of counsel’s preparation.”). See also Whittington v. Ohio River Co., 115 F.R.D. 201 (E.D. Ky. 1987) (court set forth guidelines for compliance with Rule 11); A.B.A. Professionalism Report, supra note 1, at 313.
ness as to the legal conclusions of a lawyer as well as the adequacy of the investigation. For these courts, to use the language of the Second Circuit, the test is whether a competent attorney would have concluded that the claim was not supportable. The Rule 11 evaluative task here, according to the Eastway view, is to use a reasonable lawyer standard to assess the legal and factual conclusions reached by the lawyer.

These judicial evaluations of a lawyer's legal and factual conclusions (as contrasted with the lawyer's method of inquiry) are difficult to make and present potential areas of abuse of the Rule 11 powers. They demand that a court decide what is defensible and what is indefensible lawyering. Whether a court utilizes the so-called objective standard of what a reasonable lawyer would conclude or a creative lawyering standard which incorporates some element of good faith in the assertion of a particular legal or factual conclusion, these Rule 11 assessments require subtle line-drawing. For example, distinguishing between a case where "it is patently clear that a claim has absolutely no chance of success" and a case where "there is a strong chance of losing" is a difficult task. In the latter case, it was held that a litigant is not required by Rule 11 to forego pursuit of such a claim; in the former, sanctions were imposed.

From the perspective of counseling a client on the prospects of success, such refined line-drawing suggests that at some point on the continuum (perhaps at a point below five on a scale of one

96. See supra notes 72-74 and accompanying text. Not all courts are using this so-called objective standard to assess conclusions. See also Nelson v. Piedmont Aviation, Inc., 750 F.2d 1234, 1238 (4th Cir. 1984) ("Thus we cannot say the analogies were drawn with no 'good faith argument for the extension, modification or reversal of existing law.'"); cert. denied, 471 U.S. 1116 (1985).

97. Eastway I, 762 F.2d at 254; see also Southern Leasing Partners Ltd. v. Bludworth, 109 F.R.D. 643, 645 (S.D. Miss.) (A "[r]easonable inquiry" into the doctrine of res judicata "should have indicated . . . that none of the exceptions were applicable."), aff'd, 801 F.2d 783 (5th Cir. 1986).

98. For a discussion of potential misuse of the Rule, see infra notes 223-81 and accompanying text.


101. Id.; Monument Builders of Greater Kansas City v. American Cemetery Ass'n, 629 F. Supp. 1002, 1012 (D. Kan. 1986); see also California Architectural Bldg. Prods. Inc. v. Franciscan Ceramics, Inc., 818 F.2d 1466, 1472 (9th Cir. 1987) ("[S]uit was not so baseless that sanctions ought to be imposed." The "facts [possible dissimulation by defendants] do not suffice to create a genuine issue for trial, [but] we cannot say that the complaint is so lacking . . . as to make [plaintiff's counsel's] decision to sign and certify it subject to sanctions under [Rule] 11."
a hundred as to prospects of success)\textsuperscript{102} a case would be frivolous and the attorney would be subject to Rule 11 sanctions, whereas the case would have to read above 10 on the scale to withstand a 12(b)(6) motion to dismiss (i.e. "virtually without merit" or "totally unmeritorious").\textsuperscript{103} No sanctions would be applied either to the case withstand ing a 12(b)(6) or Rule 56 motion (i.e. above ten on the continuum) or to the case which is dismissed (i.e. below ten) but not "frivolous" (not below five). Such an analysis would call for a sophisticated and detailed Rule 11 evaluation by any federal court making a Rule 11 assessment. One of the leading and most active users of Rule 11, Judge Shadur, in denying a request for sanctions, wrote, after a lengthy analysis of a Rule 56 motion, that plaintiff's claims were "not destined to fail," and "most of plaintiff's claims have withstood defendants' attacks, and those on which they have lost were not matters so well settled that reasonable legal minds might not differ."\textsuperscript{104} I presume that Judge Shadur, were he using the continuum as to the claims dismissed, would have put the latter claims between five and ten on my scale. These have to be extremely difficult distinctions to make, even for the best of judges.\textsuperscript{105}

Two decisions amply illustrate how difficult it is for a court to perform this evaluative function. First, in Judge Weinstein's lengthy remand decision in the \textit{Eastway} case, he carefully analyzes the applicable antitrust law to sustain his opinion that while the legal conclusions of plaintiff's lawyer did not withstand the Rule 12(b)(6) or Rule 56 motions (i.e. they were below ten on my scale), the claims were barely under that fine line which the Second Circuit drew to support its opinion that the claims were frivolous.\textsuperscript{106} Using my continuum Judge Weinstein, having been

\textsuperscript{102} For a discussion of the technique of using percentages or various probability language in describing the likelihood of success for a particular legal claim, see D. Binder \& S. Price, \textit{Legal Interviewing and Counseling} 141-53 \& 166-70 (1985).

\textsuperscript{103} See, e.g., Rennie \& Laughlin, Inc. v. Chrysler Corp., 242 F.2d 208, 213 (9th Cir. 1957) (regarding standard as to Rule 12(b)(6) motion).

\textsuperscript{104} Rateree v. Rockett, 630 F. Supp. 763, 778 (N.D. Ill. 1986).

\textsuperscript{105} For example, in \textit{Rateree}, it is noteworthy that Judge Shadur denied nearly all of defendants' various motions to dismiss. \textit{Id.} This is the converse of the situation, which I discuss below, when a judge grants the dismissal motion. There (especially when granting a 12(b)(6) motion holding a claim is "virtually without merit"), the intellectual pressures on a judge to impose sanctions for filing a frivolous claim are great. For a discussion of the misuse of Rule 11 sanctions for the purpose of buttressing substantive legal conclusions, see \textit{infra} notes 227-81 and accompanying text.

directed by the Second Circuit to impose Rule 11 sanctions, might say the Eastway claims were 4.9, or barely under the rating which triggers sanctions. What constitutes a frivolous claim was dealt with by the Second Circuit (a different panel) in a post-Eastway decision, in a manner more similar to that of Judge Weinstein than the earlier circuit panel in Eastway. In the more recent opinion, the Second Circuit held that the trial judge’s conclusion that the legal and factual conclusions of plaintiff’s lawyer were “very attenuated” and were not a basis for imposing Rule 11 sanctions.\footnote{107. See Kamen v. American Tel. & Tel. Co., 791 F.2d 1006, 1010 (2d Cir. 1986); see also California Architectural Bldg. Prods., Inc., v. Franciscan Ceramics, Inc., 818 F.2d 1466 (9th Cir. 1987).}

And finally, a Rule 11 inquiry may also include an evaluation of the ethical propriety of the lawyer’s behavior, the third standard in my tripartite framework. Though some courts seem to have read the need to examine the good faith of a lawyer’s actions out of Rule 11, the language of the rule suggests that it remains part of the Rule 11 standards. The proponents of a single standard assert that if the lawyering actions satisfied the objective test, then it cannot be for an improper purpose.\footnote{108. According to the Ninth Circuit: “The view is nearly unanimous that an ‘improper purpose’ is to be tested by objective standards.” Zaldivar, 780 F.2d at 831 n.9. Further, the Seventh Circuit implicitly held that if a claim satisfies the Rule 11 reasonableness standard (as to the method of inquiry and conclusion) there cannot be an improper purpose. In bitter litigation between the City of Baltimore and the Indianapolis Colts football team, the City contended that the Colts’ interpleader lawsuit was both baseless and one filed for the improper purpose of harassing the City in the conduct of its previously filed condemnation action. Indianapolis Colts v. Mayor and City Council of Baltimore, 775 F.2d 177, 178-79 (7th Cir. 1985). Baltimore argued that even if the Colts legal position was legally tenable, it was filed for an improper purpose and further that it should be entitled to garner evidence on the team’s “motive” for suing. The Seventh Circuit disagreed; since the claim was “not frivolous,” it would seem it could not be for an improper purpose. \textit{Id.} at 183. Indeed, the appellate court had concluded that since the claim was not frivolous, the team “did no more than exercise the full extent of their legal rights.” \textit{Id.} at 182. “If we were to allow sanctions against Indianapolis . . . [for] filing a colorable interpleader claim, we undoubtedly would ‘chill an attorney’s enthusiasm or creativity in pursuing factual or legal theories.’” \textit{Id.; see also} Stevens v. Lawyers Mut. Liab. Ins. Co., 789 F.2d 1056, 1060 (4th Cir. 1986).} That position, however, is not defensible as the housing discrimination hypothetical suggests, the legal and factual position in the third variation of the hypothetical is warranted and would satisfy an objective reasonableness standard as to the legal conclusion. But if the lawsuit were brought it would be to extort a settlement.\footnote{109. Other extra-legal purposes for suing may be found to be more benign. In Zaldivar v. City of Los Angeles, 780 F.2d 823, 832-834 (9th Cir. 1986), the}
certainly it would violate the improper purpose clause in Rule 11. It would, however, require a court to evaluate the ethics and motives of plaintiff's lawyer, admittedly a more difficult task than the evaluation required under an objective standard. It may also take the court more directly into matters of interpreting ethics code provisions, in a manner which some courts do not wish to encourage or even permit. Similarly, the legal and factual position in a single case may satisfy the requisite minimal reasonableness but if it is a repetitious effort it may be deemed to be for harassment purposes. A more persuasive argument by those suggesting that good faith is irrelevant to Rule 11 might be that purposeful misuse of the litigation process is relevant to other standards by which to evaluate frivolous lawyering, such as 28 U.S.C. § 1927 or the court's inherent power. Thus, for the sake of simplicity, Rule 11 should utilize only an objective standard whereas motive and good faith are relevant to the non-Rule 11 tests.

Under Rule 11, the courts must evaluate the lawyering so that they can perform the immediate judicial task of determining whether a Rule 11 sanction must be imposed; the hope: to deter baseless litigation. Perhaps the unstated and longer-term objective is to deter bad lawyering and generally up-grade the competence and ethics levels of all lawyers. In any event, the rule has significantly expanded the opportunities for courts to assess lawy-
ering performance. Before considering how courts might be misusing this power, it is useful, first to compare those situations when judges evaluate lawyering pursuant to non-Rule 11 authority.

III. Judicial Evaluations of Lawyering (Non-Rule 11 Context)

The judiciary's involvement in assessing lawyer ethics and competence did not begin with amended Rule 11. Both before and after the 1983 amendment there were and are innumerable situations in which this evaluative function has come into play. In nearly all instances (attorney's fees awarded to prevailing plaintiffs being the principal exception), these assessments have occurred in response to allegations of abuse or misbehavior by attorneys. Thus, as with Rule 11, the judiciary's imposition of sanctions usually followed an evaluation which confirmed the impropriety of some lawyering behavior. There are some crucial differences, however, and they are reflected in two themes which recur in these non-Rule 11 cases. First, the judicial responsibility to evaluate lawyering performance and to impose sanctions has arisen only in the most extraordinary of situations. There must be truly egregious lawyering before these tasks are performed by a court and before penalties are imposed. In part this was due to a reluctance on the part of many judges prior to amended Rule 11 to criticize attorneys for bad lawyering; in part it was due to the more limited and defined circumstances in which courts had been called on to evaluate lawyering performance before Rule 11 was amended. Second, in a large group of these cases involving assessments of lawyering, the evaluations and the appropriate judicial response are unavoidable. A case or a trial could not proceed unless the evaluation was made. 114

Rule 11 evaluations, in stark

114. Improper courtroom behavior and conflicts of interest are clear examples. Other instances of allegedly improper lawyering are less obvious as to the need for judicial assessment. For example, the Supreme Court recently held that a defendant's sixth amendment right to counsel was not violated when the lawyer informed his client that he (the lawyer) would have to disclose the client's perjury. Nix v. Whiteside, 475 U.S. 157 (1986). While there was a strong difference of opinion among the justices whether ethical norms were to be the governing standards, there was agreement that the lawyer's behavior had to be assessed in order to dispose of the defendant's claim. Cf. Evans v. Jeff, D., 475 U.S. 717 (1986) (court held that the Civil Rights Attorneys' Fee Award Act did not preclude a defendant from demanding that plaintiff's counsel waive fees). There, the majority of the court assessed the lawyering behavior of defense counsel but used the fee statute as a source of criteria in doing so and not any purportedly applicable ethical code provisions. See also Massa v. Eaton Corp.,
contrast, are anything but necessary to the disposition of a case or a dispute on its merits.

Even more importantly, two features of Rule 11 significantly distinguish it from these other situations in which courts assess lawyering. First, the rule is nearly open-ended as to the scope of judicial scrutiny of an attorney's performance. Any paper signed by a lawyer and filed in court can trigger an evaluation. For purposes of the Rule 11 "reasonable inquiry" requirement, a court can delve even deeper and examine what a lawyer did before filing the paper in question. Second, as the preceding section makes clear, the standard of lawyering performance which a court can now demand under Rule 11 is much higher than was previously the case under Rule 11 and also much higher, generally, than that which triggers sanctions in non-Rule 11 situations. The federal courts can now hold lawyers to the equivalent of a legal malpractice negligence standard—what the reasonable lawyer would do. The cumulative effect of these two Rule 11 features is that a court's evaluative role is potentially greatly expanded. Negatively, as I discuss in the next section (part IV) this also provides great opportunity for misuse of the rule. Thus, to place the Rule 11 evaluative function in perspective, I will briefly review some of these other instances when the judiciary must assess the ethics or competence of lawyers.

A. Improper Courtroom Behavior

Lawyering actions in the courtroom may evidence varying degrees of incompetence, misuse, or disrespect or disregard for the court, the public or an adversary. For present purposes, the subcategories of misbehavior reflect differences in degree, not kind. In the extreme case, a court will exercise its contempt power.115 In the less extreme situation, a court may grant a mistrial motion or a post-verdict motion for a new trial.116 It is nothing new for


courts to evaluate trial lawyering pursuant to the applicable pro-
cedural, evidentiary and ethical code rules and to determine the
parameters of acceptable courtroom behavior, whether the outer
constraint is the limit of the adversarial system in permitting ex-
cessive rhetoric or assurance of minimal competence. The
courts, not the disciplinary bodies, are the primary forums in
which these instances of courtroom lawyering performance are
initially and usually finally assessed. The courts are compelled to
assume this task because full evaluation and disposition of the al-
legations of bad lawyering must be made immediately in order to
determine the course of the litigation. Generally, the question is
whether the alleged misbehavior prevented the adversely affected
party from obtaining a fair and proper trial. It simply would not
be practicable or fair, for example, for a court to defer resolution
pending a decision of the nearest disciplinary body. This is in
contrast to a Rule 11 evaluation which need not be done for pur-
poses of a fair resolution on the merits. In the case of the more
extreme contempt situation, the unacceptable lawyer perform-
ance might not bear directly on the merits; but because the pur-
ported misbehavior is so egregious, it requires a prompt judicial
response to uphold the dignity of the court. Again, the Rule 11
situation differs markedly because a far less consequential mis-
deed can trigger the evaluation.

B. Conflicts of Interest

Increasingly motions are being made to disqualify counsel on
the grounds of conflicts of interest. The standards for judicial
resolution of these motions are those contained in the Code of
Professional Responsibility or the Model Rules of Professional
Conduct. But it is the courts which are being called on, as much
as if not more than the bar's disciplinary bodies, to interpret and
apply these ethical guidelines. The courts, therefore, must
evaluate the actions of the lawyers. Such an evaluation might in-

118. See generally Schwarzer, supra note 1.
119. See, e.g., Oneida of Thames Band v. New York, 757 F.2d 19 (2d Cir.),
cert. denied, 106 S. Ct. 78 (1985); see generally G. HAZARD & W. HODES, supra note
49, at 121-186; C.W. WOLFRAM, MODERN LEGAL ETHICS 314, 328-37 (1986) ("In-
creasingly, courts permit opposing litigants to employ disqualification motions
to remove an opposing lawyer from the case because of an impermissible con-
ict of interest.").
120. See, e.g., Unified Sewerage Agency v. Jelco, Inc., 646 F.2d 1339, 1342
n.1 (9th Cir. 1981).
volve issues of pure ethics or combined questions of ethics and competence. Very briefly, just as in the case of improper courtroom behavior, a court will be obliged to resolve the dispute because the exigencies of litigation necessitate immediate resolution of the allegations in the context of the lawsuit in which the accusations are being made. Whether the assertions are made for tactical advantages (e.g. for delay or to force an adversary to obtain a new and perhaps less capable lawyer)\(^{121}\) or to avoid final judgments which might later be vulnerable to collateral attack, the allegations require prompt disposition. Neither the accused nor the accuser can afford to delay resolution by deferral or by a referral to the disciplinary authorities to be decided at some distant date. Accordingly, motions to dismiss counsel due to conflicts of interest are made and decided by the courts where the lawsuits are being heard. Indeed, except for “in futuro” advisory opinions on conflicts of interest questions (issued by some disciplinary bodies and most bar association ethics committees), or the rare disciplinary enforcement proceeding, the development of the law in this area of construction of the ethical norms on conflicts of interest is primarily judicial in origin.\(^{122}\) Once again, like most instances of improper courtroom behavior, and unlike Rule 11 evaluations, conflict questions must be resolved by the court when raised, in order to facilitate timely adjudication of the case.

C. Attorneys’ Fees Awards

Attorneys’ fee award statutes are numerous and come in many forms;\(^{123}\) all constitute legislative modifications of the common law American Rule that each party pay for his or her own legal expenses.\(^{124}\) Generally, these statutes have been enacted as an incentive to victims of particular kinds of statutory or constitutional violations to bring legal action (e.g. Civil Rights Attorneys’

\(^{121}\) The courts in resolving these motions are becoming more resistant to tactical use of disqualification motions for improper manipulative purposes. See, e.g., White v. Superior Court, 98 Cal. App. 3d 51, 159 Cal. Rptr. 278 (1979); Lewis v. Unigard Mut. Ins. Co., 83 A.D.2d 919, 442 N.Y.S.2d 522 (1981); L.R. Patterson, LEGAL ETHICS: THE LAW OF PROFESSIONAL RESPONSIBILITY 311 (1984) (courts are becoming impatient with this abuse of an ethical rule). Indeed such misuse of a disqualification motion, itself, is a possible violation of Rule 11’s proscription on litigation actions taken for an “improper purpose,” to “harass” or to “delay.”

\(^{122}\) C.W. Wolfram, supra note 119, at 329.

\(^{123}\) See H. Newberg, PUBLIC INTEREST PRACTICE AND FEE AWARDS 145-48 (1980) (list of federal statutes authorizing award of attorneys’ fees).

Thus, if a plaintiff wins, the legal fees are paid by defendant. Most of the statutes, however, implicitly authorize fees to successful defendants as well. Usually—again, the civil rights fee statute is illustrative—fees will not be awarded to defendants, however, unless the plaintiffs' position is totally "without foundation" or "frivolous." In this context then, courts will engage in evaluating lawyering performance in a manner quite similar to Rule 11 assessments.

Statutory fee award assessments of lawyering are also similar to Rule 11 evaluations because they are extraneous to a determination on the merits. Both are made only after the underlying legal issues are resolved. In this sense they differ from the evaluations of lawyering in the conflict of interest and courtroom behavior situations (where the lawyering is inextricably involved with the merits). Statutory fee award assessments, however, occur only at the end of the litigation, whereas Rule 11 evaluations may occur at any point in the litigation when an allegedly baseless paper is filed. But there is a more significant difference between the two kinds of rules authorizing these evaluations of lawyering—the attorneys fee award statutes on the one hand and Rule 11 on the other—and that is in their differing fundamental objectives. The fee statutes have a positive purpose, to provide an incentive to lawyers to assist victims of various wrongdoing to seek legal relief. Rule 11 is to serve principally as a negative deterrent to bad lawyering. While the two situations coalesce when a plaintiff files a baseless claim which is covered by an attorneys' fee award statute, that statute exists primarily as an inducement—to ensure or encourage vindication of certain rights. Thus, the vast majority of the applications of fee award statutes occur when a plaintiff...
prevails. In those instances, the evaluations of lawyering may be perfunctory at best, perhaps focusing on a limited issue such as an appropriate hourly rate or the efficiency of the lawyering.

In those situations where there is a prevailing defendant and there is a possible statutory fee award, there is considerable overlap with Rule 11. In such a case, judicial evaluations of the lawyering of plaintiffs' attorney may be made under both statutes and may be performed simultaneously. Indeed, there often is little or no discussion of any differences in the applicable standards called for under a particular fee statute as compared with Rule 11.

Two general observations should be made regarding this now extensive overlap of Rule 11 with many of the fee statutes that authorize awards of fees to prevailing defendants. First, whereas nearly all of the non-Rule 11 fee statutes require some degree of frivolity if not bad faith on the part of the plaintiff or plaintiff's counsel in order to award a defendant fees for the baseless actions of plaintiff, Rule 11, as is now clear, does not. A court can find a Rule 11 violation simply by finding that there was an inadequate fact investigation under a reasonable lawyer standard. Second, Rule 11's additional grant of authority to examine

129. "It is very rare for a prevailing defendant to receive fees." Derfner, The Civil Rights Attorneys' Fees Awards Act of 1976, in H. Newberg, Public Interest Practice and Fee Awards 13, 45-46 (1980). This situation may be changing in light of the availability of Rule 11. For a discussion of this change, see infra text accompanying notes 131-32.

130. See, e.g., Blum v. Stenson, 465 U.S. 886 (1984) (public interest lawyer should be awarded fees at the same market rate as any other lawyer).

131. See, e.g., Lieb v. Topstone Indus., Inc., 788 F.2d 151 (3d Cir. 1986).


133. A defendant's recovery of fees under § 1988 has been held to require purposeful misuse of litigation or bad faith. See, e.g., Hughes v. Repko, 578 F.2d 483, 489 (3d Cir. 1978); Keyes v. Lauga, 635 F.2d 330 (5th Cir. 1981). Even under Title VII, an award of fees to a prevailing defendant, while not requiring a finding of subjective bad faith, still requires a finding of frivolousness which connotes a less stringent standard of performance for plaintiffs' lawyers to meet than the Rule 11 reasonable lawyer standard. See Christianburg Garment Co. v. EEOC, 434 U.S. 412 (1978). Putting it differently, it is easier for a court to find that Rule 11 is violated than it is to award fees to a prevailing defendant under either of these two attorneys' fees award statutes. But see Coleman v. McLaren, 631 F. Supp. 763, 766 n.7 (N.D. Ill. 1986) (Judge Shadur explicitly noted that the § 1988 Christianburg standard for prevailing defendants is identical to the new Rule 11 objective standard; "empty head" but "pure heart" no longer is enough to avoid liability under § 1988). Other courts have not been quite as definitive in holding that an "objective" standard is to be followed for prevailing defendants under § 1988. See, e.g., Keyes v. Lauga, 635 F.2d 330 (5th Cir. 1981).
the solidity of plaintiffs' claims (the reasonableness of the lawyer's legal conclusions) has fundamentally expanded courts' involvement in these evaluative tasks. The expansion is more than simply a quantitative increase. Whereas fee awards to prevailing defendants were rare and only in what seemed to be the most egregious cases of purposefully baseless lawyering, Rule 11 has now made a fee award to a prevailing defendant much less unusual.

Thus, though a court's evaluative task under the typical fee statute is conceptually identical to its Rule 11 assessment responsibility, the much broader Rule 11 authority significantly increases the frequency with which courts perform such evaluations. Further, the Rule 11 reasonable lawyer standard means that a court must delve much more deeply into what constitutes competent lawyering. The judicial task is no longer limited to the extreme case. Moreover, the evaluation of plaintiffs' lawyering pursuant to the various fee award statutes is limited only to those instances when such legislation is available to a prevailing defendant. While there are many such statutes, their patchwork availability makes them fundamentally different from Rule 11. Rule 11 is nearly unlimited; the weapon is available to any defendant (as well as plaintiff) in any federal lawsuit. And, as noted, Rule 11 may be used any time a paper is filed during the course of the litigation. The fee statutes are available to defendants only after they "prevail" at the conclusion of a lawsuit and only in the specifically enumerated categories of cases for which fee statutes exist.

