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# Observations on Recent Efforts to Deter Frivolous Papers in the Illinois Circuit Courts

*Jeffrey A. Parness\**

## I. INTRODUCTION

Recently, significant legislative initiatives have been made to deter the filing of frivolous papers in the Illinois Circuit Courts.<sup>1</sup> These initiatives authorize the imposition of sanctions on those who file litigation papers determined to be without adequate support. The 1986 amendments to section 2-611 of the Illinois Code of Civil Procedure<sup>2</sup> and the 1989 Illinois Supreme Court's adoption of Rule 137 represent the most significant of these legislative initiatives.<sup>3</sup> These changes in Illinois law were comparable to the procedural law changes effected recently for many other state trial courts and for the federal district courts.<sup>4</sup> This nationwide outburst of change regarding litigation papers, in large part, was sparked by the 1983 amendments to Rule 11 of the Federal Rules of Civil Procedure.<sup>5</sup>

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\* Professor of Law, Northern Illinois University College of Law. B.A., Colby College; J.D., The University of Chicago Law School. Many of the observations herein were formulated during Professor Parness' service as a Reporter for the 1989 Associate Judge Seminar Committee on Civil Practice. The Committee also included the Honorable Harry D. Hartel, Jr. (Chair); the Honorable Ronald S. Davis (Vice Chair); the Honorable Brent F. Carlson; the Honorable Roger W. Eichmeier; and Professor Robert G. Johnston of John Marshall Law School (Reporter). The Committee's work was significantly aided by Teri Engler Kliejunas, Staff Attorney for the Administrative Office of the Illinois Courts. Many of the observations herein were first presented by Professor Parness at the 1989 Associate Judge Seminar, held March 8-10, 1989. Comments by other Committee members, as well as by the judges attending the Seminar, greatly helped the author to refine some of his initial observations. These comments were much appreciated; any remaining errors and the like are solely the responsibility of the author.

1. ILL. REV. STAT. ch. 110, para. 2-611 (1989); ILL. S. CT. R. 137, ILL. REV. STAT. ch. 110, para. 137 (1989). *See also id.* para. 2-611 (1985) (for earlier initiatives).

2. ILL. REV. STAT. ch. 110, para. 2-611 (1987).

3. ILL. REV. STAT. ch. 110A, para. 137 (1989).

4. Slight differences co-exist between these Illinois initiatives and those undertaken in other jurisdictions. For example, section 2-611 expressly permits sanctions on insurance companies having actual knowledge of signature violations. ILL. REV. STAT. ch. 110, para. 2-611 (1987). Rule 137 expressly requires a statement of reasons supporting any sanction and does not require a sanction for each violation. ILL. REV. STAT. ch. 110A, para. 137 (1989).

5. Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Proce-

The amendments to Illinois Code of Civil Procedure section 2-611 constituted an effort to create a more stringent sanction for ill-founded claims in otherwise meritorious cases.<sup>6</sup> The amendments were patterned after Federal Rule of Civil Procedure 11, and were thought to depart so substantially from earlier provisions that existing cases likely were to have only a "general continuing relevance."<sup>7</sup> In particular, the amendments covered every pleading, motion or other paper (not only allegations and denials);<sup>8</sup> included all such papers regardless of their truthfulness (not only untrue papers);<sup>9</sup> expressly required that a reasonable inquiry be undertaken before a paper is filed;<sup>10</sup> and, encompassed both party and attorney conduct (not only party conduct).<sup>11</sup>

The adoption of Rule 137 was said to render section 2-611 obsolete.<sup>12</sup> Yet, like section 2-611, the new rule substantially tracks Federal Civil Rule 11. Unlike Rule 11 and section 2-611, however, the new Illinois rule does not require the imposition of a sanction

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ture, 90 F.R.D. 451, 462 (1981) [hereinafter Preliminary Draft]. Note: the draft is referred to because it contains a comprehensible comparison of the old and new rules, as well as the Advisory Committee Note describing the changes.

6. ILL. ANN. STAT. ch. 110, para. 2-611 (Supplement to Historical and Practice Notes) (Smith-Hurd Supp. 1990).

7. *Id.*

8. Compare ILL. REV. STAT. ch. 110, para. 2-611 (1987) ("Every pleading motion and other paper") with ILL. REV. STAT. ch. 110, para. 2-611 (1985) ("Allegations and denials").

9. Compare ILL. REV. STAT. ch. 110, para. 2-611 (1987) (papers "interposed for any improper purpose") with ILL. REV. STAT. ch. 110, para. 2-611 (1985) (allegations and denials "found to be untrue").

10. Compare ILL. REV. STAT. ch. 110, para. 2-611 (1987) ("reasonable inquiry") with ILL. REV. STAT. ch. 110, para. 2-611 (1985) (allegations and denials must be made with "reasonable cause").

11. Compare ILL. REV. STAT. ch. 110, para. 2-611 (1987) ("signature of an attorney or party") with ILL. REV. STAT. ch. 110, para. 2-611 (1985) (allegations and denials shall subject "the party pleading them").

12. Committee Comments to new Rule 137 (adopted effective August 1, 1989) declare: "Rule 137 preempts all matters sought to be covered by section 2-611 of the Code of Civil Procedure." ILL. ANN. STAT. ch. 110A, para. 137 (Committee Comments) (Smith-Hurd Supp. 1989). The preemption of procedural law statutes by court rules or by court decisions has been justified on the basis of the supreme court's "authority to manage the courts." *Gibellina v. Handley*, 127 Ill.2d 122, 133, 535 N.E.2d 858, 864 (1989). Of course, not all attorney fee shifting statutes are procedural and thus some are not subject to judicial preemption. Parness, *Choices About Attorney Fee-Shifting Laws*, 49 U. PITT. L. REV. 393 (1988).

Section 2-611 should continue to be of significance because the cases utilizing it will assist implementation of Rule 137. Additionally, section 2-611 remains applicable to cases filed before August 1, 1989. See, e.g., *Safeway Ins. Co. v. Graham*, 188 Ill. App. 3d 608, 544 N.E.2d 1117 (1st Dist. 1989) (amended section 2-611 does not apply retroactively).

for any violation<sup>13</sup> and includes an express requirement that the trial judge "set forth with specificity the reasons and basis of any sanction" that is imposed.<sup>14</sup>

Illinois judges, like federal and other state court judges, have had significant difficulties employing the recent legislative initiatives on frivolous papers. Besides grappling with how to exercise the broad discretionary authority over the choice and severity of sanctions,<sup>15</sup> courts remain uncertain about such questions as 1) what constitutes a reasonable inquiry;<sup>16</sup> 2) when is an assertion well-grounded in fact, warranted by existing law, or a good faith argument for a change in the law;<sup>17</sup> 3) what forms of sanctions are

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13. Committee Comments to new Rule 137 (adopted effective August 1, 1989) declare: "Unlike section 2-611, Rule 137 allows but does not require the imposition of sanctions." Ill. Ann. Stat. ch. 110A, para. 137 (Committee Comments) (Smith-Hurd Supp. 1989). Rule 137 says the court "may" impose an appropriate sanction while section 2-611 says the court "shall" impose an appropriate sanction. ILL. REV. STAT. ch. 110A, para. 137 (1989); ILL. REV. STAT. ch. 110, para. 2-611 (1987).

