The Cost of Rule 11

William W. Schwarzer
UC Hastings College of the Law, schwarzw@uchastings.edu

Jerold S. Solovy

Follow this and additional works at: https://repository.uchastings.edu/faculty_scholarship

Recommended Citation
Available at: https://repository.uchastings.edu/faculty_scholarship/1186

This Article is brought to you for free and open access by UC Hastings Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of UC Hastings Scholarship Repository. For more information, please contact wangangela@uchastings.edu.
The Cost of Rule 11

Is it the death knell of our adversary system or the salvation of our courts?
Some condemn Rule 11 as the death knell of the adversary system, shackling innovative and vigorous advocacy. Others praise it as the salvation of the civil-justice process, bringing litigation abuse to an end. I believe that the truth lies somewhere in between. Rule 11 is a good rule, meeting a definite need, but unless properly used by lawyers and judges, it is susceptible to abuse.

On September 21, 1983, Robin Albright filed suit in federal district court against nine drug manufacturers charging that the tetracycline which they manufactured had caused her teeth to become permanently stained. One of the manufacturers was Upjohn Company. Her complaint alleged that when she was a child, physicians had prescribed various tetracycline drugs, some of which she named. Upjohn, whose drugs were not identified in the complaint, made a motion for summary judgment to which the plaintiff never responded. However, she did file an amended complaint dropping Upjohn. After its motion was granted, Upjohn moved for sanctions under Rule 11.

The trial court denied the request, but on appeal the Sixth Circuit reversed and held that it was an abuse of the court’s discretion not to award sanctions. The court of appeals accepted Upjohn’s argument that plaintiff had had ample time to conduct a reasonable investigation before filing the complaint, and, had she done so, she would have learned before bringing suit against Upjohn that there was no evidence that she had ever taken one of its products.

The Albright case dramatically illustrates the purpose of Rule 11—to impose on lawyers a duty to conduct a reasonable investigation before filing a paper in court, whether it is a complaint, an answer, or a motion. As Professor Arthur Miller of Harvard Law has put it, the rule is intended to make lawyers stop and think before filing.

The Advisory Committee on the Civil Rules further explains its purpose in these words:

Greater attention by the district courts to pleading and motion abuses and the imposition of sanctions, when appropriate, should discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses.

It is difficult to argue with this purpose. There has been abundant evidence of dilatory and abusive tactics, resulting in costs and delays sometimes frustrating justice altogether. Even the most vigorous opponents of Rule 11 will, I expect, concede that at some point the imposition of sanctions becomes appropriate.

William W. Schwarzer is a U.S. district judge in San Francisco.

I always hesitate to disagree with Judge Schwarzer on anything. However, I do disagree with his conclusion that Rule 11 is having a salutary effect on the litigation process. In fact, the contrary is true.

One only has to look at the Advisory Committee Comments to Rule 11 to see that it has not fulfilled the expectations of the drafters. For example, the Comments state that Rule 11 is designed to “streamline the litigation process” and that it is not intended to spawn “satellite litigation.”

There are now more than 1,000 reported Rule 11 decisions and undoubtedly hundreds, if not thousands, of unreported Rule 11 opinions. Thus, the litigation process has not been streamlined and satellite litigation has become a fact of life under Rule 11. Indeed, Rule 11 is quickly outpacing RICO as the cottage industry of the 1980s. Undoubtedly in this new decade, every case will involve some form of Rule 11 motion and resulting decision.

The Advisory Committee Comments also state that the rule is not intended to “chill an attorney’s enthusiasm or creativity in pursuing factual or legal theories.” We have seen courts impose sanctions in amounts totaling tens of thousands and hundreds of thousands of dollars. I submit that sanctions of this magnitude chill, and probably kill, a lawyer’s ardor and enthusiasm for forging new legal frontiers.

"Wisdom of Hindsight"

The Comments also state that the court should not use the “wisdom of hindsight.” However, it is apparent that many Rule 11 decisions are in fact based on hindsight rather than an effort to determine what the lawyer should have done when the pleading or paper was filed. Some courts have an unfortunate tendency, having reached a decision, to conclude that anyone who advocated a contrary position failed to perform a reasonable inquiry.

What the court may conclude in hindsight was the critical issue, however, may have been one of a myriad of factual and legal issues facing a lawyer at the time he or she filed a complaint or other pleading. And the critical fact or legal analysis that now seems obvious to the court was not clear at the time of filing. In this respect, courts often ignore the limited facts typically available to plaintiffs before filing a complaint and, Judge Schwarzer’s comments notwithstanding, the unwillingness of defendants to cooperate in providing information to potential plaintiffs.

