Sanctioning Legal Organizations under the New Federal Civil Rule 11:
Radical Changes Loosen More Unforeseeable Forces

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I. Introduction

Prompted by their perception that significant civil litigation misconduct involving frivolous papers was occurring in federal trial
courts, the federal rulemakers first effected a major overhaul of Rule 11 of the Federal Rules of Civil Procedure in 1983. The changes in the Rule, which had lain dormant since 1938, greatly expanded the circumstances under which sanctions for frivolous papers might be imposed. The changes led to "a cottage industry

1. Professor Arthur R. Miller has said the following about the 1983 Rule's amendments:

    There is a widespread feeling that there is a lot of frivolous conduct on the part of lawyers out there, a lot of vexatious conduct, a lot of inefficient conduct. . . . I repeat, we do not know how much of this there really is, because what one person would call frivolous, somebody else would call meaningful or substantive. We may be the victims of the phenomenon known as the cosmic anecdote: Somebody tells a war story at one bar association meeting, and it is picked up by ten other lawyers who then tell the same anecdote at ten other bar association meetings, and before you know it people are rioting in the streets saying the foundations of the republic are crumbling, because this incident, which has only happened once, now appears to have happened a thousand times. We really don't know, but the advisory committee . . . felt that there had to be some meaningful restraint put on lawyer behavior to cut out some of this type of conduct.


3. On the operation of the 1938 Rule, see D. Michael Risinger, Honesty in Pleading and Its Enforcement: Some 'Striking' Problems With Federal Rule of Civil Procedure II, 61 MINN. L. REV. 1, 5 (1976) (examining the historical development of Rule 11 as well as the inconsistency between the obligations the Rule imposes and the mechanism it provides for enforcement).

of routine sanctions motions" for litigators\textsuperscript{5} and to "a cottage industry of writing about Rule 11" for academicians.\textsuperscript{6} One distinguished observer noted that the 1983 Rule had "an impact that has likely exceeded its drafters' expectations."\textsuperscript{7} Another found that the rulemakers had undertaken "radical changes in direction" that loosened unforeseen forces.\textsuperscript{8}

The Rule was again overhauled in 1993.\textsuperscript{9} These most recent amendments, founded on both anecdotal and empirical evidence about the 1983 Rule,\textsuperscript{10} should dampen existing cottage industries. But new industries may emerge, as once more the civil rulemakers have undertaken radical changes in direction with unforeseen consequences. One such change involves new institutional responsibilities for legal organizations, including private law firms, in-house corporate legal departments, and public offices housing such officials as attorneys general or agency commissioners. This Article will examine those new loosened forces.

\begin{itemize}
\item \textsuperscript{5} Richard L. Marcus, \textit{Of Babies and Bathwater: The Prospects for Procedural Progress}, 59 BROOK. L. REV. 761, 796 (1993); \textit{see also} Jerald Solovy et al., \textit{Curbing Frivolity in the Courts: Updated Cure}, NAT’L L.J., May 2, 1994, at A19 ("By 1986, Rule 11 had outstripped the Racketeer Influenced and Corrupt Organizations Act as the cottage industry of the 1980s.").
\item \textsuperscript{6} Marcus, \textit{supra} note 5, at 796.
\item \textsuperscript{8} Marcus, \textit{supra} note 5, at 800.
\item \textsuperscript{10} For a review of some of the empirical data, see Marcus, \textit{supra} note 5, at 797-98. For an account of how the 1993 rulemakers gathered evidence, see Jeffrey A. Parness, \textit{Fines Under New Federal Civil Rule 11: The New Monetary Sanctions for the 'Stop-and-Think-Again' Rule}, 1993 B.Y.U. L. REV. 879, 883-84, 891-95 (discussing the differences between the 1983 and 1993 amendments to Rule 11).
II. Responsibilities of Legal Organizations under the New Rule 11: More Radical Changes in Direction

Before December 1993, Rule 11 primarily addressed the responsibilities of individuals signing litigation papers. Under the 1938 Rule, papers had to be signed by an attorney representing a party or by an unrepresented party. Papers that were unsigned or signed with "intent to defeat the purpose" of the Rule could be stricken. The signature requirement helped ensure that the papers were neither "sham" nor false and that the signer had determined that there was "good ground" to support the allegations therein. An attorney who willfully violated the 1938 Rule could be "subjected to appropriate disciplinary action."

