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Rule 11: Montana Must Decide Whether to Adopt Softer Federal Version: Part I

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Rule 11

Montana Must Decide Whether to Adopt Softer Federal Version

By Cynthia Ford of the UM School of Law. First of a two-part series. Footnoted version of this article are available from the State Bar office.

Rule 11 of the Montana and federal Rules of Civil Procedure presently requires attorneys and unrepresented parties to certify that each paper (including, but not limited to, pleadings and motions) in a lawsuit is the product of a reasonable inquiry, is well grounded in fact and in law, and is not interposed for any improper purpose. The court is required to impose a sanction for a violation of this rule, although the type and amount of sanction is left to the court's discretion.

The rules were amended to their present form in 1983 (federal) and 1984 (state). Since then, Rule 11 has been the subject of intense criticism, primarily because of its perceived chilling effect on non-traditional legal theories and disproportional impact on plaintiffs, particularly in the public interest litigation fields.

As a result of this controversy, it appears that F. R. Civ. P. 11 is about to be amended in several important respects. On Sept. 21, 1992, the U.S. Judicial Conference approved an amendment which is now before the Supreme Court. If approved by the Court and Congress, as expected, the new federal Rule 11 will go into effect on or after Dec. 1, 1993.

The proposed amendment provides that sanctions for violation of Rule 11 will again be discretionary rather than mandatory, and specifies that sanctions "shall be limited to what is sufficient to deter repetition of such conduct..." Sanctions ordinarily will be payable to the court, rather than to an opponent. The amendment also contains a "safe harbor" provision, which requires a 21-day delay between service and filing of a Rule 11 motion. During this time, the challenged document may be withdrawn or corrected to prevent Rule 11 action.

Under the proposed amendment, Rule 11 liability arises not only from signing a particular document, but also from "later advocating" a paper that violates the certification requirements of Rule 11. The new version of the rule does allow a filing party to specifically identify factual allegations and denials which do not yet have evidentiary support because of a reasonable lack of knowledge and/or investigation. Law firms are held jointly responsible for violations committed by their lawyers.

NINTH CIRCUIT STUDY SUGGESTS PROPOSED RULE 11 'SAFE HARBOR' WILL LEAD TO GREATER GAMESMANSHIP IN THE FILING OF FRIVOLOUS CLAIMS.

The overall effect of the pending federal amendment is to significantly soften Rule 11. In contrast, a recent Ninth Circuit study committee report recommended Rule 11 be toughened, specifically allowing for cost-shifting sanctions, and that no "safe harbor" be established, for fear that such a move would lead to greater gamesmanship in the filing of frivolous claims. The committee did agree with the return to discretionary rather than mandatory imposition of sanctions.

If the federal Rule 11 is modified, Montana must decide whether to incorporate the new federal changes into the state Rule 11. The actual operation of the present Rule 11 in Montana's courts is important to this decision.

History of Rule 11

Montana Rule of Civil Procedure 11 is identical to the current Federal Rule of Civil Procedure 11 in all material provisions. Both resulted from major amendments to the original Rules 11. The federal amendment occurred in 1983; Montana followed suit in 1984.

Rule 11, as originally drafted, was part of a package of case management tools in the Federal Rules of Civil Procedure designed to enable judges to separate cases that warrant full judicial attention from those that are frivolous or without merit. Other rules in the same package include the rules relating to discovery, summary judgment, and pretrial conferences. However, in the first version of Rule 11, adopted with the rest of the Federal Rules of Civil Procedure in 1938, the federal Advisory Committee refused to require that attorneys certify the truth of matters contained in pleadings. When Montana adopted the M.R.Civ.P. in 1962, Rule 11 was identical to the federal model.

The original state and federal Rule 11 was neither strong nor effective. The rule did not clearly apply to any pleadings beyond the complaint and answer. Furthermore, although an attorney was required to sign these documents, doing so only certified that he or she had read the pleading and believed that there were grounds to support it. The signer was not required to undertake any investigation at all before so certifying. This resulted in a "pure heart, empty head" subjective standard. In addition to this weakness, the pre-1983 Rule 11 listed only one clearly improper purpose: delay.

Even if one side could establish that the opponent had violated these nebulous Rule 11 standards, no mandatory sanction existed. The Rule only provided that the court could — but did not have to — strike the offending pleading "as sham", and that for "a willful violation ... an attorney may be subjected to appropriate disciplinary action".

Not surprisingly, the original Rule 11 was rarely used. From 1938 to 1983, only 55 cases that even mentioned Rule 11 were reported in federal courts nationwide. Of these, only 36 directly involved allegations of Rule 11 violations.

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Montana had only two reported cases under Rule 11 from 1963 to 1984, both of which focused on technical verification of pleadings rather than the merit of the allegations made. This lack of litigation about Rule 11 indicates that the original version of the rule was not adequate to do what it was supposed to do: eliminate frivolous claims and defenses, and stem litigation abuse.

