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Civil Procedure Survey

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CIVIL PROCEDURE SURVEY

INTRODUCTION

In 1991, the Tenth Circuit handed down over 90 cases involving civil procedure. While many of these cases involved routine application of precedent in well-settled areas of the law, two areas emerged in which the court redefined or altered existing procedural law. First, the Tenth Circuit developed new rules concerning the applicability of sanctions under Federal Rule of Civil Procedure 11, in light of recent Supreme Court decisions in this area. Second, the Tenth Circuit continued its trend of allowing district courts increased discretion when disposing of lawsuits brought by prison inmates pro se.

I. RULE 11 SANCTIONS

A. *Introduction*

Rule 11, originally promulgated in 1938, consolidated a number of pleading practices from English procedure[1], the former Federal Equity Rules[2], and existing state sanctioning practices.[3] The original Rule 11 simply required an attorney to have a subjective, good-faith belief that a signed document contained a sound factual and legal basis.[4] The rule allowed a court, at its own discretion, to impose an appropriate sanction.[5] However, by the 1980's, studies indicated that Rule 11 was severely under-utilized; courts were reluctant to impose and parties reluctant to request the imposition of Rule 11 sanctions.[6]

In response to the considerable confusion surrounding the circumstances under which sanctions should be imposed and the standard of attorney conduct required, the committee significantly amended Rule 11 in 1983.[7] The new language[8] of the rule was intended to "reduce the

1. *See* English Rules Under the Judicature Act, 1935, O. 19, r. 4, and Great Australian Gold Mining Co. v. Martin, 5 ch. div. 1, 10. (L.R. 1877).

2. *See* Federal Equity Rules 21 and 24. The Federal Equity Rules of 1912 may be found at Sup. Ct. R. 21, 24, 226 U.S. 654-55 (1912).

3. CLARK, CODE PLEADING § 36 (2d. ed. 1947). For a detailed history of Rule 11, see 5A CHARLES WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE § 1331 (2d ed. 1990).

4. *See* FED. R. CIV. P. 11 (1938).

5. *Id.*

6. Mansfield, *Compliance with the 1983 Changes in Rules of Civil Procedure*, 190 N.Y.L.J. 1, 5 (1983).

7. *See* Report of the Advisory Committee on Civil Rules, 97 F.R.D. 165, 198-99 (1983) reprinted (hereinafter Report). *See also* RHODES, RIPPLE & MOONEY, SANCTIONS IMPOSABLE FOR VIOLATIONS OF THE FEDERAL RULES OF CIVIL PROCEDURE 64-65 (1981). Note that Rule 11 was also amended in 1987 but only to remove gender-biased language. The substance of the 1983 amendment was not altered.

8. Rule 11, as amended in 1983, provides in relevant part:

> The signature of an attorney or a 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

reluctance of courts to impose sanctions . . . by emphasizing the responsibilities of the attorney and reenforcing those obligations by the imposition of sanctions."[9] Unfortunately, the 1983 amendment did little to reduce this confusion, as over a thousand judicial opinions concerning the propriety of Rule 11 sanctions have been handed down since 1983.[10] The amount of Rule 11 related litigation is ironic, considering the Advisory Committee's statement that the 1983 amendment was intended to "streamline the litigation process."[11] There is considerable, continuing debate in the legal and academic communities as to the effectiveness of the rule as it now reads.[12]

In the past two years, the United States Supreme Court handed down several significant decisions discussing and refining the scope of and standard of review applicable to Rule 11 sanctions. In *Cooter & Gell v. Hartmarx Corp.*,[13] the Court held a plaintiff who voluntarily dismisses an action pursuant to Rule 41(a)(1)(i)[14] may still be subject to sanctions.[15] The Court announced that the circuit courts of appeal must apply an abuse-of-discretion standard when reviewing a district court's imposition of sanctions.[16] In order to effectuate the goals of streamlining the litigation process, the district courts on the "frontlines of litigation" must be afforded tremendous deference to determine what conduct violates Rule 11.[17] In *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*,[18] the Court held an objective standard of reasonableness applies to the inquiry conducted by represented parties, as well as attorneys, who sign papers.[19] The scope of Rule 11 sanctions was defined as applying to any paper filed or offered to the court as truthful,

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> for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this 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 . . . including a reasonable attorney's fee.

FED. R. CIV. P. 11.

9. Report, 97 F.R.D. at 198-99.

10. Call for Comments, Committee on Rules of Practice and Procedures of the Judicial Conference of the United States, 131 F.R.D. 335, 344 (1990) (hereinafter Call for Comments).

11. Report, 97 F.R.D. at 165.

12. *See e.g.*, Melinda G. Baum, *The Seven Year Itch: Is It Time to Reamend Rule 11?* 40 WASH. U. J. URB. & CONTEMP. L. 227 (1991). For a bibliography of current articles and comments on the post-1983 Rule 11, see Call for Comments, 131 F.R.D. at 350-51.

13. 110 S. Ct. 2447 (1990).

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

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

16. *Id.* at 2460.

17. *Id.* For a thorough discussion of this case, see Martin B. Bailey, Note, *Recent Development Federal Civil Procedure — Rule 11 — Rule 41(a) Voluntary Dismissal Does Not Bar Sanctions*, Cooter & Gell v. Hartmarx Corp., 110 S. Ct. 2447 (1990), 58 TENN. L. REV. 313 (1991).

18. 111 S. Ct. 922 (1991).