14. ILL. REV. STAT. ch. 110A, para. 137 (1989). Although rationales for sanctions are not expressly required in either Rule 11 or section 2-611, some federal court decisions suggest rationales are needed if a significant sanction is imposed. *See, e.g., Brown v. Federation of State Medical Bds.*, 830 F.2d 1429, 1438 (7th Cir. 1987) (stating that in Rule 11 cases "involving substantial awards a district judge [should] state with some specificity the reasons for the imposition of a sanction, and the manner in which the sanction was computed"). *But see Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 883 (5th Cir. 1988) (en banc) (rejecting a rule imposing "upon district courts the onerous and often time-consuming burden of making specific findings and conclusions in all Rule 11 cases"). In Illinois, courts have ruled similarly. *See, e.g., In re Marriage of Hartian*, 172 Ill. App. 3d 440, 454, 526 N.E.2d 1104, 1114 (1st Dist. 1988), *appeal denied*, 123 Ill. 2d 558, 535 N.E.2d 401 (1988) (to support a section 2-611 fee award, the trial court must make findings identifying the frivolous papers and the resulting expenses). The imposition of sanctions, however, need not always be preceded by a separate hearing. *See, e.g., Beno v. McNew*, 186 Ill. App. 3d 359, 542 N.E.2d 533 (2d Dist. 1989).

15. Most, but not all, frivolous paper laws recognize broad judicial discretion regarding the choice and severity of sanctions. *See, e.g., Burlington No. R.R. v. Woods*, 480 U.S. 1 (1987) (state statute requiring appellate court affirming a monetary judgment to assess a penalty equal to ten percent of the judgment not applicable in a diversity setting).

16. Under both section 2-611 and Rule 137, attorneys may be sanctioned for signing and filing litigation papers that were without adequate knowledge, information or belief formed after reasonable inquiry. ILL. REV. STAT. ch. 110, para. 2-611 (1987) and ILL. REV. STAT. ch. 110A, para. 137 (1989). Such sanctions usually follow judicial examination of the reasonableness of what is said in the papers. *But see, e.g., Mastrobuono v. Shearson Lehman Hutton, Inc.*, 128 F.R.D. 243 (N.D. Ill. 1989) (reasonable inquiry focused on attorney's prefiling conduct and found reliance on clients alone inappropriate); Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013 (1988) (urging a shift in the focus of Rule 11 enforcement proceedings from consideration of the merits of allegations and claims to examination of the reasonableness of prefiling investigation).

17. At least one Illinois court has ruled sanctionable assertions may be oral as well as written. *Modern Mailing Sys., Inc. v. McDaniels*, 191 Ill. App. 3d 347, 547 N.E.2d 762 (4th Dist. 1989). For guidelines on when written assertions are violative of a frivolous paper law, see STANDARDS AND GUIDELINES FOR PRACTICE UNDER RULE 11 OF THE FEDERAL RULES OF CIVIL PROCEDURE, 121 F.R.D. 101, 119-20 (1988). For a criticism

available to trial judges;<sup>18</sup> 4) what are the differences in the standards for lawyer and party conduct;<sup>19</sup> and, 5) how should judges handle papers that were reasonable when filed, but that remain on file though no longer reasonable?<sup>20</sup>

In a recent survey distributed to Illinois Associate Judges attending the 1989 Associate Judges Meeting, judicial responses indicated that significant difficulties continue in both the interpretation and the application of the Illinois laws governing frivolous papers. In an effort to reduce some of the difficulties, this Article will briefly review Illinois frivolous paper laws. It will then describe

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of federal cases determining whether pleadings are well-grounded in fact and sufficiently supported in law, see Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 HARV. L. REV. 630 (1987) (arguing that current interpretations of Federal Rule 11 are wrong in that they conflict with the liberal pleading regime of the Federal Rules of Civil Procedure by demanding too much specificity and by discouraging novel legal theories).

18. Compare Nelken, *Sanctions Under Amended Federal Rule 11 - Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313 (1986) (urging that Rule 11 be read to disallow more stringent sanctions, including monetary awards such as fines, that exceed a party's litigation-related expenses); with Parness, *More Stringent Sanctions Under Federal Civil Rule 11: A Reply to Professor Nelken*, 75 GEO. L.J. 1937 (1987) (finding more stringent sanctions, including excess monetary awards, are appropriate on occasion). See also Nelken, *Has the Chancellor Shot Himself in the Foot? Looking for a Middle Ground on Rule 11 Sanctions*, 41 HASTINGS L.J. 383, 408 (1990) (In most Rule 11 cases, attorney's fee awards should come only for "the most flagrant violations"; less serious violations warrant a "reprimand (on or off the record), compulsory continuing education, distribution of the court's sanctions opinions within the sanctioned lawyer's firm or assessment of costs . . .").

19. *Washington v. Allstate Ins. Co.*, 175 Ill. App. 3d 574, 529 N.E.2d 1086 (1st Dist. 1988), *appeal denied*, 125 Ill. 2d 575, 537 N.E.2d 819 (1989) (generally attorney is responsible for the reasonableness of legal assertions, although party is responsible for factual allegations at least to the extent that the attorney must rely on the party for the facts pleaded). Compare *Business Guides, Inc. v. Chromatic Communications Enter. Inc.*, 892 F.2d 802 (9th Cir. 1989) (under Rule 11, objective standard of reasonable inquiry for both parties and attorneys) with *Calloway v. Marvel Entertainment Group*, 854 F.2d 1452 (2nd Cir. 1988) (under Rule 11, objective standard of reasonable inquiry for attorneys, but subjective standard for parties), *rev'd on other grounds*, *Pavelic & Leflore v. Marvel Entertainment Group*, 110 S. Ct. 456 (1989) (rejecting the possibility of sanctioning law firms under Rule 11 for the misconduct of individual attorneys).

20. See, e.g., Cowles, *Rule 11 of the Federal Rules of Civil Procedure and the Duty to Withdraw a Baseless Pleading*, 56 FORDHAM L. REV. 697 (1988) (critically reviewing federal cases that generally refuse to find a continuing duty to investigate or a duty to amend). In Illinois, state courts have followed the majority of federal decisions and have found no continuing duty to investigate or amend under Illinois law. See, e.g., *Dunaway v. Ashland Oil, Inc.*, 189 Ill. App. 3d 106, 544 N.E.2d 1313 (5th Dist. 1989) and *Chicago Title & Trust Co. v. Anderson*, 177 Ill. App. 3d 615, 532 N.E.2d 595 (1st Dist. 1988). The lack of any continuing duty under most frivolous paper laws is especially unfortunate, as it is usually based upon the absence of enabling language rather than on public policy grounds. See, e.g., *Thomas v. Capital Sec. Servs. Inc.*, 836 F.2d 866, 874 (5th Cir. 1988) (although sympathizing with the concerns for a continuing duty under Rule 11, such a duty is rejected as being contrary to the plain meaning of the Rule's language).

the litigation event on which the survey was based. The responses to this survey will be discussed in order to elucidate some of the difficulties indicated by the participants. The Article concludes with recommendations for addressing some of the problems posed by the new frivolous paper laws.

## II. CURRENT ILLINOIS FRIVOLOUS PAPER LAWS

The major Illinois frivolous paper laws presently appear in section 2-611 of the Illinois Code of Civil Procedure and Rule 137 of the Illinois Supreme Court Rules.<sup>21</sup> Because Rule 137 applies only to papers filed after August 1, 1989,<sup>22</sup> information regarding its use is limited. The similarity between Rule 137 and section 2-611 suggests, however, that Illinois courts will apply the Rule and the statute comparably.<sup>23</sup>

The statutory predecessors to section 2-611 contained expectations regarding the legal and factual validity of papers filed with Illinois trial courts.<sup>24</sup> They authorized the trial judge to impose sanctions for the failure to meet these expectations. Prior to 1986, the predecessors to section 2-611 covered only allegations and denials in pleadings "made without reasonable cause and found to be untrue."<sup>25</sup> One found in violation of the frivolous paper law was subject to sanctions in the amount of the "reasonable expenses, actually incurred" by the opposing party.<sup>26</sup>

In 1986, section 2-611 was amended to broaden the range of sanctionable conduct.<sup>27</sup> The 1986 change shifted the focus from untrue allegations and denials "made without reasonable cause" to all litigation papers not "well-grounded in fact" or not "warranted by existing law or a good faith argument for the extension, modifi-

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21. ILL. REV. STAT. ch. 110, para. 2-611 (1987) and ILL. REV. STAT. ch. 110A, para. 137 (1989).

