GENERAL OVERVIEW OF FEDERAL RULE OF CIVIL PROCEDURE 11

*Edward W. Remsburg**
*Steven K. Gaer***

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* Partner with the law firm of Ahlers, Cooney, Dorweiler, Haynie, Smith & Allbee; B.A. with high distinction, University of Iowa 1970; J.D. with high distinction, University of Iowa Law School, 1973.

** Associate with the law firm of Ahlers, Cooney, Dorweiler, Haynie, Smith & Allbee; B.A. with high distinction, University of Kentucky, 1983; J.D. with honors, Drake University Law School, 1986.

I. Introduction

For many years the people involved in and affected by the judicial processes have been concerned about the abuses inherent in those processes. These abuses were "originally addressed by Congress as early as 1813 when it adopted legislation providing that any attorney who 'multiplied the proceedings in any cause . . . so as to increase costs unreasonably and vexatiously' could be held liable for 'any excess of costs so incurred.' "[1] The legal system continually attempts to address these abuses. This article will provide a general overview of Federal Rule of Civil Procedure 11. Rule 11 is a vehicle to obviate abuses in the federal court system.

II. Federal Rule of Civil Procedure 11

A. *History and Text*

Federal Rule of Civil Procedure 11 was originally adopted in 1937[2] and was promulgated in 1938.[3] Initially, Rule 11 provided that every signed pleading constituted "a certificate" by the attorney that he had "read the pleading," that there was "good ground to support it," and that it was "not interposed for delay."[4] The original sanction provided that in the event a pleading was not signed or was signed with the intent to defeat the purpose of the rule, the pleading "may be stricken."[5] The sanction also provided that in the event of a "willful violation" the attorney "may be subject to appropriate disciplinary action."[6]

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1. Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 182 (1985) (quoting Roadway Express, Inc. v. Piper, 447 U.S. 752, 759 (1980)).
2. *Id.* at 183.
3. Pope & Benkoczy, *A Comprehensive Guide to Sanctions Under Rule 11*, 55 Defense Counsel J. 389, 389 (Oct. 1988).
4. Proposed Amendment to the Federal Rules of Civil Procedure, 97 F.R.D. 165, 197 (1983).
5. *Id.*
6. *Id.*

In its original form Rule 11 was not effective in deterring abuses.[7] Some of the reasons advanced for its lack of effectiveness include:

(1) Confusion regarding the circumstances which trigger the rule's sanctions;[8]

(2) Confusion regarding the standard of conduct expected of the signing attorneys;[9]

(3) Confusion regarding the range of available sanctions;[10]

(4) Confusion regarding the appropriate sanctions;[11]

(5) The rule's "good ground" requirement lacked definition;[12]

(6) The rule did not provide for sanctioning other abuses, such as litigation brought with the intention to harass or to force the opposing party to incur unnecessary expense;[13]

(7) The rule's provisions did not demand enough;[14]

(8) The rule's provisions were not honored enough;[15]

(9) The types of sanctions which could be imposed were open to question;[16]

(10) The decisions interpreting the rule confused the issue of attorney honesty with the merits of the action;[17] and

(11) The sanctions provided by the rule were rarely invoked.[18]

On April 28, 1983, Rule 11 was amended.[19] This amendment became effective on August 1, 1983.[20] As amended, the rule provides:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or ac-

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7. FED. R. CIV. P. 11 advisory committee's note.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. Pope & Benkoczy, *supra* note 3, at 389.
13. *Id.*
14. Excerpt from *Report of the Committee on Federal Courts of the New York State Bar Association on Sanctions and Attorneys' Fees* ATTORNEY SANCTIONS AND FEDERAL RULE 11, at ___ (presented at the International Association of Defense Counsel 1987 Annual Meeting on Continuing Legal Education) (available in Drake University Law School Library) [hereinafter New York State Bar Association].
15. *Id.*
16. *Id.*
17. *Id. See also* FED. R. CIV. P. 11 advisory committee's note.
18. New York State Bar Association, *supra* note 14, at 1, 2. *See* Pope & Benkoczy, *supra* note 3, at 389 (from 1938 to 1976 only three of nineteen reported cases resulted in the imposition of sanctions under Rule 11). *See also* FED. R. CIV. P. 11 advisory committee's note.
19. FED. R. CIV. P. 11.
20. *Id.*

> companied 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 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 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.[21]

The 1983 amendment made significant changes in Rule 11. These changes may be summarized as follows:

(1) It applies to every paper served or filed in federal court;

(2) It applies to persons appearing *pro se* as well as to attorneys and their clients;

(3) It mandates a reasonable prefiling inquiry;

(4) It requires that any paper filed in court must be well grounded in fact and warranted by existing law or by a good faith argument for the extension, modification, or reversal of existing law;

(5) It requires that any paper filed in court may not be filed for any improper purpose (*i.e.*, to harass, cause unnecessary delay, or needlessly increase the cost of litigation); and

(6) It mandates that the court impose sanctions for a violation of the rule.[22]

There are several rationales for the amendment to Rule 11, including:

(1) Widespread concern over frivolous litigation and abusive practices;[23]

(2) A need for more effective means for deterring abuse and misuse;[24]

(3) The need for an additional tool to prevent frivolous litigation and to combat overzealous advocacy;[25]

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21. *Id.*

22. Schwarzer, *supra* note 1, at 184-85. *See also* FED. R. CIV. P. 11 and advisory committee's note.

23. Schwarzer, *supra* note 1, at 181.

24. *Id.* at 183.

25. Beck, *Client Advice on Rule 11 Sanctions Issues*, ATTORNEY SANCTIONS AND FEDERAL RULE 11, at 3 (presented at the International Association of Defense Counsel 1987 Annual Meeting on Continuing Legal Education) (available in Drake University Law School Library).

(4) Concern over tedious and baseless litigation as well as abusive litigation tactics;[26] and

(5) The problems of increasing costs and delay.[27]

The main purpose of Rule 11 is to streamline the litigation process by discouraging dilatory or abusive tactics and by lessening frivolous claims or defenses.[28] To accomplish this purpose, sanctions are now mandatory for each and every violation of the rule.[29] It is apparent from the advisory committee's note that it is believed that sanctions will sufficiently deter future violations of the rule.[30]

B. *Scope of Federal Rule of Civil Procedure 11*

1. *All Pleadings, Motions, and Other Papers Filed in a Civil Action in Federal District Court*

Generally, Rule 11 applies to "every pleading, motion, and other paper . . . signed by at least one attorney of record"[31] which is served or filed in a civil action in federal district court[32] and to anyone who signs a pleading, motion, or other paper.[33] As a consequence, no issue as to a possible viola-

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26. Peggs, *Rule 11: Advocacy's Newest Challenge*, CASE & COM. 20, 22 (May-June 1988) (citing Schwartzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181 (1985)) [hereinafter Peggs].

27. New York State Bar Association, *supra* note 14, at 2, 3.

28. FED. R. CIV. P. 11 advisory committee's note. *See* Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531, 1536 (9th Cir. 1986) (the amendments' major purposes were the deterrence of dilatory or abusive pretrial tactics and the streamlining of litigation). *See also* Pope & Benkoczy, *supra* note 3, at 390 (the purpose of the amended rule is to deter unnecessary pleadings and other processes and to enhance not only the economic and efficient administration of justice but also the rights and privileges of individual parties); Schwarzer, *supra* note 1, at 182 (amended Rule 11 is intended to deter misuse or abuse of the litigation process); Beck, *supra* note 25, at 3-4 (since its aim is to make the litigation process work better, Rule 11 is intended to be a part of an integrated system created by the federal rules for the just, speedy, and inexpensive determination of actions).

29. FED. R. CIV. P. 11 and advisory committee's note.

30. FED. R. CIV. P. 11 advisory committee's note ("greater attention by the district courts to pleading and motion abuses and the imposition of sanctions when appropriate, should discourage dilatory or abusive tactics . . . [t]he word 'sanctions' in the caption . . . stresses the deterrent orientation in dealing with improper pleadings, motions or other papers.").

31. FED. R. CIV. P. 11.

32. American Bar Association, *ABA Standards and Guidelines for Practice Under Rule 11 of the Federal Rules of Civil Procedure*, 121 F.R.D. 101, 110-11 (1988) [hereinafter *ABA Standards and Guidelines*]. *See* Soules v. Kauaians for Nukolii Campaign Comm., 849 F.2d 1176 (9th Cir. 1988) (a state court document could not be used as the basis for sanctions under Rule 11 because the document was never filed in the federal action). *See also* Peggs, *supra* note 26, at 25 (Rule 11 is clearly limited to papers filed in federal court).

33. FED. R. CIV. P. 11 advisory committee's note; *see* Adduono v. World Hockey Ass'n, 824 F.2d 617, 621 (8th Cir. 1987) (Rule 11 applies only when an attorney has signed a pleading, motion, or other paper; the court held that the rule did not apply to a settlement agreement which was not submitted to nor reviewed by the court nor incorporated into the court's order).

tion of Rule 11 is raised by oral assertions or by letters passing between parties or their attorneys, even if the correspondence contains assertions of legal positions.[34]

The application of Rule 11 is subject to the exclusions set forth in Federal Rule of Civil Procedure 81.[35] In addition, although Rule 11 by its terms applies to all signed papers which are served or filed, certain papers are governed by more specific requirements imposed by other rules.[36]

Even though both the language of Rule 11 and the weight of authority appear to indicate that the rule is directed only to a specific pleading, a specific motion, or a specific paper,[37] Rule 11 has been interpreted by at least one court to apply to the "bulk of the filings" and to the "conduct of the litigation."[38] In *Lupo v. R. Rowland & Co.*, eight plaintiffs brought a securities fraud case in which discovery took almost four years.[39] After three days of trial, the court sustained the defendants' earlier motions for summary judgment.[40] The defendants then filed a joint application for attorneys' fees and costs pursuant to Rule 11.[41] The district court awarded the defendants $100,000 in sanctions, of which $50,000 was assessed against the plaintiffs and $50,000 was assessed against the plaintiffs' attorneys.[42] The attorneys for the plaintiffs appealed the imposition of sanctions against them.[43] One argument raised by plaintiffs' counsel on appeal was that the imposition of Rule 11 sanctions was inappropriate because neither the defendants' joint application for attorneys' fees and expenses nor the court's order imposing sanctions designated any specific paper filed with the court

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See also Frantz v. United States Powerlifting Fed'n, 836 F.2d 1063, 1066 (7th Cir. 1987) (in a proceeding under Rule 11, the filing of a bloated request for fees is itself subject to sanctions); Robinson v. National Cash Register Co., 808 F.2d 1119, 1130 (5th Cir. 1987) (court held that Rule 11 sanctions can be imposed only on the attorneys who sign a document, or on the clients represented by the signing attorneys).

34. Peggs, *supra* note 26, at 25.

35. FED. R. CIV. P. 81. *See also ABA Standards and Guidelines*, *supra* note 32, at 110.

36. *ABA Standards and Guidelines*, *supra* note 32, at 110 (citing as examples FED. R. CIV. P. 26(g) (discovery requests and responses), FED. R. CIV. P. 37(c) (improper failure to admit), and FED. R. CIV. P. 56(g) (affidavits filed on summary judgment)). *See also* FED. R. CIV. P. 11 advisory committee's note (although the encompassing reference to "other papers" in new Rule 11 literally includes discovery papers, the certification requirement in that context is governed by proposed new Rule 26(g)).

37. *See* FED. R. CIV. P. 11; *ABA Standards and Guidelines*, *supra* note 32, at 110 (Rule 11 does not apply to all manner of litigation misconduct but only to the signing of a pleading, motion or other paper in violation of the Rule. Misconduct which does not involve the signing of such a document is not sanctionable under the Rule.).

38. Lupo v. R. Rowland & Co., 857 F.2d 482, 485 (8th Cir. 1988).

39. *Id.* at 483.

40. *Id.* at 484.

41. *Id.*

42. *Id.*

43. *Id.*

as violating Rule 11.[44] The district court based its decision to impose sanctions on the full record of the case and concluded that "plaintiffs' counsel conducted the litigation in a manner that escalated costs unnecessarily and vexatiously" and "the conduct of the litigation . . . was frivolous and abusive and not directed toward the 'just, speedy and inexpensive determination of [the] action.' "[45] Plaintiffs' counsel further argued that it was "fundamentally unfair for the district court to have based the sanctions on the 'bulk of the filings' and the 'conduct' of the litigation because they were not given sufficient notice as to which papers were the basis of the court's ruling" which rendered meaningless the evidentiary hearing afforded them under Rule 11.[46] The appellate court affirmed the district court's imposition of sanctions[47] and stated that even though it is preferable "that courts identify specific pleadings or other documents when imposing Rule 11 sanctions,"[48] the district court had adequate support for imposing Rule 11 sanctions and plaintiffs' counsel had "fair notice of the basis of the court's ruling."[49]

There is a split of authority on whether Rule 11 applies only to a pleading, motion, or other paper as a whole, or whether it applies to a single claim contained in an otherwise meritorious document governed by the rule.[50] Neither the language of Rule 11 itself[51] nor the advisory committee's notes[52] indicate whether the rule applies to the entire document or to each claim contained in the document.

Some courts have held that Rule 11 only applies to the document as a whole.[53] The rationale advanced for this position is that to interpret the rule

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44. *Id.* at 485.

45. *Id.*

46. *Id.*

47. *Id.* at 486.

48. *Id.* at 485.

49. *Id. See also id.* at 486. Some of the facts which were noted by the appellate court were: the parties were involved in constant battles over discovery; a special master was eventually appointed to preside over the taking of all depositions; nineteen months after the original complaint was filed the plaintiffs sought leave of the court to file an amended complaint by adding a count under the Racketeer Influenced and Corrupt Organizations Act; and plaintiffs attempted to delay the trial due to the illness of one of their counsel.

50. Romanyak & Stayart, *Rules and Procedures: The Advent of Rule 11*, 23 TORT & INS. L.J. 438, 448 (Winter 1988).

51. FED. R. CIV. P. 11 ("Every pleading, motion, and other paper") (this language appears to be directed to the document as a whole).

52. FED. R. CIV. P. 11 advisory committee's note ("discourage dilatory or abusive tactics . . . by lessening frivolous claims or defenses") (this language appears to be directed to each claim contained in the document).

53. Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d at 1540-41 ("The Rule permits the imposition of sanctions only when the 'pleading, motion, or other paper' itself is frivolous, not when one of the arguments in support of a pleading or motion is frivolous . . . [T]he fact that one argument or sub-argument in support of an otherwise valid motion, pleading, or other paper is unmeritorious does not warrant a finding that the motion or pleading is frivolous

otherwise would lead to results contrary to the presumed intent of the drafters[54] and would "chill an attorney's enthusiasm or creativity in pursuing factual or legal theories."[55]

Other courts have held that Rule 11 applies to all statements and to each claim in a document governed by the rule[56] and that the inclusion of one valid claim "does not permit counsel to file a stream of unsubstantiated claims as riders."[57] The apparent rationale advanced for this position is that "[e]ach claim takes up the time of the legal system and the opposing side."[58]

In addition, some courts appear to evaluate each claim and then make their determination concerning Rule 11 sanctions based upon whether the meritless claim "so burdens the litigation process that it triggers Rule 11 penalties,"[59] is "so abusive as to merit Rule 11 condemnation,"[60] or "combine[s] to render the pleading frivolous as a whole."[61]

2. *Actions Removed to Federal District Court*

Rule 11 applies to removal petitions which are filed in federal district court[62] and to all signed pleadings, motions, and other papers served or filed

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or that the Rule has been violated."). *See* Martinez, Inc. v. H. Landau & Co., 107 F.R.D. 775, 777 (N.D. Ind. 1985) ("The Court believes that Rule 11 was not intended to be a weapon against particular arguments in a motion or pleading, but was designed to address the pleading as a whole."). *See also* Romanyak & Stayart, *supra* note 50, at 448.

54. Martinez, Inc. v. H. Landau & Co., 107 F.R.D. at 778 (imposing Rule 11 sanctions on an otherwise successful motion just because some grounds were found to be legally unsupportable is contrary to intent of the drafters of Rule 11).

55. *Id.* (quoting FED. R. CIV. P. 11 advisory committee's note) ("An attorney who must worry about the possibility of sanctions for raising a marginal legal issue along with several sound grounds for a motion or pleading will invariably choose to reduce his risk and not raise the issue. Such timidity does disservice both to the client and to the law.").

56. Frantz v. United States Powerlifting Fed'n, 836 F.2d at 1067 ("Rule 11 applies to all statements in papers it covers. Each claim must have sufficient support; each must be investigated and researched before filing."). *See also* Romanyak & Stayart, *supra* note 50, at 448.

57. Frantz v. United States Powerlifting Fed'n, 836 F.2d at 1067.

58. *Id.*

59. Mary Ann Pensiero, Inc. v. Lingle, 847 F.2d 90, 97 (3d Cir. 1988) ("[W]e are not prepared to say that a doubtful count, such as this one, when included in the complaint with others of reasonable merit, so burdens the litigation process that it triggers Rule 11 penalties.").

60. *Id.* ("Although we acknowledge that the practice of 'throwing in the kitchen sink' at times may be so abusive as to merit Rule 11 condemnation, that threshold was not crossed in this case.").

61. Burull v. First Nat'l Bank, 831 F.2d 788, 789-90 (8th Cir. 1987) ("Whether meritless elements of a complaint combine to render the pleading frivolous as a whole is a 'matter for the court to determine, and this determination involves matters of judgment and degree' " (citation omitted). The court upheld the denial of sanctions and found that the "meritless claims, viewed in isolation, would be the appropriate subject of a sanction [however] their inclusion had no appreciable effect on the litigation of the . . . otherwise nonfrivolous lawsuit.").

62. Davis v. Veslan Enters., 765 F.2d 494, 496 (5th Cir. 1985) (court affirmed district court's imposition of Rule 11 sanctions for filing a petition for removal deemed to have been in bad faith). *See* Ident Corp. v. Wendt, 638 F. Supp. 116, 118 (E.D. Mo. 1986) (court imposed

in federal district court following removal.[63] However, Rule 11 does not apply to signed pleadings, motions, or other papers served or filed in state court, even if the action is subsequently removed to federal district court.[64] The rationale is that to allow Rule 11 sanctions to be applicable to state court pleadings, motions, and other papers may encourage parties to remove actions to federal court in an effort to obtain sanctions. This would defeat one of the purposes of the rule, which is to keep frivolous litigation out of the federal court system.[65]

3. *Appeals Filed in Federal District Court*

Rule 11 applies to a notice of appeal which is served or filed in federal district court.[66] In *Thornton v. Wahl*,[67] the Seventh Circuit stated that the term "other paper" in Rule 11 included "notices of appeal."[68]

Even though Rule 11 applies to a notice of appeal, there is no consensus on whether Rule 11 also applies to papers served or filed subsequent to the notice of appeal. The preferred line of authority indicates that Rule 11 does not apply to papers served or filed on appeal,[69] unless the local rules of the pertinent court of appeals incorporate Rule 11.[70] The rationale is that the Federal Rules of Civil Procedure apply only to the federal district courts[71]

Rule 11 sanctions for the filing of a notice of removal deemed to have been baseless and sought only to delay the administration of justice by disrupting the state court proceedings). *See also ABA Standards and Guidelines*, *supra* note 32, at 110.

63. *ABA Standards and Guidelines*, *supra* note 32, at 110. *See* Kirby v. Allegheny Beverage Corp., 811 F.2d 253, 257 (4th Cir. 1987); Brown v. Capitol Air, Inc., 797 F.2d 106, 108 (2d Cir. 1986) ("Rule 11 . . . does apply to proceedings following removal . . . and sanctions may be imposed in appropriate circumstances for post-removal proceedings in the federal court."). *See also supra* notes 31-33 and accompanying text.

64. *ABA Standards and Guidelines*, *supra* note 32, at 110. *See* Kirby v. Allegheny Beverage Corp., 811 F.2d at 256-57 ("Rule 11 sanctions may not be imposed on an attorney for merely signing and filing a state court complaint which is subsequently removed to federal court . . . . At the time a state court pleading is signed, the signing attorney is not subject to the Federal Rules of Civil Procedure."). *See also* Brown v. Capitol Air, Inc., 797 F.2d at 108. *See supra* notes 31-33 and accompanying text.

65. Kirby v. Allegheny Beverage Corp., 811 F.2d at 257 (especially in those states which have no state rule or state statute analogous to Rule 11).

66. *ABA Standards and Guidelines*, *supra* note 32, at 110. *See* Thornton v. Wahl, 787 F.2d 1151 (7th Cir. 1986).

67. Thornton v. Wahl, 787 F.2d at 1151.

68. *Id.* at 1153.

69. *ABA Standards and Guidelines*, *supra* note 32, at 111. *See* Bradley v. Campbell, 832 F.2d 1504, 1510 n.4 (10th Cir. 1987) ("But Rule 11, while its language is inclusive, empowers the imposition of sanctions at the trial court level, not on appeal.").

70. *ABA Standards and Guidelines*, *supra* note 32, at 111. *See also In re* Disciplinary Action Boucher, 837 F.2d 869, 871 (9th Cir. 1988) ("By Rule 1-1 of the Rules of this court, the Federal Rules of Civil Procedure are part of the rules of this court 'whenever relevant.' ").

71. FED. R. CIV. P. 1 ("These rules govern the procedure in the United States district courts in all suits of a civil nature . . . with the exceptions stated in Rule 81."). *See also* Brad-

and neither the language of Rule 11 nor the advisory committee note indicates that Rule 11 applies above the federal district court level.[72] The opposing line of authority appears to make Rule 11 applicable to all documents served or filed in the federal district courts and the federal appellate courts.[73]

C. *Requirements of Federal Rule of Civil Procedure 11*

1. *Signature*

The 1983 amendments to Rule 11 expanded significantly the signature requirement imposed upon attorneys who file or serve papers in federal district court.[74] Rule 11 now requires that every pleading, motion, or other paper must be signed.[75] If a party is represented by counsel, the signature must be that of "at least one attorney of record in the attorney's individual name," not in that of the firm.[76] Parties appearing *pro se* must sign every pleading, motion, or other paper; their signatures have the same effect as an attorney's signature.[77] "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."[78] Despite the specific language of Rule 11 requiring that every pleading, motion, or other paper not signed in accordance with the requirements of the rule be stricken unless cured promptly after notification of the omission,[79] some courts appear to be willing to consider some irregularities in signatures as mere technical defects and will find no violation of Rule 11 requiring the striking of the improperly signed document.[80]

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ley v. Campbell, 832 F.2d at 1510 n.4.

72. *See* Bradley v. Campbell, 832 F.2d at 1510 n.4. *See also* FED. R. CIV. P. 11 and advisory committee's note.

73. Thornton v. Wahl, 787 F.2d 1151, 1153 (7th Cir. 1986) (stating that the term "other paper" in Rule 11 includes appellate briefs).

74. 5 C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 1333 (Supp. 1987).

75. FED. R. CIV. P. 11. *See also ABA Standards and Guidelines*, *supra* note 32, at 111.

76. FED. R. CIV. P. 11. *See* Robinson v. National Cash Register Co., 808 F.2d 1119, 1128 (5th Cir. 1987). *See also ABA Standards and Guidelines*, *supra* note 32, at 111.

77. FED. R. CIV. P. 11.

78. FED. R. CIV. P. 11. *See also* Stewart v. City of Chicago, 622 F. Supp. 35 (N.D. Ill. 1985) (because plaintiff's attorney failed to sign second amended complaint, the court, on its own motion, ordered that it be stricken pursuant to Rule 11).

79. FED. R. CIV. P. 11.

80. Grant v. Morgan Guar. Trust Co., 638 F. Supp. 1528, 1531-32 n.6 (S.D.N.Y. 1986) (The court found that a pre-trial order, stipulating to facts and the admissibility of certain evidence, was binding despite the fact that plaintiff's signature lacked her address and defendant's attorney originally signed the firm's name. The court acknowledged that the signatures were in violation of Rule 11; however, the irregularities were treated as "mere technical defects" because it was clear to the court that the parties "endorsed" the pre-trial order and the violations were "inadvertent.").

Various rationales have been advanced for the signature requirement contained in Rule 11.[81] The most significant rationale is that: "The signature of an attorney . . . constitutes a *certificate* by the [attorney] that the [attorney]: (1) has read the pleading, motion, or other paper; (2) that to the best of the [attorney's] knowledge, information, and belief found after reasonable inquiry [the pleading, motion or other paper] 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 (3) that [the pleading, motion, or other paper] is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."[82] These certification requirements are "affirmative duties" which must be complied with by each signing attorney.[83] Each "affirmative duty" imposed by Rule 11's certification requirements will be discussed in more detail *infra*.[84]

In evaluating whether a signing attorney has complied with the certification requirements of Rule 11, the courts will focus on the time when the pleading, motion, or other paper was submitted, thereby avoiding the use of hindsight.[85] A paper is submitted when it is signed.[86] In addition, all doubts are to be resolved in favor of the signer.[87]

2. *Read*

The first affirmative duty imposed on the signing attorney by Rule 11 is the duty to read each pleading, motion, or other paper before signing it.[88]

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81. 5 C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 1333 (Supp. 1987) ("The purpose of requiring an unrepresented party to sign the pleadings . . . is to make certain that the persons named as parties assent to the filing of the action on their behalf."); Robinson v. National Cash Register Co., 808 F.2d at 1128 ("The purpose of the signature is to allow a court to easily identify the person or people upon whom it can place responsibility for a particular document."); FED. R. CIV. P. 11 (signature constitutes a certification by the signer); Zaldivar v. City of Los Angeles, 780 F.2d 823, 830 (9th Cir. 1986) ("The purpose of the signature . . . is to fix responsibility upon a specific person for those matters that are the subject of the certificate.").

82. FED R. CIV. P. 11 (emphasis added).

83. Thomas v. Capital Sec. Serv., Inc., 836 F.2d 866 (5th Cir. 1988). *See ABA Standards and Guidelines*, *supra* note 32, at 112; FED. R. CIV. P. 11. *See also* Sierra v. Lidchi, 651 F. Supp. 1019, 1021 (D.P.R. 1986) (suggesting that these requirements rise to the level of a "certificate or warranty as to quality and content."); FED. R. CIV. P. 11 advisory committee's note.

84. *See* §§ C 2-6 *infra*.

85. FED. R. CIV. P. 11 advisory committee's note ("The court is expected to avoid using the wisdom of hindsight and should test the signer's conduct . . . at the time the pleading, motion, or other paper was submitted."). *See also* Eastway Constr. Corp. v. City of New York, 762 F.2d 243 (2d Cir. 1985); *ABA Standards and Guidelines*, *supra* note 32, at 112.

86. Eastway Constr. Corp. v. City of New York, 762 F.2d at 254 (validity of a pleading is determined as of the time when it is signed). *See also ABA Standards and Guidelines*, *supra* note 32, at 112.

87. Eastway Constr. Corp. v. City of New York, 762 F.2d at 254.

88. FED. R. CIV. P. 11. *See also* Zaldivar v. City of Los Angeles, 780 F.2d 823, 830 (9th Cir.

This requirement is intended to eliminate the defense of personal ignorance of defects in a pleading, motion, or other paper which has been alleged to be in violation of Rule 11[89] and to "forestall signatories who seek to disclaim the contents of a pleading prepared by either an associate or referral counsel."[90]

3. *Reasonable Inquiry*

The second affirmative duty imposed on the signing attorney by Rule 11 is the duty to make a reasonable inquiry.[91] The inquiry must occur prior to signing and filing the pleading, motion, or other paper[92] and must include an inquiry into both the facts and the law.[93] This duty has been called the "duty to look before leaping,"[94] the "litigation version of the familiar railroad crossing admonition to 'stop, look, and listen,' "[95] and the duty which requires signing attorneys to "think first and file later on pain of personal liability."[96]

A standard of objective reasonableness under the circumstances will be applied to determine whether a reasonable pre-filing and pre-signing inquiry into the facts and the law has been made.[97] The advisory committee noted

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1986) ("no exceptions to the requirement that all reasonable attorneys will read a document before filing it in court.").

89. Zaldivar v. City of Los Angeles, 780 F.2d at 830 ("In practical effect, an obviously meritorious paper will go unchallenged, whether read or not. The force of the rule is to eliminate the defense of personal ignorance of defects in a paper challenged as unmeritorious."). *See also* Fed. R. Civ. P. 11; Beck, *supra* note 25, at 4 (purpose of attorney's signature is to eliminate ignorance as an excuse); Schwarzer, *supra* note 1, at 187 ("There is no room for a pure heart, empty head defense under Rule 11.").