The 1983 federal amendment arose from the perception that Rule 11 needed tightening to prevent meritless cases from flooding the courts, increasing the judicial workload and decreasing the quality of that work to the detriment of litigants whose positions did have merit. The 1983-1984 amendment to the state and federal Rules 11 was intended to reduce the reluctance of courts to impose sanctions...by emphasizing the responsibilities of the attorney and reinforcing those obligations by the imposition of sanctions.... 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.

The amended rule was designed to cause lawyers and unrepresented parties to "stop and think" before filing pleadings and other papers. Specifically, the amendment:

- made it clear that Rule 11 applies to all litigation documents except discovery requests and responses;
- clarified that a party who signed a document thereby made the same certification as a signing attorney;
- changed the standard of certification to knowledge, information, and belief formed after reasonable inquiry into both the law and the facts, imposing an affirmative duty to conduct such an investigation;
- elaborated that purposes other than delay, such as, but not limited to, harassment or the desire to increase litigation costs, were also improper;
- made some "appropriate" sanction mandatory for each violation; and
- specified that sanctions for violation could be imposed upon either the attorney, the party the signing attorney represents, or both, or on an unrepresented party.

The 1984/1984 amendments to Rules 11 immediately gave rise to an enormous increase in sanction litigation. Between 1983 and 1991, more than 1500 such cases were reported nationwide by both state and federal courts. Thousands more cases probably were unreported.

——*Rule 11 Opinions from State and Federal Courts*

Like the rest of the nation, the Montana reported cases reflect a large increase in Rule 11 activity since the 1984 amendment to M.R. Civ. P. 11. In contrast to the pair of technical cases decided from 1963 to 1983, the Montana Supreme Court decided 26 cases involving Rule 11 from 1984 through Dec. 1, 1992. Four Rule 11 decisions came down in each of the years 1989 through 1992, six in 1988, two in 1987,

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and three in 1986. As of mid-December, the Supreme Court has decided three cases in which Rule 11 was cited. Of these cases, two attorneys were sanctioned in two cases each. The monetary sanctions involved in these cases range from a low of $500 to a high of $13,746.16.

Eleven of the 26 Rule 11 cases that the Montana Supreme Court has decided to date involved appeals from Rule 11 sanctions imposed by the trial courts. The Supreme Court upheld the sanction awards in eight of those cases, and reversed the awards in the remaining three. Ten others of the 26 Rule 11 cases taken to the Supreme Court were appeals of lower court refusals to impose Rule 11 sanctions. The Supreme Court affirmed all 10 of these cases; the five remaining Rule 11 cases did not involve questions of violation of Rule 11 or sanctions therefor.

Overall, the Supreme Court affirmed the trial courts' Rule 11 actions in 21 of the 25 cases it decided, or 84 percent. The Court recently reiterated and clarified its standard of review in Rule 11 cases:

> District courts have "wide latitude to determine whether the factual circumstances of a particular case amount to frivolous or abusive litigation tactics...." [citing D'Agostino v. Swanson]
>
> In D'Agostino, we outlined the standard of review of Rule 11 sanctions: (1) The district court's findings of fact will not be overturned unless clearly erroneous; (2) the district court's conclusion that the facts constitute a violation of Rule 11 will not be reversed, absent abuse of discretion; (3) review de novo is appropriate only if the violation is based upon the legal sufficiency of a plea [sic] or motion; (4) if Rule 11 has been violated, the district court must impose sanctions on the offending party, his counsel, or both; and (5) failure to impose sanctions where the rule has been violated will be deemed reversible error.

Wise v. Sebena, 248 Mont. 32, 38-39 (1991). Thus, Montana's standard of review is multi-tiered, in contrast to the unitary deferential abuse of discretion standard of review in Rule 11 cases the U.S. Supreme Court adopted in *Cooter & Gell v. Hartmax*, 110 S.Ct. 2447 (1990). The federal deferential standard applies to all aspects of a Rule 11 proceeding, including the nature of the prefiling inquiry, the factual basis of the paper, whether the pleading is "warranted by existing law or a good faith argument" for changing the law, and finally, whether the sanction ordered is appropriate. "Familiar with the issues and the litigants, the district court is better situated than the court of appeals to marshal the pertinent facts and apply the fact-dependent legal standard mandated by Rule 11." 110 S.Ct. at 2459.

The Montana Supreme Court generally has deferred trial court in accordance with its stated standard of review. In the few cases where the Court strayed from this standard, the result was to reverse sanctions imposed by the trial judge, not impose sanctions against the trial court's better judgment. Thus, overall, the Montana Supreme Court has exercised considerable restraint in the imposition of sanctions under Rule 11, justifying the Hon. Karla Gray's observation that "Rule 11 sanctions have been imposed sparingly in Montana." The Supreme Court's caution in the imposition of sanctions indicates appropriate concern about the potential impact of sanctions on litigants.