Under the 1983 Rule, the signature of an attorney or of an unrepresented party helped ensure that a paper filed with the court was "well grounded in fact" and was not "interposed for any improper purpose." A violation of Rule 11 would lead to a mandatory sanction on the signer, the represented party, or both. Any sanction had to be "appropriate" and frequently involved "an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the . . . paper, including a reasonable attorney's fee."

The 1993 Rule maintains a signature requirement but broadens the requirement's coverage to not only all who sign, but also to all who file, submit, or later advocate frivolous papers. It specifi-

11. 1983 Amendments to the Federal Rules, supra note 2, at 196 ("Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name. . . . A party who is not represented by an attorney shall sign his pleading . . . .").
12. Id. at 197.
13. Id.
14. Id. Apparently, under the 1938 Rule, the only form of nonwillful violation that might have subjected an attorney to appropriate disciplinary action was the insertion of "scandalous or indecent matter." Id.
15. Id.
16. 1983 Amendments to the Federal Rules, supra note 2, at 196 ("If a . . . paper is signed in violation of this rule, the court . . . shall impose upon the person who signed it, a represented party, or both, an appropriate sanction . . . .").
17. Id.
18. Fed. R. Civ. P. 11(a) ("Every . . . paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party.").
cally permits the sanctioning of "law firms" that "present" frivolous papers or that are responsible for the presentation of frivolous papers on behalf of others. Additionally, the Rule expressly recognizes that law firms, "absent exceptional circumstances," will be held jointly responsible for "violations committed by its partners, associates and employees." Finally, the Rule permits trial judges to take "initiative" against "an attorney, law firm, or party" regarding frivolous papers.

The legislative history accompanying the 1993 Rule goes further in broadening the coverage by recognizing that in "unusual circumstances" an attorney presenting a frivolous paper may escape sanction altogether; in such circumstances, a court would impose a sanction only upon those who "caused" the violation, including attorneys in the presenter's law firm, co-counsel, attorneys from different law firms, or the party. The Committee's Notes state that exemplary settings are those where "governmental agencies or other institutional parties . . . impose substantial restrictions on the discretion of individual attorneys employed by [them]."

Thus, the 1993 Rule clearly recognizes that a private law firm may be sanctioned for causing the presentation of a frivolous paper signed by one of its attorneys. To more fully promote the deterrence rationale underlying this Rule, law firms should be held accountable not only for certain vicarious liability, but also for failure to adequately supervise. These vicarious and supervisory duties constitute radical changes in direction. Under the 1983 Rule, the United States Supreme Court held that a law firm could not be sanctioned for a frivolous complaint signed by one of its attorneys. That holding has been overruled by the 1993 amendment. Some have read the 1993 amendments as based on the rulemakers' view that litigation standards will be enhanced because "the

19. Id. 11(c).
20. Id. 11(c)(1)(A).
21. Id. 11(c)(1)(B).
22. Id. 11 Advisory Committee's Notes.
23. FED. R. CIV. P. 11 Advisory Committee's Notes.
possession of law firm liability would create incentives for internal
monitoring" within law firms.25

However dramatic these changes, the 1993 rulemakers said little
else about when law firms might be sanctioned for causing Rule 11
violations.26 For example, while the rulemakers listed "a variety
of possible sanctions" against individuals available to the trial
court,27 they failed to speak much about sanctions against legal
organizations. The new Rule itself states that a "sanction may
consist of, or include, directives of a nonmonetary nature, an order
to pay a penalty into court, or . . . an order directing payment . . .
of some or all of the reasonable attorneys' fees and other expenses
incurred as a direct result of the violation."28 The accompanying
legislative history acknowledges the availability of sanctions such as
"striking the offending paper; issuing an admonition, reprimand, or
censure; requiring participation in seminars or other educational
programs; ordering a fine payable to the court; referring the matter
to disciplinary authorities (or, in the case of government attorneys,
to the Attorney General, Inspector General, or agency head)."29

Thus, forces are now loose that permit federal trial judges to
sanction private law firms and perhaps other legal organizations
under Rule 11. But little direction or explanation has been given by
the rulemakers; therefore, consequences are unforeseen and
potentially unconsidered. An examination of these forces and
consequences is vital in order to awaken entrepreneurs of new
cottage industries. More importantly, an examination is necessary
because the new Rule 11 forces have been loosened precisely at a

25. The Committee on Professional Responsibility of the Association of the Bar
of the City of New York, Discipline of Law Firms, 48 Rec. Ass'n B. City N.Y. 628,
636 n.8 (1993) [hereinafter Discipline of Law Firms].

