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Viewing Rule 11 as a Tool to Improve Professional Responsibility

Victor H. Kramer*

In August, 1983, controversial amendments to Rule 11 of the Federal Rules of Civil Procedure became effective. Rule 11 now provides that when an attorney or a party signs a paper filed in connection with a lawsuit, the signature certifies that, to the best of the signer's knowledge, the paper "is well grounded in fact and is warranted by existing law or a good faith argument" for a change in the law, and that it is not interposed "to harass or to cause unnecessary delay or needless increase in the cost of litigation." Rule 11 further provides that if an attorney files a paper in violation of the Rule, the court "shall impose" on the attorney, the client, or both "an appropriate sanction." Under this provision, courts may require the violating party to pay the other party's "reasonable expenses incurred because of the filing" of the unwarranted paper, "including a reasonable attorney's fee."

In the seven years since Rule 11 was amended, it has generated well over a thousand judicial opinions, and a growing body of articles that fiercely debate the advantages and disadvantages of Rule 11. Opponents of Rule 11 rely on two princi-

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* Emeritus Professor of Law, University of Minnesota; Adjunct Professor of Law, Georgetown University Law Center. I am grateful to my colleague, Professor Jack Coumd, for his helpful advice in the preparation of this Essay.

2. Id.
3. Id.
4. Id.
6. Rule 11 is giving rise to a burgeoning literature published in Federal Rules Decisions and in both the academic law reviews as well as periodicals sponsored by bar associations and other groups. See bibliography in COMMITTEE ON RULES OF PRACTICE OF THE JUDICIAL CONFERENCE OF THE U.S., CALL FOR WRITTEN COMMENTS ON RULE 11 OF THE F.R.C.P. & RELATED RULES 7-16 (1990).

In its recent opinion in Cooter & Gell v. Hartmarx Corp., 110 S. Ct. 2447
pal criticisms. One criticism is that the Rule chills litigation by deserving plaintiffs — particularly in the civil rights and employment discrimination areas. A second criticism is that Rule 11 generates satellite litigation over the propriety of Rule 11 sanctions, thus increasing rather than decreasing the cost and complexity of litigation in the federal courts. The conflict surrounding Rule 11 also has invaded the federal courts. The various circuits disagree over what constitutes a Rule 11 violation and what is the purpose of Rule 11 sanctions. The following Table supports some of the differences that exist among the circuits.


Among the scores of articles already written on Rule 11, I would rate those cited by the Court as among the most useful. Specifically, the Vairo article, supra, is probably the most comprehensive and widely used on Rule 11. In preparing this Essay, the work I found most insightful was the student note by Alan E. Untereiner entitled “A Uniform Approach to Rule 11 Sanctions,” supra note 5, cited by the Supreme Court. I wish to express my thanks to Mr. Untereiner for a most thoughtful piece of work.

7. See Cooter, 110 S. Ct. at 2454; Vairo, supra note 5, at 200-01.
8. E.g., Hudson v. Moore Business Forms, Inc., 609 F. Supp. 467, 481-84 (N.D. Cal. 1985), aff'd in part and rev'd in part, 827 F.2d 450 (9th Cir.), vacated and remanded, 836 F.2d 1156 (9th Cir. 1988), aff'd and remanded, 898 F.2d 687 (9th Cir. 1990) (remanded for reassessment of sanctions in light of Pavelic & LeFlore v. Marvel, 110 S. Ct. 456 (U.S. 1989)). Each of the cases represented in the Table is cited in the Appendix. The Table does not include those Rule 11 cases in which a United States Court of Appeals affirmed a district court's denial of a sanction.
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This Table includes selected Rule 11 cases contained in published opinions of the United States Courts of Appeals between January 1, 1985 and December 31, 1989. Column I shows, by circuit, the number of cases in which the appellate court either affirmed a sanction against a lawyer, or reversed and remanded with directions to award a sanction against a lawyer. Column II shows, by circuit, the number of cases in which these same courts of appeals reversed sanctions imposed against a lawyer. In both columns, the figures in parentheses show how many of the cases represented by the number immediately to the left of the number in parentheses imposed sanctions of ten thousand dollars or more. The third column

10. One opinion in which the Ninth Circuit reversed a sanction imposed on a lawyer by the district court was, on rehearing en banc, vacated and the full court ruled that some sanctions against attorney Townsend were proper, but remanded the case “so that the district court can consider whether the $500 sanction was too high for the offense.” Townsend v. Holman Consulting Corp., 881 F.2d 788, 795-97 (9th Cir.), reh’g granted, 888 F.2d 646 (9th Cir. 1989), vacated, 914 F.2d 1136 (9th Cir. 1990) (en banc). In Willy v. Coastal Corp., 915 F.2d 965 (5th Cir. 1990), the court affirmed a reduced sanction against a lawyer after it had reversed and remanded to the district court to reconsider the dollar amount of the sanction. Id. at 968. The later opinions in the Townsend and Willy cases were handed down in 1990 and thus are not reflected in the Table.

11. While I took considerable pains to make sure that I found all cases
shows each circuit’s percentage of the total federal appeals filed in the fiscal year ended June 30, 1988.12

The Table confirms some of the tentative conclusions apparent in the judicial opinions and scholarly literature on Rule 11: the dramatic split between the Third Circuit and Seventh Circuit. The Third Circuit has applied Rule 11 cautiously, warning against extending the Rule “beyond its text and intent.”13 The Seventh Circuit, on the other hand, has announced that it will enforce Rule 11 “to the hilt.”14 Indeed, the opinions of Judge Posner and Judge Easterbrook come close to showing a sense of glee in socking sanctions to lawyers who file “frivolous” complaints or other papers.15 The Third Circuit, with eight percent of all federal appellate litigation (hereinafter “work load”), has approved Rule 11 sanctions against lawyers in only three percent of the total approvals, while it has disapproved twelve percent of all disapprovals. In contrast, the Seventh Circuit, with seven percent of the work load, has handed down almost a quarter of all Rule 11 opinions affirming or directing lawyer sanctions, while reversing only eight percent of the total reversals.

