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Thomas J. Hurney Jr.  
*Jackson & Kelly*

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RULE 11 SANCTIONS IN STATE AND FEDERAL COURTS IN WEST VIRGINIA

THOMAS J. HURNEY, JR.*
W. SCOTT CAMPBELL**

I. INTRODUCTION

Since its amendment in 1983, Rule 11 of the Federal Rules of Civil Procedure has spawned an enormous amount of litigation as attorneys and the courts have struggled to define the abusive litigation practices which violate the rule and therefore require the imposition of sanctions. Although West Virginia has not yet adopted the amendments to Rule 11 in the state rules of civil procedure, the Supreme Court of Appeals has condemned abusive litigation practices and endorsed the award of costs and attorneys’ fees as a sanction. This article will focus on the decisions of the United States Court of Appeals for the Fourth Circuit, the United States District Courts in West Virginia, and the decisions of the Supreme Court of Appeals of West Virginia in an effort to give some guidance on Rule 11 to the West Virginia practitioner.

II. BACKGROUND

Initially, attorneys practicing in state and federal court in West Virginia must be aware of the differing requirements contained in Rule 11 of the West Virginia Rules of Civil Procedure and of the Federal Rules of Civil Procedure.¹ West Virginia Rule 11 states:

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* Associate, Jackson & Kelly, Charleston, West Virginia; B.S., 1980, University of Dayton; J.D., cum laude, 1983, University of Dayton School of Law.
** Associate, Jackson & Kelly, Charleston, West Virginia; B.A., 1982, Hampden-Sydney College; J.D., West Virginia University College of Law, 1986.

¹ This article is an expanded and updated version of an article previously published by the Defense Trial Counsel of West Virginia. See 3 DEFENSE TRIAL COUNSEL HANDBOOK 411 (1987). The article focuses upon decisions of the West Virginia Supreme Court of Appeals, the West Virginia federal district courts and the United States Court of Appeals for the Fourth Circuit. For articles discussing cases outside of these jurisdictions see the following: Graves, Rule 11 Signing of Pleadings,
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 these rules, pleadings need not be verified or accompanied by affidavit, even though the pleadings to which they respond are verified or accompanied by affidavit. The signature of the attorney first signing a pleading constitutes a certificate by him that he has read it; 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 act-on 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.²

The present West Virginia Rule 11 is modeled upon Federal Rule 11 as it existed prior to the 1983 amendment. Although a revised rule has been recommended, it has not yet been adopted by the Supreme Court of Appeals of West Virginia.³

The 1983 amendments to Federal Rule 11 were "designed to encourage the courts to adopt more stringent standards and increase their willingness to sanction abusive litigation practices."⁴ "The new rule imposes much more specific and extensive obligations on attorneys and others filing papers in federal court and subjects them


3. Professor Franklin D. Cleckley, West Virginia University School of Law, the Official Reporter for the amendments to the West Virginia Rules of Civil Procedure, has recommended that the West Virginia Supreme Court of Appeals adopt a version of Rule 11 which substantially follows the Federal Rule. F. Cleckley, Third Preliminary Draft of Proposed Amendments to the WVRCP, [hereinafter Cleckley]. The amendments are presently being considered by the court, and Professor Cleckley believes Rule 11 will be adopted.


http://repository.wvu.edu/wvlr/vol90/iss2/5
to sanctions for violations." The expected result is deterrence. The amended Federal Rule states:

Every pleading, 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, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper 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 or party constitutes a certificate by him that he had 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 to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, 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. 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 to the other party or parties the amount of


The new language stresses the need for some prefiling inquiry into both the facts and the law to satisfy the affirmative duty imposed by the rule. The standard is one of reasonableness under the circumstances. See Kinee v. Abraham Lincoln Fed. Sav. & Loan Ass'n, 365 F.Supp. 975 (E.D. Pa. 1973). This standard is more stringent than the original good-faith formula and thus it is expected that a greater range of circumstances will trigger its violation. See Nemeroff v. Abelson, 620 F.2d 339 (2d Cir. 1980).

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 the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion or other paper was submitted. Thus, what constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available to the signer; whether he had to rely on a client for information as to the facts underlying the pleading, motion, or other paper; whether the pleading, motion or other paper was based on a plausible view of the law; or whether he depended on forwarding counsel or another member of the bar.

Proposed Amendments, 97 F.R.D. at 195, 198-99 (Advisory Committee Note). See also 2A Moore's Federal Practice, supra note 1, at para. 11.01[4].

6. Proposed Amendments, supra note 4, at 192, 198-99. See also S. Kassin, supra note 4, at ix. The rule also serves to punish its violators and compensate the offended party. Id. at 29.
the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney’s fee.

The primary difference between the present West Virginia (or pre-1983) Rule 11 and the Federal Rule lies in the definition of what constitutes a violation of the rule. The subjective “good faith” defense, engrafted in the West Virginia Rule, is eliminated in the Federal Rule, which requires an objective reasonable inquiry. Hence, the Federal Rule contains a more stringent requirement than the West Virginia Rule. Under Federal Rule 11, as amended, it is no longer enough for an attorney “to claim that he acted in good faith, or that he personally 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.”

