

Excise Tax--Power of State to Tax Income from Copyrights (Educational Films Corporation of America v. Hamilton Ward, Attorney-General of New York, et al., 41 F.2d 395 (S.D.N.Y. 1930))

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ration to be targeted as a defendant. This trend has a threatening, but somewhat necessary, effect on the attorney and client as individuals, as well as on the attorney-client privilege and relationship.

Colleen Graham

RULE 11 SANCTIONS: THE SUPREME COURT GIVES RULE 11 A STRONGER BITE AND A LONGER LEASH

In its original form, Rule 11 of the Federal Rules of Civil Procedure established that an attorney's signature on a pleading constituted a certification that to the best of the attorney's "knowledge, information and belief there is good ground to support it, and that it is not interposed for delay."¹ The rule was promulgated to

¹ FED. R. CIV. P. 11, 28 U.S.C.A. R. 11 (1938). The following text illustrates the additions and deletions of the 1983 amendment (italics show additions, brackets 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 wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.] *If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.*

Proposed Amendment FED. R. CIV. P. 11, quoted at 97 F.R.D. 196-97 (1983).

deter improper litigation practices by imposing ethical obligations on attorneys.³ Under Rule 11 attorneys were held to the standard of subjective good faith.³ When the rule was contravened, discretionary imposition of sanctions by the court were permitted.⁴ However, Rule 11 sanctions were rarely imposed.⁵

Rule 11 was amended in 1983 in an effort to overcome judicial reluctance to impose sanctions and to enhance the certification obligations of attorneys.⁶ The amended rule replaced the subjec-

³ See Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 190 (1986). "Promulgated to curb tendencies toward untruthfulness in pressing a client's suit, the effect of the rule was to place a moral obligation on attorneys to satisfy themselves that good grounds existed for the action or defense." *Id.* See also Carter, *Amended Rule 11 of the Federal Rules of Civil Procedure: How Go The Best Laid Plans?: The History and Purposes of Rule 11*, 54 *FORDHAM L. REV.* 4, (1985) (intent of original rule was to deter frivolous pleadings). Cf. Browne, *The Significance of the Signature: A Comment on the Obligations Imposed by Civil Rule 11*, 30 *CLEV. ST. L. REV.* 385, 386 (1981) (Ohio Civil Rule 11 which parallels Federal Rule 11 "imposes grave moral and ethical obligations upon attorneys.").

⁴ *Eg.*, *Badillo v. Central Steel & Wire Co.*, 717 F.2d 1160, 1166-67 (7th Cir. 1983), *superseded by* FED. R. CIV. P. 11 (1983) (Rule 11 required showing of subjective bad faith required to trigger "disciplinary action"); *Nemeroff v. Abelson*, 620 F.2d 339, 348-51 (2d Cir. 1980) (subjective bad faith standard was applied to determine whether Rule was violated).

⁵ FED. R. CIV. P. 11, 28 U.S.C. R. 11 (1988). Former Rule 11 provided that "[f]or a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action." *Id.* (emphasis added). See Vairo, *supra* note 2, at 191 (thorough discussion of differing standards for old and amended Rule 11); *supra* note 1 (text of Rule 11 prior to amendment of 1983). See generally Note, *The Dynamics of Rule 11: Preventing Frivolous Litigation By Demanding Professional Responsibility*, 61 *N.Y.U. L. REV.* 300, 313-15 (1986) (discussing flaws of former Rule 11).

⁶ See Vairo, *supra* note 2, at 191 (Rule 11 largely ignored); Miller & Culp, *Federal Practice: Litigation Costs, Delays Prompted the New Rule of Civil Procedure*, *Nat'l L. J.*, Nov. 28, 1983, at 24, col. 3 (provisions of Rule were "not read enough, not demanding enough and not honored enough"); Risinger, *Honesty in Pleadings and its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 *MINN. L. REV.* 1, 5 (1976) (prior to 1983, only handful of reported Rule 11 decisions); Schwarzer, *Sanctions under the New Federal Rule 11 - A Closer Look*, 104 *F.R.D.* 181, 183 (Rule 11 rarely invoked); 5A C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE: CIVIL* § 1331 n.9 (2d ed.1990) (Rule 11 rarely utilized before 1983). Cf. *Brown v. Cameron-Boston Co.*, 30 *Fed. R. Serv.* 2d 1181, 1189-91 (E.D. Va. 1980), *rev'd on other grounds*, 652 *F.2d* 375 (4th Cir. 1981) (court refused to dismiss what it believed to be groundless claim, pursuant to Rule 11, because it was unable to definitely determine if pleadings were "sham and false and devoid of factual basis").

Original Rule 11 was not effective in deterring abuse. See Joseph, *The Trouble with Rule 11: Uncertain Standards and Mandatory Sanctions*, *A.B.A. J.*, Aug. 1, 1987, at 87 ("the 'safe harbor' exception for subjective good faith swallowed the rule").

Former Rule 11 was limited in its application. It was applicable only to pleadings, it required a showing of bad faith and it provided for only two types of sanctions. See generally Carter, *supra* note 2 (discussion of history, limitations and use of former Rule 11); Risinger, *Striking Problems*, *supra* (same).

⁷ FED. R. CIV. P. 11 advisory committee note, *reprinted in* 97 *F.R.D.* 165, 198 (1983)

tive standard with an objective one of "reasonableness under the circumstances."⁷ Amended Rule 11 mandates that violations be punished, although courts have discretion as to who should be sanctioned, and whether monetary or other sanctions should be imposed.⁸ In addition, the amended rule authorizes the award of

(referring to expanded nature of attorney's certification obligation). The Chairman of the Advisory Committee on Civil Rules stated that the amendment of Rule 11 was "designed to minimize abuse in the signing of pleadings, motions and other papers through a more precise definition of the standard to be met by the signing party or attorney and a requirement that sanctions be imposed for violations of these standards." (March 9 letter to Judge Edward T. Gignoux, Chairman, and Members of the Standing Committee on Rules of Practice and Procedure). *Id.* at 190. See *Securities Indus. Ass'n v. Clarke*, 898 F.2d 318, 322 (2d Cir. 1990) ("In framing Rule 11 Congress intended to provide a prophylactic against abuse of the adversary system by attorneys."). See generally Vairo, *Analysis of August 1, 1983 Amendment to the Federal Rule of Civil Procedure*, ALI-ABA, 1 Civil Practice and Effective Litigation Techniques in Federal and State Courts 59 (Aug 1985 ed.) (amendment to Rule proposed to deter submission of groundless or frivolous motions); Carter, *supra* note 2, at 4 (same); Subrin, *The New Era in American Civil Procedure*, 67 A.B.A. J. 1648 (1981) (same).

