



Court Sanctions for Frivolous and Improper Litigation

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DECIDEDLY UNFUNNY

Lawyer jokes are sure to evoke laughter from any crowd. They are a slam dunk on every occasion. Lawyers laugh, as well, if only politely themselves, and they bear the mirth of others at their expense. A reason for that, we think, is the glimmer of truth skulking in the derisive comment. It is the glimmer of truth showing through overstated misbehavior that makes lawyer jokes quite funny. You are probably thinking about one now and having a good chuckle. Perhaps, for you, it is difficult to separate the overstatement from the truthful glimmer.

Actual misbehavior by lawyers and their clients is decidedly unfunny. That is the message of Rule 11, Federal Rules of Civil Procedure. This is the law that obligates the federal courts to impose sanctions on lawyers and clients who file and pursue lawsuits in *unreasonable* ways. Rule 11 breaks with precedent that required proof of *bad faith* to trigger sanctions. *Unreasonableness* is a lighter trigger that has proven beneficial to persons burdened by lawyer and client misbehavior. By the way, *sanctions* is legal terminology for getting your expenses back in some degree from an attorney or party who did you wrong in a lawsuit.

This issue of *Practice Notes* will inform you on the relief available under Federal Rule 11 through recent cases, and we will carry the discussion into state court sanctions, particularly states that have adopted a version of Federal Rule 11. The state rules considered here are not exhaustive but were selected for the primary *Practice Notes* readership. All state laws are not discussed.

You get to know your rights here, and you become better qualified to discuss them with your attorney. All your rights are not in Rule 11 or any counterpart. States have enacted frivolous suit statutes, professional panel reviews, prior expert certification and other devices to thwart baseless suits. These are not considered here. In this paper, you are sued, you have been run around the legal may pole, and you want the judge to make misbehaving persons pay you money.

WHAT REMEDY RULE 11 PROVIDES

Rule 11 prescribes sanctions for certain basic misdeeds: (1) the filing of a frivolous suit or document; (2) the filing of a document or lawsuit for an improper purpose; (3) actions that needlessly increase the cost or length of litigation.

Relevant parts of the rule are these:

The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation... If a pleading, motion, or other paper is 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 (emphasis added).

Sanctions may apply against an attorney, the client, or both; therefore, we have adopted the collective convention, attorney/client.

A. The Pen Still is Writing

Before we begin our discussion of Rule 11 as it is, we must acknowledge that Rule 11 is changing. Two key bodies have approved changes which will, if passed by Congress, dull the teeth of Rule 11. The Judicial Conference's Standing Committee on Rules of Practice and Procedure and the United States Supreme Court have both approved changes. Next, Congress may approve, reject, or rewrite Rule 11. Action may come as early as December 1993.

There are a half dozen major proposals, and, when your time is done here, you will see the hands of lawyers who foil with paper blizzards working also in the proposed amendments.

First, where Rule 11 provides that sanctions *shall* be imposed for a Rule 11 violation, the proposed revisions substitute the direction, *may...impose an appropriate sanction*. If enacted, a court that is historically strict on sanctions under the current rule will likely retain its grit. Courts less stern have an additional reason to refrain from sanctions.

Second, Proposed Rule 11 provides a safe harbor provision allowing a party 21 days to withdraw or correct a pleading before a complaining party could move for sanctions. Pleadings would not typically meet Rule 11 standards when signed; the signer would have 21 days to investigate the reasonable basis for them. Presumably, in exchange for that leniency, a signer would have an affirmative duty to dismiss a complaint within 21 days if there is no basis or none can be developed within the safe harbor.

Third, clients would not be sanctioned for complaints not well grounded in law. The attorney and law firm would be solely responsible for Rule 11 purposes.

Fourth, under the proposed revisions, Rule 11 would not provide sanctions for abuse of discovery. Those sanctions would arise under separate rules 26(g) and 37.

