# VIRGINIA ATTORNEY SANCTIONS: THE RIGHT STUFF, OR THE BIG CHILL?

by

Mark Raby

## INTRODUCTION

In 1983, Congress radically amended Rule 11 of the Federal Rules of Civil Procedure. The new rule, referred to by some as "Rule 11 with teeth,"[1] makes the signature of an attorney or pro-se litigant a certificate that the pleading is grounded in fact, warranted by law (or a good faith argument for its extension, modification, or reversal) and not interposed for an improper purpose, such as harassment or delay.[2]

The amended Rule requires courts to impose sanctions for violations.[3] These sanctions may include a requirement to pay attorney's fees and other expenses. From its inception, the new Rule 11 created a tremendous upsurge in attorney sanction litigation.[4]

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[1]Carter, The History and Purposes of Rule 11, 54 FORDHAM L. REV. 4 (1985) (stating that the 1983 amendment to Rule 11 was "designed to put teeth into the old rule").

[2] *See* Fed R. Civ. P. 11.

[3] *Id.*

[4] *See* Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions,* 100 HARV. L. REV. 630, 631 n.5 (1987).

The new Virginia attorney sanctions rule may provide a bridge to imposition of sanctions under the federal rule in cases removed to federal court. In the fourth circuit case of Kirby v. Allegheny Beverage Corp., 811 F.2d 253, 257 the court circuit court supported the denial rule 11 sanctions in a suit filed in state court and removed to federal court. The circuit court pointed out that availability of sanctions under such circumstances may provide an incentive to remove frivolous suits to federal court.

Later, in Meadow Ltd. Partnership v. Meadow Farm Partnership, 816 F.2d 970 (4th Cir. 1987), the circuit court quoted the lower court's statement that Rule 11 sanctions are never to be imposed in a case removed from state court "until such time as the states adopt counterpart rules so that their judges can give litigants who launch non-meritorious cases the same dose." Although the circuit court held that dismissal of the Rule 11 motion was error, they did so because the district court failed to consider sanctionable conduct that occurred after the case was removed to federal court. Thus, the question of whether Rule 11 sanctions would be applied in a case filed in Virginia and removed to federal court since the adoption of § 8.01-271.1 remains open.

In 1987 a joint subcommittee of the General Assembly of Virginia brought their own version of Federal Rule 11 to the Virginia Code, as part of a comprehensive package of tort reform.[5] According to the subcommittee, it is the public perception "that frivolous suits are clogging the court system".[6] Although the subcommittee received no testimony or other evidence suggesting such congestion, they included the provision to "improve public confidence in the [court] system."[7]

While improving the public image of the judicial system is a laudable goal, attorney sanctions should be applied with caution. Overly enthusiastic application of sanctions may "chill" some legitimate advocacy. Improperly applied, the provision could also pit lawyer against client in a contest over liability for sanctions. This would erode public confidence in the lawyer-client relationship, and thus of the court system as a whole.

This article begins with a discussion of possible requirements of § 8.01-271.1 by analogy to case law and commentary under Federal Rule 11. Next, the author examines the relationship between § 8.01-271.1 and the ethical duties of a lawyer to his client, noting potential conflicts that could arise through improper application of the Virginia rule. Finally, the author concludes that must apply the provision conservatively, or risk erosion of public confidence in the court system, contrary to the rule's stated purpose.

## DISCUSSION

*The Certification*

*1. Reasonable Inquiry.* Both the federal rule and § 8.01-271.1 require an attorney representing a party to sign each pleading, written motion, or other paper of the party.[8] Both rules make such a signature certification that, to the best of the attorney's "knowledge, information, and belief, *formed after reasonable*

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[5] JOINT SUBCOMMITTEE STUDYING THE LIABILITY INSURANCE CRISIS AND THE NEED FOR TORT REFORM, REPORT TO THE VIRGINIA GEN. ASSEMBLY OF 1987, Senate Document No. 11 (1987) [hereinafter SUBCOMMITTEE REPORT].

[6] *Id.* at 16.

[7] *Id.*

[8] Va. Code Ann. § 8.01-271.1 (Supp. 1987).

Unlike the federal rule, the Virginia sanctions provision also includes oral motions. *Id.* This reflects the more informal practice of Virginia district courts, where much of the practice is based on oral motions. SUBCOMMITTEE REPORT, *supra* note 5, at 16.

*inquiry*," it is well grounded in fact and law.[9] Before the adoption of § 8.01-271.1, a lawyer's duty to ground his pleadings in the law was contained in the Code of Professional Responsibility.[10] The provision purports to give us an objective standard to decide what constitutes a frivolous pleading or motion. It

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[9] Va. Code Ann. § 8.01-271.1 (Supp. 1987).