90. Lieb v. Topstone Indus., Inc., 788 F.2d 151, 157 (3d Cir. 1986).

91. FED. R. CIV. P. 11.

92. FED. R. CIV. P. 11 advisory committee's note; *ABA Standards and Guidelines*, *supra* note 32, at 113; Thornton v. Wahl, 787 F.2d 1151, 1154 (7th Cir. 1986) ("[E]very lawyer must do the necessary work to find the law before filing . . . .").

93. FED. R. CIV. P. 11 advisory committee's note. *See also* Pope & Benkoczy, *supra* note 3, at 390 ("affirmative duty to investigate the underlying facts and law"); Horan & Spellmire, *Rule 11: Practice and Procedure:* ATTORNEY SANCTIONS AND FEDERAL RULE 11, at 5 (presented at the International Association of Defense Counsel 1987 Annual Meeting On Continuing Legal Education) (available in Drake University Law School Library) ("reasonable inquiry criterion imposes affirmative duty to investigate relevant facts and law before signing pleading, motion, or other paper."); Baker v. Citizens State Bank, 661 F. Supp. 1196, 1198 (D. Minn. 1987) (Rule 11 requires "reasonable inquiry into the facts and the law"); Rachel v. Banana Republic, Inc., 831 F.2d 1503, 1508 (9th Cir. 1987) (Rule 11 creates and imposes "an affirmative duty of investigation as to both the law and the facts before filing.").

94. Lieb. v. Topstone Indus., Inc., 788 F.2d at 157.

95. *Id.*

96. Stewart v. RCA Corp., 790 F.2d 624, 633 (7th Cir. 1986).

97. *See* FED. R. CIV. P. 11 advisory committee's note; *ABA Standards and Guidelines*, *supra* note 32, at 112; Lieb v. Topstone Indus., Inc., 788 F.2d at 157 (the test is now an objective one of reasonableness). *See also* New York State Bar Association, *supra* note 14, at 27 (indicating that by the end of 1986 all of the circuits had clearly embraced an objective test);

that this standard "is more stringent than the original good-faith formula and thus it is expected that a greater range of circumstances will trigger its violation"; however, the committee cautioned that Rule 11 was "not pursuing factual or legal theories."[98]

Because the reasonableness of the inquiry into the law and the facts is evaluated according to the particular circumstances of each case,[99] all factors bearing upon the reasonableness of the inquiry are relevant and a case-by-case analysis to determine whether Rule 11 has been complied with is necessary.[100]

a. *Reasonable Inquiry into the Facts.* Circumstances which are relevant in determining whether a reasonable inquiry into the facts has been made include:

(1) The amount of time which was available to the signer to investigate the facts;[101]

(2) The complexity of the factual and legal issues in question;[102]

(3) The extent to which pre-signing investigation was feasible;[103]

(4) The extent to which pertinent facts were in the possession of opponents or third parties, or otherwise were not readily available to the signer;[104]

(5) The knowledge of the signer;[105]

(6) The extent to which counsel relied upon his or her client for the facts underlying the pleadings, motion, or other paper;[106]

(7) The extent to which counsel had to rely upon his or her client for the facts underlying the pleading, motion, or other paper;[107]

(8) Whether the case was accepted from another attorney and, if so, at what stage of the proceedings;[108]

(9) The extent to which counsel relied upon other counsel for facts un-

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Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 253 (2d Cir. 1985) (claim of acting in good faith is no longer enough; "subjective good faith no longer provides" a safe harbor); Pope & Benkoczy, *supra* note 3, at 390 (counsel will no longer be judged on subjective beliefs).

98. FED. R. CIV. P. 11 advisory committee's note.

99. *See supra* note 98 and accompanying text. *See also* Horan & Spellmire, *supra* note 93, at 6.

100. *See* Peggs, *supra* note 26, at 22; Pope & Benkoczy, *supra* note 3, at 391 ("reasonableness of counsel's inquiry is assessed case by case in light of the factual circumstances"). *See also* New York Bar Association, *supra* note 14, at 29 (stating that the courts have taken an "ad hoc approach" in evaluating "reasonable inquiry").

101. *ABA Standards and Guidelines*, *supra* note 32, at 114. *See also* FED. R. CIV. P. 11 advisory committee's note.

102. *ABA Standards and Guidelines*, *supra* note 32, at 114.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id. See also* FED. R. CIV. P. 11 advisory committee's note.

108. *ABA Standards and Guidelines*, *supra* note 32, at 114.

derlying the pleading, motion, or other paper;[109]

(10) The extent to which counsel had to rely upon other counsel for the facts underlying the pleading, motion, or other paper;[110]

(11) The resources available to the signer to devote to the inquiry;[111]

(12) The extent to which the signer was on notice that further inquiry might be appropriate;[112] and

(13) The cost of a foreseeable response by opposing parties.[113]

At a bare minimum there must be sufficient pre-filing communication with the client[114] and a review of available relevant documents.[115]

A reasonable inquiry into fact ordinarily requires more than exclusive reliance on the client's statement of the facts.[116] Circumstances which are relevant in determining whether a reasonable inquiry into fact requires more than exclusive reliance on the client's statement of the facts include:

(1) The availability of alternate sources of information;[117]

(2) The character of the client's knowledge, including whether it is first-hand, derivative, or hearsay in nature;[118]

(3) The plausibility of the client's account;[119]

(4) The history and duration of the relationship between the attorney and the client;[120]

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109. *Id. See also* FED. R. CIV. P. 11 advisory committee's note.

110. *ABA Standards and Guidelines*, *supra* note 32, at 114.

111. *Id.*

112. *Id.*

113. Unioil, Inc. v. E.F. Hutton & Co., 809 F.2d 548, 557 (9th Cir. 1986). *See also* Horan & Spellmire, *supra* note 93, at 9 ("Attorneys must also analyze the probable costs imposed on the opposing party. The suit requiring vigorous and expensive defense requires a more extensive investigation than those claims which are less involved, have less at stake, or involve a minimal number of parties."); Pope & Benkoczy, *supra* note 3, at 392 ("[C]laims that are likely to require extensive and costly defenses . . . require greater investigation than those that do not.").

114. Schwarzer, *supra* note 1, at 187 ("One aspect of this duty [of inquiry] is that the attorney communicate sufficiently with the client . . . .").

115. *ABA Standards and Guidelines*, *supra* note 32, at 115 ("The signer is obligated to review documents and information reasonably available to the signer that tend to prove or disprove any fact or claim asserted."). *See also* Yeomans, *How to Avoid Rule 11 Sanctions*, THE PRACTICAL LAWYER, 61, 64 (March 1988) ("[T]he client and key witnesses should be interviewed and relevant documents be reviewed.") [hereinafter Yeomens].

116. *ABA Standards and Guidelines*, *supra* note 32, at 115; Southern Leasing Partners, Ltd. v. McMullan, 801 F.2d 783, 788 (5th Cir. 1986) ("[B]lind reliance on the client is seldom a sufficient inquiry . . . ."). *See also* Yeomans, *supra* note 115, at 65 ("Reliance on only a client's statements not based on the client's first-hand knowledge would likely be found unreasonable."). *But see* Oliveri v. Thompson, 803 F.2d 1265, 1277 (2d Cir. 1986) ("[I]t goes too far, however, to impose monetary sanctions on an attorney on the ground that his client is not worthy of belief.").

117. *ABA Standards and Guidelines*, *supra* note 32, at 115.

118. *Id.*

119. *Id.*

120. *Id.*

(5) The extent to which the attorney questioned the client;[121] and

(6) The other factors set forth above.[122]

A reasonable inquiry into fact may require more than exclusive reliance on other counsel's determination of the facts.[123] Circumstances which are relevant in determining whether a reasonable inquiry into fact requires more than exclusive reliance on other counsel's determination of the facts include:

(1) The availability of alternate sources of information (including the client);[124]

(2) The basis of relied-upon counsel's knowledge, including whether it is first-hand, derivative, or hearsay in nature;[125]

(3) The plausibility of the factual account;[126]

(4) The respective roles of counsel in the litigation (*e.g.*, local counsel, lead counsel, forwarding counsel);[127]

(5) The respective expertise of relying counsel and of counsel on whom reliance is placed;[128]

(6) The history, duration and nature of the relationship between counsel;[129]

(7) The extent to which the signer questioned counsel upon whom reliance was placed concerning the nature and scope of the latter's inquiry into fact;[130] and

(8) The other factors set forth at the beginning of this subsection.[131]

Rule 11 by its terms does not require signing counsel to have personally performed the inquiry into the facts.[132] However, signing counsel must have the required "knowledge, information, and belief" to be able to affirm that the pleading, motion, or other paper is "well grounded in fact."[133] Therefore, it is imperative—regardless of the identity of the maker of the inquiry—that it provide the signing attorney with knowledge of the facts which enables him or her to certify that the pleading, motion, or other paper is well-grounded in fact.[134] In that regard the duty of inquiry into the facts has been described as "nondelegable but capable of being satisfied by the attor-

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121. *Id.*
122. *Id.* *See* text accompanying notes 101-13.
123. *ABA Standards and Guidelines*, *supra* note 32, at 116.
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.* *See* text accompanying notes 101-13.
132. FED. R. CIV. P. 11. *See also* Schwarzer, *supra* note 1, at 187.
133. Schwarzer, *supra* note 1, at 187 (facts must at least be calculated to lead to admissible evidence). *See also* Horan & Spellmire, *supra* note 93, at 11 (facts must be admissible).
134. Schwarzer, *supra* note 1, at 187.

ney's acquisition of the product of inquiry conducted by others."[135]

The reasonableness of the signing attorney's knowledge, information, and belief as to the facts will be assessed in light of the circumstances at the time the pleading, motion, or other paper is signed,[136] which will be measured against a standard of objective reasonableness.[137] In *Kendrick v. Zandies*[138] Judge Schwarzer set forth the following test to determine whether a reasonable inquiry into the facts has been made: "Rule 11 requires that [signing attorneys] have in hand sufficient credible information (as opposed to opinions or conclusions) from whatever source to enable *them* to form a reasonable belief that the allegations to which they put their signature are well-grounded in fact."[139] However, as other courts have noted, the factual inquiry does not have to be to a "point of certainty"[140] and "does not require steps that are not cost-justified."[141]

b. *Reasonable Inquiry Into The Law.* Circumstances which are relevant in determining whether a reasonable inquiry into the law has been made include:

(1) The amount of time which was available to the signer to research and analyze the relevant legal issues;[142]

(2) The complexity of the factual and legal issues in question;[143]

(3) The clarity or ambiguity of existing law;[144]

(4) The plausibility of the legal position asserted;[145]

(5) Whether the signer is an attorney or *pro se* litigant;[146]

(6) The knowledge of the signer;[147]

(7) Whether the case was accepted from another attorney and, if so, at what stage of the proceedings;[148]

(8) The extent to which counsel relied upon other counsel to conduct

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135. *Id.*

136. *Id. See also* Beck, *supra* note 25, at 13.

137. *See supra* note 97 and accompanying text. *See also* Cabell v. Petty, 810 F.2d 463, 466 (4th Cir. 1987) (focus of this standard is on "whether a reasonable attorney in like circumstances could believe his actions to be factually . . . justified."). *See also* Horan & Spellmire, *supra* note 93, at 9 (asserting that when conducting an investigation, attorneys with experience and expertise are held to a higher standard than that imposed on a general practitioner).

138. Kendrick v. Zandies, 609 F. Supp. 1162 (N.D. Cal. 1985).

139. *Id.* at 1172 (emphasis in original).

140. Nemmers v. United States, 795 F.2d 628, 632 (7th Cir. 1986) (Rule 11 "does not require investigation to the point of certainty.").

141. Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073, 1083 (7th Cir. 1987).

142. *ABA Standards and Guidelines, supra* note 32 at 116.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

the legal research and analysis underlying the position asserted;[149]

(9) The extent to which counsel had to rely upon other counsel to conduct the legal research and analysis underlying the position asserted;[150]

(10) The resources reasonably available to the signer to devote to the inquiry;[151] and

(11) The extent to which the signer was on notice that further inquiry might be appropriate.[152]

The duty to conduct a reasonable inquiry into the law requires that the signing attorney research and analyze the legal issues involved before signing a pleading, motion, or other paper.[153]

A reasonable inquiry into the law precludes reliance on the client's statement of what the law is unless the client is an attorney.[154] If the client is an attorney or other counsel is involved, a reasonable inquiry into the law may require more than exclusive reliance on the client's or other counsel's determinations as to the merit of the legal position(s) asserted.[155] Circumstances which are relevant in determining whether a reasonable inquiry into the law requires more than exclusive reliance on other counsel's determination as to the merit of the legal position(s) asserted include:

(1) The plausibility of the legal position asserted;[156]

(2) The respective roles of counsel in the litigation (*e.g.*, local counsel, lead counsel, forwarding counsel);[157]

(3) The respective expertise of counsel;[158]

(4) The history, duration, and nature of the relationship between counsel;[159] and

(5) The extent to which the signer questioned counsel upon whom reliance was placed concerning the nature and scope of the latter's inquiry into law.[160]

The reasonableness of the signing attorney's inquiry into the law will be assessed in light of the circumstances at the time the pleading, motion, or other paper is signed,[161] which will be measured against a standard of objective reasonableness.[162]

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149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id. See also* Comino v. Yale Univ., 638 F. Supp. 952, 959 n.7 (D. Conn. 1986) (shepardizing cases is a professional responsibility).
154. *ABA Standards and Guidelines, supra* note 32, at 117.
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*
161. *See supra* notes 85-88, 136 and accompanying text.
162. *See supra* note 97 and accompanying text. *See also* Cabell v. Petty, 510 F.2d at 466

c. *Duty of Local Counsel.* As previously noted, Rule 11, by its terms, applies to all attorneys who sign a pleading, motion, or other paper served or filed in a civil action in federal district court.[163] The majority of cases appear to have interpreted Rule 11 to apply to local counsel. In *Coburn Optical Industries, Inc. v. Cilco, Inc.*,[164] the court held that local counsel must share in the sanctions assessed against the defendant and its lead counsel.[165] The court noted that local counsel probably did not prepare the motion to dismiss which violated Rule 11; however, local counsel signed the motion to dismiss and "Rule 11 requires . . . that the lawyer who elects to sign a paper take responsibility for it, even if that responsibility is shared."[166] Local counsel was expected to ensure that out of state counsel complied with the local rules and the federal rules, even when local counsel did not prepare the pleading, motion, or other paper.[167] The court also gave the following general caveat to all local counsel: "Rule 11 makes it advisable for attorneys acting as local counsel to consider the extent to which they can perform the role of a passive conduit consistent with the responsibilities imposed by Rule 11."[168]

The court in *Long v. Quantex Resources, Inc.*[169] set forth the minimum requirement under Rule 11 for local counsel:

> [A]t the very least, a local counsel that signs the papers of a foreign counsel must 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.[170]

Other courts have recognized that local counsel seldom actively participate in the preparation of a document and have therefore imposed sanctions only on counsel actually involved in the preparation of the document.[171] In *Golden Eagle Distributing Corp. v. Burroughs Corp.*,[172] the court refused to impose sanctions on local counsel because they had not participated in preparing the summary judgment papers, and noted: "[I]n the absence of an

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(focus of this standard is on "whether a reasonable attorney in like circumstances could believe his actions to be . . . legally justified."); Eastway Constr. Corp. v. City of New York, 762 F.2d at 254 (measured against standard of a "competent attorney").

