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I. INTRODUCTION

As we become a more litigious society, the use of rule 11 is emerging as an effective tool to prevent frivolous litigation. The use of rule 11 sanctions will continue to grow as courts continue to expand the scope of rule 11. The Montana Supreme Court has only recently recognized the effectiveness of using rule 11 to deter the filing of frivolous motions and pleadings. Federal courts, however, have resolved many of the issues and questions common to the use of rule 11. This note will examine both the history and future of rule 11 and will also advocate the continued use of rule 11 sanctions in Montana when a paper is filed making allegations that have no supporting evidence.

II. THE STATUTORY DEVELOPMENT OF RULE 11

Rule 11 of the Montana Rules of Civil Procedure provides in pertinent part:

> Every pleading, motion or other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name whose address shall be stated. . . . The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper, that to the best of his 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 cause unnecessary delay or needless increase in the cost of litigation. . . . 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 the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee.[1]

Rule 11 as adopted by the 1961 Montana Legislature called for the signing of every pleading and striking the pleading as a sham if

1. Rule 11 of the Montana Rules of Civil Procedure is identical to rule 11 of the Federal Rules of Civil Procedure with the exception of one sentence regarding evidence needed to overcome an answer under oath. This difference does not appear to be significant.

there was not good ground to support it.[2] The Montana rule was amended in 1984 to conform to the 1983 amendment of the federal rule.

Today's Montana Rules of Civil Procedure have their roots in early English common law where colonial states adopted a very difficult and antiquated common law system of rules. For many years the courts were guided by equity rules developed in 1842,[3] which superseded the equity rules of 1822.[4] In 1912 the rules were revised and equity rules 1 through 81 were promulgated.[5] Adoption of code pleading in New York and in many other states further confused these conditions.[6]

The rules of civil procedure were enacted to remedy this confusing situation. The original Rules of Civil Procedure for the federal district courts became effective in 1938.[7] That rule 11 was similar to former equity rule 24[8] relating to signature of counsel and rule 21[9] relating to scandalous matters.[10] Rule 24 of the equity rules of 1842 required the attorney's signature as an affirmation

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2. The 1961 version of Montana rule 11 stated:

> Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney constitutes a certificate by him that he has read the pleading and that to the best of his knowledge, information, and belief, there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as served. For a willful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

MONT. R. CIV. P. 11; MONT. CODE. ANN. (1983).

3. 42 U.S (1 How.) Xli (1842).

4. 20 U.S. (7 Wheat) v (1822).

5. 226 U.S. 627 (1912).

6. *See generally* A. HOLTZOFF, NEW FEDERAL PROCEDURE AND THE COURTS (1940).

7. 308 U.S. 645-766 (1938).

8. Equity rule 24 stated:

> Every bill or pleading shall be signed individually by one or more solicitors of record, and such signature shall be considered as a certificate by each solicitor that he has read the pleading so signed by him; that upon the instructions laid before him regarding the case there is good ground for the same; that no scandalous matter is inserted in the pleading; and that it is not interposed for delay.

226 U.S. 627, 655 (1912).

9. Equity rule 21 stated: "The right to except to bills, answers, and other proceedings for scandalous or impertinence shall not obtain, but the court may, upon motion or its own initiative, order any redundant, impertinent, or scandalous matter stricken out, upon such terms as the court shall think fit." 226 U.S. 627, 654 (1912).

