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Rule 11 in the Constitutional Case

*Kenneth F. Ripple**
*Gary J. Saalman***

Introduction

The 1983 amendments to the Rules of Civil Procedure arose from concern over the flood of litigation in recent years and its high costs to both litigants and the court system.[1] Although the causes of this litigation explosion and the remedies are both many and complex,[2] the pretrial stage of litigation and the standards governing attorney responsibility were considered major contributors to the problem and prime areas for reform.[3] The drafters of the 1983 amendments sought to streamline the litigation process by increasing judicial oversight and deterring abusive or dilatory tactics by the bar.[4] Some of the most significant changes in the amendments were made to Federal Rule of Civil Procedure 11. Rule 11 requires the signature of the attorney, or if unrepresented, the party, on all papers filed with the court as a certification of the factual and legal merit of the filing formed after prefiling investigation.

The impact of Rule 11 on constitutional litigation has been a subject of great controversy. It has been widely suggested that the Rule will have a decidedly disproportionate impact on this area of law and therefore will

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1 *See* Miller & Culp, *Litigation Costs, Delay Prompted the New Rules of Civil Procedure*, Nat'l L.J., Nov. 28, 1983, at 24, col. 1 ("[N]ew rules . . . reflect the Advisory Committee's concern with the rising number of civil lawsuits in the federal courts as well as the increased cost and delay of contemporary litigation."). Professor Miller served as reporter to the Advisory Committee on Civil Rules of the Judicial Conference for the 1983 amendments.

2 *See* Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1, 3 (1984). Professor Miller attributes the tremendous increase in litigation to "changes in the character and makeup of the legal profession, massive growth in the number of substantive rights recognized by American law, some unfortunate side effects of policies and procedures embodied in our extremely permissive and forgiving procedural system, and the unique economics of the American legal system." Miller rejects the appointment of more judges or curtailment of substantive rights as possible approaches for reform but argues for an improvement in systemic efficiency through upgrading attorney behavior, increased judicial management, narrowing the scope of discovery and the wider use of sanctions.

3 *See* Miller & Culp, *supra* note 1, at 24, col. 3 ("Fundamental changes are needed. The key is shortening the time frame between the institution [of claims] and pre-trial determination. Concerns about the trial are misplaced since over 90 percent of federal cases terminate prior to trial. . . . There is a widespread feeling that lawyer behavior in litigation should be more responsible and professional.").

4 FED. R. CIV. P. 11 advisory committee's note ("Greater attention by the district courts to pleading and motion abuses and the imposition of sanctions when appropriate, should discourage dilatory or abusive tactics and help streamline the litigation process by lessening frivolous claims or defenses.") [hereinafter Advisory Committee's Note].

chill ardent advocacy with respect to constitutional rights.[5] It is not the purpose of this paper to assess whether Rule 11 has had that effect. Indeed, there are some indications that it is too early to measure the impact that Rule 11 has had on any particular area of law.[6] Nevertheless, the concern that has been expressed has been thoughtful and measured in tone and requires that we examine thoroughly the possibility of such an undesirable impact on serious and thoughtful efforts in constitutional litigation that might precipitate such a disproportionate impact and attempt to avoid such pitfalls. The Rule was not intended to have such an effect.[7] Rule 11 was meant to civilize the litigation process, not to kill it. Rule 11 was meant to be an even-handed device aimed at curbing litigation abuses, nothing more.

I. The Development of Rule 11

Prior to amendment in 1983, Federal Rule of Civil Procedure 11 was used only infrequently by the courts.[8] By contrast, in the four and one-half years since the amendment took effect, over 1000 district and appellate opinions have discussed the Rule and the propriety of imposing sanctions.[9] The flurry of activity indicates that the drafters of the amend-

5 *See* Cochran, *Recent Developments In Response to Rule 11 Problems*, 9 N.L.A.D.A. Cornerstone, at 1-2, col. 1 (Nov./Dec. 1987) (Center for Constitutional Rights to undertake empirical study concerning the implementation and effect of Rule 11 on civil rights and other public interest litigants and provide the vehicle for necessary change); G. Hazard, E. Larson, G. Vairo & G. Wright, The Impact of Federal Rules of Civil Procedure 11, 37 and 68 on Civil Rights Practitioners 35 (NAACP Legal Defense and Educational Fund, Inc., Sept. 28, 1985) (unpublished manuscript) ("Just as the critics feared, a disproportionate number of cases involving inadequate legal basis that have resulted in Rule 11 sanctions have been civil rights and governmental litigation."). *See also* Nelken, *Sanctions Under Amended Rule 11 — Some "Chilling" Problems in the Struggle Between Compensation & Punishment*, 74 GEO. L.J. 1313, 1327, 1340 (1986) ("Although civil rights cases accounted for only 7.6% of the civil filings between 1983 and 1985, 22.3% of the rule 11 cases involve civil rights claims.") ("The disproportionate number of civil rights cases in which rule 11 sanctions have been considered since August 1, 1983 must give pause to the civil rights bar."); S. KASSIN, AN EMPIRICAL STUDY OF RULE 11 SANCTIONS 38 (Federal Judicial Center 1985) (suggesting judges who frequently sanction may be more willing to sanction civil rights cases than other types of cases).

6 The concerns of a disproportionate effect on civil rights cases are based on early statistical studies of district court opinions in the first two years of the amendments. Since then the number of cases has more than quadrupled, *see infra* note 9, and the appellate courts have clarified standards under the Rule. "The verdict is not yet in" on the Rule 11 experience. Grosberg, *Rethinking Rule 11*, 32 VILL. L. REV. 575, 689 (1987).

For recent commentary on Rule 11, *see id.* at 630, 653-79 (arguing Rule 11 is being used to evaluate lawyer competence and alternatives may be better suited to perform this function); Levin & Sobel, *Achieving Balance in the Developing Law of Sanctions*, 36 CATH. U.L. REV. 587, 589 (1987) (arguing that while the concerns are not altogether groundless, courts have taken a balanced approach to the interpretation and application of the rule); Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013, 1020 (1988) (arguing for a shift of focus from whether a claim is factually or legally frivolous on its merits to whether the attorney properly conducted a prefiling inquiry into the facts and law).

7 The amendments were intended to address the increasing costs of litigation, particularly in the pre-trial stage, and to curb frivolous suits and abusive and dilatory tactics by the bar. *See supra* notes 1-4 and accompanying text. Neither the preliminary drafts, the public hearings, the Advisory Committee's Note, the transmittal letter to the Judicial Conference nor the subsequent writings of the reporter or other commentators give any indication that the rule was intended to impact a particular area of the law.

8 *See infra* note 24.

9 Bates, *The Rule 11 Debate, 4 Years Later*, Nat'l L.J., Oct. 12, 1987, at 3, col. 1. As of July 1, 1987, one study found 564 reported decisions in the district courts and courts of appeal. *See* G. Vairo, Report to the Advisory Committee on Amended Rule 11 of the Federal Rules of Civil Procedure 5 (Sept. 1987) (unpublished manuscript). In the first two years after the 1983 amendments, sanctions

ments have succeeded in achieving two of their primary goals — making the trial bar aware of their duty to behave responsibly in litigation[10] and reducing the reluctance of the courts to impose sanctions.[11] While many would agree former Rule 11 was ineffective in deterring abuse of the judicial process and the 1983 amendments have brought much needed reform, the amended Rule in practice is causing some concern. Many commentators and practitioners are urging cautious enforcement citing the Rule's potential to chill vigorous advocacy,[12] hamper the development of the law,[13] spawn satellite litigation,[14] and Rule 11's use as a trial strategy or judicial strong-arm.[15]

A. *Former Rule 11: The Need for Reform*

Courts have traditionally had the inherent equitable power to sanction a bad faith litigant by various means, including the award of attorneys' fees.[16] Congress has authorized awards of attorneys' fees in various statutes such as where a litigant "multiplies the proceedings . . . unreasonably and vexatiously."[17] The Federal Rules of Civil Procedure

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have been considered in approximately 200 cases. Nelken, *supra* note 5, at 1314. The large percentage of motions for sanctions have been made in the last two years indicating Rule 11 has picked up considerable momentum since its amendment.

10 Miller & Culp, *supra* note 1, at 24, col. 4 ("[T]he revision of Rules 7 and 11 is as much as a psychological exercise to get the attention of the bench and the bar as it is to make a significant change in their content.").

11 Advisory Committee's Note ("The new language is intended to reduce the reluctance of courts to impose sanctions . . . by emphasizing the responsibilities of the attorney and reenforcing those obligations by the imposition of sanctions.").

12 *See, e.g.*, ABA SECTION OF LITIGATION, SANCTIONS: RULE 11 AND OTHER POWERS 2 (C. Shaffer, Jr., G. Joseph, P. Sandler 2d ed. 1988); Nelken, *supra* note 5, at 1340; Snyder, *The Chill of Rule 11*, LITIGATION, Winter 1985, at 16, 55; Note, *Rule 11 Sanctions: Toward Judicial Restraint*, 26 WASHBURN L.J. 337, 381 (1987).

13 *See, e.g.*, Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073, 1085-86 (7th Cir. 1987) (Cudahay, J., dissenting) ("Due Process, unfortunately, is an area where creativity and frivolity sometimes threaten to merge; I would be more restrained than my brethren in handing out sanctions for civil rights claims. For the chilling effect of today's decisions will reach as tellingly to the most meritorious of such claims as to the least."), *cert. denied*, 108 S. Ct. 1101 (1988). *See also* Bates, *supra* note 9, at 42 (Several "have raised the possibility the rule is discouraging novel arguments for the extension, modifications or reversal of existing law because of fears a judge will declare the position a restatement of rejected [legal] theory."); Note, *Plausible Pleadings: Developing Standards For Rule 11 Sanctions*, 100 HARV. L. REV. 630, 651-52 (1987) (Some of today's most treasured rights were once considered unthinkable frivolity.).

14 *See, e.g.*, ABA SECTION OF LITIGATION, *supra* note 12, at 2, 16; Bates, *supra* note 9, at 3; Grosberg, *supra* note 6, at 647-53. *See also* Weiss, *A Practitioner's Commentary on the Actual Use of Amended Rule 11*, 54 FORDHAM L. REV. 23, 24 (1985) ("What Rule 11 does is inject in an atmosphere that is already a hostile one, an additional adversarial proceeding that will only exacerbate that hostility and reduce the possibilities for settlement."); Hall, *Unconscionable Delays, Discovery and Rule 11 Abuses*, 108 F.R.D. 486, 488-89 (1985) ("[T]he 1983 amendments have been so successful that they have pushed the pendulum too far to the side of encouraging sanctions. Some courts have already found it necessary to impose Rule 11 sanctions on parties who file frivolous Rule 11 motions.").

15 *See, e.g.*, Chrein, *The Actual Operation of Amended Rule 11*, 54 FORDHAM L. REV. 13, 18 (1985) ("Sanctions will be more likely imposed in situations where a relatively powerful party will use its economic leverage to oppress an economically disadvantaged opponent."); Note, *supra* note 13, at 650 n.101 ("Erratic application of Rule 11 threatens to convert it from a constructive principle for case load management into a random instrument of judicial intimidation.").

16 Roadway Express v. Piper, Inc., 447 U.S. 752, 764-67 (1980); Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 258-59 (1975).

17 28 U.S.C. § 1927 (1982). For a list of statutory provisions providing for an award of attorneys' fees, see *Alyeska*, 421 U.S. at 260 n.33.

include several provisions for attorneys' fees, namely Rules 11, 16, 26 and 37.[18] Rule 11 traces its historical roots to Equity Rule 24 of the Equity Rules of 1842 and 1912.[19] Justice Joseph Story in his 1838 treatise on equity pleading read into the signature the requirement of an affirmation or certification that there was "good ground" to support the pleading.[20] The "good ground" standard was adopted by the Equity Rules and the language carried over into former Rule 11.[21]

Prior to its amendment in 1983, Rule 11 had remained unchanged since its promulgation in 1938. The Rule provided that all pleadings were to be signed by an attorney of record, or, if unrepresented, by the party. An attorney's signature constituted a certification by him that he had "read the pleading; that to the best of his knowledge, information and belief there was good ground to support it; and that it was not interposed for delay."[22] Although parties not represented by an attorney were required to sign pleadings, the certification did not apply to them. The Rule explicitly referred only to pleadings but the certification was required of all motions and papers through incorporation by reference from Rule 7(b)(2).[23]

Sanctions under former Rule 11 were considered by the courts only infrequently in its 45 years of existence.[24] The Rule's lack of use has been attributed to its "soft standards" and "meaningless sanctions."[25] One of the few courts which addressed the Rule interpreted its vague "good grounds" standard to require subjective bad faith of the litigant.[26] Subjective bad faith was difficult to prove, and, even if the standard was

18 *See* R. RODES, K. RIPPLE & C. MOONEY, SANCTIONS IMPOSABLE FOR VIOLATIONS OF THE FEDERAL RULES OF CIVIL PROCEDURE (Federal Judicial Center 1981). In addition to Rule 11, Rule 16(f) provides for sanctions for failure to obey pretrial orders or to attend or prepare for pretrial conferences. Rule 26(b)(4) provides for an award of fees for discovery of an opposing party's expert under certain conditions. Rule 37 allows for an award of attorney's fees for failure to make or cooperate in discovery orders of the court. Rule 11 "does not repeal or modify existing authority of federal courts to deal with abuses of counsel under 28 U.S.C. § 1927 . . . Nor is it properly used to sanction the inappropriate filing of papers where other rules more directly apply." Zaldivar v. City of Los Angeles, 780 F.2d 823, 830 (9th Cir. 1986).

