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Application Of Rule 11 In The Fourth Circuit

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Federal Rule of Civil Procedure 11[1] has been a source of great controversy since its amendment in 1983. Prior to 1983, Rule 11 required attorneys to sign pleadings to certify that they had read the pleading, that to the best of their knowledge, information, and belief, good grounds existed to support the pleading, and that they were not using the pleading for delay.[2] Old Rule 11 granted district courts discretion over whether or not to impose sanctions for a violation, and the sanction for violation of old Rule 11 was to strike the pleading as false.[3] Furthermore, the court could sanction an alleged violator under a subjective bad faith standard.[4] In 1983, however, the

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1. *See* FED. R. CIV. P., 97 F.R.D. 165, 196-7 (1983) [Hereinafter "Rule 11"] (stating amended Rule 11). Amended Rule 11 provides:

> 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 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. (emphasis in original to show 1983 additions, brackets added to show deletions).

2. *See* FED. R. CIV. P. 11, 97 F.R.D. 165, 196-97 (1983) [Hereinafter old Rule 11] (stating that duty of signing attorney is to believe that pleading supported by good grounds and not to submit pleading for purpose of delay).

3. *See* old Rule 11, *supra* note 2 (stating that sanction for pleading in violation of rule was striking pleading as false). The language of old Rule 11 stated "it *may* be stricken as sham and false . . . [and] [f]or a wilful violation of this rule an attorney *may* be subjected to appropriate disciplinary action." *Id.* (emphasis added).

4. *See* Ripple & Saalman, *Rule 11 in the Constitutional Case*, 63 NOTRE DAME L. REV.

Federal Judiciary Committee on Rules amended old Rule 11 to alleviate the growing costs, delays, and abuses developing in federal courts.[5] Under the new rule, district courts must sanction every violation of Rule 11.[6] New Rule 11 narrows the parameters of acceptable legal arguments that attorneys may file in federal court by expanding attorneys' duties to the court to include increased prefiling inquiry into the facts and legal issues surrounding the case.[7] Additionally, attorneys have a duty not to file pleadings, motions, or papers with an improper purpose[8] and have a continuing obligation[9] to conduct adequate inquiry and maintain good faith purpose in subsequent filings with the court.

Drafters of original Rule 11 intended the rule to check abuses in pleadings.[10] However, courts only imposed sanctions when an attorney failed a subjective reasonableness or bad faith standard.[11] Because judges were

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788, 791-92 (1988) (stating that under old Rule 11 court had to find attorney's filing so untenable that court could infer subjective bad faith); Note, *Has a Kafkaesque Dream Come True? Federal Rule of Civil Procedure 11: Time for Another Amendment?*, 67 B.U.L. REV. 1019, 1020-21 (1987) (authored by K. Rubin) (opining that old rule was ineffective because judges applied only subjective good faith standard of reasonableness to attorney conduct). Rubin notes that judges were reluctant to invoke Rule 11 because judges properly could sanction only an attorney who had acted in bad faith. *Id.* at 1021; *see also* Grosberg, *Illusion and Reality in Regulating Lawyer Performance: Rethinking Rule 11*, 32 VILL. L. REV. 575, 591 (1987) (stating that lawyer's proof of subjective good faith was good defense under old Rule 11 but is no longer safe harbor as to alleged violation under amended Rule 11).

5. *See* Ripple & Saalman, *supra* note 4 at 793 (explaining that purpose of amended Rule 11 is to alleviate heavy case load in federal courts).

6. *Compare* FED. R. CIV. P. 11 (mandating that federal judges sanction every violation of Rule 11). The relevant language of Rule 11 states that "[i]f a pleading . . . is signed in violation of this rule, the court . . . shall impose upon the person who signed it . . . an appropriate sanction . . ." *Id.*; *with* old Rule 11, *supra* note 2 (stating that courts "may" sanction attorneys).

7. *Compare* FED. R. CIV. P. 11 (requiring that signer of pleading make reasonable inquiry to ensure that pleading is well grounded in fact and existing law); *with* old Rule 11, *supra* note 2 (stating requirement that attorneys possess belief that good grounds exist to support filing).

8. *Compare* FED. R. CIV. P. 11 (including requirement that attorneys not submit papers to court for any improper purpose); *with* old Rule 11, *supra* note 2 (not including improper purpose as prong of old rule); *see also* Note, *Critical Analysis of Rule 11 Sanctions in the Seventh Circuit*, 72 MARQ. L. REV. 91, 106 (1989) (noting expanded scope of improper purpose to include not only delay but also harassment and unnecessary increase in litigation costs).

9. *See* FED. R. CIV. P. 11 (applying rule requirements to every pleading, motion, or paper filed in court). One trial may well involve numerous pleadings or answers, and the attorney has a continuing duty to conduct adequate inquiry into the basis for each subsequent filing. *Id. See* Ripple & Saalman, *supra* note 4, at 800 (noting that although attorneys must adhere to Rule 11 obligations to adequately inquire into facts and legal bases for *subsequent* filings, most courts reject argument that attorneys have continuing obligation to reassess same facts and law supporting original filings); Shaffer, *Rule 11: Bright Light, Dim Future*, 7 REV. OF LIT. 1, 12 (1987) (discussing cases in the Second, Seventh, and Fifth Circuits treating continuing duty issue).

10. *See* FED. R. CIV. P. 11 advisory committee's note (stating Rule 11 always was intended as check on abusive pleadings) [Hereinafter Advisory Committee Notes].

11. *See* Untereiner, *A Uniform Approach to Rule 11 Sanctions*, 97 YALE L.J. 901, 903-

reluctant to label an attorney as having acted in bad faith, federal courts rarely invoked the old rule.[12] Like the drafters of the original Rule 11, the drafters of the amended rule intended Rule 11 to check abuses in pleadings.[13] The Judicial Committee on Rules further planned for the language of the 1983 amendment, which made sanctions mandatory for every violation and required the filer to ground a complaint in both facts and law, to reduce the reluctance of courts to impose sanctions.[14] The drafters believed that an increase in Rule 11 sanctions would curb dilatory or abusive tactics and help streamline the litigation process by lessening frivolous claims or defenses.[15] The amended rule, consequently, has caused an increase in sanctions, and some practitioners and scholars attribute this increase to the switch in the standard by which courts judge an attorney from a subjective standard to an objective standard.[16] The Advisory Committee, however, was aware of the risks involved in stepping up the use of sanctions and, therefore, warned against using the rule to chill attorney enthusiasm or creativity in pursuing meritorious factual or legal theories.[17]

Although the amendment of Rule 11 has caused an increase in sanctions as the drafters hoped it would, commentators debate whether the American legal system has profited from the amendment.[18] Additionally, writers debate

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4 (1988) (stating that amenders of Rule 11 changed standard of reasonableness attendant to Rule 11 from subjective to objective to increase use of Rule 11); Note, *supra* note 4, at 1020-21 (opining that old rule ineffective because of subjective reasonableness standard).

12. *See* Ripple & Saalman, *supra* note 4, at 792 (noting that judges were reluctant to find bad faith in pleadings under old Rule 11 because judges preferred to reach merits of case and to avoid punishing clients for attorney's bad faith); *see also* Note, *supra* note 4, at 1021 (noting that under old Rule 11 judges were reluctant to label attorney as possessing bad faith because filed claim could have some merit).

13. *See* FED. R. CIV. P. 11 (requiring that litigants not submit pleading for improper purpose such as to harass, to delay, or to increase cost of litigation); *see also* Advisory Committee Notes, *supra* note 10 (noting that under Rule 11 intent of drafters of old Rule 11 to cut down abuses in pleadings was frustrated by rare invocation of old Rule 11).

14. *See* Advisory Committee Notes, *supra* note 10 (stating new language aspires to reduce courts' reluctance to sanction Rule 11 violators).

15. *See id.* (stating that greater attention by courts to pleading abuses would discourage abusive tactics, streamline litigation, and lessen frivolous claims or defenses).

16. *See* Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 196 (1985) (commenting that subjective bad faith standard increases costs to judicial system and causes satellite litigation); Shaffer, *supra* note 9, at 4 (stating objective standard is new guideline for Rule 11 violations); Note, *Application of Rule 11 Sanctions in the Ninth Circuit: Weapon or Nuisance*, 24 WILLAMETTE L. REV. 801, 804 (1988) (opining that objective standard most likely is responsible for onslaught of Rule 11 litigation).

17. *See* Advisory Committee Notes, *supra* note 10 (warning against Rule 11's use to chill attorney enthusiasm in pursuing legal theories).

18. *See* Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013, 1014 (1988) (praising rule, and its purposes). *But cf.* Shaffer, *supra* note 9, at 3 (reporting no decrease in filings since Rule 11's amendment). Mr. Shaffer also notes that benefits of Rule 11 are less significant when compared with negative effects of Rule 11 which include a chilling effect that discourages attorneys from the pursuit of sound legal theories and causes an increase in satellite litigation. *Id.*

whether the burdens of Rule 11 far outweigh the benefits that the new rule brings to courts and advocates.[19] In addition to controversy over the purposes and burdens of new Rule 11, courts and lawyers also are confused regarding differing applications of the rule among the circuits and within individual circuits.[20] Furthermore, practitioners and commentators argue that the drafters of Rule 11 and the courts invoking Rule 11 have left the rule open to varying interpretations and improper applications.[21]

Unfortunately, Fourth Circuit Rule 11 cases support commentators' arguments that Rule 11 lacks clarity.[22] There are numerous Rule 11 issues about which the Fourth Circuit fails to reach a consensus.[23] The Fourth Circuit has yet to publish a satisfactory opinion binding the district courts to either an objective or subjective standard for review of attorney conduct in Rule 11 cases.[24] Furthermore, the Fourth Circuit never has addressed the issue of the appropriate manner in which to calculate the amount of a

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19. *See* Shaffer, *supra* note 9, at 3 (stating that benefits of Rule 11 have not been realized and problems with Rule 11 have resulted); Note, *supra* note 4, at 1022 (commenting that question remains whether new Rule 11 creates more problems than it cures).

20. Although many applications of Rule 11 remain in dispute, the Supreme Court resolved some disputed applications. For example, most circuits grappled with the issue of what standard of review appellate courts should apply to a district court imposition of Rule 11 sanctions. During the controversy the Fourth Circuit consistently applied an abuse of discretion standard. *See* Donaldson v. Clark 819 F.2d 1551, 1556 (11th Cir. 1987) (applying two different standards of review to Rule 11 sanctions; abuse of discretion and de novo review); Golden Eagle Distrib. v. Burroughs Corp., 801 F.2d 1531, 1538 (9th Cir. 1986) (holding legal questions subject to de novo review and factual questions subject to clearly erroneous standard of review); Thomas v. Capital Sec. Serv., 836 F.2d 866, 872 (5th Cir. 1988) (holding all Rule 11 sanctions subject to abuse of discretion review); Note, *Rule 11 in the Fifth Circuit after* Thomas v. Capital Security Services, Inc., 57 MISS L.J. 769, 771-75 (1987) (disfavoring abuse of discretion standard in contrast with de novo standard of review). *But see* Nelson v. Piedmont Aviation, 750 F.2d 1234, 1238 (4th Cir. 1984) *cert. denied* 471 U.S. 1116 (1985) (adopting abuse of discretion standard of review for Fourth Circuit Rule 11 decisions). The United States Supreme Court decision in *Cooter & Gell v. Hartmarx Corp.*, 110 S.Ct. 2447, 2461 (1990), resolved controversy over the proper standard of review for Rule 11 decisions ruling that abuse of discretion standard of review is appropriate standard for Rule 11 decisions. *Id.*

Another disputed issue hinging on Rule 11 was whether district courts retained jurisdiction over sanctions under Rule 11 even after a voluntary dismissal of a suit. The Supreme Court decision in *Cooter & Gell* also has cleared up controversy over Rule 11 jurisdiction of dismissed actions ruling that a voluntary dismissal does not divest the district court of authority to consider Rule 11 motions. *Id.* at 2457. Prior to the Supreme Court's resolution of the jurisdiction question, the Fourth Circuit similarly had held in *Langham-Hill Petroleum v. Southern Fuels*, 813 F.2d 1327, 1330 (4th Cir.), *cert. denied*, 484 U.S. 829 (1987), that a request for attorney's fees was valid four and one-half months after judgement was entered by the district court. *Id.*

21. *See* Shaffer, *supra* note 9, at 31 (summarizing Rule 11 case law and concluding that courts disagree on how to use Rule 11 and that Rule 11 is inappropriately applied to borderline violations).

22. *See infra* notes 34-291 and accompanying text (discussing inconsistent applications of Rule 11 in Fourth Circuit).

23. *Id.*

24. *See infra* notes 34-99 and accompanying text (discussing controversy regarding objective standard of reasonableness versus subjective standard of reasonableness).

sanction.[25] Additionally, Fourth Circuit decisions inconsistently encourage and discourage the district courts' use of procedural safeguards that may be necessary to comport with due process requirements in a Rule 11 proceeding.[26] Other issues in the Fourth Circuit include the manner in which an attorney should assert a modification, expansion, or reversal of the law in pleadings,[27] how a court should allocate sanctions between attorney and client,[28] when the blame for a violation of Rule 11 may be shifted from the lawyer to the client,[29] and whether pleadings, motions, or papers originally filed in state court and removed to federal court are sanctionable.[30]

The Fourth Circuit issues enumerated above also plague the other circuits.[31] As a result of the confusion over Rule 11 in the federal courts, the Judicial Conference Committee on Rules, in August of 1990, published and distributed a formal request for comments in preparation for possible amendments to the rule.[32] Because of the conflict in the courts and until the Supreme Court addresses these issues or the Judicial Conference amends Rule 11, the judicial system will not realize the intended purposes of Rule 11.[33]

(1) Subjective or Objective Reasonableness in Filing.

The first Rule 11 issue that Fourth Circuit courts confront is whether to apply an objective or subjective standard of reasonableness to the filing in question. Fourth Circuit judges claim to adhere to a general rule that federal judges should hold attorneys and clients to an objective reasonableness standard.[34] The objective reasonableness standard measures an attor-

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25. *See infra* notes 100-130 and accompanying text (discussing inconsistent manner in which Fourth Circuit calculates Rule 11 sanctions).

26. *See infra* notes 170-206 and accompanying text (discussing disagreement over appropriate procedural safeguards to Rule 11 sanctions).

27. *See infra* notes 207-233 and accompanying text (discussing confusion over how properly to assert an intent to extend, modify, or reverse existing law).

28. *See infra* notes 234-253 and accompanying text (discussing allocation of sanctions between attorney and represented party).

29. *See infra* notes 254-256 and accompanying text (discussing likelihood that attorney may shift blame for frivolous filing to client and escape sanctions).

