

# RECENT DEVELOPMENT

## Current Status of Rule 11<sup>1</sup> in the Ninth Circuit and Washington State

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### I. INTRODUCTION

In 1983, Rule 11<sup>2</sup> of the Federal Rules of Civil Procedure was amended to provide courts with enforcement bite to control abuses in the filing of frivolous or harassing motions and pleadings. The 1983 amendments to Rule 11 directed the

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1. FED. R. CIV. P. 11 and SUP. CT. R. 11, respectively.

2. FED. R. CIV. P. 11 provides in relevant part:

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. . . . 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 off the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

(As amended Apr. 28, 1983, eff. Aug. 1, 1983; Mar. 2, 1987, eff. Aug. 1, 1987).

courts' attention away from simply striking the offending material and toward taking disciplinary action against the attorney or party in violation of the rule. In addition to pleadings, which were covered under the rule prior to its amendment, the rule's scope includes the signing of motions and "other papers."<sup>3</sup> The drafters' avowed purpose in amending Rule 11 was to "discourage dilatory or abusive tactics and help streamline the litigation process by lessening frivolous claims and defenses."<sup>4</sup>

This concern over unreasonable and vexatious litigation is not new.<sup>5</sup> The courts have long exercised the "inherent power . . . to levy sanctions in response to abusive litigation practices."<sup>6</sup> However, the new emphasis on attorney sanctions, coupled with the opportunity Rule 11 presents for fee-shifting, lifted the rule from obscurity to prominence in the eyes of the courts.

Fordham University Professor George M. Vairo has observed that between August 1, 1983, and December 15, 1987, there were 688 Rule 11 decisions reported in federal courts;<sup>7</sup> and sanctions were requested against opposing counsel 680 times.<sup>8</sup> Since 1987, the use of Rule 11 to sanction attorney conduct has continued unabated. By August, 1989, the Ninth Circuit Court of Appeals was able to remark that "fully a thousand opinions have been published explaining the Rule

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3. The State of Washington adopted essentially the same language when amending its SUP. CT. R. 11 ("CR 11") in 1985, substituting only the words "legal memoranda" for "other papers." For a discussion of the different possible interpretations of this variation, see CIVIL PROCEDURE BEFORE TRIAL DESKBOOK 11 (Supp. 1986). Under the pre-1983 FED. R. CIV. P. 11, which was substantially the same as the pre-1985 Washington Rule 11, the term "[e]very pleadings" had been construed to apply to motions and other papers through reference to FED. R. CIV. P. 7(b)(2). FED. R. CIV. P. 11 advisory committee's note to the 1983 amendment.

4. FED. R. CIV. P. 11 advisory committee's note to the 1983 amendment.

5. Congress first passed legislation to provide for the award of "costs" to be satisfied by an attorney who multiplied proceedings "unreasonably and vexatiously" in 1813. Act of July 22, 1813, 3 Stat. 21, now codified as amended at 28 U.S.C. § 1927 (1989). That statute, as amended in 1980, also permitted an award of attorney's fees reasonably incurred, but the high standard of "unreasonable and vexatious" conduct continued to limit awards under this rule. See Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 182 (1985).

6. See *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765 (1980). In addition to various federal statutes that permit shifting of legal costs, including attorney's fees, to prevailing parties in certain actions, Rules 26(a) and 37(b) of the Federal Rules of Civil Procedure provide for sanctions to deter improper conduct with respect to discovery.

7. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 199 (1988).

8. *Id.*

and honing its interpretation.”<sup>9</sup>

For better or worse, the rapid rise of this new enforcement weapon has not resulted in its uniform application. As Judge William W. Schwarzer of the Northern District of California, a noted supporter of a vigorous Rule 11, remarked: “[i]n interpreting and applying Rule 11, the courts have become a veritable Tower of Babel.”<sup>10</sup> Similarly, a reporter for the Third Circuit Task Force has also concluded that the rule is not uniformly interpreted or enforced.<sup>11</sup> In fact, the reporter noted that there is conflict among the circuits on “almost every important issue of Rule 11.”<sup>12</sup>

Not surprisingly, the confusion surrounding the application of Rule 11 has spawned numerous treatises, commentaries and studies. Unfortunately, there is also little consensus among the commentators: they agree only in advising attorneys to know the standards of their jurisdiction and to be wary when practicing in unfamiliar districts.<sup>13</sup> Consequently, it would be a Herculean task to discuss all of Rule 11’s unfolding developments. Therefore, this Paper will concentrate on the development of the standards applied in the Ninth Circuit and in the Washington State courts.

## II. PURPOSE AND SCOPE OF RULE 11

The Ninth Circuit has recognized that the 1983 amendments to Rule 11 were part of an across the board effort by the courts and Congress to encourage sanctions.<sup>14</sup> In addition to the Rule 11 modifications adopted in 1983, Congress also authorized sanctions for abuse of pretrial scheduling<sup>15</sup> and abuse of discovery processes.<sup>16</sup> Furthermore, Congress did not intend for the amendments to be interpreted as repealing or modifying the “existing authority of federal courts to deal with abuses of counsel under 28 U.S.C. § 1927 . . . or under the

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9. *Townsend v. Holman Consulting Corp.*, 881 F.2d 788, 792 (9th Cir. 1989), vacated 914 F.2d 1136 (9th Cir. 1990) (*Townsend I*); see also Note, *A Uniform Approach to Rule 11 Sanctions*, 97 YALE L.J. 901 (1988).

10. Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013, 1015 (1988).

11. See generally, Mandelbaum, *Amended Rule 11: Despite Wide Application, Little Consensus Observed*, 3 INSIDE LITIGATION 2 (1989).

12. *Id.*

13. *Id.*

14. *E.g.*, *Zalvidar v. City of Los Angeles*, 780 F.2d 823, 829 n.5 (9th Cir. 1986).

15. FED. R. CIV. P. 16(f).

16. FED. R. CIV. P. 26(g).

court's inherent power to discipline attorney misconduct."<sup>17</sup> Accordingly, the Ninth Circuit has limited the scope of Rule 11 to the filing of "pleadings, motions and other papers" when other independent rules do not more directly apply.<sup>18</sup>

In contrast to the Ninth Circuit, Washington courts have been less specific in delineating the powers of the court to sanction inappropriate and improper conduct. For example, in *Wilson v. Henkle*,<sup>19</sup> the trial court awarded defendants their attorney's fees and the costs they expended to recover funds that the plaintiff's attorney had fraudulently obtained from the court registry. In upholding the sanction, the Court of Appeals cited as authority both the state's Rule 11 and the court's "inherent power to impose sanctions," but failed to specify which certifications violated the rule.<sup>20</sup> Because the court did not specify which "pleadings, motions or other papers" were in question, the Washington courts' interpretation of the Rule's scope is unclear.<sup>21</sup>

Thus, to date, Washington courts have been less clear than the Ninth Circuit in identifying the specific conduct that violates Rule 11. Because the Ninth Circuit has limited the rule's application to specific improper conduct, practitioners seeking sanctions in federal court should, out of necessity, closely identify the conduct alleged to violate Rule 11.

### III. GENERAL APPLICATION OF RULE 11

Prior to the 1983 amendments, the Ninth Circuit interpreted Rule 11 to require subjective bad faith on the part of the signing attorney to warrant the imposition of sanctions; thus, prior to 1983, good faith was a defense to a Rule 11 motion.<sup>22</sup> Subsequently, the Ninth Circuit has recognized that the 1983 amendments eliminated the "long-standing requirement that the subjective bad faith of the pleader be demonstrated."<sup>23</sup> The revised rule's focus on reasonableness is said to

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17. *Zaldivar*, 780 F.2d at 830.

18. *Id.*; see *supra* notes 15-16.

19. 45 Wash. App. 162, 724 P.2d 1069 (1986).

20. *Id.* at 173, 724 P.2d at 1076.

21. See *Cooper v. Viking Ventures*, 53 Wash. App. 739, 770 P.2d 659 (1989) (award of sanctions affirmed for *failure* to sign an order dismissing an impleaded third party defendant upon settlement with plaintiff).

22. *Zaldivar*, 780 F.2d at 829.