22. ILL. REV. STAT. ch. 110A, para. 137 (1989) (although the Rule was adopted on June 19, 1989, it took effect August 1, 1989).

23. Commentators recently have suggested the Rule is intended "to give the trial judges greater discretion in making the decision to award sanctions" and to make it "more difficult to obtain sanctions in Illinois courts." Larsen and Larsen, *Rule 137: The Illinois Supreme Court Response to the Sanctions Explosion*, 78 ILL. B.J. 74, 78 (1990).

24. In 1933, an Illinois frivolous paper law allowed sanctions for allegations and denials made without reasonable cause, found to be untrue, and not made in good faith. In 1976, the bad faith requirement was removed. ILL. ANN. STAT. ch. 110, para. 2-611 (Historical and Practice Notes) (Smith-Hurd 1983).

25. ILL. REV. STAT. ch. 110, para. 2-611 (1985).

26. *Id.*

27. ILL. REV. STAT. ch. 110, para. 2-611 (1987).

cation or reversal of existing law."<sup>28</sup> The change, for the first time, also required papers to be filed for legitimate purposes, and not for improper motives such as annoyance.<sup>29</sup> Additionally, the 1986 amendment included the new requirement that the signer of litigation papers make a "reasonable inquiry" to determine whether the statutory requirements had been met.<sup>30</sup>

The 1986 amendment also extended the reach of section 2-611 in several ways. First, section 2-611 allows sanctions against attorneys as well as parties.<sup>31</sup> Second, all signed papers, including motions, are subject to sanctions. The former rule applied only to pleadings.<sup>32</sup> Finally, section 2-611 no longer limits available sanctions to actual expenses but allows the court to impose whatever sanction it deems appropriate.<sup>33</sup> The 1986 change thus expanded the range of sanctionable persons, sanctionable conduct, and available sanctions.

Application of section 2-611 as amended is relatively straightforward. Because signatures are required on all filed papers, the potentially liable party is usually apparent.<sup>34</sup> Also, no distinctions between types of litigation papers are necessary because all signed papers are covered.<sup>35</sup> Lastly, determination of the form of sanction usually is not problematic. Although section 2-611 calls for imposition of "an appropriate sanction,"<sup>36</sup> this exercise of discretion has not proven difficult. The usual sanctions are reprimands and partial or full awards of costs and attorney's fees. Sanctions such as fines payable to the court, claim dismissals, or default judgments are not common.<sup>37</sup>

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28. Compare ILL. REV. STAT. ch. 110, para. 2-611 (1985) with ILL. REV. STAT. ch. 110, para. 2-611 (1987).

29. ILL. REV. STAT. ch. 110, para. 2-611 (1987).

30. *Id.*

31. *Id.*

32. ILL. REV. STAT. ch. 110, para. 2-611 (1985).

33. ILL. REV. STAT. ch. 110, para. 2-611 (1987).

34. Although those signing frivolous papers must be sanctioned, the court also is granted discretion, on occasion, to sanction insurance companies for frivolous papers it did not sign, but which it knew to be meritless. ILL. REV. STAT. ch. 110, para. 2-611 (1987). Unlike 2-611, Rule 137 does not make special provisions concerning such potential sanctions of insurance companies. ILL. REV. STAT. ch. 110A, para. 137 (1989). See also *Pavelic & Leflore v. Marvel Entertainment Group*, 110 S. Ct. 456 (1989) (law firm whose lawyers signed frivolous papers may not be sanctioned separately under Federal Civil Rule 11); *Modern Mailing Sys., Inc. v. McDaniels*, 191 Ill. App. 3d 347, 547 N.E.2d 762 (4th Dist. 1989) (oral motion sanctionable under section 2-611).

35. ILL. REV. STAT. ch. 110, para. 2-611 (1987).

36. *Id.*

37. Such sanctions are less frequently employed as there is concern about over deterrence and the chilling of zealous advocacy. There also is concern about the legal propri-

The "reasonable inquiry" requirements of section 2-611 have been problematic. The purpose of the inquiry is to better assure that there exists reasonable support for factual allegations, legal claims and defenses, and other assertions. Section 2-611 does not expressly require an attorney or party to personally investigate the basis for each assertion made in a paper signed and filed with the court.<sup>38</sup> The person who signs a paper, however, must have enough information from whatever source to sustain a reasonable belief that all assertions satisfy the section 2-611 requirements.<sup>39</sup> Determining the sufficiency of the supplied information has proven difficult.

The reasonableness of an inquiry and of resulting assertions is usually measured by an objective standard.<sup>40</sup> To determine reasonableness, courts review the situation at the time of the filing. Factors relevant to such a review include the amount of time available for a prefiling inquiry in light of the statute of limitations and the probability that more investigation will reveal important evidence.<sup>41</sup>

If an inquiry and a paper are reasonable at the time of filing, but later-revealed information discredits them, section 2-611 does not expressly provide for a "continuing duty" to inquire or to stand behind the paper.<sup>42</sup> Doubts about continuing reasonableness must be resolved, however, before any new and relevant papers are filed.<sup>43</sup>

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ety of these sanctions. See *supra* note 18 and accompanying text (discussion of these "chilling effects"). Despite these concerns, several courts have imposed these sanctions. See, e.g., *Safeway Ins. Co. v. Graham*, 188 Ill. App. 3d 608, 613, 544 N.E.2d 1117, 1120 (1st Dist. 1989) (fines embodied within section 2-611 sanctions); *Transamerica Ins. Group v. Lee*, 164 Ill. App. 3d 945, 948, 518 N.E.2d 413, 415 (1st Dist. 1987), *appeal denied*, 121 Ill. 2d 586, 526 N.E.2d 840 (1988) (sanction of \$5000, twice the amount of the adverse party's attorney's fees, under a rule permitting "such orders as are just").

38. ILL. REV. STAT. ch. 110, para. 2-611 (1987) (attorney's signature constitutes a certificate that to the best of the attorney's knowledge, information and belief formed after reasonable inquiry, the paper signed is adequately supported).

39. *Chicago Title and Trust Co. v. Anderson*, 177 Ill. App. 3d 615, 624, 532 N.E.2d 595, 601 (1st Dist. 1988) ("as a general rule, an attorney cannot simply rely on the client's verbal representations when the client has in his possession additional information bearing on the facts, or when additional information is readily ascertainable from third parties").

40. *Id.* at 623, 532 N.E.2d at 600.

41. *Id.* at 625, 532 N.E.2d at 601.

42. Cf. WIS. STAT. ANN. § 814.025 (West Supp. 1989) (expressly providing mandatory sanctions for commencement, continuation or use of frivolous claims or defenses).

43. *Chicago Title and Trust Co.*, 177 Ill. App. 3d at 627, 532 N.E.2d at 602 ("once it appears that the prior factual allegation is in error, this must be brought forthrightly to the attention of court and opposing counsel, at least in the next available court filing").