26. Furthermore, little was said of law firm liability for Rule 11 sanctions in the
correspondence of interested persons forwarded to the federal rulemakers between
1990 and 1993. With the much appreciated assistance of the federal rulemakers' staff,
the author reviewed the 1993 Rule 11 file on May 13, 1993, in Washington, D.C.
It should be noted, however, that the Chicago Bar Association endorsed a new form
of sanction in 1990, requiring that law firms "institute internal approval procedures
to assure" future compliance with signature rules. Comment from The Chicago Bar
Association to the Committee on Rules of Practice and Procedure of the U.S. Judicial


28. Id. 11(c)(2).

29. Id. 11 Advisory Committee's Notes.
time when the topic of sanctioning legal organizations has been raised through lively debate elsewhere; study of the new Rule may inform those debates.

Approximately six months before the 1993 Rule took effect, the Committee on Professional Responsibility of the Association of the Bar of the City of New York issued a report recommending that the attorney disciplinary rules be amended to provide for the discipline of law firms, including both "specific standards of conduct for law firms and procedures for disciplining law firms." The purpose of the proposed amendment was to prompt law firms to find new ways to avoid civil and other liability for themselves and their members by improving firm-wide practices and procedures. Thus, the aim was comparable to the enunciated goal of the new Rule 11, which was "to deter repetition" of the sanctioned "conduct or comparable conduct by others similarly situated." The New York Bar report noted that its aim paralleled the goals recently pursued in tort-law liability and in administrative-agency sanctions.

Like the 1993 Rule, the New York Bar Association deems "policies on signing pleadings" to be "the responsibility of the entire firm," not just of a supervising or signing attorney. Thus, the association recommends that law firms be required to provide adequate supervision of the legal work of all partners, associates, and nonlawyers, with adequacy gauged by the "reasonable under the

30. Discipline of Law Firms, supra note 25, at 629.
31. Id.
32. FED. R. CIV. P. 11(c)(2).
34. Discipline of Law Firms, supra note 25, at 631. An example of a supervising lawyer's responsibility for the pleadings signed by others is found in Illinois Rules of Professional Conduct: "Each partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the conduct of all lawyers in the firm conforms to these Rules." ILL. R. CT., ART. VIII, R. 5.1.
circumstances” standard. Relevant circumstances include “the experience of the person whose work is being supervised” and “the likelihood that ethical questions might arise.”

III. Directing Loosened Forces: Legal Organizations, Adequate Supervision, and Appropriate Sanctions

In exploring the unforeseen consequences of organizational duties under the new Rule 11, three issues emerge: (1) What, if any, legal organizations beside private law firms are subject to possible sanction? (2) What constitutes adequate supervision by a legal organization of its attorneys who present papers? and, (3) Beyond the usual vicarious liability for monetary directives against their attorneys, what other sanctions may be “appropriate” for legal organizations? Exploration should inform not only those responsible for compliance or enforcement of the Rule, but also those debating the extension of lawyer discipline codes and the like to legal organizations.

A. Legal Organizations

While the new Rule 11 and its legislative history expressly recognize institutional responsibilities only for “law firms,” the inherent deterrence rationale also seemingly applies to other legal organizations, including in-house corporate law offices and govern-

35. Discipline of Law Firms, supra note 25, at 638.
36. Id.
37. FED. R. CIV. P. 11(c). The federal rulemakers did not define what constitutes a law firm. Typically, a firm may be a sole proprietorship, a professional service corporation, a professional association, or a limited liability company. See, e.g., ILL. SUP. CT. R. 721 (stating that law firms may be formed as professional corporations or more informal associations). The New York Bar Association approach seems suitable for the new Rule 11: “[T]he definition of a law firm, for disciplinary purposes, should depend on whether a group of lawyers hold themselves out to the public as practicing together.” Discipline of Law Firms, supra note 25, at 642.
38. FED. R. CIV. P. 11(c)(2).
mental law offices. Possible sanctions against such entities would "create incentives for internal monitoring," and this monitoring could be judicially reviewed for adequacy under a standard of "reasonable under the circumstances." Moreover, there is little sense in deeming "policies" regarding the signing of litigation papers to be "the responsibility" of an entire private law firm and then waiving such responsibility for the law offices of private corporations or public agencies. Neither the federal rulemakers nor the New York City Bar Association found that private law firms were more likely to be unreasonable or otherwise unprofessional in presenting litigation papers than other legal organizations. Thus, the new Rule should be read broadly to subject varying forms of legal organizations to possible sanction.