30. *See infra* notes 277-291 and accompanying text (discussing whether federal courts may scrutinize under Rule 11 suits removed from state to federal court).

31. *See Call For Written Comments on Rule 11 of the Federal Rules of Civil Procedure and Related Rules*, 131 F.R.D. 344 (1990) (highlighting Rule 11 controversies present in United States Courts of Appeals).

32. *Id.*

33. *See supra* note 20 (discussing Supreme Court's resolution of controversy over proper standard of appellate review of district court imposition of Rule 11 sanctions). Courts may make progress toward resolution of lingering confusion contiguous to Rule 11 if, as it did in *Cooter & Gell v. Hartmarx Corp.*, 110 S. Ct. 2447 (1990), the Supreme Court expressly rules on troublesome issues. *Id.* Progress on a case by case basis, however, will be sluggish and a better solution is for the Judicial Conference to clarify the rule itself.

34. *See, e.g.*, In re Kunstler, 914 F.2d 505 (4th Cir. 1990) (claiming to adhere to objective standard of reasonableness standard of review), *reh'g denied*, No. 89-2815 (4th Cir. Oct. 11,

ney's conduct against that of a reasonable attorney, given the available facts and available legal precedent. If a reasonable attorney would not have filed the pleading, motion, or paper in question, an attorney filing such a paper violates the rule.[35]

Relying on the 1983 amendment to Rule 11, judges expressly applied the objective reasonableness standard to litigants who failed to conduct reasonable inquiry into factual grounds, failed to conduct reasonable inquiry into legal basis for a claim, and failed to file a claim with a proper purpose.[36] Neither the amended rule nor the Advisory Committee Notes, however, expressly require adherence to an objective reasonableness standard.[37] The new rule, however, does apply to a wider range of attorney conduct than does the old rule.[38] Furthermore, the drafters intended that courts apply the new rule more strictly.[39] These changes from the old rule,[40] coupled with the urgings of the Advisory Committee's Notes to Rule 11[41] have led the judiciary to interpret that the drafters' intent was for judges to apply an objective instead of subjective standard of reasonableness to Rule 11 disputes.[42]

1990), *petition for cert. filed*, No. 90-807 (U.S. Nov. 19, 1990) (Unpublished, text on Westlaw); United States v. Hamrick, 907 F.2d 1140 (4th Cir. June 12, 1990) (Unpublished, text on Westlaw) (same); Almi Pictures, Inc. v. WFTY, Inc., 894 F.2d 401 (4th Cir. Jan. 12, 1990) (Unpublished, text on Westlaw); Artco Corp. v. Lynnhaven Dry Storage Marina, 873 F.2d 1437 (4th Cir. Apr. 10, 1989) (Unpublished, text on Westlaw); Introcaso v. Cunningham, 857 F.2d 965 (4th Cir. 1988); In re McKissick, 856 F.2d 187 (4th Cir. Aug. 16, 1988) (Unpublished, text on Westlaw) (same).

35. *See infra* note 42 (citing cases wherein courts discuss objective standard as appropriate standard for Rule 11 analysis).

36. *See* FED. R. CIV. P. 11 (omitting term "willful" from language of new rule); Advisory Committee Notes, *supra* note 10 (emphasizing drafter's intent to render Rule 11 more applicable to unreasonable filings). The drafters of the 1983 amended Rule 11 attempted to make the rule more effective by doing away with the term "willful", thereby doing away with the original rule's requirement that courts find the filer guilty of intentionally hindering the legal process as determined by a subjective reasonableness analysis. *Id.*

37. *See* FED. R. CIV. P. 11 (including no express requirement that attorneys adhere to objective standard of reasonableness); Advisory Committee Notes, *supra* note 10 (same).

38. *Compare* FED. R. CIV. P. 11 (including stricter requirements that attorneys adequately research factual and legal basis for claims); Advisory Committee Notes, *supra* note 10 (noting that new language stresses need for prefiling inquiry into both facts and law to satisfy duty imposed by Rule 11); *with* old Rule 11, *supra* note 2 (not including express requirement that attorneys research both factual and legal basis for claims).

39. *Id.*

40. *See* Rule 11, *supra* note 1 (noting changes from old Rule 11).

41. *See* Advisory Committee Notes, *supra* note 10 (stating that amended Rule 11 designed to reduce courts' reluctance to sanction through stricter review of attorney conduct).

42. *See* Davis v. Crush, 862 F.2d 84, 88 (6th Cir. 1988) (reversing district court sanctions based on subjective standard because drafters intended that standard of amended rule be more stringent objective standard and apply to greater range of circumstances); Cabell v. Petty, 810 F.2d 463, 466 (4th Cir. 1987) (interpreting both plain language of Rule 11 and Advisory Committee Notes to mandate objective reasonableness standard); Zaldivar v. City of Los Angeles, 780 F.2d 823, 829 (9th Cir. 1986) (same).

Authorities are, for the most part, in agreement that courts should judge an attorney's failure to ground a filing on adequate inquiry into the facts or law according to an objective reasonableness standard.[43] At least one law review note has questioned, however, whether an objective standard is appropriate for review of the improper purpose prong of a Rule 11 violation.[44] The drafters specify harassing the court or the opposing party or causing unnecessary delay or needless increase in the cost of litigation as examples of improper purpose violations.[45] Because the offending party intentionally commits the conduct that the rule labels improper, one federal district court judge held that a *mens rea* element accompanies such conduct.[46] Adopting this argument, commentators note that courts should consider subjective elements in reviewing an alleged filing for improper purpose.[47]

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43. *See Cabell*, 810 F.2d at 466 (applying objective standard of reasonableness); Hsiung, *Legal Ethics: Rule 11 Sanctions: Reasonable Inquiry, Standards of Review, Due Process Concerns*, 1987 Ann. Surv. Am. L. 373, 381 (1987) (stating that most federal courts adopted objective standard under language of *Zaldivar*, 780 F.2d at 823 or *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243 (2nd Cir. 1985) *remanded*, 637 F. Supp. 558 (E.D.N.Y. 1986), *modified*, 821 F.2d 121 (2d Cir.) *cert. denied*, 484 U.S. 918 (1987)). *But see* Eastway Constr. Corp. v. City of New York, 637 F.Supp 558, 566 (E.D.N.Y. 1986) (stating review of attorney's inquiry into factual or legal basis of suit involves both objective and subjective analysis), *modified*, 821 F.2d 121 (2d Cir.), *cert. denied*, 484 U.S 918 (1987).

44. *See* Note, *supra* note 4, at 1031-32 (discussing subjectivity of improper purpose analysis). The confusion over the appropriate standard of conduct for Rule 11 became evident in the first major decision evaluating the amended rule. *See Eastway*, 762 F.2d at 253-54 (claiming to apply objective bad faith standard but actually applying dual standard). The *Eastway* court stated that, "sanctions shall be imposed . . . when it appears that a pleading has been interposed for any improper purpose, *or where*, after reasonable inquiry, a competent attorney could not form a reasonable belief that the pleading is well grounded in fact and is warranted by existing law[.]" *Id.* at 254 (emphasis in the original). Given the "or where" in the court's ruling, the reasonable inquiry only necessarily applied to the factual and legal basis for the claim and not to the improper purpose prong; Note, *supra* note 4, at 1031-32; *see also* Note, *Rule 11 Sanctions: Contrasting Applications in the Second and Fourth Circuits*, 46 MD. L. REV. 470, 479-80 (1987) (noting improper purpose findings in Fourth Circuit decisions may reflect lingering influence of old Rule 11 and its subjective bad faith standard); Note, *Rule 11 Sanctions: Toward Judicial Restraint*, 26 WASHBURN L.J. 337, 367-69 (1987) (suggesting that drafters intended courts to compare own conclusions of what reasonable attorney would conclude with what counsel actually concluded). If this comparison reflects that the attorney was unreasonable the court may presume the attorney intended to harass the court. *Id.*

45. *See* FED. R. CIV. P. 11 (stating that suit is interposed for improper purpose under Rule 11 if it constitutes harassment or causes unnecessary delay or needless increase in litigation costs).

46. *See* Eastway Constr. Corp. v. City of New York, 637 F.Supp. 558, 567 (E.D.N.Y. 1986) (holding courts should not subject attorneys to penal rule in which attorney intent or mens rea to act improperly is unnecessary to punish offender), *modified*, 821 F.2d 121 (2d Cir.) *cert. denied*, 484 U.S. 918 (1987).

47. *See* Note, *Rule 11 Sanctions: Toward Judicial Restraint*, 26 WASHBURN L.J. 337, 361-65 (discussing intent as element of improper purpose violation of Rule 11). The author expresses concern over courts' refusal to examine an attorney's subjective intent in determination of Rule 11 violations. *Id.* The author argues that a court's refusal to examine intent prior to sanctioning an attorney under a punitive statute results in compromises to an attorney's due process rights. *Id.*; *see also* Hsiung, *supra* note 43, at 381-86 (recognizing validity of Judge

Following this line of reasoning, a recent Fourth Circuit opinion, *In re Kunstler*,[48] challenged the established objective standard by holding an attorney's subjective purpose in signing a claim to be an appropriate consideration to an improper purpose analysis.[49]

Prior to Judge Chapman's express challenge to the objective standard in *In re Kunstler*,[50] Fourth Circuit judges purported to adhere to a strict objective standard for all prongs of the rule, which include legal inquiry, factual inquiry, and improper purpose.[51] However, several Fourth Circuit cases decided prior to *In re Kunstler* seemed to contradict judges' claims to adhere to an objective standard.[52] For example, Judge Haynsworth's unpublished opinion deciding *In re McKissick*[53] illustrates the confusion between objective and subjective review of an attorney's alleged failure to adequately research a claim.[54] The *McKissick* court decided whether the district court correctly had applied an objective standard of reasonableness in ruling that an attorney had failed to adequately inquire into the legal and factual basis of a claim.[55] In *McKissick*, an attorney represented a client who sued a local prosecuting attorney and the North Carolina Bureau of Investigation under 42 U.S.C. section 1983[56] alleging that the local prosecutor's investigation of a client's financial affairs was racially motivated.[57]

Weinstein's opinion in *Eastway*, 637 F. Supp. at 558, and suggesting that courts consider subjective elements to determine what is reasonable under circumstances).

48. 914 F.2d 505 (4th Cir. 1990), *reh'g denied*, No. 89-2815 (4th Cir. Oct. 11, 1990), *petition for cert. filed*, No. 90-807 (U.S. Nov. 19, 1990).

49. *See* In re Kunstler, 914 F.2d 505, 512 (4th Cir. 1990) (holding signer's subjective intent appropriate consideration in deciding signer's purpose in filing suit), No. 89-2815 (4th Cir. Oct. 11, 1990), *petition for cert. filed*, No. 90-807 (U.S. Nov. 19, 1990). In *In re Kunstler* the court clearly reveals the inconsistency in applying an objective analysis to a signer's purpose in filing by stating that "[t]here is some paradox involved in this analysis, because it is appropriate to consider the *signer's* subjective beliefs to determine the signer's purpose in filing suit, if such beliefs are revealed through an admission that the signer knew that the motion or pleading was baseless but filed it nonetheless." *Id.* at 519, (emphasis in the original). The court then qualifies its apparent rejection of the objective improper purpose test by stating that "[t]his evidence may be said to be 'objective' in the sense that it can be viewed by a court without fear of misinterpretation[.]" *Id.*

50. *Id.*

51. *See infra* notes 51-91 and accompanying text (discussing cases wherein Fourth Circuit judges purport to adhere to objective reasonableness standard in analyzing Rule 11 disputes).

52. *See* Blair v. Shenandoah Women's Center, Inc., 757 F.2d 1435, 1438 (4th Cir. 1985) (exhibiting failure to adhere to purely objective analysis of attorney conduct in Rule 11 cases); *see also infra* notes 53-91 and accompanying text (discussing three Fourth Circuit cases exhibiting failure to adhere to purely objective analysis of attorney conduct in Rule 11 cases).

53. 856 F.2d 187 (4th Cir. Aug. 16, 1988) (Unpublished, text on Westlaw).

54. *See infra* notes 55-62 and accompanying text (explaining inconsistency between *McKissick* court's claim to apply objective standard and court's inclusion of subjective considerations in opinion).

55. In re McKissick, 856 F.2d 187 (4th Cir. Aug. 16, 1988) (Unpublished, text on Westlaw at 7) [Page numbers for all unpublished cases cited in this note refer to Westlaw computer screen number on which cited text is displayed].

56. *See* 42 U.S.C. § 1983 (1988) [hereinafter section 1983] (giving plaintiffs right of action for deprivation of civil rights by persons acting under state law).

57. *McKissick*, 856 F.2d at 3-4.