10. SCHWARZER, SANCTIONS UNDER THE NEW FEDERAL RULE 11: A CLOSER LOOK, 104 F.R.D. 181, 183 (1985) [hereinafter SCHWARZER].

that there was good ground to support it.[11] Montana later adopted rules of civil procedure which conformed to the federal rules.[12] The original rule 11 provided that the signature of an attorney on a pleading certified that "there was good ground to support it"[13] and that pleadings which did not conform to this standard may be struck as a sham.[14] That rule remained unchanged until its amendment in 1983.[15] The Montana rule 11 was amended to conform to the federal rule. Prior to its amendment in 1983, sanctions imposed under rule 11 were based on a "subjective standard."[16] However, the old rule 11 was not effective in deterring abuses in the filing of pleadings in federal court because courts rarely relied on it as an effective deterrent to preventing needless litigation. Accordingly, in 1983, rule 11 was amended to provide that a lawyer's signature on a pleading certifies that he has read the pleading, that after "reasonable inquiry" he believes it to be supported in fact and in law and not to cause unnecessary delay.

According to the new federal and Montana rule, a lawyer must make a "reasonable inquiry" into the facts which serve as the basis of his pleading. Moreover, courts have held that rule 11 sanctions shall be assessed if a paper is filed and signed by an attorney and is without factual foundation even if the paper was not filed in subjective bad faith.

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11. 42 U.S. (1 How.) Xlviii (1842).

12. *See*, MONT. R. CIV. P. 1-81, MONT. REV. CODES, (1947) Vol. 7, at 1039 (1964 Replacement).

13. FED. R. CIV. P. 11; 308 U.S. 645, 676 (1939).

14. *See* Freeman v. Kirby, 27 F.R.D. 395 (S.D.N.Y. 1961).

15. The 1938 version of federal rule 11 provided:

> Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

FED. R. CIV. P. 11; 308 U.S. 645, 676 (1939).

16. Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 253 (2d Cir. 1985), *on remand* 637 F. Supp. 558 (E.D.N.Y. 1986).

III. JUDICIAL DEVELOPMENT OF RULE 11

A. *Development of Rule 11 in the Federal Courts*

Until recently the Montana Supreme Court had never dealt with the issue of sanctions under the amended rule 11. The federal courts, having defined the circumstances under which it should be used, have imposed rule 11 sanctions often. Recently, the Ninth Circuit Court of Appeals in *Zaldevar v. City of Los Angeles*,[17] upheld a federal district court decision imposing sanctions upon a plaintiff whose action was so without factual and legal foundation that it was considered frivolous and unreasonable. The plaintiffs filed an action in federal court alleging a violation of the Federal Voting Rights Act.[18] The federal district court found that the plaintiff's voting rights claims were totally frivolous and totally without merit. The court reasoned that the certification by the attorney addresses two separate problems. The first problem regards frivolous filings. The second problem addressed is misuse of judicial procedures as a weapon for personal or economic harassment.

The court began its analysis by defining the legal standard against which alleged violations of rule 11 are to be tested.[19] The court adopted an "objective reasonableness" standard which it determined would be more stringent than the original good faith formula that had been used under the old rule 11.[20] Prior to the 1983 amendments to the federal rule, rule 11 was interpreted to require subjective bad faith by the signing attorney to warrant the imposition of sanctions. With the 1983 amendments to the rule, the certificate now tests the language of the signing attorney by an objective reasonableness standard. The court went on to state that the reasonableness standard would open a greater range of circumstances which would trigger the violation of the rule.[21] The *Zaldevar* court recognized that the intent of amending rule 11 was to curb widely acknowledged abuse from the filing of frivolous pleadings and other papers.[22]

The *Zaldevar* court acknowledged that the pleader need not be correct in his view of the law underlying the claim. Rather, the pleader must have a good faith argument for his view of what the law is or should be. "Extended research alone will not save a claim

17. 780 F.2d 823 (9th Cir. 1986).
18. *Id.* at 826.
19. *Id.* at 829.
20. *See also* Comment, *Sanctions Available for Attorney Misconduct: A Glimpse at the "Other" Remedies*, 47 MONT. L. REV. 89 (1986) (authored by Tracy Axelberg).
21. *Zaldevar*, 780 F.2d at 829.
22. *Id.*

that is without legal or factual merit from the penalty of sanctions."[23] The court reasoned that a good faith belief in the merit of a legal argument is an objective condition which a competent attorney attains only after "reasonable inquiry."[24] Such inquiry is the amount of examination into the facts and legal research which is reasonable under the particular circumstances of the case.

