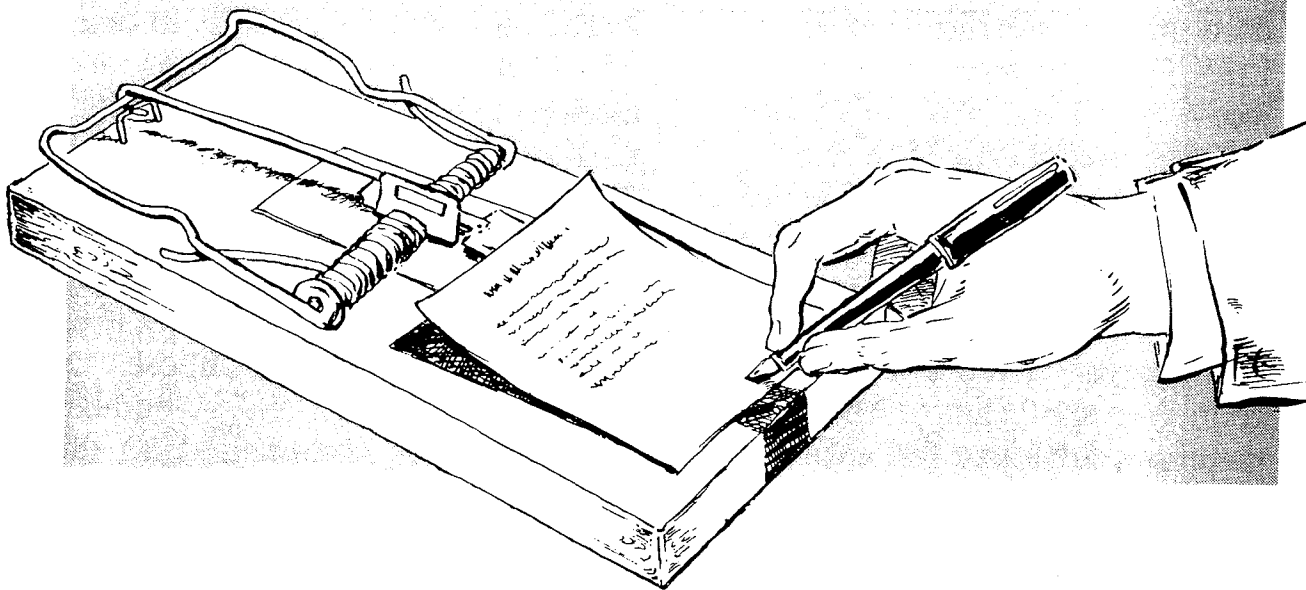


How To Avoid Rule 11 Sanctions

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Investigate the facts and the
law before you sign a pleading.



SANCTIONS AGAINST ATTORNEYS and their clients under Rule 11 ("Rule 11" or "Rule") of the Federal Rules of Civil Procedure ("FRCP")

have been the subject of an increasing number of court opinions and articles in the legal press. In some cases, when the conduct of an attorney or his cli-

ent has been particularly egregious, sanctions under the Rule have seemed very appropriate. In other cases, imposition of sanctions has raised questions of whether an attorney's "misconduct" was simply advocating a novel legal theory or zealously representing his client. It is important to understand that it is not just outrageous conduct that can trigger Rule 11 sanctions. Lawyers throughout the country are discovering that Rule 11 has real teeth.

Rule 11 was substantially amended in 1983. If you haven't read the Rule recently, it is well worth your while to do so. The subjective bad faith standard under the earlier version of the Rule has been replaced by more objective standards. An intentional or bad faith violation of the Rule is no longer necessary for sanctions to be imposed. *Rodgers v. Lincoln Towing Service, Inc.*, 771 F.2d 194, 205 (7th Cir. 1985). Application of Rule 11 appears to vary from one part of the country to another, however, and it is, therefore, advisable for attorneys to stay abreast of applications of Rule 11 in the jurisdictions in which they practice.