The Table also shows that the Ninth Circuit has approved or directed Rule 11 sanctions against lawyers eleven times, but has reversed such sanctions on eighteen occasions. The Ninth

covering the categories described in this Table, almost surely I missed a few. Nevertheless, I am reasonably confident that any omissions would not materially affect the comparisons and contrasts among the circuits shown in the Table. One difficulty in categorizing the cases deserves mention here: there are several opinions in which the Courts of Appeals did not make clear whether the Rule 11 sanction affirmed or reversed was against the lawyer or the client or both. See, e.g., White v. General Motors Corp., 908 F.2d 675, 685-86 (10th Cir. 1990); Teamsters Local Union No. 430 v. Cement Express, Inc., 841 F.2d 66, 68 (3d Cir.), cert. denied, 488 U.S. 848 (1988); Aetna Casualty & Sur. Co. v. Fernandez, 830 F.2d 952, 953 (8th Cir. 1987); Davis v. Vesland Enters., 765 F.2d 494, 496-97 (5th Cir. 1985).


Circuit thus has reversed sanctions fifty percent more often than it has either affirmed or directed sanctions. This reversal rate is in stark contrast to all but the Third Circuit. These other circuits generally have reversed sanctions approximately fifty percent less often than they have affirmed or directed them. Finally, the Table discloses that the Sixth and Eighth Circuits, which virtually surround the Seventh Circuit to the East and West, have both approved and disapproved lawyer sanctions at a rate far below their respective shares of the federal appellate work load. These inconsistencies among the circuits demonstrate the ambiguity surrounding Rule 11.

To help resolve these inconsistencies, this Essay proposes that courts should consider and interpret Rule 11 primarily as a tool to enforce the Rules of Professional Conduct in litigation rather than as a means to compensate litigants who become the victims of unprofessional conduct: deterrence rather than reimbursement should be the primary purpose of sanctioning lawyers.16 For many years, state rules have made it unethical for lawyers to file suits or take other action in litigation that is legally insupportable or designed to harass the opposing side.17

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16. For a decidedly contrary point of view, see Weston, Court-Ordered Sanctions of Attorneys: A Concept That Duplicates the Role of Attorney Disciplinary Procedures, 94 DICK. L. REV. 897 (1990), who argues that court-ordered sanctions are inherently unfair, and that only state disciplinary boards are capable of policing attorneys. Id. at 921-28. Cf. Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531, 1542 (9th Cir. 1986), rev'd 103 F.R.D. 124 (N.D. Cal. 1984), in which the Ninth Circuit in the course of reversing a sanction ordered by Judge Schwarzer to be paid by the law firm of Kirkland & Ellis, said: "We must not interpret Rule 11 to create two ladders for after-the-fact review of asserted unethical conduct; one consisting of sanction procedures, the other consisting of the well-established bar and court ethical procedures." Id. at 1542. I do not understand this statement but I do think it expresses a point of view opposite to that in the text of this Essay.


(A) In his representation of a client, a lawyer shall not:

(1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

(2) Knowingly advance a claim or defense that is unwarranted under existing law except . . . [if it] can be supported by good faith argument for an extension, modification, or reversal of existing law.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102 (A)(1)-(2) (1980). Rule 3.1 states in relevant part: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for do-
The state lawyer-disciplinary bodies, however, have failed to enforce these provisions. Rule 11 thus offers the federal courts an opportunity to enforce professional responsibility rules that state disciplinary bodies have been unable or unwilling to enforce. To the extent that federal courts interpret Rule 11 as a device to enforce these Rules, the circuits should resolve much of their disagreement.

In the balance of this Essay, I begin by considering the circumstances in which courts can appropriately sanction a party as distinguished from the counsel for a party. Next, I consider the nature and purpose of Rule 11 sanctions against lawyers in the light of my thesis that sanctions should primarily deter future misconduct rather than compensate victims of Rule 11 violations. In furtherance of this goal, I propose that courts appropriately might apportion the receipts from a monetary sanction between the court and the injured party. I conclude with suggestions for better correlation of Rule 11 sanctions with the states' enforcement of the codes of professional responsibility.

I. ALLOCATING MONETARY SANCTIONS BETWEEN ATTORNEY AND CLIENT

Courts have not taken a consistent approach to allocating Rule 11 monetary sanctions between attorneys and clients. Specifically, confusion exists as to when courts can appropriately impose a sanction on a client, on an attorney, or on both. Further, courts have failed to develop a workable method for allocating Rule 11 liability when both the client and the attorney are responsible for the violation.

Some district courts both jointly and severally sanction the party and the party's counsel without considering their respective degree of fault. A slightly different proposal advanced by
District Judge Schwarzer is that courts may jointly and severally sanction client and counsel, allowing them to sort out their respective degree of fault, only when the client's influence on the lawyer, in part, causes the sanctionable litigation strategy. Other courts impose sanctions on clients, as distinguished from their lawyers, when the lawyer was reasonably misled by the client as to the accuracy of facts — in short, where the client lied or failed to tell the whole truth to the lawyer.


20. Schwarzer, New Federal Rule 11, supra note 6, at 203; see also cases cited supra note 19.

21. See Business Guides, Inc. v. Chromatic Communications Enters., Inc., 892 F.2d 802, 812-14 (9th Cir. 1990) (sanction against party who was grossly negligent in filing affidavits in support of motion for preliminary relief), aff'd, No. 89-1500, slip op. (U.S. Feb. 26, 1991); Kraemer v. Grant County, 892 F.2d 686, 688-90 (7th Cir. 1990) (sanction against plaintiff's attorney reversed where client had lied to him and attorney had done everything possible to investigate facts before filing complaint, defendant having refused to discuss claim) (opinion in this case filed in 1990 and hence not included in Appendix); Cross & Cross Properties v. Everett Allied Co., 886 F.2d 497, 505 (2d Cir. 1989) (remanded to district court to “determine whether it was objectively reasonable for counsel to rely upon his client”); Chevron, Inc. v. Hand, 763 F.2d 1184, 1187 (10th Cir. 1985) (sanction imposed on client because she was “responsible for the filing of the offending document”); Kappenberger v. Oates, 663 F. Supp. 991, 995 (S.D.N.Y. 1987) (attorney unaware of client's perjury); cf. Lloyd v. Schlag, 884 F.2d 409, 410-12 (9th Cir. 1989) (affirming imposing of sanctions against client, but not attorney, although attorney could have discovered with reasonable inquiry that client's case was without merit).

