**Cornell Law Review**

Volume 75
Issue 3 *March 1990*

Article 6

# Rule 11: Conflicting Appellate Standards of Review and a Proposed Uniform Approach

Christopher A. Considine

# NOTES

## RULE 11: CONFLICTING APPELLATE STANDARDS OF REVIEW AND A PROPOSED UNIFORM APPROACH

Federal Rule of Civil Procedure 11 defines the boundaries of acceptable litigation behavior in the federal courts by empowering courts to sanction attorneys or their clients for abuse of the litigation process.[1] Since its amendment in 1983, Rule 11 has been the focus of a large amount of academic commentary[2] and the source of much activity in the federal courts.[3] As Judge Schwarzer commented, "Rule 11 has become a significant factor in civil litigation, with an impact that has likely exceeded its drafters' expectations."[4]

Criticisms of the Rule 11 regime are many. Commentators argue that it chills doctrine-challenging advocacy,[5] undermines its

---

1 As amended in 1983 and 1987, Rule 11 provides:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state 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 the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. 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 [hereinafter "Rule 11" or "the Rule"].

2 See *infra* sources cited in notes 3-11.

3 Rule 11 has produced over 1,000 cases since being amended in 1983. Gregory P. Joseph, *The Trouble with Rule 11*, 73 A.B.A. J. 87, 88 (1987).

4 William W. Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013, 1013 (1988).

5 Melissa L. Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313, 1338 (1986).

own purpose of streamlining federal court litigation[6] by generating satellite litigation,[7] conflicts with the Federal Rules' liberal pleading policies,[8] is imposed disproportionately on certain types of litigants,[9] and is applied inconsistently.[10]

In light of these criticisms, defining the circuit courts' role in "striking a proper balance and enforcing Rule 11 is of extreme importance."[11] The courts of appeals, however, have not taken a uniform approach in resolving Rule 11 cases, but have instead developed three different approaches.[12] Appellate court disagreement centers on the reviewing court's level of involvement in deciding Rule 11 issues. Some courts argue that the Rule 11 determination is best made by the trial judge, and the appellate court should conduct only limited review.[13] Other courts take a more hands-on approach, engaging in broad review of Rule 11 decisions.[14]

This Note analyzes appellate review of Rule 11 cases and proposes an alternative approach for courts of appeals that would combat the problems that have developed in Rule 11 jurisprudence. Part I briefly outlines the history of Rule 11 and its 1983 amendments. Part II describes the three approaches courts of appeals have taken in reviewing Rule 11 decisions. Part III discusses the potential chilling effects of overbroad and inconsistent application of Rule 11. Part IV analyzes the appellate approaches on an issue by issue basis in light of the problem of inconsistent and overbroad application of Rule 11 and argues that appellate courts should do all

---

6 FED. R. CIV. P. 11 Advisory Committee Note, *reprinted in* 97 F.R.D. 165, 198 (1983) [hereinafter Advisory Note] ("Greater attention . . . to pleading and motion abuses . . . should . . . help to streamline the litigation process.").

7 ABA COMM. ON FEDERAL PROCEDURE, SANCTIONS: RULE 11 AND OTHER POWERS 15-16 (2d ed. 1988) [hereinafter ABA SANCTIONS] ("[A]n analysis of recent circuit court authority . . . reveals that Rule 11 has caused unnecessary satellite litigation."). Satellite litigation is litigation, ancillary to the main case, over the applicability of sanctions.

8 Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 HARV. L. REV. 630, 632 (1987) ("[C]ourts have applied amended Rule 11 too broadly as a tool for docket management and . . . have thus, in many cases, undermined the value of open access to court embodied in the liberal pleading regime of the Federal Rules of Civil Procedure.").

9 Arthur B. LaFrance, *Federal Rule 11 and Public Interest Litigation*, 22 VAL. U.L. REV. 331, 353 (1988) ("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.") (emphasis in original).

10 Schwarzer, *supra* note 4, at 1015.

11 Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 226 (1988).

12 *See infra* Part II for a discussion of the appellate courts' differing approaches.

13 *See infra* Part II(A). Those courts deferring to the trial court's judgment in Rule 11 cases do so because they view the analysis as a fact-intensive inquiry.

14 *See infra* Part II(B) and (C). Those courts engaging in broad review of Rule 11 decisions do so because they see themselves as being in as good a position as the trial court to make these judgments.

they can to promote uniformity and adherence to the policies of the Federal Rules in Rule 11 cases. Finally, Part IV posits an approach to appellate review that is consistent with these interests.

## I
## HISTORICAL BACKGROUND

### A. The Original Version of Rule 11

Under the original version of Rule 11,[15] promulgated in 1938 and unchanged until its amendment in 1983,[16] an attorney's signature on a pleading certified that there was "good ground to support it; and that it [was] not interposed for delay."[17] Courts applied the "good ground to support" requirement to both the factual and legal bases of the pleading.[18] The original Rule imposed a "moral obligation" on lawyers not to file baseless pleadings,[19] and was intended "to secure lawyer honesty."[20] The original Rule gave courts two powers: (1) to strike a pleading as sham and false, and (2) to discretionarily impose disciplinary action upon an attorney who willfully violated the rule.[21]

Original Rule 11 was ineffective in deterring abuses.[22] Despite

---

15 The original version of 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 willful 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 (1938) (amended 1983, 1987) [hereinafter Original Rule].

16 Nelken, *supra* note 5, at 1314. Rule 11 also was amended in 1987. This amendment was not substantive.

17 Original Rule, *supra* note 15.

18 *See, e.g.*, Heart Disease Research Found. v. General Motors Corp., 15 Fed. R. Serv. 2d (Callaghan) 1517, 1519 (S.D.N.Y. 1972) ("Rule 11 casts an affirmative obligation upon counsel who signs a pleading to represent his honest belief that there are facts and law to support the claims asserted in his pleading.").

19 5 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1333, at 499 (1969).

20 D. Michael Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1, 14 (1976).

21 *Id.*

22 Advisory Note, *supra* note 6, at 198.

the original Rule's intention of securing lawyer honesty, courts did not strike pleadings as sham absent a determination of both the pleader's bad faith dishonesty and the pleading's falsity.[23] Paradoxically, although the language of the original Rule seemed to address lawyers' conduct, courts more frequently sanctioned the client.[24] To enforce the original Rule against a lawyer, courts had to find that the attorney willfully violated it, and, even then, "appropriate disciplinary action" was discretionary.[25] Courts often interpreted the willful violation standard as requiring a showing of subjective bad faith, making enforcement against lawyers even more difficult.[26]

Courts rarely applied the original Rule.[27] Commentators suggest several reasons for this. The good faith defense sheltered lawyers from "all but the most egregiously frivolous suits."[28] The Rule's "meaningless sanctions" also added to courts' infrequent application of the original Rule.[29] One commentator has postulated, however, "that it was less the rule's language than prevalent ideas about the propriety of sanctions against lawyers that caused it to be ignored for so long."[30]

### B. The 1983 Version of Rule 11

#### 1. *Reasons for Amendment*

In 1983, the Federal Rules Advisory Committee amended Rule 11 as part of an "integrated package" of rules amendments.[31]

---

23 *Id.* at 16.

24 Nelken, *supra* note 5, at 1315. Pleadings, if signed with "intent to defeat the purpose of the rule," could be stricken as sham. *See* Original Rule, *supra* note 15. Thus the client would be penalized for the attorney's misconduct.

25 Nelken, *supra* note 5, at 1315.

26 *See, e.g.*, Badillo v. Central Steel & Wire, 717 F.2d 1160, 1167 (7th Cir. 1983) (Rule 11 sanctions denied because of "lack of any showing of subjective bad faith"); Nemeroff v. Abelson, 620 F.2d 339, 350 (2d Cir. 1980) ("The standard under Rule 11 . . . is bad faith.").

27 *See* Risinger, *supra* note 20, at 34-35 (finding only 19 "genuine adversary Rule 11 motions" between 1938 and 1976); 5 C. WRIGHT & A. MILLER, *supra* note 19, §§ 1332-34, at 496 (1983 Supp.) (finding 40 Rule 11 cases between 1975 and 1983). For information on Rule 11 activity since 1983, see *supra* note 3.

28 *See* Note, *The Intended Application of Federal Rule of Civil Procedure 11: An End to the "Empty Head, Pure Heart" Defense and a Reinforcement of Ethical Standards*, 41 VAND. L. REV. 343, 352 (1982) (authored by Robbie A. Wilson).

