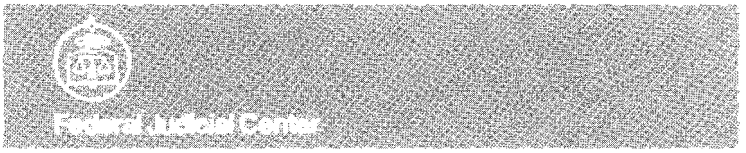
An Empirical Study of Rule 11 Sanctions



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AN EMPIRICAL STUDY OF RULE 11 SANCTIONS

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EXECUTIVE SUMMARY

The 1983 amendments to rule 11 of the Federal Rules of Civil Procedure were designed to encourage the courts to adopt more stringent standards and increase their willingness to sanction abusive litigation practices. The expectation was that these changes in judges' behavior would ultimately have a deterrent effect, forcing attorneys and litigants to exercise greater care in their pleadings and motions. This study focuses on the first aspect of this two-step process—how district judges interpret and apply the amended rule 11.

Two hundred ninety-two federal district judges participated in the project. Each judge read one of ten case summaries, adapted from published opinions that included rule 11 motions, that culminated in a party's request for summary judgment and sanctions pursuant to rule 11. The judges then completed a questionnaire in which they indicated whether the action in question represented a willful or a nonwillful violation of rule 11 and whether they would grant the request for attorneys' fees. In addition, the judges answered a series of questions concerning the offending attorneys' motives, the adequacy of their prefiling inquiries, how the judges' colleagues on the bench would rule in the cases, the rationales that guide the imposition of rule 11 sanctions, and other topics. The results of this study and the conclusions that can be drawn are summarized as follows.

1. There often was little consensus as to whether an action violated rule 11 and, then, whether that violation was willful. On the critical question of whether judges' sanction decisions followed from pre- or postamendment standards, the results were mixed. On the one hand, as many as 48 percent of the respondents indicated a willingness to award expenses, including attorneys' fees, in this sample of cases. On the other hand, many judges failed to adhere to the objective, "reasonable inquiry" test set by the 1983 amendments, relying instead on subjective considerations (i.e., willfulness and bad faith). The data also indicate that judges do not treat willfulness and bad faith as equivalent terms for describing this subjective standard. Finally, the evidence suggests that the judges' decisions reflected the use of a more complex, hybrid model that re-

sults in a compromise between purely subjective and objective standards.

2. The clear majority of respondents believed that deterrence is the primary purpose of rule 11 sanctions. The remaining judges endorsed punitive and compensatory rationales with approximately equal frequency. An examination of the relationship between these beliefs and sanctioning decisions revealed that judges who embrace a compensatory rationale are the most likely to grant a rule 11 motion for attorneys' fees. This result suggests at least one reason why the judges often reacted differently to the same case—their behavior hinges in part on their beliefs about the purposes served by affirmative and negative decisions. Further thought and discussion is needed to clarify these rationales, their relationship to subjective and objective components of the rule, and their implications for the dual issues of whether and with what severity expenses should be shifted.

3. For this sample of scenarios, judges tended to view the attorneys' inquiries as generally above or below a threshold of adequacy, without further distinguishing between the factual and legal dimensions of the actions. At the same time, there was some support for the hypothesis that judges are more likely to sanction rule 11 violations when they perceive shortcomings on substantive law-related issues than when matters of factual merit are involved.

4. There was very little consensus among respondents concerning how other judges would rule in their cases. For the most part, their tendency was to err in the direction of underestimating the frequency with which sanction requests would be granted, a finding that was especially true for the more experienced members of our sample. In addition, the judges exhibited a strong tendency to assume that others would rule as they had. In view of these systematic misperceptions of the norms, the results of this study should provide an objective frame of reference, at least for a specific set of cases, enabling federal district judges to gauge the collective reactions of their colleagues.

5. Having asked judges to report on recent rule 11 activity in their courts, this study revealed a good deal of variability in both the number of motions received and the number granted. It remains to be seen what accounts for these differences. One possible explanation, based on a differential experience hypothesis, is that they simply reflect differences in the kinds of litigation the courts are confronted with (e.g., judges who have faced a large number of claims arising under the civil rights statutes are among the more active users of rule 11). An additional possibility—and one suggested by these data—is that there are characteristic differences

between judges. Indeed, this study shows that those judges who had frequently awarded sanctions in real life were significantly tougher in their responses to our scenarios (especially for the civil rights cases) than were those who had rarely, if ever, imposed sanctions. Because the experience factor was neutralized in this study (i.e., both frequent and infrequent sanctioners responded to the same cases), this result provides unambiguous support for the latter explanation. In the absence of circuit- or tenure-related differences, it remains to be seen what demographic characteristics distinguish frequent and infrequent sanctioners.

6. Although respondents were given the opportunity, very few of them suggested sanctions in addition to or instead of monetary awards. Of those who did, reprimands, added financial penalties, and dismissal were the other responses cited. Overall, this finding corroborates the pre-1983 criticism that rule 11 did not provide guidance concerning the kinds of disciplinary action judges had available to them.

7. A subsample of judges read a clearly frivolous tax case in which the plaintiff was either pro se or represented by counsel. These judges exhibited an interesting sensitivity to this variation. On the one hand, the action was viewed as a rule 11 violation, regardless of whether it was filed by counsel or a pro se litigant. This factor thus had no effect on the probability that sanctions would be granted. On the other hand, judges were less likely to perceive that claim as evidence of subjective bad faith when filed by the pro se party. In line with that distinction, they tended to impose somewhat lighter sanctions on the pro se litigant than on counsel. This pattern is not inconsistent with the amended rule and represents an appropriate compromise between a purely objective model in which all violators are sanctioned and one that allows for the inclusion of subjective factors, such as the competence or absence of counsel, in determining the severity of the sanctions.

Overall, we found that although the 1983 amendments appear to have increased judges' readiness to enforce the new certification requirements, their success thus far has been limited. Of specific concern are the findings that there is a good deal of interjudge disagreement over what actions constitute a violation of the rule, only partial compliance with the desired objective standard, inaccurate and systematically biased normative assumptions about other judges' reactions to frivolous actions, and a continued neglect of alternative, nonmonetary means of response. The study thus identifies a need for further thought on and discussion of these issues.

I. INTRODUCTION

Since the Federal Rules of Civil Procedure were adopted in 1938, evaluations of the efficiency with which the courts administer civil justice have varied. Two frequently cited problems are (a) that the courts are too often confronted with an unknown but unacceptably large number of frivolous actions and (b) that once cases are filed, the litigation process is abused even further, as in pretrial discovery. The net result of these types of misconduct is an increase in both the costs of and delays in dispute resolution.[1]

Recent analyses have suggested a number of possible reasons for abusive litigation practices. Frivolous actions, for example, have been attributed to Americans' litigious instinct or "impulse to sue," our emphasis on substantive rights and entitlements, an overpopulation of lawyers in need of business, a procedural system that is based on an ideal of complete and open access to the courts, and a complex of economic incentives that "tend to make lawsuits in this country easy to maintain and tolerable to lose."[2]

On a conceptual level, proposed solutions all point in a single direction. Nobody has seriously suggested that frivolous litigation should be curtailed by designing genetic engineering to select for nonlitigious characteristics, curbing statutory rights to which we have become accustomed, imposing a quota on the number of lawyers who inhabit the earth, or closing the courthouse doors to classes of potential complainants. Rather, proposals have focused on ways of preventing irresponsible behavior, specifically, lawyers' and their clients' willingness to file frivolous complaints, defenses, and motions.

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1. The filing of frivolous suits can be especially egregious when it precipitates an abusive chain of conduct (e.g., when an implausible claim is filed in the hope that excessive pretrial discovery will eventually either uncover facts upon which a case can be built or wear down the opponent with burdensome requests).

2. Rosenberg, *Contemporary Litigation in the United States*, in Legal Institutions Today: English and American Approaches Compared 153 (H. Jones ed. 1977). *See also* J. Lieberman, The Litigious Society (1981); Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274 (1982); Address by Frank McGarr, Workshop for Judges of the Eighth and Tenth Circuits (Jan. 19, 1984).

Rule 11 of the Federal Rules of Civil Procedure

The goal of rule 11 is accountability. Its original version, which survived without change until 1983, stated that each party was required to sign all pleadings. That signature was then treated as a certificate that the party had read the document and "to the best of his knowledge, information and belief, there is good ground to support it." If the pleading was not signed or if it violated the purpose of the rule, it could be stricken and, in instances of willful violation, counsel could be subjected to "appropriate disciplinary action."[3] Interestingly, although this protective mechanism was built into the 1938 rule, frivolous litigation practices have surfaced with disturbing regularity and have attracted a good deal of attention in recent years.[4] Was rule 11, in its original form, ineffective, and if so, why?

The answer to the first part of that question is yes. In a review of litigation activity from 1938 to 1976, it was found that rule 11 motions had been filed in only nineteen reported cases.[5] Among these cases, violations were found in eleven instances, and attorneys were sanctioned in only three.[6] Lest these findings be dismissed as outdated, another report reviewed the relevant case law through 1979 and found only one additional reported opinion in which counsel was disciplined under rule 11.[7] What accounts for this apparent

3. Rule 7 states that the signature requirement of rule 11 is applicable to all motions and other papers.

4. Because frivolousness is a matter of judgment, it is not reflected in court statistics; *see* J. Lieberman, *supra* note 2. For an opposing view on the question of overlitigation, see Clark, *Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century*, 55 S. Cal. L. Rev. 65 (1981); Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 U.C.L.A. L. Rev. 4 (1983). These writers argue that whether there is an overlitigation phenomenon and, if so, whether it is of recent vintage are matters of controversy. Few would dispute, however, that there is a good deal of frivolous litigation and abusive conduct.

5. Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 Minn. L. Rev. 1 (1976). *See also* 6 C. Wright & A. Miller, Federal Practice and Procedure § 1334 (1971). It should be recognized, of course, that because sanctions often do not appear in reported opinions, these kinds of analyses do not provide statistically reliable estimates of the frequency of their usage.

6. In Kinee v. Abraham Lincoln Fed. Savings & Loan Ass'n, 365 F. Supp. 975 (1973), violating attorneys were ordered to pay all expenses, including counsel fees; in *In re* Lavine, 126 F. Supp. 39 (1954), the violating attorney was initially disbarred, though the decision was later reversed on due process grounds; in American Auto. Ass'n, Inc. v. Rothman, 101 F. Supp. 193 (1952), the attorney's name was "indexed" for easy reference in the event of future indiscretions.

7. R. Rodes, K. Ripple & C. Mooney, Sanctions Imposable for Violations of the Federal Rules of Civil Procedure (Federal Judicial Center 1981); the one instance was in Nemeroff v. Abelson, 469 F. Supp. 630 (1979), wherein plaintiff's lawyer was sanctioned for attorneys' fees.

neglect of rule 11 as a means of deterring abusive litigation practices? Two logical possibilities present themselves. One is that disciplinary action under rule 11 is rarely taken or even requested because lawyers always conduct themselves flawlessly. No doubt few, if any, observers would subscribe to this interpretation of the history of litigation. The other, more plausible possibility is that there is something wrong with the rule itself. Assuming the latter, an analysis of the original text of rule 11 and a review of the early case law suggested two major reasons for its impotence.[8]

First, the courts had exhibited confusion over the standard of inquiry lawyers were expected to satisfy (i.e., how thoroughly must they investigate a client's case before signing the pleading?). Some judges defined the standard narrowly, viewing attorney conduct as abusive only "when it appears beyond peradventure that it is sham and false and that its allegations are devoid of factual basis."[9] Others, however, adopted a broader interpretation, explicitly requiring lawyers to "ascertain that a reasonable basis exists for the allegations, even if the allegations are made on information and belief."[10]

Second, the enforcement mechanism provided by rule 11 was ambiguous and difficult to translate into specific policy (i.e., when was a violation sanctionable, and what disciplinary actions were then available?). To begin with, it was never clear precisely what kinds of sanctions were considered appropriate. If a pleading violated the requirements of rule 11, it could be stricken. Understandably, judges were reluctant to dispose of a client's case because of counsel's indiscretions. With regard to attorney sanctions, assessing costs, reprimands, contempt citations, and disbarment were possible reactions, but under what conditions? According to the rule, only "willful" violations were to provoke such disciplinary responses. Because of the subjectivity of this standard and the difficulty of making judgments about lawyers' underlying motives and intentions, the courts were unclear about the conditions that triggered the use of sanctions.[11] Consequently, sanctions were rarely

8. 6 C. Wright & A. Miller, *supra* note 5, at 495; *see also* Risinger, *supra* note 5, at 60.

9. Murchison v. Kirby, 27 F.R.D. 14, 19 (S.D.N.Y. 1961). A similar standard was adopted in *American Automobile Association,* 101 F. Supp. at 196.

10. Miller v. Schweickart, 413 F. Supp. 1059 (1976).

11. For a general discussion of the problems associated with subjective standards in general, see M. Freedman, Lawyers' Ethics in an Adversary System (1975). *See also* Risinger, *supra* note 5, at 60, for an opposing view that the problem is not with subjective standards per se, but with judges' unwillingness to make negative inferences about an attorney's motives.

threatened or imposed, and their availability apparently did not deter frivolous conduct.[12]

Finally, a third explanation for the ineffectiveness of rule 11 should be added to the list—judges, as a general rule, seem reluctant to impose attorney sanctions. Section 1927 of title 28 of the U.S. Code, first enacted in 1813, provides for cost shifting when a lawyer "multiplies the proceedings in any case as to increase costs unreasonably and vexatiously." Yet, as with rule 11, relatively few courts have invoked this statute.[13] In another, related context, several writers have observed the same kind of infrequent use of sanctions under federal rule 37, which articulates several types of disciplinary response to abusive pretrial discovery practices. As early as 1958, it was argued that the judiciary did not vigorously employ its power to elicit compliance with discovery guidelines.[14] Today, research shows that even though there is a consensus among lawyers that such sanctions are an effective but underutilized means of control, judges are, for a variety of reasons, generally reluctant to use them.[15] In short, at least part of the problem is attributable not to the language of rule 11 per se, but to judges' unwillingness to follow it.

The 1983 Amendments to Rule 11

On August 1, 1983, a new set of amendments to the Federal Rules of Civil Procedure went into effect.[16] In response to the

12. Regarding punitive exceptions to the American rule generally, this point is also articulated by Mallor, *Punitive Attorneys' Fees for Abuses of the Judicial System*, 61 N.C.L. Rev. 613 (1983).

13. *See* Pollack, *Sanctions Imposed by Courts on Attorneys Who Abuse the Judicial Process*, 44 U. Chi. L. Rev. 619 (1977).

14. *See* Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 58 Colum. L. Rev. 480 (1958).

15. *See* Brazil, *Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, 2 Am. B. Found. Research J. 217 (1980); P. Connolly, E. Holleman & M. Kuhlman, Judicial Controls and the Civil Litigative Process: Discovery (Federal Judicial Center 1978); C. Ellington, A Study of Sanctions for Discovery Abuse (U.S. Department of Justice, Federal Justice Research Program, Office for Improvements in the Administration of Justice 1979). For a discussion of the possible reasons for judges' reluctance to impose sanctions, see Renfrew, *Discovery Sanctions: A Judicial Perspective*, 67 Calif. L. Rev. 264 (1979); Sofaer, *Sanctioning Attorneys for Discovery Abuse Under the New Federal Rules: On the Limited Utility of Punishment*, 57 St. John's L. Rev. 680 (1983).

16. Order Amending the Federal Rules of Civil Procedure, 51 U.S.L.W. 4501 (1983).

aforementioned problems, rule 11 was significantly revised in the following ways.

First, the new rule essentially redefines the concept of "frivolousness," or, in more precise operational terms, the question of when a pleading, motion, or other action should be considered to have violated rule 11.[17] In contrast to the good-faith language of the original rule, a party's satisfaction with the merit of his or her case must now be based on, or at least follow from, a "reasonable inquiry." The addition of these two words thus imposes on counsel an affirmative duty to investigate a claim before filing it.[18] Under this standard, there is thus no allowance for a "pure heart, empty head" excuse. Rather, the party must demonstrate that his or her conduct was reasonable and justified under the circumstances at the time. Next, what does it mean to believe that there is "good ground to support" a pleading? In the amended rule, this requirement was articulated to mean that the document should be (a) grounded in fact, (b) warranted by law (or a good-faith argument for its extension, modification, or reversal), and (c) not filed for an improper purpose.

