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**COOTER & GELL v. HARTMARX CORP.: FEDERAL RULE
11 SANCTIONS AND THE INEQUITABLE
APPLICATION OF THE ABUSE OF
DISCRETION STANDARD OF
REVIEW**

I. INTRODUCTION

Federal Rule of Civil Procedure 11 (Rule 11) enables courts to sanction attorneys and parties for filing frivolous lawsuits.¹ After Rule 11's 1983 amendment,² federal circuit courts of appeals interpreted it broadly, liberally using judicial sanctions to deter litigation conduct that reflects poorly upon the legal profession.³ Amended Rule 11 expressly mandates that courts impose sanctions upon finding a violation of the Rule.⁴

This Note examines the history of Rule 11, the reasons for the 1983 amendment and the changes resulting from the amendment. It then presents the policy arguments favoring and opposing the amended Rule. Finally, the uniform standard of reviewing Rule 11 decisions set out by the United States Supreme Court in *Cooter & Gell v. Hartmarx Corp.*⁵ is examined and an appropriate interpretation of this standard for reviewing district court sanction orders is proposed.

Because a review of factual issues requires a different standard of review than that of legal issues, a sanction decision—involving issues of both fact and law—is difficult for appellate courts to review. This complexity has led the federal circuits to apply different standards when reviewing sanction orders.⁶ In *Cooter & Gell* the Supreme Court mandated a uniform abuse of discretion standard,⁷ thereby limiting and simplifying the scope of appellate review. However, by limiting the scope of appellate review for all Rule 11 decisions to a deferential standard, sanction decisions based on findings of law are receiving inadequate scrutiny.⁸

1. FED. R. CIV. P. 11.

2. See *infra* note 38 for the text of amended Rule 11.

3. Edna S. Epstein & Charles M. Shaffer, Jr., *Introduction* to FED. PROCEDURE COMM'N, AM. BAR ASS'N, SANCTIONS: RULE 11 AND OTHER POWERS 3 (Edna S. Epstein et al. eds., 1986).

4. FED. R. CIV. P. 11. Rule 11 states in pertinent part that upon finding a violation, "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." *Id.* (emphasis added).

5. 110 S. Ct. 2447 (1990).

6. See *infra* part III.

7. See *infra* notes 230-36 and accompanying text.

8. See *infra* notes 246-53, 262-76 and accompanying text.

This result may chill attorney creativity and stifle new developments in the law. This Note argues that the standard of review mandated in *Cooter & Gell* be interpreted as a three-tiered approach,⁹ which would enable a court to address properly the various questions of law, fact and discretion inherent in a Rule 11 sanction order.¹⁰

II. HISTORICAL BACKGROUND

A. History of Rule 11

Rule 11 requires an attorney to sign pleadings, motions and other papers, certifying that to the best of his or her "knowledge, information, and belief,"¹¹ the pleading is "formed after reasonable inquiry . . . 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."¹² The Rule also requires that the pleading not be "interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."¹³

The origins of Rule 11 can be traced back to English common law. The requirement that counsel sign pleadings dates from "English equity practice at the time of Sir Thomas More."¹⁴ The original intent of the signature requirement was to ensure the proper form of pleadings.¹⁵ This practice was adopted in the United States through the assimilation of English common law. Abuse of judicial process was addressed in the United States as early as 1813, when Congress adopted legislation providing that attorneys who "multiplied the proceedings in any cause before the court so as to increase costs unreasonably and vexatiously" could be held liable for "any excess of costs so incurred."¹⁶

9. See *infra* part III.D.

10. See *infra* notes 246-76 and accompanying text.

11. FED. R. CIV. P. 11. For the complete text of Rule 11 including the 1983 amendment, see *infra* note 38.

12. FED. R. CIV. P. 11.

13. *Id.*

14. Jerold S. Solovy et al., *Sanctions Under Federal Rule of Civil Procedure 11*, in *RULE 11 AND OTHER SANCTIONS: NEW ISSUES IN FEDERAL LITIGATION* 9, 15 (1987).

15. *Id.* at 15; see Melissa L. Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 *GEO. L.J.* 1313, 1315 (1986); D. Michael Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 *MINN. L. REV.* 1, 8-14 (1976).

16. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 759 (1980) (quoting Act of July 22, 1813, ch. 14, § 3, 3 Stat. 21 (1854)); William W. Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 *F.R.D.* 181, 182 (1985) (quoting *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 759 (1980)).

Rule 24 of the Federal Equity Rules of 1842¹⁷ was developed to ensure that there was "good ground" for the suit,¹⁸ requiring that every bill contain counsel's signature as an "affirmation" that there was a reasonable foundation. As a member of the United States Supreme Court at the time of the rules' adoption,¹⁹ Justice Joseph Story greatly influenced the development of Rule 24.²⁰ He believed that counsel's signature served to guarantee that "there is good ground for the suit in the manner, [sic] in which it is framed."²¹ A later version of the rule, Rule 24 of the Federal Equity Rules of 1912,²² supplied the foundation for modern Rule 11.

Rule 11 in its original form was adopted in 1937.²³ It abolished the old equity rule requiring sworn testimony to overcome an answer and a

17. Equity Rule 24 provided: "Every bill shall contain the signature of counsel annexed to it, which shall be considered as an affirmation on his part that, upon the instructions given to him and the case laid before him, there is good ground for the suit, in the manner in which it is framed." Equity R. 24, 42 U.S. (1 How.) xlviii (1842), *quoted in* JAMES L. HOPKINS, HOPKINS' NEW FEDERAL EQUITY RULES 86-87 (6th ed. 1929).

18. *Id.*

19. Justice Joseph Story served on the Supreme Court from 1811 to 1845. THE WORLD ALMANAC AND BOOK OF FACTS: 1991, at 89 (1990).

20. Risinger, *supra* note 15, at 13.

21. Solovy et al., *supra* note 14, at 16 (quoting JOSEPH STORY, EQUITY PLEADINGS § 47 (1838)).

22. 226 U.S. 655 (1912). Rule 24 of the Equity Rules of 1912 provided:

Every bill or other pleading shall be signed individually by one or more solicitors of record, and such signatures shall be considered as a certificate by each solicitor that he has read the pleading so signed by him; that upon the instructions laid before him regarding the case there is good ground for the same; that no scandalous matter is inserted in the pleading; and that it is not interposed for delay.

Id.

23. Prior to the 1983 amendment, Rule 11 provided:

Every pleading 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 and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule; it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

Fed. R. Civ. P. 11, 28 U.S.C.A. Rule 11 (1960).

The Rules Enabling Act authorized the United States Supreme Court to prescribe general rules of civil procedure for the district courts and courts of appeals of the United States. 28 U.S.C. § 2072 (1988). Before the rules and amendments to the rules take effect, two procedures must be met. The rules: (1) must be reported to Congress by the Chief Justice at or after

verifying affidavit to support any pleading.²⁴ The original federal rules were adopted by order of the Supreme Court on December 20, 1937²⁵ pursuant to the Act of June 19, 1934.²⁶ The Attorney General transmitted the rules to Congress on January 3, 1938²⁷ and they became effective on September 16, 1938.²⁸ The Advisory Committee on the Federal Rules of Civil Procedure (Advisory Committee)²⁹ commented that Rule 11 substantially conformed to Equity Rule 24 relating to signature of counsel³⁰ and Equity Rule 21³¹ relating to scandalous matters.³² Rule 11 was designed to replace the equity code's major reliance on party verification by affidavit "as the central mechanism for obtaining honesty in pleading with central reliance on attorney good faith."³³ The attorney's signature on the pleading represented to the court that he or she had read the pleading and that to the best of the attorney's knowledge there was "good ground" for the suit.³⁴ The rule offered parties some protection

the beginning of a regular session of Congress; and (2) shall not take effect until ninety days after they have been reported. *Id.* See *infra* note 38 for a discussion of the procedure used in amending the Federal Rules of Civil Procedure in 1983.

24. The original Rule 11 abolished the need for a verifying affidavit, providing that "[e]xcept when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit." Fed. R. Civ. P. 11, 28 U.S.C.A. Rule 11 (1960).

25. 308 U.S. 645, 647 (1938); H.R. EXEC. COMM. REP. NO. 905, 83 CONG. REC., 75th Cong., 3d Sess., pt. 1, at 13 (1938); FEDERAL RULES OF CIVIL-APPELLATE-CRIMINAL PROCEDURE 7 (law sch. ed., West 1978).

26. Act of June 19, 1934, ch. 651, §§ 1-2, 48 Stat. 1064 (codified as amended at 28 U.S.C. § 2072 (1988)); see *supra* note 23 and accompanying text.

27. 308 U.S. 645, 647 (1938); H.R. EXEC. COMM. REP. NO. 905, 83 CONG. REC., 75th Cong., 3d Sess., pt. 1, at 13 (1938).

28. FEDERAL RULES OF CIVIL-APPELLATE-CRIMINAL PROCEDURE, *supra* note 23, at 7.

29. See *infra* note 38 for an explanation of the Advisory Committee's role in revising the Federal Rules of Civil Procedure.

30. See *supra* note 22 and accompanying text.

31. Equity Rule 21 provided: "Scandal and Impertinence. The right to except to bills, answers, and other proceedings for scandal or impertinence shall not obtain, but the court may, upon motion or its own initiative, order any redundant, impertinent or scandalous matter stricken out, upon such terms as the court shall think fit." Equity R. 21, 226 U.S. 655 (1912).

32. Fed. R. Civ. P. 11 advisory committee's note, *reprinted in* 28 U.S.C.A. Rule 11 (1960). *But see* Risinger, *supra* note 15, at 8-9 n.20 (suggesting Equity Rule 21 provided for in Rule 12(f), not Rule 11).

Rule 11 replaced the Equity Rule 24 requirement that the attorney's signature represented that he or she had read the pleading and there was good ground for the same—that the pleading was not interposed for delay. Fed. R. Civ. P. 11 advisory committee's note, *reprinted in* 28 U.S.C.A. Rule 11 (1960); see *supra* note 22. Rule 11 combined the signing requirements set out in Equity Rule 24 with the court's ability to strike scandalous or impertinent pleadings provided for in Equity Rule 21. Equity R. 21, 226 U.S. 655 (1912). See *supra* notes 22, 31 for the text of the equity rules.

33. Risinger, *supra* note 15, at 7.

34. Fed. R. Civ. P. 11, 28 U.S.C.A. Rule 11 (1960).

against frivolous or bad faith litigation.³⁵ Nevertheless, it did not alter the American rule that “the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys’ fee from the loser.”³⁶ Rule 11 remained unchanged until its amendment in 1983.³⁷

B. Rule 11: The 1983 Amendment

In 1983 Congress amended Rule 11 of the Federal Rules of Civil Procedure³⁸ to encourage courts to impose sanctions “by emphasizing the responsibilities of the attorney and reenforcing those obligations by

35. Rule 11, prior to the 1983 amendment, provided that if a pleading were interposed for delay or were signed with intent to “defeat the purpose of this rule,” the court could strike the pleading, or subject the attorney to “appropriate disciplinary action.” *Id.*

36. *Cooter & Gell v. Hartmarx Corp.*, 110 S. Ct. 2447, 2462 (1990) (quoting *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 247 (1975)).

At the time of the publication of this Note, the Advisory Committee proposed a new amendment to Rule 11 to remedy problems discussed in this Note. COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND THE FEDERAL RULES OF EVIDENCE (August, 1991).

37. Solovy et al., *supra* note 14, at 16.

38. The following text shows the effect of the 1983 amendment (italics show additions, brackets show deletions):

Rule 11. 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] *the attorney’s* individual name, whose address shall be stated. A party who is not represented by an attorney shall sign [his] *the party’s* pleading, *motion, or other paper* and state [his] *the party’s* address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney *or party* constitutes a certificate by [him] *the signer* that [he] *the signer* has read the pleading, *motion, or other paper*; that to the best of [his] *the signer’s* knowledge, information, and belief [there is good ground to support it; and that it is not interposed for delay] *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 not signed, *it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant.* [or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.] *If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney’s fee.*

FED. R. CIV. P. 11 advisory committee’s note, 97 F.R.D. 165, 196-97 (1983) (altering advisory committee’s note to show gender neutralization used in the amended Rule); 2A JAMES MOORE & JO D. LUCAS, MOORE’S FEDERAL PRACTICE ¶ 11.01[3] (2d ed. 1991). Compare FED. R.

the imposition of sanctions."³⁹ The amendment was intended to expand the equitable doctrine that allows courts to award expenses "to a litigant whose opponent acted in bad faith in bringing suit or conducting litigation."⁴⁰ Specifically, Congress changed Rule 11 from permissive—upon finding a violation a court may subject an attorney to disciplinary ac-

Civ. P. 11 with Fed. R. Civ. P. 11, 28 U.S.C.A. Rule 11 (1960) (showing effect of gender neutralization).

The Advisory Committee on the Federal Rules of Civil Procedure circulated a draft of a revision of Rule 11 in June 1981 to the bench, bar and public. Public hearings were held in Washington D.C. and Los Angeles in 1981. After evaluating reactions to the proposed amendment, the Advisory Committee made their formal recommendation for the revision of Rule 11 to the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States. FED. R. CIV. P. 11 advisory committee's note, 97 F.R.D. app. C at 190-92. The Standing Committee submitted the revision to the Supreme Court for its acceptance. The Supreme Court's advisory committee submitted the final draft on March 9, 1982. William F. Harvey, *The Judicial Assault on the Attorney-Client Relationship: Thoughts on the 1983 Amendments to the Federal Rules of Civil Procedure*, 1 BENCHMARKS 17, 17 (1984).

