

# CIVIL RULE 11: How to Obtain and Protect Against Rule 11 Sanctions Under Ohio and Federal Law

By Jamie A. Price  
Gallagher Sharp



Despite the fact that sanctions are difficult to obtain, parties and their attorneys are increasingly seeking them pursuant to the respective versions of Civil Rule 11 in state and federal court. Due to the rise in Rule 11 motions, it is important to know how sanctions are obtained and how to prevent such an award.

## Ohio Civ. R. 11

Ohio Civ. R. 11 provides that an attorney or a pro se party must sign every “pleading, motion, or other document.” A signature “constitutes a certificate by the attorney or party that the attorney or party has read the documents; that to the best of the attorney’s or party’s knowledge, information, and belief that there is good ground to support it; and that it is not interposed for delay.” If an attorney or pro se party willfully violates Civ. R. 11, he or she “may be subjected to appropriate action, including an award to the opposing party of expenses and reasonable attorney fees incurred in bringing any motion under this rule” upon either motion of a party or the court.

To determine whether Rule 11 has been violated, a court must first determine whether the attorney or party signing the document: 1) has read the document; 2) has good grounds to support the document to the best of the attorney or party’s knowledge, information and belief; and 3) has not filed the document for purposes of delay. If each requirement is met, sanctions are not warranted. If, however, just one of these conditions is violated, a court must determine whether the transgression was willful, as opposed to being simply negligent.

Ohio applies a subjective bad faith standard to determine “willful” conduct.<sup>2</sup> The Supreme Court of Ohio has described bad faith as follows:

It is not simply bad judgment. It is not merely negligence. It imports a dishonest purpose or some moral obliquity. It implies conscious doing of wrong. It means a breach of a known duty with some motive of interest or ill will. It partakes of the nature of fraud. \*\*\* It means “with actual intent to mislead or deceive another.”<sup>3</sup>

If a court determines that the attorney or party committed a willful violation of Rule 11, it has the discretion to impose sanctions upon the attorney or party, or both.

## Fed. R. Civ. P. 11

Fed. R. Civ. P. 11, like Ohio Civ. R. 11, provides that an attorney or a pro se party must sign “every pleading, written motion, and other paper.” However, unlike the Ohio version, Fed. R. Civ. P. 11 provides:

By presenting to the court a pleading, written motion, or other paper – whether by signing, filing, submitting, or later advocating it – an attorney or unrepresented party certifies that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

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

If a court determines the Rule has been violated after notice

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and a reasonable opportunity to respond have been provided, the court “may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation” upon a motion for sanctions made by a party or upon the court’s own initiative.

Unlike with Ohio Civ. R. 11, a court must apply an objective standard to determine whether a violation of Fed. R. Civ. P. 11 occurred.<sup>5</sup> That is, instead of assessing bad faith, a court must assess whether the attorney or party’s conduct was reasonable under the circumstances.<sup>6</sup> While a court inquires as to reasonableness at the time that the pleading is filed, the attorney or party’s responsibility does not end once the document has been submitted. The document must be reviewed and modified when necessary in order to comply with Rule 11.<sup>7</sup>

### **Requirements for a Rule 11 Motions for Sanctions**

There are no specific requirements for a motion for sanctions filed pursuant to Ohio Civ. R. 11. In contrast, Fed. R. Civ. P. 11 specifies the content and procedure for sanctions motions. Per Fed. R. Civ. P. 11, a party who seeks to file a motion for sanctions must follow a two-step process. First, the moving party must provide a “safe harbor” notice by serving the Rule 11 motion upon the opposing party at least 21 days before the motion is filed with the court.<sup>8</sup>

The motion must describe the specific conduct that the moving party believes violates Rule 11. Second, if the non-moving party does not rectify the conduct – i.e. refuses to withdraw his or her position or acknowledge a lack of support of the claim – the moving party, after the expiration of 21 days, may file the Rule 11 motion with the court. If the non-moving party rectifies the conduct, the moving party may not file the Rule 11 motion.<sup>9</sup>

### **What Sanctions Are Available?**

Ohio Civ. R. 11 does not explicitly provide the types of sanctions that may be awarded. However, courts generally award attorney’s fees and expenses for a Rule 11 violation.<sup>10</sup>

Fed. R. Civ. P. 11 enumerates the types of sanctions available, stating that sanctions are “limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated.”<sup>11</sup> Sanctions may include: 1) non-monetary directives; 2) an order to pay a penalty to the court; or 3) an order to pay “part or all of the reasonable attorney’s fees and other expenses directly resulting from

the violation” when a party filed a motion for sanctions and such a sanction is warranted for “effective deterrence.”<sup>12</sup> Non-monetary directives may include dismissal of a claim or complaint, striking of a pleading, public reprimand or referral to disciplinary authorities, and imposition of a pro bono service requirement.<sup>13</sup> If attorney’s fees are awarded, they should not exceed the attorney’s fees and expenses for “the services directly and unavoidably caused by the violation of the certification requirement.”<sup>14</sup> That is, if only one count of a multiple count complaint was violative of Rule 11, the moving party should only receive expenses and attorney’s fees directly relating to the one unsupportable count, and not expenses and fees for the entire action.