23. *Townsend v. Holman Consulting Corp.*, 881 F.2d 788, 792 (9th Cir. 1989), *vacated*, 914 F.2d 1136 (9th Cir. 1990) (*Townsend I*); *Zaldivar*, 780 F.2d at 829.

“admit only of objective inquiry[s]”<sup>24</sup> because comparing the meritorious conduct of the reasonable person leaves no room for analyzing the subjective intent of the signer. In particular, the old rule’s requirement that an attorney’s conduct be a willful violation of the rule has been purposely deleted.<sup>25</sup> The new rule imposes a standard of “reasonableness under the circumstances.”<sup>26</sup> This standard refers to the circumstances of the certification and filing of the pleading, not to the merits of the case as eventually determined at trial.<sup>27</sup>

In addition, the Ninth Circuit has recognized that both attorneys and parties are held to an objective standard.<sup>28</sup> However, the court acknowledges that what is reasonable for an attorney may not necessarily be reasonable for a client.<sup>29</sup> Regardless, the standard employed by the Ninth Circuit in examining an attorney’s or a party’s conduct for violation of the amended Rule 11 is an objective one even though what is reasonable may vary depending on the sophistication of the sanctioned individual.

Like the Ninth Circuit, Washington courts also use an objective standard to evaluate whether the attorney signing the pleading conducted a reasonable inquiry into the factual and legal basis of the action.<sup>30</sup> In *Bryant v. Joseph Tree, Inc.*,<sup>31</sup> the court of appeals reversed the trial court’s imposition of sanctions after determining that the lower court’s findings of fact regarding the appellants’ failure to make a reasonable inquiry into the facts and the law were not based on objective considerations.<sup>32</sup>

Similarly, in *Doe v. Spokane & Inland Empire Blood*

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24. *Townsend I*, 881 F.2d at 792.

25. *Zaldivar*, 780 F.2d at 829.

26. *Id.*; FED. R. CIV. P. 11 advisory committee note to the 1983 amendment.

27. *Cunningham v. County of Los Angeles*, 859 F.2d 705, 714 (9th Cir. 1988); *Hudson v. Moore Business Forms, Inc.*, 836 F.2d 1156, 1159 (9th Cir. 1987), *amended by*, 898 F.2d 684 (9th Cir. 1990).

28. *Business Guides, Inc. v. Chromatic Communication Enterprises*, 892 F.2d 802, 810 (9th Cir. 1989).

29. *Id.* at 812.

30. *Bryant v. Joseph Tree, Inc.*, 57 Wash. App. 107, 791 P.2d 537 (1990).

31. 57 Wash. App. 107, 791 P.2d 537 (1990).

32. *Bryant*, 57 Wash. App. at 121, 791 P.2d at 545. According to the appellate court, the trial court did not give any consideration to a series of affidavits submitted by the plaintiff and her attorneys. These affidavits recited research and consultation conducted to make a reasonable inquiry into the facts and law. Although it is not clear, it appears that such affidavit evidence is one objective factor a trial court should consider.

*Bank*,<sup>33</sup> the court of appeals stated that an attorney's actions at issue must be examined according to a standard of objective reasonableness. The standard, the court continued, is "whether a reasonable attorney in like circumstances could believe his actions to be factually and legally justified."<sup>34</sup> Thus, the court remanded the case to the trial court to develop evidence about the attorney's "information, knowledge and belief" at the time of filing.<sup>35</sup>

In summary, both the Ninth Circuit and the Washington courts use an objective standard to evaluate attorney conduct under Rule 11. Accordingly, sanctions now may be imposed if the attorney's conduct is objectively unreasonable, whether it is in good or bad faith.

#### IV. THE TEST FOR A RULE 11 VIOLATION

The Ninth Circuit has established that sanctions *must* be imposed on the signer of a paper if either (1) the paper is "frivolous" or (2) the paper is filed for an improper purpose.<sup>36</sup> The Ninth Circuit has further divided the frivolousness prong into two parts: (1) filings that are factually frivolous; or (2) filings that are not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.<sup>37</sup> Finally, the Ninth Circuit has found that a violation of either the frivolousness prong or the improper purpose prong is sufficient to sustain sanctions.<sup>38</sup>

33. 55 Wash. App. 106, 780 P.2d 853 (1989).

34. *Id.* at 111, 780 P.2d at 857 (quoting *Cabell v. Petty*, 810 F.2d 463, 466 (4th Cir. 1987)).

35. *Id.*

36. *Townsend v. Holman Consulting Corp.*, 914 F.2d 1136 (9th Cir. 1990) (*Townsend II*).

37. *E.g., id.*; *Maisonville v. F2 America, Inc.*, 902 F.2d 746, 748 (9th Cir. 1990); *Business Guides, Inc. v. Chromatic Communications Enterprises*, 892 F.2d 802, 808-809 (9th Cir. 1989); *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 830-31 (9th Cir. 1986).

Similarly, Washington courts have identified three "independent and affirmative duties" imposed on signers who certify a pleading or motion that forms the basis of liability for a Rule 11 violation. *Miller v. Badgley*, 51 Wash. App. 285, 300, 753 P.2d 530, 538 (1988). An attorney or party signing a pleading or motion has a duty (1) to conduct a reasonable inquiry into the supporting facts; (2) to conduct a reasonable inquiry into the law to determine if the motion is warranted by existing law or good faith arguments for extension, modification or reversal of existing law; and (3) to not interpose the motion or pleading for purposes of delay, harassment or to increase costs. *Id.* According to Washington law, these duties flow directly from the amended rule's language; thus, there is little dispute over the imposition of such duties.

38. *Townsend II*, 914 F.2d 1136, 1140.

### A. The "Frivolousness" Test

The most significant development in the Ninth Circuit during the last year under the Rule 11 frivolousness test, and in Rule 11 generally, arose in the decision of *Townsend v. Holman Consulting Corp. (Townsend II)*.<sup>39</sup> Before that decision, the Ninth Circuit conducted an inquiry for frivolousness by reviewing an entire pleading as a whole and, by so doing, concluded that a single frivolous count or claim in an otherwise valid pleading was insufficient to violate Rule 11.<sup>40</sup> Specifically, the Ninth Circuit previously held that "Rule 11 permits sanctions only when the pleading *as a whole* is frivolous or of a harassing nature, not when one of the allegations or arguments in the pleading may be so characterized."<sup>41</sup>

Under this pleading-as-a-whole rule, even where some allegations contained in a complaint were false (or unwarranted by law), the court would not impose sanctions.<sup>42</sup> Furthermore, under that rule, improper inclusion of a party in a complaint which properly included other parties would not render the complaint frivolous for the purposes of Rule 11 sanctions.<sup>43</sup> Thus, the pleading-as-a-whole rule provided a safe harbor within which an attorney with one non-frivolous claim could "pile on frivolous allegations without a significant fear of sanctions."<sup>44</sup>

Such a safe harbor no longer exists. In *Townsend II*, a panel of the Ninth Circuit sitting en banc overruled *Murphy v. Business Cards Tomorrow, Inc.*,<sup>45</sup> the case that originally set out the pleading-as-a-whole rule, and vacated the decision of the three judge panel in *Townsend v. Holman Consulting Corp. (Townsend I)*<sup>46</sup> specifically for the purpose of eliminating the pleading-as-a-whole rule.<sup>47</sup> This ruling came as a result of

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39. 914 F.2d 1136 (9th Cir. 1990).

40. *Townsend v. Holman Consulting Corp.*, 881 F.2d 788, 792 (9th Cir. 1989), *vacated*, 914 F.2d 1136 (9th Cir. 1990) (*Townsend I*); *Community Elec. Serv. v. National Elec. Contractors*, 869 F.2d 1235, 1242-43 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 236 (1990), *overruled by*, *Townsend v. Holman Consulting Corp.*, 914 F.2d 1136 (9th Cir. 1990).

41. *Murphy v. Business Cards Tomorrow, Inc.*, 854 F.2d 1202, 1205 (9th Cir. 1988) (emphasis added).

42. *Id.* at 1205.

43. *Townsend I*, 881 F.2d at 795.

44. *Townsend II*, 914 F.2d at 1141.

45. 854 F.2d 1202 (9th Cir. 1988).

46. 881 F.2d 788 (9th Cir. 1989), *vacated*, 914 F.2d 1136 (9th Cir. 1990).

