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Rule 11 of the Federal Rules of Civil Procedure and the Duty to Withdraw a Baseless Pleading

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NOTES

RULE 11 OF THE FEDERAL RULES OF CIVIL PROCEDURE
AND THE DUTY TO WITHDRAW A BASELESS
PLEADING

INTRODUCTION

Rule 11 of the Federal Rules of Civil Procedure ("Rule 11") is designed to ensure that claims brought in the federal courts have merit and are not brought for an improper purpose. To accomplish these goals, the Rule imposes upon an attorney or litigant a duty to make a reasonable examination of the merits of and motives behind a claim before signing a paper and filing it with the court. Rule 11 imposes mandatory sanctions for failure to comply with this duty, and the Rule encourages both courts and litigants to play an active role in deterring litigation abuses.

1. Fed. R. Civ. P. 11. The text of Rule 11 provides in relevant part:
Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney. . . . A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper. . . . The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harrass 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.

3. Rule 11 sanctions can be imposed upon the signing attorney, the party he or she represents, or both, or on an unrepresented party who signs a pleading. Fed. R. Civ. P. 11; Fed. R. Civ. P. 11 advisory committee's note, reprinted in 97 F.R.D. 165, 200 (1983).
4. See infra note 49 and accompanying text.
5. See Fed. R. Civ. P. 11 ("the court, upon motion or upon its own initiative, shall impose . . . an appropriate sanction") (emphasis added). See, e.g., Brown v. Federation of State Medical Bds., 830 F.2d 1429, 1433 (7th Cir. 1987); Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531, 1540 (9th Cir. 1986); Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 254 n.7 (2d Cir. 1985), modified on other grounds, 821 F.2d 121, cert. denied, 108 S. Ct. 269 (1987).
6. See, e.g., Fed. R. Civ. P. 11 advisory committee's note, reprinted in 97 F.R.D. 165, 198 (1983) (amendments "intended to reduce the reluctance of courts to impose sanctions (citation omitted) by emphasizing the responsibilities of the attorney")
Courts, commentators and practitioners debate whether Rule 11 imposes a postfiling obligation. Such an obligation would require parties and attorneys to review and reevaluate their positions as a case develops and to withdraw a complaint upon discovering that it is not adequately supported by fact or by law. Proponents of such a continuing duty argue that it is consistent with the goals of Rule 11 and that other sanctioning mechanisms monitor postfiling conduct less effectively than does Rule 11. Those opposing application of Rule 11 to postfiling conduct

Zaldivar v. City of Los Angeles, 780 F.2d 823, 829 (9th Cir. 1986) ("Rule 11, as amended, is intended to be applied by district courts vigorously"); infra notes 43-44 and accompanying text (discussing more active role of courts and attorneys required by current Rule).


Until January 1988, the Fifth Circuit held that the current version of Rule 11 imposed a continuing duty. See Thomas v. Capital Sec. Servs., Inc., 812 F.2d 984, 988 (5th Cir. 1987), rev'd en banc, 836 F.2d 866, 874 (1988).


8. See Whittington v. Ohio River Co., 115 F.R.D. 201, 208 (E.D. Ky. 1987); Schwarzer, supra note 7, at 200; see also Robinson v. National Cash Register Co., 808 F.2d 1119, 1127 (5th Cir. 1987) (imposing upon attorneys and parties a duty to take reasonable action to ensure that proceedings do not continue without a reasonable basis in law and fact), overruled, Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 874 (5th Cir. 1988) (en banc).

9. See Pantry Queen Foods, Inc. v. Lifschultz Fast Freight, Inc., 809 F.2d 451, 456-57 (7th Cir. 1987) (Ripple, J., concurring in part and dissenting in part) (continuing duty would guard against unnecessarily protracted litigation and waste of court time); Nelken, supra note 7, at 1331 (imposing a continuing duty would require parties to use information gained in discovery to narrow the issues for trial); Risinger, supra note 7, at 59 ("If the Rule is designed to obtain a lawyer's certification that there are proper issues on which to spend the court's and the opposing party's time, then only a continuing certification requirement fully promotes the purpose of the Rule."); Tomlinson, supra note 7, at 69 (continuing duty to revise pleadings would expedite litigation in accordance with Rule 11).

10. See Parness, supra note 7, at 342 (advocating exclusive use of Rule 11 over the inherent power of the federal courts or 28 U.S.C. § 1927); Schwarzer, supra note 7, at 195, 206 (Rule 11 is broader in scope than inherent power or 28 U.S.C. § 1927); Note, The Dynamics of Rule 11: Preventing Frivolous Litigation By Demanding Professional Responsibility, 61 N.Y.U. L. Rev. 300, 326 (1986) [hereinafter Dynamics of Rule 11] (in-
argue that the plain language of the Rule does not provide for a continuing duty and that application of Rule 11 to subsequent pleadings or that use of alternative sanctioning mechanisms adequately monitors postfiling conduct.

This Note demonstrates that imposition of a continuing obligation comports with the spirit of Rule 11 as expressed by its broad scope and active role in monitoring litigation abuses. Because the plain language of the Rule does not impose a continuing duty, further amendments to the Rule are needed to bring a continuing duty indisputably within Rule 11's purview. Part I of this Note discusses the history and purposes of Rule 11. Part II shows that courts, whether or not they have interpreted Rule 11 to include an obligation to update, feel a need to monitor the validity of pleadings after they have been filed and that Rule 11 offers a device superior to alternative mechanisms for monitoring postfiling abuses. Part III examines the arguments for and against the imposition of a continuing duty under Rule 11, demonstrating that such a duty is consistent with the spirit of Rule 11 and the ethical obligations of the legal profession. This Note concludes that an amendment to Rule 11 expressly imposing a postfiling duty would further Rule 11's goal of ensuring efficient and ethical litigation practice in the federal courts.

I. THE HISTORY AND PURPOSES OF RULE 11

Federal Rule of Civil Procedure 11 was enacted originally in 1938 to deter frivolous actions. The original Rule required attorneys to certify that the pleading meets certain standards, and the original Rule was intended to deter frivolous lawsuits. The Rule was intended to deter attorneys from filing or presenting objections to pleadings that are not well-grounded in fact or law.


16. The relevant text of former Rule 11 provided:
   Every pleading... shall be signed. The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowl-
tify that "good ground" existed to support their pleadings. It provided for the discretionary imposition of sanctions on attorneys who submitted pleadings that were unsigned, unsupported, or interposed for delay. It also permitted the courts to strike pleadings that did not comply with the Rule. Experience showed that in practice Rule 11 failed to deter abuses in litigation. Courts found the Rule difficult to apply and enforce and so were reluctant to use it.

This ineffectiveness resulted from several deficiencies in the Rule. For example, the standard requiring "good ground to support" a pleading was vague. Under this standard, an attorney was required to investigate facts and present them "to the best of his knowledge, information, 


One study showed that between 1938 and 1976 only 19 cases reported alleged Rule 11 violations. See Risinger, supra note 7, at 34-35; see also Tomlinson, supra note 7, at 1 (discussing statistical findings of Rule 11 scholars). The reluctance of courts to impose sanctions provided one indication that the Rule needed amendment. See Fed. R. Civ. P. 11 advisory committee's note, reprinted in 97 F.R.D. 165, 198 (1983); Brown v. Federation of State Medical Bds., 830 F.2d 1429, 1435 (7th Cir. 1987); In re Ronco, Inc., 105 F.R.D. 493, 496 (N.D. Ill. 1985). Since the 1983 amendments, hundreds of Rule 11 opinions have been published, demonstrating the courts' willingness to use the new Rule. See Vairo, supra note 21, at 199; see also Tomlinson, supra note 7, at 1 ("If the frequency of Rule 11's use is a measure of the rule's effectiveness, then amending Rule 11 made the rule much more effective.").

