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Stepping on Board the Rule 11 Bandwagon

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STEPPING ON BOARD THE RULE 11 BANDWAGON

ROGER M. BARON*

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I. INTRODUCTION

On September 22, 1986, the Seventh Circuit of the U.S. Courts of Appeals announced that the rules "designed to discourage groundless litigation are being and will continue to be enforced in this circuit to the hilt."¹ To make its message perfectly clear, it further proclaimed, "[l]awyers practicing in the Seventh Circuit, *take heed!*"² In the case carrying this message, the Court of Appeals affirmed the lower court's dismissal of the plaintiff's complaint but remanded the case for an award of attorneys' fees incurred by the defendant in both the district court and the appellate court, relying on Federal Rule of Civil Procedure 11, as amended in August 1983.³

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The author wishes to thank Monica Ortale and Franda Blaylock for their assistance.

¹ *Dreis & Krump Mfg. v. International Ass'n of Machinists*, 802 F.2d 247, 255 (7th Cir. 1986)(emphasis added).

² *Id.* at 256 (emphasis added).

³ *Id.* at 255-56.

On October 9, 1986, the Ninth Circuit Court of Appeals rendered a decision reversing the imposition of sanctions levied by the district court against a major national law firm.⁴ The lawyer in question had characterized an argument as "warranted by existing law" as opposed to characterizing the argument as calling for the "extension, modification or reversal of existing law."⁵ The lawyer had also relied on a case which was questionable in the light of subsequent cases which the district court concluded were directly adverse, were not disclosed by the lawyer, and should have been discovered by the lawyer had he shepardized the case he relied on.⁶ Observing that litigation expenses must have already exceeded the amount of the sanctions "many times over," the appellate court noted that the district court had complicated the legal process by its inappropriate use of Rule 11 and unnecessarily consumed resources of time, energy, and money, which are the resources to be protected by the federal rules.⁷

Twice during the summer of 1986, the Fifth Circuit not only upheld Rule 11 sanctions by a trial court, but also awarded additional sanctions for the persistence of the frivolous arguments in the appellate court.⁸

On May 23, 1986, the Second Circuit reversed the award of \$4012 in sanctions imposed by the district court for the plaintiff's failure to make reasonable inquiry into the jurisdictional basis of the plaintiff's action.⁹ The appellate court found the jurisdictional question to be quite complicated and an inappropriate case for sanctions,¹⁰ re-stating its previously declared position that Rule 11 should not be used to "stifle the enthusiasm or chill the creativity that is the very lifeblood of the law."¹¹

Are the circuits divided? No. As will be demonstrated, there is no *real* disagreement among the circuits. The sampling of cases given above is designed to attract the reader's interest, to illustrate the range of dispositions, and to introduce a sampling of the relevant criteria used by the courts in analyzing Rule 11 cases. As a matter of fact, the Ninth Circuit, which is depicted in the text above for its October 9, 1986 opinion reversing the imposition of sanctions, did itself administer a

⁴ *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531 (9th Cir. 1986).

⁵ *Id.* at 1539.

⁶ *Id.* at 1542. The subsequent authorities in Shepard's were identified as "distinguishing" *Golden Eagle Distrib. Corp.*.

⁷ *Id.* at 1541.

⁸ *In re Ginther*, 791 F.2d 1151 (5th Cir. 1986); *Barrios v. Pelham Marine, Inc.*, 796 F.2d 128 (5th Cir. 1986).

⁹ *Kamen v. American Tel. & Tel. Co.*, 791 F.2d 1006 (2d Cir. 1986).

¹⁰ *Id.* at 1012-14.

¹¹ *Id.* at 1014.

double dose of sanctions by awarding additional attorneys' fees on appeal in another case decided eighteen days later.¹²

The federal courts have become overwhelmed with litigation over Rule 11 sanctions. It was recently observed that "literally hundreds of published opinions have appeared in the *Federal Supplement* and *Federal Rules Decisions*" reporters on Rule 11 sanctions.¹³ Comparatively fewer decisions have as yet "percolated up to the courts of appeals."¹⁴ Yet, the appellate courts have taken an active role, and litigation of issues under amended Rule 11 is now in its heyday.

