

Reasonable Inquiry Under Rule 11—Is the Stop, Look, and Investigate Requirement a Litigant's Roadblock?

I. INTRODUCTION

Amendments to the Federal Rules of Civil Procedure were transmitted to Congress by the Chief Justice of the Supreme Court on April 28, 1983, and became effective on August 1, 1983.¹ Four of the amended rules — 7, 11, 16, and 23 — have been the brunt of sharp criticism and dire predictions of adverse consequences.² This Note will examine the changes to rule 11³ and the results of its application in cases decided since the amendment.⁴

The amendments to rule 11 were prompted by the desire to increase judicial efficiency and discourage “dilatory or abusive tactics” by attorneys.⁵ Yet the opportunity to receive damage awards for attorney's fees through the operation of rule 11 sanctions has given rise to litigation.⁶ Amended rule 11 represents a serious challenge to the attorney-client relationship, and its deleterious effects may outweigh the presumed benefits of judicial economy.⁷

In 1938, the Federal Rules of Civil Procedure provided for a clear and simple statement of a claim for relief and for maximum exchange

¹Amendments to Rules, 97 F.R.D. 165 (1983). Rules 6(b), 7(b), 11, 16, 26(a) and (b), 52(a), 53(a), (b), and (c), and 67 were amended. Rules 26(g), 53(f), and 72 to 76 were added, as well as Forms 33 and 34.

²See, e.g., *Comments of the Committee on the Fed. Rules of the Am. College of Trial Lawyers Regarding the Prelim. Draft of the Proposed Amends. to the Fed. R. Civ. P.* (1981); Kuzins, *Bar Groups Attack*, 97 L.A. DAILY L. J. 1 (1984); Long, *Sanctions in the Proposed Amendments to the Federal Rules of Civil Procedure: Some Questions about Power*, 11 HOFSTRA L. REV. 997 (1983); Learner and Schwartz, *Rule 11 Shouldn't Be Changed*, 5 NAT'L L.J. 13 (1983).

³The text of Rules 7(b), 11, and 26(g) as amended are included in the Appendix to this paper.

⁴The 1983 amendments were effective August 1, 1983. They apply to any action or proceeding initiated after that date and to pending litigation insofar as just and practicable. Amendments to Rules, 97 F.R.D. 165 (1983).

⁵*Advisory Committee on Fed. R. Civ. P. Note Submitted to the Standing Committee on Rules of Prac. and Proc. of the U.S. Judicial Conf.* The text of this document is included at 97 F.R.D. 165, 198 [hereinafter referred to as *Advisory Comm. Note*].

⁶Additional motions and hearings on the motions are necessary before sanctions under rule 11 are granted. The opportunity to recover attorney's fees will only encourage rule 11 motions. See *infra* note 150 and accompanying text.

⁷Harvey, *The Judicial Assault on the Attorney-Client Relationship: Thoughts on the 1983 Amendments to the Federal Rules of Civil Procedure*, 1 BENCHMARKS 17, 21 (1984).

of information between the parties before trial.⁸ The essence of pleading and discovery under the 1938 rules was to promote resolution of lawsuits on the basis of the merits of genuine issues of law and fact.⁹ On the whole, the Federal Rules of Civil Procedure have facilitated rather than thwarted such resolution.¹⁰

The 1983 amendments to rules for pleading challenge the concept of a plain and simple claim for relief.¹¹ In substituting a test of "reasonable inquiry" for the former test of an attorney's "good faith" as the standard by which claims are judged, these amendments strike at the core of the attorney-client relationship and the orderly progression of an action from claim to pretrial discovery to resolution on the merits.

This Note will review briefly the history of rule 11 and the nature of the recent changes. By examining cases decided under amended rule 11, it will focus on the meaning of "reasonable inquiry" and how this test differs from the prior test of good faith. The effect on the attorney-client relationship will be considered in light of recent decisions awarding attorney's fees and imposing other sanctions under rule 11.

II. THE DEVELOPMENT OF RULE 11

A. Early Development

Early forms of pleading required attorney certification of the form but not the substance of a pleading.¹² Attorney certification of pleadings had its origin at common law in the institutionalization of the attorney's (solicitor's) role in drafting written pleadings for use by a party or his or her counselor (barrister).¹³ In signing the pleading, the attorney-at-law certified compliance with the required forms of pleading but did not attest to the honesty or sufficiency of what was being asserted.¹⁴

Rule 24 of the Equity Rules of 1842 required the attorney's signature on every bill or pleading as "an affirmation" that there was "good ground" to support it.¹⁵ The formulation "good ground" appears to derive from Supreme Court Justice Story's treatment of the signature requirement in his treatise on equity practice.¹⁶ Contrary to the historical sources he cited, Story saw the function of the attorney's signature as extending beyond certification of the form to certification of the substance

⁸ C. WRIGHT AND A. MILLER, *FEDERAL PRACTICE AND PROCEDURE*, §§ 1332-1334 (1969 & Supp. 1984).

⁹*Id.*

¹⁰*Id.*

¹¹FED. R. CIV. P. 3; *Conley v. Gibson*, 355 U.S. 41 (1957).

¹²Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1, 9-13 (1976).

¹³*Id.*

¹⁴*Id.*

¹⁵42 U.S. (1 How.) xlvi (1842).

¹⁶J. STORY, *EQUITY PLEADINGS*, ch. 2, § 47 at 48 (10th ed., 1892).

of the pleading.¹⁷ This view was accepted by England's Supreme Court of Judicature in *Great Australian Gold Mining Co. v. Martin*.¹⁸ The Advisory Committee on Rules for Civil Procedure in 1936 referred to Equity Rule 24 and *Great Australian Gold Mining* in its note to rule 11,¹⁹ thus adopting the view that an attorney's signature on a pleading was a certification there was good ground for the action.

B. Rule 11 in 1938

Rule 11 replaced the code pleading practice of using affidavits by a party as the means of certifying pleadings.²⁰ Thus the burden of assuring honesty in pleadings was placed squarely on the attorney under rule 11, but rested on the attorney's *good faith*. Early cases construing rule 11 referred to the attorney's signature as a means of assuring "accountability" in pleadings²¹ and as an "affidavit of merit" for the pleadings.²²

Rule 11 as first promulgated in 1938²³ contained two elements: attorney certification and provision for striking "sham" pleadings. Sanctions could be imposed on an attorney only for "willful" violations of the rule.²⁴ Rule 11 as originally promulgated was the basis of relatively little litigation. Where the signature requirement of the original rule 11 was not met, courts treated the deficiency as a technical error which they had implicit powers to correct.²⁵ In some cases, original rule 11 challenges to a pleading involved parties acting *pro se* or attorneys who assisted a party but were not the "attorney of record."²⁶ Failure to sign a pleading properly was rarely the basis for striking a pleading.²⁷

Issues of false or sham pleadings were raised infrequently.²⁸ An often-cited case, *Freeman v. Kirby*,²⁹ resulted in striking of pleadings as

¹⁷*Id.* at 49.

¹⁸1 Ch.D. 1, 10 (1877) (dictum).

¹⁹1 F.R.D. lxxxii (1938).

²⁰*Id.* See also Risinger, *supra* note 12, at 7 and text of Rule 11 in Appendix.

²¹*Foster Wheeler Corp. v. Am. Sur. Corp.*, 25 F. Supp. 225 (E.D.N.Y. 1938).

²²*Russo v. Sofia Bros.*, 2 F.R.D. 80, 82 (E.D.N.Y. 1941).

²³Rule 11 remained unchanged from 1938 until its amendment in 1983.

²⁴See 5 C. WRIGHT AND A. MILLER, *supra* note 8.

²⁵*Id.*

²⁶See *Covington v. Cole*, 528 F.2d 1365 (5th Cir. 1976); *Ellis v. Maine*, 448 F.2d 1325 (1st Cir. 1971); *Huffman v. Neb. Bureau Vital Statistics*, 320 F. Supp. 154 (D. Neb. 1970).

²⁷Risinger, *supra* note 12, at 15, reported failure to sign was never used as the basis to strike a pleading. *But see* U.S. *ex. rel. Sacks v. Philadelphia Health Management Corp.*, 519 F. Supp. 818 (E.D. Pa. 1981), where a pleading was struck for failure to sign.

²⁸Risinger, *supra*, note 12, at 25, stated that only twenty-three cases involved an attempt to strike a pleading as "sham" under rule 11 from 1938 to 1976. The first genuine rule 11 dispute involving sham pleadings did not occur until 1950 in *United States v. Long*, 10 F.R.D. 443 (D. Neb.). Since 1970, the number of references to rule 11 has increased, although given the increase in all kinds of civil litigation, it is not known whether the percentage of cases that are considered frivolous and unfounded under rule 11 has increased. See also Birnbaum, *Physicians Counterattack: Liability of Lawyers for Instituting Unjustified Medical Malpractice Actions*, 45 FORDHAM L. REV. 1003 (1977).

²⁹27 F.R.D. 395 (S.D.N.Y. 1961).

sham or false because of an attorney's willful violation of rule 11. The *Freeman* case is illustrative of the difficulties courts had with rule 11 as originally promulgated.