23. See Carter, supra note 15, at 5; Vairo, supra note 21, at 190-91.
and belief."\textsuperscript{24} Courts interpreted this as a subjective and rather vague requirement of good faith\textsuperscript{25} and were reluctant to impose sanctions under it.\textsuperscript{26} In addition, the only improper purpose for conducting litigation acknowledged by the original Rule was delay.\textsuperscript{27} The Rule failed to recognize that litigation can be conducted for other improper purposes,\textsuperscript{28} such as to mislead the court,\textsuperscript{29} to harass an opponent,\textsuperscript{30} to impose defense costs,\textsuperscript{31} or to pressure an opponent into a settlement.\textsuperscript{32} Last, courts were reluctant to invoke the Rule because they viewed the striking of a faulty pleading\textsuperscript{33} as a harsh penalty.\textsuperscript{34}

In 1983 the Rule was materially amended\textsuperscript{35} in an attempt to increase its effectiveness.\textsuperscript{36} The amendments\textsuperscript{37} also attempted to institute the

\textsuperscript{25} See Thomas v. Capital Sec. Servs., 836 F.2d 866, 870 (5th Cir. 1988) (en banc); Pantry Queen Foods, Inc. v. Lifschultz Fast Freight, Inc., 809 F.2d 451, 453 (7th Cir. 1987); Nemeroff v. Abelson, 620 F.2d 339, 350 (2d Cir. 1980) (per curiam); Carter, supra note 15, at 5-6.
\textsuperscript{29} See Golden Eagle Distrib. Corp. v. Burroughs Corp., 809 F.2d 584, 586 (9th Cir. 1987) (dissent from denial of en banc rehearing).
\textsuperscript{31} See Wiggins Remarks, supra note 28, at 178. The amended Rule lists causing "needless increase in the cost of litigation" as an improper purpose. See Fed. R. Civ. P. 11.
\textsuperscript{32} See Nelken, supra note 7, at 1331.
\textsuperscript{34} See Incomco v. Southern Bell Tel. & Tel. Co., 558 F.2d 751, 753 (5th Cir. 1977); Bertuccelli v. Carreras, 467 F.2d 214, 215 (9th Cir. 1972) (per curiam).
\textsuperscript{35} For relevant text of amended Rule 11, see supra note 1. The 1983 amendments to Rule 11 significantly changed the Rule. See Adduono v. World Hockey Ass'n, 824 F.2d 617, 621 (8th Cir. 1987); In re Yagman, 796 F.2d 1165, 1185 (9th Cir.), modified, 803 F.2d 1085 (1986); Burbank, Sanctions in the Proposed Amendments to the Federal Rules of Civil Procedure: Some Questions About Power, 11 Hofstra L. Rev. 997, 999 (1983); Vairo, supra note 21, at 193-94.
\textsuperscript{37} Amendments to the Federal Rules are promulgated by the Supreme Court pursuant to 28 U.S.C. § 331 (1982). Under this system, the Judicial Conference of the United States serves as a standing "advisory committee" to the Supreme Court. See 2 J. Moore, Moore's Federal Practice ¶ 1.02[a][2] (2d ed. 1986 & Supp. 1988). The Chief Justice of the
broader policy goals of curbing the expense and court delays caused by litigation of frivolous claims, and making the litigation process run more efficiently. The amendments expanded the Rule to prohibit filing of pleadings for any improper purpose and to impose mandatory sanctions on both attorneys and litigants, including litigants appearing without counsel.

Today Rule 11 requires both courts and attorneys to take a more

United States appoints advisory committees to formulate proposals for recommendation first to the Judicial Conference and then to the Supreme Court. See id. The Supreme Court submits proposed rules to Congress. If Congress does not amend or repeal them within 90 days, the proposed rules become effective. Id. The 1983 amendments were approved by the Supreme Court on April 28, 1983, and became effective on August 1, 1983. See Amendments to Rules, 97 F.R.D. 165 (1983).

38. See Donaldson v. Clark, 819 F.2d 1551, 1556 (11th Cir. 1987) (en banc); Zaldivar v. City of Los Angeles, 780 F.2d 823, 830 (9th Cir. 1986); Wiggins Remarks, supra note 28, at 177.

This goal of reducing expense includes curbing the costs of defending against a baseless claim. See, e.g., Brown v. Federation of State Medical Bds., 830 F.2d 1429, 1437-38 (7th Cir. 1987); In re TCI, Ltd., 769 F.2d 441, 446 (7th Cir. 1985); Lepucki v. Van Wormer, 765 F.2d 86, 87 (7th Cir.) (per curiam), cert. denied, 474 U.S. 827 (1985).


The amendments were also designed to curb the waste of judicial resources caused by meritless pleadings. See Pantry Queen Foods, Inc. v. Lifschultz Fast Freight, Inc., 809 F.2d 451, 456 (7th Cir. 1987) (Ripple, J., concurring in part and dissenting in part); Lepucki v. Van Wormer, 765 F.2d 86, 87 (7th Cir.) (per curiam), cert. denied, 474 U.S. 827 (1985); Chang v. Meese, 660 F. Supp. 782, 785 (D.P.R. 1987); cf. Talamini v. Allstate Ins. Co., 470 U.S. 1067, 1073-74 (1985) (discussing Supreme Court Rule 49.2, which prohibits frivolous appeal or frivolous petition for writ of certiorari, the opinion of Chief Justice Burger stated "every misuse of any court's time impinges on the right of other litigants with valid or at least arguable claims to gain access to the judicial process. The time this Court expends examining and processing frivolous applications... is time that could be devoted to considering claims which merit consideration.").

This desire for greater judicial efficiency reflects a concern that frivolous litigation brings the civil justice system into disrepute. See Schwarz, supra note 7, at 182; see also Colorado Chiropractic Council v. Porter Memorial Hosp., 650 F. Supp. 231, 239 (D. Colo. 1986) (citing Schwarz, supra note 7, at 182).


43. See Brown v. Federation of State Medical Bds., 830 F.2d 1429, 1433 (7th Cir. 1987); Hurd v. Ralph's Grocery Co., 824 F.2d 806, 808 (9th Cir. 1987); Vairo, supra note 21, at 190; Dynamics of Rule 11, supra note 10, at 327. The amended Rule makes explicit the court's authority to impose sanctions on its own motion. Fed. R. Civ. P. 11 advisory committee's note, reprinted in 97 F.R.D. 165, 200 (1983); see Fed. R. Civ. P. 11.

active role in eliminating meritless litigation. The amended Rule makes
detection and punishment of frivolous actions part of the court's respon-
sibility, encouraging courts to be more involved in the pretrial disposi-
tion of claims. The increased responsibility imposed upon lawyers and
parties includes imposition of a stricter standard of "reasonableness
under the circumstances" for filing a pleading. The Advisory Commit-
tee on Federal Civil Rules intended that the reasonableness standard be
more stringent than the original good faith and that a greater
range of circumstances trigger violations of the Rule.

Under this new standard, an attorney must conduct a reasonable inquiry into the merits
of a claim before filing a paper with the court. The drafters of the new
Rule deleted the previous reference to willfulness, making merely negli-

(1983); Pantry Queen Foods, Inc. v. Lifschultz Fast Freight, Inc., 809 F.2d 451, 454 (7th Cir. 1987); Vairo, supra note 21, at 190. Pro se litigants also must comply with amended Rule 11. See supra note 42.


46. See Fed. R. Civ. P. 11 advisory committee's note, reprinted in 97 F.R.D. 165, 198 (1983). By contrast, under former Rule 11, a showing of subjective bad faith was re-


sory committee explained that:

what constitutes a reasonable inquiry may depend on such factors as how much
time for investigation was available to the signer; whether he had to rely on a
client for information as to the facts underlying the pleading, motion, or other
paper; whether the pleading, motion, or other paper was based on a plausible
view of the law; or whether he depended on forwarding counsel or another
member of the bar.


gent or reckless conduct sufficient to trigger sanctions under Rule 11.51 In addition, a party seeking sanctions under amended Rule 11 has a duty to notify the court promptly upon discovering that the Rule has been violated.52

The mandatory imposition of sanctions for violations represents another major change in the Rule.53 Under the former Rule, imposition of sanctions for violations was discretionary.54 To reduce the reluctance of the courts to award sanctions,55 the amended Rule mandates imposition of sanctions, which may include an award of attorney's fees, once a violation has been found.56 Courts retain discretion, however, to determine the type and amount of the sanction to be awarded57 and are not limited to awarding attorney's fees.58

Thus, the current version of Rule 11 has a sharper "bite" than did the former Rule;59 it applies to a broader range of parties and conduct, and its mandatory nature encourages its use.60

II. THE NEED FOR IMPOSING A CONTINUING OBLIGATION TO MONITOR POSTFILING CONDUCT

Although some earlier decisions held that Rule 11 imposes a duty to withdraw or amend a claim that "became meritless" after it was filed,61


56. See supra note 5.

57. See Fed. R. Civ. P. 11 (the Rule authorizes "an appropriate sanction"); infra notes 127-31 and accompanying text.

58. See infra notes 127-31 and accompanying text.


recent cases in the federal courts of appeals have generally denied the existence of such a duty. However, sanctions continue to be imposed upon parties and attorneys who fail to take proper remedial action when a case "becomes meritless." By finding a duty of mitigation under Rule 11 and by using combined sanctioning mechanisms to monitor postfiling conduct, some courts in effect have imposed a continuing duty on attorneys and their clients without expressly recognizing such a duty under Rule 11. Thus, recent case law demonstrates that a need exists for an effective mechanism to prevent the continuation of baseless claims. In addressing this need, however, mechanisms inferior to the sanctioning power provided by Rule 11 have been implemented.