The second problem addressed by the court dealt with the improper purpose clause of rule 11. The court reasoned that a violation of the clause justified sanctions against parties as well as counsel. Rule 11, therefore, can be invoked if an initial pleading is signed for an improper purpose. An improper purpose does not require intentional impropriety. Rather, improper purpose is tested by objective standards.[25] Deciding harassment under rule 11 focuses upon the improper purpose of the signer, objectively tested, rather than the consequences of the signer's act, subjectively viewed, upon the signer's opponent. The court concluded by holding that 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.

The Ninth Circuit Court of Appeals demonstrated a willingness to expand the criteria upon which a violation of rule 11 can be determined. Courts in other jurisdictions share this willingness.[26] Courts will apply the reasonableness standard to find whether or not the pleadings are based on a belief formed after reasonable inquiry and are well-grounded in fact. Reasonableness is measured by what a competent attorney admitted to practice before the court would do. The courts will also apply the improper purpose clause to the facts to determine if elements of harassment, efforts to cause unnecessary delay, or needless increase in the cost of litigation exist.

B. *Rule 11 Sanctions in Montana*

The courts of Montana have been reluctant to impose rule 11 sanctions and the attorneys of Montana have been reluctant to move for rule 11 sanctions. As the courts' workload continues to grow, the courts may turn to rule 11 in order to avoid wasting time dealing with frivolous litigation.

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23. *Id.*
24. *Id.* at 831.
25. *Id.*
26. For a statistical profile of awards under rule 11, *see* G. VAIRO, RESOURCE MATERIALS: CIVIL PRACTICE AND LITIGATION IN FEDERAL AND STATE COURTS 56 (1985).

The Advisory Committee's Note to the Montana rule states:

> It has been the practice for many years in both Montana, federal, and state courts for the pleader to first file a responsive motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b) for the purposes of obtaining additional time within which to prepare an answer and to inform the court and parties that an appearance is being made. The courts have recognized this practice and routinely overruled the motion unless briefs are filed in support or the motions are set for oral argument. It is not the intent of the Advisory Commission in adopting the foregoing amendment to do away with this practice.[27]

While the compilers' comments note that the 1984 amendment of rule 11 makes the Montana Advisory Committee Note applicable,[28] the practicality of the comment in view of the development of rule 11 in the federal courts is questionable. Prior to the 1984 amendment a complaint or an answer was not required to be verified.[29] Montana's reluctance to impose rule 11 sanctions is founded in the belief that rule 12(b) striking of pleadings is the most appropriate method for dealing with frivolous claims.[30]

The purpose of amending the federal rule was to develop a "standard more stringent than the original good faith formula."[31] The Federal Advisory Committee Note also pointed out that it was expected that a greater range of circumstances will trigger violations of rule 11.[32] The use of the Montana rule 11 is in conflict with the law developing based on the nearly identical federal rule. If "interpretations under the federal rule have persuasive application to an interpretation of the state rule because of the identical language,"[33] the Montana position does not reflect the changing position of other courts operating under a nearly identical rule.

The Montana Supreme Court only recently addressed a challenge to rule 11 sanctions. In *Schmidt v. Colonial Terrace Associates*,[34] the court upheld a district court's decision to impose sanctions on the plaintiff and his attorney. Motions made by the plaintiff requested the court resolve issues outside the scope of

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27. MONT. R. CIV. P. 11 annot. (Advisory Committee Note) (1986).

28. MONT. R. CIV. P. 11 annot. (Compilers Comment) (1986).

29. *See, e.g.*, Keller v. Hanson, 157 Mont. 307, 309, 485 P.2d 705, 707 (1971).

