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Rule 11 and Civil Rights Lawyers Comments of National Bar Association In response to the Call for Comments Issued by the Advisory Committee on the Civil Rules Judicial Conference of the United States

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RULE 11 AND CIVIL RIGHTS LAWYERS

COMMENTS OF NATIONAL BAR ASSOCIATION

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INTRODUCTION

The National Bar Association ("NBA"), by its attorneys, hereby submits Comments on Fed.R.Civ.P. 11 ("Rule 11") in response to the Call for Comments issued by the Advisory Committee on the Civil Rules, Judicial Conference of the United States (dated August, 1990). In the Call for Comments, the Advisory Committee on Civil Rules requests comments on various aspects of Rule 11. See, 901 F.2d CLXVII (August 1, 1990).

The National Bar Association was founded in 1925, and is an organization comprised of African-American attorneys throughout the United States. Since its founding, the NBA has been involved in promoting civil rights activities in an effort to improve the educational, societal, and economic welfare of African-Americans and other minorities and has long been interested in the effect that Federal Rules of Civil Procedure might have on limiting access to the courts and the impact on sole practitioners and small law firms. In its Call for Comments, the Advisory Committee outlines ten (10) inquiries on issues of particular

importance. In that vein, the Comments of the NBA addresses specifically Inquiry #4, which requests discussion and suggestions on the impact of Rule 11 sanctions on civil rights plaintiffs and lawyers.[1]

The NBA recognizes that the broad discretion afforded district court judges in determining the appropriate Rule 11 sanction was intended as a "safety value" to reduce the pressure of mandatory sanctions that shall be imposed after a finding of a Rule 11 violation. To that extent, the NBA proposes that the basic principle governing sanctions imposed in civil rights cases, be the least severe sanction adequate to serve the purpose of the rule. NBA submits that to meet the deterrent purpose of Rule 11, the district court judge should consider a wide range of possible nonmonetary sanctions, coupled with the consideration of a host of mitigating factors, before resorting to monetary sanctions.

NBA asserts that the abuse of discretion standard should be applied in reviewing a finding of a Rule 11 violation. The choice of sanction, however, should be reviewed under a heightened level of scrutiny in civil rights cases to ensure that sanctions do not chill the advocacy of the civil rights lawyer.

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[1]Inquiry #4 states as follows: Is there evidence that the sanctions rules have been administered unfairly to any particular group of lawyers or parties? Particular concern has been expressed about the effect on civil rights plaintiffs. Bearing in mind that some categories of cases are extremely unlikely to result in sanctionable conduct . . . it cannot be expected that sanctions will be equally distributed among all categories of federal civil litigation. Data may be subject to conflicting interpretation. If this is a problem, could an amendment of the Rules alleviate or eliminate it? Id. at CLXXVI.

See Blue v. U.S. Department of the Army, Nos. 88-1364, et seq., at 33 (Slip Op.) (4th Cir., September 18, 1990). Of course, critics would argue why should such a dichotomy of standard of review be applied in Rule 11 cases involving civil rights. Those critics need only revisit the long line of U.S. Supreme Court cases that have helped shape the fabric of today's society to realize that society as a whole benefits when lawyers undertake to represent cash-trapped clients seeking to vindicate a constitutional right when those same attorneys are forsaking the prestige and money associated with representing clients with deep pockets. Common sense and the almighty dollar tilt the balance of the scales of justice in favor of the practice where money and prestige weighs heavily against altruistic rewards and the common man. A natural consequence of such circumstance creates a disadvantage for the common man whose lawyer may fall under the sanctions imposed by Rule 11, while industry, unlike the common man, will simply be able to hire another lawyer. A chilling thought.

This Comment addresses the history, function and the application of Rule 11 in civil rights cases. In addition, the Comment examines the application of Rule 11 in a recent civil rights case to illustrate how the indiscriminate application of sanctions have a chilling effect on the future practice of civil rights lawyers.

I. HISTORY

Federal Rule of Civil Procedure 11 is intended to deter abuse of the legal process by allowing courts to sanction attorneys who file frivolous pleadings and papers. Apparently the original rule as initially promulgated was not effective in deterring abuses,[2] thus the 1983 amendment to Rule 11 was intended to "reduce the reluctance of courts to impose sanctions . . . by emphasizing the responsibilities of the attorney and enforcing those obligations by the imposition of sanctions." Amended Rule 11 Advisory Committee Notes. The full text of Rule 11 reads as follows:

> Every pleading, motion and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's 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 the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's 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,

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[2]The Advisory Comments to amended Rule 11 show that the amendment's primary purpose was for deterrence of dilatory or abusive pretrial tactics and the streamlining of litigation. See Advisory Comments. See also Golden Eagle Distributing Corp. v. Burroughs Corp., 801 F.2d 1531 (9th Cir. 1986).