Second, the new language imposes a tougher enforcement mechanism through which violations of the certification requirement are sanctioned. To begin with, the new rule abandons the "willfulness" criterion that originally defined lawyers' behavior as sanctionable, so that any violation, willful or otherwise, is to be treated with a firm hand. Moreover, judges are now instructed that in response to a violation, even on their own initiative, they "shall" impose an appropriate sanction, which "may" include reasonable expenses, including attorneys' fees. This language thus makes at least some form of sanctioning mandatory and explicitly establishes the shifting of expenses in particular as a legitimate, if not preferred, means of response.[19]

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17. Black's Law Dictionary (1979) defines *frivolous* as "of little weight or importance. A pleading is 'frivolous' when it is clearly insufficient on its face, and does not controvert the material points of the opposite pleading, and is presumably interposed for mere purposes of delay or to embarrass the opponent." This concept has been variously construed in the federal courts (for a review of definitions adopted by the different circuits, see Malone v. Colyer, 710 F.2d 258 (1983)).

18. Arthur Miller described this requirement as a "stop-and-think obligation" in The August 1983 Amendments to the Federal Rules of Civil Procedure: Promoting Effective Case Management and Lawyer Responsibility (Federal Judicial Center 1984); according to the Note to the 1983 amendment, what constitutes a "reasonable" inquiry depends on the circumstances of a case (e.g., the amount of time available to counsel).

19. For a more extensive description and commentary on these revisions, see generally Agnew, *Recent Changes in the Federal Rules of Civil Procedure: Prescriptions to Ease the Pain?*, 15 Tex. Tech. L. Rev. 887 (1984); Burbank, *Sanctions in the Proposed Amendments to the Federal Rules of Civil Procedure: Some Questions About*

In the aftermath of the 1983 amendments, the courts have found themselves in a state of transition and uncertainty. Although it is still premature to predict from the case law what effects rule 11 will ultimately have on the behavior of judges and lawyers, the early returns suggest that there is a heightened awareness of these new certification requirements and the spirit in which they were written. Indeed, in less than two years of activity since the new rule was adopted, at least 159 opinions have been published concerning sanctions against both plaintiffs and defendants (most often in response to a motion from opposing counsel), and some portion of attorneys' fees has been granted in 65 of these cases.[20] Sanctions have been awarded in response to several types of violation, including the filing of a claim after the statute of limitations had expired,[21] or without subject matter jurisdiction,[22] and frivolous motions to disqualify defendant's attorney,[23] for summary judgment,[24] or for a change of venue.[25]

In addition to this numerical increase in the frequency of rule 11 motions, several recent opinions have articulated a clear sensitivity to the specific contrast between the pre- and post-1983 standards. In *Buchanan v. Blase,*[26] a case that was filed before the new rules took effect, the court denied defendant's motion for attorneys' fees on the ground that plaintiff did not clearly exhibit bad-faith conduct. Recognizing the stringency of the amended rule, however, the court cautioned that "had the complaint been filed after August 1, 1983, the plaintiff's lawyers would now find themselves facing sanctions." In *Wells v. Oppenheimer,*[27] a case that was filed after the target date, the court granted plaintiff's request for attorneys' fees based on the finding that "although the defendants acted in subjective good faith in moving for summary judgment, there was no objective basis for the attorney to conclude that the motion was well-grounded as the questions of fact were obvious."[28]

Power, 11 Hofstra L. Rev. 997 (1983); A. Miller, *supra* note 18; Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181 (1985).

20. S. Medina, M. Henifin & T. Cone, A Supplemental Analysis of Reported Decisions Applying the 1983 Amendments to Rules 11, 16 and 26 of the Federal Rules of Civil Procedure (Feb. 22, 1985) (available in Columbia Law School Library).

21. Van Berkel v. Fox Farm & Road Mach., 581 F. Supp. 1248 (D. Minn. 1984).

22. Huettig & Schromm, Inc. v. Landscape Contractors Council of North Cal., 582 F. Supp. 1519 (N.D. Cal. 1984).

23. Wold v. Minerals Eng'g Co., 575 F. Supp. 106 (D. Colo. 1984).

24. SFM Corp. v. Sunstrand Corp., 102 F.R.D. 555 (N.D. Ill. 1984).

25. Home-Pack Transp., Inc. v. Donovan, 102 F.R.D. 163 (D. Md. 1984).

26. No. 83-C2932, slip op. at 7 (N.D. Ill. July 30, 1984).

27. 101 F.R.D. 358 (S.D.N.Y. 1984).

28. *See also* Aune v. United States, 582 F. Supp. 1132, 1136 (D. Ariz. 1984): "Before August 1, 1983, the plaintiffs could have filed their actions with impunity. However, on that date an amendment to Rule 11 of the Federal Rules of Civil Procedure took effect."

Are these recent rule 11 cases representative of current thought and activity in the federal courts? Not necessarily. Some opinions reflect an element of nonrecognition of the revised standard. Specifically, the Seventh Circuit, in two post-1983 cases, *Gierbringer v. Silverman*[29] and *Suslick v. Rothschild Securities Corp.*,[30] maintained that the appropriate criterion for the awarding of attorneys' fees under rule 11 is a finding of subjective bad faith. Similarly, the Third Circuit embraced a bad-faith test in *Rubin v. Buckman.*[31] It should be noted that although these three cases were argued and decided after August 1983, they had all been filed before the rule 11 amendments took effect. The application of a subjective standard was thus appropriate to these decisions. A broader reading of the opinions, however, suggests some confusion. In *Suslick,* for example, the Seventh Circuit cited the language of the new rule in a footnote, but then went on to assert that it "requires [present tense] a finding of subjective bad faith."

In addition, the amended certification requirements and their accompanying sanctions have become a source of concern and controversy. In one case, sanctions were imposed against a defendant for making an inappropriate and untimely rule 11 motion, thus supporting a fear that "the emphasis on the availability of sanctions will create a pathology of seeking them. . . . They may clog the courts with needless sanction motions—the problem of satellite proceedings."[32] In another case, attorneys who were sanctioned complained that rule 11 could be used to stifle "the creative development of the law" and could "become a tool or club judges use to force settlements."[33] These and other questions have been raised, primarily concerning the effectiveness of sanctions as a deterrent force and the danger of discouraging potentially meritorious actions.[34] In short, it remains to be seen what impact the new requirements will have on the federal judicial system.[35]

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29. 731 F.2d 1272 (7th Cir. 1984).

30. 741 F.2d 1000 (7th Cir. 1984).

31. 727 F.2d 71 (3d Cir. 1984).

32. Miller & Culp, *Litigation Costs, Delay Prompted the New Rules of Civil Procedure,* Nat'l L.J., Nov. 28, 1983, at 23, in reference to Fisher Bros. v. Cambridge-Lee Indus., No. 82-921, slip op. (E.D. Pa. Dec. 14, 1983).

33. Arthurs, *Penalized Firms in 9th Circuit Question Reach of New Rule 11,* Legal Times, Nov. 12, 1984, at 1.

34. *See supra* note 19.

35. For a review of recent case activity, see T. E. Patton, Rule 11 Sanctions: Judicial Construction and Application, Paper Presented at the FBA/D.C. Bar Seminar on Federal Rules of Civil Procedure (April 19, 1985).

Goals of the Present Research

Essentially, the 1983 amendments to rule 11 were designed with a two-step goal in mind: (a) to encourage the courts to enforce more stringent standards, which should (b) force lawyers to exercise greater care in their pleadings and motions. Within this framework, our research focuses on the first step—judges' perceptions of what constitutes a rule 11 violation, their use of attorneys' fees as sanctions, and the relationship between these two concerns. Thus, our basic objective is to describe what rule 11 currently means to federal district judges. Briefly, the following issues are addressed:

1. Do judges' sanctioning decisions reflect their adoption of the objective, post-1983 rule, or are judges instead falling back on preamendment standards? This question is tested by looking at whether judges demand a "reasonable inquiry" into the facts and the law, and whether they are willing to impose sanctions in response to nonwillful (i.e., in the absence of a finding of subjective bad faith) violations as well as willful violations.

2. What theoretical rationale appears to provide the basis for judges' decisions concerning whether to grant a rule 11 request for expenses and then the magnitude of that award? Cost shifting may be justified as serving three different purposes—to *punish* the offending party, to *compensate* the injured party, and to *deter* similar future conduct—all of which appear to fall within the purview of the rule. We sought to answer two questions here. First, what do judges see as the primary function(s) of rule 11 sanctions? Second, how do judges' beliefs on this issue translate into a ruling on whether to impose sanctions as well as the amount of the award to be granted (i.e., less than, more than, or all reasonable expenses requested by the moving party)?

3. Do judges' reactions to rule 11 violations depend on whether they view the offending lawyer as having improperly represented or disregarded the relevant facts versus the applicable law? As specified in the language of the amended rule, the pleading or motion in question should, after a reasonable inquiry, appear to be (a) well-grounded in fact and (b) warranted by existing law (or a good-faith argument for its extension, modification, or reversal). Are these two bases for failure equally blameworthy, or are judges more likely to sanction one than the other? In a recent survey of post-1983

sanctioning activity, it was noted that "the courts appear to have imposed sanctions less frequently for misrepresentations of fact than for misrepresentations of the law."[36] Information relevant to this hypothesis was collected for this study.

4. What do judges believe about rule 11 norms and enforcement practices among their colleagues in the federal courts? In the wake of the 1983 amendments, the case law provides only tentative guidance as to how judges are applying the standards and ruling on motions for attorneys' fees. Thus, in addition to obtaining an estimate of the actual norms for a series of cases, we asked respondents to predict how their colleagues on the bench would rule under the same circumstances. This information provided a comparison of the actual results of sanctioning in response to the case scenarios and judges' beliefs about these results.

5. Are demographic characteristics of individual judges in our sample associated with rule 11 decisions? Intercircuit differences might be expected, for example, on the basis of the variability in their operational definitions of "frivolousness" and on the basis of the circuits' differential enthusiasm for an objective standard.[37] Another demographic characteristic examined was the length of judges' experience on the bench. Finally, the judges were asked to indicate the number of rule 11 motions they had received and granted within the past twelve months. This information provided insights into the relationship between judges' sanctioning activity in real life and their rulings in our hypothetical case scenarios.

6. What kinds of sanctions, other than the shifting of expenses, do judges impose for violations of rule 11? As we noted earlier, one criticism of the original version of the rule is that it did not offer guidance about what judicial reactions to abusive conduct might be appropriate, effective, or desirable. Of course, the amended rule, with its emphasis on monetary sanctions, may have inhibited even further the consideration of alternative measures. Still, in light of the provision that (a) some form of sanction is mandatory, but that (b) it need not involve the shifting of expenses, this study addressed the question of whether judges employ other means of response to

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36. S. Medina, M. Henifin & T. Cone, *supra* note 20, at 12.

37. On the frivolousness question, see *Malone,* 710 F.2d 258; on the standards question, see S. Medina, M. Henifin & T. Cone, *supra* note 20, at 5; *see also* T. E. Patton, *supra* note 35, at 1, 6–7.

abusive litigation in addition to or instead of the awarding of attorneys' fees.

7. How do judges handle the pro se litigant? Historically, this question has elicited ambivalent reactions. A preliminary draft of the original, 1938 version of rule 11 contained a subdivision (b), which stated: "A party who is not represented by an attorney shall sign the pleadings and shall be subject to the obligations and penalties herein prescribed for attorneys." This passage was then deleted at the last moment.[38] Similar provisions had been considered on several occasions but never explicitly adopted.[39] Looking at the case law, it is fair to say that, as a general rule, it suggests that pro se complaints should be held to "less stringent standards than formal pleadings drafted by lawyers,"[40] but that the pro se litigant may not "flagrantly ignore relevant procedural or substantive rules of law."[41] Is judicial practice consistent with this view? Recent case activity does not provide an unambiguous answer.[42] A portion of this study was therefore designed to explore this issue.

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38. Final Report of the Advisory Committee to the Supreme Court, Nov. 1937, at 10.

39. *See* C. Wright & A. Miller, *supra* note 5, at 496.

40. Haines v. Kerner, 404 U.S. 519, 520 (1972).

41. Faretta v. California, 422 U.S. 806 (1975); in Welsh v. Steinmetz, Civ. No. 84-1846, slip op. (D.N.M. 1984), the court stated that "the trial court is not charged with the responsibility of providing continuing education for a quarrelsome pro se litigant regarding his ethical responsibilities in filing pleadings."

42. Although pro se litigants have been sanctioned under the post-1983 version of rule 11, the sanctions are often accompanied by the court's finding of bad faith. As such, it is difficult to assess whether the more stringent, objective standard would have been employed in these cases (i.e., whether judges would have sanctioned pro se litigants in the absence of bad faith). *See, e.g.*, Cameron v. IRS, 593 F. Supp. 1540 (N.D. Ind. 1984); Day v. AMOCO Chemicals, 95 F. Supp. 1120 (S.D. Tex. 1984); Taylor v. Prudential Bache Sec., 83 Civ. No. 1103, 1161, slip op. (N.D.N.Y. Aug. 3, 1984); *Welsh*, Civ. No. 84-1846.

II. METHOD

There are at least three methodological approaches this study could have taken to achieve its various objectives. One possibility was to summarize and integrate the case literature, inferring judicial attitudes from patterns of rule 11 decisions and their accompanying opinions. Another was to conduct a survey of opinions and practices through interviews or the administration of a questionnaire. The third approach—the one selected—was to ask judges to react to specific, concrete cases involving a rule 11 motion.[43]

Sample of Respondents

All active federal district court judges were asked to participate in either a pretest or the final study.[44] Of the 474 cases and ques-

43. Compared with the alternatives, each of which has its own strengths and limitations, the simulation method used offers three unique advantages. First, getting different judges to express their views of the same case places them on a common ground for purposes of comparison. As such, the study could look at a range of opinions that could not be attributed to differences in case-related experience. Second, as recognized by psychologists who study attitudes and their relationship to overt behavior, useful information is often obtained by asking respondents about concrete, attitudinally relevant issues, instead of posing a general "what is your attitude toward 'X'" question. (*See* M. Fishbein & I. Ajzen, *Belief, Attitude, Intention, and Behavior: An Introduction to Theory and Research* (1975). Also, Wayne Brazil's study of pretrial discovery practices provides a good illustration of this rule. That is, Brazil reported that although many lawyers he interviewed initially characterized the discovery system favorably in response to a general question, they then became increasingly negative in response to more focused questions about their own experiences. Similarly, when asked whether they had experienced any difficulties in discovery, most lawyers impulsively answered in the negative but then, in follow-up questioning about concrete instances, cited several occasions in which they had problems. Brazil, *supra* note 15.) Finally, by using standard case summaries, certain factors that are thought to be important could be edited into or out of these scenarios and systematically varied in order to assess their independent effects on sanctioning decisions. Indeed, this potential for the comparison of experimental and control groups can be realized without endangering the rights of actual participants in the legal system. (For a thorough discussion of the merits of experimentation and its related ethical considerations, see Experimentation in the Law: Report of the Federal Judicial Center Advisory Committee on Experimentation in the Law (Federal Judicial Center 1981)).

44. Senior judges were excluded from the study because of the need to survey those most likely to have had experience with the post-1983 amendments.

tionnaires mailed out for the latter, 292 responses were received, representing 61.6 percent of the target population. Table 1 presents a breakdown of the number of judges representing each of the twelve circuits. In order to obtain information about general trends rather than mere reactions to the idiosyncrasies of a specific case, we sent each judge, by random assignment, one of ten different case summaries.[45] For each case, sample sizes ranged from twenty to thirty-six.

TABLE 1
Number and Percentage of Active Judges in Each Circuit Who Participated in the Study

Circuit	Sample Size	Population Size	% Representation
D.C.	9	13	69
First	14	20	70
Second	34	47	72
Third	33	45	73
Fourth	28	41	68
Fifth	33	53	62
Sixth	29	45	64
Seventh	22	35	63
Eighth	17	32	53
Ninth	34	70	49
Tenth	15	26	58
Eleventh	24	47	51
Total	292	474	62

Case Descriptions

Ten recently published cases in which rule 11 motions were filed were adapted for use in this study. The original references, listed in table 2, show that a variety of subjects were represented, including contract, securities, RICO (Racketeer Influenced and Corrupt Organizations Act), trademark, civil rights, title VII, and tax. In these original cases, nine of the sanction requests were made by the defendant, always on the ground that the plaintiff's claim was frivolous and without merit, in violation of rule 11 (in the tenth, the plaintiff charged that the defense had no grounds to support its dismissal motion). In response to these motions, attorneys' fees were awarded in six instances and denied in four.

For the purpose of presenting brief but informative case descriptions, the published opinions from the original actions were rewrit-

45. There was one exception to the random assignment rule. Since all the scenarios were adapted from actual cases, no judge was presented with a case that was tried in his or her own district.

