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Sanctions Available for Attorney Misconduct: A Glimpse at the "Other" Remedies

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SANCTIONS AVAILABLE FOR ATTORNEY MISCONDUCT: A GLIMPSE AT THE "OTHER" REMEDIES

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> Unlike the polemicist haranguing the public from his soapbox in the park, the lawyer enjoys the privilege of a professional license that entitles him to entry into the justice system to represent his client and, in doing so, to pursue his profession and earn his living. He is subject to the correlative obligation to comply with the rules and to conduct himself in a manner consistent with the proper functioning of that system.[1]

I. INTRODUCTION

Frivolous pleadings, motions, and appeals have long been a blight on the judicial process.[2] In addition to clogging the judicial machinery, these practices place an unjustifiable financial burden upon other parties, impede the timely determination of meritorious claims, and undermine public confidence in the judicial process.

The victim of abusive and frivolous litigation tactics is not without a remedy, however, and need not commence a separate civil action to find relief. This comment addresses the lawyer's ethical duty to avert meritless claims and contentions and examines the standard of conduct employed by the courts to determine the breach of that duty. Further, it explores several non-traditional mechanisms[3] available for deterring baseless litigation and analyzes who should bear the resulting financial responsibility. This comment is multi-jurisdictional in scope as Montana, like many states, has virtually no body of common law governing attorney misconduct and the application of available sanctions. It examines three sources of ammunition available to litigants for use against

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1. Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 184 (1985).

2. *See* Winchester v. Jackson, 7 U.S. (3 Cranch) 515, 515 (1806) (writ of error dismissed with costs for want of jurisdiction).

3. The "traditional" mechanisms for combatting abusive litigation tactics include abuse of process, defamation and malicious prosectuion. *See, e.g.*, Special Project, *Malicious Prosecution*, 33 S.C.L. REV. 317 (1981); Note, *Liability for Proceeding with Unfounded Litigation*, 33 VAND. L. REV. 743 (1980); Comment, *Counterclaiming for Malicious Prosecution and Abuse of Process: Washington's Response to Unmeritorious Civil Suits*, 14 WILLAMETTE L.J. 401 (1978); Harper, *Malicious Prosecution, False Imprisonment and Defamation*, 15 TEX. L. REV. 157 (1937).

lawyers who attempt to escape their professional accountability.

II. Ethical Considerations

The Ethical Considerations of the Model Code of Professional Responsibility,[4] although never formally adopted by the Montana Supreme Court, provide aspirational guidelines for combatting groundless claims and contentions. While the Model Code requires a lawyer to represent his client zealously,[5] the lawyer's duty extends "both to his client and to the legal system."[6] Thus, a lawyer may assert a position "supported by law or . . . a good faith argument for an extension, modification, or reversal of existing law,"[7] but a lawyer may not assert a frivolous position in litigation.[8] His representation must be "within the bounds of the law"[9] and although encouraged to "urge any permissible construction of the law favorable to his client,"[10] the lawyer has a "concurrent obligation . . . to avoid the infliction of needless harm"[11] and may not take "action on behalf of his client . . . merely to harass or maliciously injure another."[12]

On June 6, 1985, the Montana Supreme Court replaced the Model Code with the Model Rules of Professional Conduct.[13] Model Rule 3.1 prohibits a lawyer from asserting a claim or contention "unless there is a basis for doing so that is not frivolous,[14] which includes a good faith argument for an extension, modification, or reversal of existing law."[15] This rule modifies its counterpart in the Model Code[16] by enlarging the scope of the prohibition to encompass frivolous litigation as well as malicious and harassing

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4. Model Code of Professional Responsibility (1981) [hereinafter cited as Model Code].

5. Model Code, *supra* note 4, DR 7-101.

6. *Id.*, EC 7-1.

7. *Id.*, EC 7-4.

8. *Id.*

9. *Id.*, EC 7-1.

10. *Id.*, EC 7-4.

11. *Id.*, EC 7-10.

12. *Id.*, DR 7-102(A)(1).

13. Model Rules of Professional Conduct (1983) [hereinafter cited as Model Rules]. The Model Rules now apply to all questions of professional conduct of members of the Montana Bar, whether the conduct occurred before or after the July 1, 1985 effective date. An exception is made if the conduct occurred prior to adoption of the Model Rules and was proper under the Model Code. *See* Order Adopting Rules of Professional Conduct, No. 84-303 (Mont. June 6, 1985).