29 Arthur R. Miller & Diana G. Culp, *Litigation Costs: Delay Prompted the New Rules of Civil Procedure*, NAT'L L.J., Nov. 28, 1983, at 34, col. 1.

30 Nelken, *supra* note 5, at 1316.

31 ARTHUR MILLER, THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY (Federal Judicial Center 1984). Other Rules amended in 1983 include Rule 7 ("[a]mended to make explicit that the certification requirement and sanctions provisions of Rule 11 are applicable to motions and other papers"), Rule 16 ("[a]mended Rule 16 is intended to bring about greater judicial control of civil cases from their earliest stages"), and Rule 26 ("[a]mended Rule 26 addresses the problem of excessive or abu-

The Committee designed the amendments to "remedy the perceived inefficiencies and abuses of the system by increasing judicial oversight of litigation and by diminishing the incentives for certain kinds of litigation behavior through sanctions provisions."[32] Specifically, Rule 11 was amended to meet the legal community's concerns over "frivolous litigation,"[33] a "mounting federal caseload,"[34] and "the loss of public confidence caused by lawyers' using the courts for their own ends rather than with a consideration of the public interest."[35] The legal community believed it necessary to increase the use of sanctions to deal with these problems,[36] and considered the original Rule ineffective in deterring abuses.[37]

2. *The Amended Rule 11*

The Advisory Committee made major changes to Rule 11.[38]

---

sive discovery"). William L. Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 183 (1985).

32 Nelken, *supra* note 5, at 1317.

33 *See* Coburn Optical Indus., Inc. v. Cilco, Inc., 610 F. Supp. 656, 658, n.4 (M.D.N.C. 1985).

34 *See* Dreis & Krump Mfg. Co. v. International Ass'n of Machinists, Dist. No. 8, 802 F.2d 247, 255-56 (7th Cir. 1986).

35 Address by Chief Justice Warren Burger, *Agenda for 2000 A.D.—Need for Systematic Anticipation*, National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (April 7-9, 1976) (Conference commemorating Roscoe Pound's address to the American Bar Association 1906 annual meeting), *reprinted in* 70 F.R.D. 83, 91 (1976).

36 *Dreis*, 802 F.2d at 255-56 ("[I]t [is] imperative that the federal courts impose sanctions on persons and firms that abuse their right of access to these courts . . . . Lawyers practicing in the Seventh Circuit, take heed!").

37 Advisory Note, *supra* note 6, at 198.

38 *Id.* The italicized portions below indicate additions to the original Rule 11; the language in parenthesis has been deleted from the original Rule.

> Every pleading, *motion and other paper* of a party represented by an attorney shall be sigued 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 sigu his pleading, *motion or other paper* and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The 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 that he has read the pleading, *motion or other paper*; 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) *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 it is signed with intent to defeat the purpose of the rule; it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a willful violation of this rule an attorney may be subjected to

First, the amended version is more specific than the original Rule and expands the scope of sanctionable conduct.[39] While the original Rule required that the attorney believe good grounds existed to support the pleading,[40] the amended Rule requires the attorney to actually make a reasonable inquiry into fact and law.[41] Courts have interpreted Rule 11 as requiring that attorneys' conduct meet an objective standard.[42] The Advisory Committee also deleted the willful mental state requirement in the amended Rule.[43] Finally, the Advisory Committee withdrew trial judge discretion in imposing sanctions: once the court finds a violation of the Rule, it *must* impose a sanction.[44]

Attorneys comply with Rule 11 as long as the paper they sign satisfies the affirmative duties imposed by the Rule's three prongs.[45] To satisfy the "well grounded in fact" requirement, an attorney must conduct a reasonable inquiry into the facts, and may not simply rely on his client's representations if further investigation is reasonable.[46] A claim satisfies the "warranted by law" requirement if it

---

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, *reprinted in* 97 F.R.D. 165, 196-97 (1983).

39 The scope of sanctionable conduct is expanded in that the amendments recognize improper conduct other than delay. Advisory Note, *supra* note 6, at 198. The amended Rule is more specific in that the "good ground to support" requirement was rewritten to include both factual and legal grounds. *Id.*

40 Original Rule, *supra* note 15. Courts interpreted the original Rule to allow for a subjective good faith defense. *See supra* note 26 and accompanying text.

41 Rule 11, *supra* note 1.

42 *See, e.g.*, Donaldson v. Clark, 819 F.2d 1551, 1556 (11th Cir. 1987) ("Rule 11 as amended incorporates an objective standard"); Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 253-54 (2d cir. 1985) ("[A] showing of subjective bad faith is no longer required to trigger the sanctions imposed by the rule."); Zaldivar v. City of Los Angeles, 780 F.2d 823, 829 (9th Cir. 1986) ("[S]ubjective bad faith is not an element to be proved under present Rule 11."). This interpretation is consistent with that of the Advisory Committee. Advisory Note, *supra* note 6, at 198 ("The standard is one of reasonableness under the circumstances.").

43 Advisory Note, *supra* note 6, at 200.

44 Rule 11, *supra* note 1 ("the court . . . *shall* impose . . . an appropriate sanction") (emphasis added). Under the original Rule, courts had discretion as to whether to impose a sanction for a violation. Original Rule, *supra* note 15.

45 Judge Schwarzer states that there are "three substantive prongs of [Rule 11]: its factual basis, its legal basis, and its legitimate purpose." Schwarzer, *supra* note 31, at 186.

46 *See, e.g.*, Coburn Optical Indus., Inc. v. Cilco, Inc., 610 F. Supp. 656, 659 (M.D.N.C. 1985) (holding that an attorney is sanctionable if he relies on his clients' assurance that facts exist or do not exist when a reasonable inquiry would reveal otherwise); Kendrick v. Zanides, 609 F. Supp. 1162, 1172 (N.D. Cal. 1985) (if attorney has a document refuting client's allegations, he must investigate).

provides "a colorable basis for relief."[47] What constitutes a reasonable inquiry into the facts and law depends on the circumstances in which the attorney signed the paper.[48] Finally, courts determine whether a party or attorney signed a paper with an improper purpose under an objective standard.[49]

The Advisory Committee's stated purpose in amending Rule 11 was "to reduce the reluctance of courts to impose sanctions."[50] Studies indicate that this purpose has been achieved,[51] but as courts more frequently have resorted to Rule 11, new problems have arisen. Anticipating these developments, the Committee expressed concerns that Rule 11 might chill creative advocacy,[52] that the efficiency gained by the amendments would be "offset by the cost of satellite litigation,"[53] and that courts would not comply with due process requirements.[54]

### 3. *The Amended Rule and Appellate Courts*

Rule 11 does not set forth a specific standard of review.[55] The Advisory Committee Notes provide only limited guidance, commenting that trial courts have "discretion to tailor sanctions to the particular facts of the case."[56] The Notes remain silent as to the degree of deference appellate courts should afford trial courts regarding other Rule 11 issues.[57] Consequently, there is no consensus among the courts of appeals regarding the standard of review to be used in Rule 11 cases. Some courts adhere to the same standard of review they employed under the original Rule,[58] while others interpret the changes to require a new standard.[59]

---

47 Hudson v. Moore Business Forms, Inc., 836 F.2d 1156, 1163 (9th Cir. 1988).

48 Advisory Note, *supra* note 6, at 199.

49 *See* Brown v. Federation of State Medical Bds. of the United States, 830 F.2d 1429, 1436 (7th Cir. 1987); Hill v. Norfolk & W. Ry. Co., 814 F.2d 1192, 1201 (7th Cir. 1987).

50 Advisory Note, *supra* note 6, at 198.

51 *See, e.g.*, Joseph, *supra* note 3, and Vairo, *supra* note 11. There have been over 1,000 Rule 11 cases since its amendment in 1983. There were fewer than 60 Rule 11 cases in the period from its promulgation in 1938 through 1983. *See, e.g.*, Risinger, *supra* note 20, at 35; 5 C. WRIGHT & A. MILLER, *supra* note 19, §§ 1332-34 (1983 Supp.).

52 Advisory Note, *supra* note 6, at 199. ("The rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories.").

53 *Id.* at 201.

54 *Id.*

55 FED. R. CIV. P. 11 (1987). This also is true of the Original Rule, *supra* note 15.

56 Advisory Note, *supra* note 6, at 200.

57 *Id.*

58 *E.g.*, Zaldivar v. City of Los Angeles, 780 F.2d 823, 828 n.4 (9th Cir. 1986).