Section 2-611 dictates that motions thereunder become part of the original cause of action;<sup>44</sup> therefore, a decision on the merits of a case usually is not appealable until a section 2-611 motion is resolved. Furthermore, a decision on a section 2-611 motion is not appealable until a final decision on the merits.<sup>45</sup> Once the parties are properly on appeal, the reviewing court frequently uses an "abuse of discretion standard" to examine all trial court section 2-611 determinations,<sup>46</sup> though such a use may be questioned.<sup>47</sup>

Because section 2-611 sanctions may reach an attorney who is not a party to a lawsuit, several questions may arise regarding appeals. For example, issues may appear regarding jurisdiction over the attorney. One appellate court has held that jurisdiction over an attorney continues as long as the court has jurisdiction over the case in which a relevant paper has been filed, even if the attorney has withdrawn from the case.<sup>48</sup> Other questions have concerned an attorney's right to appeal a section 2-611 sanction despite his nonparty status. Illinois law typically allows a nonparty to appeal if there is a substantial interest affected by the judgment.<sup>49</sup> The financial or other interest implicated in a section 2-611 sanction against an attorney usually suffices.<sup>50</sup> Finally, questions arise regarding joinder on appeal of attorneys and their clients. In general, Illinois courts have held that joinder is permitted when the attorney and client have separate interests to protect.<sup>51</sup> Thus, joinder is necessary when a client appeals a loss on the merits and the attorney appeals an award of fees that is not subject to reimbursement by the client.<sup>52</sup>

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44. ILL. REV. STAT. ch. 110, para. 2-611 (1987) ("All proceedings . . . shall be within, and part of the civil action . . . and no violation . . . shall give rise to a separate cause of action . . . .")

45. *In re Marriage of Strauss*, 183 Ill. App. 3d 424, 430, 539 N.E.2d 808, 812-13 (2nd Dist. 1989). *But cf.* *Markwell v. County of Bexar*, 878 F.2d 899, 901 (5th Cir. 1989) (Rule 11 sanction against attorney immediately appealable if attorney has withdrawn from case).

46. *Chicago Title and Trust Co.*, 177 Ill. App. 3d at 625, 532 N.E.2d at 601.

47. *Id.* (Although recognizing federal circuit conflict, court adhered to Illinois precedent on abuse of discretion when parties did not argue a different standard should apply). *See also* *Cooter & Gell v. Hartmax Corp.*, 110 S. Ct. 861 (1989) (appropriate standard of reviewing Rule 11 sanctions was one of the questions presented).

48. *Western Auto Supply Co. v. Hornback*, 188 Ill. App. 3d 273, 276, 545 N.E.2d 764, 766 (5th Dist. 1989).

49. *Ignarski v. Heublein*, 171 Ill. App. 3d 830, 833, 525 N.E.2d 995, 997 (1st Dist. 1988).

50. *Id.*

51. *Dunaway v. Ashland Oil, Inc.*, 189 Ill. App. 3d 106, 109-10, 544 N.E.2d 1313, 1316 (5th Dist. 1989).

52. *Id.* at 109, 544 N.E.2d at 1316. *See also* *Sherman Hosp. v. Wingren*, 169 Ill. App.

Although Rule 137 preempts section 2-611,<sup>53</sup> the statute seemingly still applies to papers filed before August 1, 1989.<sup>54</sup> Because the new Rule is a virtual clone of section 2-611, most cases should be resolved comparably under the Rule and the statute.<sup>55</sup> The Rule does differ from the statute, however, in a number of respects. Most importantly, sanctions are no longer mandatory for all violations.<sup>56</sup> The trial judge must also set forth the basis for any Rule 137 sanction.<sup>57</sup> Finally, Rule 137 eliminated the provision in section 2-611 regarding insurance companies.<sup>58</sup>

### III. THE LITIGATION EVENT

The survey of Associate Judges on the application of section 2-611 was based on events surrounding the filing and continued maintenance of a personal injury suit by Attorney Brown on behalf of plaintiff, Mrs. Jones.<sup>59</sup> The suit was filed on September 10th against Smith and his insurer, Everystate Insurance Company.

The plaintiff's attorney first filed suit two days after a meeting with Jones that occurred in the attorney's office. Attorney Brown conducted no investigation after the meeting. At the meeting, which provides no evidence of any prior relationship between the two, Jones expressed a desire to file a personal injury suit to recover for injuries resulting from an automobile accident involving a car driven by Smith and a car in which she, her husband, and her

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3d 161, 165, 523 N.E.2d 220, 223 (2d Dist. 1988) (defendants cannot appeal sanction entered against their attorneys only).

53. ILL. ANN. STAT. ch. 110A, para. 137, at 167 (Smith-Hurd Supp. 1989). See *supra* note 12 and accompanying text. (preemption discussed).

54. *Safeway Ins. Co. v. Graham*, 188 Ill. App. 3d 608, 612-613, 544 N.E.2d 1117, 1120 (1st Dist. 1989) (noting that in a comparable setting, the procedural rather than the substantive aspects of a new frivolous paper law would be applied retroactively, and section 2-611 could not be applied to appeals filed prior to the effective date of the statute).

55. Because of the similarity between the Rule and the statute (even though the statute has not been repealed), the issue of whether judicial power can preempt legislative action regulating non-attorney, pre-litigation activity seems nonjustifiable. See, e.g., Parness and Keller, *Increased and Accessible Illinois Judicial Rulemaking*, 8 N.I.U. L. REV. 817, 836 (1988) (discussing Illinois separation of powers issues in the promulgation of procedural laws).

56. See *supra* note 13 and accompanying text for discussion of Rule 137.

57. See *supra* note 14 (rationales for sanctions discussed).

58. See *supra* note 34 and accompanying text (discussing sanctions for insurance companies).

59. The litigation event distributed to Associate Judges registered for the 1989 Associate Judge Seminar (held in March in Chicago) appears *infra* as Appendix C. It was distributed with an introductory letter (*infra* Appendix A), a copy of section 2-611 (*infra* Appendix B) and the questionnaire (*infra* Appendix D).

child were passengers. During her meeting with Brown, Jones also produced copies of hospital bills for injuries said to result from the accident.

Five days after the suit was filed, Attorney Brown learned that Mrs. Jones' suit had been consolidated with a suit brought by her husband involving the same accident and the same defendants. About a month later, on October 14th, Brown scheduled a meeting with Mr. Jones, for the next day, to ask why he had not accompanied his wife to the meeting on September 10th and why a separate pro se action was filed.

During the October 15th meeting, Mr. Jones told Brown that he had filed a separate pro se action, saying: "I don't need an attorney to represent me. I've sued these insurance companies at least 60 times all by myself. Why, I've sued Everystate alone about 25 times. I have to. They're always sending people out on the road after me. I have a right to protect myself. All the other times a judge throws my case out of court before it comes to trial and before I have a chance to prove anything. But this case is great because I've got my wife and child as witnesses. I can now prove that Everystate is out to kill me. So I don't need an attorney and you may as well leave."

The factual circumstances of the litigation event end with the indication that about four days have expired since Brown's meeting with Mr. Jones. Since the meeting, Brown has taken no further action in Mrs. Jones' case, and still awaits answers to Mrs. Jones' complaint from Smith and his insurer.

#### IV. APPLICATION OF THE FRIVOLOUS PAPER LAWS TO THE LITIGATION EVENT

Judicial responses<sup>60</sup> regarding application of section 2-611 to the litigation event indicate a wide divergence of opinion on several fundamental legal questions, as well as on the way in which accepted legal standards should apply to a rather ordinary set of facts.