The dispute in *Freeman* and its companion suit, *Murchison v. Kirby*,³⁰ stemmed from an earlier stockholder dispute involving Allegheny Corporation. In 1954 and 1955 several stockholder actions against the officers and directors of Allegheny Corporation were settled out of court. The *Murchison* suit challenging the validity of those settlement agreements was filed first. Murchison's attorney then contacted Freeman and proceeded to bring a second suit challenging the 1954-1955 settlements. Murchison had agreed to pay Holland for both suits, and materials prepared for the *Murchison* litigation were filed in both the *Murchison* and *Freeman* suits. Freeman knew little about the case against Allegheny, and in fact had never met attorney Holland before the suit in Freeman's name was filed.³¹ The *Freeman* decision resulted in dismissal when the plaintiff's complaint was struck by the court as sham without a prior finding that the complaint was in fact false.

Although this was the first time a federal court dismissed a suit based on rule 11 without first adjudicating the issue on the merits, the *Freeman* court gave little insight into how "good ground" for a pleading was to be tested. A similar rule 11 challenge in *Murchison v. Kirby* resulted in no finding of violation. In the *Murchison* suit, extensive pretrial discovery and affidavits of the attorneys involved provided ample basis for rejecting the defendants' rule 11 motion to strike the pleadings and a rule 56 motion for summary judgment.³² The *Freeman* decision has been criticized not because the decision to halt the litigation was wrong, but because there were other more appropriate grounds for dismissal. The court had grounds on which to dismiss the *Freeman* suit or consolidate it with the *Murchison* suit because Freeman's participation as plaintiff had been solicited by Murchison and Murchison, not Freeman, was the real party in interest. Based on the extensive use of pleadings and motions prepared for the *Murchison* case in the *Freeman* case, the court raised the question of attorney honesty in certifying the *Freeman* pleadings without reaching the question of the legal sufficiency of the pleadings as it had done in *Murchison v. Kirby*.³³ By citing only rule 11 as the grounds for dismissal, the court distorted the meaning of rule 11.³⁴

Although there have been more cases involving the 1938 version of rule 11 in the past ten years, rule 11 issues involving questions of bad

³⁰27 F.R.D. 14 (S.D.N.Y. 1961).

³¹*Freeman v. Kirby*, 27 F.R.D. 395, 398 (S.D.N.Y. 1961).

³²*Murchison v. Kirby*, 27 F.R.D. 14, 18-19 (S.D.N.Y. 1961).

³³*Freeman*, 27 F.R.D. at 396.

³⁴Risinger, *supra* note 12, at 41.

faith pleading still arise infrequently.³⁵ The infrequent use of a rule 11 motion to strike was and still is due in large part to the availability of other procedural devices.³⁶ Pretrial conferences under rule 16 provide an opportunity for clarification and stipulation of issues and facts.³⁷ Rule 36 requests for admissions and other forms of pretrial discovery can eliminate any doubt as to whether there was sufficient factual basis for a pleading or whether the attorney acted in bad faith.³⁸ Both a rule 12(e) motion for a more definite statement³⁹ and a rule 56 motion for summary judgment are available to resolve the matter when the sufficiency of factual material behind a pleading is questioned.⁴⁰

Because courts have been reluctant to strike a pleading without holding that the basis for the pleading is false, rule 56 motions for summary judgment have often preempted what otherwise might have been a rule 11 question.⁴¹ Once a party's motion for summary judgment has been granted, courts have often concluded that a rule 11 motion challenging the good faith of the other party is moot.⁴²

Questions of attorney conduct, separate from the truth or falsity of the ultimate facts behind the pleading, have also been raised with a rule 11 motion.⁴³ The original rule 11 did not specify what affirmative duty the attorney had to investigate the client's statement before filing. Courts have been loathe to impose sanctions on attorneys for ethical violations, and original rule 11 cases were no exception.⁴⁴ Even where the factual basis for the pleading was shown to be false, no rule 11 sanctions were imposed unless there was some other indication of bad faith by the attorney.⁴⁵

³⁵C. WRIGHT AND A. MILLER, *supra* note 8. A review of all reported federal cases since 1970 involving a rule 11 issue revealed that from 1970 to 1978 fewer than twenty rule 11 cases were raised in any year; whereas from 1979 to 1982, each year thirty to forty cases involved rule 11 issues. In 1983, nearly eighty federally reported cases raised rule 11 issues. At this writing, in 1985, there have been over 170 cases involving rule 11 issues reported.

³⁶*Id.*

³⁷C. WRIGHT AND A. MILLER, *FEDERAL PRACTICE AND PROCEDURE*, § 1525 (1969 and 1984 Supp.).

³⁸*Id.* at § 2264.

³⁹*Id.* at §§ 1376-1377.

⁴⁰*Id.* at § 2712.

⁴¹*See* M. GREEN, *BASIC CIVIL PROCEDURE* (1982) at 129, 136-37, and the cases cited therein, noting pleadings are poor screening devices, a rule 56 motion for summary judgment being better suited.

⁴²*Bates v. Clark*, 95 U.S. 204 (1877); 5 C. WRIGHT AND A. MILLER, *supra* note 8, § 1334. *Thoma v. A.H. Robbins Co.*, 100 F.R.D. 344 (D.N.J. 1983) is a recent example where even a flagrant abuse of pleading and motion practice resulted in no rule 11 sanctions once the court denied the unfounded motions.

⁴³*Gulf Oil Corp. v. Bill's Farm Center, Inc.*, 52 F.R.D. 114 (W.D. Mo. 1970).

⁴⁴C. WRIGHT AND A. MILLER, *supra* note 8, §§ 1334-1334.

⁴⁵*See Roadway Express Inc. v. Piper*, 447 U.S. 752, 766 (1980); *Nat'l Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639 (1976); *Browning Debentures Holders' Comm. v. DASA Corp.*, 560 F.2d 1078, 1088 (2d Cir. 1977) (all cited in the *Advisory Comm. Note* to rule 11). *Roadway* held that bad faith may be found in the

C. *The 1983 Amendments to Rule 11*

The changes to rule 11⁴⁶ fall into four categories: (1) extension of the signature requirements to motions and other papers and to parties acting *pro se*; (2) substitution of the "reasonable inquiry" test for the "good ground" test; (3) mandatory imposition of sanctions for violations; and (4) elimination of the provision for striking a pleading as a sham or falsity, but specific inclusion of a provision for awarding attorney's fees as a sanction for violations. These changes are the product of several important trends, but they are not the product of developments in case law under rule 11 as originally promulgated.

The remainder of this Note will focus on the "reasonable inquiry" test and the effect of the new rule 11 on the attorney-client relationship. Although the effect of extending the application of rule 11 to parties acting *pro se* may pose some initial difficulties for those parties, the courts will continue to look more leniently at the party *pro se* and correct simple technical defects.⁴⁷ Extension of rule 11 to all motions and other papers (and the concomitant requirement for discovery motions in rule 26(g)) will impose some additional risk and burden on attorneys and their clients. The discussion below highlights some of these difficulties. Elimination of the provision for striking sham or false pleadings was a step which recognized that other procedural devices (rules 12(f) and 56) are better suited to the task and that rule 11 had, in fact, rarely been used as a motion to strike.

III. REASONABLE INQUIRY INTO FACT AND LAW

A. *Foundation of the "Reasonable Inquiry" Test*

The Advisory Committee notes to rule 11 assert that the "good ground" test in the original rule "[has] been replaced by a standard

basis for bringing the action or in the way the litigation was conducted, and where there is evidence of bad faith, sanctions may include the award of attorney's fees. *See also* *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 251-53 (1975) and 28 U.S.C. § 1927 (1983), on the matter of exceptions to the American rule on attorney's fees based on the bad faith of a litigant. *See generally* *Driscoll v. Oppenheimer and Co., Inc.*, 500 F. Supp. 174 (N.D. Ill. 1980), regarding the relationship between meritlessness and bad faith. *See contra* *McCandless v. Great Atlantic and Pacific Tea Co.*, 697 F.2d 198 (7th Cir. 1983), where the court noted in dictum that all courts do not uniformly subscribe to the same standards of bad faith.

⁴⁶*See* the text of rules 7(b), 11, and 26(g) in the Appendix to this Note. These rules should be read together. Note the subtle wording changes among these three rules.