ATTORNEY CERTIFICATION • Rule 11 now provides that an attorney's signature on a pleading, motion, or other paper constitutes a certificate by the attorney that he has read the paper and that to the best of his knowledge, information, and belief, it is factually and legally warranted.

Specifically, an attorney's signature is a certification of the following:

- A "reasonable inquiry" of applicable law and facts has been made;
- The pleading, motion, or paper is "well grounded in fact";
- It is "warranted by existing law or a good faith argument for the extension, modification or reversal of existing law"; and
- 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." Rule 11.

The purpose of Rule 11 is to deter dilatory and groundless pleadings and motions and to streamline litigation. *Golden Eagle Distributing Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1536 (9th Cir. 1986); *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1180 (D.C. Cir. 1985). Rule 11 provides that if it is violated, the court "shall impose . . . an appropriate sanction." A number of courts have commented on the mandatory nature of Rule 11. *Westmoreland v. CBS, Inc.*, *supra*; *Hearld v. Barnes and Spectrum Emergency Care*, 107 F.R.D. 17, 20 (E.D. Tex. 1985).

OUT-OF-STATE VS. LOCAL COUNSEL • Suppose that upon arriving at your office one morning you find a telephone message marked "urgent" from a lawyer in a neighboring state. You call the lawyer and are delighted

to learn that he wants to retain you as plaintiff's counsel in a major tort case in your local district court. Although there is a short deadline for filing the action, the lawyer assures you that most of the necessary legal research has been done and that he will send you a memorandum summarizing the important facts. Should you give any thought to Rule 11? The answer is an emphatic "YES"!

Responsibility of Local Counsel

The first question to ask is what responsibility local counsel has under Rule 11 to make a reasonable inquiry when relying on another attorney. The advisory committee notes state that one factor that may be considered in determining whether reasonable inquiry was in fact made is whether the local attorney depended on forwarding counsel or another member of the bar. In fact, local rules often require a member of the local bar to sign all pleadings and papers, and Rule 11 expressly refers to the signature of the attorney as constituting the certification that may trigger sanctions. But if local counsel is relatively passive and is in reality nothing more than a conduit for out-of-state lead counsel, it does not seem fair that only local counsel be exposed to liability under Rule 11.

Courts have dealt with this situation in different ways. In *Coburn Optical Industries, Inc. v. Cilco, Inc.*, 610 F. Supp. 656, 660 (M.D.N.C. 1985), where out-of-state counsel acted as

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lead counsel and prepared the documents at issue, the court stated that "[i]t would subvert the purpose of Rule 11 to allow an attorney to hide behind another merely because a local district court rule requires the signature of local counsel." In that case, out-of-state counsel as well as local counsel was sanctioned with local counsel being described by the court as seeming "blindly to follow the commands of its out of state associates." In *Long v. Quantex Resources, Inc.*, 108 F.R.D. 416, 417 (S.D.N.Y. 1985), it was held that at the very least local counsel has a duty, before signing papers prepared by out-of-state counsel, to read the papers and "from that have a basis for a good faith belief that the papers on their face appear to be warranted by the facts asserted and the legal arguments made, and are not interposed for any improper purpose." In *Pravic v. U.S. Industries-Clearing*, 109 F.R.D. 620, 623 (E.D. Mich. 1986), the court stated that "an attorney may not rely on a legal memorandum prepared by a second lawyer without independently verifying the reasoning of the cases cited in the

memorandum and without 'Shepardizing' the cases cited in the memorandum."

Clearly, it is best for signing counsel to evaluate and verify the key facts and applicable law himself. If time or other circumstances do not fully permit this review, some comfort may be taken in the advisory committee note. The note provides that the signer's conduct should be tested by asking what was reasonable to believe at the time the pleading, motion, or other paper was submitted. A court is expected to avoid using the wisdom of hindsight. Nevertheless, by affixing his signature to a pleading or motion, counsel will likely find himself bound by the certification set out in Rule 11.