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

20 *Id.* at 9-10.

21 Fed. R. Civ. P. 11 (1982).

22 *Id.*

23 FED. R. CIV. P. 7(b)(2) ("The rules applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by these rules."); 2A J. Moore & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 11.02 (2d ed. 1987); 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1332 n.8 (1969).

24 Risinger, *supra* note 19, at 34-35. Risinger found only 19 genuine adversary Rule 11 motions between 1938 and 1976. The first did not occur before 1950, and nearly half of those came after 1971. It is estimated approximately 40 cases were decided between 1975 and 1983. Nelken, *supra* note 5, at 1315 n.18 (citing 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1332-34 (Supp. 1983)).

25 Miller & Culp, *supra* note 1, at 34, col. 1.

26 Nemeroff v. Abelson, 620 F.2d 339, 350 (2d Cir. 1980); *see also* 5 C. WRIGHT & A. MILLER, *supra* note 23, § 1333, at 500 (noting that questions center on the attorney's good faith). The deletion of "willful violation" and the addition of the phrase "formed after reasonable inquiry" after the clause "the attorney was certifying . . . to the best of his information, knowledge and belief" was recognized by the courts as a change from the subjective to an objective standard. *See, e.g.*, Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 870 (5th Cir. 1988) (en banc); Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 253 (2d Cir. 1985), *cert. denied*, 108 S. Ct. 269 (1987).

met, sanctions were discretionary.[27] For a court to find a violation in the absence of direct evidence or admission of bad faith, the attorney's position had to be so untenable that the court could infer subjective bad faith. The Rule lacked any explicit duty to investigate the factual and legal merits of the position asserted and any objective measure of that position.[28] Rather, the Rule as interpreted required only that the attorney had a moral obligation to satisfy himself of the factual and legal merit of his paper.[29] The only explicit sanction provided by the Rule was to strike a pleading as "sham and false."[30] Courts were generally reluctant to strike a pleading since they preferred to reach the merits of the case and striking was an ineffective penalty punishing the client for attorney misconduct.[31] The primary purpose of the Rule was considered to be that of securing lawyer honesty.[32] For a willful violation, the Rule allowed the court to impose "an appropriate disciplinary sanction." Criticism of the Rule focused on its ambiguous and narrowly defined standards and its lack of explicit and available sanctions.[33] The Rule had "little effect on actual conduct."[34]

Widespread concern over the increase in the amount and cost of litigation in the last decade spurred by the number of frivolous lawsuits, groundless defenses, and abusive and dilatory tactics by lawyers, resulted in reform in the 1983 amendments.[35] The drafters intended to make lawyers more accountable for their actions, particularly in the pre-trial stage, by giving explicit authority to award money sanctions in Rules 11, 16, and 26 and by increasing judicial oversight of the litigation process. Rule 11 as amended parts company with traditional limitations on litigation sanctions by requiring objectively affirmative conduct and mandatory sanctions.

B. *Rule 11 As Amended*

With the intention of reducing courts' reluctance to impose sanctions and increasing the circumstances under which sanctions would be triggered,[36] the amendments provide several key changes. First, the

27 Miller & Culp, *supra* note 1, at 24, col. 4 ("Problems abounded because the willfulness requirement necessitated an examination of the lawyer's motivation and intent.").

28 Although the rule made no mention of a duty of inquiry, a few courts read into the rule a requirement of a prefiling inquiry. *See, e.g.*, Rhinehart v. Stauffer, 638 F.2d 1169, 1171 (9th Cir. 1980); United States v. Price, 577 F. Supp. 1103, 1108 (D.N.J. 1983); Kinee v. Abraham Lincoln Fed. Sav. & Loan Ass'n, 365 F. Supp. 975, 982-83 (E.D. Pa. 1973).

29 5 C. WRIGHT & A. MILLER, *supra* note 23, § 1333, at 499.

30 Fed. R. Civ. P. 11 (1982).

31 *See, e.g.*, Murchinson v. Kirby, 27 F.R.D. 14, 19 (S.D.N.Y. 1982) (A pleading should be stricken only when it appears "beyond peradventure" that it is a sham and false and that its allegations are "devoid of factual basis."). Courts that were able to find a lack of good grounds to support the action, before striking, would give the party an opportunity to amend or correct the deficiency. *See, e.g.*, Bertucelli v. Carreras, 467 F.2d 214, 215-16 (9th Cir. 1972).

32 Risinger, *supra* note 19, at 14. *See also* 5 C. WRIGHT & A. MILLER, *supra* note 23, § 1333, at 500 ("For those lawyers who need reminding, this rule is intended to minimize tendencies toward untruthfulness in pressing a client's suit.").

33 Miller & Culp, *supra* note 1, at 34, col. 4.

34 5 C. WRIGHT & A. MILLER, *supra* note 23, § 1333, at 500.

35 *See supra* notes 1-4 and accompanying text.

36 *Id.*

Rule requires an objectively reasonable prefiling inquiry.[37] Second, the Rule requires objectively reasonable judgment based on the inquiry that the document is well-grounded in fact and warranted by existing law or a good faith argument for the extension, modification or reversal of existing law.[38] Third, and possibly independent of the former two,[39] the paper must not be interposed for "any improper purpose" including delay, harassment or increase in the costs of litigation. Upon a finding of a violation, sanctions are mandatory[40] though the judge in his discretion determines what sanction is appropriate.[41] Explicit authority is given for an award of attorney's fees and *sua sponte* consideration.[42] Unlike former Rule 11, these duties apply to pro se litigants when they sign papers as well as to attorneys.[43]

Interpretative issues raised by the courts have included the scope of the prefiling inquiry,[44] whether a continuing obligation exists under Rule 11,[45] the extent to which district judges must make findings and give explanations for sanction decisions,[46] and the requirements of due process.[47] Rule 11 has been held not to apply to a complaint filed in state court and removed to federal court unless it was subsequently amended in the federal forum.[48] Similarly, it has been held not to apply to an

37 Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 873-74 (5th Cir. 1988) (en banc); Cabell v. Petty, 810 F.2d 463, 466 (4th Cir. 1987); Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073, 1083 (7th Cir. 1987), *cert. denied*, 108 S. Ct. 1101 (1988); Donaldson v. Clark, 819 F.2d 1551, 1556 (11th Cir. 1987) (en banc); Albright v. Upjohn, 788 F.2d 1217, 1221 (6th Cir. 1986); Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531, 1536 (9th Cir. 1986), *dissent from denial of reh'g en banc*, 809 F.2d 584 (9th Cir. 1987); Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 253 (2d Cir. 1985), *cert. denied*, 108 S. Ct. 269 (1987); Eavenson, Auchmuty & Greenwald v. Holtzman, 775 F.2d 535, 540 (3d Cir. 1985); Westmoreland v. CBS, Inc., 770 F.2d 1168, 1173-75 (D.C. Cir. 1985).

38 Zaldivar v. City of Los Angeles, 780 F.2d 823, 831 (9th Cir. 1986) (The "conclusion drawn from the research undertaken must itself be defensible. Extended research alone will not save a claim that is without legal or factual merit from the penalty of sanctions."). *But cf.* Schwarzer, *supra* note 6, at 1025 (focus should shift from assessing the factual or legal merit toward assessing the adequacy of the prefiling inquiry); *Golden Eagle*, 801 F.2d at 1542 (sanctions should not be imposed on a lawyer who concluded in his research the adverse precedent was dissimilar).

39 Courts have differed as to whether a nonfrivolous pleading may be sanctioned if brought for an improper purpose. *See infra* note 107 and accompanying text.

40 FED. R. CIV. P. 11 ("the court . . . *shall impose* . . . an appropriate sanction") (emphasis added). For cases remanded for a mandatory imposition of sanctions, *see, e.g.*, *Albright*, 768 F.2d at 1222; *Westmoreland*, 770 F.2d at 1175. For cases remanded for more specific findings upon a suspected violation of the rule, *see, e.g.*, *Szabo Food*, 823 F.2d at 1075; *Thomas*, 866 F.2d at 884-85.

41 *See, e.g.*, *Thomas*, 836 F.2d at 878 ("[T]he district court retains broad discretion in determining the 'appropriate' sanction under the Rule.").

42 FED. R. CIV. P. 11 ("[T]he court, upon motion or upon its own initiative . . . shall impose . . . an appropriate sanction, which may include . . . a reasonable attorney's fee.").

43 Advisory Committee's Note. *See, e.g.*, Shrock v. Altru, 810 F.2d 658, 661 (7th Cir. 1987); Doyle v. United States, 817 F.2d 1235, 1238 (5th Cir.), *cert. denied*, 108 S. Ct. 159 (1987); Cotner v. Hopkins, 795 F.2d 900, 902 (10th Cir. 1986); Cheek v. Doe, 110 F.R.D. 420, 422 (N.D. Ill. 1986), *cert. denied*, 108 S. Ct. 349 (1987); Robinson v. Moses, 644 F. Supp. 975, 982 (N.D. Ind. 1986).

44 *See infra* notes 52-98 and accompanying text.

45 *See infra* notes 99-102 and accompanying text.

46 *See infra* note 117 and accompanying text.

47 *See infra* notes 142-44 and accompanying text.

48 *See* Stiefvater Real Estate v. Hinsdale, 812 F.2d 805, 809 (2d Cir. 1987); Columbus, Cuneo, Cabrini Medical Center v. Holiday Inn, 111 F.R.D. 444, 447 (N.D. Ill. 1986); Kendrick v. Zanides 609 F. Supp. 1162, 1170 (N.D. Cal. 1985). *See also* Foval v. First Nat'l Bank of Commerce in New Orleans, 841 F.2d 126, 130 (5th Cir. 1988) (sanctions may be appropriate if counsel refuses to modify the pleadings to conform to Rule 11 after the deficiency is brought to his or her attention).

attorney who has appeared in the action but not signed any of the papers.[49]

In sharp contrast with its predecessor, Rule 11 has not suffered from inactivity.[50] The ability to impose sanctions, monetary or otherwise, for failure of an affirmative duty is an immensely powerful tool capable of both great use and abuse. Rule 11 standards deserve careful articulation and consideration in each case where sought.[51]

1. Reasonable Inquiry and Warranty of Factual Merit

Rule 11 now provides that a signature on a filing constitutes a certification by the attorney or party that the signer has read the paper and "that to the best of the signer's knowledge, information and belief formed after reasonable inquiry it is well grounded in fact . . . ."[52] The Advisory Committee's Note states the standard for determining a reasonable inquiry is one of "reasonableness under the circumstances," including such factors as how much time was available to the signer; whether the signer had to rely on a client for information; and whether the signer relied on forwarding counsel.[53] After four years, the courts have provided some indication of the scope of the prefiling inquiry and the range of appropriate circumstances. Most courts agree that, at a minimum, the attorney must conduct a thorough personal interview with his client.[54] The attorney may also be required to interview key witnesses and review available, pertinent documentation.[55] Whether an attorney must go be-

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49 Teamsters Local Union No. 430 v. Cement Express, Inc., 841 F.2d 66, 69 (3d Cir. 1988); Robinson v. National Cash Register Co., 808 F.2d 1119, 1128-29 (5th Cir. 1987). However, if the circuit imposes a continuing obligation to reassess the factual and legal merit of the position, it is likely an attorney who continues to prosecute a frivolous suit will be held liable for sanctions though he has not signed the claim or filed additional papers in the federal court litigation. *See infra* notes 99-102 and accompanying text.

50 *See supra* note 9.

