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Rule 11:
Its Use and Abuse and Implications for Professionalism

October 8, 1999
8:30 a.m. to 11:45 p.m.
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Seattle, WA

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Brian J. Waid

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RULE 11: ITS USE AND ABUSE AND IMPLICATIONS FOR PROFESSIONALISM

October 8, 1999
Sheraton Seattle

AGENDA

8:00 a.m. **Registration and Coffee**

8:30 a.m. **FRCP 11**
Brian J. Waid, Esq.
Bendich, Stobaugh & Strong

9:05 a.m. **Civil Rule 11**
Linda Eide, Disciplinary Counsel
Washington State Bar Association

9:45 a.m. **BREAK**

10:00 a.m. **Sanctions on Appeal**
Michael T. Schein, Esq.,
Maltman, Reed, North, Ahrens & Malnati, Inc., P.S.

10:35 a.m. **Rule 11 and Professionalism**
Joseph P. Bennett, Esq.
Hight, Green & Yalowitz

11:15 a.m. **A View from the Bench**
Honorable Faith Ireland, Justice
Washington State Supreme Court
Honorable John C. Coughenour
Chief Judge, U.S. District Court Western District

RULE 11: ITS USE AND ABUSE AND IMPLICATIONS FOR ROFESSIONALISM

THE USE AND ABUSE OF FRCP 11

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Brian Waid is a trial attorney with Bendich, Stobaugh & Strong in Seattle, where he is involved in the Microsoft perma-temps litigation, and other class actions. He is chairperson of the King County Bar Association CLE Committee, and has served as a CLE faculty member or seminar chair on numerous occasions on subjects as diverse as subrogation, ERISA, lender liability, consumer protection and trial practice. Mr. Waid is admitted to practice in four States, six Federal districts, three Federal Circuits and the United States Supreme Court.

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THE USE AND ABUSE OF FRCP 11

By Brian J. Waid

> For the second time in a week, a San Francisco federal judge has slapped plaintiffs lawyers with significant sanctions for bringing a frivolous suit.
>
> In the most recent case, U.S. District Judge Charles Legge on Aug. 27 ordered the labor-side firm Van Bourg, Weinberg, Roger & Rosenfeld to pay Jeffer, Mangels, Butler & Marmaro $89,178 in attorneys fees and costs for filing *Radcliffe v. Rainbow Construction,* 96-1852. He also awarded the Ukiah School District $7,487 in defense costs.
>
> Legge's order came two days after U.S. District Judge Vaughn Walker sanctioned basketball star Latrell Sprewell's lawyers $153,564.[1]

Having actively litigated in both State and Federal Courts in three different states and numerous federal jurisdictions, I am surprised by the extent to which counsel in Washington invoke Rule 11. Rule 11 was never meant to be a "toy," and its use should be the exception rather than the norm. Beyond engendering collateral litigation that consumes the time of the Court, and incurs expense for the parties, indiscriminate use of Rule 11 further erodes civility in litigation to the detriment of all. Nevertheless, Rule 11 can fulfill an important function, in appropriate circumstances, especially related to counsel's responsibilities to the Court and opposing counsel under RPC 3.1 (meritorious claims); 3.3 (candor toward the tribunal) and 3.4 (fairness to opposing counsel).

The purpose of this program is to review the appropriate use, and limitations upon the use, of Rule 11, the proper procedures for asserting and resisting Rule 11 allegations, and the professional ramifications of Rule 11 use and abuse.

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[1] Elias, "*Legge Hits Van Bourg Firm With 96K Sanction Order,*" CalLaw 9/3/99.

I. FRCP 11 APPLICABILITY

Federal Jurisdiction

Despite a natural presumption that a federal court has jurisdiction to impose Rule 11 sanctions in any case before it, jurisdictional issues have nevertheless arisen in the context of removal and remand, cases dismissed due to lack of jurisdiction, and the extent of sanction that can be imposed if the Court lacks jurisdiction.