D. Discovery Sanctions

The use of sanctions to curb discovery abuses raises issues similar to those discussed here regarding Rule 11. Are sanctions

135. For a discussion of fee awards to defendants, see *supra* note 129 and accompanying text.
136. See, e.g., Olitsky v. O'Malley, 597 F.2d 303 (1st Cir. 1979) (fact that plaintiff's lawyer failed to engage in pre-trial discovery, while "poor judgment," did not constitute "bad faith" to justify fees to defendant).
137. For a discussion of the cumulative effect Rule 11 is having on the use of numerous sources of sanctioning authority, in addition to the attorneys' fee award statutes, see *infra* notes 149-211 and accompanying text. There now appears to be a greater judicial disposition to award fees because of the presence of Rule 11, pursuant to any of one or more of these sources of authority.
an effective method of deterring such abuse? Will the use of such sanctions produce unproductive satellite litigation? And even, are the courts capable of or inclined to properly evaluate lawyers' use of the discovery process? Indeed, the 1983 amendments of Rules 16 and 26 directing both the use of sanctions and earlier and greater judicial management of the litigation process are integrally related to the Rule 11 amendments. But a crucial distinction also remains between Rule 11 and Rule 26 (and Rule 37, the sanctions rule for discovery abuses). By definition, the use of Rule 26 and the accompanying sanctions are limited to the discovery process. Rule 11 is available for application to any part of the litigation process: from the filing of a complaint through the prosecution of appeals; even a post-litigation violation of a consent judgment. In fact, because there is an ostensible overlap of Rules 11, 26 and 37 regarding the use of sanctions, some courts have cited Rule 11 to penalize abuses of the discovery process. Most courts, however, have concluded that the more narrowly defined Rule 37 sanctions (and not Rule 11 sanctions) should be used to penalize discovery abuses.

Thus, application of Rules 26(b)(1), 26(c), 26(g) and 37

139. See generally Resnick, supra note 16, at 548-49 (recognizing non-punitive method of dealing with discovery abuse, exemplified by Standing Orders on Discovery of the U.S. District Court for the Eastern District of New York; set of rules designed to improve lawyering performance not by penalizing violations but by making it easier for lawyers to voluntarily comply); Sofaer, supra note 2, at 680.


141. See generally J. Friedenthal, M. Kane & A. Miller, Civil Procedure § 7.16 (1985).

142. See, e.g., Thornton v. Wahl, 787 F.2d 1151, 1154 (7th Cir. 1986), cert. denied, 107 S. Ct. 181 (1986) (Seventh Circuit, sua sponte and in reliance on Rule 11, awarded attorneys' fees to defendant for plaintiff's appeal of a summary judgment granted to defendant; appeal resting on a "serious misstatement of state law").

143. See, e.g., Adduno v. World Hockey Ass'n, 109 F.R.D. 375, 380 (D. Minn. 1986) (Rule 11 sanctions imposed on attorney for violating a settlement agreement on grounds agreement was signed for "improper purposes" and because lawyer violated duty to "conduct himself honestly and forthrightly before the court."). Other courts have taken a less expansive view of Rule 11. See Reprosystem, B.V. v. SCM Corp., 630 F. Supp. 1099 (S.D.N.Y. 1986) (court declined to impose Rule 11 sanctions for lawyer's refusal to sign stipulation because alleged impropriety did not involve filing of pleading or other paper).


145. See, e.g., Argo Marine Sys., Inc. v. Camar Corp., 755 F.2d 1006, 1014-
clearly entails an evaluative role by the courts similar to that triggered by Rule 11. A court must examine the circumstances and determine whether the use of or resistance to a particular discovery tool constitutes an abuse of the discovery process. Rule 26(c) authorizes the issuance of a protective order to prevent discovery which causes "annoyance, embarrassment, oppression or undue expense." When the purpose is harassment, discovery can be barred. Moreover, similar to the requirements of Rule 11, every lawyer must now sign all discovery documents pursuant to Rule 26(g), certifying that after a "reasonableness inquiry," it is "consistent with the rules," "not interposed for any improper purpose" and "not unreasonable or unduly burdensome or expensive." Interestingly, however, unlike their application of Rule 11, the courts often still seem to be requiring a bad faith finding or some element of purposefulness before a violation can be found which calls for sanctions, at least when the severe sanction of dismissal is used. 146 Less stringent sanctions, however, have been applied when non-willful violations of the discovery rules were found. 147

Finally, unlike the data regarding Rule 11, the frequency of use of the expanded availability of discovery sanctions (pursuant to the 1983 amendments) is not even approaching the frequency with which Rule 11 is being applied. One recent survey noted that discovery sanctions are infrequent in number and of minimal severity; the authors concluded that "either 'discovery abuse' is not a major problem in the federal district courts thanks to the threat of sanctions, or, as is more likely the case, the threat of sanctions has proved to be a paper tiger." 148 Again, it is the quantitative difference which is most important for our purposes. The lesser use of discovery sanctions means simply that these new discovery rules have not resulted in judicial involvement with evaluating lawyering performance in a manner even moderately similar to that occasioned by Rule 11. The greater use and the open-ended nature of Rule 11, therefore, raise qualitatively different questions about judicial efforts to curb abuses or to im-

15 (2d Cir. 1985); United Artists Corp. v. La Cage Aux Folles, Inc., 771 F.2d 1265 (9th Cir. 1985).


147. See, e.g., Poulis v. State Farm Fire & Cas. Co., 747 F.2d 863, 869 (3d Cir. 1984) (setting forth specific factors to consider in determining which sanctions are appropriate, including consideration of alternatives to a sanction of dismissal).

prove the quality of lawyering. While the availability of discovery sanctions does generate some lawyer assessments by the courts, the evaluations must be quite circumscribed (limited to discovery issues) and must focus, more often than not, on the kind of purposeful abuse that courts always have had power to penalize. Thus, though the questions as to effectiveness and utility are similar for the discovery and Rule 11 sanctions, the ramifications of the use of the different rules are quite different.

E. Abuse of the Judicial System

More generally, courts have imposed sanctions without Rule 11 for improper lawyering which undermines the efficacy of the judicial system. They have done so pursuant to their inherent authority to maintain the integrity of the courts, as well as pursuant to one of the several statutes or rules which authorize the use of such punitive measures. In determining what constitutes improper lawyering the courts necessarily would have to evaluate the competence or ethics of a lawyer. Unlike most current Rule 11 evaluations, however, the use of sanctions for these general abuses has been limited to the more egregious examples of bad lawyering, usually when a lawyer is found to have purposefully misused or abused the judicial process. While this ethical or moral norm (proscribing abuse of the judicial processes) remains a part of Rule 11, it does not account for much of the increase in the Rule 11 motion practice. The requirement that some form of lawyer bad faith be found before sanctions are imposed no longer exists in most Rule 11 evaluations. And it is this difference which is significant and results in a qualitative and quantitative change in the way courts now get involved in assessing lawyering performance pursuant to Rule 11.

1. Inherent Authority

The Supreme Court held in Roadway Express Inc. v. Piper the necessary to establish bad faith—both under the pre-amendment version of Rule 11 and these other sources of sanctioning authority which resulted in the ineffectual use of these powers by the courts. See, e.g., Schwarzer, supra note 6, at 195; Sanctions Imposa-

149. See, e.g., In re Cosmopolitan Aviation Corp., 763 F.2d 507, 509, 515 (2d Cir.) (sanctions imposed pursuant to combination of non-Rule 11 sources of authority on parties and lawyers who “continually mischaracterized facts,” evidenced “truly remarkable bad faith” and who will not be permitted “to profit from their contemptible conduct”), cert. denied, 106 S. Ct. 593 (1985).

150. To many observers it was this factor—the necessity to establish bad faith—both under the pre-amendment version of Rule 11 and these other sources of sanctioning authority which resulted in the ineffectual use of these powers by the courts. See, e.g., Schwarzer, supra note 6, at 195; Sanctions Imposa-

151. 447 U.S. 752 (1980). The court remanded the case to the trial court to
that a court has the inherent power to impose attorneys' fee sanctions on lawyers who act in bad faith because the exercise of such power is "necessary" to the exercise of all other judicial powers and necessary to protect "the due and orderly administration of justice and [to maintain] the authority and dignity of the court. . . ."152 In Roadway Express, the plaintiffs' lawyer repeatedly ignored court orders regarding discovery as well as deadlines for submissions of briefs. Much like the rationale underlying the contempt power, the Court concluded that the judiciary cannot tolerate an affront to its integrity; if the court becomes a party to improper use of the judicial process by countenancing abuse, respect for the judicial branch would be undermined.153 The Court held, quoting Link v. Wabash, that the inherent power to invoke the attorneys' fees sanction "is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars. . . ."154 This inherent power to sanction, however, has been limited to instances of willful abuse of judicial processes.

The scope and nature of this inherent authority were recently examined in an en banc decision of the sharply divided Third Circuit. In Eash v. Riggins Trucking Inc.,155 the court held (with four of ten judges dissenting) that it was within the inherent power of the trial court to impose a monetary sanction (equal to the cost of impaneling a jury, $390) on a lawyer who violated the judge's local rule regarding a cut-off date for settlements prior to trial. The Eash majority concluded that enforcement of the local rule was within a court's inherent authority; it is one of those powers "necessary only in the practical sense of being useful;" and it is pursuant to this inherent power that courts "have developed a wide

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152. Id. at 764 (quoting Cooke v. United States, 267 U.S. 517, 539 (1925); cf. Hull v. Celanese Corp., 513 F.2d 568, 571 (2d Cir. 1975).
153. See Link v. Wabash R.R., 370 U.S. 626 (1962) (relied on in Roadway Express) (Court upheld the dismissal of case because of lawyer's failure to appear at pre-trial conference in case which was oldest one on court's docket); Transit Ads Inc. v. Tanner Motor Livery, Ltd., 270 Cal. App. 2d 275, 282, 75 Cal. Rptr. 848, 852 (1969) ("When inexcusable neglect [by a lawyer] is condoned even tacitly by the courts, they themselves unwittingly become instruments undermining the orderly process of the law."); see also Note, Sanctions Imposed by the Courts on Attorneys Who Abuse the Judicial Process, 44 U. CHI. L. REV. 619, 639 (1977).
154. 447 U.S. at 765.
range of tools to promote efficiency in their courtrooms and justice in their results." In approving a fine for the lawyer who unnecessarily caused a jury to be impaneled, the Third Circuit found that the trial court has the "inherent power . . . to regulate the conduct of attorneys" appearing before it and to fashion tools for it to do whatever is reasonably necessary to deter abuse of the judicial process. Like the Supreme Court in Roadway Express, the Eash court reserved the use of this inherent authority to instances of bad faith misuse of the judicial process.

With respect to the judicial branch's tolerance of incompetence, as opposed to unethical behavior such as lying or improper use of the courts, the judicial activist argument is that the administration of justice is "destablized" by bad lawyering; it impairs the "orderliness, predictability and fairness" of the judicial processes. And it would "undermine public confidence" in the system. Competently litigated cases, therefore, are as significant to the integrity of judicial process as the elimination of any attempts to abuse or misuse the process. Judge Schwarzer, went even further and wrote, several years before the amendment to Rule 11, that trial courts ought to take a number of pre-trial prophylactic steps aimed at improving the quality of lawyering. Judge Schwarzer's position was a distinctly minority view and until Rule 11 was amended in 1983, the posture was not often emulated by his colleagues on the bench. Since the amendment to Rule 11, as well as the other 1983 changes increasing the pre-trial role of the judge, some other courts are following suit regarding the inherent power to ensure lawyering competence.

A related notion is that the court must ensure that the adversarial system operates fairly. If one side is the victim of incompetence that person may also be the loser not because of the merits but because of the shortcomings of the system, unless a judge

156. 757 F.2d at 563-64.
157. Id. at 567.
158. Cf. Kleiner v. First Nat'l Bank, 751 F.2d 1193, 1209 (11th Cir. 1985) (court upheld a $50,000 fine on defendant's attorney for disregarding a court order prohibiting communication with plaintiff class members).
159. Schwarzer, supra note 1, at 638.
160. The availability of malpractice suits to client victims of incompetence and the rare disciplinary proceeding initiated by a non-client to penalize incompetence apparently are not enough. The courts, Judge Schwarzer asserts, have an affirmative duty to play a role in effecting a higher level of competence among lawyers. Id. at 639.
161. Id. at 667.
162. See, e.g., In re Cosmopolitan Aviation Corp., 763 F.2d 507, 517 (2d Cir. 1985).
steps in to offset the imbalance. The proponents of this minority view espouse a more aggressive role for judges; they assert that judges must act as a constraint on incompetence and unethical behavior in order to ensure proper and effective operation of the adversarial system.\textsuperscript{163} In the criminal law context, a modified and more widely held version of this judicial duty is that the court must ensure that the constitutional law requirements of effective assistance of counsel are satisfied for defendants.\textsuperscript{164}

The standard of lawyer performance when courts evaluate lawyering pursuant to the judiciary's inherent authority is clearly less demanding than the standard used under Rule 11. Under \textit{Roadway Express}, the key distinction noted earlier between Rule 11 and the inherent authority to sanction lawyering abuses remains—some form of bad faith is required in the latter situation.\textsuperscript{165} This is so despite the minority view espoused by Judge Schwarzer that courts ought to be able to sanction (pursuant to their inherent authority) incompetent lawyering as well as purposefully unethical lawyering.\textsuperscript{166} And it is this distinction which substantially differentiates the evaluative function performed pursuant to Rule 11.

2. \textit{28 U.S.C. \S\ 1927}

In \textit{Roadway Express}, the Supreme Court also held that \textit{28 U.S.C. \S\ 1927} did not authorize awards of attorneys’ fees because, by its terms, it was limited to “costs” and costs do not include fees.\textsuperscript{167} Shortly thereafter, Congress amended \textit{\S\ 1927} to permit an award of attorneys’ fees as well. It explicitly rejected an attempt, however, to eliminate the purposefulness or bad faith re-

\begin{itemize}
  \item \textsuperscript{163} See Schwarzer, supra note 1, at 668. \textit{But see} Resnick, \textit{Managerial Judges}, 96 Harv. L. Rev. 376 (1982). Professor Resnick makes the point that this is exactly the kind of judicial intrusiveness (similar to that reflecting support for greater judicial management of cases) which will undermine the adversarial system.
  \item \textsuperscript{164} See Hill v. Lockhart, 474 U.S. 52 (1985).
  \item \textsuperscript{165} See, e.g., Fisher v. CPC Int’l Inc., 591 F. Supp. 228 (W.D. Mo. 1984) (bad faith justified sanctions pursuant to court’s inherent power and \textit{\S\ 1927}); \textit{cf.} Baker Indus. v. Cerberus, Ltd., 764 F.2d 204 (3d Cir. 1985) (bad faith required for \textit{\S\ 1927} sanctions).
  \item \textsuperscript{166} Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531 (9th Cir. 1986) (Ninth Circuit chastized J. Schwarzer for going too far in applying Rule 11 to punish supposedly unethical conduct); \textit{see} Nelken, supra note 6 at 1347-52 (detailed critique of Judge Schwarzer’s opinion in Golden Eagle, 103 F.R.D. 124 (N.D. Cal. 1984)).
  \item \textsuperscript{167} 447 U.S. at 759-63. The Supreme Court also suggested that the trial court consider on remand the availability of Rule 37(b) as a source of authority for sanctions. \textit{Id.} at 764.
\end{itemize}
requirement. 168 Congress concluded that the penalties for abusing the system should be greater but that the scope of possible violations should not be expanded. 169 Because Congress retained the bad faith requirement principally for the reason of avoiding any chilling effect on vigorous advocacy, application of § 1927, unlike that of Rule 11, continues to be limited to cases of the most egregious lawyering improprieties. Thus, judicial assumption of the task of evaluating lawyering performance pursuant to § 1927 remains relatively limited both in scope and probably in frequency. 170

3. Federal Rule of Appellate Procedure 38

This rule authorizes an award of "damages and single or double costs to the appellee" for any "frivolous" appeal. 171 Although the legislative history of this rule does not deal with whether scienter is required, most courts have so construed Rule 38, thereby limiting its applicability to the most egregious cases of baseless appeals. 172 To some courts, the word "frivolous" itself connotes an element of purposefulness. 173 While Rule 38 is, by its terms, limited to appeals which are frivolous, the previously mentioned sources of sanctioning authority (i.e., § 1927 and the inherent power of a court) may be exercised at any point in the litigation process. Thus, these broad sources of authority are also

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171. FED. R. APP. P. 38 ("If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.").


173. See, e.g., In re Ginther, 791 F.2d 1151, 1154 (5th Cir. 1986) (court of appeals found no abuse of discretion by district court in determination that "motion was frivolous, brought in bad faith, and prosecuted in violation of [Federal Rule of Civil Procedure 11]"); United States v. Blodgett, 709 F.2d 608, 610 (9th Cir. 1983) (sanctions may be imposed for "frivolous" appeal but only if filed in "bad faith").
available for punishing frivolous appeals. As in the non-appeal situations, these multiple tools have caused some confusion as to the applicable standards and, in the view of some commentators, have contributed to the lack of uniformity as to what constitutes a frivolous appeal. This in turn, they assert, has substantially diminished the deterrent effect Rule 38 might otherwise have on preventing baseless appeals. For the time being, however, even these critics concede that the Rule 38 tool is “seldom used.” Thus, like the other non-Rule 11 sources for imposing sanctions, Rule 38 has not yet produced a substantial increase in judicial evaluations of lawyering similar to that occasioned by Rule 11.

The United States Supreme court has its own rule for penalizing frivolous appeals. Like other appellate courts applying Rule 38, as well as the courts applying Rule 11, the Supreme Court is divided about the efficacy of such rules. In Talamini v. Allstate Insurance Co., the Court dismissed an appeal for want of jurisdiction but then denied the appellee’s motion for fees on the grounds the appeal was frivolous. On the fees issue the Court divided four to three against awarding fees. Justice Stevens for the majority concluded that spending court time on deciding sanctions issues adds more to the docket than it decreases, and further, that it might diminish “open access” to the courts. Former Chief Justice Burger, dissenting, lauded the appropriate use of the

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175. See, e.g., Reynolds v. Humko Prods., 756 F.2d 469, 473-74; see also Martinau & Davidson, supra note 172, at 605. The Seventh Circuit has concluded that the Rule 11 objective standard should be relied on in construing Rule 38. Hill v. Norfolk & W. Ry. Co., 814 F.2d 1192, 1202 (7th Cir. 1987).

176. Martinau & Davidson, supra note 172, at 604-05.

177. Sup. Ct. R. 49.2 provides: “When an appeal . . . is frivolous, the Court may award the appellee or the respondent appropriate damages.” Id.

178. See Natasha, Inc. v. Evita Marine Charters, Inc., 763 F.2d 468, 471 (1st Cir. 1985) (“[I]ronically, the extra time needed to determine whether an appeal is frivolous can steal yet more time from more serious cases.”).


180. Justice Powell took no part in the case and Justice White wrote separately to dismiss the appeal but said nothing about the motion for fees. Id. at 1068.

181. Id. at 1069-71. Notwithstanding its conclusion about the undesirability of sanction litigation, Justice Stevens did note that the jurisdictional defect is one “that competent counsel should recognize.” Id. at 1069.
sanction . . . in egregious cases . . . should discourage many of the patently meritless applications that are filed." At this point, the focus of the disagreement between the two groups of justices is not the standard for application but the general utility of using sanctions to deter frivolous litigation.

4. State Courts

Perhaps encouraged by the judicial activism embodied in a new Rule 11 and other recently amended federal rules, a number of states have grappled with the problem of frivolous lawyering, usually in one of two ways. Either the courts have imposed sanctions pursuant to their inherent authority or the legislatures or the courts have enacted laws or promulgated rules authorizing such sanctions. They are doing so for the reasons stated in Roadway Express and Eash—to monitor and ensure the efficiency and integrity of the courts. In the state of New York, for example, after a series of lower court decisions approving of sanctions being imposed pursuant to the inherent authority of the court,

182. Id. at 1073 (Burger, C.J., dissenting); see also Clark v. Florida, 106 S. Ct. 1784 (1986); Crumpacker v. Indiana Supreme Court Disciplinary Comm'n, 474 U.S. 1074 (1985); Hagerty v. Keller, 474 U.S. 968 (1985). Former Chief Justice Burger wrote alone in dissent in all three of these cases that sanctions should be imposed for a frivolous appeal.

183. The constituency of the two blocks on this issue appears to be quite stable. This fact is evidenced by the five cases cited by Justice Stevens in Talamini where the same three justices, Former C.J. Burger, J. Rehnquist and J. O'Connor, voted to impose sanctions. 470 U.S. at 1069 n.4. It is worth noting that despite the analogous purpose and language of Rule 11, which was promulgated by the Supreme Court, no mention was made of Rule 11 in any of these cases regarding the application of the frivolous appeal rule. Cf. Brown v. Herald Co., 464 U.S. 928 (1983) (Brennan, Marshall and Blackmun, J.J., dissenting to a denial of motion for leave to proceed in forma pauperis). For a further discussion of other differences among the justices insofar as they relate to the broader issue of how or whether the courts should try to improve the quality of lawyering, see infra notes 190-205 and accompanying text.


the New York Court of Appeals recently held that in the absence of a statute or rule authorizing such sanctions, they cannot be imposed. The Chief Judge of the New York Court of Appeals followed up this decision by proposing a court rule which would authorize sanctions in a manner similar to that embodied in Rule 11 and the rules and statutes put into effect in other states.

It remains to be seen whether state courts and legislatures will continue to move in this direction. As was the case with Rule 11, it appears that the impetus for these changes grows out of a frustration about the increasing amount of litigation and the accompanying docket pressure. Also like Rule 11, however, such state-level activity is hampered by a lack of empirical data to support the conclusion that state court docket increases are attributable in any measurable way to so-called frivolous litigation. Finally, also as is the case with Rule 11, these changes in the state courts' use of sanctions are not accompanied by any explicit statements of the goal of improving the competence level of lawyers. If that is an objective, it remains an unstated one.

5. The Supreme Court

Because the Court's position is not entirely consistent on the role of the judiciary in the various efforts to improve the quality of lawyering or decrease federal court dockets, a brief additional comment is warranted. I continue to proceed on the premise that were the competence and ethics of lawyers at the highest possible levels, there would be little or no abuse of the judicial process through the use of so-called frivolous litigation. Former Chief Justice Burger certainly has been the most outspoken member of the Court (both on and off the bench) regarding the desirability of using sanctions to deter frivolous litigation. And at least as
to efficacy of sanctions for discovery abuse, Justice Powell has been similarly vociferous.\textsuperscript{191} And it is the Supreme Court, it should be recalled, which promulgated Rule 11. But the dissonant strains from the Court seem nearly as strong. The division of opinion about the use of sanctions for frivolous appeals to the Supreme Court already was noted.\textsuperscript{192} There are other indications that the Court is anything but unified on the broader issue of what role the courts might or should play in evaluating or in turn possibly improving the quality of lawyering.