51 "Rule 11 is a powerful tool for judges in their roles as judicial overseers and attorneys in their battles against fellow practitioners who do not comply with their obligations under the rule. Invoked properly, Rule 11 can confer great benefits on all concerned. If abused, Rule 11 may chill attorneys' enthusiasm and stifle the creativity of litigants in pursuing novel factual or legal theories." Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 885 (5th Cir. 1988) (en banc).

52 FED. R. CIV. P. 11. The 1987 amendments to Rule 11 were merely technical.

53 Advisory Committee's Note. *See also Thomas*, 836 F.2d at 875 (quoting these factors and listing others to consider); Century Prods. v. Sutter, 837 F.2d 247, 250-51 (6th Cir. 1988); Brown v. Federation of State Medical Bds. of the United States, 830 F.2d 1429, 1435 (7th Cir. 1987); Donaldson v. Clark, 819 F.2d 1551, 1556 (11th Cir. 1987) (en banc).

54 *See* ABA SECTION OF LITIGATION, *supra* note 12, at 25 (citing Unioil, Inc., v. E.F. Hutton & Co., 809 F.2d 548, 557-58 (9th Cir. 1986), *cert. denied*, 108 S. Ct. 85 (1987)). *See also* Kamen v. American Tel. & Tel. Co. 791 F.2d 1006, 1012-14 (2d Cir. 1986) (reliance on client's assertion that the employer received federal financial assistance was sufficient investigation in the circumstances).

55 *See* ABA SECTION OF LITIGATION, *supra* note 12, at 25 (citing Fuji Photo Film U.S.A., Inc. v. Integrated Resources, Inc., 113 F.R.D. 664, 668 (S.D.N.Y. 1986) and Florida Monument Builders v. All Faiths Memorial Gardens, 605 F. Supp. 1324 (S.D. Fla. 1984)). *See also* Shrock v. Altru Nurses Registry, 810 F.2d 658, 661-62 (7th Cir. 1987) (sanctions imposed for failure to investigate beyond client's personal knowledge in employment discrimination suit); Nassau-Suffolk Ice Cream, Inc. v. Integrated Resources, 114 F.R.D. 684, 689-93 (S.D.N.Y. 1987) (lack of investigation beyond client's personal knowledge in RICO, antitrust, and fraud claims); O'Rourke v. Norman, 640 F. Supp. 1451, 1464-65 (W.D. Okla. 1986) (relied on client with no other investigation); Duncan v. WLJA TV, 106 F.R.D. 4, 6 (D.D.C. 1984) (failure to investigate the qualifications of a witness); Wagner v. Allied Chem. Corp., 623 F. Supp. 1407, 1411-12 (D. Md. 1985) (consultation with expert, interview with client and oral opinion from doctor was sufficient investigation).

yond a client interview will depend upon such factors as: (1) the availability of corroborating sources; (2) the cost effectiveness and time needed to obtain and review such sources; (3) the evidentiary strength of the client's assertions (actual knowledge v. inadmissible hearsay); and, (4) the attorney's confidence in his client's veracity and length of relationship with the client.[56] Whether the facts are available without discovery should be considered because some evidence can only be obtained from the adverse party in the course of discovery.[57] Still other factors considered by the courts in defining the scope include the foreseeable cost of the other party in opposing the claim,[58] the experience of counsel and the complexity of the claim.[59] Although reliance on forwarding counsel or another member of the bar is a factor for the court to consider, the signing attorney remains responsible for performing an adequate factual and legal inquiry.[60]

Although the amount of inquiry required may be fact-specific depending upon the circumstances of the individual case, it is clear courts have adopted a standard of objective reasonableness.[61] Subjective bad faith is no longer a prerequisite to finding a violation.[62] Filing a claim on a mere hunch of the client or rumor will not suffice nor will exaggerated or unsupported factual allegations be permitted.[63] If a "modicum" of inquiry would have informed the attorney his paper had no basis in fact, sanctions are appropriate.[64] Practitioners must be prepared to "stop, think and investigate"[65] before filing their paper.

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56 Rothschild, Fenton & Swanson, *Rule 11: Stop, Think, and Investigate*, LITIGATION, Winter 1985 at 13, 14.

57 ABA SECTION OF LITIGATION, *supra* note 12, at 25-26 (citing Mohammed v. Union Carbide Corp., 606 F. Supp. 252, 261-62 (E.D. Mich. 1985) and *Florida Monument*, 605 F. Supp. at 1326). "If the facts supporting the pleading are available without discovery, greater factual certainty is required. Even if the facts are available only through discovery, [the attorney] must still evaluate the evidence from the client and other available sources and make a reasonable assessment of the evidence likely to be available from your adversary during discovery." *Id. See also* Thomas v. Capital Sec. Serv., 836 F.2d 866, 875 (1988) (en banc) (noting discovery as a factor to consider in the scope of the prefiling inquiry); Kamen v. American Tel. & Tel. Co., 791 F.2d 1006 (2d Cir. 1986) (sanctions improper where information largely in the control of the defendants), *cert. denied*, 107 S. Ct. 1373 (1987); New York v. Shore Realty Corp., 648 F. Supp. 255, 267-68 (E.D.N.Y. 1986) (sanctions are not properly imposed when a complicated discovery process would be necessary to determine accuracy of allegations).

58 Unioil, Inc. v. E.F. Hutton & Co., 809 F.2d 548, 557 (9th Cir. 1986), *cert. denied*, 108 S. Ct. 85 (1987).

59 *See id.* at 557 (firm represented itself as experienced in complex litigation); Brown v. Federation of State Medical Bds., 830 F.2d 1429, 1435 (7th Cir. 1987); Oliveri v. Thompson, 803 F.2d 1265, 1275-80 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 1373 (1987).

60 *Unioil*, 809 F.2d at 558; Pravic v. United States Indus. Clearing, 109 F.R.D. 620, 623 (E.D. Mich. 1986); Coburn Optical Indus., Inc. v. Cilco, Inc., 610 F. Supp. 656, 660 (M.D.N.C. 1985).

61 *See supra* note 37.

62 Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 253-54 (2d Cir. 1985), *cert. denied*, 108 S. Ct. 269 (1987); Zaldivar v. City of Los Angeles, 780 F.2d 823, 829 (9th Cir. 1986); Rodgers v. Lincoln Towing Serv., 771 F.2d 194, 205 (7th Cir. 1985).

63 Viola Sportswear, Inc. v. Mimun, 574 F. Supp. 619 (E.D.N.Y. 1983); *Unioil*, 809 F.2d at 548.

64 Foster v. Michelin Tire Corp., 108 F.R.D. 412, 415 (C.D. Ill. 1985).

65 Miller & Culp, *supra* note 1, at 34. The term has been adopted by courts and commentators alike. *See, e.g.*, Note, *Reasonable Inquiry Under Rule 11 — Is the Stop, Look and Investigate Requirement a Litigant's Roadblock?*, 18 IND. L. REV. 751 (1985); Weir v. Lehman Newspapers, 105 F.R.D. 574, 576 (D. Colo. 1985); Duncan v. WLJA-TV, Inc., 106 F.R.D. 4, 5-6 (D.D.C. 1984).

One concern expressed with regard to Rule 11's "reasonable inquiry" standard is its interrelationships with other Rules' quantum of evidence and its consistency with the policies of the Rules as a whole. A broad interpretation of the standard by the courts might emasculate the liberal pleading and discovery regime of the Federal Rules.[66] No intention to change the specificity requirements under Rule 8[67] is evident but "as a practical matter lawyers may perceive that greater specificity in pleading is required."[68] Several courts have been sensitive to this concern noting Rule 11 does not change the pleading requirement of Rule 8.[69] The lawyer need not prove his case in his pleadings rather he need only allege those facts which he may be able to prove and have an objective basis for believing so. An attorney need not be prepared to defeat a Rule 12(b)(6) motion for dismissal or a Rule 56 motion for summary judgment to demonstrate the burden of "reasonable inquiry" and warrant under Rule 11.[70] Failure to withstand dismissal does not mean a factual or legal position was objectively unreasonable to assert under Rule 11 and sanctions should not automatically flow therefrom.

2. Reasonable Inquiry and Warrant of Legal Merit

Rule 11 places an obligation on lawyers to file only those papers which are warranted by existing law or supported by a plausible argument for a change, modification or extension of the law. Failure to make an objectively reasonable prefiling inquiry or assertion of an objectively unreasonable legal position, even after reasonable inquiry, violates the standard.[71] Sanctions have been imposed for: (1) insufficiently prepared and researched briefs and complaints;[72] (2) misstatements or omissions

66 *See* Note, *supra* note 13; Note, *supra* note 12, at 359.

67 Rule 8(a)(2) requires a "short and plain statement of the claim showing that the pleader is entitled to relief."

68 Nelken, *supra* note 5, at 1342.

69 Donaldson v. Clark, 819 F.2d 1551, 1561 (11th Cir. 1986) (en banc) ("Rule 11 does not change the liberal notice pleading regime of federal courts and [it does not] require that pleadings allege all material facts or the exact articulation of legal theories. . . ."); Foster v. Michelin Tire Corp. 108 F.R.D. 412, 415 (C.D. Ill. 1985) (Rule 11 should not be construed as to abrogate the liberal threshold standard for initiating litigation); Computer-Place v. Hewlett-Packard Co., 607 F. Supp. 822, 832 n.11 (N.D. Cal. 1984) (Rule 11 does not "increase the requirements of Rule 8"), *aff'd*, 779 F.2d 56 (9th Cir. 1985).

70 Zaldivar v. City of Los Angeles, 780 F.2d 823, 830 (9th Cir. 1986) ("granting of a motion to dismiss the complaint for failure to state a claim, or the granting of a summary judgment against the pleader is not dispositive of the issue of sanctions"); Oliveri v. Thompson, 803 F.2d 1265, 1279 (2d Cir. 1986) (citing Kamen v. American Tel. & Tel. Co., 791 F.2d 1006, 1011-12 (2d Cir. 1986) ("We hold . . . neither Rule 56 nor Rule 12(b) was in anyway modified by the adoption of the 1983 amendments to Rule 11.")), *cert. denied*, 107 S. Ct. 1373 (1987).

71 *See supra* notes 37-38 and accompanying text.

72 *See* Brown v. Federation of State Medical Bds. of United States, 830 F.2d 1429, 1435 (7th Cir. 1987) (finding an age discrimination and civil rights claim unsupported by existing law); Norris v. Grosvenor Mktg. Ltd., 803 F.2d 1281, 1288 (2d Cir. 1986) (failed to determine action was time barred); Johnson v. Kut Kwick Corp., 620 F. Supp. 748, 749 (S.D. Ga. 1984) (sanctions imposed where plaintiff erroneously cited the wrong statute for his cause of action and did not amend until six weeks later when defendant moved to dismiss). *See also In re* TCI, Ltd., 769 F.2d 441, 447 (7th Cir. 1985) ("Rule 11 now requires an attorney to do research before filing such a complaint. . . . An attorney who wants to strike off on a new path in the law must make an effort to determine the nature of the principles he is applying (or challenging); he may not impose the expense of doing this on his adversaries. . . ."); Whittington v. Ohio River Co., 115 F.R.D. 201, 207-08 (E.D. Ky. 1987) ("[I]f a

of adverse precedent,[73] and, (3) assertion of legal grounds rejected by longstanding precedent.[74] Courts generally have been sensitive to those attorneys who in good faith assert a novel cause of action[75] despite active enforcement of the Rule in patently unmeritorious cases.[76]

As under factual inquiry, the standard is one of "reasonableness under the circumstances." Reasonableness of the prefiling inquiry into the law will depend on the same types of circumstances as under the factual warrant. Ultimately, the adequacy of the facts depends on the legal theory asserted and likewise, the viability of the legal theory depends on what facts are known or can be discovered.[77] The scope of the prefiling inquiry into the law and the judgment of the merit of a position will be measured against an objective standard: what a "competent attorney" would have done in like circumstances. "[S]anctions shall be imposed . . . where after reasonable inquiry, a competent attorney could not form a reasonable belief that the pleading is well grounded."[78] Complexity of the claim, the experience of counsel, and the unsettled nature of the law are among the factors taken into consideration by the courts.[79] That a

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recent controlling court decision is fatal to claim, sanctions will be imposed . . . if a reasonably competent attorney would have found it. . . . [The files should contain] at least a skeleton memo outlining concretely . . . the legal basis for every claim or defense applying law to facts.").

