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Fines Under New Federal Civil Rule 11: The New Monetary Sanctions for the "Stop-and-Think-Again" Rule

Jeffrey A. Parness*

I. INTRODUCTION

Since 1983, Rule 11 of the Federal Rules of Civil Procedure, which deals with frivolous litigation papers, has prompted much controversy, satellite litigation, and a new cottage industry. Rule amendments in 1983 increased both the range of sanctionable attorney conduct and the extent of judicial sanctioning authority. By the latter 1980s, many had concluded that further amendments were warranted. Recent case law, commentary and empirical research have culminated in a proposed new rule forwarded by the U.S. Supreme Court to Congress in April 1993 and scheduled to take effect in December 1993. In part, the 1993 rule reduces a party's incentives to pursue sanctions for frivolous papers since less misconduct will be sanctionable. Further, attorneys' fees will be less available as a sanction even when a violation occurs. Increasingly, other forms of sanctions, such as fines payable to the court, will be employed; these new forms raise very different questions than do the most common form of reported sanction under the 1983 rule—an award of attorneys' fees. Although both fines and fees constitute monetary sanctions, fines are usually ordered with the public interest in mind while fees are awarded, at least in significant part, to promote private interests. The move from fees to fines presents new challenges for those concerned with Rule 11. This Article will review fines under the 1993 rule, finding that the new rule may best be characterized as a "Big-Brother-Says-Stop-and-Think-Again" rule—quite distinct from the "Stop-and-Think"

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II. THE HISTORY OF RULE 11 SANCTIONS

A. Changes in Sanctionable Conduct and Sanctioning Authority in the 1980s and 1990s

Pursuant to the August 1983 amendments to Rule 11 of the Federal Rules of Civil Procedure, the signature of an attorney on a litigation paper constitutes a certification by the attorney that "to the best of his knowledge, information, and belief formed after reasonable inquiry," the paper is "well grounded in fact." If an attorney violates this standard, under the rule the trial court shall impose "an appropriate sanction." Such a

1. The 1983 amendments to Rule 11 (underlined), together with the deleted portions of the earlier (1938) rule (lined through), are as follows. They appear, together with the final Advisory Committee Notes, in Amendments to the Federal Rules of Civil Procedure, 97 F.R.D. 166, 196-201 (1983) [hereinafter 1983 Amendments].

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

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief there is good ground to support it, and that it is not interposed for delay formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

2. Id. at 197.
sanction is most often imposed on the attorney, and usually requires a monetary payment to help defray the opposing party's legal expenses. This sanction cannot be charged to the client.

The 1983 amendments were intended to alter attorney conduct in order to "streamline the litigation process by lessening frivolous claims or defenses." The changes were designed to make attorneys more responsible for shielding the federal courts from frivolous papers. While the 1983 rule requires attorneys to certify that papers are "well grounded in fact," the former rule, effective in 1938, required only certification as to "good ground." The 1983 amendments were thus intended to make the certification standard for attorneys "more stringent" and to create an expectation "that a greater range of circumstances will trigger" violations of the signature rule.

The 1983 rule also expressly requires attorneys to undertake "some prefiling inquiry into both the facts and the law," while the 1938 rule contained no such explicit requirement. This addition of a prefiling duty led many to characterize the 1983 rule as a "Stop-and-Think" rule.

3. While the rule provides that a violation of the signature requirement may result in sanctions against "the person who signed it, a represented party, or both," id., the federal courts are not disposed toward sanctioning a client for misconduct solely the responsibility of some attorney. See Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp., 602 F.2d 1062, 1069 (2d Cir. 1979) (Oakes, J., concurring) ("It would be with the greatest reluctance, however, that I would visit upon the client the sins of counsel, absent client's knowledge, condonation, compliance, or causation.").


5. 1983 Amendments, supra note 1, at 198 (Advisory Committee Note to 1983 Rule 11).

6. Id. at 197.

7. Id.

8. Id. at 198-99 (Advisory Committee Note to 1983 Rule 11).

9. Id. at 198 (Advisory Committee Note to 1983 Rule 11).


11. See, e.g., ARTHUR R. MILLER, THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY 15 (Federal Judicial Center 1984) ("There is now a mandated obligation on the part of an attorney to stop and think about his behavior, whether it is pleadings, motions, discovery, or what have you..."). Miller served as Reporter for the Advisory Committee on Civil Rules which developed the 1983 rule. Preliminary Draft of Proposed Amendments to the Federal Rules of Civil
The 1983 amendments were also intended to alter judicial conduct by making trial judges more responsible for ridding the courts of frivolous papers. The 1983 rule says judges "shall impose" sanctions for violations of the signature requirement, whereas the 1938 rule provided only that attorneys "may be subjected to appropriate disciplinary action." Additionally, the 1983 rule requires sanctions for intentional and unintentional violations, while the 1938 rule permitted disciplinary action only for willful violations. The 1983 amendments were said to stress "a deterrent orientation," and were intended to focus "the court's attention on the need to impose sanctions for . . . abuses." The only appropriate "sanction" mentioned in the 1983 rule was "an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing . . . including a reasonable attorney's fee." The 1938 rule failed to elaborate on, or illustrate, what might constitute "appropriate" disciplinary action.

The 1983 amendments regarding frivolous papers constituted part of a broader judicial and congressional effort aimed at deterring attorney misconduct. Much of the attention before 1983 centered on discovery abuse. Although empirical data was scarce, the federal rulemakers in 1983 evidently believed that misconduct in the certification of litigation papers

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13. 1983 Amendments, supra note 1, at 197.

14. Id. at 197.

15. Id. at 199-200 (Advisory Committee Note to 1983 Rule 11).

16. Id. at 200 (Advisory Committee Note to 1983 Rule 11).

17. Id. at 197.


filed in civil cases undermined "the just, speedy, and inexpensive determination of every [civil] action." The 1983 amendments were intended to stimulate more fair, prompt and affordable dispute resolution by reducing problems caused by frivolous papers.

Not only was the 1983 rule heavily criticized at the outset, but new critics emerged within a few years of its promulgation. In fact, the 1983 amendments produced so much literature and litigation that in 1990 some federal rulemakers issued a "call for written comments" on the recent Rule 11 experience. Many of the respondents stated that application of the rule discriminated against certain lawyers or parties, while others claimed that the procedures employed in sanctioning were deficient. Additionally, the 1983 rule was deemed too expensive by some, who viewed the resulting costs in satellite litigation as exceeding any benefits. Further, there was concern over the "incremental injury to the civility of litigation that results from lawyers impugning one another's motives and professionalism, and seeking to impose burdens directly on one another."

The 1990 call for comments was followed by a series of proposed amendments to Rule 11 beginning in August 1991.