39. FED. R. CIV. P. 11 advisory committee's note, 97 F.R.D. at 198.

The district courts have discretion to fashion an "appropriate sanction." As well as imposing attorney's fees, courts have suspended the offending attorneys from practice in the district court unless they could show why a Rule 11 sanction motion should not be granted. See *Kendrick v. Zanides*, 609 F. Supp. 1162, 1173 (N.D. Cal. 1985). Courts have also imposed the sanction of dismissal. See *Consolidated Equip. Corp. v. Associates Commercial Corp.*, 40 Fed. R. Serv. 2d (Callaghan) 1432, 1433 (D. Mass. 1985); see also *In re Disciplinary Action Curl*, 803 F.2d 1004, 1005 (9th Cir. 1986) (approving suspension or disbarment from practice for future negligence), *overruled on other grounds by Partington v. Gedan*, 923 F.2d 686 (1991) (en banc); *Lieb v. Topstone Indus.*, 788 F.2d 151, 158 (3d Cir. 1986) (appropriate sanctions may include imposition of only part of adversary's expense, reprimand or reference to bar association grievance committee); *Davis v. Veslan Enters.*, 765 F.2d 494, 500-01 (5th Cir. 1985) (sanction may include award of amount of accrued interest lost because of delay in entering state court judgment); *Huettig & Schromm, Inc. v. Landscape Contractors Council*, 582 F. Supp. 1519, 1522-23 (N.D. Cal. 1984) (requiring sanctioned attorney to circulate court's opinion finding violation of Rule 11 to every member of firm), *aff'd*, 790 F.2d 1421 (9th Cir. 1986).

40. FED. R. CIV. P. 11 advisory committee's note, 97 F.R.D. at 198. The Supreme Court in *Chambers v. Nasco, Inc.*, 111 S. Ct. 2123 (1991), found that the sanction scheme under the federal rules did not "displace[] the inherent power to impose sanctions for . . . bad-faith conduct." *Id.* at 2134. Courts have the inherent power "to fashion an appropriate sanction for conduct which abuses the judicial process." *Id.* at 2133.

Sanctions that courts have imposed for abusing the judicial process include dismissal and attorney's fees. See, e.g., *Anderson v. United Parcel Serv.*, 915 F.2d 313, 315-16 (7th Cir. 1990) (dismissing plaintiff's action after delay and failure to comply with judge's order justified); *Hilton Hotels v. Banov*, 899 F.2d 40, 43-44 (D.C. Cir. 1990) (awarding attorney's fees to deter future abuse of litigation process justified); *Ayers v. Richmond*, 895 F.2d 1267, 1270 (9th Cir. 1990) (awarding fees to opposing side justified because of failure to appear at settlement conference). Although dismissal is particularly severe, courts have the discretion to dismiss cases for abusing the judicial process. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765 (1980) (recognizing court's power to dismiss where party abuses judicial process). Courts also have the inherent power to assess attorney's fees against a party or counsel. *Chambers*, 111 S. Ct. at 2133; *Roadway Express*, 447 U.S. at 765; *Hutto v. Finney*, 437 U.S. 678, 689 n.14 (1978); see also *Donaldson v. Clark*, 819 F.2d 1551, 1557 n.6 (11th Cir. 1987) (en banc) (court has inherent power to impose reasonable and appropriate sanctions upon counsel for abusive

tion⁴¹—to mandatory—upon finding a violation a court shall impose an appropriate sanction.⁴² This amendment also altered the Rule 11 standard from subjective, requiring both an “intent to defeat the purposes of this rule”⁴³ and a “wilful violation of this rule,”⁴⁴ to objective, requiring merely a finding of unreasonableness under the circumstances before sanctions will be ordered.⁴⁵ The Advisory Committee stressed that the “shall impose” language of the amendment to Rule 11 should “focus the court’s attention on the need to impose sanctions for pleading and motion abuses.”⁴⁶ The Advisory Committee further commented that the

litigation practices including dismissal with prejudice, entry of default judgment and monetary sanction).

The Court in *Chambers* outlined three areas where federal courts have the inherent power to assess attorney’s fees against counsel. The first area, known as “common fund exception” derives from a court’s historic equity jurisdiction, *Chambers*, 111 S. Ct. at 2133, allowing a court “to award attorney’s fees to a party whose litigation efforts directly benefit others.” *Id.*; *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 257-58 (1975).

Second, a court may sanction a party by requiring the party to pay attorney’s fees for “the willful disobedience of a court order . . . as part of the fine to be levied on the defendant.” *Chambers*, 111 S. Ct. at 2133 (quoting *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 258 (1975) (quoting *Fleishman Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967)); *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 426-28 (1923)).

Third, a court has the inherent power to impose sanctions when the losing party has “acted in bad faith, vexatiously, wantonly, or for oppressive reasons.” *Alyeska Pipeline Serv. Co.*, 421 U.S. at 258-59 (quoting *F.D. Rich Co. v. United States ex rel. Indus. Lumber Co.*, 417 U.S. 116, 129 (1974)). Bad faith may include “delaying or disrupting litigation or hampering the enforcement of a court order.” *Chambers*, 111 S. Ct. at 2133 (quoting *Hutto v. Finney*, 437 U.S. 678, 689 n.14 (1978)).

41. Fed. R. Civ. P. 11, 28 U.S.C.A. Rule 11 (1960); FED. R. CIV. P. 11 advisory committee’s note, 97 F.R.D. 165, 197 (1983). See *supra* note 23 for the text of Rule 11 prior to its amendment.

42. FED. R. CIV. P. 11. Courts have interpreted the amended Rule as being mandatory when it appears that a pleading or motion has been interposed for an improper purpose, is not well grounded in fact, or is not warranted by existing law or a good faith argument for the extension, modification or reversal of existing law. *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 254 (2d Cir. 1985). The court in *Eastway* determined that the “drafters intended to stress the mandatory nature of the imposition of sanctions pursuant to the rule.” *Id.* at 254 n.7.

43. Fed. R. Civ. P. 11, 28 U.S.C.A. Rule 11 (1960).

44. *Id.*

45. FED. R. CIV. P. 11 advisory committee’s note, 97 F.R.D. at 198-99. The Advisory Committee stated that the standard to apply when reviewing an attorney’s conduct was “reasonableness under the circumstances.” *Id.* at 198. The Advisory Committee further explained that a court should “avoid using the wisdom of hindsight and should test the signer’s conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted.” *Id.* at 199. The Rule itself states that the attorney’s signature certifies that the attorney made a “reasonable inquiry.” FED. R. CIV. P. 11. Once a court determines that an attorney or party has not acted in an objectively reasonable manner and has violated the Rule, sanctions are mandatory. FED. R. CIV. P. 11 advisory committee’s note, 97 F.R.D. at 200.

46. FED. R. CIV. P. 11 advisory committee’s note, 97 F.R.D. at 200.

standard was "more stringent than the original good-faith formula"⁴⁷ and would trigger a violation of the Rule in a greater range of circumstances.⁴⁸ Nevertheless, the amended Rule was not intended to be a fee-shifting statute⁴⁹ and "[a] movant under Rule 11 has no *entitlement* to fees or any other sanction."⁵⁰ Today, a court's inquiry involves objectively evaluating whether the filing was frivolous and whether the complaint was filed for an improper purpose.⁵¹

Congress explicitly sought to reverse the judiciary's traditional reluctance to intervene and impose sanctions on its own motion. To this end, the Advisory Committee stated that "[t]he detection and punishment of a violation of the signing requirement, encouraged by the amended rule, is part of the court's responsibility for securing the system's effective operation."⁵² The Advisory Committee intended the amendment of Rule 11 to minimize the frivolous signing of pleadings, motions and other papers by requiring courts to impose sanctions for violation of Rule 11 standards.⁵³ It also wrote that "[m]andating sanctions, such as expenses, upon the violator is viewed as a healthy deterrent against costly meritless maneuvers and worth the risk of satellite litigation."⁵⁴

Rule 11 allows a court to impose "an appropriate sanction" either on its own motion or on the motion of a party.⁵⁵ The Rule specifies one potential "appropriate sanction" as "an order to pay to the other party . . . the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's

47. *Id.* at 198-99.

48. *Id.*

49. STEPHEN B. BURBANK, AMERICAN JUDICATURE SOC'Y, RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 49 (1989).

50. *Id.* (emphasis added).

51. *Cooter & Gell v. Hartmarx Corp.*, 110 S. Ct. 2447, 2454 (1990). Rule 11 requires an attorney to inquire into the facts to make sure the pleading is well grounded in fact, i.e., not frivolous, and is not "interposed for any improper purpose." FED. R. CIV. P. 11.

52. FED. R. CIV. P. 11 advisory committee's note, 97 F.R.D. 165, 200 (1983).

53. Letter from Walter R. Mansfield, Chairman, to Judge Edward T. Gignoux, Chairman, and Members of the Standing Committee on Rules of Practice and Procedure (Mar. 9, 1982), *in* FED. R. CIV. P. 11 advisory committee's note, 97 F.R.D. app. C at 192.

54. *Id.* Satellite litigation is litigation unrelated to the merits of the case before the court, dealing with the collateral issue of sanctions such as the hearing and appeal of sanction motions and decisions.

55. FED. R. CIV. P. 11.

fee.”⁵⁶ The Advisory Committee commented that a court “has discretion to tailor sanctions to the particular facts of the case.”⁵⁷

1. Policy arguments favoring amended Rule 11

Congress intended amended Rule 11 to decrease the number of frivolous claims brought before the courts, thus allowing the judicial system to operate more efficiently.⁵⁸ Proponents of the amended Rule believe practices such as filing frivolous complaints, harassing one's opponent and maintaining baseless defenses have contributed to the problem of expensive, complex and burdensome civil litigation.⁵⁹ They suggest that implementing the amended Rule would decrease such delays.⁶⁰ Similarly, the Advisory Committee commented that the purpose behind the amendment's adoption was to “discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses.”⁶¹ The Advisory Committee intended to provide for the “detection and punishment of a violation of the signing requirement” to enable the system to operate effectively.⁶² Proponents of the amendment claim that the prior tools to deter and punish the abuse of the judicial system were inadequate, and that a more effective Rule was necessary.⁶³

The amendment was meant to solve some of the old Rule's problems. Prior to amendment, Rule 11 did not impose mandatory sanctions for a misuse of the judicial system.⁶⁴ Lawyers were reluctant to request and judges were reluctant to grant sanctions against other attorneys because: (1) the process is unpleasant and creates antagonism

56. *Id.*

57. FED. R. CIV. P. 11 advisory committee's note, 97 F.R.D. at 200.

58. *Cooter & Gell v. Hartmarx Corp.*, 110 S. Ct. 2447, 2454 (1990); *see also* William W. Schwarzer, *Pro*, 7 *COMPLEAT LAWYER* 27, 27-29 (1990) (Rule 11 intended to prevent frivolous litigation abuse and harrassment); Schwarzer, *supra* note 16, at 183 (Rule 11 intended to deter misuse or abuse of litigation process); FED. PROCEDURE COMM'N, AM. BAR ASS'N, *SANCTIONS: RULE 11 AND OTHER POWERS* 9 (Edna S. Epstein et al. eds., 1986) (Rule 11 intended to prevent unnecessary work by court or litigants).

59. Schwarzer, *supra* note 16, at 182; Schwarzer, *supra* note 58, at 27.

60. FED. R. CIV. P. 11 advisory committee's note, 97 F.R.D. at 198 (amended Rule to discourage dilatory or abusive tactics and help “streamline” litigation); Schwarzer, *supra* note 58, at 28.

61. FED. R. CIV. P. 11 advisory committee's note, 97 F.R.D. at 198.

62. *Id.* at 200.

63. *Id.* at 198; *see also* Schwarzer, *supra* note 16, at 182-84 (tools to deter and punish abuse of justice system inadequate prior to amended Rule).

64. *See infra* note 231 for the text of Rule 11 prior to amendment. Prior to amendment, Rule 11 provided that an attorney “*may* be subjected to appropriate disciplinary action,” Fed. R. Civ. P. 11, 28 U.S.C.A. Rule 11 (1960) (emphasis added), leaving the decision whether to grant the motion for sanctions within the discretion of the trial court. *See supra* notes 41-45 and accompanying text; *see infra* note 187 and accompanying text.

among members of the bar;⁶⁵ (2) lawyers may not want to call attention to practices they themselves use;⁶⁶ (3) judges do not want to appear as policemen, teachers or moral guardians;⁶⁷ and (4) judges do not want to appear as if they are imposing their own standards of professional conduct on others.⁶⁸ Making sanctions mandatory under the amended Rule relieves some of the tension present in what were previously discretionary awards. Proponents claim that the advantages of punishing and deterring abuses outweigh the uncomfortable nature of attorneys moving for sanctions and judges granting sanction motions.⁶⁹ The amended Rule allows district courts to better regulate conduct that reflects poorly on the profession, and to deter such misbehavior by consistently imposing sanctions.⁷⁰

Proponents of the amended Rule counter criticisms that it will chill zealous advocacy by pointing out that it does not "alter the adversary system or diminish the lawyer's obligation to his client."⁷¹ Additionally, there are disciplinary rules imposing limits on zealous advocacy dating back to 1908.⁷² Supporters also argue that there are necessary limits to

65. Schwarzer, *supra* note 16, at 183.

66. *Id.*

67. *Id.*

68. *Id.* at 184.

69. *Id.*

70. FED. PROCEDURE COMM'N, *supra* note 58, at 3; A. Leo Levin & Sylvan A. Sobel, *Achieving Balance in the Developing Law of Sanctions*, 36 CATH. L. REV. 587, 589 (1987) (courts taking balanced approach towards sanctions, providing corrective measures to litigation problems and avoiding negative side effects).

71. Schwarzer, *supra* note 16, at 189.

72. ABA Canons of Professional Ethics, Canon 30 (1908) (as amended, the Opinions of the ABA Comm. on Professional Ethics), reprinted in VERN COUNTRYMAN ET AL., *THE LAWYER IN MODERN SOCIETY* app. ii, at 942 (2d ed. 1976) (prohibiting attorney from conducting civil action or making defense when convinced that it is intended merely to harass or injure opposite party or work oppression or wrong); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A) (1981); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1983). Model Code DR 7-102(A)(1) and (A)(2) mandate:

Representing a Client Within the Bounds of the Law.