Since the role of the district courts in administering Rule 11 sanctions can only be given proper perspective by viewing it in the light of the controls placed in force by the appellate courts, the goal of this manuscript is to capture the present state of the law governing Rule 11 sanctions, as prescribed by the federal courts of appeals, and to highlight the differences, where appropriate, in the approaches taken by the various circuits. Additionally this manuscript categorizes the instances where the district courts have inappropriately imposed sanctions.

II. THE ESSENCE OF AMENDED RULE 11

Rule 11 of the Federal Rules of Civil Procedure, as amended in August of 1983, provides in pertinent part as follows:

Every pleading, motion or 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. . . . The signature of an attorney . . . 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 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 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.

¹² *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 505 (9th Cir. 1986)(MGIC's cause of action did not improve with age; the complaint was frivolous as was the appeal).

¹³ *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1537 (9th Cir. 1986).

¹⁴ *Id.*

A. *The Objective Quality of the Standard*

The 1983 amendments were designed to create an affirmative duty of investigation both as to the law and the facts prior to the filing of papers in federal court. Accordingly, an objective standard of reasonableness was created with the intention that a greater range of circumstances would trigger a violation of the amended Rule 11.¹⁵ Under the prior rule, sanctions were appropriate only for a willful violation or what has been described as subjective bad faith.¹⁶

The amended rule clearly imposes an affirmative duty on counsel to study the law. It has been said that "an empty head but a pure heart is no defense"¹⁷ and that "subjective good faith no longer provides the safe harbor it once did."¹⁸

The Ninth Circuit has further elaborated its view of the "reasonable inquiry" requirement of Rule 11 as follows:

A good faith belief in the merit of a legal argument is an objective condition which a competent attorney attains only after "reasonable inquiry." Such inquiry is that amount of examination into the facts and legal research which is reasonable under the circumstances of the case. Of course, the conclusion drawn from the research undertaken must itself be defensible. Extended research alone will not save a claim that is without legal or factual merit from the penalty of sanctions.¹⁹

The Second Circuit has recognized violations of amended Rule 11, using language which describes the asserted claim in situations where "it is *patently clear*" that it has "*absolutely no chance of success.*"²⁰

The Fifth Circuit has used language which describes the rule's requirement as one demanding that the assertion be "based on a *plausible view* of the law."²¹

An interesting question is whether or not an attorney who indeed acts in bad faith but who files a paper which is objectively reasonable is subject to Rule 11 sanctions. In other words, if bad faith is shown to exist,

¹⁵ *Golden Eagle Distrib. Corp.*, 801 F.2d at 1536 (citing Advisory Committee Note, 97 F.R.D. 165, 198-99 (1983)).

¹⁶ *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 829 (9th Cir. 1986); *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 253-54 (2d Cir. 1985).

¹⁷ *Thornton v. Wahl*, 787 F.2d 1151, 1154 (7th Cir.) *cert. denied* 107 S. Ct. 181 (1986).

¹⁸ *Eastway Constr. Corp.*, 762 F.2d at 253.

¹⁹ *American Metal Prod., Inc. v. Sheet Metal Workers Int'l Ass'n Local 104*, 794 F.2d 1452, 1458 (9th Cir. 1986)(quoting *Zaldivar*, 780 F.2d at 831).

²⁰ *Eastway Constr. Co.*, 762 F.2d at 254; *Norris v. Grosvenor Mktg. Ltd.*, 803 F.2d 1281, 1288 (2d Cir. 1986)(emphasis added).