14. The Model Rules define an argument as frivolous "if a disinterested legal analyst could say it lacks any basis in existing authority . . . ." *Id.*, Rule 3.1, comment.

15. Model Rules, *supra* note 13, Rule 3.1.

16. Model Code, *supra* note 4, DR 7-102(A)(1).

proceedings; the rule mandates compliance rather than merely encouraging it.

The Model Rules squarely burden the attorney with a duty to determine the validity of a claim, and require that a lawyer not initiate an action unless "according to the lawyer's belief there is good ground to support it."[17] The lawyer "may not present a claim or defense lacking serious merit,"[18] nor initiate a proceeding unless "a lawyer acting in good faith would conclude that there is a reasonable basis for doing so."[19] However, before a court can further burden an attorney with a sanction for misconduct, it must first decide what evidence to consider in making that determination.

III. Defining the Standard of Conduct

Defining a workable standard of conduct to distinguish frivolous from meritorious claims presents a professional dilemma. Too restrictive a standard has the potential of stifling the presentation of innovative theories of law and hindering the just determination of novel claims. A broad standard, on the other hand, fails to notify the profession of the conduct proscribed and may bury the judiciary with countless motions.

American courts have yet to adopt a uniform standard of conduct which balances these competing interests. The standards invoked, however, frequently fall into one of two categories: objective and subjective. The following two cases illustrate the distinction.

A. *Objective Standard*

In *Sommer v. Carr*,[20] codefendant Prudential Insurance Company filed a third party complaint against Sentry Insurance Company seeking indemnification. Sentry, claiming lack of coverage, moved for summary judgment, and maintained that because Prudential and its attorney knew that there was no coverage, the third party action was frivolous.[21] Sentry also claimed entitlement to costs and reasonable attorney fees pursuant to a state statutory provision that allows such an award in the presence of subjective

17. Model Rules, *supra* note 13, Rule 3.1(a)(1).

18. *Id.*, Rule 3, Introduction.

19. *Id.*, Rule 3.3.

20. 99 Wis. 2d 789, 299 N.W.2d 856 (1981). For additional cases employing the objective standard of conduct, see First Nat'l Bank v. Marquette Nat'l Bank, 482 F. Supp. 514, (D. Minn. 1979); Bird v. Rothman, 128 Ariz. 599, 627 P.2d 1097 (1981); State v. State Farm Fire & Cas. Co., 100 Wis. 2d 582, 302 N.W.2d 827 (1981).

21. *Sommer*, 99 Wis. 2d at 790-91, 299 N.W.2d at 856.

evidence of misconduct.[22]

The issue in *Sommer* concerned whether Prudential and its attorney knew or should have known the claim against Sentry was frivolous.[23] In its analysis, the court found an objective standard of what a reasonable attorney would have done under the same or similar circumstances preferable to the subjective standard posed by the statute. The court recognized the disparity in abilities among attorneys and reasoned that employing a subjective standard "would establish as many tests as there are attorneys practicing law in this state."[24]

B. *Subjective Standard*

Not all jurisdictions give credence to the objective standard embraced in *Sommer*. The attorneys representing the surviving spouse in *Friedman v. Dozorc*[25] filed a medical malpractice suit against several doctors and two hospitals who had treated the plaintiff's wife. Defendants were granted a directed verdict when plaintiff failed to introduce expert testimony to indicate that there had been a breach of any professional standard of conduct.[26] One of the doctors, relying upon theories of negligence, abuse of process and malicious prosecution, then sought to recover damages from plaintiff's attorneys. He based his action upon the allegedly frivolous nature of the malpractice suit.[27]

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22. WIS. STAT. ANN. § 814.025 (1983-84) provides, in part:

> *Costs Upon Frivolous Claims and Counterclaims.* (1) If an action or special proceeding commenced or continued by a plaintiff or a counterclaim, defense or cross complaint commenced, used or continued by a defendant is found, at any time during the proceedings or upon judgment, to be frivolous by the court, the court shall award to the successful party costs determined under § 814.04 and reasonable attorney fees.
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> . . . .
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> (3) In order to find an action, special proceeding, counterclaim, defense or cross complaint to be frivolous under sub. (1), the court must find one or more of the following:
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> . . . .
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> (b) The party or the party's attorney *knew or should have known*, that the action . . . was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

(Emphasis added). For a detailed analysis of this statute, see Comment, *Is Wisconsin's Frivolous Claim Statute Frivolous? A Critical Analysis of Wis. Stat. § 814.025*, 68 MARQ. L. REV. 279 (1985).