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

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

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

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A).

Model Rule 3.1 provides in pertinent part: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1.

litigation, and that judges will not unfairly punish frivolous litigation through the use of Rule 11.⁷³

2. Policy arguments criticizing amended Rule 11

Critics of the 1983 amendment argue that it encourages satellite litigation, shifts the economic burden of litigation and prolongs litigation.⁷⁴ The new freedom trial courts have in imposing sanctions may increase the number of motions for Rule 11 sanctions, which in turn may encourage opposing counsel to file Rule 11 motions for the frivolous filing of the original Rule 11 motion.⁷⁵ Motions for Rule 11 sanctions cause additional cost and time expenditures,⁷⁶ require notice to the court,⁷⁷ possibly involve discovery,⁷⁸ require an opportunity to oppose the imposition of sanctions⁷⁹ and a separate hearing on the matter,⁸⁰ and may lead

73. FED. R. CIV. P. 11 advisory committee's note, 97 F.R.D. 165, 199 (1983); Schwarzer, *supra* note 16, at 184; Levin & Sobel, *supra* note 70, at 589-91.

74. Judy L. Woods, Comment, *Reasonable Inquiry Under Rule 11—Is the Stop, Look, and Investigate Requirement a Litigant's Roadblock?*, 18 IND. L. REV. 751, 772 (1985).

75. See *infra* notes 83-87 and accompanying text. Even proponent William Schwarzer comments that "[l]awyers have tended to move for sanctions much more frequently than is justified or desirable." Schwarzer, *supra* note 58, at 29.

76. Woods, *supra* note 74, at 772.

77. FED. R. CIV. P. 11 advisory committee's note, 97 F.R.D. at 200; Tom Growney Equip. v. Shelley Irrigation Dev., 834 F.2d 833, 835-37 (9th Cir. 1987) (procedural due process requiring fair notice for Rule 11 sanctions).

78. The Advisory Committee's note suggests that "discovery should be conducted only by leave of the court, and then only in extraordinary circumstances." FED. R. CIV. P. 11 advisory committee's note, 97 F.R.D. at 201. Opponents state that often large sanctions are imposed without discovery or an evidentiary hearing, preventing the sanctioned attorney from receiving due process. Jerold S. Solovy, *Con*, 7 COMPLEAT LAWYER 27, 30 (1990).

79. Schwarzer, *supra* note 16, at 198.

80. Roadway Express, Inc. v. Piper, 447 U.S. 752, 767 (1980) ("Like other sanctions, attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record."); White v. General Motors Corp., 908 F.2d 675, 686 (10th Cir. 1990) ("A party that is the target of a sanctions request has a due process right to 'notice that such sanctions are being considered by the court and a subsequent opportunity to respond,' before final judgment." (citing Braley v. Campbell, 832 F.2d 1504, 1514 (10th Cir. 1987))), *cert. denied*, 111 S. Ct. 788 (1991); Davis v. Crush, 862 F.2d 84, 88-89 (6th Cir. 1988) (when case dismissed without trial, due process may require hearing before Rule 11 sanctions may be imposed); Tom Growney Equip., 834 F.2d at 835-37 (imposition of Rule 11 sanctions without fair notice and opportunity to be heard violates procedural due process); Donaldson v. Clark, 819 F.2d 1551, 1558-61 (11th Cir. 1987) (existence of Rule 11 is notice enough for factual deficiency, notice required for pleading requesting extension of existing law or for pleading found to be interposed for improper purpose); Eavenson, Auchmuty & Greenwald Corp. v. Holtzman, 775 F.2d 535, 540 (3d Cir. 1985) (due process requires fair notice and opportunity for hearing on record); Woods, *supra* note 74, at 772 (requests for Rule 11 sanctions requiring notice and hearing).

to an appeal of the sanction decision.⁸¹ Thus, although the Advisory Committee suggests that the amended Rule is meant to "streamline the litigation process,"⁸² opponents of Rule 11 strongly suggest that the amendment has done just the opposite.⁸³ In fact, one opponent claims that "satellite litigation has become a fact of life under Rule 11. . . . Undoubtedly in this new decade, every case will involve some form of Rule 11 motion and resulting decision."⁸⁴ Not only does the amended Rule cause more motions for sanctions, but the mandatory nature of sanctions once a violation is found also sparks more appeals of sanction orders.⁸⁵ Courts have further held that motions requesting sanctions can

81. *Cooter & Gell v. Hartmarx Corp.*, 110 S. Ct. 2447, 2456 (1990) (imposition of Rule 11 sanctions requires determination of collateral issue and may be made after principal suit has been terminated); *DeSisto College Inc. v. Line*, 888 F.2d 755 (11th Cir. 1989) (court of appeals has jurisdiction to hear interlocutory appeal from decision awarding Rule 11 sanctions under "collateral order" doctrine), *cert. denied*, 110 S. Ct. 2219 (1990); *Lupo v. R. Rowland & Co.*, 857 F.2d 482, 485 (8th Cir. 1988) (finding Rule 11 motion collateral and independent claim), *cert. denied*, 490 U.S. 1081 (1989); *Eavenson, Auchmuty & Greenwald Corp.*, 775 F.2d at 537, 539 (Rule 11 sanction order reviewable if: (1) order conclusively determines disputed question; (2) resolves important issue completely separate from merits of action; and (3) is effectively unreviewable on appeal from final judgment) (Rule 11 sanction order appealable as collateral order); *Knorr Brake Corp. v. Harbil, Inc.*, 738 F.2d 223, 226 (7th Cir. 1984) (award of attorney's fees under 28 U.S.C. § 1927 appealable collateral order). *But see* *Riverhead Sav. Bank v. National Mortgage & Equity Corp.*, 893 F.2d 1109, 1113 (9th Cir. 1990) (sanctions generally not appealable against party prior to entry of final judgment, but sanction order against non-party immediately appealable as final order).

82. FED. R. CIV. P. 11 advisory committee's note, 97 F.R.D. at 198.

83. Arthur B. LaFrance, *Federal Rule 11 and Public Interest Litigation*, 22 VAL. U. L. REV. 331, 334 (1988); Nelken, *supra* note 15, at 1325-29; Risinger, *supra* note 15, at 34. Risinger points out that there were few instances between 1938 and 1983 when sanctions were imposed or requested. However, after the 1983 amendment, in the first two years alone, there were 200 reported cases under Rule 11. Nelken analyzes some of these cases in considerable detail. Nelken, *supra* note 15, at 1325-29.

84. Solovy, *supra* note 78, at 27. Solovy reports that more than one thousand reported Rule 11 decisions have been handed down as well as undoubtedly hundreds, if not thousands, of unreported Rule 11 decisions. *Id.*

85. *Id.* at 30. Solovy argues that because of the stigma attached to being sanctioned, "counsel must appeal the decision to protect his or her reputation." *Id.*

form the basis for Rule 11 sanctions;⁸⁶ satellite litigation can reach ridiculous lengths.⁸⁷

Some members of the practicing bar criticize the amended Rule for increasing the imposition of sanctions, which in turn deters vigorous advocacy.⁸⁸ According to these opponents, zealous advocacy without concern for possible misrepresentations to the court is "the hallmark of aggressive and justified representation of the client."⁸⁹ Although the Advisory Committee suggests that Rule 11 is "not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories,"⁹⁰ courts have imposed substantial personal sanctions upon attorneys involving awards of hundreds of thousands of dollars⁹¹ and even a million dollars.⁹² One attorney argued that "sanctions of this magnitude chill, and probably kill, a lawyer's ardor and enthusiasm for forging new legal

86. *E.g.*, *Local 106, Serv. Employees Int'l Union v. Homewood Memorial Gardens*, 838 F.2d 958, 961 (7th Cir. 1988) (affirming trial court's ruling that union's motion for sanctions showed complete disregard for existing law supporting Homewood's defense and sanctionable); *In re Central Ice Cream Co.*, 836 F.2d 1068, 1074 (7th Cir. 1987) (excessive request for fees sanctionable event; district courts should try to impose sanctions for each independently sanctionable event); *Harris v. WGN Continental Broadcasting*, 650 F. Supp. 568, 576 (N.D. Ill. 1986) (claim of violation of Rule 11 serious charge and can itself form basis for Rule 11 sanctions); *Coburn Optical Indus'l v. Cilco, Inc.*, 610 F. Supp. 656, 661 (M.D.N.C. 1985) (sanctioning attorney who moved for Rule 11 sanctions in response to opposing counsel's motion for sanctions); *Fisher Bros. v. Cambridge-Lee Indus.*, 585 F. Supp. 69, 72 (E.D. Pa. 1983) (imposing sanctions against moving party of Rule 11 motion). *See generally* Susan Getzendanner, *Current Issues and Rule 11*, in 1 CURRENT PROBLEMS IN FEDERAL CIVIL PRACTICE, 415, 439 (October 17, 1988) (discussing increase in number of frivolous sanction requests and sanction requests on sanction motions).

87. *E.g.*, *Stevens v. Lawyers Mut. Liab. Ins. Co.*, 789 F.2d 1056, 1060-61 (4th Cir. 1986) (former client appealed denial of motion for sanctions against insurer for insurer's filing of motion for sanctions against former client's counsel); *see supra* note 86 and accompanying text.

88. Solovy, *supra* note 78, at 27; Woods, *supra* note 74, at 770.

89. Solovy et al., *supra* note 14, at 8.

90. FED. R. CIV. P. 11 advisory committee's note, 97 F.R.D. 165, 199 (1983).

91. Solovy, *supra* note 78, at 27. The Tenth Circuit Court of Appeals overturned a district court sanction of \$172,382 against plaintiffs and their attorneys, jointly and severally, including local counsel in Kansas, and remanded for further findings on the reasonableness of the attorney's fees. *White v. General Motors Corp.*, 908 F.2d 675, 686-87 (10th Cir. 1990). The court said the test for the amount of the sanction "should be the least severe sanction adequate to deter and punish the plaintiff," and should not be used to drive "certain attorneys out of practice." *Id.* at 684.

92. The United States district court in Miami imposed a \$1.2 million dollar sanction against the Washington D.C. based public interest law firm Christic Institute, *Avirgan v. Hull*, 705 F. Supp. 1544 (S.D. Fla. 1989), *aff'd*, 932 F.2d 1572 (11th Cir. 1991), which might put the firm out of business. Paul Marcotte, *Rule 11 Revisited*, 75 A.B.A. J. 32, 34 (1989). A spokesman for the firm commented that if the case is upheld, other public interest groups will be deterred from getting involved in controversial issues for fear of having sanctions imposed against them. *Id.*

frontiers."⁹³ The Second Circuit Court of Appeals addressed this fear: "Vital changes have been wrought by those members of the bar who have dared to challenge the received wisdom, and a rule that penalized such innovation and industry would run counter to our notions of the common law itself."⁹⁴

Critics also claim that the amended Rule causes conflict in the attorney-client relationship. Proponents of Rule 11 suggest that attorneys should warn their clients of the Rule.⁹⁵ Opponents criticize this suggestion as having a "chilling" effect on the attorney-client relationship⁹⁶ because clients may feel compelled to withhold information in order to "protect" their attorney.⁹⁷ One commentator points out that an attorney may no longer be able to rely on a client for factual information,⁹⁸ because under the amended Rule's objective standard, an attorney is expected to make a reasonable inquiry into factual matters, provided the attorney has a reasonable amount of time between engagement and filing the complaint, possibly resulting in a higher cost of legal services.⁹⁹ Not being able to rely on the client's initial statement of the facts may cause a feeling of distrust between the attorney and client.¹⁰⁰

The amended Rule may further disrupt the attorney-client relationship: once either the court or opposing counsel proposes Rule 11 sanctions at the pleading stage or later, "Rule 11 can compel the disclosure of information usually protected by the attorney-client privilege or by work product immunity."¹⁰¹ One commentator suggests that even if informa-

93. Solovy, *supra* note 78, at 27.

94. *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 254 (2d Cir. 1985). The Second Circuit noted that, "it is important that Rule 11 not have the effect of chilling creative advocacy, even of positions that may arguably be at odds with existing precedent." *Cross & Cross Properties, Ltd. v. Everett Allied Co.*, 886 F.2d 497, 504 (2d Cir. 1989).

95. Solovy, *supra* note 78, at 29.

96. Woods, *supra* note 74, at 769.

97. *Id.*

98. *Id.* at 763 (citing Richard L. Marcus, *Reducing Court Costs and Delay: The Potential Impact of the Proposed Amendments to the Federal Rules of Civil Procedure*, 66 JUDICATURE 363, 365 (1983)). For example, if sanctions are raised against an attorney who bases his certification entirely upon consultation with officers and employees of a client corporation, an adequate showing could most likely only be made by disclosing the content of such communications. *Id.* at 365.

99. Whereas prior to the 1983 amendment, an attorney could file the complaint relying on the factual information given him or her by the client, the amended Rule requires attorneys to "stop, think and investigate" more carefully before filing papers. FED. R. CIV. P. 11 advisory committee's note, 97 F.R.D. 165, 192 (1983).