In Business Guides, Inc. v. Chromatic Communications Enters., decided as this Essay went to press, the Supreme Court held in a 5-4 decision that Rule 11 gives district courts the power to sanction represented parties who sign papers or pleadings as well as their attorneys. Petitioner, the sanctioned party, argued that because a party is not required to sign most papers, a party should not be subject to Rule 11 when it volunteers to do so. No. 89-1500, slip op. at 9. The Court rejected this position, noting that the plain language of Rule 11 states that parties who sign papers must comply with the same standards of reasonable inquiry as their attorneys. Justice O'Connor, writing for the Court, explained that for parties and their attorneys, “[t]he essence of Rule 11 is that signing is no longer a meaningless act; it denotes merit.” Id. Justice Kennedy, writing for the dissenters, argued that the drafters of the 1983 amendments to Rule 11 intended for attorneys and unrepresented parties to be the only people required to comply with Rule 11. Id. at 16 (Kennedy, J., dissenting, joined by Marshall, Stevens, and Scalia, JJ.). Kennedy argued that the Court's decision will not help Rule 11's deterrent purpose because now, only unwary parties will volunteer to sign papers with their attorneys. Id. Additionally, the dissenters argued that only attorneys can assess whether a document complies with Rule 11. Id. at 18. Under the analysis of the dissenters, a represented party may be sanctioned only when its attorneys have violated Rule 11. Id. at 26.
Any imposition of joint and several liability creates unseemly conflicts between client and lawyer because the rules of allocation between the two are not clear. District courts have recognized that even when the monetary sanction is imposed on only the counsel, counsel may shift to the client responsibility for payment. In response to this threat, courts have entered orders to prohibit such shifting. When the court does not specifically allocate responsibility for the Rule 11 violation between the party and the party's counsel, the counsel is even more likely to shift responsibility for full payment to the client. Even when courts do not impose joint liability, but rather impose liability only on the party responsible for the violation, a conflict of interest can arise between attorney and client because each may blame the other for the improper conduct. This problem is exacerbated because the Rules of Professional Conduct permit a lawyer to breach the client's privilege if the lawyer is defending her own conduct. In summary, whether the lawyer is seeking to avoid payment of the monetary sanction or trying to avoid a sanction all together, it is in the lawyer's interest to put the blame on the client.

Courts can minimize the intensity of this conflict by adopting clear rules of allocation. The first step courts should take toward this goal is eliminating all joint sanctions. Although Rule 11 permits courts to sanction both attorney and client in the same case, the Rule does not specifically authorize courts to impose a joint and several monetary sanction. If a court determines that both the lawyer and client contributed to a given

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25. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(c)(4) (1980) (stating that "a lawyer may reveal: . . . confidences or secrets necessary to . . . defend himself . . . against an accusation of wrongful conduct"); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) (1983) (privilege may be breached "to establish a defense to a . . . civil claim against the lawyer based upon conduct in which the client was involved").
Rule 11 violation, the court should determine each person's degree of responsibility for the sanctionable conduct and then sanction each person according to their respective degree of responsibility. Further, courts should sanction the client in pro se cases and in cases where the client has lied to or convincingly misled the lawyer.

On occasion, courts also can properly sanction corporate clients even though corporate employees neither lied to nor misled their lawyer. The typical large corporation involved in litigation will engage outside counsel for the case. In addition, house counsel on the regular payroll of the corporation will give advice to and sometimes engage in behind-the-scenes supervision of outside counsel. Because house counsel rarely if ever sign any paper filed in litigation, courts cannot hold house counsel liable for a Rule 11 violation. House counsel, however, may be the person who advocates the conduct that the court ultimately finds to have violated the Rule. In such situations, it seems entirely just and proper to direct a sanction against the corporate plaintiff or defendant who employed the house counsel. Most Rule 11 cases involve plaintiffs or their counsel, and large corporations are more often defendants than plaintiffs, courts have seldom had occasion to sanction large corporations or their counsel for Rule 11 violations.

In addition to developing specific rules to govern the sanctioning of clients, courts can further help to resolve the Rule 11, client-attorney conflict by clearly defining the division of responsibility between lawyer and client in conducting litigation.

26. See Borowski v. DePuy, Inc., 850 F.2d 297, 305 (7th Cir. 1988). In Calloway, the court said: “We believe that a party represented by an attorney should not be sanctioned . . . unless the party had actual knowledge that . . . the paper made false statements or was filed for an improper purpose.” 854 F.2d at 1474. But see Business Guides, Inc. v. Chromatic Communications Enters., Inc., No. 89-1500, slip op. at 9 (U.S. Feb. 26, 1991) (holding that a represented party who signs a paper must comply with the reasonable inquiry requirements of Rule 11 or face sanctions).

27. See Pavelic, 110 S. Ct. at 459-60 (interpreting the phrase “the person who signed [the pleading]” as meaning the attorney who affixes her signature to the document and not extending Rule 11 liability to the attorney’s firm).

28. In approximately 60 of the 95 cases in Column I in the Table in which attorneys were sanctioned, the attorneys represented individual plaintiffs.

29. See, e.g., Aetna Casualty & Sur. Co. v. Fernandez, 830 F.2d 952, 956-57 (8th Cir. 1987) (case does not appear in Appendix because not clear from opinion that attorney, as distinguished from client, was sanctioned); Westmoreland v. CBS, Inc., 770 F.2d 1168, 1178-80 (D.C. Cir. 1985); see also Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531 (9th Cir. 1986), rev'g 103 F.R.D. 124 (N.D. Cal. 1984).
The Rules of Professional Conduct have long been unclear as to this division. Indeed, even the Supreme Court, in the not too distant past, divided on the question of whether a lawyer must make an argument on appeal of a criminal case that the client wants made when the lawyer believes that the argument is unsound. Because the Rule 11 drafters designed the Rule to eliminate frivolous arguments and legal theories from litigation, courts should interpret Rule 11 to require that lawyers withstand the pressures of strong-willed clients and withdraw from representation if necessary rather than take positions in court that the lawyers believe are unsound, incorrect, or improper. This requirement, however, should not apply when clients lie to or mislead their lawyers concerning facts that are difficult for the lawyers to check and perhaps also when a corporation's house counsel persuades outside counsel to take a frivolous position.