30. *See* Adams v. Davis, 142 Mont. 587, 386 P.2d 574 (1963).

31. FED. R. CIV. P. 11 Advisory Committee Note *reprinted in* 97 F.R.D. 165, 198 (1983).

32. *Id.*

33. Petritz v. Albertsons, Inc., 187 Mont. 102, 608 P.2d 1089, 1091 (1980).

34. ___ Mont. ___, 723 P.2d 954 (1986).

original litigation.[35] The district court imposed sanctions when it found that motions made by the plaintiff were not offered in good faith and were made only for the purposes of delay.

The plaintiff brought suit in 1979 for breach of contract. The defendant, Colonial Terrace Associates counterclaimed and a jury returned a verdict in favor of the defendant. Because the final judgment did not make any reference to offset, on appeal the court remanded the case to resolve the issue.[36] The district court then adopted a special master's report. The plaintiff filed a motion for restitution of funds. This motion was denied. The Montana Supreme Court upheld the court's adoption of the special master's findings.[37]

The plaintiff then filed a document entitled "motions" requesting the district court to determine the actual amount the plaintiff owed the defendant, an issue that had already been resolved by the court.[38] The defendant responded with a motion to strike. Upon hearing, the court granted the motion to strike and later imposed sanctions upon both the plaintiff and the plaintiff's attorney for attempting to raise issues which had been rejected several times.[39]

The Montana Supreme Court found that the district court correctly imposed sanctions on the plaintiff. The supreme court quoted the findings of the district court stating: "[Schmidt] now asks the court to re-litigate issues which arose *before the trial*, and judgment and, further, to litigate contractual controversies which arose *after trial* and judgment and which are outside the ambit of the pleadings."[40] The plaintiff's motions asked the court to resolve issues that had been settled one year earlier in the controversy.

Schmidt is significant because it demonstrates that Montana has joined the growing ranks of jurisdictions which recognize the use of rule 11 sanctions against both the plaintiff and the plaintiff's attorney as a method of preventing and deterring frivolous motions and litigation. The Montana Supreme Court should continue to follow the lead of the federal courts and adopt a broader interpretation of rule 11 imposing a clear duty to make a reasonable investigation prior to filing of the paper.

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35. *Id.* at ____, 723 P.2d at 955.
36. Schmidt v. Colonial Terrace Assoc., 202 Mont. 46, 656 P.2d 807 (1982).
37. Schmidt v. Colonial Terrace Assoc., ____ Mont. ____, 694 P.2d 1340 (1985).
38. *Schmidt*, ____ Mont. at ____, 723 P.2d at 955.
39. *Id.*
40. *Id.* at ____, 723 P.2d at 956 (emphasis in original).

IV. Appropriate Sanctions

Rule 11 expressly calls for an appropriate sanction which "may include an order to pay . . . the amount of reasonable expenses incurred . . . including reasonable attorney's fee."[41] An award of reasonable costs, including reasonable attorney's fees, is an appropriate sanction to be imposed on attorneys and their clients. Courts have primarily resorted to awarding attorney fees to be paid by the attorney who failed to make reasonable inquiry.[42] In some instances, "reasonable" fees which were substantially less than actual attorney fees have been awarded.[43]

Some courts have imposed nonmonetary sanctions. The Advisory Committee Notes to Montana's rule 11 recommend that scandalous matters be stricken under rule 12(b) as well as under the more general language of amended rule 11.[44] However, in *Armstrong v. Snyder*,[45] the court stated that challenged matter may be struck under rule 11 only if it clearly has no bearing on the subject matter and real prejudicial harm can be shown to the moving party.