23. 99 Wis. 2d at 797, 299 N.W.2d at 859.
24. *Id.* at 797, 299 N.W.2d at 860.
25. 412 Mich. 1, 312 N.W.2d 585 (1981).
26. *Id.* at 18, 312 N.W.2d at 588.
27. *Id.* at 18-19, 312 N.W.2d at 589.

The Supreme Court of Michigan affirmed the trial court and rejected the "reasonable lawyer under the circumstances" standard. The court found the objective standard "difficult to reconcile with the lawyer's obligation to represent his client's interests zealously."[28] The court stated that the question is "not a matter of what a hypothetical reasonable practitioner would have done in the same circumstances, but of whether the lawyer's conduct was beyond the limits of reason or the bounds of law."[29] The court distinguished a *client's* improper motive in bringing an action from that of his attorney and concluded that "[a] finding of an improper purpose on the part of the unsuccessful attorney must be supported by evidence *independent* of the evidence establishing that the action was brought without probable cause."[30]

In summary, the subjective standard examines the *motives* of the attorney and requires subjective evidence of misconduct before it imposes sanctions. The objective standard, on the other hand, looks at the merits of the claim or contention from the perspective of a "reasonable attorney" and imputes an improper motive in cases where a reasonable attorney would conclude that the claim or contention is devoid of merit. As a practical matter, it has been noted that the two standards merge due to the difficulty of proving intent. Therefore, the same evidence is examined as a matter of necessity and "there will be little difference in the result regardless of the standard used."[31]

IV. Professional Discipline

In Montana, an attorney who initiates baseless pleadings or motions may be subject to discipline by his peers. Professional disciplinary authority, while ultimately vested in the Montana Supreme Court,[32] becomes operative through the Commission on Practice.[33] The Rules of Lawyer Disciplinary Enforcement[34] and several statutory provisions[35] outline the Commission's powers and duties, the grounds for discipline and available sanctions.

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28. *Id.* at 54, 312 N.W.2d at 606.

29. *Id.*

30. *Id.* at 57, 312 N.W.2d at 607 (emphasis added).

31. *See* Martineau, *Frivolous Appeals: The Uncertain Federal Response*, 1984 Duke L.J. 845, 855.

32. Mont. Const. art. VII, § 2(3).

33. The eleven-member commission on practice is appointed by the Montana Supreme Court and consists of eight lawyers and three non-lawyers.

34. *See* Rules Governing the Commission on Practice, Montana Lawyer's Deskbook 125 (1985) [hereinafter cited as Rules on Practice].

35. Mont. Code Ann. § 37-61-301 to -420 (1985).

The Commission screens all allegations of grounds for discipline.[36] If the Commission determines the facts presented in support of the allegations insufficient to give rise to disciplinary action, then the matter is dismissed and the complainant and the target attorney are notified accordingly.[37]

Matters not dismissed by the Commission may be referred to either a special investigator[38] or grievance committee[39] for further investigation. The investigation culminates in a report of findings and recommendations. The Commission, in its discretion, may then privately admonish the delinquent attorney or pursue formal disciplinary proceedings.

Formal disciplinary proceedings, although neither civil nor criminal in nature, take on the full flavor of a civil action, including procedural and due process considerations.[40] The Commission appoints special counsel to manage the prosecution of the claim.[41] Once pleadings have been exchanged, the commission holds a formal hearing where the respondent attorney has the opportunity to cross-examine witnesses and present evidence. The Commission then submits a transcript of the formal proceedings and its findings and recommendations to the Montana Supreme Court which subsequently hears oral argument regarding the alleged misconduct. The court imposes discipline as it deems appropriate.[42]

The pursuit of professional discipline as a sanction for attorney misconduct is not without its shortcomings. Attorneys and judges often view the initiation of such proceedings as a "double-edged sword" and admit reluctance to punish fellow members of the profession.[43] The injured party, unfortunately, may not enjoy sufficient sophistication to pursue the remedy on his own. Even if aware of the procedure, the injured party has little incentive to pursue it; professional sanctions are extra-judicial and fail to provide compensation. Thus, unethical conduct, if not egregious, remains essentially unchallenged by the lay and legal communities.