59 *E.g.*, Donaldson v. Clark, 819 F.2d 1551, 1556 n.5 (11th Cir. 1987).

## II
## APPELLATE STANDARDS OF REVIEW

The courts of appeals have not developed a uniform approach to reviewing district court Rule 11 decisions. Instead, they have formulated and employed three distinct standards. Eight circuits have used an abuse of discretion standard,[60] merely inquiring whether the district court abused its discretion as to all issues decided in a Rule 11 case. Two circuits have applied a three-tiered standard of review,[61] investigating each of the district court's factual, legal, and sanction findings according to different standards. Finally, three circuits have applied a variation on the three-tiered approach,[62] varying the degree of scrutiny on review based on the Rule 11 decision below.

### A. Abuse of Discretion

The First, Third, Fourth, Fifth, Sixth, Seventh, Tenth, and Federal Circuits have employed an abuse of discretion standard of review for Rule 11 decisions.[63] Under this standard, the court of appeals grants the district court wide leeway in its determination of all issues decided in a Rule 11 case. The Fifth Circuit adopted this standard in the well-reasoned opinion in *Thomas v. Capital Security Services, Inc.*[64] Sitting en banc, the Fifth Circuit reconciled two lines of cases, one employing an abuse of discretion standard,[65] and the other a more demanding three-tiered analysis.[66] The court stated that "we believe application of an abuse of discretion standard

---

60 Courts employing an abuse of discretion standard include the First, Third, Fourth, Fifth, Sixth, Seventh, Tenth, and Federal Circuits. *See, e.g.*, Mars Steel Corp. v. Continental Bank, N.A., 880 F.2d 928, 933 (7th Cir. 1989); Everpure, Inc. v. Cuno, Inc., 875 F.2d 300, 304 (Fed. Cir. 1989), *cert. denied*, 110 S. Ct. 154 (1989); Herron v. Jupiter Transp. Co., 858 F.2d 332, 337 (6th Cir. 1988); Introcaso v. Cunningham, 857 F.2d 965, 969 (4th Cir. 1988); Doering v. Union County Bd. of Chosen Freeholders, 857 F.2d 191, 195 (3d Cir. 1988); Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 872 (5th Cir. 1988) (en banc); EBI, Inc. v. Gator Indus., Inc., 807 F.2d 1, 6 (1st Cir. 1986); Cotner v. Hopkins, 795 F.2d 900, 903 (10th Cir. 1986).

61 Courts employing the three-tiered analysis include the Eighth and Ninth Circuits. *See, e.g.*, Kurkowski v. Volcker, 819 F.2d 201, 203 n.8 (8th Cir. 1987); Zaldivar v. City of Los Angeles, 780 F.2d 823, 828 (9th Cir. 1986). *But see* O'Connell v. Champion Int'l Corp., 812 F.2d 393, 395 (8th Cir. 1987) (employing abuse of discretion standard).

62 Courts employing the variation analysis include the D.C., Second, and Eleventh Circuits. *See, e.g., Donaldson*, 819 F.2d at 1556; Westmoreland v. CBS, Inc., 770 F.2d 1168, 1174-75 (D.C. Cir. 1985); Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 254 n.7 (2d Cir. 1985). *But see* Adams v. Pan Am. World Airways, Inc., 828 F.2d 24, 32 (D.C. Cir. 1987) (employing abuse of discretion standard), *cert. denied* 485 U.S. 961 (1988).

63 *See, e.g.*, cases cited *supra* note 60.

64 836 F.2d 866 (5th Cir. 1988) (en banc).

65 *E.g.*, Davis v. Veslan Enters., 765 F.2d 494 (5th Cir. 1985)

66 *E.g.*, Robinson v. National Cash Register Co., 808 F.2d 1119 (5th Cir. 1987).

across the board to all issues in Rule 11 cases is the better approach."[67]

In *Thomas*, the plaintiffs-employees filed suit against Capital, the defendant-employer, alleging racial and sexual discrimination.[68] The court found for defendant on the merits, and the defendant then moved for Rule 11 sanctions.[69] The district judge denied the motion because of the unsettled nature of the law involved in the case,[70] but noted that plaintiffs' " 'shotgun' allegations . . . appear to have been taken from a litigation form book. . . . [And] the court is not totally convinced that a reasonable prefiling inquiry as to the specific law and facts was made . . . ."[71] On appeal, a Fifth Circuit panel followed *Robinson v. National Cash Register Co.*[72] by applying a de novo standard of review in reversing the denial of Rule 11 sanctions.[73]

The Fifth Circuit then reheard the case en banc and rejected *Robinson*, adopting an abuse of discretion standard in the light of the "fact-intensive inquiry" necessary to determine whether courts should impose a sanction.[74] Because "[t]he trial judge is in the best position to review the factual circumstances and render an informed judgment as he is intimately involved with the case . . . on a daily basis," the court decided that "no advantage would result if this Court were to conduct a second hand review of the facts . . . ."[75] Moreover, district courts are more familiar with what constitutes "acceptable trial-level practice . . . ."[76] The court also relied on an American Bar Association publication which argued that, although those courts employing de novo review do so in an attempt to promote uniformity, "the goal of uniformity may be no better served by the de novo standard [than by the abuse of discretion standard] because many sanctions cases are fact-intensive, close calls."[77]

### B. Three-Tiered Analysis

The Eighth and Ninth Circuits have employed a three-tiered analysis for appellate review of Rule 11 decisions. The appellate court first uses a "clearly erroneous" standard to review the facts

---

67 *Thomas*, 836 F.2d at 872.
68 Thomas v. Capital Sec. Servs., Inc., 110 F.R.D. 402, 403 (S.D. Miss. 1986).
69 *Id.* at 402.
70 *Id.* at 403.
71 *Id.*
72 808 F.2d 1119 (5th Cir. 1987).
73 Thomas v. Capital Sec. Servs., Inc., 812 F.2d 984 (5th Cir. 1987) (en banc).
74 Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 873 (5th Cir. 1988) (en banc).
75 *Id.*
76 *Id.*
77 *Id.* (citing ABA SANCTIONS, *supra* note 7, at 28-29).

upon which the district court relied to establish whether a paper violated Rule 11. It then applies de novo review to the district court's legal decisions as to whether the paper was "well grounded in fact," "warranted by law," or interposed for an improper purpose.[78] Finally, the appellate court uses an abuse of discretion standard to review the appropriateness of the sanction the district court imposed.[79]

Neither of the circuits utilizing this approach gives substantive reasons for its adoption. In *Zaldivar v. City of Los Angeles*,[80] the Ninth Circuit adopted the three-tiered approach "to maintain consistency with [its] law in similar situations."[81] The Eighth Circuit merely cited and quoted *Zaldivar* in a footnote in *Kurkowski v. Volcker*.[82] Reasons for using this standard are fleshed out more fully in *Robinson*,[83] the Fifth Circuit case rejected by *Thomas*.[84] The *Robinson* court addressed the conflict between an appellate court's deference to the district court (given the district court's superior position gained by observing the litigation), and Rule 11's requirement that, once a violation is found, a sanction must be imposed.[85] To support its adoption of the more stringent three-tiered analysis, the court relied on Judge Friendly's admonition that "abuse of discretion" is an inexact term that allows for varying degrees of scrutiny.[86]

### C. Variation on the Three-Tiered Analysis

The D.C., Second, and Eleventh Circuits employ a variation on the three-tiered analysis in reviewing Rule 11 decisions.[87] Under this analysis, the district court has wide discretion in determining whether a paper is "well grounded in fact" or filed for an improper purpose.[88] The district court, having conducted the litigation, is in the best position to make these factual determinations. The appel-

---

78 *See, e.g.*, Kurkowski v. Volcker, 819 F.2d 201, 203 (8th Cir. 1987); Zaldivar v. City of Los Angeles, 780 F.2d 823, 828 (9th Cir. 1986). *But see* O'Connell v. Champion Int'l Corp., 812 F.2d 393, 395 (8th Cir. 1987) (employing abuse of discretion standard).

79 *Kurkowski*, 819 F.2d at 203 n.8; *Zaldivar*, 780 F.2d at 828.

80 780 F.2d 823 (9th Cir. 1986).

81 *Id.* at 828 n.4.

82 819 F.2d 201, 203 n.8 (8th Cir. 1987).

