July 2015

Developing Standards for the Imposition of Sanctions Under Rule 11 of the Federal Rules of Civil Procedure

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DEVELOPING STANDARDS FOR THE IMPOSITION OF SANCTIONS UNDER RULE 11 OF THE FEDERAL RULES OF CIVIL PROCEDURE

by

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"A law suit is not a children's game but a serious effort on the part of adult human beings to administer justice." [1] Judge Parker's comment reflects the guiding spirit behind Rule 11 of the Federal Rules of Civil Procedure.[2] Since its promulgation as part of the original federal rules, Rule 11[3] has been an effort on the part of the judiciary to reduce unnecessary and expensive pleading practices.[4] Both the original and the 1983 amended versions of Rule 11 create

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[1] United States v. A.H. Fisher Lumber Co., 162 F.2d 872, 873 (4th Cir. 1947) (Parker, J.).

[2] Rule 11 was included as part of the original Federal Rules of Civil Procedure, first promulgated in 1937. Rule 11 remained unchanged until it was amended in August 1983. The current text of Rule 11 provides:

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 the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by 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 striken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

[3] The text of the pre-amended rule is set forth below to facilitate the comparison with the amended Rule 11, *supra* note 2.

Every pleading 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 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 constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed 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 [sic] 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. (emphasis in original)

See infra notes 12-29 and accompanying text.

[4] *See* Day v. Amoco Chem. Corp., 595 F.Supp. 1120, 1122 (S.D. Tex.), *appeal dismissed*, 747 F.2d 1462 (5th Cir. 1984); *see also*, Patton, *New Rules Intended to Streamline Pretrial Process*, Legal Times, May 16, 1983 and Schwarzer, *Sanctions Under The New Federal Rule 11 — A Closer Look*, 104 F.R.D. 181, 182-83 (March, 1985) [hereinafter cited as Schwarzer].

a series of duties which the signator of a pleading or motion must fulfill. By signing the pleading, the author verifies that there is good reason to file the paper and swears that the pleading is not filed for any improper purpose. Theoretically, both versions of the rule direct a judge to impose sanctions upon the judge's realization that a pleading is signed in violation of a signator's duty. In practice, however, judges rarely imposed sanctions under the original version of Rule 11.[5]

As originally drafted, Rule 11 failed to curb the abuses it was intended to limit[6] — abuses that stem from a perception felt when the federal rules were first promulgated and still felt today that the courtrooms had become places for "alley brawls," held captive by attorneys who would and could do anything to serve client interests.[7] Too often frivolous claims and meritless motions were advanced under the guise of vigorous advocacy. The courts needed some measure of power to limit the ability of counsel, to either increase the cost of litigation or to abuse court procedure by the introduction of meritless suits. Rule 11 was intended to be the weapon a judge could wield to temper the clashed swords of unchained advocates locked in the litigation battle. However, confusion as to what constituted sanctionable conduct, what standards courts use to evaluate an attorney's conduct to determine compliance with the rule, and the range of available and appropriate sanctions left the rule virtually unused in its original form.[8]

In August 1983, the Federal Rules of Civil Procedure were significantly amended. Rule 11 was virtually rewritten and rule 26(g) was added to the available weapons a judge could use to control abuses of the litigation process.[9] The amendment of Rule 11 was primarily intended to reduce the courts' reluctance to impose sanctions for violations of the rule.[10] The change in the language

[5] Fed.R.Civ.P. 11 Advisory Committee notes, *reprinted in* 97 F.R.D. 165, 198-201 (1983), [hereinafter cited as Committee notes]; *Schwarzer,* supra note 4, at 183; *see infra* notes 16-27 for the discussion of the reasons why judges rarely imposed sanctions under the original version of Rule 11.

[6] Committee notes, *supra,* note 5, at 198; *see* Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 253 (2nd Cir. 1985).

[7] *See* Committee notes, *supra,* note 5, at 198; Itel Containers Int'l Corp. v. Puerto Rico Marine Management, 108 F.R.D. 96, 101 (D.N.J. 1985).

[8] *See* Committee notes, *supra* note 5, at 198; *Day,* 595 F.Supp. at 1122.

[9] Rule 26(g) mirrors to a large degree the language of amended rule 11 requiring sanctions to be imposed for discovery requests that are unwarranted by existing law or interposed for improper purposes such as increasing the cost of litigation. *See* Committee notes, *supra* note 5, at 198; *Eastway Constr.* 762 F.2d at 253; *see also* Order of April 28, 1983 announcing changes in Fed. R. Cr. P. 6(b), 7(b), 16, 26, 52, 53, 67 as well as Rule 11. The changes announced in the federal rules in 1983 followed closely a reworking of the major discovery provisions in 1980. The amendments to rules 26, 28, 30, 33, 34, 37 and 45 in 1980 were an attempt to limit the use of discovery as a dilatory and costly practice. Furthermore, the comments of at least three Supreme Court justices disclose the Court's total dissatisfaction with the inability of the federal rules to limit abuses in trial practice. *See* Order of April 29, 1980 (Powell, J. dissenting).

[10] *See* Committee notes, *supra* note 5, at 198; Westmoreland v. CBS, Inc., 770 F.2d 1168, 1174 (D.C. Cir. 1985). It would appear that the new rule is having some effect on the judiciary. A recent survey of cases reported from August 1983 through January 1985 found 132 cases discussing the applicability of awarding sanctions under amended Rule 11. *See* Chrein, *The Actual Operation of Amended Rule 11,* 54 FORDHAM L. REV. 13, 16 (1985). *See generally* Zaldivar v. City of Los Angeles, 780 F.2d 823 (9th Cir. 1986).

of Rule 11 has raised a number of unanswered issues regarding the rule's use,[11] and one unresolved issue central to the effective implementation of amended Rule 11 is under what circumstances and by what standard of conduct should sanctions be assessed under the rule?

This article will argue that the standard for imposing sanctions under Rule 11 should focus on the nature of the conduct alleged to violate the rule. Sanctions under the rule can be triggered by different types of conduct. Certain types of conduct should be scrutinized more closely, requiring the imposition of sanctions more frequently. Factors such as whether a party subject to Rule 11 sanctions is acting *pro se* or through counsel should also impact on a decision to assess sanctions under Rule 11. Each type of conduct should be evaluated under an independent set of standards. Part I will discuss the 1983 amendments to Rule 11 and how they have changed the rule. Part II divides the Rule into

[11] Are the sanctions imposed compensatory or punitive in nature? *See,* Invst. Financial Group v. Chem-Nuclear Systems, 815 F.2d 391, 404 (6th Cir. 1987) (sanctions purpose is deterrence, punishment, and compensation for injured party) Snyder v. IRS, 596 F.Supp. 240, 252 (N.D. Ind. 1984) (Rule 11 is designed to punish violators for exposing other parties to needless expense and to discourage baseless suits); *see also* Filippini v. Austin, 106 F.R.D. 425, 433 (C.D. Cal. 1985) (sanctions serve a deterent function and are less appropriate when the attorney appears apologetic after violating Rule 11). *But see* In re Itel Sec. Litig., 596 F.Supp. 226, 234 (N.D. Cal. 1984), *cert. denied,* Bader v. Itel Corp., 107 S.Ct. 880 (1987). (Rule 11 does not contemplate an award of punitive sanctions). When should non-monetary sanctions be imposed? While a vast majority of the reported Rule 11 sanctions have been monetary awards, a few cases have sanctioned attorney violators with written reprimands in the courts' published opinions. The clear intention of these courts is to hold the violator out to ridicule for his conduct. *See* Stevens v. Lawyers Mutual Liability Ins. Co., 107 F.R.D. 112, 116 (E.D. N.C. 1985); Allen v. Faragasso, 585 F. Supp. 1114 (N.D. Cal. 1984); *see also* Filippini v. Austin, 106 F.R.D. at 433 (use of reprimand is a lighter sanction against an attorney who violates Rule 11 but is apologetic afterwards).

How should monetary sanctions be calculated? At least three different methods for evaluating the size of a sanction have been used. Courts have issued sanctions based on the judge choosing what he determines is an appropriate penalty for the party to pay. Cameron v. IRS, 593 F.Supp. 1540, 1558 (N.D. Ind. 1984), *affirmed* 773 F.2d 126 (7th Cir. 1985) (The court assessed $500 in "reasonable attorney fees"). Other courts have analyzed a number of factors in an effort to determine the full costs that the dilatory conduct imposed upon the movant. *Zaldivar,* 590 F. Supp. at 857-58 (the court described the relevant factors that the Ninth Circuit traditionally looks at in determining a fee award. Included amongst the factors the court will look to in determining the proper sanction were the time spent defending the frivolous pleading, difficulty of the research, time to conduct research, prevailing fees in the community, expertise of counsel, novelty of issues involved). Still other courts have based the sanction on the actual expenses incurred by the movant against the conduct that prompted the Rule 11 motion. *In re Perez,* 43 B.R. 530, 534 (Bankr. S.D. Tex. 1984) (the court awarded $5,290.00 for expenses incurred by the prevailing party in defending a frivolous suit).

A number of issues concerning the implementation of Rule 11 have yet to be decided by any court. For example, under what circumstances should the client be sanctioned instead of the lawyer? How should the expansion of the scope of Rule 11 to cover "other papers" interact with Rule 26(g)'s regulation of discovery sanctions. *See supra* note 9; *Zaldivar,* 590 F.Supp. 852 (use of Rule 11 is inappropriate when other rules such as 26(g) or 56(g) cover improper conduct). Perhaps the most important question regarding the new Rule 11 is whether it can be used as a pre-trial dismissal tool. Under the Federal Rules as currently written, once a plaintiff has stated a valid claim, he is entitled to proceed with discovery. After discovery has concluded, the defendant can move for summary judgment. If the plaintiff has shown that no facts which could establish liability are disputable, then summary judgment will be granted. However, the defendant must expend considerable time and money compling with discovery requests while the plaintiff is searching for evidence. Can the defendant use Rule 11 to require a plaintiff to present some evidence before discovery that shows why it is reasonable to expect that discovery will be useful? The purposes of such a motion would be to eliminate "fishing expeditions," claims which have no factual basis but were filed in the hopes that discovery would turn up some evidence to support the allegations in the complaint. Absent some pre-discovery factual basis for making the allegations in the complaint, the court could dismiss the case, saving it and the parties the cost of waiting for discovery to be completed. To date, no court has ruled on the validity of such a use for Rule 11.

five categories with each category representing a form of conduct that can trigger sanctions under Rule 11. Part III develops the standards upon which Rule 11 motions should be evaluated in each category.

THE 1983 AMENDMENTS TO RULE 11

The Pre-1983 Rule

The 1983 amendments to Rule 11 significantly changed the representations that a signator certifies by signing the pleading or motion or other paper. Under the original version of Rule 11, no sanctions were imposed if a signator read the pleading, found that to the best of his knowledge, information and belief, there was good ground to support the pleading, and did not introduce the pleading for delay.[12] Sanctions could be imposed, however, against an attorney who signed a pleading with an "intent to defeat the purpose" of the rule.[13] The rule divided possible sanctions into two categories. A pleading could be stricken as sham and false, whereby the action proceeded as though the pleading had never been filed.[14] Otherwise, willful violations of Rule 11 could subject an attorney to "appropriate disciplinary action."[15] The rule further provided for sanctions if scandalous or indecent matter was interjected into the pleading.

In practice, Rule 11 had little or no impact on the conduct of litigation in federal courts.[16] From 1938 to 1976, courts imposed sanctions in only 11 reported cases.[17] Courts were particularly reluctant to strike pleadings. Striking pleadings was considered a severe sanction, one that punished a client for the conduct of his counsel.[18] Courts would not use the power to strike down pleadings unless the pleading contained contradictions of matters in the public

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[12] *See supra* note 3. Pre-amended Rule 11 states: "The signature of an attorney constitutes a certification by him that he has read the pleading; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay."

[13] Neither the rule nor the subsequent cases, however, explained what constituted an intent to defeat the purposes of the rule. *See* 5 C. WRIGHT AND A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1334 (1982) [hereinafter cited as Wright & Miller].

[14] *Supra* note 3. Pre-amended Rule 11 states: "If a pleading is not signed 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."

[15] *See id.* Pre-amended Rule 11 provides: "For a willful [sic] violation of this rule an attorney may be subjected to appropriate disciplinary action." What was appropriate disciplinary conduct was not defined in the rule. Examples of the types of sanctions assessed on the rare occasions when sanctions were awarded included monetary costs, contempt citations or proceedings for disbarment. 5 Wright & Miller, *supra* note 13.

[16] *See* Committee Notes, *supra* note 5, at 198.

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

[18] *See* Textor v. Board of Regents, 87 F.R.D. 751, 754 (N.D. Ill. 1980) (Court reluctant to impose sanctions); Carter, *The History and Purposes of Rule 11*, 54 FORDHAM L. REV. 4, 8 (1985); *see also* Bates v. Clark, 95 U.S. 204, 205-06 (1877) (Pre-federal rules court admonished practice of striking pleadings as unscientific and unprofessional).

record,[19] or were sham and false beyond peradventure.[20] Due to the harshness of the sanction and the almost insurmountable burdens to justify its use, only a few recorded cases struck pleadings as a Rule 11 sanction.[21]

Furthermore, the courts did not assess sanctions under their power to impose "appropriate" disciplinary action because the courts interpreted Rule 11 to require a finding that the attorney acted in subjective bad faith before sanctions could be imposed.[22] Therefore, proof that the attorney acted in good faith no matter how unreasonable his conduct actually was, would be sufficient to satisfy the rule's requirements.[23] Thus in deciding whether or not to impose sanctions, Rule 11 required that the trial judge evaluate the attorney's intent. Even if the trial court found the attorney acted with subjective bad faith the rule did not command the imposition of sanctions, but rather, provided that sanctions *may* be imposed.[24] As a result, the trial judge was left with an almost unfettered discretion, and decisions denying the imposition of sanctions were rarely overturned.[25]

Even if a court found that an attorney acted in bad faith, the rule lacked an express authorization for the imposition of monetary sanctions.[26] In one case, the Seventh Circuit refused to impose monetary sanctions even after finding that the attorney had acted with bad intent.[27]

The rule, in its pre-amendment form, was at best a reminder to the attorney to minimize tendencies toward untruthfulness in advocating a client's

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[19] *See generally,* Bertucelli v. Carreras, 467 F.2d 214, 215 (9th Cir. 1972), Roosevelt Field Inc. v. Town of North Hempstead, 84 F. Supp. 456, 484 (E.D. N.Y. 1949).

[20] Child v. Beame, 412 F.Supp. 593, 600 (S.D. N.Y. 1976), Murchison v. Kirby, 27 F.R.D. 14, 19 (S.D. N.Y. 1961).

[21] Ellingson v. Burlington Northern, Inc., 653 F.2d 1327 (9th Cir. 1981); Freeman v. Kirby, 27 F.R.D. 395, 399 (S.D. N.Y. 1961); *see also* Carter, supra note 18, at 8.

[22] *See* Nemeroff v. Abelson, 620 F.2d 339, 350 (2nd Cir. 1980). (The court stated that "Rule 11 speaks in plainly subjective terms. . . . The standard under Rule 11, therefore, is bad faith."). *See also* Badillo v. Central Steel & Wire Co., 717 F.2d 1160, 1167 (7th Cir. 1983) (the proper test for determining whether to award attorney's fees under Rule 11 is subjective bad faith).

[23] The test for compliance with old Rule 11 boiled down to whether the attorney believed there was good grounds to support his pleading. Courts bent over backwards to find the requisite good faith in order to avoid imposing sanctions. *In re* Ramada Inns Secs. Litig., 550 F.Supp. 1127, 1133-35 (D. Del. 1982) (good faith was found when an attorney filed a claim based entirely upon the reporting in the Wall Street Journal). So long as the attorney could fashion some argument for his action, whether he had any support for his belief or not, then sanctions were deemed inappropriate. *See Nemeroff,* 620 F.2d at 350 (unless attorney knows his claim is frivolous beyond a doubt, sanctions are not merited).

[24] *See supra* note 3. Pre-amended Rule 11 provides: "For a willful [sic] violation of this rule an attorney *may be* subjected to appropriate disciplinary action" (emphasis added).

