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An Attorney's Primer on Federal Rule of Civil Procedure 11

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AN ATTORNEY'S PRIMER ON FEDERAL RULE OF CIVIL PROCEDURE 11

> "Although the pleading and amendment of pleadings rules in federal court are to be liberally construed, the administration of justice is not well served by the filing of premature, hastily drawn complaints."[1]

I. INTRODUCTION

Lawyers have long been subject to sanctions for filing pleadings they know are groundless. Until 1983, under Rule 11 of the Federal Rules of Civil Procedure, an attorney who signed a pleading certified that he had read the pleading, and that "to the best of his knowledge, information, and belief there [was] good ground to support it. . . ."[2] However, sanctions under the Rule were rarely imposed upon attorneys.[3] Courts were reluctant to apply the Rule because its language was vague and the required standard of conduct was merely subjective.[4] As a result, lawyers perhaps were lulled into carelessly verifying the facts and the law upon which pleadings were based.

In 1983, Rule 11 was amended to impose upon lawyers an affirmative duty to make a reasonable inquiry to determine if the pleading filed "is well grounded in fact and is warranted by existing law."[5] The

1. Burnett v. Grattan, 468 U.S. 42, 50 n.13 (1984) (referring to FED. R. CIV. P. 11 (effective Aug. 1, 1983)).

2. Fed. R. Civ. P. 11 (1982).

3. In his study of FED. R. CIV. P. 11, Risinger reported that from 1938 to 1976 only 23 cases were reported in which Rule 11 was invoked by one party to strike another's pleadings, and in only nine cases were violations found. Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1, 34-36 (1977).

4. *Id.* at 14. Prior to amendment, Rule 11 required a *willful* violation before a court could impose sanctions.

5. Rule 11 in its entirety states:

> 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 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

amendment imposes new duties on attorneys who sign pleadings. Attorneys must become familiar with the stricter standards to which they will be held under the amended Rule. Since the amendment, sanctions have been imposed in a great number of cases,[6] confirming that the members of the legal profession must become aware of their obligations.

Rule 11 now requires attorneys to satisfy three obligations to avoid sanctions. First, the attorney must certify that each of his pleadings, motions, or other papers is both well grounded in fact and warranted by existing law or a good faith argument for a change in existing law.[7] Second, the attorney must make a reasonable inquiry into the facts and law upon which the pleading is based.[8] Finally, the attorney must further certify that the document is not being filed for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.[9] Violation of these standards will result in the imposition of sanctions upon the attorney and perhaps even the client.[10]

Attorneys have an inherent interest in the application of Rule 11 because of the increased frequency of sanctions since the amendment of the rule. Of special interest to attorneys and their clients are the standards to which an attorney is held under Rule 11, circumstances that might trigger the invocation of the Rule, possible sanctions that might be imposed, and the identification of persons who may be sanctioned.

> or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

FED. R. CIV. P. 11.

The 1983 amendment met with some opposition by attorneys who feared "satellite litigation" and the damaging effects of a Rule 11 sanction upon a firm's reputation. *See* Batista, *Amended Rule 11 of the Federal Rules of Civil Procedure: How Go the Best Laid Plans?, Introductory Remarks*, 54 FORDHAM L. REV. 1, 1-2 (1985); Weiss, *Amended Rule 11 of the Federal Rules of Civil Procedure: How Go the Best Laid Plans?, A Practitioner's Commentary on the Actual Use of Amended Rule 11*, 54 FORDHAM L. REV. 23, 26 (1985).

6. Rule 11 has been discussed in over 300 federal cases since its modification. *See, e.g.*, Maier v. Orr, 758 F.2d 1578 (Fed. Cir. 1985) (sanctions imposed for frivolousness); Harris v. WGN Continental Broadcasting Co., 650 F. Supp. 568 (N.D. Ill. 1986) (attorney admonished for his frivolous claim); Hudson v. Moore Business Forms, Inc., 609 F. Supp. 467 (N.D. Cal. 1985) (sanctions imposed where claim was unconscionable).

7. FED. R. CIV. P. 11.

8. *Id.*

9. *Id.*

10. *Id.*

II. HISTORY OF RULE 11

Before amendment, Rule 11 was rarely used.[11] The Rule's infrequent use was the result of its unenforceable standards. Attorneys were disciplined only for a willful violation of the Rule, and although pleadings could be stricken as "sham and false," they must have been signed with an intent to defeat the purpose of the Rule before they would be stricken.[12] Furthermore, the Rule did not specify what disciplinary actions could be taken for a violation of the Rule.[13] Thus, the Rule required an inquiry into intent and failed to provide an explicit list of possible sanctions.

Courts were also reluctant to apply Rule 11 because they found its language vague and difficult to interpret.[14] The phrase "good ground" was especially troublesome.[15] Courts rarely hesitated to find that the attorney had good ground to support his pleading and that he had acted in good faith.[16] Rule 11 was so loosely interpreted that courts saw little reason to use it to impose sanctions on attorneys.

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11. Wright and Miller state that "there is little evidence of frequent use of sanctions for violation of Rule 11." 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1334, at 503 (1969) [hereinafter WRIGHT & MILLER]. The Rule was also criticized "as having little effect on actual conduct." *Id.* at § 1333.

12. Fed. R. Civ. P. 11 (1982). In pertinent part, the rule stated:

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

Id.