Another important difference between the present West Virginia Rule and the Federal Rule is the language regarding sanctions. West Virginia Rule 11 provides for striking of pleadings for violation of the rule as well as “appropriate disciplinary action” against attorneys for “wilful violations.” The West Virginia Rule does not, however, expressly provide for sanctions in the form of shifting of expenses as required by Federal Rule 11. Moreover, sanctions under Federal Rule 11 are mandatory - the Rule states that sanctions “shall” be imposed for violations. There is no such requirement in West Virginia's Rule 11.

10. Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 253 (2d Cir. 1985). The purpose of Rule 11, as amended, “is not to penalize a lawyer for failing to read [papers] but to eliminate ignorance as a defense. There is no room for a pure heart, empty head defense under Rule 11.” Schwarz, supra note 5, at 186-87. Eastway is considered one of the leading cases on Fed. R. Civ. P. 11. The opinion of the district court upon remand from the Second Circuit also contains an excellent analysis of the rule. See Eastway Constr. Corp. v. City of New York, 637 F.Sup. 558 (E.D.N.Y. 1986), cert. denied, 108 S.Ct. 269 (1987). See also Zaldivar v. Los Angeles, 780 F.2d 823 (9th Cir. 1986). The Fourth Circuit is in accord with Eastway. See infra note 56, and accompanying text. The objective standard of reasonableness recognized in Eastway has been “universally adopted.” 2A MOORE'S FEDERAL PRACTICE, supra note 1, at para. 11.02[3].
Virginia Rule 11. The proposed West Virginia Rule would incorporate the more stringent requirements of Federal Rule 11 except that it would provide that sanctions for violations "may" be imposed by the court. Yet another significant difference is that West Virginia Rule 11 applies only to pleadings while Federal Rule 11 applies to "pleadings, motions and other papers."

A review of the case law reveals that, notwithstanding the general parameters and differences between the state and federal rules, the imposition of sanctions will turn on the particular facts before the court. Since the imposition of sanctions appears to be a matter to be decided on a case by case basis, a review of the various decisions is helpful in gleaning an understanding of the type of behavior that violates Rule 11.

III. WEST VIRGINIA RULE 11: Daily Gazette, Inc. v. Canady

The Supreme Court of Appeals of West Virginia has not yet directly addressed the issue of sanctions under Rule 11 of the West Virginia Rules of Civil Procedure. In Daily Gazette Co., Inc. v. Canady, however, the court demonstrated that it will impose sanctions for abusive litigation practices, relying not only on Rule 11, but also on the court's inherent power to govern the litigants before it. In Daily Gazette, the court held:

A court may order payment by an attorney to a prevailing party reasonable attorney fees and costs incurred as the result of his or her vexatious, wanton, or oppressive assertion of a claim or defense that cannot be supported by good faith argument for the application, extension, modification, or reversal of existing law.

The court found that the imposition of sanctions is within the inherent power of the judiciary to "do all things that are reasonably necessary for the administration of justice within the scope of its
The court expressed its concern that unfounded claims and defenses asserted for vexatious, wanton, or oppressive purposes served to increase delay and divert attention from valid claims or defenses.17

The court supported its holding with reference to the Code of Professional Responsibility and West Virginia Rule 11, stating "[t]his rule reflects the dual concern with discouraging both frivolity and abuse found in the Code of Professional Responsibility, and places certain burdens upon the attorney with respect to his or her gatekeeping function."18

Because the record before it was insufficient, the case was remanded for consideration of sanctions. The court’s discussion of the requirements for the imposition of sanctions is instructive:

We note that no evidence of vexatiousness, wantonness, or oppressiveness has been presented. We firmly reject the petitioner’s implication that frivolity alone will support a finding of bad faith. Certainly, as the frivolousness of a claim or defense increases, the likelihood that it is being advanced for improper purposes increases. In some cases, however, frivolity may be less a function of improper motive than of sheer incompetence.19

The opinion in Daily Gazette makes it clear that the court will not hesitate to impose sanctions in an appropriate situation. Under Rule 11 as presently constituted, however, Daily Gazette is an indication that the court will impose sanctions only for particularly egregious conduct. This conclusion is supported by the court’s approval of the imposition of sanctions under West Virginia Rule 37 for discovery abuses.20

16. Id. at 264 (quoting Shields v. Romine, 122 W. Va. 639, 13 S.E.2d 16 (1940)). The inherent power of the court to govern the conduct of litigation before it was also recognized by the Fourth Circuit in Blair v. Shenandoah Women's Center, 757 F.2d 1435 (4th Cir. 1985).
17. Daily Gazette, 332 S.E.2d at 265.
18. Id.
19. Id. at 266.
IV. Federal Rule 11 in the Fourth Circuit and in West Virginia Federal District Courts

A. District Courts

To date, the United States District Court for the Southern District of West Virginia is the only West Virginia district court to issue a published opinion discussing the imposition of Rule 11 sanctions. In Steele v. Morris, the plaintiff filed a complaint alleging malicious abuse of civil process by the defendant. Electing not to answer the complaint, the defendant filed a motion to dismiss on the grounds that plaintiff’s claims should have been asserted as a counterclaim in one of two previous actions between the same parties in the Circuit Court of Clay County, West Virginia. The defendant failed to file a memorandum in support of his motion to dismiss, and the court subsequently ordered that memoranda in support and opposition be filed by both parties. The defendant failed to comply, and the plaintiff filed a memorandum of law in opposition requesting, under Federal Rule 11, the imposition of attorneys’ fees incurred in preparing the memorandum.

