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# THE SEVEN YEAR ITCH: IS IT TIME TO REAMEND RULE 11?

## I. INTRODUCTION

Seven years ago, the Advisory Committee on Civil Rules amended Federal Rule of Civil Procedure 11<sup>1</sup> to combat the widespread overuse,

1. The text below shows the additions and deletions effected by the 1983 amendment to Federal Rule of Civil Procedure 11 (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 individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, *motion, or other paper*, and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The 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 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.] *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.*

misuse and abuse of the litigation process.<sup>2</sup> Adding bite to the rarely used Rule, the Committee attempted to reduce frivolous lawsuit filings by inducing courts to impose sanctions when violations occur.<sup>3</sup> Although it was not expected to cure all the problems inherent in the judicial system, the amendment redressed many concerns.<sup>4</sup> Its impact on the litigation process is clearly manifested by the significant increase in the number of reported decisions applying the amended Rule.<sup>5</sup>

The Supreme Court recently spoke for the first time on revised Rule 11.<sup>6</sup> Experts predict more cases will reach the Court in the near fu-

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FED. R. CIV. P. 11, reprinted in 2A J. MOORE & J. LUCAS, *MOORE'S FEDERAL PRACTICE* ¶ 11.01[3] (2d ed. 1984).

2. See Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181 (1985) [hereinafter Schwarzer, *Sanctions*]. Judge Schwarzer examines the policy considerations underlying Rule 11, as well as its substantive provisions, the procedural implications of imposing sanctions, and the available sanctioning alternatives such as disbarment, temporary disbarment, or referral to the state bar. See also Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013 (1988) [hereinafter Schwarzer, *Revisited*]. Judge Schwarzer reexamines Rule 11 five years after its amendment, focusing on the major problems with the operation of the Rule and proposals for more effective and less costly approaches to enforcing the Rule.

3. 5 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE: CIVIL* § 1334 (1969) (The original rule imposed a virtually unenforceable obligation on the attorney to certify that the action or defense was supported by good grounds). See also Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313, 1352 (1986). Professor Nelken warns that the Rule does not give judges complete freedom and discretion to reform the entire adversary system. The Rule should provide a more specific standard for judges to use when imposing sanctions in order to insure vigorous, non-frivolous advocacy. *Id.* at 1353.

4. C. SHAFFER & P. SANDLER, *SANCTIONS: RULE 11 AND OTHER POWERS* 1-2 (2d ed. 1988). While the Rule was not expected to resolve all the problems with our litigation system, the authors unfortunately note that there is no evidence that it has helped to reduce the number of frivolous lawsuit filings at all. *Id.* at 2.

5. *Judicial Conference Solicits Comments on Rule 11 Revisions*, ABA/BNA Law Man. on Prof. Conduct (ABA/BNA) 278 (Aug. 19, 1990) (the Committee noted over 1000 reported decisions applying the amended Rule 11 in contrast to the 11 decisions applying the preamendment Rule).

6. See *Cooter & Gell v. Hartmarx Corp.*, 110 S. Ct. 2447 (1990) (the Court resolved three issues that created conflicts among the federal appellate circuits and settled the debate over the Rule's central purpose); *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120 — (1989) (the Court held that just the attorney who signs the pleading, motion or paper—and not her law firm—is individually responsible for the contents and liable for Rule 11 sanctions); *Business Guides, Inc. v. Chromatic Communications Enters., Inc.*, 111 S. Ct. 922 (1991) (the Court extended the imposition of the objective standard of reasonable inquiry to represented parties who, either voluntarily or by mandate, sign pleadings or papers); see also *infra* notes 72-122 and accompanying text for in-depth discussions of *Pavelic & LeFlore*, *Cooter & Gell*, and *Business Guides*.

ture.<sup>7</sup> Although the Court's decisions resolved certain conflicts as to the Rule's purpose and relationship to other procedural rules, many questions remain.<sup>8</sup> Several commentators believe that it is time to either reamend the Rule or discard it altogether.<sup>9</sup>

This Recent Development discusses the past, present and uncertain future of Federal Rule of Civil Procedure 11. Part II explains the history of Rule 11 before and after the 1983 amendment. Part III analyzes the Rule 11 issues that create the most circuit court conflicts. Part IV discusses the Rule's present status in light of two recent Supreme Court decisions and current lower court trends. Finally, Part V considers the impact of these decisions and trends on the future of the Rule.

## II. HISTORY OF RULE 11

### A. *Original Rule 11*

Historically, an attorney's signature on a pleading was proof that the party sought legal assistance before filing suit.<sup>10</sup> Legal minds subsequently interpreted a lawyer's signature to represent a personal guarantee that the pleading was well-founded.<sup>11</sup> This interpretation became the touchstone for Rule 11.<sup>12</sup>

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7. Coyle, *Rule 11 Imbroglia Rages On*, Nat'l L.J., June 25, 1990, at 1, col. 1. The author notes that scholars and experts foresee that the Court can expect to face many more cases in the future as the debate over the controversial Rule continues.

8. Coyle, *supra* note 7, at 1, col. 1 (referring to statements made by Gregory P. Joseph, a Rule 11 expert). Although the *Pavelic & LeFlore* decision focused on a narrow issue, the *Cooter & Gell* decision resolved three issues of widespread concern which could result in significant, long-term ramifications. *Id.* at 27.

9. See, e.g., Joseph, *Redrafting Rule 11*, Nat'l L.J., Oct. 1, 1990, Podium Section, at 13, col. 1. The author acknowledges that if the Rule is not abolished, it should at least be amended, for example to restore a judge's discretion to impose sanctions. *Id.*

10. Nelken, *supra* note 3, at 1315 (originally, the signature guaranteed nothing about the grounds on which the complaint was based). For a thorough discussion of the history of the signature requirement, see Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1 (1976).

11. Risinger, *supra* note 10, at 9-13. In his 1838 treatise on equity pleadings, Supreme Court Justice Story articulated that an attorney's signature was an avouchment of good ground. His view, included in the original draft of Rule 11, inextricably linked the signature requirement to the well-founded pleading requirement.

12. Nelken, *supra* note 3, at 1315. Justice Story's vision was incorporated into Rule 24 of the Equity Rules of 1842 and 1912. The Advisory Committee, in turn, based the language of Rule 11 on the Equity Rules. *Id.*

Adopted in 1938, the original version of Rule 11 required that every pleading signed by an attorney or party have a sound factual and legal basis.<sup>13</sup> The Rule authorized a court to strike the pleading if the attorney signed it intending to defeat the purpose of the Rule and to impose appropriate disciplinary action against the lawyer who willfully violated the Rule.<sup>14</sup>

In practice, however, the Rule ineffectively remedied the abuses for which it was adopted.<sup>15</sup> While it concentrated on the attorney's conduct, its enforcement provisions often harshly affected the client.<sup>16</sup> Finding it difficult to determine when the attorney acted in subjective bad faith, courts rarely struck pleadings or invoked appropriate disciplinary actions in the years prior to the Rule's amendment.<sup>17</sup>

Uncertain as to what conduct triggered the Rule, courts imposed Rule 11 sanctions only eleven times during its first forty-five years of existence.<sup>18</sup> Absent blatant violations, judges reluctantly disciplined attorneys.<sup>19</sup> Due to the Rule's relative invisibility, it became a prime

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13. See *supra* note 1 for text of Rule 11 including the preamendment language; see also Nelken, *supra* note 3, at 1314-15. By signing a pleading, a lawyer allegedly certified that there was "good ground to support [the pleading]" and that it was not interposed for delay." *Id.* (quoting FED. R. CIV. P. 11). For a thorough discussion of the origins of Rule 11, the judicial power to award attorney's fees, the original Rule 11 in practice and the author's perceived deficiencies in the original version, see generally Comment, *The Horizon of Rule 11: Toward a Guided Approach to Sanctions*, 26 HOUS. L. REV. 535-43 (1989).