The full text of the provision reads:

> Every pleading, written motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, and the attorney's address shall be stated on the first pleading filed by that attorney in the action. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address.
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> The signature of an attorney or party constitutes a certificate by him that (i) he has read the pleading, motion, or other paper, (ii) to the best of his knowledge, information and belief, formed after reasonable inquiry, it is well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and (iii) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, written motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant.
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> An oral motion made by an attorney or party in any court of the Commonwealth constitutes a representation by him that (i) 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 (ii) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.
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> If a pleading, motion, or other paper is signed or made in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed the paper or made the motion, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper or the making of the motion, including a reasonable attorney's fee. *Id.*

[10] Disciplinary Rule 7-102 states that a lawyer shall not "[k]nowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law." Rules of the Virginia Supreme Court, Pt. 6, § II, DR 7-102(2) (1987).

Section 8.01-271.1 includes the additional requirement that an attorney not bring a claim that with reasonable inquiry would show to be legally groundless. Disciplinary Rule 6-101(1) requires an attorney to "demonstrate the specific legal knowledge, skill, efficiency, and thoroughness in preparation employed in acceptable practice by lawyers undertaking similar matters . . . " Rules of the Virginia Supreme Court, Pt. 6, § II, DR 6-101(1) (1987). This rule, operating in tandem with DR 7-102(2), constitutes a reasonable inquiry duty like that imposed by § 8.01-271.1.

leaves us, however, searching for a standard. What constitutes a reasonable inquiry? A reasonable inquiry of law, according to some courts and commentators dealing with Rule 11, may operate on a sliding scale. In their view the requirement would vary with an attorney's expertise and access to research tools.[11]

Furthermore, Rule 11 case law suggests that counsel may have a continuing duty under § 8.01-271.1 to ensure that a pleading is well founded. In the Rule 11 case of In re Continental Securities Litigation the defendant claimed that there was no basis for joining him in the suit. The court noted that Rule 11 sanctions could be proper "if it develops that [the defendant] was included in the complaint without reasonable basis, or has been kept in this case beyond the point where his improper joinder should have been evidence [sic]."[12]

The question of what constitutes a reasonable inquiry of fact is, perhaps, even more difficult. For example, to what extent is a lawyer entitled to rely on the factual representations of his client? Some commentators analyzing the federal rule suggest that a lawyer must always seek independent verification of his client's representations.[13] This view finds some limited support in case law.[14] Other writers disagree, framing the question as whether it is reasonable to rely solely on the client's word.[15] These writers suggest several factors to use in determining whether it is reasonable to rely on the client's word, including the client's basis of knowledge, length of association with the lawyer, and cost of seeking corroboration.[16] The latter view, which focuses on the reasonableness of an attorney's actions, is more efficient. It saves the client the expense of having

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[11] *See* Golden Eagle Distrib. Corp. v. Burroughs Corp., 103 F.R.D. 124, 129 (N.D. Cal. 1984) (noted access to LEXIS), *rev'd*, 801 F.2d 1531 (9th Cir. 1986). *See also* Schwarzer, *Sanctions Under the New Rule 11 - a Closer Look*, 104 F.R.D. 181, 194 (1985).

[12] No. 82-C-4712 (N.D. Ill. April 9, 1984) (WESTLAW, DCT database, 1985 WL 3296) (emphasis added).

[13] Marcus, *Reducing Costs and Delay: The Potential Impact of The Proposed Amendments to the Federal Rules of Civil Procedure*, 66 JUDICATURE 363, 365(1983); *See also* Nelken, *Sanctions Under Amended Federal Rule 11 - Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313, 1319 (1986) (suggesting that an attorney must make an investigation if it can prove or disprove the client's representations).

[14] *See* Coburn Optical Indus. Inc. v. Cilco, Inc., 610 F. Supp 656, 659 (M.D.N.C. 1985) (Holding that the requirements of Federal Rule 11 are not satisfied where an attorney relies on his client's assurances that facts do or do not exist, when a reasonable inquiry would reveal otherwise).

[15] *See* Rothschild, Fenton, & Swanson, *Rule 11: Stop, Think and Investigate*, 11 LITIGATION, Winter 1985 at 13, 14.

[16] *Id.* at 14.

his own representations verified when the attorney has good reason to trust their veracity.