83 Robinson v. National Cash Register Co., 808 F.2d 1119 (5th Cir. 1987).

84 For a discussion of *Thomas*, see *supra* notes 64-77 and accompanying text.

85 *Robinson*, 808 F.2d at 1126 n.12.

86 *Id.* (citing Henry J. Friendly, *Indiscretion about Discretion*, 31 EMORY L.J. 747, 763 (1982)).

87 *See, e.g.*, Donaldson v. Clark, 819 F.2d 1551, 1556 (11th Cir. 1987); Westmoreland v. CBS, Inc., 770 F.2d 1168, 1174-75 (D.C. Cir. 1985); Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 254 (2d Cir. 1985). *But see* Adams v. Pan Am. World Airways, Inc., 828 F.2d 24, 30 (D.C. Cir. 1987) (employing abuse of discretion standard).

88 *Westmoreland*, 770 F.2d at 1174.

late court conducts de novo review if the issue is whether a paper is "warranted by law."[89] De novo review is warranted because the courts consider this issue to be a question of law. Once the district court finds factual insufficiency, legal insufficiency, or an improper purpose, "Rule 11 requires that sanctions . . . be imposed,"[90] and a district court's failure to impose sanctions "constitutes error" under this analysis.[91] The appellate court reviews the district court's selection of the type of sanction imposed under an abuse of discretion standard.[92]

## III
## RULE 11'S POTENTIAL CHILLING EFFECT

Courts may create a chilling effect on doctrine-challenging litigation by applying Rule 11 overbroadly or inconsistently. The Advisory Committee was aware of this potential problem when drafting in 1983 amendments to Rule 11.[93] Its interpretation of Rule 11 conforms to the Federal Rules' liberal pleading policies.[94] The Advisory Committee's goal in amending Rule 11 was to curb litigation abuse, not to chill creative advocacy or to eliminate dynamism in the law.[95] Despite the Advisory Committee's intentions, decisions interpreting Rule 11 are setting the stage for a chilling effect.

### A. Overbroad Application of Rule 11

Attorneys may be reluctant to try factually underdeveloped or legally novel cases if courts interpret Rule 11 overbroadly. An overbroad interpretation of Rule 11 conflicts with the liberal pleading policies of the Federal Rules of Civil Procedure, thus sanctioning

---

89 *Id.* at 1175.

90 *Id.* at 1174-75.

91 *Id.* at 1175.

92 *Id.*

93 Advisory Note, *supra* note 6, at 199 ("The Rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories.").

94 The Federal Rules were designed to de-emphasize pleadings as a screening device and to encourage discovery as a means to "get to the merits of the case." Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 440 (1986). As the Supreme Court stated, "[a] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (citations omitted). The Federal Rules thus sought to eliminate the emphasis on pleading practice that existed prior to their enactment. Marcus, *supra*, at 437-40. The Rules also sought to facilitate positive challenges to and changes in existing doctrine. *See* Note, *supra* note 8, at 646. By allowing for "good faith argument[s] for the extension, modification, or reversal of existing law," Rule 11 acknowledges and encourages the dynamism of legal doctrine. Rule 11, *supra* note 1.

95 Advisory Note, *supra* note 6, at 199.

otherwise permissible claims.[96] The Federal Rules are designed to facilitate novel claims by permitting factual development after the pleading stage[97] and by not requiring reliance on established legal doctrine.[98] If courts read Rule 11 to require extensive factual development at the pleading stage,[99] or narrowly construe the "warranted by law" requirement,[100] they undermine the liberal pleading regime. Such a reading of Rule 11 forces attorneys to eschew claims where the facts can be ascertained only through discovery[101] and claims that rely novel legal theories.[102]

### B. Inconsistent Application of Rule 11

Courts also may create a chilling effect by applying Rule 11 inconsistently. Because Rule 11 provides little guidance and because most courts of appeals conduct only limited review of district court Rule 11 decisions,[103] district court judges have been left to fashion their own standards of sanctionable conduct. Hence, judges do not

---

96 *See supra* note 94 for a description of the liberal pleading policies of the Federal Rules of Civil Procedure.

97 The Federal Rules allow a complaint to survive a motion to dismiss unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (citations omitted).

98 Courts cannot sanction an attorney if his complaint relies on a good faith argument for a change in established legal doctrine. FED. R. CIV. P. 11. Additionally, an attorney need not have settled on a legal theory in his complaint. *See* FED. R. CIV. P. 8(e)(2) (permitting a litigant to plead alternate claims).

99 *See, e.g.*, Rodgers v. Lincoln Towing Serv., Inc., 771 F.2d 194, 205-06 n.8 (7th Cir. 1985), *aff'g* 596 F. Supp. 13 (N.D. Ill. 1984) ("[H]ad plaintiff introduced . . . some fact to prove that the city maintained the policies . . . allege[d] then he would have stated an actionable claim."); Kendrick v. Zanides, 609 F. Supp. 1162, 1172-73 (N.D. Cal. 1985) (imposing sanctions on lawyer for relying on client's statements rather than conducting prediscovery inquiry at the S.E.C., the U.S. Attorney's Office, and a storage company).

100 *See, e.g., Rodgers*, 596 F. Supp. at 16-17 (sanctioning plaintiff's attorneys because plaintiff's claims had "no arguable basis in existing law").

101 Fifty-five percent of reported Rule 11 decisions are public interest cases (*e.g.*, civil rights and employment discrimination claims), antitrust, RICO, or securities claims. Note, *The Dynamics of Rule 11: Preventing Frivolous Litigation by Demanding Professional Responsibility*, 61 N.Y.U. L. REV. 300, 323 n.175 (1986) (authored by Neal H. Klansner). Professor LaFrance asserts that these cases are "uniquely targeted by Rule 11 because their facts cannot be adequately developed until after suit . . . ." LaFrance, *supra* note 9, at 353. For example, gender-based discrimination cases often must be proven by facts ascertained from a defendant's file after suit has been initiated. Edward D. Cavanaugh, *Developing Standards Under Amended Rule 11 of the Federal Rules of Civil Procedure*, 14 HOFSTRA L. REV. 499, 517-18 (1986).

102 Public interest cases fit this model. They often contain issues that are "grounded on unclear, yet fundamental concepts which challenge . . . decades of custom entrenched in legal protections." LaFrance, *supra* note 9, at 336.

103 *See supra* Part II(A) for a description of the analysis used by those courts which defer to the district court's Rule 11 decision.

apply Rule 11 consistently,[104] as a Federal Judiciary Center study documents.[105] For example, in one hypothetical case, almost half of the judges polled would have sanctioned a paper that the remaining judges found permissible.[106] Judges' conflicting notions of what behavior is sanctionable have resulted in a trial court sanctioning an attorney only to see the appellate court remove the Rule 11 sanction and reverse on the merits.[107] In such an uncertain atmosphere, an attorney may perceive himself as vulnerable to sanction and might be reluctant to make borderline arguments. He may be unsure how broadly a judge will read Rule 11 or, worse still, he may know that a judge typically reads Rule 11 broadly and that his chances of being sanctioned are high. Judge Schwarzer recognized this problem when he noted that "judges may also be chary about criticizing a lawyer's conduct out of concern that they are or will be perceived as imposing their personal standards of professionalism on others."[108] Unfortunately, that may be what judges are doing.

A more troubling aspect of the problem of courts' inconsistent application of Rule 11 is that courts sanction certain types of litigants more frequently than others. Studies show that Rule 11 sanctions are disproportionately imposed upon civil rights plaintiffs.[109] These cases advance precisely the sort of doctrinal challenges that the drafters of the Federal Rules sought to encourage and facilitate.[110] It is reasonable to expect that fear of sanction and the pecuniary risk that civil rights attorneys must take[111] will accomplish that which the Advisory Committee hoped Rule 11 would not: the chilling of creative, doctrine-challenging advocacy.

The heightened risk of sanction on an innovative case or the uncertainty of what a judge may find sanctionable will influence an attorney's conduct. Some lawyers and clients may be able to absorb the threat as a cost of litigation,[112] but many others, especially

---

104 *See* Schwarzer, *supra* note 4, at 1015 ("In interpreting and applying Rule 11, the courts have become a veritable Tower of Babel.").

105 *See* SAUL H. KASSIN, AN EMPIRICAL STUDY OF RULE 11 SANCTIONS (1985).

106 *See id.* at 17 (table 3).