22. FED. R. CIV. P. 1.
23. See, e.g., William W Schwarzer, Rule 11 Revisited, 101 HARV. L. REV. 1013, 1013 (1988) (focusing on two problems with the 1983 rule: "the lack of predictability of the standard of compliance and the excessive amount of litigation the rule generates").
25. With the assistance (much appreciated) of the federal rulemakers' staff, the author reviewed all written correspondence relevant to the 1990 call on May 13, 1993 in Washington, D.C. Another who reviewed the correspondence has said: "More than 125 individuals and groups provided written comments... The principal objections were that the Rule was fostering excessive, costly satellite litigation, that judges were inconsistently implementing the provision, that Rule 11 activity was disadvantaging civil rights plaintiffs and attorneys, and that the Rule was eroding civility among lawyers." Carl Tobias, Reconsidering Rule 11, 46 U. MIAMI L. REV. 855, 862-63 (1992). The Advisory Committee, which triggered the call for comments, also issued a report detailing its findings upon review of the responsive correspondence and testimony. Advisory Committee on Civil Rules, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Interim Report on Rule 11 (1991) [hereinafter Interim Report], reprinted in GEORGENE M. VAIRIO, RULE 11 SANCTIONS: CASE LAW PERSPECTIVES AND PREVENTIVE MEASURES, at I-3 (App. I) (2d ed. 1992).
26. Call for Comments, supra note 24, at 346.
27. Preliminary Draft of Proposed Amendments to the Federal Rules of Civil
which resulted in the 1993 rule.28


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

(a) Signature. Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) How Initiated.

(A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.
The 1993 rule "is intended to remedy problems that have arisen in the interpretation and application of the 1983 revision." For example, the new rule removes the restrictive interpretation of Pavelic & LeFlore v. Marvel Entertainment Group, so that trial courts may sanction the law firms of attorneys who present frivolous papers. Additionally, the new rule seeks "to equalize the burden of the rule upon plaintiffs and defendants."

Generally, the 1993 rule "places greater constraints on the imposition of sanctions" for rule violations by affording those most subject to possible sanctions an opportunity to take corrective action. This corrective action should typically occur within at least 21 days after the opposing party gives particularized notice of concern about alleged violations. The

(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) Nature of Sanction; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) Inapplicability to Discovery. Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.

29. Id. at 583 (Advisory Committee Note to 1993 Rule 11).
30. 493 U.S. 120 (1989) (holding the 1983 rule does not permit sanctions against law firms, but only against the individual signer).
31. 1993 Amendments, supra note 28, at 581-82 (Rule 11 (c)(1)(A) and (c)(1)(B)); id. at 588-89 (Advisory Committee Note to 1993 Rule 11).
32. Id. at 586 (Advisory Committee Note to 1993 Rule 11).
33. Id. at 584 (Advisory Committee Note to 1993 Rule 11).
34. While the 1993 rule indicates a motion for sanctions should be filed no less than 21 days after the motion is served and no corrective action has been
rulemakers contemplate a reduction in satellite litigation, because many violations are expected to be withdrawn or corrected within the 21-day "safe harbor" period. Motions for sanctions can be made only against those who have been provided the safe harbor. Thus, while the 1983 rulemakers encouraged attorneys to stop and think before signing litigation papers, the 1993 rulemakers allow many alleged violators to stop and think again after their frivolous papers have already been presented.

Simultaneously, the 1993 rule broadens the range of those ultimately responsible for frivolous papers. Some newer forms of Rule 11 violations are created, such as violations by law firms. Further, the 1993 rule replaces the signature requirement with a mandate that papers be properly "present[ed] to the court." This new duty broadens the range of those individuals accountable for frivolous papers by including within presentations not only "signing," but also "filing, submitting, or later advocating."

Violations of the 1993 rule, even those surviving the safe harbor period, no longer automatically trigger an appropriate sanction. Rather, sanction decisions are left to the "significant discretion" of the trial court. Further, the 1993 rule contemplates that every sanction "shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated," so that compensation is not the primary motivator. The 1993 rule expressly recognizes as appropriate sanctions "directives of a nonmonetary nature, an order to pay a penalty into court, or... an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation." 

taken, a lengthier time period can be anticipated "in most cases" because counsel should normally give "informal" notice of concern about alleged frivolous papers even before a Rule 11 motion is prepared. Id. at 591 (Advisory Committee Note to 1993 Rule 11).

35. Id. (Advisory Committee Note to 1993 Rule 11 indicate parties will no longer be "reluctant to abandon a questionable contention lest that be viewed as evidence of a violation of Rule 11.").

36. Id. at 588-89 (Advisory Committee Note to 1993 Rule 11 indicate the change to law firm responsibilities.).

37. Id. at 579 (Rule 11(b)).

38. Id. at 579 (Rule 11(b)).

39. Id. at 587 (Advisory Committee Note to 1993 Rule 11).

40. Id. at 582 (Rule 11(c)(2)).

41. Id. Sanctions involving "directives of a nonmonetary nature" include court
While the 1993 rule should reduce the number of motions seeking Rule 11 sanctions because the safe harbor period will frequently be used, it should also prompt a greater number of court-initiated inquiries into so-called public interest sanctions against lawyers. These sanctions are expressly recognized under the new rule.\textsuperscript{42} They also provide a vehicle for judges to address intentional and unintentional misconduct of lawyers before them, even when no private party complains.

One of the more significant forms of public interest sanctions, expressly recognized in the new rule, is a monetary assessment involving penalties paid into court.\textsuperscript{43} While such penalties were occasionally ordered under the 1983 rule,\textsuperscript{44} and perhaps under its predecessor,\textsuperscript{45} their recognition under the new rule should trigger at least a small cottage industry. Seemingly, under the 1993 rule, fines against lawyers can be ordered for many forms of Rule 11 violations, even where the misconduct is withdrawn or corrected soon after concern is expressed by either an adverse party (via the notice preceding any motion) or by the judge (via a "show cause" order).\textsuperscript{46} The aforenoted safe harbor is available chiefly for rule violators seeking to avoid fee awards. Because attorneys' fees may only be awarded when other sanctions provide "ineffective" deterrence\textsuperscript{47} and after time has been allotted for the withdrawal or

\begin{itemize}
  \item orders "striking the offending paper; issuing an admonition, reprimand, or censure; requiring participation in seminars or other educational programs; . . . [and] referring the matter to disciplinary authorities (or, in the case of government attorneys, to the Attorney General, Inspector General, or agency head)." \textit{Id.} at 587 (Advisory Committee Note to 1993 Rule 11).
  \item \textsuperscript{42} Id. at 582 (Rule 11(c)(1)(B)).
  \item \textsuperscript{43} Id. (Rule 11(c)(2)).
  \item \textsuperscript{44} VAIRO, supra note 25, at 9-53 to 9-62 (reviewing cases); see also Jeffrey A. Parness, \textit{More Stringent Sanctions Under Federal Civil Rule 11: A Reply to Professor Nelken}, 75 GEO. L.J. 1937 (1987) (urging that the 1983 rule should not be read to proscribe monetary sanctions in excess of a party's costs and fees).
  \item \textsuperscript{45} While there may have been no reported cases of fines under the 1938 rule, D. Michael Risinger, \textit{Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11}, 61 MINN. L. REV. 1, 34-37 (1976) (reviewing reported cases), the availability of "punitive" fines was recognized by at least some commentators, \textit{id.} at 43.
  \item \textsuperscript{46} Specifically, the 1993 rule allows court initiatives on all rule violations, 1993 Amendments, \textit{supra} note 28, at 582 (Rule 11 (c)(1)(B)), whether or not corrected during the safe harbor period, and only disallows court initiatives regarding monetary sanctions if voluntary dismissal or settlement has occurred, \textit{id.} at 583 (Rule 11 (c)(2)(B)), thus seemingly permitting nonmonetary sanctions (such as bar disciplinary referrals) against attorneys who have corrected their frivolous papers.
  \item \textsuperscript{47} \textit{Id.} at 587-88 (Advisory Committee Note to 1993 Rule 11). There is no explanation of why fines payable to the court are more effective deterrents of Rule
\end{itemize}
correction of the misconduct, motions for fees under the 1993 rule should be filed with the court far less frequently. Thus, fines should constitute the chief form of monetary sanction under the 1993 rule, typically coming after a court has taken "initiative," not after a party's motion. And, there is good reason to believe fines will often be chosen over other nonmonetary sanctions available against lawyers. Initiatives regarding fines may be difficult, however, because private parties have little incentive to inform the court about much Rule 11 misconduct, especially if it has been withdrawn or corrected. Under the 1993 rule, such withdrawn or corrected misconduct has been the subject of an earlier notice of concern served upon the parties, but not "filed with or presented to the court."