100. Woods, *supra* note 74, at 763.

101. *Id.* at 768; see also LaFrance, *supra* note 83, at 347 n.64 ("Rule 11 inquiries, because they arise in the same context as the litigation prompting them, inevitably create attorney-client conflicts. . . . [B]ecause Rule 11 operates independently of whether a party prevails on

tion protected by the attorney-client privilege or by work product immunity is not disclosed, an attorney may be forced to reveal trial strategy and preliminary investigative steps at an inopportune time.¹⁰²

Also, a court's imposition of sanctions on a lawyer and client creates a conflict of interest for the attorney.¹⁰³ The attorney owes a primary duty to the client.¹⁰⁴ The American Bar Association Model Rules of Professional Conduct (Model Rules) recognize that the lawyer has an ethical obligation to "hold inviolate confidential information of the client."¹⁰⁵ In order to defend against a possible sanction, the attorney may feel torn between saving his or her own pocketbook, reputation, and possibly even license to practice before the federal court,¹⁰⁶ and his or her duty to protect the attorney-client privilege.¹⁰⁷

The Model Rules recognize that a lawyer may reveal information in some circumstances. Rule 1.6(b)(2) indicates that the attorney might be able to reveal confidential client information when facing court sanctions.¹⁰⁸ Thus, facing Rule 11 sanctions may force an attorney to divulge case theories and trial strategy at an inopportune time, which may have a

the merits, it strikes uniquely at the attorney's performance and therefore his or her relationship with the client."). *But see* FED. R. CIV. P. 11 advisory committee's note, 97 F.R.D. 165, 191 (1983) (Rule 11 not to require disclosure of privileged communications or work product, however, *in camera* inspection may be required).

102. Woods, *supra* note 74, at 678.

103. Solovy, *supra* note 78, at 29.

104. *Id.*; *see also* MODEL RULES OF PROFESSIONAL CONDUCT pmbl. cmt. 7 (1983) (duty to be zealous advocate without disclosing confidences usually harmonious with responsibility to legal system). The preamble to the Model Rules states that "clients are entitled to expect that communications within the scope of the [attorney-client] privilege will be protected against compelled disclosure." *Id.*

105. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. 2 (1983).

106. The court in *Kendrick v. Zanides*, 609 F. Supp. 1162 (N.D. Cal. 1985), indicated that if the attorneys did not show credible information that justified their belief in the allegations in the complaint, the court would suspend the offending attorneys from practicing in the District Court of the Northern District of California. *Id.* at 1172-73; FED. PROCEDURE COMM'N, *supra* note 58, at 8.

107. Solovy, *supra* note 78, at 29. One critic of the amended rules stated that they "sponsor a direct attack on the attorney and his client, and their relationship." Harvey, *supra* note 38, at 21.

108. Model Rule 1.6(b)(2) provides:

A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

.....

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) (1983).

prejudicial effect on the client's interests.¹⁰⁹ The client and the attorney may even have to retain separate counsel to oppose a sanction motion or appeal a sanction order.¹¹⁰ In such situations, it is argued, attorneys and clients almost certainly will find their attention diverted from the original matter in dispute.¹¹¹

Furthermore, critics argue that since ninety-five percent of all civil cases settle before reaching trial, the beneficial effect of Rule 11 is marginal.¹¹² Critics suggest that the federal judicial system is already efficient, and that Rule 11 will not be an effective deterrent for the five percent of cases that do not settle before trial.¹¹³ They argue that the vast majority of cases which do reach trial are grounded in fact and law, and brought in good faith, thus requiring their day in court.¹¹⁴ Opponents of the Rule warn that Rule 11 favors the policy of judicial economy for the benefit of the state, rather than supporting the enforcement of the rights of individuals.¹¹⁵ Opponents also point to Rule 11's effect as an increased economic burden to litigation,¹¹⁶ and suggest that the poor and middle classes will be particularly harmed.¹¹⁷

Finally, critics note that whereas the Rule is arguably only marginally useful in deterring litigation,¹¹⁸ it is extremely detrimental to civil

109. Woods, *supra* note 74, at 768. *But see* FED. R. CIV. P. 11 advisory committee's note, 97 F.R.D. 165, 191 (1983) ("Our Advisory Committee Note has . . . been amplified to make clear . . . that the rule does not require a party or attorney to disclose privileged communications or work product."). The Advisory Committee's note states:

The rule does not require a party or an attorney to disclose privileged communications or work product in order to show that the signing of the pleading, motion, or other paper is substantially justified. The provisions of Rule 26(c), including appropriate orders after *in camera* inspection by the court, remain available to protect a party claiming privilege or work product protection.

Id. at 199.

110. Solovy, *supra* note 78, at 29.

111. Woods, *supra* note 74, at 769.

112. *Id.* at 773.

113. *Id.*

114. *Id.*

115. *Id.* at 773-74. *See generally* LaFrance, *supra* note 83, at 333-34 (warning that Rule 11 is "antithetical to public interest litigation").

116. *See supra* notes 74-85 and accompanying text.

117. Woods, *supra* note 74, at 773.

118. LaFrance, *supra* note 83, at 334 (1983 amendment to Rule 11 has generated "literally hundreds of opinions"); *see supra* notes 83-84 and accompanying text.

rights issues.¹¹⁹ Startling statistics reveal that civil rights cases are sanctioned far more frequently than other civil cases.¹²⁰

III. STANDARDS OF REVIEW

Standards of review are "those yardstick phrases meant to guide the appellate court in approaching the issues and parties before it and the trial court's earlier procedure or result."¹²¹ Standards of review frequently "describe the relevant and appropriate materials the appellate court looks to in performing its review function."¹²² Federal Rule of Civil Procedure 52 (Rule 52) provides the standard by which appellate courts must review factual findings in civil actions.¹²³ Rule 52 provides for a "clearly erroneous" standard for reviewing factual issues.¹²⁴ How-

119. See LaFrance, *supra* note 83, at 334 (Rule 11 shifts from "fifty years of progress in individual rights and civil liberties"); Marcotte, *supra* note 92, at 32 (civil rights plaintiffs disproportionately affected by Rule 11); Solovy, *supra* note 78, at 30 ("[S]ting of the rule is most often directed toward Title VII and civil rights plaintiffs.").

120. See LaFrance, *supra* note 83, at 353; Solovy, *supra* note 78, at 30. "Although civil rights cases constitute less than 8% of case filing in federal court, they amounted to more than 22% of reported Rule 11 cases between 1983 and 1985." LaFrance, *supra* note 83, at 353. If the category of "civil rights" cases were expanded to include employment discrimination, and other relevant categories, these cases would amount to 29.9% of Rule 11 motions, with sanctions granted 68% of the time. *Id.* at 353. LaFrance points out that *Brown v. Board of Education*, 347 U.S. 483 (1954), *supplemented*, 349 U.S. 294 (1955), would be "particularly vulnerable" if brought today because of the adverse impact of Rule 11 on public interest litigation. LaFrance, *supra*, note 83, at 353-54. Another critic points out that "[c]ivil-rights plaintiffs and their counsel were sanctioned at a rate of 47.1% of motions, considerably higher than the 8.4% for plaintiffs in non-civil-rights cases." Marcotte, *supra* note 92, at 32.

121. 1 STEVEN A. CHILDRESS & MARTHA S. DAVIS, STANDARDS OF REVIEW: FEDERAL CIVIL CASES AND REVIEW PROCESS § 1.1, at 3 (1986).

122. 1 *id.* § 1.1, at 5.

123. Federal Rule of Civil Procedure 52 provides appellate courts with a uniform standard to apply to factual findings by the trial court. FED. R. CIV. P. 52. The purpose of Rule 52 is:

- (1) to avoid continued confusion and conflicts among the circuits as to the standard of appellate review of findings of fact by the court;
- (2) to eliminate the disparity between the standard of review as literally stated in Rule 52(a) and the practice of some courts of appeals; and
- (3) to promote nationwide uniformity.

FED. R. CIV. P. 52 advisory committee's note, 28 U.S.C.A. Rule 52 (Supp. 1991); see also Note, *Rule 52(a): Appellate Review of Findings of Fact Based on Documentary or Undisputed Evidence*, 49 VA. L. REV. 506, 536-37 (1963) (proposing broader or narrower scope of Rule 52(a) review dependent upon type of evidence reviewed).

124. Federal Rule of Civil Procedure 52 provides:

- (a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of

ever, the discretionary aspect of imposing an appropriate sanction, "as opposed to findings of fact, [is] not generally reviewed under the clearly erroneous rule."¹²⁵ Furthermore, finding the exact dividing line between findings of fact and findings of law is often problematic.¹²⁶ Thus, it may be difficult for a court to know which standard of review to apply to Rule 11 decisions.

Factual findings by the judge generally are considered as conclusive as a jury verdict,¹²⁷ whereas equitable review of legal conclusions has been broader.¹²⁸ Thus, reviewing a decision involving both factual and legal conclusions may be difficult. When Congress authorized the merger of law and equity, the federal rules adopted a single test formulated in Rule 52(a).¹²⁹ It states in part, "[f]indings of fact . . . shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."¹³⁰ Although reviewing a Rule 11 sanction decision may involve questions of law, fact and trial court discretion in fashioning an appropriate sanction, the United States Supreme Court in *Cooter & Gell v. Hartmarx Corp.* has mandated a uniform abuse of discretion standard for reviewing all aspects of Rule 11 decisions.¹³¹ Prior to *Cooter & Gell*,

the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

(b) Amendment. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.

FED. R. CIV. P. 52.

125. 1 CHILDRESS & DAVIS, *supra* note 121, § 2.2, at 28.

126. See *Bose Corp. v. Consumers Union*, 466 U.S. 485, 501 (1984) (mentioning "vexing nature" of distinguishing law from fact); *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982) (discussing difficulty in distinguishing factual findings from legal conclusions); 1 CHILDRESS & DAVIS, *supra* note 121, § 2.3, at 28-29 (discussing problem distinguishing factual from legal findings).

127. 1 CHILDRESS & DAVIS, *supra* note 121, § 2.2, at 27.

128. 1 *id.*; see also *Bose Corp.*, 466 U.S. at 501 ("Rule 52 does not inhibit an appellate court's power to correct errors of law."); *Pullman-Standard*, 456 U.S. at 287 (stating Rule 52 does not apply to conclusions of law).

129. FED. R. CIV. P. 52(a).

130. *Id.*

131. 110 S. Ct. 2447, 2461 (1990).

the circuit courts of appeals were split on the proper standard of review to apply.¹³²

A. The "Clearly Erroneous" Standard

Some circuit courts of appeals applied a clearly erroneous standard of review to Rule 11 decisions involving questions of fact prior to *Cooter & Gell v. Hartmarx Corp.*¹³³ The "clearly erroneous" standard of appellate review developed out of the difficulty involved in reviewing a decision made in a nonjury legal action, where the judge in essence replaces the traditional function of the jury.¹³⁴ The United States Supreme Court has defined the standard: "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."¹³⁵ Under this standard, the district court's fact finding is generally protected, because a reviewing court is not entitled to reverse the findings of the trier of fact "simply because it is convinced that it would have decided the case differently."¹³⁶ The United States Supreme Court has stated that Rule 52 "recognizes and rests upon the unique opportunity afforded the trial court judge to evaluate the credibility of witnesses and to weigh the evidence."¹³⁷

132. See *infra* notes 150-58, 169-77 and accompanying text.

133. See *infra* notes 169-73 and accompanying text.

134. 1 CHILDRESS & DAVIS, *supra* note 121, § 2.2, at 27-28. Courts apply the clearly erroneous standard of review for factual findings made or adopted by the trial judge. See *Falcon Constr. Co. v. Economy Forms Corp.*, 805 F.2d 1229, 1232 (5th Cir. 1986) (findings of fact not overturned unless clearly erroneous; applying rule whether trial judge prepared own findings of fact or whether trial judge adopted party's findings of fact verbatim) (citing *FED. R. CIV. P.* 52(a); *Anderson v. City of Bessemer*, 470 U.S. 564, 572 (1985); *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656-57 (1964); *Clark v. Mobil Oil Corp.*, 693 F.2d 500, 501 (5th Cir. 1982)); *Kinnett Dairies v. Farrow*, 580 F.2d 1260, 1268 n.18 (5th Cir. 1978) (stating clearly erroneous standard of review applicable to trial court's factual findings whether findings prepared or adopted by judge) (citing *Raillex Corp. v. Speed Check Co.*, 457 F.2d 1040, 1042 (5th Cir.), *cert. denied*, 409 U.S. 876 (1972); *Louis Dreyfus & Cie. v. Panama Canal Co.*, 298 F.2d 733, 738-39 (5th Cir. 1962)); *Jenkins v. Louisiana State Bd. of Educ.*, 506 F.2d 992, 995 (5th Cir. 1975) (applying clearly erroneous standard of review for case decided by district court judge without jury) (citing *FED. R. CIV. P.* 52).

135. *Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1985) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)); *Commissioner v. Duberstein*, 363 U.S. 278, 291 (1960) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)); *Buildex Inc. v. Kason Indus.*, 849 F.2d 1461, 1464 (Fed. Cir. 1988) (quoting *Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1985)); *Nickerson v. Commissioner*, 700 F.2d 402, 405-06 (7th Cir. 1983) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)); *Gray v. Commissioner*, 561 F.2d 753, 759 n.14 (9th Cir. 1977) (quoting *Commissioner v. Duberstein*, 363 U.S. 278, 291 (1960)).

136. *Anderson*, 470 U.S. at 573.

137. *Inwood Lab. v. Ives Lab.*, 456 U.S. 844, 855 (1982).

B. *De Novo Review*

Some circuit courts of appeals reviewed sanction decisions involving questions of law de novo.¹³⁸ De novo review may be described as review without any particular deference to the trial court's decision.¹³⁹ This standard is used when the issue on appeal substantially concerns "enough law [as opposed to fact] that free review is warranted."¹⁴⁰ De novo review does not necessarily mean that the appellate court will search the entire record, but rather only that portion of the record relevant to the legal issues involved.¹⁴¹ The appellate court makes an independent conclusion based on the record, using "only those portions of the record relevant to the legal issue."¹⁴² The reviewing court is given the power, ability and competence to come to a different conclusion based on the record.¹⁴³ Although critics argue that the standard allows too much discretion to the reviewing court, the vast majority of cases on appeal are affirmed.¹⁴⁴

C. *The Abuse of Discretion Standard*

Prior to *Cooter & Gell v. Hartmarx Corp.*,¹⁴⁵ circuit courts of appeals consistently applied an abuse of discretion standard to the question of whether the sanction imposed was appropriate.¹⁴⁶ However, the circuit courts of appeals were split on whether to apply the standard to the merits of a Rule 11 sanction decision or only to a review of the actual sanction imposed.¹⁴⁷ The United States Supreme Court in *Cooter & Gell*

138. See *infra* notes 169-79 and accompanying text.

139. *United States v. Brian N.*, 900 F.2d 218, 220 (10th Cir. 1990) ("In de novo review, the appellate court must review the record in light of its own judgment without giving special weight to the prior decision."); *Ocelot Oil Corp. v. Sparrow Indus.*, 847 F.2d 1458, 1464 (10th Cir. 1988) (A court "should make an independent determination of the issues . . . ; [it] 'is not to give any special weight to the [prior] determination.'" (quoting *United States v. First City Nat'l Bank*, 386 U.S. 361, 368 (1967))). See generally 1 CHILDRESS & DAVIS, *supra* note 121, § 2.14, at 76 (discussing definition and role of de novo review of trials).