47. *Townsend II*, 914 F.2d at 1139.

the Ninth Circuit's examination of its previous standards in light of the 1990 United States Supreme Court case of *Cooter & Gell v. Hartmarx*.<sup>48</sup> In *Cooter & Gell*, the Supreme Court stated: "[i]t is now clear that the central purpose of Rule 11 is to deter baseless filings in District Court and thus, consistent with the Rule Enabling Act's grant of authority, streamline the administration and procedure of the federal courts."<sup>49</sup>

In *Townsend II*, the Ninth Circuit determined that it would ill serve the purpose of deterrence to allow a safe harbor for improper or unwarranted allegations.<sup>50</sup> Such a safe harbor, the court concluded, promoted form over substance and allowed the pleading party to manipulate the form in which his or her claims were presented.<sup>51</sup> Consequently, the Ninth Circuit eliminated the bright-line pleading-as-a-whole rule and substituted a "straightforward, common sense application of the 'reasonable inquiry' requirement."<sup>52</sup>

The new test adopted by the Ninth Circuit recognizes that "[t]he issues involved in determining whether an attorney has violated Rule 11 . . . involve fact-intensive close calls."<sup>53</sup> Consequently, a district court must consider a number of factors to determine whether a pleading is sanctionable. These factors include an assessment of:

- (1) the knowledge that reasonably could have been acquired at the time the pleading was filed;
- (2) the type of claim and the difficulty of acquiring sufficient information;
- (3) which party has access to the relevant facts; and
- (4) the significance of the claim in the pleading as a whole.<sup>54</sup>

Although the relationship of the frivolous claim to the entire pleading is a relevant factor for the court's consideration, the mere existence of one nonfrivolous claim is no longer dispositive of the sanctions issue.<sup>55</sup> Accordingly, Ninth Circuit

48. 110 S. Ct. 2447 (1990).

49. *Id.* at 2454 (1990).

50. *Townsend II*, 914 F.2d at 1141.

51. *Id.* at 1142.

52. *Id.*

53. *Id.* (citing *Cooter & Gell*, 110 S. Ct. at 2460).

54. *Id.* (citing *Cross & Cross Properties v. SOS Everett Allied Co.*, 886 F.2d 497, 504 (2nd Cir. 1989) (citing *Oliveri*)).

55. Although the Ninth Circuit eliminated the pleading-as-a-whole rule, thereby increasing the likelihood of Rule 11 sanctions for a frivolous complaint, it expressed a sensitivity to the concern that Rule 11 may spawn satellite litigation and chill vigorous advocacy:

courts are afforded a greater opportunity to evaluate the adequacy of an attorney's pre-filing inquiry in light of the circumstances of the case; however, attorneys should beware that the pleading-as-a-whole safe harbor is no longer available to protect them from sanctions as a result of the inclusion of factually or legally frivolous claims.

### 1. Factually Frivolous Claims

Under the plain language of Rule 11, the signature of an attorney or a party on a pleading is a certification that "to the best of [the attorney's] knowledge, information and belief, *found after reasonable inquiry*, [the pleading] is well grounded in fact and is warranted by existing law or good faith arguments for extension, modification or reversal of existing law."<sup>56</sup> "Reasonable inquiry" is the focal point of the court's frivolous filing evaluation. As the Ninth Circuit has stated, "the finding of no reasonable inquiry is tantamount to a finding of frivolousness."<sup>57</sup>

In analyzing the breach of an attorney's duty to make a reasonable inquiry, the Ninth circuit has identified the "key question . . . [to be] whether a pleading states an arguable claim."<sup>58</sup> To avoid a categorization as "frivolous, legally unreasonable or without factual foundation,"<sup>59</sup> a paper must first meet the Rule 11 requirement of being "well grounded in fact." The "well grounded in fact" requirement is met when an attorney or other signer has reasonably inquired into the factual underpinning of the essential elements of the pleading.<sup>60</sup> The signer who certifies that the paper is well grounded in fact must have acquired sufficient knowledge to ascertain that the paper is not frivolously filed.

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Were vigorous advocacy to be chilled by the excessive use of sanctions, wrongs would go uncompensated. Attorneys, because of fear of sanctions, might turn down cases on behalf of individuals seeking to have the courts recognize new rights. They might also refuse to represent persons whose rights have been violated but whose claims are not likely to produce large damage awards. This is because attorneys would have to figure into their costs of doing business the risk of unjustified awards of sanctions.

*Townsend II*, 914 F.2d at 1140-41.

56. FED. R. CIV. P. 11 and SUP. CT. R. 11.

57. *Townsend II*, 914 F.2d at 1140.

58. *Stewart v. American International Oil & Gas Co.*, 845 F.2d 196, 201 (1988) (citing *Hudson v. Moore Business Forms, Inc.*, 836 F.2d 1156, 1159 (9th Cir. 1986)).

59. *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 831 (9th Cir. 1986).

60. See *Greenberg v. Sala*, 822 F.2d 882, 887 (9th Cir. 1987).

Both the Ninth Circuit and the Washington courts have determined that a complaint is factually frivolous if "a competent attorney, after reasonable inquiry, could not form a reasonable belief that the complaint was well founded in fact."<sup>61</sup> An attorney must make a reasonable independent investigation into the facts and cannot unduly rely on another person's assertion of those facts.

Often, an attorney's knowledge of the facts is acquired from his or her client, and in the Ninth Circuit, to a certain extent, an attorney may rely on his or her client's assertion of the facts; however, too much reliance on a client may prove risky. In *Lloyd v. Schlag*,<sup>62</sup> a plaintiff's attorney relied on his client's innocent misunderstanding of copyright transfer requirements in bringing a copyright infringement suit. The attorney did not first conduct a reasonable inquiry into the registration of the assignment of rights to his client. Consequently, the district court's award of costs and attorney's fees to the defendant, incident to the defendant's motion to dismiss, was upheld by the court of appeals.<sup>63</sup>

However, the Ninth Circuit has also recognized that where a Rule 11 violation occurs because of a "failure to make a reasonable inquiry into the *factual* underpinnings of a paper or pleading, the client may be in an equal or better position [to verify the facts] than the lawyer."<sup>64</sup> Although a lawyer is not absolved of his or her responsibility to investigate the facts provided by the client, the client shares an obligation to assure that the facts are accurate. For example, in *Business Guides, Inc. v. Chromatic Communication Enterprises*,<sup>65</sup> where the district court judge's law clerk spent one hour verifying the accuracy of an affidavit filed by the plaintiff, it was unreasonable for the plaintiff to take no steps whatsoever to verify the facts before filing its papers and request for a temporary restraining order. Under these circumstances, the Ninth Circuit upheld an award of sanctions against the plaintiff.<sup>66</sup> Thus, in *Business*

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61. *Jensen Elec. Co. v. Moore, Caldwell, Rowland & Dodd, Inc.*, 873 F.2d 1327, 1329 (9th Cir. 1989); *Bryant v. Joseph Tree, Inc.*, 57 Wash. App. 106, 115, 791 P.2d 537, 545 (1990).

62. 884 F.2d 409 (9th Cir. 1989).

63. *Id.* at 412.

64. *Business Guides, Inc. v. Chromatic Communications Enterprises*, 892 F.2d 802, 810 (9th Cir. 1989) (emphasis in original).

65. 892 F.2d 802 (9th Cir. 1989).

66. The court in *Business Guides* also indicated that sanctions against *Business Guide's* attorney, Finley Kumble, may also have been appropriate. However, by that

*Guides*, the Ninth Circuit reasserted its previous rule that reliance on a client's assertion of the facts, without more, could leave an attorney vulnerable to sanctions under Rule 11.