²¹ *Davis v. Veslan Enter.*, 765 F.2d 494, 498 (5th Cir. 1985)(emphasis original). *See also* *Southern Leasing Partners, Ltd. v. McMullan*, 801 F.2d 783, 789 (5th Cir. 1986)("Simply put, a lawyer must have a basis for his pleading").

need further inquiry be made as to whether or not the belief is objectively reasonable? The Fifth Circuit has upheld sanctions based on a finding of "bad faith" by the district court²² and has described the amended Rule 11 as requiring both subjective good faith and objective reasonableness.²³

The opposing view has been described, but not fully adopted, by the Ninth Circuit in posing the question, "may an attorney be sanctioned for doing what the law allows, if the attorney's motive for doing so is improper?"²⁴ Under the amended rule the "improper purpose" clause is coupled with the "well grounded in fact and warranted by existing law" clause by the conjunction "and." Arguably the attorney's signature is an independent certification of both provisions.²⁵ Nonetheless the Ninth Circuit did hold that a defendant is not "harassed" (one such "improper purpose" under amended Rule 11) by the *filing of a complaint* if the complaint is one which is "well-grounded in fact and warranted by existing law," despite prior participation by the same parties in a related state court action. The court left open the question of whether or not the *filing of excessive motions*, each well-grounded in fact and law, may be sanctionable as harassment.²⁶

The Fourth Circuit has upheld Rule 11 sanctions imposed by the district court against the plaintiff who filed a motion solely for the purpose of seeing whether or not the defendant would oppose it.²⁷ The lower court's action was upheld solely on the "improper purpose" finding with no discussion as to whether or not the motion was well-grounded in fact and warranted by existing law.²⁸

B. *The Nature of the Conduct Subject to Sanctions*

Rule 11 requires that "every pleading, motion, and other paper" be signed by the attorney. That signature "constitutes a certificate" by the attorney. Sanctions are available when the "pleading, motion or other paper" is signed in violation of the rule.

Initially it should be observed and has been held that Rule 11 applies only to the *initial* signing of the "pleading, motion, or other paper" and is not appropriate to test the conduct of the attorney at all stages of a

²² *Davis*, 765 F.2d at 497.

²³ *Stites v. I.R.S.*, 793 F.2d 618, 620 (5th Cir. 1986) ("Thus, in addition to a subjective, good faith belief that the pleading is well-founded in both fact and law, Fed. R. Civ. P. 11 now requires that the brief be objectively reasonable").

²⁴ *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 832 (9th Cir. 1986).

²⁵ *Id.*

²⁶ *Id.* at 832 n.10 (hypothetical example). *Cf. In re Intel Securities Litig.*, 791 F.2d 672 (9th Cir. 1986) (upholding sanctions for attorney's "bad faith" course of conduct to secure fee-related concessions).

²⁷ *Cohen v. Virginia Elec. & Power Co.*, 788 F.2d 247 (4th Cir. 1986).

²⁸ *Id.*

proceeding.²⁹ The phrase "other paper" has been liberally interpreted to include notices of appeal and appellate briefs so that Rule 11 violations may also occur in appellate court.³⁰

Rule 11 sanctions are apparently not available for actions taken in a state court prior to removal, but do apply to proceedings following removal.³¹

In the event an attorney fails to sign a pleading, the literal language of Rule 11 indicates that the appropriate sanction for a failure-to-sign violation is to strike the pleading.³² In a case with facts bordering on the ridiculous, the Ninth Circuit declined to decide whether or not monetary sanctions are available for a failure-to-sign violation, but reached a decision which could arguably be said to be a *de facto* rejection of the district court's holding that monetary sanctions could be imposed for the attorney's failure to sign a motion.³³

Without attempting to list every type of case where sanctions have been imposed and for the purpose of illustrating the variety of situations in which Rule 11 can be applied, it should be noted that Rule 11 sanctions have been held appropriate by appellate courts in the following instances: (1) against a plaintiff whose pre-filing investigation was insufficient to disclose that it named the wrong pharmaceutical manufacturer in a products liability claim;³⁴ (2) against a debtor who brought a frivolous motion to set aside an order approving a settlement agreement in a bankruptcy proceeding;³⁵ (3) against a taxpayer who frivolously petitioned to quash an I.R.S. summons;³⁶ (4) against a plaintiff who sued a defendant without knowing precisely how the defendant fit into the

²⁹ *Oliveri v. Thompson*, 803 F.2d 1265, 1274 (2d Cir. 1986) *cert. denied* Suffok Cty. v. Grasek, 107 S. Ct. 1373 (1987) ("Limiting the application of Rule 11 to testing the attorney's conduct at the time a paper is signed is virtually mandated by the plain language of the rule").