Two additional sanctioning provisions, however, show promise as a more effective means of both regulating the performance of lawyers and attempting to make the aggrieved party whole: 28

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36. RULES ON PRACTICE, Rule 9.
37. *Id.*
38. *Id.* The Commission's power to appoint investigators is granted in Rule 3.
39. The Commission's power to appoint grievance committees is granted in Rule 3.
40. RULES ON PRACTICE, Rule 9.
41. *Id.* The Commission's power to appoint special counsel is granted in Rule 4.
42. RULES ON PRACTICE, Rule 9. Forms of discipline are outlined in Rule 8.
43. *See* Renfrew, *Discovery Sanctions: A Judicial Perspective*, 67 CAL. L. REV. 264, 272 (1979).

U.S.C. § 1927 and Rule 11 of the Federal and Montana Rules of Civil Procedure.

V. 28 U.S.C. § 1927

In the absence of express statutory authorization, the American rule[44] requires that each side bear its own litigation expenses unless one party "acted in bad faith, vexatiously, wantonly, or for oppressive purposes."[45] Section 1927 of Title 28,[46] a punitive provision of the Judicial Code, effectively challenges attorney misconduct in the federal courts. It provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses and attorneys' fees reasonably incurred because of such conduct.

The statute contemplates a requisite showing of three elements in order to trigger liability: (1) a multiplication of the proceedings by an attorney; (2) through unreasonable and vexatious[47] conduct; (3) resulting in increased attorney fees, costs, and expenses to the adverse party.[48] The sanction extends both to the filing and the prosecution of the litigation,[49] and can be invoked from the bench[50] or by the motion of a party.[51]

An attorney must engage in "serious and studied disregard for the orderly process of justice"[52] to be liable under Section 1927.[53]

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44. Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796) (first case to define the American rule).

45. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 258-59 (1975); Roadway Express v. Piper, 447 U.S. 752, 759 (1980); Nemeroff v. Abelson, 620 F.2d 339, 348 (2d Cir. 1980). *See generally* Mallor, *Punitive Attorneys' Fees for Abuses of the Judicial System*, 61 N.C.L. REV. 613 (1983).

46. 28 U.S.C.A. § 1927 (West Supp. 1985).

47. "Vexatious" has been defined as "harassing by process of law." WEBSTER'S NEW INTERNATIONAL DICTIONARY 2839 (2d ed. 1961).

48. These elements are considered individually in Comment, *Sanctions Imposed by Courts on Attorneys Who Abuse the Judicial Process*, 44 U. CHI. L. REV. 619, 624-29 (1977).

49. *See Roadway Express*, 447 U.S. at 766; Hall v. Cole, 412 U.S. 1, 15 (1973); Browning Debenture Holders' Comm. v. DASA Corp., 560 F.2d 1078, 1087 (2d Cir. 1977); Tedeschi v. Smith Barney, Harris Upham & Co., 579 F. Supp. 657, 661 (S.D.N.Y. 1984).

50. United States v. Ross, 535 F.2d 346 (6th Cir. 1976).

51. 1507 Corp. v. Henderson, 447 F.2d 540 (7th Cir. 1971).

52. Overnite Transp. Co. v. Chicago Indus. Tire Co., 697 F.2d 789, 795 (7th Cir. 1983) (quoting Kiefel v. Las Vegas Hacienda, Inc., 404 F.2d 1163, 1167 (7th Cir. 1968), *cert. denied*, 395 U.S. 908 (1969)).

53. The purpose and scope of Section 1927 has perhaps been best characterized by Judge Weinfeld:

The filing or prosecuting of a claim that lacks a plausible legal or factual basis triggers the sanction.[54] Liability under Section 1927 has also been predicated upon failure to cooperate with opposing counsel,[55] failure to support a motion for summary judgment,[56] appealing a non-appealable pretrial order,[57] misrepresentation of the record on appeal,[58] repeat filing of a dismissed complaint,[59] and delay.[60]

A collection of otherwise minor infractions indicating a pattern of abusive conduct will also result in liability. In *Tedeschi v. Smith Barney, Harris Upham & Co.*,[61] the defendant brought an action for damages against Tedeschi, a former employee, and alleged Tedeschi's questionable reception of stock. Tedeschi counterclaimed for defamation of character. Neither party prevailed at a subsequent arbitration proceeding.[62]

Following the arbitration proceeding, Tedeschi and his wife sued Smith Barney alleging malicious prosecution, abuse of process, defamation and emotional distress. The court dismissed these claims. Smith Barney, pursuant to Section 1927 and Rule 11 of the Federal Rules of Civil Procedure, moved for attorney fees and costs against plaintiffs and their counsel.[63]