163. FED. R. CIV. P. 11. *See also supra* notes 31-33 and accompanying text.

164. Coburn Optical Indus., Inc. v. Cilco, Inc., 610 F. Supp. 656 (M.D.N.C. 1985).

165. *Id.* at 660.

166. *Id. See also id.* at n.7 (the court recognizes "that local counsel must be able to rely to some extent" on representations of out-of-state counsel).

167. *Id.* at 660.

168. *Id.* at n.7. *See also* Schwarzer, *supra* note 1, at 186.

169. Long v. Quantex Resources, Inc., 108 F.R.D. 416 (S.D.N.Y. 1985).

170. *Id.* at 417.

171. Romanyak & Stayart, *supra* note 50, at 439.

172. Golden Eagle Distrib. Corp. v. Burroughs Corp., 103 F.R.D. 124 (N.D. Cal. 1984), *rev'd on other grounds*, 801 F.2d 1531 (9th Cir. 1986).

indication of active participation in the preparation or decision to file a paper by local counsel . . . it does not seem appropriate to subject them to sanctions other than criticism for their apparent neglect."[173]

4. *Well Grounded in Fact*

Rule 11 requires, in addition to a reasonable inquiry into the facts, that the signing attorney reasonably believe that the pleading, motion, or other paper is "well grounded in fact."[174] Well grounded in fact has been taken to mean that the pleading, motion, or other paper must have a "reasonable basis in fact."[175] To determine whether a pleading, motion, or other paper is well grounded in fact, courts either look at the evidence which supports the filing or examine whether there is controverted evidence to the contrary.[176] If there is no evidence to support the pleading, motion, or other paper, it is not well grounded in fact.[177] In *Mossman v. Roadway Express, Inc.*,[178] the court upheld the trial court's imposition of sanctions on the ground that the plaintiff's motion for summary judgment was not well grounded in fact because there were no affidavits of facts to support the motion.[179]

This requirement applies to each party against whom a claim is made and to every claim asserted against a party. In *Albright v. Upjohn Co.*[180] the court concluded that plaintiff's counsel signed the complaint in violation of Rule 11 in that the pre-filing investigation was "insufficient because it failed to disclose that the claim against [one defendant] was 'well grounded in fact.' "[181] The court further noted that the claim asserted against that particular defendant was made "with the knowledge that [the plaintiff] had no factual basis for the claim."[182]

A document is not well grounded in fact where it is contradicted by uncontroverted evidence which either was or should have been known to the signing party.[183] In addition, neither a baseless statement of fact[184] nor spec-

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173. *Id.* at 125 n.1.

174. FED. R. CIV. P. 11. *See also ABA Standards and Guidelines*, *supra* note 32, at 118.

175. *See* Tarkowski v. County of Lake, 775 F.2d 173, 176 (7th Cir. 1985); Pope & Benkoczy, *supra* note 3, at 393.

176. Pope & Benkoczy, *supra* note 3, at 393.

177. *Id.*

178. Mossman v. Roadway Express, Inc., 789 F.2d 804 (9th Cir. 1986).

179. *Id.* at 806.

180. Albright v. Upjohn Co., 788 F.2d 1217 (6th Cir. 1986).

181. *Id.* at 1221.

182. *Id.* at n.7. *See also* Whittington v. Ohio River Co., 115 F.R.D. 201, 206 (E.D. Ky. 1987) (the court stated that a plaintiff cannot join a defendant or make a claim against a defendant "merely hoping discovery will turn something up" and "[t]he cost of determining whether a defendant should be named in an action must be borne by the plaintiff and his attorney before the suit is filed.").

183. Horan & Spellmire, *supra* note 93, at 12. *See also* Pope & Benkoczy, *supra* note 3, at 393 ("When there is uncontroverted contrary evidence, a court will impose Rule 11 sanctions.").

184. *ABA Standards and Guidelines*, *supra* note 32, at 118. *See also* Frazier v. Cast, 771

ulation may be presented as fact.[185]

Generally, a pleading, motion, or other paper is well grounded in fact if a reasonable person in the position of the signing attorney would, following a reasonable inquiry, believe the statements of fact contained therein were accurate.[186] It appears that in determining whether a pleading, motion, or other paper is well grounded in fact, the determination will be made after evaluating the document as a whole[187] and isolated factual errors will not ordinarily warrant the imposition of sanctions as long as the document, as a whole, is well grounded in fact.[188] The court in *Forrest Creek Associates, Ltd. v. McLean Savings & Loan Association*[189] held that Rule 11 "does not extend to isolated factual errors, committed in good faith, so long as the pleadings as a whole remain 'well grounded in fact.' "[190] In addition, Rule 11 is not violated when the signing attorney asserts or pursues a litigable issue of fact,[191] nor are Rule 11 sanctions appropriate simply because a pleading, motion, or other paper is not successful on its merits.[192]

The signing attorney's reasonable belief that the pleading, motion, or other paper is well grounded in fact will be judged according to an objective standard[193] based upon what was reasonable to believe at the time the paper was signed.[194] The advisory committee to amended Rule 11 acknowledged that despite the new requirements imposed by the rule, the rule should not "chill an attorney's enthusiasm or creativity in pursuing factual . . . theories."[195]

5. *Warranted by Existing Law or a Good Faith Argument for the Extension, Modification, or Reversal of Existing Law*

Rule 11 requires, in addition to a reasonable inquiry into the law, that

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F.2d 259, 265 (7th Cir. 1985) (blatant misrepresentation); Perkinson v. Gilbert/Robinson, Inc., 821 F.2d 686, 690-91 n.4 (D.C. Cir. 1987) (mischaracterization).

185. *ABA Standards and Guidelines*, *supra* note 32, at 118.

186. *Id.*

187. Forrest Creek Assocs., Ltd. v. McLean Sav. & Loan Ass'n, 831 F.2d 1238 (4th Cir. 1987).

188. *ABA Standards and Guidelines*, *supra* note 32, at 118.

189. Forrest Creek Assocs. v. McLean Sav. & Loan Ass'n, 831 F.2d 1238 (4th Cir. 1987).

190. *Id.* at 1245.

191. *ABA Standards and Guidelines*, *supra* note 32, at 118.

192. *Id. See also* Hartman v. Hallmark Cards, Inc., 833 F.2d 117, 124 (8th Cir. 1987) (court upheld trial court's denial of Rule 11 sanctions noting that though the plaintiff "may have had a weak case and did not ultimately prevail on the merits her claims were not baseless").

193. *ABA Standards and Guidelines*, *supra* note 32, at 118. *See also* Forrest Creek Assocs., Ltd. v McLean Savings & Loan Ass'n, 831 F.2d at 1244-45 (district court found plaintiffs did make some reasonable investigation before filing, which was examined pursuant to the "standard of objective reasonableness").

194. FED. R. CIV. P. 11 advisory committee's note.

195. *Id.*

the signing attorney reasonably believe that the pleading, motion, or other paper is "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law."[196] The signing attorney will not meet this requirement unless he or she either knows what the existing law is or performs sufficient legal research prior to filing.[197]

a. *Warranted By Exiting Law.* In order to certify that a pleading, motion, or other paper is "warranted by existing law," the attorney must know what the law is, which requires legal research.[198] In *Whittington v. Ohio River Co.*,[199] Judge Bertelsman stated that "[a]n attorney has not made a reasonable inquiry as to whether a claim or defense is warranted by existing law if he or she hasn't done any research."[200] The signing attorney cannot assert a claim "merely in the hope that discovery will turn up something . . . ."[201]

To be in compliance with this requirement of Rule 11, the signing attorney's view of the law need not ultimately prove correct. However, at a minimum, the signing attorney must have a "good faith argument" for his view of the law.[202] The American Bar Association has asserted that a pleading, motion, or other paper is "warranted by existing law if it is supported by a non-frivolous legal argument [and a] legal argument is frivolous only if it is obviously and wholly without merit."[203]

A pleading, motion, or other paper is not warranted by existing law if it is contrary to established precedent.[204] In *Eastway Construction Corp. v.*

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196. FED. R. CIV. P. 11.

197. Whittington v. Ohio River Co., 115 F.R.D. 201, 207 (E.D. Ky. 1987). *See also* Continental Air Lines, Inc. v. Group Sys. Int'l Far East, Ltd., 109 F.R.D. 594 (C.D. Cal. 1986) (reasonable inquiry on issue of constitutional law must include inquiry into United States Supreme Court decisions).

198. Whittington v. Ohio River Co., 115 F.R.D. at 207. *See also* Schwarzer, *supra* note 1, at 194 (attorney holding himself out as expert can be expected to be better versed in the controlling law than a general practitioner; a firm with substantial research facilities, including access to Lexis or Westlaw, can be expected to discover authorities which may be overlooked by less well-endowed lawyers).

199. Whittington v. Ohio River Co., 115 F.R.D. at 201.

200. *Id.* at 207.

201. *Id.* at 206.

202. Wasyl, Inc. v. First Boston Corp., 813 F.2d 1579, 1583 (9th Cir. 1987); *ABA Standards and Guidelines*, *supra* note 32, at 118 (Rule 11 sanctions are not appropriate merely because a pleading, motion, or other paper is not successful on the merits). *See also* Pope & Benkoczy, *supra* note 3, at 393 (not necessary to be correct in the view presented).

203. *ABA Standards and Guidelines*, *supra* note 32, at 119 (These Standards and Guidelines were drafted by the Trial Practice Committee of the Section of Litigation of the American Bar Association and were approved by the Section of Litigation in September of 1988. These Standards and Guidelines are intended to reduce instances of disparate treatment by setting forth a uniform position [where there is uniformity] on each major issue raised by Rule 11.).

204. *See* Norris v. Grosvenor Mktg. Ltd., 803 F.2d 1281 (2d Cir. 1986); Eastway Constr. Corp. v. City of New York, 762 F.2d 243 (2d Cir. 1985); Chu v. Griffith, 77 F.2d 79 (4th Cir. 1985) (no legal basis); Schwarzer, *supra* note 1, at 190 (sanctions are appropriate where action

City of New York,[205] the court stated that Rule 11 has been violated "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 . . . ."[206] This makes an issue of the parameters of "established precedent." If a recent controlling court decision is fatal to a claim, sanctions will be imposed, whether the attorney actually found that case or not, if a reasonably competent attorney would have found it."[207] The impact of this statement has been tempered by at least two courts.[208] In *Continental Air Lines, Inc. v. Group Systems International Far East, Ltd.*,[209] the court noted that even though counsel failed to conduct a reasonable inquiry, in that counsel failed to find a four-month-old United States Supreme Court case addressing the issue at bar, Rule 11 sanctions were not warranted because the failure to cite the case did not in and of itself cause the motion to be frivolous.[210] The court found a causation factor in Rule 11 and stated: "Rule 11 requires . . . that the failure to make a reasonable inquiry result in the filing of a frivolous motion."[211] In *Zaldivar v. City of Los Angeles*,[212] the court indicated that "a single district court opinion from another circuit [even if squarely on point] cannot alone be sufficient to justify sanctions for failure to adhere to its holding."[213] It appears then that the failure to cite an "established precedent" will not warrant Rule 11 sanctions unless the precedent is from the circuit in which the case is pending and the failure to cite the case results in the filing of a frivolous pleading, motion, or other paper. It seems that only in the rarest of cases will the established precedent be clear enough to find, essentially as a matter of law, that the position asserted is governed in all legal aspects by the established precedent. Arguably almost every case will present a novel question not determined by existing precedent because almost every new claim will vary to some degree from reported decisions.[214]

A pleading, motion, or other paper is not warranted by existing law if it asserts a claim or defense which is plainly barred by operation of the doctrine of collateral estoppel or res judicata or by the applicable statute of

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is patently unmeritorious as a matter of law).

205. Eastway Constr. Corp. v. City of New York, 762 F.2d 243 (2d Cir. 1985).

206. *Id.* at 254

207. Whittington v. Ohio River Co., 115 F.R.D. at 207-08.

208. *See* Continental Air Lines, Inc. v. Group Sys. Int'l Far East, Ltd., 109 F.R.D. 594 (C.D. Cal. 1986); Zaldivar v. City of Los Angeles, 780 F.2d 823 (9th Cir. 1986).

209. Continental Air Lines, Inc. v. Group Sys. Int'l Far East, Ltd., 109 F.R.D. 594 (C.D. Cal. 1986).

210. *Id.* at 597.

211. *Id.*

212. Zaldivar v. City of Los Angeles, 780 F.2d 823 (9th Cir. 1986).

213. *Id.* at 834.

214. Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 HARV. L. REV. 630, 638 (1987) [hereinafter *Plausible Pleadings*].

limitations and the signing attorney lacks a non-frivolous argument for avoiding the bar.[215]

A pleading, motion, or other paper is arguably warranted by existing law and not subject to Rule 11 sanctions if it:

(1) Addresses a question of first impression;[216]

(2) Concerns an issue on which the law is unsettled;[217]

(3) Advances a "fairly debatable" issue of law;[218] or

(4) A judge has considered and accepted the novel legal argument.[219]

For example, in *Davis v. A.G. Edwards & Sons, Inc.*,[220] the plaintiff brought an action which included a claim pursuant to the Racketeer Influenced and Corrupt Organizations Act,[221] and the appellate court affirmed the district court's denial of Rule 11 sanctions in part based on a finding that "the 'prescriptive period underlying a . . . RICO action [was] unsettled.' "[222]

Indianapolis Colts v. Mayor and City Council [223] involved an interpleader action by the Indianapolis Colts.[224] The Mayor and city council of Baltimore filed a motion to dismiss the interpleader complaint and a request for attorney fees pursuant to Rule 11.[225] In an earlier decision a panel majority held that the district court did not have jurisdiction to hear the interpleader claim.[226] The appellate court affirmed the district court's order denying the Rule 11 attorney fee request.[227] As support for the denial of the fee request, the court noted that the district court had upheld the exercise of interpleader jurisdiction, that one member of the appellate court panel concluded that interpleader jurisdiction was proper, and that another panel member saw enough merit in the interpleader claim to vote to hear the case

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215. *ABA Standards and Guidelines*, *supra* note 32, at 119-20.