³⁰ *Thorton v. Wahl*, 787 F.2d 1151, 1153 (7th Cir.), *cert. denied* 107 S. Ct. 181 (1986).

³¹ *Brown v. Capitol Air, Inc.*, 797 F.2d 106, 108 (2d Cir. 1986).

³² "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." FED. R. CIV. P. 11.

³³ *Estate of Blas v. Winkler*, 792 F.2d 858 (9th Cir. 1986). In this case the plaintiff's attorney inadvertently failed to sign a particular discovery motion, which was combined with a supporting memorandum which he did sign. The motion was stricken, but it was granted after it was refiled with a proper signature. Attorneys' fees on the discovery motion were denied because the district court reasoned that the defendant could obtain Rule 11 sanctions for plaintiff's counsel's failure to sign the motion. When the plaintiff filed a motion to reconsider this result, the district court imposed Rule 11 sanctions on the plaintiff for filing the motion to reconsider. The court of appeals reversed the Rule 11 sanctions as an abuse of discretion without passing judgment on the rationale of the district court. *Id.* at 859-61.

³⁴ *Albright v. Upjohn Co.*, 788 F.2d 1217 (6th Cir. 1986).

³⁵ *In re Ginther*, 791 F.2d 1151. (5th Cir. 1986).

³⁶ *Stites v. I.R.S.*, 793 F.2d 618 (5th Cir. 1986).

picture, hoping that later discovery would uncover something;³⁷ (5) in favor of a non-party deposition witness against the deposing party for filing a groundless petition to hold the witness in contempt;³⁸ (6) against an attorney who filed objections to exact fee concessions;³⁹ (7) for repeating a frivolous argument on appeal;⁴⁰ (8) against a plaintiff for bringing a frivolous civil rights action under 42 U.S.C. 1983;⁴¹ and (9) against the movant on a 60(b) motion to set aside a judgment which was brought as a delaying tactic.⁴²

C. Procedural Aspects

One who is sanctioned under Rule 11 is not necessarily entitled to a hearing. The courts that have dealt specifically with this issue have noted, consistent with the Advisory Committee Notes,⁴³ that the trial judge is a "primary participant in the proceedings"⁴⁴ and has already had the opportunity to have "observed those elements of the litigation most relevant to the criteria for imposing sanctions."⁴⁵ In appropriate circumstances however, due process could require a hearing.⁴⁶

A lawyer cannot avoid the imposition of Rule 11 sanctions by withdrawing from his representation prior to the application for sanctions.⁴⁷ Furthermore, the fact that the district court lacks jurisdiction to hear the case does not preclude its authority to impose Rule 11 sanctions.⁴⁸

The imposition of sanctions is mandatory once a court finds a violation of Rule 11.⁴⁹ Selection of the type of sanction to be imposed lies within the sound discretion of the district court.⁵⁰ It may be reasonable expenses,

³⁷ *Southern Leasing Partners, Ltd. v McMullan*, 801 F.2d 783 (5th Cir. 1986).

³⁸ *Westmoreland v. CBS, Inc.*, 770 F.2d 1168 (D.C. Cir. 1985).

³⁹ *In re Intel Securities Litig.*, 791 F.2d 672 (9th Cir. 1986).

⁴⁰ *Barrios v. Pelham Marine, Inc.*, 796 F.2d 128 (5th Cir. 1986).

⁴¹ *Rodgers v. Lincoln Towing Serv., Inc.*, 771 F.2d 194 (7th Cir. 1985).

⁴² *Chevron U.S.A., Inc., v. Hand*, 763 F.2d 1184 (10th Cir. 1985).

⁴³ *Rodgers*, 771 F.2d at 205. The Court observed that since sanctions are no longer based on subjective bad faith, a hearing is less likely to be required. *Id.* at 206.

⁴⁴ *McLaughlin v. Bradlee*, 803 F.2d 1197, 1205 (D.C. Cir. 1986).