TABLE 2
References for the Ten Cases Used in the Study

Case	Original Cause of Action
A. Lucha, Inc. v. Goeglin, 575 F. Supp. 785 (E.D. Mo. 1983)	Contract
B. Laterza v. American Broadcasting Corp., 581 F. Supp. 408 (S.D.N.Y. 1984)	RICO
C. Folak v. Sheriff's Office of Cook County, 579 F. Supp. 1338 (N.D. Ill. 1984)	Civil rights
D. Williams v. Birzon, 576 F. Supp. 577 (W.D.N.Y. 1983)	Civil rights
E. Steinberg v. St. Regis/Sheraton Hotel, 583 F. Supp. 421 (S.D.N.Y. 1984)	Title VII/Age discrimination
F. Viola Sportswear, Inc. v. Mimun, 574 F. Supp. 619 (E.D.N.Y. 1983)	Trademark
G. Frederick v. Clark, 587 F. Supp. 789 (W.D. Wis. 1984)	Tax
H. Rubin v. LILCO, 576 F. Supp. 608 (E.D.N.Y. 1984)	Securities
I. Zaldivar v. City of Los Angeles, 580 F. Supp. 852 (S.D. Cal. 1984)	Voting rights act
J. Warren v. Reserve Fund, Inc., 728 F. 2d 741 (5th Cir. 1984)	Securities

ten by summarizing and sometimes embellishing the factual and legal issues, while excluding all statements about judges' rulings and opinions. After initial screening and pretesting, several minor changes were made. The scenarios ultimately employed were between two and four pages in length, each culminating in a party's motion for summary judgment and a request for sanctions pursuant to rule 11. These case descriptions are provided in appendix A.[46]

46. Preliminary testing of the adequacy of the scenarios was conducted in two phases. First, they were sent to two external consultants, a lawyer and a judge, who were asked whether they were plausible and whether they provided enough information upon which certain tentative judgments could be made. In response to their comments, several minor modifications were made. The resulting cases and questionnaires were then pretested with thirteen federal district judges. In response to these returns, some additional changes were made. The most important problem foreseen was that, in the absence of information about the attorney(s) in question, respondents would be unable to distinguish bad-faith behavior from basic incompetence. To minimize the risk that judges' reactions would be guided by the differing assumptions they might make about the lawyers' abilities, case descriptions included the statement that "both parties were represented by counsel from reputable law firms."

Finally, in order to address the question of whether pro se litigants are held to the same standard as their counterparts who are represented by counsel, we introduced a variation into one of the more clearly frivolous cases. Specifically, two versions were used of a tax case in which plaintiffs had invoked the Fifth Amendment in their refusal to complete their tax forms (cases G1 and G2 in appendix A). In one version of the case (G2), the plaintiffs were said to have been represented by an attorney from a reputable law firm. In the other (G1), the facts and arguments were identical, but the plaintiffs were introduced as pro se. By comparing judges' reactions to these two versions of the same scenario, it was thus possible to assess whether pro se litigants are held to the same or a lower standard vis-à-vis rule 11 certification requirements.

Questionnaires

A letter accompanying the cases and questionnaires informed the judges of our interest in abuses of the litigation process and the use of sanctions as a management device. This letter appears in appendix B.

In order to combine the ten cases for a description and analysis of general tendencies, basically the same questions were asked of all respondents.[47] First, judges were asked to indicate their perceptions of the action in question. That is, did it violate rule 11, and if so, was that violation willful? Second, we asked how the judges would rule on summary judgment as well as how they would use sanctions in this sample of cases.[48] Regarding the latter, the judges indicated (a) whether they would grant the request for attorneys' fees, (b) if so, how much they would be inclined to award (i.e., less than, more than, or all reasonable expenses and fees), (c) the extent to which other judges in their district would do the same, and (d) what other sanctions, if any, they might impose. Next, the judges were asked to speculate about the opposing parties' subjective experiences and states of mind. Specifically, we asked them to indicate their beliefs about how much undue hardship the moving party, usually the defendant, experienced as a result of plaintiff's action and the thoroughness of the plaintiff's attorney's investigation of the case, as well as his or her belief in its merit. Finally,

47. Depending on the specific case, the questionnaires differed only in whether the moving party was referred to as (a) the plaintiff or defendant, and (b) an individual or more than one person.

48. Although all respondents were asked to rule on a motion for sanctions, those who read cases A, F, and G were not asked to indicate their positions on the issue of summary judgment. In these particular instances, our a priori belief was that summary judgment was a foregone conclusion. As such, it was presented within these case summaries as having already been granted.

two broader issues were addressed—what the judges generally view as the primary function of rule 11 sanctions (i.e., compensation, punishment, or deterrence) and how many rule 11 sanction requests they had received in the past year, and, of those, how many they ultimately granted. A sample questionnaire appears in appendix C.

III. RESULTS

Overall, 176 (60.3 percent) of our 292 respondents judged the actions in question to have violated rule 11.[49] Ninety-six (32.9 percent) believed that the violation was willful, and 137 (47.9 percent) indicated that they would have granted the opposing parties' request for attorneys' fees. Among those in the latter category, 78 percent indicated that they would be inclined to award all reasonable expenses and fees, 19 percent favored an amount that was less than that, and 3 percent favored all costs plus a multiplier or bonus. Overall, only 23 judges (7.9 percent) recommended sanctions other than or in addition to attorneys' fees. Table 3 presents a breakdown of the major findings for each of the ten cases.

TABLE 3
Case-by-Case Breakdown of the Percentage of Affirmative Answers to Study Questions 1, 2, 3a, and 3b

Case(*n*)	Violation (1)	Willful (2)	Summary Judgment (3a)	Sanctions (3b)
A (23)	69.6	43.5	—	52.2
B (28)	21.4	10.3	32.1	11.1
C (32)	65.6	36.4	65.6	58.1
D (29)	75.9	48.3	89.7	60.7
E (34)	58.8	32.4	78.8	44.1
F (36)	97.2	44.4	—	85.7
G (36)	83.4	47.2	—	65.7
H (27)	37.0	11.1	84.6	19.2
I (24)	37.5	20.0	75.0	26.1
J (19)	36.9	25.0	70.0	30.0
Total	61.1	32.9	70.9	47.9

NOTE: Cases G1 and G2 are combined for this analysis. Total percentages represent the weighted averages of the ten cases, based on the number of respondents who answered each question. Summary judgment was presented as having already been granted in cases A, F, and G.

Before proceeding with an analysis of the specific questions raised earlier, we addressed a concern often expressed about simulation research such as this—are judges' reactions to our hypotheti-

49. Several judges answered some but not all of the questions. Consequently, our analyses of the various data are based on slightly different sample sizes.

cal case scenarios informative of their in-court decision making? Moreover, are the results generalizable to this domain? The data provide affirmative answers to both questions. Specifically, the judges' reported sanctioning activities were compared with their hypothetical rulings in this study, and a striking correspondence between the two was found. On the basis of their responses to question 13 ($n = 260$), judges were divided into groups that had sanctioned frequently (two or more times, $n = 104$) or infrequently (once or not at all, $n = 156$) during the past twelve months. Fifty-eight percent of the frequent sanctioners, compared with only 41 percent of the infrequent sanctioners, granted the request for attorneys' fees in this study, a difference that is statistically significant.[50] These data thus indicate that, in relative terms, judges' decisions in this simulation mirrored their in-court rulings, a finding that supports the external validity or generalizability of the research strategy.

Standards for the Imposition of Sanctions

According to the 1983 amendments to rule 11, all violations of the certification requirements, whether willful or the result of incompetence, lack of experience, or simple neglect, shall result in the imposition of sanctions, including attorneys' fees. In other words, sanctions should be contingent on the failure to meet an objective, "reasonable inquiry" standard rather than on an analysis of the lawyer's motives on a subjective good/bad-faith dimension.

Two methods were used to assess the extent to which judges applied the old or new standard in their decisions. First, respondents were assigned to one of three categories on the basis of their combined answers to questions 1 and 2; they were classified according to whether they perceived the act in question to have represented (a) a willful violation, (b) a nonwillful violation, or (c) a nonviolation of rule 11. Within this framework, it is clear that by both the pre- and post-1983 criteria, sanctions should be imposed for willful violations but not in the absence of a violation. What distinguishes the current standard from its predecessor is the degree of sanctioning activity expected in condition (b), in response to the nonwillful violator. According to the pre-1983 rule, nonwillful violations should yield the same level of sanctioning (or nonsanctioning) as nonviolations do. Within the guidelines of the new rule, how-

50. $p < .01$.

ever, these results should approximate those obtained in the willful-violation group.

In order to obtain a parallel measure of compliance with the new sanctioning mechanism, respondents were also categorized on the basis of their responses to question 10, which pertains to their perceptions of the offending lawyer's actions and motives. The judges were assigned, according to their views, to the following three groups: (a) bad faith, (b) good faith, but inadequate investigation (e.g., negligence), and (c) good faith and a reasonable inquiry. As with the willfulness criterion described above, it was expected that judges would uniformly grant rule 11 motions in condition (a) and deny them in condition (c). As before, we assumed that their willingness to impose sanctions in condition (b), where the party passes the subjective test but fails on the objective standard, would represent a measure of adherence to the more stringent criterion implied by the 1983 amendments.

Willful Versus Nonwillful Violations

To begin with, judges who read the same scenarios frequently did not agree on whether the pleading or motion in question violated rule 11 and, then, on whether a perceived violation was willful. This within-case variability in perceptions was more pronounced for some scenarios than it was for others. Analyses of the data presented in table 4 reveal a striking level of disparity for five of the cases (A, C, D, E, and G), where the distribution of response preferences across the three categories was statistically nonsignificant

TABLE 4
Number of Judges in Each Case Who Responded Within the Three Categories Produced by Combining Questions 1 and 2

Case	Willful Violation	Nonwillful Violation	Nonviolation
A	10	6	7
B	3	3	22
C	12	9	11
D	14	8	7
E	11	9	14
F	16	19	1
G	17	13	6
H	3	7	17
I	5	4	15
J	5	2	12
Total	96	80	112
	(33.3%)	(27.8%)	(38.9%)

(i.e., no single category received a disproportionate number of endorsements). In case C, for example, a discharged deputy sheriff had filed a complaint against the county sheriff's office for dismissing him without a hearing. Of the thirty-two judges who read that case, 37.5 percent viewed the claim as a willful violation, 28.1 percent viewed it as a nonwillful violation, and 34.4 percent described it as a nonviolation of rule 11.

TABLE 5
Raw Number and Percentage of Judges by Violation Category Who Would Award Fees Under Rule 11

Judge's Response	Willful Violation	Nonwillful Violation	Nonviolation
Fees granted	87	46	2
Fees denied	8	30	108
Sanctions imposed	91.6%	60.5%	1.8%

NOTE: All percentages differ from each other at the $p < .001$ level, via a chi-square test of significance.

With regard to the relationship between judges' perceptions of the action and their sanctioning decisions (specifically, the question of whether they applied the pre- or post-1983 rule), the results proved interesting. It can be seen in table 5 that, consistent with both versions of rule 11, the vast majority of judges who perceived the action in question as a willful violation granted the request for attorneys' fees. On the other hand, it is interesting to note that as many as eight judges (8.4 percent) did not award fees. Could they have recommended instead the imposition of other, monetary or nonmonetary, sanctions? Investigating this possibility, we found that only two of these eight respondents chose that route; six judges thus exhibited a decision-making pattern that reflected a total noncompliance with either version of rule 11.

In the critical test of whether judges applied the more stringent 1983 standard, the results were mixed. Among the seventy-six respondents who perceived the act as a nonwillful violation, forty-six (60.5 percent) granted the request, a figure that is statistically higher than that obtained from those who did not perceive a violation, but lower than that obtained in the willful violation category. Of the thirty judges who did not award fees in this category, only four stated in question 6 that they would impose other types of sanctions. In short, 34 percent of the respondents who perceived a nonwillful violation decided not to impose any sanctions, financial or otherwise, on the offending party.

Subjective Faith Versus the Reasonableness of Inquiry

In contrast to the variability that characterized judges' responses to the violation and willfulness questions, there was considerable agreement on the state-of-mind question, as 68 percent of those who answered it selected the "good faith/inadequate inquiry" explanation of the offending party's conduct. Still, as with the willfulness results, there was a good deal of within-case variability, as the remaining judges often disagreed as to whether the actions reflected good faith/adequate investigations or bad faith/inadequate investigations. These data appear in table 6.

TABLE 6
Number of Judges in Each Case Who Fell into the Three Categories Produced by Question 10

Case	Bad Faith/ Inadequate	Good Faith/ Inadequate	Good Faith/ Adequate
A	5	16	1
B	3	11	12
C	7	16	4
D	7	16	5
E	5	24	3
F	4	32	0
G	6	22	0
H	1	18	5
I	5	11	7
J	3	13	2
Total	46	179	39
	(17.4%)	(67.8%)	(14.8%)

Judges' decisions in relation to the subjective (good versus bad faith) and objective (adequate versus inadequate inquiry) criteria show a pattern roughly similar to that obtained for the willfulness criterion. As shown in table 7, judges almost uniformly imposed sanctions when they believed that the offending party not only failed to pass the reasonable inquiry test but also exhibited bad faith. However, four (8.9 percent) of the judges who believed that the pleading or motion in question reflected bad-faith conduct denied the request for fees, and none of them, in response to question 6, recommended the imposition of other sanctions as an alternative. (At the other extreme, one judge granted the request for sanctions and then described the action in good faith/adequate terms.)

In the good faith/inadequate group, in which a conflict arises between the pre- and post-1983 standards, less than half the judges (84 of 175) granted the request for attorneys' fees. Moreover, among the 91 who did not, only 9 chose another form of discipline. Thus,

TABLE 7
Raw Number and Percentage of Judges in Each of the Three State-of-Mind Categories Who Would Award Fees Under Rule 11

Judge's Response	Bad Faith/ Inadequate	Good Faith/ Inadequate	Good Faith/ Adequate
Fees granted	41	84	1
Fees denied	4	91	37
Sanctions imposed	91.1%	48.0%	2.6%

NOTE: All percentages differ from each other at the $p < .001$ level, via a chi-square test of significance.

the overall rate of sanctioning, financial and otherwise, was 53 percent among judges who believed that the offending party failed to meet a reasonable inquiry standard for reasons other than subjective bad faith.

A Comparison Between Willfulness and Bad Faith

Following the lead of the Advisory Committee and other commentators, we have been using the terms "bad-faith violation" and "willful violation" interchangeably. Are the constructs underlying these words truly equivalent? Having assessed judges' descriptions of the various actions on both dimensions, we are now in a position to conclude that they are not (see table 8). In fact, comparing tables 4 and 6, it can be seen that, given the same set of facts, only 28 percent of the respondents characterized them as nonwillful violations, whereas 68 percent described them as good-faith violations. Conversely, although 33 percent of the respondents perceived the violation as willful, only 17 percent attributed bad faith to the offending party. These data thus indicate that judges are less likely to view an instance of misconduct as evidence of bad faith than as evidence of willfulness.

This finding contributes to a growing awareness about the linguistic determinants of legal decision making[51] and bears important implications directly relevant to various aspects of the Federal Rules of Civil Procedure. It is possible, for example, that whenever a subjective, state-of-mind test is warranted, those judges who think in good/bad-faith terms, which implies a search for improper motives, will be more likely to favor the offending party than will

51. *See, e.g.,* W. O'Barr, Linguistic Evidence: Language, Power, and Strategy in the Courtroom (1982).

TABLE 8
Cross-Classification of Respondents in the Two Subjective Categories

	Category 1		
Category 2	Willful Violation	Nonwillful Violation	Nonviolation
Bad Faith/ Inadequate	42	3	1
Good Faith/ Inadequate	47	69	61
Good Faith/ Adequate	1	1	37

judges who represent the threshold issue along a willfulness dimension. Lawyers confronted with judicial scrutiny of their conduct might thus be advised to frame their defense in good-faith language (thereby forcing an opposing party into the relatively difficult position of having to prove bad faith) and avoid being evaluated against the lower standard of proof demanded by a showing of willfulness.

In summary, this attempt to obtain converging lines of evidence for judges' adherence to the post-1983 standards of rule 11 has enabled us to identify an asymmetry in the language used to describe the subjective model. Specifically, we can conclude that willfulness and bad faith are not synonymous terms, as judges are quicker to attribute rule 11 violations to the former than to the latter. In view of the practical importance of this finding, judicial and scholarly attention should be directed toward a more in-depth analysis of this distinction and its ramifications.

Demographic Differences in Sanctioning Standards

In view of the judgmental variability described above, we explored the possibility that demographic characteristics of the respondents in our sample were related to the standards by which they imposed sanctions, specifically, whether judges from the twelve circuits and with varying amounts of experience on the bench would differ in their perceptions and reactions to the pleadings and motion in question, especially when viewed as nonwillful or good-faith violations. As it turned out, neither tenure-related nor intercircuit differences proved to be statistically significant on any of the individual measures (see tables 9 and 10), nor were there significant demographic differences in the apparent use of subjec-

tive and objective criteria (as measured by the imposition of sanctions in the nonwillful and good-faith categories of violation). Put another way, it appears that our results can be generalized across these two demographic dimensions.

TABLE 9
Comparison of the Major Results According to Levels of Experience on the Bench

Tenure *(n)*	Violation	Willful	Summary Judgment	Sanctions
0–4 years (101)	68.0	36.6	54.0	52.0
5–9 years (98)	57.7	33.7	44.2	44.7
More than 10 years (93)	57.1	28.0	44.6	46.7

NOTE: None of the tenure differences is statistically significant at the conventional $p < .05$ level.