Oklahoma only recently adopted the amended federal Rule 11. 1987 Okla. Sess. Law Serv. 302 (West). The effective date of the Oklahoma amendment is November 1, 1987. Prior to this amendment, Oklahoma's version of Rule 11, codified at OKLA. STAT. tit. 12, § 2011 (Supp. 1986), was in large part identical to the old Rule 11. Both the Oklahoma and federal Rules required a willful violation as a prerequisite for sanctions. No cases are reported in Oklahoma since the Rule was adopted in November, 1985. Apparently, if the Oklahoma Rule was ever imposed, the parties did not feel that the sanctions were great enough to justify an appeal. As the Oklahoma courts begin to implement the new Rule, it is likely they will follow the federal lead and impose sanctions more frequently.

13. Fed. R. Civ. P. 11 (1982).

14. Risinger, *supra* note 3, at 5. Wright and Miller also criticized the Rule for this reason. They speculated that courts could impose any extra costs resulting from a violation of the Rule and cite the attorney for contempt, or institute disbarment proceedings. 5 WRIGHT & MILLER § 1334, at 503.

15. Risinger, *supra* note 3, at 9. Risinger considered the standard to be nebulous. *Id.* at 15.

16. In one case, the court held that attorneys had satisfied their Rule 11 obligation even though they had based their pleading entirely on a *Wall Street Journal* article without further investigation. Dresnin v. Ramada Inns, Inc. (*In re* Ramada Inns Sec. Litig.), 550 F. Supp. 1127, 1135 (D. Del. 1982).

Because Rule 11 was rarely used, it was very ineffective. The decision in *Di Silvestro v. United States*[17] illustrates the old Rule's ineffectiveness. Di Silvestro, a pro se litigant, had been filing lawsuits for thirty years, claiming that he had been wrongfully denied veteran's benefits after serving in World War II.[18] In 1983, Di Silvestro's complaint was dismissed on grounds of res judicata and he was permanently enjoined from filing any future lawsuits to recover veteran's benefits.[19] Di Silvestro was finally sanctioned in 1985 when he instituted another suit subsequent to the Rule's amendment. Attorney's fees were assessed against him for filing a vexatious and bad faith suit.[20] Cases such as *Di Silvestro* suggest that the amendment of Rule 11 was needed to halt frivolous suits.

To curb the abuses of the judicial system and in light of the "litigation explosion,"[21] the Advisory Committee resolved to put "teeth" into the "bite" of Rule 11.[22] The resulting amendment made several significant changes to the Rule. The new Rule emerged with greater clarity, specificity, stringency, and enforceability.[23] Sanctions may now be im-

17. 767 F.2d 30 (2d Cir.), *cert. denied*, 474 U.S. 862 (1985).

18. A look at the litigious history of Di Silvestro's claims will show how he abused the legal system: Di Silvestro v. United States, No. CV 83-0895 (E.D.N.Y. Aug. 13, 1983) (Mishler, J.), *aff'd mem.*, 742 F.2d 1436 (2d Cir. 1984), *cert. denied*, 466 U.S. 931 (1984); Di Silvestro v. United States, No. 79 C 1931 (E.D.N.Y. Apr. 11, 1980) (Mishler, C.J.), *aff'd mem.*, 633 F.2d 203 (2d Cir. 1980), *cert. denied*, 449 U.S. 903 (1980), *motion to extend time for appeal denied*, No. 79 C 1931 (E.D.N.Y. Oct. 23, 1981) (Mishler, C.J.), *motion to proceed in forma pauperis*, No. 81-6247 (2d Cir. Jan. 6, 1982), *cert. denied*, 454 U.S. 1156 (1982), *motion to reopen denied* (E.D.N.Y. Mar. 4, 1982) (Mishler, J.), *aff'd mem.*, 697 F.2d 289 (2d Cir. 1982), *cert. denied*, 459 U.S. 1177 (1983); Di Silvestro v. United States, No. 78 C 1525 (E.D.N.Y. 1978) (Mishler, C.J.), *aff'd mem.*, (2d Cir.), *cert. denied*, 441 U.S. 936 (1976); Di Silvestro v. Veterans Admin., No. 76 C 1167 (E.D.N.Y. 1976) (Mishler, C.J.), *aff'd mem.*, 556 F.2d 555 (2d Cir.), *cert. denied*, 434 U.S. 840 (1977); Di Silvestro v. United States, 268 F. Supp. 516 (E.D.N.Y. 1966) (Mishler, J.), *rev'd*, 405 F.2d 150 (2d Cir. 1968), *cert. denied*, 396 U.S. 964 (1969); Di Silvestro v. United States, 181 F. Supp. 860 (E.D.N.Y.), *cert. denied*, 364 U.S. 825 (1960); Di Silvestro v. United States Veterans Admin., 151 F. Supp. 337 (E.D.N.Y. 1957), *cert. denied*, 355 U.S. 935 (1958); Di Silvestro v. United States Veterans Admin., 132 F. Supp. 692 (E.D.N.Y. 1955), *aff'd*, 228 F.2d 516 (2d Cir.) *cert. denied*, 350 U.S. 1009 (1956).