⁴⁵ *Id.*

⁴⁶ *Id.* See also *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 505 (9th Cir. 1986), where on remand a hearing was directed for the sole purpose of litigating the reasonableness of the attorneys' fees awarded. Cf. *F.T.C. v. Alaska Land Leasing, Inc.*, 799 F.2d 507 (9th Cir. 1986) (reversing sanctions imposed under 28 U.S.C. § 1927 for lack of adequate notice). For a discussion of 28 U.S.C., § 1927, see *infra* text accompanying note 73.

⁴⁷ *In re Intel Securities Litig.*, 791 F.2d 672, 675 (9th Cir. 1986).

⁴⁸ *Orange Prod. Credit Ass'n v. Frontline Ventures Ltd.*, 792 F.2d 797, 801 (9th Cir. 1986).

⁴⁹ *Albright v. Upjohn Co.*, 788 F.2d 1217, 1222 (6th Cir. 1986); *Zaldivar v City of Los Angeles*, 780 F.2d 823, 831 (9th Cir. 1986).

⁵⁰ *Unioil, Inc. v. E.F. Hutton & Co.*, 802 F.2d 1080 (9th Cir. 1986).

including attorneys' fees,⁵¹ partial expenses,⁵² a reprimand or published opinion,⁵³ or referral to a bar association grievance committee.⁵⁴

Rule 11 sanctions may be imposed equally on the attorney and client⁵⁵ or on either one.⁵⁶ The court has, in at least one case, required that the sanctions be imposed solely on the client, who was determined to have been the "catalyst" for the frivolous motion.⁵⁷

III. SECURING APPELLATE REVIEW

A. Reviewability

Appeal may be sought from the final judgment which fully disposes of the underlying proceedings.⁵⁸ Sanctions against a non-party under Rule 11 are appealable as collateral orders when entered,⁵⁹ including sanctions imposed solely against attorneys.⁶⁰ It is not clear whether sanctions imposed jointly against an attorney and a party, or a party alone, may be immediately appealable.⁶¹

B. Standard of Review

Generally speaking the review afforded to a district court's ruling on Rule 11 sanctions has been an "abuse of discretion" standard by which the trial court's decision is given deference except for abuse of discretion.⁶² The Ninth Circuit has carefully delineated the standard of review on Rule 11 cases as involving three distinct parts: (1) factual disputes are reviewed under a clearly erroneous standard; (2) legal conclusions are

⁵¹ *Id.* (upholding a Rule 11 sanction of \$294,141.10).

⁵² *Lieb v. Topstone Indus., Inc.*, 788 F.2d 151, 158 (3d Cir. 1986).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *E.g., Thornton v. Wahl*, 787 F.2d 1151, 1154 (7th Cir.), *cert. denied* 107 S. Ct. 181 (1986).

⁵⁶ *Chevron U.S.A., Inc. v. Hand*, 763 F.2d 1184, 1187 (10th Cir. 1985).

⁵⁷ *Id.*

⁵⁸ *E.g., In re Intel Securities Litig.*, 791 F.2d 672 (9th Cir. 1986).

⁵⁹ *Frazier v. Cast*, 771 F.2d 259, 262 (7th Cir. 1985).

⁶⁰ *Eavenson, Auchmuty & Greenwald v. Holtzman*, 775 F.2d 535 (3rd Cir. 1985); *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531 (9th Cir. 1986); *Unioil, Inc. v. E. F. Hutton & Co.*, 802 F.2d 1080, 1089 (9th Cir. 1986).

⁶¹ *Frazier*, 771 F.2d at 262, n.1.