> 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 found 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 reasonable expenses, incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

As called for by Rule 11, an attorney signing any pleading, motion or other paper in federal court warrants that the pleading is well grounded in fact, that it is warranted by existing law, or a good faith argument for modification or reversal of existing law, and that it is not filed for an improper purpose. See Eastway Construction Corporation v. City of New York, 762 F.2d 243, 254 n.7 (2nd Cir. 1985) ("Eastway I"). The amended rule was "designed to create an affirmative duty of investigation both as to law and as to fact before motions are filed," and it creates an objective "standard of reasonableness under the circumstances." Advisory Committee Note, 97 F.R.D. 165, 198 (1983); Golden Eagle Distributing Corp. v. Burroughs Corp., 801 F.2d at 1536. This expanded application of Rule 11 sanctions gave rise to concerns that the Rule might chill creativity in advocacy, and impede on the traditional ability of the common law to adjust to changing situations. In response to this concern, the Advisory Committee noted the following:

> [T]he 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.

Advisory Committee Note, 97 F.R.D. at 199. See also, In re Ruben, 825 F.2d 977, 991 (6th Cir. 1987). The National Bar believes that this philosophy is sound and should be applied in all cases filed including civil rights cases.

II. OPERATION OF Rule 11

Rule 11 applies to the filing of "pleadings, motions, and other paper" in a civil action and the rule requires that such a paper be signed. The purpose of the signature is to attach responsibility upon a specific person for those matters that are the subject of the certificate. The certificate is meant to address two issues: the problem of frivolous filings and the problem of misusing judicial procedures as a weapon for personal or economic harassment. Zaldivar v. City of Los Angeles, 780 F.2d 823, 830 (9th Cir. 1986).

The Advisory Committee has stated that sanctions should be imposed on a party where appropriate under the circumstances and the allocation of sanctions among attorneys and their clients was a matter of judicial "discretion." See Advisory Committee's Note to 1983 amendment; cf. Browning Debenture Holders Committee v. DASA Corp., 560 F.2d 1078 (2d Cir. 1977).

Attorneys, law firms and clients have all been subject to Rule 11 sanctions. See, e.g., Chu v. Griffith, 771 F.2d 79 (4th Cir. 1985) (attorney sanctioned); Calloway v. Marvel Entertainment Group, 650 F.Supp. 684 (S.D.N.Y. 1986) (attorney and law firm sanctioned); Robinson v. National Cash Register Co., 808 F.2d 1119 (5th Cir. 1987) (attorney and client sanctioned); Chevron, U.S.A. v. Hand, 763 F.2d 1184 (10th Cir. 1985) (client sanctioned). By category, a 1985 survey of one-hundred (100) Rule 11 cases found that attorneys were sanctioned in 38% of the cases; clients in 20%; and both in 18%. See Nelken, Sanctions Under Amended Federal Rule 11 -- Some "Chilling" Problems in the Struggle Between Compensation and Punishment, 74 Geo.L.J. 1313, 1329 (1986).

With respect to attorneys, a court may consider the fact that an attorney has vast experience in litigation involving political discrimination and thus should know when certain claims are groundless. Quiros v. Hernandez Colon, 800 F.2d 1, 2 (1st Cir. 1986) (Rule 11 award here serves to sanction and deter filing of meritless claims and to compensate those forced to defend them; Due Process claims were groundless).

The attorney may also be jointly and severally liable for a Rule 11 judgment against the client, in large part because the attorney has the principal responsibility for complying with the rule. A fortiori, as long as the attorney has not been mislead by the client, then it is the attorney's conduct that is the proximate cause of the Rule 11 violation. Calloway v. Marvel Entertainment Group, 854 F.2d 1452, 1477 (2nd Cir. 1988) (court

has power to impose joint and several liability on portion of sanctions resulting from party's misconduct where attorney should have known that the misconduct violated Rule 11). The reason behind holding the attorney liable, and not the client, is because of professional responsibility, the attorney is held to know of the wrongfulness of the conduct and because of professional responsibility should act to prevent it. Id. at 1474.

The fact that the court can sanction only the attorney and not the client leaves the court with the flexibility in the myriad of situations in which attorneys fees or other sanctions may be assessed. Quiros v. Hernandez Colon, 800 F.2d at 2 (court presided over the proceedings and is uniquely qualified to perform the balancing of equities that is an integral part of the proceedings for award of attorney fees).

It is unclear in at least the Second Judicial Circuit as to whether a client may be jointly and severally liable for that portion of sanctions resulting from the lawyer's misconduct. Id. Sanctions, however, against the client is appropriate when a client either knowingly authorized or participated in the filing of a paper that violated Rule 11. Calloway v. Marvel Entertainment Group, 854 F.2d at 1474-75. Sanctions on the party alone are also appropriate when a client misleads an attorney as to facts or the purpose of a lawsuit, if the attorney nevertheless had an objectively reasonable basis to sign the papers in question. See Friedgood v. Axelrod, 593 F.Supp. 395 (S.D.N.Y. 1984) (plaintiff lied to attorney).