For example, while repeatedly decrying the dismal levels of competence in too many lawyers as well as the docket pressure on the federal courts,\textsuperscript{193} former Chief Justice Burger’s voice was strangely silent in a recent case, \textit{Webb v. County Board of Education},\textsuperscript{194} dealing with the breadth of the Civil Rights Attorneys’ Fee Award Act (“Fee Act”). The case is relevant here to show the ambivalence of the Supreme Court as to what role courts should play either in affirmatively trying to encourage good lawyering, or conversely, in penalizing bad lawyering or as to what steps courts should take to reduce court dockets. In \textit{Webb}, the Supreme Court found that it was perfectly acceptable to hold that a prevailing party in a civil rights action was not entitled to fees (under the Fee Act) for work done on a state administrative proceeding (which was not mandated under the applicable civil rights statute) even if such work reflected good lawyering.\textsuperscript{195} Moreover, one clear con-

\textsuperscript{192} For a discussion of the Court’s use of sanctions for frivolous appeals to the Supreme Court, see supra notes 177-83 and accompanying text.
\textsuperscript{194} 471 U.S. 234 (1985). Former Chief Justice Burger joined the majority written by Justice Stevens.
\textsuperscript{195} The applicable statute was 42 U.S.C. § 1983. Justice Stevens, writing for the majority, noted that while the Fee Act precluded an award of fees for administrative agency work, “competent counsel will be motivated by the interests of the client to pursue administrative remedies when they are available and counsel believes that they may be successful.” \textit{Id.} at 241 n.15. This seems to be a peculiar way to induce lawyers to be efficient. The same reasoning was expressed by Justice O’Connor in \textit{North Carolina Department of Transportation v. Crest Street Community Council}, 107 S. Ct. 336 (1986), where the Court held that a plaintiff’s lawyer was not entitled to a statutory attorney’s fee for the time spent at the administrative level in settling a claim. Even if fees could not be obtained, Justice O’Connor wrote “competent counsel will be motivated by the interests of the client to pursue . . . administrative remedies when they are available.” \textit{Id.} at 341 (quoting \textit{Webb v. County Bd. of Educ.}, 471 U.S. at 241 n.15). The dissent noted that “no challenge . . . will ever be settled \textit{without} a court action” thereby encouraging “wasteful” litigation. \textit{Id.} at 342 (Brennan, J., dissenting) (emphasis in original).
sequence of the Webb decision is that it will encourage lawyers to avoid non-compulsory administrative remedies and go directly to court thereby adding to the federal court dockets. Justice Brennan in dissent described the majority's opinion as an "unwise incentive for every potential litigant to commence a federal action." He went on to observe that good preparatory work such as was done in this case should be compensated for it "enables [plaintiffs] to prevail short of full-blown litigation of their federal claims and that thereby help[s] to lessen docket congestion." Despite Justice Brennan's explicit warnings that the decision would result in more federal lawsuits and his comments about incentives to competent lawyering, the Court chose not to address these issues in Webb.

In one of the few Supreme Court opinions in which Rule 11 was cited, the Court held in Burnett v. Grattan that in a civil rights action, the shorter administrative statute of limitations is not applicable because such actions require a thorough and extensive investigative preparation, and therefore, a plaintiff might need more than six months to adequately investigate a case in order to decide whether to file suit. Justice Marshall for the majority noted that "although the pleading ... rules are to be liberally construed, the administration of justice is not well served by the filing of premature, hastily-drawn complaints." A contrary result of opting for the shorter statute of limitations, Justice Marshall suggested, would undermine the efforts to encourage good and thorough lawyering. In a dissenting opinion by then Justice Rehnquist (joined by former Chief Justice Burger and Justice O'Connor), a much different concern was expressed about promoting non-frivolous lawyering:

197. 471 U.S. at 250 (Brennan, J., concurring in part, dissenting in part).
198. Id. at 252 (Brennan, J., concurring in part, dissenting in part) (footnote omitted). In the course of one of the few citations to amended Rule 11 by a member of the Court, Justice Brennan carefully reviewed the kind of preparatory inquiry that would comply with Rule 11 and which a competent lawyer would undertake before filing a lawsuit. It was just "this sort of preparatory work," he concluded, which was discouraged by the Webb majority. See also North Carolina Dep't of Transp. v. Crest Street Community Council, 107 S. Ct. 336, 342-47 (1986) (Brennan, J., dissenting).
200. Id. at 50 n.13.
201. These are the same three justices who consistently voted together in support of former Chief Justice Burger's opinions supporting the use of sanctions for filing frivolous appeals. For a discussion of these opinions, see supra notes 177-83 and accompanying text.
The Court apparently believes that a person asserting a federal civil rights claim must undertake an involved investigation preparatory to filing suit. . . . The basis for this assumption is not clear. The Federal Rules require nothing more than a plain statement of the grounds for relief [FRCP 8(a)], while the rules of discovery that enable a party to develop his case fully prior to trial come into play after suit has been filed.202

While this view of federal pleading requirements (until recently) has not been especially controversial,203 it also is not easily reconcilable with the position that Rule 11 is intended to be a "stop and think" rule, and a deterrent to un-thought out factual claims and legal theories.

Some of these apparent strains in the Supreme Court will probably have to be resolved soon when a Rule 11 case reaches and is heard by the Court.204 At that point the Court will have to reconcile, as the lower federal courts already have been struggling to do, its interests in: a) promoting good lawyering; b) discouraging frivolous litigation and unclogging the federal dockets; and c) avoiding satellite litigation. Despite the fact that the Supreme Court promulgated Rule 11, the Court's recent decisions construing its own frivolous appeals rule205 and the Webb and Burnett decisions discussed above suggest that its reconciliation of these competing interests will not be easy to achieve.

F. Summary of Non-Rule 11 Evaluations

This review of non-Rule 11 situations in which courts evaluate lawyering,206 reflects, I believe, the judiciary's ambivalence

202. Id. at 57 (Rehnquist, J., dissenting).
203. But see Marcus, supra note 18. Professor Marcus suggests that this long-standing view of liberalized pleading requirements may be undergoing a change to one which requires more detailed pleading. He feels this trend is counterproductive and that a better route would be to retain simple pleading requirements and rely more heavily on summary judgment as a device to preclude the necessity of trial. Id.
205. For a discussion of these cases, see supra notes 177-83 and accompanying text.
206. This review does not purport to be a comprehensive survey of all of the categories of cases in which courts are called on to evaluate the competence
about its role in trying to improve the overall quality of lawyering and its uncertainty about how to relieve the docket pressures on the courts. The Supreme Court is as good a composite illustration of that conflict as there is. The frustration of the courts is understandable when they confront attorneys who inconsiderately burden them with the results of their bad lawyering. Yet these non-Rule 11 cases also reflect the judiciary’s cognizance of its limitations in solving this problem. Rule 11, on the other hand, and as I discuss below, does not seem to recognize the limits on the judiciary’s capacity to ameliorate the problem. And, as the authors of a recent compilation of sanctions decisions state in the first sentence of their study: “Sanctions are being ordered with increased frequency.”

There now is a multiplicity of sources of authority pursuant to which lawyers’ improprieties may be sanctioned. Indeed, seemingly encouraged by the approval of the exercise of their inherent power in *Roadway Express* and the amendment to Rule 11, many courts now often cite all of the various sources of sanctioning authority. Because of the differing standards for these different sources of power, the courts’ reliance on multiple bases makes it difficult if not impossible to clarify the applicable standard for each source of sanctioning authority. Further, as a result of Rule 11 or the cumulative ef-

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207. Federal Procedure Committee, supra note 6, at 3.

208. In addition to a court’s inherent power to impose sanctions for abuses, other sources include the attorneys’ fee award statutes; 28 U.S.C. § 1927; Fed. R. App. P. 38; Fed. R. Civ. P. 11.

209. See, e.g., Hale v. Harney, 786 F.2d 688, 692 (5th Cir. 1986) (Rule 11, Rule 38, and § 1927); Steinle v. Warren, 765 F.2d 95, 101-02 (7th Cir. 1985) (§ 1927, Rule 38, Rule 11, and 42 U.S.C. § 1988). Specifically with respect to the Second Circuit, it was observed that its “courts commonly invoke Section 1927 together with Rule 11 and the inherent power of the court to furnish a solid bedrock on which to predicate the imposition of sanctions.” Federal Procedure Committee, supra note 6, at 28.

210. See, e.g., Di Silvestro v. United States, 767 F.2d 30, 32 (2d Cir. 1985), cert. denied, 474 U.S. 862 (1985) (imposition of sanctions affirmed where case brought in “bad faith,” citing both court’s inherent power and Rule 11 decision upholding the objective standard); Sam & Mary Hous. Corp. v. New York, 632 F.
fect of all of the sources of sanctioning authority, the same authors accurately observe: "[T]he ... courts are clearly signalling their intention to look with far greater care at litigation conduct that brings the profession into disrepute ...."211

IV. JUDICIAL EVALUATIONS OF LAWYERING PURSUANT TO RULE 11

As the preceding discussion makes clear, even before Rule 11 was amended in 1983, the courts played a role in evaluating and perhaps even in trying to improve the quality of lawyering. In doing so, though much less frequently than pursuant to Rule 11, the judges necessarily had to assess lawyering competence and ethics. Rule 11, however, has quite substantially changed the nature of the courts' perception of their function as evaluators of lawyering quality. It no longer is unusual for a federal judge to undertake this responsibility. It no longer is limited to the most egregious cases of bad lawyering. Indeed, it now is commonplace for federal courts to examine the quality of lawyering before them. The question, then, is whether this is an appropriate or useful function for the courts to perform.

A. A Proper Procedural Rule?

Certainly, the elimination of bad lawyering and even the improvement of lawyering quality are worthy goals of certain segments of the legal establishment—the law schools, the organized bar, even consumer groups. But is a rule of civil procedure which aims at bettering lawyers a proper rule of procedure?

There are several purposes underlying a good set of rules of civil procedure. The judicial system should facilitate a fair, just and reasonably unobstructed resolution on the merits of all civil disputes.212 The result should be fair in the sense that the litigants, after discussing the three different standards for the sanction motions, § 1988, § 1927 and Rule 11, the court simply concluded: "In light of the fact that the instant action ... was totally groundless, there is a strong probability that it was brought in bad faith. This is therefore an appropriate case for an assessment of ... attorney's fees.

211. Federal Procedure Committee, supra note 6, at 3.

212. Professor Shreve has put it succinctly: "The foremost quality of good procedural rules is fairness. A good procedure should be designed to be equally accessible to all litigants, expeditious, and capable of presenting a sufficiently unobstructed view of the rights of the parties so that the court can decide fairly the merits of the case." Shreve, Questioning Intervention of Right—Toward a New Methodology of Decisionmaking, 74 NW. U.L. REV. 894, 907 (1980) (footnotes omitted).
gants get their day in court and an opportunity to present their side of the case and argue their view of the proper application of the substantive law. Once the issue is decided, that should be it, hence the doctrine of res judicata promotes finality and peace and repose. Ideally, litigants should be able to pursue these goals with the minimum expenditure of judicial and lawyering resources. Expeditiousness is another generally recognized goal of any procedural system. Finally, it is desirable if all of this can be done inexpensively, so as to ensure full access to the courts without regard to financial status.

Assuming Rule 11 accomplished, at least to some extent, its stated deterrent purpose of eliminating frivolous lawsuits and streamlining the litigation process, the rule would seem to further the basic procedural goals of expeditiousness and efficiency in the use of judicial and lawyering resources. As stated previously, that is a large assumption. Even if the assumption is not valid (i.e. that litigation is neither less often initiated nor less lengthy) Rule 11 might still be useful in a general societal sense if it could help to make lawyers better through its deterrent effects. Putting aside the question of whether the costs of Rule 11 are too high, however, the improvement of lawyering quality is not one of the fundamental purposes of a system of civil procedure which is offered to first year procedure students. It does not seem to bear directly on whether the principal systemic procedural goals noted above are achievable. Nevertheless, a slightly modified Rule 11 may be a defensible rule of civil procedure notwithstanding the non-traditional nature of the lawyer competency objectives.

The logic in support of the indirect effort of Rule 11 to improve lawyering quality can be stated simply: it is a worthwhile goal to improve lawyers’ competence and ethics even though not

213. See 97 F.R.D. 165, 192 advisory committee’s note (regarding purpose of deterrence).

214. For a discussion of the questionable empirical bases for the conclusion that frivolous litigation is causally related to the increase in the number of lawsuits, see supra notes 17-19 and accompanying text.

215. One might argue that systemic tolerance of incompetent or unethical lawyering would undermine the integrity of the system, and that lack of respect might in turn encourage non-compliance with rules of procedure generally. This is an attenuated nexus, however, between the Rule 11 evaluative function and the general efficacy of rules of civil procedure. Moreover, even in the absence of Rule 11, there is no shortage of tools available to the courts to penalize truly incompetent or unethical lawyering. See Roadway Express v. Piper, 447 U.S. 752 (1980) (discussion of interpretation of § 1927, § 1988, Rule 37(b), and court’s inherent power to sanction).

216. For discussion of such a modified rule, see infra notes 424-50.
a typical objective of procedural rules. If the problems caused by Rule 11 can be kept in check, if no other legal institution is effectively addressing lawyering quality, and if the courts can make a positive impact on making lawyers better, then why not Rule 11?217

There are two principal reasons, however, why the present Rule 11 procedures do not make sense. First, the substantial costs incurred by Rule 11 must be weighed against the theoretical benefit of the rule—deterrence of frivolous litigation. Misuse of Rule 11 authority and satellite litigation are two such costs and are discussed below. Second, evaluating lawyers' performance is not a traditional judicial function.218 Judges are not teachers, trainers, supervisors or disciplinary authorities. Although they occasionally have to assess a lawyer's actions, especially if it is crucial to a disposition of the merits or if a statute requires them to do so, (e.g. attorneys' fees statutes), their primary task is to decide disputes between litigants. Thus, one could predict that many judges would resist performing this new and different evaluative task.219 Judges are neither inclined to become evaluators of the "ethical propriety" of all lawyer conduct before a court220 nor

217. An argument could be made that neither deterrence of so-called frivolous litigation nor improvement of lawyering quality are appropriate procedural purposes in the sense used in the Rules Enabling Act. See 28 U.S.C. § 2072. Rather, they are substantive concerns which should be addressed by legislatures (state or federal) through legislation, and not court-promulgated rules. For slightly different reasons Professor Burbank argues, with regard to the deterrence of frivolous litigation and § 1927, that Rule 11 is inappropriate as an effort to improve lawyering competence. See infra notes 282-84 and accompanying text. I think a contrary argument could also be made: that better lawyers and better lawyering would make the system work more smoothly, and, therefore, that Rule 11 falls within the scope of a Rules Enabling Act "procedural rule." This argument, however, does necessitate recognition of the nontraditional nature of this goal in terms of procedural objectives. Whether Rule 11 is retained in its present form or is modified as I suggest below, this rationale and the integrity of the system argument are the only defensible justifications for a procedural rule aimed at regulating lawyer performance. For a discussion of the suggested modifications to Rule 11, see infra notes 422-50 and accompanying text.

218. Professor Wright criticized amended Rule 11 as follows: "[T]here has never been a draft of amendments to the Civil Rules ... so devoid of substance ... I find nothing ... that authorizes courts to do things that they are not able to do and doing, and nothing that will require judges who do not want to do these things to do so." Parness, supra note 6, at 325 n.1 (Letter from Charles Alan Wright to John B. Frank and the Hon. Mary M. Schroeder, October 8, 1981).

219. For additional sources, see supra note 43.

220. Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531, 1539 (9th Cir. 1986). But see Blackwell v. Department of Offender Rehabilitation, 807 F.2d 914, 915 (11th Cir. 1987) (court upheld sanctions against attorney for "lack of factual candor" to court, even though attorney's arguments were not frivolous).
prepared or trained to make decisions about lawyering competence. As clinical teachers know, developing and applying fair and meaningful criteria to lawyering performance is not an easy task. While amended Rule 11 is an improved statement of certain of those criteria, it remains a relatively vague and difficult set of standards to apply. This is especially true if the deterrent objective of Rule 11 is to provide lawyers with some meaningful guidance as well as predictability about what is good lawyering. In part VI of this Article, I will suggest ways to address these concerns by changing the role of the courts under Rule 11 from one of direct evaluation of lawyering to one of a more limited preliminary screener of lawyer performance. And in the next section (part V), I discuss alternatives to Rule 11 as vehicles for improving lawyering quality. But first there are the immediate costs of Rule 11 which must be addressed.

B. Susceptibility of Rule 11 to Misuse

Rule 11 gives courts a large amount of discretion in deciding when there is frivolous lawyering. There seem to be two gen-

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222. Even one of the most vigorous proponents of strong enforcement of Rule 11 previously wrote: "[t]here are no general and objective standards by which to test the adequacy of counsel's preparation..." Schwarzer, supra note 1, at 654; see also Note, Civil Procedure, supra note 6 (importance of predictable guides for lawyers). As the discussion in Part IIB suggests, Rule 11 has not produced a clear set of standards by which lawyers can govern their lawyering. There clearly is an in terrorem effect of Rule 11 which probably has some deterrent impact on bad lawyering, by causing lawyers to be more careful, but it is a vague set of criteria. Furthermore, it may chill innovative lawyering.

223. Despite the drafters' attempt to narrow the range of discretion by establishing a so-called objective standard, individual judges will very much inject their personal views on Rule 11 motion practice into their resolution of these issues. The Kassin study supports the conclusion about the selective use of Rule 11. See S. Kassin, supra note 6. Further, as Judge Weinstein demonstrates at some length in the remand decision in Eastway II, although the amended rule mandates a sanction for a Rule 11 violation, it leaves the judge with considerable discretion as to what the sanction will be. A judge not favorably disposed to Rule 11, such as Judge Weinstein, will impose only mild sanctions. The Second Circuit, however, in Eastway III, vacated Judge Weinstein's $1000 sanction on the client, stating only that it exceeded the bounds of discretion, and imposed a $10,000 penalty on both the attorney and his client. Eastway III, 821 F.2d 121 (2d Cir. 1987). Thus, in the context of a lodestar amount of $52,912, the latest Eastway decision accentuates the predictability difficulties due to the absence of any criteria for assessing the propriety of a particular sanction.
eral ways in which courts can misuse these broad powers. The drafters of the Rule 11 amendments were sufficiently concerned with one potential abuse to have explicitly stated that the “rule is not intended to chill an attorney’s enthusiasm or creativity in pursuing factual or legal theories.” While they clearly sought to preclude courts from penalizing lawyers who litigate on the cutting edge of developing law, the wide discretion given to a judge would also permit the punitive use of sanctions against a disliked lawyer or one who is litigating in areas thought inappropriate for federal court. The potential for abusive imposition of sanctions to chill creative or radical lawyering is increased further because Rule 11 is nearly open-ended as to when a court can use its powers and also because of the cumulative effect of the now hefty arsenal of sanctioning powers. If a court is so inclined, it can use Rule 11 to impose sanctions at any point in the litigation. A vulnerable lawyer will have to perform at peak levels at all times to minimize the possible chilling use of a sanction.

A second kind of possible misuse of the rule arises from the

224. See 97 F.R.D. 165, 199 advisory committee’s note.

225. For cases “inappropriate” for federal court, see Dreis & Krump Mfg. v. International Ass’n of Machinists and Aerospace Workers, 802 F.2d 247 (7th Cir. 1986) (sanctions imposed for appeal of an arbitration award); Thornton v. Wahl, 787 F.2d 1151 (7th Cir. 1986) (sanctions imposed on plaintiff wife for suing husband and sheriff for her arrest; court found suit to be based entirely on vindictive motive and complete misstatement of state law); Hale v. Harney, 786 F.2d 688 (5th Cir. 1986) (sanctions imposed for alleged civil rights claim against a judge and spouse arising out of domestic relations case). The Seventh Circuit went further in Hill v. Norfolk and Western Railway Company, 814 F.2d 1192, 1203 (7th Cir. 1987): “This court has been plagued by groundless law suits to overturn arbitration awards. . . . The promise of arbitration is spoiled if parties disappointed by its results can delay the conclusion of the proceeding.” Other cases reveal a judge’s propensity to impose Rule 11 sanctions to punish a lawyer. See, e.g., Eavenson v. Holtzman, 775 F.2d 535, 543 (3d Cir. 1985) (“The district court stated . . . that he could not ‘look at [the] situation in isolation,’ referred to ‘a lot of problems . . ., a lot of motions and a lot of harassment’ which the district judge had encountered with appellant in another case . . . and imposed sanctions against appellant.”).

226. Adduno v. World Hockey Ass’n, 109 F.R.D. 375 (D. Minn. 1986). The court, relying both on its inherent authority and Rule 11, imposed a fine of $5000 on plaintiff’s counsel for violating a provision of a previously signed settlement agreement not to bring certain litigation in the future. Id. at 380. The court concluded that its Rule 11 authority could be used at any point “in the course of the litigation” and found that the lawyer violated the Rule 11 certification requirement when he signed and filed the settlement agreement through the use of false assurances. Id. at 380. But see In re Yagman, 796 F.2d 1165, 1182-85 (9th Cir. 1986) (reversal of $250,000 sanctions award against plaintiffs’ attorney upon trial court’s granting of direct verdict; sanctions based on cumulative misbehavior of plaintiffs’ counsel); Reproystem, B.V. v. SCM Corp., 650 F. Supp. 1099 (S.D.N.Y. 1986) (court chose not to apply Rule 11 to a violation of a court approved agreement).
structure of Rule 11 proceedings and apparently was not a concern of the drafters. The Rule 11 proceeding involves a two-step analysis. A court first resolves the threshold legal issue (e.g., whether to grant a summary judgment motion), and then decides the Rule 11 motion. There seems to be an ineluctable pressure on judges to reinforce the propriety of their initial legal determinations by extending them a step further, thus concluding that their legal analysis is so correct and perhaps even self-evident that anybody but a fool, an incompetent lawyer, or one misusing the courts should have reached the same conclusion. Therefore, Rule 11 sanctions must be imposed. Considerable discipline is required for a judge to resist this kind of reasoning or intellectual pressure.

A leading Rule 11 decision, *Eastway Construction Corp. v. City of New York (Eastway I)*, illustrates the possibility of both of these kinds of misuse. In *Eastway I*, the Second Circuit held that the amended Rule 11 standard now is the so-called “objective” one: whether a “competent” attorney, after a reasonable inquiry, “would have had to reach the conclusion” that “a claim has absolutely no chance of success” and “where no reasonable argument can be advanced to extend, modify or reverse the law as it now stands, Rule 11 has been violated.” Not only did the court explicitly state that “the standard is more stringent than the original good faith formula,” but it implicitly suggested that good faith may very well have been present here.

The plaintiff in *Eastway* was a general contractor who had alleged that: 1) the city and a private consortia of banks had conspired to deprive it of business in violation of the Sherman Act; and 2) the city, by refusing to consider its application in a timely and impartial fashion, had violated its rights under the United States Constitution. It seems that at least one of the principals

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227. 762 F.2d 243, 253 (2d Cir. 1985).
228. *Id.* 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.” *Id.*
229. *Id.* at 254.
230. *Id.* at 253.
231. Judge Kaufman seemed almost empathetic in recognizing the frustration of the plaintiffs which led to the filing of this antitrust suit. He stated: [W]e cannot say for a certainty that Eastway or its counsel acted in subjective bad faith in bringing or maintaining this lawsuit, or that its actual motive was to harass the City. After its travails of the preceding decade, it might just as well have been acting out of frustration or desperation. *Id.* at 254.
232. *Id.* at 248.
of the plaintiff Eastway Construction Corporation had admitted to making payments to municipal loan officials, approximately ten years earlier, to expedite loan applications. The city therefore refused to deal with Eastway, and it candidly conceded this position, at trial. As the Second Circuit stated: "In effect, Eastway was put out of business" and "[b]y early 1984, Eastway's demise as a general contractor in the public redevelopment field was nearly complete." The question then was whether a cause of action could be fashioned from these facts. The Second Circuit disagreed with Judge Weinstein, who had concluded in his original district court opinion that the complaint was "not frivolous."

Application of my tripartite analysis of Rule 11 (an investigatory standard, a creative lawyering standard, and an ethical standard) to the Eastway I holding points up the shortcomings of Judge Kaufman's analysis. He concluded that plaintiffs may not have sued for any "improper purpose," thus satisfying the good faith requirement under the old and new Rule 11 (the ethical norm). The Second Circuit opinion, however, implicitly suggests that plaintiffs failed to satisfy the good faith requirement in the first part of amended Rule 11; namely, that any attempt to change the law be made in good faith (the creative lawyering norm). Finally, Judge Kaufman explicitly found in a conclusory manner, somewhat insensitive to the potential chilling effects of his analysis, that the plaintiffs' lawyers failed to satisfy the Rule 11 objective standard as to what a reasonable lawyer would conclude.