Fifth, sanctions may be non monetary or monetary. If monetary, they may be paid into a court fund, or attorneys' fees and costs may be awarded to the offended party when warranted for effective deterrence of the offending conduct. Under this proposal, you could, but would not necessarily be able to get your attorneys' fees and costs paid by the offender. The current rule is much the same in practice, although the rule is less explicit.

Our discussion will proceed under Rule 11 as it is. In politics, anything and nothing is possible at the same time, and the proposed amendments run counter to the reform mood recently fueled by popular dissatisfaction with the legal system. If that fire has died quietly, we did not notice, but a back fire has gained some strength in Congress and the United States Supreme Court. Rule 11, if changed once, likely

will be changed again as fuel feeds one fire then another. But, your education cannot wait forever, and, as we must begin somewhere, we begin with the rule as it is.

B. Frivolous Lawsuits

A frivolous lawsuit is one not grounded in fact and not supported by either a basis in current law or a sincere argument for a novel legal theory. An attorney/client who fails to conduct a reasonable inquiry into the facts of the case and the applicable law (and who does not otherwise accidentally hit sufficient fact or law) is in frivolous lawsuit territory. The rule creates an attorney/client duty to ascertain, by reasonable inquiry before filing suit, the accuracy of the facts alleged. No longer can a client demand, without possible repercussions, that an attorney file an immediate lawsuit. The attorney must attempt to discover whether a lawsuit is appropriate. If the attorney fails to inquire into the facts of the case and the law supporting a suit, sanctions may result. A client who misleads counsel creates an additional basis for personal sanctions.

1. Subjective Bad Faith Test is No Longer Required in Some Courts

Traditionally, federal and state courts required proof of *bad faith* before sanctions were warranted. The federal courts have eliminated the bad faith requirement under the current Rule 11, as explained in *Navarro Ayala v. Hernandez Colon*, 143 F.R.D. 460 (D.Puerto Rico 1991). Also, several states have adopted a form of Rule 11 eliminating the bad faith requirement. For example, **Oklahoma, Washington, Kansas, Minnesota, Nevada, Ohio, Illinois, and Missouri** have enacted versions of Rule 11 into their state statutes.

The test has been changed from a subjective standard to the objective standard embodied in an *affirmative duty of reasonable inquiry*, which is more stringent than the original good faith formula. Attorney/client claims of good faith conduct will not acquit Rule 11 liability. The attorney/client who was careless, hasty, incompetent, or inept is not excused by claims of stumbling good faith. The courts will pass by the good faith claim to examine whether the attorney/client conducted a reasonable pre-filing inquiry such that the document, when signed, could be considered well grounded in fact. The duty of reasonable inquiry is tested by the attorney/client knowledge at the time the document was signed. Violation of Rule 11 is not based through hindsight on the information and evidence established later through discovery or trial proceedings.

The changed standard is advantageous for architects and engineers who may be sued simply because they are somehow involved with a particular project. The attorney/client cannot excuse a groundless lawsuit by saying (as was once done), "I meant no harm; I bear the architect or engineer no malice; My motives were only to protect my side of the case. " Since an attorney in our adversarial system owes a duty to vigorously pursue one side of the case, proof of bad motivation is especially difficult. But, the requirement to satisfy a separate duty of reasonable inquiry balances the field somewhat and should temper the impulse (over time with corrective teaching) to sue anybody and everybody remotely connected with a project.

2. State Courts Which Apply a Rule 11 Objective Test

If you are sued in state court in **Illinois, Kansas, Minnesota, Missouri, Nevada, Ohio, Oklahoma, or Washington**, states which have adopted Rule 11 along with an objective test, you have good assurance that the state courts are willing to impose sanctions without a bad faith showing. In **Illinois**, see *Edwards v. Estate of Harrison*, 601 N.E.2d 862 (Ill.App.1Dist. 1992). In **Kansas**, see *Fankhauser v. Bank IV Emporia*, 833 P.2d 1002 (Kan. 1992). In **Minnesota**, see *Uselman v. Uselman*, 464 N.W.2d 130 (Minn. 1990). In **Missouri**, see *State Ex Rel. Accurate Const. v. Quillen*, 809 S.W.2d 437 (Mo.App. 1991). In **Nevada**, see *Marshall v. District Court*, 836 P.2d 47 (Nev. 1992). In **Ohio**, see *Gordon Food Service v. Hot Dog John's*, 601 N.E.2d 131 (Ohio App.6Dist. 1991). In **Oklahoma**, see *Unit Petroleum Co. v. Nuex Corp.*, 907 P.2d 251 (Okla. 1991). In **Washington**, see *Bryant v. Joseph Tree, Inc.*, 829 P.2d 1099 (Wash. 1992).