In *Willys v. Coastal Corp.*, 503 U.S. 131, 112 S. Ct. 1076, 117 L. Ed. 2d 280 (1992), the underlying actions was dismissed due to lack of jurisdiction. Nevertheless, the Supreme Court held that the trial court retained jurisdiction to impose sanctions because the sanction order was "collateral to the merits" and "the interest in having rules of procedure obeyed. . .does not disappear upon a subsequent determination that the court was without. . .jurisdiction. *Id* at 112 S. Ct. 1080-1081; *accord*, *Pan-Pacific v. Pacific Union*, 987 F.2d 594, 596 (9th Cir. 1993).

Even if the dismissal is voluntary, the Court retains jurisdiction to impose sanctions. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1989). In contrast, in *Baddie v. Berkeley Farms, Inc.*, 64 F.3d 487 (9th Cir. 1995), defendants removed and the plaintiffs promptly filed a FRCP 41(a) dismissal of the claims upon which removal was premised. The Court approved remand of the case, and denied sanctions, holding that removal, followed by a Rule 41(a) dismissal designed to defeat federal jurisdiction, is not sanctionable unless the defendant(s) or claims(s) dismissed were joined in bad faith.

Removal creates other jurisdictional issues related to Rule 11. For example, a Rule 11 violation occurring prior to removal must be based on a **state** rule, rather than FRCP 11. *E.g.*, *Dahnke v. Teamsters Local 695,* 906 F.2d 1192, 1200 (7th Cir. 1990). However, (as allowed by the 1993 amendments), sanctions may be imposed, based upon FRCP 11, if counsel advances

further argument, including oral argument, based upon the state court complaint. *Bergeron v. Northwest Publications, Inc.,* 165 FRD 518 (D. Minn. 1996). Sanctions pursuant to FRCP 11 may also be imposed against the defense for improper removal. *Dollar v. General Motors Corp.,* 538, 544 (D. Tex. 1993).

A conflict exists, however, as to the extent of the sanctions that may be imposed for a Rule 11 violation in case dismissed for lack of subject matter jurisdiction. In the Third Circuit, the sanction cannot extend to dismissal with prejudice or default. *In Re Orthopedic "Bone Screw" Product Liability Litigation*, 132 F.3d 152, 157 (3rd Cir. 1997) (inherent power sanction). The Second, Ninth and D.C. Circuits, however, hold that sanctions can include dismissal or default on the merits. *In Re Exxon Valdez*, 102 F.3d 429, 431 (9th Cir. 1996); *Hernandez v. Conriv Realty Assoc.*, 116 F.3d 35, 40 (2nd Cir. 1997) (FRCP 16(f) violation); *Caribbean Broadcasting system v. Cable & Wireless P.L.C.,* 1998 U.S. App. Lexis 16286, at 33 (D.C. Cir. 7/18/98).

Pleading, Motion and Other Papers

In *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 892 F.2d 802 (9th Cir. 1989), *aff'd*, 498 U.S. 533, 111 S. Ct. 922, 112 L. Ed. 2d 1140 (1991), the Court refused to impose sanctions based upon oral representations and testimony. *Accord, Trulis v. Barton,* 67 F.3d 779 (9th Cir. 1995) (attempting to bribe witness to sign declaration that was never filed does not violate Rule 11); *Atlantic Mut. Ins. Co. v. Balfour Maclaine International Ltd.,*775 F. Supp. 101 (S.D.N.Y. 1991), *aff'd* 968 F.2d 196). In contrast, in *Turner v. Sungard Business Systems, Inc.*, 91 F.3d 1418 (11th Cir. 1996), the only "paper" filed by sanctioned counsel was a notice of appearance. The Court nevertheless imposed sanctions because counsel thereafter continued to advocate a merit less claim. *See further, American State Bank v. Pace*, 124 FRD 641 (D. Neb.

1987) (joint pre-trial order is "other paper" within FRCP 11); *Matter of Central ice Cream Co.*, 836 F.2d 1068 (7th Cir. 1987) (notice of appeal is "other paper"); *Burull v. First National Bank of Minneapolis*, 831 F.2d 788 (8th cir. 1987) (false bankruptcy petition which was part of the underlying litigation, but not filed in the proceeding before the Court was not "other paper"); *Curley v. Brignoli Curley & Roberts, Assoc.*, 128 FRD 613 (S.D.N.Y. 1989) (letter sent to Court was not "other paper"); *see further, Primus Automotive Financial Services v. Batarse*, 115 F.3d 644, 648 (9th Cir. 1997) (because trial court considered conduct of counsel and client, sanction award reviewed under 28 USCA §1927 rather than FRCP 11).