For related claims, see Di Silvestro v. Gray, 194 F.2d 355 (D.C. Cir. 1954) (*per curiam*), *cert. denied*, 343 U.S. 930 (1952); Di Silvestro v. United States Veterans Admin., 81 F. Supp. 844 (E.D.N.Y.), *aff'd*, 173 F.2d 933 (2d Cir.), *motion to vacate order dismissing complaint denied*, 9 F.R.D. 435 (E.D.N.Y. 1949), *amended complaint dismissed*, 10 F.R.D. 20 (E.D.N.Y. 1950), *aff'd*, 181 F.2d 502 (2d Cir.) (per curiam), *cert. denied*, 339 U.S. 989 (1950).

19. Di Silvestro v. United States, 767 F.2d 30, 32 (2d Cir.), *cert. denied*, 474 U.S. 862 (1985).

20. *Id.* at 33.

21. Partridge, Wikinson & Krouse, *A Complaint Based on Rumors: Countering Frivolous Litigation*, 31 LOY. L. REV. 221, 227-35 (1985). This article examines the surge of "overcrowded court dockets and increasing costs to the judicial system" which has been noted by former Chief Justice Burger and others. *Id.* at 227.

22. FED. R. CIV. P. 11 advisory committee notes.

23. *See* FED. R. CIV. P. 11 advisory committee notes. These goals are stated in the committee notes which clearly express the legislative intent.

posed based on an objective, rather than a subjective standard. The required standard of conduct focuses on individual facts and law rather than on a general requirement of good grounds to support the pleading.[24] Punishment may be imposed on either the attorney, the client, or both. In addition, the power to invoke the Rule was made explicit.[25] Finally, the new Rule deletes the confusing provision regarding the striking of a pleading because it was rarely utilized.[26] The new provisions eliminated the infirmities of the old Rule by making the Rule clear and simple to apply.

The amendment was welcomed by most, but not all attorneys. Some feared satellite litigation in which attorneys neglect the merits of a case while pursuing Rule 11 evidence.[27] However, the Advisory Committee anticipated this concern and limited evidence in a Rule 11 motion to that in the record.[28] Other attorneys opposed the amendment because it eliminated the motion to strike. They argued that the motion to strike was the most effective sanction provided in the old rule.[29] Still others opposed the new Rule because they feared that the imposition of sanctions on an attorney would greatly damage a law firm's reputation.[30] However, Rule 11 was amended in spite of these concerns.

III. USE OF THE AMENDED RULE

A. *Circumstances Triggering Rule 11*

Rule 11 explicitly describes at least five circumstances which constitute a violation of the Rule.[31] These circumstances include (1) the pleading is not well grounded in fact; (2) the pleading is not warranted by existing law or a good faith argument for a change in law; (3) the pleading is interposed merely to increase the costs of litigation ; (4) the pleading is interposed merely to harass the other party; and (5) the pleading is

24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. Discovery may be conducted in extraordinary circumstances by leave of the court. *Id.*
29. Lerner & Schwartz, *Why Rule 11 Shouldn't be Changed: The Proposed Cure Might Exacerbate the Disease*, Nat. L.J., May 9, 1983, at 13, col. 2. The significance of Rule 11 was attached to the fact that "only Rule 11 permits a court to strike pleadings which are drafted to withstand Rule 8 and 12 motions to dismiss, but which are completely devoid of any factual basis." *Id.* at col. 3.
30. Weiss, *supra* note 5, at 26. Mr. Weiss complained that a Rule 11 motion had damaged the reputation of his law firm and that his firm was subjected to having that decision cited against it in forums all over the country. *Id.*
31. "Pleading" shall refer collectively to pleadings, motions, and other papers.

interposed to unnecessarily delay the litigation.[32] A lawsuit which is not well grounded in law or fact will be deemed "frivolous" and other violations will be deemed to have an improper purpose. An explicit description of these circumstances clarified the Rule to help ensure that the courts would utilize it to impose sanctions.[33]

B. *Filing a Frivolous Pleading*

One of the aims of Rule 11 is to prevent attorneys from filing pleadings for which they have not made a reasonable inquiry into the law and facts. The standard to which attorneys are held is reasonable under the circumstances at the time that the pleading was submitted.[34] Because the standard is one of objective reasonableness, courts may act without regard to the attorney's state of mind.[35] A willful or negligent failure to correctly state facts or law is irrelevant in determining reasonableness.[36] However, the rule is not one of strict liability.[37] The standard is "reasonableness measured objectively."[38] Rule 11 now imposes a stricter duty than the old Rule 11 by requiring an objectively reasonable prefiling investigation, rather than a subjective test of good faith.

Courts take several factors into account when determining reasonableness. The amount of time available for inquiry is a consideration.[39] Presumably, courts will be more lenient if the attorney had only a day or two to prepare the pleading. Another factor courts will consider is whether the signer of the pleading had to rely on another person, such as a client or the client's previous attorney, for the facts.[40] Clients do not always tell their attorneys the truth, but an attorney should not expect to be exempt from liability on that basis.[41] The attorney must not rely solely on a client for the facts. Instead, he or she must independently inquire into the facts to satisfy Rule 11 obligations.[42] Whether the attor-

