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# Standard of Appellate Review of Rule 11 Decisions

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# STANDARD OF APPELLATE REVIEW OF RULE 11 DECISIONS

## INTRODUCTION

Congress amended Rule 11 of the Federal Rules of Civil Procedure ("Rule 11")[1] in 1983 as part of an effort to encourage the use of sanctions to prevent delay and expense caused by inappropriate litigation tactics.[2] Rule 11 litigation has increased significantly since that time.[3] Commentators predicted that the Rule would be applied inconsistently in early cases, but expressed the hope that the courts of appeals would eventually develop coherent standards to guide district courts in its use.[4] Although Rule 11 cases have become common since 1983, district courts still do not apply the Rule uniformly.[5]

Appellate courts are forced to balance several competing policy considerations in order to arrive at an appropriate standard of review for the

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1. Fed. R. Civ. P. 11. Rule 11 provides in relevant part that:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney . . . . A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper . . . . The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

*Id.*

2. *See* Excerpt From the Report of the Judicial Conference Committee on Rules of Practice and Procedure, *reprinted in* 97 F.R.D. 165, 198 (1983). The use of sanctions to deter abuse was a common theme throughout the proposed amendments to Rule 11, Rule 16 and Rule 26. For example, Rule 16(f) now authorizes sanctions for lack of preparedness at scheduling and pre-trial conferences. *See* Fed. R. Civ. P. 16, advisory committee's note, *reprinted in* 97 F.R.D. 165, 213 (1983). Delay and expense caused by improper discovery requests and responses are now expressly sanctionable under Rule 26(g). *See* Fed. R. Civ. P. 26.

3. *See* Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 199 (1988).

4. *See* Vairo, *supra* note 3, at 202; Remarks of Professor Arthur Miller, Judicial Conference—Second Circuit, 101 F.R.D. 161, 198 (1983) [hereinafter *Miller Remarks*].

5. *See* Vairo, *supra*, note 3, at 202; *see also* Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 871 (5th Cir. 1988) (en banc) ("Rule 11 decisions by courts have not always been consistent, producing confusion among the bench and bar, as well as inequitable results."); Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531, 1541 (9th Cir. 1986) (even in fairly routine cases, "there is a good deal of interjudge disagreement over what actions constitute a violation of the rule") (quoting S. Kassin, An Empirical Study of Rule 11 Sanctions xi (Federal Judicial Center 1985)).

Rule 11 decisions of district courts. For example, appellate courts can promote uniformity in district court decisions by engaging in a meticulous, point-by-point examination of the lower court's ruling.[6] Such a review, however, could represent an extravagant use of the resources of appellate courts. The propriety of a time-consuming review of Rule 11 decisions is questionable in view of the Rule's mandate to streamline judicial procedures.

Appellate courts must also realize that the standard of review they choose for Rule 11 cases could influence the outcome of appeals. More scrupulous and detailed examination of Rule 11 decisions would likely uncover more grounds for reversal than would less thorough review.[7]

Finally, appellate courts must balance Rule 11's policy of discouraging and punishing frivolous claims against the benefits to the judicial system of innovative legal theories.[8] Because the district court makes the original determination of whether a strategy represents an innovation or a Rule 11 violation, the appellate court's standard of review affects the amount of control district courts have over the creativity of litigators.

In response to the tensions between these policies, appellate courts have settled on three different standards for reviewing the Rule 11 decisions of district courts. One group of courts employs a three-part standard of review of Rule 11 decisions.[9] These courts review disputed factual determinations by applying the clearly erroneous standard. The legal conclusion whether the Rule has been violated, however, is reviewed de novo. Finally, these courts review the amount and type of sanction imposed by applying an abuse of discretion standard.[10] A second group of courts has adopted the approach employed by the Court of

6. Scrupulous appellate review in early cases was probably an attempt by the circuit courts to define Rule 11 standards to govern future litigation. *See* T.E. Willging, The Rule 11 Sanctioning Process 108 (Federal Judicial Center 1989) (lengthy appellate decisions consistent with "shakeout period" to develop standards). One author has noted that courts advocating de novo review are probably trying to promote uniformity in the imposition of sanctions, "but the goal of uniformity may be no better served by the de novo standard because many sanctions cases are fact-intensive, close calls." C. Shaffer, Jr. & P. Sandler, Sanctions: Rule 11 and Other Powers 28 (2d ed. 1988) (citations omitted).