73 Thornton v. Wahl, 787 F.2d 1151, 1154 (7th Cir.) (imposition of double costs for misstatement of state law), *cert. denied*, 107 S. Ct. 181 (1986); Jorgenson v. Volusia County, 846 F.2d 1350, 1352 (11th Cir. 1988) (failure to cite and discuss two "clearly relevant" cases). *But cf.* Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531, 1541-42 (9th Cir. 1986) (failure to cite adverse precedent excused since attorney could reasonably believe the precedent was dissimilar), *dissent from denial of reh'g en banc*, 809 F.2d 584 (9th Cir. 1987).

74 *See, e.g.*, Langham-Hill Petroleum Inc. v. Southern Fuels Co., 813 F.2d 1327, 1330 (4th Cir.), *cert. denied*, 108 S. Ct. 99 (1987); Damiani v. Adams, 657 F. Supp. 1409, 1418 (S.D. Cal. 1987); Nixon v. Phillipoff, 615 F. Supp. 890 (N.D. Ind. 1985), *aff'd*, 787 F.2d 596 (7th Cir. 1986).

75 *See, e.g.*, Teamsters Local Union No. 430 v. Cement Express, Inc., 841 F.2d 66, 70 (3d Cir. 1988) (claim, while novel and unsuccessful, is not unreasonable), *petition for cert. filed*, July 5, 1988; Hudson v. Moore Business Forms, Inc., 836 F.2d 1156, 1160 (9th Cir. 1987) (Citing the admonition of Zaldivar v. City of Los Angeles, 780 F.2d 823, 834 (9th Cir. 1986), the court in *Hudson* reversed sanctions imposed on a counterclaim noting the claim was an attempt to expand the law.); Rhoades v. Powell, 644 F. Supp. 645, 673 (E.D. Cal. 1986) (RICO enterprise theory proposed by plaintiff had found approval in at least one reported decision and could not be considered frivolous); Skepton v. Bucks County, Pa., 613 F. Supp. 1013, 1022 (E.D. Pa. 1985) (Complaint was an unsuccessful attempt to create a novel cause of action and sanctions not warranted.). *See also* Glaser v. Cincinnati Milacron, 808 F.2d 285, 289-90 (3d Cir. 1986) (Given attorney's reliance on the possibly meritorious enterprise theory of liability, attorney's investigation before filing claim was not so lacking as to constitute bad faith under former Rule 11).

76 *See, e.g.*, Cotner v. Hopkins, 795 F.2d 900 (10th Cir. 1986); Fried v. Fried, 113 F.R.D. 103 (S.D.N.Y. 1986); Nixon v. Phillipoff, 615 F. Supp. 890 (N.D. Ind. 1985), *aff'd*, 787 F.2d 596 (7th Cir. 1986); Heimbaugh v. City and County of San Francisco, 591 F. Supp. 1573 (N.D. Cal. 1984).

77 *See, e.g.*, *Glaser*, 808 F.2d 285 (reversing sanctions applying pre-amendment standards on attorney who named 96 defendants in suit based on enterprise liability of which 89 were later dropped).

78 Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 254 (2d Cir. 1985), *cert. denied*, 108 S. Ct. 269 (1987). *See also* Cabell v. Petty, 810 F.2d 463, 466 (4th Cir. 1987) ("[I]nquiry focuses only on whether a reasonable attorney in like circumstances could believe his actions to be factually and legally justified.").

79 *Hudson*, 836 F.2d at 1160 ("The rapid and recent evolution of the law in this area highlights the precariousness of drawing a line between plausible and sanctionable arguments."); Rice v. Heckler, 640 F. Supp. 1051, 1065 (S.D.N.Y. 1986) (complexity of area of jurisprudence is appropriate in determining whether to impose sanction based on allegedly incorrect legal theory); Patterson v. Aiken, 111 F.R.D. 354, 358 (N.D. Ga. 1986); Lumbard v. Magalia, Inc., 621 F. Supp. 1542, 1546 (S.D.N.Y. 1985) (sanctions not imposed because law on subject in disarray when pleading filed).

plausible argument exists, however, is not sufficient to satisfy the Rule; the argument must actually be made at the time the pleading is filed.[80]

The Advisory Committee formulated the standard for legal merit by asking whether the signer has advocated a "plausible view of the law."[81] The reported cases have set forth varying formulations for determining plausibility.[82] The Second Circuit's formulation in *Eastway Construction Corp., v. City of New York*,[83] however, is one of the earlier appellate decisions interpreting the standard and has been widely cited:[84] "[W]here it is patently clear that a claim has absolutely no chance of success under the existing precedent, and where no reasonable argument can be advanced to extend, modify or reverse the law as it stands, Rule 11 has been violated."[85] This formulation seems to at least require that an attorney who cannot support his case in existing precedent should be prepared to support his case in logic and argue it with conviction.[86] The drafters seemingly retained "good faith" as a relevant criterion when determining whether an argument for the extension, modification or reversal of existing law is frivolous; however, courts have largely ignored this distinction, being somewhat wary of reintroducing a subjective standard through the back door.[87] An early Federal Judicial Center study found judges were more willing to sanction for legal inadequacies than for factual inadequacies.[88]

One difficulty which has arisen under this prong is lack of a bright line in characterizing a legal argument. The Ninth Circuit addressed this

80 *In re* Ronco, 838 F.2d 212, 218 (7th Cir. 1988).

81 Advisory Committee's Note.

82 *See, e.g.*, Cabell v. Petty, 810 F.2d 463, 466 (4th Cir. 1987) ("whether a reasonable attorney in like circumstances could believe his actions to be factually and legally justified"); *Hudson*, 836 F.2d at 1159 ("whether a complaint states an arguable claim"); Zaldivar v. City of Los Angeles, 780 F.2d 823, 831 (9th Cir. 1986) (whether the paper is "frivolous, legally unreasonable, or without factual foundation").

83 762 F.2d 243 (2d Cir. 1985), *cert. denied*, 108 S. Ct. 269 (1987).

84 *See, e.g.*, Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531, 1538 (9th Cir. 1986) (quoting *Eastway*); Farguson v. MBank Houston, N.A., 808 F.2d 358, 359 (5th Cir. 1986) (claim was "manifestly and patently frivolous").

85 *Eastway*, 762 F.2d at 254. *Compare* Schwarzer, *supra* note 6, at 1024-25 (arguing the focus should shift from whether the claim is factually or legally frivolous to whether the attorney satisfied the prefiling inquiry into the facts and the law).

86 *See* Rothschild, Fenton & Swanson, *supra* note 56, at 15 (Rule 11 does not prohibit advancing "a logical cogent argument that the prior decisions are wrong or that they should not apply to the facts of the particular case. While you must be candid about the existence of unfavorable law, just because an argument has been rejected in the past does not mean that it will never be accepted. Indeed the argument *must* be advanced in the trial court to preserve it on appeal . . . . The rules do require a good faith showing why your position ought to be upheld. Cite the adverse cases, distinguish them if you can, or explain why you think they were wrongly decided. If you cannot do this in a way that carries conviction, then you should not certify that the pleading or motion meets the rule's legal standard.").

87 *See, e.g.*, Zaldivar v. City of Los Angeles, 780 F.2d 823, 831 (9th Cir. 1986) ("A good faith belief in the merit of a legal argument is an objective condition which a competent attorney attains only after 'reasonable inquiry.' Such inquiry is that amount of examination into the facts and legal research which is reasonable under the circumstances of the case. Of course, the conclusion drawn from the research undertaken must itself be defensible. Extended research alone will not save a claim that is without legal or factual merit."); Oliveri v. Thompson, 803 F.2d 1265, 1275 (2d Cir. 1986) ("[W]e hold today there is no necessary subjective component to a proper Rule 11 analysis. Removing any subjective good faith component from rule 11 analysis should reduce the need for satellite litigation when a district court is called upon to impose a Rule 11 sanction.").

88 S. KASSIN, AN EMPIRICAL STUDY OF RULE 11 SANCTIONS 32-33 (Federal Judicial Center 1985).

difficulty in *Golden Eagle Distributing Corp. v. Burroughs Corp.*,[89] noting precedent which an advocate believes is distinguishable the judge may consider directly adverse and controlling. The Court rejected the contention that Rule 11 imposes on the litigant a duty of candor to identify the argument as one under existing law or an argument for a change in the law. "It is not always easy to decide whether an argument is based on established law or is an argument for the extension of existing law. Whether the case being litigated is or is not materially the same as earlier precedent is frequently the very issue which prompted the litigation in the first place."[90] A distinction should be made between "the earnest advocate exaggerating the state of current law without knowingly misrepresenting it" and the "unscrupulous lawyer knowingly deceiving the court."[91] Good lawyering and common sense, however, dictate that even the earnest lawyer not delude the court as to the actual state of the law or too greatly exaggerate his position under it. Part II of this article will address these concerns in the context of constitutional litigation.

Sanctions have been imposed or considered for "ponderous, overblown and extravagant" complaints,[92] general denials made without investigation,[93] numerous unfounded defenses,[94] unsupportable damage claims,[95] and pleadings barred by doctrines of res judicata, collateral estoppel, or statutes of limitation.[96] While pleading in the alternative or multiple claims for relief is not discouraged, the courts have noted the bar should take caution when throwing in additional claims or legal theories that bear tenuously on the facts or which were inserted for tactical purposes.[97] The Ninth Circuit has distinguished between a frivolous argument or position of a claim or defense in a pleading and an entire claim or defense which fails Rule 11 standards holding only the latter is subject to sanctions.[98]

3. Continuing Obligation

Several circuits have addressed the issue whether Rule 11 requires a continuing obligation by the signer to reassess the factual and legal merit of his filing or position through the litigation process. The Advisory Committee's Note indicates the court should "avoid using the wisdom of

89 801 F.2d 1531 (9th Cir. 1986), *dissent from denial of reh'g en banc*, 809 F.2d 584 (9th Cir. 1987).
90 *Id.* at 1540.
91 *Id.*
92 Rodgers v. Lincoln Towing Serv., 771 F.2d 194, 206 (7th Cir. 1985).
93 United States v. Minisee, 113 F.R.D. 121, 123 (S.D. Ohio 1986).
94 Rolls-Royce Ltd. v. GTE Valeron Corp., 800 F.2d 1101, 1110 n.10 (Fed. Cir. 1986).
95 Hudson v. Moore Business Forms, Inc., 836 F.2d 1156, 1162-64 (9th Cir. 1987).
96 *See, e.g.*, Robinson v. National Cash Register Co., 808 F.2d 1119 (5th Cir. 1987) (res judicata); Bartel Dental Books v. Schultz, 786 F.2d 486 (2d Cir.) (res judicata), *cert. denied*, 478 U.S. 1006 (1986); Norris v. Grosvenor Mktg. Ltd., 803 F.2d 1281, 1288 (2d Cir. 1986) (time barred).
97 Pin v. Texaco, Inc., 793 F.2d 1448, 1455 (5th Cir. 1986) (federal claims added in an attempt to keep lawsuit alive after state law claims foreclosed by settlement); Original Appalachian Artworks, Inc. v. May Dept. Stores Co., 640 F. Supp. 751, 759 (N.D. Ill. 1986) (motion used as a tactical weapon).
98 *Hudson*, 836 F.2d at 1162-63 (citing Golden Eagle Distrib. Corp., v. Burroughs Corp., 801 F.2d 1531, 1541 (9th Cir. 1986)). *See also* Patterson v. Aiken, 841 F.2d 386, 387 (11th Cir. 1986) (rejecting argument that sanctions cannot be applied to a portion of the pleading).

hindsight and test the signer's conduct by inquiring what was reasonable to believe at the time the paper was submitted."[99]

Although several early opinions held that Rule 11 imposes a continuing obligation to reassess the factual and legal merit of a position,[100] several circuits have now rejected such a continuing obligation.[101] However, filing a signed memorandum in opposition to a motion for summary judgment after a case is discovered to be factually or legally unwarranted may itself be an independent violation of Rule 11 and is sanctionable apart from any warranty in the initial pleadings. While an attorney is not required to withdraw a pleading, neither will counsel be permitted to oppose efforts of another litigant to dismiss an unwarranted claim by motions or other papers.[102]

4. Improper Purpose

Rule 11 requires a paper not be filed for "any improper purpose." The amendments expanded the definition of improper purpose beyond delay to recognize explicitly harassment and actions which increase the cost of litigation.[103] Courts have differed as to whether Rule 11 retains a subjective component.[104] As a practical matter, courts have inferred improper purpose from overtly meritless pleadings and motions.[105] Willful concealment or misrepresentation to the court in a filing is sanctionable under Rule 11.[106] Although the signer certifies that the filing is factually and legally warranted and it is not inserted for any improper purpose, courts have differed as to whether a paper which is held to be well-grounded in fact and law can be sanctioned if it is inserted to harass or for another improper purpose.[107] Improper purpose has been com-

99 Advisory Committee's Note.

100 *Robinson*, 808 F.2d at 1127; Southern Leasing Partners, Ltd. v. McMullan, 801 F.2d 783, 788 (5th Cir. 1986); Thomas v. Aland, 639 F. Supp. 724, 730-31 (N.D. Tex. 1986); Advo Sys., Inc. v. Walters, 110 F.R.D. 426, 430 (E.D. Mich. 1986).