III. THE DISCRETIONARY SANCTION TOOL FOR THE COURT

It is within the discretion of the district court judge to find that a Rule 11 violation has occurred. Once the court finds that a Rule 11 violation has occurred, the judge must award sanctions. See Fed.R.Civ.P. 11 ("If a pleading, motion or other paper is signed in violation of this rule, the court, upon a motion or upon its own initiative, shall impose . . . an appropriate sanction"); see also Westmoreland v. CBS, Inc., 770 F.2d 1168, 1174 (D.C. Cir. 1985) ("[T]he new provision mandates the imposition of sanctions when warranted by groundless or abusive practice"). The court, however, has the discretion to decide what type of sanction to award. See, e.g., Fed.R.Civ.P. 11 Advisory Committee's Note (the court "has discretion to tailor sanctions to the particular facts of the case"); Eastway I, 762 F.2d at 254 n.7. ("district courts retain broad discretion in fashioning sanctions . . . ."). Rule 11 only requires that sanctions be appropriate. See e.g., In re Yagman, 796 F.2d 1165, 1184-85, opinion amended, 803 F.2d 1085 (9th Cir. 1986), cert. denied, 108 S.Ct. 450 (1987).

The "concept of discretion implies that a decision is lawful at any point within the outer limits of the range of choices appropriate to the issue at hand; at the same time, a decision is outside of those limits, exceeds, or as it is infelicitously said, "abuses" allowable discretion." See Eastway Const. Corp. v. City of New York, 821 F.2d 121, 123 (2nd Cir. 1987) ("Eastway II"); cf. Stormy Clime Ltd. v. ProGrow, Inc., 809 F.2d 971, 974 (2nd Cir. 1987) (defining abuse of discretion).

A. THE DISCRETION IN CHOOSING THE TYPE OF APPROPRIATE SANCTION

The broad discretion afforded district courts is reflected in the numerous types of sanctions that may be imposed under Rule 11. To this extent, the Advisory Committee mentions the district court's consideration of the status of a litigant as represented or pro se; the state of mind of an attorney when the paper was signed; the length of time an attorney has to investigate a claim or defense; and whether the sanction should be imposed on the attorney personally, the client, or both.

There is, however, a natural tendency to impose sanctions that include attorney's fees and reasonable costs provided by the rule. Thomas v. Capital Sec. Services, Inc., 836 F.2d 866, 877 (5th Cir. 1988). Financial penalties have been "characterized as perhaps the most effective way to deter a powerful and wealthy party from bringing frivolous or vexatious litigation; or from maintaining a baseless position in defense of another party's claim." Donaldson v. Clark, 819 F.2d 1551, 1557 (11th Cir. 1987). The monetary sanctions awarded in the estimated 600 to over 1000 Rule 11 decisions appearing in the last six years have reached amounts as high as $400,000. See Note, Insuring Rule 11 Sanctions, 88 Mich.L.Rev. 344 n.2 & 3. One survey indicated that the average Rule 11 sanction is $44,118 and the median sanction is $5,135. Id. at 345 (citing T. Willging, The Rule 11 Sanctioning Process, 30, 80 (1988). Moreover, some courts impose monetary sanctions that bear no relation to the expenses and

attorney fees of the opposing party. See Note, Insuring Rule 11 Sanctions, 88 Mich.L.Rev. at 353 n.62 (1988) (citations omitted).

The history of the rule supports the argument that the "rulemakers inserted the discretionary language in Rule 11 in response to concerns that mandatory sanctions would chill the adversarial process." See Thomas v. Capital Sec. Services, Inc., supra. In other words, the "broad discretion in determining sanctions was intended as a 'safety valve' to reduce the pressure of mandatory sanctions." Thomas v. Capital Sec. Services, Inc., 836 F.2d at 877. Nowhere is the "safety valve" concern more evident than in civil rights cases, where the pressure of mandatory sanctions chills the advocacy of civil rights attorneys.

"As a matter of empirical analysis, however, it may be next to impossible to assess the full extent of the chilling effect, if any, created by the rule." See Note, Insuring 11 Sanctions, 88 Mich.L.Rev. at 382 n. 240 (citations therein). Nonetheless, the NBA members who disproportionately handle civil rights cases can unequivocally attest to the chilling effect of sanctions in their practice. Further, where Rule 11 is used to curb litigation abuses in civil cases in general, there is usually a profit concern motivating the lawsuit. Where, however, litigation abuse is being curbed by Rule 11 sanctions in civil rights cases there is seldom the backdrop of profit motivating the filing of the suit. The distinction is important because it helps to illuminate the logic of how sanctions would chill an area of law practice where profit is not the primary motivation

for bringing the suit. The result could drive these members out of the field of civil rights law altogether. What a paradox!