⁷ FED R. CIV. P. 11 advisory committee note, reprinted in 97 F.R.D. 165, 198 (1983). "The standard is one of *reasonableness under the circumstances*." *Id.* (emphasis added). See J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE §11.02 [3] (1990) (principal change in standard is requirement of "reasonable inquiry"); Note, *Insuring Rule 11 Sanctions*, 88 MICH. L. REV. 344, 348 (1989). Amended Rule 11 dictates that the signing attorney must: 1) make "reasonable inquiry" into the facts 2) undertake "reasonable inquiry" into the law 3) must not file papers with the court for any improper purpose. *Id.* See generally *Thomas v. Capital Social Servs. Inc.*, 836 F.2d 866, 873-74 (5th Cir. 1988) (*en banc*) (general requirements of Rule 11); *Szabo Food Serv. Inc. v. Canteen Corp.*, 823 F.2d 1073, 1080 (7th Cir.1987) (same), *cert. dismissed*, 485 U.S. 1101 (1988); *Davis v. Veslan Enters.*, 765 F.2d 494, 497-98 n.4 (5th Cir. 1985) (standard under amended Rule 11 is objective one); *Indianapolis Colts v. Mayor and City Council of Baltimore*, 775 F.2d 177, 181 (7th Cir. 1985) (same).

⁸ See *Cooter & Gell v. Hartmarx Corp.*, 110 S. Ct. 2447 (1990).

Determining whether an attorney has violated Rule 11 involves a consideration of three types of issues. The court must consider factual questions regarding the nature of the attorney's prefiling inquiry and the factual basis of the pleading or other paper. Legal issues are raised in considering whether a pleading is 'warranted by existing law or a good faith argument' for changing the law and whether the attorney's conduct violated Rule 11. Finally, the district court must exercise its discretion to tailor an appropriate sanction.

Id. at 2457; *supra* note 1 (text of amended Rule 11). See also *Insurance Benefit Adm'rs., Inc. v. Martin*, 871 F.2d 1354, 1359 (7th Cir. 1989) (district court may impose wide range of sanctions); *Unioil Inc. v. E.F. Hutton & Co.*, 809 F.2d 548, 559 (9th Cir. 1986) (plain meaning of Rule 11 clearly indicates sanctions are mandatory), *cert. denied*, 484 U.S. 822 (1987); *Albright v. Upjohn Co.*, 788 F.2d 1217, 1222 (6th Cir. 1986) (same); *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1174 (D.C. Cir. 1985) (same); Levin & Sobel, *Achieving Balance in the Developing Law of Sanctions*, 36 CATH. U.L. REV. 587, 589 (1987) (amended Rule 11 sanctions are mandatory and may be imposed upon courts' initiative); Note, *supra* note 7, at 378 (noting that in certain cases appropriate sanctions may be nonmonetary, for example, "dismissing a pleading that violates the rule, reprimanding an attorney in a published opinion, referring the attorney to a disciplinary body, or barring the attorney from appearing in court"); Vairo, *supra* note 2, at 193 (Rule 11 provides for mandatory sanc-

expenses, including the award of "a reasonable attorney's fee."⁹ Commentators disagree as to whether the combined effects of judicial discretion and the objective standard of "reasonableness under the circumstances" result in what amounts to a subjective standard.¹⁰

Advocates of amended Rule 11 contend that it is necessary to control widespread litigation abuse by attorneys, an important consideration in the face of an overburdened federal court system.¹¹ Critics of the rule focus on the potential dangers arising

tions). *But see* Schwarzer, *supra* note 5, at 200. "It is not likely that courts will consider themselves bound by the rule's mandatory language to impose sanctions." *Id. Cf.* Burbank, *Sanctions in Proposed Amendments to the Federal Rules of Civil Procedure: Some Questions About Power*, 11 HOFSTRA L. REV. 997, 1009 (1983) (questioning authority from which power to impose mandatory sanctions arises); Joseph, *Redrafting Rule 11*, Nat'l L. J., Oct. 1, 1990, at 14, col. 1 (suggesting mandatory sanctions may interfere with parties' settlement plans).

⁹ FED. R. CIV. P. 11 (1983). See FED. R. CIV. P. 11 advisory committee note, *reprinted in* 97 F.R.D. 165, 168 (1983) (courts may "tailor sanctions to the particular facts of the case"). See also Ahern v. Central Pac. Freight Lines, 846 F.2d 47, 50 (9th Cir. 1988) (district court was correct in assessing attorneys fees); Smith v. Egger, 108 F.R.D. 44, 45 (E.D. Ca. 1985) (imposition of attorney's fees warranted under Federal Rule 11); Note, *Applying Rule 11 to Rid Courts of Frivolous Litigation Without Chilling the Bar's Creativity*, 76 KY. L.J. 891, 905-06 (1987-88). The court may sanction the attorney, the client or both. *Id.* "[T]he court retains discretion to determine the appropriate sanctions" *Id.* See generally Levin & Sobel, *supra* note 8, at 597-99 (application of sanctions under Rule 11).

¹⁰ See *infra* note 31 (discussing subjective application of amended Rule 11). Compare Oliveri v. Thompson, 803 F.2d 1265, 1271 (2d Cir. 1986) (standards for imposing sanctions "have not always been either clear or consistently applied"), *cert. denied*, 107 S. Ct. 1373 (1987) and Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013, 1015 (1988) ("In interpreting and applying Rule 11, the courts have become a veritable Tower of Babel") and Joseph, *The Trouble with Rule 11: Uncertain Standards and Mandatory Sanctions*, 73 A.B.A. J., Aug. 1, 1987, at 87, 89 (practicing law under Rule 11 described as "negotiating a minefield") and Mandelbaum, *Amended Rule 11: Despite Wide Application Little Consensus Observed*, 3 INSIDE LITIGATION (P.H.) 1, 18 (July 1989) (practicing law under Rule 11 described as "playing a game of Russian roulette") with Greenberg v. Hilton Int'l Co., 870 F.2d 926, 934 (2d Cir. 1989) (party seeking sanctions need not show bad faith, rather test is "objective standard, focusing on what a reasonably competent attorney would believe"). Certain general types of cases are more likely to result in sanction awards. See Cherin, *The Actual Operation of Amended Rule 11*, 54 FORDHAM L. REV. 13, 18-19 (1985). Sanctions will likely be imposed "where a relatively powerful party will use its economic leverage to oppress an economically disadvantaged opponent." *Id.* "[S]anctions are often awarded in consideration of an attorney's experience - either in terms of the number of years admitted to practice or the degree of specialization and expertise he presumably has - as being inconsistent with the type of pleading offered." *Id.* [S]anctions are often imposed when "a party has persisted in bringing repeated harassing lawsuits against the same target." *Id.*