Overall, the results described above indicate that when confronted with an action that is sanctionable under the post- but not pre-1983 version of rule 11, a substantial minority of judges (between 34 percent and 47 percent, depending on the criterion employed) provided a response pattern that is internally inconsistent with the new rule. Does this finding reflect simple ignorance and confusion in the immediate aftermath of the rule change, or does it reflect something more meaningful and stable, perhaps, concerning how judges are likely to interpret and implement the new certification requirements? Although recent opinions provide some evidence for a simple time lag in the development of rule 11, there is reason to suspect the latter.

Two views of recent rule 11 case activity provide a point of departure for the idea that the amended language can support a range of interpretations. In a report prepared for the Second Circuit, Standish Forde Medina, Mary Sue Henifin, and Timothy Cone noted that although the new rule articulates an objective model based on reasonableness, its language does not completely disavow subjective considerations.[52] In particular, they cite two components of the rule that are subjectively tainted. First, it provides that pleadings be based on a "good-faith" argument for the extension, modification, or reversal of existing law. Second, it states that pleadings may not be interposed for any "improper purpose," implying an unacceptable state of mind. On these grounds, the authors argue that the failure to impose sanctions on subjective grounds is not necessarily inconsistent with rule 11.

52. *See* S. Medina, M. Henifin & T. Cone, *supra* note 20, at 12 (Supp. May 6, 1985).

TABLE 10
Comparison of the Major Results Among the Twelve Circuits

Circuit (*n*)	Violation	Willful	Summary Judgment	Sanctions
D.C. (9)	66.7	22.2	77.8	33.3
First (12)	75.0	50.0	66.7	66.7
Second (34)	52.9	32.4	38.2	47.1
Third (33)	45.5	30.3	57.6	39.4
Fourth (25)	64.3	35.7	39.3	60.0
Fifth (33)	54.5	27.3	43.8	48.5
Sixth (29)	65.5	37.9	48.3	44.8
Seventh (21)	59.1	31.8	59.1	38.1
Eighth (17)	56.3	17.6	29.4	47.1
Ninth (33)	70.6	38.2	48.5	51.5
Tenth (14)	60.0	26.7	53.3	42.9
Eleventh (22)	78.3	37.5	39.1	54.5

NOTE: None of the intercircuit differences is statistically significant at the $p < .05$ level.

In their review of the postamendment activity, Medina et al. did indeed discover a number of cases in which district courts denied sanction requests in response to postamendment pleadings that were not reasonable under the circumstances but were also not attributable to improper motives. As such, they characterize the judgment rule implied by these decisions as one that appears to be based on the egregiousness of the misconduct, so that only serious violations are taken as evidence of willfulness. The decision in *Ward v. Bonanza Steak House*[53] is a case in point, wherein the court dismissed the action as "frivolous" and for lack of jurisdiction, but noted: "As to defendant's motion for attorney's fees and sanctions pursuant to Rule 11, defendant has not satisfied his burden of showing that this suit was filed in bad faith."

In sharp contrast to this practice, several judges have taken a firm position in favor of a purely objective model, one that preempts the consideration of purpose and intent. Observing the persistence of a bad-faith standard, Judge Abraham Sofaer said "that policy is wrong. . . . When the Rules say that the judge 'shall' impose sanctions . . . absent some exceptional circumstances, the rule should read to mean just that."[54] Similarly, Judge Jack Weinstein complained that "the threshold level of egregiousness required to make out a case under Rule 11 is so high, and the prob-

53. 84 Civ. No. 3097, slip op. (S.D.N.Y Jan. 7, 1985).

54. Address by Abraham Sofaer, 1984 Fourth Circuit Judicial Conference (June 29, 1984).

ability of successful motions for improper certification so low, that the Rule in general provides little protection for prospective defendants, the public, and the courts."[55] Finally, Judge William Schwarzer has specifically rejected the idea that the apparently subjective language of the new rule implies a need to analyze the violator's state of mind. In considering whether a paper was interposed for an improper purpose, for example, he asserted that "the court need not delve into the attorney's subjective intent. The record in the case and all of the surrounding circumstances should afford an adequate basis."[56]

This stringent view is not without its adherents in the district courts, as sanctions have indeed been imposed for nonwillful violations of rule 11.[57] In *Van Berkel v. Fox Farm and Road Machinery,*[58] for example, the plaintiff filed a products liability claim after the statute of limitations had expired. Because the lawyer based the claim on his client's word rather than on a firsthand review of the medical records, the court imposed sanctions covering all costs, including attorneys' fees.

To summarize, our data and recent decisions indicate that there is substantial disagreement among federal district judges concerning the propriety of and doctrinal standards for imposing sanctions on attorneys who violate rule 11. This difference of opinion could be interpreted in one of two ways. One possibility is that some judges accept, whereas others reject, in principle, the stringency of the new requirements. This explanation implies that there is a group of dissenters for whom good-faith violations will seldom result in the imposition of sanctions (in fact, about 8 percent of those judges who defined the pleading in question as a bad-faith violation refused to award fees). Why might some judges habitually deny sanction requests? Several possible explanations, both personal and professional, that have been offered in the discovery abuse area may be applicable to the rule 11 problem.[59] For example, a number of judges apparently feel that sanctioning lawyers is counterproductive—that it fundamentally alters their working relationship from one of cooperation to one that is more combative. Along similar lines, there is the belief that monetary sanctions do not effectively deter abusive conduct. Since, as this study has found, deterrence is the most frequently cited rationale for the use

55. *In re* "Agent Orange" Prod. Liab. Litig., M.D.L. No. 381, slip op. at 10 (E.D.N.Y. Jan. 7, 1985).
56. Schwarzer, *supra* note 19, at 195.
57. *See* T. E. Patton, *supra* note 35, at 9–10.
58. 581 F. Supp. 1248 (D. Minn. 1984).
59. *See generally* C. Ellington, *supra* note 15; Renfrew, *supra* note 15; Sofaer, *supra* note 15.

of rule 11 sanctions, this belief alone would discourage their use. Another explanation is that, at least on a short-term basis, the procedural steps necessary to award fees consume judicial time and energy, making alternative, less effortful means of response more attractive. Finally, on a more interpersonal level, it has been suggested that, except under extreme circumstances, some judges are reluctant to take the kind of harsh action that would embarrass fellow members of the bar.

An alternative interpretation of the variability in our results, one that is based on categorical differences between specific types of misconduct rather than on differences between judges, is that some but not all good-faith violations will elicit disciplinary action. As this research has shown, all good-faith violations are not created equal. It should therefore not be surprising to find that judges sanction simple negligence or laziness more heavily than they do incompetence or lack of experience, despite their apparent equivalence in implying the lack of bad faith. This explanation suggests that the pattern of judges' rulings could more accurately be described through a four- rather than a three-tiered model, one that moves toward representing subjective faith as a continuous rather than dichotomous variable. As depicted in table 11, the essence of this idea is that unlike the either/or language of rule 11 (in which the label *good faith* applies to all conduct for which bad faith has not been demonstrated), judges rather naturally make distinctions within the category of good-faith violations. Indeed, as revealed in our comparison of the two subjective criteria, many judges perceived good-faith violations as nonwillful, whereas others viewed them as willful (see table 8). Willfulness thus appears to be a distinguishing variable within the broad category of good-faith misconduct. Along similar lines, as noted earlier, Medina et al.'s review indicates that in the absence of bad faith, only serious forms of misconduct appear to have resulted in the award of fees. What do they mean by "serious"? Although the basis for this distinction is subject to debate, it is conceivable that serious good-faith violations are those that are perceived as having been willful or controllable. One would thus expect that rulings on sanction requests might hinge, in part, on the judges' perceptions of how readily the offending party could have prevented his or her failure to meet the certification requirements.

Further analysis of our own results lends support to the four-tiered model illustrated in table 11. By comparing judges on the basis of their combined standing on the two subjective categories presented in table 8, four distinct groups are formed, consisting of judges who believed that the action was (1) not in violation of rule

TABLE 11
Four-Tiered Model Describing Judges' Rulings on Rule 11 Motions for Sanctions

Characterization of Attorney's Conduct	Rule 11 Prescriptions	Actual Decision Model (% Sanctions Granted)
1. Nonviolation (pleading is reasonable under the circumstances)	No sanctions	No sanctions (2%)
2. Nonwillful good-faith violation (reasonableness standard not met because of factors such as incompetence, lack of experience, case complexity, and oversight)	Sanctions	Variable sanctions (61%)
3. Willful good-faith violation (reasonableness standard not met because of personally controllable factors such as neglect or laziness)	Sanctions	Sanctions (85%)
4. Willful bad-faith violation (reasonableness standard not met because of a willful disregard or misrepresentation of the facts or law, or improper purpose)	Sanctions	Sanctions (98%)

11, (2) a nonwillful good-faith violation, (3) a willful good-faith violation, and (4) a willful bad-faith violation. Table 11 shows that the frequency of sanctions increased steadily across the four categories. Most directly relevant to the idea that not all good-faith violations are created equal is the finding that nonwillful good-faith misconduct was sanctioned with significantly lower frequency than was willful good-faith misconduct (61 and 85 percent, respectively).[60]

Another interesting source of evidence for the importance of this willfulness or controllability factor concerns the question of whether all lawyers should be held to the same standard or whether allowances should be made for differences in competence, experience, and the availability of support services. By definition, a purely objective standard does not allow for such considerations, as all failures to conduct a reasonable inquiry are sanctionable. And yet, Judge Schwarzer, a strong proponent of the objective model, writes that "[w]hile all attorneys practicing in the federal court are subject to its rules, it is not realistic to hold all to the same standards. For example, a failure to cite contrary authority may be excusable neglect in the case of an inexperienced solo practitioner but amount to serious misconduct if perpetrated by a lawyer from a large, well-equipped law firm."[61] Another use of a hybrid model

60. $p < .05$.
61. Schwarzer, *supra* note 19, at 201.

resulting from an ambivalence concerning mandatory sanctions for certain types of good-faith violations occurred in *Weisman v. Rivlin,*[62] wherein rule 11 sanctions were imposed against plaintiff's counsel for mistakenly filing a complaint that on its face disclosed a lack of diversity jurisdiction. The court ruled in favor of the defendant's motion, noting that good faith is not an excuse under the new rule 11, but then awarded the defendant only $200 of the $7,800 he had requested.

Rationales for the Imposition of Sanctions

Although the Advisory Committee Notes articulate only a deterrence rationale, rule 11 sanctions simultaneously serve three purposes—to penalize the violator, to compensate the offended party, and to deter others from engaging in similarly abusive conduct. Accordingly, we raised the following two-pronged question: What rationales do judges assert on behalf of rule 11, and do these beliefs guide their rulings on sanction motions?

In question 11, the judges were asked to indicate their preferences regarding these rationales by either checking one alternative or ranking the three in order of importance. As can be seen in table 12, the majority of judges (59.4 percent) expressed a belief that deterrence is the most important purpose of sanctions. Significantly fewer judges selected either the compensation rationale or the punishment rationale (21 and 19.6 percent, respectively). Viewed another way, deterrence received a mean rank order of 2.28, compared with a rank order of 1.33 for compensation and 1.29 for punishment.

Having found that most respondents favored a deterrence model, we explored the question of whether judges' rationales were related to their rulings on requests for attorneys' fees. Each judge was assigned to one of three groups on the basis of which rationale he or she had selected as the most important (see table 12). These groups were then compared both in terms of the percentage of those who granted the motion (question 3b) and the average relative amount of fees awarded (question 5). The results of this analysis appear in table 13. An interesting difference emerged, as compensation-oriented judges were more likely to impose sanctions than were those who were either punishment or deterrence oriented. This same pattern appeared when responses were further scaled for analysis according to the relative amount of fees favored in question 5 (where

62. 598 F. Supp. 724 (D.D.C. 1984).

TABLE 12
Rank Orders Chosen for Each of the Three Rationales

Rank Order[1]	Compensation	Punishment	Deterrence
0	95	96	29
1	67	74	35
2	68	64	52
3	**62**	**58**	**176**
Mean rank	1.33	1.29	2.28

NOTE: The mean rank of the deterrence rationale is significantly higher, at the $p < .001$ level, than that obtained for the compensation and punishment rationales, which did not differ from each other.

[1]0 = not important; 1 = least important; 2 = second-most important; 3 = most important. Note that the figures in bold are those used to calculate the percentages in table 13.

0 = request denied in 3b, 1 = grant of less than all reasonable expenses, 2 = grant of all reasonable expenses, and 3 = grant of all reasonable expenses plus a multiplier).[63]

The next issue to be determined was the extent to which judges' sanctioning decisions were based on their beliefs about the harmful consequences of the violation to the injured party (a compensatory concern) and the violator's intentions, on a good/bad-faith dimension (a retribution-related concern). Accordingly, the magnitude of awards provided in question 5 was correlated with responses to questions 10 (pertaining to the offending lawyer's intent and conduct) and 7 (pertaining to consequences suffered by the injured party). As it turned out, both factors were significantly and about equally related to sanctions. Rule 11 decisions were thus associated with both retributive and compensatory concerns.

Finally, on the question of whether judges for the twelve circuits and with varying amounts of experience held differing views on the purpose of rule 11 awards, we found quite a bit of intercircuit variability in beliefs about the importance of punishment as a rationale. Specifically, compared with the rest of our sample, judges from the District of Columbia and Third Circuits ranked punishment considerations as relatively important, whereas those from the Eighth Circuit viewed them as relatively unimportant. When coupled with the earlier finding that judges who endorsed a punish-

63. Considering only the subgroup of 133 respondents who had decided to award attorneys' fees, no significant between-group differences appeared strictly on the question of the amount.

TABLE 13
Sanctioning Activity of Judges According to Their Primary Rationale

Sanctions	Compensation	Punishment	Deterrence
Percentage of awards granted	61.1	34.6	48.5
Mean amount (0–3)	1.15	0.67	0.89

NOTE: On both simple (χ^2 (2) = 7.45, $p < .05$) and weighted ($F(2, 282) = 3.40, p < .05$) frequency measures, awards were significantly greater among compensation-oriented than among punishment-oriented judges. Those who favored the deterrence rationale did not differ significantly from the respondents in either of those extremes.

ment rationale for sanctions were generally less likely than others to award fees (see table 13), this intercircuit difference in rationales could provide at least a partial explanation for the fact that the District of Columbia and Third Circuit respondents were among the least likely in the sample to grant rule 11 motions (see table 10).

With regard to the philosophy that guides the award of attorneys' fees under rule 11, the major findings are twofold: (1) the majority of judges selected deterrence as the primary function of these awards, and (2) those who favored a compensatory rationale were the most likely to impose sanctions. What do these results suggest about current thinking? First, they illustrate the need to distinguish between the separate questions of whether fees should be awarded and, if so, how the amount should be determined.

On the first question, the rule 11 Advisory Committee has articulated only a deterrence rationale. Others have emphasized the punitive nature of rule 11 sanctions.[64] In contrast to these positions, this study revealed that those judges who asserted a compensation rationale for rule 11 sanctions were the most likely to grant the request for attorneys' fees. This result makes conceptual sense. In order to award fees on the basis of compensatory considerations, one need only be satisfied that the rule has been violated, causing some degree of financial hardship to the offended party. The standard implied by this rationale is thus lower than the standard that would arise from the concerns for punishment and deterrence, where sanctions should additionally hinge on the willfulness or intent of the offending party. In broader terms, this reasoning is consistent with the fact that although monetary sanctions under rule 11 necessarily fulfill a compensatory function, resulting in a reimbursement to the prevailing party, that rationale alone is not sufficient. As with other exceptions to the American rule, compen-

64. *See* Schwarzer, *supra* note 19, at 185.

satory concerns should be ancillary to other policies that mandate reimbursing some but not all litigants for their expenses. Indeed, those other policies typically have some basis in the blameworthy conduct of the party against whom the expenses are assessed. As Judge Schwarzer advised in his discussion on the need for punishment and deterrence, "In assessing the gravity of the violation . . . the court should determine the extent to which the violation reflects a *deliberate effort* to misuse or abuse the litigation process."[65]

On the relative amount question, this study does not provide a clear answer. The magnitude of awards among those who granted them (question 5) was unrelated to judges' rationales and was related equally (i.e., neither factor predominated) to judges' perceptions of the offending lawyer's state of mind (question 10) and the hardship experienced by the offended party (question 7). In part, our failure to understand how judges decide on an amount reflects the fact that this study was not operationally focused on this issue. We did not incorporate specific monetary requests into the scenarios, nor did we ask respondents for dollar figures, an itemized account of their decision, or a justification. Additionally, perhaps these results (or lack thereof) reflect the possibility that judges' financial sanctions are not guided by a common philosophy. In their review of recent case activity, Medina et al. note that the courts do not appear to apply a consistent rationale in computing awards. Some are imposed as a "fine" on the offending attorney,[66] whereas others are based strictly on the goal of compensating the injured party for unnecessarily incurred expenses.[67] Further research is needed to clarify this aspect of the sanctioning process and the rationales that guide it.