Similarly, in Washington, reliance on a client's version of the facts may not discharge an attorney's duty of reasonable inquiry.<sup>67</sup> In *Miller v. Badgley*,<sup>68</sup> the court found that plaintiff's *ex parte* motion for *supersedeas* in a form other than bond was not based on a reasonable inquiry into the facts, where the alternative *supersedeas* offered was a promissory note that ultimately was discovered by opposing counsel to be subject to prior obligations exceeding its value.<sup>69</sup>

Although in none of these cases, either in the Ninth Circuit or in Washington, were sanctions imposed exclusively on the attorney, it is the attorney who must assert, by signing a pleading, that to the best of his or her "knowledge, information and belief" the pleading is well-grounded in fact. Perhaps, as Judge Schwarzer has suggested, "if all the attorney has is his client's assurance that facts exist, he has not satisfied his obligation," and could therefore be the direct target of the Rule 11 sanction.<sup>70</sup>

An attorney may also become the target of Rule 11 sanctions for failure to make a reasonable inquiry if he or she, as local counsel, relies on the advice of other attorneys as to a suit's underlying factual basis. In *Unioil, Inc. v. E.F. Hutton &*

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point in the litigation, Finley Kumble had filed bankruptcy and Chromatic had withdrawn without prejudice the portion of its Rule 11 motion that applied to the law firm.

67. *Miller v. Badgley*, 51 Wash. App. 285, 302, 753 P.2d 530, 539 (1988). See also *Bryant v. Joseph Tree, Inc.*, 57 Wash. App. 107, 120-21, 791 P.2d 537, 545 (1990) (where uncontroverted affidavits demonstrated that plaintiff's attorneys consulted with their client, reviewed documents provided by their client, and conducted an independent search for documents, there was sufficient evidence that a reasonable prefiling inquiry had been conducted); *Guardianship of Lasky*, 54 Wash. App. 841, 848, 776 P.2d 695, 701 (1989) (a court-appointed guardian ad litem made several allegations in the complaint based only on information provided by the ward; such reliance on the ward did not constitute a reasonable inquiry into readily available facts). The *Miller* case was a case of first impression regarding the question of sanctions pursuant to the state's revised CR 11. Because Washington's revised rule was modeled upon and is substantially similar to the federal rule, the appellate court looked to the federal decisions under Rule 11 for guidance. Accordingly, it is not surprising that Washington courts require more than mere reliance on the client's assertion of the facts to discharge an attorney's duty of reasonable inquiry.

68. 51 Wash. App. 285, 753 P.2d 530 (1988).

69. *Id.*

70. Schwarzer, *supra* note 5, at 187.

*Co., Inc.*,<sup>71</sup> the Ninth Circuit affirmed the district court's award of substantial sanctions against an attorney who failed to satisfy his duty of reasonable inquiry to verify the facts. The court stated that "reliance on forwarding co-counsel may in certain circumstances satisfy an attorney's duty of reasonable inquiry."<sup>72</sup> However, the court continued by stating that "[a]n attorney who signs the pleading cannot simply delegate to forwarding co-counsel his duty of reasonable inquiry."<sup>73</sup> Thus, a certain amount of reliance on another lawyer may be deemed reasonable; however, in relying on another lawyer, counsel must acquire independent knowledge of facts sufficient to enable him to certify that the paper is well-grounded in fact.<sup>74</sup>

In comparison, in *Golden Eagle Distributing Corp. v. Burroughs Corp.*,<sup>75</sup> Judge Schwarzer declined to impose monetary sanctions on the California local counsel who signed the offending motion papers, but who apparently did not actively participate in preparation of the papers or in the decision to file. Judge Schwarzer did, however, impose monetary sanctions on the Chicago law firm whose associate prepared the offending papers.<sup>76</sup> In addition, Judge Schwarzer found it appropriate to reprimand both the Chicago firm and California local counsel by requiring them to submit statements certifying that a copy of his sanctions opinion was given to each partner and associate of each firm.<sup>77</sup>

An attorney is also under some obligation to make a reasonable inquiry into the appropriateness of suing each of the named defendants. In *Townsend I*, the circuit court panel reversed the district court's award of sanctions where a claim

71. 809 F.2d 548 (9th Cir. 1986), *cert. denied*, 108 S. Ct. 83 (1987).

72. *Id.* at 558.

73. *Id.*

74. *Id.* (citing Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 187 (1985)).

75. 103 F.R.D. 124 (N.D. Cal. 1984), *rev'd on other grounds*, 801 F.2d 1531 (9th Cir. 1986).

76. As a result of the Supreme Court's decision in *Pavelic & Leflore v. Marvel Entertainment Group*, 110 S. Ct. 456 (1989), sanctions under Rule 11 may no longer be imposed on an entire law firm. Instead, the individual attorney (or client) who signs the pleading is the sole target of the sanctions. See *infra* notes 140-146 and accompanying text.

77. *Golden Eagle Distributing Corp. v. Burroughs Corp.*, 103 F.R.D. 124, 129, *rev'd on other grounds*, 801 F.2d 1531 (9th Cir. 1986). Washington courts have not addressed the issue of whether local counsel's reliance on another attorney's assertion of the facts would constitute reasonable inquiry for purposes of CR 11. However, because this would be a case of first impression in the state, it is likely that a Washington court would look to the Ninth Circuit for guidance on this issue. See *supra* note 67.

of ERISA violations by Employee Benefit Plan administrators improperly included the plan's attorneys.<sup>78</sup> In *Townsend II*, the Ninth Circuit vacated the three judge panel of *Townsend I* and affirmed the district court's award of sanctions.<sup>79</sup> The district court had awarded sanctions because the offending attorney had continued to name the benefit plan's attorneys in an amended complaint even after affidavits were submitted that disclaimed any involvement with the adoption, implementation or administration of the plan. The court considered that such inclusion of improper defendants, after having been warned, was sanctionable under Rule 11.<sup>80</sup>

Although an attorney may be sanctioned under Rule 11 for improperly including some defendants, if at the time of filing reasonable inquiry indicates that such defendants are not improperly named, sanctions under Rule 11 are not available. In the Ninth Circuit, the reach of Rule 11 is limited to evaluating the signing attorney's information, knowledge and belief *at the time of signing*.<sup>81</sup> Therefore, a failure to dismiss defendants who only later appear to have been improperly included may be sanctioned only under the strictures of 28 U.S.C. § 1927, which requires a finding of "recklessness" or "bad faith."<sup>82</sup> However, if there is a subsequent signing of a pleading, such as a defense to a summary judgment motion, or a memorandum of law opposing such a motion, those signings are evaluated in the light of the circumstances existing at that time, and Rule 11 sanctions may well apply.

Like the Ninth Circuit, Washington courts have also been unforgiving with regard to the naming of improper defendants. In *Doe v. Spokane & Inland Empire Blood Bank*,<sup>83</sup> the court indicated that sanctions would be proper for frivolously including two defendants where the plaintiff admittedly had no contact with either of the defendant's products. Although the record was not sufficient for the court to determine whether

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78. *Townsend v. Holman Consulting Corp.*, 881 F.2d 788, 790 (9th Cir. 1989), vacated, 914 F.2d 1136 (9th Cir. 1990) (*Townsend I*).

79. *Townsend v. Holman Consulting Corp.*, 914 F.2d 1136, 1145 (9th Cir. 1990) (en banc) (*Townsend II*).

80. *Id.*; see also *West Coast Theater Corp. v. Portland*, 897 F.2d 1519 (9th Cir. 1990) (where improper service on two defendants with an incomplete draft of the complaint was a factor considered in awarding sanctions).

81. See *supra* text accompanying notes 26-35.

82. *Cunningham v. County of Los Angeles*, 879 F.2d 481, 490 (9th Cir. 1988), cert. denied, 110 S. Ct. 757 (1990).

83. 55 Wash. App. 107, 780 P.2d 853 (1989).

sanctions were appropriate, it did indicate that if, on remand, the trial court determined that the attorney had not undertaken an adequate inquiry to determine the propriety of naming the two defendants, then Rule 11 had been violated.<sup>84</sup> However, the court also indicated that if the trial court determined that, at the time of filing, the attorney was in possession of information justifying a belief that there was an adequate factual or legal basis for filing the claim, then there was not a violation of Rule 11.<sup>85</sup>

Finally, Washington courts have cautioned that judges should be especially reluctant to impose sanctions for factual errors or deficiencies in the complaint that occur before there has been an opportunity for discovery.<sup>86</sup> For instance, the court in *Bryant v. Joseph Tree, Inc.*<sup>87</sup> rejected a contention that all the facts supporting a claim must be set forth in the complaint because such a requirement would be inconsistent with the state's notice pleading rule.<sup>88</sup>

In summary, in both the Ninth Circuit and in Washington, a factually frivolous complaint may expose an attorney to Rule 11 sanctions if the attorney has not conducted a reasonable pre-filing inquiry to independently verify the facts and to identify the appropriate defendants to name. Furthermore, the overruling of the pleading-as-a-whole rule by the Ninth Circuit eliminated the safe harbor for frivolous claims included in a pleading also containing a single non-frivolous claim. This is true whether the frivolous claims are factually or legally frivolous.