A. The Duty of Mitigation Under Rule 11

In order to reduce the harmful effects of frivolous claims, Rule 11 has been interpreted to include a duty to mitigate fees. Pursuant to this duty to mitigate, parties or attorneys defending against baseless claims have an obligation under the Rule to bring frivolous pleadings to the court's attention, thereby keeping the costs of defense to a minimum.


64. See, e.g., Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 878-79 (5th Cir. 1988) (en banc) (nonviolating party's duty of mitigation under Rule 11 includes obligation to incur only reasonable costs of defense and duty to notify court of opponent's Rule 11 violation); Brown v. Federation of State Medical Bds., 830 F.2d 1429, 1439 (7th Cir. 1987) (duty of mitigation under Rule 11 "should ensure that party requesting fees has not needlessly protracted the litigation"); Donaldson v. Clark, 819 F.2d 1551, 1560 (11th Cir. 1987) (en banc) (giving notice of Rule 11 violation can save monetary and judicial resources); Nassau-Suffolk Ice Cream, Inc. v. Integrated Resources, Inc., 114 F.R.D. 684, 692-93 (S.D.N.Y. 1987) (court reduced unreasonably large fee award requested by attorneys who defended against a claim they knew to be baseless).

65. See infra note 82 and accompanying text.


67. See cases cited supra note 64.

68. See cases cited supra note 64.

69. See cases cited supra note 64; see also United Food & Commercial Workers Union Local No. 115 v. Armour & Co., 106 F.R.D. 345, 350 (N.D. Cal. 1985) (early notice can prevent the costs of defending a frivolous lawsuit from becoming excessive).
By enforcing a duty to mitigate under Rule 11, courts have recognized that continuation of frivolous claims is harmful.\(^7\) The mitigation duty in effect places a continuing obligation on defendants by denying a portion of the fee award to them when they allow a baseless claim to continue.\(^7\)

The requirement of mitigation stems from the Rule's allowance of only a "reasonable" attorney's fee to parties who have defended against a baseless claim.\(^7\) If a defendant delays in informing the court that the claim is baseless and continues to litigate against it, the amount of attorney's fees he incurs is no longer reasonable, and the fee sanction levied against the plaintiff will be reduced accordingly.\(^7\)

Thus, the duty to mitigate illustrates that courts are concerned with limiting the costs of frivolous litigation.\(^7\) Such costs naturally increase the longer a meritless claim remains active.\(^7\) Requiring a defendant to mitigate by keeping costs down and by promptly notifying the court that a claim is baseless, without imposing a concomitant duty on the proponent to minimize costs and delay in litigation by amending or withdrawing a baseless claim,\(^7\) places the sole affirmative duty to prevent damage on the person defending a baseless claim.\(^7\) Because courts already use Rule 11 through the mitigation doctrine to require defendants to prevent the harmful effects caused by the continuation of meritless claims, fairness seems to require that they also impose on proponents of claims an

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\(^{70}\) See Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 879-80 (5th Cir. 1988) (en banc); United Food & Commercial Workers v. Armour and Co., 106 F.R.D. 345, 350 (N.D. Cal. 1985); see also Donaldson v. Clark, 819 F.2d 1551, 1560 (11th Cir. 1987) (en banc) (giving notice of Rule 11 violation can save monetary and judicial resources).

\(^{71}\) See Thomas, 836 F.2d at 878-80; Brown v. Federation of State Medical Bds., 830 F.2d 1429, 1439 & n.6 (7th Cir. 1987); Schwarz, supra note 7, at 200.


\(^{73}\) See Thomas, 836 F.2d at 879; Brown, 830 F.2d at 1439 & n.6; Donaldson v. Clark, 819 F.2d 1551, 1560 (11th Cir. 1987) (en banc); In re Yagman, 796 F.2d 1165, 1184-85 (9th Cir.), modified, 803 F.2d 1085 (1986); Schwarz, supra note 7, at 203.

\(^{74}\) See supra note 69 and accompanying text.

\(^{75}\) See Pantry Queen Foods, Inc. v. Lifschultz Fast Freight, Inc., 809 F.2d 451, 456-57 (7th Cir. 1987) (Ripple, J., concurring in part and dissenting in part); Schwarz, supra note 7, at 200-01.

\(^{76}\) See Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 879 (5th Cir. 1988) (en banc) (imposing duty to notify court of violation but holding that proponent of now baseless claim has no duty to amend); Gaiardo v. Ethyl Corp., 835 F.2d 479, 483-84 (3d Cir. 1987) (same).

\(^{77}\) This inequity exists in the context of a claim that becomes meritless after it has been filed. Under the prevailing view, the proponent of the now baseless claim has no obligation to withdraw the claim or to notify the court that the claim is baseless. See, e.g., Thomas, 836 F.2d at 874. The party defending against the baseless claim, however, has a duty to keep its costs of defense down, see Nassau-Suffolk Ice Cream, Inc. v. Integrated Resources, Inc., 114 F.R.D. 684, 692 (S.D.N.Y. 1987), and a duty to notify the proponent that the claim lacks merit, see United Food & Commercial Workers Union Local No. 115 v. Armour & Co., 106 F.R.D. 345, 349-50 (N.D. Cal. 1985).
affirmative duty to prevent damage in the form of a continuing obligation to withdraw a claim if it becomes baseless.

The mitigation cases also illustrate the courts' concern with dismissing baseless claims on a timely basis, further demonstrating the need for a continuing obligation. At least one court has considered withdrawal by the proponent of a frivolous claim as another factor of mitigation. Preventing the continuation of meritless claims through prompt amendment or withdrawal comports with the dual policies behind Rule 11: to increase judicial efficiency and to minimize costs and delays in litigation. Thus, the Rule is ideally suited to bringing about prompt termination of baseless claims.

**B. Combined Sanctioning Powers**

De facto continuing obligations also have been imposed by courts using a combination of mechanisms to sanction the continuation of a meritless claim. These mechanisms include 28 U.S.C. § 1927, which prohibits multiplication of proceedings in federal courts, and the inherent power of the federal courts, which enables courts to take actions necessary to exercise their judicial power. Courts frequently will combine the

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78. *See* Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 879-80 (5th Cir. 1988) (en banc); Brown v. Federation of State Medical Bds., 830 F.2d 1429, 1439 (7th Cir. 1987); Donaldson v. Clark, 819 F.2d 1551, 1560 (11th Cir. 1987) (en banc).


80. *See supra* notes 38, 39 and accompanying text.


83. 28 U.S.C. § 1927 (1982) is a general federal fee-shifting statute that empowers a court to assess against an attorney who "multiplies the proceedings in any case unreasonably and vexatiously" his opponent's excess costs and attorney's fees incurred as a result of such conduct. *See id.;* Braley v. Campbell, 832 F.2d 1504, 1511 (10th Cir. 1987). For further discussion of the scope of 28 U.S.C. § 1927, see *infra* notes 105-18 and accompanying text.