19. *Id.* at 930. For a thorough discussion of *Business Guides*, see Jennifer M. Moore, Note, *Sanctioning Clients Under Rule 11*: Business Guides Inc. v. Chromatic Communications Enterprises, Inc., 14 HARV. J.L. & PUB. POL'Y 913 (1991).

including affidavits signed by parties.[20]

This past year, the Tenth Circuit considered a number of Rule 11 appeals under the Supreme Court's recent decisions. Unfortunately, these recent Tenth Circuit decisions do little to ease the uncertainty surrounding the applicability of Rule 11, and instead reflect the confused state of Rule 11 law both in other circuits and at the Supreme Court level.[21] In *Dodd Insurance Services v. Royal Insurance Co.*,[22] the Tenth Circuit held that Rule 11 sanctions are appropriate in cases in which pleadings contain both frivolous and non-frivolous claims.[23] However, the court indicated exceptions to this holding that make it unclear exactly when a complaint containing both non-frivolous and frivolous claims should be sanctioned.[24] Second, in *Eisenberg v. University of New Mexico*,[25] the court held that Federal Rule of Evidence 408 does not exclude from Rule 11 sanctions an affidavit submitted during a settlement conference.[26] The scope of amended Rule 11 includes any paper offered by a litigant.[27] Third, the Tenth Circuit upheld a district court's *refusal* to impose Rule 11 sanctions in *Hughes v. City of Fort Collins*,[28] applying the deferential review standard required by *Cooter & Gell*. However, the court indicated that it was not pleased by the district court's refusal to impose sanctions and indicated that the plaintiff's good-faith argument for the extension of existing law was about as tenuous as will be tolerated.[29] Finally, the somewhat related case of *In re Byrd, Inc.*[30] held that Rule 11 standards and case law apply in reviewing a district court's imposition of sanctions under Federal Rule of Civil Procedure 26(g).

B. *The Cases*

1. Dodd Insurance Services v. Royal Insurance Co.

Plaintiff insurance agency (Dodd) sued an insurer (Royal) after Royal attempted to terminate an agency-company sales agreement. Dodd alleged ten claims, and Royal moved for summary judgment on seven of them. The district court adopted a federal magistrate recommended summary judgment on eight of the plaintiff's claims and imposed Rule 11 sanctions based on three of the ten claims. The three claims adjudged frivolous were defamation, breach of fiduciary duty, and negligence. The court granted Royal thirty percent of its litigation

20. 111 S. Ct. at 928.

21. *See* SAUL KASSIN, AN EMPIRICAL STUDY OF RULE 11 SANCTIONS (1985); Charles M. Shaffer, Jr., *Rule 11: Bright Light, Dim Future*, in SANCTIONS: RULE 11 AND OTHER POWERS 1 (Charles M. Shaffer, Jr. & Paul M. Sandler eds. 1988).

22. 935 F.2d 1152 (10th Cir. 1991).

23. *Id.* at 1158.

24. *Id.*

25. 936 F.2d 1131 (10th Cir. 1991).

26. *Id.* at 1134.

27. *Id.* at 1133.

28. 926 F.2d 986 (10th Cir. 1991).

29. *Id.* at 990.

30. 927 F.2d 1135 (10th Cir. 1991).

costs, based on its finding that three claims out of ten were frivolous.[31] Dodd appealed on three grounds: (1) the three claims were not sufficiently meritless to be considered frivolous for Rule 11 sanction purposes; (2) a complaint that contains both frivolous and non-frivolous claims does not violate Rule 11; and (3) the court erred in applying a mathematical percentage approach in determining the amount of sanctions imposed when some claims are frivolous and some are not.

The Tenth Circuit applied the Supreme Court mandated abuse of discretion review standard of *Cooter & Gell v. Hartmarx Corp.*,[32] upholding the district court's determination that the claims were sufficiently meritless. The most important issue was whether pleadings containing both valid and frivolous claims can violate rule 11. In this regard, the circuits are split. The Seventh, Eighth, and Ninth Circuits hold that sanctions are improper where most of the claims within the complaint are valid.[33] The court declined to follow this view and instead followed the view of the Second and Eleventh Circuits, that a pleading containing a single frivolous claim can violate Rule 11.[34] The court noted that the Supreme Court, in *Cooter & Gell*, had admonished the circuits to apply extreme deference to a district court's conclusions regarding Rule 11 sanctions. In holding that a single frivolous claim could lead to Rule 11 sanctions, the Tenth Circuit reasoned that a contrary conclusion would allow a litigant with one or more competent claims to include in his complaint one or more highly advantageous, yet wholly frivolous, claims, because that party can be confident that the presence of the meritorious claims will shield him from sanctions.[35] The court noted in dictum that, although the presence of a single frivolous claim may not require Rule 11 sanctions, here the fact that only three of the plaintiff's ten claims survived summary judgment strongly suggested that sanctions were in order.

The Tenth Circuit attempted to give guidance to the district courts as to which complaints containing both nonfrivolous and frivolous claims deserve sanctions. The court compared *Burull v. First National Bank of Minneapolis*[36] and *Oliveri v. Thompson*,[37] cases in which the presence of a single frivolous claim did not warrant sanctions, with *Patterson v. Aiken*[38] in which the Eleventh Circuit approved of sanctions for a sin-

31. *Dodd Ins. Services, Inc. v. Royal Ins. Co. of America*, 935 F.2d 1152, 1159 n.5 (10th Cir. 1991).

32. 110 S.Ct. 2447 (1990).

33. *See* FDIC v. Tefken Constr. and Install. Co., 847 F.2d 440, 444 n.6 (7th Cir. 1988) (fact that one argument in an otherwise valid paper is not meritorious does not warrant Rule 11 sanctions); Burull v. First Nat'l Bank of Minneapolis, 831 F.2d 788 (8th Cir. 1987), *cert. denied*, 485 U.S. 961 (1988); Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531 (9th Cir. 1986); *but see* Frantz v. United States Powerlifting Fed'n., 836 F.2d 1063 (7th Cir. 1987) (Rule 11 applies to all statements in papers it covers, each must have sufficient support and be investigated and researched before filing).

34. *Dodd*, 935 F.2d at 1158 (citing Cross & Cross Properties v. Everett Allied Co., 886 F.2d 497 (2d Cir. 1989); Patterson v. Aiken, 841 F.2d 386 (11th Cir. 1988)).

35. *Dodd*, 935 F.2d at 1158 (quoting Cross & Cross Properties v. Everett Allied Co., 886 F.2d 497, 505 (2d Cir. 1989)).

36. 831 F.2d 788, 790 (8th Cir. 1987) *cert. denied*, 485 U.S. 961 (1988).

37. 803 F.2d 1265, 1280 (2d Cir. 1986).