⁴⁷*See supra* notes 16-19 and accompanying text; *Haines v. Kerner*, 404 U.S. 519, 520 (1972), *cited in* *Advisory Comm. Note* to rule 11. A case involving a *pro se* action under amended rule 11 is *Theim v. Hertz Corp.*, 732 F.2d 1559 (11th Cir. 1984). *But cf.* *Hernandez-Avail v. Averill*, 725 F.2d 25 (2d Cir. 1984) (failure to sign a pleading may still result in a decision that the individual who did not sign cannot be considered a party to the action and therefore is ineligible to appeal and share damages). *See also* *Rodgers v. Lincoln Towing Services, Inc.*, 596 F. Supp. 13 (N.D. Ill. 1984), where an attorney who appeared in a proceeding but did not sign the pleadings was exempted from rule 11 sanctions.

that is much more focused. . . . This standard is more stringent than the original good-faith formula and thus it is expected that a greater range of circumstances will trigger its violation."⁴⁸ The Advisory Committee Note cites two cases decided under the original rule 11 in this context: *Kinee v. Abraham Lincoln Federal Savings and Loan Ass'n*⁴⁹ and *Nemeroff v. Abelson*.⁵⁰

In *Kinee*, a class action was brought by several mortgagors alleging that failure to pay interest on that portion of their monthly mortgage payments held in escrow for insurance and property taxes by defendant mortgagees was an actionable wrong. The plaintiffs claimed this practice was a precondition for obtaining a mortgage and therefore constituted a violation of antitrust laws.⁵¹ Defendants sought to have the case dismissed on, among other grounds, a rule 11 violation because the plaintiffs had joined as defendants every individual or lending institution listed in the Philadelphia telephone directory under various headings relating to mortgage brokers. The court found this to be "grossly improper" but held that dismissal was an inappropriate sanction. Forty-six of the 131 party-defendants were dismissed, and the plaintiffs' attorneys were held responsible for the expenses incurred by those defendants in connection with the suit.⁵²

The *Nemeroff* case, also a class action, involved insider stock trading. After dismissing the action, the district court found that the action had been commenced in bad faith against the publishers of certain financial columns and awarded attorneys' fees and costs to them. However, the court also found the action against other investors involved in short stock sales as a result of information in those financial publications was not commenced in bad faith and awarded no attorneys' fees to them.⁵³ The circuit court reversed the finding that *Nemeroff* commenced his action against the publishers in bad faith, noting that the question under rule 11 is "whether a reasonable attorney could have concluded that facts supporting the claim *might be established*, not whether such facts *actually had been established*."⁵⁴

Both *Kinee* and *Nemeroff* involved the question of how much pre-filing inquiry into the facts and law is necessary and sufficient to justify the filing of a complaint. The plaintiffs' attorneys in *Kinee* did little or no investigation into who was a proper party-defendant. The court properly applied rule 11 to reach an equitable solution. The attorneys responsible for the improper act were required to pay the costs and fees of those prejudiced by their act. The suit was not dismissed because

⁴⁸Advisory Comm. Note, *supra* note 5.

⁴⁹365 F. Supp. 975 (E.D. Pa. 1973).

⁵⁰620 F.2d 339 (2d Cir. 1980).

⁵¹365 F. Supp. at 977.

⁵²*Id.* at 977 n.1.

⁵³620 F.2d at 350. The investor defendants were awarded costs as the prevailing parties under rule 54(d).

⁵⁴*Id.* at 348.

this would have punished the plaintiffs rather than their attorneys. By allowing the case to go forward for a decision on the merits, the remaining defendants were not unjustly benefited by a procedural dismissal.

The decision in *Nemeroff* resulted in no sanctions on the plaintiff's attorney because no violation was found. The Advisory Committee Note implies a different result might be reached under new rule 11.⁵⁵ If the standard is "reasonableness under the circumstances," as the Committee Note states,⁵⁶ it seems both the *Kinee* and *Nemeroff* courts would reach the same conclusions now as they did under rule 11 before the amendment. The *Kinee* plaintiffs' attorneys did not investigate and were sanctioned. The *Nemeroff* plaintiff's attorney investigated the complaint for three months prior to filing. He contacted the New York Stock Exchange, confirmed that a Securities and Exchange Commission investigation into the matter was pending, discussed the matter with the attorney of another stockholder considering filing a similar complaint, discussed the matter with a stockbroker who had expressed concern about the defendants' activities in question, and reviewed other published material, all of which led him to conclude there was a sufficient factual basis to substantiate his client's complaint.

The Advisory Committee for the 1983 amendments listed four factors that affect what constitutes a reasonable inquiry at the time the action is commenced: the amount of time available for investigation, whether a client must be relied on as the source of information, whether the interpretation of the law is plausible, and whether forwarding counsel or another attorney was relied on by the attorney filing the pleading.⁵⁷ None would nor should have caused the plaintiff's attorney in *Nemeroff* not to file the complaint.

In fact, another result was reached in *Nemeroff* on remand. In 1980, the Second Circuit Court of Appeals remanded the case on the question of bad faith. In 1982, the district court⁵⁸ held that an award of attorney's fees was in order for both the publisher defendants and the investor defendants. At issue was the way the plaintiff had handled pretrial discovery, especially after July, 1977, when the SEC released the results of its investigation and revealed that it had found no misconduct on the part of the defendants. On appeal to the Second Circuit in 1983, the decision of the district court was affirmed.⁵⁹ The court held:

We uphold the District Court because its finding of bad faith *continuation* of this lawsuit is well supported by the particular circumstances of this record. We do not thereby create an easy test for the award of attorney's fees to a successful defendant.

⁵⁵Advisory Comm. Note, *supra* note 5.

⁵⁶*Id.*

⁵⁷*Id.* See also *General Accident Insurance Co. of America v. Fidelity & Deposit Co. of Md.*, 598 F. Supp. 1223 (E.D. Pa. 1984), on the issue of reliance on another attorney.

⁵⁸94 F.R.D. 136.

⁵⁹704 F.2d 652.

Plaintiffs who have a colorable basis for a claim and who act in good faith need not apprehend that defeat on the merits of their lawsuit will require them to pay their adversaries' legal fees. . . . In this case the pace of discovery was just one factor that contributed to the District Court's finding of bad faith. Far more important was the fact that Nemeroff and his attorneys chose to *keep* Abelson and the investor defendants in court without an adequate factual basis behind the case.⁶⁰

The distinction between the first and second decisions in the circuit court is crucial: it is the difference between a bad faith basis for bringing the complaint in the first place and a bad faith continuation of the litigation (with specific pretrial practice abuses) over a period of years. It is important to note that the circuit court in the second appeal did not "reach the District Court's alternative holding that Nemeroff's attorney prosecuted the case in an intentionally dilatory fashion."⁶¹ It seems that both decisions of the circuit court would stand under rule 11 as amended.⁶²

B. Application of the Reasonable Inquiry Test

At this time, courts are just beginning to explore what is "reasonable inquiry" under amended rule 11. At this writing, the Supreme Court has discussed amended rule 11 in only one case, *Burnett v. Grattan*.⁶³ Affirming a Fourth Circuit Court of Appeals decision regarding the appropriate statute of limitations for this action, the Court recognized that preparation for civil litigation is considerably different from what is required of one seeking administrative remedies. Writing for the majority, Justice Marshall noted that the party (and his or her attorney) "must conduct enough investigation to draft pleadings that meet the requirements of the federal rules. . . . Although the pleading and amendment of pleadings rules in federal court are to be liberally construed, the administration of justice is not well-served by the filing of premature, hastily-drawn complaints."⁶⁴

⁶⁰*Id.* at 660 (emphasis supplied).

⁶¹*Id.*

⁶²The distinction between bringing a complaint without factual or legal basis and pursuing or multiplying the proceedings without legal or factual basis is one courts continue to make under rule 11. *See, e.g.,* *Rogers v. Kroger*, 586 F. Supp. 597 (S.D. Tex. 1984); *Taylor v. Belger Cartage Service, Inc.*, 102 F.R.D. 172 (W.D. Mo. 1984); *In re Perez*, 43 Bankr. 530 (S.D. Tex. 1984); *In re 1801 Restaurant, Inc.*, 40 Bankr. 455 (D. Md. 1984).

⁶³104 S. Ct. 2924 (1984). The court made reference to rule 11 in *U.S. v. Sells Engineering, Inc.*, 463 U.S. 418, 429-30 n.12 (1983), acknowledging that the pre-filing investigation and certification requirements of rule 11 may hamper the Department of Justice in bringing civil fraud claims, because the government attorneys are not likely to have personal knowledge of the facts of a case prior to the discovery process.

⁶⁴104 S. Ct. at 2930.

The opinion gives no further insight into what preparation is required or what is "enough" investigation other than to add that "the litigant must look ahead to the responsibilities that immediately follow the filing of a complaint. The litigant must be prepared to withstand various responses, such as a motion to dismiss, as well as to undertake additional discovery."⁶⁵ A litigant must also be prepared to withstand a rule 11 challenge to the appropriateness and sufficiency of his or her pleading prior to trial.⁶⁶

As yet, no definitive statements of what constitutes "reasonable inquiry" into the facts or the law have emerged in either the circuit or district courts. These courts are beginning to acknowledge that there are differences between the "good ground" subjective test and the new "reasonable inquiry" test.⁶⁷ In *Wells v. Oppenheimer*, the defendants were warned during a pretrial conference that a motion for summary judgment would be a "waste of time, should be discouraged, [and that the court would be] generous in awarding counsel fees to parties who successfully opposed such motions."⁶⁸ When defendants proceeded to bring their motion, the court found it "futile." While acknowledging that the attorneys acted in "subjective good faith" in bringing the motion, the court ruled there was no *objective* basis in law or fact for the motion and thus found the attorneys in violation of rule 11.⁶⁹ The court deferred its decision on the amount of fees to be awarded until after a final determination of the case, because it believed "litigation on this point at this time would frustrate the goal of judicial economy and could have an ill effect on settlement possibilities."⁷⁰

Under the "good ground" test, a pleading not supported by the subjective good faith of an attorney, that is, one that was frivolous or brought vexatiously or with the intent of multiplying the proceedings,⁷¹ could be challenged whether or not later steps in the litigation revealed the matter to be true or false in terms of underlying facts and law.⁷² In fact, this rarely happened under the 1938 rule 11, *Freeman v. Kirby* being the notable exception. Courts have been reluctant to challenge a

⁶⁵*Id.*

⁶⁶Rule 11 inquiries may be conducted at a discovery conference under rule 26(f). *Del Valle v. Taylor*, 587 F. Supp. 514 (D.N.D. 1984).