14. See *supra* note 1 for text of the original Rule.

15. FED. R. CIV. P. 11 Notes of Advisory Committee on Rules [hereinafter Committee Notes]. See also 5 C. WRIGHT & A. MILLER, *supra* note 3, for a detailed discussion of the effectiveness of the original Rule 11.

16. Nelken, *supra* note 3, at 1315. If the court determined that the lawyer willfully violated the Rule by signing a sham pleading, it would strike the pleading. Unfortunately, as a result, clients were penalized for making a poor choice in hiring an attorney. *Id.* See also Comment, *supra* note 13, at 541 (noting that the Rule's non-use stemmed in part from the fact that the only explicitly authorized penalty was to strike the pleadings).

17. See Nelken, *supra* note 3, at 1315; Comment, *supra* note 13, at 541.

18. Risinger, *supra* note 10, at 34-37. The author explains that since its adoption in 1938, parties have brought only 19 genuine Rule 11 motions. None appeared until after 1950 and over half after 1971. Of these, courts found violations in only 11 of the cases, but subsequently disposed of four on other grounds, imposed no disciplinary action in two, invoked alternative sanctions in three and reversed one on appeal. Only one case finally succeeded. *Id.*

19. See Survey Project, *Attorney Sanctions: Rule 11*, 3 GEO. J. LEGAL ETHICS 71, 74 (1989) (because the Rule offered little guidance in formulating appropriate sanctions, courts imposed such measures only where extreme, subjectively bad faith cases arose).

candidate for amendment.<sup>20</sup>

### B. *The 1983 Amendment*

The 1983 amendment to Rule 11 changed the language of the Rule's certification requirement and significantly altered its enforcement provisions.<sup>21</sup> The drafter's decision to force the legal profession to finally notice the Rule created an impact almost as great as the amendment itself.<sup>22</sup> The new Rule's primary purpose was to streamline the litigation process by deterring dilatory or abusive tactics and decreasing frivolous filings.<sup>23</sup>

The Committee replaced the original good-ground certification requirement with the more stringent reasonable inquiry standard.<sup>24</sup> The attorney's duty to investigate the facts and law prior to filing became

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20. Nelken, *supra* note 3, at 1316 (to deter attorneys from using tactics which disregarded the "social costs of litigation," the Advisory Committee amended the Rule to give meaning to its sanctions and to set stricter standards).

21. *Id.* at 1318-25 (discussing in-depth the changes made in the Rule's certification and enforcement provisions). See also *supra* note 1 for the text of the amended version of Rule 11. See generally G. JOSEPH, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE (1989 & Supp. 1990) (citing the most recent case law, the author provides a general overview of the laws governing the litigation process); Barton, *Rule 11 Sanctions*, 63 CONN. B.J. 63 (1989) (discussing the different approaches to sanctions under amended Rule 11); Remsburg & Gaer, *General Overview of Federal Rule of Civil Procedure 11*, DRAKE L. REV. 261 (1989) (an exhaustive and detailed analysis of the requirements of the language of Rule 11); Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189 (1988) (presenting an in-depth and technical interpretation of the practices and problems under Rule 11).

22. Nelken, *supra* note 3, at 1318 (citing Miller & Culp, *Litigation Costs, Delay Prompted the New Rules of Civil Procedure*, Nat'l L.J., Nov. 28, 1983, at 24, col. 1 ("[T]he revision of Rules 7 and 11 is as much a psychological exercise to get the attention of the bench and the bar as it is to make a significant change in their content.")).

23. See Committee Notes, *supra* note 15 (the Committee called upon district courts to pay greater attention to pleading and motion abuses and to impose sanctions when appropriate).

24. Nelken, *supra* note 3, at 1319 ("[A] lawyer's failure to make the required inquiry will result in sanctions, regardless of her subjective good faith."). See also *Sanctions, supra* note 2, at 186-97. Judge Schwarzer proposes that the new certification requirement consist of three overlapping prongs: (1) its factual basis; (2) its legal basis; and (3) its legitimate purpose. As to the factual obligation, the attorney must certify that he has read the paper and believes, after reasonable inquiry, that it is well grounded in fact. *Id.* at 186. The second factor involves the lawyer's duty to act as a zealous advocate, but does not reduce her concurrent duty to only advance a claim or defense based on existing law or a good faith argument for its extension, modification or reversal. *Id.* at 189. Finally, to satisfy the third prong, a lawyer must not interpose papers only to harass or cause unnecessary delay or other improper purposes. *Id.* at 195.

explicitly affirmative.<sup>25</sup> The Committee expected this change to dramatically increase the number of reported Rule 11 violations.<sup>26</sup> The new Rule removed the willful violation restriction and proposed instead to prohibit filing for any improper purpose.<sup>27</sup> Courts now impose sanctions for a wide variety of conduct, including bad faith procedural moves.<sup>28</sup>

The Rule's second major change involved its enforcement provisions.<sup>29</sup> Sanctions under the amended Rule 11 are mandatory.<sup>30</sup> As judges reluctantly imposed sanctions due to sympathy, pressure or uncertainty, the new Rule removed a judge's discretion to deny sanctions.<sup>31</sup> Courts gained flexibility, however, in choosing the appropriate

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25. See Committee Notes, *supra* note 15, which read in pertinent part:

The words "good ground to support" the pleading in the original Rule were interpreted to have both factual and legal elements. They have been replaced by a standard of conduct that is more focused.

The new language stresses the need for some prefiling inquiry into both the facts and the law to satisfy the affirmative duty imposed by the Rule. The standard is one of reasonableness under the circumstances.

*Id.* (citations omitted).

26. *Id.* See also Nelken, *supra* note 3, at 1322 (expectations also included discouraging the courts from overlooking or minimizing sanctions).

27. But see Committee Notes, *supra* note 15. "However, in considering the nature and severity of the sanctions to be imposed, the court should take account of the state of the attorney's or party's actual or presumed knowledge when the pleading or other paper was signed." *Id.*

28. See *Coburn Optical Indus., Inc. v. Cilco, Inc.*, 610 F. Supp. 656 (M.D.N.C. 1985) (sanctions warranted for making a motion to dismiss for improper venue when venue was proper and the factual basis for venue was readily ascertainable); *Cannon v. Loyola Univ.*, 609 F. Supp. 1010 (N.D. Ill. 1985) (sanctions imposed for bringing an action clearly barred by *res judicata*), *aff'd*, 784 F.2d 777 (7th Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987); *Hochalter v. Century 21 Hallmark*, No. 84C7924 (N.D. Ill. Feb. 13, 1985) (sanctions imposed for failing to meet the amount in controversy requirement for diversity jurisdiction); *Thompson v. Midland Prods.*, No. 83C7469 (N.D. Ill. Jan. 20, 1984) (sanctions imposed for naming the wrong defendant as a result of inadequate prefiling investigation).