11 misconduct than awards of attorneys' fees. Perhaps the federal rulemakers found that the lure of attorneys' fees caused excessive Rule 11 motions and thus too much satellite litigation, and that federal judges could be trusted to detect and act wisely regarding significant Rule 11 misconduct, even though the injured party might not help much since there is little incentive to move for sanctions. Given the 1990 Call for Comments, supra note 24, at 347 (soliciting evidence), and the varying studies of the 1983 rule employed by the 1993 rulemakers, 1993 Amendments, supra note 28, at 583-84 (Advisory Committee Note to 1993 Rule 11), the decision to abandon fee awards may have been undertaken with an "empirical approach." Laurens Walker, A Comprehensive Reform for Federal Civil Rulemaking, 61 GEO. WASH. L. REV. 455, 484-85 (1993) (direct observation and experience used). Yet, the decision to move to fines as a chief means of deterrence seems grounded on the rulemakers' (more frequently employed) "rationalistic approach," as there was little examination of (or experimentation with) fines. Id. at 484-88 (rationalistic approach employs reason and intuition alone); infra notes 55-92 and accompanying text (review of 1993 rulemakers' consideration of fines and of information on fines supplied to the rulemakers).

48. 1993 Amendments, supra note 28, at 584 (Advisory Committee Note to 1993 Rule 11). Motions for fees most typically will be made where frivolous papers remain unwithdrawn or uncorrected after concern is expressed by the movant and where those papers were presented for improper purposes, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. Id. at 588 (Advisory Committee Note to 1993 Rule 11 find fees most appropriate for the "unusual" circumstance of a Rule 11(b)(1) violation). Compare the proposed amendments to the discovery rules, which permit fees for discovery abuse where there is no improper purpose. Id. at 684-85 (Rule 37 (a)(4)(A)).

49. "Since the purpose of Rule 11 sanctions is to deter rather than to compensate, the rule provides that, if a monetary sanction is imposed, it should ordinarily be paid into court as a penalty." Id. at 587-88 (Advisory Committee Note to 1993 Rule 11).

50. On the available nonmonetary sanctions, see id. at 582 (Rule 11 (c)(2)). On why fines often are more effective than these other sanctions, see Stephen G. Bené, Note, Why Not Fine Attorneys? An Economic Approach to Lawyer Discipline Sanctions, 43 STAN. L. REV. 907 (1991) (stating that fines are preferable to other sanctions in many attorney discipline situations).

51. 1993 Amendments, supra note 28, at 581 (Rule 11(c)(1)(A)).
The reduction in Rule 11 motions and the increase in Rule 11 court initiatives will signal a move from a time when opposing counsel often inquires into whether an attorney reasonably stopped and thought before filing, to a time when the government, as the public representative, frequently asks whether an attorney reasonably stopped and thought again after being put on notice of an opposing party's concern.

The procedural mechanisms and substantive criteria relevant to fines, a public interest sanction, vary dramatically from the guidelines for awards of attorneys' fees, a private interest sanction. While both may provide a remedy for similar litigation misconduct, the purposes behind public and private interest sanctions are typically quite different and thus the nature of remedial relief chosen is usually quite different.52 Public interest sanctions are most often intended to address the harm caused the public at large, while private interest sanctions are intended, in significant part at least, to address the harm caused particular individuals or entities; thus, public interest sanctions are usually considered at the urging of a public representative, while private interest sanctions are typically requested by certain individuals or entities who have been harmed. In considering harm to the public caused by civil litigation misconduct, the public representative is often most interested in protecting scarce governmental resources, general deterrence, quasi-criminal punishment, and professional discipline. The same misconduct causes a private party to focus on gaining compensation for personal loss, specific deterrence, and perhaps punitive damages (possibly constituting a windfall). Public interest sanctions for civil litigation misconduct are frequently raised and adjudicated by judges on their own initiative upon evidence of especially egregious behavior, with these judges then left in the somewhat uncomfortable position of performing both executive and judicial functions. These judges may also need to undertake legislative functions where the guidelines for public interest sanctions are unclear, and to serve as witnesses when the misconduct occurred in their presence or when the reasonable person standard is applicable. By contrast, private interest sanctions for litigation misconduct are

frequently urged in adversarial settings where judges can remain more disinterested. In sum, there are very different factors utilized when public representatives and private parties raise concerns over the very same civil litigation misconduct.

Under the 1993 rule and its legislative history, a variety of forms of public interest sanctions beyond fines are contemplated. They include an admonition, a reprimand or a censure; an order requiring participation in an educational program; and a disciplinary referral.53 The noted private interest sanctions under the 1993 rule include an order striking an offending paper and a fee award.54

B. The Intent Behind the Push for More Public Interest Sanctions in the 1990s

What prompted the federal rulemakers to encourage more public interest sanctions against lawyers? The rulemakers seemed chiefly concerned with channeling attention away from compensation and toward deterrence, with assuring fair application of Rule 11, with reducing satellite litigation, and with restoring judicial discretion in the imposition of sanctions. The rulemakers rejected the urging of many that the rule be returned to its pre-1983 form (or to something comparable), so that only willful violations would be addressed and so that a disciplinary action would be the sole sanction. Trial judges retain the power under the 1993 rule to remedy both intentional and unintentional actions through a variety of remedies.

While the goals of the 1993 rule are somewhat clear, the particular ways in which public interest sanctions will serve these goals are far from clear. Certainly, the newly recognized authority of district judges to issue “show cause” orders on their own “initiative” invites greater consideration of public interest sanctions. To support the call for more public interest sanctions, the federal rulemakers also referred to the *Manual for Complex Litigation* when discussing “the variety of possible sanctions.”55 The *Manual* does include within its recognized “types of sanctions” the imposition of a “fine.”56 Yet, the *Manual* does not say much about when fines are most appropriate.

54. *Id.*
55. *Id.*
The Manual does say that in imposing any sanction, a court should consider "the nature of the sanctionable conduct, its consequences on others, and the purposes to be served by a sanction." The drafters of the 1993 rule otherwise give little guidance on how district judges will determine when public interest sanctions might be considered, which of the possible public interest sanctions is most appropriate, or when relevant misconduct has even occurred. Further, injured parties and opposing lawyers have little incentive, and no widely recognized duty, to inform the court about the misconduct of others, so district judges will often have difficulty learning of Rule 11 violations.