Thus, the Second Circuit extended the "reasonable inquiry" language in Rule 11 to the phrase "good faith argument for the extension, modification or reversal of existing law." By doing so, Judge Kaufman accomplished two things. First, he resolved the ambiguous language in favor of the application of a single

233. Id. at 246. Eastway’s president, George Jaffee, admitted the payments amidst a well-publicized scandal over the conviction of a city official on bribery and extortion charges in relation to the municipal loan program. Id.

234. Id. at 248. After the bribery scandal, the city decided that it, and companies under its supervision, "would no longer enter into rehabilitation contracts with firms whose principals controlled companies that had defaulted on or were in arrears with respect to loans received from the City." Id. at 246. Eastway was one such company. Id.

235. Id. at 246.

236. Id. at 248.

237. Id. at 252; see Eastway II, 637 F. Supp. 558, 578-82 (E.D.N.Y. 1986) (Judge Weinstein’s discussion on remand in support of his earlier conclusion that plaintiff’s position was arguable).

238. 762 F.2d at 254.
objective standard (the same reasonable lawyer standard used in lawyer malpractice law) to the adequacy of a lawyer's investigation and to the reasonableness of the legal and factual conclusions reached as a result of that investigation. Second, he effectively read out of Rule 11 the words "good faith." That is not the only possible interpretation of the rule. Another is the one reflected in the tripartite framework suggested above. A good faith element on the part of the lawyer remains in Rule 11 and it comes into play when a new and different legal argument is being made. This interpretation would limit the objective standard to the adequacy of the investigation and retain a good faith argument standard which is more sensitive to creative, ground breaking and sometimes disturbing or even disruptive lawyering. While respectfully trying to apply the Second Circuit's opinion upon remand, Judge Weinstein very carefully analyzed the substantive law, discussed the fact that some competent lawyers may very well have disagreed with the Second Circuit's mythical reasonable lawyer, and concluded that plaintiff's claim was a viable one.²³⁹ While the Second Circuit purported to be concerned with avoiding a chilling effect, one may question, especially in light of the remand decision, whether that aim was accomplished.

Where does this leave creative lawyering or risk-taking by clients or lawyers? How fundamental a shift does this analysis suggest in the American rule that each side pay its own lawyering costs? In Ring v. R.J. Reynolds Industries,²⁴⁰ the Seventh Circuit awarded Rule 11 fees to the defendant where plaintiff alleged a wrongful discharge claim.²⁴¹ The Ring court concluded in a somewhat peremptory fashion that "a reasonable prefiling inquiry . . . would have disclosed that this complaint was not warranted under well settled law."²⁴² But the employment-at-will doctrine is far from settled; indeed the question whether a traditional employee-at-will has a claim for wrongful discharge is in a

²³⁹. Eastway II, 637 F. Supp. at 581. On remand, Judge Weinstein seemed to be trying hard to undo any chilling effect which the Second Circuit might have caused in Eastway. Judge Weinstein found, after an exhaustive review of the degree to which plaintiff's lawyer may have acted "unreasonably," that there were many factors which led him to believe that monetary sanctions should not be imposed on counsel. Id. at 584. The Second Circuit has now concluded that Judge Weinstein's carefully written opinion was an abuse of the discretion preserved for the trial judge under Rule 11. The Second Circuit vacated the $1,000 sanction against the plaintiff and ordered that a $10,000 sanction be borne both by counsel and his client. See Eastway III, 821 F.2d 121 (2d Cir. 1987).

²⁴⁰. 597 F. Supp. 1277 (N.D. Ill. 1984), aff'd, 804 F.2d 143 (7th Cir. 1986).

²⁴¹. Id. at 1282.

²⁴². Id. at 1281.
constant state of flux. Both *Eastway II* and *Ring* illustrate how Rule 11 could be applied to chill creative lawyering.

The same two cases also illuminate the possible misuse of the rule due to the two-step process involved in the proceeding. In both cases, once the court concluded that the claim should be dismissed, it then seemed relatively easy for them to conclude that it also was frivolous. In the *Eastway* case, Judge Weinstein's remand decision demonstrates *Eastway II*, I believe, that the second step should not have been as easy as it seemed. This pressure to buttress an initial legal conclusion is most pronounced when the threshold resolution is in the context of Rule 12(b)(6) or Rule 56 motions, motions where the ordinary procedural standards for prevailing already are quite stringent. One commentator stated that "a court in its opinion has the power to make an attorney's argument seem frivolous or implausible." Indeed, the proponent of either of these potentially dispositive motions must establish that the opponent's legal position is "virtually without merit." Drawing a line between a legal position which is "virtually without merit" and one which is "frivolous" is a difficult task. A judge must resist those pressures in order not to misuse Rule 11. The *Ring* court recognized this point but, nevertheless,

243. *Compare* Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 71, 417 A.2d 505, 511 (1980) ("The interests of employees, employers, and the public lead to the conclusion that the common law of New Jersey should limit the right of an employer to fire an employee at will.") *with* Meeks v. Opp Cotton Mills, 459 So. 2d 814 (Ala. 1984) ("Nothing in the record before us persuades us to deviate from the steadfastly followed rule that an employee at will may be discharged for no reason or any reason, including a 'wrong' reason."). For discussions on the development and status of employment-at-will, respectively, see generally Durkin, *Employment At Will in the Unionized Setting*, 34 CATH. U.L. REV. 979 (1985); Feinman, *The Development of the Employment At Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976).

244. See *Eastway II*, 637 F. Supp. at 581; see also Hill v. Norfolk & W. Ry., 814 F.2d 1192 (7th Cir. 1987) (a divided court ruled in favor of sanctions for baseless appeal of arbitration award; dissent concluded appeal was not frivolous. If one of three federal appellate judges concludes an appeal is defensible, it is difficult to accept the assessment that the appeal is frivolous.).

245. For discussion of the difficulties facing courts being asked to assess the difference between a claim which is virtually without merit and one which if frivolous and worthy of sanction, see *supra* notes 98-107 and accompanying text.

246. Vairo, *supra* note 112, at 88; see, e.g., Stiefvater Real Estate Inc. v. Hinsdale, 812 F.2d 805, 808-09 (7th Cir. 1987) (both granting of defendant's summary judgment motion and sanctions motion were reversed by Second Circuit: "several genuine issues of material fact" remained and claim was "far from frivolous"); Stevens v. Nationwide Mut. Liab. Ins., 789 F.2d 1056 (4th Cir. 1986) (reversed trial court's sanctions decision as abuse of discretion, where trial court had erroneously dismissed lawsuit based on mistaken understanding of law and then had imposed sanctions on plaintiff whose suit was dismissed).
seemed to inappropriately cross the line.\textsuperscript{247}

An analogous situation occurs with respect to malicious prosecution claims, where a court may not consider a defendant’s potential malicious prosecution claim until after it disposes of the plaintiff’s initial main claim.\textsuperscript{248} If the trier of fact (a jury or judge) were considering the defendant’s malicious prosecution claim at the same time as it was evaluating the plaintiff’s principal claim, it could prejudice plaintiff’s case. This would occur if some of the evidence a defendant might offer in support of the malicious prosecution claim would be irrelevant and therefore inadmissible with respect to a defense to the principal claim. For example, a defendant’s evidence of extraneous matters (e.g. the plaintiff’s bad personal experience with defendant) might help defendant’s allegation of maliciousness. But such evidence could explicitly undercut plaintiff’s case; at a minimum it would prejudice plaintiff’s claim.\textsuperscript{249} Further, plaintiff’s counsel might be a defendant in the malicious prosecution claim and thus be placed in an untenable conflict with the plaintiff.\textsuperscript{250} Rule 11 claims by a defendant present a situation quite similar to a defendant’s assertion of a malicious prosecution counterclaim; i.e. a defendant can assert simultaneously, and the court will decide at the same time, both a 12(b)(6) motion to dismiss (failure to state a claim for relief) and

\textsuperscript{247} Ring v. Reynolds Indus., 577 F. Supp. 1297, 1281 (N.D. Ill. 1984).

\textsuperscript{248} Although most “malicious prosecution” cases which arise out of an earlier, baseless civil lawsuit are so described, the more accurate label is a claim for “wrongful civil proceeding.” PROSSER AND KEETON ON THE LAW OF TORTS 892 (1984). One of the requirements for this tort action is that the prior proceeding, which is the basis of the claim, must have been terminated. Id.

\textsuperscript{249} E.g., Babb v. Superior Court, 3 Cal. 3d 841, 843, 92 Cal. Rptr. 179, 181, 479 P.2d 379, 382 (1971); see Birnbaum, Physicians Counterattack: Liability of Lawyers from Instituting Unjustified Medical Malpractice Actions, 45 FORDHAM L. REV. 1003, 1026-27 (1977).

\textsuperscript{250} See Nataros v. Superior Court, 113 Ariz. 498, 500, 557 P.2d 1055, 1057 (1976). Babb v. Superior Court, 3 Cal. 3d 841, 842, 92 Cal. Rptr. 179, 180, 479 P.2d 379, 380 (in support of its holding that one of the requirements for a malicious prosecution claim is that the prior proceeding be terminated, the court stated that a contrary conclusion “pits plaintiff and her attorney against each other as adversaries.”); see also Mahaffey v. McMahon, 630 S.W.2d 68 (Ky. 1982) (attorney for plaintiff in original action was sued in malicious prosecution action; lawyer advised his client to assert attorney-client privilege and court deemed that claim of privilege to support malicious prosecution claim). It is just the kind of conflict demonstrated in Mahaffey, between a lawyer and a client, which is unavoidable if the malicious prosecution claim were tried in the main action. But see Note, Groundless Litigation and the Malicious Prosecution Debate: A Historical Analysis, 88 YALE L.J. 1218, 1234 (1979) (“compulsory counterclaim” for “groundless suit” better solves problem than second lawsuit asserting malicious prosecution). With respect to similar conflict of interest problems regarding Rule 11, see Nelken supra note 6, at 1344-45.
a Rule 11 motion (claim frivolous or brought for improper purpose). In that Rule 11 context, a conflict of interest might very well be present between the plaintiff, who might be liable for Rule 11 sanctions, and plaintiff's lawyer, who also is potentially liable, as to who insisted on filing the complaint. Further, a court that is hearing both a motion to dismiss and a Rule 11 motion, will be receiving evidence possibly attesting to plaintiff's improper motive in filing the suit which may be prejudicial in favor of granting the motion to dismiss.

Returning to the ineluctable pressures caused by the two-step Rule 11 process, a recent Second Circuit opinion demonstrates just how far a court can go in using Rule 11 to support the propriety of its primary legal conclusion and also the extent to which it might expand the "reasonable inquiry" requirement into a completely unrealistic norm. In *Johnson v. United States*, 251 the federal court of appeals in a divided opinion held that it lacked subject matter jurisdiction over a tort claim against the United States. The claim arose from a sexual attack by a government employee and the court held it fell within the exception (for assaults) to the waiver of sovereign immunity. 252 The district court had dismissed the complaint for lack of subject matter jurisdiction on other grounds; the Second Circuit held that decision to be in error, 253 but then dismissed for lack of subject matter jurisdiction on the sovereign immunity grounds. Plaintiffs also alleged a negligent supervision claim against the government employer. 254 The majority held that the negligence claim also was barred by sovereign immunity, despite a split among the circuit courts and an even four-to-four split on the Supreme Court with the opponents reaching the opposite conclusion. 255 Furthermore, the majority stated that even if the claim were not barred as a jurisdictional matter, it was inadequately pled. 256 The court

252. *Id.* at 847. The claim arose from an alleged sexual assault by a postal worker upon a child. *Id.*
253. *Id.* The district court based its dismissal on plaintiffs' failure to meet the requirement of filing the claim with the appropriate administrative agency before instituting suit against the United States. *Id.* The Second Circuit reversed the district court on this issue, holding that plaintiffs' administrative claim alleging only sexual assault was sufficient under the governing statute to permit a negligent supervision claim to be heard in court. *Id.* at 849.
254. *Id.* at 848.
255. *Id.* at 850-54 (reviewing decisions of federal courts regarding the assault and battery exception where complaint framed as one for negligent supervision).
256. *Id.* at 854 ("[F]acts which are claimed to circumvent application of the
found that plaintiffs' allegation that the government knew or should have known that the postal clerk who committed the assault on plaintiff had malicious tendencies, was conclusory and based on "pure speculation." 257 Judge Mansfield, writing for the majority, continued: "We are forced to conclude" that the plaintiffs violated Rule 11; that their complaint had not "alleged facts supporting the conclusion that their negligence claim represents a 'belief formed after reasonable inquiry [that] it is well grounded in fact.' " 258 Judge Pratt, in a dissenting opinion, observed that the pleading burden imposed by the majority "may well prove to be insurmountable," and noted that "[a]s a practical matter, . . . plaintiffs' attorney would probably be unable [prior to filing] to obtain the information required by the majority to satisfy Rule 11." 259 Judge Pratt concluded that the majority's standard "erects a 'Catch 22' barrier: no information until litigation, but no litigation without information." 260

What is particularly distressing about the Johnson majority's gratuitous reference to Rule 11 (and, therefore, implicit criticism of the lawyering abilities of plaintiffs' attorney) is that no sanction apparently was even imposed by the court. Thus, reliance on or citation to Rule 11 served no real purpose other than to lend support to the majority's legal conclusion and to impugn the competence or integrity of the lawyer. Furthermore, resolution of the core legal issue in this case was one which was very much in dispute, and the majority even acknowledged that fact. The result cannot be encouraging for those asserting new, different, or controversial claims. Finally, as Judge Pratt suggested in his dissent, as have others elsewhere, using Rule 11 to effect a reversion to detailed fact pleading requirements undermines both the language of the federal rules and the basic policy of notice pleading. 261

Interestingly, had the Rule 11 drafters more explicitly recognized the pressures on a court to buttress its primary conclusion with a finding of a Rule 11 violation, thus acknowledging that a Rule 11 analysis is a two-step process, they might have more provision [assault and battery exception] must be pleaded at the outset of the case."

257. Id.
258. Id.
259. Id. at 856 (Pratt, C.J., dissenting).
260. Id.
261. Id.; see also Marcus, supra note 18, at 434 (liberal federal pleading requirements are being disregarded).
clearly identified the evaluative function as a purpose of the second step. Further, had they recognized the pressures on judges to use Rule 11 to complement their core legal decision, they might have contemplated separating the evaluative function and giving it to someone other than the judge. Yet, had the drafters given any thought at all to the two-step Rule 11 analysis, it would have raised the more fundamental question—and the one which is the primary concern of this article—of whether the federal courts ought to be, or, indeed, have the disposition to be, involved in this task of assessing the competence of lawyers. The drafters did not acknowledge the two-step aspect or the pressures on the initially deciding judge.

It is true that should a trial court succumb to the inclination to buttress its finding that a legal position is without merit, by further finding that it also is baseless or frivolous, that an appellate court can undo that judicial excess. But the appellate court itself may also reach out and use Rule 11 to buttress its own conclusions. For example, the Seventh Circuit recently imposed sanctions sua sponte for what it concluded in a split opinion was a frivolous appeal of a denial of a request to overturn an arbitration award. And it did so without briefing, without any argument or

262. E.g., Johnson v. United States, 788 F.2d 845 (2d Cir. 1986); Hill v. Norfolk & W. Ry., 814 F.2d 1192 (7th Cir. 1987).

263. Hill v. Norfolk & W. Ry. Co., 814 F.2d 1192 (7th Cir. 1987). Judge Posner’s majority opinion must be characterized as one of the most extraordinary and angry attacks on a lawyer’s competence yet reported under Rule 11. Some of the majority’s statements critical of plaintiff’s lawyers abilities and reflecting its anger include the following: “... it reveals a serious misunderstanding of the scope of federal judicial review of arbitration decisions.” Id. at 1194. “... the failure of Hill’s counsel to conform his submission to [the court’s statement of the principle of judicial review of arbitration decision] falls short of minimum professional standards of representation.” Id. at 1196. “Hill’s argument ... is absurd.” Id. “The ostrich-like tactic of pretending that potentially dispositive authority against a litigant’s contention does not exist is as unprofessional as it is pointless.” Id. at 1198. [This last capricious and gratuitous sentence with respect to a minor appellate argument is followed by a concession that out of “fairness” a closer reading of the briefs might produce a different conclusion.] “Hill’s counsel wasted our time and his adversary’s money unpardonably by misrepresenting the standard of federal judicial review of arbitration decision.” “Where ... the conduct sought to be sanctioned consists of making objectively groundless legal arguments ... there are no issues that a hearing could illuminate.” Id. “... we have said repeatedly we would punish such tactics, and we mean it.” Id. at 1203. “... some members of the bar still do not realize that the judicial attitude toward attorney misconduct has stiffened. They had better realize it.” Id. And while Judge Posner concluded that the plaintiff’s attorney had totally wasted the time of the court, and he wrote “... we do not suppose anyone would or could raise a question about the procedures used to determine that Rule 38 sanctions should be imposed in this case.” Id. at 1201. He made no reference whatsoever to the fact that a third member of the panel did in fact
hearing, notwithstanding its concession that at least part of the appeal was colorable, and despite the fact that a dissenting panel member concluded the appeal was a reasonable one.264 Further, it must be noted that an appellate court's scope of review is often quite limited.265 And while it may be difficult for the trial court to draw the line between "wrong but not frivolous" actions and "wrong and frivolous" actions, it is doubly difficult for an appellate court to review the propriety of the initial line-drawing. In Cohen v. Virginia Electric & Power Co.,266 the Fourth Circuit upheld the imposition of sanctions against the plaintiff under an abuse of discretion standard, but denied attorneys' fees to defendant for the appeal because it did not "view this as a case where [plaintiff's] claims were so frivolous that he should be sanctioned for taking the appeal."267 These subtle line-drawing exercises continue apace.

A recent Ninth Circuit case further illustrates the discipline which is required for a trial court to resist the pressure to reinforce its substantive decision with an award of Rule 11 sanctions. In Zaldivar v. City of Los Angeles,268 plaintiffs claimed that the City of Los Angeles violated voting rights laws by not requiring recall petitions to be printed in Spanish as well as English.269 Plaintiffs disagree with his sanctions analysis. Even a cautious commentator would be obliged to conclude that this opinion reflects a judicial arrogance not consistent with fairness and justice.

264. Judge James B. Parsons, of Northern District of Illinois, sitting by designation, as a member of the Seventh Circuit panel dissented as to sanctions. He concluded the appeal was not frivolous and wrote with respect to the majority's opposite conclusion: "It is a common human tendency to find self-assurance in anger when punishing, and that drive for self-assurance itself tends to enhance the level of punishment." Id. at 1203 (Parsons, S.D.J., concurring in part and dissenting in part).

265. See, e.g., Cohen v. Virginia Elec. & Power Co., 788 F.2d 247, 248 (4th Cir. 1986); see generally Cavanagh, supra note 6, at 535-36 (differing standards of appellate review: regarding appropriateness of particular sanction—abuse of discretion standard is used; propriety of basic Rule 11 violation involving factual finding—clearly erroneous standard is used; propriety of Rule 11 violation based on conclusion that argument is objectively legally groundless—de novo review standard is used).

266. 788 F.2d 247 (4th Cir. 1986).

267. Id. at 249-50. In Cohen, plaintiff and his counsel had agreed to withdraw the motion for leave to amend the complaint if it were opposed, and did indeed withdraw upon receipt of defendant's nineteen-page memorandum in opposition to the motion. Id. at 248.

268. 780 F.2d 823 (9th Cir. 1986).

269. Id. at 826. The city and its clerk were characterized as "nominal defendants" with "no genuine interest . . . adverse to the plaintiffs." Id. at 825 (footnote omitted). The Ninth Circuit characterized this case as "a purely political dispute." Id.
were supporters of the incumbent councilman, the target of the recall petition being circulated by politically opposed constituents.\textsuperscript{270} Ironically, the petition's proponents, who were primarily Mexican American, became intervenors in the suit and asserted that the complaint was baseless.\textsuperscript{271} The trial court agreed and concluded that the Voting Rights Act applied only to states or political subdivisions of the state and not to private individuals circulating a recall petition.\textsuperscript{272} Furthermore, the lower court viewed plaintiffs' claim as a "last ditch effort" to delay the recall process and in that light, imposed Rule 11 sanctions on plaintiffs for a "frivolous" claim.\textsuperscript{273} It would appear that the trial court succumbed to the pressures described above to reinforce its substantive conclusion with a Rule 11 award of attorneys' fees.\textsuperscript{274}

The Ninth Circuit, in contrast to the Second Circuit in the \textit{Eastway} decisions, reversed the trial court's Rule 11 decision on the grounds that sanctions here would chill creative lawyering.\textsuperscript{275} Implicitly acknowledging the pressures to sanction which are felt by a trial court granting a Rule 56 motion, the appellate panel stated: "[T]he granting of a motion to dismiss the complaint for failure to state a claim, or the granting of a summary judgment . . . is not dispositive of the issue of sanctions."\textsuperscript{276} Relying on the "frivolous or legally unreasonable" standard used in civil rights fees cases for awarding fees to prevailing defendants, the court simply reached a different conclusion than the trial court: that plaintiffs had made a "good faith" argument for applying the voting Rights Act and thus reversed the sanctions decision. It evaluated the efforts of plaintiffs' lawyers and concluded that they were those of a "competent attorney."\textsuperscript{277}

If the \textit{Ring} court, the trial court in \textit{Zaldivar}, the Seventh Cir-

\textsuperscript{270} Id. at 825.
\textsuperscript{271} Id. at 825-27.
\textsuperscript{272} Id. at 827.
\textsuperscript{273} Id. at 830.
\textsuperscript{274} See \textit{Zaldivar}, 590 F. Supp. 852 (C.D. Cal. 1984) (district court opinion). In granting the intervenor's motion to dismiss, the district court stated: "[W]e cannot reasonably conclude that such conduct violates the [Voting Rights] Act . . . ." \textit{Id.} at 855. In its discussion granting the intervenor's motion for the imposition of Rule 11 sanctions, the court concluded: "Plaintiffs' arguments are so without merit that their claim can be deemed frivolous." \textit{Id.} at 857. One would be hard-pressed to draw a line in this opinion between the analysis that the claim was "virtually without merit" (Rule 12(b)(6) standard) and "frivolous" (Rule 11 standard).
\textsuperscript{275} \textit{Zaldivar}, 780 F.2d at 834.
\textsuperscript{276} Id. at 830.
\textsuperscript{277} Id. at 833.
cuit in *Hill* and the Second Circuit in *Johnson* and possibly in *Eastway* over-reacted, this would seem to be producing the kind of chilling effect which the Rule 11 drafters sought to discourage, if not prevent. As Justice Stevens has written in questioning the efficacy of sanctions for so-called “frivolous” litigation:

> Freedom of access to the courts is a cherished value in our democratic society. Incremental changes in settled rules of law often result from litigation. The courts provide the mechanism for the peaceful resolution of disputes that might otherwise give rise to attempts at self-help. There is, and should be, the strongest presumption of open access to all levels of the judicial system. Creating a risk that the invocation of the judicial process may give rise to punitive sanctions simply because the litigant’s claim is unmeritorious could only deter the legitimate exercise of the right to seek a peaceful redress of grievances through judicial means. This Court, above all, should uphold the principle of open access.\(^{278}\)

It is difficult to state with any certainty whether Rule 11 is actually having a chilling effect and the broad question of whether to limit or decrease access to the federal courts, especially among victims of civil rights violations and persons otherwise disenfranchised, is one of great concern but beyond the scope of this article. Yet, looking only at the civil rights category, the limited data thus far would suggest that Rule 11 probably is being used selectively against such claimants.\(^{279}\) It also appears, however, that traditional civil rights and poverty lawyers are themselves using Rule


\(^{279}\) Of the 98 times Rule 11 sanctions were imposed during the first two years of the amended rule, 20 of those instances (20% of total) were in “civil rights cases.” Of the 345 opinions where Rule 11 was cited, during the same two year period, 72 were in civil rights cases (21% of total). In comparison, 250,292 civil cases were pending in all United States District Courts as of June 30, 1984; 261,485 were commenced during the year ending June 30, 1984 and 243,113 were terminated. Of the civil cases commenced during that year, 21,219 were in the civil rights category (excluding 18,856 in the prisoner civil rights category). This would suggest that the percentage of cases where Rule 11 sanctions were imposed in the civil rights category (20-21%) must be compared to the percentage of all civil cases which are in the civil rights category, which roughly is either 8% (if you exclude prisoner civil rights cases) or 16%; (if you include them). *Administrative Office of the United States Courts, Annual Report, supra* note 2. Others have commented on the disparate impact of Rule 11 on civil rights litigants. *See* Nelken *supra* note 6, at 1327; Resnick, *supra* note 16, at 556.
affirmatively to fend off baseless attacks. In any event, we ought to continue to closely monitor Rule 11 decisions to ensure that creativity and proper access to the federal courts are not adversely affected and that lawyers are not deterred from asserting valid claims out of a fear they will incur sanctions. Even if the prospects for success are "extremely unlikely," a person has a right to present issues that are arguably correct.

