

Conflict of Interest, Confidential Information, and Rule 11

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A challenge under Fed. R. Civ. P. 11 ("Rule 11"), whether made by opposing counsel or posed by the Court, raises important questions concerning the attorney-client relationship. The charge that a pleading, motion or other paper signed by counsel is not well grounded in fact, is not warranted by existing law, or a good faith argument for the extension, modification or reversal of existing law, or is interposed for an improper purpose, threatens the confidence and trust that are central to the attorney-client relationship. Whether the challenge is considered substantive or is considered nothing more than a tactic by opposing counsel calculated to harass and to interfere with trial preparation, counsel must decide whether his client should be advised to obtain independent representation.

Independent representation must be considered because a challenge under Rule 11 raises the possibility that the interests of lawyer and client may become adverse. Rule 11 provides for sanctions against not only the represented party, but also against the lawyer signing the document, or against both the party and the lawyer. Indeed, the advisory committee note to Rule 11 expressly states that the language of the Rule "should eliminate any doubt as to the propriety of assessing sanctions against the attorney." As one court has observed, "[i]n the run-of-the-mill Rule 11 reasonable-investigation case, the attorney says 'my client told me X.'" *Brandt v Schal Associates, Inc* 121 FRD 368, 385 (ND Ill 1988). Serious ethical problems can arise when such a defense is made to exculpate the lawyer from Rule 11 sanctions.

The issue of separate independent representation for the client does not arise only when a Rule 11 challenge is based on a claim that a document is not well grounded in fact. Although that prong of Rule 11 may most clearly raise questions of conflict of interest and confidentiality of client communications, such questions may arise elsewhere under Rule 11. For example, counsel may have chosen a particular legal theory and pursued the theory based on the client's relation of the facts. Indeed, even when the subject document is based entirely on the lawyer's own independent investigation of the facts and the law, a conflict between lawyer and client may arise. For example, client and lawyer may have differing views concerning the effect of different sanctions. The client may view the most severe sanction to be dismissal of his case. *E.g., Del Valle v Taylor* 587 FSupp 514 (D ND 1984). The lawyer, however, may view dismissal of the case as preferable to a personal reprimand or to a fine. *E.g., Allen v Faragasso* 585 FSupp 1114 (ND Cal 1984) (reprimand); *Olga's Kitchen of Hayward, Inc v Papo* 108 FRD 695 (ED Mich 1985) modified 815 F2d 79 (6th Cir 1987) (fine).

The American Bar Association Model Rules of Professional Conduct (1987) ("Model Rules") address these issues. Model Rule 1.7 deals with conflicts of interest. Premised on the concept that unflinching loyalty is an essential element of a lawyer's relationship with his client, the Rule prohibits representation where that loyalty may be impaired. Specifically, Model Rule 1.7(b) provides that "[a] lawyer shall not represent a client if the representation of that client may be materially limited by . . . the lawyer's own interests, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation . . .".

ABA Code of Professional Responsibility DR 5-105(A) provides that "[e]xcept with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property or personal interests". Such interests include all interests which adversely affect either the judgment or loyalty of a lawyer to his client. *Cf. Matter of Mercer* 652 P2d 130 (Ariz 1982) (DR 5-104(A)). See DR 2-110

concerning a lawyer's withdrawal from representation. Model Rule 1.7 is broader than DR 5-105(A). Under the Model Rule, when a lawyer's own interests are involved, not only must the client consent after consultation, but, additionally, it must reasonably appear that the lawyer's representation will not be adversely affected by the lawyer's interests.

A lawyer must avoid placing himself in a position where his advice to his client might affect his own personal or financial interests. A Rule 11 charge clearly has the potential to affect a lawyer's own interests, including personal and financial interests. The Comment to Model Rule 1.7 notes that when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of other interests of the lawyer, loyalty to a client is impaired. As under DR 5-105, the key inquiry is whether the conflict will interfere with the lawyer's independent professional judgment and the zealous representation of his client. The Comment also notes that "[i]f the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice."