7. *Cf.* J. Friedenthal, M. Kane, & A. Miller, Civil Procedure § 13.4, at 597-98 (1985) (likelihood of reversal depends on standard used to determine whether trial court erred).

8. The Advisory Committee cautioned against stifling legal creativity. *See* Fed. R. Civ. P. 11, advisory committee's note, *reprinted in* 97 F.R.D. 165, 199 (1983); *see also* Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 254 (2d Cir. 1985) ("Vital changes have been wrought by those members of the bar who have dared to challenge the received wisdom, and a rule that penalized such innovation and industry would run counter to our notions of the common law itself."), *modified on other grounds*, 821 F.2d 121 (2d Cir.), *cert. denied*, 484 U.S. 918 (1987). *But see Miller Remarks*, *supra* note 4, at 200 (concern may be overemphasized); Schwarzer, *Rule 11 Revisited*, 101 Harv. L. Rev. 1013, 1018 (1988) (no evidence of Rule's chilling effect).

9. *See, e.g.*, Ahern v. Central Pac. Freight Lines, 846 F.2d 47, 49-50 (9th Cir. 1988); Zaldivar v. City of Los Angeles, 780 F.2d 823, 828 (9th Cir. 1986); *see also* Kurkowski v. Volcker, 819 F.2d 201, 203 n.8 (8th Cir. 1987) (adopting the *Zaldivar* standard).

10. *See Zaldivar*, 780 F.2d at 828; *infra* notes 33-35 and accompanying text.

Appeals for the District of Columbia Circuit in *Westmoreland v. CBS*.[11] These courts hold that the type of violation that is alleged determines whether the appellate court should apply the abuse of discretion standard or review the district court decision de novo.[12] A third group of courts uses an abuse of discretion standard to review all aspects of the decision.[13]

This Note will consider which standard of review best balances the competing policies surrounding application of Rule 11. A uniform standard of review among the circuit courts, as well as within each circuit,[14] will promote consistency in Rule 11 appellate decisions and provide litigants with a better basis on which to decide whether to appeal district court decisions.[15] Part I of this Note discusses the background of the Rule 11 amendment and the policy behind the amendment. Part II sets forth the standards that appellate courts have used when reviewing Rule 11 decisions. Part III argues that the competing goals of Rule 11 are best served by a modified abuse of discretion standard that calls for stricter scrutiny of the imposition of sanctions than of the denial of such penalties.

## I. THE AMENDED RULE 11

Congress modified Rule 11[16] as part of a package of amendments to the Federal Rules of Civil Procedure designed to reduce litigation abuse

11. 770 F.2d 1168 (D.C. Cir. 1985).

12. *See id.* at 1174-75; City of Yonkers v. Otis Elevator Co., 844 F.2d 42, 49-50 (2d Cir. 1988); Donaldson v. Clark, 819 F.2d 1551, 1556 (11th Cir. 1987); *infra* notes 39-46 and accompanying text.

13. *See, e.g.*, F.D.I.C. v. Tekfen Constr. & Installation Co., 847 F.2d 440, 443 (7th Cir. 1988); Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 872-73 (5th Cir. 1988) (en banc); *infra* notes 49-53 and accompanying text.

14. For examples of intracircuit confusion on what standard of review applies to Rule 11 decisions, see generally, Mars Steel Corp. v. Continental Bank N.A., 880 F.2d 928, 930 (7th Cir. 1989) (en banc); *Thomas*, 836 F.2d at 871-73.

15. *Cf.* J. Friedenthal, M. Kane, & A. Miller, *supra* note 7, at 597 ("decision to take an appeal is influenced . . . by considerations relating to . . . standards involving the nature and scope of review").

16. The first version of Rule 11, enacted in 1938, provided in part that:

> [t]he signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a willful violation of this rule an attorney may be subjected to appropriate disciplinary action.

28 U.S.C. app. § 540, 540-41 (1982). The original Rule was ineffective in deterring litigation abuses. Under the original Rule 11, only willful violations could be sanctioned. Therefore, an attorney who was merely negligent or incompetent did not violate the Rule. In addition, the courts differed as to whether a party could be sanctioned for a violation by his attorney. *See* Fed. R. Civ. P. 11, advisory committee's note, *reprinted in* 97 F.R.D. 165, 198 (1983). Courts were reluctant to invoke the Rule because the imposition of "disciplinary action" was discretionary. *See id.* For a discussion of fee-shifting under the old Rule 11, see Vairo, *supra* note 3, at 191 n.8; *see also* Schwarzer, *Sanctions Under the*

and to reform pretrial procedures.[17] Recognizing that more than 90 percent of cases never reach trial, the Advisory Committee on Federal Civil Rules realized that the best way to address the "litigation crunch" was to focus on the rules that govern pretrial procedure.[18] The principal objective was to increase the involvement of district courts in the management and control of litigation.[19] In particular, the Advisory Committee hoped that Rule 11 would streamline litigation by discouraging frivolous claims and defenses.[20]