29. See Committee Notes, *supra* note 15 ("[T]he text of the amended Rule seeks to dispel apprehensions that efforts to obtain enforcement will be fruitless by insuring that the Rule will be applied when properly invoked."); see also Nelken, *supra* note 3, at 1321-23 (noting that the court should not be limited to just striking pleadings).

30. See *Sanctions*, *supra* note 2, at 200. Judge Schwarzer predicts that courts will not feel bound to impose sanctions under the amended Rule, however, as the discretion to tailor sanctions according to the gravity of the facts at issue is still a critical factor. *Id.*

31. Nelken, *supra* note 3, at 1321-22 (noting that the drafter's purpose in making sanctions mandatory was to "discourage any collegial inclination to overlook or minimize violations . . . [and] to maximize the deterrent effect of sanctions").

sanctions to apply.<sup>32</sup> The language of the Rule provides that courts shall award reasonable costs and attorney's fees incurred because of the violation.<sup>33</sup> At their discretion, courts may fashion other sanctions depending upon the particular circumstances and choose who bears the responsibility for the sanctions according to the relative degree of liability.<sup>34</sup>

Although commentators disagree as to the new Rule's function—whether the purpose of sanctions is compensatory, or punitive—its message is clear.<sup>35</sup> Objectivity is the guidepost.<sup>36</sup> If the litigant and counsel go forward with a pleading or legal argument that is objectively frivolous, Rule 11 can take its toll.<sup>37</sup> At the very least, lawyers must stop and think, or pay the consequences.<sup>38</sup> The Rule is not without faults, however. Over the years, the clear concepts underlying amended Rule 11 blurred as a result of inconsistent court use and

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32. *Id.* at 1322. See also FED. R. CIV. P. 11 and Committee Notes, *supra* note 15 (“The 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.”).

33. FED. R. CIV. P. 11.

34. See Committee Notes, *supra* note 15 (courts can impose sanctions on the attorney, the party represented by the signing attorney, or both, or even a party unrepresented by counsel but who signs the pleading); see also Untereiner, *A Uniform Approach to Rule 11 Sanctions*, 97 YALE L.J. 901, 916-20 (1988) (proposing an analytical framework for understanding who should be sanctioned and what sanctions are proper).

35. See Nelken, *supra* note 3, at 1323-25. Professor Nelken reports that Professor Miller, Reporter to the Civil Rules Advisory Committee, asserts that sanctions should be looked at economically, as a type of cost-shifting technique. *Id.* at 1323 (citing A. MILLER, *THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY* 18-19 (1984)). In the alternative, Judge Schwarzer advises that sanctions be deemed punishment, requiring judges to take corrective measures in order to deter and reprimand current or future offenders. *Id.* at 1324 (citing Schwarzer, *Managing Civil Litigation: The Trial Judge’s Role*, 61 JUDICATURE 400 (1978)).

36. See Survey Project, *supra* note 19, at 75 (given that the language of the amendment mandates particular affirmative obligations, objectivity is appropriate in considering Rule 11 violations).

37. See, e.g., *Zola v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 84 Civ. 8522 (S.D.N.Y. May 28, 1985) (court again warned the plaintiff of its willingness to use Rule 11 after ruling that his complaint was insufficient); *Laterza v. American Broadcasting Co.*, 581 F. Supp. 408 (S.D.N.Y. 1984) (court warned that it would entertain a motion for Rule 11 sanctions if plaintiff did not adequately amend his utterly insufficient complaint); *Lancaster v. Thompson*, No. 82C5548 (N.D. Ill. Dec. 15, 1983) (court called the attorney’s attention to Rule 11 when it dismissed the complaint for failing to allege supporting facts).

38. See A. MILLER, *supra* note 35, at 15.



application.<sup>39</sup>

### III. ISSUES IN CONFLICT UNDER AMENDED RULE 11

Despite an occasional definitive circuit court ruling, application of Rule 11 continues to spark controversy.<sup>40</sup> Although the new objective standard is clearly advantageous over the former subjective approach, it creates confusion when applied inconsistently.<sup>41</sup> Critics blame these inconsistencies on the unavoidable fact that judges apply Rule 11 differently.<sup>42</sup> As courts subject the elements of Rule 11 violations to various interpretations, they inevitably undermine its effectiveness.<sup>43</sup>

One common issue confronting lower courts is the meaning of a reasonable factual and legal inquiry.<sup>44</sup> Courts generally take an ad hoc approach when determining whether a reasonable factual inquiry has occurred.<sup>45</sup> The standard asserted by the Advisory Committee is rea-

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39. For a circuit by circuit analysis of Rule 11's application, see generally C. SHAFFER & P. SANDLER, *supra* note 4.

40. *Id.* at 8 (noting that only two years after its amendment, commentators stated that studies already had shown that courts needed more clearly articulated and internally consistent guidelines for ruling on Rule 11 violations).

41. *Id.* See also S. BURBANK, *RULE 11 IN TRANSITION, THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11*, at 3 (1989) (whatever benefits are derived from amended Rule 11 are offset by the increased costs of the sanctioning procedures, otherwise known as satellite litigation).

42. C. SHAFFER & P. SANDLER, *supra* note 4, at 8-9. The result is referred to as "interjudge disagreement." This phenomenon occurs because trial judges, given great latitude in determining whether a violation has occurred, often have varying ideas about exactly what degree of frivolousness justifies awarding sanctions. *Id.* at 9.

43. *Id.* at 8-9. The inconsistent application of the purportedly "objective" standard is almost as detrimental as the old subjective approach. *Id.* Attorneys simply learn how the courts will rule in this particular jurisdiction and connivingly fashion their pleadings accordingly. *Id.* Thus, the Rule's purpose of deterring frivolous lawsuits is circumvented.

44. *Id.* at 3 (clearly "a minimal factual inquiry and a cursory legal investigation" can cause a court to impose sanctions (citing *Cleveland Demolition Co. v. Azcon Scrap Corp.*, 827 F.2d 984 (4th Cir. 1987))). See generally Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 HARV. L. REV. 630 (1987).

45. Vairo, *supra* note 21, at 218. Relying solely on the word of co-counsel or a client, sloppy investigatory work or outright deception are all grounds for the imposition of sanctions. *Id.* Compare *Cabell v. Petty*, 810 F.2d 463, 467 (4th Cir. 1987) (Butzner, J., dissenting) (arguing that the level of factual inquiry considered reasonable under the circumstances should be determined by carefully weighing all of the mitigating factors at the time of the filing) and *Oliveri v. Thompson*, 803 F.2d 1265, 1279 (2d Cir. 1986) (noting that it would be improper to require plaintiffs and counsel to plead facts before commencing suit that could only be obtained through the discovery process), *cert. denied*, 480 U.S. 918 (1987) with *Skycom Corp. v. Telstar Corp.*, 813 F.2d

sonableness under the circumstances.<sup>46</sup> Factors to be considered include: (1) How much time the signer had to investigate the facts underlying the complaint; (2) whether he had to rely exclusively on his client for the factual information surrounding the cause of action; and (3) whether the attorney was experienced in the particular type of matter.<sup>47</sup>

The standard for reasonable legal inquiry evokes divergent concerns.<sup>48</sup> The Rule's chief criticism is its chilling effect on creative advocacy.<sup>49</sup> Courts reluctantly impose Rule 11 sanctions where parties

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810 (7th Cir. 1987) (the court remanded the case to the district court for a determination of appropriate sanctions when it found that the attorneys had either not inquired or intentionally misrepresented facts of which they had knowledge); *Unioil, Inc. v. E.F. Hutton & Co.*, 809 F.2d 548, 558 (9th Cir. 1986) (in one of the largest sanction award cases in the Ninth Circuit, the court rejected counsel's reliance argument and stated that when a lawyer signs a pleading he then "cannot simply delegate to forwarding co-counsel his duty of reasonable inquiry"), *cert. denied*, 484 U.S. 822 (1987); *Brown v. National Bd. of Medical Examiners*, 800 F.2d 168, 173 (7th Cir. 1986) (plaintiff's attorney sanctioned for filing a factually baseless motion which alleged that defendants had behaved in an inappropriate manner); *and World v. Minerals Eng'g Co.*, 575 F. Supp. 166, 167 (D. Colo. 1983) (defendant's lawyers sanctioned for failing to reasonably investigate the truth of their pleadings upon learning information which disaffirmed the facts as they knew them).