## 2. Legally Frivolous Claims

The Ninth Circuit and Washington courts have determined that a complaint is legally frivolous "where it is not

84. *Spokane & Inland Empire*, 55 Wash. App. at 112, 780 P.2d at 857.

85. *Id.*

86. *Bryant v. Joseph Tree, Inc.*, 57 Wash. App. 106, 118-119, 791 P.2d 537, 544 (1990).

87. 57 Wash. App. 107, 791 P.2d 537 (1990).

88. "Washington's notice pleading rule does not require parties to reveal all the facts supporting their claim but instead contemplates that discovery will provide parties with the opportunity to learn more detailed information about the nature of a complaint." *Id.* at 118-19 n.6, 791 P.2d at 544 n.6. This approach is especially appropriate as well as salutary in cases where many of the pertinent facts may be in the exclusive position of the defendants, e.g., conspiracy cases and professional malpractice.

based on a plausible view of the law.”<sup>89</sup> Rule 11 requires the signing attorney to certify that the facts stated in the complaint give rise to a legal argument that is “warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.”<sup>90</sup> Rule 11 does not require the attorney to be correct in his or her view of the law; however, the attorney must have a good faith argument for his or her view of what the law is or should be.<sup>91</sup>

An attorney must conduct the research necessary under the circumstances and must reach a defensible conclusion. However, “[e]xtended research alone will not save a claim that is without legal . . . merit from the penalty of sanctions.”<sup>92</sup> Although an attorney may make reasonable arguments for the change of existing law, he or she is expected to be aware of well-settled areas of the law.<sup>93</sup> On the other hand, courts are discouraged from finding violations of Rule 11 in such a way as to chill attorneys’ enthusiasm or creativity in cases of first impression.<sup>94</sup>

Division I of the Washington Court of Appeals has rejected a plaintiff’s argument that the imposition of sanctions would chill attorneys’ enthusiasm or creativity in cases of first impression.<sup>95</sup> In *Layne v. Hyde*,<sup>96</sup> the state court levied sanctions because the law was well-settled regarding judicial immunity, abuse of process, and conspiracy. Significantly, the court noted that the argument for extension of existing law was first raised on appeal of the order of sanctions below.<sup>97</sup>

In contrast, in *Bryant v. Joseph Tree, Inc.*,<sup>98</sup> the trial court found that the appellant’s legal research was inadequate because the appellants had drafted an unintelligible complaint. The appellants also failed to amend the complaint in compliance with a court order. The court of appeals reversed, stating

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89. *Aetna Life Ins. Co. v. Alla Medical Serv., Inc.*, 855 F.2d 1470, 1475 (9th Cir. 1988); *Bryant v. Joseph Tree, Inc.*, 57 Wash. App. 106, 791 P.2d 537 (1990).

90. FED. R. CIV. P. 11 and SUP. CT. R. 11.

91. *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 831 (9th Cir. 1986).

92. *Id.* at 831.

93. *Hudson v. Moore Business Forms, Inc.*, 836 F.2d 1156 (9th Cir. 1987), *amended by*, 898 F.2d 684 (9th Cir. 1990); *Hurd v. Ralph’s Grocery Co.*, 824 F.2d 806 (9th Cir. 1987).

94. FED. R. CIV. P. 11 advisory committee’s note to 1983 amendment.

95. *Layne v. Hyde*, 54 Wash. App. 125, 135, 773 P.2d 83, 88 (1989).

96. 54 Wash. App. 125, 773 P.2d 83 (1989).

97. *Id.* at 135, 773 P.2d at 88.

98. 57 Wash. App. 107, 791 P.2d 537 (1990).

that the “[i]mposition of CR 11 sanctions is improper where other rules more directly apply.”<sup>99</sup> The court stated that under CR 12(e), the appellants could have supplied the missing facts, missing dates, and missing allegations the court required.<sup>100</sup>

When determining the “frivolousness” of a pleading or motion, the Ninth Circuit also considers an attorney’s duty to conduct reasonable legal research. However, the Ninth Circuit appears to apply a somewhat more lenient standard in judging claims to be legally frivolous than do Washington courts. The Ninth Circuit has held that even a failure to allege a significant and necessary element of the cause of action after filing several amended complaints is an insufficient ground for finding a violation of Rule 11.<sup>101</sup>

In *Golden Eagle Distributing Corp. v. Burroughs Corp.*,<sup>102</sup> the Ninth Circuit rejected the argument that an attorney must *identify* an argument as one for an extension, modification, or reversal of existing law if it is not based on existing precedents.<sup>103</sup> The court found that an “argument identification” requirement “tends to create a conflict between the lawyer’s duty to zealously represent his client . . . and the lawyer’s own interest in avoiding rebuke.”<sup>104</sup> Therefore, even though the law firm failed to present a valid good faith argument for an extension of the law until it filed its brief opposing sanctions, the court held that sanctions had been improperly assessed.<sup>105</sup> The appellate court also rejected the district court’s sanctions based on a failure to cite contrary authority despite the identification of such authority in Shepard’s.<sup>106</sup>

Even with its forgiving standard, however, the Ninth Circuit finds some pleadings, even complaints, violative of the legally frivolous standard. In *Mir v. Little Company of Mary Hospital*,<sup>107</sup> the court upheld sanctions where the plaintiff brought an action for \$27,000,000 in damages in the face of

99. *Id.* at 121, 791 P.2d at 545.

100. *Id.* at 121 n.9, 791 P.2d at 545 n.9.

101. *Les Schockley Racing, Inc. v. Nat’l Hot Rod Ass’n*, 884 F.2d 504 (9th Cir. 1989) (although plaintiff’s second amended complaint alleging a violation of a Sherman Act § 1 was properly dismissed because it inadequately pleaded injury to competition in the market, the trial court’s denial of sanctions upheld).

102. 801 F.2d 1531 (9th Cir. 1986).

103. *Id.* at 1541.

104. *Id.* at 1540.

105. *Id.* at 1535, 1539.

106. *Id.* at 1542.

107. 844 F.2d 646 (9th Cir. 1988).

clear authority that the claims were procedurally barred. Moreover, the court found that the claims were based on cases that no competent lawyer would believe supported his argument.<sup>108</sup> Thus, the "frivolousness" test for an abuse of a signer's duty to conduct a reasonable inquiry as to the law appears to establish a high threshold for opposing parties seeking Rule 11 sanctions in the Ninth Circuit.<sup>109</sup>

### B. Improper Purpose

The improper purpose prong of the Rule 11 two-part analysis prohibits a pleading, motion or other paper from being filed for an "improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."<sup>110</sup> However, the Ninth Circuit has held that a nonfrivolous *complaint* cannot be said to be filed for an improper purpose.<sup>111</sup> Specifically, in *Townsend II*, the court made it clear that the frivolousness inquiry subsumes the improper purpose inquiry for purposes of reviewing initial complaints.<sup>112</sup>

In *Zaldivar v. City of Los Angeles*,<sup>113</sup> the court held that the improper purpose must be "objectively tested, rather than [focused on] the consequences of the signer's act, subjectively viewed by the signer's opponent."<sup>114</sup> Thus, neither the signer's motive nor the resulting actual harassment, delay, or increase

108. *Id.* at 652. See also *Adriana Corp. v. Lewis & Co.*, 913 F.2d 1406 (9th Cir. 1990) (frivolous motion to reconsider); *West Coast Theater Corp. v. Portland*, 897 F.2d 1519 (9th Cir. 1990) (complete failure to articulate in complaint an adequate foundation in fact or in law); *In re Hawaii Asbestos Cases*, 871 F.2d 891 (9th Cir. 1989) (summary judgment motion); *Pine Trades Council of Northern California v. Underground Contractors Association of Northern California*, 835 F.2d 1275 (9th Cir. 1988) (second motion to compel arbitration, having already appealed identical first motion); *In re Disciplinary Action (Mooney)*, 823 F.2d 302 (9th Cir. 1988) (removal to federal court when not all defendants were diverse); *Unioil, Inc. v. E.F. Hutton, Inc.*, 809 F.2d 548, *cert. denied*, 108 S. Ct. 83, 85 (9th Cir. 1986) (motion to reconsider); *Hewitt v. City of Stanton*, 798 F.2d 1230 (9th Cir. 1986) (petition for removal).