Before deciding to encourage more public interest sanctions, particularly fines, in the 1993 rule, the federal rulemakers did consider the responses to the 1990 call for comments, as well as prior case law and commentaries on the 1983 rule. Only a few of the responses to its 1990 call, however, addressed fines payable to the court; none mentioned the Manual for Complex Litigation; and few discussed in any detail the procedural or substantive guidelines for fines.

The American College of Trial Lawyers recommended in October 1990 certain amendments to the 1983 rule, including a proposal that a frivolous paper could prompt an order for payment of "the amount of reasonable expenses, not to include attorneys' fees, incurred" because of the rule violation. This order might be accompanied by "an additional monetary sanction," with all "monetary sanctions" to be "paid into the registry account of the clerk of the district court."

57. Id.
58. Prior to 1990, a slowly emerging body of cases appeared which supported fines under the 1983 rule and other sanctions authority. See infra notes 93-104 and accompanying text. Earlier commentary supporting greater consideration of fines includes Parness, supra note 21, at 354 ("Cost recovery by the government should constitute part of the trial court's sanctioning arsenal pursuant to Rule 11 because there are times when no other sanctions may be effective.").
59. With the assistance (much appreciated) of the federal rulemakers' staff, the author reviewed all written correspondence relevant to the 1990 call on May 13, 1993 in Washington, D.C. Of course, the responses to the 1990 call do not constitute the legislative intent behind the 1993 rule, Bancorp Leasing & Fin. Corp. v. Augusta Aviation, 813 F.2d 272, 276 (9th Cir. 1987), but they are evidence of what the rulemakers were thinking when proposing the rule.
61. Id., Addendum 2, at 2.
62. Id.
63. Id., Addendum 2, at 3. In rejecting the possibility of attorneys' fees, the
In the fall of 1990, the Chicago Council of Lawyers also urged that new forms of sanctions be expressly recognized. Specifically, the Council sought an amendment to “make clear that a non-monetary sanction is a legitimate form of sanction under the Rule,” urging that Rule 11 should expressly recognize a reprimand.66

In the fall of 1990, the Chicago Bar Association urged that “greater consideration be given to non-monetary sanctions” under Rule 11.68 Its proposal contemplated that no attorneys’ fees be awarded unless other sanctions were “insufficient to deter future violations and that the amount of the sanction is the least severe sufficient to deter future violations.”69 Besides attorneys’ fees, the sanctions endorsed by the Association included continuing legal education; the use of unpublished, rather than published, opinions; and the requirement that law firms “institute internal approval procedures to assure that future filings comply with the rule.”70

Like the Chicago associations, the National Bar Association asked federal rulemakers to direct more attention to nonmonetary sanctions. On behalf of a membership heavily involved in federal civil rights litigation, the Association suggested that federal judges be “encouraged to utilize innovative approaches as a preferred deterrence to monetary sanctions in light of the dearth of attorneys who choose to practice civil rights law and the unprofitability of practicing civil rights

College characterized “whether or not the sanctioned person should pay the opponent’s legal fees” as a close question. Id. at 4. The College stood by its October 1990 proposal after an early version of the 1993 rule was issued about a year later. See Letter from American College of Trial Lawyers to Secretary, Committee on Rules of Practice and Procedure (Nov. 14, 1991) (copy on file with author).

64. Letter from Chicago Council of Lawyers to Committee on Rules of Practice and Procedure (Nov. 1990) (copy on file with author).
65. Id. at 3.
66. Id.
68. Id. at 12.
69. Id. at 2.
70. Id. at 12.
71. Rule 11 and Civil Rights Lawyers: Comments of National Bar Association in Response to Call for Comments Issued by the Advisory Committee on the Civil Rules, Judicial Conference of the United States (Nov. 1, 1990) (copy on file with author).
72. Id. at 1.
Possible approaches were said to include private and public reprimands, referrals to state disciplinary bodies, attorney license suspensions, and required legal education. At the same time, Professor Victor H. Kramer urged that Rule 11 be rewritten so that it would serve as "an instrument to improve professional responsibility" and thus become "primarily a lawyer discipline device." He suggested that a new rule include as an appropriate sanction "an order to pay to the clerk of the court a civil penalty . . . in the nature of a fine," which would serve to "compensate the courts for causing them to engage in needless expense arising from frivolous litigation." A few other professors joined in the fall of 1990 in urging the move from fees to fines or from private to public interest sanctions. Professors Dennis Curtin and Judith Resnick indicated their understanding that this move was "emerging" as a "central" recommendation. They supported the move, indicating it would "reduce the amount of monetary fines imposed" and could provide "money . . . either for continuing legal education or for the provision of legal services to pro se litigants." They suggested fines be "limited" in amount and should only come after other public interest sanctions, including "mandatory legal education," were considered. And, Professor John Leubsdorf urged federal rulemakers "to

73. Id. at 12.
74. Id. at 14-15.
76. Id. at 4.
77. Id.
78. Id. at 5.
79. Id. at 5-6. He further urged that each federal district "should adopt a local rule to provide that every violation of Rule 11 by a lawyer will be reported to the disciplinary authority in the state in which the offending lawyer both has been authorized to practice law and has his own principal office." Id. at 4. For a further elaboration of Professor Kramer's views, see Victor H. Kramer, Viewing Rule 11 as a Tool to Improve Professional Responsibility, 75 MINN. L. REV. 793 (1991).
80. Letter from Professors Dennis Curtis & Judith Resnick, University of Southern California Law Center, to The Honorable Sam Pointer 2 (Nov. 21, 1990) (copy on file with author).
81. Id.
82. Id.
83. Id.
84. Id.
replace the present discretionary sanctioning provisions" of Rule 11 "with a requirement of fixed but relatively small lawyer fines." This would drive the sanctioning scheme toward deterrence and away from compensation, and "provide protection against sanctions that are unfairly large."

Between publication of the proposed amendments to Rule 11 in August 1991 and the communication of the 1993 rule by the U.S. Supreme Court to Congress in April 1993, others joined in supporting the move from private to public interest sanctions. But they too have provided little assistance on the procedural or substantive criteria which should guide the imposition of increasing numbers of fines and other public interest sanctions. For example, a bench-bar proposal to revise Rule 11 was issued by a distinguished group of judges and lawyers shortly after the August 1991 proposed amendments to Rule 11 appeared. That proposal recommended that the sole Rule 11 sanction be an "appropriate" monetary payment "into the registry account of the clerk of the district court." While the proponents indicated their provision was "taken directly from the proposal of the American College of Trial Lawyers," they failed to indicate why they rejected the College's proposal allowing recovery of a private party's expenses, not including attorneys' fees.

85. Letter from John Leubsdorf, Visiting Professor, Columbia University School of Law, to Professor Paul Carrington 1 (Nov. 16, 1990) (copy on file with author).
86. Id. at 2.
87. Id.
88. Of course, many who found fault with the 1983 rule criticized the 1991 proposal, including its projected move from fees to fines. See, e.g., Carl Tobias, Civil Rights Plaintiffs and the Proposed Revision of Rule 11, 77 IOWA L. REV. 1775, 1793 (1992) (suggesting a prohibition of all monetary sanctions). Since the 1993 rule was sent to Congress, much of the criticism of the Rule 11 proposal has abated. See, e.g., Carl Tobias, New Rule in Need of Trial Run, NAT'L L.J., June 21, 1993, at 15, 16 (urging Congress to allow the 1993 rule to take effect). Yet, significant criticism of changes in the discovery rules, which accompanied the 1993 rule to Congress, continues. Id.; Randall Samborn, Derailing the Rules, NAT'L L.J., May 24, 1993, at 1, 33.
90. Bench-Bar Proposal, supra note 89, at 165.
91. Id. at 169.
92. Id. The College viewed the availability of attorneys' fees under Rule 11 as
In sum, the 1993 version of Federal Civil Rule 11 should prompt fewer motions seeking attorneys' fees, but more court initiatives regarding alleged attorney misconduct. There should be a greater number of fines. Yet, the federal judges will need to develop on a case-by-case basis, and perhaps through local rules, the procedural mechanisms and substantive criteria for fines and other public interest sanctions since the rulemakers have provided little guidance. When fines have been ordered under the 1938 and 1983 rules, the results often were both unfair and uneven. This history further challenges the judges responsible for implementing the 1993 rule.