216. Romanyak & Stayart, *supra* note 50, at 446; Nelson v. Piedmont Aviation, Inc., 750 F.2d 1234 (4th Cir.), *cert. denied*, 471 U.S. 1116 (1984) (holding that appellant's attempt to extend the coverage of the Railway Labor Act by analogy to the National Labor Relations Act and the Federal Labor-Management and Employee Relations Act was not frivolous because it was a case of first impression).

217. Romanyak & Stayart, *supra* note 52, at 446. *See* Davis v. A.G. Edwards & Sons, Inc., 823 F.2d 105 (5th Cir. 1987); Zaldivar v. City of Los Angeles, 780 F.2d 823 (9th Cir. 1986) (Rule 11 sanctions are not appropriate when dealing with an area in the law which cannot be regarded as settled).

218. *ABA Standards and Guidelines*, *supra* note 32, at 119. *See* Laborers Local 938 Joint Health & Welfare Trust Fund v. B.R. Starnes Co., 827 F.2d 1454 (11th Cir. 1987).

219. *ABA Standards and Guidelines*, *supra* note 32, at 120.

220. Davis v. A.G. Edwards & Sons, Inc., 823 F.2d 105 (5th Cir. 1987).

221. *Id.* at 106.

222. *Id.* at 108.

223. Indianapolis Colts v. Mayor & City Council, 775 F.2d 177 (7th Cir. 1985).

224. *Id.* at 178.

225. *Id.*

226. *Id.*

227. *Id.* at 184.

en banc.[228] This led the court to note that "the fact that judges who have ruled on the merits of [a] pleading disagree provides significant evidence that the pleading was not frivolous or unreasonable."[229]

An inherent obligation in certifying that a pleading, motion, or other paper is warranted by existing law is the signing attorney's duty not to misrepresent the law.[230] In *Thornton v. Wahl*[231] the appellate court upheld the district court's Rule 11 sanctions on the basis that the appeal rested on a serious misstatement of the law.[232] It has also been asserted that a necessary corollary of this "warranted by existing law" requirement is the corollary of candor,[233] which seems to have found its roots in *Golden Eagle Distributing Corp. v. Burroughs Corp.*[234] In that case Judge Schwarzer stated:

> The duty of candor is a necessary corollary of the certification required by Rule 11. A court has a right to expect that counsel will state the controlling law fairly and fully; indeed, unless that is done the court cannot perform its task properly. A lawyer must not misstate the law, fail to disclose adverse authority (not disclosed by his opponent), or omit facts critical to the application of the rule of law relied on . . . The most elemental rationale of this branch of Rule 11 is that fair decisions cannot be expected if the deciding tribunal is not fully informed, let alone if it is misled. It is as badly misled by an argument purporting to reflect existing law when such law does not exist as by a failure to disclose adverse authority . . . .[235]

Judge Schwarzer apparently based the duty of candor on Model Rules of Professional Conduct Rule 3.3 (1983).[236] On appeal the Ninth Circuit Court of Appeals reversed,[237] and stated that Judge Schwarzer's interpretation is contrary to Rule 11 requirements.[238] Specifically, the court noted that Rule 11 "does not impose upon the district courts the burden of evaluating under ethical standards the accuracy of all lawyers' arguments" and:

> neither Rule 11 nor any other rule imposes a requirement that the lawyer, in addition to advocating the cause of his client, step first into the

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228. *Id.* at 181.

229. *Id.* at 182.

230. *ABA Standards and Guidelines*, *supra* note 32, at 120 (a baseless statement or a deliberate misrepresentation of law may not be made in a pleading, motion, or other paper).

231. Thornton v. Wahl, 787 F.2d 1151 (7th Cir. 1986).

232. *Id.* at 1154 (misrepresented existing law).

233. Schwarzer, *supra* note 1, at 193.

234. Golden Eagle Distrib. Corp. v. Burroughs Corp., 103 F.R.D. 124 (N.D. Cal. 1984).

235. *Id.* at 127-28. *See also* Schwarzer, *supra* note 1, at 193-95.

236. Golden Eagle Distrib. Corp. v. Burroughs Corp., 103 F.R.D. at 127. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (1983) provides in pertinent part: "A lawyer shall not knowingly: (1) make a false statement of material fact or law to a tribunal . . . ." *See also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-23 (1979).

237. Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531, 1542 (9th Cir. 1986).

238. *Id.*

> 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. It is not in the nature of our adversary system to require lawyers to demonstrate to the court that they have exhausted every theory, both for and against their client.[239]

The court denied a *sua sponte* request for *en banc* hearing.[240]

In discussing this corollary of candor, the court in *Continental Air Lines, Inc. v. Group Systems International Far East, Ltd.*[241] refused to apply Rule 11 to enforce the duty of candor,[242] and indicated that the violation of the duty of candor would be a violation of the rules of professional conduct and is "in the first instance and primarily, a matter for the appropriate disciplinary authority."[243] However, the Eleventh Circuit Court of Appeals, in *Blackwell v. Department of Offender Rehabilitation*,[244] upheld the imposition of Rule 11 sanctions "based upon the attorney's failure to discharge his duty of candor . . . ."[245]

The signing attorney's reasonable belief that the pleading, motion, or other paper is warranted by existing law will be judged according to an objective standard based upon what was reasonable at the time the paper was signed.[246] Ignorance of the existing law does not offer a defense.[247] As with the "well grounded in fact" requirement, the advisory committee stated that Rule 11 should not "chill an attorney's enthusiasm or creativity in pursuing . . . legal theories."[248] One commentator has indicated that in deciding whether a pleading, motion, or other paper is warranted by existing law, judges "cannot merely assess whether pleaders have properly applied established doctrine, but must evaluate [the pleading, motion, or other paper] in light of a theory of what makes a legal argument plausible."[249]

b. *Warranted by existing law on a Good Faith Argument for the Ex-*

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239. *Id.*

240. Golden Eagle Distrib. Corp. v. Burroughs Corp, 809 F.2d 584 (9th Cir. 1987) (Noona, Circuit Judge, with whom Sneed, Anderson, Hall, and Kozinski, Circuit Judges, joined dissenting from the denial).

241. Continental Air Lines, Inc. v. Group Sys. Int'l Far East, Ltd., 109 F.R.D. 594 (C.D. Cal. 1986).

242. *Id.* at 598.

243. *Id.*

244. Blackwell v. Department of Offender Rehabilitation, 807 F.2d 914 (11th Cir. 1987).

245. *Id.* at 915 (it is not apparent in the opinion from what source the court derived the duty of candor).

246. *See supra* notes 193-94 and accompanying text. *See also* Whittington v. Ohio River Co., 115 F.R.D. 201 (E.D. Ky. 1987); Wasyl, Inc. v. First Boston Corp., 813 F.2d 1579 (9th Cir. 1987); Schwarzer, *supra* note 1, at 91.

247. Pope & Benkoczy, *supra* note 3, at 394. *See also* Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d at 1542 (lawyer should not be able to proceed with impunity in ignorance of the legal authorities).

248. FED. R. CIV. P. 11 advisory committee's note.

249. *Plausible Pleadings*, *supra* note 214, at 638.

tension, Modification, or Reversal of Existing Law. The signing attorney must certify that a pleading, motion, or other paper is "warranted by . . . a good faith argument for the extension, modification, or reversal of existing law."[250] In *Whittington v. Ohio River Co.*,[251] Judge Bertelsman stated that "[a]n attorney cannot have a reasonable belief that a claim or defense is warranted by a good faith argument for the 'extension, modification or reversal of existing law,' unless he or she knows what the existing law is."[252]

Any argument for the extension, modification, or reversal of existing law must be made in good faith.[253] The court in *Zaldivar v. City of Los Angeles*[254] stated that "[t]he pleader, at a minimum, must have a 'good faith argument' for his or her view of what the law . . . should be."[255] The good faith argument must be reasonable.[256] Creativity is not enough.[257] In dealing with the advisory committee's note indicating that Rule 11 should not be used to chill creativity, the court in *Pawlowske v. Chrysler Corp.*[258] indicated that "clearly creativity is not enough by itself . . . . [T]he creativity must be in service of . . . at least a good faith request for a change in the law."[259]

It appears that the safest approach is to cite the adverse controlling legal authority and proceed either to distinguish it or to advance a reasonable good faith argument for an extension, modification, or reversal.[260] In *Thornton v. Wahl*[261] the court indicated that the signing attorney should have "accurately describe[d] the law and then call[ed] for [a] change."[262] However, at least one court has held that Rule 11 does not require counsel to differentiate between an argument "warranted by existing law" and an argument for "extension, modification, or reversal of existing law"[263] because to do so would tend "to create a conflict between the lawyer's duty zealously

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250. *See supra* note 200 and accompanying text.

251. Whittington v. Ohio River Co., 115 F.R.D. 201 (E.D. Ky. 1987).

252. *Id.* at 207.

253. FED. R. CIV. P. 11. *See also* Burkhart v. Kinsley Bank, 804 F.2d 588, 590 n.3 (10th Cir. 1986) (the term "good faith" in Rule 11 modifies only "argument for the extension, modification or reversal of existing law," and nothing more); Yeomans, *supra* note 115, at 66.

254. Zaldivar v. City of Los Angeles, 780 F.2d 823 (9th Cir. 1986).

255. *Id.* at 831.

256. Eastway Constr. Corp. v. City of New York, 762 F.2d at 254 (need to advance a "reasonable argument . . . to extend, modify or reverse the law as it stands").

257. Pawlowske v. Chrysler Corp., 623 F. Supp. 569 (N.D. Ill. 1985).

258. *Id.*

259. *Id.* at 573.

260. *See* Yeomans, *supra* note 115, at 66; Pope & Benkoczy, *supra* note 3, at 394 ("Argument contrary to undisclosed authority is not warranted by a good faith argument for a change."); Horan & Spellmire, *supra* note 93, at 15 ("Several courts have required the attorney who seeks modification to just present all facts and controlling authority, both adverse and favorable, before arguing for a change.").

261. Thornton v. Wahl, 787 F.2d 1151 (7th Cir. 1986).

262. *Id.* at 1154.

263. Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531 (9th Cir. 1986).

to represent his client . . . and the lawyer's own interest in avoiding rebuke . . . and [would] chill advocacy."[264]

Factors which will be considered in determining whether a pleading, motion, or other paper is warranted by a good faith argument for the extension, modification, or reversal of existing law include:

(1) Whether the signer has offered arguments in support of the extension, modification, or reversal of existing law;[265]

(2) The legal sufficiency and plausibility of those arguments;[266]

(3) The creativity, novelty, or innovativeness of those arguments;[267]

(4) Any other objective indication that the signer sought the extension, modification, or reversal of existing law;[268]

(5) The candor and adequacy of the discussion of existing law, including adverse precedent;[269]

(6) The clarity or ambiguity of existing law;[270]

(7) The nature of the case, including whether constitutional doctrines are implicated;[271]

(8) The danger of chilling either the enthusiasm and creativity of counsel or reasonable efforts to extend, modify, or reverse existing law.[272]

Whether a pleading, motion, or other paper is warranted by a good faith argument for the extension, modification, or reversal of existing law will be judged according to a standard of objective reasonableness at the time the paper was signed.[273] This determination must be made while keeping in mind that "[v]ital changes have been wrought by those members of the bar who have dared to challenge the received wisdom, and a rule that penalized such innovation and industry would run counter to our notions of the common law itself"[274] and that courts must avoid the use of hindsight.[275]

6. *Not Interposed for Improper Purpose.* Rule 11 provides that the signing attorney certifies that the pleading, motion, or other paper "is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."[276] The advisory

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264. *Id.* at 1540.

265. *ABA Standards and Guidelines*, *supra* note 32, at 120.

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.* at 121.

272. *Id.*

273. *Id. See also supra* note 246 and accompanying text.

274. Eastway Constr. Corp. v. City of New York, 762 F.2d at 254.

275. *Id.*; FED. R. CIV. P. 11 advisory committee's note; Hamer v. County of Lake, 819 F.2d 1126, 1267 (7th Cir. 1987) ("It is often through vigorous advocacy that changes and developments in the law occur and new precedent is created. Innovative, even persistent advocacy in the fact of great adversity must not be unreasonably penalized with hindsight.").

276. FED. R. CIV. P. 11.

committee's notes to Rule 11 acknowledge that the litigation process can be abused for purposes other than delay.[277] The "improper purpose" requirement of Rule 11 appears to have resulted in the most divergent views among the courts.

The courts are divided on whether a pleading, motion, or other paper, which is well grounded in fact and law, can be found to be in violation of Rule 11 because it was determined to have been filed for an improper purpose. The majority of courts take the position that if a the pleading, motion, or other paper is well grounded in fact and law as measured against the objective standard given above, it does not violate the "improper purpose" clause of Rule 11, notwithstanding the subjective intent of the signing attorney in filing the document.[278] In *Rachel v. Banana Republic, Inc.*[279] the court stated that "[b]ecause of the objective standard applicable to Rule 11, a complaint that is well-grounded in fact and law cannot be sanctioned regardless of counsel's subjective intent."[280] One commentator proposes that in deciding whether a pleading, motion, or other paper is interposed for an improper purpose, the court should make its determination based upon the record in the case along with all the surrounding circumstances and not inquire into the signing attorney's subjective intent.[281] The rationale for the majority's rule is that to allow an inquiry into the signing attorney's good faith would produce harmful effects and make Rule 11 less effective.[282]

Other courts take the position that if the signing attorney files or serves a pleading, motion, or other paper for an improper purpose, Rule 11 is violated even though the document is well grounded in fact and law.[283] This approach requires the court to inquire into the subjective intent of the signing attorney.[284] The court in *Whittington v. Ohio River Co.*[285] held that the

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277. FED. R. CIV. P. 11 advisory committee's note.