2. *Improper purpose.* Section 8.01-271.1 imposes sanctions on an attorney who brings an action for purposes of harassment or delay.[17] Since the provision is framed in terms of motive, it calls for the courts to inquire into the state of mind of the attorney when the action was instituted. Some courts considering Rule 11 have avoided employing such a subjective standard by inferring improper purpose from a violation of the objective portion of the rule.

Thus, a court may find improper purpose if reasonable inquiry (the objective standard) would have disclosed that the action was not well grounded in fact and law. In *Hudson v. Moore Business Forms, Inc.*[18] the court employed this reasoning in imposing Rule 11 sanctions on defense counsel for groundless counterclaims. The *Hudson* court said that the lack of reasonable justification for the sanctioned firm's claims raised "a strong inference that the defendant's motive in bringing the counterclaim was to harass the plaintiff and to deter similar actions from being brought."[19]

The objective standard can also guide consideration of the "good faith argument for extension, modification, or reversal" exception to the requirement that a pleading be based on existing law. Without reasonable inquiry into existing law (under the objective standard) one cannot make a good faith argument to change it.

The sanctions provision will no doubt be attractive to lawyers, since it can be a powerful litigation tactic. Some lawyers may hope to persuade opposing counsel to nonsuit a borderline claim with the threat of a sanctions motion. Lawyers, however, must take care in employing the provision. A motion for attorney sanctions not grounded in law and fact, brought with improper motive, is itself subject to sanctions under § 8.01-271.1.

*Sanctions*

By increasing the range of sanctions at a judge's disposal, § 8.01-271.1 becomes a tool for more flexible docket management. For example, suppose that a Motion for Judgment[20], the pleading which initiates an action at law in Virginia, is not well grounded in fact or law. Without the sanctions provision, a judge sustaining a demurrer to such a pleading has only two options. The judge could allow amendment if the defects could be cured. If the plaintiff does not,

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[17] Va. Code Ann. § 8.01-271.1 (Supp. 1987).

[18] 609 F. Supp. 467 (N.D. Cal. 1985).

[19] *Id.* at 484.

[20] *See* Rules of Virginia Supreme Court 3:3 (1987).

or cannot, fix his pleading, the suit would be subject to dismissal.

While this system allows one with a valid claim to overcome defects of form, it leaves unpunished those who, while having a valid claim, do not make a reasonable inquiry into fact or law before filing their initial pleading. Under the new provision, sanctions may be levied on those responsible: Attorney, client, or both. Applied correctly, this flexibility would allow more efficient and fair case management. For instance, a court may punish an attorney for abuses of the system, while allowing his client's cause to proceed. As the author will argue in part II(C) of this article, improper application could result in a battle between attorney and client over liability for sanctions, which would have a deleterious effect on the system as a whole.

While the provision makes sanctions for violation mandatory,[21] the type and severity of punishment is left to judicial discretion.[22] The law allows for the award of expenses and attorney's fees, but does not mandate them. Indeed, criticism alone may prove a powerful sanction. Publication or dissemination of an unfavorable sanctions ruling may tarnish the public and professional reputation of an attorney.[23]

Some courts have shown great creativity in fashioning sanctions under the federal rule. In *Heuttig & Schromm v. Landscape Contractors Council*,[24] the court awarded $5,625 in attorney's fees to the defendant union, specifying that no part of this penalty was to be paid by the client.[25] Furthermore, the court chose to publish the highly critical opinion, and required that a copy be distributed to each lawyer in the sanctioned firm.[26]

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[21] Va. Code Ann. § 8.01-271.1 (Supp. 1987).

[22] *Id.*

[23] *See* Schwarzer, *supra* note 11, at 201 ("Judges are prone to forget the sting of public criticism delivered from the bench. Such criticism, while potentially constructive, can also damage a lawyer's reputation and career . . . There is a distinction between bad practice and lack of integrity.").

[24] 582 F. Supp. 1519 (N.D. Cal. 1984), *aff'd*, 790 F.2d 1421 (9th Cir. 1986).

[25] *Id.* at 1522.

[26] *Id.* at 1522-23; *See also* Golden Eagle Distrib. Corp. v. Burroughs Corp., 103 F.R.D. 124, 129 (N.D. Cal. 1984) (requiring decision to be shown to all attorneys in firm); Larkin v. Heckler, 584 F. Supp. 512, 514 (N.D. Cal. 1984) (requiring dissemination of decision to all Assistant United States Attorneys in the Northern District of California engaged in similar litigation).

It is interesting to note that Articles by Judge Schwarzer, caution judges about the potentially harmful effects of such dissemination, despite his own frequent use of such sanctions. *See* Schwarzer, *supra* note 23.