Another classic example of hindsight in Rule 11 occurs when sanctions are imposed after a full trial.
The Compleat Lawyer

PRO
(Continued from page 27)

The difficulty, of course, lies in defining that point clearly so that lawyers will know what is expected of them. Opponents argue that often the subjective judgment of the particular judge will determine whether sanctions are imposed. But that is as true of Rule 11 as it is of so many decisions judges are called on to make—judicial discretion is inherent in the system, and lawyers are accustomed to dealing with it.

Albright illustrates a pretty clear violation of Rule 11. A lawyer should understand his or her obligation to investigate whether there are facts to support a claim against a defendant before naming that defendant in the complaint. That does not mean, of course, that the lawyer must have a summary judgment-proof case—only that the claim, defense, or other paper, is "well grounded in fact."

Sometimes the facts are not as readily accessible as they were to Albright, who only had to check with her physicians and hospitals to find out which drugs had been prescribed. In other cases, the facts may be largely under control of the prospective defendant. But that is no reason for the plaintiff's lawyer not to conduct a reasonable investigation before filing.

Get the Client's Story

Obviously, the lawyer should begin by getting the client's story. But a reasonable investigation does not stop there. The lawyer should then look for corroborations of that story. He or she would examine records and documents, interview witnesses, consult public records, and perhaps even request critical information from the prospective defendant itself.

Is it absurd to suggest, for example, that a person who feels discriminated against by the employer should, before filing, ask the employer for relevant data bearing on the treatment of persons of a different gender or race? Not at all.

The corollary of protecting prospective defendants against frivolous claims is to require them to respond reasonably and fairly to requests intended to determine whether a claim would be frivolous.

The same duty to investigate rests on defendants. The day of boilerplate defense is over. There is no more reason why a plaintiff should be burdened with having to litigate baseless defenses than for a defendant to defend against frivolous claims.

Some argue that the effect of all this is to make unnecessary work for lawyers, and more expense for clients. If requiring lawyers to do a reasonable amount of preparation before filing will result in added cost, then that is a necessary cost that is well justified. For the alternative is to permit dilatory and abusive practices making litigation more burdensome and much more costly in the end.

Rule 11 also requires the lawyer to satisfy himself or herself that the paper being filed is "warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law." This has been the most controversial part of the rule. The Advisory Committee stated that the rule is not intended to "chill an attorney's enthusiasm or creativity in pursuing factual or legal theories." But judges do not necessarily agree on where to draw the line on legitimate advocacy.

Is the Argument Reasonable?

This is not a ground for condemning the rule. Implicit in it is an intent to deter lawyers from getting as close to the line as they can—from pushing the rule to see what they can get away with. In preparing an argument, a lawyer should ask not whether it will lead to sanctions, but whether it is an argument that can reasonably be made in light of how the law is developing and that has a chance of being persuasive.

Arguments may not succeed the first time—sometimes it takes persistence to prevail. The rule does not punish persistence, but it does warn lawyers against filing a paper for "any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." Once something has been finally and authoritatively decided, or the court has made it clear that it will stand on its ruling, pursuing the matter may be evidence of abuse or harassment.

The Rule Itself

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record ... . The signature of any attorney ... constitutes a certificate by the signer that the signer has read the pleading, motion or other paper (and) 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 ... If a... 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 paper, including a reasonable attorney's fee.

Rule 11,
Federal Rules
of Civil Procedure

28
Rule 11 recognizes that there must be an end to litigation over an issue.

By the same token, the drafters of the rule stated that they did not want its benefits to be "offset by the cost of satellite litigation over the imposition of sanctions." This worthy goal has not always been achieved. Lawyers have tended to move for sanctions much more frequently than is justified or desirable. And courts have not always acted firmly to control litigation over sanctions.

The profusion of activity under Rule 11 is a genuine problem that must be addressed. Lawyers must recognize that Rule 11 is not a fee-shifting rule—it does not entitle one side to recover fees from the other simply because it has prevailed. Sanctions under Rule 11 are appropriate only in cases of abuse and those, fortunately, are not common. The answer to this problem, however, is not to eliminate Rule 11 but to improve its administration.

Who Should Be Sanctioned?
The rule permits a court to impose sanctions either on the lawyer who signed the offending paper or on the party the lawyer represents; problems can arise in deciding who should be sanctioned. The court may have to determine who is responsible. In most cases, this determination can be avoided since the lawyer who signed the paper is presumptively responsible. Of course, if the lawyer then proceeds to try to blame the client, serious difficulties follow. The lawyer becomes disqualified and the attorney-client privilege is in jeopardy. Fortunately, this is a situation that rarely arises and, with proper judicial management, should be avoidable. But again, the proper approach is to address the specific problem, not to condemn the rule.

