

SANCTIONS
The Federal Law of
Litigation Abuse

THIRD EDITION

Gregory P. Joseph

**SANCTIONS: THE FEDERAL LAW
OF LITIGATION ABUSE**

Third Edition

Gregory P. Joseph

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Dedication

To Barbara

INTRODUCTION

When the President of the United States is personally sanctioned \$90,000 for litigation abuse and no one in legal circles is particularly surprised, as happened in 1999, it is evident that sanctions jurisprudence has reached a level of maturity and stability undreamt of not long ago.

The first edition of this book in 1989 was prompted by the avalanche of sanctions decisions set off by the 1983 amendments to Federal Rules of Civil Procedure 11, 16(f) and 26(g), and the onslaught of motions and penalties that followed. The second edition, in 1994, was prompted by the substantial amendments to Rule 11 in 1993 and the impact on practice those amendments had both under that Rule and other sanctions powers. This third edition is a product of the cumulative impact of those changes and others — namely:

- Federal Rule of Civil Procedure 11 was substantially amended in 1993 in light of the Advisory Committee's recognition "that there ha[d] been an excessive and unproductive amount of Rule 11 activity" under the 1983 version of the Rule (see Appendix L, prepared Congressional testimony of Judge Sam C. Pointer, Chair of the Judicial Conference Advisory Committee on Civil Rules (June 16, 1993)).

- In federal securities litigation, the 1993 amendment to Rule 11 was largely reversed in 1995, in the Private Securities Litigation Reform Act.

- Bankruptcy Rule 9011 was amended in 1997 to parallel, in material respects, the 1993 amendment to Rule 11.

- The Supreme Court has written important opinions construing Rule 11, the inherent power of the court, the relationship between the two, and their relationship to 28 U.S.C. § 1927.

- Numerous additional sanctions provisions have been tucked into the discovery Rules (26-37), and procedural prerequisites to the filing of discovery sanctions motions have been added.

- Rule 26(g) is no longer substantively identical to Rule 11 (though it still parallels the 1983 version of the Rule).

- Appellate Rule 38 has been amended to ensure due process on appeal.

Impact. The effect of these intervening events has been enormous. To begin with, the caselaw developed under the 1983 version of Rule 11 is no longer altogether good law — under Rule 11. However, many of these precedents do retain vitality under Rule 11 and almost all are still solid guideposts to decision under Rule 26(g) (which remains largely identical to the 1983 version of Rule 11.)

Similarly, the Standards and Guidelines for Practice Under Rule 11 of the Federal Rules of Civil Procedure issued by the American Bar Association's Litigation Section, which are set forth in Appendix A to this book (and are cited as "Standard" throughout the text) are of uneven viability. While many of the

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Standards remain good law under Rule 11, many others retain vitality only under Rule 26(g) (e.g., Standard (J)(1), pertaining to the mandatory nature of sanctions).

Additionally, the Supreme Court's broad receptivity to inherent power sanctions in *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991), has raised the profile of this previously rather dormant power. In light of the 1993 limitations placed on Rule 11, inherent power and § 1927 sanctions have, predictably, become more prominent as Rule 11 has receded. Moreover, as the courts have heeded the Advisory Committee's call to turn away from monetary sanctions under 1993 Rule 11, alternate remedies that permit an award of fees — including statutory provisions of defined scope, such as 28 U.S.C. § 1447(c) (providing for an award of attorneys' fees in the event of improper removal) — are receiving additional attention and use.

The proliferation of sanctions provisions throughout the Rules, moreover, reflects a lingering judicial perception that litigation abuse is disturbingly recurrent.

Terminology. Because there are now so many versions of Rule 11, they will be referred to by their respective year of promulgation or proposal, except where the context requires otherwise: 1938 Rule 11 (or the “original Rule;” set forth in Appendix B); 1983 Rule 11 (Appendix C); the Spring 1991 Draft, which was not circulated for public comment by the Advisory Committee (Appendix D); the 1991 Proposal, which was circulated for public comment (Appendix E); and 1993 Rule 11 (the “current” or “new Rule” or “Rule 11;” Appendix F).

The same convention is applied to other Rules, especially Rules 26(g) and 37, which are likewise identified by their respective years of promulgation, except where the context requires otherwise: 1983 Rule 26(g) (Appendix H); 1993 Rule 26(g) (Appendix I; also the “current” or “new” Rule); 1980 Rule 37 (Appendix J) and 1993 Rule 37 (Appendix K; also the “current” or “new” Rule).

Statutes that are repeatedly referenced — specifically, 28 U.S.C. §§ 1912, 1920 and 1927— are usually referred to solely by section number, without reference to title 28.

Drafting History. In addition to the various drafts and versions of these rules, the Appendices include commentary on the drafting history of the 1993 Rule from two insiders. Appendix G contains a lengthy analysis of the penultimate version of the 1993 Rule 11 — i.e., a version substantively identical to the final except that sanctions remained mandatory, not permissive. Appendix G accompanied a May 1, 1992, letter from the Chair of the Advisory Committee on Civil Rules, Judge Sam C. Pointer, to the Chair of the Standing Committee on Rules of Practice and Procedure, Judge Robert E. Keeton. Appendix L consists of the prepared Congressional testimony of Judge Pointer and of Judge William W. Schwarzer (then Director of the Federal Judicial Center) in their June 16, 1993,

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appearance before a House Judiciary Subcommittee considering the 1993 amendments to Rule 11, among other things.

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