3. Subjective Bad Faith Test Lives On

Some states have not yet enacted a state version of Rule 11. In those states, the federal courts will follow Rule 11, while the state courts will apply various other rules. The following are examples:

In **California**, the imposition of sanctions is governed by the Code of Civil Procedure, Section 128.5. The court, in *Brewster v. Southern Pacific Transportation Co.*, 1 Cal.Rptr.2d 89 (Cal.App.4Dist. 1991), held that Section 128.5 allows a court to order sanctions when expenses are incurred by the opposing party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay. Thus, a bad faith subjective standard is still in place in California.

In **Connecticut**, a trial court attempted to adopt Rule 11 on its own, but the Connecticut Appeals Court ruled in *Fattibene v. Kealey*, 558 A.2d 677 (Conn.Application 1989) that a court has no authority to impose sanctions without the presence of bad faith. Connecticut does have a statute, General Statutes, Section 51-84(b), that allows the court to sanction an attorney one hundred dollars for violating court rules.

In **Florida**, Section 57.105 of the Florida Statutes governs the sanctioning of attorneys. Section 57.105 provides that before awarding attorneys' fees, a court must find that there is a total or absolute lack of a justifiable issue, which is tantamount to a finding that the action is frivolous and so clearly devoid of merit both on the facts and the law as to be completely untenable. In *Muckerman v. Burris*, 553 So.2d 1300 (Fla.App.3Dist. 1989), the court held that bad faith was required to prove a violation of Section 57.105.

Likewise, **Georgia** has not enacted Rule 11 into its statutes and does not favor imposing sanctions without a showing of bad faith. See *Nodvin v. Investguard, Ltd.*, 411 S.E.2d 709 (Ga. 1992).

In **New Jersey**, no court rule or statute will allow a court to impose sanctions when a party has not acted in bad faith. New Jersey courts will only impose sanctions in severe cases where bad faith is present. See *Oliviero v. Porter Hayden Co.*, 575 A.2d 50 (N.J.Super.A.D. 1990).

New York, when sanctioning, follows a court rule that imposes a duty on a party and his or her attorney to act in good faith to investigate a claim and promptly discontinue it where inquiry would reveal that the claim lacks a reasonable basis. An action is deemed frivolous when it is commenced or continued in bad

faith. Where a claim is found to be frivolous, the court rules mandate that sanctions be imposed against the party, the attorney, or both. Sanctions are available, but only after a showing of bad faith. See *Smullens v. MacVean*, 584 N.Y.S.2d 335 (A.D.3Dept. 1992).

North Carolina has not adopted Rule 11 but does allow sanctions to be imposed against an attorney or client for actions taken in bad faith. See *Foy v. Hunter*, 418 S.E.2d 299 (N.C.App. 1992). **South Carolina**, likewise, has not adopted Rule 11. Its statute, 15 South Carolina 36-20, requires a showing of bad faith.

Maine, in *Chiappetta v. LeBlond*, 544 A.2d 759 (Me. 1988), allows sanctions if "the abuse of the process by parties or counsel is clear." The historic term "abuse of process" is likely synonymous with bad faith, as the court did not adopt the readily available Rule 11 reasonableness standard.