[25] *See* Gieringer v. Silverman, 731 F.2d 1272, 1281 (7th Cir. 1984) (*citing to Badillo* 717 F.2d at 1163 (7th Cir. 1983) (where the court analyzing a case decided under the pre-amended rule stated, "the denial of attorneys' fees is a matter of sound discretion of the trial judge." Appellate review of a decision not to impose sanctions is very limited).

[26] *See supra* note 3. The old Rule 11 provided only that "appropriate sanctions" were to be awarded, but did not define what those sanctions should be. *See also supra* note 15.

[27] *See Badillo,* 717 F.2d at 1166 (decided under the pre-amended rule, the court stated that, "nowhere [does Rule 11] explicitly provide [ ] for an award of attorneys' fees.").

claim.[28] At its worst, the rule was a useless paper tiger. As numerous courts have accurately surmised, a rule applying sanctions only upon a finding of subjective bad faith would logically go unused because there was no position, no matter how absurd, that an advocate could not convince himself had merit if it advanced a client's interest.[29]

The 1983 Amendments

The goal of the 1983 amendment was to remove the reluctance on the part of federal judges to impose sanctions when the rule was vioalted.[30] Attempting to increase the issuance of sanctions under Rule 11, the 1983 amendments changed every facet of the rule. Originally, Rule 11 applied only to pleadings. The scope of the rule was enlarged to include "pleadings, motions and other papers."[31] The rule expanded the express duty to verify pleadings from *solely* attorneys to *all* parties.[32] Thus, the amended rule requires *pro se* litigants to comply with its provisions and subjects *pro se* parties to sanctions for any violation.[33]

The majority of the 1983 amendments changed the averments to which a signator certifies when signing the pleading, motion or paper. While the old rule simply required the signator to certify that there were sufficient grounds to support the filing, the new rule requires the signator to conduct a *reasonable inquiry* into the filing.[34] Furthermore, the signator must conduct his reasonable inquiry so that he can certify that the pleading is well-grounded in fact, warranted by existing law, and not filed for any improper purpose.[35] The new Rule

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[28] *See* 5 Wright & Miller, *supra* note 13, § 1333 at 500.

[29] Lyle v. Charlie Brown Flying Club, Inc., 112 F.R.D. 392, 398 (N.D. Ga. 1986); Rodgers v. Lincoln Touring Serv., Inc., 596 F.Supp. 13, 27 (N.D. Ill. 1984), *aff'd* 771 F.2d 194 (7th Cir. 1985); Wells v. Oppenheimer & Co., 101 F.R.D. 358, 359 (S.D. N.Y. 1984), *vacated* on other grounds 106 F.R.D. 258 (1985). "We know from our own experience that there is no position — no matter how absurd — of which an advocate cannot convince himself." *See also* Robinson v. National Cash Register Co., 808 F.2d 1119, 1126-27 (5th Cir. 1987) (in essence an honest but incompetent attorney would be immune from Rule 11 sanctions).

[30] *See supra* note 10 and accompanying text; *Zaldivar,* 780 F.2d 823 (Rule 11 was amended to curb increased use of inappropriate litigation tactics by forcing courts to impose sanctions for a wider variety of conduct).

[31] The original version of Rule 11 merely stated, "Every pleading of a party . . .", *supra* note 3. However, by implication Rule 7 had required motions to also comply with Rule 11. Rule 7(b)(2) provides in pertinent part that: "The rules applicable to captions and other matters of form of pleadings apply to all motions and other papers provided for by these rules." The new Rule 11 makes its provision expressly applicable to motions. "Every pleading, motion, and other paper of a party . . ." *Supra* note 2. *See also* Committee notes, *supra* note 5, at 198.

[32] Rule 11 now states that, "The signature of an attorney or party constitutes a certificate . . . ." *Supra* note 2.

[33] Committee notes, *supra* note 5, at 199; Nixon v. Phillipoff; 615 F.Supp. 890, 896 (N.D. Ind. 1985), *affirmed,* 787 F.2d 596 (N.D. Ind. 1986); Cameron v. I.R.S., 593 F.Supp. 1540, 1557 (N.D. Ind. 1984), *affirmed* 773 F.2d 126 (7th Cir. 1985); *see also* Schwarzer, *supra* note 4, at 184.

[34] *See supra* notes 3, 12 and accompanying text. Amended Rule 11 states "the signature of an attorney or party constitutes a certificate by the signer . . . that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry . . . ." *Supra* note 2.

[35] *See supra,* note 2, Amended Rule 11 provides: "The signature of an attorney . . . constitutes a certificate by the signer . . . that to the best of the signer's information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by 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. The pre-amended version of Rule 11 makes no specific requirement to research the facts of the law

11 shifts the burden from the movant to show that a violation was "willful" to the signator who must show he has conducted a "reasonable inquiry." [36] The Advisory Committee Notes clearly state that the amended rule places an affirmative duty upon the signator to conduct a pre-filing inquiry into the facts and the law or else he will be found to have violated the rule.[37] The amended rule was intended to trigger the imposition of sanctions in a greater number of circumstances than the original good-faith formula of the old rule.[38] The rule no longer requires that a court find that a party committed a willful violation of the rule before sanctions may be imposed. The new language mandates that a court shall impose sanctions when the rule is violated, willful or not, effectively removing the unreviewable discretion given a trial judge under the pre-amended rule.[39] Furthermore, the rule expressly allows for the imposition of monetary sanctions in the form of reasonable expenses incurred, including attorneys fees.[40]

The new Rule 11 allows a party to avoid the imposition of sanctions for filing a seemingly frivolous legal claim if the pleading argues in good faith for the extension, modification or reversal of existing law. The inclusion of this language gives the rule a curious unbalanced nature: on the one hand, the new rule changes the certification away from good faith to an objective reasonableness standard; but on the other, compliance with the rule may still rest upon good faith in those circumstances when a party argues for legal change. The courts' interpretation of its meaning could very well determine the scope of the new rule's power in controlling pleadings abuse.[41]

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and lists only delay as a particular purpose that might violate the rule. *See supra* notes 3, 12 and accompanying text.

[36] Committee notes, *supra* note 5, at 198. Pre-amended Rule 11 states that "[f]or a willful violation of this rule an attorney may be subjected . . ." *Supra* note 3, however, amended Rule 11 states that, "If a pleading . . . is signed in violation [without the reasonable inquiry] . . . the court, upon motion . . . shall impose . . . an appropriate sanction." *Supra* note 2.

[37] Committee notes, *supra* note 5, at 198. "The new language stresses the need for some prefiling inquiry into both the facts and the law to satisfy the affirmative duty imposed by the rule."

[38] *Id. See also Zaldivar,* 780 F.2d 823 (The amended rule is more stringent than the original good-faith formula and thus, it is expected that a greater range of circumstances will trigger its violation); Eavenson v. Holtzman, 775 F.2d 535, 540 (3rd Cir. 1985) (amended Rule 11 was intended to increase the circumstances under which sanctions would be imposed).

[39] *See supra* note 2. Amended Rule 11 states, "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 . . . an appropriate sanction." The advisory committee and the courts have recognized the new mandatory nature of the duty to impose sanctions. See Committee notes, *supra* note 5, at 198. *See generally* Golden Eagle Distributors Grp. v. Burroughs Corp., 801 F.2d 1531, 1536 (9th Cir. 1986) (breach of Rule 11 "warranty" gives rise to mandatory sanctions); *Westmoreland,* 770 F.2d at 1174; *Eastway Constr.*, 762 F.2d at 254 n.7; *Hearld v. Barnes and Spectrum Emergency Care,* 107 F.R.D. 17, 20 (E.D. Tex. 1985); and Pudlo v. I.R.S., 587 F.Supp. 1010, 1011 (N.D. Ill. 1984).

[40] *See supra* note 2. Amended Rule 11 provides, "[t]he court, . . . shall impose . . . 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." *See also* Cannon v. Loyola University of Chicago, 784 F.2d 777 (7th Cir. 1986), *cert. denied,* 107 S. Ct. 880 (1987).

[41] *See supra* note 3. Allowing a signator to avoid sanctions whenever he thought he was making an argument to extend or change the law could destroy the new rule's premise — that a signator must conduct an objective reasonable inquiry into the existing law. *See infra* notes 170-178 and accompanying text for a more detailed discussion of this language and how it can be read consistent with the rest of the rule.

Confronted with Rule 11 motions, courts have determined that the rule requires them to evaluate compliance objectively to determine whether the signator acted reasonably under the circumstances. Under the old rule an attorney's good faith belief that his actions were sufficient to comply with Rule 11 was sufficient to comply with the rule.[42] The new rule, according to the courts, cannot be satisfied unless the actions taken by the attorney viewed at the time taken were reasonable. The standard of analysis used by the court no longer requires a review of subjective intent, but focuses on whether objectively the attorney conducted himself in a manner sufficient to comply with the rule.[43]

Changing the standard for imposition of sanctions from the subjective intent of the signator to whether an objective reasonable inquiry was conducted is a radical shift in focus. Clearly, the new rule reflects a desire that sanctions be assessed more frequently.[44] However, the new Rule 11 is not a license for the judiciary to engage in post hoc evaluations of whether a claim should have been brought. The court is only empowered to examine whether the attorney acted reasonably based on information available at the time of his action.[45] The rule neither requires that any action be successful in its purpose, nor that the judge agree such actions were prudent; rather, the rule simply requires that the courts test the conduct to see if it meets some minimum standard of reasonable behavior.[46]

CATEGORIES BY WHICH RULE 11 MOTIONS SHOULD BE EVALUATED

Lack Of Reasonable Inquiry Into The Facts

Each time a party loses a case upon a Rule 12(b) motion,[47] summary judgment, directed verdict or a judgment on the merits, the result, in one sense,

[42] *See supra* notes 22 and 23 and accompanying text.

[43] *See Invst. Financial Group*, 815 F.2d at 401; *Eastway Constr.*, 762 F.2d at 253-54; Rodgers v. Lincoln Towing Serv., Inc., 771 F.2d 194, 205 (7th Cir. 1985); *Cameron*, 593 F.Supp. at 1557; *Fernandez v. Southside Hospital*, 593 F.Supp. 840, 845 (E.D. N.Y. 1984); SFM.Corp. v. Sundstrand Corp., 102 F.R.D. 555, 556 (N.D. Ill. 1984). Typical of the courts interpretation of the duty created by the new rule is this passage from *Robinson*, 808 F.2d at 1127: [W]e have held, consistent with the view of most other circuits, that the revised Rule 11 imposes an objective, rather than subjective, standard of reasonableness . . . An attorney's good faith is no longer enough to protect him from Rule 11 sanctions.

[44] *See supra* note 38.

[45] The Advisory Committee notes make it clear that the judiciary must avoid post hoc determinations of the attorney's conduct:

> The rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories. The court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted.

Committee notes, *supra* note 5, at 199.

Moreover, the courts have recognized that overzealous use of Rule 11 sanctions is to be avoided to protect the integrity of the judicial system. *Golden Eagle Distributing Corp.*, 801 F.2d at 1540-41; *Robinson*, 808 F.2d at 1139 (sanctions should not be given lightly given impact on attorney's and parties reputations).

[46] *Id.*

[47] Fed. R. Civ. P. 12(b) lists seven motions that a party can make to dismiss an action. Rule 12(b) motions cover dismissal for lack of personal or subject matter jurisdiction, improper venue, insufficient service or process, failure to state a claim and failure to join proper parties as defined by Fed. R. Civ. P. 19.

means that the party failed to show the proper facts to justify his claim. It could be argued that each time a claim is presented in which the facts ultimately do not support the legal argument made, that such action was not well-grounded in fact. To carry the point to extremes then, Rule 11 could be violated by the losing party to every case or motion. Imposing monetary sanctions based on an adverse decision in court implicitly repeals the American rule requiring each party to pay the cost of his own claim.[48] There is little or no support for such a broad reading of Rule 11.[49] The rule does not require the imposition of sanctions based solely on the existence of an adverse decision.[50] The Rule is intended to change the conduct of a lawyer in the pre-filing stage. Rule 11 requires a lawyer to conduct research into his case before filing. The rule contemplates not that the attorney be successful, but that he take reasonable steps to insure that he presents a colorable factual claim.[51] Therefore, Rule 11 is an attempt to regulate attorney conduct, sanctioning those parties who fail to act reasonably. Success or failure is one measure of the reasonableness of the conduct taken, but is not the only measure. Certainly, conduct to be unreasonable must be unsuccessful, but all unsuccessful actions are not unreasonable.[52]

Failure to conduct a reasonable inquiry into the facts of a pleading covers a broad area of attorney conduct. One common infirmity that serves as an example of a failure to properly research the facts is a failure to identify the requisite jurisdictional requirements to state a claim in federal court. In *Weisman v. Rivlin,*[53] the plaintiff brought suit in federal court based on diversity of citizenship.[54] The plaintiff's complaint, however, showed that he and one of the defendants were both citizens of the same state. Such a fact destroys the necessary requirement of federal diversity jurisdiction — the existence of complete diversity

[48] *See* Alyeska Pipeline Serv. Co. v. Wilderness Society, 421 U.S. 240, 247 (1975) ("In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser."); Fleischman Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717-18 (1967) (American rule is that attorney's fees ordinarily are not among costs available to prevailing party). In adopting Rule 11, Congress could have changed the American rule and accepted the notion that a prevailing party could recover the costs of litigation; however the intent of the Rule as currently drafted does not reasonably lead to the conclusion that Congress intended to do so. Schwarzer, *supra* note 4, at 205-206. English courts have for centuries allowed the award of costs to prevailing party. However Congress has consistently expressed a policy towards adherence to the American rule except in narrow statutory exceptions. Nor is Rule 11 the only weapon a court has in sanctioning parties who have abused the right to seek redress of grievancies in the court. 28 U.S.C. § 1927 (1982) is an example of a congressionally enacted means to curb unnecessary litigation. 28 U.S.C. § 1927 (1982) provides that "any attorney or other person admitted to conduct cases in any court . . . who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs."

[49] *See Zaldivar,* 780 F.2d 823 (The granting of a motion to dismiss for failure to state a claim, or granting of summary judgment against the pleader is not dispositive of the issue of sanctions).

[50] *See In re* TCI Limited, 769 F.2d 441, 445 (7th Cir. 1985) (Rule 11 does not change the established American Rule; costs are only assessed for objective violations of proper conduct that causes substantial and unnecessary costs on the other side).

[51] *Id.* at 447. An attorney may not file a claim without conducting research and expect his opponent to be amused at accepting the time and cost to research the case for him.

[52] *See Zaldivar,* 780 F.2d 823.

[53] 598 F.Supp. 724 (D.D.C. 1984).

[54] *Id.* at 725.

of citizenship between each plaintiff and each defendant.[55] The plaintiff's counsel did not become aware of this fact until after the complaint was filed.[56] The court imposed sanctions, reasoning that despite the attorney's good faith belief in the accuracy of the diversity assertions, the plaintiff and his counsel should have researched the diversity issue more carefully.[57]

Failure to adequately allege the requisite factual predicate to state a claim under a particular cause of action is another common setting for Rule 11 violations. The filing of a suit after the statute of limitations has run is an example of the attorney failing to adequately allege a fact that must exist in order to state a valid claim under a particular cause of action. In *Van Berkel v. Fox Farm and Road Machinery,*[58] the plaintiff filed a products liability suit in 1983, even though the accident underlying the suit occurred seven years earlier.[59] Minnesota, the state whose law governed the suit, had a six-year statute of limitations for personal injury actions. The suit was clearly time-barred. The court imposed sanctions upon the plaintiff's attorney for his failure to investigate the true facts of his complaint.[60]

The courts have shown a willingness to impose sanctions against attorneys or clients when facts that show an action is frivolous or inaccurate are clearly in the possession of the sanctioned party. Sanctions have been assessed against a client, but not his attorney, when the lawyer relied on allegations solely in the possession of the client and the client was later shown to have fabricated

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[55] *See* Strawbridge v. Curtiss, 7 U.S. (3 Cranch.) 263 (1806) Eze v. Yellow Cab Co. of Alexandria Va., Inc., 782 F.2d 1064, 1065 (D.C. Cir. 1986) (under long-held precedent diversity must be complete as to all defendants); WRIGHT & MILLER, *supra* note 13, § 3605.