The court summarily denied defendant’s motion to dismiss and granted plaintiff’s motion for Rule 11 sanctions. The court placed particular emphasis on the fact that the law governing defendant’s motion to dismiss was “well settled” and stated “[t]he Court cannot help but conclude that had Defendant’s counsel made a reasonable inquiry into ‘both the facts and the law’ before filing the motion.


In Pocahontas Supreme Coal Co. v. Bethlehem Mines Corp., 1986-1 Trade Cases para. 67, 111 (S.D. W. Va. 1986) aff’d 828 F.2d 211 (4th Cir. 1987), the court’s refusal to award Rule 11 sanctions for plaintiff’s alleged pattern of abusive litigation was affirmed by the Fourth Circuit.

22. The underlying civil proceedings ultimately giving rise to this action involved claims concerning the personal relations between the parties, specifically, a civil paternity suit brought by the plaintiff and subsequent breach of contract suit filed by defendant. Steele, 608 F. Supp. at 275.

23. Id.

24. Id.

25. Id. at 277.
to dismiss that he would have been quickly dissuaded from filing that motion."^{26}

Thus, the court construed defendant’s conduct as constituting "precisely the type of unnecessary delay [and ‘expense’] Rule 11 is designed to avoid" and imposed attorneys’ fees on the defendant.\(^\text{27}\)

\section*{B. Fourth Circuit}

The Fourth Circuit first addressed the imposition of attorneys’ fees as a sanction in \textit{Blair v. Shenandoah Women’s Center, Inc.} \(^\text{28}\) In \textit{Blair}, the plaintiff’s counsel filed a complaint seeking recovery on eight different legal theories against thirteen different defendants, damages in the amount of $10,000,000, attorneys’ fees, and injunctive relief.\(^\text{29}\) Several parties were named as defendants without explanation; and no allegations were made to support a race discrimination claim, one of the eight theories.\(^\text{30}\)

The defendants’ motion to dismiss the complaint was granted by the district court judge, who suggested a hearing on attorneys’ fees.\(^\text{31}\) Cross-examination of plaintiff’s counsel at the hearing showed a "paucity" of case preparation by him and various improprieties in his conduct of the litigation.\(^\text{32}\) Consequently, the judge imposed attorneys’ fees on both the plaintiff and his counsel.\(^\text{33}\)

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.}
\item \textit{Id.} The court’s holding in \textit{Steele} is significant as it imposed Rule 11 sanctions on a defendant. Rule 11, of course, makes no distinction between plaintiffs and defendants. The Fourth Circuit has also recognized that sanctions may be imposed on defendants. \textit{Cf. Rossmann v. State Farm Mut. Auto Ins. Co.}, 832 F.2d 282, 289-90 (4th Cir. 1987). While, for now, the imposition of Rule 11 sanctions on defense counsel has occurred only sparingly, it appears likely that as Rule 11 continues to grow more teeth and the plaintiff’s bar becomes increasingly thick-skinned, plaintiffs will, in turn, take a bite out of defense counsel as well. \textit{Vairo, supra} note 1, at 88-91 (with the exception of civil rights and employment discrimination cases, "plaintiffs and defendants are being sanctioned at relatively equal rates. . . .").
\item \textit{Id. v. Shenandoah Women’s Center, Inc.}, 757 F.2d 1435 (4th Cir. 1985).
\item \textit{Id.} at 1436.
\item \textit{Id.}
\item \textit{Id.}
\item Under Rule 11, as amended, sanctions may be imposed by the Court \textit{sua sponte}: "[T]he court, upon motion or upon its own initiative shall impose . . . an appropriate sanction." \textit{Fed. R. Civ. P. 11} (emphasis added). \textit{See also Hasty v. Paccar, Inc.}, 583 F. Supp. 1577 (E.D. Mi. 1984) (court suggested motion for sanctions). \textit{See generally Vairo, supra} note 1, at 85-6.
\item \textit{Blair}, 757 F.2d at 1436.
\end{enumerate}
\end{footnotesize}
RULE 11 SANCTIONS

On appeal, the Fourth Circuit affirmed the imposition of sanctions against counsel based upon Rule 11, 28 U.S.C. § 1927, and the court's inherent power to govern and regulate the conduct of litigation before it. The court flatly rejected plaintiff's counsel's argument that he had not acted in bad faith because he was obliged to make the allegations desired by his client and to conduct the case as his client wished.

Since Blair, the Fourth Circuit has issued several opinions dealing with Federal Rule 11 as amended in 1983 and has demonstrated its willingness to impose sanctions for violations of the rule.