Ultimately, the type of sanction imposed may turn on a judge's view of the purpose of sanctions. The subcommittee report speaks only in terms of deterrence,[27] a function which is served whether the provision is applied as an economic or punitive measure.

Professor Arthur Miller, reporter to the advisory committee that fashioned the new federal rule, supports the economic justification of such a sanctions provision. Although the federal rule (like the Virginia law) speaks of sanctions, Professor Miller asserts that it is "in reality . . . more appropriately characterized as a cost-shifting technique" to redistribute the cost of litigation between the parties or their attorneys.[28] Professor Miller feels that the sanctions are merely an economic incentive for lawyers to "stop and think" before pursuing claims.[29]

Judge William W. Schwarzer of the Northern District of California views the federal rule as a punitive measure.[30] "The rule provides for sanctions, not fee shifting" writes Judge Schwarzer, "[i]t is aimed at deterring and, if necessary, punishing improper conduct rather than merely compensating the prevailing party."[31]

This latter view is more likely to be adopted by Virginia courts. If viewed as a cost shifting tool, sanctions are likely to be an effective deterrent only to the extent that they outweigh the benefit of sanctionable conduct. For instance, some lawyers may make a motion designed to cause delay if they believe it is worth the monetary cost of having to pay attorney's fees. Without the stigma of punishment, sanctions will do little to remedy the unfavorable public impression of the court system as the legislature intended.

If the sanctions are to be viewed as punitive, they should be applied with extreme caution. Overzealous implementation of § 8.01-271.1 could harm the relationship between lawyer and client, and chill zealous representation of the client's claim.

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[27] *See* SUBCOMMITTEE REPORT at 16.

[28] Miller & Culp, Litigation Costs, Delay Prompted the New Rules of Civil Procedure, Nat'l L.J., Nov. 28, 1983, at 34.

For a more complete discussion of the views of Professor Miller and Judge Schwarzer on the purpose of Rule 11 see Nelken, *supra* at n. 13.

[29] Miller & Culp, *supra* note 27, at 34.

Some writers suggest that making sanctions more palatable by portraying them as mere cost-shifting provisions will make them more likely to occur. *See* Nelken, *supra* note 13 at 1323-24.

[30] *See* Schwarzer, *supra* note 11, at 185.

[31] *Id.*

*Potential for Damage*

Part of the burden of enforcing the sanctions provision rests on the attorney. He is responsible for examining a client's claim before proceeding. The legislature, by deliberately including attorneys among those who can move for sanctions, made them partly responsible for detection and punishment of violations.[32] Thus, the sanctions provision reinforces the attorney's role as an officer of the court. A stringent application of the provision may bring the attorney's duty to the system into conflict with his duty as an advocate. This section compares an attorney's duty under § 8.01-271.1 to his duty as advocate (largely contained in Virginia's Code of Professional Responsibility) and argues that both should be considered in interpreting the sanctions provision.

1. *Chilling Zealous Representation.* The sanctions provision imposes a duty on the attorney to refrain from employing claims and defenses not grounded in fact and warranted by existing law.[33] Furthermore, the lawyer has an ethical duty to evaluate his client's claim, and to inform the client if the claim has a limited chance of success.[34] In some part these duties of a lawyer to client and court overlap and reinforce each other. Courts must remember, however, that today's frivolous claim is tomorrow's law. Courts must carefully weigh the possibility of squelching legitimate advocacy before applying sanctions for advancement of a legal argument.

Sanctions for incorrect legal judgment are likely to fall, as they should, on the lawyer.[35] Over-application of such sanctions may stifle legal creativity. From fear of economic loss and injury to reputation, many lawyers will decline to represent clients with novel or disfavored claims. Thus, the pressure at the boundary of existing law that is responsible for the development of legal doctrine may cease to exist.

Yet this pressure must exist if a lawyer is to properly serve his client. Although driven back from the courts by potential sanctions, lawyers are urged forward by ethical considerations. While stringent application of § 8.01-271.1 may discourage some borderline factual and legal assertions; EC 7-3 encourages a lawyer, in his role as advocate, to "resolve in favor of his client doubts as to the bounds of the law."[36] Courts must also be wary of applying the wisdom of hindsight when examining pleadings. Discovery may prove invalid a claim that

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[32] *See* SUBCOMMITTEE REPORT at 16-17.

[33] *Id.*

[34] *See, e.g.*, Rules of the Virginia Supreme Court, Pt. 6, § II, EC 7-5 (1987).

[35] *See* Blake v. National Casualty Co., 607 F. Supp. 189, 193 (C.D. Cal. 1984).