84. The inherent power of the federal courts is power vested in the courts upon their creation and not derived from any statute. *See* Eash v. Riggins Trucking Inc., 757 F.2d 557, 561 (3d Cir. 1985) (en banc). For further discussion of the scope of inherent power, see *infra* notes 96-100 and accompanying text.
use of Rule 11 (to sanction claims that were baseless at the time the lawsuit was filed) with the use of one of these other mechanisms (to sanction claims that were continued unreasonably).\textsuperscript{85}

The use of combined powers to impose sanctions for continuing a baseless lawsuit demonstrates that courts need a mechanism to monitor postfiling conduct.\textsuperscript{86} The combination of mechanisms to monitor postfiling conduct has resulted in inaccurate analysis in continuing violation situations, thus obscuring the guidelines attorneys follow to avoid pleading abuse. Some opinions cite authority imprecisely when sanctioning an unreasonably continued lawsuit.\textsuperscript{87} For example, some cases have been decided by using Rule 11 in combination with other mechanisms that require a subjective standard of good faith;\textsuperscript{88} such an analysis potentially could thwart the scope of the amended Rule. In addition, mechanisms other than Rule 11 that are being used to monitor continuing violations lack the flexibility\textsuperscript{89} of sanctioning intended under Rule 11 because the provisions of those alternative mechanisms limit judges as to the type of sanction they may impose.\textsuperscript{90}

As factual situations arise that create a need to sanction parties for failure to withdraw or amend a pleading, courts often look to Rule 11 for a solution.\textsuperscript{91} For example, sanctions have been imposed on the ground

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\textsuperscript{86.} See supra note 85 and accompanying text.


\textsuperscript{88.} In Van Berkel the court imposed sanctions pursuant to Rule 11 and 28 U.S.C. § 1927, which imposes a subjective good faith standard of conduct on attorneys, for prefiling violations and for failure to dismiss a baseless claim. See 581 F. Supp at 1251; 28 U.S.C. § 1927 (1982). The court appears to have ignored the § 1927 bad faith standard. It summarily held that counsel's failure to withdraw his claim constituted unreasonable and vexatious litigation. Van Berkel, 581 F. Supp. at 1251. Thus only the objective standard of Rule 11 was actually applied, although § 1927 was used to sanction the postfiling conduct.

\textsuperscript{89.} See Fed. R. Civ. P. 11 (Rule authorizes "an appropriate sanction"); supra notes 41, 48 and accompanying text; infra note 131 and accompanying text.

\textsuperscript{90.} See 28 U.S.C. § 1927 (1982) (excess fees for vexatious attorney conduct); 42 U.S.C. § 1988 (1982) (reasonable attorney’s fee). Although a fee award is the most common sanction imposed under Rule 11, the Rule does not limit courts to awarding attorney's fees. See infra note 127.

\textsuperscript{91.} Rule 11 has been used to sanction the failure to amend pleadings or dismiss meritless claims in several different contexts. In Basch v. Westinghouse Elec. Corp., 777 F.2d 165 (4th Cir. 1985), cert. denied, 476 U.S. 1108 (1986), the court sanctioned an attorney under Rule 11 and Federal Rule of Civil Procedure 37(d) (which authorizes sanctions for failure to answer interrogatories) because a delay in amending his response to interrogatories caused his opponent to incur extra defense costs. See Basch, 777 F.2d at 173-74. Thus, a continuing obligation was imposed on an attorney in the form of a duty to inform an opponent of an important development in a litigation. Id.

In Kendrick v. Zanides, 609 F. Supp. 1162 (N.D. Cal. 1985), Rule 11 was invoked to
that the attorney or litigant continued to pursue a baseless claim, in addition to neglecting their prefiling duty on that claim. The initial violation of Rule 11 enables the court to sanction continuation of the suit without expressly imposing a duty to withdraw the pleading. Moreover, discussion of a continuing duty to refrain from persisting in meritless litigation can be found in Rule 11 cases sanctioning postfiling conduct.

Although judges are not without means to sanction postfiling conduct, the resulting decisions lack clarity and consistency. A clear and flexible sanction the continuation of a claim in an amended complaint after its removal from state to federal court. See id. at 1170. The Federal Rules do not govern actions filed in state court. Thus, Rule 11 does not apply to plaintiff's complaint when defendant removes plaintiff's action into federal court. See Stiefvater Real Estate, Inc. v. Hinsdale, 812 F.2d 805, 809 (2d Cir. 1987); Lee v. Criterion Ins. Co., 659 F. Supp. 813, 820 (S.D. Ga. 1987); Kendrick, 609 F. Supp. at 1170. In Kendrick, plaintiff was sanctioned for bringing unsupported charges in an amended complaint filed after removal of the action. See Kendrick, 609 F. Supp. at 1172. The court held, however, that the discretionary aspect of Rule 11 sanctions allowed it to sanction plaintiff for the costs of the entire action and did not limit the sanction to costs attributable to the amended complaint. See id. at 1173. Because the sanctions reached the whole action, in effect sanctions were imposed for continuation of the baseless claim.


93. See supra note 92.

94. See Markel, 657 F.2d at 1112 ("there came a point in [the] action in which plaintiffs' continuance of the action was unjustified"); Smith v. United Transp. Union Local No. 81, 594 F. Supp. 96, 101 (S.D. Cal. 1984) (court stated that "[w]hen confronted with the correct citations and holdings in plaintiff's reply brief and by the Court during oral argument, counsel for the [defendant] remained unrepentant . . . . [That] conduct . . . stands out as an appropriate case for the imposition of Rule 11 sanctions."); see also Collins v. Walden, 834 F.2d 961, 965 (11th Cir. 1987) (court sanctioned attorneys under Rule 11, stating that "[w]hen it becomes apparent that discoverable evidence will not bear out the claim, the litigant and his attorney have a duty to discontinue their quest").

In Levine v. Arabian Am. Oil Co., 664 F. Supp. 733, 737 (S.D.N.Y. 1987), although the court was bound by precedent set in Oliveri v. Thompson, 803 F.2d 1265 (2d Cir. 1986), which denies a continuing duty under Rule 11, it stated that:

Although a party or counsel is subject to sanctions [under Rule 11] for filing a spurious complaint, it is important to distinguish claims that are dropped after the pleading stage from those that a plaintiff continues to press even after it has become clear that they stand no chance of success. See, e.g., Fuji Photo Film U.S.A., Inc. v. Aero Mayflower Transit Co., 112 F.R.D. 664 (S.D.N.Y. 1986) (Carter, J.) (refusal to drop spurious claims warrants sanctions); Steinberg v. St. Regis/Sheraton Hotel, 583 F. Supp. 421, 425 (S.D.N.Y. 1984) (Goettel, J.) (same). Levine, 664 F. Supp. at 737. Because the plaintiff withdrew her claims, thereby saving the court the effort of assessing the merits of her claims and sparing the defendant costs of defense, the court declined to impose a sanction. Id. This case demonstrates the lack of clarity in continuing violation decisions. The cases cited by the court in Levine to support the proposition that continuation of a baseless claim warrants sanctions were inherent power and prefiling violations cases, while the decision itself was based on Rule 11.

95. See supra notes 87-90 and accompanying text; see also Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 871 (5th Cir. 1988) (en banc) ("Rule 11 decisions by courts have not always been consistent, producing confusion among the bench and bar, as well as inequitable results." (footnote omitted)).
mechanism is needed to monitor postfiling conduct. Examination of the alternative mechanisms for preventing unreasonably continued litigation demonstrates that Rule 11 is the most effective mechanism for preventing such abuse.

C. Alternative Devices Insufficient to Monitor Postfiling Conduct

An argument has been made that Rule 11 need not be used to impose a postfiling duty because courts have other means, such as the inherent power of the federal courts and specific statutory powers, to impose sanctions against attorneys who continue litigation in bad faith. These alternative devices, however, are insufficient to monitor litigation abuse because they lack the flexibility and breadth of Rule 11.

1. Inherent Power

The inherent power of the federal courts is that which is necessary to enable them to exercise their judicial powers. Inherent power includes the power to levy sanctions in response to abusive litigation practices. For example, courts have used the inherent power doctrine to dismiss an action for lack of prosecution, or to grant attorney's fees to a prevailing party when his opponent has acted in bad faith. An inherent power award of attorney's fees has been imposed on a litigant who has conducted litigation in bad faith, and it has also been used to assess fees against an attorney who willfully abused the judicial process.