1. Rule 11 Sanctions Imposed.

The Fourth Circuit affirmed the imposition of Rule 11 sanctions in several cases. In Dalton v. United States, the court approved the award of sanctions against a taxpayer's attorney who advanced a frivolous position. Although the court recognized that Rule 11 is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories, it stated, "this cautionary note affords no shield to the taxpayer's attorney. The theories he advanced were not creative. They had been uniformly rejected. It was not reasonable to believe that the taxpayer's position was plausible." Moreover, the court held that the standard for determining whether an attorney has discharged the affirmative duty imposed by Rule 11 is "'one of reasonableness under the circumstances' . . . , a standard more stringent than good faith."

Similarly, in Chu v. Griffith, the plaintiff's attorney filed an action against a judge under 42 U.S.C. § 1983. Finding that the

34. Id. at 1438.
35. Id.
37. Id. at 1320.
38. Id.
judge was clearly immune from liability, the court affirmed the district court's award of sanctions.  

In Cohen v. Vepco, the Fourth Circuit extended the parameters of Rule 11 to encompass improper motives (even in the absence of meritless pleadings), affirming the award of Rule 11 sanctions where plaintiff's counsel filed a motion to amend his complaint with the full intention to withdraw such motion if defendant's counsel objected. The court found that the motion for leave to amend was filed for an improper purpose and concluded that Rule 11 sanctions were appropriate.

A series of opinions released in 1987 further demonstrates that the Fourth Circuit will enforce the stringent application of Rule 11 in appropriate cases. In NCNB v. Tiller, appellants pressed a variety of meritless claims ranging from violations of the Racketeer Influenced and Corrupt Organizations Act (RICO) to common law contract actions.

Beginning its opinion with the language "this frivolous appeal," the court excoriated appellants for their illegitimate action, maintaining that "the issues presented are unworthy of the vast amount of paperwork which they have prompted [since] not one of the thirteen issues presented on appeal addresses a legitimate question of law or fact." Focusing on the "clear" language of Rule 11 which imposes a duty to conduct a prefiling examination of facts and law, the court stated that potentially frivolous actions are to be measured by "a standard of objective reasonableness. If the standard of objective reasonableness is not met, sanctions are mandatory." In

43. Id. at 249-50.
44. Id. at 249.
45. NCNB v. Tiller, 814 F.2d 931 (4th Cir. 1987).
46. Id. at 935.
47. Id. at 941 (citing Cabell v. Petty), 810 F.2d 463 (4th Cir. 1987). Significantly, the Cabell court noted that claimants are not "automatically entitled to an award of attorneys' fees. While some sanction is required when an infraction occurs, . . . the least severe sanction adequate to serve the purpose should be imposed." Id. at 466.
addition to imposing sanctions pursuant to Rule 38 of the Federal Rules of Appellate Procedure, the court remanded the case to allow the district court to determine whether Rule 11 was violated "given the clear absence of a legal or factual basis for this appeal."48

The Fourth Circuit again expressed its contempt for groundless litigation in Cleveland Demolition Co. v. Alcon Scrap Corp.49 Cleveland Demolition was an action brought by the plaintiff to overturn a jury verdict against it in a breach of contract case.50 Based solely upon discrepancies between the deposition and trial testimony of a witness, Cleveland Demolition alleged not only that the witness perjured himself, but that Alcon's attorney conspired to present perjured testimony.51 Finding that the only evidence of the alleged conspiracy was a conflict in testimony, the court stated "[t]his routine evidentiary conflict does not justify an action for fraud on the court or the serious allegations of attorney misconduct leveled in this case."52 Hence, the district court's imposition of sanctions was affirmed.53

The Fourth Circuit found the utter lack of legal or factual investigation significant. The court's discussion of this finding is instructive:

The district court found that Cleveland did not conduct a reasonable factual or legal investigation. We agree. Although Cleveland discovered a conflict between the Spine and Dun & Bradstreet versions, this discovery should have been only the beginning of the inquiry into whether Spine committed perjury. Rather than continuing its investigation, however, Cleveland was apparently satisfied with a few interviews with a Dun & Bradstreet employee.

A complaint of this nature has a potentially devastating impact upon professional reputations. Even if Cleveland had found evidence of perjury, it had an obligation to investigate whether attorney Demase was involved. Cleveland's inquiry never produced any evidence that Demase participated in Spine's alleged perjury. As the district court noted, 'this part of [Cleveland's] case has always been nothing more than speculative and conclusory.' Instead of conducting a

48. Tiller, 814 F.2d at 941.
50. Id. at 984-85.
51. Id. at 985.
52. Id.
53. Id. at 988.
reasonable factual investigation, Cleveland apparently chose to build its case on the unsupported assumption that Spine must have been lying and that Demase must have been participating. This speculative basis for a Rule 60(b) action alleging attorney misconduct of the most serious nature does not satisfy Rule 11 standards.