On balance, Rule 11 is useful and necessary. To be effective, it must be carefully administered. Both lawyers and judges must recognize that it addresses the exceptional, not the routine case. Perhaps experience under it will suggest some revisions. Repeal of the rule, however, would send the wrong message.

CON
(Continued from page 27)
on the merits. Cases survive motions to dismiss, motions for summary judgment, and motions for directed verdicts. The trial court permits the case to go to jury. When the jury returns the verdict in favor of one litigant, the thrill of victory for the triumphant party is often followed with a Rule 11 motion to make sure that the final arrow pierces the heart of the vanquished party and their counsel. All too often sanctions are granted in these situations. It is hard for me to believe that "hindsight" is not involved when sanctions are imposed after a party has jumped all the hurdles (motions to dismiss, motions for summary judgment, and motions for directed verdict), but nonetheless loses the ultimate race.

Finally, the Advisory Committee Comments state that Rule 11 "does not require a party or an attorney to disclose privileged communication or work product" in order to defend against a Rule 11 motion. Although the courts have paid precious little attention to this issue, disclosure of privileged information and work product has proven to be a vexing problem.

Both court opinions and commentators have stated that the privilege and work-product doctrine need not be invaded in order to defend against a Rule 11 motion. In fact, a lawyer is placed in a terrible dilemma when a Rule 11 motion is filed jointly against the lawyer and his or her client.

Terrible Dilemma
Number one, when a lawyer and client are faced with a joint motion for sanctions, a conflict of interest may arise that requires the client to retain separate counsel (hardly a cost-saving device).

Number two, commentators have suggested that when you are retained by a client you should make a "Miranda-type" Rule 11 warning stating that privileged information may be divulged if a Rule 11 motion is filed. Such a warning is not calculated to foster the communication between client and counsel that the privilege was developed to protect.

A lawyer owes his or her primary duty to the client. The mere fact that a lawyer must defend against a Rule 11 motion should not mean that a lawyer is permitted to divulge privileged information, even though his or her reputation may be at stake. After all, the opposing party has launched the charge against both the lawyer and the client. The lawyer's highest duty of loyalty to his or her client remains fully intact.

The lawyer may have carefully and reasonably investigated pertinent facts and researched all of the applicable law. Nonetheless, the client may have adventantly or inadvertently misled the lawyer. I submit that under the applicable canons of ethics, the lawyer in a Rule 11 sanction proceeding must protect the privilege at all costs—even to the cost of the lawyer's reputation, pocketbook, or even his or her license to practice before the federal court.

The foregoing represents just some of the general mischief created by Rule 11. We operated under the 1938 Federal Rules of Civil Procedure fairly well for nearly five decades. In 1983, the drafters of Rule 11 decided that "abusive" litigation had to be curtailed. Their solution was to amend Rule 11. As noted above, rather than curtailing the filing of lawsuits, Rule 11 has spawned a tremendous amount of collateral sanctions litigation, which
has added to the already large caseload of district and appellate judges.

Without saying so, Rule 11 has repealed the philosophy of liberal rules of pleading and discovery that were explicit and inherent when the Federal Rules were adopted in 1938. Now a lawyer would be a fool not to plead evidence. Further, Rule 11 decisions are quite clear that liberal rules of discovery cannot be used to escape the lash of Rule 11 sanctions.

**No Predictability**

The most telling condemnation of Rule 11 is that it carries with it no certainty because sanctions are imposed inconsistently and with utter unpredictability.

A major factor leading to this unpredictability has been the failure of courts to agree that there is a single purpose for the rule. Three purposes have been espoused: punishment, deterrence, and compensation. The failure to agree on the true purpose leads to a tremendous variation in results, including both the decision as to whether the rule has been violated itself and the type of sanctions to be imposed.

There is at least some hope that the confusion as to the purpose of Rule 11 will be eliminated by the Supreme Court’s decision in *Pavelic & LeFlore v. Marvel Entertainment Group*, 110 S. Ct. 456 (1989). In *Pavelic*, the court held that Rule 11 sanctions could be imposed only on the signing attorney, and not on the attorney’s firm. The court stated that the purpose of the rule is not compensation: “The purpose of the provision in question, however, is not reimbursement but ‘sanction.’” *Pavelic* therefore established that punishment, and the accompanying “economic deterrence upon the signing attorney,” is the primary purpose of Rule 11.