[36] Rules of the Virginia Supreme Court, Pt. 6, § II, EC 7-3 (1987).

seemed well grounded in fact when filed. An attorney in this predicament should voluntarily nonsuit,[37] but even that won't shield him from sanctions. The provision focuses on the signing of a groundless pleading, not the continuous wrong of pressing an ill-founded claim. The court should examine whether at the time of signing[38] reasonable inquiry would have shown the pleading or motion to be groundless (or that the lawyer continued to pursue it after discovering it was groundless).

This inquiry requires particular restraint on the part of judges in the context of the "grounded in fact" requirement. Neither lawyers nor judges can determine the sufficiency of alleged facts without examining the plausibility of legal arguments that organize them into a claim.[39] A set of facts, while insufficient under existing law, may be adequate when coupled with a plausible argument for a change in the law.[40] Before courts recognized the doctrine of *res ipse loquitur*, a plaintiff had to make a direct showing of causation to recover from negligence. Since the adoption of the doctrine, it is only necessary to show that the instrumentality of the harm was in the defendant's control.[41]

2. *The Lawyer-Client Relationship.* Candid, open communication between lawyer and client is in best interest of the lawyer, the client, and the system as a whole. Among the obvious benefits from a policy of candor is the reduction of frivolous litigation. As previously noted, a lawyer should advise his client when a claim stands little chance of success.[42] Conversely, a client should apprise his lawyer of all relevant facts, even if they are unfavorable to his claim. Such communication should reduce the number of groundless actions filed.

Aggressive application of sanctions can damage the lawyer-client relationship and stifle such candor. The sanction provision allows apportionment of sanctions between lawyer and client. A lawyer being sanctioned for pressing a novel, yet potentially successful claim could conceivably avoid sanctions by showing that he advised the client against proceeding. Similarly, a lawyer could likely avoid

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[37] *See* Va. Code Ann. § 8.01-380 (1984). This statute has been construed to confer upon a plaintiff the absolute right to one nonsuit. A first nonsuit under complying with this section cannot be blocked by opposing counsel nor the court. Nash v. Jewell, 227 Va. 230, 237 (1984).

[38] Or at the time of making of an oral motion, as provided for in Va. Code Ann. § 8.01-271.1 (Supp. 1987).

[39] *See Note, Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 HARV. L. REV. 630, 637 (1987).

[40] *Id.*

[41] *Id.*

[42] *See* EC 7-5 *supra* note 34.

sanctions for a pleading not grounded in fact if it can be shown that he was misled by the client.

The preservation of client confidences and secrets is an important part of the attorney-client relationship. However, Virginia's Code of Professional Responsibility provides that a lawyer may reveal confidences or secrets necessary to defend himself against an accusation of wrongful conduct.[43] Thus, an attorney may expose client secrets or his own work product to shift sanctions to the client.

An erosion of trust will occur as clients learn about the potential use of their secrets by attorneys to avoid sanctions. As a result, they are likely to be less candid with their lawyer. Also, lawyers wishing to limit their liability for ill-founded legal arguments are likely to become more conservative in evaluating a client's claims. This may also limit client candor, encouraging clients to withhold information detrimental to their case. The tension created by over-applied sanctions would affect the relationship of attorney and client to the court as well. Courts could unwittingly discourage disfavored claims as lawyers seek to avoid sanctions. Sanctions may be deliberately employed by some courts to clear overloaded dockets, since the court may impose sanctions *sua sponte*. Courts abusing sanctions as a case management tool may effectively remove from client and attorney the decision of whether to test a claim in court, and vest it in the judge.

## CONCLUSION

The stated goal of the legislature in providing for attorney sanctions is to improve public confidence in the court system.[44] With that goal in mind, courts should be wary of over-applying such sanctions. To do so would create tension between a lawyer's duty to zealously represent his client and his responsibility as an officer of the court. Many lawyers, fearing censure and economic loss, would not resolve that conflict in favor of the client. This may further erode public confidence in the attorney-client relationship, and thus of the court system as a whole.

To promote confidence in the system, courts must use sanctions as a scalpel, not as a bulldozer. Courts must use discretion in finding violations of the provision and fashioning punishment. A broad reading of the sanctions provision would create a disincentive to some legitimate advocacy and limit access to the courts. Therefore, courts must cut away frivolous claims and defenses carefully,

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[43] Rules of the Virginia Supreme Court, Pt. 6, § II, DR 4-101(C)(4) (1987).

[44] SUBCOMMITTEE REPORT, *supra note* 7, at 16.

or risk chilling the zealous representation that drives the adversary system, and ensures continued development of the law.