II. MONETARY SANCTIONS AGAINST LAWYERS: DETERRENCE OR REIMBURSEMENT?

The last sentence of Rule 11 provides for "an appropriate sanction" and, in addition, provides that a sanction "may include an order to pay . . . the amount of the reasonable expenses incurred" by the injured party as a result of the

31. Jones v. Barnes, 463 U.S. 745, 753-54 (1983). The Court held that an attorney does not have to argue on appeal every non-frivolous issue raised or requested a client, and that the exercise of an attorney's professional judgment is consistent with the Constitution's guarantee of effective assistance of counsel. Id.
32. See infra note 36 and accompanying text.
33. See In re TCI, Ltd., 769 F.2d 441, 446 (7th Cir. 1985); Mohammed v. Union Carbide Corp., 606 F. Supp. 252, 261 (E.D. Mich. 1985); cf. Calloway v. Marvel Entertainment Group, 854 F.2d 1470, 1474 (2d Cir. 1988) (holding that when client does not realize that participation in or signing a pleading is wrong, the attorney has an obligation to prevent wrongful conduct), rev'd in part sub nom. Pavelic & LeFlore v. Marvel, 110 S. Ct. 456 (1989). But see Vairo, supra note 5, at 227 (arguing that both attorney and client should be sanctioned in this situation).
34. For instance, in Business Guides v. Chromatic Communications Enters., Inc., No. 89-1500, slip op. (U.S. Feb. 26, 1991), the sanctioned party was a publisher that had developed its own sophisticated system for detecting whether others were illegally reproducing its copyrighted material. The publisher ordered its law firm to draft a complaint based upon violations its system had detected that were later revealed to be false. The Court stated that: "Quite often it is the client, not the attorney, who is better positioned to investigate the facts supporting a paper or pleading." Id. at 13.
offending conduct, "including a reasonable attorney's fee." This language contains the seeds that have led to the conflict among the circuits. On the one hand, most courts, including the Supreme Court, have stated that the purpose of a sanction is to deter a wayward attorney from repeating a violation of the Rule's injunctions. On the other hand, the Rule, by permitting a sanction equal to the amount necessary to reimburse the party injured for the expenses of defending against a position that violated the Rule, suggests that compensation or reimbursement is the principal or, at least, an important purpose of Rule 11. In fact, this Rule 11 language has led to a debate over whether Rule 11 is a fee shifting device. This debate is misconceived. Because the current trend is to sanction attorneys rather than clients, references in the "fee-shifting" debate to the American rule as contrasted with the English rule are irrelevant. The debate, however, demonstrated that, although the Supreme Court has stated that the purpose of Rule 11 is deterrence, some confusion as to its purpose still exists.

This confusion as to the purpose of Rule 11 has led to conflict among the authorities over the standard courts should use to determine the nature and the amount of Rule 11 sanctions.

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36. See Cooter & C. & O Enters., 886 F.2d 1485, 1496 (7th Cir. 1989); Note, supra note 5, at 906-07.
37. See, e.g., Kapco Mfg. Co. v. C & O Enters., 886 F.2d 1485, 1496 (7th Cir. 1989); Note, supra note 5, at 907 n.47.
38. See Hays v. Sony Corp. of America, 847 F.2d 412, 419 (7th Cir. 1988). Judge Posner said in Hays that "Rule 11 is a fee-shifting statute." 847 F.2d at 419. Several months later, Judge Easterbrook said for the same court, this time sitting en banc, that "Rule 11 is not a fee-shifting statute in the sense that the loser pays." Mars Steel Corp. v. Continental Bank B.A., 880 F.2d 928, 932 (7th Cir. 1988) (en banc). The Third Circuit takes the position that the "goal" of Rule 11 is "not wholesale fee shifting but correction of litigation abuse." Giarlo v. Ethyl Corp., 835 F.2d 479, 483 (3d Cir. 1987).

This debate was settled by the Court in Cooter, when Justice O'Connor, writing for a unanimous Court, stated that the central goal of Rule 11 is deterrence. 110 S. Ct. at 2454. The Court noted that Rule 11 is not a fee-shifting device: "Such a sanction may, but need not, include payment of the other parties' expenses." Id.

39. Compare Vairo, supra note 5, at 232 (arguing that sanctions should not be used as a routine fee-shifting device) and American Judicature Soc'y, supra note 6, at xv (stating that court should impose the least severe sanction necessary to attain goal of specific deterrence and avoid full-expense fee-shifting) with Rowe, ALI Study on Paths to a Better Way, 1989 DUKE L.J. 824, 890-91 (arguing that threat of fee-shifting needed to deter frivolous claims). See also Eastway Constr. Corp. v. City of New York, 821 F.2d 121, 123 (2d Cir. 1987) (holding court not required to award the full amount of attorney's fees
In the oft-cited case, *Thomas v. Capital Security Services, Inc.*, Judge Johnson for the Fifth Circuit sitting en banc stated that the sanction imposed should be "the least severe sanction adequate to the purpose of Rule 11."\(^{40}\) In contrast, the Seventh Circuit, at times, apparently regards Rule 11 as requiring the offending party or the party's attorney to reimburse the opposing party for the costs of defending against the frivolous action.

The debate over the purpose of Rule 11 sanctions is important because the sanction, whether monetary or not, necessary to deter a lawyer from repeating a violation of Rule 11 usually is quite different, either in kind or amount, than the sanction necessary to reimburse the aggrieved party for its expenses. For example, a sanction requiring a civil rights lawyer to pay an amount equal to the aggrieved party's "expenses... including a reasonable attorney's fee" can be draconian and could bankrupt the lawyer.\(^ {41} \) Such lawyers typically are not highly paid. Thus, a sanction much smaller than is necessary to compensate the aggrieved party probably would effectively deter future misconduct. Accordingly, if deterrence is Rule 11's goal, as the courts proclaim, a court should focus on whether a given sanction improves or enhances professional responsibility and only secondarily on whether the sanction compensates the victim of the Rule 11 violation. In doing so, a court can still properly consider the costs unnecessarily imposed by the sanctioned

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40. See *Thomas v. Capital Sec. Serv., Inc.*, 836 F.2d 866, 878 (5th Cir. 1988). The court in *Thomas* stated that "what is 'appropriate' [for a sanction] may be a warm friendly discussion on the record, a hard-nosed reprimand in open court, compulsory legal education, monetary sanctions or other measures... the district court should utilize the sanction that... is the least severe sanction adequate to such purpose." *Id.* Accord *Cabell v. Petty*, 810 F.2d 463, 466-67 (4th Cir. 1987).