Monetary sanctions will not be awarded against a party represented by counsel that violates Rule 11(b)(2), which provides that claims made must be warranted by existing law or an extension of existing law. A court is also precluded from imposing monetary sanctions on its own, “unless it issued the show-cause order under Rule 11(c)(3) before voluntary dismissal or settlement of the claims made by or against the party that it, or whose attorneys are, to be sanctioned.”<sup>15</sup>

### **Who Can Be Sanctioned?**

Under both Ohio and federal law, attorneys, parties represented by counsel, and pro se parties may be sanctioned for a Rule 11 violation. Under federal law, a law firm may also be sanctioned. In fact, a law firm “must be held jointly responsible for a violation committed by its partner, associate, or employee” unless exceptional circumstances exist.<sup>16</sup>

Ohio courts have wide latitude to impose sanctions.<sup>17</sup> Therefore, whether the attorney, the client, or both are should be sanctioned depends upon the circumstances of the case and the court’s discretion. While federal courts have discretion as well, they generally allocate sanctions between the attorney and the client based upon relative responsibility. For example, the attorney, and not the party, is generally sanctioned where the violation involves making arguments that are not supported by existing law or by an attempt to modify or extend existing law.<sup>18</sup> However, the party is sanctioned usually where the party misled the attorney as to the facts or purpose behind a claim, defense, or proceeding.<sup>19</sup> Under both the Ohio and Federal Rule, the attorney or party who signed the violative document is sanctioned.<sup>20</sup>

### **Are There Time Limits For Filing a Rule 11 Motion?**

A motion for sanctions under Ohio Civ. R. 11 may be filed at

any time.<sup>21</sup> It may be filed shortly after the alleged violation of Rule 11 occurred, or it may be filed after final judgment has been entered.<sup>22</sup> A Rule 11 motion may also be filed after a plaintiff files a Civ. R. 41(A) dismissal.<sup>23</sup>

Fed. R. Civ. R. 11 motions slightly differ. While there is technically no time limit, the language of the Rule generally precludes filing a Rule 11 motion post-judgment. As the safe harbor provision in Fed. R. Civ. P. 11(c)(2) requires that the non-moving party have an opportunity to review the motion before its filing and withdraw offensive documents, it necessarily precludes a post-judgment Rule 11 motion because the non-moving party cannot withdraw an offensive document once judgment has been entered.<sup>24</sup> Similarly, while a voluntary dismissal under Fed. R. Civ. P. 41(A) does not ordinarily deprive the court of jurisdiction to consider a Rule 11 motion, the safe harbor provision precludes the court from imposing sanctions where the complaint is voluntarily dismissed within the 21 day safe harbor period.<sup>25</sup> To ensure that a Rule 11 motion can be considered by the court, it is best to file it soon after the alleged violation occurs, or at a minimum, before final judgment is rendered.

### **What Have Courts Considered to be Sanctionable Conduct Under Rule 11?**

The following types of conduct have been found sanctionable:

- Failing to engage in a reasonable investigation into the factual or legal basis of a claim<sup>26</sup>
- Filing claims not recognized under law<sup>27</sup>
- Filing claims that clearly cannot be sustained by the facts<sup>28</sup>
- Misrepresenting facts or including information in a pleading that is knowingly false<sup>29</sup>
- Failing to dismiss a case upon knowledge that the case lacked merit<sup>30</sup>
- Alleging punitive damages without any basis<sup>31</sup>
- Engaging in a continual effort to delay proceedings and increase the costs of the litigation<sup>32</sup>
- Repeatedly seeking removal of all judges assigned to case because of dissatisfaction with judges' rulings<sup>33</sup>

Misinterpretations of existing law, or reasonable or good faith arguments extending, modifying, or reversing existing law or establishing new law, are commonly not sanctionable.<sup>34</sup> Under Fed. R. Civ. P. 11, discovery-related violations under Fed. R. Civ. P. 26 - 37 are also not sanctionable.<sup>35</sup>

### **How Can I Avoid a Rule 11 Motion Being Filed Against Me?**

There is no guarantee that an opposing party will not file a Rule 11 motion against you. However, as long as you conduct due diligence as to the legal authority and facts supporting the arguments and claims in the documents you sign and file with the court, and otherwise comply with the Rules, you can be confident that your actions will not be deemed violative of Rule 11.

Most importantly, let the Ohio Rules of Professional Conduct guide your conduct. Rule 3.1 of the Ohio Rules of Professional Conduct provides that an attorney "shall not bring or defend a proceeding, or assert or controvert an issue in a proceeding unless there is a basis in law and fact for doing so that it not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law." As explained in Comment 2 to Rule 3.1:

The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification, or reversal of existing law.