¹¹ See Johnson & Cassidy, *Frivolous Lawsuits and Defensive Responses to Them - What Relief is Available?*, 36 ALA. L. REV. 927, 927 n.1 (1985) (federal courts inundated with unprecedented number of lawsuits in past decade); Nelken, *Sanctions Under Amended Federal Rule 11 - Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313, (1986) (pretrial stage of litigation characterized by "spiraling costs, delay and

from Rule 11 decisions. Among these are the ensuing satellite litigation,¹² the rule's potential misuse as a fee-shifting tool,¹³ and its potential "chilling effect" on advocacy,¹⁴ as well as its encroach-

abuse"). See, e.g., J. KAKALIK & A. ROBYN, COSTS OF THE CIVIL JUSTICE SYSTEM: COURT EXPENDITURES FOR PROCESSING TORT CASES 49 (Rand Institute for Civil Justice 1982) (single hour spent by federal judge in tort case costs government approximately \$600); Rosenberg & King, *Curbing Discovery Abuse in Civil Litigation: Enough is Enough*, 1981 B.Y.U. L. REV. 579 (1981) (increasing costs of federal litigation system). Cf. Schwarzer, *supra* note 5, at 204 (Rule 11 "part of an integrated system created by the federal rules for the just, speedy and inexpensive determination of actions"); S. Kassin, *An Empirical Study of Rule 11 Sanctions* 29 (Federal Judicial Center 1985) (Federal Judicial Center study finds several purposes to be served by Rule: "to penalize the violator, to compensate the offended party, and to deter others from engaging in similarly abusive conduct").

¹² See A. Miller, Remarks at Annual Judicial Conference at the Second Judicial Circuit of the United States (Sept. 30, 1983), reprinted in 101 F.R.D. 161, 200 (1984) (potential for sideshow series of hearings and appeals resulting from Rule 11 sanctions); Levin & Sobel, *supra* note 8, at 606 ("Sanctions for discovery abuse . . . could in theory give rise to the need for several rounds of discovery to challenge the need for sanctions, to dispute the selected sanctions, and to mitigate the severity of proposed sanctions."); Schwarzer, *supra* note 10, at 1017-18 (excessive amount of litigation "spawned" by Rule 11 due to its "inherent unpredictability and the readiness of lawyers to resort to any device available to exert pressure on their opponents"). The threat of satellite litigation was apparent to the drafters of the amended rule. See Fed. R. Civ. P. 11 advisory committee notes, reprinted in 97 F.R.D. 165, 201 (1983). They sought to ensure that "efficiencies achieved through more effective operation of the pleading regimen will not be offset by the cost of satellite litigation . . ." *Id.* The Supreme Court recognized the potential for ensuing satellite litigation subsequent to the imposition of sanctions. See *Cooter & Gell v. Hartmarx Group*, 110 S. Ct. 2447, 2462 (1990). The Court noted that allowing sanctions in the context of appeals may result in encouraging satellite litigation. *Id.*

¹³ See *Hays v. Sony Corp. of Am.*, 847 F.2d 412, 419 (7th Cir. 1988) (Rule 11 described as "fee-shifting statute"); Levinson, *Frivolous Cases: Do Lawyers Really Know Anything At All?*, 24 OSGOODE HALL L.J. 353, 373 (1986) ("Rule 11 in form requires sanctions such as fee shifting . . ."). But see *White v. General Motors*, 908 F.2d 675 (10th Cir. 1990) (sanctions may include attorney's fees, but there is no "entitlement to full compensation"). But cf. Note, *supra* note 4, at 315 ("Fee-shifting, especially when directed at attorneys personally, provides an economic control against frivolity that is otherwise lacking in the American system.").

¹⁴ See *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 254 (2d Cir. 1985) (court does "not intend to stifle the enthusiasm or chill the creativity that is the very lifeblood of the law"), *cert. denied*, 108 S. Ct. 269 (1987); *Erie Conduit Corp. v. Metropolitan Asphalt & Paving Ass'n*, 106 F.R.D. 451, 459 (E.D.N.Y. 1985) (courts particularly concerned with "chilling effect on potentially meritorious actions" that sanctions may have); N.Y. Times, Oct. 2, 1986, at 30-31 (Rule may be deterring creative and novel theories; effect not intended by drafters). Cf. S. Medina, M. Henifin & T. Cone, A Preliminary Analysis of Reported Decisions Applying the 1983 Amendments for Rules 11, 16, 26 of the Federal Rules of Civil Procedure, Aug. 28, 1984, at 16 (available at Columbia Law School Library) (highest number of sanction motions were brought in civil rights cases); Comment, *Sanctions Unwarranted By Existing Law*, 52 BROOKLYN L. REV. 609, 640-41 (1986) (our system of common-law operates according to stare decisis, but occasionally decision can completely reverse existing precedent, so existing law is never fixed). See generally Note, *supra* note 9, at 891 (discussing Rule 11's potential "chilling effects" on innovative and enthusiastic advocacy).

ment on attorney-client relationships.¹⁵ This survey will discuss two recent decisions in which the United States Supreme Court addressed Rule 11 for the first time. It is suggested that these decisions have done little to resolve the areas of conflict surrounding Rule 11 and have instead created additional areas of dispute.