32. FED. R. CIV. P. 11.
33. FED. R. CIV. P. 11 advisory committee notes.
34. *Id.*
35. Rodgers v. Lincoln Towing Service, Inc., 596 F. Supp. 13, 22 (N.D. Ill. 1984), *aff'd*, 771 F.2d 194 (7th Cir. 1985).
36. Coburn Optical Indus. v. Cilco, Inc., 610 F. Supp. 656, 659 (D.C.N.C. 1985). However, the advisory committee stated that willfulness is a factor to be taken into account when a court is determining the severity of sanctions. *See infra* notes 96-117 and accompanying text.
37. Southern Leasing Partners, Ltd. v. McMullan, 801 F.2d 783, 789 (5th Cir. 1986).
38. *Id. See also In re* Ronco, Inc., 105 F.R.D. 493, 499 (N.D. Ill. 1985), *appeal dismissed*, 793 F.2d 1295 (7th Cir. 1986) (per curiam).
39. FED. R. CIV. P. 11 advisory committee notes.
40. *Id.*
41. See Coburn Optical Indus. v. Cilco, Inc., 610 F. Supp. 656, 659 (D.C.N.C. 1985).
42. *Id.*

ney conducted a reasonable inquiry will also vary according to the type of the litigation, and the extent of the investigation.[43] Finally, another important consideration is the degree of hardship caused to the opposing side by the insufficient inquiry.[44]

An attorney's duty is not complete even though he has filed a pleading and has determined after reasonable inquiry that it is well grounded in law and fact. As new facts are revealed, an attorney is obligated to continually review and reevaluate what he has previously stated in his pleading.[45] An attorney is obliged under Rule 11 to reevaluate an earlier certification if later investigation reveals evidence which indicates that his position has no factual or legal basis.[46]

A pleading which is not based on existing law may sometimes be the basis for sanctions. Unless the attorney is urging a good faith change in existing law, a pleading must reflect a plausible view of the law.[47] The reasonableness of a pleading depends on several factors. If the pleading was based on an incorrect legal theory, courts will consider the complexity of the area of jurisprudence upon which the pleading was based.[48] For example, if the law is difficult, complex, and evolving,[49] courts may be lenient. One court has even ruled that sanctions should be imposed only "where it is patently clear that a claim has absolutely no chance of success."[50] Finally, doubts regarding the possible success of the pleading might be resolved in favor of the signer.[51] Such liberal applications of Rule 11 are rare and may be contrary to the intent of the Rule,[52] which seeks to punish litigants who pursue baseless vindication of claims.[53] Nevertheless, they may provide relief to attorneys who have been accused of Rule 11 violations.

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43. *Id.* (citing Wold v. Minerals Eng'g Co., 575 F. Supp. 166, 167 (D. Colo. 1983)).

44. *Id.*

45. Woodfork *ex rel.* Houston v. Gavin, 105 F.R.D. 100, 104 (N.D. Miss. 1985).

46. *Id.*

47. FED. R. CIV. P. 11 advisory committee notes.

48. Rice v. Heckler, 640 F. Supp. 1051, 1065 (S.D.N.Y. 1986).

49. *Id.*

50. Monument Builders, Inc. v. American Cemetary Assoc., 629 F. Supp. 1002, 1012 (D. Kan.), *modified*, 647 F. Supp. 972 (1986). In one case, a complaint alleging antitrust violations formed the basis for Rule 11 sanctions because the complaint was filed against non-competitors and did not allege any antitrust injury. Eastway Constr. Corp. v. City of New York, 762 F.2d 243 (2d Cir. 1985), *modified*, 821 F.2d 121 (1987).

51. *Monument Builders*, 629 F. Supp. at 1011.

52. FED. R. CIV. P. 11 advisory committee notes state that one aim of Rule 11 is to streamline litigation. Although a frivolous lawsuit has a chance of success, it certainly does not further the goal of streamlining litigation.

53. Dreis & Krump Mfg. Co. v. International Ass'n of Machinists, Dist. No. 8, 802 F.2d 247, 255 (7th Cir. 1986).

The reasonableness of a pleading is not always destroyed by a dismissal for failure to state a claim upon which relief can be granted.[54] Where nothing shows that the claims are meritless or filed for an improper purpose, Rule 11 sanctions will be denied even though the claim is dismissed.[55] However, in some situations a motion for dismissal and a motion for sanctions go hand-in-hand. In those cases, a reasonable prefiling inquiry might have revealed that the complaint was not warranted by existing law.[56] A dismissal will be the basis for sanctions if the pleading is frivolous or filed for an improper purpose.

Frivolous pleadings are often found when the issue upon which they are based is res judicata.[57] A claim which is res judicata in state court should not be refiled in a federal court. Often a reasonable prefiling investigation will convince an able attorney that such claims are meritless.[58] Thus a dismissal for res judicata will justify sanctions if it is unreasonable to pursue the claim.

Although a pleading which asserts a new cause of action or legal theory may not necessarily be supported by existing law, it does not automatically warrant sanctions. As the Advisory Committee noted, Rule 11 was "not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories."[59] Thus Rule 11 sanctions are not automatically imposed after an unsuccessful attempt to assert a novel cause of action.[60] Instead, an attempt to assert an unsuccessful novel cause will escape sanctions if it is an objectively reasonable effort to challenge the existing law.[61]

However, an attorney who realizes his case requires a change in existing law may instead decide to try to "fit" the case into existing law. If an attorney, rather than attempting to change the existing law, attempts to "squeeze" his client's case into the form of existing law by irresponsibly and artlessly presenting the case, it is proper to impose sanctions

54. Ring v. R.J. Reynold Indus., Inc., 597 F. Supp. 1277, 1281 (N.D. Ill. 1984), *aff'd*, 804 F.2d 143 (7th Cir. 1986).

55. Bower v. Weisman, 639 F. Supp. 532, 542 (S.D.N.Y. 1986).

56. *See, e.g., Ring*, 597 F. Supp. at 1281.