41. See *Jennings v. Joshua Indep. School Dist.*, 869 F.2d 870, modified and reh'g denied, 877 F.2d 313, 322 (5th Cir. 1989), cert. denied, 110 S. Ct. 3212 (1990). Here, a district court sanctioned a lawyer who sued a school district under 42 U.S.C. § 1983 (1988), for searching a student's automobile for drugs even though the trial court had denied a defense motion for summary judgment and the case was tried. *Id.* The *Jennings* case, which the American Civil Liberties Union supported, *id.* at 877, is another example of a case that has spawned considerable satellite litigation. See *supra* note 8 and accompanying text. On remand by the Fifth Circuit to the district court for reconsideration of the sanction, the district court reduced the original sanction of approximately $84,000 by 50%. See *Jennings v. Joshua Indep. School Dist.*, No. 3-85-1700, slip op. (N.D. Tex. Oct. 18, 1990) (order concerning attorneys fees after remand). The plaintiffs and their attorneys will appeal once again to the Fifth Circuit. Letter from counsel Don Gladden to Victor Kramer (Oct. 31, 1990).
attorney on his or her opponent's client. A court, however, also should consider other factors when calculating the amount of a sanction. The Rule 11 language permitting a sanction in the amount of the aggrieved party's attorney's fee does not mandate otherwise.

One factor a court should consider when determining the kind and amount of a sanction is the deterrent effect achieved by simply imposing any sanction. Arguably, the public censure implicit in the imposition of a sanction and the resulting effect on a lawyer's reputation is itself a strong deterrent. In fact, if deterrence is the sole purpose of Rule 11 and the publicity surrounding a Rule 11 sanction is sufficient to affect a lawyer's reputation, the amount of the sanction in dollars could always be relatively low.

The deterrent effect of a monetary sanction on a lawyer would seem to vary depending on many factors, perhaps the most important of which are the lawyer's income, the amount of his or her personal capital, and the size and wealth of the firm, if any, with which the lawyer is associated. For example, to achieve the same degree of deterrence, a court would have to impose on a partner in a large New York corporate law firm a sanction many times larger than the amount imposed on a typical trial lawyer in the average small law firm. Moreover, this difference is aggravated because the large corporate firm is likely to reimburse the partner for the amount of the sanction. Thus, when calculating the amount of a sanction, the offending lawyer's ability to pay should be as important a consideration as compensating the aggrieved party.

Courts have expressly or implicitly recognized this consideration. In several cases, the court expressly stated that it must take into account the offending lawyer's ability to pay when de-

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42. See Townsend v. Holman Consulting Corp., 881 F.2d 788, 790 n.1 (9th Cir.), rehe'g granted, 888 F.2d 646 (9th Cir. 1989), vacated, 914 F.2d 646 (9th Cir. 1990) (en banc); FDIC v. Tefken Constr. & Installation Co., 847 F.2d 440, 444 (7th Cir. 1988).

43. It can be argued that the purpose of Rule 11 would be thwarted if a law firm were to reimburse one of its professionally irresponsible partners. Nevertheless, this situation is not to be confused with the argument that clients should not be permitted to reimburse their lawyers for the lawyers' violations of Rule 11 because to do so "would interfere with the courts' attempt to maintain discipline." The quotation is from Judge Weinstein's opinion in Eastway Construction Corp. v. City of New York, 637 F. Supp. 553, 570 (E.D.N.Y. 1989), modified, 821 F.2d 121, 123 (2d Cir.), cert. denied, 484 U.S. 918 (1987).
terminating the amount of the sanction.\textsuperscript{44} There are also several cases in which the court, while treating the reasonable attorney's fees of the aggrieved party as the starting point, fixed the amount of the sanction at a figure far below the prevailing side's fees and other expenses.\textsuperscript{45} Indeed, most monetary sanctions have been for relatively small dollar amounts; in only about a quarter of the cases in the above Table was the sanction as high as ten thousand dollars.\textsuperscript{46} Although this Table represents only those cases in which a sanctioned attorney appealed the district court's judgment, an attorney sanctioned in an amount of ten thousand dollars or more probably would appeal the sanctioning judgment.

Some courts have justified reducing sanctions below the aggrieved parties' costs on the grounds that the efforts expended to defend against the frivolous positions were unreasonably extensive, unreasonably expensive, or both.\textsuperscript{47} In addition, through application of the doctrine of mitigation, courts frequently reduce sanctions below the fees requested by the aggrieved parties because the aggrieved parties' attorneys failed to take steps to reduce the costs of opposing the sanctioned conduct.\textsuperscript{48} In sum, many cases exist in which the court refused to reimburse the injured party for its total attorney's fee because the fee was unreasonable, because, viewed as a sanction, the fee was inappropriately high, or because the fee was beyond the lawyer's ability to pay. Judges, in such cases, wisely read the last sentence of Rule 11 as if it provided for payment of all, or an appropriate percentage, of the injured party's reasonable at-

\textsuperscript{44} See, e.g., Jackson v. Law Firm of O'Hara, Ruberg, Osgood & Taylor, 875 F.2d 1224, 1229-30 (6th Cir. 1989); Doering v. Union County Bd. of Chosen Freeholders, 857 F.2d 191, 196 (3d Cir. 1988); Oliveri v. Thompson, 803 F.2d 1265, 1261 (2d Cir. 1986), cert. denied, 484 U.S. 918 (1987) (sanctions reversed); cf. Kapco Mfg. Co. v. C & O Enters., Inc., 886 F.2d 1485, 1496 (7th Cir. 1989) (sanction in excess of $45,000 imposed on attorney Eugene F. Friedman despite fact that the amount constituted a "hardship" on him).


\textsuperscript{46} See Appendix for cases in which sanctions totaled at least $10,000. The largest sanction was that against attorney Joseph L. Alioto in the sum of $294,141.10 in the case of Unioil, Inc. v. E.F. Hutton & Co., Inc., 809 F.2d 548, 559 (9th Cir.), cert. denied, 484 U.S. 822 (1987); cf. Brandt v. Schal Assocs., Inc., 131 F.R.D. 512, 522 (N.D. Ill. 1990) (imposing sanctions of $443,564.66).

\textsuperscript{47} See, e.g., INVST Fin. Group, 815 F.2d at 404.

torney's fee. This interpretation is a sensible way of reconciling Rule 11's purpose of deterrence with the purpose of compensating the victim suggested in the Rule's last sentence.