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### **Endnotes**

- <sup>1</sup> Ohio law provides two mechanisms in which a party may obtain sanctions for frivolous conduct: Civ. R. 11 and R.C. 2323.51. As the requirements for sanctions under R.C. 2323.51 differ, the statute is not addressed in this article.
- <sup>2</sup> *State ex rel. Bardwell v. Cuyahoga County Bd. of Comm'rs*, 127 Ohio St.3d 202, 2010-Ohio-5073, 937 N.E.2d 1274.
- <sup>3</sup> *Id.* at 202.
- <sup>4</sup> Fed. R. Civ. P. 11(b).
- <sup>5</sup> *Nieves v. City of Cleveland*, 153 Fed. Appx. 349 (6th Cir. 2005); *Union Planters Bank v. L & J Dev. Co.*, 115 F.3d 378 (6th Cir. 1997).
- <sup>6</sup> *Id.*
- <sup>7</sup> *Merrit v. Int'l Ass'n of Machinists & Aero. Workers*, 613 F.3d 609 (6th Cir. 2010).
- <sup>8</sup> Fed. R. Civ. P. 11(c)(2); *Ridder v. City of Springfield*, 109 F.3d 288 (6th Cir. 1997).
- <sup>9</sup> *Id.*
- <sup>10</sup> See *Capital One Bank v. Day*, 176 Ohio App.3d 516, 2008-Ohio-2789,

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892 N.E.2d 932 (4th Dist.); *Millis Transfer, Inc. v. Z & Z Distributing Co.*, 76 Ohio App.3d 628, 602 N.E.2d 766 (6th Dist. 1991).

<sup>11</sup> Fed. R. Civ. P. 11(c)(4).

<sup>12</sup> *Id.*

<sup>13</sup> See Notes of Advisory Committee on Rules – 1993 Amendment to Fed. R. Civ. P. 11.

<sup>14</sup> *Id.*

<sup>15</sup> Fed. R. Civ. P. 11(c)(5).

<sup>16</sup> Fed. R. Civ. P. 11(c)(1).

<sup>17</sup> *Sweeny v. Hunter*, 76 Ohio App.3d 159, 601 N.E.2d 166 (8th Dist. 1991).

<sup>18</sup> *Norfolk & W. Ry. v. Szymanczyk*, 1994 U.S. Dist. LEXIS 8275 (N.D. Ill June 20, 1994); *Borowski v. De Puy, Inc.*, 850 F.2d 297 (7th Cir. 1988).

<sup>19</sup> *Id.*

<sup>20</sup> See Civ. R. 11; Fed. R. Civ. P. 11; *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533 (1991).

<sup>21</sup> *Fast Prop. Solutions, Inc. v. Jurczenko*, 11th Dist. Nos. 2012-L-015, 2012-L-016, 2013-Ohio-60.

<sup>22</sup> *Id.*

<sup>23</sup> *ABN Ambro Mortgage Group, Inc. v. Evans*, 8th Dist. No. 96120, 2011-Ohio-5654; see *State ex rel. Hummel v. Sadler*, 96 Ohio St.3d 84, 2001-Ohio-3605, 771 N.E.2d 853.

<sup>24</sup> *Ridder v. City of Springfield*, 109 F.3d 288 (6th Cir. 1997).

<sup>25</sup> *Id.*

<sup>26</sup> *Howard v. Klynveld Peat Marwick Goerdeler*, 977 F. Supp. 654 (S.D.N.Y. 1997), *aff'd mem.*, 173 F.3d 844 (2d Cir. 1999); *Rust v. Harris-Gordon*, 6th Dist. No. L-03-1091, 2004-Ohio-1636.

<sup>27</sup> *First Federal Bank of Ohio v. Angelini*, 3rd Dist. No. 3-11-16, 2012-Ohio-2136.

<sup>28</sup> *Nieves v. City of Cleveland*, 153 Fed. Appx. 349 (6th Cir. 2005).

<sup>29</sup> *Union Planters Bank v. L & J Development Company, Inc.*, 115 F.3d 378 (6th Cir. 1997); *Navarro-Ayala v. Nunez*, 968 F.2d 1421 (1st Cir. 1992).

<sup>30</sup> *Sigmon v. Southwest General Health Center*, 8th Dist. No. 88276, 2007-Ohio-2117.

<sup>31</sup> *Id.*

<sup>32</sup> *Jurczenko*, 2013-Ohio-60.

<sup>33</sup> See *First Federal Bank of Ohio v. Angelini*, 3rd Dist. No. 3-11-16, 2012-Ohio-2136.

<sup>34</sup> Fed. R. Civ. P. 11(b); *Ceol v. Zion Industries*, 81 Ohio App.3d 286, 610 N.E.2d 1076 (9th Dist. 1992).

<sup>35</sup> Fed. R. Civ. P. 11(d).

Ms. **Jamie Price** joined Gallagher Sharp as an Associate in 2011. Her practice involves the defense of lawyers against malpractice claims. She also represents employers in discrimination, harassment, and whistleblowing lawsuits, as well as violations or enforcement of non-compete agreements. Her experience includes commercial litigation, breach of contract, and post-trial motions and appeals at the state and federal levels.