109. See *Woodrum v. Woodward County, Oklahoma*, 866 F.2d 1121 (9th Cir. 1989).

110. FED. R. CIV. P. 11.

111. *Townsend v. Holman Consulting Corp.*, 914 F.2d 1136, 1144 n.5 (9th Cir. 1990) (en banc) (*Townsend II*) ("The sanctioning of claims in initial complaints will of course more likely be an abuse of discretion than the sanctioning of other claims."); *Greenberg v. Sala*, 822 F.2d 882, 885 (9th Cir. 1987); *Golden Eagle Distributing Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1538 (9th Cir. 1986); *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 832 (9th Cir. 1980) ("a defendant cannot be harassed under Rule 11 because a plaintiff files a complaint against that defendant which complies with the 'well grounded in fact and warranted by existing law clause' of the Rule").

112. *Townsend II*, 914 F.2d at 1140, 1144-45.

113. 780 F.2d 823 (9th Cir. 1986).

114. *Id.* at 832.

in costs will have any bearing on whether a complaint, which was well grounded in fact and law violates Rule 11. However, the court in *Zaldivar* also found that successive complaints based upon propositions of law previously rejected may constitute harassment under Rule 11.<sup>115</sup> In *Zaldivar*, the issues raised in federal court had previously been rejected in state court.

In contrast to initial complaints, pleadings and other papers may violate Rule 11 without a showing of frivolousness if they are filed for an improper purpose.<sup>116</sup> Thus, sanctions for pleadings filed for an improper purpose have been imposed in the following situations: (1) where the defendant unnecessarily delayed and multiplied the proceedings by filing a contrived third party complaint in order to induce the district court to transfer the cause of action;<sup>117</sup> (2) where the defendant counterclaimed for \$200,000 in costs and \$4 million in punitive damages in a suit for wage discrimination and wrongful termination;<sup>118</sup> (3) where a second motion to compel arbitration was filed in a labor dispute when the denial of a nearly identical prior motion had been appealed;<sup>119</sup> and (4) for filing a complaint in district court where there was no federal subject matter jurisdiction and the plaintiff had previously filed a suit in another district court on the same claims.<sup>120</sup> Generally, though, to present a convincing case for Rule 11 sanctions in the Ninth Circuit, a party must show both a degree of frivolousness coupled with a fairly apparent purpose to harass, delay, or apply economic pressure.

## V. THE APPROPRIATE SANCTION

Focusing on the mandatory language in Rule 11, both the Ninth Circuit and Washington courts have held that a court *must* impose a sanction if it finds that the rule has been vio-

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115. *Id.*

116. *Aetna Life Insurance Co. v. Alla Medical Services, Inc.*, 855 F.2d 1470, 1476 (9th Cir. 1988) ("there comes a point when successive motions and papers become so harassing and vexatious that they justify sanctions even if they are not totally frivolous under the standard set forth in our prior cases").

117. *Stewart v. American International Oil & Gas*, 845 F.2d 196, 201 (9th Cir. 1988).

118. *Hudson v. Moore Business Forms, Inc.*, 836 F.2d 1156 (9th Cir. 1987).

119. *Pipe Trades Council of Northern California v. Underground Contractors Association of Northern California*, 835 F.2d 1275 (9th Cir. 1988).

120. *Orange Production Credit Association v. Frontline Ventures, Ltd.*, 792 F.2d 797 (9th Cir. 1986).

lated.<sup>121</sup> However, the permissive language of Rule 11 allowing an award of reasonable expenses has led to general agreement that trial courts "retain broad discretion to tailor an 'appropriate sanction' and to determine against whom such a sanction should be imposed."<sup>122</sup>

While attorneys' fees and costs tend to be the favored form of sanctions, the Ninth Circuit has noted that Rule 11 was not designed to provide monetary restitution in every case to a litigant who has been harassed or inconvenienced by the conduct of opposing counsel.<sup>123</sup> Because Rule 11 is not to be used as a mere fee shifting device, courts have devised other means of sanctioning attorneys. For example, the Ninth Circuit has approved publication of reprimands as appropriate sanctions in some cases.<sup>124</sup> The Ninth Circuit has also held that the appropriate sanction for a Rule 11 violation might include suspension of an attorney from practice before the court and public censure.<sup>125</sup>

Like the Ninth Circuit, Washington courts have frequently noted that public censure may be an appropriate sanction in some situations.<sup>126</sup> However, one Washington court has found public censure alone to be insufficient.<sup>127</sup> In *Guardianship of Lasky*, the trial court's failure to award terms was held to be an abuse of discretion considering the large expenditures incurred in opposing the litigation.<sup>128</sup>

In addition to monetary sanctions and public censure, the Ninth Circuit has also found dismissal of the case to be an appropriate sanction in certain circumstances.<sup>129</sup> In *Adriana v. Lewis & Co.*,<sup>130</sup> in addition to imposing Rule 11 sanctions for

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121. See *Golden Eagle Distributing Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1536 (9th Cir. 1986); *Miller v. Badgley*, 51 Wash. App. 285, 300, 753 P.2d 530, 540 (1988).

122. *Miller*, 51 Wash. App. at 303, 753 P.2d at 540; see also *Pony Express Courier Corp. of America v. Pony Express Delivery Service*, 872 F.2d 317, 319 (9th Cir. 1989).

123. *Pony Express Courier Corp.*, 872 F.2d at 319.

124. *Id.* at 317 (9th Cir. 1989); In re Disciplinary Action (Mooney), 841 F.2d 1003 (9th Cir. 1988); In re Disciplinary Action (David L. Curl), 803 F.2d 1004 (9th Cir. 1986).

125. In re Disciplinary Action (Raymond P. Boucher), 837 F.2d 869 (materially misrepresenting facts on appeal and failure to respond to order to show cause why sanctions should not be imposed).

126. *Doe v. Spokane & Inland Empire Blood Bank*, 55 Wash. App. 106, 780 P.2d 853 (1989); *Miller*, 51 Wash. App. 285, 753 P.2d 530.

127. *Guardianship of Lasky*, 54 Wash. App. 841, 776 P.2d 695 (1989).

128. *Id.* at 855-56, 776 P.2d at 702.

129. *Adriana Corp. v. Lewis & Co.*, 913 F.2d 1406 (9th Cir. 1990); *West Coast Theater Corp. v. Portland*, 897 F.2d 1519 (9th Cir. 1990); *Zambrano v. City of Tustin*, 885 F.2d 1473 (9th Cir. 1989).

130. 913 F.2d 1406 (9th Cir. 1990).

frivolous motions to reconsider and to disqualify counsel, the district court used Rule 37 to grant the defendant's motion to dismiss the complaint, to strike the plaintiff's answers to the cross and counterclaims, and to enter a default judgment. The Ninth Circuit upheld the district court's default judgment of \$8.5 million and its award of monetary sanctions for the Rule 11 violations. In addition, the court awarded fees and double costs for a frivolous appeal under Rule 38. In so doing, the court also found that counsel's misconduct could be imputed to his clients.

In contrast, in *Zambrano v. City of Tustin*,<sup>131</sup> the circuit court cautioned that, "[a]s a general rule, the minor problems created by counsel should not be visited upon the litigants."<sup>132</sup> In that case, the district court declared a mistrial because plaintiff's counsel had never been admitted to the district bar. The Ninth Circuit held that a mistrial was inappropriate and that in such a situation "the district court is under an affirmative obligation to explore alternative remedies to dismissal."<sup>133</sup>

The Ninth Circuit conducts a three-part analysis to determine whether a district court has properly considered the adequacy of less drastic sanctions:

- (1) did the court explicitly discuss the feasibility of less drastic sanctions and explain why alternative sanctions would be inappropriate;
- (2) did the court implement alternative sanctions before ordering dismissal; and
- (3) did the court warn the party of the possibility of dismissal before actually awarding dismissal?<sup>134</sup>

Dismissal was appropriate where counsel repeatedly failed to respond to the court's warnings, failed to appear at a show cause hearing, and failed to file papers of opposition or to ask for a rescheduling of the hearing.<sup>135</sup> Thus, where the district court has attempted other measures to coerce counsel to act responsibly, it is within the court's discretion to grant sanctions in the form of dismissal.