Incidentally, even if the reach of the new Rule is read to exclude legal organizations other than law firms, other entities may still be subject to "the inherent power of a federal court to sanction." As the United States Supreme Court stated, it is not to be "lightly" assumed that new procedural rules are intended to depart from established principles regarding the scope of inherent court power. Inherent power may be employed "to achieve the orderly and

39. Of course, there are differences between private and public legal organizations that may necessitate differing approaches to deterrence when sanctions are considered for comparable misconduct. See, e.g., RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 156 cmts. a-b (Preliminary Draft No. 10, 1994) (discussing differences in goals, legal restraints, and process powers).

40. Discipline of Law Firms, supra note 25, at 636 n.8.

41. Id. at 638. Of course, because clients employing private law firms, in-house corporate offices, and governmental bodies have different expectations, motivations, and attorney relationships, reasonableness standards should vary widely between legal organizations. Even in a single legal organization, reasonable lawyering will vary widely if different types of clients are represented or if the same client is litigating several dissimilar lawsuits.

42. Discipline of Law Firms, supra note 25, at 631.

43. See, e.g., N.Y. CIV. PRAC. L. & R. 130-1.1(b) (McKinney 1994) (stating that a financial sanction may be assessed upon an attorney or "upon a partnership, firm, corporation, government agency, prosecutor's office, legal aid society or public defender's office with which the attorney is associated and that has appeared as attorney of record"); Brignoli v. Balch Hardy & Scheinman, Inc., 735 F. Supp. 100, 101 (S.D.N.Y. 1990) (indicating that a law firm may be sanctioned for multiplying proceedings unreasonably and vexatiously (citing 28 U.S.C. § 1927)).


45. Id. at 47.
expeditious disposition of cases" by regulating the conduct of not only parties, lawyers, and witnesses, but also legal organizations providing legal services.

B. Adequate Supervision

The recent New York City Bar Association report provides a good general statement regarding a legal organization’s responsibility for adequately supervising attorneys who present civil litigation papers:

A law firm shall adequately supervise the work of all partners, associates and non-lawyers who work at the firm. The degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter and the likelihood that ethical problems might arise in the course of working on the matter . . . . [E]very lawyer’s and non-lawyer’s work should be supervised to some degree. Depending upon the circumstances, adequate supervision may include steps such as review of work product [and] discussion of . . . client problems . . . .

In applying amended Rule 11, courts should recognize the varying circumstances under which federal court papers are presented (that is, signed, filed, submitted, or later advocated).

Consider a legal organization’s duty to supervise those responsible for a complaint that commences a civil action filed in a federal court. Before the complaint is filed, the legal organization must supervise its lawyers and nonlawyers alike to make sure that the complaint is “not being presented for any improper purpose,” is drafted to include “warranted” legal contentions and factual allegations having a sufficient evidentiary basis, and is formed only after “an inquiry reasonable under the circumstances.” Surely, what is minimally adequate for an action involving only a few dollars and no major injunctive relief may be inadequate for a

46. Link v. Wabash R.R. Co., 370 U.S. 626, 630-31 (1962); see also Pagano v. Rand Materials Handling Equip., 621 N.E.2d 26, 29 (Ill. App. Ct. 1993) (stating that although a statute foreclosed sanctioning a law firm for the frivolous litigation papers of its attorney, the “inherent power of a court over all those who appear before it” allows such a sanction).

47. Discipline of Law Firms, supra note 25, at 638.

48. FED. R. CIV. P. 11(b).

49. Id.
multimillion dollar civil action involving alleged sexual abuse by a well-known member of the clergy or sexual harassment by a high-ranking government official. For many settings, adequate prefiling supervision by a legal organization may simply entail the distribution of copies of professional conduct standards, the distribution of memos saying, “We need to have compliance,” and occasional meetings at which some “bright young” lawyer talks about the standards.50 In other settings, perhaps two or more attorneys should be required to inspect certain documents before any filing.51

After filing, an organization’s duty to supervise changes. Consider how such a duty can be met when an attorney filing a complaint is subject to a Rule 11 notice of concern about apparent frivolity. The notice of concern triggers a safe harbor period within which the challenged complaint should be reexamined and perhaps amended or withdrawn in order to avoid an assessment of “reasonable expenses and attorneys’ fees.”52 A legal organization should at least have devices in place to help ensure that during the safe harbor period the signing attorney, the fact investigator, the legal researcher, and others will stop and reassess before acting again. On occasion, perhaps more devices would be needed, such as oversight by an internal review committee of attorneys (and perhaps others) theretofore not personally involved in the presentation of the complaint.53

Should the safe harbor period pass and an adversary continue to challenge a complaint for frivolity by moving for an award of fees and expenses, adequate supervision seemingly should require additional action by the responsible legal organization. The responsible legal organization must ensure that new steps are taken that encourage a reassessment of the complaint. The third assessment should differ from the initial and safe harbor steps.