One final point regarding the possible chilling effect of Rule 11 has been offered by Professor Burbank, who has written that amended Rule 11 exceeds the judicial rule-making authority of 28 U.S.C. § 2072 (Rules Enabling Act). He cites the legislative history of the recent amendment to § 1927 as primary support for his conclusion. What that history shows, he asserts, is that Congress explicitly rejected a proposed amendment to § 1927 which would have eliminated the requirement that a lawyer's bad motive be established before any penalties under § 1927 could be imposed for "frivolous" litigation. Furthermore, the congressional rejection was expressly for the purpose of avoiding any "chilling effect" on creative lawyering. Since amended Rule 11 now does precisely what Congress rejected in considering changes to § 1927, Professor Burbank argues, the rule exceeds what is permitted under the Supreme Court's rule-making authority in § 2072. His argument is persuasive. At the very least, it

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280. See, e.g., Zaldivar, 780 F.2d at 825 (party seeking Rule 11 sanctions represented by Center for Law in the Public Interest and Mexican American Legal Defense Educational Fund); United States ex rel. U.S.-Namibia Trade & Cultural Council v. Africa Fund, 588 F. Supp. 1350, 1353 (S.D.N.Y. 1984) (Center for Constitutional Rights was public interest counsel for defendant, whose request for Rule 11 attorneys' fees was granted for "plaintiff's repeated initiation of obviously groundless actions, coupled with the specifics of this action.").

281. In re Marriage of Flaherty, 31 Cal. 3d 637, 650, 183 Cal. Rptr. 508, 516 (1982); 646 F.2d 179, 187 (1982); see also Leema Enter., v. Willi, 582 F. Supp. 255, 257 (S.D.N.Y. 1984) (defendant sought Rule 11 sanctions based on plaintiff's unsuccessful argument of "minimum contacts" and subsequent dismissal of complaint for want of personal jurisdiction; court denied fees and noted that "[t]he jurisprudence of personal jurisdiction . . . is an occasionally confusing and complex area of the law."); Parness, supra note 6 at 360 n.146 ("concerns mount about the impact of increased sanctions on the policy of free access to courts."). Two recent appellate court decisions reversing awards of fees suggest, however, that appropriate judicial restraint is being exercised on occasion in the interests of avoiding any chilling effect. See Oliveri v. Thompson, 803 F.2d 1265, 1279 (2d Cir. 1986) (Rule 11 demands should reflect "strong policies favoring suits protecting the constitutional rights of citizens"); Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531, 1540 (9th Cir. 1986) (imposition of sanctions should not be done in a way which will "chill an attorney's enthusiasm or creativity.")


283. Id. at 1003.
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accentuates the need for sensitivity by the courts in avoiding any application of Rule 11 which would unduly limit access to the federal courts.\footnote{284}{Id. at 1003-04. One response to Professor Burbank: “Although it seems clear that the Supreme Court ultimately would uphold the new provisions as proper exercises of the rulemaking power, the question raised [by Professor Burbank] is a legitimate one and worthy of consideration.” 5 C. WRIGHT, & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1334 (1969 & West Supp. 1986) (Professor Miller was principal drafter of Rule 11 amendment).}

C. Satellite Litigation

Another key concern of the Rule 11 drafters, and a continuing concern of many judges, is to ensure that the benefits achieved by Rule 11 in the form of reduced dockets in the federal courts are not outweighed by the new motion practice engendered by the rule.\footnote{285}{See 97 F.R.D. 165, 201 (drafters’ concern regarding satellite litigation); Becker, supra note 43 (judge’s concern); see also 105 F.R.D. 378-79 (criticisms of use and effectiveness of Rule 11 offered by Judge Gesell and Magistrate Attridge at Judicial Conference for District of Columbia Circuit).} Rule 11 litigation has grown substantially and all of it may appropriately be called satellite litigation (i.e. litigation not relevant to the merits of a case); it essentially falls in two categories. First, there is simply the huge and still growing number of basic Rule 11 motions each of which must be adjudicated. These motions, minimally, raise interpretive questions as to whether something is or is not frivolous litigation. In addition, there is a seemingly never-ending list of secondary issues arising out of Rule 11 practice; a new body of Rule 11 jurisprudence has developed. The issues range from such clear procedural questions as whether one may immediately appeal the granting or denying of sanctions\footnote{286}{Eavenson v. Holtzmen, 775 F.2d 535 (3d Cir. 1985) (yes).} to whether the ability to pay can be taken into account in determining the amount of sanctions.\footnote{287}{See Oliveri v. Thompson, 803 F.2d 1265, 1281 (2d Cir. 1986) (yes); In re Yagman, 796 F.2d 1165, 1185 (9th Cir. 1986) (yes). Some of the other issues which have arisen include: 1) Can a firm be sanctioned as well as the lawyer in the firm? (Yes: Calloway v. Marvel Entertainment Group, S.D.N.Y., Dec. 23, 1986, reported in ABA/BNA Lawyers Manual on Professional Conduct at 502); 2) Can a lawyer reply on co-counsel to satisfy Rule 11 obligations? (No: Unioul Inc. v. E.F. Hutton & Co., 802 F.2d 1080 (9th Cir. 1986); 3) Can Rule 11 sanctions be imposed on government lawyers as well as private attorneys? (Yes: In re Two Star Surgical Supply Inc., 74 Bankr. 241 (E.D.N.Y. 1987).} It may be that the quite large number of these related issues is due simply to the fact that the amount of Rule 11 motion practice has been enormous. It may also be due to the ambiguity of the lan-
guage and purposes of the rule. Whatever the reason there is a lot of such secondary Rule 11 litigation.

Not only was there the fear that initial Rule 11 motion practice would far surpass the quantity of baseless litigation deterred by the rule, but there is the ultimate Kafkaesque nightmare posed with some humility by Professor Arthur Miller, a principal drafter of Rule 11: "Of courts being besieged by motions to sanction attorneys for making frivolous motions for sanctions." In that same vein and with respect to similar issues raised in the context of discouraging baseless appeals, it has been argued that a "new jurisprudence of the frivolous" ought not to be created and that it would be "odd" if the judiciary which "already feels overburdened" had to spend its time "trying to distinguish between the almost frivolous and the extremely frivolous." As noted previously, a majority or at least a plurality of the Supreme Court justices generally has taken this position.

A Seventh Circuit decision demonstrates that Professor Miller's fear was not far from the mark. In Indianapolis Colts v. Mayor and City Council of Baltimore, the city of Baltimore and the Colts football team (which formerly resided in Baltimore) were fighting bitterly about the team's departure. On the midwest litigation front, the Colts sued the city in interpleader and sought and obtained an injunction of a condemnation action which the city had initiated in Maryland. After the city won a reversal of the lower court by a 2 to 1 decision in the Seventh Circuit, it then sought Rule 11 fees from the trial judge. One might characterize the city's attempt to seek fees as brash or bold, since one deciding appellate judge sided with the team's legal position, a second appellate judge voted to rehear en banc, and the trial judge himself had originally rejected the city's legal position. Not surprisingly, therefore, both the trial court and a unanimous Seventh

290. See supra notes 177-83 and accompanying text.
291. 775 F.2d 177 (7th Cir. 1985).
293. In its 1984 decision, the Seventh Circuit reversed the district court, holding that the Colts' claim did not satisfy interpleader jurisdiction. Id. In its 1985 Decision, the circuit court considered the city's appeal from the district court's denial of its motion for attorneys' fees. Indianapolis Colts v. Mayor and City Council of Baltimore, 775 F.2d at 178.
Circuit denied the city’s effort to gain fees. Moreover, the Seventh Circuit awarded attorneys’ fees to the Colts for having to oppose the appeal, pursuant to Rule 38, because the city “wasted the time and energy” of the team and the court, and because “a competent attorney reasonably should have recognized [that the fee request] had no chance of success.”

Such endless Rule 11 bickering is not an isolated occurrence. The rule has produced numerous other similar almost surreal episodes. For example, the Seventh Circuit held that sanctions should be imposed for a motion to reconsider a motion for sanctions but not for appealing the award of sanctions for both motions. In another case, a denial of sanctions was appealed, reversed and then appealed a second time as to the amount of the sanctions. Appeals of sanctions have gone up to the Supreme court despite the absence of any continuing dispute on the merits. And, similarly, denials of requests for sanctions have been appealed even when there is no longer any dispute about the underlying substantive issue. There have even been several cases in which a defendant in state court has removed a case to federal court for purposes of moving to dismiss and to seek sanctions for filing the frivolous claim in state court, in one instance leaving half the claim behind in state court. In all of these removal cases the courts quite properly concluded that granting sanctions would result in increasing not decreasing federal court dockets, thereby undermining a basic purpose of Rule 11.

Another procedural issue which has not yet produced a clear consensus among the circuits is whether a hearing of some sort is required before sanctions can be imposed. If, as is usually the case, a Rule 11 motion is made on papers, a court generally will

294. 775 F.2d at 178.
295. Id. at 184.
302. Cf. Hewitt v. City of Stanton, 798 F.2d 1230 (9th Cir. 1986) (sanctions imposed on a plaintiff who removed a state court action to federal court).
303. A hearing might mean an opportunity to brief and argue a motion or to present testimony at an evidentiary hearing.
treat it as it would any motion and have argument or an evidentiary hearing as needed. If an award of attorneys’ fees is the sanction to be imposed, there will then be an opportunity for additional submissions and possibly an evidentiary hearing.\(^{304}\) In the more unusual situation of sanctions being imposed \textit{sua sponte}, at least one circuit panel has held that when sanctions are being imposed for “making objectively groundless legal arguments,” a hearing is not required, nor even an opportunity for briefing or argument; there are no relevant issues “that a hearing could illuminate.”\(^{305}\) More typically, while a full blown criminal contempt type of evidentiary hearing may not be required to adjudicate a Rule 11 issue, a flexible standard to meet varying situations will be followed which minimally affords notice and an opportunity to be heard.\(^{306}\) The tension engendered by this issue understandably poses the need to avoid unnecessary litigation (the basic purpose of Rule 11) against the need to afford due process to a lawyer whose competence and integrity may be impugned.\(^{307}\) On this latter point, it is worth noting that the publicity and often the acrimony of a Rule 11 attack on a lawyer’s competence or ethics may have a far greater adverse impact than disciplinary proceedings which are often secretive but where appropriate due process protections are afforded to lawyers being charged.\(^{308}\)

Still another Rule 11 issue which strikes at the heart of the adversarial system is whether or how a lawyer must withdraw a complaint, long after it was filed when newly discovered information discloses the claim to be baseless.\(^{309}\) Some courts have held that the Rule 11 obligation is not a continuing one as to the veracity and completeness of the original complaint, though it does

\(^{304}\) \textit{E.g.,} Fried v. Fried, 113 F.R.D. 103, 108 (S.D.N.Y. 1986); \textit{see also} Oliveri v. Thompson, 803 F.2d 1265, 1280 (2d Cir. 1986) (evidentiary hearing not required if judge has full knowledge of all relevant facts); SFM Corp. v. Sundstrand Corp., 102 F.R.D. 555, 560 n.6 (N.D. Ill. 1984) (District Judge Shadur attempted to avoid the need for an evidentiary hearing by strongly urging the parties to reach agreement on fees or risk incurring additional costs).

\(^{305}\) Hill v. Norfolk & W. Ry., 814 F.2d 1192, 1201 (7th Cir. 1987).

\(^{306}\) Donaldson v. Clark, 819 F.2d 1551, 1560 (11th Cir. 1987) (\textit{en banc}) (“The accused must be given an opportunity to respond, orally or in writing as may be appropriate, to the invocation of Rule 11 and to justify his or her actions.”); Ford v. Alfaro, 785 F.2d 835 (9th Cir. 1986). This position is consistent with that taken in the advisory committee’s note to Rule 11.


\(^{308}\) C.W. Wolfram, \textit{supra} note 119, at \S 3.4 (1986).

\(^{309}\) \textit{Cf.} Local District Court Rule 5(b)(iv), Eastern District of New York. For the text of the rule, see \textit{supra} note 67.
survive as to each subsequently filed paper. In the Fifth Circuit, however, the court held that there is a continuing obligation to withdraw or discontinue an action that no longer has a reasonable basis in fact and law. The complexities of stopping a lawsuit in mid-stream, however, have yet to be fully explored. For example, if a plaintiffs' lawyer voluntarily moves to dismiss a complaint, does that mean the lawyer is inviting a sanction? In one case the Ninth Circuit affirmed the propriety of a trial court's conditioning an order granting a voluntary dismissal on the payment of $294,141 in fees to defendants. In another, sanctions against a plaintiff's attorney were affirmed even when the voluntary dismissal was filed before the defendant had even responded to the initiating papers, on the grounds that the complaint was baseless when filed.

This partial catalog of Rule 11 issues reflects the extraordinary increase in Rule 11 motion practice. While it might seem reasonable to presume that the number of these issues is finite, and, therefore, that this increase might soon end, the evidence suggests the contrary. The Supreme Court has not yet addressed any Rule 11 question. Even if it deals with the basic standards question it seems doubtful that many of these secondary questions will soon get resolved at the Supreme Court level. That would suggest that differences between circuits and even subtle distinctions between different panels in the same circuit on these secondary issues are likely to continue and, therefore, likely to continue to engender litigation.

While all of this raises serious questions about whether the costs of this additional litigation outweigh the possible benefits of Rule 11, there exists no hard data on which to base a conclusion. Such an assessment of the deterrent effect of Rule 11 would require a careful empirical study which has not yet been done and
which would address several questions. First, how much of Rule 11 practice is accomplished by a party’s mere addition of a Rule 11 argument to an existing motion or response, followed by a court’s inclusion of its response to the Rule 11 arguments as a minor part of its decision on the merits? In short, if Rule 11 issues can be resolved with a minimal and quite marginal expenditure of judicial resources, then the imposition on the courts probably might be acceptable. Second, is Rule 11 practice becoming so commonplace that the failure to add a Rule 11 motion to each and every court paper will become an implicit statement that the opponent’s position has satisfied a minimal standard of reasonableness? Put differently, the use of typical brief writing hyperbole, such as “plaintiff’s position is totally baseless” or “plaintiff’s argument is totally inappropriate and without legal or rational foundation,” will either have to cease (which seems unlikely) or it will compel an accompanying Rule 11 motion. Certainly in some courts that would seem to be the case. If this is verified, it would seem to reflect a misuse of limited judicial resources and clearly undermine the objective of unclogging the dockets. A third question worthy of exploration is how much judicial and lawyer time is being spent exclusively on Rule 11 issues when there no longer is a dispute on the merits.

Until some empirical data is available on these issues (though skepticism is appropriate as to whether such information can be compiled), it will be difficult to fully assess the question of


315. See, e.g., In re Morrell, 42 Bankr. 973 (N.D. Cal. 1984) (denial of Rule 11 request for fees in two sentences); Deutsch v. Health Ins. Plan, 573 F. Supp. 1443 (S.D.N.Y. 1983) (denial of Rule 11 motion in single sentence). The issue of satellite litigation and the burden on judicial resources is, of course, independent of the concerns over the abuse or misuse of the sanctioning power. For a discussion of the potential misuses, see supra notes 223-48 and accompanying text.

316. This would be a fair observation in the Northern District of Illinois, the Southern District of New York and the Northern District of California. See supra note 42 and accompanying text. Judge Brieant has made the additional observation regarding the litigiousness which might arise due to Rule 11. He counselled lawyers to be wary of causing an adversary to be “resentful,” because of a Rule 11 motion, stating that “[a] cordial, professional relationship must be preserved.” Hot Locks, Inc. v. Ooh La La, Inc., 107 F.R.D. 751, 752 (S.D.N.Y. 1985). In short, Rule 11 motion practice could very well exacerbate the already contentious atmosphere of most litigation. Cf. Brazil, Improving Judicial Controls Over the Pre-Trial Development of Civil Actions: Model Rules for Case Management and Sanctions, 1987 Am. B. Found. Res. J. 873, 924 (one reason judges do not use discovery sanctions is to avoid “intensifying acrimony between attorneys”).

317. For examples of a Rule 11 dispute which has a life of its own, see supra notes 291-302 and accompanying text.
whether Rule 11 is more costly than its drafters intended. More broadly, an inquiry into the satellite litigation costs of Rule 11 should consider whether the promulgation of a sanctions rule like Rule 11 is the best way or even an effective way to ameliorate the problems of overburdened courts, so-called frivolous lawsuits or bad lawyering. As Professor Rosenberg has written in reviewing the problems of improving the civil litigation process: "the rules' goals of promoting the speedy and inexpensive achievement of just outcomes are often impeded by difficulties created by the rules themselves."318

V. ALTERNATIVES FOR IMPROVING LAWYERING ETHICS OR COMPETENCE

If lawyering improvement is a worthy goal, perhaps even very much needed, and perhaps a way to reduce frivolous litigation (as this article suggests), then who is doing anything about it? A lot has been written about improving the competence of lawyers,319 but little of that writing has included the subject of the direct role of the courts in pursuing that goal.320 Neither Rule 11 nor the advisory committee's notes deals explicitly with this as an objective. Yet, intended or otherwise, it is an expanded judicial role under Rule 11 which may be doing just that—improving the quality of lawyering. To further evaluate the desirability and efficacy of that newly assumed judicial task, we should consider what, if any, alternative methods of lawyer improvement are available, and which are being utilized.321

One can identify at least four different perspectives from which to view the available options. First, the perspective of the adversary (both lawyer and client): to what extent does the in-

318. Rosenberg, supra note 23 at 243. While the stated goals of Rule 11 are to reduce the costs of litigation and expedite the process are laudatory, it is debatable at best whether the rule is achieving those objectives and then, if so, at what costs. Similarly, Professor Resnick wrote: "The history of procedure is a series of attempts to solve the problems created by the preceding generation's procedural reforms." Resnick, Tiers, 57 S. Cal. L. Rev. 837, 1030 (1984).

319. See A.B.A., Model Peer Review, supra note 94. For a further discussion, see the sources cited supra note 1 and infra notes 321, 407, 411.

320. Exceptions include the Devitt and King Committee reports. See supra note 1 (however, implementation of the various ways in which courts can play a role has been very slow).

competence or unethical behavior of an adversary or his or her lawyer constitute a wrong to the opponent which demands a legal remedy? Amended Rule 11 says it does and provides a compensatory remedial vehicle for the victim. Do remedies exist irrespective of Rule 11, the newly added weapon to the adversary's arsenal? Second, from the judiciary's perspective, good lawyering is desirable both to maximize the efficient use of the courts and to insure the integrity of the judicial system. Third, from the perspective of the client whose lawyer may be incompetent, unethical, or both, the legal malpractice standards and the traditional lawyer disciplinary processes are available relief mechanisms. Finally, the general public has an interest in improving the quality and efficiency of lawyering; from their vantage point as potential consumers of legal services they would wish to have the best and most economical counsel and as taxpayers they would wish to see efficient and proper use of judicial resources.

Innumerable possibilities exist for the general improvement of lawyering; some have been tried, others just debated. Having chiefly in mind the first two perspectives (those of the adversary and the courts), I will focus on two institutions purportedly concerned with lawyering quality: the existing lawyer disciplinary mechanisms and the law schools (and basic legal education). I will then discuss briefly a third, the law of attorney malpractice, and mention even more briefly other reform ideas. The purpose of this survey is to offer general background information about lawyer improvement efforts which in turn should lend perspective to this critical appraisal of the lawyer improvement function or results of Rule 11. More positively, it may suggest ideas about how to make Rule 11 more effective in this respect.

A. Code Enforcement

Ostensibly, it seems entirely appropriate that the lawyer disciplinary authorities assume the primary, if not exclusive, responsibility for maintaining the highest levels of competency and ethics for the practicing bar. That is, after all, the purpose of


323. See L.R. Patterson, supra note 121, at 251-88.

324. See id. at 495-562 (regulatory remedies as to client-lawyer relationships); C.W. Wolfram, supra note 119, at 206-41 (summary of legal malpractice remedies).

325. The “obligation of lawyers is to maintain the highest standards of ethi-
the ethical code and the justification for the lawyers' "professional monopoly." Quite specifically, there are two provisions of the Code of Professional Responsibility (Code), Disciplinary Rules 6-101, 7-102(A), and the Model Rules of Professional Conduct (Model Rules), Rules 1.1 and 3.1, which, read together, closely parallel the language of Rule 11 insofar as stating a prohibition on incompetent and frivolous lawyering. In assessing the realistic possibilities that the disciplinary bodies might do what many federal courts are now doing pursuant to Rule 11, it is important to examine: first, the express language of the two Code and Model Rules provisions; second, the manner and circumstances in which these two norms actually have been interpreted and applied; and third, the way in which the two provisions arguably could be applied.

The Code and Model Rules language is similar, but not identical, to Rule 11. Disciplinary Rule 6-101(A) provides:

A lawyer shall not:

1. Handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it.

2. Handle a legal matter without preparation adequate in the circumstances.

3. Neglect a legal matter entrusted to him.

Model Rule 1.1 provides: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably..."
necessary for the representation.\textsuperscript{329} The Code provision, adopted in the 1969 Code, represents the first time that the lawyers' ethical code explicitly recognized and required a duty of competence. Unlike Rule 11, Disciplinary Rule 6-101(A) contains a specific directive that a lawyer shall not "neglect" any matter.\textsuperscript{330} While the Code section does not mandate a "reasonable inquiry" before taking any action, it does explicitly require that the lawyer adequately prepare, thereby imposing a "reasonable lawyer" standard; it also specifies the components of competence.\textsuperscript{331} While clearly there are some fine distinctions between Rule 11, Disciplinary Rule 6-101(A), and Model Rule 1.1, the similarities outweigh the differences in number and significance.

Disciplinary Rule 7-102(A) and Model Rule 3.1 address other concerns in Rule 11. Disciplinary Rule 7-102(A) provides in part:

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

(1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

(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.

(5) Knowingly make a false statement of law or fact.\textsuperscript{332}

Model Rule 3.1 provides in part:

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that includes a good faith argument for an extension, modification or reversal of existing law.

\textsuperscript{329} \textit{Model Rules of Professional Conduct} Rule 1.1 (1986).


\textsuperscript{331} See \textit{Model Code of Professional Responsibility} DR 6-101(A)(2) (1986).