Because FRCP 11 extends to "presenting" a paper, sanctions may be premised upon the filing of documents signed by others, such as declarations.

Oral Advocacy

Even if the original pleading was not sanctionable when filed, once a position becomes untenable, continuing advocacy (even oral advocacy) of that position is sanctionable as provided by FRCP 11(b). *See, e.g., Turner, supra.* This obligation is not to be confused with a continuing duty to amend pleadings; rather, (as the Comments clarify) the continuing duty is merely to refrain from continuing to advocate a position that is no longer justified.

However, there must be a "close nexus" between the oral statement and the underlying written paper. *O'Brien v. Alexander*, 101 F.3d 1479, 1489 (2nd Cir. 1996).

1993 Changes to FRCP 11

1. Sanctions are discretionary, rather than mandatory
2. 21-day "safe harbor"
3. Separate document requirement
4. "Likely to have evidentiary support" or "lucky shot" safe harbor

5. Purpose (*i.e.* deterrence) clarified

6. Limitation to least oppressive sanction necessary

7. Joint liability of signatory and law firm or other responsible counsel

8. Discovery not subject to FRCP 11

9. No cross-motion necessary; Court has authority to award sanctions against mover.

10. Not a fee-shifting mechanism; sanctions normally payable to the Court.

Inapplicability to Discovery

Rule 11 has no applicability to discovery and motions under FRCP 26-37. FRCP 11(c)(4).

II. REPRESENTATIONS

If The Pleading Is Not Frivolous, Lack of a Pure Heart Is Not Sanctionable

By its explicit terms, FRCP (b) is stated in the conjunctive, *i.e.* the pleading may not be presented for any improper purpose, must be warranted by existing law (or an extension of existing law), the factual allegations must have an evidentiary basis after reasonable inquiry, and denials must be warranted on the evidence. However, if the pleading is not frivolous, then an improper motive (*i.e.* impure heart) standing alone does *not* give rise to Rule 11 sanctions. *Townsend v. Holman Consulting Corp,* 929 F.2d 1358 (9th Cir. 1990) (*en banc), cited with approval in In Re Keegan Mgmt Co., Securities Litigation*, 78 F.3d 431, 434 (9th Cir. 1996) (applying 1983 rule); *Sussman v. Bank of Israel*, 56 F.3d 450 (2nd Cir. 1995) (pre-litigation letters warning that complaint would be filed do not suffice to demonstrate improper purpose if non-frivolous complaint is thereafter filed).

The Limited "Lucky Shot" Rule

In *In Re Keegan*, the Court held, applying the pre-1993 rule, that an attorney may not

be sanctioned for filing a complaint that is not well-founded, so long as she conducted a reasonable inquiry. *Keegan, supra* 78 F.3d at 434. The Court further held, relying upon *Townsend*, that counsel could not be sanctioned for filing a well-founded complaint merely because she failed to conduct a reasonable inquiry, reasoning:

> We do little to undermine the deterrent goals of the Rule by not sanctioning complaints which have merit on their face. The potential for such sanctions, however, may do much to increase the frequency of the collateral litigation that is Rule 11's unfortunate side effect.

Similarly, pleadings "on information and belief" were allowed prior to the 1993 amendments. *Vista Mfg., Inc. v. Trac-4, Inc.*, 131 FRD 134, 141 (N.D. Ind. 1990); *Zakutansky v. Bionetics Corp.*, 806 F. Supp. 1362, 1363 (N.D. Ill. 1992).

However, the 1993 amendments may change the result in *Keegan*. Now, if counsel does not have evidentiary support for factual contentions when the pleading is filed, counsel must specify that they "are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." FRCP 11(b)(3). Absent this disclaimer, the party opposing the Rule 11 motion must be able to demonstrate evidentiary support for the pleading, at the time of its filing. *O'Brien v. Alexander*, 101 F.3d 1479, 1489 (2nd Cir. 1996); *Garr v. U.S. Healthcare, Inc.*, 22 F.3d 1274, 1279 (3rd Cir. 1994)(rejecting "lucky shot" exception). Nevertheless, the level of evidentiary support is *de minimis*. *O'Brien, supra* ("utterly lacking support").