III. FINES UNDER THE OLD AND NEW RULE 11

While the 1993 rule encourages fines, orders of penalties paid to the court were occasionally issued under the earlier versions of Rule 11. After this experience is described, fines under the new rule will be explored.

A. Fines Under the Old Rule 11

As noted, the 1938 version of Rule 11 covered only willful violations, which, when found, might only subject an attorney "to appropriate disciplinary action." By comparison, the 1983 version contemplated both willful and nonwillful violations, which, when found, must trigger "an appropriate sanction," exemplified only by an order requiring the reimbursement of "reasonable expenses . . . including a reasonable attorney's fee." Assuming comparable willful violations, both versions of the rule seemingly allowed a fine as a form of "appropriate" sanction, and the 1983 rule may have allowed fines even for certain forms of nonwillful conduct. Yet neither rule mandated, encouraged, or generated many fines. In the last few years, however, the 1983 rule, together with comparable rules on discovery and appellate practice, have prompted a

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93. 1983 Amendments, supra note 1, at 197.
94. Id.
97. See, e.g., In re Pritzker, 762 F.2d 532 (7th Cir. 1985) (using Federal Rules
slowly growing number of federal court fines. The predominant legal issues raised have concerned process, not the guiding substantive criteria.

Both cases and commentaries have addressed the need for notice, opportunity to be heard, and articulated findings when fines are ordered under Rule 11. Typically, fines have occurred in settings where at least one private party moved for attorneys' fees and a fine was ordered during a ruling on the motion; often the fine was not requested by the movant, and the possibility of a fine was never raised by the court prior to its ruling. Occasionally, fines have been ordered after "show cause" orders were served.

Usually, fines under the 1983 rule were imposed only upon findings of willful violations. Such fines have taken two forms: compensatory and punitive. Compensatory fines usually seek to reimburse the judiciary for at least some, if not all, of

of Appellate Procedure 46(c)); Robert J. Martineau, Frivolous Appeals: The Uncertain Federal Response, 1984 DUKE L.J. 845, 868 (noting fines have been levied based on Federal Rule of Appellate Procedure 46(c), recognizing "appropriate disciplinary action" may be taken after a "show cause" hearing); see also Kleiner v. First Nat'l Bank, 751 F.2d 1193, 1209-10 (11th Cir. 1985) (ordering fine against counsel for intentional misconduct under inherent power); Miranda v. Southern Pac. Transp. Co., 710 F.2d 616, 521 (9th Cir. 1983) (assessing fines against both attorneys under local court rule); Roy v. American Professional Mktg., Inc., 117 F.R.D. 687, 692-93 (W.D. Okla. 1987) (ordering monies to be paid to court clerk for pretrial misconduct under the authority of Federal Rule of Civil Procedure 16(f)).

98. See, e.g., Donaldson v. Clark, 819 F.2d 1551, 1558-61 (11th Cir. 1987).

99. For an early view, see Michael S. Cooper, Comment, Financial Penalties Imposed Directly Against Attorneys in Litigation Without Resort to the Contempt Power, 26 UCLA L. REV. 855, 882-91 (1979).

100. See, e.g., Warshay v. Guinness PLC, 750 F. Supp. 628, 639-41 (S.D.N.Y. 1990), aff'd, 935 F.2d 1278 (2d Cir. 1991). In one unusual case, the trial court ordered fines while granting a motion for fees, but lowered their amounts because those assessed "were likely unaware that such a sanction might be imposed." Advo Sys., Inc. v. Walters, 110 F.R.D. 426, 433 (E.D. Mich. 1986).

101. In one federal circuit, fines against attorneys for trial court misconduct must be accompanied by procedural protections under Federal Rule of Appellate Procedure 46(c), see discussion supra note 97, which requires a hearing and an opportunity to show cause. Miranda, 710 F.2d at 522-23.


103. See Parness, supra note 52, at 1313 (raising equal treatment questions where courts fail to explain why only partial reimbursement is ordered and where
the costs incurred in handling frivolous papers. Punitive fines typically seek to deter future misconduct, where the amount is unconnected to wasted judicial resources.  

**B. Fines Under the New Rule 11**

In inviting increasing fines, the drafters of the 1993 rule provided some guidance on the applicable procedural and substantive standards. The new rule expressly mandates that there be “notice and a reasonable opportunity to respond” prior to the imposition of any sanction. Clearly, fines can be ordered upon notice of, and an opportunity to respond to, a court-initiated inquiry into Rule 11 misconduct; perhaps they can also follow a hearing on a private party’s motion for sanctions, though such motions will be infrequent. Further, the 1993 rules indicate a sanction order must be accompanied by a description of the conduct determined to violate the rule, as well as an explanation of “the basis for the sanction imposed.”  

At least six major issues face federal judges who seek to fine attorneys presenting frivolous papers under the 1993 rule:

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105. 1993 Amendments, *supra* note 28, at 580 (Rule 11(c)).

106. *Id.* at 582 (Rule 11(c)(1)(B)) (indicates a “show cause” order should describe “the specific conduct that appears to violate” the rule).

107. With both court initiatives and party motions, notice must be given of the specific conduct that appears to violate the rule; attorneys’ fees are to be awarded only where “warranted” and are not preferred; and, trial judges have “significant discretion.” *Id.* at 581-82 (Rule 11(c)(1)(A), (B)).

108. The rule drafters indicated that a party may only be awarded attorneys’ fees after a safe harbor has been provided and where fees are necessary to deter repetition of the “conduct or comparable conduct by others similarly situated.” *Id.* at 582 (Rule 11(c)(2)). Movants for fees will likely stress their opponents presented papers for improper purposes, “such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.” *Id.* at 580 (Rule 11 (b)(1)). With the expected drop in Rule 11 motions, fines should increasingly be dependent upon court “initiative.” *Id.* at 582 (Rule 11(c)(1)(B)).

109. *Id.* at 583 (Rule 11 (c)(3)).

110. *Id.*
(1) the manner in which the judges will become informed about possible lawyer misconduct, since there will be fewer Rule 11 movants; (2) the additional procedures necessary before fines can be levied; (3) the type of conduct for which Rule 11 fines might be imposed; (4) who will pay the fine; (5) the manner in which federal trial courts will employ the uncontrolled discretion afforded them in the 1993 rule to fine attorneys; and (6) the uncertain relationship between Rule 11 proceedings and other public interest proceedings, such as bar disciplinary actions, which can involve the very same litigation misconduct.