57. *See, e.g.*, Di Silvestro v. United States, 767 F.2d 30 (2d Cir.), *cert. denied*, 474 U.S. 862 (1985) (after filing lawsuits for 30 years, the plaintiff was finally sanctioned for filing a claim which had been ruled res judicata in an earlier case and which he had been enjoined from refiling); Columbus v. United Pac. Ins. Co., 641 F. Supp. 707, 711-12 (S.D. Miss. 1986) (res judicata barred the suit and sanctions were imposed on both the plaintiff and the attorney).

58. Johnson v. New York Transit Auth., 639 F. Supp. 887, 896 (E.D.N.Y. 1986) *modified*, 823 F.2d 31 (2nd Cir. 1987).

59. FED. R. CIV. P. 11 advisory committee notes.

60. Skepton v. County of Bucks, 613 F. Supp. 1013, 1022 (E.D. Pa. 1985).

61. *Id.*

upon the attorney.[62] Therefore, pleadings which are not an objectively reasonable attempt to change law or present a client's case can be the basis for sanctions.

How unreasonable must an attorney's pleading be before Rule 11 sanctions are warranted? One court has stated that sanctions are warranted when a complaint is riddled with mere legal conclusions, boilerplate allegations, and lacks a legitimate legal basis.[63] This holding ensures that some investigation will precede the filing of a complaint. Sometimes even modest research or even a "casual perusal" of the law will reveal that some claims have no basis in law.[64] However, courts will also award sanctions where the legal error is not so blatant. For example, one court found a Rule 11 violation in an attempted joinder because the plaintiff failed to allege anything which "even remotely" suggested that the defendant had any contacts with the forum state.[65] The defendant was advised to move for sanctions because the plaintiff's unreasonable pleadings imposed substantial burdens upon the defendant.[66]

Some attorneys believe that Rule 11's requirement of objective reasonableness conflicts with their professional responsibility to pursue their client's case zealously as required by the Code of Professional Responsibility.[67] *Van Berkel v. Fox Farm and Road Machinery*[68] held that such an attitude is incorrect.[69] The *Van Berkel* court stated that an attorney has a duty to promptly dismiss a baseless suit, even over the client's objections, when the attorney learns that his client has no case.[70] The court continued that an attorney's first duty, as an officer of the court, is to administer justice.[71] Where the duties owed to a client conflict with the duties owed to the public, the public interest must be given deference.[72] Thus, the attorney's ethical obligations do not conflict with Rule 11 because both require candor with the court.

62. *Id.* at 399 (quoting WSB Elec. Co., v. Rank & File Comm., 103 F.R.D. 417, 420 (N.D. Cal. 1984)).

63. Rodgers v. Lincoln Towing Serv., 596 F. Supp. 13, 22 (N.D. Ill.) (1984), *aff'd*, 771 F.2d 194 (7th Cir. 1985).

64. *Id.* at 18.

65. Hasty v. Paccar, Inc., 583 F. Supp. 1577, 1580 (E.D. Mo. 1984).

66. *Id.* In this case, the court chose not to impose sanctions on its own motion, although it could have done so. *See* Coburn Optical Indus. v. Cilco, Inc., 610 F. Supp. 656 (D.C.N.C. 1985). Instead, the court invited the defendant to move for sanctions. *Hasty*, 583 F. Supp. at 1580.

67. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1980).

68. 581 F. Supp. 1248 (D. Minn. 1984).

69. *Id.* at 1251.

70. *Id.*

71. *Id.*

72. *Id.* The court stated that any other idea would be counter to the judicial process.

C. *Pleadings Filed for an Improper Purpose*

Attorneys must not confuse strategy with actions that have an "improper purpose." The Rule itself gives examples of what may be considered an improper purpose. These examples include a pleading which is filed to "harass or to cause unnecessary delay or needless increase in the cost of litigation."[73] However, case law sheds additional light on what may be considered an improper purpose. For example, where the plaintiff's attorney signed a disclaimer which would have had the effect of destroying diversity, the court held that the disclaimer was filed for an improper purpose.[74] Claims which are considered unconscionable will be deemed improper and will warrant sanctions.[75] Additionally, sanctions may be ordered by the court when the defendant brings counterclaims intended to discourage the plaintiff from pursuing litigation.[76]

Perhaps a good test for "improper purpose" is whether the filing of the pleading unduly diverts attention from the merits of the litigation.[77] In *Miller v. Affiliated Financial Corp.*, the court found that attention was diverted from the merits of a case when a party was burdened with responding to a patently frivolous pleading.[78] This test would also be used to consider whether a Rule 11 motion itself has an improper purpose, for a claim of a Rule 11 violation is a serious one, and can itself justify Rule

73. FED. R. CIV. P. 11.

74. Hearld v. Barnes and Spectrum Emergency Care, 107 F.R.D. 17, 19 (E.D. Tex. 1985).

75. *See, e.g.*, Hudson v. Moore Business Forms, Inc., 609 F. Supp. 467 (N.D. Cal. 1985) (wrongful discharge suit in which defendant employer counterclaimed for four million dollars of punitive damages against an unemployed fifty year old woman whose husband was retired; the court declared the claim to be unconscionable).