278. *See ABA Standards and Guidelines*, *supra* note 32, at 122; Hudson v. Moore Business Forms, Inc., 836 F.2d 1156, 1159 (9th Cir. 1986) ("An objective standard of reasonableness is applied to determinations of frivolousness as well as improper purpose."). *See also*, Rachel v. Banana Republic, Inc., 831 F.2d 1503 (9th Cir. 1987).

279. Rachel v. Banana Republic, Inc., 831 F.2d 1503 (9th Cir. 1987).

280. *Id.* at 1508.

281. Schwarzer, *supra* note 1, at 195.

282. *See* Oliveri v. Thompson, 803 F.2d 1265, 1275 (2d Cir. 1986) ("Removing any subjective good faith component from Rule 11 analysis should reduce the need for satellite litigation . . . ."); Schwarzer, *supra* note 1, at 196 ("It is crucial to the effectiveness of Rule 11 that this approach be followed. Were a court to entertain inquiries into subjective bad faith, it would invite a number of potentially harmful consequences, such as generating satellite litigation, inhibiting speech and chilling advocacy. At the same time, some offenders might escape for lack of sufficient evidence of bad faith. Finally, a bad faith test would make courts more reluctant to impose sanctions for fear of stigmatizing a lawyer by a bad faith finding.").

283. *ABA Standards and Guidelines*, *supra* note 32, at 121. *See also infra* note 284 and accompanying text.

284. *See* Whittington v. Ohio River Co., 115 F.R.D. 201 (E.D. Ky. 1987); Brown v. Federation of State Medical Bds., 830 F.2d 1429, 1436 (7th Cir. 1987) (noting subjective bad faith may be important when action is objectively colorable).

"improper purpose" provision of Rule 11 was "a subjective requirement and . . . even meritorious litigation positions, if taken for purposes of harassment or other improper reason can violate Rule 11 . . . [T]herefore, whether or not a pleading was interposed for an improper purpose involves a subjective standard of bad faith."[286] On its face Rule 11 appears to require that the pleading, motion, or other paper be both well grounded in fact and law *and* not interposed for any improper purpose.[287]

The nature of certain pleadings, motions, or other papers, along with the timing of their service or filing, may give rise to an inference that they were served or filed for an improper purpose. Repetitive service or filing of previously rejected positions evidences an improper purpose.[288] Improper purpose may also be inferred from a determination that the pleading, motion, or other paper caused unnecessary delay, that it caused needless increase in the cost of litigation, that it lacked any apparent legitimate purpose, or that it constituted an obdurate resistance out of proportion to the amounts or issues at stake.[289] The consequences of the filing may lead to an inference of improper purpose—*e.g.*, when a party will benefit from a delay,[290] or when a paper appears to have been filed solely to affect another's business decision.[291] In addition, the filing of excessive, successive or repetitive pleadings, motions, or other papers may constitute evidence of an improper purpose even if the papers are well grounded in fact and law.[292] In *Robinson v. National Cash Register Co.*[293] Judge Hill noted that it was "entirely plausible that the filing of successive motions, each of which is individually well founded in fact and law, could under various circumstances constitute an improper purpose under Rule 11 such as harassment or delay."[294]

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285. Whittington v. Ohio River Co., 115 F.R.D. 201 (E.D. Ky. 1987).

286. *Id.* at 208.

287. FED. R. CIV. P. 11 ("The signature of an attorney . . . constitutes a certificate [that] the pleading, motion or other paper . . . 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 . . . .") (emphasis added).

288. *ABA Standards and Guidelines*, *supra* note 32, at 121; Zaldivar v. City of Los Angeles, 780 F.2d at 832 n.10 (filing of excessive motions, even if well grounded, may be harassment under Rule 11); Cannon v. Loyola Univ., 784 F.2d 777 (7th Cir. 1986) (res judicata).

289. *See* Schwarzer, *supra* note 32, at 196; Pope & Benkoczy, *supra* note 3, at 394.

290. Pope & Benkoczy, *supra* note 3, at 394; *See* Cinema Serv. Corp. v. Edbee Corp., 774 F.2d 584 (3d Cir. 1985) (bankruptcy petition filed for purpose of delay and not reorganization); *In re* Oximetrix, Inc., 748 F.2d 637 (Fed. Cir. 1984) (petition filed solely in hope of delaying further impact of state court judgment); Davis v. Veslan Enters., 765 F.2d 494 (5th Cir. 1985) (one purpose of removal petition was to delay entry of state court judgment).

291. Burlington Coat Factory Warehouse Corp. v. Esprit De Corp., 769 F.2d 919, 927 n.2 (2d Cir. 1985).

292. *ABA Standards and Guidelines*, *supra* note 32, at 122.

293. Robinson v. National Cash Register Co., 808 F.2d 1119 (5th Cir. 1987).

294. *Id.* at 1130. *But see supra* note 278 and accompanying text; Schwarzer, *supra* note 1, at 196 ("If a reasonably clear legal justification can be shown for the filing of the paper . . . no

D. *Continuing Duty to Evaluate*

Rule 11, by its specific language, seems to make the certification requirements applicable only at the time the motion, pleading, or other paper is signed.[295] However, there is a split of authority as to whether Rule 11 imposes a continuing obligation on the signing attorney to ensure that each pleading, motion, or other paper complies at all stages of the litigation with the requirements of the Rule.

Some courts hold that Rule 11 does not impose a continuing obligation on the signing attorney to update, correct, or withdraw any pleading, motion, or other paper which, when signed, satisfied the requirements of Rule 11.[296] In *Pantry Queen Foods, Inc. v. Lifschultz Fast Freight, Inc.*[297] the court held that "Rule 11 does not require the updating of papers that were not subject to sanctions when filed"[298] and stated that " . . . Rule 11 does not require revisions of pleadings to conform with newly discovered information."[299] From the court's reasoning it appears that its decision was based on the fact that the advisory committee's notes do not indicate that there is a requirement to update and the advisory committee discourages resorting to hindsight in evaluating filings.[300]

Other courts hold that Rule 11 imposes a continuing obligation on the signing attorney to update, correct, or withdraw any pleading, motion, or other paper which, when signed, satisfied Rule 11 requirements if the signing attorney later learns that there is no reasonable basis for the previously asserted position.[301] In *Southern Leasing Partners, Ltd. v. McMullan*,[302] the court, in a *per curiam* opinion, found that counsel had "neglected its continuing obligation to review, reexamine and reevaluate its position as the facts came to light after the filing of the complaint."[303] The court interpreted the duty to require that "[w]hen [the signing attorney] learns that an asserted position, even if originally supported by adequate inquiry, is no longer justified he must not persist in its prosecution."[304] Similarly, Judge Bartelsman

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improper purpose can be found and sanctions are inappropriate.").

295. FED. R. CIV. P. 11 ("The signature of an attorney or party constitutes a certificate by the signer . . . .").

296. *ABA Standards and Guidelines*, *supra* note 32, at 112; Oliveri v. Thompson, 803 F.2d 1265, 1276 (2d Cir. 1986) ("rule 11 does not impose a continuing obligation"). *See also* Pantry Queen Foods, Inc. v. Lefschultz Fast Freight, Inc., 809 F.2d 451 (7th Cir. 1987).

297. Pantry Queen Foods, Inc. v. Lefschultz Fast Freight, Inc., 809 F.2d at 451.

298. *Id.* at 454.

299. *Id.*

300. *Id. See* advisory committee's note ("The court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted.").

301. *ABA Standards and Guidelines*, *supra* note 32, at 113; *infra* notes 304-08.

302. Southern Leasing Partners, Ltd. v. McMullan, 801 F.2d 783 (5th Cir. 1986).

303. *Id.* at 788.

304. *Id.*

stated in *Whittington v. Ohio River Co.*[305] that the signing attorney "must . . . continually review and reevaluate his position as the case develops [and] . . . must abandon claims or defenses as soon as it becomes apparent that it is unreasonable to pursue them."[306] This view seems to advance the purposes of Rule 11 such as streamlining the litigating process and lessening frivolous claims and defenses.[307]

E. *Sanctions*

1. *General Rule*

"If a pleading, motion or other paper is signed in violation of [Rule 11], 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."[308] The advisory committee's notes indicate that not only are sanctions mandatory once a violation of Rule 11 has occurred, but that there is a "need" to impose sanctions for violation,[309] which the court may do *sua sponte* or on the motion of a party.[310]

It would appear from the mandatory language of Rule 11 and the advisory committee's note that the court does not have discretion to deny the imposition of sanctions once Rule 11 has been violated. In *Westmoreland v. CBS, Inc.*[311] the court stated that the "shall impose" language of Rule 11 "concentrates the district court's discretion on the *selection* of an appropri-

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305. Whittington v. Ohio River Co., 115 F.R.D. 201 (E.D. Ky. 1987).

306. *Id.* at 208. *See also* Albright v. Upjohn Co., 788 F.2d 1217, 1221 n.7 (6th Cir. 1986) ("continued to assert claim long after it would have been reasonable to have dismissed it"); Schwarzer, *supra* note 1, at 189 ("[A] claim that may be properly asserted and a defense that may be properly maintained when first filed could be rendered untenable by later discovery disclosures. To persist in claims or defenses beyond a point where they could no longer be considered to be well-grounded in fact may violate the rule."); Markel v. Scovill Mfg. Co., 657 F. Supp. 1102 (W.D.N.Y. 1987) ("there came a point in this action in which plaintiffs' continuance of the action was unjustified").

307. *See supra* note 28 and accompanying text. *See also* Beck, *supra* note 25, at 22 (imposing continuing duty to evaluate requires parties to refine and narrow their issues and claims).

308. FED. R. CIV. P. 11.

309. FED. R. CIV. P. 11 advisory committee's note. *See also* O'Connell v. Champion Int'l Corp., 812 F.2d 393 (8th Cir. 1987) (sanctions are mandatory when a Rule 11 violation occurs); FED. R. CIV. P. 11; *ABA Standards and Guidelines*, *supra* note 32, at 122.

310. FED. R. CIV. P. 11; *ABA Standards and Guidelines*, *supra* note 32, at 112; FED. R. CIV. P. 11 advisory committee's note ("Authority [for courts to impose sanctions on their own motion] has been made explicit in order to overcome the traditional reluctance of courts to intervene unless requested by one of the parties.").

311. Westmoreland v. CBS, Inc., 770 F.2d 1168 (D.C. Cir. 1985).

ate sanction rather than on the *decision* to impose sanctions . . . ."[312] However, one commentator, Judge Schwarzer, noted that it was "not likely that courts will consider themselves bound by the rule's mandatory language to impose sanctions."[313] It appears that this belief is held by other judges because some courts have declined to impose a sanction if a violation of Rule 11 is merely technical or *de minimis* in nature, or if, under the circumstances, it would be inequitable to impose a sanction.[314] Therefore, despite the mandatory language of Rule 11, under certain circumstances a violation of Rule 11 will not automatically result in the imposition of a sanction by some courts.

The purposes for which Rule 11 sanctions are imposed include:

(1) Deterring dilatory or abusive litigation tactics by the same offender and others;[315]

(2) Imposing punishment for misconduct;[316]

(3) Compensating an offended person for some or all of the reasonable expenses incurred by reason of the misconduct;[317]

(4) Alleviating other prejudice to an offended person resulting from the misconduct, including prejudice to that person's litigation positions;[318] and

(5) Streamlining litigation and bringing about economics in the use of judicial resources by curtailing frivolous and abusive practices.[319]

2. *Who May Be Sanctioned*

Rule 11 states that sanctions can be imposed against "the person who signed [a paper], a represented party, or both."[320] Therefore, Rule 11 appears to make sanctions applicable to the signing attorney, his client, or both.[321] However, courts have sanctioned counsel whose signatures did not

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312. *Id.* at 1174.

313. Schwarzer, *supra* note 32, at 200.

314. *See ABA Standards and Guidelines*, *supra* note 32, at 122; Oliveri v. Thompson, 803 F.2d 1265, 1280 (2d Cir. 1986) (finding that any technical violation of Rule 11 was *de minimis* because no one appeared to have given the claims serious consideration or devoted any significant work toward disposing of them); Greenberg v. Sala, 822 F.2d 882, 887 (9th Cir. 1987) (court noted its reluctance to impose sanctions for factual errors). *See also Plausible Pleadings*, *supra* note 214, at 649 (maintaining that courts need to consider before imposing sanctions whether a penalty is needed to deter abuses; if not, courts should prefer other alternatives such as pretrial conferences, discovery conferences, etc.); FED. R. CIV. P. 11 advisory committee's note ("The court . . . retains the necessary flexibility to deal appropriately with violations of the rule.").

315. *ABA Standards and Guidelines*, *supra* note 32, at 125.

316. *Id.*

317. *Id.*

318. *Id.*

319. *Id.*

320. FED. R. CIV. P. 11. *See* FED. R. CIV. P. 11, advisory committee's note ("discretion to impose sanctions on either the attorney, the party the signing attorney represents, or both").

321. *Id. See also ABA Standards and Guidelines*, *supra* note 32, at 123; Chevron, U.S.A.,

appear on the document,[322] other members of the signing attorney's firm,[323] a partner on whose behalf an associate prepared the document,[324] and local counsel.[325] It also appears that sanctions can be imposed on attorneys even after they have withdrawn from the case.[326] However, when new counsel assumes responsibility for a pending case, new counsel's liability is limited to liability for the documents which he or she signs, and counsel has no responsibility for documents previously signed except to the extent that such documents are expressly relied upon or incorporated within papers signed by new counsel.[327]

3. *An Appropriate Sanction*

Rule 11 requires that the court, in its discretion, impose "an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expense incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee."[328] The district court is vested with broad discretion to fashion an appropriate sanction based upon the facts of the case[329] and the gravity of the conduct at issue.[330]

Generally, in determining the appropriate sanction, the court will consider which of the purposes underlying Rule 11 it seeks to implement and then impose the least severe sanction deemed adequate to serve the purpose

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Inc. v. Hand, 763 F.2d 1184, 1187 (10th Cir. 1985) ("Rule 11 directs that the sanction should fall upon the individual responsible for the filing of the offending document. In a given case this could be the attorney, the client, or both.").

322. *See* Pope & Benkoczy, *supra* note 3, at 396; Alcan Aluminum Corp. v. Lyntel Prod., Inc., 656 F. Supp. 1138, 1140 n.4 (N.D. Ill. 1987) (disagreeing with Robinson v. National Cash Register Co., 808 F.2d 1119 (5th Cir. 1987), which held that an attorney must sign the document violating Rule 11 to be subject to sanctions and noting that jurors are instructed that whatever a person is legally capable of doing he can do through another person by causing that person to act).