46. See Committee Notes, *supra* note 15 ("[T]he Rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories. . . but [t]he court is expected to 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.").

47. *Id.* The Rule, however, does not require a party or an attorney to reveal privileged communications or work product to prove that his signature is sufficiently justified. See also *Unioil, Inc. v. E.F. Hutton & Co.*, 809 F.2d (9th Cir. 1986) (attorney receiving a case from forwarding counsel must at least speak to the client; furthermore, an attorney experienced in certain areas of complex litigation should be subjected to a higher standard than a general practitioner), *cert. denied*, 484 U.S. 822 (1987); *Southern Leasing Partners, Ltd. v. McMullan*, 801 F.2d 783 (5th Cir. 1986) (attorney sanctioned for purposely eschewing other modes of investigation and, instead, relying solely on client interviews); *O'Rourke v. City of Norman*, 640 F. Supp. 1451 (W.D. Okla. 1986) (attorney sanctioned for making no inquiries other than discussing the case with the client during the year and a half between the time the action occurred and the date he filed the complaint).

48. See *Remsburg & Gear*, *supra* note 21, at 276-77. The pertinent factors include: (1) Whether a credible legal theory supported the pleading, motion or other paper; (2) the extent to which the lawyer's actions hinged in any way on another member of the legal community; (3) the complexity of the legal matters at issue; and (4) the amount of time available to the signer to research the relevant legal issues.

49. Nelken, *Has the Chancellor Shot Himself in the Foot? Looking for a Middle Ground on Rule 11 Sanctions*, 41 HASTINGS L.J. 383, 393-94, 404-05 (1990) (specifically the chilling effect is most evident in civil rights cases where the Rule unduly burdens the

attempt to stretch at least arguably relevant legal theories.<sup>50</sup> Judges take special care when confronted with cases of first impression or those involving undetermined or confusing areas of law.<sup>51</sup> Courts hesitate less when the lack of legal basis is fairly obvious and the absence of good faith readily apparent.<sup>52</sup>

Another related issue is whether Rule 11 imposes a continuing obligation on the attorney to evaluate the reasonableness of pleadings previously filed.<sup>53</sup> Commentators in favor of a continuing obligation

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congressional policies in favor of such suits). *See, e.g., In re Kunstler*, No. 89-2815 (4th Cir. Sept. 18, 1990) (the court voided the \$123,000 sanction award but agreed that some sanctions were due because the attorney had filed the harassment suit on behalf of an Indian-rights group for the sake of publically humiliating and embarrassing certain government officials); *Blue v. United States Dep't of the Army*, No. 88-1364 (4th Cir. Sept. 18, 1990) (a court affirmed sanctions levied on the director of NAACP Legal Defense Fund for filing a suit based on unsubstantiated allegations of widespread discrimination); *Thornton v. Wahl*, 787 F.2d 1151 (7th Cir.) (court affirmed imposition of sanctions on attorney for making untrue statements of law and on his client for pursuing spurious litigation), *cert. denied*, 479 U.S. 851 (1986).

50. *Vairo*, *supra* note 21, at 214-15. *See Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073 (7th Cir. 1987) (the court addressed the problem of distinguishing between sanctionable, meritless claims and those that are not); *see also Indianapolis Colts v. Mayor of Baltimore*, 775 F.2d 177, 181-82 (7th Cir. 1985) (refusal to impose sanctions affirmed where the complaint was, from an objective point of view, based on reasonable legal arguments).

51. *See, e.g., Van Dorn Co. v. Howington*, 623 F. Supp. 1548 (N.D. Ohio 1985) (court refused to impose sanctions against a plaintiff in a RICO case due to unsettled law and an unusual factual setting).

52. *Vairo*, *supra* note 21, at 215. Some cases are not so obvious, however. In *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531 (9th Cir. 1986), *rev'g* 103 F.R.D. 124 (N.D. Cal. 1984), for example, the Ninth Circuit reversed sanctions imposed on defense counsel whose summary judgment arguments were legally and factually supportable, but who presented arguments for the extension of law as if they were existing law. *Id.* at 1539. *See also Continental Air Lines, Inc. v. Group Sys. Int'l Far East*, 109 F.R.D. 594 (C.D. Cal. 1986) (attorney ordered to pay sanctions where he failed to research Supreme Court cases on particular issue); *National Survival Game, Inc. v. Skirmish, U.S.A., Inc.*, 603 F. Supp. 339 (S.D.N.Y. 1985) (defendants sanctioned for utterly disregarding precedents which, although well known, were unfavorable).

53. *See C. SHAFFER & P. SANDLER*, *supra* note 4, at 9-10. The authors discuss several Rule 11 cases concerning this issue. *See Robinson v. National Cash Register Co.*, 808 F.2d 1119, 1127 (5th Cir. 1987) (The court initially stated that "[u]pon discovering that a good faith basis no longer exists [for a pleading], it is incumbent upon the appropriate counsel and party to take necessary actions to ensure that the proceedings do not continue without a reasonable basis in law and fact."); *Pantry Queen Foods, Inc. v. Lifschultz Fast Freight, Inc.*, 809 F.2d 451, 454 (7th Cir. 1987) (although ongoing revisions are not required, the Rule does implicitly obligate a party to update its pleadings because the Rule applies to all papers filed in the litigation); *Oliveri v. Thompson*, 803 F.2d 1265, 1275 (2d Cir. 1986) (holding that the signer's conduct must be judged as

argue that such a view is consistent with the stream-lining purpose of Rule 11.<sup>54</sup> They insist that a claim which becomes frivolous after it is filed is just as burdensome as one that was frivolous when filed.<sup>55</sup> The opposition suggests that no support for the extension of the reasonable inquiry requirement exists.<sup>56</sup> They base their conclusion on the Rule's express call for some prefiling inquiry and its silence as to a continuing obligation.<sup>57</sup>

Another disputed issue is whether the Rule's "improper purpose" clause is independent from the "well-grounded in fact and warranted by existing law" clause.<sup>58</sup> Although the Rule primarily calls for objective analysis, the improper purpose clause necessarily requires subjective inspections.<sup>59</sup> The circuits are split as to whether the improper purpose component can be violated—a subjective determination—even after concluding that the pleading is objectively reasonable.<sup>60</sup>

Another issue debated among the circuits involves the nature and function of sanctions.<sup>61</sup> The Rule's language refers to an "appropriate" sanction.<sup>62</sup> Courts find it difficult to determine whether to view

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of the time the signature was affixed and, therefore no Rule 11 violation exists where an attorney failed to withdraw a complaint that later proved to be groundless), *cert. denied*, 480 U.S. 918 (1987). The Fifth Circuit later reconsidered and rejected this theory in *Thoms v. Capital Sec. Serv., Inc.*, 836 F.2d 866 (5th Cir. 1988), where it noted that "[l]ike a snapshot, Rule 11 review focuses upon the instant when the picture is taken—when the signature is placed on the document." *Id.* at 874.