Although the inherent power of the courts appears expansive, in practice awards pursuant to the doctrine are rare. Unlike Rule 11, inherent power awards are restricted to instances when a party or an attorney has acted in bad faith. In addition, the Supreme Court has discou-
aged expansion of the courts' inherent powers because it lies beyond the reach of legislative control. These limitations make the doctrine's use in curbing postfiling abuses insufficient.

2. 28 U.S.C. § 1927

Some have suggested the use of Section 1927 of Title 28 of the United States Code as another alternative to Rule 11. This section is entitled "Counsel's Liability for Excessive Costs," and it imposes liability on attorneys who conduct litigation in bad faith. This alternative for monitoring postfiling conduct is inferior to Rule 11 because section 1927 is merely a fee-shifting statute under which an attorney can be assessed only excess costs and attorney's fees, while Rule 11 allows the court to tailor an appropriate sanction to the facts of the case. In addition to financial penalties, courts may sanction by warning, oral reprimand or written admonition under Rule 11. Furthermore, because imposition of sanctions under section 1927 is permissive rather than mandatory, some technical violations may go unsanctioned.

In addition, the mechanism provided by section 1927 is a limited

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105. 28 U.S.C. § 1927 provides:
   Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses and attorneys' fees reasonably incurred because of such conduct.
28 U.S.C. § 1927 (1982). Section 1927 initially was meant to monitor United States Attorneys, who were paid by the pleading. See Roadway Express, Inc. v. Piper, 447 U.S. 752, 759 & n.6 (1980); In re TCI, Ltd., 769 F.2d 441, 446 (7th Cir. 1985).
107. See supra note 105; Parness, supra note 7, at 342.
108. Fee-shifting statutes permit courts to override the common law american rule, which provides that each party to a litigation bears his own costs, and allows courts to transfer the costs of legal fees from one party to his opponent or the opposing attorney. See Marek v. Chesney, 473 U.S. 1, 8 (1984); In re TCI, Ltd., 769 F.2d 441, 445 (7th Cir. 1985).
111. See Gaiardo v. Ethyl Corp., 835 F.2d 479, 482 (3d Cir. 1987).
112. See Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 876 (5th Cir. 1988) (en banc); In re TCI, Ltd., 769 F.2d 441, 448 (7th Cir. 1985).
113. See Thomas, 836 F.2d at 876 (28 U.S.C. § 1927 gives court discretion to deny sanctions if it concludes that a fee award is unwarranted); Burull v. First Nat'l Bank of Minneapolis, 831 F.2d 788, 790 (8th Cir. 1987) (district court did not abuse its discretion to deny sanctions under 28 U.S.C. § 1927 where vexatiousness or bad faith not clearly demonstrated); Nelken, supra note 7, at 1321 (court has discretion to deny sanctions under § 1927).
one\textsuperscript{114} and therefore ineffective as an alternative to Rule 11. Section 1927 sanctions can be imposed only against attorneys,\textsuperscript{115} whereas Rule 11 sanctions are available against both attorneys and their clients.\textsuperscript{116} Section 1927, like the inherent power doctrine, also encompasses a subjective standard of bad faith.\textsuperscript{117} Under Rule 11, however, because an attorney is held to a standard of reasonable inquiry under the circumstances, the court need not find that an attorney or party acted willfully before imposing a sanction.\textsuperscript{118} Thus, Rule 11's scope and flexibility make it a more effective mechanism to monitor postfiling abuses.

3. Fee-Shifting Statutes

Unlike section 1927, which applies to all litigation in the federal courts, a number of federal fee-shifting statutes\textsuperscript{119} are action-specific.\textsuperscript{120} Courts that refuse to apply Rule 11 to postfiling conduct have suggested that these fee-shifting statutes provide another alternative.\textsuperscript{121} These statutes provide for the prevailing plaintiff in certain types of actions to recover attorney's fees from the losing party.\textsuperscript{122} Some statutes also impose an obligation on litigants to refrain from continuing meritless actions.\textsuperscript{123}

\begin{itemize}
\item \textsuperscript{114} Vairo, \textit{supra} note 21, at 192.
\item \textsuperscript{115} See 28 U.S.C. § 1927 (1982); Oliveri v. Thompson, 803 F.2d 1265, 1273 (2d Cir. 1986), \textit{cert. denied}, 107 S. Ct. 1373 (1987); \textit{Dynamics of Rule 11, supra} note 10, at 311-12, 326.
\item \textsuperscript{116} \textit{See supra} note 3 and accompanying text; \textit{see also} Oliveri, 803 F.2d at 1273 ("if a claim is groundless, the mere fact that the plaintiff relies on his attorney's erroneous contrary advice does not relieve him of liability [under Rule 11]").
\item \textsuperscript{117} Section 1927 has been reserved for situations involving a "serious and studied disregard for the orderly processes of justice." Kiefel v. Las Vegas Hacienda, Inc., 404 F.2d 1163, 1167 (7th Cir. 1968), \textit{cert. denied}, 395 U.S. 908 (1969); \textit{see Oliveri}, 803 F.2d at 1273; Vairo, \textit{supra} note 21, at 192; \textit{Dynamics of Rule 11, supra} note 10, at 312.
\item \textsuperscript{118} \textit{But see} Ordower v. Feldman, 826 F.2d 1569, 1574 (7th Cir. 1987) (reckless conduct can trigger sanctions under § 1927); \textit{In re Ruben}, 825 F.2d 977, 984 (6th Cir. 1987) (imposing objective test under § 1927, but stating that negligence will not support a § 1927 award), \textit{cert. denied}, 56 U.S.L.W. 3608 (1988).
\item \textsuperscript{119} \textit{See supra} note 108.
\item \textsuperscript{120} Congress has enacted over 100 fee shifting statutes applicable to specific causes of action. \textit{See} Marek v. Chesny, 473 U.S. 1, 43-51 (1985) (Appendix to Opinion of Brennan, J., dissenting) (providing a comprehensive listing).
\item For example, actions for employment discrimination brought under Title VII of the Civil Rights Act of 1964 are subject to the fee-switching provision of § 706(k) of Title VII, which provides that "[i]n any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee.
\item \textsuperscript{122} \textit{See supra} note 120.
\item \textsuperscript{123} \textit{In Christiansburg Garment Co.} v. \textit{EEOC}, 434 U.S. 412 (1978), § 706(k) of Title
\end{itemize}
Although it is true that certain fee-shifting statutes already impose a continuing duty in specific contexts, the existence of those statutes does not obviate the need for a general continuing obligation under Rule 11.

First, fee-shifting statutes often apply to the losing party and not to his attorney, whereas the amendments to Rule 11 specifically broadened the Rule's scope to apply to attorneys as well. Second, although fee-shifting is the most commonly imposed Rule 11 sanction, the Rule is not merely a fee-shifting device. Rule 11 sanctions are available not only as compensation for the costs of defending against a baseless action, but as punishment and as a method of deterrence. In suggesting that fee-shifting statutes offer a viable alternative to Rule 11 sanctions, some courts and commentators have overlooked the fact that Rule 11 makes available a far wider variety of sanctions. The ability to tailor the VII was interpreted to include a continuing obligation. Although the plain language of the statute does not include a continuing duty, the Supreme Court stated that "a plaintiff should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." Christiansburg Garment, 434 U.S. at 422 (emphasis added). The Supreme Court has held that the same standard is applicable in determining a fee award under 42 U.S.C. § 1983 (1982). See Hughes v. Rowe, 449 U.S. 5, 14-15 (1980) (per curiam); see also Eastway Constr. Corp. v. City of New York, 821 F.2d 121, 123 (applying Hughes v. Rowe standard to 42 U.S.C. § 1988), cert. denied, 108 S. Ct. 269 (1987).

124. See supra note 123.


126. See supra note 3 and accompanying text.

127. Although fee-shifting is the most common sanction imposed under Rule 11, see Donaldson v. Clark, 819 F.2d 1551, 1557 (11th Cir. 1987) (en banc); Nelken, supra note 7, at 1333; Dynamics of Rule 11, supra note 10, at 329, Rule 11 authorizes "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." Fed. R. Civ. P. 11. See Gaiardo v. Ethyl Corp., 835 F.2d 479, 481-83 (3d Cir. 1987); Parness, supra note 7, at 353; Note, Litigant Responsibility: Federal Rule of Civil Procedure 11 and Its Application, 27 B.C.L. Rev. 385, 390 (1986) [hereinafter Litigant Responsibility]. Recent Rule 11 cases have encouraged the use of sanctions other than fee awards. See, e.g., Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 877-78 (5th Cir. 1988) (en banc); Cabell v. Petty, 810 F.2d 463, 466-67 (4th Cir. 1987); Vairo, supra note 21, at 230-31.