I. COOTER & GELL V. HARTMARX CORP.

In *Cooter & Gell v. Hartmarx Corp.*,¹⁶ the Supreme Court addressed three issues involving Rule 11.¹⁷ First, the majority affirmed a sanction imposed on an attorney subsequent to a voluntary dismissal of an action.¹⁸ Justice O'Connor, writing for the Court, concluded that since a Rule 11 sanction does not involve a decision on the merits, it is an issue "collateral" to the main cause of action.¹⁹ Therefore, Rule 11 sanctions may be addressed after the suit has been dismissed.²⁰ The Court reasoned that if an attorney signs pleadings, motions or other documents in violation of the rule, courts must have the authority to impose sanctions notwithstanding the dismissal of the underlying action.²¹ The Court then addressed the standard of appellate review applicable to a district court's imposition of Rule 11 sanctions.²² Inconsistent standards have been applied by the lower federal courts.²³ The

¹⁵ See Vairo, *supra* note 2, at 196. "The encroachment into privileged areas that may result from Rule 11 proceedings may weaken the attorney-client relationship." *Id.*; Swindal, *Frivolity in Court: New Rule 11*, 13 LITIGATION 3, 4 (Summer 1987). The court, in determining fault for the imposition of sanctions, must inquire into the facts. *Id.* This can put the interests of the lawyer in conflict with the interests of the client. *Id.* This situation can "jeopardize the attorney-client privilege." *Id.* It may result in the client "having to retain independent counsel to represent himself against his attorney in satellite litigation." *Id.* See also Joseph, *Redrafting Rule 11*, Nat'l L. J., Oct. 1, 1990, at 13, 14 ("There may be times when an attorney whose conduct is attacked will feel constrained, nevertheless, to reveal client confidences in self-defense.").

¹⁶ 110 S. Ct. 2447 (1990).

¹⁷ *Id.* at 2447, 2449-51.

¹⁸ *Id.* at 2454-57.

¹⁹ *Id.* at 2456.

²⁰ *Id.* at 2456-57. Justice O'Connor reasoned that allowing litigators to remove the threat of Rule 11 sanctions by voluntarily dismissing the action would result in the loss of "all incentive to . . . investigate more carefully before serving and filing papers." *Id.* at 2457 (quoting amendments to FED. R. CIV. P. 11, reprinted in 97 F.R.D. 165, 191-92 (1983) (letter from Judge Walter Mansfield, Chairman, Advisory Committee on Civil Rules)).

²¹ *Cooter & Gell*, 110 S. Ct. at 2455.

²² *Id.* at 2457-61.

²³ Compare International Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of

Court imposed an abuse-of-discretion standard of review upon all aspects of a Rule 11 proceeding,²⁴ applying this deferential standard to factual questions and legal issues as well as to the district court's exercise of discretion in tailoring an "appropriate sanction."²⁵ The Court recognized the difficulty in distinguishing between legal and factual issues, particularly with regard to Rule 11, as the legal standard is fact dependent.²⁶ The Court also emphasized that the district courts were better situated to determine a signer's credibility, thus supporting the deferential standard of review.²⁷ The majority noted that a judge considering a sanction motion must examine all the circumstances of the case and conclude whether an attorney's pre-filing inquiry was reasonable.²⁸ The Court compared this level of inquiry to that of a determination in negligence.²⁹

It is suggested that the combination of a discretionary level of appellate court review with the applicable standard of "reasonableness under the circumstances" broadens the reach of Rule 11 sanctions. It is further suggested that this expansive reading permits the imposition of sanctions for conduct which does not rise to the level of abusiveness contemplated by the creators of the Rule. Although the Court has established a uniform standard of review,

Am. (Airline Div.) v. Association of Flight Attendants, 864 F.2d 173, 176 (D.C. Cir. 1988) (granting "wide discretion" to determine factual basis and existence of improper purpose and applying *de novo* standard for questions of law) and *Zaldivar v. Los Angeles*, 780 F.2d 823, 828 (9th Cir. 1986) (reviewed findings of facts under clearly erroneous standard, Rule 11 violations under *de novo* standard, and appropriateness of sanction under discretionary standard) and *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1174-75 (D.C. Cir. 1985) (same) with *Mars Steel Corp. v. Continental Bank N.A.*, 880 F.2d 928, 933 (7th Cir. 1989) (applied deferential standard of review) and *Kale v. Combined Ins. Co. of Am.*, 861 F.2d 746, 757-58 (1st Cir.) (same) and *Teamsters Local Union No. 430 v. Cement Express, Inc.*, 841 F.2d 66, 68 (3d Cir.) (same), *cert denied*, 488 U.S. 848 (1988).

²⁴ *Cooter & Gell*, 110 S. Ct. at 2461.

²⁵ *Id.* at 2457.

²⁶ *Id.* at 2458-59. For example, in determining "whether an attorney's pre-filing inquiry was reasonable," a court must consider "the time frame the attorney had to prepare a complaint." *Id.* at 2459. In addition, the Court noted that the district court is more familiar with the "local bar's litigation practices" and would therefore be in a better position to know if sanctions were warranted. *Id.* Such deference "enhance[s] these courts' ability to control the litigants before them." *Id.* See *Mars Steel*, 880 F.2d at 933 ("[d]istrict judges have the best information about the patterns of their cases . . .").

²⁷ *Cooter & Gell*, 110 S. Ct. at 2459-60 (citing *Pierce v. Underwood*, 487 U.S. 552 (1988)).

²⁸ *Id.* at 2457.

²⁹ *Id.*

it has not succeeded in removing the subjective element inherent in such review.³⁰ The subjective good faith standard of old Rule 11 has been replaced by the subjective view of each individual judge.³¹ It is submitted that under this standard, the lack of uniformity will result in inadequate notice to attorneys on the issue of sanctionable conduct.³² Attorneys may be sanctioned in one court

³⁰ See Swindal, *supra* note 15, at 4. "Under the guise of objectivity, one subjective standard has been substituted for another." *Id.* "Instead of the subjective good faith of the lawyer, the governing standard now is the subjective view of hundreds of judges about how a reasonable lawyer will act." *Id.* Cf. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982) (arguing that objective interpretation of legal norms is possible but only within "interpretive community"); Vairo, *supra* note 2, at 194 (both language of amended rule and Advisory Committee Notes contain highly subjective elements). *But see* Brown v. Federation of State Medical Bds., 830 F.2d 1429, 1435 (7th Cir. 1987) ("standard for imposing sanctions under Rule 11 is an objective determination of whether a sanctioned party's conduct was reasonable under the circumstances"); Stevens v. Lawyers Mut. Liab. Ins. Co., 789 F.2d 1056, 1060 (4th Cir. 1986) (new standard is objective test of reasonableness); Albright v. Upjohn Co., 788 F.2d 1217, 1221 (6th Cir. 1986) (same); *In re* TCI Ltd., 769 F.2d 441, 445 (7th Cir. 1985) (same).