In summary, these findings collectively implicate differences in rationale as at least a partial answer to the question raised earlier, that is, why some but not all judges may be generally reluctant to impose sanctions. These findings suggest a need for further examination of the multiple purposes served by rule 11 sanctions.

Violations in Fact Versus Law

Do judges differentiate in their reactions to rule 11 motions between claims that lack factual support (e.g., case E, where plaintiffs apparently failed to disclose facts that were inconsistent with

65. *Id.* at 201 (emphasis added); *see also* Mallor, *supra* note 12.
66. *E.g.*, Barton v. Williams, 38 Fed. R. Serv. 2d 966 (N.D. Ohio 1983).
67. *E.g.*, Taylor v. Weissman, No. 84-CV-357, slip op. (N.D.N.Y. June 14, 1984).

their discrimination suit) and those that inadequately represent the law (e.g., case I, where plaintiffs misapplied a statute)? As noted earlier, Medina et al.'s review of the postamendment case law led them to conclude that judges are more likely to impose sanctions in the latter instance, perhaps because they "are more comfortable correcting a party's legal contentions than they are in second-guessing what may be a materially incorrect statement of fact. It is easier for courts to detect errors in law, by referring to lawbooks, than to detect misrepresentations of facts, which remain outside the courtroom."[68] For this study, all judges were asked to rate the adequacy of the offending lawyer's inquiry into the relevant facts (question 8) and the law (question 9). The relationship between these measures and the judges' rulings on the motions for sanctions was then examined.

Overall, 76.8 percent of the respondents believed that the lawyers' investigation of the facts was inadequate, and 76.4 percent believed that their inquiry into the law was inadequate (for both questions 8 and 9, "inadequate" was defined by an endorsement of description 3 or 4, rather than 1 or 2; the number of judges responding to each question was 271 and 263, respectively). Turning to the rulings on sanction motions, the top half of table 14 shows that an increase in the frequency with which awards were granted was associated with inadequate compared with adequate inquiries into both fact and law. These results are based on the entire sample of judges who answered each of these questions, including those who described the lawyer's behavior in the extreme. To obtain a more sensitive test of the differences in treatment elicited by violations (i.e., inadequate compared with adequate inquiries) in fact versus law, we looked further at only those judges who provided intermediately positive (adequate but not thorough) and negative (inadequate but not flagrant) responses to questions 8 and 9. The bottom half of table 14 illustrates the results of this analysis. It can be seen that, as before, judges imposed sanctions for both fact- and law-related violations. Consistent with Medina et al.'s suggestion, however, violations of the inquiry standard were sanctioned somewhat more frequently when they reflected shortcomings on law-related issues than when they involved factual matters. In this regard, it should be noted that the legal improprieties illustrated in these cases were always of a substantive nature (i.e., the claims lacked a foundation in settled law), not procedural matters (e.g., lack of jurisdiction, statute of limitations, collateral estoppel).

68. S. Medina, M. Henifin & T. Cone, *supra* note 20, at 12–13.

TABLE 14
Sanction Rulings as a Function of the Adequacy of Inquiry into the Facts and the Law

	Facts			Law		
Sanctions (%)	(+)	(−)	Phi	(+)	(−)	Phi
Full sample	11.3	60.6	**.42**	6.6	61.4	**.47**
Partial sample	8.8	35.5	**.29**	5.2	48.8	**.42**

NOTE: Phi coefficients represent, in statistical terms, the size of the difference in sanction rulings between inquiries rated as adequate (+) and those rated as inadequate (−). The full sample reflects a comparison of all judges who rated the inquiry as 1 (highly adequate) or 2 (just adequate) with those who rated it as 3 (just inadequate) or 4 (highly inadequate). The partial sample includes only those judges who placed their attorney's inquiry into one of the intermediate categories (i.e., 2 versus 3, just above or below the threshold of adequacy, respectively).

These results are generally consistent with the observation that judges seem more willing to sanction lawyers for inquiry failures on legal issues than for inquiry failures on factual issues. Although this is a discernible pattern, the fact versus law distinction was, on the whole, not particularly meaningful. According to judges' ratings of their respective cases on these two theoretically independent dimensions, 81 percent believed that the offending lawyer's investigation was either adequate (14 percent) or inadequate (67 percent) on both counts. In other words, only 19 percent of the respondents felt that the attorney's inquiry was above threshold on one dimension, but below it on the other. This suggests that, at least for our sample of scenarios, judges tended to view the actions in question in unitary terms, as either passing or failing a reasonable inquiry test, without further distinguishing the precise bases for those evaluations.

Judges' Beliefs About the Norms

In the absence of clear normative information concerning judges' use of the new rule 11 guidelines, respondents' expectations of how their intradistrict colleagues would have reacted to their specific cases (see question 4) were assessed, and some interesting results emerged.

First, there seemed to be little consensus on predictions about how other judges would rule on these motions. For all the cases combined, judges' estimates of the norms ranged from 0 to 96 percent. Second, respondents generally underestimated the frequency

with which their colleagues would have granted the request for attorneys' fees. As table 15 illustrates, the mean expected percentage of affirmative rulings was only 38 percent, compared with the finding that 48 percent of the sample did, in fact, grant a motion for sanctions. Indeed, this pattern appeared in nine of ten cases, suggesting that judges' beliefs about their colleagues' decisions to award attorneys' fees lag behind their own willingness to grant requests for such sanctions.[69]

TABLE 15
Judges' Expectations Regarding Sanctions Compared with the Actual Frequency of Sanction Motions Granted in Each Case

Case	Actual Sanctions (%)	Expected Sanctions (Mean %)
A	52	35
B	11	14
C	58	49
D	61	54
E	44	37
F	86	69
G1	61	35
G2	71	42
H	19	16
I	26	35
J	30	20
Mean	48	38

Third, although the judges' experience on the bench was unrelated to how they actually ruled on sanction motions, it did significantly color their normative expectations. When the judges were grouped according to their tenure (roughly 0 to 4, 5 to 9, and 10 or more years), the results showed that the more experience they had, the less sanctioning they expected from their colleagues (the mean estimates were 45.7, 38.3, and 28.5 percent, respectively).[70] This finding sheds further light on the previously mentioned tendency toward underestimation. It also makes intuitive sense that the more experience judges have had with the original version of rule 11, the more skeptical they would be about the impact of the 1983 amendments.

69. It should be noted that this result does not specifically address the issue of whether respondents were accurate in their predictions of how judges in their own districts would rule. We asked the norms question with this local frame of reference, one with which judges are relatively familiar, in order to elicit more thoughtful, knowledge-based predictions.

70. $p < .005$.

Finally, there is strong evidence for what social psychologists have called the "false consensus bias" in social perception, that is, the nonconscious tendency to use one's own behavior as a frame of reference and thereby assume that it is consistent with relevant norms.[71] Specifically, judges who ruled in favor of the request for attorneys' fees overestimated the actual level of sanctioning (mean = 62.52), whereas those who denied the motion underestimated its frequency (mean = 14.47). This difference in estimates is, in statistical terms, highly significant.[72] It suggests that the variability that characterizes judges' rulings in the first place is exacerbated by their tendency to assume that others would naturally share their opinions.

Judges' Reports of Their Recent Sanctioning Activity

Rule 11 Motions

In response to question 12, a total of 267 judges provided specific, quantitative estimates of the number of rule 11 motions they had received during the previous twelve months.[73] The result of this inquiry is striking in terms of the high frequency and the variability with which rule 11 sanctions are being sought. That is, the judges in our sample estimated that they had received an average of 5.35 requests (median estimate = 3.04). At the bottom of the distribution, 71 judges had not received any motions, and 24 had received only 1. At the other extreme, 140 judges had been confronted with 4 or more rule 11 motions, and 11 of these judges reported having received at least 25 of them. One judge estimated his number of requests at approximately 75, another at 100.

Rule 11 Sanctions

In response to question 13, 260 judges reported the number of instances, referred to in the previous question, in which they had ultimately granted the request for attorneys' fees.[74] The mean

71. Ross, Greene & House, *The False Consensus Phenomenon: An Attributional Bias in Self-Perception and Social-Perception Processes,* 13 Journal of Experimental Social Psychology 279 (1977).

72. $p < .0001$.

73. Some of the judges' answers to questions 12 and 13 could not be converted into numeric estimates (e.g., "often," "several"). In these instances, the data were omitted.

74. Nine judges reported in question 12 on motions that were pending. Only motions actually granted were included in question 13.

number of sanctions was 1.62 (median = .96). According to the distribution of responses, 108 judges had not granted any fees under rule 11 (of course, 71 of them had not received a single request), and 48 had done so once. Together, these judges account for 60 percent of the judges who answered this question. In contrast, 104 judges reported having granted rule 11 sanctions on two or more recent occasions, including 2 who reported that they had awarded fees fifteen times, and 1 whose estimate was eighteen times.

Relationship Between Reported Activity and Hypothetical Decisions

It was noted earlier that there was a significant correlation between judges' reported sanctioning activity in the real world and their reactions to the scenarios in this study. This issue can now be explored further. First, it turned out that the number of rule 11 motions judges had received was consistently unrelated to the views they expressed in this study. On their sanction rulings, for example, the 140 judges who had received a relatively large number of sanction requests during the past twelve months (four or more) were not significantly more likely to award attorneys' fees than were the 118 who had received fewer requests (the percentages of affirmative decisions were 43 and 51, respectively).

There was a significant relationship, however, between the frequency with which judges had actually granted rule 11 sanctions and the data they provided in this study. For the purpose of analysis, the 104 judges who had imposed sanctions two or more times were compared with the 156 who had done so once or not at all. The results showed that the relatively frequent sanctioners were more likely to award attorneys' fees in this study than were the infrequent sanctioners (mean percentages = 57.8 and 41.2, respectively).[75] Further analysis indicated that these two groups differed from each other on several dimensions: The frequent sanctioners were more likely to (a) view the pleadings as violations of rule 11, (b) assume that other judges would also impose sanctions, (c) view the offending lawyer's inquiry into both the facts and the law as inadequate, and (d) ascribe willfulness and subjective bad faith to that lawyer.[76] This last finding is noteworthy because it suggests that the differential decisions made by frequent and infrequent sanctioners may reflect their interpretations of the offending lawyers and their actions, not differences in the standards by which they grant rule 11 awards. Indeed, on the latter point, when these

75. $p < .01$.

76. All of these differences were statistically significant at the .05 level or better.

two groups are equated according to their perceptions of the acts in question (i.e., when their level of sanctioning is compared within the nonwillful violation and good faith/inadequate categories), the decisional differences disappear.

Finally, a closer look at the data uncovers an interesting pattern. Each judge in this study read one of ten case descriptions, half of which involved civil rights actions. Bearing this distinction between cases in mind, we found that the frequent and infrequent sanctioners were significantly different in their responses to rule 11 violations for the civil rights actions (63.9 and 42.5 percent, respectively) but not for the other cases (48.9 and 40 percent, respectively).[77]

Judges' reports of their recent sanctioning activity proved informative. Caution should be taken, however, in attempting to extrapolate from these data estimates of actual sanctioning activity in the federal courts. It would be tempting to conclude, for example, with 267 respondents reporting a mean number of 5.35 motions, and with 260 of them granting an average of 1.62 during the year, that the federal courts, consisting of 696 district judges (through April 1985), must have been confronted with approximately 3,724 rule 11 motions, of which 1,128 were granted. For a variety of reasons, these calculations would yield spuriously inflated estimates.

First, many of the respondents apparently provided rough approximations, not precise figures, concerning the activity in their courts. Although there is no reason to suspect that these figures are systematically biased, this fact does introduce a substantial element of random error. Second, we restricted our sample to active district judges only (of which there were 494 in April 1985). It would thus be more appropriate to extrapolate from that smaller segment of the full population, resulting in reduced estimates. Third, we need to bear in mind that our questionnaires were received from 292 of the 494 active judges, or approximately 60 percent of that original population, and that within that sample, only 260, or 53 percent of the total population, answered both questions 12 and 13. Although the size of the sample per se is sufficient for hypothesis testing within the context of this study, the degree to which these respondents are representative of federal district judges in general is an empirical question for which we do not have an answer. It is entirely possible, for example, that judges who participated in the study and answered the questions pertaining to their recent experience were among those who had the most to

77. The corresponding levels of significance were $p < .01$ and $p > .50$.

report—another reason to suspect that the obtained estimates could be inflated. In short, although the results clearly reflect the post-1983 increase in the use of rule 11 that has been observed by others, attempts to convert these data into a quantitative measure of that increased activity should be made with caution.

What does clearly emerge from these results is that some judges have already had a good deal more experience with rule 11 cases than others have, and this difference is, for some reason, related to the likelihood that they would award attorneys' fees when confronted with an appropriate motion. Neither tenure nor circuit differences account for this result, though perhaps other demographic variables (e.g., size and structure of the court) would be worth examining. The one interesting and significant finding that does appear in the data is that the decisional differences between relatively frequent and infrequent sanctioners appeared primarily in their reactions to the civil rights claims. One possible explanation is that perhaps a good deal of the in-court rule 11 experience that distinguishes the frequent sanctioners from the infrequent sanctioners is in the area of civil rights litigation; indeed, Medina et al.'s review indicates that 21 percent of all sanction motions filed since August 1983 were in civil rights cases. If so, then perhaps judges who have been confronted with a sizable number of civil rights suits, many of which are pro se, have developed, as a result of that experience, a generally negative expectation concerning the merit of these actions.

Sanctions Other Than Attorneys' Fees

After being questioned about their decisions on the motion for attorneys' fees, the judges were asked whether they would impose any other sanctions in addition to or instead of expenses and, if so, what they would be (question 6). Overall only 23 of the 292 judges (7.9 percent) suggested another form of sanction. Of these, 15 had also decided in favor of awarding expenses. Thus, only 8 judges recommended another form of sanction as an alternative to attorneys' fees. This result alone provides support for the criticism of the pre-1983 version of rule 11 that it was never entirely clear to judges precisely what kinds of disciplinary action were available to them.

In order to understand what alternative means of sanction these twenty-three judges had recommended, the content of their written responses to question 6 was analyzed. The results of this endeavor are straightforward. Ten judges suggested financial penalties such as out-of-pocket expenses, court costs, and fines, six judges suggest-

ing them as a supplement to and four as a replacement for attorneys' fees. An additional seven judges indicated that they would warn, reprimand, chastise, or admonish the offending lawyer orally or in writing. Within this general category of sanction, specific suggestions ranged from "a warm, friendly discussion on frivolous motions" to "a hard-nosed reprimand in open court." Five judges, four of whom had awarded fees, indicated that they would dismiss the action in question with prejudice. One judge wrote that he would refer the case to a grievance committee.

For the most part, in keeping with the 1983 amendments, the courts have imposed rule 11 sanctions consisting of the payment of reasonable expenses by one party to another. For that reason, this study was focused on judges' reactions to motions for the award of attorneys' fees. Still, in authorizing the use of an "appropriate sanction," rule 11 does not limit judges' choices. There are isolated instances in which courts have made creative use of alternatives that are, it is to be hoped, in line with the principle that the nature and magnitude of the sanction should be commensurate with the egregiousness of the conduct, the amount of harm inflicted, and the purposes to be served by the sanction.

Recent case activity reveals the use of a number of specific alternatives.[78] Reprimands are probably the most common means of response, varying not only in substance and tone but also in whether they include a specific warning against future abuses and in whether they are oral or written, public or private, published or unpublished. In *Golden Eagle Distributing Corp. v. Burrough's Corp.*,[79] for example, the court required the attorneys who violated the rule to circulate throughout their firm a copy of the opinion in which their pleadings were criticized.[80] Although the precise frequency with which rule 11 violations trigger judicial reprimands is not known, this study leads us to suspect that it must be fairly uncommon. Among the judges surveyed, only 2.4 percent suggested this type of response. In view of Judge Schwarzer's discussion of the potential of this device as an effective deterrent,[81] this result suggests that reprimands of all shapes and sizes should be considered more closely.

In theory, dismissal is another alternative. Under the pre-1983 rule 11, judges occasionally dismissed frivolous claims and defenses. This mechanism was part of the problem with the original rule,

78. *See generally* S. Medina, M. Henifin & T. Cone, *supra* note 20; Schwarzer, *supra* note 19, at 201–04.
79. No. C-84-0523 (N.D. Cal. Sept. 19, 1984).
80. *See also Huettig & Schromm*, 582 F. Supp. at 1522–23.
81. Schwarzer, *supra* note 19, at 201–02.

however, as judges were understandably reluctant to dispose of a client's case because of the indiscretions of his or her lawyer. Under the amended rule, therefore, the Advisory Committee noted that dismissal as such is better grounded on the merits under rules 8, 12, and 56 than on misconduct. As it turned out, only 1.7 percent of the judges in our sample recommended dismissal as a means of sanction.