[56] 598 F.Supp. at 726. Plaintiff's action is a failure to research facts because he admitted he knew the law required complete diversity, but was unaware of the facts destroying diversity until after the complaint was filed. This is different than a party who knows there is not complete diversity, but files suit under the mistaken impression that the law does not require complete diversity. *See, e.g.*, Rowlands v. Fayed, 115 F.R.D. 605 (D.D.C. 1987) (suit by one foreign national against another foreign national violates rule that alien may not sue another alien in federal court).

[57] *Id. See also* Hasty v. Paccar, Inc., 583 F.Supp. 1577 (E.D. Mo. 1984). In *Hasty,* a plaintiff brought a tort suit in Missouri District Court and attempted to assert jurisdiction over an Arizona corporation under the Missouri Long-Arm statute. The Missouri court granted the Arizona corporation's motion to dismiss on lack of personal jurisdiction grounds, because the plaintiff failed to state any connection between the Arizona defendant and Missouri. *Id.* at 1580. Sanctions were not assessed. The court stated, however, that it would seriously consider the award of Rule 11 sanctions to the defendant corporation should they seek such sanctions in a subsequent motion. *Id.*

[58] 581 F.Supp. 1248 (D. Minn. 1984).

[59] *Id.* at 1249.

[60] *Id.* at 1251. The *Van Berkel* court also stated that sanctions would have been warranted because the plaintiff's attorney acted with an improper purpose, evidenced by his failure to dismiss the time barred suit even after it was conclusively shown to him that the statute of limitations had expired. Plaintiff's counsel was informed of the correct date of the accident by the defendant who suggested that the suit be voluntarily dismissed. Counsel refused to voluntarily dismiss the action, even though he never contested the conclusion that the suit was time barred. *Id.* The court rejected plaintiff's attorney's reason for not dismissing the suit — the need for the client's approval — as a dereliction of the attorney's duty to uphold the integrity of the legal system. *Id. But see* Baranski v. Serhant, 106 F.R.D. 247, 249 (N.D. Ill. 1985) (series of claims filed, some of which were time-barred. Court did not assess sanctions because the court found the filing of time-barred suits was a mistake. Counsel for the plaintiff dismissed the barred claims immediately upon discovering the mistake.)

his statements.[61] In *Taylor v. Belger Cartage Serv. Inc.*,[62] sanctions were assessed against the counsel of a union member who filed a suit for unfair union representation alleging negligence on the part of the union defendant. However, the statute creating this cause of action requires the existence of arbitrary bad faith actions, not just negligence.[63] *Ring v. R.J. Reynolds Indus.*,[64] is another example of sanctions assessed against an attoirney who filed a claim even though he had possession of a key fact that clearly showed the claim was frivolous. In *Ring*, a 39-year old plaintiff filed an unfair discrimination suit under an anti-age discrimination statute. However, the statute stated that one must be over 40 years of age to plead a cause based on the statute; therefore, sanctions were assessed.[65]

Pleadings not warranted by existing law

As a result of the difficulty in differentiating between what is a "fact" and what is "law," it is often hard to distinguish between a pleading that warrants sanctions because it fails to evince a reasonable inquiry into the facts and a pleading that merits sanctions for not being warranted by existing law. Generally, questions of fact relate to information that requires proof. A fact is that which is to be proved, while law is the standard of principles that dictate whether a set of facts has significance in the dispute between the parties.[66]

[61] Friedgood v. Axelrod, 593 F.Supp. 395 (S.D. N.Y. 1984) (court assessed sanctions against the client for lying to the attorney and bringing the suit. Court appointed attorney was not assessed sanctions because he conducted adequate research on the logical assumption that his client was not lying). *But see Van Berkel*, 581 F.Supp. at 1259 (attorney sanctioned because he relied on client's inaccurate description of accident date when accident occurred beyond statute of limitations.)

An important decision the court must make in accessing Rule 11 sanctions is whether the attorney or client is to be liable for the sanctions. *See supra* note 11. In the factual context a logical dichotomy can be drawn between personal facts and objective facts. When the attorney can by diligence and research uncover the true fact then he should be responsible. *See e.g., Van Berkel*, 581 F.Supp. at 1249; *Hasty*, 583 F.Supp. at 1580; *Silverman v. Center*, 603 F.Supp. 430, 432 (F.D. N.Y. 1985) (filing claim that was res judicata because of adverse state case on exactly same claims). However, when the client alone possesses the information which is inaccurate, then sanctioning the attorney is illogical. Rule 11 does not require that counsel distrust or refuse to believe his client. If a client tells his attorney that a fact is true, the attorney need be allowed to believe the truth of the fact. If the client has lied or been inaccurate, the court should not assess sanctions on the attorney so long as his action was based on the belief that his client's statement was reasonable. *See* Friedgood v. Axelrod, 593 F.Supp. 395.

[62] 102 F.R.D. 172 (W.D. Mo. 1984).

[63] *Id.* at 181. Under Labor Management Relations Act of 1947 § 301 the plaintiff would need to allege bad faith or discrimination to state a claim for breach of duty to represent. He stated only that negligent representation occurred. The court stated that the attorney had a duty to tell the client he had no claim rather than bring a claim he knew was frivolous. *Id.* at 181.

[64] 597 F.Supp. 1277 (N.D. Ill. 1984), *aff'd* 804 F.2d 143 (7th Cir. 1986).

[65] *Id.* at 1280-81. *See* McCabe v. General Foods Corp., 811 F.2d 1336, 1341 (4th Cir. 1987) (amended complaint alleged acts by defendants in 1982-83 that led to plaintiff's dismissal. However, in answer to interrogatories plaintiff admitted such acts occurred in 1976-81 and thus were irrelevant. Court asserted sanctions and appellate court affirmed because failure to research facts led to filing of frivolous amended complaint.) Duncan v. WJLA-TV, 106 F.R.D. 4, 5-6 (D.D.C. 1984) (Plaintiff stated that an expert it offered at trial was a graduate of Emerson College. The expert testified at voir dire that he was not a college graduate. The court assessed sanctions because the plaintiff's counsel failed to reveal or ascertain this pertinent fact that rendered the expert witness unqualified).

[66] *See* 35 C.J.S. *Fact* p. 491 (1960); *see generally* Hinckley v. Town of Barnstable, 311 Mass. 600, 603, 42 N.E.2d 581, 584 (1942).

The difference between fact and law can best be described through examples. In *Van Berkel,* the plaintiff's claim for negligence failed because it was filed after the statute of limitations had expired.[67] The date of the accident was a factual matter that had to be proven by the plaintiff. Having acquired the date of the accident, this fact only had significance when applied to law, specifically, the statute of limitations. When the fact was applied to the law, the plaintiff was bereft of a cause of action. With respect to Rule 11, *Van Berkel* involved a question of fact because the dispute centered upon was whether the plaintiff's counsel, knowing what the law required, was acting reasonably in filing the claim when the *facts* in his possession should have told him that he had no claim.

On the other hand, *Dore v. Schultz*[68] provides an example of a case where the dispute focused on a question of law. In *Dore,* a mother whose children had been taken out of the country by their father without her consent sued the Secretary of State for failure to enforce a statute requiring anyone leaving the country to have a passport. Plaintiff had no right to recover because legally the Secretary of State is immune from a suit to recover damages for acts taken within his governmental employment.[69] No matter what facts the plaintiff proved, she could not recover from the defendant because the law did not recognize her claim. Thus, Rule 11, with respect to *Dore,* involved a question of law because the dispute centered upon whether it was reasonable to file a claim when no set of facts could have allowed recovery; in other words, when the cause of action was not warranted by then existing law.

Despite the apparent difficulty in distinguishing between a claim violating Rule 11 because of a failure to conduct a reasonable inquiry into the facts and claims unwarranted by existing law, the courts have assessed sanctions quite frequently against parties for filing legally insufficient claims. In *Huettig & Schromm, Inc. v. Landscape Contractors Council,*[70] the plaintiff sought damages under the Labor Management Relations Act § 301[71] for a breach of a union's collective bargaining agreement. The court dismissed the suit for a lack of subject-matter jurisdiction. The plaintiff had breached the agreement himself, while the statute only provided a basis for a claim when the other party committed the breach.[72] Furthermore, the claim was barred by collateral estoppel, since the same issue had been raised and dealt with in a prior suit before the

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[67] 581 F.Supp. 1248 (D. Minn. 1984); *supra* notes 58-60.

[68] 582 F.Supp. 154 (S.D. N.Y. 1984).

[69] *Id.* at 158.

[70] 582 F.Supp. 1519 (N.D. Cal. 1984), *aff'd* 790 F.2d 1421 (9th Cir. 1986).

[71] 29 U.S.C. § 185(a) (1982) which says in part: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States . . . ."

[72] 582 F.Supp. at 1521.

National Labor Relations Board.[73] The court found that the plaintiffs' attorneys had violated Rule 11 since then existing law did not permit the filing of a § 301 claim when the underlying breach was the plaintiff's.[74]

Motion practice provides a number of examples of conduct not supported by existing law. The making of a motion requires that the attorney establish a legal basis for his action. Sanctions are appropriate when a motion is made where no legal basis for it exists. For example, in *SFM Corp. v. Sundstrand Corp.*,[75] the defendant moved for summary judgment. The court denied the motion for two principal reasons.[76] The defendant admitted that the issues of material fact were still in dispute.[77] Furthermore, the defendant stated his legal basis for his motion was Rule 56(d), when in reality there is no such thing as a Rule 56(d) motion.[78]

Similarly, the attorney in *Wolst v. American Airlines, Inc.* [79] was sanctioned because he filed a removal petition that could not legally be granted. Plaintiff sued in state court for breach of an airline ticket refund contract. The defen-

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[73] *Id. See* Paramount Transport Sys. v. Local 150, Int'l Bhd. of Teamsters, 436 F.2d 1064 (9th Cir. 1971) (proceedings before administrative boards that comply with due process standards of courts should be given collateral estoppel effect). *See also* United States v. Utah Const. & Mining Co., 384 U.S. 394 (1966) and United States v. Carlo Bianchi & Co., 373 U.S. 709 (1963).

[74] 582 F.Supp. at 1522. On closer analysis of the court's opinion in *Huettig & Schromm* the imposition of sanctions appears questionable. The court did not account for the Rule 11 defense that arguments advocating extension in the law should not draw sanctions. In *Huettig v. Schromm,* the plaintiff and his counsel apparently understood that technically they had breached the collective bargaining agreement. However, the plaintiff claimed his breach was induced by actions of the employer. *Id.* at 1520-22. The inducement of the breach was viewed as the conduct that violated § 301 under the plaintiff's approach to the case. In this manner, the plaintiff attempted to argue for an extension of the law as it relates to acts constituting breach of a collective bargaining agreement by management. It further appears that the plaintiff was entirely candid about his reliance on this argument to extend the law and that such an extension was reasonable. When a party argues openly for a change in the law and such an argument is reasonable, the imposition of Rule 11 sanctions is unwarranted. *See infra* notes 170-178 and accompanying text.

The Ninth Circuit in affirming the award of Rule 11 sanctions found that the plaintiff could not have expected the court to consider an extension of labor law when the NLRB had already ruled on the issue. "[A]s experienced labor lawyers, counsel must have known that they could not relitigate the issue of whether [plaintiff] was governed by the collective bargaining agreement." Assessing Rule 11 sanctions against plaintiffs for denying the impact of res judicata is proper, but the court should not undertake to limit reasonable creative advocacy.

[75] 102 F.R.D. 555 (N.D. Ill. 1984).

[76] *Id.*

[77] The standard for the granting of a summary judgment motion is that the party making the motion show that no issues of material fact remain to be decided. *See* Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464 (1962); Fitzsimmons v. Best, 528 F.2d 692 (7th Cir. 1976); Illinois Bell Telephone Co. v. The Reuben H. Donnelley Corp., 595 F.Supp. 1192 (N.D. Ill. 1984). Thus the defendant's admission of material issues of fact makes his motion almost per se unwarranted by existing law.

[78] *Id.* Rule 56(d) deals with situations where a court wishes to grant partial summary judgment and yet recognizes that other areas of factual controversy remain. The rule provided that "at the hearing of the [56(a)] motion; by examining the pleadings and the evidence before it the court . . ., shall if practicable ascertain what material facts exist without controversy and what material facts are actually and in good faith controverted." The SFM court points out overwhelming authority for the proposition that Rule 56(d) is to be used by the court alone and can not be the basis for a motion by a party to the litigation. *See* Yale Transport Corp. v. Yellow Truck & Coach Mfg. Co., 3 F.R.D. 440, 441 (S.D.N.Y. 1944); Oberweis Dairy, Inc. v. Associated Milk Producers, Inc., 553 F.Supp. 962, 970-71 (N.D. Ill. 1982).

[79] 608 F.Supp. 417 (N.D. Ill. 1987).

dant moved to remove the action on federal question grounds arguing that airline carriers cannot be sued in state court.[80] The court dismissed this claim stating that "it remains hornbook law that 'the party who brings a suit is master to decide what law he will rely on'."[81] Moreover, the court dismissed defendants' preemption argument by finding that "since 1887 it has been settled law that a defense of preemption is not a predicate for removal."[82] Accordingly, the court ordered sanctions against the defendant.[83]

Often a party must show that he possesses a particular legal characteristic in order to claim recovery under a cause of action. For example, in antitrust law to prove damages the plaintiff is required to pass a specific legal test.[84] A failure to meet this test will render the claim invalid. When a party who fails to allege facts that could allow him to meet his burden of presenting the court with a claim that can legally meet the elements of a cause of action may be subject to sanctions.[85]

Pleadings Interposed For Improper Purposes

Unlike the well-grounded in fact or warranted by existing law requirements, the requirement that a paper not be filed for an improper purpose focuses on the motive behind the pleading. A pleading filed for some reason other than to achieve success on the merits is subject to Rule 11 scrutiny. However, the existence of a motive to achieve some goal other than success on the merits is not sufficient to warrant Rule 11 sanctions. The pleading must cause a needless delay or add unnecessary costs to the litigation. Thus, a pleading is subject

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[80] *Id.* at 1118-19.

[81] *Id.* at 1119, *quoting* Franchise Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 22 (1983).

[82] *Id.* at 1119-20.

[83] *Id.* at 1121. *Id. See also,* Hewitt v. City of Stanton, 798 F.2d 1230 (9th Cir. 1986) (Defendant sought removal of civil rights action. Legal precedent made removal impossible; court assessed sanctions for both frivolous petition and for bringing appeal to challenge valid order.) *Westmoreland,* 770 F.2d at 1175 (defendant was sanctioned for making contempt motion against a non-party witness who refused to allow his deposition to be videotaped. The defendant had no right to videotape the deposition because he had failed to follow the procedures found in Rule 37 to request a videotaped deposition. Thus the non-party witness was entitled to refuse to be deposed on tape.) When a statute precludes review of an agency action, a court is legally without power to act. Requesting that the court nonetheless review such a decision may require the imposition of Rule 11 sanctions. *See* Johnson v. Veterans Administration, 107 F.R.D. 626 (N.D. Miss. 1985). (Sanctions imposed on the plaintiff's attorney; statute and courts clearly state that judiciary shall have no jurisdiction to review factual decisions made by Veterans Administration).

[84] Antitrust injury is a legal concept that requires a plaintiff to show more than injury in fact. The plaintiff must show the conduct violates the antitrust laws and that specific conduct caused the plaintiff's injury. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977). Thus showing that a violation of the Sherman Act existed and that the plaintiff lost profits is insufficient to show a legal injury. A nexus between the loss and the conduct is also a requisite proof of antitrust injury.

[85] *See* Eastway Construction Corp. v. City of New York, 762 F.2d 243, 254 (2nd Cir. 1985). (Antitrust action was legally insufficient because plaintiff had not suffered legally defined antitrust injury), Heimbaugh v. City and County of San Francisco, 591 F.Supp. 1573, 1576-77 (N.D. Cal. 1984). (Plaintiff assessed sanctions when he alleged a cause of action under 42 U.S.C. § 1983. 1983 action must include some constitutional deprivation. Plaintiff, however, alleged his claim was based on the commission of a tort.) *See also* Dore v. Schultz, 582 F.Supp. 154 (S.D. N.Y. 1984). (Suit improperly sought damages from government officer covered by official immunity).

to Rule 11 sanctions as being interposed for an improper purpose when it serves some purpose other than achieving success on the merits and the results of the pleading is to harass, delay or add cost to the litigation. Finding that a pleading was filed for an improper purpose does not require that the court evaluate the subjective intent of the party.[86] The rule is violated if the court finds that a pleading did cause delay or harassment and objectively that such a result was unnecessary.[87]

In some instances, conduct that evinces a failure to conduct a reasonable inquiry into the facts or the filing of a claim unwarranted by existing law may also show that the pleading was interposed for an improper purpose.[88] However, the court need not find that the pleading was frivolous before assessing sanctions.[89] Once the court finds that a filing has the result of needlessly prolonging the case or causing the opponent to spend resources and the filing served no valid purpose other than achieving success on the merits, sanctions would be appropriate. Put another way, where a party gains some tactical advantage from merely filing a motion and not from the merits of the filing and the court or adversary party suffers as a result, such party is subject to Rule 11 sanctions.