The district court dismissed the civil rights action in an unpublished opinion and required McKissick to show why the court should not sanction McKissick.[58] McKissick offered a substantial affidavit that stated the basis for filing the suit.[59] At the sanctions hearing, however, the district court declined to consider any additional information, stating that the affidavit came too late and relied solely on the pleadings, motions, and other papers filed in the underlying action.[60] Consequently, concluding that McKissick had not acted reasonably when he filed the complaint, the district court sanctioned McKissick.[61]

On appeal, Judge Haynsworth held that the excluded, additional information that McKissick supplied should have been the most important focus of the district court's inquiry.[62] According to the court, McKissick's affidavit could have made believable McKissick's claim of reasonableness, and, therefore, the district court had inappropriately limited the record and abused its discretion.[63] Although this decision purports to enforce an objective reasonableness standard, the appellate court's consideration of McKissick's explanatory affidavit is a subjective inquiry into individual reasons for filing the complaint.[64] The Fourth Circuit, in effect, rejected the true objective inquiry that the district court performed when the district court refused to consider any information other than the pleadings filed in the underlying action.[65]

In addition to the Fourth Circuit's erroneous attempt to apply an objective standard to the alleged violation in *McKissick*, the Fourth Circuit also fails to adhere to an objective inquiry when analyzing a district court's imposition of Rule 11 sanctions against a litigant sanctioned for improper purpose.[66] For example, in *Chu v. Griffith*[67] the Fourth Circuit considered whether to uphold the district court's imposition of Rule 11 sanctions against the plaintiffs' attorney.[68] In *Chu* the plaintiffs filed a section 1983 claim for damages in federal district court against a judge who was presiding over the plaintiffs' contested divorce proceedings and had ordered the plaintiffs' children into the temporary custody of the state.[69] The plaintiffs alleged that the judge violated their civil rights by depriving them of custody of their children.[70] The district court dismissed the action against the judge

58. *Id.* at 4.
59. *Id.* at 5.
60. *Id.* at 6.
61. *Id.*
62. *Id.* at 7-8.
63. *Id.* at 8.
64. *See supra* notes 55-60 and accompanying text (explaining district court's refusal to consider facts not on record at trial and appellate court's belief that consideration of affidavit proper).
65. *Id.*
66. *See infra* notes 68-83 and accompanying text (discussing courts' tendency to allow subjective considerations into Rule 11 improper purpose analysis).
67. 771 F.2d 79 (4th Cir. 1985).
68. Chu v. Griffith, 771 F.2d 79, 80 (4th Cir. 1985).
69. *Id.* at 81.
70. *Id.*

and imposed Rule 11 sanctions against the plaintiffs' attorney for failure to show an adequate legal basis for the claim and for filing the claim with an improper purpose.[71] The Fourth Circuit affirmed, reasoning that because a judge is absolutely immune from a claim for damages arising out of the judge's performance of judicial duties, the plaintiffs had no legal basis for the claim.[72] Furthermore, concluding that the plaintiffs filed the damages claim in an attempt to compel the judge to recuse himself from the divorce and custody proceeding, the Fourth Circuit approved the district court's finding of improper purpose.[73]

Because both the district court and the Fourth Circuit relied on the finding of attempt or *mens rea*, the Fourth Circuit applied a subjective reasonableness standard.[74] Because an objective analysis omits evidence of an individual's intent, a true objective analysis of the plaintiff's action in *Chu* would have resulted in the court's finding only that the plaintiffs lacked an adequate legal basis for filing the complaint.[75] Specifically, had the court applied an objective standard, the court would have excluded from its consideration the plaintiffs' underlying intent to compel the judge to recuse himself.[76]

Similarly, in *Cohen v. Virginia Electric & Power Co.*,[77] the Fourth Circuit applied a subjective analysis to the plaintiff's purpose in filing a motion.[78] In *Cohen* the Fourth Circuit decided whether to uphold a district court sanction for improper purpose under Rule 11.[79] The plaintiff filed a motion to amend the plaintiff's original complaint following the district court's dismissal of a portion of the plaintiff's copyright infringement action.[80] Despite the district court's finding that the plaintiff had legal grounds to file the motion to amend, the district court sanctioned the plaintiff for improper purpose when the court discovered that the plaintiff and his attorney had decided in advance to withdraw the motion if the defendant indicated any opposition to its amendment.[81] In affirming Rule 11 sanctions the Fourth Circuit reasoned that if the plaintiff did not want to displease its opponent by amending its motion, the plaintiff could have contacted the defendant informally to discover whether the defendant would object.[82] Instead, the plaintiff wasted judicial resources by filing a motion

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71. *Id.* at 80.
72. *Id.* at 81.
73. *Id.*
74. *Id.*
75. *See supra* notes 40-44 and accompanying text (discussing objective reasonableness standard of attorney conduct).
76. *Id.*
77. 788 F.2d 247 (4th Cir. 1986).
78. Cohen v. Virginia Electric & Power Co., 788 F.2d 247, 249 (4th Cir. 1986).
79. *Id.*
80. *Id.* at 248.
81. *Id.* at 249.
82. *Id.*

that the plaintiff did not intend to pursue if it were opposed.[83] Because an objective analysis of the plaintiff's motion would not have taken into consideration the plaintiff's personal *mens rea*, the Fourth Circuit's affirmance of Rule 11 sanctions supports the conclusion that courts often apply a subjective analysis to an improper purpose violation.[84] Consequently, under a purely objective analysis, the court would not have sanctioned the plaintiff's plan to withdraw the motion upon objection, which resulted in the expending of judicial resources and exhaustive research on the part of the defendant.

Writers make a strong argument, therefore, that the term "improper purpose" necessarily requires an *intent* on the part of the person filing a pleading, motion, or other paper, to deceive or take advantage of the legal process.[85] For judges to label an attorney's conduct improper is perhaps impossible without inquiring into the attorney's motivations precedent to every action instituted in court. One court, frustrated by this incongruity, reasoned that applying a penal rule to lawyers without a subjective guilt standard is an offense to American penal and professional traditions.[86] Accordingly, commentators attribute the reluctance to apply an objective reasonableness standard in improper purpose cases to a court's desire not to curb attorney creativity through penal sanctions.[87] If courts only impose sanctions when the offender exhibits *mens rea*, courts will not chill attorney creativity and enthusiasm.[88] However, if courts sanction attorneys according to the objective reasonableness of attorney judgment, attorneys might never assert questionable causes of action.[89]

Fourth Circuit decisions show that courts necessarily must review an attorney's subjective reasonableness to determine whether an attorney filed with an improper purpose.[90] The objective reasonableness standard is proper to analyze an attorney's investigation into the factual or legal grounds of a claim because the available facts in a case are the same for any attorney taking the case and all attorneys have access to appropriate precedent in

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83. *Id.*

84. *See supra* notes 50-84 and accompanying text (discussing courts' tendency to allow subjective considerations into Rule 11 improper purpose analysis).

85. *See supra* note 44 (citing articles wherein writers discuss cases that illustrate confusion over what standard, subjective or objective, is appropriate for Rule 11 analysis in general).

86. *See* Eastway Constr. Corp. v. City of New York, 637 F. Supp. 558, 567 (E.D.N.Y. 1986) *modified*, 821 F.2d 121 (2d. Cir.) *cert. denied*, 484 U.S. 918 (1987) (revealing Judge Weinstein's apparent rejection of objective standard for penal Rule 11), *modified*, 821 F.2d 121 (2d Cir.), *cert. denied*, 484 U.S. 918 (1987).

87. *See* Advisory Committee Notes, *supra* note 10 (stating that Rule 11 was not intended to chill attorney enthusiasm or creativity in pursuing factual or legal theories).

88. *See* Note, *supra* note 47, at 370 (recognizing drafters' intent to chill certain types of creativity and certain courts' sensitivity to dangers of chilling).

89. *Id.*

90. *See supra* notes 50-83 and accompanying text (analyzing Fourth Circuit cases containing subjective standards for review of attorney conduct).

their jurisdictions.[91] On the other hand, the intentions and wishes of individual litigants and the litigants' attorneys are not universally available.[92] Therefore, the application of an objective reasonableness standard to the improper purpose prong of Rule 11 is inappropriate and impossible.

According to some writers, however, the elements of subjectivity compromise the purposes of Rule 11 and, therefore, should be eliminated.[93] Specifically, these writers argue that decisions based on an attorney's honest belief ignore the attorney's duty to plead responsibly under the rule.[94] Using Fourth Circuit decisions as a model, the more convincing argument is that courts should limit the objective reasonableness requirement to the factual and legal inquiry prongs and that courts should apply a subjective test to the improper purpose prong. Similarly, one Fourth Circuit judge suggests that courts should consider the attorney's factual and legal inquiry before moving to an investigation of improper purpose to ensure that the court applies the proper standard to each issue.[95] As is shown in *McKissick*, *Chu*, and *Cohen*, the subjective inquiry is not overburdensome and results in punishment for improper filings.[96] Additionally, when a Rule 11 movant calls a litigant's intentions into question, the equitable procedure is for the moving party to air grounds for suspicion and for the responding party to explain the conduct called into question.[97] As was stated in *In re Kunstler*, it is appropriate for a finder of fact to consider a signer's subjective intention in filing a motion, if such intentions reveal the signer's knowledge that a suit was groundless.[98] Additionally, the judge also should consider intentions which reveal that the signer had no improper motives.[99]

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91. *See* Schwarzer, *supra* note 18, at 1022-23 (expounding benefits of reasonable inquiry analysis of attorney's duty to research facts and law supporting claim).

92. *See* Shaffer, *supra* note 9, at 13-14 (recognizing subjective elements necessarily included in determining improper purpose); Nelken, *Sanctions Under Amended Federal Rule 11*, 74 GEO L.J. 1313, 1320 (1986) (stating that the improper purpose standard requires court to attempt to fathom motives of the signer).

93. *See* Schwarzer, *supra* note 16 (encouraging firm objective standard); Note, *supra* note 4, at 1043-44 (criticizing use of subjective standard).

94. Note, *supra* note 4, at 1043.

95. *See* In re Kunstler, 914 F.2d 505, 518 (4th Cir. 1990) (recommending that district court consider first two prongs of Rule 11 before improper purpose prong), *reh'g denied*, No. 89-2815 (4th Cir. Oct. 11, 1990), *petition for cert. filed*, No. 90-807 (U.S. Nov. 19, 1990). Judge Chapman explained that the district court discussed improper purpose in its opinion before discussing the possibility of factual and legal support for the claim. *Id.* In Judge Chapman's view the outcome of an inquiry into an attorney's legal and factual basis of the claim will often influence the determination of the signer's purpose. *Id.* Chapman suggested, therefore, that the district court consider the legal and factual prongs of the rule first. *Id.*

96. *See supra* notes 50-83 and accompanying text (analyzing Fourth Circuit cases containing subjective elements in Rule 11 findings).

97. *See Kunstler*, 914 F.2d at 522 (discussing that court denial of Rule 11 offender's right to be heard is violation of due process rights).

98. *Id.* at 512.

99. *Id.*

(2) AMOUNT OF SANCTION

A second Rule 11 issue confronting the Fourth Circuit is the proper calculation of sanction amounts. The relevant language of Rule 11 permits federal courts to order sanctions awarding expenses including reasonable attorney fees to a party harmed by a frivolous filing.[100] As Rule 11 authorizes and the advisory committee notes explain, the Fourth Circuit affords the district courts broad discretion to determine the appropriate amount of sanction.[101] Rule 11 does not require that the offender compensate full attorney fees, and the Fourth Circuit has taken advantage of this leniency.[102] However, the Fourth Circuit has not adopted a uniform method of sanctioning or a uniform method of calculating sanctions. For example, the Fourth Circuit has both awarded and reversed sanctions equalling the full costs of litigation to the opposing side.[103] Additionally, some Fourth Circuit judges consider mitigating factors of a case, such as time constraints on

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100. *See* FED. R. CIV. P. 11 (authorizing sanctions constituting amount of attorney fees incurred in defending frivolous suit).

101. *See* FED. R. CIV. P. 11 (granting sanctioning court authority to impose an appropriate sanction); Advisory Committee Notes, *supra* note 10 (stating that district court has discretion to fashion sanction appropriate to facts of case); *see also* Introcaso v. Cunningham, 857 F.2d 965, 970 (4th Cir. 1988) (stating that imposition of commensurate sanction is within province of the district court); Cabell v. Petty, 810 F.2d 463, 466 (4th Cir. 1987) (recognizing that language of Rule 11 leaves questions of amount of sanction to district court's discretion); Cleveland Demolition Co. v. Azcon Scrap Corp., 827 F.2d 984, 988 (4th Cir. 1987) (same); Green v. Foley, 907 F.2d 1137 (4th Cir. 1990) (Unpublished, text on Westlaw at 6) (same), *cert. denied*, 111 S.Ct.257 (1990)).

102. *See* Basch v. Westinghouse Elec. Corp., 777 F.2d 165, 174 (4th Cir. 1985) (awarding nonviolating party only fraction of attorney's fees) *cert. denied*, 476 U.S. 1108 (1986). In *Basch* the district court found that the plaintiffs abused the discovery procedure in failing truthfully and timely to reveal the identity of their expert witness. *Id.* at 174. Given the time constraints confronting the defendants' lawyers, the law firm, believing the plaintiffs' expert witness to be adverse to the defendant, sent a partner to depose the plaintiff's expert witness. *Id.* at 173. The witness during the deposition identified himself as a "witness of fact without prejudice to either side[.]" *Id.* Had the defendant known the true nature of the witness, an associate instead of a partner with the defending law firm would have been sent to conduct the deposition. *Id.* at 174. Judge Murhaghan affirmed the district court's sanction amounts, which consisted of the fee difference between a partner's hourly rate and the hourly rate of an associate, in addition to the cost to the corporation of prosecuting the motion for sanctions. *Id.*

103. *See* Local Union No. 24 Int'l Bhd. of Elec. Workers v. Daigle Elec. Service, Inc., 818 F.2d 29 (4th Cir. Apr. 30, 1987) (Unpublished, text on Westlaw at 3) (validating sanction although sanction amount in excess of costs associated with the pleading that violated Rule 11). In *Electric Workers* the Fourth Circuit rejected the contention that a sanction under Rule 11 should not exceed the costs attributable to services rendered in responding to a frivolous defense. *Id.* The Fourth Circuit ruled that the district court had discretion to fix the sanction in the amount of attorney's fees for the entire case if that court thought it appropriate. *Id. But cf.* Corcoran v. IBM, 896 F.2d 545 (4th Cir. Jan. 30, 1990) (Unpublished, text on Westlaw at 9-10) (remanding sanctions totalling full costs of fees for opposing party for recalculation), *reh'g denied*, (4th Cir. Mar. 13, 1990); In re Scarlett, 907 F.2d 1139 (4th Cir. June 12, 1990) (Unpublished, text on Westlaw at 3) (same).

filing or the inexperience of an attorney and, then, decrease or reverse the amount of sanction.[104]

When district courts choose to base the amount of Rule 11 sanctions on legal costs, the courts rely on a fee statement that the nonviolating party provides the court.[105] When a district courts finds a fee statement to be unreasonably large, the court discounts the fee statement by a percentage[106] or by dividing the amount stated in half.[107] Although large sanctions are within the boundaries of the rule, little justification exists for large sanctions that financially may cripple an attorney because the rule's primary purpose is deterrence and not reimbursement.[108] In most cases a sanction of any amount will deter an attorney from future frivolous filings. Courts must take caution, therefore, not to chill unnecessarily attorney enthusiasm that could result in decreased filings of meritorious suits.[109] To curb the imposition of severe sanctions, the Fourth Circuit considers mitigating factors in

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104. *See* Blue v. United States Dept of Army, 914 F.2d 525, 546 (4th Cir. 1990) (reversing district court sanction of inexperienced attorney taking into consideration inexperience, late entry into litigation, and subordination to more experienced attorney), *petition for cert. filed*, No. 90-1076 (U.S. Dec. 17, 1990); *Corcoran*, 896 F.2d 545 (text on Westlaw at 9-10) (remanding sanction amount to district court for recalculation in accordance with mitigating factors first outlined in *Barber v. Kimbrell's Inc.*, 577 F.2d 216, 226 n.28 (4th Cir.) *cert. denied*, 439 U.S. 934 (1978)). The *Barber* mitigating factors include: (1) time and labor expended; (2) novelty and difficulty of the legal questions raised; (3) skill required properly to perform the legal services rendered; (4) the attorney's opportunity costs in pressing the instant litigation; (5) the customary fee for like work; (6) the attorney's expectations at the outset of litigation; (7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation, and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorneys' fees awards in similar cases. *Barber*, 577 F.2d at 226 n.28; *see also* Poindexter v. Town of Rocky Mount, 849 F.2d 606 (4th Cir. June 9, 1988) (Unpublished, text on Westlaw at 7) (affirming district court sanction amount in approval of district court's adherence *Barbers* factors) *cert. denied*, 488 U.S. 968 (1988).