52. FED. R. CIV. P. 11(c)(1).
53. An informal survey by the author of all major Illinois law firms (those with 25 or more attorneys) in the Spring of 1994 indicated that few law firms have changed policy in response to the new Rule 11 (data on file with author).
C. Appropriate Sanctions

Besides joint responsibility for awards of attorney’s fees, expenses, and other monetary directives issued against its lawyers, what other sanctions may be appropriate for legal organizations that cause Rule 11 violations? An array of alternative sanctions are necessary to encourage a legal organization’s adequate supervision of personnel who present papers. At times, sanctioning an organization may even be appropriate when “blame” cannot be assigned to any “particular lawyers.” A sanction might address problems with the organization’s “ethical infrastructure”—or “bureaucratic controls” designed to limit organizational “exposure.”

Two forms of sanctions against legal organizations for inadequate supervision seem especially worthy: monetary directives for which no individual is responsible, and injunctions or, preferably, admonitions about infrastructure failings that are accompanied by organizational reforms.

Monetary directives under the new Rule could include “an order to pay a penalty into court” and “an order directing payment . . . of some or all of the reasonable attorneys’ fees and other expenses

54. FED. R. CIV. P. 11(c)(1)(A).

55. While the Rule’s acknowledgment of joint law firm “responsibility for violations committed by its partners, associates and employees” occurs in a provision that elsewhere speaks only of fees and expenses, id., joint responsibility for other monetary directives—such as fines payable to the court—would serve the deterrence function of the Rule, especially given that most monetary directives will involve fines, id. 11 Advisory Committee’s Notes. Of course, should a court not impose joint responsibility for fines, it might reduce assessments against individual attorneys with no lessened deterrence resulting.

56. Nonmonetary sanctions against legal organizations were contemplated, though not implemented, by the federal rulemakers. Supra text accompanying notes 27-29. Trial courts are expressly authorized to initiate a sanction hearing against a law firm believed to have violated the Rule. FED. R. CIV. P. 11(c)(1)(B).

57. Schneyer, Professional Discipline for Law Firms?, supra note 33, at 8.

58. Id. at 10.

59. Id. at 5. Of course, even two law firms with comparable size, revenues, clients, and workload can have quite different bureaucratic controls. Firms may have strong central management (with, for example, a dominant managing partner), decentralized committee responsibilities, or a more democratic flavor (where no individual or group assumes much authority).
incurred as a direct result of the violation." Fines payable to the court are preferred, with fees and expenses awarded only when needed "for effective deterrence"—usually occurring in "unusual circumstances" and involving papers presented for an "improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." District judges will be challenged in using the newly loosened force to issue monetary directives necessary for effective deterrence of Rule 11 violations by legal organizations.

Sanctions involving infrastructure reforms would, as intimated above, follow judicial review of organizational policies involving prefiling preparation of litigation papers, responses to an opponent's notice of concern during a safe harbor period, responses to judicial initiatives into possible Rule 11 violations, and procedures employed when an adversary seeks sanctions after a safe harbor period has run. Typically, the infrastructure addressed by such sanctions might be described by the organization's policy manual, formal rules, or established practice in operating committees and allocating responsibilities. Furthermore, nonmonetary sanctions could encompass an organization's techniques for training or educating its personnel about Rule 11 or could simply involve "an admonition, reprimand, or censure" directed at, and circulated within, the organization.