The Advisory Committee revised the Rule to impose a more demanding, objective standard of reasonableness upon attorneys.[21] The new standard specifies what an attorney must do before filing a pleading, motion or other paper.[22] An attorney's signature now certifies that he has read the document; he has made a reasonable inquiry into the facts; he has made a reasonable inquiry into the law; the document is well-grounded in fact; the document is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that the document has not been interposed for any improper purpose.[23] The Advisory Committee also strengthened Rule 11 by re-

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*New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 183 (1985) (discussing reluctance of judges to sanction attorneys).

17. *See supra* note 2.

18. *See Miller Remarks*, *supra* note 4, at 198.

19. *See* Vairo, *supra* note 3, at 190; *supra* note 17 and accompanying text.

20. *See* Fed. R. Civ. P. 11, advisory committee's note, *reprinted in* 97 F.R.D. 165, 198 (1983). However, one commentator has remarked that "more and 'better' rules may not be the answer. Rules require sanctions. Sanctions require enforcement proceedings. These absorb resources of time, energy, and money that it is the very purpose of the rules to spare." Rosenberg, *The Federal Civil Rules After Half a Century*, 36 Me. L. Rev. 243, 244 (1984).

21. *See* Fed. R. Civ. P. 11, advisory committee's note, *reprinted in* 97 F.R.D. 165, 198 (1983) ("The standard is one of reasonableness under the circumstances."); Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 253 (2d Cir. 1985) ("[S]ubjective good faith no longer provides the safe harbor it once did."), *modified on other grounds*, 821 F.2d 121 (2d Cir.), *cert. denied*, 484 U.S. 918 (1987).

22. This objective standard increases the scope of abuses covered by Rule 11. The Rule now effectively provides for the sanctioning of abuse caused not only by bad faith but by negligence and to some extent, by professional incompetence. *See* Hays v. Sony Corp. of America, 847 F.2d 412, 418-19 (7th Cir. 1988); Gaiardo v. Ethyl Corp., 835 F.2d 479, 482 (3d Cir. 1987).

23. One commentator has referred to it as a "five-fold certification":

> An attorney's signature now constitutes a five-fold certification that an attorney or party: [1] has read the [document]; [2] that to the best of his knowledge, information and belief formed after reasonable inquiry; [3] it is well grounded in fact and [4] is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and [5] 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.

Vairo, *supra* note 3, at 194. The reasonable inquiry requirement can be further split into two parts: reasonable inquiry into the facts and reasonable inquiry into the law. *See* Thomas v. Capital Sec. Serv., Inc., 836 F.2d 866, 874 (5th Cir. 1988) (en banc) (Rule requires reasonable inquiry into facts, reasonable inquiry into law, and proper purpose for interposition of all documents).

quiring that all violations be sanctioned.[24]

In addition, the new Rule authorizes the award of costs and attorneys' fees to deter attorneys from filing papers that are frivolous or motivated by a purpose other than legitimate advocacy.[25] This authorization, however, was not intended to turn the Rule into a wholesale fee-shifting device; the Rule's primary objective remains the deterrence of litigation abuses.[26]

The circuit courts have emphasized the role of the amendments to the Rule, as well as the policy concerns behind them, in deciding which standard of review should be utilized.[27]

## II. STANDARDS OF REVIEW APPLIED IN RULE 11 CASES

Rule 11 requires a court finding a violation to impose "an appropriate sanction."[28] The Advisory Committee gave the district court discretion to choose how best to sanction violations.[29] Accordingly, all appellate courts apply the abuse of discretion standard[30] when reviewing the

24. *See* Fed. R. Civ. P. 11, advisory committee's note, *reprinted in* 97 F.R.D. 165, 200 (1983) (stressing necessity of sanctions to secure system's effective operation). Members of the Advisory Committee feared that the proposed Rule would not be used enough, notwithstanding the new objective standard, the explicit authorization of costs and the mandate that all violations be punished. Many other members feared, however, that parties would invoke the new Rule too often. The Advisory Committee acknowledged this possibility but believed that, although lawyers might be carried away for a time, the management efficiencies of the district courts would overcome any temporary litigation burden. *See Miller Remarks*, *supra* note 4, at 200.