105. *See e.g.*, *Scarlett*, 907 F.2d at 1139 (Unpublished, text on Westlaw at 5) (discussing requested sanctions based on fee statement submitted by nonviolating party); *Corcoran*, 896 F.2d at 545 (text on Westlaw at 8-9) (same); *In re Fallin*, 888 F.2d 1385 (4th Cir. Oct. 11, 1989) (Unpublished, text on Westlaw at 4) (same); Zaidi v. Edwards, 829 F.2d 1121 (4th Cir. Sept. 22, 1987) (Unpublished, text on Westlaw at 3) (same).

106. *See* Cleveland Demolition Co. v. Azcon Scrap Corp., 827 F.2d 984, 988 (4th Cir. 1987) (finding case to be over-lawyered and, therefore, reducing requested fees by 10% to reflect local rate).

107. *See* Almi Pictures, Inc. v. WFTY, Inc., 894 F.2d 401 (4th Cir. Jan. 12, 1990) (Unpublished, text on Westlaw at 10) (dividing attorney's fees statement in half when court found bill unreasonably large).

108. *See* In re Kunstler, 914 F.2d 505, 522 (4th Cir. 1990) (vacating sanction imposed by district court finding sanction too large), *reh'g denied*, No. 89-2815 (4th Cir. Oct. 11, 1990), *petition for cert. filed*, No. 90-807 (U.S. Nov. 19, 1990). The Fourth Circuit held that the sanction amount should reflect the primary purpose of rule which is deterrence, not punishment. *Id.*; *see also* Cabell v. Petty, 810 F.2d 463, 466 (4th Cir. 1987) (holding that courts should impose least severe sanction adequate to serve purposes of Rule 11).

109. *See* Advisory Committee Notes, *supra* note 10 (warning courts not to unnecessarily chill attorneys with Rule 11 and thereby prevent filings of meritorious suits).

setting the sanction amount.[110] In many cases, judges adhere to the well-known principle that courts should impose only the least severe sanction adequate to serve the purpose of the rule.[111] Accordingly, appellate courts generally do not disturb district court calculations of small awards. The appellate courts are concerned, however, about large, unjustified awards and, thus, remand for clarification cases in which the district court imposes severe sanctions.[112]

On the other end of the spectrum, the Fourth Circuit also has affirmed nonmonetary sanctions absent specific findings of cost.[113] The language of the rule contains no express requirement that a sanction be monetary.[114] The Fourth Circuit typically imposes monetary sanctions, but the Fourth Circuit also has used threats and reprimands to punish a Rule 11 violator.[115]

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110. *See* Blue v. United States Dept. of Army, 914 F.2d 525, 546 (4th Cir. 1990) (reversing district court sanctioning of inexperienced attorney taking into consideration inexperience, late entry into litigation, and subordination to more experienced attorney), *petition for cert. filed*, No. 90-1076 (U.S. Dec. 17, 1990); Corcoran v. I.B.M., 896 F.2d 545 (4th Cir. Jan. 30, 1990) (Unpublished, text on Westlaw at 9) (remanding sanction amount to district court for recalculation in accordance with mitigating factors first outlined in *Barber v. Kimbrell's Inc.*, 577 F.2d 216, 226 n.28 (4th Cir.), *cert. denied*, 439 U.S. 934 (1978)); *see also* Poindexter v. Town of Rocky Mount, 849 F.2d 606 (4th Cir. June 9, 1988) (Unpublished, text on Westlaw at 7) (affirming district court sanction amount and approving district court's adherence to factors in *Barber*); *supra* note 104 (listing *Barber* mitigating factors).

111. *See* Green v. Foley, 907 F.2d 1137 (4th Cir. June 6, 1990) (Unpublished, text on Westlaw at 16) (citing *Cabell*, 810 F.2d at 466, wherein court justified low award because purpose of Rule 11 is to deter rather than to punish); *Cabell*, 810 F.2d at 466 (citing Schwarzer, *infra* who argued that courts should merely reprimand attorney for attorney's first violation of Rule 11); *see also* Schwarzer, *supra* note 16 (stating basic Rule 11 principle that courts should impose least severe sanctions adequate to serve purposes of Rule 11).

112. *See* In re Scarlett, 907 F.2d 1139 (4th Cir. June 12, 1990) (Unpublished, text on Westlaw at 10-11) (remanding for explanation of sanction amount). In *Scarlett* the Fourth Circuit remanded the case for the district court to clarify the basis for the amount awarded. *Id.* at 11. The court suggests that a better choice for the court would be to apportion the award between the client and the attorney because the client's actions were "particularly offensive" while the attorney's violation was more a result of inexperience. *Id.*; *see also Corcoran*, 896 F.2d at 545 (text on Westlaw at 10) (remanding for explanation of sanctions amount); *infra* notes 234-253 and accompanying text (discussing apportionment of awards between attorneys and clients).

113. *See* Baldwin v. Boone, 812 F.2d 1400 (4th Cir. Feb. 6, 1987) (Unpublished, text on Westlaw at 4) (affirming district court sanction consisting of reprimand and threat to take 25% percent of prisoner's prison trust account).

114. *See* FED. R. CIV. P. 11 (omitting requirement that Rule 11 sanction must be monetary). Rule 11 provides that an appropriate sanction *may* include an order to pay the other party reasonable expenses, including a reasonable attorney's fee. *Id.* (emphasis added).

115. *See Baldwin*, 812 F.2d at 1400 (text on Westlaw at 3) (imposing Rule 11 sanctions on plaintiff consisting of threat to deduct two $200 from plaintiff's prison trust account). In *Baldwin* the plaintiff was a prison inmate who had filed previous suits in federal court on the identical subject matter addressed in the current suit. *Id.* at 2. The judge found that the plaintiff violated Rule 11 by giving a fraudulent answer to the court when asked whether he had previously filed portions of his claim in federal court. *Id.*; *see also* Stevens v. Lawyers Mut. Liab. Ins. Co., 789 F.2d 1056, 1059 (4th Cir. 1986) (discussing Rule 11 sanction constituting reprimand). In *Stevens* the district court sanctioned the petitioner through a

The Fourth Circuit tolerates the disparity between large monetary awards and nonmonetary or small monetary awards because the primary purpose of the rule is not to reimburse the other side but rather to punish and deter the offending party from violation of the rule in the future.[116] Additionally, Rule 11 and the Advisory Committee Notes leave to the district court the task of designing an appropriate sanction.[117]

Courts also sanction attorneys for their efforts to appeal sanctions imposed against them.[118] Before the Supreme Court's decision in *Cooter & Gell v. Hartmarx Corporation*,[119] the cost to the successful Rule 11 movant of defending an appeal from an imposition of Rule 11 sanctions could affect the amount that the attorney eventually might owe in total sanctions.[120] The *Cooter & Gell* case presented three issues to the Supreme Court.[121] The first was whether to uphold a district court's affirmation of sanctions against a party who voluntarily had dismissed that party's own complaint.[122] Secondly, the Court ruled on the appropriate standard of appellate review of a Rule 11 sanction.[123] Finally, the Court decided whether Rule 11 authorizes sanctions for a frivolous appeal of sanctions imposed in an underlying dispute.[124] In *Cooter & Gell* the petitioner filed claims of antitrust violations against the respondent.[125] The respondent replied with a motion to dismiss and, alleging inadequate factual basis to support the petitioner's claim, a motion for Rule 11 sanctions.[126] The district court found that the

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reprimand. *Id.* at 1059. The Fourth Circuit reversed the sanction on other grounds. *Id.*; In re McKissick, 856 F.2d 187 (4th Cir. Aug. 16, 1988) (Unpublished, text on Westlaw at 6) (reversing on other grounds district court's Rule 11 sanction constituting reprimand).

116. *See* Pavelic & LeFlore v. Marvel Entertainment Group, 110 S. Ct. 456, 460 (1989) (ruling that reimbursement is not the purpose of Rule 11) *remanded*, 907 F.2d 145 (2d Cir. 1990). In *Pavelic & LeFlore* the Supreme Court held that the purpose of Rule 11 was to stress to the individual signer the importance and nondelegability of the signer's duty to the court. *Id.* at 460.

117. *See* FED. R. CIV. P. 11 (stating that upon violation court shall impose an appropriate sanction); Advisory Committee Notes, *supra* note 10 (noting that courts retain flexibility to deal with circumstances of each case appropriately).

118. *See Stevens*, 789 F.2d at 1061-62 (denying plaintiff's motion for sanctions and sanctioning plaintiff's motion for sanctions under Rule 11); Chu v. Griffith, 771 F.2d 79, 81 (4th Cir. 1985) (imposing sanctions for cost to opposition of defending sanction motion). In *Chu* the plaintiff sued a judge in the face of settled law that a judge is absolutely immune from claims for damages. *Id.*

119. 110 S. Ct. 2447 (1990).

120. *See Chu*, 771 F.2d at 81 (imposing sanctions for cost of sanction motion). *But see* Introcaso v. Cunningham, 857 F.2d 965, 970 (4th Cir. 1988) (holding costs of litigation not compensable following grant of motion to dismiss, including costs of motion for attorney's fees under Rule 11 even if stemming from signing of pleading proscribed by Rule 11).

121. *See* Cooter & Gell v. Hartmarx Corp., 110 S.Ct. 2447, 2451 (1990) (holding that costs to defend an appeal of Rule 11 sanction not sanctionable under Rule 11).

122. *Id.* at 2452.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

petitioner violated Rule 11 in filing the complaint and awarded attorney fees to the respondent based on the costs of answering the frivolous claim.[127] The Court of Appeals for the District of Columbia affirmed the Rule 11 sanction imposed by the district court and awarded the respondent costs for defending the Rule 11 award on appeal.[128] The United States Supreme Court affirmed the sanctions but reversed the award of costs for defending the sanctions on appeal reasoning that Rule 11 does not apply to appellate proceedings because the Federal Rules of Civil Procedure only govern procedure in United States district courts.[129] Because an appeal of sanctions is filed in circuit court and not district court, no grounds exist for the argument that Rule 11 authorizes sanctions for motions not filed in district court.[130]

In addition to barring sanctions on actions not filed in federal district court, the Fourth Circuit urges litigants to keep costs, which form the basis for many monetary sanctions, to a minimum.[131] To keep sanction amounts low, the Fourth Circuit imposes a duty of reasonable efficiency on the successful Rule 11 movant to attend to legal matters, specifically the cost of a motion for sanctions, at low cost.[132] Judge Wilkinson expressed the wisdom of this policy in *Blue v. United States Department of the Army*.[133] In *Blue* Judge Wilkinson extensively analyzed the amount of the district court's sanction award.[134] The plaintiffs in *Blue* retained an experienced civil rights attorney who first filed suit in federal court in September of 1981.[135] The attorney filed the case as a class action with five representa-

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127. *Id.* at 2453.

128. *Id.*

129. *See id.* at 2457, 2461 (holding that courts should understand that Rule 11 allows awards only for costs resulting from filings at trial court level).

130. *Id.* at 2463.

131. *See infra* notes 131-169 and accompanying text (discussing Fourth Circuit case imposing duty of efficiency on successful Rule 11 movants to keep costs associated with frivolous filing at minimum).

132. *See* Corcoran v. I.B.M., 896 F.2d 545 (4th Cir. Jan. 30, 1990) (Unpublished, text on Westlaw at 9) (admonishing district court's imposition of large sanction and defendant's over-lawyering of case and remanding award for clarification of amount). In *Corcoran* the court stated,

> The issue of sanctions, though not particularly savory, is not a thorny or complicated matter of law requiring extensive research, deliberation, or tactical maneuvering . . . Accordingly, we find that the exertion of 312.6 hours of attorney and paralegal time preparing a 20-page memorandum in support of such a motion was an inefficient and excessive use of manpower for which the appellant should not now be required to pay. Here, the attorneys of record for IBM are all professionals of ability; the fees they command are high. We believe that with such recognition arises a duty of reasonable efficiency in attending to legal matters[, and] the allowance of $30,000 for such efforts was an abuse of discretion.

Id.

133. 914 F.2d 525 (4th Cir. 1990), *petition for cert. filed*, No. 90-1076 (U.S. Dec. 17, 1990).

134. Blue v. United States Dep't of the Army, 914 F.2d 525, 548-49 (4th Cir. 1990), *petition for cert. filed*, No. 90-1076 (U.S. Dec. 17, 1990).