38. 841 F.2d 386, 387 (11th Cir. 1988).

gle frivolous claim.[39] The *Burull* and *Oliveri* decisions affirmed a refusal of sanctions where the frivolous claim had little or no appreciable effect on litigation and the legal argument was not taken seriously by the opposing parties.[40] Conversely, in *Patterson*, where the effect and cost of defending against the single violative claim could be separately proven, sanctions were in order.[41]

The court's comparison of these two lines of cases suggests an economic approach to the applicability of sanctions. The implication is that when the costs legitimately incurred in defense of a frivolous claim are separable from those incurred defending valid claims, sanctions seem to be in order. However, if the claim is so frivolous that a reasonable person would not have been concerned with defending against it or would have incurred minimal cost in doing so, then sanctions may not be in order.

However, in *Dodd*, the court's decision regarding sanctions is not consistent with this economic approach. In *Dodd*, Royal was unable to separate the costs of defending against the three frivolous claims. The district court noted that the Supreme Court, in *Hensley v. Eckerhart*[42] expressly rejected the percentage approach, and ordered Royal to resubmit its claim, detailing the actual hours spent on defense of the three frivolous claims.[43] Royal responded it could not segregate the attorney's fees and costs relating to the three claims, but the previously submitted figure of $39,050.88 was a "reasonable estimate."[44]

On appeal, the Tenth Circuit held the district court erred in imposing sanctions that reflected a percentage of total costs based on the percentage of frivolous claims in the complaint. It reasoned that since the purpose of Rule 11 sanctions is to deter future frivolous claims, the amount of the sanction should not be determined mechanically.[45] The court agreed sanctions were in order, however the case was remanded for a determination of the correct amount of sanctions.

Under the court's economic analysis approach to the imposition of sanctions where the complaint contains both frivolous and non-frivolous claims, sanctions should not be imposed in this case because Royal was unable to separate its litigation costs incurred solely as a result of defending against the three frivolous claims. Clouding the issue further, the court relied on the magnitude of sanctions in this case as an indication the district court concluded that the three claims substantially burdened Royal.[46] Yet the court failed to notice the district court, in

39. *Dodd*, 935 F.2d at 1158.

40. *See Burull*, 831 F.2d at 790; *Oliveri*, 803 F.2d at 1280.

41. 841 F.2d at 387.

42. 461 U.S. 424, 435 n.11 (1983).

43. *Dodd*, 935 F.2d at 1159 n.5.

44. *Id.*

45. *Dodd*, 935 F.2d at 1159 (citing White v. General Motors Corp., 908 F.2d 675, 684-685 (10th Cir. 1990)).

46. *Dodd*, 935 F.2d at 1159-60.

determining the amount of the sanctions, merely relied on Royal's estimate of the costs of defending the frivolous claims.

This holding does little to clear up the confusion surrounding Rule 11 sanctions. While it indicates Rule 11 sanctions are proper if economic loss results from even one claim in an otherwise valid complaint, the facts of this case indicate sanctions may be imposed even where it is impossible to separate the costs of the one claim. Further, this holding will not discourage some frivolous litigation, in that claims that the court finds so baseless that no reasonable attorney would have spent any time or money defending them may not warrant sanctions. Only those claims causing the opposing party to incur some costs will be sanctioned. This may lead to the ironic result that utterly baseless claims run less risk of sanctions than do those with a less tenuous legal or factual basis.

2. Eisenberg v. University of New Mexico

Torres, the attorney representing the plaintiff in an underlying case, moved for a new trial following a verdict against her client,[47] alleging the judge's law clerk engaged in prejudicial ex parte conduct regarding the sending of exhibits to the jury during deliberations and stated to several people, including Ms. Torres, that she was being represented by a member of defense counsel's law firm.[48] Torres filed an affidavit, signed by herself, in support of the allegations.[49] The motion was denied, and the district court issued an order to show cause as to why Torres should not be sanctioned under Rule 11 for failing to adequately inquire into the truth and accuracy of her affidavit. The hearing was conducted by Judge Parker after the original trial judge recused himself. Ms. Torres's attorney requested a settlement conference and filed a second affadavit by Ms. Torres. It detailed a second statement made by the law clerk indicating that she was represented by defense counsel's law firm.[50] Following the hearing, Ms. Torres's first affadavit was found not to violate Rule 11. However without a hearing, Judge Parker ordered a fine of $250 for violation of Rule 11 on the second affidavit. Torres challenged the sanction on three grounds: (1) the offending affidavit was not filed with the court, but instead was part of the settlement negotiations and therefore outside the scope of Rule 11, (2) she was denied due process due to lack of a hearing, and (3) the court abused its discretion by imposing a Rule 11 "fine" without a finding of criminal contempt that would have afforded her the due process protections of Rule 42(b) of the Federal Rules of Criminal Procedure.[51]

Torres argued on appeal that because the offending affidavit was not formally filed, it does not fall under the scope of Rule 11. Torres pointed to Justice Kennedy's dissent in *Business Guides, Inc. v. Chromatic*

47. Eisenberg v. University of New Mexico, 936 F.2d 1131, 1132 (10th Cir. 1991).
48. *Id.* at 1133.
49. *Id.*
50. *Id.*
51. *Id.*

Communications Enterprises, Inc.,[52] where he questioned the majority's holding that any paper filed with the court could be subject to sanctions.[53] The Tenth Circuit court rejected this defense, citing the majority opinion in *Business Guides* that any paper submitted to the court for its review, even an affidavit submitted during *in camera* review and not formally filed, is still subject to the signing requirements of Rule 11.[54]

Torres argued the second affidavit should be excluded from Rule 11 consideration pursuant to Federal Rules of Evidence Rule 408.[55] Reasoning the purpose of Rule 408 is to promote nonjudicial settlement of disputes,[56] Judge McKay held that Rule 408 does not protect evidence of unqualified factual assertions, that Torres waived any Rule 408 protection by submitting the affidavit to the court, and that the affidavit fell under the "evidence set forth for other purposes" exception to Rule 408.