The first fear has proven to be groundless, although the second may have been realized. *See* Vairo, *supra* note 3, at 195; *see also* Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531, 1541 (9th Cir. 1986):

> Litigation on the issue of sanctions, like any litigation, is expensive. . . . It is not unusual for lawyers involved in sanction proceedings to hire other lawyers to represent them. . . . Litigation expenses [in this case] already must have exceeded, many times over, the few thousand dollars of sanctions imposed.

*Id.*

25. *See* Fed. R. Civ. P. 11, advisory committee's note, *reprinted in* 97 F.R.D. 165, 198 (1983); Schwarzer, *supra* note 16, at 184-85. Other changes, not relevant to the discussion of appellate review, include: 1) the ability to sanction the party, the attorney, or both, whereas the original Rule could be invoked only against the attorney; 2) the applicability to all signed papers, not only pleadings; and 3) the court's ability to raise the issue *sua sponte*. *See* Fed. R. Civ. P. 11, advisory committee's note, *reprinted in* 97 F.R.D. 165, 198-200 (1983).

26. *See* Gaiardo v. Ethyl Corp., 835 F.2d 479, 483 (3d Cir. 1987) (goal of Rule 11 is deterrence, not wholesale fee-shifting).

27. *See infra* notes 28-46 and accompanying text.

28. Fed. R. Civ. P. 11.

29. The Advisory Committee's note states that "[t]he court, however, retains the necessary flexibility to deal appropriately with violations of the rule. It has discretion to tailor sanctions to the particular facts of the case, with which it should be well acquainted." Fed. R. Civ. P. 11, advisory committee's note, *reprinted at* 97 F.R.D. 165, 200 (1983). The Advisory Committee provided no specific guidelines for tailoring a sanction but did suggest that a court give some consideration to whether a party is proceeding *pro se* and whether the violation is willful. *See id.*

30. *See* J. Friedenthal, M. Kane, & A. Miller, *supra* note 7, at 605 (appellate court

amount and type of sanctions.[31] Courts have disagreed, however, about the standard of review to be applied to other Rule 11 issues.[32]

### A. *The Tripartite Standard*

The Court of Appeals for the Ninth Circuit, in *Zaldivar v. City of Los Angeles*,[33] was the first to employ a tripartite standard. This standard requires that courts review disputed factual determinations under the clearly erroneous standard.[34] De novo review is used to test the legal conclusion that the Rule was or was not violated. Finally, courts overturn the amount and type of sanction imposed only upon finding an abuse of discretion.[35]

Other courts have adopted the *Zaldivar* standard, reasoning that "[a]

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will reverse discretionary decision only if court below was clearly wrong); *see also* Friendly, *Indiscretion About Discretion*, 31 Emory L.J. 747, 763 (1982) (there are many definitions of "abuse of discretion," ranging from ones requiring extreme deference to others differing from error by only slightest nuance).

31. *See* Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 874 (5th Cir. 1988) (en banc) (court reviews amount of sanction under abuse of discretion standard); Zaldivar v. City of Los Angeles, 780 F.2d 823, 828 (9th Cir. 1986) (court uses abuse of discretion standard to review amount of sanction); Westmoreland v. CBS, 770 F.2d 1168, 1174 (D.C. Cir. 1985) (employing abuse of discretion standard to review amount of sanction).

32. *See infra* notes 33-55 and accompanying text.

33. 780 F.2d 823 (9th Cir. 1986). The court held that:

> Appellate review of orders imposing sanctions under Rule 11 may require a number of separate inquiries. If the facts relied upon by the district court to establish a violation of the Rule are disputed on appeal, we review the factual determinations of the district court under a clearly erroneous standard. If the legal conclusion of the district court that the facts constitute a violation of the rule is disputed, we review that legal conclusion *de novo*. Finally, if the appropriateness of the sanction imposed is challenged, we review the sanction under an abuse of discretion standard.

*Id.* at 828 (emphasis in original).

34. The Supreme Court defined a finding as "clearly erroneous" when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).

35. The Ninth Circuit adopted the tripartite standard to maintain consistency with its standard of review of discovery sanctions and sanctions under various statutes. *See Zaldivar*, 780 F.2d at 828 n.4. Several of these authorities leave the imposition of sanctions to the discretion of the trial court. *See, e.g.*, 28 U.S.C. § 1927 (1982) (any attorney who unreasonably and vexatiously multiplies proceedings *may* be required to satisfy excess costs, expenses and attorney's fees) (emphasis added); 42 U.S.C. § 1988 (1982) (court may, at its discretion, award attorney's fees in civil rights litigation).