107 *See* Goldman v. Belden, 754 F.2d 1059 (2d Cir. 1985), *vacating* 580 F. Supp. 1373 (W.D.N.Y. 1984) (district court's grant of motion to dismiss and imposition of Rule 11 sanction).

108 Schwarzer, *supra* note 31, at 184.

109 *See, e.g.*, LaFrance, *supra* note 9, at 353; Nelken, *supra* note 5, at 1354-69; Vairo, *supra* note 11, at 200.

110 For an analysis of the role of public interest litigation in the American legal system and its relation to Rule 11, see LaFrance, *supra* note 9.

111 Civil rights clients often "do not have the resources or access of great corporations or governmental agencies . . . ." LaFrance, *supra* note 9, at 353. Their attorneys thus tend to rely on statutory fees, *see id.* at 338-39, which makes the attorneys particularly vulnerable to financial hardship.

112 *See* Note, *A Uniform Approach to Rule 11 Sanctions*, 97 YALE L. J. 901, 914 (1988)

poorly-financed public interest lawyers, will be reluctant to take certain cases or make certain arguments. Their "enthusiasm or creativity in pursuing factual or legal theories" will be chilled.[113]

## IV
## THE ROLE OF THE APPELLATE COURTS

The courts of appeals should play a role in preventing overbroad and inconsistent application of Rule 11 and the ills caused thereby. Appellate review, although not a constitutional obligation, is a highly valued aspect of the American judicial process.[114] This may be a function of the view that "an appellate judge is inherently more able than a trial judge,"[115] but it is more likely a result of the idea that "unreviewable discretion offends a deep sense of fitness in our view of the administration of justice."[116] Whatever the reasons for this preference, "broad judicial review is necessary to preserve the most basic principle of jurisprudence that 'we must act alike in all cases of like nature.' "[117] In Rule 11 jurisprudence, this tenet suggests a need to promote the uniformity that is lacking in district court sanction decisions.[118] The courts of appeals can help ameliorate this problem by providing guidelines where appellate scrutiny will reap benefits, and deferring to the district court in other circumstances.[119] An appellate court can combat uncertainty by exercising its "power to declare the law and thus to impose on the trial level decision maker general rules affecting all cases that come within the

---

(authored by Alan E. Untereiner) (Defense counsel representing wealthy individuals or corporations might "agree to risk Rule 11 sanctions, for example, in order to delay a judgement.").

113 Advisory Note, *supra* note 6, at 199. Judge Schwarzer argues that the threat of sanctions, which he concedes could inhibit attorneys, will not chill vigorous advocacy. Schwarzer, *supra* note 31, at 184. His premise, that attorneys will only be sanctioned for illegitimate litigation tactics, *id.*, is undermined by studies demonstrating Rule 11's inconsistent application and disparate impact on public interest attorneys.

114 *See* Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 641-42 (1971).

115 Friendly, *supra* note 86, at 757. Judge Friendly did *not* espouse this view. See *infra* note 126 and accompanying text for a description of Judge Friendly's views on this issue.

116 Rosenberg, *supra* note 114, at 641-42.

117 Friendly, *supra* note 86, at 757-58 (quoting Ward v. James, [1966] 1 Q.B. 273, 294, (C.A.) (quoting Lord Mansfield in John Wilkes' case, Rex v. Wilkes, 96 Eng. Rep. 327, 335 (1770))).

118 *See* S. KASSIN, *supra* note 105, at 29-32. Judges take three different views of Rule 11's purpose: deterrence, compensation and punishment. In hypothetical situations, those who viewed compensation as the Rule's primary purpose imposed sanctions most frequently. Those who viewed the purpose as deterrence imposed sanctions somewhat less frequently. And those who considered punishment the Rule's primary purpose imposed sanctions least often.

119 *See infra* Part IV(A) for an analysis of the standards appellate courts should adopt in reviewing Rule 11 decisions.

rules' terms."[120] Once attorneys and their clients know where the lines delineating acceptable litigation tactics are drawn, they will be freed from the chilling effects of subjective or inconsistent application of Rule 11. An example of this approach can be found in *Eastway Construction Corp. v. City of New York*.[121] The Second Circuit affirmed the district court's imposition of sanctions for legal insufficiency and formulated a generally applicable rule. The court stated that "where it is *patently clear* that a claim has *absolutely no chance* of success under the existing precedents, and where *no reasonable argument* can be advanced to extend, modify, or reverse the law as it stands, Rule 11 has been violated."[122] Such a standard clearly indicates to litigants the limits to which they can push the legal sufficiency requirement and removes much of the uncertainty that exists in the absence of such a pronouncement.

While a more uniform approach offers benefits, it does not, standing alone, cure all ills. Appellate courts should not only offer guidance in order to effectuate Rule 11's policies, they should do so in such a way so as to avoid conflict with the Federal Rules' liberal pleading policies. There is no easy formula for accomplishing this task. The American system of judicial administration is "committed to the practice of affording a two-tiered or three-tiered court system, so that a losing litigant may obtain at least one chance for review of each significant ruling made at the trial court level."[123] We believe that appellate review is crucial to achieving justice. Hence, appellate courts typically review questions of law independently.[124] "[L]aw declaration is the special province of the appellate level."[125] This allocation of responsibility must be based on the conclusion that the appellate court, for whatever reason,[126] is more likely to make a cor-

---

120 Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question and Procedural Discretion*, 64 N.C.L. REV. 993, 1017 (1986). Professor Louis defined the appellate function as "establish[ing] the relevant definitions and limits through the exercise of lawmaking power . . . ." *Id.* He subdivides this appellate lawmaking power into three subsidiary powers: the "law declaration power," whereby appellate courts make general rules; the "supervisory power," whereby appellate courts can rule that particular trial-level findings are abuses of discretion; and the "classification power," whereby appellate courts can dictate the standard of review of a trial level decision by calling it a question of law, which requires de novo review. *Id.* It is the law declaration power that is most crucial to appellate court promotion of uniformity because, through its excercise, reviewing courts limit the lawmaking power of trial courts, thus imposing one rule on every court within the circuit.

121 762 F.2d 243 (2d Cir. 1985).

122 *Id.* at 254 (emphasis added).

123 Rosenberg, *supra* note 114, at 642.

124 Kevin M. Clermont, *Procedure's Magical Number Three: Psychological Bases for Standards of Decision*, 72 CORNELL L. REV. 1115, 1128 (1987).

125 Louis, *supra* note 120, at 994.

126 *See* Friendly, *supra* note 86, at 757-58. Judge Friendly states that "[t]he advan-

rect decision. Thus, where they promote uniformity by formulating generally applicable rules, appellate courts also are expected to formulate the correct rule. It is on this likelihood that the litigant must place his hope that courts will interpret Rule 11 so as to avoid a chilling effect.

### A. A Critical Analysis of Present Standards of Review and a Proposed Alternative

In this section, this Note analyzes the courts of appeals' approaches to appellate review in the light of Rule 11's potential chilling effects and the role of appellate courts. The analysis is conducted on an issue by issue basis because of the different inquiries necessary under Rule 11. It concludes that the courts of appeals should review Rule 11 cases under varying standards, depending upon the issues on appeal: where the issue on appeal is whether a paper is "well grounded in fact" or "warranted by law," the appellate court should conduct de novo review; if the issue is whether the attorney had an improper purpose in filing the paper, the appellate court should defer to the district court; an appellate court should review the district court's choice of sanction under an abuse of discretion standard; and the appellate court should use a clearly erroneous standard to review the facts upon which the trial court relied.