Torres further argued the district court's failure to conduct a second hearing denied her due process. Noting that due process is a flexible concept,[57] the court held Torres was given adequate notice under due process concepts. Citing Eleventh Circuit precedent,[58] the court held an attorney who files court papers cannot claim lack of notice of the standard of conduct that Rule 11 itself provides.[59] Although Torres stepped out of her role as an attorney at the time she submitted the second affidavit, under *Business Guides* even a represented party who signs a document bears a personal responsibility to verify its contents.[60] The show cause order also provided adequate due process, which constituted notice reasonably calculated to apprise her of the pendency of the action under *Mullane v. Central Hanover Bank & Trust Co.*[61]

The court also held the $250 sanction[62] was not a "fine," but rather a "monetary sanction," applying *Miranda v. Southern Pacific Transport Co.*[63] In *Miranda* the sanction was distinguished from a fine for willful

52. 111 S. Ct. 922 (1991).
53. *Id.* at 939.
54. *Id.* at 928.
55. FED. R. EVID 408 provides in relevant part:
> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible . . . . This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness.

56. *Eisenberg*, 936 F.2d at 1134 (citing Bradbury v. Phillips Petroleum Co., 815 F.2d 1356 (10th Cir. 1987)).
57. *Id.* at 1134 (citing Braley v. Campbell, 832 F.2d 1504, 1514 (10th Cir. 1987)).
58. *Id.* at 1135 (citing Donaldson v. Clark, 819 F.2d 1551, 1560 (11th Cir. 1987)).
59. *Id.*
60. *Id.*
61. 339 U.S. 306 (1950).
62. It is more than a little ironic that a $250 sanction generated an eight-page circuit opinion, obviously consuming valuable judicial resources, in light of the Advisory Committee's statement that the amended rule was intended to cut down on "satellite litigation." *See* 97 F.R.D. at 198-99.
63. 710 F.2d 516 (9th Cir. 1983).

misconduct, which included denial of court access, until the fine was paid. The sanction against Torres did not approach the magnitude of a fine, thus the more stringent due process requirements of criminal contempt as set forth in *Cotner v. Hopkins*[64] did not apply. *Cotner* involved a fine for willful disregard of a court order.[65] The court agreed with the Eleventh Circuit opinion in *Donaldson v. Clark*,[66] holding nothing in the text of Rule 11 indicates the due process requirement called for in criminal contempt proceedings be applied in the present case.

3. Hughes v. City of Fort Collins

In this case, the husband and children of a murder victim sued the City of Fort Collins, its police officers and district attorneys, alleging that the City's failure to solve a previous murder and apprehend the perpetrator before he murdered Hughes's spouse deprived plaintiffs of their constitutional rights.[67]

The City moved for dismissal of the claim for failure to state a claim upon which relief could be granted and requested sanctions pursuant to Rule 11. After a hearing, the district court dismissed the complaint,[68] but denied sanctions, believing a good faith argument for the extension of existing law could be made.[69]

Plaintiffs appealed the dismissal of their complaint, and defendants cross-appealed the denial of sanctions. The Tenth Circuit affirmed the dismissal, and reversed the trial court for "summarily refusing to consider the award of sanctions."[70] On remand, the district court again denied the sanctions, reiterating its belief that a good faith argument for the extension of existing law could be made.[71] The City again appealed, arguing the district court based its denial of sanctions on an "improper hybridization of the old and new standards mandated by Rule 11."[72]

Judge Anderson, speaking for the court, upheld the district court's refusal to award sanctions, relying heavily on the *Cooter & Gell* abuse of discretion standard for all aspects of a district court's Rule 11 determination. This standard of review applies not only to factual determinations, but also to determinations of matters of law.[73] Judge Anderson noted the deferential abuse of discretion standard mandated by *Cooter &*

64. 795 F.2d 900 (10th Cir. 1986).
65. *Id.* at 902.
66. 819 F.2d 1551 (11th Cir. 1987).
67. Hughes v. City of Fort Collins, 926 F.2d 986, 987 (10th Cir. 1991).
68. Dismissal was based on a finding that there is no constitutional protection for members of the public against criminal attacks by third parties. *Id.*
69. *Id.* at 987-88.
70. *Hughes*, 926 F.2d 986 at 988.
71. This is the same reason the court gave for the original denial of sanctions. The district court re-asserted its reasoning stating that the Tenth Circuit had apparently overlooked it. *Id.* at 988.
72. *Id.* at 989. The City argued that the trial court had confused the old subjective standard of the pre-1983 Rule 11, with the objective standard required by amended Rule 11. Therefore, they further alleged that the court based it ruling on an erroneous view of the law under *Cooter & Gell.*
73. *Cooter & Gell*, 110 S. Ct. at 2460.

Gell enhances the dual goals of judicial economy and integrity of the trial courts. The court reasoned that:

> [t]he Supreme Court's message is clear. It is not the role of the circuit court to second-guess the district court's Rule 11 determinations. While we are sympathetic with the burdens this litigation has imposed on the City, we are not the district court, and we cannot reverse the court simply because, had we been the triers of fact, we might have decided the case differently.[74]

The court agreed with the City that the inquiry required by Rule 11 is now an "objective assessment of 'reasonableness under the circumstances,' "[75] and the district court confused the present standard with the pre-1983 standard by interjecting the subjective phrase "good faith belief" before the objective phrase "formed after reasonable inquiry."[76] Reviewing the denial of sanctions under the present objective standard, the circuit court presumed, although there was no indication in the oral ruling, that the district court must have concluded the attorney made an adequate pre-filing inquiry into the factual basis for the case. Further, the circuit court found that the trial court determined that the attorney made a good faith argument for modification of existing law.[77]

Although the Tenth Circuit upheld the refusal to impose sanctions, it clearly indicated its strong disapproval of the district's holding and the plaintiff's legal theories[78] and sternly warned the district to keep abreast of controlling law. The court warned that the argument for a modification of existing law in this case came dangerously close to being "[a] mere assertion that the controlling law is wrong [that] should, at the very least, be viewed critically by the district court," and that "[a]n unadorned and forlorn hope that a court may change settled law at some future time ought not to be enough."[79]

This case highlights the way in which *Cooter & Gell* has muddied the waters of Rule 11. The extreme deference to the district courts, re-

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74. *Hughes*, 926 F.2d at 989 (citing Anderson v. Bessemer City, 470 U.S. 564 (1985)).