In fact, this tripartite standard conforms with appellate review in general. Appellate courts should not overturn factual determinations unless they are "clearly erroneous." *See* Fed. R. Civ. P. 52. Legal questions are reviewed de novo. *See* Century Products, Inc. v. Sutter, 837 F.2d 247, 253 (6th Cir. 1988) (Nelson, J. concurring); J. Friedenthal, M. Kane, & A. Miller, *supra* note 7, § 13.4, at 600 ("The fullest scope of review, not surprisingly, is for errors of law; the appellate court will decide questions of law de novo."). Few courts will allow a permissible conclusion of law when another is more correct. "However, an implicit tendency to affirm and the fact that the lower court has considered the legal point may add up to practical deference in some cases." 1 S. Childress & M. Davis, Standards of Review 78 (1986).

natural concomitant of a mandatory imposition of sanctions is a broadened scope of review by the Court of Appeals."[36] These courts conclude that an appellate court is in as good a position as a district court to determine whether a pleading violated Rule 11 and, therefore, need not defer to the lower court's judgment.[37]

The tripartite standard dictates more thorough review than the other standards. More thorough review better ensures due process[38] to a sanctioned attorney and provides for a greater appellate curb on the possible district court stifling of legal creativity. In addition, because more thorough review increases the chances of finding grounds for reversal, it increases the possibility that a party injured by abusive practices but improperly denied sanctions will be compensated.[39]

However, the tripartite standard has shortcomings. The standard's more thorough review consumes more judicial resources. The standard is also difficult to apply. This difficulty arises because Rule 11 controversies implicate questions of both fact and law. Because appellate courts must defer to district courts' factual determinations, while the legal conclusions whether the Rule has been violated must be reviewed de novo, a court applying the tripartite standard must first separate the factual findings from the legal conclusion.

### B. *The* Westmoreland *Standard*

The Court of Appeals for the District of Columbia, in *Westmoreland v. CBS*,[40] held that the type of violation considered on appeal determines the standard of review. The court determined that the district court should focus on the objective merits of the pleading.[41] Because compliance with the Rule is now judged under an objective standard, courts applying the *Westmoreland* standard focus only on the requirements that the pleading be well-grounded in fact, warranted by existing law and not interposed for an improper purpose. These courts assume that an objec-

36. Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 254 n.7 (2d Cir. 1985), *modified on other grounds*, 821 F.2d 121 (2d Cir.), *cert. denied*, 484 U.S. 918 (1987); *accord* Robinson v. National Cash Register Co., 808 F.2d 1119, 1126 (5th Cir. 1987); Brown v. Federation of State Medical Bds., 830 F.2d 1429, 1434 & n.3 (7th Cir. 1987); Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531, 1538 (9th Cir. 1986).

37. *See Eastway*, 762 F.2d at 254 n.7.

38. *See* Vairo, *supra* note 3, at 226 (more thorough review of district court grants of sanctions protects litigants from arbitrary and unfair imposition of sanctions by district court); *cf.* Fed. R. Civ. P. 11, advisory committee's note, *reprinted in* 97 F.R.D. 165, 201 (1983) (sanctions proceedings must comport with due process).

39. *See supra* notes 7-8 and accompanying text.

40. 770 F.2d 1168 (D.C. Cir. 1985).

41. The court held that:

> [u]nder Rule 11, sanctions may be imposed if a reasonable inquiry discloses the pleading, motion, or paper is (1) not well grounded in fact, (2) not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, or (3) interposed for any improper purpose such as harassment or delay.

*Id.* at 1174.

tive inquiry into the merits of the pleading will reveal non-compliance with any of the other requirements.[42]

Courts that adopt the *Westmoreland* approach use an abuse of discretion standard to review fact-intensive issues such as whether a pleading, motion or other paper was well grounded in fact or had been interposed for an improper purpose.[43] However, the appellate court must review de novo questions of law such as whether a document was warranted by existing law or a good faith argument[44] for the modification, extension or reversal of existing law.[45] Finally, these courts review the amount and type of sanction imposed under an abuse of discretion standard.[46]