Finally, the amended Rule 11 retained the requirement

131. 885 F.2d 1473 (9th Cir. 1989).

132. *Id.* at 1475 n.4.

133. *Id.*

134. *Adriana*, 913 F.2d at 1412-13 (quoting *Malone v. United States Postal Service*, 833 F.2d 128, 130 (9th Cir. 1987)); *West Coast Theatre Corp.*, 897 F.2d at 1524.

135. *West Coast Theater Corp.*, 897 F.2d at 1524.

that pleadings, motions and other papers that are not signed must be stricken. Whether striking a paper signed in violation of the rule is still appropriate, however, is an open question. The Advisory Committee Note to the 1983 Amendment commented on the tendency of courts under the former rule to confuse attorney honesty with the merits of the action.<sup>136</sup> Thus, courts will likely continue to disfavor this form of sanction despite the drafters' specific approval of the courts' broad discretion to tailor the appropriate sanction to particular facts.

The explosion of Rule 11 motions in recent years is no doubt driven not only by opposing parties' desire to deter frivolous and improper litigation, but also by a desire to shift the increasingly heavy economic burden of litigation. Notwithstanding the conflict with the principles behind the American Rule, which requires each party to pay his or her own litigation costs unless a statute or contract of the parties provides otherwise, the most appropriate form of sanction is likely to remain an award of reasonable costs and attorneys fees for the foreseeable future.

Finally, until recently, the Ninth Circuit held that Rule 11 permitted sanctions to be imposed on the signing attorney, the party he or she represented, or the attorney's firm as a whole.<sup>137</sup> In 1990, the United States Supreme Court held that the plain language and policies of Rule 11 made it inappropriate to impose sanctions on an entire firm; the court held that "just as the requirement of a signature is imposed upon the individual, . . . the recited import and consequences of signature run *as to him*."<sup>138</sup> Thus, an attorney's duty of reasonable inquiry is nondelegable; moreover,

[t]he signing attorney cannot leave it to some trusted subordinate, or to one of his partners, to satisfy himself that the filed paper is factually and legally responsible; by signing he represents not merely the fact that it is so, but also the fact that he personally has applied his own judgment.<sup>139</sup>

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136. Fed. R. Civ. P. 11 Advisory committee's note to 1983 amendment.

137. See *Business Guides, Inc. v. Chromatic Communications Enterprises*, 892 F.2d 802 (9th Cir. 1989); *Hudson v. Moore Business Forms, Inc.*, 836 F.2d 1156 (9th Cir. 1987).

138. *Pavelic & Leflore v. Marvel Entertainment Group*, 40 S.Ct. 456, 459 (1990) (emphasis in original).

139. *Id.* While the majority opinion relies heavily on the clear language of the rule, Justice Marshall's dissent is worth noting. He states:

Yet encouraging individual accountability and firm accountability are not mutually exclusive goals. Indeed, individual accountability may be heightened

Consequently, where sanctions were previously imposed on an entire firm, the Ninth Circuit has remanded for disposition in light of the Supreme Court's pronouncement that Rule 11 sanctions apply only to the individual signing attorneys.<sup>140</sup>

In addition, the Supreme Court pronounced in 1990 that Rule 11 applies only to proceedings at the trial court level; therefore, use of Rule 11 to impose sanctions on appeal is inappropriate.<sup>141</sup> If an appeal of Rule 11 sanctions is frivolous, appellate courts have recourse to Federal Rule of Appellate Procedure 38, which allows for just damages and single or double costs.

However, in *Partington v. Gedan*, the Ninth Circuit has chosen to disregard this clear directive from the Supreme Court.<sup>142</sup> In that case, a two judge majority of the Ninth Circuit determined that there was no conflict with *Cooter & Gell* because Circuit Rule 1-1 (old Rule 5) and prior case law of the Ninth Circuit expressly incorporates Rule 11 into the appellate court rules.<sup>143</sup> Thus, at least currently, the Ninth Circuit may impose sanctions pursuant to Rule 11 at the appellate level as, in effect, part of its Circuit rules.<sup>144</sup>

A separate consideration is the appropriate time to ask for sanctions. While counsel may be tempted to wait until the completion of litigation to document a clear pattern of abuse,<sup>145</sup> due process concerns may be raised where the offending party

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when an attorney understands that his carelessness or maliciousness may subject both himself and his firm to liability. The concern that a person take direct responsibility for each paper is not disserved by holding the law firm responsible in cases where the district court determines that both are blameworthy.

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Admittedly, in some cases, sanctions imposed solely on the individual signer may halt abusive practices most effectively. In other cases, however, deterrence might best be served by imposing sanctions on the signer's law firm in an attempt to encourage internal monitoring. The trial judge is in the best position to assess the dynamics of each situation and to act accordingly.

*Id.* at 461-62 (Marshall, J., dissenting).

140. *Hudson v. Moore Business Forms, Inc.*, 898 F.2d 654, 687 (9th Cir. 1990).

141. *Cooter & Gell v. Hartmarx*, 110 S.Ct. 2447, 2462 (1990).

142. *Partington v. Gedan*, 914 F.2d 1349 (9th Cir. 1990) (Reinhardt, J., dissenting) (previously reported at 880 F.2d 116 (9th Cir. 1989)), *vacated and remanded*, 110 S. Ct. 3265 (1990), for further consideration in light of *Cooter & Gell*.

143. *Id.* at 1349-50.

144. *Id.*

145. *See Aetna Life Insurance Co. v. Alla Medical Services, Inc.*, 855 F.2d 1470 (9th Cir. 1988) (remanded to determine if cumulative effects of defendant's litigation tactics would indicate an improper purpose in filing motion to dismiss).

has insufficient notice or opportunity to defend his or her tactics.<sup>146</sup> In the Ninth Circuit, at least, the mere presence of Rule 11 is not sufficient "notice" to satisfy the requirement of due process.<sup>147</sup> Furthermore, a minimum requirement that the certifying attorney be warned that Rule 11 sanctions may be assessed at the end of trial, if appropriate, is consistent with the Rule 11 purposes of avoiding delay and unnecessary cost by deterring future violations and correcting behavior.<sup>148</sup>

Finally, counsel should avoid the cavalier use of Rule 11. The court may view dimly the use of Rule 11 "out of habit or as a standard device to burden an adversary with responses on issues collateral to the merits of a claim."<sup>149</sup> Thus, too frequent use of casually drafted Rule 11 motions may prompt a court to "give scrutiny to the Rule 11 movant equal to that they afford the Rule 11 target."<sup>150</sup>

## VI. APPELLATE REVIEW

After the Supreme Court's decision in *Cooter & Gell v. Hartman*,<sup>151</sup> the Ninth Circuit and Washington courts now apply the same standard of appellate review to an award of Rule 11 sanctions: abuse of discretion. Prior to *Cooter & Gell*, the Ninth Circuit applied the same standards to review a Rule 11 order as it applied to other similar, final determinations of the trial court.<sup>152</sup> Thus, previously the appellate court reviewed: (1) factual determinations only for clear error; (2) legal conclusions *de novo*; and (3) the appropriateness of the sanction imposed for abuse of discretion.<sup>153</sup>

However, in *Cooter & Gell*, the Supreme Court specifically considered the validity of the Ninth Circuit's tripartite standard of review for Rule 11 sanctions. The Court rejected this standard and replaced it with a unitary abuse of discretion

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146. *Tom Growney Equipment, Inc. v. Shelly Irrigation Development, Inc.*, 834 F.2d 833 (9th Cir. 1987). See also *In re Taylor*, 884 F.2d 478 (9th Cir. 1989).

147. *Tom Growney Equipment*, 834 F.2d at 836 n.5.

148. *Matter of Yagman*, 796 F.2d 1165, 1184 (9th Cir. 1986).