75. *Id.* (quoting FED. R. CIV. P. 11, Advisory Committee Notes).

76. *Id.*

77. *Id.* Based on the following statement, the trial court declined to impose sanctions:

> I think there is no such constitutional claim; but I think probably there is room, if one reads *Martinez* (referring to Martinez v. California, 444 U.S. 277 (1980)), for inquiring whether these various progeny of *Martinez* which have been decided in all these circuits really flow from the words of *Martinez* or whether there is a possible challenge there which needs to be further clarified ultimately by the Supreme Court. Certainly it's established law, I think, in the Tenth, Eleventh, Ninth, Seventh, Sixth Circuits; but whether there is an argument which may ultimately be resolved by the Supreme Court in carving out an exception to *Martinez*, I don't know.

Hughes, 926 F.2d at 990.

78. The court made note of plaintiff's attorney's lack of knowledge and disregard for controlling law. When the attorney was informed of the Supreme Court's decision in *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189 (1989) (holding that a state's failure to protect an individual against private violence does not constitute a violation of the due process clause) and its direct applicability to the case, he responded that the decision was "horrendous" and that he would distinguish it in a reply brief. No reply brief was ever filed, nor was the case ever distinguished. *Hughes*, 926 F.2d at 990 n.3.

79. *Id.* at 990.

quired by *Cooter & Gell*, obviously constrained the Tenth Circuit's ability to effectively review this case. Even though the trial court had misapplied Rule 11, the attorney framed extremely weak legal arguments which disregarded existing case law, and the defendants had incurred considerable expense in defending the suit, the circuit was unable to reverse. It is difficult to conceive of a case in which an abuse of discretion sufficient to reverse under the *Cooter & Gell* standard of review could be found. Because inconsistent sanctioning practices between judges will be upheld, attorneys may never understand the level of inquiry necessary to satisfy Rule 11.

4. In re Byrd, Inc.

The debtor in a Chapter 12 bankruptcy reorganization filed a motion to assess the value of the estate's primary property. Experts' depositions were scheduled after the property valuations were submitted. A creditor served the debtor's expert with a subpoena duces tecum timed to coincide with the originally sceduled deposition date, although the deposition was rescheduled for a later date. The creditor sent a second subpoena, which for unknown reasons never reached the expert. Although the subpoenas did not comply with procedural rules,[80] the debtor did not object to the subpoenas or creditor's method of service.

The subpoenas requested the expert to produce appraisals he prepared for similar properties. Citing "business ethics," he refused to produce the documents without a court order. The creditor moved for an order to show cause for the expert's failure to comply with the subpoenas, and the bankruptcy court issued the order. At the hearing the bankruptcy judge quashed the show cause order, finding the subpoenas unenforceable due to their noncompliance with procedural rules. The judge also awarded the expert costs and fees in the amount of $5,496.86 pursuant to Federal Rule of Civil Procedure 26(g). On appeal, the district court slightly reduced the amount, but upheld the ruling. The creditor appealed the awards.

Before this case, the Tenth Circuit did not specifically address either the standard for sanctioning a party under Rule 26(g) or the standard of review for such sanctions. After reviewing the decisions of other circuits, that applied Rule 11 standards to Rule 26(g),[81] the circuit expressly adopted their approach. Specifically, the court looked to *Cooter & Gell v. Hartmarx Corp.*,[82] and *Burkhart v. Kinsley Bank*[83] in applying an abuse of discretion standard of review in Rule 26(g) sanction cases. Regarding the standards for sanctions, subjective bad faith is not required, but rather the central issue is whether "the person who signed the pleading conducted a reasonable inquiry into the facts and law support-

80. Specifically, FED. R. CIV. P. 45(d)(2) and *D. N.M. R.* 30.1.

81. *See* Insurance Benefit Adm'rs Inc. v. Martin, 871 F.2d 1354, 1360 (7th Cir 1989); Apex Oil Co. v. Belcher Co., 855 F.2d 1009 (2d. Cir. 1988); *see also* FED. R. CIV. P. Advisory Committee's Note (Rule 26(g) "parallels the [1983] amendments to Rule 11").

82. 496 U.S. 384, 384 (1990).

83. 852 F.2d 512, 515 (10th Cir. 1988).

ing the pleading."[84] Applying this standard, the circuit held the subpoenas were not supported by reasonable inquiries and upheld the district court's award of costs and fees. This holding provides another example of the scope of the Tenth Circuit's interpretation of *Cooter & Gell*, which applies not only to Rule 11 sanctions but also to sanctions imposed under other rules.

C. *Conclusion*

The Tenth Circuit's 1991 Rule 11 decisions do little to clarify the confusion surrounding Rule 11 sanctions. The *Cooter & Gell* standard of review cemented this confusion by permitting a district court to either run wild in sanctioning or indiscriminately refuse to sanction the attorney. However, the ruling makes two things clear. First, it is unlikely the Tenth Circuit will reverse the award of sanctions or refusal to sanction on appeal. Second, there are, and will continue to be, glaring inconsistencies in the district courts' application of Rule 11 that the Tenth Circuit cannot address due to the extreme deference given to lower court decisions. A recurring theme in 1991 cases was the Tenth Circuit's inability or refusal to take action even when the appellate court did not agree with or approve of the district court's imposition (or denial) of Rule 11 sanctions.[85]

II. PRO SE LITIGANTS

A. *Introduction*

The Tenth Circuit dealt with a number of cases involving pro se litigants this past year. In these cases prison inmates sued for relief from various civil rights violations. Congress gave the federal judges who hear these cases wide discretion in how to deal with them.[86] For instance, a judge can allow an inmate to proceed without a prepayment of the fees and costs,[87] appoint counsel to represent the prisoner,[88] or dismiss the action as frivolous or malicious.[89] However, section 1915 presents a court with several problems. One problem the courts face is how to differentiate a valid complaint from one factually or legally unsupportable. In 1978, the Tenth Circuit created a mechanism to aid judges in determining the validity of a complaint called a *Martinez* report, named for the case creating it, *Martinez v. Aaron*.[90]

