

THE "SAFE HARBOR" PROVISION OF FEDERAL RULE 11

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Under both the state and federal schemes, Rule 11 establishes standards attorneys must meet when filing pleadings, motions or other documents with the Court. It also regulates the circumstances under which sanctions may be imposed if those standards are not satisfied. Yet the rules – and the procedures employed to enforce them – have differences that could lead to pitfalls for unwary attorneys seeking sanctions against an opposing party.

The major distinction between Nevada's Rule 11 and Federal Rule 11 exists in the procedure devised for awarding sanctions under the Rule. Specifically, the Federal Rule provides a "safe-harbor" provision allowing a filing party the opportunity to amend his allegedly sanctionable pleading or paper prior to the imposition of sanctions, whereas the Nevada Rule does not.

Federal Rule 11 imposes a duty on attorneys to certify by their signature that (1) they have read the pleadings or the motion that they file, and (2) the pleading or motion is "well-grounded in fact, has a colorable basis in law and is not filed for an improper purpose." Notably, the Ninth Circuit has ruled that satisfaction of either the frivolousness or improper purpose prong of the above federal sanctions rule *alone* is sufficient to warrant sanctions.

Furthermore, "the subjective intent

of the . . . movant to file a meritorious document" is of no moment. The standard is reasonableness. The 'reasonable man' against which conduct is tested is a competent attorney admitted to practice before the district court." *G.C. and K.B. Investments, Inc. v. Wilson*, 326 F.3d 1096, 1109 (9th Cir. 2003). As such, counsel may not avoid "the sting of Rule 11 sanctions by operating the under the guise of a pure heart and empty head." *Smith v. Ricks*, 31 F.3d 1478, 1488 (9th Cir. 1994).

However, a party who believes a signed and filed pleading or paper fails to conform to this standard may not immediately seek redress with the Court under the Federal Rules. Federal Rule 11 was amended in 2001 to include the safe-harbor provision, which alters the procedure used to enforce the Rule by award of sanctions and thereby arguably reduces the Rule's bite. Currently, as provided by Rule 11(c)(1)(A), the party seeking sanctions must first provide the other party with notice and the opportunity to withdraw or amend the allegedly improper filing before moving the Court for sanctions. Specifically, the safe-harbor provision states the following:

A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct

alleged to violate [the standard]. It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion.

Thus an aggrieved party must provide the other side with a "way out" under the Federal Rules prior to seeking sanctions. However, federal practitioners should be aware that the same is not true for the Court, which may initiate the sanction process without providing any safe harbor. According to Rule 11(c)(1)(B), the Court may, "[o]n its own initiative . . . enter an order describing the specific conduct that appears to violate [the standard] and directing an attorney, law firm, or party to show cause why it has not violated [the standard] with respect thereto." Therefore while counsel filing frivolous federal pleadings may receive safe harbor from her colleagues, she may not receive a similar luxury from the Court.

As a final federal note, it appears that discovery may be exempt from the safe harbor procedures discussed above. Federal Rule 11 explicitly states that it does "not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37." These subjects are governed by the safe-harborless provisions of FRCP 26(g). In the District of Nevada, of course, some "harbor" can be found in local rules and federal case law. *See, e.g., Shuffle Master, Inc. v. Progressive Games, Inc.*, 170 F.R.D. 166, 171 (D. Nev. 1996) (Judicial discovery intervention appropriate only when (1)



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informal negotiations reach an impasse on a substantive issue in dispute, or (2) a party acting in bad faith refuses to engage in negotiations or refuses to provide specific support for claims of privilege).

Nevada's version of Rule 11, in conjunction with Supreme Court Rule 170, NRCP 26(g) and the statutory incarnation of the Rule found in NRS 7.085, parallels the general federal theme used to discourage and punish frivolous pleadings. Yet Nevada's Rule may have more teeth, as it includes no safe harbor provision, thus allowing complaining parties to seek sanctions for frivolous filings without providing the opposition with any notice or opportunity to cure the defect. Furthermore, Nevada's Rule actually mandates sanction awards by Courts that find Rule 11 violations:

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 other paper,

including a reasonable attorney fee.

Consequently, under the Nevada rule, an attorney faced with frivolous opposition need not provide the other side any opportunity to cure his pleadings, and may immediately file a – nonfrivolous – motion for appropriate sanctions with the court. Whereas both the federal and state versions of Rule 11

proscribe frivolous pleadings, counsel faced with such pleadings and papers will want to carefully weigh the strategical benefits of moving for sanctions under either version, as each provides unique mechanisms for redress.

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