128. See Brown v. Federation of State Medical Bds., 830 F.2d 1429, 1437-38 (7th Cir. 1987); In re TCI, Ltd., 769 F.2d 441, 446 (7th Cir. 1985).


130. See Gaiardo v. Ethyl Corp., 835 F.2d 479, 482, 484 (3d Cir. 1987); Collins v. Walden, 834 F.2d 961, 966 (11th Cir. 1987); Brown v. Federation of State Medical Bds., 830 F.2d 1429, 1439 (7th Cir. 1987).

Although some form of sanction is mandatory once a court finds that the rule has been violated, the court "retains the necessary flexibility to deal appropriately with violations of the rule." Fed. R. Civ. P. 11 advisory committee's note, reprinted in 97 F.R.D. 165, 200 (1983). See Collins, 834 F.2d at 966; Donaldson v. Clark, 819 F.2d 1551, 1557 (11th Cir. 1987) (en banc). Rule 11 permits, but does not require, the district court to award attorney's fees as a sanction. See Gaiardo, 835 F.2d at 482-83 (amount and type of sanction depends on circumstances giving rise to the sanction); Doyle v. United States, 817 F.2d 1235, 1237 (5th Cir. 1987) (Rule 11 sanctions not limited to attorneys' fees). Sanco
sanction to the particular violation provided by Rule 11 is not present in the fee-shifting statutes. 131

Last, the policy underlying special fee-shifting statutes differs completely from that underlying Rule 11.132 For example, fee-shifting provisions like section 706(k) of Title VII, 42 U.S.C. § 2000e-5(k), are designed to encourage certain plaintiffs, such as those alleging a violation of their civil rights, to file lawsuits to enforce important public policies.133 The goal of Rule 11 is not to encourage certain litigation through fee-shifting, but to correct and prevent litigation abuse.134 Although special fee-shifting provisions in civil rights cases may overlap with a continuing obligation under Rule 11, the existence of one mechanism does not eliminate the need for the other.

When courts and critics claim that alternative sanctioning mechanisms obviate the need for the imposition of a continuing duty under Rule 11,135 they fail to recognize that Rule 11’s structure provides a much more nuanced approach to litigation management and enforcement. Rule 11 allows for a broad range of sanctions, including formal reprimands, educational sanctions, and financial penalties, depending on the circumstances. For instance, in Blanchette v. Cataldo, 734 F.2d 869, 871 (1st Cir. 1984), the court imposed Rule 11 sanctions on an attorney who failed to examine complaints to verify whether they stated a legitimate cause of action. As a remedy, the court ordered the attorney to review the suits still on the court’s docket and to file appropriate affidavits. See id.

Numerous examples illustrate the flexibility Rule 11 allows in imposing sanctions. In Basch v. Westinghouse Elec. Corp., 777 F.2d 165 (4th Cir. 1985), cert. denied, 476 U.S. 1108 (1986), the court awarded a sanction in the amount of extra costs incurred by defendant as a result of plaintiff’s failure to correct an answer to an interrogatory. See id. at 173-74; supra note 91.

In United Food & Commercial Workers Union Local No. 115 v. Armour and Co., 106 F.R.D. 345, 350 (N.D. Cal. 1985) the court reduced a sanction award because defendant’s attorney failed to mitigate. The court ordered that the attorney, and not the client, would be billed for the excess costs, and ordered the attorney to circulate the court’s opinion to the members of his firm. See id. at 346-47.

Among the factors that courts have considered in determining the proper sanction is the sanctioned party’s ability to pay. See Brown v. Federation of State Medical Bds., 830 F.2d 1429, 1439 (7th Cir. 1987); Oliveri v. Thompson, 803 F.2d 1265, 1281 (2d Cir. 1986), cert. denied, 107 S. Ct. 1373 (1987); In re Yagman, 796 F.2d 1165, 1185 (9th Cir.), modified, 803 F.2d 1085 (1986). Thus, Rule 11 allows for a de minimus sanction rather than allowing the party’s ability to pay dictate whether the Rule has been violated.

133. See supra note 132; Dynamics of Rule 11, supra note 10, at 305 n.36.
135. See cases cited supra note 62. In the Fifth Circuit’s decision in Thomas v. Capital
more effective tool for curbing litigation abuses. Rule 11 allows for flexible sanctions, is applicable to clients as well as attorneys, and can be used to protect the court system from negligent, in addition to vexatious, conduct. In order to bring about the prompt withdrawal of meritless claims, the most effective mechanism must be made available to the courts.

III. Rule 11 Should Be Amended to Impose on Attorneys a Continuing Obligation to Monitor the Validity of A Claim Once It Has Been Filed

A few lower courts have held that the current version of Rule 11 creates a duty to withdraw or amend baseless pleadings. All of the federal courts of appeals that have ruled on the issue, however, have held that Rule 11 does not impose a continuing obligation. These courts correctly argue that the plain language of the Rule does not include a continuing duty; they also rely on the advisory committee note, which they interpret to prohibit imposition of a continuing obligation, and the adequacy of alternative sanctioning mechanisms to govern attorney conduct. Imposition of a continuing duty, however, is consistent with Rule 11's underlying objectives. Moreover, the advisory committee note and the ethical standards of the legal profession support imposition of a continuing duty. As demonstrated above, mechanisms suggested as alternatives to imposing a continuing duty under Rule 11 lack the

Sec. Servs., Inc., 836 F.2d 866, 878 (5th Cir. 1988) (en banc), the court held that the "district court should utilize the sanction that furthers the purposes of Rule 11 and is the least severe sanction adequate to such purpose." Id. Ironically, in further holding that Rule 11 does not contain a continuing duty, the court precluded itself from using the more flexible Rule 11 to accomplish the goal of imposing the least severe sanction in continuing violation cases. See id.

136. Negligent conduct also can trigger Rule 11. See supra note 51 and accompanying text.


138. See cases cited supra note 62.


140. See infra notes 162-68 and accompanying text.

141. See infra notes 156-60, 169-77 and accompanying text.

142. See supra notes 96-136 and accompanying text.
scope and flexibility of the amended Rule. 143 Because the courts largely have rejected a continuing duty under the current version of Rule 11, an amendment to the Rule is needed to give the courts a tool adequate to sanction postfiling abuses in the federal courts. 144

A. A Continuing Obligation Comports with the Purposes of Rule 11

In refusing to impose a continuing obligation under Rule 11, courts have cited the absence from the Rule of an express duty to update pleadings or to withdraw baseless claims. 145 The language of Rule 11 states only that it applies to the signing of a paper 146 and makes no mention of an obligation to withdraw a baseless pleading. Thus, according to most courts, the Rule does not contain an obligation to prevent continuation of baseless claims once a pleading has been signed and filed after a reasonable inquiry. 147

Imposing a continuing obligation under Rule 11 to require attorneys to update pleadings, rather than to allow court proceedings to continue until the time when a party must file its next paper, however, comports with

143. See supra notes 41, 48, 130 and accompanying text.
144. See Parness, supra note 7, at 337-38; Risinger, supra note 7, at 59 n.187.
145. See supra note 11.
146. See Fed. R. Civ. P. 11. The rule bears the title "Signing of Pleadings, Motions, and Other Papers; Sanctions" and requires that each pleading, motion, or other paper be signed. It further provides that the signature constitutes the attorney's certification that he has read the pleading and that the pleading is well grounded both in fact and law and not interposed for any improper purpose. See Oliveri v. Thompson, 803 F.2d 1265, 1274 (2d Cir. 1986), cert. denied, 107 S. Ct. 1373 (1987).