140. 1 CHILDRESS & DAVIS, *supra* note 121, § 2.14, at 76.

141. 1 *id.*

142. 1 *id.* § 2.14, at 76-77.

143. *Brian N.*, 900 F.2d at 220 (appellate court reviewing record using own independent judgment without giving special weight to prior decision); see also 1 CHILDRESS & DAVIS, *supra* note 121, § 2.14, at 76-77 (discussing degree of deference trial court uses in de novo review as "no particular deference").

144. 1 CHILDRESS & DAVIS, *supra* note 121, § 2.14, at 77. In 1982 there was an approximate 80% affirmance average in the circuits for civil appeals. *Id.* at 77 n.58 (citing W. STUART DORNETTE & ROBERT R. CROSS, FEDERAL JUDICIARY ALMANAC 10 (1984)).

145. 110 S. Ct. 2447 (1990).

146. See *infra* notes 150-58, 169-80 and accompanying text.

147. D. Lee Decker, Note, *Appellate Review of Rule 11 Issues—De Novo or Abuse of Discretion?* *Thomas v. Capital Security Services, Inc.*, 1989 B.Y.U. L. REV. 877, 896-97 (arguing for

imposed a uniform abuse of discretion standard of review for reviewing all aspects of a Rule 11 decision.¹⁴⁸

When an appellate court uses an abuse of discretion standard, it "grants the district court wide leeway in its determination of all issues."¹⁴⁹ The First,¹⁵⁰ Third,¹⁵¹ Fourth,¹⁵² Fifth,¹⁵³ Sixth,¹⁵⁴ Seventh,¹⁵⁵ Tenth¹⁵⁶ and Federal Circuits¹⁵⁷ have rather consistently applied an abuse of discretion standard of review in Rule 11 cases.¹⁵⁸ The standard has often been compared with reasonableness.¹⁵⁹ In reviewing a trial court decision, the appellate court decides not whether it would have made the same decision, but rather whether the trial court abused its discretion in making the decision.¹⁶⁰ The appellate court may find that

uniform flexible abuse of discretion standard); see *infra* notes 150-58, 169-80 and accompanying text.

148. 110 S. Ct. at 2461.

149. Christopher A. Considine, Comment, *Rule 11: Conflicting Appellate Standards of Review and a Proposed Uniform Approach*, 75 CORNELL L. REV. 727, 734-37 (1990); see Kasper v. Board of Election Comm'rs, 814 F.2d 332, 339 (7th Cir. 1987).

150. *E.g.*, Kale v. Combined Ins. Co. of America, 861 F.2d 746, 757-58 (1st Cir. 1988) (stating abuse of discretion standard should be used for all aspects of district court's Rule 11 determination); EBI, Inc. v. Gator Indus., 807 F.2d 1, 6 (1st Cir. 1986) (applying abuse of discretion standard of review).

151. *E.g.*, Doering v. Union County Bd. of Chosen Freeholders, 857 F.2d 191, 195 (3d Cir. 1988) (recognizing "abuse of discretion" standard for reviewing initial decision to impose sanctions as well as specifics of fee awards).

152. *E.g.*, Introcaso v. Cunningham, 857 F.2d 965, 969 (4th Cir. 1988) (not disturbing district court's decision to impose sanctions except for abuse of discretion).

153. *E.g.*, Thomas v. Capital Sec. Servs., 836 F.2d 866, 872 (5th Cir. 1988) (en banc) (adopting abuse of discretion standard across-the-board to all issues in Rule 11 cases).

154. *E.g.*, Herron v. Jupiter Transp. Co., 858 F.2d 332, 337 (6th Cir. 1988) (selection of sanction lies within district courts' sound exercise of discretion).

155. *See, e.g.*, Mars Steel Corp. v. Continental Bank, 880 F.2d 928, 933 (7th Cir. 1989) (en banc) (adopting uniform deferential standard to achieve harmony within circuit); R.K. Harp Inv. Corp. v. McQuade, 825 F.2d 1101, 1103 (7th Cir. 1987) (finding Rule 11 decision reversible only where there has been abuse of discretion).

156. *E.g.*, Adamson v. Bowen, 855 F.2d 668, 673 (10th Cir. 1988) (applying abuse of discretion standard "across the board" to all Rule 11 issues); Burkhardt Through Meeks v. Kinsley Barik, 852 F.2d 512, 515 (10th Cir. 1988) (Tenth Circuit "committed to 'abuse of discretion' standard"); Cotner v. Hopkins, 795 F.2d 900, 903 (10th Cir. 1986) (district court's imposition of sanction under Rule 11 subject to review under abuse of discretion standard).

157. Considine, *supra* note 149, at 734-35; see, *e.g.*, Everpure, Inc. v. Cuno, Inc., 875 F.2d 300, 304 (Fed. Cir.) (finding no abuse of discretion in denying request for Rule 11 sanctions), *cert. denied*, 493 U.S. 853 (1989).

158. Considine, *supra* note 149, at 734.

159. See FED. R. CIV. P. 11 advisory committee's note, 97 F.R.D. 165, 192, 198-99 (1983).

160. Kasper v. Board of Election Comm'rs, 814 F.2d 332, 339 (7th Cir. 1987) (" 'Abuse of discretion' means a serious error of judgment, such as reliance on a forbidden factor or failure to consider an essential factor."); Jaimez-Fevolla v. Bell, 598 F.2d 243, 246 (D.C. Cir. 1979) ("Abuse of discretion may be found 'only if there is no evidence to support the decision or if the decision is based on an improper understanding of the law.' " (quoting Song Jook Sun v.

the trial court has abused its discretion "when the judicial action is arbitrary, fanciful or unreasonable."¹⁶¹ In general, the abuse of discretion standard is meant to prevent the appellate court from second-guessing the trial court.¹⁶² Exactly how much deference the appellate court gives the trial court depends on the facts of the individual case and the issues involved.¹⁶³

D. *The Three-Tiered Approach*

In reviewing an imposition of Rule 11 sanctions, the appellate court is faced with three separate issues: (1) "factual questions regarding the nature of the attorney's prefiling inquiry and the factual basis of the pleading or other paper";¹⁶⁴ (2) legal issues in determining "whether a pleading is 'warranted by existing law or a good faith argument' for changing the law and whether the attorney's conduct violated Rule 11";¹⁶⁵ and (3) whether the district court "tailor[ed] an 'appropriate sanction.'" ¹⁶⁶ Counsel for the petitioners in *Cooter & Gell v. Hartmarx*

Rosenberg, 437 F.2d 1098, 1102 (9th Cir. 1971)); see also 1 CHILDRESS & DAVIS, *supra* note 121, § 4.1, at 228 (applying abuse of discretion to questions of trial judge overreaching, such as considering wrong factors in applying discretion or exercising such poor discretion appellate court compelled to reject trial judge's choice).

161. *Delno v. Market Street Ry.*, 124 F.2d 965, 967 (9th Cir. 1942) (abuse of discretion review in context of refusal to grant declaratory relief). The court in *Delno* explained abuse of discretion as the following: "Discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion." *Id.*

162. *Kasper*, 814 F.2d at 339 (reviewing court may substitute its own judgment only if confident that lower court decision is quirky); see also 1 CHILDRESS & DAVIS, *supra* note 121, § 4.21, at 289-90 (abuse of discretion standard meant to insulate trial judge decision from second-guessing by appellate court).

163. See *In re Sharon Steel Corp.*, 871 F.2d 1217, 1226 (3d Cir. 1989) (stating abuse of discretion standard most appropriate for flexible review); *Abrams v. Interco, Inc.*, 719 F.2d 23, 28 (2d Cir. 1983) (stating abuse of discretion standard flexible); *United States v. Criden*, 648 F.2d 814, 817 (3d Cir. 1981) (although review standard designated as abuse of discretion, scope of review directly related to reason why category or type of decision is committed to trial court's discretion in first place); 1 CHILDRESS & DAVIS, *supra* note 121, § 4.10, at 256 (stating each application of abuse of discretion standard depends on factors and issues reviewed). The court in *Abrams* explained the differing amount of deference due the trial court based on the type of decision reviewed. The court stated that "abuse of discretion is found far more readily on appeals from a denial or grant of class action status than where the issue is, for example, the curtailment of cross-examination or the grant or denial of a continuance." *Abrams*, 719 F.2d at 28.

164. *Cooter & Gell v. Hartmarx Corp.*, 110 S. Ct. 2447, 2457 (1990) (quoting FED. R. CIV. P. 11).

165. *Id.* (quoting FED. R. CIV. P. 11).

166. *Id.* (quoting FED. R. CIV. P. 11).

*Corp.*¹⁶⁷ proposed an approach whereby the appeals court would review findings of law under a de novo standard, findings of fact under a clearly erroneous standard, and the choice of sanction under an abuse of discretion standard.¹⁶⁸

Prior to the Supreme Court decision in *Cooter & Gell*, the Eighth¹⁶⁹ and Ninth¹⁷⁰ Circuits used this three-tiered approach when reviewing Rule 11 decisions.¹⁷¹ For example, the Ninth Circuit Court of Appeals applied a three-tiered approach in *Zaldivar v. City of Los Angeles*.¹⁷² The court recognized the number of inquiries required in reviewing an imposition of sanctions, and decided that the factual determinations should be reviewed under a clearly erroneous standard, the legal conclusion under a de novo standard, and the sanction imposed under an abuse of discretion standard.¹⁷³

167. 110 S. Ct. 2447 (1990).

168. *Id.* at 2457-58.

169. *E.g.*, *EEOC v. Milavetz & Assocs., P.A.*, 863 F.2d 613, 614 (8th Cir. 1988); *Kurkowski v. Volcker*, 819 F.2d 201, 203 n.8 (8th Cir. 1987).

170. *E.g.*, *In re Taylor*, 884 F.2d 478, 480 (9th Cir. 1989); *Community Elec. Serv. of Los Angeles, Inc. v. National Elec. Contractors Ass'n*, 869 F.2d 1235, 1241-42 (9th Cir.), *cert. denied*, 493 U.S. 891 (1989); *Mackey v. Pioneer Nat'l Bank*, 867 F.2d 520, 526 (9th Cir. 1989); *Stewart v. American Int'l Oil & Gas Co.*, 845 F.2d 196, 200-01 (9th Cir. 1988); *United Energy Owners Comm. v. United States Energy Management Sys.*, 837 F.2d 356, 364 (9th Cir. 1988); *Hudson v. Moore Business Forms*, 836 F.2d 1156, 1159 (9th Cir. 1987); *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 828 n.4 (9th Cir. 1986).

171. *See generally* *Considine*, *supra* note 149, at 735-36 (discussing three-tiered approach applied in reviewing Rule 11 decisions).

The Seventh Circuit occasionally used the three-tiered approach. *E.g.*, *Brown v. Federation of State Medical Bds.*, 830 F.2d 1429, 1434 (7th Cir. 1987) (reviewing factual findings using clearly erroneous standard; legal conclusions reviewed de novo; type of sanction imposed reviewed for abuse of discretion). The Fifth Circuit has also reviewed legal questions de novo. *See Robinson v. National Cash Register Co.*, 808 F.2d 1119, 1126 (5th Cir. 1987), *overruled on other grounds by Thomas v. Capital Sec. Servs.*, 836 F.2d 866 (5th Cir. 1988).

172. 780 F.2d 823 (9th Cir. 1986).

173. *Id.* at 828.

Prior to *Cooter & Gell*, the District of Columbia,¹⁷⁴ Second¹⁷⁵ and Eleventh Circuits¹⁷⁶ employed a variation of the three-tiered approach.¹⁷⁷ These circuits gave the district courts wide discretion when the sanction was based on a pleading that allegedly was filed for an improper purpose or was not well-grounded in fact.¹⁷⁸ If, however, the issue was whether the pleading or other paper was warranted by law, these appellate courts reviewed the legal determination de novo.¹⁷⁹ The appellate courts reviewed the type of sanction selected under an abuse of discretion standard.¹⁸⁰ The Third Circuit, although generally having employed an abuse of discretion standard,¹⁸¹ similarly exercised "plenary review concerning the legal standards applied by the district court in exercising its discretion."¹⁸²

174. *E.g.*, *Westmoreland v. CBS*, 770 F.2d 1168, 1174-75 (D.C. Cir. 1985) (according district court wide discretion for factual findings; legal conclusions reviewed de novo; type of sanction reviewed for abuse of discretion).

175. *E.g.*, *Calloway v. Marvel Entertainment Group*, 854 F.2d 1452, 1470, 1476 (2d Cir. 1988) (reviewing factual findings under clearly erroneous standard; legal finding reviewed de novo; choice of sanction reviewed for abuse of discretion), *rev'd on other grounds sub nom. Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120 (1989); *Eastway Constr. Corp. v. New York*, 762 F.2d 243, 254 n.7 (2d Cir. 1985) (To determine whether the pleading was groundless, "we are in as good a position to determine the answer and, thus, we need not defer to the lower court's opinion.") (reviewing decision of sanction for abuse of discretion), *cert. denied*, 484 U.S. 918 (1987).