Finally, although disbarment and contempt proceedings are within the range of options available, they obviously represent severe and, in some ways, impractical solutions.[82] Aside from the fact that the amended rule eliminates the original reference to "disciplinary action," these responses are subject to stringent due process safeguards.[83] As such, the use of such extreme measures, although not inconsistent with rule 11, would inevitably give rise to the kinds of satellite litigation predicted by critics of the 1983 amendments. In any event, none of the judges in our study suggested the possibility of imposing sanctions of this magnitude.

The Pro Se Litigant

To address the question of how judges apply the rule 11 certification requirements to the pro se litigant, we had a sample of respondents read one of two versions of the tax case (G), which are identical in all respects except for the status—pro se versus counsel—of the party whose pleading is in question. Overall, this case turned out to be one of the more frivolous ones, with thirty of thirty-six judges viewing it as a violation of rule 11 (see table 3).

A comparison of responses to the two versions of the case, presented in table 16, reveals that although the party's status did not have a statistically significant effect on decisions, there was a tendency, albeit a statistically nonsignificant one, for judges to impose tougher sanctions on counsel than on the pro se litigant. In addition, judges were significantly more likely to characterize the action as having reflected bad faith when it was filed by counsel than when it was filed by the pro se litigant (33 and 7 percent, respectively).

Historically, the status of the pro se litigant vis-à-vis the certification requirements has been ambiguous. Looking closely at the new rule 11, it appears that judicial discretion on the matter is not

82. *See* Schwarzer, *supra* note 19, at 204.

83. For a discussion of the limitations on the courts' contempt and disbarment powers in a rule 11 context, see *In re* Los Angeles County Pioneer Soc'y, 217 F.2d 190 (9th Cir. 1954).

TABLE 16
Major Results for the Pro Se and Counsel Versions of Case G

Question	Pro Se	Counsel	Significance Level
1. Violation	84.2%	82.4%	n.s.
2. Willful	36.8%	58.8%	$<.20$
3. Fees	61.1%	70.6%	n.s.
5. Fees (0–3 scale)	0.95	1.53	$<.10$
8. Fact inquiry (1–4)	3.06	3.53	$<.20$
9. Law inquiry (1–4)	3.33	3.76	$<.20$
10. Subjective faith (1–3)	1.93	2.33	$<.05$

NOTE: Significance levels are based on the chi-square test for questions 1–3 and the *t* test for questions 5–10; n.s. = not significant.

inconsistent with it. To begin with, the rule is said to apply to anyone who signs a pleading or motion. On the setting of prefiling inquiry standards, however, unrepresented parties could be granted special consideration within the "reasonableness under the circumstances" test described in the Advisory Committee Notes. It is thus conceivable that a given action could be viewed as a violation of the rule if signed by an attorney but not by a pro se litigant. Since, for case G of our study, the party's status had no effect on the likelihood that the disputed claim was perceived to have violated rule 11 (see table 16, question 1), it can be concluded that judges did not significantly lower their reasonable inquiry criterion for the pro se litigant.

Although the vast majority of our respondents viewed case G as a violation of rule 11 regardless of whether the plaintiffs were represented by counsel, this factor did affect their inferences about the plaintiff's motives on the subjective-faith dimension. Specifically, judges were relatively unlikely to attribute the pro se litigant's pleading to bad faith (see table 16, question 10). This finding makes sense, as the layperson's failures to meet the necessary standard of inquiry are often quite readily excusable on the grounds of inexperience and a lack of knowledge about the law. Of course, the decision to impose sanctions should not, within the framework of the new rule, be contingent upon such subjective considerations. Consequently, it would follow from these findings (i.e., that the pro se litigant was as likely to have been viewed as having violated the rule, but for reasons other than bad faith) that attorneys' fees should be levied against the pro se litigant and counsel with approximately equal frequency, and that supposition is supported by this study (see table 16, question 3).

In the only other specific mention of the pro se litigant, the Advisory Committee Notes stated that the courts should take into account an attorney's or party's state of knowledge when deciding on the nature and severity of the sanctions to be imposed ("[w]hen a party is not represented by counsel, the absence of legal advice is an appropriate factor to be considered"). Thus, in keeping with the distinction between the question of whether to award fees and, if so, the question of how much, it appears that rule 11 provides for the differential treatment of the pro se litigant in the latter determination. Again, although the difference is not overwhelming, the data are at least consistent with that prescription, as judges tended to suggest milder fees in the pro se version of case G (see table 16, question 5).[84]

In summary, the data concerning judges' treatment of the pro se litigant are interesting but merely suggestive, having been based on a small sample of judges and their reactions to only one, highly frivolous, case. At the very least, we can say that judges appear to have shown the kind of sensitivity to this special circumstance that was intended by the rule 11 Advisory Committee. That is, the pro se litigants in this case were held to the same standard of inquiry as the lawyer was, and as such, they were just as likely to have received sanctions. However, their failure was viewed in more favorable subjective terms, and therefore judges had a tendency (albeit a statistically nonsignificant one) to take this factor into account when deciding on the magnitude of the award. Further research is needed to establish the generalizability of this response pattern and to investigate the potentially critical relationship between judges' beliefs about sanctioning rationales and their reactions to abusive conduct on the part of the pro se litigant.[85]

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84. Looking only at the twenty-three judges who granted the defendants' request for attorneys' fees in question 3, the study revealed a nonsignificant tendency for the judges to consider more severe sanctions against counsel than against the pro se litigants (the means on the 3-point scale were 2.0 and 1.64, respectively, $p < .15$).

85. Specifically, it would be reasonable to hypothesize that the party's status (i.e., pro se or represented by counsel) should make a difference to judges for whom sanctions primarily serve punitive and deterrent ends, but not to those for whom compensation is the most important rationale.

IV. CONCLUSIONS

In this study, we found that although the 1983 amendments to rule 11 have apparently increased judges' willingness to enforce the certification requirements, the clarity and uniformity with which they are applied are thus far limited. Of specific concern are the findings that there is a good deal of interjudge disagreement over what actions constitute a violation of the rule, only partial compliance with the desired objective standard, inaccurate and systematically biased normative assumptions about other judges' willingness to impose sanctions, and a continued neglect of alternative, nonmonetary means of response. This study thus identifies a need for further thought and discussion of these issues.

The study also suggests that greater attention be directed toward articulating an internally consistent theory in which the rationales for imposing rule 11 sanctions provide the basis for developing a clearer set of guidelines for determining (a) when sanctions should be imposed (e.g., should counsel's competence and experience enter into the judgmental equation?) and (b) with what severity (e.g., should the standard, compensation-based formulas for calculating reasonable expenses take punitive concerns such as the offender's motives into account?). Having found, in contrast to the reasonable inquiry test, that judges are reluctant to award fees in response to certain good-faith violations, it seems reasonable to propose a bifurcated task that explicitly distinguishes the dual requirements that sanctions be "mandatory" (a statement of whether they should be imposed) and "appropriate" (a statement of severity). Essentially, this kind of approach would enable courts to resolve the conflict by granting sanctions according to a strict objective standard, but then engaging subjective-faith considerations in setting an amount.[86]

Finally, it should be noted that this study addressed only the first step in the anticipated chain of events, that is, judges' use of rule 11 sanctions. As such, it cannot answer the ultimate question concerning the overall success of the new rule—whether it will ef-

86. Indeed, this was the solution arrived at in Weisman v. Rivlin, 598 F. Supp. 724 (D.D.C. 1984), wherein the court granted defendant's request for sanctions but reduced the figure from $7,800 to $200.

fectively deter abusive litigation practices. Drawing on psychological and economic theories of reinforcement, punishment, and behavior change, one could certainly speculate about this link (e.g., the incidence of frivolous pleadings and motions should decrease as a joint function of the perceived probability of being sanctioned and the expected value or severity of that sanction). Still, future research is necessary to address this important empirical question.

APPENDIX A
The Ten Case Descriptions

Case A

Plaintiff's cause of action arises out of a contract allegedly entered into between plaintiff seller and defendant buyer that provided that the defendant would rent and then purchase certain video and electronic equipment from the plaintiff for $23,600. Both parties were represented by counsel from reputable law firms.

Count 1 alleges that defendant repudiated said contract, that plaintiff is now in possession of said equipment, that plaintiff will attempt to sell said equipment for the account of defendant, and that defendant is indebted to plaintiff for $23,600 plus its expenses of sale and attorneys' fees. Paragraph 1 of count 1 alleges that plaintiff is a State A corporation with its principal place of business in State A. Paragraph 2 of count 1 alleges that defendant is a resident and citizen of State B, a state that shares a common border with State A. Plaintiff filed its claim in the United States District Court for the District of State A, alleging diversity of citizenship as grounds for federal jurisdiction.

Count 2 alleges that defendant intentionally, maliciously, and with intent to injure plaintiff breached both an express agreement to prevent abuse and harm to the equipment and an implied agreement to use his best efforts to maximize the income from the equipment. Count 2 seeks $20,000 in actual and $50,000 in punitive damages.

Plaintiff submitted three affidavits. Each of these states that defendant and plaintiff negotiated and signed the contract in State A. Two of plaintiff's affidavits state that plaintiff is a State A corporation with its principal place of business in State A. Two of plaintiff's affidavits also state that the equipment in question was delivered to and picked up by defendant in State A. Defendant's affidavit does not controvert these assertions. Defendant's affidavit does state, contrary to plaintiff's affidavits, that the equipment in question was not returned in a damaged condition.

Defendant enters a motion for summary judgment, on the grounds that the complaint fails to state a claim upon which relief can be granted, that the amount in controversy does not exceed the $10,000 figure required for the court to have subject-matter jurisdiction, and that the forum is inconvenient.

Plaintiff moves for an award of its attorneys' fees and costs incurred in responding to defendant's motion to dismiss on the grounds that it is frivolous, meritless, and unsupported by a good-faith interpretation of the law. Defendant argues that there was no agreement to purchase, merely a lease agreement on a monthly basis, and that plaintiff's loss, if any, amounts to a one-month

rental charge of $1,000. Assuming arguendo that the court decides to overrule defendant's motions, defendant argues that sanctions would be inappropriate because defendant has made good-faith arguments in an effort to assist the court in clearing a case from its docket based on lack of jurisdiction. Defendant argues that a court should not penalize a party for making such motions because they are beneficial to the judicial process.

Case B

Each year, a small percentage of subscriptions for numerous nationally circulated magazines, including those of publisher defendants, are solicited through door-to-door sales. This sales device, known as "cash field subscriptions," is conducted through a series of arrangements between independent contractors, each of whom takes responsibility for a different level of the operation. The first level is a contractual arrangement between magazine publishers and circulation companies whereby the publishers agree to process the subscriptions remitted by the companies in exchange for a percentage of the sale price of the magazine subscription. The circulation companies, in turn, contract with "field sales representatives" who administer the arrangement on a local level. The field sales representatives hire sales agents, such as the plaintiffs, and move them from one location to the next under the supervision of "carhandlers" to solicit sales on a door-to-door basis. Although it is not entirely clear from the record, it appears that the carhandlers are employees of the field sales representatives.

Plaintiffs are five young adults, three men and two women, who at the times relevant to this complaint were seeking employment. Each responded to a local advertisement that offered what appeared to be well-compensated employment for young people. Immediately after interviews, each of the plaintiffs was offered employment if he or she could leave that same day for a training session. During the course of their respective interviews and periods of employment (which ranged in length from four days to eighteen months), substantial representations as to the terms and conditions of employment were made to the plaintiffs. Among other things, they were told they would each make between $300 and $500 per week, that valuable prizes would be awarded for performance, that room and board would be provided free of charge through their training period, and that a portion of their earnings would be held for them in savings accounts.

Plaintiffs seek relief against defendants under the Racketeer Influenced and Corrupt Organizations Act (RICO). They seek to recover damages for injuries allegedly sustained as a result of a systematic nationwide pattern of racketeering involving the cash field subscription aspect of the magazine publishing industry. Each of the five plaintiffs was employed by one of several field sales representatives. Twelve of the defendants are publishers of nationally circulated magazines ("publisher defendants"). The remaining defendants, including one hundred John Does, are circulation companies and their officers, directors, and employees, and their agents ("subscription agents") who solicit magazine subscriptions for the publisher defendants. Defendants have moved to dismiss the case or, in the alternative, for summary judgment, and for an award of costs, including attorneys' fees. Both parties are represented by counsel from reputable law firms.

Plaintiffs seek to invoke the civil remedies of RICO by alleging in their complaint that defendants subjected them to extortion, racketeering, mail fraud, and wire fraud. It is alleged that these acts constitute a pattern of racketeering activity and that defendants have used and invested, directly or indirectly, part of the income or proceeds of such income derived from that activity in the acquisition of an interest in or establishment of an enterprise that engages in or affects interstate commerce.

Specifically, plaintiffs register the following complaints:

- that they have been injured within the meaning of RICO as the result of a pattern of misrepresentation in which each plaintiff was denied the benefit of his or her bargain.
- as to the subscription agents, that they have established various companies, superficially unrelated, whose apparent function is to enter into contracts with magazine publishers for cash field subscription sales.
- that through the use of the mails, telephones, and newspapers, the subscription agents have carried out a scheme to defraud the plaintiff sales agents by directly or indirectly controlling and supervising the field sales representatives.
- that publisher defendants have long known about this arrangement and have benefited from it.
- that by continuing to contract with the subscription agents with knowledge of their illegal activities, the publisher defendants are liable as coconspirators and as aiders and abettors.

In response to these allegations, the defendants essentially argue that the factual allegations in support of the complaint are grossly inadequate. Publisher defendants argue that the complaint fails to adequately allege that they had participated as principals in any specific criminal act. On the contrary, they argue that plaintiffs admit that the publisher's sole connection with the purported acts, which were allegedly committed by field sales representatives who are not parties in this action, is by way of contract with the subscription agents (also referred to as "circulation companies"). Moreover, publisher defendants argue that the complaint suffers from a similar problem with respect to the attempt to impose liability on the publisher defendants by way of a conspiracy.

The subscription agents and circulation companies primarily attack the sufficiency of plaintiffs' allegations as to the predicate acts (i.e., extortion, racketeering, mail fraud, and wire fraud). They make the same argument as the publisher defendants, namely, that the complaint does not specifically implicate participation by each of the subscription agents in predicate acts. The complaint merely alleges that they directly or indirectly supervised and controlled the field sales representatives, who, in turn, engaged in illegal conduct.

Plaintiffs stand by the allegations in their complaint and argue that they have raised substantial factual issues that, if proven, will entitle them to relief against both the publisher defendants and the subscription agents. Specifically, they allege that the publisher defendants and subscription agents had actual knowledge of the illegal activities of the field sales representatives and that they failed to supervise and eliminate these flagrant illegalities so that they would continue to benefit from them.

Plaintiffs also argue that their allegations of a conspiracy are not simply formal. They have evidence of discussions among the publisher defendants and the subscription agents that included consideration of the complaints about the field service representatives. Granting a dismissal before these facts can be developed through discovery is premature at best. For the same reasons, defendants' motions for costs and attorneys' fees should be denied because plaintiffs have not had an opportunity to pursue their allegations in the discovery process. Plaintiffs argue that their allegations satisfy each element of the RICO statute and that fundamental fairness dictates that plaintiffs be given an opportunity to substantiate their allegations.

Both the publisher defendants and subscription agents move for summary judgment and request attorneys' fees under rule 11 of the Federal Rules of Civil Procedure.

Case C

Plaintiff, a discharged deputy county sheriff, filed a complaint under section 1983 against defendant, the county sheriff's office, alleging that it deprived him of a property interest in public employment without due process.

Defendant filed a nonclassical response—an authenticated fifty-page factual stipulation by plaintiff that had been filed in a criminal case, in which plaintiff admitted to facts underlying numerous counts of alleged mail fraud and extortion perpetrated during the course of his employment.

In light of this stipulation, defendant moved for (a) summary judgment dismissing plaintiff's case for failure to state a claim upon which relief can be granted, and (b) sanctions in the form of attorneys' fees to be imposed against plaintiff and his attorney for bringing this action vexatiously, unreasonably, and in bad faith. Both parties were represented by counsel from reputable law firms.

The facts are these: Plaintiff had been a deputy county sheriff for twelve years when he was fired without written notice or a statement of reasons for his termination. Defendant's failure to afford the plaintiff procedural safeguards before termination was allegedly in contravention of a commitment, under a general order of the Court Services Department (entitled "Complaint and Disciplinary Procedures"), to provide the plaintiff with notice and a hearing on the reasons for termination. The defendant's position is that the order's language establishes as a matter of law its inapplicability to plaintiff's termination: "The procedure does not purport to govern all terminations, is not stated to be a right of all terminated deputies, and creates no property interest in employment."