³¹ See Schwarzer, *supra* note 10 at 1016. "[W]hat a judge will find to be objectively unreasonable is very much a matter of that judge's subjective determination. Judges differ in what they expect of lawyers and in the way they accommodate the values in tension in the adversary system." *Id.* See also Minkoff, *Reevaluating Rule 11*, N.Y.L.J., Oct. 23, 1990, at 6, col 2 (even within same case courts differ as to what constitutes sanctionable conduct). Cf. W. PROSSER, D. DOBBS, R. KEETON & D. OWEN, PROSSER & KEETON ON THE LAW OF TORTS §32, at 173-74 (5th ed. 1984) (impossible to prefix definite rules for all conceivable conduct). Caselaw illustrates the many factors considered by judges toward a determination of "objective good faith." See *In re* Yagman, 796 F.2d 1165, 1183 (9th Cir.) (reversing district court's imposition of sanctions which threatened balance between punishing improper behavior and discouraging vigorous advocacy), *cert. denied*, 484 U.S. 963 (1986); Huettig & Schromm, Inc. v. Landscape Contractors Council, 582 F. Supp. 1519, 1522 (N.D. Cal. 1984) (court willing to hold specialized lawyers to higher standard of conduct than that of average qualified attorney), *aff'd*, 790 F.2d 1421 (9th Cir. 1986); Mossman v. Roadway Express, 789 F.2d 804, 806 (9th Cir. 1986) (affirming imposition of sanctions but remanding to reconsider amount of award); Eavenson, Auchmuty & Greenwald v. Holtzman, 775 F.2d 535, 544 (3d Cir. 1985) (appellate court found that since attorney's conduct was subject to more than one reasonable interpretation, trial court's imposition of sanctions was improper and reversed).

³² Carter, *supra* note 2, at 12 (arguing that standard of Rule 11 is *not* more "focused" than it was and that old good faith standard remains); Cavanagh, *Frivolous Litigation: Developing Standards Under Amended Rule 11 of the Federal Rules of Civil Procedure*, 14 HOFSTRA L. REV. 499, 514 (1986) ("new criteria for attorney conduct are somewhat amorphous"); Elson & Rothschild, *Rule 11: Objectivity and Competence*, 123 F.R.D. 361, 363 (1988) ("[S]uch 'objective' requirements as that there be 'reasonable inquiry' and that the pleading be factually 'well grounded' and legally 'warranted' are hardly precise; each calls for the exercise of individual judgment by the parties and by the court."); Note, *supra* note 7, at 350 (discussing factors that aid in determination of "reasonableness" and how "it is not surprising that some judges find a particular type of behavior sanctionable while others find it permissible"). Cf. Aminoil, Inc. v. United States, 646 F. Supp. 294, 298 (C.D. Cal. 1986) ("[w]hat may be considered reasonable by one court may be found unreasonable by another"). See

for conduct permitted in another.³³ Additionally, attorneys may find themselves sanctioned months, even years after the voluntary dismissal of an action.³⁴

Lastly, the Court reversed the lower court's decision that the defendants were entitled to reimbursement for attorney's fees incurred in defending a Rule 11 award on appeal.³⁵ The majority reasoned that neither the language nor the purpose of the rule suggests application of the sanctions outside the scope of district court proceedings.³⁶ The Court noted that such an interpretation "would be likely to chill all but the bravest litigants from taking an appeal."³⁷ It is submitted that this "chilling effect" is not lim-

also supra notes 31-32 (discussion of inconsistency of standard applied by courts). *But see* Note, *Has a "Kafkaesque Dream" Come True, Federal Rule of Civil Procedure 11: Time For Another Amendment?*, 67 B.U.L. REV. 1019, 1026 (1987) [hereinafter Note, *Kafkaesque Dream*]. "In most of the cases in which Rule 11 violations are found, a reasonable attorney could infer that the challenged litigation was frivolous." *Id.*

³³ *See, e.g.,* *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1980) ("Like other sanctions, attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record."); *In re Yagman*, 796 F.2d 1165, 1183-84 (9th Cir.) (when "circumstances lead the court to strongly suspect that a filed paper may not be well-grounded in fact or law, the court should at a minimum provide notice to the certifying attorney that Rule 11 sanctions will be assessed at the end of the trial if appropriate") (emphasis in original), *cert. denied*, 484 U.S. 963 (1986). *Cf. Eastway Constr. Corp. v. City of New York*, 821 F.2d 121, 124 (2d Cir. 1986) (Pratt, J., dissenting) ("We should end the misleading practice of justifying what are in reality punitive fines by pretending that they represent attorney's fees."), *cert. denied*, 484 U.S. 918 (1987). Sanctions that are excessive in light of the surrounding circumstances may be construed as a penalty or fine and thus raise due process concerns. Schwarzer, *supra* note 5, at 202. "[C]ourts need to be wary about imposing fines under the rule." *Id.* "The criminal character of the fine brings into play additional due process safeguards." *Id.* *See also* Levin & Sobel, *supra* note 8, at 606 ("[D]ue process is required in order to impose sanctions."); Note, *supra* note 9, at 908 ("[S]evere sanctions . . . must comply with due process requirements . . .").

³⁴ *See, e.g., Cooter & Gell*, 110 S. Ct. at 2447 (district court imposed sanctions more than three years after dismissal of action). *But cf. Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90, 100 (3d Cir. 1988) (all sanction motions must be filed as soon as practicable after discovery of Rule 11 violation, but in no event later than entry of final judgment).

³⁵ *Cooter & Gell*, 110 S. Ct. at 2461. The Court pointed out that a movant under Rule 11 is not entitled to fees other than those incurred at the trial level. *Id.* at 2462. To find otherwise would promote appellate litigation. *Id.* *See* *Orange Prod. Credit v. Frontline Ventures, Ltd.*, 801 F.2d 1581, 1583 (9th Cir. 1986) (court denied claim for attorney's fees incurred in defending appeal of Rule 11 sanctions); *North Am. Watch Corp. v. Princess Ermine Jewels*, 786 F.2d 1447, 1451 (9th Cir. 1986) (same).