It would be naive to think, however, that *Pavelic* will suddenly eliminate the mischief wrought by the tension between the goals of punishment and compensation. It is apparent that many courts still view compensation as the primary purpose of the rule. These courts seem to favor the English system where the losing side pays the opponent’s attorney’s fees. Payment of the opposing side’s attorney’s fees remains by far the most frequent “punishment” imposed under Rule 11. Yet the problem will persist as long as the “punishment” dished out remains “compensation” of the opposing side. This is obviously contrary to the American rule and contrary to our tradition of free access to the courts.

Moreover, the studies of Rule 11 demonstrate that the sting of the rule is most often directed toward Title VII and civil rights plaintiffs. The law is intended to encourage the vindication of the public policies behind these statutes, but individual Title VII and civil rights plaintiffs and their counsel can hardly afford to pay the large sanctions that have been imposed in these cases. Thus, Rule 11 has certainly chilled the very type of litigation that our society wishes to encourage.

As noted above, Rule 11 also chills a great deal of advocacy directed toward expansion of the law’s horizons. Although the Second Circuit in *Eastway Construction Corp. v. Sherman*, 762 F.2d 243 (1985), stated that advances in the law almost always are greeted by initial failure, the Second Circuit also held that a lawyer could be sanctioned for arguing against settled precedent. How is a lawyer to know when Rule 11 permits an argument for the modification or reversal of law or whether such an argument will meet with Rule 11 sanctions? The answer cannot be found in the rule itself, the Committee Comments, or the applicable appellate court decisions.

One of the primary goals of the ABA and its Litigation Section is to enhance civility among lawyers. The filing of Rule 11 motions and the inevitable Rule 11 letter wars, which have become commonplace in metropolitan areas, have had the opposite effect. It is difficult to remain civil to your opponent when he or she seeks large monetary sanctions against you or your client.

Rule 11 is also misdesigned because it robs the trial court of all discretion. The rule speaks in mandatory terms. Thus, the trial court must order sanctions if the rule is violated. At the very least, the rule should be changed to state the trial judge “may” impose sanctions, rather than mandate that the trial judge “must” impose sanctions.

**The Matter of Reputation**

Of course, being sanctioned places a great stigma on a lawyer. Thus, even though the sanction is in a paltry amount, counsel must appeal the decision to protect his or her reputation. In addition to the concern about reputation, sanctions are often followed by disciplinary proceedings either by the federal court or the state disciplinary system. Accordingly, merely paying the amount of the sanction does not solve the lawyer’s problem. Further complicating the issue is the definition by the Seventh Circuit that a violation of Rule 11 is the equivalent of “malpractice.” This ruling has grave implications regarding a lawyer’s malpractice insurance.

If all of the foregoing were not sufficient, one should also bear in mind that litigants and their counsel obtain precious little due process in the sanctions proceeding. Courts frequently hand out sanctions in large amounts without affording any discovery or an evidentiary hearing. A litigant with the smallest claim gets more due process than is normally afforded in a Rule 11 proceeding. The problem is also magnified by the fact that many appellate courts grant sanctions following an unsuccessful appeal.

The courts operated quite well before the birth of Rule 11. We do not need Rule 11 to counter litigation abuse. The courts have available Section 1927. The courts also have inherent power to punish improper conduct.

The profession would do well to effect the repeal of Rule 11 as rapidly as possible.
"The practicing bar has waited years for a book like Across State Lines. . . . Robert A. Sedler has filled a void that has long existed in legal literature. He has authored a well written, practitioner-oriented discussion of this important, but often misunderstood, area of law. . . . Through his efforts, a succinct handbook on conflicts has finally been made available not only to the practicing bar, but also to anyone else who seeks to understand how to handle a conflicts' problem."

—Michael P. Cox, Michigan Bar Journal

**Strategic options and actual outcomes**

Summarizing the different approaches that can be followed and their likely outcomes in various courts, Across State Lines will help you recognize:

— major considerations influencing choice-of-law decisions
— constitutional limits and crucial procedural issues
— relevant fact-law patterns, "long-arm" situations, and full-faith-and-credit issues
— when to go forum-shopping and how to counter it

**Specific examples in specific areas of law**

The book covers those substantive areas in which choice of law can be an issue, focusing particularly on cases involving:

- interstate accidents
- products liability
- property and contracts
- "the interstate family"

Numerous hypothetical situations are proposed in which conflict of laws might be a factor, and a multitude of actual cases and their results are cited. A Table of Cases is included.