Cleveland also failed to conduct a reasonable legal investigation to determine if the complaint was 'warranted by existing law.' Cleveland limited its inquiry to a brief reading of Rule 60, a portion of American Jurisprudence, a Federal Procedure Guide, and Hazel-Atlas Glass Co. v. Hartford-Empire Co., 332 U.S. 238, 64 S.Ct. 997, 88 L.Ed. 1250 (1944). If Cleveland had conducted even a minimal investigation into Fourth Circuit precedent, it would have discovered Great Coastal Express v. International Brotherhood of Teamsters, 675 F.2d 1349 (4th Cir. 1982). Although Great Coastal suggests that a conspiracy by a witness and an attorney to commit perjury will amount to a fraud on the court, the case specifically notes that other sanctions exist to punish perjury and that 'perjury or fabricated evidence are not grounds for relief as a fraud on the court.' 675 F.2d at 1357. Thus, even if Cleveland had evidence of perjury by Spine, it was still required to show that Demase participated. Because Cleveland had absolutely no evidence of involvement by Demase, a quick reading of Great Coastal would have revealed that Cleveland's complaint had 'absolutely no chance of success under the existing precedent.' Eastway Construction Corp. v. City of New York, 762 F.2d 243, 254 (2d Cir. 1985).54

Hence, the Fourth Circuit held:

In sum, Rule 11 'explicitly and unambiguously imposes an affirmative duty on each attorney to conduct a reasonable inquiry into the validity of a pleading before it is signed.' Eastway, 762 F.2d at 253. The Rule does not seek to stifle the exuberant spirit of skilled advocacy or to require that a claim be proven before a complaint can be filed. The Rule attempts to discourage the needless filing of groundless lawsuits. To fulfill his duty, an attorney must investigate the facts, examine the law, and then decide whether the complaint is justified. Cleveland failed to discharge this duty; it conducted only a minimal factual inquiry and a cursory legal investigatory. The district court properly imposed sanctions.55

Likewise, in Baldwin v. Boone,56 the court imposed Rule 11 sanctions on a North Carolina inmate who filed a pro se action for damages and declaratory and injunctive relief pursuant to the eighth and fourteenth amendments under 42 U.S.C. § 1983.57 In filing his

54. Id. at 987-88.
55. Id. at 988.
56. Baldwin v. Boone, No. 36-7341, slip op. (4th Cir. Feb. 6, 1987). Baldwin is an unpublished disposition by the Fourth Circuit. Pursuant to Internal Operating Procedure (I.O.P.) 36.5, citation of such dispositions is disfavored by the Fourth Circuit except for establishing res judicata, estoppel or the law of the case. If such a disposition is cited, copies must be served on opposing counsel.
57. Id. at 9.
complaint, Baldwin provided a fraudulent negative response to the question contained in the docketing sheet, "have you begun other lawsuits dealing with the same facts involved in this action?" The Fourth Circuit upheld the district court’s imposition of Rule 11 sanctions, stating:

This rule applies to pro se litigants as well as those represented by an attorney. Baldwin’s fraudulent conduct clearly falls within the realm of conduct for which a sanction may be imposed. Furthermore, no monetary penalty was actually given; instead a mere reprimand was issued warning Baldwin of the consequences which would result from future fraudulent conduct. The action of the district court was appropriate considering the circumstances in this case.

2. Rule 11 Sanctions Denied.

Notwithstanding its apparent inclination to rigorously enforce the mandates of Federal Rule 11, the Fourth Circuit has indicated that it will generally defer to the finding of the district court. In the absence of the imposition of sanctions at the district court level, the appellate court will not strain to find a violation so long as the pleadings in question are grounded in a reasonable basis of law and fact.

The Fourth Circuit refused to award sanctions in *Hoover-Universal, Inc. v. Brockway Ind. Co.* Hoover was an action in which the plaintiff alleged breach of warranty and fraud arising from the sale of certain pieces of industrial equipment. The district court granted summary judgment against the plaintiff but denied the defendant’s motion for sanctions under Rule 11. The Fourth Circuit Court of Appeals found no error in the district court’s ruling, stating:

Contrary to [defendant’s] argument on appeal, we see no indication that the District Court improperly applied a subjective standard of good faith rather than an objective test of reasonableness to a determination of whether plaintiff’s action was ‘warranted by existing law.’ Indeed, the Court expressly stated that ‘objec-

58. Id. at 2.
59. Id. at 3.
61. Id. at 1040.
62. Id. at 1044.
tively. . . [plaintiff had] a glimmer of a chance of prevailing.' In a case turning upon such general concepts as 'basis of the bargain' and 'reasonable reliance' we cannot disagree with that conclusion.63

In Nelson v. Piedmont Aviation, Inc.,64 a pilot brought an action against Piedmont alleging that Piedmont had refused to hire him for discriminatory reasons in violation of the Railway Labor Act.65 On cross-appeal Piedmont moved for the imposition of costs and attorneys' fees pursuant to Rule 11, relief which the district court had denied.66

Deferring to the reasoning of the district court, the Fourth Circuit affirmed the denial of sanctions, stating:

Appellant and his counsel were relying upon anti-discrimination provisions in hiring in other labor laws that were not dissimilar in purpose and scope to the RLA. Thus we cannot say the analogies were drawn with no 'good faith argument for the extension, modification or reversal of existing law.'67

