OBTAINING RULE 38 SANCTIONS (DURING AN APPEAL) MAY BE MUCH HARDER THAN OBTAINING RULE 11 SANCTIONS (AT THE TRIAL LEVEL)[1]

By Howard A. Newman
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Two goals that all modern courts have are to reduce groundless and baseless filings and to streamline the course of civil litigation in these courts. In the federal context, such is accomplished at the trial level via Federal Rule of Civil Procedure ("***FRCP***") 11 and at the appellate level via Federal Rule of Appellate Procedure ("***FRAP***") 38. Many jurisdictions have predicated their own rules on these two cited rules that provide for sanctions for violations thereof. Though the goals of the rule are identical, obtaining sanctions, especially monetary sanctions, at the appellate level may be much more difficult to obtain.

FRCP 11 reads, in relevant part, that one who:

> certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
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> > (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
> >
> > (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
> >
> > (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
> >
> > (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

Thus, FRCP 11 has two bases for sanctions: 1) the frivolous clause; and 2) the improper purpose clause. The frivolous clause has two components: whether the party or attorney made a reasonable inquiry into the facts, and whether the party or attorney made a reasonable inquiry into the law

One tenet central to any analysis under FRCP 11 is that an inquiry reasonable under the circumstances must be performed by counsel. The rule explicitly and unambiguously imposes an affirmative duty on counsel to conduct a reasonable inquiry into the viability of a pleading or other court document before it is signed. That duty is continuing in nature.

[1] For ease of reading, all of the court and treatise citations have been removed as this article is meant to be a non-exhaustive overview.

Therefore, a litigant or his attorney may no longer claim that he acted in good faith or was unaware of the groundless nature of an argument or claim. “Simply put, subjective good faith no longer provides the safe harbor it once did.” In all cases, the attorney must have made a serious enough inquiry into the substance of the filing so that the filing is not made for an improper purpose, such as harassment.

To determine whether the attorney made a reasonable inquiry into the facts of a case, i.e., the implication of subpart (3), a court typically considers: i) whether the signer of the documents had sufficient time for investigation; ii) the extent to which the attorney had to rely on his or her client for the factual foundation underlying the pleading, motion, or other paper; iii) whether the case was accepted from another attorney; iv) the complexity of the facts and the attorney's ability to do a sufficient pre-filing investigation; and v) whether discovery would have been beneficial to the development of the underlying facts

To determine whether the attorney in question made a reasonable inquiry into the law, i.e., the implication of subpart (2), a court typically considers: i) the amount of time the attorney had to prepare the document and research the relevant law; ii) whether the document contained a plausible view of the law; iii) the complexity of the legal questions involved; and iv) whether the document was a good faith effort to extend or modify the law

Trial courts typically “balance the potential ‘chill’ on innovative theories of law against the need to discourage frivolous or dilatory litigation.” Trial courts recognize that subpart (2) is violated only when it is “patently clear that a claim has absolutely no chance of success.” Though this standard is similar in the appellate context, as will be seen below, it appears that trial courts are more likely to award FRCP 11 sanctions rather than their appellate colleagues. Of course, the pre-disposition of a particular judge and a particular court or jurisdiction usually has a direct bearing on whether sanctions are awarded.

Should a litigant obtain monetary or other sanctions, trial counsel must take appropriate actions to greater withstand any appellate challenge. Thus, if a court may impose sanctions for both legally- and factually-baseless claims, due to the standard of review, a litigant should attempt to persuade a court to base its decision first on the factually baseless prong (i.e., subpart (3)) and then on the legally baseless prong of subpart (2). Similarly, a litigant should also have a trial court note if there were improper purposes behind a particular filing. In any event, a litigant should ensure that a trial court has adequately explained the basis for sanctions, either preferably in a written order or at least on the record. Failure to do either will almost always lead to a reversal.

FRAP 38 reads, in part, that:

> If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

Some jurisdictions, including the District of Columbia, have specifically incorporated the improper purpose prong into the rule. At least one (federal) circuit court of appeals has through its case law cited to Rule 11 as a baseline for attorney conduct in incorporating the improper purpose prong. Thus, appellate counsel should always consider whether an appeal is frivolous and whether an improper purpose exists.

Thus, two questions materialize. First, what does it mean for an appeal to be interposed for an improper purpose and second, what is a frivolous appeal? It is imperative for counsel to be able to distinguish between frivolity and improper purpose.

Channeling Justice Potter Stewart, it appears that frivolity, like obscenity, may be difficult to define, but when one sees it, he or she knows it. Part of the reason for such a statement is that there is no one formula for determining whether an appeal is frivolous. Frivolity, especially in the appellate context, is synonymous with the phrases "utterly without merit" or lacks "even a faint hope of success on the legal merits." One federal court has stated that "an appeal is frivolous if the result is foreordained by the lack of substance to the appellant's arguments." Another court has found an appeal frivolous when infected by false statements which were central to the case and the appeal.

Typically, bad faith is neither required to find an appeal frivolous nor having been interposed for an improper purpose. Improper purpose, which includes at least harassment, causing unnecessary delay, and failing to obey a court order, appears to be a broad concept in the law. Some examples of improper purpose may include needlessly increasing the cost of litigation, asserting a claim wantonly, or basing an appeal on known falsehoods. Quoting one court, "frivol[ity] should be understood as referring to legal or factual contentions so weak as to constitute objective evidence of improper purpose." This standard appears to be very similar to the one in FRCP 11.

Regardless of the specific contours of the definitions of frivolity or improper purpose, they will be found not only for the initiation of an appeal, but its maintenance as well. Thus, once it becomes clear to appellate counsel that an appeal violates FRAP 38, it is incumbent on appellate counsel to discontinue prosecution of the appeal. Should her client disagree, appellate counsel must withdraw.

With the standards so seemingly similar, why are appellate courts more loathe to award sanctions? First, there may be a history in a particular circuit (or jurisdiction) of not awarding sanctions. For example, the third circuit had historically been a stickler for awarding sanctions while one recent commentator has suggested that the sixth has been much more generous in awarding sanctions. Second, many judges solemnly understand that the right to appeal an underlying decision, even one that awarded FRCP 11 sanctions, does not necessarily imply an appeal is frivolous or was interposed for an improper purpose. Rather, appellate courts do not want to curtail open access to the courts by chilling potentially meritorious arguments. The

previous principal also guides some trial courts in their pre-disposition against awarding monetary sanctions as there are other sanctions in the armamentarium of judges.

Procedurally, there is a safe harbor requirement in FRCP 11, i.e., twenty-one days prior to filing, the target of a FRCP 11 action must first receive a survey motion and this procedure is almost always strictly construed in state jurisdictions, including Florida and Oregon (and the District of Columbia). In the appellate context, there is no similar safe harbor requirement. Notwithstanding, it is solid practice to at least provide a 21-day safe harbor period at least via letter and if possible, via a survey motion as well. Since one court, in awarding monetary sanctions, looked approvingly on that informal procedure, this practitioner employs the use of twenty-one day safe harbor letters; moreover, appellate courts will almost quickly approve a request for an extension of time to answer should a separate motion be filed asking for the additional time to allow a safe-harbor period to expire.

Finally, there is a certain procedure that must get followed (strictly) in the appellate level. Though an appellate court may, *sua sponte*, invoke Rule 38, a motion must get filed. Alluding to or implicating FRAP 38, or any violation thereof, in a brief, no matter how thorough, is entirely insufficient. In fact, there are multiple decisions where appellate courts have refused to award sanctions because procedure was not followed precisely even though the court had found an appeal frivolous.