76. The *Hudson* court found no explanation for such a counterclaim "other than an overzealous attempt on the part of defendant's counsel to intimidate this and other plaintiffs from pursuing wrongful discharge litigation." *Id.* at 480.

77. *See* Miller v. Affiliated Fin. Corp., 600 F. Supp. 987, 991 (N.D. Ill. 1984).

78. *Id.* The court continued:

> What defense counsel's preciousness really did was to cause their substantive challenges . . . to be advanced only in their Reply Memorandum. That placement shifted the burden of researching and answering defendants' real arguments from Millers' counsel (where the burden belonged) to this Court's law clerk and this Court itself (where it did not). All the work on those issues reflected in this opinion was ours. Unfortunately Rule 11's reference to "an appropriate sanction" does not appear to contemplate . . . a fine payable to the District Court's fund maintained to reimburse pro bono lawyers for out-of-pocket expenses, or some similar means of repaying the damage done to the justice system itself. Some judges have sought to be creative in devising "appropriate" sanctions in the early days of the new Rule. For example, [one court] required distribution of a copy of the opinion finding a Rule 11 violation to every lawyer in the offending counsel's law firm[.] Any such emphasis on internal publicity of course ignores the possibility that the obstructionist tactics may have been known to the offending lawyer's firm generally or may even have made the lawyer a kind of folk hero within the firm.

Id. at n.8 (citations omitted).

11 sanctions.[79]

IV. SANCTIONS

Rule 11 permits the court to impose "an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee" for violation of the Rule.[80] Must a sanction always be imposed once a Rule 11 violation is found? The language of the statute prescribes that the court "shall impose" sanctions upon the person. The advisory committee notes state that those words were chosen to draw the court's attention to the need for sanctions when pleadings are abused.[81] However, as if to temper the unambiguous language of Rule 11, the advisory committee notes also provide that a court preserves the essential flexibility to appropriately handle violations of the Rule.[82] Courts appear to be split on their interpretation of this portion of the Rule. For example, some have stated that sanctions are mandatory[83] when a court finds that an attorney has violated Rule 11.[84] On the other hand, a court which will not impose sanctions on its own motion will allow a party to move for sanctions.[85]

When sanctions are imposed, they may be levied upon the attorney, the client, or both.[86] The advisory committee notes explain that "[e]ven though it is the attorney whose signature violates the rule, it may be appropriate under the circumstances of the case to impose a sanction on the client."[87] Where the violations in a case are legal rather than factual, the court should impose sanctions only against the attorney.[88] On the other hand, where the client failed to assist counsel by giving insight into

79. Harris v. WGN Continental Broadcasting Co., 650 F. Supp. 568, 576 (N.D. Ill. 1986) (Attorney was merely admonished for his claim).

80. FED. R. CIV. P. 11.

81. FED. R. CIV. P. 11 advisory committee notes.

82. *Id.*

83. International Harvester Credit Corp. v. Henry (*In re* Curl), 803 F.2d 1004, 1007 (9th Cir. 1986).

84. Unioil, Inc. v. E.F. Hutton & Co., 809 F.2d 548, 559 (9th Cir. 1986) (citing Zaldivar v. City of Los Angeles, 780 F.2d 823, 831 (9th Cir. 1986), *petition for cert. filed sub nom.* Barton v. E.F. Hutton & Co., 55 U.S.L.W. 3822 (U.S. May 26, 1987) (No. 86-1894); *accord* Albright v. Upjohn Co., 788 F.2d 1217, 1221-22 (6th Cir. 1986); Westmoreland v. CBS, Inc., 770 F.2d 1168, 1174-75 (D.C. Cir. 1985)).

85. Hasty v. Paccar, Inc., 583 F. Supp. 1577, 1580 (E.D. Mo. 1984).

86. FED. R. CIV. P. 11.

87. FED. R. CIV. P. 11 advisory committee notes.

88. Thompson v. Aland, 639 F. Supp. 724, 732 (N.D. Tex. 1986).

his records, the costs may be borne equally by the client and counsel.[89] Thus, the type of violation determines who will receive sanctions.

Attorneys are certainly interested in the types of sanctions available under Rule 11. Expenses and attorney's fees are the obvious sanctions under the Rule.[90] However, imposing the full amount of expenses and attorney's fees is not always necessary.[91] Because the purpose of a sanction is to deter future abuses of the legal system, rather than to reimburse the prevailing party,[92] full compensation is not always required.[93]

Sanctions under Rule 11 are not limited to expenses. It has been held that sanctions may be more than just the amount of reasonable expenses of the other party.[94] The Rule authorizes a court "to impose . . . an appropriate sanction, which *may* include . . . the amount of the reasonable expenses incurred."[95] Courts therefore may examine the circumstances of the case to determine the amount of sanctions.