III. REQUIRING SANCTIONED PARTIES AND ATTORNEYS TO PAY A PORTION OF THE SANCTION TO THE COURT

To further enhance the usefulness of Rule 11, district courts should consider adopting a local rule that requires a sanctioned party or attorney to pay to the court a specified percentage of every Rule 11 monetary sanction. I have found only one appellate court opinion approving such a payment.49 No Rule 11 language, however, requires that sanctioned parties or attorneys pay monetary sanctions exclusively to prevailing litigants. In fact, reasons exist for apportioning cash payments by offending parties or lawyers between district courts and aggrieved parties.

Rule 11 speaks of "appropriate" sanctions. Partial reimbursement of courts for needless expenditure of time seems entirely appropriate. Opposing parties are not the only entities injured by Rule 11 violations; courts (and ultimately the taxpayers) also are injured, having had to spend time needlessly on frivolous cases and legal maneuvers. Thus, a rule requiring sanctioned parties to pay a portion of sanctions to courts would shift at least a fraction of the costs of operating the judicial system to those who unjustifiably contribute to increasing those costs. Such a rule also would serve the salutary purpose of reminding litigants and their attorneys that frivolous litigation aggrieves not only opposing parties, but also the courts.

49. See Four Keys Leasing & Maintenance Corp. v. Simithis, 849 F.2d 770, 772 (2d Cir. 1988) (court ordered the attorney to pay $2,500 in legal fees and an additional $2,500 fine to the court). In Adduono v. World Hockey Ass'n, 109 F.R.D. 375 (D. Minn. 1988), rev'd, 824 F.2d 617 (8th Cir. 1987), District Judge Alsop required plaintiff's lawyer to pay a $5,000 sanction to defendant and a $5,000 "fine," imposed pursuant to the court's inherent power to regulate attorney conduct, to be paid to the World Hockey Association and to the National Hockey League. Id. at 380-81. The Eighth Circuit reversed because the sanction was not based on the sanctioned attorney’s signature or a paper filed in court. 824 F.2d at 621. Cf. Lomeli v. INS, 737 F.2d 824, 824 (9th Cir. 1984) (fine payable to Ninth Circuit court clerk imposed but not under Rule 11); see also Schwarzer, New Federal Rule 11, supra note 6, at 202 (stating that "[i]n order to impose a fine under Rule 11 without extending the procedural protections of criminal contempt proceedings risks reversal on appeal and is inadvisable").
IV. PUBLICIZING IMPOSITION OF SANCTIONS AND REPORTING THEIR IMPOSITION TO STATE DISCIPLINARY AUTHORITIES

To maximize the deterrent effect of Rule 11 sanctions, courts should ensure that the identity of sanctioned lawyers is a matter of public record, and should routinely report imposition of sanctions on lawyers to the state bar disciplinary bodies of the fifty states.50 Unfortunately, district courts sometimes impose sanctions without filing published opinions, and appellate court opinions all too often fail to make clear whether the district court imposed the sanction on the client, the client’s lawyer, or both.51 As a result, it is impossible to know on whom the court imposed a sanction, at least without going to the record in the district clerk’s office. Although a reviewing court may be understandably reluctant to publicize the name of a sanctioned attorney when the lower court improperly imposed the sanction,52 it is difficult to justify anonymity when the appellate court affirms the sanction. As noted above, the adverse publicity to a sanctioned lawyer can be an important part of the deterrent effect of sanctions.53 If the public is not made aware of the discipline, the professional ignominy of having been sanctioned or otherwise disciplined is far less intense.54

Once a court has imposed a sanction on an attorney, it is difficult to justify not reporting the sanction to the disciplinary body of the jurisdiction which has authorized the sanctioned attorney to engage in the practice of law. Reporting of Rule 11 sanctions will give state disciplinary authorities an opportunity to review the records of attorneys who previously had violated

50. Where a sanction is reversed on appeal, care must be taken to notify the state disciplinary authorities though the erroneously sanctioned attorney can be relied on to make sure that the record is corrected. The Seventh Circuit in at least two cases has referred attorneys to their state bar to consider taking disciplinary action or investigation. See Steinle v. Warren, 765 F.2d 95, 102 (7th Cir. 1985); Lepucki v. Van Wormer, 765 F.2d 56, 89 (7th Cir.) (per curiam), cert denied, 474 U.S. 827 (1985). In the former case the court directed its clerk “to transmit as promptly as practicable to the Board of Attorneys Professional Responsibility, Madison, Wisconsin, a certified copy of the record in this case including a copy of this opinion, for such disciplinary action as that Committee may consider appropriate.” Steinle, 765 F.2d at 102.

51. See cases cited supra note 12.

52. See Townsend v. Holman Consulting Corp., 881 F.2d 788, 790 (9th Cir.), reh’g granted, 888 F.2d 646 (9th Cir. 1989), vacated, 914 F.2d 1136 (9th Cir. 1990) (en banc).

53. See supra note 42 and accompanying text.

54. This may be a reason why the Bar has been so reluctant over the years to conduct disciplinary proceedings in public.
the state's code of professional responsibility in light of their Rule 11 violations. Regular reporting of all Rule 11 sanctions to state disciplinary authorities also would disclose multiple Rule 11 sanctions against the same lawyer.\textsuperscript{55} To effectively use this information, state disciplinary bodies should investigate every lawyer who has received more than one Rule 11 sanction. Reporting by federal district clerks to state authorities would make this salutary practice possible.

CONCLUSION

The tendency of many federal judges to use Rule 11 as a fee-shifting device is an important reason why the Rule has created so much controversy and criticism. This Essay argues that courts primarily should use Rule 11 to improve the professional responsibility of litigators in the federal courts by imposing sanctions on lawyers who abuse the processes of the courts. Such sanctions can and should include a reasonable fine payable to the district court in which the Rule violation occurred. If Rule 11 is regarded as a disciplinary rule for lawyers, I believe it will be more effective and will ultimately achieve greater acceptance among members of the federal court bars.

\textsuperscript{55} Although my review of the cases contained in the above Table has uncovered no instances of sanctions imposed on a lawyer in more than one case, this Table is not comprehensive. My study of Rule 11 cases was confined to those cases in which sanctions against lawyers were appealed and does not include opinions dated after December 31, 1989. See also \textit{In re Kunstler}, 914 F.2d 505, 525 (4th Cir. 1990) (stating in dicta that a court might increase a sanction against an attorney if the attorney has already been sanctioned to enhance the deterrent effect of the sanction).
This Appendix cites in numerical order of the circuits, after the D.C. Circuit, and alphabetically within each circuit, each case included shown in Columns I and II respectively of the Table above. Cases in which a district court imposed sanctions in the sum of $10,000 or more have an asterisk at the beginning of the citation.