EXTENT OF FACTUAL INQUIRY • What kind of factual inquiry is required by Rule 11? Case law suggests that, to the extent circumstances permit, the client and key witnesses should be interviewed and relevant documents be reviewed. Failure to conduct personal interviews of knowledgeable witnesses and meaningful telephone inquiries may result in Rule 11 sanctions being imposed. *Wold v. Minerals Engineering Co.*, 575 F. Supp. 166, 167 (D. Colo. 1983). Rule 11 does not expressly require that the signing attorney conduct the inquiry. In the above example, local counsel need not personally conduct the factual inquiry. What is important is that an inquiry in fact be made that is reasonable under the circum-

stances. *E.g.*, *Lieb v. Topstone Industries, Inc.*, 788 F.2d 151, 157 (3rd Cir. 1986).

For example, in *Continental Air Lines, Inc. v. Group Systems International Far East, Ltd.*, 109 F.R.D. 594 (C.D. Cal. 1986), Rule 11 sanctions were sought after defendant's motion to dismiss for lack of personal jurisdiction was denied. The court determined that a reasonable inquiry by counsel would have revealed his client's presence in the forum state through its general agents, including the fact that one of defendant's directors lived and worked in the state and conducted business on behalf of defendant there. Defendant and its attorney were both fined.

Investigate the Facts

The lesson to be learned from the case law is that an attorney must take the time to check the facts. Local counsel should inquire of forwarding counsel the extent to which factual inquiry has been made. Some investigation, though no guarantee of safety from Rule 11 sanctions, is far better than no investigation. The reasonableness of the investigation and the reasonableness of counsel's belief as to the facts will be viewed under the circumstances existing at the time of the investigation.

Documentation

Document your fact investigation. If critical evidence is possessed by an opposing party, you should request the

party to allow you to review the evidence before filing suit. *See Kamen v. American Telephone & Telegraph Co.*, 791 F.2d 1006, 1014 (2d Cir. 1986). Before a party is named as a defendant, plaintiff's attorney should have some reasonable basis to believe that the party is subject to liability. *Jackson Marine Corp. v. Harvey Barge Repair, Inc.*, 794 F.2d 989, 992 (5th Cir. 1986). A short deadline for taking action (such as the expiration of a statute of limitations) should be taken into account when determining whether the investigation was reasonable.

Reliance on Client's Statements

May an attorney rely on his client's word alone and satisfy the "reasonable factual inquiry" requirement of Rule 11? The court in *Coburn Optical Industries, Inc. v. Cilco, Inc.*, 610 F. Supp. 656, 659 (M.D.N.C. 1985), stated that if an attorney has only his or her client's assurance that facts do or do not exist and reasonable inquiry would reveal otherwise, the attorney has not satisfied his Rule 11 obligation of reasonable inquiry. Reliance on only a client's statements not based on the client's first-hand knowledge would likely be found unreasonable. On the other hand, it must be kept in mind that the attorney is not the trier of fact. The advisory committee notes mention that whether an attorney "had to rely on a client for information as to the facts" may be a factor to be considered in determining the reasonableness of the inquiry. The com-

mittee notes state further that the Rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual theories. Counsel should not feel obligated to abandon a credible client solely because his version of events differs from that of other witnesses and that set out in documents.