³⁶ *Cooter & Gell*, 110 S. Ct. at 2461. Attorney's fees incurred in defense of a baseless suit are a direct result of a Rule 11 violation. *Id.* However, when a plaintiff appeals the imposition of Rule 11 sanctions, the "expenses incurred in defending the award on appeal are directly caused by the district court's sanction and the appeal of that sanction." *Id.*

³⁷ *Id.* at 2462. Courts of appeals have authority under Rule 38 to protect the beneficiaries of Rule 11 sanctions by awarding costs and damages. *Id.* Thus, expanding Rule 11

ited to the context of appeals. Rule 11 sanctions pose a substantial threat to innovative or unpopular causes of action.³⁸ The result is an adverse effect on creative advocacy, a cornerstone of the common law legal system.³⁹

Justice Stevens argued forcefully in dissent that the mere filing of a complaint that is subsequently withdrawn does not impose a sufficient burden on the court, in terms of needless expense and delay, to justify a Rule 11 sanction.⁴⁰ Imposing sanctions in such actions can itself be an abuse of judicial resources since, in effect, it forces the court to continue with the matter long after it has been dismissed.⁴¹ Furthermore, permitting sanctions after voluntary dismissal may discourage the voluntary dismissal of actions in the future, thereby contravening the purpose of judicial efficiency supporting the rule.⁴²

protections to appellants is unnecessary. *Id. Cf. Webster v. Sowders*, 846 F.2d 1032, 1040 (6th Cir. 1988) (sanctions may be imposed under 28 U.S.C. 1912, 1927, FED. R. APP. P. 38); *Jones v. Continental Corp.*, 789 F.2d 1225, 1229 (6th Cir. 1986) (court may award attorney's fees under 28 U.S.C. 1927, 42 U.S.C. 1988 or under courts' "inherent powers").

³⁸ See *Risinger*, *supra* note 5, at 52-58 (concern that Rule 11 is potential threat to novel or unpopular causes of action). See also *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1540-41 (9th Cir. 1986) (overzealous use of Rule 11 sanctions should be avoided to protect integrity of judicial system). *Cf. Robinson v. National Cash Register Co.*, 808 F.2d 1119, 1131 (5th Cir. 1987) (sanctions should not be imposed lightly due to impact on attorney's reputation). See generally *Nelken*, *supra* note 11, at 1340-41 (discussion of potential "chilling" effect of sanctions); *Snyder, The Chill of Rule 11*, 11 LITIGATION 16 (Winter 1985) (same). *But see* S. Medina, M. Henifin & T. Cone, A Preliminary Analysis of Reported Decisions Applying the 1983 Amendment to Rules 11, 16, 26 of the Federal Rules of Civil Procedure, 17 (August 28, 1984) (unpublished paper available in Columbia Law Library) (empirical research indicating courts are sensitive to "chilling" effect).

³⁹ See *Golden Eagle*, 801 F.2d at 1540 (conflict between "[l]awyer's duty zealously to represent his client . . . and lawyer's own interest in avoiding rebuke"); *In re Yagman*, 796 F.2d 1165, 1182 (9th Cir.), *cert. denied*, 484 U.S. 963 (1986) (sanctions not intended to chill attorneys' creativity or enthusiasm). See also B. CARDOZO, *THE GROWTH OF THE LAW* 143 (1948) ("Law must be stable, and yet cannot stand still."); *Snyder*, *supra* note 38, at 55 ("Punishing a lawyer for the legal theory he pleads is a dangerous game . . . [as] it will . . . stifle legitimate innovation, a result that the framers of Rule 11 never intended."); *Weiss, A Practitioner's Commentary on the Actual Use of Amended Rule 11*, 54 *FORDHAM L. REV.* 23, 26 (1986) (Rule 11 sanctions inhibit lawyers' creative and aggressive style, thus shifting evolution of law).

⁴⁰ *Cooter & Gell v. Hartmarx Corp.*, 110 S. Ct. 2447, 2464 (1990) (Stevens, J., dissenting). Justice Stevens reasoned that the court is burdened only to the extent of a "notation . . . on the court's docket sheet." *Id.*

⁴¹ *Id.* See also *Joseph, Redrafting Rule 11*, *Nat'l L.J.* 13, 14 (Oct. 1, 1990) ("If the parties have agreed to dispose of the case, including sanctions issue, that should be the end of the matter.").

⁴² *Cooter & Gell*, 110 S. Ct. at 2464 (Stevens, J., dissenting). See also *Mullenex, Justices Clarified Courts' Role on Sanctions and Attorney Fees*, *Nat'l L.J.*, Sept. 10, 1990, at 25, 27

Justice Stevens also noted the importance of interpreting the mandates of Rule 11 as consistent with Federal Rule of Civil Procedure 41(a).⁴³ Rule 41(a) was intended to permit a party to reconsider its decision to file suit and to withdraw its complaint.⁴⁴ Justice Stevens commented that the majority's emphasis on the textual language of Rule 11 and its reliance on plain meaning contravened the purpose of Rule 41(a) and "created a federal common law of malicious prosecution."⁴⁵ Justice Stevens further posited that the majority's overbroad reading of Rule 11 was unwarranted since the court has other means at its disposal for dealing with unmeritorious pleadings.⁴⁶ Federal courts have the equitable power to award attorney's fees to a successful party whose opponent has acted in bad faith.⁴⁷ Additionally, a court may subject an attorney to contempt or disciplinary proceedings if the attorney's conduct is sufficiently egregious.⁴⁸ Expanding the

(recent holding that trial courts have authority to impose Rule 11 sanctions after voluntary dismissal fairly criticized).

⁴³ *Cooter & Gell*, 110 S. Ct. at 2463 (Stevens, J., dissenting).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 2464 (Stevens, J., dissenting).

⁴⁷ See *NASCO, Inc. v. Calcasieu Television & Radio, Inc.*, 894 F.2d 696 (sanctions were not barred if offending conduct was not within reach of Rule 11 since court can assess sanctions using its inherent powers) *cert. granted*, 59 USLW 3243 (1990); *Roadway Express v. Piper*, 447 U.S. 752, 766-67 (1980) (general rule that litigant cannot recover counsel fees does not apply when opposing party acted in bad faith); *F. D. Rich Co., Inc. v. Industrial Lumber Co.*, 417 U.S. 116, 129 (1974) (fee-shifting triggered by bad faith); *Hall v. Cole*, 412 U.S. 1, 5 (1973) (same); *Oliveri v. Thompson*, 803 F.2d 1265, 1272 (2d Cir. 1986) (same), *cert. denied*, 480 U.S. 918 (1987). Our federal courts follow the "American Rule" where each party must pay its own litigation costs. See *Alyeska Pipeline Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975) (attorneys' fees not ordinarily recoverable); *F. D. Rich*, 417 U.S. at 126 (same) (citing *Fleischman Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717 (1967)); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 391 (1970) (same). Exceptions to this rule exist to deter excessive or groundless litigation. See *Alyeska*, 421 U.S. at 260 (exceptions to "American Rule"); *F. D. Rich*, 417 U.S. at 129 (same).