All judges first were asked whether any of Attorney Brown's conduct could be characterized as "frivolous, without merit, or

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60. Responses were received from eighty-seven Associate Judges who planned to attend the Associate Judge Seminar conducted by the Illinois Judicial Conference in March 1989. Responses appear *infra* in Appendix D. In 1989, there were about 365 Associate Judges; surveys were distributed by the Administrative Office of Illinois Courts only to those judges who registered in advance for the meeting.

otherwise in violation of Section 2-611.”<sup>61</sup> Over seventy percent of the respondents found a violation of section 2-611; about thirty percent found no violation.<sup>62</sup> Of those who found a violation, about thirty-five percent opined there was a “willful (i.e., in bad faith)” violation of section 2-611.<sup>63</sup> Described another way, about one fourth of the judges found a willful violation, about one half of the judges found a non-willful violation, and about one fourth of the judges found no violation.

The judges who found a section 2-611 violation generally agreed on the nature of the violation and on the appropriate sanction. Most judges described Attorney Brown’s “most serious or significant breach” as the failure to further investigate the circumstances surrounding the accident described by Mrs. Jones, before filing the lawsuit. Thus, over ninety percent of the judges found that a section 2-611 violation first occurred on the day the civil action was filed.<sup>64</sup>

The disagreement between judges as to the adequacy of the prefiling inquiry stems from one of two sources. The judges either disagree on the legal standards established by section 2-611 or differ in their understanding of how these standards should be applied to the litigation event. Given the “reasonable inquiry” standard in section 2-611, the judges likely disagreed on the application of this standard, much as two juries might disagree on whether a particular fact pattern demonstrates a person’s negligence. The legal standards for judging the reasonableness of an attorney’s prefiling inquiry based upon a client’s story, with little other investigation, recently was described as follows:

Whether such reliance is reasonable depends upon several factors. First, can the client’s statements be corroborated, and, if so, at what cost? It generally is unreasonable to rely, to the exclusion of an independent investigation, upon unverified statements that could be readily corroborated. . . . Second, are the statements based upon the client’s personal knowledge? It is unreasonable to file a pleading or a motion founded upon unreliable second-hand assertions . . . . Third, are the statements plausible? It is unreasonable to rely upon representations that are implausible on their face. . . . Fourth, how well does counsel know the client? It may be more reasonable to depend upon the statements of a long-standing client who has demonstrated his reliability

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61. Appendix D, Question 1.

62. *Id.*

63. Appendix D, Question 2.

64. Appendix D, Question 3.

rather than upon a client who is unknown to the attorney . . . .<sup>65</sup>

Mrs. Jones was not a long-standing client. Further corroboration of her story would have been easy, and there was no need to file a complaint quickly. Accordingly, there appears to be insufficient inquiry by Attorney Brown prior to the commencement of the civil action.

A second area of disagreement among the judges involved the appropriate sanction to be imposed. About eighty percent of those who found some section 2-611 violation were "inclined to grant defendants' requests for attorneys' fees against plaintiff's attorney."<sup>66</sup> Of those inclined to award fees, over eighty percent were inclined to order payment of "all reasonable expenses and attorney's fees" (rather than some lesser or greater amount of money).<sup>67</sup> Less than twenty percent of the judges responding were inclined to impose other sanctions against Attorney Brown "in addition to or instead of attorney's fees."<sup>68</sup>

Significant disagreement also arose among all of the judges over the applicability of section 2-611 to Attorney Brown's conduct after the civil action was commenced on September 10th.<sup>69</sup> Fifty-five percent of the judges responding expressed the belief that "Section 2-611 may be applied to any of Attorney Brown's conduct after September 10th,"<sup>70</sup> while forty-five percent saw no possible application.<sup>71</sup> Of those believing post-filing conduct is covered by section 2-611, most opined that Attorney Brown should have undertaken further investigation of the facts. Furthermore, some judges noted that section 2-611 imposes a duty upon an attorney to amend pleadings (even those reasonable when first filed) when post-filing events demonstrate their unreasonableness.

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65. Solovy, Hirsch, and Thesing, *Sanctions Under Federal Rule of Civil Procedure 11*, 33 THE TRIAL LAW GUIDE 354, 366-67 (1989) (citations omitted). See also *Chicago Title & Trust Co. v. Anderson*, 177 Ill. App. 3d 615, 624, 532 N.E.2d 595, 601 (1st Dist. 1988) (reliance on client alone is wrong when corroborating evidence easily is available or when client's story reveals gaps or discrepancies).

66. Hypothetically, the request came after the uncontested dismissal of the suit by the plaintiff in the face of the defendant's summary judgment motions establishing Smith's non-involvement in the accident. Appendix D, Question 5.

67. Appendix D, Question 6. Payment of all, rather than an amount less than all, of the attorney's fees does seem somewhat severe. Cf. *Doering v. Union County Bd. of Chosen Freeholders*, 857 F.2d 191 (3rd Cir. 1988) (full reimbursement of fees is inappropriate without first examining whether a lesser sanction is more appropriate; factors include the lawyer's ability to pay and the degree of culpability).

68. Appendix D, Question 8.

69. Recall that most judges believed a section 2-611 violation occurred when the suit was filed; see *supra* note 64 and accompanying text.

70. Appendix D, Question 4.

71. *Id.*

Such disagreements are unfortunate. Public policy seemingly dictates post-filing attorney duties, but section 2-611 is silent. Frivolous paper laws should expressly require post-filing duties of inquiry and amendment.<sup>72</sup> It is regrettable that the Illinois Supreme Court failed to consider such duties when adopting Rule 137.<sup>73</sup>

There also was some disagreement among the judges about the likely attitudes of other Illinois trial judges regarding the applicability of section 2-611 to the litigation event. About seventy-five judges expressed a view on the approximate percentage of circuit and associate judges who would "find some section 2-611 violation" in the relevant factual circumstances.<sup>74</sup> Thirty of the seventy-five judges indicated they thought at least seventy-five percent of their fellow judges would find a violation.<sup>75</sup> As noted earlier, about three-fourths of all judges surveyed found some violation in the litigation event;<sup>76</sup> thus, most judges underestimated the likelihood that their colleagues would find a violation. Nineteen of the seventy-five judges responding believed twenty-five percent or less of their fellow judges would find a violation; these judges grossly misread their peers.<sup>77</sup> In addition, fifteen of the seventy-five judges indicated they thought at least seventy-five percent of other judges "would be inclined to order some fees paid,"<sup>78</sup> while thirty-four believed twenty-five percent or less of their fellow judges would be disposed toward ordering a payment of fees.<sup>79</sup> In fact, well over half the judges surveyed not only found a violation, but also deemed attorney's fees to be appropriate;<sup>80</sup> again, many judges underestimated their colleagues' attitudes.

Perhaps such results are not surprising in that the litigation event presented a fact pattern not easily subject to the application of existing law that is not written precisely. The results do suggest a recognition of the broad judicial discretion authorized under frivolous paper laws and the need for developing a shared understanding of this discretion's breadth. Guidelines for the utilization of

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72. Parness, *Groundless Pleadings and Certifying Attorneys in the Federal Courts*, 1985 UTAH L. REV. 325, 337 (urging Rule 11 amendments).

73. Parness, *Frivolous Pleadings in Illinois: Observations on the 1985 Medical Malpractice Reforms*, 74 ILL. B.J. 238, 242-43 (1986) (urging Illinois Supreme Court consideration of a continuing duty, prior to section 2-611 enactment).