A. *Factors in Amount of Sanctions*

Courts will look at several factors to determine what is an appropriate sanction. Although Rule 11 no longer requires subjective bad faith, bad faith will be a factor in determining the amount of sanctions.[96] Courts will also consider the "degree of frivolousness."[97] Other factors which are regarded as having great importance are "the procedural posture of the case at the time of the frivolous filing, and the extent to which a non-monetary sanction would fulfill the spirit and tenor" of the Rule.[98]

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89. United States v. Kirksey, 639 F. Supp. 634, 639 (S.D.N.Y. 1986).

90. Fees have been awarded for as little as fifty dollars, Heimbaugh v. City and County of San Fransisco, 591 F. Supp. 1573, 1577 (N.D. Cal. 1984), and as much as $294,141.10, Unioil, Inc. v. E.F. Hutton & Co., 809 F.2d 548, 559 (9th Cir. 1986), *petition for cert. filed sub nom.* Barton v. E.F. Hutton & Co., 55 U.S.L.W. 3822 (U.S. May 26, 1987) (No. 86-1894).

91. Anschutz Petroleum Mktg. Corp. v. E.W. Saybolt & Co., 112 F.R.D. 355, 357 (S.D.N.Y. 1986).

92. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 245 (1975) (the "American Rule" generally does not award fees to the prevailing party).

93. *Anschutz*, 112 F.R.D. at 357.

94. Moore v. Secretary of Health and Human Services, 651 F. Supp. 514, 517 (E.D. Mich. 1986), *appeal dismissed*, 816 F.2d 681 (6th Cir. 1987).

95. *Id.* (citing FED. R. CIV. P. 11) (emphasis included in original); Unioil, Inc. v. E.F. Hutton & Co., 809 F.2d 548, 559 (9th Cir. 1986), *petition for cert. filed sub nom.* Barton v. E.F. Hutton & Co., 55 U.S.L.W. 3822 (U.S. May 26, 1987) (No. 86-1894).

96. FED. R. CIV. P. 11 advisory committee notes (in determining the nature and severity of sanctions, the court should consider the "state of the attorney's or party's actual or presumed knowledge"); Rice v. Heckler, 640 F. Supp. 1051, 1064-65 (S.D.N.Y. 1986).

97. Colorado Chiropractic Council v. Porter Memorial Hosp., 650 F. Supp. 231, 243 (D. Colo. 1986).

98. *Id.*

Another factor which is considered is the "nature of the litigation."[99]

The court may also consider the experience of the signing attorney.[100] For example, an attorney who had only recently graduated from law school was sanctioned only fifty dollars.[101] On the other hand, there may be greater expectations from a more experienced attorney.[102] Regardless of the attorney's experience, a compressed time frame may mitigate sanctions.[103]

A court not only considers the nature of the law and the knowledge of the attorneys as factors in determining the amount of sanctions, but will also consider the circumstances of a party. For example, a court may modify the amount sanctioned against a party, or his attorney, according to the person's ability to pay.[104] A court may also consider the sincerity of the plaintiff and an emotionally charged atmosphere as mitigating factors.[105] Furthermore, a court may consider the "need for compensation" and the deterrent purposes of the Rule.[106] Finally, the type of litigation involved may influence the size of sanctions. Some courts fear that excessive sanctions will have a chilling effect on certain types of litigation, such as civil rights actions[107] and antitrust suits.[108]

B. *Additional Sanctions*

Rule 11 is not the only guard against abusive proceedings by attorneys. Under section 1927 of Title 28 a court may require one who "unreasonably and vexatiously" multiplies costs to pay the extra costs resulting from that conduct.[109] Both section 1927 and Rule 11 comple-

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99. *Id.*

100. FED. R. CIV. P. 11 advisory committee notes.

101. Heimbaugh v. City and County of San Francisco, 591 F. Supp. 1573 (N.D. Cal. 1984).

102. Hudson v. Moore Business Forms, Inc., 609 F. Supp. 467 (N.D. Cal. 1985) (law firm sanctioned for prosecuting a counterclaim seeking more than $4,200,000 from an unemployed 50 year old woman whose husband lived on retirement). *See also* Colorado Chiropractic Council v. Porter Memorial Hosp., 650 F. Supp. 231 (D. Colo. 1986).

103. Hammonds v. Board of Election Comm'r, 112 F.R.D. 33, 35 (N.D. Ill. 1986).

104. *Colorado Chiro.*, 650 F. Supp. at 243; Oliveri v. Thompson, 803 F.2d 1265, 1281 (2d Cir.) (1986) (dicta), *cert. denied*, __ U.S. __, 107 S. Ct. 1373 (1987). *Heimbaugh*, 591 F. Supp. at 1577.

105. *Hammonds*, 112 F.R.D. at 35.

106. *Colorado Chiro.*, 650 F. Supp. at 243.

107. O'Rourke v. City of Norman, 640 F. Supp. 1451, 1471-72 (W.D. Ok. 1986) (possible award of $59,869.02 was reduced to a payment of one-third).

108. *Colorado Chiro.*, 650 F. Supp. at 243.