323. *See ABA Standards and Guidelines*, *supra* note 32, at 123; Calloway v. Marvel Entertainment Group, 650 F. Supp. 684, 687 (S.D.N.Y. 1986) ("[S]anctions will be imposed on both the individual attorney and the law firm on whose behalf he signed the papers.").

324. *See* Schwarzer, *supra* note 1, at 185 ("An associate in a law firm charged with preparing a paper for filing may be carrying out the instructions of a partner who made the decision to file it. In such a situation, sanctions are more appropriately imposed on the principal rather than the agent carrying out his orders and nothing in the rule bars its application in that manner."). *See also* Navarro v. Cohan, 109 F.R.D. 86, 88 (S.D. Fla. 1985) (sanctioning a partner for failure to adequately supervise an associate).

325. *See supra* notes 164-73 and accompanying text.

326. Pope & Benkoczy, *supra* note 3, at 397.

327. *ABA Standards and Guidelines*, *supra* note 32, at 123.

328. FED. R. CIV. P. 11.

329. FED. R. CIV. P. 11 advisory committee's note; *ABA Standards and Guidelines*, *supra* note 32, at 123.

330. Schwarzer, *supra* note 1, at 200.

or purposes,[331] which sanction must be reasonable.[332] Factors which the court may consider in determining the appropriate sanction, as to both type and amount, include:

(1) The good faith or bad faith of the offender;[333]

(2) The degree of willfulness, vindictiveness, negligence, or frivolousness involved in the offense;[334]

(3) The knowledge, experience, and expertise of the offender;[335]

(4) Any prior history of sanctionable conduct on the part of the offender;[336]

(5) The reasonableness and necessity of the out-of-pocket expenses incurred by the offended person as a result of the misconduct;[337]

(6) The nature and extent of prejudice, apart from out-of-pocket expenses, suffered by the offended person as a result of the misconduct;[338]

(7) The relative culpability of client and counsel, and the impact on their privileged relationship of an inquiry into that area;[339]

(8) The risk of chilling the specific type of litigation involved;[340]

(9) The impact of the sanction on the offender, including the offender's ability to pay a monetary sanction;[341]

(10) The impact of the sanction on the offended party, including the offended person's need for compensation;[342]

(11) The relative magnitude of sanction necessary to achieve the goal or goals of the sanction;[343]

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331. *ABA Standards and Guidelines*, *supra* note 32, at 124.

332. *See* Brown v. National Bd. of Medical Examiners, 800 F.2d 168, 173 (7th Cir. 1986) (affirming sanctions based upon a finding that they were reasonable); *In re* Yagman, 796 F.2d 1165, 1185 (9th Cir. 1986) ("Recovery should never exceed those expenses and fees that were reasonably necessary to resist the offending action.").

333. *ABA Standards and Guidelines*, *supra* note 32, at 125.

334. *Id.*

335. *Id.*

336. *Id.*

337. *Id. See also* Horan & Spellmire, *supra* note 93 at 20 (incumbent upon a party to mitigate expenses and fees when faced with a document which appears to violate Rule 11); Schwarzer, *supra* note 1, at 202 (asserting that mitigation principle should apply to limit recovery of sanctions to the amount of expenses and fees which were reasonably necessary to resist the document); Oliveri v. Thompson, 803 F.2d 1265, 1280 (2d Cir. 1986) ("As a general principle, it would be inequitable to permit a defendant to increase the amount of attorneys' fees recoverable as a sanction by unnecessarily defending against frivolous claims which could have been dismissed on motion without incurring . . . additional expense."); Dubisky v. Owens, 849 F.2d 1034, 1037 (7th Cir. 1988) (duty to mitigate legal fees and expenses by resolving frivolous issues quickly and efficiently).

338. *ABA Standards and Guidelines*, *supra* note 32, at 125.

339. *Id.*

340. *Id.*

341. *Id.*

342. *Id.*

343. *Id.* at 126.

(12) Burdens on the court system attributable to the misconduct, including consumption of judicial time and incurrence of juror fees and other court costs;[344]

(13) The degree to which the offended person attempted to mitigate any prejudice suffered by him or her;[345]

(14) The degree to which the offended person's own behavior caused the expenses for which recovery is sought;[346]

(15) The extent to which the offender persisted in advancing a position while on notice that the position was not well grounded in fact or warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;[347] and

(16) The time of, and circumstances surrounding, any voluntary withdrawal of a pleading, motion, or other paper.[348]

Among the types of sanctions the court, in its discretion, may impose include:

(1) A reprimand of the offender;[349]

(2) Mandatory continuing legal education;[350]

(3) A fine;[351]

(4) An award of reasonable expenses, including reasonable attorneys' fees, incurred as a result of the misconduct;[352]

(5) Reference of the matter to the appropriate attorney disciplinary or grievance authority;[353]

(6) An order precluding the introduction of certain evidence;[354]

(7) An order precluding the litigation of certain issues;[355]

(8) An order precluding the litigation of certain claims or defenses;[356]

(9) Dismissal of the action;[357]

(10) Entry of a default judgment;[358]

(11) Injunctive relief limiting a party's future access to the courts;[359]

(12) Censure, suspension, or disbarment from practicing before the fo-

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344. *Id.*
345. *Id.*
346. *Id.*
347. *Id.*
348. *Id.*
349. *Id.* at 124.
350. *Id.*
351. *Id.*
352. *Id.*
353. *Id.*
354. *Id.*
355. *Id.*
356. *Id.*
357. *Id.*
358. *Id.*
359. *Id.*

rum court, subject to applicable rules or statutes;[360] and

(13) When the violation has been committed by out-of-state counsel appearing *pro hac vice* pursuant to leave granted by court, withdrawal of that leave.[361]

In addition, the court in *Blanchette v. Cataldo*[362] affirmed the district court's finding that an attorney had violated Rule 11 by allowing his name to be signed to thousands of court-filed complaints without verifying each complaint's legitimacy. The court found adequate support for the sanction which ordered the attorney to review the suits remaining on the court docket and file appropriate affidavits.[363]

If the court decides to award a monetary sanction to compensate an offended person for attorneys' fees incurred as a result of a Rule 11 violation, the factors to be considered include:

(1) The time and labor required;[364]

(2) The novelty and difficulty of the questions involved;[365]

(3) The skill requisite to perform the legal service properly;[366]

(4) The customary fee;[367]

(5) Whether the fee is fixed or contingent;[368]

(6) Time limitations imposed by the client or the circumstances;[369]

(7) The amount involved and the results obtained;[370]

(8) The experience, reputation, and ability of the attorneys;[371]

(9) Awards in similar cases;[372] and

(10) The other factors set forth at the beginning of this subsection.[373]

When a monetary sanction is imposed, fees and expenses awarded must have been caused by the Rule 11 violation and the amount awarded must be reasonable.[374] Reasonable does not necessarily mean actual.[375] The court in *INVST Financial Group, Inc. v. Chem-Nuclear Systems, Inc.*[376] stated that

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360. *Id.*

361. Schwarzer, *supra* note 1, at 204.

362. Blanchette v. Cataldo, 734 F.2d 869, 874 (1st Cir. 1984).

363. *Id.*

364. *ABA Standards and Guidelines*, *supra* note 32, at 126.

365. *Id.*

366. *Id.*

367. *Id.*

368. *Id.*

369. *Id.*

370. *Id.*

371. *Id.*

372. *Id.*

373. *See supra* text accompanying notes 333-48.

374. Schwarzer, *supra* note 1, at 202; Pope & Benkoczy, *supra* note 3, at 395.

375. INVST Fin. Group, Inc. v. Chem-Nuclear Sys., Inc., 815 F.2d 391, 404 (6th Cir. 1987); Schwarzer, *supra* note 1, at 203 (measure is not actual expenses and fees but what court determines to be reasonable).

376. INVST Fin. Group, Inc. v. Chem-Nuclear Sys., Inc., 815 F.2d at 404.

a reasonableness inquiry "requires a determination as to what extent [the offended party's] expenses and fees could have been avoided and were self-imposed,"[377] which "prevents a party from misusing Rule 11 sanctions in order to benefit from the errors of opposing counsel."[378] In addition, the amount of a reasonable fee is not necessarily measured by a previously agreed-upon fee between the successful party and counsel.[379]

Sanctions will be allocated among the persons responsible for the pleading, motion, or other paper based upon their respective culpability.[380] Where the violation is primarily a result of a professional dereliction (such as failure to adequately research or investigate), sanctions will be imposed only on the attorney.[381] When a court imposes sanctions on counsel, the court will often specify that the client may not reimburse his or her counsel for those sanctions.[382] When a client is found to have misled his or her attorney, courts impose sanctions solely on the client.[383] When responsibility for a Rule 11 violation lies with both counsel and client, courts impose sanctions jointly and severally on the client and his or her counsel.[384]

A conflict of interest may arise when the court considers whether to assess sanctions against counsel or against the client.[385] The conflict will arise if counsel claims to have relied upon confidential communications received from his client.[386] The advisory committee's notes state that Rule 11 "does not require a party or an attorney to disclose privileged communications or work product to show that the signing of the pleading, motion, or other paper is substantially justified."[387] However, neither Rule 11 nor the advisory committee's notes address the situation which arises where a real or apparent need for disclosure exists.[388] If counsel seeks to vindicate himself personally by relying on privileged communications, confidential docu-

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377. *Id.*

378. *Id.*

379. Aetna Casualty & Sur. Co. v. Fernandez, 830 F.2d 952, 956-57 n.17 (8th Cir. 1987) ("An agreed-upon fee between a successful party and counsel might well be proper in the light of the results obtained, but yet not reasonable when involuntarily shifted to the opposing party."); *ABA Standards and Guidelines*, *supra* note 32, at 127.

380. *ABA Standards and Guidelines*, *supra* note 32, at 124; Pope & Benkoczy, *supra* note 3, at 397 (courts usually look to where responsibility lies for the Rule 11 violation); Chevron, U.S.A., Inc. v. Hand, 763 F.2d 1184, 1187 (10th Cir. 1985) ("Rule 11 directs that the sanction should fall upon the individual responsible for the filing of the offending document.").

381. Schwarzer, *supra* note 1, at 203; Pope & Benkoczy, *supra* note 3, at 397; Borowski v. DePuy, Inc., 850 F.2d 297, 305 (7th Cir. 1988).

382. *See* Borowski v. DePuy, Inc., 850 F.2d at 305.

383. Pope & Benkoczy, *supra* note 3, at 397; Chevron, U.S.A., Inc. v. Hand, 763 F.2d at 1187 (found the client was the "catalyst behind [the] frivolous motion" and imposed the sanction solely on the client).

384. Pope & Benkoczy, *supra* note 3, at 397. *See also* Schwarzer, *supra* note 1, at 203.

385. Schwarzer, *supra* note 1, at 199.

386. *Id.*

387. FED. R. CIV. P. 11 advisory committee's note.

388. Schwarzer, *supra* note 1, at 199.

mentation, or directions received from the client,[389] the client may need independent representation and the attorney-client representation may be so tainted as to jeopardize the representation for the remainder of the litigation.[390] Alternatives are to seek a protective order,[391] permit *in camera* inspection by the court,[392] or have the court defer the decision over allocation of the sanctions until the litigation has been concluded.[393]

4. *Procedure for Imposing Sanctions*

If an investigation warrants the conclusion that a Rule 11 violation has occurred, opposing counsel should immediately file notice with the court and serve the opposing party.[394] "Prompt notice serves to further the objectives of Rule 11 by allowing an attorney, possibly in violation, to alter his course of conduct" if deemed necessary.[395] Some courts have denied sanctions on the basis that the notice of the violation of Rule 11 was not prompt.[396] One must also keep in mind that a Rule 11 motion is itself subject to sanctions if found to be in violation of the rule;[397] therefore, prior to filing a formal Rule 11 motion for sanctions, it may be appropriate to request a voluntary dismissal or seek to have the filing withdrawn at an informal status conference.[398]

The procedure employed by the court prior to imposing sanctions must comport with due process.[399] Due process requires that, before sanctions are imposed, the alleged offender be afforded fair notice and an opportunity to

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389. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1985) provides that:
(b) A lawyer may reveal [information relating to representation of a client] to the extent the lawyer reasonably believes necessary: . . . (2) 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.

390. Schwarzer, *supra* note 1, at 199.

391. *See* FED. R. CIV. P. 11 advisory committee's note.

392. *Id.*

393. Schwarzer, *supra* note 1, at 25.

394. Peggs, *supra* note 26, at 24; FED. R. CIV. P. 11 advisory committee's note (give notice promptly upon discovering a basis for doing so).

395. Horan & Spellmire, *supra* note 93, at 19.

396. *See* Stevens v. Lawyers Mut. Liab. Ins. Co., 789 F.2d 1056, 1061 (4th Cir. 1986) (denied plaintiff's motion for sanctions because of the delay in filing it); Duane Smelser Roofing Co. v. Armm Consultants, Inc., 609 F. Supp. 823, 823-24 (E.D. Mich. 1985) (held district court lacked jurisdiction to consider motion for sanctions when motion was filed after court of appeals had affirmed decision on merits of the case).

397. *See* FED. R. CIV. P. 11; Frantz v. United States Powerlifting Fed., 836 F.2d 1063, 1066 (7th Cir. 1987) ("In a proceeding under Rule 11, the filing of a bloated request for fees is itself subject to sanctions . . . ."); FED. R. CIV. P. 7(b)(3) (provides that all motions shall be signed in accordance with Rule 11).

398. Horan & Spellmire, *supra* note 93, at 20.

399. FED. R. CIV. P. 11 advisory committee's note.

be heard.[400] This does not include an evidentiary hearing.[401] The notice component of due process requires that the party against whom sanctions are sought be given notice of the fact that sanctions are being considered, reasons why sanctions are being considered, and the type of sanctions being considered.[402] Factors which the courts consider in fashioning a procedure to ensure that due process is provided for include:

(1) The severity of the sanction under consideration;[403]

(2) The interests of the alleged offender in having a sanction imposed only when justified;[404]

(3) The risk of an erroneous imposition of sanctions relative to the probable value of additional notice and hearing;[405]

(4) The interest of the court in the efficient use of the judicial system, including the fiscal and administrative burdens which additional procedural requirements would entail;[406]

(5) Whether the sanctions at issue were sought by a party or are being considered *sua sponte* by the court;[407]

(6) If the sanctions were sought by a party, the type of sanction sought;[408]

(7) The type of sanction under consideration by the court;[409]

(8) Whether the alleged offender was notified, or is otherwise aware, that sanctions are under consideration, and the nature of those sanctions;[410]

(9) Whether the sanction under consideration rests on a factual finding, such as a finding of bad faith on the part of the alleged offender;[411]

(10) Whether the judge imposing or considering the sanction presided over the proceedings and is the same judge before whom the offense was committed;[412]

(11) Whether the alleged offender has been provided an opportunity to be heard before sanctions are issued;[413]

(12) Whether the alleged offender will be provided an opportunity to be heard after sanctions are issued;[414] and

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400. *ABA Standards and Guidelines*, *supra* note 32, at 127.