The court granted Smith Barney's motion and assessed a $10,000 sanction jointly and severally against the Tedeschis and their counsel, noting that their claims were "patently without substance and color of law."[64] The court based its ruling upon an ac-

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> The thrust of [Section 1927] is to curb dilatory practices and the abuse of court processes by attorneys. The sanctions authorized under section 1927 are not to be lightly imposed; nor are they to be triggered because a lawyer vigorously and zealously pressed his client's interest. The power to assess the fees against an attorney should be exercised with restraint lest the prospect thereof chill the ardor of proper and forceful advocacy on behalf of his client. To justify the imposition of excess costs of litigation upon an attorney his conduct must be of an egregious nature, stamped by bad faith that is violative of recognized standards in the conduct of litigation. The section is directed against attorneys who willfully abuse the judicial processes.

See Colucci v. New York Times Co., 533 F. Supp. 1011, 1013-14 (S.D.N.Y. 1982).

54. Knorr Brake Corp. v. Harbil, Inc., 738 F.2d 223, 227 (7th Cir. 1984).

55. Regional Transp. Authority v. Grumman Flxible Corp. 532 F. Supp. 665 (N.D. Ill. 1982).

56. W.H. Brady Co. v. Lem Prod., Inc., 521 F. Supp. 676 (N.D. Ill. 1981).

57. Pfister v. Delta Air Lines, 496 F. Supp. 932 (N.D. Ga. 1980).

58. Malhiot v. Southern Cal. Retail Clerks Union, 735 F.2d 1133 (9th Cir. 1984).

59. Matter of Chronopoulos, 36 B.R. 364 (Bankr. N.D. Ill. 1984).

60. *In Re* Johnson, 24 B.R. 832 (Bankr. E.D. Pa. 1984).

61. 579 F. Supp. 657.

62. *Id.* at 659.

63. *Id.*

64. *Id.* at 661.

cumulation of offenses including repeated failure to adhere to stipulations, failure to attend hearings on several occasions, the filing of frivolous motions requesting reargument of decided matters, and attempts to avoid the meritorious determination of defendants' pending motions.[65]

The costs assessable under Section 1927 are not expressly defined in the statute, but they have generally been held to encompass only those costs that are attributable to the misconduct, not the total cost of the litigation.[66] Furthermore, the punitive character of Section 1927 has caused some courts to consider the relative wealth of the transgressor as a factor in determining the amount of the sanction.[67] Although the statute restricts the application of the sanction to "[a]ny attorney or other person admitted to conduct cases,"[68] case law has expanded the target to include the client in instances of collusive misconduct.[69]

A Section 1927 sanction carries with it an implicit condemnation of the lawyer's professional judgment. Judges, therefore, strictly construe the statute[70] to encourage free access to the courts, zealous advocacy and the availability of counsel for "close" cases.[71] Some courts require the satisfaction of a fourth element—intent—and define the sanction to encompass only an "intentional departure from proper conduct,"[72] "an intent only to harass,"[73] or bad faith in relation to what counsel "knew or should have known."[74] Conduct displaying a colorable[75] legal or factual

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65. *Id.* at 663.

66. *See, e.g.*, Rogers v. Kroger Co., 586 F. Supp. 597 (S.D. Tex. 1984).

67. *Id. See also Tedeschi*, 579 F. Supp. at 664.

68. 28 U.S.C.A. § 1927 (West Supp. 1985).

69. *See, e.g., Tedeschi*, 579 F. Supp at 663; Lipsig v. National Student Mktg. Corp., 663 F.2d 178 (D.C. Cir. 1979).

70. As held in United States v. Ross, 535 F.2d 346, 350 (6th Cir. 1976): "Because § 1927 is penal in nature, we believe that it should be strictly construed . . . ." *See also* Monk v. Roadway Express, Inc., 599 F.2d 1378 (5th Cir. 1979), *aff'd sub. nom.* Roadway Express, Inc. v. Piper, 447 U.S. 752 (1979); *Rogers*, 586 F. Supp. 597; Lewis v. Brown & Root, Inc., 711 F.2d 1287 (5th Cir. 1983).

71. *Knorr Brake Corp.*, 738 F.2d at 227.

72. *Ross*, 535 F.2d at 349.