101 Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 874 (5th Cir. 1988) (en banc); Pantry Queen Foods, Inc. v. Lifschultz Fast Freight, Inc., 809 F.2d 451, 454 (7th Cir. 1987); Oliveri v. Thompson, 803 F.2d 1265, 1274 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 1373 (1987). *See also* Continental Air Lines, Inc. v. Group Sys. Int'l. Far East, Ltd., 109 F.R.D. 594, 598-99 (C.D. Cal. 1986).

102 *See Thomas*, 836 F.2d at 874 n.9.

103 FED. R. CIV. P. 11.

104 *Compare* Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073, 1083 (7th Cir. 1987) (noting Rule 11 has a subjective component), *cert. denied*, 108 S. Ct. 1101 (1988), *with* Zaldivar v. City of Los Angeles, 780 F.2d 823, 831 n.9 (9th Cir. 1986) (noting improper purpose should be tested by an objective standard) *and* Lieb v. Topstone Indus., Inc., 788 F.2d 151, 157 (3d Cir. 1986) (same).

105 *See, e.g.*, Fiore v. Thornburgh, 658 F. Supp. 161, 165 (W.D. Pa. 1987); Wold v. Minerals Eng'g Co., 575 F. Supp. 166, 167 (D. Colo. 1983).

106 *See, e.g.*, Itel Containers Int'l Corp. v. Puerto Rico Marine Mgt., Inc., 108 F.R.D. 96, 102 (D.N.J. 1985).

107 *See Zaldivar*, 780 F.2d at 832 ("We hold that a defendant cannot be harassed under Rule 11 because a plaintiff files a complaint against the defendant which complies with the 'well grounded in fact and warranted by existing law clause of the Rule.' "); Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531, 1538 (9th Cir. 1986) (citing *Zaldivar*); Hudson v. Moore Business Forms, Inc., 836 F.2d 1156, 1162 (9th Cir. 1987) (finding the claim frivolous is a prerequisite to appraising the impropriety of counsel's motives). *But compare Szabo*, 823 F.2d at 1083 (obligation not to file with an improper purpose is an independent duty), *cert. denied*, 108 S. Ct. 1101 (1988); Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 254 (2d Cir. 1985) (sanctions are proper "when it appears that a pleading has been interposed for any improper purpose, *or where*, after reasonable inquiry, a competent attorney could not form a reasonable belief that the pleading is well grounded . . . ."),

monly implied from: (1) multiple suits by the same party;[108] (2) abusive motion practice or excessive filings in an action;[109] (3) continuation of the suit after warnings from the court or opposing counsel;[110] (4) excessive damage claims;[111] and, (5) delay.[112]

5. Sanctions

In an effort to curb litigation abuse, the drafters of the 1983 amendments envisioned stronger judicial oversight over the litigation process. Amendments to Rule 11 reflect this policy by making sanctions mandatory while allowing the judge to determine which sanction is appropriate and giving explicit authority to award attorney's fees and raise the issue sua sponte.[113] The relevant criteria in determining the nature and severity of the sanction include: (1) costs incurred by the opposing party and attempts at mitigation; (2) vindictiveness, bad faith, or repeat offenses; (3) the experience of the lawyer or pro se litigant and area of expertise or lack thereof of the pro se litigant; (4) degree of frivolousness; (5) the offending party's ability to pay; and, (6) dangers in chilling the particular kind of litigation involved.[114] "Although equitable considerations are not relevant to the initial decision to impose sanctions . . . they may be an ingredient in fashioning the reward."[115] Consistent with the reference to "sanctions" in the Rule and in the Advisory Committee's Note, the courts have emphasized the deterrent rationale imposing the least severe sanction adequate to accomplish this purpose.[116] While district courts need not make specific findings of fact and law, such findings assist in appellate review and several circuits have warned that sanctions should not be the subject of cursory orders from the bench.[117]

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cert. denied, 108 S. Ct. 269 (1987). *See also* Robinson v. National Cash Register Co., 808 F.2d 1119, 1129-31 (5th Cir. 1987) (successive motions, each of which is well grounded in fact or law, may constitute an improper purpose); *Zaldivar*, 780 F.2d at 832 n.10 (same); *In re* Itel Sec. Litig., 791 F.2d 672, 675 (9th Cir. 1986) (finding of improper purpose in a nonfrivolous motion can be sanctioned under the inherent power of the court), *cert. denied*, 107 S. Ct. 880 (1987).

108 Cook v. Peter Kiewit Sons Co., 775 F.2d 1030, 1036 (9th Cir. 1985) (sanctions properly awarded for multiple suits), *cert. denied*, 476 U.S. 1183 (1986); Damani v. Adams, 657 F. Supp. 1409, 1417 (S.D. Cal. 1987) (same legal argument already heard and rejected in numerous other suits by plaintiff).

109 McLaughlin v. Bradlee, 602 F. Supp. 1412, 1418 (D.D.C. 1985) (order denying postjudgment motions and imposing sanctions), *aff'd*, 803 F.2d 1197 (D.C. Cir. 1986).

110 Gas Reclamation, Inc. v. Jones, 113 F.R.D. 1, 5 (S.D. Tex. 1985). *See also* Hudson v. Moore Business Forms, Inc., 836 F.2d 1156, 1160 (9th Cir. 1987) (noting that the district court's personal contact with the attorney may be an appropriate element to consider in determining whether a violation occurred).

111 *Hudson*, 836 F.2d at 1162-64.

112 Ricci v. Key Bancshares of Maine, Inc., 111 F.R.D. 369 (D. Me. 1986).

113 *See supra* notes 40-42 and accompanying text.

114 Eastway Constr. Corp. v. City of New York, 637 F. Supp. 558, 571 (E.D.N.Y. 1986), *modified*, 821 F.2d 121 (2d Cir. 1987).

115 Brown v. Federation of State Medical Bds. of United States, 830 F.2d 1429, 1439 (7th Cir. 1987) (noting the signer's assets and the conduct of the opposing party as relevant considerations).

116 Thomas v. Capital Sec. Servs., 836 F.2d 866, 878 (5th Cir. 1988) (en banc); Eastway Constr. Corp. v. City of New York, 821 F.2d 121, 123 (2d Cir. 1987).

117 *Thomas*, 836 F.2d at 883.; Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073, 1084 (7th Cir. 1987), *cert. denied*, 108 S. Ct. 1101 (1988).

Sanctions have been imposed upon attorneys and clients both jointly and individually.[118] The Fifth Circuit has held sanctions may not be imposed vicariously on a law firm for the conduct of one of its members.[119] Sanctions which have been considered or imposed have included: (1) published reprimand;[120] (2) distribution of a reprimanding opinion to the attorney's firm;[121] (3) striking a pleading or motion or portion thereof;[122] (4) reasonable expenses including attorney's fees;[123] (5) restricting access to the courts;[124] (6) punitive amounts payable to the clerk of court;[125] (7) disbarment;[126] and, (8) requiring the attorney to attend continuing legal education.[127] Practitioners have expressed concerns of the potential effects on professional reputation from public reprimand.[128] Commentary has suggested that Rule 11 should reflect a cost-shifting approach, focusing on the costs imposed to the court system and the opposing litigant rather than on the nature of the conduct giving rise to sanctions.[129] Courts, while recognizing the extent to which the opposing party has been burdened, have emphasized the deterrence rationale

118 Hamilton v. Neptune Orient Lines, Ltd., 811 F.2d 498 (9th Cir. 1987) (joint award); Reliance Ins. Co. v. Sweeney Corp., 792 F.2d 1137 (D.C. Cir. 1986) (joint award); Glenn v. Farmers & Merchants Ins. Co., 649 F. Supp. 1447 (W.D. Ark. 1986) (attorney only). *See also* Weir v. Lehman Newspapers, Inc. 105 F.R.D. 574, 576 (D. Colo. 1985) (when questions raised are of law, rather than fact, attorney's reliance on his client is minimal, and attorney's burden is therefore greater); Blake By & Through Blake v. National Casualty Co., 607 F. Supp. 189, 192 (C.D. Cal. 1984) (sanctions should be imposed on attorney rather than party where motion was unsupported by existing law, rather than unsupported by existing facts).

119 Robinson v. National Cash Register Co., 808 F.2d 1119, 1132 (5th Cir. 1987). *See also In re* Delorean Motor Co. Litig., 59 Bankr. 329 (E.D. Mich. 1986). *But see* Calloway v. Marvel Entertainment, 650 F. Supp. 684, 687 (S.D.N.Y. 1986); Sony Corp. v. S.W.I. Trading, Inc., 104 F.R.D. 535, 542 (S.D.N.Y. 1985).

120 *See, e.g.*, Huettig & Schromm v. Landscape Contractors Council, 582 F. Supp. 1519 (N.D. Cal. 1984), *aff'd*, 790 F.2d 1421 (9th Cir. 1986).

121 *See, e.g., id.* at 1522-23.

122 *See, e.g.*, National Ass'n of Radiation Survivors v. Walters, 111 F.R.D. 595 (N.D. Cal. 1986) (misleading quotation stricken and future submissions by attorney to be treated with due skepticism); United States v. Excellair, Inc., 637 F. Supp. 1377 (D. Colo. 1986).

123 *See* Donaldson v. Clark, 819 F.2d 1551, 1557 (11th Cir. 1987) (en banc) ("imposition of a monetary sanction is a particularly reasonable use of a court's discretion"). Rule 11 gives explicit authority for the award of attorney's fees, and this has been by far the most common sanction. *See also* Unioil, Inc. v. E.F. Hutton & Co., Inc., 809 F.2d 548 (9th Cir. 1986) ($294,000 award upheld), *cert. denied*, 108 S. Ct. 85 (1987).

124 *See, e.g.*, Daniels v. Stovall, 660 F. Supp. 301, 306 (S.D. Tex. 1987) (no further complaints may be filed until monetary sanctions are paid in full); Elmore v. McCammon, 640 F. Supp. 905, 911-12 (S.D. Tex. 1986) (future filings subject to preliminary review by the court for frivolousness).

125 *See, e.g.*, United States v. Stillwell, 810 F.2d 135, 137 (7th Cir. 1987); Kearns v. Ford Motor Co., 114 F.R.D. 57, 68 (E.D. Mich. 1987); Edwards v. Marsh, 644 F. Supp. 1564, 1573 (E.D. Mich. 1986).

126 *See* Kendrick v. Zanides, 609 F. Supp. 1162, 1173 (N.D. Cal. 1985) (relying on both Rule 11 and 28 U.S.C. § 1927 (1982)).

127 *See* Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 878 (5th Cir. 1988) (en banc) (noting compulsory legal education may be an appropriate sanction).

128 Weiss, *A Practitioner's Commentary on the Actual Use of Amended Rule 11*, 54 FORDHAM L. REV. 23, 26 (1985) ("If a firm then gets sanctions against it as my firm did . . . it is subjected to having that decision cited against it in forums all over the country. Every time my firm made a motion for certification of a class, that decision was cited. How much damage did that do to my firm?").

129 Nelken, *supra* note 5, at 1352 (arguing the cost-shifting rationale "comes closest in spirit" to the drafters intention and the Rule's goals while warning a punitive rationale might "heighten the chilling effect that the drafters sought to avoid"). *See also* Miller & Culp, *supra* note 1, at 34 ("Although denominated a sanction provision, in reality it is more appropriately characterized as a cost-shifting technique.").

often awarding sanctions for a reduced percentage of attorney's fees claimed.[130]

Although the time when sanctions are to be imposed is left to the discretion of the trial court, the Advisory Committee's Note states that normally sanctions should be considered at the end of the litigation after the litigant has had the chance to prove his case and the judge has heard all the relevant facts and considerations. However, if a court or party believes a violation has occurred, the court or the party should give immediate notice to the litigant that sanctions may be assessed or sought at the end of the litigation.[131] Early notice will serve to deter or mitigate further abuses.[132] A party seeking sanctions should promptly notify the opposing litigant of the alleged violation and may not wait until the litigation is terminated to challenge all papers filed in the action as frivolous.[133]

6. Standard of Review

The circuits have split on the proper standard of review. Several circuits have applied a tiered analysis reviewing findings of fact or factual sufficiency under a clearly erroneous[134] or abuse of discretion[135] standard. The decision to impose sanctions has been reviewed under an abuse of discretion standard[136] and as a legal conclusion requiring a de novo review.[137] The nature or severity of the sanction is reviewed under an abuse of discretion standard.[138] Other circuits have applied the abuse of discretion standard across the board citing the unique position of the district judge to determine acceptable trial practice and the critical role of discretion in the exercise of judicial power.[139]

130 *See* Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 877 (5th Cir. 1988) (en banc) (citing Donaldson v. Clark, 819 F.2d 1551, 1556 (11th Cir. 1987) (en banc), ("[W]hether sanctions are viewed as a form of cost-shifting, compensating opposing parties injured by the vexatious or frivolous litigation forbidden by Rule 11, or as a form of punishment imposed on those who violate the rule, *the imposition of sanctions pursuant to Rule 11 is meant to deter attorneys from violating the rule.*")).