⁶⁷*Zaldivar v. City of Los Angeles*, 590 F. Supp. 852, 856-57 (C.D. Cal. 1984), provides an excellent comparison of the two tests.

⁶⁸101 F.R.D. 358, 359 (S.D.N.Y. 1984). See also *SFM Corp. v. Sundstrand Corp.*, 102 F.R.D. 555 (N.D. Ill. 1984) (citing *Wells v. Oppenheimer* and further distinguishing the bad faith test from the amended rule 11 test).

⁶⁹101 F.R.D. at 359.

⁷⁰*Id.*

⁷¹This is the "bad faith" test of *Badillo v. Central Steel & Wire Co.*, 717 F.2d 1160, 1166 (7th Cir. 1983), under original rule 11 and the test for 28 U.S.C. § 1927 as explained in *Overnite Transportation Co. v. Chicago Industrial Tire Co.*, 697 F.2d 789, 794 (7th Cir. 1983).

⁷²*Cf. Freeman v. Kirby* and *Murchinson v. Kirby*, where the same facts resulted in opposite rulings on whether a rule 11 violation had occurred.

pleading on the basis of an attorney's bad faith where the underlying falsity or frivolity of the pleading was not apparent.⁷³

Under the objective test of amended rule 11, regardless of the attorney's honest belief that the pleading is well founded in law and fact, the pleading may be challenged. This does not mean, however, that the losing party will be subject to rule 11 sanctions, where at least colorable argument has been made.⁷⁴

C. *Delay and Improper Purposes in Pleading*

In *Nemeroff*, the Second Circuit Court of Appeals felt that holding a party to the good ground test "would promote the abortion of many potentially meritorious claims."⁷⁵ This criticism was raised by the American College of Trial Lawyers, who noted:

The proposed rules provide the right to sanction a lawyer who proceeds in good faith upon information obtained from his client if the judge concludes that under the circumstances additional inquiry should have been made. This concern is increased when one considers that the requirement for willfulness has been deleted by the proposed amendments to Rule 11 and that the Advisory Committee expressly states that sanctions should be imposed if the principal effect of the pleading is unreasonable delay, even if there is another legitimate purpose for the pleading.⁷⁶

Under the new rule 11, the effect of a party's motion or pleading on the litigation process becomes the measure of its judicial appropriateness, not its result in terms of adjudication on the merits of the dispute. Some avenues of litigation may be necessarily foreclosed as a result.⁷⁷ For example, in a 1983 case under the original rule 11 in which an alien sought review of an Immigration and Naturalization Service (INS) order of deportation, the District Court for the Western District of Missouri noted that the appeal of the INS order accomplished the desired delay. The court presumed the appeal was taken in good faith

⁷³Heart Disease Research Found. v. General Motors Corp., 15 Fed. R. Serv. 2d 1517, 1519 (S.D.N.Y. 1972), cited in the *Advisory Comm. Note*, supra note 5.

⁷⁴Ring v. R.J. Reynolds Industries, Inc., 597 F. Supp. 1277 (N.D. Ill. 1984); Ank Shipping Co. v. Seychelles Nat'l Commodity Co. Ltd., 596 F. Supp. 1455 (S.D.N.Y. 1984).

⁷⁵620 F.2d at 349.

⁷⁶*Am. College of Trial Lawyers Comments*, supra note 2.

⁷⁷Tax protest cases have resulted in rule 11 sanctions on plaintiffs and their attorneys in many courts. See, e.g., Parker v. Commissioner of Internal Revenue, 724 F.2d 469 (5th Cir. 1984); Granzow v. Commissioner of Internal Revenue, 739 F.2d 265 (7th Cir. 1984); United States v. Hart, 701 F.2d 749 (8th Cir. 1983); McCoy v. Commissioner of Internal Revenue, 696 F.2d 1234 (9th Cir. 1983). In Blair v. U.S. Treasury Dept., 596 F. Supp. 273, 282 (N.D. Ind. 1984), the court notes a valid tax dispute will not result in sanctions under rule 11 even where the taxpayer loses on every issue.

under rule 11 and allowed the suit to go forward.⁷⁸ Amended rule 11 makes the issue of good faith irrelevant. It requires the judge to look at the result of a motion regardless of the party's intent in making the motion. Under amended rule 11, the procedural result in this and similar INS actions would probably be different.⁷⁹

The requirement that a pleading, motion, or other paper not be "interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation," originally required that the pleading not be "primarily interposed" for such a purpose.⁸⁰ The Advisory Committee Note explains the word "primarily" was removed to eliminate ambiguity. The result is that the rule forecloses pleadings and motions which may result in delay and increased cost even where a legitimate trial tactic or client interest may be involved. For example, while no decisions have yet dealt directly with this facet of rule 11, critics of the rule recognized that this clause may allow the judge to second-guess the attorney.⁸¹ Words such as "unnecessary delay" and "needless cost" are highly subjective. What is "unnecessary" and "needless" from the judge's perspective may not appear so to the client whose interest is being litigated.

D. Inquiry Into Facts

Few cases involving reasonable inquiry into questions of fact have surfaced under amended rule 11.⁸² In *Van Berkel v. Fox Farm and Road Machinery*, the plaintiff's attorney was sanctioned under amended rule 11 where a products liability claim was brought and not voluntarily dismissed when it became evident the six-year statute of limitations barred

⁷⁸*Carrette-Michel v. I.N.S.*, 575 F. Supp. 150 (W.D. Mo. 1983), *rev'd*, 749 F.2d 490 (8th Cir. 1984).

⁷⁹In reversing and remanding the district court's order denying a suspension of the deportation order for Carrette-Michel, the appellate court made no note of the rule 11 issue. The reversal was made on the basis of new evidence in the case.

⁸⁰*Advisory Comm. Note*, *supra* note 5.

⁸¹*Am. College of Trial Lawyers Comments*, *supra* note 2. After protracted litigation, the Seventh Circuit Court of Appeals noted in *Miller Brewing Co. v. Brewery Workers Local Union No. 9*, that it would be pointless "to divide a suitor's claims or defenses into frivolous and nonfrivolous" ones. Although this decision reversed a lower court rule 11 sanction for that reason, such a result cannot be predicted in all cases, especially where alternative pleadings are used. 739 F.2d 1159, 1168 (1984).

⁸²Amended rule 11 requires inquiry into both fact and law. It is not enough that some facts exist to support a party's claim. Those facts must support the specific legal claims being made. In a labor dispute case, the District Court for the Northern District of California found a rule 11 violation resulting in an award of attorney's fees of \$6,125 based on that distinction. *WSB Electric Co., Inc. v. Rank and File Committee to Stop the 2-Gate System*, 103 F.R.D. 417 (1984).

Certain pleadings may require higher levels of specificity and more extensive investigation of both fact and law to survive pretrial rule 11 challenges. *See, e.g., Elliott v. Perez*, 751 F.2d 1472 (5th Cir. 1985), involving questions of tort immunity for public officials.

the claim.⁸³ The plaintiff had lost his right arm in a corn chopper manufactured, sold, and distributed by the defendant. The plaintiff engaged attorney Schmidt sometime in 1979 and told Schmidt the accident had occurred on September 6, 1977. Schmidt filed suit on September 2, 1983. The defendants answered on October 7, 1983, raising the statute of limitations, among other defenses. After several months Schmidt responded to the defendant's request for discovery of the plaintiff's medical records. When those records confirmed that the accident had occurred on September 6, 1976, the defendant's attorney made repeated requests to Schmidt to dismiss the suit voluntarily.

After a summary judgment was granted for the defendant, the defendant moved for costs and fees under rule 11. Schmidt offered a personal affidavit that he had acted in good faith in believing the date his client had given him and that he believed his client had also acted in good faith. His pre-filing inquiry involved investigation of the corn chopper machine but did not include obtaining the plaintiff's medical records. Under the circumstances, it may not have been unreasonable for Schmidt to believe his client recalled correctly the day his right arm had been severed. Had Schmidt filed suit promptly on the basis of his client's statement, the defendant's rule 11 motion might not have been successful. However, given the length of time Schmidt had between the time of engagement and the time of filing, there appears to be no reason why Schmidt should not have obtained his client's medical records or newspaper clippings of the accident. Because Schmidt's refusal to dismiss the suit voluntarily was not based on any legitimate concern for his client, the court felt no compunction in imposing a sanction on Schmidt personally.