The Comment to the Model Rule confirms that a client may consent to representation notwithstanding a conflict. Prudence would suggest that a lawyer not only make complete disclosure to the client of how the client's interests differ from the lawyer's interests under the circumstances, but also that the lawyer document his disclosure and consultation with the client, as well as the client's consent to continued representation. Under the Model Rule, if a client does consent to continued representation, there remains another hurdle to overcome. Continued representation must reasonably appear not to be adversely affected by the lawyer's own interests. The Comment notes that "when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent."

A strict reading of Model Rule 1.7 and its Comments suggests that counsel faced with a Rule 11 challenge should in many instances advise his client to obtain separate independent representation. Even DR 5-105, addressing situations where counsel's professional judgment "reasonably may be affected by his own . . . interests," suggests advising separate independent representation more often than appears in reported decisions. This is especially true in light of the admonition to lawyers of Canon 9 to avoid even the appearance of impropriety. However, a review of reported decisions indicates that separate counsel is rarely retained by the client when a Rule 11 challenge is made. This may simply reflect clients' widespread consent, after full disclosure, to continuation of the original representation. It may reflect a lack of knowledge of the ethical pitfalls posed by a Rule 11 challenge. Or it may reflect counsels' general conclusion, concurred in by clients, that, as a practical matter, any effect on counsels' judgment and advice resulting from a Rule 11 challenge is *de minimis*.

Reliance on client statements is often raised by counsel to defend against Rule 11 claims. It has been suggested that in a Rule 11 context "a judge should view assertion of the [attorney-client] privilege by a lawyer with skepticism." Schwarzer, *Sanctions Under the New Federal Rule 11 - A Closer Look* 104 FRD 181, 199 (1985). This is because information relating to whether a pleading, motion or other paper is well-founded will usually be disclosed in discovery or otherwise during the course of litigation. *Id.* There may, nonetheless, be legitimate tactical reasons for seeking to avoid premature disclosure of information to opposing counsel. Questions of waiver of the privilege may also arise.

Model Rule 1.6 deals with confidentiality of information relating to representation of a client, and provides generally that disclosure of such information shall not be made unless the client consents after consultation. The Comment to the Model Rule recognizes the importance of maintaining client confidences. "The observation of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance." Or, stated differently, "[b]oth the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him." ABA Code of Professional Responsibility EC4-1. See DR 4-101 (B), generally prohibiting use of a client's confidences or secrets for his own advantage, unless the client consents after full disclosure.

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However, there are certain exceptions to the general prohibition against disclosure of confidential information without client consent. In certain circumstances where his actions are questioned, a lawyer must be allowed to defend his actions and to present his defense and is not required to stand mute or be bound by the version of the facts his client may offer. Model Rule 1.6(b)(2) states that "[a] lawyer may reveal such information to the extent the lawyer reasonably believes necessary . . . to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client . . . or to respond to allegations in any proceeding concerning the lawyer's representation of the client." DR 4-101(C) permits a lawyer to reveal information protected by the attorney-client privilege and certain other information gained in the professional relationship "necessary to . . . defend himself or his employees or associates against an accusation of wrongful conduct." There can be little doubt that a Rule 11 claim against a lawyer raises allegations concerning the lawyer's representation of the client and is also an accusation of wrongful conduct. Such a claim can also result in controversy between lawyer and client.

But permitted disclosure is limited. The Model Rule allows disclosure only of information the lawyer "reasonably believes necessary." DR 4-101(C) allows disclosure only of information "necessary" to defend the lawyer and his associates. As amplified in the Comments to the Model Rule, "disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable."

After noting that a Rule 11 claim against a lawyer constitute an "accusation of wrongful conduct" within the meaning of DR 4-101(C)(4), one court has suggested that an "under-seal filing might be sought to protect the separate interests of the lawyer and the client." *Brandt v Schal Associates, Inc* 121 FRD 368, 385 n.48 (ND Ill 1988) (in *Brandt*, after reviewing three volumes of materials claimed to be protected by the attorney-client privilege or work-product doctrine submitted under seal, the court concluded the lawyer concocted a theory of liability on his own, with no direct evidence from his client.) This approach is consistent with the advisory committee notes to Rule 11 which state that the Rule "does not require a party or an attorney to disclose privileged communications or work product" to show that signing the document at issue was substantially justified. The notes refer to the protective provisions available under Fed.R.Civ.P. 26(c), and to *in camera* inspection by the court. Cf. *Rodgers v Lincoln Towing Service, Inc* 771 F2d 194 (7th Cir 1985). In a pending matter, and even in a jury case, *in camera* examination by the court may have the undesirable implication of an *ex parte* communication on the merits. See Schwarzer, *supra* at 199. However, this limited dissemination of pertinent confidential information seems the most practical way to balance competing interests while making the necessary inquiry under Rule 11.