\textsuperscript{332} \textit{Model Code of Professional Responsibility} DR 7-102(A) (1986).
As Rule 11 did in both its pre-amended and current versions, Disciplinary Rule 7-102(A) proscribes “knowing” or purposeful lawyering misbehavior.\(^{334}\) It does not contain what many federal courts are now describing as the Rule 11 objective standard, a norm which does not require an examination into the mind or motive of a lawyer to determine non-compliance. But inclusion of that norm, as suggested above, is covered by Disciplinary Rule 6-101(A)(2). Model Rule 3.1 does contain, although implicitly in contrast to the explicitness of Model Rule 1.1, the reasonable lawyer standard. Again, the overlap is clear among the ethical rules and Rule 11.

Each of the two Code provisions has been used somewhat differently by the courts and the disciplinary authorities, and usually not for the lawyer improvement purposes of concern here.\(^{335}\) Certainly, reliance on these two rules to improve lawyering has not begun to approach the extent to which amended Rule 11 has been so used.\(^{336}\) Disciplinary Rule 6-101(A) has been applied almost exclusively to cases involving attorney-client issues, usually client complaints that their lawyers neglected matters or otherwise mishandled their cases.\(^{337}\) This more traditional conception of the duty of competence, from the lawyer to the client, has always been reasonably clear. A breach not only subjected the lawyer to a malpractice claim but also, potentially, to a disciplinary proceeding for violating the Code.\(^{338}\) What has been less clear is
the lawyer's ethical duty of competence—or more accurately, obligation or responsibility—to the court, the public, a non-party witness, or an adversary. This duty to others has been called one of "fairness." Rule 11 embodies this expanded view of the competence duty. The question, then, is whether this broader view of competency requirements can be or will be effectuated pursuant to the Code and or the Model Rules through the disciplinary mechanisms.

On its face, Disciplinary Rule 6-101(A) does not preclude enforcement by persons other than maltreated clients. A defendant, for example, could logically argue that a plaintiff's lawyer who failed to properly answer a set of interrogatories was "inadequately prepared" and therefore in violation of Disciplinary Rule 6-101(A)(2). Such an interpretation would be quite consistent with the so-called objective standard (the "reasonable lawyer" standard) now used in applying the "reasonable inquiry" test in Rule 11. And occasionally it has been so used. Generally, however, it is rare that Disciplinary Rule 6-101(A) is used in cases other than ones raising attorney-client issues, and even then, enforcement seems to be limited to "relatively exotic, blatant, or repeated cases of lawyer bungling."

The situation regarding Disciplinary Rule 7-102(A) is a bit different. This provision, as noted, has been cited infrequently. To the extent Disciplinary Rule 7-102(A) has been relied on in cases, those cases tend to be very much like Rule 11 cases, where adversaries and courts, but not clients, have asserted that they were victims of bad lawyering, essentially in two kinds of situa-

without purposefulness or gross negligence. A.B.A. Professionalism Report, supra note 1, at 23. It is worth noting, parenthetically, that this debate very much parallels the discussion leading to the amendment of Rule 11 and the expansion of its provision to negligent as well as purposeful lawyer misbehavior.

339. L.R. PATTERN, supra note 121, at 289.

340. Model Rule 1.1, on the other hand, defines competence only in terms of the lawyer’s duty to the client. See Model Rules of Professional Conduct Rule 1.1 (1986); see also Model Code of Professional Responsibility EC 6-1, 6-3, 6-4, 6-6 (1986) (seem to limit duty of competence to that owed to client only). Clearly, the content and applicability of competence norms will depend on the perspective of the observer; a client, a judge and an adversary are not necessarily going to be concerned with the same indicia of competence.


343. C.W. WOLFRAM, supra note 119, at 190 (footnote omitted).
tions. First, there are the disciplinary cases in which a lawyer was found to have violated the rule and therefore was subjected to a disciplinary sanction (suspension, censure, etc.).\(^{344}\) In a second category are cases in which a court refers to Disciplinary Rule 7-102(A) in the first instance, a disciplinary proceeding not yet having been initiated. In these cases the courts invariably are also applying other rules such as Rule 11 or section 1927.\(^{345}\) For example, in a recent decision, the Second Circuit simultaneously referred to its earlier *Eastway* decision, Rule 11, and Disciplinary Rule 7-102(A) in suggesting to a plaintiff that a business policy of bringing meritless actions “solely to affect business decisions” could produce substantial penalties against the user of such a policy.\(^{346}\) Similarly, former Chief Justice Burger, although alone in his opinion, recommended that sanctions be imposed for filing a frivolous petition for certiorari because the petitioner failed to advance a “good faith argument for the extension, modification or reversal of existing law,” citing both the Supreme Court rule (rule 49.2) and Disciplinary Rule 7-102(A).\(^{347}\) In addition, a few state courts, now electing to exercise their inherent powers to impose sanctions for frivolous litigation, are also citing Disciplinary Rule 7-102(A) in support of their conclusions.\(^{348}\)

Thus, there does seem to be enough discretionary authority arising out of a combined reading of Disciplinary Rules 6-101(A) and 7-102(A) (and presumably, Model Rules 1.1 and 3.1) for both courts and disciplinary bodies to pursue Rule 11 type objec-

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\(^{344}\) See, e.g., *In re Wetzel*, 143 Ariz. 35, 691 P.2d 1063 (1984), *cert. denied*, 469 U.S. 1213 (1985) (disbarment for, among other things, wrongfully asserting baseless claims for inflated damages); *In re Budnick*, 466 N.E.2d 36 (Ind. 1984); *People v. Kane*, 655 P.2d 390 (Colo. 1982). But disciplinary proceedings focusing on DR 7-102(A) for frivolous litigation seem to be few and far between. Professor Wolfram observed: “discipline is rarely imposed for violations [of DR 7-102(A)] and then mainly for moves in litigation that sometimes seem more psychopathic than nasty.” C.W. WOLFRAM, supra note 119, at 595 (citing *In re Jaffe*, 93 Ill. 2d 450, 444 N.E.2d 143 (1982) (plaintiff’s lawyer disbarred for filing forty baseless lawsuits)).


\(^{346}\) Burlington Coat Factory Warehouse Corp. v. Esprit De Corp., 769 F.2d 919, 927 n.2 (2d Cir. 1985).


For the most part, however, these Code provisions are not being used for those purposes, either by the courts or the disciplinary authorities. As for the federal courts, the explanation, at least since August, 1983, lies in the grant of explicit judicial authority to impose sanctions pursuant to Rule 11, so the disciplinary rules simply afford a supplemental rationale for the conclusion. With respect to the disciplinary bodies, they generally were doing very little enforcement of the two rules before 1983, especially from the perspectives of adversaries, the courts and the public as victims of bad lawyering; they do not seem to be doing very much more now. Why? It may simply be because complaints are not being filed. Alternative explanations for the disinclination of the disciplinary authorities to be more actively involved in improving the quality of lawyering may simply parallel the reasons for the inefficacy of disciplinary bodies generally. Broad criticism of lawyer disciplinary mechanisms has increased in recent years. The critiques address several fundamental realities of the ethics code enforcement procedures: 1) failure to include non-lawyers in the mechanisms, 2) failure to impose sanctions in the vast majority of complaints which are investigated; 3) failure of both practicing lawyers and judges to initiate disciplinary complaints arising out of incompetence or unethical behavior; 4) failure to improve clarity and understanding of disciplinary rules.

349. Even as to compensatory restitution, such as the payment of attorneys' fees incurred by victims of baseless lawyering, disciplinary bodies have occasionally been given authority to include monetary sanctions in their dispositions of disciplinary matters. E.g., Mich. Gen. Ct. R. § 9.123(9).

350. As to observations about disciplinary enforcement activities, commentators have generally criticized the level of enforcement. "After three years of studying lawyer discipline throughout the country, this Committee must report the existence of a scandalous situation. . . . Disciplinary action is practically nonexistent in many jurisdictions." Report of the A.B.A. Comm. on Evaluation of Disciplinary Enforcement, Problems and Recommendations in Disciplinary Enforcement—Final Draft, quoted in G. Hazard & D. Rhode, The Legal Profession Professional Responsibility 428 (1985); see also Rhode, Why the A.B.A Bothers: A Functional Perspective on Professional Codes, 59 Tex. L. Rev. 689, 718 (1981) ("[E]very major study of bar disciplinary agencies has found them grossly unresponsive both to serious misfeasance and to garden-variety consumer complaints about the cost and quality of services.").

351. Rhode, supra note 350; see also D. Rhode, Professionalism in Perspective (1984); P. Stern, Lawyers on Trial (1980); Martyn, supra note 321.

352. See Garth, supra note 1, at 671-76 (monitoring lawyer negligence from a consumer perspective); Martyn, supra note 321, at 707-13 (analysis of the bar grievance process). In California, the Senate Judiciary Committee recently approved a bill making the disciplinary process more public, but rejected a provision which would have changed the disciplinary committee to one comprised of a majority of non-lawyers. See Lawy. Man. on Prof. Conduct (ABA/BNA) 159 (1986).
of disciplinary rules with which lawyers are to comply; 5) failure of the bar to devote adequate resources to investigation and enforcement; and 6) decentralization of enforcement mechanisms.

One could fairly observe that favorable views of the lawyer disciplinary system are generally not held at this time either by the public or the bar. This dissatisfaction played a large role in the establishment of the Kutak Commission in 1980 and the ABA's later approval of the Model Rules of Professional Conduct to replace the 1969 Code of Professional Responsibility. The fact that relatively few states, albeit a slowly increasing number, have adopted the Model Rules and that even those which have, have done so with significant variations, has not markedly improved the perception of the disciplinary system held by the public or the bar. Because of the difficulties encountered in trying to obtain approval of the Model Rules, the esteem with which the disciplinary system is held by the general public and lawyers might very well be lower. These difficulties certainly have not made enforcement any less complicated and it seems highly doubtful that one could assert that the efficacy of the disciplinary system has improved.

Further compounding the shortcomings of the present Code is the fact that existing definitions of competence are inadequate. Even the Model Rules do not assist in any significant


354. Public disapproval of lawyers is nothing new. "[H]ostility to lawyers dates back at least to Plato—my guess is that somewhere in Hammurabi's tables or Rameses II's hieroglyphics we would find similar sentiments...." Schwartz "Comment" 37 Stan. L. Rev. 653, 654 (1985). A recent ABA poll registered the view of both judges and the public that lawyers' professionalism had declined. A.B.A. Professionalism Report, supra note 1, at 254; see also What America Really Thinks About Lawyers, Nat'l L.J. Aug. 18, 1986.


357. It is generally acknowledged that there are five basic components of lawyering competence: 1) knowledge of the law; 2) lawyering skills; 3) management of practice in effectively and efficiently applying knowledge; 4) preparation and 5) mental and physical capabilities. See A.L.I.-A.B.A., supra note 321, at XI-XII. The Code provision on competence, DR 6-101(A), at best touches on one
way in providing the kind of criteria or standards with which the competence of lawyering might be better evaluated.\textsuperscript{358} In some respects, at least as to the adequacy and propriety of court filings, Rule 11 is a more effective codification of lawyering competence standards than the Code, if not the Model Rules.

In this context, then, what is the likelihood of the disciplinary system becoming more responsive and effective, thereby reducing or eliminating the need for direct judicial assessment of lawyer competence pursuant to Rule 11? While significant change is not realistic in the short run, there are several relatively modest steps which could be taken to render the Code or the Model Rules more effective in the improvement of lawyering quality. First, as noted, the incorporation of more meaningful, clearer, and more objective criteria for good lawyering might enhance enforcement efforts.\textsuperscript{359} Second, more effective monitoring could be instituted of cases involving attorney malpractice, malicious prosecution, abuse of process or Rule 11 violations. With minimal effort, the judiciary could require judges to report to local bar authorities all instances where a judgment, order, or verdict reflected a court’s or a jury’s view that bad lawyering took place.\textsuperscript{360} The categories of cases just noted are obvious illustrations. Such judicial reporting, in turn, would require appropriate investigative follow-up by the disciplinary authorities.

A third reform of the disciplinary process has been offered for reasons going beyond the desire to improve levels of competency, and aiming for a greater degree of openness and publicity of these elements, preparation. Rule 11 is a slight improvement, incorporating legal knowledge and at least the skills of investigation and preparation. More meaningful and detailed definitions of competent lawyering would facilitate evaluations, whether the assessments are made pursuant to a disciplinary rule or Rule 11.

\textsuperscript{358} See \textit{Model Rules of Professional Conduct} Rule 1.1. For a further discussion, see \textit{supra} text accompanying note 329.

\textsuperscript{359} See \textit{supra} note 308; see also \textit{Antioch School of Law Competency-Based Task Force, Catalog of Definitions of Generic Lawyering Competencies} (1978); \textit{White, The Definition of Legal Competence: Will the Circle Be Unbroken?}, 18 \textit{Santa Clara L. Rev.} 641 (1978).

\textsuperscript{360} The ABA has established a data bank which records all the ABA National Discipline Data. See \textit{Task Force on Professional Competence, A.B.A., Final Report} 24 (1983). There also exists the National Legal Malpractice Data Center, an effort of cooperating malpractice insurance carriers which records malpractice claims. \textit{Id.} at 22. But there remains much to be done regarding the centralization of data on bad lawyering. The integration of disciplinary, malicious prosecution, malpractice, and Rule 11 information into a data bank with easy accessibility would be a major step. I am unaware of any current efforts to accomplish this step.
about the results of the disciplinary system. By opening up the process, the argument goes, the public’s confidence will increase, reporting of violations will increase, and bad lawyering will be more effectively deterred. A related suggestion is to include lay persons in the process of developing improved competence standards as well as in the enforcement process itself. These efforts would educate the public as to how to evaluate lawyering and, presumably, encourage the filing of complaints when bad lawyering occurs.

These proposed reforms are being debated more fully elsewhere. But, realistically, and for purposes of this assessment of Rule 11, it seems unlikely that any meaningful improvement of the lawyer disciplinary system will occur in the near future. Indeed, to the extent there was pressure on bar officials to take more aggressive action to end lawyer incompetence, that pressure has been lessened by the courts’ use of Rule 11. Paradoxically, even the courts without a Rule 11 (e.g. most state courts) are now more freely exercising inherent powers to impose sanctions for bad lawyering and doing so with open expressions of their frustration about the failure of disciplinary bodies to do anything about the problem. The judiciary’s recognition of the bar’s inaction or ineptitude on the issue is further reflected by the fact that courts rarely refer instances of incompetence or bad ethics to the disciplinary authorities. Occasionally, a court itself will

361. See Marks & Cathcart, Discipline Within the Legal Profession Is it Self-Regulation?, 1974 U. ILL. L. REV. 193; Steele & Nimmer, Lawyers, Clients and Professional Regulation, 1976 AM. B. FOUND RES. J. 917; see also Martyn, supra note 321, at 737 (“Publicity . . . is essential to the deterrence potential of the disciplinary process.”); Murphy, Restructuring is Proposed for Disciplinary System, N.Y.L.J., Jan. 15, 1986, at 1, col. 5 (Justice Murphy suggests that a public representative acting as a “grievance prosecutor” “be an independent actor in the disciplinary process.”).

362. See, e.g., Martyn, supra note 321; Rhode, supra note 350.

363. See, e.g., LTown Ltd. Partnership v. Sire Plan, Inc., 108 A.D.2d 435, 489 N.Y.S.2d 567, 571 (1985) (disciplinary proceedings have “not proven to be an effective deterrent” to frivolous litigation). In New York, however, the response thus far has not been to encourage more aggressive enforcement by the disciplinary bodies. Rather, the state is looking to the judiciary to ameliorate the problem by proposing a court rule quite similar to Rule 11. See supra notes 186-88 and accompanying text.

364. See Walsh v. Schering-Plough Corp., 758 F.2d 889, 896, (3d Cir. 1985) (where the dissent chastised the majority for failing to follow-up with some kind of fact-finding process regarding what appeared to be questionable lawyering or at least conflicting accusations between lawyers); see also C.W. Wolfram, supra note 121, at 191 (“Despite the furor over incompetence created by speeches of judges, few judges report instances of incompetence they encounter.”) One reason for non-referrals is the belief that it would be a waste of energy. Judge Oakes of the Second Circuit noted that enforcement of the disciplinary code is
perform a disciplinary proceeding.365 This is certainly one issue in the debate about the need to examine more closely. If the bar does not directly deal with the understandable societal and judicial desire to have more competent, efficient and ethical lawyering, then who will do it and how will it be done? The amendment of Rule 11, in part, is a response to the non-activity of the bar regarding frivolous lawyering. As this article suggests, having the courts heavily involved in the task of evaluating lawyering performance is not the ideal situation. And yet, while it may not be the optimal solution, it is difficult to criticize the judiciary for stepping in to address the problem, even indirectly through Rule 11, when the organized bar has essentially defaulted.366

B. Expansion of Malpractice Standard

Some commentators have concluded that one way to deter baseless lawsuits and improve lawyering is to expand the category of persons to whom a lawyer owes a duty of competence367 or, alternatively, create a new tort for the non-client victims of the

"non-existent." Oakes, Lawyer and Judge: The Ethical Duty of Competency in Ethics and Advocacy (1979). All of this is notwithstanding the fact that U.S. judges are supposed to report disciplinary actions to the National Discipline Data Bank. See Federal Judicial Center, Desk Book for Chief Judges of the U.S. District Courts (Wheeler 1985). Nevertheless in a small number of reported cases where Rule 11 sanctions were imposed, the federal court did refer the matter to a disciplinary body. See, e.g., Lepucki v. Van Wormer, 765 F.2d 86, 89 (7th Cir. 1985); Steinle v. Warren, 765 F.2d 95, 102 (7th Cir. 1985).

365. In re Disciplinary Action Curl, 803 F.2d 1004, 1007 (9th Cir. 1986) (in this instance, which resulted in the sanction of public admonishment, the court even relied on Rule 11 as the standard for assessing the ethical propriety of the attorney’s conduct).

366. One federal district court judge observed: “it is quite obvious to the judiciary that if the organized bar is not going to clean its own house then somebody has got to do something about it.” Duffy, supra note 43, at 20.

367. This point of view would require substantial modification of the traditional doctrine of privity. See, e.g., Note, Attorneys Negligence and Third Parties 57 N.Y.U. L. Rev. 126, 144 (1982) (proposing that lawyers have a duty to certain third parties to act non-negligently, not only to deter attorney misconduct but to “compensate” victims and “promote attorney competency.”). A few courts have extended a lawyer’s duty to limited categories of third parties notwithstanding privity. See Heyer v. Flaig, 70 Cal. 2d 223, 228, 74 Cal. Rptr. 225, 228, 449 P.2d 161, 165 (1969) (attorney owes duty to beneficiaries of will to nonnegligently effectuate testamentary scheme of testatrix); Licata v. Spector, 26 Conn. Supp. 378, 382, 225 A.2d 28, 30 (1966) (same). Neither the case law nor the N.Y.U. Note go so far as to propose eliminating privity for a claim by a defendant against plaintiff’s lawyer for a negligently filed complaint. See also Gillers, Ethics that Bite: Lawyers Liability to Third Parties, 13 Litigation 8 (1987); Note, supra note 2, at 1579; 45 A.L.R.3d 1181 (attorney’s liability, to one other than his immediate client, for consequences of negligence in carrying out legal duties).
incompetence. If a plaintiff's lawyer owed a duty of reasonable care to the defendant in a lawsuit initiated by that lawyer, the defendant could later assert a malpractice claim if the lawsuit was a frivolous one. Here, as with Rule 11, it is a deterrence theory which would produce more competent lawyering. For example, if a physician is sued for medical malpractice and wins, there is little if any relief available to the doctor against the plaintiff or plaintiff's lawyer. Traditionally, the physician in this situation could pursue a malicious prosecution or abuse or process claim against the plaintiff and/or the plaintiff's lawyer. Both of these torts, however, like the Rule 11 subjective bad faith standard prior to the 1983 amendment, require proof of improper motive on the part of the defendant, lawyer or lay person. The making of such proof is quite difficult. Such tort claims, therefore, are not often asserted against the unsuccessful plaintiff and even less often against the original plaintiff's lawyer. Because of the difficulties of proving intent, other avenues which impose less onerous proof burdens have been sought by physicians in the situation just posed. It is in this context that an attorney malpractice claim was conceived on behalf of the victimized physician against the allegedly malpracticing plaintiff's lawyer who filed the original action.

This attempt to expand the categories of persons who might obtain relief through the assertion of malpractice claims has met with little success. The sought for substantive expansion called on the courts to conclude that a lawyer had a duty of care not only to her or his client but to the client's adversary as well. Easing the burden of proof on the plaintiff-doctor (only negligence would be required), the argument went on, would prevent or at least discourage the bringing of frivolous claims. Despite the efforts of

368. Thode, The Groundless Case—The Lawyer's Tort Duty to His Client and to the Adverse Party 11 St. Mary's L.J. 59 (1979) (proposing new tort against lawyers for reckless prosecution of a civil claim); Van Patten & Willard, supra note 322 (tort of malicious defense would apply principles established for malicious prosecution).

369. See W. Keeton, supra note 66, at 897-900. Occasionally a physician has succeeded with malicious prosecution claims after first prevailing against a medical malpractice plaintiff. See Raine v. Drasin, 621 S.W.2d 895 (Ky. 1981) (professional's negligence can produce action for malicious prosecution).


the proponents of this new tort, a lawyer's duty of care for purposes of malpractice liability remains essentially a duty to the client.

A prime factor in the rejection of this expanded version of malpractice liability is the fear that it would chill creative lawyering. 372 While the same concern has not been enough to curtail the promulgation or application of Rule 11, it very much has slowed the use of any new tort or any elimination of privity requirement for the traditional malpractice claim. Conversely, the creation of a new tort claim for this supposed victim of baseless litigation, presumably would add to, not subtract from the litigation dockets. At the same time, at least in the medical malpractice area (where the efforts to expand attorney malpractice liability have been the most active) other steps have been taken, also ostensibly designed to reduce the number of suits filed. 373 Although discussion of remedies for the so-called medical malpractice crisis has recently taken on a hysterical tone, 374 one of the premises of the attempt to expand lawyer malpractice liability is that at least part of the great increase in medical malpractice suits is due to the filing of baseless claims. Accordingly, as with Rule 11, the theory is that attorney malpractice claims by third parties would result in examination of the lawyering competence and ethics, at least of lawyers for medical malpractice plaintiffs. These examinations could have the same deterrent effect and therefore positive impact on the improvement of lawyers as Rule 11 inquiries. But even if they do deter a handful of baseless malpractice claims, these new devices would be highly inefficient ways to raise the quality of lawyering. Furthermore, use of this expanded malpractice tort, or a newly created tort, also like Rule 11, 

372. Id. at 601. "Surely, in any case where a suit is filed by a defendant who was vindicated in a contested case against the attorney for the plaintiff some consideration must be given to the ‘chilling effect’ such an action might have on the basic right of a citizen to seek redress in court for what he considers to be a wrong." Id.; see also Talamini v. Allstate Ins. Co., 470 U.S. 1067 (1985); Friedlander v. Nims, 755 F.2d 810 (8th Cir. 1985); C.W. Wolfram, supra note 119, at 233.

373. Efforts have mushroomed to curb allegedly baseless medical malpractice claims. See Redlich, Understanding the Medical Malpractice Crisis, N.Y. STATE BAR JOURNAL 38 (October, 1985); Abram, To Curb Medical Suits, N.Y. Times, March 31, 1986 at A13 (recommending more client-centered method of lawyer decision-making); see also Fla. STAT. § 768.56(1) (1985) (requiring losing party in medical malpractice case to pay for opponent's legal fees); Sponce & Roth, Closing the Courthouse Door: Florida's Spurious Claims Statute, 11 STETSON L. REV. 283 (1982) (critique of Florida statute).

raises the spectre of satellite litigation. Finally, if these new
claims were available in the initial or main lawsuit they would be
vulnerable to many of the same kinds of potential misuse raised in
this paper regarding Rule 11. In any event, the availability of any
such new remedies, either via statute or case law, is far from a
reality.