The language of the Advisory Committee Note indicates that a variety of sanctions were meant to be considered.[46] Nonmonetary sanctions, as well as monetary sanctions, may be imposed by the court.[47] Nonmonetary sanctions imposed by courts under rule 11 have included striking the paper[48] and refusing to grant leave to amend the pleadings.[49] One commentator suggests reprimand or barring an attorney from appearing for a period of time.[50]

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41. Fed. R. Civ. P. 11. *See also* Eastway Constr. Corp. v. City of New York, 762 F.2d 243 (2d Cir. 1985), *on remand* 637 F. Supp. 558 (E.D.N.Y. 1986) (award of attorney fees proper where frivolous claim); Woodford v. Gavin, 105 F.R.D. 100 (N.D. Miss. 1985) (In an action initiated by a plaintiff's attorneys without adequate investigation, an award of attorney fees is proper); Badillo v. Central Steel & Wire Co., 717 F.2d 1160, 1166 (7th Cir. 1983) (attorney fees appropriate); Hedison Mfg. Co. v. N.L.R.B., 643 F.2d 32, 35 (1st Cir. 1981) (counsel fees appropriate).

42. *See, e.g.*, Wold v. Minerals Eng'g Co., 575 F. Supp. 166 (D. Colo. 1983).

43. Continental Airlines v. Group Systems Int'l, 109 F.R.D. 594 (C.D. Cal. 1986); United Food & Commercial Workers Union Local No. 115 v. Armour Co., 106 F.R.D. 345 (N.D. Cal. 1985).

44. *See* Mont. R. Civ. P. 11 annot. (Advisory Committee Note) (1986).

45. 103 F.R.D. 96 (E.D. Wis. 1984).

46. Mont. R. Civ. P. 11 provides that the court shall impose an appropriate sanction which may include an order to pay the other party or parties the reasonable expenses incurred because of the filing.

47. *But see In re* Itel Sec. Litigation, 586 F. Supp. 226 (N.D. Cal. 1985) (Punitive sanctions not allowed by rule 11).

48. Threm v. Hertz Corp., 732 F.2d 1559 (11th Cir. 1984).

49. Wren v. New York City Health & Hosp. Corp., 104 F.R.D. 553 (S.D.N.Y. 1985).

50. Schwarzer, *supra* note 10, at 201-04.

Courts have considered mitigating factors in determining the severity of the sanction imposed. Factors such as ability to pay, need for compensation, degree of frivolousness, and experience of counsel have been considered.[51] Sanctions have been imposed on the party to the action in addition to his counsel.[52]

In *Schmidt*, the Montana Supreme Court held a district court did not abuse its discretion in imposing sanctions against both the plaintiff and his attorney for filing frivolous motions.[53] Appropriate sanctions were determined to be reasonable attorney's fees and costs.

V. RULE 11 PROCEDURE

The Advisory Committee Note to federal rule 11 suggests basing sanction decisions on the facts of the record. The note states: "To assure that the efficiency is achieved . . . the court must to the extent possible, limit the scope of the sanction proceedings to the record."[54] "Commentators note, however, that where a court must resolve a series of disputed facts or credibility as an issue, a hearing would be in order."[55]

Commentators have criticized the new rule as depriving the attorney of due process rights.[56] One committee noted:

> There are factors relevant to a finding that sanctions should be imposed that ordinarily will not have been addressed four-square in the record, and there are other factors that normally must be established before the record . . . . The right of a person facing sanctions to participate and to add to the court's store of information continues to be essential to assure accuracy and both the reality and appearance of fairness whenever sanctions are imposed.[57]

One court has reasoned that in the case of sanctions, due process requires that the attorney be given notice of the motion for fees and have an opportunity to address the court before sanctions are imposed.[58] *Eastway Construction Corp. v. City of New York*,[59]

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51. Eastway Constr. Corp. v. City of New York, 637 F. Supp. 558 (E.D.N.Y. 1986).

52. *See* Aune v. United States, 582 F. Supp. 1132 (D. Ariz. 1984); Friedman v. Axelrod, 593 F. Supp. 395 (S.D.N.Y. 1984).

53. *See Schmidt*, ___Mont. ___, 723 P.2d 954 (1986).