The "resort to the courts to seek vindication of constitutional rights is a different matter from the oppressive, malicious, or avaricious use of the legal process for purely private gain." N.A.A.C.P. v. Button, 371 U.S. 415, 443 (1962). Monetary sanctions chill the adversarial process in civil rights cases because "lawsuits attacking racial discrimination, [ ] are neither very profitable nor very popular." Id. As recognized by the U.S. Supreme Court, the problem that civil rights clients face is the "apparent dearth of lawyers who are willing to undertake such litigation." Id. The reason for the lack of attorneys who practice civil rights is clear: "lawsuits attacking racial discrimination, [ ] are neither very profitable nor very popular." Id. "They are not an object of general competition among [ ] lawyers." Id.

Particularly in civil rights cases, judges should be encouraged to utilize innovative approaches as a preferred deterrence to monetary sanctions in light of the dearth of attorneys who choose to practice civil rights law and the unprofitabilty of practicing civil rights law. District court judges should, particularly in civil rights cases, consider a "wide range of alternative possible sanctions for violations of the rule" and the court's "choice of deterrence [should be deemed] appropriate when it is the minimum that will serve to adequately deter the undesirable behavior." Doering v. Union County Board of Chosen Freeholders, 857 F.2d 191, 194 (3rd Cir. 1988).

To date, district court judges implementing Rule 11 have resorted to a variety of nonmonetary sanctions, including reprimanding attorneys, see, e.g., In re Curl, 803 F.2d 1004 (9th Cir. 1986) ("[T]he public admonishment of this opinion is sufficient sanction"), striking pleadings or papers, see, e.g., Thomas v. Capital Sec. Servs., Inc., 836 F.2d at 878 ("[D]istrict courts may theoretically still dismiss baseless claims or defenses as sanctions . . . ."), barring attorneys from the court, see, e.g., Kendrick v. Zandides, 609 F.Supp. 1162, 1173 (N.D. Cal. 1985) (ordering attorney to show cause why he should not be suspended for practicing in the Northern District of California), and referring attorneys to state disciplinary boards, see, e.g., Lepucki v. Van Wormer, 765 F.2d 86, 89 (7th Cir.) cert. denied, 474 U.S. 827 (1985) (referring attorney to state disciplinary body for investigation).

As stated by the Fifth Circuit, and hereby endorsed by the NBA with respect to civil rights cases, "the basic principle governing the choice of sanctions is that the least severe sanction adequate to serve the purpose should be imposed." Thomas v. Capital Sec. Services, Inc., 836 F.2d at 878; see also Boazman v. Economics Laboratory, Inc., 537 F.2d 210, 212-13 (5th Cir. 1976); Reizakis v. Loy, 490 F.2d 1132, 1136 (4th Cir. 1974); Industrial Building Materials Inc. v. Interchemical Corp., 437 F.2d 1336, 1339 (9th Cir. 1970). The least severe sanction adequate to meet the purpose of Rule 11 has been embraced by both the Fifth Circuit and the Third Circuit. See Lieb v. Topstone Industries, Inc., 788 F.2d 151, 158 (3rd Cir. 1986) ("Influenced

by the particular facts of a case, the court may decide that the circumstances warrant imposition of only part of the adversary's expenses or perhaps only a reprimand[.] In other cases, reference to a bar association grievance committee may be appropriate").

To serve the deterrent purpose behind the rule, particularly in civil rights cases, district court judges should carefully "choose sanctions that foster the appropriate purpose of the rule, depending upon the parties, the violation, and the nature of the case." Thomas v. Capital Sec. Services, Inc., 836 F.2d at 877.

The NBA suggests that, in civil rights cases, sanctions of first resort should be "educational and rehabilitative in character and, as such, tailored to the particular wrong." See Thomas v. Capital Sec. Services, Inc., 836 F.2d at 877. The educational effect of sanctions might be enhanced even by requiring some form of legal education, see Thomas v. Capital Sec. Services, Inc., 836 F.2d at 878, or, "[w]hat is appropriate may be a warm friendly discussion on the record, a hard-nosed reprimand in open court, compulsory legal education, monetary sanctions, or other measures appropriate to the circumstances." Id. at 878.

One district court exemplified the type of innovation which the NBA subscribes to, in requiring an errant attorney to circulate the court's opinion criticizing this conduct through his own firm. Heuttig & Schromm, Inc. v. Landscape Contractors Council, 582 F.Supp. 1519 (N.D.Cal. 1984), aff'd 790 F.2d 1421

(9th Cir. 1986); see also Schwarzer, 104 F.R.D. 181, 201-02 (1985) (judges cautioned not to violate Rule 11; the sting of public criticism delivered from the bench, while potentially constructive, can also damage a lawyer's reputation and career). As noted by Judge A. Leon Higginbothom, other sanctions that could be appropriate in taking the place of monetary awards include publication, an order barring an attorney from appearing for a period of time, reprimand, dismissal of baseless claims or defenses...", or even ordering "the attorney[] who violated the rule to circulate in [his or her] firm a copy of the opinion in which the pleadings were criticized." Doering v. Union County Bd. of Chosen Freeholders, 857 F.2d at 194 (citing Gaiard v. Ethyl Corp., 835 F.2d 479, 482 (3rd Cir. 1987); Golden Eagle Distrib. Corp. v. Burroughs Corp., 103 F.R.D. 124, 129 (N.D.Cal. 1984) rev'd, 801 F.2d 1531 (9th Cir. 1986)).