401. Oliveri v. Thompson, 803 F.2d at 1280. *See also* FED. R. CIV. P. 11 advisory committee's note (limit sanction proceedings to the record to avoid satellite litigation).

402. *ABA Standards and Guidelines*, *supra* note 32, at 127.

403. *Id.*

404. *Id.*

405. *Id.*

406. *Id.*

407. *Id.*

408. *Id.*

409. *Id.*

410. *Id.*

411. *Id.*

412. *Id.* at 128.

413. *Id.*

414. *Id.*

(13) Whether counsel, the client, or both are the targets of the proposed sanction, and the impact of the sanctions proceeding on the attorney-client relationship.[415]

It is within the court's discretion to hold a hearing on the sanctions being considered.[416] A hearing is ordinarily required prior to the issuance of any sanction which is based upon a finding of bad faith on the part of the alleged offender.[417] A hearing is appropriate whenever it would assist the court in its consideration of the sanctions issue,[418] when the hearing would significantly assist the alleged offender in the presentation of his or her defense,[419] when sanction is based on an improper purpose,[420] if the sanctioning judge did not participate in the proceedings which resulted in the pleading, motion, or other paper allegedly in violation of Rule 11,[421] or when a litigant put his or her ability to pay a sanction at issue.[422] Discovery will be allowed only in extraordinary circumstances and only by leave of court.[423] The timing of any sanctions imposed is in the trial court's discretion.[424]

5. *Jurisdiction to Impose Sanctions*

Generally, a court has jurisdiction to impose sanctions upon any counsel who has signed a pleading, motion, or other paper served or filed in a civil action in federal district court, even if the court lacks jurisdiction over the subject matter of the action.[425] An appellate court has jurisdiction to order the imposition of sanctions for violations which occurred before a lower court in the same action.[426]

There is a split of authority concerning the jurisdiction of a court to impose sanctions after the underlying action has been dismissed or judgment entered. Some courts hold that there is jurisdiction to impose sanctions for violation of Rule 11 after the underlying action has been dismissed or judgment entered;[427] however, the ability to do so may be limited by local

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415. *Id.*
416. *Id.*
417. *Id.*
418. *Id.*
419. *Id.*
420. Pope & Benkoczy, *supra* note 3, at 398.
421. *Id.*
422. *Id.*
423. FED. R. CIV. P. 11 advisory committee's note.
424. *Id.* ("However, it is anticipated that in the case of pleadings, the sanctions issued under Rule 11 normally will be determined at the end of the litigation, and in the case of motions at the time when the motion is denied or shortly thereafter.").
425. *ABA Standards and Guidelines*, *supra* note 32, at 129.
426. *Id.* at 111.
427. *See* McLaughlin v. Bradlee, 803 F.2d 1197, 1205 (D.C. Cir. 1986) (not abuse of discretion to impose sanctions against an attorney who filed four insubstantial post-judgment motions); Hicks v. Southern Md. Health Sys. Agency, 805 F.2d 1165, 1167 (4th Cir. 1986) (held district court had jurisdiction to grant sanction motion which was made several months after

district court rule.[428] The rationale for this position appears to be the discretionary time period granted the district court in determining when to impose sanctions.[429]

Other courts take the position that once an action is dismissed the court loses all jurisdiction and is precluded from entering an award of sanctions,[430] and that following the entry of judgment, no sanctions may be imposed.[431]

6. *Findings and Conclusions*

Even though the language of Rule 11 does not require that courts make findings of fact and conclusions of law when considering potential Rule 11 violations,[432] it appears that courts will generally require that the record reflect the specific reasons for which a sanction is imposed and the basis on which the imposition rests, especially when the basis and justification for a Rule 11 decision are not apparent from the record.[433] The degree of specificity required will depend upon the circumstances and upon the amount, type, and effect of the sanction imposed.[434] Unless it is otherwise apparent from the record, the trial court should include an identification of each pleading, motion, or other paper held to violate Rule 11, a specification of the nature of the violation, and an explanation of the manner in which the sanction was computed or otherwise determined.[435] However, if the court denies a motion for sanctions, it has discretion to determine whether to place on the record the reasons for its action.[436] In addition, findings of fact and conclusions of law serve at least three useful purposes:

(1) They assist in appellate review, demonstrating that the trial court exercised its discretion in reasoned and principled fashion;

(2) They help ensure litigants, and incidentally the judge as well, that the decision was the product of thoughtful deliberation; and

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the conclusion of all appellate proceedings); *ABA Standards and Guidelines*, *supra* note 32, at 129.

428. *See* Hicks v. Southern Md. Health Sys. Agency, 805 F.2d at 1167; *ABA Standards and Guidelines*, *supra* note 32, at 129.

429. FED. R. CIV. P. 11 advisory committee's note ("The time when sanctions are to be imposed rests in the discretion of the trial judge.").

430. Johnson Chem. Co. v. Home Care Prods., Inc., 823 F.2d 28, 31 (2d Cir. 1987) (vacated Rule 11 sanctions because once action was dismissed, the court lost all jurisdiction over the action). *See also ABA Standards and Guidelines*, *supra* note 32, at 130.

431. *See ABA Standards and Guidelines*, *supra* note 32, at 130.

432. FED. R. CIV. P. 11.

433. *See ABA Standards and Guidelines*, *supra* note 32, at 128; Brown v. Federation of State Medical Bds., 830 F.2d 1429, 1435 (7th Cir. 1987) (court held that in cases involving a substantial sanction award, the district court must state with some specificity the reasons for the imposition of sanctions); Thomas v. Capital Sec. Serv., Inc., 836 F.2d 866, 883 (5th Cir. 1988).

434. *ABA Standards and Guidelines*, *supra* note 32, at 128.

435. *Id.*

436. *Id.* at 129.

(3) Their publication enhances the deterrent effect of the ruling.[437]

7. *Appealability of Sanction Award*

Once sanctions have been fixed,[438] an order imposing sanctions upon a party is appealable upon the entry of judgment or a final decision adverse to that party.[439] An order imposing sanctions on a non-party is appealable when entered by the district court.[440] Similarly, an order imposing sanctions on counsel under Rule 11 is appealable when entered by the district court.[441]

When a Rule 11 sanction award is appealed, the appeal must be brought in the name of the appropriate party. Where an award of sanctions runs only against the attorney, the attorney is the party in interest and the appeal must be brought in his name.[442] In *DeLuca v. Long Island Lighting Co.*,[443] a sanction award against the plaintiff's lawyer was appealed in the name of the plaintiff. The court held that it was jurisdictionally barred from considering the appeal because the matter was not appealed in the name of the attorney.[444]

8. *Appellate Review*

The appropriate standard for review by an appellate court of Rule 11 decisions varies by circuit. Some courts have held that all aspects of an order imposing Rule 11 sanctions are reviewed under the abuse-of-discretion standard.[445] Other courts have held that the court's factual determinations are reviewed under the clearly erroneous standard; that the facts constituting a violation of the Rule are reviewed *de novo;* and that the appropriateness of the sanction imposed is reviewed under the abuse-of-discretion standard.[446]

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437. Schwarzer, *supra* note 1, at 199.

438. *In re* Jeannette Corp., 832 F.2d 43, 46 (3d Cir. 1987) ("sanctions . . . must be fixed before the order is . . . appealable"). *See also ABA Standards and Guidelines*, *supra* note 32, at 130.

439. *See ABA Standards and Guidelines*, *supra* note 32, at 130; 28 U.S.C.A. § 1291 (West Supp. 1988).

440. *See* Frazier v. Cast, 771 F.2d 259, 262 (7th Cir. 1985). *See also ABA Standards and Guidelines*, *supra* note 32, at 130.

441. *See* Optyl Eyewear Fashion Int'l Corp. v. Style Co., Ltd., 760 F.2d 1045, 1047 n.1 (9th Cir. 1985) (order imposing sanction upon counsel is appealable when the sanction is imposed); *ABA Standards and Guidelines*, *supra* note 32, at 130. *But see* Eavenson, Auchmuty & Greenwald v. Holtzman, 775 F.2d 535, 539 (3d Cir. 1985) ("We do not now adopt a rule that would allow immediate appellate review of *any* sanction order imposed upon counsel.") (emphasis added).

442. DeLuca v. Long Island Lighting Co., 862 F.2d 427 (2d Cir. 1988).

443. *Id.*

444. *See id.*

445. *See ABA Standards and Guidelines*, *supra* note 32, at 130.

446. *Id.*

III. Tips to Avoid Rule 11 Violations

The following tips will help attorneys avoid violating Rule 11 and reduce their potential liability under the Rule:

1. Become familiar with Rule 11 and what it requires;[447]

2. Stay apprised of applications of Rule 11 in the jurisdiction(s) in which you practice;[448]

3. Read each pleading, motion, or other paper before signing it;[449]

4. Guard against unwarranted assumptions;[450]

5. Evaluate and verify the key facts and applicable law yourself prior to signing the pleading, motion, or other paper;[451]

6. Document in your file the factual investigation made; the file should contain facts admissible in evidence or at least facts indicating the probable existence of admissible facts;[452]

7. If critical evidence is possessed by an opposing party, you should request permission to review the evidence before filing the pleading, motion, or other paper;[453]

8. Your interpretation of the law, formulated after sufficient legal research, must be reasonable as evaluated by a competent attorney;[454]

9. Document in your file the legal basis for every claim or defense;[455]

10. Distinguish adverse precedent or present a reasoned argument explaining why prior decisions are wrong;[456]

11. Do not overplead your case;[457]

12. Even if meritorious, do not take a litigation position solely for the purpose of harassment, to cause unnecessary delay, to needlessly increase the costs, or for any other improper purpose;[458]

13. Continually review and re-evaluate your position as the case develops and abandon claims or defenses as soon as it becomes apparent that it is unreasonable to pursue them;[459]

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447. *See* Whittington v. Ohio River Co., 115 F.R.D. 201, 206 (E.D. Ky. 1987).

448. *See* Yeomans, *supra* note 115, at 62.

449. *See supra* notes 88-89 and accompanying text.

450. *See* Pegga, *supra* note 26, at 24.

451. Yeomans, *supra* note 115, at 64. *See supra* notes 91-162 and accompanying text.

452. *See* Yeomans, *supra* note 115, at 64; Whittington v. Ohio River Co., 115 F.R.D. at 207.

453. *See* Whittington v. Ohio River Co., 115 F.R.D. at 207.

454. *See id. See also supra* notes 161-62 and accompanying text.

455. *See* Whittington v. Ohio River Co., 115 F.R.D. at 208.

456. *See* Yeomans, *supra* note 115, at 66.

457. *See* Treece, *Practical Tips to Avoid Sanctions Under Rule 11*, Attorney Sanctions and Federal Rule 11, at 8-9 (presented at the International Association of Defense Counsel 1987 Annual Meeting on Continuing Legal Education) (available in Drake University Law School Library).

458. *See* Whittington v. Ohio River Co., 115 F.R.D. at 208; Fed. R. Civ. P. 11. *See also supra* notes 276-94 and accompanying text.

459. *See supra* notes 295-307 and accompanying text.

14. When serving as local counsel, verify key facts and the applicable law yourself. If you are unable to do so, you are well advised not to sign the pleading, motion, or other paper;[460]

15. Rule 11 motions themselves should not be filed routinely or without careful thought. Prior to filing a Rule 11 motion, it may be appropriate to write opposing counsel and ask for an explanation of what appears to you to be a pleading, motion, or other paper which violates Rule 11.[461]

IV. Conclusion

Since its amendment in 1983, Rule 11 has become the predominant means to sanction attorneys for filing frivolous or harassing pleadings, motions, or other papers.[462] From August 1, 1983, to August 5, 1985, there were more than two hundred reported cases involving Rule 11 sanctions.[463] As of October 1986 more than three hundred cases were reported.[464] As of April, 1989 a Westlaw search reported over two thousand federal cases involving Rule 11.

It has been reported that almost every major lawsuit now includes at least a threat of a Rule 11 motion.[465] Of the Rule 11 motions which have been filed, one source indicates that eighty percent were filed against plaintiffs, and that a violation was found in sixty percent of those cases. Twenty percent of the Rule 11 motions were filed against defendants, in which a violation was found in fifty percent of the cases.[466] Courts appear to be very aggressive in applying Rule 11.[467] Thus, Rule 11 is a major consideration for every attorney handling civil cases in federal court.

The purposes behind Rule 11 are noble and much needed. Only time will tell whether Rule 11 deters or creates more litigation abuses. For the time being, however, one thing is certain—Rule 11 is alive and well. Federal court practitioners must govern themselves accordingly.

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460. *See* Yeomans, *supra* note 115, at 64; Schwarzer, *supra* note 1, at 186. *See also supra* notes 164-73 and accompanying text.

461. *See* Yeomans, *supra* note 115, at 68; Peggs, *supra* note 26, at 24; Frantz v. United States Powerlifting Fed., 836 F.2d 1063 (7th Cir. 1987) (Rule 11 motions are themselves subject to sanctions).

462. Mallen, *Judicial Sanctions 1987*, Attorney Sanctions and Federal Rule 11, at 4 (presented at the International Association of Defense Counsel 1987 Annual Meeting on Continuing Legal Education) (available in Drake University Law School Library).

463. Pope & Benkoczy, *supra* note 3, at 389.

464. *Id.*

465. *Plausible Pleadings*, *supra* note 214, at 631.

466. Address by Bennett A. Webster, Federal Practice Seminar, sponsored by the Iowa State Bar Association (December 9, 1988).

467. *See* Dreis & Krump Mfg. Co. v. International Ass'n of Machinists & Aerospace Workers, 802 F.2d 247, 255-56 (7th Cir. 1986) (stating that Rule 11 will continue to be enforced to the hilt in that circuit); Rachel v. Banana Republic, Inc., 831 F.2d 1503, 1508 (9th Cir. 1987) (Rule 11 is intended to be applied vigorously).