⁶² *Southern Leasing Partners, Ltd. v. McMullan*, 801 F.2d 783, 787 (5th Cir. 1986); *Kamen v. American Tel. & Tel. Co.*, 791 F.2d 1006 (2d Cir. 1986); *Stevens v. Lawyers Mut. Liab. Ins. Co.*, 789 F.2d 1056, 1060 (4th Cir. 1986); *Cohen v. Virginia Elec. & Power Co.*, 788 F.2d 247, 248 (4th Cir. 1986); *Davis v. Veslan Enter.*, 765 F.2d 494, 500 (5th Cir. 1985).

reviewed *de novo*; and (3) the appropriateness of the sanction imposed is reviewed under an abuse of discretion standard.⁶³

C. Relief

The following categories represent instances where the imposition of Rule 11 sanctions was reversed by the appellate courts:

1. The Objective Criteria Satisfied

There are instances where the court of appeals just simply disagreed with the district court's determination as to whether the attorney had an objectively reasonable basis in law and in fact to proceed.⁶⁴ Reversal of sanctions has been further based on the additional consideration that to do otherwise would "stifle the enthusiasm or chill the creativity that is the very lifeblood of the law."⁶⁵

2. Avoidance of the Wisdom of Hindsight

It has been held that a district court should not go so far as to "hold a lawyer to a standard measured by what the judge later decides, but should look at the situation which existed when the paper was filed."⁶⁶ The trial court should "avoid using the wisdom of hindsight" and confine the analysis just to the signer's conduct at the time of submission of the paper.⁶⁷ Sanctions imposed by district courts which rely too heavily on hindsight are subject to reversal.⁶⁸

3. Analysis of Entire Pleading

It has been held that Rule 11 sanctions do not apply to the mere making of a frivolous argument. The entire "pleading, motion or other paper"

⁶³ *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 828 (9th Cir. 1986); *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1538 (9th Cir. 1986).

⁶⁴ *Stevens*, 789 F.2d 1056.

⁶⁵ *Kamen*, 791 F.2d at 1014.

⁶⁶ *Golden Eagle Distrib. Corp.*, 801 F.2d at 1536.

⁶⁷ *Id.* at 1537 (quoting Advisory Committee Note, 97 F.R.D. 165, 199 (1983)).

⁶⁸ *Lacina v. G-K Trucking*, 802 F.2d 1190 (9th Cir. 1986) *vacated* 107 S. Ct. 3224 (1987); *Eavenson, Auchmuty & Greenwald v. Holtzman*, 775 F.2d 535 (3d Cir. 1985); *Frazier v. Cast*, 771 F.2d 259, 266 (7th Cir. 1985) (Flaum J., concurring).

The prohibition against using the wisdom of hindsight has been invoked to uphold a sanction against an attorney who in his original motion to intervene failed to include federal law claims, but did so much later when it appeared as though the state law claims were going to be foreclosed by other action. *Pin v. Texaco, Inc.*, 793 F.2d 1448 (5th Cir. 1986). Reasoning that the court is expected to avoid using the wisdom of hindsight, counsel's conduct was measured by the reasonableness of the action at the time the pleading was submitted. *Id.* at 1455-56.

must itself be frivolous. Sanctions are not appropriate just because one of the arguments or subarguments in support of it is frivolous.⁶⁹

4. Unclean Hands

Although not designated as an "unclean hands" doctrine, both the Second Circuit⁷⁰ and the Ninth Circuit⁷¹ have clearly indicated that Rule 11 sanctions are inappropriate where the opposing party had engaged in delaying tactics or other misconduct.

IV. OTHER SANCTIONS

This manuscript is confined only to the discussion of Rule 11 as amended in 1983. There are numerous attorneys' fee shifting statutes and exceptions now generally applicable in federal court and not discussed herein.⁷²

Of particular interest and closely related to Rule 11 sanctions is the statutory provision found in 28 U.S.C. § 1927. This is similar to Rule 11 in that it authorizes sanctions against an attorney, but is basically limited to conduct which deals with a *multiplication* of proceedings, not *initial* pleadings.⁷³

It should be noted that the appellate courts have found additional authority in both the Federal Rules of Appellate Procedure and in statute to impose sanctions for frivolous appeals.⁷⁴

V. ETHICAL CONSIDERATIONS

Rule 11 has developed separate and apart from the ethical rules of conduct. Generally speaking the courts of appeals cases analyzed discuss the ethical rules of conduct very little. It has been observed that the

⁶⁹ Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531, 1540-41 n.4 (9th Cir. 1986).