74. Appendix D, Question 7.

75. *Id.*

76. Appendix D, Question 1.

77. Appendix D, Question 7.

78. *Id.*

79. *Id.*

80. Appendix D, Question 5.

judicial discretion should also be developed. Assistance for judges in applying frivolous paper laws containing intentionally-ambiguous terms such as "reasonable inquiry" could have been provided in the commentaries accompanying section 2-611 or Rule 137. Given the lack of insight provided in the available Committee Commentaries, judicial decisions or local court rules may be the remaining means of developing the suggested shared understanding and guidelines.<sup>81</sup>

In addition to addressing the relationship between section 2-611 and the litigation event, several general questions were posed regarding section 2-611 itself. As with the inquiries on the litigation event, these responses differed significantly. When asked which of several enumerated sanctions were available under section 2-611 "in addition to or instead of attorney's fees," about sixty percent of the respondents indicated that "some form(s) of reprimand" and "a referral to a bar disciplinary committee" were possible.<sup>82</sup> About forty-four percent identified the appropriate sanction as "a fine payable to the court and related to the court's expenses caused by [the section] 2-611 violation."<sup>83</sup> About twenty-two percent advocated a sanction in the form of a fine payable to the court but unrelated to the court's expenses stemming from the section 2-611 violation.<sup>84</sup> Only eight percent found "a public apology (printed in a newspaper, sent in a letter to one's law partners and associates, etc.)"<sup>85</sup> to be an appropriate sanction.

Unlike disagreements on the application of law to facts when legal standards such as "reasonable inquiry" are as clear as they can and should be, disagreements on the law, such as which sanctions to apply, should be easier to resolve. Even if frivolous paper laws should contain open-ended phrases to permit discretion, for example, "appropriate sanction," the availability of particular sanctions involves a legal question for which there should be a single answer. Here, legislative notes or decisional laws are needed to assure uniformity of approach.

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81. Parness, *supra* note 72, at 339.

82. Appendix D, Question 9.

83. *Id.* On the propriety of such assessments under frivolous papers laws, see *supra* note 18.

84. Appendix D, Question 9. Such assessments are far more problematic than assessments tied to the court's related expenses. *Eash v. Riggins Trucking Inc.*, 757 F.2d 557, 568 (3d Cir. 1985).

85. Appendix D, Question 9. In *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 103 F.R.D. 124, 129 (N.D. Cal. 1984), *rev'd*, 801 F.2d 1531 (9th Cir. 1986), a trial court order detailing Rule 11 violations was distributed to members of an offending attorney's law firm.

The judges were in greater agreement on the rationale underlying the frivolous paper laws. When asked what constitutes "the primary function of sanctions under Section 2-611," about eighty percent replied that any one or a combination of three purposes could be primary, depending upon the circumstances of the case wherein a sanction is warranted.<sup>86</sup> 1) "to compensate the aggrieved party"; 2) "to penalize the offending party"; and 3) "to deter future misconduct of a similar nature."<sup>87</sup> Such responses indicate that judges recognized broad judicial discretion in fashioning remedies for violations of frivolous paper laws. Judicial inclination toward awarding attorney's fees for such violations indicates a fee award is the one remedy that typically can accommodate one, or some combination, of the enumerated purposes.<sup>88</sup>

#### V. SOME THOUGHTS ON IMPLEMENTING THE NEW FRIVOLOUS PAPER LAWS

All of the differences in the views of Associate Judges on section 2-611 and on its application to the litigation event are not cause for concern. Frivolous paper laws contemplate areas of broad judicial discretion in which differing approaches to a single problem nevertheless may all be deemed reasonable. Judges thus may disagree over whether Attorney Brown's prefilings activities were exemplary, though developed guidelines suggest the inquiry was not reasonable. Additionally, the frivolous papers laws provide relatively unbridled judicial authority to choose the nature and level of sanctions to be imposed for violations of these rules. Nevertheless, certain legal questions under frivolous paper laws—such as those involving a continuing duty or the availability of certain sanctions—should be resolved.

To the extent troublesome, legal questions under frivolous paper laws arise for trial judges, they may be diminished over time through judicial attention to guidelines found, not only in appellate

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86. Appendix D, Question 12. Although the question on primary function was intended to elicit a single choice among the four alternatives presented, several judges did choose two or more options. Nevertheless, it is fair to say that an overwhelming number of judges indicated any one, or any combination, of the purposes primarily could be behind 2-611 sanctions.

87. *Id.* When federal judges similarly have been asked to name the primary function of Rule 11, they have not been allowed to indicate whether each or some combination of the three options may be primary, depending upon the case. When forced to choose one of three, their answers vary. See generally Untereiner, *A Uniform Approach to Rule 11 Sanctions*, 97 YALE L.J. 901, 906 (1988) (empirical studies demonstrate differing views of primary function of the Rule).

88. Appendix D, Question 5.



court opinions, but also in other judicial and non-judicial writings. Because more than three years elapsed between the amendments to Federal Rule of Civil Procedure 11 and the amendments to section 2-611, the Illinois trial courts always have had, and frequently have relied upon, earlier federal court decisions addressing similar questions concerning federal frivolous paper laws. Thus, in the absence of controlling Illinois precedent, federal case law commonly has been employed by Illinois courts in the implementation of section 2-611.<sup>89</sup> A similar application of federal precedent should occur as Illinois courts implement Supreme Court Rule 137.

Of course, not all aspects of the federal experience may be transported to Illinois courts. Beside the variations in the language in section 2-611, Illinois Supreme Court Rule 137, and Federal Rule of Civil Procedure 11, Illinois and federal frivolous paper laws must be distinguished because of the different settings in which they operate. For example, section 2-611 and Rule 137 operate in a pleading system that demands "substantial allegations of fact necessary to state any cause of action";<sup>90</sup> Federal Rule of Civil Procedure 11 operates in a so-called notice pleading system.<sup>91</sup> Given this difference in pleading requirements, prefiling inquiries in Illinois should be fuller and more detailed. Wholesale use of federal court decisions in resolving issues under Illinois frivolous paper laws should therefore be avoided.

Even though some divergence in judicial attitudes and actions regarding Illinois frivolous paper laws both is inevitable and welcome, further action should be undertaken to facilitate the implementation of the relevant Illinois laws in a fairer and more consistent manner. For example, a variety of new sources of information on frivolous paper laws should be devised. Sources beyond judicial decisions are needed because the written judicial opinions provide only incomplete information.<sup>92</sup> Possible secondary sources

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89. See, e.g., *Frisch Contracting Serv. Co. v. Personnel Protection, Inc.*, 158 Ill. App. 3d 218, 224, 511 N.E.2d 831, 835-36 (2nd Dist. 1987). Illinois precedents were recently reviewed in Solovy, Hirsch and Brewer, *Sanctions Under Amended Section 2-611: Remedying Litigation Abuse*, 76 ILL. B.J. 486 (1988).

90. ILL. REV. STAT. ch. 110, para. 2-611 (1987).

91. J. FRIEDENTHAL, M. KANE AND A. MILLER, *CIVIL PROCEDURE* 252-56 (1985).

92. The pros and cons of publishing opinions on Rule 11 matters were reviewed by Judge William W. Schwarzer of the United States District Court for the Northern District of California:

Publication enhances the deterrent effect of sanctions and helps educate the bar about what is expected of them under Rule 11. Publication is also useful in developing the emerging jurisprudence under this new rule. But publication of the name of the offending lawyer will perpetuate the record of his transgression

include judicial surveys founded on commonplace litigation events, such as the one described earlier. Dissemination and discussion of these surveys will inform judges and others on such matters as the perceived limits on judicial discretion, the guidelines appropriate during exercises of such discretion, and the areas of law that remain uncertain.<sup>93</sup> Surveys of judges, lawyers, and others regarding their actual experience in using frivolous paper laws may be an additional source of information.<sup>94</sup> Discussion of actual cases may also prove worthwhile, especially in creating an environment in which judges and lawyers share common expectations about the future use of frivolous litigation laws.<sup>95</sup>

Fairer and more consistent implementation of frivolous paper laws would also be encouraged by more detailed rulemaking by the Illinois Supreme Court. The recent adoption of Rule 137 (and the preemption of section 2-611) provided the supreme court with a good opportunity to resolve at least some of the legal issues that have arisen regarding section 2-611. Issues ripe for resolution included questions involving the applicability of the frivolous paper laws to events occurring after the initial filing of a paper, in particular, issues about continuing duties to conduct reasonable investigations regarding papers already filed and to amend papers that no longer are supported adequately even though proper support may have once existed.<sup>96</sup> Additional issues involved the range of avail-

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and . . . may be unduly harsh . . . . Publication can also be in less permanent media than law reports, such a [sic] local legal newspaper . . .

Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 202 (1985). The studies of Rule 11 dispositions in federal district courts suggest reported decisions contain only the "tip of the iceberg." S. BURBANK, *RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11*, 56-59 (1989).

93. One such early survey was done of federal judges. The results appeared in S. KASSIN, *AN EMPIRICAL STUDY OF RULE 11 SANCTIONS* (1985).

94. See, e.g., T. WILLGING, *THE RULE 11 SANCTIONING PROCESS* (1988); S. BURBANK, *supra* note 92.

95. Discussion of cases at annual judicial meetings such as the one that prompted this Article, seems worthwhile. Because publication of the names of offending attorneys may be "unduly harsh," Judge Schwarzer has suggested that publication of the circumstances surrounding an actual Rule 11 sanction ("which enhances the deterrent effect of sanctions") occur on occasion without the use of names of the violators. Schwarzer, *supra* note 92, at 202. Notwithstanding Judge Schwarzer's concerns, frequent and long-time readers of such private legal publications as the *Chicago Daily Law Bulletin* and the *National Law Journal* undoubtedly sense that at least some deterrence has come through the reporting of actual cases with the names of offending attorneys and their law firms prominently displayed.

96. See *supra* note 20 and accompanying text for another reference to this type of situation.

able sanctions.<sup>97</sup> By failing to address such questions, disparate treatment of similarly situated persons will continue as judges continue to disagree.

Detailed supreme court rulemaking about frivolous trial court papers may be accomplished in a number of ways. Relevant supreme court rules could address explicitly legal issues ripe for resolution. It seems the court included such detail when it approved the following language for Rule 137: "Where a sanction is imposed under this rule, the judge shall set forth with specificity the reasons and basis of any sanction so imposed either in the judgment order itself or in a separate written order."<sup>98</sup> Despite the court's specificity in this instance, the opportunity to address other troubling issues, *e.g.*, the nature and extent of any continuing duties, was missed, or passed over without comment, during the adoption of Rule 137.

More detailed rulemaking could also provide commentary on the techniques and exercises of rule enforcement. The promulgation of Federal Rule of Civil Procedure 11 in 1983 was accompanied by a legislative record that has proven quite useful to those applying and enforcing the Rule.<sup>99</sup> For example, this record provided guidelines regarding determinations as to whether "reasonable inquiry" occurred.<sup>100</sup> The absence of such guidelines in the comments accompanying Rule 137 leaves Illinois judges and lawyers in doubt as to the means of making such determinations. The commentary accompanying Rule 137 lacks any statement as to the reasons behind the apparently significant changes made in the Rule from the language found in section 2-611. Although section 2-611 mandates a sanction for each violation, Rule 137 does not. The supreme court's commentary, which consists merely of the comments of its rulemaking committee, simply noted: "Unlike section 2-611, Rule 137 allows but does not require the imposition of sanctions."<sup>101</sup>

Finally, the utility of local court rules in promoting fairer and more consistent implementation of frivolous paper laws merits careful examination. Even though laws such as section 2-611 and Rule 137 generally apply to all trial court proceedings, differences

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97. See *supra* note 18 and accompanying text (discussing when stringent sanctions might be appropriate).

98. ILL. REV. STAT. ch. 110A, para. 137 (1989).

99. Preliminary Draft, *supra* note 5.

100. *Id.* at 464-66.

101. ILL. ANN. STAT. 110A, para. 137 (Smith-Hurd Supp. 1989) (Committee Comments).

in custom and contemporary expectations exist from circuit to circuit, and from one component of a circuit court to another. On occasion, the explicit recognition of these differences in local rules should facilitate the implementation of the general laws in certain courts, or parts thereof, without sacrificing needed discretion and without undermining the minimum uniformity necessary throughout the State.<sup>102</sup>

## VI. CONCLUSION

A recent survey of Illinois associate judges revealed significant difficulties for the circuit courts with the interpretation and application of Illinois frivolous paper laws. These difficulties include issues regarding the nature of reasonable inquiry, the existence of continuing duties to inquire and amend, and the types of sanctions available. Although precise standards regarding litigation behavior should not be codified, and although broad areas of judicial discretion in handling litigation misconduct seem warranted, more can and should be done to facilitate the implementation of frivolous paper laws in a fairer and increasingly consistent manner. New informational sources must be devised and employed and more detailed Illinois Supreme Court rulemaking should be pursued. Finally, the adoption of local court rules should be more fully considered.

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102. Previously, the author has suggested local court rules in the federal district court setting, where the differences between the courts and between the varieties of civil cases before the differing judges of a single court are far less significant than the differences between the Illinois circuit courts and the civil cases therein. On the desirability of local rules see Parness, *Grounding Groundless Papers*, *THE JUDGES' J.* 2, 6 (1986); see also *supra* text accompanying note 81 (for further discussion of this point). For suggested guidelines for implementing federal Civil Rule 11, see Untereiner, *supra* note 89, at 914-921. Some federal courts have gone beyond local rules to consider so-called "standards of practice" or "professional courtesy" codes. See, e.g., *Dondi Properties Corp. v. Commerce Sav. & Loan Ass'n*, 121 F.R.D. 284 (N.D. Tex. 1988) (en banc). In Illinois, of course, local court rules must be consistent with generally applicable laws and must not intrude into areas of exclusive supreme court authority. *People ex rel Brazen v. Finley*, 119 Ill. 2d 485, 519 N.E.2d 898 (1988).

*Appendix A*

February 9, 1989

To Associate Judges Scheduled to Attend Civil Practice Sessions at Associate Judge Seminar:

In light of heightened judicial interest in abuses of the litigation process and in the use of sanctions as a management device, the committee planning the program on civil practice for the 1989 Associate Judge Seminar has initiated a study of associate judges' practices and views. We solicit your assistance as a participant in this inquiry—participation that should not impose more than a 15-minute interruption in your schedule. You should know that this study is significantly patterned after a study of Federal Rule of Civil Procedure 11 and of federal district judges completed in 1985 by the Federal Judicial Center.

Enclosed is a summary description of a litigation event. The event culminates in a party's request for sanctions under Section 2-611 of the Illinois Code of Civil Procedure. Also enclosed is a brief questionnaire seeking your reactions to the described event and the request, as well as your views generally on 2-611 proceedings. Portions of Section 2-611 have been enclosed for your convenience.

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

Please return the completed questionnaire in the enclosed envelope *no later than February 24, 1989*. All responses will be treated confidentially; the report will make no attributions to any individual judge.

Thank you for your time and attention. Results of the study will be presented at the sessions of the Committee on Civil Practice at the March seminar.