54. See Comment, *supra* note 13, at 550-51 (a continuing obligation forces parties to clarify issues based on discovery information, thus eliminating frivolous litigation at an early stage).

55. *Id.* (citing Note, *The Dynamics of Rule 11: Preventing Frivolous Litigation by Demanding Professional Responsibility*, 61 N.Y.U. L. REV. 300, 325-26 (1986)).

56. *Id.* (both the Rule's language and the Advisory Committee's Notes support this contention).

57. See *supra* note 1 for text of FED. R. CIV. P. 11.

58. C. SHAFFER & P. SANDLER, *supra* note 4, at 10-11 ("[T]he language of the Rule . . . turns on whether the pleading, motion or other paper was interposed to harass the opposing party or to cause unnecessary delay or needless expense . . . [n]o matter how objective the [n]ew Rule is, determination of 'improper purpose' . . . necessarily involves subjective intent.").

59. *Id.*

60. *Id.* The authors note that while the Fifth Circuit holds that the clauses are to be evaluated independently, the Ninth Circuit recognizes that, even though the clauses are independent, where a complaint is found to be well grounded in fact and law it cannot be sanctioned as harassing, regardless of the attorney's subjective intent. *Id.*

61. See Comment, *supra* note 13, at 552-54. See generally C. SHAFFER & P. SANDLER, *supra* note 4 for an overview of how each circuit handles this issue.

62. See *supra* note 1 for text of Rule 11.

sanctions as compensation or punishment.<sup>63</sup> Unfortunately, neither approach alone satisfies the ultimate goals of Rule 11.<sup>64</sup>

The punitive approach easily invites abuse unless courts carefully tailor sanctions to individual violations.<sup>65</sup> Alternatively, the compensatory approach either results in an insufficient deterrent effect or fails to alleviate the harm caused by the violation.<sup>66</sup> The mandatory nature of sanctions, although under criticism as well, at least ensures that courts will continue to impose sanctions even if they disagree as to their proper function.<sup>67</sup>

On a procedural level, disputed issues include whether the prevailing attorney in a Rule 11 decision has a duty to mitigate the amount of fees that the sanctioned party or attorney will have to pay.<sup>68</sup> Courts also disagree as to whether they may impose Rule 11 sanctions for a frivolous argument in a non-frivolous motion.<sup>69</sup> Finally, debates continue as to whether it is proper for a lower court to impose sanctions for a complaint filed in state court and removed to federal court.<sup>70</sup> In light of these circuit court conflicts, it was not surprising when the Supreme Court, last term, granted review of its first Rule 11 cases.

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63. See, e.g., *Eastway Constr. Corp. v. City of New York*, 821 F.2d 121 (2d Cir.) (court basically imposed a "slap on the wrist" sanction where it ordered the sanctioned attorney to pay \$10,000 in fees, even though the lodestar figure was over \$50,000), *cert. denied*, 484 U.S. 918 (1987); see also *supra* note 35 and accompanying text for a discussion of two commentators' views on the function of sanctions.

64. See Comment, *supra* note 13, at 554.

65. *Id.* By failing to tailor the sanction, courts run the risk of exceeding the Rule's deterrent effect. *Id.*

66. *Id.* The compensatory approach will only have a deterrent effect if the costs incurred due to the tactic used outweigh the benefit bestowed upon the party who used it. Nelken, *supra* note 3, at 1325.

67. Comment, *supra* note 13, at 551. Those opposed to mandatory sanctions argue that courts often ignore the Advisory Committee's recommendations to carefully consider each Rule 11 violation. *Id.*

68. C. SHAFFER & P. SANDLER, *supra* note 4, at 12 (recognizing a duty to use the most inexpensive approach in notifying the court of a Rule 11 violation (citing *United Food & Commercial Workers Union Local No. 115 v. Armour & Co.*, 106 F.R.D. 345 (N.D. Cal. 1985))).

69. *Id.* at 13 (the Ninth Circuit decisions on this issue best illustrate the dispute). See, e.g., *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531 (9th Cir. 1986) (Rule 11 does not authorize sanctions where one unjustified legal argument exists in an otherwise non-frivolous motion).

70. C. SHAFFER & P. SANDLER, *supra* note 4, at 11. As Rule 11 cannot apply to state court pleadings, several circuits hold that it cannot apply to removed state court pleadings. *Id.*

#### IV. THE RULE'S CURRENT STATUS

##### A. *The Supreme Court Decisions*

As stated above, circuit courts continually debate many aspects of Rule 11. Speaking for the first time on amended Rule 11 last term, the Supreme Court resolved several particularly controversial issues.<sup>71</sup> In the first case, *Pavelic & LeFlore v. Marvel Entertainment Group*,<sup>72</sup> the Court determined whether a lawyer or his law firm should be sanctioned for a Rule 11 violation.<sup>73</sup>

The sanction in *Pavelic & LeFlore* arose from an amended complaint in a copyright infringement action.<sup>74</sup> The plaintiff claimed that his name had been forged on several key documents relied on by the defendants to counter his claim of infringement.<sup>75</sup> When he was unable to substantiate that claim at trial, the district court awarded \$100,000 in sanctions under Rule 11.<sup>76</sup>

While the amended complaint was signed only by the plaintiff's attorney, subsequent papers relevant to the forgery allegations were signed by the attorney and indicated his affiliation with a subsequently formed partnership.<sup>77</sup> The district court ordered that the firm pay half of the sanctions.<sup>78</sup> Writing for an eight-member majority, Justice

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71. See *infra* notes 72-122 and accompanying text for detailed discussion of cases.

72. 493 U.S. 120 (1989).

73. *Id.* at —, 110 S. Ct. at 460. For a detailed discussion of the case, see also Case Comment, *Rule 11: A Matter of Individual Responsibility: A Case Analysis of Pavelic & LeFlore v. Marvel Entertainment Group*, 110 S. Ct. 456 (1989), 13 HAMLINE L. REV. 373 (1990).