In **Oregon**, the statute governing wrongful litigation is ORS 20.105(1), 656.390. That statute provides in relevant part: "In any civil action, suit, or other proceeding in a district or circuit court, the court may, in its discretion, award reasonable attorneys' fees appropriate in the circumstances to a party against whom a claim is asserted, if that party is a prevailing party in the proceeding and to be paid by the party asserting the claim, upon a finding by the court that the party willfully disobeyed a court order or acted in *bad faith, wantonly, or solely for oppressive reasons*" (emphasis added). Clearly a bad faith subjective standard is still required by Oregon courts. See *Westfall v. Rust International*, 826 P.2d 64 (Or.App. 1992).

By contrast, if an appeal is involved in **Oregon**, the statute provides an exception to the bad faith requirement. ORS 20.105(1), 656.236 governs the imposition of sanctions on appeal. The statute states that frivolousness or bad faith or harassment will suffice for the imposition of sanctions.

Pennsylvania has not adopted Rule 11 into its statutes and is very reluctant to impose sanctions, except in extreme cases of bad faith. See *Amaker v. Board of Probation & Parole*, 576 A2d 50 (Pa. 1990).

Rhode Island is an unusual state in its imposition of sanctions. Rhode Island has enacted Rule 11 into its state statutes, but courts have refused to apply an objective standard. A bad faith showing is still required in **Rhode Island**, despite the adoption of Rule 11. All other states that have adopted Rule 11 have also adopted the objective test and done away with the bad faith requirement.

It is important to remember that, even though **California, Connecticut, Florida, Georgia, Maine, New Jersey, New York, North Carolina, Oregon, Pennsylvania, South Carolina**, and **Rhode Island** require bad faith before imposing sanctions in state court, sanctions can still be awarded in Federal District Court in these states. That may be a factor, among others, in deciding whether to remove a lawsuit to federal court. There, if the opposing party engages in frivolous or improper conduct, sanctions can be imposed without a showing of bad faith.

C. Short on the Law or Ahead of One's Time?

A lawsuit lacking case law or a statutory basis warranting the action is also frivolous under Rule 11. An attorney cannot file a lawsuit in the hope that the court will buy an unsupported, outrageous argument. If one presses the limit, sanctions are avoided by demonstrating a novel legal theory that argues for a feasible extension or reversal of existing law.

The line between a lawsuit grounded and a lawsuit not grounded in existing law is wide. On the line and still in bounds are lawsuits that may reform the law. The courts are not likely to impose sanctions under Rule 11 for an argument that is creative. A portion of the legal system aims to encourage arguments that could advance, modernize, clarify, or particularize existing law. A good deal of reform (and some wreckage) has resulted from lawyers working on that line.

Pierce v. Commercial Warehouse, 142 F.R.D. 687 (M.D.Fla. 1992) establishes the attorney's duty under Rule 11 to support a lawsuit with existing law. The court held that an attorney cannot mislead the court by contending that his or her argument is supported by existing law, in the sense that the issue has been decided, when that is not true. An attorney must be clear in presenting the argument for what it is. If acceptance of the argument would require extension, modification, or reversal of existing law, Rule 11 requires disclosure and precludes presentation of the argument as though it rested on existing law.

In *Harverstick Enterprises v. Financial Fed. Credit*, 803 F.Supp. 1251 (E.D.Mich. 1992), the defendant asked for sanctions against an attorney for bringing a frivolous lawsuit not well-grounded in law. The court refused to issue sanctions, despite the fact that only one of several claims was reasonably grounded in law. The balance of the claims were wholly unsupported in fact and law, and much money was expended in defending the meritless claims. The court held that Rule 11 was not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories. That is the case even when the initial support may be thin but more discovery might prove the claim. By extension of that reasoning, sanctions would be inappropriate when (having begun with a basis) an exhaustive inquiry would be necessary to discover the claims were without merit. The court, in *Harverstick Enterprises*, makes the reluctance to impose sanctions on an attorney plain if there is even a slim chance that existing law might have been extended. There is a *deliberate inclination* favoring novel legal theory. More latitude is allowed to hit on a legal basis than a factual basis because the law is intentionally a moving target.