Given this new responsibility for monitoring litigation practices of private law firms, corporate legal departments, and United States Attorney's Offices, and given the lack of transferable judicial experience elsewhere in assuring that adequate supervision occurs in law offices, certain comparisons seem helpful for those directing the

60. FED. R. CIV. P. 11(c)(2).
61. Id.
62. Id. 11(b)(1) Advisory Committee's Notes.
63. One of the possible differences between private and public legal organizations relevant here is the availability of a sovereign immunity defense.
64. Schneyer, Professional Discipline for Law Firms?, supra note 33, at 5.
65. FED. R. CIV. P. 11 Advisory Committee's Notes (indicating that sanctions may require "participation in seminars or other educational programs").
66. Id. (indicating that admonition, reprimand, and censure are possible sanctions); see also Golden Eagle Distrib. Corp. v. Burroughs Corp., 103 F.R.D. 124, 129 (N.D. Cal. 1984) (discussing the circulation of a sanction order to the offending lawyer's firm), rev'd on other grounds, 801 F.2d 1531 (9th Cir. 1986).
newly loosened forces. In particular, federal judges under the new Rule 11 could look to two arenas.

First, they could examine procedural due process cases involving the lack of an opportunity for a hearing prior to the deprivation of life, liberty, or property by some state entity. Absent "extraordinary situations," the United States Supreme Court has held that some type of predeprivation hearing is constitutionally necessary. When losses can be anticipated and avoided without undue burden, state entities must establish mechanisms that help protect against such foreseeable harm. These mechanisms are analogous to legal organizations' supervisory infrastructure. Of course, responsibility is not unlimited: It has been recognized that these mechanisms cannot prevent random and unauthorized acts. Similarly, guidelines for adequate supervision under Rule 11 could be grounded on differentiations between feasible supervisory mechanisms and random and unauthorized acts that cannot be deterred effectively.

Second, federal judges could employ civil rights cases involving governmental agency failures in hiring and personnel oversight. While vicarious liability for an individual agent's acts is foreclosed, 67

67. Fuentes v. Shevin, 407 U.S. 67, 90-92 (1972) (stating that "truly unusual" situations include a national war effort, a bank failure, and the risks posed by misbranded drugs and contaminated food).
68. Boddie v. Connecticut, 401 U.S. 371, 379 (1971) (stating that "an individual be given an opportunity for a hearing before he is deprived . . . except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event").
69. As the court said in Parratt v. Taylor, 451 U.S. 527 (1981),

The justifications which we have found sufficient to uphold takings of property without any predeprivation process are applicable to a situation such as the present one involving a tortious loss of a prisoner's property as a result of a random and unauthorized act by a state employee. In such a case, the loss is not a result of some established state procedure and the State cannot predict precisely when the loss will occur. It is difficult to conceive of how the State could provide a meaningful hearing before the deprivation takes place. The loss of property, although attributable to the State . . . is in almost all cases beyond the control of the State. Indeed, in most cases it is not only impracticable, but impossible, to provide a meaningful hearing before the deprivation.

Id. at 541. The Court's rationale regarding state control and procedure remains unaffected by its later decision in Daniels v. Williams, 474 U.S. 327 (1986), in which the Court overruled Parratt to the extent that it stood for the proposition that mere negligence by a state official could trigger a due process deprivation. Id. at 329-31.
liability may still arise when an agency implements a policy statement, regulation, or some other form of decision officially adopted by agency officers, or an agency proceeds via a recognized custom or practice, even though it has not been the subject of formal approval in the agency’s official decisionmaking mechanism.70 Similarly, guidelines for inadequate supervision under Rule 11 could be based on inquiries into the established formal and informal policies of legal organizations with respect to civil litigation papers.

IV. Conclusion

With the 1993 amendments to Rule 11 addressing the presentation of frivolous civil litigation papers by legal organizations, federal rulemakers undertook “radical changes in direction” that loosened unforeseeable forces.71 These forces are loose at a time when similar duties for legal organizations are being debated by the crafters of professional discipline codes and other lawyer liability standards. Thus, Rule 11 developments will inform debates in several arenas.

Rule 11 should now be read to permit sanctions against all legal organizations, including private law firms, corporate in-house law offices, and governmental legal departments. Sanctions should be available when legal organizations fail to adequately supervise personnel who present litigation papers. To deter frivolous papers, federal judges should invoke both monetary and nonmonetary sanctions against legal organizations. If used wisely, Rule 11 thus provides new and unprecedented opportunities for effective judicial oversight of the federal litigation practices of legal organizations.

70. Thus, under a provision of the Civil Rights Act of 1871, now in 42 U.S.C. § 1983 (1988), the Court in Monell v. New York City Dept. of Social Servs., 436 U.S. 658 (1978) described a governmental unit’s civil liability as follows:

We conclude . . . that a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government’s policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.

Id. at 694.

71. Marcus, supra note 5, at 800.