SUBSTANCE OF THE LEGAL INQUIRY
S • What kind of legal inquiry is required by Rule 11? If a pleading or motion is represented to be consistent with existing law, that must, of course, in fact be the case. Reliance on the legal inquiry of another attorney is not a complete defense against a claim that Rule 11 has been violated. A pleading is not warranted by existing law if it is contrary to established precedent. *Chu by Chu v. Griffith*, 771 F.2d 79, 81 (4th Cir. 1985). Moving for summary judgment when there are genuine issues of material fact in the record may lead to imposition of sanctions. *SFM Corp. v. Sundstrand Corp.*, 102 F.R.D. 555 (N.D. Ill. 1984). It has been stated that reasonable inquiry on an issue of constitutional law must at least include a determination of whether the United States Supreme Court has ruled on the issue. *Continental Air Lines, Inc. v. Group Systems International Far East, Ltd.*, 109 F.R.D. 594, 597 (C.D. Cal. 1986).

Good Faith Arguments

Any argument for the extension, modification, or reversal of existing law must be made in good faith. There is a real tension between an attorney's role as client advocate and an attorney's obligations under this portion of Rule 11. Although the advisory committee notes refer to whether the pleading, motion, or other paper was based on a "plausible view of the law," it is not at all clear what a plausible view of the law is. Adverse precedent should be distinguished, or a reasoned argument should be offered explaining that prior decisions are wrong. Although the committee notes state that creativity in pursuing legal theories is not intended to be chilled, "[t]he creativity must be in service of a good faith application of the law or at least a good faith request for a change in the law." *Pawlowske v. Chrysler Corp.*, 623 F. Supp. 569, 573 (N.D. Ill. 1985), *aff'd without opinion*, 799 F.2d 753 (7th Cir. 1986).

In *Eastway Construction Corp. v. City of New York*, 762 F.2d 243, 254 (2d Cir. 1985), the court stated that "where it is patently clear that a claim has absolutely no chance of success under the existing precedents, and where no reasonable argument can be advanced to extend, modify or reverse the law as it stands, Rule 11 has been violated." A bald claim that a modification or extension of existing law is sought, without any reasonable argument being offered for that extension or modification, may be insufficient to

avoid Rule 11 sanctions. *WSB Electric Co. v. Rank and File Committee to Stop 2-Gate System*, 103 F.R.D. 417, 420 (N.D. Cal. 1984).

Obligation To Cite Adverse Case Law

Is there an obligation under Rule 11 to cite law adverse to a client's position to the court? Some courts have determined that Rule 11 does impose this obligation on an attorney, finding a duty of candor imposed by the Rule. *Jorgenson v. County of Volusia*, 625 F. Supp. 1543, 1547-48 (M.D. Fla. 1986), *rev'd*, 824 F.2d 973 (11th Cir. 1987). More often, however, courts have refused to impose sanctions for an attorney's failure to draw the court's attention to possibly adverse authority. As stated by the court in *Golden Eagle Distributing Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1542 (9th Cir. 1986), *rev'g* 103 F.R.D. 124 (N.D. Cal. 1984), Rule 11 does not require that an attorney "in addition to advocating the cause of his client, step first into the shoes of opposing counsel to find all potentially contrary authority, and finally into the robes of the judge to decide whether the authority is indeed contrary or whether it is distinguishable."

Again, the critical issue is whether a reasonable inquiry was made into applicable law. An attorney must make time to check applicable law and document his or her legal inquiry. Was it reasonable for counsel to have missed a recent case on point pertaining to an

issue raised in the court papers? The research capabilities and resources of an attorney and his firm may bear on the question. See Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 194, 201 (1985).

IMPROPER PURPOSE • Finally, what is an “improper purpose” under Rule 11? Under the language of the Rule, a pleading or motion may be well-grounded in fact and warranted by existing law but, if found to have been interposed for an improper purpose, “such as to harass or to cause unnecessary delay or needless increase in the cost of litigation,” may still result in Rule 11 sanctions.