73. Fisher v. Fashion Inst. of Tech., 491 F. Supp. 879, 888 (S.D.N.Y. 1980).

74. North Am. Foreign Trading Corp. v. Zale Corp., 83 F.R.D. 293, 297 (S.D.N.Y. 1979); *cf. Nemeroff*, 620 F.2d at 350; Virginia v. Charles Pfizer & Co., 440 F.2d 1079, 1092 (2d Cir. 1971).

75. As stated by the Second Circuit Court of Appeals in *Nemeroff*:

> A claim is colorable, for purpose of the bad faith exception, when it has some legal and factual support, considered in light of the reasonable beliefs of the individual making the claim. The question is whether a reasonable attorney could have concluded that facts supporting the claim *might be established, not whether such facts actually had been established.*

Nemeroff, 620 F.2d at 348 (emphasis in original). *See also* Health-Chem Corp. v. Hyman,

foundation generally escapes the sanction.[76]

VI. RULE 11

Rule 11 of the Federal and Montana Rules of Civil Procedure has, since its inception, provided a mechanism for the imposition of sanctions upon attorneys who abuse the judicial process.[77] The purpose of Rule 11, as noted by the Advisory Committee in 1983, "is to facilitate the imposition of sanctions by the court, upon motion or upon its own initiative, in order to deter pleading and motion abuses."[78] Violation of the rule *requires*[79] the court to impose sanctions upon the attorney, his client, or both.[80]

Rule 11 equates an attorney's signature on a pleading, motion, or other document with an "affidavit of merit."[81] In essence, the signature represents a certification that to the best of the attorney's knowledge "formed after reasonable inquiry,"[82] the document 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.

Signature further certifies that the document is not interposed for delay or other improper motive.[83] Improper motive may in-

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523 F. Supp. 27 (S.D.N.Y. 1981).

76. Inadequate grounds to warrant a Section 1927 sanction were found in *Overnite Transp. Co.*, 697 F.2d 789 (case of first impression); Boksa v. Keystone Chevrolet Co., 553 F. Supp. 958 (N.D. Ill. 1982) (weak argument); Leema Enterprises, Inc. v. Willi, 582 F. Supp. 255 (S.D.N.Y. 1984) (lack of jurisdiction); Cheng v. GAF Corp., 713 F.2d 886 (2d Cir. 1983) (bona-fide disqualification efforts); Davidson v. Allis-Chalmers Corp., 567 F. Supp. 1532 (W.D. Mo. 1983) (claim becoming meritless during proceedings); Gianna Enter. v. Miss World (Jersey) Ltd., 551 F. Supp. 1348 (S.D.N.Y. 1982) (inartful pleading).

77. *See* Rules of Civil Procedure for the District Courts of the United States, 308 U.S. 663, 676 (1939).

78. FED. R. CIV. P. 11, Advisory Committee Note.

79. Amended Rule 11 is clearly mandatory, providing in part: "If a pleading, motion, or other paper is signed in violation of [Rule 11], the court . . . *shall* impose upon the person who signed it, a represented party, or both, an appropriate sanction . . . ." FED. R. CIV. P. 11 (emphasis added). Although not specifically enumerated, an unrepresented party is also subject to the Rule. *See, e.g.*, Ginter v. Southern, 611 F.2d 1226 (8th Cir. 1979).

80. Purely professional misconduct warrants the imposition of sanctions upon the attorney alone, and the court can prohibit reimbursement by the client. *See, e.g.*, Wold v. Minerals Eng'g Co., 575 F. Supp. 166, 168 (D. Colo. 1983); Van Berkel v. Fox Farm & Road Mach., 581 F. Supp. 1248, 1251 (D. Minn. 1984); Heuttig & Schromm, Inc. v. Landscape Contractors Council, 582 F. Supp. 1519, 1522 (N.D. Cal. 1984). Misconduct resulting from attorney-client collusion, however, will yield joint and several liability. *See Tedeschi*, 579 F. Supp. at 663-64; Lucha, Inc. v. Goegein, 575 F. Supp. 785, 788 (E.D. Mo. 1983); *see also infra* discussion accompanying notes 103-105.