Bankruptcy actions are one type of action that are prone to making of motions for an improper purpose. A party facing foreclosure or heavy losses will often grab at any motion to delay the final judgment.[90]

Another type of improper purpose was disclosed in *AM International, Inc. v. Eastman Kodak Co.*,[91] where the court found a motion requesting the court to review plaintiff's actions for ethical violations was interposed for an improper

[86] The original version of Rule 11 allowed sanctions to be assessed only when the intent of the pleading was to cause delay or needlessly increase litigation costs. Thus, the old rule would not sanction actions that had the effect of causing delay and were shown to have no legitimate purpose unless it could be shown that the attorney knew and intended his actions to so result. *See supra* notes 3, 12, 23 and accompanying text.

[87] Judge Schwarzer would find that an improper purpose inference can be drawn when a pleading causes needless delay and was filed for no legitimate purpose. *Schwarzer, supra* note 4, at 195.

[88] *See, e.g.*, Bookkeepers Tax Services, Inc. v. N.C.R. Co., 598 F.Supp. 336, 340 (F.D. Tex. 1984). (Suit barred by *res judicata*, but had purpose of stemming foreclosure); Atlantic Purchasers, Inc. v. Aircraft Sales, Inc., 101 F.R.D. 779, 783 (W.D.N.C. 1984) (defendants argued a frivolous lack of subject matter jurisdiction motion and failed to fulfill discovery request. Court assessed sanctions because of delay and increased expense to opposition).

[89] Frivolous as used here refers to a pleading found to be not well-grounded in the facts or warranted by existing law.

[90] *See In re* Perez, 43 B.R. 530, 554 (S.D. Tex. 1984). (Motion for restraining order, according to court, was filed solely to prevent judgment creditors from foreclosing upon bankrupt's property without legal basis). *See also* Chevron v. Hand, 763 F.2d 1104 (10th Cir. 1985) (Defendant filed removal petition solely for purpose of delaying judgment and payment therein); United States v. Allen L. Wright Development Corp., 667 F.Supp. 1218 (N.D. Ill. 1987) (Defendant filed numerous frivolous discovery requests and pleadings for purpose of permitting time to accrue which caused defendants to accrue tax benefits and to bilk corporate client for additional attorneys' fees). Hearld v. Barnes and Spectrum Emergency Care, 107 F.R.D. 17, 19-20 (E.D. Tex. 1985). (Improper purpose found when plaintiff's attorney filed an affidavit which purported to waive third party plaintiff's interest in wrongful death action. However affidavit was a sham, third party plaintiff retained an unannounced interest in the outcome of the litigation thus destroying diversity jurisdiction); *Atlantic Purchasers*, 101 F.R.D. at 783; Silverman v. Center, 603 F.Supp. 430 (E.D.N.Y. 1985) (Filing a claim barred by res judicata in order to stay effect of previous judgment).

[91] 39 Fed. R. Serv. 2d 433 (N.D. Ill. 1984).

purpose. In *Kodak,* the defendant sought to depose a key official of plaintiff's corporation.[92] Attorneys for the plaintiff stated that for nearly a year the official was ill and could not be deposed.[93] Eventually, defendant's attorneys were able to depose the witness.[94] Kodak's attorney then filed a pleading informing the court of the health of the witness and suggested that he had never been ill.[95] The court finding no evidence of improper conduct by plaintiff's counsel, held that defendant's counsel had intended by innuendo to accuse plaintiff's counsel of lying about their client's health. The court found Kodak's innuendo an attempt to cast the plaintiff in an unnecessarily bad light and awarded sanctions.[96]

The *Kodak* case represents a court using Rule 11 to limit a party's ability to create prejudice or bias in its favor. Cases involving the disqualification of adversary counsel of hostile judges often produce the same result. In *Chu v. Griffith,*[97] the Fourth Circuit assessed sanctions against a party to a state divorce proceeding.[98] The state court judge was prepared to award custody of the plaintiff's children to their mother and as a preliminary step had the children transferred to a state agency. The father sued in federal court to have the judge held liable for illegally depriving him of his children's custody.[99] The court dismissed the claim because the judge was immune to such suits. The court imposed sanctions because it found the purpose of the suit was not to win on its merits, but to embarrass the state judge into recusing himself.[100]

Improper purposes can also be manifested by withholding information from the court for the purpose of allowing a statute of limitations to run out precluding refiling of the suit,[101] or when an attorney refuses to voluntarily dismiss a suit he knows to be without merit because he cannot act without client approval.[102]

Similarly, a lawsuit may be filed for an economic, social or philosophical purpose, where the goal of such a suit is to cause an opposing party to expend

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[92] *Id.* at 434.

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] *Id.* at 435.

[97] 771 F.2d 79 (4th Cir. 1985).

[98] *Id.* at 80.

[99] *Id.* at 81.

[100] *Id.; see also* Wold v. Minerals Engineering Co., 575 F.Supp. 166, 167 (D. Colo. 1983) (motion to disqualify law firm representing defendant was unsupported by any claim that privileged information was compromised. Motion's sole purpose was to cause delay and harassment of opposing counsel).

[101] *Itel Containers,* 108 F.R.D. at 96. (Defendant knew that plaintiff had mistakenly asserted diversity jurisdiction, but allowed litigation to proceed for almost 2 years because statute of limitations would run out, forestalling plaintiff's liability to refile suit in state court).

[102] Van Berkel v. Fox Farm and Road Machinery, 581 F.Supp. 1248 (D. Minn. 1984).

resources and not necessarily to succeed on the merits.[103]

Pleadings containing allegations which affect the party's character

Certain types of allegations can damage a defendant without proof of the truth of the allegations, simply by the filing of a pleading. One such damaging allegation is fraud. The federal rules have recognized the danger that unfounded allegations of fraud can cause and have enacted the specific pleading requirements of Rule 9(b).[104] Similarly, by requiring a party to plead fraud more specifically then other causes of action, the plaintiff must show that he possesses more than mere speculation before filing his claim. A plaintiff wishing to allege fraud will need to provide more than mere allegations to satisfy his Rule 9(b) burden.[105] This will eliminate the ability of a party to allege fraud without some

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[103] Davis v. Crush, 656 F.Supp. 468 (S.D. Ohio 1987). In *Davis* opponents of abortion sought to challenge a state court preliminary injunction in federal court. The court found the challenge to the integrity of the state court judge, his order, the attorneys for the abortion clinic and the clinic were entirely groundless. *Id.* at 469. The court further found that the federal lawsuit was merely an attempt to harass the anti-abortionists perceived enemies regardless of the consequences. The court ordered sanctions stating:

> Attorneys must restrain the excessive zeal of their clients and not participate in harassing efforts at their behest. A lawyer is more than an ordinary member of society and more than just a 'hired gun.' However deeply held his own personal views maybe, he must not encourage the activities of his clients when they begin to infringe on the constitutional rights of others, even though such rights are personally offensive.

Id. at 469. *See also,* Lupucki v. Van Worner, 587 F.Supp. 1390, 1395 (N.D. Ind. 1984), *aff'd,* 765 F.2d 86 (7th Cir. 1985) (Court found "it is patently obvious that this action was instituted not for the good faith reparation of an actual wrong, but, rather, as a device for asserting certain philosophical beliefs").

[104] Fed. R. Civ. P. 9(b) requries that when fraud is alleged the pleading must be more factually specific than in a nonfraud claim. Rule 9(b) states: "in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge and other condition of mind of a person may be averred generally." A recent case discussing Rule 9(b) and its purpose is *In re* Consumers Power Co. Securities Litigation, 105 F.R.D. 583 (F.D. Mich. 1985) where the court stated:

> The particularity requirement of Rule 9(b) serves three purposes. First, it ensures that fraud allegations are concrete enough to give defendants fair notice of the grounds of the complaint so they can prepare a defense. *Second, it protects defendants' reputations or good will from the harm that comes from being accused of serious wrong doing.* Third, it inhibits the filing of complaints that are a pretext for the discovery of unknown wrongs, or that are groundless claims designed to coerce a settlement out of defendants who wish to avoid the time and expense of defending themselves.

105 F.R.D. at 591 (emphasis added). Saine v. A.I.A., Inc., 583 F.Supp. 1299, 1306 n.5 (D. Colo. 1984) ("a charge of fraud is a serious matter with attendant consequences to a person's reputation and goodwill") *See also* McGinty v. Beranger Volkswagen, Inc. 633 F.2d 226, 229 n.2 (1st Cir. 1980), Billard v. Rockwell Int'l Corp., 683 F.2d 51, 57 (2nd Cir. 1982), Saveri, *Pleading Fraudulent Concealment is an Antitrust Price Fixing Case: Rule 9(b) v. Rule 8,* 17 U.S.F.L. REV. 631, 636 (1983); Sovern, *Reconsidering Federal Civil Rule 9(b): Do We Need Particularized Pleading Requirements In Federal Cases?,* 104 F.R.D. 143, 165 (1985).

Since its inception, Rule 9(b) has been the subject of harsh criticism. Many commentators find the specific pleading requirements of Rule 9(b) counterproductive to the spirit of the Federal Rules. They argue that the federal rules establish overall a policy of liberal pleading serving only a purpose of providing notice. To single out fraud claims as possessing dangers greater than other types of cases is illogical. Further opponents of Rule 9(b) argue that it is ineffective at stopping unfounded allegations of fraud from being filed. *See generally* Lees, *Rule 9(b) — Who Needs It?,* 3 J. CONTEMP. L. 105 (1976-77); Note, *Pleading Securities Fraud Claims with Particularity Under Rule 9(b),* 97 HARV. L. REV. 1432 (1984); Sovern, *supra.* These authors, while criticizing Rule 9(b) do not reject its underlying policy.

[105] *See* WRIGHT AND MILLER, *supra* note 13 § 1298; *see also* Summer v. Land & Leasure, Inc., 664 F.2d 965 (5th Cir. 1981), *cert. denied,* 458 U.S. 1106 (1982) (conclusory allegations of fraud underwriters insufficient to satisfy Rule 9(b)), SEC v. Tiffany Indus. Inc., 535 F. Supp. 1160, 1166 (E.D. Mo. 1982) (mere stating allegation that Rule 10b-5 has been violated insufficient under Rule 9(b).)

underlying evidence for doing so. Thus, a defendant is spared the damage to his reputation that a totally unfounded fraud suit can bring.

Rule 11 aims to protect innocent parties from needless cost and damge to reputation.[106] Therefore, Rule 9(b) and Rule 11 should be read in conjunction with each other.[107] Thus, a party who files a fraud complaint should be subject to a heightened scrutiny under Rule 11. A court should be more willing to assess sanctions when the complaint alleges a cause of action in fraud. In this manner, Rule 11 will bolster Rule 9(b) in attempting to eliminate unfounded fraud claims.

While the federal rules have provided special pleading rules for fraud claims, a number of claims, having potentially the same negative impact upon a person's reputation as fraud have not been provided for in the rules. The RICO[108] statutes were added to the battery of federal anti-crime laws to address the infiltration of legitimate business by organized crime.[109] However, due to the broad language of the statutes, courts have allowed civil RICO recoveries in areas beyond traditional organized crime "racketeering" activities.[110] In fact, ordinary

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[106] *See In re* Ramada Inns Securities Litigation, 550 F. Supp. 1127, 1132 (D. Del. 1982). (In *Ramada* the court stated: "the combined effect of Rules 9(b) and 11 is that an attorney, before commencing any action involving fraud or mistake, must have more specific information reasonably beleived to be trustworthy than . . . if she were commencing any other kind of action. *Id.* at 1132.) *See also* Sovern *supra* note 103, at 175-176; *supra* Note 103, at 41.

[107] A number of recent cases have assessed sanctions against parties who fail to properly allege fraud. *See, e.g.*, Hershey v. E.F. Hutton & Co., Inc., 113 F.R.D. 181 (S.D. Ala. 1986); Taylor v. Prudential-Bache Securities, Inc., 594 F.Supp. 226 (N.D.N.Y. 1984); Tedeschi v. Smith Barney, Harris Upham and Co., Inc., 579 F.Supp. 657 (S.D.N.Y. 1984); *see also* Goldman v. Belden, 580 F.Supp. 1373 (W.D.N.Y. 1984), *vacated on other grounds*, 754 F.2d 1059 (2nd Cir. 1985).

In *Goldman v. Belden*, the plaintiff alleged securities fraud by the sale of stock by corporate insiders. *Id.* at 1376. The district court dismissed the claim because the plaintiff had failed to allege any act which constituted fraud. The court assessed sanctions under Rule 11 because the allegations of fraud were unfounded and had caused irreparable harm to the defendants. *Id.* at 1382. The court cited the sensationalist nature that securities fraud claims have and the duty of a court to penalize for filing unfounded claims in this area. *Id.* at 1381. The Second Circuit reversed the trial court's dismissal of the fraud claim. The Second Circuit held that the claim stated a cause of action. Thus, the sanctions were vacated. 754 F.2d at 1072. However, the second circuit's reversal of the trial court's substantive securities law holding does not refute the logic of the trial court regarding the appropriateness of sanctions. In fact, the appeals court stated that it declined to comment one way or the other as to the merits of imposing sanctions based on the trial judge's perception of the complaint's deficiencies. *Id.*

[108] RICO refers to the Racketeer Influenced and Corrupt Organizations Act of 1970 added to the United States Code at 18 U.S.C. § 1961-1968 (1982). 18 U.S.C. § 1964 allows a private party who can show that a defendant has conducted some organized and sustained pattern of illegal criminal activity to recover civil damages when such activity causes injury to the plaintiff. *See* Wilcox Development Co. v. First Interstate Bank of Oregon, N.A., 97 F.R.D. 440 (D. Or. 1983).

[109] United States v. Turkette, 452 U.S. 576 (1981); *see also* Pub. L. No. 91-452, 84 Stat. 922, 923 (codified as amended at 18 U.S.C.A. §§ 1961-1968) (1970) (West 1984 Supp. 1986) (stating that the purpose of RICO was to seek the eradication of organized crime in the United States).

[110] *See* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, (1985) (Court held that RICO does not require a showing that criminal conduct occurred, only that the predicated acts alleged by the plaintiff show a failure to adhere to legal requirements); *see also* Austin v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 570 F.Supp. 667 (W.D. Mich. 1983) (RICO recovery allowed based on commercial fraud), Mauriber v. Shearson/American Express, Inc., 567 F.Supp. 1231 (S.D.N.Y. 1983) (RICO recovery for securities fraud).

business disputes can now be subject to RICO claims.[111] Yet, the mere filing of a RICO claim can stigmatize a defendant as being involved in organized crime.[112] A defendant can suffer loss of reputation and goodwill, not because he was convicted of a RICO violation, but from the mere publicity surrounding the filing of the RICO claim.[113] Like fraud cases, the filing of frivolous RICO claims deserves a heightened sense of scrutiny under Rule 11.[114]

The mere filing of a libel suit can damage the reputation of the defendant named in the suit. The Supreme Court has recognized that libel plaintiffs may be motivated not by their chances of success, but rather by their ability to generate negative publicity against the defendant.[115] Libel, like fraud or RICO claims connotes a sense of wrongdoing upon the defendant that is often sensationalized outside the courtroom.[116] Furthermore, libel suits are rarely successful, yet can cost millions of dollars to defend before dismissal is achieved.[117] The high risk that a libel suit will be frivolous and the potential for damage to the defendant from the mere filing of the libel claim suggest that the court should seek to discourage the filing of baseless libel suits by sanctioning plaintiffs more frequently in such cases. As in fraud or RICO cases, the existence of extrajudicial injury to the defendant, injury that can not be undone by the dismissal of the claim, argues for a greater willingness on the court's part to sanction

[111] *Revamping RICO,* 71 A.B.A.J., December 1985, at 32; Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482, 487 (2nd Cir. 1984); *rev'd* 473 U.S. 479 (1985) (the court was troubled by RICO claims whose predicate "racketeering" conduct was not traditional organized crime activities because RICO creates a stigma that a legitimate business may be owned by racketeers. The court interpreted the statute to require a conviction for some criminal act before RICO violation recovery can be made and thus reversed a trial court's decision to impose RICO liability for breach of contract action); *see Sedima, S.P.R.L.*, 473 U.S. 479, (Powell, J, dissenting) (Decision in this case allows use of RICO against respected businesses to redress ordinary fraud and breach of contract cases); *see also* Comment, 99 HARV. L. REV. 312, 313-16 (1985-86). (Because a RICO claim need only show that a predicated act violates legal requirements mail fraud, securities fraud and even breach of conduct can serve as a basis for a civil RICO recovery.)