The timing of a pleading or motion may give rise to an inference that it is made for an improper purpose. *Chevron, USA, Inc. v. Hand*, 763 F.2d 1184, 1187 (10th Cir. 1985) (motion found to have been brought for purpose of delay). The pleading or motion itself may lead a court to find an improper purpose. In *Miller v. Affiliated Financial Corp.*, 600 F. Supp. 987, 990-92 (N.D. Ill. 1984), a motion to dismiss based on a typographical error of one letter in a statutory reference in the complaint, where from its context the statute to which reference was intended was easily determined, caused the court to direct submission of memoranda “detailing any claimed justification or mitigating factors” for the motion to dismiss. Persistent claims after repeated adverse rulings

may lead a court to conclude that the claims are made for an improper purpose, such as harassment. *Cannon v. Loyola University of Chicago*, 784 F.2d 777 (7th Cir. 1986), cert. denied, 107 S. Ct. 880 (1987).

In practice, courts often first determine that a pleading or motion was unwarranted in fact or law and then conclude, based at least in part on that determination, that the pleading or motion was interposed for an improper purpose. For example, in *Hudson v. Moore Business Forms, Inc.*, 609 F. Supp. 467 (N.D. Cal. 1985), vacated in part, 827 F.2d 450 (9th Cir. 1987), a multimillion dollar counterclaim by a former employer against a former employee was found not to be based on existing law or a good faith argument for the extension of existing law, but was found to have been filed to harass the former employee into dropping her lawsuit and to deter others from bringing suit.

THE ATTORNEY-CLIENT PRIVILEGE • An attorney faced with a Rule 11 motion seeking sanctions must consider whether his or her defense will infringe on the attorney-client privilege. How should counsel proceed if the basis for the pleading or paper he or she signed was a confidential communication with the client? Model Rule of Professional Conduct 1.6 provides that information relating to representation of a client may be revealed by an attorney to the extent reasonably believed neces-

sary to respond to allegations in a proceeding concerning the attorney's representation of the client. The advisory committee notes state that Rule 11 does not require disclosure of privileged communications to show that the signing was substantially justified and refers to the protective provisions of FRCP 26(c). Disclosure of privileged information in camera may sometimes be necessary. *Cf. Rodgers v. Lincoln Towing Service, Inc.*, 771 F.2d 194 (7th Cir. 1985). Whether an attorney against whom Rule 11 sanctions are sought is able to continue to represent his client with the loyalty and independence of judgment to which every client is entitled must be carefully considered. It may be appropriate for the client to retain independent representation when sanctions are sought against his attorney.

HAPHAZARD MOTIONS • Rule 11 motions should not be filed routinely or without careful thought. Counsel should bear in mind that Rule 11 is itself applicable to motions for sanctions under Rule 11. *See*

Fisher Brothers v. Cambridge-Lee Industries, Inc., 585 F. Supp. 69 (E.D. Pa. 1983). This was made explicit with the addition of FRCP 7(b)(3), which provides that “[a]ll motions shall be signed in accordance with Rule 11.” Prompt filing of a Rule 11 motion upon discovery of a violation of the Rule is recommended, as this allows easier determination of expenses and fees incurred because of the filing of the offending paper. Prompt filing may also undercut a claim that the Rule 11 motion is filed for an improper tactical purpose.

CONCLUSION • Whether amended Rule 11 has actually resulted in more attorneys investigating the facts and the law more thoroughly than before and filing fewer motions and pleadings for improper “tactical” purposes is unclear. What is clear is that the sanction provisions of Rule 11 have been greatly strengthened. Those provisions should be borne in mind the next time a case is referred to you by out-of-state counsel who assures you he or she has already looked into the facts and the law.

Initially, perhaps the best approach for getting the “big picture” of the chain of events that lead a particular client to your office is to let the client “go” with his story — without any interruptions from the lawyer. Although it may be necessary to take some notes, be sure to make the client feel that he has your full attention. Note the gaps, improbabilities, and strong points of the client's story and, when the narration is finished, probe further by questioning the client in more depth in these areas.

R.C. McCULLOUGH II AND J.L. UNDERWOOD, CIVIL TRIAL MANUAL 2 19 (ALI-ABA, Philadelphia, 1980, Supp. 1987)