135. *Id.* at 531.

tives.[136] The plaintiffs alleged that the Army had discriminated against them on the basis of race with respect to their employment.[137] The case became an appeal of the largest employment discrimination class action ever filed against the United States Army.[138] A year after filing suit, the plaintiffs' attorney turned the case over to a junior associate who was eighteen months out of law school and six months out of a judicial clerkship.[139]

The trial of the first plaintiff's case began in January of 1984. The pretrial brief omitted several of the claims that the plaintiff originally had alleged, and the court took under advisement the Army's motion to sanction the plaintiffs for abandonment of claims.[140] Over the next few months and prior to a final judgement on the merits, a significant number of the plaintiffs withdrew their claims.[141] The district court subsequently rejected all the remaining claims as frivolous and awarded sanctions against two members of the class for committing perjury on the stand and against plaintiffs' attorneys for violating Rule 11.[142]

The district court found that the plaintiffs' attorneys violated Rule 11 by filing frivolous claims and acting in bad faith.[143] The district court imposed every conceivable sanction against the attorneys, including but not limited to, court costs, attorney fees, court salaries (including the salary of the court's law clerk), a fine, and a reprimand for violation of state ethical rules.[144]

On appeal Judge Wilkinson warned district courts against the temptation to conclude that a plaintiff who loses in court is necessarily asserting an unreasonable complaint.[145] Judge Wilkinson stressed that the civil rights movement of the 1960's could not have withstood Rule 11 if overzealous sanctioning had existed.[146] However, Judge Wilkinson went on to say that the same standards of legal equality sought by civil rights plaintiffs require all plaintiffs not to pursue patently frivolous lawsuits.[147]

On the merits, the Fourth Circuit agreed that sanctions were warranted against both plaintiffs and plaintiffs' counsel.[148] Accordingly, the Fourth Circuit rejected all the plaintiffs' arguments in support of reversing the sanctions.[149] First, the court denied the plaintiffs' claim that the ability to establish a prima facie case of racial discrimination should be a shield from

136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.* at 532.
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.* at 535.
145. *Id.* at 534.
146. *Id.*
147. *Id.* at 534-35.
148. *Id.* at 544.
149. *Id.* at 536-44.

sanctions.[150] Judge Wilkinson found that because the threshold requirements for a prima facie case are very low and because the process of discovery brings to light the unreasonableness of claims, the plaintiffs should not have continued to press their case.[151] Second, the court denied the plaintiffs' claim that Congress did not intend the government, as a defendant, to benefit from an award of attorney fees because of a plaintiff's failure to prove that the government had violated that plaintiff's rights.[152] Third, the Fourth Circuit found no abuse of discretion in the district court's sanction for improper purpose because the plaintiffs' abandonment of claims between the time of filing the suit and the pretrial brief constituted a "cavalier attitude" toward the government's resources.[153] Finally, the Fourth Circuit found no abuse of discretion in the district court's finding that the suits had no basis in fact.[154]

The Fourth Circuit opinion questions why the Rule 11 movant never moved for summary judgment during district court proceedings.[155] Instead, the defendant moved for Rule 11 sanctions and awaited the district court's independent decision on the Rule 11 motion, which ultimately held the plaintiffs' claims without merit.[156] According to the Fourth Circuit, the defendant's failure to move for summary judgment led to the continuation of unnecessary and frivolous litigation, at great cost to judicial resources, and increased the defendant's own costs, which, consequently, became the basis of a Rule 11 sanction against the plaintiffs.[157] The Fourth Circuit pointed out that the court could have reached a more efficient result if the government had made an early motion for summary judgement, however, Judge Wilkinson did not punish the government for this oversight.[158]

Blue is also an example of a Fourth Circuit court's consideration of mitigating factors in determining an appropriate sanction amount. In *Blue*, despite the Fourth Circuit's agreement with the district court that the conduct of the attorneys was sanctionable, the Fourth Circuit did not agree with the amount of sanctions. The court of appeals found that the district court's sanctions were unprecedented in "breadth and magnitude."[159] The amounts

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150. *Id.* at 536.
151. *Id.* at 537.
152. *Id.* at 537-38.
153. *Id.* at 539.
154. *Id.* at 540.
155. *Id.* at 535. In *Blue* the Fourth Circuit inquired of the government, defendant, why it had sought sanctions from the plaintiffs instead of moving for summary judgment earlier in the litigation. *Id.* The Fourth Circuit disapproved of the government's waiting for the plaintiffs to drop their claims before moving for sanctions. *Id.* The court went on to state the principle that "[a]s a general matter, dismissal of a frivolous Title VII case on the merits should be a first option, whereas imposition of sanctions should be a matter of last resort." *Id.*
156. *Id.* at 535, 542.
157. *Id.* at 535.
158. *Id.* at 535-36.
159. *Id.* at 535.

were so large that Judge Wilkinson feared that the sanctions would compromise the very purpose of the Civil Rights Act of 1964 because attorneys would develop a lasting reluctance to represent civil rights causes in the future.[160] Additionally, Judge Wilkinson found that the district court took too narrow a view of its authority to consider equitable and mitigating factors of the case with respect to imposing appropriate sanctions.[161] The mitigating factors that the district court failed to recognize were: the failure of the government to move for summary judgment early in the litigation process;[162] the junior associate's relative inexperience;[163] the entrance of the junior associate at an advanced stage of the litigation;[164] and the reality that the junior associate merely followed the directions of a senior partner in charge of the case.[165] Accordingly, the Fourth Circuit set aside all sanctions against the associate.[166] In contrast, the experienced senior partner's past professional distinction did not serve to lessen the senior partner's culpability in this case.[167] Rather, the court found that to relieve the senior partner of sanctions in this case would be to hold more established members of the legal profession above the reach of the law.[168] Therefore, the Fourth Circuit affirmed sanctions against the more experienced attorney.[169]

(3) Procedural Safeguards

While courts justify inconsistent sanction amounts by arguing that Rule 11's purpose is not to reimburse,[170] courts explain inconsistent use of procedural safeguards in Rule 11 cases as the courts' efforts to minimize satellite litigation.[171] Rule 11 does not require courts to hold a separate hearing on sanctions.[172] In the interest of reducing the satellite litigation which results from Rule 11 sanctions, the Fourth Circuit does not require evidentiary hearings before imposing sanctions.[173] Nevertheless, in numerous

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160. *Id.*

161. *Id.* at 546.

162. *Id.* at 535. In *Blue* the government, instead of making an early motion for summary judgement, waited until the plaintiffs dropped their claims before moving for Rule 11 sanctions. *Id.*

163. *Id.* at 546. *Blue* was the junior associates' first case. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 546-47. In *Blue* the Fourth Circuit did not require the senior partner to shoulder the burden of the sanctions erroneously imposed on the junior associate by the district court. *Id.* at 547.

168. *Id.* In *Blue* the Fourth Circuit also stated that if the senior partner were pardoned here, because of his excellent reputation, the pardon would lead district courts to take on "reputational measurement" with each Rule 11 dispute. *Id.*

169. *Id.*

170. *See supra* note 116 and accompanying text (explaining that purpose of Rule 11 is deterrence not reimbursement).

171. *See infra* notes 173, 185 and accompanying text (discussing court's fears that additional procedural safeguards attendant to Rule 11 sanctions will result in increase in satellite litigation).

172. *See* Fed. R. Civ. P. 11 (omitting requirement that hearings precede sanctions);

cases the district courts do conduct full evidentiary hearings.[174] In an evidentiary hearing, courts are likely to disregard precedent holding that courts shall limit analysis to an objective reasonableness review of attorney conduct and to lapse into consideration of an attorney's subjective reasonableness in pleading or filing.[175]

The evidentiary hearing is the product of appellate court concern over sanctions imposed without the support of complete district court findings.[176] Fourth Circuit judges have expressed considerable concern when district courts fail to establish an adequate record to support Rule 11 sanctions.[177] In fact, many Fourth Circuit judges do not hesitate to remand a district court sanction because the court failed to establish its reasoning in the record.[178] Moreover, the Fourth Circuit demands not only a record in support

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Advisory Committee Notes, *supra* note 10 (indicating that to extent possible courts should limit satellite litigation over sanctions and separate hearings).

173. *See* In re Kunstler, 914 F.2d 505, 521-22 (4th Cir. 1990) (explaining that evidentiary hearings are not required when sanctions imposed for improper purpose but that hearings are valuable safeguard to other violations of Rule 11), *reh'g denied*, No. 89-2815 (4th Cir. Oct. 11, 1990), *petition for cert. filed*, No. 90-807 (U.S. Nov. 19, 1990). The Fourth Circuit stated that failure of a court to provide hearing does not deprive sanctioned attorneys of due process. *Id.* at 521. The court further states that where the same judge presiding over the underlying action is to be the sanctioning judge, the judge's participation in the event is adequate to give the judge full knowledge of relevant facts. *Id.* at 522.

174. *See generally* Blue v. United States Department of the Army, 914 F.2d 525 (4th Cir. 1990) (conducting hearing before sanctioning under Rule 11), *petition for cert. filed*, No. 90-1076 (U.S. Dec. 17, 1990). AGS Genasys Corp. v. Nixon, 908 F.2d 966 (4th Cir. July 11, 1990) (Unpublished, text on Westlaw) (same); Green v. Foley, 907 F.2d 1137 (4th Cir. June 6, 1990) (Unpublished, text on Westlaw) (same); Coker's Mobile Home Plaza Inc. v. ITT Commercial Fin. Corp., 900 F.2d 250 (4th Cir. March 13, 1990) (Unpublished, text on Westlaw) (same); Almi Pictures, Inc. v. WFTY, Inc., 894 F.2d 401 (4th Cir. Jan. 12, 1990) (Unpublished, text on Westlaw) (same); In re McKissick, 856 F.2d 187 (4th Cir. Aug. 16, 1988) (Unpublished, text on Westlaw) (same); Baldwin v. Boone, 812 F.2d 1400 (4th Cir. Feb. 6, 1987) (Unpublished, text on Westlaw) (same).

175. *See supra* notes 46-99 and accompanying text (discussing subjective elements in analysis of attorney's intent in filing).

176. *See infra* note 180 and accompanying text (discussing district court leaving inadequate record in support of sanctions). *See generally* In re Scarlett, 907 F.2d 1139 (4th Cir. June 12, 1990) (Unpublished, text on Westlaw at 10-11) (remanding for clarification of basis for sanction amount); Corcoran v. I.B.M, 896 F.2d 545 (4th Cir. Jan. 30, 1990) (Unpublished, text on Westlaw at 9-10) (remanding for lack of explanation of sanction amount on record).

177. *See AGS Genasys Corp.*, 908 F.2d 966 (text on Westlaw at 6-7) (admonishing district court's imposition of sanctions without support in record). The Fourth Circuit affirmed the sanction stating "although at least a short statement of reasons for a Rule 11 ruling would usually be preferable, we decline to adopt a rule requiring remand every time a district court fails to announce its reasons for denying sanctions[.]" *Id. But see supra* note 112 and accompanying text (citing cases remanding Rule 11 sanctions for failure of district court to establish record in support of decision).

178. *See* Miltier v. Beorn, 896 F.2d 848, 855 (4th Cir. 1990) (remanding sanctions for failure to establish reasons in record); Ervin v. Traxler, 829 F.2d 35 (4th Cir. Sept. 11, 1987) (Unpublished, text on Westlaw at 5-6) (same); LaVay Corp. v. Dominion Federal Sav. & Loan Ass'n, 830 F.2d 522, 528 (4th Cir. 1987) (remanding for dismissing Rule 11 motion without developing a record), *cert. denied*, 484 U.S. 1065 (1988). *See also supra* note 112 and

of a sanction, but also a record in support of a denial of sanctions.[179] This requirement is evident in one Fourth Circuit case where the appellate court remanded a district court's refusal to impose sanctions that the district court did not support with reasons in the record.[180] Therefore, the evidentiary hearing held at the district court level not only provides the sanctioned party with due process,[181] but also eliminates some of the risk that the appellate court will remand for failure to establish a record in support of sanctions.

Due process requirements demand that when deprivations of a property interest, such as large monetary fines, or a liberty interest, such as disbarment, are at issue, the court must meet sufficient procedural and substantive due process requirements.[182] When Rule 11 sanctions are at issue an evidentiary hearing satisfies the due process requirement.[183] In some Rule 11 cases the court, sua sponte, will impose sanctions and order a hearing.[184] In other cases, the court will order a hearing after one of the parties to the suit has made a motion for Rule 11 sanctions.[185] Although due process requirements are met adequately through a hearing, in some cases the court may feel a hearing is an unnecessary waste of judicial resources and only will encourage satellite litigation.[186] A significant conflict exists between the drafters' intent

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accompanying text (citing cases remanding Rule 11 sanctions for failure of district court to establish record in support of decision).

179. *See LaVay*, 830 F.2d at 528 (remanding for district court's failure to establish adequate record supporting denial of Rule 11 sanctions).

180. *See* Coker's Mobile Home Plaza, Inc. v. ITT Commercial Fin. Corp., 900 F.2d 250 (4th Cir. March 13, 1990) (Unpublished, text on Westlaw at 18-19) (remanding district court's denial of sanctions for failure to include court's reasoning for its denial in record).

181. *See infra* notes 182-189 and accompanying text (discussing satisfaction of due process requirements through evidentiary hearing).

182. *See* In re Kunstler 914 F.2d 505, 523-24 (4th Cir. 1990) (discussing district court's denial of sanctions hearing), *reh'g denied*, No. 89-2815 (4th Cir. Oct. 11, 1990), *petition for cert. filed*, No. 90-807 (U.S. Nov. 19, 1990). In *Kunstler* the Fourth Circuit found that because of the size of the sanction and the district court's denial of a hearing on the reasonableness of the fee statements, the plaintiff's did not have adequate opportunity to respond to type and amount of sanctions imposed. *Id.* at 522, 524.

183. *Id.* at 522 (stating that although hearings not necessary in every Rule 11 case, hearings are of value where court makes judgments about litigants' credibility).

184. *See* Blair v. Shenandoah Women's Center, 757 F.2d 1435, 1436-37 (4th Cir. 1985) (affirming sanction imposed when district court made motion for sanction hearing on own initiative). *But see* Childers v. United States, 542 F.2d 1243, 1246 (4th Cir. 1976) (affirming district court decision not to sanction when district court did not hold hearing because no relevant facts were in dispute although petitioner challenged court's denial of hearing).

Noteworthy is that in the recent Fourth Circuit decision *In re Kunstler*, the court found that when the same judge hearing the underlying action is to preside over a Rule 11 evidentiary hearing, "further hearing on the sanctions issue may well be not only unnecessary but also a waste of judicial resources." *Kunstler*, 914 F.2d at 521.

185. *See* Cabell v. Petty, 810 F.2d 463 (4th Cir. 1987) (holding hearing on Rule 11 issue after plaintiffs requested attorney's fees).

186. *See Childers*, 542 F.2d at 1246 (affirming sanctions without hearing because no relevant facts were in dispute although petitioner challenged court's denial of hearing); *Kunstler*,

to curb litigation costs, waste of judicial resources, and frivolous suits, and the sanctioned individual's constitutional rights to receive notice and have an opportunity to be heard. Courts have not resolved this conflict.[187] In contrast to the claim that Rule 11 evidentiary hearings increase litigation, an evidentiary hearing actually may reduce satellite litigation.[188] An evidentiary hearing provides a more complete record at the district court level in support of either a denial or a grant of sanctions, thereby eliminating the cause of most remands by the Fourth Circuit.[189]

Ervin v. Traxler[190] is an example of a Fourth Circuit case that resulted in a great deal of unnecessary litigation which the district court could have eliminated if it had held an evidentiary hearing. In *Ervin* the Fourth Circuit decided whether a district court judge improperly based Rule 11 sanctions on the plaintiffs' out of court conduct.[191] *Ervin* stemmed from a suit in state court wherein the plaintiffs sought appointment as guardians ad litem for one plaintiff's daughter (an unwed mother of thirteen) and the daughter's illegitimate son.[192] The daughter and grandson needed a guardian ad litem to institute a suit for damages against a hospital for injuries to the grandson.[193] The state court refused to appoint the plaintiffs as guardians, and the plaintiffs removed the case to federal court claiming a violation of their constitutional rights.[194] The federal district court ruled that it had no subject matter jurisdiction over the case and imposed Rule 11 sanctions against the plaintiffs without providing reasons for sanctions on the record.[195] The Fourth Circuit remanded to the district court for failure to establish a proper record.[196] The Fourth Circuit reasoned that the need for an adequate record especially was great in this case because the record at trial revealed a probability that the district court judge based sanctions on the plaintiffs' "extrajudicial" conduct, which is not conduct within the

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914 F.2d at 521-22 (noting that although hearing is valuable in establishing reasons for Rule 11 sanction hearing not necessary when same judge hears underlying action and imposes sanctions).