[112] *Sedima, S.P.R.L.*, 741 F.2d 482, *rev'd* 473 U.S. 479 (Powell, J. dissenting) (In their dissents to *Sedima* Justices Powell and Marshall stressed that a danger from a expansive reading of the RICO statutes was that respectable businesses and business people suffered from being labeled as racketeers which by Congress' very intent manifested in the title to the Act serves as a buzz term for "linked to organized crime." *See supra* note 108. Courts have also recognized the danger in the filing of unfounded RICO claims.

[113] Congress has recognized the negative implications to a defendant by the use of the term racketeer in the Act's title. A move to change the statute is underway. *See* H.R. 2517 (1985); A.B.A.J., *supra* note 110, at p. 32. Courts have also recognized the danger in the filing of unfounded RICO claims. *Saine,* 582 F.Supp. at 1306 n.5.

> A charge of racketeering, with its implications of links to organized crime, should not be construed to give a pleader license to bully and intimidate nor to fire salvos from a loose cannon. Irresponsible or inadequately considered allegations should be met with severe sanctions pursuant to Rule 11, F.R. CIV. P.

See also, Foval v. First National Bank of Commerce in New Orleans, 1987 U.S. Dist. LEXIS 1890 (E.D. La. 1987).

[114] *See* Rojas v. First Bank National Ass'n., 613 F.Supp. 968 (E.D.N.Y. 1985) (plaintiff filed frivolous fraud and civil RICO claims court stated that seriousness of charges affects Rule 11 analysis).

[115] Herbert v. Lando, 441 U.S. 153, 204-05 (1979) (Marshall, J. dissenting) (many self-perceived victims of defamation are animated by something more than a rational calculus of their chance of recovery and may fashion their maneuvers more with an eye to retaliation than success on the merits); *see also* Anderson, *Libel and Press Self-Censorship,* 53 TEX. L. REV. 422, 435 (1975).

[116] *See supra* note 114.

[117] *See* Franklin, *Suing Media for Libel: A Litigation Study,* 1981 AM. B. FOUND. RES. J. 797.

plaintiffs for filing baseless suits.

Pleadings Filed By Parties Action Pro Se

Rule 11 clearly applies to cases where the offending party has acted *pro se.*[118] Litigants acting *pro se* to protest a tax assessment pose a difficult problem for courts deciding whether to impose sanctions. While tax laws are complex, a large number of *pro se* tax challenges attack the constitutional or statutory right of the government to collect income taxes rather than the specific amount of a particular tax assessment.[119] However, there is no doubt that the IRS possesses the power to collect taxes[120] and to levy judgments for back taxes.[121] Nor is the collection of income taxes open to attack as an unconstitutional deprivation of property.[122] As a result, it is likely that the *pro se* challenge of a tax assessment will be frivolous. The courts have become extremely hostile to the notion of *pro se* tax challenges.[123]

In *Eske v. Hynes,*[124] the taxpayer refused to pay taxes for 1979 and 1980 and was assessed a deficiency for the amount owed.[125] Eske sought from the IRS the return of the levied tax and sued local IRS agents personally as a means of collecting his alleged overpayment of tax. The plaintiff refused to recognize the IRS' right to collect taxes because taxes were a usurpation and tyrannical act of sedition repugnant to a republican form of government.[126] Furthermore,

[118] *See supra* note 2, 32-3 and accompanying text. *See, e.g.*, Rurkowski v. Volcker, 819 F.2d 201 (8th Cir. 1987) (affirming award of sanction against *pro se* litigant); Doyle v. United States, 817 F.2d 1235 (5th Cir. 1987) (*pro se* litigant who signs frivolous pleadings properly sanctioned); Hilgeford v. Peoples Bank, 776 F.2d 176, 178 (7th Cir. 1985) (*Pro se* litigant properly sanctioned), McKinney v. Regan, 599 F.Supp. 126 (M.D. La. 1984) (sanctions assessed against *pro se* plaintiff), Heimbaugh v. City and County of San Francisco, 591 F.Supp. 1573 (N.D. Cal. 1984) (law student acting *pro se* assessed $50 sanction under Rule 11 for making frivolous legal claims). Indeed, the courts have assessed large sanction awards against various parties who acted *pro se. See, e.g.*, Smith v. Egger, 108 F.R.D. 44, 45 (E.D. Cal. 1985) (court assessed plaintiff over $3700 in sanctions for bringing frivolous constitutional challenge to a valid tax levy); Taylor v. Prudential-Bache Securities, Inc. 594 F.Supp. 226, 228-29 (N.D.N.Y. 1984) (court assessed over $20,000 in sanctions against a pro se plaintiff for bringing frivolous securities fraud claims).

[119] *See, e.g., Doyle,* 817 F.2d 1235 (Taxpayers claimed they were exempt from withholding) Smith v. Egger, 108 F.R.D 44 (E.D. Cal. 1985) (constitutional challenge to tax levy court rejected summarily); Eske v. Hynes, 601 F.Supp. 142 (E.D. Wis. 1985) (tax on income violates constitution court assessed sanctions); Snyder v. IRS, 596 F.Supp. 240 (N.D. Ind. 1984) (wages are not income so cannot be taxed court dismissed as frivolous); Aune v. United States, 582 F.Supp. 1132 (D. Ariz. 1984) (providing income data on tax return violates fifth amendment right not to self-incriminate, court rejected).

[120] *Eske,* 601 F.Supp. 142.

[121] *Smith,* 108 F.R.D. 44.

[122] *Snyder,* 596 F.Supp. 240. Cameron v. IRS, 593 F.Supp. 1540 (N.D. Ind. 1984).

[123] *McKinney v. Regan,* 599 F.Supp. 126, 129 (N.D. La. 1984) (Plaintiff argued that the failure of the Secretary of the Treasury to appear in court personally rather than through counsel meant a default judgment should be entered. The court assessed sanctions and decried such tax challenges as America's newest and most unpleasant indoor sport); LeBlanc v. Shirey, 598 F.Supp. 747, 754 (E.D. Tex. 1984) (court stated that petitioner's challenge to IRS fines for filing falsified tax information as unconstitutional was the epitomy of "the litigant acting in bad faith and for oppressive reasons").

[124] 601 F.Supp. 142 (E.D. Wis. 1985).

[125] *Eske,* 601 F.Supp. at 143.

[126] *Id.* at 144.

the plaintiff charged the IRS officials with conspiracy to commit fraud, extortion, conversion, and grand larceny against himself and the republican form of government. The court found the plaintiff's remarks frivolous and "intemperate" and assessed a $500 sanction under Rule 11.[127]

In *Snyder v. IRS*,[128] the litigant sued the IRS because it withheld wages from his paycheck.[129] The court dismissed the suit finding that, in essence, the plaintiff alleged that "the IRS code does not apply to him." The court assessed sanctions under Rule 11 finding no basis in law for the claim.[130]

Pro se litigants acting in other areas besides tax challenges have posed problems for courts. Sanctions were imposed upon a *pro se* plaintiff who refused to pay court costs claiming that the court's policy of accepting federal reserve notes violated Article I of the Constitution.[131] Furthermore, sanctions were assessed against a party who instituted a federal suit in an effort to stem the foreclosure of his home; the alleged basis for federal jurisdiction was the patent clause of the constitution.[132] The court dismissed the suit because federal law does not recognize real property as patentable.[133]

Filing repeated claims by *pro se* litigants has prompted a number of courts to sanction *pro se* litigants.[134] The courts have had little sympathy for *pro se* litigants who attempt to relitigate issues that have been settled earlier. In one instance, the court stated that a *pro se* party had filed 15 suits that arose from the same facts, and each had been dismissed on *res judicata* grounds.[135]

The decision to sanction *pro se* litigants becomes especially difficult in light of the understanding courts have that *pro se* litigants are to be given liberal

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[127] *Id.*

[128] 596 F.Supp. 240 (N.D. Ind. 1984).

[129] *Snyder*, 596 F.Supp. at 243.

[130] *Id.* at 253. *See also, Doyle*, 817 F.2d 1235.

[131] Nixon v. Phillipoff, 615 F.Supp. 890 (N.D. Ind. 1985) (Plaintiff alleged that accepting federal reserve notes as payment for court fees was unconstitutional).

[132] *Hilgeford*, 776 F.2d at 178.

[133] *Id.*

[134] *See* Johnson v. United States, 607 F.Supp. 347 (E.D. Pa. 1985) (plaintiff filed action attacking a fine; using a pleading that was taken from a book of forms. The form pleading had been summarily rejected as inadequate and frivolous by the court on numerous other occasions); Nixon v. The Individual Head of St. Joseph Mortgage Co., 612 F.Supp. 253 (N.D. Ind. 1985) (relitigated issue for foreclosure upon mortgage); Taylor v. Prudential-Bache Securities, 594 F.Supp. 226 (N.D.N.Y. 1984) (court had previously dismissed same claim four times).

[135] DiSilvestro v. United States, 767 F.2d 30, 31-32 (2nd Cir. 1985) (Veteran sued for benefits, which were properly denied, based on injuries suffered during World War II). In Gagliandi v. McWilliams, 834 F.2d 81 (3d Cir. 1987), *pro se* plaintiff filed seven complaints alleging various civil rights violations. Each case was dismissed. *Id.* at 82. The district court sanctioned under Rule 11 the plaintiff from filing any more lawsuits in his district without review by the court. *Id.* The Third Circuit reversed the injunction because the court had not given the plaintiff notice that such a sanction was contemplated. However, the court stated that a "continuous pattern of groundless and vexatious litigation can, at some point, support an order against further filings of complaints without court permission." *Id.* at 83, quoting In re Oliver, 682 F.2d 443 (3d Cir. 1982).

pleading requirements.[136] The courts recognize that *pro se* litigants are not trained attorneys and consequently should not be held to the same requirements as attorneys.[137] However, when faced with claims that are wholly frivolous, repetitive or clearly legally insufficient, the courts have felt compelled to apply Rule 11 and assess sanctions. As a result, the application of Rule 11 in *pro se* cases must reflect a balance between the necessity of eliminating unreasonable pleadings and the liberal treatment courts should afford *pro se* litigants.

STANDARDS FOR THE IMPOSITION OF SANCTIONS

Rule 11 requires all pleadings or filings to be reasonable.[138] What is reasonable, however, depends upon the circumstances under which a pleading is filed.[139] Clearly, one of the circumstances that affect whether sanctions should or should not be imposed is the type of conduct that is claimed to have violated the rule.[140] Furthermore, the type of case at bar[141] or the status of the offending party affects the decision to impose sanctions.[142]

While it is true that each Rule 11 case turns on its specific context, courts must ultimately determine the reasonableness of a particular pleading. Evaluating a particular type of unreasonable pleading behavior under a uniform standard places greater emphasis on the objective nature of Rule 11 and limits the ability of a judge to base his decision to assess sanctions on a *post hoc* analysis of what the attorney should have done, rather than determining whether the attorney in fact acted reasonably at the time he made his filing.[143]

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[136] *See, e.g.*, Haines v. Kerner, 404 U.S. 519 (1972).

[137] *Hilgeford*, 776 F.2d at 178 (*pro se* litigants are held to lower standard); *see also* McCottrell v. EEOC, 726 F.2d 350, 351 (7th Cir. 1984) (courts will hold *pro se* litigants to lower standards).

[138] *Supra* notes 2, 34 (the signature of an attorney constitutes that he has conducted a reasonable inquiry).

[139] *See Schwarzer, supra* note 4, at 194; Thomas v. Capital Sec. Serv., Inc., 812 F.2d 984, 988 (5th Cir. 1987); *Zaldivar*, 780 F.2d 823.

[140] Whether the alleged wrongdoing necessitating sanctions is based on a failure to reasonably inquire into the facts, or plead under established law or whether a pleading is filed for an improper purpose existed will affect the determination of what is reasonable.

[141] Specifically, claims that by the mere filing cause damage to a defendant's reputation such as fraud, RICO or libel should require a more stringent standard of what is reasonable. *See supra* notes 103-116 and accompanying text.

[142] *Pro se* litigants are judged under a more liberal standard than attorneys; courts should be mindful of this when deciding whether to assess Rule 11 sanctions. *See supra* notes 118-137 and accompanying text.

[143] The Committee notes to amended Rule 11 make clear that judges should assess sanctions because the conduct was unreasonable at the time it was committed. Sanctions should not be assessed because the judge determines in light of subsequent events conduct is now unreasonable. *See supra* note 45 and accompanying text. Particularizing the focus of the court into an analysis of whether a specific type of conduct is reasonable will require a judge to more thoroughly explain his justification for assessing sanctions. This, in turn, will allow appellate courts to evaluate the trial judges compliance with the applicable standard of conduct and allow the appeals court to recognize sanctions based on post hoc analysis.

Indeed, the appellate courts have recognized the need for a more focused analysis of the district courts' Rule 11 analysis. In Thomas v. Capitol Sec. Services, Inc., 812 F.2d 984 (5th Cir. 1987), the Fifth Circuit noted that "district courts can no longer selectively impose sanctions when a violation of Rule 11 is established." *Id.* at 989. The court went on to require that a district court make detailed findings of fact and conclusions of law describing:

(1). whether a reasonable inquiry into the facts was made;

A Pleading Is Not Warranted By The Facts

The purpose behind Rule 11's requirement that a pleading be well-grounded in fact is to ensure the court that the attorney has inquired into whether a given statement contained in a pleading is accurate.[144] The attorney by signing the pleading avers that he has the requisite knowledge, information and belief to qualify the statements as true.[145] When he cannot state to himself and the court that the facts pled are true he should not sign the paper because it is not well-grounded in fact.

Before assessing sanctions against a party for not conducting a reasonable inquiry into the facts, a court should apply a two-pronged test. First, the court should inquire whether a reasonable attorney knowing the true facts, would have signed the paper. Second, the court should inquire into the accessibility of the true facts. Only when the signator should not have filed a paper knowing the true facts and where the true facts were accessible would sanctions then appropriate.

Undeniably this standard is harsh and if applied vigorously would impose sanctions in a large number of cases. Courts cannot countenance failure by counsel to research facts that are essential to their claims. When an attorney files a pleading without researching the facts, he forces his opponent to conduct his research for him.[146] This creates needless costs to the opposing parties, and it wastes judicial resources.

The duty imposed by the first prong of this standard directs the court from the subjective level of knowledge that a particular attorney believed was sufficient and towards an analysis of what research a reasonable attorney should have conducted. Thus, in a case like *Van Berkel v. Fox Farm and Road Machinery,*[147] sanctions would be imposed if a court decided that filing a time

(2). whether a reasonable inquiry into the law was made;
(3). whether the action was taken to harass, delay or increase unnecessarily costs of litigation; and
(4). whether an attorney has met his continuing obligation to reevaluate his litigation position.

Id.

[144] *See* Schwarzer, *supra* note 4, at 187; *see also* Robinson v. National Cash Register Co., 808 F.2d at 1131 (attorney informed of facts establishing his claim was res judicata prior to filing); Wold v. Minerals Engineering Co., 575 F.Supp. 166, 167 (D. Colo. 1983) (inquiry into allegations made by client that opposing counsel possessed confidential documents would have disclosed opposing counsel did not have confidential materials thus avoiding the filing of a frivolous disqualification of counsel motion).

[145] *See supra,* note 2; (Rule "provides the signature of an attorney . . . constitutes a certificate by him . . . that to the best of his knowledge, information and belief formed after reasonable inquiry it is well grounded in fact.")