D. Improper Purpose and Tactics

If a frivolous lawsuit is not presented as described to this point, pleadings and tactics of another ilk will mandate Rule 11 sanctions. The second ground for Rule 11 sanctions is a lawsuit or pleadings filed for an improper purpose. In *Boese*, supra, the court held that an improper lawsuit is presented when an attorney/client files any document, pleading, or motion for the purposes of delay, harassment, or increasing the costs of litigation. A lawsuit started for legitimate purposes can turn into a candidate for sanctions.

Fundamentally, a party cannot use litigation or litigation techniques to punish the opposing party. The playing field is leveled by this--a well padded party cannot litigate for the purpose of grinding the rest of us into submission. A party genuinely harassed with needless litigation should petition the court for sanctions under Rule 11. At the least, this may help to define the limits allowable by the court for the balance of the case. It helps when the court (if not ready to sanction) admonishes, "You are this close, and that is as close as you want to get! " At best, improper behavior or the entire litigation may be stopped.

Improper litigation includes requests for excessive discovery, filing unnecessary motions, filing a lawsuit and dismissing it only to refile it later, and other dilatory tactics that cause litigation to hang over a party's head. The courts will find these tactics abusive under Rule 11, or local court rules, and will impose sanctions.

That said, Rule 11 does not mean that a party cannot bring a lawsuit to pressure the opposing party to settle a dispute. In *Gillette Foods v. Bayernwald-Fruchteverwertung*, 977 F.2d. 809 (3rdCir. 1992), this issue was determined. In *Gillette Foods*, a food distributor filed a lawsuit against a wholesaler over a sales agreement dispute. The district court said the lawsuit was without merit and awarded the wholesaler \$50,000 in attorney's fees. The appeals court reversed, stating that the trial court was wrong to impose sanctions solely because the trial court felt the lawsuit was brought for the purposes of making the wholesaler succumb to the food distributor's demands.

The court held that Rule 11 does not prevent one litigant from bringing a claim against another in order to force its demands if the claim asserted has a reasonable basis. Lawsuits are generally brought for that specific purpose. Suits filed to force settlement are not, for that reason alone, a violation of Rule 11.

ATTORNEY AND CLIENT BOTH POTENTIALLY LIABLE

The two grounds for sanctions under Rule 11 now behind us, it is important to establish what persons are liable for bringing frivolous or maintaining improper lawsuits. Rule 11's hook is double barbed.

Rule 11 clearly establishes liability for any person who signs a pleading, motion, or other paper. Thus, a client and/or attorney can be sanctioned by the court. Pending Rule 11 amendments, you recall, would relieve the client from sanctions for the attorneys' failure to supply an adequate basis in law.

Navarro Ayala v. Hernandez Colon, supra, is an instructive example of sanctions against a client. In *Navarro Ayala*, the Assistant Secretary of Mental Health for Puerto Rico signed a document certifying that patients could leave a hospital any time they wanted to leave. This was a factual matter. The Assistant Secretary told his attorney that he had reservations about signing the document, but his lawyer assured him it was proper to sign. The court found that the document was not entirely accurate, factually. Therefore, the document misled the court. The court imposed \$20,000 in sanctions against the Assistant Secretary under Rule 11. The attorney was not sanctioned.

The court was willing to sanction a client, even when his attorney assured him it was acceptable to sign the document. This is an excellent example of the court's desire to enforce Rule 11. The courts are not inclined to excuse a party due to extenuating circumstances, as evidenced in *Navarro Ayala*. Even if a client signs a document, regardless of an attorney's advice, he can be liable for Rule 11 sanctions, and the court is required to sanction the signer.

HOW TO AVOID SANCTIONS YOURSELF

We have examined key factors when you are wrongfully involved in litigation. That is not the whole picture. You may occasionally file a suit, or, when sued, you may well counter sue. In either case, you will sign, file, and participate in a defense that is part of the whole litigation. Rule 11 applies to all.