⁴⁸ See MODEL RULES OF PROFESSIONAL CONDUCT RULE 3.1, comment 2 (1989) (lawyer shall not file suit when it is obvious such action merely serves to harass or maliciously injure another). See generally Note, *Kafkaesque Dream*, *supra* note 32, at 1024-26 (discussing alternative means of limiting litigation abuse); *supra* note 8 (discussing alternative sanctions). Cf. *Porter v. Farmers Supply Serv., Inc.*, 790 F.2d 882, 887 (Fed. Cir. 1986) (appellant and counsel sanctioned pursuant to FED. R. APP. P. 38 and 35 U.S.C. § 285 (1982) for distorting language in case cited on appeal). Another exception to the "American Rule" is contained in 28 U.S.C. § 1927, which provides that an attorney "who so multiplies the proceedings . . . may be" personally liable for excess costs and attorney's fees that were reasonably incurred because of her actions. 28 U.S.C. § 1927 (1988). These sanctions are permissible and not mandatory. See *id.*

bounds of Rule 11, concluded the dissent, would result in an unnecessary waste of judicial resources and an "unwarranted perversion of the Federal Rules."⁴⁹ Commentators criticizing Rule 11 have buttressed their position with similar reasoning.⁵⁰ Several commentators have remarked that courts already had the means to deal with groundless or frivolous claims and that the imposition of mandatory sanctions could potentially impose a burden that clearly outweighs the benefits of Rule 11.⁵¹

II. PAVELIC & LEFLORE V. MARVEL ENTERTAINMENT GROUP

In another recent case, *Pavelic & LeFlore v. Marvel Entertainment Group*,⁵² the Supreme Court held that a sanction imposed on the

⁴⁹ *Cooter & Gell*, 110 S. Ct. 2447, 2464-65 (Stevens, J., dissenting). Justice Stevens refers to the Court's refusal to read Rule 11 in conjunction with Rule 41(a)(1), which permits plaintiff's voluntary withdrawal of a complaint. *Id.* This resulted in the court incorrectly focusing on "filing of baseless complaints, without any attention to whether those complaints will result in the waste of judicial resources." *Id.* at 2463 (Stevens, J., dissenting). Justice Stevens commented that by expanding the perimeters of Rule 11, the Court "creates a federal common law of malicious prosecution inconsistent with the limited mandate of the Rules of the Enabling Act." *Id.* But see FED. R. CIV. P. 11 advisory committee's note. It provides that "[t]he amended rule attempts . . . [to] build upon and expand the equitable doctrine permitting the court to award expenses, including attorneys fees, to a litigant whose opponent acts in bad faith in instituting or conducting litigation." *Id.* (citing *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980)); *Hall v. Cole*, 412 U.S. 1, 5 (1973) (bad faith by opponent justifies award of counsel fees); *Cf. Lepucki v. Van Wormer*, 765 F.2d 86, 87 (7th Cir.) (good sense and integrity of lawyers will safeguard against danger of unmanageable dockets), *cert. denied*, 474 U.S. 827 (1985).

⁵⁰ See *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1540-42 (9th Cir. 1986) (excessive use of Rule 11 increases rather than reduces time and expense). See also *Elliott v. Perez*, 751 F.2d 1472, 1481 (5th Cir. 1985) (noting that federal trial judges must not take on "role of an active manager and director of the whole litigation process"); *Weiss*, *supra* note 39, at 27 ("[m]aking Rule 11 motions is bad, it is evil, and it is going to hurt us all and adversely affect the judicial process"); Note, *Kafkaesque Dream*, *supra* note 32, at 1040 (Rule 11 responsible for wasting court time and increasing delays). *Cf. Coburn Optical Indus., Inc. v. Cilco, Inc.*, 610 F. Supp. 656, 661 (M.D.N.C. 1985) (sanctions imposed for violating Rule 11 based on filing of frivolous Rule 11 motion itself); *supra* note 12 (discussing satellite litigation ensuing from Rule 11 sanctions).

⁵¹ See Bloomenstein, *Developing Standards for the Imposition of Sanctions Under Rule 11 of the Federal Rules of Civil Procedure*, 21 AKRON L. REV. 289, 325 (1988). "[T]he intemperate issuance of Rule 11 motions by the courts could make Rule 11 motions pro forma additions to all actions." *Id.* "In this way, Rule 11 would add to the time and expense of a trial and not reduce the cost in bringing claims to court." *Id.* *Cf. Schwarzer*, *supra* note 10, at 1018 ("Rule 11 has added substantially to volume of motions in district courts and appeals in circuit courts"); Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 HARV. L. REV. 630, 632 (1987) ("[r]eading [Rule 11] too broadly promotes efficiency only at the cost of deterring undeveloped and nonstandard claims").

⁵² 110 S. Ct. 456 (1989).

“person who signed” a pleading, motion or other paper in violation of Rule 11, implicates the individual signer and not the “natural or juridical person on whose behalf the paper was signed.”⁵³ The Court held that Rule 11 imposes an affirmative non-delegable duty on the individual signer.⁵⁴ This responsibility, the Court contended, was not furthered by the imposition of sanctions on the signatory attorney’s law firm.⁵⁵ The Court reasoned that “the psychological effects and economic deterrence” flowing from sanctions on individual attorneys will result in a more certain standard for district courts to follow and for attorneys to rely upon.⁵⁶ The Court grounded its analysis on the text of the rule itself.⁵⁷ The majority reasoned that the reference in the rule to the “person who signed” connoted an individual signer and thus the consequences of such a signature “run as to him.”⁵⁸ The Court rejected arguments based on traditional principles of partnership and agency that support the imposition of liability on a law firm as well as the individual attorney.⁵⁹

It is suggested that in its analysis the Supreme Court ignored

⁵³ *Id.* at 458.

⁵⁴ *Id.* Justice Scalia premised his reasoning on the “plain meaning” of Rule 11. *Id.* (citing *Walker v. Armco Steel Corp.*, 446 U.S. 740, 750 n.9 (1980)). Following this statement, Justice Scalia discussed possible alternative interpretations. *Id.*

⁵⁵ *Id.* at 460. However, Justice Scalia acknowledged that sanctions imposed on the law firm would “better guarantee reimbursement of the innocent party for expenses caused by the Rule 11 violation.” *Id.* The partnership’s susceptibility to sanctions might induce it to increase “internal monitoring.” *Id.* See also E. Rothschild, R. Fenton, S. Swanson, *Rule 11: Stop, Think and Investigate*, 11 LITIGATION 13, 15 (Winter 1985) (“The Advisory Committee Notes suggest that lawyers should not incur sanctions for the mistakes of other lawyers.”). Cf. *Colucci v. New York Times*, 533 F. Supp. 1011 (S.D.N.Y. 1982) (award that imposed extreme hardship on attorney and would have forced him to file for bankruptcy was excessive and unwarranted).