The "likely to have evidentiary support" safe harbor of FRCP 11(b)(3) is not without criticism. For example, L. Pondrom, "Predicting the Unpredictable Under Rule 11(b)(3): When Are Allegations 'Likely' To Have Evidentiary Support," 43 *UCLA L. Rev.* 1393 (1996), suggests that application of this safe harbor should be limited to circumstances in which the proof of the contention is exclusively in the hands of a third party, or when the statute of limitations is about

to expire, and questions whether discovery should be allowed on 11(b)(3) claims. *See, Arthur Children's Trust v. Keim*, 994 F.2d 1390 (9th Cir. 1993).

The "Pleading As A Whole" Rule

In *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1364 (9th Cir. 1990), the Court rejected strict application of the "pleading as a whole" rule, stating:

> Without applying the pleading-as-a-whole rule, the court refused to affirm awards of sanctions for certain kinds of conduct by emphasizing. . .it must be based on an assessment of the **"significance"** of the claim in the pleading as a whole." The relation of the allegedly frivolous claim to the pleading as a whole is thus a relevant factor, but the mere existence of one non-frivolous claim is not dispositive, as it was in Murphy.

[Emphasis added; citation omitted], *quoting Cross & Cross Properties v. Everett Allied Co.,* 886 F.2d 497, 504 (2nd Cir. 1989); *see, Schutts v. Bentley Nevada Corp.*, 966 F. Supp. 1549, 1560 (D. Nev. 1997). *Townsend* is still the law. *Heim v. Kaminer,* 1999 WL 637799 (9th Cir. 8/10/99)(unpublished).

Applying the rationale of *Townsend,* the Ninth Circuit held that plaintiffs' non-frivolous federal claims did not create a "safe harbor" for its frivolous state law claims. *Pan-Pacific v. Pacific Union,* 987 F.2d 594, 597 (1993).

The Committee that drafted the 1993 amendments rejected the "pleading as a whole" concept, on a vote of 9-3, believing that the safe harbor provisions and other changes were sufficient to protect litigants from Rule 11 motions based upon minor violations. As Prof. Tobias, states, discussing the Advisory Committee deliberations:

> Rule 11 motions should not be prepared--or threatened for minor, inconsequential violations or as a substitute for traditional motions designed to challenge the sufficiency of pleadings.

C. Tobias, "Civil Rights Plaintiffs and the Proposed Revision of Rule 11," 77 *Ia. L. Rev.* 1775,

1780 (1992); *cf., Yagman v. Republic Insurance*, 987 F.2d 622 (9th Cir. 1993) (a statement subject to misinterpretation is not sanctionable if a proper meaning is ascertainable from the pleading).

Defendants Can Be Sanctioned Too

Plaintiffs' counsel frequently believe, rightly or wrongly, that Rule 11 only seems to apply to them. This belief is not without some foundation. *E.g., Larez v. Holcomb,* 16 F.3d 1513, 1522 (9th Cir. 1994)(Denying request for sanctions against *defense* counsel for filing jury demand in response to post-trial motion for statutory attorney's fees, and stating: "[W]e must exercise *extreme caution*...where such sanctions emerge from an attorney's efforts to secure the court's recognition of new rights.") [Emphasis added].

Nevertheless, in addition to imposition of Rule 11 sanctions for pleadings such as a wrongful removal, defendants can be sanctioned for denying allegations that it knows to be true, *Bodenhammer Bldg. Corp. v. Arch. Research Corp.,* 989 F.2d 213 (6th Cir. 1993), filing affirmative defenses that violate Rule 11, *Gargin v. Morrell*, 133 FRD 504 (D. Mich. 1991), filing a frivolous counterclaim, *Doe v. Maywood Housing Authority,* 71 F.3d 1294, 1298-1299 (7th Cir. 1995), or for filing a frivolous Rule 11 motion. *Williams v. General Motors Corp.,* 158 FRD 510 (M.D. Ga, 1993). There may, however, be greater latitude afforded the filing of a compulsory counterclaim. *Geisinger Med. Ctr. v. Gough*, 160 FRD 467 (D. Pa. 1994).

The United States is *not immune* from FRCP 11 sanctions. *Mattingly v. United States,* 939 F.2d 816 (9th Cir. 1991).