1. Learning of lawyer misconduct

With fewer Rule 11 motions, how will judges learn of attorney misconduct which might prompt a fine? One solution is to mandate (or at least encourage) those involved in civil litigation to report their beliefs about significant Rule 11 attorney misconduct which will not otherwise likely be subject to any court initiative or motion. The Model Rules of Professional Conduct for lawyers already require reports to disciplinary agencies when substantial questions are raised about another lawyer’s conduct. A reporting rule for serious Rule 11 misconduct could easily be incorporated into local federal court rules, which could require, for example, reports of especially egregious conduct that has been withdrawn or corrected during a safe harbor period.

Such a reporting rule would not interfere with bar disciplinary responsibilities. Additionally, it would address somewhat Justice Scalia’s concerns in opposing the 1993 rule. Scalia urged that the net effect of the new standard would be “to decrease the incentive on the part of the person best situat-

111. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3(a) (1992) [hereinafter MODEL RULES] (“A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate professional authority.”); cf. id. Rule 3.1 (“A lawyer shall not . . . assert . . . an issue . . . unless there is a basis for doing so that is not frivolous.” Frivolous issues are described in the accompanying note as requiring an objective test.).

112. While egregious conduct which is corrected within the safe harbor period may not support a fee award, nevertheless it still constitutes a violation to which a court may apply certain sanctions on its initiative. See supra note 48.

113. MODEL RULES, supra note 111, Rule 8.3 cmt. (recognizing that serious offenses may be referred to other agencies “more appropriate in the circumstances” and that less serious offenses require no bar disciplinary agency report).
ed to alert the court to [the] perversion of our civil justice system." Thus, a reporting rule could cover flagrant misconduct, such as pleadings apparently filed without any prefiling inquiry or motions seemingly intended to harass or to cause unnecessary delay, even when the papers have been withdrawn. A mandatory reporting provision should at least encompass reports by attorneys, since they are court officers as well as the zealous advocates of private interests and thus are more justifiably subject to the courts' dictates on professional behavior. A voluntary reporting provision could also cover nonlawyers, particularly litigants harmed by the Rule 11 misconduct of their adversaries' attorneys.

This reporting rule would be consistent with the intent of the Rule 11 reformers dating to the 1983 amendments. Professor Arthur Miller, the reporter to the committee which primarily drafted the 1983 changes, said this about the 1983 rule when it first took effect:

We have lived so long with the emphasis on "duty to client" that redirecting the responsibilities of lawyers to the system is easier said than done. Yet once it is understood that the court system is a societal resource, not merely the private playpen of the litigants, the difficult task of discouraging hyperactivity must be undertaken.

The 1983 amendments to the Federal Rules of Civil Procedure represent a modest step in that direction.  

2. Process of fining lawyers

With the decrease in Rule 11 motions, what process will provide the required "notice and . . . reasonable opportunity to respond" for hearings on fines under the 1993 rule? Notice should come pursuant to a "show cause" order issued under Rule 11(c)(1)(B), which describes the specific conduct that allegedly violates the rule. Unlike past practice, notice by way of a private party's motion should usually be inadequate. As well, the notice should provide some guidance on the standards to be applied and the procedures to be employed at the

116. 1993 Amendments, supra note 28, at 580 (Rule 11(c)).
117. Id. at 582.
118. Cf. supra note 100.
hearing. For example, it should indicate whether oral or written testimony will be entertained and whether discovery is available.\textsuperscript{119} Finally, the notice should indicate whether the judge might consider other public interest sanctions, including a reprimand, a bar disciplinary referral, or an order requiring participation in an educational program. Boilerplate "show cause" orders could easily be incorporated into local rules.

Because hearings required for compensatory fines under Rule 11 seemingly trigger fewer constitutional rights than do hearings for punitive fines,\textsuperscript{120} and because all conduct prompting a possible Rule 11 fine has caused some wasted judicial resources, Rule 11 fines should be limited to those which compensate wholly or partially for societal loss. Punitive fines arising from conduct violating Rule 11 are still available during more traditional disciplinary hearings before attorney regulatory commissions and the like.

The opportunity to be heard on compensatory fines should vary depending upon the relevant factual and legal issues. On occasion, it seems appropriate for a federal judge to appoint a special public representative to urge the public interest, as can occur in some contempt settings;\textsuperscript{121} such a representative often should not be an attorney otherwise involved in the lawsuit.\textsuperscript{122} The representative might be an attorney who is em-

\textsuperscript{119} The legislative history of the 1993 rule indicates the availability of the opportunity for written submissions, oral arguments, or "evidentiary presentation will depend on the circumstances." 1993 Amendments, supra note 28, at 589 (Advisory Committee Note to 1993 Rule 11) (parentheses omitted).

\textsuperscript{120} See, e.g., Donaldson v. Clark, 819 F.2d 1551, 1559 n.10 (11th Cir. 1987) ("It may be that the monetary sanction . . . is . . . so arguably unrelated to the misconduct that due process will require extensive due process safeguards."); Bagwell v. International Union, United Mine Workers of Am., 423 S.E.2d 349 (Va. 1992) (stating that coercive civil contempt fines in fixed amounts not measured by any harm suffered by civil party may raise due process and excessive fines concerns), cert. granted sub nom. United Mine Workers of Am. v. Bagwell, 113 S. Ct. 2439 (1993).

\textsuperscript{121} In some contempt settings, appointment is required. See Young v. United States \textit{ex rel.} Vuitton et Fils, 481 U.S. 787, 809 n.21 (1987) (finding, under its supervisory authority, that a criminal contemner has a right to a disinterested prosecutor, who cannot be the successful civil litigant whose injunction was allegedly disobeyed); see also Newton v. A.C. & S., Inc., 918 F.2d 1121, 1124 n.1 (3d Cir. 1990) (finding no "concrete adverseness" as plaintiffs did not appear during defendants' appeal of fine payable to the court) (citation omitted); Snow Machs., Inc. v. Hedco, Inc., 838 F.2d 718, 726 (3d Cir. 1988) (expressing surprise that problem of public representation in fine cases has received no attention, but offering "no solutions").

\textsuperscript{122} At times, such an attorney would have conflicting interests if appointed; consider settings involving unwithdrawn frivolous papers presented for an improper
ployed by the court in the clerk's office, or who is an assistant United States Attorney. If needed, compensation for such public representatives who normally work in the private sector could come from the fines earlier collected in other cases.\textsuperscript{123} Jury trials need not be conducted,\textsuperscript{124} and the burden of proof may need only be preponderance of the evidence.\textsuperscript{125}

3. **Conduct warranting fines**

What type of conduct might warrant a Rule 11 penalty paid into court? Seemingly, negligent presentation of frivolous papers alone should not suffice. Sufficient deterrents for such future conduct by the same or other attorneys already exist,\textsuperscript{126} and thus fines for simple negligence should be deemed barred under the 1993 rule as deterrence is now to be the chief goal behind Rule 11 sanctions. On the other hand, intentional misconduct—such as presenting frivolous papers for the purpose of harassment—should always subject the wrongdoer to the possibility of a fine. Fines provide an efficient tool for deterring attorneys specially and generally from future Rule 11 violations. The economic interests which drove many attorneys and parties to seek fee awards under the 1983 rule should prove to be quite different from the motivations of judges who will initiate inquiries into compensatory fines under the 1993 rule.