187. *See* Hsiung, *supra* note 43, at 397 (stressing need to keep procedural safeguards at minimum while comporting with due process requirements); Note, *Critical Analysis of Rule 11 Sanctions in the Seventh Circuit*, 72 MARQUETTE L. REV. 91, 110-11 (1989) (same); Burbank, *The Report o the Third Circuit Task Force on Federal Rule of Civil Procedure 11: An Update*, 19 SETON HALL L. REV. 511, 515-16 (1989) (same); Note, *Rule 11 Sanctions: Toward Judicial Restraint*, 26 WASHBURN L. J. 337, 361-62 (1987) (same).

188. *See infra* notes 190-99 and accompanying text (discussing ways hearings could cut down on necessity of appellate courts to remand to district courts).

189. *See supra* notes 176-181 and accompanying text (discussing appellate courts' remands for failure to establish adequate findings in support or denial of sanctions).

190. 829 F.2d 35 (4th Cir. Sept. 11, 1987) (Unpublished, text on Westlaw).

191. Ervin v. Traxler, 829 F.2d 35 (4th Cir. Sept. 11, 1987) (Unpublished, text on Westlaw at 6).

192. *Id.* at 2.

193. *Id.* at 3.

194. *Id.* at 2.

195. *Id.* at 5-6.

196. *Id.* at 6.

province of Rule 11.[197] The Fourth Circuit found the record to show that the plaintiffs angered the district court judge when they made a public statement that federal judges in South Carolina did not take civil rights cases seriously.[198] After the district court judge expressed his anger, the judge improperly imposed Rule 11 sanctions, without a sanctions hearing.[199] A requirement that the district court judge put findings in the record could have prevented the improper sanctions in *Ervin* because a hearing would have forced the judge to examine his reasons for imposing sanctions. An evidentiary hearing process, therefore, likely would prevent a judge from imposing unjustified sanctions.

In addition to Rule 11 hearings, several Fourth Circuit decisions endorse as an effective procedural safeguard against unnecessary expenditures of time, resources, and money, advance notice to the opposing party of a litigant's intent to make a Rule 11 motion.[200] The Fifth Circuit agrees with this proposition and requires timely notice of a party's intent to pursue Rule 11 sanctions.[201] The Fifth Circuit suggests that upon receipt of notice, the nonmoving attorney, from that point forward, is more likely to put forth extra effort to present that attorney's client's case as supported by both law and fact.[202] Additionally, the court, from the point of notice forward, would take note of all evidence of legal and factual inquiry or lack thereof, thereby establishing a more complete record of Rule 11 issues.[203] Unfortunately, neither the federal rule, nor any Fourth Circuit decision, holds advance notice to be mandatory.[204] Advance notice to the opposing

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197. *Id.*

198. *Id.* at 5-6. In *Ervin* the record revealed that just before the district court judge announced that Rule 11 sanctions were awarded the judge accused the plaintiffs of twice attacking the judiciary. *Id.*

199. *Id.* at 6.

200. *See* In re Kunstler, 914 F.2d 505, 512-13 (4th Cir. 1990) (stating that although no requirement exists that moving party give advance notice to opponent under Rule 11, moving party may avoid court's consideration of that party's failure to give notice if moving party gives notice of intent to move for Rule 11 sanctions at earliest possible date), *reh'g denied*, No. 89-2815 (4th Cir. Oct. 11, 1990), *petition for cert. filed*, No. 90-807 (U.S. Nov. 19, 1990). In *Kunstler* the plaintiffs, alleged Rule 11 violators, asserted as a defense that the defendants failed to give notice of their intent to move for sanctions under Rule 11. *Id.* at 512. The court recognized the equitable basis for this argument but found no express requirement that notice be given. *Id.* at 513; *see also* Advisory Committee Notes, *supra* note 10 (stating that party seeking sanctions should give prompt notice to both court and offending party).

201. *See* Thomas v. Capital Sec. Serv., Inc., 836 F.2d 866, 880 (5th Cir. 1988) (holding that Fifth Circuit recognizes importance of prompt action by parties to Rule 11 case and recommends that party seeking Rule 11 sanctions give notice of that intent and that notice be made part of record).

202. *Id.* at 881.

203. *Id.* at 880 n.21 (noting significance of nexus between notice and behavior that drafters of Rule 11 sought to be deter).

204. *See* FED. R. CIV. P. 11 (omitting express requirement that attorney moving for Rule 11 sanctions give notice to opponent of that intent). *But see* Advisory Committee Notes *supra*, note 10 (stating that party seeking sanctions should give prompt notice to both court and offending party).

party and to the court could negate the need for an evidentiary hearing.[205] Notice requirements necessarily would be a vehicle for getting evidence of Rule 11 violations on the record, thereby cutting down on evidentiary hearings, satellite litigation, and the need for remand on appeal.[206]

(4) Modification, Expansion, Reversal

In addition to Rule 11 's drafters' encouragement that litigants give notice of intent to move for Rule 11 sanctions, the drafters also encourage that courts not unnecessarily chill attorney enthusiasm.[207] The drafters intended only to curb the impact of frivolous litigation in federal courts.[208] The Advisory Committee Notes to Rule 11 encourage attorneys with valid arguments in support of modification, expansion, or reversal of existing law, to come forward with claims.[209] As a result, federal courts must make difficult distinctions between valid attempts to alter existing law and attempts brought forward without any basis in law.[210] The Fourth Circuit has recognized the importance of protecting parties asserting a change in the law and, in *Dostert v. Harshbarger*,[211] has reversed Rule 11 sanctions in this interest. In *Dostert* the Fourth Circuit decided whether a plaintiff had shown a good faith effort to modify, extend, or reverse existing law.[212] The plaintiff was a former state judge.[213] The district court opinion labeled the plaintiff as generally disliked during his career and as consistently embroiled in controversy.[214] Moreover, while still on the bench, a jury found the plaintiff guilty of criminal contempt.[215] Subsequent to the jury conviction, a Judicial

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205. *See* Advisory Committee Notes *supra*, note 10 (encouraging party seeking sanctions to give prompt notice to both court and offending party to cut down on excess litigation)

206. Ripple & Saalman, *Rule 11 in the Constitutional Case*, 63 Notre Dame L. Rev. 788, 803 (1988) (citing *Thomas v. Capital Sec. Serv., Inc.*, 836 F.2d 866, 881 (5th Cir. 1988) for proposition that notice of intent to seek Rule 11 sanctions cuts down on litigious burdens); *see also supra* notes 200-205 and accompanying text (same).

207. *See* Cleveland Demolition Co. v. Azcon Scrap Corp., 827 F.2d 984, 988 (4th Cir. 1987) (finding prevention of groundless suits to be purpose of Rule 11 not chilling of advocacy). In *Azcon Scrap* the Fourth Circuit stated, "[t]he Rule does not seek to stifle the exuberant spirit of skilled advocacy or to require that a claim be proven before a complaint can be filed . . . The Rule attempts to discourage the needless filing of groundless lawsuits." *Id.*

208. *Id.*

209. *See* Advisory Committee Notes, *supra* note 10 (stating that Rule 11 is not intended to chill attorney enthusiasm or creativity to pursue factual or legal theories).

210. *See* Dostert v. Harshbarger, 911 F.2d 721 (4th Cir. July 18, 1990) (Unpublished, text on Westlaw at 11-12) (disagreeing with district court finding that plaintiff did not state argument attempting to extend, modify, or reverse existing law) In *Dostert* the Fourth Circuit could not affirm the sanctions because the extension of established precedent was not "beyond the realm of credibility." *Id.* at 12.

211. 911 F.2d 721 (text on Westlaw at 12); *see also* Carlton v. Franklin, 911 F.2d 721 (4th Cir. Aug. 2, 1990) (Unpublished, text on Westlaw at 19-20) (stating lower court refused to sanction because state law unsettled in area of complaint).

212. *Dostert*, 911 F.2d 721 (text on Westlaw at 11).

213. *Id.* at 4.

214. *Id.*

215. *Id.*

Investigation Commission found that the plaintiff was unable to continue his duties due to advancing age and physical incapacity.[216] In an action instituted by the plaintiff before the Supreme Court of West Virginia, that court refused to consider the judge's request for retirement benefits.[217] The plaintiff then sued the West Virginia Supreme Court judges in federal court claiming that the denial of his retirement benefits violated his right to due process.[218] The district court dismissed the case and sanctioned the plaintiff for filing a claim with no legal basis.[219] The court reasoned that because judges are immune from suit when acting within their judicial capacity, the plaintiff did not have a legal claim against the West Virginia Supreme Court judges.[220] On appeal, the Fourth Circuit reversed the Rule 11 sanctions on the ground that the plaintiff sufficiently claimed that the suit attempted to extend, modify, or reverse existing law.[221]

The Fourth Circuit's willingness to protect litigants who attempt to extend, modify, or reverse existing law, however, is not unlimited. In *Cabell v. Petty*[222] the district court sanctioned an attorney for failing to put good faith intentions on the face of a pleading, thereby frustrating the court's ability to distinguish the good complaints from the bad.[223] In *Cabell* litigants again presented to the Fourth Circuit the issue whether an attorney in filing a complaint successfully exhibited an intent to extend, modify, or reverse existing law.[224] The case began as a civil action filed against the Commonwealth of Virginia and the Commonwealth Attorney for the City of Lynchburg.[225] The plaintiff alleged that a Virginia state court was negligent in returning a firearm to a youthful offender after that court had convicted the youth of assault with a deadly weapon.[226] Two and one-half weeks after the court returned the firearm to the youth, the youth shot and killed the plaintiff's husband.[227] Following the filing of the plaintiff's suit, the attorney for the Commonwealth answered the complaint, made a motion to dismiss, and notified the plaintiff's attorney of the Commonwealth's intention to

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216. *Id.* at 5.
217. *Id.*
218. *Id.*
219. *Id.* at 6.
220. *Id.*
221. *Id.* at 11-12.
222. 810 F.2d 463 (4th Cir. 1987).
223. *See* Cabell v. Petty, 810 F.2d 463, 466 (4th Cir. 1987) (noting that because weight of existing law was overwhelmingly in favor of defendants, only excuse petitioner could have for filing claim would be attempt to extend, modify, or reverse existing law). In *Cabell* the Fourth Circuit affirmed the imposition of a sanction because the court saw no indication that plaintiff's counsel sought a modification of the law. *Id.* The *Cabell* decision effectively requires every attorney wishing to assert a change in the law, to say so clearly in each filing. *Id.*
224. *Id.* at 466; *see also supra* note 212 and accompanying text (discussing Fourth Circuit decision raising question whether litigant put forth good faith effort to extend, modify, or reverse existing law).
225. *Cabell*, 810 F.2d at 464.
226. *Id.*
227. *Id.* at 464-65.

pursue Rule 11 sanctions.[228] The district court subsequently dismissed the case because the weight of existing law was overwhelmingly in favor of the Commonwealth.[229] The district court did not impose sanctions, however, reasoning that Rule 11 sanctions were inappropriate because the plaintiff's attorney may have intended to make an argument for reversal of precedent, but then had a change of mind.[230] On appeal, the Fourth Circuit reversed the district court's denial of sanctions finding that no objective indication appeared in the record showing that the offending attorney sought a good faith reversal of the law.[231] The *Cabell* decision effectively requires every attorney intending to assert a change in the law clearly to say so in the attorney's filing with the court.[232]

Attorneys may interpret a requirement that attorneys state an intent to extend, modify, or reverse existing law on the face of pleadings merely as another restriction on attorney creativity. Such an interpretation may be reasonable because courts often reject an attorney's creative efforts to fit the facts of a current case into the law of one previously decided, but only marginally on point. The United States Supreme Court has yet to address the issue of how attorneys should present a good faith effort to extend, modify, or reverse existing law. The Court easily could resolve controversy over the rule by adopting a clear requirement that attorneys state any intention to extend, modify, or reverse existing law in their complaints. Such a requirement, however, would limit severely a judge's ability to avoid sanctions when a judge is in doubt about whether the attorney is trying to modify existing law or trying to mislead the court regarding the substance of existing law. Unfortunately, a requirement that attorneys state intentions to expand, modify, or reverse existing law on the face of the complaint or automatically be subject to sanctions would eliminate one creative outlet to Rule 11 sanctions, perhaps with harsh results.[233]

(5) Allocation of Sanction Between Attorney and Client

Courts would undoubtedly sanction only an attorney, and not the attorney's client, for failing to assert an effort to extend, modify, or reverse existing law. Most Rule 11 sanctions, however, result from faulty legal grounds and the great majority of Fourth Circuit Rule 11 decisions sanction the attorney as the violator.[234] Nevertheless, courts have sanctioned both *pro se* litigants and litigants with counsel.[235] Where a court sanctions a layperson it usually sanctions the client's attorney as well,[236] although the

228. *Id.* at 465.

229. *Id.*

230. *Id.* at 466.

231. *Id.*

232. *Id.* In *Cabell* the Fourth Circuit noted that from the available record no objective indication was apparent that the plaintiff intended to seek a modification of the law. *Id.*

233. *See* Advisory Committee Notes, *supra* note 10 (warning against possible chilling effects of Rule 11).

234. *See* Note, *Rule 11 Sanctions: Contrasting Applications in the Second and Fourth*

Fourth Circuit has sanctioned at least two *pro se* litigants.[237] Furthermore, several Fourth Circuit cases impose sanctions on clients alone even though counsel represented the client.[238] For example, the Fourth Circuit decision in *Green v. Foley*[239] sanctioned only the client because the attorney claimed that the client lied to the attorney.[240] On the other hand, where the court finds that the client filed with an improper purpose and that the attorney failed to conduct adequate legal inquiry, the Fourth Circuit has held the attorney and client jointly and severally liable.[241] The Fourth Circuit readily sanctions a client if the client also is an attorney.[242]

Evidence, however, exists that courts do not hold clients to the same objective reasonableness standard that the courts expect of attorneys.[243]

Circuits, 46 MD. L. REV. 470, 482 (1987) (discussing rarity of client sanctions). *Compare* T. WILLGING, RULE 11 SANCTIONING PROCESS, 76 (1988) (giving numerical survey of published Rule 11 decisions from federal courts). This study reveals that federal courts sanctioned clients in approximately half of cases in which any sanctions were imposed. *Id.*

235. *See infra* notes 236-242 and accompanying text (discussing instances when court sanctions client and attorneys under Rule 11).