Similarly, in Vance v. M. Loeb Co.,68 the Fourth Circuit again upheld the district court's denial of sanctions under Rule 11. The appellant filed a complaint seeking collection of weekly insurance benefits from the appellee employer, alleging that he had sustained severe job-related injuries which rendered him totally disabled.69 The employer moved for summary judgment based on appellant's failure to exhaust his remedies pursuant to a collective bargaining agreement which provided for certain grievance procedures.70 The district court granted appellee's motion for summary judgment but denied its motion for Rule 11 sanctions.71 On appeal, the Fourth Circuit affirmed the district court's denial of sanctions:

63. Id.
65. Id. at 1236.
66. Id. at 1237-38.
67. Id. at 1238 (quoting Textor v. Board of Regents, 87 F.R.D. 751, 754 (N.D. Ill. 1980)). See also Basch v. Westinghouse Elec. Corp., 777 F.2d 165, 175 (4th Cir. 1985) ("... appeal, although found to be without merit, was not frivolous nor was it interposed to harass . . . or to delay . . . .").
69. Id. at 203.
70. Id. at 3.
71. Id. at 4.
The [District] Court reasoned that futility (i.e., [plaintiff's] claim that he should be excused from pursuing grievance procedures because it would have been futile), if sufficiently raised, would be an exception to the exhaustion requirement so that 'there was, perhaps a colorable claim here.' This reasoning shows that the trial Judge applied an objective test.

... ...

In the present case, the trial Judge did not err in finding that [plaintiff's] attorney did not violate Rule 11. [Plaintiff] had a colorable futility argument. Rule 11 should not be used to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories. 72

Although sanctions were denied, two recent decisions from the Fourth Circuit appear to lend support to an expansive reading of Rule 11 with respect to abusive litigation practices other than pleadings which are found, on their face, to violate the rule. In Rossman v. State Farm Mutual Auto Insurance Co., 73 the plaintiff alleged that the defendant violated Rule 11 when it simply withdrew certain arguments on the morning of trial. Rossman involved a somewhat complex dispute over insurance coverage which resulted in considerable discovery, as noted by the court:

[T]he [plaintiffs] at considerable expense, deposed witnesses in Illinois and Indiana on the ownership issues. On the morning of the trial, Consolidated [the defendant insurer] informed the [plaintiffs] that it intended to drop the ownership arguments and base its case on the automatic termination issue. According to the [plaintiffs] this was a tactic designed to deplete their resources and force them to abandon their suit. They based their allegations of bad faith primarily on the timing of the so-called tactic. 74

The Fourth Circuit affirmed the denial of the motion for sanctions under Rule 11, stating:

We are not persuaded that these allegations require the imposition of sanctions. The trial judge has discretion in determining whether to impose sanctions under Rule 11. Here, the district court found that Consolidated acted 'reasonably under the circumstances' and refused to award attorneys fees. . . . This is the kind of matter on which deference to the district court is particularly appropriate. Everything about the arrangements for the Mazda automobile has been hotly disputed throughout this litigation; the district court did not err in declining to

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72. Id.
74. Id. at 280.
impose sanctions on Consolidated for vigorously pursuing these questions. Finding no abuse of discretion on the part of the trial court, we affirm the denial of the Rule 11 motion.\textsuperscript{25}

The defendants in \textit{Forrest Creek Associates Ltd. v. McLean Savings & Loan Association}\textsuperscript{76} raised a similar argument, claiming that they were forced to spend "over half a million dollars" in legal fees because the plaintiffs' complaint misstated facts in a "scurrilous and fictitious manner."\textsuperscript{77} The Fourth Circuit stated:

It is true, as the defendants have documented at considerable length, that the plaintiffs' pleadings contain a number of inaccuracies. We do not agree, however, that the case was utterly 'groundless', or that it 'never existed except in the imagination of Shaffer and Labowitz', counsel for the plaintiffs. That the plaintiffs did not prevail at trial is irrelevant. Rule 11 was never meant to impose a penalty upon every plaintiff whose case is dismissed.\textsuperscript{78}

Because the Fourth Circuit affirmed the denial of sanctions based upon an abuse of discretion standard in both \textit{Rossman} and \textit{Forrest Creek}, these cases appear to indicate that in the appropriate circumstance, the pursuit of a claim which causes the other party to expend attorney's fees and costs may be an appropriate basis for sanctions, even where the claim, on its face, might appear valid.

3. Pleading and Practice.

The Fourth Circuit has announced several significant restrictions on Rule 11 pleading and practice of which the practitioner should be aware. The Fourth Circuit has held that Rule 11 applies only to actions filed in federal court and not to actions removed from state court. In \textit{Kirby v. Allegheny Beverage Corporation},\textsuperscript{79} the Fourth Circuit held that "a pleading signed in a state court proceeding which is later removed to federal court clearly cannot be signed in violation of [Federal] Rule 11."\textsuperscript{80} The court buttressed this holding by stating that Rule 11 provides for sanctions when a pleading is

\textsuperscript{75} Id. (quoting Cobell v. Petty, 810 F.2d 463, 466 (4th Cir. 1987)).

\textsuperscript{76} Forrest Creek Assoc. Ltd. v. McLean Sav. & Loan Ass'n, 831 F.2d 1238 (4th Cir. 1987).