74. *Pavelic & LeFlore*, 110 S. Ct. at 457. The original complaint alleged that the plaintiff developed an idea for a motion picture and wrote a script, and that respondents had begun to develop this work without his permission. Respondents motioned to dismiss, asserting that certain documents attached to the complaint evidenced their right to develop the work commercially. *Id.*

75. *Id.* Following the district court's dismissal of the original complaint for failure to specify the registration number of the copyright and the dates upon which the alleged acts of infringement had occurred, plaintiffs filed the amended complaint which included the forgery allegation. *Id.*

76. *Id.* The court based this award on the grounds that the forgery claim had no factual basis and had not been investigated sufficiently by counsel. *Id.*

77. *Id.* In October 1984, after the plaintiff's attorney, Ray LeFlore, had signed the amended complaint, he joined with Radovan Pavelic to form the law partnership of *Pavelic & LeFlore*. *Id.*

78. *Id.* at 458. Pavelic immediately moved to relieve the firm of the sanction, arguing that the firm should not be responsible for the violations as it did not exist during a major portion of the litigation and because Rule 11 did not give the court authority to

Scalia explained that Rule 11 does not permit the district court to impose a sanction against the signer's law firm, even if the pleadings which violated the Rule were signed by the lawyer on behalf of his law firm.<sup>79</sup> The opinion stressed that the Rule's primary purpose was to assure that the signing attorney carries out his individual responsibility to verify the paper, not just to reimburse the opposing party.<sup>80</sup> Critics claim that the Court simply applied the text of the Rule without attempting to improve upon it.<sup>81</sup>

The Supreme Court's second Rule 11 case was *Cooter & Gell v. Hartmarx Corp.*<sup>82</sup> In *Cooter & Gell*, the Court was asked to resolve three issues: (1) whether a voluntary dismissal under Federal Rule of Civil Procedure 41(a)(1)(i) ends the case and the trial court's authority to impose Rule 11 sanctions; (2) what standard of review should an appellate court use when determining the appropriateness of a trial court's imposition of Rule 11 sanctions; and (3) whether a penalized attorney may face additional sanctions for bringing a losing appeal of the initial sanctions.<sup>83</sup>

The underlying lawsuit involved a class action against a leading manufacturer of men's suits on antitrust grounds.<sup>84</sup> The defendants

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impose sanctions upon a law firm. *Id.* at 457-58. The district court agreed that half of the sanction should be shifted from the firm to LeFlore but disagreed that a court could not sanction a law firm. *Calloway v. Marvel Entertainment Group*, 650 F. Supp. 684, 687 (S.D.N.Y. 1986). The Second Circuit affirmed, *Calloway v. Marvel Entertainment Group*, 854 F.2d 1452, 1479 (1988), *rev'd on other grounds sub nom. Pavelic & LeFlore v. Marvel Entertainment Group*, 110 S. Ct. 456 (1989) thereby creating a direct conflict with a previous Fifth Circuit holding in *Robinson v. National Cash Register Co.*, 808 F.2d 1119, 1128-30 (1987). *Pavelic & LeFlore*, 110 S. Ct. at 458.

79. *Pavelic & LeFlore*, 110 S. Ct. at 460. The Court focused on the provision in the text of Rule 11 that requires a court, when a paper is signed in violation of the Rule, to "impose upon the person who signed it . . . an appropriate sanction." *Id.* at 458. Although seemingly ambiguous, when read in the total context of all the provisions of the Rule, the phrase "person who signed it" must mean the same individual signer mentioned at the outset of the Rule. *Id.* at 458-59.

80. *Id.* at 460. Arguably, the purpose is better served by making the signer personally responsible. *Id.*

81. See Coyle & Strasser, *Court Eases Firm Worries on Rule 11 Sanctions*, Nat'l L.J., Dec. 18, 1989, at 5 (noting that Rule 11 expert, Gregory Joseph, observed that although the ruling in *Pavelic & LeFlore* was correct, it would not prove helpful in determining how the Court will rule on future Rule 11 cases).

82. 110 S. Ct. 2447 (1990).

83. *Cooter & Gell*, 110 S. Ct. at 2447.

84. *Id.* The plaintiff, a discount clothier, alleged a nationwide conspiracy on the part of the manufacturer and its subsidiaries to fix prices and eliminate competition. *Id.* at 2448.

moved to dismiss the antitrust complaint and for sanctions under Rule 11.<sup>85</sup> Several months later, the district court granted the plaintiff's law firm's motion for a voluntary dismissal of the class action.<sup>86</sup> Three years passed before the court finally granted the defendant's motion for Rule 11 sanctions on the ground that the plaintiff's prefiling inquiry was grossly inadequate.<sup>87</sup>

The District of Columbia Circuit affirmed, rejecting the argument that voluntary dismissal divests the district court of jurisdiction to award Rule 11 sanctions.<sup>88</sup> Justice O'Connor, writing the opinion for the United States Supreme Court agreed on this first point.<sup>89</sup> She explained that Rule 11 sanctions involve a collateral issue that the district court may address even after dismissing the suit.<sup>90</sup> She warned that the plaintiff's right to one free dismissal under Rule 41 does not secure the right to file baseless papers.<sup>91</sup>

Noting the compatibility of Rules 11 and 41(a)(1)(i), Justice O'Connor reasoned that because a Rule 11 sanction does not signify a district court's assessment of the complaint's legal merits, imposing a sanction after a voluntary dismissal does not deprive a plaintiff of his right under Rule 41(a) to dismiss an action without prejudice.<sup>92</sup> The Court further noted that the Rule would be an ineffective deterrent against baseless filings if a party could escape its Rule 11 violation

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85. *Id.* At this time, the plaintiff filed three affidavits setting forth the prefiling research, essentially consisting of telephone inquiries, that supported the allegations in the complaint. *Id.*

86. *Id.* Before the dismissal became effective, the district court heard oral arguments on the Rule 11 motion and took it under advisement. *Id.* at 2449.

87. *Id.* The court found that the allegations were completely baseless and imposed a sanction of \$21,452.52 against the plaintiff's attorney and \$10,701.26 against the plaintiff. *Id.*

88. *Id.* The court reasoned that Rule 11's punishment and deterrent functions would only be furthered if courts could sanction parties, notwithstanding their efforts to cut their losses by running out of court. *Id.* at 2450.

89. *Id.* at 2454. Justice O'Connor held that this view is more consistent with the majority of the circuits which have ruled on this issue. *Id.*

90. *Id.* at 2455. Justice O'Connor illustrated this remark by pointing out that courts may award costs after an action is dismissed for want of jurisdiction. *Id.*

91. *Id.* at 2456-57. Justice O'Connor noted that attorneys who file complaints, papers, or other motions paying careful attention to their preparation are committing a separate abuse of the litigation process and are, therefore, subject to separate sanction. *Id.*

92. *Id.* at 2455-56. Justice O'Connor noted that such an interpretation is consistent with the goals of Rule 41(a)(1)—to curb abuses of the nonsuit Rules—which is strikingly similar to Rule 11's purpose. *Id.* at 2456-57.



merely by dismissing the case.<sup>93</sup>

Justice O'Connor then turned to the appropriate standard of review issue.<sup>94</sup> A majority of the circuits agreed to use the deferential standard in reviewing a district court's findings of fact and sanction selections.<sup>95</sup> The narrow issue involved whether a court of appeals must defer to a district court's legal conclusions in Rule 11 proceedings.<sup>96</sup> Justice O'Connor concluded that an abuse-of-discretion standard should govern all aspects of a district court's Rule 11 determination.<sup>97</sup> She noted that the trial court, familiar with the issues and litigants, is better situated than an appellate court to determine the relevant facts, apply the legal standards, and draw the legal conclusions mandated by Rule 11.<sup>98</sup>

On the final issue involving the award of attorney's fees incurred on appeal, the Court held that Rule 11 applies only to district court filings.<sup>99</sup> This holding cleared up another area of disagreement among the circuits.<sup>100</sup> The Court stated that interpreting the last sentence of Rule 11 as extending the scope of the sanction to cover any expenses, including fees on appeal incurred "because of the filing," would be overbroad.<sup>101</sup>

Justice O'Connor noted that, logically, only those expenses directly

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93. *Id.* at 2457.