#### 1. *"Warranted by Law" Cases*

Under Rule 11, a judge must impose a sanction if an attorney or pro se litigant submits a paper that is not "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law . . . ."[127] Arguably, this requirement poses the greatest potential for conflict with liberal pleading policies and the greatest threat of a chilling effect. Litigation that challenges established legal doctrine often involves issues which are "grounded on unclear, yet fundamental concepts which [challenge] decades of custom entrenched in legal protections."[128] Rule 11 requires trial judges to distinguish between claims that are "so implausible that the lawyer must refrain from filing in order to avoid sanctions"[129] and good faith arguments for change in the law. Because Rule 11 provides little guidance in making this determination, judges have

---

tages of the appellate tribunal lie not in the personal qualities of its members but elsewhere." *Id.* at 757. These advantages are: the lesser time constraints appellate courts enjoy; the existence of counsel who have had more time to prepare their cases; issue refinement by the trial court; appellate court judges' combined greater experience in the subject matter of the case; and the benefits of being a collegial body. *Id.*

127 FED. R. CIV. P. 11 (1987).

128 LaFrance, *supra* note 9, at 336.

129 Note, *supra* note 8, at 638.

"depended on their own individual notions of good legal arguments,"[130] and doctrine-challenging cases have been disproportionately sanctioned.[131]

The courts of appeals employ two standards in reviewing "warranted by law" cases.[132] Some courts apply an abuse of discretion standard, and the remaining courts review legal sufficiency cases de novo.[133]

a. *Abuse of Discretion Review Is Ineffective in Combatting Rule 11's Chilling Effect in "Warranted by Law" Cases*

The abuse of discretion standard is less restrictive than the de novo standard, granting wide deference to district court decisions. Its effectiveness as a means of promoting uniformity in Rule 11 jurisprudence is debatable. Studies indicate that a judge's decision to impose a Rule 11 sanction is highly subjective.[134] Because the legal sufficiency clause requires judges to determine the legal plausibility of claims, this subjectivity may give rise to different standards among judges. Without guidance from above, these differing standards will remain; judicial fiefdoms will arise, each employing its own rules. By reviewing a trial court's highly individualized legal sufficiency decision under an abuse of discretion standard, an appellate court is more likely to obstruct than to promote uniformity. Because such relaxed review leaves lawmaking power with the district judge, it is hardly surprising that these judges have developed different standards.[135] The appellate courts fail to play their role in administering Rule 11 by failing to reconcile these inconsistent standards.

Additionally, courts employing the abuse of discretion standard fail to further the policies of the Federal Rules' liberal pleading regime.[136] If each district court judge applied Rule 11 consistently with these policies, abuse of discretion review would be acceptable. This, however, is not the case. A district court decision can be reasonable, and therefore non-reversible under the abuse of discretion standard, but still apply Rule 11 overbroadly. *Rodgers v. Lincoln Towing Serv., Inc.*,[137] is an example of an overbroad but reasonable appli-

130 Note, *supra* note 8, at 638.

131 Nelken, *supra* note 5, at 1327.

132 See *supra* Part II for a description of the approaches of the courts of appeals.

133 *See supra* Parts II(B) and (C).

134 *See, e.g.*, S. KASSIN, *supra* note 105, at 29-32 (judges with different rationales have different views of hypothetical cases).

135 For a demonstration and discussion of judges' inconsistent application of Rule 11, see *supra* notes 104-08 and accompanying text.

136 For a description of the Federal Rules of Civil Procedure's liberal pleading policies, see *supra* notes 94-98 and accompanying text.

137 596 F. Supp. 13 (N.D. Ill. 1984), *aff'd* 771 F.2d 194 (7th Cir. 1985).

cation of Rule 11. In *Rodgers*, the Northern District of Illinois found the plaintiff's section 1983 claim to be sanctionable because most of his "claims ha[d] no arguable basis in existing law."[138] This holding overlooks Rule 11's allowance of "good faith arguments for the extension, modification, or reversal of existing law."[139] While some of plaintiff's claims were clearly implausible and therefore sanctionable, others were not so clearly implausible.[140] However, the trial judge was not unreasonable in sanctioning plaintiff's attorney; he merely engaged in an overbroad reading of Rule 11.[141] This case demonstrates how chilling decisions may slip through under abuse of discretion review.

Attorneys in those circuits employing abuse of discretion review for "warranted by law" cases must face inconsistent and possibly overbroad judicial application of Rule 11. One judge may find a paper sanctionable which another judge finds permissible. With only limited appellate court review to guide them, district court judges are free to develop their own personal standards in line with their differing views of Rule 11. Although one can argue that uncertainty serves the deterrence purposes of Rule 11,[142] the price—dis-

---

138 *Id.* at 16-17.

139 Rule 11, *supra* note 1.

140 In *Rodgers*, Lincoln Towing Service towed plaintiff's car because it was illegally parked in a private lot. Several days later, Chicago police questioned plaintiff without having read him his rights, regarding a vandalism incident which Lincoln reported. The police held plaintiff until 5 a.m. the next morning and did not let him post bail, although he offered to do so. *Rodgers*, 596 F. Supp. at 16. Plaintiff's complaint alleged violations of the first, fourth, fifth, sixth, seventh, eighth, and fourteenth amendments. *Id.* at 15. Some of these claims are clearly implausible. For example, it is difficult to imagine the first amendment being implicated under these facts. However, other claims are more plausible. The court rejected plaintiff's eighth amendment claim, stating that "[t]he eighth amendment proscribes cruel and unusual punishment, excessive bail, and excessive fines. Nothing in the facts alleged fits within the ambit of the kind of conduct the cases say is prohibited by this amendment." *Id.* at 17. However, this reasoning does not address whether the denial of bail is a good faith argument for the *extension or modification* of existing law. In addition, the court relied on a 5 to 4 Supreme Court decision, Ingraham v. Wright, 430 U.S. 651 (1977), to add that because plaintiff had not been convicted, the cruel and unusual punishment clause would not apply. 596 F. Supp. at 17. Considering that four Supreme Court justices adhere to plaintiff's view, surely it is a good faith argument for a change in the law.

141 In attempting to define the term "abuse of discretion," Judge Friendly describes the most deferential form of that standard as requiring the appellate court to ask if the trial court was unreasonable, the moderate approach as requiring the appellate court to ask if the trial court committed a clear error of judgment, and the least deferential approach as allowing the appellate court to reverse if it thinks the trial court made a mistake. Friendly, *supra* note 86, at 763-64. Thus, if the district judge in *Rodgers* were unreasonable, the court of appeals would have reversed regardless of which form of abuse of discretion review it used. Since it did not reverse, the Seventh Circuit must not have considered the district court decision unreasonable.

142 *See* Note, *supra* note 112, for a discussion of deterrence as the primary purpose of Rule 11. Uncertainty overdeters attorneys who see themselves as being particularly vulnerable to sanction. An uncertain risk of sanction may lead an attorney who can ill af-

couraging attorneys from trying doctrine-challenging cases—is too high to justify this means of accomplishing those goals.

b. *De Novo Review Is the Better Approach in "Warranted by Law" Cases*

Courts applying de novo review[143] to "warranted by law" cases do so because they perceive the question as one of law.[144] As the Second Circuit stated in *Eastway Construction Corp. v. City of New York*, "[w]here the only question on appeal becomes whether, in fact, a pleading was groundless, [appellate courts] are in as good a position to determine the answer [as trial courts]."[145]

Greater appellate court involvement in this inquiry helps promote uniformity to the extent that the "warranted by law" decision is taken out of the trial court's hands. No longer are there many different voices in a circuit, each setting its own standards of legal sufficiency. Instead, the discretion lies with the court of appeals, whose decisions are binding on all of the district courts in the circuit. Thus, appellate courts create greater uniformity regarding issues upon which they have ruled by exercising their law declaration power.[146] Such uniformity is especially important in "warranted by law" cases, as the threat of a chilling effect is great. In a circuit where the appellate court has taken an active role in the development of Rule 11 jurisprudence, the court supplies litigants with bright line standards that provide notice and promote fairness and efficiency.[147] The uncertainty that contributes to the chilling effect is diminished.

The Fifth Circuit, in *Thomas v. Capital Security Services, Inc.*,[148] raised the counter-argument that de novo review does not promote uniformity any more than abuse of discretion review does because "many sanctions cases are fact-intensive, close calls."[149] This argument, however, does not apply to the "warranted by law" inquiry. Appellate courts can create general rules in "warranted by law" cases that would channel trial courts' behavior, thus promoting uni-

---

ford one to perceive a threat and steer clear of borderline, yet legitimate claims and theories.

143 These courts include those which employ the three-tiered analysis, *see infra* Part II(B), and those that adhere to the variation analysis. *See supra* Part II(C).

144 *See, e.g.*, Westmoreland, Inc. v. CBS, 770 F.2d 1168, 1175 (D.C. Cir. 1985).

145 762 F.2d at 254 n.7.

146 See *supra* note 120 and accompanying text for a discussion of the law declaration power of appellate courts.

147 *See* Note, *supra* note 112, at 912-13.

148 836 F.2d 866 (5th Cir. 1988) (en banc). For a discussion of this case, see *supra* notes 64-77 and accompanying text.