COLUMN I

land Demolition Co. v. Azcon Scrap Corp., 827 F.2d 984 (4th Cir. 1987); Cohen v. Virginia Elec. & Power Co., 788 F.2d 247 (4th Cir. 1986); Dalton v. United States, 800 F.2d 1316 (4th Cir. 1986), cert. denied, 481 U.S. 1024 (1987); *Fahrenz v. Meadow Farm Partnership, 850 F.2d 207 (4th Cir. 1988); Langham-Hill Petroleum, Inc. v. Southern Fuels Co., 813 F.2d 1327 (4th Cir.), cert. denied, 484 U.S. 829 (1987); Barrios v. Pelham Marine, Inc., 796 F.2d 128 (5th Cir. 1986); Brown v. Nationwide Mut. Ins. Co., 805 F.2d 1242 (5th Cir. 1986); *Chapman & Cole v. Itel Container Int'l B.V., 865 F.2d 676 (5th Cir. 1989), cert. denied, 110 S. Ct. 201 (1989); *In re Ginther, 791 F.2d 1151 (5th Cir. 1986); Hale v. (Judge) Harney, 786 F.2d 688 (5th Cir. 1986); Howell v. Sup. Ct. of Texas, 885 F.2d 308 (5th Cir. 1989), cert. denied, 110 S. Ct. 3213 (1990); *Jennings v. Joshua Ind. School Dist., 869 F.2d 870 (5th Cir.), modified and reh'g denied, 877 F.2d 313 (5th Cir. 1989), cert. denied, 110 S. Ct. 3212 (1990); Markwell v. County of Bexar, 878 F.2d 899 (5th Cir. 1989); Pin v. Texaco, Inc., 793 F.2d 1448 (5th Cir. 1986); Robinson v. National Cash Register Co., 808 F.2d 1119 (5th Cir. 1987); Saint Amant v. Bernard, 859 F.2d 379 (5th Cir. 1988); Southern Leasing Partners, Ltd. v. McMullan, 801 F.2d 783 (5th Cir. 1986); *Truck Treads, Inc. v. Armstrong Rubber Co., 868 F.2d 1472 (5th Cir. 1989); Veillon v. Exploration Services, 876 F.2d 1197 (5th Cir. 1989); Albright v. Upjohn Co., 788 F.2d 1217 (6th Cir. 1986); Herron v. Jupiter Transp. Co., 858 F.2d 332 (6th Cir. 1988); *INVST Fin. Group, Inc. v. Chem-Nuclear Sys., Inc., 815 F.2d 391 (6th Cir. 1987), cert. denied, 484 U.S. 927 (1987); Jackson v. Law Firm of O'Hara, Ruberg, Osborne & Taylor, 875 F.2d 1224 (6th Cir. 1989); Lemaster v. United States, 891 F.2d 115 (6th Cir. 1989); Brown v. National Bd. of Med. Examiners, 800 F.2d 168 (7th Cir. 1986); *Burowski v. DePuy, Inc., 850 F.2d 297 (7th Cir. 1988); Cannon v. Loyola Univ., 784 F.2d 777 (7th Cir. 1986), cert. denied, 479 U.S. 1033 (1987); Dreis & Crump Mfg. Co. v. International Assn. of Machinists, 802 F.2d 247 (7th Cir. 1986); Frantz v. United States Powerlifting Fed'n, 836 F.2d 1063 (7th Cir. 1987); Frazier v. Cast, 771 F.2d 259 (7th Cir. 1985); *Hamre v. County of Lake, 871 F.2d 58 (7th Cir. 1989), cert. denied, 110 S. Ct. 146 (1989); Hapaniewski v. City of Chicago Hgts., 883 F.2d 576 (7th Cir. 1989), cert. denied, 110 S. Ct. 1116 (1990); *Hays v. Sony Corp. of America, 847 F.2d 412 (7th Cir. 1988); Insurance Benefit Adm'rs v. Martin, 871 F.2d 1354 (7th Cir. 1989); *Kapco Mfg. Co. v. C & O Enters., Inc., 886 F.2d 1485 (7th Cir. 1989); Lepucki v. Van Wormer, 765 F.2d 86 (7th Cir.), cert. denied, 474 U.S. 827 (1985); Local 106 v. Homeway Memo-
rial Gardens, Inc., 838 F.2d 958 (7th Cir. 1988); Magnus Elecs., Inc. v. Masco Corp., 871 F.2d 1354 (7th Cir.), cert. denied, 110 S. Ct. 237 (1989); Mars Steel Corp. v. Continental Bank, N.A., 880 F.2d 928 (7th Cir. 1989); Medical Emergency Serv. Assoc. v. Foulke, 844 F.2d 391 (7th Cir. 1988); Ordower v. Feldman, 826 F.2d 1569 (7th Cir. 1987); Rodgers v. Lincoln Towing Serv., Inc., 771 F.2d 194 (7th Cir. 1985); In re Ronco, Inc., 838 F.2d 212 (7th Cir. 1988); S.A. Auto Lube, Inc. v. Jiffy Lube Int'l, Inc., 842 F.2d 946 (7th Cir. 1988); Fred A. Smith Lumber Co. v. Edidin, 845 F.2d 750 (7th Cir. 1988); *Steinle v. Warren, 765 F.2d 95 (7th Cir. 1985); Triad Assocs., Inc. v. Chicago Hous. Auth., 892 F.2d 583 (7th Cir. 1989), cert. denied, 111 S. Ct. 129 (1990); EEOC v. Milavetz & Assocs., 863 F.2d 613 (8th Cir. 1988); *Lupo v. R. Rowland & Co., 857 F.2d 482 (8th Cir. 1988), cert. denied, 109 S. Ct. 2101 (1989); Hewitt v. City of Stanton, 798 F.2d 1230 (9th Cir. 1986); Hudson v. Moore Business Forms, Inc., 836 F.2d 1156 (9th Cir. 1987); Huettig & Schromm, Inc. v. Landscape Contractors Council, 790 F.2d 1421 (9th Cir. 1986); *In re Ital Sec. Litig., 791 F.2d 672 (9th Cir. 1986), cert. denied, 479 U.S. 1033 (1987); *King v. Idaho Funeral Serv. Ass'n, 862 F.2d 744 (9th Cir. 1988); McCabe v. General Foods Corp., 811 F.2d 1336 (9th Cir. 1987); MGIC Indem. Corp. v. Weisman, 803 F.2d 500 (9th Cir. 1986); In re Disciplinary Action against (Paul) Mooney, 841 F.2d 1003 (9th Cir. 1988); Pipe Trades Council Local 159 v. Underground Contractors Ass'n, 855 F.2d 1275 (9th Cir. 1987); Pony Express Courier v. Pony Express Delivery, 872 F.2d 317 (9th Cir. 1989); *Unioil, Inc. v. E.F. Hutton & Co., 809 F.2d 54 (9th Cir. 1986), cert. denied, 484 U.S. 822 (1987); Monument Builders v. American Cemetery Ass'n, 891 F.2d 1473 (10th Cir. 1989); *Blackwell v. Dep't of Offender Rehabilitation, 807 F.2d 914 (11th Cir. 1987); Collins v. Walden, 834 F.2d 961 (11th Cir. 1987); DeSisto College, Inc. v. Line, 888 F.2d 755 (11th Cir. 1989), cert. denied, 110 S. Ct. 2219 (1990); Hatteras of Lauderdale, Inc. v. Gemini Lady, 853 F.2d 848 (11th Cir. 1988); Jorgenson v. Volusia County, 846 F.2d 1350 (11th Cir. 1988); *Ortho Pharmaceutical Corp. v. Sona Distribrs., 847 F.2d 1512 (11th Cir. 1988); United States v. Milam, 855 F.2d 739 (11th Cir. 1988).