C. Law Schools

A more direct and affirmative way to improve the quality of
lawyering is to better educate and train lawyers, most especially,
in the area of applied lawyering skills. Is this being done? Could
it be done? If so, is this a better method than the indirect way
effected through the use of Rule 11? And finally, is it necessary to
talk of one or the other? Why not both?

Two roles for educators come to mind in this evaluation of
the Rule 11 experience. First, legal educators could do much
more both in law schools and after in continuing education pro-
grams to address the goal of improving the quality of lawyers’
performance. Second, there may be a role for them to play in
assisting the courts to make the Rule 11 evaluative function oper-
ate more effectively. For example, if, as I propose below, a Rule
11 arm of the court were established, the educators might as-
sist in the refinement of lawyering standards and the application
of those criteria.

The genesis of this assessment of the judicial application of
Rule 11 and the rule’s potential as a vehicle for improving the
quality of lawyering lies in my experience as a clinical teacher.
Before and after Rule 11 was amended, I used the rule and its
Code counterparts as vehicles for teaching the skill of investiga-
tion. Until recently, the teaching of this lawyering task was not
often thought of as a responsibility of law schools. Indeed, many
in and out of law schools believed it was not a skill or subject
capable of being taught. Those views are still held by many, per-
haps even most legal educators. Yet quite a significant number of
educators and lawyers now take a contrary position. Accepting

375. For a discussion of the proposed Rule 11 arm of the court, see infra
notes 424-50 and accompanying text.
376. This skill also is referred to as a research or a fact gathering skill and
often is included within the skill of case planning.
377. See A.B.A., Law Schools and Professional Education, (Report and Recom-
   mendations of the Special Committee for a Study of Legal Education of the
   American Bar Association, 1980) (The Zemans-Rosenblum Sample of Chicago
   attorneys was asked to evaluate “skills and areas of knowledge considered im-

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the increasingly available empirical data showing that lawyers are most critical of their education for failing to teach them such skills as investigation, counseling and interviewing, some educators (at least initially only clinical educators) confronted this shortcoming in legal education. Today, there are separate textbooks for the subject of investigation and treatment of it in numerous other law school texts. Similarly, there are innumerable books and complimentary pedagogical tools such as videotapes for the teaching of the other related lawyering skills such as interviewing and negotiating. It would be highly unusual for today's law school not to have at least a sampling of such clinical or skills courses.

Clearly, the ability to complete competently and efficiently a factual investigation and appropriate legal research are skills integral to the satisfaction of Rule 11. It is the lawyers' failing in this regard which gives rise to many of the recent Rule 11 judicial critiques of lawyering performance. Similarly effective interviewing, in turn, may be crucial to a lawyer's ability to ascertain the necessary facts. The judicial Rule 11 assessment of the performance of these skills is an evaluative task similar to those facing the clinical law teacher. The primary difference—and it is a critical one—is that for teachers, evaluation is integral to their pedagogical responsibility, whereas for judges, assessing a lawyer's performance of the investigative obligations of Rule 11 is, at best, tangential to the primary task of judging.
On a broader analogous level, one might ask why a judge's capacity to evaluate the merits (as compared with a teacher's opinion on the same substantive legal issue) is any different from a judge's capacity to evaluate lawyering performance (as compared with a teacher's evaluation of lawyering). If a judge can perform the former function (i.e., the act of deciding or judging a case on the merits) why cannot the judge also perform the latter function of evaluating lawyers? Judge Weinstein recently suggested that judges may not always be capable of assessing degrees of competence, even when the Rule 11 inquiry is focused on the legal as opposed to the factual basis of a complaint.\(^{384}\) Judges surely could evaluate lawyering (especially if trained to do so); the more important question is whether they should. I think not, at least not in the relatively commonplace fashion occurring with Rule 11. The principal reason is the point just made about the difference between teaching and judging. Evaluating performance is central to the functioning of teachers. For judges, it is not. While judges certainly could be trained to evaluate lawyering performance, they will resist even if they are trained because it is a task not integral to their duty and responsibility to decide cases. In some ways the function of evaluating lawyers is similar to the new responsibilities of judicial management which are now increasingly being imposed on judges. There, however, I think it is easier for judges to assume the management tasks because they are more directly tied to performing efficiently the judicial tasks of deciding particular cases. The nexus between judging and evaluating lawyer performance is far more tenuous.

Only in the last decade or two have law teachers recognized any responsibility to teach the skills of lawyering. Previously teachers focused their attention as judges do only on various bodies of substantive and procedural law. That realization by law

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\(^{384}\) See Eastway II, 637 F. Supp. 558, 568 (E.D.N.Y. 1986) ("Appropriate modesty would, even here [regarding reasonableness of legal conclusions], in many cases suggest that generalist federal judges might not be fully aware of what reasonable and competent members of the bar consider a reasonable conclusion."). Judge Weinstein is a former law professor. Judge Posner, also a former professor, in stark contrast, certainly has no such problem. See, e.g., Hill v. Norfolk & W. Ry., 814 F.2d 1192, 1201-02 (7th Cir. 1987).
professors, in my judgement, was long overdue. Though slowly, legal education is increasingly and more effectively assuming that educational responsibility. These clinical education developments confirm the validity of that recognition (late though it was) that the teaching, and therefore the evaluating of lawyering skills, clearly is part of the educators’ tasks. While judges may decry bad lawyering and while certain individual judges may wish to contribute to the educational effort, and while their responsibilities are expanding beyond simply applying the law and deciding cases (e.g., “managing” caseloads), neither teaching nor the evaluation of lawyering is crucial or even important to the task of judging. It is tangential at most.

What is the role of law schools in the profession’s effort to improve lawyering? In teaching the skill of fact investigation I focus on three constraints which affect the scope and quality of an investigation: the legal constraints (e.g., the evidentiary limitations on the potential trial use of a lawyer’s file memo reflecting a witness interview in contrast to a certified transcript of a deposition of the witness), the ethical constraints (e.g., the obligation to provide information or documents obtained in an investigation which are harmful to the client’s position in response to a proper discovery request, and perhaps even when not requested); and the practical constraints (e.g., the limits of time and money on how much can be done to investigate a case). Variations of such a three-tiered analysis occasionally are seen in judicial applications of Rule 11; different permutations can occur in assessing the adequacy of a pre-filing Rule 11 investigation versus, for example, a post-filing investigation prior to making a motion for a summary judgment. Together with a suggested temporal

387. See Garth, supra note 1, at 670. Professor Garth focuses his attention on the fact that most if not all of the concern expressed about lawyering competence pays no heed to the reality that lawyers rarely have the luxury of doing a complete or thorough investigation. What is crucial, therefore, he asserts, is that consumers through informed consent be able to purchase a lesser quality of services if they so choose. Id. While this is hard to disagree with, it does not seem to recognize the educational role in teaching lawyers how to be more efficient. See also M. Meltsner & P. Schrag, Public Interest Advocacy: Materials for Clinical Legal Education 17-22 (1974).
388. What is a “reasonable inquiry” under Rule 11 depends on the circumstances. Much less time may be available before filing a complaint than later on in a lawsuit. See, e.g., Foster v. Michelin Tire Corp., 108 F.R.D. 412, 415 (C.D.
scheme for fact-gathering. I use Rule 11 and the parallel Code of Professional Responsibility language and an understanding of the three constraints just mentioned to teach the skill of investigation. Usually these analyses will be done both in the context of one or two continuing and somewhat complex simulations as well as actual cases on which the students are working. Teaching the skill of interviewing is similar. Effective interviewing technique usually is necessary to obtain the kind of complete information required to comply with the Rule 11 standard. This thumbnail sketch of a portion of one clinician’s syllabus is offered not as a guide for other clinical teachers but as a single skeletal illustration of how the skill of investigation might be taught and to contrast it with the manner and purposes of a judicial interpretation and application of Rule 11 insofar as the rule’s standards of investigation are concerned. Judges, for the reasons discussed above, are not prepared to devote comparable time and energy to explaining or even evaluating investigative technique. It is not their responsibility.

Nevertheless, even a perfunctory Rule 11 judicial evaluation could contribute to the improvement of lawyering. It simply is a less effective method than a comprehensive clinical or simulation educational experience should be. The lawyer who is the object of a judicial Rule 11 inquiry and the student participant in the clinical exercise will each have a greater appreciation for the importance of a thorough and efficient execution of a well prepared investigation plan. But which of the two will have the greater impact? Recognizing the self-serving bias of a clinician, it seems irrefutable that the educational experience will produce better and more lasting results in terms of better lawyering without the chilling effect on creative lawyering occasioned by stiff Rule 11 sanctions. Minimally, the clinical exercise will involve a dialectical give and take between teacher and student that cannot be equal-

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389. I suggest a framework developed by the Legal Services Corporation (in their lawyer training materials) which breaks down events according to whether they occurred before or after the event or transaction which gave rise to the claim for relief: pre-incident, incident, post-incident. Training Legal Services Lawyering: A Manual for the Design of Local Training Programs and Teaching of Basic Lawyering Skills at III-15 to III-34 (1972).
led even by the most pedantic of judges.\footnote{Even with respect to those judges who provide the more detailed critiques in their written Rule 11 opinions there is little if any face to face contact between the lawyer and the judge/teacher. See, e.g., Magnus Elec., Inc. v. Argentine Republic, 637 F. Supp. 487 (N.D. Ill. 1986) (opinion by J. Shadur); Huettig & Schromm, Inc. v. Landscape Contractors Council, 582 F. Supp. 1519 (N.D. Cal. 1984) (opinion by J. Schwarzer), aff'd, 790 F.2d 1421 (9th Cir. 1986). Nor, in the minds of many if not most judges should there be. Rule 11, as presently drafted, was not intended to make the judge a teacher, supervisor or trainer. Rather, the rule was simply to keep out baseless litigation.} Even more often, the judicial assessment will be conclusory or cryptic or both and perhaps even caustic or denigrating.\footnote{See, e.g., Thornton v. Wahl, 787 F.2d 1151, 1154 (7th Cir.) cert. denied, 107 S. Ct. 131 (1986) ("An empty head but a pure heart is no defense."); see also In re TCI, Ltd., 769 F.2d 441, 445-50 (7th Cir. 1985) (judge criticizes bad lawyering); Hill v. Norfolk & W. Ry., 814 F.2d 1192 (9th Cir. 1987) (extraordinary attack on the competence of lawyer who was not even given opportunity to respond).} A financial penalty and a published opinion criticizing a lawyer's skills unquestionably will cause the recipient (and perhaps others) to be more careful in the future. More negatively, it may discourage a lawyer from bringing a novel but non-frivolous claim. But the constructive educational guidance (which should be part of a good clinician's critique) will usually not be present in a Rule 11 assessment.\footnote{Unfortunately there are too few clinicians and too few critiques. And even in law schools with relatively strong clinical programs, many if not most graduates have not had any opportunity to "learn" the skills of interviewing or investigation. See D. Binder & L. Bergman, supra note 377, at xvii.} Although this is not the place to detail educational proposals, at least three possible areas where law schools could act may be identified. First, there is much room for the development of more clinical and simulation courses teaching case planning and investigation at the law school level. A very modest goal would be the incorporation of six or eight class hours in basic investigation concepts into any one of a number of clinical or non-clinical courses so that every law graduate would have this minimal exposure. Second, law schools could do more in the area of continuing education. Skills training programs are increasing in number for law graduates who did not have the opportunity to take skills courses in law school, but most remain unaffiliated with law schools.\footnote{For example, see advertisements in the National Law Journal for seminars on subjects from "Critical Issues for Corporate Counsel" to "Legal Research," sponsored by organizations such as the Practicing Law Institute.} On the assumption that full-time teachers may more effectively impart skills learning than moonlighting or volunteer lawyers, the law schools seem aptly suited for this task.\footnote{See, e.g., King Committee Report, supra note 1, at 22.}
are vast areas into which legal educators might go regarding continuing education.

There is a third way in which law schools might get involved with improvement of lawyering quality, directly arising out of Rule 11 litigation. And this assumes that Rule 11 is modified in the manner I suggest later in this paper to remove its evaluative function from the judges. Legal educators could assist the peer review panels which would adjudicate Rule 11 motions either as an arm of the judiciary or as an arm of the existing lawyer disciplinary bodies. These non-judicial panels could then determine possible violations of Rule 11, propose corrective steps and impose appropriate sanctions. This suggestion is discussed further below. 395

D. Further Suggestions for Improving Lawyering Quality

There are a number of additional methods which periodically have been proposed to improve the competence of lawyers. It is useful at least to note 396 them in considering the efficacy, efficiency and appropriateness of the judiciary’s new Rule 11 involvement in this pursuit. The common denominator for each of these directions for reform is the premise that lawyers’ performance is not up to par. That may or may not be a valid assumption. Nevertheless it is the primary impetus for the bar’s discussion of various a meliorative devices.

1. Continuing Education and Specialization

These two ideas are often discussed together on the assumption that lawyers will be more receptive to continuing education requirements if, as a result of satisfaction of the requirements, the lawyer is allowed to assume the public status of a specialist. 397

Thus, the incentive of being able to call themselves a securities lawyer or a malpractice specialist would induce lawyers to take the securities law or medical malpractice continuing education courses. Some states have imposed continuing education requirements without tying them to any right to specialize, or, more

395. For a discussion of the proposed non-judicial panels, see infra notes 424-50 and accompanying text.
396. The following summary, at most, is a cursory survey of various ideas, proposals or programs which deal with the issue of lawyering competence. Closer examination is beyond the scope of this paper.
accurately to advertise as specialists. 398

In terms of improving lawyering competence levels, these efforts have had a limited impact. Most of the continuing education courses (as well as the specialist certification programs) have required only that the lawyer attend a certain number of lectures; invariably no feedback, evaluation or grading process is involved. 399 Even in the more sophisticated offerings relating to trial skills, constructive critiques are often not provided, grades usually are not given, and comprehensive assessments are rarely provided. 400 Critics have reasonably asserted, therefore, that the completion of such continuing education courses is no assurance that any degree of specialized expertise has been acquired. With respect to the more modest objective of encouraging members of the bar to stay current (as compared to the goal of qualifying specialists), it is fair to say that continuing education requirements (even if attendance is the only criteria for satisfaction) are not harmful. 401 The accomplishment of this modest goal, however, is not terribly pertinent to the kind of allegations of incompetence that are now the subject of Rule 11 judicial opinions. Unless and until the nature and method of conducting these courses is changed, continuing education programs cannot be expected to have a significant impact on the level of lawyering competence.

2. Total Deregulation of Bar (Market Forces)

Some in the consumer movement assert that the present regulatory system governing the practice of law neither protects the consuming public nor ensures minimal competency among lawyers; rather it is a mechanism which essentially protects the bar. 402 These sentiments, in the context of growing support for the thesis that, generally, less regulation is better than more, have produced the relatively extreme proposal: eliminate all regulation of lawyers, either by the bar or any governmental author-

398. ALI/ABA, ENHANCING THE COMPETENCE OF LAWYERS 353-54.
399. See Martyn, supra note 321 at 725-26.
400. The highly respected National Institute of Trial Advocacy (NITA) does provide constructive feedback. It also awards a certificate of completion which, presumably, is not granted unless there is serious and conscientious participation. The NITA trial advocacy courses usually are quite intensive and require full-time participation for one, two or three weeks.
401. There certainly seems to be an increase in the numbers of these continuing education offerings. See, e.g., Nat'l L. J., Aug. 18, 1986 (containing 8 pages of courses).
402. See Garth, supra note 1.
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403. This, it is suggested, will create a system of pure competition among lawyers. A critical corollary of general deregulation or at least deregulation as to those norms relating to competency, is the concept of informed consent. With proper disclosure, a consumer should be able to purchase whatever quality of services she or he wishes; that the consumer should be able to choose between the Cadillac and Chevrolet quality of lawyering. 404. This thesis, of course, has no applicability to poor people who cannot afford to pay anything, and, therefore have no choice, but rather must simply accept the legal services or legal aid lawyers, competent or not. Such a deregulated world of lawyers would, the argument goes, weed out in the natural order of things the less fit and certainly the incompetent at the same time as benefiting the consumer.

This indirect market mechanism method of raising the quality of lawyering, even if it were a realistic option and even if it were a successful strategy to make lawyers more competent, is even more attenuated than the Rule 11 method. It certainly would not afford compensatory relief to the adversary or the court who are victims of baseless and wasteful claims. Nor would it punish (at least directly) the frivolous litigator. The proposal assumes that the fear of competition alone would induce lawyers to be more competent. No direct effort to articulate the skills of lawyering or the criteria for evaluating such skills would be involved; nor would there be the published critiques of Rule 11 judicial opinions. It is interesting, perhaps even amusing to some, to debate the theoretical efficacy of this pure competition model. Realistically, it is not an idea which is likely to be implemented in the foreseeable future.

3. Non-Lawyer Regulation of the Bar

A less drastic but equally unrealistic change would be to substantially alter rather than eliminate the system of lawyer regulation. By replacing lawyers and judges as the regulators, with representatives of the consuming public and other non-lawyers, some argue, a more effective system would be created. 405. Such a regulatory system, it is asserted, would be more sensitive to the

403. See Horowitz, The Economic Foundations of Self-Regulation in the Professions in Regulating the Professions 16 (R. Blair and S. Rubin eds. 1980) (espousing deregulation as appropriate).

404. See Garth, supra note 1, at 682 (a legal services consumer can be a gourmet purchaser or one seeking “no frills”).

405. See Martyn, supra note 321, at 736-43.
concerns of the public for competent lawyering and certainly to the unmet demand that consumers of legal services be treated respectfully and thoughtfully. Again, however, like the pure competition model, such a restructuring of the lawyer disciplinary system would at best indirectly induce lawyers to perform at higher levels. It may even be more indirect than the pure competition model. Here the inducement would depend on the assumptions first, that a non-lawyer regulated system would more effectively effectuate norms requiring minimal levels of competence and, second, that the existence of the new system would (through deterrence) induce lawyers to perform better. As with any deterrence model, it is the threat of sanctions (or the loss of business) which causes improvement. It is not a process by which lawyers become better educated or trained to perform better but rather, one which encourages each individual lawyer to try harder on her or his own initiative.

4. Peer Review

Institutionalizing a critique or feedback system is a more direct method of improving lawyering performance. Peer review operates on the same principle which is integral to clinical legal education. After a particular skill is performed (e.g. initial client interview, motion argument, drafting of a brief), another lawyer or lawyers (preferably attorneys trained and experienced in the skill) would provide a critique. As with clinical teaching techniques the give and take of the critique provides the grist for the learning process. When done well, peer review can be very effective in improving the quality of lawyering.

Peer review could be implemented in several different ways. Bar associations could establish clearing house operations which would match lawyers volunteering to act as peer reviewers with lawyers voluntarily seeking such instruction. A

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406. Id.
407. The concept of peer review has been much discussed and written about. See A.L.I./A.B.A., ENHANCING THE COMPETENCE OF LAWYERS (1981); Devitt Committee Report and King Committee Report, supra note 1.
408. See A.B.A., MODEL PEER REVIEW, supra note 94 at §§ 12-22; see also Martyn, supra note 321 at 726-28; ABA, PROFESSIONALISM REPORT, supra note 1, at 272; Promoting Lawyer Competence, State Court Journal 15, 21 (Fall, 1986) (A Model State Court Lawyer Competence Plan developed by the Conference of Chief Justices Committee on Lawyer Competence) [hereinafter CCJ Plan].
variation which may be less conducive to solid educational gains is where a local disciplinary body would direct that a particular lawyer participate in such a program.\textsuperscript{410} To what extent peer review might result in punitive sanctions could vary depending on the circumstances. On a more localized and private basis, law offices could set up such a review mechanism internally, trying to remain sensitive to the problem of confusing constructive critiques with promotional evaluations. Many large law offices now use such a review system.\textsuperscript{411}

For most lawyers, however, peer review is not now available. Whether because the attorney is in a one or two lawyer office or because the law office’s commitment to training and supervision is less than ideal, critiques of lawyering performance are not the norm. Few bar associations have set up the kind of clearinghouse peer review board mentioned above. Moreover, there does not seem to be a practical way in which the private institutionalization of such practices could be mandated outside of the judicial context.\textsuperscript{412} Whereas some of the other lawyering improvement vehicles discussed above could be imposed from outside (e.g. clinical education, expanded malpractice concepts, continuing education requirements, etc.), voluntary peer review is, by definition, lawyer-initiated. The organized bar might more actively encourage its use, but essentially, it will remain up to individual lawyers and law offices to implement the device. Peer review which is not voluntary but rather related in some way to the disciplinary mechanisms, does not yet seem to be in use anywhere. Despite all of these problems, however, as the Conference of Chief Justices stated in the commentary to their recently proposed Model State Court Lawyer Competence Plan, peer review could be a “therapeutic exercise based upon a concern for attorneys whose competence is in question.”\textsuperscript{413}

\textsuperscript{410} Judge Frankel said this about compulsory “disciplinary” peer review: “discipline is not a promising road to competence.” \textit{Id.} at 226.

\textsuperscript{411} A partner in Arnold & Porter recently described its internal lawyer evaluation system as one entailing about 500 hours/year work for 10 partners. Wertheimer, \textit{A Look at Evaluation of Performance: In the Law Firm}, 16 SYLLABUS 1 (June, 1986); see also \textit{A.B.A. Professionalism Report}, supra note 1, at 272 (suggestion of the use of preceptor).

\textsuperscript{412} For a discussion of modification of current Rule 11 procedures to include such a judicially established peer review mechanism, see \textit{supra} notes 424-50 and accompanying text.

\textsuperscript{413} Promoting Lawyer Competence, \textit{supra} note 408, at 21.
5. Skills Tests

The use of tests of various lawyering skills has arisen in two post-graduate contexts: a) as part of an entry bar exam; and b) as a requirement for admission to practice in the federal courts or other specialized forums. It is fair to say, however, that neither the California “performance test” nor the federal court experimental admissions test (both written) have yet been accepted to the extent necessary to realistically expect that they will soon be used on a wider scale. Conceptually, testing may be a useful device to encourage lawyers to focus on the learning of discrete skills. There is a strong urge among many, however, to resist increasing the number or significance of tests required after graduation from law school. This is another rationale to include the skills learning and testing in the law school experience when learning, testing and feedback are accepted parts of the educational process.

6. Public Registering of “Bad” Lawyers

Another deterrent vehicle which I alluded to above would be a central registry in which the name of every lawyer found to be incompetent or unethical would be listed. The mechanics would have to be carefully delineated but the concept is clear.

414. California, for example, since 1983, includes a “performance test” as a mandatory part of its general bar examination. This test is intended to test a broader range of lawyering skills than those reflected in the traditional exams. The performance test assesses, in addition to analytical skills, fact-gathering, drafting and case-planning skills (including ethical and tactical considerations). See information sheet distributed by California Committee of Bar Examiners. See also M. Josephson, Learning & Evaluation in Law School 40-42, 64-271 (1984); O’Hara & Klein, Is the Bar Examination an Adequate Measure of Lawyer Competence? 50 Bar Examiner 28 (August 1981).

415. See Devitt and King Committee Reports, supra note 1; I. Kaufman, supra note 3 (regarding special federal court exams). Unlike the California performance test, the federal admissions test that has been experimented with is a relatively limited test of knowledge of the federal and local rules of procedure. King Committee Report, supra note 1, at 10.

416. See, e.g., King Committee Report, supra note 1, at 72 (Higginbotham, J., dissenting). “We must remember that we do not sit as philosopher kings charged with the burden of contemplating fascinating pedagogical theories on the causes of incompetence of some members of the bar.” Id.

417. See, e.g., M. Josephson, supra note 414 (regarding ways to improve testing methodology as a way of measuring competence as to numerous lawyering skills).