Sincerely,

Teri e. Engler  
Staff Attorney  
AOIC/Judicial Branch  
Education  
on behalf of the 1989 Associate  
Judge Seminar Committee on  
Civil Practice

TEE/il

*Appendix B*

Section 2-611 of the Illinois Code of Civil Procedure was amended, effective November 25, 1986. This amendment closely tracks the amendment to Rule 11 of the Federal Rules of Civil Procedure, which took effect in 1983. Section 2-611 now states:

2-611. Signing of pleadings, motions and other papers—  
Sanctions

§ 2-611. Signing of Pleadings, Motions and Other Papers; Sanctions. Every pleading, motion and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation . . . . If a pleading, motion, or other paper is signed in violation of this Section, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee . . . . All proceedings under this Section shall be within, and part of the civil action in which the pleading, motion or other paper referred to herein has been filed, and no violation or alleged violation of this Section shall give rise to a separate cause of action, or another cause of action within the civil action in question, by, on behalf of or against any party to the civil action in question, and by, on behalf of or against any attorney or insurance company involved in the civil action in question . . . .

*Appendix C*

Early on the morning of September 8, 1988, Mrs. Jones walked into Attorney Brown's office. She expressed a desire to file suit against John Smith and Everystate Insurance Company for her injuries arising out of an auto accident. It was related by her that a week before, she, her husband, and their small child were out for a Sunday drive when they stopped for a traffic light. It was further said that the driver of the car in front of them at the light, John Smith, apparently thought he was too far into the intersection because he put his car into reverse and started to back up. The unavoidable resulting collision between the front of their car and the rear end of his car, it was said, caused her injuries. At the end of her story Mrs. Jones showed Attorney Brown copies of hospital bills said to be due to the accident. She also said she knew Smith's name, address and insurer because she received them from Smith immediately after the accident.

On September 10, 1988, and after no further investigation, Attorney Brown filed a complaint on Mrs. Jones' behalf against Smith and Everystate Insurance Company, alleging negligence on the part of Smith and seeking \$20,000 in actual and punitive damages. A direct action statute was clearly appropriate.

On September 15, 1988, Attorney Brown received a notice from the court to the effect that Mrs. Jones' suit had been consolidated with another action. Deciding to investigate further, Attorney Brown went to the courthouse that day to read the complaint in the other action. He found the other action was brought by Mr. Jones against the same defendants, and that this other action arose from the same accident involving his client. In this pro se action Mr. Jones sought \$500,000 in damages. Puzzled as to why Mr. Jones did not come to him when Mrs. Jones did and why Mr. Jones decided to file a separate action, Attorney Brown decided to pay a visit to Mr. Jones. He acted on this decision on October 14th when he scheduled a meeting with Mr. Jones.

Upon putting these questions to him on October 15, 1988, Mr. Jones replied: "I don't need an attorney to represent me. I've sued these insurance companies at least 60 times all by myself. Why, I've sued Everystate alone about 25 times. I have to. They're always sending people out on the road after me. I have a right to protect myself. All the other times a judge throws my case out of court before it comes to trial and before I have a chance to prove anything. But this case is great because I've got my wife and child as witnesses. I can now prove that Everystate is out to kill me. So

I don't need an attorney and you may as well leave." Obviously, Mr. Jones' action was filed pro se. It is now October 19, 1988, and Attorney Brown is still awaiting Smith's and Everystate's answers—having taken no further action in Mrs. Jones' case.



*Appendix D\**

## Questionnaire

1. Having read a summary of the case, do you think any of the plaintiff's attorney's action is frivolous, without merit, or otherwise in violation of Section 2-611? (circle one)

YES 71%

NO 29%

If so, how would you characterize plaintiff's attorney's most serious or significant breach of Section 2-611?

2. If you answered YES to Question 1, do you think any violation of 2-611 was willful (i.e., in bad faith)?

YES 35%

NO 65%

3. If you answered YES to Question 1, at what point did a violation first occur? (circle one)

a. Sept. 10th

b. Sept. 15th or shortly thereafter

c. Oct. 15th or shortly thereafter

4. Do you believe Section 2-611 may be applied to any of Attorney Brown's conduct after September 10th? (circle one)

YES 55%

NO 45%

Please explain your answer.

5. If you answered YES to Question 1, would you be inclined to grant defendants' requests for attorneys' fees against plaintiff's attorney coming after a dismissal uncontested by plaintiff and after a summary judgment motion filed by defendants in which Smith's non-involvement in any accident was established? (circle one)

YES 78%

NO 22%

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

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\* This questionnaire is the same as the one distributed in February, 1989, except for the insertion of percentages in italicized type. The percentages in italicized type are the percentages of responding judges who answered the particular question in a particular way. While 87 questionnaires were returned and tabulated, there were not 87 responses to many of the questions. More complete results of the survey are available from Professor Parness.

\*\* This question was intended, and its responses were read, to cover an order against plaintiff's attorney.

- an amount less than all reasonable expenses and attorneys' fees 12%
- all reasonable expenses and attorneys' fees 82%
- all reasonable expenses and attorneys' fees plus a multiplier or bonus (perhaps related to other expenses) 5%

7. In this case, approximately what percentage of circuit and associate judges do you think would find some Section 2-611 violation and would be inclined to order the payment of some attorneys' fees?

\_\_\_\_% would find some violation

\_\_\_\_% would be inclined to order some fees paid

8. In addition to or instead of attorneys' fees assessed against plaintiff's attorney, would you be inclined to impose any other sanctions against plaintiff's attorney? (circle one)

YES 17%

NO 83%

If so, what would they be?

9. In addition to or instead of attorneys' fees, what other sanctions do you believe may be imposed under Section 2-611 against attorneys in other cases? (please place a check next to each form of sanction you think is available for some form of a 2-611 violation)

- some form(s) of reprimand 60%
- a referral to a bar disciplinary committee 60%
- a fine payable to the court and related to the court's expenses caused by 2-611 violation 44%
- a fine payable to the court and unrelated to the court's expenses caused by 2-611 violation 22%
- a public apology (printed in a newspaper, sent in a letter to one's law partners and associates, etc.) 8%

What, if any, other sanctions may be issued under 2-611?

10. Which of the following statements most nearly describes your position regarding the plaintiff's lawyer's initial factual investigation (i.e., on or before Sept. 10th) in this case? (check one)

- The lawyer appears to have investigated this case thoroughly. 0%
- The lawyer's investigation was not exemplary, but was adequate under the circumstances of this case. 26%

- The lawyer's investigation of this case appears to have been inadequate. 30%
- The lawyer obviously did not reasonably investigate the facts in this case. 44%

11. Which of the following statements most nearly describes your judgment of the plaintiff's attorney's state of mind regarding the action as of October 19th?

- The lawyer appears to be acting in good faith, truly believing, after sufficient inquiry, that the case has merit. 16%
- The lawyer appears to be acting in good faith, but probably out of negligence, believing that the case has merit only because he failed to investigate adequately. 44%
- The lawyer appears to be acting in bad faith, pursuing the case despite knowledge of, or strong suspicions about, its lack of merit. 39%

12. In general, what do you see as the primary function of sanctions under Section 2-611?

- to compensate the aggrieved party  
*noted by 14% of respondents*
- to penalize the offending party  
*noted by 3% of respondents*
- to deter future misconduct of a similar nature  
*noted by 17% of respondents*
- to accomplish any one, or any combination, of the three, depending upon the circumstances of the case.  
*noted by 80% of respondents*

13. How often in the past 12 months have you been confronted with a Section 2-611 motion for sanctions? (give approximate percentage of civil cases excluding small claims in which a Section 2-611 motion was made) %

14. In what percentage of these cases did you grant the request for attorneys' fees under Section 2-611? (check one)

0 - 15%	16 - 30%	31 - 45%	45 - 60%	over 60%
68%	11%	2%	9%	11%

15. Approximately how many people live within the geographical area served by your circuit court? (circle one)

under 25,000	25 - 50,000	50 - 100,000
2%	8%	7%
100 - 250,000	250 - 500,000	over 500,000
20%	20%	44%