One commentator has suggested that under the new rules, an attorney may never again rely on a client for factual information.⁸⁴ While such a conclusion probably goes too far, a seed of doubt has been sown in the attorney-client relationship. Whether that seed takes root depends on the circumstances surrounding the particular attorney-client relationship. Those particular circumstances will also determine the degree to which the attorney may rely on statements by the client in lieu of conducting his or her own investigations.

E. Inquiry Into the Law

In contrast to the infrequent litigation involving original rule 11,⁸⁵ the question of reasonable inquiry into the law under amended rule 11

⁸³581 F. Supp. 1248 (D. Minn. 1984).

⁸⁴Marcus, *Reducing Court Costs and Delay: The Potential Impact of the Proposed Amendments of the Federal Rules of Civil Procedure*, 66 JUDICATURE 363 (1983).

⁸⁵Nussbaum and Fenton, *1983 Amendments to Rules 7(b), 11, 26(g) of the Federal Rules of Civil Procedure: Description and Analysis*, Comments at the Business and Law Conference, Chicago, Oct. 11-13, 1983, reprinted in P. ROTHSTEIN, *THE NEW AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE*, 118, 127 (1983).

has already been the source of considerable litigation.⁸⁶ As amended, rule 11 requires an attorney to ensure that the pleading or motion is "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law."⁸⁷

A few of these cases involve insufficient preparation by attorneys, including the failure to cite long-standing authority on a subject,⁸⁸ failure to file a memorandum of law when presenting a motion to dismiss,⁸⁹ or failure to demonstrate adequate legal grounds for the action, even after being given leave to amend the complaint.⁹⁰ The suits that are clearly frivolous pose little problem.⁹¹ A number of procedural devices are available to dispose of the litigation and to sanction the attorneys and/or the parties responsible. Two areas of the law have raised more difficult rule 11 issues: personal jurisdiction and claims under the Racketeering Influenced and Corrupt Organizations Act (RICO).

Personal jurisdiction was termed a "difficult area of the law" by the District Court for the Southern District of New York, which held there was no rule 11 violation in bringing an action, even where jurisdiction over the defendant was not ultimately established.⁹² District courts

⁸⁶See *supra* notes 27 and 34.

⁸⁷97 F.R.D. 165, 167; see also Appendix.

⁸⁸Booker v. City of Atlanta, 586 F. Supp. 340 (N.D. Ga. 1984).

⁸⁹Lucha v. Goeglein, 575 F. Supp. 785 (E.D. Mo. 1983).

⁹⁰Rubin v. Long Island Lighting Co. 576 F. Supp. 608 (S.D.N.Y. 1984).

⁹¹In *Aune v. United States*, the district court in Arizona noted that while taxpayers challenging the I.R.S. could have "filed their suit with impunity before August 1, 1983," now the suit resulted in a show cause order as to why the plaintiffs should not be required to pay the I.R.S.'s attorney's fees for defending a frivolous action. 582 F. Supp. 1132 (1984). In another taxpayer case, the telephone company questioned whether it should be compelled to obey a summons in a taxpayer's frivolous claim against the I.R.S. *U.S. v. New England Telephone and Telegraph Co.*, 575 F. Supp. 138 (D.R.I. 1983). See also *Frederick v. Clark*, 587 F. Supp. 789 (W.D. Wisc. 1984), resulting in an award of attorney's fees to the I.R.S. under rule 11, and *Sunn v. Dean*, 597 F. Supp. 79 (N.D. Ga. 1984), where a losing party sued the jury from his previous trial.

Truly frivolous and vexatious actions should not be brought and the attorney does have a professional responsibility to refuse such cases under the ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(1) and ABA MODEL RULES OF PROFESSIONAL CONDUCT 3.1. Richardson, "Unconscionable Litigation" and the Attorney, 3 J. LEGAL PROF. 153 (1978). The difficulty is that there is no clear test for deciding what is a meritless case. Where a plaintiff's claim was "destined to fail" but not made in bad faith no rule 11 sanction was imposed. *Williams v. Birzon*, 576 F. Supp. 577 (W.D.N.Y. 1983). In a suit filed in hopes of inducing financial gain through settlement rather than in the interest of pursuing the legal claims made, no rule 11 sanctions were granted. *Gieringer v. Silverman*, 731 F.2d 1272 (7th Cir. 1984). Although there was no objective basis for the suit in *Williams* and neither objective nor subjective merit for the suit in *Gieringer*, no sanctions resulted.

⁹²*Leema Enterprises Inc. v. Willi*, 582 F. Supp. 255 (S.D.N.Y. 1984). *But cf.* *Laborers Health and Welfare Trust Fund v. Hess*, 594 F. Supp. 273 (N.D. Cal. 1984), where the defendant's request for rule 11 sanctions was termed frivolous and the plaintiff's novel arguments for an extension of ERISA jurisdiction were not; *Hasty v. Paccar, Inc.*, 583 F. Supp. 1577 (E.D. Mo. 1984), where jurisdiction was clearly not established and a rule 11 violation was found; *In re Oximetrix*, 748 F.2d 637 (D.C. Cir. 1984), where a similar result was reached.

in Michigan⁹³ and Indiana⁹⁴ have suggested that the timing of a jurisdictional challenge has a bearing on whether rule 11 has been violated.

In *Rubin v. Buckman*, the Third Circuit Court of Appeals remanded a case to determine whether a claim of diversity jurisdiction had been made in bad faith, before an award of attorney's fees could be made under rule 11.⁹⁵ *Rubin v. Buckman*, two other cases involving claims under the RICO Act,⁹⁶ and a case involving a petition to quash an IRS summons⁹⁷ all applied a subjective test to the attorney's actions and refused to impose sanctions under rule 11. In *Pudlo v. IRS*, the District Court for the Eastern District of Illinois noted that the attorneys had misread relevant sections of the IRS Code but that the misreading was not "unreasonable" under the circumstances. The court went on to say, however, "As the courts' interpretation of that section becomes more familiar to attorneys practicing in the field, even one-day late filings will likely become more suspect."⁹⁸

Not only will the standards for what is reasonable inquiry into the law vary with the area of substantive law involved, but the experience and knowledge of the attorney may also be a factor.⁹⁹ Attorneys are left with few clear guidelines regarding what constitutes sufficient inquiry into the law to justify a pleading or motion without invoking rule 11. The Advisory Committee Note says only that the intent of the rule is not to "chill an attorney's enthusiasm or creativity."¹⁰⁰ It is not clear whether reasonable inquiry is to be determined by the amount of inquiry into the law or by a qualitative inquiry sufficient to give the attorney a good faith belief the client will prevail.

In holding that the plaintiff's attorney did not violate rule 11 even though the claim could have no "useful . . . outcome" in terms of ultimate determination and that there "was no genuine issue of material fact" to be tried, the court in *Folak v. Sheriff's Office of Cook County*¹⁰¹ refused to impute bad faith to the plaintiff's attorney who had filed the complaint. Although the complaint was based on an untenable interpretation of the law, the court found that it is the honest belief

⁹³*Sheet Metal Workers Int'l Ass'n v. Wer-Coy Fabrication Co., Inc.*, 578 F. Supp. 296 (E.D. Mich. 1984).

⁹⁴*Gonzales v. Union Carbide Corp.*, 580 F. Supp. 249 (N.D. Ind. 1983).

⁹⁵727 F.2d 71, 73 (3rd Cir. 1984).

⁹⁶*Laterza v. Am. Broadcasting Co., Inc.* 581 F. Supp. 408 (S.D.N.Y. 1984); *Hudson v. LaRouche*, 597 F. Supp. 623 (S.D.N.Y. 1983).

⁹⁷*Pudlo v. Director, I.R.S.*, 587 F. Supp. 1010 (N.D. Ill. 1984).

⁹⁸*Id.* at 1012.

⁹⁹*Huetting and Schromm Inc. v. Landscape Contractors Council*, 582 F. Supp. 1519, 1522 (N.D. Cal. 1984).

¹⁰⁰*Advisory Comm. Note, supra* note 5. Substantial attorney's fees were awarded as rule 11 sanctions in *Taylor v. Prudential Bache Securities, Inc.*, wherein the court voices "great reluctance in rendering such awards in light of the attendant potentially chilling effect." 594 F. Supp. 226, 229 (N.D.N.Y. 1984).

¹⁰¹579 F. Supp. 1338 (N.D. Ill. 1984).

of the attorney that the case *might* be established at the time of filing that is determinative, not the ultimate merit of the case.

One recent decision illustrates a different approach to arguments for extension of existing law under rule 11. In a Fourth Circuit Court of Appeals decision, the court refused to reverse a lower court decision not to impose a rule 11 sanction on an attorney who could cite no supporting authority for his argument that broad statutory interpretation supported his client's case.¹⁰²

Conversely, in *Golden Eagle Distributing Co. v. Burroughs Corp.*,¹⁰³ although the defendants had submitted "an excellent brief" in support of their argument for an extension of the law regarding a conflicts of laws and statute of limitations problem, rule 11 sanctions were imposed. The defendant's original memorandum to the court and its brief filed in response to the plaintiff's motion for rule 11 sanctions were not based on the same arguments.¹⁰⁴ The result in this case illustrates how the ultimate decision on the merits of the claims involved may not coincide with the outcome of rule 11 motions.