Federal Rule 11 Activity in Montana

Rule 11 traffic also has increased substantially in Montana's federal courts since the 1983 amendment of F. R. Civ. P. Before 1983, there were no cases from the Montana federal district courts involving Rule 11, either formally reported or not. Since 1983, we have found 15 Rule 11 opinions by U.S. District Court judges sitting in Montana. Most of this activity appears in informal rather than formal reporting services.

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Only two published cases involving Rule 11 arise from the District of Montana. The first of these involved a disgruntled litigant who filed 13 separate suits against state and federal judicial officers who had ruled adversely to him in other litigation. In addition to dismissing the cases with prejudice on the basis of judicial immunity, the Hon. Charles C. Lovell found clear abuse of the justice system and violations of Rule 11. He imposed sanctions of $500 in each case, for a total of $6,500, to recompense the United States and the State of Montana for the costs of defending their judges. This case was not appealed.

The only other Montana-based formal Rule 11 opinion in the federal system also involved a lawsuit by a disappointed litigant. In Elks National Foundation v. Weber, the plaintiff brought a civil rights action in U.S. District Court against the justices of the Montana Supreme Court, two Montana trial judges, and other parties to the state case. The Hon. James F. Battin dismissed the federal complaint for lack of subject matter jurisdiction and awarded attorneys' fees to the defendants pursuant to 28 U.S.C. Section 1988 and alternatively under Rule 11. The Ninth Circuit affirmed the award and exercised its own discretion to impose additional attorneys fees and costs on appeal against the plaintiff-appellant.

Montana Law Week's informal reports indicate more Rule 11 activity in the Montana federal courts than the small number of published opinions indicates. For the period 1984 to November 1992, the federal trial courts issued 13 unpublished opinions dealing with Rule 11 claims. One group of litigants was involved in four of these orders, in three different cases.

Of these sixteen Rule 11 motions in Montana's federal courts since 1984, eight have involved Rule 11 actions against pro se parties; in a ninth case, the court specifically imposed the sanctions against the represented party rather than the attorney. The court did not find any violation in three of these 16 cases. One was a plaintiff's motion against a defendant and two were defense motions against plaintiffs. In the remaining 13 motions, the court found violations of Rule 11, one by a defendant and the rest by plaintiffs.

THE MONTANA SUPREME COURT'S CONSIDERABLE RESTRAINT IN THE IMPOSITION OF SANCTIONS UNDER RULE 11 INDICATES APPROPRIATE CONCERN ABOUT THE POTENTIAL IMPACT OF THOSE SANCTIONS ON LITIGANTS.

In seven of the 13 motions that resulted in findings of Rule 11 violations, the court imposed monetary sanctions ranging from $250 to $61,193. In an eighth case, the court dismissed the complaint, enjoined further litigation, and explicitly indicated that it would consider a motion for monetary sanctions. In the remaining five cases, the court did not order monetary awards to the moving party, but took other action, including dismissal of the complaint, enjoining future litigation, and requiring an apology.

Much more federal Rule 11 activity is likely in cases in which the U.S. is a party. President Bush issued Executive Order 12779 (Civil Justice Reform) on Oct. 23, 1991, affirmatively directing agencies and litigation counsel participating in civil litigation on behalf of the U.S. government in federal court to seek sanctions where appropriate. The order holds the attorney general responsible for coordinating efforts by federal agencies to implement the order, and authorizes him or her to issue guidelines for implementation for the Department of Justice. These guidelines are to serve as models for the internal guidelines of other affected agencies. The Executive Order applies to all litigation commenced after Jan. 21, 1992.

Given the fact 41.6 percent of civil cases (353 of 848) filed in the U.S. District Courts in Montana in 1991 named the U.S. or one of its agencies as a party, the clear directive from the president that sanctions should be pursued is sure to give rise to a larger volume of Rule 11 motions in federal courts here.

Conclusion

Montana's state and federal courts have dealt with a steady but manageable flow of Rule 11 cases in the years since the 1983-1984 amendment. The results in the cases reported formally and informally constitute an important part of the picture about the effect of Rule 11 on litigants, lawyers and the judicial system in Montana.

Part 2 of this series, to be published in the February issue of *The Montana Lawyer*, will describe the practicing bar's experiences with and perceptions of Rule 11. ❐

STATE BAR CALENDAR

JANUARY

8: Executive Committee, 10 a.m., State Bar.
15: Judicial Relations Comm., 10 a.m., State Bar.
18: Martin Luther King's Day. State Bar Closed.
29: Montana Law Foundation, 1:30 p.m., State Bar.

FEBRUARY

5: Dispute Resolution Committee, 1:30 p.m., State Bar.

1993 CLE SEMINARS

Jan. 8: Water Law CLE, Colonial Inn, Helena.
Jan. 15-17: Business (CLE and Ski), Big Sky Resort.
Feb. 5: Construction Law, Fairmont Hot Springs Resort.
Feb. 26: Employment Law CLE, Colonial Inn, Helena.
March 19: Litigation, War Bonnet Inn, Butte.
April 2: Insurance Law, Sheraton Inn, Billings. ❐