149 *Id.* at 873 (quoting ABA SANCTIONS, *supra* note 7, at 28-29.

formity. For example, the *Eastway*[150] court held that Rule 11 is violated "where it is patently clear that a claim has absolutely no chance of success under the existing precedents, and where no reasonable argument can be made to extend, modify, or reverse the law as it stands . . . ."[151] Had the Seventh Circuit ruled similarly in *Rodgers*,[152] it would have given the district courts a workable standard for determining whether claims are "warranted by law."[153] By providing such standards, appellate courts can promote uniformity in legal sufficiency cases.

Because the American judicial system views appellate courts as more qualified than district courts to decide questions of law,[154] one may assume that their legal sufficiency decisions will effectuate more closely the policies of the Federal Rules. Appellate courts can limit overbroad application of Rule 11 in "warranted by law" cases by reading Rule 11 so as not to conflict with the Federal Rules' liberal pleading policies. Thus, de novo review of legal sufficiency cases should further combat Rule 11's potential chilling effects.

2. *"Well-Grounded in Fact" Cases*

Courts must impose a sanction if they find that an attorney or pro se litigant has filed a paper that is not "well grounded in fact."[155] As with other Rule 11 issues, the courts of appeals have developed two different standards of review. Courts that employ the abuse of discretion standard and courts that employ the variation standard review factual sufficiency cases under an abuse of discretion standard.[156] Courts employing the three-tiered analysis review these decisions do novo.[157]

---

150 Eastway Constr. Corp. v. City of New York, 762 F.2d 243 (2d Cir. 1985); *see also supra* notes 121-22 and accompanying text.

151 *Id.* at 254.

152 Rodgers v. Lincoln Towing Serv., 771 F.2d 194 (7th Cir. 1985); *see supra* notes 137-41 and accompanying text for an analysis of *Rodgers*.

153 Such a standard would be binding on the district courts in the circuit. *See supra* notes 123-26 and accompanying text for an analysis of the status of appellate courts in the American judicial system.

154 *See supra* note 126 for a discussion of the reasons this is so.

155 Rule 11, *supra* note 1. It should be noted here that the trial court's findings of fact are to be distinguished from its determination that the "well grounded in fact" clause of Rule 11 has or has not been violated. The former refers to the facts or circumstances which gave rise to the Rule 11 controversy. The latter refers to the factual basis of the litigant's papers.

156 *See supra* Parts II(A) and (C).

157 *See supra* Part II(B).

a. *Abuse of Discretion Review Is Ineffective in Combatting Rule 11's Potential Chilling Effect in "Well Grounded in Fact" Cases*

Those courts that review factual sufficiency cases under an abuse of discretion standard defer to the district court's familiarity with "the flavor of the litigation."[158] Such an approach does little to counter the potential chilling effects of Rule 11. Courts choose the abuse of discretion standard because they believe that "well grounded in fact" decisions require a fact-intensive inquiry that is best left to trial courts.[159] However, the factors that inform factual sufficiency cases[160] are as available to reviewing courts as they are to the trial court. The facts alleged in a pleading are a matter of record. The reviewing court easily can ascertain the circumstances surrounding the attorney's factual inquiry. For example, the appellate court can determine whether an impending statute of limitations deadline existed or whether defendant controlled all of the facts supporting plaintiff's case.[161] This inquiry does not depend upon the trial judge's observation of the development of the lawyer's behavior or the development of the litigation, as is the case with improper purpose sanctions.[162] The factual sufficiency decision depends only on whether the pleading was reasonably well grounded in fact under the circumstances.[163] Thus, appellate courts are qualified to make a de novo review.

b. *De Novo Review Is the Better Approach*

There are, however, good reasons for appellate courts to closely review factual sufficiency cases. As with legal sufficiency cases, courts may interpret Rule 11 in "well grounded in fact" cases in a way that conflicts with the liberal pleading policies of the Federal Rules. Courts also may apply the Rule inconsistently.[164] By do-

158 *See, e.g.*, Westmoreland v. CBS, Inc., 770 F.2d 1168, 1174 (D.C. Cir. 1985).

159 *See, e.g.*, Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 873 (5th Cir. 1988) (en banc).

160 The Advisory Committee Note describes these factors as being the amount of time available for investigation, whether the attorney had to rely on the client for the facts, and whether the attorney depended on forwarding counsel or another member of the bar. Advisory Note, *supra* note 6, at 199.

161 Although the Advisory Committee's concerns about satellite litigation, *id.* at 201, may be a factor here, such a limited factual inquiry does not seem to create a danger of "ancillary proceedings that may themselves assume the definition of litigation with a life of its own." Schwarzer, *supra* note 31.

162 See *infra* Part IV(A)(3) for an analysis of appellate approaches to improper purpose cases.

163 *See* Advisory Note, *supra* note 6, at 199 for a description of what constitutes the factual sufficiency inquiry; *see also supra* note 160.

164 For a description of overbroad and inconsistent applications of Rule 11 in the factual sufficiency context, see *supra* notes 97, 99, and 101 and accompanying text.

ing so, they may chill the enthusiasm of lawyers bringing unorthodox or doctrine-challenging claims.[165]

By reviewing factual sufficiency decisions de novo, appellate courts can prevent these problems. Courts should treat what is essentially a question of law as such. Appellate courts reviewing these cases de novo will promote uniformity by promulgating general rules to guide trial courts, thus ameliorating litigant uncertainty. Additionally, appellate courts are expected to decide questions of law "correctly,"[166] in harmony with the liberal pleading standards of the Federal Rules.[167] By applying de novo review to "well grounded in fact" decisions, courts of appeals merely fulfill their role in the American system of judicial administration as the fora which decide questions of law.[168]

### 3. *Improper Purpose Cases*

Courts must impose a sanction if a paper is "interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."[169] Prevention of these abuses is a laudable goal and this clause is probably the least controversial and the least likely to cause an unacceptable chilling effect.[170]

The courts of appeals have adopted two standards for reviewing Rule 11 decisions based on the improper purpose clause. Courts using the abuse of discretion standard and the variation standard conduct abuse of discretion review.[171] Those using the three-tiered analysis review these cases de novo.[172]

The improper purpose clause "requires that the court attempt to fathom the motives of the siguer."[173] Because this is a subjective determination, it calls for a different inquiry than the other grounds for imposing a sanction. In this case, the inquiry must focus on the signer's behavior, rather than on the paper itself, because a signer's motive is best ascertained by observing his behavior over the course

---

165 For an analysis of Rule 11's potential chilling effect in factual sufficiency cases, see *supra* notes 99 and 101 and accompanying text.

166 For an analysis of this proposition, see *supra* notes 123-26 and accompanying text.

167 See *supra* notes 94-98 and accompanying text for a description of the Federal Rules' liberal pleading standards.

168 Louis, *supra* note 120, at 994 ("[L]aw declaration is the special province of the appellate level.").

169 FED. R. CIV. P. 11 (1983).

170 *See* Note, *supra* note 8, at 642-43 (the improper purpose clause is less troublesome than the others because it focuses on lawyer behavior rather than product).

171 *See supra* Part II(A) and (C).

172 *See supra* Part II(B).

173 Nelken, *supra* note 5, at 1320.

of the litigation.[174]

a. *Appellate Courts Should Defer to the District Court's Decision in "Improper Purpose" Cases*

Because the improper purpose ruling often depends on information obtained apart from the record—from having observed the proceedings—the trial judge is in the best position to make this determination. He has "tasted the flavor of the litigation"[175] and has a "better grasp of what is acceptable trial-level practice among litigating members of the bar than [do] appellate judges."[176] Improper purpose cases, unlike legal sufficiency and factual sufficiency cases, fit the "fact-intensive inquiry" paradigm relied on by the *Thomas* court.[177] Consequently, appellate courts should defer to district court "improper purpose" findings and employ abuse of discretion review.

The term "abuse of discretion," however, "is a verbal coat of . . . many colors,"[178] and is an incomplete description of what the appellate court actually does when it applies this standard. Courts employing an abuse of discretion standard may grant "almost unreviewable discretionary power" to trial courts in some cases,[179] "much narrower discretionary power" in others,[180] and there are numerous variations between the extremes.[181]

Because appellate courts defer broadly to trial courts[182] in finding the facts of a case, Judge Friendly suggests that "[o]ne test for determining the amount of deference that should be accorded to rulings of trial courts . . . is how closely the trial court's superior opportunities to reach a correct result approximate those existing in its determinations of fact."[183] A trial court's superior opportunities to reach a correct result in its determinations of facts arise from its direct contact with the witnesses.[184] Similarly, the trial court's superior opportunities to reach a correct result in the "improper pur-

174 *See* Note, *supra* note 8, at 642.