While amended rule 11 purports to apply an objective test for what is reasonable inquiry, the courts are faced with a very narrow interpretation of reasonableness on a case-by-case basis. Courts will probably be more willing to impose sanctions on attorneys whose inquiry into the law is insufficient.¹⁰⁵ On the other hand, attorneys who rely on forwarding counsel¹⁰⁶ or on statements by the client when facts are in question¹⁰⁷ will probably be treated more leniently. Questions of subjective bad faith are still relevant where interpretation of the law is involved and where the motive for filing a pleading, motion, or paper may be questioned. In both the wording of rule 11 and in the Advisory Committee Note, ambiguous terms such as "good faith argument," "improper

¹⁰²*Nelson v. Piedmont Aviation, Inc.*, 720 F.2d 1234 (1984). See also *In re Morrell*, 42 Bankr. 973 (Cal. 1984), which involved a similar outcome where the question of law was one of first impression for California courts.

¹⁰³103 F.R.D. 124, 125 (N.D. Cal. 1984).

¹⁰⁴Defendants were sanctioned not only for misleading the court as to the status of existing law in their original brief, but also for failing to cite contrary authority. *Id.* at 129.

¹⁰⁵*Ring v. R.J. Reynolds Industries, Inc.*, 597 F. Supp. 1277 (N.D. Ill. 1984). See also notes 149-51 and accompanying text.

¹⁰⁶*General Accident Insurance Co. of America v. Fidelity and Deposit Co. of Md.*, 598 F. Supp. 1223 (E.D. Pa. 1984), where the defendant as third-party plaintiff was not subject to rule 11 sanctions because it did not rely solely on information contained in the original complaint. See also *Colucci v. N.Y. Times Co.*, 533 F. Supp. 1011 (S.D.N.Y. 1982), as an example where no sanctions were imposed for discovery abuse where an attorney relied on predecessor counsel.

¹⁰⁷*Van Berkel v. Fox Farm and Road Machinery*, 581 F. Supp. 1248 (D. Minn. 1984), did not involve a valid question of fact. The matter at issue was not on what date the accident did occur, but at what point in the litigation process the plaintiff's attorney determined the correct date of the accident, and whether he responded appropriately when he discovered that the date his client had given him did not correspond to the date of the medical records.

purpose,” and “plausible interpretation” imply a subjective standard.¹⁰⁸ Whether a subjective or objective standard should be applied could be difficult to decide in mixed questions of law and fact.

It seems that rule 11 has moved pleadings far beyond a plain and simple claim for relief. The judge or other party may now challenge the very filing of any motion, paper, or pleading. Not only must an attorney be prepared to face the challenges of discovery, rule 12 motions to dismiss, and motions for summary judgment, but also the very act of filing can be challenged. Furthermore, courts and parties are not hesitating to bring rule 11 challenges.¹⁰⁹ Under rule 11 an attorney must now be prepared to prove in court that sufficient and reasonable inquiry was conducted before suit was brought.

F. Rule 11 Inquiry is Not a Substitute for Discovery

Shortly before rule 11 was amended, the Ninth Circuit Court of Appeals stated clearly that rule 11 was “not a discovery device.”¹¹⁰ In holding a lower court’s requirement that plaintiffs produce rule 11 certifications to show there was “good ground” to support their pleadings was in error, the court said rule 11 “is not to be used to require plaintiff to offer proof of his case through supplemented Rule 11 certificates before discovery and before trial.”¹¹¹ Citing Wright and Miller, the court agreed that such a practice “exposes the plaintiff to the risk of adverse judgment without the safeguards of Rule 56.”¹¹² A rule 56 motion for summary judgment requires that all inferences be made in favor of the non-moving party and that the entire record be reviewed in determining whether there are any issues of fact in controversy.¹¹³ Under a rule 11 motion these safeguards do not exist. A case could be dismissed where the pleading was not based on adequate pretrial investigation, notwithstanding the existence of genuine issues of fact and law.

In an Eleventh Circuit Court of Appeals case, rule 11 as amended was used in an attempt to forestall discovery and terminate the suit at the pleading stage.¹¹⁴ The plaintiff, a doctor, claimed violation of various federal and state laws when he was denied staff privileges at a local hospital. He sought a temporary restraining order to halt the hospital’s interference with his medical practice. The case was dismissed by the

¹⁰⁸97 F.R.D. 165, 167; *Advisory Comm. Note*, *supra* note 5; *see also* Appendix.

¹⁰⁹*See supra* note 35. Courts are also raising rule 11 *sua sponte*, as in *Envirotech Corp. v. Bethlehem Steel Corp.*, 729 F.2d 70, 77 (2d Cir. 1984), and in *Hasty v. Paccar Inc.*, 583 F. Supp. 1577 (E.D. Mo. 1984).

¹¹⁰*Chippano v. Champion Int’l Corp.*, 702 F.2d 827, 831 (9th Cir. 1983).

¹¹¹*Id.* *See also* *Lau Ah Yew v. Dulles*, 236 F.2d 415, 416 (9th Cir. 1956), and *Risinger*, *supra* note 12.

¹¹²C. WRIGHT AND A. MILLER, *supra* note 8, § 1333; *see also* *United States v. Price*, 577 F. Supp. 1103 (D.N.J. 1984), and *Dravo Corp. v. Ohio Power Co.*, 100 F.R.D. 307 (N.D. Ohio 1983), holding rule 11 is not a discovery device.

¹¹³C. WRIGHT AND A. MILLER, *supra* note 8.

¹¹⁴*Majd-Pour v. Georgiana Community Hospital, Inc.*, 724 F.2d 901 (11th Cir. 1984).

district court for lack of subject matter jurisdiction at the hearing for the temporary restraining order. The plaintiff argued at the hearing that jurisdiction could be established with discovery.

In reversing the lower court's dismissal, the Eleventh Circuit court held that it was abuse of the court's discretionary powers to dismiss without allowing discovery on the question of jurisdiction.¹¹⁵ In noting rule 11 and how ill-prepared the attorney was for the hearing, the circuit court held that the district court could limit the scope of discovery and deal with the jurisdiction question with appropriate motion procedure.¹¹⁶

Although discussion of rule 26(g) is beyond the scope of this Note, discovery motions are within the ambit of rule 11.¹¹⁷ If rule 11 motions challenging the legal and factual sufficiency of pleadings are allowed but the case goes forward into the discovery stage, a question of judicial economy arises. No legitimate purpose is served by turning a rule 11 proceeding into a mini-trial on the pleadings.¹¹⁸

IV. ATTORNEY-CLIENT RELATIONSHIP UNDER RULE 11

Whether a rule 11 challenge occurs at the pleading stage or later, rule 11 can compel the disclosure of information usually protected by the attorney-client privilege or by work product immunity. The Advisory Committee Note states that such disclosure is not required, but that *in camera* inspection of privileged or work product material may be necessary.¹¹⁹ Rule 11 challenges may force an attorney to divulge trial strategy in an untimely manner, thereby having a prejudicial effect on the client's interest. Being forced to reveal preliminary investigative steps taken by the attorney and the contents of discussions with the client or witnesses could result in exposing case theories and strategies the attorney would prefer not be revealed until later, either in the interest of obtaining a more favorable settlement or in the interest of trial tactics.

In practical terms, rule 11 requires attorneys filing papers before a court "to memorialize in their files any additional aspects of their factual and legal investigation at the time."¹²⁰ Without an adequate record of the investigation, the sources of material factual allegations, and the

¹¹⁵*Id.* at 903.

¹¹⁶*Id.*

¹¹⁷702 F.2d 827. *In re Dayco Corp. Derivative Securities Litigation*, 102 F.R.D. 468, 471 (S.D. Ohio 1984), makes clear that discovery and pleadings are still distinct processes, and that discovery may proceed while pleadings are being amended subject to a rule 11 challenge.

¹¹⁸Rule 11 inquiries may be conducted at a discovery conference under rule 26(f) and may result in an amended complaint, judgment on the pleadings, or summary judgment. *Del Valle v. Taylor*, 587 F. Supp. 514 (D.N.D. 1984).

¹¹⁹*Advisory Comm. Note, supra* note 5.

¹²⁰Sussman and Sussman, *Overview of the 1983 Amendments to the Federal Rules of Civil Procedure*, reprinted in J. Rothstein, *supra* note 70, at 1, 13.

legal underpinnings of the case, it may be difficult to reconstruct later the rationale for proceeding.¹²¹

A second practical consideration may be to inform the client of these rules, the possibility of needing to disclose "confidential" information, and the possibility of sanctions. So informing a client may have a "chilling" effect on the attorney-client relationship. It may lead the client to withhold information in order to "protect" the attorney.