If the Rule 11 motion itself violates Rule 11, then there is no need for the non-movant to file a cross-motion, in order for sanctions to be imposed against the moving party. *Advisory Committee Notes.*

III. SANCTIONS (PROCEDURE)

Notice Requirements--Opponent's Motion

The 1993 amendments substantially tightened the procedures applicable to Rule 11 motions in two important respects. First, the motion must be in a separate document that specifies the conduct alleged to violate FRCP 11(b). FRCP 11(c)(1)(A). Second, the motion cannot be filed "within 21 days" of service. Absent compliance with these two limitations, the Court may not impose sanctions based upon the motion.

The purpose of the 21-day safe harbor is to allow counsel to fulfill their duty of candor to the tribunal, under RPC 3.3, by withdrawing an offending pleading without fear that the withdrawal will be considered as an admission that sanctions are warranted. The courts have been unanimous in denying Rule 11 motions filed less than 21 days after service. *E.g.,United Food Workers Union Local No. 576 v. Four B Corp.,* 893 F. Supp. 980 (D. Kan. 1995), *aff'd* 83 F.3d 433 (10th Cir.); *Sears , Roebuck & Co. V. Sears Realty Co., Inc.,* 932 F. Supp. 392, 408-409 (N.D.N.Y. 1996)(letter requesting withdrawal of motion insufficient to satisfy 21-day safe harbor). The 21-day notice safe harbor protects the offending party even if opposing counsel has indicated a willingness to persist in meritless claims. *Ridder v. City of Springfield,* 109 F.3d 288, 296 (6th Cir. 1997). The 21-day notice period must expire prior to final judgment or judicial rejection of the offending contention. *Id* at 109 F.3d 299. Accordingly, if the Rule 11 violation relates to a motion, for example, then decision on the motion prior to expiration of the 21-day safe harbor period moots the Rule 11 claim because the offending party did not have the full notice period in which to withdraw the offending pleading.

However, the specificity and separate document requirements have not been so rigidly enforced. For example, in *In Re Mahendra*, 131 F.3d 750, 759 (8th Cir. 1997), the Court held

that separate document and specificity requirements could be met by a supporting brief that detailed the Rule 11 violation. However, in *Mahendra*, the brief was in fact served with the motion. In *Ridder v. City of Springfield*, 109 F.3d 288 (6th Cir. 1997) the Court allowed a Rule 11 motion even though it included alternative grounds for imposing sanctions, based upon the same alleged misconduct.

Notice Requirements--Court's Own Motion

The 21-day safe harbor does *not* apply to a show cause order issued by the Court *sua sponte*. FRCP 11(c)(1)(B). However, the specificity requirement is applicable to the Court's *sua sponte* order to show cause under Rule 11. *Nuwesra v. Merrill Lynch, Fenner & Smith,* 174 F.3d 87, 92-93 (2nd Cir. 1999). Also, as provided by FRCP 11(c)(2)(B), after dismissal, the Court may *not* award monetary sanctions based upon its *sua sponte* Rule 11 show cause order.

Evidentiary Hearing

Due process requires notice and an opportunity for a hearing before imposition of sanctions. *Weissman v. Quail Lodge, Inc.*, __ F.3d __ (9th Cir. No. 98-15131, 6/10/99); *Nuwesra v. Merrill Lynch, Fenner & Smith, supra* at 174 F. 3d 92-93; *Ames Dept. Stores, Inc. v. Sayre Cent. Corp.*, 76 F.3d 66, 70 (2nd Cir. 1996). However, this does not mean that a "full evidentiary hearing" is required. *Klein v. Ulter Savings Bank (In Re Stein)*, __F.3d ___(2nd Cir. 10/20/97, No. 95-5133) (applying FRBP 9011); *see further, Pan-Pacific v. Pacific Union,* 987 F.2d 594, 597 (9th Cir. 1993)(notice and an opportunity to be heard "but no more."), *but cf., Nuwesra, supra* at 174 F.3d 93-94 (Court's failure to question counsel at the hearing about "other specific instances of conduct for which it later sanctioned" him did *not* provide a reasonable opportunity to respond).