175 Westmoreland v. CBS, Inc., 770 F.2d 1168, 1174 (D.C. Cir. 1985).

176 Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 873 (5th Cir. 1988) (en banc) (quoting Eastway Constr. Corp. v. City of New York, 637 F. Supp. 558, 566 (E.D.N.Y. 1986), *aff'd in part, rev'd in part*, 762 F.2d 243 (1985)).

177 *Id.*

178 Friendly, *supra* note 86, at 763 (paraphrasing Justice Frankfurter, United States v. L.A. Tucker Truck Lines, 344 U.S. 33, 39 (1952) (Frankfurter, J. dissenting)).

179 Louis, *supra* note 120, at 1039.

180 *Id.*

181 Friendly, *supra* note 86, at 763.

182 For a discussion of the reasons underlying this deference, see *id.* at 759.

183 *Id.* at 760.

184 *Id.* at 759.

pose" context arise from its insight into the signer's motive gained from having observed the litigation.

The potential chilling effect in the improper purpose context is limited,[185] and the trial court is better suited to make the determination. Thus, there is little to be gained by appellate court scrutiny of "improper purpose" cases.

4. *The District Court's Choice of Sanction*

The Advisory Committee Note interprets Rule 11 to give discretion to the trial court "to tailor sanctions to the particular facts of the case" so that it "retains the necessary flexibility to deal appropriately with violations of the rule."[186] While the Advisory Committee states deterrence as the primary purpose of Rule 11,[187] judges have different conceptions. Some believe that compensation is the primary purpose; others believe that punishment is.[188] A study has shown that a judge's view of the Rule's primary purpose may influence her determination of which sanction to impose.[189] Thus, similarly situated litigants may be treated differently, and this disparity violates the basic tenet of justice and fairness.[190]

Nevertheless, the flexibility the Advisory Committee views Rule 11 as affording district court judges in fashioning appropriate sanctions makes Rule 11 a potentially effective case management tool. The trial judge has observed the attorney throughout the litigation and can best gauge which sanction will best serve Rule 11's purpose.

In view of this, the courts of appeals all agree that the standard of review to apply for "sanctions imposed" cases is abuse of discretion.[191] This is the best approach. As in the "improper purpose" inquiry, the trial court's observation of the litigation plays an important role in its decision here. The appellate court would be less able to make an informed judgment as to how best to deter the offending attorney because it must rely on the record alone. Additionally, as explained below, appellate courts can combat the potential chilling

185 *But see* Note, *supra* note 8, at 642-43 (arguing that improper purpose cases give rise to a chilling effect if courts infer an improper purpose from the poor quality of the lawyer's product).

186 Advisory Note, *supra* note 6, at 200.

187 *Id.* at 198-200.

188 *See* S. KASSIN, *supra* note 105, at 29-32. Of judges asked about Rule 11's primary purpose, 59.4% said deterrence, 21% compensation, and 19.6% punishment.

189 *Id.* at 32. Kassin's study indicated that compensation-oriented judges may grant higher awards than punishment-oriented judges, with deterrence-oriented judges in between. However, Kassin warns that the study does not settle the issue because the group tested was too small. *Id.* at 30 n.63.

190 *See supra* note 117 and accompanying text.

191 *See supra* Part II.

effect of an extreme sanction without engaging in broad review and undermining the district court's flexibility. Thus, appellate courts should continue to apply an abuse of discretion standard in reviewing the district court's choice of sanction.

The question of how broadly appellate courts should read the abuse of discretion standard suggests itself. The choice of sanction issue is a "situation where there are strong reasons to defer to the trial court's judgment, [and yet,] substantial benefits from the development of generally applicable rules" are possible."[192] Appellate courts should provide guidance as to the purpose of Rule 11,[193] which in turn would indicate that some sanctions are more appropriate than others.[194] This guidance would give "direction to lower courts and promote uniformity"[195] without intruding too much on the benefits to be derived from allowing the trial court to exercise its discretion. Judge Friendly recommends "a principle of preference: The district judge shall, or shall not, do thus and so, unless he finds that course inappropriate."[196] In a Rule 11 case, the appellate court might say, for example, that "the purpose of Rule 11 is deterrence. Therefore, the district judge shall not use fee shifting as her formula for computing sanctions, unless she deems it appropriate. In making this determination, the district judge shall consider the degree of subjective bad faith present in the siguer."[197] In this way, the district judge has both the freedom to tailor the sanction and guidance as to the factors to consider in making this determination. This type of limited review will preserve district court flexibility and also decrease the chilling effect that can arise from the district court's choice of sanction.

5. *Findings of Fact*

Appellate courts should review the trial court's determination of the facts used to establish whether Rule 11 was violated under a clearly erroneous standard. Rule 52(a)[198] dictates this standard, providing that "[f]indings of fact . . . shall not be set aside unless

192 Friendly, *supra* note 86, at 768.

193 For a discussion of Rule 11's primary purpose of deterrence and of the relationship between that purpose and the sanction chosen, see Note, *supra* note 112.

194 For an analysis of what sanction is appropriate in various circumstances, see *id.* at 917-20.

195 Friendly, *supra* note 86, at 769.

196 *Id.* at 768.

197 For a more comprehensive analysis of this approach, see Advisory Note, *supra* note 6, at 198; *see also* Friendly, *supra* note 86, at 767-71. Subjective bad faith in the signer, while no longer necessary to impose a sanction, is recommended by the Advisory Committee as a factor to be considered in deciding "the nature and severity of the sanctions to be imposed." Advisory Note, *supra* note 6, at 200.

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

clearly erroneous" in cases where the trial judge was the fact finder.[199] There is some debate as to whether a Rule 11 decision must in all cases be supported by findings of fact.[200] While an in-depth analysis of this issue is beyond the purview of this Note, it seems reasonable that, at least in some cases, findings should be required.[201] Although one must consider the Advisory Committee's legitimate concerns regarding satellite litigation[202] and should note that Rule 52(a) does not require findings of fact for most motions,[203] "[a] serious Rule 11 motion is not a gnat to be brushed off with the back of the hand."[204]

## CONCLUSION

The courts of appeals have not taken a leading role in combatting the dangers of district courts' inconsistent and overbroad application of Rule 11. Although Rule 11 is fundamentally a case management tool, there are several issues that not only allow for, but also require appellate court scrutiny. In the American system of judicial administration, appellate courts are equipped with the power to refine and correct trial courts' legal decisions. By deferring to the district courts regarding some or all Rule 11 issues, the appellate courts abdicate this responsibility. On the other hand, because some Rule 11 issues are best left to the trial court's discretion, appellate courts can do more harm than good by being overly intrusive regarding them.

Because Rule 11 decisions require several inquiries that, in turn, call for differing degrees of appellate scrutiny, appellate courts must analyze these cases on an issue by issue basis. The appellate courts should review de novo the district court's legal conclusion that a paper was grounded in fact or grounded in law. In this way, the reviewing courts can contribute to the goal of uniformity and combat the potential chilling effect of inconsistent and overbroad application of Rule 11. The district court's findings of fact should be reviewed under a clearly erroneous standard. The reviewing court should play a more subdued role regarding improper purpose

---

199 *Id.*

200 *See* Thomas v. Capital Sec. Servs., 836 F.2d 882-83 (5th Cir. 1988) (en banc); Schwarzer, *supra* note 31, at 199.

201 In fact, several circuits do require findings under certain circumstances. *See, e.g.*, Brown v. Federation of State Medical Boards of United States, 830 F.2d 1429, 1438 (7th Cir. 1987) (district court judges shall "state with some specificity the reasons for the sanctions."); *Thomas*, 836 F.2d at 882 n.23 (findings mandated when prepayment of sanctions award has effect of significantly precluding access to courts.).

202 *See* Advisory Note, *supra* note 6, at 201.

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

204 Szabo Food Service, Inc. v. Canteen Corp., 823 F.2d 1073, 1084 (7th Cir. 1987).

findings, given the importance of trial court observation of litigation behavior to making this finding. Finally, the courts of appeals should allow the trial court to retain its flexibility in choosing the appropriate sanction, but at the same time, should provide guidance.

*Christopher A. Considine*