[146] Van Berkel v. Fox Farm and Road Machinery, discussed *supra* notes 58-60, is an example of the effect of a failure to research facts by an attorney. In *Van Berkel,* plaintiff attorney filed a time barred claim for personal injury incorrectly stating the date of the accident at issue. The attorney should have known when the date of the accident occurred. The defendant clearly had no trouble determining the proper date of the accident. Further, plaintiff's lawyer was told by the defendant's attorney that the date of accident was in 1976. The defendant presented plaintiff's counsel with medical records that were signed by the plaintiff proving the 1976 date. *See Van Berkel,* 581 F.Supp. at 1249-1250. The medical records were easily available to plaintiff's counsel. *Id.* at 1250.

[147] *See supra* notes 58-60 and 146.

barred claim based on a failure to determine the date of the underlying accident was unreasonable.[148] Under normal circumstances, attorneys must be responsible for all facts that they certify are true. It is not a defense to the imposition of sanctions that a fact was incorrectly stated due to clerical or typographical mistakes.[149] Nor can an attorney generally rely on the description of facts provided by the client, unless the facts relate to matters that can only be discovered through reliance on the statements of the client.[150]

What the first prong of this standard seeks to require is an increase in the level of factual accuracy that accompanies a pleading. A pleading must demonstrate that the attorney inquired into his assertions before making a certification. When an attorney makes a conscious decision, such as in what district to file a claim[151] or under what cause of action[152] and whether to file in state or federal court,[153] his Rule 11 burden is great. He alone invokes the court's jurisdiction and he bears the burden of establishing the justification for such invocation. When through inadequate preparation, ignorance or incompetence he cannot present the court with facts that justify his actions, then the purpose Rule 11 serves, elimination of frivolous pleadings, will only be fulfilled by imposing sanctions.

The second prong of this standard contemplates that sanctions will only

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[148] It should be noted that this question is not always going to be as simple to answer as it was in *Van Berkel*. In *Van Berkel*, plaintiff's complaint affirmatively stated an incorrect date. The incorrect date would have satisfied the statute of limitations. The sanctions were appropriate because the attorney did not research whether this date, told to him by his client, was accurate. The case would be different if the attorney had stated the date of the accident accurately in his complaint; in essence, filing a claim he knew to be time barred. Since the defense to a claim that it is time barred is an affirmative defense, the onus is on the defendant to correctly plead. The defense may be waived if not plead in the answer by the defendant. *See* Fed. R. Civ. Pro. 12(h). Therefore, it may not be unreasonable to file a time barred suit. However, there is no doubt that it is unreasonable not to research the date of the accident as was done in *Van Berkel*.

[149] Clerical mistakes that are immaterial will not draw sanctions. However, the filing of claims barred by res judicata is not an immaterial mistake. *But c.f.* Baranski v. Serhant, 106 F.R.D. 247, 249-50 (N.D. Ill. 1985) (Inadvertant filing of 8 claims barred by res judicata was mistake not warranting sanctions).

[150] *See* Friedgood v. Axelrod, 593 F.Supp. 395 (S.D. N.Y. 1984) (plaintiff claimed he was exposed to asbestos while in prison. Attorney had no access to prison to research claim. Attorney justifiably filed claim based on client's statements); *but see* Coburn Optical Industries, Inc. v. Cilco, Inc., 610 F.Supp. 656, 659 (M.D.N.C. 1985) ("If all the attorney has is his client's assurance that facts exist or do not exist, when a reasonable inquiry would reveal otherwise, he has not satisfied his obligation.")

[151] *See* Hasty v. Paccar, 583 F.Supp. 1577, 1580 (E.D. Mo. 1984) (plaintiff selected Missouri as forum. Plaintiff failed to provide any evidence that would establish personal jurisdiction over the defendant. Having chosen to file the claim in Missouri there is no excuse for a complete failure to assert contacts between the defendant and the forum. Thus, sanctions would be merited under the standard herein developed).

[152] *See* Ring v. R.J. Reynolds Industries, Inc., 597 F.Supp. 1277 (N.D. Ill. 1984), *affirmed* 804 F.2d 143 (7th Cir. 1986) (plaintiff filed age discrimination claim even though he knew he was not covered by statute's provision due to his youth).

[153] Weisman v. Rivlin, 598 F.Supp. 724, 726 (D.D.C. 1984) (Attorney filed diversity suit but did not find out that his client was Maryland citizen, same as the defendant. It is unreasonable to overlook the citizenship of counsel's own client); *see also* Silverman v. Center, 603 F.Supp. 430, 432 (E.D. N.Y. 1985) (counsel represented plaintiff on same claim; both counsel and plaintiff knew that present action was barred by *res judicata); see also* Coburn Optical Industries Inc. v. Cilco, Inc., 610 F.Supp. 656, 658 (M.D. N.C. 1985) (Defendant challenged venue, however defendant should have known his client conducted business in venue).

be imposed when the true fact could have been ascertained by the signator, if he conducts a reasonable level of research.[154] Facts contained in a complaint alleging conduct that can only be proven by discovery should not engender sanctions.[155] However, facts that establish jurisdiction of the court over the defendant are examples of facts that do not normally require discovery before they can be ascertained.[156]

It must be remembered that a trial itself will determine the existence or non-existence of specific facts. A fact that is determined at trial is not the sort of fact that is capable of ascertainment before trial. Imposing sanctions because a party alleged that a fact occurred, such as a defendant's negligent act, and the jury found otherwise would be *post hoc* analysis at its worst. The court would essentially be sanctioning a party for losing the lawsuit and not because the party acted unreasonably.[157] Similarly, when an attorney bases his actions on statements made by his client or some other party, which subsequently are shown to be untrue, the attorney should not be sanctioned,[158] unless the attorney could have ascertained through his own research that the statements were inaccurate.

Claim Is Not Warranted By Existing Law

Rule 11 requires sanctions to be imposed when a signator files a paper that is unwarranted by existing law and is not found to be a good faith argu-

[154] An example of a failure to research facts that were clearly ascertainable by the certifying party is Duncan v. WJLA-TV, Inc., 106 F.R.D. 4, 5-6 (D.D.C. 1984) (plaintiff stated that an expert graduated from Emerson College and was a communications expert. Expert testified he was not an Emerson graduate and was not qualified to give opinion in case). In *Duncan*, the plaintiff had a duty to ascertain the education of his potential expert. The ability to simply ask the expert and accurately report his answer is patently obvious even without Rule 11. Plaintiff counsel's failure to make this basic inquiry necessarily merited an assessment of sanctions.

[155] However, the duty to warrant a claim as reasonable under the facts is a continuing duty. If after conducting discovery a party learns that its position is unreasonable, Rule 11 requires the party to dismiss his action. The failure to react to facts discovered during the course of litigation is as much a violation of Rule 11 as the failure to conduct a pre-filing inquiry. Thomas v. Capitol Sec. Services, Inc. 812 F.2d at 989 ("When a lawyer learns that an asserted position, even if originally supported by adequate inquiry, is no longer justifiable, he must not persist in its prosecution"); Southern Leasing Partners, Ltd. v. McMullan, 801 F.2d 783, 789 (5th Cir. 1986) (attorney must dismiss or withdraw action if discovery proves claim is bareless); *see also* Collins v. Valden, 834 F.2d 961, 965 (11th Cir. 1987) ("When it becomes apparent that discoverable evidence will not bear out the claim, the litigant and his attorney have a duty to discontinue their quest.")

[156] *See supra* notes 150-152. When a dispute as to the existence of jurisdiction occurs, then an adverse holding finding a lack of jurisdiction should not draw sanctions because the court ascertained what the true facts were *after* the filing of the pleading. Since the true facts could not be known until the court rendered its decision, Rule 11 is not violated because to do so would be a post hoc determination based on subsequent information. Thus, decisions not to assess sanctions were appropriate in Fernandez v. Southside Hospital, 593 F.Supp. 840, 841 (E.D. N.Y. 1984) (whether claim was barred by statute of limitations was fact issue that could be disputed) and Lemma Enterprises, Inc. v. Willi, 582 F.Supp. 255, 257 (S.D. N.Y. 1984) (plaintiff showed some evidence of personal jurisdiction but court found it was not enough).

[157] Rule 11 does not allow for the court to impose sanctions solely because a party lost a case. *See supra* note 48 and accompanying text.

[158] See *Friedgood*, 593 F.Supp. 395 (fact that client lied about asbestos in prison could only be known when defendant provided factual information unavailable to petitioner's lawyer until discovery began).

ment for the extension, modification or reversal of existing law.[159] While the intention of the drafters of amended Rule 11 is not to eliminate creativity on the part of legal counsel,[160] the rule, nonetheless, defines a limit beyond which proper advocacy ends and improper conduct begins.[161]

The not warranted by existing law prong of Rule 11 places a minimum requirement upon the signator to satisfy himself that a legal claim might exist.[162] Therefore, in determining whether sanctions are appropriate in a particular case, a two-part test must be satisfied. First, the court must be satisfied that the attorney has determined what the existing law is. Second, the court must conclude that a reasonable attorney would believe that the case presented a plausible legal claim under that law.

The first prong of this standard requires the attorney to determine what the existing law is. If the signator fails to determine what law applies to his case, then he is liable for sanctions when his claim is not in accordance with existing law. Arguing a position contrary to clearly established precedent without distinguishing the contrary law is one way a court can determine that an attorney has not met his burden under this prong of the standard.[163] Sanctions

[159] *See supra* note 2; Rule 11 provides that: "the signature of an attorney . . . constitutes a certificate by him that . . . to the best of his knowledge, information and belief formed after reasonable inquiry . . . it is warranted by existing law or a good faith argument for the extension, modification or reversal of existing laws."

[160] *See supra* note 45. *See also Golden Eagle Distributing Corp.*, 801 F.2d at 1540 (Rule 11 was not intended to chill zealous advocacy and cannot be allowed to conflict with lawyer's duty to zealously represent client).

[161] Rule 11 limits an attorney to pleading well-established law or making a good faith argument for the laws' change. Thus, attorneys are not free to argue on behalf of clients without limit. The argument must identify that it is relevant under existing law or if the argument does not comport with existing law reasonably argue for the law's change. Similarly, the disciplinary rules established by the bar seek to define zealous advocacy as distinguished from improper conduct by attorneys representing clients. *See, e.g.*, Disciplinary Rule 7-102(A), which states:

> (a) 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 this is unwarranted under existing law, except that he may advance such a 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.

Model Code of Professional Responsibility Dr. 7-102(A) (1982). This rule is based on a subjective bad faith standard similar to old Rule 11. To be in violation an attorney must knowingly advance a frivolous claim.

In 1983 the ABA enacted the Model Rules of Professional Conduct. The applicable model rule enlarges the attorney's duty and changes the analysis from subjective to objective.:

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

Model Rules of Professional Conduct Rule 3.1 (1983).

[162] *See Schwarzer, supra* note 4, at 190; *Zaldivar*, 780 F.2d 823; *see also* Committee notes *supra* note 5, at 199 (what constitutes reasonable inquiry into law includes whether the pleading was based on a plausible view of the law).

[163] *See* Worrell v. Uniforms to You & Co., 673 F.Supp. 1461 (N.D. Cal. 1987) (Defendant removed sexual harassment suit to federal court despite clear law which requires filing of suit with EEOC to establish federal jurisdiction, where plaintiff had not made such a filing precluding federal jurisdiction. *Filippini*,

should not be assessed, however, where the state of the law is in flux or has not yet crystalized to a point where a reasonable attorney could be sure of what the existing law is.[164] Furthermore, when the law has recently been changed through judicial decision, sanctions should not be imposed upon parties who immediately thereafter argue positions opposite to the new, but now existing law.[165] In other words, while the existence of new law may make the argument advanced contrary to the new existing law, it may not be unreasonable to file a claim based on research conducted into the old law.[166]

The second prong of the standard requires the court to question whether a reasonable attorney would have filed the claim once the existing law has been determined. At this point a court should be keenly aware of the duty it has to avoid chilling creative advocacy.[167] The rule does not require that the pleading be successful, only that it be a plausible interpretation of existing law.[168] The court should resist the impulse to assess sanctions because a pleading does not

106 F.R.D. at 432 (Cases from 9th circuit should have tipped attorney that his view of law was not correct; court did impose sanctions); *see also* SFM Corp. v. Sundstrand Corp., 102 F.R.D. 555 (N.D. Ill. 1984) (The court stated that clear precedent existed, undiscussed by the attorney, to the effect that a party may not make a Rule 56(d) motion).

[164] *See SFM Corp.*, 102 F.R.D. at 558 discussed *supra* notes 75-78. In *SFM*, the court sanctioned the defendant's counsel for making a partial summary judgment motion under Rule 56(d). Defense counsel admitted that some issues of material fact existed, but requested the court to dismiss other issues. The court assessed sanctions because a large majority of courts have held that a party may not make a Rule 56(d) motion; only the court may do so. However, at least one circuit judge in the relevant forum thinks such a motion would be proper. *See Id.* at 558, n.1. Thus, arguably the law is not clear as to whether a Rule 56(d) motion may be made. The decision in *SFM* can be justified, however, because the defendant's motion as originally filed showed that the defendant was unaware of any debate as to the validity of a Rule 56(d) motion. *See* 102 F.R.D. at 558, n.2; *see also Zaldivar*, 780 F.2d 823 (single district court opinion cannot alone be sufficient proof of existing law to justify sanctions for failing to adhere to its holding because such an area of law cannot be regarded as settled).

[165] *Pudlo*, 587 F.Supp. at 1012. No sanctions issued against taxpayer with counsel who argued that IRS code § 7609(b)(2)(A) provided that a petition to quash an IRS summons need be filed 20 days after *receipt* of the summons — when recent cases had held that the provision meant 20 days after *issuance* of the summons. The court stated that when a complex statute "does not admit of only one possible reading and the cases interpreting it are very few and are only found in the advance sheets, sanctions should not be imposed." *Id.*

[166] Attorneys have continuing duties to keep abreast of new developments in the law. However, new legal decisions are not instantaneously disseminated to all attorneys. Not all offices are equipped with Lexis or Westlaw computer services. Thus, the court should not expect an attorney to automatically become aware of new decisions as they are handed down. When a pleading would satisfy Rule 11 as an interpretation of the old law, a court must then determine whether sufficient time has elapsed since the new decision was made available for an attorney to become acquainted with the new law before making a decision on sanctions. Some factors to consider include the size of the attorney's law office, its resources, whether the new decision came from the Supreme Court or a lower court, the complexity of the issue involved and the relative importance of the new law. *See generally* Committee notes *supra* note 5, at 198; *Schwarzer supra* note 4, at 194.

[167] *See supra* note 45. The greatest tension between promoting vigorous enforcement of Rule 11 and impinging on proper zealous advocacy is in a court's decision to sanction an attorney for bringing a claim based on an unreasonable interpretation of existing law. Attorneys must be given great discretion to meld and manipulate the law to attempt to bring existing law into the focus of his client's goals. The prime purpose of Rule 11 in terms of eliminating frivolous claims is in sanctioning attorneys who do not understand or bother to research what the existing law is. Once the attorney demonstrates that he is aware of the existing law, the court should only impose sanctions if the interpretation of that law is so out of line that to argue such a position is beyond peradventure without a chance of success.

[168] *See supra* note 48.

ultimately prevail[169] and only impose sanctions when the legal basis for the claim was patently unreasonable.[170]

Sanctions would be improper in a case where the attorney was clearly aware of the proper existing law and attempted an argument based on that law. Regardless of the success of the argument, once the pleader has evinced his knowledge of the law and the logical connection to his argument, then sanctions are not warranted.[171]

Furthermore, sanctions may not be imposed if a legal claim is unwarranted by existing law, but was nonetheless made as a good faith argument for its extension, modification or reversal.[172] Good faith, as used in this context, does

[169] *See* Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421-22 (1978) (court upheld imposition of attorneys fees to prevailing defendant as a sanction for a frivolous claim under Title VII). The court stated:

> It is important that a district court resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his actions must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success . . . Even when the law . . . appear[s] questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit.

See also, Golden Eagle, 801 F.2d at 1540 (warning that judge who has decided that losers position was wrong will probably also decide that such a position was unwarranted by existing law).