109. 28 U.S.C. § 1927 (1982). Section 1927 states:

> § 1927. Counsel's liability for excessive costs
>
> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

ment attempts to rid the courts of abusive litigation.[110] A court may find that an attorney or party has violated both provisions.[111] A comparison of the two provisions shows that Rule 11 is designed to sanction a knowingly groundless pleading, while section 1927 is designed to punish extremely vexatious behavior. For example, a section 1927 award of attorney's fees "must be based on more egregious behavior than a sanctions award under Rule 11."[112] A proceeding will warrant section 1927 sanctions if the lawyer acted in bad faith.[113] Even though an appeal is found to be nonmeritorious, the court will not award attorney's fees if there is no indication of bad faith or an attempt to delay the proceedings for some tactical advantage.[114] A further comparison of the two provisions discloses that Rule 11 sanctions are generally considered mandatory[115] whereas section 1927 awards are discretionary.[116] However, the two provisions are similar with regard to investigative duties.[117] By punishing different types of conduct, Rule 11 and section 1927 protect against a wide variety of attorney abuses.

V. MECHANICS OF ENFORCEMENT

Due process requires that notice be given to the signer of a pleading before sanctions may be imposed.[118] However, the judge may have sufficient knowledge of the case through his participation in it, to proceed to impose sanctions with little further inquiry.[119] The kind of notice required depends on the circumstances of the particular case. For example, an appellant who knew generally that penalties would be imposed at a hearing, but who did not attend the hearing, may not protest that he did not have explicit notice that *he* might be sanctioned.[120]

110. T. Axelberg, *Sanctions Available for Attorney Misconduct: A Glimpse of 'Other' Remedies*, 47 MONT. L. REV. 87, 100 (1986).

111. *O'Rourke*, 640 F. Supp. at 1471.

112. *Id.* at 1470.

113. *Id.*

114. T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Assoc., 809 F.2d 626, 638 (9th Cir. 1987).

115. *See supra* notes 81-86 and accompanying text.

116. 28 U.S.C. § 1927 (1982). Section 1927 provides that sanctions *may* be imposed for unreasonable or vexatious multiplication of litigation.

117. Colorado Chiropractic Council v. Porter Memorial Hosp., 650 F. Supp. 231, 239 (D. Colo. 1986). Additionally, such a duty is imposed upon attorneys by legal ethical requirements. *See supra* note 67.

118. Lepucki v. Van Wormer, 765 F.2d 86, 88 (7th Cir.), *cert. denied*, 474 U.S. 827 (1985); FED. R. CIV. P. 11 advisory committee notes.

119. FED. R. CIV. P. 11 advisory committee notes.

120. *Lepucki*, 765 F.2d at 88.

Orders denying or granting a motion for Rule 11 sanctions may generally be immediately appealed.[121] Where an immediate appeal is allowed, the order is considered an exception to the general rule that only final decisions are appealable.[122] However, some Rule 11 motions which are aimed against the party's conduct or more closely related to the merits of the action may still be appealed only after final judgment.[123] Furthermore, attorneys must carefully consider the appeal of a Rule 11 order because the appeal itself may be frivolous.[124]

The appellate court may invoke Rule 11 for the first time on appeal.[125] One court stated that appellate courts have the power to impose sanctions necessary to regulate the docket, and to deter frivolous pleadings.[126] Thus, attorneys must constantly be vigilant of Rule 11.

VI. CONCLUSION

The explosion of cases imposing sanctions since the amendment of Rule 11 indicates that the amendment has made the Rule easier to apply. Although the courts generally do not hesitate to impose sanctions if the Rule has been violated, it does not appear that courts have become "trigger-happy" as was feared by some attorneys. Instead, courts are adhering to the spirit of the Rule as outlined in the advisory committee notes. To temper application of the Rule, courts generally take into consideration the circumstances under which the pleading, motion, or paper was drafted and signed. Additionally, the courts have attempted to prevent a chilling effect on litigation, especially on complex areas of law. Because the federal Rule has been so effective, perhaps state courts should adopt an identical rule.

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121. *See* Frazier v. Cast, 771 F.2d 259, 262 (7th Cir. 1985); Westmoreland v. CBS, Inc., 770 F.2d 1168, 1172 (D.C. Cir. 1985); Falvey, *Significant Developments in the Law: Appeal of Sanctions Imposed Under Rule 11*, N.Y.L.J., May 29, 1986, at 1, col. 1.

122. *See, e.g., Westmoreland*, 770 F.2d at 1172. To determine if an interlocutory order is directly reviewable, courts have applied a three part test as set out in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). To be immediately reviewable, the order "must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978).

123. Falvey, *supra* note 121, at 2, col. 4.

124. Brown v. Nationwide Mutual Ins. Co., 805 F.2d 1242, 1244 (5th Cir. 1986); 28 U.S.C. § 1927 (1982); FED. R. APP. P. 38 (providing for damages and imposition of single or double costs if an appeal is frivolous).

125. *See* Van Sickle v. Holloway, 791 F.2d 1431, 1432 (10th Cir. 1986); Moulton v. Commissioner, 733 F.2d 734, 735 (10th Cir.), *modified*, 744 F.2d 1448 (10th Cir. 1984). *See also* Roadway Express, Inc. v. Piper, 447 U.S. 752, 766-67 (1980), *superceded*, 758 F.2d 1352 (10th Cir. 1985).

126. *Van Sickle*, 791 F.2d at 1437.

Whether Rule 11 is effective as a deterrent on abusive attorneys remains to be seen. Currently, however, the Rule remains a strong force four years after its amendment. Even so, some legal professionals are not aware of the stricter standards presently required of attorneys in federal courts, and should therefore become more familiar with Rule 11.

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