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42. One court limited the analysis to only two critical inquiries: "[A] complaint which complies with the 'well-grounded in fact and warranted by . . . law' clause cannot be sanctioned as harassment under Rule 11, regardless of the subjective intent of the attorney or litigant." Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531, 1538 (9th Cir. 1986) (citation omitted); *accord* Hudson v. Moore Business Forms, Inc., 836 F.2d 1156, 1159 (9th Cir. 1987). Most courts, however, retain the "improper purpose" clause, judging its violation by an objective standard. *See* Brown v. Federation of Medical Bds., 830 F.2d 1429, 1436 (7th Cir. 1987); Lieb v. Topstone Indus., 788 F.2d 151, 157 (3d Cir. 1986); Zaldivar v. City of Los Angeles, 780 F.2d 823, 831 n.9 (9th Cir. 1986); Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 253-54 (2d Cir. 1985), *modified on other grounds*, 821 F.2d 121 (2d Cir.), *cert. denied*, 484 U.S. 918 (1987); Schwarzer, *supra* note 16, at 195-96.

There is some support for the proposition that only the objective merits of the pleading should be examined. *See, e.g.*, Kale v. Combined Ins. Co. of America, 861 F.2d 746, 759 (1st Cir. 1988) (fearing "myriad number of satellite litigations," court refused to entertain defendant's argument that, although equitable tolling argument was possible, plaintiff knew of no such argument when complaint was filed); *Zaldivar*, 780 F.2d at 830 ("In practical effect, an obviously meritorious paper will go unchallenged, whether read or not."). *But see generally* Schwarzer, *Rule 11 Revisited*, 101 Harv. L. Rev. 1013 (1987) (arguing that focus on merits of litigation clouds issue of attorney misconduct); *accord* Beeman v. Fiester, 852 F.2d 206, 211 (7th Cir. 1988) (primary focus is on pre-filing inquiry).

43. The court added:

> In determining whether factual (1) or dilatory or bad faith (3) reasons exist which may give rise to invocation of Rule 11 sanctions, the district court is accorded wide discretion. For the district court has tasted the flavor of the litigation and is in the best position to make these kinds of determinations. However, once the court finds that these factors exist, Rule 11 *requires* that sanctions of some sort be imposed. A refusal to invoke Rule 11 constitutes error. On the other hand, a decision whether the pleading or motion is *legally* sufficient (2) involves a question of law and receives this court's *de novo* review.

Westmoreland v. CBS, 770 F.2d 1168, 1174-75 (D.C. Cir. 1985) (emphasis in original).

44. Although the focus in most of these appeals will be on the merits of the legal arguments in light of existing law, there are some factual components to this determination. One court has noted that "[t]he only way to find out whether a complaint is an effort to change the law is to examine with care the arguments counsel later adduce." Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073, 1082 (7th Cir. 1987); *see also In re* Central Ice Cream Co., 836 F.2d 1068, 1072 (7th Cir. 1987) (determination of whether complaint is good faith argument for extension of existing law involves factual issues concerning position litigant took). *But see Szabo*, 823 F.2d at 1085 (Cudahy, J., concurring in part, dissenting in part) (under this approach "rhetoric can salvage almost any position and avoid sanctions").

45. *See Westmoreland*, 770 F.2d at 1174-75.

46. *See id.* at 1174 (Rule's provision that court "shall impose" sanctions concentrates

Courts that apply the *Westmoreland* standard[47] are forced to consume more judicial resources when reviewing alleged "warranted by existing law" violations than courts that apply the abuse of discretion standard. In addition, a court that applies this standard may find it difficult to characterize the type of violation alleged. A pleading may be frivolous in part because of an insufficient factual inquiry and in part due to an implausible legal argument. In such a situation, the appellate court may have trouble determining whether to characterize the pleading as one that was not "well-grounded in fact" or one that was not "warranted by existing law."

### C. *The Abuse of Discretion Standard*

Many other courts use an abuse of discretion standard to review all aspects of Rule 11 decisions.[48] In applying this standard, an appellate court examines the lower court's factual determinations, its legal conclusion regarding whether the Rule has been violated, and the amount of any sanction imposed, looking for an abuse of discretion. This standard is widely accepted because it is easy to apply.[49] Some courts that apply this standard also reason that an appellate court cannot achieve a district court's familiarity with the case and the parties.[50] These courts stress

district court's discretion on selection of appropriate sanctions rather than on decision to impose sanctions).