Deferral/Discovery

Filing of a Rule 11 motion should occur promptly after the inappropriate paper (or argument thereon) is filed. However, one purpose of the 1993 amendments is to avoid costly and distracting satellite litigation, that had become a feature of Rule 11 practice. Accordingly, one option open to the Court when a Rule 11 motion is filed is to defer its resolution until the conclusion of the case. *Cf., Cunningham v. Hamilton County, Ohio,* _ U.S. __, 119 S. Ct. 1915. 1923 (1999)(Rule 37(a) sanction). Deferral allows the Court "to gain a full sense of the case and to avoid unnecessary delay of disposition of the case on the merits." *Lichtenstein v. Consolidated Services Group, Inc.,* 173 F.3d 17, 23 (lst Cir. 1999).

Who Can Be Sanctioned?

As provided in the 1993 amendments, the signatory is not the only attorney against whom sanctions can be imposed. *Cf., Triad Systems Corp. v. Southeastern Express Co.,* 64 F.3d 1330, 1339 (9th Cir. 1995) (prior to 1993 amendments, only signatory could be sanctioned). Law firms are now jointly responsible for Rule 11 violations of its partners, associates and employees, absent extraordinary circumstances. FRCP 11(c)(1)(A). Furthermore, the Court is authorized to impose sanctions against the attorney's law firms, or parties, who are **responsible** for the violation. Non-signatories are now clearly subject to sanctions. *Bergeron, supra.*

IV. SANCTIONS (FORM)

Discretionary

Under the 1993 amendments, sanctions are clearly *discretionary*. **This change applies retroactively**. *Simpson v. Lear Astronics Corp.*, 77 F.3d 1170 (9th Cir. 1996); *Moore v. Local 569 of Int'l Brotherhood of Electrical Workers*, 53 F.3d 1054 (9th Cir. 1995).

In determining whether the court should exercise its discretion, the Advisory Committee

Notes suggest a number of factors to be considered, such as: (a) willfulness; (b) evidences a pattern of conduct; (c) whether the entire pleading was offensive; (d) similar past conduct; (e) intent to injure; (f) effect on the litigation process; (g) whether the responsible person is trained in the law. Thus, a *pro se* litigant will be held to the standard of "what is objectively reasonable for a pro se litigant" and *pro se* status "is relevant to the choice of an appropriate sanction." *Zegula v. United States,* 954 F.2d 728 (9th Cir. 1992)(unpublished).

In determining whether to exercise its discretion, the court may also consider whether the moving party has been "an equal contributor to the disharmony" in the proceedings. *See, Walker v. City of Bogalusa,* 168 F.3d 237, 241 (5th Cir. 1999) (Both parties' motions for sanctions on appeal denied. "Briefs in this Court were long on hyperbole and personal attacks and short on thoughtful analysis."); *cf., St. Jarre v. Heidelberger Druckmaschiner A.G.*, 816 F. Supp. 424, 427 (E.D. Va. 1993), *aff'd,* 19 F.3d 1430 (4th Cir. 1994); *Kassner v. Ashley Plaza Mall Assoc.*, 758 F. Supp. 939, 941 (S.D.N.Y. 1991); *Mescal v. U.S.*, 161 FRD 450, 455 n. 11 (D.N.M. 1995).

Furthermore, the reasonableness of counsel's inquiry may depend upon the time available to investigate. *E.g., Garr v. U.S. Healthcare, Inc.,* 22 F.3d 1274, 1279-1280 (3rd Cir. 1994). Thus, the investigation of an attorney retained close to expiration of the statute of limitations will not be subject to the same level of scrutiny as counsel who has ample time to investigate.

These considerations, of course, provide fertile ground for discovery by both the mover and the party opposing the motion.

Sole Purpose--Deterrence

The 1993 amendments clarify that deterrence, rather than fee-shifting, is the purpose to be served by FRCP 11. A Rule 11 sanction, therefore, is not meant to reimburse opposing parties for their costs of defense, but to deter baseless filings. *Anderson v. County of Montgomery,* 111

F.3d 494, 502 (7th Cir. 1997). Accordingly, absent *extraordinary* circumstances, monetary penalties should be paid into court. Furthermore, if the Court awards fees and expenses against either party (*i.e.* mover *or* party opposing the motion), the amount is limited to those fees and expenses "incurred as a direct result of the violation." *But see*, *Schutts, supra* 966 F. Supp. 1560 ("compensatory" fees awarded from date counsel received notice of controlling authority, plus additional sanction to "vindicate the court's own interest").