\textsuperscript{77} Id. at 1244.

\textsuperscript{78} Id.

\textsuperscript{79} Kirby v. Allegheny Beverage Corp., 811 F.2d 253 (4th Cir. 1987).

\textsuperscript{80} Id.
signed "in violation of this rule." The court supported its holding with Federal Rule of Civil Procedure 81(c), which provides that the rules apply to actions removed to United States district courts from state courts and govern procedures after removal. It concluded that "by obvious implication, the rules, including Rule 11, do not apply to the filing of pleadings or motions prior to removal." Similarly, in Meadow Ltd. Partnership v. Meadow Farm Partnership, the court held that sanctions could not be imposed for any proceedings or actions which occurred in the state court prior to removal.

Interestingly, the Fourth Circuit used Rule 11 to justify the eleventh hour amendment of a complaint in Sweetheart Plastics v. Detroit Forming, Inc. The plaintiff moved to amend its complaint to include a count for trademark infringement on the first day of trial based upon documents it had received from the defendant six (6) days prior. The district court denied the motion to amend.

On appeal, the Fourth Circuit reversed the district court's denial of the motion to amend. Stating that amendments should be freely granted, the court also noted that under Rule 11 "[c]learly, [plaintiff's] counsel could not in good faith have included in his complaint a count for trademark infringement before he was aware of evidence to support such a claim. Such conduct would have violated both the letter and the spirit of Rule 11." The standard of review the Fourth Circuit will apply in considering the decisions of the district courts regarding Rule 11 sanctions is one of "abuse of discretion." Hence, the case for or against

81. Id.
82. Id.
83. Meadow Ltd. Partnership v. Meadow Farm Partnership, 816 F.2d 970 (4th Cir. 1987).
84. Id.
86. Id. at 1042.
87. Id.
88. Id. at 1045.
89. Id. at 1044.
90. Rossman, 832 F.2d 282; Forrest Creek Assoc., 831 F.2d 1238; Pocahontas Supreme Coal, 828 F.2d 211; Cleveland Demolition, 827 F.2d 984; La Rouche v. National Broadcasting Co., 780 F.2d 1134 (4th Cir. 1986); Stevens 789 F.2d 1056; Cohen, 788 F.2d 247; Nelson, 750 F.2d at 1238; Langham - Hill v. Southern Fuels Co., 813 F.2d 1327 (4th Cir. 1987); Ancona v. Umstadter, 800 F.2d 260 (4th Cir. 1986) (unpublished disposition; available on Lexis).
sanctions must be made in the district court. Nonetheless, in *Stevens v. Lawyer’s Mutual Liability Ins. Co.*, the Fourth Circuit indicated that it will reverse a district court’s imposition of Rule 11 sanctions when circumstances warrant. In *Stevens*, a former client of a law firm filed an action seeking declaratory judgment that an insurer’s “claims made” liability policy covered the firm’s former partner in a malpractice action. The district court imposed sanctions against the client’s counsel, and the Fourth Circuit reversed, reasoning that the action “had a reasonable basis in fact and law and was not objectively frivolous nor interposed for any improper purpose.”

Conversely, in *LeVay Corporation v. Dominion Federal Savings & Loan Association*, the Fourth Circuit reversed the denial of sanctions because the district court failed to develop a record on the issue of whether a Rule 11 violation occurred.

In *LeVay*, the plaintiffs brought claims against one of the defendants, Dorn, which he claimed were frivolous. In fact, at trial the district court “directed a verdict for Dorn after plaintiffs failed to present any evidence that he entered into or breached a fiduciary relationship with LeVay. The evidence suggested that LeVay was aware that Dorn’s only fiduciary duty was to his client Dominion.”

The district court denied the defendant Dorn’s motion for Rule 11 sanctions because it did not find “any frivolousness or any showing that this was a claim not well grounded in fact or law.” The Fourth Circuit, however, reversed the district court’s decision, stating:

> This conclusion was premature because plaintiffs have yet to state any inquiry or facts which justified their filing a claim against Dorn. The District Court should have developed some record on this issue to justify its conclusion regarding the objective basis for the plaintiffs’ claims. While the directed verdict alone did not
merit an award of sanctions, the plaintiffs were required to demonstrate some reasonable basis for their filings in regards to Dorn. The District Court's conclusion was therefore improper because it was not based on any record of the inquiry, if any, made by LeVay. We vacate the District Court's Order denying sanctions and remand the case for consideration of whether there was a reasonable basis for the action against Dorn, and if not, consideration of a proper sanction.99

LeVay appears to require that a party faced with a motion for Rule 11 sanctions has an obligation to demonstrate a reasonable basis for the filing of the challenged claims. Perhaps more significant is LeVay's suggestion that the trial Court has an obligation to make such an inquiry on the record. This decision, therefore, may require that evidentiary hearings be held in Rule 11 situations.