The American College of Trial Lawyers pointed out that these new rules may create situations where attorneys face a choice between client loyalty and confidentiality, and sanctions by the court.¹²² Because the attorney-client privilege belongs to the *client* and not to the attorney, the attorney may in fact have no choice but to divulge information in order to show that reasonable pre-filing or pre-motion investigation was conducted without exposing herself or himself to malpractice claims by the client.¹²³

The American Bar Association (ABA) Model Rules of Professional Conduct at 1.6(b)(2) permit an attorney to divulge confidential information when necessary to defend against a civil claim in which the client's conduct was involved or to respond to allegations concerning the attorney's representation of the client. However, DR 4-101(C) of the ABA Code of Professional Responsibility gives broader authority to the attorney to breach the client's confidences or secrets whenever necessary to defend himself against an accusation of wrongful conduct. The fact that an attorney may not be subject to disciplinary proceedings for complying with the requirements of rule 11 is comforting, but does not negate the fact that proceedings can be multiplied, involving greater cost and more time for all parties, and that the strength of the fiduciary relationship between attorney and client may be severely tested as a result.¹²⁴ When rule 11 challenges are raised, it seems likely that both the client and the attorney will find their energies diverted from the underlying matter in dispute and may themselves end up as adversaries.

The amendments to the Federal Rules of Civil Procedure, especially rule 11,¹²⁵ alter the relationship between attorney and client by forcing the attorney to weigh at every step of the litigation not only what is in the best interests of the client, but what possible sanctions on the attorney personally may result and how the step being considered can

¹²¹*Id.*

¹²²*Am. College of Trial Lawyers Comments, supra note 2.*

¹²³*Id.*

¹²⁴*Textor v. Bd. of Regents of Northern Ill. Univ.*, 711 F.2d 1387 (5th Cir. 1983), holding that where a rule 11 violation was raised, due process requirements must be observed before sanctions can be imposed on attorneys. *But see* *Rodgers v. Lincoln Towing Service, Inc.*, 596 F. Supp. 13 (N.D. Ill. 1984), holding that a hearing is not necessary where a rule 11 sanction is applied as a matter of law and no factual issues of the attorney's bad faith are involved.

¹²⁵Rules 7(b) and 26(g) are substantially the same as rule 11 and therefore have a similar effect. *See* Appendix to this Note.

be justified and legitimized to the judge. While it is not a bad result to force attorneys to weigh the benefits and outcomes of their actions, it is not in the best interests of an adversary system of justice to force attorneys to value their own interests or their adversary's interests over their client's interests. While some commentators have considered the dilemma the rules create for attorneys and feel these rule changes will deter dilatory practices,¹²⁶ others suggest that it is unfair to expect the attorney to balance conflicting loyalties.¹²⁷

By extending the attorney's ethical duty to the judicial system not to represent a client in a groundless case¹²⁸ to every pleading, motion, and paper filed in litigation, rule 11 denigrates the attorney's duty to represent her or his client zealously.¹²⁹ It places every attorney, and ultimately the judge, in the position of deciding the case on procedural grounds, before and perhaps without ever reaching the merits of the case.

V. SANCTIONS

It has been noted that federal judges have a broad range of sanctions available when a litigant acts in bad faith or in some way manipulates the judicial process to make the outcome unjust, delayed, or excessively expensive.¹³⁰ Nevertheless, judges have been reluctant to impose sanctions on attorneys, either because the standards for violation are unclear or because they are reluctant to impute bad faith or to find that attorneys acted willfully.¹³¹

The reluctance of judges to use their inherent power to impose sanctions¹³² or to impose sanctions under the federal rules¹³³ or 28 U.S.C. § 1927¹³⁴ may also be due to concern as to who is actually being punished by such actions: the attorney, the client, or even the clients on both

¹²⁶Buckley, *Detering Dilatory Tactics in Litigation: Proposed Amendments to Rules 7 and 11 of the Federal Rules of Civil Procedure*, 26 ST. LOUIS U. L.J. 895, 910 (1982).

¹²⁷Thode, *The Groundless Case—The Lawyer's Tort Duty to his Client and to the Adverse Party*, 11 ST. MARY'S L.J. 59 (1979).

¹²⁸This duty is also encompassed in ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(1), and MODEL RULES OF PROFESSIONAL CONDUCT 3.1, but the standards for applying these requirements are no clearer than those for rule 11.

¹²⁹ABA CODE OF PROFESSIONAL RESPONSIBILITY Canon 7.

¹³⁰R. Rodes and R. Kipple, *Sanctions Imposable for Violations of the Federal Rules of Civil Procedure, A Report to the Federal Judicial Center* (1981); Renfrew, *Discovery Sanctions: A Judicial Perspective*, 67 CALIF. L. REV. 264 (1979); Edelstein, *The Ethics of Dilatory Motion Practice: Time for a Change*, 44 FORDHAM L. REV. 1069 (1976).

¹³¹*Id.*

¹³²Rodes and Kipple, *supra* note 130.

¹³³*See* *Roadway Express v. Piper*, 447 U.S. at 765.

¹³⁴28 U.S.C. § 1927 (1983) empowers courts to require "[a]ny attorney or other person admitted to conduct cases in any court in the United States or any Territory thereof who so multiplies the proceeding in any case unreasonably and vexatiously . . . to satisfy personally such excess costs."

sides of the litigation.¹³⁵ The Advisory Committee was cognizant of these concerns and made specific provision for mandatory sanctions to be imposed personally on the responsible attorney where appropriate.¹³⁶

Critics of these sanction provisions point out that because sanctions, although "mandatory," are to be "appropriate,"¹³⁷ many of the problems of judicial reluctance and unclear standards have not been corrected.¹³⁸ The imposition of appropriate sanctions for violations of rule 11 is even more fact-sensitive than application of the "reasonable inquiry" test. Cases decided in the district and appellate courts give attorneys little guidance as to what is an "appropriate" sanction.¹³⁹ For example, in a case where pleading alternate citizenship was found to be a "flagrant violation" of rule 11, the court awarded no sanctions.¹⁴⁰ In another case, a "nonmeritorious" claim based on "very scanty" evidence was held not to be a rule 11 violation and no sanctions were imposed.¹⁴¹ In close cases, courts may simply find no violation existed and so no sanction is warranted.¹⁴² Other cases tend to look to the attorney's bad faith before imposing a sanction, even where the initial finding of violation was based on an objective standard.¹⁴³

The Advisory Committee Note explains that rule 11 sanctions are to be seen as "expanding on the equitable doctrine permitting the court to award expenses, including attorney's fees, to a litigant whose opponent acts in bad faith. . . ." ¹⁴⁴ The Committee notes further that rule 11 sanctions now emphasize a "deterrent orientation," bringing them in line with the approach for discovery sanctions.¹⁴⁵ Parties, their attorneys,

¹³⁵Renfrew, *supra* note 130 at 273.

¹³⁶*Advisory Comm. Note, supra* note 5.

¹³⁷*Id.*

¹³⁸Sussman and Sussman, *supra* note 120, at 22; *Am. College of Trial Lawyers Comments, supra* note 2.

¹³⁹*Day v. Amoco Chemicals Corp.* lists twelve factors to be considered in awarding attorney's fees under rule 11, 28 U.S.C. § 1927, or the inherent powers of the court. 595 F. Supp. 1120, 1123 n.2 (S.D. Tex. 1984). These factors were rejected as a basis for fee determination in *Zaldivar v. City of Los Angeles*, which suggested that no clear consensus on how fees should be determined has emerged. 590 F. Supp. 852 (C.D. Cal. 1984).

¹⁴⁰*Rubin v. Buckman*, 727 F.2d 71 (3rd Cir. 1984).

¹⁴¹*Victory Beauty Supply, Inc. v. LaMaur*, 98 F.R.D. 306 (N.D. Ill. 1983).

¹⁴²*Gold v. Blinder Robinson Co.*, 580 F. Supp. 50, 55 (S.D.N.Y. 1984); *but cf.*, *McHan v. Grandbouche*, 99 F.R.D. 260, 267 (D. Kan. 1983), warning that courts will act differently under amended rule 11.

¹⁴³*Weisman v. Rivlin*, 598 F. Supp. 724 (D.D.C. 1984); *Dahlberg v. Becker*, 581 F. Supp. 855 (N.D.N.Y. 1984), *aff'd*, 748 F.2d 85 (2d Cir. 1984); *Williams v. Birzon*, 576 F. Supp. 577 (W.D.N.Y. 1983).

¹⁴⁴*Advisory Comm. Note, supra* note 5; *see also* *Roadway Express v. Piper*, 447 U.S. 752 (1980); *Hall v. Cole*, 412 U.S. 1 (1973). In *Taylor v. Prudential Bache Securities, Inc.*, the court suggested a dual purpose for rule 11 sanctions: to compensate victims and to discourage frivolous litigation. 594 F. Supp. 226 (N.D.N.Y. 1984).