If a party violates Rule 11, sanctions are mandatory. Therefore, it is critical to avoid filing a lawsuit that could result in court sanctions. In *Harlyn Sales Corp. v. Investment Portfolios*, 142 F.R.D. 671 (N.D.Ill. 1992), the court established guidelines which acquit attorney and client from Rule 11 sanctions. The guidelines are these:



1. Make a reasonable inquiry into the facts of the case before filing a pleading, motion, or any paper.
2. Make a reasonable investigation into the law applying to the case.
3. Do not submit any pleading to harass, delay, or increase the cost of litigation for the opposing party.
4. Do not include unnecessary parties.
5. Do not sign any document that could mislead the court.
6. Make sure every document explains the matter without a requirement for qualification. The writing must speak the entire truth by itself.

The lawsuit is the client's lawsuit under Rule 11. Anything you sign as a client will be subject to Rule 11 scrutiny.

RULE 11 IS, SUPPOSEDLY, NOT A FEE SHIFTING DEVICE

Rule 11 is not an intentional fee shifting device. Sanctions will not be available simply because a party is subjected to a lawsuit and is judged, finally, free from liability. The courts have refused to use Rule 11 to compensate a party for defending a lawsuit to a no liability result. Courts are committed (absent contractual fee shifting in some cases) to the American Rule, which provides that each party to a lawsuit must pay its own way. The prevailing party's path to cost recovery is not Rule 11. More is required--no less than a violation of Rule 11 prohibitions.

When Rule 11 has been violated, sanctions frequently, but not always require that the violating party pay the aggrieved party's costs and attorneys' fees. Sanctions are made to fit the particular case, but costs and attorneys' fees are a standard and sensible beginning. Take it from there.

Oxfurth v. Siemens A.G., 142 F.R.D. 424 (D.N.J. 1991), states that the purpose of Rule 11 is not to serve as a general fee shifting statute. In *Oxfurth*, an attorney was sanctioned by the court for abusing the judicial process by filing an improper lawsuit. The court held that sanctions were warranted and that the attorney should pay the opposing side's attorneys' fees and attend four legal seminars.

The court scolded the attorney, Frost, throughout the opinion for his conduct. The court stated:

- Frost quite clearly didn't stop, for he filed a frivolous motion; he certainly didn't look, for he failed to do any research and failed to cite any case law on the subject; and he didn't listen, for he was given the opportunity by defense counsel to withdraw the motion after being advised by letter and citation to the appropriate cases, stating that his action had no basis, but he failed to pay heed. After taking into consideration all of the mitigating factors, the Court concludes that both monetary sanctions and compulsory legal education will best deter Frost from exploiting the federal court system in the future. Frost would reap great benefit by attending four seminars given by the Institute for Continuing Legal Education. One of the seminars must relate to law office management, because Frost blames his problems on his office manager. Another seminar must

relate to some aspect of the Federal Rules of Civil Procedure, while the other two seminars must relate to federal court practice in general.

It is nowhere made plain whether the judge cut his judicial teeth in traffic court, but the opinion went to some length to point out that Rule 11 was not a fee shifting statute. Still, the opposing side's attorneys' fees were set as sanctions. This seems to be the way the courts are applying Rule 11 in recent cases. First, it is carefully said that Rule 11 is not a fee shifting statute. Then, the adversary's attorneys' fees are ordered paid in full. In reality, it appears that Rule 11 is a fee shifting statute, so add up the bills, and ask for the money.

One court has expressly stated that Rule 11 can be used to shift attorney fees to a party that has abused another by frivolous or improper litigation. In *Brandt v. Schal Associates, Inc.*, 960 F.2d 640 (7th Cir. 1992), Circuit Judge Manion wrote a blistering opinion concerning the abuse of the judicial process. In *Brandt*, a dispute arose over a construction contract. The plaintiff's attorney prolonged the case for four years through extensive, unnecessary discovery. All the while, the lawsuit had no basis in law or fact. The United States District Court for the Northern District of Illinois assessed sanctions of \$351,664.96 against the attorney. The court then added an additional \$7,511.10 in sanctions when the attorney urged the court to modify the original sanction order. Finally, the court sanctioned the attorney an additional \$84,388.60 as a "delay factor" for a total of \$443,564.66.