418. For a further discussion, see supra note 360 and accompanying text. For 15 years the ABA National Disciplinary Data Bank has been distributing names of lawyers who have been disciplined to prevent a lawyer who was disbarred in one state from moving to another state to practice law. See McPike & Harrison, The True Story on Lawyer Discipline, 70 A.B.A. J. 92 (1984).
enough. Lawyers would improve their performance in order to avoid being put on the list. Malpractice, abuse of process and malicious prosecution judgements against lawyers would be the principle bases of adding names to the list. A violation of Rule 11 simply would be another way for a lawyer’s name to find its way to such a registry. Currently, in our decentralized method of disciplinary enforcement, there does not seem to be any follow-up by judges as to lawyers found liable in the kinds of cases just mentioned. Regardless of any other steps which might be taken for the purpose of improving lawyering quality, the central registry suggestion would provide a disclosure mechanism by which the public could be alerted to problem lawyers and thereby possibly contribute to the quest for better lawyers.

VI. The Future of Rule 11

Improving the quality of lawyering is a worthy goal. Though not a stated purpose of Rule 11 it probably is being achieved, at least to some extent, as a result of the 1983 amendment to the rule. No one would fault the general pursuit of the goal of raising lawyering quality. The only questions are whether the costs of this achievement are reasonable and whether the method is an effective and efficient one. As suggested above, Rule 11 does not fare well under either of these tests. Furthermore, it is far from certain whether there are any positive results with respect to the primary goal of Rule 11—to deter frivolous litigation and help unclog the court dockets. The costs incurred from Rule 11 are

419. For example, the current disciplinary data bank does not include private disciplinary actions even though such sanctions (usually in the form of reprimand letters) constitute a significant portion of disciplinary actions.

420. For example, in New York City, the City Health Department distributes (and the various newspapers then publish) lists of restaurant and food shop violators of various health maintenance laws. Sometimes the listing alone (in the event the violator is well-known) gives rise to a separate newspaper article. This public dissemination of the names of the violators cannot help but “encourage” compliance with the various laws. There also must be a fair and easy way to have one’s name removed from the registry, perhaps after certain remedial steps were taken.

421. For a discussion of the lack of follow-up by judges, see supra note 364 and accompanying text.

422. Concedely, this is extraordinarily difficult to assess. The data is nearly non-existent as to whether any meaningful portion of increased court filings was attributable (in August, 1983 when Rule 11 was amended) to frivolous litigation. There is even less data as to whether the frequency of frivolous litigation has diminished due to Rule 11. In terms of the drafters’ “streamlining litigation” objectives, the necessary empirical test would be whether enough judicial time and energy has been saved (due to the deterred frivolous litigation) to outweigh
Because of the wide discretion left to trial judges there is great potential for misuse both as to claims thought by certain judges to be inappropriate for federal court and even as to lawyers who for whatever reason provoke the ire of particular judges. The fact that the judicial decision-making process under Rule 11 may make it very difficult for judges to resist the temptation to buttress their initial legal conclusion with a complementing Rule 11 decision of frivolousness, merely accentuates the potential for abuse. Returning to the probable positive impact of Rule 11 on lawyering competence, the use of this procedural rule, nevertheless, is neither a direct nor particularly efficient way to raise the quality of lawyering.

It is against this background that I offer suggestions for changes in Rule 11 procedures aimed at diminishing the costs and making more effective and efficient the lawyer improvement methods. With the following changes, Rule 11 could be a more effective vehicle for accomplishing this dual purpose and still act as a vehicle theoretically aimed at streamlining the litigation process. If the Rule 11 evaluative function were essentially removed from the responsibilities of federal judges and given to others, I believe the stated objectives of the drafters, as well as the lawyering improvement concerns which I have addressed, could be better accomplished without many of the problems occasioned by Rule 11 in its present form.

In response to a Rule 11 motion, a court would make only a preliminary inquiry into the Rule 11 arguments and, then, if appropriate, a referral would be made to: a) the local lawyer disciplinary body; b) a special Rule 11 inquiry committee, panel, commission or individual, established as an arm of the federal court; or c) a special master appointed by the court to conduct the Rule 11 inquiry. Only at that second stage would a careful exami-

the judicial time spent on Rule 11 litigation. I remain skeptical whether such an empirical survey could ever be designed or carried out.

423. For a discussion of the misuse of Rule 11, see supra notes 223-84.

424. The more drastic suggestion of repealing Rule 11 and reverting to the pre-amendment version of the rule seems highly improbable. First, a significant amount of debate and care went into the promulgation of the 1983 amendments. Just as a matter of fairness it may be premature to conclude that the rule is having no measurable positive impact on the dockets. And second, even without any supportive empirical data, there remains a significant cadre of Rule 11 supporters who clearly feel that the rule is having a positive deterrent effect on baseless litigation, albeit based on subjective reactions. See Report of New York State Bar Association, supra note 32 (75% of lawyers surveyed favor sanctions).
nation be made of the competence and ethics of the lawyer in question, regardless of which possible mechanisms were utilized.

More specifically, upon receipt of a Rule 11 motion (or by raising the Rule 11 issue at its own initiative) a court would first complete the primary task of deciding the underlying substantive or procedural issue. Then the court would review the Rule 11 papers in terms of the rule’s minimum competence and ethics standards. Based only on this review of the papers and a low threshold standard, a court would decide whether to make a referral of the Rule 11 issue to a second body for more detailed consideration. The standard of proof would be comparable to the standard for probable cause for the issuance of a search warrant, or an indictment standard or perhaps the administrative law standard for probable cause which calls, at the completion of a preliminary investigation, for a full administrative hearing.

The function of the second stage of this bifurcated Rule 11 inquiry, would be both to adjudicate the Rule 11 motion (and thereby determine any appropriate sanctions) and equally important, to directly teach better lawyering. To do this, more meaningful critiques as well as follow-ups would be provided to the offending lawyer. In this sense the Rule 11 body would work in the same way as a peer review committee. Refined criteria for various lawyering skills would have to be developed either by amendment to the rule, local rules or otherwise. And the proceeding would be more educational and less punitive (though the use of sanctions would still be available). In terms of peer review terminology, it would be closest to the non-voluntary or disciplinary peer review mechanism. The panel would have the same discretionary sanctioning power now exercised by the courts, the panel’s decision could be reviewable by the district court, particularly if the choice for the form of the panel is that it be an arm of


The author proposes a three stage compulsory counterclaim procedure for malicious prosecution. In the first, the court would decide the merits of plaintiff’s claim; in the second, a “probable cause” determination would be made as to the “probable cause” of the plaintiff’s claim; and in the third, damages for the defendant would be determined if the original claim of the plaintiff was found to have lacked even probable cause. The key difference between this proposal and mine is that the judge is not likely, in mine, to get involved with the finding that the plaintiff’s lawyer acted frivolously.
the federal court. Attorneys who are the objects of review would have the same basic due process rights which, generally, are now accorded under the Rule 11 procedures—notice and an opportunity to be heard. In many ways, the process might approximate what now happens in clinical law class and in a handful of courtrooms under Rule 11. And finally, these Rule 11 referrals would be limited to questions as to lawyers’ behavior; Rule 11 motions seeking sanctions against litigants would continue to be dealt with by the courts. In situations when both parties and litigants are the object of a Rule 11 motion, the court might defer consideration of the issue regarding the party until the referral of the lawyer’s competence took its course.

As noted, there are at least three possibilities for a Rule 11 panel. The first is that the traditional disciplinary authorities assume the functions. If the local attorney disciplinary bodies were to assume this responsibility for Rule 11 inquiries, the present burden on the federal courts would be reduced almost completely. But this is a task—taking more disciplinary enforcement action to improve the competence and ethics of lawyers—which has often been urged on local bar officials. The realistic likelihood of implementing such a proposal is not great. Despite the fact that current ethics codes contain norms nearly identical to those in Rule 11, such pleas are not meeting with any more success than before Rule 11 was amended. Local disciplinary bodies simply assert that they do not have resources to enforce more effectively even the more egregious lawyering defalcations. A quick retort is that fines might be used to finance the costs.

428. If the choice of the panel to which a Rule 11 inquiry might be referred is the local disciplinary body, the referring court would not have reviewing responsibilities. Only if the panel is an arm of the federal court would the court have direct appellate responsibilities. Assuming Rule 11 is a proper procedural rule it would seem that the Rule 11 inquiry functions could be delegated to an arm of the court, subject to appellate review by the court, in the same fashion in which magistrates' decisions are reviewed. Contra Burbank, supra note 169.

429. See, e.g., Donaldson v. Clark, 819 F.2d 1551 (11th Cir. 1986) (en banc); Ford v. Alfaro, 785 F.2d 835 (9th Cir. 1986); see also Procedural Rights of Attorneys Facing Sanctions, 40 Record, Association of Bar of City of New York, 313 (1985). Contra Hill v. Norfolk & W. Ry., 814 F.2d 1192, 1201-02 (9th Cir. 1987).

430. See, e.g., In re TCI Ltd., 769 F.2d 441 (7th Cir. 1985) (J. Easterbrook, in lengthy opinion affirming fees sanction, sets forth guidelines for how lawyers should prepare cases); cf A.B.A. Professionalism Report, supra note 1, at 313-17 (guidelines for practice under federal Rule 11).

431. The claim by disciplinary authorities of a lack of resources for adequate enforcement continues notwithstanding vigorous recommendations by various respected panels that adequate funds be made available. E.g., A.B.A. Professionalism Report, supra note 1, at 294; CCJ Plan, supra note 408 at 20.
nues from fines, however, are unlikely, and, therefore, it seems improbable that local disciplinary bodies would assume this Rule 11 referral responsibility.

A second possible forum in which the Rule 11 evaluative function might be performed would be a special Rule 11 body established by each federal court. The authority to create such a body would be found in any of several places. First, Rule 11, which already recognizes the valid role of the courts in carrying out the Rule 11 functions, could be explicitly amended to establish a uniform mechanism for such Rule 11 bodies in all district courts. Second, even without such an amendment, any district court could establish a Rule 11 arm by local court rule. And third, to the extent one might characterize Rule 11 concerns as ethical mandates to ensure compliance with the minimum competence and anti-harassment norms of the lawyer ethics codes, the federal court has the inherent powers to take appropriate disciplinary actions against lawyers who appear before them.

The third possibility for a Rule 11 arm could be to use a special master to make the Rule 11 inquiry and then report to the initial judge. This seems less satisfactory both because the expenses would be greater and because the first judge would still have to make the Rule 11 decision.

Let me both sketch the possible framework for such a Rule

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432. For the language of such an amendment, see infra note 437.

433. Fed. R. Civ. P. 83. Rule 83 authorizes the promulgation by district court of any such local rules necessary to carry out its judicial responsibilities which are not inconsistent with the Federal Rules of Civil Procedure. Id.

434. Most federal courts already have established either committees to deal with disciplinary matters or at least procedures for handling such matters. See, e.g., N.Y. Cr. R. 4 (Local Rules of Southern District of New York). The U.S. Supreme Court has held that the federal courts have autonomous control over the conduct of lawyers who appear before them; "[t]he court's control over a lawyer's professional life derives from his relationship to the responsibilities of a court." Theard v. U.S., 354 U.S. 278, 281 (1957); cf. In re Snyder, 472 U.S. 634 (1985). In the comments to the Model Rules, the drafters stated, regarding the antidote to the problem of delay or obstruction in the litigation process that "any solution must necessarily involve appropriate disciplinary measures." Model Rules of Professional Conduct Rule 3.2 (1976) (Comment) (emphasis added). Clearly Rule 11, in seeking to do just that, encompasses both procedural and disciplinary functions. E.g., In re Disciplinary Action Curl, 803 F.2d 1004, 1007 (9th Cir. 1986).

435. It is the Rule 11 two-step process which, as suggested above, makes it difficult for a judge to resist the inclination to support the initial legal conclusion. For a discussion of the inclination to support the initial legal conclusion, see supra notes 244-47 and accompanying text. Use of a special master would interrupt the process but not alter the fact that the same judge would make both the underlying legal decision and the Rule 11 decision.
11 arm of the court (whichever of the three models is being considered) and raise, without resolving, the large number of procedural and mechanical issues which would have to be dealt with before implementing such a proposal. The primary Rule 11 objective of this body would remain—deter frivolous litigation. Compensation for the victim and punishment of the wrongdoer would also remain as Rule 11 objectives, but clearly as secondary goals. I would, however, make explicit what is now implicit and that is the goal of improving the quality of lawyering through the use of remedial educational steps to reduce the future incidence of the kind of incompetent and unethical lawyering which can lead to frivolous litigation. For this proposal to make any progress, it would require those who have supported the various recommendations to improve lawyering, to step forward and decide that Rule 11 is now the vehicle to actually implement some of the ideas (especially peer review concepts) which until now have only been talked about.

A threshold issue is whether the establishment of this Rule 11 arm should be accomplished through amendment of Rule 11 or merely recommended by the Judicial Conference and then implemented or not, pursuant to a decision of each district court whether to create such an arm with local court rules. In the interests of uniformity and predictability, I would opt for an amendment to Rule 11. As an initial matter, one or more district

436. See, e.g., King and Devitt Committee Reports, supra note 1; A.B.A. Professionalism Report, supra note 1; CCJ Plan, supra note 408.

437. The amendment would be: (new matter italicized; deleted matter lined through):

RULE 11: SIGNING OF PLEADINGS, MOTIONS, AND OTHER PAPERS; REMEDIAL ACTIONS; SANCTIONS

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 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...
courts might establish a Rule 11 arm on an experimental basis.\footnote{438}

The design and operation of a Rule 11 body suggest several possibilities. As with the peer review concept,\footnote{439} should the Rule 11 mechanism be a committee or an individual? If the former, should it be comprised only of volunteer lawyers or should it also have a judge or magistrate (possibly on a rotating basis)? Perhaps a law teacher should also be on the committee especially if remedial steps are ordered by the Rule 11 body.\footnote{440} Should each court have an administrator or law clerk (cf. \textit{pro se} law clerk) to oversee the administration of such a body?

One explanation for the lack of success (or at least the lack of use) of the Devitt Committee experimental peer review committees is the absence of lawyers volunteering to act as peer reviewers.\footnote{441} Participation on such a committee is very much a thankless job and most lawyers do not want to judge—or worse, second-guess—their peers. Further, it would be critical on a Rule 11 review body that the lawyer peers be familiar with or at least
empathetic to the pressures of the practitioner who is the object of the Rule 11 inquiry. Wall Street partners probably would not be ideal peer reviewers for legal services lawyers or single practitioners. The participation on the Rule 11 body of a rotating judge or magistrate might ameliorate this problem. If volunteers were not available, two possible solutions might be: require lawyers to periodically serve on the Rule 11 body as a condition of admission to practice in the court or simply have the rotating judge or magistrate (with the assistance of a clerk of administrator) singly perform the functions of the Rule 11 body. Although a consensus is unlikely in every instance on what is a competent or ethical lawyer, a more detailed set of criteria by which to evaluate lawyering pursuant to Rule 11 is possible and certainly would be helpful.\footnote{442} Perhaps the Judicial Conference could draft such criteria and then each district court could make any changes it deemed appropriate. Some kind of a training program, or minimally a manual, ought to be provided for those who sit on the Rule 11 panel.

Based on the studies and experiments with peer review committees, an additional comment is in order because of the “disciplinary” functions to be performed by this Rule 11 body, beyond its educative role. The King Report speculated that a key reason for the non-use of the experimental peer review mechanisms was that lawyers and judges could not separate the totally benign and constructive assistance responsibilities of the peer group from the disciplinary aspect.\footnote{443} In essence, the King Report suggested that peer review would be used more if it was perceived only as a help-

\footnote{442}{For example, the Comment to Rule 1.1 “Competence” in the Model Rules of Professional Conduct, outlines in greater detail than the language of Rule 11 (if not the Advisory Notes) as to what competent lawyering is: “[e]ven in an emergency . . . assistance should be limited to that reasonably necessary in the circumstances”; “inquiry into and analysis of the factual and legal elements of the problem”; “[i]t also includes adequate preparation.” \textit{Model Rules of Professional Conduct} Rule 1.1 at Comment. If Rule 11 panels were established, it probably would be constructive for a more detailed set of competence criteria to be drafted (reflecting the tenor of the Rule 1.1 Comment and advisory committee’s notes to Rule 11 and other discussions of competence standards) but in a form which might be more easily utilized by a working Rule 11 panel. For other sources of more detailed sets of competence criteria, see \textit{supra} notes 357, 359.}

\footnote{443}{Nine of the thirteen courts established experimental peer review bodies but they were used infrequently. Only eight referrals were made by judges and twenty-one lawyers referred themselves. \textit{King Committee Report, supra} note 1, at 15 & 17-18; \textit{cf. Spears, supra} note 7, at 241 (in Texas, a concerted effort was made to have the peer review committee act in a “non-punitive” manner, and that it not be viewed as a “disciplinary committee.”)}
ful and not as a disciplinary arm of the court. Anything characterized as disciplinary is seen as a severe condemnation of a lawyer’s abilities and therefore to be avoided at all costs.

To a large extent, this problem would be unavoidable by the proposed Rule 11 panel, because any Rule 11 inquiry is, in many ways, in the nature of a disciplinary proceeding. But Rule 11 decisions are now being published and written about and probably are having a greater adverse impact on the offending lawyers than a disciplinary sanction might have if it came out of the kind of panel envisioned here. If anything, my proposed Rule 11 arm might result in more informal resolutions and therefore fewer written and published opinions condemning a lawyer’s actions. Conversely, the point has been made that peer review mechanisms would be more effective in terms of lawyers following through with remedial activities if the sanctions of a disciplinary type procedure were available to support peer review—the carrot and stick principle. Thus, recognizing that this proposal would not be voluntary on the part of the targeted lawyers and that sanctions still could be imposed, it is an attempt to bridge the gap and incorporate the educative features of constructive voluntary peer review into a Rule 11 inquiry and yet not produce a mechanism which is any more in the nature of a disciplinary proceeding than a Rule 11 inquiry already is.

Procedurally, the compulsory arbitration panels used by many federal courts provide a model. A critical difference

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444. Rule 11 opinions often are quite critical of lawyers’ abilities. In addition to publication of the opinions, there also has been widespread publicity of many sanction decisions. See, e.g., Hill v. Norfolk & W. Ry., 814 F.2d 1192, 1203 (7th Cir. 1987); Northern Trust Co. v. Muller, 616 F. Supp. 788, 790 (N.D. Ill. 1985) (the attorney’s arguments (in this case) “are cut from the same cloth as those found without merit—or worse—in the Opinion.”); Fleming Sales Co. v. Bailey, 611 F. Supp. 507, 518 (N.D. Ill. 1985) (“And it also discloses (at a minimum) its counsel’s noncompliance with Rule 11’s mandate.”); see also Lawyer Assessed $160,000 For Bringing ‘Baseless’ Suit, N.Y.L.J., Mar. 31, 1986, at 1, col. 4; Circuit Court Firm on Sanctions Against Attorneys and Clients, N.Y.L.J., Feb. 24, 1986, at 1, col. 4. These few examples illustrate how Rule 11 proceedings often produce much more adverse publicity for the offending lawyer than what is likely to occur after a private or semi-public disciplinary proceeding. Cf. Spears, supra note 7, at 241. (The peer review committee kept its records confidential).

445. See Martyn, supra note 321, at 728.

would be that the decision of a Rule 11 panel, which is an arm of the federal court, like a magistrate's decision, would be final and binding, subject to appeal, in contrast to the arbitration mechanisms. Appeals of sanctions or remedial orders would be to district judges and would proceed in the same manner as appeals of magistrates' decisions. The availability of an appeal to the district court judge could diminish the value of this proposal. This reality seems unavoidable, however, in light of the unlikelihood of local disciplinary bodies (ideally, a preferable Rule 11 arm) being prepared to assume these Rule 11 evaluative responsibilities.

The lack of financial resources clearly is an obstacle to any of these referral methods—a local disciplinary authority's Rule 11 panel, a federal court's Rule 11 panel, or a special master. But it is illusory to think that no judicial resources are now being expended on Rule 11 litigation. The extraordinary amount of judicial time and resources spent on the Eastway Rule 11 litigation, though extreme, is illustrative. If the judiciary's role were reduced to the minimal step of making a preliminary determination as I have proposed, those savings could be used to meet at least some of the costs of the referral methods. If the secondary bodies do what I propose—which is to perform a more meaningful evaluative critique, along the lines of accepted clinical education methodology—there certainly would be still other additional costs. Those costs are defensible, it seems to me, both because the lawyer improvement efforts would be so much more effective and because the separation of the second step of the Rule 11 analysis (by referring it to the special Rule 11 body) would avoid


448. For a discussion of the complaints by disciplinary authorities of a lack of adequate funding, see supra note 431 and accompanying text.

449. The Eastway litigation while exceptional in terms of the length of the decisions is not unusual in terms of the appellate and remand issues. See, e.g., Zaldivar v. City of Los Angeles, 780 F.2d 823 (9th Cir. 1986). It is true that such appeals and remands could still occur just as they do with magistrates' decisions. But they seem less likely. And further, this proposal would still have the added benefit of more effective use of teaching and remedial devices.

450. See, e.g., Continental Air Lines v. Group Sys. Int'l Far East, Ltd., 109 F.R.D. 594 (C.D. Cal. 1986); In re TCI Limited, 769 F.2d 441 (7th Cir. 1985). These cases illustrate lengthy judicial evaluative excursions into what is or is not good lawyering. Had the courts here simply determined as a threshold matter that there was a "probable" Rule 11 violation and then referred the matter to a Rule 11 panel, the opinions would have been unnecessary. Further, a peer review type panel might have improved on the educative value of the Rule 11 inquiry.
many of the other costs and problems of the present Rule 11 proceedings which are discussed above. These include monetary costs as well as the potential misuse of the rule. Because informal educational remedial responses would be used more and highly publicized monetary sanctions less, it would ameliorate to a large extent the possible chilling effects on civil rights litigation and also the potential problem of Rule 11 being used punitively against certain lawyers or causes. The argument that Rule 11 is producing satellite litigation would probably result in a stand-off; while the additional time and costs of federal court litigation might be substantially reduced by my proposal, the costs of these special Rule 11 bodies would offset those savings.

VII. CONCLUSION

The verdict is not yet in whether Rule 11 is streamlining the litigation process and decreasing the court dockets or simply adding another layer to litigation and resulting in undesirable abuses as well.451 The rule may very well be deterring some frivolous lawyering. It also may very well be causing some attorneys to be more careful and be better prepared and, therefore, contributing to the general improvement in the quality of lawyering.452 But Rule 11 may also be chilling some creative lawyering and penalizing some lawyers unfairly. It clearly is producing satellite liti-
The changes suggested above would enable the federal courts to continue to pursue the objective of reducing the court dockets (though there still is no empirical data to support the conclusion that Rule 11 does this) and yet ameliorate the adverse consequences just noted of the present rule. And perhaps most importantly, the changes would make Rule 11 a much more effective tool for improving lawyering competence. Although the satellite litigation costs of Rule 11 would be offset by the costs of the proposed additional Rule 11 evaluative proceedings, the other negative consequences of the current rule would be lessened.

In the absence of such changes, the results of Rule 11 should be monitored closely. The negative effects should be watched especially closely. Apart from whether the rule is achieving its streamlining objective, at least part of the Rule 11 debate should be whether the Rule 11 evaluative function is a proper judicial task and whether there are any realistic and meaningful alternatives to the judiciary’s direct involvement in improving the ethics and competence of lawyers. Unfortunately, it would appear that few of these alternatives are likely to be implemented. That this is so is a sad commentary on the profession. Efforts should continue, nevertheless, to improve the quality of lawyering, most especially by legal educators.

In the meantime, it is difficult to fault the judiciary for assuming at least part of the profession’s responsibility in this area. Provided the potential negative consequences of Rule 11 are prevented or can be kept to a minimum (though I remain quite skeptical about this if Rule 11 procedures remain the same), the deterrent effect of the rule cannot hurt the cause of better lawyering. Effecting higher levels of competence is not a traditional judicial function, yet it remains a secondary result of Rule 11. With the changes I have suggested, I think Rule 11 could be a more constructive vehicle for improving the quality of lawyering.