Plaintiff had been indicted on numerous counts of mail fraud and extortion. Several months later, he stipulated to the facts underlying the indictment. In the following month, the plaintiff was dismissed from his job. He and his codefendants were subsequently tried via a "stipulated bench trial" (i.e., based solely on the facts agreed upon in the stipulation without the presentation of other evidence). Plaintiff's defense was that the facts as stipulated did not constitute federal offenses. Still, he was convicted on twenty-eight of thirty-nine counts.

Because plaintiff was not convicted until after he had been fired, defendant's argument for the propriety of the firing is based not on the conviction but on the stipulation. Plaintiff claimed that defendant did not follow the procedures set forth in the order and argued that this failure, combined with his alleged property inter-

est in continued employment, constitutes a deprivation of procedural due process in support of his claim.

Defendant seeks sanctions against plaintiff, claiming that the lawsuit was initiated in bad faith, as evidenced by its obvious lack of merit. Defendant argues for such obviousness by stating that "plaintiff has absolutely no right to a hearing, and no basis for the belief that one would serve any useful purpose, even if he had such a right."

Plaintiff responds by asserting the court should not prejudge the issues in his discharge solely on the basis of the stipulation. If granted his procedural right to due process, he would be able to show that the stipulated facts were not job related and do not constitute good cause for discharge. Finally, assuming arguendo that defendant prevails, plaintiff argues that sanctions should not be imposed in a case such as this because sanctions will have a chilling effect on good-faith arguments to advance civil rights. Imposition of sanctions will interfere with the congressional policies expressed in the Civil Rights Attorney's Fees Awards Act of 1976.

There is now before the court defendant's motion for summary judgment and request for an assessment of costs, including attorneys' fees, under rule 11 of the Federal Rules of Civil Procedure.

Case D

Defendant, Maureen Jones (wife), commenced an action for divorce against plaintiff, Henry Jones (husband), in a state divorce court on October 3, 1983. Concurrent with the commencement of that action, a second defendant (D2), the wife's counsel, applied ex parte for certain preliminary relief. A third defendant (D3), a state divorce court justice, granted an order directing the husband to appear before a fourth defendant (D4), an acting divorce court justice, on October 7, 1983, and show cause why the wife's request for preliminary relief should not be granted. At that time, D3 had issued the following preliminary matrimonial relief: He directed the husband to refrain from any physical or verbal assault or harassment of the wife and prohibited the husband from removing the infant children of the parties from the wife's presence except at designated times of visitation. Further, he restrained and enjoined both husband and wife from removing any personal property from the marital residence.

The plaintiff husband appeared on October 6 before D3 and on October 7 before D4. On each occasion, the husband's attorney requested that the temporary relief previously granted to the wife by

D3 be vacated and any hearing or argument on the show cause be adjourned. Both applications were denied. On October 7, D4 granted the wife preliminary matrimonial relief and referred the matter to another acting divorce court justice for further applications, orders, and hearings with respect to the relief sought by each party.

After repeated unsuccessful attempts to vacate or stay the October 3 and October 7 orders, the husband commenced this section 1983 action, claiming that in the absence of a meaningful hearing at a meaningful time, the defendants, acting under color of state law, deprived him of due process rights secured to him by the Constitution.

All parties were represented by counsel from reputable law firms. Now, defendants move for dismissal. In addition, the wife's counsel requests an assessment of costs, including attorneys' fees under rule 11. The defendants maintain that in deciding whether a given deprivation violates the Constitution, a court must balance the importance of the private interest and length or finality of the deprivation with several other factors. The courts, for example, have long recognized that a deprivation or interference with property and liberty interests without a predeprivation hearing is permitted where the deprivation is based on an emergency situation such as this, and is coupled with an opportunity for some postdeprivation hearing or review to assess the propriety of the action. In this case, the plaintiff husband was given such an opportunity three days after the order was granted but chose instead to adjourn the hearing. Finally, defendants point out that state law authorizes the relief granted without a predeprivation hearing only on narrow grounds when it is necessary to protect the safety and security of persons, including minor children, and property.

Plaintiff argues that no emergency existed in the instant case to justify prehearing injunctive relief. He had not threatened or physically or mentally abused his spouse or children. Thus, he argues, the court's order is primarily directed toward property interests that could be protected without denial of a prior hearing. Finally, assuming arguendo that defendants prevail, plaintiff argues that sanctions should not be imposed in a case such as this because sanctions will have a chilling effect on good-faith arguments to advance constitutional and civil rights and will interfere with the congressional policies expressed in the Civil Rights Attorney's Fees Awards Act of 1976.

There is now before the court defendants' motion for summary judgment and request for costs, including attorneys' fees, under rule 11 of the Federal Rules of Civil Procedure.

Case E

In this employment discrimination case, the court is confronted with defendant's motion for summary judgment and defendant's request for costs, including attorneys' fees. The defendant seeks the latter on the ground that the complaint was frivolous, vexatious, without merit, and in "bad faith." Specifically, defendant's counsel seeks all legal fees incurred for defending against the claims of both plaintiffs on both grounds, indicating that it is not possible to segregate and identify the expenses incurred with respect to each claim. Both parties are represented by counsel from reputable firms.

The complaint contained two claims for relief. The first was a claim that the defendant, a major hotel chain, had discriminatorily discharged plaintiff 1 on the basis of his religion (Jewish) and plaintiff 2 on the basis of his national origin (Italian), in violation of the Civil Rights Act of 1964. The second claim was that the plaintiffs had been discriminatorily discharged on the basis of age, in violation of the Age Discrimination in Employment Act of 1967.

At his deposition, defendant's counsel asked plaintiff 1, "What makes you think you were discriminated against?" Plaintiff 1 responded by presenting a handwritten chart showing the names and ages of those serving as the hotel's department heads at the start of the plaintiffs' employment as well as the names and ages of the ultimate successors to all of those department heads who were later replaced. Counsel elicited admissions from plaintiff 1 that the great majority of the individuals who were on this list had not been discharged, but had either transferred to other hotels in the chain or resigned. All but one of the former employees listed on the chart were younger than forty and thus were outside the protection of the ADEA. None of them were Italian or Jewish.

Plaintiffs later deposed certain of the employees who were listed as having voluntarily resigned to try to elicit testimony that they had, in fact, been forced to resign and replaced by younger employees. Defendant objected to such depositions, but the court permitted them on the grounds that they might lead to admissible evidence. As it turned out, none of the former employees testified that they had been forced to resign, and only one of the four had been replaced by a younger employee.

The plaintiffs' only other evidence of discriminatory practice was the statistical fact that the hotel's newly hired employees were younger on the average than the newly terminated employees. Defendant argued that in the "natural order of things" new employees on the job are younger than the persons they replace.

Several facts elicited during discovery undercut the plaintiffs' title VII claims. For example, the hotel's senior official in the New York area is of the same religious background (Jewish) as one of the plaintiffs, and the second plaintiff's immediate superior (who agreed with the decision to discharge) was of the same national origin as that plaintiff (Italian). Both plaintiffs were forty-eight years old when they were discharged. One was replaced by an individual who was thirty-five, the other by one who was forty-eight.

After defendant filed its motion for summary judgment, plaintiffs withdrew their title VII claim, explaining that the facts developed during discovery did not support the original allegations of the complaint. Plaintiffs continue to assert their ADEA claims, arguing that the disparity between the average age of newly hired employees and the average age of discharged employees is statistically significant and constitutes a prima facie case of age discrimination. On the issue of sanctions, plaintiffs argue that the voluntary withdrawal of the title VII case shows their good faith in trying to avoid additional work for the court. The only reason the claim proceeded as far as it did is that defendant "stonewalled" them by refusing to turn over their employment records before the suit was filed and formal discovery was instituted.

The case is before the court on defendant's motions for summary judgment and for costs, including attorneys' fees, under rule 11 of the Federal Rules of Civil Procedure.

Case F

An action was commenced in which the plaintiff, Fiola Sportswear, Inc., alleged trademark infringement, deception, and unfair competition by the defendants. All of the defendants have moved for summary judgment based on the following stipulated facts. Defendants also move for the court to award costs and attorneys' fees for defending the action, pursuant to rule 11 of the Federal Rules of Civil Procedure. All parties were represented by counsel from reputable law firms.

A stipulation by the parties states the material facts to be as follows. The plaintiff, Fiola Sportswear, Inc., entered into an exclusive license with Slim Jeans, Inc. (SJI), for the manufacture and sale of children's Slim Jeans in May 1980. On August 26, 1982, plaintiff purchased a pair of such jeans from defendant Tonelli Sportswear International, Ltd. Those jeans were part of a group of production samples prepared by defendant Davis Apparel Manufacturing Co. for SJI in February 1980. Those jeans were sold by SJI to Tonelli

Sportswear International, Ltd., in early 1980, before the plaintiff obtained the exclusive right to manufacture and sell children's Slim Jeans. Other than the single sale alleged in the complaint, none of the defendants had manufactured, sold, or offered for sale children's Slim Jeans since plaintiff obtained its exclusive license to manufacture and sell such jeans in May 1980.

A review of the pleadings, affidavits with annexed exhibits, depositions, and memoranda of law, which fill hundreds of pages, reveals that the jeans in question were worth approximately ten dollars. The complaint, commenced one week after the jeans were purchased, charges the defendants with a trademark conspiracy that was nationwide in scope. In deposition, the president of the plaintiff corporation stated that he had not reviewed the complaint before it was filed nor did he see any other document (such as the investigator's report or a photograph of the allegedly offending jeans) upon which he might have substantiated the belief that the charges in the complaint were valid. He also stated that he knew only of the single pair of jeans involved in this lawsuit and had no hard evidence of a nationwide conspiracy. He also testified that it was possible, though not likely, that the jeans in question might have been manufactured prior to the date the plaintiff became the exclusive licensee for their manufacture.

Defendants asked plaintiff to remove the action from one state to another. The request was denied, but a motion for that purpose made subsequently was unopposed. An order for expedited discovery had, in the meantime, been obtained. A whirlwind of legal activity ensued. Depositions were taken in several cities. Defendants are now requesting costs, including attorneys' fees.

Plaintiff does not oppose the motions for summary judgment. Plaintiff does, however, resist the motion for sanctions, arguing that it had to make an emergency decision to file the action to enjoin further infringement of its trademark and exclusive license. While facts have developed that show the allegation of a nationwide conspiracy to be difficult to substantiate, the evidence of the sale of a pair of jeans linked to the defendants was tangible evidence of a conspiracy among the defendants. Had plaintiff failed to act promptly, it might have been deemed to have waived its exclusive rights. In short, plaintiff argues that it acted in good faith on the basis of available facts.

Case G1

In this case, pro se plaintiffs are Terry and Kathy Broderick, husband and wife. In April 1983, the two filed a tax return (whether joint or separate is not of record) that claimed the Fifth Amendment privilege against self-incrimination. They were separately notified that the tax return was unacceptable and were notified of the imposition of a penalty for the filing of a frivolous tax return. Neither filed for appeal or judicial review.

In late August 1983, Mr. Broderick was notified that the $500 penalty assessment would be enforced, perhaps by the filing of a tax lien against his property, salary, or wages. Mrs. Broderick received a similar notice in October 1983. After the IRS failed to find a bank account to satisfy the lien, it levied against the wife's wages from her employer, Harlettz Custom Products, Inc., and against the husband's milk payments from Associated Milk Producers, Inc. Mr. Broderick is a self-employed dairy farmer.

Throughout this process, the plaintiffs asserted their right to invoke the Fifth Amendment on their tax return and stated that they objected to the assessment of a penalty because (a) they had entered into no agreement with the secretary of the treasury concerning their tax liability and (b) no economic sanction (i.e., tax, penalty) can be assessed against a person for exercising his or her constitutional rights.

The plaintiffs filed this lawsuit in January 1984 against IRS officials and agents of Harlettz and AMPI, the employers, alleging a deprivation of property without due process and a conspiracy in furtherance of this claim. The complaint asked for damages of $10,000 against each defendant in addition to an amount against various defendants that totaled the penalty assessment levied against the plaintiffs.

Attorneys entered appearances on behalf of the defendants and filed a motion for more definite statements with regard to the statutory basis of the actions and to the specific facts that constituted the liability of each of the defendants. This motion was granted. In response, plaintiffs filed an amended complaint similar to the original, generally alleging that the defendants deprived plaintiffs of property without due process of law in retaliation for plaintiffs' assertion of the Fifth Amendment's self-incrimination clause. Plaintiffs claim that various exhibits show that "defendants did effect a seizure of plaintiffs' funds" and that "defendants did conspire and perform acts to obtain the object of the conspiracy."

Plaintiffs move for a summary judgment based on the proposition that defendants have defaulted in this action by failing to

answer the complaint. They cite various authorities for the claim that a motion to dismiss is not a pleading. They also argue that the complaint cannot be dismissed if they might be entitled to some relief, albeit not the relief they had requested. At the same time, the defendants charge that the plaintiffs' amended complaint is totally without merit and, further, that it fails to resolve the problems that led the judge to grant the earlier motion for more definite statements.

The defendants (a) move for a dismissal of the complaint for failure to prosecute and (b) request costs, including attorneys' fees, under rule 11 of the Federal Rules of Civil Procedure.

Case G2

In this case, plaintiffs are Terry and Kathy Broderick, husband and wife. In April 1983, the two filed a tax return (whether joint or separate is not of record) that claimed the Fifth Amendment privilege against self-incrimination. They were separately notified that the tax return was unacceptable and were notified of the imposition of a penalty for the filing of a frivolous tax return. Neither filed for appeal or judicial review.

In late August 1983, Mr. Broderick was notified that the $500 penalty assessment would be enforced, perhaps by the filing of a tax lien against his property, salary, or wages. Mrs. Broderick received a similar notice in October 1983. After the IRS failed to find a bank account to satisfy the lien, it levied against the wife's wages from her employer, Harlettz Custom Products, Inc., and against the husband's milk payments from Associated Milk Producers, Inc. Mr. Broderick is a self-employed dairy farmer.

Throughout this process, the plaintiffs asserted their right to invoke the Fifth Amendment on their tax return and stated that they objected to the assessment of a penalty because (a) they had entered into no agreement with the secretary of the treasury concerning their tax liability and (b) no economic sanction (i.e., tax, penalty) can be assessed against a person for exercising his or her constitutional rights.

The plaintiffs filed this lawsuit in January 1984 against IRS officials and agents of Harlettz and AMPI, the employers, alleging a deprivation of property without due process and a conspiracy in furtherance of this claim. The complaint asked for damages of $10,000 against each defendant in addition to an amount against various defendants that totaled the penalty assessment levied

against the plaintiffs. All parties were represented by counsel from reputable law firms.

Attorneys entered appearances on behalf of the defendants and filed a motion for more definite statements with regard to the statutory basis of the actions and to the specific facts that constituted the liability of each of the defendants. This motion was granted. In response, plaintiffs filed an amended complaint similar to the original, generally alleging that the defendants deprived plaintiffs of property without due process of law in retaliation for plaintiffs' assertion of the Fifth Amendment's self-incrimination clause. Plaintiffs claim that various exhibits show that "defendants did effect a seizure of plaintiffs' funds" and that "defendants did conspire and perform acts to obtain the object of the conspiracy."

Plaintiffs move for a summary judgment based on the proposition that defendants have defaulted in this action by failing to answer the complaint. They cite various authorities for the claim that a motion to dismiss is not a pleading. They also argue that the complaint cannot be dismissed if they might be entitled to some relief, albeit not the relief they had requested. At the same time, the defendants charge that the plaintiffs' amended complaint is totally without merit and, further, that it fails to resolve the problems that led the judge to grant the earlier motion for more definite statements.

The defendants (a) move for a dismissal of the complaint for failure to prosecute and (b) request costs, including attorneys' fees, under rule 11 of the Federal Rules of Civil Procedure.

Case H

Plaintiff Geraldine Dubin filed a complaint against a regional utility company in connection with its offering and sale of 3 million shares of Series T preferred stock in September 1980. The alleged violations consist of omissions of material facts required to clarify allegedly misleading statements in the prospectus. Defendant moves to dismiss the complaint for various reasons, including a failure to state a claim upon which relief can be granted. Both parties are represented by counsel from reputable law firms.

Plaintiff alleges that she purchased two hundred shares of Series T preferred stock from the initial offering in September 1980, "in reliance upon the Prospectus, and subsequently sold said shares at a loss." In the prospectus filed by the defendant with the Securities and Exchange Commission as part of its registration statement, under the heading "Tax Status," there appeared the following

paragraph, which is the focal point of the alleged misrepresentation:

"Our preliminary estimate indicates that a substantial portion of the Preferred Stock dividends to be paid in 1980 may represent return of capital for tax purposes and therefore will not be subject to federal income tax as ordinary income, but will be considered as a return of capital, thereby reducing the tax basis of the applicable shares by such amount. In 1979, 63 percent of the dividends paid on Preferred Stock were considered to be a return of capital. This was the first year in which any portion of the dividends paid on Preferred Stock was not taxed as ordinary income."