176. *E.g.*, *Donaldson v. Clark*, 819 F.2d 1551, 1556 (11th Cir. 1987) (reviewing factual, dilatory or bad faith reasons for abuse of discretion, legal sufficiency reviewed de novo).

177. *E.g.*, *Century Prods. v. Sutter*, 837 F.2d 247, 253 (6th Cir. 1988) (whether individual's conduct was reasonable under circumstances is mixed question of fact and law and should be reviewed for abuse of discretion; de novo review proper for pure questions of law). *See generally* *Considine*, *supra* note 149, at 736-37 (discussing variation on three-tiered approach).

178. *E.g.*, *Westmoreland v. CBS*, 770 F.2d 1168, 1174 (D.C. Cir. 1985) (according district court wide discretion in determining factual, dilatory or bad faith reasons for Rule 11 sanctions).

179. *Id.* at 1175 (reviewing whether pleading is legally sufficient de novo); *Donaldson*, 819 F.2d at 1556 (reviewing legal sufficiency de novo).

180. *Westmoreland*, 770 F.2d at 1175. The standard applied is "modified" because the court did not specify a clearly erroneous standard of review for factual determinations.

181. *E.g.*, *Lieb v. Topstone Indus.*, 788 F.2d 151, 154-58 (3d Cir. 1986) (decision to sanction party and amount of sanction within discretion of trial court, but though trial judges still retain substantial discretion, exercise now directed more to nature and extent of sanctions than initial imposition); *Eavenson, Auchmuty & Greenwald Corp. v. Holtzman*, 775 F.2d 535, 540 (3d Cir. 1985) (applying abuse of discretion standard when reviewing choice of sanction).

182. *Snow Machs. Inc. v. Hedco, Inc.*, 838 F.2d 718, 725 (3d Cir. 1988); *see also* GREGORY P. JOSEPH, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE 308 (1989) (Third Circuit generally applies abuse of discretion standard, but also employs "plenary review concerning the legal standards applied by the district courts in exercising its discretion").

IV. TESTS FOR APPLYING RULE 11 SANCTIONS

A. *Pre-1983 Subjective Test for Imposing Rule 11 Sanctions*

Prior to the 1983 amendment of Rule 11, the test for imposing sanctions was one of subjective bad faith.¹⁸³ Pre-amendment Rule 11 required that “to the best of [the attorney’s] knowledge, information, and belief there is good ground to support [the pleading]; and that it is not interposed for delay.”¹⁸⁴ The Rule also stated that an attorney might be subjected to disciplinary action for a “wilful violation” of the Rule.¹⁸⁵ The language of the old Rule suggested a subjective standard since the Rule referred to the signer’s intent in signing the pleading and the wilfulness of the violation.¹⁸⁶ Finally, even after a finding of bad faith under the old Rule, the court would not necessarily impose sanctions against the attorney or the litigant.¹⁸⁷

B. *Objective Test for Imposing Sanctions Under Current Rule 11*

The amended Rule’s focus on “reasonableness” imposes an objective inquiry into the facts of the case before imposing sanctions.¹⁸⁸ The Advisory Committee stated that “the new language stresses the need for some pre-filing inquiry into both the facts and the law to satisfy the affirmative

183. *Eastway Constr. Corp. v. New York*, 762 F.2d 243, 253 (2d Cir. 1985) (prior to amendment, Rule 11 spoke in plainly subjective terms), *cert. denied*, 484 U.S. 918 (1987); *Nemeroff v. Abelson*, 620 F.2d 339, 348 (2d Cir. 1980) (power to shift fees if action commenced “in bad faith, vexaciously, wantonly or for oppressive reasons” (quoting *F.D. Rich Co. v. United States ex rel. Indus. Lumber Co.*, 417 U.S. 116, 129 (1978))). See generally Edward L. Foote & R. Mark McCareins, *Rule 11: Objectivity Replaces Subjectivity*, in *RULE 11 AND OTHER SANCTIONS* 219 (1987) (discussing replacement of subjective test with objective test for pre-filing inquiry).

184. Fed. R. Civ. P. 11, 28 U.S.C.A. Rule 11 (1960). See *supra* note 23 for the text of the Rule prior to amendment.

185. Fed. R. Civ. P. 11, 28 U.S.C.A. Rule 11 (1960).

186. See *supra* note 23 for the text of Rule 11 prior to amendment.

187. *Nemeroff v. Abelson*, 620 F.2d 339, 350 (2d Cir. 1980) (precluding award of fees under Rule 11 since action not in bad faith); *Rhinehart v. Stauffer*, 638 F.2d 1169, 1171 (9th Cir. 1979) (granting motion to dismiss as deterrence without monetarily sanctioning attorney or client after finding Rule 11 violation); *Heart Disease Research Found. v. General Motors Corp.*, 463 F.2d 98, 101 (2d Cir. 1972) (dismissing action without monetarily sanctioning attorney or client after finding complaint frivolous and insufficient). *But see* *Anderson v. Allstate Ins. Co.*, 630 F.2d 677, 684 (9th Cir. 1980) (finding abuse of court’s process justified sanctions against attorney); *Kinee v. Abraham Lincoln Fed. Sav. & Loan Ass’n*, 365 F. Supp. 975, 983 (E.D. Pa. 1973) (sanctioning plaintiff’s attorney after finding abuse of judicial process).

188. *Townsend v. Holman Consulting Corp.*, 914 F.2d 1136, 1140 (9th Cir. 1990); *Adamson v. Bowen*, 855 F.2d 668, 673 (10th Cir. 1988); *Hudson v. Moore Business Forms*, 836 F.2d 1156, 1159 (9th Cir. 1987); *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 829 (9th Cir. 1986).

duty imposed by the Rule. The standard is one of reasonableness under the circumstances."¹⁸⁹

In *Eastway Construction Corp. v. New York*¹⁹⁰ the Second Circuit determined that the revised language of the amended Rule provides for a more expansive standard for imposing sanctions.¹⁹¹ The new Rule explicitly and unambiguously "imposes an affirmative duty on each attorney to conduct a reasonable inquiry into the viability of a pleading before it is signed."¹⁹² Similarly, the Ninth Circuit in *Stewart v. American International Oil & Gas Co.*¹⁹³ announced a two-part test for the mandatory imposition of sanctions under Rule 11. The court divided judicial review into two distinct areas of violation: (1) documents which constitute "frivolous filings";¹⁹⁴ and (2) documents which use "judicial procedures as a tool for harassment."¹⁹⁵

Amended Rule 11 suggests an objective test which takes certain factors into account:

[H]ow much time for investigation was available to the signer; whether he had to rely on a client for information as to the facts underlying the pleading, motion, or other paper; whether the pleading, motion, or other paper was based on a plausible

189. FED. R. CIV. P. 11 advisory committee's note, 97 F.R.D. 165, 198 (1983); see *Donaldson v. Clark*, 819 F.2d 1551, 1556 (11th Cir. 1987).

190. 762 F.2d 243 (2d Cir. 1985).

191. *Id.* at 253 (subjective good faith no longer sufficient to prevent imposition of sanctions); see *Huettig & Schromm, Inc. v. Landscape Contractors Council*, 790 F.2d 1421, 1426 (9th Cir. 1986) (stating sanction mandatory for Rule 11 violation).

192. *Donaldson*, 819 F.2d at 1559.

193. 845 F.2d 196, 201 (9th Cir. 1988).

194. *Id.*

195. *Id.*; see also *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 831 (9th Cir. 1986) (imposing sanctions if documents frivolous or constitute harassment). The Second Circuit Court of Appeals announced a similar two-part test for the mandatory imposition of sanctions under Rule 11 in *Eastway*. The court, quoting the language of Rule 11, stated that sanctions should be imposed if:

(1) "After reasonable inquiry, a competent attorney could not form a reasonable belief that the pleading [or other paper] 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;" or (2) "A pleading [or other paper] has been interposed for any improper purpose."

Eastway, 762 F.2d at 254 (quoting FED. R. CIV. P. 11); see *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1537 (9th Cir. 1986); see also *McLaughlin v. Western Casualty & Sur. Co.*, 603 F. Supp. 978, 981 (S.D. Ala. 1985) (Rule 11 imposes two duties on every lawyer: (1) that reasonable inquiry into facts and law that applies to facts be made; and (2) that pleadings are not interposed for improper purpose.).

view of the law; or whether he depended on forwarding counsel or another member of the bar.¹⁹⁶

Courts have looked to other factors as well: (1) the level and nature of legal experience of the attorney(s) filing the pleading;¹⁹⁷ (2) whether personal interviews were conducted with the parties and the witnesses, as opposed to cursory telephone inquiries, before the pleading was filed;¹⁹⁸ (3) whether pertinent and available documents were reviewed prior to filing the pleading;¹⁹⁹ (4) whether there was time pressure involved in meeting a filing deadline;²⁰⁰ and (5) whether counsel blindly relied on other attorneys as to fundamental matters of federal practice which should be within the ready grasp of anyone litigating a federal case.²⁰¹ In applying the objective test for deciding whether an attorney has acted reasonably, federal district court judges look to various factors before finding a violation of Rule 11.

V. *COOTER & GELL V. HARTMARX CORP.*: STATEMENT OF THE CASE

A. *Facts*

In *Cooter & Gell v. Hartmarx Corp.*²⁰² the United States Supreme Court reviewed the order of the United States District Court for the Dis-

196. FED. R. CIV. P. 11 advisory committee's note, 97 F.R.D. 165, 199 (1983); *Century Prods. v. Sutter*, 837 F.2d 247, 250-51 (6th Cir. 1988) (citing FED. R. CIV. P. 11 advisory committee's note, 97 F.R.D. 165, 199 (1983)); *Donaldson v. Clark*, 819 F.2d 1551, 1556 (11th Cir. 1987) (quoting FED. R. CIV. P. 11 advisory committee's note, 97 F.R.D. 165, 199 (1983)).

197. *E.g.*, *Huettig & Schromm, Inc. v. Landscape Contractors Council*, 790 F.2d 1421, 1426-27 (9th Cir. 1986) (affirming district court's sanction order which, in part, looked at attorney's experience in area of law).

198. *E.g.*, *Wold v. Minerals Engineering Co.*, 575 F. Supp. 166, 167 (D. Colo. 1983) (no personal interviews of knowledgeable witnesses conducted, limited telephone inquiries did not meaningfully address relevant facts).

199. *E.g.*, *Florida Monument Builders v. All Faiths Memorial Gardens*, 605 F. Supp. 1324, 1326-27 (S.D. Fla. 1984) (affirming sanction order on appeal because pertinent and available documents not reviewed prior to filing).

200. *E.g.*, *Gillette v. Delmore*, 886 F.2d 1194, 1199-1200 (9th Cir. 1989) (reversing Rule 11 sanction order in part because attorney under time pressure to file complaint).

201. *E.g.*, *Pelletier v. Zweifel*, 921 F.2d 1465, 1514 n.88 (11th Cir. 1991) (stating court may consider whether signing attorney accepted case by referral from another member of bar; time available for investigation; extent of attorney's reliance on client's version of facts; complexity of facts; and extent to which factual development requires discovery), *cert. denied*, 1991 U.S. LEXIS 4327; *Unioil, Inc. v. E.F. Hutton & Co.*, 809 F.2d 548, 558 (9th Cir. 1986) (in relying on another attorney, counsel must acquire sufficient knowledge to enable him or her to certify that pleading is well-grounded in fact; reliance on forwarding co-counsel did not satisfy duty of reasonable inquiry), *cert. denied*, 484 U.S. 822 (1987), and *cert. denied*, 484 U.S. 823 (1987); see also FEDERAL PROCEDURE COMM'N, *supra* note 58, at 4-5 (discussing objective factors district courts look to in determining whether attorney made "reasonable inquiry").

202. 110 S. Ct. 2447 (1990).

trict of Columbia imposing Rule 11 sanctions in an antitrust action.²⁰³ Danik, Inc., represented by the law firm Cooter & Gell, owned and operated discount clothing stores in the Washington, D.C. area.²⁰⁴ Intercontinental Apparel, a subsidiary of Hartmarx Corp., brought a breach of contract action against Danik.²⁰⁵ Danik filed a counterclaim alleging violations of the Robinson-Patman Act.²⁰⁶ Intercontinental Apparel won a summary judgment motion against Danik and subsequently won a jury trial on Danik's counterclaim.²⁰⁷

While the litigation was proceeding, Danik filed two antitrust complaints against Hartmarx and two of its subsidiaries.²⁰⁸ One of the complaints alleged a nationwide conspiracy of price-fixing and numerous other unfair competition practices.²⁰⁹ Hartmarx moved to dismiss the complaint and moved for the court to impose Rule 11 sanctions on the grounds that the complaint had no basis in fact.²¹⁰ In opposition to the motion, the law firm of Cooter & Gell filed affidavits describing its pre-filing research.²¹¹ The total research consisted of telephone calls to a number of men's clothing stores in four eastern cities.²¹² Based solely on this limited research, the plaintiff alleged that only one store in each major metropolitan area in the country sold Hart, Schaffner & Marx suits.²¹³

Five months after filing the complaint, Cooter & Gell filed a notice of voluntary dismissal pursuant to Federal Rule of Civil Procedure 41(a)(1)(i).²¹⁴ Prior to the dismissal becoming effective, the court heard

203. *Danik, Inc. v. Hartmarx Corp.*, 120 F.R.D. 439 (D.D.C. 1988).