¹⁴⁵*Advisory Comm. Note, supra* note 5; *see also* *Nat'l Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639 (1976). This deterrent function does not yet go so far as to allow punitive damages. *In re Intel Securities Litigation*, 596 F. Supp. 226, 235 (N.D. Cal. 1984).

or parties and their attorneys jointly may be held liable for rule 11 sanctions. The majority of cases imposing rule 11 sanctions in the form of awards of attorney fees have imposed the sanction on the attorney upon whom the burden of "reasonable inquiry" rested.¹⁴⁶ A few cases have imposed sanctions on the client and attorney jointly.¹⁴⁷

To the extent that rule 11 sanctions are seen as a way to shift the economic burden of litigation, concerns about extended litigation, satellite hearings, and challenges to the attorney-client relationship become acute. Requests for sanctions under rule 11 require notice to the court, and then presumably other papers must be filed and a hearing on the matter may be held. Although the Advisory Committee Note discourages such action,¹⁴⁸ it is likely that some discovery into the "reasonableness" of pre-filing inquiry will be necessary.¹⁴⁹ If the intent of rule 11 motions is to promote judicial economy by eliminating frivolous and unmerited actions, this goal will be achieved *only* to the extent it has a deterrent effect on other actions not yet filed. In the case where rule 11 challenges are raised, the litigation will be extended.¹⁵⁰ Even where the court is able to limit the scope of satellite proceedings, some additional cost and time are involved.

¹⁴⁶*Dore v. Schultz*, 582 F. Supp. 154 (S.D.N.Y. 1984); *Wold v. Minerals Engineering Co.*, 575 F. Supp. 166 (D. Col. 1983), ordering attorneys personally to pay all costs and fees imposed under rule 11 sanctions. A party proceeding *pro se* may be held to the same standards as an attorney. *In re 1801 Restaurant, Inc.* 40 Bankr. 455 (D. Md. 1984).

¹⁴⁷*See, e.g., Aune v. United States*, 582 F. Supp. 1132 (D. Ariz. 1984), where sanctions were directed at the plaintiffs; *Rubin v. Long Island Lighting Co.*, 620 F.2d at 349, where the plaintiff and her attorney were ordered to share the sanction; *Steinberg v. St. Regis/Sheraton Hotel*, 583 F. Supp. 421 (S.D.N.Y. 1984), where the plaintiffs and their attorney were ordered to share the costs imposed for the defendant's attorney fees but the plaintiffs' share was reduced in light of the financial status of the plaintiffs.

¹⁴⁸*Advisory Comm. Note, supra* note 5. It is not unlikely that the question of appropriate legal fees to be awarded will become a matter of dispute as it has in civil rights and in antitrust litigation. *See, e.g., Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Jacquette v. Black Hawk County Iowa*, 710 F.2d 455 (8th Cir. 1983); *In re Fine Paper Antitrust Litigation*, 98 F.R.D. 48 (E.D. Pa. 1983).

¹⁴⁹In granting sanctions under rule 11, the District Court for the District of Columbia noted that the request for attorney's fees must itself be reasonable. The reasonableness of the request may be determined in light of the time necessary to respond to an improper pleading, the causal link between the improper pleading and the request for sanctions, and the prior actions of the party requesting sanctions. *Weisman v. Rivlin*, 598 F. Supp. 724 (1984). The court may also use its discretion to reduce fee awards to avoid financial ruin of the sanctioned party or the party's attorney. *Rogers v. Kroger Co.*, 586 F. Supp. 597, 601 (S.D. Tex. 1984).

¹⁵⁰In *SFM Corp. v. Sundstrand Corp.*, the court urged the parties to reach an out-of-court settlement on the appropriate amount of rule 11 fees, but noted a hearing could be held later if the parties did not agree. 102 F.R.D. 555, 560 (N.D. Ill. 1984). A court may also reserve a decision on rule 11 sanctions, pending other actions by the parties. *McLaughlin v. Bradley*, 599 F. Supp. 839 (D.D.C. 1984); *McDonough v. Ney*, 599 F. Supp. 679 (D. Me. 1984). *See also Knorr Brake Corp. v. Harbil, Inc.*, 738 F.2d 223 (7th Cir. 1984), holding an award of attorney's fees under 28 U.S.C. § 1927 is an appealable collateral order.

Advisory Committee reporter Arthur Miller acknowledged the critics' concern about satellite litigation and the "cloning" or routine use of sanction motions under rule 11.¹⁵¹ He expressed the opinion that there would be a "two- or three-year period of hyperactivity under some of these sanction provisions," but that judges will be able to curb this and handle sanctions "rapidly and very efficiently."¹⁵² Another Committee member, Congressman Charles Wiggins, summarized the amendments under three headings: judicial activism, attorney accountability, and deterrence of noncompliance with the rules through sanctions.¹⁵³ The primary concerns behind these amendments are unnecessary delay and expense in litigation.

Because the federal judicial system is already highly efficient, with ninety-five percent of all civil cases settled before reaching trial,¹⁵⁴ the marginal utility of these amendments to rule 11 must be questioned. It can be assumed that the vast majority of cases brought before the courts are based on good faith and grounded objectively in fact and law. The system of plain and simple pleading and pretrial discovery propels most cases into out-of-court settlement before trial is necessary. However, there are those cases which still require their day in court. No amount of judicial rule-making or sanctions designed to have a deterrent effect will prevent such litigation.

These rule amendments not only increase the economic risk of litigation for the private citizen, which is especially burdensome to the poor and middle classes, but they also challenge the right to file a civil action. Even in a "litigious society," any measure designed to chill a party's or an attorney's willingness to file suit and prosecute it vigorously must be carefully weighed.

The right to bring a civil action is basic to our democratic and human values. This right is vital because it is the enforcement mechanism for all other civil rights. The private right to bring an action against another person or even against the state is the right to invoke the enforcement power of the state once a judgment is obtained. It is this right more than any other which distinguishes ours from a society where

¹⁵¹Miller, *Proceedings of the Second Circuit Judicial Conference*, 101 F.R.D. 161, 200.

¹⁵²*Id.*

¹⁵³Wiggins, *Proceedings of the Second Circuit Judicial Conference*, 101 F.R.D. at 179.

¹⁵⁴*Federal Judicial Workload Statistics During the Twelve-Month Period Ending December 31, 1983*, Administrative Office of the U.S. Courts, Statistical Analysis and Reports Div., at A-24 show that only 5.2% of all civil cases in all district courts ever reach trial:

Total civil cases, all district courts	224,745
Settled with no court action	105,241
Settled before pretrial	80,066
Settled during/after pretrial	27,748
Settled during/after trial	11,690

the rights of the state rather than the rights of individuals are paramount. It is a right upon which the courts should tread lightly.

VI. CONCLUSION

In 1938, the president of the American Bar Association suggested, "If wisely administered, the Rules should do much to eliminate the complaints of laymen and of lawyers alike as to the technicalities of the law, the subtleties of practice, and the involvements of procedure. Their object must at all time control — 'to secure the just, speedy and inexpensive determination of every action.'"¹⁵⁵ By requiring pleadings to be "simple, concise and direct,"¹⁵⁶ but allowing for maximum disclosure of information between the parties before trial, the Federal Rules of Civil Procedure have advanced the cause of justice in an effective and efficient manner. Pleadings were not meant "to inform too much or too well";¹⁵⁷ they were "allegations, not facts."¹⁵⁸

The 1983 amendments to these rules have now subjugated those achievements to the interest of more active case management by the judiciary and greater vigilance over the exercise of the civil right to bring a cause of action.¹⁵⁹ There is great difference between a procedural system which effectively advances the adversary system to promote resolution of actions on the basis of the merits of the facts and law in dispute and a procedural system which advances economy and efficiency at the expense of adjudication on the merits.

JUDY L. WOODS

¹⁵⁵FEDERAL RULES OF CIVIL PROCEDURE AND PROCEEDINGS OF THE AM. BAR INSTITUTE, at iv, (1938).

¹⁵⁶*Id.*

¹⁵⁷Shuchman, *The Question of a Lawyer's Deceit*, 53 CONN. B.J. 101, 107 (1979).

¹⁵⁸*Id.*

¹⁵⁹Harvey, *supra* note 7, at 21.

Appendix

FINAL DRAFT OF PROPOSED AMENDMENTS TO RULES 7(b), 11, AND 26(g) OF FEDERAL RULES OF CIVIL PROCEDURE

Rule 7. Pleadings Allowed; Form of Motions

* * *

(b) MOTIONS AND OTHER PAPERS

* * *

(2) The rules applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

(3) *All motions shall be signed in accordance with Rule 11.*

* * *

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 statutes, 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 knowledge, information, and belief ~~there is good ground to support it, and that it is not interposed for delay formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.~~ If a pleading, *motion, or other paper* is not signed, *it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant.* ~~or is signed with the 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 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, including a reasonable attorney's fee.

Rule 26. General Provisions Governing Discovery

* * *

(g) SIGNING OF DISCOVERY REQUESTS, RESPONSES, AND OBJECTIONS. Every request for discovery or response or objection thereto made by 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 the request, response, or objection and state his address. The signature of the attorney or party constitutes a certification that he has read the request, response, or objection, and that to the best of his knowledge, information, and belief formed after a reasonable inquiry it is: (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response or objection.

If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.