94. *Id.* at 2458. Justice O'Connor first explained that determining a Rule 11 violation involves the consideration of three distinct issues: factual questions, legal findings, and the appropriateness of the sanctions. *Id.*

95. *Id.* at 2459. Justice O'Connor cites to cases from the First, Third, Fourth, Fifth, Sixth, Seventh and Tenth Circuit Courts of Appeals in support of the deferential standard of review as to all Rule 11 issues. *Id.*

96. *Id.* at 2460. In support of applying the deferential standard to legal conclusions, the Court noted the long history of difficulty courts have endured when trying to distinguish between legal and factual issues and how this determination is made even more difficult in Rule 11 cases. *Id.* at 2460-61.

97. *Id.* at 2464.

98. *Id.* at 2461. Justice O'Connor likened this reasoning to negligence cases, which are generally reviewed deferentially. *Id.*

99. *Id.* at 2468. The Court reasoned that in order not to discourage meritorious appeals, Rule 11's scope should be limited in this manner. *Id.* at 2467.

100. *Id.* at 2465. The First and Seventh Circuits had held that attorney's fees incurred in defending an award on appeal were reimbursable, whereas the Fourth and Ninth Circuits held to the contrary. *Id.*

101. *Id.* The Court explained that this line of reasoning would extend indefinitely the possibility of incurring expenses "because of" a baseless filing. *Id.*

caused by the filing—those at the trial level—may be awarded.<sup>102</sup> She explained that fees on appeal are governed by the frivolous appeal standard of Federal Rule of Appellate Procedure 38.<sup>103</sup> Further, Justice O'Connor advised that Rule 38 and Rule 11 be read together as allowing expenses incurred on appeal to be shifted to appellants only if those expenses are caused by a frivolous appeal, and not merely because a Rule 11 sanction upheld on appeal ultimately can be traced to a baseless filing in district court.<sup>104</sup>

Rule 11 commentators disagree on which of the Court's three rulings in *Cooter & Gell* will have the greatest impact.<sup>105</sup> While some think the decision will be very helpful in providing lower courts more uniformity of interpretation, others feel that it will further the Rule's chilling effect on litigation.<sup>106</sup>

The third Rule 11 case to reach the Supreme Court was *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*<sup>107</sup> In *Business Guides*, the Court decided whether Rule 11 imposed the same objective standard of reasonable inquiry on represented parties who sign papers as it imposed on attorneys.<sup>108</sup> The majority opinion, authored once again by Justice O'Connor, answered in the affirmative.<sup>109</sup>

*Business Guides* involved a copyright infringement suit brought by a business directory publisher against one of its competitors.<sup>110</sup> The plaintiff, along with its counsel, signed an application for a temporary

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102. *Id.* at 2466.

103. *Id.* Federal Rule of Appellate Procedure 38 states, "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.

104. *Cooter & Gell*, 110 S. Ct. at 2467. The Court explained that because Rule 11 is not a fee-shifting statute, the same policies that allow courts to award attorney's fees to the prevailing party on appeal do not apply to appeals of Rule 11 sanctions. *Id.* at 2468.

105. See Coyle, *supra* note 7, at 27.

106. *Id.* Some critics believe courts already have too much discretion to punish a lawyer's misconduct and, thus, feel that now courts will surely overstep their bounds. *Id.*

107. 111 S. Ct. 922 (1991).

108. *Business Guides*, 111 S. Ct. at 931.

109. *Id.* at 933.

110. *Id.* at 925. *Business Guides, Inc.* alleged that *Chromatic Communications Enterprises, Inc.* had published a competing trade directory using pieces of false information copied from *Business Guides'* directory known as "seeds." *Business Guides* asserted that *Chromatic* had used 10 of these "seeds" which it specifically inserts in an effort to protect against other competitors copying its directories. *Id.*

restraining order (TRO).<sup>111</sup> At the hearing on the TRO, the district court easily determined that the application was based on faulty information and, thus, denied it.<sup>112</sup> The court found the plaintiff and its counsel in violation of Rule 11, sanctioned the company and dismissed the complaint.<sup>113</sup>

In its 5-4 decision, the Court affirmed the order of sanctions against the plaintiff by addressing three issues.<sup>114</sup> First, Justice O'Connor determined that the text of Rule 11 clearly implies its application to represented parties, not just attorneys and unrepresented parties.<sup>115</sup> Secondly, the Court stated that an objective certification standard—one of reasonableness under the circumstances—should apply to the represented parties who sign motions, pleadings or other papers.<sup>116</sup> Lastly, the court held that sanctioning a represented party, not acting in bad faith, did not violate the Rules Enabling Act.<sup>117</sup>

Justice O'Connor examined each sentence of the Rule in determining that the lower courts holdings were consistent with the plain language and purpose of Rule 11.<sup>118</sup> She agreed that the Rule does not distinguish between the standard of inquiry that applies to attorneys as op-

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111. *Id.* The application, supported by affidavits prepared by Business Guides, set forth the portions of the directory which had been copied but did not specifically point to the seed in each listing. *Id.*

112. *Id.* at 925-26. The district court discovered that nine of the 10 "seeds" actually contained correct information and, thus, were, in fact, not seeds. *Id.*

113. *Id.* at 926-27. At the hearings to determine whether Rule 11 sanctions should be imposed, the court found that Business Guides had failed to conduct a proper pre-filing inquiry into the accuracy of their allegations and invited Chromatic to file a motion for sanctions. The sanctions motion against Business Guides' counsel was later withdrawn as the law firm had recently gone bankrupt. Business Guides', however, was sanctioned \$13,000, Chromatics legal expenses and out-of-pocket costs. *Id.*

114. *Id.* at 923-25.

115. *Id.* at 928-31. Justice O'Connor noted that "[h]ad the Advisory Committee intended to limit the application of the certification standard to parties proceeding pro se, they would surely have said so." *Id.* at 930.

116. *Id.* at 931-33. Business Guides' argued that the court should apply a subjective bad faith standard to represented parties. The Court, however, pointed out that the plain language of the rule "draws no distinction between the state of mind of attorneys and parties." The Rule merely refers to the "signer." *Id.* at 932.

117. *Id.* at 933-35. Justice O'Connor wrote that although imposing monetary sanctions for Rule 11 violations confers benefits on other parties, "such incidental effects" do not abridge, modify or enlarge anyone's substantive rights in violation of 20 U.S.C. § 2072 (1988). *Id.* at 933.

118. *Id.* at 928-31. The opinion focuses primarily on sentence five of the rule which refers to the signature of the attorney or party as a certificate that the pleading or paper is well grounded in fact. *Id.* at 929 (construing FED. R. CIV. P. 11).

posed to parties.<sup>119</sup> The fact that a party chooses to sign a pleading, even if represented by counsel, imposes upon it a duty to conduct an adequate pre-filing inquiry into the merits or be held accountable.<sup>120</sup> The Court expressly did not decide what standard, if any, to apply to a non-signing party.<sup>121</sup>

The dissent in *Business Guides* noted that the majority's interpretation of the Rule created a new duty, one that only Congress should create.<sup>122</sup> Perhaps this statement foreshadows the realization that the legislature's involvement is overdue. The Court surely recognizes that many of the controversies brewing in the circuits may wind up on its dockets.