47. Some courts have misinterpreted this standard as being a variation of the tripartite standard. The Court of Appeals for the Fifth Circuit specifically referred to it as:

> a variation of the three-tiered analysis espoused in *Zaldivar*, utilizing an abuse of discretion standard when reviewing the factual reasons for imposing Rule 11 sanctions and the amount and type of sanctions, while reserving a de novo analysis for reviewing the legal sufficiency of a pleading or motion and the determination to impose sanctions.

Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 872 (5th Cir. 1988) (en banc); *see also* Kale v. Combined Ins. Co. of America, 861 F.2d 746, 757 (1st Cir. 1988) (quoting *Thomas* interpretation of *Westmoreland* standard). The *Westmoreland* standard, as quoted by other courts, would appear to differ from the *Zaldivar* standard only in its application of an abuse of discretion standard rather than a clearly erroneous standard to factual determinations. This misinterpretation may be the reason why only one other circuit has adopted the *Westmoreland* approach. *See* Donaldson v. Clark, 819 F.2d 1551, 1556 (11th Cir. 1987).

48. *See, e.g., Thomas*, 836 F.2d at 872; EBI, Inc. v. Gator Indus., Inc., 807 F.2d 1, 6 (1st Cir. 1986); Cotner v. Hopkins, 795 F.2d 900, 903 (10th Cir. 1986); Stevens v. Lawyers Mut. Liab. Ins. Co., 789 F.2d 1056, 1060 (4th Cir. 1986); Lieb v. Topstone Indus., Inc., 788 F.2d 151, 157 (3d Cir. 1986).

49. *See Kale*, 861 F.2d at 758. The Seventh Circuit has also accepted this standard but has emphasized Rule 52's mandate that factual determinations be undisturbed unless clearly erroneous. *See* Fed. R. Civ. P. 52(a). Therefore, it has been held that while factual determinations are subject to a clearly erroneous review, the abuse of discretion standard generally applies to Rule 11 decisions. *See* F.D.I.C. v. Tekfen Constr. & Installation Co., 847 F.2d 440, 443 (7th Cir. 1988); *In re* Ronco, Inc., 838 F.2d 212, 217 (7th Cir. 1988); Ordower v. Feldman, 826 F.2d 1569, 1574 (7th Cir. 1987).

50. *See Kale*, 861 F.2d at 758; Mihalik v. Pro Arts, Inc., 851 F.2d 790, 793 (6th Cir. 1988); *Thomas*, 836 F.2d at 872-73.

that district courts must have discretion to regulate their dockets[51] and that "the district court will have a better grasp of what is acceptable trial-level practice."[52] Courts that use the abuse of discretion standard agree that the Rule's mandatory language requires that all violations be sanctioned, but unlike courts employing the tripartite standard, do not believe that the words "shall impose" mandate de novo review.[53]

Recently, some courts employing the abuse of discretion standard, including a panel of the Court of Appeals for the Fifth Circuit,[54] have suggested that in order to ensure fairness to attorneys who have been sanctioned, a district court's decision to impose sanctions should be reviewed more closely than a denial of sanctions.[55] In contrast, there is no need for thorough review of a denial because the unsuccessful movant has no substantive right to a fee-shifting.[56] More importantly, this approach conserves appellate resources by discouraging appeals of unsuccessful sanctions motions, which now comprise a large percentage of Rule 11 appeals.[57]

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51. *See* Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 872 (5th Cir. 1988) (en banc).

52. Eastway Constr. Corp. v. City of New York, 637 F. Supp. 558, 566 (E.D.N.Y. 1986), *aff'd in part, rev'd in part*, 762 F.2d 243 (2d Cir. 1985), *modified on other grounds*, 821 F.2d 121 (2d Cir.), *cert. denied*, 484 U.S. 918 (1987).

53. *See* O'Connell v. Champion Int'l Corp., 812 F.2d 393, 395 (8th Cir. 1987) (Rule requires that all violations be sanctioned but decision whether violation occurred deserves substantial deference).

54. *See Thomas*, 836 F.2d at 883.

55. *See In re* Ronco, Inc., 838 F.2d 212, 217 (7th Cir. 1988). The court held that:

> Review under the abuse of discretion standard does not mean no appellate review. Rule 11 sanctions have significant impact beyond the merits of the individual case. Concerns for the effect on both an attorney's reputation and for the vigor and creativity of advocacy by other members of the bar necessarily require that we exercise less than total deference to the district court in its decision to impose Rule 11 sanctions.