⁷⁰ Woodcrest Nursing Home v. Local 144, Hotel, Hosp., Nursing Home and Allied Serv. Union 788 F.2d 894 (2d Cir. 1986)(the opposing party engaged in conduct designed to delay proceedings and also obtained repeated *ex parte* orders despite requests to be advised of applications for relief.) See also Brown v. Capitol Air, Inc. 797 F.2d 106, 108 (2d Cir. 1986) (the opposing party increased litigation costs for everyone, including the courts, by bifurcating a unitary claim through partial removal).

⁷¹ Mossman v. Roadway Express, Inc., 789 F.2d 804 (9th Cir. 1986)(opposing party caused discovery fracas by pleading thirty-seven separate affirmative defenses).

⁷² For a discussion of fee shifting statutes and exceptions, see Starr, *The Shifting Panorama of Attorneys' Fees Award: The Expansion of Fee Recoveries in Federal Court*, 28 S. TEX. L. REV. 189 (1986).

⁷³ For a comparison of Rule 11 and 28 U.S.C. § 1927, see Zaldivar v. City of Los Angeles, 823, 831 (9th Cir. 1986).

⁷⁴ FED. R. APP. P. 38; 28 U.S.C. § 1912 (1982); Reliance Ins. Co. v. Sweeney Corp., 792 F.2d 1137 (D.C. Cir. 1986).

inappropriate imposition of sanctions by a district court may create a conflict with a lawyer's duty zealously to represent his client.⁷⁵ In the same case, an effort by the district court to enforce the ethical rule relating to the duty of candor in connection with a Rule 11 sanctions was reversed.⁷⁶ Nevertheless, there is an ever-present relationship between Rule 11 and the ethical rules of conduct,⁷⁷ and, if appropriate, a Rule 11 sanction may take the form of a referral to a bar association grievance committee.⁷⁸

VI. CONCLUSION

Prior to the 1983 amendments to Rule 11, there was some concern as to whether or not the Federal Rules had adequate provisions to insure the truthfulness of allegations in pleadings and motions.⁷⁹ With the 1983 incorporation of an objective standard of reasonableness, subjective good faith was eliminated as a defense. Whether anticipated or not, the federal courts have now become flooded with litigation concerning the new Rule 11. As initially posed, certain differences do exist among the circuits; however the differences are relatively minor, relating primarily to each circuit's description of the conduct which violates the relevant standards and to the standard of review to be exerted by the appellate courts. There is uniformity in the application of the *objective* nature of the standard of reasonableness and a uniform recognition that deserved sanctions will be upheld and increased, if appropriate, for frivolous appeals. Additionally, the appellate courts have recognized areas where a district court may overstep its limits by relying too heavily on a hindsight analysis or by otherwise failing properly to apply the objective standard to the paper at the time it was filed.

An argument can easily be made that the broad scope of sanctions now authorized by Rule 11 is self-defeating because it has led to "protracted and expensive satellite litigation over the appropriateness of sanctions."⁸⁰ Although this argument has merit, its usefulness appears to be

⁷⁵ *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1540 (9th Cir. 1986).

⁷⁶ *Id.* at 1539, 1542.

⁷⁷ *Id.* at 1539 n. 2.

⁷⁸ *Lieb v. Topstone Indus., Inc.*, 788 F.2d 151, 158 (3rd Cir. 1986).

⁷⁹ Risinger, *Honesty in Pleading and its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1 (1976).

⁸⁰ *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1537 (9th Cir. 1986) (Advisory Committee's concern that courts will be besieged with motions to impose sanctions against attorneys who make frivolous motions for sanctions)(citing Advisory Committee Notes, 101 F.R.D. 161, 200 (1984)). See also *Id.* at 1541 (relying on Rosenberg, *The Federal Civil Rules After Half a Century*, 36 ME. L. REV. 243, 244 (1984)).

limited only to a case-by-case analysis, and it is highly unlikely that it will serve as a broad-scale rejection of the new standard.⁸¹ It uniformly appears as though the federal courts have not only been receptive to the new Rule 11, but they are all stepping on board the Rule 11 bandwagon to sanction frivolous filings.

⁸¹ *Id.* at 1531.