54. FED. R. CIV. P. 11 Advisory Committee Note *reprinted in* 97 F.R.D. 96, 201 (1983).

55. *See* SCHWARZER, *supra* note 10.

56. *See generally* Committee on Federal Courts of the Association of the Bar of the City of New York, *Procedural Rights of Attorneys Taking Sanctions*, 40 THE RECORD 313 (1985).

57. *Id.*

58. *See also* Hasty v. Paccar, Inc., 583 F. Supp. 1577 (E.D. Mo. 1984).

involved an antitrust claim and a due process claim by a construction company against the city of New York. The case was originally dismissed.[60] Eastway appealed the dismissal and the city cross-appealed for the denial of attorneys fees. The case was remanded to set fees. In *Eastway*, the court noted that an evidentiary hearing should be held when sanctions depend on the resolution of factual issues.[61] The court began by determining that an objective standard would apply in cases where reasonable inquiry was at issue. It went on to state that in the case of sanctions, the attorney should have an opportunity to address the court before sanctions are to be imposed. It reasoned that due process requires an evidentiary hearing be held if necessary and stated: "an evidentiary hearing will be necessary when the imposition of the sanction is dependant upon the facts genuinely in dispute."[62] The court also cited Schwarzer[63] stating "evidentiary hearings should be avoided, unless the court must find disputed facts or resolve issues of credibility."[64] A hearing should be held when issues which will determine whether a violation of rule 11 has occurred cannot be resolved by examining the documents that have been filed.

Commentators have noted that the amended rule 11 imposes additional burdens on the attorney signing the pleadings and that the attorney will be forced at every step of the litigation to weigh "not only what is in the best interests of the client, but what possible sanctions on the attorney personally may result and how the step being considered can be justified and legitimized to the judge."[65] One commentator noted that the rule places attorneys and judges in the position of "deciding the case on procedural grounds before and perhaps without ever reaching the merits of the case."[66]

As a general rule, the courts do not wait until the end of the litigation to determine the appropriateness of rule 11 sanctions.[67] "The rule leaves timing to the court's discretion."[68] The Advisory Committee Note to the federal rule states that in the case of pleadings the rule 11 sanctions issue normally would be determined at

59. 637 F. Supp. 558 (E.D.N.Y. 1986).
60. *See Eastway*, 762 F.2d 243.
61. 637 F. Supp. at 568.
62. *Id.*
63. 104 F.R.D. at 181.
64. 637 F. Supp. at 568.
65. Comment, *Reasonable Inquiry Under Rule 11—Is the Stop, Look, and Investigate Requirement a Litigant's Road Block?*, 18 IND. L. REV. 751 (1985).
66. *Id.*
67. *See Eastway*, 637 F. Supp. at 568.
68. SCHWARZER, *supra* note 10, at 197.

the end of the litigation. In the case of motions, rule 11 issues should be resolved at the time the motion is decided or shortly thereafter.[69]

The policy underlying rule 11 is to prevent frivolous litigation and avoid waste. Rule 11 sanctions should be determined at the time the motion for sanctions is decided to prevent needless litigation.[70] This rule should be extended to pleadings in order to fulfill the policy objectives underlying rule 11.

One court found that sanctions are mandatory under the federal rule. Therefore, rule 11 sanctions *must* be imposed if a reasonable inquiry discloses that the pleading is not well-grounded in fact. In *Westmoreland v. Columbia Broadcasting System*,[71] the court in dicta stated that once those factors which violate rule 11 were found to exist, a *refusal* to invoke rule 11 sanctions constitutes error. The District of Columbia Circuit Court of Appeals reversed a lower court decision not to impose sanctions for a party's groundless petition seeking to hold a witness in contempt of court.[72] *Westmoreland* represents the stricter standard which the courts are moving towards. Indeed, the language of the federal rule 11 and the Montana rule 11 make the imposition of sanctions mandatory upon a finding that the filed paper is not based on reasonable inquiry. The plain language of the rule states that the court *shall* impose an appropriate sanction for rule 11 violations.