236. *See* Almi Pictures, Inc. v. WFTY, Inc., 894 F.2d 401 (4th Cir. Jan. 12, 1990) (Unpublished, text on Westlaw at 5) (sanctioning both client and attorney). The plaintiffs in *Almi Pictures* attached to their complaint an altered version of the original contract with the defendant. *Id.* at 4. The court imposed sanctions of $50,000 against the plaintiffs, allocating only $1,000 to the plaintiff's counsel. *Id.* at 5. The apportionment was made according to the relative degrees of fault, the clients being more culpable than counsel. *Id.* However, the court found that inconsistencies between the altered contract and the complaint should have put the attorney on notice. *Id.*; *see also* In re Scarlett, 907 F.2d 1139 (4th Cir. June 12, 1990) (Unpublished, text on Westlaw at 3) (remanding sanction of attorney back to district court for apportionment of sanction between both "guilty parties", client and attorney); Cohen v. Virginia Elec. & Power Co., 788 F.2d 247, 248-250 (4th Cir. 1986) (holding attorney and client jointly and severally liable for $2,814.14 sanction).

237. *See* Baldwin v. Boone, 812 F.2d 1400 (4th Cir. Feb. 6, 1987) (Unpublished, text on Westlaw at 4) (affirming sanctions for fraud on inmate appearing pro se who previously filed portions of claim in federal court); Zaidi v. Edwards, 829 F.2d 1121 (4th Cir. Sept. 22, 1987) (Unpublished, text on Westlaw at 3-4) (affirming sanctions against pro se litigant who brought action to enjoin closing of school from which he graduated and who sought damages of $25,000).

238. *See* Green v. Foley, 907 F.2d 1137 (4th Cir. June 6, 1990) (Unpublished, text on Westlaw at 6) (affirming sanctioning of client under Rule 11). In defense of the motion for sanctions against him, the plaintiff's attorney claimed his client fooled him along with the court with the client's lies. *Id.* at 5. The district court believed the attorney and imposed no sanctions against him. *Id.* The court sanctioned the plaintiff in the amount of $20,000, which was affirmed by the Fourth Circuit. *Id.* at 18; Introcaso v. Cunningham, 857 F.2d 965, 965-66 (4th Cir. 1988) (sanctioning client alone).

239. 907 F.2d 1137 (4th Cir. June 6, 1990) (Unpublished, text on Westlaw).

240. *Green*, 907 F.2d 1137 (text on Westlaw at 5).

241. *See* Carlton v. Franklin, 911 F.2d 721 (4th Cir. Aug. 2, 1990) (Unpublished, text on Westlaw at 22) (finding that attorney filed action without regard to fact that statute of limitations was time-bar to claim and that client filed with improper purpose to force a quick settlement and to improve relations with his clients).

242. *See* In re Scarlett, 907 F.2d 1139 (4th Cir. June 12, 1990) (text on Westlaw at 3) (remanding sanction award for apportionment between client and attorney finding client guilty because client was attorney also). In *Scarlett* the district court judge stated that because the client was an attorney himself the client's actions were particularly offensive. *Id.*

243. *See* Note, *Critical Analysis of Rule 11 in the Seventh Circuit*, 72 MARQ. L. REV. 91,

Contrary to attorney sanctions, which courts most often impose because of inadequate legal inquiry, courts are more likely to base client sanctions on inadequate factual basis or on improper purpose.[244] Therefore, when courts base a Rule 11 infraction on inadequate legal support the attorney is responsible.[245] The Advisory Committee Notes recommend that federal courts take the layman's lack of legal experience into consideration and sanction them accordingly.[246] Therefore, courts do not hold clients to as stringent a standard of conduct as attorneys.[247] Given the advisory committee's warning against chilling litigants' enthusiasm for bringing meritorious suits, the subjective standard applied to laymen is just.[248] The United States Supreme Court currently is considering whether litigants should be held to the same objective standard as their attorneys.[249]

109-10 (1989) (noting that courts do not impose Rule 11 sanctions on laymen unless blatant harassment occurs); Untereiner, *A Uniform Approach to Rule 11 Sanctions*, 97 YALE L.J. 901, 914 (1988) (commenting that attorneys are ones who bear sanctions for motions not warranted by facts or law because client not in position to know whether factual and legal grounds are sufficient).

244. *See* Untereiner, *supra* note 243, at 914 (discussing court's willingness to sanction clients who provide attorneys with false facts and clients who continuously refile same complaints using different attorneys). *See generally* Kendrick v. Zanides, 609 F. Supp. 1162 (N.D. Cal. 1985); Blake v. Nat'l Casualty Co., 607 F. Supp. 189, 193 (C.D. Cal. 1984); Wold v. Minerals Eng'g Co., 575 F. Supp. 166 (D.Co. 1983).

245. *See* Muthig v. Brant Point Nantucket, Inc., 838 F.2d 600, 607 (1st Cir. 1988) (stating courts should not expect nonlawyer clients to understand whether legal inquiry sufficient); *Blake*, 607 F. Supp. at 193; *see also* Untereiner, *supra* note 243, at 915 (opining that judges should sanction only attorney who prepared legally insufficient submission).

246. *See* Advisory Committee Notes, *supra* note 10 (discussing court's discretion to take lack of legal advice and situation of a pro se litigant into consideration in fashioning appropriate sanction).

247. *See Standard Applicable to Parties Under Fed. R. Civ. P. 11*, 59 U.S.L.W. (BNA) 3439 (Jan. 1, 1991) (discussing whether difference should exist between attorney and layman reasonableness standards under Rule 11). The article discusses the issue facing Supreme Court on certiorari from the Ninth Circuit decision in *Business Guides Inc. v. Chromatic Communications Enter.*, 892 F.2d 802 (9th Cir. 1990), *aff'd*, 111 S. Ct. 922 (1991). In *Business Guides* the Ninth Circuit imposed sanctions against the plaintiff for filing a frivolous copyright infringement suit. 59 U.S.L.W. at 3439. In its decision the Ninth Circuit refused to accept the argument that a laymen should be sanctioned under Rule 11 only if a layman exhibited bad faith in filing or answering a claim in federal court. *Id.* In the brief submitted to the Supreme Court the attorney for the petitioner argued that Rule 11 should permit parties to rely on the advice of counsel as to whether additional verification of facts is necessary prior to filing a pleading because the duty to develop a claim properly lies with counsel. *Id.* Additionally, the petitioner's attorney argued that lawyers are trained to discern tenable from untenable claims, and laypersons are not, thereby implying that to require the same standard of conduct of an attorney and a party is unjust. *Id.*

The U.S.L.W. article also noted that the Second Circuit in Calloway v. Marvel Entertainment Group, 854 F.2d 1452 (2nd Cir. 1988) *rev'd on other grounds*, 493 U.S. 120 (1989) adopted a more lenient standard of conduct requirement for laymen than for attorneys. *Id.* *See* addendum, *infra* end of text (discussing Supreme Court's decision on certiorari in *Business Guides, Inc. v. Chromatic Communications Enter.*, 111 S. Ct. 922 (1991)).

248. *See* Advisory Committee Notes, *supra* note 10 (stating that Rule 11 not intended to chill attorney enthusiasm or creativity in pursuing factual or legal theories).

249. *See Business Guides*, 892 F.2d at 811 (holding clients and attorneys to same objective

The Fourth Circuit remains reluctant to impose sanctions against persons other than violating attorneys.[250] Courts impose sanctions against clients only where the client brings suit in bad faith or for improper purpose, or where the client is an attorney and ought to have known better.[251] Under the language of the rule, however, sanctioning the client alone, or apportioning of sanctions between client and attorney, is permissible.[252] Thus, because the Fourth Circuit adheres to conservative sanctioning of laymen litigants, no danger of overstepping the purposes of the rule exists.[253]

(6) Shifting the Blame to the Client

While the Fourth Circuit has remained reluctant to sanction the client, the Fourth Circuit has failed to resolve contradictory decisions on whether an attorney successfully may defend a Rule 11 motion by passing blame to the client.[254] One decision has held that an attorney may not escape liability simply because the client's behavior is more objectionable than the attorney's behavior.[255] In contrast, when the client was an attorney who deliberately misinformed the hired attorney, the Fourth Circuit affirmed a district court

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standard of reasonableness); *see also supra* note 247 (explaining issue facing Supreme Court in *Business Guides*).

250. *See supra* note 234 and accompanying text (discussing rarity of sanctions against laymen).

251. *See* Untereiner, *supra* note 243, at 246-47 (stating that courts sanction litigants who are attorneys because they are in position to recognize legally frivolous filings and courts sanction nonattorney litigants who provide false facts in bad faith).

252. *See* Fed. R. Civ. P. 11 (stating that courts may impose sanctions upon signer, represented party, or both).

253. *See* Advisory Committee Notes, *supra* note 10 (stressing that purpose of Rule 11 is deterrence of frivolous claims not deterrence of meritorious claims).

254. *See* Green v. Foley, 907 F.2d 1137 (4th Cir. June 6, 1990) (Unpublished, text on Westlaw at 6) (excusing attorney but sanctioning client under Rule 11 because client misled attorney and court). *But see* Blair v. Shenandoah Women's Center, 757 F.2d 1435, 1438 (4th Cir. 1985) (sanctioning attorney and client and holding attorney may not shield own transgressions behind plea that attorney only followed desire of client).

255. *Blair*, 757 F.2d at 1438. In *Blair* an abusive husband sued the shelter in which his wife sought refuge from him with their two children. *Id.* at 1436. The husband also sued 12 other defendants, including the United Way, the State of West Virginia, unknown police officer, the county board of education, the county, and several employees of the county. *Id.* The district court found that the plaintiff's attorney, "argued his case in a way suggesting that he had not researched the legal issues at all." *Id.* The attorney argued that sanctions against him should be set aside because: (1) the attorney's forced representation of both himself and the client at the sanctions hearing prejudiced the attorney's ability to defend himself, (2) the court made no finding that he acted in bad faith, and (3) the court should not assess fees against him absent a showing that he was more culpable than his client. *Id.* at 1438.

The Fourth Circuit found Blair's claim of prejudice unfounded reasoning that if anyone was prejudiced in the evidentiary hearing his client was, not the attorney. *Id.* Furthermore, the court held that Rule 11 does not permit a lawyer to shield his transgressions behind the simplistic claim that he only did what his client desired. *Id.* Finally, the court held that an attorney does not escape liability just because his client's poor behavior was worse than the attorney's. *Id.*

decision to sanction only the client and not the hired attorney.[256]

To maintain a consistent application of Rule 11 to attorneys and laymen, and to realize the purposes of Rule 11, courts should employ a two-part test in reviewing attorney and layman conduct.[257] A court should first determine whether the attorney acted reasonably and then move to an investigation of whether the client is at fault.[258] Under this test, the attorney carries the initial burden to prove that the attorney's investigations were reasonable under an objective standard.[259] The court should then examine the client's conduct even if the attorney has successfully defended the attorney's own actions.[260] This approach is followed in *Almi Pictures, Inc. v. WFTY, Inc.*[261] In *Almi* the court decided whether the plaintiff's attorney adequately inquired into the factual basis for the suit. The plaintiff claimed a breach of contract arising out of a failed movie license agreement.[262] The basis of the complaint was the written agreement between the parties, and the plaintiff provided a photocopy of that agreement to its attorney.[263] During the course of discovery the parties became aware that one of the plaintiff's employees had altered the photocopy so that it was no longer true to the original agreement.[264] The district court first addressed the attorney's culpability and reasoned that inconsistencies between the complaint and the photocopied contract should have alerted the attorney that

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256. *Green*, 907 F.2d 1137 (text on Westlaw at 6) (excusing attorney on plea that client fooled attorney and the court with client's lies).

257. *See* In re Kunstler, 914 F.2d 505, 518 (4th Cir. 1990) (suggesting two-part test similar to test proposed in text), *reh'g denied*, No. 89-2815 (4th Cir. Oct. 11, 1990), *petition for cert. filed*, No. 90-807 (U.S. Nov. 19, 1990). In *Kunstler* Judge Wilkinson recommends a two-part test constituting first, an analysis of the factual and legal basis of a claim, and, second, an analysis of any improper purpose. *Id.* This text recommends the same two-part test: First, the courts should look to an attorney's reasonableness, which is determined by the factual and legal basis in support of a claim; and second, the court should inquire into the client's good faith or bad faith conduct.

258. *See Green*, 907 F.2d 1137 (Unpublished, text on Westlaw at 6) (affirming district court finding that client in violation of Rule 11 and that attorney not guilty of violation of Rule 11).

259. *See supra* notes 34-99 and accompanying text (discussing applicability of objective standard of reasonableness).

260. *See supra* notes 243-249 and accompanying text (discussing different requirements of reasonableness with respect to attorneys and clients); *see also supra* notes 89-90 and accompanying text (proposing that objective reasonableness standard appropriate for review of attorney's inquiry into legal and factual basis for claim and that subjective standard is appropriate for improper purpose prong).

261. 894 F.2d 401 (4th Cir. Jan. 12, 1990) (Unpublished, text on Westlaw at 4-7) The *Almi* court affirmed the district court finding that the attorney did not conduct adequate factual inquiries after the client provided the lawyer with a photocopy of the disputed contract that was not faithful to the original. *Id.* The district court held that inconsistencies between the complaint, contract and the photocopy of the contract, should have alerted the attorney that more investigation into the factual support for the claim was necessary. *Id.* at 5.

262. *Id.* at 3.

263. *Id.* at 4.