131 *Thomas*, 836 F.2d at 881; *In re* Yagman, 796 F.2d 1165, 1183-84 (9th Cir. 1986), *cert. denied*, 108 S. Ct. 450 (1987).

132 *Thomas*, 836 F.2d at 881; *Yagman*, 796 F.2d at 1183-84.

133 *Thomas*, 836 F.2d at 879-80 (citing Advisory Committee's Note).

134 Brown v. Federation of State Medical Bds. of United States, 830 F.2d 1429, 1434 (7th Cir. 1987); Zaldivar v. City of Los Angeles, 780 F.2d 823, 828 (9th Cir. 1986).

135 Donaldson v. Clark, 819 F.2d 1551, 1556 (11th Cir. 1987) (en banc). Westmoreland v. CBS, 770 F.2d 1168, 1174-75 (D.C. Cir. 1985).

136 *In re* Ronco, Inc., 838 F.2d 212, 217 (7th Cir. 1988); Borowski v. DePuy, Inc., 850 F.2d 297, 304 (7th Cir. 1988).

137 *Zaldivar*, 780 F.2d at 828; Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531, 1538 (9th Cir. 1986); *Westmoreland*, 770 F.2d at 1174-75; *Donaldson*, 819 F.2d at 1556; Stewart v. American Int'l Oil & Gas Co., 845 F.2d 196, 200-01 (9th Cir. 1988). *See also* Snow Mach., Inc. v. Hedco, Inc., 838 F.2d 718, 724-25 (3d Cir. 1988) (plenary review when the court failed to apply the correct legal standard).

138 *Brown*, 830 F.2d at 1434; *Zaldivar*, 780 F.2d at 828; *Westmoreland*, 770 F.2d at 1174-75; *Donaldson*, 819 F.2d at 1556. Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 254 n.7 (2d Cir. 1985), *cert. denied*, 108 S. Ct. 269 (1987).

139 Thomas v. Capital Sec. Servs., 836 F.2d 866, 872 (5th Cir. 1988) (en banc); Century Prods., Inc. v. Sutter, 837 F.2d 247, 253 (6th Cir. 1988); O'Connell v. Champion Int'l Corp., 812 F.2d 393, 395 (8th Cir. 1987); Cotner v. Hopkins, 795 F.2d 900, 903 (10th Cir. 1986); EBI, Inc. v. Gator Indus., Inc., 807 F.2d 1, 6 (1st Cir. 1986); Lieb v. Topstone Indus., Inc., 788 F.2d 151, 157 (3d Cir. 1986); Stevens v. Lawyers Mut. Liab. Ins. Co., 789 F.2d 1056, 1060 (4th Cir. 1986).

7. Other Considerations

Commentators have noted that Rule 11 may be usurping the systemic efficiencies the amendments sought to achieve by deteriorating into protracted satellite litigation.[140] The drafters of the amendments were sensitive to this concern and noted that to the extent possible, the scope of sanction proceedings were to be limited to the record and discovery should be conducted only in extraordinary circumstances.[141] The imposition of sanctions must comport with due process and requires notice[142] and an opportunity to respond orally or in writing.[143] A hearing may or may not be necessary depending upon: "(1) the circumstances in general; (2) the type and severity of the sanction under consideration; (3) the judge's participation in the proceedings."[144]

II. The Process of Constitutional Litigation: Identifying the Stress Points

A. *Constitutional Litigation — Same and Different*

If Rule 11 has the capacity to impact more harshly on constitutional litigation, it must be because of a difference between constitutional litigation and other forms of civil litigation. As a first step in identifying the "stress points," we must delineate in some detail how constitutional litigation differs from other litigation presently in our federal courts. We shall then identify several specific areas where the differences between constitutional litigation and other forms of litigation may indeed require particular sensitivity in the application of Rule 11. We suggest that, by being aware of these differences between constitutional litigation and other litigation, the bench and the bar can prevent turning Rule 11 into something it was never intended to be — a burden on the legitimate vindication of constitutional rights through the judicial process.

Constitutional litigation, when compared with other litigation, is, at the same time, both the same and different.[145] The basic difference was noted quite bluntly by Chief Justice Marshall in *McCulloch v. Maryland*:[146]

> A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, re-

140 *See supra* note 14; Grosberg, *supra* note 6, at 647.

141 Advisory Committee's Note.

142 Donaldson v. Clark, 819 F.2d 1551, 1560 (11th Cir. 1987) (en banc) (Notice can come from the party seeking sanctions, or from the court, or from both. Notice is not required to be in writing but evidence that it was given should appear in record.). *See also* INVST Fin. Group v. Chem-Nuclear Sys., 815 F.2d 391, 405 (6th Cir. 1987); Rodgers v. Lincoln Towing Serv., Inc., 771 F.2d 194, 205-06 (7th Cir. 1985); Lepucki v. Van Wormer, 765 F.2d 86, 88 (7th Cir. 1985).

143 *Donaldson*, 819 F.2d at 1560.

144 *Donaldson*, 819 F.2d at 1561 (citing Advisory Committee's Note). *See also INVST*, 815 F.2d at 405 (in certain cases no hearing is required where judge has participated in proceedings).

145 A more detailed description of the difference between constitutional litigation and other forms of civil litigation was presented by one of the authors in K. RIPPLE, CONSTITUTIONAL LITIGATION §§ 1-1 - 1-2(C) (1984).

146 17 U.S. (4 Wheat.) 316 (1819).

> quires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves.[147]

In short, the Constitution sets forth the basic framework of government; it describes — starkly—the basic values of our political society. The courts, through case by case adjudication, refine, in more concrete fashion, the precise contours of those values. Consequently, the process of constitutional adjudication thus involves a more uncharted judicial inquiry than is normally necessary in interpreting a statute or elaborating on a principle of common law.

In his famous address before the American Philosophical Society in Philadelphia, Justice Frankfurter expanded on this difference between constitutional litigation and other types of litigation.[148] For him, as for Chief Justice Marshall, the basic difference was in the subject matter of the Constitution. The Constitution deals with the distribution of governmental power, the balance between various spheres of authority. It also involves marking the contours of legitimate government power in relation to the individual person. For Justice Frankfurter, it was this latter task which posed "the most delicate and most pervasive of all issues . . . . For these cases involve no less a task than the accommodation by a court of the interest of an individual over against the interest of society."[149] He further remarked, in words reminiscent of Justice Brandeis' famous dissent in *Burnet v. Coronado Oil & Gas Co.*,[150] that the difference was most marked when one dealt with the so-called "open-ended" clauses of the Constitution such as the due process clause. Relying on his own opinion in *Joint Anti-Fascist Refugee Committee v. McGrath*,[151] Justice Frankfurter noted that:

> [the] 'due process' [clause], unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, 'due process' cannot be imprisoned within the treacherous limits of any formula.[152]

How one goes about the inquiry described by Justice Frankfurter depends, of course, on one's views with respect to the great jurisprudential question of our time— the proper limitation on judicial power in a democracy. However, no matter what approach one adopts with respect to this question, the process of constitutional adjudication necessarily involves the process of constitutional characterization. The human situation before the Court must be defined in terms of constitutional values. This process requires that judge and counsel assess the facts of the case

147 *Id.* at 407.
148 Frankfurter, *Some Observations on the Nature of the Judicial Process of Supreme Court Litigation*, 98 PROC. AM. PHIL. SOC. 233 (1954).
149 *Id.* at 234.
150 285 U.S. 393, 406-11 (1932) (Brandeis, J., dissenting).
151 341 U.S. 123, 162 (1951).
152 Frankfurter, *supra* note 148, at 235.

against a far broader background of information. In one sense, this step in the process of characterization goes on in all common law litigation; judges take the facts of the case and weigh them against a broader background of information. In constitutional litigation, however, the process is markedly different simply because the types of information required to assess a case are significantly different. Indeed, commentators have referred to this background information not by the term usually employed in other civil litigation, "legislative facts," but rather as "constitutional facts."[153] The use of this more descriptive adjective—constitutional—is significantly different in character or quality from that which is necessary in other cases. The Constitution deals with ultimate values of our political society and the constitutional decision will directly impact on our fundamental jurisprudence. Therefore, the process of characterization involves recourse to a broader and more profound view of our past experience in making similar value choices. Justice Frankfurter, who was not exactly a judicial activist, described the judicial approach to characterization in the constitutional case in these terms:

> A judge whose preoccupation is with such matters should be compounded of the faculties that are demanded of the historian and the philosopher and the prophet. The last demand upon him—to make some forecast of the consequences of his action—is perhaps the heaviest. To pierce the curtain of the future, to give shape and visage to mysteries still in the womb of time, is the gift of imagination. It requires poetic sensibilities with which judges are rarely endowed and which their education does not normally develop. These judges, you will infer, must have something of the creative artist in them; they must have antennae registering feeling and judgment beyond logical, let alone quantitative, proof.[154]

The reconciliation of conflicting constitutional values inevitably requires both judges and counsel to bring to the decision-making process "his whole experience, his training, his outlook, his social, intellectual, and moral environment."[155] In most cases, as Justice Douglas reminded us in *Estin v. Estin*,[156] "there are few areas . . . in black and white. The greys are dominant and even among them the shades are innumerable."[157]

While this process of reconciling value-laden constitutional principles is obviously distinct from the processes of ordinary litigation, it still takes place within the general framework of our common law judicial tradition. While the breadth of the inquiry may be greater, the traditional common law techniques will still guide the inquiry. Indeed, constitutional litigation involves, in its most disciplined form, the evaluation of the facts of the case through—to borrow from Justice Stone—a methodology of "reasoned application of authoritative standards of conduct for

153 *See* K. RIPPLE, *supra* note 145, at § 2-2; Note, *The Role of Constitutional Facts in Commerce Clause Litigation*, 65 IOWA L. REV. 1053 (1980). *See also* Alfange, *The Relevance of Legislative Facts in Constitutional Law*, 114 U. PA. L. REV. 637 (1966).

154 Frankfurter, *supra* note 148, at 237.

155 *Id.* at 238.

156 334 U.S. 541 (1948).

157 *Id.* at 545.

all actions, public and private."[158] Cases must be decided on their facts. Principles developed in earlier cases must be respected and applied uniformly. Decision ought to rest on the most narrow ground possible. The prerogatives of the political branches must be respected.

B. *The "Stress Points"*

The foregoing description of the process of constitutional litigation suggests two basic differences between constitutional litigation and other forms of contemporary American litigation that are relevant to our exploration of the impact of Rule 11 on constitutional litigation. First, to undertake properly the task of constitutional adjudication, the judiciary must have a particularly comprehensive and profound understanding of the facts of the case. Without this understanding, the process of constitutional characterization easily becomes a dangerously unstructured affair. The nature of the human values at stake will not be fully appreciated; the reconciliation of those values will be less precise than it ought to be. There is also the danger that the judge's lack of appreciation of the human situation will result in the fashioning of a broader constitutional issue than ought to emerge from the litigation. Second, while constitutional litigation takes place within the common law system, the process must necessarily adjust to the nature of the inquiry. Therefore, in constitutional litigation, the role of *stare decisis* and precedent is necessarily different.

How Rule 11 might impact on each of these differences and therefore have a significant impact on the conduct of constitutional litigation is the focus of our inquiry.

1. The Pleadings and Facts

Dismissal of a complaint for failure to state a claim upon which relief can be granted is governed, as far as Supreme Court precedent is concerned, by the rule announced in *Conley v. Gibson*.[159] Dismissal is appropriate only when the plaintiff "can prove no set of facts in support of his claim which would entitle him to relief."[160] Pro se complaints, the Court held in *Haines v. Kerner*,[161] are to be held to a less stringent standard. Yet it is clear that many circuits have adopted, either expressly or by implication, a higher standard for the pleading of facts.[162] This requirement appears to have been born out of what has been perceived by some

158 Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 23 (1936).