When counsel has filed pleadings and subsequently finds that the pleading or motion does not have a basis in fact or law, the duties of the attorney are not defined. Some commentators have suggested that the rule may pose a continuing duty to stand behind the pleadings rather than simply state that the attorney believes the pleading is grounded in fact and law at the time he signs the document.[73] Presently, however, the federal courts are split on the issue. *Kendrick v. Zanides*[74] is representative of the holding that the attorney's duty to stand behind the pleading is continuing.[75] In *Kendrick*, an attorney persisted in pursuing a claim despite documents which demonstrated that the plaintiff's allega-

69. FED. R. CIV. P. 11 Advisory Committee Note *reprinted in* 97 F.R.D. 196, 201 (1983).

70. *See Eastway*, 637 F. Supp. at 558.

71. 770 F.2d 1168 (D.C. Cir. 1985).

72. *Id.* at 1170.

73. *See* Parnes, *Groundless Pleadings and Certifying Attorneys in Federal Courts*, 1985 UTAH L. REV. 325, 340.

74. 609 F. Supp. 1162 (N.D. Cal. 1985).

75. *But see In re Mid-Atlantic Toyota Trust Litigation*, 525 F. Supp. 1265 (C.D. Md. 1981), *modified on other grounds*, 541 F. Supp. 62 (C.D. Md. 1981).

tions were false. The plaintiff was engaged in the securities business and came under investigation by the Securities and Exchange Commission (SEC). The plaintiff brought suit alleging violation of his constitutional and common law rights by the SEC. He claimed that the defendants were motivated by the envy of his wealth. The *Kendrick* court reasoned that rule 11 required the attorney to have in hand sufficient credible evidence to form a reasonable belief that the allegations they certify are grounded in fact. A distinction was drawn between credible evidence and opinions or conclusions.[76] The plaintiff was not able to come forward with facts to support his claim. Rather, he relied on conclusory allegations described in his complaint. The court noted that no declarations to support the charges had been submitted which would raise any inference that the defendants had a plan to achieve the alleged objectives charged. The attorney based his belief on what his client had told him and the promise that there would be "copious documents but that he had been unable to find them."[77] The plaintiff's counsel knew that the allegations were false when they filed the complaint and had not made an effort to comply with rule 11. The court found that they continued defamatory attacks on the defendants even after conceding that the attacks were unprovable.[78] Rule 11 requires that the plaintiff have in hand sufficient credible information to enable him to form a reasonable belief that the allegations are well-grounded in fact. The sanctions imposed by that court required the plaintiff and his attorneys to pay all of the reasonable expenses, including reasonable attorney fees incurred by the defendants in the defense of their action.

Generally, reasonable attorney fees and court costs will be assessed as a reasonable sanction when rule 11 has been violated. The sanction may be commensurate with the seriousness of the violation. A more serious penalty may be imposed in cases where the violation of the rule is more harmful to the judicial proceeding.

V. Attorney-Client Privilege

Determining factual issues relating to rule 11 sanctions raises problems of potential conflict with the attorney-client privilege. The Montana Code Annotated provides: "An attorney cannot without the consent of his client, be examined as to any communication made by the client to him or his advice given thereon in the

76. *Kendrick*, 609 F. Supp. at 1172.
77. *Id.* at 1168.
78. *Id.* at 1173.

course of professional employment."[79] The protection and the applicability of the attorney-client privilege when making a determination on a rule 11 claim is questionable. Commentators have noted "a judge should view assertion of the privilege by a lawyer with skepticism."[80] Schwarzer notes,

> If the information received from the client is relevant to whether a paper is well-founded, it must eventually be disclosed in any event, either in a pleading or in discovery; that it may have been incorporated in work product does not immunize it from disclosure. In the last resort, the judge should make an in camera examination; this, however, should be the exception, rather than the rule because of the implication of an ex parte communication on the merits.[81]