It has also been suggested, however, that "[t]he purpose of the signature is to allow a court to easily identify the person or people upon whom it can place responsibility for a particular document." Robinson v. National Cash Register Co., 808 F.2d 1119, 1128 (5th Cir. 1987), overruled, Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 874 (5th Cir. 1988) (en banc); accord Zaldivar v. City of Los Angeles, 780 F.2d 823, 830 (9th Cir. 1986). In addition, some courts have forgone the signature requirement and imposed sanctions on nonsigners, further demonstrating that the signing requirement is not an absolute necessity to trigger liability under Rule 11. See Alcan Aluminum Corp. v. Lyntel Products, Inc., 656 F. Supp. 1138, 1140 n.4 (N.D. Ill. 1987); Calloway v. Marvel Entertainment Group, 650 F. Supp. 684, 686-87 (S.D.N.Y. 1986); Itel Containers Int'l Corp. v. Puerto Rico Marine Management, Inc., 108 F.R.D. 96, 102-03 (D.N.J. 1985). Therefore, this focus on signing perhaps has been misplaced.

147. See cases cited supra note 62. It also has been argued that if the drafters of amended Rule 11 intended to extend the Rule to include a continuing obligation, they could have done so in 1983. See Oliveri v. Thompson, 803 F.2d 1265, 1274 (2d Cir. 1986), cert. denied, 107 S. Ct. 1373 (1987). Because Rule 11 applies to all papers filed in the litigation, see Fed. R. Civ. P. 11.; Letter From Mansfield, supra note 35, at 191, courts that oppose finding a continuing duty under the Rule have asserted that reading the Rule to require an additional postfiling duty is unnecessary. See Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 875 (5th Cir. 1988) (en banc); Pantry Queen Foods, Inc. v. Lifschultz Fast Freight, Inc., 809 F.2d 451, 454 (7th Cir. 1987); Levin & Sobel, supra note 7, at 605. It also has been asserted, however, that Rule 11's application to all filings creates an implicit obligation to keep the court apprised of any material changes in the case. See Advo System, Inc. v. Walters, 110 F.R.D. 426, 430 (E.D. Mich. 1986).
the goals of the Rule\textsuperscript{148}—including increased judicial efficiency and decreased litigation expense.\textsuperscript{149} Thus, an amendment to the Rule expressly imposing such an obligation would promote the policies underlying the Rule.

The advisory committee note\textsuperscript{150} to amended Rule 11 emphasizes that judges are to avoid post hoc judgments as to the viability of a claim in handing out sanctions.\textsuperscript{151} Because the advisory committee note instructs courts to assess the reasonableness of a pleading by examining facts known at the time of filing,\textsuperscript{152} it has been cited extensively to deny use of Rule 11 as a monitor of postfiling conduct.\textsuperscript{153} Requiring an attorney to respond in a reasonable manner at the time new facts are presented to him, however, would satisfy the advisory committee note. Such a requirement still would avoid post hoc judgments by evaluating the attorney's conduct at the time he learned of the information giving rise to a duty to amend or withdraw the pleading.\textsuperscript{154} An attorney should not be allowed to avoid responsibility for the merit of a pending claim simply because it complied with Rule 11 when filed.\textsuperscript{155}


\textsuperscript{149} See supra notes 38-39 and accompanying text.

\textsuperscript{150} The advisory committee notes are considered highly persuasive. See 2 J. Moore, Moore's Federal Practice \textsection 1.13 [2] (2d ed. 1986 & Supp. 1988). The Supreme Court has stated that the notes are of weight on the issue of construction. See Mississippi Publishing Corp. v. Murphree, 326 U.S. 438, 444 (1946); J. Moore, supra.

\textsuperscript{151} The advisory committee's note states that "[t]he court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted." Fed. R. Civ. P. 11 advisory committee's note, \textit{reprinted in} 97 F.R.D. 165, 199 (1983). See Gaiardo v. Ethyl Corp., 835 F.2d 479, 484 (3d Cir. 1987); Hurd v. Ralph's Grocery Co., 824 F.2d 806, 810-11 (9th Cir 1987).


\textsuperscript{154} See Pantry Queen Foods, Inc. v. Lifschultz Fast Freight, Inc., 809 F.2d 451, 457 (7th Cir. 1987) (Ripple, J., concurring in part and dissenting in part). Courts have interpreted the advisory committee's note to prohibit making post hoc judgments as to the viability of a claim, without holding that the advisory committee intended to bar imposition of a continuing duty. See Robinson v. National Cash Register Co., 808 F.2d 1119, 1131 (5th Cir. 1987) (imposing a continuing duty), \textit{overruled}, Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 874 (5th Cir. 1988) (en banc); Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531, 1536-37 (9th Cir. 1986) (applying the advisory committee's note but not discussing a continuing duty); \textit{infra} note 155. The advisory committee note merely prohibits the court from acting as a "Monday morning quarterback" in imposing sanctions. See Westmoreland v. CBS, Inc., 770 F.2d 1168, 1177 (D.C. Cir. 1985).

\textsuperscript{155} See Schwarzer, \textit{supra} note 7, at 200. Judge Schwarzer suggests that:

While hindsight must be rejected as a sword, it also provides no shield. A position that might be reasonable in a paper filed early in the action may become unreasonable or frivolous in the light of subsequent discovery. The relevant state of facts, knowledge and belief will therefore change during the course of the litigation and papers must be assessed accordingly.

\textit{Id.} (citing Steinberg v. St. Regis/Sheraton Hotel, 583 F. Supp. 421, 425 (S.D.N.Y.
The advisory committee note to the 1983 amendments to Rule 11 also states that Rule 11 is intended for use in circumstances similar to those that courts address by use of their inherent power. The note provides that amended Rule 11 is designed to curb abuses in litigation "by building upon and expanding" courts' inherent power. The inherent power doctrine requires parties and attorneys to refrain from dilatory litigation practices throughout the course of the litigation and can be used to impose sanctions for continuing an action in bad faith. Because the inherent power doctrine indirectly imposes a continuing obligation, the advisory committee's reference to it indicates the scope of litigation abuses subject to amended Rule 11. Thus, an amendment to Rule 11 should expressly state that the Rule can be used for more than merely examining the validity of a claim at the time a paper is signed and filed.

Amending Rule 11 to include a duty to withdraw or amend baseless pleadings also comports with Federal Rule of Civil Procedure 1 ("Rule 1"), which provides that the Federal Rules of Civil Procedure "shall be construed to secure the just, speedy, and inexpensive determination of every action." The objectives of the Federal Rules in general, as expressed in Rule 1, strongly resembles the policy goals of the 1983 amend-
ments. As a result, imposing a continuing duty comports with the spirit of Rule 1, as well as that of Rule 11. For example, imposing such a duty will require parties to eliminate claims that pretrial discovery shows to be meritless, and thus fulfills the Rules' goal of "streamlining" litigation. A continuing duty prevents continuation of a claim in order to pressure an opponent into a settlement, giving effect to the Rules' general interest in expeditious resolution as expressed in Rule 1, as well as to amended Rule 11's expansion to abuses other than delay. Last, Rule 11, consistent with the spirit of the Federal Rules as expressed in Rule 1, was intended to cut back on the costs of frivolous litigation. Imposition of a continuing obligation would further this objective as well, because litigation that becomes frivolous proves just as costly to the system as the filing of a claim that was frivolous at its inception.


In UNR Indus., Inc. v. Continental Ins. Co., 623 F. Supp. 1319 (N.D. Ill. 1985), the court noted that delay in amending a pleading pursuant to Rule 15 contradicts Rule 1 because a party who so delays is "holding back and only playing his cards when necessary to avoid defeat." Id. at 1325. A failure to withdraw a claim that becomes meritless contravenes Rule 1 in the same way.


162. Compare Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (Rule 1 expresses purpose of Federal Rules as a whole) and Brennan v. O'Donnell, 426 F.2d 218, 221 (5th Cir. 1970) (Rule 1 demonstrates purpose of Federal Rules: "to expedite the just disposition of cases and reduce the costs of litigation") with Donaldson v. Clark, 819 F.2d 1551, 1556 (11th Cir. 1987) (en banc) (Rule 11 designed to avoid unnecessary delay and expense in litigation) and Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531, 1536 (9th Cir. 1986) (major purpose of Rule 11 is to streamline litigation).

163. See Advco System, Inc. v. Walters, 110 F.R.D. 426, 430 (E.D. Mich. 1986); Nelken, supra note 7, at 1331; Parness, supra note 7, at 341; Schwarzer, supra note 7, at 200; Dynamics of Rule 11, supra note 10, at 326.