[170] *See, e.g.*, Eastway Construction Corp. v. City of New York, 762 F.2d 243 (2d Cir. 1985) (Plaintiff identified requirements that antitrust action must allege a competitive relationship. However, he failed to disclose how his client was a competitor under the law. Thus, sanctions were appropriate); *Worrell,* 673 F.Supp. at 1465 ("Defense counsel's undaunted persistence in asserting their erroneous interpretations of the law in spite of overwhelming contrary authority is ample proof that they failed to undertake a 'reasonable inquiry' into the state of the law as required (by Rule 11.").

[171] *See Zaldivar,* 780 F.2d 823 (plaintiff's claim was dismissed on Rule 12(b)(6) motion for failure to state claim; circuit court reversed order imposing sanctions because view of law was logical based on statutory history, even though it was ultimately a wrong interpretation).

[172] Even if the court finds that a claim is unwarranted by existing law, the Rule tempers the situations when sanctions can be assessed. A party may defend his seemingly unwarranted legal claim by showing that it was brought in good faith for the extension, modification or reversal of existing law. Even if the claim was based on an unwarranted legal basis the attorney would not be assessed sanctions if he could explain that what he had really meant to say was that the law should allow recovery (or deny recovery) even though at present the law does not so hold. Decisions by courts regarding the interaction between the objective determination that the pleading was not warranted by existing law and the meaning of the good faith extension defense have been limited. In Golden Eagle Distributing Corp. v. Burroughs Corp., 103 F.R.D. 124, 125-26 (N.D. Cal. 1984), *rev'd* 801 F.2d 1531 (9th Cir. 1986), the court found that the pleading was not warranted by existing law even though a subsequent memorandum from the party exposed a logical good faith extension argument. *Id.* at 126. The court stated that:

> The difficulty is that this is not the argument presented when the motion was made. Had it been made then, there would be no question that it would have qualified under Rule 11 as "a good faith argument for the extension . . . of existing law" and the issue of sanctions would never have arisen. Instead of doing what they now have done (specifically told the court that the law should be changed to reflect the attorney's contention), counsel presented an argument calculated to lead the Court to believe that it was "warranted by existing law."

Id.

The Ninth Circuit is currently engaged in a debate over the question of whether a lack of candor can or should be a basis for Rule 11 sanctions. The Court reversed the district's award of sanctions in *Golden Eagle,* finding that the district courts opinion creates "serious concern about the effect of such a rule on advocacy." *Golden Eagle,* 801 F.2d at 1540. The court found a conflict between zealous advocacy and the candor required by the district court. *Id.* Ultimately, the appellate court felt that requiring a differentiation between arguments based on existing law and arguments for an extension of existing would create greater litigation expense, chill effective advocacy and run counter to the design of Rule 11. *Id.* at 1540-41. The Ninth Circuit narrowly rejected an en banc review of its decision in *Golden Eagle.* However, five judges wrote a separate dissenting opinion to speak out against the panel decision. *Golden Eagle,* 809

not return Rule 11 to its pre-amendment reliance on finding subjective intent, but rather requires the court to analyze whether the attempt to argue at odds with existing law was itself reasonable.[173] In order for the rule to function logically, a signator can only rely on the "good faith extension" to Rule 11 when he can satisfy a two-pronged test. He must make the court aware explicitly that his argument is contrary to existing law and he is arguing in good faith for extension of the law. Second, the court must determine that the argument is reasonable under the circumstances.[174]

Sanctions should be assessed when an attorney does not express his pleadings as arguments for extension, modification or reversal of existing law, but rather seeks to misinform the court that his argument is the existing law.[175] When a party presents an argument as if it were in accordance with existing law, he may not subsequently turn around and claim the pleading's real purpose was to argue for a change in the law.[176] Similarly, a party who has not adequately established what the existing law is,[177] may not avoid the imposition of sanctions by explaining his conduct as merely an attempt to argue for the creation of new law.[178] Furthermore, the rule cannot be satisfied solely by labeling an argument as novel or requesting a reversal. The rule is satisfied when the pleading

F.2d 584 (9th Cir. 1987). The dissenters supported the district court's original order of sanctions finding that a court should have the power to sanction for misrepresentations. *Id.* at 585-86.

The panel decision by the Ninth Circuit in *Golden Eagle* appears to run contrary to the emerging judicial consensus. *See, e.g.*, Lyle v. Charlie Brown Flying Club, Inc., 112 F.R.D. 392 (N.D. Ga. 1986); Blake v. National Casualty Co., 607 F.Supp. 189, 192 (C.D. Cal. 1984); Blackwell v. Dept. of Offender Rehabilitation, 807 F.2d 914, 915-16 (11th Cir. 1987).

It is entirely consistent with the purpose of Rule 11 to require a party making an argument based on the extension or modification of existing law to inform the court of its intention to do so when the pleading is filed. While the court should refrain from sanctioning a party who honestly argues for a change in existing law, it should sanction a party who labels arguments for legal change as arguments based on existing law; Schwarzer, *supra* note 4 at, 193-195 (Attorney must be candid with court that his argument is by analogy or at odds with existing law).

[173] *See* Committee notes *supra* note 5, at 199.

[174] *See infra* note 179.

[175] *See Golden Eagle Distributing Corp.*, 103 F.R.D. at 127. The court stated that "[t]here would be little point to Rule 11 if it tolerated counsel making an argument for the *extension* of existing law disguised as one *based* on existing law." (emphasis not in original) *Id. See also* Rodgers v. Lincoln Towing Service, Inc., 771 F.2d 194, 205 (7th Cir. 1985) (argument labeled as in accordance with established law could not be subsequently argued as an argument for a good faith extension of the law); *SFM Corp.*, 102 F.R.D. at 558, n.2; *Schwarzer, supra* note 4, at 194-195. Judge Schwarzer states:

> Counsel is free to make an argument at odds with existing law. He can argue by analogy or extension from existing law. He can predict what he believes a court would or should hold on an issue not heretofore decided. What he cannot do is to mislead the court by contending that his argument is supported by existing law in the venue that the issue has been decided when that is not true. . . . Rule 11 requires disclosure and precludes presentation of the argument as though it rested on existing law.

See also supra note 172.

[176] *Id.*

[177] For the discussion of the importance of determining the existence of the proper established law, *see supra* notes 162-164 and accompanying text.

[178] *See, e.g., Worrell*, 673 F.Supp. at 1165, where a noted labor firm was sanctioned for making a removal petition despite labor law that required a prior filing in the EEOC which had not occurred. The court noted that the defense counsel had clearly argued incorrect existing law and not that the law should be changed. Since its position was frivolous, sanctions were merited.

establishes the reasonableness of the particular argument made to revise, modify or extend the established law. Even if a pleading expressly informs the judge that it is not based on existing law but instead urges a change in the law, sanctions would be warranted if the suggested change is not itself reasonable.[179] An argument for a new statutory interpretation will more likely be reasonable than an argument to overrule established judicial precedent.[180]

Pleading Is Filed For An Improper Purpose

In imposing sanctions for filing pleadings not well grounded in fact or not warranted by existing, law a court examines the merits of a pleading.[181] When a court determines whether to impose sanctions for filing pleadings for an improper purpose, it examines the reasons for filing the pleading. However, the court should not be looking at the subjective intent behind the attorney's action.[182] Rather, the court should look only at the objective information available to it and decide on the record of the case whether a paper was filed for an improper purpose.[183] Deciding what is an improper purpose for which a pleading may be filed is the key element in a court's deliberation over the imposition of sanctions. As with all determinations made with regard to Rule 11, what is an improper purpose deserving of sanctions is a fact to be judged by the court based on the circumstances of the case.[184] However, a common element that should permeate a court's finding of an improper purpose is the existence of a motive, a reason to act by the pleader, that is outside his presentation of the merits of the action.[185] An improper purpose usually results from an attorney seeking a tactical advantage by filing a pleading that results in an increase in costs, or a delay or harassment to either the court or an adversary.[186]

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[179] *See* Eastway Construction Corp. v. City of New York, 762 F.2d 243, 254 (2d Cir. 1985) ("Where no reasonable argument can be advanced to extend, modify or reverse the law as it stands, Rule 11 has been violated."); *see also Worrell*, 673 F.Supp. at 1465 ("Even if this Court were to assume defense counsel's briefs argued for an extension of the law, counsel's reliance on a clearly erroneous interpretation [of precedent] does not meet the requisite good faith standard").

[180] Compare *Zaldivar*, 780 F.2d 823 (statute could be logically argued to extend to cover plaintiff's interpretation) with *SFM Corp.*, 102 F.R.D. 555 (argument can not be reasonable if it has been rejected by majority of courts). *But see* Huettig & Schromm v. Landscape Contractors Council, 582 F.Supp. 1519. (statutory argument was not reasonable extension of existing law).

[181] Schwarzer, *supra* note 4, at 195.

[182] *Id.*

[183] *See supra* note 86 and accompanying text.

[184] *See supra* note 87.

[185] *See* Davis v. Crush, 656 F.Supp. 468 (S.D. Ohio 1987) (purpose of lawsuit was to harass pro-abortion group and generate publicity for anti-abortion cause); Hearld v. Barnes and Spectrum Emergency Care, 107 F.R.D. 17 (E.D. Texas 1985) (suit based on diverity jurisdiction. Possible additional plaintiff's interest in litigation as compulsive party would destroy diversity with defendant; plaintiff purportedly got release of non-diverse plaintiff's interest in the litigation. However, the attorney actually arranged for secret recovery to the non-diverse plaintiff.)

[186] *See* Chevron v. Hand, 763 F.2d 1184 (10th Cir. 1985) (filing of removal petition was for purpose of delaying entry of judgment and costs therein); *In re* Perez, 43 Br. 530 (S.D. Texas 1984) (claim filed by bankrupt was filed to avoid foreclosure on assets not because of change of success).

Therefore, in determining whether to assess sanctions against a party for filing a paper for an improper purpose, a court should satisfy itself that two tests have been met. First, the court should determine if the pleader has attempted to gain a tactical advantage by drafting his pleading so that it does not address the merits of the case. Second, the court should determine that this advantage was procured without some legitimate purpose or reasonably clear justification for causing the increase in cost, delay or harassment to the court or the opposing party.

The first part of this standard is straight forward. Objectively, the court must evaluate whether the attorney has filed his pleading for some reason other than to illuminate the merits of his claim or defense. The court need not look beyond the record of the case to establish the motive for filing a pelading. Motion practice is an area that is especially susceptible to motives other than the success of the case on its merits.[187] However, all motions made during the course of a trial are not sanctionable. What separates a proper motion from an improper motion is the second prong of the test; that only those actions which have no legitimate purpose merit sanctions.

The requisite tactical advantage a party may gain from filing a pleading can also be merely to harass a party. Filing successive claims that have no merit is one example of an action that harasses an opponent and has no relation to any chance of recovery.[188] Furthermore, advantage may be gained by inaction, such as where a party does not dismiss a claim because of a jurisdictional infirmity until the statute of limitations runs out; making it impossible for the adversarial party to somehow refile his claim and allow the merits to be reached.[189]

Once the court has determined that a pleading was filed for the purpose of gaining a tactical, non-merit related advantage, the court must determine whether the pleader had a justifiable reason for his action.[190] A justifiable reason

[187] *See* Davis v. Veslan Enterprises, 765 F.2d 494 (5th Cir. 1985) (motion to remove case to state court was based on improper motive); Coburn Optical Industries Inc. v. Cilco, Inc., 610 F.Supp. 656 (M.D. N.C. 1985) (Sanctions assessed because of improper motion to impose sanctions on opposing party); Tedeschi v. Smith Barney, Harris Uphan, & Co., Inc., 579 F.Supp. 657 (S.D. N.Y. 1984), *aff'd*, 757 F.2d 465 (2d Cir. 1985) (improper motion to transfer case filed just prior to defendant's motion to dismiss).

[188] *See* DiSilvestro v. United States, 767 F.2d 30, 32-33 (2d Cir. 1985), *cert. denied*, 106 S.Ct. 177 (1986) (plaintiff filed claim identical to fourteen others previously dismissed claims. Court assessed sanctions); *Eastway Construction Corp.*, 762 F.2d at 252-54 (Circuit court reversed district court's refusal to impose sanctions when party brought meritless claim already litigated in state court.); *see also Zaldivar*, 780 F.2d 823 (filing of excessive motions even if well grounded in fact and law may constitute harassment).

[189] *Itel Containers Int'l*, 108 F.R.D. 96 (Defendant improperly withheld fact that plaintiff had filed in federal court based on diversity jurisdiction since the defendant and plaintiff were citizens of the same state. Defendant's delay of over 2 years caused the claim to be time barred and incapable of being refiled in state court).

[190] It has not been determined whether a court must further find that the alleged improper pleading is also either not grounded in fact or unwarranted by existing law before a sanction can be imposed, if his purpose in filing the motion was improper. One circuit court, in dicta, suggested that the improper purpose clause of Rule 11 can be violated by conduct that is of itself well grounded in fact and law. *Zaldivar*, 780 F.2d 823. This is logical because otherwise the improper purpose prong of the rule becomes superfluous, i.e. subsumed within the fact and law prongs.

for an action does not necessarily include the pleading's subsequent success or failure.[191] A pleading may achieve the goal intended by the drafter yet sanctions may be warranted. For example, a defendant knowing that the plaintiff has improperly asserted diversity jurisdiction withholds the information from the court forstalling the claim's dismissal, because the defendant wishes to delay the eventual dismissal until the statute of limitations precludes a refiling of the claim.[192] The court must dismiss a claim that improperly asserts the jurisdiction of the court and, furthermore, the court cannot extend the statute of limitations to allow the claim to be refiled in state court. However, the federal court can impose sanctions on the party because he wasted judicial resources, by not informing the court of the lack of jurisdiction immediately, and using the processes of the court for his own advantage.

The courts should be vigilant in imposing sanctions on parties who file pleadings that are baseless and achieve a harassment purpose. A party who files successive claims knowing that he cannot recover should be sanctioned for his harassment of the adversary.[193] Bankrupts who forestall foreclosure by filing claims that are meritless are not concerned with the lack of success on their claim, rather they are more concerned with holding on to their property.[194] In short, the justifiability of a pleading relates to whether a favorable result from the pleading will help the party secure success on the merits or will help to achieve the non-merits purpose that the court has determined exists.[195]

Complaint Contains Unfounded Allegations That Have An Impact Upon The Defendant

The courts have long recognized the fact that certain causes of action can have adverse effects on the economic well-being and reputations of a defendant merely by the publicity surrounding the filing of a complaint.[196] Such allegations, even if unsubstantiated, can have a negative impact upon the defendant.[197]

[191] *See Tedeschi*, 579 F. Supp. 657 (whether or not motion to transfer case was successful, sanction should be imposed because plaintiff waited to file his motion until the defendant had expended considerable costs in preparing his motion to dismiss, which was filed on the next day).

[192] *Itel Containers Int'l*, 108 F.R.D. 96.

[193] *See DiSilvestro*, 767 F.2d at 32-33 (filing of claims barred by res judicata evinced a desire to harass because plaintiff knew he could not recover).

[194] Bookkeepers Tax Services, Inc. v. NCR Co., 598 F.Supp. 336, 340 (E.D. Tex. 1984), affirmed on relevant part, 808 F.2d 1119 (5th Cir. 1987) (suit barred by res judicata would nonetheless stem foreclosure during its pendancy and allow bankrupt chance to raise funds to keep property).

[195] *See e.g.*, Davis v. Veslan Enterprises, 765 F.2d 494 (5th Cir. 1985) (motion to remove case to state court even though defendant admitted liability would allow for savings in interest payments while appealing decision); United States v. Allen L. Wright Devel. Corp., 667 F.Supp. 1218 (N.D. Ill. 1987) (filing of frivolous discovery request to stall litigation, create fees for attorney, and tax benefits for party); Wold v. Minerals Engineering Co., 575 F.Supp. 166, 169 (D. Col. 1983) (disqualification of counsel motion caused delay and harassment to adversary, impeding his ability to prepare for trial).

[196] *See supra* note 104; *Sedima, S.P.R.L. v. Imrex Co. Inc.*, 741 F.2d 482, 487 (2d cir. 1984); *rev'd*, 105 S.Ct. 3275 (1975); *see also supra* notes 108, 111.

[197] *See, e.g.*, Spanish International Communications Corp. v. Leibowitz, 608 F.Supp. 178 (S.D. Fla.), *aff'd* 778 F.2d 791 (11th Cir. 1985). In *Leibowitz*, the defendant was the counsel to a group of spanish radio

Furthermore, unlike pleadings that are filed for an improper purpose, the potential harm to the defendant happens regardless of the plaintiff's intention. While in some instances, the plaintiff may use a fraud or libel suit as a means to harass a defendant[198] and thus warranting sanctions for filing a pleading for an improper purpose;[199] a plaintiff filing such a suit need not have a harassment animus yet the defendant would be subject to the same negative effects.