COLUMN II

Kamen v. American Tel. & Tel. Co., 791 F.2d 1006 (2d Cir. 1986); Mercado v. United States Customs Serv., 873 F.2d 641 (2d Cir. 1989); *Oliveri v. Thompson, 803 F.2d 1285 (2d Cir. 1986), cert. denied, 480 U.S. 918 (1987); Sanko S.S. Co., Ltd. v. Galin,
835 F.2d 51 (2d Cir. 1987); *Dura Systems, Inc. v. Rothbury Investments, Ltd., 886 F.2d 551 (3d Cir. 1989), cert. denied, 110 S. Ct. 844 (1990); Evenson, Auchmuty & Greenwald v. Holtzman, 775 F.2d 535 (3d Cir. 1985); Mary Ann Pensiero, Inc. v. Lingle, 847 F.2d 90 (3d Cir. 1988); *Napier v. Thirty or More Unidentified Fed. Agents, 855 F.2d 1080 (3d Cir. 1988); *Schering Corp. v. Vitarine Pharmaceuticals, Inc., 889 F.2d 490 (3d Cir. 1989); Snow Machines, Inc. v. Hedco, Inc., 838 F.2d 718 (3d Cir. 1988); Introcaso v. Cunningham, 857 F.2d 965 (4th Cir. 1989); Kirby v. Allegheny Beverage Corp., 811 F.2d 253 (4th Cir. 1987); Stevens v. Lawyers Mut. Liab. Ins. Co., 789 F.2d 1056 (4th Cir. 1986); Foval v. First Nat'l Bank of Commerce, 841 F.2d 126 (5th Cir. 1988); Harmony Drilling Co. v. Kreutter, 846 F.2d 17 (5th Cir. 1988); *Kucel v. Walter E. Heller & Co., 813 F.2d 67 (5th Cir. 1987); *Adduono v. World Hockey Ass’n, 824 F.2d 617 (8th Cir. 1987); Aetna Life Ins. Co. v. Alla Medical Servs., Inc., 855 F.2d 1470 (9th Cir. 1988); In re Akros Installations, Inc., 834 F.2d 1526 (9th Cir. 1987); Ault v. Hustler Magazine, Inc., 860 F.2d 877 (9th Cir. 1988), cert. denied, 109 S. Ct. 1532 (1989); California Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc., 818 F.2d 1466 (9th Cir. 1987), cert. denied, 484 U.S. 1006 (1988); Cunningham v. County of Los Angeles, 869 F.2d 427 (9th Cir.), vacated, 879 F.2d 481 (9th Cir. 1989), cert. denied, 110 S. Ct. 757 (1990); Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531 (9th Cir. 1986); Great Hawaiian Fin. Corp. v. Aiu, 863 F.2d 617 (9th Cir. 1988); Tom Growney Equip., Inc. v. Shelley Irrigation Dev., Inc., 834 F.2d 833 (9th Cir. 1987); *Jensen Elec. Co. v. Moore, Caldwell, Rowland & Dodd, Inc., 873 F.2d 1327 (9th Cir. 1989); Lacina v. G-K Trucking, 802 F.2d 1190 (9th Cir. 1986), cert. granted and vacated, 483 U.S. 1003 (1987), on remand, 822 F.2d 51 (9th Cir. 1987), appeal after remand, 877 F.2d 741 (9th Cir.), cert. denied, 110 S. Ct. 563 (1989); Lemos v. Fencl, 828 F.2d 616 (9th Cir. 1987); Mossman v. Roadway Express, Inc., 789 F.2d 804 (9th Cir. 1986); Rachel v. Banana Republic, Inc., 831 F.2d 1503 (9th Cir. 1987); Townsend v. Holman Consulting
Corp., 881 F.2d 788 (9th Cir. 1989); United Energy Owners Comm., Inc. v. United States Energy Management Sys., Inc., 837 F.2d 356 (9th Cir. 1988); Woodrum v. Woodward County, 866 F.2d 1121 (9th Cir. 1989); In re Yagman, 796 F.2d 1165, modified and reh'g denied, 803 F.2d 1085 (9th Cir. 1986), mandamus granted sub nom. Brown v. Baden, 815 F.2d 575 (9th Cir.), cert. denied, 484 U.S. 963 (1987); *Zaldivar v. City of Los Angeles, 780 F.2d 823 (9th Cir. 1986); O'Rourke v. City of Norman, 875 F.2d 1465 (10th Cir. 1989); Corporation of the Presiding Bishop v. Associated Contractors, Inc., 888 F.2d 1398 (11th Cir. 1989), cert. denied, 110 S. Ct. 1133 (1990); Donaldson v. Clark, 819 F.2d 1551 (11th Cir. 1987); Threaf Properties, Ltd. v. Title Ins. Co., 875 F.2d 831 (11th Cir. 1989).