B. MITIGATION

In civil rights cases in particular, the NBA proposes that courts consider as instructive the mitigating factors articulated by Judge A. Leon Higginbothom in the context of Rule 11; these considerations should also be relevant to the extent of any monetary award:

(1) attorney's history of filing frivolous actions or alternatively, his or her good reputation, Eastway, 637 F.Supp. at 573;

(2) "the defendant's need for compensation, id at 574;

(3) the degree of frivolousness, recognizing that cases do lie along a continuum rather than neatly falling into either the frivolous or non-frivolous category and that Congressional intent, in promulgating Rule 11 sanctions, was not to "chill an attorney's enthusiasm or creativity in pursuing factual or legal theories," Fed.R.Civ.P. 11 Advisory Committee Notes; see also, Napier, 855 F.2d at 1091-1092; Gaiardo, 835 F.2d at 483-484 ("The rule seeks to strike a balance between the need to curtail abuse of the legal system and the need to encourage creativity and vitality in the law.")

(4) "whether the frivolousness also indicating that a less sophisticated or expensive response [by the other party] was required," Napier, 855 F.2d at 1094; and

(5) the importance of not discouraging particular types of litigating which may provide the basis of legislative and executive ameliorative actions when the courts lack power to act." Eastway, 637 F.Supp. at 575.

See Doering v. Union County Bd. of Chosen Freeholders, 857 F.2d at 197.

Also, the Seventh Circuit suggests that a court consider whether the party seeking fees caused the litigation to be longer than necessary, because a duty of mitigation exists for that party. Brown v. Federation of State Medical Boards, 830 F.2d 1429, 1430 (7th Cir. 1987); cf. Schwarzer, 104 F.R.D. at 198-200 (in assessing the damage done, the court should consider the extent to which it is self-inflicted due to the failure to mitigate: If a baseless claim could have been readily disposed of by summary procedures, there is perhaps, little justification

for a claim for attorney's fees and expenses engendered in length and elaborate proceedings in opposition).

IV. THE STANDARD OF REVIEW

There is a split of opinion among the circuits as to the proper standard of review to be applied to Rule 11 decisions by district courts. Within the Fifth Circuit, there had existed a divergence of opinion as to the proper standard of review of district court Rule 11 judgments. For example, in Robinson v. National Cash Register Co., 808 F.2d 1119 (5th Cir. 1987) the court used a three-tiered approach:

> In reviewing an order imposing sanctions, we must examine the aspect of the order that is being reviewed. Findings of facts used by the district court to determine that Rule 11 has been violated are reviewed under the clearly erroneous standard. The legal conclusion of the district court that a particular set of facts constitutes a violation of Rule 11 is reviewed de novo. The amount and type of the sanction imposed is examined under the abuse of discretion standard.

Id. at 1125-26; But see Davis v. Veslan Enterprises, 765 F.2d 494 (5th Cir. 1985) (abuse of discretion standard is appropriate). In 1988, the Fifth Circuit decided that the "complexity of the three-tiered standard creates additional work for district courts and additional issues for appeal" and adopted the abuse of discretion standard. Thomas v. Capital Sec. Services, Inc., 836 F.2d at 883-84.

The three-tier approach first surfaced in Zaldivar v. City of Los Angeles, 780 F.2d at 828; see also Brown v. Federation of

State Medical Boards, 830 F.2d at 1434. Other circuits suggest a variation of the approach used in Zaldivar v. City of Los Angeles, employing an abuse of discretion standard when reviewing the factual reasons for imposing Rule 11 sanction and the amount and type of sanctions, while reserving a de novo analysis for reviewing the legal sufficiency of a pleading or motion and the determination to impose sanctions. See Donaldson v. Clark, 819 F.2d at 1556; Westmoreland v. CBS, 770 F.2d at 1175; Eastway I, 762 F.2d at 254 n. 7. The D.C. Circuit has even suggested that a "wide discretion" is available. See Adams v. Pan American World Airways, Inc., 828 F.2d 24, 32 (D.C. Cir. 1987) (court refused to overturn the district court's denial of sanction stating that "we may overturn [the district court's] ruling only if it abused its 'wide discretion' to determine whether grounds exist to support Rule 11 sanctions.") Once again, NBA reaffirms its position that the abuse of discretion standard be applied in reviewing a finding of a Rule 11 violation. However, a heightened level of scrutiny should be applied in reviewing the choice of sanctions to be imposed.

V. Rule 11 DISCRETION AND CIVIL RIGHTS CASES

There are two schools of thought regarding the application of Rule 11 to civil rights cases: on the one hand, critics argue that no special treatment should be given to civil rights litigation, and, on the other hand, critics argue that sanctions should not chill the advocacy of the practice of civil rights law which has help shaped America's history.