149. *Townsend v. Holman Consulting Corp.*, 881 F.2d 788, 797 (9th Cir. 1989), vacated, 914 F.2d 1136 (9th Cir. 1990) (en banc) (*Townsend D*).

150. *Id.*

151. 110 S.Ct. 2447 (1990).

152. *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 828 n.4 (9th Cir. 1986).

153. See, e.g., *United States Energy Owners Committee, Inc. v. United States Energy Management Systems*, 837 F.2d 356, 364 (9th Cir. 1988) (citing *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 828 (9th Cir. 1986)).

standard for all aspects of a Rule 11 proceeding.<sup>154</sup> Although the Supreme Court articulated an across the board abuse of discretion standard for all aspects of a Rule 11 inquiry, it did caution that such a standard “would not preclude the appellate court’s correction of a district court’s legal errors, *e.g.*, . . . relying on a materially incorrect view of the relevant law in determining that a pleading was not ‘warranted by existing law or a good faith argument for changing the law.’”<sup>155</sup> In response to *Cooter & Gell*, the Ninth Circuit has substituted a unitary abuse of discretion standard for its previous tripartite standard of review.<sup>156</sup>

Washington courts, on the other hand, originally adopted across the board abuse of discretion appellate review.<sup>157</sup> Washington courts were concerned that to do otherwise would impose a “chilling effect on the [trial] court’s willingness to impose CR 11 sanctions.”<sup>158</sup> The Washington courts’ standard would seem to discourage a probing review of the lower court’s discretion. However, the appellate court was not reluctant to find an abuse of discretion where the trial court failed to award terms when it should have;<sup>159</sup> and it has remanded for further findings on the attorney’s conduct where the claims appeared facially frivolous but no sanctions were awarded.<sup>160</sup> These cases indicate that appellate review in the Washington courts is likely to remain vigorous.

## VII. CONCLUSION

According to Professor Arthur Miller of the Harvard Law School and Reporter to the Advisory Committee, the Committee had two fears when amending Rule 11 in 1983: that Rule 11 would be as little used as Rule 37 had been or that Rule 11 would be overused.<sup>161</sup> Dramatizing the fear of overuse and the resulting satellite litigation over the appropriateness of sanc-

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154. *Cooter & Gell*, 40 S. Ct. 2447, 2461.

155. *Id.* at 2459.

156. *E.g.*, *Adriana International Corp. v. Lewis & Co.*, 913 F.2d 1406 (9th Cir. 1990); *Townsend v. Holman Consulting Corp.*, 914 F.2d 1136 (9th Cir. 1990) (en banc) (*Townsend II*).

157. *Bryant v. Joseph Tree, Inc.*, 57 Wash. App. 107, 115, 791 P.2d 537, 542 (1990); *Doe v. Spokane & Inland Empire Blood Bank*, 55 Wash. App. 106, 110, 780 P.2d 853, 856 (1989); *Cooper v. Viking Ventures*, 53 Wash. App. 739, 743, 770 P.2d 659, 661 (1989).

158. *Cooper*, 53 Wash. App. at 743, 770 P.2d at 661.

159. *Guardianship of Lasky*, 54 Wash. App. 841, 848, 776 P.2d 695, 702 (1989).

160. *Spokane & Inland Empire*, 55 Wash. App. at 112, 780 P.2d at 857.

161. *Vairo*, *supra* note 7, at 195, citing remarks of Professor Arthur Miller,

tions, Professor Miller described his own " 'Kafkaesque dream' of courts being besieged by motions to sanction attorneys for making frivolous motions for sanctions."<sup>162</sup>

Perhaps in response to such concerns, the Ninth Circuit Court of Appeals early recognized the burden of increased activity in the district courts which would inevitably result from too liberal application of Rule 11.<sup>163</sup> The prudently cautious acceptance of the courts' new weapon has not been without controversy, even within the Ninth Circuit.<sup>164</sup> But, while the Ninth Circuit has continued to be "dovish" in its approach to Rule 11 sanctions, a willingness to impose sanctions to deter truly egregious conduct is equally clear from the reported opinions; furthermore, although not likely to transform a dove into a hawk, the opinion in *Townsend II* may lead to a somewhat more frequent use of sanctions.

While far fewer cases involving sanctions under amended Washington State CR 11 have reached the appellate level, the state appellate courts seem to give solid encouragement to the use of the amended rule to curb abuses in attorney conduct. It is the authors' belief that this encouragement has produced results, especially with some King County Superior Court judges. There are at least a few instances where superior court judges have seemingly ignored the purposes and limits of Rule 11 and have applied it solely as a means to shift fees to the losing party on a motion. Washington courts have placed less emphasis on, or ignored, the technical limitations imposed by the specific language of the Rule, seemingly regarding Rule 11 at least in part as another extension of the inherent power of the courts to control their cases.

While Professor Miller's Kafkaesque dream does not appear to have come to pass in the Ninth Circuit or in the state courts of Washington, the authors believe that a more disturbing nightmare may be threatening. In the authors' view, some amended Rule 11 proceedings appear to be reflecting the highly publicized decline in professionalism and courtesy among members of the trial bar. The use, or threat of use, of

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Reporter to the Advisory Committee, Federal Bar Council Annual Winter Meeting (February 1987).

162. Judicial Conference—Second Circuit, 101 F.R.D. 161, 200 (1984).

163. See *Golden Eagle Distributing Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1537 (9th Cir. 1986).

164. See *Golden Eagle Distributing Corp. v. Burroughs Corp.*, 809 F.2d 584 (9th Cir. 1987).

Rule 11 motions to shift litigation costs to the opponent, as a bargaining chip in settlement negotiations, or simply to appease an outraged client, has been noted on an increasing number of occasions at least in Western Washington's metropolitan areas. If such misuse of the rule, the plain purpose of which is to curb litigation abuse, is accepted by courts, a highly valuable tool will have been not lost but perverted. Federal district courts in Western Washington, taking their cue no doubt from the Ninth Circuit as well as from the extensive preappointment trial practice experience of many of the sitting judges, appear to have evolved a philosophy for applying Rule 11 which will serve to curb genuine abuses without abetting inappropriate litigation tactics. An additional reason for this successful evolution is the facility with which the judges of the western district are able to exchange views among themselves.

It is the authors' impression based on anecdotal information, and some direct experience, that the present application of Rule 11 at the state trial court level is far more idiosyncratic and on occasion less in keeping with the salutary purpose of the rule. The authors, like the rest of the bar, have gained most of the information on which this tentative conclusion is founded on word of mouth, grapevine, and inquiry since most Rule 11 decisions are not appealed and many at both the circuit and district court levels are not published.<sup>165</sup> In state court, of course, no trial court opinions are published. The authors believe that the information regarding enforcement practices and philosophies concerning Rule 11 which would be most useful to both trial lawyers and judges will be gained by timely familiarity with trial court decisions, the overwhelming majority of which will never be appealed. The existing information gap should be eliminated or reduced as much and as soon as possible. This could be accomplished by a carefully planned survey of district court and state superior court Rule 11 decisions conducted on a periodic basis (annually or bi-annually). Such a survey would be of great service to the courts and the bar by accurately and in a timely fashion communicating trends, standards, and practices under the rule.

Another mechanism for gaining a better understanding of Rule 11's function in actual practice would be the formation of a standing committee of the Washington State Bar Association,

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165. A West Law search discloses 82 unpublished Rule 11 opinions in the Ninth Circuit between January 1, 1989, and October 31, 1990.

composed of trial lawyers and federal and state judges. The committee could review trial court decisions under Rule 11, exchange views on the implementation of the rule, and publish a bimonthly or semi-annual summary in the Washington State Bar News. These proposals are not intended to be definitive but to stimulate thinking on the subject.

Admittedly, amended Rule 11 has stirred up a great deal of controversy. The Advisory Committee of which Professor Miller is now a member will be considering a variety of proposed amendments to the Rule. While in Seattle for the 1991 spring meeting of the American Bar Association, Professor Miller expressed his own personal hope that the Rule be left unchanged for now, predicting that the upsurge in its use (and misuse) will follow a bell-shaped curve. The authors concur with the hope that it be left unchanged until the bench and bar have had both additional time to develop the limits of salutary enforcement and the opportunity to create means for assisting that process such as those suggested in this essay.