Least Oppressive Sanction/Nonmonetary Sanctions

The 1993 amendments make explicit that, if the Court decides to exercise its discretion, it must impose the least oppressive sanction necessary to achieve the rule's deterrent purposes. *Merriman v. Security Ins. Co. of Hartford,* 100 F.3d 1187, 1194 (5th Cir. 1996)(compensatory attorney's fees is appropriate to deter abuse). In this context, the Advisory Committee Notes suggest that the Court has a variety of sanctions available to it, such as striking the offending paper, issuing an admonition, reprimand or censure, requiring participation in seminars or other educational programs, or referring the matter to disciplinary authorities.

Attorney's Fees/Expenses

If awarded, the amount is normally determined by the prevailing rate in the community. *Binghamton Masonic Temple, Inc. v. Bares*, 168 FRD 121 (S.D.N.Y. 1996). For example, in the Latrell Sprewell litigation, the Northern District of California ordered $153,564 in sanctions against plaintiff's counsel, approving rates $560 per hour for Los Angeles counsel and $510 per hour for New York counsel. Elias, *"Huge Sanctions for Spree's Team,"* (CalLaw 8/27/99).

However, the Court must also consider the financial resources of the offending party, and the amount necessary to deter similar activity. *Anderson v. County of Montgomery, supra* 111 F.3d 502-503 (sanctioned attorney's financial circumstances *waived* because he "failed to effec-

tively" bring them up and stated he was not relying upon them).

If the Rule 11 violation is due to an error as to interpretation of law, rather than fact, then FRCP 11(c)(2)(A) prohibits a monetary sanction against the *party* (but allows a monetary sanction against the lawyer). For *sua sponte* motions by the Court, monetary sanctions are prohibited if the case has been voluntarily dismissed or settled. The Second Circuit recently concluded that attorneys' fees may *never* be awarded by the Court pursuant to *sua sponte* Rule 11 motion. *Nuwesra, supra* 174 F.3d 94-95 (but penalty payable to the court may be imposed).

The Court may include in the award the reasonable expenses and fees incurred in presenting or opposing the motion. *Margolis v. Ryan,* 140 F.3d 850, 854 (9th Cir. 1998) (overruling prior Ninth Circuit precedent under pre-1993 Rule 11).

V. ORDER AND APPEAL

Form of Order

The Order must describe the specific conduct being sanctioned and explain the basis for the sanction imposed. FRCP 11(c)(3). If the order is cursory or unclear, then it will be reversed. *Katz v. Household Int'l, Inc.,* 36 F.3d 670 (7th Cir. 1994).

Requirement That All Sanctioned Parties Notice Appeal

If counsel is sanctioned, a notice of appeal filed on behalf of the party must include an indication that the appeal is also on behalf of the attorney. If the sanctioned party's name does not appear in the notice of appeal, the appellate court will be without jurisdiction. *Coleman v. Marshall, Dennehey, Warner, Coleman & Goggin*, 977 F.2d 93 (3rd Cir. 1992).

Standard of Review

Review of a trial court's Rule 11 decision is under the abuse of discretion standard. *Cooter & Gell, supra.* However, if the trial court relied upon an erroneous view of the law, then

it abused its discretion. *Keegan, supra; Weissman v. Quail Lodge, Inc.*, _ F.3d __ (9th Cir. No. 98-15131, 6/10/99).

Timing of Appeal

The Ninth Circuit has previously held that an order against a non-party (*e.g.* counsel) is final and appealable upon imposition of the sanction. *Triad Systems Corp. v. Southeastern Express Co.*, 64 F.3d 1330, 1338 (9th Cir. 1995). However, *Triad* is now open to question because of the Supreme Court's recent decision in *Cunningham v. Hamilton County, Ohio,* _ U.S. __, 119 S. Ct. 1915 (1999). In *Cunningham,* the Supreme Court held that a FRCP 37(a) discovery sanction against counsel (who was also disqualified), is not appealable until final judgment in the case. Quite obviously, this presents a bit of a quandary for counsel who must decide both whether and *when* to appeal a Rule 11 sanction.