⁵⁶ *Pavelic & LeFlore*, 110 S. Ct. at 460.

⁵⁷ *Id.* at 459-60. The Court noted that the phrase “person who signed” is ambiguous. *Id.* The Court viewed this phrase in the total context of Rule 11 as indicating the individual attorney. *Id.*

⁵⁸ *Id.* at 459 (italics omitted).

⁵⁹ *Id.* The Court noted that Rule 11:

departs from normal common-law assumptions such as that of delegability. The signing attorney cannot leave it to some trusted subordinate, or to one of his partners, to satisfy himself that the filed paper is factually and legally responsible; by signing, he represents not merely the fact that it is so, but also the fact that he personally has applied his own judgment. Where the text establishes a duty that cannot be delegated, one may reasonably expect it to authorize punishment only of the party upon whom the duty is placed.

Id.

the fact that very often the final product filed with the court is a composite of the work of multiple attorneys.⁶⁰ Ignoring this reality, the Court has placed a potentially onerous burden squarely on the shoulders of the individual attorney.⁶¹ Furthermore, it is submitted that the Court's decision will have a disparate impact on the legal community. Monetary sanctions have the potential to bankrupt sole practitioners and smaller law firms, while the large firms have the financial resources to survive such sanctions.⁶² In the lone dissent, Justice Marshall expressed his reluctance to accept the majority's reliance on the "plain meaning" of Rule 11.⁶³ Justice Marshall found the wording of the statute susceptible to other "reasonable interpretation."⁶⁴ Additionally, Justice Marshall posited that the purposes of Rule 11 could be served by the imposition of sanctions both on the individual attorney and the signer's law firm.⁶⁵ The dissent emphasized that the majority's narrow reading of the "person" referred to in the statute could encroach

⁶⁰ Cf. Brief for Respondent, *Pavelic & LeFlore v. Marvel Entertainment Group*, 110 S. Ct. 456 (1989) (No. 89-275) (federal courts have routinely imposed sanctions against law firm on whose behalf lawyer signed paper in violation of Rule 11). But see Schwarzer, *supra* note 5, at 186-88 (discussing reasons why sanctions against law firms may be inappropriate).

⁶¹ *Pavelic & LeFlore*, 110 S. Ct. at 459-60 (discussing attorneys' non-delegable duties). Cf. Brief for Respondent, *supra* note 60 (sanctions on individual attorney allows other culpable attorneys to escape sanctions). But see *White v. General Motors*, 908 F.2d 675 (10th Cir. 1990) (wrongdoer's ability to pay is one of factors considered by court when fashioning sanctions).

⁶² See Sanborn, *Rule 11 Tremors Continue*, Nat'l L.J., July 30, 1990, at 1 (discussing largest Rule 11 sanctions against individual attorney in amount of \$350,000 and potential bankruptcy resulting from such large awards on small/solo practitioner). See generally Galanter, *Why the "Haves" Come Out Ahead: Speculation on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974) (arguing that system favors big corporate law firms - repeat players - over solo practitioners).

⁶³ *Pavelic & LeFlore*, 110 S. Ct. 456, 460 (1989) (Marshall, J., dissenting).

⁶⁴ *Id.* The dissent commented that "in the context of the Federal Rules of Civil Procedure" the word "person" can be reasonably interpreted to encompass more than just "natural person." *Id.* at 461 (Marshall, J., dissenting). Other statutes containing the word "person" have been construed to encompass partnerships, associations, corporations and public and private organizations. *Id.* See also *supra*, note 52 (discussing inconsistencies present in majority's reliance on "plain meaning").

⁶⁵ *Pavelic & LeFlore*, 110 S. Ct. at 461 (Marshall, J., dissenting). "[E]ncouraging individual accountability and firm accountability are not mutually exclusive goals." *Id.* "[I]ndividual accountability may be heightened when an attorney understands that his carelessness or maliciousness may subject both himself and his firm to liability." *Id.* (emphasis deleted). The purpose of Rule 11 will best be served by apportioning the sanctions "between the signing attorney and his law firm, based on [the district court's] assessment of the relative culpability of each." *Id.* at 462 (Marshall, J., dissenting).

on the discretion of the courts in formulating appropriate sanctions.⁶⁶ Justice Marshall concluded that the holding of the majority "ties the hands of a trial judge" by denying her the flexibility essential to fashion appropriate sanctions.⁶⁷

CONCLUSION

The *Cooter & Gell*⁶⁸ and *Pavelic & LeFlore*⁶⁹ decisions have added significantly to the controversy surrounding Rule 11. It is submitted that the Supreme Court's expansive reading of Rule 11 has broadened the reach of sanctions beyond its proper role in discouraging abusive litigation tactics. It is suggested that Rule 11 should be further amended, narrowly tailoring the language of the rule to address only abusive conduct without chilling creative advocacy. It is further suggested that Rule 11 be amended to permit attorneys, with immunity from sanctions, to withdraw legally or factually inadequate pleadings within the mandates of Federal Rule of Civil Procedure 41(a). It is submitted that without further amendment to Rule 11, the ramifications of *Cooter & Gell* and *Pavelic & LeFlore* cast lingering uncertainty on the Rule's benefits, in light of its burden on individual attorneys and the courts.

Monica M. Bartow

⁶⁶ *Id.* "Flexibility is . . . important when a judge decides whether one, some, or all of the many entities before him should be held responsible for improper pleadings, motions or papers." *Id.* "The judge who observes improper behavior and who is intimately familiar with the facts of a case should be allowed to fashion the penalty that most effectively deters future abuse." *Id.* See also FED. R. CIV. P. 11 advisory committee's note, reprinted in 97 F.R.D. 165, 201 (1983). "In many situations the judge's participation in the proceedings provides him with the full knowledge of the relevant facts . . ." *Id.*

⁶⁷ *Pavelic & LeFlore*, 110 S. Ct. at 462 (Marshall, J., dissenting).

⁶⁸ *Cooter & Gell*, 110 S. Ct. 2447 (1990).

⁶⁹ *Pavelic & LeFlore*, 110 S. Ct. 456 (1989).