### B. *The Current Trends*

Although the Supreme Court resolved five major Rule 11 issues, many others remain. In the lower courts, several of the conflicts mentioned above continue to surface. The Seventh Circuit recently reaffirmed its position that Rule 11 does not impose a continuing obligation on lawyers to review pleadings and other papers after filing to make sure they still have factual and legal support.<sup>123</sup> A Pennsylvania district court also recently held that the Supreme Court's voluntary dismissal ruling in *Cooter & Gell* applies to a sanctions motion that is not filed until after the court voluntarily dismisses the complaint under Rule 41(a)(2).<sup>124</sup>

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119. *Id.* at 932. Justice O'Connor explained that to allow a more lenient standard for represented parties under which sanctions would only lie if there was a finding of subjective bad faith, would establish a "safe harbor" whereby sanctions would not be imposed except upon the attorney, who "pressed to act quickly, reasonably relies on a client's careless misrepresentation." *Id.* at 933.

120. *Id.* The Court stated that the first sentence of the Rule does not require a represented party to sign pleadings and other papers and, thus, likewise, does not prohibit such a party from attesting to the underlying bases of the complaint filed by its attorneys. *Id.* at 929.

121. *Id.* at 935.

122. *Id.* at 940 (Kennedy, J., dissenting). The dissent, written by Justice Kennedy, disagreed as to the standard to apply to represented parties. The opinion further declared that the majority's holding created a "new tort of negligent prosecution or accidental abuse of process." Justice Kennedy expressed concern that the majority was overstepping its bounds as a rule-making authority. *Id.* at 941-42.

123. *Samuels v. Wilder*, 906 F.2d 272, 275 (7th Cir. 1990) (reversing a sanction the district court has imposed on plaintiffs' lawyers who did not immediately dismiss their client's complaint once discovery showed it was groundless).

124. *Cambridge Prods., Ltd. v. Penn Nutrients, Inc.*, 131 F.R.D. 464, 466 (E.D. Pa.

Finally, the Ninth Circuit recently joined the majority of circuits in holding that the inclusion of one frivolous claim in an otherwise meritorious complaint or counterclaim, or the frivolous inclusion of one defendant among others properly included as parties, is sanctionable.<sup>125</sup> Following in other circuits' footsteps, the court effectively discarded the "frivolous as a whole" test.<sup>126</sup>

Other newly established Rule 11 trends involve the imposition of sanctions. In addition to levying enormous and unprecedented monetary sanctions upon attorneys,<sup>127</sup> courts are also imposing unusual non-monetary sanctions. For instance, the Fifth Circuit recently ordered an attorney to read and brief the facts and law of the cases cited in its rulings, to do so on the attorney's own time during nights and holidays or days off, and to deliver a letter-perfect brief to the judge's chambers by a specified date.<sup>128</sup>

In light of these current court cases and trends, the Advisory Committee on Civil Rules is considering whether the time has come to revise the Rule.<sup>129</sup> The Committee solicited comments from interested lawyers regarding the amended Rule 11 and held hearings in February and April of 1991.<sup>130</sup> The Committee's concerns include whether the cost of satellite litigation has exceeded its benefits, whether there is evidence that sanctions have been administered unfairly, whether the size of sanctions is getting out of hand, and whether the Rule is being used to intimidate weaker parties.<sup>131</sup> Rule 11 experts believe that a re-evalu-

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1990) (noting that because the harm occurs upon the filing of the baseless complaint, it is irrelevant in what manner the court voluntarily dismisses the complaint).

125. *Townsend v. Holman Consulting Corp.*, 914 F.2d 1136, 1141 (9th Cir. 1990) (en banc) (cautioning that the fact that the pleading is frivolous as a whole will no longer be treated as a safe harbor that insulates lawyers from sanctions).

126. *Id.*

127. A federal district court in Illinois recently levied a sanction of \$351,664.96 against a contractor's attorney in a failed action against a construction management firm accused of violating RICO. *Brandt v. Schal Assocs., Inc.*, 131 F.R.D. 485, 503 (N.D. Ill. 1990).

128. The Fifth Circuit imposed the innovative sanction on an attorney who submitted several motions that were not supported in fact or in law, and that were filed to delay the trial for which the attorney was unprepared. *Henderson v. Department of Pub. Safety & Corrections*, 901 F.2d 1288 (5th Cir. 1990). Interestingly, the attorney did not protest the form of the sanction.

129. See *Judicial Conference Solicits Comments on Rule 11 Revisions*, *supra* note 5, at 278.

130. *Id.*

131. *Id.* Other concerns include: (1) Whether the amendments have served their

ation of the Rule is both timely and necessary.<sup>132</sup>

## V. ANALYSIS

The 1983 amendment to Rule 11 introduced an objective standard and authorized mandatory sanctions.<sup>133</sup> As a result of these changes, the Rule's use increased dramatically.<sup>134</sup> Unfortunately, this increase brought with it inconsistent application and enforcement.<sup>135</sup> The Advisory Committee's call for comments arguably indicates that the Rule is on its way out. In the alternative, the Committee's action might suggest it recognizes the need to revise the Rule.

The definitive manner in which the Supreme Court ruled on its first three Rule 11 cases implies that it, too, recognizes the exigency of abating the circuit court controversies.<sup>136</sup> It would be overly burdensome, if not impossible, for the Court to rule on all the Rule 11 issues mentioned above. As is evident from the recent trends, the legal community cannot rely upon the lower courts to remedy the situation.<sup>137</sup> New disagreements inevitably replace the old.

For Rule 11 to survive, the Advisory Committee must reamend it. The amendments should focus on reducing the burden of satellite litigation, minimizing the Rule's chilling effect and providing the lower courts with more uniform guidelines for applying the Rule.<sup>138</sup> Revision suggestions might include restoring discretionary sanctions, making sanctions awardable only upon motion, replacing the objective standard with something stricter, and redrafting the Rule to reduce its

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aims in discouraging the Rule's misuse; (2) the extent to which there is incremental injury to the civility of the adversary process due to lawyers accusing one another of Rule 11 violations; and (3) whether sanctions have been unfairly administered to any particular group of attorneys or parties. *Id.* at 278-79.

132. See Joseph, *supra* note 9, at 13.

133. See *supra* notes 21-39 and accompanying text for discussion of the 1983 amendment.

134. See *supra* notes 17 & 28 and accompanying text for a discussion of pre-amendment and post-amendment Rule use.

135. See *supra* notes 40-70 and accompanying text for an analysis of issues in conflict.

136. See *supra* notes 71-122 and accompanying text for discussion of *Pavelic & LeFlore*, *Cooter & Gell*, and *Business Guides*.

137. See *supra* notes 123-32 and accompanying text for analysis of recent trends.

138. See Nelken, *supra* note 49, at 405-08; Comment, *supra* note 13, at 570-73 (both authors propose amendments to the Rule).

intrusiveness into the attorney-client relationship.<sup>139</sup> The Advisory Committee must attempt to incorporate such changes without suppressing the Rule's goal.

## VI. CONCLUSION

Since its 1983 amendment, courts have applied Rule 11 both energetically and disparately.<sup>140</sup> The Rule's potential to deter frivolous litigation is underscored only by its susceptibility to abuse. Perhaps the Advisory Committee is experiencing a proverbial "seven year itch." After careful review, the Committee may decide to discard Rule 11. The better alternative is to substantially revise the Rule. Although referred to as a necessary evil, the Rule plays an indispensable role in the continuing effort to improve our adversary system.

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139. For discussion in support of the revisions, see Joseph, *supra* note 9.

140. See *supra* notes 40-70 and accompanying text.

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