Judge Manion, in writing the court's opinion affirming the sanctions, stated:

- This case is an unfortunate example of why "litigation" has taken on a bad name. These claims may have been shallow, but the volume of pleadings, documents, and other clutter in the record could fill a bottomless pit. We have little sympathy for the litigant who fires a big gun, and when the adversary returns fire, complains because he was only firing blanks. Indeed, Campbell's antagonistic, windy, excessive, and voluminous style of practice easily suggests that Campbell's trial strategy was to exhaust his opponent's financial resources by needlessly increasing the costs of litigation. For such egregious behavior, Rule 11 expressly provides for the shifting of attorney's fees to the other party. This award addresses, not only the spurious complaint filed by Campbell, but it also addresses the bad faith pursuit of a worthless claim.

RULES TO REMEMBER WHEN MOVING FOR SANCTIONS

Under Rule 11, the court, on motion from the opposing party or on its own initiative, can impose sanctions. When making a motion for sanctions, there are rules to respect.

A motion must be timely. It is imperative that a party move for sanctions before a final judgment is rendered. *Young v. West Coast Indus. Relations Ass'n, Inc.*, 144 F.R.D. 206 (D.Del. 1992), makes this requirement clear. In *Young*, a party moved for sanctions by a motion to amend a final judgment. That was too late.

The court held that it was improper to impose Rule 11 sanctions after a final judgment had been rendered, although a motion for a new trial, a motion for alteration or amendment, and a motion for reargument were pending. A motion is timely, if made after a case is dismissed voluntarily or by summary judgment. The court in *Pierce v. Commercial Warehouse*, *supra*, addressed this issue. In *Pierce*, summary judgment

was granted to the defendants in an antitrust action. The defendants then moved for Rule 11 sanctions. The court held that sanctions were appropriate and stated that a district court may enforce Rule 11, even after the plaintiff has filed a notice of dismissal. A Rule 11 violation is complete when the offending paper is signed. A voluntary dismissal does not expunge the Rule 11 violation. The court reasoned that, if a plaintiff could merely avoid Rule 11 sanctions by filing a dismissal, then he or she would lose all incentive to stop and think before filing the lawsuit in the first place. Jokes about that logic are unknown.

The motion must be brought in the proper court. If only one court is involved, no question arises; however, when two courts are involved, it is important to choose the proper court or risk sanctions oneself.

That situation was presented in the case of *CJC Holdings, Inc. v. Wright & Lato, Inc.*, 142 F.R.D. 648 (W.D.Tex. 1992). In *CJC Holdings*, the plaintiff had been awarded a default judgment in forum court. The defendants had attacked the default judgment in a collateral action in Federal District Court in New Jersey. The plaintiffs moved for Rule 11 sanctions in forum court because they felt that the collateral attack violated Rule 11. The defendants then moved for sanctions against the plaintiffs for filing the motion in forum court, instead of District Court.

The District Court held that the plaintiff had violated procedural rules by filing the motion in a court that did not have control over the conduct of the defendants. The court held that the motion must be filed in the court where the alleged wrongful conduct took place. Because the plaintiffs were contending that the collateral attack was improper, they should have filed the motion for Rule 11 sanctions in the District Court where the collateral attack was brought by the defendants. The District Court found that the plaintiffs were subject to sanctions due to filing in the wrong court, and it awarded the defendants their attorneys' fees.

Only a party to the suit may file the motion. The case of *New York News, Inc. v. Kheel*, 972 F.2d. 482 (2ndCir. 1992), dealt with this situation. In *New York News*, an attorney who had knowledge about the lawsuit, but was not a party to the suit, petitioned the court for Rule 11 sanctions against the plaintiff. The court held that, although the attorney might have appropriate knowledge to warrant sanctions, he did not have standing to request sanctions. A nonparty cannot interject itself into a lawsuit to request Rule 11 sanctions.