In *Martinez*, several prisoners in a New Mexico correctional facility brought a section 1983 action[91] alleging theft and confiscation of per-

84. *See* United Mo. Bank of Kansas City v. Bank of N.Y., 723 F. Supp 408, 415 (W.D. Mo. 1989) (applying Rule 11 standards to Rule 26(g)).
85. *See e.g.*, *Hughes*, 926 F.2d at 989; *Eisenberg*, 936 F.2d at 1137.
86. 28 U.S.C. § 1915 (1988).
87. *Id.* § 1915(a).
88. *Id.* § 1915(d).
89. *Id.*
90. 570 F.2d 317 (10th Cir. 1978).
91. *See* 42 U.S.C. § 1983 (1988).

sonal property by the prison guards. To aid its decision regarding whether to dismiss the case as frivolous, the trial judge ordered the prison officials to investigate the incident.[92] The Tenth Circuit expressly approved the procedure outlined in this order, finding the report useful for deciding preliminary issues, including jurisdiction under section 1915(a)[93] and allegations as to color of state law.[94]

Last year the Tenth Circuit handed down two decisions involving *Martinez* reports. In *Hall v. Bellmon*,[95] the Circuit decided a *Martinez* report may be considered both as an affidavit for defendant in a summary judgment motion, and as part of the pleadings for the purposes of a motion to dismiss under Federal Rules of Civil Procedure Rule 12(b)(6). This decision allowed the court to avoid the procedures established in *Reed v. Dunham*,[96] which held that when documents other than the pleadings are considered a Rule 12(b)(6) motion is treated as a Rule 56 motion for summary judgment.[97] Since the *Martinez* report is treated as part of the pleadings, *Reed* is inapplicable.

In *Mosier v. Maynard*,[98] the circuit elaborated on another aspect of *Hall*, narrowing the circumstances under which a defendant prison official can use a *Martinez* report as an affidavit in a motion for summary judgment. *Hall* limited the use of a *Martinez* report in cases where the plaintiff presented conflicting evidence.[99] *Mosier* went one step further, negating the effects of the *Martinez* report in a motion for summary judgment by using the plaintiff's complaint as an opposing affadavit.

A civil rights suit brought by a prison inmate pro se under section 1915[100] has many hurdles to pass before it is allowed to proceed to trial.

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92. The court order states *inter alia*:

> (3) Officials responsible for the operation of the New Mexico State Penitentiary are directed to undertake a review of the subject matter of the complaint: a. to ascertain the facts and circumstances; b. to consider whether any action can and should be taken by the institution to resolve the subject matter of the complaint; and c. to determine whether other like complaints . . . are related to this complaint and should be take up and considered together.
>
> (4) In the conduct of the review, a written report shall be compiled and filed with the Court. Authorization is granted to interview all witnesses including the plaintiffs and appropriate officers of the New Mexico State Penitentiary . . . .
>
> (5) All reports made in the course of the review shall be attached to and filed with defendant's answers to the complaint.

Martinez, 570 F.2d at 319.

93. 28 U.S.C. § 1915(a) (1988).

94. *Martinez*, 570 F.2d at 319.

95. 935 F.2d 1106 (10th Cir. 1991).

96. Reed v. Dunham, 893 F.2d 285 (10th Cir. 1990).

97. *Id.* at 287 n.2. The court stated:

> [f]urthermore, once it is determined . . . that a particular claim is not subject to dismissal under § 1915(d), a requested disposition of that claim premised upon materials outside the pleading should be treated as a motion for summary judgment, with due regard for the requirements of notice and opportunity to respond specified in FED. R. CIV. P. 56.

Id.

98. 937 F.2d 1521 (10th Cir. 1991).

99. Hall v. Bellmon, 935 F.2d 1106, 1111 (10th Cir. 1991). "The court is not authorized to accept the factual findings of the prison investigation when the plaintiff has presented conflicting evidence." *Id.*

100. 28 U.S.C. § 1915 (1988).

Federal judges dispose of the cases in a variety of ways, including dismissal as frivolous under section 1915(d),[101] dismissal for failure to state a claim upon which relief can be granted[102] and summary judgment.[103] Each of these has a different set of requirements applied in different circumstances. However, the lines between the three are becoming blurred as the courts actively eliminate the procedural distinctions in order to make it easier to dispose of a frivolous lawsuit.

The use of the *Martinez* report as an affidavit and as an attachment to the pleadings contributed to the elimination of those distinctions. *Hall v. Bellmon* effectively eliminated a distinction between dismissal for failure to state a claim and summary judgement by allowing a *Martinez* report to be considered an attachment to the pleadings.[104] In *McKinney v. Okla. Dept. of Human Services*,[105] the circuit eliminated another distinction between the types of dismissal. After comparing dismissal under section 1915(d) with dismissal under Federal Rules of Civil Procedure Rule 12(b)(6), the court announced a new rule allowing *sua sponte* dismissals of a pro se litigant's action under Rule 12(b)(6).

Section 1915(d)[106] allows a court to appoint counsel to represent an indigent party. However, if the suit is frivolous or legally unsupported, the court need not appoint counsel. The Tenth Circuit gives a trial judge broad discretion to deny an indigent plaintiff's request for the appointment of counsel. In 1985 in *McCarthy v. Weinberg*, the Tenth Circuit ruled a district court decision will not be overturned unless "the lack of counsel results in fundamental unfairness."[107] The court adopted the guidelines the Seventh Circuit set forth in *Maclin v. Freake*.[108] In deciding whether to appoint counsel, the court should consider the merits of the litigant's claims, the nature of the factual issues raised, and the complexity of the legal issues.[109] This year the circuit decided two cases based upon *McCarthy*: *Long v. Shillinger*[110] and *Williams v. Meese*.[111] These cases do not change the holding of *McCarthy* but simply follow it indirectly by explicitly following *Maclin*.