81. Russo v. Sofia Bros., Inc., 2 F.R.D. 80, 82 (S.D.N.Y. 1941).

82. FED. R. CIV. P. 11.

83. The amended rule effectively eliminates ignorance as an excuse. As one commentator notes: "There is no room for a pure heart, empty head defense under Rule 11." *See*

clude: (1) the filing of baseless motions to dismiss and unsupported motions to transfer;[84] (2) the continued prosecution of claims after rejection by an appellate court;[85] and (3) a combination of failure to adhere to stipulations, failure to attend hearings on time, and filing a frivolous motion for reargument, all in addition to pursuing a baseless claim.[86]

Originally, Rule 11 required *willful* violation of the certification requirement to trigger sanctions. This constraint severely impeded invocation of the rule by the bench and bar.[87] The amended rule does not require proof of intent and leaves judges free to impose the sanction for negligent conduct.[88]

The Advisory Committee also adopted a standard of "reasonable inquiry," which mandates "prefiling inquiry into both the facts and the law to satisfy the affirmative duty imposed by the rule."[89] The amended rule clearly contemplates an objective standard of "reasonable inquiry under the circumstances." The standard pivots upon the length of time available for investigation,[90] the merit of the legal theory posed[91] and whether the signing attorney relied upon forwarding counsel or another member of the bar.[92] What constitutes reasonable inquiry must be determined at the time of signature.[93] However, a claim or defense once reasonable may become unreasonable as discovery unfolds the details of the case. Continued pursuit of an untenable claim violates the rule.[94] In effect, the rule will impute an attorney's intent to file the suspect

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

84. *Lucha*, 575 F. Supp. at 788.

85. Andre v. Merrill Lynch Ready Assets Trust, 97 F.R.D. 699, 702 (S.D.N.Y. 1983).

86. *Tedeschi*, 579 F. Supp. at 663.

87. The paucity of case law developed under federal Rule 11 is considered in Risinger, *Honesty in Pleading and its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1, 34 (1976).

88. The Advisory Committee Notes indicate, however, that the court should consider the actual or presumed knowledge of the party who signs the paper at the time he signs it. *See infra* note 94 and accompanying text.

89. FED. R. CIV. P. 11, Advisory Committee Note.

90. *Id.* This factor establishes a "sliding scale" and protects the attorney facing an impending statute of limitations. A matter not requiring prompt action by the attorney would be expected to be more thoroughly investigated.

91. The court must judge the reasonableness of the legal theory posed in light of the general law, not what it considers "substantial justice" in a particular controversy. *See* Canons of Judicial Ethics No. 20 (1971).

92. A party acting pro se is not held to the same standard as that imposed upon attorneys. *See, e.g.*, Haines v. Kerner, 404 U.S. 519 (1972) (per curiam).

93. The Advisory Committee Notes state: "The court is expected to avoid using hindsight and should test the signor's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted."

94. *Nemeroff*, 620 F.2d at 350-51.

document if the court finds the degree of inquiry unreasonable *any time* during the course of the litigation.

The "reasonable inquiry" standard broadens the scope of Rule 11 and suggests that an attorney may need more than a short conference with his client as justification for taking a particular posture in litigation. In *Viola Sportswear, Inc. v. Mimun*,[95] the plaintiff alleged trademark infringement, deception and unfair competition by the defendants. Discovery undertaken by the defendants subsequently revealed that plaintiff based his complaint of nationwide conspiracy upon the sale of one $10 pair of jeans. Defendant further discovered that plaintiff failed to review the complaint to determine its accuracy with respect to an investigator's report. Additional discovery indicated that plaintiff had no evidence of a nationwide conspiracy and that the jeans in question might have been manufactured prior to the date the plaintiff became the exclusive licensee for their manufacture. As a result, defendants sought attorney fees following their unopposed motion for summary judgment.[96]

Relying on the reasonable inquiry provision of Rule 11, the court granted defendants' request and assessed $20,000 in attorney fees jointly and severally against plaintiff and its attorneys. The court rested its decision on the plaintiff's failure to show that "any inquiry was made to lend some assurance that the allegations of the complaint were well-grounded in fact."[97]

Amended Rule 11 calls for an "appropriate sanction"[98] which, although not specifically defined, implicitly encourages monetary rather than non-monetary sanctions.[99] Indeed, monetary sanctions offer distinct advantages which may increase the frequency with which attorneys invoke Rule 11. Monetary sanctions, because of their flexibility, can be tailored to meet the seriousness of the infraction. Monetary sanctions also leave undisturbed the merits of the action: one of the reasons advanced as to why courts have historically been reluctant to invoke Rule 11.[100]

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95. 574 F. Supp. 619 (E.D.N.Y. 1983).

96. *Id.*

97. *Id.*, at 621.