The policy underlying the attorney-client privilege contemplates protecting communications between the attorney and client and promoting complete disclosure between the attorney and client. This appears to conflict with the application of rule 11 which requires a determination of the extent of the attorney's investigation into the facts at law underlying the pleading which are signed. The Advisory Committee recognized the potential for conflict when it stated:

> The rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories. The court is expected to avoid using the wisdom of hindsight and should test signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted . . . . The rule does not require a party or an attorney to disclose privileged communications or work product in order to show that the signing of the pleading, motion, or other paper is substantially justified. The provisions of Rule 26(c), including orders after in camera inspection by the court, remain available to protect the party claiming privilege or work product protection.[82]

A court may encounter difficulty in determining the reasonableness of an attorney's inquiry into the facts and law if that attorney claims the protection of the attorney-client privilege. Courts have recognized, however, that the attorney-client privilege exists solely for the personal benefit and protection of the client. The client holds the privilege and it must be asserted by the client. Underly-

79. MONT. CODE ANN. § 26-1-803 (1985).
80. SCHWARZER, *supra* note 10.
81. *Id.*
82. FED. R. CIV. P. 11 Advisory Committee Note *reprinted in* 97 F.R.D. 165, 199 (1983).

ing this reasoning is the policy that the attorney-client privilege extends only to confidential matters communicated by or to the client in the course of gaining counsel's advice with respect to the client's rights or obligations.[83] It does not pertain to the attorney's reasonable investigation of the facts and law underlying the paper he has filed.

While an attorney could assert the attorney-client privilege in order to avoid revealing matters underlying and forming the basis for his pleading, the attorney should not be able to assert the attorney-client privilege to avoid revealing matters regarding his reasonable investigation of the allegations of the pleadings. An attorney should not be able to use the attorney-client privilege to frustrate questioning about information he received from other sources, his own investigation, or his basis for believing that the pleadings have a solid legal foundation. If an attorney has conducted a reasonable investigation as required by rule 11, the information he received in that investigation from other sources should not be protected by the attorney-client privilege when rule 11 sanctions are at issue. Information received from witnesses, legal research, and his investigation of the facts should not be protected.

The Montana Supreme Court, however, has taken a liberal view of the work product rule. The rule protects materials prepared during litigation or in anticipation of litigation and provides for a disclosure of such material only upon showing that the party seeking discovery has a substantial need for the material and is unable, without undue hardship, to obtain materials through other means.[84] In *Kuiper v. District Court*,[85] the Montana Supreme Court noted that Montana rule 26(b)(3) protects impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation. If this is the case, the broad protections granted by the work product rule will make rule 11 difficult to enforce. If a question exists, however, the solution to that problem lies in the court's making an in camera inspection of the attorney's investigation to determine if the pleadings have a reasonable foundation in fact and in law.

The attorney-client privilege and work product doctrine are not in hopeless conflict with rule 11. In most instances the reasonable investigation of the attorney should be apparent from the face of the paper that has been filed.[86]

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83. *See generally* Bernard D. Morely, P.C. v. McFarlane, 647 P.2d 1215 (Colo. 1982).
84. Kuiper v. District Ct., ___ Mont. ___, 632 P.2d 694 (1981).
85. *Id.*
86. *See Schmidt*, ___ Mont. ___, 723 P.2d 954.

VII. Conclusion

To avoid rule 11 sanctions, the attorney must make a reasonable effort to determine that the pleading is not designed to harass, and has a reasonable foundation in facts and law. Each attorney will have to make a personal assessment, however, realizing that a subjective standard will not apply if the question of whether rule 11 sanctions should be imposed arises. Properly applied by the courts, rule 11 will achieve its intended effect of curbing frivolous litigation.