B. *The Cases*

1. Hall v. Bellmon

Plaintiff, a Native American state prisoner, brought a pro se action alleging violation of his civil rights. Specifically, Hall alleged he was denied his First Amendment right to free exercise of religion by the confis-

101. *Id.* § 1915(d).
102. FED. R. CIV. P. 12(b)(6).
103. FED. R. CIV. P. 56.
104. *Hall*, 935 F.2d at 1112.
105. 925 F.2d 363, 365 (10th Cir. 1991).
106. 28 U.S.C. § 1915(d) (1988).
107. 753 F.2d 836, 840 (10th Cir. 1985).
108. 650 F.2d 885 (7th Cir. 1981).
109. *Id.* at 887-89.
110. 927 F.2d 525 (10th Cir. 1991).
111. 926 F.2d 994 (10th Cir. 1991).

cation of his medicine bag and talisman, destruction of his property, and forced compliance with the prison grooming code.[112]

The district court considered and dismissed each of plaintiff's claims pursuant to Federal Rule of Civil Procedure 12(b)(6). Although on appeal the plaintiff claimed the district dismissed his claims as frivolous under section 1915(d), the Tenth Circuit concluded the only plausible reading of the district's memorandum opinion was that the case was dismissed for failure to state a claim upon which relief could be granted.[113] Plaintiff argued on appeal that the court erred in considering the *Martinez* report in dismissing his claim under Rule 12(b)(6).[114]

The Tenth Circuit affirmed the dismissal. Typically, when the court considers materials outside the pleadings, a Rule 12(b)(6) motion is treated as a motion for summary judgment, requiring the plaintiff be given notice and an opportunity to respond with affidavits or similar evidence before the court considers the motion.[115] However, the Tenth Circuit held a *Martinez* report may be treated as an attachment to the plaintiff's complaint for purposes of Rule 12(b) dismissal "[w]hen the plaintiff challenges a prison's policies or established procedures and the *Martinez* report's description of the policies or procedures remains undisputed after the plaintiff has an opportunity to respond."[116] In support of its holding, the court looked to precedent from the First,[117] Third,[118] Eighth,[119] Ninth[120] and Eleventh[121] Circuits. The court also noted that the Third Circuit disagreed, holding in *Rose v. Bartle*[122] that affidavits, in contrast to other written documents attached to the complaint,[123] may not be considered in granting a dismissal under Rule 12(b)(6).[124] Also noted is the contrary ruling of the Second Circuit in *Goldman v. Belden*[125] that it is improper to consider documents attached to defendant's motion to dismiss.[126] The Tenth Circuit reasoned it was appropriate for the district court to consider the *Martinez* report because the purpose of the report is to identify and clarify issues plaintiff raises in his complaint, to develop a basis for determining whether the plaintiff

112. *Hall*, 935 F.2d at 1111-12.

113. *Id.* at 1112. The court noted that the district court never characterized plaintiff's claims as frivolous. Dismissal under 28 U.S.C. § 1915(d) is only proper when a claim is based on an indisputably meritless legal theory. *Id.* at 1109.

114. *Id.* at 1112.

115. *See Reed*, 893 F.2d at 287 n.2.

116. *Hall*, 935 F.2d at 1112-13.

117. Sullivan v. United States, 788 F.2d 813, 815 n.3 (1st Cir. 1986).

118. Chester County Intermediate Unit v. Penn. Blue Shield, 896 F.2d 808 (3d Cir. 1990).

119. Morton v. Becker, 793 F.2d 185, 187 (8th Cir. 1986).

120. AMFAC Corp. v. Arizona Mall, 583 F.2d 426, 429-30 (9th Cir. 1978).

121. Quiller v. Barclays-Am./Credit, Inc., 727 F.2d 1067, 1069 (11th Cir. 1984), *cert. denied*, 476 U.S. 1124 (1986).

122. 871 F.2d 331, 339-40 n.3 (3d Cir. 1989).

123. See *Chester County*, 896 F.2d at 812.

124. *Rose*, 871 F.2d at 339-40 n.4.

125. 754 F.2d 1059 (2d Cir. 1985).

126. *Id.* at 1066.

has a meritorious claim,[127] and to assist the court in the broad reading of the pro se litigant's pleadings, which was held to a less stringent standard than formal pleadings drafted by lawyers *Haines v. Kerner*.[128]

2. Mosier v. Maynard

Mosier v. Maynard was a civil rights action brought by a prisoner against Oklahoma prison officials alleging violation of his right to free exercise of religion by requiring him to comply with the grooming code. The district court ordered a *Martinez* report.[129] The defendants filed a motion to dismiss, which the district court converted to a summary judgment motion under Federal Rule of Civil Procedure 56. The district court granted summary judgment in favor of defendants and plaintiff appealed,[130] claiming that the district court improperly granted summary judgment because a genuine issue of material fact existed concerning the reasonableness of the prison grooming code. An exemption to the grooming code can be obtained only if the prisoner supplies external documentation concerning the sincerity of his religious belief from reputable, non-family members. Plaintiff supplied no documentation, although he supplied other forms of proof.[131]

The Tenth Circuit, applying de novo review,[132] reversed and remanded the case. In *Hall v. Bellmon*,[133] the court held a *Martinez* report can be treated as an affidavit, but the court cannot accept the factual findings of the prison investigation when the plaintiff presents conflicting evidence.[134] The court, treating plaintiff's complaint as an affidavit, found conflicting evidence was presented.[135] The court allowed plaintiff's complaint to be treated as an affidavit after finding the complaint was based on personal knowledge and sworn under penalty of perjury and thus met the procedure requirements of Rule 56.[136] The court ruled, in the face of this conflicting evidence, summary judgment was not proper because the factual statements attributable to counsel contained in defendant's brief do not constitute summary judgment evidence. Therefore, the defendants had no support either by affadavit or in their brief upon which the district court could rely in granting summary judgment.[137]