In Perez v. Velez, 629 F. Supp. 734, 737 (S.D.N.Y 1985), the court said: "Our responsibility is to take needed punitive action against irresponsible and unprofessional conduct without doing damage to the underlying cause of equal rights which the attorney has served." Nonetheless, that district court judge wrote counsel in these cases cannot be permitted to engage with impunity in conduct of egregious professional responsibility simply because the frivolous lawsuits they sponsor are in the sensitive civil rights area. Perez v. Velez, 629 F. Supp. at 737 ("litigation frivolous, even though the underlying litigation here concerns the voting rights of minorities and the court is particularly mindful of the need not to discourage politically powerless minority voters from bringing legitimate claims into court"). The problem is that where political and fundamental rights are sought in the courts, minority lawyers have sometimes felt the sting of claims of unprofessional conduct when the underlying objective is to deter the aim of the litigation, to wit, obtain political and fundamental rights for their clients.

Some district court judges flatly reject any notion "that special treatment of sanctions should be given to attorneys who handle unpopular civil rights claims, particularly those representing indigent and minority clients. Oliveri v. Thompson, 803 F.2d 1265, 1280 (2nd Cir. 1986) (all attorneys are to be held to the same standards of conduct, no matter who their clients are; dilatory practices of civil rights plaintiffs are as objectionable as those of defendant) (citing Roadway Express Inc. v. Piper, 447 U.S. 752, 762 (1980)).

The NBA does not suggest that civil rights cases should be immune from the threat of sanctions for violating Rule 11. Rather, the NBA does strongly advocate that civil rights cases be treated differently in the type of sanction awarded against civil rights litigants. Why? The undesirability of the case. "Civil rights attorneys face hardships in their communities because of their desire to help the civil rights litigant" and most federal judges know this. See N.A.A.C.P. v. Button, 371 U.S. at 433. Oftentimes an attorney's decision to help eradicate discrimination is not pleasantly received by the community or his contemporaries. Cf. Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 719 (5th Cir. 1974). As in Rule 11, "this case can have an economic impact on his practice which can be considered by the Court." Id. at 719. Available empirical data suggests that Rule 11 does potentially chill the advocacy of civil rights law. See, e.g., Note, Insuring Rule 11 Sanctions, 88 Mich. L. Rev. at 382 n. 241 (citing for e.g., Note, Plausible Pleadings: Developing Standards for Rule 11 Sanctions, 100 Harv. L. Rev. 630 (1987) ("Conflicting notions of plausibility, as much as overly narrow ones, have a chilling effect on litigation, leading prudent lawyers to steer wide of even potential implausibility by avoiding filing nonstandard claims"); Rothstein & Wolfe, Innovative Attorneys Starting to Feel Chill From New Rule 11, Legal Times, Feb. 23, 1987 at 18:10 ("attorneys unsure of the boundaries of Rule 11's sweep many be refusing to take novel or risky, but arguably meritorious, cases for fear of being personally sanctioned" by federal judges); see also Thomas v.

Capital Sec. Servs., Inc., 836 F.2d at 885 ("If abused, Rule 11 may chill attorneys' [in civil rights cases] enthusiasm and stifle the creativity of litigants in pursuing novel factual or legal theories")). Civil rights cases, in addition, accounting for only 7.6% of the civil filings from 1983 to 1985, but accounted for 22.2% of the Rule 11 cases during the same period; in contrast, contract claims accounted for 35.7% of all cases, but only 11.2% of the Rule 11 cases. See Note, Insuring Rule 22 Sanctions, 88 Mich. L. Rev. 383 n. 244 (1989) (citing Nelkin, Sanctions Under Amended Federal Rule 11 -- Some "Chilling Problems in the Struggle Between Compensation and Punishment, 74 Geo. L. J. 1313, 1327 1340 (1986); see also Woodrum v. Woodward County, Okl., 866 F.2d 1121, 1127 (9th Cir. 1989); Vairo, Rule 11: A Critical Analysis, 118 F.R.D. 189, 200-01 (1988). And, in a survey of civil cases in general in the Third Circuit, one survey data found that reported decisions are only the "tip of the iceberg" with respect to Rule 11. See Third Circuit Task Force on Federal Rule of Civil Procedure, Rule 11 in Transition 59 (1989).