159 355 U.S. 41, 45-46 (1957).

160 *Id.*

161 404 U.S. 519, 520-21 (1972).

162 *See* Elliot v. Perez, 751 F.2d 1472, 1479 (5th Cir. 1985); United States v. City of Philadelphia, 644 F.2d 187, 204 n.26 (3d Cir. 1980); Hurney v. Carter, 602 F.2d 993 (1st Cir. 1979); Slotnick v. Staviskey, 560 F.2d 31, 33 (1st Cir. 1977); Rotolo v. Borough of Charleroi, 532 F.2d 920, 922 (3d Cir. 1976). *Contra* Berquist v. County of Cochise, 806 F.2d 1364, 1367 (9th Cir. 1986). *See also* Wingate, *A Special Pleading Rule For Civil Rights Complaints: A Step Forward or a Step Back*, 49 MO. L. REV. 677 (1984); Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433 (1986).

courts as practical necessity. As the Third Circuit noted in *Rotolo v. Borough of Charleroi*:[163]

> In recent years there has been an increasingly large volume of cases brought under the Civil Rights Act. A substantial number of these cases are frivolous or should be litigated in the state courts; they all cause defendants—public officials, policemen and citizens alike, considerable expense, vexation and perhaps unfounded notoriety. It is an important public policy to weed out the frivolous and insubstantial cases at an early stage in the litigation, and still keep the doors of the federal courts open to legitimate claims.[164]

Yet, it appears that the need for at least a reasonable degree of specificity might be justified on other grounds as well. Constitutional litigation involves, as we have noted in the foregoing material, judicial interpretation of the basic document of our political society. Under the established rules of constitutional adjudication, it is to be undertaken only when the dispute cannot be resolved on other grounds and then only on the narrowest constitutional grounds possible. It does not seem unreasonable that, before undertaking such a task, the court ought to require, even in the initial pleading, a higher degree of specificity than it might otherwise require in other litigation contexts.

One particular need for specificity in the constitutional case has recently been isolated by the Fifth Circuit. In requiring a higher degree of specificity in the initial pleadings, the Fifth Circuit in *Elliot v. Perez*,[165] stressed the responsibility of the district court to determine, at a very early stage of the proceedings, whether the individual defendants in a civil rights suit may assert the defense of qualified (and, on rare occasions, absolute) immunity. In *Harlow v. Fitzgerald*,[166] the Supreme Court stressed that, because immunity was meant to be a shield not only to liability but also to the obligation to litigate, it must be established early in the litigation, preferably before discovery. "[T]he burden of being able to ascertain what the real facts are in order to determine the defense of immunity is placed squarely on the district judge."[167] Moreover, since the Fifth Circuit's ruling in *Elliot*, the Supreme Court has stressed in *Anderson v. Creighton*,[168] that the issue of immunity is to be resolved at a sufficiently specific level of generality to permit a determination as to whether the officer acted in an objectively reasonable manner. This approach to the immunity doctrine necessarily requires a greater degree of specificity in the pleadings.

While there may be sound policy justifications for requiring additional factual specificity in the constitutional case, we must recognize that neither the Federal Rules nor the holdings of the Supreme Court interpreting those Rules provide for such a disparity of treatment. No matter

163 532 F.2d 920 (3d Cir. 1976).
164 *Id.* at 922 (quoting Kauffman v. Moss, 420 F.2d 1270, 1276 n.15 (3d Cir.), *cert. denied*, 400 U.S. 846 (1970)).
165 751 F.2d 1472 (5th Cir. 1985).
166 457 U.S. 800, 808 (1982).
167 *Elliot*, 751 F.2d at 1480.
168 107 S. Ct. 3034, 3038-39 (1987).

what theoretical or practical justification might exist for maintaining such a higher standard, it must be acknowledged that it exists without such firm support. Under these circumstances, perhaps we ought to be particularly circumspect in treating a failure to comply with this requirement for greater factual specificity in the early stages of constitutional litigation as a basis for the *immediate* imposition of sanctions under Rule 11. If it appears that, in a particular case, the court has a need for additional factual material, that need can be conveyed to the parties and a reasonable opportunity given to rectify the situation. For instance, in *Elliot*, the Fifth Circuit noted that the district court, when it finds that the complaint is not sufficient to permit a proper adjudication of the matter of immunity can, sua sponte, require a more definite statement under Rule 12(e).[169] By requiring the party to allege "with particularity all material facts on which he contends he will establish his right to recovery,"[170] the court will not only obtain the facts necessary to decide the threshold issues before it but will also afford the litigant an opportunity to improve what might otherwise be a sanctionable case. Of course, the failure of a party, once asked, to provide such additional material may, in the circumstances of a particular case, be adequate grounds for imposing sanctions.

The pro se litigant requires special care in this respect. The courts have held, and quite properly we suggest, that pro se litigants are subject to Rule 11. When the focus is on the Rule's requirement that a pleading be well-grounded in fact, such an application seems especially justified. The factual undergirding of the complaint is a matter peculiarly in the control of the plaintiff. Yet, it must be remembered that the failure to *present* in plenary fashion can often be the product of lack of skill in communication.

2. Stare Decisis

It has long been acknowledged, as a general principle, that a different rule of *stare decisis* is applied in constitutional cases. Justice Brandeis set forth the classic rationale for this distinction in his famous dissent in *Burnet*:[171]

> *Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. This is commonly true even when the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function. . . . In cases involving the Federal Constitution the position of this Court is unlike that of the highest Court of England, where the policy of *stare decisis* was formulated and is strictly ap-

169 *Elliot*, 751 F.2d at 1482 (citing FED. R. CIV. P. 12(e)).
170 *Id.*
171 285 U.S. 393, 406-10 (1932) (Brandeis, J., dissenting) (citations and footnotes omitted).

> plied to all classes of cases. Parliament is free to correct any judicial error; and the remedy may be promptly invoked.

This less stringent rule of *stare decisis* was especially appropriate, continued Justice Brandeis, "where the question presented is one of applying, as distinguished from what may accurately be called interpreting, the Constitution."[172] He suggested as an example of this latter distinction issues where the question is whether a statute is unreasonably arbitrary or capricious and is violative of the due process clause—what we would call today substantive due process. He also suggested that cases under the equal protection clause, where the issue is whether the governmental classification is reasonable, would fall under this category. And, finally, he noted that commerce clause cases, dealing with whether a particular state regulation burdens interstate commerce, would deserve similar treatment.[173]

It is not difficult to think of examples that demonstrate the soundness, as a general proposition, of Justice Brandeis' approach. Few today would accept without question Justice Holmes' supposition that "feeble mindedness" is inherited.[174] Nor would Justice Peckham's assumption that health considerations do not require a limit on the hours one works in a bakery be accepted without question.[175] Certainly, few would accept Justice Bradley's view that the "natural and proper timidity and delicacy which belongs to the female sex evidently unfits it" for the practice of law.[176] In each of these instances, the evaluation of the constitutional issue turns on what were previously referred to as "constitutional facts." In earlier cases, there may have been either inadequate presentation of those facts or, advances in the information available may have convinced us that the earlier decision was influenced by "prevailing views as to economic or social policy that have since been abandoned."[177]

How one views the doctrine of *stare decisis* is likely to be, to some extent, a function of one's judicial philosophy. Those more prone to an "open textured" approach to constitutional interpretation will be less enthusiastic about its application. Similarly, those who view the judge's role in society as that of "prophet" or physician will not, to quote Professor Monaghan, "welcome the bony fingers of the past's dead hand around the patient's throat."[178] On the other hand, more conservative jurists may also have difficulty with the doctrine as the basis for constitutional adjudication. They must confront the reality of a long common law development of the law. Picking and choosing among the cases on the ground that some decisions are faithful to the original intent and others are not is a methodology that, in its purest form, raises questions of principle itself.

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172 *Id.* at 410.

173 *Id.*

174 Buck v. Bell, 274 U.S. 200, 206 (1927).

175 Lochner v. New York, 198 U.S. 45 (1905).

176 Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1872).

177 Burnet v. Coronado Oil & Gas Co., 285 U.S. 395, 412 (1931) (Brandeis, J., dissenting) (footnote omitted).

178 Monaghan, *Taking Supreme Court Opinions Seriously*, 39 MD. L. REV. 1, 4 (1979).

Putting aside for the moment such ideological issues, it must be generally acknowledged that there is a greater flexibility in the doctrine of *stare decisis* in constitutional cases—especially in those cases that deal with the so-called "open ended" clauses such as the due process clause and the equal protection clause. This greater flexibility must be taken into consideration in the administration of Rule 11. The greater propensity to undertake reconsideration of issues that have already been adjudicated must temper the judiciary's willingness, especially at the lower court level, to impose sanctions on those who raise a matter seemingly precluded by earlier decisions. While this proposition may be a satisfactory general principle, there are some difficult sub-issues that require more focused attention.

a. *The Multiple-Count Complaint*

Under the case law as it has developed, the question of Rule 11 sanctions is to be considered for each count in the complaint rather than for the complaint as a whole.[179] However, it is not unusual in constitutional litigation, especially in public interest litigation, for a plaintiff to take in his complaint a "dual stance." In one count, he seeks relief on a relatively traditional basis; in another count, he seeks broader relief, perhaps precluded by present case law. This approach reflects the realization that growth in constitutional law, as in other areas, usually comes slowly. Constitutional doctrine unfolds incrementally. The court rarely takes a single giant step and establishes a new doctrine or definitively rejects an old one. Therefore, the sophisticated constitutional litigator rarely asks the court to take a "giant step" in doctrinal development. Rather, he slowly educates the court by suggesting and attempting to support with appropriate constitutional facts, a more novel theory in the hope that the court will at least demonstrate an increased receptivity to his viewpoint in future cases. [180] Justice Marshall, when he undertook the effort to overrule *Plessy v. Ferguson*,[181] understood this reality and presented, at each stage of the school desegregation litigation, a case designed to deal with this reality. In each step toward *Brown v. Board of Education*,[182] the courts, and ultimately the Supreme Court, were presented with a litigation theory that would permit them to grant relief without squarely confronting the necessity of overruling the precedent that "separate but equal" satisfied the equal protection clause. Simultaneously, through careful factual presentation in each case, the courts were educated about the futility of perpetuating this rule and given the opportunity to set out on a more enlightened course. Indeed, Justice Marshall, in a symposium at Howard University, frankly acknowledged that this "dual approach" was followed in order to deal with the reality of the doctrine of *stare decisis*.[183]

179 *See supra* notes 97-98 and accompanying text.

180 Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75, 99.

181 163 U.S. 537 (1896).

182 347 U.S. 483 (1954).

183 *See* Marshall, *An Evaluation of Recent Efforts to Achieve Racial Integration in Education Through Resort to the Courts*, 21 J. NEGRO EDUC. 316 (1952).

The difficulty with this approach, of course, is that the litigant offers to the court not only a theory of recovery rather clearly—although perhaps only arguably—grounded in established law but also a theory of recovery that is not at all well-grounded in precedent and that seeks change in that precedent. Indeed, the plaintiff may have, as did Justice Marshall in the early school desegregation cases, very little hope that such a theory will be accepted (or even entertained seriously) by the tribunal. Yet, the theory is advanced in order to "educate" the judiciary as to the necessity of eventually departing, in rather radical fashion, from the precedent. For instance, in the early university school desegregation cases, Marshall's "conservative" position was that *Plessy* required absolute equality of separate but equal facilities. Yet, simultaneously, he argued that such "equal" facilities are inherently unequal. The latter theory was curtly rejected by the Supreme Court.[184]

Is such a use of the adjudicative process—to "educate" the court and pave the way for further doctrinal advances down the road—a permissible use of the judicial system? Is such a complaint well-grounded in law and fact? Certainly, our historical experience suggests that this process has, over time, permitted the reasoned evaluation of constitutional principle. Perhaps the answer rests in the relationship of the two counts. By presenting both arguments simultaneously, counsel perhaps suggests—or with a little effort can suggest— the function each plays in the litigation process. A frank presentation of that role would seem, as we shall discuss more fully below, to go a long way toward fulfilling the mandate of Rule 11.

b. *The Summary Affirmance*

Another difficulty in dealing with the question of *stare decisis* in constitutional cases is the matter of summary disposition in the Supreme Court. It is now clear that the Supreme Court gives some precedential weight to its own summary dispositions. However, it is also clear that the Court gives far less weight to these summary dispositions than it does to cases rendered after full argument and opinion. Nevertheless, ever since *Hicks v. Miranda*,[185] the Supreme Court has made it clear that:

> [U]nless and until the Supreme Court should instruct otherwise, inferior federal courts had best adhere to the view that if the Court has branded a question as unsubstantial, it remains so except when doctrinal developments indicate otherwise and . . . the lower courts are bound by summary decisions by this Court until such time that the Court informs them that they are not.