Special care is required on frivolous appeals. Sanctions may be more available for an appeal filed without a sound basis. The logic holds that the issue has already been decided and, if there is no basis for the appeal, no party should be forced to expend money winning the same argument twice.

In **New York**, although a version of Rule 11 has not been enacted, the courts will sanction parties under 22 New York Court Rules Sect. 130-1.1. In *Lewis v. Agency Rent-A-Car*, 567 N.Y.S.2d 286 (A.D.2Dept. 1991), the court imposed sanctions that included attorney's fees and the cost of the appeal, holding: "After hearing argument of the parties, we conclude that the appellant's appeal was completely frivolous, and counsel for the appellant should compensate the defendant, personally, \$3,500 in addition to the appeals costs which the defendant incurred. " *Lewis* at 287.

DEFENDANT MAY ALSO BEAR SANCTIONS

Sanctions are available equally to plaintiff and defendant. Despite feelings of personal abuse, it is unwise for defendants to frustrate discovery and the orderly course of litigation. *B & H Mfg., Inc. v. Foster-Forbes Glass Co.*, 143 F.R.D. 664 (N.D.Ind. 1992), illustrates this point well. In *B & H Mfg.*, the defendant did not disclose to the plaintiff that discovery directed to defendant's shell corporation (a dummy, not the real defendant) was unnecessary. The defendant knew that the plaintiff had made a reasonable mistake, but he failed to disclose the truth. Time and money were wasted. The plaintiff moved for Rule 11 sanctions when he later discovered the shell game.

The court held that the plaintiff was entitled to Rule 11 sanctions for defendant's abuse of the discovery process by harassment, delay, and wasting attorney's fees. Plaintiff was awarded the *wasted attorney's fees* (if one can suspend judgment on the possible oxymoron).

North Carolina provides for sanctions against a defendant if he or she "manifests an intent to thwart the progress of the action to its conclusion " or "fails to progress the action toward its conclusion " by engaging in delaying tactics (*Foy v. Hunter, supra*, at 302). The court may enter the sanctions against either the represented party or the attorney, even when the attorney is solely responsible for the delay or violation. Thus, it is important that parties in **North Carolina** be aware of the course the litigation is taking, because they may be liable for their attorneys' actions. That thought is sobering.

TO SUM AND ADVISE

Rule 11 is alive and well, although under threat of some anemia. The rule can be an effective tool to deter frivolous or improper litigation. Care is required: Rule 11 cuts in many directions and may be invoked by a judge whose personal patience is tested too often. One must watch the other party, the judge, one's own conduct, and one's lawyer, to boot.

Rule 11 is not intended for fee shifting, but it has become that in recent court decisions. When the circumstances apply, Rule 11 sanctions are mandatory, and courts are quite willing to award attorneys' fees and costs. Please note again with some melancholy the more pallid proposals pending.

If you are in state court where Rule 11 has been adopted, sanctions will be available to you without a showing of bad faith. For example, **Illinois, Kansas, Minnesota, Missouri, Ohio, Ohio, Oklahoma, Nevada, and Washington** have enacted versions of Rule 11 into their state statutes and have established precedent for awarding attorneys' fees for violations utilizing an objective standard.

Attorney's fees and costs are harder to obtain in, for example, **California, Connecticut, Florida, Georgia, Maine, New Jersey, New York, North Carolina, Oregon, Pennsylvania, South Carolina, and Rhode Island**, but an award is more probable if bad faith is present. Remember, if you are in one of these states and the case is moved to federal court, sanctions are then available under the Federal Rule 11.

It is your money. When you believe you are aggrieved, study a motion for sanctions with your attorney. Seek fairness rather than sympathy. Lawyers and insurance companies risk punch weariness from a system where you give it to the other side one day and get it back the next. You're the Louisville slugger



ProNet Practice Notes

one day; next day, the ball (thanks to Dire Straits) . Your sensitivity to fairness may be greater. You may require advice from an attorney not currently involved in the litigation, not one of the bed fellows strangely made by adversity. Follow your instincts until you are convinced on a motion for sanctions one way or another.

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