264. *Id.*

more inquiry was necessary.[265] Accordingly, the court entered summary judgement for defendant WFTY, and imposed a $50,000 sanction against the plaintiff for failure to conduct adequate prefiling inquiry.[266] The court then assessed the relative degrees of fault between the plaintiff's attorneys and the plaintiff and determined the attorney's sanction to be $1,000, and the plaintiff's sanction to be $49,000.[267] Although the Fourth Circuit did not discuss the allocation of sanctions to the plaintiff, the Fourth Circuit affirmed the sanctions against both the attorney and the plaintiff, reasoning that if the attorney had conducted a reasonable inquiry into the facts and law of the case, the attorney could have discovered the misrepresentation.[268] In *Almi*, therefore, the district court performed the two-part test by first determining that the plaintiff's prefiling inquiry was inadequate under Rule 11 and by next assessing the relative fault of the attorney and the client.[269]

The Fourth Circuit again performs the two-part test in *Green v. Foley*.[270] In *Green* the plaintiff filed suit to collect payment on notes against the defendant guarantor.[271] During the proceedings, the defendant discovered and revealed that the plaintiff's involvement with the notes was a sham transaction.[272] The district court entered summary judgment in favor of the defendant and considered the defendant's motion for Rule 11 sanctions against the plaintiff and the plaintiff's attorney.[273] The district court excused the attorney from sanctions because the attorney claimed to have been fooled along with the court by his client's fraud.[274] The district court then imposed sanctions against the plaintiff.[275] The Fourth Circuit affirmed, reasoning that the plaintiff had exhibited bad faith and that the district court did not abuse its discretion in imposing sanctions only on the client.[276]

In *Green* the Fourth Circuit's separate treatment of the attorney's reasonableness and the offending client's bad faith enabled the court to arrive at a fair imposition of sanctions.[277] Although the court did not expressly state that it was applying a two-part test, in effect, the separate consideration of attorney and client conduct constituted a two-part analysis. Because the language of Rule 11 gives district courts the authority to sanction both attorneys and parties, a two-part analysis ensures that sanctionable

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265. *Id.*
266. *Id.*
267. *Id.* at 5.
268. *Id.*
269. *Id.*
270. 907 F.2d 1137 (4th Cir. June 6, 1990) (Unpublished, text on Westlaw).
271. Green v. Foley, 907 F.2d 1137 (4th Cir. June 6, 1990) (Unpublished, text on Westlaw at 3).
272. *Id.* at 4.
273. *Id.* at 5.
274. *Id.*
275. *Id.*
276. *Id.* at 18.
277. *See Id.* at 14-15 (discussing equitable considerations including client's concealment of fraud as justification to affirm district court's sanctions of client alone).

conduct of all litigants is revealed to the court and that the deterrence objectives of the rule are effectively served.[278]

(7) Removal of Cases

In addition to the Fourth Circuit's failure to resolve whether an attorney may shift blame for frivolous filings to the client, the Fourth Circuit has not resolved the issue whether frivolous pleadings filed in a state court and subsequently removed to federal court are sanctionable.[279] Similarly, other circuits are in general disagreement over this issue.[280] In *Kirby v. Allegheny Beverage Corp.*[281] the Fourth Circuit held that state actions removed to federal court are not sanctionable. In *Kirby* the plaintiff originally filed suit in state court alleging five claims against both his former employer and his labor union.[282] The attorney for the defendant union immediately advised the plaintiff's attorney that the statute of limitations barred the plaintiff's claim.[283] The Union further threatened to have the case removed to federal district court if the plaintiff did not withdraw the suit.[284] After removal to federal court, the plaintiff withdrew some claims and the court dismissed the remainder. The court also imposed Rule 11 sanctions against the plaintiff's attorney for filing a suit that was both preempted by federal law and barred by the statute of limitations.[285] The Fourth Circuit affirmed the dismissal of the plaintiff's claims as proper, but reversed the Rule 11 sanctions, reasoning that the language of Rule 11 provides for sanctions only when a pleading is *signed* in violation of the rule.[286] Therefore, when an attorney signs a pleading filed in state court and later one of the parties

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278. *See* Fed. R. Civ. P. 11 (authorizing federal courts to sanction signer, represented party, or both for violations of Rule 11); *see also* Advisory Committee Notes, *supra* note 10 (stating that greater attention by district courts to filing abuses should discourage frivolous filings and abusive tactics).

279. *See* Kirby v. Allegheny Beverage Corp., 811 F.2d 253, 257 (4th Cir. 1987) (holding district court sanctions improper because plaintiff initially filed and removed action from state court); Cannon v. Kroger Co., 832 F.2d 303, 306-07 (4th Cir. 1987) (relying on *Kirby supra* for proposition stated above); Meadow Ltd. Partnership v. Meadow Farm Partnership, 816 F.2d 970, 970 (4th Cir. 1987) (same). *But see* Anton Leasing, Inc. v. Engram, 846 F.2d 69 (4th Cir. Apr. 14, 1988) (Unpublished, text on Westlaw at 3) (sanctioning action filed in state court but later removed to federal court).

280. *See* Willy v. Coastal Corp., 915 F.2d 965, 966-68 (5th Cir. 1990) (sanctioning under Rule 11 state action removed to federal court); Herron v. Jupiter Transp. Co., 858 F.2d 332, 335 (6th Cir. 1988) (same). *But see* Dahnke v. Teamsters Local 695, 906 F.2d 1192, 1201 (7th Cir. 1990) (finding actions removed from state court not sanctionable under Rule 11); In re Summers, 863 F.2d 20, 21 (6th Cir. 1988) (same); Steifvater Real Estate, Inc. v. Hinsdale, 812 F.2d 805, 809 (2nd Cir. 1987) (same).

281. 811 F.2d 253 (4th Cir. 1987).

282. *Kirby*, 811 F.2d, at 254.

283. *Id.* at 255.

284. *Id.*

285. *Id.*

286. *Id.* at 257.

removes the action to federal court, the attorney has not signed the pleading in violation of Rule 11.[287]

The Fourth Circuit contradicted the *Kirby* rule in *Anton Leasing, Inc. v. Engram*.[288] In *Anton* the Fourth Circuit decided that when a removal motion is so patently without legal basis, an "inescapable conclusion" of bad faith arises, and courts may sanction the motion under Rule 11.[289] *Anton* involved a dispute over responsibility for damages to a car owned by the plaintiff car leasing business in Maryland and leased by the defendant customer who was a resident of West Virginia. [290] By trying to remove the case from state court in Maryland to federal court in West Virginia, the defendant's attorney violated a removal statute's clear prohibition of removal to a court other than to the district in which the case is pending.[291] The district court remanded the case back to state court and imposed Rule 11 sanctions against the defendant's attorney.[292] The Fourth Circuit affirmed, reasoning that when a motion to remove to federal court is completely without merit, Rule 11 is properly invoked.[293]

(8) Conclusion

The Judicial Committee on Rules, in its study of needed changes to Rule 11, should attempt to develop a distinction between subjective and objective reasonableness standards.[294] Specifically, an amendment to the Rule should limit the objective reasonableness standard to the factual and legal prongs of Rule 11, while applying a subjective reasonableness standard to the improper purpose prong.[295] To facilitate the use of different standards of reasonableness to the prongs of Rule 11, the Judicial Conference should direct federal courts to first inquire whether the factual and legal requirements of the rule are met and then proceed to inquire whether a pleading, motion, or paper was filed with an improper purpose.[296] Furthermore, the

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287. *Id.*

288. 846 F.2d 69 (4th Cir. Apr. 14, 1988) (Unpublished, text on Westlaw). *See also* ITT Indus. Credit Co. v. Durango Crushers Inc., 832 F.2d 307, 308 (4th Cir. 1987) (sanctioning frivolous motion to remove from state to federal court).

289. Anton Leasing, Inc. v. Engram, 846 F.2d 69 (4th Cir. Apr. 14, 1988) (Unpublished, text on Westlaw at 4).

290. *Id.* at 2.

291. *Id.* at 3.

292. *Id.*

293. *See id.* (failing to cite to *Kirby*, which Fourth Circuit previously had decided on this issue). The *Kirby* decision held that state actions removed to federal court are not sanctionable under Rule 11. *Kirby v. Allegheny Beverage Corp.*, 811 F.2d 253, 257 (4th Cir. 1987). Anton reached an opposite ruling. *Anton*, 846 F.2d 69 (Unpublished, text on Westlaw at 3).

294. *See supra* notes 34-99 and accompanying text (discussing controversy over proper standard of reasonableness, objective or subjective, to apply to Rule 11 analysis).

295. *See supra* notes 34-99 (discussing necessary subjective elements in analysis of improper purpose under Rule 11).

296. *See supra* note 94 and accompanying text (discussing order of inquiry into Rule 11 violations).

duty and discretion to fashion an appropriate type and amount of sanction should remain with the district courts.[297] Inconsistent Fourth Circuit sanction amounts are not a problem because the primary goal of Rule 11 is to deter future violations.[298] Therefore, depending on the case at hand, lenient or somewhat harsher sanctions may be appropriate.[299] The Fourth Circuit is conscientious about keeping sanction amounts low by considering mitigating factors of a case.[300] Specifically, when the nonviolating party fails to mitigate damages, a court is likely to reduce the Rule 11 sanction.[301] Consequently, courts should impose the least amount necessary to achieve the purposes of Rule 11.[302]

Clearly both judges and commentators recognize a need for additional safeguards to a Rule 11 finding.[303] As is shown in the Fourth Circuit, evidentiary hearings provide due process to the offending party and put evidence in support of a Rule 11 sanction or denial on the record.[304] Either an amendment of Rule 11 or a Supreme Court decision should effectuate a hearing requirement for all Rule 11 sanctions. The result would be to decrease satellite litigation and the waste of judicial time and resources.[305] Similarly, advance notice by the party intending to seek Rule 11 sanctions both provides due process to the offending party and alerts the court to scrutinize a judicial proceeding for violations.[306] If the Judicial Conference amends Rule 11 to require Rule 11 movants to give advance notice to pursue sanctions, needless litigation due to inadequate district court consideration of the Rule 11 question would decrease.[307]

The Judicial Committee also needs to annunciate clear rules regarding how attorneys in their filings may properly seek to extend, modify, or reverse existing law.[308] As the law now stands in the Fourth Circuit, judges

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297. *See supra* notes 100-169 (discussing methods of calculating sanction amount and noting that deterrent purposes of Rule 11 make compensation of nonviolating party less important consideration).

298. *See supra* notes 108-112 and accompanying text (discussing that large sanction not necessary to deter future frivolous filings and courts, therefore, closely scrutinize large sanction awards).

299. *Id.*

300. *See supra* notes 104, 110-112, 131-169 (discussing mitigating factors that either decrease sanction amount to appropriate figure or negate sanctions against less deserving violator).

301. *Id.*

302. *See supra* note 103-112 and accompanying text (discussing courts' general approval of low sanction amounts that serve purposes of Rule 11).

303. *See supra* notes 170-206 and accompanying text (discussing appropriate procedural safeguards to apply before imposing Rule 11 sanctions on violating party).

304. *See supra* notes 170-199 and accompanying text (discussing advantages of holding Rule 11 hearing before imposing sanctions).

305. *Id.*

306. *See supra* notes 200-202 and accompanying text (discussing advantages of advance notice as procedural safeguard against unnecessary expenditures of time, resources and money).

307. *Id.*

308. *See infra* notes 207-233 and accompanying text (discussing contradictory decisions in Fourth Circuit regarding how attorney may properly attempt to extend, modify or reverse existing law in a pleading, motion, or paper filed in federal court).

are free to deduce from an attorney's frivolous claim, a valid attempt to reverse existing law.[309] Unfortunately, concurrent law exists that subjects an attorney to sanctions for failure to state on the face of a filing whether the arguments made therein are an attempt to extend, modify or reverse existing law.[310]

The Supreme Court's imminent decision in *Business Guides*[311] should clear up dispute over whether attorneys and parties should be held to the same degree of reasonableness under Rule 11.[312] It may be unnecessary, therefore, for the Judicial Committee to address this issue in an amendment to Rule 11. The *Business Guides* decision will label the Fourth Circuit's conservative sanctioning of laypersons as either proper or improper under Rule 11.[313]

Finally, contradictory decisions exist in the Fourth Circuit whether or not an action removed from state to federal court falls within the scope of Rule 11.[314] Either the Judicial Committee or the United States Supreme Court, therefore, should alleviate this confusion. Hopefully, the amenders or the United States Supreme Court, in whose hands the future of Rule 11 rests, will act quickly to resolve these issues so that courts may move forward to effectuate Rule 11's intended purposes.

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309. *See supra* notes 211-221 and accompanying text (discussing Fourth Circuit decisions that liberally protect litigant's right to assert change in law).

310. *See supra* notes 222-232 and accompanying text (discussing Fourth Circuit decision that effectively requires attorneys to assert an attempt to extend, modify, or reverse existing law on face of pleadings).

311. 892 F.2d 802 (9th Cir. 1990), *aff'd*, 111 S. Ct. 922 (1991).

312. *See supra* note 247 (summarizing issue facing Supreme Court in *Business Guides*).

313. *See supra* notes 234-242 and accompanying text (discussing trend of Fourth Circuit decisions to limit sanctions to attorneys and to sanction clients only after finding improper purpose).

314. *See supra* notes 277-291 and accompanying text (discussing contradictory Fourth Circuit decisions on whether action removed from state to federal court falls within reach of Rule 11).

Addendum

In *Business Guides, Inc. v. Chromatic Enterprises* the Supreme Court recently resolved whether represented parties and attorneys are held to the same standard of reasonableness with respect to their conduct under Rule 11. *See* Business Guides v. Chromatic Communications Enter., 111 S. Ct. 922, 934-35 (1991) (holding that Rule 11 imposes objective standard of reasonable inquiry on represented parties who sign papers). In *Business Guides* a publisher plaintiff brought an action against a competitor company alleging copyright infringement. *Id.* at 925. The United States District Court for the Northern District of California dismissed the action and imposed Rule 11 sanctions for failure to adequately investigate the basis for the claim, finding that nine out of the ten charges alleged by the plaintiff were frivolous. *Id.* at 926. The Ninth Circuit affirmed the sanctions in part, reasoning that an objective standard of reasonableness applies to both laymen and attorneys who sign papers submitted to federal court. *Id.* at 927. The Supreme Court affirmed the sanctions concluding that the language of Rule 11 clearly mandates application to both represented and unrepresented parties who sign papers submitted to federal court. *See id.* at 928 (viewing plain language of Rule 11 to require that party who signs pleading without first conducting reasonable inquiry shall be sanctioned). In response to the plaintiff's argument that the drafters intended Rule 11 to apply only to laymen when laymen appeared *pro se*, the Court held that if the Advisory Committee to Rule 11 had intended to limit the rule's application to *pro se* parties, they would have said so. *Id.* at 930. The court further held that represented parties should be held to exactly the same standards of reasonableness as attorneys when *factual* inquiry is lacking because they are often in a better position that their attorneys to investigate facts supporting a paper. *Id.* at 932. The Court conceded, however, that represented parties well may be less able to investigate the legal basis for a claim, and, therefore, courts should apply case by case analysis of what is reasonable under the circumstances to represented parties who fail to assert adequate legal basis for a claim. *Id.* at 933. Lastly, the Court explained that Rule 11 is not a fee shifting statute because sanctions are not tied to the outcome of the litigation, and that the rule does not create a cause of action for malicious prosecution because the main objective for the rule is not to reward the victims of frivolous filings but to deter baseless filings in the future. *Id.* at 934-35.

Under the *Business Guides* decision the Supreme Court requires equal application of an objective standard of reasonableness to both clients and attorneys who fail adequately to inquire into the factual basis of a claim. The decision, however, leaves room for conservative sanctioning of clients when attorneys fail in their duty to adequately investigate the legal basis for a claim. Thus, although the Fourth Circuit may have to adhere to application of the objective standard to clients' factual pleadings, as to the legal prong of reasonable investigation, the Fourth Circuit's preference for sanctioning of attorneys over sanctioning of clients is not endangered.