What of fines for misconduct which is more culpable than purpose, where both fines and fee awards to the attorney's clients could be urged. See supra note 48; see also Snow Machs., Inc., 838 F.2d at 726 n.6 (noting the possibility of appointing an amicus).


\textsuperscript{124} But see Parness, supra note 52, at 1314 (uncertainty on the need for a jury to assess Rule 11 punitive fines, but not for Rule 11 compensatory fines).

\textsuperscript{125} But see Santosky v. Kramer, 455 U.S. 745, 745 (1982) (discussing when "fair preponderance of the evidence" standard may be unconstitutional); Donaldson v. Clark, 819 F.2d 1551, 1559 n.10 (11th Cir. 1987) ("It may be that the monetary sanction being considered in a specific case is so severe in amount . . . that due process will require extensive due process safeguards as prerequisites to its imposition.").

\textsuperscript{126} Notice of an opposing party's concern about negligent presentations can always be served; if such presentations are not corrected, they can be stricken upon motion. See supra note 54. Further, reprimands and orders of continuing education are some of the public interest sanctions available to address such conduct. See 1993 Amendments, supra note 28, at 587 (Advisory Committee Note to 1993 Rule 11).
negligence, but not quite intentional\(^2\) (however intentional is defined\(^2\))? The legislative history to the 1993 rule provides some guidance by indicating that "show cause orders will ordinarily be issued only in situations that are akin to a contempt of court."\(^2\) Civil contempt settings, at least, need not involve allegations of bad intent.\(^3\) Thus, compensatory fines under Rule 11 should be available for conduct which does not involve bad intent, but is serious enough that adequate deterrence requires some fine payable to the court. While somewhat imprecise, the term "egregious misconduct" could serve as a guidepost.

4. **Paying the fine**

Normally, attorneys should be held personally liable for any compensatory fines resulting from their own presentations of papers deemed violative of Rule 11. Yet, recall that the 1993 rule also now allows judges to sanction law firms of attorneys who have presented frivolous papers.\(^4\) Should law firms ever be assessed joint liability for the fines incurred by their lawyers? Should law firms ever be fined even where their responsible personnel are not fined personally?

When attorneys' fees and other litigation expenses are awarded against an attorney for presenting a frivolous paper, the 1993 rule provides that "[a]bsent exceptional circumstances, a law firm shall be held jointly responsible for violations

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128. Cf. Hazen Paper Co. v. Biggins, 113 S. Ct. 1701, 1710 (1993) ("willful" conduct under Age Discrimination in Employment Act includes conduct showing reckless disregard for whether acts were prohibited by statute); Cheek v. United States, 498 U.S. 192 (1991) (accused must know his conduct was illegal to attempt "willfully" to evade income tax).

129. 1993 Amendments, supra note 28, at 592 (Advisory Committee Note to 1993 Rule 11).


131. Specifically, Rule 11(c)(1)(A) allows sanctions against "law firms . . . that . . . are responsible for the violation." 1993 Amendments, supra note 28, at 580-81; see also Edward A. Adams, Bar: Discipline Rules Should Cover Firms, NAT'L L.J., July 5, 1993, at 10 (A committee of the Association of the Bar of the City of New York has urged that the New York attorney disciplinary rules should be extended to cover law firms).
committed by its partners, associates, and employees.\textsuperscript{132} Additionally, the 1993 rule expressly permits court initiatives on public interest sanctions to be directed to law firms regarding all forms of Rule 11 violations.\textsuperscript{133} The legislative history to the new rule further indicates that ordinarily, law firm responsibility for its agents' misconduct is to follow "established principles of agency."\textsuperscript{134} Thus, the 1993 rule clearly warrants that in most instances joint liability be assigned law firms for compensatory fines levied against their personnel.\textsuperscript{135}

The joint responsibility of law firms for such compensatory fines would also promote one of the major goals behind the 1993 rule, the additional deterrence of Rule 11 attorney misconduct. The 1993 amendment expressly provides that Rule 11 sanctions are to be "limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated."\textsuperscript{136} With law firm liability, not only will law firms have some economic incentive to better monitor their personnel so that frivolous papers are not presented by their offices, but they will also have greater incentives to monitor internal operations so as to avoid federal court inquiry into how the firms' policies and practices may have led to frivolous paper presentations. Additionally, attorneys will become more concerned about exposing others to the costs of their own sins.

Under the 1983 rule, trial courts occasionally sought to motivate reforms within law firms in order to reduce the chances of future Rule 11 misconduct. For example, one judge ordered that his opinion finding a Rule 11 violation in the ways in which legal memoranda had been prepared be circulated among all partners and associates of the law firms employing the errant lawyers.\textsuperscript{137} Presumably, the hope, in part, was to stimulate debate on, and facilitate any necessary changes to, the firm's established approach to legal memoranda.\textsuperscript{138}

\textsuperscript{132} 1993 Amendments, supra note 28, at 581 (Rule 11(c)(1)(A)).
\textsuperscript{133} Id. at 582 (Rule 11(c)(1)(B)).
\textsuperscript{134} Id. at 589 (Advisory Committee Note to 1993 Rule 11).
\textsuperscript{135} The rule further allows sanctions against individuals and law firms who helped others present frivolous papers, though they themselves did not "actually" make the presentations. Id.
\textsuperscript{136} Id. at 582 (Rule 11(c)(2)).
\textsuperscript{138} Elsewhere, this federal judge has written:

The impact of a reprimand is greatly increased by including it in a published order. Publication enhances the deterrent effect of sanctions and
Furthermore, at times under the 1993 rule, compensatory fines should be levied upon law firms even where there are no parallel fines upon any individuals. It is easily imaginable that the fining of a law firm might be the most effective deterrent to the repetition of misconduct by those within the firm, while other sanctions, such as bar disciplinary referrals or reprimands or required continuing legal education, would be most effective in deterring the repetition of the conduct by the individual attorney involved. As contrasted with the 1983 rule which urged individual attorneys to stop and think about their litigation papers before signing them, the 1993 rule should prompt trial judges to urge law firms to stop and think about their internal practices which may have contributed to the presentation of a frivolous paper.

5. Uncontrolled discretion to fine

Yet another difficulty facing courts contemplating compensatory fines of lawyers under the 1993 rule is how to exercise wisely the delegated discretion as to process and substance. "Of course, discretion . . . is an integral element of the litigation process . . . Such discretion is necessary if trial judges are to manage the litigation before them effectively." Nevertheless, discretion which is too broad can cause unfortunate and avoidable differences in treatment of similarly situated people, as well as a lack of fair notice of what is required. These problems can be avoided with the adoption of a few local court rules. Such local rules seem preferable to allowing a "shakedown period" on fines, characterized as "a bell-shaped curve of litigation activity responsive to rule change," which helps educate the bar about what is expected of them under Rule 11 . . . . Publication can . . . (be achieved) by distribution of copies of the order to other lawyers in the sanctioned firm.

William W Schwarzer, Sanctions Under the New Federal Rule 11—A Closer Look, 104 F.R.D. 181, 202 (1985). Recall as well that in the fall of 1990, the Chicago Bar Association said that possible sanctions under Rule 11 should include requirements that law firms "institute internal approval procedures to assure that future filings comply with the rule." Comment of Chicago Bar, supra note 67, at 12.