The parties stipulated the following facts. The statements regarding tax treatment of 1979 preferred stock dividends were correct. Defendant's prediction as to tax treatment of preferred dividends paid in 1980 proved to be accurate and, indeed, conservative. In January 1981, defendant advised its preferred stockholders that 100 percent of the preferred dividends paid in 1980 would be considered as a return of capital for tax purposes. Preferred dividends paid in the following two years, however, received less advantageous tax treatment. All preferred dividends paid in 1981 received ordinary income treatment for tax purposes. In early 1983, defendant advised its preferred stockholders that 81 percent of the preferred dividends paid in 1982 would be treated as return of capital.

Plaintiff alleges that the prospectus was deceptive in two respects. Her first claim is that the "Tax Status" paragraph quoted above misled the investing public into believing that preferred dividends to be paid in years after 1980 would be treated as return of capital for tax purposes. Plaintiff alleges that defendant accomplished this deception by omitting from the prospectus what in summary are (a) the company's earnings of profits between 1913 and 1979 for dividend purposes, (b) earnings and profits in the years 1979 and 1980 for dividend purposes, (c) an explanation of the effects of the above on tax treatment of preferred dividends paid in 1979 and 1980, and (d) whether the circumstances were nonrecurring, which led to tax treatment of preferred dividends paid in 1979 and 1980 as return of capital. In short, the plaintiff claims that she was injured because the Series T preferred stock dividends paid by the defendant in 1981 received tax treatment as ordinary income, while she was led to expect return of capital treatment.

The defendant asserts several grounds in support of its motion for summary judgment dismissing the complaint. First, it attacks the plaintiff's claim for failing to allege fraud and scienter with particularity and failing to allege how the claimed omissions proxi-

mately caused her undisclosed loss. Second, defendant seeks dismissal for failure to state a claim upon which relief can be granted. In essence, defendant argues that as a matter of law, the challenged "Tax Status" paragraph in the prospectus contained no misleading statements nor omitted material facts necessary to render the statements made not misleading—that it is unreasonable for an investor to draw from that paragraph any inference whatsoever concerning tax treatment of dividends paid in 1981 and onward.

With regard to the prospectus' omission of data, formulas, explanations, and predictions, as specified by the plaintiff, the defendant notes that nothing in the law requires defendant to include in the prospectus details of the computation of the earnings and profits data or details of the accounting principles employed in determining tax treatment of dividends paid in those two years. Further, under the authorities it is clear that SEC registrants are under no obligation to make speculative projections of financial or economic events to satisfy the curiosity of an investor as to immaterial matters.

In sum, defendant argues that the plaintiff's action can only be described as frivolous. In addition to its motion for summary judgment, the defendant requests costs, including attorneys' fees.

Responding to the request for sanctions, plaintiff argues that the case presents an issue of first impression for the court. Assuming arguendo that the court grants the motion to dismiss, no penalty should be imposed on plaintiff for making a good-faith argument for extension of a rule of law to protect investors. Plaintiff was in fact misled by the prospectus, and other investors could be expected to be misled as well. Because defendant had information from which it could reasonably foresee discontinuance of the tax status, plaintiff has made a reasonable argument that a warning should be issued to investors. The plaintiff's efforts to articulate such arguments are in the public interest and should not be sanctioned by the imposition of costs and attorneys' fees.

There is now, before the court, a motion for summary judgment, dismissing the plaintiff's action. In addition, the defendant requests costs, including attorneys' fees, under rule 11 of the Federal Rules of Civil Procedure.

Case I

Supporters of a city councilman brought action against the city, claiming that recall elections violated the voting rights act. Recall proponents intervened and moved for dismissal of the complaint

and an award of attorneys' fees. Both parties were represented by counsel from reputable law firms.

Arthur K. Ryder was elected councilman of a district in a large city on April 12, 1983. Shortly after his election, supporters of the candidate he defeated, Steve Hernandez, initiated a campaign to have Ryder recalled. On December 2, 1983, the recall proponents served on Ryder, and had published in a local newspaper, a notice of intention to recall Ryder and the reasons for the proposed recall. In accordance with the requirements of the city election code in effect at the time, the notice and accompanying statement were published and printed in English only. On December 16, 1983, Ryder published his answer to the recall statement in another local newspaper in both English and Spanish.

On December 23, 1983, the recall proponents began circulating petitions and gathering signatures. On that date, however, the city council unanimously passed an ordinance, effective December 27, 1983, that provided that all recall materials must be published in both English and Spanish. The recall proponents then reprinted their petitions in bilingual fashion and continued their efforts to get signatures for the recall. The petitions were tendered to the city clerk on February 8, 1984, but were refused because the new ordinance required both the petition and the initial notice to be printed in English and Spanish. The recall proponents then initiated an action in a superior court to compel the city clerk to accept the petitions for filing and to determine whether there were a sufficient number of signatures for a recall election to be held. The superior court found in favor of the recall proponents, but the city filed a notice of appeal and thereby obtained an automatic stay of the court's ruling. As a result, the city clerk stopped processing the recall petition. The recall proponents proceeded to file an emergency application for an order from the court of appeals dissolving the stay. The court of appeals dissolved the stay and directed the city to comply with the superior court's ruling. After numerous delays, the signatures were counted, and the clerk determined that there were sufficient signatures for a recall election to be held. The election is presently scheduled.

Plaintiffs, supporters of Ryder, filed a complaint alleging that the proponents of the recall election violated the voting rights act by publishing the notice of intention to recall in English only, specifically: "No State or political subdivision shall provide registration or voting notices, form instructions, assistance, or other materials or information relating to the electoral process, including ballots, only in the English language if the Director of the Census determines . . . that more than 5 percent of the citizens of voting age

in such State or political subdivision are members of a single language minority." On that basis, plaintiffs sought to prevent the clerk from processing the petitions. They then sought a temporary restraining order, and the defendants did not oppose the motion. The court denied the motion, and the recall proponents intervened in the action. A hearing on the issuance of a preliminary injunction enjoining the clerk from counting the signatures on the petition was set for March 19. The court issued an order the next day denying the motion.

On April 2, 1984, the intervenors filed a motion for summary judgment, dismissing the complaint on the ground that it is frivolous and without merit, that the statutes upon which it is based clearly do not provide support. In addition, the intervenors seek costs, including attorneys' fees under rule 11. Specifically, they point out that the statute applies to the state or political subdivision, not to private citizens who, in this case, were responsible for the recall attempt. Further, they argue that the language of the statute applies to information relating to the electoral process, of which the recall movement, though it might ultimately lead to voting, is not a part. Plaintiffs then filed an opposition to the motion to dismiss.

Specifically, plaintiffs argue that they had in fact sued the city clerk in his official capacity as a representative of a political subdivision. The statutory scheme demands that the clerk monitor the conduct of private parties because acceptance of a recall petition cloaks their prefiling activity with official approval. They also argue that the filing of a recall petition is an integral, indeed indispensable, part of the voting process. Finally, assuming arguendo that defendants prevail, plaintiffs argue that sanctions should not be imposed in a case such as this because they will have a chilling effect on good-faith arguments to advance civil rights. Imposition of sanctions will interfere with the congressional policies expressed in the Civil Rights Attorney's Fees Awards Act of 1976.

There is now before the court a motion for summary judgment, dismissing the plaintiffs' action. In addition, the intervenors request costs, including attorneys' fees, under rule 11 of the Federal Rules of Civil Procedure.

Case J

Plaintiff Henry Lee Barron, an investor in the Empire Reserve Fund, Inc., a mutual fund headquartered in New York City, filed a complaint alleging securities misrepresentation by defendant, the

mutual fund. In his complaint, Barron claimed that prerecorded WATS-line telephone messages that stated the fund's "current yield" misrepresented the fund's actual daily dividend to investors. Both parties are represented by counsel from reputable law firms.

On June 26, 1979, plaintiff consulted his broker about investing some cash he had received from the sale of stock. The broker suggested investing in the Empire Reserve Fund, Inc., a no-load (i.e. without separate commission charges), open-end mutual fund, and gave Barron a WATS-line number to call for more information about the fund's performance. Each day, the reserve fund prepared a recorded message based on the following format:

> The Empire Reserve Fund's current yield on _____ is _____ percent. We paid _____ percent for the last _____ days. We earned _____ percent for the last quarter. Our assets exceed $ _____ and our average portfolio life is _____ days. For further information, please call (212) 997-9880 or write us at 711 Sixth Avenue, New York, New York 10018. Thank you for calling.

On June 26, the fund reported on the WATS message that the "current yield" was 9.88 percent. Plaintiff invested $7,827.79 with the fund that same day.

On October 22, 1979, plaintiff initiated the action against the mutual fund, claiming that the first sentence of the WATS-line telephone message, which reported the fund's current yield, constituted a scheme to defraud the investing public, since the figure quoted as the "current yield" was not the actual rate that funds placed with defendant earned on that date (on June 26, 1979, the fund paid an actual dividend of 7.91 percent; the WATS message stated the current yield to be 9.88 percent). Plaintiff argues that a reasonable investor would naturally assume that "current yield" represented actual dividends paid. He maintains that the fund should not have stated the "current yield" at all, since stated alone this information is misleading.

Plaintiff bases his claim on an alleged violation of rule 10b-5 of the Securities Exchange Act of 1934. In order to state a claim for relief under 10b-5, the plaintiff must establish (a) misrepresentation or omission or other fraudulent device, (b) a purchase or sale of securities in connection with *a,* (c) scienter by defendant in making *a,* (d) materiality of *a,* (e) justifiable reliance by plaintiff on *a,* and (f) damages resulting from *a.*

Defendant moves for summary judgment, dismissing the case on the ground that it is frivolous and without merit. Defendant also requests, under rule 11 of the Federal Rules of Civil Procedure, all costs and attorneys' fees incurred in defending the action. First,

the defendant argues that plaintiff had not made a threshold showing of out-of-pocket loss, considered to be the proper measure of damages in a 10b-5 action. Six months after filing the action, in April 1980, plaintiff redeemed his investment and received $8,571, representing a gain of $743.21 and a yield of 12.15 percent. Plaintiff responds that he did suffer out-of-pocket loss (based on the fact that the fund paid a smaller dividend than represented, considering the price paid for the shares), and that in any event out-of-pocket loss is not the only measure of injury in a 10b-5 action—that it is also possible to base damages on a benefit of the bargain, lost opportunities, or disgorgement of profits analysis.

The defendant also argues that plaintiff has not established the presence of scienter, another necessary prerequisite to recovery under 10b-5, defined by the Supreme Court as "a mental state embracing intent to deceive, manipulate, or defraud" (*Ernst & Ernst v. Hochfelder,* 425 U.S. 185 (1976)) and typically referring to "an extreme departure from the standards of ordinary care." Scienter cannot be established by a mere assertion of plaintiff's confused state of mind, but requires proof that the defendant's conduct presented a danger of misleading buyers or sellers and that this danger either was known to the defendant or was so obvious that the defendant must have been aware of it.

In refutation of the scienter requirement, defendant introduces three facts about its conduct. First, it presents evidence indicating that the fund's method of calculating and reporting yields and the information it provides in its telephone messages fully complied with then-existing SEC recommendations (and that, in addition, the fund provided information regarding its past performance). Second, even if an investor was confused by the recorded message, he or she could call an additional number, provided by the fund in the message, for an explanation. Third, the record shows that the fund has not changed the format of its message to represent the best picture at all times. Rather, the fund has used the same format for six years, regardless of whether interest rates were falling or rising. Thus, while on some days the current yield quoted exceeded the actual dividends paid, on other days actual dividends paid were higher than the current yield figure quoted on the WATS message. In sum, defendant maintains that although the string of financial quotations may have confused the plaintiff, there is not a scintilla of factual evidence that the fund intentionally misled him or even departed from the standard of ordinary care in formulating the WATS message.

Responding to the argument for sanctions, plaintiff restates his argument on the merits. Assuming arguendo that the court holds

otherwise, plaintiff argues that the case is founded on an objective assessment that the recorded message is misleading, indeed so misleading that it convinces the caller that there is no need to call the number given for further information. Plaintiff himself was misled, and plaintiff's counsel made a good-faith determination that the misleading nature of the message was so obvious that it would meet the scienter test under 10b-5. Even if the court should disagree, it should not, with the benefit of hindsight, impose sanctions that will deter good-faith arguments to protect investors.

Defendant has moved for summary judgment and requests costs, including attorneys' fees, under rule 11 of the Federal Rules of Civil Procedure.

APPENDIX B
The Letter Sent to District Judges

January 25, 1985

To All United States District Judges:

In light of heightened judicial interest in abuses of the litigation process and the use of sanctions as a management device, the Federal Judicial Center Board has called for a study of district judges' practices and views on the issues that have arisen. We solicit your assistance as a participant in this inquiry—participation that should not impose more than a fifteen-minute interruption in your schedule.

Enclosed is a summary description of a litigation event, one that is adapted from an actual case. The event culminates in a party's request for sanctions under rule 11 of the Federal Rules of Civil Procedure. Also enclosed is a brief questionnaire seeking your reactions to the described event and the request.

Inevitably, descriptions of this sort cannot provide all the information that might be needed for making absolute judgments. Accordingly, we have attempted to phrase our questions more tentatively, asking for your thoughts, inclinations, and estimates in light of the information presented.

Please return the completed questionnaire in the enclosed envelope at your earliest convenience. All responses will be treated confidentially; the report will make no attributions to any individual judge or court. The questionnaires are numbered to permit monitoring of returns and follow-ups. Upon completion of that task, these numbers will be removed to prevent any further identification.

It would be most helpful if you could return your questionnaire within two weeks. Thank you for your time and attention.

Sincerely,

William B. Eldridge
Director of Research

APPENDIX C
A Version of the Questionnaires

Questionnaire

1. Having read a summary of this case, do you think plaintiff's attorney's action is frivolous and without merit, in violation of rule 11? (circle *one*)

YES NO

2. If you answered YES, do you think this violation of rule 11 was willful (i.e., in bad faith)?

YES NO

3. If you were the judge in this case, would you grant:

A. defendants' motion for summary judgment?

YES NO

B. defendants' request for attorneys' fees?

YES NO

4. In this case, approximately what percentage of federal judges in your district do you think would grant:

A. defendants' motion for summary judgment?

_____ %

B. defendants' request for attorneys' fees?

_____ %

5. If you answered YES to question 3b, how much would you be inclined to order plaintiff to pay defendants in this case? (check *one*)

—an amount less than all reasonable expenses and attorneys' fees

—all reasonable expenses and attorneys' fees

—all reasonable expenses and attorneys' fees plus a multiplier or bonus

6. In addition to or instead of attorneys' fees, would you impose any other sanctions against plaintiff and, if so, what would they be?

7. Overall, how much undue hardship (i.e., unnecessary expenditures of time, resources, and money) do you think defendants experienced as a result of plaintiff's action? (circle *one*)

none at all 1 2 3 4 5 6 7 8 9 10 a good deal

8. Which of the following statements most nearly describes your position regarding the plaintiff's lawyer's factual investigation in this case? (check *one*)

—The lawyer appears to have investigated this case thoroughly.

—The lawyer's investigation was not exemplary, but was adequate under the circumstances of this case.

—The lawyer's investigation of this case appears to have been inadequate, or at least limited, perhaps because there were no immediately obvious ways to do so, or perhaps because he had no reason to disbelieve his client's statement of the facts.

—The lawyer obviously did not investigate the facts in this case because any reasonable investigation would have shown it to be groundless.

9. Which of the following statements most nearly describes your position concerning the plaintiff's lawyer's inquiry into the legal basis for this action? (check *one*)

—The lawyer's inquiry was thorough; the law clearly supports his theory of the case.

—The lawyer's inquiry was adequate; the case is one of first impression, and his theory of the case is warranted by a reasonable extension of existing law.

—The lawyer's inquiry was inadequate; the case is one of first impression, but his theory of the case is not warranted by a reasonable extension of existing law.

—The lawyer apparently never opened a book or consulted an expert; settled law clearly rejects his theory of the case.

10. Which of the following statements most nearly describes your judgment of the plaintiff's lawyer's state of mind regarding this action? (check *one*)

—The lawyer appears to have acted in good faith, truly believing, after a reasonable inquiry, that the case had merit.

—The lawyer appears to have acted in good faith, but probably out of negligence, believing that the case had merit only because he failed to investigate adequately its factual or legal basis.

—The lawyer appears to have acted in bad faith, pursuing the case despite knowledge of its lack of merit, for an improper purpose such as to increase the cost of litigation.

11. In general, what do you see as the primary function of sanctions under rule 11? (check one or rank in order of importance, where 1 = most important and 3 = least important)

—to compensate the aggrieved party

—to penalize the offending party

—to deter future misconduct of a similar nature

12. How often in the past 12 months have you been confronted with a rule 11 motion for sanctions?

_____

13. In how many of these cases did you grant the request for attorneys' fees?

_____

TABLE OF CASES

Table of Cases

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