When the nature of the allegation in the complaint, runs the risk of harming the defendant, such as in a claim based on fraud, the plaintiff bears a higher standard of pleading.[200] He must show with more particularity the basis for his allegations. When the plaintiff cannot plead his claim with the requisite particularity, the court should not be content with simply dismissing the claim. While sanctions should be used cautiously and a presumption, against the necessity of imposing sanctions should exist when harm to a defendant occurs merely by instituting a suit the normal reluctance to sanction should be removed. When a suit which can cause harm to the defendant merely by its filing, fails to show that the allegations contained therein had a sufficient level of particularity, then sanctions should be imposed, unless the pleader can present the court with some reasonable justification for his filing the claim. The dismissal at a pre-trial stage of a claim under these circumstances should be viewed as *per se* unreasonable, violating the rule and meriting the imposition of sanctions, unless the plaintiff can offer a sufficient explanation why sanctions should not be imposed.[201]

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broadcasters. He successfully pursued his client's interest in having the FCC review the spanish television network's fitness to hold American broadcast licenses. The television broadcasters sued the attorney as a co-conspirator with his client in an antitrust action. The plaintiff attempted to show that Leibowitz had a personal stake in the success of his client's petition before the FCC and, as such, should be held liable as a principal conspirator and not immune from antitrust liability as merely counsel for a client. The court, however, saw the plaintiff's action as a sham and felt the real purpose of the suit was to discredit attorney Leibowitz before the FCC by tarnishing his reputation as an honest, hard-working communication attorney. Thus, the court dismissed the claim and stated:

> [i]t is apparent that Defendant is representing a client before the FCC and that the pendancy of the instant litigation offers opportunities for the opposition [plaintiff here] to claim a conflict of interest and thereby compel disqualification of defendant Leibowitz as counsel for the SRBA. This smacks of a legal ploy which this court refused to condone.

Id. at 184-185. Under the standard discussed herein, sanctions should have been imposed, however, the court's opinion does not discuss sanctions.

[198] *See supra* note 197. The court in *Leibowitz* made it clear that it felt the plaintiff was consciously using the suit to force the defendant to cease representing his client's interest in ways that were adverse to the plaintiff's interest. *See also* Taylor v. Prudential Bache Securities, 594 F.Supp. 226 (N.D. N.Y. 1984), *aff'd* 751 F.2d 371 (2d Cir. 1985) (plaintiff filed numerous securities fraud cases for purpose of harassing the defendant).

[199] *See supra* notes 181-195 and accompanying text. As discussed in the previous section, sanctions for pleadings filed for an improper purpose are warranted when a pleading is filed for some purpose other than to achieve success on the merits and the pleading causes harassment, delay or increased costs without a justifiable purpose.

[200] *See supra* note 104 and accompanying text.

[201] *See e.g.* Hudson v. Larouche, 579 F. Supp. 623, 629-31 (S.D.N.Y. 1983) (Complaint alleged fraud and RICO claims. Plaintiff did not plead that any fraudulent conduct had occurred, nor did he attempt to show the elements of a RICO claim. Court dismissed the action. Sanctions were not imposed because the court erroneously used the subjective bad faith standard); Rojas v. First Bank National Assoc., 613 F.Supp. 968 (E.D.N.Y. 1985) (Complaint alleged but offered no evidence of fraud or civil RICO claims. Sanctions were not imposed.)

By exposing a plaintiff to sanctions for being unable to plead his claim with particularity, the court creates an incentive for the plaintiff to honestly evaluate his claim before it is filed.[202] Unless the claim can be pleaded with particularity, it should not be filed because the harm to the defendant is irreversible.[203]

However, simply because a complaint which can cause harm to a defendant is dismissed on summary judgment, does not mean a Rule 11 sanction must be imposed. Rather, in dismissing of the case at summary judgment, a violation of the rule should be presumed unless the plaintiff explains why his actions were reasonable. Sanctions would not, thus, be appropriate where the plaintiff has plead his claim with particularity, meeting the requirements of Rule 9(b), but has his claim dismissed.[204] Similarly, when a plaintiff can show that some element of his claim cannot be plead particularly because discovery is the only way to develop the necessary evidence, filing of the claim would be reasonable even if the plaintiff is unable to develop the necessary evidence.[205]

Sanctioning The Pro Se Litigant

Rule 11 applies not only to attorneys but also to *pro se* litigants.[206] *Pro se* litigants are not attorneys,[207] nor should the courts treat them as if they were.

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[202] The drafters of Rule 9(b) hoped to discourage parties from instigating suits and then seeking the evidence to substantiate the allegations. *See supra* note 104. One criticism of Rule 9(b) is that it does not fulfill this purpose. By imposing Rule 11 sanctions as the penalty for violating Rule 9(b), more teeth can be put into the pleading with particularity requirement. *See Lee, supra* note 104, at 109; *Sovern, supra* note 104, at 165.

[203] The clear intent of Rule 9(b) is to eliminate fraud actions in which all the facts are learned through discovery after the complaint is filed. Friedlander v. Nims, 755 F.2d 810, 813n.3 (11th Cir. 1985); *see* Elster v. Alexander, 75 F.R.D. 458, 461 (N.D. Ga. 1977).

[204] *See In re* Ramada Inns Securities Litigation, 550 F.Supp. 1127, 1134 (D. Del. 1982).

[205] *See* Herbert v. Lando, 441 U.S. 153 (1979) (malice can only be developed by discovery of defendant's decision makers); Hutchinson v. Proximire, 443 U.S. Ill. 117n.9 (1979) (summary judgment should be used infrequently in libel actions because actual malice is fact issue). What makes the filing of this type of claim reasonable is that the plaintiff is presenting the court with some evidence of why the claim is valid. For example in libel cases since N.Y. Times v. Sullivan, 376 U.S. 255 (1964), a libel plaintiff must show the defendant had actual malice before he may recover. Actual malice is a fact issue that requires the fact finder to delve into the subjective motivation for a defendant's action. Evidence of such an intent will often be found in the personal writings and thoughts of the defendant. Such information is normally not available until discovery. If a plaintiff can present in his claim the existence of a libelous statement and meet the jurisdictional requirements for bringing a claim in federal court, this is sufficient to satisfy his burden under Rule 11. He should not be sanctioned because the court later finds that actual malice does not exist. However, the obligation under Rule 11 is continuing and a party has a duty to dismiss a suit once he discovers that the action is no longer tenable. *See supra* note 155 and accompanying text.

[206] *See supra* note 32-33 and accompanying text..

[207] Implicit within the standards I have developed is the notion that all attorneys should be judged as if their resources and skills were roughly equal. However, some commentators suggest that all attorneys should not be treated equally. Rather attorneys who are experts in a given area of the law should have a higher duty than general practitioners. *See* Schwarzer, *supra* note 4, at 194. This note rejects that approach and suggests that the court evaluate attorneys against the hypothetical average, "reasonable" attorney. Evaluating conduct based on what the individual attorney knew or should know smacks more of a subjective analysis of the attorney's capabilities and state of mind and runs counter to the objective nature of Rule 11.

The courts have traditionally recognized that *pro se* pleadings are to be evaluated under a more lenient standard.[208] Allowances are made for improper form and for shortcomings in the compliance with the technical requirements of federal court procedure.[209] In determining whether to impose sanctions courts should hold *pro se* parties to lower standards.

However, simply choosing to appear *pro se* does not grant a party the license to abuse the judicial system. Economy of judicial resources,[210] and in the case of *pro se* tax cases, protection of the tax system,[211] are valued and important considerations. A balance must be struck between fostering the goals of Rule 11 — efficiency and elimination of frivolous suits — and the policies supporting liberalized *pro se* pleadings. Therefore, a party appearing *pro se* should be subject to Rule 11 sanctions only if the court finds that a reasonable non-lawyer would not have acted as the *pro se* litigant did. Second, the court should not sanction conduct by a *pro se* litigant, even if it finds it unreasonable conduct, unless the *pro se* party had some notice that his conduct did not conform to Rule 11 and would, if continued, lead to the imposition of sanctions.

Pro se parties as non-lawyers generally do not possess the skill and legal acumen to distinguish complex legal concepts. The same conduct by a lawyer receiving a sanction should not warrant the imposition of sanctions upon a *pro se* litigant, if the reason that the suit is frivolous requires significant understanding of legal concepts and effective legal research.[212] Sanctions should not be assessed when the legal issues invoked by the *pro se* litigant are either complicated or unsettled.[213]

This is not to say that situations do not arise where sanctions are appropriate. The court should sanction *pro se* parties who present claims that all reasonable

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[208] *See infra* note 209.

[209] *See* Haines v. Kerner, 404 U.S. 519, 520 (1972); Hilgeford v. Peoples Bank, 776 F.2d 176, 178 (7th Cir. 1985), *cert. denied* 106 S.Ct. 1644 (1986) (*pro se* briefs held to lower standard); *Nixon,* 615 F.Supp. at 891 ("federal courts have historically exercised great tolerance to ensure that an impartial forum remains available to plaintiffs invoking the jurisdiction of the court without the guidance of trained counsel. *Pro se* motions . . . are held to less stringent pleading requirements . . ."); *see also* McCottrell v. EEOC, 726 F.2d 350, 351 (7th Cir. 1984) (*pro se* briefs will be acceptable so long as the argument alleged is discernable).

[210] *See supra* note 123 and accompanying text. Many courts have recognized that unbridled pro se actions can strain the judicial system to the point where more meritorious and important issues are not able to be heard. Steinrecher v. C.I.R., 712 F.2d 195 (6th Cir. 1983); McKinney v. Regan, 599 F.Supp. 126, 129 (M.D. La. 1984); Williams v. Duckworth, 617 F.Supp. 597, 602 (N.D. Ind. 1985) (frivolous *pro se* suits force significant expenditure of judicial resources).

[211] *See* Leblanc v. Shirey, 598 F.Supp. 747, 754 (E.D. Tex. 1984), *aff'd,* 782 F.2d 1341 (5th Cir. 1986).

[212] *See* Walker T. Martin, Inc. v. Peoples Gas and Light And Coke Co., slip op. No. 85-9728 (N.D. Ill 1986) (failure to state claim based on pro se party's ignorance of law. Therefore, sanctions were not imposed). Most cases that involve tax assessment challenges do not require effective legal research to recognize the lack of merit of the claim, *see e.g. Snyder,* 596 F.Supp. 240 (attack on income tax constitutionality); *Eske,* 601 F.Supp. 142, *Smith,* 108 F.R.D. 44 (tax was violation of 14th amendment); *McKinney v. Regan,* 599 F.Supp. 126 (M.D. Lg. 1984) (constitution requires Sec. of Treasury to answer all court summons and appearing by agent violates constitution).

[213] *See e.g. Paddock,* 587 F.Supp. at 1012 (complex and unsettled area of the legal procedure for challenging tax claim does not warrant sanctions against pro se litigant).

people would understand as being frivolous. Constitutional challenges of the government's ability to collect taxes[214] are examples of cases that all reasonable citizens should recognize as meritless. Also, if a party has previously brought a similar claim in federal court and been unsuccessful, to sue again is an act that is unreasonable for any party to take.[215]

The second part of this test would establish a *pro se* "one-bite rule." Courts should refrain from sanctioning *pro se* litigants absent some objective manifestation that the *pro se* party was aware of the frivolousness of his action. Notice sufficient to allow for the imposition of sanctions can come in many forms.[216] Previously litigating substantially similar claims is one obvious example.[217] Persisting in continuing a claim once the *pro se* party has been informed of its frivolousness is sufficient notice for the imposition of a sanction.[218] Furthermore, if the court determines that the *pro se* party intended the suit to fulfill a harassment purpose, then the court can impose sanctions regardless of any evidence of notice.[219] All citizens should understand that the courts are not the place to harass fellow citizens, but are reserved for the resolution of disputes.

CONCLUSION

The 1983 amendments to Rule 11 of the Federal Rules of Civil Procedure represent the judiciary's most powerful weapon in the war against unnecessary and frivolous trial practice. Practice under the pre-amended Rule 11 allowed for the imposition of sanctions only if the court could determine that a pleading was filed in subjective bad faith. Sanctions were rarely imposed. The judiciary amended Rule 11 specifically to create a weapon to be used to deter unreasonable conduct and to punish parties who waste judicial resources or seek to abuse the courts by instigating harassment suits.

However, it must be remembered that Rule 11 does not repeal the established American rule that each litigant should bear his own cost in bringing the suit, and that a prevailing party does not recover his litigation expenses, including

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[214] *See supra* note 212.

[215] *See Kurkowski*, 819 F.2d at 204; *DiSilvestro*, 767 F.2d 30; *Taylor*, 594 F.Supp. 226; Johnson v. United States, 607 F.Supp. 347 (E.D. Pa. 1985).

[216] Most of the cases involving *pro se* tax litigants are appeals from tax deficiency judgments and have already been adjudicated as meritless under IRS § 6707 which allows the IRS to assess a penalty for the filing of frivolous tax claims. *See* Woida v. United States, 609 F.Supp. 1271 (E.D. Wisc. 1985). Thus, the *pro se* tax challenger is usually well aware of the frivolousness of his claim and is therefore subject to sanctions. Furthermore, in those cases where the *pro se* party evinces an understanding of the legal process, notice of meritless conduct can also be presumed. See *Nixon*, 612 F.Supp. 253.

[217] *See supra* notes 134-35; *see also Kurkowski*, 819 F.2d at 204; Hilgeford v. Peoples Bank, 607 F.Supp. 536 (N.D. Ind. 1985), *aff'd*, 776 F.2d 176 (7th Cir. 1985), Crooker v. United States Marshal Service, 641 F.Supp. 1141 (D.D.C. 1986); Williams v. Duckworth, 617 F.Supp. 597 (N.D. Ind. 1985).

[218] *See* Bigalk v. Federal Land Bank Ass. of Rochester, 107 F.R.D. 210 (D. Minn. 1985).

[219] *See Aune*, 582 F.Supp. 1132 (avoidance of paying income tax as improper purpose); *see also* Tarkowski v. County of Lake, 775 F.2d 173 (7th Cir. 1985).

attorney's fees, as a spoil of victory.[220] Courts, therefore, must resist the desire to invoke Rule 11 too frequently. A fine line must be walked between curtailing the advocates ability to abuse the legal system by filing frivolous lawsuits and chilling the exercise of innovative and creative lawyering.[221] In addition, the intemperate issuance of Rule 11 motions by the courts could make Rule 11 motions pro forma additions to all actions. In this way, Rule 11 would add to the time and expense of a trial and not reduce the costs in bringing claims to court.[222]

Precisely because Rule 11 has been made a more powerful tool in the judiciaries search for ways to control the ever burgeoning amount of cases, a thorough understanding of the type of conduct that will draw sanctions is required. Developing specific standards that trigger the imposition of sanctions based on the nature of an attorney's conduct will serve to better educate the profession on the nature of its duty under Rule 11. Separating the conduct into different categories allows the courts to recognize that certain types of attorney conduct should be sanctioned more frequently than other types of conduct. Courts, however, should be lenient and slower to sanction *pro se* litigants. Similarly, courts should be careful in sanctioning parties who advance legal theories outside established law because innovative legal thinking is at the heart of zealous advocacy. Finally, the courts should not countenance the abuse of the judicial process or forums for harassment or personal vendetta's; nor should the courts stand still and allow innocent defendants to be injured by the commencement of suits that call into question their honesty and integrity.

[220] *See supra* note 48.

[221] *Supra* note 45.

[222] In at least one case a party was assessed sanctions for violating Rule 11 based on the filing of a frivolous Rule 11 motion itself. Coburn Optical Industries, Inc. v. Cilco, Inc., 610 F.Supp. 656, 661 (M.D. N.C. 1985). The action of the court in *Coburn* is a positive step towards avoiding the situation where parties routinely "try their luck" with a Rule 11 motion and are not made to pay for abusing the process and purpose of the rule. *See also Golden Eagle*, 801 F.2d at 1540-42 (excessive use of Rule 11 turns purpose of Rule on its head; rather than saving time and expense, and increase results instead).