*Id*; *see also* Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 883 (5th Cir. 1988) (en banc) ("If the sanctions imposed are substantial in amount, type, or effect, appellate review of such awards will be inherently more rigorous."); Vairo, *supra* note 3, at 226 (arguing imposition of sanctions should be reviewed more closely than denial). One commentator has remarked that:

> To the extent that the appellate [reversals of district courts' denials of sanctions] conclude that an argument was frivolous as a matter of law, they appear to be incompatible with the standards articulated by the circuits for judging frivolity. In other words, a standard of frivolity that depends on an argument's having absolutely no chance of success implies giving deference to a trial judge who finds a chance of success.

T.E. Willging, *supra* note 6, at 46 (footnote omitted). Judge Friendly characterized the different definitions of "abuse of discretion" as not only defensible but essential because the reasons for deference vary. *See* Friendly, *supra* note 30, at 764.

56. *See supra* note 26 and accompanying text.

57. As of December 1987, approximately 42% of reported Rule 11 decisions by the circuit courts involved appeals of denials and approximately 72% of these were affirmed. *See* Vairo, *supra* note 3, at 234.

## III. BALANCING RULE 11 POLICY CONSIDERATIONS

The abuse of discretion standard best balances the competing policy considerations of Rule 11. However, the standard should be modified so that appellate courts review the decision to impose sanctions more closely than the denial of such penalties.

The abuse of discretion standard gives the district court more control of the litigation. Such control was one of the goals of the 1983 amendments.[58] Courts advocating an abuse of discretion standard correctly emphasize that the district court's perspective on what occurred during the proceedings cannot be duplicated.[59] Even the Ninth Circuit, which first articulated the tripartite standard, has acknowledged that the appellate court's perspective is limited.[60] In contexts other than Rule 11, the use of an abuse of discretion standard reflects the appellate court's decision that the trial judge is in a better position to make a determination and should be afforded discretion.[61] As the district court is in a better position to make a Rule 11 determination, appellate courts should also use an abuse of discretion standard to review Rule 11 decisions.

However, to best balance Rule 11's competing policy considerations, appellate courts should review the district court decisions which impose sanctions more closely than those denying sanctions. By so modifying the standard, appellate courts will better ensure fairness to attorneys and room for legal creativity, while discouraging appeals of decisions denying sanctions, thereby limiting proceedings. By limiting the possibility of the reversal of a decision denying sanctions, litigants will have less incentive to abuse the Rule by continuing to use it as a fee-shifting device. How-

58. *See id.* at 190; *supra* note 19 and accompanying text. Judge Friendly noted that deference has traditionally been given in other trial management matters such as discovery, continuances, allowing amendments to pleadings and holding pre-trial conferences. He remarked that:

> [a]nother principle supporting deference to rulings of the trial court is the absence of the benefits that ordinarily flow from appellate review in establishing rules that will govern future cases. This is true in the frequent situations . . . where the factors "are so numerous, variable and subtle that the fashioning of rigid rules would be more likely to impair [the trial judge's] ability to deal fairly with a particular problem than to lead to a just result.

*See* Friendly, *supra* note 30, at 760 (quoting United States v. McCoy, 517 F.2d 41, 44 (7th Cir.), *cert. denied.*, 423 U.S. 895 (1975)).

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

60. *See* Hudson v. Moore Business Forms, Inc., 836 F.2d 1156, 1160 (9th Cir. 1987) ("[A]lthough this court reviews de novo whether particular conduct is sanctionable, it is necessarily handicapped in its review because it is more distant from the parties and events than the district court.").

61. *See* J. Friedenthal, M. Kane, & A. Miller, *supra* note 7, at 605:

> [T]his narrow scope of review reflects the desire of the appellate courts not to intrude on the trial process too readily, particularly when the trial judge may be in the best position to make the determination involved. Indeed, the decision to treat certain matters as discretionary indicates that that is the case.

*Id.*

ever, when the district court does impose sanctions, this modified abuse of discretion standard will ensure fairness to the sanctioned attorney and will provide appellate guidance to control the Rule's "chilling effect".

## CONCLUSION

An unmodified abuse of discretion standard emphasizes conservation of judicial resources over the pursuit of compensation, but may be unfair to an improperly sanctioned attorney and may chill legal creativity. The tripartite standard, in all appeals of awards, and the *Westmoreland* standard, in appeals of district court decisions that a pleading was not warranted by existing law, ensure fairness and room for legal creativity, but dictate a needlessly extensive review when sanctions have been denied. A modified abuse of discretion standard that reviews district court impositions of sanctions more closely than denials accomplishes these goals without expending judicial resources unnecessarily.

*Louis Greco*