3. McKinney v. State of Oklahoma Department of Human Services

The plaintiff brought a pro se section § 1983 civil rights complaint

127. *Hall*, 935 F.2d at 1112.
128. 404 U.S. 519 (1972).
129. *Mosier*, 937 F.2d at 1522. *See* Martinez v. Aaron, 570 F.2d 317 (10th Cir. 1978).
130. *Mosier*, 937 F.2d at 1522.
131. *Id.* at 1522-23.
132. *See* FED. R. CIV. P. 56(c) and (e).
133. 935 F.2d 1106 (10th Cir. 1991).
134. *Id.* at 1111-12.
135. *Mosier*, 937 F.2d at 1524.
136. *Id.*
137. *Id.* at 1525.

alleging various violations arising out of his felony conviction and a juvenile proceeding involving his minor children.[138] The district court held the Eleventh Amendment barred the plaintiff from proceeding against the Oklahoma Department of Human Services, found his allegations against the other defendants "frivolous, improper, and totally devoid of merit"[139] and dismissed the action pursuant to 28 U.S.C § 1915(d).[140]

The circuit upheld the dismissal. In doing so, the Tenth Circuit announced a new rule concerning the propriety of *sua sponte* dismissals under Federal Rule of Civil Procedure 12(b)(6).[141] The Supreme Court in *Neitzke v. Williams*[142] discussed the dismissal power of a judge under section 1915(d) but expressly declined to rule on the propriety of *sua sponte* dismissals under Rule 12(b)(6). The Tenth Circuit adopted the holding of the District of Columbia Circuit in *Baker v. Director, United States Parole Comm.*,[143] that "a trial court may dismiss a claim *sua sponte* without notice where the claimant cannot possibly win relief."[144] Typically, a plaintiff is allowed notice and an opportunity to amend before the court acts on a motion to dismiss for failure to state a claim.[145] However, following the District of Columbia Circuit's reasoning, the Tenth Circuit announced a *sua sponte* dismissal under Rule 12(b)(6) is not reversible error when it is "patently obvious" the plaintiff could not prevail on the facts alleged and allowing him an opportunity to amend his complaint would be futile.[146]

4. Long v. Shillinger

A state prisoner in Wyoming brought a pro se action against the prison warden under section 1983[147] alleging civil rights violations consisting of denial of due process afforded prisoners under Wyoming's extradition act.[148] The district court ordered the defendant warden to submit an affidavit describing his version of the events leading to the violations alleged in the complaint.[149] After the defendant filed the affidavit, the court ordered the plaintiff to submit a more definite statement of damages and documentation thereof. Defendant then filed a motion for summary judgment based on Eleventh Amendment immunity and qualified personal immunity.[150]

138. McKinney v. State of Okla. Dept. of Human Serv., 925 F.2d 363, 364 (10th Cir. 1991).
139. *Id.* at 364.
140. 28 U.S.C. § 1915(d) (1988).
141. *McKinney*, 925 F.2d at 364 (the underlying case was not dismissed under FED. R. CIV. P. 12(b)(6), but under 28 U.S.C. 1915(d)).
142. 490 U.S. 319 (1989).
143. 916 F.2d 725 (D.C. Cir. 1990).
144. *Id.* at 726 (quoting Omar v. Sea-Land Serv., 813 F.2d 986, 991 (9th Cir. 1987)).
145. *McKinney*, 925 F.2d at 365.
146. *Id.*
147. 42 U.S.C. § 1983 (1988).
148. WYO. STAT. ANN. §§ 7-3-201 to 227 (1987).
149. *See* Martinez v. Aaron, 570 F.2d 317 (10th Cir. 1978).
150. Long v. Shillinger, 927 F.2d 525, 526 (10th Cir. 1991).

The district denied defendant's motion for summary judgment, entered judgment against the defendant in his official capacity and awarded nominal damages of one dollar. Plaintiff filed a motion to alter or amend the judgment pursuant to Federal Rule of Civil Procedure 59, which the district court denied.[151]

The plaintiff appealed, arguing the district court abused its discretion by refusing to appoint counsel. The Tenth Circuit affirmed the district's decision. Following *Maclin v. Freake*,[152] the circuit held the district has wide discretion to appoint counsel for indigents under 28 U.S.C. § 1915(d) and decisions denying counsel will not be overturned unless so unfair they impinge on due process rights.[153]

5. Williams v. Meese

The plaintiff filed a civil rights action alleging discrimination in assigning prison jobs, deprivation of personal property and retaliation for filing grievances. After most of the defendants answered the complaint, Williams filed a motion seeking the appointment of counsel pursuant to section 1915(d).[154] The district court did not specifically rule on the motion to appoint counsel but instead dismissed the entire action for failure to state a claim for relief.[155]

The Tenth Circuit remanded the case, having found that Williams stated two valid claims for relief. Further, the circuit ordered the district court to consider the motion to appoint counsel "in light of the factors set forth in *Maclin*."[156]

C. *Conclusion*

The Tenth Circuit Court of Appeals has made it increasingly easy for district courts to dismiss a lawsuit brought by an inmate. During the survey period, the court continued that trend. The use of the *Martinez* report was expanded into a tool for prison officials that can be used either as a summary judgment affidavit or as part of the pleadings when a Rule 12(b)(6) dismissal is appropriate. The utility of the *Martinez* report is tempered only by rules that prevent its use when an inmate can present conflicting evidence. Further, procedural rules that differentiate section 1915(d) dismissals, Rule 12(b)(6) dismissals and summary judgement from one another are being eroded, making it easier for a district court to dispose of an inmate's claim at the pleadings stage. An attorney could assist an inmate to avoid a dismissal or an adverse judgment at an

151. *Id.*
152. 650 F.2d 885 (7th Cir. 1981).
153. *Id.* at 886.
154. 28 U.S.C. § 1915(d) (1988).
155. Williams v. Meese, 926 F.2d 994, 996 (10th Cir. 1991).
156. *Id.* at 996-97. *See* Maclin v. Freake, 650 F.2d 885 (7th Cir. 1981).

early stage. However, under the current Tenth Circuit standards a district court will rarely be compelled to appoint one.

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