Therefore, the constitutional litigant who desires to attempt to change the Supreme Court's mind on an issue governed by a summary disposition must face the very real probability of losing twice before he even gets a chance to knock on the Supreme Court's door through the certiorari process. At first glance, this problem would indeed seem to be a minor one; the Court has also made clear that its summary affirmances

184 Fisher v. Hurst, 333 U.S. 147 (1948).
185 422 U.S. 332, 344-45 (1975) (citations omitted).

are, from the perspective of precedential value, to be read narrowly. As Chief Justice Burger observed:[186]

> When we summarily affirm, without opinion, the judgment of a three-judge district court we affirm the judgment but not necessarily the reasoning at which it was reached. An unexplicated summary affirmance settles the issues for the parties, and is not to be read as a renunciation by this Court of doctrines previously announced in our opinions after full argument. Indeed, upon fuller consideration of an issue under plenary review, the Court has not hesitated to discard a rule which a line of summary affirmances may appear to have established.

However, rather than solving a problem, this narrow approach may actually add one. It simply makes it more difficult for the bench and bar to determine precisely what a summary affirmance means. Clearly, it does not foreclose later lower court determinations of issues which were not before the Court on the earlier appeal.[187] Yet, its precise scope can remain elusive. *Mandel v. Bradley*[188] makes the task of ascertaining the scope of a summary disposition even more of a problem. In that case, the Court said that a summary affirmance or a dismissal for want of a substantial federal question performs the following functions: (1) rejects the "specific challenges presented in the statement of jurisdiction;" (2) leaves "undisturbed the judgment appealed from;" (3) prevents "lower courts from coming to opposite conclusions on the *precise issues presented and necessarily decided by those actions*;" and (4) does not break new ground but applies principles established in prior decisions to particular facts involved.[189] Does *Mandel* mean, as Justice Brennan suggested, that:

> After today, judges of the state and federal systems are on notice that, before deciding a case on the authority of a summary disposition by this Court in another case, they must (a) examine the jurisdictional statement in the earlier case to be certain that the constitutional questions presented were the same and, if they were, (b) determine that the judgment in fact rests upon decision of those questions and not even arguably upon some alternative nonconstitutional ground. The judgment should not be interpreted as deciding the constitutional questions unless no other construction of the disposition is plausible.[190]

We suggest that courts must be very circumspect about the imposition of sanctions on an attorney who has "guessed wrong" with respect to the precise boundaries of the summary affirmance. It is indeed a most delicate task to delineate with any precision precisely what is encompassed within the holding of the earlier case and what is not. Indeed, often, members of the bar may not have available to them all of the information necessary to arrive at such a precise determination. Moreover, as we shall develop below, we must confront squarely the question of whether the litigant has the right to proceed in the lower courts despite the existence of summary affirmance when the Supreme Court of the

186 Fusari v. Steinberg, 419 U.S. 379, 391-92 (1975) (Burger, C.J., concurring).
187 *See* Usery v. Turner Elkorn Mining Co., 428 U.S. 1, 14 (1976).
188 432 U.S. 173, 176 (1977).
189 *Id.* (emphasis added).
190 *Id.* at 180 (Brennan, J., concurring).

United States has clearly signaled that it may be more open than the lower courts are allowed to be to his claim.

In dealing with Rule 11 and *stare decisis*, our starting point must be the language of the Rule. Rule 11 permits explicitly "a good faith argument for the extension, modification, or reversal of existing law." In the context of constitutional litigation, how does one establish—in the objective terms now demanded by Rule 11— that the argument presented is a "good faith" argument? Our discussion of the "stress points" suggests the most obvious starting point: frankness in presentation. Counsel must, early on in the litigation, acknowledge the existence of precedent that must be overturned if the theory of recovery is to prevail. One cannot engage in the "ostrich-like tactic of pretending that potentially dispositive authority against a litigant's contention does not exist."[191]

There will be cases where it will be too difficult to determine whether counsel has fulfilled this responsibility. "When counsel represent that something clearly rejected by the Supreme Court is governing law, then it is appropriate to conclude that counsel are not engaged in trying to change the law; counsel either are trying to buffalo the court or have not done their homework."[192] However, it is not the easy case that will most often confront counsel. It is often not clear whether the present case is controlled by precedent. Two factors contribute to this difficulty. First, as discussed in the foregoing material, many constitutional cases, especially in the area of equal protection and due process, are premised on "constitutional facts." The "givens" which formed the basis for the earlier decision may be far less obvious in the present litigation. Second, because the prevailing cannons of constitutional interpretation require that courts decide constitutional cases narrowly, there is often a good deal of room by which precedent can be distinguished in at least a superficially principled manner.

In the close case, where lawyers may in fact reasonably differ with respect to whether the present litigation is controlled by earlier precedent, it would seem prudent, even if not absolutely required, for counsel to set forth as precisely as possible and as soon as possible those characteristics that distinguish the present litigation from the former.

Quite obviously, counsel cannot be expected to deal entirely with this matter in the complaint. Rule 11 did not transform the complaint into a memorandum of law. On the other hand, it hardly seems unreasonable to expect a court to be satisfied with a mere admission that existing case law does not support the present litigation (or even that, while distinguishable, the present litigation finds little or no support in the case law). Therefore, the "only way to find out whether a complaint is an effort to change the law is to examine with care the arguments counsel later adduce."[193] Our previous discussions suggest the *sine qua non* of that task—facts. The complaint that can be characterized as "con-

191 Hill v. Norfolk & Western Ry., 814 F.2d 1192, 1198 (7th Cir. 1987). *See also* Szabo Food Serv. Inc. v. Canteen Corp., 823 F.2d 1073, 1081 (7th Cir. 1987), *cert. denied*, 108 S. Ct. 1101 (1988).

192 *Szabo*, 823 F.2d at 1082.

193 *Id.*

clusory" is in trouble.[194] Moreover, counsel can be expected "to grapple with the established law of the Supreme Court,"[195] and to make at least "a reasonable argument" as to why the court ought to extend, modify or reverse the law as it stands."[196] In grappling with the case law, counsel—and the court—need to be particularly sensitive to signals indicating that what seemed closed is now open for further discussion and debate. When the Supreme Court is ready to welcome that renewed "conversation" on a particular point, a variety of events may signal this change in receptivity to the bench and bar. Some of these signals are more obvious than others. The granting of certiorari on the question at issue is almost too obvious to mention. Certainly, if the Court is about to hear a case on the particular subject that forms the basis of the complaint, there is the distinct probability that the court may take other cases in the area before too long. At least in modern times, the Court has often followed a behavioral pattern of concentrating on a particular area of American life or on a particular area of constitutional doctrine for a period of time and of reassessing that area on a case-by-case basis over several Terms of the Court. Therefore, the grant of certiorari in a particular area of national life or on a particular issue may signal that closely related areas or closely related issues will also be explored in the very near future.

Another signal which cannot be overlooked is the dissent from the denial of certiorari. Indeed, this is one of the most obvious ways by which the Court invites the bar to supply it with fodder for further exploration of a particular area. When the dissent from denial of certiorari indicates that more than one justice is interested in the subject matter, the indication is, of course, even stronger. If the dissent of a single justice becomes the dissent of two or three justices in later cases, this is an even stronger indication of growing receptivity on the part of the Court for the issue at hand.

The dialogue in constitutional law takes place not only between the Supreme Court and the lower federal courts but also among the other lower courts themselves. If the issue at hand is being entertained by the courts in other circuits, it is difficult to say that the matter ought to be considered closed for all time, even in a circuit that has ruled upon the matter. Every circuit has the obligation to reconsider its position on a given issue when it is confronted with the well-reasoned opinion of a sister circuit. If another circuit that had previously decided the issue reopens the matter for further litigation and reconsideration of its position, such activity should receive respectful notice in the other circuits. Similarly, broad discussion and responsible rethinking of an area by the academic bar ought to be given significant heed.

Certainly, when a court indicates that its precedent ought not be considered the last word, or when it experiences obvious difficulty in applying settled precedent in other cases, the bench and bar ought to rec-

194 *See* Rodgers v. Lincoln Towing Serv., Inc., 771 F.2d 194, 205 (7th Cir. 1985).
195 *Id.* at 205.
196 Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 254 (2d Cir. 1985), *cert. denied,* 108 S. Ct. 269 (1987).

ognize the diminished stature of that precedent. On the other hand, the simple fact that there continues to be a dissent from the position taken by the court ought not in and of itself be considered a particularly reliable signal of the court's intention to reopen the question into further litigation. One must go beyond the mere fact of the dissent and attempt to characterize the motivation for that recurring phenomenon. The singular position repeated time after time by a judge who has continually been in the minority on the position is hardly a significant sign of the court's willingness to change its position unless other members of the court gradually join his position. On the other hand, if the dissent is based on a legitimate suggestion that changed circumstances make reconsideration appropriate, the significance of the dissent is much greater.[197]

III. Summary

The approach suggested in the foregoing paragraphs—requiring counsel seeking change to grapple with the case law—is hardly an original one. In *Vasquez v. Hillery*,[198] Justice Marshall described the importance of *stare decisis* in the following language:

> Today's decision is supported, though not compelled, by the important doctrine of *stare decisis*, the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion. That doctrine permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact. While *stare decisis* is not an inexorable command, the careful observer will discern that any detours from the straight path of *stare decisis* in our past have occurred for *articulable* reasons, and only when the Court has felt obliged 'to bring its opinions into agreement with experience and with facts newly ascertained.'[199]

Justice Marshall went on to note that there was no rigid formula by which the Court determined when to depart from the doctrine of *stare decisis*. "Rather, its lesson is that every successful proponent of overruling precedent has borne the heavy burden of persuading the Court that changes in a society or in the law dictate that the values served by *stare decisis* yield in favor of a greater objective."[200] In her separate concurring opinion in the same case, Justice O'Connor also spoke of the need for a "sufficiently compelling case" to be made before the doctrine of *stare decisis* could be abandoned.[201] This same theme of "special justification" was alluded to by the Court in *Arizona v. Rumsey*.[202]

Justice Marshall's remarks in *Vasquez* make it clear that it is perfectly proper to place the burden of demonstrating that the doctrine of *stare*

197 *See, e.g.*, Thornburg v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 785 (1986) (White, J., dissenting).
198 474 U.S. 254 (1986).
199 *Id.* at 265-66 (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting)) (emphasis added).
200 *Id.* at 266.
201 *Id.* at 267 (O'Connor, J., concurring).
202 467 U.S. 203, 212 (1984).

decisis ought not be followed on the proponent. The proponent ought to be required to demonstrate by *articulable* reasons why the status quo ought not continue. This basic approach offers a cornerstone of the application of Rule 11 in the constitutional case—not only with respect to *stare decisis* but also with respect to the other "stress point" covered, the need for a sufficient factual basis for the allegation. In terms of Rule 11, it seems quite appropriate to require that, even at the pleading stage, the proponent of a novel theory present, early on, reasoned argument for such a position. That is, reasoned argument grounded in a sufficiently precise factual presentation to permit adversary and judge to grasp the contours of the argument and deal with it squarely. Justice Brandeis tells us that precedent may be reopened when the realities of the situation demonstrate that the underpinnings of the earlier case are no longer valid.[203] Is it really too much to ask the proponent to suggest either in his pleadings or by supplemental memorandum precisely why the question ought to be opened again? Is it really a burden to require that the proponent explicitly inform the Court that he is aware of the precedent and that he is asking that the precedent be overruled? Is it really an imposition to require that the proponent state or supply a sufficient factual basis to permit the Court to determine whether there is a basis for reopening the matter?

Once counsel has made a reasonable effort to fulfill this minimal obligation, great caution is necessary in requiring more. The litigant has the right to present his case despite odds as long as he presents it squarely and with sufficient factual basis and reasoned explanation to permit its fair adjudication. Rule 11 requires that one respect the judicial system but it was not meant to prevent the litigant who marches to a different drummer from entering the federal courtroom. It simply requires that he identify the tune to which he is marching and present a reasoned, fact-based explanation as to why others ought to join him.

203 *See supra* notes 171-173 and accompanying text.