98. FED. R. CIV. P. 11.

99. FED. R. CIV. P. 11, Advisory Committee Note. Although the amended rule provides for the striking of unsigned motions, pleadings and other papers, such action will not be taken unless the attorney or party fails to sign the document after being notified of the omission. The provision in the original rule allowing for the striking of pleadings and motions as sham, false, indecent, or scandalous has been deleted. *See* Sofaer, *Sanctioning Attorneys for Discovery Abuse Under the New Federal Rules: On the Limited Utility of Punishment*, 57 ST. JOHN'S L. REV. 680, 706 (1983).

100. Dismissal of the action or striking of entire pleadings, although of obvious deter-

Courts have implied a duty to mitigate upon the aggrieved party in interpreting the reasonableness of a request for monetary sanctions under Rule 11.[101] Thus, a party's resistance to a frivolous claim must *in itself* be reasonable and undertaken with full consideration of other possible remedies such as summary judgment or a motion to dismiss. The rule refuses compensation to litigants who incur excessive and unnecessary costs.[102]

VII. Allocation of the Financial Burden

Once a court establishes that a claim or contention is sufficiently meritless to warrant the imposition of sanctions, the question becomes one of financial responsibility. Who should bear the financial burden of the sanction: the attorney, the client, or both?

Viewing the attorney-client relationship from a strict agency perspective yields client liability in nearly every conceivable instance. As a "principal," the client is charged "with notice of all facts, notice of which can be charged upon the attorney."[103] The client, although typically under the direction of an attorney, is the consumer of legal services. He initiates the litigation in *his* name and enjoys unbridled freedom in choosing a legal representative to press his claim or defense. The client is also in command of the initial interview which generally dictates the attorney's preliminary legal position. Indeed, charging the client with notice of counsel's activities has significant deterrent value. This approach burdens the client, not his counsel, with financial liability for abusive conduct in litigation. It compels a thoughtful and informed decision in choosing an advocate and mandates close monitoring of counsel's activities.[104]

Placing financial responsibility upon the advocate, on the other hand, can also be convincingly supported. One argument holds that the attorney's duty to the public and the profession must be dominant to that of the client's because "there is no doubt that attorneys, as officers of the court, must operate on an honor system . . . and must be appropriately disciplined to provide both specific and general deterrence."[105] This approach views the attor-

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rent value, penalizes the party, not the attorney, and impacts directly on the result of the case. *See* Sofaer, *supra* note 100, at 706.

101. *See, e.g., Colucci*, 533 F. Supp. at 1013; Taylor v. Prudential-Bache Sec., Inc., 594 F. Supp. 226, 228-29 (N.D.N.Y. 1984). *See also Tedeschi*, 579 F. Supp. at 663-64.

102. *See Tedeschi*, 579 F. Supp. at 663-64.

103. Smith v. Ayer, 101 U.S. 320, 326 (1879).

104. *See* Sofaer, *supra* note 100, at 711.

105. Litton Sys., Inc. v. AT&T, 700 F.2d 785, 827 (2d Cir. 1983). *See generally*, Sofaer, *supra* note 100, at 710-13.

ney as the procedural manager of the case and recognizes that he often makes strategy decisions without consulting the client. Most clients, even if maintaining a diligent watch on counsel's activities, lack the sophistication needed to detect procedural misconduct and therefore should not be held financially accountable.

One commentator proposes a "facts and circumstances" standard as a solution to the inevitable post-sanction finger pointing between attorney and client.[106] Under this rule, the attorney is presumptively responsible for monetary sanctions flowing from procedural misconduct and for failure to advise the client of the meritless nature of his case.[107] Courts can assist in insuring the deterrent effect of this rule by prohibiting monetary contribution from the client in such instances. Of course, a client who participates in the procedural abuse should share financial responsibility. Similarly, the client is presumptively responsible for substantive misconduct if he has been forewarned of the weakness of his position. These presumptions not only assist in preserving the attorney-client relationship but also combat potential satellite litigation as to personal fault.[108]

VIII. Conclusion

This comment has examined several means of regulating attorney misconduct. Section 1927 and Rule 11 complement the traditional remedies of abuse of process, malicious prosecution and defamation by compensating the victim of unfounded litigation but do not require the initiation of a derivative civil action. Professional discipline challenges unethical conduct and preserves self-regulation of the profession.

Pleading and motion warfare cannot coexist with the efficient administration of justice. The courts have clear authority to impose sanctions, without procedural delay, in the absence of self restraint and sound professional judgment.

106. *See* Mallor, *supra* note 45, at 651-52.
107. *Id.* at 651.
108. *Id.* at 651-52.