139. Schwarzer, supra note 23, at 1017 n.22.

140. The wisdom of the 1993 rulemakers in not promulgating a "uniform approach" to fines is not addressed herein. Evidently, they believed a single approach was not desirable "given that the district courts vary tremendously in size, volume of cases, calendar congestion, and types of cases, and that litigation tactics of attorneys may differ across the country." Eash v. Riggins Trucking Inc., 757 F.2d 557, 569-70 (3d Cir. 1985).
"peaks and then declines to normality as the profession's understanding of the rule is stabilized." The local rules could address both the procedural and substantive aspects of Rule 11 practice, serving to promote uniformity within the district. The aforedescribed reporting duties, boilerplate notices of court initiatives, and differentiation between nonegregious and egregious misconduct, as well as other matters, could all be addressed through local rules. Experience under the 1993 rule should prompt reformulations of the local rules over time; further, local rules might be changed to accommodate the differences found in the federal districts or to try new approaches to perennial problems.

6. Varying mechanisms which address frivolous litigation papers in the federal district courts

A final problem confronting judges considering the imposition of compensatory fines on misconducting attorneys under the 1993 rule involves the role to be assigned other remedial mechanisms which can also address Rule 11 misconduct. The drafters of the new rule were certainly aware of these other mechanisms and of the difficulties they posed to trial judges acting pursuant to the 1983 rule; but the 1993 rulemakers failed generally to address the relationships. In particular, given the federal rulemakers' express approval of bar disciplinary referrals as a form of Rule 11 sanction, the relationship between fines and referrals merits some attention.

In some instances, Rule 11 misconduct should prompt (or prompt in the alternative) referrals to traditional disciplinary remedies. In fact, the federal rulemakers in 1990 welcomed "comment and suggestions with respect to the relationship amongst . . . several sources of sanctions law." Call for Comments, supra note 24, at 350. In the end, they deemed the 1993 rule inapplicable to discovery, 1993 Amendments, supra note 28, at 583 (Rule 11(d)), but otherwise indicated the 1993 rule would continue to operate simultaneously with other sanctioning authority: Id. at 592 (Advisory Committee Note to 1993 Rule 11). Their interim report, published after their 1990 call for comments, said: "Some unification of the various rules authorizing sanctions may be desirable; however, creation of a single rule for sanctions may not be appropriate in view of the different situations to which they are addressed." Interim Report, supra note 28, at 1-23. For a proposal of a single rule covering all abusive conduct in litigation, see The Committee on Federal Courts, Comments on Federal Rule of Civil Procedure 11 and Related Rules, 46 REC. ASSN BAR CITY N.Y. 267, 299-302 (1991).

141. Call for Comments, supra note 24, at 346.
142. See supra note 112 and accompanying text.
143. See supra notes 116-119 and accompanying text.
144. See supra notes 127-130 and accompanying text.
145. In fact, the federal rulemakers in 1990 welcomed "comment and suggestions with respect to the relationship amongst . . . several sources of sanctions law." Call for Comments, supra note 24, at 350. In the end, they deemed the 1993 rule inapplicable to discovery, 1993 Amendments, supra note 28, at 583 (Rule 11(d)), but otherwise indicated the 1993 rule would continue to operate simultaneously with other sanctioning authority: Id. at 592 (Advisory Committee Note to 1993 Rule 11). Their interim report, published after their 1990 call for comments, said: "Some unification of the various rules authorizing sanctions may be desirable; however, creation of a single rule for sanctions may not be appropriate in view of the different situations to which they are addressed." Interim Report, supra note 28, at 1-23. For a proposal of a single rule covering all abusive conduct in litigation, see The Committee on Federal Courts, Comments on Federal Rule of Civil Procedure 11 and Related Rules, 46 REC. ASSN BAR CITY N.Y. 267, 299-302 (1991).
agencies for consideration of legal practice restrictions. In the past, there have been some referrals of Rule 11 misconduct to these agencies. When referrals have been made, the recipients have usually been state disciplinary agencies, not the disciplinary panels established within the federal courts; this seems a bit odd given the significant federal interest in civil litigation misconduct in federal courts that is often defined by standards quite different than those governing civil practice in the state courts. Further, a few federal judges have acted under the 1983 rule as their own trial court’s disciplinarian by seeking to suspend from practice, or otherwise to restrict the practice opportunities of, misconducting attorneys without referrals either to their own court’s disciplinary process or to the relevant state disciplinary agency. In many ways, such vigilante discipline is comparable to the assessment of punitive fines under Rule 11. As contrasted with compensatory fines which primarily seek both to compensate and to deter and which can address less than very egregious misbehavior, punitive fines, like legal practice restrictions, are essentially concerned with deterrence and with very egregious misconduct.

Of course, at least some of the problems caused by these referral differences and by vigilante discipline could be alleviated with the establishment of “uniform federal rules of federal litigation conduct backed up by uniform federal enforcement

146. See, e.g., Greenfield v. United States Healthcare, Inc., 146 F.R.D. 118, 128-29 (E.D. Pa. 1993) (referring to state agency, though court notes local federal rules on professional conduct may have been violated). On occasion, referrals are made by appellate courts when Rule 11 misconduct at the trial level persists in the same case on appeal. See, e.g., Lepucki v. Van Wormer, 765 F.2d 86 (7th Cir.), cert. denied, 474 U.S. 827 (1985); see also Cannon v. Loyola Univ., 676 F. Supp. 823, 831 n.8 (N.D. Ill. 1987) (referring attorney to both the state and the federal trial court disciplinary bodies in civil contempt proceeding arising out of attempts to enforce earlier Rule 11 monetary sanctions), and vacated on other grounds, 687 F. Supp. 424 (N.D. Ill. 1988).


mechanisms."149 Further discussion is needed on the interface between a federal trial court’s disciplinary power, a state disciplinary agency’s authority and the power of a single federal judge to impose fines and other public interest remedies for conduct violating Rule 11.150

IV. CONCLUSION

The 1993 amendments to Federal Civil Rule 11 invite fewer private interest sanctions, such as attorneys’ fee awards, and more public interest sanctions, such as fines payable to the court. This move raises difficult procedural and substantive questions. To a large extent, these questions cannot be answered by examining the legislative history of the 1993 rule or the fines imposed under earlier versions of the rule. New guidelines for fines payable to the court are needed. Such guidelines should distinguish between compensatory and punitive fines and be integrated with other public interest sanctions such as bar disciplinary referrals. In many ways, the 1993 rule presents some new forms of the “stop-and-think” standard; it focuses on stopping and thinking by lawyers after papers have been presented, not before, and focuses on stopping and thinking by law firms about the relationships, if any, between their internal practices and any frivolous papers presented by them to federal courts. Debate on the new Rule 11 should begin soon so that the surge in fines paid to federal district courts after December 1993 is handled fairly and efficiently.

149. Stephen B. Burbank, State Ethical Codes and Federal Practice: Emerging Conflicts and Suggestions for Reform, 19 FORDHAM URB. L.J. 969, 977 (1992). Problems could also be reduced with the creation of a “national bar.” Id. at 974.

150. See, e.g., Blue v. United States Dept of the Army, 914 F.2d 525, 550 (4th Cir. 1990) (where “an attorney's conduct does not threaten the orderly administration of justice in the courtroom,” trial court should refer the attorney to the disciplinary mechanism established by local court rule), cert. denied, 111 S. Ct. 1580 (1991).