The question of whether a client requires separate independent representation when a Rule 11 claim is made turns on the specific facts of each case. As one court has observed, "if attorney and client disagree about who is at fault and point their fingers at each other, the interests of the two are now clearly adverse. The client, therefore, will need new counsel to represent him against his former counsel in the proceedings to determine fault." *Eastway Const. Corp v City of New York* 637 FSupp 558 (ED NY 1986) mod 821 F2d 121 (2d Cir) cert den 484 US 918 (1987). On the other hand, the interests of lawyer and client may be more closely aligned, and there may be no "finger pointing." At a minimum, the client should be advised of the ramifications of a Rule 11 claim, and the potential or actual difference in interests between lawyer and client should be disclosed. A lawyer must carefully determine whether his own interests will affect his loyalty to his client and interfere with the independent professional judgment he is obligated to exercise on behalf of his client. If the representation continues after a Rule 11 challenge, the question remains whether the trust and confidence so important in the attorney-client relationship have been damaged so as to make continuation of the relationship difficult or impossible.

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DISCOVERY

Requesting Production of Documents After Close of Discovery Scheduling Depositions After Close of Discovery While Motion to Extend Discovery Was Pending

Monetary Sanctions

13. *Odie v General Motors Corporation*
 131 FRD 365 (D Mass 1990)

Counsel for the plaintiff filed a request for production of documents after the close of discovery without first obtaining leave of court to do so, thereby requiring the defendant to file a motion for a protective order. Counsel also filed notices of four depositions for a date certain after the close of discovery, while a motion to extend the discovery period to allow the depositions was pending. The defendant responded with a motion for sanctions under Fed. R. Civ. P. 37(b)(2).

The court ordered the plaintiff, under Fed. R. Civ. P. 16(f), to pay the costs, including reasonable attorneys' fees, incurred by the defendant in preparing, filing and litigating the motion for a protective order and motion for sanctions. The award of fees and costs was justified on the grounds that the defendant's motions would not have been necessary if counsel for the plaintiff had obeyed the court's scheduling orders and obtained amendment of those orders before initiating additional discovery, and that plaintiff's counsel's conduct showed a deliberate indifference to the court's scheduling orders that "tends to make a mockery of the Court's effort to manage civil cases in an efficient manner."

Failure to Comply with Discovery Procedures Should Be Sanctioned with Dismissal Only in Extreme Circumstances

Dismissal Reversed

14. *U S B Acquisition Co, Inc v U S Block Corporation* 564 So2d 221 (Fla App 1990)

Shortly after a complaint was filed, the defendants served notice on the plaintiffs to produce 51 classes of documents. The plaintiffs made no objection to the notice. One month later the defendants filed a motion to compel production of documents requested in three paragraphs of the original notice; counsel for the plaintiff agreed to produce all other documents. The court granted the motion and compelled production of documents requested in two of the paragraphs, but did not set a date for compliance. A few weeks later, counsel for the defendant wrote to counsel for the plaintiff, requesting the "missing" documents, and was informed by counsel for the plaintiff that they would be forwarded when obtained from the plaintiff. A second letter, a "final demand" for the documents, was sent one month later. Two months after the "final demand," the defendant filed a second motion to compel and sought sanctions. The plaintiff substantially complied with the discovery order on the day before the hearing on the second motion, but the trial court dismissed the plaintiff's complaint as a sanction for violating discovery orders.

The court of appeals reversed the order of dismissal, and remanded for further proceedings. The court reasoned that although a complaint may be dismissed for failure to respond to a request for production (even in the absence of a court order and without a showing of prejudice), a plaintiff's constitutionally