204. *Cooter & Gell*, 110 S. Ct. at 2452.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.* Federal Rule of Civil Procedure 41(a)(1) provides:

Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

FED. R. CIV. P. 41(a)(1).

arguments on the Rule 11 motion.²¹⁵ Three and one-half years after the dismissal and hearing on the Rule 11 motion, the district court ordered Hartmarx to submit a statement of costs and attorney fees.²¹⁶ In response, Hartmarx requested \$61,917.99.²¹⁷ Two months later, the court granted the motion for Rule 11 sanctions, holding that the research done before filing the complaint was "grossly inadequate."²¹⁸ No research had been done with regard to one subsidiary, and the research related to Hart, Schaffner & Marx was found to be an inadequate basis for the allegations in the complaint.²¹⁹ Sanctions in the amount of \$21,452.52 were awarded against the law firm Cooter & Gell and \$10,701.26 against Danik.²²⁰ The Court of Appeals for the District of Columbia affirmed the sanctions.²²¹

Review by the United States Supreme Court was limited to three issues: (1) whether voluntary dismissal precluded the imposition of Rule 11 sanctions; (2) whether an abuse of discretion standard was the proper standard of review; and (3) whether Rule 11 allows attorney fees on appeal.²²²

B. *Opinion of the Court*

In considering whether the voluntary dismissal of the complaint precluded the district court from subsequently imposing Rule 11 sanctions, the Supreme Court determined that even if the plaintiff dismissed an action voluntarily, a court still had jurisdiction to impose sanctions under Rule 11 for the original filing of the complaint.²²³ The Court reiterated that the purpose of Rule 11 is to discourage the filing of unsubstantiated pleadings.²²⁴ Once a complaint is filed and a party is required to answer, the damage has been done.²²⁵ "Baseless filing puts the machinery of justice in motion, burdening courts and individuals alike with needless expense and delay."²²⁶ The Court determined that an attorney

215. *Cooter & Gell*, 110 S. Ct. at 2452.

216. *Id.* The opinion did not explain why so much time had elapsed between the district court's hearing on the motion for Rule 11 sanctions and subsequent request for a statement of costs and attorney's fees.

217. *Id.*

218. *Id.*

219. *Id.* at 2453.

220. *Id.*

221. *Id.*

222. *Id.* at 2451-52.

223. *Id.* at 2455.

224. *Id.* at 2454; see *supra* note 61 and accompanying text.

225. *Cooter & Gell*, 110 S. Ct. at 2457.

226. *Id.*

could circumvent the Rule if he or she were allowed to file an unsubstantiated complaint and then escape Rule 11 sanctions by voluntarily dismissing the complaint.²²⁷ Depriving the court of jurisdiction would diminish the incentive for the attorney to investigate fully before filing.²²⁸ The Court determined that nothing in Rule 41(a)(1)(i), Rule 11, or any other federal rule or statute terminates a district court's jurisdiction or authority to impose sanctions after a voluntary dismissal.²²⁹

The Court also addressed the contention that the court of appeals did not apply the proper standard of review. The Court found that in reviewing an imposition of Rule 11 sanctions, three separate issues must be considered: (1) "factual questions regarding the nature of the attorney's prefiling inquiry and the factual basis of the pleading or other paper",²³⁰ (2) legal issues in determining "whether a pleading is 'warranted by existing law or a good faith argument' for changing the law";²³¹ and (3) whether the district court tailored an "appropriate sanction."²³² Although the court of appeals did not specify which standard of review it used, the Supreme Court determined that appellate courts should review district courts' selection of a sanction and findings of fact under a deferential standard.²³³ The Court narrowly defined the controversy over the appropriate standard of review to "whether the court of appeals must defer to the district court's legal conclusions in Rule 11 proceedings."²³⁴ The Court recognized the difficulty in distinguishing between factual and legal conclusions²³⁵ and held that appellate courts should apply a unitary abuse of discretion standard to all aspects of a Rule 11 proceeding.²³⁶ The Court stated that "an appellate court reviewing legal issues in the Rule 11 context would be required to determine whether, at the time the attorney filed the pleading or other paper, his legal argument would have appeared plausible."²³⁷

In addressing whether appellate courts may impose Rule 11 sanctions for frivolous appeals, the Supreme Court reversed the court of ap-

227. *Id.*

228. *Id.*

229. *Id.* at 2455.

230. *Id.* at 2457.

231. *Id.* (quoting FED. R. CIV. P. 11).

232. *Id.*

233. *Id.* at 2457-58. The "deferential" standard advocated by the Court conforms with an "abuse of discretion" standard. A court would give deference to the lower court's decision, overturning it only upon a finding that the lower court had abused its discretion. *Id.*

234. *Id.* at 2458.

235. *Id.* at 2458-59.

236. *Id.* at 2461.

237. *Id.* at 2460.

peals' decision, stating that Appellate Rule of Civil Procedure 38²³⁸ offered adequate protection for costs in frivolous appeals.²³⁹ The Court reasoned that appellants should not be compelled to carry the burden of appellee's attorney's fees because that would discourage meritorious appeals.²⁴⁰ The Court stated, "[t]he knowledge that, after an unsuccessful appeal of a Rule 11 sanction, the district court that originally imposed the sanction would also decide whether the appellant should pay his opponent's attorney's fees would be likely to chill all but the bravest litigants from taking an appeal."²⁴¹

The Court stated that Rule 11, however, is not aimed at discouraging the filing of meritorious claims, but rather is designed to tell the attorney he or she had better have a reasonable basis in law and fact for a pleading before filing it.²⁴² In the same way, the attorney must have a reasonable basis in law and fact for the appeal before subjecting his or her opponent to the expense and the time of defending it. The Supreme Court's argument against applying sanctions to appeals of Rule 11 sanction orders²⁴³ parallels the arguments proposed by opponents of Rule 11—that the Rule places a chilling effect on the filing of meritorious appeals and may encourage satellite litigation.²⁴⁴ The Court emphasized that any interpretation of the Rule must "give effect to the rule's central goal of deterrence."²⁴⁵

VI. A PROPOSED ALTERNATIVE TO THE ABUSE OF DISCRETION STANDARD OF REVIEW

The abuse of discretion standard mandated by the United States Supreme Court in *Cooter & Gell v. Hartmarx Corp.*²⁴⁶ may produce inequitable results. First, applying an abuse of discretion standard to findings of law results in the danger of stifling attorney creativity and preventing the advancement of necessary changes in the law.²⁴⁷ Rather, findings of law should be reviewed de novo to prevent disparate results and the inhi-

238. Federal Rule of Appellate Procedure 38 provides: "If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee." FED. R. APP. P. 38.

239. *Cooter & Gell*, 110 S. Ct. at 2462.

240. *Id.*

241. *Id.*

242. *Id.* at 2454.

243. See *supra* notes 239-41 and accompanying text.

244. *Cooter & Gell*, 110 S. Ct. at 2462; see *supra* notes 74-87 and accompanying text.

245. *Cooter & Gell*, 110 S. Ct. at 2462.

246. 110 S. Ct. 2447 (1990).

247. See *infra* notes 262-76 and accompanying text.

bition of legal developments.²⁴⁸ Second, the clearly erroneous standard should be used for findings of fact,²⁴⁹ because the district court judge is best able to evaluate the evidence and attorney conduct throughout the proceeding.²⁵⁰ Third, appellate courts should use an abuse of discretion standard to review the actual sanction imposed.²⁵¹ Appellate courts should use a three-tiered approach, such as that used by the Eighth and Ninth Circuits prior to *Cooter & Gell*,²⁵² to provide the most evenhanded review of the various findings of fact and law and judicial discretion necessary in reviewing a Rule 11 decision. Although there may be some difficulty in application, the fairness of this review will outweigh any difficulties involved. In cases where the appellant is appealing the refusal to impose sanctions, appellate courts should rarely disturb or require explanation of the district court's denial of a motion for Rule 11 sanctions.²⁵³ Courts should concentrate on whether the attorney made a reasonable inquiry, rather than focusing on whether the inquiry is warranted by existing law. In their rulings trial courts need to specify the factual and legal elements the decision is based upon to facilitate easier appellate review; attorneys should request this information on the record.

A. *Different Standards of Review Are Necessary for Distinct Findings*

In a Rule 11 sanction order, the district court makes determinations of both fact and law. The court must make factual determinations such as whether the attorney or signing party has (1) read the pleading, motion or other paper; (2) made reasonable inquiry; (3) determined the pleading is well grounded in fact; and (4) determined that the pleading is

248. See *infra* notes 262-76 and accompanying text.

249. See *infra* notes 256-61 and accompanying text. The clearly erroneous standard is expressly mandated for findings of fact tried without a jury by Federal Rule of Civil Procedure 52. See *supra* notes 123-25 and accompanying text.

250. *Anderson v. City of Bessemer*, 470 U.S. 564, 574-75 (1985); *Inwood Labs. v. Ives Labs.*, 456 U.S. 844, 855 (1982). The United States Supreme Court, in discussing the standard of review imposed by Federal Rule of Civil Procedure 52 for factual findings, explained the reasons for deference to the trial court. The Court stated that the trial judge is in a superior "position to make determinations of credibility." *Anderson*, 470 U.S. at 574. Also, the trial judge has more experience and expertise in making determinations of fact. *Id.* Requiring parties to convince three more judges at the appellate level of their version of the facts would be too great a burden. *Id.* at 575. Furthermore, reviewing factual determinations more closely would only divert judicial resources for a negligible return in accuracy. *Id.* at 574-75.

251. The language of Rule 11 mandating that upon finding a violation of the Rule, the trial judge shall impose an "appropriate" sanction suggests that the determination of what an "appropriate" sanction should be lies within the discretion of the trial judge. There is no real controversy about the standard of review for this aspect of a sanction order.

252. See *supra* notes 164-73 and accompanying text for a discussion of the three-tiered approach.

253. BURBANK, *supra* note 49, at 48-49.

not interposed for an improper purpose.²⁵⁴ The court must also make legal determinations such as whether the pleading, motion or other paper is warranted (1) by existing law; (2) by a good faith argument for the extension of existing law; (3) by a good faith argument for the reversal of existing law; and (4) by the modification of existing law.²⁵⁵ The very nature of Rule 11, in requiring both factual and legal determinations, warrants the use of differing standards of review based on the district court's reason for imposing sanctions. District courts should specify these reasons to deter specific conduct and to provide attorneys and clients guidance as to the acceptable limits of litigation practice.

B. Factual Determinations Should Be Reviewed Under a Clearly Erroneous Standard

It is appropriate that findings of fact are reviewed under a clearly erroneous standard because the district court is in the best position to observe the conduct of the litigation.²⁵⁶ In *Pullman-Standard v. Swint*²⁵⁷ the United States Supreme Court stated that Federal Rule of Civil Procedure 52(a) "does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous."²⁵⁸

Scrutinizing the factual findings more closely would "very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources."²⁵⁹ Critics claim that any standard of review that more carefully examines factual findings by the district court creates the danger of spurring satellite litigation.²⁶⁰ One commentator suggested that "[a]pplication of the abuse-of-discretion standard across the board probably enhances litigants' ability to revisit factual questions given that the prevailing alternative is the 'clearly erroneous' standard. Discretion might be abused even if the factual error is not 'clear.'"²⁶¹

254. FED. R. CIV. P. 11.

255. *Id.*

256. *See supra* note 250 and accompanying text. Rule 52(a) expressly states that "[f]indings of fact shall not be set aside unless clearly erroneous . . ." FED. R. CIV. P. 52.

257. 456 U.S. 273, 287 (1982).

258. *Id.*; *Anderson v. City of Bessemer*, 470 U.S. 564, 574 (1985) (quoting *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982)).

259. *Anderson*, 470 U.S. at 575.

260. *See id.* at 574-75 (duplicating trial judge's efforts would only divert judicial resources for negligible gain); *see also supra* notes 74-87 and accompanying text.

261. JOSEPH, *supra* note 182, at 309.

C. Findings of Law Should Be Reviewed Under a De Novo Standard

The proper standard for reviewing findings of law is de novo.²⁶² "Once a court has labeled a finding not fact, or enough law that free review is warranted, each case requires application of a *de novo* review function."²⁶³ As a rule, courts do apply different standards of review to different issues.²⁶⁴ When reviewing a particular legal issue, the court "has no license to venture freely into other issues of fact or the case as a whole."²⁶⁵ Rather, the court may only review those parts of the record relevant to the legal issue being challenged.²⁶⁶

Applying a narrower standard of review for legal issues not only stifles attorney creativity and innovation, but also hinders the enforcement of controversial legislation.²⁶⁷ One critic assessed Rule 11 as representing "a collision between the democratizing values of federal reform of the 1930s, which led to the Federal Rules of Civil Procedure, and the efforts during the 1980s, to close the federal courts to the poor and the powerless."²⁶⁸ Another critic wrote: "[B]ecause the horizons of

262. See *United States v. Maull*, 773 F.2d 1479, 1487 (8th Cir. 1985) (stating ultimate questions flowing from factual considerations subject to independent review); *Molerio v. FBI*, 749 F.2d 815, 820 (D.C. Cir. 1984) (making independent assessment of factual findings); *First Nat'l Bank v. National Bank*, 667 F.2d 708, 711 (8th Cir. 1981) (stating reviewing court reviews law de novo); *Transport Indem. Co. v. Liberty Mut. Ins. Co.*, 620 F.2d 1368, 1370 (9th Cir. 1980) (stating question of law subject to de novo review); *United States v. Haas & Haynie Corp.*, 577 F.2d 568, 572 (9th Cir. 1978) (stating appellate court can review legal issues); see *supra* note 140 and accompanying text.

263. 1 CHILDRESS & DAVIS, *supra* note 121, § 2.14, at 76; see also *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 526 (1961) (appellate court not considering original evidence); JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 600 (1985) (fullest scope of review is for errors of law; appellate court decides questions of law de novo).

264. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988). In a case involving an analogous issue, laches, the Third Circuit applied the three-tiered standard of review to the district court finding. *Bermuda Express, N.V. v. M/V Litsa (Ex. Laurie U)*, 872 F.2d 554, 557 (3d Cir. 1989), *cert. dismissed in part sub nom. M/V Litsa v. Southeastern Maritime Co.*, 492 U.S. 939 (1989), and *cert. denied*, 493 U.S. 819 (1989). The appellate court reviewed factual findings under the clearly erroneous standard, balancing of equities for abuse of discretion, and legal precepts plenary. *Id.*

265. 1 CHILDRESS & DAVIS, *supra* note 121, § 2.14, at 77; see also *Mississippi Valley Generating Co.*, 364 U.S. at 526 (relying on trial court's findings of fact did not preclude Court from making independent legal conclusions and inferences).

266. *National Advertising Co. v. Arizona Dep't of Transp.*, 617 P.2d 50, 52 (Az. Ct. App. 1980) (court considers only those matters presented on appeal); 1 CHILDRESS & DAVIS, *supra* note 121, § 2.14, at 77; FRIEDENTHAL ET AL., *supra* note 263, at 600 (only those issues presented by parties' briefs and relevant portion of trial court record brought to appellate court's attention reviewed).

267. Louis Greco, Comment, *Standard of Appellate Review of Rule 11 Decisions*, 58 FORDHAM L. REVIEW 251, 252 (1989) (stating appellate standard of review affects amount of district court control over litigation creativity).

268. LaFrance, *supra* note 83, at 334.

the law are in the process of continual expansion, an expansion that is certainly consummated along the frontier, the line of demarcation between a frivolous and non-frivolous claim is constantly shifting."²⁶⁹ Because courts are torn between the "need to sanction overzealous attorneys and the need to allow growth in the law,"²⁷⁰ Rule 11 has been applied inconsistently.²⁷¹ Requiring appellate courts to review trial court sanction orders de novo will help curb the inconsistent application of sanctions.²⁷²

Courts are using Rule 11 for docket management,²⁷³ thereby undermining "the value of open access to court embodied in the liberal pleading regime of the Federal Rules of Civil Procedure."²⁷⁴ One way to reduce inconsistent applications of Rule 11 sanctions is to allow appellate courts greater latitude in reviewing sanction orders. Appellate courts are in a better position to detect whether the Rule has particularly impacted on distinct areas of litigation, since they review a broad range of cases from different district courts.²⁷⁵ If appellate courts were to note that a particular line of cases was demonstrating a shift in legal thinking, they could better determine whether the arguments put forth do, in fact, represent "a good faith argument for the modification, extension, or reversal of existing law."²⁷⁶

Although in *Cooter & Gell v. Hartmarx Corp.*²⁷⁷ the United States Supreme Court expressly set out the standard for reviewing Rule 11 sanction decisions as abuse of discretion "in reviewing all aspects of a district court's Rule 11 determination,"²⁷⁸ the Court also stated that "[a] district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of

269. David J. Webster, Comment, *Rule 11: Has the Objective Standard Transgressed the Adversary System?*, 38 CASE W. RES. L. REV. 279, 306 (1987).

270. *Id.* at 308.

271. *Id.*

272. See *supra* note 120 for a discussion of the inconsistent application of Rule 11 to civil rights cases. See also Randall Samborn, *Rule 11 Tremors Continue*, NAT'L L.J., July 30, 1990, at 1, 32 (discussing lack of uniform application).

273. Comment, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 HARV. L. REV. 630, 632 (1987).

274. *Id.*

275. FRIEDENTHAL ET AL., *supra* note 263, at 600-01. "The appellate court actually is in as good a position as the trial court to decide those legal questions and, indeed, ruling on questions of law is one of its functions in guiding the lower courts." *Id.* at 601.

276. Greco, *supra* note 267, at 258 (stating more thorough appellate review provides greater curb on possible district court stifling of legal creativity).

277. 110 S. Ct. 2447 (1990).

278. *Id.* at 2461.

the evidence."²⁷⁹ In *Teamsters Local Union No. 760 v. United Parcel Service*²⁸⁰ the Ninth Circuit Court of Appeals in effect applied this standard by closely scrutinizing legal issues. In reviewing the decision to impose sanctions, it applied the abuse of discretion standard set out in *Cooter & Gell*.²⁸¹ The court in *Teamsters* also recognized that the Supreme Court had expressly rejected the previously used three-tiered standard of review.²⁸² Nevertheless, in determining "whether the district court abused its discretion by basing its Rule 11 determination on 'an erroneous view of the law,'" the Ninth Circuit seemingly conducted a de novo review of the controlling law,²⁸³ noting that the district court had failed to set out the controlling substantive law.²⁸⁴ Apparently, however, de novo review is not limited to cases where the district court has not revealed the substantive law. Rather, "[d]istrict courts should clearly set forth their view of the substantive law at issue so we can provide a meaningful de novo review of the controlling law before reviewing the application of that law for abuse of discretion, as directed by *Cooter & Gell*."²⁸⁵ Thus, the Ninth Circuit suggests that *Cooter & Gell* allows de novo review of legal issues to determine whether the district court has abused its discretion by relying on a clearly erroneous view of the law.

D. District Court Sanctions Should Be Reviewed Under an Abuse of Discretion Standard

Finally, in reviewing the district court's imposed sanction, the appellate court should use an abuse of discretion standard of review. No claim has been advanced that the standard should be anything other than abuse of discretion, since selecting an "appropriate" sanction itself entails

279. *Id.*

280. 921 F.2d 218 (9th Cir. 1990).

281. *Id.* at 219.

282. *Id.*

283. *Id.* (quoting *Cooter & Gell v. Hartmarx Corp.*, 110 S. Ct. 2447, 2461 (1990)). The Ninth Circuit Court of Appeals seemingly took the same approach in *Federal Savings & Loan Insurance Corp. v. Molinaro*, 923 F.2d 736 (9th Cir. 1991). In *Molinaro* the district court had imposed sanctions against the plaintiffs because the court found the claim to be "frivolous, legally unreasonable and without factual foundation." *Id.* at 738. The Ninth Circuit, citing *Cooter & Gell*, stated that "a district court necessarily abuses its discretion when it bases sanctions on an erroneous view of the law." *Id.* at 739. In order to determine whether the district court had based its decision on a clearly erroneous view of the law, thereby "abusing its discretion," the Ninth Circuit closely scrutinized the legal arguments which formed the basis of the sanctions. *Id.* After closely scrutinizing the legal findings made by the district court, the appellate court determined that the plaintiffs' legal arguments were "at the very least plausible[e]," and reversed the order imposing sanctions. *Id.* at 739-40.

284. *Teamsters*, 921 F.2d at 219.

285. *Id.*

the exercise of discretion.²⁸⁶ Having appellate courts review the choice of the sanction imposed for abuse of discretion promotes uniformity in sanction awards without unnecessarily encouraging satellite litigation.

Since Rule 11 is meant to act as a deterrent, and not mark the adoption of the English system,²⁸⁷ appellate courts should make sure that an "appropriate sanction"²⁸⁸ is not defined as reasonable attorney fees, but is a measured response to the conduct involved. The Third Circuit Task Force on Rule 11 recommends that the court should "avoid routine resort to expense-shifting, particularly on an attorney's fee model, which is inconsistent with the exercise of judicial discretion contemplated by the Rule."²⁸⁹ Expense shifting "only fortuitously suits the primary goal of deterrence, invites routine motions for sanctions, and may entail a jurisprudence that breeds satellite litigation."²⁹⁰

The sanction imposed should be the least amount possible to achieve the desired result. In a case concerning a related topic, civil contempt sanctions, the United States Supreme Court recently reemphasized the doctrine that in selecting contempt sanctions, a court must exercise "the least possible power adequate to the end proposed."²⁹¹ High sanction awards breed satellite litigation.²⁹² When the district courts impose a

286. *Cooter & Gell*, 110 S. Ct. at 2458.

287. In England, for centuries statutes have provided for the awarding of costs, including attorney's fees to the prevailing party. Schwarzer, *supra* note 16, app. A at 205. Under the American rule, however, the prevailing party must ordinarily pay its own attorney's fees and costs. *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 683-84 (1983); *Alyeska Pipeline Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975); *Eastway Constr. Corp. v. New York*, 762 F.2d 243, 252 (2d Cir. 1985). The loser is not ordinarily required to pay the prevailing party's costs. *Ruckelshaus*, 463 U.S. at 684. The Supreme Court has provided for the awarding of attorney's fees in certain exceptional situations, such as when the losing party has acted in bad faith. *Vaughan v. Atkinson*, 369 U.S. 527, 530-31 (1962) (awarding attorney's fees as damages when nonprevailing party acted with willful and persistent bad faith). Certain federal statutes have also provided for awarding attorney's fees to the prevailing party, but the rationale behind this policy is to encourage private enforcement of the legislation. Schwarzer, *supra* note 16, app. A at 206.

288. FED. R. CIV. P. 11.

289. *BURBANK*, *supra* note 49, at 98.

290. *Id.*

291. *Spallone v. United States*, 493 U.S. 265, 276 (1990) (quoting *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 231 (1821)). In *Spallone* members of the Yonkers city council refused to enact legislation implementing a consent decree earlier approved by the city. *Id.* at 270-71. The legislation was to enact a public housing ordinance required in a civil rights suit. *Id.* at 268-69. Sanctions were imposed both on the city and individual council members. *Id.* at 272. The Supreme Court affirmed the sanction against the city, but overruled the sanctions against the individual council members. *Id.* at 280. The Court held that the lower court should have first imposed sanctions against the city alone in attempt to secure compliance before sanctioning the council members. *Id.*

292. See *supra* notes 81, 290 and accompanying text.

large monetary sanction,²⁹³ attorneys and their clients are likely to appeal the decision because of the stigma attached to being sanctioned as well as the desire to avoid having to pay a large fine.²⁹⁴ Parties often appeal sanctions even if the cost on appeal outweighs or nearly equals the actual sanction amount.²⁹⁵ Thus, imposing large sanctions against attorneys creates the problem Rule 11 is intended to prevent, that of increasing litigation.

Since the "main purpose of sanctions . . . is education and deterrence,"²⁹⁶ even a minimal penalty may achieve this goal.²⁹⁷ A reprimand may suffice as a "sanction" when the violation is the attorney's first.²⁹⁸ The impact of "the sting of public criticism delivered from the bench,"²⁹⁹ although possibly constructive, may also "damage a lawyer's reputation and career."³⁰⁰ The Ninth Circuit also stated that "[e]ven the charge of sanctionable conduct may do unwarranted damage to an attorney's reputation."³⁰¹ Publication of reprimand orders would "[enhance] the deterrent effect of sanctions and help[] educate the bar about what is expected of them under Rule 11."³⁰² Instead of concentrating on the legal basis for the claim, Rule 11 motions should concentrate on what constitutes a reasonable prefilng inquiry under the circumstances of each

293. For the purpose of this argument, \$5000 is a reasonable amount.

294. Solovy, *supra* note 78, at 30.

295. BURBANK, *supra* note 49, app. E at 180. The task force found that the average cost to sanction appellants in a single issue appeal was \$15,763, whereas the average cost to sanction appellees was \$5209 when the average amount of the sanctions being challenged or defended was about \$4896. *Id.* The higher the amount of the sanction, the more likely the appellant attorney would personally pay the costs. Generally, the lower the amount, the more likely the client would pay the costs. Appellee clients usually bore the costs for the appeal of the sanction. *Id.* app. E, tbl. B at 190.

296. Schwarzer, *supra* note 16, at 201.

297. The 1991 preliminary draft of proposed amendments to the Federal Rules of Civil Procedure modifies Rule 11, stating that sanctions shall be limited "to what is sufficient to deter comparable conduct by persons similarly situated." COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., *supra* note 36. The proposed amendment specifically mentions sanctions such as "directives of a nonmonetary nature." FED. R. CIV. P. 11 (Tent. draft 1991).

298. Schwarzer, *supra* note 16, at 201.

299. *Id.*

300. *Id.*

301. *Townsend v. Holman*, 881 F.2d 788, 790 n.1 (9th Cir. 1989) (dictum) (emphasis added), *vacated on other grounds*, 914 F.2d 1136 (9th Cir. 1990). In reversing the district court's decision to impose sanctions, the appellate court decided not to publish the attorney's name because of the possible damage to his reputation simply from the charge of sanctionable conduct. *Id.*

302. Schwarzer, *supra* note 16, at 202. In an article written in 1988, three years after his initial analysis, William Schwarzer warned against too great an emphasis being placed on frivolous claims or defenses. William W. Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013, 1025 (1988).

case, because a general consensus on that question is easier to obtain.³⁰³ Focusing on the factual issues, such as whether an attorney made a reasonable prefiling inquiry into the facts, should reduce the amount of Rule 11 litigation while serving the interests of deterrence without chilling attorneys' enthusiasm or creativity.³⁰⁴

VII. CONCLUSION

Rule 11 sanctions, developed as an adjunct to efficient litigation, can easily make the judicial system clumsy and stifle many of its most important purposes. The Rule was developed to promote judicial efficiency uniformly and to deter litigation abuse. Appellate review of Rule 11 sanctions is critical to ensure the intentions of the Rule are met. Appellate courts should adopt the interpretation of *Cooter & Gell v. Hartmarx Corp.* applied by the Ninth Circuit in *Teamsters Local Union No. 760 v. United Parcel Service* and *Federal Savings & Loan Insurance Corp. v. Molinaro* for Rule 11 sanction analysis on review: a clearly erroneous standard of review for questions of fact as set out by Rule 52, the customary de novo review for questions of law, and an abuse of discretion standard for determining the propriety of the sanction imposed. Using the Ninth Circuit's interpretation of *Cooter & Gell* would protect against the possibility of sanctions stifling new developments in the law.

Inflicting less severe penalties based on more easily identifiable violations should decrease the amount of satellite litigation, yet still deter abuses. By modifying the uniform approach ambiguously advanced by *Cooter & Gell* and by applying the Ninth Circuit's interpretation of *Cooter & Gell*, appellate courts would be better able to monitor arbitrary and inconsistent Rule 11 decisions.

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303. Schwarzer, *supra* note 302, at 1025.

304. *Id.* at 1021.

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