165. See Nelken, supra note 7, at 1331.

166. See Fed. R. Civ. P. 11. Eliminating meritless claims from court dockets will reduce defense expenditures and use of court time, in accordance with the policies underlying Rule 11. See Pantry Queen Foods, Inc. v. Lifschultz Fast Freight, Inc., 809 F.2d 451, 456 (7th Cir. 1987) (Ripple, J., concurring in part and dissenting in part); see also Wiggins Remarks, supra note 28, at 178 (improper purposes other than delay are covered by the amended rule).

167. See supra note 162.

168. See Donaldson v. Clark, 819 F.2d 1551, 1560 (11th Cir. 1987) (en banc); Pantry Queen Foods, 809 F.2d at 456-57 (Ripple, J., concurring in part and dissenting in part); Parness, supra note 7, at 338; Dynamics of Rule 11, supra note 10, at 326.
B. Ethical Aspect of Rule 11

The duty to investigate claims and to avoid pursuing frivolous litigation is imposed not only by the Federal Rules of Civil Procedure, but also by the ethical rules of the legal profession.\(^{169}\) That the new language of


The various codes of professional responsibility and conduct were promulgated by the American Bar Association and operate as guidelines for state and local bar associations. F. Marks & D. Cathecart, Discipline Within the Legal Profession in Ethics and the Legal Profession 62, 65 (M. Davis & F. Elliston ed. 1986). The state and local bar associations, legislatures and courts have for the most part enacted these guidelines, id., and disciplinary procedures typically are conducted by the state and local bar. Id. at 72.

Model Code of Professional Responsibility DR 7-102(A)(2) (1983), which provided the phraseology for Model Rule 3.1 and Rule 11, provides that "a lawyer shall not . . . [k]nowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law." Id. That rule is complemented by DR 7-102(A)(1), which provides that a lawyer shall not "[f]ile a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another." Model Code of Professional Responsibility DR 7-102(A)(1) (1983).

The adoption of the Model Rules of Professional Conduct by the American Bar Association took place nearly simultaneously with the 1983 amendments to Rule 11. See Schwarzer, supra note 7, at 189-90 (Model Rules that parallel Rule 11 adopted in 1983). The Model Rules add an additional burden on an attorney to expedite litigation. See Model Rules of Professional Conduct Rule 3.2 (1983) ("A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client."). The comment to Model Rule 3.2 indicates the scope of this duty:

Dilatory practices bring the administration of justice into disrepute. Delay should not be indulged merely for the convenience of the advocates, or for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.


Model Rule 3.1 addresses the same goals as does Rule 11. Compare ABA Rules of Professional Conduct Rule 3.1 (1983) ("[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law") with Fed. R. Civ. P. 11 ("The signature of an attorney . . . constitutes a certificate by the signer that . . . [the pleading] 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. . . .") Under the Model Rules, an action is frivolous

if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person or if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

Rule 11 adopted in the 1983 amendments parallels the language used in its ethical rules counterpart\(^{170}\) evidences the intention of the drafters of the current Rule to reinforce a commitment to legal ethics.\(^{171}\)

These ethical rules resemble Rule 11 in that they are designed to help conserve judicial resources.\(^{172}\) Yet they also attempt to balance the desire for efficiency against the duties of loyalty to the client and zealous advocacy.\(^{173}\) A client’s right to zealous representation, however, does not require courts to tolerate the continuation of baseless claims.\(^{174}\) Thus, to prohibit continuation of meritless claims is consistent with an attorney’s pledge to represent his client zealously within the bounds of the law.

A lawyer’s responsibility under the combined guidance of the various rules of professional conduct may involve advising a client to forego a claim or theory of recovery that technically may go forward but practi-
cally or ethically should not.\textsuperscript{175} Ultimately, the ethical standards collectively imposed on attorneys require an attorney to withdraw a claim when he learns that it lacks merit.\textsuperscript{176} Because Rule 11 was drafted, in part, as a necessary reinforcement of this ethical standard,\textsuperscript{177} Rule 11 should be amended to expressly require withdrawal of a baseless claim.

Cases rejecting an implied continuing duty under Rule 11, based on a finding that the plain language of Rule 11 does not include a duty extending beyond the time a pleading is signed, necessarily ignore the important policy arguments favoring imposition of such a duty set forth above.\textsuperscript{178} Because courts have been reluctant to adopt a continuing duty not expressly contained within the Rule,\textsuperscript{179} amending Rule 11 to expressly include a continuing duty to withdraw a baseless claim offers the best solution to the problem of unreasonably continued litigation.

\section*{Conclusion}

In order for the goals of Rule 11 to be realized, attorneys and parties should be required to update pleadings filed with the court upon discovery that the underlying facts are materially different from what they had supposed or that a change in the law has materially affected the merits of their claim. Under such a system, lawsuits that become meritless after the filing of pleadings would be dismissed immediately.

The drafters of Rule 11 and its amendments were concerned with

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\footnote{175. See Fleming Sales Co. v. Bailey, 611 F. Supp. 507, 519 (N.D. Ill. 1985) (a claim which could survive a motion to dismiss may still violate the ethical rules).}
\footnote{176. It could be argued that under the ethical rules if an attorney discovers \textit{after} filing suit that his client in fact does not have a case, his withdrawal is permissive and not mandatory. See Model Code of Professional Responsibility DR 2-110(C) (1983); Cann, \textit{Frivolous Lawsuits—The Lawyer's Duty To Say "No"}, 52 U. Colo. L. Rev. 367, 377 (1981); cf. Spencer v. Burglass, 337 So. 2d 596, 601 (La. App. 1976) (applies similar Louisiana statute). However, Disciplinary Rule 2-110(B) and Model Rule 1.16(a)(1) mandate withdrawal when the attorney knows that his continued employment will result in violation of a disciplinary rule. Because Disciplinary Rule 7-102(A)(2) and Model Rule 3.1 prohibit lawyers from advancing a claim unwarranted under existing law, withdrawal should be mandatory. See Model Code of Professional Responsibility DR 2-110(B), 7-102(A)(2) (1983); Model Rules of Professional Conduct Rule 1.16(a)(1), 3.1 (1983); Cann, \textit{supra}, at 377 & n.51.}
\footnote{177. See \textit{supra} note 171 and accompanying text. Although the ethical rules provide guidance for attorney conduct, they alone are insufficient to deter continuing violations for two reasons. First, because the stigma attached to a disciplinary sanction is severe, courts discipline attorneys for ethical violations with great reluctance. See Brown v. Federation of State Medical Bds., 830 F.2d 1429, 1437 (7th Cir. 1987); Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531, 1540 (9th Cir. 1986). The former version of Rule 11, which proved ineffective, relied on disciplinary action to deter willful violations. See Fed. R. Civ. P. 11, 28 U.S.C. app. 540, 540-41 (1982); \textit{supra} note 22. Second, Rule 11 recognizes that it is the trial court that is most familiar with the conduct of persons appearing before it and is best suited to determine if, and what, sanctions should be imposed. See Fed. R. Civ. P. 11 advisory committee's note, \textit{reprinted in} 97 F.R.D. 165, 200 (1983); Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 873 (3rd Cir. 1988) (en banc). \textit{See supra} note 11 and accompanying text.}
\footnote{178. See \textit{supra} note 11 and accompanying text.}
\end{footnotesize}
curbing defense costs imposed on parties by meritless claims and with halting the waste of judicial resources in handling such claims. Imposing a continuing obligation on litigants and their attorneys furthers the goals of Rule 11 by halting defense costs and the use of court resources as soon as possible.

Unfortunately, the drafters of the 1983 amendments did not provide expressly that Rule 11 creates a duty to update pleadings or to withdraw baseless claims. Adherence to the letter of the law has made courts reluctant to interpret Rule 11 to include a continuing duty. Case law since the 1983 amendments suggests, however, that courts are finding a need to monitor postfiling conduct. Rather than imposing sanctions by forcing a square peg into a round hole, an amendment to Rule 11 requiring litigants to update pleadings and withdraw baseless claims is needed. Such an amendment would clarify the standards governing postfiling conduct and would further Rule 11’s goal of ensuring efficient and ethical litigation practice in the federal courts.

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