Another impact of Rule 11 that disproportionately affects civil rights cases is that some district court judges interpret it to mean that all arguments and subarguments fall within the award of sanctions. Civil rights attorneys, however, often are called upon to make novel arguments to complement the statistical data used to make a colorable claim of discrimination. Further, to show intent necessary to prove discrimination it is inevitable that the civil rights attorney will not have a solid basis in

fact until discovery is far along in the process. Or, civil rights attorneys may have to call for an extension of existing law or just the reverse. District court judges must be mindful that Rule 11 does not apply to the mere making of a frivolous argument. Golden Eagle Distributing Corp. v. Burroughs Corp., 801 F.2d at 1540. "The rule permits the imposition of sanctions only when the "pleading, motion, or other paper" itself is frivolous, not when one of the arguments in support of a pleading or motion is frivolous. Id. Stated differently, "the fact that the court concludes that one argument or sub-argument in support of an otherwise valid motion, pleading, or other paper is unmeritorious does not warrant a finding that the motion or pleading is frivolous or that the Rule has been violated." Id. When mandatory sanctions ride upon close judicial decisions the "danger of arbitrariness increases and the probability of uniform enforcement declines." Id.; See, e.g., Zaldivar v. City of Los Angeles, 780 F.2d 823 (9th Cir. 1986) (we believe a plausible, good faith argument can be made by a competent attorney to the contrary); see also Davis v. Veslan Enterprises, 765 F.2d at 498 ("the district court's determination to impose sanctions may depend on whether the pleading, motion, or other paper was based on a plausible view of the law.'") (quoting comment to 1983 amendments); Eastway I, 762 F.2d at 254 ("[W]here it is patently clear that a claim has absolutely no chance of success under the existing precedents, and where no reasonable argument can be advanced to extend, modify or reverse the law as it stands, Rule 11 has been violated." Further, judges must be mindful that the

subjective intent of the attorney or litigant is not a basis for a Rule 11 violation when a complaint which complies with the standard of being "well-grounded in fact and warranted by . . . law"), Zaldivar v. City of Los Angeles, 780 F.2d at 832 (instructions to district court judges in making determinations that the second prong of Rule 11 -- "not for improper purposes" has been violated). Moreover, the pleading or paper that is the subject of the sanction is to be judged by what is known at the time the pleading or paper is filed, and not by hindsight.

VI. THE NIGHTMARE OF THE APPLICATION OF RULE 11 TO A CIVIL RIGHTS CASE

Just recently, the Fourth Circuit overturned a district court decision which involved sanctions imposed on one of this country's greatest civil rights advocates -- Julius LeVonne Chambers, Executive Director of the NAACP Legal Defense Fund. See Blue v. U.S. Department of the Army, Slip Op. (Nos. 88-1364, et seq.) (4th Cir., September 18, 1990). In this case, the plaintiffs accused the U.S. Army with wide-ranging acts of discrimination in civil employment including: hiring and promotion criteria, pay practices, job assignments, job performance, job evaluations, disciplinary actions, reductions in workforce, and numerous aspects of on the job treatment. The trial proceeded with approximately 38 plaintiffs. The parties eventually reached a settlement in which the Army agreed to pay all plaintiffs as a group $75,000, and a guarantee that it would continue to implement its affirmative action in good faith. The court still was to adjudicate claims which it had already heard,

as well as all sanctions motions. The court conducted extensive sanctions hearings to determine the reasons why plaintiffs had abandoned their claims and whether the claims were frivolous. It heard several weeks of testimony and argument by the parties. The parties then reached a "final agreement" nullifying and superseding the earlier settlement. Pursuant to the final agreement, the substantive claims of all except two plaintiffs, Sandra Blue and Mattiebelle Harris, were dropped. These two plaintiffs were not included in settlement because they failed to sign the final agreement. However, still before the district court were the merits of Blue's tried claims and the government's motions for sanctions against Blue, Harris, and their counsel for their abandoned claims. The district court ultimately rejected Blue's discrimination claim as frivolous and, in a near 200-page opinion, awarded sanctions totaling approximately $85,000, apportioned as follows: $17,000 against Harris, $13,000 against Blue, $30,000 against Chambers, $12,000 against Chambers' young law associate Geraldine Sumter, $1,414 against a North Carolina law firm that had assisted Chambers in the case, and the remainder against other attorneys involved in the case in lesser capacities. In calculating the amount of sanctions, the district court included the salaries of the judge and law clerks as a component of the sanction amount. The district court also ruled that the NAACP Legal Defense Fund could not be the source for satisfying the payment of the sanctioned amount in this case.

But for the Fourth Circuit's heightened level of scrutiny (despite not labeling it as such) of the district court judge's

choice of sanctions in Harris v. Marsh, 679 F.Supp. 1204 (E.D.N.C. 1987), there is no doubt that there would have been a chilling effect on civil rights advocacy. As noted by the Fourth Circuit,

> The district court did not abuse its discretion in determining that the conduct warranted appropriate sanctions. But, for reasons given earlier, we are satisfied that the court then failed to exercise sufficient selectivity in imposing wider, ongoing sanctions than it chose and sufficient selectivity to the deterrent effect its decision might create upon future Title VII litigants with meritorious claims. In our view, this did constitute an abuse of the court's discretion which we are obliged to correct in the exercise of our reviewing function.

Blue v. Department of the Army, supra.

The court's opinion underscores NBA's argument of how sanctions can have a chilling impact on civil rights advocacy. For example, with respect to the sanctions awarded against Sumter, the Fourth Circuit stated: "We are unwilling to see the career of a young attorney compromised at its inception because she found herself cast virtually alone into a case which a team of experienced lawyers would have deemed a daunting one." Id.