Finally, the Fourth Circuit has indicated that it will defer to the district court with respect to the type of sanction imposed100 and, where appropriate, the amount of attorney's fees imposed. With respect to attorney's fees, the Fourth Circuit will adhere to the twelve factors enunciated in Barber v. Kimbrell's Inc.101 The factors set forth in Barber are:

(1) the time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in pressing the instant litigation; (5) the customary fee for like work; (6) the attorney's expectations at the outset of the litigation; (7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorneys' fees awards in similar cases.102

The Fourth Circuit applied these factors in Cleveland Demolition Co., stating:

In determining the specific amount of sanctions, the district court reduced Azcon's legal fees by 10%, finding that the case was slightly over-lawyered and did not require a trial. The hourly fees of several attorneys were lowered to reflect the prevailing local rate, while the fees of attorneys from out of state were reduced by 10% because they failed to provide the district court with sufficient information

99. Id. (emphasis added).
100. In Baldwin v. Boone, No. 86-7341, slip op. (4th Cir. Feb. 6, 1987) the court affirmed the issuance of a reprimand as a sanction.
about their professional backgrounds. These adjustments are consistent with the twelve factors listed in *Barber v. Kimbrell's, Inc.*, ... and we therefore affirm the amount of the award in this case.\textsuperscript{102}

\section*{IV. Analysis}

The decisions of the Fourth Circuit provide the most guidance to practitioners in West Virginia regarding Rule 11 practice. Assuming that West Virginia adopts the proposed amendments to Rule 11, these decisions will be given great weight in the state courts.\textsuperscript{104} Even absent the amendment, however, the federal decisions on Rule 11 provide guidelines for the identification and handling of the abusive litigation practices which were recognized in *Daily Gazette v. Canady* as falling within the state court’s power to govern the litigants before it.\textsuperscript{105}

Like pornography, it is perhaps impossible to define a Rule 11 violation. As Justice Stewart once noted, “I know it when I see it.”\textsuperscript{106} At best, the answer to whether a Rule 11 violation has occurred is to be determined on a case-by-case basis. Some guidelines, however, have been set. Probably most important is the need to make the case for (or against) sanctions at the trial court level.\textsuperscript{107} In federal court it is clear that such decisions will be reversed only on rare occasions under the abuse of discretion standard. While West Virginia has not spoken to this issue with respect to Rule 11, it has applied the same standard of review to decisions regarding sanctions under West Virginia Rule 37. A *caveat* is that both the Fourth Circuit and the Supreme Court of Appeals of West Virginia will require that a complete record support the findings of the lower court.\textsuperscript{108}

The assertion of a claim for a demonstrably improper purpose\textsuperscript{109} or in spite of clear law barring it\textsuperscript{110} present clear examples of Rule 11 violations. Less clear are the cases where the facts which underlie

\begin{itemize}
  \item \textsuperscript{103} *Cleveland Demolition*, 827 F.2d at 988 (citation omitted).
  \item \textsuperscript{105} *Daily Gazette*, 332 S.E.2d 262. See *supra* notes 12-19.
  \item \textsuperscript{106} *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).
  \item \textsuperscript{107} *Daily Gazette*, 332 S.E.2d at 262.
  \item \textsuperscript{108} See *LeVay Corp.*, 830 F.2d at 522 and *Daily Gazette* 332 S.E.2d at 262.
  \item \textsuperscript{109} *Cohen*, 788 F.2d at 247.
  \item \textsuperscript{110} *Chu*, 771 F.2d at 79; *Dalton*, 800 F.2d at 1316.
\end{itemize}
facially valid claims are insufficient. It is this gray area where it becomes vitally important to present evidence—law and facts—to the trial court in support of the motion for sanctions. Like any other motion, such evidence may consist of assertions made by the opposing party in pleadings and motions, along with depositions and affidavits. The courts may allow limited discovery related to Rule 11. The evidence must present a clear picture for sanctions; otherwise, as a practical matter, most judges will be reluctant to impose sanctions on counsel who are obligated to vigorously press their client’s claims. As indicated in LeVay, it appears that the party opposing a Rule 11 motion must produce evidence demonstrating compliance with the requirements of the rule. A simple way to demonstrate compliance may be good record-keeping. Where an action does not require a memorandum to the court (which would outline the legal and factual basis for a position or claim), counsel should keep a contemporary record in the client file showing, for example, authority for legal positions as well as factual investigation undertaken.

Finally, the use of Rule 11 is not be taken lightly or used for in terrorem effect. As a general rule, counsel should inform the opponent of his or her intent to seek sanctions before approaching the court. This gives the offender the opportunity to either explain or to “cure” the sanctionable behavior.

V. Conclusion

Since the 1983 amendment, the federal courts have shown an increasing willingness to apply sanctions under Federal Rule 11. The Fourth Circuit is embracing this trend. Although the Supreme Court of Appeals of West Virginia has not adopted a revised Rule 11, the Daily Gazette decision evidences a willingness on the part of the court to impose sanctions for egregious behavior, whether based upon the present rule or upon the court’s inherent powers. It therefore seems apparent that West Virginia courts will follow the federal courts’ lead in applying Rule 11, especially if and when the proposed

111. See Tiller, 814 F.2d at 931.
amendment is adopted. Whether in state or federal court, the new willingness of the courts to impose sanctions simply increases counsels' obligation to not only comply with Rule 11, but to do so in a manner that will withstand scrutiny.