With respect to the $30,000 total amount awarded against the plaintiffs, including salaries of the court and its staff, the court also underscored the NBA's position that one end result of sanctions is that it can deter access to the courts. "Imposing the cost of judicial salaries...upon litigants is a sort of 'user fee' sanction which may operate as an impediment to judicial access for those with legitimate claims." Id.

With respect to sanctions imposed on counsel for opposing the sanctions motions, the Fourth Circuit's review found no

sanctionable conduct in the attorney's opposition to the sanctions motions. Id. The Fourth Circuit also found the district court judge's award of sanctions against the plaintiff's law firm improper which was based on the fact "that a number of other lawyers with the firm participated in this case in varying minor ways." Id citing, Harris v. Marsh, 679 F. Supp. at 1392.

Moreover, the court also reversed the district court in its indiscriminate choice of sanctions that ordered the NAACP Legal Defense Fund not to pay any portion of the Chambers sanction award. "However well intentioned the district court may have been, a concern for how the Legal Defense Fund allocates its monies is not a legitimate basis in which to order it not to pay sanctions." Id.

The district court's opinion demonstrates how the broad discretion granted district judges in imposing sanctions can have far-reaching and highly damaging effects in a civil rights case. This case reflects the real-life impact that the district court's discretionary authority in imposing sanctions has over the survival of the civil rights attorney and his/her law practice. Moreover, this case further exemplifies the need for the Advisory Committee to recognize, adopt and strongly advocate the use of alternative, nonmonetary sanctions as a method for deterring misconduct, particularly in the area of civil rights cases, and discouraging the use by district court judges of monetary sanctions on sole practitioners and small law firms. As one well-known civil rights attorney has confided, "any Rule 11

sanction [imposed on him], would force [him] into Chapter 11 Bankruptcy."

VII. INSURANCE AND CIVIL RIGHTS ATTORNEYS

Another major concern regarding Rule 11 is its effect on NBA members and the issue of their malpractice insurance. The uncertainty as to what conduct constitutes a Rule 11 violation inevitably prompts attorneys to wonder if they can run for cover under their existing professional liability insurance policies. Many insurance companies, however, expressly exclude "sanctions" from coverage. There are probably many civil rights attorneys who carry no malpractice insurance. A 1989 survey of 25 professional liability policies revealed that 14 have some form of an exclusion for "sanctions." See Note - Insuring Rule 11 Sanctions, 88 Mich. L. Rev. 344, 364 n. 129 (Nov. 1989). What a chilling effect. In representing poor clients, the civil rights attorney suffers from the absence of prestige in both the community and among the legal bar in practicing civil rights law. When factoring in the potential exposure of sanctions under Rule 11, and the absence of insurance coverage, this is to say at the very least, chilling. That, coupled with difficulty that many sole practitioners and small law firms already face in obtaining malpractice insurance and paying its high premiums is driving many attorneys away from the practice of civil rights law.

Further, the liability policies that cover sanctions will no doubt charge high premiums for attorneys who practice an area of

law as civil rights, where there is a high risk of being sanctioned under Rule 11. As noted earlier, civil rights cases tend to be implicated in Rule 11 sanctions more often than in any other types of civil cases. That fact, combined with the unprofitability of practicing civil rights law makes for an excellent reason to review the effect of Rule 11 sanctions on civil rights attorneys. Add the lack of insurance to the equation, and the dearth of attorneys who practice civil rights law, and the end result is the substantial denial of access to the courts to the oppressed and disadvantaged seeking to vindicate constitutional rights. It must be remembered that the right to counsel is not guaranteed in civil trials.

VIII. CONCLUSION

The deterrent effect of an award of attorney's fees depends on the extent of the sanctioned party's resources. In civil rights cases, however, the plaintiff is usually poor or are persons seeking court-appointed representation. Secondly, The deterrent effect of monetary sanctions is de minimis because the civil rights litigants, on average, seldom resort to the legal process more than once in their lifetime to vindicate a constitutional right. In reality, a monetary sanction serves no deterrent effect for the civil rights litigant. With respect to the attorney, courts must be careful not to impose monetary sanctions so great that they are punitive or that they might even drive the sanctioned party out of practice. See, e.g., Napier v. Thirty or More Unidentified Federal Agents, 855 F.2d 1080, 1094

n. 12 (3rd Cir. 1988) (citations omitted). Courts must be mindful that "other proceedings such as disbarment exist to weed out incompetent lawyers; Rule 11 was not entered for that purpose, but rather to provide deterrence for abuses of the system of litigation in federal district courts." Doering v. Union County Bd. of Chosen Freeholders, 857 F.2d at 196 n. 4. In the long run, the deterrent effect of the rule on attorneys in civil rights cases results in chilling the advocacy for persons in such areas. There is more utility in educating the civil rights client and attorney.

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